

**RESPOND**

## **Working Papers**

### **Global Migration: Consequences and Responses**

Paper 2018/12, May 2018

## **United Kingdom – Country Report**

### **Legal & Policy Framework of Migration Governance**

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**Reference:** RESPOND [D1.2]

This research was conducted under the Horizon 2020 project ‘RESPOND Multilevel Governance of Migration and Beyond’ (770564).

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Horizon 2020  
RESPOND: Multilevel Governance  
of Mass Migration in Europe and  
Beyond (770564)



Co-funded by the Horizon 2020 programme  
of the European Union

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## **Acknowledgement**

We would like to acknowledge Dr Kirsty Hughes, from the Faculty of Law at University of Cambridge, for her invaluable review of this entire report. Any errors are the authors' own.

## Executive summary

This report explores the legal and policy framework of migration governance in the United Kingdom (UK). It shows that migration governance is complicated, reactive, and that the needs of immigrants, refugees and asylum seekers have been eroded at the expense of border control overtime. The constitutional organisation of the state has contributed to these features of immigration policy. Evidence of the complexity, reactivity and restrictiveness of migration governance is found in the UK's legislative framework, the legal status of foreigners, the reception system and post-refugee crisis reforms.

Constitutionally there are three tiers of government in the UK – the central UK Government, the devolved governments of Northern Ireland, Scotland and Wales, and local authorities. The central UK Government is responsible for immigration, nationality and asylum policy. However, the devolved legislations and local authorities have a role in providing refugee and asylum seekers support within their constitutional remit, including in the areas of social security, housing and health care. The structure of government contributes to the complexity of migration governance, given the sometimes-difficult task of distinguishing the functions and different objectives of the tiers.

The rights of asylum seekers are in a more precarious position than in other countries for two reasons. First, there is no specific right to asylum enshrined in the UK's uncodified constitution, although the Human Rights Act 1998 plays a significant role in protecting asylum seeker rights. Second, the UK has no entrenched provisions in its constitution, meaning that legislation such as the Human Rights Act 1998 could be amended or replaced simply via an act of parliament<sup>1</sup>.

Despite some historical peculiarities that still persist, the UK has an independent judiciary that has at times been in conflict with the government over the human rights of immigrants, asylum seekers and refugees. However, the principle of parliamentary sovereignty in the UK means that i) the courts cannot invalidate primary legislation on the basis of its incompatibility with the Human Rights Act 1998 ii) the judiciary have tended to be cautious vis-à-vis parliament, not wanting to overstep their role.

Evidence of the complexity, reactivity and restrictive nature of migration governance can be found in the evolution of legislation. With some notable exceptions, the evolution of primary legislation on immigration and asylum has been regressive, with successive restrictions on appeal rights, social benefits and the criminalization of irregular migrants. Legislation has been introduced to circumvent more progressive court decisions and has at times been rushed through without adequate consultation. Legislation has also tended to be reactive, with each wave of immigration throughout the 20<sup>th</sup> century being met with a legislative backlash. Legislation is also complex and rapidly evolving, with 12 Acts of Parliament affecting immigration being passed in the last 20 years.

Routes to live in the UK are incredibly complex, with over 16 different types of work visa, which are being amended, removed and replaced all the time. Conditions are attached to all types of visa, with asylum seekers for example being unable to work unless their claim takes more than one year to process. Although most visa categories are not entitled to access public funds, education for children between the ages of 5 and 16 is compulsory and free at state

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<sup>1</sup> Although the UK is bound in international law by the Convention Relating to the Status of Refugees 1951, and under European Union (EU) law by the EU Common European Asylum System.

schools; while the National Health Service provides free emergency treatment to most migrants (although some must pay a surcharge before they arrive in the UK). Undocumented immigrants have limited pathways to resurface from ‘illegal’ immigration, their access to services is circumscribed and it is a crime for them to be employed.

The reception system for asylum seekers provides another example of the complexity and regressive nature of immigration governance, which fails to meet asylum seekers’ needs. Only destitute and unaccompanied asylum-seeking children have access to the reception system. The weekly allowance given to destitute asylum seekers is barely enough to make ends meet, while reception centre accommodation is not sensitive to the needs of vulnerable asylum seekers. The Government has contracted out the delivery of reception housing to three private companies, which then sub-contract themselves, adding to the complexity.

Since the outbreak of the Syrian war, the Government has set up the Syrian Vulnerable Person Resettlement Scheme (VPRS), the Vulnerable Children Resettlement Scheme and children relocated under the ‘Dubs Amendment’. Advocates have been particularly critical of the implementation of the ‘Dubs Amendment’, with the charity *Help Refugees* challenging the Government’s implementation of the scheme in the High Court in 2017, albeit unsuccessfully (Help Refugees, 2017).

The current immigration landscape notwithstanding, Brexit has generated significant ambiguity as to the future of UK migration governance. Uncertainty surrounds the status of EU citizens who wish to live in the UK in future, as well as the treatment of asylum seekers once the UK is no longer bound by the Common European Asylum System. However, there are significant components of UK migration governance that will remain unaffected – the UK will still need to meet its obligations under the Convention Relating to the Status of Refugees 1951 (Refugee Convention) and the European Convention on Human Rights (ECHR), while Brexit will not directly affect the UK’s export of border controls to France<sup>2</sup> (Gauci, 2017, p.3).

The methodological approach of the report has been to rely on secondary research. Where possible, government documents, policies, legislation and publications have been used in order to gather information about the policy and legal environment directly from the source. This has been supplemented by third sector research reports, text books, academic journal articles, media articles and other public commentary.

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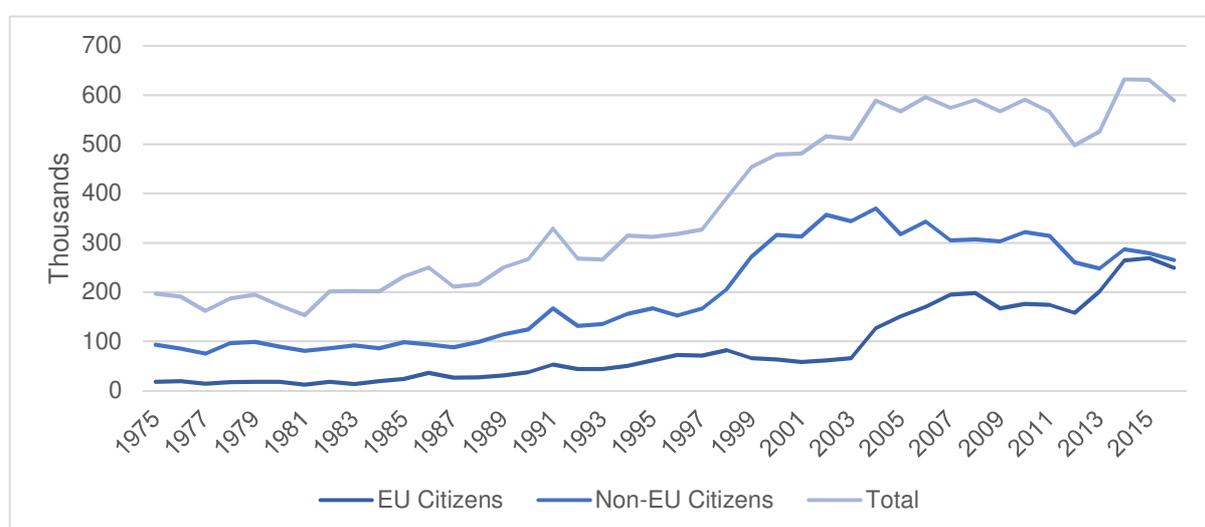
<sup>2</sup> Although France may reconsider the agreement in light of Brexit (Gauci, 2017: 3).

## 1. Statistics and Data Overview<sup>3</sup>

### 1.1. Non-EU Migration to the United Kingdom

Migration<sup>4</sup> to the United Kingdom (UK) has been trending upwards since the mid-1980s, with significant increases from 1998. The majority of immigrants are citizens of countries outside the European Union (EU) (see Figure 1), with 53% of immigrants to the UK since 1975 possessing non-EU citizenship (Office for National Statistics, 2017a). Non-EU immigration peaked in 2004, and has been trending downwards since, almost becoming equal to EU migration<sup>5</sup> in 2015 (Office for National Statistics, 2017a). In 2016, 45% of immigrants to the UK were non-EU citizens, 42% were EU citizens, and 13% were British<sup>6</sup> (Office for National Statistics, 2017a).

**Figure 1: Long-Term International Migration to the UK by Citizenship, 1975-2016**



Source: Office for National Statistics, 2017a.

Net migration<sup>7</sup> to the UK has been positive every year since 1994, with immigration outstripping emigration by more than 100,000 people annually from 1998 (Office for National

<sup>3</sup> There are two main sources of immigration data in the UK – Home Office data and the Office for National Statistics (which uses International Passenger Survey data). The two organizations use different methodologies resulting in variances in data, however both are rigorous and coherent, and the data they collect is publicly available. The latest available data from the Office for National Statistics is for the year 2016, whereas the Home Office has data available for 2017.

<sup>4</sup> In this section, migration refers to long-term migration, that is, migration into or out of the UK for a period greater than 12 months. This means that tourists and transit visitors are not included in the data.

<sup>5</sup> EU migration includes the EU15 up until 2003; the EU15, the EU8, Malta and Cyprus from 2004 until 2006; the EU15, the EU8, Malta, Cyprus and the EU2 from 2007; the addition of Croatia from mid-2013.

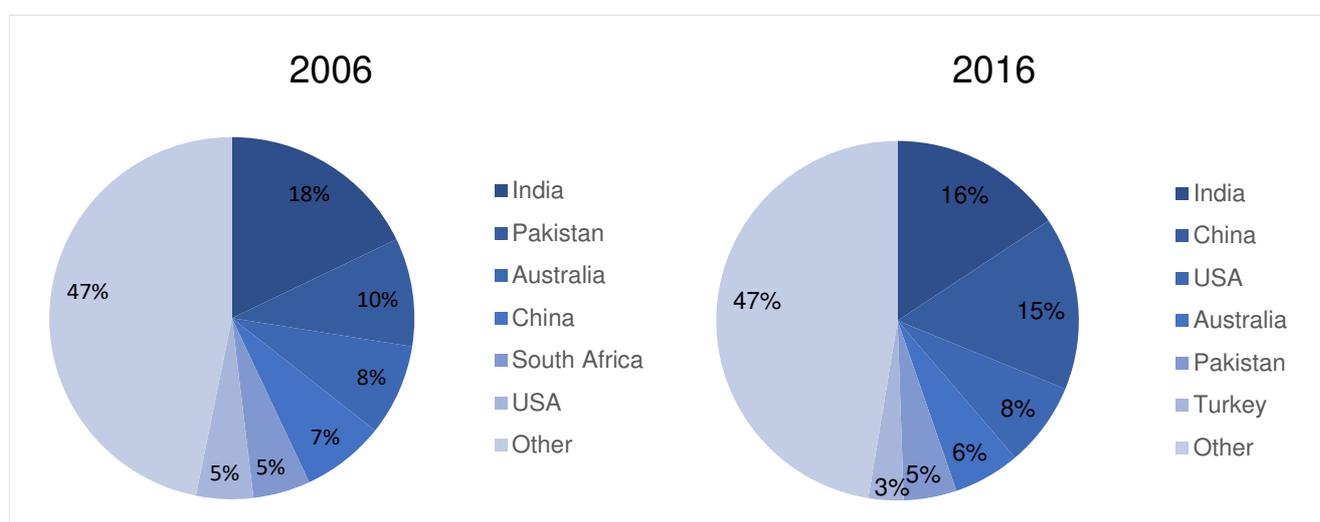
<sup>6</sup> Total migration comprises EU citizen, non-EU citizen and British citizen migration. British migration captures British citizens who are returning to the UK after living overseas, or British citizens who were born in other countries travelling to live in the UK (Office for National Statistics, 2016).

<sup>7</sup> Net migration is the difference between emigration out of the UK for at least one year, and immigration into the UK for at least one year.

Statistics, 2016a). In 2016, approximately 588,000 people immigrated to the UK, and 339,000 people emigrated, creating a net balance of +248,000 (Office for National Statistics, 2017b). This is a statistically significant decrease from the previous year, when net migration was +333,000 (Office for National Statistics, 2017b and 2016b). This change is driven in part by the increased emigration of EU citizens (Office for National Statistics, 2017b). In 2016, net migration of non-EU citizens was +175,000, EU citizens was +133,000, and British citizens was -60,000 (Office for National Statistics, 2017b). Net migration of non-EU citizens has been both positive every year since 1975, and greater than EU-citizen net migration (Office for National Statistics, 2017b). However, over the last 10 years the gap between EU and non-EU net migration has narrowed (Office for National Statistics, 2016a).

There is a high degree of diversity in the nationalities of non-EU migrants to the UK. The most common nationality in both 2006 and 2016 was Indian, however Indian immigrants only made up a small share of the total – 18% in 2006 and 16% in 2016 (see Figure 2). There were over 89 nationalities in the ‘Other’ category in 2006, and 72 nationalities in 2016 (Office for National Statistics, 2017c).

**Figure 2: Long-Term International Migration to the UK by Non-EU Citizens, 2006 and 2016**



Source: Office for National Statistics, 2017c.

There is a near-even split between male and female immigrants to the UK from outside the EU – between 2006 and 2016, 50.5% of immigrants were male and 49.5% were female (Office for National Statistics, 2017d). Minors comprise a small share of non-EU citizens migrating to the UK – between 2006 and 2016 they made up only 12% of all non-EU migrants (Office for National Statistics, 2017e). The vast majority of non-EU citizens migrating to the UK arrive via air. Between 2006 and 2016, 99% of non-EU citizens arrived via air, with only 1% arriving via the channel tunnel and by sea (Office for National Statistics, 2017f).

The most common reasons for non-EU citizens to migrate to the UK between 2006 and 2016 were for formal study (51%), related to work (22%) and to accompany or join others (20%) (Office for National Statistics, 2017g). In 2017 there were 655,877 entry clearance visa applications<sup>8</sup>, including dependents - the highest number of applications in the last seven

<sup>8</sup> Excluding visitor and transit visas. When visitor and transit visas are included, this figure becomes 3,062,210 (Home Office, 2018a).

years, and an increase of 4% from 2016 (Home Office, 2018a). Of the 655,601 visa applications resolved in 2017, 91% were granted and 9% were refused (Home Office, 2018a).

## 1.2. Non-EU Population in the United Kingdom

In 2016, 4% of the resident population of the UK had a non-EU nationality (Office for National Statistics, 2017h). The most prevalent non-EU citizens were nationals of: India, Pakistan, the United States of America, China, Nigeria, Australia, South Africa, Bangladesh, the Philippines and Canada (Office for National Statistics, 2017i). The percentage of the population that has a non-EU nationality has remained relatively steady since 2006, as both the total UK population and the non-EU citizen population have increased (see Table 1).

**Table 1. Non-EU Resident Population of the UK, 2006-2016**

Year	Total Resident Population	Non-EU Citizen Population	Percentage
2006	60,036	2,207	3.7%
2007	60,522	2,356	3.9%
2008	61,022	2,419	4.0%
2009	61,461	2,473	4.0%
2010	61,958	2,439	3.9%
2011	62,480	2,476	4.0%
2012	62,893	2,515	4.0%
2013	63,270	2,421	3.8%
2014	63,686	2,406	3.8%
2015	64,265	2,408	3.7%
2016	64,727	2,425	3.7%

Source: Office for National Statistics, 2017j.

As a share of the of the non-British population, residents with citizenship from a country outside the EU have been steadily declining between 2006 and 2016 – in 2006, 61% of the non-British population were from outside the EU, whereas by 2016 this had decreased to 40% (Office for National Statistics, 2017h). The main reasons non-EU citizens were resident in the UK in 2016 were for work (40%), to accompany or join others (35%), to study (13%) and other<sup>9</sup> (11%) (Office for National Statistics, 2017k). Of the non-EU nationals residing in Britain in 2016, 52% were female and 48% were male<sup>10</sup> (Office for National Statistics, 2017l).

<sup>9</sup> This category includes reasons for residency such as seeking asylum and marrying or forming a civil partnership.

<sup>10</sup> These figures are for the 39 most common non-EU nationalities residing in Britain, due to data availability.

## 1.3. Humanitarian Protection, Asylum Seekers and Refugees

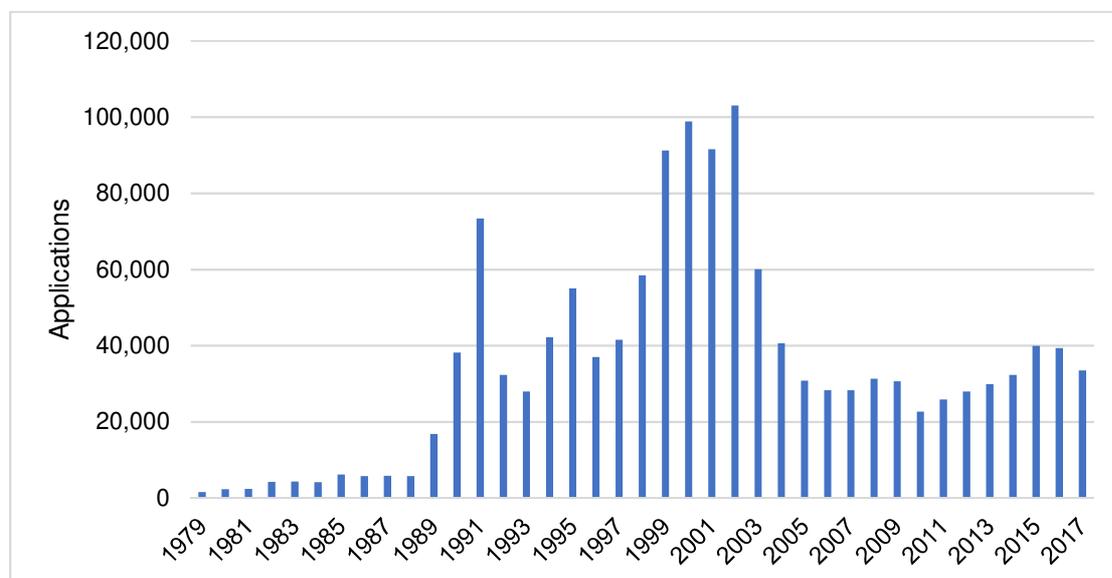
There are two broad categories of refugees in the UK, differentiated according to where they apply:

- i. Asylum seekers granted refugee status (or humanitarian protection: successfully apply for protection once already in the UK, or upon arrival at a UK port;
- ii. Resettled refugees: successfully apply for protection outside the UK to the United Nations High Commissioner for Refugees (UNHCR), who then refer them to the UK for resettlement.

### 1.3.1. Applications for Asylum

Asylum seeker applications to the UK peaked in the early 2000s, with large numbers of applicants and their dependants from Iraq, Afghanistan, Somalia and Zimbabwe<sup>11</sup> (Home Office, 2018b). Every year from 1991 there have been more initial refusals than approvals, peaking at 89% of initial decisions being refusals in 2004 (Home Office, 2018b). However, such a high rate of rejections hasn't always been the case— between 1979 and 1990 only 19% of applications were denied at initial decision, with 81% being favourable to the applicant (Home Office, 2018b).

**Figure 3: Asylum Seeker Applications (including dependants) 1979-2017**



Source: Home Office, 2018b.

In 2017 there were 33,512 applications for asylum made (Home Office, 2018b). Of the 27,814 initial decisions made, 8,555 (31%) were favourable to the applicant (Home Office, 2018b). The majority of successful applicants received asylum status (87%), while smaller

<sup>11</sup> All the data in this section is for main applications and their dependants.

portions were granted humanitarian protection<sup>12</sup> (3%), discretionary leave<sup>13</sup> (2%), or another form of protection status<sup>14</sup> (8%) (Home Office, 2018b). Of the 8,555 people granted asylum or another form of protection, 2,774 (32%) were minors (Home Office 2018c).

In 2017, a significant proportion of asylum seekers applied for protection when they were already in the UK (84%), as opposed to at a UK port (16%) (Home Office, 2018b). This is in keeping with long-term trends – between 2002 and 2016 82% of applicants applied in-country, compared to 18% at a port (Home Office, 2018b).

The greatest number of applications in 2017 were lodged by Iraqis (3,268), Pakistanis (3,130), Iranians (3,057), Bangladeshis (1,982) and Afghans (1,927) (Home Office, 2018b). There was a 49% decrease in the number of Syrians who lodged asylum applications in 2017 – there were 1,569 applicants in 2016 compared to just 793 in 2017 (Home Office, 2018b). There was however an increase in the number of Syrian refugees resettled in the UK (please see the next section below). One can observe a significant variation in the success rates of different nationalities – 84% and 81% of initial decisions were favourable to Syrians and Eritreans respectively, whereas just 19% of Iraqis and 16% of Egyptians were successful (Home Office, 2018b).

### **1.3.2. Resettlement of Refugees**

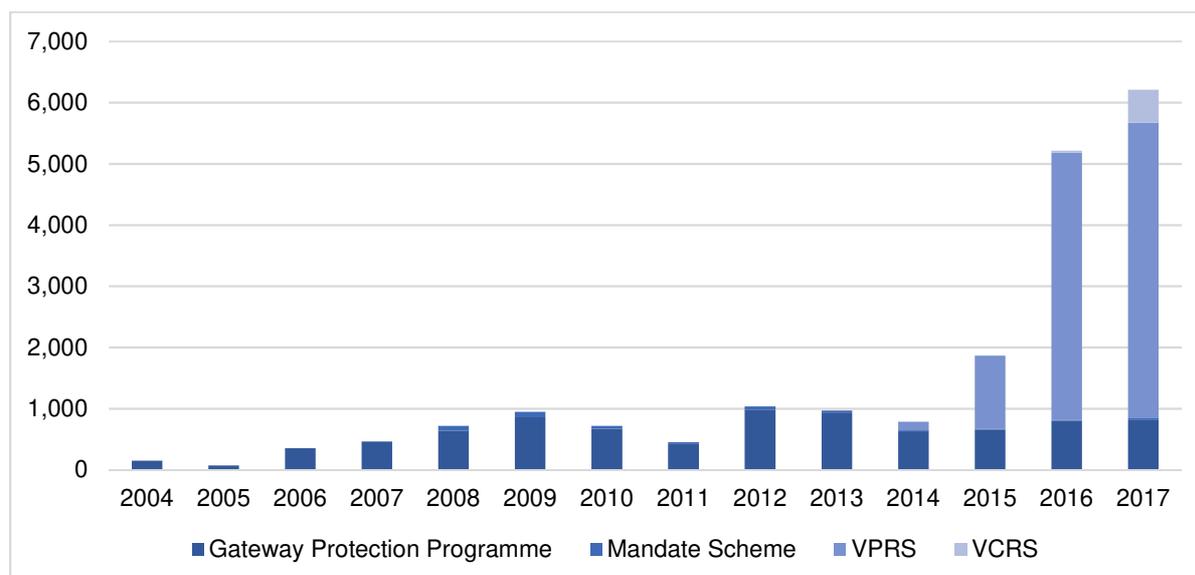
Separately to asylum claims, the UNHCR refers some of those it has granted refugee status to outside the UK to the Home Office for resettlement (Home Office, 2018c). Since 2004, 19,954 refugees and their dependants have been resettled in the UK under the four programmes operating during this period – 8,456 under the Gateway Protection Programme (commenced 2004), 390 under the mandate scheme (commenced 2008), 10,538 under the Vulnerable Persons Resettlement Scheme (commenced 2014) and 570 under the Vulnerable Children Resettlement Scheme (commenced 2016) (Home Office, 2018d). The years 2015, 2016 and 2017 saw a spike in resettlements, coinciding with the launch of the Vulnerable Persons Resettlement Scheme for Syrian refugees (Home Office, 2018d). Aside from Syrians, the most significant number of resettlements have been of nationals from Somalia, the Democratic Republic of Congo and Iraq (Home Office, 2018d).

