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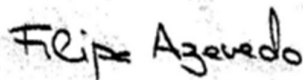
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Assinatura:



The impact of Brexit on the UK's Asylum Law and Policy

O impacto do Brexit no Direito e Política de Asilo do Reino Unido

Filipa Azevedo

Tese de Mestrado em Direito

Especialização em Ciências Jurídico-Políticas

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Janeiro, 2024



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UNIVERSIDADE PORTUCALENSE

Resumo

Findo o período de transição no dia 31 de dezembro de 2020, o Reino Unido deixou de ser um dos Estados Membros da União Europeia. A saída da UE teve um impacto na política de asilo do Reino Unido. Antes do Brexit, o Reino Unido fazia parte da estrutura de solidariedade europeia, o que permitia uma colaboração próxima com os outros Estados-Membros, nomeadamente no âmbito do Regulamento de Dublin. Apesar de os tópicos da crise dos refugiados e da necessidade de controlo de fronteiras terem figurado amplamente na campanha política que impulsionou a realização de um referendo sobre a manutenção da pertença à UE, nenhum dos acordos alcançados entre o Reino Unido e UE vinculam as partes em matéria de asilo. Ainda que o Reino Unido continue a estar vinculado a normas de Direito Internacional, sendo membro signatário da Convenção de Genebra de 1951, e do seu Protocolo Adicional celebrado em 1967 os padrões e as garantias de proteção dos direitos de refugiados e requerentes de asilo foram afetados pela perda de jurisdição do Tribunal de Justiça da União Europeia e pela desvinculação à Carta de Direitos Fundamentais da União Europeia. A cooperação bilateral enfrenta desafios decorrentes da falta de reciprocidade e de confiança, o que dificulta particularmente a conclusão de acordos de transferência. O Reino Unido está a ser pressionado devido ao seu *legacy backlog* de pedidos de asilo e ao afluxo contínuo de requerentes de asilo. O Governo britânico pretende resolver estas questões recorrendo, numa tendência de externalização, à criação de centros de processamento offshore. Esta dissertação utiliza uma abordagem qualitativa, analisando documentos oficiais, *policy papers*, leis e artigos científicos, a fim de avaliar o impacto do Brexit no direito e nas políticas de asilo do RU. A hipótese a ser testada é a de saber se, tal como o governo britânico alegou, o Brexit resultou numa melhoria da gestão dos pedidos de asilo e numa redução das chegadas de requerentes de asilo.

Palavras-chave

Cooperação Internacional; Sistema Europeu Comum de Asilo, Brexit; Política de Asilo do Reino Unido

Abstract

The United Kingdom ceased its EU membership on December 31, 2020, impacting its asylum law and policy. Pre-Brexit, the UK collaborated closely with EU Member States under frameworks like the Dublin Regulation. Despite the extensive discussions on border controls and the refugee crisis surrounding the referendum campaign, post-Brexit agreements lack asylum-related provisions. Although the UK continues to be bound by international refugee law, being a signatory to the 1951 Geneva Convention and its Additional Protocol signed in 1967, the UK's standard of protection and guarantees of refugees' rights has been severely affected without CJEU jurisdiction and CFR influence. Bilateral cooperation faces challenges stemming from a lack of reciprocity and trust, particularly straining the reaching of return agreements. The UK is under pressure due to its "legacy backlog" of applications and continued influx of asylum seekers arriving in small boats from Calais. The British government plans to address these issues through externalisation, by setting up offshore processing centres. This thesis uses a qualitative method, examining official documents, laws, and articles in order to assess Brexit's legal, domestic, and international impact on asylum law and policies. The core hypothesis being tested is whether leaving the EU, as the British government claimed, resulted in an improvement of asylum application management and a reduction in arrivals of asylum seekers.

Key words

Brexit; Common European Asylum System; European Union; UK's Asylum Policy; International Cooperation

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List of Abbreviations

EU - European Union

ECHR – European Convention on Human Rights

ECHtR – European Court of Human Rights

UK - United Kingdom

CEAS - Common European Asylum System

CJEU – Court of Justice of the European Union

ECHR - European Convention on Human Rights

MS - Member State

IO - International Organisation

TEU - Treaty of European Union

TFEU - Treaty on the Functioning of European Union

TPD - Temporary Protection Directive

UKIP – United Kingdom’s Independent Party

PM – Prime Minister (to the UK)

MP – Members of the (UK) Parliament

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1. Introduction

On the 23rd of June 2016, British citizens were asked to vote on a referendum to decide on the permanence of the United Kingdom as a Member State to the European Union. The lack of a sentiment of belonging and the, at the time, worst refugee crisis the EU had ever gone through, motivated people to deepen their nationalist beliefs, driven by populist ideas and politicians and resulted in a 52% win for the “Leave”.¹ Even while being a part of the EU, the UK benefited from a particular position,² not being part of the Monetary Union or the Schengen Area, and being allowed to choose to opt-in or out on a number of matters. In fact, when it comes to Asylum, the UK was barely a part of the Common European Asylum System (CEAS), since it chose to opt-out of most of the recasts of the second-phase, designed to move from minimum to common standards, which meant it was only bound by the Dublin III Regulation, the Temporary Protection Directive, as well as the Eurodac Regulation (the recast Reception Conditions Directive, Asylum Procedures and Qualification Directive did not apply).³ When it comes to other asylum related measures outside the CEAS, the UK was part of most of the EU Readmissions Agreements and benefitted from AMIF, the Asylum and Migration Integration Fund, but opted out of the Family Reunification Directive and the Returns Directive. Therefore, arguably, the UK already had lower standards of refugee protection compared to other EU Member States.⁴

¹ “The political parties and their representatives from the Brexit or ‘Leave the EU’ camp tended to associate migration issues with the EU (Szczerbiak & Taggart, 2017) and warned that Britain did not have control of its borders and migration policy while it remained in the EU. UKIP was criticised for deliberately stirring voters’ fears, especially using the ‘immigration’ theme and linking it to the EU during the leave/remain campaign. (...) This discourse, produced by UKIP and reflected in the media, contributed to strengthening Eurosceptic national narratives, which were already persistent and based on the idea that Britain is culturally detached from Europe (Spiering, 2015). Thus, the primary concern of the referendum moved from providing special status for the UK in the EU to the issue of freedom of movement and its impacts on immigration, jobs and security (Zappettini, 2019). Eventually, 52% voted to leave and 48% to remain in the EU.” TEMIZISLER. Sevgi. The Mediatisation of Migrant Issues During the Refugee Crisis: A comparative study of the UK, Denmark and Germany. in JAKOBSON, ML, et al. *Anxieties of Migration and Integration in Turbulent Times* [online]. IMISCOE Research Series. 2023. [Consulted on the 14th of November]. ISBN 978-3-031-23996-0 (eBook). Available on: <https://doi.org/10.1007/978-3-031-23996-0>

² “In the case of the UK, there are other practical and legal obstacles to migration. As the UK is not part of the Schengen regime, both EU citizens and third-country nationals cannot enter British territory without having to show their travel documents to the British border patrol. The UK hence has a gatekeeping position when it comes to migration that most other EU Member States do not have. With its specific situation as an island in the North-West of Europe, irregular migrants and asylum-seekers who are usually coming from the Middle East or Africa have to cross large distances to reach the UK. Without a valid visa, no migrant is allowed to board a plane from anywhere in the world, given carrier sanctions.” ZAUN, Natasha . *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog. 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

³ “The UK has a selective relationship with the CEAS. It participates fully in the Dublin and Eurodac Regulations but only opted into the original Directives on reception conditions, asylum procedures, and qualification for international protection (not the phase two recast versions).” UK Parliament Publications, *Brexit: refugee protection and asylum policy* [online]. Chapter 2: Refugee protection: international, EU and UK policy. [no available date of publication]. [Consulted on the 14th of November]. Available on: <https://publications.parliament.uk/pa/ld201719/ldselect/lddeucom/428/42805.htm>

⁴ “Despite continued support from the House of Lords EU Committee for the UK to opt in to the Family Reunification Directive, the UK instead in 2012 introduced further restrictions for TCNs before they can apply for family reunification.

People were led to believe that being a part of the EU meant that the UK had no control over its borders⁵, the deliberate use of the term “migrant” indistinctly, created the false idea that economic migrants coming from the EU and refugees seeking asylum belonged to the same category and were given the same rights.⁶ The Leave campaign benefited from the xenophobia of the older generations and the anti-EU migration sentiment⁷. During the negotiations that took place between the UK and the EU, it was portrayed that a beneficial immigration agreement would be reached⁸ - one that would, for example, allow the UK to continue to have access to Eurodac data or even to maintain the Dublin Regulation III, a regime that was both geographically and legally convenient, as it provided for its de-responsibility and a privileged selective approach by instituting the “first country entrance rule”.⁹ Chances were, anyone trying to reach the UK would have their fingerprints scanned by another member state, making it responsible for processing their asylum request (unless they had close family or a previously issued visa

Amongst other criteria, TCNs require a minimum income, language skills and knowledge of life in the UK. The EU Committee notes this increases the UK's divergence from the common EU policy on family migration.” COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Asylum_Law.pdf

⁵ “*The political parties and their representatives from the Brexit or ‘Leave the EU’ camp tended to associate migration issues with the EU (Szczerbiak & Taggart, 2017) and warned that Britain did not have control of its borders and migration policy while it remained in the EU.*” TEMIZISLER, Sevgi. *The Mediatization of Migration Issues During the Refugee Crisis: A comparative study of the UK, Denmark and Germany.* in JAKOBSON, ML, et al. *Anxieties of Migration and Integration in Turbulent Times* [online]. IMISCOE Research Series, 2023 [Consulted on the 14th of November]. ISBN 978-3-031-23996-0 (eBook). Available on: <https://doi.org/10.1007/978-3-031-23996-0>

⁶ “*(...) this is a deliberate action to identify asylum-seekers/refugees with economic migrants and develop a negative attitude in the UK towards EU's free movement policies.*” TEMIZISLER, Sevgi. *The Mediatization of Migration Issues During the Refugee Crisis: A comparative study of the UK, Denmark and Germany.* in JAKOBSON, ML, et al. *Anxieties of Migration and Integration in Turbulent Times* [online]. IMISCOE Research Series, 2023. [Consulted on the 14th of November]. ISBN 978-3-031-23996-0 (eBook). Available on: <https://doi.org/10.1007/978-3-031-23996-0>

⁷ “*The Brexit referendum and the election of Trump are often bracketed as twin events of 2016. Voters for both had similar sociological profiles: older, less skilled, less likely to have a university education, more likely to have suffered years of stagnant earnings, more threatened by immigration (Sobolewska and Ford 2020).*” FOSSUM, John Erik and LORD, Christopher. *Introduction to the European Union and Brexit.* In: *Handbook on the European Union and Brexit* [online]. Edward Elgar Publishing, 2023, P.1–24 [Consulted on the 14th of November]. eISBN: 9781839100697. Available on: DOI: <https://doi.org/10.4337/9781839100697.00008>

⁸ “*a new legal framework to return illegal migrants and asylum-seekers to a country they have travelled through, or have a connection with, in order to have their protection claim considered, where necessary. People should be prevented from making claims in more than one country, and on multiple occasions. A clear legal structure, facilitated by access to Eurodac (the biometric and fingerprint database used for evidencing secondary asylum claims) or an equivalent system will help achieve this.*” *The Future Relationship Between the United Kingdom and the European Union* [online]. Presented to Parliament by the Prime Minister by Command of Her Majesty. House of Commons Library, July 2018, P.70 [Consulted on the 14th of November]. Available on: https://assets.publishing.service.gov.uk/media/5c8f805440f0b640d60882b1/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

⁹ *The Dublin Regulation, according to which the first country of entry is in charge of an asylum-seeker unless they have close family or a visa or residence permit in another European country, makes it virtually impossible to legally reach the UK these days in order to apply for asylum.* ZAUN, Natasha. *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics, Brexit Blog, 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

by the UK).¹⁰ But what was a heated subject during the Leave campaign and negotiations, paradoxically, resulted in a no-deal.¹¹

In this thesis we will attempt to answer the starting question of what was the real impact of Brexit on the UK's Asylum Policy.

By comparing the UK's Asylum Policy before and after its departure from the EU, through a legal and qualitative analysis, we will attempt to assess it. In order to do this, we will start by explaining the particular place the UK had while being a part of the EU, given its possibility to opt-in and out of CEAS and other instruments, in order to provide a clear legal framework of instruments the UK was bound by, as well as its' Domestic Law regarding asylum before Brexit. We will later discuss the process of leaving the EU, the referendum, the triggering of article 50, the transition period and the withdrawal agreement as well as the final result of the negotiations, the Trade and Cooperation Agreement.

We will conclude by examining the asylum-related legislation currently binding the UK, the international conventions it is nonetheless bound by and the changes introduced by the 2022 Nationality and Borders Act. To finalise, we will discuss the future of bilateral cooperation agreements between the UK and EU Member States (such as Belgium and France, with which the UK maintains juxtaposed border controls) and the proposal of creating off-shore processing centres (following the Australian Model) and their implication for human rights guarantees, examining the case of Rwanda and the 2023 Illegal Migration Act.

¹⁰ "The Dublin Regulation, according to which the first country of entry is in charge of an asylum-seeker unless they have close family or a visa or residence permit in another European country, makes it virtually impossible to legally reach the UK these days in order to apply for asylum." ZAUN, Natasha. *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog. 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

¹¹ "The TCA, which was eventually signed by the EU and the UK in December 2020, focuses on trade, fisheries, policing and security, and the overarching governance framework. The only clear migration-related commitment concerns anti-smuggling operations: the TCA establishes that Europol should continue its operational cooperation and information exchange with the UK, which is now a third party. In relation to other elements of migration and asylum policies, such as family reunions and returns, the TCA includes not binding commitments but aspirations and long-term goals. More specifically, the annexed Joint Political Declaration highlights the importance of the "good management of migratory flows". Due to its declaratory nature, it falls short of setting reciprocal obligations. Instead, it signals the UK's intention to engage bilaterally with Member States to identify "practical arrangements on asylum, family reunion for unaccompanied minors or illegal migration". NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

2. Theoretical and conceptual framework

The concept of migrant, asylum seeker, refugee and beneficiary of subsidiary or international protection

In the context of this study, understanding and distinguishing between the concepts of migrant, immigrant, asylum seeker, refugee and beneficiary of subsidiary or international protection is crucial for several reasons. First of all, these concepts provide the foundation for policy analysis and formulation. To assess the impact of Brexit on the UK's asylum policy, we must be able to differentiate between various categories of people who are affected by the policy changes. For instance, changes in immigration rules may have different consequences for refugees compared to regular immigrants. Public perception and discourse around immigration and asylum can be influenced by the way these concepts are framed and understood. Misconceptions or a lack of clarity about these terms can lead to public misunderstanding and potentially negative attitudes towards certain groups of migrants, including refugees. Different groups of migrants have distinct needs and vulnerabilities and have access to different legal statuses.

All of the above-mentioned concepts are terms used in the context of immigration and asylum to describe different categories of people based on their legal status and reasons for moving to another country. The definition of these concepts varies within the existing legal instruments regulating these matters. For the purpose of this study, we used the European Migration Network Glossary as the main font, in order to achieve uniformity and clarity in the definition of concepts.

Migrant¹² is the broader term, as it commonly refers to any person who moves from one place to another, which may or may not include crossing international borders, generally in order to seek better economic opportunities, family reunification, or education. Migrants may have various legal statuses and apply for different types of visas such as tourist, student, or work permits, depending on the purpose of their migration. Migrants are not necessarily fleeing persecution, conflict, or human rights abuses; they may simply choose to move for better opportunities or personal reasons.

¹² European Commission. *EMN Asylum and Migration Glossary* [online], definition of migrant [consulted on the 26th of September 2023] https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/migrant_en

On the other hand, an immigrant¹³ is a person who has moved from one country to another with the intention of settling in the destination country for an extended period. While immigrants also leave their home country voluntarily, the process of immigration often involves obtaining legal status or a visa to fix residence in the destination country. In summary, the key difference lies in the intention and duration of the move, the concept of migrant can be used to encompass a wider range of movement and can include people who voluntarily move: either temporarily, abroad or within their own country.

An asylum seeker¹⁴ is an individual who has left their home country and is seeking asylum in another country. They made an application for refugee status, claiming that they are unable or unwilling to return to their home country due to a well-founded fear of persecution based on factors like race, religion, nationality, political opinion, or membership in a particular social group. An asylum seeker's status is pending a determination of their asylum claim. A refugee¹⁵ is a person who has been granted asylum or refugee status in another country, therefore benefiting from international protection.

International Protection¹⁶ can be a broad term used in the context of EU law to encompass both refugees and beneficiaries of subsidiary protection. Beneficiaries of international protection, in a broader and global sense are individuals who have been granted protection under international and national asylum laws due to their need for safety and security. In legal terms, international protection, often referred to as refugee status, is a form of protection granted to individuals who meet the criteria set out in international refugee law, particularly under the 1951 Refugee Convention and its 1967 Protocol. International protection includes the principle of non-refoulement, which prohibits the return of refugees to a country where they would face persecution or harm. People who are granted international protection have access to a broader range of rights and benefits, including the possibility of resettlement in a third country and a pathway to citizenship in their host country.

¹³ European Commission. *EMN Asylum and Migration Glossary* [online], definition of immigrant [consulted online on the 26th of September 2023] https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/immigrant_en

¹⁴ European Commission. *EMN Asylum and Migration Glossary* [online], definition of asylum seeker [consulted online on the 26th of September 2023] https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/asylum-seeker_en

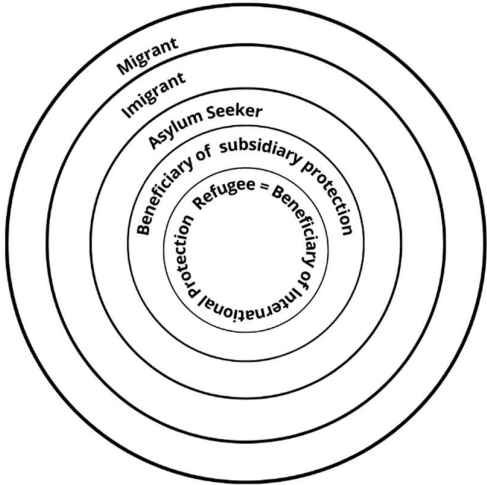
¹⁵ European Commission. *EMN Asylum and Migration Glossary* [online], definition of refugee [consulted online on the 26th of September 2023] https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/refugee_en

¹⁶ European Commission. *EMN Asylum and Migration Glossary*, definition of beneficiary of international protection [consulted online on the 26th of September 2023] https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/beneficiary-international-protection_en

Subsidiary protection¹⁷ is a legal status granted to individuals who do not meet the criteria for refugee status but are at risk of serious harm, such as torture, inhumane or degrading treatment, or death if they return to their home country due to armed conflict, generalized violence, or other grave threats. Subsidiary protection is a form of complementary protection (i.e. protection outside the scope of the 1951 Geneva Convention).¹⁸

In summary, the key distinction between these concepts lies in the reasons for migration and the level of protection granted: migrants move voluntarily for various reasons, whereas refugees flee their home countries due to a well-founded fear of persecution. Subsidiary protection beneficiaries are individuals who do not meet the refugee status criteria but still face significant harm if they return to their home countries. International protection beneficiaries in EU Law includes both refugees and subsidiary protection beneficiaries who are granted protection under international and national laws.

Figure 1 - The concept of migrant, immigrant, asylum seeker, refugee, and beneficiary of subsidiary or international protection



Understanding these concepts is essential because they provide the necessary framework for understanding, analysing, and addressing the diverse challenges and implications associated with changes in asylum and migration policies resulting from the UK's departure from the European Union. The visual representation in the graphic above

EMN Glossary [online], definition of beneficiary of subsidiary protection [consulted online on the 26th of September 2023] https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/beneficiary-subsiary-protection_en

¹⁸ PEERS, Steve. *The EU Asylum System: Challenges and Shortcomings* [online]. Strategic Sectors. Culture and Society. IEMed, Mediterranean Yearbook 2014 [Consulted on 10th November 2023]. Available on: <https://www.iemed.org/publication/the-eu-asylum-system-challenges-and-shortcomings/>

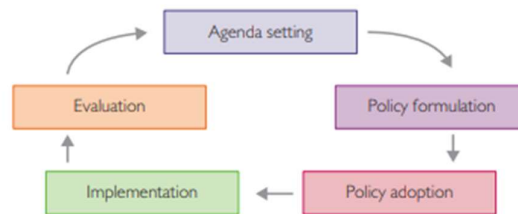
allows us to understand that the word refugee, *strictu sensu* can only be used to refer to a small part of the entire population that is constituted by migrants.

Furthermore, it should also be said that we do not agree with the use of the term “illegal migrant” as we believe the characteristic of being illegal is not one that can be attributed to any human being. Therefore, in line with several international recommendations,¹⁹ we support the use of the word “irregular migrant” or “undocumented migrant” as this is a much clearer and correct way to portray people who enter a state’s territory irregularly.²⁰

The theory of policy-making as a process: the policy cycle framework

21

Figure 2 - The policy cycle



Analysing the policy-making process, within the framework of the theory of policy cycle, attributed to Lasswell²² is crucial for studying the impact of Brexit on the UK’s asylum policy. The policy cycle outlines the stages through which a policy evolves, from agenda setting to policy evaluation. In this study, we pay special attention to the influence

¹⁹ The term ‘irregular’ is preferable to ‘illegal’ migrant because the latter carries a criminal connotation, entering a country in an irregular manner, or staying with an irregular status, is not a criminal offence but an infraction of administrative regulations. Apart from this, juridically and ethically, an act can be legal or illegal but a person cannot. Thus, more and more the term ‘migrant in an irregular situation’ or ‘migrant with irregular status’ is preferred. European Commission. EMN Asylum and Migration Glossary. Available on: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/irregular-migrant_en See also: https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/09/TerminologyLeaflet_EN_PICUM.pdf

²⁰ PASPALANOVA, Mila. Undocumented vs. Illegal Migrant: Towards Terminological Coherence. *Migr. Inter* [online]. 2008, vol.4, n.3 pp.79-90. Available on: http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1665-89062008000100004&lng=es&nrm=iso ISSN 2594-0279.

²¹ This graphic was extracted from KNILL, Christoph and TOSUN, Jale. Policy-making. Chapter 20. In CARAMANI, Daniele. Oxford Comparative Politics 5TH Edition. ISBN 978–0–19–882060–4 where it was used to synthesise the policy-making cycle: Each policy cycle begins with the identification of a societal problem and its placement on the policy agenda. Subsequently, policy proposals are formulated, from which one will be adopted. In the next stage, the adopted policy is taken to action. Finally, the impacts of the policy are evaluated. This last stage leads straight back to the first, indicating that the policy cycle is continuous and unending.

²² KNILL, Christoph and TOSUN, Jale. *Policy-making*. Chapter 20. In CARAMANI, Daniele. Oxford Comparative Politics 5TH Edition. ISBN 978–0–19–882060–4

of mass media and political discourse in the agenda-setting phase, since we believe, it was used to pave the way for the UK to leave the EU. We will also discuss how the Hostile Environment Policy, initially designed to address immigration issues such as non-documented migrants, appears to be shifting towards asylum-related issues.²³ To pursue this goal, we will describe each phase of the policy-making cycle in order to be able to identify it during the analysis of the UK's policy development related to asylum, throughout this thesis.

The initiation of policy-making, known as the agenda-setting phase, entails identifying societal issues necessitating governmental intervention. Among numerous societal problems, only a select few gain public attention in order to form the political agenda, a process influenced by cultural, political, social, economic, and ideological factors. Following Kingdon's model, agenda setting involves three distinct streams—problems, policies, and politics—that converge, creating a pivotal "policy window" through which issues enter the agenda. This convergence is facilitated by policy entrepreneurs. Various actors, including public officials, bureaucracy, mass media, and interest groups, each employing unique strategies that contribute to agenda setting.²⁴

The policy formulation phase, the second stage in the policy cycle, is characterized by the definition, discussion, acceptance, or rejection of practical courses of action to address policy problems. This stage is closely tied to policy adoption, which follows it. Generally, policy formulation involves the elaboration of alternative actions, while policy adoption refers to the formal acceptance of a policy. This process occurs within the broader context of technical and political constraints on state action, encompassing both substantive (related to the nature of societal problems) and procedural (related to institutional and tactical issues) constraints. The interaction between executives and legislatures is crucial during policy formulation, with literature suggesting executive dominance due to greater resources. Ministerial bureaucracy also plays a role, engaging in informal negotiations with interest groups. Interest groups, especially in complex and technical issues, contribute significantly when elected officials and bureaucrats lack the necessary time, staff, and expertise. The ministerial bureaucracy can act as a policy broker and mediator in political conflicts, influencing formulation by positioning itself in relevant policy networks. Additionally, scientific experts and policy advisors contribute to policy design, aligning with the concept of evidence-

²³ PEREZ, Cristina Saenz. *The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit* [online]. *International Journal of Refugee Law*, 2023, XX, 1–18. Available on: DOI: <https://doi.org/10.1093/ijrl/eead030>

²⁴ KNILL, Christoph and TOSUN, Jale. *Policy-making*. Chapter 20. In CARAMANI, Daniele. *Oxford Comparative Politics* 5TH Edition. ISBN 978–0–19–882060–4

based policy-making. Policymakers often use shortcuts involving emotions and beliefs to understand problems and rational approaches to explore potential solutions, drawing on scientific advice during the policy formulation phase.²⁵

The policy adoption phase, following policy formulation, involves the critical process of gaining approval for feasible policies. The complexity of this phase arises from the necessity to build majorities for policy approval, which requires considerations of values, party affiliation, constituency interests, public opinion, deference, and decision rules. Party loyalty plays a significant role as a decision-making criterion for members of parliament, making party affiliation a central predictor for the likelihood of approving a policy draft. Additionally, the expected costs and benefits of a policy proposal for the constituency are crucial factors influencing adoption decisions. Members of parliament are generally expected to support a policy option if the benefits for their constituency outweigh the costs, although considerations about re-election may sometimes lead to suboptimal policy choices. Public opinion, decision rules, values, and perceptions of deference also impact policy choices. Another set of factors influencing policy adoption pertains to the allocation of competencies among the actors involved in policy-making. Cross-national research indicates that the type of state organization, whether federal or unitary, can affect the success, speed, and nature of governmental policy-making. The concept of veto players, as proposed by scholars like Tsebelis, provides a theoretical understanding of how the distribution of powers among different entities can influence policy adoption. For instance, in a semi-presidential system like that of France, a "divided government" where the offices of president and prime minister are held by members of different political parties can impede policy adoption due to insufficient incentives for political parties to cooperate and build policy-making coalitions.²⁶

The policy implementation phase is the process of translating new laws and programs into practical action. Despite appearing as a natural extension of the policy-making process, there often exists a substantial gap between the passage of legislation and its actual application. Implementation research aims to unveil the 'black box' between policy formation and outcomes, with theoretical approaches categorized into top-down models, bottom-up models, and hybrid models. Top-down models emphasize policymakers' ability to produce clear objectives and control implementation, while bottom-up models view local bureaucrats as central actors engaged in negotiation

²⁵ KNILL, Christoph and TOSUN, Jale. *Policy-making*. Chapter 20. In CARAMANI, Daniele. *Oxford Comparative Politics* 5TH Edition. ISBN 978-0-19-882060-4

²⁶ KNILL, Christoph and TOSUN, Jale. *Policy-making*. Chapter 20. In CARAMANI, Daniele. *Oxford Comparative Politics* 5TH Edition. ISBN 978-0-19-882060-4

processes within networks. Hybrid models integrate elements of both. Successful implementation requires an entity capable of translating policy objectives into an operational framework and being accountable for its actions, often led by bureaucracies, although private actors are increasingly important. The choice of policy instruments and types, such as regulatory, distributive, or redistributive policies, influences implementation dynamics. The implementation process also varies in federal systems, where efforts may move between and within levels of government. The number and interaction of actors during implementation, whether horizontally within the executive branch or vertically across national and sub-national levels, significantly impact its smoothness. The role of bureaucracies in implementation presents a contradictory picture—while essential for making policies work, experienced senior bureaucrats may contribute to 'bureaucratic drift,' where policies deviate from the original legislative intent. This underscores the complexities and challenges inherent in the policy implementation phase.²⁷

The policy evaluation phase occurs after a policy has been passed by the legislature and implemented by the bureaucracy. It involves assessing whether the policy has achieved its intended goals. Evaluation is often a formal component of policy-making, conducted by experts with knowledge of the processes and objectives related to the policy under review. Different evaluation approaches include purely formal evaluations (monitoring routine tasks), client satisfaction evaluations (performance of primary functions), outcome evaluations (measuring intended outcomes), cost–benefit evaluations (comparing costs and impacts), and evaluations of long-term consequences (impact on core societal problems). Policy evaluation serves as a feedback loop, allowing decision-makers to learn from each policy's operation. It identifies new problems, restarting the policy-making process and creating an ongoing policy cycle. However, policy evaluation faces challenges, as citizens and governments may interpret policy effects to serve their own intentions. Governments may avoid precisely defining policy objectives to evade blame for failure, and decisions cannot be limited to intended effects alone. Challenges also arise from changing program circumstances during evaluation, requiring a balance between scientific and pragmatic considerations.²⁸

The results of the evaluation can lead to the termination of a policy in theoretical terms, particularly when a policy problem is solved or dysfunctionality is revealed.

²⁷ KNILL, Christoph and TOSUN, Jale. *Policy-making*. Chapter 20. In CARAMANI, Daniele. *Oxford Comparative Politics 5th Edition*. ISBN 978–0–19–882060–4

²⁸ KNILL, Christoph and TOSUN, Jale. *Policy-making*. Chapter 20. In CARAMANI, Daniele. *Oxford Comparative Politics 5th Edition*. ISBN 978–0–19–882060–4

However, empirical findings show that once a policy is institutionalized within a government, termination becomes challenging. The immortality of policies is attributed to inefficient programs persisting due to concentrated benefits in well-organized constituencies and dispersed costs in larger, unorganized groups. Legislative and bureaucratic interests may also impede termination, aligned with the concept of incrementalism, where proposed changes focus on parts of existing policies rather than their entirety. Termination becomes more likely in the face of external shocks, such as economic crises, justifying drastic measures. Overall, policy evaluation is a powerful tool in the policy-making process, capable of reframing issues and contributing to an ongoing cycle of policy improvement.²⁹

The political and governmental system in the UK

Understanding the political and governmental system in the UK is crucial for a comprehensive study on the country's asylum policy. The UK's asylum policy is intricately linked to its political landscape and the decision-making processes within its government. A nuanced comprehension of the parliamentary system, the role of the Prime Minister, the House of Commons, and the House of Lords is essential to grasp the formulation, implementation, and potential changes in asylum policies. Political ideologies, party dynamics, and public opinion significantly influence the development of policies. Additionally, knowledge of the separation of powers, legal frameworks, and the constitutional structure aids in evaluating the legal aspects and potential challenges within the asylum system.

