Refugees: English Law's Protection or Persecution?

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In this lecture, we're going to look at the protection of refugees in UK law. This is a timely subject, with the current debate over the Government's appalling scheme to remove asylum-seekers to Rwanda. I will argue that, even before the recent spate of draconian anti-refugee measures, the UK's asylum system was a grossly inadequate, and often cruel and discriminatory, form of protection. I will argue that what we need, ultimately, is open borders – the abolition of all immigration controls.

But first, a note on terminology. What is a refugee? If you ask a lawyer, they'll give you a precise answer to this question. They'll tell you that, according to Article 1A of the 1951 Convention relating to the Status of Refugees (the Refugee Convention), a refugee is a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

But this doesn't necessarily accord with the way that people use the term "refugee" in everyday speech. And when we delve into the history of refugee protection, we will see that the term "refugee" hasn't always had a consistent meaning.

I should also explain how I intend to use the terms "asylum-seeker" and "refugee". An important concept to understand is that refugee status under the Refugee Convention is declaratory, not constitutive. A person who meets the refugee definition is a refugee, irrespective of whether a state has recognised them as a refugee. When the state grants you asylum, it doesn't make you a refugee; it recognises that you already are a refugee. An asylum-seeker is, of course, someone who has applied for asylum. But the terms "asylum-seeker" and "refugee" are not mutually exclusive, because many asylum-seekers are in fact refugees in law, albeit that they have not yet been recognised as refugees.

A Historical Perspective

I now want to turn to the history of asylum and refugee protection in the UK.

Although refugee law as we know it today is relatively new, the idea that the state should extend protection to people who are fleeing persecution, for example on political or religious grounds, is not new. There were waves of immigrants fleeing persecution in earlier centuries, such as the Huguenots, the French Protestants who migrated to the UK after 1685 fleeing religious persecution. And as Alison Bashford and Jane McAdam highlight, an early legal concept of asylum developed in the context of extradition: states had the right to refuse to extradite fugitive offenders who were wanted for purely political offences.[1]

[1] Alison Bashford and Jane McAdam, "The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law." Law and History Review, vol. 32, no. 2, 2014, pp. 309–50, pp 334-335

The reason this early concept of asylum was concerned primarily with extradition, not immigration, is that immigration controls as we know them are relatively recent.

For a brief time in the late eighteenth and early nineteenth century, the UK did have a system of immigration control. During the French Revolution, large numbers of French refugees arrived in the UK. This led to a moral panic about the UK being infiltrated by Jacobins, which in turn led to Parliament enacting the Aliens Act 1793. This was an immigration control statute which regulated the entry and stay of aliens.[2] It was followed by the Aliens Act 1798 which was a more draconian statute, requiring aliens to obtain a licence to reside in Britain. Notably, the preamble to the 1798 Act made reference to the principle of asylum,[3] stating *"And whereas the Refuge and Asylum which, on Grounds of Humanity and Justice, have been granted to Persons flying from the Oppression and Tyranny exercised in France, and in Countries invaded by the Armies of France , or under their Power or Controul, may… be abused by Persons coming to this Kingdom for Purposes dangerous to the Interests and Safety thereof".*

These Acts were extraordinary wartime measures. A peacetime Alien Act was enacted in 1814, which maintained the Crown's ability to exclude and expel aliens by royal proclamation. This was a temporary Act, but was renewed by Parliament every two years until 1824.[4] In 1826, it was replaced with the Aliens Registration Act, which, unlike its predecessors, conferred no power to exclude or expel aliens.[5] This in turn was replaced by the Aliens Registration Act 1836, which required aliens to register and obtain certificates, but again conferred no power to expel them. In any case, it fell into disuse.[6]

From a practical perspective, therefore, between 1826 and 1905 there were no immigration controls as we know them today. The UK had open borders. In fact, the Foreign Secretary, Lord Granville, said in a directive to all British missions in 1852:

> *"By the existing laws of Great Britain, all foreigners have the unrestricted right of entrance and residence in this country … No foreigner, as such, can be sent out of the country by the Executive Government, except persons removed by treaties with other States, confirmed by Act of Parliament, for the mutual surrender of criminal offenders."*[7]

This all changed in 1905, with the passage of the Aliens Act 1905. This Act was again enacted in response to a flow of refugees – this time, Jewish refugees fleeing persecution in Eastern Europe.

