

The Nationality and Borders Act, the Illegal Migration Act and the Rwanda Policy – an obdurate response to the consequences of austerity

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At a glance

In this paper I briefly discuss some of the wider political, economic and social changes which I believe may have contributed to the surprisingly sharp response of the current government to the ‘small boats’ issue. I argue that the recent and current legislative moves against asylum-seekers require a broader explanation than is provided by the view that the government is just tapping into ‘far-right’ anti-migrant sentiment. I suggest that we are seeing a significant long-term consequence of austerity, whereby a country not able to cope with asylum-seekers within standard programmes believes it has no alternative other than adopting policies echoing the rhetoric of the ‘war on terror’, rather than attempting to provide protection for refugees who arrive in the UK. I look at two consequences of austerity in particular, namely, delays and housing shortages. I argue that those particular consequences of austerity flowing together have rendered asylum-seekers ‘hyper-visible’ and thus, in the minds of such as this government, require ‘absolute’ solutions – solutions which admit of absolutely no discretion and virtually no interference by any court.

1. Introduction

On 20 July 2023, the Illegal Migration Bill finally passed through Parliament. Its propositions are blunt. The Secretary of State is to have a duty not to consider any claim made by a person who arrives illegally after the Act’s commencement date.¹ If such a person makes a protection (asylum) claim or a human rights claim, it must be declared inadmissible, and may not be considered under the Immigration Rules.² The Secretary of State is under a duty to remove that person from the UK. No court order may impede that duty, unless stating that removal would risk ‘serious and irreversible harm’.³ If for any reason such a person is not removed, no

¹ The four conditions triggering the duty are set out in s 2 Illegal Migration Act (IMA) 2023.

² See s 5 IMA 2023.

³ *ibid.*

leave to remain will ever be granted unless not granting leave would result in a breach of their human rights; and citizenship will never be granted.⁴

This, along with the proposed prompt removals to Rwanda, is the detailed mechanism by which the government intends to carry out its King Cnut-style aim to ‘stop the boats’. But so remote is the hope of success that no commencement date has yet been given for those crucial ss 2 and 5 of the Act. First, the Supreme Court ruled on 15 November 2023⁵ that Rwanda would not be safe, since that country could not guarantee an asylum determination system that would protect against refoulement. At the time of writing, a new Bill⁶ stating the ‘startling’⁷ proposition that Rwanda is in fact ‘safe’ is in committee stage in the House of Lords.

But, secondly, it is probably clear even to the government that the ‘absolute’ measures in the IMA and the proposed Rwanda Bill will not deter arrivals, at least for some time. The Impact Statement for the IMA⁸ accepted that straightforward deterrence is at best difficult to achieve. The Statement presents a clear summary of the results of academic research on deterrence, and says:

The academic consensus is that there is little to no evidence suggesting changes in a destination country’s policies have an impact on deterring people from leaving their countries of origin or travelling without valid permission, whether in search of refuge or for other reasons.

The Impact Assessment examines policies from a number of other countries including Australia, Spain, Sweden, and concludes that very strict border regimes do lead to a reduction of illegal crossings there, but cannot guarantee that other routes are not then developed. The Assessment discusses different policies including paying large sums to border zone countries such as Turkey, Libya and Tunisia to control migrant transit routes, tightening up control of land border crossing points (Sweden, Denmark), and physical returns of people on small boats from international waters to specified offshore destinations (Australia). It accepts that these solutions are not available to the UK, whether straightforwardly or at all. Thus, presumably to avoid imposing on the Home Secretary a duty that cannot be carried out, no commencement date has been fixed for the Act’s crucial ss 2 and 5.

Despite the increasingly shrill pronouncements, especially from those recently resigned from Home Office ministerial office,⁹ the difficulties to commencing ss 2 and 5 do not lie in the Rwanda litigation, nor in developments such as the discovery of legionella on the Bibby Stockholm barge. Rwanda was not planning to accept more than a few hundred asylum-seekers, and the fateful barge would only accommodate another 500 or so. A bigger barrier is the absence of returns agreements with the European states which most irregular migrants will have crossed. There appears to be little appetite in the EU for a returns agreement. One obstacle to negotiating a new returns agreement appears currently to be an EU requirement for the UK to agree to accept ‘its share’ of migrants arriving in Italy, Greece and Spain (or instead

4 See s 30 IMA 2023.

5 *AAA and others v SSHD* [2023] UKSC 42.

6 Safety of Rwanda (Asylum and Immigration) Bill.

7 Lord Clarke, House of Lords debate on the Rwanda Bill, 29 January 2024.

8 Home Office Impact Assessment – Illegal Migration Bill HO 0438 26 June 2023, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf.

9 Ex Home Secretary Suella Braverman, ex Minister for Immigration Robert Jenrick.

pay a fee, as has been suggested to Poland and Hungary), while France itself has shown itself unwilling to make bilateral arrangements other than to increase the policing of its northern beaches.¹⁰ And a presumably unintended consequence of Brexit is that while an asylum-seeker fingerprinted in, say, Bulgaria, can be returned there by any other EU Member State, he cannot be returned there from Britain, so once having been rejected anywhere in the EU, his only chance is to try to reach the UK.

But the biggest issue is that once having imposed a duty on the Home Secretary not to consider an asylum claim, he cannot return such a person to their home country, at least without directly breaching the Refugee Convention, as he cannot know whether he is a 'genuine refugee' or not. This is clearly a legislative own goal, as it cannot be blamed on the EU. In the absence of agreements with safe third countries to accept these unexamined asylum applicants, they will remain in limbo in the UK.

Some asylum claims may still be substantively considered. Anyone lawfully in the UK who makes a *sur place* claim; anyone unlawfully in the UK but who did not travel here through a third safe country; anyone arriving lawfully with a visa (or without a visa from a non-visa national country) who claims asylum on arrival, and who can convince the Home Office that, at the moment they passed through immigration control, they had not formed the intention of claiming asylum,¹¹ should have their asylum claim considered. Such new claims, along with the existing backlog, and the thousands in the cohort arriving after December 2021¹² who have been declared inadmissible but whose claims may be considered if not removed within six months,¹³ will require examination and will ensure a need for advice and representation, appeal hearings, new legal precedents and of course asylum support, for years to come.

What, politically or administratively, can possibly lie behind such obdurate legislation, introducing duties that are unenforceable, and purporting to declare certain facts, mostly in the control of a foreign government, to be beyond evidence or argument? Those supporting such legislation point to a rise in world migration movements which 'must be stopped' before our overcrowded island is overwhelmed. I suggest instead that behind such legislation is a desperate political response to the deteriorated state of public infrastructure and services in the UK, the most important in this context being the long delays in Home Office decision-making and the general, acute shortage of social and low-rent housing. A popular description

10 Ben Quinn, 'EU denies reports it has rejected UK deal to return people who cross Channel', *The Guardian* (15 August 2023), available at: <https://www.theguardian.com/uk-news/2023/aug/15/eu-denies-reports-rejected-uk-deal-return-cross-channel> accessed 24 February 2024. This article notes that it was President Macron of France who was resisting the idea of a bilateral returns agreement. In any event, a new pact on migration was agreed within the EU on 20 December 2023, with no mention of any side agreements with third countries. See 'What is the New Pact on Migration and Asylum of the EU?', available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/new-pact-migration-and-asylum_en accessed 25 February 2024.

11 Otherwise their entry would be deemed to be by 'deception' (Immigration Rules Part 9 Grounds of refusal paras 9.7.1 to 9.7.4).

12 The concept of 'inadmissibility' was introduced to apply on the UK's withdrawal from the EU. See C J McKinney and Georgina Sturge, *Refusing to process asylum claims: the safe country and inadmissibility rules* (House of Commons Library 2023); Statement of Changes in Immigration Rules 10 December 2020 HC 1043, changes to Part 11 para 11.5.

13 Asylum-seekers who arrived before 28 June 2022 are described as 'legacy' cases. Those likely to be granted (principally those from Afghanistan, Iran, Eritrea, Yemen and Libya) have been fast-tracked with 'asylum claim questionnaires' and are supposed to have been dealt with before the end of 2023, but there were 4537 left as at 28 December 2023; between 28 June 2022 and 7 March 2023 claims can be processed if not declared inadmissible (38529 of these left as at 28 December 2023; between 7 March 2023 and 20 July 2023 [IMA 1st tranche – their asylum claims will be declared inadmissible, but not yet clear whether ss 2 and 5 IMA will be implemented – 22448 left as at 28 December 2023; and finally those arriving after 20 July 2023, declared inadmissible and depending on implementation of ss 2 and 5 IMA – of which there were already 33085 left as at 28 December 2023. Statistics from *Free Movement* 5 March 2024, extracted from the latest immigration and asylum statistics.

of the results of austerity is ‘Everything’s broken’. But these particularly broken aspects of public administration and infrastructure have made the arrivals of asylum-seekers and their continued presence here hyper-visible, seeming to require an ‘absolute solution’ occupying almost the whole attention of government, and raising questions of the proper relationship between parliamentary sovereignty and the rule of law.