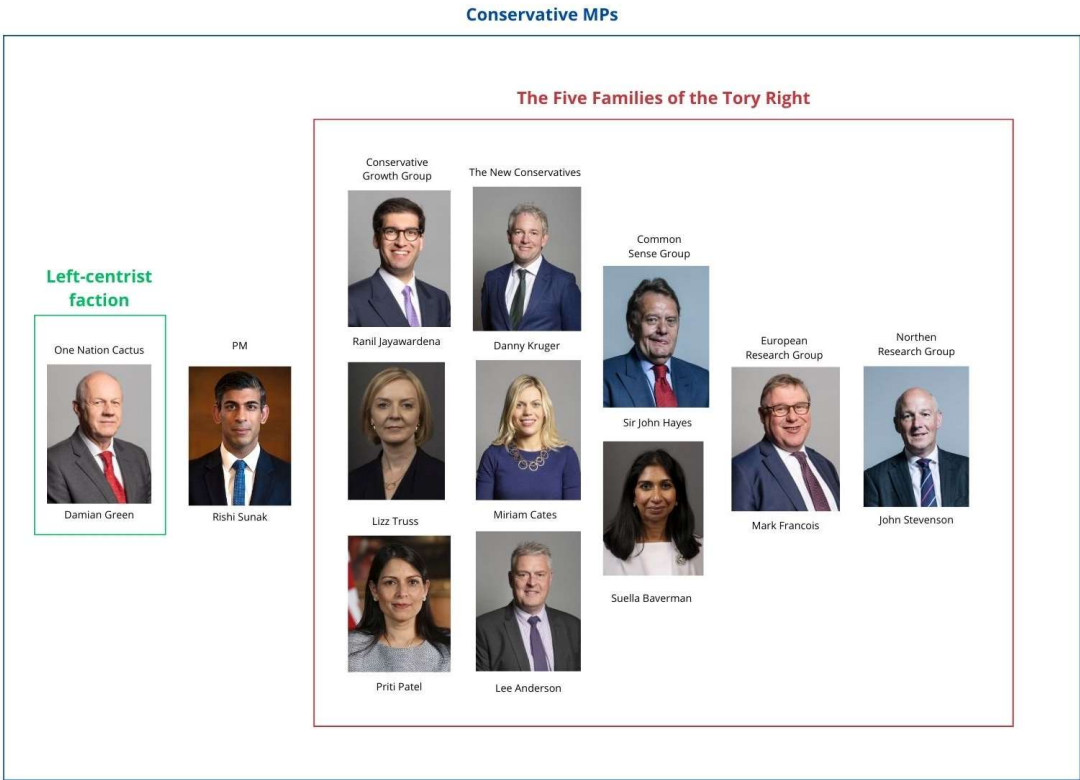
The UK is a parliamentary democracy where the Parliament is sovereign. The Parliament is bicameral, it is constituted by the House of Lords and the House of Commons. The House of Commons is elected by popular vote. The House of Lords is nominated. The Government/Cabinet is constituted by ministers, they are elected Members of Parliament (MPs) appointed by the Prime Minister (PM), they speak on the front benches and must answer questions put to them by other MPs. MPs are qualified to sit in the Commons because they have been elected. MPs can hold the government accountable through the PM Questions, and Ministerial Questions, which offer the opportunity to check and challenge government policies while urgent questions can be put forward on a daily basis in response to current affairs. Opposition and backbench

²⁹ KNILL, Christoph and TOSUN, Jale. *Policy-making*. Chapter 20. In CARAMANI, Daniele. *Oxford Comparative Politics* 5TH Edition. ISBN 978-0-19-882060-4

MPs³⁰ can also put forward topics for debate. There are currently 650 MPs in the House of Commons (350 seats for the majority Conservative Party) and 120 ministers in the Cabinet, which is chaired by PM Rishi Sunak.

In the UK there is a confusion between the legislative and executive power, ministers of government are required to be MPs, either from the House of Commons or the House of Lords. However, party discipline does not command the MPs action, they are not required to vote according to their Party ID, unless Whips³¹ are at place. Sometimes, MPs disagree with their party’s view and will vote against it – this is known as “voting against the whip”, this makes them party rebels.

Figure 3 - Political factions within the Conservative Party



³⁰ Which are neither government ministers nor opposition shadow spokespeople (MPs who do not form part of the government). UK Parliament. *How it works* [online]. Available on : <https://assets-learning.parliament.uk/uploads/2019/12/How-it-Works-booklet.pdf>

³¹ Whips are MPs or members of the House of Lords who are appointed by each political party to inform and organise their own members in Parliament. One of their responsibilities is to make sure that their members vote in divisions, in line with party policy. UK Parliament. *How it works* [online]. Available on : <https://assets-learning.parliament.uk/uploads/2019/12/How-it-Works-booklet.pdf> Whipping. The whips are often seen as ‘the stick’ that maintains party discipline. The job of the whips is to make sure that MPs know how their parties want them to vote, indicated by debates being underlined once, twice or three times (obedience is essential in the case of a ‘three-line’ whip). The party whips exercise control. In extreme circumstances, an obstructive MP can be suspended from their party, which will damage their career. Whips also remind MPs about prime ministerial patronage and how important party loyalty is. There is a variety of ways in which the whips can make life difficult for uncooperative MPs. MURPHY, Robert Et. Al. *Party Discipline and Elective Dictatorship* [online]. Available on : <https://sites.google.com/site/thepoliticsteacherorg/party-discipline-and-elective-dictatorship?authuser=0>

In the current political landscape, within the Conservatives (also known as Tories) there are different factions. There are five families among the right-wing groups: i) the European Research Group³² (ERG) ii) the New Conservatives,³³ iii) Northern Research Group,³⁴ iv) Common Sense Group³⁵ and the v) Conservative Growth Group.³⁶ On the other side of the wing, the One Nation³⁷ MPs form the leftist-centrist faction of the Conservative Party, standing in contrast to the fragmentation on the right.

The legislative power is held by the Parliament, who decides whether or not to adopt Bills proposed by the Government or Private Member's Bills, introduced by MPs, or members of the House of Lords who are not Government Ministers. Bills can start in

³² *The Eurosceptic group is currently chaired by Mark Francois, but saw many of its members promoted to ministerial positions after Boris Johnson came to power - including Sir Jacob Rees-Mogg, Suella Braverman and Steve Baker.* SCOTT, Jennifer. *Battles on the backbenches - what are the different factions in the Conservative Party?* [online]. Sky News Explainer. 13 December 2023. Available on: <https://news.sky.com/story/battles-on-the-backbenches-what-are-the-different-factions-in-the-conservative-party-12964275>

Also known as "The old right", "These guys are (or were) the original Brexiteers — hardcore Eurosceptics like Bill Cash and Bernard Jenkin who defied the advice to stop "banging on about Europe". Instead, they turned up the volume until David Cameron gave in and called a referendum. But then, having won the war, they lost the peace. Pigeonholed by their favourite subject, they were mostly left behind on the backbenches while newly-minted Brexiteers took the plum jobs. Today, they're ageing out of politics altogether. Expect their clout to decline as retirement takes it toll. FRANKLIN, Peter. *Meet the five factions of the Tory Right* [online]. Unherd Explainer. Available on: <https://unherd.com/the-post/meet-the-five-factions-of-the-tory-right/>

³³ *"(...) this group is made up of 25 Tory backbenchers predominantly from so-called "Red Wall" seats that the party won from Labour in recent elections. All of the members only entered parliament after 2016 - since the Brexit referendum took place - and say they are determined to focus the party on delivering on the 2019 manifesto, where Mr Johnson won a significant majority on his promises to "get Brexit done" and "level up" the country. One of its first events as it sought to raise its public profile was outlining its 10-point plan for immigration, causing controversy with its call to end the temporary visa scheme for care workers and cap the number of refugees who can settle in the UK."* SCOTT, Jennifer. *Battles on the backbenches - what are the different factions in the Conservative Party?* [online]. Sky News Explainer. 13 December 2023. Available on: <https://news.sky.com/story/battles-on-the-backbenches-what-are-the-different-factions-in-the-conservative-party-12964275>

³⁴ *"(...) this faction was also born from the 2019 election victories in the Red Wall, promising to focus on the interests of the towns and cities that make up the Tories' "Northern Powerhouse". With around 55 MPs from the north of England, Scottish borders and North Wales - led by the now-former chairman of the party, Sir Jake Berry - the group has expanded its remit somewhat, speaking out against COVID lockdowns and business taxes, as well as pushing for its core goals around devolution, transport and investment.* SCOTT, Jennifer. *Battles on the backbenches - what are the different factions in the Conservative Party?* [online]. Sky News Explainer. 13 December 2023. Available on: <https://news.sky.com/story/battles-on-the-backbenches-what-are-the-different-factions-in-the-conservative-party-12964275>

³⁵ *This collective of around 50 MPs and peers says it "stands for authentic conservatism", with many of the issues it focuses on falling squarely into the culture wars category. From slamming the National Trust for publicising Winston Churchill's family links to slavery, to attacking Black Lives Matter and Extinction Rebellion as "subversives fuelled by ignorance", the group - led by veteran backbencher Sir John Hayes - calls on the government to "reflect the will of the people, rather than pandering to the peculiar preoccupations of the liberal elite and the distorted priorities of left-wing activists".* SCOTT, Jennifer. *Battles on the backbenches - what are the different factions in the Conservative Party?* [online]. Sky News Explainer. 13 December 2023. Available on: <https://news.sky.com/story/battles-on-the-backbenches-what-are-the-different-factions-in-the-conservative-party-12964275>

³⁶ *There are only thought to be around 20 members in the group, including Ms Truss herself, but they are pushing for popular policies in the party, such as tax cuts and deregulation, as the best way for growing the British economy. It is chaired by Ranil Jayawardena, who was environment secretary while Ms Truss was prime minister.* SCOTT, Jennifer. *Battles on the backbenches - what are the different factions in the Conservative Party?* [online]. Sky News Explainer. 13 December 2023. Available on: <https://news.sky.com/story/battles-on-the-backbenches-what-are-the-different-factions-in-the-conservative-party-12964275>

³⁷ *"(...) there are still over 100 members in parliament - with some former figures, such as Alex Chalk and Gillian Keegan, making it onto the frontbench - and they are starting to peek out above the parapet again."* SCOTT, Jennifer. *Battles on the backbenches - what are the different factions in the Conservative Party?* [online]. Sky News Explainer. 13 December 2023. Available on: <https://news.sky.com/story/battles-on-the-backbenches-what-are-the-different-factions-in-the-conservative-party-12964275> *Chaired by former First Secretary of State Damian Green, it says it is "committed to the values of the liberal centre right".* MURPHY, Robert Et. *Case Study: Rwanda Bill and Conservative Party Factions* [online]. Available on: <https://sites.google.com/site/thepoliticsteacherorg/home/a-and-as-politics-2017/unit-1-politics-in-the-uk-year-12--13/political-parties/case-study-rwanda-bill-and-conservative-party-factions?authuser=0>

either the House of Commons or the House of Lords. When both Houses have agreed on the content of a bill it is then presented to the reigning monarch for approval (known as Royal Assent). The stages a bill has to go through before it is enacted are: i) first reading ii) second reading iii) committee stage iv) report stage v) third reading and vi) amendments/ping pong.³⁸

The UK does not have a written constitution, but a consuetudinary one. The fundamental principle in UK constitutional law is parliamentary sovereignty, which means that Parliament has the highest authority, and its laws supersede any other legislative or legal acts, including international obligations. Parliament cannot bind itself or its successors from changing laws. If a later Act contradicts a former one, the later Act is considered to have impliedly repealed the earlier one.³⁹

UK courts are starting to conceptualize the idea that, although all Acts of Parliament are theoretically equal in authority, some may possess a higher status, suggesting that the concept of "implied repeal" does not apply to them. According to this theory, it would require the UK Parliament's jurisdiction to formally and intentionally repeal these special constitutional acts. This category includes notable acts such as the (English) Magna Carta of 1216, the (English) Bill of Rights 1688, the (Scottish) Claim of Right Act 1689, the (UK) European Communities 1972 Act, the Human Rights Act (HRA), and the constitutional agreements with Scotland, Wales, and Northern Ireland.⁴⁰

³⁸ The to and fro of amendments to bills between the House of Commons and the House of Lords. UK Parliament. *How it works* [online]. Available on : <https://assets-learning.parliament.uk/uploads/2019/12/How-it-Works-booklet.pdf>

³⁹ *The most basic principle in UK constitutional law is that Parliament is sovereign. An Act of Parliament will trump any other form of legislative or legal act including, in the ordinary case, an international obligation entered into by the Government on behalf of Her Majesty. A further consequence of the sovereignty of Parliament is that one Parliament cannot bind itself, let alone its successors, not to alter the laws it has made. So, where a later Act is inconsistent with a former one, the later Act is held to have "impliedly repealed" the earlier one.* LOCK, Tobias and LAYDEN, Patrick, *Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions (FIDE National Report for the United Kingdom)* [online]. (October 7, 2011). Available on: DOI: <http://dx.doi.org/10.2139/ssrn.1940381>

⁴⁰ *UK courts are beginning to develop a theory that while all Acts of Parliament are notionally equal in force and effect, some may be more equal than others, in the sense that the doctrine of „implied repeal“ does not apply in relation to them. Thus, so this theory runs, it would be competent for the UK Parliament to repeal but that would require to be done formally and deliberately. Into this category of special, constitutional Acts have gone the (English) Magna Carta of 1216, the (English) Bill of Rights 1688, the (Scottish) Claim of Right Act 1689, the (UK) European Communities 1972 Act, the HRA, and the constitutional settlements with Scotland, Wales and Northern Ireland.* LOCK, Tobias and LAYDEN, Patrick, *Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions (FIDE National Report for the United Kingdom)* [online]. (October 7, 2011). Available on: DOI: <http://dx.doi.org/10.2139/ssrn.1940381>

3. The UK's Asylum Policy before Brexit

Before leaving the EU, the United Kingdom's asylum policy was largely governed by EU law and international agreements. The key aspects of the UK's asylum policy before its departure from the EU included: the Dublin Regulation,⁴¹ which allowed for the transfer of asylum seekers between EU Member States found to be responsible for the analysis of the application for international protection, and the several other directives from the Common European Asylum System (CEAS)⁴² which the UK was part of (at least the directives that constituted the first phase), and which aimed to establish common asylum standards across the EU. As a MS, the UK was also under the jurisdiction of the CJEU,⁴³ and bound by the EU Charter of Fundamental Rights,⁴⁴ which gained primary law force with the Treaty of Lisbon. The United Kingdom's domestic law governing its asylum policy before their departure from the EU was primarily contained in the Immigration Rules and the Immigration Act 1971, as well as subsequent amendments and regulations. These laws set out the procedures and criteria for asylum applications and the treatment of asylum seekers within the UK.

Understanding the UK's asylum policy before Brexit is crucial for several reasons. First, it provides the necessary context for comprehending the implications of Brexit on the country's asylum system. This baseline comparison is essential for identifying how

⁴¹ European Commission. Migration and Home Affairs. *Country responsible for asylum application (Dublin Regulation)* [online]. [Consulted on the 2nd of October]. Available on: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en

⁴² European Commission. Migration and Home Affairs. *Common European Asylum System* [online]. [Consulted on the 2nd of October]. Available on: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en

⁴³ "In relation to the applicability of the CJEU to the UK, the 1972 European Communities Act (ECA), through section 2(1), provided EU law with domestic legal effect. As such, in practice, UK courts have interpreted this section as a 'requirement to give effect to direct effects and supremacy of EU law'. This position is reiterated in section 18 of the European Union Act 2011, as well as the recent UK Supreme Court *Miller* judgement, in which it is noted that 'EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes (paragraph 60)'. However, there are restrictions to the status of EU law in relation to the expression of constitutional principles. In particular, the UK Supreme Court (in alignment with the respective courts of other Member States, in particular the German Federal Constitutional Court) has implied that it may be willing to call into question the CJEU's jurisdiction in relation to judgements that it considers impact constitutional principles." European Parliament Policy Department for Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

⁴⁴ "Initially the UK, together with Poland, opted-out from the Charter, stating that 'nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law'. However, this opt-out was incompatible with the CJEU interpretation of the Charter [on CJEU Case C-411/10, *R(S) v. Secretary of State for the Home Department*], and in 2011 the CJEU ruled that the Charter had to apply in all EU Member States, with no exclusions. The Charter, however, binds all Member States and EU Institutions 'only when they are implementing Union law' (Art 51), meaning that the UK will only be bound by the Charter when it acts within the scope of the EU asylum law to which it is bound (...) The Charter has played an important role in British courts, for example in the *Janah v Libya and Benkharbouche v Sudan* cases, where the Supreme Court set aside part of an Act of Parliament to give effect to a Charter right." European Parliament Policy Department for Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

Brexit has influenced and altered the UK's approach to asylum. Additionally, knowledge of the pre-Brexit asylum policy is crucial for evaluating whether the UK continues to meet its international obligations, particularly those outlined in the 1951 Refugee Convention and other human rights agreements. Furthermore, discussing the pre-Brexit asylum policy provides historical context for the study, contributing to a more comprehensive understanding of policy evolution over time. In summary, understanding the UK's asylum policy before Brexit serves as the foundation for assessing how Brexit has shaped the country's asylum policies, both in terms of continuity and change. It provides context, facilitates comparison, and offers a historical perspective for a more informed analysis of the impact of Brexit on the UK's asylum system. The aim of the following chapter is to dedicate some attention to each of the above-mentioned instruments in order to form a global image that we can use to compare to the final one.

3.1. The UK's Participation in the CEAS and related legal instruments

The Common European Asylum System (CEAS) is a set of legal and policy frameworks developed by the European Union (EU) to harmonize asylum policies and procedures across EU Member States in order to avoid certain identified issues such as asylum shopping, disparate asylum outcomes in different EU Member States and differing social benefits.⁴⁵ Its primary goal was to ensure a consistent and fair approach to the treatment of asylum seekers and refugees throughout the EU, ensuring the compliance to the international law principle of *non-refoulement*.⁴⁶ It was developed on the basis of the provision in article 78 TFEU (1)⁴⁷ and established through the Tampere Declaration.⁴⁸ It was implemented in two phases, the first set of directives established common minimum standards, whereas the second sought for more ambitious

⁴⁵ RAITHEL, Silvia. *The Common European Asylum System: Its History, Content and Shortcomings* [online]. Michigan Journal of International Law, 2016, Vol.37 [Consulted on the 13th of November] Available on: <https://www.mjilonline.org/the-common-european-asylum-system-its-history-content-and-shortcomings/>

⁴⁶ For more information on this principle: chr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf

⁴⁷ "The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties." European Union. *Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE V: AREA OF FREEDOM, SECURITY AND JUSTICE - Chapter 2: Policies on border checks, asylum and immigration - Article 78 (ex-Articles 63, points 1 and 2, and 64(2) TEC)* [online]. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E078>

⁴⁸ European Council. *Tampere European Council 15 and 16 October 1999 Presidency Conclusions* [online]. Available on: https://www.europarl.europa.eu/summits/tam_en.htm

compromises such as “effective and well-supported practical cooperation and increased solidarity and a sense of responsibility among EU States”.⁴⁹

The first phase included the Asylum Procedures Directive, the Reception Conditions Directive, the Qualification Directive, the Temporary Protection Directive (TPD) and the Dublin II Regulation,⁵⁰ previously the Eurodac Regulation had been established, regulating a fingerprint database in which asylum seekers’ fingerprints were stored, making the return system established by the Dublin Regulation possible.⁵¹

However, because there was a “urgent need for increased European solidarity in the area of asylum [and the Commission wanted to] ensure that responsibility for processing asylum applications and granting protection in the EU is shared equitably”,⁵² the second phase of the CEAS was negotiated. It essentially consisted on recasting and revising the directives of the first phase, to include further obligations to the agreeing MS, and resulted in the revised Asylum Procedures Directive⁵³, the revised Reception Conditions Directive,⁵⁴ the Dublin III Regulation and the revised Qualification Directive.⁵⁵ The TPD⁵⁶ was not revised.

⁴⁹ RAITHEL, Silvia. *The Common European Asylum System: Its History, Content and Shortcomings* [online]. Michigan Journal of International Law, 2016, Vol.37 [Consulted on the 13th of November] Available on: <https://www.mjilonline.org/the-common-european-asylum-system-its-history-content-and-shortcomings/>

⁵⁰ PEERS, Steve. *The EU Asylum System: Challenges and Shortcomings* [online]. Strategic Sectors. Culture and Society. IEMed, Mediterranean Yearbook 2014 [Consulted on 10th november 2023]. Available on: <https://www.iemed.org/publication/the-eu-asylum-system-challenges-and-shortcomings/>

⁵¹ PEERS, Steve. *The EU Asylum System: Challenges and Shortcomings*. Ref.33.

⁵² THIELEMANN, Eiko. *The future of the common European Asylum System: in Need of a More Comprehensive Burden-Sharing Approach* [online]. SIEPS, Swedish Institute for European Policy Studies, European Policy Analysis, February Issue, 1-2008 [Consulted on 10th November 2023] Available on: <https://personal.lse.ac.uk/thielemann/papers-pdf/sieps-2008.pdf>

⁵³ *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection* [online]. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032>, for further reading and latest developments: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/asylum-procedures_en

⁵⁴ *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection* [online]. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN> for further reading and latest developments: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/reception-conditions_en

⁵⁵ *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* [online]. Available on: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:en:PDF> for further reading and latest developments: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/who-qualifies-international-protection_en

⁵⁶ *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* [online]. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0055> for further reading and latest developments: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/temporary-protection_en

Asylum Procedures Directive

Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection recasts⁵⁷ Council Directive 2005/85/EC of 1 December 2005 and aims to focus on due process and access to justice, in order to ensure: “the right to stay pending a decision by the determining authority; access to the services of an interpreter for submitting his or her case if interviewed by the authorities; the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) and with organisations providing advice or counselling to applicants for international protection; the right to appropriate notification of a decision and of the reasons for that decision in fact and in law; the opportunity to consult a legal adviser or other counsellor; the right to be informed of his or her legal position at decisive moments in the course of the procedure, in a language which he or she understands or is reasonably supposed to understand; and, in the case of a negative decision, the right to an effective remedy before a court or a tribunal”⁵⁸ and adequate time limits,⁵⁹ to guarantee equivalent treatment of applications among the MS.⁶⁰

The Qualification Directive

Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted recast Council Directive 2004/83/EC of 29 April 2004, recognizing the need to “introduce common criteria for recognising applicants for asylum as refugees within the meaning of article 1 of the Geneva Convention.”⁶¹ The Qualification Directive expands upon both the concept of persecution and the grounds

⁵⁷ “The second-phase Directive improved standards as regards, for instance, setting a six-month time limit (subject to exceptions) to make a first-instance decision on an application, reducing the number of possible cases subject to accelerated procedures, strengthening the right to an effective remedy, and abolishing the option to apply lower standards as regards the “safe country of origin” concept.” PEERS, Steve. *The EU Asylum System: Challenges and Shortcomings*. Strategic Sectors. Culture and Society. IEMed. Mediterranean Yearbook 2014. [Consulted on 10th November 2023]. Available online on: <https://www.iemed.org/publication/the-eu-asylum-system-challenges-and-shortcomings/>

⁵⁸ Recital no. 25 of Directive 2013/32/EU

⁵⁹ Recital no.18 of Directive 2013/32/EU

⁶⁰ Recital no.13 of Directive 2013/32/EU

⁶¹ “The core definition of a “refugee” portrayed in the 1951 Geneva Convention is a person who has “a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group.” PEERS, Steve. *The EU Asylum System: Challenges and Shortcomings* [online]. Strategic Sectors. Culture and Society. IEMed. Mediterranean Yearbook 2014 [Consulted on 10th november 2023]. Available on: <https://www.iemed.org/publication/the-eu-asylum-system-challenges-and-shortcomings/>

of persecution, allowing for gender-based as grounds for prosecution and private parties prosecution other than just State-based.⁶²

Reception Conditions Directive

The Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection⁶³ recast Council Directive 2003/9/EC of 27 January 2003, introducing substantive changes.⁶⁴ It aims to ensure improved reception conditions for applicants for international protection⁶⁵ and harmonisation of these standards among Member States,⁶⁶ to avoid secondary movements.⁶⁷ It pays special attention to detention⁶⁸ – the conditions,⁶⁹ grounds⁷⁰ and timing,⁷¹ establishing it as *ultima ratio*.⁷² It reiterates the importance of procedural guarantees⁷³ and access to legal advice.⁷⁴ The recitals no.22 to 24, focus on housing arrangements, labour market and material support, these rights are then regulated in article 15,17 and 18 of the Directive, which are conditional upon the verification of insufficient means, i.e. only if the asylum seeker or beneficiary of international protection is not able to provide for themselves (para. 3 and 4 of article 17).

⁶² PEERS, Steve. *The EU Asylum System: Challenges and Shortcomings* [online]. Strategic Sectors. Culture and Society. IEMed, Mediterranean Yearbook 2014 [Consulted on 10th november 2023]. Available on: <https://www.iemed.org/publication/the-eu-asylum-system-challenges-and-shortcomings/>

⁶³ *The Directive on reception conditions regulates such issues as the employment, health care, education, and welfare of asylum-seekers during the process of deciding on their application. The second-phase Directive improves standards as compared to the first-phase Directive, particularly as regards employment, permitting Member States to require an asylum-seeker to wait up to nine months for employment access, whereas the first-phase Directive had permitted a wait of up to twelve months.* PEERS, Steve. *The EU Asylum System: Challenges and Shortcomings* [online]. Strategic Sectors. Culture and Society. IEMed, Mediterranean Yearbook 2014 [Consulted on 10th november 2023]. Available on: <https://www.iemed.org/publication/the-eu-asylum-system-challenges-and-shortcomings/>

⁶⁴ Recital no.1 of *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection* [online]. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN> . Ref.37.

⁶⁵ Recital no.7 of Directive 2013/33/EU. Ref.37.

⁶⁶ Recital no.11 of Directive 2013/33/EU. Ref.37.

⁶⁷ Recital no.12 of Directive 2013/33/EU. Ref.37.

⁶⁸ *“It also inserted detailed rules on detention of asylum-seekers into the Directive. These differ somewhat from the rules on detention of irregular migrants in the returns Directive, in that the grounds for detention are different and there is no express time limit on detention. However, the rules on legal safeguards and detention conditions are quite similar.”* PEERS, Steve. *The EU Asylum System: Challenges and Shortcomings* [online]. Strategic Sectors. Culture and Society. IEMed, Mediterranean Yearbook 2014 [Consulted on 10th november 2023]. Available on: <https://www.iemed.org/publication/the-eu-asylum-system-challenges-and-shortcomings/>

⁶⁹ Recital no.19 and 20 of Directive 2013/33/EU. Ref.37.

⁷⁰ Recital no.16 and 17 of Directive 2013/33/EU. Ref.37.

⁷¹ Recital no.15 of Directive 2013/33/EU. Ref.37.

⁷² Recital no.20 of Directive 2013/33/EU. Ref.37.

⁷³ Recital no.15 of Directive 2013/33/EU. Ref.37.

⁷⁴ Recital no.21 of Directive 2013/33/EU. Ref.37.

The Dublin III Regulation

Formally known as Regulation (EU) No. 604/2013, the Dublin III recast previous Council Regulation (EC) No. 343/2003 of 18 February 2003 and establishes the criteria and mechanisms for determining which EU member state is responsible for processing an asylum application submitted by a third-country national (someone from a non-EU country) or stateless person seeking international protection within the EU.⁷⁵ It is designed to prevent multiple asylum claims in different Member States⁷⁶ and to ensure that responsibility for processing asylum applications is allocated among Member States in a clear, fair and workable manner,⁷⁷ according to the hierarchy established on Chapter III – Criteria for Determining the Member State Responsible.

The established criteria are based on the hierarchy of: (i) family reunion (Article 8 to 11), (ii) the recent issue of a visa or a residence permit (Article 12), or (iii) evidence of crossing a border or remaining on the territory illegally (Article 13).

This set of rules has been criticized for “potentially overburdening the MS at the EU’s periphery”⁷⁸ due to the established criteria for responsibility and the lack of the presupposed “uniformity in the protection offered to refugees, which is far from the case across the EU, where both reception conditions and recognition rates for refugees still vary enormously”.⁷⁹ In fact, the responsibility for analysing the application for international or subsidiary protection is most commonly attributed⁸⁰ to the MS “which played the most significant role in the phase of the first arrival of the individual in the

⁷⁵ REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [online]. Available on: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:en:PDF>

⁷⁶ “The objective of the Dublin III Regulation is to ensure quick access to the asylum procedures and the examination of an application on the merits by a single, clearly determined EU country.” European Commission. Migration and Home Affairs. Available for online consultation on: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en

⁷⁷ Recital no. 4 and 5 of Regulation (EU) 604/2013. Ref. 58.

⁷⁸ COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Asylum_Law.pdf

⁷⁹ COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Ref.60.

⁸⁰ “The core principle underpinning the Dublin system is that responsibility for processing an asylum application lies with the member state most involved in the individual’s entry to the EU. This is usually the member state of first entry as the most frequently applied criteria is irregular entry; this criterion requires that the member state where an asylum seeker first entered the EU holds responsibility for processing their claim. OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexite/>

European Union area”,⁸¹ therefore, multiple times overburdening the southern border countries of the EU, that receive asylum seekers coming from the Mediterranean.⁸²

As a Member State, the UK always maintained a distinctive position in the EU, as it had the option to negotiate opt-outs or derogations from specific EU laws or policies.⁸³ These opt-outs were usually negotiated as part of EU treaties, such as the Treaty of Lisbon. An opt-out allowed the UK not to participate in a particular EU policy or law while other EU Member States proceeded with it. Conversely, the UK could also choose to opt into certain EU policies or regulations on a case-by-case basis if it believed it was in its national interest. The decision to opt out or opt in to EU laws was made by the UK government in consultation with the UK Parliament. Opt-outs and opt-ins often required negotiation with the EU and the agreement of the other Member States. Several articles in the TFEU address specific policy areas, and contain provisions for cooperation or opt-outs, but it is in Protocol nr.15 to the TFEU,⁸⁴ the “UK opt-out protocol,” where the specific areas where the UK had the right to opt out of EU legislation related to justice and home affairs are outlined. The UK also negotiated various opt-outs and opt-ins related to police and judicial cooperation. The European Communities Act 1972⁸⁵ served as the primary mechanism for incorporating EU law into UK law. It also included provisions for implementing EU decisions and regulations, as well as mechanisms for derogations and opt-outs.