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<sup>12</sup> Humanitarian protection can be granted where an applicant does not meet the criteria to be deemed a refugee, but who would still be subjected to significant harm if they returned to their home country (Home Office, 2017a).

<sup>13</sup> Discretionary leave can be granted where an applicant does not meet the criteria for asylum or humanitarian protection, but who is affected by exceptional, compassionate circumstances (Home Office, 2015a).

<sup>14</sup> This category can include approvals under the family and private life rules, Leave Outside the Rules and unaccompanied asylum-seeking children who are denied refugee status but who are granted permission to remain until the age of 17.5 years of age (Home Office, 2018b).

**Figure 4: Refugees (and others)<sup>15</sup> resettled, including dependants, 2004-2017**

Source: Home Office, 2018d.

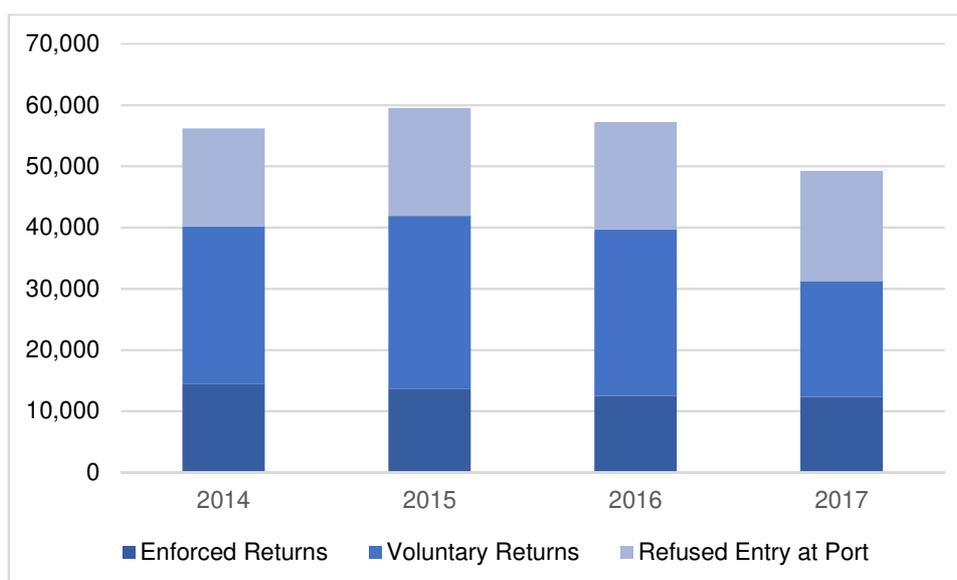
In 2017, 6,212 refugees and their dependants were resettled in the UK under the four operating resettlement schemes (Home Office, 2018c). The majority were Syrians resettled under the Vulnerable Person Resettlement Scheme (4,832 people), with smaller groups resettled under the Gateway Protection Programme (813 people), the Vulnerable Children Resettlement Scheme (539 people), and the Mandate Scheme (28 people). Approximately 50% of those resettled were minors (Home Office, 2018c).

## 1.4. Expulsions and Detention

In 2017 there were 12,321 enforced returns from the UK, which made up 22% of total returns – there were 18,928 (47%) voluntary returns<sup>16</sup> while 17,977 people (31%) were refused entry at a port of entry to the UK (Home Office, 2018e). Just over 58% of forcible returnees were non-EU citizens (7,210 people), while 41% were from the EU (5,111) (Home Office, 2018f). Of those forcibly expelled from the UK, 23% were people who had previously applied for asylum, which was an increase of 12% from 2016 (Home Office, 2018f). The most common nationalities of those forcibly returned after seeking asylum were Pakistani (14%), Albanian (13%), Indian (10%), Bangladeshi (8%) and Nigerian (6%) (Home Office, 2018e).

<sup>15</sup> Including people granted other forms of protection status.

<sup>16</sup> This category includes assisted returns, controlled returns and other verified returns (Home Office, 2018f).

**Figure 5: Returns by type, 2014-2017**

Source: Home Office, 2018e.

There are several reasons a person can be held in immigration detention in the UK – prior to their removal from the country, to establish their identity or the credibility of their claims, or if they are at risk of absconding, harming themselves or harming the public<sup>17</sup> (Silverman, 2017). The UK has one of the largest immigration detention systems in Europe, with between 2,000 and just over 3,500 people being detained at any given time between 2008 and 2017 (Silverman, 2017; Home Office 2018g). The number of people in immigration detention peaked in the period July-September 2015 at 3,531 detainees, declining to 2,545 by the end of 2017 (Home Office, 2018g). In 2017, 27,331 people entered detention, and 28,244 left (Home Office, 2018f). Nearly half (49%) of all detainees released between 2010 and 2017 were held for less than 29 days, with 81% being released within two months (Home Office, 2018h). Just under half (49%) of those who entered detention between 2009 and 2017 had sought asylum in the UK at some stage (Home Office, 2018i). The vast majority of those entering detention between 2009 and 2017 were men (84%) (Home Office, 2018i), and the largest nationality groups were Pakistanis (29,408), Indians (24,722), Nigerians (15,642), Bangladeshis (14,070) and Afghans (13,128)<sup>18</sup> (Home Office, 2018j),

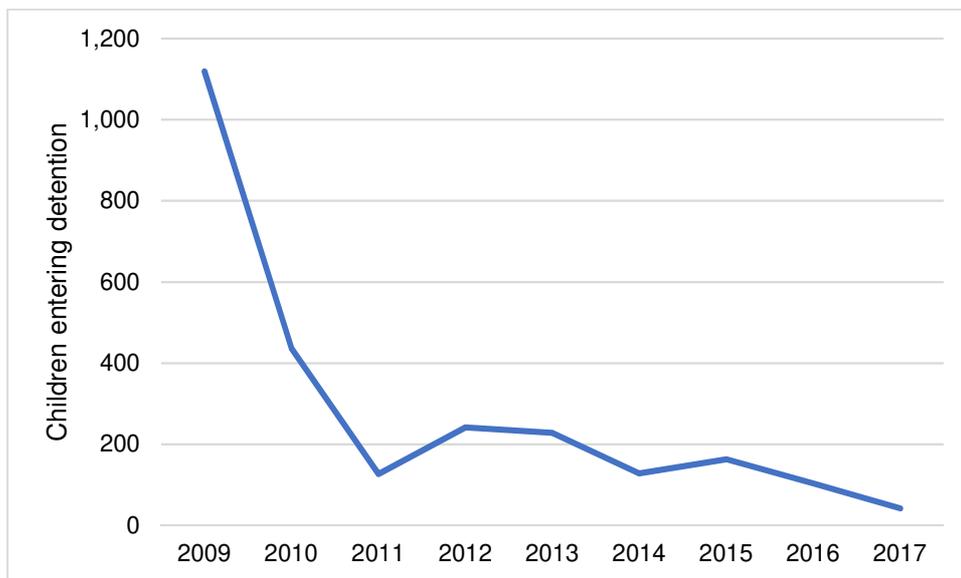
The number of children entering the detention system has been trending downwards since 2009, when 1,119 children were detained (see Figure 6). In 2017, 42 children entered detention and 44 children departed detention, with no children being held at the close of 2017 (Home Office, 2018j, 2018k and 2018l). The sharp drop in the number of children entering detention in 2010 coincides with the Coalition Government's decision to no longer detain

<sup>17</sup> Between 2000 and mid-2015, asylum seekers could also be detained as part of the detained fast-track (DFT) process if their claim for asylum was likely to be resolved quickly (McGuinness and Gower, 2017: 9; Silverman, 2017). The DFT policy was suspended in July 2015 following a High Court ruling that it resulted in procedural unfairness (McGuinness and Gower, 2017:9-10).

<sup>18</sup> The figures in this paragraph include those detained in Her Majesty's Prisons from July 2017. For further information on the implications of this methodological change in data collection, please see Home Office, 2018f.

families with children in Immigration Removal Centres prior to their departure from the UK<sup>19</sup> (McGuinness and Gower, 2017, p.8). Unaccompanied children can only be held in detention if there are exceptional circumstances (as outlined in the Immigration Act 1971, paragraph 18B of schedule 2). The majority of children (72%) who entered detention between 2009 and 2017 were asylum seekers (Home Office, 2018j).

**Figure 6: Children entering detention, 2009-2017**



Source: Home Office, 2018j.

<sup>19</sup> Families may be held in pre-departure accommodation in rare circumstances (McGuinness and Gower, 2017: 8).

## 2. The Socio-Economic, Political and Cultural Context

### 2.1. A Brief Immigration History

The UK has a long history of immigration – from the arrival of Roman legionnaires in 43 AD, Viking invasions from 793AD, the Norman Conquest in 1066, Huguenot refugees after 1685, and immigration associated with the slave trade and Britain’s empire into the 19<sup>th</sup> Century (BBC, 2002; Williams 2012, p.25, p.53; Winder, 2004).

From at least the 20<sup>th</sup> century, a discernible pattern of immigration, public resentment and then legislative restrictions unfolded in various waves<sup>20</sup>. In the decades preceding, and into the first half of the 20<sup>th</sup> century, most immigrants arrived from Ireland and continental Europe – escaping the cruelties of the Tsarist empire, Russian Jewry fleeing pogroms and Irish families pushed by famine (Harper and Constantine, 2011, pp.183-4; Winder, 2004, p.150). Public opinion reacted unforgivingly – the Russian Jews were seen as insular, the Irish as dirty and responsible for the proliferation of slums, while riots broke out against Germans in 1915 against the backdrop of the First World War (Harper and Constantine, 2011, p.206; Williams, 2012, p.167; Winder, 2004, p.148). The British Brothers’ League was established in 1901 advocating for greater controls on immigration, with a Royal Commission into Alien Immigration held two years later (Harper and Constantine, 2011, pp.196-7). A barrage of restrictive legislation followed, controlling the movement of foreigners (that is, non-British citizens and subjects). The 1905 Aliens Act regulated the entry of foreigners, with provisions for the deportation of those deemed undesirable or unable to support themselves financially (Harper and Constantine, 2011, pp.196-7; Williams, 2012, pp.166). Further restrictions followed in 1914, 1919 and 1920 (Harper and Constantine, 2011, pp.196-7).

The second wave of immigration coincided with the end of the Second World War. Whereas previous migration had largely been European, the post-World War II era heralded the arrival of significant numbers of people from the Commonwealth<sup>21</sup>. The British Nationality Act was passed in 1948, granting a common nationality to both British nationals as well as British colonial subjects (Hansen, 2000, p.17). This meant that people from across the empire could live and work freely in Britain, with no restrictions<sup>22</sup> (Harper and Constantine, 2011, p.197-8). According to Home Office estimates, between 1955 and 1960, there was positive net migration of 160,000 West Indians, 33,000 Indians and 17,000 Pakistanis (Harper and Constantine, 2011, pp.185-186). During the 1950s, immigrants from the Commonwealth were

<sup>20</sup> This pattern, while being the prevailing one, obscures secondary, countervailing dynamics. The history of British immigration is not only one of public discontent and ever-tightening restrictions – politicians and bureaucrats have made successful stands against racism (Hansen, 2000: vi), church groups, charities, lawyers and medical associations have championed asylum seeker rights (Winder, 2013: 431-2, 439), and governments have loosened restrictions at various times – granting amnesty to illegal migrants in 1974, raising the quota for Citizens of the United Kingdom and Colonies in 1975, and easing restrictions on spousal visas in 1997 (Hansen, 2000: 225, 233).

<sup>21</sup> There were of course significant arrivals from Europe in the wake of WWII too, with the entry of more than 147,000 Poles and 80,000 displaced people (Harper and Constantine, 2011: 185-186).

<sup>22</sup> Immigrants from the Caribbean who arrived between 1948 and 1971 have been named the Windrush generation, after the ship MV Empire Windrush which brought Caribbean migrants to Tilbury docks in June 1948. There has been recent controversy over the legal status of the Windrush generation, with some people who have lived in the UK for decades being told they are here illegally. Prime Minister Theresa May apologised to Caribbean leaders in April 2018 for deportation threats made to Windrush generation immigrants (BBC, 2018).

drawn to Great Britain by the myriad economic opportunities – demand for labour abounded amidst the formidable task of post-war reconstruction, coupled with low unemployment rates (Hansen, 2000, p.9; Harper and Constantine, 2011, p.186-7). The exceptional openness of the period from 1948 came to a close in 1962, as discontent mounted on the basis of perceived economic competition, fear of cultural domination, and racial prejudices with the influx of ‘non-white’ migrants (Harper and Constantine, 2002, p.204, p.210). There was strong public support for tighter controls on immigration, as recorded since the first Gallup Poll of public opinion in 1958 (Hansen, 2000, p.14). Clashes broke out in Birmingham and London in 1948, 1949 and 1954, culminating in street fighting in Nottingham and Notting Hill in 1958, and in Middlesbrough in 1961 (Clayton, 2016, p.66; Harper and Constantine, 2011, p.206; Phillips, 2013).

A series of legislative restrictions on Commonwealth migration were passed over subsequent decades. In 1962 controls were tightened so that only Commonwealth immigrants with definite employment lined up or enough money to support themselves without a job were permitted entry (Hansen, 2000, p.238; Harper and Constantine, 2011, p.198). Kenyan Asians with British passports were barred from migrating after 1968 legislation; 1971 saw all privileges for Commonwealth citizens abolished except for those with parents or grandparents born in Britain; and in 1988 UK nationals and permanent residents were stripped of their right to have their spouses and families join them in the UK (Hansen, 2000, p.14, 16, 230, 238; Harper and Constantine, 2011, p.198-9). These changes left the UK immigration system as one of the most inaccessible in the West<sup>23</sup> (Hansen, 2000, p.v). The changes to the immigration regime were so successful that migration figures dropped drastically and consistently from their peak in 1961, and by the late 1980s immigration was no longer a key public concern in the UK (Hansen, 2000, pp.21-22; Winder, 2013, p.410).

The third wave of migration commenced with the last decade of the twentieth century, comprising largely asylum seekers. Although asylum seekers were hardly a new phenomenon – for example with exoduses from Kenya in 1968, Uganda in 1972 and Vietnam from 1975 – numbers had remained relatively small, with less than 6,500 applications<sup>24</sup> each year of the 1980s, up until 1989 (Home Office, 2018b). With conflicts<sup>25</sup> in Afghanistan, the Balkans, Colombia, Iraq, Rwanda, Sierra Leone, Somalia and Sri Lanka, asylum applications<sup>26</sup> ballooned from 5,739 in 1988 to 73,400 in 1991. There was another spike between 1999 and 2002, peaking at 103,081 applications in 2002<sup>27</sup>. Since 2004, asylum applications have been fewer, fluctuating within the range of 22,000 and just over 40,000 applications each year<sup>28</sup> (Home Office, 2018b; Winder, 2013, p.411). As in the past, public discontent mounted with the increase in asylum applications. Panic and anger were both whipped up and exploited by the media and some politicians, with much of the public believing that asylum seekers were ingenuine, and were after a free ride (Clayton, 2016, p.13; Winder, 2013, p.419, p.39). The lines became blurred between refugees and asylum seekers specifically, and between asylum

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<sup>23</sup> Instead of being channelled towards creating more open borders, liberalism was instead expended on bringing about anti-discrimination laws – with Race Relations Acts passed in 1965, 1968 and 1979 (BBC, 2014; Hansen, 2000: 26; Harper and Constantine, 2011: 199).

<sup>24</sup> Including dependants.

<sup>25</sup> Several of which the UK was militarily engaged in (Winder, 2013: 411).

<sup>26</sup> Including dependants.

<sup>27</sup> Including dependants

<sup>28</sup> Including dependants.

seekers and immigrants more broadly (Prior and the Centre for Social Justice, 2008, p.10; Winder, 2013, p.433-4, 436). The Government responded to growing voter pressure with several pieces of legislation aimed at curbing the flow of asylum seekers (Hansen, 2000, p.222; Winder, 2013, p.419). Appeal rights were successively eroded under legislation passed in 1993, 1996, 1999, 2002 and 2004 (Hansen, 2000, p.234-5; Home Office, 2018m). Benefits were curbed under the 1996, 1999 and 2002 Acts, with vouchers introduced under the 1999 Act (Hansen, 2000, p.235; Winder, 2013, p.421, p.431). The 1999 Act also pursued a programme of the mandatory diffusion of asylum seekers throughout the UK, resulting in isolated instances of violence in some communities<sup>29</sup> (Hansen, 2000, p.235; Winder, 2013, p.429-31). This period also saw the establishment of several detention centres – in Campsfield, Dover and Oakington in the 1990s, and the opening of Yarl’s Wood in 2001 (Winder, 2013, p.420, p.436). Currently there are ten detention centres<sup>30</sup> in operation in the UK, as well as many short-term holding facilities and some secure accommodation facilities for families (Library of Congress, 2016). With the eruption of the 2015 refugee crisis, the UK refused to participate in a scheme with other EU countries to take quotas of refugees. Instead the Government declared it would take 20,000 Syrian refugees over five years (Clayton, 2016, pp.55-6).

The fourth wave of immigration began in the early 2000s, and has been shaped by both Government policies to attract ‘super-skilled’ workers, and the expanding membership of the EU. While the UK Government has been tightening controls on asylum seekers, it has been making immigration easier for other categories of people deemed good for the economy – that is skilled workers and international students. The Highly Skilled Migrants Programme, which commenced in 2002, was designed to encourage people with certain educational qualifications, work experience, earnings and proven excellence in their field to settle in the UK, exempting them from the usual requirement to have an offer of employment before arrival (Shachar, 2006, p.193). There have been significant increases in the number of skilled-worker visas issued – more than doubling over the last decade (Williams, 2012, p.166). The Government has similarly encouraged the entry of international students, with the Prime Minister’s Initiative on International Education announced in 1999, and the second phase instituted in 2006. The International Graduate Student Scheme was launched the same year, permitting non-European Economic Area students to work in the UK for one year after completing specific qualifications (Verbik and Lasanowski, 2007, p.7). Between 2000 and 2014 there was a 92% increase in international, tertiary student enrolments in the UK (OECD, 2017, p.9). A new points-based system (PBS) was rolled out over 2008 and 2009 – including Tier 1 (for highly skilled workers), Tier 2 (for sponsored skilled workers), Tier 5 (for temporary workers) and Tier 4 (for students) (Gower, 2016, p.9). There have been significant changes to the PBS since 2010, largely tightening the visa eligibility criteria, including the imposition of caps<sup>31</sup> (Gower, 2016, pp.10-12). However, restrictions haven’t been placed on all immigrant groups. The Tier 1 exceptional talent visa was introduced in 2011, to attract the best and brightest in the humanities, arts, engineering and science, and exempting them from the requirement of sponsorship by an employer (Shachar and Hirschl, 2013, pp.92-93). The binary policy of tightening the eligibility criteria for most immigrant categories, coupled with making it

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<sup>29</sup> Stabbing attacks resulted in the deaths of two Afghans in Hull, an Iranian in Sunderland, and a Kurdish child was blinded in one eye by a thrown rock in Hull (Winder, 2004: 330-331).

<sup>30</sup> Referred to as Immigration Removal Centres from 2003 (McGuinness and Gower, 2017: 12)

<sup>31</sup> This coincides with the Coalition Government’s promise to cap the number of work permits they grant, and reduce net immigration overall (Winder, 2013: 496).

easier for others, reflects the Government's attempt to lower net immigration, while 'cherry-picking' those deemed most desirable to the UK economy and society, and acceptable to a fatigued voting public<sup>32</sup> (Shachar and Hirschl, 2013, pp.93-4; Winder, 2013, p.497).

Another component of the fourth wave has been immigration from EU countries. Although net migration of non-EU citizens has been greater than EU citizens since the 1980s, there was a significant influx of EU citizens following the enlargement of the EU in 2004<sup>33</sup> (Office for National Statistics, 2015b), and again in 2014, with statistically significant increases in both EU15 and EU2 immigration (Office for National Statistics, 2017a and 2015a). The share of immigrants from EU countries has been steadily growing, comprising 42% of immigrants in 2016 (Office for National Statistics, 2017a). The majority of immigrants from the EU (69%) came to the UK for work-related reasons in 2016; the next most common reason was formal study (14%) (Vargas-Silva, 2017). Whereas other EU countries such as Greece, Italy and France are more worried about non-EU migration than EU migration, the UK recorded similar levels of concern about EU and non-EU migration in the 2014 Transatlantic Trends survey (Blinder and Allen, 2016). In June 2016 the UK voted to leave the EU, with long-term international immigration concerns being a key driver (Office for National Statistics, 2016c).

Brexit leaves a significant question mark hanging over UK migration governance. There has been much speculation over what Brexit could mean for immigration policy (see for example Garavoglia 2016, O'Connor and Viña 2016 and Consterdine 2017). Key questions surround the treatment of EU nationals currently living in the UK, EU nationals who wish to live in the UK after Brexit, the treatment of non-EU nationals from countries who enter into trade deals with the UK (which often come with increased freedom of movement), as well as asylum seekers who currently benefit from the Common European Asylum System. (Consterdine 2017). Although the UK has opted out of some EU asylum policies and legislation, it is currently bound by the original Common European Asylum System instruments that it agreed to in 2005, which would be affected by Brexit (Gauci, 2017, p.1). This includes the Qualification Directive, the Reception Directive, the Procedures Directive and the Dublin System – which provide minimum standards for the treatment of asylum seekers and determine which EU member state is responsible for an asylum seeker's claim (Gauci, 2017, p.2). There may not be certainty regarding the UK's policy direction for some time – the Government is currently developing the detail of an agreement with the EU over the status of EU residents already in the UK, and the repeatedly delayed immigration white paper is now not expected to be available until October 2018 (Wright and Parker, 2018).

## **2.2. Cleavages: Religious, Cultural and Linguistic Context**

Ethnically, the majority of the UK population identify as white – in 2011 98.2% in Northern Ireland, 96.0% in Scotland and 86.0% in England and Wales (Office for National Statistics, 2012a; National Records of Scotland, 2014a and 2001; Northern Ireland Statistics and Research Agency, 2014a, p.40; and 2002, p.18). The largest ethnic minorities according to the 2011 censuses were Indian (comprising 2.5% of the English and Welsh populations),

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<sup>32</sup> Several surveys have shown that the most negatively viewed categories of immigrants are low-skilled migrants, extended family members and asylum seekers, while high-skilled migrants, students and close family members are less negatively viewed (Blinder and Allen, 2016).

<sup>33</sup> The UK was one of three countries (along with Sweden and Ireland) not to impose work restrictions on the newly acceded EU8 countries (Williams, 2012: 166).

Asian<sup>34</sup> (comprising 2.7% of the Scottish population), and Chinese (comprising 0.4% of the Northern Irish population) (Office for National Statistics, 2012; National Records of Scotland, 2014; Northern Ireland Statistics and Research Agency, 2014a, p.40). The UK is becoming more ethnically diverse, with increases in the proportion of people born outside the UK. In 2011 this group comprised 13.4% of England and Wales, 7.0% of Scotland, and 6.6% of Northern Ireland. Although all areas in England and Wales have experienced increases in the proportion of residents born outside the United Kingdom between the 2001 and 2011 censuses, London and the South East of England have had the most significant increases, with 37% of the population of London being born overseas (Office for National Statistics, 2012b). Of the 20 local authority areas in England and Wales with the greatest proportion of the population born overseas, 19 are in London (Office for National Statistics, 2012b).

