

Does the UK Home Office care about the rule of law? Implications for “unwanted migrants”

Abstract

The instrumentalisation of law for the purposes of creating a ‘hostile environment’ and deterring ‘unwanted migration’ is particularly visible in the UK. The new Nationality and Borders Act 2022 contains proposals on asylum which show a rejection of international law norms and conventions, without having had the political courage to put that rejection squarely to the public. That is not new. Right from the emergence of asylum as a political issue in the 1980’s, the lukewarm official ‘welcome’ never quite hid the stance of disbelief which underlay the UK’s legal and procedural responses. A parallel process, beginning even earlier but accelerating from 2010 onwards, has taken place in UK domestic immigration law. New legislation, Immigration Rules, policies, application procedures and litigation practices show diminishing respect for rule of law principles. This article uses simple and hopefully uncontroversial definitions of international law norms and accepted common law rule of law principles against which to analyse and critique key aspects of UK immigration control. It concludes that UK policies and practice have over time displayed an increasing hostility to those norms and principles, resorting to ignorant and even brazen indifference to facts, evidence, and analysis, and widening the gap between domestic and international law in important respects.

1. Introduction

I propose a straightforward understanding of international law norms as consisting, firstly, of willing participation by a sovereign state in an international rule-based order, as operated through such international organisations as the United Nations and its institutions such as the UNHCR,¹ and, secondly, a ‘good faith’ based - and not reductive or meagre - honouring of that state’s obligations under any specific international instruments, which it has signed and ratified.² I propose a similar straightforward account of the accepted requirements of the rule of law, as understood in a common law context. Lord Bingham, one of the UK’s most eminent judges, sets out requirements so basic to our understanding of the *role* of law in a democratic society that they appear self-evident:³

The law must be accessible and so far as possible intelligible, clear and predictable;

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¹ Art 1 UN Charter <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=1-1&chapter=1&clang=en>.

² Arts 26 and 31, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (VCLT).

³ Tom Bingham *The Rule of Law* London: Penguin 2011. On alternative conceptualisations, see Pitt’s contribution to this Special Issue.

Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding such powers and not unreasonably;
Adjudicative procedures provided by the state should be fair...

T R S Allan⁴ arrives at the same conclusion:

‘The law provides for the enforcement of the rights and duties that the scheme of public justice affirms. Insofar as public authorities act in breach of these principles, they act *ultra vires*; they must be accountable to independent and impartial courts, able to arbitrate fairly between citizen and state.

In relation to Lord Bingham’s second test, Simon Halliday develops and applies the concept of *legal conscientiousness*. For Halliday,

‘knowing what the law requires of you as a decision-maker is not enough to ensure compliance ... Decision-makers must also care about acting lawfully. A commitment to legality must be part of the decision-maker’s professional orientation and value system. They must be conscientious about applying their legal knowledge to the full range of their decision-making tasks.’⁵

Simon Halliday developed this concept through looking at decision-making in a public service concerned with allocating scarce resources but lacking legal conscientiousness. By this he meant, for example, tendencies to rely on ‘*professional intuition*’ or a ‘*gut feeling*’ that the applicant is lying; a culture of suspicion, which arises from a ‘siege mentality’ in a hard-pressed homeless person’s unit. He notes that officials often ‘*lack faith that the law will produce the right decision*’, noting that this arises particularly when officers find their decisions being overturned by the courts. In other words, they do not accept this as their having made a legal mistake. His research showed that quality of decision-making depends on there being a mechanism for decision-makers to learn about why their decisions were overturned: but there is often no interest in learning from litigation. All the characteristics described by Halliday are present in the immigration and asylum system.

I propose that, in a discussion of UK immigration and asylum law, no further academic gloss on these concepts is necessary. The practices of the UK state and successive governments fall so far below the standards set above as to fail any reasonable definition.

Using these concepts, I examine two aspects of UK immigration control, first setting each in their historical context, but then concentrating on recent, egregious developments. The first is the UK’s response to the UN 1951 Convention on Refugees,⁶ and to the phenomenon of asylum-seeking—tacitly understood as a manifestation of ‘unwanted migration’ as addressed in this Special Issue. The second examines how the recent ‘hostile environment’ measures,

⁴ T. R. S. Allan (2020) *Why the law is what it ought to be*, Jurisprudence, 11:4, 574-596, DOI: 10.1080/20403313.2020.1782596 [577]

⁵ Simon Halliday *Judicial Review and Compliance with Administrative Law*, Hart Publishing Limited, 2004.

⁶ Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (CSR).

directed at driving out ‘unlawful migrants’, display at least indifference to Lord Bingham’s rule of law principles: and how their day-to-day operation manifestly displays a lack of legal conscientiousness. From both these examinations I draw out common features. These are: the importance in UK immigration control of *laying the burden of proof on the applicant* and of *the lack of democratic accountability* for immigration control measures. The first is shown to underpin the ‘culture of disbelief,’ often described and generally accepted, but its legal basis never identified. This will be discussed in section 4 below. The second helps to explain the *different ways* in which international law norms and domestic rule of law principles are each shown to be often or even largely aspirational and lacking effectiveness in the day-to-day practice of UK immigration control. In this article I contrast the aspirational nature of international law norms, whose weaknesses are cruelly exposed by signatory states simply not sharing their goals and not facing any consequences, with the weakness of the basic rule of law principles accepted to underlie the common law systems in democracies such as the UK. The requirements of intelligibility, predictability, fairness, and good faith held, formally at least, in the UK to be necessary for law to function in a democracy, are shown to have been frequently breached by developments in UK domestic immigration law. The ‘different nature of the weakness’ can be said to arise from an apparent lack of democratic support for the needs, rights and entitlements of those who are the subjects of these laws, coupled with a lack of democratic accountability for often egregious legal changes. Both these, in my view, contribute to the manifest lack of official legal conscientiousness in day-to-day immigration control. This, in turn, presents a significant problem for social solidarity and justice vis-à-vis ‘unwanted migrants’.

