

History of immigration and asylum law european essay

Law



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Introduction

Nations are constantly looking at ways to protect their borders from the inflow of Immigrants and Asylum seekers, fears of losing identity as well as a fear of 'different' drives forward governments in creating new laws and legislations to keep anyone that doesn't belong out. The legislation then only serves to isolate them from society and the media only serves to promote social exclusion. Conventions and protocols set out to encourage countries to uphold a duty to those in need are often there to help any claimant that's knowing, willing and able to fight against a countries own domestic laws and procedure which very often isn't the case. Refugees are often made to feel highly unwelcome and as detention would stand, seeking help from persecution from their country of origin often leads to further persecution in the country of residence.

Chapter one

1. 1 History of Immigration and Asylum

Immigration and asylum policy has been one of the most politically and publicly divisive issues in the United Kingdom and other liberal democracies especially in the last 20 years. The drama over asylum seekers and social welfare has arisen because of dwindling political and popular support for refugees and the enactment of a statutory bill of rights – the Human Rights Act 1998[1](HRA) – which has acted as a normative counterweight to restrictive asylum welfare policies.[2]Before the twentieth century the UK did not have a developed body of law. There were provisions in place to control the movement of what immigrants and asylum seekers were classed as '

Aliens'. This phrase was used on those who did not owe an allegiance to the crown and were not British subjects[3]. Many of the decisions made back then were mostly made on the state of relations between the UK and other countries. If at the time there was a bad affiliation between the countries the UK would seek to remove all nationals from that country. The first modern piece of immigration law was the Aliens Act 1905[4] this set the template as it aimed to exclude from the country those who were unable to support themselves "decently"[5]. 'The Aliens Act 1905[6] gave court's jurisdiction over whether a person's circumstances would exempt them from deportation where political asylum could be claimed. The 1905 Act was replaced by the Aliens Restriction Act 1914[7] and the Aliens Restriction Act 1919[8]. The exemption for refugees disappeared. Refugee status was a matter for Secretary of State, not an independent body and not the appeals authority'[9]. The history of immigration shows that each new group of arrivals into the UK have always been regarded with suspicion and hostility. Over the years and due to a number of wars in different countries the need for asylum has risen. 'The Convention relating to the status of refugee's, was adopted in the wake of World War II initially to aid the repatriation and resettlement of people displaced by the war. The convention consolidates previous norms relating to refugees, contains a definition of who refugees are, and describes the basic obligations of states regarding the treatment of refugees[10]. The Protocol relating to the Status of Refugees removed restrictions present in the Refugee Convention at the moment of drafting, eliminating from the definition of refugee the condition that such persons must have suffered persecution as a result of "events occurring before 1

January 1951" and also removing the Convention's geographic limitations'. [11]There have been a number of different races coming across the border from Jews to the west Indians in the 50's and Asians in the 60's and 90's and at the turn of the twenty-first century, Every mass immigrant group was liable to be pronounced unconventional, unclean, unprincipled and generally unwelcome. Since the 1990s, the UK government has targeted immigrants who claim a right to asylum as refugees. In the past 15 years no fewer than seven major Acts of Parliament have attempted to regulate and stem the flow of people seeking asylum in the UK. The Government has encouraged some sorts of immigration in order to promote economic growth. Over the last decade, the number of work permits issued annually to skilled workers has more than doubled.[12]As well as those set in place by the UK, European and World conventions to control countries and the way they govern the incoming refugees. The UK have created a number of legislative acts to deal with the influx of migrants over the years these include the Immigration Act 1971[13]which was created to amend and replace any existing law, the British Nationality Act 1981[14]which was created to make fresh provisions to the right to abode. Since this time the Immigration Act has been updated a number of times creating fresh rules and protocols in relation to asylum. The main statute was The Immigration and Asylum Act 1991[15], which was updated by The Nationality, Asylum and Immigration Act 2002[16]and then the Immigration, Asylum and Nationality 2006[17]. ' The Universal Declaration on Human Rights provides that everyone has the right to seek and enjoy in other countries asylum from persecution'[18].

