POLICY PRIMER

Asylum Policy

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This policy primer examines some of the key questions underlying the UK's asylum policy, focusing on the challenges and tensions between protecting human rights and ensuring that immigration controls are not undermined.

The issue: How to provide asylum while maintaining the integrity of general immigration controls?

Asylum is a protective immigration status offered to refugees by nation states. The status is a trump granted to seekers of refuge over normal immigration requirements, providing them with immunity from expulsion at least while their claim is determined. If successful in their claim to asylum, a refugee (or other protected person) is normally given a residence permit of some duration. A key policy issue facing all states is how to provide asylum while maintaining the integrity of general immigration controls. Where other avenues for entrance are not available, asylum admission can become a way that economic migrants from relatively poor countries bypass normal immigration controls. As a result, asylum applications may swell to levels that tax the host state's financial resources, systems for determining eligibility for protection, and the political willingness of governments and the public to accept refugees.

Asylum is intrinsically important as a policy matter because it involves the protection of individuals who may face torture, unjust detention or death if returned to their country of origin. It has also been an issue of major concern to Western states in recent years because rising numbers of applicants have been taken as emblematic of a more general failure of sovereign border control. The asylum issue has been particularly salient in the UK since the early 2000s, when annual applications hovered between 70,000 and 85,000 per year (see The Migration Observatory's briefing on asylum). Between 2001 and 2004, the British Prime Minister Tony Blair called more meetings to discuss the issue of asylum than any other issue except Iraq (Spencer 2009: 359).

The UK operates a system of asylum for those in need of protection that centres on the provision of refuge to those meeting the 1951 UN Convention definition of a refugee as an individual with a "well-founded fear of persecution". Protection against expulsion is also offered to those whose return would place them at a real risk of "cruel and degrading treatment" under the terms of the 1950 European Convention on Human Rights. According to Home Office figures, in 2007, "19 out of every 100 people who applied for asylum in the UK were recognised as refugees and given asylum. Another 9 of every 100 who applied for asylum did not qualify for refugee status but were given permission to stay for humanitarian or other reasons" (UK Border Agency 2011).

While the Home Office considers itself as continuing Britain's tradition of offering asylum to refugees, the UK's welcome to seekers of asylum is far more ambivalent in practice. A range of measures are used to prevent or deter the arrival of asylum seekers or to ensure their speedy departure from the country (of their own volition or under the threat of coercion). These measures, which have flourished since asylum seeker numbers shot up in Britain the late 1990s, include restrictions on their access to welfare, place of residence, and freedom to settle in a place of their choosing. Successive governments have also implemented of a range of extraterritorial measures designed to prevent asylum seekers from reaching the UK where they could claims status. The uncomfortable balance between the British government's stated commitment to asylum and its embrace of measures designed to reduce asylum applications has generated considerable controversy in recent years.

Who is a refugee?

While there is widespread consensus that refugees should be granted asylum, the question of who is a refugee and the procedures for determining this status are contentious. In the UK, the definition of those warranting protection has recently been expanded by international human rights law beyond the traditional definition of a refugee to include anyone who if expelled would face a real risk of exposure "to torture,

or inhuman or degrading treatment or punishment" (UKBA 2011). Unlike the UN Refugee Convention which excludes from protection those convicted of serious non-political crimes and people deemed a threat to national security, the protection offered by Article 3 of the European Convention on Human Rights (incorporated into UK law through the Human Rights Act of 1998) is absolute. Even non-citizens convicted of terrorist offences or violent crimes cannot be deported if there is a real risk that they would be exposed to treatment proscribed in Article 3. This insulation of those deemed a threat to national security or the UK community's physical safety from deportation has generated some consternation in government circles and in the media (The Sun, 7 Feb 2011). In a 2011 report by the government's independent reviewer of terrorism legislation, Lord Carlisle, the limitations on expulsion imposed by the ECHR were criticized for making Britain a "safe haven" for terrorists (Lord Carlisle 2011: 31).

If the scope of who should receive asylum has proven controversial, so too have the procedures for determining eligibility. Decisions on asylum (or refugee status) are the task of the Home Office with appeals handled by the judges of Chambers of the Immigration and Asylum Tribunal. In recent years, many refugee advocates, legal experts and academics have criticized what they see as the poor quality of decision making in asylum judgements, claiming that a "culture of disbelief" operates in the Home Office. This culture is seen as evinced in a presumption by officials that applicants are attempting to abuse the system (Stewart 2004' Robinson 1999). While some asylum claims are indeed weak and even fraudulent, the vast majority of all asylum applicants come from countries where human rights violations and conflict are endemic (Schuster 2003: 131-179). Concerns have also been expressed about the ability of governments to manipulate the chances of asylum seekers making successful claims through changes to procedural rights and entitlements. It is perhaps no coincidence that a period of government anxiety over asylum numbers since the early 2000s has been accompanied by legislative and policy changes that have withdrawn in-country appeal rights for certain categories of applicant, reduced legal aid for the preparation of asylum cases, and introduced the fast-tracking of asylum claims deemed unlikely to succeed (Gibney 2008). The large proportion of negative

decisions made by the Home Office and overturned on appeal by immigration judges has also fed a perception that the UK government may be more interested in limiting the number of successful claims than in ensuring that those that are truly endangered receive protection (Asylum Aid 2010).