2. UK asylum policy

The UN 1951 Convention on Refugees has its origins in the calamitous impacts of totalitarian regimes all around the world, some of which were defeated and disbanded after the Second World War. However, the rights it offers are limited and specific, focusing on individuals facing persecution ‘by reason of’ a narrow range of factors. The Convention was tightly drawn to avoid obligations being owed to the victims of colonial wars: and principally used to welcome individuals fleeing the USSR and other communist regimes. Decades passed before receiving states accepted persecution by non-state agents, persecution based on gender or sexual orientation, persecution for imputed political opinion, persecution for silent atheists, closet homosexuals and others not showing the requisite political enthusiasm.⁷ It offers no explicit ‘right’ to enter another country to claim asylum, and does not recognise ‘rights’ for those fleeing generalised violence, climate emergencies or natural disasters. However, the UNHCR has always recognised those categories of people ‘of concern’, as people with humanitarian needs who needed assistance.⁸

When the first Tamils arrived in the UK in 1985, fleeing communal violence and making their own way to the UK, and other cohorts of migrants began to arrive in Europe

⁷ See, e.g., Danièle Joly (ed.), *Global Changes in Asylum Regimes* (Basingstoke: Macmillan Palgrave, 2002).

⁸ Jackson, Ivor. 1991. *The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection* International Journal of Refugee Law vol 3 edition 3, 1991

fleeing from civil wars and violence in Somalia, Ghana and elsewhere, the UK authorities not only swiftly brought in visa requirements and carriers' liability legislation, but strongly advocated within the EEC against acceptance of anyone other than those meeting the UN 1951 Convention definition of a refugee.⁹ Those otherwise 'of concern' – i.e. those with humanitarian needs – were to be *excluded*. The ensuing 25 years have shown an almost continuous stream of restrictive legislation, rules and procedures explicitly designed to deter asylum-seekers (described as 'bogus' or 'abusive') from travelling to the UK.

Then, as now, there was little evidence that asylum-seekers were influenced by so-called pull factors, such as a receiving country's benefits or housing regimes, or how easy it was to get work. There was no evidence that a person applying after entering the UK was any more or less likely to be 'genuine' than someone who claimed at the border – contemporary appeal statistics demonstrated the opposite.¹⁰ Yet, those kinds of factors were used as justifications for: regulations and then primary legislation¹¹ denying access to benefits for asylum-seekers who had not claimed asylum 'on arrival' or 'as soon as reasonably practicable'¹²; and policies, Immigration Rules, and then primary legislation requiring decision-makers and judges to judge an applicant negatively on the basis of specific 'credibility factors'.¹³ If they passed through other 'safe countries' before arriving in the UK; if they had no documents; if they did not claim asylum straight away; if they produced evidence 'late', and so on, their applications were to be considered unfounded and inadmissible.

Labour's enormous Immigration and Asylum Act 1999 introduced an entirely new housing and social benefits system for asylum-seekers, which relegated them to lower standards of housing than the general population, and weekly benefits of 70% income support, at first given in vouchers only, again as a deterrent.¹⁴ Labour also proposed housing all asylum-seekers, including families, in accommodation centres.¹⁵ Having expanded access to legal aid in immigration and asylum cases, access to the 'legal aid gravy train' (as it was described by prime minister Tony Blair) was rapidly restricted in the early 2000's, as asylum numbers rose steadily.¹⁶ Labour made major changes, referred to as the 'revenge package',¹⁷ to the

⁹ 20 Oct 1986, London (UK), as an intergovernmental forum under the Working Group 'Trevi 92' of [Trevi Group](#), within the framework of [European Communities \(EC\)](#) referred to in Frances Webber *The new Europe: immigration and asylum*, in *Statewatching the New Europe*, ed Tony Bunyan 1993, Statewatch. [144]. Referred to by Douglas Hurd 16/3/87 in the House of Commons debate on the Carriers Liability Bill

¹⁰ Heaven Crawley, Refugee Council January 2010 Refugee Council *Chance or choice? Understanding why asylum seekers come to the UK*; Lucy Mayblin 2019 ECRE op-ed <https://ecre.org/op-ed-pull-factors-the-myth-that-never-dies/>

¹¹ Asylum and Immigration Act 1996; Nationality, Asylum and Immigration Act 2002 s55

¹² Sheona York *The Law of Common Humanity: revisiting Limbuela in the 'Hostile Environment'*. *Journal of Immigration, Asylum and Nationality Law*, 31 (4) 2017. pp. 308-329

¹³ Section 8 Asylum and Immigration (Treatment of Claimants) Act 2004

¹⁴ Asylum and Immigration Act 1996 part VI support for asylum seekers, Home Affairs Select Committee Second Report of 2003-4 Adequacy of Support for Asylum Seekers <https://publications.parliament.uk/pa/cm200304/cmselect/cmhaff/218/21810.htm>

¹⁵ Proposed in the 2002 White Paper *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* CM 5387 [55 onwards]

¹⁶ In a memorandum for the House of Commons, in 2003, the Information Centre about Asylum and Refugees in the UK (ICAR) provided the figures showing asylum applications made in the UK from 1985 to 2002: Select Committee on Home Affairs Written Evidence 18. Memorandum submitted by the Information Centre about Asylum and Refugees in the UK (ICAR)

<https://publications.parliament.uk/pa/cm200304/cmselect/cmhaff/218/218we22.htm>

¹⁷ Rawlings, Richard. 2005. *Review, Revenge and Retreat* *Modern Law Review*, (2005) 68(3) MLR 378-410

immigration tribunal system, explicitly to limit the number of successful appeals, and also attempted to exclude immigration cases altogether from access to judicial review.