The 1905 Act was extremely controversial at the time. In part, it was rooted in anti-Semitic agitation against Jewish immigration. As Bashford states, *"Throughout the 1890s and into the early twentieth century, a stark and populist anti-Semitism was at work in the East End of London. And although regularly denied at the time, it was evident in Westminster and Whitehall as well."* However, in addition to race and religion, another consideration in play was the regulation of labour. Bashford notes that anti-immigrationists *"cast Eastern European and Jewish immigrants as a threat to wages and industrial concerns".* Indeed some of the opposition to the Aliens Bill was cast in these terms too. According to Bashford, *"the successive Aliens Bills and the very principle of immigration restriction were resisted by the Liberals as an attempt to introduce 'back-door' labor law,"* and a young Winston Churchill, at that time a member of the Liberal Party, *"argued that the free movement of people necessary went along with the free trade of goods".*[8]

But the Act also contained an important innovation: an asylum clause. Under section 1(3)(d), *"in the case of an immigrant who proves that he is seeking admission to this country solely to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on account of religious belief, leave to land shall not be*

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[2] See generally David LuVerne Ferch, "The English Alien Acts, 1793-1826" (1978). Dissertations, Theses, and Masters Projects. William & Mary. Paper 1539625034.
[3] Bashford and McAdam, op. cit., p 331.
[4] Ferch, op. cit., pp 81-82
[5] Ibid, p 118
[6] Bashford, op. cit., p 331
[7] Quoted in Ian Macdonald, "Rights of settlement and the prerogative in the UK - a historical perspective," *Journal of Immigration, Asylum and Nationality Law* 2013, 27(1), pp 10-22, p 16
[8] Bashford, op. cit, p 316

refused on the ground merely of want of means, or the probability of his becoming a charge on the rates". Bashford and McAdam argue that this had much greater significance than historians have generally acknowledged. They state *"Although it was undisputed at the time, as now, that states possessed the right under international law to grant asylum to whomever they wished, the statute framed it as a right that individuals could claim to their admission to Britain."*[9] Unfortunately, the asylum clause was short-lived. It was removed by the Aliens Restriction Act 1914, which allowed the King in Council to make Orders restricting alien immigration.[10]

The 1914 Act was originally a wartime measure, but was extended for one year after the war by the Aliens Restriction (Amendment) Act 1919, and thereafter was renewed each year. An Aliens Restriction Order was made in 1920 under the 1914 and 1919 Acts, and remained in force until it was replaced by the Aliens Order 1953.[11]

Meanwhile, in the inter-war years, the concept of refugee status in international law developed, with a series of international instruments on the protection of particular groups of refugees, such as Russian, Armenian and German refugees.

The modern refugee definition was introduced by the 1951 Convention relating to the Status of Refugees, which remains the cornerstone of international refugee law today. Originally, the 1951 Convention was limited to protecting European refugees in the aftermath of the Second World War, and therefore limited the definition of a refugee to those who had a well-founded fear of persecution *"as a result of events occurring before 1 January 1951".* This restriction was later removed by the 1967 Protocol to the Convention.

The central principle of the Refugee Convention was that of *non-refoulement*. Article 33(1) provided that *"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.".* However, the Convention's protection for refugees suffers from a number of serious limitations, to which I shall return later.

Meanwhile, UK immigration law was continuing to develop. Here we need to go on a brief digression about British nationality. Before 1949, everyone born within the British monarch's dominions and allegiance was a British subject. That included not only those born in the UK, but also those born in British colonies abroad. This changed on 1 January 1949 with the British Nationality Act 1948, which divided British subjects into two groups: citizens of the United Kingdom and Colonies (CUKCs) and citizens of the newly independent Commonwealth countries, such as Canada, Australia and India. CUKCs and Commonwealth citizens were not regarded as aliens and were not subject to immigration controls. They retained an absolute right to settle in the UK.