The UK is relatively homogenous linguistically, with English being the main language<sup>35</sup> of 96.9% of the Northern Irish population (Northern Ireland Statistics and Research Agency, 2014a, p.66); 92.6% of the Scottish population (National Records of Scotland, 2013b) and 92.3% of the English and Welsh populations<sup>36</sup> (Office for National Statistics, 2013a). Although Polish was the most common other main language used in England, Wales and Northern Ireland, it was the main language of only 1.0% of the population (Office for National Statistics, 2013a; Northern Ireland Statistics and Research Agency, 2014a, p.66).<sup>37</sup>

Similarly, in terms of religion, there is a significant degree of uniformity<sup>38</sup>. Christianity is followed by 82.3% of the Northern Irish population (Northern Ireland Statistics and Research Agency, 2014a, pp.84-85), 59.3% of the English and Welsh populations (Office for National Statistics, 2013b), and 53.8% of the Scottish population (National Records of Scotland, 2013c). Islam is the second biggest religion in England and Wales, with Muslims comprising 4.8% of the population (Office for National Statistics, 2013b), and also in Scotland, where they comprise 1.4% of the Scottish population (National Records of Scotland, 2013c).

### 2.3. Cleavages: Socio-Economic Context

The relative linguistic, religious and ethnic homogeneity of the UK notwithstanding, there are enduring class-based cleavages that have a significant impact on society today. Class is a complex sociological concept, encompassing disparities in economic, cultural and social capital, that are accumulated and reinforced over time (Atkinson, Roberts and Savage, 2013, p.1; Cunningham, Devine and Snee, 2018, p.78). The ‘historical baggage’ of class shapes the parameters of opportunity, goods and experiences a particular person can have (Atkinson, Roberts and Savage, 2013, p.1; Savage et al., 2015, pp.45-6). Class has a long history in Britain, with the working, middle and upper classes solidifying in the nineteenth century amidst the industrial revolution (France and Roberts, 2017, p.10; Savage et. al, 2015). Although the

<sup>34</sup> This category includes Asian British and Asian Scottish.

<sup>35</sup> There are variations in wording between the different UK censuses: England, Wales and Northern Ireland refer to ‘main language’, whereas Scotland refers to language used at home.

<sup>36</sup> Including those who speak Welsh in Wales as their main language.

<sup>37</sup> Scots was the most common language other than English used at home in Scotland at 1.09%, closely followed by Polish at 1.06% (National Records of Scotland, 2013b).

<sup>38</sup> Historically, there have been multiple chapters of conflict between Catholics and Protestants in the UK, the most recent being ‘the Troubles’, the epicentre of which was Northern Ireland between 1968 and 1998.

contours of class in the UK have changed somewhat over time, class is still supremely relevant in today's context<sup>39</sup> (France and Roberts, 2017, p.10; Savage et al., 2015, p.27, p.391). Savage et al., have shown that instead of the previous working, middle and upper-class division, there are now seven classes structuring society in the UK: elite, established middle class, technical middle class, new affluent workers, traditional working class, emergent service workers and the precariat (2015, pp.168-9). Each of these groups possesses different amounts of economic, cultural and social capital.

Although the UK is an affluent country<sup>40</sup> with a strong economy<sup>41</sup>, this prosperity is not felt by everyone. In terms of economic capital, that is income and wealth, inequality is significant in the UK, with the gap expanding (Savage et al., 2015, p.65). The average household income of the 'elite' class, which comprise around 6% of the UK, is almost double that of the next most affluent class; while elite savings are more than two times the savings of any other class (Savage et al, 2015, p.170, p.310). Economic capital also affects education, whether it be university attendance or pre-school education outcomes, as well as health outcomes such as life expectancy (Campbell, 2016; Savage et. al, 2015, p.226; Wilkinson and Pickett, 2010, p.110). Elites also have more cultural capital than other classes (attending museums, galleries, sporting events and classical concerts) with metropolitan centres key hubs of highbrow cultural capital; as well as more social capital, with expansive social networks comprising people of the same status (Savage et al., 2015, p.170; Savage et al., 2018, pp.141-2).

Class also has a geographic dimension in the UK. Historically, the main axis of division was between the working-class North (and Scotland and Wales) and the middle-class South (Savage et al., 2015, pp.264-5). The North – once an industrial and mining powerhouse – began to decline economically and socially along with waning industry as early as the 1930s, and particularly from the 1970s (Bailoni, 2018, p.60, p.62). This neat division between North and South however belies a degree of messiness, which is ever more the case since the 2008 recession (Bailoni, 2018, p.66; Savage et al., 2015, pp.264-5). The structuring logic of the North-South divide has been superseded by two other spatial configurations of class (Savage et al., 2015, p.265). First, there is a rural urban divide, with the wealth elite class occupying central urban zones in all major cities in the UK (an exception being Belfast, as a result of the city's divided history along religio-national lines) (Bailoni, 2018, p.66; Savage et al., 2015, p.265, pp.272-4). The second divide is between London and the rest, with high concentrations of the wealth elite in London and the surrounding South-East (Savage et al., 2015, pp.264-5,

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<sup>39</sup> Governments and academics during the 1980s and 1990s challenged the relevance of the concept of class, seeing different outcomes as being the result of individual capabilities, rather than the politico-social context in which people found themselves (Atkinson, Roberts and Savage, 2013: 1, 8; Fée and Kober-Smith, 2018: 3; France and Roberts, 2017: 10; Reay, 2017: 7; Savage et al., 2015: 391).

<sup>40</sup> For 2015, the UK had a Human Development Index rank of 16 out of 188 countries and territories, placing it in the very high human development category with a value of 0.909. This value is above the OECD average of 0.887 and above the average value for countries in the very high human development category, which sits at 0.892 (United Nations Development Programme, 2016).

<sup>41</sup> In terms of unemployment, following a peak of 8.5% in September-November 2011, the unemployment rate has been trending downward, sitting at 4.3% in September-November 2017<sup>41</sup> (Office for National Statistics, 2018). Between 1993 and 2007 the unemployment rate of those born overseas has on average been higher than those born in the UK. Interestingly in subsequent years this gap has disappeared for men, but has remained static for women (Rienzo, 2017: 3). This could be due to more traditional gender roles among those born outside the UK.

295). These geographical inequalities have implications for the UK Government's dispersal policy for housing asylum seekers, with asylum seekers tending to be housed in less affluent areas of the UK where property is cheaper, in communities that can also be experiencing disadvantage (House of Commons Home Affairs Committee, 2017, p.16). Asylum seeker housing is discussed further in Section 6.

## 2.4. Cleavages: Political Context

### 2.4.1. Polarization of Society

Commentators<sup>42</sup> and academics have been documenting increased political polarization amongst the British population, with immigration being a key issue. Whereas previously the predominant political divide has been between the economic 'left' and 'right', a new divide has become prominent – that between advocates of an open society versus those advocating a closed society<sup>43</sup>. Between 2015 and 2017, English party supporters became significantly more polarized on the open-closed divide (Wheatley, 2017).

Further, the 2014 British Attitudes Survey, published last year, has shown that the biggest societal cleavages in Great Britain are around Brexit and immigration (Ford, 2017). The population is divided on the topic of immigration along the axes of age, education levels, economic status and heritage, among others – with gaps of between 9% and 30% on most measures between those who are most supportive of immigration and those who are least supportive<sup>44</sup> (Ford, 2017).

### 2.4.2. Polarization of Political Parties

The dominant political ideology regarding immigration has been one of tightening control, with both Labour and the Conservatives playing a role in the current restrictive legislative environment. For example, the Immigration Act 1971 was passed when the Conservatives were in power, but the Bill was largely drafted by the preceding Labour Government (Abrahámová, 2007, p.52). Further, the perceived incompetence of both Labour and Conservative Home Secretaries has also played a role in the current, rigid climate. Former Labour Home Secretary Charles Clarke stoked public fears about the ineffectiveness of border controls when, in 2006, it was revealed that 1,023 foreign prisoners were released instead of being candidates for deportation. Similarly, 89 foreign criminals were released between 2010 and 2014 when Conservative Theresa May was Home Secretary (BBC, 2006; Hope and Barrett, 2015). Theresa May has had a significant impact on immigration policy during her time as Home Secretary – declaring a 'hostile environment' for irregular migrants, refusing to place a time limit on immigration detention, declining to participate in the EU's refugee resettlement programmes, and pledging to withdraw the UK from the ECHR (Travis, 2016). An interesting question for further research is whether hostile public sentiment has influenced

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<sup>42</sup> See for example the Economist, 2016, which positions this phenomenon in a global context.

<sup>43</sup> The open-closed debate concerns issues such as immigration, EU membership and overseas aid (Wheatley, 2017).

<sup>44</sup> Although there has been a positive shift in views on immigration since the last survey in 2002, a majority of residents still view it negatively (Ford, 2017).

politicians, the hostile attitudes of politicians have influenced public sentiment, or whether both exist in a mutually reinforcing cycle.

Tougher asylum seeker policies have also tended to receive bi-partisan support particularly since the 1990s, with New Labour and the Conservatives showing a striking convergence. Both Labour and the Conservatives have pledged restrictions – with Tony Blair declaring he would cut the number of asylum seekers in half in 2003, Michael Gove pledging to limit refugee numbers in 2005 (Winder, 2013, p.496), and David Cameron initially refusing to take more Syrian refugees even in the throes of the crisis (Wintour, 2015).

This bi-partisan toughness on immigration notwithstanding, there is a greater polarization of views across the whole political spectrum. UKIP, the Conservatives and (to a lesser extent) Labour advocate restrictions on immigration, while the Liberal Democrats and the Greens promote more immigration, not less. UKIP is the most outspoken on the perceived negative impacts of immigration, and proposes the following restrictions: a target of zero net migration over five years, a halt to unskilled and low-skilled migration for five years following Brexit, and testing the social values of potential immigrants to the UK (The Guardian, 2017). The Conservatives have pledged to limit immigration to tens of thousands annually, have proposed more stringent conditions on family visas, and want to reduce claims for asylum being made in the UK (The Guardian, 2017). Although Labour is committed to reviewing inadequate refugee policies to improve the lives of refugees in the UK, it is considering a post-Brexit immigration system based on the following restrictions: work permits, visa regulations and employer sponsorship (The Guardian, 2017; The Labour Party, 2017, pp.28-29). Towards the other end of the spectrum, the Liberal Democrats advocate freedom of movement in Brexit negotiations, want to grow the Syrian Vulnerable Persons Resettlement Scheme to 50,000 people, and take more unaccompanied minors from Europe (The Guardian, 2017). The Green Party similarly advocate for freedom of movement with the EU, does not believe that migrants with wealth and particular skills should be prioritised above others, and that current refugee policy should be overhauled to be more humane to refugees (Greens Party 2017a, p.7 and 2017b; The Guardian, 2017).

## **3. The Constitutional Organization of the State and Constitutional Principles on Immigration and Asylum**

### **3.1. Powers and Functions of the Different Tiers of Government**

There are three tiers of government in the UK. At the apex sits the central Government of the UK in Westminster, with sovereignty over the entire Kingdom and reserved powers as set out in a series of Acts, including foreign policy, defence, broadcasting, fiscal policy, nuclear energy policy and social security. The UK Government has a bicameral sovereign parliament, comprising the elected House of Commons and the unelected House of Lords (Carroll, 2015, p.35). The House of Commons' authority trumps that of the House of Lords by convention, as well as by the 1911 and 1949 Parliaments Acts (Carroll, 2015, p.35). The UK is a constitutional monarchy, that is, the Monarch's powers are exercised within the parameters of the constitution (Carroll, 2015, p.32). The Monarch still has significant powers under the royal prerogative, including the ability to dissolve Parliament, appoint the Prime Minister, approve legislation and declare war (Carroll, 2015, p.32). However, by convention these powers are usually exercised by, or directed by, the Government (Carroll, 2015, p.32). The UK has a unitary system of Government. This means that Westminster has ultimate authority over the Scottish, Welsh and Northern Irish governments, as well as local government. Unlike a federation, their powers and existence are not protected in the constitution (Carroll, 2015, pp.21-2).

Since the Scottish, Welsh and Northern Ireland devolution legislation of 1998 (as amended), unreserved powers have been asymmetrically devolved to the Northern Irish, Scottish and Welsh executives and legislatures, which comprise the second tier of government (Blackburn, 2015; European Committee of the Regions, 2012). There are twenty areas of responsibility devolved to the Welsh Government, spanning local service delivery, agriculture forestry and fisheries, language and culture, economic development and the environment (UK Government, 2013). There is no specific list of powers delegated to the governments of Northern Ireland and Scotland – their powers extend to everything that has not been reserved by the Government of the UK (European Committee of the Regions, 2012).

The third tier of government in the UK is local government, comprising 353 local authorities in England<sup>45</sup> (Local Government Information Unit, 2017), 11 local authorities in Northern Ireland (Northern Ireland Direct, 2017), 32 local authorities in Scotland (Scottish Government, 2017), and 22 local authorities in Wales (Welsh Government, 2015). The structure and functions of local government are set out in a series of Acts, for example the Local Government Acts of 1972 and 1992, Greater London Authority Act 1999, the Local Government and Public Investment in Health Act 2007 and various other Acts spanning housing, education and highways, for example (Carroll, 2015, pp.10-12, p.21). The functions of local governments

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<sup>45</sup> In some areas of England there are two tiers of local government responsible for different services – an upper tier (county council) and a lower tier (district council). In other areas there is only one authority, responsible for the provision of all local government services (Local Government Information Unit, 2017).

vary according to which country they are in, and whether they are county, district or borough councils.

Powers surrounding immigration, citizenship and nationality are the purview of the UK Government only. The Secretary of State<sup>46</sup> and her department – the Home Office, are responsible for nearly all aspects of immigration, including nationality, asylum, and border control (Library of Congress, 2016). Specifically, within the Home Office, UK Visas and Immigration has responsibility for processing asylum and other applications for entry, Immigration Enforcement monitors and enforces compliance with immigration laws (including deportation), the Border Force implements customs and immigration controls at airports and ports, and HM Passport Office processes British passport applications (Library of Congress, 2016). Support for eligible adult asylum seekers and their dependents waiting for their applications to be processed is provided by the Home Office, via UK Visas and Immigration. Asylum seekers who are eligible for support are those who are either homeless, do not have sufficient funds to buy food, or both. Short-term support can also be granted by UK Visas and Immigration to unsuccessful asylum seekers while they prepare to leave the UK (UK Government, 2017a). The institutional landscape evolves quickly. In 2008 the Border and Immigration Agency, UK Visas and part of HM Revenue and Customs were merged to become the UK Border Agency, which was then subsequently abolished and replaced with UK Visas and Immigration, the UK Border Force and Immigration Enforcement in 2013.

The devolved administrations have four key roles in the provision of immigration and asylum seeker support:

- *Unaccompanied asylum-seeker children*: local authorities are directly responsible for the care and provision of services to unaccompanied asylum-seeker children (please see Section 5.5 for further information).
- *Asylum seeker accommodation*: although accommodation for destitute asylum seekers is administered by the Home Office, local authorities choose whether they will accept asylum seekers to be housed within their boundaries, and approve the use of specific properties (House of Commons Home Affairs Committee, 2017, p.16). (For more information, please see Section 5.1.4).
- *Refused asylum seekers*: if a refused asylum seeker is not eligible for support from the Home Office, the local authority has a statutory duty to provide housing and subsistence payments if they are destitute, or need care because of poor mental and physical health (Asylum Information Database, 2018, p.63; House of Commons Home Affairs Committee, 2017, p.18).
- *Successful asylum seekers and resettled refugees*: if an asylum seeker is successful they will no longer be supported by the Home Office, and move into the mainstream benefits system (House of Commons Home Affairs Committee, 2017, p.18). Refugees (both resettled and successful asylum seekers) receive support and services from the Scottish, Welsh and Northern Irish governments, along with local councils, in line with their constitutional functions.

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<sup>46</sup> Also known as the Home Secretary.

## 3.2. Constitutional Entrenchment of the Principle of Asylum

The UK does not have a codified constitution. Instead, the fundamental principles governing the UK are laid out in a series of Acts of Parliament, court judgments and conventions that have evolved over hundreds of years (Blackburn, 2015; Carroll, 2015, p.4, pp.16-17). There is no specific principle of asylum enshrined in the UK's constitution, however there are several statutes relating to civil liberties and human rights that are relevant to asylum-seekers:

- Habeas Corpus Acts 1640-1862: a person in detention can issue a writ of *habeas corpus*, which triggers judicial review as to whether the justification for their detainment is lawful (McGuinness and Gower, 2017, p.10).
- Human Rights Act 1998: the Act gave effect to the principal provisions of European Convention on Human Rights<sup>47</sup> (ECHR) in domestic UK law (Carroll, 2015, pp.397-8). Some of the relevant articles of the Act are:
  - Article 2: Right to life – may be relevant to those being expelled from the UK who may face death upon return (whether via the death penalty or unlawful killing), although there is very limited domestic case law on the UK Government's obligations under this Article when returning someone who may face death upon their return (UK Visas and Immigration, 2009, pp.15-16).
  - Article 3: Prohibition of torture, inhuman or degrading treatment – relevant to expulsions from the UK where the individual may face such conditions upon return; and the denial of state support such as food and shelter to asylum seekers as a result of late application (as per the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002) (Carroll, 2015, pp.494-5).
  - Article 5: Right to liberty and security of the person – relevant to the detention of individuals prior to deportation as per the Immigration Act 1971 Schedule 3 and the UK Borders Act 2007 (Carroll, 2015, p.497).
  - Article 6: Right to a fair trial – relevant to expulsions from the UK where the individual may be denied a fair trial in the receiving state. It is important to note that asylum hearings fall outside the ambit of Article 6 (which applies to criminal and civil hearings only).
  - Article 8: Right to private and family life – relevant to family reunion, and those with established families in the UK facing deportation (Owers, 2003)
  - Article 9: Right to freedom of thought, conscience and religion – may be relevant to those being expelled who may not be able to practice their religion upon return to their country of origin.
  - Article 14: Protection from discrimination in the application of Convention rights – for example, this could be relevant to those challenging inadequately justified variances in deportation policies based on nationality, where it adversely affected their Article 8 rights (Owers, 2003).

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<sup>47</sup> The Human Rights Act enacts articles 2-12 and 14 of the ECHR, as well as articles 1-3 of Protocol 6 to the Convention.

The UK's constitution has no entrenched provisions<sup>48</sup>. It can be altered via standard processes – legislation, judicial decisions or a shift in conventions (Carroll, 2015, p.20). This means that the principles relevant to asylum as codified in the Human Rights Act 1998 can be repealed or replaced relatively quickly by Parliament at any time, although political and cultural pressures would likely be a restraining force<sup>49</sup> (Carroll, 2015, pp.20-1; Waites, 2008, p.25).

### 3.3. Constitutional Case Law on Asylum

The current body of constitutional case law on asylum focuses on the Human Rights Act 1998, which came into force in 2000. Due to space constraints only Articles 3, 5 and 8 are dealt with. Some landmark cases are highlighted below:

#### 3.3.1. Article 3 ECHR: Prohibition of Ill-treatment

The Article 3 ECHR prohibition of torture, inhuman or degrading treatment has been invoked by those facing expulsion in multiple domestic cases. The Court of Appeal outlined the tests to be applied in determining whether deportation would contravene Article 3 ECHR rights in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629 (Carroll, 2015, p.494). The case of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 was significant in ruling that fear of ill-treatment on the basis of sexual orientation was protected by Article 3 ECHR, alongside fear of ill-treatment based on political or religious persuasion (Carroll, 2015, p.495). In a case that same year, the Supreme Court clarified that it was not reasonable for a deported person to conceal or avoid disclosing their sexual, religious or political orientations in order to prevent ill-treatment upon return to their country of origin (*RT (Zimbabwe) v Secretary of State for the Home Department* [2010] UKSC 31) (Carroll, 2015, p.495).

The case of *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] 2 AC 668 was important in distinguishing between ill-treatment caused by state and non-state actors. In this instance, a Lithuanian couple were seeking asylum in the UK, as they feared violence perpetrated by the wife's family as a result of the husband being Roma. The appeal was dismissed. The Court found that the protections of Article 3 ECHR only applied to harm caused by non-state actors when it could be shown that the state does not provide victims with an appropriate level of protection against such ill-treatment (Department for Constitutional Affairs, 2006, p.14; Dickson, 2013, pp.146-7). Issues surrounding medical treatment and deportation have been raised in the case of *N v Secretary of State for the Home Department* [2005] 2 AC 296. A failed Ugandan asylum seeker with advanced HIV/AIDS argued that return to her home country would constitute ill-treatment, as there was not adequate medical care available there. The court rejected her appeal, ruling that Article 3 ECHR does not impose a duty on the state to provide medical care to all severely ill people with HIV/AIDS who cannot be appropriately treated in their own countries (Department for Constitutional Affairs, 2006,

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<sup>48</sup> That is, there are no laws in the United Kingdom that require a referendum or a special legislative process in order to be changed or repealed (Carroll, 2015, p.20).

<sup>49</sup> Even if the Human Rights Act were repealed, asylum seekers in the United Kingdom would still have recourse to the European Court of Human Rights in Strasbourg. It is important to note that the ECHR guarantees the rights of those in member countries of the European Council. As the European Council is entirely separate from the European Union, Brexit will not affect the UK's obligations under the Convention (Equality and Human Rights Commission, 2017).

p.14). *GS (India) & Ors v The Secretary of State for the Home Department* [2015] EWCA Civ 40, Article 3 confirmed the high threshold for Article 3 to be breached. The case of *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [32] was also pivotal, as the House of Lords ruled that articles of the ECHR other than Article 3 ECHR could be used to challenge expulsions or extraditions, such as Article 6 ECHR (Dickson, 2013, pp.144-5). This case also established the ‘Ullah principle’, whereby UK courts are to keep pace with the jurisprudence of the Strasbourg Court (unless extenuating circumstances prevailed)<sup>50</sup> (Dickson, 2013, p.240; Turpin and Tomkins, 2011, p.766).

Article 3 ECHR has also been used to challenge UK Government restrictions on the provision of support to asylum seekers. In *R (Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 the Court of Appeal held that Article 3 ECHR imposed a duty on the Secretary of State to ensure asylum seekers do not face severe destitution (Department for Constitutional Affairs, 2006, p.14; Dickson, 2013, pp.157-8). This was further reinforced in *R (on application of Adams) v Secretary of State for the Home Department* [2008] UKHL 66, where it was established that Article 3 imposes a duty to prevent ‘serious suffering’ resulting from the denial of basic provisions necessary to live (irrespective of whether an asylum seeker applied for asylum as soon as they entered the country or not)<sup>51</sup> (Carroll, 2015, p.495).

### 3.3.2. Article 5 ECHR: Right to Liberty and Security

Article 5 ECHR the right to liberty and security of the person has been particularly useful in cases of administrative detention. As per the Immigration Act 1971 people about to be deported from the UK can be detained while the final decision about their fate is made, and until their removal. Similarly, and as per the UK Borders Act 2007, non-British convicted criminals who have served at least one year in prison can be detained upon their release from prison, prior to their automatic deportation (Carroll, 2015, p.497). In the case of *R (Saadi) v Secretary of State for the Home Department* [2002] 1 WLR 3131, the House of Lords ruled that it was within the bounds of Article 5(1) ECHR to detain certain categories of asylum seekers as part of a fast-track process if their asylum claims were expected to be dealt with swiftly. The plaintiff in that case, Mr Saadi later took the case to the European Court of Human Rights in Strasbourg (*Saadi v UK* (2008) 47 EHRR 427), which agreed with the House of Lords’ decision (although the European Court ruled there had been a violation of Article 5(2), given Mr Saadi had not been informed of the true reason for his detention until 76 hours into his detention) (Dickson, 2013, pp.172-3). In the case of *R (on application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12], the Supreme Court ruled that failed asylum seekers can only be administratively detained if there is an intention to deport them, as per Article 5(1)(f) of the ECHR (Carroll, 2015, p.498).