1. 2 Entry into the UK

A claim for asylum can only be made once a person has arrived in the UK. No claims can be made outside the UK unless under special circumstances. A person can apply to remain if removing them would breach their rights laid down in the 1950 European Convention on Human rights[19]. This is classed as a Human rights claim. The ECHR contains a number of articles of protocol rights. Most Human rights claims are based on Article 3 of the Human Rights Act 2002[20], the prohibition on torture and or inhuman or degrading treatment. Many people coming to a country to claim asylum claim it will be unsafe for them to return to their country of origin. The claims they make on entry must be valid and true. To have any chance of being successful with their claim they must have at least one of five grounds to base their fear upon, the fear of persecution due to race, religion, nationality or political opinion. Asylum seekers coming to the UK travel by any means necessary which means that they may not be in a position to comply with the legal formalities for entry, and may be forced to arrive or enter illegally[21]

1. 3 Illegal Entry

The UK system states anyone that uses false documents to enter the UK, may affect their case considerably and or may face prosecution. Asylum seekers are often prosecuted by the UK government for the use of false documents. On occasion they are often represented by lawyers who specialise in criminal law who may not be aware of Article 31 as a defence and may be advised to plead guilty in light of the facts held against them. If found to be guilty with no valid reason this can weigh heavily against them in their application for asylum if they UK. Before a ground-breaking case in

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1999, this was common in the UK. *R v Uxbridge Magistrates' Court ex parte Adimi* [1999] EWHC Admin 765[22] established that the Refugee Convention made it unlawful. In this case, the judges were horrified that the provisions of Article 31 were not reflected in English criminal law. The court interpreted liberally the requirements that refugees must come 'directly' from countries of persecution, allowing those coming through transit countries to benefit from the provision, and the court ruled that generally speaking, anyone trying to enter on false documents 'as part of a bona fide quest for asylum' was protected from prosecution. Following that case, parliament amended the law to provide a defense for asylum seekers using false documents[23]. More recently a case involving an Iranian man trying to escape persecution in his country of origin was convicted of this despite the law having changed which would make this an illegal conviction on the part of the UK. *MD and others v R* [2010] EWCA Crim 2400, 19 October 2010[24] An Iranian man goes on a demonstration and is beaten up, detained and tortured for sixteen days, his relatives organise his escape, and he is bundled out of Iran, away from his wife and young son, through Turkey to Syria, and on to the UK, where he proffers a false Bulgarian passport he was given by his smuggler, on arrival he tells the immigration officer his true name and nationality, and asks for asylum. He is immediately detained, and charged with using a false document. On the advice of a duty solicitor, he pleads guilty and is sentenced to 12 months' imprisonment[25]. The detention of asylum seekers, though widely accepted in Europe looks like a prime facie breach of Article 31 of the refugee convention.

1. 4 Defence against illegal entry

Article 31 of the refugee convention provides a defence when refugees come to the UK and Europe using false documents. The Article states that refugees coming directly from the country of persecution should not be punished on account of their illegal entry or presence, provided they present themselves and show good cause for this[26]The purpose of the law was to provide immunity for someone whose request for asylum reasonably involved a breach of the law.[27]

