

TEMPORAL PILLARS OF FAIRNESS:
Reflections on the UK's Asylum Adjudication Regime
from an Original Refugee-Centred Position

Doctoral Thesis

Doctor of Philosophy (Law)

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May 2020

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Word count: 80, 741

Acknowledgments

Completion of this PhD thesis would not have been possible without the input and support of several individuals.

I am most grateful to those generous individuals who participated in this research project and shared their invaluable personal insights. Your perceptions helped me to view the problem of (un)fair treatment in the asylum system in a new way and I am so very appreciative of the time and thought that you gave to my questions. I am also very grateful to Ruth Brown of Asylum Justice for helping to facilitate the research interviews.

I am very grateful to the Economic and Social Research Council and the School of Law and Politics at Cardiff University for having given me the opportunity to conduct the research. I am indebted to my wonderful PhD supervisors, Dr Bernadette Rainey, Professor Lydia J B Hayes, and Professor John Harrington, for all the interesting and illuminating discussions and feedback. Thank you so much for matching your intellectual guidance with push, good humour and encouragement. I also owe thanks to Professor Annette Morris for her brilliant support, as well as Professor Luke Clements, Professor Urfan Khaliq, and Professor Russell Sandberg for their kind inputs to the project.

Thanks are due to my office colleagues, of the past and present. Special thanks to Dr Jennifer Hampton, Dr Holly Greenwood, Caer Smyth, Alison Tarrant, Claire Thurlow, Dr Katy Vaughan, and Lizzy Willmington for the sisterhood and support. I am also very thankful to my amazing family, by relation and through friendship. Mum, Auntie June, Cara, Stewart, Isie, John-Paul, Holly, Jen, Rose, Drew, Luke and Adrián, you are the most excellent cheerleaders.

Abstract

The central question of this thesis is how we should think about fairness within the context of the United Kingdom's asylum adjudication regime. Asylum and refugee law scholars frequently appeal to 'fairness' in critiques of asylum determination processes. However, few offer a sustained philosophical interpretation of juridical fairness in asylum procedures. By re-imagining Rawlsian fairness from an asylum-centred (rather than a state-centred) perspective, this thesis excavates four fairness 'pillars' from contemporary liberal legal theory. This fresh account conceives juridical fairness in liberal democracies as requiring the pillars of: (i) situated, conscious impartiality; (ii) respect for human rights; (iii) social cooperation and caring; and (iv) inclusive public reason. The study adopts a socio-legal approach to asylum law in the UK, directed by the theoretical investigation. Qualitative interviews with asylum-claimants reveal the empirical finding of time-related fairness. The participants' expressions of (un)fair time(s) are examined in relation to the three main categories, which emerge from the findings, namely: *doing time*, *unequal time*, and *severed time(s)*. The participants complain predominantly of delay in the asylum system, which creates a sense of unfairly *doing time*. The participants express how administrative-legal time controls, devalues and unfairly differentiates between their lived time(s), exposing the category of *unequal time*. The participants also communicate experiences of *severed time(s)*. Administrative-legal time divides the participants from their lived time(s), namely, their memories, family time, work time, social time, and their futures. The investigation finds further empirical evidence of temporal (un)fairness within asylum jurisprudence. The thesis critiques the anomaly of the non-application of the (temporal) protections of Article 6 (right to a fair hearing within a reasonable time) of the European Convention on Human Rights (ECHR) to asylum decisions. The study also examines the administrative practice of using time restrictions to disadvantage asylum-claimants. The findings of temporal fairness in asylum law, policy and practice are important in view of the neglect of time and temporalities in contemporary liberal theories of fairness. This thesis applies the four pillars of fairness to explore the temporal dimensions of juridical fairness in the United Kingdom's asylum adjudication regime. This approach illuminates opportunities for temporal resistance to the unfair treatment of asylum-claimants and calls for a turn to time and temporalities in philosophical accounts of fair and just asylum laws and practices.

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PART I: EXPLORING FAIRNESS IN PRINCIPLE

CHAPTER 1: THESIS OVERVIEW AND RESEARCH DESIGN

*It's not fair...people are suffering.*¹

1. INTRODUCTION

The aim of this thesis is to develop a philosophical approach to the legal issue of the fair determination of asylum claims in liberal democracies. The normative framework presented is theoretically, historically, empirically and doctrinally informed, and centres the interests of asylum-claimants. The thesis critiques and builds upon John Rawls's fairness project.² Rawls famously addressed the question of fairness by designing a fairness thought experiment. He asked us to imagine which basic principles for a fair society would be agreed by members of a bounded community at the 'original position'.³ The members are positioned behind a 'veil of ignorance'.⁴ The veil conceals from the members' knowledge of their identities and biases. This, Rawls described as an initial situation that is fair because 'no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles.'⁵ Simulating the deliberations of Rawls's veiled hypothetical situation allows us to impartially, and, therefore, fairly, consider the interests of those who are worse off in society. The simplicity of the exemplar appeals to our intuitions about fairness and brings essential fairness conditions into sharp focus. The benefit of Rawls's theoretical device is that it encourages us to imagine ourselves in the position of those who are the most disadvantaged. We can thereby explore the boundaries and nuances of fairness by pursuing the interests of the underprivileged as if they were our own.

However, this thesis argues that Rawls's state-centric view of the original position obscures the interests of asylum-claimants as non-members of the bounded community. This is problematic because asylum-claimants are one of society's most disadvantaged groups and national citizenship can be as arbitrary and exclusionary as social class, for example. This

¹ Blessing at p. 26 (Appendix 4).

² John Rawls, *A Theory of Justice* (Oxford University Press 1973).

³ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 17-22.

⁴ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 136-142.

⁵ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 18.

thesis contends, therefore, that asylum-claimants ought to be included in the central design of the original position. The thesis refocuses Rawls's fairness experiment from a state-centric to an asylum-centric view. The fairness conditions at the original position are adjusted to include the movement of people across 'porous borders' as, what Rawls would call, a 'general fact'.⁶ Rawls specifies that the veiled members, ignorant of their particular fortunes or misfortunes, have general knowledge about human life and society. The thesis argues that the veiled members would know about the general fact of migration and would not, therefore, design a society that would disadvantage asylum-claimants. Situated at the original position, the members are yet to materialise in time and space. The members do not know whether they will be asylum-claimants as the veil is lifted and as they take form in time and place. They, therefore, would not design foundational principles that would unfairly affect asylum-claimants. This adjustment towards an asylum-centric account of fairness allows us to concentrate on developing a more inclusive theoretical device that yields fairer principles and laws.

This thesis presents an asylum-centred perspective that reveals four fairness 'pillars'. I label these pillars as: situated, conscious impartiality; respect for human rights; social cooperation and caring; and inclusive public reason.⁷ The pillar of situated, conscious impartiality aims to overcome the problem of the information deficit in Rawls's theory design. According to Rawls, the original position 'models what we regard – you and I, here and now – as fair'.⁸ The asylum-centred adjustment to Rawls's fairness expository encourages us not only to imagine but to find out empirically, in the here and now, what asylum-seekers regard as fair. The pillar of respect for human rights requires that state sovereignty is limited by respect for the moral and legal rights of asylum-claimants. Human rights are not contingent on national citizenship and they have the transformative potential to elevate the political and legal status of asylum-claimants. The pillar of social cooperation and caring requires mutual respect, caring and cooperation across borders and between generations. This pillar necessitates that the intergenerational interests of asylum-claimants are considered. Finally, inclusive public reason is fairness in action. It is the discursive

⁶ See John Rawls, *A Theory of Justice* (Oxford University Press 1973) 137 and 142, regarding the idea of general facts about human society. See Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 93, regarding the idea of porous borders. These ideas are explained more fully below.

⁷ The four pillars are outlined at section 4, below, and are the focus of, and provide the framework for, discussions in Chapters 3 and 6.

⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 30-32.

process by which democratic voice is given to asylum-claimants. It requires us to ascertain the accounts of asylum-claimants in legal and policy decision-making.

The four asylum-centred fairness pillars provide justification for moving beyond a purely theoretical account of fairness and seeking the empirical voices of asylum-claimants as part of the thesis design. The philosophical thesis is thus tested and developed by empirical examination. Taking the United Kingdom's (UK) asylum determination system as an example, a real-world analysis supports an asylum-centric account of fairness but also reveals the temporal dimensions of fairness. This is an important finding that exposes, in addition to the lack of attention to the issue of asylum, the lack of attention to time and temporalities in Rawls's fairness archetype. Examination of the lived experience of asylum-claimants reveals that the force of asylum law is bound with temporal regulation. The thesis finds that movement across borders and time are important to how we think philosophically about fairness, if theory is to have meaningful application in the real world. An asylum-centred and temporal-focused approach to fairness concerns human lives, present here, and human lifetimes, passing now.

2. SOCIO-LEGAL INTRODUCTION TO ASYLUM LAW

This thesis combines doctrinal legal research and social-science research methods to address the philosophical issue of conceptualising fairness in the context of the UK's asylum adjudication regime. A doctrinal approach involves the analysis of legal principles and rules found in case law and statutes.⁹ The doctrinal method is necessary to ascertain the relevant substantive and procedural laws under study. As Chynoweth explains, a doctrinal method is appropriate when 'research questions take the form of asking "what is the law?" in particular contexts.'¹⁰ However, this conventional, 'black-letter' form of legal scholarship is limited in its scope to examining the internal meaning of the law. The doctrinal method does not attempt to discover 'the fundamental questions about law's nature, sources, and consequences as a social phenomenon or about its moral groundings'.¹¹

⁹ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83.

¹⁰ Paul Chynoweth, 'Chapter 3 – Legal Research' in Les Ruddock and Andrew Knight (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008) 30.

¹¹ Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Sociological Studies' (2003) 29(4) *Journal of Law and Society* 632, 633.

The research topic, namely, the UK's asylum adjudication regime, is a site of legal, political and social tensions.¹² The research question, namely, how to conceptualise fairness in the context of the UK's asylum adjudication regime, is shaped by law and the lived experience of legal practice. In order to gain a broad and rich understanding of the issue of 'fair' asylum determination, an interdisciplinary approach to the study is required.¹³ In addition to the doctrinal method, socio-legal empirical methods are incorporated. Socio-legal research is understood broadly as 'the study of law and legal processes', which '...covers the theoretical and empirical analysis of law as a social phenomenon'.¹⁴ Asylum law is value-laden and complicated and different approaches are needed to understand its complexities and impacts. An interdisciplinary and multimethod approach thus provides thoroughness and richness to the inquiry.¹⁵ A combination of methods adds value by offering new understanding in the field of asylum law and a new theoretical framework for approaching the issue of juridical fairness.

2.1 Juridical fairness in matters of asylum

Broadly speaking, asylum-claimants and refugees are displaced migrants forced to cross an international border. Colin Harvey highlights that states have the right to exclude non-citizens but that asylum 'is thought to be the humanitarian *exception* to this general right of states.'¹⁶ To this extent, at its core, the nature of the institution of asylum requires a shift of perspective

¹² See, for example, John R. Campbell, *Bureaucracy, Law and Dystopia in the United Kingdom's Asylum System* (Routledge 2016).

¹³ Paul Roberts, 'Interdisciplinarity in Legal Research' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 106.

¹⁴ Fiona Cownie and Anthony Bradney, 'Socio-legal studies: A challenge to the doctrinal approach' in Dawn Watkins and Mandy Burton, *Research Methods in Law* (2nd edn, Routledge 2017) 42 citing the ESRC, 'Review of Socio-Legal Studies: Final Report' (ESRC 1994). The ESRC report described socio-legal research as displaying 'considerable eclecticism in subject-matter, theorising and methodology, ranging from macro-theoretical scholarship through empirical analyses designed to test and generate theoretical propositions, to experimental designs and small-scale case studies'

¹⁵ Rosemary Hunter calls for an aggregation of 'critical theoretical, progressive political, policy oriented and empirical approaches to law'. Rosemary Hunter, 'Would You Like Theory With That? Bridging the Divide Between Policy-Oriented Empirical Legal Research, Critical Theory and Politics' (2008) 41 Special Issue: Law and Society Reconsidered 12. See, also, Alan Bryman, *Social Research Methods* (5th edn, OUP 2016) and Norman K. Denzin and Yvonna S. Lincoln, *the SAGE Handbook of Qualitative Research* (5th edn, SAGE 2017).

¹⁶ Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths 2000) 142 (emphasis added).

from the traditional state-centric view to an individualistic asylum perspective. Indeed, the 1951 UN Refugee Convention provides an individualistic view of who is a refugee.¹⁷

In the UK, the legal term ‘refugee’ refers to someone who has been recognised as satisfying the conditions under Article 1A(2) of the Refugee Convention, or who otherwise has claimed asylum and has been granted humanitarian protection.¹⁸ These definitions are reflected in UK primary and secondary legislation and within the Immigration Rules.¹⁹ Within this thesis, the term ‘asylum-claimant’ is used to refer to someone who is inside the UK and who is seeking international protection.²⁰ The focus of this thesis is on the asylum procedure in the UK and not on access to the UK territory. It is acknowledged that there is no single, unified asylum or refugee experience. Rather, people belonging to the category of asylum-claimant have multiple and diverse identities, views and experiences.²¹

The flaws and failures of the UK’s asylum system and the extreme hardships experienced by claimants are reported by a growing scholarship across academic disciplines.²² There has also been increased public awareness of asylum issues following the period of intense media coverage of the refugee crisis in 2015.²³ However, despite increased concern, those who arrive in the UK in search of safety still experience a hostile rather than a compassionate system. The system is characterised by restrictive and deterrent policies that conceive asylum-claimants as undeserving.²⁴ Enforced poverty is used as a deterrent

¹⁷ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

¹⁸ Immigration Rules, para 339C, and Council Directive (EC) 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ 304/12 (Qualification Directive), article 15.

¹⁹ Asylum and Immigration Appeals Act 1993, s2; The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2005 2525, s 2; and the Immigration Rules, para 327.

²⁰ Used interchangeably with ‘asylum-seeker’ and ‘asylum-applicant’.

²¹ Gill Valentine, Deborah Sporton and Katrine Bang Nielson, ‘Identities and Belonging: A Study of Somali Refugee and Asylum Seekers Living in the UK and Denmark’ (2009) 27 *Society and Space* 234.

²² Andrew Burridge and Nick Gill, ‘Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals’ (2016) 49(1) *Antipode* 23.

²³ Kerry Moore, Michael Berry and Inaki Garcia Blanco, ‘Saving refugees or policing the seas? how the national press of five EU member states framed news coverage of the migration crisis’ (2018) 2(1) *Justice, Power and Resistance* 66.

²⁴ Maria O’Sullivan and Dallal Stevens, ‘Access to Refugee Protection: Key Concepts and Contemporary Challenges’ in Maria O’Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing 2017) 3 and Erika Feller, ‘Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come’ (2006) 18 *International Journal of Refugee Law* 509, 515.

measure.²⁵ Access to the labour market is severely restricted and those who apply for asylum support are dispersed to deprived areas and housed in poor standard accommodation.²⁶ Reception centres and dispersal accommodation are managed by private contractors driven by ‘fiscal savings at the expense of human dignity.’²⁷ The low rate of asylum support benefit forces claimants to live far below the poverty line and sudden withdrawal of support leaves asylum-claimants destitute and homeless.²⁸ Legal aid and advice and support services have been diminished.²⁹ Detention of asylum claimants is also used as a means of control and deterrence.³⁰ Such hostile and dehumanising measures exacerbate the suffering of asylum-claimants, entrench a ‘culture of disbelief’ and impair the quality of asylum determination procedures.³¹ The well-documented ‘culture of disbelief’ is an ingrained culture of insensitivity and bias created by harsh asylum policies.³² In 2010, the whistleblower Louise Perrett, a Home Office asylum decision-maker, disclosed that in her Cardiff office a ‘grant monkey’ was placed, as a mark of shame, on the desks of staff who granted asylum.³³ The culture of disbelief perpetuates a hostile, anti-asylum environment of decision-making and engenders mutual distrust between claimants and decision-makers.³⁴ Asylum claims are often wrongly refused based upon unfair adverse credibility findings, particularly at the initial

²⁵ Ryszard Cholewinski, ‘Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Human Rights’ (1998) 10 *International Journal of Refugee Law* 462.

²⁶ Emma S Stewart, ‘UK Dispersal Policy and Onward Migration: Mapping the Current State of Knowledge’ (2012) 25 *Journal of Refugee Studies* 25.

²⁷ Birgit Glorius and Jeroen Doornik, Jonathan Darling, ‘Asylum in Austere Times: Instability, Privatization and Experimentation within the UK Asylum Dispersal System’ (2016) 29(4) *Journal of Refugee Studies* 483.

²⁸ *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin). Legal Aid is not available for appeals against decisions to refuse asylum support.

²⁹ Andrew Burrige and Nick Gill, ‘Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals’ (2016) 49(1) *Antipode* 23.

³⁰ Helen O’Nions, ‘No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience’ (2008) 10(2) *European Journal of Migration and Law* 149 and Leanne Weber, ‘The Detention of Asylum Seekers: 20 Reasons Why Criminologists Should Care’ (2002) 14(1) *Current Issues in Criminal Justice* 9.

³¹ Liza Schuster, ‘Fatal flaws in the UK asylum decision-making system: an analysis of Home Office refusal letters’ (2018) *Journal of Ethnic and Migration Studies* 1 and James Souter, ‘A Culture of Disbelief or Denial? Critiquing Refugee Status Determination the United Kingdom’ (2011) 1(1) *Oxford Monitor of Forced Migration* 48.

³² Olga Jubany, ‘Constructing Truths in a Culture of Disbelief: Understanding Asylum Screening from Within’ (2011) 26(1) *International Sociology* 74.

³³ Diane Taylor and Hugh Muir, ‘Border staff humiliate and trick asylum seekers – whistleblower’ *The Guardian* (2 February 2010).

³⁴ Helen Baillot, Sharon Cowan and Vanessa E. Munro, ‘Reason to disbelieve: evaluating the rape claims of women seeking asylum in the UK’ (2014) 10(1) *International Journal of Law in Context* 105.

Home Office decision making stage.³⁵ Evidence of poor Home Office case handling and inaccurate credibility assessments is borne out by the statistics, which show that one in four Home Office asylum refusals are overturned on appeal.³⁶ There is also evidence that the asylum process aggravates mental illness amongst claimants and mental illness can affect the ability of claimants to navigate the system, self-advocate, and provide crucial evidence.³⁷

There has long been anecdotal evidence, and now emerging empirical evidence, of the high degree of inconsistency in asylum adjudication in the UK. Robert Thomas observes that ‘it has become almost customary for the phrases “asylum lottery” or “refugee roulette” to be employed by those who perceive that the outcomes of decisions on asylum claims differ widely irrespective of their essential similarity.’³⁸ Thomas points out that this is problematic both in terms of undermining our sense of fairness and also in terms of increasing the risk of substantively unfair results.³⁹ Empirical research has detected the role of ‘luck’, and therefore a level of structural unfairness within the system, due to uneven geographies of legal aid and inconsistent decision-making practices.⁴⁰ Unfair asylum determination has potentially grave consequences for claimants. As the Countess of Mar points out, the asylum tribunal:

...is the only jurisdiction in the country that has the power of invoking the death penalty... You can also impose on people an awful prison sentence. Some of the conditions in the country that asylum seekers come from are appalling.⁴¹

However, despite the central importance of fairness to the UK’s asylum legal system, little attention has been paid to exploring the conceptual meaning and manifestations of fairness.⁴²

³⁵ See Robert Thomas, ‘Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined’ (2006) 8 *European Journal of Migration and Law* 79, for detailed discussion of the difficulties of credibility assessments.

³⁶ Elizabeth Williams, Natasha Tsangarides, Jan Shaw and Mike Kaye, ‘A question of credibility: Why so many initial asylum decisions are overturned on appeal in the UK’ (Amnesty International and Still Human Still Here, 2013).

³⁷ See, for example, Diana Bögner, Chris Brewin and Jane Herlihy, ‘Refugees’ Experiences of Home Office Interviews: A Qualitative Study on the Disclosure of Sensitive Personal Information’ (2009) 36(3) *Journal of Ethnic and Migration Studies* 519.

³⁸ Robert Thomas, ‘Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom’ (2008) 20 *International Journal of Refugee Law* 489, 490. See, also, Hugo Storey, ‘Consistency in Refugee Decision-Making: A Judicial Perspective’ (2013) 32(4) *Refugee Survey Quarterly* 112.

³⁹ Robert Thomas, ‘Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom’ (2008) 20 *International Journal of Refugee Law* 489, 490.

⁴⁰ Andrew BurrIDGE and Nick Gill, ‘Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals’ (2016) 49(1) *Antipode* 23, 33 and 38.

⁴¹ Cited by Helen MacIntyre, ‘Imposed dependency: client perspectives of legal representation in asylum claims’ (2009) 23(2) *Journal of Immigration, Asylum and Nationality Law* 188.

2.2 An international right to asylum and to fair asylum procedures

In the aftermath of the mass displacement of the Second World War, the right of asylum was recognised and enshrined in international law by the 1948 Universal Declaration of Human Rights (UDHR). The UDHR declares under Article 14 that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’.⁴³ Writing in 1949, Morgenstern observed that while this right was not enforceable, ‘as a matter of policy, refugees are not sent back to their home state’.⁴⁴

The commitment to granting asylum to those deemed in need of protection was strengthened when the UK became party to the 1950 European Convention on Human Rights (ECHR),⁴⁵ the 1951 Refugee Convention, and the 1967 Refugee Protocol.⁴⁶ These instruments are part of the post-war agenda to protect displaced people from human rights violations. The Refugee Convention is also the cornerstone of a distinct regime of international refugee law. Article 33(1) of the Refugee Convention establishes the fundamental legal principle of *non-refoulement*, that is, the non-return of refugees. This principle is not limited to those formally recognised as refugees. Thus, with the controversial exception of return to ‘safe third countries’, asylum-claimants cannot be returned until and unless their claim has been processed and they receive a final negative decision.⁴⁷ The Refugee Convention is legally binding and its primacy has been recognised in domestic statute and in the UK’s Immigration Rules.⁴⁸ Article 3 (prohibition against torture, inhuman or degrading treatment) and Article 8 (respect for family and private life) of the ECHR are also often relied upon to prevent the return of asylum claimants. The Human Rights Act 1998 bolstered the protections of Articles 3 and 8 ECHR by allowing UK courts to directly defend

⁴² Legal scholars tend to focus on illuminating the legal and practical obstacles to a fair asylum decision-making. See, for example, Frances Webber, ‘Struggles for Fair Decision-making’ in *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto Press 2012), 35-54.

⁴³ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

⁴⁴ Felice Morgenstern, ‘The Right of Asylum’ (1949) 26 *British Yearbook of International Law* 327, 348.

⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁴⁶ Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

⁴⁷ Richard Dunstan, ‘Playing human pinball: the Amnesty International United Kingdom Section Report on UK Home Office “safe third country” practice’ (1995) 7(4) *International Journal of Refugee Law* 606.

⁴⁸ Asylum and Immigration Appeals Act 1993, s 2.

these rights.⁴⁹ Furthermore, the UK has opted in to some of the measures of the Common European Asylum System, including the EU Asylum Qualification Directive.⁵⁰ Arguably, the mandatory terms of the Qualification Directive, that Member States ‘*shall* grant refugee status’ to those who qualify as refugees, read together with the EU Charter’s robust statement of ‘the right to asylum’, strengthens the legal right to asylum.⁵¹ These EU law measures have been transposed into UK domestic law and will remain enforceable in the UK after Brexit as ‘retained law’ under the EU (Withdrawal) Act 2018.⁵²

The Refugee Convention demands that immigration controls on asylum-claimants are fair, in so far as asylum-claimants are not to be punished for illegal entry and are not to be deported to a country where their life and freedom would be threatened.⁵³ The Refugee Convention and its Protocol define who is a refugee but do not stipulate the procedures for determining refugee status. As confirmed in the UNHCR Handbook, ‘[i]t is therefore left to each Contracting State to establish the procedure that it considers most appropriate, having regard to its particular constitutional and administrative structure’.⁵⁴ The Executive Committee of the High Commissioner’s Programme, at its twenty-eighth session in October 1977, recommended that procedures should satisfy certain basic requirements, including a reasonable time to appeal for a formal reconsideration of a decision if not recognised.⁵⁵ The Refugee Convention itself does provide that a refugee cannot be expelled without ‘due process of law’ and the opportunity to ‘submit evidence’, ‘appeal’ and ‘be represented’.⁵⁶ Article 16 of the Convention, which arguably extends to asylum-claimants, also requires free and equal access to the courts, including legal assistance for refugees who are habitually resident in the Contracting State.

⁴⁹ Human Rights Act 1998, ss 2, 3, 4 and 6.

⁵⁰ Council Directive (EC) 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ 304/12 (Qualification Directive).

⁵¹ Qualification Directive, article 13 (emphasis added) and the Charter of Fundamental Rights of the European Union, OJ C 364/1, 18 December 2000 (entry into force 1 December 2009) (EU Charter), article 18. This argument is returned to and pursued in Chapter 5.

⁵² Via the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2005 2525, the Asylum (Procedures) Regulations 2007, SI 2007 3187, and the Immigration Rules.

⁵³ See Refugee Convention, articles 31 and 33.

⁵⁴ UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3 (UNHCR Handbook), [189].

⁵⁵ UN High Commissioner for Refugees (UNHCR), Addendum to the Report of the United Nations High Commissioner for Refugees, 31 October 1977, A/32/12/Add.1.

⁵⁶ Refugee Convention, article 32(2).

The freedom of Contracting States to regulate their own refugee determination procedures is subject to international and regional obligations that guarantee minimum standards of procedural fairness.⁵⁷ The ECHR is also silent on how asylum claims should be processed. However, Articles 3, 8 and 13 (right to an effective remedy) ECHR impose procedural obligations. Article 6 (right to a fair hearing within a reasonable time) ECHR has been found not to apply to asylum disputes.⁵⁸ Article 47 of the EU Charter is legally binding and provides a right to an effective remedy, which includes an express, albeit restricted, right to legal aid.⁵⁹ Article 47 is limited by the scope of EU law. The UK is obliged, at least for the time being, to adhere to the requirements under the EU Asylum Procedures Directive.⁶⁰ The Procedures Directive lays down *minimum* standards. Notably, some of the UK's restrictive measures find their origins in EU asylum policy.⁶¹ The UK has refused to adopt the enhanced Recast Asylum Procedures Directive.⁶²

2.3 Overview of the UK legal framework

Since the 1990s, a distinct body of asylum law has emerged in the UK. This highly politicised area of law is subject to frequent change and is marked by restrictive policies and complexity. The harsh policies that characterise UK asylum law were implemented in reaction to increasing numbers of asylum-claimants in the 1990s. However, the numbers of asylum-claimants peaked in 2002 (at the time of the Kosovo crisis) and have not reached the same

⁵⁷ The UK is obligated to respect her commitments under the ECHR (ratified by the UK in 1951 and incorporated into domestic law in 2000 by the Human Rights Act 1998) and under European Union law (the UK has opted in to a number of the measures of the Common European Asylum System (CEAS) and has transposed these directives into domestic law). However, some of the UK's restrictive measures find their origins in EU asylum policy. See Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 *European Journal of Migration and Law* 35. The Refugee Convention, article 16, guarantees equal and 'free access to the courts on the territory of all Contracting States...including legal assistance'. While article 16 applies *prima facie* to recognised refugees, it is arguable that the right to access to court under article 16 applies equally to asylum seekers given that refugee status is declaratory rather than determinative.

⁵⁸ This legal anomaly is examined in Chapter 5.

⁵⁹ EU Charter.

⁶⁰ Council Directive (EC) 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005], OJ L 326/13 (Procedures Directive).

⁶¹ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 168-169.

⁶² Council Directive (EC) 2013/32/EU on common procedures for granting and withdrawing international protection [2013] OJ L180/60 (Procedures Directive (recast)).

record high since.⁶³ Even at its core, the question of whether someone is a refugee is inherently problematic. Those fleeing persecution are rarely able to provide corroborative evidence. The success of a claim often rests solely upon whether the decision-maker is convinced by the claimant's oral testimony. As such, personal judgments, and speculation over future risk, become determinative factors in asylum cases.⁶⁴ Robert Thomas thus distinguishes asylum adjudication as 'one of the most difficult areas of decision-making in the modern legal system.'⁶⁵

The UK's asylum procedure is 'both an administrative and legal one'.⁶⁶ The Home Office, which is responsible for immigration control, processes and determines initial claims for asylum. Once a claim has been registered (at the port of entry or at the Asylum Screening Unit in Croydon), claimants are required to undergo screening. They will have a short interview and will have their photographs and fingerprints taken. Claimants should not be expected to go into the details of their claim until the substantive asylum interview. The asylum interview is the most important event in the asylum determination process. It is the claimant's main opportunity to explain the reasons for applying for asylum. This testimony forms the key evidentiary basis for the initial Home Office decision, and for any subsequent appeal. Despite the significance of this event, and in view of the room for language interpretation errors or other misunderstandings, there is no longer legal aid available for a legal representative to attend the Home Office asylum interview. However, the Court of Appeal has found that in the interests of fairness, claimants have the right to request for their interview to be electronically recorded in the absence of a legal representative.⁶⁷

Since 2013, asylum claims are processed under the Asylum Operating Model, which replaces the New Asylum Model.⁶⁸ The primary aim of both models has been speed.⁶⁹ However, neither model required the recommended processing timeframes to be adhered to

⁶³ There were 84,130 asylum applicants in 2002. See Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25 *Legal Studies* 462, 464. In the year ending June 2019, there was a total of 32,693 asylum applications in the UK. Home Office, *Immigration statistics data tables, year ending June 2019 second edition* (Home Office, 22 August 2019).

⁶⁴ Michael Kagan, 'Believable Victims: Asylum Credibility and the Struggle for Objectivity' (2015) 16(1) *Georgetown Journal of International Affairs* 123.

⁶⁵ Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart 2011) foreword.

⁶⁶ Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart 2011), 22.

⁶⁷ *R (Dirshe) v Secretary of State for the Home Department* [2005] EWCA Civ 421.

⁶⁸ The New Asylum Model was rolled out in 2007.

⁶⁹ Home Office, *Fairer, Faster and Firmer – a Modern Approach to Immigration and Asylum* (Cmd 4018, 1998).

and long delays continue to be reported.⁷⁰ More than half of asylum claimants wait longer than six months for an initial decision.⁷¹ In some cases, claimants have waited many years for an initial Home Office decision.⁷² The Home Affairs Select Committee have highlighted the significant human cost of delays in decision-making.⁷³ Despite serious concerns raised over delayed initial decisions, in 2019, the Home Office announced that it is abandoning its six months target to process asylum claims.⁷⁴ There is also increasing backlog and delay in the tribunal and asylum-claimants face lengthy appeal processes in addition to delayed Home Office processes.⁷⁵ The asylum determination system has been criticised as operating too slow or too fast.⁷⁶ For example, in addition to long delays, it has been reported that the speed of the asylum process meant that some claimants had difficulty accessing legal advice prior to their substantive interview.⁷⁷ Some asylum claims and any subsequent appeal were processed under the detained-fast-track rules and subject to even stricter timeframes. In 2015, the Court of Appeal ruled that the detained-fast-track appeals system was structurally unfair and unlawful.⁷⁸

The Home Office refuses most asylum claims.⁷⁹ The burden of proof is on the claimant to show that they have a ‘well-founded fear’ of persecution if returned for one of the Refugee Convention reasons or, otherwise, for humanitarian protection.⁸⁰ The standard of proof is that of ‘a reasonable degree or likelihood’, or ‘real risk’, which is lower than the civil

⁷⁰ Kate Lyons, ‘Revealed: asylum seekers’ 20-year wait for Home Office ruling’ *The Guardian* (17 August 2018).

⁷¹ In the year ending June 2019, 53% of applicants waited longer than six months for an initial asylum decision. Home Office, *Immigration statistics data tables, year ending June 2019 second edition* (Home Office, 22 August 2019).

⁷² Home Affairs Select Committee, *7th Report – Asylum – Volume I* (2013-14, HC 71) 3-7.

⁷³ Home Affairs Select Committee, *7th Report – Asylum – Volume I* (2013-14, HC 71) 4.

⁷⁴ Eric Allison and Diane Taylor, ‘Home Office abandons six-month target for asylum claim decisions’ *The Guardian* (7 May 2019).

⁷⁵ Robert Thomas, ‘Immigration appeals and delays: On the verge of a crisis?’ (UK Administrative Justice Institute, 18 May 2017) < <https://ukaji.org/2017/05/18/immigration-appeals-and-delays-on-the-verge-of-a-crisis/> > accessed 28 September 2019.

⁷⁶ Saulo B. Cwerner ‘Faster, Faster and Faster: The Time Politics of Asylum in the UK’ (2004) 13(1) *Time and Society* 71.

⁷⁷ Kate Smart, ‘Access to legal advice for dispersed asylum seekers,’ (Asylum Support Partnership Impact Report, July 2008).

⁷⁸ *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840. The flaws and unfairness of the detained fast track process are discussed in Chapter 5.

⁷⁹ In the year ending June 2019, the Home Office granted asylum to 39% of applicants. Home Office, *Immigration statistics data tables, year ending June 2019 second edition* (Home Office, 22 August 2019).

⁸⁰ ‘...for reasons of race, religion, nationality, membership of a particular social group or political opinion...’ Refugee Convention, article 1A(2). See above regarding the legal grounds for humanitarian protection applicable where a claimant does not meet the criteria under the Refugee Convention but otherwise is granted asylum.

standard of the balance of probabilities.⁸¹ However, the decision whether a claimant has established that they have a ‘well-founded fear’ will often depend upon the credibility assessment. In other words, whether the decision-maker believes that the claimant is telling the truth. The UNHCR have noted the tendency of Home Office decision-makers ‘to apply an inappropriately high burden of proof, meaning that sometimes minor discrepancies resulted in every aspect of an applicant’s claim being disbelieved or rejected’.⁸² Moreover, the UNHCR’s Quality Initiative Project and Quality Integration Project (working collaboratively with the Home Office) have identified a number of shortcomings in terms of Home Office training and the quality of initial decisions.⁸³ Home Office ‘decision-making has often been criticised for being of indifferent quality, poorly reasoned, inadequately engaging with the evidence of the applicant and for disclosing factual errors concerning country conditions’.⁸⁴ Compassion fatigue and a culture of disbelief impinge the quality of Home Office case handling and decisions.⁸⁵

There is a right of appeal (in most asylum cases) against refusals to a specialist tribunal (the two-tiered Immigration and Asylum Chamber).⁸⁶ A high proportion of claimants refused asylum by the Home Office lodge appeals.⁸⁷ The courts have recognised that ‘in asylum cases the appellate structure...is to be regarded as an extension of the decision-making process’.⁸⁸ As highlighted above, in light of poor Home Office case handling and decision-making, one in four initial decisions to refuse asylum are overturned on appeal.⁸⁹ In *Horvath v SSHD*, the tribunal highlighted that poor initial Home Office decision-making

⁸¹ *Sivakumaran v Secretary of State for the Home Department* [1988] AC 958 and *Kacaj v Secretary of State for the Home Department* (starred determination) [2002] Imm AR 213.

⁸² Home Affairs Select Committee, *7th Report – Asylum – Volume I* (2013-14, HC 71) 13.

⁸³ UN High Commissioner for Refugees (UNHCR), *Evaluation of the UNHCR Quality Integration Project In the United Kingdom*, (ES/2017/0, July 2017).

⁸⁴ Robert Thomas, ‘Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals’ (2005) 25 *Legal Studies* 462, 479.

⁸⁵ Robert Thomas, ‘Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined’ (2006) 8 *European Journal of Migration and Law* 79, 84.

⁸⁶ Asylum and human rights claims might be certified by the Secretary of State as ‘clearly unfounded’. In such cases appeals can only be brought from outside the UK. Nationality, Immigration and Asylum Act 2002, s 94, s 96 and s 94B (as inserted by the Immigration Act 2014 and amended by the Immigration Act 2016).

⁸⁷ Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart 2011) 22.

⁸⁸ *Ravichandran v SSHD* [1996] Imm Ar 97, 112

⁸⁹ Elizabeth Williams, Natasha Tsangarides, Jan Shaw and Mike Kaye, ‘A question of credibility: Why so many initial asylum decisions are overturned on appeal in the UK’ (Amnesty International and Still Human Still Here 2013).

‘places extra burdens on adjudicators.’⁹⁰ It is the overriding objective of the tribunal to deal with cases ‘fairly and justly.’⁹¹ However, reported excessive tribunal delay risks undermining the fairness of the tribunal procedure.⁹² Moreover, due to the pressures of incremental cuts to legal aid and the attrition of good, specialist lawyers, asylum-seekers are not always able to access legal representation at the crucial appeal-stage.⁹³ No legal representation, or poor legal representation, can lead to ‘less robust decisions.’⁹⁴

Legal reforms of onward appeals and judicial review in asylum cases have also curtailed access to justice. Craig and Fletcher observe that, ‘[t]wo sets of significant reforms in 2005 and then in 2010 each had as a main thrust the restriction of the supervision of asylum appeals by the higher courts.’⁹⁵ Most notably, judicial reviews of asylum claims can be transferred from the High Court to the Upper Tribunal.⁹⁶ This contributes to a ‘largely self-contained [asylum] tribunals system in the UK’.⁹⁷ Geoffrey Care, a leading Immigration Judge, has highlighted how Immigration Judges ‘still sit as judge and jury and with the removal of any effective review of most of their decisions which are based on fact, the element of chance remains very high indeed.’⁹⁸

In summary, the literature points to several serious concerns about the fairness of the asylum adjudication regime in the UK and the human cost of unfairness. A complicated and hostile asylum bureaucracy, expanding legal advice deserts, an overburdened adversarial appeals system, and restrictions on the oversight of the courts, affect the fair treatment and well-being of asylum claimants, producing inconsistent and erroneous results. Despite growing evidence that the system is operating unfairly, there have been few scholarly efforts

⁹⁰ *Horvath v Secretary of State for the Home Department* [1999] Imm AR 121.

⁹¹ The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, SI 2014 2604 (L.31), rule 2(2).

⁹² Robert Thomas, ‘Immigration appeals and delays: On the verge of a crisis?’ (UK Administrative Justice Institute, 18 May 2017) <<https://ukaji.org/2017/05/18/immigration-appeals-and-delays-on-the-verge-of-a-crisis/>> accessed 28 September 2019.

⁹³ Andrew Burridge and Nick Gill, ‘Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals’ (2016) 49(1) *Antipode* 23.

⁹⁴ An Immigration Judge explained that: ‘There’s a greater chance that something important will be overlooked. There’s a greater chance that something will not be understood, an aspect of the appellant’s case ... all of that adds to the length, it adds to the resources you need to make a decision ... decisions having to be reviewed, as well as the injustice of somebody who should win losing.’ Julia Gibbs and Deri Hughes Roberts, ‘Justice at Risk: Quality and Value for Money in Asylum Legal Aid’ (Runnymede Trust, 5 September 2013).

⁹⁵ Sarah Craig and Maria Fletcher, ‘The Supervision of Immigration and Asylum Appeals in the UK – Taking Stock’ (2012) 24(1) *International Journal of Refugee Law* 60, 84.

⁹⁶ *Tribunals, Courts and Enforcement Act 2007*.

⁹⁷ Sarah Craig and Maria Fletcher, ‘The Supervision of Immigration and Asylum Appeals in the UK – Taking Stock’ (2012) 24(1) *International Journal of Refugee Law* 60, 84.

⁹⁸ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 260.

to analyse the conceptual meanings and manifestations of (un)fairness within UK asylum law.

3. RESEARCH STRUCTURE

3.1 Research questions

The main research question to be answered, is, how should we think about ‘fairness’ in the context of the UK’s asylum system? In order to answer this overarching question, the following research questions are posed: What does ‘fairness’ mean for asylum-claimants in liberal democratic theory? Historically, what role has ‘fairness’ played in the development of the UK’s asylum determination system? Empirically, how does ‘fairness’ materialise for asylum-claimants in the UK? And, finally, how have the UK courts interpreted ‘fairness’ in asylum cases?

3.2 Theoretical framework and choices

John Rawls’s seminal ‘justice as fairness’ thesis was the starting point for the theoretical investigation. However, the Rawlsian state-centred approach to fairness is not easily applied to the issue of asylum. In view of Rawls’s neglect of the issue of asylum, I turned to Amartya Sen, Jürgen Habermas and Seyla Benhabib, who offer instructive critiques of Rawls’s exposition of fairness. The alternative approaches of these eminent thinkers aided the development of an asylum-centred revision of Rawls’s theory design. Sen’s theory of justice incorporates global perspectives, inclusive of the interests and views of asylum-claimants.⁹⁹ Sen considers that wide and inclusive empirical information is integral to impartiality, and thus essential for fairness. He also provides a generous interpretation of the human rights of asylum-seekers as ethical claims. Habermas reconciles human rights with popular sovereignty, and his theory of discourse ethics advocates democratic voice for marginalised groups such as asylum-seekers.¹⁰⁰ He defends expressly the moral claims of asylum-seekers and argues the need for liberal immigration policies. Benhabib builds upon Habermas’s

⁹⁹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010).

¹⁰⁰ Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000).

discourse ethics to address the issue of the rights of migrants, asylum-seekers and refugees.¹⁰¹ She argues for a human right to legal and political membership, realisable, she says, by the democratic iterations of migrant rights in the public sphere. By this reflexive method, Benhabib argues, universal rights can take form and have meaningful effect within a local context. According to these theorists, boundaries might inevitably have to be drawn but they need not sever common humanity and liberal tendencies towards open fair-mindedness and solidarity with asylum-claimants. Starting at the position of an asylum-centred Rawlsian account of fairness and pulling together the common threads of the liberal theories explored, I discerned four ‘pillars’ of fairness.¹⁰² The work of Sen and Benhabib directed the thesis towards investigating the lived experiences of asylum-claimants. The empirical study revealed another gap in Rawls’s theory. The main finding was that time and temporal concepts are key to asylum-claimants’ experiences and understandings of fairness. The liberal theories studied focused on spatial fairness, neglecting temporal fairness. I analysed the legal reasoning of asylum case law and found that time played an important role in judicial interpretations of fairness. These findings directed the thesis to return to the normative asylum-centred fairness pillars to examine the UK asylum adjudication regime through the lens of temporal fairness.

3.3 Research focus on asylum adjudication

As highlighted above, the asylum-determination trend in the UK has been to focus on the adversarial appeals process.¹⁰³ The emphasis on asylum appeals as part of the asylum determination process is also a symptom of the legal aid funding structure. The legal aid model fails to incentivise early preparatory work by legal representatives during the initial stage of the asylum claim. In 2004, legal aid entitlement was reduced from around forty hours to just five hours preparation for each initial asylum application to the Home Office.¹⁰⁴ This curtailment of legal aid was introduced ‘despite grave concerns...that such restrictions would

¹⁰¹ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004).

¹⁰² See section 1, above, and section 4, below, of this Chapter for a list and brief outline of these pillars. The development of the pillars is discussed in Chapter 3 and the pillars are applied to analyse the UK asylum adjudication regime in Chapter 6.

¹⁰³ At section 2.3 of this Chapter.

¹⁰⁴ The time restrictions on legal aid are returned to and discussed in detail in Chapter 6.

not allow enough time for cases to be adequately prepared'.¹⁰⁵ Under the fixed fee arrangement, introduced in 2007, '[a]ll providers who reach a minimum level of quality are...paid an identical fee..., reducing the incentive to strive for high quality, in effect penalising those firms that do, and forcing the choice between financial survival and responsibility to clients'.¹⁰⁶ Financial pressures, coupled with time constraints, result in the majority of clients receiving 'inadequate or, in some cases, virtually no legal advice to assist them in presenting their asylum case during their substantive interview'.¹⁰⁷ Asylum case preparation, therefore, tends to be left to the appeal stage, if legal aid is granted.¹⁰⁸

Asylum appeal hearings are 'meant to be less intimidating than normal courts, which they nonetheless resemble'.¹⁰⁹ As Thomas highlights, the hearings are 'conducted on an adversarial basis, but this can vary depending upon the presence and quality of representation'.¹¹⁰ The Immigration Judge may put their own questions to the appellant in order to give the appellant the opportunity to clarify any issues. However, the Immigration Judge must be careful not to 'enter the arena'¹¹¹ and assume the role of the Home Office Presenting Officer.¹¹² As highlighted above, there is empirical evidence of geographic disparities of tribunal success rates.¹¹³ This is due, in part, to inconsistent practices by Immigration Judges across the UK, putting the fairness of asylum appeals into question.¹¹⁴ The imposition of a legal aid merits test at the appeal stage, and the growing dearth of good

¹⁰⁵ Jon Burnett, 'No Access to Justice: Legal Aid and Destitute Asylum Seekers' (pafras Briefing Paper Number 3, January 2008) <http://www.pafras.org.uk/wp-content/uploads/2010/09/3_No_access_to_justice_legal_aid_and_destitute_asylum_seekers.pdf> accessed 19 November 2012.

¹⁰⁶ Adeline Trude and Julie Gibbs, 'Review of Quality Issues in Legal Advice: Measuring and Costing Asylum Work' (Report by icar, City University, London, 2010).

¹⁰⁷ Alison Griffin, 'Justice denied?' [2012] 162 (7519) Supp (Charities Appeals Supplement) New Law Journal 88, discusses the experience of Refugee Action.

¹⁰⁸ The problems of legal aid funding in the asylum system, and lack thereof, are addressed in Chapter 6.

¹⁰⁹ Anthony Good, 'Anthropologists as Experts: Asylum Appeals in British Courts' (2003) *Anthropology Today* 3, 4.

¹¹⁰ Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing 2011) 23.

¹¹¹ Anthony Good, 'Anthropologists as Experts: Asylum Appeals in British Courts' (2003) *Anthropology Today* 3, 4.

¹¹² The guidance (Adjudicator Guidance Note, Unrepresented Appellants (Guidance Note No. 5, April 2003) stresses, consistent with the *Surendran* Guidelines (*MNM (Surendran guidelines for Adjudicators) Kenya* * [2000] UKIAT 00005) that 'the adjudicator may ask questions, but must not descend into the arena and appear to be assuming the HOPO's mantle'.

¹¹³ At section 2.1.

¹¹⁴ Melanie Griffith, 'Observing differences: asylum appeals in the UK' (The COMPAS Blog, 2013) <<http://compasoxfordblog.co.uk/2013/08/observing-differences-asylum-appeals-in-the-uk/>> accessed 22 October 2013.

immigration lawyers due to legal aid restrictions, mean that appellants are often unrepresented (or poorly represented) on appeal. This is problematic because the chances of winning as an unrepresented appellant before the adversarial tribunal is hindered.¹¹⁵ Thomas highlights that when the appeal system ‘was initially established it was intended to be informal and largely inquisitorial, and legal representation was not envisaged as necessary.’¹¹⁶ However as asylum law and procedure has increased in complexity, a legal-model has developed where legal representation is crucial. The absence of quality legal representation therefore compromises the fairness of the legal procedure. In summary, legal outcomes directed by uneven legal aid provision and decision-making practices, and an overburdened system marred by arbitrary speed and excessive delay, are anathema to fairness. The issue of fairness in the UK’s asylum adjudication regime, therefore, warrants careful academic investigation and reflection.

3.4 Methodology

3.4.1 Multimethod research

This thesis employs an interdisciplinary and multimethod research design to the issue of conceptualising juridical fairness within the context of the UK’s asylum adjudication system. Historical, theoretical, empirical and doctrinal methods of study are combined to unpick the research problem. Broadly speaking, multimethod research can produce more thorough and reliable results, as methods from different disciplines offer fresh insights and enrich analytic quality.¹¹⁷

The thesis draws on liberal political theory to interrogate how the question of normative fairness has been approached in liberal democratic thinking. As noted, insights are gained from Rawls, Sen, Habermas and Benhabib.¹¹⁸ The theoretical findings aid the first stage of development of a normative asylum-centric fairness framework (labelled ‘pillars’).¹¹⁹ The perspectives of Sen, Habermas and Benhabib also illuminate the benefits of a multimethod approach to the complex question of asylum fairness. Sen is concerned with

¹¹⁵ Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing 2011) 116.

¹¹⁶ Robert Thomas, ‘Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals’ (2005) 25 *Legal Studies* 462, 477.

¹¹⁷ Paul Roberts, ‘Interdisciplinarity in Legal Research’ in Michael McConville and Wing Hong (Eric) Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 106.

¹¹⁸ At section 3.2 of this Chapter.

¹¹⁹ See Chapter 3.

identifying injustices empirically, both historically and contemporaneously. He considers that Rawls overlooks the empirical. Sen believes in enhancing fairness in the real world by taking account of the perspectives of the globally disadvantaged.¹²⁰ Habermas also criticises the knowledge deficit of Rawls's abstract theory. He believes that the inclusion of the wisdoms of asylum voices (and other marginalised voices) in public discourse helps to realise fairness in the real world.¹²¹ Similarly, in terms of realising fairness in the real world, Benhabib highlights the importance of the territoriality of human rights. She observes that human rights are enforceable only if they are legally constituted by a particular people, situated in a particular place, at a particular time.¹²² To this extent, the theorists are concerned not only with the moral and political nature of fairness but also with the application of fairness as lived reality. Fairness in action, rather than in abstract, is not inconsistent with Rawls's theory. Indeed, Rawls intended his abstract fairness theory to have real world application.

Accordingly, the normative asylum-centric fairness pillars are tested empirically in this thesis. Driven by the theoretical findings, the research design choices link historical, first-hand and doctrinal study to normative legal issues. An historical analysis of the UK's asylum determination system is employed to provide important legal and political context to examine the role of fairness in the system. Social-science research methods are also used as a tool for empirical data collection and analysis. The data gathered, namely, the first-hand accounts of a group of asylum-claimants, aids the analysis and second stage development of the asylum-centred fairness pillars.¹²³ Enabling the voices of asylum-claimants is also important in and of itself, given that the voices of this marginalised group are often silenced.¹²⁴

3.4.2 *Hearing asylum voices*

While there are opportunities for asylum-claimants to demonstrate agency and resilience within the UK's asylum determination system, asylum-claimants remain one of the most disadvantaged and invisible groups in society.¹²⁵ Frances Webber highlights that asylum-claimants suffer from '[t]he cloak of invisibility conferred by...political and media

¹²⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010), 402-403.

¹²¹ Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 190.

¹²² Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 44.

¹²³ See Chapter 6.

¹²⁴ See Chapter 4.

¹²⁵ See, for example, Barbara Harrell-Bond and Eftihia Voutira, 'In Search of 'Invisible' Actors: Barriers to Access in Refugee Research' (2007) 20(2) *Journal of Refugee Studies* 281.

dehumanisation.’¹²⁶ The voices of asylum-claimants still remain largely unheard within legal research. The small collection of legal research studies on the UK’s asylum adjudication regime have tended to be doctrinal, or focused on field observations.¹²⁷ The views of Immigration Judges, Home Office staff, legal representatives, social workers, and NGO workers, have, to some extent, been taken into account.¹²⁸ Yet, with only a few notable exceptions, the perspectives of asylum claimants in the UK, those subject to the processes, are, generally, treated as peripheral rather than central within legal scholarship.¹²⁹ The dearth of asylum claimants’ accounts in legal research is particularly problematic in view of the acknowledged repression of their narratives within the asylum determination system.¹³⁰ Trauma, language barriers and culture can impede story telling.¹³¹ The neglect of asylum voices in legal research, therefore, adds another layer of silencing; as well as being a missed opportunity to gather rich data to better understand the topic. As Hynes points out, ‘refugees are the experts of their own experience.’¹³² If we are to better understand asylum legal issues then there is an imperative to move beyond analysing legal materials, observing procedures, and interviewing legal experts. It is critical that the voices of asylum-claimants and refugees are centred.

¹²⁶ Frances Webber, ‘Borderline justice’ (2012) *Race and Class* 39, 52.

¹²⁷ See, for example, Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths 2000); Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004); Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing 2011); Frances Webber, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto Press 2012); Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013).

¹²⁸ See, for example, Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart 2011); Jessica Hambly, ‘Interactions and Identities in UK Asylum Appeals: Lawyers and Law in Nick Gill and Anthony Good (eds), *Asylum Determination in Europe: Ethnographic Perspectives* (Palgrave Macmillan 2019); and Stephen Meili, ‘Do Human Rights Treaties Help Asylum-Seekers: Lessons from the United Kingdom’ (2015) 48 *Vanderblit Journal of Transnational Law* 123.

¹²⁹ See, for example, Denise Venturi, ‘Reflections on empirical research with LGBTI refugees - a legal scholar’s perspective’ (2017) 16(2) *Oxford Monitor of Forced Migration* 20.

¹³⁰ See, for example, Toni A.M. Johnson, ‘On Silence, Sexuality and Skeletons: Reconceptualising Narrative in Asylum Hearings’ (2011) 20(1) *Social and Legal Studies* 57.

¹³¹ See, for example, Helen Baillot, Sharon Cowan and Vanessa E Munro, ‘“Hearing the Right Gaps”: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process’ (2012) 21(3) *Social and Legal Studies* 269.

¹³² Tricia Hynes, ‘New Issues in Refuge Research: The issue of ‘trust’ or ‘mistrust’ in research with refugees: choices, caveats and considerations for researchers’ (UNHCR, Evaluation and Policy Analysis Unit, Working Paper No. 8, 2003) 1.

3.4.3 Researcher positionality

As part of my commitment to transparent research, I reveal here the significance of my identity and the impact of my identity on the research project. This reflexive approach is considered good practice in qualitative research.¹³³ I include here relevant aspects of my biography and experiences. This provides context for the study and exposes how my background has influenced the research. I also reflect upon the issues I experienced negotiating my position between researcher, trustee of Asylum Justice (a Welsh charity that provides free legal services to asylum-claimants and refugees) and former immigration practitioner.

My personal concern with this topic stems from my experience working as an immigration lawyer. Between 2010 and 2012, I worked as an accredited practitioner at a legal aid law firm in Nottingham, UK. I specialised in asylum cases. During this time, I was struck by the extreme hardships experienced by my clients and the prevalence of luck within the asylum determination system. I saw how the success of an asylum claim often did not depend upon the actual merits of the case but whether the claimant had a ‘good’ lawyer or appeared before a ‘good’ Immigration Judge. I also felt increasingly under pressure to make legal aid asylum work pay for my firm. I had to meet daily targets of chargeable units of work. However, the time that I needed to spend with my (often traumatised and vulnerable) clients - to take good witness statements, for example - did not fit within the limited billable hours assigned to their casefiles under the funding contract. My experiences align with the developing body of literature on asylum lawyering and asylum decision-making in the UK.¹³⁴ As noted, the scholarship suggests that the system operates as a legal ‘lottery’.¹³⁵ In 2012, I moved to Cardiff, Wales. I started volunteering as a legal adviser with Asylum Justice. Asylum Justice is a Welsh charity that offers *pro bono* advice, assistance and representation

¹³³ See, for example, Melanie J. Greene, ‘On the Inside Looking In: Methodological Insights and Challenges in Conducting Qualitative Insider Research’ (2014) 19 *The Qualitative Report* 1-13 and Roni Berger, ‘Now I see it, now I don’t: researcher’s position and reflexivity in qualitative research’ (2013) 15(2) *Qualitative Researcher* 219.

¹³⁴ See, for example, Stephen Meili ‘U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law’ (2013) 36 *Boston College International and Comparative Law Review* 1123; Deborah James and Evan Killick, ‘Empathy and Expertise: Case Workers and Immigration/Asylum Applicants in London’ (2012) 37(2) *Law and Social Inquiry* 430; Helen Baillot, Sharon Cowan and Vanessa E. Munro, ‘Second-Hand Emotion – Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context’ (2013) 40(4) *Journal of Law and Society* 509.

¹³⁵ Above at section 2.1 of this Chapter. See, for example, Andrew BurrIDGE and Nick Gill, ‘Conveyor-Belt Justice: Precarity, Access to Justice, and Uneven Geographies of Legal Aid in UK Asylum Appeals’ (2016) 49(1) *Antipode* 23.

to asylum-claimants and refugees. I continued to see numerous examples of poor Home Office case handling, unlawful Home Office decisions, wrongful decisions by lawyers to withdraw legal aid, and tribunal decisions that disclosed errors of law. Those who had slipped through the net, and sought assistance from Asylum Justice, included children, victims of trafficking and victims of torture. Admittedly, all systems are imperfect and will include a margin of error.¹³⁶ In addition, asylum determinations are inherently problematic due to the paucity of corroborative evidence in most cases and the speculative nature of such decisions.¹³⁷ However, the high success rate of Asylum Justice suggests that there are systemic failures.¹³⁸ Asylum Justice does not have a legal aid contract. The charity takes on cases either deemed without merit by legal aid lawyers or cases where claimants otherwise cannot access a legal aid lawyer. The charity's success rate is nearly double the national average.¹³⁹ This suggests that high numbers of claimants entitled to international protection are being wrongly refused legal aid and wrongly refused asylum. The instances of asylum injustice that I have witnessed are not isolated anecdotes. For example, Home Office whistleblowers and press investigations have exposed the unfair, dehumanising decision-making procedures and practices that asylum-claimants are subjected to.¹⁴⁰ The injustices that I observed, taken together with the gravity of asylum decisions, and the multiple disadvantages experienced by asylum claimants, have been the impetus behind my doctoral study.

When undertaking data collection and interviewing asylum-claimants, I ensured that I clarified my identity and the purpose of the interview. This was particularly important given that the research participants were contacted via Asylum Justice. I explained my role as a researcher, emphasising that I had no connection to the Home Office. I highlighted my position as an Asylum Justice trustee but explained that the research was not on behalf of

¹³⁶ Robert Thomas, 'Risk, Legitimacy and Asylum Adjudication (2007) 58(1) Northern Ireland Legal Quarterly 49.

¹³⁷ Thomas highlights the 'difficult and uncertain fact-finding exercise involved in asylum decision-making'. Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25 *Legal Studies* 462, 466.

¹³⁸ Asylum Justice, 'Asylum Justice Success Rate in Asylum Appeals Nearly Double the National Average' (Asylum Justice News, 13 February 2019) < <http://asylumjustice.org.uk/asylum-justice-success-rate-in-asylum-appeals-double-the-national-average/>> accessed 17 September 2019.

¹³⁹ Asylum Justice, 'Asylum Justice Success Rate in Asylum Appeals Nearly Double the National Average' (Asylum Justice News, 13 February 2019) available at < <http://asylumjustice.org.uk/asylum-justice-success-rate-in-asylum-appeals-double-the-national-average/>> accessed 17 September 2019.

¹⁴⁰ Diane Taylor and Hugh Muir, 'Border staff humiliate and trick asylum seekers – whistleblower' *The Guardian* (2 February 2010); Amelia Hill, 'Asylum offices 'in a constant state of crisis', say whistleblowers' *The Guardian* (25 December 2017); and Kate Lyons and Kirstie Brewer, 'A lottery': asylum system is unjust, say Home Office whistleblowers' *The Guardian* (11 February 2018).

Asylum Justice. It was further stressed that access to the charity's services did not depend upon participation or non-participation. I also underlined that I was not able to assist with immigration, asylum or welfare matters. Admittedly, maintaining a non-intervention approach was emotionally challenging for me, particularly when one participant revealed that he was homeless.¹⁴¹

3.4.4 Selection of participants

My connection to Asylum Justice was key in accessing the hard to reach asylum-seeking population. My link to Asylum Justice also helped to establish trust and rapport with the participants. Seven of the participants were identified by the Legal Director of Asylum Justice. This selection process was positive in terms of the Legal Director's ability to carefully assess the circumstances and vulnerabilities of potential participants. This helped to promote the safety of both the participants and me as the researcher.¹⁴² All participants were adult males but from different countries. The decision to interview only male participants was to exclude the male and female comparative aspect of analysis.¹⁴³ That is not, of course, to dismiss the value of taking account of the views of female asylum-claimants and other hidden and harder to reach populations of asylum-claimants.¹⁴⁴ All participants spoke English adequately, either as a first or second language, so interpreters were not needed. Participants were asked to indicate if they wished to use an interpreter, but all preferred to speak in English.¹⁴⁵ The sample included participants at different stages of the asylum process and a mix of successful and unsuccessful cases. Most of the participants had experienced difficulties accessing a legal aid lawyer. Half of the participants volunteered with Asylum Justice and this enhanced their expert view of the asylum system. The small, heterogeneous sample was not intended to be representative. Nonetheless, the sample offers an important insight into the lived experiences of a largely hidden group.