All those types of policies, and all the rhetoric supporting them, are currently being revisited. The numbers of asylum claimants presenting in the UK remained below 30,000 since the latter part of the Labour government, just reaching 48,000 in 2021.¹⁸ It appears that the mere change in method of irregular arrival - to 'landing on the beaches' - has revived some atavistic Second World War anxiety. Certainly, it has generated the most disproportionate official reactions.¹⁹

The new Nationality and Borders Act 2022,²⁰ directed principally against asylum-seekers arriving irregularly on UK shores, demonstrates the same indifference to the principles of the Refugee Convention, the same indifference to evidence, and the same performative style as the measures introduced by Home Secretary David Blunkett in the 2000's, as described above. The new Act was preceded by a December 2020 change in the Immigration Rules,²¹ a process which receives the barest parliamentary scrutiny. The changes provided that the Secretary of State may certify as 'inadmissible' the claim of an asylum applicant who has arrived from continental Europe. This straightforwardly declines to carry out an individual determination of the claim, as required by the Refugee Convention.²² The declared aim of that Rule was to deter asylum-seekers from setting out in small boats from Europe. However, not only has the number of arrivals continued to increase, but, of the over 3,000 applicants whose case have been certified as inadmissible, only around five have been returned to continental Europe. The rest, in the absence of any agreement with any other European country, remain warehoused in low-grade asylum accommodation.²³ The plan to send irregular asylum-seekers to Rwanda, set out in a Memorandum of Understanding between the UK and Rwanda signed on 14/2/22,²⁴ is similarly intended to act as a deterrent, but is already being talked down.²⁵

The Bill was preceded by the *New Plan for Immigration*.²⁶ This was remarkable for two features. First, its mendacious partial representations of 'facts', such as trumpeting the UK's greater numbers of resettled refugees, while ignoring other states' far greater acceptances of irregularly-arriving asylum-seekers. Secondly, it purported to 'consult' on its proposals by offering a multiple-choice questionnaire asking respondents to rank their acceptance to

¹⁸ Georgina Sturge 2/3/22, *Asylum Statistics*, House of Commons library

¹⁹ Jack Wright, Mail Online 22/1/22 'Every male migrant arriving in the UK by boat' will be detained in immigration removal centres in a bid to deter Channel crossings' under Boris Johnson and Priti Patel's border clampdown <https://www.dailymail.co.uk/news/article-10430241/EVERY-male-migrant-arriving-Channel-boat-detained.html>

²⁰ <https://www.legislation.gov.uk/ukpga/2022/36/contents/enacted>

²¹ HC 1043, 10 December 2020

²² Art 33 CSR.

²³ ICIBI November 2021 *An inspection of asylum casework (August 2020 – May 2021)* gives figures and complains about the stupidity of the policy

²⁴ <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-rwanda>

²⁵ <https://www.bbc.co.uk/news/uk-politics-61133983> ; May Bulman, Independent 2/5/22 <https://www.independent.co.uk/independentpremium/uk-news/rwanda-asylum-seeker-home-office-uk-b2064888.html>

²⁶ <https://www.gov.uk/government/consultations/new-plan-for-immigration/new-plan-for-immigration-policy-statement-accessible> [no PDF appears to be available now 23/1/22]

proposals such as ‘Asylum-seekers need good legal advice,’ while providing no route for reasoned critiques of the whole Plan. A legal challenge to that consultation process was rejected on 23/2/22.²⁷

Both the *New Plan* and the Bill’s proposals on asylum (among other issues) were forensically scrutinised by the House of Commons/House of Lords Joint Committee on Human Rights (JCHR).²⁸ This sets out the multiple ways in which the Bill effectively proposed to disapply the Refugee Convention. Besides denying the right to an individual determination of their claim by declaring it to be ‘inadmissible’, the Bill proposed: to grant differential rights according to how refugees arrived in the UK; to keep them in ‘accommodation centres’ or indeed send them offshore; to impose further ‘credibility’ criteria, including placing further restrictions on ‘late’ evidence; and to amend the standard of proof from ‘real risk’ of future harm to the balance of probabilities. The JCHR report points out that the Refugee Convention is an international convention, and that the UK therefore may not adjust its criteria or its application to suit its domestic agenda.²⁹ However, the government did not have the political stomach to propose withdrawing from the Convention altogether.

2.1 Lack of democratic accountability in UK asylum law and policy

I argue that this lack of political stomach for a clear public argument, coupled with the tendentious nature of the *New Plan for Immigration* paper and its so-called consultation exercise, shows a *lack of democratic accountability* for its stance towards the Convention. Significant changes in policies and procedures for dealing with asylum claimants (as a particularly vulnerable group of ‘unwanted migrants’), undoubtedly leading to many breaches of the Convention, have been activated in recent months, bypassing even the perfunctory consultation process on the *New Plan for Immigration* and before the relevant new legislation was passed. Newly-arrived asylum-seekers are being directly placed in immigration removal centres, subjected to brief screening procedures and scheduled for removal without access to an adequate determination procedure, without consideration of history of torture or human trafficking, and without proper consideration of their age.^{30,31} It has been argued that the government’s formal proposals, giving resettled migrants more rights than those arriving ‘spontaneously’ - even those granted asylum - amount to a form of ‘antagonistic protection’ – aiming at a long-term downgrading of rights accorded to many of those accepted to be refugees, maybe in order to make a future exit from the Convention less obviously objectionable.³² This was nowhere signposted in the 2019 general election, which concentrated on Brexit, and in which the Conservative Party promised a ‘new’ Australian-style points-based system *for*

²⁷ R (A and Others) v Secretary of State for the Home Department [2022] EWHC 360 (Admin)

²⁸ House of Commons, House of Lords Joint Committee on Human Rights 12/1/2022 *Legislative Scrutiny: Nationality and Borders Bill (parts 1, 2, 4) Asylum, Home Office decision-making, Age Assessment, and Deprivation of Citizenship Orders* Twelfth Report of Session 2021-22 HC 1007, HL 143

²⁹ Ibid [10-12]

³⁰ Public law solicitor Toufique Hossain, speaking to the Guardian <https://www.theguardian.com/uk-news/2021/jul/11/home-office-acting-unlawfully-in-rush-to-deport-asylum-seekers> accessed 11 July 2021.