1. 5 Detention

The power to detain immigrants in the UK was first provided by the Immigration Act 1971, which allows for the detention of asylum seekers in detention centres and in prisons. Although the deprivation of one's liberty is the most serious form of punishment in the UK, Infringements of fundamental human rights in immigration law means this occurs on a regular basis due to laws in place allowing this to take place. In the words of Lord Atkin on the statement of legal principle " In English law every imprisonment is prima facie unlawful and it is a person directing imprisonment to justify this act[28]. Detention can be lawful when authorized by law, when considering detention the UKBA will take a number of factors into account before making a decision. The likelihood of a person being removed and the time frame of removal, whether the claimant has applied previously and been refused, if so for what reason/s. If they are likely to abscond during the decision making and breach any rules set. If they have family already in the UK, any mental health factors and more importantly whether they are likely to be a risk to the public if allowed into the community. There were two

types of detention centres previously, the removal centre and the removal prison. These were much like prison facilities which imposed major restrictions on detainees often similar to category b prisons. This was so they could be monitored at all times by officials. The government started a process to provide a network of detention centres with the aim of providing a system where no asylum seeker would be held in a prison in the UK, unless of course a crime had been committed. The power to detain for immigration purposes is can be found in the Immigration Act 1971[29]Schs 2 and 3 and in Nationality, Immigration and Asylum Act 2002[30]s 62. There is no distinction between asylum seekers and others. Powers to detain are possessed both by immigration officers and by officials in the Home Office, as a matter of policy though, the immigration officer's power to detain is normally exercised by a Chief Immigration Officer.[31]It is up to the Home Office and UKBA to take the plea into account and assess whether they believe there is a reasonable risk that the claimant will receive some form of serious harm, rather than just some harassment and relatively minor intimidation if you are returned to the country you fled from. If they do not believe the claimant is at risk the claim will be refused. Claimants have the right to appeal.[32]The UKBA makes decisions in allowing asylum seekers to stay under the Nationality and Immigration and Asylum Act 2002 S3.[33]The detaining of an Asylum seeker takes away one of the basic Human rights of physical liberty. The deprivation of physical liberty is regarded as the most severe punishment available in the criminal justice system in the UK yet in regards to the Immigration and Asylum system in place people who have not committed any crime or who are suspect to any crime are detained without

charge.[34]Under protocol set out in the European convention on Human Rights Article 5 ‘ Everyone has the right to liberty and security of a person. No one shall be deprived of his liberty except in procedure by law.[35]Once detained asylum seekers face many limitations. An important one being access to public health of their country of residence. ‘ Due to a host of pre and post migration risk factors, pre migration factors include torture and refugee trauma, which may result in mental and physical illness. Asylum seekers often come from conflict areas, without the access to adequate health care. Post migration factors also place a role for health. They include detention, length of asylum, language barriers and lack of knowledge about the new countries health care system. Previous studies have revealed that many asylum seekers have mental health problems as well as infectious diseases. Physical problems include TB, HIV/Aids, hepatitis, parasitic diseases whilst the mental health issues include depression and post traumatic stress which can often be expected due to torture and or persecution in their country of origin’[36]. Detention can be justified in two ways in regards to immigration when taking Article 5 of the ECHR into account. The first would be to prevent unauthorized entry and when action is being taken with a view of deportation. Since the outcome of an asylum seekers claim isn’t known the view of deportation would not be justified. A key case considered in regards to the meaning of unauthorised entry and where arbitrary can be questioned is in the case of Saadi v UK (2008)[37]They were detained for seven days in a detention centre whilst their case was being looked at. They challenged their detention and argued that their detention was not to prevent unauthorised entry. Their claim was at first accepted, having

presented themselves to the immigration authorities, stated their need to claim asylum, and complied with requirement, they were doing everything they could to make an authorized entry. The Court of Appeal and the House of Lords found that until a state has authorized entry into any country, any entry is unauthorised.[38]The decision by the UK Home office to detain asylum seekers for administration purposes regardless of how short the time may be violates the right to liberty under Article 5. Deprivation of liberty can only be justified when absolutely necessary rather than for convenience. The independent Asylum Commission criticized excessive use of detention as part of the asylum process. The impact detention has on people can be very distressing with a lack in fixed end points and the fear of removal it can create even more trauma for people who have assumingly been through so much already[39]. Article 9(1) ‘ everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention’ there is no legal basis for detention; detention is imposed as a state response to the exercise of a fundamental right. The total or partial non-observance of the normal trial is such gravity as to make the resulting detention arbitrary.