3.4.5 Approach to interviews

The semi-structured interview schedule was designed and honed to elicit information about what happened to the participants during the asylum process, how this made them feel, and

¹⁴¹ These points and other ethical issues are discussed in Chapter 4.

¹⁴² See Chapter 4 for full discussion of sampling method and issues.

¹⁴³ See Chapter 4 for discussion of this point.

¹⁴⁴ Alice Bloch, 'Carrying Out a Survey of Refugees: Some Methodological Considerations and Guidelines' (1999) 12(4) *Journal of Refugee Studies* 367.

¹⁴⁵ See Chapter 4 for further discussion.

whether they perceived the system, or aspects of the system, to be (un)fair. The difficulty and effectiveness of the questions were tested and adapted as part of an iterative process of data collection and preliminary analysis. The direct question of whether the participants thought the system was fair was found to be too abstract and nebulous. Questions that required the participants to describe what happened to them and how that made them feel elicited richer responses. Participants were not asked about their experiences prior to arriving in the UK, however some of the participants volunteered this information. The average interview length was one hour and a half hours. Participants were offered refreshments but not all accepted. One participant, for example, was fasting. The reimbursement of travel expenses was not accepted by any of the participants. A pro-forma, completed at the beginning or end of the interviews, was used to note basic information, including age, nationality, background, stage of the asylum matter, and self-chosen pseudonym.

Given the precarious nature of the immigration status of participants, and their potential vulnerability, it was particularly important to ensure that the participants understood the purpose of the research. Information sheets were provided in advance and were explained to the participants. I highlighted at the outset that questions about the substance of their matters would not be asked. Nonetheless, the interviews did trigger emotional responses from several of the participants.¹⁴⁶

It quickly became evident that some participants were wary to sign the consent form using their real name. It was therefore agreed with the School's Ethics Committee that it was better to audio record the discussion about informed consent and gain the verbal agreement of the participants. Participants were invited to choose a pseudonym. Some of the participants were less concerned with anonymity and preferred to use their real name. However, even in these instances, steps have been taken to protect the personal details of the participants. Only first names and pseudonyms have been recorded.¹⁴⁷ In accordance with the ethical approval received for the project, the audio recordings and forms were kept securely and the interviews were transcribed by me shortly after the interviews had been undertaken. The files were encrypted and protected on a computer and hard copies of documents were kept in a locked file.

¹⁴⁶ See Chapter 4 for full details of the approach to interviews.

¹⁴⁷ See Chapter 4 for discussion of ethical issues.

3.4.6 Analysis of interview data

Thematic analysis was used in the open, bottom-up coding of the transcribed, qualitative interviews. The method of thematic analysis was used intuitively and inductively, allowing manifest and latent themes to emerge. Multiple readings of the transcriptions revealed strong conceptual patterns. The themes were organised into overarching and sub-themes and sorted as to relevance to the research objective. The winnowing and whittling of the data left one overarching theme standing, namely, the temporal dimension of fairness.¹⁴⁸

3.5 Methods deployed

The purpose of deploying four methodological strands of inquiry (theoretical, historical, empirical and doctrinal) is to move beyond routine lawyerly critiques of the UK's asylum system. In addition to developing a theoretical framework (the pillars), and studying relevant legal texts, social-science research methods are employed as tools for data gathering and analysis. A qualitative study reveals what doctrinal evaluation alone masks. As Cotterrell highlights, 'legal ideas' admit of no singular 'truth', but are 'the varied understandings' of people.¹⁴⁹ This thesis therefore uses semi-structured interviews to seek the understandings of asylum-claimants, as participants in the asylum legal process, in order to shed new light on the system's machinations.

To understand the relationship between asylum fairness in principle and asylum fairness in practice, an interdisciplinary approach is necessary to unpick the normative, legal and empirical strands of the research problem. The interdisciplinary method aids the development of a broader, and richer, reinterpretation and understanding of the asylum legal system as a social phenomenon.¹⁵⁰ Such an approach to law is concerned with 'the text, context, and subtext of law in terms of concepts and relationships among society.'¹⁵¹ In other words, the method is concerned with 'the what, why, and how'.¹⁵² Dissolving the dichotomy between theory and practice, and between insider and outsider perspectives, an interpretative,

¹⁴⁸ See Chapter 4 for more detailed discussion regarding analysis.

¹⁴⁹ Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate 2006) 3-4.

¹⁵⁰ Roger Cotterrell, 'Why must legal ideas be interpreted sociologically?' (1998) 25(2) *Journal of Law and Society* 171.

¹⁵¹ Janet McKnight, 'The Fourth Act in Socio-Legal Scholarship: Playing With Law on the Sociological Stage' (2015) XI(1) *Qualitative Sociology Review* 108, 110.

¹⁵² Janet McKnight, 'The Fourth Act in Socio-Legal Scholarship: Playing With Law on the Sociological Stage' (2015) XI(1) *Qualitative Sociology Review* 108, 117.

iterative, and interdisciplinary analytic approach is used. The thesis shifts between principle and practice, between legal theory and lived reality, to develop an asylum-centric and temporally sensitive view of fairness. This unique account is distilled by the filtering of asylum fairness pillars and the infusion of asylum fairness perspectives.

Starting with Rawls's original position, the present study reworks Rawlsian fairness, shifting from a state-centric to an asylum-centric account. Considering the general silencing of asylum-claimants, and the marginalisation of their experience, this study captures and centres the perspectives of members of this group, at the empirical and theoretical level. The inquiry therefore includes analysis of the accounts of eight asylum claimants in South Wales. In addition to contributing to a relatively nascent corpus of socio-legal empirical literature on the UK's asylum system, the empirical data calls for a further reworking of Rawls's thought experiment to incorporate the temporal dimensions of fairness. Griffiths highlights the central role of time to the framing of administrative systems but that this aspect has been overlooked by scholars examining the asylum system.¹⁵³ The present investigation, therefore, intends to help to fill the lacuna, at the same time contributing to what Grabham has identified as, 'growing interdisciplinary literatures on time and governance...to trace the productive force and specific qualities of diverse temporal horizons.'¹⁵⁴

The merit of adopting a normative approach is articulated by Sen. He acknowledges that, '...philosophy can...play a part in bringing more discipline and greater reach to reflections on values and priorities as well as on the denials, subjugations and humiliations from which human beings suffer across the world.'¹⁵⁵ While competing liberal-democratic fairness accounts exist, Rawls's famous original position is selected as the starting point of the inquiry due to the great prominence and influence of this thought experiment. The present study is limited to the asylum system and practice in England & Wales (rather than the whole of the United Kingdom) because the two regions share a common legal jurisdiction and legal aid system. Scotland, for example, shares the same asylum laws and tribunal system, but has

¹⁵³ Melanie B.E. Griffiths, 'Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees' (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991.

¹⁵⁴ Emily Grabham, 'Time and technique: the legal lives of the 26-week qualifying period' (2016) 45 (3-4) *Economy and Society* 379.

¹⁵⁵ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 413.

a separate legal aid system and professional legal tradition. The main limit of the empirical study is the small sample size. The findings are, therefore, non-representative. Nonetheless, interviews across participants revealed the significance of the temporal dimensions of fairness.

4. THESIS STRUCTURE: FAIRNESS IN PRINCIPLE AND FAIRNESS IN PRACTICE (A TURN TO TIME)

Split into two parts, both fairness in principle and fairness in the practice of asylum determination is explored. Part I, Exploring Fairness in Principle, begins with Chapter 2 and a study of fairness in historical context. This preparatory chapter considers the extent to which ‘fairness’ is evident in the historical design of the UK’s asylum adjudication regime. In 1905, within the context of the first extensive legislative restrictions on immigration (driven by anti-Semitism), there were calls by Liberals to ‘fairness’ to justify the establishment of a legal right to asylum and fair asylum procedures. These rights to asylum and to due process disappeared in 1914, as the executive relied upon the exigencies of war to bring asylum completely within the purview of the prerogative. Compelled by the discriminatory treatment of Commonwealth citizens, from 1969, asylum appeals developed as a branch of the immigration appeals system. As in 1905, the 1969 appellate system was established as a ‘fair’ concession to those subject to increased immigration control.¹⁵⁶ The purpose of the appeals system was to provide a sense of fairness, if not substantively fair outcomes. Despite long-standing concerns from refugee advocates about a right of appeal not being available to all asylum-claimants, a comprehensive in-country right of appeal in asylum cases was not introduced until as late as 1993. Once again, appellate oversight of all asylum decisions was heralded by restrictive immigration laws. Harsh measures were introduced in 1993 in the wake of a rise of asylum applications, a rise in asylum judicial reviews and, correspondingly, increased judicial activism. History did not fail to repeat itself. The expansion of appeal rights to all asylum claimants was offered as a compromise to maintain an appearance of fairness as other rights were taken away. Between 2004 and 2013, regardless of the increasing

¹⁵⁶ In 1967, the then Home Secretary, Mr Roy Jenkins, observed that the tougher immigration restrictions would ‘be acceptable to those directly affected by it and to public opinion generally only if its fair and impartial application is guaranteed by the existence of a procedure for resolving disputed cases which measures up to present-day standards of administrative justice.’ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd. 3387, 1967).

complexity of asylum law, and the appeals system becoming more judicialised, legal aid was significantly eroded. The dismantling of legal aid created advice deserts and encouraged inconsistent quality among the remaining providers. Post-2013, legal aid was further hollowed out and the hostile environment was formalised in legislation and exacerbated. Yet, the façade of fairness was maintained by ring-fencing asylum rights of appeal and eligibility for legal aid; available in principle, if not in practice.¹⁵⁷

In view of the role of ‘fairness’ in the development of the UK’s asylum adjudication regime, Chapter 3 investigates the normative underpinnings of fairness. Rawls’s fairness theory provides (as presented in a *Theory of Justice* and *Political Liberalism* and extended in *The Law of Peoples* to an international view) the theoretical heritage and centre-pole for discussion.¹⁵⁸ Chapter 3 critiques Rawls’s exposition of fairness, finding Rawls’s state-centred frame too narrow. Paradoxical to Rawls’s aims, the state-centred foundation of his thesis risks eclipsing the full interests of non-citizens, and therefore of asylum-seekers. Turning to the theories of Sen, Habermas and Benhabib for assistance, I challenge Rawlsian assumptions and develop an asylum-centric, rather than state-centric, account of fairness.¹⁵⁹ The value of this approach is that it tackles the inherent exclusionary nature of the Rawlsian design, while retaining Rawls’s normative presuppositions of fairness. This re-positioning reveals four essential fairness ‘pillars’, which provide a robust normative framework for analysing the empirical findings in the second part of the thesis.¹⁶⁰

In Part II, the thesis turns to consider time and temporalities within understandings of fairness. By investigating, in Chapter 4, how fairness materialises for asylum-claimants, the analysis reveals that the participants used expressions of time to convey feelings of (un)fair treatment. The predominant theme was excessive systemic delay and the sense of unfairly *doing time*. Unpicking this theme, reveals other temporal themes. The participants were aware that the administration controlled the clock, and of the tensions between administrative-legal time and their lived time(s). Administrative-legal time dominated, and the participants felt that their lived temporalities were not valued, exposing the theme of *unequal time*. The force of administrative-legal time also divided the participants from their pasts, their families, their new communities, their future ambitions, and from each other. In this way, the participants’ lived experience was also one of *severed time(s)*. The temporal

¹⁵⁷ See Chapter 2 discussion.

¹⁵⁸ John Rawls, *A Theory of Justice* (Oxford University Press 1973); *Political Liberalism* (Cambridge University Press 1996); and *The Law of Peoples* (Harvard University Press 1999).

¹⁵⁹ See section 3.2 of this Chapter regarding justification of theoretical choices.

¹⁶⁰ Listed at section 1 of this Chapter and discussed in Chapters 3 and 6.

categories within the empirical data drew my attention to the role of law in regulating time and temporalities in the asylum system. Conversely, the influence of time and temporalities upon conceptions of juridical fairness in the asylum system also became apparent.

Chapter 5 addresses the question of how the UK courts have interpreted fairness in asylum cases. The investigation found that time played a significant role in judicial commentary on fairness, locating unfair practice in terms of unfair time. Notably, the Court of Appeal found, in 2015, that the time limits in detained-fast-track (DFT) asylum appeals were structurally unfair and unlawful. This ruling illustrates how the courts are sensitive to the temporal dimensions of fairness.¹⁶¹ The former Master of Rolls, Lord Dyson, acknowledged the complexity and gravity of asylum appeals and that the procedural safeguards were insufficient to overcome the inherent unfairness caused by the strict timeframes of the DFT system.¹⁶² This case, and the string of litigation that led to and followed it, demonstrate how the courts and tribunals, repeatedly petitioned by civil society on behalf of asylum-seekers, are challenging unfair administrative-legal time rules.¹⁶³

Chapter 6, the final and concluding thesis chapter, ties together the threads of the theoretical, doctrinal and empirical inquiries. Using the asylum-centred pillars, developed in Chapter 3, temporal issues in the UK's asylum adjudication system are analysed. The analysis exposes the temporal gaps in Rawls's theory and concludes with a call for further study of the normative value(s) of time and temporalities in fair asylum processes in liberal democracies.

5. CONCLUSION AND THESIS CONTRIBUTION

As outlined so far, this thesis explores the concept of fairness within the context of the UK's asylum adjudication regime. The topic merits attention due to growing evidence of the harmful impacts of layers of deterrent asylum policies and expanding gaps in legal aid

¹⁶¹ *Lord Chancellor v Detention Action* [2015] EWCA Civ 840. Permission for the Government to appeal the decision to the Supreme Court was refused. However, the Ministry of Justice announced in April 2017 plans to implement a new fast-track system. Ministry of Justice and The Rt Hon Elizabeth Truss, *New fast-track immigration appeal rules proposed* Press Release (18 April 2017).

¹⁶² *Lord Chancellor v Detention Action* [2015] EWCA Civ 840 [37]-[45].

¹⁶³ *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin); *Detention Action v Secretary of State for the Home Department* [2014] EWCA Civ 1634; *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin); *R (JM and ors) v Secretary of State for the Home Department* [2015] EWHC 2331 (Admin); *R (TN (Vietnam) & US (Pakistan)) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin).

provision and asylum support services. UK asylum decisions are, increasingly, a lottery; characterised by excessive speed or excessive delay. Contributing to the discussion, this thesis puts asylum-claimants at the centre of the conversation about normative fairness in liberal democracies. This method enhances understanding by shedding light on the significance of time and temporalities within conceptions of juridical fairness. The distinct value of the thesis is, essentially, two-fold. First, the study challenges the Rawlsian approach to fairness, arguing for an asylum-centric view of fairness. Rawls's device is enlightened in shaping our understanding of fairness by requiring that we pursue the interests of the underprivileged as if they were our own. However, Rawls's device must be adjusted in order to fully explore the interests of asylum-claimants. The fresh asylum-centred perspective reveals the pillars of, what I call: situated, conscious impartiality, respect for human rights, social cooperation and caring and inclusive public reason.¹⁶⁴ The revision also forms part of the justification for seeking the empirical voices of asylum-claimants. Second, the empirical investigation exposes the temporal dimensions of fairness and the neglect of time and temporalities in liberal legal theory. For example, (un)fairness was found to manifest for the research participants where they experienced or observed *doing time*, *unequal time*, and *severed time(s)*. The finding of temporal fairness adds a second innovative layer to the re-worked Rawlsian view of fairness. Overall, the thesis argues for an asylum-centric and temporally sensitive approach to the normative question of fair adjudication. The next chapter begins the investigation by providing the historical context for discussion and analysis.

¹⁶⁴ The pillars are discussed in Chapters 3 and 6.

CHAPTER 2: FAIRNESS IN HISTORICAL CONTEXT: THE UK'S ASYLUM ADJUDICATION REGIME

*...it's not a safe place that I come from.*¹

*Why are they coming here? They need help.*²

1. INTRODUCTION

This chapter explores the concept of fairness from an historical perspective. The inquiry reviews the academic literature and Hansard records on the development of UK asylum law, tracing notions of fairness across the permeable line between international and domestic law.³ The UK is a particularly interesting site for the study of asylum law because the UK was a colonial power. The UK also played important roles in drafting the post-war instruments that founded the international asylum rights regime, namely, the 1948 Universal Declaration on Human Rights (UDHR), the 1950 European Convention on Human Rights (ECHR), and the 1951 Refugee Convention.⁴ Yet, a distinct asylum legal regime did not emerge domestically until the 1990s. The UK did not incorporate the Refugee Convention into domestic law until 1993 and did not incorporate the ECHR until 1998.⁵ Additional asylum rights were later given effect as part of European Union (EU) law, by virtue of the Common European Asylum System (CEAS),⁶ and the EU Charter of Fundamental Rights and Freedoms.⁷ The

¹ Yonas at p. 8 (Appendix 5).

² Mohammed 2 at p. 13 (Appendix 8).

³ 'Although legal scholarship traditionally separates the study of domestic and international law, historical scholarship can show just how artificial that separation is.' Alison Bashford and Jane McAdam, 'The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law' (2014) 32 Law and History Review 309, 314.

⁴ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI (adopted on 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights, as amended) (ECHR); Geneva Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

⁵ By virtue of the Immigration and Asylum Act 1993 and the Human Rights Act 1998.

⁶ Amongst the measures adopted, and of particular relevance to this thesis, are the Qualification Directive and the Procedures Directive, adopted as part of the 'first phase' of the CEAS to which the UK has opted in. The EU is currently in the third phase of the CEAS revised directives. The UK has not opted-in to the second phase or third phase instruments and only remains bound by the first-phase measures. Council Directive (EC) 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ 304/12 (Qualification Directive) and

contemporary UK asylum system consists of administrative and legal structures. This administrative-legal system is a complicated patchwork of volumes of legislative provisions, case law, Immigration Rules and policy documents.⁸ Jackson LJ has, accordingly, described the field as ‘an impenetrable jungle of intertwined statutory provisions and judicial decisions.’⁹ Likewise, Underhill LJ has expressed his ‘great sympathy for the applicants trying to find their way through the maze of immigration and asylum procedure (quite apart from the shameful complexities of the substantive law), which is all the more difficult if they are unrepresented...’.¹⁰ Reforms to asylum law and procedure have led practitioners and academics to question the fairness of the system.¹¹

The question that the chapter seeks to answer is, how have notions of fairness shaped the development of the UK’s asylum system? Both primary and secondary sources are included in the analysis. Five key time periods are used to aid the analysis, namely, the turn of the 20th century, the post-war era, the 1960s, the late 1980s and 1990s, and post-2013. This historical approach finds that, at the turn of the 20th century, notions of ‘fairness’ were expressed in framing asylum law and procedure.¹² The view of Liberal Parliamentary lawmakers was that asylum was a legal right, requiring fair legal process (namely, a right of appeal to an impartial adjudicator).¹³ This is significant because, subsequently, in the post-war era, the right to asylum was diluted considerably. Conferred upon the UK executive was virtually limitless administrative power over processing asylum claims. Fairness was, thus, conceptualised from a predominantly state-centric view from 1914. A right of appeal was reintroduced in the late 1960s to address the unfair discriminatory treatment of Commonwealth Citizens, some of whom were refugees. However, the issues of asylum and

Council Directive (EC) 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005], OJ L 326/13 (Procedures Directive).

⁷ Charter of Fundamental Rights of the European Union OJ C 364/1, 18 December 2000 (entry into force 1 December 2009) (EU Charter).

⁸ Immigration Act 1971, s 3(2) gives the Secretary of State the power to lay before Parliament the Immigration Rules, which are administrative rules that set out the regulation of the entry into and stay in the United Kingdom of persons required by the 1971 Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances.

⁹ *Sapkota v Secretary of State for the Home Department* [2011] EWCA Civ 1320, [127].

¹⁰ *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 424, [21].

¹¹ See, for example, Robert Thomas, who has observed that, ‘The appeal system must still seek to operate in accordance with legal principle but the consequence of these reforms has been to increase the difficulties in achieving fair and accurate decision-making.’ Robert Thomas, ‘Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals’ (2005) 25 *Legal Studies* 462,498.

¹² In the next Chapter, I explore the what fairness means in liberal democratic theory.

¹³ Independent ‘Immigration Boards’ were established under the Aliens Act 1905, s.2.

immigration were shackled together, and a separate system of asylum appeals was not established until the 1990s. The 1990s was also marked by the juridification of asylum.¹⁴ Juridification is defined by Jürgen Habermas as ‘the tendency toward an increase in formal (or positive, written) law’.¹⁵ The rapid growth of legislative measures in the field of asylum law has been heavily criticised as a legal technique for restricting rights.¹⁶ However, the concept of juridification includes judicialisation, that is, the expansion of judicial norms.¹⁷ In historical context, the phenomenon of judicialisation in asylum might be viewed, at least in part, in a positive light. Increased judicial oversight, and the growth of government-funded legal aid in the 1990s, saw the expansion of asylum rights in the UK. However, success in the courts contributed to the post-2013 agenda of ratcheting up the hostile environment, restricting access to justice for asylum-seekers.¹⁸

This chapter tracks the historical pendulum swing between asylum as the right of the individual and asylum as the right of the executive to grant (from asylum-centred to state-centred accounts of fairness). The concept of ‘asylum’ is not easy to define because there is no single, agreed meaning under international refugee law.¹⁹ The international legal debate about whether asylum is the sovereign right of the state to grant, or the human right of the individual to be granted, remains unresolved.²⁰ This chapter posits that historic tension in domestic UK law between these two rights is indicative of the problem of confusing asylum and immigration. The chapter further argues that domestic lawmakers, and drafters of applicable international and regional asylum law, constructed asylum as an individual legal

¹⁴ See, for example, Matthew J. Gibney, ‘The State of Asylum: Democratization, Judicialization and Evolution of Refugee Policy in Europe’, (2001) New Issues in Refugee Research Working Paper, No. 50.

¹⁵ Jürgen Habermas, *The Theory of Communicative Action: Vol. 2: The Critique of Functionalist Reason* (T. McCarthy tr, Polity Press 1987) 357.

¹⁶ See, for example, Sheona York, ‘Deportation of foreign offenders - a critical look at the consequences of Maaouia and whether recourse to common-law principles might offer a solution’ (2017) 31(1) *Journal of Immigration, Asylum and Nationality Law* 8, 17.

¹⁷ See, for example, Gavin Drewry, ‘The Judicialisation of ‘Administrative’ Tribunals in the UK: From Hewart to Leggatt’ (2009) 5(28) *Transylvanian Review of Administrative Sciences* 45.

¹⁸ See, for example, Rowena Moffatt and Carita Thomas, ‘And then they came for judicial review: proposals for further reform’ (2014) *Journal of Immigration, Asylum and Nationality Law* 237 and Sheona York, ‘The “hostile environment” – how Home Office immigration policies and practices create and perpetuate illegality’ (2018) 32(4) *Journal of Immigration, Asylum and Nationality Law* 363.

¹⁹ Patricia Tuitt, for example, refers to the concept of asylum in international refugee law as ‘somewhat elusive.’ Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (Pluto Press 1996) 105.

²⁰ Salvatore Fabio Nicolosi, ‘Re-conceptualising the right to seek and to obtain asylum in international law’ (2015) 44 *International Human Rights Law Review*. 303, 305.

right. The legal right to asylum, in turn, requires fair asylum procedures to assert that right before an impartial adjudicator.

2. TURN OF THE 20TH CENTURY

To guarantee asylum-seekers a ‘fair chance, and the same chance which was not denied to all persons in other Courts’,²¹ a legal right to asylum (from religious or political persecution), and a right of appeal against a decision to refuse a person seeking asylum entry, was introduced under the Aliens Act 1905.²² During this time period, the idea of fairness to asylum seekers was procedural and substantive. Fair asylum procedures were integral to the legal system to protect the substantive liberties of asylum-seekers (treated as equal subjects of the law). The inclusion of an asylum clause in 1905 is, however, surprising given that the Act is notorious for its racist exclusion of ‘aliens’.²³ The 1905 Act, introduced by Balfour’s Conservative-Liberal Unionist Government, was the first concerted endeavour to comprehensively regulate immigration. The Act granted the power to immigration officers to exclude from the UK ‘undesirable’ immigrants,²⁴ namely, those immigrants with insufficient means, ‘lunatic[s]’, ‘idiot[s]’, the ‘disease[d]’, the ‘infirm’, and criminals.²⁵ An exception to exclusion was seeking asylum.²⁶ As per the legislation, leave to enter was not to be refused ‘on the ground merely of want of means’ or ‘becoming a charge on the rates’, ‘in the case of an immigrant who proves that he is seeking admission to the country solely to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on account of religious belief’.²⁷ The terms ‘asylum’ or ‘refugee’ do not appear under the 1905 Act.

The implicit aim of the 1905 Act, however, was to stem the arrivals of Jewish immigrants fleeing the pogroms in Russia and Eastern Europe at the end of the nineteenth

²¹ HC Deb 03 July 1905 vol 148 cols 797-798, per Mr Churchill.

²² Aliens Act 1905, that repealed the Registration of Aliens Act 1836, and entered into force on 1 January 1906.

²³ Bridget Anderson differentiates between ‘subjects’, ‘foreigners’, ‘aliens’, and ‘migrants’, in contrast to British ‘citizens’. She argues that these are value laden (in terms of race and politics) categories and not, simply, legal categories. Bridget Anderson, *Us & Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 29.

²⁴ Aliens Act 1905, s 1(3).

²⁵ Aliens Act 1905, s 1(3).

²⁶ Aliens Act 1905, s 1(3).

²⁷ Aliens Act 1905, s 1(3).

century.²⁸ The Act has been widely criticised as being an example of British anti-Semitism, founded upon the ‘superstition of race’ and ‘the search for politically profitable protectionism’.²⁹ As the number of unwanted Jews arriving rose in the late 19th century, anti-immigration rhetoric grew, and ‘there cascaded an avalanche of pamphlets, articles and books directed against the alien immigrant.’³⁰ It was claimed that the influx of aliens ‘significantly affected the balance in the struggle against the problems of housing and unemployment’ in the East End of London.³¹ Concerns of anti-Semitism were voiced in 1904 by Liberal parliamentarians during the passage of the Aliens Bill. For example, Mr Trevelyan deplored the ‘frankly anti-Semitic movement’ among many of the public and some members of the House.³² He believed the Bill to be ‘an evil step in the same direction as the Governments of Russia and Roumania’.³³

As the Aliens Bill was introduced, Sir Charles Dilke explained that he opposed the Bill because it would be used ‘to exclude from this country people whom we shall afterwards be ashamed we have excluded.’³⁴ Dilke was afraid that the proposed regulations bestowed ‘dangerous powers’ upon the Home Secretary against Jews, who ‘were the helpless victims of political and religious persecution.’³⁵ Prior to 1905, there had been *ad hoc* legislative regulation of immigration to the UK, as ‘the Aliens Acts were repeatedly repealed and re-introduced in amended form’.³⁶ Bashford and McAdam observed that ‘[t]here was no comprehensive system of regulation, registration, or even of registration of entrants in Britain, notwithstanding the Registration of Aliens Act 1836, a statute so thinly implemented,

²⁸ Peter Tompkins, ‘Immigration: Governments and Lawyers on a Collision Course’ (1995) 17 *Loyola of Los Angeles International and Comparative Law Review* 891.

²⁹ C. H. R. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25 *Modern Law Review* 654, 657, citing Arnold White, *The Destitute Alien in Great Britain: A Series of Papers Dealing with the Subject of Foreign Pauper Immigration* (Swan Sonnenschein & Co. 1892) 2; Bernard Semmel, *Imperialism and Social Reform: English Social-Imperial Thought, 1895-1914* (George Allen & Unwin 1960) 116; and Lloyd P. Gartner, *The Jewish Immigrant in England, 1870-1914* (Allen & Unwin 1960) 278.

³⁰ C. H. R. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25 *Modern Law Review* 654, 656.

³¹ C. H. R. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25 *Modern Law Review* 654, 657.

³² HC Deb 25 April 1904 vol 133 cols 1082-1083.

³³ HC Deb 25 April 1904 vol 133 cols 1082-1083.

³⁴ HC Deb 29 March 1904, vol 132 cols 993-994.

³⁵ HC Deb 29 March 1904, vol 132 cols 992-995. Dilke later highlighted that, ‘the Jews are victims of persecution in a more peculiar degree than any persons in Russia, because in Russia other people have not been burned alive, or hunted through their towns as the Jews have been’. HC Deb 25 April 1904 vol 133 1071-1072.

³⁶ Beginning with the enactment of the Aliens Act 1793. See Dallah Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 23.

if at all, that by the end of the century it had been more or less forgotten.’³⁷ The 1905 Act, thus, symbolised closing the door on immigration while keeping the window to asylum open, or at least ajar.

Demonstrative of the political quarrel that took place during the passage of the Bill, the 1905 Act reads as an expression of both xenophobia and liberalism.³⁸ It was thanks to strong opposition from the Liberal party that the exemption to immigration control for those seeking religious or political asylum was conceded and codified in the statute. From the political tensions embodied in the Act, emerged the recognition of the significance of legal right and fair process in asylum cases (the issue of fair process is discussed in more detail below). As highlighted above, the Act gave immigration officers the power to refuse entry to ‘undesirable’ aliens. However, alongside the ‘apparent end of open-door immigration’,³⁹ the Act provided, for the first time, an individual right to asylum. Under section 1(3)(d) of the 1905 Act, political and religious asylum seekers were not to be refused entry for mere reason of being poor. The exemption read:

...in the case of an immigrant who proves that he is seeking admission to this country solely to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on account of religious belief, leave to land shall not be refused on the ground of merely of want of means, or the probability of his becoming a charge on the rates...

There is scholarly disagreement over the scope of the right to asylum under the 1905 Act (and more generally regarding the scope of the right to asylum under international law). Over whether the right to asylum under section 1(3)(d) included both a right *to seek asylum* and a right *to be granted asylum*. Bashford and McAdam have argued that section 1(3)(d) amounts to a right to be granted asylum. They contend that the ‘mandatory language of the Act – “leave to land shall not be refused” – transformed the state’s discretion to turn away certain persons from the border into a right of entry for those fleeing religious persecution or political offences.’⁴⁰ However, the extent of the right to asylum under the 1905 Act is

³⁷ Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309, 314.

³⁸ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 23.

³⁹ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 39.

⁴⁰ Bashford and McAdam find that the 1905 asylum clause represented a ‘high water-mark’. They argue that the inclusion of the asylum clause under the 1905 Aliens Act was significant both

debatable as the Home Secretary retained considerable control under the legislative framework. It was the job of immigration officers, under section 1, to decide who the refugee exception applied to and for Immigration Boards to hear appeals. Yet, under section 6(1), the Home Secretary retained control over the appointment of immigration officers and the Boards, and was responsible, under section 2, for setting-out the decision-making rules. Notwithstanding the Home Secretary's powers under the Act, Wray has highlighted the limits to entry control because they:

...applied only to ships carrying more than twenty alien steerage (that is, third-class) passengers. First- and second-class passengers were exempt from control...[and] The statutory recognition of a right to asylum was described at the time as the 'most comprehensive declaration of the right to asylum that is to be found in the whole range of municipal legislation, not merely in the history of this country, but throughout the civilised world'.⁴¹

Wray, therefore, concludes that the 'overt recognition of the right to claim asylum', under section 1(3)(d), was another indication of the 'political ambivalence in restricting entry'.⁴² Despite the nuances of the debate, clearly, the explicit legal exemption for refugees under section 1(3)(d) curtailed the discretion of the Home Secretary. During the parliamentary debate of the Bill, Mr Asquith expressed the want for an asylum definition that was sufficiently wide and 'elastic' to protect 'victims of social and political prejudices...in the future, as in the past'.⁴³ The UK's lauded tradition of granting asylum to the persecuted was preserved, not tokenistically, but in a meaningful way.

Sir Thomas Erskine May noted that, historically, it 'has been a proud distinction for England to afford an inviolable asylum to men of every rank and condition, seeking refuge on her shores, from persecution and danger in their own lands.'⁴⁴ Thornberry cited the following as nostalgic evidence of the UK's ancient liberal traditions of free-movement and hospitality towards refugees:

domestically and internationally. They point out that the 'Aliens Act was itself regarded at the time as a "domestication" of international law' and that '[i]t was also an important domestic antecedent to modern international refugee law.' Alison Bashford and Jane McAdam, 'The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law' (2014) 32 *Law and History Review* 309, 311-314.

⁴¹ Helena Wray, 'The Aliens Act 1905 and the Immigration Dilemma' (2006) 33(2) *Journal of Law and Society* 302, 312, citing N.W. Sibley and A. Elias, *The Aliens Act and Right of Asylum* (1906) 130, quoted in P. Shah, *Refugees, Race and the Concept of Asylum* (2000), p. 36.

⁴² Helena Wray, 'The Aliens Act 1905 and the Immigration Dilemma' (2006) 33(2) *Journal of Law and Society* 302, 312.

⁴³ HC Deb 02 May 1905 vol 145 cols 743-744.

⁴⁴ Thomas Erskine May, *Constitutional History of England, Vol. 3* (Longman 1878) 50.

England was a sanctuary to the Flemish refugees driven forth by the cruelties of Alva; to the Protestant refugees who fled from the persecutions of Louis XIV; and to the Catholic nobles and priests who sought refuge from the bloody guillotine of revolutionary France. All exiles from their own country whether they fled from despotism or democracy, - whether they were kings discrowned, or humble citizens in danger, - have looked to England as their home. Such refugees were safe from the dangers which they had escaped. No solicitation or menace from their own government could disturb their right of asylum; and they were equally free from molestation by the municipal laws of England.⁴⁵

James C. Hathaway attributes this open door policy to asylum-seekers in the medieval era to a 'universalist political philosophy', which 'continued during the era of liberalism, both as an acknowledgment of individual liberties and as a means of promoting communal enrichment.'⁴⁶ Yet, these historic open-door asylum practices tend to be overstated. For example, the French Huguenots of the 17th century did not receive an entirely welcoming reception and were not granted permanent residence. The Huguenots kept the status of foreigner, rather than being considered 'subjects'. The Huguenots, therefore, only had limited 'rights'.⁴⁷ The Aliens Act 1793 was the first major piece of immigration legislation and was enacted in light of the exodus caused by the French Revolution. Reflecting the societal norms of the time, the 1793 Act was aimed at restricting entry to Jacobins (considered a security threat) and to the poor. The narrative of the UK's tradition of generosity towards asylum-seekers that supported inclusion of the liberal asylum clause was lore. Throughout the UK's history are examples of exclusion and intolerance towards those perceived as 'alien', 'other', 'foreigner', or 'outsider'.⁴⁸ Notably, however, the liberal tradition of asylum was interpreted in 1803 to extend beyond free-movement and to humanitarian relief. Lord Ellenborough attested to this in the 'Inhabitants of Eastbourne case' (1803), when he commented:

As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save

⁴⁵ C. H. R. Thornberry, 'Dr Soblen and the Alien Law of the United Kingdom' (1963) 12 *International and Comparative Law Quarterly* 414, 416, Thomas Erskine May, *Constitutional History of England*, Vol. 3 (Longman 1878) 50.

⁴⁶ James C. Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31(1) *Harvard International Law Journal* 129, 134-135.

⁴⁷ Later made 'denizens', which entitled them to more rights but less than 'subjects'. Bernard Cottret *The Huguenots in England: Immigration and Settlement C.1550-1700* (Cambridge University Press 1991) 53.

⁴⁸ 'Such exclusion and intolerance were particularly visible in medieval England in the form of persecution and expulsions. [...] The group to suffer most were the Jews.' Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell, 2004) 3.

them from starving; and those laws were only passed to fix the obligation more certainly, and point out distinctly in what manner it should be borne.⁴⁹

Notwithstanding, Bashford and McAdam argued that, from an international perspective, the codification of an individual and mandatory right to asylum in the 1905 Act was ‘highly unusual’ and of great significance in the history and development of international refugee law.⁵⁰ The spirit of the 1905 asylum clause is echoed in the 1951 Refugee Convention.⁵¹ However, Stevens observes the more problematic legacy of the 1905 Act. She highlights that the 1905 Act framed asylum as an exception to immigration control, thereby linking the issues, which ‘would prove damaging to future asylum seekers.’⁵² Indeed, this chapter’s analysis shows that subsuming asylum law within immigration law has allowed the retreat to state-centred notions of fairness.

As noted, in addition to a legal right to asylum, the 1905 statutory framework introduced a legal right of appeal.⁵³ The Liberals criticised the original Bill because, as explained by Mr Asquith, ‘It vested in the Home Secretary executive power, by his own act, without the protection of any preliminary judicial investigation, without any regard to any law of evidence, which is the safeguard of our liberties, to refuse admission to alien immigrants and to expel them from this country.’⁵⁴ As such, to uphold these values associated with liberal ‘fairness’, a right of appeal was codified. The Immigration Board created under the 1905 Act was an independent tribunal comprised of three laypersons, appointed by the Secretary of State, with ‘magisterial, business, or administrative experience’.⁵⁵ Concerns were raised in debate during the passage of the Bill that procedural unfairness was created by placing the onus of proof upon the immigrant in disputes before the Immigration Board.⁵⁶ However, the final Act placed the evidential burden on asylum-claimants and on persons

⁴⁹ *R v Inhabitants of Eastbourne* (1803) 4 East 103.

⁵⁰ Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309, 336.

⁵¹ Discussion of the 1951 Refugee Convention is returned to in this Chapter, below.

⁵² Dallah Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 42.

⁵³ To an immigration board against a decision of an immigration officer to refuse entry at port. Aliens Act 1905, s 1(2). A right of appeal had also existed under the Aliens Act 1793.

⁵⁴ HC Deb 02 May 1905 vol 145 cols 742-743.

⁵⁵ Aliens Act 1905, s 2(1).

⁵⁶ As highlighted above, Mr Churchill, sympathetic to this view, stated that those before the immigration board ‘ought to have a fair chance, and the same chance which was not denied to all persons in other Courts.’ HC Deb 03 July 1905 vol 148 cols 797-798.

excluded as ‘undesirable’.⁵⁷ The procedure rules were ultimately determined by the Secretary of State but the 1905 Act stipulated that notice of the right of appeal must be issued together with notice of the grounds on which leave to enter had been refused.⁵⁸ Any question arising on appeal over the interpretation of the terms used in the 1905 Act was to be referred by the Immigration Board to the Secretary of State.⁵⁹

Campbell-Bannerman’s Liberal government, who took power in 1906, did not repeal the 1905 Act but sought to enforce its immigration controls liberally.⁶⁰ Gladstone, the Home Secretary, recognised that ‘the statements of a man claiming to be a political or religious refugee may be insufficient or inaccurate’.⁶¹ Gladstone directed immigration officers and appellate boards to afford refused asylum-seekers the ‘benefit of the doubt’, in order to avoid the possibility of ‘cruel hardship’ or ‘serious risk from political causes’.⁶² In practice, however, asylum appellants were rarely given the benefit of the doubt.⁶³ Contrary to concerns that liberal implementation would result in ‘crowds of undesirable aliens’, statistics showed that asylum was granted to a very small number of claimants.⁶⁴ The majority of successful claimants, arriving in 1906, were Jewish refugees from Russia.⁶⁵ Geoffrey Care describes how the Immigration Board’s ‘comprehension of asylum seems to have been worse than dangerous and their decision could not be reviewed by the courts.’⁶⁶ The lack of understanding was not helped by the fact that appellants were often absent from proceedings, having not been told the hearing date.⁶⁷ The use of interpreters was rare, so appellants were

⁵⁷ Aliens Act, 1905, ss 1(3) and 7(5). See, also, Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309, 327.

⁵⁸ Aliens Act 1905, s 2(2).

⁵⁹ Aliens Act 1905, s 8(4).

⁶⁰ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 40.

⁶¹ Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309, citing the Memorandum to the Members of Immigration Boards, March 9, 1906, TNA HO 45/10326/131787/9.

⁶² Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309, citing the Memorandum to the Members of Immigration Boards, March 9, 1906, TNA HO 45/10326/131787/9.

⁶³ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 7-8.

⁶⁴ ‘The number of immigrants admitted on the sole ground that they were political or religious refugees during the five years was 603, of whom 505 were admitted in 1906 (the year of very disturbed conditions in Russia), 43 in 1907, 20 in 1908, 30 in 1909, and 5 in 1910.’ Home Office, *Annual Report for the Aliens Act 1905* (Cd. 5789, 1910).

⁶⁵ Home Office, *Annual Report for the Aliens Act 1905* (Cd. 5789, 1910).

⁶⁶ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 7.

⁶⁷ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 7.

unlikely to understand the proceedings even if present.⁶⁸ The right to counsel was confirmed in 1910 but only at the appellant's own cost.⁶⁹ Despite these defects, a significant proportion of appeals succeeded.⁷⁰ This demonstrates the significance of a legal right to asylum and right of appeal in tempering, at least somewhat, the political and racial biases of immigration controls and practices. The historic situation in the early 20th century interestingly mirrors today's system, with the hollowing out of legal aid and the reliance on appeals for fairer decisions. These issues will be returned to later in this thesis.

From 1914, there was a retreat from the 'liberal' fairness values extolled under the 1905 Act. The right to asylum and the right of appeal to an independent tribunal were removed in 1914, alongside the outbreak of the First World War and the implementation of the Aliens Restriction Act 1914.⁷¹ From 1914 until 1969, the Home Secretary exerted complete discretionary power over the admittance to and removal from the UK of 'aliens'.⁷² A 'fair' asylum system was thus constructed as state-centred, administrative expediency. However, the absence of judicial oversight provoked Colin Harvey to later observe that, 'the pre-1960s history of the regulation of immigration and asylum reveals a remarkable void in legal protection.'⁷³ Anticipating this historical review, Vivian St. Clair Mackenzie, in 1918, mused that, '[a]ny future historian...will point, no doubt with surprise, to the unlimited powers which a democratic Parliament, wittingly and unwittingly, conferred upon the Executive.'⁷⁴ The 1919 Aliens Restriction (Amendment) Act and the Aliens Order extended the 1914 wartime powers.⁷⁵ In 1919, during the second reading of the Aliens Restriction Bill, Colonel Wedgwood strongly objected to the Bill and pleaded 'in favour of the old British traditions of *fair play*, justice and liberty.'⁷⁶ Sir Donald Maclean also warned against

⁶⁸ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 7.

⁶⁹ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 8.

⁷⁰ 'In 1906, 935 people were excluded and 796 appeals heard, of which 442 succeeded; in 1910, there were 1,066 people excluded, and 432 appeals, of which 144 were successful.' Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 8.

⁷¹ 'The Act of 1914 went through all its stages and received the Royal Assent in one day on the outbreak of war'. C. H. R. Thornberry, 'Law, Opinion and the Immigrant' (1962) 25 *Modern Law Review* 654, 657.

⁷² The Aliens Restriction Act 1914.

⁷³ Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths 2000) 155.

⁷⁴ V. St. Clair Mackenzie, 'The Royal Prerogative in War-Time' (1918) 34 *Law Quarterly Review* 152.

⁷⁵ The 1919 Act was 'introduced into a climate of extreme economic hardship and social upheaval and acute xenophobia', C. H. R. Thornberry, 'Law, Opinion and the Immigrant' (1962) 25 *Modern Law Review* 654, 657. Thornberry notes that there were race riots in 1919 in Cardiff and in other seaports throughout the country. C. H. R. Thornberry, 'Law, Opinion and the Immigrant' (1962) 25 *Modern Law Review* 654, 659.

⁷⁶ HC Deb 15 April 1919 vol. 114 cols 2791-2792 (emphasis added).

wrecking the ‘noble tradition’ of asylum by ‘any gust of popular passion.’⁷⁷ However, these pleas were met with stark condemnation of asylum-seekers, the ancient institution of asylum, and the mandatory asylum provision under the 1905 Act. Mr Horatio Bottomley asserted that, ‘[w]e do not want in these days, when clearing up a great world tragedy which has brought us to the brink of bankruptcy and ruin, to indulge in copy-book maxims about the rights of refugees. We have been the dumping ground for the refugees of the world for too long.’⁷⁸ Bottomley’s exaggerated rhetoric prevailed and the Home Secretary was given ‘virtually limitless’ powers under the Aliens Order to refuse admission to aliens, including asylum-seekers, or to send them away.⁷⁹ The continuation of the 1914 and 1919 admission and deportation provisions, far beyond the existence of any emergency, has been described as ‘not very far short of a national scandal and a disgrace’.⁸⁰ Asylum-seekers between 1914 and 1969 were subjected to the unlimited exercise of the prerogative, rather than the values of ‘fair play’ that had applied to asylum-seekers from 1905.

A statutory right of appeal against immigration decisions was not re-introduced until 1969. This was an incredibly long time after the emergency of 1914 had subsided.⁸¹ During this period, there was a ‘short-lived’ Committee, appointed in 1932, which provided an adversarial judicial process for aliens to give reasons why they should not be deported.⁸² However, the Committee existed for only four years before being disbanded.⁸³ It was not until as late as 1993 that a specific right of appeal from refusal of asylum decisions was enacted.⁸⁴ The reluctance to extend appeal rights to asylum-seekers can be viewed as a consequence of tying asylum to immigration and placed at the whim of administrative convenience. The Home Office was also concerned that ‘spurious’ applicants would abuse the appeal system to prolong residence and evade deportation.⁸⁵ However, the introduction of appeal rights for all asylum-seekers was only conceded alongside the introduction of restricted time limits for appeals certified as ‘manifestly unfounded’ by the Home

⁷⁷ HC Deb 15 April 1919 vol 114 cols 2759-2760.

⁷⁸ HC Deb 15 April 1919 vol 114 cols 2762-2763.

⁷⁹ C. H. R. Thornberry, ‘Dr Soblen and the Alien Law of the United Kingdom’ (1963) 12(2) *International and Comparative Law Quarterly* 414, 432.

⁸⁰ C. H. R. Thornberry, ‘Dr Soblen and the Alien Law of the United Kingdom’ (1963) 12(2) *International and Comparative Law Quarterly* 414, 474.

⁸¹ Geoffrey Care, ‘The Judiciary, the State and the Refugee: the Evolution of Judicial Protection in Asylum – A UK Perspective’ (2004-2005) 28 *Fordham International Law Journal* 1421, 1429.

⁸² Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 9.

⁸³ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 9.

⁸⁴ Asylum and Immigration Appeals Act 1993.

⁸⁵ Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (Pluto Press 1996) 134.

Secretary.⁸⁶

In addition to providing comprehensive appeal rights to asylum-seekers, the 1993 Act asserted the primacy of the 1951 Refugee Convention.⁸⁷ Like the 1905 Act, the 1993 protected the substantive and procedural legal rights of refugees. An enduring legacy of the 1905 Act is the enshrining of the liberal principles of the right to asylum and the right to a fair hearing. However, another legacy of the 1905 Act is that it tied the issue of asylum to the issue of immigration and sovereign control of borders.⁸⁸ The coupling of asylum and immigration risked a state-centred approach over an asylum-centred approach. Illustrated by the post-1914 period, history testifies to the danger of unchecked power being exerted by the executive over asylum-claimants. From 1905, liberal fairness ebbed and flowed as the executive expanded and relinquished power over asylum determination.⁸⁹

3. THE POST-WAR ERA

The struggle between asylum-centred accounts of fairness and state-centred accounts of fairness continued throughout the post-war period, at the domestic and international levels. In the wake of the Second World War, the international community committed to developing frameworks to protect refugees. The late 1960s heralded the expansion of the international refugee rights regime (removing the temporal and geographical restrictions of the 1951 Refugee Convention) against the background of decolonisation and the emergence of new refugee crises.⁹⁰ Domestically, during this period, the re-institution of an immigration appeals system, modelled on the Canadian system, was considered necessary in the light of the unfair and racially discriminatory treatment of Commonwealth immigrants (some of whom were refugees).

In the aftermath of the Second World War, and the mass displacement that had resulted, the right to seek asylum was recognised and enshrined in international law by virtue

⁸⁶ See Chapter 5 for discussion.

⁸⁷ Asylum and Immigration Appeals Act 1993, s 2.

⁸⁸ Dallah Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell, 2004) 42.

⁸⁹ See, also, Alison Bashford and Catie Gilchrist, 'The Colonial History of the 1905 Aliens Act' (2012) 40(3) *The Journal of Imperial and Commonwealth History* 409, for discussion regarding the important role played by colonial immigration restriction laws played in the passing of the 1905 Aliens Act.

⁹⁰ With the adoption of the 1967 Protocol. Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol).

of the 1948 Universal Declaration of Human Rights (UDHR). Article 14 UDHR declares that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution’.⁹¹ This is a watered-down statement of a right to asylum when compared to the 1905 asylum clause, yet it remains ‘the sole normative reference [of a right to asylum] at the universal level.’⁹² Unlike the asylum provision under the 1905 Aliens Act, Article 14 UDHR is not legally enforceable. It does not expound a mandatory right of the individual to asylum. Rather, the provision is declaratory and reinforces the norm that it is the prerogative of the state to grant asylum.⁹³ Writing in 1949, Felice Morgenstern observed that ‘as a matter of [UK] policy, refugees are not sent back to their home state’.⁹⁴ However, it lay within the complete discretion of the Home Secretary to grant asylum and asylum-seekers could not appeal against refusals.

During the drafting negotiations of the UDHR, the UK downplayed its past commitment to an individual right to asylum under the 1905 Act, and ‘a British-driven amendment to the draft UDHR undid such a right’.⁹⁵ The Drafting Committee of the UDHR set up a temporary working group.⁹⁶ Their discussions were based upon an International Bill of Human Rights drafted by the UK.⁹⁷ There was no mention of asylum within this document. The inclusion of the ‘sacred’ right to asylum was sponsored subsequently.⁹⁸ However, the drafters had trouble agreeing the wording as they wavered between the

⁹¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR) article 14.

⁹² Salvatore Fabio Nicolosi, ‘Re-conceptualising the right to seek and to obtain asylum in international law’ (2015) 4(2) *International Human Rights Law Review*, 306.

⁹³ Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309, 313.

⁹⁴ Felice Morgenstern, ‘The Right of Asylum’ (1949) 26 *British Yearbook of International Law* 327, 348.

⁹⁵ Alison Bashford and Jane McAdam, ‘The Right to Asylum: Britain’s 1905 Aliens Act and the Evolution of Refugee Law’ (2014) 32 *Law and History Review* 309, 343, and Felice Morgenstern, ‘The Right of Asylum’ (1949) 26 *British Yearbook of International Law* 327, 337.

⁹⁶ Comprised of representatives from France (René Cassin), Lebanon (Charles Malik), and the UK (Geoffrey Wilson), and the Chairman (Eleanor Roosevelt).

⁹⁷ See UN Doc. E/CN.4/AC.1/4 Text of Letter From Lord Dukeston, the United Kingdom Representative on the Human Right Commission, to the Secretary-General of the United Nations: 05/06/1947 and UN Doc. E/CN.4/AC.1/4/ADD.1 International Bill of Rights: Proposals/Submitted by the United Kingdom Representative on the Drafting Committee: 18/06/1947.

⁹⁸ The inclusion of a right of asylum was sponsored subsequently by Dr Malik (Lebanon) and Dr Chang (China). Dr Malik considered that the principle of ‘political asylum is something sacred and ought to be preserved in the community of nations.’ Prof. Cassin (France) also suggested that the Committee might consider and discuss ‘certain so-called international rights’, such as the ‘right to asylum’. See UN Doc. E/CN.4/AC.1/SR.4 4th Meeting, Thursday, 12 June 1947: 13/06/1947, 9 and UN Doc. E/CN.4/AC.1/SR.5 5th Meeting, Thursday, 12 June 1947: 17/06/1947, 3.

individual's right to asylum and the right of the State to grant asylum.⁹⁹ At the end of 1947, in the report of the working group, at the stage of the second session of the Commission on Human Rights, the draft Article on the right of asylum read: 'Everyone shall have the right *to seek and be granted* asylum from persecution...'¹⁰⁰ The words 'and be granted' were inserted further to submissions made by the International Organization of Christian Trades and Unions and the International Refugee Organization (IRO), who found the expression 'to seek asylum' insufficient in expressing the right of a persecuted individual.¹⁰¹ Disregarding these concerns, the UK representative, Lord Dukeston, proposed that the original text should be restored.¹⁰² Lord Dukeston considered that 'some countries might be incapable of absorbing large numbers of refugees and...the State should have the right, for any reason considered right and proper, to refuse to grant asylum.'¹⁰³ However, Prof. Cassin 'felt that it was a humanitarian duty for a State to grant asylum to refugees' and that Members of the Commission should 'give an example in that respect to the rest of the world.'¹⁰⁴ The UK's proposed amendment was rejected.¹⁰⁵ Momentarily, the values of fairness expressed within the asylum clause under the 1905 Aliens Act prevailed.

However, the UK persisted in trying to dilute the obligations upon States and proposed a further amendment to the text, namely, that: 'Everyone shall have the right to seek and *may* be granted asylum from political, racial and religious persecution.'¹⁰⁶ Miss Sender of

⁹⁹ Mr Harry (Australia) submitted that the provision 'should be formulated from the point of view of human rights rather than the rights of the State'. Dr Chang considered that the Declaration should include 'the individual's right to asylum and the State's right to grant asylum'. See UN Doc. E/CN.4/AC.1/SR.5 5th Meeting, Thursday, 12 June 1947: 17/06/1947, 3; UN Doc. E/CN.4/AC.1/SR.9 9th Meeting, Wednesday, 18 June 1947: 03/07/1947, 8; UN Doc. E/CN.4/AC.1/SR.13 13th Meeting, Friday, 20 June 1947: 08/07/1947, 11.

¹⁰⁰ UN Doc. E/CN.4/56 Report of the Working Party on An International Convention on Human Rights: Commission on Human Rights, 2nd Session: 11/12/1947, 9 (emphasis added).

¹⁰¹ UN Doc. E/CN.4/56 Report of the Working Party on An International Convention on Human Rights: Commission on Human Rights, 2nd Session: 11/12/1947, 9.

¹⁰² 'Everyone has the right to escape persecution on grounds of political or other beliefs or on grounds of racial prejudice, by taking refuge on the territory of any State willing to grant asylum'. UN Doc. E/CN.4/SR.37 Summary Record of 37th Meeting, Held on Saturday, 13 December 1947: 13/12/1947, page 9.

¹⁰³ UN Doc. E/CN.4/SR.37 Summary Record of 37th Meeting, Held on Saturday, 13 December 1947: 13/12/1947, 9.

¹⁰⁴ UN Doc. E/CN.4/SR.37 Summary Record of 37th Meeting, Held on Saturday, 13 December 1947: 13/12/1947, 10.

¹⁰⁵ UN Doc. E/CN.4/SR.37 Summary Record of 37th Meeting, Held on Saturday, 13 December 1947: 13/12/1947, 10.

¹⁰⁶ UN Doc. E/CN.4/82/ADD.9 Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation: 10/05/1948, 5. Notably, the inclusion of the term 'racial' to this definition develops the asylum definition under the 1905 Act (which was limited to political and religious persecution).

the American Federation of Labor submitted that the phrase ‘may be granted’ deprived the article of ‘any real value.’¹⁰⁷ Mr Bienenfeld of the World Jewish Congress pointed out that the UK, alongside other states, ‘had been generous in providing homes for many Jewish refugees before and during the last war’ and, therefore, ‘it was difficult to believe that the representatives in the Commission would oppose the inclusion of the right to asylum.’¹⁰⁸ As a result of the submissions made by these NGOs, the text, ‘Everyone shall have the right to seek and be granted asylum from persecution...’, was reinstated.¹⁰⁹ Mr Wilson pointed out that the discussions revealed the difficulty reconciling, on the one hand, control over immigration as ‘one of the most jealously guarded rights of sovereign states’ and, on the other, the right of every person ‘to escape and seek asylum from persecution.’¹¹⁰ Indeed, the tension between these two moral and legal norms continued to influence the discussions of the representatives and delegates.

The UK continued to strongly resist the inclusion of a right to asylum. At the third committee of the General Assembly, the UK was only willing to guarantee that ‘any persecuted person asking it for refuge would be treated with sympathy.’¹¹¹ Mrs Corbet, the UK delegate, felt that a right to asylum was ‘contrary to almost all existing immigration laws’ and maintained that it was ‘the right of every State to offer refuge’.¹¹² As such, the following amendment was put forward by the UK: ‘Everyone has the right to seek, and to enjoy in other countries, asylum from persecution.’¹¹³ The UK managed to secure enough support for this amendment and the final text included the aforementioned words.¹¹⁴ Prof. Cassin considered it ‘a mistake...to recognize the individual’s right to seek asylum while neither imposing upon States the obligation to grant it nor invoking the support of the United Nations.’¹¹⁵ This error permitted the conflation of asylum and immigration, erasing the 1905 asylum clause.

¹⁰⁷ UN Doc. E/CN.4/SR.56 56th Meeting, Held on Wednesday, 2 June 1948: 04/06/1948, 7.

¹⁰⁸ UN Doc. E/CN.4/SR.56 56th Meeting, Held on Wednesday, 2 June 1948: 04/06/1948, 7.

¹⁰⁹ UN Doc. E/CN.4/SR.57 57th Meeting, Held on Thursday, 3 June 1948: 07/06/1948, 11.

¹¹⁰ UN Doc. E/CN.4/SR.57 57th Meeting, Held on Thursday, 3 June 1948: 07/06/1948, 3.

¹¹¹ UN Doc. A/C.3/SR.121 121st Meeting, held on Wednesday, 3 November 1948: 01/01/1948, 330.

¹¹² UN Doc. A/C.3/SR.121 121st Meeting, held on Wednesday, 3 November 1948: 01/01/1948, 330-331.

¹¹³ UN Doc. A/C.3/SR.121 121st Meeting, held on Wednesday, 3 November 1948: 01/01/1948, 330.

¹¹⁴ France did not agree with ‘the restrictive conception embodied in the words “to enjoy” in the United Kingdom amendment’ and considered that this ‘unduly weakened the article’. However, Prof. Cassin ultimately voted in favour of the amended text, ‘imperfect as it was, because it was essential for the declaration to contain an article dealing with the right of asylum.’ UN Doc. A/C.3/SR.122 122nd Meeting, held on Thursday, 4 November 1948: 01/01/1948, 342, 345 and 347.

¹¹⁵ UN Doc. A/C.3/SR.122 122nd Meeting, held on Thursday, 4 November 1948: 01/01/1948, 347.

At this juncture, it is important to highlight that, in the early 1950s, the UK was among the first signatories of the 1950 European Convention on Human Rights and the 1951 Refugee Convention, having played key roles in drafting both Conventions.¹¹⁶ The Conventions provide the modern framework for refugee and humanitarian protection in the UK. These instruments were negotiated in the aftermath of the Second World War, within a universal human rights paradigm, and as part of the international effort to avoid any repeat of the horrors of Nazism and Fascism in Europe. Lucy Mayblin observes that ‘negotiations around the Refugee Convention, specifically around the refugee definition and the territorial applicability of the refugee convention heavily drew upon the UDHR, as well as the already existing rules governing the European focused International Refugee Organisation.’¹¹⁷ Indeed, the Convention embodies an ‘individuated conception of refugeehood’ that assists ‘persons whose basic human rights [are] jeopardized.’¹¹⁸ There is no explicit reference to a right to asylum in the 1951 Convention text. However, there is an implicit right to asylum in the Convention, as well as the right of an asylee to a form of legal appeal. The *travaux préparatoires* refer explicitly to the ‘sacred’ right of asylum, ‘one of the oldest human rights’, which rests ‘on moral and humanitarian grounds’, which should be granted ‘with the utmost liberality’, and which should only be limited for reasons such as national security.¹¹⁹ Moreover, expulsion cannot take place without ‘due process’, namely, not before some sort of legal ‘appeal’ where evidence can be considered before a ‘competent authority’.¹²⁰

In research by Gilad Ben-Nun, that goes beyond the *travaux préparatoires* and scrutinises unpublished Israeli and UK archival material, the critical role of the UK in the negotiations of the Refugee Convention has been revealed.¹²¹ The diplomatic efforts of the UK, alongside Central European Jewish Jurists, secured the adoption and the ratification of the Convention, while guarding adequate refugee protections therein. Endorsement of the

¹¹⁶ The UK ratified the ECHR in 1951 and the Refugee Convention in 1954. Gilad Ben-Nun notes, ‘As a permanent member of both the UN Security Council and ECOSOC, the UK played a vital role in drafting the [1951 Refugee] Convention.’ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 94.