In section 2, I briefly set out the background to the austerity policy and its impact on the Home Office and other relevant government expenditure. In section 3 I then look at the resulting pressure on the ‘asylum sector’ of those particular austerity policy impacts. In section 4 I look at previous governments’ responses to the ‘spontaneous’ or irregular arrivals of asylum-seekers to show clearly the qualitative difference between the current response and what went before, when far larger numbers of arrivals had to be accommodated and processed. In section 5, I look at how delay has consistently been used by the Home Office as its main administrative technique in management of ‘workflow’, and how, when backlogs come to the surface of political controversy, it resorts to gaming its service standards and introducing quasi-amnesties. I also note the weakness and indifference of the law in responding to the human impact of Home Office delay. In section 6, I note the aspects of the housing shortage specifically impacting on asylum-seekers and refugees, and the role outsourcing companies are increasingly playing, and whether a withdrawal from the European Convention on Human Rights could have any impact other than a search for a new legal remedy to protect the thousands of irregular migrants on UK territory against destitution. In section 7, the Conclusion, I reiterate that the NABA-IMA-Rwanda set of policies cannot work. Therefore those who claim asylum will require a proper determination procedure, as otherwise there is little prospect of the UK securing any returns agreement that would meet the established requirements of refugee law. Finally, I conclude that a failure to deal with administrative delays and backlogs especially in asylum determination, and a parallel failure to address the acute shortage of low-rent and social housing, will ensure that asylum-seekers remain hyper-visible, giving space to challenges to the very concept of asylum.

2. Economic background

To deal with the impacts of the 2008 financial crisis on UK government debt and spending, the 2010 Conservative–Liberal Democrat coalition government introduced ‘austerity’, which sought to protect spending on health and education by making deep cuts in other public programmes. Most relevant to this discussion are the cuts in the budgets of the Home Office, Ministry of Justice (MOJ) and local authorities. For the Home Office, by 2017–18 its budget on day-to-day spending (the vast majority of its spending) had decreased by 25 per cent in real terms compared to 2010–11. During that same period, income from significantly increased visa fees (£2,114 million) and passport applications (£755 million) offset increases in the cost of asylum support (£862 million) and Border Force (£702 million).¹⁴ In 2011 the MOJ announced cuts of 35 per cent in expenditure on courts, tribunals and legal aid. The Institute for Fiscal Studies calculated that in 2019–20 the total MOJ budget was around 25 per cent lower than in 2010–11.¹⁵ The impact on local authorities (responsible for local housing need,

14 House of Commons Scrutiny Committee slide show – undated but likely 2022 – this very useful set of slides has no URL of its own, nor any date or author on the face of the slides! I searched ‘Home Office budget cuts under austerity’.

15 *The spending of the Ministry of Justice*, House of Commons Library, 1 December 2019.

education, adult and children's social care, local roads, public transport and waste management) was even more severe. For example, a London Councils report states: 'Over the decade to 2020, while overall public spending (Total Managed Expenditure) will have increased by 5 per cent, London local government will have seen the core funding it receives from government reduce by 63 per cent in real terms'.¹⁶ A comprehensive report produced by Labour in 2018 sets out the impact of the cuts across all the major areas of public expenditure.¹⁷

On 4 September 2019 the then Chancellor of the Exchequer Sajid Javid announced 'the end of austerity',¹⁸ with a significant increase in spending on health and education and police. But few now, at the time of writing, with the UK in the middle of an acute cost of living crisis, argue that public expenditure has caught up with pre-austerity expectations. What we are seeing now is a milder version of post-war Britain – indebted, shabby and run down. The wider consequences of austerity can be summed up in the daily refrain that 'everything's broken'. From potholes to the National Grid; from missed NHS targets and lack of NHS dentists to school buildings riddled with asbestos and crumbling aerated concrete; from adult children still living with their parents into their 30s and 40s to local authorities battling with outsourcing companies for access to short-term housing; from ambulance queues outside A&Es to care homes closing for lack of staff: infrastructure and public services around the UK are in a calamitous condition.

Austerity also contributed directly to the failure to invest in social and affordable housing. A Shelter report¹⁹ shows that in the 2010 Spending Review, the level of capital funding from the government to local authorities to build new affordable homes was cut by 60 per cent compared to the previous programme which ran from 2008–2011, and has never recovered: and that in the decade 2010–20 over 135,000 social housing units have been lost through right-to-buy sales and demolition. More than one million households are on social housing waiting lists across England. More than 200,000 people are trapped in temporary accommodation, half of whom are children.

3. Pressures on the 'asylum sector' resulting from austerity policies

Particular pressures can be seen in the 'asylum sector'. Both asylum 'processing' (decision-making, appeals, grants of leave, removals) and accommodation and support have been affected.

The major impacts of these cuts on migrants and asylum-seekers are well-known. Home Office visa processing times have lengthened in almost every category, leading to long delays in both asylum determination and human rights applications. For migrants, both sets of delays mean long periods spent in limbo, divided from family members, surviving in low-quality accommodation and unable to work or claim benefits. This impact was intensified as new rules added significantly to workloads, while staff numbers were falling. Home Secretary

16 London Councils, 'A decade of austerity' (14 November 2018), available at: <https://www.londoncouncils.gov.uk/our-key-themes/local-government-finance/london-per-centE2-per-cent80-per-cent99s-local-services-investing-future/decade-austerity> accessed 4 February 2024.

17 Labour, *Eight years of failure: the truth behind the Tories' 'ending austerity' claim* (Labour 2018).

18 Dearbail Jordan, 'Chancellor Sajid Javid declares end of austerity', *BBC* (4 September 2019), available at: <https://www.bbc.co.uk/news/business-49577250> accessed 25 February 2024.

19 Reshima Sharma, 'One step forward, two steps back – a decade of social housing decline', *Shelter* (23 July 2021), available at: <https://blog.shelter.org.uk/2021/07/one-step-forward-two-steps-back-a-decade-of-social-housing-decline/> accessed 4 February 2024.

Theresa May's new family and private life Immigration Rules introduced in 2012 required families to make several repeat applications over several years to reach settlement, and the large increase in application fees and a new Immigration Health Surcharge led, after expensive litigation, to the introduction of fee waivers, leading in turn to the need for onerous fee waiver applications to be prepared and processed.

Delays in tribunal hearings have stretched to around one year. Since 2012, rates of removals of those finally determined to have no right to remain have fallen significantly,²⁰ adding to the large numbers of people surviving on illegal work, informal support and overcrowded accommodation.

These delays in turn impact on local authorities. Young 'failed asylum-seekers' must still be supported formally through local authority 'leaving care' provisions. And the same local authorities are obliged to spend out of squeezed children's social services budgets to support NRPF families waiting for a decision on regularisation or variation of their NRPF conditions – for whom fee waiver decisions are currently taking six months, and substantive applications are taking over a year.

The demand for cheap accommodation is acute. We see the government casting around for wartime-style solutions, procured through untendered contracts for billions.²¹ After a brief drama over legionnaire's disease, asylum-seekers are being accommodated on the Bibby Stockholm, moored in Portland docks – with twice as many people packed in as when the barge was moored in Shetland to house oil workers, leading to formal warnings about fire safety. Conservative MPs including the current Home Secretary are to be seen opposing proposals to house asylum-seekers on disused military barracks in their constituencies, and reports from these already show concern about inmates' mental health.²² Afghan people rescued and brought here on a solemn promise to those who served with British forces are now being made homeless. Those granted refugee status are now having their asylum support accommodation terminated too quickly for them to receive the benefits needed for them to find their own accommodation. There are accounts of Home Office officials battling each other to contract with particular hotel providers, and outsourcing companies overbidding local authorities seeking provision for their homeless families.²³ All these pressures show Britain's long-term failure to renew and develop its social infrastructure. More recently all these and similar problems are often blamed on Covid, or on the war in Ukraine, or on Liz Truss's mini-budget. But these factors, though clearly not trivial, have simply aggravated the long-term damage done by austerity.

20 National Audit Office, Home Office Departmental Overview 2022–23, Doc No 014017, published October 2023, slide 24.

21 Lizzie Dearden, 'Government quietly awards travel firm £1.6bn contract for asylum barges and accommodation', *Independent* (16 June 2023), available at: <https://www.independent.co.uk/news/uk/home-news/barge-australia-asylum-contract-travel-b2354578.html> accessed 25 February 2024.

22 Diane Taylor, 'Asylum seekers housed at ex-RAF base tried to kill themselves, study says', *The Guardian* (15 December 2023), available at: <https://www.theguardian.com/uk-news/2023/dec/15/asylum-seekers-housed-at-ex-raf-base-wethersfield-tried-to-kill-themselves-finds-study> accessed 18 February 2024; Rajeiv Syal, 'Médecins Sans Frontières treating refugees housed in home secretary's constituency', *The Guardian* (8 January 2024), available at: <https://www.theguardian.com/uk-news/2024/jan/08/medecins-sans-frontieres-treating-refugees-home-office> accessed 18 February 2024.

23 Michael Buchanan, 'Clearsprings: Home Office asylum contractor prices out homeless', *BBC* (23 June 2023), available at: <https://www.bbc.co.uk/news/uk-65984461> accessed 25/2/24; Independent Commission for Aid Impact Report March 2023, available at: <https://icai.independent.gov.uk/icai-rapid-review-finds-poor-value-for-money-in-uk-aid-to-refugees-in-the-uk/> accessed 25 February 2024; Charlotte Lynch, 'Home Office drives up migrant hotel costs with staff "competing for the same contracts"', *LBC* (30 March 2023), available at: <https://www.lbc.co.uk/news/home-office-drives-up-migrant-hotel-costs-with-staff-competing-for-the-same-cont/> accessed 25 February 2024.