Table 1 - The instruments that compose the CEAS

Instruments that compose the CEAS (Common EU Asylum Policy)	UK Participation CEAS 1st Phase	UK Participation CEAS 2nd Phase
Temporary Protection Directive (TPD)	✓	-

⁸¹ AMMIRATI, Annapaola. *What is the Dublin Regulation* [online]. Open Migration, 2015-12-08. Available on: consultation on: <https://openmigration.org/en/analyses/what-is-the-dublin-regulation/#:~:text=The%20founding%20principle%20of%20the%20Dublin%20III%20Regulation.of%20the%20individual%20in%20the%20European%20Union%20area>.

⁸² “To sum it up: the asylum request by a third country national is to be presented in the first European country the person arrives in – usually, either Italy or Greece – and where he or she was identified by local authorities.” AMMIRATI, Annapaola. *What is the Dublin Regulation* [online]. Ref.63.

⁸³ COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: <https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK-EU-Asylum-Law.pdf>

⁸⁴ Consolidated version of the Treaty on the Functioning of the European Union
PROTOCOL (No 15) ON CERTAIN PROVISIONS RELATING TO THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND [online]. Available on : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E%2FPRO%2F15>

⁸⁵ UK Public General Acts. *European Communities Act 1972* [online]. Available on: <https://www.legislation.gov.uk/ukpga/1972/68/enacted>

EURODAC Regulation	✓	✓
Reception of Asylum Seekers Directive	✓	✗
Dublin Regulation	✓ (Dublin II)	✓ (Dublin III)
Qualification Directive	✓	✗
Asylum Procedures Directive	✓	✗

As we can see in the above table, the UK was part of the first phase of the Common European Asylum System (CEAS) but chose to opt out of the directives of the second phase of the CEAS.⁸⁶ The UK's decision to opt out of the second phase⁸⁷ meant that it did not participate in the adoption and implementation of the recast directives,⁸⁸ however, because there was not a recast of the TPD, it was technically still applicable although it was never activated. In fact, although the UK government tried to argue that if it did not opt-in to the recast measure, then the original measure would cease to apply to the UK following the entry into force of the recast, the House of Lords EU Committee questioned this claim, and it became clear that the common minimum standards put forward by the first phase of the CEAS were still applicable to the UK.⁸⁹ The UK was therefore essentially only part of the Dublin III and the EURODAC Regulation.

⁸⁶ "The UK has a selective relationship with the CEAS. It participates fully in the Dublin and Eurodac Regulations but only opted into the original Directives on reception conditions, asylum procedures, and qualification for international protection (not the phase two recast versions)." UK Parliament Publications, *Brexit: refugee protection and asylum policy* [online]. Chapter 2: Refugee protection: international, EU and UK policy. [no available date of publication]. [Consulted on the 14th of November]. Available on: <https://publications.parliament.uk/pa/ld201719/ldselect/lducom/428/42805.htm>

⁸⁷ "However, in 2013 the coalition government confirmed that it has "no plans for future participation" in the second phase, judging it not to be in "Britain's best interests" (Home Office Commitment to Write: Debate on the Report of the European Union Committee on the EU's Global Approach to Migration and Mobility 2013). (...) The UK consistently asserts that maintenance of its own border controls is required (Government's Response to the House of Lords EU Committee's 8th Report of Session 2012-2013)." COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Asylum_Law.pdf

⁸⁸ "EU asylum harmonisation had indeed entailed liberalisations against the will of some Member States, and the UK made use of its right to opt out, in part to protect restrictive practices, such as 'detained fast track', which would not have been in line with the EU's policies." ZAUN, Natasha. *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog. 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

"The failure to opt in to EU measures clearly diminishes migrants' and refugees' rights in the UK, in particular as regards their rights to move within the EU." COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Asylum_Law.pdf

⁸⁹ COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Asylum_Law.pdf

The Dublin Regulation, according to which the first country of entry is in charge of an asylum-seeker unless they have close family or a visa or residence permit in another European country, makes it virtually impossible to legally reach the UK these days in order to apply for asylum.⁹⁰

That is probably why the UK opted into the recast Dublin Regulation, in fact, being located in the North-West of the EU while asylum-seekers are usually coming from Middle East and Africa entailed a very favourable position for the UK under the Dublin Regulation.⁹¹ “Most importantly, [it is highly beneficial because] the UK participates in the Dublin regulation without, however, contributing to the solidarity measures, such as the relocation decisions on resettling 160,000 asylum seekers from Greece and Italy to other Member States.”⁹²

Table 2 - Other instruments related to asylum policy that are not part of the CEAS

Other instruments related to asylum policy that are not part of the CEAS	UK Participation
Family Reunification Directive	×
Returns Directive	×
EU Readmission Agreements	✓
AMIF (Asylum, Migration and Integration Fund)	✓

Family Reunification Directive

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification recognizes that “family reunification is a necessary way of making family life

⁹⁰ ZAUN, Natasha. *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog. 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

⁹¹ ZAUN, Natasha. *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog. 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

⁹² THYM, Daniel. *The Irony of Brexit for Immigration Control* [online]. VerfBlog, 2017/10/20, [Consulted on the 16th of November]. Available on: DOI: 10.17176/20171020-110133

possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the Member State, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty”.⁹³ It establishes a right to family reunification by allowing legal stay in the MS territory through conceding a residence permit to third country nationals whose family members (sponsor in the sense of Article 2 c)) are already residing legally in said MS. It is, therefore, different from the family reunion criteria established on the Dublin III Regulation for international or subsidiary protection applicants.⁹⁴

The United Kingdom is not bound by the Family Reunification Directive, although the House of the Lords EU Committee has urged for the UK to opt-in to this directive highlighting that it wouldn't prejudice the control of their borders – because it is possible that if spouses and children are admitted to other MS and therefore end up acquiring the right to free movement anyway – the UK chose not to enhance the position of TCN and instead introduced further restrictions before permitting their application for family reunification, imposing a minimum income, language skills and knowledge of life in the UK. This, according to said Committee further increases the lack of uniformity in treatment of TCN and family reunification rights between the UK and the other MS of the EU.⁹⁵ The possibility of family reunification in the UK is, as a result, mostly versed on the Dublin III Regulation, as we will see later on.

Returns Directive

Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals was established to ensure that the end of the illegal stay is carried out through “a fair and transparent procedure”⁹⁶ by returning these people through bilateral and readmission

⁹³ Recital no. 4 of COUNCIL DIRECTIVE 2003/86/EC of 22 September 2003 on the right to family reunification [online]. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086>

⁹⁴ “Britain has tended to participate in coercive measures that curtail the ability of migrants to enter the EU while opting out of protective measures [such as] on family reunion and the rights of long-term residents that to some extent give rights to migrants and third-country nationals.” (Fletcher 2009: 81). COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Asylum_Law.pdf

⁹⁵ COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Asylum_Law.pdf

⁹⁶ Recital no. 6 of *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals* [online]. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115>

agreements⁹⁷ with third countries provided the respect for the principle of *non-refoulement*.⁹⁸ What is curious, is that although the UK has chosen not to opt in to the Returns Directive, it is part of the EU Readmission Agreements which aims to return people not only to their countries of origin, but also to third countries⁹⁹. In response to a Parliamentary Question on the 2nd of November 2009, Minister of Borders and Immigration at the time, Phil Woolas explained the non-participation of the UK by saying that:

The UK has not participated in and has no plans to implement the EU Returns Directive 2008/115/ EC. We agree that a collective approach to removal can have advantages. However, we are not persuaded that this Directive delivers the strong returns regime that is required for dealing with irregular migration. Our current practices on the return of illegal third country nationals are broadly in line with the terms of the Directive, but we prefer to formulate our own policy, in line with our stated position on retaining control over conditions of entry and stay.¹⁰⁰

EU Readmissions Agreements

Readmission Agreements are agreements between the EU and/or an EU MS with a third country, establishing cooperation for rapidly returning people who do not fulfill or stopped fulfilling the requirements to enter and stay in an EU MS.¹⁰¹ According to the possibility established on Protocol 21 to the TFEU, the United Kingdom chose to opt in on the EU Readmission Agreements with Albania, Bosnia-Herzegovina, FYROM, Georgie, Hong Kong, Macao, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, Turkey and Ukraine.¹⁰²

On his famous speech on the 25th of October 2004, Prime Minister to the UK, Tony Blair said:

⁹⁷ Preamble 7 of Directive 2008/115/EC. Ref. 79.

⁹⁸ Preamble 8 of Directive 2008/115/EC. Ref.79.

⁹⁹ COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Asylum_Law.pdf

¹⁰⁰ *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom* [online]. A Joint Inquiry by the All-Party Parliamentary Group on Refugees & the All-Party Parliamentary Group on Migration. 2014. Available on: <https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf>

¹⁰¹ European Commission. *EMN Asylum and Migration Glossary* [online], definition of readmission agreements. Available on : https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/migrant_en

¹⁰² European Parliament. *The implications of the United Kingdom's withdrawal from the European Union on readmission cooperation* [online]. Briefing, February 2018. P.6. Available on: https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/596843/IPOL_BRI%282018%29596843_EN.pdf

There is no question of Britain giving up our veto on our border controls. In the Treaty of Amsterdam seven years ago we secured the absolute right to opt in to any of the asylum and immigration provisions that we wanted to in Europe. Unless we opt in, we are not affected by it. And what this actually gives us is the best of both worlds. We are not obliged to have any of the European rules here, but where we decide in a particular area, for example to halt the trafficking in people, for example to make sure that there are proper restrictions on some of the European borders that end up affecting our country, it allows us to opt in and take part in these measures.

To conclude, we can say that while the UK was still a MS of the EU it benefitted from a privileged position carefully and politically crafted to ensure both the maintenance of control over its borders and the possibility to take advantage of whatever EU rules found to be beneficial.¹⁰³

3.2. Domestic UK Law in Asylum Matters before Brexit

In the aftermath of World War II, nations understood the need of establishing of international conventions regulating the issues that surfaced during the international conflict, including the need to agree on refugee law matters.¹⁰⁴ This is the context that brought forward the agreement of the 1951 Refugee Convention and its 1967 Protocol, which laid the foundation for modern refugee law.¹⁰⁵ The UK became a signatory to this Convention, committing to providing protection to those with a well-founded fear of persecution.¹⁰⁶ Within the Immigration Act 1971¹⁰⁷ adopted afterwards, Section 4, addresses asylum claims, and Section 35, deals with detention of asylum seekers.

¹⁰³ "In short, British participation in justice and home affairs was highly selective and lopsided: it enhanced state control without promoting the rights of migrants and refugees. As a member of the EU, the UK could use the justice and home affairs Protocols to enhance control of its external borders towards other Member States through à la carte participation." THYM, Daniel. *The Irony of Brexit for Immigration Control* [online]. VerfBlog, 2017/10/20, [Consulted on the 16th of November]. Available on: DOI: 10.17176/20171020-110133

¹⁰⁴ "Political asylum was first recognised as a human right following the Second World War, in the 1948 Universal Declaration on Human Rights Art 14(1)." European Parliament Policy Department for Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

¹⁰⁵ "In the following years, the 1951 Refugee Convention broadened the criteria under which States would grant asylum to refugees, and the 1967 Protocol Relating to the Status of Refugee was developed to expand the Convention's geographical and temporal limits, which only referred to European citizens becoming refugees as a result of events occurring before 1951." European Parliament Policy Department for Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

¹⁰⁶ "Together, the 1951 Convention and the 1967 Protocol form the core of the international protection system and international refugee law, to which the UK is a signatory." European Parliament Policy Department for Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

¹⁰⁷ UK Public General Acts. *Immigration rules* [online], available on: <https://www.legislation.gov.uk/ukpga/1971/77/contents>

We used the “Policy and legislative changes affecting migration to the UK: timeline”¹⁰⁸ in order to provide a brief historical overview of the most relevant changes in policy regarding asylum¹⁰⁹ in the UK (from 1993 onwards).

The Asylum and Immigration Appeals Act 1993¹¹⁰ restricted appeal rights for those seeking entry as visitors, short-term, or prospective students, therefore making no relevant changes to asylum law. Asylum and Immigration Act 1996,¹¹¹ however, introduced accelerated appeals procedure for refused asylum applications, designated countries of destination with no serious risk of persecution, restricted appeals against return to safe third countries and made it a criminal offence for an employer to employ those who do not have permission to live or work in the UK. It requires all UK employers to make basic document checks on every person they intend to employ.¹¹²

White Paper 'Fairer, Faster and Firmer' (1998)¹¹³ abolished the four-year qualifying period for settlement for recognized refugees; reduced exceptional leave qualifying period from seven to four years. While not specific to asylum, the 1998 Human Rights Act¹¹⁴ incorporates the European Convention on Human Rights into UK law, playing a crucial role in protecting the rights of asylum seekers and refugees in the UK.¹¹⁵

¹⁰⁸ UK Home Office. *Policy and legislative changes affecting migration to the UK: timeline* [online]. Published: 19 February 2014. Last updated: 23 November 2023. Available on: <https://www.gov.uk/government/publications/policy-and-legislative-changes-affecting-migration-to-the-uk-timeline>

¹⁰⁹ UK Home Office. *Policy and legislative changes affecting migration to the UK: timeline* [online]. Published: 19 February 2014. Last updated: 23 November 2023. Available on: <https://www.gov.uk/government/publications/policy-and-legislative-changes-affecting-migration-to-the-uk-timeline>

¹¹⁰ UK Public General Acts. *Asylum and Immigration Appeals Act 1993* [online]. Available on: <https://www.legislation.gov.uk/ukpga/1993/23/contents>

¹¹¹ UK Public General Acts. *Asylum and Immigration Act 1996* [online]. Available on: <https://www.legislation.gov.uk/ukpga/1996/49/contents>

¹¹² Denbighshire County Council. *Right to work in the UK* [online]. Available on: <https://www.denbighshire.gov.uk/en/jobs-and-employees/recruitment-and-selection/right-to-work-in-the-uk.aspx>

¹¹³ *Fairer, Faster and Firmer - a modern approach to immigration and asylum* [online]. Policy Paper Presented to Parliament by The Secretary of State for the Home Department by Command of Her Majesty. Published 27 July 1998. Available on: <https://assets.publishing.service.gov.uk/media/5a7cdecbed915d7c849adbdd/4018.pdf>

¹¹⁴ UK Public General Acts. *Human Rights Act 1998* [online]. Available on: <https://www.legislation.gov.uk/ukpga/1998/42/contents>

¹¹⁵ “The ECHR includes provisions to safeguard the rights of asylum seekers. In addition to the rights provided by the 1951 Convention, the ECHR imposes the obligation to respect the human rights of migrants and asylum seekers (e.g. right to life, prohibition of torture, right to liberty and security, right of fair trials, no punishment without law prohibition of discrimination) who leave their country for a reason which is different from persecution, which could include family reunification, study or employment. 173 The Convention also established the European Court of Human Rights (ECtHR), based in Strasbourg, which has jurisdiction over European countries that are signatories to the ECHR. 174 The ECtHR deals with complaints from direct victims of violations of obligations from the Convention, only after applicants have exhausted all domestic remedies, and within six months of the final decision made by the highest court of the State in which the complaint originated.” European Parliament Policy Department for Citizen’s Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK’s withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

The Immigration and Asylum Act 1999¹¹⁶ addressed issues related to support for asylum seekers and their dependents while their claims were being processed. It established a comprehensive 'one-stop' appeals process, replacing multiple appeals; introduced new arrangements for overstayers and those with deceptive leave, and provided for the further use of detention centres.¹¹⁷

The Nationality, Immigration, and Asylum Act 2002¹¹⁸ introduced significant changes to the UK's asylum system, including the establishment of the Immigration and Asylum Chamber of the First-tier Tribunal¹¹⁹ and the Upper Tribunal to handle asylum appeals. It also introduced provisions related to support for asylum seekers, namely: a single right of appeal with well-defined grounds, a certification process for certain asylum claims without in-country appeal rights and the requirement for asylum seekers to apply promptly for eligibility for support.

In 2003, The UK implemented Dublin II Regulation into its domestic legislation, which we have had opportunity to discuss, as well as the Family Indefinite Leave to Remain Exercise (2003),¹²⁰ which allowed certain asylum-seeking families to obtain settlement after three years, with specific criteria.

The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004¹²¹ included provisions aimed at deterring abuse of the asylum system and introduced measures such as penalties for document forgery and the concept of "removal pending appeal." as well as offenses related to undocumented status and non-compliance with re-documentation. It restructured the appeals system, combining adjudication and Immigration Appeals Tribunal stages.

¹¹⁶ UK Public General Acts. *Immigration and Asylum Act 1999* [online]. Available on: <https://www.legislation.gov.uk/ukpga/1999/33/contents>

¹¹⁷ *Until 1999, this measure was rarely used for asylum seekers and undocumented immigrants in the UK, 95 but this changed with the implementation of the Immigration and Asylum Act 1999, which expanded the use of detention in immigration and asylum and facilitated the opening of new detention centres. Since then, detention has become an 'essential element' of UK immigration and asylum law.* PEREZ, Cristina Saenz. *The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit* [online]. *International Journal of Refugee Law*, 2023, XX, 1–18. Available on: DOI: <https://doi.org/10.1093/ijrl/eead030>

¹¹⁸ UK Public General Acts. *Nationality, Immigration and Asylum Act 2002* [online]. Available on: <https://www.legislation.gov.uk/ukpga/2002/41/contents>

¹¹⁹ UK Government. *Immigration and Asylum Chamber of the First-tier Tribunal* [online]. Available on: <https://www.gov.uk/courts-tribunals/first-tier-tribunal-immigration-and-asylum>

¹²⁰ UK Parliament Select Committee on Public Accounts Minutes of Evidence. *Supplementary memorandum submitted by the Home Office* [online]. Available on: <https://publications.parliament.uk/pa/cm200506/cmselect/cmpubacc/620/5102611.htm>

¹²¹ UK Public General Acts. *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* [online]. Available on: <https://www.legislation.gov.uk/ukpga/2004/19/contents>

The Immigration, Asylum and Nationality Act 2006 restricted appeals for those refused entry to the UK for work or study, and the UK Borders Act 2007 created an automatic link between criminality and deportation for non-EEA foreign national offenders and established priorities for resolving the backlog of unsuccessful asylum cases.

From 2008 to 2011, policy changed, limiting leave to remain granted instead of indefinite leave for refugees, and introducing restrictions on asylum seekers' work permissions. From 2011 to 2015, the restricted Leave for individuals refused asylum due to war crimes, was introduced and the Unaccompanied Asylum-Seeking Children policy was altered following the Alvi & Munir judgment.¹²² In 2015 asylum claims from EU nationals started being treated as inadmissible unless exceptional circumstances apply.

¹²² “Alvi, Munir and Rahman applied for leave to remain in the UK but their applications were refused. In Alvi’s case his Tier 2 (General) application was refused because his job, as an assistant physiotherapist, was not on the UK Border Agency’s approved list of skilled professions which meant that he did not get the required points for a certificate of sponsorship as set out in Appendix A of the Immigration Rules. Munir and Rehman’s applications for leave to remain were refused because Deportation Policy 5/96 (DP 5/96) which contained a presumption operating in their favour – that leave would be granted where the circumstances involved children born in the UK who had been present here for seven years – had been withdrawn. The refusals were challenged on the grounds that by sidestepping Parliament through the relevant policy or policy change, the government had evaded the statutory procedure expressly contained in section 3(2) of the Immigration Act 1971 (the 1971 Act) which was unlawful.” KHAN, Ali Asad. *Case Preview: Alvi and Munir in Supreme Court* [online]. Posted on April 19, 2012. Available on: <https://asadakhan.wordpress.com/2012/04/19/case-preview-alvi-and-munir-in-supreme-court/>

Table 3 - Comparison of family reunion rights under the Dublin III Regulation and under UK domestic legislation

Applicants	Sponsors					
	Parent in UK who has refugee or humanitarian status		Asylum-seeker parent in UK		British parent in UK	
	Dublin III Regulation	UK RFR Immigration Rules	Dublin III Regulation	UK RFR Immigration Rules	Dublin III Regulation	UK RFR Immigration Rules
Under-18 year old unmarried child (who was part of the family unit before the parent fled) to join...	Yes – Article 9 Article 8.1 for unaccompanied child	Yes– Part 11 (Paras. 352D and 352FG)	Yes – Article 10 for joining a parent who is an asylum-seeker Article 8.1 for unaccompanied child	No	Yes – Article 8.1 for unaccompanied child	No
Under-18 year old unmarried child (who was not part of the “pre-flight” family unit) to join...	Yes – Article 9	No	No	No	No	No
Over-18 year old child to join...	No. But Article 16 gives this right in certain cases of dependency	No	No	No	No. But Article 16 gives this right in certain cases of dependency	No

This table was extracted from the Refugee Family Reunion after Brexit: British Red Cross policy briefing on what Brexit will mean for separated families seeking to reunite in the UK. The table sets out the family reunion rights for refugee and asylum-seeking families under the Dublin III Regulation and the UK’s domestic legislation. In the table, “applicant” refers to the family members outside of the UK and “sponsor” refers to the relative in the UK. Please note that in some cases where there is not a family reunion right within the Immigration Rules people may be able to benefit from discretionary provisions.

Table 4 - Comparison of family reunion rights under the Dublin III Regulation and under UK domestic legislation

Applicants	Sponsors			
Parent to join...	(Unmarried) Under-18 year-old child in UK who has refugee or humanitarian status		(Unmarried) Under-18-year-old asylum-seeking child in UK	
	Dublin III Regulation	UK RFR Immigration Rules	Dublin III Regulation	UK RFR Immigration Rules
	Yes – Article 9 – regardless of whether the family was previously formed in the country of origin	No	Yes - Article 10 for joining a child who is an asylum-seeker	No
Parent to join...	Over-18 year old child in UK			
	Dublin III Regulation		UK RFR Immigration Rules	
	No. But Article 16 gives this right in certain cases of dependency		No	
Sibling to join...	Sibling in UK			
	Dublin III Regulation		UK RFR Immigration Rules	
	Yes – for unaccompanied child - Article 8.1 No – for most adult siblings and accompanied children. But Article 16 gives this right in certain cases of dependency		No	

As we can see on the above tables, the key articles and provisions relevant to the UK's asylum policy were established in part 11: paragraphs 326A to 352H¹²³ of the Immigration Rules,¹²⁴ a comprehensive set of regulations that outlined the requirements for various types of immigration applications, including asylum. The tables make it clear how the family reunion rights provided by the Dublin III Regulation are often times more beneficial for refugee and asylum-seeking families.¹²⁵ The reason why these benefits are not integrated into the UK RFR Immigration Rules, has to do with the fear of motivating people to seek asylum in the UK.¹²⁶

¹²³ UK Home Office. *Immigration rules, Part 11, Asylum* [online]. Available on : <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

¹²⁴ UK Home Office. *A collection of current immigration rules.* [online]. Available on: <https://www.gov.uk/guidance/immigration-rules>

¹²⁵ "The family reunion provisions in the [Dublin III] Regulation are available to a wider range of beneficiaries, and have some more favourable provisions, than the comparable arrangements in the UK's Immigration Rules." GOWER, Melanie. *Brexit: the end of the Dublin III Regulation in the UK* [online]. House of Commons Library, Briefing Paper no. 9031, 2020-12-21 [Consulted on the 23rd of November 2023]. Available on: <https://researchbriefings.files.parliament.uk/documents/CBP-9031/CBP-9031.pdf>

¹²⁶ "Successive recent governments have cited concerns that adopting the same criteria as the Dublin Regulation could create a "pull-factor" for claiming asylum in the UK and encourage unfounded claims. They have not agreed that children should be able to sponsor applications from other family members, or that it should be possible for asylum seekers in the UK to be joined by family members before their claim for asylum has been determined" GOWER, Melanie. *Brexit: the end of the Dublin III Regulation in the UK* [online]. House of Commons Library, Briefing Paper no. 9031, 2020-12-21 [Consulted on the 23rd of November 2023]. Available on: <https://researchbriefings.files.parliament.uk/documents/CBP-9031/CBP-9031.pdf>

Furthermore, the right to family reunification is considered to be restricted by the need to prove “sole responsibility” in the case of a parent bringing a child to the UK¹²⁷ and due to the necessity of financial independence.¹²⁸ As we can see, the development of UK domestic law provisions related to asylum over the years was influenced by increasingly restrictive policy-making decisions. We will not go into detail as to what were the many reasons the government felt like the UK should leave the EU,¹²⁹ we will instead analyse the process of leaving, from the political discourse surrounding the referendum, to the triggering of article 50 of the TEU as well as the negotiations leading up to the Withdrawal Agreement and the subsequent Trade and Cooperation Agreement.

4. Leaving the EU

For many years, the right to leave was not established in the Treaties. Even when it was, it was only included in one article, this small provision, is argued, not to be very

¹²⁷ “The rules for family reunification with minor children depend on whether the child is joining or accompanying both parents or one parent with a settlement permit. The rules for one parent bringing a child to the United Kingdom hinge on whether that parent had ‘sole responsibility’ for the child which can be a very hard criterion to test.” GROENENDIJK, Kees et al. *The Family Reunification Directive in EU Member States the First Year of Implementation* [online]. Centre for Migration Law Radboud University Nijmegen. Wolf Legal Publishers (WLP), Nijmegen, 2007, P.16 [Consulted on the 10th of November] ISBN: 978-90-5850-290-2 Available on: <https://cmr.jur.ru.nl/cmr/docs/family.rd.eu.pdf>

¹²⁸ *Children accompanying or joining parents who are in the UK with limited leave can also apply for family reunification if they are unmarried, have not formed an independent family unit, [provided that they] will be adequately maintained and accommodated without recourse to public funds and if they will not remain in the UK for longer than the leave given to their parents. Spouses can be admitted to the UK if the sponsor is settled. If not, the rules sometimes allow admission for limited periods.* GROENENDIJK, Kees et al. *The Family Reunification Directive in EU Member States the First Year of Implementation* [online]. Centre for Migration Law Radboud University Nijmegen. Wolf Legal Publishers (WLP), Nijmegen, 2007, P.16 [Consulted on the 10th of November] ISBN: 978-90-5850-290-2 Available on: <https://cmr.jur.ru.nl/cmr/docs/family.rd.eu.pdf>

¹²⁹ “(...) it remains unclear how far there was a public demand for a referendum beyond the needs of the Conservative Party to ensure its internal cohesion and to compete with other parties. The EU had rarely been popular with the public. But it had rarely been salient either. EU questions usually ranked low in surveys of issues most important to the public. The 2016 referendum was not required to resolve deep divisions amongst the public on the UK’s membership of the Union. It created those divisions.” FOSSUM, John Erik and LORD, Christopher. Introduction to the European Union and Brexit. In: *Handbook on the European Union and Brexit* [online]. Edward Elgar Publishing, 2023, P.1–24 [Consulted on the 14th of November]. eISBN: 9781839100697. Available on: DOI: <https://doi.org/10.4337/9781839100697.00008>

elucidate¹³⁰ - as so not to encourage Member States.¹³¹ In fact, when it came to the UK leaving the EU most of the procedure had to be created *ad hoc*. Even before it was used for the first time, this clause was widely criticised,¹³² creating a division between its supporters who underlined the voluntary character attributed by this article¹³³ which provided the Member States with a choice, and its critics, who argue that this provision could endanger the European integration, its cohesion, seeing it as contrary to the interests of the Union and its citizens.¹³⁴ In the case of Brexit, before article 50 was triggered, the government decided to hold a referendum.

4.1. The referendum: the political discourse surrounding it and its legitimacy

It's impossible to talk about the 2016 Brexit referendum without mentioning its 1975 predecessor. In fact, the people of the UK had already expressed their opinion on the same matter, but with a different outcome. Back then, the Remain prevailed, and the UK maintained its position as a member of the European Economic Community (EEC). During this 30-year hiatus, the UK took a lot of steps away from European integration, by choosing not to adopt the euro or to become part of the Schengen *acquis* (under Protocol 19) and choosing to opt-out in legislation regarding several distinct areas, the UK created a singular particular position within the European Union.¹³⁵ There were always Eurosceptic parties and factions in the British government, but this anti-EU sentiment grew stronger with the impulse of anti-immigration discourse,¹³⁶ and this is

¹³⁰ "A common critique in the literature is that the procedure of Article 50 TEU is formulated in an incomplete, unclear if not cryptic fashion, thus generating uncertainty." HILLION, Christophe. Accession and Withdrawal in the Law of the European Union. in ARNULL, Anthony et al. *The oxford handbook of european union law*. Oxford University Press, 2015, P.135 ISBN: 9780199672646.

¹³¹ "Perhaps the lack of clarity is also a way to avoid making the clause too user-friendly and thereby encouraging its use." HILLION, Christophe. Accession and Withdrawal in the Law of the European Union. in ARNULL, Anthony et al. *The oxford handbook of european union law*. Oxford University Press, 2015, P.135 ISBN: 9780199672646.

¹³² "In contrast to the accession procedure, the EU exit mechanism has not been put to the test. And yet, it has already been subject to considerate scholarly scrutiny." HILLION, Christophe. Accession and Withdrawal in the Law of the European Union. in ARNULL, Anthony et al. *The oxford handbook of european union law*. Oxford University Press, 2015, P.135 ISBN: 9780199672646.

¹³³ "(...) supporters of a withdrawal clause underline the fact that belonging to the European Union (EU) is not an imposition but a choice." BARATA, Mario. *Brexit and the limits of article 50 Treaty of the European Union* [online]. De Gruyter, Open Political Science, Volume 3 Issue 1, 2020. Available on: <https://www.degruyter.com/document/doi/10.1515/openps-2020-0013/html>

¹³⁴ BARATA, Mario. *Brexit and the limits of article 50 Treaty of the European Union* [online]. De Gruyter, Open Political Science, Volume 3 Issue 1, 2020. Available on: <https://www.degruyter.com/document/doi/10.1515/openps-2020-0013/html>

¹³⁵ "(...) there are significant limits to the UK government's engagement with the EU's free movement, migration and asylum policy framework through non-participation in Schengen passport-free travel and various opt-outs." GEDDES, Andrew. *Brexit and the Perils of 'Europeanised' migration* [online]. Migration Policy Centre, Journal of European Public Policy, 2018, P.3 [Consulted on the 29th of November 2023]. Available on: <https://migrationpolicycentre.eu/brexit-and-the-perils-of-europeanised-migration/>

¹³⁶ "The broad-brush term 'immigration' has only limited analytical utility because it disguises a much more complex reality of varying motives for migration (to work, to study, to join with family members or to seek refuge being four key types), socio-demographic characteristics of migrants, durations of stay and also categorical ambiguities and

why it is relevant here to address a special mention to the referendum and the political campaign that surrounded it. Furthermore, we will also discuss its overall legitimacy.