³¹ An important case condemning the Home Office new-style age assessment practices has just been decided - *MA & Anor, R (On the Application Of) v Coventry City Council & Anor* [2022] EWHC 98 (Admin)

³² Dr Kieren McGuffin, presentation at SLS conference 2021

workers in order to ‘take back control’. On asylum, their manifesto said: ‘*We will continue to grant asylum and support to refugees fleeing persecution...*’.³³

Constitutionalists and political scientists will rightly point to parliamentary sovereignty, and others may argue that the Home Secretary was simply jumping the gun, since the Bill contained the powers she began to exercise. However, if the government’s New Plan, or the Bill itself, had explicitly stated that they were formally withdrawing from the Refugee Convention (as some Conservatives have argued for³⁴) the passage of the Bill through parliament may have faced greater opposition or, at least, more clarity in debate. As I will argue below, much of the legal damage in immigration law arises from bill clauses whose impacts are barely understood, and which are barely debated in parliament, let alone subject to wide and knowledgeable discussion outside it. As it is, on the front page of the Nationality and Borders Bill, the Home Secretary states shortly: ‘*In my view the provisions of the ... Bill are compatible with the Convention rights*’.

Clearly, the government’s underlying assumptions about asylum-seekers arriving in small boats, just as the assumptions made in the 1990’s and 2000’s, are that most asylum-seekers are ‘bogus’: merely economic (unwanted) migrants. This even though the majority are granted asylum, and many of those refused would meet the UNHCR definition of people ‘of concern’. The formal debates on the Bill may well have contested these headline issues. But the controversial day-to-day changes in operations and decision-making relating to asylum-seekers have faced no parliamentary oversight.

3. Immigration control

The 2010 change of government from Labour to the Conservative-Liberal Democrat Coalition brought significant changes in domestic immigration policy, partly driven by a change in attitude to international law norms. Strategic aims to ‘reduce net migration to the tens of thousands’ arguably contributed to the eventual Brexit vote, and the 2014 and 2016 ‘hostile environment’ measures,³⁵ based on obliging civil society to perform immigration control functions aimed at driving out ‘unlawful’ residents, often display indifference to international law norms. Examples range from simply ignoring an international agreement, despite having just signed it,³⁶ to frequently breaching a Convention both ratified and introduced into UK law, such as the UN Convention on the Rights of the Child.³⁷ The last several decades of domestic immigration control measures appear deliberately aimed at increasing the precarity and steadily undermining the security of existing UK-resident migrants, who face lengthening ‘routes to settlement’, increasingly strict financial requirements, and changes in the law imposing

³³https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf accessed 11/7/21

³⁴ Including Michael Howard, party leader in 2005.

³⁵ Immigration Act 2014 part 3 Access to Services; part 5 on art 8 ECHR; Immigration Act 2016 part 2 Access to services, also measures on sham marriages and illegal working; and ‘deport first, appeal later’ measures in both Acts

³⁶ Such as the Global Compact on Safe, Orderly and Regular Migration, signed in December 2018 – see Objective 7 para 23(h)

³⁷ UN Convention on the Rights of the Child, 1577 U.N.T.S. 3 (CRC).

debilitating retrospective effects. All this is in direct opposition to the Global Compact's demand that receiving countries seek to reduce migrants' precarity.³⁸

3.1 Impact of lack of democratic accountability in domestic immigration law

Many changes in domestic immigration law, especially those affecting family migrants and those needing to rely on human rights arguments, lack democratic scrutiny, and even formal public announcement. The frequent changes to the Immigration Rules are at least laid before Parliament. But important legal changes are often introduced through internal policies and guidance, as well as by unannounced changes to online forms and procedures.³⁹ It will be argued that all these practices demonstrate an institutional indifference to basic rule of law principles, which has inexorably led to a world in which immigration law and policies lead to violation of Convention rights, and *create and perpetuate illegality*.⁴⁰

The notorious 2012 'new rules' on family migration, which significantly increased the financial and other requirements and significantly lengthened the time to be served on 'routes to settlement' before being eligible for indefinite leave to remain, were considered in a 3-hour non-binding 'debate', in which both Labour and Tory MPs concentrated on the measures affecting 'foreign criminals' – which almost no one opposed – while ignoring the very significant barriers being introduced to family unity.⁴¹

Many important legal changes and provisions are introduced and enforced via Home Office Guidance. This means no publicity, and certainly no parliamentary debate. Examples affecting families and those relying on human rights claims include the significant increase in immigration application fees and the subsequent introduction of the fee waiver procedure. Since the 2012 changes in the Rules, the Home Office decided (without parliamentary debate) to subject certain migration 'routes' to significant increases in application fees, explicitly to load the cost of administering the immigration system on to migrants.⁴² It then became apparent that many family migrants with strong human rights claims, as set out in the Rules, could not present an application, because they could not afford the fees. Applications were seen in which a parent would renew her own visa, leaving her children to become unlawful, as she could not afford more than one fee.⁴³ After a few judicial review claims were lodged and conceded,⁴⁴ a fee waiver policy was introduced, again not publicised or presented to parliament. At first, this was vitiated by the application of a test of 'destitution', similar to the test for asylum-seeker support – which led to a single parent client of mine, living on benefits in temporary accommodation, having to sell for derisory cash sums her second-hand television, her cheap

³⁸ Global Compact for Safe, Orderly and Regular Migration, UN doc A/RES/73/195 (2019).