4. Previous governments' responses to the arrival of asylum-seekers

Neither Labour nor previous Tory governments have ever legislated so bluntly to permanently exclude the majority of claims for international protection without considering them at all, simply on the basis of the person's journey to the UK. However, assessing and determining the credibility of an asylum claim at least partly on this basis has underlain asylum determination in the UK at least since the 1980s. I suggest that this reasoning arises from two related aspects of the development of refugee law and practice.

The background to the 1951 Refugee Convention is widely understood to have been the need for a formalised international response to the need for protection of people in Europe displaced during and in the immediate aftermath of the second world war. Two issues stand out. The first is how the idea of 'a refugee' was conditioned from the beginning to apply to the lonely, courageous and high-profile individuals who left or who wished to leave the USSR and other Iron Curtain countries. This is clear from the very drafting of the definition of a refugee, where the burden of proof falls on an applicant, in an individual determination, to show a risk of persecution directed at him or her, 'for reason of' five specific types of risk. This emphatically was not directed at the several million people displaced at the end of the second world war, who were dealt with under quite other programmes. Nor was it intended to apply to the further millions displaced around the world by colonial wars and attempts to reorganise colonial boundaries: the scope of the Refugee Convention did not extend beyond Europe until 1967. It took decades of litigation for the acceptance that persecution could be meted out by non-state agents; political opposition could be imputed to family members, or assumed from non-participation; claimed on the basis of personal identity and relationships. And even now, persecution is rarely accepted as applying to large cohorts or whole populations, even where 'persecution' is clearly visible in the news.

And yet the UNHCR has always made it clear that responsibilities for displaced people go wider than just the paradigm Rudolf Nureyev or Alex Navalny figure – as demonstrated by the UNHCR's assistance given formally to hundreds of thousands in refugee camps in Lebanon, in sub-Saharan Africa and elsewhere.²⁴ I have argued elsewhere²⁵ that it is this divergence between the UNHCR's 'people of concern' and the West's narrower view of the 'political refugee' which has given room since the 1980s to Western governments' discourse in which people are either 'genuine refugees' (fearing individual persecution) or illegal economic migrants.

The second issue is that the 1951 Convention does not anywhere state that a person seeking refuge from persecution must seek it in 'the first safe country'. From the very beginning this 'principle' was wielded to ward off irregular arrivals. In 1956 some 180,000 Hungarians fled Hungary when the Soviet Union sent troops in to suppress an anti-government rising. Thirty-seven countries offered resettlement,²⁶ including the UK, which accepted around 11,000.²⁷ The Thatcher government was reluctant to accept any Vietnamese 'boat people' but in 1980

24 Ivor Jackson, 'The 1951 Convention relating to the Status of Refugees: A Universal Basis for Protection' (1991) 3(3) *International Journal of Refugee Law*.

25 Sheona York, *The Impact of UK Immigration Law: Declining Standards of Public Administration, Legal Probity and Democratic Accountability* (Palgrave Macmillan 2022) 60.

26 Amanda Cellini, 'The resettlement of Hungarian refugees in 1956' (2017) 54 *FMR*.

27 Oliver Gillie, 'When Britain's arms and pockets were wide open...', *Independent* (13 August 1992), available at: <https://www.independent.co.uk/news/uk/when-britain-s-arms-and-pockets-were-wide-open-oliver-gillie-looks-back-36-years-to-the-arrival-of-another-group-of-eastern-european-refugees-1539982.html> accessed 25 February 2024.

did formally accept 15,000,²⁸ far more than the previous Labour government had been prepared to accept. In contrast, the far fewer Sri Lankan Tamils arriving under their own steam in the UK in the mid-1980s, trying to escape oppression from the Sri Lankan government, faced rapid changes in the Immigration Rules, the Carriers Liability Act 1986 and a UK campaign inside the EU urging Europe to rule out any cross-continent arrivals.²⁹

Politically, the 'first safe country' principle has been used to underpin the argument that most asylum claims are bogus, since crossing continents to claim asylum must be evidence of choice rather than desperation.

Thus, from the 1980s, legislation dealing with the asylum determination process, and most of the parallel provision of asylum support, rested on the view that asylum-seekers perforce fell into two mutually exclusive categories, either 'genuine' or 'bogus'.³⁰ From the Carriers Liability Acts and imposition of visa requirements in the 1980s, through the 1990s exclusion of migrants and asylum-seekers from social housing and welfare benefits, to Tony Blair's 2004 stamping on the 'legal aid gravy train' and announcing his 'tipping point' of removing more asylum-seekers than had arrived,³¹ 'asylum' remained a top concern of every government for over two decades. Only from the later 2000s was that particular immigration issue overtaken by 'foreign criminals', including 'bogus' claims for the right to family life under art 8 ECHR, and then by the arrivals of 'too many' EU nationals, campaigns about which eventually contributed to the Brexit referendum and its outcome.

Current debates on trends in the movement of refugees are marked by references to 'failed states' following the 'war on terror' which has destabilised not just Iraq and Afghanistan, but large areas of sub-Saharan Africa. We see growing high-level geopolitical instability, large-scale economic upheavals such as the 2008 financial crisis and Covid and post-Covid inflation, accelerating climate change and most recently the war in Ukraine and its impacts.³²

But the 1990s was also a time of great international instability. This period included the refugee-producing break-up of Yugoslavia, and significant numbers of refugees arriving in Europe from countries such as Sri Lanka,³³ Ghana,³⁴ Nigeria³⁵ and Zimbabwe.³⁶ The break-up of Yugoslavia in the 1990s led to the displacement of around 2.3 million people, mostly from areas attacked by Serbian forces. Of those, around 400,000 people fled to other countries, while the remainder were surviving in protected zones inside the former Yugoslavia. Germany

28 Alan Travis, 'Margaret Thatcher reluctant to give boat people refuge in the UK', *The Guardian* (30 December 2009), available at: <https://www.theguardian.com/uk/2009/dec/30/thatcher-snob-vietnamese-boat-people> accessed 25 February 2024.

29 York (n 25) 61.

30 *ibid.*

31 Bethany Maughan, *Tony Blair's asylum policies: The narratives and conceptualisations at the heart of New Labour's restrictionism*. Working Paper Series NO. 69. Refugee Studies Centre, University of Oxford 2010, 8.

32 The war in Gaza does not yet seem to have led to significant asylum movements – surely because of no way out for Gazans.

33 UN High Commissioner for Refugees (UNHCR), *UNHCR CDR Background Paper on Refugees and Asylum Seekers from Sri Lanka*, 1 March 1997, available at: <https://www.refworld.org/docid/3ae6a6470.html> accessed 17 August 2023.

34 Edward Opoku-Dapaah, 'Ghana 1981–1991: a decade of forced repression and migration' (1992) 11(3) *Refuge: Canada's Journal on Refugees* 8.

35 UN High Commissioner for Refugees (UNHCR), *UNHCR CDR Background Paper on Refugees and Asylum Seekers from Nigeria*, 1 November 1997, available at: <https://www.refworld.org/docid/3ae6a6510.html> accessed 17 August 2023.

36 ICAR, *Memorandum submitted by the Information Centre about Asylum and Refugees in the UK* 26 January 2004 <https://publications.parliament.uk/pa/cm200304/cmselect/cmhaff/218/218we22.htm> Table 4.

received over 200,000, Hungary 60,000, Austria 50,000 and Sweden 44,000. The UNHCR noted that this crisis, occurring in Europe, was absorbing around 15 per cent of its entire budget.³⁷

Meanwhile, UK asylum figures, and UK responses, look truly parochial. A House of Commons Written Answer on 23 February 1994³⁸ stated that in respect of 620 applicants from the former Yugoslavia, 55 decisions had been made in the previous six months. Five had been granted asylum, 100 had been given exceptional leave to remain, and 55 had been refused. Even claims from the main nationalities seeking asylum in the UK in that particular period were low in numbers: Turkish (730), Ghanaian (920), Nigerian (1,200), Somali (600), Indian (685), Pakistani (454) and Sri Lankan (1130). But even despite these small numbers, delays and backlogs were already accruing. The figures show that a total of 11,285 asylum claims had been lodged in that particular period, and in that same period only half that number had received decisions (Home Office statistics cannot show the outcomes of a particular cohort of asylum-seekers). Of the decisions, 290 had been granted refugee status, and just over 1000 exceptional leave to remain.

In 2004 the Information Centre about Asylum and Refugees in the UK (ICAR) produced a report³⁹ for the House of Commons Home Affairs Select Committee. This provides total asylum figure by year from 1985 (4389) to 2002 (85,865), the highest number of annual asylum applications made in the UK to date.