### 3.3.3. Article 8 ECHR: Right to Family and Private Life

The right to family life conferred under Article 8 ECHR has also been used as a basis for challenging the deportation of asylum seekers (failed or otherwise) (Carroll, 2015, p.508). The

<sup>50</sup> This is a significant decision, as previously domestic courts were obliged by section two of the Human Rights Act to take into account Strasbourg court rulings, rather than to abide by them (Turpin and Tomkins, 2011, p.766).

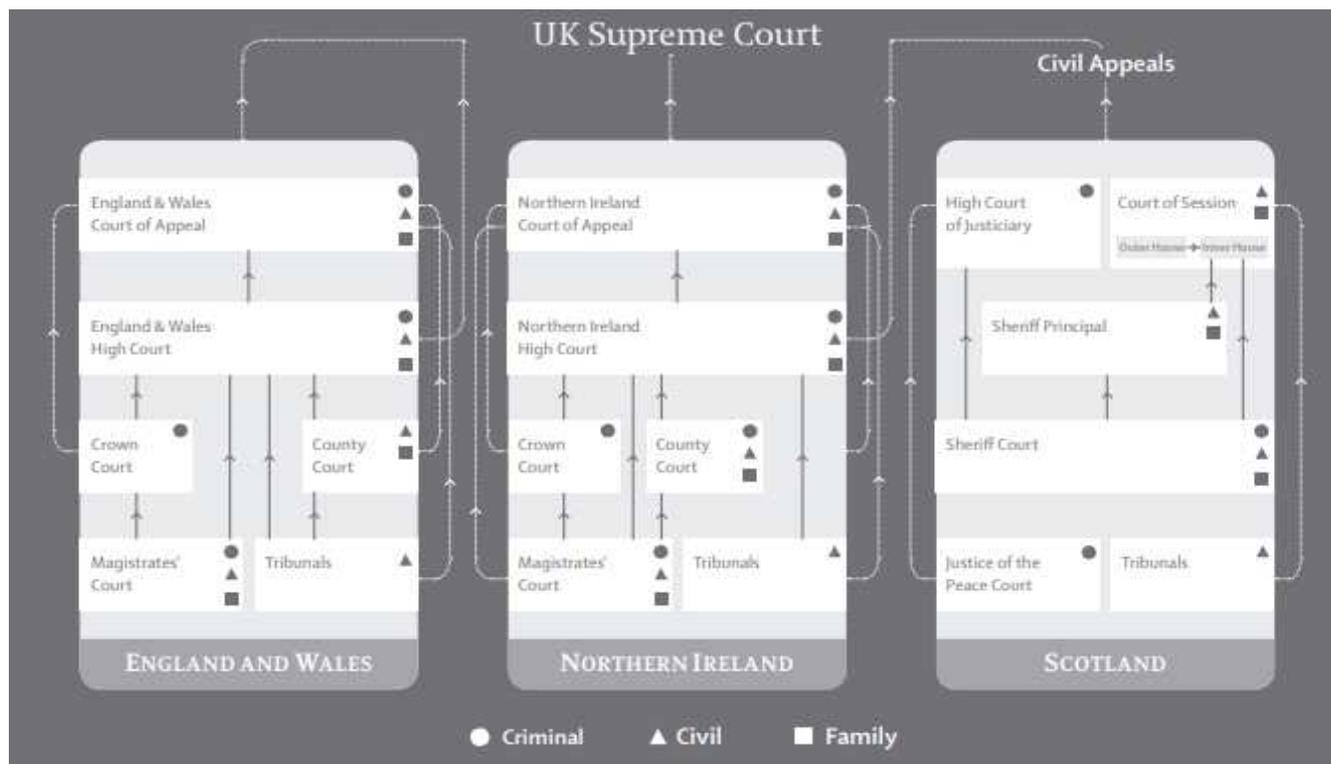
<sup>51</sup> As per the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002, asylum seekers who do not apply for asylum immediately upon arrival in the UK will not receive support from the Government (Carroll, 2015, p.495).

House of Lords held that the effects of deportation on the deportee's family should be considered, in addition to the effects on the deportee (*R (on application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27) (Carroll, 2015, p.508). In the case of *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5, the Court of Appeal held that the key test for determining whether Article 8 rights of family members would be breached was whether it is reasonable for them to follow a parent or partner to the country to which they had been returned (rather than whether there are insurmountable hurdles preventing them from going to that country) (Carroll, 2015, p.508). Special consideration should be given to the best interests of any children impacted by the deportation of a parent, as per *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, however the interests of children do not automatically trump the interests of the public (Carroll, 2015, p.508). In the case of *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, the House of Lords held that although EM and her son did not meet the criteria to be deemed refugees, their Article 8 rights (read with Article 14 rights) would be abrogated upon return to Lebanon, given that EM's abusive husband would gain custody of the child under Islamic law by virtue of his sex (Carroll, 2015, p.495)

## **3.4. The Judiciary**

### **3.4.1. Structure and Role of the Judiciary**

The UK has a complex judicial system comprising the English and Welsh, Scottish, and Northern Irish judiciaries, as well as the overarching Supreme Court of the UK (see Figure 1.1 below). Correspondingly there are three legal systems in the UK: the laws of England and Wales, Scotland, and Northern Ireland (European Committee of Regions, 2012). However, as immigration and asylum are areas reserved by Westminster, immigration and asylum tribunals in England and Wales, Northern Ireland and Scotland are all administered centrally by HM Courts and Tribunal Service.

**Figure 7: UK Legal System**

Source: Supreme Court, 2018a.

Since February 2010, immigration and asylum matters have been dealt with through the unified tribunals system – which encompass all areas of law. The unified tribunals system has two tiers – the First-tier Tribunal and the Upper Tribunal<sup>52</sup>. There are Immigration and Asylum Chambers in both tiers (Clayton, 2016, p.242; Courts and Tribunals Judiciary, 2018a). The First-tier Tribunal (Immigration and Asylum Chamber) reviews most decisions made by the Home Office upon appeal, as well as considering applications for immigration detention bail (UK Government, 2018b).

Appeals against decisions made by the First-tier Tribunal (Immigration and Asylum Chamber) are referred to the Upper Tribunal (Immigration and Asylum Chamber) (Courts and Tribunals Judiciary, 2018a). A First-tier Tribunal decision can only be appealed on a point of law (Asylum Information Database, 2018, p.16; Clayton, 2016, p.242). An appellant must first seek permission to appeal the decision to the Upper Tribunal from the First-tier Tribunal, however if they are unsuccessful, they can seek permission straight from the Upper Tribunal (Clayton, 2016, p.242). If the appellant loses the appeal in the Upper Tribunal, they can appeal to a higher court if the appeal raises an important point of principle or practice, or if there is another persuasive reason: the Court of Appeal in England and Wales, the Court of Appeal in Northern Ireland, and the Court of Session in Scotland (Clayton, 2016, p.243; UK Government, 2018a). The appellant must seek permission to appeal from the Upper Tribunal first, and if unsuccessful, can then seek permission from the relevant Court of Appeal or Session themselves (UK Government, 2018a).

<sup>52</sup> A two-tier immigration tribunal system existed until 2005, when it was replaced with the single tier Asylum and Immigration Tribunal, before being separated back into two tiers in 2010.

Permission to appeal a decision made by the Court of Appeal (England and Wales, Northern Ireland) or Inner House of the Court of Session (Scotland) must first be sought from those courts themselves. If permission to appeal is denied, permission can then be sought directly from the Supreme Court (Registry of the Supreme Court, 2016, pp.2-3). The Supreme Court, as the final court of appeal in the UK, will only preside over appeals on ‘arguable points of law of general public importance’ (Supreme Court, 2018c). Twelve independently appointed judges sit on the Supreme Court.

The role of the judiciary is circumscribed in the UK compared to other countries as a result of parliamentary sovereignty. The judiciary does not wield the power to ‘strike down’ primary legislation, because it is inconsistent with other statutes, treaties or the constitution (Supreme Court, 2018d). Instead the judiciary’s role is to interpret legislation and advise of incompatibilities, rather than to decisively act upon them (Hansen, 2000, p.239; Supreme Court, 2018d). For example, in the event that primary legislation is deemed to be in conflict with the Human Rights Acts 1998, the High Court, Courts of Appeal and Session and the Supreme Court can issue a ‘declaration of incompatibility’. Although such a declaration does not affect the validity or operation of the legislation, it will influence the Government’s decision whether to take remedial action or not – either via the fast-track Remedial Orders procedure, or by reintroducing amended legislation through parliament<sup>53</sup> (Carroll, 2015, pp.479-80). Secondary legislation however can be struck down by the courts on the basis that it is incompatible with the Act (Carroll, 2015, p.479).

It has been lamented that the UK judiciary have as a result not had the impact that judiciaries in Germany, France and the United States have in curbing the regressive immigration policies of Parliaments (Hansen, 2000, pp.241-2). In the UK, power over immigration and asylum falls squarely within the ambit of the executive (Clayton, 2016, p.26).

### 3.4.2. Independence of the Judiciary

There are two aspects of judicial independence: first, separation of the arms of government, which are the executive, legislature and judicial arms, and second: the independent decision-making of judges. Both elements will be dealt with separately below.

#### Independence from the Executive and the Legislature

The peculiarity of the UK not having a codified constitution has meant that executive, legislature and judiciary have not always been clearly delineated constitutionally. For example, judges could be elected as Members of Parliament up until the late 1800s, and there has even been an instance of a judge also being a member of Cabinet (Carroll, 2015, pp.41-2; UK Judiciary, 2018b). The judiciary and legislature were fused, with judges on the UK’s final court of appeal also being members of the House of Lords, with the ability to vote and deliberate on legislation (Carroll, 2015, p.42). The office of the Lord Chancellor combined executive, legislative and judicial functions – being a senior Cabinet Minister, a judge and head of the judiciary, and a member of the legislature through the House of Lords (Carroll, 2015, p.42; UK Judiciary, 2018b). There have been several recent Acts and reforms strengthening the

<sup>53</sup> An important example of this is *A v Secretary of State for the Home Department* [2004] UKHL 56, also referred to as the Belmarsh Case. The House of Lords declared that the Anti-Terrorism, Crime and Security Act 2001 Part 4 s 23 (which had allowed for the indefinite detention of foreign terror suspects without trial) was incompatible with Articles 5 and 14 of the Human Rights Act 1998. Parliament subsequently repealed Part 4 of the Security Act 2001.

independence of the Judiciary in the UK. These changes have redistributed power away from the office of Lord Chancellor to other bodies and institutions:

- Constitutional Reform Act 2005 – served to separate the House of Lords from the judiciary, by circumscribing the judicial powers of the Lord Chancellor, making provisions for the establishment of a Supreme Court, mandating the creation of a Judicial Appointments Commission and bestowing a statutory duty upon ministers to maintain judicial independence (Carroll, 2015, p.46; UK Judiciary, 2018b).
- Judicial Appointments Commission established in 2006 – recommends judicial appointments to English and Welsh courts, and some Scottish and Northern Irish tribunals based on the principles of merit, diversity, and free and fair competition (Judicial Appointments Commission, 2018; UK Judiciary, 2018a).<sup>54</sup> The Queen makes the judicial appointments, upon the recommendation of the Lord Chancellor, whose guidance must be consistent with the advice of the Judicial Appointments Commission (Carroll, 2015, p.47).
- The Establishment of the Ministry of Justice in 2007 – responsible for criminal justice, prisons and penal policy, as well as the courts and legal aid. These functions previously fell within the remit of the Secretary of State for the Home Department, and the Lord Chancellor (UK Judiciary, 2018b).
- Establishment of the UK Supreme Court in 2009 – ended the judicial powers of Parliament, with the Law Lords (senior judges) in the House of Lords becoming Justices of the Supreme Court (Supreme Court, 2018b). Supreme Court Justices are barred from being members of the House of Commons, as well as voting or sitting in the House of Lords (Carroll, 2015, p.47). Supreme Court Justices are appointed by the Queen upon the recommendation of the Prime Minister, following the convening of an ad hoc Selection Commission and consideration of the nominee by the Lord Chancellor (Carroll, 2015, p.47).

There have also been concerns about the powers of each branch of government vis-à-vis the others. Especially in the years since the Human Rights Act 1998 came into force, there have been significant tensions between the executive and the judiciary, with the executive often critical of the judiciary's application of the Act to asylum and immigration cases (Clayton, 2016, p.15). Although ultimately unsuccessful, the Government went as far as trying to eliminate court review of asylum and immigration matters, via an ouster clause in the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003 (Clayton, 2016, p.15). Immigration Rules introduced by the Government in 2012 circumscribe the power of the courts to interpret and apply human rights, while the Immigration Act 2014 limits the application of Article 8 (Clayton, 2016, p.15).

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<sup>54</sup> The Justice (Northern Ireland) Acts of 2002 and 2004 prescribed the establishment of the Northern Ireland Judicial Appointments Commission, which was set up in 2005 to appoint judges solely based on merit (McCaffrey and O'Connell, 2012, p.3). Similarly, as per the Judiciary and Courts (Scotland) Act 2008, the Judicial Appointments Board became an advisory Non-Departmental Public Body (NDPB) in 2009, recommending appointments based on merit, and cognisant of the need to encourage diversity (Judicial Appointments Board for Scotland, 2017).

## Independent Judicial Decision-Making

Beyond the institutional separation of the different arms of government, judicial independence is also maintained through independent and impartial decision-making by individual judges. There are several protections afforded to judges – judges have security of tenure subject to good behaviour, with High Court, Court of Appeal, and Supreme Court judges only being able to be dismissed via resolutions of both Houses (Carroll, 2015, p.47). Judges in lower courts can ostensibly be removed by the Lord Chancellor, although this power is rarely exercised (Carroll, 2015, p.45). Further, judicial salaries are set upon the advice of the independent Senior Salaries Review Body, rather than at the determination of the executive (Carroll, 2015, p.45). In the performance of their duties judges are immune from all civil liability, including protection against defamation proceedings during the course of hearings (Carroll, 2015, pp.45-6; Courts and Tribunals Judiciary, 2018b). Finally, Government Ministers, including the Lord Chancellor are required to uphold judicial independence by not using their position to influence judicial outcomes (Carroll, 2015, p.48). While Ministers are not barred from speaking about cases and airing their views on judicial decisions, they should not mount *ad hominem* attacks on the judges themselves for making those decisions (Carroll, 2015, pp.45-6; Clayton, 2016, p.63)

Obligations are also imposed on judges – as per convention, judges do not voice political opinions or participate in political events or activities, while the reasonable reporting of judicial proceedings is covered by the defence of qualified privilege (Carroll, 2015, p.46).

Despite these protections, there is ongoing tension between the judiciary and the executive on immigration and asylum cases. For example, in several instances judges have been personally criticized for decisions, with Ministers even suggesting that judicial rulings favourable to immigrants and asylum seekers are undemocratic (Carroll, 2015, pp.45-6; Clayton, 2016, p.63). Similarly, senior judges have broken convention commenting on policy, with several current and former judges denouncing the ouster clause<sup>55</sup> in the Asylum and Immigration (Treatment of Claimants etc.) Bill 2003 (Clayton, 2016, p.64). Within constitutional constraints, the judiciary have generally played a significant role in protecting the freedoms of asylum seekers against the regressive decisions of Parliament. (Winder, 2013, p.421).

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<sup>55</sup> An ouster clause is a clause in an Act of Parliament that removes judicial review.

## 4. The Relevant Legislative Framework in the Fields of Migration and Asylum

### 4.1. National Legislation on Immigration and Asylum

#### 4.1.1. Evolution and Main Stages of Immigration and Asylum Law

##### Primary Legislation

There is no consolidated immigration law in the UK, which is instead set out in a series of Acts<sup>56</sup>. The backbone of the present-day immigration system is the Immigration Act 1971, which was the last of three Acts passed in the decade from 1962 to restrict immigration in response to growing public concern about the influx of foreigners post-World War II (for more information, see Section 2.1). The Immigration Act 1971 was expansive, replacing all existing immigration laws and amending contemporary citizenship laws. The general trend since 1971 has been ever greater immigration restrictions – along the themes of eroding appeal rights, expanding the surveillance apparatus, limiting social benefits, and depriving asylum seekers of a thorough review of their claim if they are deemed to be ingenuine at the outset. Key Acts are listed below:

- *Asylum and Immigration Appeals Act 1993* – established the category of an asylum claim ‘without foundation’ (Sch 2 para 5), which means curtailed appeal rights. This was based on the premise that the asylum seeker was ingenuine and could be identified as such early on in the process, so their application could be dealt with more swiftly.
- *Asylum and Immigration Act 1996* – expanded the designation of ingenuine claims to encompass those from particular countries, where it was deemed that residents were at low risk of persecution. New offences were established for facilitating unauthorized entry of immigrants into the UK (s 5), and for individuals gaining leave to remain in the UK using false claims (s 4). Further, employers became co-opted into the monitoring apparatus, being obliged to check the immigration status of their employees (s8, s9).
- *Immigration and Asylum Act 1999* – included significant new provisions: asylum seekers and their dependants were removed from the standard benefits system in the UK, instead becoming part of the asylum benefits scheme, while support was taken away from failed asylum seekers without dependents (Part VI); asylum seekers receiving support would now be dispersed around the UK to prevent concentration in the south-east of England (Part VI); to address the significant backlog of cases and removals, the appeal rights of those in contravention of immigration law were circumscribed (Part IV); asylum claims deemed to be ingenuine now fell into a category termed ‘manifestly unfounded’; fines for transporting undocumented passengers were expanded to trains, buses, coaches, car and lorry drivers (Part II), while registrars of births, marriages and deaths now had a duty to report suspicious marriages (s 24).

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<sup>56</sup> In 2008, the government attempted to amalgamate all immigration Acts into the one for the purpose of simplification. A ‘Draft Partial Simplification Bill’ was released in July 2008, however it was met with much criticism as it was far from simple and very difficult to read and comprehend, and was subsequently withdrawn (Clayton, 2016, pp.23-4).

- *Nationality Immigration and Asylum Act 2002* – also contained significant new provisions: if a person is due to be deported but cannot (for example because of the threat of human rights abuses in the country of return), the Secretary of State can deprive them of their right to work and claim benefits (s 76); allowed the Secretary of State to strip people of British citizenship, as long as it wouldn't render them stateless (s 4); set the foundations for the export of immigration control to other countries, which later took effect at French ports (s 141); ingenuine asylum cases now termed 'clearly unfounded', and decided by the Secretary of State on the basis of safe country lists (s 94); asylum seekers who do not lodge their claim 'as soon as reasonably practicable' could be deprived of housing and subsistence support (s 55).
- *The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* – conflated the two-tier immigration appeals system into one tier, required people subject to immigration control to get approval from the Home Office in order to marry (ss 19-25), while successful asylum seekers could no longer backdate their welfare support claims to their date of entry into the UK. Further, failed asylum seekers with dependents could now be deprived of support (s 9).
- *Immigration, Asylum and Nationality Act 2006* – mainly concerned the expansion of enforcement powers, for example, the Act meant employers could be fined if they employed people without the right to work, while immigration officers received expanded powers of arrest. The points-based system (PBS) was introduced under this Act; as well as the denial of appeal rights if entry clearance was denied (except on discrimination or human rights grounds, and in some family visitor and dependant cases).
- *UK Borders Act 2007* – gave immigration officers expanded powers of detention, enabled the routine removal of people convicted of specific crimes (ss 32-39), and removed appeal rights for those facing deportation (except if their deportation would abrogate their rights) Biometric identification was also introduced under the 2007 Act.
- *Borders, Citizenship and Immigration Act 2009* – allowed the UK Border Agency to perform the functions of Her Majesty's Revenue and Customs, a step towards the creation of a unified border agency.
- *Legal Aid Sentencing and Punishment Offenders Act 2012* – legal aid no longer awarded in some immigration and human rights cases.
- *Immigration Act 2014* – appeal rights removed for all migrants and replaced with administrative review (the exception being those appealing on asylum or human rights grounds). Further, the Act stipulates certain factors that the courts must consider when dealing with Article 8 ECHR and the Human Rights Act 1998 appeals<sup>57</sup>. Other provisions concern removal powers, the 'deport first, appeal later' policy (which has since been ruled unlawful by the Supreme Court), and the removal of British citizenship.
- *Immigration Act 2016* – included measures targeting unauthorized migrants – employing or renting accommodation to those without permission to work or rent is now a criminal offence, while immigrants without permission to be in the UK can have their

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<sup>57</sup> Article 8 concerns the right to family life. The courts must not give much weight to a private life that was established when the person's immigration status was uncertain, and must consider the 'public interest' in all Article 8 appeals (Clayton, 2016, p.25).

bank accounts frozen and driver's license confiscated . The Act also allows for the withdrawal of support from refused asylum seeking families.

It would be an oversimplification however to say that legislation has been unidirectional – some notable exceptions to the generally regressive trend are: i) the Asylum and Immigration Appeals Act 1993, which established the right of appeal for asylum seekers ii) the watershed Human Rights Act 1998, which has been critical in protecting the rights of asylum seekers and other immigrants iii) the Immigration and Asylum Act 1999, which established the right of immigration appeal on human rights grounds, as well as restoring partial appeal rights for family visitors iv) the Borders, Citizenship and Immigration Act 2009 obliged the Secretary of State to work to protect the welfare of children in the carrying out all immigration, asylum and nationality duties (s 55) v) the Immigration Act 2014 prohibits the detention of unaccompanied minors, unless in short-term holding facilities or the (now-closed) Cedars facility, designed for families with children vi) the Immigration Act 2016 s 60 stops pregnant women from being detained for more than 72 hours unless permission to do so is granted by a Government Minister; s 67 provides for the relocation of unaccompanied refugee children to the UK from Europe as soon as possible vii) the Refugees (Family Reunion) Bill passed its second reading in the House of Commons on 16 March 2018, which expands the definition of family member for the purposes of reunification<sup>58</sup> and reinstates legal aid for refugee family reunion cases.

There are certain other features of the UK's immigration and asylum legislation that go beyond the generally ever-restrictive content of the Acts. First, UK immigration and asylum legislation has evolved swiftly over the years, with twelve new Acts affecting immigration policy being passed in the last 20 years, in addition to rapidly changing secondary legislation (Willman and Knafler, 2009, p.4). This adds to the complexity and difficulty of navigating immigration and asylum law. Second, legislation has often been introduced to circumvent court decisions, reflecting tensions between the executive and the judiciary. For example, regulations stripping virtually everyone subject to immigration control of benefits was ruled *ultra vires* by the Court of Appeal in 1996, however shortly after s 11 of the Asylum and Immigration Act 1996 thwarted the ruling (Clayton, 2016, p.14). Third, a lack of consultation and the introduction of late amendments to Bills has also been a feature of immigration and asylum legislation. Recently, late amendments plagued the 2002, 2004 and 2014 Acts, limiting parliamentary scrutiny, however this practice goes as far back as the passage of the *Immigration (Appeals) Act 1969* (Clayton, 2016; 19-20, 22). The 2003 Asylum and Immigration (Treatment of Claimants etc.) Bill 2003 was introduced with negligible consultation towards the end of the year, while the Commonwealth Immigrants Act 1968 was expedited through Parliament in a frenetic five days (Clayton, 2016; 20).

## Secondary Legislation

The Immigration Act 1971 s 1(4) empowers the Secretary of State to make 'Immigration Rules' – the rules that govern when a person is permitted to enter or stay in the UK. There are thousands of Immigration Rules, which are produced at least once a month on average

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<sup>58</sup> Currently, as per rr.352A, 352AA and 352D of the Immigration Rules, only the spouse, partner or child (under the age of 18) of a refugee or holder of humanitarian protection, who formed a family unit prior to fleeing their country of origin, are exempted from the maintenance and English language requirements for family reunion purposes. The Refugees (Family Reunion) Bill clause 1 expands the definition of family to include grandchildren, siblings, nieces and nephews under the age of 18, unmarried children who are at least 18 years of age and parents (or aunts/uncles in some circumstances).