It was 2010 and the Conservative Party was back in power. The first mandate of David Cameron, in coalition with the Liberal Democratic Party, had to deal with one of the greatest financial crises in Europe. In 2011, the “European Union Act” was approved, and introduced the need for a referendums in its clause 4 “Cases where treaty or Article 48(6) decision attracts a referendum” - the content of this decisions were mainly those in which there was to be an expansion of the competences of the EU; and clause 6 “Decisions requiring approval by Act and by referendum”, in which it is required the approval by an act of parliament and the meeting of the condition of the referendum in order for the Minister of Crown to be able to confirm or vote in favour in representation of the position of the United Kingdom, thus creating further barriers in the implementation of EU Law in the UK.

In an effort to change the downfall tendencies of the Conservative Party and the parallel upward tendencies of the UK Independence Party (UKIP),¹³⁷ David Cameron promised, in a 2013 speech¹³⁸ in Bloomberg, to hold a referendum on the permanence of the UK in the EU if the Conservative Party was able to secure an absolute majority in the upcoming legislative elections.¹³⁹ This majority was indeed accomplished and so the “European Union Referendum Act 2015” was approved by the House of Commons establishing the realisation of a referendum until the end of 2017. In the meantime, in the sequence of the letter written by the British prime minister on the 10th of november 2015, negotiations were initiated with the aim of obtaining a number of concessions from the EU, that would affirm the special position of the UK. It was called “A New Settlement for the United Kingdom within the European Union - Extract of the conclusions of the European Council of 18-19 February 2016 (2016/C69/01)” and it recalled, reaffirmed and established even further liberties to the UK.

misspecification.” GEDDES, Andrew. *Brexit and the Perils of ‘Europeanised’ migration* [online]. Migration Policy Centre, Journal of European Public Policy, 2018, P.3 [Consulted on the 29th of November 2023]. Available on: <https://migrationpolicycentre.eu/brexit-and-the-perils-of-europeanised-migration/>

¹³⁷ “*The promise of a referendum on EU membership was primarily an electoral gambit by David Cameron, who wanted to appease the eurosceptical members of his conservative party and neutralize the threat of UKIP*” LACEY, Joseph. *What was wrong with the Brexit referendum and what would be wrong with a second* [online]. London School of Economics Blog. 2018-03-23. [Consulted on the 29th of November 2023]. Available on: <https://blogs.lse.ac.uk/politicsandpolicy/what-was-wrong-with-the-brexit-referendum-and-what-would-be-wrong-with-a-second/>

¹³⁸ UK Cabinet Office, Prime Minister’s Office, 10 Downing Street, and The Rt Hon Lord Cameron. *EU speech at Bloomberg* [online]. Prime Minister David Cameron discussed the future of the European Union at Bloomberg. Published 23 January 2013. Available on: <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>

¹³⁹ “*The Prime Minister, David Cameron, announced on 23 January 2013 that if his party is elected to power following the next election expected in 2015, it would hold a referendum in the UK on EU membership, framed on an in out question. The wording of the question was not specified.*” GAY, Oonagh and Miller Vaughne. *Regulation of referendums* [online]. 29 January 2013. Available on : <https://researchbriefings.files.parliament.uk/documents/SN05142/SN05142.pdf>

All the guarantees had been accomplished, and still, on the 23rd of June 2016 “Leave” won. Shocked by this result, PM David Cameron resigned on the 13th of July and was replaced by Theresa May. Specialists have tried to explain the 52% win of “Leave” in a number of different ways. Some studies point out the staggering unbalance of the demographics on the referendum, with young people expressing their wish to remain and older people their wish to leave.¹⁴⁰ Others point out to the misleading arguments and populist discourse of “taking back control”¹⁴¹ and the suggestion that the UK would retain the benefits of EU membership without meeting any of its obligations.¹⁴² There are many reasons that can explain the growth of the eurosceptic sentiment, immigration and the 2015 Refugee Crisis are often mentioned as an unpleasant situation that the government took advantage of.¹⁴³

Furthermore, “the confluence of these two events [voters cast their ballots just as the influx of asylum seekers into Europe was reaching its peak] opened a unique opportunity for the political Right, and particularly UKIP (United Kingdom Independence Party), to fundamentally reshape the language of “immigration.” By blurring the boundaries between EU and non-EU, economic and humanitarian, and legal and illegal migration, the Leave campaign challenged established notions of membership, nationality, and human rights in a democratic vote, and won.”¹⁴⁴

¹⁴⁰ “The Brexit referendum and the election of Trump are often bracketed as twin events of 2016. Voters for both had similar sociological profiles: older, less skilled, less likely to have a university education, more likely to have suffered years of stagnant earnings, more threatened by immigration (Sobolewska and Ford 2020)” FOSSUM, John Erik and LORD, Christopher. Introduction to the European Union and Brexit. In: *Handbook on the European Union and Brexit* [online]. Edward Elgar Publishing, 2023, P.1–24 [Consulted on the 14th of November]. eISBN: 9781839100697. Available on: DOI: https://doi.org/10.4337/9781839100697_00008

¹⁴¹ *The Brexit campaign, and especially UKIP's breaking point poster, suggested that the European Union did not control the immigration of third-country nationals (i.e. non-EU citizens) and that this resulted in uncontrolled immigration into the UK. According to Eurosceptics, voting for Brexit would hence help the UK “take back control”, not only of the migration of EU citizens, but of third-country nationals as well.* ZAUN, Natasha . *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog. 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

¹⁴² “That contrasts with the idea floated by Brexit minister David Davis, who has said that after the UK leaves the EU, giving it control over migration, the country could continue to make payments into the EU budget in order to maintain access for its exporters to the single market.” Euractiv.com with Reuters. *Faull: UK can't buy single market access* [online]. 2017-01-06. Available on: <https://www.euractiv.com/section/economy-jobs/news/faull-uk-cant-buy-single-market-access/>

¹⁴³ “Other than the hot topics of immigration - not even making a distinction between european citizens and third country nationals - the recuperation of various dimensions of national sovereignty (take back control!), the economic and financial constraints resulting from the integration and riding the diffuse wave of popular dissatisfaction in the confrontation of dominant classes, the Brexit propaganda intended to capitalise from the indignation, making use of more impactful than truthful arguments” SOARES, António Goucha. *Brexit. O referendo de 2016* [online]. Relações Internacionais, 2019. Available on: Doi: <https://doi.org/10.23906/ri2019.61a06>

¹⁴⁴ GARRET, Amanda. *The Refugee Crisis, Brexit, and the Reframing of Immigration in Britain*. Europe Now. August, 2019. Available for online consultation on: <https://www.europenowjournal.org/2019/09/09/the-refugee-crisis-brexit-and-the-reframing-of-immigration-in-britain/>

In “Should I stay or should I go - Images of the EU in the British press during the Brexit debate” the author, Nadja Harvard, argues that according to the theory of “second level agenda setting (...) the image of a political institution in media can have a significant impact on popular opinion.”¹⁴⁵ In fact, “in the case of the EU, research has shown that media in the UK overwhelmingly portrays the EU as a less than desirable political institution”. The author goes on to point out the several reasons why there is a general negative perspective of the European Union, she highlights that a lot of it has to do with it being “(...) seen as secretive and elitist, as well as being too distant from the citizens of its Member States.” resulting in a general lack of knowledge of the inner workings of its institutions, “[which] makes it hard for the citizens to form informed opinions about the EU”.¹⁴⁶

If the relationship between Britain and the EU prior to the referendum had long been unstable, 2016 constituted a particularly turbulent year for the EU. With the financial crisis, refugee crisis and extreme right crisis, the pressure on the EU was high (...) a democratic deficit within the EU was one of the main issues (along with national security and refugee quota) brought up in the press and debates in preparation for the referendum.¹⁴⁷

It might not have been the most relevant factor, giving the emphasis was essentially on “EU immigration” but especially in the ways in which it is related to free movement, borders, national security and sovereignty, the refugee crisis and its perceived mishandling by the EU¹⁴⁸ played a role, and it was one of the areas in which Brits were eager to “take back control”.¹⁴⁹ Arguments on the increase of foreign workers fueled the “they are stealing our jobs” discourse and contributed to a further hostile perception of everything that is “foreign”.¹⁵⁰

¹⁴⁵ HARVARD, Nadja. *Should I stay or should I go - Image of the EU in the British press during the Brexit debate* [online]. Lund University Publications, 2018. Available on: <https://lup.lub.lu.se/student-papers/search/publication/8931444>

¹⁴⁶ HARVARD, Nadja. *Should I stay or should I go - Image of the EU in the British press during the Brexit debate* [online]. Ref.128.

¹⁴⁷ HARVARD, Nadja. *Should I stay or should I go - Image of the EU in the British press during the Brexit debate* [online]. Ref.128.

¹⁴⁸ “[while] economic reasons are being brought in as a positive aspect to a membership of the EU, (...) the EU’s handling of the refugee crisis is being criticised.” HARVARD, Nadja. *Should I stay or should I go - Image of the EU in the British press during the Brexit debate* [online]. Lund University Publications, 2018. Available on: <https://lup.lub.lu.se/student-papers/search/publication/8931444> and “The topic of migration featured prominently in the Brexit campaign, with the perception that the EU has been unable to control migration featuring as a key tenet of the «Leave» campaign.” European Parliament Policy Department for Citizen’s Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK’s withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

¹⁴⁹ “The Brexit campaign, and especially UKIP’s breaking point poster, suggested that the European Union did not control the immigration of third-country nationals (i.e. non-EU citizens) and that this resulted in uncontrolled immigration into the UK. According to Eurosceptics, voting for Brexit would hence help the UK ‘take back control’, not only of the migration of EU citizens, but of third-country nationals as well.” ZAUN, Natasha . *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog, 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

¹⁵⁰ “The argument of migration was used by the Telegraph in a negative sense as it communicated an economical loss, as the argument of jobs” HARVARD, Nadja. *Should I stay or should I go - Image of the EU in the British press during the*

Figure 4 - UKIP's Breaking Point Poster



UKIP had been carefully crafting¹⁵¹ the notion of EU immigration since 2010.¹⁵² Even if it is true that before joining the EU, most people came to the UK from Ireland and British colonies and ex-colonies,¹⁵³ and that it was only in 2004 after Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia joined the Union¹⁵⁴ that we started to see an increased migration of workers from these countries to the UK,¹⁵⁵ it was always crystal clear that the one could not have one without the other. Free market came with free movement.¹⁵⁶ However, ingeniously misleading

Brexit debate [online]. Lund University Publications, 2018. Available on: <https://lup.lub.lu.se/student-papers/search/publication/8931444>

¹⁵¹ "After 2010, the primary electoral beneficiaries of the increased salience of immigration were UKIP who consciously and successfully pursued a strategy of fusing the immigration debate and EU membership (Goodwin and Milazzo 2015)." GEDDES, Andrew. *Brexit and the Perils of 'Europeanised' migration* [online]. Migration Policy Centre, Journal of European Public Policy, 2018, P.3 [Consulted on the 29th of November 2023]. Available on: <https://migrationpolicycentre.eu/brexit-and-the-perils-of-europeanised-migration/>

¹⁵² "The term 'EU immigration', despite its ubiquity in the UK, is problematic because, pre-Brexit, EU citizens moved in the context of a rights-based treaty framework and therefore were not 'immigrants' in any legal sense. Some argue that it has been a triumph for the arguments of the populist right UK Independence Party (UKIP) that the term 'EU immigrant' managed so decisively to enter public debate and also academic interpretations of Brexit (Favell and Barbulescu 2018), although, as we argue, UKIP's ability to do this was partly endogenous to Britain's long-standing weak sense of pan-European identity. GEDDES, Andrew. *Brexit and the Perils of 'Europeanised' migration* [online]. Migration Policy Centre, Journal of European Public Policy, 2018, P.3 [Consulted on the 29th of November 2023]. Available on: <https://migrationpolicycentre.eu/brexit-and-the-perils-of-europeanised-migration/>

¹⁵³ GEDDES, Andrew. *Brexit and the Perils of 'Europeanised' migration* [online]. Migration Policy Centre, Journal of European Public Policy, 2018, P.3 [Consulted on the 29th of November 2023]. Available on: <https://migrationpolicycentre.eu/brexit-and-the-perils-of-europeanised-migration/>

¹⁵⁴ Through the Treaty of Accession 2003 [online]. Available on: https://www.europarl.europa.eu/enlargement_new/treaty/default_en.htm

¹⁵⁵ "The decision by the Blair government to allow immediate access in 2004 to the UK labour market for the 10 accession states, including eight central and eastern European countries was truly momentous (...) EU free movement was linked to a liberal, deregulated UK labour market to which flexible, migrant labour became crucial" GEDDES, Andrew. *Brexit and the Perils of 'Europeanised' migration* [online]. Migration Policy Centre, Journal of European Public Policy, 2018, P.6 [Consulted on the 29th of November 2023]. Available on: <https://migrationpolicycentre.eu/brexit-and-the-perils-of-europeanised-migration/>

¹⁵⁶ "Faull [Jonathan Faull, previous top UK official at the European Commission] dismissed the idea that Britain could have an arrangement with the bloc similar to that of non-EU member Norway, pointing out that Norway makes budgetary contributions to the EU as well as accepting the free movement of people." Euractiv.com with Reuters. Faull: UK can't buy

the public in the “Breaking Point” poster, confusing EU Immigration with the Refugee Crisis, by presenting a queue of refugees crossing the border from Croatia to Slovenia in summer 2015 really worked as “(...) a tipping point in the debate. The EU was associated with chaos and open borders – both for EU citizens and third country nationals.”¹⁵⁷

In this study, we argue that the misleading use of the word migrant led voters to confuse EU immigrants and refugees, in the context of the 2015 Refugee Crisis and the political campaign that surrounded the Brexit Referendum of 2016.¹⁵⁸ The misunderstanding of these concepts and the different areas of policy they entail resulted in the common belief that leaving the EU would enable the government to stop the movement of “migrants” into the UK because it would end free movement.¹⁵⁹ However, failing to differentiate immigrants from refugees meant failing to understand that refugees were protected under International Law and therefore withdrawal from the EU would not, in itself, solve this issue.¹⁶⁰

The legitimacy of holding a referendum to validate the option of leaving the EU, especially one that isn’t mandatory but *ad hoc* and mostly political is questioned¹⁶¹ by several authors that highlight the fact that the UK is supposed to be a Parliamentary democracy with elected representatives, whose job is precisely to decide on these kind

single market access [online]. 2017-01-06. Available on: <https://www.euractiv.com/section/economy-jobs/news/faull-uk-cant-buy-single-market-access/>

¹⁵⁷ THYM, Daniel. *The Irony of Brexit for Immigration Control* [online]. VerfBlog, 2017/10/20, [Consulted on the 16th of November]. Available on: DOI: 10.17176/20171020-110133

¹⁵⁸ “*In the British media, the term ‘migration’ was used to cover ‘asylum(-seeker)’ and ‘refugee’ without differentiating their implications (...)*”. TEMIZISLER, Sevgi. The Mediatisation of Migration Issues During the Refugee Crisis: A comparative study of the UK, Denmark and Germany. in JAKOBSON, ML, et al. *Anxieties of Migration and Integration in Turbulent Times* [online]. IMISCOE Research Series. 2023. [Consulted on the 14th of November]. ISBN 978-3-031-23996-0 (eBook). Available on: <https://doi.org/10.1007/978-3-031-23996-0>

¹⁵⁹ “*First, the main concern in the UK was the high increase in EU immigration, particularly after the ‘A8’ East European countries joined the EU in 2004. Rather than the refugees, many British people were worried that EU immigrants reduce the pay and job opportunities of the UK-born due to greater competition for jobs (Wadsworth et al., 2016). Since the UK is not in the Schengen passport-free travel zone, refugees were not posing a big problem due to border checks.*” TEMIZISLER, Sevgi. The Mediatisation of Migration Issues During the Refugee Crisis: A comparative study of the UK, Denmark and Germany. in JAKOBSON, ML, et al. *Anxieties of Migration and Integration in Turbulent Times* [online]. IMISCOE Research Series. 2023. [Consulted on the 14th of November]. ISBN 978-3-031-23996-0 (eBook). Available on: <https://doi.org/10.1007/978-3-031-23996-0>

¹⁶⁰ “*(...) while Brexit can facilitate legal control over the entry and stay of EU citizens, it need not necessarily make it easier for the UK to control the immigration of third-country nationals, including asylum seekers. It might even, paradoxically, render control of immigration by non-Europeans more difficult to some extent.*” THYM, Daniel. *The Irony of Brexit for Immigration Control* [online]. VerfBlog, 2017/10/20, [Consulted on the 16th of November]. Available on: DOI: 10.17176/20171020-110133

¹⁶¹ “*Northern Ireland and Scotland voted to remain. For some, the idea that a majority of the whole of the UK should trump majorities in its parts in determining the nature of Brexit has already begged the very question of whether the UK should decide fundamental questions as a democratic people or a democracy of more than one democratic people. For some of that view, the referendum has not been a legitimating moment. It has been used to impose Brexit on parts of the UK that should have had a larger role in discussing and deciding it.*” FOSSUM, John Erik and LORD, Christopher. Introduction to the European Union and Brexit. In: *Handbook on the European Union and Brexit* [online]. Edward Elgar Publishing, 2023, P.1–24 [Consulted on the 14th of November]. eISBN: 9781839100697. Available on: DOI: <https://doi.org/10.4337/9781839100697.00008>

of matters.¹⁶² Essentially it has been claimed that the function of a referendum was subverted, from being a way of protection from arbitrary use of government power¹⁶³ to being used by the government¹⁶⁴ to legitimize its political decisions and manipulate the electors.¹⁶⁵

4.2. Triggering article 50 of the TEU

Article 50 of the Treaty of European Union sets out the right of a Member State to withdraw from the EU. It was included in the EU primary law through the Treaty of Lisbon (2009) but it substantially corresponds to its original version on the TECE (2004).¹⁶⁶

According to par.1 of article 50, the decision to leave is a voluntary decision of the Member State according to its own constitutional system and its requirements. These are different from Member State to Member State. In the United Kingdom, the Parliament¹⁶⁷ is considered to be the sovereign institution and the political system is based on a representative democracy model, therefore, as we've mentioned before, it has been questioned whether choosing to hold a referendum in order to establish

¹⁶² LACEY, Joseph. *What was wrong with the Brexit referendum and what would be wrong with a second* [online]. London School of Economics Blog. 2018-03-23. [Consulted on the 29th of November 2023]. Available on: <https://blogs.lse.ac.uk/politicsandpolicy/what-was-wrong-with-the-brexit-referendum-and-what-would-be-wrong-with-a-second/>

¹⁶³ "(...) the need for referendums as a means for correcting the elitist character of political constitutionalism." FOSSUM, John Erik and LORD, Christopher. Introduction to the European Union and Brexit. In: *Handbook on the European Union and Brexit* [online]. Edward Elgar Publishing, 2023, P.1–24 [Consulted on the 14th of November]. eISBN: 9781839100697. Available on: DOI: <https://doi.org/10.4337/9781839100697.00008>

¹⁶⁴ "(...) referendums are deviations from representative democracy and serve to disfigure democracy, given that 'they deny the pluralism and tolerance of true democratic decision-making by emphasizing the existence of a mythical and singular people's will.'" FOSSUM, John Erik and LORD, Christopher. Introduction to the European Union and Brexit. In: *Handbook on the European Union and Brexit* [online]. Edward Elgar Publishing, 2023, P.1–24 [Consulted on the 14th of November]. eISBN: 9781839100697. Available on: DOI: <https://doi.org/10.4337/9781839100697.00008>

¹⁶⁵ LACEY, Joseph. *What was wrong with the Brexit referendum and what would be wrong with a second* [online]. London School of Economics Blog. 2018-03-23. [Consulted on the 29th of November 2023]. Available on: <https://blogs.lse.ac.uk/politicsandpolicy/what-was-wrong-with-the-brexit-referendum-and-what-would-be-wrong-with-a-second/>

¹⁶⁶ "(...) the drafting history of Article 50, (...) was derived from Article I-60 of the Constitutional Treaty, and was headed *Voluntary Withdrawal from the Union*. Lord Kerr, who was responsible for drafting that provision with Giuliano Amato, has stated that it was intended to provide a procedural framework for the pre-existing right of a Member State to leave the EU of its own free will, and that such a decision was revocable." in CRAIG, Paul. In F Fabbrini (ed), *The Law and Politics of Brexit* (Oxford University Press, 2017), Chap. 3. Oxford Legal Studies Research Paper No. 37/2017. *The process: Brexit and the Anatomy of Article 50*. [Consulted on the 14th of November], available for online consultation on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967808

¹⁶⁷ "One cannot forget the legal and constitutional controversy regarding the participation of Parliament in the withdrawal process. Although the United Kingdom Government did not want to involve Parliament in the triggering of Article 50 of the TEU, the Courts decided otherwise. In the Case R - on the applicants of Miller and another (Respondents) v. Secretary of State for Exiting the European Union (Appellant) - the Supreme Court ruled on January 24, 2017 that the Government could not trigger Article 50 without obtaining parliamentary authorisation. Following that decision, the UK Parliament adopted the "European Union (Notification of Withdrawal) Act 2017" on March 13, 2017" BARATA, Mario. *Brexit and the limits of article 50 Treaty of the European Union* [online]. De Gruyter, Open Political Science, Volume 3 Issue 1, 2020. Available on: <https://www.degruyter.com/document/doi/10.1515/openps-2020-0013/html>.

For further information regarding this decision read CRAIG, Paul. *Miller, Structural Constitutional Review and the Limits of Prerogative Power* (2017).

whether or not the UK should leave the EU was the most adequate means of deciding this matter.¹⁶⁸

Mauro Gatti, one of its critics, points out that this provision “(...) merely prescribes an obligation of means (the negotiation), and not an obligation of result (the conclusion of a withdrawal agreement)”.¹⁶⁹ The same author also identifies that this obligation to negotiate “is aimed at preventing the legal uncertainty caused by a «no deal» scenario” and thus one of the objectives of Article 50 is to establish “a procedure to enable withdrawal to take place «in an orderly fashion»”. In fact, we can say that “the reason why EU treaties seek to facilitate negotiation is evident: unilateral withdrawal from the EU would greatly affect the economy and citizens of both the EU and the withdrawing state (...)”.¹⁷⁰ However, the result of this is not only that the reaching of an agreement for the withdrawal is not mandatory, but also that even in the absence of an agreement, at the end of the 2-year period, the departure will become effective “hence it is considered by some as an unfettered right to unilateral withdrawal”.¹⁷¹

Regarding par.4, the notion of “decisions concerning it”¹⁷² is criticised for being subjective and unclear. Christophe Hillion warns that while it could be interpreted broadly, in order to be understood as meaning to “limit its [the withdrawing state] weight in the Council and European Council” to make sure the MS is prevented from influencing EU decisions that it might never be subjected to (or else we might have a withdrawing state with more influence than a new one), this construction might be exaggeratingly broad in the event of a change of heart.¹⁷³

It is widely believed and stated that a strong approach was needed in the withdrawal negotiations in order to avoid Brexit to work as encouragement for other Member States to leave: “the EU cannot risk letting the UK be seen to have won a deal that results in it being materially no worse off, let also potentially better off, than it was

¹⁶⁸ SOARES, António Goucha. *Brexit. O referendo de 2016* [online]. Relações Internacionais, 2019. Available on: Doi: <https://doi.org/10.23906/ri2019.61a06>

¹⁶⁹ GATTI, Mauro. *Withdrawing from the EU: Between Sovereign Rights and Union Autonomy* [online]. Bruxelles, 2020. PP. 1-13. Available on: <https://hdl.handle.net/11585/763275>

¹⁷⁰ GATTI, Mauro. *Withdrawing from the EU: Between Sovereign Rights and Union Autonomy* [online]. Bruxelles, 2020. PP. 1-13. Available on: <https://hdl.handle.net/11585/763275>

¹⁷¹ HILLION, Christophe. Accession and Withdrawal in the Law of the European Union. in ARNULL, Anthony et al. *The oxford handbook of european union law*. Oxford University Press, 2015, Footnote 71, P.139 ISBN: 9780199672646.

¹⁷² 4. *For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.* European Union. Treaty of the European Union [online]. Available on:

¹⁷³ HILLION, Christophe. Accession and Withdrawal in the Law of the European Union. in ARNULL, Anthony et al. *The oxford handbook of european union law*. Oxford University Press, 2015, Footnote 68, P. 139 ISBN: 9780199672646.

pre-Brexit".¹⁷⁴ Although we have not seen any other Member State follow the lead of the United Kingdom, their withdrawal seems to question the integration project, especially if in theory it could simply be used as a political-pressure tool.

Following the *Miller* decision, it was necessary for the British Parliament to adopt the European Union (Notification of Withdrawal) Act 2017 authorising the government to trigger Article 50. The UK government feared that the previous intervention of Parliament signaled the intention of influencing the negotiations and refused to be subject to these kinds of constraints.¹⁷⁵

Nonetheless, the Parliament established a select committee on Exiting the European Union¹⁷⁶ to join the already existing House of Lords' Select Committee on the EU and the House of Lords' Constitution Committee.

Article 50 was officially triggered on the 29th of March 2017, when Permanent Representative of the United Kingdom to the European Union, Tim Barrow, hand delivered Prime Minister' Theresa May letter¹⁷⁷ to Donald Tusk, the president of the European Council in Brussels.

4.3. Reaching a Withdrawal Agreement (WA)

The method according to which the UK and the EU were to tackle the negotiations leading up to a Withdrawal Agreement was widely discussed. The public and expert

¹⁷⁴ NUGENT, Neill. Brexit: Yet another crisis for Europe. In: MARTIL, Benjamin. *Brexit and beyond. Rethinking the future of Europe*. UCL Press, 2018 pp. 54-62. E-ISBN: 9781787352759. Available on: <https://www.jstor.org/stable/j.ctt20krxf8.11>

¹⁷⁵ *The government accepted that it would have to gain statutory approval, but rejected constraints on the negotiating position. Thus, it refused procedural constraints designed to impose reporting requirements during the negotiation process, and rejected also the amendment to the Bill in the House of Lords whereby the government would have been legally obliged to place a withdrawal agreement before Parliament, prior to accepting or rejecting it (...) while making it clear that if Parliament rejected a withdrawal agreement, then the UK would exit the EU without an agreement and default to World Trade Organization rules. (...) It has been contended, in what is known as the Three Knights Opinion, that the enactment of the European Union (Notification of Withdrawal) Act 2017 does not suffice to entitle the executive to commit to a withdrawal agreement, or to leave the EU in the absence of an agreement, without securing statutory approval (...) Parliamentary sovereignty and the principle of legality therefore require Parliament «expressly to authorise withdrawal on the terms agreed with the European Union, or to authorise withdrawal if no acceptable terms can be agreed. The 2017 Act authorised the Prime Minister to notify the UK's intent to leave the EU, but did not remove rights, or change domestic law, hence the need for a further statute.* CRAIG, Paul. The process: Brexit and the Anatomy of Article 50. In F Fabbrini (ed). *The Law and Politics of Brexit*. Oxford University Press, 2017, Chap. 3, Oxford Legal Studies Research Paper No. 37/2017. Available on : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967808

¹⁷⁶ The Department for Exiting the European Union (DExEU) was a ministerial department from 14 July 2016 to 31 January 2020. It was responsible for overseeing negotiations to leave the EU. For more information on this, please consult the following website: <https://www.gov.uk/government/organisations/department-for-exiting-the-european-union>

¹⁷⁷ Prime Minister's letter to Donald Tusk triggering Article 50. Available on: https://assets.publishing.service.gov.uk/media/5a7481c140f0b646cbc40610/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf

opinion were divided between wanting a hard and a soft Brexit,¹⁷⁸ but what became clear was that there were to be two agreements and a correspondent two phase negotiation, as formally endorsed by the European Council on the negotiation guidelines of 29 April 2017,¹⁷⁹ contrary to the sentiment expressed in the White Paper on Exit from the EU¹⁸⁰ drafted by the House of Lords' Constitution Committee and reaffirmed in the Prime Minister's notification of withdrawal letter of 20 March 2017.

[President Tusk] outlined the fundamental principles that would inform the negotiations, which were: minimization of disruption caused by the UK withdrawal, securing agreement on the rights of EU citizens living in the UK, ensuring that the UK honours its financial commitments; and avoiding a hard border between Northern Ireland and Ireland (...) these four issues are all part of the first phase of negotiations. Once and only once we have achieved sufficient progress on the withdrawal, can we discuss the framework for our future relationship. Starting parallel talks on all issues at the same time, as suggested by some in the UK, will not happen.¹⁸¹

Each of the above referenced main issues: money, people and borders, generated further discussions and highlighted the division between hard and soft Brexiters, and even contradictions within the same "faction". Among its advocates, Brexit was interpreted divergently. Some view it as an opportunity to establish a Thames-version of Singapore, characterized by radical deregulation and a highly open economy with minimal state intervention. Others see it as a chance to forge a more communitarian economic and societal structure or, at the very least, a new social compromise. To certain individuals, a hard Brexit signifies a decisive separation from the European Union in terms of economic governance and regulation. Conversely, for others, a hard Brexit entails adopting a rigorous stance on immigration. Despite these internal contradictions,

¹⁷⁸ "As the name implies, the difference between hard and soft Brexit, and therefore the division between hard Brexiters and soft Brexiters lies in the different opinions regarding the approach that the UK should have towards leaving the EU. While hard Brexit means cutting ties with the EU in every aspect: meaning no longer being part of the single market, which allows free movement of goods, services and people, no longer being part of the single customs union or the EU trade agreements, considered to be the only way for the UK to regain its full political sovereignty. On the other hand, soft Brexit means making a compromise between staying and leaving, creating a similar regime to the ones of Iceland and Norway according to which, although the UK ceases to have political representation within the EU it still benefits from the economical advantages of staying in the single market." JUNEJA, Pranchi. *Hard Brexit vs. Soft Brexit* [online]. Available on: <https://www.managementstudyguide.com/hard-brexit-vs-soft-brexit.htm>

¹⁷⁹ European Council General Secretariat of the Council Delegations. *Guidelines following the United Kingdom's Notification under article 50 TEU* [online]. Brussels : 2017-04-29. Available on : <https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf> .