That changed with the Commonwealth Immigrants Act 1962, which imposed immigration controls both on non-CUKC Commonwealth citizens, and on CUKCs who did not hold a UK-issued passport, principally Black and Asian people from the UK's colonies. The Commonwealth Immigrants Act 1968 extended this further, imposing immigration controls on all CUKCs unless they, or one of their parents or grandparents, were born, naturalised, adopted, or registered as a citizen in the UK. This Act was targeted specifically at the East African Asians, who were CUKCs of Asian extraction who had been resident in Kenya or Uganda and had had to flee. The Act prevented many East African Asians from settling in the UK and left them with no home to go to. I talked about this shameful chapter of our history in an earlier lecture, and time doesn't permit me to go into detail here.

From 1973, immigration controls for both aliens and Commonwealth citizens were consolidated in a single statute, the Immigration Act 1971, which still remains the basis of UK immigration law today.

Paragraph 58 of the 1972 Immigration Rules, made under the 1971 Act, broadly incorporated the principle of asylum into domestic law. However, the Refugee Convention itself was not incorporated into domestic

[9] Bashford, op. cit, p 311.
[10] Ibid, p 338.
[11] See generally Macdonald, op. cit.

law, and refugees who were not lawfully in the UK had no in-country right of appeal if they were refused asylum. Their only recourse was judicial review.

This changed in 1993, when the Asylum and Immigration Act 1993 provided that the Immigration Rules could not lay down any practice which would be contrary to the Refugee Convention, and gave a right of appeal to those who were refused asylum.

A broadly positive change came in 2004 when the European Union's Qualification Directive came into force, which states were required to implement by 2006. This introduced the concept of "subsidiary protection", known as "humanitarian protection" in the UK, which provides protection to people who are not refugees but are at risk of serious harm on return. It also introduced a number of provisions about the interpretation of the Refugee Convention. It was accompanied by the Reception Directive, which deals with living conditions and support for refugees, and the Procedures Directive, which deals with asylum procedure. Following the UK's exit from the EU the status of these Directives was ambiguous, but it appears from current case law that they are no longer part of UK law, although UK law and practice on asylum continue to be heavily influenced by the Directives.

Over the past 20 years a number of measures have been taken by successive governments, both Conservative and Labour, to deter claiming asylum and make life harder for refugees.

One of the primary means used to deter claiming asylum has been to keep asylum-seekers intentionally in poverty until their claims are determined. Asylum-seekers' entitlement to welfare benefits and housing assistance were curtailed during the 1990s. The Immigration and Asylum Act 1999 excluded asylum-seekers from mainstream benefits and local authority housing altogether, and created a separate system of support for asylum-seekers, often known as "NASS support" after the former National Asylum Support Service. This remains in place today. Asylum-seekers are placed in accommodation provided by private contractors on behalf of the Home Office, often of very poor quality. They are given a minimal level of financial support, currently £49.18 per person per week. In the last few years, many have been left to languish in hotels instead of being transferred to self-contained accommodation, often with entire families sharing a single hotel room, and disabled and vulnerable people being accommodated in grossly unsuitable conditions.[12]

Section 55 of the Nationality, Immigration and Asylum Act 2002, passed under Tony Blair's government, prohibited the Home Secretary from providing a person with asylum support if they were *"not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom".* The intent was deliberately to make asylum-seekers homeless and destitute to punish them for making a late claim. The House of Lords in *Limbuela,*[13] however, held that forcing an asylum-seeker into street-homelessness in this way was a breach of Article 3 of the European Convention on Human Rights.