The Labour government's response to this was forceful. Labour was often condemnatory of 'abusive' asylum-seekers, and of judges' rulings amounting to an 'abuse of common sense',⁴⁰ and, in the 2003–5 *Limbuela* litigation, Home Secretary David Blunkett fulminated about the courts' dismissal of his attempt to exclude from support any asylum-seekers who did not claim asylum 'as soon as reasonably practicable' (s 55 Nationality, Immigration and Asylum Act 2002).⁴¹ But the nearest that government came to excluding the substantive asylum claims of those once on UK territory was s 8 Asylum and Immigration (Treatment of Claimants) Act 2004, requiring judges to 'have regard to' a person's journey to the UK in considering their credibility.⁴²

We should not need reminding that the numbers of applications did overwhelm the Home Office. But the 2006 discovery of over 450,000 unresolved applications, leading to Home Secretary John Reid's decision that the Immigration and Nationality Department was 'not fit

37 Henry Kamm, 'Yugoslav Refugee Crisis Europe's worst since 40's', *New York Times* (24 July 1992), available at: <https://www.nytimes.com/1992/07/24/world/yugoslav-refugee-crisis-europe-s-worst-since-40-s.html> accessed 19 March 2024.

38 House of Commons Written Answer 23 February 1994 Hansard <https://hansard.parliament.uk/commons/1994-02-23/debates/99df2b8c-5558-4901-87b4-b021e7449a6e/AsylumSeekers> accessed 25 February 2024.

39 ICAR n35.

40 Tony Blair on the allowed asylum appeals of the Stansted Afghans – I was interviewed on BBC News at 10 on 4 August 2006 about the judgment *S & Ors v Secretary of State for the Home Department* [2006] EWCA Civ 1157 referred to in 'Timeline of Afghan hijacker case', *BBC* (4 September 2006), available at: <http://news.bbc.co.uk/1/hi/uk/5245302.stm> accessed 19 March 2024.

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

42 Earlier government attempts to deter asylum-seekers operated by restricting and denying access to accommodation and benefits (see York (n 25) ch 3) and, as now, research showed that the welfare regimes of receiving countries were only weakly correlated with refugee flows. Ian Macdonald, Frances Webber, *Immigration Law and Practice* (5th Ed) (Butterworths 2001), 599; Mark Townsend, 'Home Office "covering up" its own study of why refugees come to the UK', *The Guardian* (20 November 2021), available at: <https://www.theguardian.com/uk-news/2021/nov/20/home-office-covering-up-its-own-study-of-why-refugees-come-to-the-uk> accessed 22 November 2021.

for purpose',⁴³ did not arise just from the increased arrivals in the immediately preceding years. I describe elsewhere⁴⁴ how the backlogs had been building up, with at best limited attempts to deal with them. The Labour government's solution was to place all those outstanding cases in a separate Case Resolution Directorate, or 'Legacy', with a formal commitment to either grant leave or remove all those applicants by 2011.

What was different then is that those applicants stuck in 'limbo' were not declared to be criminals. Many benefited from the quasi-amnesty of the Legacy programme and were granted indefinite leave to remain. Even the approximately 100,000 applicants remaining without decisions after the Legacy programme ended in 2011 had the legal benefit of a decision under the Immigration Rules with a right of appeal.

Above all, those asylum-seekers, some of whom had been waiting several years even before the 'Legacy' programme started, mostly had somewhere to live. The asylum support policy introduced in the Immigration and Asylum Act 1999 was to utilise empty private properties and 'hard to let' Council flats in the North to 'disperse' asylum-seekers away from London. Although the accommodation was poor, and the subsistence very limited, those arrangements did not on the whole force asylum-seekers into the spotlight, and by the end of the 2000s 'asylum' was not a major political issue. As asylum numbers began to fall during the 2000s, the processing backlogs did also diminish.⁴⁵

The important point for the present discussion is that even though in 2006 the Home Office asylum determination system collapsed under the weight of applications, the asylum-seekers themselves were able to survive in tolerable conditions for many years until granted leave to remain. What the present government faces is fewer than half the numbers of applicants, and far fewer family members. The fact they cannot be absorbed and catered for even within the very poor standard programmes of asylum accommodation and support exposes the impact of austerity. The wider housing shortage has forced hard-working families into the hard-to-let Council accommodation and low-rent private housing, reducing the already diminished availability of accommodation for asylum-seekers.

These are the practical circumstances in which the present government sees no alternative but to prevent any asylum-seekers from arriving 'spontaneously', and let no asylum-seekers benefit from their arrival on UK soil: a reaction of a wholly different quality. The decision-making processes, physical infrastructure and administrative costs of supporting so many asylum-seekers, for so long, can no longer be accommodated within standard programmes because of the ravages of austerity. This has made the asylum-seekers themselves, and even the concept of asylum, hyper-visible. Because of this they face a further consequence of austerity, namely, that the 'wartime' or pandemic-style responses (requisitioning hotels, housing people in disused barracks) which are now found to be necessary, themselves appear unacceptable precisely because they cannot be afforded within standard programmes.

For example, people on both sides of the political divide view it as unacceptable, in a country with 200,000 homeless families living in temporary accommodation, to be spending £8 million a day on hotel accommodation for asylum-seekers.⁴⁶ There are some within even

43 Helene Mulholland and Matthew Tempest, 'System "not fit for purpose" says Reid', *The Guardian* (23 May 2006), available at: <https://www.theguardian.com/politics/2006/may/23/immigrationpolicy.immigration1> accessed 25 February 2006.

44 York (n 25) ch 3 section 8.4 and, on the public administration implications of the Legacy see ch 5 section 3.2.

45 Recent Migration Observatory report – backlogs in 2010 compared to the 130,000 or so as at last year.

46 Rajeev Syal, 'Cost of housing asylum seekers in hotels rises to £8m a day, says Home Office', *The Guardian* (19 September 2023), available at: <https://www.theguardian.com/uk-news/2023/sep/19/cost-housing-asylum-seekers-hotels-rise-home-office> accessed 4 February 2024.

this government who understand this. It is interesting to note that a 2020 National Audit Office (NAO) report⁴⁷ revealed that in around 2017 during preparation for the new asylum support contracts, the Home Office ‘long list’ of policy alternatives for housing and supporting asylum-seekers included new (or even old!) ideas, such as building new houses and allowing asylum-seekers to claim mainstream benefits. The NAO reported that because so little time had been left to consider the parameters of the new contracts for asylum support, those two proposals were not included in the ‘short list’ of ideas for detailed consideration.

Two important questions emerge. Why do applications to the Home Office take so long to be processed? And why has it taken so long to appreciate the consequences of over 10 years with no significant building programme of social and low-rent accommodation?

5. Home Office Delays

The norms of good public administration deprecate delay: delay in litigation is understood generally as ‘justice denied’. And even in relation to immigration control, the legal position is that decisions are expected to be taken within ‘a reasonable time’, though the cases of *R(S)* [2007] and *MK* [2019] show, in relation to the great pressures on asylum claims processing in two very different periods, how limited a protection this offers to applicants.⁴⁸

But the Home Office has never been subject to normal standards of public administration.⁴⁹ What is considered ‘reasonable’ in immigration and asylum decision-making has for several decades been measured in terms of months if not years.⁵⁰ Even where particular ‘workstreams’ purport to operate under timed service standards, the standards are generally three months or more, are not applied to cases deemed ‘complex’, and are often put aside without reasons given, both in individual cases and for whole workstreams, such as currently for refugee family reunion applicants.

Delay in the immigration and asylum context has attracted plenty of legal and political attention. Even in the 1980s commentators blamed racism for the lack of resources devoted to spouse entry clearance applications, and at the beginning of the 1990s, as ‘citizens’ charters’ were introduced, the Home Office was well-known for its ‘delays and backlogs’.⁵¹ In the 2000s the *Rashid* and *R(S)* cases⁵² held that subjecting older asylum cases to newer harsher rules so as to meet Treasury-imposed performance targets was an ‘abuse of power’. But in 2005, in *FH*, the High Court held that if a backlog reduction plan was rational, and allowed for taking cases out of a queue in order to respond to vulnerability, delay could not be challenged.⁵³ *R(S)* was subsequently overturned,⁵⁴ on the basis that the role of the courts was not to sanction the Home Office for incompetence. Asylum determination should be based on the country

47 NAO, *Asylum Accommodation and Support* (NAO 2020), available at: <https://www.nao.org.uk/reports/asylum-accommodation-and-support/#downloads> accessed 19 March 2024.

48 Specifically in relation to asylum the courts have so ruled: *R(S) v SSHD* [2007] EWCA Civ 546 para 51, referred to in *MK v SSHD* [2019] EWHC 3573 (see paras 15 and 17).

49 York, *The Impact of UK Immigration Law* (n 25), ch 5.

50 *ibid* ch 5 and n 51–54 below.

51 Randell Hansen, *Citizenship and Immigration in Post-war Britain* (OUP 2000), 229; House of Commons Home Affairs Committee, *The Work of the UK Border Agency (January–March 2013)* Eighth Report of Session 2013–14 HC 616 witness evidence q14; Home Affairs Committee 6th report *form and content of the Home Office annual report* HC 464 session 1989–90; HL Deb 07 December 1992 vol 541 cc75–84.

52 *Rashid* [2005] EWCA Civ 744, *R(S)* [2007] EWCA Civ 546.

53 *FH* [2007] EWHC 1571 (Admin).

54 *EU (Afghanistan)* [2013] EWCA Civ 32.

conditions applicable at the time, otherwise individuals no longer facing persecution might nevertheless be granted asylum.