³⁹ Practitioner experience.

⁴⁰ Sheona York, *The 'hostile environment': How Home Office immigration policies and practices create and perpetuate illegality*. *Journal of Immigration, Asylum and Nationality Law*, 32 (4). 2018 ISSN 1746-7632

⁴¹ Hansard House of Commons 11 June 2012 Col 48

⁴² ICIBI 2019 *An inspection of the policies and practices of the Home Office's Borders, Immigration and Citizenship Systems relating to charging and fees June 2018 – January 2019*

⁴³ Practitioner networks experience, including our submissions to the ICIBI Inspection report on fee charging (cited at n41).

⁴⁴ Practitioner experience on unreported cases.

old laptop, and her son's tablet, to show and prove that she was 'destitute'. It took some time for this test to be challenged in court – the test is now 'affordability'.⁴⁵

Many changes to immigration requirements occur through unannounced changes to online application forms and submission procedures. For example, Home Office Guidance accepts that applicants for refugee family reunion may well be stuck in third countries and not hold national documents. But the privatised visa application centres often refuse to admit such applicants to do their biometrics⁴⁶ – amounting to an unlawful rejection of an application without any consideration of personal circumstances or any other factors. This (along with most of the problems arising from privatising the visa application process⁴⁷) has not been subject to any democratic debate. Neither are such practices easily amenable to legal challenge. The outsourcing process 'legally distances' the applicant,⁴⁸ since there is no point of contact with the visa processing company other than their application, while the Home Office operationally resists taking responsibility until after the appointment has taken place.⁴⁹

Finally, ensuring clarity and consistency in legislation and rules has been made difficult by the sheer frequency of legislative and rule changes. Many of these have amounted to 'relegislating' – performative redefinitions or reintroductions of requirements or prohibitions already in force – or restrictions of rights with retrospective effect. By the end of Labour's term in office in 2010, there had been 13 primary Acts of Parliament concerning immigration since 1971, eight of which introduced in the immediately previous 12 years.⁵⁰ The Labour government's 'simplification programme'⁵¹ came to nothing. The pace of changes in the Rules accelerated during the 2000's under Labour. From 1994 (the earliest year for which information is provided on the Home Office website⁵²) to date there have been 157 Statements of Changes in the Immigration Rules.⁵³ Between 1994 and 2002, there were 19 changes, or just over 2 per year, while from 2003 to 2013, there were 93 changes or around 8 per year. Most of those changes were ad-hoc Home Office responses to increasing numbers of allowed appeals and

⁴⁵ *R (on the application of Dzinoku-Liggison and Others) v Secretary of State for the Home Department (Fee Waiver Guidance v3 unlawful)* [2020] UKUT 00222 (IAC), and for fee waivers for overseas applicants, in *JR/2557/2020, 3/3/21, Upper Tribunal* (order publicised by Free Movement)

⁴⁶ Practitioner experience.

⁴⁷ See, e.g. Nick Miller, 'Don't do what the UK did': Aussies sound warning at Dutton's visa plan', 19 November 2019, *Sydney Morning Herald* <<https://www.smh.com.au/world/europe/don-t-do-what-the-uk-did-aussies-sound-warning-at-dutton-s-visa-plan-20191017-p531mz.html>>.

⁴⁸ On the purposeful generation of 'distance' as a means to deny or avoid legal responsibility, see Violeta Moreno-Lax and Martin Lemberg-Pedersen, 'Border-induced Displacement: The Ethical and Legal Implications of Distance-creation through Externalization' (2019) 56 *Questions of International law* 5-33.

⁴⁹ By 'operational resistance' I mean that the Home Office, as decision maker, provides no formal contact method whatsoever in respect of an application once lodged (and paid for) but still requiring formalities carried out by the outsourced visa application centre (VAC). See also York, Sheona (2018) *The 'hostile environment': How Home Office immigration policies and practices create and perpetuate illegality*. *Journal of Immigration, Asylum and Nationality Law*, 32 (4). ISSN 1746-7632

⁵⁰ The HAC report 2003 on asylum applications HC 218-1 lists the legislation since 1993 and their main measures 'to restrict unfounded asylum applications' – [35] <https://publications.parliament.uk/pa/cm200304/cmselect/cmhaff/218/218.pdf> accessed 31/10/19

⁵¹ Melanie Gower, House of Commons Library 14/10/2014 *Organisational reforms to the immigration system since 2006* [10]

⁵² <https://www.gov.uk/government/collections/immigration-rules-statement-of-changes#statement-of-changes-to-the-immigration-rules:-1994> accessed 4/11/19; current archive 2012-2021 accessed 29/1/22

⁵³ The Statement of Changes of 24/1/22 has not yet reached the Home Office website!

applicants' victories in the higher courts. The higher courts have in fact criticised immigration law *as an architecture*.^{54,55}

The Institute for Government notes the lack of democratic accountability inherent in the wide use of secondary legislation, and recommends that rule changes should be scrutinised by a committee similar to the Social Security Advisory Committee, to consider the impact of each new rule and precisely how it would be put into practice.⁵⁶ Instead, from the announcing of the New Plan for Immigration and the Nationality and Borders Bill, we see the present Home Secretary *narrowing* the opportunities for debate and participation.