More recently, the current Conservative government has started housing asylum-seekers in former Ministry of Defence barracks and on the Bibby Stockholm barge, again as a deliberate deterrent measure that can only be described as wanton cruelty. In the case of *NB*[14] the High Court found that the accommodation at Napier Barracks was inadequate for asylum-seekers' needs, and that the process for identifying vulnerable asylum-seekers who were unsuitable to be accommodated there was also inadequate. In December 2022 an Albanian asylum-seeker, Leonard Farruku, who was accommodated on the Bibby Stockholm tragically took his own life.[15]

But it isn't just poor living conditions that have been used to make life harder for refugees. For many years, many asylum-seekers were subjected to the "Detained Fast Track" process, an accelerated decision-making process that took place while they were held in detention, and on which the vast majority of claims were

[12] See for instance *R (TMX) v Croydon LBC* [2024] EWHC 129 (Admin)
[13] *R (Limbuela) v SSHD* [2005] UKHL 66, [2006] AC 396
[14] *R (NB) v SSHD* [2021] EWHC 1489 (Admin), [2021] 4 WLR 92
[15] The Guardian, "The tragedy of Leonard Farruku, the gifted young musician whose dream of a better life ended on the Bibby Stockholm," 5 February 2024 https://www.theguardian.com/uk-news/2024/feb/05/the-tragedy-of-leonard-farruku-the-gifted-young-musician-whose-dream-of-a-better-life-ended-on-the-bibby-stockholm

refused and appeals dismissed. Eventually, the Detained Fast Track was successfully challenged by the NGO Detention Action, with the Court of Appeal holding in 2015 that it was "structurally unfair and unjust".[16]

The Immigration and Asylum Act 1999 introduced a power, now found in the Nationality, Immigration and Asylum Act 2002, for the Home Secretary to certify asylum claims as unfounded, so that the asylum-seeker could not appeal the refusal of their claim from within the UK. In recent years this draconian measure has been used particularly often against Albanian asylum-seekers.

Another weapon in the Home Secretary's arsenal has been removal of asylum-seekers to supposedly "safe" third countries. Until the end of the post-Brexit transition period on 31 December 2020, the UK participated in the EU Dublin Regulation arrangements, under which asylum-seekers could be returned from the UK to other European countries which were deemed responsible for dealing with their claims. The problem was that some other European countries were habitually leaving asylum-seekers destitute and street-homeless. In 2011, in *MSS v Belgium*[17] the European Court of Human Rights found that the removal of asylum-seekers to Greece under the Dublin arrangements breached Article 3 of the European Convention, on the ground that asylum-seekers in Greece were living in conditions of destitution and homelessness. More recently, in *SM*[18] the Upper Tribunal accepted that some particularly vulnerable asylum-seekers would be at Article 3 risk in Italy. Another issue was that not all European countries handled asylum claims acceptably. In *Ibrahimi*[19] the High Court accepted that asylum-seekers returned to Hungary would be at risk of onward *refoulement* to countries where they faced persecution.

The UK ceased to participate in the Dublin arrangements when the transition period ended. With the increase in small boat arrivals, the Conservative government, as is well known, took drastic action. It negotiated the Migration and Economic Development Partnership (MEDP) under which asylum-seekers were to be sent to Rwanda, which would be responsible for deciding their asylum claims. Asylum claims by individuals who had claimed asylum in supposedly "safe" third countries, or who had passed through "safe" third countries and whom the Home Office considered ought to have claimed asylum there, were to be held inadmissible, and not considered in the UK. At the same time, Parliament passed the Nationality and Borders Act 2022, a compendious statute which, among other things, put the new inadmissibility rules on a statutory footing, changed the UK's interpretation of the Refugee Convention in several respects, expanded the criminalisation of asylum-seekers, and provided for recognised refugees to be treated less favourably if it was deemed that they should have claimed asylum in a safe third country, with a shorter period of leave and no right to family reunion. The latter policy has since been abandoned.