These legal propositions, which of course are also political propositions, may have been reasonable in the context of asylum. However, they cemented the retrospective effect of much of immigration control policy. For those needing to make five applications over 10 years for settlement, a year's wait for each application increases the chance of restrictive rule changes delaying settlement. For example, the recent increase in the Minimum Income Requirement⁵⁵ and the Immigration Health Surcharge⁵⁶ for family and private life visas will catch many people who, but for Home Office delays, would have reached their 5-year or 10-year qualifying period much sooner. But from a public administration point of view, these types of delay have long since been consolidated into Home Office workforce planning. Many service agreements for visa processing are three months – an astonishing length of wait for a case which is reported to take Home Office officials only a few minutes to consider.⁵⁷

These waits can be extended without giving reasons, as for example when refugee family reunion applications were taken out of service agreements early in 2023,⁵⁸ leaving people making the most straightforward and easy-to-grant applications, generally from a position of great vulnerability, without remedy. Currently, delays in fee waiver applications have extended from two months to six months – for people needing then to make their substantive human rights application, which itself may take over a year.

The recently published report of the Independent Chief Inspector of Borders and Immigration (ICIBI), *An inspection of asylum casework June-October 2023*,⁵⁹ sets out in detail the desperate steps taken by the Home Office to reduce asylum backlogs as well as dealing with the imperatives of NABA 2022 and IMA 2023. The purpose of that inspection was not to evaluate the impacts on the other work streams (from within and outside the Home Office) from which staff were abruptly transferred. But in those political circumstances, in which the courts would undoubtedly recognise a government's right to legislate strongly, and adopt emergency-style solutions, it is not clear that a court would consider it *Wednesbury* unreasonable for the Home Office to (for example) abruptly move all its family reunion staff to dealing with asylum backlog claims. In these political circumstances, would a court consider that it is wholly unreasonable to have queues for asylum or human rights claims lasting a year, or a wait of six months to obtain a change of conditions allowing access to public funds?⁶⁰ Looking at the reasoning in *FH*, and Mr Justice Collins's ready acceptance of the Home Office witness statements setting out the working of the Legacy scheme, I would not be confident that such an argument would be accepted. After all, it was known at the time of *FH* that the Legacy scheme was chaotic, and there certainly was no method of bringing a vulnerable case to their attention other than by issuing proceedings. And the case of *MK*, cited above, (which considered the impact of

55 Home Office Factsheet, updated 5 January 2024, available at: <https://www.gov.uk/government/news/fact-sheet-on-net-migration-measures-further-detail> accessed 11 March 2024.

56 Immigration (Health Charge) (Amendment) Order 2023, approved on 16 January 2024.

57 York (n 25)143. See also ICIBI 2017, *An inspection of entry clearance processing operations in Croydon and Istanbul November 2016-March 2017*; House of Commons Home Affairs Committee *The work of the UK Border Agency (January-March 2013) Eighth Report of Session 2013-14* HC 616 witness evidence q14.

58 Home Office letters to clients; concurrent reporting from other practitioners.

59 ICIBI, *An Inspection of Asylum Casework*, available at: <https://www.gov.uk/government/publications/an-inspection-of-asylum-casework-june-october-2023> accessed 5 March 2024.

60 Those applications were recommended by Robert Jenrick at the beginning of Covid in May 2020, for NRPF families who lost their jobs because of the pandemic. He also suggested that such families could rely on local authority social service to support them.

processing delays for unaccompanied young asylum-seekers) shows the courts unwilling to 'embark on a macroeconomic and social policy designing exercise'.⁶¹

It is fascinating to consider a judicial review claim against the Department of Work and Pensions concerning delays in deciding applications for personal independence payments (PIP),⁶² to see public law arguments decided in immigration cases – even cases long since disapproved in the immigration context – used to support a decision that, in the two particular benefits cases before the court, the delay was unlawful. The court considered the following issues, all of which can be seen to be crucial in the immigration and asylum context:

- It was 'uncontroversial between the parties' that applications have to be determined within a reasonable period of time.

However, in the immigration context, and in particular in asylum, it has been stated that a wait of more than 12 months only *might* be considered unreasonable.⁶³

- The parties agreed that, if an applicant were eligible, he should receive the benefit, as it was expressed in statute as a right.

However, in both asylum and non-asylum cases, it is certainly not accepted that, even where an applicant meets the relevant Immigration Rules, they have a *right* to be granted the relevant status. This possibility has been attacked from several different angles, considering whether the right was 'vested', (not if only offered by the Immigration Rules – *Odelola*)⁶⁴ or alternatively whether a 'legitimate expectation' had been given or created (not unless expressly stated – *HSMP* cases,⁶⁵ *Abidoye*).⁶⁶

- What is a reasonable period has to be informed by the impact on the claimants.

This is virtually never accepted in immigration litigation. Even where the court decides that vulnerability should be taken into account in considering delay, as in relation to the 2005–11 Legacy programme dealt with in *FH*, above, no effective mechanism for identifying vulnerable applicants was ever introduced. It can be seen from the recent inspection report into asylum casework⁶⁷ that, even now, the Home Office can barely identify and prioritise applicants by nationality, or by whether they are claiming asylum support.

- There has to be a reason for the delay. In the personal independence payment (PIP) cases there was 'no external factor' making it inevitable that dealing with the claim will take nine months.

In considering this, it should be noted that delays in deciding PIP applications arose as a consequence of a major reorganisation of disability benefits to a new style of benefits requiring

61 *MK* (n48) para 124.

62 *R (C and W) v DWP* [2015] 1607 (Admin).

63 *MM v Secretary of State for the Home Department* [2005] UKIAT 00763, quoted in *FH* [2007] EWHC 1571 (Admin) para 8.

64 *Odelola v SSHD* [2009] UKHL 25.

65 *HSMP forum UK Ltd v SSHD* [2018] UKSC 58.

66 *Abidoye v SSHD* [2020] EWCA Civ 1425 esp paras 41–45.

67 ICIBI report (n 59).

individual assessments, involving outsourcing contracts. Both the NAO and Public Accounts Committee (PAC) had concluded that not enough care had been taken with letting the contracts, including the lack of a pilot scheme, which would have shown that the new assessments of entitlement to disability payments would take more time. However, in the immigration context, in the case of *FH* the court found not just that the Home Office should not be blamed or sanctioned for the delays, even though agreed to be caused by its own incompetence, but that even in the context of delays of years, and a backlog of 450,000 unresolved cases, no individual's delay would be actionable unless there was particular vulnerability. The only requirement, even where, as now, the Home Office has 'allowed the asylum system to become a burning platform that required radical action and attracted significant ministerial and public scrutiny',⁶⁸ is that the scheme of rectification should be *Wednesbury* reasonable.

- The volume of claims is consistent with departmental expectations.

It could be argued that, in the 2000s, the volume of claims was far outside departmental expectations, though Ministers later said that the situation had been made worse by previous large cuts in workforce in anticipating the introduction of an IT system, which however did not work.⁶⁹ As to the recent delays, a House of Commons Library report⁷⁰ gives the following information:

- The annual number of asylum applications to the UK peaked in 2002 at 84,132. After that the number fell sharply to reach a twenty-year low point of 17,916 in 2010. It rose steadily throughout the 2010s, then sharply from 2021 onwards to reach 81,130 applications in 2022, the highest annual number since 2002.
- The 81,130 applications made in 2022 related to 99,939 individuals (main applicants and dependents).

A Migration Observatory report⁷¹ covering the same period states:

From 2015 to 2020, the number of asylum applications was relatively stable, fluctuating between 25,000 and 36,000 per year. This pattern changed in 2021 and 2022, with higher numbers of applications by the standards of recent years.

Could the Home Office have argued that the recent numbers rose too fast to be 'consistent with departmental expectations'? It should be difficult to so argue, since the geopolitical situation during the 2010s was unstable, and in the middle of the decade very large numbers of refugees were arriving in Europe especially from Syria. Even if the UK, sheltered behind mainland Europe and a further small sea, would not expect the numbers arriving in Greece or Italy, it surely would have been reasonable to anticipate an increase in arrivals however they travelled.

68 ICIBI report (n 59), Foreword, 2.

69 Beverley Hughes, Immigration Minister, in evidence to the Home Affairs Committee – Minutes of Evidence 8 May 2003 q37.

70 Georgina Sturge, 'Asylum Statistics', *House of Commons Library* (1 March 2024), available at <https://commonslibrary.parliament.uk/research-briefings/sn01403/> accessed 18 February 2024.

71 Peter Walsh & Madeleine Sumption, 'The UK's Asylum Backlog', *The Migration Observatory* (5 April 2023), available at: <https://migrationobservatory.ox.ac.uk/resources/briefings/the-uks-asylum-backlog/> accessed 18 February 2024s.

The Home Office response to the increase was certainly inadequate, since the backlog has significantly increased. The Migration Observatory report states that at the end of 2012 the backlog was 9,871. The House of Commons report continues:

- As of June 2023, the total 'work in progress' asylum caseload consisted of 215,500 cases. Of these, 138,000 cases were awaiting an initial decision, 5,100 were awaiting the outcome of an appeal, and approximately 41,200 cases were subject to removal action.
- The total asylum caseload has more than doubled in size since 2014, driven both by applicants waiting longer for an initial decision and a growth in the number of people subject to removal action following a negative decision.