¹¹⁷ Lucy Mayblin, ‘Colonialism, decolonisation, and the right to be human: Britain and the 1951 Geneva Convention on the status of refugees’ (2014) 27(3) *Journal of Historical Sociology* 423, 425.

¹¹⁸ James C. Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’ (1990) 31(1) *Harvard International Law Journal* 129, 134-140.

¹¹⁹ United Nations High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* by Dr. Paul Weis (1990), 236 and 270.

¹²⁰ Refugee Convention, article 32(2).

¹²¹ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 93-95.

Refugee Convention was threatened by the division between those states that believed the Convention should apply to European refugees only and those that believed the Convention should have universal application. In the Final Act at the Conference of Plenipotentiaries in 1951, a compromised position is reflected in the text. Contracting States were offered the choice of protecting refugees ‘in Europe’ or ‘in Europe or elsewhere’.¹²² Dr Jacob Robinson, the Israeli Ambassador, and Sir Samuel Hoare, the UK delegate, were instrumental in formulating the compromise.¹²³ Historically, the scope of the Convention was limited to Europe until 1967.¹²⁴ However, morally at least, the 1951 Convention remained open to all refugees.¹²⁵ Robinson was responsible for suggesting the particular wording, which was ‘picked up by the UK’.¹²⁶ Robinson himself explained that the text put the ‘Universalists’ and the ‘Europeanists’ on ‘the same legal and moral level.’¹²⁷ Reception countries, such as Belgium, were accommodating large numbers of refugees from the Second World War who had been displaced across European borders. Immigration countries, such as Australia, inadvertently accepted refugees but only those selected in accordance with their immigration laws. As Ben-Nun explains, ‘If all states had equal humanitarian obligations, the limiting of these via selective immigration policies, leaving Europe to deal with its vast refugee populations, seemed rather unfair.’¹²⁸ The ultimate success of establishing international refugee protection, applicable to all of humanity, in the form of the Convention, rested, primarily, upon normative fairness between states. Nonetheless, Ben-Nun concludes that, at the core of the Refugee Convention is ‘a universal moral imperative, and an ancient Jewish decree, of not returning refugees back to the hands of their tormentors, wherever this may take place. The qualifying criterion here is humanity, not geography.’¹²⁹ As the Liberal parliamentarians in 1904 and 1905 had appealed to the UK’s ancient liberal tradition of

¹²² Refugee Convention, article 1B(1)(a) and (b).

¹²³ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 97.

¹²⁴ The territorial limitation was lifted by the 1967 Protocol which amended the 1951 Convention.

¹²⁵ Lucy Mayblin, ‘Colonialism, Decolonisation, and the Right to be Human: Britain and the 1951 Geneva Convention on the Status of Refugees’ (2014) 27(3) *Journal of Historical Sociology* 423.

¹²⁶ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 97, quoting from Robinson Final Plenipotentiary Report, point 3 p. 3.

¹²⁷ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 97, quoting from Robinson Final Plenipotentiary Report, point 3 p. 3.

¹²⁸ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 99.

¹²⁹ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 113.

asylum, the Jewish jurists in 1950 and 1951 appealed to ancient biblical principles to support the universal right of asylum under international law.¹³⁰

The Refugee Convention was drafted to treat asylum seekers and refugees more favourably than other migrants. Hathaway and Neve observe that, ‘In principle, refugee protection is not about immigration. It is intended to be a situation-specific human rights remedy’.¹³¹ The Convention, thus, to some extent, unravels the issues of asylum and immigration. The liberal provisions discourage states from evading their responsibilities by subsuming the special category of asylum within immigration laws. The discretion of Contracting States to admit and expel asylum-seekers is limited by the principle of *non-refoulement* (non-return) under Article 33(1) of the Refugee Convention, and asylum-seekers should not be punished for illegal entry.¹³² Determination of refugee status is declaratory, not constitutive.¹³³ If a person meets the criteria under Article 1A of the Refugee Convention then they are legally a refugee and must be recognised as such. Arguably, therefore, the rights of refugees under the Convention are effective even during the asylum stage. The Refugee Convention does not stipulate the procedures for determining refugee status and Contracting States are free to adopt their own procedures. As such, procedures vary considerably from state to state, from purely administrative processes to procedures involving a judicial element.¹³⁴ The principle of *non-refoulement* is a norm of customary international law and is strengthened by Article 3 of the ECHR, which prohibits the return of individuals to situations where there is a risk of torture or inhuman or degrading treatment.¹³⁵ Core rights of the

¹³⁰ According to Lewin, the prophet Amos ‘considered the prohibiting of sending refugees back to be a binding rule of international law of his time. He once said that God would never forgive Philistine Gaza and Phoenician Tyre for the crime of expelling the Jewish refugees who had found asylum in their countries delivering them to the enemy, the Kingdom of Edom.’ Isaac Lewin, *In Defense of Human Rights* (Research Institute of Religious Jewry, 1992) 161.

¹³¹ James C. Hathaway and R. Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented-Protection’ (1997) 10 *Harvard Human Rights Journal* 115, 117.

¹³² Refugee Convention, article 31(1). See also, *R v Uxbridge Magistrates' Court ex parte Adimi* [1999] EWHC Admin 765.

¹³³ UNHCR, Note on Determination of Refugee Status under International Instruments EC/SCP/5 (UNHCR, 24 August 1977).

¹³⁴ The UNHCR is also involved in refugee determination, under the UNHCR Statute, in some Contracting States. The UNHCR’s definition of refugee status is wider and applied more generously. UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V).

¹³⁵ See *Chahal v. the United Kingdom* (Grand Chamber) (1997) 23 EHRR 413. See also, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), article 7, and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT), article 3.

ECHR, such as Article 3 and Article 8, impose positive obligations upon Council of Europe states to have fair and effective determination procedures. The Refugee Convention also provides that the expulsion of a refugee ‘shall be only in pursuance of a decision reached in accordance with due process of law’ (Article 32), that refugees should have access to the courts (Article 16), and that every effort should be made to expedite naturalisation proceedings (Article 34).

The 1951 Convention is a Convention for refugees, drafted by Jewish refugees. To this extent, the Convention might be described as refugee-centred.¹³⁶ Robinson, for example, the Israeli Ambassador and a Jewish refugee from Lithuania, was aware that he represented not only the Israeli government but ‘also morally the refugee.’¹³⁷ Paul Weis, a refugee who escaped Dachau, took part in all the drafting stages of the Convention as the International Refugee Organisation delegate.¹³⁸ Rabbi Dr Isaac Lewin drafted the non-expulsion (Article 32) and non-refoulement (Article 33) provisions that were adopted. The *non-refoulement* provision is the cornerstone of the Convention and refugee protection. Lewin was a representative of a Jewish NGO and he was himself a refugee, having fled Poland to the US in 1939.¹³⁹ He helped to save other European-Jewish refugees during the Second World War and became an expert on refugee issues.¹⁴⁰ Lewin’s draft provisions were not novel but a ‘reworking of previous international instruments’.¹⁴¹ However, as Ben-Nun observes, Lewin’s ‘added value’ was the insertion of the requirement that, ‘The refugee shall have the right to submit evidence and to clear himself and to appeal to be represented before a

¹³⁶ However, scholars have criticised the Refugee Convention as too state centred. See, for example, T. Alexander Aleinkoff, ‘State-Centered Refugee Law: From Resettlement to Containment’ (1992) 14(1) Michigan Journal of International Law 120.

¹³⁷ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) Journal of Refugee Studies 93, citing Robinson Final Plenipotentiary Report, point 2 p. 2.

¹³⁸ Weis also provided a commentary on the Refugee Convention. Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed, With a Commentary* (Cambridge University Press 1995).

¹³⁹ Lewin was a representative of the ultra-Orthodox Agudas Israel organization.

¹⁴⁰ It would have been this expertise that got Lewin his place at the drafting table, despite not being a representative of a member state or the UN. His campaign to save refugees contributed to him earning a UN Peace Medal in 1981, along with his publication ‘The Declaration on the Elimination of all Forms of Intolerance and Discrimination Based upon Religion or Belief’.

¹⁴¹ ‘...most notably the 1928, 1933, 1936 and 1938 conventions.’ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) Journal of Refugee Studies 93, 102-103.

competent authority.’¹⁴² Due to having to satisfy the particularities of the established law and procedures of Contracting States, the wording is not as specific or as strong as that under the 1905 Act. However, the clause still provides a legal right to appeal against expulsion. When read with Article 16 (access to courts), and Article 3 (non-discrimination) of the Convention, it seems that the right demands equal access to the ordinary courts, including access to legal assistance.¹⁴³ Lewin sheds some light upon the significance of his contribution by drawing attention to the special nature of refugeehood. He highlights that, ‘Expulsion of a refugee, in the majority of cases, means prolonged agony. It is equivalent to death when he is sent back to his country of origin’.¹⁴⁴ The gravity of the consequences for refugees therefore requires protection that is legally binding and that necessitates a fair legal hearing before expulsion.

Unfortunately, the Final Act contained some exceptions to *non-refoulement*. Robinson thus commented that, despite a ‘sincere desire to get a liberal and well drafted convention’, there was the ‘deliberalisation of substantive provisions’, eroding refugee protection and watering down values of individual fairness.¹⁴⁵ Ben-Nun’s study exposes that the exceptions to *non-refoulement*, under Article 33(2), were drafted by the UK Home Office. According to Ben-Nun, Sir Samuel Hoare, ‘a veteran of the Home Office and an expert on refugee issues’, prepared the text but with the intention that *non-refoulement* should only be qualified by espionage and as a last resort.¹⁴⁶ These findings support the body of scholarship that contends that the Article 33 principle of *non-refoulement* implies a human right of asylum, particularly when considered within the wider normative framework of human rights.¹⁴⁷ *Non-refoulement* and asylum are different but inextricably related concepts.¹⁴⁸ Conceptually, and in UK

¹⁴² See Refugee Convention, article 32(2). Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 103.

¹⁴³ The Refugee Convention, article 16 provides that: ‘1. A refugee shall have free access to the courts of law on the territory of all Contracting States. 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*. 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.’

¹⁴⁴ Isaac Lewin, *In Defense of Human Rights* (Research Institute of Religious Jewry 1992) 161.

¹⁴⁵ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 106.

¹⁴⁶ Gilad Ben-Nun, ‘The British-Jewish roots of non-refoulement and its true meaning for the drafters of the 1951 Refugee Convention’ (2015) 28(1) *Journal of Refugee Studies* 93, 108 and 110.

¹⁴⁷ Salvatore Fabio Nicolosi, ‘Re-conceptualising the right to seek and to obtain asylum in international law’ (2015) 4(2) *International Human Rights Law Review* 303, 313.

¹⁴⁸ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed., Oxford University Press 2007), 357.

practice, ‘asylum can be derived from the principle of *non-refoulement*, because the latter cannot be effectively guaranteed without admitting asylum seekers to the State territory and conduct a refugee status determination.’¹⁴⁹ *Non-refoulement* prohibits the return of asylum-seekers until and unless there has been a final negative refugee status determination. The principle is thus ‘remedial to the lack of specific provision on the right to asylum in international human rights instruments’ and is enforceable against the host state.¹⁵⁰ While there is no international adjudicative mechanism, Contracting States have agreed to be bound by the legal right to asylum (to admittance and non-return), which requires fair procedures (including a right to determination procedures, to appeal and to submit evidence, and, arguably, to legal aid). This compromised position still focused on state-centred fairness, but some room was made for the importance of refugee voices within the final treaty.

Domestically, in the same year as the UDHR, the British Nationality Act, 1948, was passed. The 1948 Act extended British citizenship to nationals of the Commonwealth and colonies, known as a Citizen of the UK and Colonies (CUKC).¹⁵¹ Nadine El-Enany argues that granting British citizenship to citizens of the Commonwealth and colonies was ‘principally an attempt to hold together what remained of the British Empire’.¹⁵² She explains that ‘British politicians accepted migration of non-white people from the New Commonwealth countries into Britain as a trade-off, an unfortunate but necessary by-product of maintaining the relationship between Britain and the Old (white) Dominions.’¹⁵³ In addition to the symbolic political benefit, was the economic benefit of immigration to the

¹⁴⁹ Salvatore Fabio Nicolosi, ‘Re-conceptualising the right to seek and to obtain asylum in international law’ (2015) 4(2) *International Human Rights Law Review* 303, 313.

¹⁵⁰ Salvatore Fabio Nicolosi, ‘Re-conceptualising the right to seek and to obtain asylum in international law’ (2015) 4(2) *International Human Rights Law Review* 303, 313.

¹⁵¹ Treating the UK, Commonwealth and Colonies as a ‘unit of citizenship’. M.D.A. Freeman and Sarah Spencer, ‘Immigration Control, Black Workers and the Economy’ (1991) 6 *British Journal of Law and Society* 53, 56. Care explains that: ‘The Act retained the British Subject status and created the Citizen of the UK and Colonies (CUKC), citizenship of the Dominions Countries, Canada, Ceylon (Sri Lanka), Australia, India, New Zealand, Pakistan and Southern Rhodesia (Zimbabwe). Indigenes of the protectorates remained British Protected Persons. However many Asians and persons born in former trust territories could register under s 6(1) of the 1948 Act and did so and thereby became CUKCs.’ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 10.

¹⁵² Nadine El-Enany, ‘Brexit is not only an expression of nostalgia for empire, it is also the fruit of empire’ (LSE Blog, 11 May 2017) <<https://blogs.lse.ac.uk/brexit/2017/05/11/brexit-is-not-only-an-expression-of-nostalgia-for-empire-it-is-also-the-fruit-of-empire/>> accessed 28 September 2019.

¹⁵³ Nadine El-Enany, ‘Brexit is not only an expression of nostalgia for empire, it is also the fruit of empire’ (LSE Blog, 11 May 2017) <<https://blogs.lse.ac.uk/brexit/2017/05/11/brexit-is-not-only-an-expression-of-nostalgia-for-empire-it-is-also-the-fruit-of-empire/>> accessed 28 September 2019.

UK.¹⁵⁴ The recruitment of people from the Commonwealth and colonies started during the Second World War as ‘large numbers of coloured labourers and combatants were...brought to England’.¹⁵⁵ Continuing throughout the 1950s and 1960s, the British government actively encouraged people from the Commonwealth and colonies to come to the UK to fill the labour gaps created by the Second World War. Many came to work in the health service, in public transport, and in the depleted factories.¹⁵⁶ Just five years prior to his infamous ‘Rivers of Blood’ speech, Enoch Powell, in his capacity as Health Minister, visited Commonwealth countries to recruit doctors and nurses to work in the NHS.¹⁵⁷

In the 1950s and early 1960s, racial tensions began to mount in the UK.¹⁵⁸ This racial friction, coupled with economic changes, led to the passage of the Commonwealth Immigrants Act 1962 by the Macmillan Conservative government.¹⁵⁹ The 1962 Act imposed immigration control upon Commonwealth citizens for the first time.¹⁶⁰ As in 1905, the Act was reactionary. The Government’s justification for the 1962 Act was ‘the sudden rise in immigration figures, the consequent deterioration in the housing situation, and the deceleration in the speed and success of assimilation of the newcomers into the community’.¹⁶¹ However, while no accurate count was possible - as, prior to 1962, Commonwealth citizens had a long-established right of free entry to the UK - ‘no reasonable authority has placed the number of coloured British immigrants at more than one per cent. of the total population of [the UK]’.¹⁶² Writing in 1962, Thornberry observed that ‘the agitation caused to our society by [the arrival of Commonwealth citizens] has been wholly disproportionate to their quantity’.¹⁶³ Despite the low numbers, there were, admittedly,

¹⁵⁴ M.D.A. Freeman and Sarah Spencer, ‘Immigration Control, Black Workers and the Economy’ (1991) 6 *British Journal of Law and Society* 53.

¹⁵⁵ C. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25(6) *Modern Law Review* 654, 658

¹⁵⁶ Mahmud Quayum and Mick Chatwin, ‘Demise of the Commonwealth’ (2009) 21(1) *Journal of Immigration, Asylum and Nationality Law* 51-59

¹⁵⁷ Stephanie Snow and Emma Jones, ‘Immigration and the National Health Service: Putting History to the Forefront’ <<http://www.historyandpolicy.org/index.php/policy-papers/papers/immigration-and-the-national-health-service-putting-history-to-the-forefront>> accessed 15 November 2018.

¹⁵⁸ J. Henderson, *Coloured Immigrants in Britain* (OUP, 1960).

¹⁵⁹ The 1962 Act restricted ‘the immigration of all holders of Commonwealth passports except those born in the UK, those holding passports issued by the UK government, and those included on the passport of a person exempt from immigration control under the first two exceptions’. See *Commonwealth Immigrants Act 1962*, ch. 21, s. 2.

¹⁶⁰ Mahmud Quayum and Mick Chatwin, ‘Demise of the Commonwealth’ (2009) 21(1) *Journal of Immigration, Asylum and Nationality Law* 51-59.

¹⁶¹ C. H. R. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25(6) *Modern Law Review* 654, 661.

¹⁶² C. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25(6) *Modern Law Review* 654, 658.

¹⁶³ C. H. R. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25(6) *Modern Law Review* 654,

problems surrounding the acceptance of racial minorities within the receiving communities. Thornberry observed that Commonwealth citizens remained as ‘alien to the community in these islands as any alien properly so-called’.¹⁶⁴ He explained that ‘the coloured immigrant may be seen as the “archetypal stranger” in the mythology of xenophobia, who because of his “high visibility” has little opportunity to conceal himself in his new surroundings’.¹⁶⁵ As Hathaway and Neve highlight, states have historically afforded refugees permanent status where there has been ‘interest-convergence’.¹⁶⁶ That is, where there has been straightforward cultural assimilation and, or, economic benefit to the receiving state.¹⁶⁷ Perhaps due to the race interest-divergence, on the one hand, but the economic interest-convergence on the other, racial tensions in the 1950s and early 1960s only ‘occasionally flared into...something more aggressive.’¹⁶⁸ In any event, the legislation was a disproportionate and inappropriate way to address the issue of race relations.

There does not appear to be a rational link between the purported aims of the 1962 Act and the measures that were introduced under this Act. Thornberry highlighted that, ‘restrictions would not be placed on the entry of Southern Irish, whose annual total amounted to perhaps one-half of the immigration figures supplied by the Government’.¹⁶⁹ Thornberry concluded that ‘no one could seriously contend that the Act...makes any substantial contribution to the solution of the housing and colour problems in which lay its origins’.¹⁷⁰ Perhaps a better course of action would have been, as suggested by some at the time, to implement ‘a more energetic housing programme, better education, and legislation against

656.

¹⁶⁴ C. H. R. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25(6) *Modern Law Review* 654, 655.

¹⁶⁵ C. H. R. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25(6) *Modern Law Review* 654, 655

¹⁶⁶ James C. Hathaway & R. Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented-Protection’ (1997) 10 *Harvard Human Rights Journal* 115, 119.

¹⁶⁷ James C. Hathaway & R. Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented-Protection’ (1997) 10 *Harvard Human Rights Journal* 115, 119.

¹⁶⁸ ‘In 1958, occurred the race rioting in Nottingham and Notting Hill and in 1959 the murder in Notting Hill of Kelso Cochrane’. C. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25 *Mod. L. Rev* 654, 659.

¹⁶⁹ This ‘provoked the greatest misgiving’ throughout the Home Secretary’s own party. C. H. R. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25(6) *Modern Law Review* 654, 662.

¹⁷⁰ C. H. R. Thornberry, ‘Law, Opinion and the Immigrant’ (1962) 25(6) *Modern Law Review* 654, 670-671.

racial discrimination and group defamation'.¹⁷¹ However, a bill on racial discrimination was resisted in favour of legislation controlling immigration.¹⁷² As had happened during the passage of the 1905 Bill, Thornberry observed that the passage of the 1962 Act was 'energetically resisted through all its stages'.¹⁷³ One of the major arguments against the Bill was based upon 'the suspicion that the Bill was, or would be seen to be, actuated by colour prejudice and racial discrimination'.¹⁷⁴ According to Denis Healey, '[t]he Bill was... simply a panic improvisation to appease racial pressures inside the Conservative Party'.¹⁷⁵

Thornberry further noted that 'a determined and sustained attempt was made by the Opposition', to establish alongside the restrictive measures under the 1962, 'an Immigration Appeals Tribunal to hear the appeals of Commonwealth citizens to whom entry had been refused'.¹⁷⁶ However, a right of appeal to an independent tribunal was resisted by the Government. The Government's reasons were that, 'delays would occur and that such large numbers would appeal that they could not be accommodated while their appeals were pending'.¹⁷⁷ The Government also considered that a judicial appeal should not concern itself with Home Office policy.¹⁷⁸ A lack of judicial oversight of the treatment of Commonwealth citizens was later found to be unfair by the Wilson Committee (appointed to examine the lack of a right of appeal for immigrants, including asylum-seekers).¹⁷⁹ The fair treatment of asylum-seekers, thus, can only be guaranteed with consideration by 'independent and judicially-minded people'.¹⁸⁰

Around the same time, British colonies in East Africa gained independence. The UK made a 'pledge' to allow the Asian minority in East Africa to obtain a British passport issued

¹⁷¹ C. H. R. Thornberry, 'Law, Opinion and the Immigrant' (1962) 25(6) *Modern Law Review* 654, 659.

¹⁷² HC Deb 12 November 1958 vol 595 col 410.

¹⁷³ C. H. R. Thornberry, 'Law, Opinion and the Immigrant' (1962) 25(6) *Modern Law Review* 654, 660.

¹⁷⁴ C. H. R. Thornberry, 'Law, Opinion and the Immigrant' (1962) 25(6) *Modern Law Review* 654, 661.

¹⁷⁵ HC Deb 07 February 1962 vol 653 col 459.

¹⁷⁶ C. H. R. Thornberry, 'Law, Opinion and the Immigrant' (1962) 25(6) *Modern Law Review* 654, 666.

¹⁷⁷ C. H. R. Thornberry, 'Law, Opinion and the Immigrant' (1962) 25(6) *Modern Law Review* 654, 666.

¹⁷⁸ C. H. R. Thornberry, 'Law, Opinion and the Immigrant' (1962) 25(6) *Modern Law Review* 654, 666.

¹⁷⁹ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd. 3387, 1967). The Committee and Report are named after the chairman, Sir Roy Wilson QC. See below for further discussion.

¹⁸⁰ HC Deb 15 November 1967 vol 754 col 457, per Mr. Roy Jenkins.

by the UK government.¹⁸¹ Those with a British passport were exempted from the 1962 Act and granted free entry to the UK. In view of the persecution of the Asian minority in East Africa, the vast majority decided to retain their British citizenship during the two years in which they could have applied for local African citizenship.¹⁸² Forced to flee their countries of residence, the British Asian refugees began to exercise their right as citizens to come to the UK.¹⁸³ In response to the increase in numbers coming to the UK, the Labour government pushed through parliament, in three days, the Commonwealth Immigrants Act 1968. The divisive 1968 Act was designed to amend the 1962 Act and stem the flow of ‘coloured’ immigration.¹⁸⁴ As Lord Lester of Herne Hill has observed, ‘[a] group of British citizens, temporarily in public office, successfully used their legislative majority to abridge the basic rights and freedoms of another group of British citizens, because of their colour and ethnic origins’.¹⁸⁵ It is noteworthy that within a few weeks of the enactment of the 1968 Act, Enoch Powell made his ‘river-of-blood’ speech. The 1968 Act imposed immigration control upon those who were not born in the UK or who did not have ancestral links. During the passage of the Bill, both Houses of Parliament were divided, across political parties, on whether the proposed legislation was in conflict with the ‘pledge’ to East African Asians, and whether the Bill was racially discriminatory.¹⁸⁶ The Government, therefore, ‘knew that it was vulnerable to charges of perfidy and racial discrimination even as it passed the legislation.’¹⁸⁷

In response to the question of whether the 1968 Act was racially discriminatory, the Strasbourg Court answered affirmatively in 1973. In the *East African Asians* case, the European Commission of Human Rights concluded that the severe discrimination suffered by British Asians from East Africa, amounted to ‘degrading treatment’ under Article 3 of the ECHR.¹⁸⁸ The Commission found that, although the 1968 Act may have appeared neutral, it

¹⁸¹ Satvinder S. Juss, ‘The Slow Death of Citizenship Rights’ (2007) 18 King’s Law Journal 95.

¹⁸² Anthony Lester, ‘Thirty years on: the East African Asians case revisited’ (2002) (Spring) Public Law 52.

¹⁸³ Between 1965 and 1967, the annual number of entrants increased from 6,150 to 13,600. In the first two months of 1968, the number of people exercising their right was 12,800. Anthony Lester, ‘Thirty years on: the East African Asians case revisited’ (2002) (Spring) Public Law 52.

¹⁸⁴ Anthony Lester, ‘Thirty years on: the East African Asians case revisited’ (2002) (Spring) Public Law 52.

¹⁸⁵ Anthony Lester, ‘Thirty years on: the East African Asians case revisited’ (2002) (Spring) Public Law 52.

¹⁸⁶ Satvinder S. Juss, ‘The Slow Death of Citizenship Rights’ (2007) 18 King’s Law Journal 95.

¹⁸⁷ Satvinder S. Juss, ‘The Slow Death of Citizenship Rights’ (2007) 18 King’s Law Journal 95.

¹⁸⁸ *East African Asians v United Kingdom* (1973) 3 EHRR 76.

was racially discriminatory in respect of its motives.¹⁸⁹ The European Commission found that ‘[w]hen it was introduced into Parliament as a Bill, it was clear that it was directed against the Asian citizens of the United Kingdom and Colonies in East Africa and especially those in Kenya’.¹⁹⁰ The Commission went on to highlight the differential treatment between white and non-white citizens under the UK’s immigration laws and, interestingly, commented upon the Immigration Act 1971 which replaced the 1968 Act.¹⁹¹ The 1971 Act, which remains the cornerstone of UK immigration law, allowed the immigration control of anyone who did not have a ‘right of abode.’ Care observes that the 1971 Act ‘put Commonwealth citizens and aliens on the same basis.’¹⁹² Commonwealth citizens, once insiders, were now outsiders. The Commission noted that, under the 1971 Immigration Act, persons who belonged to the category of ‘partials’ alone had a right of abode in the UK irrespective of whether they were Citizens of the UK and Colonies (CUKC).¹⁹³ The Commission observed that this rule would normally ‘favour white people’.¹⁹⁴ By 6 votes to 3, the Commission concluded that the British legislation was racially discriminatory in its aims and effects and accepted that the subjection of the East African Asians to such racial discrimination amounted to degrading treatment in breach of Article 3 ECHR.¹⁹⁵ As Lord Lester described, the East African Asians were:

...stripped of their livelihood and possessions in East Africa; divided from members of their families in the UK; detained for weeks or months in prison if they sought to

¹⁸⁹ Lord Lester recalled that in presenting the applicant’s case, ‘[w]e relied upon the Parliamentary debates, together with evidence given by Dipak Nandy, the Director of the Runnymede Trust, about demography and immigration statistics, and Nicholas Deaking about the political history’. Anthony Lester, ‘Thirty years on: the East African Asians case revisited’ (2002) (Spring) Public Law 52.

¹⁹⁰ *East African Asians v United Kingdom* (1973) 3 EHRR 76, [199].

¹⁹¹ *East African Asians v United Kingdom* (1973) 3 EHRR 76, [202].

¹⁹² Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 28.

¹⁹³ P.J. Duffy explains that ‘[p]artiality...essentially requires a substantial link with the United Kingdom by birth there or descent from someone who was born there; it thus tends to include white United Kingdom Citizens and to exclude those of African or Asian origin’. P.J. Duffy, ‘Article 3 of the European Convention on Human Rights’ (1983) 32 *International and Comparative Law Quarterly* 316.

¹⁹⁴ *East African Asians v United Kingdom* (1973) 3 EHRR 76, [202]. The Cabinet papers and other official records are now publicly available having been released under the thirty-year rule. Anthony Lester, ‘Thirty years on: the East African Asians case revisited’ (2002) (Spring) Public Law 52.

¹⁹⁵ In the Commission’s memorable words, it was held that: ‘...a special importance should be attached to discrimination based on race...publicly to single out a group of persons for differential treatment on the basis of race might in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.’ *East African Asians v United Kingdom* (1973) 3 EHRR 76, [207].

enter the UK without Home Office vouchers; or shuttled here and there, across Europe, Africa and Asia, desperately seeking a new world; some stranded in Europe en route for the UK, others in India. Nominally, they remained citizens of the UK and Colonies, but they became citizens without status, lacking status in fact, if not in law.¹⁹⁶

An earlier immigration case before the Commission, the case of *Mohamed Alam and Mohamed Khan*, helped to cajole the government into implementing a right of appeal against immigration decisions in 1969.¹⁹⁷ It is important to observe the social and political context from which the Immigration Appeals Act 1969, which established the immigration appeals system, was created. Professor Sir Bob Hepple highlighted that the Report of the Wilson Committee and the Street Report on Anti-Discrimination Legislation 1967 were published within months of one another.¹⁹⁸ The Home Secretary was not satisfied that race relations legislation alone could ‘increase Britain’s capacity to absorb immigrant minorities’.¹⁹⁹ The Home Secretary thus announced that immigration controls would be strengthened.²⁰⁰ The Wilson Committee was set up in response to criticisms that ‘the Government was taking a firm line to stop coloured immigration but was doing virtually nothing to make immigration procedures fairer or to create equal opportunities for those already here’.²⁰¹ The Wilson Committee was therefore tasked with considering whether rights of appeal should be available to immigrants refused entry or required to leave the UK.²⁰² The Wilson Committee received evidence that ‘among the communities of Commonwealth immigrants in this country, and among people specially concerned with their welfare, there is a widespread

¹⁹⁶ Anthony Lester, ‘Thirty years on: the East African Asians case revisited’ (2002) (Spring) Public Law 52.

¹⁹⁷ I return to discuss this case in Chapter 5.

¹⁹⁸ The Wilson Report (*Report of the Committee on Immigration Appeals* (Cmnd. 3387, 1967)) draws heavily upon the Franks Report (*Report of the Committee on Tribunals and Enquiries*, Cmnd. 218 (1957)). The Franks Report led to the enactment of the Tribunals and Inquiries Act 1957. B. A. Hepple, ‘Reports of Committees: The Street Report on Anti-Discrimination Legislation; Report of the Committee on Immigration Appeals’ (1968) 31(3) *Modern Law Review* 310. The Race Relations Act came into force in 1968.

¹⁹⁹ B.A. Hepple, ‘Reports of Committees: The Street Report on Anti-Discrimination Legislation; Report of the Committee on Immigration Appeals’ (1968) 31(3) *Modern Law Review* 310, 311-312. For discussion about the relationship between race relations and immigration law, see I. MacDonald, *Race Relations and Immigration Law* (Butterworths 1969).

²⁰⁰ B.A. Hepple, ‘Reports of Committees: The Street Report on Anti-Discrimination Legislation; Report of the Committee on Immigration Appeals’ (1968) 31(3) *Modern Law Review* 310, 311-312.

²⁰¹ B.A. Hepple, ‘Reports of Committees: The Street Report on Anti-Discrimination Legislation; Report of the Committee on Immigration Appeals’ (1968) 31(3) *Modern Law Review* 310, citing Memorandum of Evidence submitted by the National Committee for Commonwealth Immigrants to the Committee on Immigration Appeals, dated May 26, 1966, para. 3.

²⁰² Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 1.

belief that the Immigration Service deals with the claims of Commonwealth citizens seeking admission in an arbitrary and prejudiced way'.²⁰³ The Committee received mixed reports of immigration officers being 'harsh and high-handed', as well as 'humane and conscientious'.²⁰⁴ Yet, the Committee's 'impression' from their inquiry was that, 'generally speaking, immigration officers act with fairness and respect for the rights and feelings of the people with whom they have to deal.'²⁰⁵

Nonetheless, the Committee acknowledged that, 'cases do from time to time occur in which the decision would have been different if it had been made by an appellate authority after a dispassionate review of the relevant evidence'.²⁰⁶ Based upon '[t]hat consideration alone', the Committee felt that setting up an appeal system was justified.²⁰⁷ While the Committee found no general impropriety, it also considered that it was 'fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose finding there is no appeal.'²⁰⁸ The Committee highlighted that this principle 'reached the heart of the matter.'²⁰⁹ The Committee therefore concluded that it was not sufficient for justice to be done, justice must also be seen to be done.²¹⁰ In other words, a system of immigration appeals was essential 'not only to check any possible abuse of executive power but also to give a private individual a sense of protection against oppression and injustice, and of confidence in his dealings with the administration'.²¹¹

The Labour government's acceptance of the Wilson Committee's proposal to establish a system of immigration appeals can be interpreted as a tacit acknowledgement of the unfair legislative control on Commonwealth immigration. As the Committee highlighted, '[a]ny system of control necessarily involves restrictions; and to have an appeal system is one way of ensuring that the restrictions are fairly applied.'²¹² However, it was outside the remit of the Wilson Committee to comment upon the fairness of the legislative immigration

²⁰³ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 84.

²⁰⁴ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 62.

²⁰⁵ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 62.

²⁰⁶ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 83.

²⁰⁷ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 83.

²⁰⁸ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 84.

²⁰⁹ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 84.

²¹⁰ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 84.

²¹¹ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 85.

²¹² Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 59.

controls.²¹³ As Hepple has observed:

...it would be idle to think that immigrants will regard control as acceptable simply because of guaranteed due process. The very substance of control needs impartial investigation in the light of Britain's economic needs and international responsibilities.²¹⁴

The Government did not, however, accept the Committee's recommendation that security cases should be subject to the same general appeals system with no need to withhold information from the appellant provided that the hearings were *in camera*.²¹⁵ The Government proposed, rather, that such cases should be subject to a closed appeal hearing before a special, private panel, leaving the final decision to the Home Secretary. The practice of closed hearings before a Special Immigration Appeals Commission (SIAC) is still used but remains controversial.²¹⁶ Disputes about claims for political asylum would, normally, be heard within the general immigration appeals system. The Wilson Committee also proposed that the powers of the courts to recommend deportation should be withdrawn.²¹⁷ The Government did not accept this recommendation either.²¹⁸

Members of the Wilson Committee gathered first-hand evidence of the immigration appeals systems of the United States and Canada.²¹⁹ The UK ultimately copied and adapted the Canadian model to 'the peculiarities of the legal system of Britain', further to the recommendations made by the Committee.²²⁰ The Committee estimated that the system would process between 15,000 and 20,000 appeals each year and therefore considered that it would be impracticable for the ordinary courts to hear such matters. It was proposed to

²¹³ Particularly given the availability of the Home Office, *White Paper on Immigration from the Commonwealth* (Cmnd 2739, 1965). The Committee stressed, however, that 'it is not our function to consider the desirability or otherwise of controlling immigration.' Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 59.

²¹⁴ B.A. Hepple, 'Reports of Committees: The Street Report on Anti-Discrimination Legislation; Report of the Committee on Immigration Appeals' (1968) 31(3) *Modern Law Review* 310, 321

²¹⁵ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 144.

²¹⁶ Special Immigration Appeals Commission Act 1997. Investigation of the full implications of closed proceedings and the concept of security are outside the scope of this thesis.

²¹⁷ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd. 3387, 1967), paras 132-136.

²¹⁸ The Home Secretary continues to have the power to deport further to a court-recommended deportation, under the Immigration Act 1971, s 3(6).

²¹⁹ The Wilson Committee also considered in the Report the French system of *droit administratif*.

²²⁰ B.A. Hepple, 'Reports of Committees: The Street Report on Anti-Discrimination Legislation; Report of the Committee on Immigration Appeals' (1968) 31(3) *Modern Law Review* 310, 320. See also, P. Tompkins, 'Immigration: Governments and Lawyers on a Collision Course' (1995) 17 *Loyola of Los Angeles International and Comparative Law Review* 891.

appoint some twenty full-time and thirty part-time adjudicators.²²¹ As Hepple concluded, the cost of the new appeals system was ‘a small price to pay for justice in race relations’; race relations being the implicit aim of the 1969 Act.²²² It was also upon the recommendation of the Wilson Committee that the Joint Council of the Welfare of Immigrants (JCWI) was established.²²³ The JCWI is an independent organisation that was set up to help those subject to immigration control and, where necessary, to represent them.²²⁴ The Committee believed that ‘many hopeless appeals could be obviated’ because an immigrant would be ‘much more likely to accept a decision if its correctness is explained to him by someone who is obviously bringing a sympathetic mind to bear on his case’.²²⁵ The Committee also thought that ‘if the person concerned is able to talk his case over with someone who he feels is ready to help him, he may find it easier to collect his thoughts and do himself full justice’.²²⁶ Moreover, the Committee speculated that ‘a Commonwealth citizen or alien is more likely to use the appeal procedure to good effect if he can get advice in preparing his case and assistance in presenting it from someone outside the Immigration Service who is experienced in dealing with such cases.’²²⁷ In order to carry out these functions, the Committee stated that the independent advisors ought to have ‘early access to any Commonwealth citizen or alien in difficulties.’²²⁸

Further to the Wilson Committee’s recommendations, and the settlement in the case of *Alam*, an immigration appeals system was re-introduced after a 42 years period in which there had been no such remedy. And so, in the interests of fairness, immigration decisions in the UK became subject to a degree of judicial oversight. The Home Secretary, during the passage of the Immigration Appeals Bill, stated, importantly, that, ‘I think that the Bill will

²²¹ B.A. Hepple, ‘Immigration Appeals Act 1969’ (1969) 32(2) *Modern Law Review* 668.

²²² B.A. Hepple, ‘Reports of Committees: The Street Report on Anti-Discrimination Legislation; Report of the Committee on Immigration Appeals’ (1968) 31(3) *Modern Law Review* 310, 321

²²³ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) paras 182-188.

²²⁴ The Committee recommended that ‘the organisation should be at once recognisably independent of Government control and free of commitment to any views about the policy or administration of immigration control which may be held by the bodies which cooperate to set it up: its function should be to help and advise the immigrant in his own best interests. The organisation ought in our view to receive such financial support as is necessary from public funds.’ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 188.

²²⁵ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 186.

²²⁶ The Committee stated that ‘in particular, women and children are likely to confide more easily in a woman than in an officer of the all-male Immigration Service.’ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 186.

²²⁷ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 186.

²²⁸ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) para 186.

enhance the reputation of the country for justice and fair dealing'.²²⁹ Lord Stonham, the Minister of State at the Home Office, highlighted that the Bill brought 'immigration control more fully under the rule of law and so making it manifest that those affected by it are treated fairly.'²³⁰ The right of appeal was not general but, rather, lay in respect of certain defined decisions and actions. To this extent the right was limited. Under the provisions of the 1969 Act, and the corresponding provisions of the Aliens (Appeal) Order 1970, the following categories of decision invoked a right of appeal: refusal of entry; refusal overseas of an entry certificate or visa; refusal by the Home Secretary to extend the stay of a person already admitted to the country for a limited period; decisions to deport (unless deportation on the recommendation of a court); refusal to revoke a deportation order; and the giving of directions for the removal of a person and a direction that she be removed to a particular country.²³¹ The refusal to grant asylum was not an appealable decision under the 1969 Act and asylum appeals were, thus, merged with immigration appeals. Asylum appeals were therefore determined by the same procedure as disputes over entry and stay of students and visitors.²³² Stevens notes that the 'Committee spent very little time on refugee rights'.²³³ Although, the Wilson Committee did recommended that 'special arrangements be made to expedite the hearing of appeals where the appellant was seeking political asylum.'²³⁴ There were extra-statutory arrangements whereby the Home Secretary could concede an appeal to passengers refused entry on arrival where they held entry certificates, vouchers, visas, or work permits.²³⁵

The 1969 Act established full-time and part-time adjudicators, appointed by the Home Secretary, who sat at 'strategic points in the country' to hear appeals in the first instance.²³⁶ The role of the Home Secretary to appoint adjudicators and members of the IAT was contrary to the Wilson Committee's recommendations. This function was transferred to the Lord

²²⁹ HC Deb Vol. 776, January 2, 1969, col 501. 22 January 1969 vol 776 col 501.

²³⁰ HL Deb Vol. 300, March 27, 1969, col 1420.

²³¹ B.A. Hepple, 'Immigration Appeals Act 1969' (1969) 32(2) *Modern Law Review* 668; R.E. Wraith and P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 48.

²³² And the Immigration Appeals (Procedure) Rules 1970, SI 1970 794 stated that the burden of proof was on the appellant (rule 28).

²³³ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 42.

²³⁴ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd 3387, 1967) 66, recommendation 16.

²³⁵ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 48

²³⁶ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 89 and 109.

Chancellor in 1987.²³⁷ There was a hearing at which the appellant, or his representative, would present the case. There was a further right of appeal by either party, against the decisions of the regional adjudicators, to the central Immigration Appeal Tribunal (IAT). The IAT was a sort-of ‘court of appeal’, that could only hear appeals with leave from the adjudicator or the Tribunal.²³⁸ In some deportation cases, the appellant could appeal directly to the IAT.²³⁹ The IAT used the ‘single panel’ system whereby the quorum was a Chairman and one or two other members.²⁴⁰ The appellate authorities were brought within the scope of the Tribunal and Enquiries Act and so were under the supervision of the Council of Tribunals. The IAT was based in London and the Lord Chancellor appointed its members.²⁴¹ The decision of the IAT was final with no further appeal from the Tribunal to the ordinary courts. Hepple commented that, ‘One cannot fail to be struck by the paradox of a “Star Chamber in the Strand” (as one commentator described the unilateral Immigration Appeal Tribunal proceedings in Thanet House) in the same historical period in which the Royal Courts of Justice, on the other side of the Strand, are developing their expansive notions of openness, fairness and impartiality.’²⁴² However, decisions of the adjudicators and the IAT were still, at least, subject to judicial review by the ordinary courts. Unlike the immigration board created in 1905 and disbanded in 1914 with the outbreak of war, this model ‘contained the essential element of manifest independence from the Home Office’, its organisation stemming from a national President.²⁴³

The immigration appeals system was established as a system of adjudication rather than a system of administration.²⁴⁴ Yet, the 1969 Act still permitted the Home Secretary considerable discretionary power. There was a special procedure under the 1969 Act for a special panel of the IAT, nominated by the Lord Chancellor and the Home Secretary jointly, to hear national security cases in private.²⁴⁵ Secret evidence was permitted in the hearings before the special panel if the Home Secretary certified that disclosure would be contrary to

²³⁷ Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths 2000) 156, citing the Transfer of Functions (Immigration Appeals) Order 1987, SI 1987 465.

²³⁸ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 71.

²³⁹ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 48.

²⁴⁰ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 94.

²⁴¹ At Thanet House, Strand, WC2. The President of the Tribunal was appointed for 5 years and ‘lay’ members off three. R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd, 1973) 72, 89 and 109.

²⁴² B.A. Hepple, ‘Aliens and Administrative Justice: The Dutschke Case’ (1971) 34(5) *Modern Law Review* 501, 501-502.

²⁴³ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd, 1973) 90.

²⁴⁴ Home Office, *Report of the Committee on Tribunals and Enquiries* (Cmnd 218, 1957) para. 40.

²⁴⁵ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 48.

the interest of national security.²⁴⁶ The decision of the IAT in national security cases was not binding and the Home Secretary had the final say.²⁴⁷ In light of such closed proceedings, Hepple lamented, when writing in 1971, the failure of the IAT to develop rules of fairness to guide the discretionary decision-making of the Home Office.²⁴⁸ Those refused entry or permission to stay on grounds of national security were not regarded as eligible for political asylum.²⁴⁹ Hepple highlighted that such persons were ‘particularly vulnerable to changes in the climate of political tolerance.’²⁵⁰ This is helped little by the ‘crucial rider that the Home Secretary would retain the power of final decision’ in national security cases.²⁵¹ In the case of an alien whom the Home Secretary had decided to deport for reasons that deportation was deemed ‘conducive to the public good’, there was a right of appeal directly to the IAT.²⁵² However, the appeal would lie to an adjudicator where the Home Secretary had refused to revoke a deportation order.²⁵³ As Hepple acknowledged, ‘the apparent liberality’ of the 1969 Act provisions for appeal ‘must be measured against the difficulties which will face the adjudicators and Tribunal in deciding to interfere with the exercise of discretion (e.g., what is “conducive to the public good”?).’²⁵⁴ Hepple further noted that ‘the Act provides a textbook example as to how Parliament has drawn the line between “justiciable issues” and “policy”.’²⁵⁵ The instructions of the Home Secretary on immigration control, namely the ‘immigration rules’, were to be published and laid before Parliament and the appellate authorities were bound by these rules.²⁵⁶

While there was provision in the Act for providing financial support to voluntary organisations that advised and assisted appellants, there was ‘[c]onsiderable doubt’ as to the

²⁴⁶ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 48.

²⁴⁷ B.A. Hepple, ‘Aliens and Administrative Justice: The Dutschke Case’ (1971) 34(5) *Modern Law Review* 501, 507.

²⁴⁸ B.A. Hepple, ‘Aliens and Administrative Justice: The Dutschke Case’ (1971) 34(5) *Modern Law Review* 501, 513.

²⁴⁹ *R v Governor of Brixton Prison, ex parte Soblen* [1963] 2 Q.B. 243.

²⁵⁰ B.A. Hepple, ‘Aliens and Administrative Justice: The Dutschke Case’ (1971) 34(5) *Modern Law Review* 501, 514.

²⁵¹ B.A. Hepple, ‘Aliens and Administrative Justice: The Dutschke Case’ (1971) 34(5) *Modern Law Review* 501, 514.

²⁵² B.A. Hepple, ‘Immigration Appeals Act 1969’ (1969) 32(2) *Modern Law Review* 668, 670.

²⁵³ B.A. Hepple, ‘Immigration Appeals Act 1969’ (1969) 32(2) *Modern Law Review* 668, 670.

²⁵⁴ B.A. Hepple, ‘Immigration Appeals Act 1969’ (1969) 32(2) *Modern Law Review* 668, 670.

²⁵⁵ B.A. Hepple, ‘Immigration Appeals Act 1969’ (1969) 32(2) *Modern Law Review* 668, 670.

²⁵⁶ Immigration Appeals Act 1969, s 8(1) provides that an appeal should only be allowed if it is considered: (i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case; or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently (...).

availability of legal advice and assistance.²⁵⁷ This was because the ‘Wilson Committee recognised that legal aid would have to await the extension of the legal aid scheme to tribunals in general.’²⁵⁸ Hepple predicted that a lack of legal aid would undermine the effectiveness of the immigration appeals system.²⁵⁹ In the first two years of operation of the 1969 Act, the adjudicators and the IAT heard a larger number of appeals made by Commonwealth Citizens than by aliens but a higher percentage of aliens than Commonwealth Citizens appealed to the IAT against the initial decisions made by the adjudicator.²⁶⁰ Both the adjudicators and the IAT allowed few of the appeals made by Commonwealth Citizens and aliens and, accordingly, the Secretary of State had a far higher success rate before both the adjudicators and the IAT.²⁶¹

Adjudicators were bound by the decisions of the IAT and were to have regard for decisions of other adjudicators. The IAT was not bound by its decisions with each appeal being decided upon its merits.²⁶² As for the order of events, it was usual that the appellant would open, the respondent would reply, and the appellant was given the last word.²⁶³ Wraith and Hutchesson questioned whether unrepresented appellants should have been asked to speak first given that they tended to be ‘unaccustomed to putting their thoughts into words in public’.²⁶⁴ Unrepresented appellants are likely to have difficulty recognising the crucial

²⁵⁷ B.A. Hepple, ‘Immigration Appeals Act 1969’ (1969) 32(2) *Modern Law Review* 668, 671. Home Office, Report of the Committee on Immigration Appeals (Cmnd 3387, 1967) paras. 177-178.

²⁵⁸ B.A. Hepple, ‘Immigration Appeals Act 1969’ (1969) 32(2) *Modern Law Review* 668, 671. Home Office, Report of the Committee on Immigration Appeals (Cmnd 3387, 1967) paras 177-178.

²⁵⁹ B.A. Hepple, ‘Immigration Appeals Act 1969’ (1969) 32(2) *Modern Law Review* 668, 671.

²⁶⁰ Commonwealth citizens lodged 6,112 appeals and aliens lodged 541 appeals. 850 of the appeals made by Commonwealth citizens were allowed (14%), with 2,757 of the appeals dismissed (45%), 673 withdrawn (11%) and the remaining were outstanding when the figures were published. 27 of the appeals made by aliens were allowed (5%), 94 dismissed (17%), 70 withdrawn (13%) and the remaining were outstanding when the figures were published. There were 213 onward appeals (8%) made to the IAT by Commonwealth Citizens (8% of those Commonwealth Citizens dismissed by appealed to the Tribunal). There were 29 appeals made to the IAT by aliens (31% of those aliens dismissed appealed to the Tribunal). The Secretary of State appealed 72 of the Commonwealth Citizens’ cases to the Appeal Tribunal (8%) and 5 of the aliens’ cases (19%). R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 191.

²⁶¹ In total, 60 of the individual appeals were allowed (25%) and 116 dismissed (48%). 31 of the appeals by the Secretary of State were allowed (40%) and 21 dismissed (27%). The rest remained outstanding or were withdrawn. R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 191.

²⁶² R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 275.

²⁶³ While the order of events was ultimately left to the discretion of the adjudicator and Tribunal, allowing flexibility, ‘[i]n practice, adjudicators normally invite the appellant to open, after the Home Office representative has been asked whether he wishes to amplify the Home Office statement’. R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 263. See the Immigration Appeals (Procedure) Rules 1970, rule 25 and rule 7(3).

²⁶⁴ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 262.

points to their case and presenting evidence material to these points.²⁶⁵ Moreover, the person speaking second has an advantage in that she can rebut the statements made by the first speaker.²⁶⁶ Civil servants presented Home Office cases.

The President and Vice-President of the Immigration Appeal Tribunal, the Chief Immigration Adjudicator and his full-time colleagues, as permanent, salaried members, ‘by virtue of their work and status, represent[ed] the permanent “judiciary” of the tribunal world’.²⁶⁷ The President and Vice-President were required by statute to be legally qualified as a barrister or solicitor of not less than seven (or ten) years’ standing.²⁶⁸ While not a statutory requirement, it was considered advantageous for the Chief Immigration Adjudicator to be legally qualified.²⁶⁹ The adjudicators in most cases were non-lawyers. However, legal training of these members was also considered advantageous given that:

...it is often necessary to apply statute law or case law to complex situations; to control proceedings at a hearing in a ‘court-like’ manner, even if not according to court rules; and to see, as far as possible, that unrepresented appellants are not at a disadvantage. A further reason is the right of appeal on questions of law provided by the Tribunals and Inquiries Act 1958.²⁷⁰

The Immigration Act 1971 succeeded the 1969 Act and replicated the system of immigration appeals. The 1971 Act created the Immigration Appellant Authority (IAA) administered by the Tribunals Service.²⁷¹ This was an independent judicial body consisting of two-tiers: Immigration adjudicators and the Immigration Appeal Tribunal.

The Immigration Act 1971, which aimed to consolidate the law on immigration, failed to deal with asylum, leaving this to the Immigration Rules and the discretion of the Home Office. Accordingly, UK asylum policy continued to develop *ad hoc*. Applicants found not to meet the Article 1A(2) Refugee Convention criteria were still granted asylum.²⁷² In 1981, specialist adjudicators were appointed to hear asylum appeals and the Home Office had a

²⁶⁵ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd, 1973) 262.

²⁶⁶ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd, 1973) 262.

²⁶⁷ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 106.

²⁶⁸ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 106.

²⁶⁹ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd, 1973), 102.

²⁷⁰ R.E. Wraith & P.G. Hutchesson, *Administrative Tribunals* (George Allen & Unwin Ltd 1973) 102.

²⁷¹ Entered into force on 1 January 1973.

²⁷² Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 81.

duty to provide specialist representatives at asylum appeals.²⁷³ It was not until 1984 that the Home Secretary was required to give reasons for an asylum decision.²⁷⁴ As noted, the 1971 Act did not provide a right of appeal against refusal of asylum. Asylum-seekers, therefore, could only appeal if they could rely on one of the limited immigration grounds of appeal under the Act. Whether an asylum-seeker had a right of appeal was determined by their pre-application immigration status, which differed from asylum-seeker to asylum-seeker.²⁷⁵ This meant that some asylum-seekers were denied a right of appeal or could only appeal from outside the UK.²⁷⁶ This discrimination between asylum-seekers has prompted Tuitt to describe the ‘historical system of appeals’ as ‘arbitrary’.²⁷⁷ In the absence of a right of appeal, the only recourse was an application for judicial review, which only allows the courts to scrutinise the decision-making process and not the merits of the decision itself. It was not until 1987 that the House of Lords was asked to consider issues arising under the 1951 Convention. The House of Lords famously found that asylum decisions, due to the gravity of the issue, required more rigorous examination by the courts.²⁷⁸ The inconsistent and limited rights of appeal for asylum seekers has been attributed to the conclusion of the Wilson Committee that asylum appeals ‘could be suitably dealt with under the [immigration] appeal system’.²⁷⁹ Once again, the problem of merging immigration and asylum resulted in the rights of asylum-seekers being denied.

In summary, the right of appeal against immigration decisions was re-established in 1969 to treat immigrants fairly and to improve the UK’s reputation for fair dealing. However, there was no comprehensive in-country right of appeal against a refusal to grant asylum until 1993.²⁸⁰ Prior to 1993, asylum-centred fairness values were suppressed as some asylum-

²⁷³ Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (Pluto Press 1996) 132.

²⁷⁴ The Immigration Appeals (Notices) Regulations 1984, SI 1984 2040.

²⁷⁵ Immigration Act, 1971, s 14 (3) section 15 (3).

²⁷⁶ Under the 1971 Act, it was not possible for an asylum seeker to bring an appeal against refusal of entry if the reason for refusal was that it would not be conducive to the public good. There was also no right of appeal against curtailment of stay or refusal to extend it or against deportation if the decision was based on security or political grounds. Asylum seekers who claimed asylum on entry without possessing a valid visa, those who made *sur place* claims after expiry of limited leave, and those who faced deportation upon recommendation of a court, did not have an in-country right of appeal.

²⁷⁷ Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (Pluto Press 1996) 135.

²⁷⁸ *Bugdaycay v Secretary of State for the Home Department* [1987] Imm Ar 250, [263].

²⁷⁹ Home Office, *Report of the Committee on Immigration Appeals* (Cmnd. 3387, 1967) para. 145.

²⁸⁰ The failure of the UK to accord an in-country right of appeal to all asylum seekers was not found to be a breach of Article 13 ECHR in the case of *Vilvarajah and Others v. the United Kingdom* (1992) 14 EHRR 248.

seekers were arbitrarily denied a right of appeal and some could only appeal after return to countries where they feared persecution.

4. THE LATE 1980S AND THE 1990S

The third important period is the late 1980s and early 1990s. This time was pivotal in terms of the establishment of appeals against asylum decisions and the rise of legal aid provision.²⁸¹ These fairness procedures attempted to offset the growth of restrictive asylum measures. Following the end of the Cold War, the rise in ‘new arrivals’ from the global south, and the peak in asylum claims during the violent period of the breakup of the former Yugoslavia, policy shifted to controlling asylum. Efforts to limit access to asylum under the *non-entrée regime* were influenced, in part, by the ‘soft law’ instruments that lay the foundations for the EU asylum *acquis* and the Common European Asylum System.

From the late 1980s onwards the judiciary’s attitude shifted from abstentionism to activism in the field of asylum.²⁸² This shift (and the delays caused by an increase in judicial review applications) heralded a new asylum appellate structure and increased legal oversight of asylum decision-making.²⁸³ Just as the 1905 Act had embodied conflicting values, so too did the Asylum and Immigration Appeals Act 1993 (which established the primacy of the Refugee Convention and the new asylum appeals system) manifest conflicting concerns. On the one hand, the 1993 Act was aimed at weeding out ‘bogus’ asylum claims in view of increasing numbers of arrivals. On the other hand, the 1993 Act was an expression of the liberal values of fairness, rights and due process.²⁸⁴ Extending the right of appeal to all asylum-seekers was a concession in view of the restrictive measures adopted under the 1993 Act.²⁸⁵ Previously, asylum policy remained in the administrative sphere. Much of the asylum administrative practices were not provided for in the Immigration Rules and were not part of law.²⁸⁶ Refugee status determination was viewed as ‘entirely political’ and therefore the job

²⁸¹ A brief history of the rise and fall of legal aid for asylum representation is outlined in Chapter 6 as part of the analysis of legal aid time restrictions.

²⁸² Robert Thomas, ‘The impact of judicial review on asylum’ (2003) (Autumn) Public Law 479.

²⁸³ Robert Thomas, ‘The impact of judicial review on asylum’ (2003) (Autumn) Public Law 479, 488.

²⁸⁴ Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (Pluto Press 1996) 138.

²⁸⁵ See below for discussion. These restrictions are also explored further in Chapter 6.

²⁸⁶ Robert Thomas, ‘The impact of judicial review on asylum’ (2003) (Autumn) Public Law 479, 481 and M. Connelly, ‘Refugees and the United Kingdom’ (1984) 69 *Race and Immigration* 8, 9.

of the Home Secretary, not the courts.²⁸⁷ As already highlighted, the resistance to a specific system of asylum appeals until as late as 1993 was to protect the administrative expediency of border control against the perceived threat of abusive asylum claims.²⁸⁸ However, increased state-centric legislative zeal against ‘bogus’ asylum-seekers reshaped asylum law as increasingly restrictive and complex.

There was a rise in the numbers of asylum judicial review applications and, from 1993, asylum also started to take up a substantial proportion of the work of the Court of Appeal.²⁸⁹ Asylum-seekers sought recourse from the courts as restrictive legislative powers to control asylum grew.²⁹⁰ Attempts to limit access to asylum was part of a wider EU trend to stem the arrival of the ‘new asylum seekers’ from the global south.²⁹¹ However, the claim that the cause of these restrictive policies was caused by the arrival of new non-European asylum-seekers is based upon the ‘myth of difference’; the myth that the numbers and character of refugee flows from the global south (since the 1980s) were radically different from refugee flows in Europe (since the end of the First World War).²⁹² In terms of numbers, Mayblin highlights that Europe ‘hosts a tiny proportion of global refugees, whereas in the mid-twentieth century, as a producing region, it hosted a much greater proportion.’²⁹³ In terms of character, Mayblin observes, ‘that the British government was hostile to non-European refugees, particularly those from the colonies, right from the start.’²⁹⁴

As the judicial supervision of asylum decisions began to increase, the UK courts started to undertake a ‘major role’ in interpreting the Refugee Convention.²⁹⁵ The courts considered it their ‘responsibility to scrutinise [asylum] decisions anxiously’ in view of the

²⁸⁷ Christopher Vincenzi, *Crown Powers, Subjects and Citizens* (Pinter 1998) 150.

²⁸⁸ Robert Thomas, ‘The impact of judicial review on asylum’ (2003) (Autumn) *Public Law* 479, 481-482.

²⁸⁹ Under the Immigration and Asylum Appeals Act 1993, s 9, an onward appeal from the Immigration and Asylum Tribunal (IAT) could be made to the Court of Appeal.

²⁹⁰ Robert Thomas observed in 2003 that, ‘Parliament has legislated for asylum policy on five separate occasions since 1987 with each Act making the law progressively more technical and complex, and substantial rule-making powers have been conferred on the Home Office.’ Robert Thomas, ‘The impact of judicial review on asylum’ (2003) (Autumn) *Public Law* 479, 483. Immigration (Carriers’ Liability) Act 1987.

²⁹¹ Guy Goodwin-Gill, ‘Non-Refoulement and the New Asylum Seekers’ (1985) 26(4) *Virginia Journal of International Law* 897.

²⁹² B.S. Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11(4) *Journal of Refugee Studies* 350, 351.

²⁹³ Lucy Mayblin, ‘Colonialism, decolonisation, and the right to be human: Britain and the 1951 Geneva Convention on the status of refugees’ (2014) 27(3) *Journal of Historical Sociology* 423, 426.

²⁹⁴ Lucy Mayblin, ‘Colonialism, decolonisation, and the right to be human: Britain and the 1951 Geneva Convention on the status of refugees’ (2014) 27(3) *Journal of Historical Sociology* 423, 424.