Deterring and preventing asylum claims

Another site of tension between Britain's commitment to asylum and the desire for control lies in the rights and entitlements enjoyed by applicants while waiting for their claims to be determined. Asylum seekers in the UK currently wait about six months for a first instance decision from the Home Office (in the early 2000s, it was more than a year) and around a year if an appeal is involved. During this time, they are given "temporary admission" to the UK which "means that while their physical presence is... lawful, they are legally considered not to have entered the country" (Sawyer and Turpin 2005). This marginal status not only enables state officials to speed up removal in the event of an unsuccessful claim, it also makes their status as rights holders unclear. Since the late 1990s there has been a growth of legislative measures designed to make the life of asylum seekers in UK more uncomfortable (Gibney 2004). They are forbidden from seeking paid employment and receive welfare at a fraction of the level of residents, they are routinely detained if adjudged to be at risk of disappearing into the community or deemed to have a weak claim, they cannot live where they want (if they wish to receive state accommodation and other support) but are "dispersed" around the UK (and typically outside the South East), often to its most marginalized and least salubrious parts. An objection frequently made to such limitations on rights and entitlements is that they are inhumane, insensitive to the psychological and material needs of those who have suffered conflict, torture or other state sanctioned abuse.

A more complex concern is that such restrictive measures fuel the very public distrust and antipathy towards the institution of asylum that they are intended to address. The widespread practice of detention in jail-like facilities links asylum seekers with criminality by creating the impression that asylum seekers are

something from which the public needs to be protected (Schuster and Welch 2005; Bosworth 2008). Similarly, the lack of a right to work makes asylum seekers reliant on state welfare and accommodation which has the effect of confirming public stereotypes that asylum seekers are simply a drain on the public purse and do not contribute to society (Sales 2002). Policies of dispersal risk creating social tensions by separating asylum seekers from the social capital provided by their settled compatriots and ethnic associates in large cities and thrusting them into already marginalized communities (Boswell 2001). While these communities may not always act negatively to the new arrivals, the arrival of asylum seekers may place greater burdens on existing public resources in places already under strain. The chances of community backlash are thus often high. Finally, restrictive controls can increase the incentives for those with legitimate asylum claims to bypass the formal UK refugee system altogether and disappear underground, seeking a kind of informal asylum as undocumented migrants (Gibney 2000). If it is true that asylum seekers respond to incentives and disincentives, very punitive policies may have the effect of making life outside the state's purview and control increasingly desirable, especially if one has little trust in the state's ability to judge asylum claims with equanimity. There is, then, lively debate about whether the punitive policies enhance or hinder public confidence in asylum.

Ensuring return

Another key area of policy concern raised by asylum has been the return of asylum seekers who fail to receive refugee status. Asylum determination is a hugely expensive and labour intensive business. In some estimates, the amount of money spent by European governments annually on determining refugee claims dwarfs the yearly budget of the UNHCR, the organization tasked with responding to almost all of the world's refugees. Yet, especially since the early 2000s, there have been consistent concerns that many asylum seekers remain in the UK irrespective of the outcome of their asylum decision. The so-called "deportation gap"—the gap between the number of people who fail their asylum application and the number whose departure from the UK is actually effected—has been a hot political issue because it is seen as the reductio

ad absurdum of a dysfunctional asylum system (Gibney 1999).

There are a number of reasons why the operation of an effective removals policy for asylum seekers is a difficult business. One is the ease with which unsuccessful claimants can disappear into the community upon (or before) receiving a negative asylum decision, making their apprehension by authorities difficult (Gibney 1999). Another is that the deportation of asylum seekers is often contested by members of the local communities into which they often integrate during the period while they wait for their claim to be determined. While members of the public often support tough removal policies when they are presented in broad policy terms, attitudes tend to become less supportive when they are confronted with the removal of their neighbour, colleague, school-friend or fellow church-goer (Ellermann 2009). Local campaigns against the deportation of particular individuals and families have been an important factor in frustrating attempts to remove failed asylum seekers. Thirdly, the removal of asylum seekers requires the agreement of other states, specifically the state to which the individual is being returned. If, as is often the case, passports are unavailable, the deportee refuses to help, or the country in question is simply reluctant, return may be difficult, time-consuming or even impossible (Ellermann 2009).