And the Migration Observatory report states that in 2022 the UK had the second largest backlog after Germany, despite receiving far fewer asylum applications than that country. Clearly then, the Home Office was unprepared and did not respond quickly enough to the increased arrivals. On the reasons why, the Migration Observatory discusses a report⁷² of the ICIBI which pointed to the very high staff turnover among Home Office decision-makers, low morale and a perception that decision numbers were prioritised over decision quality, as well as out-of-date technology. There are numbers of reports from this period criticising various aspects of poor administration by the Home Office⁷³ of which delays and backlogs are only the symptoms. Reading these reports, it would be difficult indeed to find that the Home Office's immigration control operations are *Wednesbury* reasonable, whether individually or taken as a whole.⁷⁴ But whether a court, dealing with an individual application, would so find, is unlikely.

The wider point to be drawn from the above is that, whatever the distant roots of the staffing and resource issues which lie behind perpetual Home Office delays and backlogs, austerity will have exacerbated them, exposing asylum-seekers stuck in the backlogs to the bright light of hostile publicity. This is because of the expense of support during the long delays, together with the sheer lack of suitable accommodation for those waiting for a decision. Recent government imperatives to 'solve' the various backlogs in asylum determinations, and in the various human rights-based resettlement programmes (Ukraine, Hong Kong and the various Afghanistan schemes), have not taken asylum-seekers out of the limelight, but have in turn affected migrants making other types of applications, in particular those based on family and private life and refugee family reunion, as Home Office staff are abruptly transferred between different workstreams.

More recently, it can be seen that the attempt to 'solve' the asylum backlog is creating its own chaos in decision-making and in the world outside. In 2023 the Home Office introduced the 'asylum claim questionnaire', which was to be provided to 'legacy' applicants from five countries with high asylum grant rates, to resolve those cases quickly.⁷⁵ However, the 'questionnaire' was in fact a long rambling discussion of what the Home Office thought

72 ICIBI, *An inspection of asylum casework* (August 2020 – May 2021).

73 I give extensive references in York (n 25) ch 5.

74 Recently-sacked Independent Chief Inspector of Borders and Immigration stated 11 March 2024 to the BBC's Dominic Casciani that the Home Office is 'dysfunctional' and that the problems go right to the top. See Dominic Casciani, 'Home Office is dysfunctional, says ex-borders watchdog David Neal', *BBC* (11 March 2024), available at: <https://www.bbc.co.uk/news/uk-68528149> accessed 19 March 2024.

75 On 3 March 2023 this writer published a post on *Free Movement* critiquing the questionnaire. The ICIBI report (n 59) noted the resulting issues and the Home Office's attempts to solve them.

was relevant (emphasising the method of travel from country of origin to the UK, as ever an algorithm for identifying ‘bogus’ claims) followed by several pages of open-ended questions such as ‘describe the background to your claim’. Applicants with lawyers, and those who had already provided a statement or a self-completion form, were told they still had to complete the new form, but found that their lawyers were not covered by legal aid to do this. Applicants without lawyers struggled to find any help with the forms. Many missed the 20-day deadline for completing them. They have been declared to have ‘withdrawn’ their claims – an administrative own goal, since they are still here, and no longer in contact with the authorities. Home Office officials questioned by MPs⁷⁶ stated that over 17,000 asylum-seekers treated as withdrawn have simply disappeared. Physically invisible, maybe, but perforce, will eventually have to be re-included in the formal backlog either to have their claim processed or join those warehoused in disused army camps, contributing to the hyper-visibility of asylum-seekers.

6. How wider housing shortages are rendering asylum-seekers hyper-visible

I argue that the specific shortage of low-rent and social housing, itself a consequence of austerity, has meant that the delays in asylum processing and the arrivals ‘on the beaches’ have led to a real crisis in where to place asylum-seekers and how to pay for their accommodation. Thus now, if not previously, there is developing a direct link between the presence of asylum-seekers on UK territory and the availability of low-rent housing, at least in certain localities.

What the current ‘absolute’ Home Office policy neglects is that though the ‘small boats’ are boats, which can be stacked, burned, melted, put in landfill or otherwise disposed of, they are vessels full of people who need food, clean clothes, medical treatment but above all shelter. As Baroness Hale said in *Limbuela*,⁷⁷ ‘Britain is not a place where a person can live off the land’. And the informal camps in northern France show that anywhere where destitute people are left to shift for themselves in numbers becomes squalid very quickly.

I argue that austerity’s cuts in new social housing, and increased general demand for low-cost housing, exposes asylum-seekers to blame. The government’s desperate casting about for places to put newly-arrived asylum-seekers is the clearest, sharpest evidence of the UK’s housing shortages. I write ‘shortages’ as, contrary to the impression given by politicians and the media, there clearly is not one ‘housing market’, but several distinct ‘markets’ whose relations to each other are complicated. For the purposes of this paper, we can ignore the private (as in hidden) market for multi-million-pound properties whose ownership is unclear, and the market for landed property, also hidden, both of which markets are more affected by international financial movements, falls of governments, changes in tax policy, international legal sanctions and so on. We can also ignore that part of the housing market which gets the most political attention, in which accommodation is bought by individuals on a mortgage, to live in, and, problematically, to serve as a store of wealth for their old age.

76 Callum May & Suzanne Leigh, ‘Asylum seekers: Home Office says more than 17,000 are missing’, *BBC* (29 November 2023), available at: <https://www.bbc.co.uk/news/uk-67567401> accessed 18 February 2024. See also the ICIBI (n 59) comments on this issue.

77 *Limbuela (Adam, Limbuela and Tesema) v SSHD* [2005] UKHL 66.

From the point of view of asylum policy we need to look at the lower-value end of the market in properties owned by landlords, not so much individual buy-to-let arrangements but landlords owning multiple properties including those registered as houses in multiple occupation: and the transformation in the demographics of those who are living in such properties. We also need to look at the provision of social housing, the erosion of that stock by the right to buy legislation, and by failures to keep what is left in repair because of local authority budget cuts. Because it is in these types of properties where the first waves of asylum-seekers arriving in the 1980s, 1990s and 2000s were placed, and were expected to live, but where, now, ordinary 'hard-working families' are forced to live.

It should therefore not be a surprise that asylum-seekers are being forced to live on a barge or in tents, when a housing district such as Tunbridge Wells, Kent, for instance, not in a deprived area of Britain, and where the average purchase price for a house is £569,584⁷⁸ has 946 families on its housing waiting list⁷⁹ has built only 36 units of social housing in five years.⁸⁰ It should not be surprising that asylum-seekers are faced with barges and tents when local authorities have been forced to keep homeless families in B&Bs for longer than the legal time limit,⁸¹ and some local authorities such as Harlow and Bristol have resorted to the use of converted office blocks.⁸²

It certainly should not be surprising now, in 2024, when the squeeze on lower-value housing has been clear for ten years at least. In 2013 the Local Government Chronicle⁸³ reported how the London Borough of Lambeth set up a scheme to move homeless families to Margate, a town with three of the most deprived areas in the UK.⁸⁴ This was followed by landlords buying up unused hotels for renting to local authorities as homeless families accommodation, and in Kent we now see homeless and NRPF families placed by London boroughs in B&Bs and rented flats in Kent coastal towns and in Medway. When those families are granted leave to remain, it is the Kent district councils, and Kent County Social Services, who are then faced with the task of finding permanent housing for those families, and dealing with their social care

78 Rightmove, 17 August 2023.

79 *KentLive* series of FOI requests (19 October 2019).

80 Mary Harris, 'New housing boss reveals only 36 homes for social rent were delivered in Tunbridge Wells in 5 years', *KentLive* (24 August 2022), available at: <https://www.kentlive.news/news/kent-news/new-housing-boss-reveals-only-7504993> accessed 19 March 2024.

81 Sammy Gecsoyler, 'More than 1,600 homeless families left in English hotels and B&Bs past legal limit', *The Guardian* (15 May 2023), available at: <https://www.theguardian.com/society/2023/may/15/more-than-1600-homeless-families-left-in-english-hotels-and-bbs-past-legal-limit> accessed 19 March 2024; Michael Savage, 'Revealed: homeless children spending entire lives in temporary housing in England', *Observer* (9 March 2024), available at: <https://www.theguardian.com/society/2024/mar/09/homeless-kids-england-childhood-temporary-housing-families> accessed 11 March 2024.

82 May Bulman, "'Hidden homeless': Families being permanently housed in office blocks to shift them from homelessness lists', *Independent* (14 October 2019), available at: <https://www.independent.co.uk/news/uk/home-news/homeless-office-block-families-children-connect-house-housing-crisis-a9120416.html> accessed 11 March 2024; Vicky Spratt, "'How long can you live in a place like this?': the homeless families trapped in former office blocks", *inews* (20 February 2023), available at <https://inews.co.uk/news/homeless-families-trapped-former-office-blocks-2150686> accessed 11 March 2024; Rowan Moore, "'It's like an open prison': the catastrophe of converting office blocks to homes", *The Guardian* (26 September 2020) <https://www.theguardian.com/society/2020/sep/27/housing-crisis-planning-converting-office-blocks-homes-catastrophe-jenrick> accessed 11 March 2024.