²⁹⁵ Robert Thomas, ‘The impact of judicial review on asylum’ (2003) (Autumn) *Public Law* 479, 484.

new strict measures that risked undermining the refugee's right to protection.²⁹⁶ The Court of Appeal has acknowledged that asylum has become 'an area where the law is riddled with obscurities and regularly amended by primary and secondary legislation and by rules'.²⁹⁷ Alongside legislative hyperactivity, legal challenge of administrative asylum decisions became routine.²⁹⁸ Staughton LJ has noted that, 'the tension between humanitarian concern on the one hand and self interest on the other has produced in this country the whole apparatus of immigration control, with immigration officers, adjudicators, appeal tribunals, judicial review and a greater burden on the Civil Division of the Court of Appeal than any other single topic.'²⁹⁹

The 'initial breakthrough in the supervision of asylum decisions' was the 1987 decision of the House of Lords in *Bugdaycay* that concerned procedural fairness and the refusal of refugee status.³⁰⁰ The House of Lords was unimpressed with the way the Home Office had handled the asylum claim. The Home Office had been unaware of conditions in the claimant's home country of Uganda and had not investigated whether if returned to Kenya the claimant would be returned to Uganda. The oft-cited finding of Lord Bridge was that asylum decisions affecting 'the most fundamental of all human rights' must be subject to 'the most anxious scrutiny' by the courts.³⁰¹ In the same year, the High Court found that it would be preferable for the Home Office to provide detailed written reasons for refusing asylum, which led to the Home Office changing its practice and providing written reasons.³⁰² Following on logically, the courts recognised the claimant's right to have the opportunity to respond to the reasons for refusal.³⁰³ As articulated by Lord Bingham, in the case of

²⁹⁶ Robert Thomas, 'The impact of judicial review on asylum' (2003) (Autumn) Public Law 479. This was happening alongside a general shift to anxious scrutiny in human rights cases (*R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33).

²⁹⁷ *Zenovics v Secretary of State for the Home Department* [2002] EWCA Civ 273, [228].

²⁹⁸ A 'culture of pervasive challenge' has been recongised. The Leggatt Report, *Tribunals for Users: One System, One Service: Report of the Review of Tribunals by Sir Andrew Leggatt* (Lord Chancellor's Department, 2001), Pt II "The Immigration Appellate Authorities", para.22.

²⁹⁹ *R v Immigration Appeal Tribunal, ex parte Shah* [1998] All E.R. 30, [48]. This is illustrative of Hathaway and Neve's interest convergence thesis in the field of refugee law. James C. Hathaway and R. Alexander Neve, 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution Oriented-Protection' (1997) 10 *Harvard Human Rights Journal* 115, 119.

³⁰⁰ *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514.

³⁰¹ *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514, per Lord Bride at [513].

³⁰² *R v Secretary of State for the Home Department, ex parte Singh* [1987] Imm.A.R. 489, per Lord Justice Woolf at [498].

³⁰³ *R v Secretary of State for the Home Department, ex parte Yemoh* [1988] Imm.A.R. 595. See also *R v Secretary of State for the Home Department, ex parte Awuku* [1988] Imm.A.R. 606 and *Gaima v Secretary of State for the Home Department* [1989] Imm.A.R. 205.

Thirukumar, ‘asylum decisions are of such moment that only the highest standards of fairness will suffice’.³⁰⁴ The Home Office amended its procedures accordingly. These cases marked historically significant developments in UK asylum law. As the UK’s colonial past collided with its post-colonial present, Parliament in the late 1960s had pursued a concept of fairness based on balancing racial prejudice and the UK’s international responsibilities and reputation for ‘fair dealing’. However, in the 1990s, judges (less constrained by executive dictat) began to generate concepts of fairness based on juridical notions of rights protection and equal treatment.

While the courts showed willingness to scrutinise procedural fairness through judicial review, this ‘was considered an inadequate substitute for a right of appeal because the real issue in an asylum claim was – and still is – invariably factual: is the fear of persecution well-founded?’³⁰⁵ Judicial review does not allow the courts to scrutinise the merits of the decision. Thomas also highlights that, as happened with the case of *Alam*, ‘the prospect of an adverse ruling by the European Court of Human Rights’ also played a part in the introduction of the in-country right of appeal against asylum refusals.³⁰⁶ The Asylum and Immigration Appeals Act 1993 provided asylum seekers with the right to an oral appeal hearing before an independent adjudicator and a right to remain in the UK pending appeals.³⁰⁷ This concession, brought in under Major’s Conservative government, following defeat of the Asylum Bill 1991, to some extent, addressed the unjustifiable inconsistency in appeal rights for asylum-seekers.

The 1993 Act purported to give ‘a fair deal to asylum seekers’.³⁰⁸ However, the 1993 Act controversially established the ‘fast track’ appeals system. The cases that were fast-tracked were those individual claims – and in some cases by group – summarily certified as ‘manifestly unfounded’ by the Home Office.³⁰⁹ The Act imposed strict time limits for lodging

³⁰⁴ *R v Secretary of State for the Home Department, ex parte Thirukumar* [1989] Imm AR 402, [414].

³⁰⁵ Robert Thomas, ‘The impact of judicial review on asylum’ (2003) (Autumn) Public Law 479, 487.

³⁰⁶ In *Vilvarajah and Others v. the United Kingdom* (1992) 14 EHRR 248, [275]-[286], the European Commission of Human Rights ruled that judicial review alone did not provide an adequate remedy under ECHR, article 13. Concerned that this ruling would be upheld by the European Court of Human Rights, the government introduced the Asylum Bill (HC Bill 1, 1991-92) to establish a right of appeal. However, this Bill ran out of Parliamentary time owing to the timing of the 1992 general election and a new Bill was introduced in the 1992-93 session. In any event, the European Court of Human Rights ruled that judicial review alone was sufficient for the purposes of article 13: (1992) 14 EHRR 248, [290]-[293].

³⁰⁷ Immigration and Asylum Appeals Act 1993, s 8 and s 6.

³⁰⁸ HC Deb 02 November 1992 vol 213 col 35.

³⁰⁹ Immigration and Asylum Appeals Act 1993, schedule 2 para 5. Contrary to the 1951 Convention which requires claims to be considered individually.

and disposing of appeals and created, effectively, a ‘two-tier’ asylum appeals system.³¹⁰ Those perceived as deserving, having an arguable claim under the 1951 Refugee Convention, were subject to the standard procedures. Those perceived as undeserving, as bogus or abusive claimants, were subject to accelerated procedures. Tuitt observed that, ‘in spite of an extension of the right of appeal to all applicants, the same class of refugees who were denied a right of appeal under the old system – whether in-country or at all – fall within the fast-track appeals procedure’.³¹¹ The 1993 Act also provided that where someone had leave to enter and subsequently applied for asylum but was refused, their leave could be curtailed and they could be removed without an appeal against the curtailment.³¹² This was problematic for some refugees *sur place*. That is, someone who becomes a refugee due to a change of circumstances after arrival in a host country.

The restrictive measures of deterrence and accelerated procedures under the 1993 Act were in response to the rise in asylum applications in the 1980s and early 1990s.³¹³ Stevens described this as ‘a panicked response and misguided belief in the power of legislation to reduce numbers and deter asylum seekers.’³¹⁴ The professed aim of the legislation was to establish ‘a better system for making prompt and fair decisions’.³¹⁵ The Home Secretary, Kenneth Clarke, presented the Bill as addressing the issue of weeding out bogus asylum applications. Tony Blair clarified that the accepted issue, rather, between both sides of the House of Commons was ‘the due process of law – in other words, it is about fairness and whether our procedures conform to the rules of natural justice.’³¹⁶ Blair expressed the concern that ‘weeding out false claims should not be at the expense of prejudicing genuine

³¹⁰ Asylum applicants whose claims were certified by the Secretary of State as ‘without foundation’ had two days to lodge an appeal and appeals were to be heard and determined within seven days of receipt of the notice of hearing.

³¹¹ Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (Pluto Press 1996) 131.

³¹² Immigration and Asylum Appeals Act 1993, s 7.

³¹³ Thomas explains: ‘The increase of applications has been ascribed to various causes: the end of the Cold War, increased conflict throughout the world, the ease of international travel, and the consequent advent of “jet-age” asylum and the growing number of people seeking better economic opportunities.... Under, at times, intense public pressure, governments have viewed this increase as a distinct problem requiring resolution by the introduction of new policies to expedite the processing of claims, to prevent and deter people from claiming asylum in the United Kingdom and to ensure that unsuccessful applicants are removed quickly. The principal assumption behind this programme has been that people who do not otherwise qualify to enter or remain in the country lodge asylum applications in order to prolong their stay primarily for economic reasons.’ Robert Thomas, ‘The impact of judicial review on asylum’ (2003) (Autumn) Public Law 479, 483.

³¹⁴ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 219.

³¹⁵ HC Deb 02 November 1992 vol 213 col 22.

³¹⁶ HC Deb 02 November 1992 vol 213 col 36.

claims'.³¹⁷ He considered that asylum decisions 'should be the outcome of a proper evaluation of each case according to the rules that are clear and fair and not the accident of procedures that are at best faulty and at worst entirely arbitrary, and that would be the position under the Bill'.³¹⁸ Blair pointed out that it was not only the Opposition who were questioning the fairness of the procedures proposed by the Bill, but also 'the Law Society, many senior lawyers operating in the immigration area, the Joint Council for the Welfare of immigrants, the National Association of Citizens Advice Bureaux and Amnesty International'.³¹⁹ The debate over the passage of the 1993 Bill mirrors the Parliamentary debate of the passage of the 1905 Bill. Once again, prejudice comes into conflict with liberal values of fairness.

The 1993 Act established the primacy of the Refugee Convention over domestic Immigration Rules.³²⁰ However, the 1993 Act failed to incorporate the full corpus of international human rights instruments related to refugee protection. Stevens highlights that the Conservative government resisted incorporating, 'the 1950 European Convention on Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1984 UN Convention Against Torture, and the 1989 UN Convention on the Rights of the Child'.³²¹ Notably, the 1993 Act introduced fingerprinting, criminal sanctions and imposed restrictions on access to housing for asylum-seekers.³²² Yet, more positively, the 1993 Act provided for the first time the right of onward appeal from the Tribunal to the Court of Appeal.³²³ The courts continued to demonstrate an 'intention to ensure that the asylum appellate process operates fairly', showing a 'willingness to defend concepts of basic fairness at a time when government seemed more concerned with administrative expediency'.³²⁴ However, the 'government has not hesitated to invoke its command of the legislative process in order to reverse or limit the effect of judgments adverse to its policy objectives', undermining the principled position of the courts.³²⁵ The 1993 Act was followed by a string of domestic

³¹⁷ HC Deb 02 November 1992 vol 213 col 36.

³¹⁸ HC Deb 02 November 1992 vol 213 col 36.

³¹⁹ HC Deb 02 November 1992 vol 213 col 37.

³²⁰ Asylum and Immigration Appeals Act 1993, s 2. The 1993 Act defined an asylum claim, under s 1, as a claim under the 1951 Refugee Convention.

³²¹ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 166.

³²² Asylum and Immigration Appeals Act 1993, ss 3-5.

³²³ Asylum and Immigration Appeals Act 1993, s 9.

³²⁴ Robert Thomas, 'The impact of judicial review on asylum' (2003) (Autumn) Public Law 479, 489-490. Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths 2000) 150, citing *R v Secretary of State for Social Security, ex parte JCWI* [1996] 4 All ER 385.

³²⁵ Robert Thomas, 'The impact of judicial review on asylum' (2003) (Autumn) Public Law 479, 510.

legislation that saw ‘the progressive hardening of asylum law’.³²⁶ The 1996 Act, for example, imposed further restrictions on access to housing, restricted access to benefits, and placed restrictions on employment.³²⁷ The 1996 Act also extended the ‘fast track’ procedure and endorsed the ‘safe third country’ procedure and restricted appeal rights in these cases.³²⁸ After 1993, ‘primary and subordinate legislation followed so rapidly that there was never enough time between one set of legislative measures and the next to gain any knowledge of how the most recent changes could be made to produce a “good” outcome.’³²⁹ To this extent, the speed of legislative change affected the substantive fairness of decisions. Moreover, hyper-legislation in the area of asylum undermined fair procedure and the core values of fairness and consistency underpinning the tribunal process.³³⁰

In the light of the 1998 Kosovo refugee crisis, the UK received its highest recorded number of asylum-seekers.³³¹ The Labour government responded by implementing, under the Immigration and Asylum Act 1999, a policy of ‘Fairer, Faster and Firmer’ asylum procedures in order to address delays and backlogs.³³² Despite Labour’s opposition to the 1993 and 1996 Acts, the restrictive trend, to deter ‘abusive’ asylum-seekers, was continued and strengthened under the new Labour government. The appeal process was reviewed and the practices of certification, fast-track, and tight time-limits were maintained.³³³ In tandem with ‘bringing rights home’ under the Human Rights Act 1998, the 1999 Act introduced a new appeal on human rights grounds.³³⁴ The 1999 Act sought to regulate the provision of asylum and immigration advice in order to address the problem of unscrupulous immigration advisers. The 1999 Act also saw the withdrawal of all rights to social security benefits for asylum-seekers.³³⁵ The Labour government picked up the Conservative government’s mantle of fast

³²⁶ Dallah Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell, 2004) 164.

³²⁷ Asylum and Immigration Appeals Act 1996, ss 8-11.

³²⁸ Asylum and Immigration Appeals Act 1996, ss 1-3 and schedule 2 para 5. In light of these findings, a detailed critique of time-related practices is made in Chapter 6.

³²⁹ Geoffrey Care, *Migrants and the Courts: A Century of Trial and Error?* (Ashgate 2013) 73.

³³⁰ See, for example, Government Legal Department, *The judge over your shoulder — a guide to good decision making* (2018).

³³¹ Following the crisis, the numbers diminished and have never reached again this record high.

³³² Home Office, *Fairer, Faster and Firmer – a Modern Approach to Immigration and Asylum* (Cm 4018, 1998).

³³³ Immigration and Asylum Act 1999, schedule 4 para. 9(7). Immigration and Asylum Appeals (Procedure) Rules 2000, SI 2000 2333, rule 6. The central importance of legal aid to the findings of this thesis is set out in Chapter 6.

³³⁴ Human Rights Act 1998, s 6 and Immigration and Asylum Act 1999, s 65.

³³⁵ Immigration and Asylum Act 1999, ss 94-127.

asylum refusals while the courts tried to maintain a basic level of fairness and rights protection.

Just two years later, there were yet further legal reforms to the asylum system. The Nationality, Immigration and Asylum Act 2002 was presented as, ‘offering an holistic and comprehensive approach to nationality, managed immigration and asylum that recognises the interrelationship of each element in the system’.³³⁶ This approach further confused asylum and immigration matters. Notably, the 2002 Act sanctioned the refusal of support where an asylum claim was not made ‘as soon as reasonably possible.’³³⁷ The House of Lords, in *Limbuela*, found that decisions made to refuse support under this provision risked violating Article 3 ECHR (prohibition on inhuman and degrading treatment). This was due to the risk of a ‘late applicant’ being ‘obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene’.³³⁸ This is a good example of the courts not allowing the Government to use administrative expediency to justify the unfair treatment and suffering for asylum-seekers.

The asylum appeal system became increasingly judicialised as the IAT began to deliver ‘starred’ (on points of law) and country-guideline decisions which set a binding precedent.³³⁹ The aim of promulgating starred and country-guideline determinations (by a specially convened legal panel) was consistency of decision-making. However, country-guideline cases have been ‘controversial’, in view of country conditions constantly changing and the high volume of reviews and remittals of tribunal decisions based on country-guideline cases.³⁴⁰ Thomas observed that this, in part, contributed to the abolition of the two-

³³⁶ HC Deb 07 February vol 379 col 1027, per David Blunkett on the White Paper, *Secure Borders, Safe Have – Integration with Diversity in Modern Britain* (Home Office, *Secure Borders, Safe Have – Integration with Diversity in Modern Britain* (Cm 5387, 2002)).

³³⁷ Nationality, Immigration and Asylum Act 2002, s 55 and schedule 3.

³³⁸ *Limbuela v Secretary of State for the Home Department* [2005] UKHL 66 [9]. As per Baroness Hales, [78], ‘It might be possible to endure rooflessness for some time without degradation if one had enough to eat and somewhere to wash oneself and one’s clothing. It might be possible to endure cashlessness for some time if one had a roof and basic meals and hygiene facilities provided. But to have to endure the indefinite prospect of both, unless one is in a place where it is both possible and legal to live off the land, is in today’s society both inhuman and degrading. We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age.’

³³⁹ Robert Thomas, ‘The impact of judicial review on asylum’ (2003) (Autumn) Public Law 479, 484. The starring system was introduced in 2000.

³⁴⁰ Robert Thomas, ‘Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals’ (2005) 25(3) Legal Studies 462, 486.

tier appellate system with a single tier in 2004.³⁴¹ Reform of the tribunal system introduced alongside cuts to legal aid in 2004.³⁴² Thomas highlighted that the reforms to the tribunal and to legal aid were, '[m]otivated by political considerations to reduce delay and costs', and 'enabled the government to benefit from the symbolic reassurance provided by a tribunal system and to justify its inaction with respect to the improvement of primary decision-making.'³⁴³ He further commented that the impact would be 'to increase the difficulties in achieving fair and accurate decision-making.'³⁴⁴ Certainly, the reforms were driven by notions of state-centred fairness despite maintaining the appearance of asylum-centred fairness.

Before moving on to consider the post-2013 era, it is important to highlight that the right to asylum has been more strongly stated with the development of the Common European Asylum System under the European Union. The EU Qualification Directive 'seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members'.³⁴⁵ The EU Charter, under Article 18, also provides a 'right to asylum'. In addition to these substantive rights, the CEAS and the EU Charter also enhance procedural protections. While the UK opted-in to the first-phase of the Common European Asylum System, adopted between 1999 and 2005, the UK's approach to the second phase of the CEAS was lacklustre.³⁴⁶ Nonetheless, Article 47 of the Charter is more extensive than Articles 6 and 13 of the ECHR. Article 47 provides the right to a fair hearing but is not restricted to the determination of civil rights because the EU is 'a community based on the rule of law.' However, Article 47 is only binding if EU law is applicable. In asylum cases, EU law is invoked when measures of the CEAS are relied upon. Article 39 of the Asylum Procedures Directive (one of the measures of the CEAS) guarantees the right to an effective remedy before a court or tribunal.³⁴⁷ Articles 15 and 16 of the Procedures Directive provide explicit rights to free legal representation during asylum appeals. However, these rights are subject to a means and merits test and are not guaranteed in respect of any onward appeals or

³⁴¹ Asylum and Immigration (Treatment of Claimants, etc) Act 2004. A two-tier appellate structure was re-introduced in 2010 further to the Tribunals Courts and Enforcement Act 2007. See below for discussion.

³⁴² I return to analyse the restrictions on legal aid in Chapter 6.

³⁴³ Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) *Legal Studies* 462, 498.

³⁴⁴ Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) *Legal Studies* 462, 486.

³⁴⁵ Preamble to the Qualification Directive.

³⁴⁶ The UK has opted-in to only the 2013 re-cast Dublin and Eurodac Regulations.

³⁴⁷ Council Directive (EC) 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005], OJ L 326/13 (Procedures Directive).

reviews.³⁴⁸ Although, such restrictions must not be arbitrary and must not undermine the right to human dignity.³⁴⁹ The asylum law developments towards the end of the 20th century, and beginning of the 21st century, were shaped by the same conflicting state-centred and asylum centred fairness values of the early and mid-20th century. However, this period witnessed the rapid judicialisation of asylum (at the domestic and EU levels) and a shift towards judicial fairness in asylum matters.

5. POST-2013

Since 2013, the policy has been to restrict judicial oversight of immigration and asylum decision-making. Judicial review has been restructured, legal aid has been dismantled, the hostile environment has been codified, and immigration appeal rights have been eroded.³⁵⁰ These measures mark an accelerated regression of asylum rights protection. State obligations have been reduced to the bare requirements of a narrow interpretation of international law. Legal aid and appeal rights have been retained in principle for asylum-claimants. However, these safeguards are more symbolic than substantive due to the hollowing-out of legal aid and an increasingly hostile environment.³⁵¹ The post-2013 suite of hostile measures have raised serious concerns amongst refugee lawyers, academics and civil society campaigners, about access to justice for asylum-seekers in the UK.³⁵²

As observed by Moffatt and Thomas, ‘judicial review has become a victim of its own success in immigration and asylum law.’³⁵³ The writers outline how the ‘increasing number of immigration and asylum judicial reviews has been used to justify not only the removal of these cases from the Administrative Court, but also a raft of further cuts and reforms.’³⁵⁴ Since 2013, the majority of immigration and asylum judicial reviews have been transferred to the Tribunal, removing the supervision of High Court judges.³⁵⁵ The provision of legal aid

³⁴⁸ Procedures Directive, article 17.

³⁴⁹ Procedures Directive, article 15(3) and the EU Charter, article 47.

³⁵⁰ Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Immigration Act 2014.

³⁵¹ Restrictions on legal aid are discussed and analysed in Chapter 6.

³⁵² See, for example, Refugee Action, ‘Tipping the Scales: Access to Justice in the Asylum System’ (2018).

³⁵³ Rowena Moffatt and Carita Thomas, ‘And Then They Came for Judicial Review: Proposals for Further Reform’, (2014) 28(3) *Journal of Immigration, Asylum and Nationality Law* 237, 237.

³⁵⁴ Rowena Moffatt and Carita Thomas, ‘And Then They Came for Judicial Review: Proposals for Further Reform’, (2014) 28(3) *Journal of Immigration, Asylum and Nationality Law* 237, 237.

³⁵⁵ Tribunals, Courts and Enforcement Act 2007, s 18, and the Crime and Courts Act 2013.

has also been significantly re-structured and curtailed. Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which came into force in April 2013, legal aid was removed for most immigration cases. While legal aid remained in scope under LASPO for most asylum cases, the cuts to legal aid for immigration cases threatened access to justice for asylum-seekers. The restrictions put pressure under already struggling legal aid practitioners, contributing to the attrition of specialist lawyers and creating conditions in which bad practice is more likely. LASPO largely safeguarded legal aid for judicial reviews. However, in 2013, further proposed reforms to judicial review were published.³⁵⁶ This led to the enactment of the Criminal Courts and Justice Act 2015, which limits access to judicial review and has been criticised by practitioners and academics.³⁵⁷

Similarly, the expansion of the appellate machinery, overseeing the fairness of immigration and asylum decisions, no doubt contributed to the curtailment of appeal rights under the Immigration Act 2014 and the Government policy of a hostile environment.³⁵⁸ Although, Sheona York highlights that hostile environment measures were in place long before Theresa May used the term in 2013.³⁵⁹ The 2014 Act gives the Home Secretary new certification powers and reduces significantly the grounds of appeal.³⁶⁰ Most asylum-applicants retain the right of appeal against a Home Office refusal to the First-tier Tribunal (FTT) of the Immigration and Asylum Chamber (IAC).³⁶¹ Asylum decisions are appealable on the grounds that removal from the UK would breach the UK's obligations under the Refugee Convention, and, or, in relation to persons eligible for a grant of humanitarian

³⁵⁶ Ministry of Justice, *Judicial Review: Proposals for further reform* (Cm 8703, 2013).

³⁵⁷ See, for example, Robert Thomas, 'Immigration judicial reviews' (UK Constitutional Law Association, 12 September 2013).

³⁵⁸ Expanded under the Immigration Act 2016.

³⁵⁹ Sheona York, "The "hostile environment" – how Home Office immigration policies and practices create and perpetuate illegality' (2018) 32(4) *Journal of Immigration, Asylum and Nationality Law* 363.

³⁶⁰ Immigration Act 2014, s 7, inserts a new section 94B into the Nationality, Immigration and Asylum Act (NIAA) 2002; Immigration Act 2014, s 15, amends NIAA 2002, ss 82 and 84 and repeals s 83, considerably reducing the rights of appeal in immigration cases. There will no longer a right of appeal unless the matter relates to refugee or human rights decisions. These provisions came into force on 20 October 2014.

³⁶¹ Created under the Tribunal, Courts and Enforcement Act 2007. The structure of the immigration and asylum tribunal has been subject to reform over the years. For example, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 abolished two-tier structure and created a single-tier tribunal, the Asylum and Immigration Tribunal (AIT). All adjudicators and members of the old tribunal became Immigration Judges under the AIT. Procedure governed by Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005 230.

protection, and, or, would be unlawful under the Human Rights Act 1998.³⁶² The grounds of appeal are no longer against a type of immigration decision but, rather, have been limited to the UK's obligations under international law and will depend upon the nature and substance of a decision. This change invites people to try to shoehorn refugee, or humanitarian protection, or human rights claims in order to gain a right of appeal and risks feeding the narrative of abusive and vexatious claims.³⁶³ The 2014 Act also limits the power of the tribunal. The tribunal cannot consider new evidence without the consent of the Secretary of State.³⁶⁴ The Act also, controversially, proscribes how courts and tribunals should interpret Article 8 ECHR cases.³⁶⁵ Further to the 2014 Act, new Tribunal Procedure Rules replaced the old procedure rules.³⁶⁶ The 2014 procedure rules altered the time limits to appeal a negative decision and to ask for permission to appeal to the upper tribunal.³⁶⁷ The 2014 procedure rules also only require the tribunal to give written reasons if the decision relates to a protection claim, which has to be sent to the parties 'as soon as reasonably practicable.'³⁶⁸ In contrast to the 2005 procedure rules, the 2014 rules allow the tribunal to consider evidence that has been withheld from one of the parties.³⁶⁹

During Parliamentary debate on the 2014 Act, Mrs May stated the Government's proposal to 'deliver for people in this country a fair approach on immigration, which ensures...that those who are here illegally can be removed more quickly.'³⁷⁰ This expresses a state-centric view of fairness, similar to the prevalent view in the 1919 to 1969 period. The cumulative attacks on the rights of asylum-seekers and immigrants creates a hostile environment for all non-citizens and restricts access to justice. In 2013, Labour MP Diane

³⁶² Immigration Act 2014, s 15; NIAA 2002, new s 84. However, foreign criminals and those subject to deportation are negatively affected by the Act.

³⁶³ Stephen Meili, 'U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law' (2013) 36 Boston College International and Comparative Law Review 1123, 1138.

³⁶⁴ New section 85(5) of the NIAA 2002.

³⁶⁵ Immigration Act 2014, s 19.

³⁶⁶ Asylum and Immigration Tribunal (Procedure) Rules 2005 were replaced by the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, SI 2014 2604.

³⁶⁷ 14 days if inside the UK and 28 days if outside the UK. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, rule 19(2)-(3) and rule 33.

³⁶⁸ The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, rule 29.

³⁶⁹ The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, rule 13. Rule 51(7) of the 2005 Rules. *Tariq v The Home Office* [2011] UKSC 35, [104]. NIAA 2002, s 97-98 and Special Immigration Appeals Commission Act 1997.

³⁷⁰ HC Deb 22 Oct 2013 vol 569 col 157. The Bill received royal assent as the Immigration Act 2014 on 14 May 2014.

Abbott, when debating the Immigration Bill, reminded the House of Commons that history tends to repeat itself. She urged members of the Commons to:

...read the report of the royal commission on alien immigration in 1903 and the subsequent Aliens Act 1905, which deals with exactly the ideas that those on the Government Front Bench are trying to push forward today. What people say about east European migrants today is what was said about east African migrants in the '60s, what was said about west Indian migrants, what was said about Jewish migrants to the east end after the first world war, and what was said about Irish migrants in the 19th century: driving down wages; living in terrible housing conditions; assaulting our women. It is always the same narrative, which should be a clue to the House that it is always the same issue.³⁷¹

The eternal issue to which Abbott alluded to is the ongoing problem of racism and xenophobia in the UK. Since 1905, public prejudice has fuelled restrictive immigration measures for political gain. During each period of tough immigration reforms, the racial sting of controls has been taken out by preserving liberal values of juridical fairness. Namely, a right to asylum and a right to appeal to an impartial adjudicator. The 1905 Act, the 1993 Act, and the 2014 Act, for example, have offered the veneer of fairness to asylum-seekers but expanded state control and diminished asylum rights. It is always the same issue. Notions of fairness are deployed to mask prejudice and a highly restrictive regime.

6. CONCLUSION

By exploring the legal history of asylum law in the UK, this chapter has shown that competing notions of fairness (from asylum-centred to state-centred) underpinned the development of the asylum system. Notions of asylum-centred fairness established a domestic right to asylum and a system of appeals in the early twentieth century. These ideas were based upon notions of equal protection of civil liberties and equal due process. However, racial hostility to Jewish people limited the translation of liberal fairness into substantive protection. The liberal expressions of fairness could not withstand the exigencies of the First World War. The right to asylum was seriously curtailed and the right of appeal removed. These rights were not reinstated until 1993 after a shamefully long period of administrative fiat over asylum, fuelled by racist narratives of foreigners as undeserving of fair treatment.

³⁷¹ HC Deb 22 October 2013 vol 569 col 220.

It is evident that asylum-centred notions of fairness were critical to the drafting of the international framework of refugee law. Historical data reveals UK fairness values (in terms of due process) within the drafting of the Refugee Convention. However, these notions were in tension with notions of fairness between states, and a compromise between asylum-centred and state-centred fairness was ultimately reached. The discussion in the next chapter on theoretical fairness focuses on the question of fairness to asylum seekers in the domestic case. This is because the thesis is directed primarily towards the question of fair domestic asylum adjudication. This thesis does not, therefore, address all asylum fairness issues. Notably, external asylum issues (that is, measures to restrict movement and access to territory) and the normative fairness between states (that is, responsibility sharing), at the regional and international levels, is not explored in depth. The question of the fair distribution of refugees across states is an important one but this particular normative issue is not pursued within this thesis.³⁷²

Returning to what has been addressed within this chapter, the Refugee Convention was not immediately incorporated into domestic law and the Convention was silent on fair asylum procedures. Commonwealth refugees in the post-war period suffered racially discriminatory and unfair treatment. Their plight heralded the re-establishment of an appellate structure and establishment of assistance from NGOs. However, the re-introduction of appeal rights was aimed primarily at enhancing the UK's international reputation for fair dealing. Little regard was had for the suffering of asylum seekers. Still, the Human Rights Act 1998 served to bolster fairness, providing an additional procedural safety net.

From the 1990s, alongside the growth of asylum law, increased judicial oversight of asylum determinations, and the expansion of legal aid, there was increased judicial concern for the fair treatment of asylum-seekers. Successive governments viewed fairness primarily in terms of administrative expediency, with policies of quick asylum refusals and removals. Each new piece of legislation introduced harsh asylum measures; however, the symbolism of a fair appellate system was retained. When presented with the substantive injustices of the system, the judiciary reasserted the importance of substantive and procedural asylum rights. However, success in the courts heralded legal reforms to restrict the judicial oversight of asylum determinations.

³⁷² Others have explored this question. See, for example, Matthew J. Gibney, 'Refugees and Justice between states' (2015) 14(4) *European Journal of Political Theory* 448 and David Owen, 'Refugees, fairness and taking up the slack: On justice and the International Refugee Regime' (2016) 3(2) *Moral Philosophy and Politics* 141.

The trend of restricting judicial oversight of asylum was ramped up from 2013. Fairness was framed as a fair deal to citizens, not to ‘illegal’ asylum-seekers. This rhetoric justified the statutory enactment of a hostile environment, reforms to judicial review, the dismantling of legal aid and the erosion of appeal rights. None of these measures were directed explicitly towards asylum-claimants but yielded serious consequences for asylum-claimants. The UK remained, at least in principle, committed to its international obligations to uphold refugee rights and its liberal traditions of procedural fairness. However, policies driven by notions of state-centred fairness had hollowed out resources and rights, leaving only a façade of liberal fairness. In view of the tensions between asylum-centred and state-centred notions of fairness highlighted within this chapter, the next chapter explores what fairness means in legal theory in liberal democracies.

CHAPTER 3: THE PILLARS REVEALED: RAWLSIAN FAIRNESS FROM THE REFUGEE POSITION

Fairness is if they pay more attention to the cases and listen to the cases.¹

1. INTRODUCTION

In the previous chapter, on fairness in the historical context of UK asylum law, fairness was found to be a historically contingent concept with conflicting accounts of what a fair asylum system should look like. Throughout the development of the system, some constitutional actors appealed to fairness for the state and its citizens, while others appealed to fairness for individual asylum-seekers. At the heart of the disagreements, was the tension between the sovereign prerogative to grant asylum (state-centred) and the individual right to asylum (asylum-centred). This chapter seeks to resolve this normative and legal paradox by centring refugees in a conception of liberal-democratic fairness.

There is a tendency to think about refugees as outside the community of nation-states, reinforcing images of otherness and contributing to exclusionary policies. The principal conception of refugeehood is of a person outside his home country, adrift but in search of protection.² The definition of a refugee under the 1951 Convention refers to a person ‘outside the country of his nationality...or...former habitual residence’, who thus seeks protection in a country of refuge.³ This legal conception, premised upon assigning persons to states, has been criticised as too state-centred.⁴ However, underlying the conception of refugeehood as democratic protection is Arendt’s famous treatise of the ‘right to have rights.’⁵ As summarised by

¹ TIB, p. 15. (Appendix 1).

² According to Paul Weis, ‘the absence of protection by a State...is a determining element of [a person’s] refugee character.’ Weis distinguishes between stateless persons who are de jure unprotected persons and refugees who are de facto unprotected persons but notes that their situation in customary international law is anomalous. Paul Weis, ‘Human Rights and Refugees (I)’ (1972) 12(139) *International Review of the Red Cross* (1961 - 1997) 537, 537-538. See, also, Atle Grahl-Madsen, *The Status of Refugees in International Law*, 2 vols. (Leyden: A. W. Sijthoff, 1966-72) and Paul Weis, ‘The Concept of Refugee in International Law,’ (1960) 87 *Journal du Droit International* 929.

³ Refugee Convention, article 1(A)(2).

⁴ See, for example, T. Alexander Aleinkoff, ‘State-Centred Refugee Law: From Resettlement to Containment’ (1992) 14(1) *Michigan Journal of International Law* 120.

⁵ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Books 1976).

Aleinkoff, ‘individuals need to belong to a state both to ensure their protection and acquisition of rights and to permit the system of states to ascertain which particular state has responsibility for (or control over) which persons.’⁶ The moral and legal imperative of the right to have rights lies at the heart of liberal democratic thinking. The following work, therefore, puts the near rightless asylum-seeker at the centre of the theoretical inquiry. By doing this, I argue that the ‘refugee’, as an embodiment of the paradox of liberal democratic values, has the power to mitigate these tensions and strengthen the foundations of liberal democratic legal theory.

‘In the first place,’ wrote Hannah Arendt in 1943, ‘we don’t like to be called “refugees”.’⁷ In a short essay, she described the fractured and vanishing identities of Jewish refugees in their struggle to forget and assimilate within the new countries that they hoped to call home. However, Arendt warned that the reinvented super-patriot, the social parvenu, who sought inclusion within the ‘narrowness of caste spirit or the essential unreality of financial transactions’,⁸ betrayed the opportunity of meaningful belonging and political relevance. Arendt contended that, by claiming her unpopular identity, the ‘conscious pariah’ represented the ‘vanguard of their peoples.’⁹ By peoples, Arendt did not mean the Jewish people exclusively but also other Europeans, who found their fates inseparable from the Jews. These refugees had the power to expose the reality that, ‘[t]he comity of the European peoples went to pieces when, and because, it allowed its weakest member to be excluded and persecuted.’¹⁰ This thesis builds upon Arendt’s notion that refugees have the power to expose the fundamentals of a fair society.

The methodological task of this chapter is to reveal the pillars of normative fairness in liberal democracies by bringing asylum-seekers, overlooked in Rawls’s theory, to the fore of theoretical thought and discussion. The reader is invited to take the position of the ‘conscious pariah’ in order to unearth the basic norms of juridical fairness in liberal democracies. A conception of liberal democracy is adopted that

⁶ T. Alexander Aleinkoff, ‘State-Centred Refugee Law: From Resettlement to Containment’ (1992) 14(1) *Michigan Journal of International Law* 120, 120.

⁷ Hannah Arendt, ‘We Refugees’ in Marc Robinson (ed) *Altogether Elsewhere: Writers on Exile* (Faber and Faber 1994) 110. The article was first published in the *Menorah Journal*.

⁸ Hannah Arendt, ‘We Refugees’ in Marc Robinson (ed) *Altogether Elsewhere: Writers on Exile* (Faber and Faber 1994) 110, 119.

⁹ Hannah Arendt, ‘We Refugees’ in Marc Robinson (ed) *Altogether Elsewhere: Writers on Exile* (Faber and Faber 1994) 110, 119.

¹⁰ Hannah Arendt, ‘We Refugees’ in Marc Robinson (ed) *Altogether Elsewhere: Writers on Exile* (Faber and Faber 1994) 110, 119.

would satisfy John Rawls's test, as summarised: (i) government under political and electoral control that serves the fundamental constitutional interests of the people; (ii) uniting people of common sympathies but accommodating diverse interests; and (iii) requiring a firm political (moral) attachment to justice where rational interests are constrained by the reasonable willingness to offer fair terms of cooperation.¹¹ The starting point and main focus of this inquiry into fairness is the theory design of Rawls's seminal conception of 'justice as fairness',¹² as broadened to include his reflections on international justice in *The Law of Peoples*.¹³ Rawls's method is helpful in excavating fairness values embedded within the sub-terrain of politically liberal culture.¹⁴ However, Rawls's design buries one of the most significant sources of injustice. That is, the exclusionary privileges of national citizenship. However, unlike Benhabib, I do not set aside Rawls's model due to its deficiencies.¹⁵ I agree with Susan Moller Okin that Rawls's model is important in promoting 'strong empathy and a readiness to listen to the very different points of view of others.'¹⁶ As Rawls highlighted, the veil of ignorance 'forces each person in the original position to take the good of others into account.'¹⁷ This thesis inquiry revises and reads Rawls by drawing upon the justice theories of Jürgen Habermas, Amartya Sen, and Seyla Benhabib.¹⁸ These theorists challenge and build upon Rawls's thinking in a way that is consistent with the core aims of the Rawlsian fairness project. This new reading of Rawls casts a wider conceptual net, capable of catching both Rawls's cultivated liberal fairness norms and the optimum interests of asylum-seekers. Other legal scholars have applied Rawlsian fairness to juridical issues. However, very few have applied Rawlsian fairness to issues of asylum and refugee law.¹⁹ Answering the

¹¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 23-25.

¹² John Rawls, *A Theory of Justice* (Oxford University Press 1973).

¹³ John Rawls, *The Law of Peoples* (Harvard University Press 1999).

¹⁴ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 48-51 and John Rawls, *Political Liberalism* (Cambridge University Press 1996) 8.

¹⁵ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 92-93.

¹⁶ Susan Moller Okin, 'Justice and Gender: An Unfinished Debate' (2004) 72 *Fordham L Rev* 1537, 1538.

¹⁷ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 139.

¹⁸ Drawing principally from Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004), Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 1998), and Amartya Sen, *The Idea of Justice* (Penguin Books 2010).

¹⁹ See Robert S. Chang, 'Centering the Immigrant in the Inter/National Imagination (Part III): Aoki, Rawls, and Immigration' (2012) 90(5) *Oregon Law Review*, 1319, Maxine Burkett,

question of what liberal fairness is, this thesis considers the ‘who’ of fairness.²⁰ This chapter re-positions the Rawlsian frame, putting the outsider asylum-seeker at the centre of philosophical and legal thinking. This repositioning is to ‘make vivid to ourselves’ the basic constituents of fairness in a liberal conception that properly takes account of the interests of asylum-seekers.²¹

The skeleton of the theoretical argument, fleshed out in the rest of this chapter, is as follows. I revise John Rawls’s famous fairness device, the ‘original position’, by employing Seyla Benhabib’s notion of ‘porous borders’.²² This releases the conception from the anchorage of notions of the nation-state. Like Rawls, I begin at the hypothetical initial situation of the constitution of a liberal democratic regime. The situated members are veiled and deprived of knowledge of their membership status and their strength of connection to the territory. However, departing from Rawls’s exposition (but still consistent with his approach), the members know that borders are porous and that migrations happen as a general fact. As potential asylum-seekers upon the veil being lifted, I contend that the situated, veiled members would design the basic structure of society in a way that is fair to asylum-seekers.²³ I draw upon insights from the work of Amartya Sen to justify turning to the empirical voices of asylum-seekers. This tempers the exclusionary neglect of outsider perspectives in Rawls’s design. I argue that this adapted approach, which centres refugees, enhances Rawls’s conception of fairness. From the standpoint of the refugee, the basic fair terms of agreement are interpreted as the four pillars of: (situated and conscious) impartiality, respect for human rights, cooperation and caring, and inclusive public reason. A discussion of each of these pillars follows a consideration of the merits of centring the refugee.

‘Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice’ (2018) 53(2) *Harvard Civil Rights-Civil Liberties Law Review* 445, and Tally Kritzman-Amir, ‘Looking behind the Protection Gap: The Moral Obligation of the State to Necessitous Immigrants’ (2009-2010) 13(1) *University of Pennsylvania Journal of Law and Social Change* 47.

²⁰ See Nancy Fraser, ‘Abnormal Justice’ (2008) 34(3) *Critical Inquiry* 393, 407 and Nancy Fraser, ‘Who Counts? Dilemmas of Justice in a Postwestphalian World’ (2009) 41(1) *Antipode* 281.

²¹ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 18.

²² John Rawls, *A Theory of Justice* (Oxford University Press 1973) 17 and Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 93.

²³ And other vulnerable migrants, such as victims of trafficking.

2. FAIRNESS AS SITUATED AND CONSCIOUS IMPARTIALITY

2.1 Revising Rawlsian fairness from an original refugee position

The first pillar unearthed by an asylum-centric account of fairness is the idea of situated, conscious impartiality. Sen highlights how fairness as impartiality is ‘so central to the idea of justice.’²⁴ The notion of situated, conscious impartiality is a reworking of Rawls’s thought experiment, which he names the ‘original position’, and which forms the basis of his theory.²⁵ The hypothetical device aids the identification of principles of justice that inform the fundamental political structure of a just (or reasonably just) society and the assignment of rights and duties within the basic structure. These principles are agreed upon by situated, free, equal, rational, cooperative members, within a closed society, behind a ‘veil of ignorance’.²⁶ By imagining a closed society, Rawls excludes asylum-seekers from his original position. In the following sections, I set out a revision of Rawls’s original position. The revision pays attention to the necessary requirements of a truly fair starting point that is inclusive of asylum-seekers. In this revision, I retain Rawls’s veil of ignorance, which removes privilege and prejudice. However, to ensure that the veil does not act as a ‘cloak of invisibility’, I introduce the ideas of porous borders, migration as a general fact and the ‘conscious’ asylum-seeker.²⁷

2.2 Removing privilege and prejudice within a community of porous borders

Concealed behind a veil of ignorance, no one knows her place in society or her natural endowments, so will not design principles to her advantage that would disadvantage other members. Situated impartiality is thus a key fairness ingredient, defined in Rawls’s abstraction by cloaking social, historical and natural privileges.²⁸ This impartiality perspective is determined innovatively ‘from the standpoint of the

²⁴ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 405.

²⁵ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 17.

²⁶ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 12 and John Rawls, *Political Liberalism* (Cambridge University Press 1996) 23.

²⁷ As cited in Chapter 1, Frances Webber highlights that asylum seekers suffer from ‘[t]he cloak of invisibility conferred by... political and media dehumanisation.’ Frances Webber, ‘Borderline justice’ (2012) 54(2) *Race and Class* 39, 52.

²⁸ John Rawls, *Political Liberalism* (Cambridge University Press 1996) 23.

litigants themselves'.²⁹ Rawls's situated objectivity encourages decision-makers to put themselves in the shoes of others, foregrounding the rights and interests of the disadvantaged. In contrast, Sen prefers the alternative Smithian conception of the impartial spectator to harness impartiality.³⁰ Sen favours this conception for reason that the impartial spectator need not come from a 'focal group'.³¹ The impartial spectator is the distanced, ideal spectator and not a participant in a group-based contract. However, I find that the view of the distanced spectator loses the elements of vested concern, caring and cooperation, which makes the Rawlsian impartiality device so powerful. Nonetheless, as will be demonstrated, the cogency of Rawls's design is undermined by his stipulation that the veiled representatives, freed from their bias, are trapped territorially and deprived of important fairness enhancing knowledge.

Persuasively, Benhabib argues that Rawls anchors his theory to the arbitrariness of national citizenship.³² Rawls based his theory on a perfectly closed society. Made stark in view of the topic of this thesis inquiry, Rawls's criterion is problematic because it excludes non-citizens. Rawls acknowledged that his justice as fairness theorem left the problem of justice across borders unresolved.³³ For this reason, Thomas Pogge and Charles Beitz, for example, prefer a global original position.³⁴ Inspired by Rawls's idea of the original position, Pogge and Beitz diverge from Rawls and defend versions of a global difference principle. A global difference principle arranges global social and economic inequalities for the benefit of the world's least advantaged. However, the accounts of these global distributive justice theorists are silent

²⁹ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 190.

³⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 124-125. Following Adam Smith's model of the 'impartial spectator'. See Adam Smith, *The Theory of Moral Sentiments* (Cambridge University Press 2002).

³¹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 145 and 149. See section 3.4. for discussion of Sen's impartiality perspective.

³² Seyla Benhabib, 'The Law of Peoples, Distributive Justice, and Migrations' (2004) 72(5) *Fordham Law Review* 1761, 1762. Nancy Fraser similarly concludes that Rawls inhabits the grey area between a nationality and citizenship model. Where nationality, unlike citizenship, relies upon a substantive pre-political commonality. Nancy Fraser, 'Who Counts? Dilemmas of Justice in a Postwestphalian World' (2009) 41(1) *Antipode* 281, 288.

³³ John Rawls, *Political Liberalism* (Cambridge University Press 1996) 21. Also see Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality and Species Membership* (Harvard University Press 2007) 23, who concludes that Rawls's theory does not provide a satisfactory answer to this problem.

³⁴ Charles Beitz, *Political Theory and International Relations* (Princeton University Press, 1979) and Thomas W. Pogge, 'An Egalitarian Law of Peoples' (1994) 23(3) *Philosophy & Public Affairs* 195.

on immigration and refugees. I also find that the Rawlsian cosmopolitans throw up more problems that they solve. Like Rawls, I agree with the aims of global distributive justice but I do not accept Beitz's and Pogge's formulations of global principles of justice.³⁵ I am persuaded by Rawls that pursuit of a 'realistic utopia' is essential.³⁶ Rawls believed that gross inequalities and suffering are political injustices which can be solved, realistically, by cultivating reasonable and just political institutions.³⁷ However, a global difference principle, according to Rawls, fails to 'have a defined goal, aim, or cut-off point'.³⁸ Without a clear target, Rawls found a hypothetical global original position 'questionable' and 'unacceptable'.³⁹ By contrast, Rawls's view of international justice involves the duty of assistance. This principle is targeted to the short to mid term achievable goal of helping burdened societies to transition to have politically just or decent institutions (discussed later). The Rawlsian cosmopolitan theories of Pogge and Beitz are appealing in so far as they concern the well-being of individuals. Nonetheless, and despite the deficits of Rawls's position discussed in this chapter, I find Rawls's defense against the cosmopolitan view more convincing. Like Rawls, I am interested in developing a philosophical device capable of application in the here and now. A hypothetical which is not too far removed from existing political structures is more viable and therefore more persuasive than pursuing the distant dream of a world society. Like Rawls, I accept the reality and significance of borders while highlighting the arbitrary nature of borders.⁴⁰ My adapted Rawlsian thought experiment, that introduces porous borders, is more likely to enhance asylum fairness in the short to mid term. Moreover, my asylum-centric approach acknowledges the importance of access to rights and membership. An imagined bounded-community, akin to a nation-state, is therefore essential for the realisation of contemporary political and legal claims to rights and membership.

In Rawls's imagined contained territory, 'persons enter only by birth, and exit only by death'.⁴¹ Membership of the isolated society is determined solely by unrenounceable birthright. This creates an apparent paradox. Central to Rawls's

³⁵ See John Rawls, *The Law of Peoples* (Harvard University Press 1999), 116.

³⁶ See John Rawls, *The Law of Peoples* (Harvard University Press 1999), 6. Emphasis added.

³⁷ See John Rawls, *The Law of Peoples* (Harvard University Press 1999), 7.

³⁸ See John Rawls, *The Law of Peoples* (Harvard University Press 1999), 106.

³⁹ See John Rawls, *The Law of Peoples* (Harvard University Press 1999), 117.

⁴⁰ As per Rawls: 'An important role of a people's government, however arbitrary a society's boundaries may appear from a historical point of view, is to be the representative and effective agent of a people as they take responsibility for their territory and its environmental integrity, as well as for the size of their population.' John Rawls, *The Law of Peoples* (Harvard University Press 1999), 38.

⁴¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 26.

theoretical reasoning is the notion that, '[n]o one deserves his greater natural capacity nor merits a more favourable starting place in society'.⁴² His theory seeks to neutralise arbitrary natural or social facts. Yet, in seeking to mitigate against unjust discrimination and arbitrary class bias, Rawls weds his theory to the arbitrary notion of birth-right citizenship. As Joseph Carens highlights, '[i]n many ways, citizenship in Western democracies is the modern equivalent of feudal class privilege – an inherited status that greatly enhances one's life chances.'⁴³ Despite the dilution of arbitrary societal divisions being Rawls's intention, the narrowness of caste spirit remains rooted in his design.

Rawls's notion of life-long membership tied to a closed territory is hypothetical. Yet, it constrains our thinking when challenging existing structures. The idea of membership obtained by accident of birth, unable to be cast off, is close to contemporary reality. Notwithstanding the Universal Declaration of Human Rights (UDHR) 1948 asserting, under Article 15, the right to change nationality, the stringency of national rules create high or, in some cases, insurmountable hurdles to acquiring new citizenship.⁴⁴ Such rules are, as Benhabib highlights, 'an admixture of historical contingencies, territorial struggles, cultural clashes, and bureaucratic fiat.'⁴⁵ Access to national citizenship is therefore as contingent upon arbitrary fortune (or misfortune) as the aristocratic and caste systems rejected by Rawls.⁴⁶

In response to criticism, Rawls adapted the design of his original position in *The Law of Peoples* to apply to international justice. In the design of the second original position, Rawls helpfully stipulates that the veiled peoples do not know the territory, population or resources to which they are tied.⁴⁷ This point is returned to later to aid the development of the refugee-centred model. However, I agree with Benhabib that because *The Law of Peoples* builds upon the first closed original position, the adjustment does not sufficiently overcome the flaw of assuming a state-

⁴² John Rawls, *A Theory of Justice* (Oxford University Press 1973) 102.

⁴³ Joseph Carens, *The Ethics of Immigration* (Oxford University Press 2013) 227.

⁴⁴ UDHR, article 15.

⁴⁵ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (CUP 2004) 18

⁴⁶ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 102. Indeed, the Refugee Convention, article 1A, considers nationality to be an immutable characteristic and therefore a ground of persecution.

⁴⁷ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 32-33.

centric model.⁴⁸ The first original position, therefore, should be revised to shift away from a state-centric position.

The aim of Rawls's thought experiment was to remove all arbitrary inequalities when establishing the basic structure of a political-legal order.⁴⁹ Therefore, we might expect the symmetrically, and therefore fairly, positioned veiled-community to comprise of all possible variations of identity (in terms of age, sex, gender, social class, ethnicity, intelligence, disability, sexual orientation, religion, politics, culture, and so on, as well as nationality). The non-citizen, the recently arrived asylum-seeker, should be accommodated within the imagined community, which attempts to remove exclusionary prejudice. This is argued by Carens who finds that national citizenship is as happenstance as race and therefore should be screened as part of a global original position.⁵⁰

Notwithstanding the arguable merits of a world without borders, that position is not taken here due to its unlikely contemporary realisation.⁵¹ Neither Rawls, Sen, Habermas, nor Benhabib, argue for justice within a world-state.⁵² Their reasoning is convincing, as challenges to hegemonic frames of understanding are more likely to have transformative traction if they are not too radically removed from existing structures and experience.⁵³ At this point in history, when the European Union (EU) free-movement project is fraying, a call to no borders risks being dismissed as

⁴⁸ Seyla Benhabib, 'The Law of Peoples, Distributive Justice, and Migrations' (2004) 72(5) *Fordham Law Review* 1761, 1762.

⁴⁹ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 99.

⁵⁰ Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' in Ronald Beiner (ed) *Theorizing Citizenship* (SUNY Press 1995) 229. See also Charles Beitz, *Political Theory and International Relations* (Princeton University Press 1979) and Thomas Pogge, *Realizing Rawls* (Cornell University Press 1979).

⁵¹ Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' in Ronald Beiner (ed) *Theorizing Citizenship* (SUNY Press 1995).

⁵² cf Thomas Pogge, *Realising Rawls* (Cornell University Press 1989) and Charles Beitz, *Political Theory and International Relations* (Princeton University Press 1979). Against which Benhabib presents epistemic, hermeneutic and democratic objections. Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 72 and 106.

⁵³ See Jürgen Habermas, 'Kant's Idea of Perpetual Peace' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed MIT Press 1998) 183. Sen endorses Thomas Nagel's argument that institutional global justice is not currently viable. Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 25 and Thomas Nagel, 'The Problem of Global Justice' (2005) 33(2) *Philosophy & Public Affairs* 113.

fanciful.⁵⁴ Following Rawls's instruction to proceed from the 'world as we see it', Benhabib's notion of 'porous borders' has better purchase as it is presented, deftly, as both reality and liberal idea.⁵⁵ Benhabib's 'porous borders' helps to pursue the complaint that Rawls's omission of the migrant variable risks skewing the results of the thought experiment. The point is discussed in detail below. At this juncture, however, it is concluded that, by extending Rawls's aim of filtering 'those contingencies which sets men at odds and allows them to be guided by their prejudices', members at the original position should be veiled from knowledge of arbitrary and exclusionary national citizenship.⁵⁶

As already noted, having first worked out the principles of justice for domestic society, relying upon the original position with a veil of ignorance as a model of representation, Rawls extended his idea to the level of international justice.⁵⁷ He developed the Law of Peoples by advancing a second original position with a modified veil of ignorance.⁵⁸ Under this adjustment, the parties are deprived of information to the extent that they 'do not know for example, the size of the territory, or the population, or the relative strength of the people whose fundamental interests they represent'.⁵⁹ Nor do they know 'the extent of their natural resources, or the level of their economic development, or other such information.'⁶⁰ However, they 'do know that reasonably favourable conditions obtain that make constitutional democracy possible'.⁶¹ Just as arbitrary social, historical and natural privileges are veiled in the first original position, arbitrary claims to a fixed territory and its resources are veiled in the second original position. This feature of removing claims to territory and natural resources is harnessed and included in the current revised refugee-centric account.

⁵⁴ Particularly considering the British exit from the European Union (BREXIT) and the temporary closure of borders within the Schengen area during the 2015/16 European refugee crisis.

⁵⁵ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 116-117.

⁵⁶ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 19.

⁵⁷ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 30-32, 63 and 70.

⁵⁸ *ibid* 32. Note that Rawls employs a third original position to apply to decent hierarchical peoples. He explains that: '...the Law of Peoples uses an original position argument only three times: twice for liberal societies (once at the domestic level and once at the Law of Peoples level), but only once, at the second level, for decent hierarchical societies.' See John Rawls, *The Law of Peoples* (Harvard University Press 1999) 70.

⁵⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 32.

⁶⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 33.

⁶¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 33.

The 'realistic utopia' of the Law of Peoples described by Rawls is akin to an international system of nation-states.⁶² As already highlighted, Rawls ties democratic-citizenship to territory and birth-right nationality. Benhabib identifies the 'tension between the universalistic premises of Rawls's political liberalism and the more particularistic orientations of his Law of Peoples'.⁶³ Rawls's 'peoples' are partitioned and penned to maintain order. Benhabib ruminates that:

In Rawls's ideal utopia, peoples become windowless monads who have no interest in mixing, mingling, and interacting with others. This is certainly a vision of an ordered world but it is also the vision of static, dull world of self-satisfied peoples, who are indifferent not only to each other's plight but to each other's charms as well.⁶⁴

The problem of the exclusion of the perspectives of asylum-seekers in Rawls's design is returned to below.⁶⁵ For now, a conceptual paradox created by Rawls's commitment to modelling his theory upon the nation-state, is discussed. Rawls considered that rich diversity, including religious, racial, ethnic and cultural diversity, exists as an inevitable feature within the fixed spaces of his paradigm of 'peoples'.⁶⁶ However, the nation-state is an historic amalgamation of the ethnic nation (ethnos) and republican citizenship (demos).⁶⁷ It is a non-sequitur that confuses civic power with homogenous ethnic or cultural identity. This 'double coding', as per Habermas, 'has a bearing on the issue of exclusion and inclusion'.⁶⁸ Habermas describes the

⁶² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 6. The Law of Peoples is grounded in political liberalism. Political liberalism is in contrast with the cosmopolitan view that is concerned with the 'well-being of individuals and not the justice of societies.' John Rawls, *The Law of Peoples* (Harvard University Press 1999) 119. For a full account of Rawls's liberal conception of justice, see John Rawls, *Political Liberalism* (Cambridge University Press 1996). An update to his work presented in John Rawls, *A Theory of Justice* (Oxford University Press 1973).

⁶³ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 85.

⁶⁴ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 85.

⁶⁵ At section 3.4. of this Chapter.

⁶⁶ John Rawls, *Political Liberalism* (Cambridge University Press 1996) 36-37 and Rawls, *The Law of Peoples* (n 6) 31.

⁶⁷ See Jürgen Habermas, 'The Nation, the Rule of Law, and Democracy' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 1998)129-134.

⁶⁸ Jürgen Habermas, 'The Nation, the Rule of Law, and Democracy' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 1998) 131.

‘Janus face of the nation, which opens itself internally but shuts itself off from the outside’.⁶⁹ The disposition of the nation-state towards exclusionary ethno-cultural homogeneity, and Rawls’s implied acceptance of this structure, does not align easily with Rawls’s desire to accommodate pluralism.⁷⁰

The construct of the nation-state - and the (largely fictional) commonality of a shared historic and cultural identity - has served to fix civic boundaries and, up to a point, ‘to transcend particularistic, regional ties’.⁷¹ The illusion of homogeneity has been a precursor to bestowing ‘republican liberty rights’ upon nationals.⁷² Moreover, the nation-state has been reasonably effective in maintaining relative peace and stability by guarding the independence of the asserted collective.⁷³ As Habermas proffers, ‘the ethnonational understanding of popular sovereignty seems to provide a solution to a problem that republicanism cannot solve: How are we to define the totality of those to whom citizens’ rights should legitimately apply?’⁷⁴ However, despite its historical utility, the bleak reality that the ‘formation of nation-states under the banner of ethno-nationalism has almost always been accompanied by bloody purification rituals, and it has generally exposed new minorities to new waves of repression’, cannot be escaped.⁷⁵ It is crucial, therefore, that any justice theory endeavours to break the potentially dangerous ties to ethno-nationalism.

The need for normative reflection on the repression of asylum-seekers, migrants and refugees is urgent.⁷⁶ As Habermas has observed, globalisation ‘splits the world in two and at the same time forces it to act cooperatively as a community of shared risks.’⁷⁷ Within our unequal and fragile world, the movement of people is

⁶⁹ Jürgen Habermas, ‘The Nation, the Rule of Law, and Democracy’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 1998) 131.

⁷⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 32.

⁷¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 131 and 140. See, also, Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread on Nationalism* (Revised ed, Verso 2006).

⁷² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 131 and 140.

⁷³ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 131 and 140.

⁷⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 140.

⁷⁵ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 142.

⁷⁶ Alexander Betts, ‘The normative terrain of the global refugee regime’ (2015) 29(4) *Ethics & International Affairs* 363, 363.