Over and above more resources being made available for the enforcement of removals, the desire to solve the problem of returns has led to four different and highly contentious state responses. First, governments have expanded the use of detention for asylum seekers who have had (or are deemed likely to have) negative asylum decisions. Detention helps increase the number of people being removed by acting against absconsion and preventing the kind integration into the community which sparks anti-deportation campaigns. However, detention has proved a lightning rod for criticism because it is a form of custody operated by the state that, unlike most other forms of incarceration, does not follow from a criminal conviction and is of indefinite duration (Schuster and Welch 2005). Furthermore, huge concern has been generated by the detention of children, a practice which Labour governments defended as necessary in order to keep families together and make removals efficient. The practice proved so unpopular

that the current coalition government announced in December 2010 that children would no longer be placed in detention centres. A second approach to deal with the removal problem has been for the Home Office to grant informal amnesties to asylum seekers whose claims have been lost or have remained undecided after many years. This approach, which was used by governments in 1998 and 2003 (The Guardian, 23 April 2010), certainly reduces the numbers of people eligible for removal but some lobby groups and political figures argue that it demonstrates the failure of government attempts to get the asylum system under control and acts as an incentive for applicants with weak asylum claims. By contrast, some human rights groups and advocates for asylum seekers have argued for a more systematic and broader approach to amnesty to allow long-term undocumented migrants (many of whom are failed asylum seekers) access to legal residence on the grounds that they are informal members of the British community and that there are strong economic and security reasons for regularization. Third, governments have withdrawn sources of state support for asylum seekers in order to encourage voluntary return. The previous Labour government implemented a practice of automatically taking away welfare benefits and state-sponsored housing from asylum seekers twenty-one days after a negative decision (Gibney 2009). After this point, individuals were also forbidden from accessing the National Health System except when emergency treatment was required. Critics have responded that such policies are tantamount to starving asylum seekers out of the country and condemn individuals and families who may fear persecution to destitution (Independent Asylum Commission 2008).

Finally and less directly, the attempt to bypass the problem of removing failed asylum seekers has been an important factor behind the UK's participation in a range of extra-territorial migration control measures in recent years. Offshore immigration controls and pre-inspection (e.g., at Gare de Nord in Paris and at Prague Airport in the Czech Republic), participation in EU measures to police the Mediterranean through FRONTEX (the EU agency tasked to coordinate between Member States in the field of border security) operations, schemes for off-shore processing, and fines on carriers that bring individuals to the UK without documents to the UK, all have as their aim bypassing the difficulties caused by

returning asylum seekers once they arrive in the UK. They work on the assumption that the best way of responding to pressure on removals is to reduce the number of individuals who are eligible for deportation in the first place (Gibney 2004). However, while extraterritorial measures help solve the problem of removals, they raise serious questions of their own about the morality and lawfulness of denying refugees the right to seek asylum or the acceptability of passing on the UK's asylum "burden" to other (often poorer) states closer to regions of refugee origin (McAdam 2008, Gibney 2004).

Britain's asylum policies: How to measure success?

In some key respects, it is possible to see British policy making in the area of asylum in recent years as a success. The number of applicants has fallen sharply since the early 2000s, as has the political salience of the issue of asylum. The removal of asylum seekers has also become more systematic.

However, three issues remain a cause for concern. First, while the putative goal of policy-making has been to square asylum for genuine refugees with the prevention of "bogus" or unfounded asylum applications, restrictive policies have often operated with insufficient regard for the protection of those with valid refugee claims. Non-arrival measures, to take just one example, have halted the entry of those with the strongest claims every bit as much as the weakest. Second, it is unclear to what extent the falling numbers of asylum seekers in recent years is the result of fewer arrivals or simply the diversion of potential asylum seekers into an irregular existence in Britain. Measuring irregular migrant numbers is always an inexact exercise (and thus unlikely to settle any issues), but it seems likely that the use of policies, like detention and restrictions on residence, work and welfare for asylum seekers, simply make it more appealing for some asylum seekers, particularly those without children, to move beyond the state's control. Finally, it remains uncertain what the consequences of the "crackdown" on asylum in recent years will be for immigration policy more generally. It is plausible to argue that the government's "successes" in responding to public concerns over the number of asylum seekers have

created unrealistic and unhelpful public expectations of what can be done in other areas of immigration.

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The Migration Observatory

Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides independent, authoritative, evidence-based analysis of data on migration and migrants in the UK, to inform media, public and policy debates, and to generate high quality research on international migration and public policy issues. The Observatory's analysis involves experts from a wide range of disciplines and departments at the University of Oxford.

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The Migration Observatory is based at the ESRC Centre on Migration, Policy and Society (COMPAS) at the University of Oxford. The mission of COMPAS is to conduct high quality research in order to develop theory and knowledge, inform policy-making and public debate, and engage users of research within the field of migration.
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