(Clayton, 2016, pp.31-2). New rules are created via the issuing of a 'Statement of Changes to Immigration Rules' which are placed before Parliament for 40 days, pursuant to the Immigration Act 1971, s 3(2). The changes will become law after the 40 days without debate unless objections are raised by either House (known as the negative resolution procedure) (UK Council for International Student Affairs, 2015, p.17; UK Parliament, 2018). The Immigration Rules have only been rejected by Parliament a handful of times, and are rarely the subject of Parliamentary debate (Clayton, 2016, p.32). The Immigration Rules have not been consolidated in hard copy since Order Paper HC 395 in 1994, although they are available on the Home Office website with all Statements of Changes since 1994 (UK Council for International Student Affairs, 2015, p.18; Willman and Knafler, 2009, p.4).

A feature of primary immigration legislation throughout the twentieth century and beyond is that it has tended to be high-level, enabling legislation, with wide discretion therefore allowed in the development of more detailed immigration rules and procedures, which are subject to less parliamentary scrutiny (Clayton, 2016, p.17). For example, the export of immigration controls to overseas jurisdictions was scarcely mentioned in the 2002 Act, save for one general enabling section (s 141). It was in the secondary legislation and administrative arrangements that the fine detail of UK immigration control operating in France was mapped and implemented (Clayton, 2016, pp.17-18).

#### **4.1.2. Principles Informing Asylum and Immigration Legislation**

As discussed above, factors shaping immigration and asylum legislation have included a perception of asylum seeker exploitation of welfare benefits, disingenuous asylum seekers creating backlogs in the assessment and appeals system, as well as 'racketeers' benefiting from employing, housing and facilitating the entry of people without state permission. This has led to legislation that reduces appeal and benefit rights, sanctions employers, transportation carriers and landlords, and legislative mechanisms for supposedly determining if an asylum claim is unfounded early on, and therefore subject to less thorough review. Security has been another critical issue informing immigration and asylum legislation

Even before 11 September 2001 there had been growing concerns surrounding security in the UK, which the attacks only served to intensify (Clayton, 2016, p.15, p.50). Immigration, asylum and terrorism have become increasingly fused in public discourse, policy formulation and in legislative terms (Clayton, 2016, p.50, p.516). Variations on the term 'security' have permeated immigration policy documents and legislation, for example the publication of the White Paper *Secure Borders, Safe Haven; Integration with Diversity in Modern Britain* in 2002, references to 'national security' in the 2002 and 2014 Acts, and a section on 'border security' appearing in the 2016 Act. Legislation relating to terrorism and security has impacted asylum seekers, refugees and other immigrants. The Anti-terrorism, Crime and Security Act 2001 included a section on immigration and asylum (Part IV), whereby suspected terrorists may not have their asylum claims substantively reviewed if their deportation would be in the public interest; refugee status can be revoked on the basis of national security, as per the UK's interpretation of the Refugee Convention article 1(f) and 33(2); while fingerprints taken in asylum and some immigration procedures can be held for up to 10 years. Further, the Crime and Courts Act 2013 limited appeals against national security deportations (s 54).

Although terrorism is rarely mentioned explicitly in immigration and asylum Acts, the security discourse has pervaded such legislation nonetheless (Clayton, 2016, p.18). The Immigration, Asylum and Nationality Act 2006 circumscribed appeal rights for those facing

national security deportations (s 7). Sections 54 and 55 of the Act made terrorism-related activities grounds for exclusion from refugee status (with reference to the Refugee Convention Article 1(F)(c)). The Immigration Act 2014 allows the Secretary of State to revoke the citizenship of anyone who behaves contrary to the key interests of the UK, even if they do not possess dual citizenship (s 66). The stringent surveillance and monitoring regime of asylum seekers and other immigrants, expanded through successive Acts, is in keeping with the securitized landscape (Clayton, 2016; 18). Another thread of the security discourse is the interweaving of immigrants and criminals more broadly. The UK Borders Act 2007 provided for the automatic deportation of foreigners convicted of criminal offences (s 32), with some exceptions (outlined in s 33). This link between immigration and criminality can also be seen as making the detention of asylum seekers and other immigrants more acceptable (Clayton, 2016, p.50).

### **4.1.3. Entry, Residence and Resurfacing from Undocumented Immigration**

British nationals, Commonwealth nationals with the right of abode and European Economic Area nationals generally do not require permission to enter the UK (leave to enter), as per the 1971 Immigration Act s 2(1) as amended, the Immigration Act 1988 s 7 and the Immigration Rules. All other nationals do require leave to enter<sup>59</sup> (Home Office, 2018n). Pursuant to the Immigration Rules (Part I, paragraphs 7 to 39E), this permission can be granted upon arrival at a UK port or border, or prior to arrival, usually at a UK consulate or high commission in the applicant's country of residence<sup>60</sup> Advanced permission is usually granted in the form of a visa (entry clearance), and is a requirement for citizens of specific countries as outlined in the Immigration Rules ('visa nationals'), for non-visa nationals if the length of stay will be for more than six months, as well as if entry is for specific purposes, such as setting up a business or studying.

Asylum seekers and established refugees both require leave to enter the UK (Clayton, 2016, p.196). Asylum seekers are not granted leave to enter until their asylum claim has been processed, and so they are usually granted 'temporary admission'<sup>61</sup> (Immigration Act 1971 Sch 2 para 21). Refugees require leave to enter in the form of entry clearance since 2003 when the UK suspended its duties under the 1959 Council of Europe Agreement on the Abolition of Visas for Refugees (Clayton, 2016, p.197).

Estimating the number of unauthorized immigrants in the UK is by necessity a difficult task – in 2007 it was estimated there were between 417,000 and 863,000 unauthorized migrants (among the highest estimates among EU countries), while in 2017 the former Home Office head of immigration enforcement speculated that there were as many as 1.2 million unauthorized migrants (Library of Congress, 2017; McCann, 2017; Vollmer, 2011). Although the usual path for detected undocumented immigrants is deportation and/or prosecution

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<sup>59</sup> Exceptions include air and sea crews, service people, diplomats and people arriving from another part of the Common Travel Area (comprising the United Kingdom, the Republic of Ireland, the Channel Islands and the Isle of Man) Immigration Act 1971 ss 1(3) and 8.

<sup>60</sup> The Gulf Cooperation Council states (Oman, Qatar, the United Arab Emirates) can apply for an electronic visa waiver online prior to arrival.

<sup>61</sup> Replaced by 'immigration bail' under the Immigration Act 2016.

(Library of Congress, 2017), there are some pathways to regularization as outlined in the Immigration Rules:

- A person born in the UK who unlawfully resides there for the first ten years of their life may apply for British citizenship from the age of ten (British Nationality Act 1981; Borders, Citizenship and Immigration Act 2009, ss. 42(5) and 58)
- A child born in the UK who has unlawfully resided there for at least seven years can apply for leave to remain on the basis of their right to a private life, as long as it would be 'unreasonable' to return them to their home country. If successful, the child will be granted permission to stay for two-and-a-half -years, at which point they can apply to renew their leave. After ten years they can then apply for citizenship (Article 8 of the ECHR and the Human Rights Act 1998; Immigration Rules).
- A person brought to the UK as a child, who has unlawfully resided there for at least half their life can apply for leave to remain on the basis of their right to private life. They must be between the ages of 18 and 24 when they apply. Leave to remain will be granted in two-and-a-half-year intervals, with the ability to lodge an application for citizenship after 10 years (Article 8 of the ECHR and the Human Rights Act 1998; Immigration Rules).
- A person who has lived in the UK for at least 20 years, when some or all of this period was unlawful, can apply for leave to remain on the basis of their right to private life. As above, the person can apply for leave to remain every two-and-a-half-years, and then for citizenship after 10 years (Article 8 of the ECHR and the Human Rights Act 1998; Immigration Rules) (Library of Congress, 2017).

## 4.2. Sub-National Legislation on Immigration and Asylum

The devolved governments of Scotland, Wales and Northern Ireland cannot legislate directly on issues of immigration, asylum and nationality, as these are powers reserved by the central Westminster Government. However, some devolved powers are relevant to immigration and asylum, particularly housing<sup>62</sup>, local government, legal aid, health care, education, children's services, policing and social welfare (Harper, 2016, p.1; Mooney and Williams, 2006, p.620). Some examples of devolved legislation relevant to immigration and asylum are below:

- *Children and Young People (Scotland) Act 2014* – the objective of the Act is to improve the well-being of children and ensure young people and their families have access to the services they need, including young refugees, asylum seekers and their families. The Act also stipulates the provision of services to unaccompanied asylum-seeking children (Scottish Government, 2018).
- *Housing Act (Wales) 2014* – the Act provides that local authorities make available to homeless people accommodation that meets all health and safety standards. This Act also applies to refugees – ensuring that they have access to accommodation that is of a reasonable standard (Welsh Government, 2016, p.7).

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<sup>62</sup> Housing support for destitute asylum seekers is a reserved matter, while housing support for unaccompanied asylum-seeking children is devolved.

- *Northern Ireland Act (1998) s 75* – confers a duty on public authorities to support equality of opportunity irrespective of religion, race, political persuasion, marital status or sexual orientation. The Act has provided the enabling environment for the Racial Equality Strategy which highlights the importance of co-ordinated service provision to meet asylum seeker needs (Office of the First Minister and Deputy First Minister, 2005, pp.29-30).

Distinctions between reserved and devolved powers can be particularly blurry in the case of immigration and asylum legislation. For example, there have been several conflicts between the central UK Government and Scotland, which tends to take a more progressive stance on asylum and immigration issues than the rest of the UK (Scottish Detainee Visitors, 2017, p.5; Scottish Refugee Council, 2016, p.5). There has been conflict between the devolved Children (Scotland) Act 1995 and three pieces of UK legislation which provide for the detention of people liable to deportation and removal: the Immigration Act 1971 (as amended), the Nationality, Immigration and Asylum Act 2002 and the UK Borders Act 2007 (McGuinness and Gower, 2017, p.5). Asylum seekers, including children, were taken in dawn raids and detained at Dungavel detention centre in 2004 (the only detention centre in Scotland), under central Government powers. The Scottish Children’s Commissioner argued that the detention of children contravened the Children (Scotland) Act 1995, stating ‘Immigration may well be a reserved issue, but the children aren’t. My job is to promote and safeguard the rights of all children and people in Scotland’ (BBC, 2004; Mooney and Williams, 2006, p.620).

The role of municipalities in relation to asylum seekers and immigration is discussed in Sections 3.1 and 5.

There is a significant role for non-government-organizations and the third sector in plugging the legislative gaps in helping asylum seekers, immigrants and refugees in the UK. The role of the third sector spans three areas: i) support services, ii) integration and iii) legal advice and advocacy. First, many asylum seekers and refugees face significant financial hardship and poverty. Asylum seekers are not allowed to work while their claim is being processed. They can receive housing support and up to £37.75 per person per week if they meet the stringent destitution test: they are homeless and/or do not have enough money to buy food (UK Government, 2017a). The weekly allowance must cover everything from food, and toiletries, to clothes and transportation costs. People that receive permission to remain in the UK<sup>63</sup> have access to the same benefits that British citizens have access to, with any benefits they are entitled to depending on their employment status, income, disability status and dependants (Department for Work and Pensions and the Home Office, 2018). Irregular migrants have no access to government support or services. The third sector plays a significant role in supplementing asylum support, the benefits received by those granted leave to remain, as well as helping those that do not qualify for any support (Refugee Council, 2018). Services offered include emergency provisions, advice on accessing government support, help entering the private housing market, and collecting and distributing donations from the community for example bicycles, clothing, microwaves and toys (Cambridge Refugee Resettlement Campaign, 2017; Refugee Council, 2018).

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<sup>63</sup> This includes successful asylum seekers, resettled refugees, and those granted humanitarian protection and discretionary leave to remain (Willis, 2010).

The third sector also plays an important role in providing integration services, for example mentoring, home visits, homework support, English language classes, training and education, and the organization of social groups and events (Cambridge Refugee Resettlement Campaign, 2017; Community Action for Refugees and Asylum Seekers, 2018).

Finally, the third sector also provides legal services, including legal advice, representation, drop-in legal clinics, pamphlets and other information. This is invaluable given the complexity of immigration and asylum law in the UK (Community Action for Refugees and Asylum Seekers, 2018; Rights in Exile Programme, 2017).

## 5. The Legal Status of Foreigners

There are four broad categories of migrants to the UK i) asylum seekers, who may be granted refugee status, humanitarian protection, discretionary leave to remain or restricted leave. Unaccompanied asylum-seeking children (UASC) may also be granted UASC leave ii) resettled refugees, who have either been granted refugee status or humanitarian protection prior to their arrival in the UK iii) regular migrants, who are granted work, study or family visas iii) irregular migrants, such as visa overstayers and those who enter the UK without permission.

### 5.1. Asylum Seekers

Applicants can apply for asylum upon arrival at a UK port (with the Home Office UK Border Force), after arrival at the Asylum Screening Unit in Croydon<sup>64</sup> (with UK Visas and Immigration), or in a detention centre if detained (with Home Office Immigration Enforcement) (Asylum Information Database, 2018, pp.14-15; Clayton, 2016, p.390; Home Office, 2017b; Willman and Knafler, 2009, p.23). There are three different procedural pathways depending on the circumstances of the applicant: standard procedure, accelerated procedure, and the third country procedure (Asylum Information Database, 2018, pp.13-15). The first step in all cases is a screening interview with an immigration officer, where the applicant registers their asylum claim, and the interviewer determines if they will be detained or admitted temporarily (Clayton, 2016c, p.390; UK Government, 2018c). The applicant must bring their passport or travel documents, police registration certificates and identity documents with them to the interview (UK Government, 2018c). Arriving at the interview without a current immigration document that confirms their identity and nationality can be a criminal offence, as per the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 s2. This offence is punishable by a prison sentence of up to two years<sup>65</sup>. The interview determines which procedural pathway the case will follow.

#### 5.1.1. Standard pathway

Shortly after the screening interview, the applicant will attend an asylum interview where they provide the evidence upon which their claim will be assessed to the caseworker that has been allocated to them (UK Government, 2018c; Immigration Rules, Part 11, Para 339NA). The initial decision is usually made within six months if the case is straightforward (UK Government, 2018c). Refugee status, humanitarian protection and discretionary leave may be granted. If the applicant is not granted leave to remain they will need to leave the UK either voluntarily or by compulsion. The decision not to grant refugee or any other protection status can be appealed, as outlined in Section 3.4.1 above (UK Government, 2018c).

<sup>64</sup> Recently renamed the Asylum Intake Unit, although this name change doesn't appear in all official information (Asylum Information Database, 2018, p.15).

<sup>65</sup> It is not an offence to attend an interview without the requisite documentation if the interview takes place after the applicant has already entered the UK, and the applicant is able to produce the required document within three days of the interview (s 2(3)). There are certain defences permitted as outlined in ss 2(4-5) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. In the first six months since s2 of the Act came in to force, at least 230 asylum seekers were arrested, and 134 convicted of this new offence (Taylor and Muir, 2005). Multiple asylum seekers have received jail sentences (BBC, 2015).

### 5.1.2. Accelerated procedure

If an application is deemed to be ‘clearly’ unfounded by the Secretary of State (as per the Nationality, Immigration and Asylum Act 2002), the claim will be refused and the person removed from the UK. The applicant is prohibited from appealing within the UK in such cases (non-suspensive appeal), and can only do so via judicial review (Asylum Information Database, 2018, p.15; Clayton, 2016, p.400). A case can be certified as ‘clearly unfounded’ on the basis of individual circumstances, as well as if they are on a list of countries designated as safe (Nationality, Immigration and Asylum Act 2002 s 94). A second accelerated procedure – Detained Fast Track (DFT) – was suspended in July 2015 following multiple successful legal challenges brought by *Detention Action*<sup>66</sup>. DFT allowed applicants to be detained while their claim was being processed if the Home Office determined a decision could be reached quickly (Asylum Information Database, 2018, p.15; McGuinness and Gower, 2017, p.9).

### 5.1.3. Third Country Pathway

If it is determined at the initial screening interview that the applicant passed through a safe third country en route to the UK, their case will be referred to the Third Country Unit within the Home Office (Asylum Information Database, 2018, p.15). An asylum claim will not be substantively considered in the UK if another EU state has granted that person protection, if a non-EU member state is deemed to be the first country of asylum, if a non-EU member state is deemed to be a safe third country, and if the Dublin Regulation applies (for further details see Immigration Rules Part 11, Paras 345A-345E). The Dublin III Regulation permits detention of a person if there is a significant risk of absconding (Article 28(2)), however detention cannot exceed six weeks (Article 28(3)). The Home Office detains most people subject to the Dublin III Regulations according to its determination that most people are at high risk of absconding (Right to Remain, 2017a, p.2). The UK must issue the transfer request within one month if the applicant is detained (Article 28(3)). If the EU member state accepts the transfer request the UK has six months to transfer the applicant (Article 29(1)), with some exceptions (Article 29(2)). Applicants cannot appeal a removal decision in third country instances, with their only avenue being judicial review by the Upper Tribunal (Tribunals Courts and Enforcement Act 2007 s 16).

### 5.1.4. Rights and Duties

The Home Office administers support provided to destitute asylum seekers who have not been detained. If an asylum seeker and their dependents demonstrate that they are destitute at the time they lodge their asylum application, they will be eligible for temporary ‘Section 98’ support while they wait for their application for longer term support to be processed (‘Section 95’

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<sup>66</sup> Various elements of the DFT process were ruled unlawful in *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin), *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634 and *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin). The unlawful elements were the delayed allocation of lawyers to detainees; the detention of all asylum seekers who meet the quick processing criteria while they are appealing their refused asylum seekers claim for reasons of clarity and transparency; and the DFT procedural appeals rules on the grounds of the unfairness of the short timeframes involved, respectively.

support)<sup>67</sup>. Beneficiaries of Section 98 support are usually housed in reception centres, which the Home Office has contracted to three private providers to operate since 2012: Serco, G4S and Clearsprings Group (House of Commons Home Affairs Committee, 2017, p.3). The contracted providers must supply three meals a day, bedding, and toiletries (House of Commons Home Affairs Committee, 2017, p.12). Section 98 beneficiaries are not entitled to financial support, so anything beyond meals and board can only be provided by non-governmental organizations and charities (House of Commons Home Affairs Committee, 2017, p.13). Section 98 support can be withdrawn once the asylum seeker starts receiving Section 95 support, or if their Section 95 application fails (Asylum Support Appeals Project, 2017, p.2). Reception policies are not tailored to the needs of vulnerable asylum seekers, such as trafficking victims, torture survivors and people with mental illnesses and disabilities. There is no formal process in law for identifying vulnerable asylum seekers, and limited support available if their needs do become known.

Section 95 support gives housing and a monetary allowance to asylum seekers and their families who pass the destitution test while their asylum claim is being processed<sup>68</sup>. The monetary allowance is currently £37.75 per family member per week (Asylum Information Database, 2017, p.62; UK Government, 2017a). A pregnant woman or a parent with a child between the ages of one and three gets an additional £3 per week to buy healthy food, while a parent with a child under five years of age gets an additional £5. There are additional one-off maternity payments available as well (UK Government, 2017a). The weekly allowance is only 52% of what a British benefit recipient receives and leaves many asylum seekers struggling to make ends meet (Asylum Information Database, 2018, p.65). As with accommodation provided under Section 98 support, Section 95 support housing has been contracted to the same three companies to provide and manage asylum seeker accommodation<sup>69</sup> (Asylum Information Database, 2018, p.69). Asylum seekers are generally housed in privately owned flats and share houses, and have no choice which region they will live in (Asylum Information Database, 2018, pp.68-9). Given the Government's policy of dispersal throughout the UK, asylum seekers will not be housed in London or the South

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<sup>67</sup> As per the Immigration and Asylum Act 1999 Part VI s95 and s98, with the detail fleshed out in the Asylum Support Regulations 2000. A hallmark of these support policies has been meeting the bare-minimum needs of asylum seekers (Willman and Knafler, 2009, p.227). This has been the case for two reasons i) the Government has attempted to use destitution as a means of immigration control (despite evidence that this does not work) (Willman and Knafler, 2009, p.v) ii) asylum seekers are an easy group to target for budget cuts in the context of austerity, as they cannot vote, wield little political influence, and do not receive much public sympathy (Darling, 2016, p.489).

<sup>68</sup> The application process to receive Section 95 support is not easy – the application form is 33 pages long, in English, and can only be accessed online (Asylum Information Database, 2018, p.63). The Home Office can also refuse to provide support to asylum seekers who did not lodge their asylum claim as soon as possible (usually three days from arrival in the UK), although as per the High Court ruling in *R (Limbuella) v Secretary of State for the Home Department* [2006] 1 AC 396, this cannot result in forcing people to sleep on the streets (Asylum Information Database, 2018, p.63; Asylum Support Appeals Project, 2016, p.2).

<sup>69</sup> There are several problems with the current system of outsourcing to the private sector: i) the provision of sub-standard accommodation and failure to fulfil all contractual obligations, due to fiscal pressures faced by two of the three companies who are running at a loss (House of Commons Home Affairs Committee, 2017, p.3, pp.49-50) ii) there is a high degree of complexity, with the three providers being at the centre of a convoluted web of contractors, sub-contractors and hundreds of private land lords, with instances of poor communication between the private providers and local authorities, the local community, the Home Office, the third sector and devolved governments (House of Commons Home Affairs Committee, 2017, p.3, p.14, p.23, p.49).

(Asylum Information Database, 2018, p.68). Local authorities choose whether they will allow asylum seekers to be housed in accommodation in their area, with only 121 local authorities out of 453 having asylum accommodation (House of Commons Home Affairs Committee, 2017, p.16).

Section 95 support may be withdrawn on multiple grounds such as obtaining Section 95 support on false pretences (for example, concealing financial assets); failure to comply with conditions of support (for example periods of absence from the accommodation, or having guests stay); and exhibition of extremely violent behaviours (Asylum Information Database, 2018, p.66). Support can also be withdrawn if the asylum seeker's circumstances change and they are no longer destitute (Asylum Support Appeals Project, 2016, p.2). However, asylum support is rarely withdrawn in practice (Asylum Information Database, 2018, p.66; Asylum Support Appeals Project, 2016, p.3). Section 95 support lasts for the duration of the asylum process. The support will end 28 days after an asylum seeker has been granted leave to remain, or if unsuccessful, 21 days after appeal rights have been exhausted or have expired (Asylum Information Database, 2018, p.62). The Immigration Act 2016 provided for support to be withdrawn from refused asylum seekers with children, although this part of the act has not yet been implemented (Asylum Information Database, 2018, p.62).