[40]Under Article 12 Everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial. The UK does not follow the protocol in regards to this as asylum seekers are detained without trial and without committing any unlawful crime. Humanitarian considerations may also apply in some cases where Asylum Seekers who may have been tortured or come from a war zone or otherwise already suffered in detention.

[41]Amnesty international and the Medical foundation found evidence that

claimants who had suffered torture were still being detained[42]. The degrading treatment of some asylum seekers is highlighted in the case of *R v Secretary of state for the home department* (2006)[43] which found the defendant to have been tortured whilst in detention. This case comes under Article 3 of the Human rights Act where no one should be subjected to torture, inhuman or degrading treatment or punishment. The treatment of many asylum seekers on arrival to this country has been criticised heavily. Many of the centres do not keep up with the stature set out in the Human Rights Acts. Many of the detainees are denied even the basic of things. Some are not even given the right to make a phone call or have any contact with life outside. So they have no contact with family or friends during their detention. This can be seen as a breach under Article 8 of the European Convention on Human Rights. In the UK due to the statutes in place it is most likely any attempt to claim asylum will lead to the claimant being detained. More so in regards to men, although it's unfortunate but depending on which country the claimant is arriving from will play a big part when deciding. Migration and Asylum issues are controversial in Western Europe. Since the well documented terror attacks security has become the governing force in regards to asylum. There is concern amongst non-governmental organisations that security concerns could affect the European Union's effort to create a common asylum system[44].

2. 0 The fast track system

The fast track system was developed in 2000 to deal with the backlog of asylum claims made. If a decision can be made 'quickly' and is suitable for fast tracking a home office official may decide to detain the claimant whilst a

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decision is being made. Once detained the claimant will be formally interviewed the next day then the process will begin on deciding whether or not they cannot return to their country of origin. If their claim fails they have the right to appeal although most claimants do not have the right to legal aid during this stage. The home office though always is always legally represented[45]. Although the facilities where they are detained are removal centres there is no way of knowing until the claim has been looked at and processed whether or not they will be removed[46]. It is then process from there as to whether they will be able to go through the fast track system and be detained or if they will be allowed to live amongst the public whilst the claim is being decided. The decision by the UKBA to detain an asylum seeker is often made before any in depth questions regarding the claim have been asked. Under the rules of the ECHR detention for seven days only is lawful. The UK process of Detained fast track often only begins after double this. The main reason for detention is claimed to be for 'fast track' of applications, which is known as Detained Fast Track. Many asylum seekers are unaware of their rights and are offered little or no support or legal representation so once they are in the system and in a facility they are often left for long period of times till there is a decision made. Whilst many government sources claim the fast track system takes between seven days to two weeks in reality it can take months or even years with people who have done nothing wrong other than ask for help being imprisoned. The law appears on the one hand to guarantee a 'right to liberty & security of a person' whilst on the other, accepts that certain limits can be placed on personal freedom.

2. 1 Detained Non Suspensive Appeal (DNSA)

This is another procedure in which those wishing to claim asylum are detained whilst their application is being processed. They will usually be detained between 10 – 14 days and at the end of this process the person has no right to appeal in the UK to an independent court or tribunal. People from certain countries such as Ghana, Nigeria, Liberia and sierra leone are among those who will all be automatically detained under this procedure, unless it can be shown on arrival that their claim is not clearly unfounded[47].