⁷⁷ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 1998) 183. See, also, Alexandra Trzeciak-Duval and Erwin van Veen, ‘Globalisation with a Twist: Stability, Volatility and Fragility All in One’ (2012) 1(1) *Stability: International Journal of Security & Development* 80.

subject to stricter control than the movement of capital, commodities, information and technology.⁷⁸ As sovereign governments yield control to free global markets, there is a retreat towards nationalism.⁷⁹ States attempt to reassert control over populations by exercising tougher immigration control.⁸⁰ Benhabib refers to this as the ‘crisis of the territorially circumscribed nation-state formation’.⁸¹ Asylum seekers act as powerful symbols as the synthesised republican and liberal democratic foundations are tested by globalisation.⁸² Within the UK, deterrent measures attempt to prevent asylum seekers from accessing asylum procedures.⁸³ Those who do make it across the border and access procedures face exacting adjudication processes.⁸⁴ Access to the labour market is extremely limited for asylum seekers in the UK and, in the light of global terrorism, asylum seekers have been subjected to ever stricter securitisation policies.⁸⁵ These restrictive measures consign asylum-seekers to, what Habermas would refer to as, a growing ‘underclass’, and creates social tensions.⁸⁶

Thus far, this discussion has critiqued Rawls’s closed society at the original position as too state-centric and too closely tied to arbitrary birth-right claims and the dangers of ethno-nationalism. Rawls, in his model of ‘abstracting away from the things that divide us’,⁸⁷ inadvertently anchors his theory to restrictive and divisive notions of static membership. However, the essential design of Rawls’s theory is, otherwise, an evocative fairness heuristic. The idea of situated impartiality and the

⁷⁸ For discussion, see, for example, Robert E. Goodin, ‘If people were money...’ in Brian Barry (ed), *Freemovement: Ethical issues in the transnational migration of people and money* (Routledge 1992) 6. Also see Seyla Benhabib, ‘Borders, Boundaries and Citizenship’ (2005) 38(4) *Political Science and Politics* 673, 674.

⁸⁰ Habermas observes that ‘many indications seem to point...to a regression to nationalism.’ See Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 1998) 183.

⁸¹ Seyla Benhabib, ‘Borders, Boundaries and Citizenship’ (2005) 38(4) *Political Science and Politics* 673, 673.

⁸² See, for example, Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2013) 13-17.

⁸³ See, for example, Gina Clayton, *Textbook on Immigration and Asylum Law* (7th edn, Oxford University Press 2016) 40.

⁸⁴ These procedures are discussed in Chapters 4, 5 and 6.

⁸⁵ See, for example, Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths 2000) and John R. Campbell, *Bureaucracy, Law and Dystopia in the United Kingdom’s Asylum System* (Routledge 2016). Discussion of securitisation policies is outside the scope of this thesis.

⁸⁶ Jürgen Habermas, ‘The European Nation State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 1998) 123. See also Vicki Squire, *The Exclusionary Politics of Asylum* (Palgrave Macmillan 2009) 133.

⁸⁷ Peri Roberts, *Political Constructivism* (Routledge 2007) 12.

aim of tempering privilege and prejudice are endorsed. However, to improve Rawls's thought experiment to accommodate the interests of asylum-seekers, a few adjustments need be made to the design of the original position.

2.3 Introducing migration as a general fact

Reinforcing Benhabib's idea of 'porous borders', I introduce the fairness enhancing knowledge of migrations (as general facts) to the revised original position. The above section illuminated the (particular) knowledge that the imagined founding members would be deprived of, such as their place in society, personal strengths, or status. I also argued that the members in the first original position should be deprived of the broader knowledge of their connection to territory.⁸⁸ Just as time-preference (location in time) is omitted from Rawls's first original position, so too should territory-preference (connection to territory) be omitted.⁸⁹ I argued that the members should not know whether they are new arrivals and, should, therefore, be deprived of knowledge of their residence status and national citizenship. Rawls set out that the members would know 'general facts about human society' and that there are 'no limitations on general information'.⁹⁰ This section argues that the members would know that migrations happen as a general fact, enhancing their fairness perspective.

In the real, contemporary, globalised and connected world, most borders are porous.⁹¹ In the light of industrialisation and globalisation, increased cross border movement has contributed to growing multiculturalism.⁹² Yet, Rawls's thought

⁸⁸ As Rawls stipulated in the design of his second original position.

⁸⁹ See later in this section and in section 5.1. for discussion of Rawls's removal of time-preference.

⁹⁰ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 138.

⁹¹ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 116-117. Although, the ability to cross borders often depends upon constructions of race and class. See, for example, the powerful account stemming from personal experience of Amit Sen, 'Policing the Border: Regulating Race, Gender, and Sexuality' (2007) 8 *Geo. J. Gender & L.* 67. Also see, Tanya K. Hernández, 'The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws' (1997) 76 *Or. L. Rev.* 731 and Mawuna Remarque Koutonin, 'Why are white people expats when the rest of us are immigrants?' *The Guardian* (13 March 2015) <<https://www.theguardian.com/global-development-professionals-network/2015/mar/13/white-people-expats-immigrants-migration>> accessed 6 January 2017.

⁹² As Liav Orgad highlights, '[t]echnological changes in global transportation and communications facilitate easier and cheaper movement between states and continents, culminating in the largest wave of immigration in history.' Liav Orgad, 'Illiberal Liberalism:

experiment requires us to envisage a completely closed society where citizenship is attained by birth and cannot be relinquished, and his international utopia is a relatively static, partitioned world. Alternatively, in Rawlsian terms, we might frame migration as a general, basic fact of human society, which those behind the veil of ignorance are presumed to know.⁹³ Alongside the facts of reasonable pluralism, democratic unity in diversity, public reason, and liberal democratic peace, the fact of migration can be ‘confirmed by reflecting on history and political experience’.⁹⁴

Rawls recognised that a closed society is a ‘considerable abstraction’.⁹⁵ However, in working out his theory, Rawls considered this abstraction important for us to focus, first, on the possibility of achieving justice within a society, before considering the question of justice between peoples.⁹⁶ Rawls insisted that:

[A] democratic society, like any political society, is to be viewed as a *complete* and *closed* social system. It is complete in that it is *self-sufficient* and has a place for all the main purposes of human life. It is also closed...in that entry into it is only by birth and exit from it is only by death...Thus, we are not seen as joining a society at the age of reason, as we might join an association, but as being born into society where we will lead a complete life.⁹⁷

The requirements of an imagined self-sufficient society, where persons may lead a complete life, were introduced by Rawls to avoid the oppression of others through the pursuit of ‘religion and empire, dominion and glory’.⁹⁸ To this end, Rawls was concerned with the problem of emigration for the purposes of plundering resources. However, by attempting to exclude the problem of colonisation, and the denial of the rights and status of others, Rawls inadvertently allowed the injustices faced by migrants and refugees to be hidden.

Rawls justified closed borders because ‘it enables us to focus on certain main questions free from distracting details.’⁹⁹ However, it is difficult to sustain the

Cultural Restrictions on Migration and Access to Citizenship in Europe’ (2010) 58 Am. J. Comp. L 5357.

⁹³ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 137.

⁹⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 124-125

⁹⁵ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 12.

⁹⁶ John Rawls, *Political Liberalism* (Cambridge University Press 1996) 41.

⁹⁷ John Rawls, *Political Liberalism* (Cambridge University Press 1996) 40-41. Emphasis added.

⁹⁸ John Rawls, *Political Liberalism* (Cambridge University Press 1996) 41.

⁹⁹ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 12.

position that migration is a ‘distracting detail’ in a justice thesis, even theoretically, in view of the great suffering of forcibly displaced people in the contemporary world.¹⁰⁰ Rawls, after all, intended for his theory to apply to real world problems.¹⁰¹ Benhabib observes that alongside the acceleration of migratory movements, the ‘plight of refugees has also grown’.¹⁰² This is one of the greatest challenges of our time and cannot be dismissed as a footnote, in practice or in theory. While Rawls’s thought experiment enhances sensitivity to several injustices, it simultaneously obscures other enduring struggles.¹⁰³ Imagined closed borders adopts the logic of inclusion and exclusion, the politics of difference, the dominating power over the inferior ‘Other’, and the silencing of the voices of human suffering.¹⁰⁴ Distinct from Rawls, Benhabib starts with the premise that human interdependence and migration are perennial (and state-territoriality, in contrast, is ‘a recent product of modernity’).¹⁰⁵ For Benhabib, migration, therefore, must be central to any justice theory.¹⁰⁶ This repositioning helps to unmask the plight of asylum-seekers.¹⁰⁷ The general knowledge of migrations, including forced migrations, should be brought to the fore of the thought experiment. As explained, Benhabib’s notion of ‘porous borders’ supports this idea.

The introduction of porous borders to an original position supports rather than undermines Rawls’s aims of securing the equal worth of people and maintaining resources over time. By imagining an almost but not perfectly closed society, we are still encouraged to focus on maintaining just institutions for that bounded society intergenerationally. However, the inclusion of porous borders permits consideration of the rights of migrants and refugees, from the position of migrants and refugees. The adaptation urges us to view migrants and refugees as part of society and, therefore, as holders of basic rights. It also prompts us to consider how migrants and

¹⁰⁰ There are unprecedented numbers of displaced people globally. See UNHCR, ‘Global trends: Forced displacement in 2015’ (UNHCR Report, 20 June 2016) <<http://www.unhcr.org/576408cd7.pdf>> accessed 20 February 2017.

¹⁰¹ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 128.

¹⁰² Seyla Benhabib, ‘Borders, Boundaries and Citizenship’ (2005) 38(4) *Political Science and Politics* 673, 673.

¹⁰³ Okin presents a parallel argument for women. Susan M. Okin, *Justice, Gender and the Family* (Basic Books 1989).

¹⁰⁴ See, for example, Upendra Baxi, ‘Voices of Suffering and the Future of Human Rights’ (1998) 8 *Transnational Law & Contemporary Problems* 125.

¹⁰⁵ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 73.

¹⁰⁶ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 17.

¹⁰⁷ See section 3.4. of this Chapter.

refugees can help to look after resources and just institutions. We must assume an attachment to a territory but, as Rawls stipulated for the model of his second original position, we might veil against knowledge of the particular resources of the territory.¹⁰⁸ The assumption of sufficient resources mitigates against the problem of large scale emigration to appropriate resources elsewhere. An original position with porous borders, therefore, upholds Rawls's aims but does not lock people out or hold them captive. Entertaining the possibility of cross border movement within the original position reflects empirical reality and ensures that undertakings between citizens and migrants (including refugees) are fair. The question of numbers does not arise because those at the original position are veiled from knowing the population size and extent of the natural resources. Members at the original position might restrict superfluous migration but the case for unqualified admittance and integration of forced migration, in the case of refugees, is strengthened.

Like Benhabib, Amartya Sen also highlights the need to take account of global interdependence and the fluidity of borders to enhance our fairness perspective. For Sen, fairness requires transcending both cultural and sovereign borders in view of global interdependence and the need to avoid parochialism.¹⁰⁹ Sen observes that, 'our "neighbourhoods" now effectively extend across the world.'¹¹⁰ In view of the general fluidity of capital, goods, ideas, information, people, and services across nation-state lines, Sen finds it 'hard for us to expect that an adequate consideration of diverse interests or concerns can be plausibly confined to the citizenry of any given country, ignoring all others.'¹¹¹ Even as we find ourselves in the wake of a retreat toward nationalism,¹¹² it is short-sighted to ignore the entanglement of economic, environmental, and social factors above, and indeed below, the state level.¹¹³ Sen is aware that the causes and consequences of illiberal regimes cannot be contained by

¹⁰⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 32-33.

¹⁰⁹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 402.

¹¹⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 403. Also see Chapter 7 of Sen's *The Idea of Justice*, 'Position, Relevance and Illusion', citing Dr Martin Luther King, Junior, who wrote that, '[i]njustice anywhere is a threat to justice everywhere'.

¹¹¹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 402.

¹¹² Linda Bosniak, for example, highlights the 'dramatic return of the *national* citizen'. Linda Bosniak, 'Universal Citizenship and the Problem of Alienage' (2000) 21 *Immigr. & Nat'lity* L. Rev 373, 373.

¹¹³ In terms of black markets and criminal networks, for example.

state boundaries. Sen is also alive to the need to take account of the voices of the ‘other’.¹¹⁴

Rawls proffered in *The Law of Peoples* that the ‘problem of immigration’ would disappear in a just international society.¹¹⁵ He proffered that there would no longer be any injustice, such as famine or persecution, which would drive members of the society to migrate.¹¹⁶ Rawls thus conceived of migration narrowly and negatively, as a flaw of the political system. This view overlooks migrations as perennial and positive and fails to consider the factors of close human relationships and human development through cross-border movement. As in Homer’s *Odyssey*, often the life-journey is manifest in a long, physical journey. Indeed, the UDHR recognises freedom of movement, albeit largely focused on the protection of refugees.¹¹⁷ Migration also has economic and social advantages.¹¹⁸ Migrations happen, for multifarious reasons, and such elementary facts of society should, it is argued here, be considered explicitly in the design of a liberal justice theory.¹¹⁹ Moreover, to conceive of migration as a problem is to construct asylum-seekers as undesirable.¹²⁰ What is more, Rawls stated that the ‘Law of Peoples assumes that every society has in its population a sufficient array of human capabilities, each in sufficient number so that the society has enough potential human resources to realize just institutions.’¹²¹ However, the idea of static membership, rooted in Rawls’s design, does not fit with the interdependent nature of humanity and resources. As Benhabib illuminates, ‘the ideal of territorial self-sufficiency flies in the face of the tremendous interdependence

¹¹⁴ This point is returned to in section 3.4. of this Chapter.

¹¹⁵ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 9.

¹¹⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 8-9.

¹¹⁷ UDHR, articles 13,14 and 15.

¹¹⁸ See, for example, OECD, ‘Is migration good for the economy?’ (OECD, Migration Policy Debates, May 2014)

<<https://www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%202.pdf>> accessed 21 April 2017.

¹¹⁹ In the same way that the representatives of peoples under the adjusted veil of ignorance know that ‘reasonably favourable conditions obtain that make constitutional democracy possible’. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 33.

¹²⁰ Migrants and asylum seekers are regularly portrayed as dangerous, deviant, and destabilising. See, for example, Gareth Mulvey, ‘When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK’ (2010) 23(4) *Journal of Refugee Studies* 437; Thomas Spijkerboer, ‘Moving Migrants, States, and Rights. Human Rights and Border Deaths’ (2013) 7(2) *Law & Ethics of Human Rights* 213; and Jef Huysmans, ‘The European Union and the Securitization of Migration’ (2000) 38(5) *Journal of Common Market Studies* 751.

¹²¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 9.

of the people of the world.¹²² Nor do fenced-off communities join with Rawls's vision of plural and cooperative societies.¹²³ Indeed, Rawls acknowledged immigration is a historical, empirical fact, which 'caused the intermingling of groups with different cultures and historical memories who now reside within the territory of most contemporary democratic governments'.¹²⁴ Rawls's attempt to ignore migration as a problem and a distracting detail results in a limited account of justice as fairness, which overlooks the interests of, and duties owed to, migrants and asylum-seekers in liberal democracies.

Rawls tells us that, at the original position under the veil of ignorance, to use our imagination to conceptualise all past and future generations simultaneously.¹²⁵ He proffers that, in agreeing a scheme, representatives would be motivated by imagining that they are 'representing family lines, say, with ties of sentiment between successive generations'.¹²⁶ What Rawls is asking us to do here, effectively, is to focus on the psychology and rationality of human bonds.¹²⁷ For now, I wish to underline that such bonds transcend territorial boundaries and are not restricted to family connections. Rawls's exercise requires that the members ascertain what duty they are willing to accept by asking themselves what they would expect to inherit. If we apply this same reasoning to the issue of claiming asylum, it can be inferred that only liberal policies

¹²² Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 216. Indeed, the economies and political institutions of many European states need immigration in view of increased life expectancy and a decline in birth rates. The doors of 'fortress Europe' remaining closed to young refugees is an obvious irony. See Liav Orgad, 'Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe' (2010) 58 *Am. J. Comp. L.* 53, 58. Ashifa Kassam, Rosie Scammell, Kate Connolly, Richard Orange, Kim Willsher, and Rebecca Ratcliffe, 'Europe needs many more babies to avert a population disaster' *The Guardian* (23 August 2015) <<https://www.theguardian.com/world/2015/aug/23/baby-crisis-europe-brink-depopulation-disaster>> accessed 20 March 2017; Efthymios Papastavridis, 'Fortress Europe and FRONTEX: Within or without International Law', (2010) 79 *Nordic Journal of International Law* 75 and Silvia Borelli and Ben Stanford, 'Troubled Waters in the Mare Nostrum: Interception and Push-backs of Migrants in the Mediterranean and the European Convention on Human Rights' (2014) 10 *Review of International Law and Politics* 29; Samuel Granados, Zoeann Murphy, Kevin Schaul and Anthony Faiola, 'Fenced Out: A New Age of Walls' (*Washington Post*, 14 October 2016).

¹²³ Rawls considered that under the Law of Peoples the parties would set up cooperative organisations, including an organisation like the United Nations, what he called 'a Confederation of Peoples (not states)'. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 42.

¹²⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 24.

¹²⁵ Accommodating the 'just savings' principle. John Rawls, *A Theory of Justice* (Oxford University Press 1973) 284-289.

¹²⁶ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 292

¹²⁷ This point is returned to in section 5 of this Chapter.

that maximise the rights of non-citizens (without placing an insufferable burden on citizens) are acceptable within a just society predicated upon fairness. To frame it slightly differently, the members at the original position know that migration is a general fact (and that borders are porous) but they have no idea whether they are long-standing members or recent arrivals. Regardless of whether they are new or old members, the ability to offer fair terms of social cooperation must arise between them.

Rawls's design has, so far, been adjusted so that borders are porous, rather than closed, and members have general knowledge of migrations, but no knowledge of their strength of connection to territory. I turn now to introduce the interests of asylum-seekers (as distinct from other migrants) within the thought experiment.¹²⁸

2.4 Introducing the 'conscious' asylum seeker

In Rawls's theory design, the risk of exclusion remains present even though the parties are disposed to inclusivity by being shrouded against prejudice. This is because migrants (including asylum-seekers) are not considered in the design of the original position. Sen finds fault in Rawls's method for this reason, highlight that, '[n]o outsider is involved in, or party to, such a contractarian procedure'.¹²⁹ Sen thus perceives the limitations of Rawls's original positions as 'exclusionary neglect'.¹³⁰ A defence of Rawls's closed original position is that it is a thought experiment that aids the identification of justice principles, which, in the Law of Peoples, are intended to have universal reach.¹³¹ According to Rawls, the original position 'models what we regard – you and I, here and now – as fair'.¹³² However, the 'who' of the 'you and I' matters, as does the 'now'.¹³³ The issue of time, the 'now', is returned to in chapter 6. The empirical perspectives of asylum-seekers can shed fresh light on exclusionary frames of understanding. This section argues that room must be made for these empirical perspectives. It is not enough to blindly imagine the situated position of

¹²⁸ Although, arguments to include other vulnerable migrants within the fair conditions of the original position may be posited.

¹²⁹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 123.

¹³⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 138.

¹³¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 86.

¹³² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 30-32.

¹³³ The issue of time, the 'now', is returned to in section 5.4. of this Chapter and in Chapter 6.

asylum-seekers; we must listen to their empirical voices to become ‘conscious’ of their unique experiences.¹³⁴

Within the original position, the members have a special status for they determine the basic structure of society. The size and composition of a population will vary over time (influenced by births and deaths) and new members may not be represented by the basic structure agreed by the focal-group in the original position. Once the veil is lifted, and as the linear phases of Rawls’s theory of justice unfold (the constitutional, legislative, and judicial stages), the original members will become less representative.¹³⁵ The inevitable changing size and composition of the population makes a difference to the way that the basic structure of society could, or should, be organised. New groups of individuals will hold different priorities and values.¹³⁶ Sen thus critiques Rawls’s theory for reason that, ‘the original position can incarcerate the basic idea – and the principles – of justice within the narrow confines of local perspectives and prejudices of a group or a country.’¹³⁷ Incarcerating the basic idea of fairness within local perspectives and prejudices contradicts the central ambitions of Rawls’s thesis. This ‘procedural parochialism’, Sen considers, is limited to local ethics and does not marry Rawls’s universalist intentions.¹³⁸ Sen argues that even at the original position, there is ‘inclusionary incoherence and focal group plasticity’.¹³⁹ He highlights that, on the one hand, population size and composition is influenced (directly or indirectly) by policies made in accordance with the basic social structure, as determined in the original position by the focal group. On the other hand, the population size and composition influence the make-up of the focal group. A fully representative closed group of a yet to be determined polity is, therefore, incoherent. Sen observes the ‘impossibility of having a fixed group to be represented, in choosing

¹³⁴ This encourages the realisation of Arendt’s ‘conscious pariahs’, capable of being the ‘vanguard of their peoples’. Hannah Arendt, ‘We Refugees’ in Marc Robinson (ed) *Altogether Elsewhere: Writers on Exile* (Faber and Faber 1994) 110, 119.

¹³⁵ See John Rawls, *A Theory of Justice* (Oxford University Press 1973) 195-201 regarding his four-stage sequence for applying the principles for institutions.

¹³⁶ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 148.

¹³⁷ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 148.

¹³⁸ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 149. Rawls submits that the Law of Peoples is universal in reach because it provides principles by which all politically relevant subjects can be judged. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 85. Habermas similarly observes, Rawls’s aim is ‘not to limit himself solely to the fundamental normative convictions of a particular political culture’. Jürgen Habermas, ‘Reconciliation through the Public Use of Reason’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 60.

¹³⁹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 145.

the basic structure of the society when the set of actual persons itself varies depending on the choice of that structure'.¹⁴⁰

The inherent indeterminacy of Rawls's focal group is also relevant to cross border movements. As Sen explains, 'the dependence of births and deaths on the basic social structure has some parallel also in the influence of that structure on the movements of people from one country to another.'¹⁴¹ He quotes David Hume who considered this phenomenon in his own time:

The face of the earth is continually changing, by the increase of small kingdoms into great empires, by the dissolution of great empires into smaller kingdoms, by the planting of colonies, by the migration of tribes...¹⁴²

The constant shift in populations, within and across borders, exposes the unstable insider-outsider dichotomy created by Rawls's closed original position. Rawls viewed society as a human project and, as already argued, we might infer that those in the original position would be cognisant of the general fact of migration and would, therefore, anticipate change.¹⁴³ The members in the adjusted original position would be aware of shifting insider-outsider generations. As Benhabib highlights, the 'binarism between nationals and foreigners, citizens and migrants, is sociologically inadequate and the reality is much more fluid, since many citizens are of migrant origin, and many nationals themselves are foreign-born.'¹⁴⁴

Rawls proposed that removing the question of migration was one of the necessary control conditions and considered that the experiment's findings would, nonetheless, be tested once again by public reason in the real world. However, as the veil of ignorance is lifted from the imaginary members, and the just (or reasonably just) structures play out and are tested in the real world, then, we know, empirically, the tangible outsider will appear. Habermas highlights that as the veil of ignorance is gradually raised, 'unpleasant surprises' may occur if the new information that streams

¹⁴⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 148.

¹⁴¹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 146.

¹⁴² Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 147, citing David Hume, 'On the Original Contract', republished in David Hume, *Selected Essays* (Stephen Copley and Andrew Edgar edn, Oxford University Press 1996) 279.

¹⁴³ 'The social system is not an unchangeable order beyond human control but a pattern of human action'. John Rawls, *A Theory of Justice* (Oxford University Press 1973) 102.

¹⁴⁴ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 210.

is not in harmony with the basic principles already selected.¹⁴⁵ The problem with Rawls's conception is that the asylum-seeker finds herself in a society that is not designed to protect her interests, for they were never considered in the original position. She might, therefore, remain an outsider with possibly little or no political power. To permit such moral and legal inferiority is inconsistent with the aims of Rawls's fairness experiment.

I have made the case for the veiled members to know that migrations happen but to screen knowledge of membership in the original position. Rawls's veils of ignorance conceal knowledge of the starting position in society and strength of connection to the territory.¹⁴⁶ The principles chosen in the original position then would be more likely to mitigate against the arbitrariness of national citizenship. The veiled members would know that migrations happen, but they would not know if they (or their ancestors or successors) are insiders or outsiders upon the veil being lifted. However, this approach still creates a potential blind spot. The members would not necessarily know exactly what the interests of asylum-seekers are. If they are not alive to the real injustices faced by this group, then they cannot ensure that the chosen principles will mitigate against the unfairness and injustices experienced by asylum-seekers.

Developing the argument that the members in the original position must also be 'conscious' of the experiences of asylum-seekers, I rely upon Sen's call to take account of the global and empirical perspectives of outsiders. In chapter 4, I take up this call and incorporate the empirical voices of asylum-seekers. Sen considers that the exercise of impartiality (fairness) cannot be confined within the borders of a shared sovereignty or a shared culture.¹⁴⁷ He recognises the interdependence of interests globally, and the requirement to take into account other interests in order to remove bias and to be fair to others.¹⁴⁸ Likewise, as highlighted, Benhabib recognises that the 'international system of peoples and states is characterized by such extensive

¹⁴⁵ Habermas therefore finds that the initial abstraction in the original position creates a 'double burden of proof'. He considers that, '[i]f we are to ensure that no discrepancies arise, we must construct the original position already with knowledge, and even foresight, of all the normative contents that could potentially nourish the shared self-understanding of free and equal citizens in the future'. Jürgen Habermas, 'Reconciliation through the Public Use of Reason' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 58.

¹⁴⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 32-33.

¹⁴⁷ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 402.

¹⁴⁸ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 402.

interdependencies and the historical crisscrossing of fates and fortunes that the scope of special as well as generalized moral obligations to our fellow human beings far transcends the perspective of the territorially bounded state-centric system.¹⁴⁹

Sen and Rawls agree that fairness is understood broadly as the demands of impartiality. However, they disagree as to how impartiality is best conceptualised in theory design. Interrogating the essence of fairness, Sen responds:

...central to it must be a demand to avoid bias in our evaluations, taking note of the interests and concerns of others as well, and in particular the need to avoid being influenced by our respective vested interests, or by our personal priorities or eccentricities or prejudices. It can broadly be seen as a demand for impartiality.¹⁵⁰

Rawls deliberately rejects the classic doctrine of the impartial spectator as the correct interpretive tool, for reason that it does not specify deductive conditions from which the principles of justice can be realised.¹⁵¹ It is the essence of Rawls's special deductive fairness conditions that this thesis builds upon. Rawls stipulated that, at the original position, the members, 'lacking knowledge of their natural assets or social situation, they are forced to view their arrangements in a general way.'¹⁵² At the same time, he highlighted that the veil of ignorance 'forces each person in the original position to take the good of others into account.'¹⁵³ The device neutralises bias, and instils mutual caring, but deprives the members of knowledge of the struggles of others. Sen therefore criticises the 'closed impartiality' approach of Rawls's original position, preferring an 'open impartiality' approach, which accommodates the interests of others.¹⁵⁴ I argue that an adjusted Rawlsian device can harness non-bias, vested concern and the interests of asylum-seekers. However, Sen's regard for the empirical is instructive.

¹⁴⁹ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 37.

¹⁵⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 54.

¹⁵¹ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 185 and 187-189. See also David Hume, *A Treatise of Human Nature* (Oxford University Press 2000) and Adam Smith, *The Theory of Moral Sentiments* (Cambridge University Press 2002) for the classic doctrine of the impartial spectator.

¹⁵² John Rawls, *A Theory of Justice* (Oxford University Press 1973) 187.

¹⁵³ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 139.

¹⁵⁴ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 123.

Central to Sen's theory is diagnosing injustices in the real world by relying upon global perspectives that can enhance understanding and help to work out how justice can be advanced. Sen considers that taking into account the perspectives of others helps us to avoid 'the trap of parochialism', that is, the values and presumptions in the local community.¹⁵⁵ For Sen, a thought experiment that invokes impartial reasoning should aim not only at scrutinising objectively 'the influence of vested interests, but also the captivating hold of entrenched traditions and customs.'¹⁵⁶ He submits that 'global knowledge...can contribute to the debates on local values and practices' and argues that we must be open to hearing foreign voices.¹⁵⁷ In so doing, we may find 'particular cases of reasoning that could make us reconsider our own understandings and views, linked with the experiences and conventions entrenched in a country, or in a culture.'¹⁵⁸

I contend that adapted Rawlsian fairness, as outlined above, takes account of the interests of real-world asylum-seekers by incorporating their outsider perspectives at the core of the theoretical design. This also avoids the trap of parochialism. In summary, the vested veiled-parties, situated within a bounded community with porous borders: (i) know that migrations happen as a general fact; (ii) are deprived of knowledge of their membership status and strength of connection to the territory; and (iii) as potential pariahs upon lifting the veil, they are super-positioned (like Schrödinger's cat) to be conscious of and compassionate to the interests of asylum-seekers. Rawls tells us that the original position is flexible, and he thus modifies it in *The Law of Peoples* to fit the subject in question.¹⁵⁹ An asylum-centred original position, which encourages us to put aside our arbitrary privileges and prejudices and subject local values to critical scrutiny, is therefore consistent with the Rawlsian fairness project. I define this model as situated, conscious impartiality, rather than closed, blind impartiality, as the parties are attuned to the fact of migrations and the empirical wisdoms of asylum voices.¹⁶⁰

¹⁵⁵ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 402-403.

¹⁵⁶ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 404.

¹⁵⁷ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 407.

¹⁵⁸ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 407.

¹⁵⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 86.

¹⁶⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 405.

3. FAIRNESS AS RESPECT FOR HUMAN RIGHTS

3.1 Bounded sovereignty

The second pillar of fairness to emerge forcefully, from an asylum-centric reading of Rawls, is respect for universal human rights. Integral to Rawls's thesis is the contention that unbounded state sovereignty is unreasonable and unfair. Rawls's idea of the Law of Peoples challenges unfettered sovereignty. Rawlsian 'peoples' is a political conception set within the international context.¹⁶¹ Just as citizens are political actors within the domestic context, 'peoples' are political actors in the 'Society of Peoples'.¹⁶² Rawls's conception of peoples is not to be confused with the cosmopolitan view of justice for all individuals.¹⁶³ Rather, Rawlsian societies consist of ordered politically-represented groups. They are characterised by being subject to 'a reasonably just constitutional democratic government that serves their fundamental interests';¹⁶⁴ united culturally by 'common sympathies';¹⁶⁵ and they have the same moral character as citizens, that is, they are rational and reasonable.¹⁶⁶ As moral actors, peoples are motivated by a sense of fair equality and due respect for other peoples.¹⁶⁷ Rawls emphasises that, '[f]airness... plays an important role in the political processes of the basic structure of the Society of Peoples.'¹⁶⁸ Being reasonable, peoples 'are ready to offer to other peoples fair terms of political and social cooperation.'¹⁶⁹ Rawls thus distinguishes 'peoples' from 'states' by the notion that 'liberal peoples limit their basic interests as required by the reasonable',¹⁷⁰ while states (as conceived traditionally) are concerned with power and are 'always guided

¹⁶¹ Conceived as 'liberal democratic peoples' and 'decent peoples'. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 23.

¹⁶² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 23.

¹⁶³ See, for example, Kok Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge University Press 2004).

¹⁶⁴ This is the 'institutional' feature. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 23.

¹⁶⁵ This is the 'cultural' feature and is taken from John S. Mills *Considerations* (1862). John Rawls, *The Law of Peoples* (Harvard University Press 1999) 23.

¹⁶⁶ This feature requires 'a firm attachment to a political (moral) conception of right and justice.' John Rawls, *The Law of Peoples* (Harvard University Press 1999) 24-25.

¹⁶⁷ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 28, 34, 44-45

¹⁶⁸ He notes that this is 'analogous to, but not the same as, its role in the domestic case'. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 115.

¹⁶⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 35.

¹⁷⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 29.

by their basic interests.’¹⁷¹ He thereby negates Westphalian sovereignty as unreasonable and unfair.

Rawls’s primary aim in *The Law of Peoples* is to delimit (using the principle of toleration)¹⁷² the extent to which modern liberal democracies might intervene politically (employing military, economic, or diplomatic strategies) with illiberal regimes to make them become liberal (or at least decent).¹⁷³ Benhabib criticises Rawls’s approach for taking for granted the nation-state frame. She finds that he places more emphasis on achieving international stability between (siloed) communities than on universal human rights claims.¹⁷⁴ Nonetheless, in view of the development of international human rights post World War II, Rawls’s theory restricts a state’s sovereignty to ‘do as it wills with people within its own borders’.¹⁷⁵ While ‘the Law of Peoples does not question the legitimacy of government’s authority to enforce the rule of democratic law’,¹⁷⁶ Rawls questioned the unbound sovereignty of states.¹⁷⁷

Rawls also highlighted some qualifications on immigration control. Acknowledging that borders are arbitrary from an historical point of view, Rawls nonetheless considered their role in the Law of Peoples justified and necessary.¹⁷⁸ He

¹⁷¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 29.

¹⁷² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 59-62.

¹⁷³ The right to go to war is limited to the interests of self-defence and collective security only. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 59-60.

¹⁷⁴ Seyla Benhabib, ‘Borders, Boundaries and Citizenship’ (2005) 38(4) *Political Science and Politics* 673, 673.

¹⁷⁵ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 26-27.

¹⁷⁶ As such, domestic justice allows a police force, a judiciary and other institutional arrangements to ‘maintain an orderly rule of law’. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 26, footnote 22.

¹⁷⁷ Benhabib observes that, empirically, the Westphalian model has been challenged by external and internal pressures, namely globalisation and the disaggregation of citizenship. The latter describes the unbundling of the components of citizenship: political membership; shared cultural identity; and access to rights. Against this backdrop, Benhabib finds that, ‘internally fractured political communities...continue to negotiate the terms of their own collective identities at the site of migration debates.’ Indeed, the entangled questions of sovereignty and immigration control dominated the UK’s EU referendum debate. Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 93 and 127. Also see, for example, Ira Ryk-Lakhman, UCL Laws Event: “Brexit: Legal & Constitutional Requirements”, (13 July 2016) <<https://blogs.ucl.ac.uk/law-journal/2016/07/14/ucl-laws-event-brexit-legal-constitutional-requirements-13-july-2016/>> accessed 31 October 2016.

¹⁷⁸ Rawls states that boundaries play an important role ‘however arbitrary a society’s boundaries may appear from a historical point of view.’ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 38-39.

found that ‘in the absence of a world-state, there *must* be boundaries of some kind’.¹⁷⁹ Rawls conceived a people’s territory as an asset for which responsibility must be taken for maintaining its environmental integrity and the size of the population.¹⁸⁰ This responsibility, he considered, could not be shirked by migrating.¹⁸¹ Although, he recognised a right to emigrate (to escape religious persecution, for example), which should be accompanied, he said, by assistance for emigrants where feasible.¹⁸² He therefore accepted that there is a right to seek asylum and a right to assistance for asylum-seekers.

Rawls also stated that one cannot enter another territory without consent and, to this extent, he considered that peoples have ‘at least a qualified right to limit immigration’.¹⁸³ While he did not detail what those qualifications might be, he noted that, ‘limiting immigration is to protect a people’s political culture and its constitutional principles’.¹⁸⁴ Diversity is unproblematic for the Law of Peoples because, ‘within a reasonably just liberal (or decent) polity it is possible...to satisfy the reasonable cultural interests and needs of groups with diverse ethnic and national backgrounds.’¹⁸⁵ Such liberal principles, Rawls believed, can ‘enable us to deal with more difficult cases where all the citizens are not united by a common language and shared historical memories.’¹⁸⁶ This suggests that in the absence of a common cultural identity, acceptance of shared political principles alone is sufficient to satisfy the requirement of ‘common sympathies’.¹⁸⁷

While liberal and decent peoples might have a responsibility to maintain their societies and not to migrate to other territories without consent, there cannot be the same expectation upon members of, what Rawls defined as, ‘burdened’ and ‘outlaw’ societies to remain and tolerate human rights violations.¹⁸⁸ A well-ordered society is

¹⁷⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 39.

¹⁸⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 39.

¹⁸¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 8.

¹⁸² He gives the example of emigrating to escape religious persecution. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 74.

¹⁸³ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 38-39.

¹⁸⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 39.

¹⁸⁵ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 25.

¹⁸⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 25.

¹⁸⁷ For discussion, see Liav Orgad, ‘Liberalism, Allegiance and Obedience: The Inappropriateness of Loyalty Oaths in a Liberal Democracy’ (2014) 27(1) *Can. J. L. & Jurisprudence* 99.

¹⁸⁸ Indeed, as highlighted, Rawls accepts that there is a right to emigrate for reason of persecution. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 74.

responsible for maintaining its population, however, this need not diminish its duty to assist burdened or outlaw societies.¹⁸⁹ Granting surrogate protection (asylum) to members of burdened or outlaw societies is justifiable so long as the well-ordered society can sustain the increased population. The fact that the receiving society is well-ordered will aid its ability to accommodate new members. Indeed, the arrival of new members may help to maintain the population and the economy of a well-ordered society. Moreover, a society's responsibility for maintaining its population is not the same as preserving an asserted ethnicity or culture. Rawls is unsympathetic to such arguments.

A fair system of granting asylum may promote, in the long-term, liberal values and human rights globally, gradually transforming illiberal regimes. Conversely, refusing to accept asylum-seekers and refugees undermines liberal values and institutions. Little weight should be given to the argument of the risk of cultural hostilities due to forced migration. Rawls writes, 'the divisive hostilities of different cultures can be tamed, as it seems they can be, by a society of well-ordered regimes'.¹⁹⁰ Furthermore, presumably well-ordered societies cannot plead a lack of natural resources as an excuse for denying basic human rights (including the right to seek asylum) any more than burdened societies can.¹⁹¹ Having established that the sovereign prerogative to control entry and stay is not unbound, I address the unbinding of rights from national citizenship.

3.2 Unbounded rights

This section discusses how, even in Rawls's theory, basic human rights need not be contingent upon national citizenship. The theories of Rawls, Sen, Habermas, and Benhabib, bear the indelible print of the basic rights enshrined, primarily, in the Universal Declaration of Human Rights 1948. These rights belong to every human by virtue of their humanity and therefore irrespective of the possession of any national passport. Sen stresses the relevance of human rights to any theory of justice and considers that the pursuit of a theory of justice has something to do with the question:

¹⁸⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 109. See section 5.2. of this Chapter for discussion of the duty to assist asylum seekers from burdened or outlaw societies.

¹⁹⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 111.

¹⁹¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 110.

what is it like to be a human being?¹⁹² Habermas observes that human rights, as actionable, basic rights within a legal order, are addressed to human beings and thus have a universal range of application to citizens and non-citizens alike,¹⁹³ transcending the frame of the nation-state.

For Rawls, human rights are not the same as the rights that citizens hold. In the *Law of Peoples*, he describes human rights as, ‘a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide’.¹⁹⁴ The rights of citizens are more expansive as they extend to all the rights that liberal governments guarantee.¹⁹⁵ Rawls concludes, therefore, that human rights ‘set a necessary, though not a sufficient standard for the decency of domestic political and social institutions.’¹⁹⁶ This is an admission that, while important, the bare human rights duties, stipulated in Rawls’s theory and applicable to asylum-seekers, do not adequately meet the fairness quality test. A more robust interpretation, as outlined in this chapter, is therefore needed to satisfy the fairness standard.

Sen’s answer to what is fair, on the other hand, directs us straight to a broader conception of human rights, bypassing institutional understandings. According to Sen, a ‘broad framework of impartiality makes it particularly clear why consideration of basic human rights, including the importance of safeguarding elementary civil and political liberties, need not be contingent on citizenship and nationality, and may not be institutionally dependent on a nationality derived social contract.’¹⁹⁷ He takes the view that socio-economic rights have an equally important place within contemporary understandings of human rights to civil and political rights.¹⁹⁸ Habermas similarly considers that human rights should include civil and political as well as social, economic and cultural rights.¹⁹⁹ For Sen, difficulties in realising rights do not denigrate a claim to a non-right but, rather, enjoins action.²⁰⁰ He sees human rights as

¹⁹² Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 414.

¹⁹³ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 190-191.

¹⁹⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 78-79.

¹⁹⁵ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 78.

¹⁹⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 80.

¹⁹⁷ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 144.

¹⁹⁸ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 381.

¹⁹⁹ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 192.

²⁰⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 383-385.

motivational discourse vehicles for change. The struggle to realise the fullest spectrum and force of human rights is, therefore, according to Sen, key to achieving egalitarian fairness. Nonetheless, it is important that rights are legally enforceable to protect asylum-seekers from unfair treatment.

Rawls's minimum standard of human rights protection is not insignificant. He requires that the admissibility of domestic law within a reasonably just Society of Peoples is tempered by, what he calls, 'human rights proper',²⁰¹ illustrated by Articles 3 to 18 of the UDHR.²⁰² This list includes a right to emigrate and an explicit right to seek political asylum.²⁰³ The list also contains a number of substantive and procedural rights relevant to those seeking protection from persecution.²⁰⁴ In addition, as highlighted above, the rights to nationality, to change nationality, and not to be deprived arbitrarily of one's nationality, are declared under the UDHR.²⁰⁵ The fulfilment of these rights, says Rawls, 'is a necessary condition of the decency of a society's political institutions and of its legal order'.²⁰⁶ These rights, 'intrinsic to the Law of Peoples',²⁰⁷ are understood as 'universal'.²⁰⁸ They have a 'political (moral) force',²⁰⁹ that makes them 'binding on all peoples and societies'.²¹⁰ The objective of the Law of Peoples is for all societies to become well-ordered and to secure human

²⁰¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 80.

²⁰² Relevant to the present thesis, this includes the following rights under the UDHR: right to seek and enjoy asylum (Article 14); the right to life (Article 3); freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 5); freedom of thought, conscience and religion (Article 18); freedom from slavery or servitude (Article 4); equality before the law and freedom from discrimination (Article 7); right to an effective remedy (Article 8); freedom from arbitrary arrest or detention (Article 9); right to a fair and public hearing before an independent and impartial tribunal (Article 10); and right to family and private life (Article 12 and Article 16).

²⁰³ UDHR, articles 13 and 14.

²⁰⁴ Relevant substantive (UDHR) rights include Articles 3, 4, 5 and 18 and procedural (UDHR) rights include Articles 7, 8, 9 and 10. Articles 12 and 16 are also important to the asylum-seeker and refugee as they recognise the importance of family unity.

²⁰⁵ UDHR, articles 1 and 15. Also see Stephan Hall, 'The European Convention on Nationality and the right to have rights' (1999) 24(6) E.L. Rev. 586. While the European Convention on Human Rights does not recognise a right to nationality, the Council of Europe has endeavoured to enshrine this gateway right in the European Convention on Nationality 1997 (E.T.S. No 166).

²⁰⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 80.

²⁰⁷ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 80.

²⁰⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 80.

²⁰⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 80.

²¹⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 80.

rights everywhere.²¹¹ How this is to be achieved, Rawls observes, is a question of foreign policy.²¹² However, as Upendra Baxi has observed, this Rawlsian notion might be invoked to support ‘the collective human right of the well-ordered societies to govern the wild and “savage” races.’²¹³ Moreover, the notion risks diverting attention away from the duties owed to asylum-seekers situated domestically.

Forged in the aftermath of the horrors of World War II, the instruments that give effect to the 1948 UDHR include the 1950 European Convention on Human Rights (ECHR) the 1951 Refugee Convention. In addition to honouring human rights, Rawls made clear that respect for international treaty obligations was one of the founding principles of the charter of the Law of Peoples.²¹⁴ Rawls explained that the baseline for these ‘familiar and traditional principles of justice among free and democratic peoples’ is ‘the equality of and the equal rights of all peoples’.²¹⁵ Rawls was also clear that his list of minimum, universal principles is non-exhaustive, as is his list of human rights.²¹⁶ These base-line guides are therefore open to more generous interpretations better suited to upholding the principles of equality and justice. They lay down concrete foundations from which more favourable rights may develop. The principles transcend national boundaries, having ‘universal reach’, so far as ‘[t]here is no relevant subject, politically speaking, for which we lack principles and standards to judge.’²¹⁷ However, the minimum rights are also open to a restrictive and exclusionary reading. The adapted original position developed in this thesis is therefore preferred for bestowing more generous rights and fairer treatment on asylum-seekers.

²¹¹ Rawls comments that the ‘long-run aim’ of well-ordered societies ‘is to bring all societies eventually to honor the Law of Peoples and to become full members in good standing of the society of well-ordered peoples. Human rights would thus be secured everywhere.’ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 80 and 92-93

²¹² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 93.

²¹³ Upendra Baxi, ‘Voices of Suffering and the Future of Human Rights’ (1998) 8 *Transnat'l L & Contemp Probs* 125, 135.

²¹⁴ These are two of Rawls’s eight principles of the Law of Peoples. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 37.

²¹⁵ Which Rawls takes from the history and usages of international law and practice. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 37 and 41.

²¹⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 37 and 41.

²¹⁷ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 86.

On the nature of human rights, Habermas considers that a strict distinction between moral or legal rights ‘sets the wrong parameters for the debate’.²¹⁸ Rather, he frames human rights as a category of legal norms, derived from constitutional legal orders, capable of commanding universal agreement.²¹⁹ The international human rights regime developed out of the eighteenth century establishment of individual liberties within the American and French constitutional declarations. Habermas thus finds that:

The concept of human rights does not have its origins in morality, but rather bears the imprint of the modern concept of individual liberties, hence of a specifically juridical concept. Human Rights are juridical *by their very nature*. What lends them the appearance of moral rights is not their content, and most especially not their structure, but rather their mode of validity, which points beyond the legal orders of nation-states.²²⁰

Habermas observes that human rights are vulnerable to the same fate as all positive laws as they can be changed or suspended following a change of regimes.²²¹ However, he explains that, ‘[a]s constitutional norms, human rights enjoy a certain privilege’.²²² They engender a dual validity as domestically enforceable positive laws and as norms that are capable of rational justification, claiming normative legitimacy and transcending the nation-state.²²³ Habermas highlights that, despite the fact that human rights are implemented predominantly within the context of national legal orders, ‘ground rights *for all persons* and not merely for citizens.’²²⁴ While legal norms are justified with the help of moral arguments, basic human rights can be

²¹⁸ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 190.

²¹⁹ Jürgen Habermas, ‘A Genealogical Analysis of the Cognitive Content of Morality’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 43.

²²⁰ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 190.

²²¹ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 190.

²²² This privilege is ‘manifested in part by the fact that they are constitutive for the legal order as a whole and to this extent determine a framework within which normal legislation must be conducted.’ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in Cronin and De Greiff (n 31) 190.

²²³ *ibid*

²²⁴ Human rights, as Habermas observes, ‘remain only a weak force in international law and still await institutionalization within the framework of a cosmopolitan order that is only now beginning to take shape.’ See Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in Cronin and De Greiff (n 31) 190 and 192.

justified exclusively from the moral point of view, namely, that their implementation is in the equal interest of all persons qua persons.²²⁵ Habermas notes that this ‘by no means robs the basic rights of their juridical character’ as actionable individual rights.²²⁶ As Benhabib highlights, the recognition of the moral and legal quality of human rights remains important because, otherwise, ‘we cannot criticize the legally enacted norms of democratic majorities even if they refuse to admit refugees to their midst, or turn away asylum-seekers at the door, and shut off their borders to immigrants.’²²⁷

So far, the universality of human rights, which took centre stage after World War II, and challenges unlimited state sovereignty, has been highlighted.²²⁸ The rights enshrined under international and national laws apply equally to asylum-seekers, as human beings, demonstrative of the barest minimum threshold requirements of a fair society. However, reflections upon the moral and legal nature of human rights allows us to consider their evolution and modes of transformative power in struggles for the fairer treatment of minorities.

3.3 The transformative potential of human rights

Drawing upon Habermas’s thesis of the co-originality of sovereignty and human rights, and Benhabib’s idea of a human right to membership, this section argues that human rights have the potential to elevate the normative and legal status of asylum rights in liberal democracies. Habermas explains that historically, and ideally, there is an ‘internal relation’ between the rule of law and democracy.²²⁹ He finds that human rights (civil rights) and constitutional rights are ‘nourished by the same root.’²³⁰ Demonstrating, therefore, that human rights (that protect civil interests) and the principle of popular sovereignty (that protects constitutional rights) are mutually

²²⁵ *ibid* 190

²²⁶ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in Ciaran Cronin and Pablo De Greiff (ed), *The Inclusion of the Other: Studies in Political Theory*, (Cambridge, Mass, MIT Press, 1998) 191

²²⁷ Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (n 24) 16

²²⁸ The difference between the absolute nature and universal nature of rights is observed.

²²⁹ Jürgen Habermas, ‘On the Internal Relation between Law and Democracy’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 253.

²³⁰ Jürgen Habermas, ‘Reconciliation through the Public Use of Reason’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 71.

constitutive.²³¹ Human rights and sovereignty presuppose each other because, ‘there can be no law at all without actionable subjective liberties’ and there can be ‘no legitimate law without collective democratic law-making citizens who, as free and equal, are entitled to participate in this process.’²³² The ideals of equal liberal rights and republican self-determination are, therefore, integrated and embedded in the deliberative, democratic processes of contemporary liberal societies.²³³ As Habermas points out, ‘[t]he further normal legislation exhausts the implications of human rights, the more the legal status of resident aliens comes to resemble that of citizens.’²³⁴ Habermas expounds that the ‘juridified ethos of a nation-state cannot come into conflict with civil rights so long as the political legislature is oriented to constitutional principles and thus to the idea of actualizing basic rights.’²³⁵

Building upon Habermas’s thesis that universal human rights and popular sovereignty are the co-original foundations of the liberal-democratic constitutional state, Benhabib develops the concepts of ‘democratic iterations’²³⁶ and a human right to membership.²³⁷ The latter idea is to be realised by the process of the former. Benhabib describes democratic iterations as, a ‘complex process of public argument, deliberation, and learning through which universalist right claims are contested and contextualized, invoked and revoked, throughout legal and political institutions as

²³¹ The civil nature of human rights is explored further in Chapter 5.

²³² Jürgen Habermas, ‘Reconciliation through the Public Use of Reason’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 72.

²³³ Seyla Benhabib, ‘Borders, Boundaries and Citizenship’ (2005) 38(4) *Political Science and Politics* 673–673. While law is formal, Habermas notes that ‘the system of rights and the principles of the constitutional state are in harmony with morality by virtue of their universalistic content.’ At the same time, ‘legal systems are “ethically permeated” in that they reflect the political will and the form of life of a specific legal community.’ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 227.

²³⁴ Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 190.

²³⁵ Juridified here means legalised. Jürgen Habermas, ‘Kant’s Idea of Perpetual Peace’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 190. Note that the effect of the judicialisation of asylum law is discussed in Chapter 5.

²³⁶ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 19.

²³⁷ Benhabib defines political membership as ‘the principles and practices for incorporating aliens and strangers, immigrants and newcomers, refugees and asylum-seekers, into existing politics.’ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 1 and 73.

well as in the public sphere of liberal democracies.²³⁸ Through this medium, Benhabib considers that new forms of political agency on behalf of non-citizens are emerging.²³⁹ The ongoing process of constitutional reconstruction, where the individual rights of full membership, democratic voice, and territorial residence, are renegotiated, challenges group homogeneity and the exclusionary privileges of membership.²⁴⁰

Like Rawls, Sen, and Habermas, Benhabib does not argue for global justice within a world state.²⁴¹ As explained above, nor do I embrace the view of a global original position. Like Benhabib, I consider that democratic representation requires closure of some sort in order to preserve democratic legitimacy.²⁴² I endorse Benhabib's idea of porous borders, not accepting that communities must be bound by a national or cultural identity. All that is required are 'democratic attachments', which link the individual politically to a circumscribed territory.²⁴³ To this extent, the idea of democratic attachments is similar to Rawls's notion of 'common sympathies'.²⁴⁴ However, Benhabib demands that democratic attachments are not limited to existing nation-state structures.²⁴⁵

Benhabib does not believe that the rights of others should rest with the good will and generosity of democratic people.²⁴⁶ At the heart of the asylum dilemma is the

²³⁸ Benhabib also phrases it as: 'moral and political dialogues in which global principles and norms are reappropriated and reiterated by constituencies of all sizes, in a series of interlocking conversations and interactions.' Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 19 and 113. The process of public reason is discussed at section 6 of this Chapter.

²³⁹ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 117.

²⁴⁰ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 21.

²⁴¹ cf Thomas Pogge, *Realizing Rawls* (Cornell University Press 1979) and Charles Beitz, *Political Theory and International Relations* (Princeton University Press 1979). See also Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 72 and 106.

²⁴² Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 220.

²⁴³ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 3.

²⁴⁴ See John Rawls, *The Law of Peoples* (Harvard University Press 1999) 23. Discussed under section 4.1. of this Chapter.

²⁴⁵ Seyla Benhabib, 'Borders, Boundaries and Citizenship' (2005) 38(4) *Political Science and Politics* 673, 674 and Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 3.

²⁴⁶ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 122.

tension between the human rights of asylum-claimants and the sovereignty of the asserted demos.²⁴⁷ Benhabib (as does Rawls) challenges unlimited state sovereignty and unfettered power to control immigration.²⁴⁸ Benhabib calls the tension between sovereign self-determination and universal human rights, ‘the paradox of democratic legitimacy’.²⁴⁹ She finds that the answer to aligning the opposing forces is a human right to membership.²⁵⁰ Benhabib’s dovetailing thesis seeks to highlight the fluidity of membership (discussed in more detail below). She demonstrates that the enfranchisement of outsiders is possible via the communicative mediation of human rights and popular sovereignty. Relying upon Habermas’s discourse theory (discussed below), Benhabib proposes that:

If you and I enter into a moral dialogue with one another, and I am a member of a state of which you are seeking membership and you are not, then I must be able to show you with good grounds, with grounds that would be acceptable to each of us equally, why you can never join our association and become one of us. These must be grounds that you would accept if you were in my situation and I were in yours. Our reasons must be reciprocally acceptable; they must apply to each of us equally.²⁵¹

Like Rawls’s original position and Sen’s impartial spectator, this device seeks to remove prejudice and impose objective reason and egalitarian cooperation. It asks you and I, here and now, to be conscious of, and fair to, both insider and outsider perspectives to ascertain a fair appropriation of rights. However, I argue that these aims are better achieved by centring asylum-seekers within my adapted original position.²⁵² In Benhabib’s articulation, the asylum-claimant is outside and seeking entry. In my version, I invite the decision-maker to enter a dialogue which requires them to consider the position of an asylum-seeker already inside the bounded

²⁴⁷ Rawls considers that there are limits on the right to independence and the right to self-determination. He believes that ‘no people has the right to self-determination, or the right to secession, at the expense of subjugating another people.’ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 38.

²⁴⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 4 and 6.

²⁴⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 2 and 43.

²⁵⁰ Benhabib premises her idea of a human right to membership upon the Kantian tradition of cosmopolitan federalism. Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 22 and 134.

²⁵¹ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 138.

²⁵² As outlined under section 2 of this Chapter.

community, imagining this were their position. This more firmly and vividly addresses the issue of the fair treatment of asylum-seekers.

Before moving on to consider in more depth the fair process of inclusive public reason, a few points are made about the fluid nature of political membership.²⁵³ In contemporary democracies, moral and legal membership of a polity is not binary between citizens and non-citizens.²⁵⁴ There are different degrees of membership and associated rights. Theory ought to be alive to these nuances so as not to eclipse the interests of those with peripheral and precarious statuses. Benhabib observes that ‘the entitlement to rights is no longer dependent upon the status of citizenship; legal resident aliens have been incorporated into civil and social rights regimes, as well as being protected by supra- and sub-national legislations’.²⁵⁵

The example of the UK context is illustrative of why it is important to challenge any ‘static vision of collective-identity’.²⁵⁶ In the UK, devolved power, membership of the EU, and the political-legal relics of the British Empire and Commonwealth, shape the modes of immigration status and democratic participation. Shifting insider-outsider boundaries are determined by politics, history, race, capital, and culture. Civil and social rights vary between and within the legal categories of British citizens, EU citizens, Commonwealth citizens, and third country nationals. The condition of those claiming protection is also stratified and fractured. For example, the status of asylum-seekers is less secure than recognised Convention refugees and they hold lesser rights. Even within the class of asylum-seekers, there are so-called ‘failed asylum-seekers’ whose rights are diminished and who may face detention and administrative removal. As Benhabib explains, asylum-seekers tread in the ‘murky domain between legality and illegality’.²⁵⁷ Immigration, nationality and asylum law and practice in the UK is extremely convoluted and complex. A successful asylum-claimant is on track towards indefinite leave to remain and then citizenship. However, the multitude of constantly changing, crosscutting provisions

²⁵³ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 210.

²⁵⁴ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 210.

²⁵⁵ Seyla Benhabib, ‘Borders, Boundaries and Citizenship’ (2005) 38(4) *Political Science and Politics* 673, 675.

²⁵⁶ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 173.

²⁵⁷ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 173.

and (inconsistent) practices, can blur lines and derail claims. As argued, firmly centring asylum-seekers within a conception of fairness helps to overcome the legal and practical obstacles (discussed later in this thesis) in the path to citizenship. In summary so far, in addition to situated, conscious impartiality, fairness requires respect for human rights that temper sovereignty. Moreover, human rights act as a discursive mechanism for legal, political and social change, dissolving the boundary between citizens and non-citizens. The final section on fairness as inclusive public reason returns to this discursive mechanism. The following section addresses the requirement of fair cooperation between individuals in an original position.

4. FAIRNESS AS SOCIAL COOPERATION AND CARING

4.1 Temporal fairness: intergenerational duties

The third fairness pillar exposed is a broad conception of social cooperation across borders and time. As explained in section 2, Rawls restricts territorial outsiders from the original position but invites temporal outsiders by asking us to envisage all past and future generations simultaneously. This requires us to contemplate the design of constitutional arrangements and policies with regard for what we ourselves would expect to inherit. It encompasses the notion that we are obligated to do our ‘fair share’ if we are to benefit from the cooperation of (past, present and future) others.²⁵⁸ Underpinned by the principles of reciprocity and mutual caring, Rawls demands intergenerational respect for equal liberty and equal opportunity.²⁵⁹

Habermas also suggests that fairness is intergenerational. He adopts the view that special duties attach to western European countries in view of ‘the history of colonization and the uprooting of regional cultures by the incursion of capitalist modernization.’²⁶⁰ In addition, he notes, Europeans have profited from being ‘disproportionately represented in intercontinental migratory movements’ during the

²⁵⁸ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 112.

²⁵⁹ The principle of mutual caring is discussed at section 5.2. of this Chapter.

²⁶⁰ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 231.

19th and 20th centuries.²⁶¹ Moreover, ‘the immigration to Europe during the reconstruction period following the Second World War’ improved the economic situation in those European countries.²⁶² The example of the unfair treatment of Commonwealth citizens in the mid-twentieth century was discussed in chapter 2. Habermas concludes that these facts ‘justify a moral obligation to have a liberal immigration policy that opens one’s own society to immigrants and regulates the flow of immigration in relation to existing capacities.’²⁶³ This intergenerational moral obligation operates so as ‘not to limit immigration quotas to the recipient country’s economic needs.’²⁶⁴ Benhabib seems equally alive to the necessity of intergenerational fairness. She observes the problem that the establishment of a constitution circumscribes ‘We, the people’ in space and time.²⁶⁵ In order to move beyond the characteristics of the founding community, universal constitutional principles must also be established. As a long-term solution, Habermas’s discourse theory sets out a communicative process of expanding rights-frameworks of solidarity.²⁶⁶

Apart from discussing intergenerational justice, Rawls, Habermas, and Benhabib take time for granted. There are a few nods to time in Rawls’s thesis.²⁶⁷ For example, some regard is given to the role of the present, so far as his experiment is a model for what you and I think ‘here and now’. Rawls includes historical privilege explicitly as a type of privilege to be veiled in the original position. He implicitly acknowledges that immigration is perennial and a general fact. He also briefly mentions accommodating different cultural and historical memories within a state. However, his handling of time is sparse and largely superficial. I critique the temporal

²⁶¹ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 231.

²⁶² Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 231.

²⁶³ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 231.

²⁶⁴ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 231.

²⁶⁵ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 44.

²⁶⁶ Discussed under section 6 of this Chapter.

²⁶⁷ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 23 and 410.

gap in Rawls's thesis in chapter 6 of this thesis. For now, I turn to highlight the stronger attention paid to spatial fairness (than temporal fairness) by liberal justice theorists.

4.2 Spatial fairness: inter- and transnational duties

I have argued that Rawls unnecessarily limited the reach of his thesis by specifying closed borders in the design of his original position. Utilising Benhabib's idea of porous borders, Rawls's original position was reimagined. While Rawls's theory failed to grapple with the issue of asylum, he did expand the spatial scope of his thesis in the Law of Peoples. I consider here whether duties towards asylum-seekers can be inferred from the expanded Rawlsian perspective in the Law of Peoples. Rawls examined the duties of well-ordered societies to burdened societies and I consider whether the duty to assist peoples living under unfavourable conditions can be applied to asylum seekers.²⁶⁸ Under Rawls's non-ideal theory in the Law of Peoples, inequalities of power and resources across borders are to be resolved by 'the duty of assistance that reasonably just liberal peoples and decent peoples owe to societies burdened by unfavourable conditions.'²⁶⁹ In seeking to realise and preserve just or decent institutions internationally, liberal and decent peoples do not tolerate failing regimes that cause or allow peoples to live under unfavourable conditions.²⁷⁰ Rawls describes this duty as a 'principle of transition', which 'holds until all societies have achieved just liberal or decent basic structures'.²⁷¹ In a fair society of peoples, we might infer that assisting asylum-seekers is one way to discharge this duty.