Asylum seekers are usually not permitted to work while their claim is being assessed. An exception is if the initial decision on their claim has not been made after one year, with the delay not being the fault of the applicant (Willman and Knafler, 2009, p.25). It is obligatory for all children between the ages of five and 17 to attend school. State schools are free and places can be applied for via the local council (UK Government, 2017a). In England, asylum seekers and their dependents are entitled to free primary and secondary healthcare provided under the National Health Service, including maternity care, General Practitioner appointments and non-emergency hospital care (HM Government National Health Service (Charges to Overseas Visitors) Regulations 2015 No. 238, as amended in 2017). Those in receipt of Section 95 support, or who qualify on the basis of low income, are also entitled to free dental care, prescriptions and eye tests. Refused asylum seekers are only entitled to free secondary health care if they receive support from the Home Office or a local authority<sup>70</sup>. Similar entitlements apply in Scotland, Wales and Northern Ireland, except that failed asylum seekers and their dependents have access to free health care on the same basis as citizens and permanent residents (Scottish Government Healthcare Policy & Strategy Directorate, April 2010, CEL 9 (2010) Overseas Visitors' Liability to Pay Charges for NHS Care and Other Services; NHS (Charges to Overseas Visitors) (Amendment) (Wales)(Regulations 2009); Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015 SI No. 27 reg. 9). Asylum seekers may be eligible for legal aid if they cannot afford to pay their own legal costs (UK Government, 2018e). Asylum seekers waiting for the outcome of their application cannot sponsor a family member to join them. However, when lodging their initial asylum application, a person can include their spouse, partner and children as dependents in their application if they are with them in the UK at the time (Home Office, 2018c and 2016c, p.15). Duties imposed upon asylum seekers include meeting any reporting requirements, cooperation with the Home Office and giving truthful information, complying with the law, and supervision of any dependents under the age of 16 (UK Government, 2014).

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<sup>70</sup> Some secondary healthcare services are free to all irrespective of immigration status, such as accident and emergency services, family planning services and palliative care services.

## 5.2. Beneficiaries of International Protection

There are three types of protection status that can be granted in the UK: refugee status, humanitarian protection and discretionary leave to remain. The application procedure is the same for each, and is outlined above in Section 5.1. However once granted, the three categories have different rights, as outlined below.

### 5.2.1. Refugee Status

There are several criteria for being granted refugee status in the UK: i) the applicant must have left their country of origin ii) the applicant must be unable to return to any part of their home country for fear of persecution, whether it be on the basis of race, religion, nationality, political opinion, gender, gender identity, sexual orientation or any other reason that puts the applicant in danger due to the social, religious, cultural or political situation in the home country iii) the authorities in the applicant's home country must have failed to protect them (UK Government, 2018c). Those who are granted refugee status have permission to stay in the UK for five years<sup>71</sup>, after which time they can apply for indefinite leave to remain (Willman and Knafler, 2009, p.33). Refugee status may be revoked if: i) the Refugee Convention no longer applies (for example the person relocates to their country of origin); ii) the person is excluded from the protection of the Refugee Convention (for example it is determined the person has committed a war crime) iii) it becomes apparent that the person gained refugee status via deception iv) the person poses a significant danger to the security of the UK or the public (for example being convicted of a serious crime) (Home Office, 2018o and 2016, p.12; UNHCR, 2010, p.16; Willman and Knafler, 2009, p.33). Refugee status can be revoked during the initial five-year period of leave to remain, while awaiting the outcome of a settlement application, and once the refugee has been granted indefinite leave to remain (which they hold concurrently with their refugee status) (Home Office, 2016a, p.13). If a refugee acquires British citizenship, they cannot have their refugee status revoked on the above grounds as they are no longer a refugee (they have their refugee status revoked upon acquiring British citizenship). However, if it is discovered that a British citizen gained their previous refugee status by deception, or engaged in activities that excluded them from the Refugee Convention, their ongoing entitlement to British citizenship may be reviewed by the Home Office (Home Office 2016, pp.12-13). Review of refugee status is only routine in instances of criminal conviction, where the refugee has been outside the UK for two years, or if the refugee acquires British citizenship (Asylum Information Database, 2018, p.95; Home Office, 2016a, p.13).

A person who receives refugee status is allowed to have their immediate family join them in the UK, that is, a spouse or partner, and children under the age of 18, subject to certain conditions (Asylum Information Database, 2018, pp.96-7; Willman and Knafler, 2009, p.34).

Once granted refugee status, those who have been receiving Home Office support as a destitute asylum seeker will continue to do so for a further 28 days while they transition to the mainstream benefits and housing system (whether privately renting, buying or entering the public housing system) (Asylum Information Database, 2018, p.98). This transition is challenging as often public housing is only allocated to adults with dependents, disability or illness, while the private housing market is expensive and often requires a lump sum deposit which is beyond the means of most refugees (Asylum Information Database, 2018, pp.98-9).

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<sup>71</sup> An exception is if people are determined to be a threat to the UK's security or the public (Willman and Knafler, 2009, p.33)

This means that refugees are reliant on social networks, friends and the third sector for accommodation during this period, or otherwise face homelessness<sup>72</sup> (Stewart and Shaffer, 2015, p.60). Applications for benefits can take weeks to process, and there are additional hurdles such as opening a bank account which can be difficult before having a regular income (Asylum Information Database, 2018, p.99). Formally, refugees have the same access to the labour market as British citizens, however in practice there are obstacles such as English language proficiency and the conversion of qualifications attained in their country of origin (Asylum Information Database, 2018, p.99). Refugees can also theoretically access professional training, although cost is a barrier. Education is compulsory for children until they reach the age of 16, and state schools are free of charge for all children irrespective of whether they are refugees or British citizens (Asylum Information Database, 2018, p.99). Higher education is available to refugees, who are treated as domestic students in terms of tuition fees and access to student support (Asylum Information Database, 2018, p.100). Refugees and their dependents receive free health care from National Health Services on the same basis as Scottish<sup>73</sup>, English<sup>74</sup>, Welsh<sup>75</sup> and Northern Irish<sup>76</sup> citizens. Refugees have the same access to Government-provided legal aid as British nationals, with eligibility for legal aid depending on their financial situation and the nature of their case (UK Government, 2018e). Asylum claims are the only immigration cases that can receive legal aid in England and Wales, which, for example means that applications for family reunion under the Refugee Convention are excluded from legal aid.<sup>77</sup> In Scotland and Northern Ireland legal aid is available for all immigration matters (Right to Remain, 2017b, pp.1-2)

Refugees resettled in the UK, for example via the Syrian Vulnerable Person Resettlement Scheme<sup>78</sup>, also formally have the same access to housing, education, benefits and health care as British nationals. However, they are entitled to additional support beyond that given to refugees that go through the asylum process. They are able to claim a small lump sum payment from the Home Office upon arrival in the UK, and receive support in opening bank accounts, signing leases and claiming benefits (Asylum Information Database, 2018, pp.98-9). Note that prior to 1 July 2017, resettled refugees received humanitarian protection, whereas now they receive refugee status. Those who arrived in the UK before 1 July 2017 are able to switch to refugee status (Asylum Information Database, 2018, p.12, p.60).

## 5.2.2. Humanitarian Protection

A person may be granted humanitarian protection if they do not meet the criteria for refugee status, but would nonetheless face serious harm if they were returned to their country of origin

<sup>72</sup> Homelessness is not uncommon amongst refugees, with 40% of refugees interviewed by Stewart and Shaffer (2015: 60) having experienced homelessness.

<sup>73</sup> As per the National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989 No.364

<sup>74</sup> As per HM Government National Health Service (Charges to Overseas Visitors) Regulations 2015 No. 238, as amended in 2017.

<sup>75</sup> As per the National Health Service (Charges to Overseas Visitors) Regulations 1989 No.306

<sup>76</sup> *Provision of Health Services to Persons not Ordinarily Resident Regulations (Northern Ireland) 2005 No. 551.*

<sup>77</sup> Some exceptions include victims of trafficking, domestic violence and cases involving the Special Immigration Appeals Commission (Right to Remain, 2017b, p.2).

<sup>78</sup> Please see Section 6.1 for further information about the Syrian Vulnerable Person Resettlement Scheme.

(Immigration Rules, Part 11 Paras 339c and 339A)(i). A person will not be granted humanitarian protection if they have committed a serious crime (such as a war crime or crime against humanity), have acted in a way that is inconsistent with the principles of the United Nations, are a threat to the security of the UK, are a danger to the community, or who have committed a crime in their country of origin that would, if committed in the UK attract a custodial sentence, and fled to escape punishment (Home Office, 2017, pp.16-17). Holders of humanitarian protection are granted permission to stay in the country for five years, after which time they can apply for indefinite leave to remain (UK Government, 2018c; Willman and Knafler, 2009, p.34).

Like refugee status, humanitarian protection can be revoked during the initial five-year visa period, while awaiting the outcome of a settlement application, and once the person has been granted indefinite leave to remain (Home Office, 2017, p.23). Humanitarian protection may be revoked if i) the conditions warranting humanitarian protection no longer apply ii) the person is excluded from humanitarian protection iii) the person gained humanitarian protection via deception (Home Office, 2018o). A criminal conviction should trigger the automatic review of the person's humanitarian protection status. A person's case will also be reviewed if evidence arises that they may meet one of the grounds for revocation listed above, such as evidence included in a family reunion application indicating that the protected person lied in their original asylum application (Home Office, 2018o).

Holders of Humanitarian Protection have the same rights to family reunion, housing, the labour market, the welfare system, professional training, education, healthcare and legal assistance as refugees (and British nationals), although like refugees, these rights are often *de jure* not *de facto* (Asylum Information Database, 2018, pp.96-100; Willman and Knafler, 2009, p.35). In access to higher education however there are differences between refugees and those with humanitarian protection. Holders of humanitarian protection must live in the UK for three years before gaining access to domestic student fee rates and student loans (Asylum Information Database, 2018, p.100).

### 5.2.3. Discretionary and Other Types of Leave

Asylum seekers who are not eligible for refugee status or humanitarian protection may be granted discretionary leave on exceptional humanitarian or compassionate grounds (Asylum Information Database, 2018, p.6; Home Office, 2015a, p.8). Leave is granted for those cases that fall outside the Immigration Rules on a discretionary basis, as determined by UK Visas and Immigration (Home Office, 2015a, p.4). An example of when Discretionary Leave may be granted is in situations of severe illness, where return to the person's country of origin would constitute inhuman or degrading treatment (as per Article 3 of the ECHR)<sup>79</sup>. Discretionary Leave may also be granted in some instances of trafficking, or situations involving unaccompanied asylum-seeking children (see Section 5.5 for further details). The length of time granted depends on the individual case, but is generally no more than 30 months (Home Office, 2015a, p.5). The person can reapply for discretionary leave after the 30 months, and

<sup>79</sup> The threshold for a breach of Article 3 is very high however. As per *D v United Kingdom* [1997] 25 EHRR 423, *N v Secretary of State for the Home Department* [2005] UKHL31 and *GS (India) & Ors v The Secretary of State for the Home Department* [2015] EWCA Civ 40, only exceptional circumstances would trigger Article 3 protections – where a terminally ill patient in the later stages of their illness faces return to their country of origin where they would not have access to palliative care or a support network.

then after ten years of living in the UK can apply for indefinite leave to remain (Home Office, 2015a, p.15). Discretionary leave may be curtailed or ceased on the following grounds: if the reasons the person was granted discretionary leave no longer apply (for example a medical condition improves), the person becomes a threat to national security or commits a serious crime, the person gained discretionary leave by deception (Home Office 2015a, pp.18-19). Discretionary leave holders can access benefits, the labour market and the housing market (both private and council housing). Since 2011, holders of discretionary leave to remain were treated as international students (and were therefore not eligible for domestic fee rates, student support or student finance), However, the Supreme Court decision in *R (Tigere) v. Secretary of State for Business* [2015] UKSC 57, ruled that the universal denial of student loans to those who do not hold indefinite leave to remain breached their rights under Article 2 (Protocol 1) and Article 14 of the ECHR. As a result of the ruling, the Student Loans Company introduced an interim policy for handling applications from holders of discretionary leave (and other forms of limited leave), while the Department for Business, Innovation and Skills contemplates how to best accommodate the judgment (Hubble and Foster, 2015, pp.3-8). Holders of discretionary leave are not entitled to bring their family members to the UK to join them (Clayton, 2016, p.429). In Wales, Scotland and Northern Ireland, any person (and their dependents) who has lodged a formal asylum application is eligible for the same health care entitlements as citizens and residents, irrespective of the outcome of their application<sup>80</sup> (including the granting of Discretionary Leave). In England, holders of Discretionary Leave are not an exempt category for the purposes of health care charges, although the Secretary of State can approve treatment for persons granted leave outside the immigration rules in exceptional humanitarian circumstances) (HM Government National Health Service (Charges to Overseas Visitors) Regulations 2015 No. 238). All people in England are entitled to primary healthcare (including General Practitioner appointments), as well as certain categories of secondary health care (including accident and emergency services, family planning services, and treatment for some diseases) free of charge (HM Government National Health Service (Charges to Overseas Visitors) Regulations 2015 No. 238).

Restricted leave can be granted to people who are excluded from refugee status and humanitarian protection (for example because they committed a serious crime or threaten the security of the UK), but whose human rights would be abrogated if they were to be removed (Home Office, 2016b, pp.6-7)<sup>81</sup>. In such instances leave is granted outside the immigration rules by the Office for Security and Counter Terrorism, Home Office (Home Office, 2016b, p.12). An example of Restricted Leave is the case of *R. (on the application of Kardi) v Secretary of State for the Home Department* [2014] EWCA Civ 934. This case concerned a Tunisian man who was convicted in France of weapons smuggling-related charges. He applied for asylum in the UK, however his application was rejected given that his conviction made him ineligible under Article 1F of the Refugee Convention. He was instead granted

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<sup>80</sup> National Health Service (Charges to Overseas Visitors) Regulations 1989 No.306 (which cover Wales); the National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989 No.364; *Provision of Health Services to Persons not Ordinarily Resident Regulations (Northern Ireland) 2005 No. 551*.

<sup>81</sup> As per the Immigration Act 1971 s 3(1)(c) and s 24(1)(b)(ii); the Nationality, Immigration and Asylum Act 2002 ss 72(2), 76, 82, 94 and 96; UK Borders Act 2007 ss 32 and 33; Part 9, 11 and 13 of the Immigration Rules; Immigration Rules Paragraph 8(c) of Appendix AF, Paragraph S-LTR.1.8 of Appendix FM and Paragraph S-ILR.1.9 of Appendix FM.

discretionary leave because return to Tunisia would risk his Article 3 ECHR rights being contravened.

Leave is usually granted for a maximum of six months, after which it may be renewed (Home Office, 2016b, p.14). There is no limit to how many times restricted leave can be renewed, as long as the person still satisfies the qualifying criteria. Restricted leave is reviewed regularly, so that the person can be removed from the UK as soon as it would no longer breach their human rights to do so (Home Office, 2016b, p.7). The conditions attached to grants of restricted leave vary from case to case, however in most cases employment is restricted (and is sometimes prohibited), study is prohibited and the person is not entitled to any public funds, housing or benefits unless that would render them destitute (Home Office, 2016b, pp.14-15, p.18). In terms of healthcare, the same entitlements apply as with holders of discretionary leave, outlined above. Residence conditions can also be imposed obliging the person to receive permission from the Secretary of State in order to move houses (Home Office, 2016b, p.20). Holders of restricted leave cannot sponsor a family member to come to the UK to join them (Home Office, 2016b, p.13).

### 5.3. Regular Migrants

There are three broad categories of regular immigrants to the UK: those that immigrate for work, study and family<sup>82</sup>. The visa (or 'entry clearance') system for regular migrants is incredibly complex, with multiple different visa types under each category (for example there are at least 16 different work visas). Each visa has different eligibility criteria, entitlements and conditions attached to it, and the duration varies<sup>83</sup>. Generally speaking, visas may be refused if the applicant does not meet the specific eligibility criteria, has a criminal history or is a threat to national security, has committed an immigration offence in the past, has a National Health Service or litigation debt, or if the application contains evidence of forgery, fraud or dishonest information (UK Visas and Immigration, 2018b, p.3). Applications have also been refused because of minor errors, which are made ever the more likely given the growing complexity of the visa system (Clayton, 2016, p.329). Other conditions that must be met include the payment of an 'immigration health surcharge' when the applicant lodges their immigration application, allowing them to use the National Health Service<sup>84</sup> (UK Government, 2018f); further, residents of 102 countries who are applying to live in the UK for more than 6 months must also have a tuberculosis test, including evidence of a positive result with their application (UK Government, 2018g).

Once living in the UK, there are also several conditions that the visa-holder must comply with, depending on the type of visa. Breach of these conditions may mean revocation of the visa and removal from the UK. A visa may also be cancelled if the visa-holder's circumstances change, for example if a student on a Tier 4 visa takes a break from their studies, their university (sponsor) must notify the Home Office who will bring forward to expiry date of their

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<sup>82</sup> This section does not consider short-term visas such as visitor and transit visas.

<sup>83</sup> Beyond its commitments as a member of the EU and European Economic Area, the UK does give preferential treatment to citizens of certain countries based on reciprocal arrangements, however this is generally in the area of visitor visas, rather than residence visas (exceptions are the Tier 5 (Youth Mobility) visa and the Turkish Businessperson visa, outlined in Annex V).

<sup>84</sup> Which is £150-200 per year of the visa, which must be paid upfront. Visa-holders however still must pay for some types of healthcare, including prescriptions, dental care and eye tests.

visa (London School of Economics, 2018). Committing a serious offence is automatic grounds for the deportation of non-British nationals, and thus cancellation of their leave to enter or remain status (as per the UK Borders Act 2007) (McGuinness, 2017a, p.5). The Secretary of State can also deport foreign nationals and revoke their leave to remain if it would be beneficial for the public good (McGuinness, 2017a, p.5). Current UK residence visas are listed in Annex V below, along with their specific eligibility criteria, conditions, and the entitlements they bestow.

Visas can be granted either inside the point-based system (PBS)<sup>85</sup>, or outside it. Most work routes and study visas fall within the PBS, while family reunion visas fall outside it. The PBS was introduced to make immigration more transparent, objective and flexible, however since its introduction in 2008, it has become increasingly complex and restrictive, with widening scope for subjective decision-making (Clayton, 2016, pp.328-9). Although the hallmark of points-based systems is meant to be flexibility, whereby an applicant who falls short in one eligibility category can still gain entry by performing well in another, this has entirely disappeared from the UK system (Clayton, 2016, p.329). The PBS is also exceptionally complex, with the guidance on Tier 2 visas being 75 pages long; and expensive, with fees for applications lodged outside the UK ranging from £244 for a Tier 5 Temporary Worker visa to £1,623 for a Tier 1 (Investor) visa (Clayton, 2016, p.331; UK Visas and Immigration, 2018a, p.1). The PBS is also subject to rapid change, with work visa categories regularly being established and discontinued, reflecting the Government's attempts to both limit immigration, and be responsive to employer demands to have the skilled employees they need (Clayton, 2016, p.52). With the exception of Tier 1, all PBS applications require a sponsor (in the case of student visas, the sponsor is the educational institution) (Clayton, 2016, p.334). Sponsorship has become costly and burdensome, with sponsors having many reporting obligations to the Home Office, for example if a student misses enrolment or an employee has unapproved absences (Clayton, 2016, p.334). The consequences can be devastating, with companies and universities having their sponsorship license revoked if they are deemed non-compliant (Clayton, 2016, p.335).

Family visas fall outside the PBS (except for PBS applicants who apply for dependents to join them). Family migration has been an area of concern for the UK Government, particularly since the 1960s, when immigration from the Commonwealth was in full swing (Clayton, 2016, p.271). Whereas the Government can more easily control who enters the UK on a work or student visa, and ensure this aligns with the UK's economic interests, immigrants moving to the UK to join family can gain entry when they might not have otherwise through other routes (Clayton, 2016, p.271). Balancing the interests of British citizens who want their family to join them with tight immigration control has been a perpetual challenge, often resulting in restrictive policies regarding family immigration (Clayton, 2016, p.271-2).

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<sup>85</sup> The PBS comprises five tiers, only four of which are active – Tier 1 includes investor, entrepreneur and exceptional talent visas; Tier 2 includes skilled worker visas; Tier 4 includes student visas, Tier 5 includes temporary worker visas. The logic of the PBS is that applicants must accumulate a certain number of points across different categories in order to be successful (for example English language capabilities, qualifications, or a certain amount of savings).

## 5.4. Undocumented Migrants

There are several ways of becoming an undocumented immigrant in the UK: i) entering the country without permission (for example clandestinely in a lorry) ii) entering the country with permission, but then overstaying a visa iii) remaining in the country after an asylum claim and/or appeal has been refused iv) no longer having the requisite documentation or papers (whether via loss, accident or an employer or partner holding on to them) v) being born to undocumented immigrant parents (citizenship is not automatically given to babies who are born in the UK) (Housing Rights Information, 2018; Library of Congress, 2016; Migration Watch UK, 2017, p.1). Most undocumented migrants are thought to be visa overstayers (Library of Congress, 2017; Vollmer, 2011).

The legislation surrounding undocumented migrants in the UK is expansive and strict. The Immigration Act 1971 Part 3 criminalizes entering the UK without leave or in breach of a deportation order, using deception to gain entry<sup>86</sup>, remaining beyond the period of leave granted and breaking the conditions attached to a visa. The Immigration Act 2014 ss 40 and 46 prevents undocumented migrants from opening bank accounts and being granted driving licenses<sup>87</sup>. As discussed previously, aiding undocumented immigrants can also be a criminal offence – helping someone to enter the country unlawfully, employing an undocumented migrant and renting housing to undocumented migrant are all crimes (Immigration Act 1971 s 25, Immigration Act 2014 s 22, Immigration, Asylum and Nationality Act 2006, s 15). This means undocumented migrants have few rights in the UK – both working and renting private housing are criminal offences, while undocumented migrants are unable to access benefits, homelessness assistance and council housing (Homeless Link, 2016, p.4). Primary and emergency healthcare is available to all people free of charge, including undocumented migrants. There are concerns that undocumented migrants may be wary of seeking health care as a result of a Memorandum of Understanding between National Health Service Digital and the Home Office, which allows confidential patient data to be given to the Home Office to help track immigration offenders (Iacobucci, 2018). Although all children between the ages of five and 16 must attend school in the UK and can do so free of charge at state schools, undocumented child migrants can face barriers to enrolment in practice (Signoa and Hughes, 2012, p.30). Such barriers include difficulties providing identity documents, the discretion schools enjoy as to whether they enrol undocumented migrants, undocumented parents being fearful of discovery by the authorities, and language challenges (Signoa and Hughes, 2012, p.30). Access to pre-schooling and education beyond the age of sixteen is virtually impossible, due to the cost of nurseries and visa status requirements for further and higher education (Sigona and Hughes, 2016, p.viii).

## 5.5. Unaccompanied Foreign Minors

There are several ways unaccompanied children can enter the UK – for example as a Tier 4 (child) student visa-holder, on a standard visitor visa (with written parental permission), as an unaccompanied asylum-seeking child (UASC), under the ‘Dubs Amendment’ (see Section 6.3

<sup>86</sup> This can include asylum seekers who apply for entry as a visitor, but then who lodge an asylum claim shortly after (Willman and Knafler, 2009, pp.17-18).

<sup>87</sup> Without records such as bank statements and driver’s licenses, it can be hard for unauthorised immigrants to prove how long they have lived in the United Kingdom for regularization purposes (Library of Congress, 2017).

for more details), as part of the Dublin System, or as a child trafficking victim. The law necessarily treats these categories of children very differently<sup>88</sup>. This section deals with UASC.

UASC go through a different process to the usual asylum seeker pathways outlined above in Section 5.1. UASC do not attend a screening interview. If they are already in the care of a local authority, the child will attend an appointment with a Home Office immigration officer to register their claim for asylum. If the child is not yet in the care of a local authority, they will attend a 'welfare interview' with an immigration officer. Biometric data is taken at both types of appointments, and if the child is under the age of 16, a responsible adult who is independent of the Home Office will attend the appointment as well (Asylum Information Database, 2018, p.19). Unlike other asylum seekers, UASC will have a publicly-funded legal representative attend their interview (Asylum Information Database, 2018, p.25). Age assessment processes in the UK have been criticised by various non-governmental-organisations and researchers (see for example Coram Children's Legal Centre, 2017a; Dehaghani, 2017; Refugee Council, 2015). Criticisms have centred on the detention of presumed-adults who have subsequently been found to be children, reliance on the ineffective indicators of demeanour and appearance when making initial age assessments, the delegation of age assessments to social workers, and a 'prevailing culture of disbelief' when dealing with young asylum seekers (Coram Children's Legal Centre, 2017a, pp.1-2; Refugee Council, 2015; Dehaghani, 2017). Some of these concerns have been addressed in updated Home Office guidelines, published on 26 February 2018<sup>89</sup> (Asylum Information Database, 2018, p.44). Ongoing concerns relate to the policy that claimants must be treated as adults 'if their physical appearance and demeanour very strongly suggest that they are significantly over 18 years of age', as independently assessed by two Home Office staff (Home Office, 2018p, p.11).