2. 2 Immigration UK and Worldwide

‘ The routine practice of detaining asylum seekers in the US, the UK, and Continental Europe, worries human rights organizations, especially since it clashes with the United Nations Convention on Refugees. In the aftermath of the Second World War, the US, along with many of its European allies, ratified international and domestic laws requiring them to provide a safe haven for people who demonstrate a credible fear of persecution on account of their race, religion, national origin, social group or politics. Fifty years later, human rights advocates are distressed to find that western nations have rolled back their commitment to refugees and those seeking political asylum’[48]. Over the past two decades the issue of migration has been a top public concern, not only in the UK but across Europe and in all industrialised countries. Early in 1996 Amnesty international launched a worldwide campaign on behalf of refugees which called on the world governments to fulfil their international obligations for the protection of refugees. It had asked governments to take concrete measures to prevent human rights violations, stressing that refugee crisis cannot be resolved

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unless the underlying human rights issues were addressed. As the number of those seeking protection increases, many governments seem unwilling to live up to their international obligations, implementing restrictive measures which are meant to prevent or deter asylum – seekers from arriving at their shores.[49]In July 1996, the Asylum and Immigration Act 1996[50]came into force effectively abolishing the appeal rights (which were only introduced in 1993) in the majority of ‘ safe third country’. The Act thereby disabled all effective legal safeguards in most cases where the applicant does not arrive directly from the country of persecution, but has transited a country of the EU (as in the majority of cases), Norway, Switzerland, Canada or the USA. This can result in an asylum seeker being bounced from country to country with a risk of eventually being expelled to the country of persecution.[51]Which seems unfair because in some cases the person travels a longer distance and to other countries due to many circumstances including funds. It is often cheaper to make stops in other countries than to make a straight trip to the UK. The 1996 Act also extended the ‘ fast track’ appeal procedures introduced in the 1993 Act to cover a wide range of cases including those where the applicant has fled from a country designated as one where there is ‘ no serious risk of persecution’, otherwise known as the ‘ white list’. In addition, the Act provided for the withdrawal of welfare benefits to all those except those who apply for asylum immediately at the port of entry.

[52]While the majority of asylum seekers were admitted temporarily to the UK pending the outcome of their claim, an increasing number have been incarcerated in immigration detention centres and prisons while their applications are examined. Although the Home Office previously declined to

provide figures of the total number of asylum seekers detained each year it was estimated that during 1995 some 2000 people were being detained for a month or much longer.[53] Approximately 300 of those in detention on any given date were held in criminal prisons despite the fact that their only ‘crime’ is to have sought asylum in the UK. 82% of the detainees surveyed were detained continuously from the day they first applied for asylum. Although successive governments have maintained that detention is ‘targeted’ at rejected asylum seekers.[54] This clearly wasn’t the case seen as many are detained as soon as asylum requested so it is not known whether or not their application will or will not be rejected. Near the end of 2004, The United Nations High Commission for refugees had millions of refugees under mandate. Most stayed near their home countries of Asia or Africa, a number of these travelled to the EU, a small number of which arrived illegally. There was a drop in the amount of asylum claims to the ‘old’ EU countries and a rise in the number of claims to the ‘new’ EU countries. The drop is believed to have come from stricter domestic laws and policies put in place as a way of controlling the vast numbers entering any country at any one time and the effect it had on these countries’ economies. France, Cyprus, Austria and Sweden began to have higher rates in asylum claims followed by Germany and the Netherlands. To deal with these issues these countries began toughening their own immigration rules to deal with the flow of those in need of asylum. Governments around the world are increasingly using various forms of detention as a migration management tool. Because visas are often unavailable to refugees and asylum seekers who seek to enter a country to seek protection, many are forced to attempt entry without proper