3.2 *The need for continuing democratic accountability in immigration matters*

Lack of democratic accountability does not just occur during the passing of an Act of Parliament, or in changes in rules and procedure. It arises from the limited opportunities for Parliament to repair legislation where it results in unintended or undesirable consequences. The House of Commons Home Affairs Committee produces ad-hoc reports on impacts and outcomes of Home Office policies and activities, but there is no systematic Law Commission-style parliamentary body to keep an eye on how new legislation is interpreted by the Home Office and by the courts. Here are a few examples, aspects of which also raise the issue of the unequal burden of proof in immigration control, discussed below.

The 2012 'new rules' on family migration and deportation aimed to limit and standardise recourse to ECHR rights by concepts such as '*insurmountable obstacles*'; '*unduly harsh*'; '*unjustifiably harsh*'; '*a real risk of serious irreversible harm*' and '*significant obstacles to integration*'. This has just led to more litigation. Consequent changes in rules and legislation have led to tribunals and courts establishing tests so harsh as to be virtually unachievable. In deportation appeals, the legal test '*unduly harsh*' has been interpreted as '*more harsh than the effect on an average child whose father is being deported*'.⁵⁷ While the headline decision 'to deport more foreign criminals' may be asserted to be popular, it is not at all clear that the general public is aware of, or would support, the consequences of the types of decision now made.

True democratic accountability surely requires a regular parliamentary review of major court decisions arising from recent legislation, to expose to MPs the consequences of particular clauses, and check if this was what was really intended. Below are two further examples, whose pernicious effects are only just beginning to emerge.

3.3 *The legal meaning of 'precarious'*

⁵⁴ *Alvi, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 33, [2012] WLR(D) 211, [2012] 1 WLR 2208

⁵⁵ *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568,

⁵⁶ Institute of Government report *Managing Migration after Brexit* 2019 [52]

⁵⁷ *KO (Nigeria) [2018]* UKSC 53

In considering Article 8 ECHR, s19 Immigration Act 2014⁵⁸ mandated courts and tribunals to give ‘little weight’ to private life where an applicant’s stay in the UK had been ‘precarious’.⁵⁹ In the legislation, ‘precarious’ was kept distinct from ‘unlawful’, but otherwise not defined. After decisions in the Upper Tribunal appearing to some commentators to be out of line with ECtHR jurisprudence on the meaning of the term,⁶⁰ the Supreme Court, in *Rhuppiah*,⁶¹ in 2018, preferred to assist Home Office decision-makers by providing a ‘bright line’: all those without indefinite leave to remain must count as ‘precarious’. That decision is condemning many more than just that appellant, already resident 20 years in the UK, to a further 10 years of ‘precarious’ life on a ‘route to settlement’ whose requirements might change at any time, and where, if refused, the judge in their appeal would be required to discount their long residence. Parliament should surely have to reconsider such retrospective effects, clearly breaching the requirement of laws to be *predictable*.

3.4 The consequences of removing the right of appeal where the Home Office ‘has not followed the law or its own rules’

One of the appeal rights removed by Theresa May’s meretricious claim to have ‘reduced appeal rights from 17 to four’⁶² was against decisions where the Home Office had not followed the law, including the Immigration Rules and its own guidance. The repeal of that ground of appeal has had two harmful outcomes. Where an applicant subsequently wins their appeal, the Tribunal cannot allow the appeal ‘under the Immigration Rules’, but only ‘on human rights grounds’, which means that the allowed applicant can only be granted leave on human rights grounds, usually on the ‘ten-year route to settlement’. Home Office Guidance states that where a tribunal finds that the applicant had indeed met the rules, the leave applied for will be granted: but tribunal judges do not always make sufficiently clear findings.

A more subtle and complex outcome, emerging from recent controversial Tribunal cases,⁶³ is that the post-2014 Act appeals regime arguably *disincentivises* the Home Office from following the law – even where the relevant law concerns an international Convention whose requirements have been enacted into UK law. The issue here also raises the issue of burden of proof and adversarial procedure, discussed below. The recent case of *Arturas*, in a multi-layered discussion of the duties and responsibilities of the courts, concerned a child in respect of whom the Home Office had arguably not considered his best interests, as required by the UN Convention on the Rights of the Child (UNCRC) and by s55 Borders, Citizenship and Immigration Act (BCIA) 2009. The Upper Tribunal found that: ‘...a failure by the

⁵⁸ Introducing a new Part 5 ss117A-D into the Nationality, Immigration and Asylum Act 2002

⁵⁹ Ibid s117B (5)

⁶⁰ My colleague Dr Richard Warren’s article *Private life in the balance: constructing the precarious migrant* Journal of Immigration, Asylum and Nationality Law 2016 vol 3 issue 2, presenting a detailed argument also based on ECtHR jurisprudence, was put before the Supreme Court in *Rhuppiah*. Unfortunately, the court did not prefer his argument.

⁶¹ *Rhuppiah* [2018] UKSC 58

⁶² Theresa May speech to the Conservative Party Conference 2013, reported to the Daily Mail (Alan Travis, Guardian 30/9/13) <https://www.theguardian.com/uk-news/2013/sep/30/tories-curb-right-appeal-deportation>

⁶³ *Arturas (child’s best interests: NI appeals)* [2021] UKUT 00237, preceded by *AA (Iran), R (On the Application of) v Upper Tribunal (IAC) & Anor* [2013] EWCA Civ 1523 [‘giving Tinizaray its quietus’] *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550, *Tinizaray* [2011] EWHC 1850