Those determined to be under the age of 18, or given the benefit of the doubt, are transferred into the care of the social service department of a local authority while their claim is processed (Asylum Information Database, 2018, p.76). The local authority must look after the following needs of UASC (as well as other children in their care): i) health ii) education and training iii) emotional and behavioural development iv) identity (including religious, cultural and linguistic background v) family and social relationships vi) social presentation vii) self-care skills (Coram Children's Legal Centre, 2017b, p.1). Accommodation depends on the age and needs of the individual child. Generally, children under the age of 16 are placed with foster carers or in a children's home, while children 16 and over tend to be accommodated in quasi-autonomous housing (Coram Children's Legal Centre, 2017b, p.2; Home Office, 2017d, p.12). The experiences of UASC vary greatly, with some having positive foster care experiences and others not even having a social worker assigned to them (Asylum Information Database, 2018, p.77). More thorough guidance is needed for social workers and local authorities to understand and meet the needs of UASC (Asylum Information Database, 2018, p.76). The National Transfer Scheme was launched in July 2016. The objective of the scheme is to disperse

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<sup>88</sup> Details about Tier 4 (Child) Student visas can be found in Annex V, while more information on EU child-trafficking victims can be found on ECPAT UK's website (ECPAT, 2015).

<sup>89</sup> The guidelines incorporate a Court of Appeal ruling in the case of *Ali, R (on the application of) v The Secretary of State for the Home Department & Anor* [2017] EWCA Civ 138. The Court of Appeal confirmed that the detention of a child asylum seeker prior to deportation was unlawful, even though at the time of detention there were reasonable grounds for believing the asylum seeker was an adult. Other changes to the guidelines include the direction that Home Office staff are to treat asylum seekers as per their stated age until an age assessment has been undertaken, unless the 'Significantly Over 18' policy applies (Asylum Information Database, 2018, p.45).

unaccompanied asylum-seeking children throughout the UK, with no one region to have unaccompanied asylum-seeking children comprise more than 0.07% of the total child population (Local Government Association, 2018). If an unaccompanied asylum-seeking child arrives in a local authority with a high ratio of unaccompanied asylum-seeking children, they will be transferred to a local authority who has volunteered to take on more (Local Government Association, 2018).

UASC can be granted refugee status or humanitarian protection (Home Office, 2017d, pp.58-60). Unsuccessful UASC are only very occasionally returned to their home country, as the UK does not return children to countries where there are no safe reception arrangements in place (Asylum Information Database, 2018, p.50; Home Office, 2017d, p.62). Children who do not meet the criteria for refugee status or humanitarian protection, but who would face an inadequate reception system upon return home are usually granted UASC leave, that is, limited leave to remain in the UK for 30 months or until they are 17.5 years old (whichever is sooner). The child can reapply for leave until they reach the age of 17.5 (Asylum Information Database, 2018, p.50, p.61). Once a child turns 18 they can be returned to their home country even without adequate reception system in place (Home Office, 2017d, p.62). If a UASC does not qualify for refugee status, humanitarian protection or UASC leave and they cannot be returned to their home country, then they may be granted discretionary leave which is generally not to exceed 30 months (Home Office, 2017d, p.58). In exceptional circumstances a child may be granted indefinite leave to remain (Home Office, 2017d, p.61). Children who are granted refugee status are not able to sponsor their parents or siblings to join them in the UK, although Two Private Members' Bills to change this have recently been introduced to Parliament (Asylum Information Database, 2018, p.96).

## 6. Refugee Crisis Driven Reforms 2011-2016

Reforms and new policies that have been introduced in the context of the refugee crisis have had uneven outcomes – reflecting the Government’s clumsiness in walking the tightrope between appearing compassionate towards refugees, as well as tough on immigration control. The overall effect has been the introduction of three new policies to enable vulnerable refugees to settle in the UK, two of which have had limited success. The three programmes – the Syrian Vulnerable Person Resettlement Scheme (VPRS), the Vulnerable Children Resettlement Scheme and children relocated under the ‘Dubs Amendment’ – were introduced under the Conservative Government, with significant pressure from other Members of Parliament (McGuinness, 2017b, p.9, p.12).

### 6.1. Syrian Vulnerable Person Resettlement Scheme

The UK Government announced the VPRS in January 2014, and it was implemented two months later. The Programme followed several years of Government recalcitrance on the issue of resettling Syrian refugees, during which it had instead preferred to address the Syrian conflict by contributing humanitarian relief (McGuinness, 2017b, p.9). Initially the Government did not commit to a quota, instead promising that an unspecified number of the most vulnerable refugees would be resettled in the UK (McGuinness, 2017b, p.10). By June 2015, only 216 refugees and their dependents had arrived in the UK under the programme (McGuinness, 2017b, p.10). Following consternation from the third sector and the public at the Government’s tepid response to the refugee crisis, the Government announced in September 2015 that it would take as many as 20,000 Syrian refugees<sup>90</sup> over the next five years (McGuinness, 2017b, p.10). The definition of vulnerability (for the purposes of prioritised resettlement) was also expanded from the elderly, disabled and trauma-survivors to include children, orphans and people rendered vulnerable by their minority status (such as Yazidis and Christians) (McGuinness, 2017b, pp.10-11). As of 22 February 2018, 10,538 refugees have been resettled under the VPRS (Home Office, 2018r).

### 6.2. Vulnerable Children Resettlement Scheme

In April 2016 the Government committed to resettle up to 3,000 at-risk<sup>91</sup> children and their families from conflict zones in the Middle East and North Africa, by 2020 (McGuinness, 2017b, p.12). The scheme is not exclusive to Syrian nationals (McGuinness, 2017b, p.3). So far only 570 people have been resettled under this scheme (Home Office, 2018d).

### 6.3. The ‘Dubs Amendment’

The ‘Dubs Amendment’ is an amendment to the Immigration Act 2016 successfully advocated for by Lord Dubs. As per the amendment (section 67), the Secretary of State must allow for

<sup>90</sup> The Government announced in July 2017 that the programme would be expanded to all nationals fleeing the conflict in Syria. This means, for example, that Palestinians who had found refuge in Syria and have since been displaced by the conflict can be resettled in the UK (Electronic Immigration Network, 2017).

<sup>91</sup> The UK Government borrowed the ‘at-risk’ UNHCR definition, and includes unaccompanied children, child carers or children vulnerable to exploitation and abuse (McGuinness, 2017b, p.12).

the relocation of unaccompanied children from Europe to the UK, with the specific number to be determined in consultation with local authorities (Asylum Information Database, 2018, p.6; McGuinness, 2017b, p.13). As implemented in practice, the scheme applies to unaccompanied asylum-seeking children who are currently in France, Greece and Italy, with priority being given to those at risk of abuse or exploitation (McGuinness, 2017b, pp.13-14). There are other eligibility criteria, for example children located in Calais must be one of the following: i) 12 years or younger ii) at high risk of sexual exploitation iii) 15 or under and either Syrian or Sudanese nationals iv) under 18 with a sibling that meets one of the preceding three criteria<sup>92</sup> (McGuinness, 2017b, p.14). Controversially, the number of children to be resettled under the scheme was initially only 350, being revised slightly upwards to 480 children in April 2017. (McGuinness, 2017b, pp.15-16). The reason the Government has given for such a small number is the capacity of local authorities to care for these children (McGuinness, 2017b, pp.15-16). Only around 200 children have been transferred under the programme to date (Home Office, 2018q, p.1).

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<sup>92</sup> For further eligibility criteria, please see: Home Office, 2018q, pp.1-2.

## 7. Conclusions

An examination of the legal and policy framework has shown that migration governance in the UK is characterised by three key themes. First, the system of migration governance is incredibly complex. One reason for this is the sheer number of government actors involved in the immigration and asylum system. The dense web of public actors makes communication, coherence and collaboration more challenging. A peculiar feature of the UK system of government that makes it particularly complex is the existence of the devolved Scottish, Welsh and Northern Irish administrations, as well as the multi-tier local authority system. Not only are there challenges in clearly delineating functions, but there are tensions and conflicting objectives, for example between the executive and the judiciary, and between the UK government and devolved governments. This is further complicated by the role of the private and third sectors in the immigration and asylum system, with the UK Government subcontracting elements of the reception system to the private sector, and the third sector playing a crucial role in supporting immigrants due to legislative deficiencies. Whereas the for-profit motive of the private sector has sometimes meant inadequate service provision in the context of their costs exceeding their remuneration from the Government, the third sector plays a critical role in supporting immigrants on a not-for-profit basis. Another element of complexity is due to the detail and volume of migration legislation – both primary and secondary. There have been 12 Acts affecting immigration and asylum over the last 20 years, and thousands of Immigration Rules which are often technical and hard to understand. The complex legislative environment is particularly difficult for vulnerable immigrants to navigate.

A second, and related, feature of migration governance in the UK is its frequent evolution. Constantly changing legislation affects immigrant's everyday lives, with appeals procedures and requirements, access to Government benefits, and the criteria for being accepted as a refugee frequently shifting, often in a regressive direction. The pace of change also applies to institutional arrangements, with institutions changing names, merging and being scrapped altogether. For example, the two-tier system of immigration appeals was collapsed into one in 2005, and then replaced with a unified two-tier structure in 2010. Further, in 2008 the Border and Immigration Agency, UK Visas and part of HM Revenue and Customs were merged to become the UK Border Agency. However, in 2013 the UK Border Agency was abolished and replaced by three new bodies: UK Visas and Immigration, the UK Border Force and Immigration Enforcement. Another example is the renaming of the Asylum Screening Unit as the Asylum Intake Unit, although this name change doesn't appear in all official information (Asylum Information Database, 2018, p.15). The shifting legislative and institutional environment is difficult for migrants and their advocates to navigate and keep pace with, and can lead to confusion and difficulties engaging with the immigration system. Another major shift will take place in March 2019 when the UK exits the EU. Unless otherwise negotiated, freedom of movement between the UK and the EU will end, and the UK will no longer be bound by and able to participate in the Common European Asylum System.

A third feature of migration governance is that policies, legislation and rules regarding immigration and asylum have become increasingly regressive and far-reaching. This is to do in part with the significant power wielded by the executive in the governance apparatus. The executive, who are also members of parliament, are able to push through legislation as their party has a parliamentary majority, weakening the ability of parliament to control the executive (Carroll, 2015, p.44). Further, as discussed in Section 3.4.1, parliamentary sovereignty in the UK means that the judiciary are unable to strike down parliamentary legislation on the basis

that it is incompatible with the constitution (including the Human Rights Act 1998). This deprives the UK judiciary of an important check on parliamentary (and executive) power (Hansen, 2000, pp.241-2). As the executive and other parliamentarians are beholden to voters, hostile public sentiment towards asylum seekers and immigrants has resulted in ever tightening restrictions and an ever-greater system of control (see Section 2.1). Migration governance has become pervasive, interfering in the lives of landlords, employers, educational institutions, the National Health Service, and registrars of births, marriages and deaths. These regressive measures notwithstanding, the UK Government has generally managed not to overstep its international law obligations. The UK ratified the Refugee Convention in 1954 and acceded to the Protocol relating to the 1967 Status of Refugees in 1968. The Refugee Convention (as modified by the Protocol) was incorporated into domestic law via the Asylum and Immigration Appeals Act 1993. The UK Government has been cooperating with UNHCR on the resettlement of refugees, however UNHCR has raised several concerns regarding UK refugee and asylum policy, some of which will be elaborated below. First, UNHCR has been critical of the UK's detention of significant numbers of asylum seekers, and for being one of only a few countries that does not have a maximum timeframe for immigration detention (UNHCR, 2017a) (relevant to Article 31 of the Refugee Convention). The UNHCR and the High Commissioner for Human Rights have recommended that the UK institute a prohibition on indefinite detention, stop detaining vulnerable asylum seekers and migrants, impose time limits on detention, introduce regular judicial oversight of people's detention and increase the use of alternatives to detention (UNHCR, 2017a; Al Hussein, 2017, p.7). Second, UNHCR has been critical of the UK's narrow interpretation of the Refugee Convention grounds – with those fleeing violent conflict not deemed to be refugees unless they could demonstrate persecution above and beyond the general risks of conflict (UNHCR, 2011, p.3) (relevant to Article 1(A)(2) of the Refugee Convention).

The UK ratified the ECHR in 1951, as one of the founding members of the Council of Europe. The ECHR was directly incorporated into domestic law via the Human Rights Act 1998 (which came into force in 2000). Despite periodic political grumblings about the European Court of Human Rights (ECtHR)<sup>93</sup>, the UK has one of the strongest compliance records amongst Council of Europe member states (Jay, 2017). Compliance can be measured across two dimensions i) the number of successful complaints brought against the UK in the ECtHR, and ii) whether and how quickly the UK implements judgements handed down by the ECtHR domestically. Examining the first dimension, between 1959 and 2017 there were 545 judgements handed down by the ECtHR concerning the UK, of which 314 found at least one violation of the ECHR (European Court of Human Rights, 2018). This means that only 58% of judgements went against the UK, making the UK the sixth most complaint member state, behind Andorra, Denmark, the Netherlands, Sweden and Switzerland (King, 2018)<sup>94</sup>. The number of judgements handed down are only a fraction of the total applications made against the UK, with over 99% of applications being declared inadmissible prior to reaching the

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<sup>93</sup> The UK media and politicians have been critical of the ECtHR when they have found against the UK on particularly sensitive issues, such as the prohibition on prisoners voting (Amos, 2017: 764). After their electoral victory in May 2015, the Government, led by the Conservative Party, promised to get rid of the Human Rights Act 1998 and replace it with a Bill of Rights (although this proposal has subsequently been put on hold in light of Brexit) (Amos, 2017, p.764).

<sup>94</sup> Although a 58% adverse ruling rate does not sound particularly positive, this is a relatively low rate when compared to the 47 other Council of Europe Members. Further, as a result of the stringent admissibility criteria, only those applications that have a significant degree of merit make it all the way to the judgment phase, resulting in high applicant success rates (Donald et al., 2012, p.vii).

judgment stage (King, 2018). When factoring in these cases that don't make it past the first hurdle, the UK has an even better record. The Human Rights and Equality Commission has found that between 1999 and 2010, only 3% of applications were deemed admissible, with only 1.8% of total applications resulting in adverse judgments against the UK (Donald et al., 2012, p.xii). In the period between August 2016 and July 2017 the ECtHR made nine judgements relating to the UK, three of which related to immigration, specifically detention<sup>95</sup>.

In terms of the second dimension – the implementation of Strasbourg Court judgements – the UK also performs well, with a 'generally exemplary record' (Donald et al., 2012, p.x). A large-N study comparing the implementation performance of nine states<sup>96</sup> shows the UK to be the best performer (Anagnostou and Mungiu-Pippidi, 2014). This assessment is based on the percentage of judgments implemented, as well as the average time to implementation (Anagnostou and Mungiu-Pippidi, 2014). There are only two significant categories of cases that have not yet been implemented in the UK – concerning the UK's ban on prisoner voting, and the security forces' actions in the deaths of two people in Northern Ireland during 'the Troubles' (Amos in Moxham and Wicks, 2017, pp.1-2). Neither of these cases directly relate to immigration. The barriers to implementation in the UK are political, not institutional – the UK certainly has the resources and institutional structures to implement ECtHR judgments efficiently (Amos in Moxham and Wicks, 2017, p.2).

The UK has a challenging time ahead, as it continues to balance restrictive immigration policies, its international law obligations, and its changing relationship with Europe and beyond as it extricates itself from the EU.

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<sup>95</sup> *V.M. v. the United Kingdom* (no. 49734/12) - Violation of Article 5 § 1; *Ahmed v. the United Kingdom* (no. 59727/13) – no violation of Article 5 § 1 f) and no violation of Article 34; *SMM v. United Kingdom* (no. 77450/12) – violation of Article 5 § 1.

<sup>96</sup> These nine states are: Austria, Bulgaria, France, Germany, Greece, Italy, Romania, Turkey and the UK.

## Appendices

### Annex I: Overview of the Legal Framework on Migration, Asylum and Reception Conditions

Legislation title	Date	Type of law	Object	Link/PDF
Immigration Act 1971	Jan-1973	Statute	Replaced all existing immigration laws and amended contemporary citizenship laws. Removed the special immigration status of Commonwealth citizens, instead introducing the concept of partiality.	<a href="http://www.legislation.gov.uk/ukpga/1971/77/contents">http://www.legislation.gov.uk/ukpga/1971/77/contents</a>
British Nationality Act 1981	Jan-1983	Statute	Replaced the existing citizenship category with three new categories, and made amendments to the category of right of abode.	<a href="https://www.legislation.gov.uk/ukpga/1981/61">https://www.legislation.gov.uk/ukpga/1981/61</a>
Immigration Act 1988	Jul-1988	Statute	Restricted the settlement entitlements of Commonwealth citizens and their families.	Immigration Act 1988
Asylum and Immigration Appeal Act 1993	Jul-1993	Statute	Restricted the appeal rights of people applying to enter the UK as a visitor or short-term student.	<a href="https://www.legislation.gov.uk/ukpga/1993/23/contents">https://www.legislation.gov.uk/ukpga/1993/23/contents</a>
Asylum and Immigration Act 1996	Jul-1996	Statute	Expanded the accelerated appeal procedure for refused asylum seekers, and restricted appeal rights against return to countries deemed safe.	<a href="https://www.legislation.gov.uk/ukpga/1996/49/contents">https://www.legislation.gov.uk/ukpga/1996/49/contents</a>
Human Rights Act 1998	Oct-2000	Statute	Enacted the primary provisions of the European Convention on Human Rights into domestic legislation.	<a href="https://www.legislation.gov.uk/ukpga/1998/42/contents">https://www.legislation.gov.uk/ukpga/1998/42/contents</a>
Immigration and Asylum Act 1999	Oct-2000	Statute	Part IV superseded all previous legislation on asylum appeals, creating a 'one-stop' process. New arrangements introduced for people who overstay their visa, breach the conditions of their leave, or obtain further leave via deception.	<a href="http://www.legislation.gov.uk/ukpga/1999/33/contents">http://www.legislation.gov.uk/ukpga/1999/33/contents</a>
Nationality Immigration and Asylum Act 2002	Nov-2002	Statute	Applicants for British citizenship required to demonstrate their knowledge of UK culture and language; further amended appeal rights; asylum seekers required to apply for asylum as soon as reasonably	<a href="http://www.legislation.gov.uk/ukpga/2002/41/contents">http://www.legislation.gov.uk/ukpga/2002/41/contents</a>

			possible to receive support (with some exceptions); Exceptional Leave to Remain replaced by Humanitarian Protection, Discretionary Leave.	
Asylum and Immigration (Treatment of Claimants etc) Act 2004	Jul-2004	Statute	Appeals system restructured and new offences created regarding undocumented migrants.	<a href="http://www.legislation.gov.uk/ukpga/2004/19/contents">http://www.legislation.gov.uk/ukpga/2004/19/contents</a>
Immigration, Asylum and Nationality Act 2006	Mar-2006	Statute	Restricted appeal rights for those refused entry to the UK for work or study.	<a href="https://www.legislation.gov.uk/ukpga/2006/13/contents">https://www.legislation.gov.uk/ukpga/2006/13/contents</a>
UK Borders Act 2007	Jan-2008	Statute	Allowed asylum seekers with remaining in-country appeal options to remain eligible for support; introduced automatic deportation for serious criminal offence committed by non-EEA nationals.	<a href="https://www.legislation.gov.uk/ukpga/2007/30/contents">https://www.legislation.gov.uk/ukpga/2007/30/contents</a>
Borders Citizenship and Immigration Act 2009	Nov-2009	Statute	Extended nationality registration provisions, and allowed the UK Border Agency to perform the functions of Her Majesty's Revenue and Customs, a step towards the creation of a unified border agency.	<a href="http://www.legislation.gov.uk/ukpga/2009/11/contents">http://www.legislation.gov.uk/ukpga/2009/11/contents</a>
Legal Aid Sentencing and Punishment of Offenders Act 2012	Apr-2013	Statute	Legal aid no longer awarded in some immigration and human rights cases.	<a href="http://www.legislation.gov.uk/ukpga/2012/10/section/85/enacted">http://www.legislation.gov.uk/ukpga/2012/10/section/85/enacted</a>
Immigration Act 2014	Apr-2014	Statute	Further extended nationality registration provisions; restricted the ability of undocumented migrants to access services; stipulated certain factors that the courts must consider when dealing with Article 8 of the Human Rights Act 1998 appeals	<a href="http://www.legislation.gov.uk/ukpga/2014/22">http://www.legislation.gov.uk/ukpga/2014/22</a>
Immigration Act 2016	May-2016	Statute	Introduced further measure targeting undocumented migrants; allowed for the withdrawal of support from refused asylum seeker families	<a href="http://www.legislation.gov.uk/ukpga/2016/19/contents">http://www.legislation.gov.uk/ukpga/2016/19/contents</a>

Source: Asylum Information Database, 2018, p.11; Clayton, 2016, p.11, pp.24-6; Home Office, 2018m; Lea, 2016; No Recourse to Public Funds Network, 2016; Phelan and Gillespie, 2015; Willman and Knafler, 2009, p.8

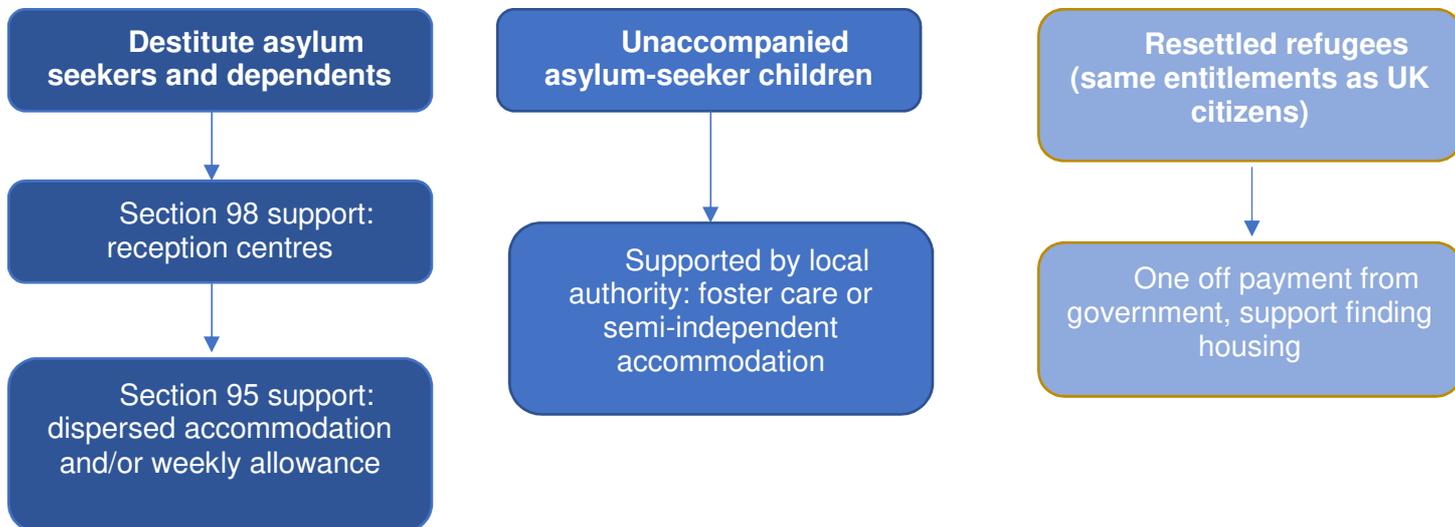
## Annex II: List of Authorities Involved in Migration Governance