documentation. As a result, they are caught in the same migration controls used by governments to thwart entry of undocumented migrants. Thousands and thousands of refugees and asylum seekers are detained in the following places: removal centres; privately and publicly-run immigration detention facilities; jails; prisons; police stations; airports; hotels; ships; shipping containers; and, closed refugee camps. They are being held upon arrival in a country, pending a final immigration decision, or while awaiting removal from the country. Worldwide, immigration and asylum decisions may take months or years, during which time men, women and children can languish in often overcrowded and unhygienic conditions. Many human rights violations can and do occur in these circumstances. In some cases there is little or no independent oversight governing the basis for detention or detention conditions, and many detainees are denied access to bail hearings and a judicial review. Refugees and asylum seekers in need of international protection having fled their countries of origin owing to persecution, other serious human rights abuses, or armed conflict, are being denied access to the asylum and protection procedures to which international law entitles them. Stateless persons and others without documentation who are unable to be removed from a country may face being detained indefinitely.’ In 2012 over 300, 000 refugees (out of the 10 million worldwide) applied for asylum in the EU. The way they were treated varied widely from country to country. Their chance of getting protection depended of the EU country involved. The same was true of reception conditions which ranged from fair and satisfactory to inhuman and degrading’[55].’ The position on removal to other countries in the European Union is governed by a regulation, which

came into force in September 2003, known as "Dublin II". This sets out criteria for determining which member state is responsible for examining any asylum claim made within the EU. One of the main criteria is the point of entry into the EU. Unless other factors such as family unity or existing residence documents are in issue, the member state into which the person first arrived from outside the EU will be responsible for determining any claim for asylum made within 12 months. After that time responsibility lies with the last member state where the asylum seeker has lived continuously for a period of at least five months[56]. So if they are a genuine refugee their claim will not be rejected on the basis that they did not claim asylum in the first country you came to, but they may be passed from one country to another before your claim is determined and the effect of the 2004 act is that it is extremely difficult for an asylum seeker to challenge removal from the UK to a country deemed to be "safe" – particularly if the removal is pursuant to Dublin II'.[57]

2. 3 Article 33

'Whether or not a state has an obligation to grant refugee status, it does have an obligation not to return someone on its soil to persecution'[58]. Controversially it is said that this is often done indirectly, by making life so difficult that the better choice is to return to the country of origin and risk persecution. Some of the UK's legal provisions denying adequate support may have supported volunteer refoulment of asylum seekers[59]. Article 33 of the convention prohibits "refoulement" of refugees. The removal to places or countries where their lives or freedom would be at risk on account of their race, religion, nationality, membership of a particular social group or political

opinion. The convention also imposes other obligations on states, which includes secure equal treatment for refugees and issue special travel documents to refugees, which can be used instead of their national passport. The effect of the convention is that states are required to determine asylum claims made by anyone within their territory. The principal exception to this is where there is a safe third country to which the person can be sent in order for substantive consideration to be given to their claim. Removing a person to a safe third country will not engage the removing state's obligations under the convention unless doing so exposes the person to a real risk of refoulement. There is no obligation under the refugee convention or any other instrument of international law that requires refugees to seek asylum in any particular country[60]." The domestic law on this issue is contained in the Asylum and Immigration Act 2004 and the immigration rules. Schedule 3 to the 2004 act contains lists of countries that are deemed to be safe for the purposes of the refugee convention and the UK's obligations under the European convention on human rights, the obligation not to expose anyone to a real risk of torture or inhuman or degrading treatment". The immigration rules state, however, that the secretary of state will only remove an asylum seeker to a safe third country if there is clear evidence that the country concerned will admit the person. This will be so if the person has arrived in the UK via another safe country and had an opportunity at the border of or within that country to claim asylum. The mere fact that the person has passed through another country does not necessarily mean there was an opportunity to claim asylum; if an agent planned the journey and the person was hidden in a vehicle for the

duration of it, for example, there is unlikely to have been any realistic opportunity for the person to approach the authorities".[61]