As is well known, the Rwanda scheme was successfully challenged in the courts. The European Court of Human Rights granted an interim measure under Rule 39 of the Rules of Court on the eve of the first flight taking off. As a result, no one has actually been sent to Rwanda. In the High Court, the lawfulness of the Rwanda scheme was upheld, but several individual claimants still succeeded in their judicial review claims.[20] The Court of Appeal allowed the appeal and held that the Rwanda scheme was unlawful, on the basis that there was a risk of onward *refoulement* from Rwanda to countries where asylum-seekers were at risk of persecution, due to the inadequacy of the Rwandan asylum system.[21] The Supreme Court dismissed the Home Secretary's appeal and confirmed that the scheme was unlawful.[22]

Meanwhile, Parliament passed the Illegal Migration Act 2023, an exceptionally draconian statute which, if and when it is brought fully into force, will give the Home Secretary a duty to remove from the UK any adult who meets the Act's four "removal conditions", regardless of any asylum or human rights claim they may make. The first removal condition encompasses *inter alia* those who entered the UK without leave, entered with leave obtained by deception, entered in breach of a deportation order, or arrived without entry clearance

[16] *Lord Chancellor v Detention Action* [2015] EWCA Civ 840
[17] (2011) 53 EHRR 2
[18] *R (SM) v SSHD (Dublin Regulation - Italy)* [2018] UKUT 429 (IAC)
[19] *Ibrahimi v SSHD* [2016] EWHC 2049 (Admin)
[20] *R (AAA (Syria)) v SSHD* [0222] EWHC 3230 (Admin)
[21] *R (AAA (Syria)) v SSHD* [2023] EWCA Civ 745, [2023] 1 WLR 3103
[22] *R (AAA (Syria)) v SSHD* [2023] UKSC 42, [2023] 1 WLR 4433

when they were required to have it. That covers the vast majority of asylum-seekers. The second removal condition is that they entered or arrived on or after 20 July 2023. The third removal condition is that they did not "come directly" to the UK from a country where they faced persecution. The language of "coming directly" comes from the Refugee Convention, in the context of which it has previously been held that a person may have "come directly" even if they briefly transited through a safe third country,[23] but the Act seeks to head this off by providing that a person has not "come directly" if they passed through or stopped in a safe third country. The fourth removal condition is that they require leave to enter or remain but do not have it. Unaccompanied children are not subject to the duty to remove while they are children, but will become subject to that duty when they turn 18.

For most asylum-seekers, the Illegal Migration Act only allows them to be sent to a safe third country, not to their own country. They can make a "serious harm suspensive claim" if they claim to be at risk of serious harm in the third country, with a right of appeal to the Upper Tribunal if it is refused. However, there is an exception for nationals of certain states, which include the states of the European Economic Area and, controversially, Albania. Nationals of these states can be returned to their own countries, and cannot make a "serious harm suspensive claim" to stop their return. This is a clear breach of the Refugee Convention, given that many Albanian asylum-seekers are in fact at serious risk on return.

Now that the Government has lost the Rwanda case in the Supreme Court, they have, as is well known, introduced the Safety of Rwanda (Asylum and Immigration) Bill, which is currently before Parliament and which seeks to overturn the Supreme Court judgment by statutorily deeming Rwanda to be a safe country.

Therefore, we can see that the story of UK refugee protection has often been "one step forward, two steps back". The last two decades have seen a series of increasingly draconian anti-refugee measures. Against this backdrop, I now want to turn to look at the international legal instrument which is at the heart of these debates – the Refugee Convention.

The Refugee Convention

The Refugee Convention, while a groundbreaking measure, is severely limited in the protection it affords to refugees. This is for a number of reasons.

First, the refugee definition only encompasses victims of persecution. Contrary to popular usage, not everyone fleeing a war zone, for example, is necessarily a refugee. The fact that someone is at risk from indiscriminate violence does not by itself make them a refugee, although it may entitle them to humanitarian protection. Similarly, the fact that a person would be destitute on return does not in itself make them a refugee, although it may be relevant to their refugee claim if, for example, their poverty would put them at risk of human trafficking.

Second, not all victims of persecution are refugees. The persecution has to be inflicted on account of one of the five "Convention reasons": race, religion, nationality, membership in a particular social group, and political opinion. Membership in a particular social group has been construed relatively widely, to encompass, for example, gender and sexual orientation. But the concept does have limits.