83 Kate Wiggins, 'Exclusive: Lambeth to move homeless families to Kent', *Local Government Chronicle* (3 April 2013), available at: <https://www.lgcplus.com/services/regeneration-and-planning/exclusive-lambeth-to-move-homeless-families-to-kent-03-04-2013/> accessed 11 March 2024.

84 Madeleine Bunting, 'How England's impoverished seaside towns became both a trap and a refuge', *Prospect* (10 May 2023), available at: <https://www.prospectmagazine.co.uk/society/poverty/61328/england-poverty-seaside-towns-blackpool-weston-super-mare> Madeleine Bunting 10 May 2023 accessed 17 August 2023 (this link is behind a paywall).

needs. These same councils have recently been asked by the Home Office to start accepting 'dispersed' asylum-seekers as well, to help the Home Office reduce its spending on placing asylum-seekers in hotels.⁸⁵

In contrast, in 1992, there was controversy about provisions in the Asylum Bill as was, which proposed weakening local authorities' homelessness duties to asylum-seekers to the question of whether they had some accommodation 'however temporary'; and to exclude asylum-seekers from offers of permanent social housing (only) until their claims should be determined.⁸⁶ Clearly, even in the 1990s there were shortages of social housing, and arguments were made even then that 'asylum-seekers are taking our jobs and housing'. But, even then, the greater burden lay on London boroughs' adult social care departments, following the exclusion of asylum-seekers without children from any benefits or housing as homeless.⁸⁷ It was resolved by Labour's creation of the entirely parallel system of asylum support and accommodation in the Immigration and Asylum Act 1999. The National Asylum Support Service (NASS) was charged with providing 'no-choice' accommodation in dispersal areas around the country, all well away from London and the southeast. It did this by contracting out the accommodation duties to large private landlords, who executed these contracts by placing asylum-seekers in low-cost and even poor accommodation mostly in the Midlands and north of England. There was no argument at that time that there was insufficient accommodation at the price the government was prepared to pay; no argument at that time that private sector house prices would be affected even locally: certainly no suggestion of having to place asylum-seekers in barracks, on boats or under tents, not even in 2002 when asylum claims were at their highest.

There certainly were complaints about the cost of the asylum system which, as now, were increased by the enormous backlogs in outstanding claims, and the refusal to allow asylum-seekers to work.⁸⁸ But the backlogs in the 2000s dwarf the current backlog. In 2006, when the Home Office Immigration and Nationality Division was formally declared 'not fit for purpose' and broken up, there were around 450,000 unresolved asylum claims, for which the Home Office was obliged to make a plan to conclude all those claims within five years.⁸⁹ And in 2011, at the conclusion of the work of the 'case resolution directorate', 100,000 cases still remained to be decided. During that period of course, further asylum-seekers continued to arrive, cases continued to be appealed and challenged by judicial review, fresh claims and other challenges to removal were made; and during that time all those people had to be accommodated. The NASS set-up was eventually reviewed, and provision of accommodation and support was eventually let to large outsourcing contractors (discussed below). The standard of accommodation was often unsuitable, often poor, and complaints about disrepair often took a long time to be resolved. But enough 'hard to let' Council flats and poorly-repaired low-quality private accommodation remained available to accommodate thousands of applicants for many years.

However, recently, the cost of accommodating the backlogs has led to an intensification of pressure on the low-rent housing stock, made worse by placing the asylum support duties

85 Reported to the South East Region Strategic Partnership for Migration, 2023.

86 Hansard HL Deb 10/2/1992 col 461.

87 York (n 25) ch3 – at the introduction of the Immigration and Asylum Act 1999, around 57,000 single asylum-seekers were being supported, mainly in London boroughs. But the issue was not the availability of accommodation but the cost of support.

88 Except, following ZO (*Somalia*), after 1 year's wait, in 'shortage occupations'.

89 I describe the 2006 'not fit for purpose' declaration and ensuing Legacy scheme (and the continued build-up of backlogs leading to the 2013 'not good enough' decision), in York (n25) ch 5 section 3.

in the hands of outsourcing companies. NASS was eventually disbanded, the responsibility for asylum support and accommodation was taken into the UK Border Agency as was, and the accommodation and support duties were contracted out. In some geographical areas the contractors continued to be large regional landlords, but other areas became the responsibility of large outsourcing companies Serco, Mears and G4S (the COMPASS contracts).⁹⁰ In 2019 new contracts were let to three outsourcing companies. These are Serco, Clearsprings Readyhomes and Mears. All have reported increased profits from their 'immigration' businesses (see below), as the number of arrivals has increased, and the Home Office backlog of asylum determination has grown.

A 2020 NAO report⁹¹ briefly discusses how these contracts were negotiated and let to take over from the previous COMPASS contracts (involving two of the same contractors, Serco and Clearsprings (then Clearel)). The NAO states briefly that the Home Office did not give itself enough time to consider and negotiate better deals, nor to properly consider two of the 'longlist' models for a new service, 'such as building new houses or allowing asylum-seekers access to mainstream benefits'.⁹² The main changes in the contracts were to pay a higher price per person housed, to require specific attention to the needs of vulnerable people, and to include more furniture and equipment in the accommodation requirements. At the same time the Home Office made a separate contract, the Advice, Issue Reporting and Eligibility (AIRE) contract, with Migrant Help.⁹³

The NAO makes clear the difficulties inherent in outsourcing provision of a service where the need for the service is outside the control of the government department. And already by 2020 the NAO was noting the need to increase the number of local authorities designated as 'dispersal areas', so that the contractors could source accommodation in them. Local authorities' reluctance is ascribed to potential financial burdens such as catering for those asylum-seekers once they are granted leave to remain, and whether rural locations provide suitable destinations for numbers of displaced young men. However, more recently, as shown in Kent, local authorities' reluctance arises from the resultant competition for accommodation needed for 'their own' homeless families.

The NAO report does not, except indirectly, consider the issue of available housing. It does note, in 2020, that expecting even local authorities in the south of England to accommodate more asylum-seekers may have an impact on house prices, and notes a provision to renegotiate the contract price 'if more than 70,000 asylum-seekers are housed throughout the UK'. That report, published in 2020, did not foresee the current battles between Clearsprings and local councils trying desperately to house homeless families and families on their own housing waiting lists. But a new NAO report just published states that 'The Home Office recognises that ... its actions over the past year have exacerbated many of the challenges that local authorities have faced, particularly around social housing demand and homelessness'.⁹⁴

90 National Audit Office, HC 880 SESSION 2013–14 10 January 2014. In March 2012, the Department signed six new contracts for the provision of these services, collectively called COMPASS (Commercial and Operating Managers Procuring Asylum Support). It awarded G4S, Serco and Clearel contracts to supply accommodation services, with each awarded a contract to deliver these services in two of the six regions of the UK.

91 NAO, *Asylum Accommodation and Support* HC 375 3 July 2020.

92 *ibid.* Evidently those alternatives were not considered by the Home Office in its rushed and expensive attempts to reduce the use of expenditure on hotels – see the new report NAO, *Investigation into asylum accommodation* Session 2023–24 20 March 2024 HC 635.

93 In my view this contract misstates the law on eligibility for asylum support, and I am pursuing a formal complaint about it. Schedule 2 of this contract is on the House of Commons webpage, but has a security warning!

94 NAO 2024 (n 92) para 5.5.

The report notes missed targets, such as people being kept too long in 'initial accommodation', generally hotels and hostels, which as well as being expensive does not permit applicants to register with a GP or for children to be found school places. The NAO appears to ascribe this to the specific type of target set, meaning that a person who has been in initial accommodation longer than the target time may then remain there even longer, while newer arrivals are prioritised to avoid missing their targets.⁹⁵ But compared to the situation in 2023, the numbers in hotels in 2019 were around 1500, while before August 2019 fewer than 100 had to be so housed.⁹⁶

On forecasting demand, the NAO briefly considers the Home Office role in determining asylum applications. The report notes that the Home Office procedures changed in 2018 to concentrate on those in asylum support rather than those living independently, and withdrew its target to process 98 per cent of 'straightforward' claims within six months. But the House of Commons Home Affairs Committee had since 2013 been criticising the Home Office for massaging its progress by increasing the proportion of claims deemed not 'straightforward'.⁹⁷ Of course in 2020 the NAO could not have predicted that the backlog would reach well over 100,000.

A recent article⁹⁸ in the *Times* business pages pointed out that 'much of the chaos in the asylum system is due to a huge backlog in claims waiting to be processed, up from 93,000 in 2022 to 133,607 in March 2023.' Serco's turnover of its UK and European immigration and justice businesses increased by 88 per cent. The article then pointedly notes that, while Serco and other private companies are contracted to accommodate those asylum-seekers (and making huge profits from this), it is the Home Office that is charged with processing the applications. The *Times* does not say this, but the implication is that those outsourcers would have no interest in any change in policy, whether one with limited effect such as the Asylum Claim Questionnaire or an outright amnesty, as their profit units would disappear.