Authority	Tier of government	Type of organization	Area of competence	Link
Home Office UK Border Force	UK	UK Government Department	Implements customs and immigration controls at airports and ports	<a href="https://www.gov.uk/government/organisations/uk-visas-and-immigration">https://www.gov.uk/government/organisations/uk-visas-and-immigration</a>
Home Office UK Visas and Immigration	UK	UK Government Department	Processes visitor and residency applications (including asylum applications); supports eligible asylum seekers	<a href="https://www.gov.uk/government/organisations/uk-visas-and-immigration">https://www.gov.uk/government/organisations/uk-visas-and-immigration</a>
Home Office Immigration Enforcement	UK	UK Government Department	Monitors and enforces compliance	<a href="https://www.gov.uk/government/organisations/immigration-enforcement">https://www.gov.uk/government/organisations/immigration-enforcement</a>
HM Passport Office	UK	UK Government Department	Processes British passport applications	<a href="https://www.gov.uk/government/organisations/hm-passport-office">https://www.gov.uk/government/organisations/hm-passport-office</a>
First Tier Tribunal (Immigration and Asylum Chamber)	UK	Tribunal (administered by HM Courts & Tribunals Service)	Handles appeals against Home Office decisions	<a href="https://www.gov.uk/courts-tribunals/first-tier-tribunal-immigration-and-asylum">https://www.gov.uk/courts-tribunals/first-tier-tribunal-immigration-and-asylum</a>
Upper Tribunal (Immigration and Asylum Chamber)	UK	Tribunal (administered by HM Courts & Tribunals Service)	Handles appeals against First Tier Tribunal decisions; handles applications for judicial review against Home Office decisions	<a href="https://www.gov.uk/courts-tribunals/upper-tribunal-immigration-and-asylum-chamber">https://www.gov.uk/courts-tribunals/upper-tribunal-immigration-and-asylum-chamber</a>
Supreme Court	UK	Court	Presides over appeals on arguable points of law that are of public importance	<a href="https://www.supremecourt.uk/">https://www.supremecourt.uk/</a>

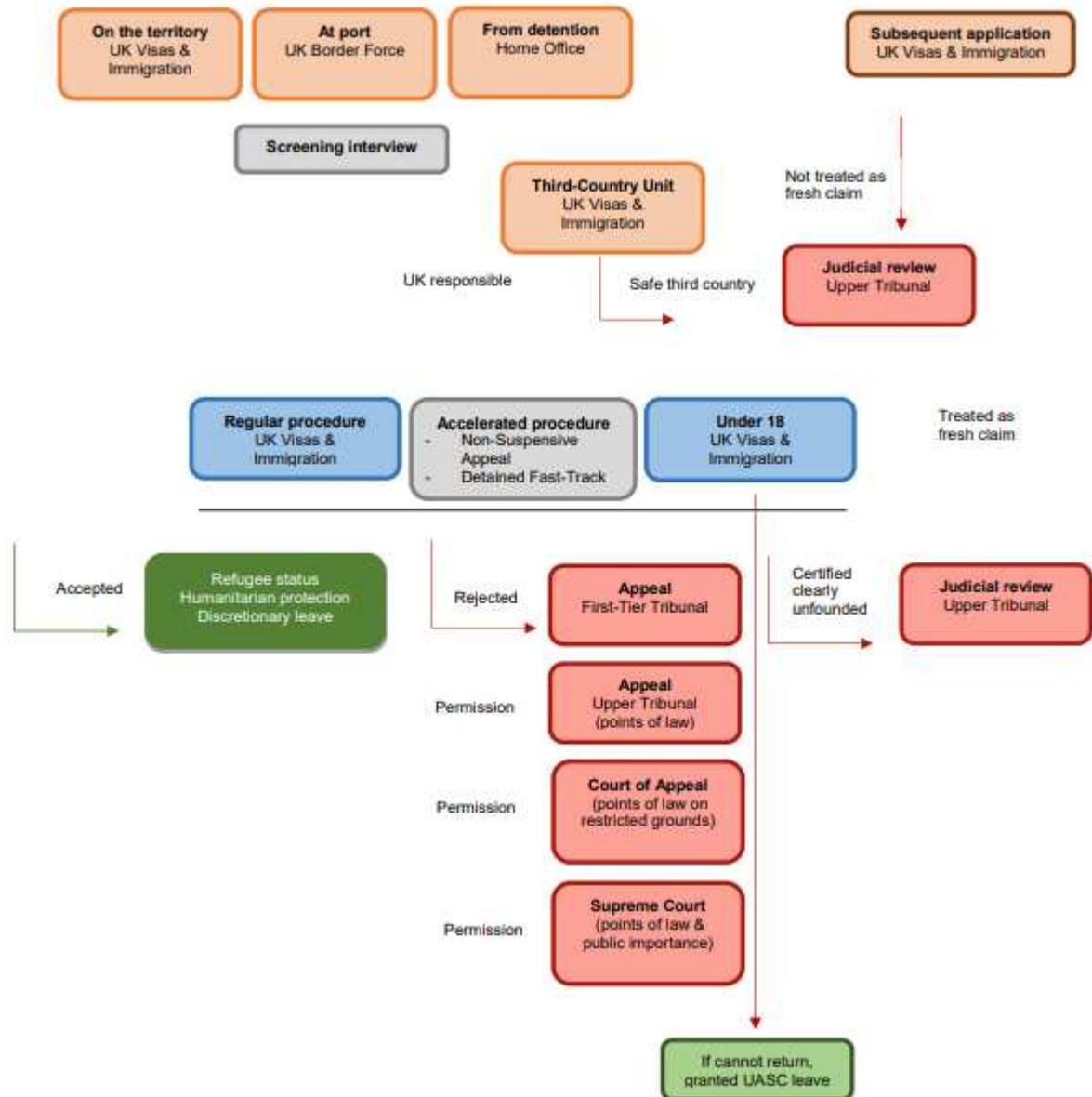
Court of Appeal (England and Wales)	National	Court	Presides over appeals on arguable points of law	<a href="https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/">https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/court-of-appeal-home/</a>
Court of Appeal (Northern Ireland)	National	Court	Presides over appeals on arguable points of law	<a href="https://www.justice-ni.gov.uk/articles/royal-courts-justice">https://www.justice-ni.gov.uk/articles/royal-courts-justice</a>
Court of Session (Scotland)	National	Court	Presides over appeals on arguable points of law	<a href="https://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session">https://www.scotcourts.gov.uk/the-courts/supreme-courts/about-the-court-of-session</a>
Scottish Government	National	Devolved Government	Education and training, health and social services, housing, law and order Local government	<a href="http://www.gov.scot/">http://www.gov.scot/</a>
Welsh Government	National	Devolved Government	Economic development, education and training, health and health services, housing, local government, social welfare	<a href="http://gov.wales/?lang=en">http://gov.wales/?lang=en</a>
Northern Irish Government	National	Devolved Government	Health and social services, education, employment and skills, social security, pensions and child support, housing, economic development, local government, equal opportunities, justice and policing	<a href="https://www.nidirect.gov.uk/articles/overview-government-northern-ireland">https://www.nidirect.gov.uk/articles/overview-government-northern-ireland</a>
Local authorities	Local	Local Government	Directly responsible for the care of unaccompanied asylum-seeking children; support of destitute people (which can include refused asylum seekers), and provision of council housing (which can be refugees if they are eligible).	Various. See: <a href="https://www.gov.uk/understand-how-your-council-works">https://www.gov.uk/understand-how-your-council-works</a> for more information.

Sources: Asylum Immigration Database, 2017, p.14; Clayton, 2016, p.243; Library of Congress, 2016; Scottish Parliament, 2018; Supreme Court, 2018c; UK Government, 2017a, 2013a, 2013b.

## Annex III: Flow Chart of the National Reception System



## Annex IV: Flow Chart of the International Protection Procedure



Source: Asylum Information Database, 2018, p.11.

## Annex V: Non-visitor Visa Categories<sup>97</sup>

### Work Visas

#### Tier 1 (Investor) visa

- Criteria. The applicant:
  - must have at least £2 million disposable funds to invest in the UK, that is either theirs or their partners, and held in a regulated financial institution/s
  - must at least 18 years of age
  - must have opened a UK bank account
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 3 years and 4 months
- Conditions. The visa-holder:
  - cannot access public funds<sup>98</sup>
  - cannot be employed as a professional sports person or sports coach, or a doctor or dentist in training (except in certain circumstances)
  - cannot invest in property investment, management or development companies
- Entitlements:
  - Work and study
  - Invest in UK Government bonds, share or loan capital in active and trading UK registered companies
  - Bring family members (partner and children)

#### Tier 1 (Entrepreneur) visa

- Criteria. The applicant:
  - must have at least £50,000 in disposable investment funds, that is held in a regulated financial institution/s, and want to set up or run a business
  - must demonstrate English language ability
  - must be at least sixteen years of age
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 3 years and 4 months
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot work in any job outside the person's business/es
- Entitlements
  - Set up or take over one or more businesses
  - Work for your business/es
  - Bring family members (partner and children)

#### Tier 1 (Graduate Entrepreneur) visa

- Criteria. The applicant:
  - must be endorsed as having a credible business idea by either a UK higher education institution or the Department for International Trade
  - must have £945 in savings (if applying inside the UK) or £1,890 in savings (if applying outside the UK)
  - must demonstrate English language ability
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 1 year
- Conditions. The visa-holder:

<sup>97</sup> The information in Annex V is taken from the UK Government's website (UK Government, 2018i).

<sup>98</sup> Public funds include most government-funded welfare benefits, tax credits, housing assistance (UK Visas and Immigration, 2014).

- cannot access public funds
- cannot be employed as a doctor, dentist in training, a professional sports person or sports coach
- Entitlements:
  - Bring family members (partner and children)

#### Tier 1 (Exceptional Talent) visa

- Criteria. The applicant:
  - must be endorsed as a recognized or emerging leader in science, the humanities, engineering, medicine, digital technology or the arts
  - must not be from a European Economic Area country or Switzerland
- Duration:
  - maximum 5 years and 4 months (if applicant applied outside the UK)
  - maximum 5 years (if applicant applied inside the UK)
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot be employed as a doctor, dentist in training, a professional sports person or sports coach
- Entitlements:
  - Employment and voluntary work (with no requirement to report to the Home Office when changing jobs)
  - Travelling and returning to the UK
  - Bring family members (partner, children and dependents)

#### Tier 2 (General) visa

- Criteria. The applicant:
  - must have been offered a skilled job in the UK, by a licensed sponsor
  - must not be from a European Economic Area country or Switzerland
  - must demonstrate English language ability
  - must have £945 to support themselves, or an ‘A-rated’ sponsor that has certified their maintenance
- Duration:
  - maximum 5 years and 14 days, or the length of sponsorship plus one month (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access to public funds
  - cannot own more than 10% of the employer’s shares, unless they earn more than £159,600 a year
  - cannot be employed in a second job until the sponsored role has commenced
- Entitlements:
  - Employment in the sponsored role and voluntary work (a second job may be allowed in some circumstances)
  - Study (as long as it doesn’t interfere with the sponsored role)
  - Travelling and returning to the UK
  - Bring family members (partner, children and dependents)

#### Tier 2 (Intra-Company Transfer) visa

- Criteria. The applicant:
  - must have been offered a job at a UK branch of their organization
  - have a valid certificate of sponsorship from a licensed sponsor
  - must have £945 to support themselves, or an ‘A-rated’ sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration:

- 9 years (long-term staff earning more than £120,000 per year)
- 5 year 1 month (long-term staff earning less than £120,000 per year)
- 1 year (graduate trainees)
- OR the length of sponsorship (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access to public funds
  - cannot start work before they have received their visa.
- Entitlements:
  - Employment in the sponsored role and voluntary work, as well as a second job in the same sector and at the same level for up to 20 hours per week
  - Study (as long as it doesn't interfere with the sponsored role)
  - Travelling and returning to the UK
  - Bring family members (partner, children and dependents)

#### Tier 2 (Minister of Religion) visa

- Criteria. The applicant:
  - must have been offered a religious job in the UK, and have a certificate of sponsorship reference number
  - must demonstrate English language ability
  - must have £945 to support themselves, an 'A-rated' sponsor that has certified their maintenance, or already holds a Tier 2 visa and is applying inside the UK
  - must not be from a European Economic Area country or Switzerland
- Duration:
  - 3 years 1 month, or the length of sponsorship plus one month (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access to public funds
  - cannot own more than 10% of their sponsors shares (unless they earn more than £159,600 per year).
- Entitlements:
  - employment in the sponsored role and voluntary work (as well as a second job in some circumstances)
  - Study (as long as it doesn't interfere with the sponsored role)
  - Travelling and returning to the UK
  - Bring family members (partner, children and dependents)

#### Tier 2 (Sportsperson) visa

- Criteria. The applicant:
  - must be an elite sportsperson or coach who is at the highest level of their profession globally, who will develop their sport in the UK
  - must have £945 to support themselves, an 'A-rated' sponsor that has certified their maintenance, or already holds a Tier 2 visa and is applying inside the UK
  - must demonstrate English language ability
  - must not be from a European Economic Area country or Switzerland
- Duration:
  - Maximum 3 years
- Conditions. The visa-holder:
  - cannot access to public funds
  - cannot setup or run a business
  - cannot apply for a second job until they have commenced their sponsored role
- Entitlements:
  - employment in the sponsored role and voluntary work (as well as a second job in some circumstances)
  - Study (as long as it doesn't interfere with the sponsored role)

- Travelling and returning to the UK
- Bring family members (partner, children and dependents)

#### Tier 5 (Temporary Worker – Charity Worker) visa

- Criteria. The applicant:
  - must have a certificate of sponsorship reference number from a UK sponsor
  - must have £945 to support themselves, or an ‘A-rated’ sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 1 year or the time listed on the certificate of sponsorship plus 28 days (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot be paid for work (it must be voluntary work)
  - cannot take on a permanent role
- Entitlements:
  - Employment in the sponsored role (and in a second job in the same sector and at the same level for up to 20 hours per week, or on the Tier 2 shortage occupation list for up to 20 hours per week)
  - Study
  - Bring family members (partner and children)

#### Tier 5 (Temporary Worker – Government Authorized Exchange) visa

- Criteria. The applicant:
  - must have a certificate of sponsorship reference number from their sponsor
  - must have £945 to support themselves, or an ‘A-rated’ sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 1 year or the time listed on the certificate of sponsorship plus 28 days (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot take on a permanent job.
- Entitlements:
  - employment in the sponsored role (and in a second job for up to 20 hours per week, or on the Tier 2 shortage occupation list for up to 20 hours per week)
  - Study
  - Bring family members (partner and children)

#### Tier 5 (Temporary Worker – International Agreement) visa

- Criteria. The applicant:
  - must have a certificate of sponsorship reference number from their UK sponsor, being contracted to do work in the UK covered by international law (for example working for a foreign government)
  - must have £945 to support themselves, or an ‘A-rated’ sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 2 years or the time listed on the certificate of sponsorship plus 28 days (whichever is shorter). There are some differences for those providing services under some trade agreements.
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot start working before they receive their visa.
- Entitlements:

- employment in the sponsored role (and in most cases in a second job in the same sector for up to 20 hours per week, or on the Tier 2 shortage occupation list for up to 20 hours per week)
- study
- travel abroad and return to the UK
- bring family members (partner and children)

#### Tier 5 (Temporary Worker – Religious Worker) visa

- Criteria. The applicant:
  - must have a certificate of sponsorship reference number from their UK sponsor, to do religious work (for example preaching)
  - must have £945 to support themselves, or an ‘A-rated’ sponsor that has certified their maintenance
  - must not be from a European Economic Area country or Switzerland
- Duration: maximum 2 years or the time listed on the certificate of sponsorship plus 28 days (whichever is shorter).
- Conditions. The visa-holder:
  - cannot access public funds.
- Entitlements:
  - employment in the sponsored role (and in a second job in the same sector for up to 20 hours per week, or on the Tier 2 shortage occupation list for up to 20 hours per week)
  - study
  - bring family members (partner and children)

#### Tier 5 (Youth Mobility Scheme) visa

- Criteria. The applicant:
  - must be between the ages of 18 and 30
  - must have £1,890 to support themselves
  - must be from certain countries<sup>99</sup>
  - have a certificate of sponsorship reference number (if from Hong Kong or Korea)
  - cannot have children living with them, or who are financially dependent
  - cannot have previously held this visa.
- Duration: maximum 2 years
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot extend their stay
  - bring family members
  - cannot work as a professional sportsperson or sports coach, doctor or dentist in training (unless they received their qualifications in the UK).
- Entitlements:
  - employment and study (including being self-employed and setting up a company, as long as the premises are rented, equipment isn’t worth more than £5,000 and there are no employees).
  - travel abroad and return to the UK

#### Representative of an Overseas Business visa

- Criteria. The applicant:

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<sup>99</sup> Australia, Canada, Japan, Monaco, New Zealand, Hong Kong, Republic of Korea and Taiwan, with reciprocal rights offered to British youth. British overseas citizens, British overseas territory citizens and British national (overseas) are also eligible.

- must be the only representative of an overseas company intending to establish a UK branch or wholly owned subsidiary for a foreign parent company, or
- must work for a foreign newspaper, news agency or broadcasting entity posted on a longer-term assignment to the UK
- must demonstrate English language ability
- must not be from a European Economic Area country or Switzerland
- Duration: 3 years initially
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot be self-employed or work for another business
- Entitlements
  - employment in existing role
  - bring family members (partner and children)

#### Turkish Businessperson visa

- Criteria. The applicant:
  - must have Turkish citizenship
  - must have sufficient funds to set up and run the business (or join an existing business in a crucial capacity)
  - must be able to support themselves and any dependants without needing another job
- Duration: 1 year
- Conditions. The visa-holder:
  - cannot access public funds
- Entitlements
  - start a new business (or join an existing business)
  - bring family members (partner and children)

#### Domestic Worker in a Private Household visa

- Criteria. The applicant<sup>100</sup>:
  - must be employed as a domestic worker in the same private household for at least one year
  - must be at least 18 years of age
  - must intend to travel to the UK with their employer and work for them full-time while in the UK
  - must be able to support themselves while in the UK
  - must not be from a European Economic Area country or Switzerland
  - the employer must be British or a European Economic Area national who usually lives outside the UK
- Duration: six months or the duration of the employer's trip (whichever is shorter)
- Conditions. The visa-holder:
  - cannot access public funds
  - bring family members (partner and children)
  - cannot change jobs once in the UK
- Entitlements:
  - travel abroad and return to the UK

#### Student Visas

##### Tier 4 (General) student visa

- Criteria. The applicant:
  - must be 16 years of age or more

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<sup>100</sup> There are other eligibility criteria that are relevant to the employer. For further information, please see Home Office, 2018h.

- must hold an unconditional offer to study at a licensed Tier 4 sponsor
- must have enough money to pay their tuition fees and support themselves
- must demonstrate English language ability
- must not be from a European Economic Area country or Switzerland
- Duration: contingent on the type of course and level of study
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot work in some jobs for example as a professional sport person or sports coach
  - cannot study at a maintained school (an academy of a school funded by a local authority)
- Entitlements:
  - study in the sponsored course
  - work in most jobs (depending on the sponsor and the course-level)
  - bring family members (if enrolled in a course that lasts more than one year and at a higher level; a Doctorate Extension Scheme student; a new government-sponsored student enrolled in a course of at least 6 months).

#### Tier 4 (Child) student visa

- Criteria. The applicant:
  - must be between the ages of 4 and 17
  - must hold a place in an eligible course at an independent school
  - must have enough funds to cover tuition fees and support themselves
  - must not be from a European Economic Area country or Switzerland
- Duration: contingent on the length of the course and the student's age
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot study at a maintained school (an academy of a school funded by a local authority) or a further education college
  - cannot work in a full-time, ongoing job, be self-employed, work as a doctor or dentist in training, work as a sportsperson or sports coach, or as an entertainer
  - settle in the UK
  - cannot bring family members (parents can apply for a Parent of a Tier 4 (Child) visa).
- Entitlements:
  - study in the sponsored course
  - work if 16 years or older: part-time during term (up to 10 hours per week) and full-time in the holidays; as part of a course-related work placement (but no more than 50% of the course load); as a student union sabbatical officer (for up to 2 years)

#### Family Visas

##### Parent of a Tier 4 (Child) visa

- Criteria. The applicant:
  - must have a child under the age of 12 enrolled in a fee-paying independent school, who is on a Tier 4 (Child) student visa
  - must have the funds to support themselves and any dependents, and fly home after the child has left school
  - must have another home outside the UK
  - must not be from a European Economic Area country or Switzerland
- Duration: usually six or 12 months, and can be extended
- Conditions. The visa-holder:
  - cannot access public funds
  - cannot switch into a different visa category

- cannot have their main residence in the UK
- cannot work or study
- cannot bring family members
- Entitlements:
  - apply to extend the visa every 12 months, as long as still eligible

#### UK Ancestry visa

- Criteria. The applicant:
  - must be a Commonwealth citizen
  - must be 17 years of age or older
  - must have a grandparent that was born in the UK
  - must apply from outside the UK
  - must be able to work, and plan to do so while in the UK
  - must have sufficient funds to support themselves
- Duration: 5 years (and can be extended)
- Conditions. The visa-holder:
  - cannot access public funds
- Entitlements:
  - work and study
  - bring family members (partner and children)

#### Family visa – partner or spouse

- Criteria. The applicant:
  - must be 18 years or older (and their partner must be too)
  - must have a partner who is a British citizen, has permanent residency or has refugee status or humanitarian protection
  - must intend to live with their partner permanently in the UK
  - must demonstrate English language ability
  - must be able to support themselves and any dependants
- Duration:
  - fiancé, fiancée or proposed civil partner: 6 months
  - partner: 2.5 years
- Conditions:
  - generally no access to public funds
- Entitlements:
  - work
  - study

#### Family visa – parent

- Criteria. The applicant:
  - must have a child under 18 years of age that lives in the UK, and does not lead an independent life (for example, is married and has children). The child must either be a British citizen, have indefinite leave to remain, or have lived in the UK for 7 continuous years and it would be unreasonable for them to leave
  - must have sole or shared parental responsibility for their child
  - must demonstrate English language ability
  - must be able to support themselves and any dependants
- Duration: 2.5 years
- Conditions:
  - generally no access to public funds
- Entitlements:
  - other children can be added to the application as dependants
  - work
  - study

#### Family visa – child

- Criteria. The applicant:
  - if under the age of 18: must not be leading an independent life; must be able to be supported financially
  - if over the age of 18: must not be leading an independent life; must have received a family visa when they were under the age of 18

#### Family visa – adult coming to be cared for by a relative

- Criteria. The applicant:
  - Must be 18 years of age or older
  - must have a relative (parent, grandchild, brother, sister, son or daughter) who is settled in the UK. The relative must be a British citizen, have indefinite leave to remain in the UK or have refugee status or humanitarian protection
  - must need long-term care because of illness, disability or age
  - must not be able to receive the care they need in their home country
  - must be able to be financially supported, cared for and housed by their relative, without the relative needing public funds for five years.
- Duration:
  - indefinite (relative is a citizen or had indefinite leave to remain)
  - time limited (relative has refugee status or humanitarian protection)

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