This means that a person can be at risk of persecution, even appalling persecution, on return, and yet not be entitled to the protection of the Refugee Convention. This means, for example, that the victims of criminal gangs or armed groups are not necessarily entitled to refugee protection; it depends on the motive of their persecutors for persecuting them.[24] Today, in a UK context this matters less than it once did, because a person who is at risk of serious harm on return, but who cannot establish that the harm they would suffer is on account of a Convention reason, is normally entitled to humanitarian protection. But before the introduction of humanitarian protection, it mattered a lot.

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[23] *R (Adimi) v Uxbridge Magistrates' Court* [2001] QB 667

[24] See *Gomez v SSHD* [2000] INLR 549; *EMAP (Gang violence, Convention Reason)* [2022] UKUT 335 (IAC)

At times, this has led to appallingly harsh decisions. In the American case of *Campos-Guardado,*[25] a woman who had been raped and had seen her male family members hacked to death with machetes was denied asylum, because she failed to show that the persecution she had suffered was for a Convention reason.

I should say a little about the definition of "particular social group". Two basic approaches to this concept have emerged from the case law. One is that such a group must share a common characteristic which is either immutable, in that it cannot be changed, or fundamental, in that the individual should not be required to change it. The other is that such a group must have a distinct identity in the society concerned, such that they are perceived as being different by that society. The Qualification Directive incorporates both of these approaches. For some years, the Qualification Directive was interpreted by UK courts as requiring that a proposed particular social group must meet both the "immutable characteristic" and the "distinct identity" tests. But in the landmark case of *DH*[26] the Upper Tribunal held that they should be read as alternative, not cumulative, so that only one or the other need be satisfied. This was a progressive decision that significantly widened eligibility for refugee status. From 28 June 2022 Parliament has now reversed *DH* by statute, in the Nationality and Borders Act 2022, so that it is once again necessary to meet both limbs of the test.

A third limitation of the Refugee Convention is that it excludes from its protection those who are considered undeserving. Article 1F of the Convention excludes from refugee status those who have committed crimes against peace, war crimes or crimes against humanity, those who have committed a "serious non-political crime" outside the country of refuge, and those who have been guilty of acts contrary to the purposes and principles of the United Nations. Article 33(2) of the Convention provides another very significant limitation on refugee protection. Under Article 33(2), a refugee who has committed a "particularly serious crime" and is a "danger to the community", or who is a "danger to the security" of the host state, is not protected against *refoulement.* Such a person is still technically a refugee, but the Convention does not prevent the host state from expelling them. The UK has adopted a very harsh interpretation of this provision. Section 72 of the Nationality, Immigration and Asylum Act 2002 introduced a statutory presumption that someone sentenced to 2 years' imprisonment has committed a "particularly serious crime" and is a "danger to the community". The Nationality and Borders Act 2022 has now reduced that threshold to one year.

This does not mean that the UK is able to deport criminals who would face persecution on return. Article 3 of the European Convention on Human Rights provides absolute protection against torture and inhuman or degrading treatment or punishment. If there is a real risk that a person would be subjected to such treatment on return, they cannot be removed or deported, regardless of what crimes they may have committed. But in such a case, the UK's approach is normally to give such individuals "restricted leave" to remain in the UK for six months at a time, subject to significant restrictions on their freedom, in contrast to the five years' leave to remain normally granted to refugees.

The fourth, and perhaps the most important, limitation of the Refugee Convention is that it doesn't require states to provide safe and legal routes to flee persecution. When a refugee gets to the UK, they are protected by the Convention. But before they get here, they enjoy no such protection. The UK has deliberately made it as difficult as possible for refugees to reach its shores. The few safe and legal routes that exist are limited to particular nationalities and groups, and are not available to most refugees. Most refugees come from countries whose nationals are treated by the UK as "visa nationals", meaning that they cannot simply get on a plane to the UK; they must apply for and obtain entry clearance in order to come to the UK. Due to the UK's regime of carrier sanctions, airlines will not carry a visa national who does not have a visa. And there is no such thing as a refugee visa. Unless you qualify for one of the few available safe and legal routes, you cannot apply from abroad to come to the UK as a refugee. You can only claim asylum once you get here.