¹⁸⁰ *The Future Relationship Between the United Kingdom and the European Union* [online]. Presented to Parliament by the Prime Minister by Command of Her Majesty. House of Commons Library, July 2018, P.70 [Consulted on the 14th of November]. Available on: https://assets.publishing.service.gov.uk/media/5c8f805440f0b640d60882b1/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

¹⁸¹ CRAIG, Paul. The process: Brexit and the Anatomy of Article 50. In F Fabbrini (ed). *The Law and Politics of Brexit*. Oxford University Press, 2017, Chap. 3, Oxford Legal Studies Research Paper No. 37/2017. Available on : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967808

a common thread among most Brexit supporters is the belief that the UK lacked adequate 'control' over its laws, finances, and borders, providing a shared basis for their vote.¹⁸²

It was soon understood by every part involved that the amount of negotiation required would take more than the two-year period established, as so, it was necessary to make it clear for the sake of legal certainty and people's rights, what laws were to be applicable during what became known as the "transition period". There were calls for a "transition agreement", which was admissible according to the European Council guideline,¹⁸³ but its limits were soon recognised: if on one hand, in order for it to have practical applicability the transitional arrangements needed to be detailed, on the other, this might fall under competences that are not exclusive of the EU and thus require ratification from the other MS and the question of whether this transition should be connected to the withdrawal agreement in itself and how this can be managed with the 2 year deadline since "the agreement must be legally in force for the transitional provisions to apply [but] when the agreement enters into force article 50 stipulates that the Treaties cease to apply [and] there is no provision allowing some of the Treaty articles to continue [being applicable] pending completion of a trade agreement at an unspecified future date."¹⁸⁴

There were temptations from other MS to try and arrange for better bilateral deals with the UK. This was avoided by the efforts of the Commission and the European Parliament, which disciplined MS not to seek these, as it would result in fragmentation.¹⁸⁵

¹⁸² *Some of its supporters understand Brexit as an opportunity to create a kind of Singapore on Thames: a radically deregulated and maximally open economy with a minimal state. Others understand it as an opportunity to create a more communitarian economy and society or at least a new social compromise. For some, a hard Brexit means a hard break from the EU as a form of economic governance and regulation. For others, a hard Brexit means being hard on immigration (...). Yet, whatever their other contradictions, most who voted for Brexit agreed with some part of the idea that the UK had insufficient 'control' of its laws, money and borders.* FOSSUM, John Erik and LORD, Christopher. Introduction to the European Union and Brexit. In: *Handbook on the European Union and Brexit* [online]. Edward Elgar Publishing, 2023, P.1–24 [Consulted on the 14th of November]. eISBN: 9781839100697. Available on: DOI: <https://doi.org/10.4337/9781839100697.00008>

¹⁸³ European Council General Secretariat of the Council Delegations. *Guidelines following the United Kingdom's Notification under article 50 TEU* [online]. Brussels : 2017-04-29. Available on : <https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf> .

¹⁸⁴ CRAIG, Paul. The process: Brexit and the Anatomy of Article 50. In F Fabbrini (ed). *The Law and Politics of Brexit*. Oxford University Press, 2017, Chap. 3, Oxford Legal Studies Research Paper No. 37/2017. Available on : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967808

¹⁸⁵ *"The EP played an important role in sustaining EU coherence during the negotiations (...) much less known is how far the Commission developed its role in continuous communication with the Member States. (...) It was also an important reason why the EU maintained its powerful position as a bloc negotiator throughout, without fragmentation, as many had feared, into a series of competing bilateral discussions with the UK."* FOSSUM, John Erik and LORD, Christopher. Introduction to the European Union and Brexit. In: *Handbook on the European Union and Brexit* [online]. Edward Elgar Publishing, 2023, P.1–24 [Consulted on the 14th of November]. eISBN: 9781839100697. Available on: DOI: <https://doi.org/10.4337/9781839100697.00008>

Nevertheless, the negotiations were so long and complicated that at some point the impossibility of reaching an agreement was considered.¹⁸⁶

Although it had been clearly stated that only after finishing the first phase of negotiations would it be possible to negotiate the future relationship, the UK Government, on its July 2018 White Paper the Future Relationship Between the United Kingdom and the European Union,¹⁸⁷ proposed “joint action (...) on asylum and illegal migration”¹⁸⁸ to which it dedicated a whole chapter (2.5.1). In its proposal, the UK Government suggests that a Dublin-like system is created, in order to avoid secondary movements and double applications¹⁸⁹ by arranging for the return of illegal migrants though continued access to the Eurodac database and continued cooperation with Frontex and Europol.¹⁹⁰ It is also proposed that a new legal framework is created to provide for the family reunion of

¹⁸⁶ *The no deal scenario has, moreover, been criticised by the select committee on Exiting the European Union. It was of the view that this would be bad for the UK and the EU and it was critical because the government had not explained what terms would be demonstrably worse for the UK than “no deal”. It was therefore incumbent on the Government to «conduct a thorough assessment of the economic, legal and other implications of leaving the EU at the end of the article 50 with ‘no deal’ in place.* CRAIG, Paul. *The process: Brexit and the Anatomy of Article 50.* In F Fabbrini (ed). *The Law and Politics of Brexit.* Oxford University Press, 2017, Chap. 3, Oxford Legal Studies Research Paper No. 37/2017. Available on : https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967808

¹⁸⁷ *The Future Relationship Between the United Kingdom and the European Union* [online]. Presented to Parliament by the Prime Minister by Command of Her Majesty. House of Commons Library, July 2018, P.70 [Consulted on the 14th of November]. Available on: https://assets.publishing.service.gov.uk/media/5c8f805440f0b640d60882b1/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf “Considering the prominence of the topic in the UK political arena, it is not surprising that the UK Government proposed arrangements for the future EU-UK relationship in the field of «asylum and illegal migration» in its July 2018 White Paper the Future Relationship Between the United Kingdom and the European Union.” European Parliament Policy Department for Citizen’s Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK’s withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

¹⁸⁸ *The Future Relationship Between the United Kingdom and the European Union* [online]. Presented to Parliament by the Prime Minister by Command of Her Majesty. House of Commons Library, July 2018, P.53 [Consulted on the 14th of November]. Available on: https://assets.publishing.service.gov.uk/media/5c8f805440f0b640d60882b1/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

¹⁸⁹ “a new legal framework to return illegal migrants and asylum-seekers to a country they have travelled through, or have a connection with, in order to have their protection claim considered, where necessary. People should be prevented from making claims in more than one country, and on multiple occasions. A clear legal structure, facilitated by access to Eurodac (the biometric and fingerprint database used for evidencing secondary asylum claims) or an equivalent system will help achieve this” *The Future Relationship Between the United Kingdom and the European Union* [online]. Presented to Parliament by the Prime Minister by Command of Her Majesty. House of Commons Library, July 2018, P.70 [Consulted on the 14th of November]. Available on: https://assets.publishing.service.gov.uk/media/5c8f805440f0b640d60882b1/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

¹⁹⁰ “The UK therefore proposes a comprehensive, ‘whole of route’ approach that includes interventions at every stage of the migrant journey and ensure no new incentives are created to make dangerous journeys to Europe. It should cover: a. ongoing operational cooperation, for example working with Frontex to strengthen the EU’s external border, and Europol to combat organised immigration crime” in *The Future Relationship Between the United Kingdom and the European Union* [online]. Presented to Parliament by the Prime Minister by Command of Her Majesty. House of Commons Library, July 2018, P.70 [Consulted on the 14th of November]. Available on: https://assets.publishing.service.gov.uk/media/5c8f805440f0b640d60882b1/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

unaccompanied children.¹⁹¹ This approach has been criticised for its securitization focus and potential contribution to the crimmigration phenomena.¹⁹²

None of the proposed topics related to asylum featured in the Withdrawal Agreement¹⁹³ reached on the 17th of October 2019. The agreement established a transition period, during which the UK continued to follow EU rules (with some exceptions) while the negotiations were in process. The content of the WA essentially focused on establishing protections for EU citizens residing in the UK, settling financial obligations and contributions and avoiding the “hard border” between Northern Ireland (part of the UK) and the Republic of Ireland (an EU member) through the Northern Ireland Protocol.¹⁹⁴

While the Withdrawal Agreement focused on the terms of the UK’s departure, it also set the stage for negotiations on the future relationship between the EU and the UK, covering areas like trade, security, and other bilateral issues. In fact, the revised Political Declaration on the framework for the future relationship¹⁹⁵ was endorsed at the same time as the revised WA. However, in this Declaration there is no mention to asylum, but only to “illegal migration”¹⁹⁶ to which a small section under the Thematic Cooperation

¹⁹¹ “(...) *new arrangements that enable unaccompanied asylum-seeking children in the EU to join close family members in the UK, where it is in their best interests and vice versa*” *The Future Relationship Between the United Kingdom and the European Union* [online]. Presented to Parliament by the Prime Minister by Command of Her Majesty. House of Commons Library, July 2018, P.70 [Consulted on the 14th of November]. Available on: https://assets.publishing.service.gov.uk/media/5c8f805440f0b640d60882b1/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

¹⁹² *The government proposal does not specify whether the new partnership should include the Dublin system and in fact, it makes no reference to a responsibility for processing asylum applications. It associates migration and asylum with security threats, thus conflating immigration with criminal law, the so-called ‘crimmigration’,³⁴ feeding the narrative of burden that is associated with asylum seekers and migrants. The proposal only discusses asylum cooperation from a purely migration control perspective without any humanitarian regard to sharing responsibility with other neighbouring countries and without any regard to standards of protection or the applicable law. It reveals a vague intention of cooperation for the purpose of migration control and the fight against crime associated with ‘illegal immigration’ without, however, referring to responsibilities stemming from the humanitarian nature.* XANTHOPOULOU, Ermioni. *Legal uncertainty, distrust and injustice in post-Brexit asylum cooperation* [online]. In: AHMED, Tawhida. *On Brexit. Law, Justices and Injustices*. Edward Elgar Publishing, 2019. ISBN: 9781789903003. Available on: <https://www.elgaronline.com/edcollchap/edcoll/9781789903003/9781789903003.00021.xml>

¹⁹³ *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01* [online]. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29>

¹⁹⁴ European Commission. *The EU-UK Withdrawal Agreement* [online]. Available on: https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement_en

¹⁹⁵ *Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (2019/C 384 I/02)* [online]. Available on: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL\(01\)&from=PT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=PT)

¹⁹⁶ *“The Parties support ambitious, close and lasting cooperation on external action to protect citizens from external threats, including new emerging threats, prevent conflicts, strengthen international peace and security, including through the United Nations and NATO, and address the root causes of global challenges such as terrorism or illegal migration. They will champion a rules-based international order and project their common values worldwide.”* *Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (2019/C 384 I/02)* [online]. III. Foreign policy, security and defence. Available on: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL\(01\)&from=PT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=PT)

Chapter is dedicated.¹⁹⁷ The Withdrawal Agreement¹⁹⁸ entered into force on the 1st of February 2020, marking the start of the transition period, during which EU Law remained applicable to the UK, that was still treated like a MS,¹⁹⁹ with the exception of participation in the EU institutions and governance structures.²⁰⁰

4.4. The Trade and Cooperation Agreement (TCA)

“Although it was stated by the EU negotiations team that there was an intention to set up a regular dialogue on irregular migration, the UK proposed two draft agreements, one on transferring unaccompanied, asylum-seeking children²⁰¹ and the other²⁰² on readmitting persons who entered or reside without authorisation”,²⁰³ both proposals were rejected by the European Commission on the grounds that they were outside the scope of the agreed topics of discussion.²⁰⁴ Besides, the proposals were found to be lopsided, as they intended to provide the UK with the maintenance of possibility to return asylum seekers whose data had been previously scanned in another MS; but in turn, allow the UK to exercise discretion when deciding which people to accept

¹⁹⁷ Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (2019/C 384 I/02) [online]. IV. Thematic Cooperation. D. Illegal migration. Available on: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL\(01\)&from=PT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=PT)

¹⁹⁸ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 [online]. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29>

¹⁹⁹ Until the withdrawal of the UK from the EU, the UK remains a full member of the first phase of the CEAS. Moreover, during the transition period, Protocols 19 and 21, which outline the UK's right to participate on an opt-in basis, will continue to apply. European Parliament Policy Department for Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

²⁰⁰ European Commission. *The EU-UK Withdrawal Agreement* [online]. Available on: https://commission.europa.eu/strategy-and-policy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement_en

²⁰¹ UK Negotiation Team. *Draft agreement on the transfer of unaccompanied children* [online]. Shared by the UK negotiating team with the Task Force for Relations with the United Kingdom as a draft negotiating document, made public and available for online consultation on: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886020/DRAFT_Agreement_on_the_transfer_of_unaccompanied_asylum-seeking_children.pdf

²⁰² UK Negotiation Team. *Draft agreement on the readmission of persons residing without authorisation* [online]. Shared by the UK negotiating team with the Task Force for Relations with the United Kingdom as a draft negotiating document, made public and available for online consultation on: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/886021/DRAFT_Agreement_on_the_readmission_of_people_residing_without_authorisation.pdf

²⁰³ NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

²⁰⁴ NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

from other MS, admitting only unaccompanied children to reunite with a legally residing family member.²⁰⁵

The transition period was used to negotiate the Trade and Cooperation Agreement. On the 31st of December 2020, the transition period ended, and the UK formally completed its separation from the EU. After multiple guesses on what the deal would consist of, on the 1st of January 2021 the Trade and Cooperation Agreement (TCA) provisionally entered into force. The TCA virtually has no mention of what will happen in terms of asylum.²⁰⁶ It establishes the regime to be applied to EU citizens residing in the UK but does not mention refugees or asylum seeker's situation. Initially there were suggestions that the UK would try to negotiate its continued participation in the Dublin III Regulation²⁰⁷ and maintenance of access to the EURODAC database.²⁰⁸ However, "(...) the only clear migration-related commitment concerns anti-smuggling operations: the TCA establishes that Europol should continue its operational cooperation and information exchange with the UK, which is now a third party."²⁰⁹ Nonetheless, this is not *per se* an impediment for the UK to participate in EU agencies, as they are open for third country participation, which is relevant since the TCA only features 7 EU Agencies, seeing as the UK walked away from cooperation on foreign policy, external security and defense.²¹⁰

²⁰⁵ NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

²⁰⁶ "No agreement was reached on asylum policy in the Trade and Cooperation Agreement (TCA) between the UK and EU." OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

²⁰⁷ "Some stakeholders called for the UK and EU to reach an agreement for continued UK participation in the Dublin system after the end of the Brexit transition period, or at least until successor arrangements were finalized". The Lords EU Home Affairs Committees. *Brexit: refugee protection and asylum policy expressed support for such an approach* [online]. October 2019. Available on: <https://committees.parliament.uk/work/47/brexit-future-ukeu-cooperation-on-asylum-and-international-protection/publications/>

²⁰⁸ "The Government did not seek continued UK participation in the Dublin Regulation as a 'third party', or a new agreement which simply replicated the Dublin provisions. Although the UK had originally expressed interest in continued access to Eurodac, or a similar alternative, it ceased to pursue this during the course of the negotiations." GOWER, Melanie. *Brexit: the end of the Dublin III Regulation in the UK* [online]. House of Commons Library, Briefing Paper no. 9031, 2020-12-21 [Consulted on the 23rd of November 2023]. Available on: <https://researchbriefings.files.parliament.uk/documents/CBP-9031/CBP-9031.pdf>

²⁰⁹ NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

²¹⁰ *An interesting and explicitly Brexit-relevant fact is that EU agencies are open for participation from third countries. (...) Post-Brexit the UK's role has changed to third country and what is notable is that the TCA only covers seven EU agencies. The political declaration initially envisaged cooperation also in foreign policy, external security and defence, but the UK walked away from this.* FOSSUM, John Erik and LORD, Christopher. Introduction to the European Union and Brexit. In: *Handbook on the European Union and Brexit* [online]. Edward Elgar Publishing, 2023, P.1–24 [Consulted on the 14th of November]. eISBN: 9781839100697. Available on: DOI: <https://doi.org/10.4337/9781839100697.00008>

The only mention to asylum is made on the non-binding²¹¹ UK-EU Joint Political Declaration to the TCA²¹², particularly in the Joint Political Declaration on Asylum.²¹³ Thus, we can conclude that there is not a single binding rule established between the UK and the EU related to asylum or the protection of asylum seekers and refugee's rights.²¹⁴ Therefore, it is uncertain what the future for international protection cooperation between the UK and the EU holds.²¹⁵

In this sense, we argue that being part of the Dublin system was actually beneficial for the UK, allowing for the return of previously scanned asylum seekers to the MS responsible for analysing their claim. Furthermore, we point out the fact that this "issue", although mentioned in the negotiations,²¹⁶ was not at all addressed in the Withdrawal Agreement (except for two non-binding paragraphs on the annexed Joint Political Declaration) or the Trade and Cooperation Agreement.

We will now focus on the impact of Brexit on the current UK's Asylum Policy, demonstrating how, much more than the non-application of EU Law, the loss of the European *acquis* and shared standard of human rights protection results in the passing of rights-restrictive laws that breach international obligations²¹⁷ and complicates bilateral cooperation.

²¹¹ NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

²¹² UK-EU Joint Political Declaration. *Declarations referred to in the Council Decision on the signing on behalf of the Union, and on a provisional application of the Trade and Cooperation Agreement and of the Agreement concerning security procedures for exchanging and protecting classified information* [online]. 2020-12-31. Official Journal of the European Union. Available on: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231\(03\)&rid=4](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(03)&rid=4)

²¹³ *While the Trade and Cooperation Agreement between the European Union and the United Kingdom does not include provisions on asylum, returns, family reunion for unaccompanied minors, or illegal migration, the Parties note the importance of good management of migratory flows, and recognise the special circumstances arising from the juxtaposed control arrangements, roll-on roll-off ferry services, the Channel Fixed Link and the Common Travel Area. To this end, the Parties take note of the United Kingdom's intention to engage in bilateral discussions with the most concerned Member States to discuss suitable practical arrangements on asylum, family reunion for unaccompanied minors or illegal migration, in accordance with the Parties' respective laws and regulations.*

²¹⁴ "As a result, at the end of the Brexit transition period on 31 December 2020, the Dublin III Regulation, EURODAC and all other elements of the CEAS ceased to apply to the UK." OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

²¹⁵ "However, as the UK is no longer party to Dublin III or EURODAC, there is great uncertainty about the UK's handling of asylum seekers arriving in the country. There are currently no formal agreements between the UK and the EU or individual EU Member States to determine responsibility for examining an asylum request. Dublin III also provided rules on family reunion which are no longer applicable in the UK. As a result, it is harder for asylum seekers wishing to join family members in the UK to do so." OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

²¹⁶ "(...) joint action on asylum and illegal migration". *The Future Relationship Between the United Kingdom and the European Union* [online]. Presented to Parliament by the Prime Minister by Command of Her Majesty. House of Commons Library, July 2018, P.70 [Consulted on the 14th of November]. Available on: https://assets.publishing.service.gov.uk/media/5c8f805440f0b640d60882b1/The_Future_Relationship_between_the_United_Kingdom_and_the_European_Union_120319.pdf

²¹⁷ "However, the UN Refugee Agency has said it is 'profoundly concerned' by the Bill. It says: 'The legislation, if passed, would amount to an asylum ban – extinguishing the right to seek refugee protection in the United Kingdom for those who

5. UK's Asylum Policy after Brexit

Having analysed the UK's asylum policy before Brexit, which included, not only EU Law instruments, but also Domestic UK Law, we have come to the conclusion that even before leaving the EU, the UK already received less asylum seekers when compared to the other MS²¹⁸ and had a less guaranteeing legal framework for refugees' and asylum seekers' rights.²¹⁹ We therefore argue that, more than the non-application of EU law,²²⁰ the most relevant consequence deriving from leaving the EU is the loss of the European *acquis*²²¹ shared principles, such as mutual trust, and the deterioration of the standard of human rights protection and guarantees,²²² with direct implication to the ability of reaching cooperation agreements and resulting in the lowering of refugees rights and protection.²²³

arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual circumstances.' It adds that this would be 'a clear breach of the Refugee Convention'." DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

²¹⁸ "There are some things that will not change. Given the UK's non-participation in the Schengen Area before Brexit, the country already received lower numbers of asylum seekers than some other EU Member States. Both EU citizens and third-country nationals had to show travel documentation to enter the UK before Brexit. Given this 'gate-keeping' position, the UK's specific geographical location, and the Dublin Regulation's system whereby the first country of entry is responsible for considering an asylum application, it was already difficult for asylum seekers to apply for refugee status in the UK." OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

²¹⁹ *In fact, the cracks in mutual trust were already facilitated by the pre-Brexit legal regime where the UK has always enjoyed a privileged and selective access to the CEAS. More particularly, the UK had not opted-in the recast measures of the second legislative phase – with the exception of Dublin III Regulation. These measures put forward common standards in relation to reception conditions, asylum procedures and increased the protection of fundamental rights of asylum seekers. Although these measures aimed at improving the CEAS, they also acted as trust-building measures. This is because the law is premised on the confidence that there is equivalence in standards of protection granted to asylum seekers with regard to asylum procedures. They contributed to a common sense of confidence that asylum seekers will be treated according to these common standards and safeguards (as opposed to the minimum standards) in all Member States. As the UK never opted-in to these measures, the same trust-building process never took place in relation to it. As a result, the domestic law never changed in accordance with these standards.* XANTHOPOULOU, Ermioni. *Legal uncertainty, distrust and injustice in post-Brexit asylum cooperation* [online]. In: AHMED, Tawhida. *On Brexit. Law, Justices and Injustices*. Edward Elgar Publishing. 2019. ISBN: 9781789903003. Available on: <https://www.elgaronline.com/edcollchap/edcoll/9781789903003/9781789903003.00021.xml>

²²⁰ *The UK's departure from the EU might enable the lowering of standards of protection for asylum seekers as the UK law will no longer be bound by the EU laws it has been bound so far.* XANTHOPOULOU, Ermioni. *Legal uncertainty, distrust and injustice in post-Brexit asylum cooperation* [online]. In: AHMED, Tawhida. *On Brexit. Law, Justices and Injustices*. Edward Elgar Publishing. 2019. ISBN: 9781789903003. Available on: <https://www.elgaronline.com/edcollchap/edcoll/9781789903003/9781789903003.00021.xml>

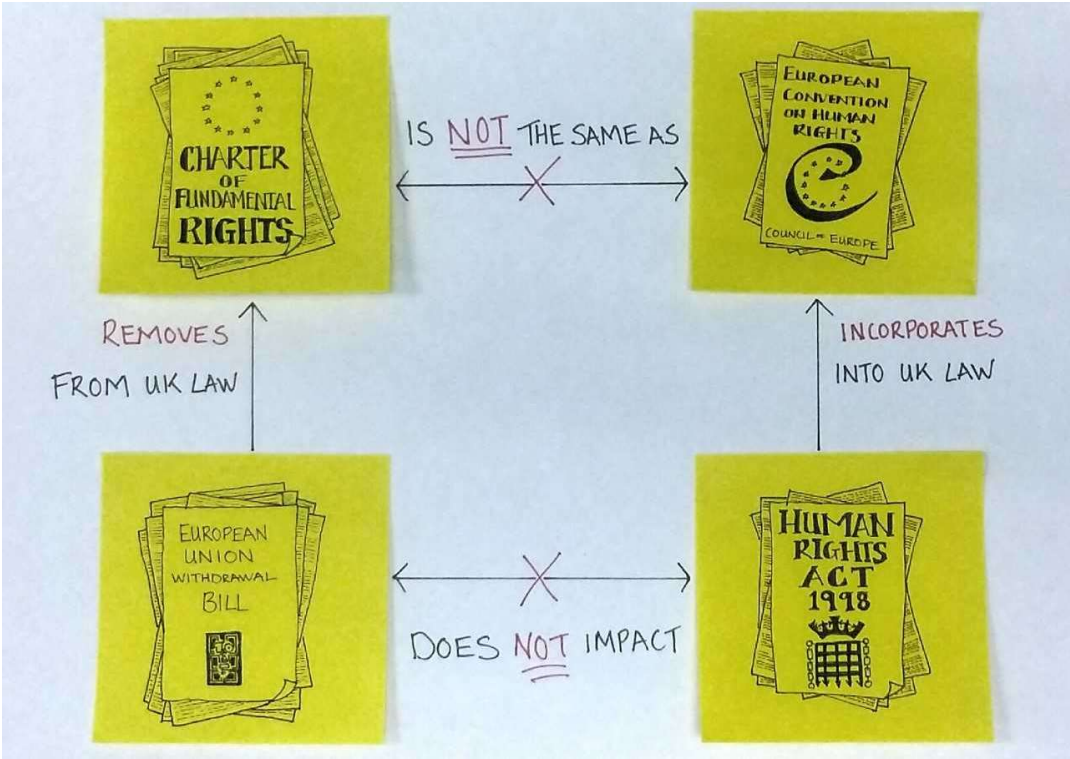
²²¹ EUR-Lex. *Acquis* [online]. Available on: <https://eur-lex.europa.eu/EN/legal-content/glossary/acquis.html>

²²² *This concern is exacerbated by the likelihood that Brexit will dilute the impact of certain overarching aspects of EU law that serve to ensure the conformity of all aspects of EU law and national implementing measures with human rights — namely, the general principles of EU law and the CFR. Commentators have again focused upon this risk with concern, with some identifying it as perhaps the most significant negative consequence of Brexit for human rights protection* O'CONNOR, Colm. *Brexit and Human Rights* [online]. *Brexit: The International Legal Implications*, Paper No. 16, February 2018. Available on: <https://www.cigionline.org/publications/brexit-and-human-rights/>

²²³ *Having said that, there are also political factors in play which make it likely that there will be some departure from existing EU standards that currently help secure human rights. At present, both the Conservative and Labour parties are committed to changing EU free movement rules as they apply to the United Kingdom — meaning that migrant rights are likely to be diluted in the wake of the United Kingdom's exit from the European Union. To start with, if EU standards in areas such as migrant rights or non-discrimination are to be replaced over time by UK regulation, this replacement process will inevitably play out against the divisive backdrop of acrimonious political debates about immigration, equality rights, devolution and the United Kingdom's continuing relationship with Europe. This creates a risk that new legal standards will be framed with an eye on achieving short-term political gains or to appease special interests or particular segments of the electorate, rather than with a fuller perspective centred around the assumption that human rights need to be given*

We have yet to discuss the international legal instruments the UK is bound by. We decided to dedicate this final part of the thesis to analysing them since they will now become the framework for the future of UK's asylum policy. We will also discuss the most recent developments in asylum-related domestic UK legislation, namely the Nationality and Borders Act and the Illegal Migration Act, as well as policy options such as signing a Memoranda of Understanding with Rwanda for the creation of an offshore processing centre and its compatibility with international law and the maintenance of juxtaposed border controls with France and Belgium regardless of the increased difficulty on bilateral cooperation and on controlling small embarkations arriving from Calais.

Figure 5 - ECHR. CFR. HRA and EU Withdrawal Bill



Having reached no agreement on this matter, EU Asylum Law in effect ceases to apply to the UK, which is no longer bound by the EU Charter of Fundamental Rights

presumptive priority in law making. As a result, there are grounds for being concerned about how UK migration rules will be framed in the future — when ministers will, post-Brexit, be freed from the constraints of EU migration rules and the protective, rights influenced jurisprudence of the CJEU. O’CINNEIDE, Colm. *Brexit and Human Rights* [online]. Brexit: The International Legal Implications, Paper No. 16, February 2018. Available on: <https://www.cigionline.org/publications/brexit-and-human-rights/>

(CFR)²²⁴ or subject to CJEU jurisdiction²²⁵, this in particular raises concerns about potential reductions in rights,²²⁶ since it may result in gaps in legal safeguards, especially in preventing the arbitrary detention of stateless individuals and protecting the right to dignity.²²⁷ However, since the UK is still a signatory state of the European Convention on Human Rights (and under the jurisdiction of the European Court of Human Rights)²²⁸ and of the 1951 Geneva Convention (and its 1967 Protocol), there are still many international law obligations binding the UK's course of action. Nevertheless, leaving the EU brings about several significant shifts, marking a departure from established practices and raising concerns about control, accountability, and human rights protection.²²⁹

²²⁴ However, this constitutional layer of rights protection provided by the general principles and CFR is unlikely to be preserved in a post-Brexit United Kingdom. Once the United Kingdom leaves the European Union and the European Communities Act 1972 is repealed, the doctrine of parliamentary sovereignty will again take full effect: this means that national legislation will be immune from challenge on the basis of incompatibility with the general principles and/or the CFR, restricting the protection they currently afford to rights. O'CONNOR, Colm. *Brexit and Human Rights* [online]. Brexit: The International Legal Implications, Paper No. 16, February 2018. Available on: <https://www.cigionline.org/publications/brexit-and-human-rights/>

²²⁵ The CJEU has recognized the existence of certain general principles that underpin the EU legal order. All EU law and national implementing measures must respect these general principles — which, since the early 1970s, have been interpreted by the court as requiring adherence to human rights that form part of the common constitutional tradition of EU member states or are recognized in international treaties, such as the ECHR, that have been ratified by all member states. The CFR was intended to specify these human rights obligations with more precision.²⁴ It sets out a wide-ranging list of fundamental rights and principles, extending to cover certain social and citizen rights that human rights instruments such as the ECHR do not cover. Since 2009, it has had the same legal status as the EU treaties, meaning that all EU law and national implementing measures must comply with its requirements.²⁵ As confirmed by the CJEU in the case of *NS*,²⁶ its provisions apply to the United Kingdom notwithstanding the provisions of protocol 30²⁷ to the TEU, which affirm that nothing in the CFR extends the competency of the CJEU to set aside existing UK laws for incompatibility with fundamental rights principles: it appears as if the only legal impact of this protocol, often erroneously described as a UK opt-out from the CFR, may be to limit the application to UK law of certain social rights principles set out in the CFR. Taken together, the general principles and the CFR serve as human rights guarantors within the EU legal framework: the provisions of EU law and national implementing measures must be read subject to their requirements and can be set aside by the CJEU and national courts if they are incompatible with the rights they protect. Both the general principles and the CFR have been applied so as to reinforce fundamental rights protection by the CJEU and national courts (including the UK Supreme Court) — with particular impact in areas such as immigration and asylum (...). O'CONNOR, Colm. *Brexit and Human Rights* [online]. Brexit: The International Legal Implications, Paper No. 16, February 2018. Available on: <https://www.cigionline.org/publications/brexit-and-human-rights/>

²²⁶ A key challenge will be to ensure the protection of asylum seekers' and refugees' human rights in the UK following Brexit, as the UK will neither have obligations under the EU Charter nor be subject to CJEU jurisdiction after exit day unless explicitly agreed as part of an arrangement for continued cooperation in the area of international protection. European Parliament Policy Department for Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

²²⁷ "(...) it is envisaged that, following Brexit, a small number of gaps will occur regarding the rights protected by the UK and the EU. In particular, without the Charter of Fundamental Rights of the EU (CFR), the UK will have no legal safeguard to prevent the arbitrary detention of stateless individuals and no protection for the right to dignity (Article 1 CFR). As such, concerns persist related to the potential deterioration of the rights afforded to those applying for international protection in the UK. European Parliament Policy Department for Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

²²⁸ The Human Rights Act 1998 (HRA) will continue to apply after the United Kingdom's exit from the European Union. However, the fundamental rights protected by the HRA are much more limited in scope than those protected by the CFR or the general principles of EU law. The HRA protects the core civil and political rights set out in the ECHR. However, the CFR's scope, in particular, is much greater, extending as it does to cover a wide range of dignitarian, social, equality and citizenship rights, in addition to the civil and political rights set out in the ECHR. O'CONNOR, Colm. *Brexit and Human Rights* [online]. Brexit: The International Legal Implications, Paper No. 16, February 2018. Available on: <https://www.cigionline.org/publications/brexit-and-human-rights/>

²²⁹ However, although the UK will remain committed to the 1951 UN Convention relating to the status of Refugees and the European Convention on Human Rights (under the jurisdiction of the European Court of Human Rights), there are concerns that the UK will not replace the elements of the EU Charter that are not covered by these international commitments, leading to reduced human rights protection in the UK. Moreover, there is no guarantee that the UK will

Because it was one of the few instruments the UK considered to be beneficial, naturally the end of application of the Dublin III Regulation (and inexistence of alternative return agreements with EU MS) is the main challenge in asylum policy resulting from the withdrawal of the EU. Ironically, the non-application of Dublin III will result in less control,²³⁰ as the UK will no longer be able to return asylum seekers on the basis of the first country of entrance or any other Dublin rule.²³¹ Furthermore, “(...) British policy-makers will lose this symbolic tool and they will be no longer able to blame the EU for the lack of managed migration.”²³² This shift, therefore, necessitates the UK taking full responsibility for its asylum policy decisions without laying blame on the EU. Furthermore, in the absence of a deal, the Dublin and Eurodac Regulations cease to apply, introducing uncertainty and challenges in the transfer of asylum seekers. This lack of a backup option may complicate the management of asylum cases, requiring the UK to navigate a new landscape without established mechanisms.