However, the duty of assistance is to be applied with caution. Benhabib recognises that this duty 'has implications for migration rights, in that such assistance

²⁶⁸ Rawls aligned the duty of assistance owed to burdened societies by well-ordered societies with the duty of just savings in the domestic case (as outlined in *A Theory of Justice*). See John Rawls, *A Theory of Justice* (Oxford University Press 1973) 284-289 and Rawls, *The Law of Peoples* (n 6) 107.

²⁶⁹ Rawls, *The Law of Peoples* (n 6) 39. Burdened societies are those that 'lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered'. The duty to assist burdened societies is to be viewed as the 'long-term goal of (relatively) well-ordered societies...to bring burdened societies, like outlaw states, into the Society of well-ordered Peoples.' See John Rawls, *The Law of Peoples* (Harvard University Press 1999) 106.

²⁷⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 106-107.

²⁷¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 118.

to economically poor and disadvantaged societies is expected to reduce the pressure of migratory movements on richer societies.²⁷² However, she warns that there needs to be ‘careful distinctions between refugees and asylum-seekers toward whom states have not only moral but also legal obligations, and the moral claims of migrants.’²⁷³ There is the danger that those claiming asylum from burdened societies are labelled as illegal, economic migrants and undeserving of protection.²⁷⁴ James Hathaway, highlights how ‘[g]overnments have decided to treat migrants from the less developed world as an undifferentiated evil: refugees, economic migrants, drug traffickers, and terrorists are officially categorized as presenting a unified threat, and will all confront a common policy of deterrence.’²⁷⁵ The categories of asylum-seekers, refugees and migrants are prone to abuse by states seeking to avoid their responsibilities towards asylum-seekers and refugees. For example, in 1989, some Labour MPs took up the cause of Turkish Kurds imprisoned and returned without the opportunity of claiming asylum. They accused the Conservative government of ‘using the “economic migrant” tag to label most of the Kurds, when the underlying motive, they claimed, was the government’s racist policies towards any sizeable group coming from the Third World.’²⁷⁶ Theresa May’s 2016 UN summit speech on refugees, calling, amongst other things, for a clearer distinction between refugees and economic migrants, should, thus, be approached with caution.²⁷⁷

Habermas considers the question of who has the right to immigrate and observes that ‘[t]here are sufficient moral grounds for an individual legal claim to

²⁷² Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 90-91.

²⁷³ Noting that these distinctions find no place in Rawls’s scheme. Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 91.

²⁷⁴ See, for example, Alan Travis, ‘Theresa May maintains tough stance on “economic migrants”’ *The Guardian* (22 September 2015)

<<https://www.theguardian.com/world/2015/sep/22/theresa-may-tough-stance-economic-migrants-europe>> accessed 1 April 2017. While legal obligations are also often owed to migrants, Benhabib’s point remains valid.

²⁷⁵ James C. Hathaway, ‘Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration’ (1993) 26 *Cornell Int’l L.J.* 719, 723.

²⁷⁶ Ronald Kaye, ‘Defining the Agenda: British Refugee Policy and the Role of Parties’ (1994) 7(2/3) *Journal of Refugee Studies* 144, 152.

²⁷⁷ May, T., The Rt Hon Theresa May MP, ‘PM speech at Leaders Summit on Refugees’ (Department for International Development, Foreign & Commonwealth Office, Prime Minister’s Office, 10 Downing Street, 20 September 2016) <<https://www.gov.uk/government/speeches/pm-speech-at-leaders-summit-on-refugees-20-september-2016>> accessed 22 September 2016.

political asylum’,²⁷⁸ citing the definition of a refugee under the 1951 Geneva Convention on the Status of Refugees.²⁷⁹ However, he is open to a broader definition of the refugee. Habermas acknowledges that it is against ‘immigration from the impoverished regions of the East and South that a European chauvinism of affluence is now arming itself.’²⁸⁰ While European states face an increase in migrants, it is the neighbouring states of refugee producing countries who receive by far the largest numbers.²⁸¹ Habermas observes that, ‘[a]nyone who dissolves the connection between the question of political asylum and the question of immigration to escape poverty is implicitly declaring that he or she wants to evade Europe’s moral obligation to refugees from the impoverished regions of the world and instead tacitly tolerates a flow of illegal immigration that can always be exploited as “abuse of asylum” for domestic political purposes.’²⁸² I endorse Habermas’s view of a broad conception of refugeehood.

By focusing on stemming migration in his thesis, Rawls fails to recognise the nuanced causes of migration and, therefore, correspondingly, the full range of effective forms of assistance. Although, Rawls did acknowledge that ‘not all [burdened societies] are poor, any more than all well-ordered societies are wealthy.’²⁸³ Rather, he explained, it is ‘the political culture of a burdened society [that] is all-important.’²⁸⁴ Rawls relied upon Sen’s work on famines to illustrate his point. Sen found that famines are attributable to faults within the political and social

²⁷⁸ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 230.

²⁷⁹ He takes the view that this definition needs to be extended to include ‘the protection of women from mass rapes’ and finds the ‘right to temporary asylum for refugees from civil war regions...also unproblematic.’ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 230. Benhabib highlights that the weakness of the 1951 Refugee Convention and 1967 Protocol is that they can be ‘brazenly disregarded by non-signatories and, occasionally, even by signatory states themselves’. Seyla Benhabib, ‘Borders, Boundaries and Citizenship’ (2005) 38(4) *Political Science and Politics* 673, 674.

²⁸⁰ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 230.

²⁸¹ UNHCR, ‘Global trends: Forced displacement in 2015’ (UNHCR Report, 20 June 2016).

²⁸² Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 232.

²⁸³ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 106.

²⁸⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 108.

structure and not just food crises.²⁸⁵ Rawls anticipated that ‘there is no recipe, certainly no easy recipe, for well-ordered peoples to help a burdened society to change its political and social culture.’²⁸⁶ However, he considered that ‘merely dispensing funds will not suffice to rectify basic political and social injustices (though money is often essential)’.²⁸⁷ Moreover, the use of force is prohibited.²⁸⁸ Rawls submitted that ‘an emphasis on human rights may work to change ineffective regimes and the conduct of the rulers who have been callous about the well-being of their own people.’²⁸⁹ He framed this in terms of ‘advice’ to burdened societies (although how this is to work in practice is not clear).²⁹⁰ Certainly, he did not frame the duty of assistance as a duty to grant asylum to those forcibly displaced from burdened societies.

Habermas takes issue with any law that ‘weakens the substance of the individual legal right to political asylum’,²⁹¹ by allowing, for example, ‘refugees coming into the country from a so-called “safe Third Country” to be deported without legal recourse.’²⁹² This he considers ‘shifts the burden of immigration...to countries that are ill prepared to handle this problem in a legally unobjectionable way.’²⁹³ Following the principle of responsibility sharing under the Refugee Convention, distant, wealthier countries have the same if not a greater duty to assist.²⁹⁴ Like Sen, Habermas finds that, ‘[f]rom the moral point of view we cannot regard this [refugee] problem solely from the perspective of the inhabitants of affluent and peaceful societies; we must also take the perspective of those who come to foreign continents seeking their well-being, that is, an existence worthy of human beings, rather than

²⁸⁵ See John Rawls, *The Law of Peoples* (Harvard University Press 1999) 109 and Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 338.

²⁸⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 108.

²⁸⁷ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 108.

²⁸⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 110.

²⁸⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 109.

²⁹⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 110.

²⁹¹ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 232.

²⁹² Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 232.

²⁹³ He also finds ‘curtailing the guarantee of legal protection from refugees from countries defined as “free from persecution”’ to be problematic. Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 232.

²⁹⁴ Paragraph 4 of the Preamble of the Refugee Convention.

protection from political persecution.²⁹⁵ Habermas highlights that people do not tend to leave their home countries ‘except under dire circumstances; as a rule the mere fact that they have fled is sufficient evidence of their need for help.’²⁹⁶ In addition to this ground, Habermas contends that a ‘moral obligation to provide assistance arises in particular from the growing interdependencies of a global society.’²⁹⁷

According to Rawls, liberal societies cannot tolerate people living under burdened regimes.²⁹⁸ Rawls’s solution, in view of the instability that forced migration can cause, was to focus on long-term, sustainable, human-rights-based solutions to help burdened societies become well-ordered societies. Unlike Sen and Habermas’s interpretation of moral assistance to asylum-seekers, Rawls’s duty of assistance is focused on preventing the causes of forced migration. However, such programmes tend to be long-term. In the short-term, it is difficult to see how liberal and decent societies can ignore the pressing moral and legal claims of asylum-seekers and refugees if they are to act in accordance with the values of human rights and basic justice. Framed in this way, assistance requires more than mere advice. Moreover, the efforts to assist the burdened societies (by advice alone) may be resisted. In any event, the intolerable conditions of burdened regimes imply that there is good reason for accepting asylum-seekers from burdened societies, at least temporarily, until the burdened regime becomes well-ordered. However, relying upon Benhabib’s case for a human right to membership, it also would be wrong to deny asylum-seekers a path to citizenship. Or, using Arendt’s famous expression, it would be wrong to deny asylum-seekers the ‘right to have rights’.²⁹⁹

Similar reasoning might be extended to argue that well-ordered societies receive persecuted individuals from outlaw regimes. In the Law of Peoples, outlaw states that violate human rights are condemned and subject to forceful sanctions and

²⁹⁵ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 230.

²⁹⁶ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 231.

²⁹⁷ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 231.

²⁹⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 59.

²⁹⁹ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Books 1976).

even to intervention.³⁰⁰ Alternatively, by not tolerating outlaw regimes and in condemning human rights abuses, well-ordered states might accept asylum-seekers and a fair number of refugees from out-law regimes.³⁰¹ If basic human rights ‘belong to the common institutions and practices of all liberal and decent societies’,³⁰² then these well-ordered regimes should protect the human rights of people from outlaw states when these regimes fail wilfully to do so.³⁰³

Both arguments, as applied to burdened societies and outlaw states have a human rights basis. While liberal and decent peoples might have a responsibility to maintain their societies and not to migrate to other territories without consent, there cannot be the same expectation upon members of burdened and outlaw societies to remain and tolerate human rights violations.³⁰⁴ A well-ordered society is responsible for maintaining its population, however, this need not diminish the duty to assist or intervene.³⁰⁵ Granting surrogate protection to members of burdened or outlaw societies is justifiable so long as the polity can sustain the increased population. Indeed, the arrival of those fleeing human rights violations may help to maintain the population and the economy of a well-ordered society. Moreover, a society’s responsibility for maintaining its population is not the same as preserving an asserted ethnicity or culture. As highlighted above, cultural hostilities to migration can be ‘tamed’ by well-ordered regimes.³⁰⁶ Furthermore, well-ordered societies cannot plead a lack of natural resources as an excuse for denying basic human rights any more than burdened societies can.³⁰⁷ I have demonstrated that there is some, arguable, scope for interpreting Rawls’s duties to burdened and outlaw regimes in a way that accounts for asylum-seekers. Whilst there is some scope for interpreting Rawls’s theory in the interests of asylum-seekers, as demonstrated in the preceding, the stronger method is the adapted original position developed in this chapter.

³⁰⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 81.

³⁰¹ The argument of solidarity and responsibility-sharing is not pursued further as it is outside the scope of the present thesis.

³⁰² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 110.

³⁰³ The notion of surrogate state protection underpins the Refugee Convention.

³⁰⁴ As already highlighted, Rawls accepts that there is a right to emigrate for reason of persecution. John Rawls, *The Law of Peoples* (Harvard University Press 1999) 74.

³⁰⁵ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 109.

³⁰⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 111.

³⁰⁷ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 110.

I have demonstrated that there is some scope for interpreting Rawls's duties to burdened and outlaw regimes in a way that accounts for asylum-seekers. In accordance with Rawls's reasoning, people cannot be expected to stay within burdened societies. Therefore, people should be admitted to well-ordered societies and be able to remain living under decent institutions. They cannot be expected to return to face conditions that would violate their human rights. This asylum-focused approach draws implications directly from Rawls's Law of Peoples and therefore is closer to and more consistent with Rawlsian thought. The asylum-focused reading draws the principle of *non-refoulement* from the Law of Peoples as you cannot, from a Rawlsian perspective, logically return people to a situation where they will be persecuted or live under indecent institutions. This seems to be a sufficiently broad understanding of the principle of non-return, consistent with international refugee law and international human rights law.

Whilst there is scope for interpreting Rawls's Law of Peoples and duty of assistance in the interests of asylum-seekers, as demonstrated in the preceding discussion, I believe the stronger method is the adapted original position developed in this chapter. By stronger, I mean the approach more likely to secure the rights of, and fair terms with, asylum seekers. This is because my approach considers the rights and interests of asylum seekers in the first instance. Rawls's first original position excludes asylum seekers. The issue of asylum fairness and justice is too important to try to pick up later on. The question is so fundamental that it has to be built in from the beginning. Otherwise, fairness only arises between citizens. This excludes asylum seekers. That aside, Rawls's notion of 'mutual caring', which underpins his duty of assistance, offers helpful insight to the nature of social cooperation (which is envisaged at the original position).³⁰⁸

Rawls presents the duty of assistance as an aspiration to 'mutual caring' between peoples to bring about a world in which all peoples have a well-ordered regime.³⁰⁹ He calls into question whether a degree of affinity (namely a sense of social cohesion) is necessary to motivate support to follow the duty of assistance.³¹⁰ Rawls suggests that in the absence of a sense of affinity between people, '[i]t is the

³⁰⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 113.

³⁰⁹ This duty is reinforced by the duty to support just institutions and the obligations of those governed by the principle of fairness.

³¹⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 112.

task of the statesman' to address this.³¹¹ He observes that 'relations of affinity are not a fixed thing, but may continually grow stronger over time as people come to work together in cooperative institutions'.³¹² Through cooperative efforts (motivated by self-interest) a sense of 'mutual caring' develops. Mutual caring affirms peoples' 'liberal and decent civilization and culture, until eventually they become ready to act on the *ideals and principles* their civilization specifies'.³¹³ Such political and moral principles that have already developed, according to Rawls, are religious toleration, abolition of slavery and serfdom, the rule of law, the right to war only on self-defence, and the guarantee of human rights.³¹⁴ The right to seek asylum and the principle of *non-refoulement* are equally well established political, moral and legal principles.³¹⁵ Thus, Rawls has good reason to accept these norms, strengthened by the fact that he generally reflects norms of international law where they are compatible with justice. If affinity among peoples is naturally weaker as a matter of human psychology between peoples across a larger area and cultural distances,³¹⁶ is there a greater affinity and therefore a stronger duty to those non-citizens physically present within a territory?³¹⁷ In addition, there is the argument that those who flee regimes in search for protection of their human rights tacitly ascribe to and share liberal values. To this extent liberal peoples have an affinity with refugees as a normatively special category and a strong duty of mutual caring and cooperation.³¹⁸ Moreover, as discussed above, geographic space is less relevant in a globalised world of shared risks and responsibilities.

To conclude this section, in the context of an increasingly interconnected world, fairness requires mutual caring and cooperation between generations and between peoples across borders. This moral view cements existing international legal duties while advancing a broader conception of who is a refugee. Drawing upon the

³¹¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 112.

³¹² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 112-113.

³¹³ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 112-113.

³¹⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 112-113.

³¹⁵ Both the right to seek asylum and the principle of non-refoulement are fundamental norms in customary international law. See, for example, Subrata Roy Chowdhury, 'A Response to the Refugee Problems in Post Cold War Era: Some Existing and Emerging Norms of International Law' (1995) 7(1) *International Journal of Refugee Law* 100.

³¹⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 112.

³¹⁷ This question is considered by Virginia Mantouvalou in 'N v UK: No Duty to Rescue the Nearby Needy?' (2009) 72(5) *Modern Law Review* 815.

³¹⁸ Jean François Durieux, 'Three Asylum Paradigms' (2013) 20(2) *International Journal on Minority and Group Rights* 147.

theories of Rawls, Habermas, Sen and Benhabib, fair cooperation and care transcends spatial and temporal boundaries, promoting openness to both temporal and territorial outsiders. The issue of temporal fairness is revisited throughout this thesis. The normative method for including temporal and territorial outsiders is developed further in the following section on fairness as inclusive public reason.

5. FAIRNESS AS INCLUSIVE PUBLIC REASON

5.1 Accommodating diverse views

The fourth pillar to support an asylum-centric account of fairness in liberal democracies, which seeks to overcome arbitrary inequality, is inclusive public reason. The idea of inclusive public reason builds upon the notion of social cooperation and is adapted from Rawls's (more narrowly defined) conception of public reason. In *A Theory of Justice*, Rawls had not fully appreciated how diverse people are even within a closed society. He therefore adjusted his theory in *Political Liberalism* to accommodate profound divisions.³¹⁹ In *Political Liberalism*, Rawls insisted upon a freestanding political conception of justice, distinct from comprehensive moral doctrines (religious or secular). His aim was to mitigate the tension between conflicting worldviews and achieve an inclusive, liberal, egalitarian, constitutional-democratic society based upon the criterion of reciprocity (that is, fair terms of social cooperation that reasonable, free and equal citizens would accept).³²⁰ Essential to this form of governance is the political idea of public reason informed by a family of reasonable, politically liberal conceptions of justice.³²¹ As such, fair cooperation requires open- and fair-mindedness.

³¹⁹ The concept of stability, as realised over time and through the process of moral learning, dominated in John Rawls, *A Theory of Justice* (Oxford University Press 1973) - Chapters 8 and 9. However, Rawls reconsidered and found that this was the wrong account. See introduction to paperback edition of John Rawls, *Political Liberalism* (Cambridge University Press 1996). Rawls observed increased religious pluralism (with Christian pluralism in mind).

³²⁰ Such fair terms are defined by principles and ideals and are therefore intrinsically moral but not comprehensive doctrine. See introduction to paperback edition John Rawls, *Political Liberalism* (Cambridge University Press 1996) xlv.

³²¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 133.

Rawls stated that the justice principles agreed behind the first ‘thick veil of ignorance’³²² would be supported by a plurality of reasonable views within an ‘overlapping consensus’.³²³ In Rawls’s words, ‘a sufficiently inclusive concordant fit among political and other values’ would be reached to maintain the system of a well-ordered liberal constitution.³²⁴ This, Rawls explained, is more than a mere *modus vivendi*. The consensus affects ‘social concord’ and shapes ‘the moral quality of public life’ as different conceptions of the good coincide to affirm the shared content of a political conception.³²⁵ An overlapping consensus generates compatibility between comprehensive doctrines and democracy.³²⁶

At the first original position, Rawls argued that justice as fairness is the best contender. He deduced that the symmetrical representative-members would choose the following two ordered principles, as summarised: (i) that all are afforded equal basic rights and liberties; and (ii) any difference is justified only if it is for the benefit of the least advantaged members of society.³²⁷ The equal political freedoms specified by Rawls are: freedom of thought and liberty of conscience; the political liberties and freedoms of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law.³²⁸ These principles are tested again by public reason once the veil has been raised and then affirmed by an overlapping consensus.³²⁹ However, the Law of Peoples requires the representatives to support the eight principles of equality among peoples (as outlined by Rawls) which he takes ‘from the history and usages of international law and

³²² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 32.

³²³ John Rawls, ‘The Idea of an Overlapping Consensus’ (1987) 7(2) *Oxford Journal of Legal Studies* 1, 17; John Rawls, *Political Liberalism* (Cambridge University Press 1996) 146-147 and 168.

³²⁴ John Rawls, ‘The Idea of an Overlapping Consensus’ (1987) 7(2) *Oxford Journal of Legal Studies* 1, 17.

³²⁵ John Rawls, ‘The Idea of an Overlapping Consensus’ (1987) 7(2) *Oxford Journal of Legal Studies* 1, 10.

³²⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 175.

³²⁷ John Rawls, *Political Liberalism* (Cambridge University Press 1996) 5-6.

³²⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 291.

³²⁹ Rawls explained that non-reasonable doctrines include ‘many fundamentalist religious doctrines, the doctrine of the divine right of monarchs and the various forms of aristocracy, and... the many instances of autocracy and dictatorship.’ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 173.

practice.³³⁰ The use of the second level original position (in the Law of Peoples) therefore only permits debates around the interpretation of these principles.³³¹

It is important to highlight that Rawls confined public reason to the ‘public political forum’,³³² namely, ‘the discourse of judges in their decisions...; the discourse of government officials...; and finally, the discourse of candidates for public office and their campaign managers’.³³³ In contrast to the public political forum, is, what Rawls calls, ‘the background culture’.³³⁴ That is, ‘the culture of civil society’,³³⁵ made up of ‘many and diverse agencies’,³³⁶ and to which the rules and values of public reason do not apply. Nor does public reason apply, according to Rawls, to the media.³³⁷ However, citizens generally are bound morally by the ‘duty of civility’³³⁸ that requires them to support the idea of public reason by imagining themselves as ideal legislators, holding government officials to account for violating public reason.³³⁹ These limits on public reason and the duties of civil society to challenge instances of unfairness and injustice can be contrasted with Sen’s wider conception.³⁴⁰

For Rawls and Habermas, only constitutional, or civic, patriotism is considered fair and reasonable. Rawls considered that the moral nature of peoples ‘includes a certain proper pride and sense of honor.’³⁴¹ For example, ‘peoples may take a proper pride in their histories and achievements’.³⁴² This he calls ‘proper patriotism’.³⁴³ The ‘common sympathies’ that unite peoples are shared principles that allow them to live under the same democratic government.³⁴⁴ They need not, therefore, be united by a common language or culture.³⁴⁵ Just as members, in the domestic case, develop a sense of justice and accept to live by justice as fairness

³³⁰ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 41.

³³¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 42.

³³² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 133.

³³³ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 133-134.

³³⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 134.

³³⁵ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 134.

³³⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 134.

³³⁷ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 134.

³³⁸ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 135-136.

³³⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 135-136.

³⁴⁰ Discussed at section 5.2. of this Chapter.

³⁴¹ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 44 and 62.

³⁴² John Rawls, *The Law of Peoples* (Harvard University Press 1999) 44 and 62.

³⁴³ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 44 and 62.

³⁴⁴ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 23.

³⁴⁵ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 23-24.

principles, allegiance to the legal fairness norms incorporated in the Law of Peoples is achieved over time. This is by the psychological process of ‘moral learning’, whereby mutual trust and confidence is demonstrated and the desire to live harmoniously is strengthened.³⁴⁶

Similarly, Habermas believes that stability can be achieved by an inclusive democratic government if it ‘keeps itself open to the equal protection of those who suffer discrimination and to the *integration* of the marginalized, but without *imprisoning* them in the uniformity of a homogenized ethnic community.’³⁴⁷ He considers that ‘constitutional patriotism’³⁴⁸ (that is, appeal to a political community rather than an imagined ethnic-cultural community) can replace nationalism and resolve the pressing need for peace and solidarity between strangers in growing multicultural societies.³⁴⁹ Asylum prompts the question of the extent to which a community has a right to maintain the integrity of its way of life. In response, Habermas concludes that only integration by political socialisation can be required,³⁵⁰ preserving the identity of the political community.³⁵¹ He admits that the requirement of political integration cannot preserve the identity of the political community indefinitely, but this is not something that concerns him.³⁵² A liberal and fair society, therefore, accommodates diverse races, ethnicities, cultures and views, opening itself to the diverse voices of marginalised groups.

³⁴⁶ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 44-45.

³⁴⁷ Jürgen Habermas, ‘The Nation, the Rule of Law, and Democracy’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 139.

³⁴⁸ Habermas explains that, ‘[e]ach national culture develops a distinctive interpretation of those constitutional principles that are equally embodied in other republican constitutions – such as popular sovereignty and human rights – in light of its own national history.’ See Jürgen Habermas, ‘The European Nation State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 118.

³⁴⁹ Similarly, Benhabib calls for ‘the need for “democratic attachments” that need not be directed toward existing nation-state structures alone’. See Seyla Benhabib, ‘Borders, Boundaries and Citizenship’ (2005) 38(4) *Political Science and Politics* 673, 674.

³⁵⁰ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 228-229.

³⁵¹ Habermas clarifies that political integration does not cover ‘fundamentalist immigration cultures’, nor does it ‘justify compulsory assimilation for the sake of the self-affirmation of the cultural form of life dominant in the country.’ Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 229.

³⁵² Jürgen Habermas, ‘Struggles for Recognition in the Democratic State’ in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 229.

5.2 Giving voice to marginalised groups

Habermas's distinct 'moral and legal theory' builds upon Rawls's idea of public reason in democratic deliberation and decision-making.³⁵³ It is conceptually narrower than Rawls's theory as far as it 'focuses exclusively on the procedural aspects of the public use of reason and derives the system of rights from the idea of its legal institutionalization'.³⁵⁴ Habermas labels this form of legal constitution, by an 'ideal procedure' of intersubjective communication: 'discourse theory'.³⁵⁵ While Rawls extolled the idea of an overlapping consensus, Habermas believes that discourse-ethics provides, potentially universally valid, answers to conflicts (where there are competing conceptions of the good).³⁵⁶ Habermas's discourse principle expounds that '[o]nly those norms can claim validity that could meet with the acceptance of all concerned in practical discourse'.³⁵⁷ In contrast to Rawls's theory, Habermas himself observes that his alternative approach leaves 'more questions open because it entrusts more to the *process* of rational opinion- and will-formation'.³⁵⁸ However, Habermas's theory is broader and more inclusive in so far as, 'the practice of deliberation is

³⁵³ Jürgen Habermas, 'Reconciliation through the Public Use of Reason' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 72.

³⁵⁴ Jürgen Habermas, 'Reconciliation through the Public Use of Reason' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 72.

³⁵⁵ Habermas explains that discourse theory integrates elements from both the liberal and republican traditions. Jürgen Habermas, 'Three Normative Models of Democracy' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 246.

³⁵⁶ See Jürgen Habermas, 'Reconciliation through the Public Use of Reason' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 72.

³⁵⁷ Habermas submits that '[i]n view of the universality and nonsubstitutability of the practice of argumentation, it would be difficult to dispute the neutrality of the discourse principle.' Jürgen Habermas, 'A Genealogical Analysis of the Cognitive Content of Morality' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 41 and 43.

³⁵⁸ Jürgen Habermas, 'Reconciliation through the Public Use of Reason' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 72.

extended to an inclusive community that does not in principle exclude any subject capable of speech and action who can make relevant contributions.³⁵⁹

Habermas's discourse principle rests upon the belief that participants have an intuitive understanding of how to engage in a fair process of argumentation and are therefore fundamentally cooperative.³⁶⁰ He submits, as mentioned, that a norm can claim universal validity within practical discourse. This happens 'when the foreseeable consequences and side effects of its general observance for the interests and value-orientations of *each individual* could be *jointly* accepted by *all* concerned without coercion.'³⁶¹ The 'rational acceptability of a statement' depends upon the inclusion of all concerned in public practical discourse and the granting of equal communicative rights to all participants.³⁶² The principle of universalisation is the only rule of argumentation that Habermas proffers.³⁶³ On this view, fairness is inclusive and equal democratic participation³⁶⁴ Like Rawls, Habermas presents an ideal theory. However, this does not prevent his theory from having leverage in the real, contemporary world. Habermas demonstrates how his theory can apply in the asylum context to promote liberal immigration and asylum policies. Moreover, the significance of Habermas's unified theory of popular sovereignty and human rights (discussed above) is that it requires the human rights of asylum-seekers to be protected by law and for their voices to be included within the democratic process.

³⁵⁹ Jürgen Habermas, 'A Genealogical Analysis of the Cognitive Content of Morality' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 41.

³⁶⁰ Jürgen Habermas, 'A Genealogical Analysis of the Cognitive Content of Morality' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 43-44.

³⁶¹ Jürgen Habermas, 'A Genealogical Analysis of the Cognitive Content of Morality' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 42-43.

³⁶² Habermas elucidates that it also requires that the participants mean what they say and the absence of deception and coercion. Jürgen Habermas, 'A Genealogical Analysis of the Cognitive Content of Morality' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 44.

³⁶³ Along with the caveat that the participants will be satisfied with this rule if 'it proves useful and does not lead to counterintuitive results.' That is, '[i]t must turn out that a practice of justification conducted in this manner selects norms that are capable of commanding universal agreement.' Jürgen Habermas, 'A Genealogical Analysis of the Cognitive Content of Morality' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 43-44.

³⁶⁴ Premised upon an impartial procedure, honesty, and the ability of participants to agree universal truths within this sphere of open and free argumentation.

The interests of asylum-seekers should be able to be represented meaningfully in political processes and they should have fair access to the courts to argue their claims.

Sen also presents a wider conception of public reason than Rawls. While Sen considers that it is impossible to have a global democratic state, he takes the view that ‘if democracy is seen in terms of public reasoning, then the practice of global democracy need not be put in indefinite cold storage.’³⁶⁵ He believes that ‘global institutions as well as less formal communications and exchanges’³⁶⁶ are imperfect articulations that nonetheless operate with some effectiveness. Sen cites the examples of ‘the United Nations and the institutions associated with it’,³⁶⁷ ‘the committed work of citizens’ organizations’,³⁶⁸ ‘of many NGOs’,³⁶⁹ ‘of parts of the news media’,³⁷⁰ and ‘individual activists’,³⁷¹ that work together to enhance the opportunities for global dialogue.³⁷² He considers that the ‘plurality of sources enriches the reach of global democracy’³⁷³ and that the ‘challenge today is the strengthening of this already functioning participatory process, on which the pursuit of global justice will to a great extent depend.’³⁷⁴ Taking the example of the role of the press and the media, unlike Rawls, Sen considers this to be an important part of democracy as public reason by ‘making the problems, predicaments and humanity of certain groups more understood by other groups’.³⁷⁵ Nevertheless, Sen observes that the realisation of social justice and fairer politics, by the democratic process so described, is ‘not automatic and requires activism on the part of politically engaged citizens.’³⁷⁶ Sen’s warning that we should not leave justice exclusively in the hands of those in public office echoes Marx. Marx famously said that, ‘the ideas of the ruling class are in every epoch the ruling ideas’.³⁷⁷ Ideas of fairness should not be incarcerated by the ideals of a privileged few.

³⁶⁵ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 408.

³⁶⁶ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 408.

³⁶⁷ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 409.

³⁶⁸ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 409.

³⁶⁹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 409.

³⁷⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 409.

³⁷¹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 409.

³⁷² Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 409.

³⁷³ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 408.

³⁷⁴ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 410.

³⁷⁵ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 335-337 and 354.

³⁷⁶ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 351.

³⁷⁷ He says: ‘The success of democracy is not merely a matter of having the most perfect institutional structure that we can think of. It depends inescapably on our actual behaviour

Sen describes the inclusion of minority rights as ‘undoubtedly one of the most difficult issues that democracy has to tackle.’³⁷⁸ However, he contends that a broad conception of public reasoning, that goes beyond public balloting, ‘can accommodate the importance of minority rights without ignoring majority votes as part of the total structure of democracy.’³⁷⁹ He notes that the ‘formation of tolerant values’³⁸⁰ is central to this idea and explains that ‘[t]he effect of sectarian demagoguery can be overcome only through the championing of broader values that go across divisive barriers’.³⁸¹ This depends, he says, ‘on the ability of inclusive and interactive political processes to subdue the poisonous fanaticism of divisive communal thinking.’³⁸² Sen considers that it is through this wider process of democratic politics (and not just relying on the existence of democratic institutions) that national democracies can generate more tolerant values.

In short, inclusive public reason is fairness in action. It is by this process that divisions can be overcome, and diversity accommodated. Both political and civil society are, therefore, encouraged to give voice to asylum-seekers as weak and marginalised members of society.

6. CONCLUSION

By putting asylum-seekers at the centre of our thinking in social contract theory, fairness is revealed as the pillars of situated, conscious impartiality, respect for human rights, social cooperation and caring, and inclusive public reasoning.³⁸³ Rawls, Sen, Habermas and Benhabib have each grappled with how best to understand fairness and each thinker uses different fairness devices. Rawls seeks to harness impartiality by the design of the original position. While Sen, Habermas and Benhabib consider Rawls’s method of the original position to be flawed, the essential normative fairness

patterns and the working of political and social interactions. There is no chance of resting the matter in the ‘safe’ hands of purely institutional virtuosity.’ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 354. See also Karl Marx and Friedrich Engels, *The German Ideology*, (C. J. Arthur ed, New York, International Publishers, 1970) 64.

³⁷⁸ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 352.

³⁷⁹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 352.

³⁸⁰ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 352.

³⁸¹ Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 353.

³⁸² Amartya Sen, *The Idea of Justice* (Penguin Books 2010) 352.

³⁸³ The pillars are returned to in Chapter 6 to examine the temporal dimensions of fairness which have been overlooked by Rawls and his peers.

conditions that he identifies are accepted by these philosophers. To this extent Rawls succeeds in excavating ideas of liberal fairness and reviving the philosophical debate of justice. Uncovering the ideas upon which Rawls's theory is premised, I find that liberal fairness means impartiality, social cooperation, and fair distribution and respect for human rights. With the aim that his theory of justice as fairness might have purchase in the real world, Rawls creates the additional theory stage (and fairness requirement) of subjection of his thesis to the scrutiny of public reason. Just as Habermas affirms Rawls's general position, admitting that he 'admire[s] this project, share[s] its intentions, and regard[s] its essential results as correct',³⁸⁴ Rawls's notions of fairness have influenced this chapter's theoretical development.

Rawls's innovation of the original position and the veil of ignorance helps us to think about fairness with clarity and compassion. The intention behind his veil of ignorance is to remove the arbitrariness of natural and social inequalities and elicit the moral intuitions of mutual caring and cooperation.³⁸⁵ However, the design of the closed society hides an important source of injustice: the exclusion of non-citizens. Rawls's state-centred view and silence on the struggles of asylum-seekers has required a revision of his theory design. Putting asylum-seekers at the centre of the theoretical inquiry, I argue that the tension between insider and outsider can be tempered and normative fairness in liberal democracy can be better understood. I have presented an initial position that imaginatively situates asylum-claimants, inviting the participant in the thought experiment to become 'conscious' of the 'struggles of inclusion and exclusion.'³⁸⁶ Drawing upon the work of Benhabib, Sen and Habermas I have moved away from Rawls's restricted view of fairness tied to the nation-state. The work of these eminent theorists has justified thinking about Rawls afresh and helped to address the intractable problem of exclusionary national borders. Thinking about Rawlsian fairness from the refugee position allows more inclusive fairness

³⁸⁴ Jürgen Habermas, 'Reconciliation through the Public Use of Reason' in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff ed, MIT Press 2000) 50. Rawls admitted that 'many are prepared to accept the conclusion that a just and well-ordered democratic society is not possible, and even regard it as obvious.' However, he refused to accept this conclusion, asking, '[w]hat is the effect of our doing so and what is the consequence for our view of the political world, and even the world as a whole?' John Rawls, *Political Liberalism* (Cambridge University Press 1996) lx.

³⁸⁵ This moral point of view of fair conditions leads to the identification of ordered principles to govern the institutional arrangement of a just society and to provide clear answers to justice problems.

³⁸⁶ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 216.

conditions, and a more generous interpretation of the rights and duties owed to asylum-seekers, to be imagined. Boundaries might have to be drawn but they need not sever common humanity and the liberal tendencies towards open, fair-mindedness and solidarity. Turning to time, the second part of this thesis responds to the critique that Rawls's theory is lacking in terms of exploring empirical views of fairness. The empirical investigation discussed in the next chapter reveals the importance of time and temporalities in relation to ideas of fairness.

PART II: A TURN TO TIME: EXPLORING FAIRNESS IN PRACTICE

CHAPTER 4: FINDING TIME IN THE ACCOUNTS OF ASYLUM CLAIMANTS

I was waiting for five years and they put me back to interview again. I had an interview. They refused me again. I went back to court.¹

1. INTRODUCTION

This chapter explores the perspectives of asylum-claimants in South Wales through eight in-depth, individual interviews. The aim is to investigate their narratives in order to explore fair treatment from an asylum-claimant perspective. The chapter does not assess whether the treatment of each of the participants meets a fairness threshold standard, or whether the outcomes of their asylum or asylum-related matters were substantively fair, this was not the purpose of the investigation. It was evident that time and temporal concepts were a central reference in understandings fairness. All the participants in this study complained vociferously of the long delays in the asylum process.²

I argue that time and temporal concepts play a central role in the framing and function of administrative-legal systems. This is an important argument to draw from empirical research because temporalities of asylum have been underexplored by scholars examining the asylum system.³ Yet almost a decade and a half ago, Saulo B. Cwerner highlighted the critical importance of the time politics of asylum in the UK and the inattention to this

¹ Mohammed 1 at p. 11. (Appendix 3).

² Moreover, time is one of the most immediate and fundamental lenses through which humans experience and understand the world. Mariana Valverde, “‘Time Thickens, Takes on Flesh’: Spatiotemporal Dynamics in Law’ in Irus Braverman, Nicholas Blomely, David Delaney and Alexandre Kedar (eds), *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford University Press 2014) 59 and 67.

³ Griffiths notes that ‘time remains under-theorised in relation to migration and mobility.’ Melanie B.E. Griffiths, ‘Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees’ (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991, 1992.

phenomenon.⁴ My investigation, therefore, helps to fill the lacuna, at the same time contributing to what Emily Grabham has identified as, ‘growing interdisciplinary literatures on time and governance...to trace the productive force and specific qualities of diverse temporal horizons.’⁵ The focus of my analysis is the relationship between time and juridical fairness in the UK’s asylum system. In this chapter I use the term ‘time’ in the sense of ‘scientifically measured durational time.’⁶ However, the significance of different ‘temporalities’, including different cultural perceptions of time, are also acknowledged.⁷

Following an overview of my research methods and ethical issues, the chapter splits discussion into two parts. Firstly, research participants’ experience of the ‘temporal stages’ of the UK’s asylum process are explored. through the experiences of the research participants. Secondly, the participants’ expressions of (un)fair time are discussed in relation to three categories of analysis that emerged from my findings, namely: *doing time*, *unequal time*, and *severed time(s)*.

2. METHODS

2. 1 Sample and data collection

Eight semi-structured interviews were conducted between 25th August and 5th December 2017. Potential interviewees were identified through Asylum Justice, a charity that provides free legal services to asylum-claimants and refugees in Wales. Purposive and convenience sampling techniques were used.⁸ I provided the Legal Director of Asylum Justice with my selection criteria and asked her to identify a group of potential participants. From this group, seven agreed to take part in the study, each of them lived in Cardiff and I interviewed them on site at Cardiff Law School. There was one self-selecting participant based in Swansea. He contacted me after finding out about the project at an Asylum Justice drop-in surgery in Cardiff and he met the sampling criteria. I interviewed him at Morrision public library, near

⁴ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71.

⁵ Emily Grabham, ‘Time and technique: the legal lives of the 26-week qualifying period’ (2016) 45 (3-4) *Economy and Society* 379.

⁶ Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration, and Democratic Justice* (Cambridge University Press 2018) 25.

⁷ See, for example, Alfred Gell, *The anthropology of time: cultural constructions of temporal maps and images* (Berg 1992).

⁸ Cheryl M.R. Sulaiman-Hill and Sandra C. Thompson, ‘Sampling challenges in a study examining refugee resettlement’ (2011) 11(2) *BMC International Health and Human Rights* 1.

Swansea. The location, dates and times of the interviews were negotiated with the participants based on what was convenient and comfortable for them.⁹

All participants were adult males, from different countries. The decision to interview only male participants was to exclude the male and female comparative aspect of analysis.¹⁰ The design reflects the empirical reality that most asylum-claimants in the UK are male.¹¹ That is not, of course, to dismiss the value of taking account of the views of female asylum-claimants and other hidden and harder to reach populations of asylum-claimants, such as disabled asylum-claimants.¹² The gendered experience of asylum-claimants, and male and female temporalities of asylum-claimants, are critical aspects of asylum law and procedure.¹³ These important matters require scholarly attention but are out-with the scope of this thesis. Moreover, qualitative researchers ought to be conscious of reaching out to particularly vulnerable and hard to reach groups.¹⁴ However, eliminating women as a variable also helped to protect the anonymity of research participants within a small, local sample. Albeit with varying degrees of proficiency, all participants spoke English adequately, either as a first or second language. Participants were asked to indicate if they wished to use an interpreter, but all preferred to speak in English. Indeed, one participant viewed the interview as an opportunity not only to support the research project but to speak English. Conducting the interviews in English, and without an intermediary interpreter, allowed for nuance, flow and rapport.¹⁵ The sample included participants at different stages of the asylum process and a mix of successful and unsuccessful cases. Most of the participants had experienced difficulties accessing a Legal Aid lawyer. Half of the participants volunteered with Asylum Justice and this enhanced their expert status. The small, heterogeneous sample was not

⁹ Sarah A. Elwood and Deborah G. Martin, ‘“Placing” Interviews: Location and Scales of Power in Qualitative Research’ (2000) 52(4) *The Professional Geographer* 649.

¹⁰ Narrowing the variables in this way does not mean that the findings do not concern gender. The findings shed light on the experiences of men which are gendered. However, gender is not the focus of this thesis.

¹¹ Around three-quarters of all asylum applicants in 2019 were male. Home Office, *National Statistics: How many people do we grant asylum or protection to?* (Home Office, 22 August 2019).

¹² Alice Bloch, ‘Carrying Out a Survey of Refugees: Some Methodological Considerations and Guidelines’ (1999) 12(4) *Journal of Refugee Studies* 367.

¹³ See, for example, Sima Shakhshari, ‘The queer time of death: Temporality, geopolitics and refugee rights’ (2014) 17(8) *Sexualities* 998.

¹⁴ Janine Dahinden and Denise Efnayyi-Mäder, ‘Challenges and Strategies in Empirical Fieldwork with Asylum Seekers and Migrant Sex Workers’ (2009) 4 *The Ethics of Migration Research Methodology* 98.

¹⁵ Rosalind Edwards, ‘A Critical Examination of the Use of Interpreters in the Qualitative Research Process’ (1998) 24(1) *Journal of Ethnic and Migration Studies* 197 and Bogusia Temple, ‘Crossed Wires: Interpreters, Translators, and Bi-lingual Workers in Cross-language Research’ (2002) 12 *Qualitative Health Research* 844.

intended to be representative;¹⁶ however it does provide rich, abundant data that offers an important insight into the lived experiences of a largely hidden group.

The semi-structured interview schedule was designed and honed to elicit information about what happened to the participants during the asylum process, how this made them feel, and whether they perceived the system, or aspects of the system, to be (un)fair. The difficulty and effectiveness of the questions were tested and adapted as part of an iterative process of data collection and preliminary analysis.¹⁷ Participants were not asked about their experiences prior to arriving in the UK, however some participants volunteered this information. The average interview length was one hour and a half. Participants were offered refreshments but not all accepted. One participant, for example, was fasting. The reimbursement of travel expenses was not accepted by any of the participants. Pro-formas, completed at the beginning or end of the interviews, were used to note basic information, including age, nationality, background, stage of the asylum matter, and self-chosen pseudonym. These details are outlined in Table 1, below.

Table 1: Profiles of research participants

Pseudonym	Age	Country of Origin	Educational and Work Background	Approximate length of time in the UK	Status / Stage of Asylum Matter
Tomorrow is better (TIB)	46	Withheld	Legal	4 years	Refugee
Mr M	42	Syria	Lawyer	1 year	Refugee
Mohammed I	22	Iran	Two years of high school in the UK.	7 years	Refused asylum seeker and appeal rights exhausted.
Blessing	42	Democratic Republic of	Teacher	1 year	Asylum seeker with pending

¹⁶ Mira Crouth and Heather McKenzie, 'The logic of small samples in interview-based qualitative research' (2006) 45(4) *Social Science Information* 483.

¹⁷ Roulston and Choi observe that, 'Careful analysis of preliminary interviews can assist researchers in learning about the characteristics of their own talk, how conversations transpire with participants and whether or not the interviews conducted meet the needs of a specific project.' Kathryn Roulston and Myungweon Choi, 'Qualitative Interviews' in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Collection* (SAGE 2018) 9.

		Congo			appeal before the Upper Tribunal.
Yonas	29	Eritrea	College Student in the UK.	3 years	Refugee
John	Withheld	Tanzania	Debt collector	11 years	Asylum seeker with pending appeal before the Upper Tribunal.
Colosso Golombat (CG)	25	Withheld	UK A-Levels	10 years	Refugee but status under Home Office review.
Mohammed 2	73	Palestine	Army General	10 years	Asylum seeker

The pro-forma also identified whether the participant would like to see final drafts of the thesis or articles prior to publication, whether they would like to highlight and withhold any sensitive information provided, and whether there was any other information that they wished to add.¹⁸

2.2 Access and ethics

My connection to Asylum Justice was key in accessing the hard to reach population of asylum-claimants and helped to establish trust and rapport between me and the participants.¹⁹ The role of the Legal Director as gatekeeper was positive in terms of identifying those most appropriate for the study, by assessing the circumstances and vulnerability of potential participants. This helped to promote the safety of both the participants and the researcher.

Given the precarious nature of their immigration status and potential vulnerability, it was particularly important to ensure that participants understood the purpose of the research.

¹⁸ Eileen Pittaway, Linda Bartolomei, and Richard Hugman, “‘Stop Stealing Our Stories’: The Ethics of Research with Vulnerable Groups”, (2010) 2(2) *Journal of Human Rights Practice* 229.

¹⁹ Kabranian-Melkonian observes that, ‘professionals need to implement the work gradually by, first, building trust among the members of the community or group they intend to research. This can be done by finding those who are called gatekeepers, trusted members of the community and trusted by the researchers, who can serve as a bridge between the researcher and the target group.’ Seta Kabranian-Melkonian, ‘Ethical Concerns with Refugee Research’ (2015) 25 *Journal of Human Behaviour in the Social Environment* 714, 717.

Information sheets were provided in advance and were explained to the participants.²⁰ It was highlighted that questions about the substance of their matters would not be asked. Nonetheless, the interviews did trigger emotional responses from several of the participants. I was sensitive to this by ensuring that I acknowledged when the participants expressed loss or other significant emotions.²¹ One participant expressed suicidal thoughts, although I was reassured by him that he did not plan to act upon these and was not, therefore, a serious danger to himself. Another participant felt physically shaken by the emotion of taking part in the interview. He said to me, ‘I mean, you see me right now, I get emotional even talking about it.’²² I checked that the participant was comfortable in the physical environment and wished to continue with the interview. I found my background and training as an asylum lawyer helpful in responding appropriately to these situations.

My role as a researcher was carefully explained to the participants. I emphasised that I had no connection to the Home Office. I also highlighted that the research was not on behalf of Asylum Justice and that access to the charity’s services did not depend upon participation or non-participation. It was also stressed that I was not able to assist with immigration, asylum or welfare matters. Admittedly, maintaining a non-intervention approach was emotionally challenging for me, particularly when one participant revealed that he was sleeping rough. It also transpired immediately prior to one of the interviews that the self-selecting participant believed he would be assisted to access legal services if he participated in the project. I explained to him the ethical and practical reasons that prevented me from doing this. It was further underlined to the interviewees that participation was voluntary and that they could withdraw at any point from the study without giving a reason.

It quickly became evident that some participants were wary to sign the consent form using their real name. It was therefore agreed with the School’s Ethics Committee that it was better to audio record the discussion about informed consent and gain the verbal agreement of the participants.²³ Participants were invited to choose a pseudonym. One participant chose the

²⁰ See copy of research information sheet at Appendix 9. Donna M. Mertens, ‘Ethics of Qualitative Data Collection’ in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Collection* (SAGE 2018).

²¹ Julia Brannen, ‘Research note: The study of sensitive subjects’ (1988) 36(3) *The Sociological Review* 552.

²² CG at p. 8. (Appendix 7).

²³ Robert J Barrett and Damon B Parker, ‘Rites of consent: Negotiating research participation in diverse cultures’ (2003) 22(2) *Monash Bioethics Review* 9 and Tricia Hynes, ‘New Issues in Refugee Research: The issue of ‘trust’ or ‘mistrust’ in research with refugees: choices, caveats and considerations for researchers’ (UNHCR, Evaluation and Policy Analysis Unit, Working Paper No. 8, 2003) 1.

unusual but hopeful pseudonym, ‘Tomorrow Is Better’ (abbreviated in the transcript, coding and reporting to TIB). Another chose the imaginative and grandiose name, ‘Colosso Golombat’ (abbreviated in the transcript, coding and reporting to CG). Some of the participants were less concerned with anonymity and preferred to use their real name. However, even in these instances, steps have been taken to protect the personal details of the participants. Only first names and pseudonyms have been recorded. Given the high-profile nature of one of the participant’s cases, his country of origin has been omitted in order to protect his anonymity.

2.3 Data analysis

The audio recordings and forms were kept securely and the interviews were transcribed by me shortly after the interviews had been undertaken.²⁴ Transcribing following the interviews was beneficial in terms of the accuracy, level of detail and quality of the transcription, protecting anonymity, and helping me to engage closely with the data.²⁵ Thematic analysis was used in the open, bottom-up coding of the transcribed, qualitative interviews.²⁶ The method of thematic analysis was used intuitively, inductively, and iteratively, allowing manifest and latent codes to emerge.²⁷ Multiple readings of the transcriptions revealed strong conceptual patterns. The codes were organised into overarching and sub-themes and sorted as to relevance to the research objective. The winnowing and whittling of the data left standing the overarching finding of the centrality of time and temporal concepts in asylum-claimants’ accounts.

²⁴ Odette Parry and Natasha S. Mauthner, ‘Whose Data Are They Anyway? Practical, Legal and Ethical Issues in Archiving Qualitative Research Data’ (2004) 38(1) *Sociology* 139.

²⁵ Julia Bailey, ‘First steps in qualitative data analysis: transcribing’ (2008) 25(2) *Family practice* 127 and William J. Gibson and Andrew Brown, ‘Transcribing and representing data’ in William J. Gibson and Andrew Brown (eds), *Working with Qualitative Data* (SAGE 2009).

²⁶ Aronson describes how, ‘Thematic analysis focuses on identifiable themes and patterns of living and/or behaviour.’ Jodi Aronson, ‘A Pragmatic View of Thematic Analysis’ (1994) 2(1) *The Qualitative Report* 1, 1.

²⁷ Brianna L. Kennedy, ‘Deduction, Induction, and Abduction’ in Uwe Flick (ed), *The SAGE Handbook of Qualitative Data Collection* (SAGE 2018) 49.

2.4 Limits to the research

There are limits to the generalisability of the research findings due to the small size of the sample and the unrepresentative nature of the sampling; this is not a representative study of male asylum-claimants in South Wales. For example, half of the participants had at some point acted as volunteers of Asylum Justice and this gave them an unusual level of expertise in asylum matters. While there were benefits to accessing participants through an intermediary, drawing on gatekeeper assistance via Asylum Justice produced a non-representative sample.²⁸ Nevertheless, this was necessary in order to enable me to reach an otherwise hard to access population and to interview people who are too often treated as invisible in legal research and public policy reports. The interviews were in-depth, credible, valid and repeatable. They produced rich data for the purposes of my qualitative analysis. The findings are generalisable to theory, albeit not to population.²⁹ Conducting the interviews in English reduced the risk of misinterpretation and removed the risk of the interpreter speaking on behalf of the participant.³⁰ To mitigate against the danger of emotional or professional bias, the qualitative method of thematic analysis was rigorously employed.³¹

3. FINDINGS: TEMPORAL DIMENSIONS OF FAIRNESS

3.1 Summary

The predominant research finding is that participants used expressions of time to convey feelings of (un)fair treatment within the asylum system. The participants complained mainly of lengthy delays and a sense of *doing time*. The participants' accounts revealed multiple temporalities. In addition to the participants' day-to-day lived temporalities, administrative and legal temporalities were identified in the analysis. Administrative-legal time regulated and dominated the lived temporalities of participants. The participants drew attention to

²⁸ Priscilla Alderson and Virginia Morrow, 'Ethics, social research and consulting with children and young people' (1998) 139 *Bulletin of Medical Ethics* 5.

²⁹ Qualitative research should be generalizable to theory and not to population. David Silverman, *Interpreting Qualitative Data* (5th edn, SAGE 2014) 62.

³⁰ Agnieszka Kosny, Ellen MacEachen, Marni Lifshen, and Peter Smith, 'Another Person in the Room: Using Interpreters During Interviews With Immigrant Workers' (2014) 24(6) *Qualitative Health Research* 837, 841.

³¹ Jennifer Fereday and Eimear Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5(1) *International Journal of Qualitative Methods* 80.

unequal time. For example, participants were required to adhere to strict administrative-legal timeframes while no time limits were placed upon the administration. As such, there was stark disparity between the waiting times of participants. As well as inordinate delay, the participants described rushed decisions and prejudgments that reduced decision-making time. Decision-makers required sufficient time to determine cases. Likewise, participants highlighted that lawyers required sufficient time to prepare cases. The participants also spoke of fading pasts and frustrated futures due to acceleration and delay. In this way, they experienced *severed time(s)*.

The asylum system is characterised by Home Office processing stages and tribunal appeal stages. The research participants referred explicitly to the ‘stages’ of the process, the ‘steps that you go’ through, in the hopes of being recognised as a refugee.³² These punctuated bureaucratic moments involved the initial claim and screening, dispersal, the asylum interview, recognition or refusal, the appeal stage, the ‘appeal rights exhausted’ stage, and the fresh claim. There were also the application, decision and appeal phases of related claims, such as applications for refugee family reunion. The participants were locked into these stages and progressed through them at varying speeds. As one participant highlighted, ‘you cannot quit being an asylum-seeker.’³³ The participants described how, within these temporal categories, their freedoms were curtailed even though no crime had been committed; each stage was like serving a sentence. This was felt acutely by one participant who had waited for more than a decade for his case to be resolved. He said, ‘But what did I do? I am in the prison now.’³⁴ Within these temporal categories the participants were cut off from other temporalities, such as family time, social time and work time. These situations are also illustrations of *severed time(s)*.

Passage through the temporal stages was not necessarily experienced by the participants along a straight, one-directional temporal line. Some of the participants described their experience of time as fluctuating or circular, rather than linear.³⁵ In the case of Mohammed 1, for example, the tribunal remitted his matter to the Home Office to make a fresh decision due to Home Office error. Mohammed 1 described his experience as a revolving door. He explained, ‘That was, like, a really hard situation that happened to me. After all that, I was waiting for five years and they put me back to interview again. I had an

³² See, for example, Yonas at p. 5. (Appendix 5).

³³ CG at p. 14. (Appendix 7).

³⁴ Mohammed 2 at p. 4. (Appendix 8).

³⁵ Carol Greenhouse, *A Moment's Notice* (Cornell University Press 1996) 23, challenges assumptions about the linear nature of time.

interview. They refused me again. I went back to court.’³⁶ The temporal themes of *doing time*, *unequal time* and *severed time(s)* are explored through the participants’ experiences of the asylum procedural stages (set out below and which set the scene for discussion) and the participants’ expressions of time (at section 3.3.).

3.2 Temporal asylum stages

3.2.1 Initial claim and screening

When asked how they felt at the time of claiming asylum, most participants recounted finding the experience very stressful and isolating. The participants were worried that the authorities might return them to their home countries. One participant described feeling in ‘shock’, and another as being under ‘huge pressure’.³⁷ TIB, like the other participants, did not know what the process would entail or what would happen to him. He explained that, in search of a ‘safe place’, and ‘losing everything’, he felt that he was ‘in the middle of the sea.’³⁸ However, most participants considered that they were treated fairly by the authorities upon arrival. They described being welcomed by the immigration officers and reassured that they would not be returned. For example, an immigration officer told Blessing upon arrival, ‘you’re a refugee...don’t worry, we can’t send you back’.³⁹ Nonetheless, TIB highlighted that the initial claim is a life-changing moment upon which the fates of asylum-claimants depend. He observed that, ‘in that moment, maybe one hour, two hours, or how long it will take, I don’t know, but your future will be decided upon that interview.’⁴⁰ The stress was compounded in TIB’s case because the success of his asylum claim would also determine the fates of his wife and children. His family were stranded in a dangerous situation in the Middle East. They had fled their home country but had not risked undertaking the perilous journey across the Mediterranean. Participants’ accounts illustrated how time was compressed at this bureaucratic juncture, where the past, present and future intersected and contracted within the confines of administrative-legal time. My findings are echoed in the work of Saulo B. Cwerner, who describes the context of the initial asylum screening interview as ‘a rich

³⁶ Mohammed 1 at p. 11. (Appendix 3).

³⁷ Mr M at p. 6. and TIB at p. 2. (Appendices 1-2).

³⁸ TIB at p. 1 and p. 3. (Appendix 1).

³⁹ Blessing at p. 33 (Appendix 4).

⁴⁰ TIB at p. 3. (Appendix 1).

temporal domain because it brings together a number of narratives, memories and temporal regulations in one regular social activity.’⁴¹

As part of the ‘first-steps’ of the screening process, the participants were required to submit themselves to security checks, including body scans, searches, fingerprinting, and, possibly, detention.⁴² Some of the participants felt that this treatment contributed to the construction of them as dangerous and a threat. CG, who claimed asylum after a period of residing in the UK, felt nervous when claiming asylum. This was due to negative portrayals in the UK media of asylum-claimants and general public hostility towards asylum-claimants. He explained that his anxiety did not begin to ease until he received his refugee status. He explained:

I kept watching...YouTube videos where the immigration police caught illegal refugees and that stressed me out a lot...I nearly failed my exams because I could not study...even though my case was strong, I was still worried...until the moment I received my residence permit, I was stressed out. I'm still stressed out sometimes.⁴³

CG emphasised that he ‘did not come here with the possibility of being a dangerous person.’⁴⁴ Yet, the participants described being treated as criminals. They spoke of being arrested,⁴⁵ detained,⁴⁶ investigated,⁴⁷ and put in ‘prison’.⁴⁸ The participants were willing, nonetheless, to submit themselves to these checks. Most were also agreeable to temporary detention of up to a week and considered that they were treated reasonably well in detention. Yonas recalled how he felt rescued when he claimed asylum. Before being dispersed to Wales, he spent a week in immigration detention, which he referred to as ‘prison’.⁴⁹ However, he compared this experience to the intolerable conditions in Eritrea, where he had been detained for six months. While he did not ‘feel comfort’ in immigration detention, he ‘didn’t feel that bad’ because he was given everything he needed, including facilities to

⁴¹ Cwerner would describe the context of the initial asylum screening interview as ‘a rich temporal domain because it brings together a number of narratives, memories and temporal regulations in one regular social activity.’ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71, 80.

⁴² TIB at p. 2. (Appendix 1).

⁴³ CG at p.4. (Appendix 7).

⁴⁴ CG at p. 7. (Appendix 7).

⁴⁵ Mohammed 1 at p. 5. (Appendix 3).

⁴⁶ Blessing at p. 33. (Appendix 4).

⁴⁷ TIB at p. 1. (Appendix 1).

⁴⁸ Yonas at p. 4. (Appendix 5).

⁴⁹ Yonas at p. 4. (Appendix 5).

study, exercise and to listen to music.⁵⁰ Mohammed 1, on the other hand, who arrived in the UK as a child, did not have a positive experience upon arrival. He arrived on a lorry and described the experience of being arrested and handcuffed as frightening. He said that he ‘was really scared’, that the handcuffs were ‘too tight’, and that he was ‘crying’.⁵¹ He was then detained at a police station for twenty-four hours but did not have access to an interpreter during this period. He could not understand anyone, and he did not eat any food because he did not know if it was halal.

While the participants did not have any prior knowledge of the system and felt anxious about their fates, they tended to find the short screening interviews straightforward. At this initial stage, the Home Office is not concerned with gathering substantive information about the claim. The purpose, rather, is to begin documentation and case categorisation processes. TIB, who claimed asylum at port, described being treated well during his screening interview. He said that ‘the investigator that interviewed [him] was so, very open, very clear. So, nothing too hidden, actually.’⁵² This degree of clarity about the screening process was important to TIB because of his lack of knowledge about the system and the absence of early access to legal advice or assistance. The spirit of openness was considered by TIB to work both ways. He noted that, ‘[t]hey checked all my stuff, I declared for them my position, and everything went smoothly, actually...’⁵³ He emphasised that ‘it was very important to state everything in that interview, the initial one.’⁵⁴ Similarly, CG recalled that, ‘by the time I got to my screening interview, I was not that stressed out...all I could do was tell the truth, which was kind of relieving, actually.’⁵⁵ Blessing also stressed that ‘all the things I said are true.’⁵⁶

CG complained, however, that he did not find it easy to explain himself because the Home Office staff at the asylum screening unit were ‘difficult’.⁵⁷ In the absence of a legal adviser, he did not understand the purpose of the screening questions. He did not know ‘what was expected of [him]’, and therefore did not know how best to answer the questions.⁵⁸ The

⁵⁰ Yonas at p. 4. (Appendix 5).