This means that someone who is being persecuted, and needs to flee their country, has very few options. If they have the financial resources to do so, they might be able to obtain a UK visa in some other category, such as a visitor or student, through deceiving UK officials as to their intentions. They can then claim asylum

[25] *Campos-Guardado v INS* 809 F.2d 285 (1987)
[26] *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC)

once they arrive. But for most refugees, that option is inaccessible. Paying smugglers to bring them illegally to the UK is simply the only option available to them.

Significantly, the UK criminalises both of these routes of entry. A person who obtains a visa by deception commits an offence under section 24A of the Immigration Act 1971. A person who enters the UK illegally commits an offence under section 24 of that Act. The UK's criminalisation of refugees was significantly widened in 2022. Previously, in the 2021 case of *Kakaei,*[27] it was held that if an asylum-seeker crossing the English Channel in a small boat intended to arrive at an approved port of entry and claim asylum there, then they would not commit an offence under section 24 of the 1971 Act, and anyone who assisted them (such as another asylum-seeker who steered the small boat) would not commit the offence of assisting unlawful immigration under section 25. The Nationality and Borders Act 2022, however, changed the law so that arriving in the UK without a visa, where one is required, is now a crime.

Article 31 of the Refugee Convention is supposed to bar states from penalising refugees on account of their illegal entry or presence. But in domestic law, section 31 of the Immigration and Asylum Act 1999, which provides refugees with a defence to some criminal charges, does not apply to the offences of arrival without leave or assisting unlawful immigration.[28]

As such, if you want to come to the UK and claim asylum here, in general you have no choice but to commit a crime.

However, the typical argument made by politicians to justify anti-refugee policies goes like this. Those refugees who come to the UK over land have travelled through a number of ostensibly safe European countries on the way here. The argument is that they should have claimed asylum in one of those countries, rather than travelling on to the UK. They argue that someone who travels onward to the UK rather than claiming asylum in France, Italy or another European country is travelling by choice, not necessity.

There are a number of reasons why that is a bad argument, and I will list them.

The first is that many refugees have no choice in their destination. Refugees seeking to flee to a safe country often have no choice but to rely on unscrupulous criminal gangs. In many cases, the gangs give the refugee no choice as to their destination. In some cases, once the refugee arrives, they will be exploited by the gang, using the pretext that they owe a debt for their journey to the UK. Human trafficking of refugees into labour exploitation, forced criminality and sexual exploitation is rife. And even where a refugee has not been trafficked, it does not follow that the smuggling gang will give them a choice about their destination, or even tell them where they are going.

The second is that many European countries, to be blunt, treat refugees appallingly. France, for example, regularly leaves refugees, including children and families, homeless and destitute on the streets, which was condemned by the European Court of Human Rights in *MK and Others v France*[29] in December 2022. Nor do all of the supposedly safe European countries operate an adequate system of asylum adjudication. As we've already heard, for example, in *Ibrahimi* asylum-seekers successfully challenged their removal to Hungary on the basis that they would be at risk of *refoulement* to countries where they would be persecuted.

The third, which is equally important, is that it is plainly unreasonable to expect those countries on the southern and eastern periphery of Europe to host all the refugees travelling into Europe from elsewhere. Britain is a very wealthy country. We have a moral obligation to shoulder our fair share of the global refugee crisis, instead of leaving it to other European countries to do so.

So, the argument that refugees should "claim asylum in the first safe country" is a spurious one, and a poor excuse for punishing refugees.

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[27] *R v Kakaei* [2021] EWCA Crim 503
[28] *R v Mohamed* [2023] EWCA Crim 211
[29] App nos 34349/18, 34638/18 and 35047/18, 8 December 2022

We've now looked at four limitations of the Refugee Convention. I now want to turn to a fifth limitation, which is that the Convention does not actually give refugees a right to be granted asylum. It only prohibits *refoulement* to a country where they face persecution. So, as we have seen, it doesn't stop states from expelling refugees to supposedly "safe" third countries.