Moreover, the loss of “regulatory leverage post-Brexit”, particularly regarding immigration controls for third-country nationals, poses additional challenges. The UK’s historical opt-out and opt-in options for immigration measures no longer apply, potentially impacting its ability to effectively manage immigration policies,²³³ despite remaining influenced by EU border policies, such as the EU-Turkey deal and FRONTEX operations.

continue to align its asylum standards with those of the EU in the future. European Parliament Policy Department for Citizen’s Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK’s withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

²³⁰ “(...) some of the legal obstacles, especially those resulting from the Dublin Regulation, will disappear and potentially make the UK less able to control migration of third country nationals” ZAUN, Natasha. *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog, 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

²³¹ *In contrast to the first-round CEAS Directives, the Dublin and Eurodac Regulations will cease to apply following Brexit in the case of a no-deal. In such a scenario, there will be no backup option to transfer asylum seekers to or from the UK under international law and uncertainty will persist in relation to pending transfers.* European Parliament Policy Department for Citizen’s Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK’s withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

²³² ZAUN, Natasha. *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog, 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

²³³ *What is more, the UK might even lose regulatory leverage post-Brexit insofar as immigration controls vis-à-vis third-country nationals are concerned. The underlying reason is simple: at the time of the Treaty of Amsterdam, the British government of Tony Blair secured not only an opt out from the Schengen regime. It also won an opt in option for all immigration, visa, asylum and border control measures, which are not inseparably linked to the abolition of border controls. This opt in option of was reinforced by the Treaty of Lisbon which established an hitherto unprecedented option of ‘cherry picking’ in the field of justice and home affairs legislation. The UK has used this opt in option quite extensively – and selectively – over the years, including during the time when Theresa May was Home Secretary.* THYM, Daniel. *The Irony of Brexit for Immigration Control* [online]. VerfBlog, 2017/10/20, [Consulted on the 16th of November]. Available on: DOI: 10.17176/20171020-110133

This continued influence underscores the undeniable interconnected nature of migration policies, implicating the UK even after its withdrawal.²³⁴

In essence, Brexit brings about a reconfiguration of the UK's asylum policy, marked by shifts in control mechanisms, the loss of symbolic tools, changes in regulatory leverage, continued influence from EU policies, challenges in managing asylum transfers, and potential gaps in human rights protections. Understanding these shifts is crucial for comprehending the nuanced landscape of the UK's asylum policies post-Brexit.

5.1. International Legal Instruments the UK is bound by

The European Convention on Human Rights (ECHR)

The European Convention on Human Rights (ECHR)²³⁵ stands as a pivotal document in the post-World War II era, serving as foundation for the protection of fundamental rights and freedoms across Europe. Drafted in 1950 by the Council of Europe, a regional intergovernmental organization founded in 1949, the Convention aimed to prevent the recurrence of the atrocities witnessed during the war and to establish a common standard of human rights among its Member States. The ECHR was opened for signature in Rome on November 4, 1950, and entered into force in 1953. It outlines a set of rights and freedoms, including the right to life,²³⁶ freedom of expression,²³⁷ and the prohibition of torture,²³⁸ among others. To ensure the effective implementation of the Convention, the European Court of Human Rights (ECtHR) was established in 1959. Based in Strasbourg, France, the ECtHR serves as the judicial arm of the Council of Europe, adjudicating cases brought against Member States for alleged violations of the Convention.²³⁹ Over the years, the ECHR and the ECtHR have played a crucial role in

²³⁴ Even when the UK has left the EU, it will still 'benefit' from restrictive border policies, such as the EU-Turkey deal, the closure of the Balkan route or FRONTEX operations aimed at deterring irregular migrants and asylum-seekers. ZAUN, Natasha. *Taking back control? The impact of Brexit on the immigration of third country nationals and asylum seekers* [online]. London School of Economics Brexit Blog. 2018-05-11. [Consulted on the 14th of November]. Available on: <https://blogs.lse.ac.uk/brexit/2018/05/11/taking-back-control-the-impact-of-brexit-on-the-immigration-of-third-country-nationals-and-asylum-seekers/>

²³⁵ Council of Europe. *Convention for the Protection of Human Rights and Fundamental Freedoms* [online]. Available on: https://www.echr.coe.int/documents/d/echr/convention_ENG

²³⁶ Article 2 Council of Europe. *Convention for the Protection of Human Rights and Fundamental Freedoms* [online]. Available on: https://www.echr.coe.int/documents/d/echr/convention_ENG

²³⁷ Article 10 Council of Europe. *Convention for the Protection of Human Rights and Fundamental Freedoms* [online]. Available on: https://www.echr.coe.int/documents/d/echr/convention_ENG

²³⁸ Article 3 Council of Europe. *Convention for the Protection of Human Rights and Fundamental Freedoms* [online]. Available on: https://www.echr.coe.int/documents/d/echr/convention_ENG

²³⁹ "The Convention also established the European Court of Human Rights (ECtHR), based in Strasbourg, which has jurisdiction over European countries that are signatories to the ECHR." European Parliament Policy Department for

shaping human rights jurisprudence in Europe, fostering a culture of respect for fundamental rights among Member States.

The ECHR is relevant to asylum issues because it includes several articles that protect the rights of individuals, including those seeking asylum.²⁴⁰ While the ECHR itself does not specifically address asylum procedures, Article 3 prohibits the expulsion, deportation, or extradition of individuals to countries where they may face torture or inhuman or degrading treatment²⁴¹. This provision is crucial in the context of asylum, as it protects individuals from being returned to countries where they are at risk of persecution.²⁴²

The European Convention on Human Rights (ECHR) was incorporated into UK legislation through the Human Rights Act 1998.²⁴³ The Human Rights Act came into force on October 2, 2000, and it marked a significant development in the protection of human rights within the United Kingdom. The Act was enacted to give effect to the rights and freedoms guaranteed by the ECHR in domestic law, allowing individuals to bring claims

Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

²⁴⁰ "The ECHR includes provisions to safeguard the rights of asylum seekers. In addition to the rights provided by the 1951 Convention, the ECHR imposes the obligation to respect the human rights of migrants and asylum seekers (e.g. right to life, prohibition of torture, right to liberty and security, right of fair trials, no punishment without law and prohibition of discrimination) who leave their country for a reason which is different from persecution, which could include family reunification, study or employment". European Parliament Policy Department for Citizen's Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK's withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

²⁴¹ *Prohibition of expulsion on the grounds of violation of Article 3 also encompasses traditional cases of non-refoulement, as foreseen in Article 33 of the 1951 Geneva Convention on the Status of Refugees. But the ECtHR as moreover developed the concept of "double refoulement", meaning that Article 3 also requires that, when returning an asylum seeker to an intermediate country, State Parties must certify that the asylum procedure in that country offers sufficient guarantees to prevent his or her expulsion to another country where the foreigner may be subjected to ill treatments. Therefore, an arbitrary indirect return will not be in accordance with the Convention. The scope of Article 3 also encompasses the conditions of administrative detention of migrants, implemented under the domestic legal framework, in reception centres, airport transit zones or other detention facilities, for the purposes of immigration control. In this realm, the European Judges have emphasize that migrants are a particularly vulnerable group in need of special protection. Besides, to comply with Article 3, States must ensure that detention is held in "conditions that are compatible with the respect for human dignity", namely providing basic well-being, access to health care and adequate food. According to the European Court, the lack of space, overcrowding, absence of light, lack of sufficient ventilation, access to toilets or to outdoor activities, as well the lack of access to healthcare may constitute degrading treatment contrary to Article 3, irrespective of the authorities' intention to humiliate or mistreat the detainees. In what concerns asylum seekers' reception conditions, the ECtHR laid down on Member States the positive obligation to protect them from conditions of extreme poverty and material deprivation, and thus provided Article 3 with a socio-economic dimension.* GIL, Ana Rita and ALMEIDA, Susana. *The Direct and Indirect (Par Ricochet) protection of migrants in the light of the European Convention on Human Rights: Brief Notes on the Evolution of the Strasbourg Court's case-law* [online]. Human(ities) and Rights, Global Network Journal, Vol.3. 2021-08-20, Issue 1, P. 119-145. Available on: DOI: <https://doi.org/10.24861/2675-1038.v3i1.59>

²⁴² No one shall be subjected to torture or to inhuman or degrading treatment or punishment. Article 3 Council of Europe. *Convention for the Protection of Human Rights and Fundamental Freedoms* [online]. Available on: https://www.echr.coe.int/documents/d/echr/convention_ENG

²⁴³ UK Public General Acts. *Human Rights Act 1998* [online]. Available on: <https://www.legislation.gov.uk/ukpga/1998/42/contents>

based on ECHR rights directly in UK courts rather than having to go to the European Court of Human Rights in Strasbourg.²⁴⁴

The Human Rights Act (HRA) incorporates most of the provisions of the ECHR into UK law, making it unlawful for public authorities to act in a way that is incompatible with the rights enshrined in the Convention. In fact, under Section 19 of the HRA, ministers are required to state the compatibility of the proposed legislation with the Convention. If a court in the UK finds that legislation is incompatible with the ECHR, it has the power to issue a declaration of incompatibility. While the declaration itself does not invalidate the law, it signals to Parliament that the legislation should be reconsidered.²⁴⁵ The Human Rights Act thus provides a mechanism for individuals to assert their rights under the ECHR in the UK legal system.

Even before leaving the EU, there were calls for repealing the HRA, replacing it with a “British Bill of Rights”, but although public concern on this issue seemed to have faded shifting to the Brexit negotiations, recently, prime-minister Rishi Sunak has stated that he would be “willing to reconsider whether being part of the ECHR is in the UK’s long-term interests”.²⁴⁶ Ironically, withdrawal from the EU has potentially made it more difficult for the UK to repeal the HRA²⁴⁷ or to withdraw from the ECHR, since there were efforts to tie the UK to its international obligations under the convention, firstly on the Joint

²⁴⁴ “The ECtHR deals with complaints from direct victims of violations of obligations from the Convention, only after applicants have exhausted all domestic remedies, and within six months of the final decision made by the highest court of the State in which the complaint originated.” European Parliament Policy Department for Citizen’s Rights and Constitutional Affairs. *The future relationship between the UK and the EU in the field of international protection following the UK’s withdrawal from the EU* [online]. Study requested by the LIBE Committee, 15-10-2018. [Consulted on the 11th of November]. Available on: [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2018\)608836](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2018)608836)

²⁴⁵ The sovereignty of Parliament is preserved by a provision to the effect that, if an Act cannot be read consistently with the Convention, then the court may do no more than declare that it is incompatible. The inconsistent Act remains in force, and the Government and Parliament must decide, on a political level, whether to rectify the situation. LOCK, Tobias and LAYDEN, Patrick, *Protection of Fundamental Rights Post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions (FIDE National Report for the United Kingdom)* [online]. (October 7, 2011). Available on: DOI: <http://dx.doi.org/10.2139/ssrn.1940381>

²⁴⁶ DONALD, Alice; LEACH, Philip: *The UK vs the ECtHR: Anatomy of A Politically Engineered Collision Course* [online]. VerfBlog, 2023/5/05, Available on: DOI: 10.17176/20230505-204527-0

²⁴⁷ COWELL, Frederick. *A strange irony: How the EU withdrawal process ended up saving the Human Rights Act* [online]. London School of Economics Blog, 2018-12-03. Available on: <https://blogs.lse.ac.uk/brexit/2018/12/03/a-strange-irony-how-the-eu-withdrawal-process-ended-up-saving-the-human-rights-act/>

Political Declaration²⁴⁸ to the Withdrawal Agreement and then on the Northern Ireland Protocol²⁴⁹ and the Trade and Cooperation Agreements' Part III.²⁵⁰

Repealing the HRA would remove the requirement for UK national courts to take ECtHR relevant case law into account, unbinding it from its duty to align Acts of Parliament to the ECHR and allowing for the disregard of interim measures (or urgent injunctions) from ECtHR. Withdrawing from the ECHR without provision for Northern Ireland would break both international agreements²⁵¹ and in terms of EU-UK relationships, it would mean the ceasing of cooperation on law enforcement and security established by the TCA, with serious consequences when it comes to cross-border cooperation on crime prevention.²⁵² From a political perspective it would undermine seriousness in pressuring other human rights violating countries and result in a loss of human rights protection efforts and developments achieved over the years.²⁵³ Moreover, the possibility of leaving the Council of Europe, and joining Belarus and Russia as the only European countries outside this interregional organisation would further diminish UK's influence and ability to fight transnational organised crime.²⁵⁴

²⁴⁸ "The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights (ECHR), while the Union and its Member States will remain bound by the Charter of Fundamental Rights of the European Union, which reaffirms the rights as they result in particular from the ECHR." Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom (2019/C 384 I/02) [online]. Available on: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL\(01\)&from=PT](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=PT)

²⁴⁹ European Union Treaties. *PROTOCOL ON IRELAND/NORTHERN IRELAND* [online]. Available on: <https://www.legislation.gov.uk/eut/withdrawal-agreement/attachment/1/adopted>

²⁵⁰ Part Three of the TCA concerning law enforcement and judicial cooperation in criminal matters includes a commitment by both sides to continue 'giving effect to the rights and freedoms in that Convention domestically' – and this is strengthened by a provision stating that if the UK withdraws from the ECHR, cooperation on law enforcement and security would cease, regardless of whether the rest of the treaty is still in force. DONALD, Alice; LEACH, Philip: *The UK vs the ECHR: Anatomy of A Politically Engineered Collision Course* [online]. VerfBlog, 2023/5/05, Available on: DOI: 10.17176/20230505-204527-0

²⁵¹ "(...) the Northern Ireland Protocol affirms the UK's commitment to maintaining membership of the ECHR. If the UK withdrew from the ECHR without provision for Northern Ireland, it would violate both international agreements" DONALD, Alice; LEACH, Philip: *The UK vs the ECHR: Anatomy of A Politically Engineered Collision Course* [online]. VerfBlog, 2023/5/05, Available on: DOI: 10.17176/20230505-204527-0.

²⁵² *Termination or suspension of Part Three of the TCA would have extremely serious consequences for UK-EU security cooperation, curtailing our ability to combat cross-border criminal activity.* GUILD, Elspeth and NIBLOCK, Rebecca. *The TCA, the ECHR and the Illegal Migration Act* [online]. Kingsley Napley, 2023-08-26. Available on: <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/the-tca-the-echr-and-the-illegal-migration-act>

²⁵³ DONALD, Alice; LEACH, Philip: *The UK vs the ECHR: Anatomy of A Politically Engineered Collision Course* [online]. VerfBlog, 2023/5/05, Available on: DOI: 10.17176/20230505-204527-0

²⁵⁴ *Leaving the European Convention on Human Rights would, in all probability, end the UK's membership of the Council of Europe. This, in turn, would cease the UK's participation in the 1957 European Convention on Extradition, making any extraditions between the UK and the 45 other members of the Council of Europe virtually impossible, resulting in the impunity of criminals.* GUILD, Elspeth and NIBLOCK, Rebecca. *The TCA, the ECHR and the Illegal Migration Act* [online]. Kingsley Napley, 2023-08-26. Available on: <https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/the-tca-the-echr-and-the-illegal-migration-act>

The 1951 Geneva Convention (Refugee Convention)

The 1951 Geneva Convention,²⁵⁵ formally known as the "Convention Relating to the Status of Refugees," emerged in the aftermath of World War II to address the escalating refugee crisis. Adopted on July 28, 1951, in Geneva, Switzerland, the convention aimed to establish a comprehensive legal framework for the protection of refugees and to ensure their basic human rights. Initially, the Convention focused on the protection of European refugees, but a 1967 Protocol²⁵⁶ expanded its scope to cover refugees worldwide. The Convention and its protocol have been signed by a significant number of States, reflecting a global commitment to upholding humanitarian principles. The main provisions of the 1951 Geneva Convention outline the rights and obligations of both refugees and host states, emphasizing non-discrimination, freedom of movement, access to courts, and the provision of basic necessities such as education and employment. The Convention remains a cornerstone of international refugee law, serving as a critical instrument in safeguarding the well-being and rights of those fleeing persecution and violence.

The UK signed the Convention on July 28, 1951, the day it was adopted, and it is a party to the 1967 Protocol Relating to the Status of Refugees. The Convention and its Protocol form the basis for the UK's legal framework²⁵⁷ concerning the protection and treatment of refugees, they are international agreements that the UK entered into independently of its EU membership. Therefore, leaving the EU does not directly impact the UK's obligations under these Conventions.²⁵⁸ However, we argue that leaving the EU

²⁵⁵ United Nations. *Convention relating to the Status of Refugees Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 Entry into force: 22 April 1954, in accordance with article 43* [online]. Available on: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.23_convention%20refugees.pdf

²⁵⁶ United Nations. *Protocol relating to the Status of Refugees* [online]. Available on: <https://www.ohchr.org/sites/default/files/protocolrefugees.pdf>

²⁵⁷ *Parliament has given effect to both the Refugee Convention and the ECHR in our domestic law. Asylum seekers are protected against refoulement by the Human Rights Act 1998, section 6 of which makes it unlawful for the Home Secretary to remove asylum seekers to countries where there are substantial grounds to believe that they would be at real risk of refoulement contrary to article 3 ECHR. Further protection is provided by provisions in the Asylum and Immigration Appeals Act 1993, the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004, under which Parliament has given effect to the Refugee Convention as well as the ECHR.* UK Supreme Court. *R (on the application of AAA and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent)* [online]. Press Summary 15 November 2023 P.3. Available on: <https://www.supremecourt.uk/cases/docs/uksc-2023-0093-press-summary.pdf>

²⁵⁸ *The UK does have obligations under these international law Treaties. The obligations stemming from these documents are unrelated to the UK's membership to the EU and will not be affected by Brexit. Therefore, asylum seekers will be able to submit their application for asylum in the UK, if they make it to its territory. The UK will continue to be obliged towards these people, in the sense that asylum authorities will have to assess the application of asylum seekers who manage to reach the UK and apply for asylum. Accordingly, asylum seekers will have the right to have their application assessed by asylum authorities and not be deported before their application is assessed and refused. They will also have the right to make use of procedural guarantees and the UK will not be able to deport them unless they have exhausted all their rights to appeal.* XANTHOPOULOU, Ermioni. *Legal uncertainty, distrust and injustice in post-Brexit asylum cooperation* [online]. In: AHMED, Tawhida. *On Brexit. Law, Justices and Injustices*. Edward Elgar Publishing. 2019. ISBN: 9781789903003. Available on: <https://www.elgaronline.com/edcollchap/edcoll/9781789903003/9781789903003.00021.xml>

results in a further step away from international obligations, given that, regardless of still being a signatory to the Refugee Convention,²⁵⁹ the UK has, since its departure from the EU, pursued efforts to passing of concerning legislation, contrary to its international commitments which we will discuss further.

5.2. Domestic UK Law in Asylum Matters after Brexit

The end of the transition period marked a shift on the UK's asylum policy. Faced with increased arrivals of Channel crossings by small embarkations coming from Calais, the UK government aimed to solve the “broken asylum system” by following the “New Plan for Immigration” announced on March 2021.²⁶⁰ In line with this plan, the government has, since, passed comprehensive legislation, impacting various aspects of the asylum policy, including the establishment of a two-tier refugee system, reduced family reunion rights, augmented inadmissibility grounds for asylum applications, establishment of offshore processing centres following agreements with third countries meant to facilitate returns and removals, further detaining and diverting powers, and criminalisation of illegal entry. We will pay special attention to the Nationality and Borders Act and the Illegal Migration Act, as these are the legal instruments with the most profound connection with asylum, discussing criticism raised by UNHCR and scholars, as well as claims of unlawfulness and international law violations.

5.2.1. Immigration Rules

Following the UK's departure from the EU, the government has passed legislation that has had a profound impact on various aspects of immigration, particularly concerning family reunion, asylum procedures, and the application process. Ceasing the application of the Dublin III Regulation, which was replaced by domestic immigration rules, means that when it comes to family reunion rights, individuals can now reunite with relatives in the UK only if the latter holds refugee or subsidiary protection status. Additionally, unaccompanied minors seeking reunion are restricted to reuniting

²⁵⁹ The UK remains a signatory to the 1951 Convention relating to the status of refugees and its 1967 Protocol. OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

²⁶⁰ UK Home Office. *New Plan for Immigration* [online]. Available on: https://assets.publishing.service.gov.uk/media/605b039ce90e0724c0df468d/CCS207_CCS0820091708-001_Sovereign_Borders_FULL_v13_1_.pdf

exclusively with their parents.²⁶¹ Claiming asylum was already limited to those physically present within the UK, with no option for external applications or an asylum visa for legal entry.²⁶² Following Brexit new laws on "inadmissibility" have been introduced. These laws aim to prevent individuals with prior connections to a safe third country from claiming asylum in the UK.

The asylum application process itself has undergone noteworthy changes. There are four potential outcomes for asylum seekers, under Immigration Rules Paragraph 349: "Group 1" refugees may be granted asylum with five years' leave, allowing for subsequent applications for permanent residence. "Group 2" refugees receive lesser rights, including 2.5 years' (30 months) leave with the opportunity for permanent residence after 10 years. Others may be granted permission to stay for humanitarian reasons, falling under various statuses such as humanitarian protection (HP), discretionary leave (DL), leave under family or private life rules and unaccompanied asylum-seeking child (UASC) leave. Alternatively, asylum claims may be refused, with the option for appeal and potential permission to stay upon a successful appeal. Dependent family members, including spouses, civil partners, unmarried partners, and children under 18, are subject to the same outcome as the main applicant.²⁶³ This underscores the interconnected nature of family outcomes within the asylum application process, extending the right to asylum if grounds for it are recognised but diminishing it in case they are not.

²⁶¹ As of 1 January [2021], UK Immigration Rules changed: family reunion is possible only if the relative living in the UK has refugee - or subsidiary protection status, and unaccompanied minors can only reunite with parents. OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

²⁶² Because of Brexit, the UK is no longer a part of the Dublin arrangements, but has introduced new laws on "inadmissibility" to bar people from claiming asylum in the UK if they had an earlier presence in or connection to a safe third country. To claim asylum in the UK, a person must be in the UK. It is not possible to apply from outside the country, and there is no asylum visa to enable people to travel to the UK legally to apply for asylum. Therefore, for citizens who do not have visafree travel to the UK, to claim asylum in the UK, they must enter either irregularly, such as by small boat, lorry, or by using false documents, or on a visa for some other purpose, such as tourism or study. WALSH, Peter. *Asylum and Refugee Resettlement in the UK* [online]. Briefing for the Migration Observatory at the University of Oxford, 2022-08-19. Available on: <https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/>

²⁶³ There are four possible outcomes of an asylum application. First, an applicant can be recognised as a 'Group 1' refugee (see below) and granted asylum with five years' leave (i.e., permission to stay in the UK), after which they may apply, free, for permanent residence. Second, an applicant can be recognised as a 'Group 2' refugee, and given lesser rights: 2.5 years' leave with the opportunity to apply for permanent residence after 10 years. Third, the applicant is judged not to qualify for refugee status but granted permission to stay in the UK for humanitarian or other reasons. These statuses include humanitarian protection (HP); discretionary leave (DL); leave under family or private life rules; unaccompanied asylum-seeking child (UASC) leave. Fourth, the asylum claim can be refused. If a claim is refused, the applicant can appeal against the initial decision, and if the appeal is successful be granted permission to stay. All applications request protection for a 'main applicant', and some include requests for protection for the main applicant's dependent family members as well, specifically: their spouse, civil partner, or unmarried partner, and any children under 18, but not dependent parents. The dependants on an application receive the same outcome as the main applicant (Immigration Rules, Paragraph 349)" WALSH, Peter. *Asylum and Refugee Resettlement in the UK* [online]. Briefing for the Migration Observatory at the University of Oxford, 2022-08-19. Available on: <https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/>

Furthermore, a crucial aspect of these changes involves the evaluation of the risk an applicant may pose to the UK. As per UK Immigration Rules paragraph 334, individuals will not be granted asylum if the government perceives them as a threat to the country.²⁶⁴ This emphasises the securitization characterised approach being adopted by the British government, towards asylum-seekers.²⁶⁵

5.2.2. Nationality and Borders Act

The Nationality and Borders Act,²⁶⁶ enacted in 2022, brought about substantial changes to the United Kingdom's asylum system, marking a significant shift in the government's approach to immigration, in line with the “New Plan for Immigration”.²⁶⁷ Although the Nationality and Borders Bill presented in 2021 was widely criticised, often leading to the retracting of excerpts from certain clauses, there were still concerning provisions included in the final text enacted with Royal Assent. We will present the clauses that were mostly academically scrutinised, criticizing the ways in which they contend with international law obligations and policy recommendations.

The most contested introduction of the Nationality and Borders Act, was the two-tier asylum system established by Clause 12, which categorises asylum seekers based on their mode of arrival – directly (Group 1 Refugees) or indirectly (Group 2 Refugees).²⁶⁸ This categorisation influences various aspects of their treatment, including the duration of leave granted, requirements for indefinite leave to remain, and the eligibility of family

²⁶⁴ Applicants will not be granted asylum if the government believes they represent a danger to the UK (UK Immigration Rules, paragraph 334). WALSH, Peter. *Asylum and Refugee Resettlement in the UK* [online]. Briefing for the Migration Observatory at the University of Oxford, 2022-08-19. Available on: <https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/>

²⁶⁵ Since 2000, political discourses linking migration and asylum to national security have become increasingly common. This trend, known as ‘securitization’ (...) This has fuelled a securitization discourse that targets asylum seekers and blurs the differences between them and undocumented immigrants. As a result, asylum seekers are depicted as threats to national stability that should be managed through increasingly punitive approaches, displacing original conceptions of asylum as a humanitarian phenomenon. PEREZ, Cristina Saenz. *The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit* [online]. *International Journal of Refugee Law*, 2023, XX, 1–18. Available on: DOI: <https://doi.org/10.1093/ijrl/eead030>

²⁶⁶ UK Public General Acts. *Nationality and Borders Act* [online]. Available on: <https://www.legislation.gov.uk/ukpga/2022/36/enacted/data.pdf>

²⁶⁷ UK Home Office. *New Plan for Immigration* [online]. Available on: https://assets.publishing.service.gov.uk/media/605b039ce90e0724c0df468d/CCS207_CCS0820091708-001_Sovereign_Borders_FULL_v13_1_.pdf

²⁶⁸ 12. For the purposes of this section— (a) a refugee is a Group 1 refugee if they have complied with both of the requirements set out in subsection (2) and, where applicable, the additional requirement in subsection (3); (b) otherwise, a refugee is a Group 2 refugee. (2) The requirements in this subsection are that— (a) they have come to the United Kingdom directly from a country or territory where their life or freedom was threatened (in the sense of Article 1 of the Refugee Convention), and (b) they have presented themselves without delay to the authorities. 3) Where a refugee has entered or is present in the United Kingdom unlawfully, the additional requirement is that they can show good cause for their unlawful entry or presence. UK Public General Acts. *Nationality and Borders Act* [online]. Available on: <https://www.legislation.gov.uk/ukpga/2022/36/enacted/data.pdf>

members for leave to enter or remain.²⁶⁹ Critics point out the excessively broad discretionary powers attributed to the Secretary of State, allowed to exercise differential treatment to the two groups of categorised refugees, which raises discrimination concerns based on previous experience.²⁷⁰ The discriminatory nature of this system, has raised significant concerns about its impact on refugees, with critics arguing that it will disproportionately affect refugees arriving in the UK, potentially resulting in reduced entitlements, integration difficulties and limited family reunion rights for those deemed to have entered the country indirectly.²⁷¹ Its *raison d'être* is also criticised by authors who question how restricting Category/Group 2 refugees rights fulfils the goal of tackling channel crossings and people smugglers criminal activity,²⁷² and highlight its unlawfulness, on the grounds of violating article 3 and articles 17 to 24 of the 1951 Refugee Convention,²⁷³ on the basis of an excessively narrow interpretation of Article

²⁶⁹ The Secretary of State or an immigration officer may treat Group 1 and Group 2 refugees differently, for example in respect of (a) the length of any period of limited leave to enter or remain which is given to the refugee; (b) the requirements that the refugee must meet in order to be given indefinite leave to remain; (c) whether a condition under section 3(1)(c)(ii) of the Immigration Act 1971 (no recourse to public funds) is attached to any period of limited leave to enter or remain that is given to the refugee; (d) whether leave to enter or remain is given to members of the refugee's family. UK Public General Acts. *Nationality and Borders Act* [online]. Available on: <https://www.legislation.gov.uk/ukpga/2022/36/enacted/data.pdf>

²⁷⁰ The content of the clause raises further prospects of illegality on the face of the clause and in its application. In particular, this can be seen in the way that clause 11 confers excessively broad discretionary powers on the UK immigration authorities. Firstly, although clauses 11(5)-(6) do not specify any limit on how the UK 'may treat Group 1 and Group 2 refugees differently', [5] important general legal limits to such powers do exist as a result of binding standards contained in treaties to which the UK is party. [6] Moreover, the modes of differentiation listed in clauses 11(5)-(6) also raise questions of compliance with specific obligations in those treaties, including the non-penalisation provisions in Article 31(1) and 31(2) of the Refugee Convention, the employment and welfare rights in Articles 17-24 of the Refugee Convention, and equality and non-discrimination obligations in domestic and international human rights law. Secondly, by allowing the discretionary powers to be exercised in particular cases by the 'Secretary of State or an immigration officer', clauses 11(5)-(6) create the risk that other factors, including discrimination on the basis of protected characteristics, may influence decisions about whether to treat an individual as a Group 1 or Group 2 refugee. The courts have had to intervene previously where UK immigration authorities have abused such broad discretionary powers to disadvantage asylum-seekers on discriminatory racial grounds. [7] Article 3 of the Refugee Convention forbids discrimination on grounds of 'race, religion or country of origin', as do other domestic and international legal standards. CANTOR, David. *Clause 11, Nationality and Borders Bill: Why Two-Tier Refugee Status is a Bad Idea* [online]. Refugee Law Initiative, 2022-03-28. Available on: <https://rli.blogs.sas.ac.uk/2022/03/28/clause-11-nationality-and-borders-bill-why-two-tier-refugee-status-is-a-bad-idea/>

²⁷¹ Refugee Council. *Differential treatment (Clause 11 of the Nationality and Borders Act)* [online]. Available on: <https://www.refugeecouncil.org.uk/information/refugee-asylum-facts/differential-treatment-clause-11/>

²⁷² Officially, the legislation's premise is that asylum seekers should not reach the UK via the Channel but rather via regular routes. However, the UK government has not opened any new safe and legal channels post-Brexit. It also did not swiftly implement its emergency programmes for Afghans and Ukrainians, although its new immigration agenda includes an explicit commitment to ensure that resettlement schemes are "responsive to emerging international crises". The two-tier system thus appears to be the culmination of a long-term endeavour to create a "hostile environment" for asylum seekers – as well as other mobile persons –, in line with the uncorroborated assumption that this would dissuade Channel crossings and facilitate removals. CANTOR, David. *Clause 11, Nationality and Borders Bill: Why Two-Tier Refugee Status is a Bad Idea* [online]. Refugee Law Initiative, 2022-03-28. Available on: <https://rli.blogs.sas.ac.uk/2022/03/28/clause-11-nationality-and-borders-bill-why-two-tier-refugee-status-is-a-bad-idea/>

²⁷³ *The Home Secretary, Suella Braverman, was asked in the House of Commons whether she was confident that the [Nationality and Borders] Bill was compatible with the 1951 Refugee Convention, which among other things protects the right of asylum-seekers to enter a state, to have their claim assessed, not to be penalised for entering a state illegally, and not to be expelled to a territory where they would face persecution. She replied: "The Bill introduces measures that we consider to be compliant with all our international obligations – in fact, we are certain." However, the UN Refugee Agency has said it is 'profoundly concerned' by the Bill. It says: "The legislation, if passed, would amount to an asylum ban – extinguishing the right to seek refugee protection in the United Kingdom for those who arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual circumstances." It adds that this would be 'a clear breach of the Refugee Convention'*

31(1) of said convention, which the governments claims to facilitate the differentiation of treatment based on the mode of arrival.