⁵¹ Mohammed 1 at p. 5. (Appendix 3).

⁵² TIB at p. 2. (Appendix 1).

⁵³ TIB at p. 1. (Appendix 1).

⁵⁴ TIB at p. 2. (Appendix 1).

⁵⁵ CG at p. 2. (Appendix 7).

⁵⁶ Blessing at p. 34. (Appendix 4).

⁵⁷ CG at p. 8. (Appendix 7).

⁵⁸ CG at p. 8. (Appendix 7).

fact that the member of staff was ‘on the other side of the screen’, created physical distance.⁵⁹ CG felt that she asked ‘the wrong questions’.⁶⁰ He was asked to answer the set questions ‘straightforwardly’ but found that ‘the questions did not work for [his] mind-set’.⁶¹ He explained that when asked about why it would be dangerous for him to return to his home country, he answered that he did not have money. For him, the risk of return had always been present. However, the death of his father and estrangement from his family meant that he would no longer be able to pay the bodyguards needed to protect him from political persecution. He described the woman who conducted the interview as ‘neither aggressive’ towards him, nor ‘particularly nice’ towards him.⁶² He said that he did not like her because he ‘could feel no warmth from her’.⁶³

In sum, the transformative bureaucratic moment of the initial claim was described as a dense temporal site where participants felt stress and relief. Here, pasts, presents and futures interplayed in ways that had significant personal and legal meanings. There were tensions between conflicting narratives (which are inherently temporal) of asylum-seekers as dangerous people and as vulnerable people in need of protection. The compression of time affected the interactions between the parties, their judgments, and the ability of the participants to advocate for themselves. Moreover, aware that they were under the control of administrative time, the participants had a sense of *doing time*. The force of administrative time also *severed* their lived temporalities.

3.2.2 *Dispersal*

Although participants tended to feel that they had been treated well during the screening phase, they experienced tough living conditions at the point of dispersal. Dispersal is the process by which asylum-seekers in need of accommodation are sent to local authority areas outside London and the South East.⁶⁴ Blessing described how he saw ‘things start to change’ when he was dispersed to Cardiff.⁶⁵ He ceased to feel welcome. He recalled the public demonstrations in Cardiff in January 2017 in support of refugees and against Trump’s travel ban. He responded cynically, saying:

⁵⁹ CG at p. 8. (Appendix 7).

⁶⁰ CG at p. 8. (Appendix 7).

⁶¹ CG at p. 8. (Appendix 7).

⁶² CG at pp. 2-3. (Appendix 7).

⁶³ CG at p. 3. (Appendix 7).

⁶⁴ This policy has been rebranded as Home Office, *Allocation of Accommodation Policy* (Home Office 2017).

⁶⁵ Blessing at p. 34. (Appendix 4).

I was in town, people were marching, demonstrating: “Welcome refugees! Welcome refugees!” I don’t know, maybe they are calling refugees to come and suffer. Why? I don’t know. Because if you say, “Welcome refugees!”, you are supposed to welcome them also. But to me, like, no welcome.⁶⁶

With no prior knowledge of the asylum system, the participants had not anticipated the restrictive implications of claiming asylum, such as not being able to work, choose where to live, or travel abroad. The participants found the policies of dispersal and restrictions on work to be harsh and unfair. Blessing explained that he believed that he would ‘be free in the UK and the people [would] treat [him] well’.⁶⁷ However, he and most of the other participants found it difficult to survive on the asylum support allowance of around £35 per week. Most participants noted that this was not enough to cover the basics of food, clothes, toiletries and travel. CG observed that the allowance is only enough to buy food and little else.⁶⁸ Blessing highlighted having to make difficult choices about whether to spend his small support allowance on travel or food. He concluded, ‘I’m not free’.⁶⁹

The participants complained that the living conditions in asylum accommodation were ‘very tough’.⁷⁰ Blessing explained that, in shared accommodation, ‘there are some people there who can make trouble for you’.⁷¹ Mohammed 1 was placed in inappropriate asylum accommodation because the Home Office processed his case erroneously as an adult. He did not feel safe in his asylum accommodation which he shared with an adult male in his thirties. Following an age assessment by social services that concluded he was a child, Mohammed 1 was moved to semi-independent accommodation.⁷² John talked about the language barrier between him and his housemates. Unable to interact with his housemates, he found himself feeling increasingly isolated. John compared dispersal to ‘getting dumped in the desert’.⁷³

All the participants experienced health problems which they linked to their tough living conditions and stress. TIB, for example, described how his health started to suffer shortly after his dispersal to Cardiff. At one point he was taken to hospital by ambulance, a

⁶⁶ Blessing at p. 32. (Appendix 4).

⁶⁷ Blessing at p. 28. (Appendix 4).

⁶⁸ CG at p. 11. (Appendix 7).

⁶⁹ Blessing at p. 33. (Appendix 4).

⁷⁰ See Mr M at p. 2., John at p.18 and Blessing at p.34. (Appendices 2, 6 and 4).

⁷¹ Blessing at p. 34. (Appendix 4).

⁷² He lived on his own but with support from social services.

⁷³ John at p. 18. (Appendix) 6.

fact he attributed to the stress of his situation.⁷⁴ TIB's situation worsened when the Home Office withdrew his asylum support and he became homeless. The Home Office withdrew support because they did not believe that TIB was destitute. In short, dispersal marked a period of stasis and decline for the participants. They reported enduring poverty, hardship and isolation. This contributed to feelings of *doing time* and *severed times(s)*. The participants felt less welcome over time and their health deteriorated.

3.2.3 *The asylum interview*

The asylum interview was the participants' main opportunity to put their case. Like the initial interview, the main asylum interview was described by the participants as a dense temporal domain where memory, narratives and legal temporalities intersect. Mohammed 1 was refused asylum and said that in his asylum interview the Home Office caseworker was 'horrible' to him.⁷⁵ He was met with disbelief and his matter was processed as if he was an adult when he was a child. He said that he was crying during his interview, which lasted about two hours, but he was not given a break. He felt 'nervous', 'tired' and 'hungry' and 'didn't know what to say'.⁷⁶ Mohammed 1 explained that he was so eager for the interview to end that he felt like he was 'going to say anything' so that he could leave.⁷⁷ He also said that the interpreter made a lot of mistakes and that the case-owner did not ask him appropriate questions to elicit his story. The other participants also identified misinterpretation and inappropriate questions as problems within the asylum interview. Mohammed 1 found that he was unable to answer some of the questions. He said:

They asked different questions and not even good. They asked me how long you were on your way to come here. I didn't know. I'm on the lorry. I didn't know what time it was. I didn't know is it day or night? How do I know?⁷⁸

The Home Office and tribunal fixate on chronological dates and times. Decision-makers are likely to use failure to recall or any discrepancies as reason to undermine a claimant's credibility.⁷⁹ Embedded in individualistic Western culture, the myth of single, Western time

⁷⁴ TIB at p. 6. (Appendix 1).

⁷⁵ Mohammed 1 at p. 9. (Appendix 3).

⁷⁶ Mohammed 1 at pp. 8, 18, 21 and 22. (Appendix 2).

⁷⁷ Mohammed 1 at p. 20. (Appendix 3).

⁷⁸ Mohammed 1 at p. 20. (Appendix 3).

⁷⁹ See, for example, Juliet Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers' (2002) 13 *International Journal of Refugee Law* 293 and

obscures different cultural understandings and perceptions of time, including the use of non-Gregorian calendars.⁸⁰ Gillian McFadyen observes that, ‘It is not just the fragility of memory that asylum-seekers may face in seeking refuge, but the articulation of memory and the distinction between individualistic or collectivist cultures and the impact that they have on an individual shaping their memories and thus speaking of memories.’⁸¹ McFadyen explains that, ‘When a person from an individualist culture is reminiscing, there is more of a focus on details, dates, and the self’ and that ‘even speaking in an individualistic language (such as English) creates a more individualistic account of a memory, than recalling a memory from a language from a collectivist culture’.⁸²

TIB was outside of the asylum support system, homeless, and in poor health at the time of his substantive asylum interview. However, his homelessness meant that he did not receive important written communication from the Home Office. This demonstrates the problems that can result from misaligned administrative-legal temporalities with lived temporality.⁸³ Fortunately, TIB was granted asylum quickly following his interview. He felt that the case-owner listened to his account during the interview ‘because the things in our country were so new, so people hadn’t started to feel bored about what had happened in our country.’⁸⁴ This is illustrative of how narratives, timing and time perspectives can impact upon understandings and feelings of apathy or empathy.⁸⁵ Mr M had a more positive experience overall. He recalled how his case-owner ensured that he was informed of his rights and that the procedure and role of the interpreter was made clear.⁸⁶ Mr M considered that his case-owner was a ‘good man’ because he was ‘friendly’ and he did not ‘use a manner

Jenni Millbank, ‘“The Ring of Truth”: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21 *International Journal of Refugee Law* 1.

⁸⁰ Marco Jacquemet, ‘Crosstalk 2.0: asylum and communicative breakdowns’ (2011) 31(4) *Text & Talk* 488, regarding confusion over calendars in asylum interviews and determinations.

⁸¹ Gillian McFadyen, ‘Memory, Language and Silence: Barriers to Refuge Within the British Asylum System’ (2019) 17(2) *Journal of Immigrant & Refugee Studies* 168, 172, citing Jane Herlihy and Stuart W. Turner, ‘Asylum claims and memory of trauma: Sharing our knowledge’ (2007) 3(4) *British Journal of Psychiatry* 191.

⁸² Gillian McFadyen, ‘Memory, Language and Silence: Barriers to Refuge Within the British Asylum System’ (2019) 17(2) *Journal of Immigrant & Refugee Studies* 168, 172-173, citing Jane Herlihy and Stuart W. Turner, ‘Asylum claims and memory of trauma: Sharing our knowledge’ (2007) 3(4) *British Journal of Psychiatry*, 191.

⁸³ Carol J. Greenhouse, ‘Time’s up, timed out: reflections on social time and legal pluralism’ (2014) 46(1) *The Journal of Legal Pluralism and Unofficial Law* 141.

⁸⁴ TIB at p. 6. (Appendix 1).

⁸⁵ Adam Crawford, ‘Temporality in restorative justice: On time, timing and time-consciousness’ (2015) 19(4) *Theoretical Criminology* 470.

⁸⁶ Mr M at p. 23. (Appendix 2).

too stressful'.⁸⁷ He further described his case-owner as 'fair' because he found him to be 'professional' and considered his work to be of 'good quality'.⁸⁸ He therefore felt 'free to talk' during the interview which lasted less than two hours.⁸⁹ However, Mr M was surprised by the questions that he was asked about his country. He told his caseworker that if you asked the average Syrian these questions then they would not be able to answer. Mohammed 2 also thought that the questions he was asked were 'stupid'.⁹⁰ He explained that he was not asked questions about his life. Rather, he was asked about the decisions and actions of high-ranking Palestinian political figures and whether he agreed with them. Mohammed 2 thought to himself, 'Why do you ask me this question? Go and ask him. Go to him and ask him why you took this decision.'⁹¹ John believed that the questions asked during the asylum interview were designed to help the Home Office to refuse applicants. He said, 'those questions, the way they've been designed, they've been set to fail you, to be honest. Not to help you.'⁹² As Cwerner highlights, the questions posed by the interviewer, and the time, duration and tempo of the interview, shape the narrative form of the claim.⁹³

Yonas felt uncomfortable having to recall the traumatic events of his case. However, he observed that he was able to tell the Home Office his story in about ten minutes. He said that it was 'just like narrating' and that the Home Office listened.⁹⁴ Similarly, CG said that his 'story rolls off [his] tongue', but that the 'emotional part' is not so easy to talk about.⁹⁵ CG highlighted the importance of the demeanour of Home Office staff because this affects the ability of claimants to tell their stories. He observed that they are already 'scary enough' and do not need to be, as he had heard of, 'unkind or mean' to asylum-claimants.⁹⁶ He felt that this was 'not helpful at all' because '[i]f you want someone to tell you about their problems and be truthful', then 'empathy goes a long way'.⁹⁷ CG described feeling stressed and uncomfortable during his asylum interview. He said:

⁸⁷ Mr M at p. 3. (Appendix 2).

⁸⁸ Mr M at p. 11. (Appendix 2).

⁸⁹ Mr M at p. 3 at p. 4. (Appendix 2).

⁹⁰ Mohammed 2 at p. 2. (Appendix 8).

⁹¹ Mohammed 2 at p. 2. (Appendix 8).

⁹² John at p. 22. (Appendix 6).

⁹³ Saulo B. Cwerner, 'Faster, Faster and Faster: The time politics of asylum in the UK' (2004) 13(1) *Time and Society* 71.

⁹⁴ Yonas at p. 8. (Appendix 5).

⁹⁵ CG at p.8. (Appendix 7).

⁹⁶ CG at p. 13. (Appendix 7).

⁹⁷ CG at p. 13. (Appendix 7).

...I did feel a little bit intimidated because it was just me, and the lady, and the tape recorder in that closed room. It was all white. When I looked around, I thought, is this where...as I saw on...episodes of immigration police before. I wish I hadn't. It's like going out at night after having watched a horror movie. And I was wondering, is this where they're going to put me in chains or something?⁹⁸

TIB and Mr M both believed that, in order to promote compassionate case-handling, the Home Office staff ought to be well-qualified and trained. TIB considered that it was important for Home Office staff to be informed of and sensitive to the situations in the home countries of applicants. Blessing believed that being attentive and sensitive to the stories of claimants could help decision-makers to be better informed about country situations. He said, 'the Home Office is supposed to believe to me...because I'm the one who was on the ground.'⁹⁹ Cwerner highlights the 'information about sending countries, which is constructed often in terms of historical narratives and social truths...can be outdated and selective.'¹⁰⁰

Following age assessment by social services, Mohammed 1's case was remitted by the tribunal to the Home Office, delaying resolution of his case. Griffiths would characterise this as 'sticky time' during which there is a 'sense of time slowing down'.¹⁰¹ Griffiths highlights that far less has been written on stasis, and mainly in the context of prisons, in contrast to the literature on accelerated time.¹⁰² Mohammed 1 was not processed as a child because he had, by this point, reached the age of majority. Nonetheless, he felt that he was treated better in his second interview. He explained that this was, 'Because they knows I am on tablet and they were like whenever you need break or anything, or anything you want, please tell us.'¹⁰³ However, fixing the procedural error retrospectively did not result in a positive substantive outcome for Mohammed 1. The passage of time disadvantaged him as he no longer benefited from the procedural safeguards applied to children. Mohammed 1's story illustrates the importance of the 'temporal location' of the interview.¹⁰⁴

The participants reported that asylum-claimants tend to be mistrustful of the authorities and that this can impede disclosure. Mr M and Blessing highlighted that the

⁹⁸ CG at p. 8. (Appendix 7).

⁹⁹ Blessing at p. 30. (Appendix 4).

¹⁰⁰ Saulo B. Cwerner, 'Faster, Faster and Faster: The time politics of asylum in the UK' (2004) 13(1) *Time and Society* 71, 81.

¹⁰¹ Melanie B.E. Griffiths, 'Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees' (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991, 1995.

¹⁰² Melanie B.E. Griffiths, 'Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees' (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991, 1995.

¹⁰³ Mohammed 1 at p. 24.

¹⁰⁴ Saulo B. Cwerner, 'Faster, Faster and Faster: The time politics of asylum in the UK' (2004) 13(1) *Time and Society* 71, 81.

mistrust might stem from past negative experiences with the authorities in their home countries. TIB highlighted that claimants may also be mistrustful of the interpreter during an asylum interview out of fear that the interpreter, if the same nationality, might pass information on to the authorities in their home country. Recognition of the frequency of misinterpretation during asylum interviews prompted some of the participants to be vigilant in checking that their accounts had been accurately recorded by the Home Office. For example, following his asylum interview, Blessing felt that he needed to ‘be very careful’ to ensure that his solicitor corrected accurately the information misreported by the Home Office.¹⁰⁵ This procedure was important because there was no legal aid available for lawyers to be present during the asylum interview.

In short, the participants experienced dense time, where memories, present struggles and anxieties and future hopes overlapped within the temporal constraints of the asylum interview. At this significant event, participants identified the need to foster an environment to help to overcome latent mistrust. According to participants, a non-hostile environment requires Home Office staff to be sensitive to cultural temporalities. Otherwise, the temporalities of the asylum interview sever the temporalities of claimants.

3.2.4 Recognition or refusal

Of the eight participants, four received positive asylum decisions at first instance and were recognised as refugees.¹⁰⁶ The other four participants were refused asylum at first instance. TIB’s family reunion application was initially refused but the Home Office reversed their decision following the intervention of a Member of Parliament. He described how he and his family, ‘suffered so much.’¹⁰⁷

Those recognised as refugees felt safer and experienced ‘a little bit of comfort’, while those refused faced chronic uncertainty and fear.¹⁰⁸ However, temporal uncertainty remained present even for those granted refugee status. Due to the quick transition to refugee status, TIB faced problems accessing benefits and became homeless again.¹⁰⁹ He explained, ‘I went to register with the job centre. There was no insurance number at all. I went through a tough

¹⁰⁵ Blessing at p. 29. (Appendix 4).

¹⁰⁶ TIB, Mr M, Yonas and CG received positive initial decisions. (Appendices 1, 2, 5 and 7).

¹⁰⁷ TIB at p.14. (Appendix 1).

¹⁰⁸ Yonas at p. 9. (Appendix 5).

¹⁰⁹ Upon receiving a positive decision, individuals have 28 days to ‘move on’ from asylum accommodation. This short time frame risks destitution and homelessness. Lisa Doyle, ‘28 days later: experiences of new refugees in the UK’ (Refugee Council 2014).

process. I became homeless, also. I went to the Huggard Centre. I slept on the floor.’¹¹⁰ Griffiths would describe this as an example of ‘frenzied time’, where ‘time accelerates quickly and rushes out of control.’¹¹¹ The temporary leave to remain which Mohammed R received until the age of 17.5 years, in acknowledgment that he was a child and could not be returned safely to his home country, had only a sticking plaster effect. He explained that, ‘I was still worried because people told me [the leave is] not forever...I was scared to be sent back to Iran in that time.’¹¹² CG, after five years with refugee status, faced the uncertainty of his case being subject to Home Office review.

Those participants who received a quick, positive asylum decision considered that they had been lucky and perceived that there was Home Office bias.¹¹³ Blessing said:

I ask also some people, they say, it’s the way [the Home Office] are working. They cannot continue to believe everything. They can know this is right, but they can reject it...It depends, the chance of the person, also. And depends also the person you are doing the interview together.¹¹⁴

John believed that the Home Office had refusal targets, concluding ‘that’s where the unfairness comes from.’¹¹⁵ He observed that the Home Office ‘try to minimise the number of people who stay. I know it’s in their blood. I know that. But people have got legitimate reasons...they should look at the big picture rather than focus on the targets...that’s not fair.’¹¹⁶

There was a belief amongst the participants that nationality was, at least to some degree, pre-determinative, with certain nationalities more likely to receive a positive and timely decision. A Syrian participant, for example, had been advised by his lawyer that his case was ‘clear’ and ‘they just want to know about your nationality.’¹¹⁷ Nationality bias is contrary to the spirit of the Refugee Convention but is encouraged by overreliance on Home Office Country Policy and Information Notes and the tribunal country guidance cases.¹¹⁸

¹¹⁰ TIB at p. 19. (Appendix 1).

¹¹¹ Melanie B.E. Griffiths, ‘Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees’ (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991, 1998-2000.

¹¹² Mohammed 1 at p. 23. (Appendix 3).

¹¹³ Mr M at p. 3. and Yonas at p.10. (Appendices 2 and 5).

¹¹⁴ Blessing at p. 34. (Appendix 4).

¹¹⁵ John at p. 22. (Appendix 6).

¹¹⁶ Johan at p. 22. (Appendix 6).

¹¹⁷ Mr M at p. 4. (Appendix 2).

¹¹⁸ Robert Gibb and Anthony Good, ‘Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures’ (2013) 25(2) *International Journal of Refugee Law* 291 and Jasper van der Kist, Huub Dijstelbloem and Marieke de

While the use of country guidance is intended to save decision-making time and reduce inconsistencies,¹¹⁹ its overreliance has been criticised as a flaw in asylum decision-making.¹²⁰

Yonas highlighted that:

...people are getting refused when the country is believed to be in a good situation...as Eritreans we would get refused because the other two years before...there was a Danish report and they said the country is in a good situation...then the British also accepted the report and then they start to refuse people...They generalise every information that they get...they harm to individual people.¹²¹

TIB thought that the decision-maker in respect of his application for family reunion was biased because ‘they presume there is no real relationship’.¹²² He considered that the visa clearance officer had not done their job properly because ‘[t]hey take a prejudgment on the papers’, ignoring the evidence and without considering properly the case.¹²³ Nationality bias and prejudgments are fruitful for decision-makers in that decision-making time is reduced. The need for openness from both sides, from claimants and decision-makers, was identified. TIB observed that some claimants might ‘try to hide a lot of information just from the position of being defending themselves, rather than to disclose. And this is a prejudgment, actually, it won’t work.’¹²⁴

As noted above, procedural time constraints and political narratives affect decisions. Mohammed A was of the view that the people of the UK ‘are very, very nice people’,¹²⁵ but that the UK government was politically biased, and he felt ‘stupid’ for coming to the UK for this reason.¹²⁶ Mr M, however, was of the opinion that the Home Office remained best placed to make initial asylum decisions, provided that there was a system of appeal to an impartial judge. To foster non-bias, TIB noted that it was necessary to, ‘put our emotion aside...the

Goede, ‘In the Shadow of Asylum Decision-Making: The Knowledge Politics of Country-of-Origin Information’ (2019) 13(1) *International Political Sociology* 68.

¹¹⁹ Linda J. Kirk, ‘Improving consistency in protection status decisions in Australia: looking to the United Kingdom for “guidance”?’ (2017) 31(2) *Journal of Immigration Asylum and Nationality Law* 151.

¹²⁰ Natasha Tsangarides, ‘The politics of knowledge: an examination of the use of country information in the asylum determination process’ (2009) 23(3) *Journal of Immigration Asylum and Nationality Law* 252.

¹²¹ Yonas at pp. 10-11. (Appendix 5).

¹²² TIB at p. 10. (Appendix 1).

¹²³ TIB at p. 13. (Appendix 1).

¹²⁴ TIB at p. 5. (Appendix 1).

¹²⁵ Mohammed 2 at p. 1. (Appendix 8).

¹²⁶ Mohammed 2 at p. 1. (Appendix 8).

negative emotion aside.’¹²⁷ However, he recognised the challenge in doing this in the light of ‘the media, the propaganda’.¹²⁸ He did not mean to say that the decision-maker should be unfeeling. Quite the opposite. Given the gravity of the decision for the claimant, TIB believed that the decision-maker, ‘as a human...should take the case with big responsibility’.¹²⁹ John felt that asylum-claimants were not treated with compassion. He said, ‘I’m not asking them to be lenient. No, no. I ask them to be more compassionate because some people they have genuine reasons to remain’.¹³⁰

Overall, the participants felt that decisions made by the Home Office were biased because decision-makers did not give enough time and attention to individual cases. Uneven consideration of cases and ill-informed decisions also resulted in *unequal time* between claimants (with some receiving quick decisions while others waited a long time). The participants believed that decision-making time was rushed and influenced by external temporalities, such as political narratives. Those refused asylum turned to the (lengthy) appeals process for remedy. The experiences of *doing time* and *severed time(s)* became more pronounced at this stage.

3.2.5 Appeals phases

Unfair decisions challengeable by way of an appeal place a burden upon the tribunal’s time. Most Home Office asylum refusals are overturned on appeal.¹³¹ Given the perceived Home Office bias and mishandling of cases, John took the view that it was better for claimants to withhold information from the Home Office in the hope of having their claim fairly decided by the tribunal on appeal. He explained that:

...they say to you, it’s better to say the whole truth... But then, to be honest, sometimes it’s good to withhold some information so that you can take that to court...I feel even more free to explain whatever I want to explain in court than to the Home Office.¹³²

Those participants refused by the Home Office exercised their right of appeal. At the time of the research interviews, two of the participants, Blessing and John, had their cases dismissed

¹²⁷ TIB at p. 16. (Appendix 1).

¹²⁸ TIB at p. 16. (Appendix 1).

¹²⁹ TIB at p. 16. (Appendix 1).

¹³⁰ John at p. 22. (Appendix 6).

¹³¹ As highlighted in Chapter 1.

¹³² John at p. 22. (Appendix 6).

by the First-tier Tribunal and had pending appeals before the Upper Tribunal. Blessing highlighted the cycle of rejection experienced by some claimants, explaining that he had been ‘rejected again in the tribunal...So, I’m supposed to appeal again.’¹³³

Those refused by the Home Office also experienced rejection from their lawyers who withdrew legal aid, leaving them to represent themselves at the appeal stages. Mohammed 1, for example, explained that his lawyer had told him that his ‘case is not that strong’ and he needed to pay privately for representation. However, prohibited from working, he ‘didn’t have money’ to pay privately.¹³⁴ Mohammed 2 also described how his lawyer withdrew legal aid and he did not understand why. In receipt of asylum support, he explained that he could not afford the fee quoted by his lawyer to continue to represent him.¹³⁵ John expressed his view that the withdrawal of legal aid left some claimants with ‘genuine reasons’ without legal support, ‘which is not fair’.¹³⁶ Likewise, CG was ‘surprised’ and did not really understand why victims of torture who he had met through his volunteering had been refused legal aid. He pointed out that ‘it’s pretty obvious that they cannot go back to their country. The marks are on their body...they walk with the evidence on their body everywhere they go.’¹³⁷

Mohammed 1’s experience before the tribunal was negative because, once again, he was treated with disbelief. He said that the Home Office Presenting Officer (HOPO) ‘was really horrible’. Mohammed R said that the HOPO told him, ‘You’re lying. You did this, you did that. You must go back to Iran. You don’t have problems.’¹³⁸ John felt that the Immigration Judge who heard his appeal was ‘unfair’ because he had not been sensitive to his particular family situation. He explained that:

...she was asking me constantly the questions and I felt like if I say what she wants, expects me to say, it’s like I’m cutting myself off from the family...then that would have made me feel guilty for the rest of my life...Because if I say my father is the bad person, just because for a few mistakes, that’s not fair, is it?¹³⁹

In Blessing’s case, the tribunal dismissed his appeal but on a different ground from the Home Office, thereby creating a third version of ‘truth’. For Mohammed 2, he expressed confusion

¹³³ Blessing at p. 3. (Appendix 4).

¹³⁴ Mohammed 1 at p. 12. (Appendix 3).

¹³⁵ Mohammed 2 at p. 6. (Appendix 8).

¹³⁶ John at p. 22. (Appendix 6).

¹³⁷ CG at p. 15. (Appendix 4). The issue of claimants being cut off from ‘legal-aid-time’ is explored in Chapter 6.

¹³⁸ Mohammed 1 at p. 13. (Appendix 3).

¹³⁹ John at p. 19. (Appendix 6).

over the Home Office not accepting the tribunal's finding of fact in his case that he could not be removed from the UK.¹⁴⁰ He emphasised that, '[t]hey can't say the judge is wrong.'¹⁴¹

As in the asylum interview, in the context of the rich temporal domain of the appeal, the narratives of claimants clashed with institutional narratives (which are temporal) and time constraints. Participants thus experienced *unequal time*. The participants' accounts revealed that misaligned temporalities framed different 'truths'. Participants also continued to experience *doing time* and *severed time(s)* due to disbelief, rejection (including withdrawal of legal aid) and uncertainty at the appeal stage.

3.2.6 Appeal rights exhausted and fresh claims

The Home Office had erred in Mohammed 1's case and processed his matter as an adult when he was a child. After seven years, he found his appeal rights were exhausted and that he fell outside the asylum support system. He revealed that he had become one of the hidden homeless and sometimes slept rough. Mohammed 1 found himself walking a tight line, relying upon the offer of shelter wherever he could find it but trying to avoid places where people were drinking and taking drugs. Reliant on the kindness of friends and strangers, he was wary of being exploited and lured into criminal activity. He explained that:

...now I get refused from everything and I don't have any benefits. I don't have any home so, like, every night I sleep in different places. The other day, one of the Kurdish boys...he took me to town and bought me clothes, bought me a jacket because I was really cold. And he took me to the barber shop on City road to cut my hair...And he gave me money as well for food. Because I am not doing, like, stupid things...like I said, I feel nervous to go with someone who I don't know.¹⁴²

Mohammed 1 was working with a charity and lawyers to gather evidence to support a fresh asylum application. However, this was proving to be a long, slow and opaque process. When asked about the progress of his case, he answered, 'I don't know, I'm still waiting. They said, "Wait, wait, wait..." They don't think how I'm going to get food, how I'm going to support myself.'¹⁴³ For Mohammed 1, as for the other participants, the uncertainty of time was caused by unpredictable administrative-legal temporalities outside of his control. Mohammed 1 was frustrated that his case had not been prepared or handled properly in the first instance. He

¹⁴⁰ Mohammed 2 at p. 23. (Appendix 8).

¹⁴¹ Mohammed 2 at p. 23. (Appendix 8).

¹⁴² Mohammed 1 at p. 3. (Appendix 3).

¹⁴³ Mohammed 1 at p. 16. (Appendix 3).

found himself severely marginalised in a spiralling situation of poverty and despair, which exacerbated his mental health problems. Meanwhile, the procedural and evidentiary hurdles in his case became harder to jump. When asked what he would like to say to the Home Office now, he replied:

I'd just want to say, they knows I came here as a baby. If I don't have problems or anything, what I will do here after seven years? I would do better in my country if I didn't have problems. Here I can't do anything. I can't even work. I can't do anything at all. Now, I have to ask people to buy me food, ask people to buy me this... If I was back home, I wouldn't ask anyone to buy food.¹⁴⁴

Similarly, John had 'seen a lot of people...they are homeless. They have got no status.'¹⁴⁵ He explained that, 'Once your case is exhausted...once it's dismissed...you don't know what to do anymore.'¹⁴⁶ He worried that the same fate of homelessness and hunger awaited him if the Upper Tribunal were to dismiss his case.

This was the most marginalised and precarious stage described by the participants. Mohammed 2 highlighted the difficulty accessing a lawyer at this stage. The hardship, uncertainty and fear experienced was acute. Mohammed 1, for example, maintained that he had not been fairly heard and that it remained unsafe for him to return to Iran. His only option to relieve the extreme destitution and the looming risk of detention and removal was to initiate a fresh claim for asylum. However, the temporary lifeline of lodging a fresh claim was hard to reach due to the evidentiary hurdles and uncertain timeframes.

TIB highlighted that claimants 'need to hear their final decision.'¹⁴⁷ However, as Mohammed 2's case demonstrates, further submissions keep claimants stuck in uncertain institutional timeframes. Waiting for over a decade had become unbearable for Mohammed 2 and he compared himself to someone drowning in a river. He said:

I'm looking for to the stick. Take me to this. Take me out the river. Because I need the help from anybody for my case. Only for my case. Because now ten years and it will start eleven years. Too much. Too much.¹⁴⁸

Time stagnated as the participants circled this punishing inferno of *doing time*, which became increasingly unbearable. Griffiths describes this period as 'suspended time', during which

¹⁴⁴ Mohammed 1 at p. 14. (Appendix 3).

¹⁴⁵ John at p. 22. (Appendix 6).

¹⁴⁶ John at p. 22. (Appendix 6).

¹⁴⁷ TIB at p. 20. (Appendix 1).

¹⁴⁸ Mohammed 2 at p. 12. (Appendix 3).

individuals tend to see ‘no purpose, fairness or progression’.¹⁴⁹ Here, the experience of *severed time(s)* was most severe. So far, the participants temporal experiences within and between the stages of the asylum process have been illuminated. The following section analyses the expressions of time used by the participants.

3.3 Expressions of time: doing time, unequal time and severed time(s)

3.3.1 ‘A long, long, long time waiting’¹⁵⁰

All participants complained predominantly of the unfairness of significant delay in the system. Delay was encountered during the Home Office decision-making phase, pending subsequent appeal determinations before the tribunal, and when preparing a fresh asylum claim. It was also experienced when requesting asylum support; one of the participants avoided homelessness and hunger by seeking assistance from his family and from the British Red Cross. Delay also occurred when trying to access help from third sector organisations.

A long delay was identified by the participants as a period greater than six months. In the most extreme case, Mohammed 2, an elderly Palestinian in poor health, had been waiting more than ten years for his case to be resolved. He remained in receipt of asylum support, but he was unclear as to why resolution of his case was not forthcoming. He expressed his confusion, and sense of personal victimisation, saying, ‘I don't know what the problem between me and the Home Office is. I don't understand.’¹⁵¹ However, the significant delay experienced by this participant was not unheard of and was not the longest waiting period observed. Another participant exclaimed that he had heard of some people waiting, ‘twelve years without paper - Twelve years!’¹⁵² While the full details and reasons behind these examples of extremely protracted matters are not known, there was consensus amongst the participants that lengthy delays in and of themselves were unfair.

The sense of unfairness worsened for Mohammed 2 when he compared his case to other cases that had been resolved within months, rather than years. The inconsistent treatment left Mohammed 2 feeling, ‘Upset too much’.¹⁵³ The longer that he waited, the greater his sense of confusion, mistrust, and unfairness, and the more desolate he felt. Those

¹⁴⁹ Melanie B.E. Griffiths, ‘Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees’ (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991, 1997.

¹⁵⁰ TIB at p. 12. (Appendix 1).

¹⁵¹ Mohammed 2 at p. 11. (Appendix 3).

¹⁵² Blessing at p. 32. (Appendix 4).

¹⁵³ Mohammed 2 at p. 12. (Appendix 8).

participants who received a quick, positive decision considered that they had been lucky. A lack of transparent information reinforced the impression that variable waiting times were drawn from the proverbial hat. This aroused suspicion and a strong sense of unfairness. CG, for example, questioned the disparate waiting times, stating, ‘I’ve always been wondering, is it fair that my case only took six months when people who are suffering more hardship than me wait for years?’¹⁵⁴ The participants inferred that delay occurred depending upon the availability of evidence and case complexity. However, there was a lack of clarity of what constitutes a complicated matter and the evidence required to satisfy the Home Office and tribunal.

One of the participants considered that a fairer system would prioritise cases based upon vulnerability and that only reasons of national security should be used to justify delay. He arrived at this conclusion having met other asylum-seekers through his voluntary work who ‘had been tortured’.¹⁵⁵ He explained that ‘it is obvious on their body that they have been tortured’, and said, ‘When I see that, I wonder, why don’t they have a residence permit yet? They should not be kept on the balance as to, will I have to go back to that?’¹⁵⁶

The participants recognised that significant delay impacts upon mental health, access to services and the ability to gather and give evidence. One of the participants concluded, therefore, that ‘the most important’ thing to enhance the fairness of the asylum system is to reduce significant delay.¹⁵⁷

3.3.2 *‘The time is passing and we are human beings’*¹⁵⁸

Participants emphasised periods of prolonged waiting in order to highlight the problems associated with the suspension of their lives. Echoing a sentiment of temporal uncertainty that was repeatedly used by asylum-claimants in this study, John described his situation as being ‘in limbo’.¹⁵⁹ For example, according to CG:

...the worst thing for an asylum seeker is not knowing what will happen...the uncertainty of it all...I think that’s the really frightening thing about the Home Office. You don’t know what they are going to do to you. And I very much dislike that, being at the mercy of somebody else that I don’t know.¹⁶⁰

¹⁵⁴ CG at p. 15. (Appendix 7).

¹⁵⁵ CG at p. 15. (Appendix 7).

¹⁵⁶ CG at p. 15. (Appendix 7).

¹⁵⁷ Mr M at p. 13. (Appendix 2).

¹⁵⁸ Blessing at p. 31. (Appendix 4).

¹⁵⁹ John at p. 20. (Appendix 6).

¹⁶⁰ CG at p. 12. (Appendix 7).

The participants likened waiting at the behest of the administration to serving a prison sentence. This sentiment was expressed forcibly by Blessing. He found the experience of being an asylum-seeker to be a ‘punishment’.¹⁶¹ He considered writing a book entitled, ‘To be refugee is a crime!, or, ...is a sin!, or ...you are a slave!’¹⁶² This was also felt strongly by Mohammed 2 who compared his state of stasis and curtailed freedoms to someone who had an accident and could no longer walk. He felt that he had been incapacitated and forgotten about. Yet, he was obliged to report to the Home Office every week, despite his age and poor health making this an onerous task. He felt increasingly depressed and hopeless in light of the inordinate period of uncertainty.

Two of the participants acknowledged the possible resource implications of tackling delay. It suggested that the recognised the market value of time. Carol Greenhouse observes:

The chartering myth of time that pervades modern social science is that the time of capital increase is one and the same time as that of an individual life, or at least, that the former contains the latter. One modern expression of this myth is that there are no inherent limits to the costing out of life chances, no investment in the public good that cannot be tallied as expense against revenue.¹⁶³

Challenging cuts and the impersonal, bureaucratic ‘time politics’ of asylum, the participants placed far greater emphasis on the human cost of delay, in terms of extreme uncertainty, destitution, stress, and deteriorating psychological well-being.¹⁶⁴ TIB concluded that there were problems with the asylum system because, ‘A lot of people are suffering but that doesn’t mean they are suffering from nothing.’¹⁶⁵ He summarised clearly how delay prolongs forced poverty, instability and isolation. Within this temporal space, asylum seekers are prone to deteriorating health, and are at risk of being exploited and turning to crime. According to TIB, delay:

¹⁶¹ Blessing at p. 33. (Appendix 4).

¹⁶² Blessing at p. 33. (Appendix 4).

¹⁶³ Carol J. Greenhouse, ‘Time’s up, timed out: reflections on social time and legal pluralism’ (2014) 46(1) *The Journal of Legal Pluralism and Unofficial Law* 141

¹⁶⁴ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71.’

¹⁶⁵ TIB at p. 19. (Appendix 1).

...will put [asylum-seekers] in trauma, depression, isolation...No stabilised future for them. They can't seek any support. They can't do any work. So, all the time, their lives are under threat.¹⁶⁶

He continued, emphasising that, '[t]he waiting time might lead them to have mental problem, health problem, and maybe lead them to do something against the law, breach the law...lead them to prison, sometimes, or involving in bad behaviours.'¹⁶⁷

Several of the participants mentioned crying, having difficulties sleeping, and being prescribed mental health medications. Mohammed 1, for example, explained that, 'Because I've got a bad situation and, like, I started taking the tablets for it. In the night I don't sleep well, hear voices, telling me to do things.'¹⁶⁸ Similarly, Blessing described his mental anguish, saying, '[t]hey told me that at the hospital, if you continue thinking about things you will die...Because sometimes I'm walking, I'm thinking, I'm thinking. I lost control sometimes.'¹⁶⁹ Mohammed 2 explained that it was his religion that prevented him from killing himself. John, however, had tried to commit suicide by overdosing on ibuprofen and alcohol. CG observed that he had 'heard of asylum-seekers at Asylum Justice having mental [health] issues' but that he had 'never heard about any one of them getting mental help.'¹⁷⁰ He explained that, 'I know that they get GPs but, so, maybe they talk to their GPs about it. But I've never heard of any one of them going to see a professional in that particular area.'¹⁷¹

The participants' accounts are stark illustrations of a dehumanising system, characterised by punishing delay. As Blessing observed, poignantly, '...so we are waiting...the time cannot forgive. The time is passing...The time is passing and we are human beings.'¹⁷² Blessing stresses that our existences are finite and time taken cannot be returned. To alleviate suffering and the injustice of stolen time, the participants called for a more compassionate system that recognises the significance of lived human time. Blessing suggested that, 'they are supposed to see first we are human beings, all of us'.¹⁷³ He explained that this could overcome bureaucratic, dehumanising processes because, 'Since

¹⁶⁶ TIB at p. 19. (Appendix 1).

¹⁶⁷ TIB at p. 19 (Appendix 1). Likewise, Blessing observed that, 'People are stealing because of hunger'. Blessing at p. 33. (Appendix 4).

¹⁶⁸ Mohammed 1 at p. 2. (Appendix 3).

¹⁶⁹ Blessing at p. 25. (Appendix 4).

¹⁷⁰ CG at p. 15. (Appendix 7).

¹⁷¹ CG at p. 15. (Appendix 7).

¹⁷² Blessing at p. 31. (Appendix 4).

¹⁷³ Blessing at p. 35. (Appendix 4).

you're a human being, you can feel pity for her, for him. You say, why?'¹⁷⁴ Similarly, Mohammed 2 expressed that when encountering an asylum-claimant, it is important to 'look inside, not outside'.¹⁷⁵

3.3.3 *'It's just the situation that I'm in at the moment'*¹⁷⁶

The participants highlighted the temporary nature of their statuses and that they did not become asylum-seekers through choice. According to CG, he 'never thought that [he] would be in that situation'.¹⁷⁷ Yonas explained that he came to the UK 'because it's not a safe place that I come from',¹⁷⁸ and Mr M observed that, 'Our country refused us.'¹⁷⁹ Blessing pointed out that 'if our country was good then we would not to come here.'¹⁸⁰ Likewise, Mohammed 2 highlighted - using the pronoun 'they', instead of 'we' - 'Why are they coming here? They need help.'¹⁸¹

Participants expressed feelings of difference and shame over their transient statuses. Mohammed 1, for example, described his experience as a child asylum-claimant in school. He became acutely aware of his marginal position when his classmates would go on holiday. He would try to conceal that he was an asylum-claimant out of fear of ridicule. The feelings of difference and disconnection seemed to intensify for Mohammed 1 over time and he decided to quit college. CG also observed his sudden drop in social status at the point of claiming asylum, which he had not anticipated. He spoke of how he regretted telling his school friends because he was ostracised and ridiculed. He said:

...I realised a bit later that was a mistake because another one of my friends led me to a page where they were making fun of me. And I thought, ok, that's turned a little bit. But it was just because I was an asylum seeker and I was someone to avoid.¹⁸²

It was difficult for CG to challenge the myths and negative asylum tropes. He tried to get his friends to realise that he claimed asylum through no fault of his own and that it did not change fundamentally who he was. For CG to retain a sense of self-worth, it was important for him that his friends saw beyond his newly formed asylum-seeking identity. He said, 'I

¹⁷⁴ Blessing at p. 32. (Appendix 4).

¹⁷⁵ Mohammed 2 at p. 13. (Appendix 8).

¹⁷⁶ CG at p. 13. (Appendix 7).

¹⁷⁷ CG at p. 4. (Appendix 7).

¹⁷⁸ Yonas at p. 8. (Appendix 5).

¹⁷⁹ Mr M at p. 18. (Appendix 2).

¹⁸⁰ Blessing at p. 28. (Appendix 4).

¹⁸¹ Mohammed 2 at p. 13. (Appendix 8).

¹⁸² CG at p. 6. (Appendix 7).

was trash, basically....it took my friends a while to get used to the idea of, well, it's just his status that's changed, not him.'¹⁸³

Nonetheless, CG had reluctantly accepted and internalised the negative attitudes, resigning himself grudgingly to a marginalised position and 'low self-esteem.'¹⁸⁴ He had resented his involuntary asylum-seeker identity because it made him feel unequal. He said:

...I don't know what most people have to go through in order to claim asylum but I feel, personally, that being so down on your luck that you have to beg someone for a sense of identity, is pretty shameful. And to add on top of that is kind of unfair.¹⁸⁵

He felt that he had to trade all that he had, his asylum story, his dignity, for the life-line of asylum. He explained that:

...usually when someone has been unkind to asylum-seekers, it's because the asylum seekers will take it, because they are taking something, and they feel like if they can repay that way, by just taking the shit...¹⁸⁶

CG was eager to shed his asylum-seeking identity when he received his refugee status. When he spoke about the asylum experience, he tended to disassociate himself with it. He recognised that he did this, saying:

Yeah, I just feel bad for the asylum-seekers because they...we...we...It feels strange saying that again because my case has changed since the five years have passed. I'm still waiting for the Home Office to get back to me about my indefinite leave to remain. So, I have to say 'we'.¹⁸⁷

He deliberately tried to forget about being an asylum-claimant, saying, 'It's such a long time ago. I've tried to bury those memories...It was not pleasant. It was stressful.'¹⁸⁸ Similarly, Yonas distanced himself from his asylum-seeking past, struggling to remember when asked about the help that asylum-claimants need, saying '[i]t's been a while as well since I was there.'¹⁸⁹ In sum, the participants drew attention to their involuntary change in circumstances. Time helped them to forget and deny the negative identities that had been forced upon them.

¹⁸³ CG at p. 6. (Appendix 7).

¹⁸⁴ CG at p. 14. (Appendix 7).

¹⁸⁵ CG at p. 13. (Appendix 7).

¹⁸⁶ CG at p. 14. (Appendix 7).

¹⁸⁷ CG at p. 10. (Appendix 7).

¹⁸⁸ CG at p. 4. (Appendix 7).

¹⁸⁹ Yonas at p. 10. (Appendix 5).

3.3.4 *'This fear is still alive'*¹⁹⁰

Participants spoke of their continuing fear of return to their home countries. John experienced difficulties because his delay in claiming asylum made the tribunal question his credibility and whether, after so many years, his 'fear [was] still alive'.¹⁹¹ He maintained, however, that it was not safe for him to return. Similarly, CG explained that 'it would not be a good idea for me to return, even now.'¹⁹² Mr M also noted that it was 'good news' when he was recognised as a refugee because 'the situation in [his] country got worse and worse.'¹⁹³ In addition, Blessing described remaining fearful of going to the Zimbabwe Embassy in London. He said, 'They can catch me. They send me back in Zimbabwe.'¹⁹⁴

Participants acknowledged that the question of the fear of return involved the interface of the past, present and future. CG, for example, highlighted that his Home Office case-owner 'wanted to know how I'd been living in the past...how I had been living all my life.'¹⁹⁵ Likewise, John observed the need to ask 'about the history, so you know the nature of the case.'¹⁹⁶ Mohammed 2 highlighted, 'I told the true story about my life. From the beginning to this moment when I come here to the UK.'¹⁹⁷ TIB explained, 'I am safe now.'¹⁹⁸ However, he acknowledged that his 'future life will rely on' the success of his asylum case.¹⁹⁹ The participants' reflections illuminate the complex temporal interactions of lived experience that shape legal questions. This point will be explored further in the concluding discussion below on the temporalities of fairness in asylum lives and law.

3.3.5 *'Take a decision and rush'*²⁰⁰

Asylum claims were identified by participants as 'special'²⁰¹, requiring decision-makers to take their time to investigate individual claims properly, to 'pay a lot of attention', and not to 'take a decision and rush'.²⁰² In other words, not to 'prejudge'.²⁰³ CG observed that the

¹⁹⁰ John at p. 14. (Appendix 6).

¹⁹¹ John at p. 14. (Appendix 6).

¹⁹² CG at p. 7. (Appendix 7).

¹⁹³ Mr M at p. 3. (Appendix 2).

¹⁹⁴ Blessing at p. 18. (Appendix 4). Blessing fled his home country of the DRC to Zimbabwe where he received refugee protection from the UNHCR.

¹⁹⁵ CG at p. 5. (Appendix 7).

¹⁹⁶ John at p. 9. (Appendix 6).

¹⁹⁷ Mohammed 2 at p. 6. (Appendix 8).

¹⁹⁸ TIB at p. 1. (Appendix 1).

¹⁹⁹ TIB at p. 9. (Appendix 1).

²⁰⁰ TIB at p. 13. (Appendix 1).

²⁰¹ Mr M at p. 17. (Appendix 2).

²⁰² TIB at p. 13. (Appendix 1).

‘Home Office takes its time when it first meets an asylum-seeker’.²⁰⁴ The focus at this stage is to gather administrative data and run security checks. However, as time passed, at the stages of the asylum interview and decision, the participants felt less observed and listened to. Mohammed 1, said, for example, ‘they do only listen to themselves, they don’t listen to me.’²⁰⁵ TIB felt that the person who had made the decision to refuse his asylum support had closed his mind to his submissions. He described the decision-maker as ‘stubborn’ and felt that they insisted, ‘I will ruin this person’s life even though he has solid evidence.’²⁰⁶ TIB also thought that the decision-maker in respect of his application for family reunion was biased because ‘they presume there is no real relationship’ between him and his wife.²⁰⁷ He considered that the visa clearance officer had not done their job properly because ‘[t]hey take a prejudgment on the papers’, ignoring the evidence and without considering the case properly.²⁰⁸ For John, he thought that the Home Office ‘just want to rush that thing so they can get me into a plane fast and send me back.’²⁰⁹ He felt that the Home Office staff ought to be ‘more compassionate’ rather than try ‘to get rid of people’.²¹⁰ In a similar sentiment, at the end of our interview, Mohammed 2 said, ‘Thank you for everything...when I talk, you know, when somebody who needs to talk is listened.’²¹¹

Moreover, as evidence of rushed time, Mohammed 1 and TIB believed that their lawyers had not given their full attention to their cases and were more concerned with their limited hours of service. It seemed that the lawyers did little work at the stage of first instance in terms of helping participants to gather and present corroborative evidence to the Home Office. Indeed, Blessing was aggrieved because he had submitted all his evidence to his lawyer, but she had not disclosed this to the Home Office. The reason was not clear to Blessing or to the Home Office. This aroused suspicion in both. John also explained, ‘I need someone...you see the time you have taken here, you know, for your research, I need someone who can tell me vividly...you know, tell me a, b, c...this is what it means, what you should do.’²¹² Blessing thought legal aid lawyers were paid by the Home Office and therefore

²⁰³ TIB at p. 15. (Appendix 1).

²⁰⁴ CG at p. 13. (Appendix 7).

²⁰⁵ Mohammed 1 at p. 6. (Appendix 3).

²⁰⁶ TIB at p. 17. (Appendix 1).

²⁰⁷ TIB at p. 10. (Appendix 1).

²⁰⁸ TIB at p. 13. (Appendix 1).

²⁰⁹ John at p. 11. (Appendix 6).

²¹⁰ John at p. 22. (Appendix 6).

²¹¹ Mohammed 2 at p. 13. (Appendix 8).

²¹² John at p. 20. (Appendix 6).

‘they can just present for you but not to fight for you to get your paper’.²¹³ He believed that if you find a lawyer who will ‘go very far for you’ then ‘you get the paper.’²¹⁴ CG, on the other hand, found his legal aid lawyer to be ‘very helpful.’²¹⁵

TIB believed that fairness requires decision-makers to ‘pay more attention to the cases and listening to the cases’.²¹⁶ According to him, this means that ‘they don’t prejudge’ and they ‘[d]on’t generalise if this case is coming from such country, or specific places, doesn’t mean they are all similar.’²¹⁷ TIB was of the opinion that the Home Office ought to carefully and critically examine evidence submitted by claimants but ‘with concern’.²¹⁸ TIB also observed that attentive listening is important in building trust, which is necessary to encourage disclosure. CG gave an example of how he, personally, when volunteering, took time to patiently elicit information from an asylum-seeker with a hearing impairment. He explained:

I just sat down with him and tried to be empathetic... somehow I managed to get some information as to where he lived and what he needed from us. I would not have been able to do that if I was being forceful. Like, thankfully, I was not in a rush or anything like that.²¹⁹

In short, the participants conveyed that rushed decisions were unfair because they lacked open-mindedness and empathy. Rather, participants believed that decisions-makers and lawyers should take enough time to improve compassion, quality and fairness in the decision-making system.

3.3.6 *‘From the beginning’*,²²⁰

Taking time to create an open, compassionate space which encourages mutual trust and disclosure was considered important in terms of getting decisions right first time. It was also felt that lawyers needed to give their full attention to cases at an early stage rather than waiting until later appeal or fresh claim stages to help to gather evidence.

²¹³ Blessing at p. 21. (Appendix 4).

²¹⁴ Blessing at p. 21. (Appendix 4).

²¹⁵ CG at p. 3. (Appendix 7).

²¹⁶ TIB at p. 15. (Appendix 1).

²¹⁷ TIB at p. 15. (Appendix 1).

²¹⁸ TIB at p. 13. (Appendix 1).

²¹⁹ CG at p. 13. (Appendix 7).

²²⁰ Mr M at p. 13. (Appendix 2).

Mr M speculated that his claim had been successful, ‘maybe because [he] was clear from the beginning.’²²¹ He recalled how his Home Office case-owner had also been clear, ‘From the beginning’, and ‘told [him] about all [his] rights.’²²² Mr M considered, however, that the Home Office should give claimants the benefit of the doubt ‘from the beginning’ because it is difficult to ‘find out who is good, who is bad’.²²³ He thought that the Home Office should be sensitive to the particular background of a claimant, such as age and level of education, and take this into account. He highlighted that, ‘Maybe they not attended school... You must excuse them because they need time to be educated to have knowledge and then you can judge them...’²²⁴ Rather than adopting a supportive approach, John believed that the Home Office were hostile and ‘create[d] fear from the very beginning’.²²⁵ John also found that ‘from the very beginning until now’, he never received the help that he needed.²²⁶ Similarly, TIB found the asylum process unclear and difficult to navigate from the outset. Even after having gone through the process personally and having gathered further information about the system through his voluntary work with asylum-claimants, he remained unclear about the asylum system. He said, ‘I won’t say I broadly know about the asylum system, how it works. Nobody advise us, nobody told us about the asylum system, how it works.’²²⁷ TIB was of the view that, ‘If we talk about the case, it means legal case, if it’s related to immigration. So, legal case, that means it’s better to have a legal adviser, to lead you, to advise you. Because it’s your life... If there is something we need to do, we seek legal advice to do it properly.’²²⁸ Similarly, Yonas considered that claimants ‘need like legal advice after they came here.’²²⁹

Mohammed 1 was frustrated that his case had not been prepared or handled properly in the first instance. For him, the prospect of a successful outcome was impeded due to Home Office error and delay. He also complained that it was only after seven years that lawyers had taken an interest in helping him to gather evidence and prepare his case. He said, ‘I think, why they don’t do that... the first time?’²³⁰ Mohammed 1 explained that he did not know what was going to happen to him when he arrived as a child and he regretted not bringing evidence

²²¹ Mr M at p. 13. (Appendix 2).

²²² Mr M at p. 23. (Appendix 2).

²²³ Mr M at pp. 19-20. (Appendix 2).

²²⁴ Mr M at pp. 19-20. (Appendix 2).

²²⁵ John at p. 22. (Appendix 6).

²²⁶ John at p. 20. (Appendix 6).

²²⁷ TIB at p. 19. (Appendix 1).

²²⁸ TIB at p. 3. (Appendix 1).

²²⁹ Yonas at p. 9. (Appendix 5).

²³⁰ Mohammed 1 at p. 16. (Appendix 3).

with him to support his claim. He explained that, ‘Now, because the situation has gone far, far, far. I don’t know what to do at the moment.’²³¹ To this extent, the participants felt that early legal assistance and getting decisions right in the first instance would enhance the fairness of the system.

3.3.7 ‘Build a new future’²³²

Having left behind their old lives, participants were eager to form new lives and identities but struggled to rebuild their lives. Blessing, for example, wished to ‘start again here’ by studying law and politics, or criminology.²³³ Mr M hoped ‘to be a legal adviser in the future’ if given the chance.²³⁴ However, from their suspended positions, the participants described feelings of lost time and vanishing identities. Yonas found that his old identity, in terms of the knowledge and skills he had gained in Eritrea, failed to serve him in the UK. He, like the other participants, faced the challenge of ‘starting from scratch’.²³⁵ He explained that:

You feel, like, you lost, like, all the rest of the years that I spent there. Because when I came here, I learned, like, twelve years there but I feel like I haven't done nothing. Because it doesn't work here.²³⁶

Yonas put into words how refugees feel that they need to work harder than everyone else to succeed in their new lives. Failure can then, he noted, create feelings of self-reproach and identity denial and crisis. He said:

...let's say if you work hard and it doesn't work then you feel, like, sad, like, and you just regret where you come from. If you don't get to where you go. And then you have to work again and again. Like, in order to get to what you want to. Life is like that but you feel like you are just going back. Like, you are still behind.²³⁷

The asylum process imposed upon the participants difficult, transient existences, confining them to the margins of society. In this suspended state, the fear of return was kept alive, the right to work was denied, access to further or higher education was limited, travel abroad was

²³¹ Mohammed 1 at p. 17. (Appendix 3).

²³² TIB at p. 20. (Appendix 1).

²³³ Blessing at p.3. (Appendix 4).

²³⁴ Mr M at p. 15. (Appendix 2).

²³⁵ Yonas at p. 4. (Appendix 5).

²³⁶ Yonas at p. 6. (Appendix 5).

²³⁷ Yonas at p. 9. (Appendix 5).

prohibited, and claimants were often separated from their families. This led TIB to conclude that the Home Office should:

...proceed their case and look up their case quickly because asylum-seekers, they don't want to stay in this position without nothing. They need to improve their life. If not, they need to hear their final decision. Ok, I don't have the right to stay? Leave me to go because rather than to wait.²³⁸

TIB also thought that it was important for the UK government to invest in the futurity of asylum-claimants and refugees. He explained that the investment in asylum-claimants and refugees benefits host communities:

They will seek a safe place, they will educate themselves, they will build their family, they will have a new community, a new country. And the other side will found benefit from them. If their skills wasn't enough sufficient, they will build their skills again. If they've got family, their family, their kids will be the future for this country. It will enrich this country and it will enrich the family as well.²³⁹

Likewise, Mr M believed that investment in inclusion and integration was important for asylum-seekers and refugees as well as their new communities:

I think because after times there will be members of the community. So, they will help and they will build and be active people in this country. And I think there is need for this young people.²⁴⁰

Digital literacy was recognised as an important skill that aided integration. However, it was acknowledged that it 'takes time' to develop this skill and that digital inclusion and exclusion is generational.²⁴¹ CG recalled helping refugees by informing them of 'the various websites where they can look'.²⁴² He noted that 'they were middle aged' and 'they did not know how technology worked'.²⁴³ In view of the advent of the Online Court in the tribunal context, the relationship between digital literacy, time, temporalities and fairness merit careful academic consideration but fall outside the time constraints of this thesis.²⁴⁴ In short, the participants

²³⁸ TIB at p. 20. (Appendix 1).

²³⁹ TIB at p. 20. (Appendix 1).

²⁴⁰ Mr M at p. 20. (Appendix 2).

²⁴¹ Mr M at p. 12. (Appendix 2).

²⁴² CG at p. 12. (Appendix 7).

²⁴³ CG at p. 12. (Appendix 7).

²⁴⁴ Lord Justice Briggs, 'Civil courts structure review: Final Report' (Judiciary of England and Wales, July 2016) 36.

recognised that restrictive policies and waiting were barriers to integration and developing their future selves. Administrative-legal time restricted access to lived temporalities key to personal development, such as work time and social time. Challenging these temporal curtailments, Participants highlighted the present and future value of integration for both asylum-seekers and their host communities.

4. CONCLUSION: TEMPORALITIES OF FAIRNESS IN ASYLUM LIVES AND ASYLUM LAW

The above sections have illuminated the research participants' temporal experiences of fairness within the UK's asylum system. While there were commonalities, the participants' narratives did not fit tidily within a homogenous conception of time. Their accounts revealed the multiple, overlapping and competing temporalities of law and lived experience. I have analysed these within three categories of *doing time*, *unequal time*, and *severed time(s)*.