Finally, I turn to the sixth limitation, which is the inadequacy of the process by which the state decides whether a person is, or is not, a refugee. When decision-makers are seeking to determine whether an asylum-seeker is credible – that is, whether they are telling the truth about what has happened to them – the methods they use to distinguish truth from falsehood are demonstrably unreliable. Research has shown that asylum decision-makers have unrealistic expectations about what asylum-seekers should remember.[30] Decision-makers often treat inconsistency in a person's account as evidence of fabrication – but in fact inconsistencies routinely arise in the accounts of truthful witnesses, and this is exacerbated by the fact that many asylum-seekers suffer from mental health conditions, which can affect memory.[31]

Similarly, in deciding whether asylum-seekers are at risk of persecution, and whether they would be adequately protected by the state against persecution from non-state actors, Home Office decision-making is often unreliable and influenced by political considerations. For example, my colleague David Neale has shown that the Home Office guidance to caseworkers about how to decide Albanian claims is unreliable, misleading, and based on cherry-picking the country evidence. And a report by the former Chief Inspector of Borders and Immigration – coincidentally also called David Neal – revealed, shockingly, that as part of a recent Government initiative called Operation BRIDORA, *"a decision had been taken at ministerial level that no more than 2% of Albanian claims should be successful".*[32]

This appalling decision-making comes at a terrible human cost. A person wrongly refused asylum may be removed to a country where they face death or serious ill-treatment. Or, if not removed, they may become street-homeless, be exploited in dangerous illegal work, or be driven into the arms of human traffickers.

What is the solution? The bare minimum that is required is to establish safe and legal routes for refugees to come to the UK, without a restriction on which nationalities are eligible, and without a cap on numbers. That is the only solution that will stop small boat crossings, and that will end the tragic loss of life in the Channel.

But I think we need to go further. The Refugee Convention, while a vital humanitarian measure, is simply not enough. We need to return to the pre-1905 position, and abolish all controls on immigration. We need open borders. That is the only solution that will ensure that everyone who needs the UK's protection is able to obtain it. The UK is one of the world's wealthiest countries, and has far greater resources and resilience than many countries which host far greater numbers of refugees.

The commonplace counter-argument is that open borders would overwhelm the UK's infrastructure and services, and lead to fewer jobs and lower living standards for British workers. There are two answers to that. The first answer is that it doesn't have to. As I made clear in my last lecture, on wealth inequality, our current neoliberal economic model and depleted state capacity is a deliberate political choice, not an inevitability. If we had the political will, we could marshal the UK's resources to provide a decent standard of living to everyone, citizens and immigrants alike. We could nationalise major industries and banks, expropriate the wealth of billionaires, and use that wealth to provide housing, healthcare, infrastructure and a universal basic income. And refugees would be a help, not a hindrance. Refugees bring huge benefits to the UK's economy and society.

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[30] Hilary Evans Cameron (2010) 'Refugee status determinations and the limits of memory', 22 *International Journal of Refugee Law* 4, 469-511

[31] See generally Helen Bamber Foundation, "Bridging a Protection Gap: Disability and the Refugee Convention," April 2021, pp 38-48 https://www.helenbamber.org/sites/default/files/2021-04/Bridging%20a%20Protection%20Gap%20-%20Disability%20and%20the%20Refugee%20Convention.pdf

[32] ICIBI, An inspection of asylum casework: June-October 2023, February 2024, [7.79] https://assets.publishing.service.gov.uk/media/65e06d45f1cab36b60fc47ad/An_inspection_of_asylum_casework_June_to_October_2023.pdf

The second answer is that, even if one assumes that open borders would lead to lower living standards for British people, this argument assumes what it needs to prove: namely, that British people are more important than foreigners. I simply don't accept that. I hope that one day, we will recognise that discrimination on the basis of nationality is just as iniquitous as discrimination on the basis of race, gender, or sexual orientation. No one should be consigned to a lesser status because of an accident of birth. In short, open borders are the only just solution.