Clauses 15²⁷⁴ and 16²⁷⁵ render asylum claims made by EU nationals or those connected to a “safe third country” inadmissible. This aligns with the existing Immigration rules permitting inadmissibility decisions based on prior presence or passage through such countries²⁷⁶ and the New Plan for Immigration intent of creating a “rebuttal presumption”.²⁷⁷ However, whether the true aim of article 31(1) of the Refugee Convention was to deter 2nd applications of asylum after successful settlement²⁷⁸ or to function as a limited exception for immigration law penalties, generally applicable to aliens,²⁷⁹ it certainly did not intend to create a distinction based on a previous brief passage on the territory of a third country²⁸⁰ considered to be safe,²⁸¹ as there is no obligation under international refugee law for asylum-seekers to apply for asylum on the

²⁷⁴ 15. Asylum claims by EU nationals: inadmissibility (1) After Part 4 of the Nationality, Immigration and Asylum Act 2002 insert— “PART 4A INADMISSIBLE ASYLUM CLAIMS 80A Asylum claims by EU nationals (1) The Secretary of State must declare an asylum claim made by a person who is a national of a member State inadmissible. UK Public General Acts. *Nationality and Borders Act* [online]. Available on: <https://www.legislation.gov.uk/ukpga/2022/36/enacted/data.pdf>

²⁷⁵ 16 Asylum claims by persons with connection to safe third State: inadmissibility In Part 4A of the Nationality, Immigration and Asylum Act 2002 (as inserted by section 15), after section 80A insert— “80B Asylum claims by persons with connection to safe third State (1) The Secretary of State may declare an asylum claim made by a person (a “claimant”) who has a connection to a safe third State inadmissible. UK Public General Acts. *Nationality and Borders Act* [online]. Available on: <https://www.legislation.gov.uk/ukpga/2022/36/enacted/data.pdf>

²⁷⁶ See 5.2.1

²⁷⁷ *UK Immigration Rules already allow an inadmissibility decision to be taken on the basis of a person’s earlier presence or passage through a ‘safe third country’. The ‘New Plan for Immigration’ also set out the government’s plan to introduce a ‘rebuttal presumption’ for the return of asylum seekers to all European Economic Area (EEA) states and other designated safe countries.* OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexite/>

²⁷⁸ *The travaux préparatoires of the Convention show that the insertion of the expression ‘coming directly’ was not intended to deny protection to asylum seekers who transit ‘safe third States’. Analysis of the travaux préparatoires indicates that this clause was inserted under the initiative of the French delegation, which was concerned about the number of refugees who had settled and obtained protection in neighbouring countries and could potentially move to France and claim asylum. Consequently, the French delegation demanded the insertion of a clause that would exclude them from entering France and being eligible for international protection in the country. It wanted to ensure that France could return these refugees to the country where they had settled without such a decision being deemed an ‘unlawful penalty’ under the Refugee Convention.* PEREZ, Cristina Saenz. *The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit* [online]. *International Journal of Refugee Law*, 2023, XX, 1–18. Available on: DOI: <https://doi.org/10.1093/ijrl/eead030>

²⁷⁹ CANTOR, David. *Clause 11, Nationality and Borders Bill: Why Two-Tier Refugee Status is a Bad Idea* [online]. *Refugee Law Initiative*, 2022-03-28. Available on: <https://rli.blogs.sas.ac.uk/2022/03/28/clause-11-nationality-and-borders-bill-why-two-tier-refugee-status-is-a-bad-idea/>

²⁸⁰ *A reading of these explanations in the travaux préparatoires shows that the drafters did not intend article 31(1) to limit access to international protection for those who briefly transit through or stop over in third countries or who cannot find effective protection in the countries that they transit.* PEREZ, Cristina Saenz. *The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit* [online]. *International Journal of Refugee Law*, 2023, XX, 1–18. Available on: DOI: <https://doi.org/10.1093/ijrl/eead030> *UNHCR has supported this interpretation, noting that article 31(1) does not remove or restrict the rights that all refugees enjoy under the Refugee Convention, including those who transit through other States before requesting protection. The only exception applies to those who have settled in another country and have obtained protection in that third country.*

²⁸¹ The way in which this safety is ascertained is criticised in KUZNIAR, Dagmara. *The British Nationality and Borders Bill and the international protection of refugees in the light of the concept of community interest in international law* [online]. *Review of European and Comparative Law*, 2022, Vol. 49, No. 2, 253–269. Available on: DOI: <https://doi.org/10.31743/recl.13560>

first safe country,²⁸² and this inadmissibility results in the restriction of an asylum seekers' right to choose where to apply for asylum.²⁸³ Furthermore, the inadmissibility of an asylum claim based on a connection to a safe third country undermines the individual character of an asylum application,²⁸⁴ ignoring the person's specific circumstances and potentially leading to refoulement situations,²⁸⁵ in violation of article 33 of the 1951 Refugee Convention that establishes the principle of *non-refoulement*. Nevertheless, the return of people whose asylum claim is found to be inadmissible on these grounds will depend on future arrangements between the UK and the concerned country.²⁸⁶ The introduction of these inadmissibility clauses has been criticised by Amnesty International.²⁸⁷

Additionally, Clause 72 grants the Home Secretary the authority to impose visa penalties on countries that fail to cooperate in the returns of their nationals with rejected asylum claims. Nevertheless, it has been hard for the UK to establish such agreements, especially with EU Member States, the government, therefore, sought to find an alternative solution²⁸⁸ that would tackle the "broken" asylum system.

²⁸² *The question arises whether a refugee must apply for protection in the first safe country. The Refugee Convention does not refer to the first safe country principle and does not oblige a refugee to seek protection in the nearest country or the first country to which they flee.* KUZNIAR, Dagmara. *The British Nationality and Borders Bill and the international protection of refugees in the light of the concept of community interest in international law* [online]. Review of European and Comparative Law, 2022, Vol. 49, No. 2, 253–269. Available on: DOI: <https://doi.org/10.31743/recl.13560>

²⁸³ *The doctrine indicates that the use of the safe country concept violates the rights of refugees by restricting their freedom to choose the State in which they will seek protection.* KUZNIAR, Dagmara. *The British Nationality and Borders Bill and the international protection of refugees in the light of the concept of community interest in international law* [online]. Review of European and Comparative Law, 2022, Vol. 49, No. 2, 253–269. Available on: DOI: <https://doi.org/10.31743/recl.13560>

²⁸⁴ *Moreover, it infringes the individual character of an asylum claim by relying on a general assessment of the situation in the country of origin or a third country, without considering individual circumstances.* KUZNIAR, Dagmara. *The British Nationality and Borders Bill and the international protection of refugees in the light of the concept of community interest in international law* [online]. Review of European and Comparative Law, 2022, Vol. 49, No. 2, 253–269. Available on: DOI: <https://doi.org/10.31743/recl.13560>

²⁸⁵ *"strict application of the [safe third country] concept could lead to individuals being returned to a situation of danger to life, in violation of the Article 33 prohibition against refoulement".* KUZNIAR, Dagmara. *The British Nationality and Borders Bill and the international protection of refugees in the light of the concept of community interest in international law* [online]. Review of European and Comparative Law, 2022, Vol. 49, No. 2, 253–269. Available on: DOI: <https://doi.org/10.31743/recl.13560>

²⁸⁶ *Following this extension, an application for international protection is to be regarded as inadmissible if, before reaching the UK, the asylum seeker benefitted from refugee status or some other form of protection in a member state, had made or could make an application for asylum there, or was refused asylum. This extension implies that the UK could, in principle, return asylum applicants to any designated safe country, including EU Member States. Considering that virtually all asylum seekers who reach the UK irregularly do so after transiting through the EU and that Member States will most likely be considered the responsible safe countries in such cases, the extension is in line with the British government's hopes to step up returns. However, without an EU-wide agreement or bilateral arrangements with Member States, the UK will not be able to remove to the EU asylum seekers whose claims are to be regarded as inadmissible under the new law. Instead, because of the two-tier system, persons apprehended after crossing the Channel will likely end up in legal limbo, facing destitution and exploitation.* DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

²⁸⁷ OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexite/>

²⁸⁸ *"(...) he also highlighted that the UK must develop an alternative framework to end irregular arrivals and step up returns instead of "waiting for a deal [with the EU or France] that just doesn't exist."* NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

In this context, the act lays the groundwork for offshore asylum processing centers on its Clause 14, where it is established that asylum applications must be made in person at designated places.²⁸⁹ The definition of “designated place” remains open-ended, encompassing locations where the asylum-seeker is directed to, by the Secretary of State or immigration officers.²⁹⁰ In an effort to achieve externalization, the UK government entered into a Memorandum of Understanding (MoU) with Rwanda, intending to transfer asylum seekers arriving via the Channel to Rwanda for processing. However, this offshoring arrangement faced criticism for potential human rights violations, shifting international obligations, and increasing risks for asylum seekers.²⁹¹ Legal challenges were mounted against the UK-Rwanda deal, with concerns raised about the compatibility of the arrangement with human rights and international obligations.²⁹² Therefore, it has been suggested that it would probably be cheaper and more efficient for the UK government to achieve an agreement with EU.²⁹³

²⁸⁹ 14. Requirement to make asylum claim at “designated place” (1) An asylum claim must be made in person at a designated place. UK Public General Acts. *Nationality and Borders Act* [online]. Available on: <https://www.legislation.gov.uk/ukpga/2022/36/enacted/data.pdf>

²⁹⁰ (2) A “designated place” means any of the following places in the United Kingdom— (a) a place identified in a notice published by the Secretary of State as an asylum intake unit; (b) a removal centre (within the meaning of section 147 of the Immigration and Asylum Act 1999); (c) a port (within the meaning of section 33 of the Immigration Act 1971); (d) a place where there is a person present who, for the purposes of the immigration rules, is authorised to accept an asylum claim on behalf of the Secretary of State; (e) a place to which the claimant has been directed by the Secretary of State or an immigration officer to make the claim; (f) such other place, or a place of such other description, as the Secretary of State may by regulations designate. UK Public General Acts. *Nationality and Borders Act* [online]. Available on: <https://www.legislation.gov.uk/ukpga/2022/36/enacted/data.pdf>

²⁹¹ *In April 2022, the UK government signed a Memorandum of Understanding (MoU) with Rwanda. Under the MoU, asylum seekers arriving via the Channel would be transferred to and have their applications processed in Rwanda. The UNHCR, the Council of Europe and virtually all refugee rights organisations in the UK sharply criticised this ‘offshoring arrangement’ for promoting the use of detention, shifting international obligations to third countries, and increasing risks for asylum seekers. The European Commission also took the unusual step of criticising the UK’s plans for similar reasons, despite it being a sovereign third country. This only goes to confirm the policy and political cleavage between the two sides.* NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

²⁹² *Despite the British government’s hopes, it is far from certain whether the MoU with Rwanda will allow the UK to pursue its plans without wider cooperation with the EU or Member States. Firstly, the British government declared that the partnership with Rwanda is the best solution to end irregular arrivals by boat, claiming that it would deter those considering crossing the Channel. But the unabating number of recorded crossings following the announcement of the MoU put this claim into question. Even a top civil servant of the UK Home Office, Matthew Rycroft, challenged the claim, stating that there is no hard evidence supporting it. The UK would still need the coastal states and the EU at large to help limit the number of Channel crossings in the future. Secondly, the MoU stands in contrast with the UK’s international obligations. According to the UNHCR, it is contrary to the spirit and letter of the 1951 Refugee Convention. In addition, under the European Convention on Human Rights, removing an asylum seeker is unlawful if it leads to prolonged arbitrary detention, torture or inhumane or degrading treatment. Refugees in Rwanda enjoy stronger legal protections and a more welcoming environment than in other third countries. But Rwanda also has a worrying human rights track record. A string of legal challenges was mounted against deportations and the MoU following its announcement, a prospect that both the British government and experts had anticipated.* NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf This is further discussed in 5.2.3

²⁹³ *Against this background, a return agreement between the UK, and Member States and the EU would not only have lower economic and political costs compared to the MoU with Rwanda. It would also not face the same operational and legal challenges. The question then is what the EU and its Member States will consider an offer balanced enough to convince them to sit at the negotiating table in the future.* NEIDHART, Alberto-Horst. *Post-Brexit EU–UK cooperation on migration and Asylum* [online]. Discussion Paper for the European Migration and Diversity Programme of the European

Despite the government's claims that the Act aims to break up smuggling gangs and increase “safe and legal routes”, critics assert that the provisions fall short of achieving these objectives. In fact, increased numbers of channel crossings and applications for the modern slavery protection scheme made by Albanian nationals signaled the government that the Nationality and Borders Act was not working.²⁹⁴ In a statement made on the 8th of June 2023, the Minister of State for Immigration, Robert Jenrick announced the pausing of the two-tier refugee system.²⁹⁵

5.2.3. Illegal Migration Act

The Illegal Migration Act²⁹⁶ was given Royal Assent on the 20th of July 2023 and introduces provisions aimed at controlling and addressing illegal migration in the United Kingdom.²⁹⁷ The legislation imposes a duty on the Home Secretary to arrange for the removal of individuals meeting specific conditions.²⁹⁸ These conditions include entering the UK in violation of immigration laws, arriving on or after March 7, 2023²⁹⁹ (with

Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

²⁹⁴ Since the NABA was passed, the number of people arriving by small boats has risen to 45,000 a year, 90% of whom claim asylum, and there is clear evidence that our modern slavery system is being abused. For example, the most referred nationality into the modern slavery system last year was Albania, a country that is a signatory to the same anti-trafficking treaty as the UK and a safe, European country. The lesson from previous immigration legislation, including the NABA, is that incremental reforms do not work at the pace required. This is a problem that requires novel and ambitious solutions so we need to do things that previous governments were not willing to do to prevent our asylum system and legal framework being abused by those with no right to be here. UK Home Office. *Nationality and Borders Act compared to Illegal Migration Bill: factsheet* [online]. Policy Paper. 20-07-2023. Available on: <https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/nationality-and-borders-act-compared-to-illegal-migration-bill-factsheet>

²⁹⁵ We will therefore pause the differentiation policy in the next package of Immigration Rules changes in July 2023. This means we will stop taking grouping decisions under the differentiated asylum system after these Rules changes and those individuals who are successful in their asylum application, including those who are granted humanitarian protection, will receive the same conditions. JENRICK, Robert. *Illegal Migration Update* [online]. 8 June 2023. Available on: <https://questions-statements.parliament.uk/written-statements/detail/2023-06-08/hcws837>

²⁹⁶ UK Parliamentary Bills. *Illegal Migration Act 2023* [online]. Available on: <https://bills.parliament.uk/bills/3429>

²⁹⁷ *A Bill to Make provision for and in connection with the removal from the United Kingdom of persons who have entered or arrived in breach of immigration control; to make provision about detention for immigration purposes; to make provision about unaccompanied children; to make provision about victims of slavery or human trafficking; to make provision about leave to enter or remain in the United Kingdom; to make provision about citizenship; to make provision about the inadmissibility of certain protection and certain human rights claims relating to immigration; to make provision about the maximum number of persons entering the United Kingdom annually using safe and legal routes; and for connected purposes.* UK Parliamentary Bills. *Illegal Migration Act 2023* [online]. Available on: <https://bills.parliament.uk/bills/3429>

²⁹⁸ (2)(a) places a duty on the Secretary of State to make arrangements for the removal of certain persons who enter or arrive in the United Kingdom in breach of immigration control as soon as is reasonably practicable after their entry or arrival, subject only to the exceptions specified by or under this Act. UK Parliamentary Bills. *Illegal Migration Act 2023* [online]. Available on: <https://bills.parliament.uk/bills/3429>

²⁹⁹ (1)(3) The second condition is that the person entered or arrived in the United Kingdom as mentioned in subsection (2) on or after the day on which this Act is passed. UK Parliamentary Bills. *Illegal Migration Act 2023* [online]. Available on: <https://bills.parliament.uk/bills/3429>

retrospective effect), traveling through a safe third country *en route* to the UK,³⁰⁰ and lacking the required leave to enter or remain³⁰¹. Individuals meeting these conditions, along with their family members, including children, must be removed "as soon as is reasonably practicable",³⁰² unless exceptional circumstances are identified by the Home Secretary. It is not mandatory to remove unaccompanied children,³⁰³ but the Home Secretary has the authority to make removal arrangements as soon as they turn 18.³⁰⁴

The Secretary of State is obliged to automatically refuse processing any asylum claims made by individuals meeting the conditions for removal.³⁰⁵ Individuals can challenge their removal by arguing a real risk of "serious and irreversible harm" in the specified removal territory.³⁰⁶ However, there is no formal process established for this purpose, and the challenge must be made within a week from their place of detention.³⁰⁷

The Act confers the power to detain individuals pending removal, including families with children and unaccompanied children.³⁰⁸ Immigration judges can grant bail after 28 days of detention, but this is not guaranteed, potentially leading to extended

³⁰⁰ (1)(4) The third condition is that, in entering or arriving as mentioned in subsection (2), the person did not come directly to the United Kingdom from a country in which the person's life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion. (5) For the purposes of subsection (4) a person is not to be taken to have come directly to the United Kingdom from a country in which their life and liberty were threatened as mentioned in that subsection if, in coming from such a country, they passed through or stopped in another country outside the United Kingdom where their life and liberty were not so threatened. UK Parliamentary Bills. *Illegal Migration Act 2023* [online]. Available on: <https://bills.parliament.uk/bills/3429>

³⁰¹ (1) (6) The fourth condition is that the person requires leave to enter or remain in the United Kingdom but does not have it. UK Parliamentary Bills. *Illegal Migration Act 2023* [online]. Available on: <https://bills.parliament.uk/bills/3429>

³⁰² Where the Secretary of State is required by section 2(1) to make arrangements for the removal of a person from the United Kingdom, the Secretary of State must ensure that the arrangements are made— (a) as soon as is reasonably practicable after the person's entry or arrival in the United Kingdom, or UK Parliamentary Bills. *Illegal Migration Act 2023* [online]. Available on: <https://bills.parliament.uk/bills/3429>

³⁰³ The Secretary of State may make arrangements for the removal of a person from the United Kingdom at a time when the person is an unaccompanied child. UK Parliamentary Bills. *Illegal Migration Act 2023* [online]. Available on: <https://bills.parliament.uk/bills/3429>

³⁰⁴ b) where the person has ceased to be an unaccompanied child, as soon as is reasonably practicable after the person has ceased to be an unaccompanied child. UK Parliamentary Bills. *Illegal Migration Act 2023* [online]. Available on: <https://bills.parliament.uk/bills/3429>

³⁰⁵ If someone meets the conditions for removal, the Secretary of State has a duty to refuse to process any asylum claim they make, along with any claim that removal to their country of origin would breach their human rights. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³⁰⁶ The Bill allows a person to challenge their removal by arguing that there would be a real risk of 'serious and irreversible harm' if they were to be sent to the territory specified in the removal notice. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³⁰⁷ They will have a week to bring such a claim from their place of detention; however, no formal process is established to do this as no Home Office asylum interview will take place. All other legal challenges to removal, including those on human rights grounds, would only be considered by the UK courts after a person's removal from the UK. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³⁰⁸ The Bill confers the power to detain people pending their removal and while it is determined whether they should be subject to the removal duty. The detention power applies to families with children and to unaccompanied children. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

periods of detention.³⁰⁹ However, judicial claims of *habeas corpus*, protecting against unlawful detention, is not excluded.³¹⁰ Potential victims of slavery or human trafficking are disqualified from protection, modern slavery support, and any requirement to be granted leave unless they cooperate with an investigation or criminal proceedings.³¹¹ The Act enforces a permanent bar on individuals within the scheme from re-entering the UK or being granted leave to remain or citizenship, with limited exceptions based on human rights or compelling circumstances,³¹² this citizenship ban extends to UK-born children of individuals falling within the scheme. Individuals within the scheme will be removed either to their home country (deemed safe) or a safe third country,³¹³ as identified in Schedule 1, which includes all EU Member States, eight African countries identified as safe only “in respect of men”, and Rwanda.

Although inter-state transfer of asylum applicants is not unlawful,³¹⁴ a memorandum of understanding is a political agreement based simply on the goodwill of the parties,³¹⁵ and as Rwanda is not a signatory state to the European Convention on Human Rights,

³⁰⁹ Immigration judges will have the power to grant bail after a person has been detained for 28 days, but bail will not necessarily be granted, which means detention could continue for longer periods. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³¹⁰ The Bill does not however, exclude the power of courts to grant the ancient common law remedy of *habeas corpus*, which protects against unlawful detention and could lead to the release of detainees. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³¹¹ The Bill will disqualify potential victims of slavery or human trafficking from protection from removal, modern slavery support, and any requirement to be granted leave. There would be exceptions for people cooperating with an investigation or criminal proceedings. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³¹² Finally, the Bill provides for a permanent bar on those who fall within the scheme from ever re-entering the UK or being given leave to remain or citizenship, with limited exceptions on human rights grounds or in ‘compelling circumstances’. The citizenship ban extends to their UK-born children. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³¹³ People within the scheme will be removed either to their home country (where it is deemed safe) or a safe third country where their claim for asylum will be processed. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³¹⁴ *In principle, inter-State transfers of asylum seekers do not violate the Refugee Convention or the ECHR, if specific and stringent safeguards are met. UNHCR has stated that inter-State transfers of asylum seekers may be lawful, if governed by a formal, legally binding, and public agreement, which sets out the responsibilities of each State involved, along with the rights and duties of the individuals affected.* PEREZ, Cristina Saenz. *The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit* [online]. International Journal of Refugee Law, 2023, XX, 1–18. Available on: DOI: <https://doi.org/10.1093/ijrl/eead030>

³¹⁵ *The use of memoranda of understanding fails to meet these standards. These political agreements lack any legally binding character, and their fulfilment relies on the goodwill of the parties.* PEREZ, Cristina Saenz. *The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit* [online]. International Journal of Refugee Law, 2023, XX, 1–18. Available on: DOI: <https://doi.org/10.1093/ijrl/eead030>

asylum-seekers are less protected,³¹⁶ even if *par ricochet* protection still applies.³¹⁷ In addition, there have also been claims presented to the UK Supreme Court on the grounds that this agreement is potentially problematic since article 6 of the Human Rights Act 1998 enacts article 3 of the ECHR, therefore removing asylum-seekers to Rwanda, where there cannot be a decent expectation of compliance with article 3, would be unlawful under UK Law.³¹⁸ Furthermore, deficiencies in Rwanda's asylum procedures could eventually lead to the return of the asylum-seeker to the country he or she fled from prosecution, therefore violating article 33 of the Refugee Convention (that establishes the principle of *non-refoulement*) to which the UK is a signatory state.³¹⁹

The repeal of the HRA and withdrawal from the ECHR³²⁰ has been put back on the political agenda since ECHR provisions and ECtHR interim measures³²¹ are

³¹⁶ *The diplomatic assurances against torture or ill-treatment contained in the UK–Rwanda MoU lack any binding character and are particularly weak, as Rwanda is not a signatory to the ECHR, which leaves the relocated asylum seeker with no remedy available.* PEREZ, Cristina Saenz. *The Securitization of Asylum: A Review of UK Asylum Laws Post-Brexit* [online]. International Journal of Refugee Law, 2023, XX, 1–18. Available on: DOI: <https://doi.org/10.1093/ijrl/eead030>

³¹⁷ Which means that the UK can be condemned by the ECtHR for extraterritorial violations of the ECHR, i.e. provided that people are under UK's jurisdiction, the UK is still responsible for what happens to them in a country it directed them to, even if that country is not a Signatory to the Convention and their territory is outside Europe. For more information on this and further reading on this subject you may consult: GIL, Ana Rita and ALMEIDA, Susana. *The Direct and Indirect (Par Ricochet) protection of migrants in the light of the European Convention on Human Rights: Brief Notes on the Evolution of the Strasbourg Court's case-law* [online]. Human(ities) and Rights, Global Network Journal, Vol.3. 2021-08-20, Issue 1, P. 119-145. Available on : DOI : <https://doi.org/10.24861/2675-1038.v3i1.59>
Relevant ECtHR jurisprudence in this context is the Soering v. The United Kingdom, Application No. 14038/88, 7 July 1989 (Available on: <https://www.asylumlawdatabase.eu/en/content/ecthr-soering-v-united-kingdom-application-no-1403888-7-july-1989>) and D. v. The United Kingdom, Application No. 30240/96, 2 May 1997 (Available on: <https://www.asylumlawdatabase.eu/en/content/ecthr-d-v-united-kingdom-application-no-3024096-2-may-1997>) referenced and further explained in: GIL, Ana Rita. *A proteção derivada de direitos fundamentais de imigração* [online]. September 2016. Available on: <http://hdl.handle.net/10362/19078>

³¹⁸ *By a majority, the Court allowed the claimants' appeal on the ground that the deficiencies in the asylum system in Rwanda were such that there were substantial reasons for believing that there is a real risk of refoulement. That is, a real risk that persons sent to Rwanda would be returned to their home countries where they face persecution or other inhumane treatment, when, in fact, they have a good claim for asylum. In that sense Rwanda was not a safe third country. Accordingly, unless and until the deficiencies in its asylum processes are corrected, removal of asylum seekers to Rwanda will be unlawful under section 6 of the Human Rights Act 1998. This is because it would breach article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment.* UK Supreme Court. *Facts on R (on the application of AAA and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent)* [online]. 2023-11-15. Available on: <https://www.supremecourt.uk/cases/uksc-2023-0093.html>

³¹⁹ *The UK remains a signatory to the 1951 Convention relating to the status of refugees and its 1967 Protocol. The Convention's key principle of non-refoulement – that a refugee should not be expelled or returned to a country where they face serious threats to their life or freedom, now considered part of customary international law – remains applicable to the UK. This means that the UK has the duty to verify that third countries receiving asylum seekers from the UK respect human rights. These obligations would therefore apply in any bilateral discussions the UK has with third countries* OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

³²⁰ *To leave the ECHR a state must formally notify the Council of Europe of its intention to withdraw [according to the exit mechanism contained on Clause 58 to the Convention]. The state ceases to be a member of the Council of Europe (and the ECHR) at the end of the financial year of notification. At a domestic level, the UK would have to repeal the Human Rights Act 1998 through an Act of Parliament. Many Acts, including devolution legislation concerning Scotland, Northern Ireland and Wales, refer to the ECHR and would need to also be amended.* DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³²¹ *The Bill has implications for the UK's future compliance with urgent orders, known as interim measures, which the ECtHR exceptionally issues where there is an imminent risk of irreparable harm. On 14 June 2022, the Court issued an interim measure to prevent the removal of an applicant to Rwanda as part of the UK-Rwanda asylum agreement until the legality of the scheme has been established. The Bill empowers the Home Secretary to make regulations about interim*

challenging the implementation of the Illegal Migration Act. In fact, there have been suggestions that the Act was knowingly enacted “push[ing] the boundaries of what is legally possible while staying within the ECHR”³²² in order to arise challenges of its incompatibility with the ECHR³²³ and bring back this debate.³²⁴ This claim is also supported by the introduction of a s.19(1) b³²⁵ statement.