*Secretary of State... to comply with her duties [under the above act] is highly unlikely to prevent the Tribunal from reaching a lawful decision in a human rights appeal involving a child...'.⁶⁴ The substantive point is that a tribunal cannot allow an appeal *just because* the Home Office has failed to comply with such duties, (which would be a quasi-judicial review decision, followed by remitting the decision back to the Home Office for proper consideration) but must consider it, and most likely dismiss it, on the basis that *the appellant* has failed to discharge the burden of proof, which entirely lies on them, to show that a child's best interests would be breached by the Home Office refusal. Thus, there is no duty, and thus no pressure whatsoever, on the Secretary of State to make more than a cursory reference to the best interests of the child, leaving the *appellant* with the burden of finding and paying for independent social work reports to prove how the decision would breach the child's best interests. Yet, the UNCRC, and the relevant law, requires the *public authority* to make the child's interests a primary concern.⁶⁵ It should be noted that in *SS (Nigeria)*,⁶⁶ one of the cases relied on in *Arturas*, Laws LJ commented that the Secretary of State had made its own enquiries of the child's mother and of the relevant Social Services, which must have influenced his dictum that there would be little scope for the Tribunal to exercise an inquisitorial function.⁶⁷ But that judgment was given in 2013, before the repeal of the relevant ground of appeal. Once more, surely Parliament should have the opportunity of reconsidering the impact of removing the very ground of appeal which imposes any decision-making rigour on the institutional defendant.*

4. The burden and standard of proof in UK immigration and asylum law

The Home Office has often and for many years been accused of operating a 'culture of disbelief' in relation to immigration and asylum applications. This concept has been extensively explored in academic research⁶⁸ and critical NGO reports.⁶⁹ I noted above that, in relation to asylum, through the 1990's and beyond, measures were introduced in the Immigration Rules and then in primary legislation, obliging decision-makers and tribunal adjudicators to 'have regard' to specific factors said to damage an asylum-seeker's 'credibility'.⁷⁰ In 2013, it was revealed that gay asylum applicants had been reduced to providing video evidence of their sexual activity, to prove their sexual orientation.⁷¹ As with Section 8 Asylum and Immigration (Treatment of Claimants) Act 2004 before it, the new Nationality and Borders Act contains several separate

⁶⁴ Ibid [*Arturas*] headnote (1). At (2) the headnote notes that the position is different in Northern Ireland, which can only be resolved in the Supreme Court.

⁶⁵ UN Convention on the Rights of the Child art 3, Borders, Citizenship and Immigration Act 2009 s55, Baroness Hale, *ZH (Tanzania)* [2011] UKSC 4 para 29 onwards

⁶⁶ *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550

⁶⁷ Ibid at [57].

⁶⁸ For example Olga Jubany *Screening asylum in a culture of disbelief* Palgrave Macmillan 2017; John R Campbell, *Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System* Routledge 2017

⁶⁹ Alasdair Mackenzie, *No Reason at All* Asylum Aid April 1995; *Get it right: How Home Office decision making fails refugees*, Amnesty International 2004; Independent Asylum Commission, Report of Interim Findings (London, IAC, 2008); T Trueman, 'Reasons for refusal: an audit of 200 refusals of Ethiopian Asylum-Seekers in England (2009) 23 Journal of Immigration, Asylum and Nationality Law 281; *Unsustainable: the quality of initial decision-making in women's asylum claims*, Asylum Aid 2011.

⁷⁰ For example, s8 Asylum and Immigration (Treatment of Claimants) Act 2004

⁷¹ S Chelvan, Barrister, note for Home Affairs Committee *The assessment of credibility of women... victims of torture.. within the decision-making process...* Published by the Committee October 2013

measures based on faulty assumptions about what makes a credible asylum claim, which will effectively require caseworkers and the courts to accept those assumptions rather than apply the correct standard of proof.⁷²

Legislative, policy, decision-making and judicial assumptions about the ‘genuineness’ of relationships and the ‘credibility’ of asylum-seekers are just some of the more egregious examples of the operation of the ‘culture of disbelief’. However, it is not widely understood that the ‘culture of disbelief’ has a solid basis in UK immigration law (and indeed in the Refugee Convention itself⁷³). Unlike other UK administrative and social welfare law systems, such as welfare benefits, provision of social housing, or the adjudication of rights at work, in immigration law *the burden of proof falls on the applicant*. The legal effect of this is that, although the standard of proof is formally the balance of probabilities,⁷⁴ the effective standard of proof is nearer to the ‘beyond all reasonable doubt’ of criminal law.

How does this arise? It is emphatically not just a question of prejudice, though an environment of prejudice provides fertile ground.⁷⁵ In a world where the burden of proof falls on an applicant, there is little or no legal or procedural control on an institutional defendant. Put bluntly, such an institutional adversary does not follow the law because it does not have to. Refusing a claim on the basis that the applicant has not discharged the burden of proof is entirely valid if properly reasoned. But decision-makers often go further, relying on ‘knowing what harm is when they see it’ or collective institutional folklore about ‘that kind of applicant’. Or they may throw into the decision some unproven or insufficiently-grounded ‘facts’ – with no duty to provide evidence or reasoning in support. The below case examples, taken from my own legal practice, amply illustrate this point.

Case example 1

An Eritrean client had been refused asylum on the grounds that after he and his mother fled Eritrea, she had married a Sudanese, and therefore my client ‘might be able to obtain Sudanese nationality through his mother’. Neither in their refusal letter nor at his appeal did the Home Office provide any evidence on Sudanese nationality law. The judge simply found as the Home Office had suggested, leaving the burden on our client to establish that he could not even legally enter Sudan, let alone apply for citizenship, regardless of his mother’s marriage. (It took several years and two judicial reviews for it to be accepted that his removal was ‘remote’).

Under a shared burden of proof, the Home Office might be expected to make official contact with the Sudanese Embassy and ask for a formal statement of current Sudanese nationality law, which would have straight away shown that their proposition had no legal basis.