A closer look at the outsourcing contractors

A current Serco advertisement is titled 'Calling all landlords'.⁹⁹ It states that Serco is accommodating 30,000 asylum-seekers in 7000 properties in the Midlands. The 'benefits' to landlords include five-year leases, rent paid on the nail, repairs and maintenance done, all bills paid, and no letting or management fees. It must be difficult for many local authorities, themselves suffering from cuts in resources in every area of responsibility, to compete with this prospectus when looking for private rented accommodation to provide as temporary homes for homeless families, including refugees and Ukrainian, Afghan and Hong Kong resettled people.

95 The Home Office has created this type of target problem previously, notably in 2006 when putting aside old cases in order to deal with new ones quickly. This led to the *R(S)* litigation, discussed in the above section on delay.

96 Compare the outraged response of *The Sun* in response to one family of Ugandan Asians being housed in a hotel next to Gatwick Airport, for a few nights. See Charlie Kimber, 'Scapegoating led to murder', *Socialist Worker* (14 April 2000), available at: <https://socialistworker.co.uk/news/scapegoating-led-to-murder/> accessed 11 March 2024.

97 House of Commons Home Affairs Committee, *Home Office Delivery of Brexit: immigration* Third report 2017-19.

98 Laith al Khalaf, 'The Bibby Stockholm may have become a symbol of asylum chaos but who is making money? The asylum process is in disarray. Despite the strain on the system, private firms are raking in cash', *Sunday Times* (12 August 2023), available at: <https://www.thetimes.co.uk/article/whos-making-money-from-the-uks-asylum-system-tmqnn5p5f> accessed 19 March 2024.

99 Serco, 'Asylum Accommodation and Support Services Contract', available at: <https://www.serco.com/uk/sites/serco-aasc/landlords> accessed 19 March 2024.

Clearsprings boasted in its annual accounts of 'growth in demand for its services due to soaring numbers of asylum seekers fleeing "political and economic turmoil"'.¹⁰⁰ According to the *Independent* on 16 June 2023, 'an Australian travel firm previously slammed for its handling of Covid quarantine hotels has been quietly handed a £1.6bn contract covering the UK's new asylum accommodation ships',¹⁰¹ namely, the Bibby Stockholm.

These reports suggest a potential further development: that the financial interests of large outsourcing companies may begin to influence government policy. There is a body of academic work in the USA arguing that large companies which run private prisons are able to influence wider policy so as to ensure a steady or even growing number of people to be incarcerated. For example, a 2011 Justice Policy report quoted from a Corrections Corporation of America 2010 annual report as saying that measures to decriminalise certain activity, or to decrease punishments, would 'adversely affect demand for our services'.¹⁰² A more recent report describes how the management consulting giant McKinsey first provided pro bono support to policy discussions in Greece about the handling of asylum-seekers on the islands – and was rewarded by the introduction of policies recommended by them – a procedure which 'the bloc's own internal procurement watchdog later deemed 'irregular'.¹⁰³ It is surely not fanciful to suggest that a company awarded a £1.6 billion contract without having to tender for it might be listened to if it found a new government deciding not to place asylum-seekers on barges. In other words, keeping asylum-seekers hyper-visible might be good news for some.

Some in government and outside it have suggested that the UK should withdraw from the European Convention on Human Rights (ECHR), whether just in relation to asylum, or altogether. Some have posed this as a fundamental constitutional issue, effectively arguing that binding ourselves to any foreign treaty or instrument is an abrogation of parliamentary sovereignty. For this paper, the emergence of these types of arguments simply demonstrates the desperation born of seeming impotence, leading to a wielding of obdurate government might to solve the problem 'absolutely', in the way that various acts have been done in the name of the 'war on terror'.

However, such propositions cannot, and do not ever, 'solve' these types of problems. Even if the Rwanda scheme passes parliament, and a few migrants are sent there, the vast majority will remain in the UK. However undeserving, however bogus, however criminal, an irregular migrant present on the territory cannot be returned anywhere without a returns agreement. And, although the provision of support and accommodation for asylum-seekers may be squeezed still further than currently, no government could publicly and explicitly decide to starve large numbers of people present on UK territory. Even without *Limbuela* itself, (which relied on Parliament's decision¹⁰⁴ to allow exceptions based on ECHR rights) it would

100 Adam Bychawski, 'Private firm that left asylum seekers to sleep on street made £28m profit', *Open Democracy* (2 June 2023), available at: <https://www.opendemocracy.net/en/clearsprings-asylum-seekers-home-office-hotels-suella-braverman/> accessed 19 March 2024.

101 Lizzie Dearden, 'Government quietly awards travel firm £1.6bn contract for asylum barges and accommodation' *Independent* (16 June 2023), available at: <https://www.independent.co.uk/news/uk/home-news/barge-australia-asylum-contract-travel-b2354578.html> accessed 19 March 2024.

102 See for example *Gaming the System* (Justice Policy Institute 2011), inset on page 2.

103 Luděk Stavinoha and Apostolis Fotiadis, 'Asylum Outsourced: McKinsey's Secret Role in Europe's Refugee Crisis', *BIRN* (22 June 2020), available at: <https://balkaninsight.com/2020/06/22/asylum-outsourced-mckinseys-secret-role-in-europes-refugee-crisis/> accessed 19 March 2024.

104 Section 55(5) NIAA 2002.

not be long before cases would reach the High Court arguing the law of common humanity ‘which is above all positive law’.¹⁰⁵ And before long, a judge would decide, much as Baroness Hale did, ‘can we imagine that, if a woman had to survive living in a car park, her condition would not very soon breach the “law of common humanity”?’¹⁰⁶

I am not suggesting that such legal arguments would be straightforward. I have argued myself before that *Limbuela*-type arguments could only with great difficulty be used on behalf of cohorts of applicants, such as overstayers, who do not (as pre-IMA asylum-seekers did) have a legal right to be in the UK until their claims were determined. But, precisely because the post-IMA cohort would not have had an asylum claim determined, the Home Office could not rely on their other argument, namely, that any applicants facing destitution could reasonably be expected to opt to ‘go home’.

But I think the greater force of objection would be political: that the internment camps, barges and other wartime-style accommodation which would be needed for post-IMA asylum-seekers, who would have no prospect whatever of any change in their status, would eventually come to be regarded by the general public as unacceptable. One could even argue that ‘common humanity’-style arguments already have some traction even in the present government. Not all those voicing concerns about housing asylum-seekers in disused barracks are motivated by Nimby resentments, but can see the long-term impact on hundreds and thousands of mostly male ‘inadmissible’ asylum-seekers confined to what will effectively be internment camps. And recently Michael Gove, Minister of Housing, drew back from relieving landlords of asylum-seekers from registering the accommodation as Houses in Multiple Occupation, showing that, for some at least in this government, there are accommodation standards below which they are not prepared to go.¹⁰⁷

7. Conclusion – the consequences of hyper-visibility

In the front line of both these consequences of austerity – Home Office delays and acute shortages of low-rent housing – are the hyper-visible newly-arrived asylum-seekers. And they do not just suffer the substantive disadvantages of delayed resolution of their claims, and poor accommodation and support. Migrants, and asylum-seekers in particular, are treated differently, and suffer in different ways, than other casualties of austerity. Sick people in ambulances outside A&E, and other sick people in long waiting lists for elective NHS treatment, are generally not blamed for their situation (although in discussions about links between ill-health and poverty, blame sometimes creeps in). But asylum-seekers now face severe legal consequences, just from being here. Their advisers are condemned merely for assisting them. Tribunal and court judges face condemnation for their judgments, and now vicars for apparently colluding in the ‘abuse’ by those claiming asylum on grounds of conversion to Christianity.¹⁰⁸

¹⁰⁵ Lord Ellenborough, *R v Inhabitants of Eastbourne* (1803) 4 East 103, quoted in *Limbuela* and before that in *Joint Council for the Welfare of Immigrants & Anor*, (*R. on the Application of*) *v Secretary of State for Social Security* [1996] EWCA Civ 1293.

¹⁰⁶ *Pace Limbuela*, cited as *R (Adam, Tesema and Limbuela) v SSHD* [2005] UKHL 66.

¹⁰⁷ Diane Taylor, ‘Home Office drops plan to remove housing protections from asylum seekers’, *The Guardian* (7 February 2024), available at: <https://www.theguardian.com/society/2024/feb/07/home-office-drops-plan-to-remove-housing-protections-from-asylum-seekers-in-england-and-wales> accessed 19 March 2024.

¹⁰⁸ The Rwanda judgment has led to claims that parliamentary sovereignty cannot be subject to court decisions. The recent case of Abdul Ezedi, who had attacked a woman and child with a corrosive chemical, may yet lead to new legal definitions of persecution on grounds of religion. Ezedi had first been refused asylum, but subsequently won an appeal following conversion to Christianity.

I have argued that a major cause of this extra level of opprobrium, and the ‘absolute’ measures in NABA, IMA and the Rwanda Bill, arises from the effects of austerity. The real difference between 1985-2005 and the current period is that now ‘everything is broken’. In particular, unless the Home Office adopts strategies with a chance of working (a shared burden of proof, simplified requirements and enough staff to process applications promptly), and unless this country quickly builds significant new social housing and other public services infrastructure, then asylum-seekers, in the form of profit units for such as Serco and Clearsprings, will, however indirectly, indeed be taking needed resources away from low income families, a trend which will contribute to popular hostility to the very concept of asylum.