2. 4 Families in detention

The negative impact of even short-term detention on the mental health of individuals is now well documented, particularly for children. Migration-related detention not only creates incredible hardships on those in detention, it also separates families, disrupts communities and diverts both governmental and non-governmental actors and resources from more humane, reasonable and cost-effective alternatives to detention.[62] Policies in relation to the detention of families was that it should be avoided, and should if at all take place ' only as close to removal as possible' to removal so as to ensure that it lasted no longer than a few days.[63] To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy[64] The home office states that special consideration must be given to family cases where it is proposed to detain one or more family members and when the family includes children under the age of 18. Special consideration must be given when it is planned to detain unaccompanied children to allow enquiries to be made into their immigration status or prevent them absconding and pending their hand over to a local authority, or to escort such children when removing them to an EU member state. Section 55 of the Borders, Citizenship and Immigration Act 2009[65](s. 55) requires UK Border Agency functions to be carried out having regard Enforcement Instructions and Guidance to the need to safeguard and promote the welfare of children. Staff must therefore ensure they have

regard to this need when taking decisions on detention involving or impacting on children under the age of 18 and must be able to demonstrate that this has happened, for example by recording the factors they have taken into account. Key arrangements for safeguarding and promoting the welfare of children are set out in the statutory guidance issued under s. 55'[66]. The UKBA claim that occasionally the need to detain the head of the house or an adult who takes care of the children in the family is necessary, which would then lead obviously to separation. In doing so could represent a breach under Article 8. The decision to detain which interferes with a person's right to family life in order to enforce immigration control and maintain effective immigration policy apparently pursues a legitimate aim and is accordance with the law which is justified and established that the interests of the state in maintaining effective immigration policy for the economic well-being of the country and for the prevention of crime and disorder, the UKBA claim to give careful thought when deciding decisions like this and whether there is a legitimate reason in pursuing these actions. If this is strictly about immigration control and not any criminal purpose there surely can't be any legitimate reason as to separate a parent or guardian of young children and or to detain them with the adult in question and whether this decision will interfere with Article 8(2)[67]

2. 5 Women and Children in detention

When women and children are detained they are especially vulnerable in these centres, Tinsley House, Gatwick airport there were claims that detainees were not providing adequate care to accommodate woman and children. As the result of an unannounced inspection, the centre was said to

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be more ' prison like' and there were fears for the women and children at the largely male based establishment. There were concerns about the detention of children held over 72 hours and five known families being held for many weeks. Many of the women felt intimidated and rarely left their room, There had been no progress in child protection arrangements since the last inspection in 2008 and a significant deterioration in some areas no qualified childcare staff and parents were anxious about having their children in a facility with strange unrelated men. This meant the children had limited access to fresh air[68]. G4S managers had focused on teething problems at a neighbouring removal centre and Tinsley had become an afterthought " housing some poorly cared for children and a small number of scared and isolated single women". Inspectors were also disturbed to find an incident where " unnecessary force" had been used on two children when their family was being deported: " The use of force on children aged 10 and 14 was unacceptable." Some detainees had experienced successive disorientating moves within a short space of time and the transport for families was dirty and strewn with used tissues and food debris. The inspectors also complain of unprofessional conduct by some overseas escort contractors including those involved in sending people back to Afghanistan. There was no use of interpreters to explain what was going to happen to detainees and staff did not introduce themselves.[69]There are three removal centres that have facilities for women and children. The home office recently announced an increase of family detention provision, and the detention criteria for families were brought more closely into line with the criteria for detention of people without detention. Although this would only be necessary in view of the

possible breach of article 8, the Home Office stated that families can be detained on the same footing as all other persons liable to detention.

[70]Families are still regularly being detained even though there is little to no chance of them absconding due to a number of key reasons, their child/children's welfare, healthcare, the need to avoid destitution and the preservation of dignity.[71]It would be a lot more difficult to support a whole family illegally than it would be for a lone person to abscond under the same circumstances. The detention of children is subject to the government's duty under S55 Borders Citizenship and Immigration Act 2009[72]Any immigration decision affecting children are to be in the best interests of the child and should always be taken into account. In the case of R (on the application of Konan) v SSHD (2004) EWHC 22[73]The six month detention of a mother and her two year old daughter was unlawful. The detention was in breach of policy and of common law rules as the removal could not be affected because judicial review of it was pending. The detention was also a prima facie breach of Article 8. The Court held that if and to the extent that proportionally applied, the Secretary of State's policy should be taken as representing his view of what is proportionate. Also the case of S, C and D (by their litigation friend S v SSHD (2007) EWHC 1654 (Admin)[74]highlights the physical effect detention can have on children detained in these facilities. The baby spent his/her first birthday during a four month detention period whilst awaiting a decision, developed rickets and anaemia as a consequence of denial of medical and nutritional care during that time. The damage to his health was then held in breach of his rights to respect for private life, namely his physical integrity[75]. The government announced in