Case example 2

⁷² Nationality and Borders Act 2022 s19

⁷³ UNHCR *Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 Convention and the 1967 Protocol relating to the status of refugees* reissued Geneva, February 2019 [para 195]

⁷⁴ The new Act s32 provides that the balance of probabilities should apply in asylum also.

⁷⁵ See Jubany and Campbell fn 68

A Palestinian Arab client had applied for asylum in the 2000's, when the delays in processing claims ran into years. In that asylum application, his family name had been rendered in the European alphabet as 'Ghalib'. In his asylum support application different officials rendered his family name as 'Khalib'. His asylum application was refused, as '*having made more than one asylum application*', a mandatory ground for refusal, because of these mistakes.

A shared burden of proof may well have required the applicant to write his name in Arabic and ask an interpreter to comment on the two names. (An earlier Home Office practice required applicants to write their name in their own alphabet on their asylum form).

Case example 3

An unaccompanied Afghan child asylum-seeker had been wrapped up in five jackets in order to survive a cross-Channel journey in a refrigerated lorry. He was refused asylum, having been found to have '*lied about being in touch with his parents*' because on his arrival the authorities had found a phone number on a scrap of paper in one of the jackets. He said the jacket was not his, and that he did not know his family's phone number. Nobody believed him.

Under a shared burden of proof, and especially bearing in mind the duty to accord children the benefit of the doubt as required by UNHCR Guidance,⁷⁶ surely either the police, or the immigration officer, or even Social Services, in charge of a 13-year-old child, might have wondered why the child was wearing 5 jackets, (nobody had asked him!) or thought of getting the interpreter to telephone the number to corroborate whether it belonged to his family. Academic and practitioner research shows that failure to give the benefit of the doubt in children's cases is a common failing.⁷⁷

4.1 *The unequal burden of proof gives free rein to any 'culture of disbelief'*

Certainly, the 'culture of disbelief' is influenced by and feeds on wider social and political prejudices, but there is a *legal* foundation for it. During the 1970's and 1980's male spouse applicants from the Indian subcontinent were viewed as engaging in sham marriages so they could get into the UK to find work.⁷⁸ From the beginning of 'asylum' in the 1980's, asylum-seekers have been politically described as 'bogus' and as 'economic migrants'. However much we might campaign against racial and cultural prejudice in immigration decision-making, and

⁷⁶ *Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 convention and the 1967 protocol relating to the status of refugees* UNHCR, reissued Geneva, February 2019 paras 202-203

⁷⁷ Warren, Richard and York, Sheona (2014) [*How children become failed asylum-seekers: Research report on the experiences of young unaccompanied asylum-seekers in Kent from 2006 to 2013, and how 'corrective remedies' have failed them.*](#) Project report. Kent Law School ([KAR id:44608](#)), *Systemic delays in the processing of the claims for asylum made in the UK by unaccompanied asylum seeking children* (UASC): Elder Rahimi solicitors, 2018

⁷⁸ See for example the reports on virginity testing in UK entry clearance offices in South Asia in the 1970's, and the justifications for the 'primary purpose' rule. See also ECtHR *Abdulaziz, Cabales and Balkandali v. UK*, App No 15/1983/71/107-109, 24 April 1985.

however much the Home Office may invite the UNHCR and others to work with caseworkers to improve decision-making quality, so long as the burden of proof is placed on the applicant, the institutional opponent has the advantage, as applicants are required to prove impossible negatives.

The *Windrush Lessons Learned Review* shows how laying the burden of proof on an applicant leads inexorably to the parallel tightening of the *standard* of proof from the civil ‘balance of probabilities’ standard to the criminal standard of ‘beyond all reasonable doubt’.⁷⁹ To prove their historic right to remain in the UK, Windrush ‘victims’ have been required to present formal documents evidencing their presence during every year of their residence – even where the school they attended or the house they lived in has since been demolished; where the parents who brought them have since passed away; the documents they travelled on have since been discarded *as not needed*, etc.

Other examples include doubting that minor children were ‘related as claimed’, only resolvable by DNA tests. I brought the first ever DNA case in 1985, and was subsequently criticised by other immigration lawyers who argued that that success would inevitably lead to a Home Office expectation, if not a requirement, that DNA tests would be provided: and they often are. In 2018, home secretary Sajid Javid had to disavow Home Office letters telling refugee family reunion sponsors that it was ‘imperative’ that they obtained DNA tests for their family applicants.⁸⁰

I maintain that the ‘culture of disbelief’ and the tightening of the standard of proof will persist in UK immigration and asylum decision-making so long as the burden of proof remains as it is.

5. Conclusion

In this article, I used straightforward definitions of international law norms, and an eminent UK judge’s definition of the rule of law as applicable to UK domestic law, to shine an unforgiving light on how UK governments neglect those principles in a bid to suppress ‘unwanted migration’. I showed how the UK has demonstrated over many years an indifference to international law norms and conventions concerning asylum – additionally showing a contempt for democratic accountability, in proposing measures which effectively derogate for the 1951 Refugee Convention without presenting such a proposition to Parliament. I have demonstrated how the UK government’s management of immigration legislation, rules, procedures and practices have increasingly downgraded and marginalised the value of the rights contained in the ECHR, and the duties set out in the UNCRC, leaving widening gaps between UK and international law, while often bypassing democratic accountability - failing to observe the legal principles essential in a democracy for the law to work at all. Finally, I also highlighted how placing the burden of proof on applicants serves to perpetuate a ‘culture of disbelief’, reinforcing negative public narratives towards migrants.

⁷⁹ Wendy Williams, *Windrush Lessons Learned Review* Ordered by the House of Commons to be printed on 19 March 2020 HC 93

⁸⁰ BBC News 25/10/18 <https://www.bbc.co.uk/news/uk-45979359> accessed 19/9/21