Ignoring interim measures might not have concrete sanctions but, again, will undermine the UK’s credibility and international role and a human-rights protecting

*measures ‘as they relate to the removal of persons from the United Kingdom under this Act’. The Explanatory Notes to the Bill say that this provision is a ‘placeholder’, which suggests that it will be replaced by a substantive clause via a government amendment during the passage of the Bill. The provision has been interpreted as a warning that it will be used to ignore future interim measures in UK cases. This would be in breach of the UK’s obligations under the ECHR: interim measures are binding and the obligation to comply with them cannot be overridden by any national legislation. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>*

³²² *The source told the newspaper that Mr Sunak, alongside Home Secretary Suella Braverman, will be “pushing the boundaries of what is legally possible, while staying within the ECHR”, with the UK Government plan for halting the boats. Independent. No 10 says ‘no plans’ to withdraw from ECHR over small boats crackdown plan [online]. <https://www.independent.co.uk/news/uk/echr-prime-minister-rishi-sunak-bob-neill-suella-braverman-b2276662.html>*

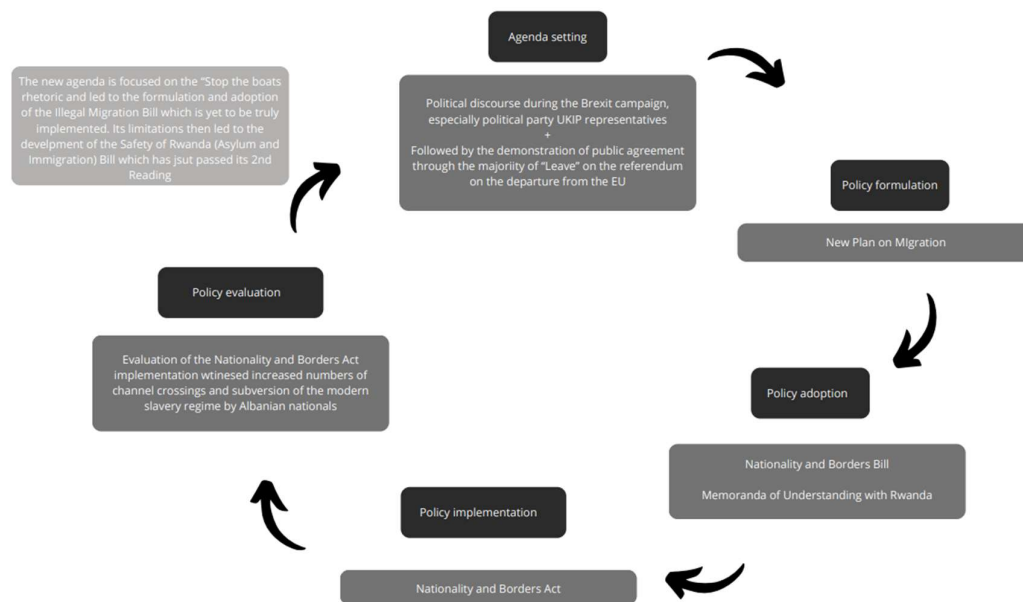
³²³ *Experts venture that the Bill is likely to lead to more challenges against the UK at the European Court of Human Rights (ECtHR) in Strasbourg. This is partly because the Bill would disapply section 3 of the Human Rights Act, which empowers and requires courts to interpret Acts of Parliament so that the rights, duties and powers that they establish can only be exercised in ways that are compatible with – and do not lead to breaches of – Convention rights. If this is not possible, all the higher UK courts can do is issue a ‘declaration of incompatibility’ under section 4 of the HRA, signalling to ministers and Parliament that it needs to be changed. Disapplying section 3 of the HRA from the Illegal Migration Bill makes it more likely that declarations of incompatibility will be made, because UK courts will have little or no scope to interpret laws so as to avoid the existence of incompatibilities in the first place. In addition, as explained above, the Bill would prevent UK courts from hearing human rights claims from asylum-seekers. In turn, more cases are likely to be taken to the ECtHR. If the UK loses those cases, it will either have to comply with the ECtHR judgments or defy them, which would be a breach of its international law obligations under the ECHR. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>*

³²⁴ *Talk of withdrawal now appears to form part of the Conservative Party’s electoral strategy. The chair of the JCHR, Scottish National Party MP Joanna Cherry, has suggested that the plan behind the Illegal Migration Bill is to pass legislation ‘in the certain knowledge’ that courts will find it incompatible with the ECHR, and thereby lay the ground for the Conservatives to fight the next general election on a promise to take the UK out of the ECHR. DONALD, Alice; LEACH, Phillip: *The UK vs the ECtHR: Anatomy of A Politically Engineered Collision Course* [online]. VerfBlog, 2023/5/05, Available on: DOI: 10.17176/20230505-204527-0*

³²⁵ *The Illegal Migration Bill is the first piece of immigration legislation for which the Government has made a s.19(1)(b) statement, meaning, in this instance, that we believe we have credible legal arguments for the legislation but recognise that because it is novel, ambitious and untested, we cannot be sure we have a better than evens chance of success in the European Court in Strasbourg. We will always comply with international law, but this statement demonstrates the extent to which we are doing whatever it takes to fix this problem within those boundaries. UK Home Office. *Nationality and Borders Act compared to Illegal Migration Bill: factsheet* [online]. Policy Paper. 20-07-2023. Available on: <https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/nationality-and-borders-act-compared-to-illegal-migration-bill-factsheet> [Home Secretary] Suella Braverman was unable to make a declaration under section 19(1)(a) of the Human Rights Act 1998 that the Bill’s provisions are compatible with the ECHR. Instead, she took the unusual step of declaring – under section 19(1)(b) of the HRA – that she was unable to make a statement of compatibility, but that the government nevertheless wishes Parliament to proceed with the Bill. The ECHR memorandum attached to the Bill states that the Convention rights raised by its provisions are: the right to life; the prohibition of torture and inhuman or degrading treatment; the prohibition of slavery; the rights to liberty and security, a fair trial, respect for private and family life, and an effective remedy, and the prohibition of discrimination. The memorandum argues that the Bill’s provisions do not infringe these Convention rights because of various safeguards and exceptions. It identifies only one reason why the Home Secretary could not make a statement of compatibility with the ECHR – the fact that the duty to remove, the power to detain and the permanent ban on ever being granted citizenship status apply even to victims of modern slavery. The memorandum justifies this approach by saying that ‘radical solutions’ are required to put a stop to the small boats crossing the Channel. Commentators argue that the suspension of modern slavery protection is ‘fairly obviously in breach’ of the UK’s obligations under the Council of Europe Convention on Action against Trafficking in Human Beings and is likely to lead to litigation under Article 4 of the ECHR, which prohibits slavery.*

nation³²⁶ and potentially irreparably harm current and future cooperation with the EU.³²⁷ Faced with the Supreme Courts' ruling on the unlawfulness of the UK-Rwanda Asylum Scheme,³²⁸ Rishi Sunak has now introduced the Safety of Rwanda (Asylum and Immigration) Bill,³²⁹ aiming to get Parliament to rule Rwanda as a safe third country, which would avoid domestic court appeals and allow the bypassing of interim measures by having ministers overrule them. The bill has split support among the Conservative Party factions, which passed the 2nd reading with 29 Tory abstentions.

Figure 6 - UK's Asylum Policy Cycle



³²⁶ There are no specific sanctions for the breach of international law. However, failure to meet international obligations could lead to reputational damage, particularly with treaty partners where it raises questions of commitment to international law. The UK positions itself internationally as a leading defender of the rule of law, democracy and human rights on the international stage. The Foreign Affairs Committee has urged the government to challenge states that seek to 'subvert the international system and weaken rights'. The perception that the UK does not follow its own international obligations could weaken the argument that other countries should follow theirs. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³²⁷ The most significant threat to the UK-EU relationship is if the UK withdraws from the ECHR as a consequence of this Bill. (...) The UK-EU Trade and Cooperation Agreement (TCA) also contains an obligation for both the UK and EU to continue their commitment to human rights. This shared commitment is an 'essential element' of the TCA. In general, a 'serious and substantial' failure to fulfil this obligation which 'threatens peace and security or that has international repercussions' could lead to the suspension or termination of the Agreement by the other party. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³²⁸ MCDONNELL, Emilie. *UK Supreme Court Finds UK-Rwanda Asylum Scheme Unlawful* [online]. Human Rights Watch, November 15, 2023. Available on: <https://www.hrw.org/news/2023/11/15/uk-supreme-court-finds-uk-rwanda-asylum-scheme-unlawful>

³²⁹ UK Parliament. *Safety of Rwanda (Asylum and Immigration) Bill* [online]. Government Bill, Introduced on the 7th of December 2023. Available on: <https://publications.parliament.uk/pa/bills/cbill/58-04/0038/230038.pdf>

5.3. Bilateral Cooperation on asylum matters

The future of bilateral cooperation between the UK and EU Member States post-Brexit appears to be facing challenges, particularly in the area of asylum and immigration policies. We argue that previous bilateral agreements were reached based on the principle of mutual trust, constructed on the common ground of i) compromise to the same international obligations, ii) harmonisation achieved by the CEAS and iii) relative uniformity provided by the European *acquis*, therefore, the now lack of such a principle, challenges bilateral cooperation.³³⁰ In fact, since the signing of the Trade and Cooperation Agreement (TCA), the UK has encountered difficulties in convincing EU Member States, including France, Belgium, Germany, Sweden, and the Netherlands, to enter into bilateral return agreements,³³¹ which is compromising the effectiveness of UK legislation, especially the Illegal Migration Act.

Several EU Member States, such as the Netherlands, Germany, and France, have argued that decisions on these matters should be made collectively by the EU, rather than through bilateral agreements with individual Member States.³³² Others, like Belgium, have expressed that the UK can no longer rely on "European Solidarity." Despite the UK's intention to establish bilateral arrangements for the return of asylum-seekers, no agreements have been successfully reached with these EU neighbours.³³³ The lack of bilateral returns agreements has raised concerns about the legal grounds for Home Office removals, especially in cases involving inadmissible asylum seekers, especially since The UK government's "New Plan for Immigration" acknowledges that its plans are contingent on securing such agreements with safe third countries.³³⁴

³³⁰ XANTHOPOULOU, Ermioni. *Legal uncertainty, distrust and injustice in post-Brexit asylum cooperation* [online]. In: AHMED, Tawhida. *On Brexit. Law, Justices and Injustices*. Edward Elgar Publishing, 2019. ISBN: 9781789903003. Available on: <https://www.elgaronline.com/edcollchap/edcoll/9781789903003/9781789903003.00021.xml>

³³¹ DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³³² *Countries including France, Belgium, Germany, Sweden and the Netherlands have said they will not agree to bilateral returns deals with the UK. Previously, when part of the Dublin system the UK was party to its returns mechanism through which asylum seekers who travelled to the UK from other Dublin countries could be returned to them. Without replacement returns agreements, UK removals of asylum seekers will not be facilitated by their EU member state neighbours.* OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

³³³ DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³³⁴ *In the 'New Plan for Immigration', the UK government admitted its plans for the return of inadmissible asylum seekers are 'contingent on securing returns agreements' with safe third countries. Without such agreements, Home Office removals would not be facilitated by third countries meaning removals occurring would be on dubious legal grounds. It is looking highly unlikely that the UK will secure bilateral returns agreements with its EU member state neighbours.* OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

However, there have been some developments in cooperation between the UK and specific EU Member States. On March 10, 2023, Prime Minister Rishi Sunak and French President Emmanuel Macron reached an agreement for the UK to fund enforcement measures and the construction of a detention center in France. This agreement, while not a “returns agreement”, reflects a commitment to managing specific aspects of migration and border enforcement.³³⁵ Additionally, a joint statement released on July 20 by the UK and France expressed support for a UK-EU readmission agreement, although the specifics and mutual advantages are yet to be determined. Notably, this statement did not mention a bilateral UK-France readmission treaty.³³⁶

The UK's historical commitment to its internal market, has always had a significant impact on its border practices. Although the UK retained the right to impose border controls on intra-EU movement, opting-out of the Schengen area, the existence of the Schengen border-free area influenced the establishment of juxtaposed border controls in France. The UK maintains border management agreements with neighboring coastal states (France and Belgium), through Le Touquet (2003) and Sandhurst (2018) treaties, which remain unaffected.³³⁷ In fact, bilateral cooperation increased post-Brexit, with agreements leading to the creation of the UK-France Coordination and Information Centre, enhancing real-time intelligence exchange on traffic flows across the Channel.³³⁸

³³⁵ On 10 March 2023, Prime Minister Rishi Sunak and French President Emmanuel Macron reached a further agreement for the UK to fund enforcement measures and the building of a detention centre in France. This followed a funding agreement in 2022. This is not, however, a ‘returns agreement’ whereby the UK would return asylum seekers to France. DONALD, Alice and GROGAN, Joel. *The Illegal Migration Bill* [online]. Explainer for UK in a Changing Europe, 2023-08-18 [Consulted on the 11th of November] Available on: <https://ukandeu.ac.uk/explainers/the-illegal-migration-bill/>

³³⁶ On 20 July, the UK and France released a joint statement on the next phase in their cooperation to manage small boat crossings on the English Channel, setting out a new funding agreement in which the UK will contribute €62.7 million (£54.1 million) towards France’s border enforcement and technology capabilities. The statement included an announcement that ‘the UK and France support the idea of a UK-EU re-admission agreement’. However, such an agreement would have to be to ‘mutual advantage’. Furthermore, as noted by Professor Steve Peers, a UK-EU readmission agreement would not be ‘solely up to France’ on the EU side and the joint statement makes no mention of a bilateral UK-France readmission treaty. OVERTON, Sarah. *UK Asylum Policy after Brexit* [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>

³³⁷ Although the UK has long been committed to an internal market, it did not become a member of the Schengen system for the abolition of internal border controls on intra-EU movement. The UK position is reflected in a special Protocol to the EU Treaties, which stipulates that notwithstanding the internal market, the UK maintains its right to keep border controls on movement from within the EU. The Treaty of Amsterdam fully integrated the Schengen system into the EU framework, although the UK opted to preserve autonomous border controls and visa policy under the Schengen Protocol. The UK consistently asserts that maintenance of its own border controls is required (Government’s Response to the House of Lords EU Committee’s 8th Report of Session 2012-2013). Although the UK remains outside of the Schengen border free area, that area’s existence has had an impact on UK border practices. In particular, the UK’s establishment of so-called juxtaposed border controls in France is seen as a response to the internal free movement across the continent (Ryan 2004). COSTELLO, Cathryn. *The UK, the Common European Asylum System and EU Immigration Law* [online]. Policy Primer for the Migration Observatory at the University of Oxford. COMPAS, University of Oxford, UK, 2014-05-02, P.6. [Consulted on the 14th of November]. Available on: https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-UK_EU_Asylum_Law.pdf

³³⁸ Brexit did not affect the UK’s border management agreements with its neighboring coastal states, France and Belgium. In fact, cooperation at the bilateral level increased following the UK’s departure from the EU. Border controls between the UK and France are regulated by the Le Touquet (2003) and Sandhurst (2018) treaties. Under the former, French authorities must prevent non-EU nationals from entering the UK without a visa. The latter reinforced French–UK border cooperation, leading to the creation of the UK-France Coordination and Information Centre to exchange real-time

Nevertheless, despite increased resources allocated to bilateral border management and surveillance arrangements, the number of Channel crossings reached record highs in 2020 and 2021. Weaknesses in anti-smuggling and deterrence strategies, exacerbated by the UK's departure from the EU, contributed to the professionalization and internationalization of cross-border criminal activities. Motivations for irregular Channel crossings are diverse, including family reunification, cultural ties with the UK, and a lack of safe and legal routes.³³⁹

In contrast to the challenges faced with EU Member States, the UK has secured an agreement with the non-EU country Albania for the return of asylum seekers and criminals. This agreement is significant due to the high number of Albanian nationals among asylum applicants and foreign national offenders in the UK.³⁴⁰ In terms of offshore processing, the UK has engaged in talks with Denmark regarding the possibility of sharing the offshore processing center in Rwanda. However, the European Commission has expressed concerns about Denmark's new law on offshore processing, raising fundamental questions about access to asylum procedures and protection.³⁴¹

intelligence on traffic flows across the Channel. In 2021, the UK also agreed to pay €63 million to strengthen France's surveillance capabilities and stop departures of small boats from its coasts. Similarly, Belgium increased the control of its transit points following an agreement reached in 2018 with the UK. In November 2021, the British and Belgian governments also signed a Joint Declaration, renewing their commitment to preventing irregular migration to the UK through mutual information exchange and effective security technology and operational enhancements. Bilateral border management and surveillance arrangements benefitted from more resources in recent years, not less. This resulted in an unprecedented number of interceptions in the Channel, despite UK officials accusing European national border forces of not doing enough to stop irregular departures. NEIDHART, Alberto-Horst. Post-Brexit EU–UK cooperation on migration and Asylum [online]. Discussion Paper for the European Migration and Diversity Programme of the European Policy Centre and the Friederich Nauman Foundation, 2022. [Consulted on the 14th of November]. Available on: https://www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf

³³⁹ *Channel crossing reached record highs in 2020 and 2021. The reasons for the rise in the crossings are complex. Nevertheless, anti-smuggling and deterrence strategies in particular have become weak spots following the UK's departure from the EU. Firstly, the Channel route has seen a swift professionalisation and internationalisation of criminal activities, with smuggling networks going as far as establishing procurement cells abroad and outsourcing logistics to specialised criminal facilitators. Prompt and effective anti-smuggling information exchange has become essential to issuing early warnings and preventing both criminal activities and incidents. Intelligence and operational gaps have remained unaddressed in this respect, with the UK government's attention long focused on maritime surveillance and on making the Channel route 'unviable'. Secondly, 2021 and 2022 statistics suggest that increased maritime surveillance alone will not discourage asylum seekers from crossing the Channel. Those reaching the UK irregularly are driven by a variety of personal motivations and may include persons who previously applied for asylum in a Dublin state but wish to be reunited with their family members, or else have language or other cultural links with the UK. The lack of opportunities to reach the UK via safe and legal routes combined with increased border surveillance have pushed asylum seekers – and other third-country nationals (TCNs) – into the hands of smugglers and to take greater risks to cross irregularly*

³⁴⁰ *On 9 July, it was announced that the UK has secured an agreement with the non-EU country Albania for the return of asylum seekers and Albanian criminals. This is a significant agreement as Albanians make up a significant percentage of asylum applications and foreign national offenders (FNOs) in the UK. Albanians make up the largest number of FNOs held in UK prisons, at 16% of the total FNO prison population. Similarly, the second largest number of asylum applications in the UK in the last two years has come from Albanian nationals, following the largest number of applications from Iranian nationals. However, even with this UK-Albania removals agreement, there remains very little to facilitate the removals element of the UK's post-Brexit asylum system. OVERTON, Sarah. UK Asylum Policy after Brexit [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>*

³⁴¹ *Separate to removals agreements, the UK has opened talks with Denmark on the possibility of sharing an offshore processing centre in Rwanda. This comes after Denmark passed legislation in June allowing it to relocate asylum seekers offshore for processing. However, Denmark's willingness cannot be taken as a sign that talks on offshore processing could occur with the rest of the EU. Rather, the European Commission has raised concerns around Denmark's new law, stating offshore processing raised 'fundamental questions about both the access to asylum procedures and effective access to protection'. OVERTON, Sarah. UK Asylum Policy after Brexit [online]. Explainer for UK in a Changing Europe, 2021-07-29. Available on: <https://ukandeu.ac.uk/explainers/asylum-policy-after-brexit/>*

Overall, the critical lack of return deals with the EU may result in increased delays in the asylum system, with some anticipating a rise in undocumented asylum seekers. The situation underscores the complexity of navigating post-Brexit cooperation on migration-related issues between the UK and its EU neighbours.

6. Tentative Conclusions

The following tentative conclusions are subject to future examination and empirical validation, as the long-term implications of Brexit on the UK's asylum policy unfold over time. As the landscape continues to evolve, it is crucial to consider additional factors and developments that may shape the trajectory of the UK's international obligations and its relationship with human rights frameworks.

Tentative Conclusion 1: Impact on UK's International Obligations

Based on the analysis conducted in this master thesis, it can be tentatively concluded that Brexit has a discernible influence on the UK's commitment to its international obligations, particularly in the context of asylum policy. The departure from the European Union (EU) framework may introduce shifts in the UK's approach to meeting its international commitments, potentially creating conditions conducive to the facilitation of breaches. As the UK redefines its relationship with the EU and other international entities, there is a need for vigilant monitoring of the evolving landscape to assess the implications for the adherence to asylum-related obligations.

The validation of this conclusion could be made by examining the EU's role in promoting compliance with judgments from the ECtHR. Preliminary findings indicate that EU member states are subject to political pressure and mechanisms that enhance their adherence to ECHR judgments. By comparing the compliance rates of ECtHR judgments between EU member states and non-member states (such as Switzerland, North Macedonia, Armenia, Azerbaijan, and Russia³⁴²), it could become apparent that being an EU member state correlates with a higher likelihood of consistent adherence to ECHR

³⁴² LAPITSKAYA, Julia. *ECHR, Russia, and Chechnya: two is not company and three is definitely a crowd* [online]. 43 N.Y.U. J. Int'l L. & Pol. 479 (2011). Available on: <https://nyujilp.org/wp-content/uploads/2013/02/43.2-Lapitskaya.pdf>

rulings. This examination of the EU's influence on ECHR compliance serves as a basis for the tentative conclusion that, post-Brexit, the UK may face challenges in maintaining a comparable level of compliance with ECHR judgments. The absence of direct EU oversight might impact the political dynamics that traditionally encouraged the UK to align with ECHR decisions. Therefore, the validation of the first tentative conclusion would involve a nuanced understanding of how the EU's influence on compliance has historically shaped the behavior of member states compared to non-member states, providing valuable insights into potential implications for the UK's post-Brexit asylum policy.

Tentative Conclusion 2: Brexit's facilitation of ECHR withdrawal

An initial assessment of the impact of Brexit on the UK's asylum policy suggests that leaving the EU and consequently no longer being under the jurisdiction of the Court of Justice of the European Union (CJEU) could signal a notable step towards disengagement from the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) jurisdiction. The analysis implies that the absence of EU membership might create an environment wherein the withdrawal from ECHR and ECtHR jurisdiction becomes more feasible. Seeing as it was more difficult for the UK to withdraw from the ECHR while it was still a MS to the EU – as it would jeopardise fundamental membership freedoms and rights³⁴³ – we tentatively conclude that leaving the EU represents a further step towards achieving the ultimate aim to untie the UK from the ECtHR “foreign court” judicial oversight,³⁴⁴ perceived to weaken the UK's sovereignty³⁴⁵, since, in fact, withdrawing from the ECHR would have a greater influence when it comes to immigration control.³⁴⁶

³⁴³ JAHN, Jannika. *The UK's Potential Withdrawal from the European Convention on Human Rights – Just a Flash in the Pan or a Real Threat?* [online]. VerfBlog, 2014/12/17. Available on: DOI: 10.17176/20181005-151949-0

³⁴⁴ *This would allow the Conservatives to appeal to the part of their electoral base that still embraces the attitudes that animated the Brexit vote – hostility to Europe and to judicial oversight, especially by international courts – while avoiding the highly disruptive consequences of actual withdrawal.* DONALD, Alice; LEACH, Philip: *The UK vs the ECtHR: Anatomy of A Politically Engineered Collision Course* [online]. VerfBlog, 2023/5/05, Available on: DOI: 10.17176/20230505-204527-0

³⁴⁵ *Linking leaving the EU with ECHR withdrawal made sense in terms of political framing. Although being outside the EU has no bearing on ECHR membership – Norway and Switzerland are not EU member states but have been party to 2/3 the ECHR for almost half a century – the European Court of Human Rights was considered another ‘foreign court’ in the newspapers and political circles that would go onto become the most enthusiastic Brexit supporters.* COWELL, Frederick. *A strange irony: How the EU withdrawal process ended up saving the Human Rights Act* [online]. London School of Economics Blog, 2018-12-03. Available on: <https://blogs.lse.ac.uk/brexit/2018/12/03/a-strange-irony-how-the-eu-withdrawal-process-ended-up-saving-the-human-rights-act/>

³⁴⁶ *The situation is different for the ECHR and corresponding limits to state discretion, on the basis of Articles 3 and 8 ECHR, on the expulsion of those staying illegally, including suspects of terrorism. That is why Theresa May was promoting a departure from the ECHR (or at least a repeal of the Human Rights Act when she was Home Secretary. Leaving the*

Validating the provisional conclusion that the UK's departure from the EU and the subsequent cessation of the Court of Justice of the European Union's (CJEU) jurisdiction might signify a progression towards withdrawing from the European Convention on Human Rights (ECHR) and the jurisdiction of the European Court of Human Rights (ECtHR) involves several key considerations. Firstly, one should analyse the legal intricacies surrounding fundamental rights and freedoms tied to EU citizenship, examining how they intersect with ECHR provisions. Assessing the legal and procedural challenges of withdrawing from the EU and the ECHR is crucial, recognising that while EU membership posed constraints, post-Brexit, the UK gains greater autonomy in shaping its human rights landscape. Additionally, exploring political intentions, government statements, and public discourse provides insight into the UK's commitment to international human rights standards. The potential impacts on national legal frameworks, international relations, and practical implementation challenges post-Brexit also contribute to validating the assertion that leaving the EU might signify a shift away from the ECHR and the ECtHR jurisdiction, particularly in light of the altered legal and political context.

While the tentative conclusions provided offer valuable insights into the potential impact of Brexit on the UK's asylum policy and international relations, it is important to acknowledge certain limitations that could prejudice attempts at their validation. Isolating the impact of Brexit alone on compliance with international obligations and facilitation of a yet-to-happen withdrawal may result in an oversimplification of a very a complex landscape. Such limitations are related to other influencing factors that may contribute to policy development as media coverage, domestic politics, public opinion, economic considerations, and geopolitical dynamics influencing a country's behaviour.

ECHR (or repealing the Human Rights Act) might have extended UK sovereignty over third-country national somewhat (albeit with a considerable constitutional price-tag attached). By contrast, leaving the EU won't change much regarding immigration control. THYM, Daniel. *The Irony of Brexit for Immigration Control* [online]. VerfBlog, 2017/10/20, [Consulted on the 16th of November]. Available on: DOI: 10.17176/20171020-110133

7. Conclusion

By analysing the UK's asylum legal framework, we were able to conclude that before leaving the EU, the United Kingdom's asylum policy was largely governed by EU law and international agreements. However, while the UK was still a MS of the EU it benefitted from a privileged position carefully and politically crafted to ensure both the maintenance of control over its borders and the possibility to take advantage of whatever EU rules found to be beneficial.

In fact, there were always Eurosceptic parties and factions in the British government, but the anti-EU sentiment grew stronger with the impulse of anti-immigration discourse, in which, we argue, the media and political campaign surrounding the referendum played a relevant role. There are many reasons that can explain the growth of the Eurosceptic sentiment, immigration and the 2015 Refugee Crisis are often mentioned as an unpleasant situation that the government took advantage of, others point out to the misleading arguments and populist discourse of "taking back control" and the suggestion that the UK would retain the benefits of EU membership without meeting any of its obligations. We believe that security and sovereignty concerns were used to highlight the need to withdrawal from the EU. Having achieved the majority popular vote on "Leave", the government withdrew from the EU by using the exit mechanism, triggering article 50 of the TEU for the first time, experiencing an *ad hoc* procedure of negotiation of a Withdrawal and Trade and Cooperation Agreement. The transition period ended, and the UK formally left the EU, without legally binding itself to any asylum-related agreement. The UK government had long identified that the "asylum system was broken" but it was the increase of the number of crossings of the English Channel through small embarkations arriving from Calais in 2020/2021, that dictated the new approach for the UK's asylum policy. Without the jurisdiction of the CJEU and the binding EU Charter of Fundamental Rights, the UK outlined its "New Plan on Immigration" meant to stop the boats and fight people smugglers criminal activity. In line with this plan the government has achieved enactment of the 2022 Nationality and Borders Act and the 2023 Illegal Migration Act, legislative instruments meant tackle the identified issues through externalisation.

The impact of Brexit on the UK's Asylum Policy is evidenced by the fact that the British government has not been successful in its endeavor to shape its asylum policy independently from the EU as returns remain contingent on the yet-to-reach return

agreements. The passing of these concerning legislative instruments questions the UK's compromise to its international commitment to the ECHR and the 1951 Refugee Convention, potentially further damaging the possibility of future cooperation with the EU and undermining the UK's reputation as a human-rights protecting nation. In fact, the evolving landscape of asylum policy in the UK and the EU, marked by recent legislative developments such as the EU-Tunisia agreement and the EU New Pact on Migration, reflects a broader trend towards more defensive and externalised approaches.

The current remaining backlog of asylum applications³⁴⁷ demonstrates that our hypothesis questioning of whether, as stated by the UK Government, leaving the EU would result in improvements in the management of asylum applications and a decrease in asylum seeker arrivals in the country, was correct. In fact, leaving the EU has not resulted in a lowering of asylum applications or a further ability to return asylum seekers arriving at UK's borders. This fact that this issue has not been resolved can be partly attributed to the biased approach with which the government has attempted to solve it. Externalisation is not working and is not the solution to the delays in Home Office, the problem must be solved from within.

Throughout this study we were also able to identify the phases in the UK's policy making that correspond to the policy cycle framework. We therefore were able to conclude that the agenda setting phase began during the Brexit referendum political campaign, as the government identified the need for the UK to leave the EU in order for it to be able to tackle several issues related to immigration, which the government associated with free movement. In fact, during the campaign, UKIP's representatives pushed negative narratives related to EU Immigration blurring the lines between migrants and refugees, by using the terms indistinctly and on the "Breaking Point" poster. The policy formulation phase corresponded to the proposed "New Plan on Immigration", which identifies that the British asylum system is broken and needs to be fixed by deterring channel crossings and arresting people smugglers, enablers of the dangerous journeys made by asylum-seekers. The passing of the Nationality and Borders Bill represents the phase of policy adoption. After facing criticism, some clauses and sections were revised and retracted from what became the Nationality and Borders Act. There were some changes implemented through the NABA, but policy evaluation led to the belief of the necessity of development of further-restrictive legislation, achieved through the Illegal Migration Act. However, the latter is still on the policy implementation

³⁴⁷ SYAL, Rajeev. *Cleverly says UK asylum backlog cleared as almost 100,000 wait for decision* [online]. The Guardian. 2nd of January 2024. Available on: <https://www.theguardian.com/uk-news/2024/jan/02/james-cleverly-uk-asylum-backlog>

phase, as many of its sections have not been enforced and international law commitments are challenging its implementation, which in turn has led to the introduction of the Safety of Rwanda (Asylum and Immigration) Bill, that has just passed its 2nd reading on the House of Commons. The latest developments in this area highlight the never-ending nature of the policy-making cycle.

The research carried out in this thesis resulted in a thorough and critical analysis of the ramifications of Brexit on UK asylum policy, which sought to explore its legal, domestic and international implications. The conduction of an objective and quantitative impact assessment study based on the theoretical and legal framework provided by this study could provide us with real data from which we could be able to extract further conclusions. Naturally this is an ever-evolving subject with prolonged consequences that can reach far into the future, this study is, therefore, limited in time, focusing only on the developments up until the present moment (January 2024) and may become outdated with the passage of time.

The following tentative conclusions are subject to further examination and empirical validation, as the long-term implications of Brexit on the UK's asylum policy unfold over time. As the landscape continues to evolve, it is crucial to consider additional factors and developments that may shape the trajectory of the UK's international obligations and its relationship with human rights frameworks.

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