May 2010 that it was going to put an end to child detention for the purpose of immigration; although the announcement was made with intent the government did not make any changes until May the following year. The case of *Suppiah v SSHD* (2011) EWHC 2(Admin)[76] was a key case in bringing the matter to a head. Immigration officers took them from their home in the early hours of the morning after arriving unexpectedly. The youngest of which was a two year old. They were detained on the 10th February 2010[77]. The court referring to the reports of the Children's commissioner and the Chief inspector of Prisons said 'detention is inherently and seriously harmful to the health and development of children' and also quoted a passage from the HASC stating 'We do not understand why, if detention is the final step in the asylum process, and there is no evidence of families systematically 'disappearing or absconding', families are detained pending judicial reviews and other legal appeals. The detention of children for indeterminate periods of time (6-9 weeks) pending legal trials must be avoided'[78]' The UN Convention on the rights of the Child Article 22 states that appropriate measures must be in place to ensure any child seeking refugee status or is considered to be is in accordance with international and domestic law procedures and shall receive appropriate treatment and humanitarian assistance in the enjoyment of applicable rights set forth in the present convention and in other international human rights or humanitarian instrument to which they are parties'[79].

3. 0 Direct effect EU Law

' In the European union, the Refugee Qualification 2004/83 governs the interpretation of the Convention in member states and has been

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implemented in the UK by the Refugee or Person in Need of International Protection Regulations 2006 SI 2006/2525 and changes to the immigration rules. The effect is that asylum law, which until 2006 was based solely on the Refugee Convention, general immigration rules and case law, has been placed on a legislative footing and the Home Office and courts must follow the regulations which implement the Directive. Additionally, with the Lisbon treaty, the Court of Justice of the EU acquired jurisdiction in immigration and asylum matters. Judgements of the CJEU are binding'[80].

3. 1 Comparative and reforms

The old domestic and international laws and statutes and the new ones only set forth in providing a stronger rule in the operation for states to have ultimate controls over borders. Reforming the immigration and asylum system is something the UK government is constantly working on. Changes are happening each year in a bid to reduce the numbers and the number of people remaining in the UK. To be effective and to provide a fairer system in dealing with asylum seekers will need much more reform. ' Current asylum policy is based on deterrence and the negatives assuming all asylum claims are fraudulent, the vast majority of the worlds displaced people need concrete assistance and support'[81]. The government will always be cautious in laxing laws on the way asylum seekers are vetted and any changes in the near future I feel will not benefit asylum seekers in the light of them being detained or in providing extra support for those that require it. Detention will continue for as long as is necessary to ensure maximum protection

Conclusion

The acceptance of detention of asylum seekers has been driven by fear and exaggerated perception of threat due to political climate and legal framework has dictated that the detention of asylum seekers is ok as long as it's within the law. Human rights has somewhat failed in strengthening the right to liberty. Domestically the rule of law tends to operate within restrictive confines and human rights have failed in delivering the right to liberty[82]. The protection of borders, and the associated preservation of national identity, is something that the English in particular have been argued to conscientiously guard and frequently re-affirm, particularly with regard to the fact that the UK as a whole is a cut-off island nation. Such need for self-preservation is compounded by a fear of lack of control over territory, which English immigration policy specifically has historically been concerned with a fear of "foreign invader[s]", and an anxiety that the Other will not effectively assimilate within the culture once and if allowed to remain, but rather, multiply and take over.[83].