The prevalent experience was long periods of waiting, of *doing time*, akin to serving a prison sentence. During times of stasis, rights were suspended, destitution was imposed, fear was kept alive, well-being deteriorated, and futures were frustrated. Participants endured lengthy administrative-legal processes and the uncertainty and fear of waiting for an outcome. The visibility and identities of the participants shifted over time. At the point of claiming asylum, participants became visible to the Home Office but only within the short timeframes that influenced interactions between the parties and shaped narratives. The full narratives and vulnerabilities of the participants, therefore, remained largely invisible. The imposition of institutional timeframes created distance between the parties. The participants described the administrative-legal junctures, such as the initial claim and asylum interview, where time became concentrated and strict deadlines had to be complied with. The participants were compliant with trading their time and their memories for protection. However, they were only willing to wait patiently for a period of up to six months. While the participants tended to feel visible and treated fairly during the screening phase, they entered a bureaucratic fog at the point of dispersal. John explained how the Home Office ignored his letters in which he detailed how he felt 'very depressed and distressed'.²⁴⁵ However, when his GP wrote to the Home Office on his behalf, a reply was received from the Home Office within eight days. This illustrates how little value was placed upon the time of asylum-

²⁴⁵ John at p. 22. (Appendix 6).

claimants and how easily they were forgotten. The refugee experience was also controlled by the ticking clock. Status expired after five years and could be reviewed and revoked by the Home Office. Administrative-legal time dominated, which included Home Office time, tribunal time and the time of legal aid lawyers.²⁴⁶ Little value or importance was given to the lived time(s) of asylum-claimants and refugees. Their lives were put on hold and time punished.

Implicit in the predominant experience of a ‘long, long, long time waiting’, was the sense of *unequal time*, where administrative-legal bodies controlled the clock.²⁴⁷ While Home Office and tribunal delays were common, participants were expected to claim asylum without delay and to comply with strict administrative-legal time limits. A further temporal tension was apparent between slow decisions, caused by Home Office and tribunal delay, and rushed decisions.²⁴⁸ Greenhouse would describe speedy decisions as constituted within ‘the fast time of global capitalism’s mythic increase.’²⁴⁹ While none of the participants were subject to detained fast-track procedures, their experiences varied in terms of receiving fast or slow decisions. The participants were, therefore, differentiated by the administration in temporal terms. The temporal designation (of fast or slow decisions) seemed to depend upon nationality, with some nationalities deemed more deserving than others. The literature reveals that the asylum system tends to operate too slow or too fast, failing to find a Goldilocks zone where cases are neither shelved nor rushed.²⁵⁰ These temporal discrepancies, it is argued, can disadvantage claimants both procedurally and substantially, undermining the quality and fairness of the process.²⁵¹ As Thomas explains, ‘[i]f cases are decided too quickly, then there is the risk of rushed and unfair justice. On the other hand, justice delayed is justice denied.’²⁵² Within the adjudicative space, parties ought to be afforded equal time to present their

²⁴⁶ Time in legal aid is discussed in Chapter 6.

²⁴⁷ TIB at p. 12. (Appendix 1).

²⁴⁸ While some of the participants experienced rushed decisions, none of the participants were subject to detained fast-track procedures. Detained fast-track processes are discussed and analysed in Chapters 5 and 6.

²⁴⁹ Carol J. Greenhouse, ‘Time’s up, timed out: reflections on social time and legal pluralism’ (2014) 46(1) *The Journal of Legal Pluralism and Unofficial Law* 141, 144.

²⁵⁰ Melanie B.E. Griffiths, ‘Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees’ (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991, 1994.

²⁵¹ See, for example, Elder Rahimi Solicitors, ‘Systemic delays in the processing of the claims for asylum made in the UK by unaccompanied asylum seeking children (UASC)’ (2018) <http://www.elderrahimi.co.uk/UserFiles/Files/p_nS4kT4.pdf> accessed 28 June 2018.

²⁵² Robert Thomas, ‘Immigration appeals and delays: On the verge of a crisis?’ (UK Administrative Justice Institute, 18 May 2017) <<https://ukaji.org/2017/05/18/immigration-appeals-and-delays-on-the-verge-of-a-crisis/>> accessed 28 September 2019. See discussions in Chapters 5 and 6 regarding time and fairness.

respective cases. There ought to be ‘equality of arms’ to ensure fair treatment and opportunity.²⁵³

The distinct ‘asylum seeker’ and ‘refugee’ labels encouraged administrative-legal time to displace lived time, dividing the participants from their past identities, their families, their new communities, their future ambitions, and from each other. The lived time(s) of the participants were thereby *severed* by administrative-legal time. Temporal meanings attached to the legal constructions of ‘asylum’ and ‘refugee’. Both asylum-claimants and refugees endured temporary status which kept them separate from their communities. However, refugees had more rights and enjoyed a greater degree of permanence. Successful claimants tended to try to erase their own asylum-seeking past from memory, and unsuccessful claimants faded further into the margins. Home Office and tribunal disbelief repressed and distorted asylum accounts, rewriting history to fit administrative-legal temporalities. For example, persistent Home Office disbelief made Blessing question the veracity of his own account and his refugee identity. He said, ‘To me, like they was accusing me, I did something fault. It was a fake. All those papers from Zimbabwe. Even to me, it was like a fake.’²⁵⁴ The participants endured harsh policies and denied their past experiences. Not only did restrictive policies cause some of the participants to resent their own asylum-seeking identity, the measures also created a sense of resentment amongst asylum-claimants towards new arrivals. Future, unrivied asylum-claimants were viewed by Blessing as a threat to scant resources. He described how he would rather see borders closed than continue subjecting present asylum-claimants to harsh policies. He said:

We cannot survive with £35. We can’t. We can’t...if you don’t want people to come, you must open another system for people to not get to UK. But you can satisfy all those people inside already. The way you are killing people who are inside already because of people coming. It’s not fair.²⁵⁵

To this effect, Blessing challenged his disenfranchisement by arguing to exclude other asylum-claimants. He echoed anti-immigration and austerity sentiments, separating himself, as someone present, and therefore deserving, from others outside the border. He internalised market-driven asylum policies, categorising those beyond the border as expenditures rather

²⁵³ See Chapter 5 discussion.

²⁵⁴ Blessing at p.18. (Appendix 4). Blessing fled his home country of the DRC to Zimbabwe where he received refugee protection from the UNHCR.

²⁵⁵ Blessing at p. 32. (Appendix 4).

than equals. The constraints of administrative-legal temporalities reinforced the negative stereotypes that asylum-claimants are welfare scroungers, criminals and terrorists.

Participants used expressions of time to explain but also to confront the treatment they perceived as unfair. The participants thereby displayed *temporal resistance*. Indeed, several of the participants claimed permanency and rights by distinguishing themselves as ‘good’ and, therefore, deserving.²⁵⁶ In addition to claiming presence in the here and now, the participants claimed belonging through duration, by identifying with past struggles, and by making claims to the future. The participants were aware of the temporal forces that facilitated their exclusion. They appealed to the same temporal forces to highlight their struggle and demand inclusion and permanency. CG compared his struggle to the historical struggle faced by LGBT people, appealing to shared values. He also defined the prejudice he experienced as ‘an old-fashioned kind of thinking and lack of understanding’, which his friends had inherited from their parents.²⁵⁷ Using the future as a site of resistance, TIB argued that:

The people who fled their country they want to build a new future. Why don’t we open the opportunity to help them to build their new future in this country? It’s a chance for them to invest. Both sides will get profit.²⁵⁸

Mohammed 2, on the other hand, had given up all hope in the authorities helping him. He was grateful for the flat that he had been given to live in but had lost all faith in the law to resolve his problem of punishing delay. He felt that the only justice he would receive would be from God, from a power beyond time. He said, ‘I hope, I hope she is coming from the God...From the God, not from the human. From the God, she is coming.’²⁵⁹ The central finding, that time and temporal concepts are key to asylum-claimants’ understanding, point to the importance of understanding how time is conceived within juridical considerations of fairness in asylum. This is the task to which the next chapter turns.

²⁵⁶ See, for example, Mohammed 1 at p.13. (Appendix 3).

²⁵⁷ CG at p. 6. (Appendix 7).

²⁵⁸ TIB at p. 20. (Appendix 1).

²⁵⁹ Mohammed 2 at p. 12. (Appendix 8).

CHAPTER 5: TEMPORAL FAIRNESS IN THE COURTS

I think they just want to rush...so they can get me into a plane fast and send me back.¹

1. INTRODUCTION

This chapter finds that the UK courts have identified time as a key component of fairness in asylum determination. This is an important finding in view of the lack of attention to time within liberal democratic theories of fairness. Chapter 3, on fairness in legal theory, identified the lack of attention to cross-border movements and lack of attention to the lived experience in the design of Rawls's fairness theory. The work of Benhabib, Sen and Habermas demonstrated why it is important to reimagine Rawls' thought experiment to incorporate fully the rights and experiences of asylum-seekers within liberal theories of fairness. In chapter 4, interviews with asylum-seekers drew attention to the temporal dimensions of (un)fairness within the UK's asylum system, exposing time as a blind spot of Rawls's theory. Benhabib, Sen and Habermas also neglect time, focusing more on the spatial in terms of ideas of fairness unbound from the strictures of the nation-state. These empirical findings called for analysis of asylum case law.

This chapter builds upon a very small body of legal scholarship that addresses temporal dimensions of fairness in asylum determination procedures in the UK.² However, in view of the empirical findings in chapter 4, this chapter pioneers a time focused analysis of case law on the fairness of UK asylum determination procedures.³ The cases have been

¹ John at p. 11 (Appendix 6).

² See, for example, Peter W. Billings, 'A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims' (2000) 52(1) *Administrative Law Review* 253; Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum appeals' (2005) 25(3) *Legal Studies* 462; Michael John-Hopkins, 'The Emperor's New Safe Country Concepts: A UK Perspective on Sacrificing Fairness on the Altar of Efficiency' (2009) 21(2) *International Journal of Refugee Law* 218; Sarah Craig & Maria Fletcher, 'The Supervision of Immigration and Asylum Appeals in the UK – Taking Stock' (2012) 24(1) *International Journal of Refugee Law* 60; Stephen Meili, 'Do Human Rights Treaties Matter: Judicial Responses to the Detention of Asylum-Seekers in the United States and the United Kingdom' (2015) 48(1) *New York Journal of International Law and Politics* 209.

³ There is an emerging body of social science literature which explores time within the asylum system. See, for example, Rebecca Rotter, 'Waiting in the asylum determination process: Just an empty interlude?' (2016) 25(1) *Time and History* 80 and Melanie B.E. Griffiths, 'Out of Time: The Temporal Uncertainties of Refused Asylum Seekers and Immigration Detainees' (2014) 40(12) *Journal of Ethnic and Migration Studies* 1991.

selected based on their high level of authority and handling of the issue of legal fairness in matters of asylum and immigration. The analysis focuses on a clear line of relevant Strasbourg and domestic jurisprudence.⁴ The jurisprudence excludes asylum determinations from the scope of the temporal protections under Article 6 ECHR but identifies time as a key component of fairness in asylum determination.⁵ Strasbourg and the domestic courts have found that asylum determinations do not engage Article 6 because an asylum claim is not a ‘civil right’ within the meaning of Article 6(1). I argue that this position is mistaken. The discussion draws substantially from three key legal authorities, namely, *Maaouia v France*, *MK (Iran) v SSHD*, and *The Lord Chancellor v Detention Action*.⁶ The chapter concludes that judicial concern for time in asylum cases has manifested as two key requirements, namely, that a decision is made in a reasonable time (that is, not too fast or too slow), and that there is sufficient time to prepare and present the legal case. The second temporal requirement includes enough time to prepare the case with the assistance of a legal aid lawyer.⁷

In reaching these conclusions, the overarching legal argument is structured as follows. In view of the domestic judicialisation of asylum and the transformative effect of EU law, I argue that a substantive legal right to asylum has evolved.⁸ This right to asylum engages Article 6 ECHR, which protects the right to a fair hearing. To exclude asylum-claimants from Article 6 protection is to suggest that they are external to democratic societies. I characterise Article 6 as a temporal right because it upholds, *inter alia*, a right to legal aid (essentially, access to the billable hours of a legal aid practitioner so that access to court is effective), and a right to a decision within a reasonable time.⁹ Limitations, (which tend to be delay or short time-limits) on these rights are only permitted so long as the claimant’s reasonable

⁴ Case law from the European Court of Justice and comparative jurisprudence is out-with the scope of the thesis inquiry. Further study of the role of the ECJ in the increasing judicialisation of asylum and the transformative potential of EU law in the area of asylum would be beneficial.

⁵ That is, cases concerning claims for refugee status or humanitarian protection, or human rights claims, or claims for refugee family reunion.

⁶ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42; *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115; *ZL and VL v Secretary of State for the Home Department* [2003]; EWCA Civ 25; *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; and *Lord Chancellor v Detention Action* [2015] ECWA Civ 840.

⁷ This issue of sufficient time with a legal aid lawyer to prepare the asylum case is considered in Chapter 6.

⁸ Since the right to asylum was first enshrined domestically, under the 1905 Aliens Act, and declared internationally, under Article 14 UDHR, the right to asylum has been strengthened by the development of international refugee law and international and regional human rights instruments. See discussion in Chapter 2 on Fairness in Historical Context. Also see, Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004), 136-161.

⁹ The issue of legal aid time is addressed in Chapter 6.

opportunity to present her case is not impeded or she is placed at a substantial disadvantage *vis-à-vis* her adversary.

Developing this argument, the discussion is structured as follows. The first part of this chapter grapples with the vexing issue of why the Strasbourg Commission and Court and the UK courts have found that Article 6 ECHR does not apply to immigration decisions, and by extension, to asylum decisions. I find the non-application of the temporal protections of Article 6 untenable. The denial of this right is, I argue, based on a misinterpretation of the normative and legal nature of asylum, discussed in chapter 2, and upon inadequate judicial reasoning (which is not formally binding). My analysis supports the view of the dissenting judges in the landmark case of *Maaouia* and finds that the majority ruling in *Maaouia* is out-of-line with other jurisprudence. In any event, my analysis shows that the evolution of the legal landscape has transformed the right to asylum and Article 6 should be engaged. The problems of chronic delay within the UK's asylum determination system and unfair fast-track procedures, throws the issue of the non-application of temporal Article 6 protection into sharp relief. One of the unintended consequences of restrictions to legal aid and reduced appeal rights has been increased tribunal asylum caseloads, backlog and excessive delay. At the other extreme of the UK's asylum determination system, has been the unfair and unlawful operation for fifteen years of accelerated appeals procedures.¹⁰ The non-application of Article 6 to asylum determination is a pressing issue because Article 6 provides the most robust judicial safeguards. The non-application of Article 6, therefore, devalues the procedural and substantive rights, and the lived time(s), of asylum-seekers with potentially grave consequences. The second part of the discussion explores how, given the exclusion of Article 6, the UK courts have interpreted fairness in the context of asylum. I find that, despite the exclusion of Article 6, the UK courts have identified time as a key fairness component in asylum cases. The focus of the discussion is the landmark ruling of the Court of Appeal, which found that the truncated timescales under the detained fast-track appeal rules were 'structurally unfair and unjust'.¹¹ The case is a stark demonstration of how the Home Office controlled procedural time-frames in order to unfairly disadvantage many asylum-claimants.

Before moving on, some preliminary, general comments about Article 6 ECHR are necessary. The non-application of Article 6 to the area of asylum and immigration is

¹⁰ *Lord Chancellor v Detention Action and the Secretary of State for the Home Department* [2015] ECWA Civ 840, [45].

¹¹ *Lord Chancellor v Detention Action and the Secretary of State for the Home Department* [2015] ECWA Civ 840, [45].

lamentable because the judicial guarantees under Article 6 are ‘usually regarded as providing the most muscular procedural protection’.¹² Article 6(1) protects the right to ‘a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’¹³ Decision-making within a reasonable time is a core, express component of Article 6(1) and length of proceedings is the most litigated aspect of Article 6.¹⁴ Furthermore, Article 6 not only requires that the hearing is fair but implies a right of access to the courts or tribunals.¹⁵ This is because the ECHR is intended to guarantee rights that are practical and effective.¹⁶ To this end, Article 6 offers a route to legal aid.¹⁷ Article 6(3)(c) provides an explicit right to legal aid in criminal cases if required by the interests of justice. There is no general right to legal aid in civil cases.¹⁸ However, Article 6 imposes a positive obligation upon states to provide legal aid if representation is indispensable for effective access to court.¹⁹ To this end of granting legal aid for effective access, lack of time for a legal aid lawyer to prepare the case within the time limits might violate Article 6.²⁰ Legal aid (legal-aid-time) might be indispensable due to the complexity of the case or procedure, the seriousness of what is at stake for the applicant, or the applicant’s inability to represent herself effectively.²¹ Strasbourg has identified the following factors as relevant to determining whether an applicant would be able to present her case properly without a lawyer, despite assistance afforded by the judge; the complexity of the procedure, the necessity to address complicated points of law or to establish facts, involving expert evidence and the examination of witnesses, and the fact that the subject matter entails an emotional

¹² Nick Armstrong, ‘LASPO, Immigration and *Maaouia v United Kingdom* (2013) 18(2) Judicial Review 177, 178.

¹³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

¹⁴ Council of Europe, ECHR Statistics, Violations by Article and by State 1959-2018, available at <<https://www.echr.coe.int/Pages/home.aspx?p=reports>> accessed 03/09/2019. Analysis of the Article 6 ECHR ‘reasonable time’ jurisprudence is outside the scope of this thesis.

¹⁵ *Golder v United Kingdom* (1975) 1 EHRR 524, [36]. The concept of the Convention being a ‘living instrument’ was adopted in *Golder*, although the expression was not coined until the case of *Tyrer v United Kingdom* (1979-80) 2 EHRR 1.

¹⁶ *Airey v Ireland* (1979-80) 2 EHRR 305, [24].

¹⁷ A complete analysis of the jurisprudence on the right to legal aid under Article 6(1) ECHR is outside the scope of this thesis.

¹⁸ *Airey v Ireland* (1979-80) 2 EHRR 305, [26].

¹⁹ *Airey v Ireland* (1979-80) 2 EHRR 305, [26].

²⁰ See, for example, *Siatkowska v Poland* (2010) 51 EHRR 18.

²¹ *Airey v Ireland* (1979-80) 2 EHRR 305, [26]; *Steel and Morris v United Kingdom* (2005) 41 E.H.R.R. 22, [61]. See Chapter 6 for further discussion of legal aid time.

involvement that is not compatible with the degree of objectivity required by advocacy in the court.²²

Central to the Article 6 concept of a fair hearing is the applicant's ability to enjoy equality of arms with the opposing side.²³ Article 6 does not guarantee total equality of arms, however. Access to legal aid (in essence, access to legal-aid-time) may be limited by conditions such as means and merits tests, if the scheme 'does not fail to offer individuals substantial guarantees to protect them from arbitrariness'.²⁴ The limitations must not impinge the essence of the right of access to court.²⁵ Legal aid (legal-aid-time) might therefore be required to ensure that 'each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* the adversary'.²⁶ Moreover, 'the key principle governing the application of Article 6 is fairness'.²⁷ Even if an applicant 'manages to conduct his or her case in the teeth of all the difficulties, the question may nonetheless arise as to whether this procedure was fair'.²⁸ This is because of the 'importance of ensuring the appearance of the fair administration of justice'.²⁹ Actual and apparent fairness are therefore relevant.

This chapter turns now to explore the judicial reasoning for denying Article 6 temporal protection in asylum cases. I find that the exclusion rests upon inadequate reasoning and a misinterpretation of the nature of asylum decisions. I then explore cases about the problem of accelerated decision-making.

²² *P, C and S v United Kingdom* (2002) 35 EHRR 31, [89]; *Airey v Ireland* (1979-80) 2 EHRR 305, [24].

²³ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, [59].

²⁴ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, [62].

²⁵ *P, C and S v United Kingdom* (2002) 35 EHRR 31, [90].

²⁶ *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, [62].

²⁷ *P, C and S v United Kingdom* (2002) 35 EHRR 31, [91].

²⁸ *P, C and S v United Kingdom* (2002) 35 EHRR 31, [91].

²⁹ *P, C and S v United Kingdom* (2002) 35 EHRR 31, [91].

2. THE NON-APPLICATION OF THE TEMPORAL PROTECTIONS OF ARTICLE 6 ECHR TO ASYLUM DETERMINATIONS

2.1 Introductory remark on the substantive legal right to asylum

Asylum applications are a special category of claims, which raise ‘the most fundamental of all human rights’.³⁰ Asylum decisions determine rights under the Refugee Convention, ECHR, and EU law, given effect under domestic law. The nature of asylum decisions is non-discretionary and alleged violation of these rights are not incidental to a decision on entry or stay. They are central to such decisions and the Home Office and tribunal are required to consider the substantive asylum and human rights claims. The stakes are at their highest for asylum-seekers as flawed decisions may result in return to countries where there is a risk of persecution or death. Prior to the incorporation of the Refugee Convention into domestic law, and the establishment of asylum appeals, and the Human Rights Act 1998, the judicial committee of the House of Lords, in the refugee case of *Bugdaycay*, recognised that decisions that ‘may imperil life or liberty’ require ‘the most anxious scrutiny’.³¹ In another refugee case, *Thirukumar*, before the Court of Appeal in 1989, Bingham LJ famously stated that, ‘it is...plain that asylum decisions are of such moment that only the highest standards of fairness will suffice.’³² The legal landscape has changed significantly since *Bugdaycay* and *Thirukumar* and the status of asylum decision-making has, arguably, been raised to a pure question of law.³³ The historical tension between the individual right to asylum and the state prerogative to expel was discussed in chapter 2. In this chapter, the position taken is that the development of a domestic legal model of asylum decision-making, and the development of EU asylum law, transforms the right to asylum to a right that is judicial and imperative. These points are unpacked below. However, first, I explain the problem of why the scope of Article 6 ECHR has not been extended to immigration and asylum cases.

³⁰ *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531.

³¹ *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531 and 537.

³² *R v Secretary of State for the Home Department, ex parte Thirukumar* [1989] Imm AR 402, 9.

³³ See, for example, William Thomas Worster, ‘The Contemporary International Law Status of the Right to Receive Asylum’ (2014) 26(4) *International Journal of Refugee Law* 477. There is some disagreement in the literature as to whether a right to asylum exists.

2.2 Strasbourg jurisprudence and the unclear meaning of ‘civil rights’

The rights under Article 6 ECHR are only engaged in respect of the determination of a person’s ‘civil rights and obligations or of any criminal charge against him.’³⁴ Defining what constitutes ‘civil rights’ within the meaning of Article 6 has been a contentious issue and the Strasbourg jurisprudence has been unclear and inconsistent. The dissenting Strasbourg Judges in the landmark case of *Maaouia*, highlighted that Strasbourg’s failure to define ‘civil rights’ has ‘led to uncertainty as to their meaning’.³⁵ In the domestic case of *Maftah*, Sedley LJ concluded:

The only thing which is certain is that civil rights in article 6 have an autonomous meaning. The Strasbourg court has made this clear on more than one occasion. What is neither certain nor clear is what that meaning is.³⁶

The lack of clarity stems from the fact that:

...the meaning of the word “civil” in continental jurisprudence is rather different from the word “civil” in our jurisprudence, because we use the word civil as an antonym to criminal whereas European jurisprudence uses it as an antonym to private in the sense of the distinction between private and public law.³⁷

Writing in 1969, Harris observed:

The meaning of the term ‘civil rights’ is a matter that has vexed the Commission from the beginning. Just how wide is the guarantee in Article 6 in non-criminal cases? Does it cover all rights? (If so, what is a right?) Is it limited to rights enforceable in a court of law? Does it extend, following Continental civil law, only to private rights, leaving out public rights or rights *vis-à-vis* the government?³⁸

Strasbourg indicated in its early case law that Article 6 might apply to immigration and asylum decisions if raised in connection with an arguable Article 8 (right to private and

³⁴ Article 6(1) ECHR.

³⁵ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42, dissenting opinion of Judge Loucaides joined by Judge Traja, 18.

³⁶ *Secretary of State for the Foreign Office and Commonwealth Affairs v E Maftah and A Khaled* [2011] EWCA Civ 350, [14].

³⁷ *HH (Iran) v Secretary of State for the Home Department* [2008] EWCA Civ 504, [44].

³⁸ D.J. Harris, ‘Immigration and the European Convention on Human Rights’ (1969) 32(1) *Modern Law Review* 102, 104.

family life) ECHR claim.³⁹ However, in the landmark case of *Maaouia*, the Grand Chamber of the ECtHR did not accept that Article 6 could be engaged in respect of decisions of entry or stay of non-nationals.⁴⁰ Strasbourg and the UK courts have since repeatedly upheld this judgment, extending the decision to asylum cases, even though *Maaouia* was not an asylum case.⁴¹ The following discussion addresses why Strasbourg and the domestic courts have maintained that asylum decisions fall outside the scope of Article 6, finding that this position is untenable. Disputes concerning asylum involve the determination of enforceable legal rights (under the Refugee Convention – the primacy of which is recognised under section 2 of the Asylum and Immigration Appeals Act 1993 – under the Human Rights Act 1998 and under EU law). There is a strong argument that these fundamental rights fall squarely within the civil limb of Article 6. Yet, early case law of the Commission indicated that Article 6 might be engaged if raised in connection with an Article 8 ECHR complaint.

2.2.1 *The case of Alam and Khan (1967) and the admissibility of Article 6 ECHR*

The very first case brought against the UK, after the UK allowed individual petitions in 1966, concerned an immigration dispute that raised Article 6(1).⁴² The Commission was open then to the argument that Article 6(1) could be invoked in immigration cases, despite the administrative nature of such decisions, if raised alongside Article 8 ECHR.⁴³ Thirteen-year-old Mohamed Khan, a citizen of Pakistan and the son of Mohamed Alam, was refused entry to the UK because the authorities did not accept that he was Alam's son.⁴⁴ Alam and Khan complained that the refusal to allow Khan to enter to join his father violated their right to family life guaranteed by Article 8. There was no right of appeal against immigration decisions in 1966. Alam and Khan thus also complained that they were denied a fair and public hearing before an independent and impartial tribunal for the determination of their

³⁹ *Alam and Khan v United Kingdom* (1967) 24 CD 116. The case was procedurally joined with *Singh v United Kingdom (Application 2992/66)* (1967) 24 CD 116. In *Singh* the Commission ruled that, unlike in *Alam*, no issue arose under Article 8(1) and therefore it could not be said that a 'civil right' within the meaning of Article 6(1) was being determined. The application was rejected as inadmissible on both Article 8 and Article 6.

⁴⁰ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42.

⁴¹ *Mamatkulov v Turkey* (2005) 41 EHRR 25; *Lupsa v Romania* (2008) 46 EHRR 36; *Kaya v Romania* (2010) 50 EHRR 14; *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115; *R. (on the application of BB (Algeria) v Special Immigration Appeals Commission* [2012] EWCA Civ 1499; *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10.

⁴² *Alam and Khan v United Kingdom* (1967) 24 CD 116.

⁴³ The Commission dealt with petitions in the first instance in those days.

⁴⁴ Alam was a citizen of Pakistan and a Commonwealth citizen under the Commonwealth Immigrants Act 1962.

right to family life. They argued that their Article 8 right was a ‘civil right’ within the meaning of Article 6(1). The Commission declared both the Article 8 and Article 6 complaints admissible. Harris explained that the ‘facts did raise the possibility of a breach of Article 8(1) so that there was a “civil right” in the sense of Article 6(1) being determined when the decision was being taken to exclude the second applicant and Article 6 applied.’⁴⁵ The Commission seemed to take the view that ‘civil rights’ included rights directly guaranteed by the ECHR. However, the argument was not tested fully as a friendly settlement was reached in this case. There was a favourable result for Khan who was granted entry to join his father in the UK and the Home Office met the cost of his flight. The UK also informed Strasbourg of its intention to introduce legislation that would confer rights of appeal against immigration decisions. The immigration appeals system was established in 1969.⁴⁶ However, the Commission and then the Court went on to find that the alleged violation of other Convention rights did not invoke Article 6 in immigration and asylum cases. This was because the violation of such rights was considered incidental to immigration decisions.

2.2.2 *The case of Mr and Mrs Uppal (1979) and the non-application of Article 6*

In 1979, in a case concerning decisions to deport Mr and Mrs Uppal, a married Indian couple who had overstayed in the UK, the Commission ruled that Article 6(1) did not apply to deportation matters.⁴⁷ The Commission concluded, within a brief paragraph, that decisions regarding the stay of non-nationals are of an administrative nature, made in the exercise of discretionary powers.⁴⁸ The Commission referred to ‘previous cases’ but did not reference these cases and there was no reference to *Alam* in the Commission’s opinion. Nonetheless, the Commission reasoned that immigration decisions do not involve the determination of civil rights, even if such decisions interfere with Article 8 rights. The Commission explained that:

⁴⁵ D.J. Harris, ‘Immigration and the European Convention on Human Rights’ (1969) 32(1) *Modern Law Review* 102, 104.

⁴⁶ Under the Immigration Appeals Act 1969.

⁴⁷ The couple had applied for permission to settle permanently in the UK, anticipating that they would benefit from amnesties given by the Home Secretary to illegal immigrants who had entered the UK prior to the Immigration Act 1971 coming into force (before 1 January 1973). However, the Home Secretary decided to maintain his intention to deport the husband and served a notice of intention to deport upon the wife. The Uppals complained that the decisions to deport violated their right to respect for family life under Article 8. They also complained that the alleged Article 8 violation was aggravated, being adversely discriminatory on the grounds of race, birth and the Uppals’ status as overstayers as distinguished from illegal immigrants. *Uppal and Others v United Kingdom* (1981) 3 EHRR 391.

⁴⁸ *Uppal and Others v United Kingdom* (1981) 3 EHRR 391, 398.

...even assuming that the respective rights of grandparents, parents and children to maintain a life in common is a civil right within the meaning of that provision, the decision of the [UK] immigration authorities to expel the applicant parents does not determine such a right.⁴⁹

The distinction drawn by the Commission is artificial because Article 8 was in play at the time of the deportation decisions and the Article 8 issue was directly relevant to the substantive immigration decisions. Evidence of family life was submitted and the Home Secretary attested to the ‘careful consideration of the applicants’ circumstances.’⁵⁰ The Home Secretary demonstrated that his decisions to deport were in the direct determination of Article 8 when he stated that he took account of ‘the partial rights of the children...by virtue of their birth in the [UK]’.⁵¹ Notwithstanding the weak reasoning in *Uppal*, the Commission and the Court extended the flawed logic to asylum decisions.

2.2.3 *The extension of the non-application of Article 6 to matters of asylum*

The Commission, and later the ECtHR, ‘applied a self-denying ordinance’⁵² to the question of the application of Article 6(1) to immigration and asylum matters.⁵³ The Commission considered that decisions on political asylum were analogous to expulsion decisions. Such decisions, the Commission concluded with brevity, are similarly of a discretionary nature and therefore do not involve the determination of civil rights.⁵⁴ As Collins J has observed, the reference to discretionary decision-making with regards to political asylum seems ‘a little

⁴⁹ The Commission explained that ‘even assuming that the respective rights of grandparents, parents and children to maintain a life in common is a civil right within the meaning of that provision, the decision of the United Kingdom immigration authorities to expel the applicant parents does not determine such a right.’ *Uppal and Others v United Kingdom* (1981) 3 EHRR 391, 396 and 398.

⁵⁰ *Uppal and Others v United Kingdom* (1981) 3 EHRR 391, 394.

⁵¹ In the facts before the Commission, it was also noted that, ‘Mrs Uppal had become pregnant and it was thought she would not be deported in that condition’ and, later, she was ‘admitted to a mental hospital for observation and the Home Secretary has apparently intimated that their deportation will not be effected whilst she is in hospital.’ *Uppal and Others v United Kingdom* (1981) 3 EHRR 391, 394.

⁵² Nick Armstrong, ‘LASPO, Immigration and Maaouia v United Kingdom’ (2013) 18(2) *Judicial Review* 177, 178–179.

⁵³ *Bozano v France* (1984) 39 DR 119; *Urrutikoetxea v France* (1996) 87-B DR 151; and *Kareem v Sweden* (1996) 87-A DR 173.

⁵⁴ See, for example, *Lukka v United Kingdom* (1987) 9 EHRR CD 552, 554; *P v United Kingdom* (1987) 54 DR 211. In the asylum case of *J.E.D. v United Kingdom* (1999) 27 EHRR CD 65, the Court regarded judicial review as an adequate remedy in the absence of any proper appeal.

curious'.⁵⁵ This is because, '[i]n asylum cases, discretion is not a relevant consideration. If the claim falls within the [Refugee] Convention, asylum must be granted.'⁵⁶ This position is endorsed by the UNHCR:

From an analysis of the international legal instruments relating to refugees, it is obvious that determination of refugee status can only be of a *declaratory nature*. Indeed, any person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument, whether he is formally recognized as a refugee or not.⁵⁷

The Commission's inadequately reasoned extension of the exclusion of Article 6 to asylum cases regrettably conflates asylum and immigration matters, against international and domestic principles about the nature of asylum decisions (discussed further below). The Grand Chamber of the ECtHR then adopted the Commission's jurisprudence on the non-application of Article 6 to immigration and asylum matters with little scrutiny of that jurisprudence.

2.2.4 *The flawed reasoning in the case of Maaouia*

In 2000, in the landmark case of *Maaouia v France*, the Grand Chamber of the ECtHR ruled for the first time upon the applicability of Article 6(1) to expulsion procedures.⁵⁸ The case before the Court concerned a Tunisian citizen who complained of delayed proceedings to rescind an order excluding him from French territory for ten-years. The exclusion order had been made for reason of the applicant refusing to comply with a deportation order resulting from a criminal conviction. However, the applicant had been unaware of the deportation order, which was later quashed in the absence of notice being served upon him. On this basis, and for reason of his marriage to a French national, he applied for the exclusion order to be

⁵⁵ *MNM v Secretary of State* [2000] UKIAT 00005, [11] (emphasis added). This position is endorsed by the UNHCR: 'From an analysis of the international legal instruments relating to refugees, it is obvious that determination of refugee status can only be of a declaratory nature. Indeed, any person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument, whether he is formally recognized as a refugee or not.' UNHCR, Note on Determination of Refugee Status under International Instruments EC/SCP/5 (UNHCR, 24 August 1977).

⁵⁶ *MNM v Secretary of State* [2000] UKIAT 00005, [11].

⁵⁷ UNHCR, Note on Determination of Refugee Status under International Instruments EC/SCP/5 (UNHCR, 24 August 1977) (emphasis added).

⁵⁸ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42. The ECtHR abolished the Commission in 1998 and replaced it with a two-tier court system. The Chamber and Grand Chamber. See ECHR and its Protocols as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

rescinded. After a process of several years, the Aix-en-Provence Court of Appeal rescinded the order and the applicant sought to regularise his status. The applicant complained that the length of the proceedings violated Article 6(1). However, the ECtHR found that Article 6 was not applicable.

The ECtHR in *Maaouia* affirmed that the concepts of ‘civil rights’ and ‘criminal charge’ had autonomous ECHR meanings. The ECtHR also noted the Commission’s consistent opinion that immigration decisions did not come within the scope of Article 6(1).⁵⁹ However, as Sheona York has observed, ‘the cases mentioned in *Maaouia* simply refer to each other, or to other cases which merely state that conclusion, which begins to look like a case of “the emperor's new clothes”’.⁶⁰ The majority drew further support for their view from Article 1, Protocol 7, which contains minimum procedural guarantees to lawfully resident non-nationals subject to exclusion orders.⁶¹ The ECtHR reasoned that adopting special measures applicable to expulsion showed that France (and other member states) did not intend for Article 6(1) to apply to such proceedings.⁶² The ECtHR cited the explanatory note that states that Protocol 7 ‘does not affect [the Commission’s] interpretation of Article 6’.⁶³ The ECtHR considered that, ‘[t]he fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights’.⁶⁴ Echoing earlier case law, Nicolas Bratza, in his concurring opinion, explained that, ‘because of the substantial discretionary and public-order element in such decisions, proceedings relating to them are not to be seen as determining the civil rights of the person concerned’.⁶⁵

⁵⁹ *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1; *Uppal and Others v United Kingdom* (1979) 17 DR 149; *Bozano v France* (1984) 39 DR 119; *Urrutikoetxea v France* (1996) 87-B DR 151; and *Kareem v Sweden* (1996) 87-A DR 173.

⁶⁰ Sheona York, ‘Deportation of foreign offenders - a critical look at the consequences of *Maaouia* and whether recourse to common-law principles might offer a solution’ (2017) 31(1) *Journal of Immigration, Asylum and Nationality Law* 8, 17.

⁶¹ The UK has not ratified this Protocol.

⁶² The explanatory note to Protocol 7 emphasises that the Protocol does not preclude the procedural protections afforded by Articles 3, 8 and 13 ECHR.

⁶³ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42, [16]. The dissenting judges did not think it reasonable to assume that the statement in the explanatory report was as an endorsement of the jurisprudence on the non-application of Article 6. Nor did they think it reasonable to imply that the Protocol was adopted because Article 6 had been found not to apply to expulsion cases.

⁶⁴ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42 [38].

⁶⁵ The ECtHR further considered that exclusion orders ‘constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge’. *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 4 [39]. However, ‘the situation would be different if the order for deportation were made by a court following a conviction for a criminal offence and formed

There was persuasive dissent at the time of the *Maaouia* ruling. Judges Loucaides and Traja disagreed with the ECtHR's findings, offering a more convincing analysis. The dissenting Judges were concerned that the ECtHR adopted the Commission's jurisprudence without any analysis of the Commission's reasoning.⁶⁶ They observed that a restrictive reading of 'civil rights' was inconsistent with the expansive interpretation of Article 6, particularly with reference to the implied right of access to court. Indeed, it is the ECtHR's opinion that 'the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 para. 1 (art. 6-1) of the Convention restrictively.'⁶⁷ By excluding asylum-claimants from Article 6 protection, the implication is that refugees are conceptually external to democratic societies. The non-entitlement to Article 6 pre-emptively positions asylum-seekers as non-refugees. This is contrary to the spirit of international human rights and international refugee law. Moreover, the doctrine of the margin of appreciation in other ECHR rights (such as Article 8 ECHR) provides a mechanism for protecting sovereignty in immigration matters while including immigrants as rights-bearers subject to democratic decision-making.

The dissenting judges in *Maaouia* found that 'civil' was better interpreted as meaning 'non-criminal'. Unlike the majority, the dissenting Judges examined the wording of Article 6 in the light of its legal history.⁶⁸ Such a reading pointed to a liberal view, which 'enhances individual rights' and is 'more in line with the object and purpose of the Convention.'⁶⁹ The dissenting Judges found it 'absurd to accept that the [Article 6] judicial safeguards were intended only for certain rights...and not for all legal rights...including those *vis à vis* the

an integral part of the proceedings resulting in the conviction.' As per the concurring opinion of Sir Nicolas Bratza at p. 16.

⁶⁶ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42, dissenting opinion of Judge Loucaides joined by Judge Traja, p. 21.

⁶⁷ *Moreira de Azevedo v. Portugal* (1991) 13 EHRR 721, [66].

⁶⁸ Armstrong observes that: 'There is a very powerful argument that the drafters of the Convention never intended Art. 6 to be confined to "civil" proceedings, as has come to be assumed. A number of writers, including in particular Frank C Newman, have shown that the model for Art. 6 was Art. 14 of the International Covenant on Civil and Political Rights (ICCPR). Indeed, the French version of Art. 6 is precisely the same as the French version of Art. 14 ("contestations sur ses droits et obligations de caractère civil"). The English version of Art. 14, by contrast, is "obligations in a suit at law", with no mention of "civil" at all.' Nick Armstrong, 'LASPO, Immigration and *Maaouia v United Kingdom* (2013) 18(2) *Judicial Review* 177, 179-180; Frank C. Newman, 'Natural Justice, Due Process and the New International Covenants on Human Rights: Prospectus' (1967) (Winter) *Public Law* 274.

⁶⁹ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42, dissenting opinion of Judge Loucaides joined by Judge Traja, p. 19. See also Article 31 of the Vienna Convention on the Law of Treaties.

administration, where an independent judicial control is especially required for the protection of individuals against the powerful authorities of the State.’⁷⁰

Loucaides and Traja were doubtful of the cogency of the ECtHR’s reliance on Article 1, Protocol 7 because ‘Protocols add to the rights of the individual’ and ‘do not restrict or abolish them.’⁷¹ The inference drawn by the ECtHR’s from Article 1, Protocol 7, to exclude Article 6, is further called into question by the fact that Strasbourg held previously that Article 1, Protocol 7 did not protect asylum-claimants. This is because asylum-claimants cannot be said to be ‘lawfully resident’ in accordance with this provision.⁷² H el ene Lambert has observed that Article 1, Protocol 7 ‘has never been invoked successfully by refugees’.⁷³ The dissenting Judges also considered that the special provisions were limited to procedural guarantees *vis   vis* the *administrative authorities* and could not be assumed to substitute the *judicial guarantees* of Article 6.⁷⁴

Loucaides and Traja further highlighted, crucially, that the interpretation of ‘civil rights’ has, in certain cases, been extended to public law matters. For example, Strasbourg has found Article 6(1) to apply to administrative claims for social security, despite the Commission originally finding such rights outside of scope.⁷⁵ The distinction between private and public law rights has thus become increasingly stretched and blurred.⁷⁶ Strasbourg has clarified that Article 6 is not limited to ‘private-law disputes in the traditional sense’ and ‘[o]nly the character of the right at issue is relevant.’⁷⁷ Whether a right is a civil right ‘must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned’.⁷⁸ The ECtHR ‘must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States’.⁷⁹ If the asserted right is of a personal and individual nature then

⁷⁰ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42, dissenting opinion of Judge Loucaides joined by Judge Traja, p. 20.

⁷¹ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42, dissenting opinion of Judge Loucaides joined by Judge Traja, p. 22.

⁷² *ST v France* Appl no 20649/92 (ECtHR, 8 February 1993).

⁷³ H el ene Lambert, ‘The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities’ (2005) 24(2) *Refugee Survey Quarterly* 39, 46.

⁷⁴ *Maaouia v France* (Grand Chamber) (2001) 33 EHRR 42, dissenting opinion of Judge Loucaides joined by Judge Traja, p. 22-23.

⁷⁵ *Bentham v the Netherlands* (1986) 8 EHRR 1; *Feldbrugge v. Netherlands* (1986) 8 EHRR 425; *Deumeland v Germany* (1986) 8 EHRR 448; *Salesi v Italy* (1993) 26 EHRR 187.

⁷⁶ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [58].

⁷⁷ *K onig v. Germany* (1978) 2 EHRR 170, [90].

⁷⁸ *K onig v. Germany* (1978) 2 EHRR 170, [89].

⁷⁹ *K onig v. Germany* (1978) 2 EHRR 170, [89].

this will bring it closer to falling within the civil sphere.⁸⁰ The ECtHR has held that restrictions on the privacy of oral communications between a prisoner and his lawyer fell under the notion of Article 8 ‘private life’. Despite the public nature of the restriction, its purpose being the order and security of the prison, the ECtHR found Article 6(1) applicable because the substance of the asserted right was of a predominantly personal and individual character.⁸¹ There have been opportunities for Strasbourg and the UK courts to reverse *Maaouia* but, unfortunately, the courts have shown reluctance to bring asylum-seekers and migrants firmly within the scope of Article 6. Neither Strasbourg, nor the domestic courts, are strictly bound to follow *Maaouia*.⁸² There is, therefore, potential for a new body of jurisprudence to emerge.

2.2.5 A missed opportunity to revisit *Maaouia*

The trend of the ECtHR has been to find more and more situations falling within the ambit of ‘civil rights’ under Article 6(1). However, Strasbourg has resisted expanding the scope of Article 6(1) to apply to immigration or asylum decisions, rejecting applications that asylum proceedings were unfair under Article 6(1) without proper consideration.⁸³ This narrow interpretation excludes recent arrivals from equal protection of law, implying a residence requirement. A residence test (requiring proof of connection to the UK) is inconsistent with accepted human rights standards, the principles of equality before law and non-discrimination.⁸⁴ In 2014, in *N. and Others v UK*, the ECtHR managed to evade the question of whether Article 6 might apply to asylum cases by assessing only the Article 13 ECHR complaint.⁸⁵ Article 13 provides the right to an effective remedy. However, Article 6 provides more extensive procedural protection than Article 13. An Article 13 claim can also only exist alongside an arguable claim that another Convention right has been violated.

⁸⁰ *Feldbrugge v. Netherlands* (1986) 8 EHRR 425, [37].

⁸¹ *Altay v. Turkey (No. 2)* (2019) ECHR 276, [59]-[69].

⁸² See discussion at section 2.9 of this Chapter.

⁸³ *Eskelinen v Finland* (2005) 45 EHRR 43.

⁸⁴ See, *R (on the application of The Public Law Project) v Lord Chancellor* [2016] UKSC 39. Also see *East African Asians v United Kingdom* (1973) 3 EHRR 76; *Vilvarajah and Others v the United Kingdom* (1992) 14 EHRR 248; *Chahal v. the United Kingdom* (Grand Chamber) (1997) 23 EHRR 413; *D. v the United Kingdom* (1997) 24 EHRR 423; *Abdulaziz, Cabales and Balkandali v the United Kingdom* (Plenary) (1985) 7 EHRR 471; *M.S.S. v. Belgium and Greece* (Grand Chamber) (2011) 53 EHRR 2; *Hirsi Jamaa and Others v Italy* (Grand Chamber) (2012) 55 EHRR 21; *Regina v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55.

⁸⁵ *N. and Others v UK* Appl no 16458/12 (ECtHR, 15th April 2014). The applicant was represented by The AIRE (Advice on Individual Rights in Europe) Centre.

Moreover, Article 13 was not incorporated into domestic law by the Human Rights Act 1998.⁸⁶ Damages cannot therefore be claimed domestically in respect of a breach of Article 13. Article 13 is, therefore, no substitute for the more robust Article 6 protection, particularly in the domestic context.

The ECtHR's decision in *N. and Others* was a missed opportunity to clarify the parameters of Article 6 in view of the expansion of EU law. *N* argued that her disclosure that she had been raped met the requirements of Article 32(4) of the EU Procedures Directive. This provision conferred a right to have a new application for asylum considered. *N* observed that EU law was domestic law for the purposes of the ECHR and that the provision was enforceable by means of a judicial remedy, in accordance with Article 47 of the Charter.⁸⁷ *N* complained that failure to provide her with a hearing of her fresh claim violated Article 6(1) ECHR because 'where a State conferred rights which could be enforced by means of a judicial remedy, these could, in principle be regarded as civil rights'.⁸⁸ By failing to make a decision on the Article 6 complaint, the ECtHR has left the door open for fresh challenges that raise the same or similar arguments.⁸⁹ However, as discussed below, while the UK courts have been critical of Strasbourg's flawed reasoning for the non-application of Article 6(1) to asylum cases, the UK courts are yet to depart from its jurisprudence.

⁸⁶ Leaving the Human Rights Act 1998, s 7, as the only 'effective remedy' in such cases. Section 7 of the HRA provides that: 'A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings'.

⁸⁷ *N. and Others v UK* Appl no 16458/12 (ECtHR, 15th April 2014), [81] citing *Aristimuno Mendizabal v France* Appl no 51431/99 (ECtHR, 17 January 2006). Following the entry into force of the Lisbon Treaty. Article 32(4) of Council Directive 2005/85/EC; *Aristimuño Mendizabal v. France*, no. 51431/99, § 79, 17 January 2006; *Oršuš and Others v. Croatia* (Grand Chamber) (2011) 52 EHRR 7. Article 47 of the EU Charter combines, and is based upon, Article 13 ECHR (the right to an effective remedy) and Article 6 ECHR (the right to a fair hearing). It includes an express right to legal aid, albeit not an absolute right. However, Article 47 is limited by the scope of EU law.

⁸⁸ *N. and Others v UK* Appl no 16458/12 (ECtHR, 15th April 2014), para. 81 citing *Oršuš and Others v Croatia* (2011) 52 EHRR 7.

⁸⁹ *N. and Others v UK* Appl no 16458/12 (ECtHR, 15th April 2014). The ECtHR considered, at [128], that the 'Article 6 complaint is, essentially, a reformulation of her complaint under Article 13 that the holding of a hearing only after her removal did not allow proper consideration of her Article 3 complaint. The Court therefore considers it appropriate to assess the complaint under Article 13 only'.

2.3 Domestic case law and anomalous results

The UK courts have interpreted the complicated Strasbourg Article 6(1) jurisprudence as, generally, meaning that Article 6 will come into play depending upon the ‘nature and purpose of the administrative action’.⁹⁰ According to Stanley Burton J:

The principle behind the distinction between decisions determinative of rights and those made in the exercise of a discretion is not hard to see. Not all decisions made by governmental bodies involve objectively definable rights and obligations...A line has to be drawn between those decisions which, in a democratic society, must be given to an independent tribunal and those which need not.⁹¹

However, ‘the line between a discretionary benefit and one to which the citizen may be entitled may not be an easy one.’⁹² It is interesting, and somewhat telling, that the High Court used the term ‘citizen’, rather than ‘individual’, for example. This echoes Strasbourg’s framing of Article 6, by implication of the non-application of Article 6 to asylum and immigration procedures, as narrowly constructed through a citizen’s right rather than a human right.

In the year following the ECtHR’s judgment in *Maaouia*, there was a domestic ruling that a decision to withdraw financial support from asylum-seekers involved the determination of civil rights within the meaning of Article 6(1).⁹³ Stanley Burton J noted that it ‘was common ground...that rights to social security payments and the like are civil rights for the purposes of Article 6, even though the rights exist under public law rather than private law.’⁹⁴ He considered that the withdrawal of support from destitute asylum-seekers, in the absence of other means, would violate Article 3 ECHR. This fortified his view that destitute asylum-seekers have an enforceable claim, which is a civil right within the meaning of Article 6, to asylum support.⁹⁵ The anomalous result is that asylum-seekers are entitled to the judicial guarantees under Article 6 in respect of disputes over asylum support but not in respect of disputes over their claims for asylum. Asylum claims have long asserted legal rights under

⁹⁰ *Secretary of State for the Foreign Office and Commonwealth Affairs v E Maftah and A Khaled* [2011] EWCA Civ 350, [24]; *R(A) v Croydon LBC* [2009] UKSC 8.

⁹¹ *R. (on the application of Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852, [27].

⁹² *R. (on the application of Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852, [28].

⁹³ *R. (on the application of Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852. The Leggatt Report on the Reviews of Tribunals was published around the same time.

⁹⁴ *R. (on the application of Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852, [25].

⁹⁵ *R. (on the application of Husain) v Asylum Support Adjudicator* [2001] EWHC Admin 852, [54].

the Refugee Convention and the ECHR, which are directly effective under domestic law.⁹⁶ It is difficult to reason that these enforceable claims are anything but civil rights. The discussion below argues that, in view of the direct effect of EU law and the existence of a mandatory right to asylum under EU law, the question of whether asylum decisions invoke Article 6 has been moved beyond doubt.

2.3.1 *The transformative potential of EU law*

This section demonstrates that it is time to depart from *Maaouia* due to the transformative potential of EU law. The impact of delay upon the lives of asylum-seekers can be devastating but the Court of Appeal missed the opportunity in *MK (Iran)* to depart from the inadequate and unsound Strasbourg jurisprudence. The Court of Appeal relied on the *Ullah* principle (explained below) to refuse to depart from *Maaouia*. However, domestic authorities suggest that the *Ullah* principle may be departed from if Strasbourg jurisprudence is wrong or not particularly helpful.⁹⁷ In the case of *MK (Iran)*,⁹⁸ Home Office delay in processing an asylum claim had a harmful effect on the claimant's mental health.⁹⁹ The claimant (whose age was disputed but who was eventually accepted as a child) argued that the delay caused or aggravated his severe mental condition and prevented him from presenting his case during a 'window of lucidity'.¹⁰⁰ With 'considerable reluctance', the Court of Appeal followed *Maaouia* and refrained from developing a more generous domestic interpretation of Article 6(1).¹⁰¹ The argument in this chapter supports and builds upon the 'powerful' argument submitted by the claimant's lawyer in *MK (Iran)*.¹⁰² The claimant's lawyer argued that the right to asylum under the EU Qualification Directive elevates the asylum claim to a 'civil right', entitling the claimant to determination of that right within a reasonable time under

⁹⁶ Notably, Article 2 (right to life), Article 3 (prohibition against torture and inhuman and degrading treatment) and Article 8 (right to a private and family life) ECHR. Article 5 (right to liberty) might also be raised where asylum seekers are detained. The EU Qualification Directive and Procedures Directive are also applicable.

⁹⁷ *Manchester City Council v Pinnock* [2010] UKSC 45, [48]; *A v SSHD* [2004] UKHL 56, [92].

⁹⁸ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115.

⁹⁹ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [76] (Sedley LJ).

¹⁰⁰ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [11]. Carnwarth LJ, at [31], summarised the evidence as follows: 'the overall impression of the evidence is reasonably clear. There was a serious deterioration of his condition from the end of 2004, a brief period of improvement while he was a resident inpatient at the end of 2005, followed by renewed deterioration during his period of leave until the end of February 2006. Thereafter the same problems continued with some fluctuation but without significant change until Dr Lister reported in June 2007, and thereafter.'

¹⁰¹ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [70] (Sedley LJ).

¹⁰² *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [75].

Article 6(1).¹⁰³ The Court of Appeal considered that this argument was ‘capable of changing the decided or assumed relationship of article 6 to asylum claims.’¹⁰⁴ The novel argument was laid out as follows. Refugee status and subsidiary protection are fully incorporated into domestic law by virtue of the Qualification Directive. The Qualification Directive provides, in mandatory terms, that member states ‘shall grant refugee status’ to someone who qualifies.¹⁰⁵ Refugees are not only granted stay but are entitled to economic and social rights under domestic law, for example, to work and to claim benefits.¹⁰⁶ Determination of the right to asylum is, therefore, determination of a civil right within the meaning of Article 6(1).

Carnwath LJ in *MK (Iran)* agreed with Collins J in *MNM* that ‘a criterion based on the “discretionary nature of a decision” is not readily applicable to claims to asylum’.¹⁰⁷ Nonetheless, citing the ‘mirror’ principle in *Ullah*, the Court of Appeal felt bound to follow the ‘consistent line of [Strasbourg] authority culminating in the Grand Chamber decision in *Maaouia*, which has been treated as applying to refugee status.’¹⁰⁸ However, the *Ullah* principle is problematic. Strasbourg jurisprudence is not formally binding, and Strasbourg does not itself follow a strict rule of precedent.¹⁰⁹ Section 2 of the HRA requires the UK Courts to ‘take into account’ Strasbourg jurisprudence. Lord Bingham interpreted section 2 HRA in *Ullah* as a duty of domestic courts ‘to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.’¹¹⁰ The ‘no more’ part of the *Ullah*

¹⁰³ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [70] (Sedley LJ): ‘Mr Bedford has advanced a formidable argument that article 13 of the Qualification Directive has introduced into EU law, and hence into the law of all EU member states, an affirmative right to asylum. The obligation which the article spells out may be a public law duty, but it is an obligation which arguably generates a correlative individual right. In the domestic law of the United Kingdom and, I suspect, in civil law systems likewise, it is not easy to see how such a right, if it exists, can be anything but a civil right.’ Where there is an alleged violation of EU law, Article 47 of the EU Charter confers a right to a ‘fair hearing within a reasonable time’.

¹⁰⁴ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [75] (Sedley LJ).

¹⁰⁵ Article 13 of the Procedures Directive.

¹⁰⁶ Article 26 and Article 28 of the Procedures Directive. This point is arguable because Sir Nicholas Bratza in his concurring opinion in *Maaouia* found that personal and economic implications are not determinative.

¹⁰⁷ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [58].

¹⁰⁸ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [58].

¹⁰⁹ Under Article 46 of the ECHR, the United Kingdom is only bound to ‘abide by’ rulings of the Strasbourg Court in cases in which it has been involved as a party to proceedings. Lewis also highlights that ‘decisions of the Strasbourg institutions are often inherently unsuited to being followed as most judgments are essentially declaratory in nature.’ Jonathan Lewis, ‘The European Ceiling on Human Rights’ (2007) 4 Public Law 720, 731.

¹¹⁰ *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 350, [20]. And as per Lord Brown’s in *Al-Skeini*: ‘I would respectfully suggest that last sentence could as well have ended: “no less, but certainly no more”,’ *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, [105].

principle has been subject to academic criticism.¹¹¹ The ECHR provides a ‘floor of rights.’¹¹² Domestic courts should not use Strasbourg jurisprudence to impose a ‘ceiling on human rights.’¹¹³

There has been some judicial resistance to *Ullah*. Laws LJ expressed his ‘hope’ that *Ullah* ‘may be revisited by the Supreme Court’ because there is ‘a great deal to be gained from the development of a municipal jurisprudence of the Convention rights.’¹¹⁴ A more generous domestic interpretation of an ECHR article does not affect the content of the ECHR right and thus does not disrupt uniformity.¹¹⁵ Indeed, Strasbourg’s doctrine of the margin of appreciation grants national authorities flexibility to interpret ECHR obligations.¹¹⁶ One of the key reasons for enacting the HRA was that it would enable domestic judges ‘to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe’, providing Strasbourg with a ‘useful source of information and reasoning for its decisions’.¹¹⁷ Lord Philips considered in *Horncastle* that there would be occasions where the UK courts would ‘decline to follow the Strasbourg decision giving reasons for adopting this course’, resulting in ‘what may prove to be a valuable dialogue between [the UK court] and the Strasbourg Court’.¹¹⁸ On the basis of the principle of dialogue, Strasbourg could and should, therefore, change its approach (taking into account national interpretations) in relation to asylum and the non-application of Article 6.¹¹⁹ The *Ullah* principle limits the

¹¹¹ As Bjorge observes, ‘[d]effering or opting not to adopt an interpretation which would fall foul of the Ullah rule seems...tantamount to go with the smallest common denominator, resulting more often than not in an interpretation which falls short of rigorous rights protection’. Eirik Bjorge, ‘National Supreme Courts and The Development of ECHR Rights (2011) 9(1) International Journal of Constitutional Law 5.

¹¹² HL Deb 18 November 1997 vol 583 col 510 (per the Lord Chancellor).

¹¹³ See Jonathan Lewis, ‘The European Ceiling on Human Rights’ (2007) 4 P.L. 720; Francesca Klug, Helen Wildbore, ‘Follow or Lead? The Human Rights Act and the European Court of Human Rights’ [2010] 6 European Human Rights Law Review 621.

¹¹⁴ *R (on the application of the Children’s Rights Alliance for England) v Secretary of State for Justice* [2013] EWCA Civ 34, [62]-[64].

¹¹⁵ Jonathan Lewis, ‘The European Ceiling on Human Rights’ (2007) 4 P.L. 720; Francesca Klug, Helen Wildbore, ‘Follow or Lead? The Human Rights Act and the European Court of Human Rights’ [2010] 6 European Human Rights Law Review 621.

¹¹⁶ *Handyside v United Kingdom* (1979) 1 EHRR 737.

¹¹⁷ Home Office, *Rights Brought Home: The Human Rights Bill* (Cm 3782, 1997), para 1.14.

¹¹⁸ *R v Horncastle & Others* [2009] UKSC 14, [11].

¹¹⁹ For example, in *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1, the ECtHR found use of hearsay evidence as the ‘sole or decisive’ evidence against a defendant violated Art 6(1) in conjunction with Article 6(3). The Grand Chamber upheld the violation. Then, in *Horncastle v UK* (2015) 60 EHRR 31, the Grand Chamber retreated and accepted the principle set out in UKSC’s *Horncastle* judgement. On this basis, the GC found no violation of Article 6 despite use of hearsay evidence leading to the defendant’s conviction.

contribution of the UK courts to international human rights jurisprudence.¹²⁰ Other Council of Europe countries have not adopted principles equivalent to *Ullah* and the principle has prevented the UK courts from developing indigenous human rights jurisprudence.¹²¹

As I have shown, domestic authorities suggest that the *Ullah* principle may be departed from if Strasbourg jurisprudence is wrong or not particularly helpful.¹²² The Strasbourg jurisprudence on the relationship between Article 6(1) and asylum claims is based upon inadequate and unsound reasoning. As Sedley LJ noted, what appears to place asylum outside Article 6 is ‘the assumption (I use the word advisedly, for the proposition is not reasoned out) in *Eskilainen v Finland* and *IN v Sweden* that the effect of *Maaouia* is to assimilate asylum claims to deportation and removal proceedings.’¹²³ In other words, the exclusion rests upon an assumption that asylum-claimants are external to the community and as persons to be removed. They are not presumptively regarded as potential refugees and citizens until determined otherwise. There is domestic authority that asylum is a special category that is distinguishable because decisions are not discretionary. This is reinforced by Parliament’s decision in 2012 to retain legal aid for asylum claims and Parliament’s decision in 2014 to retain rights of appeal against asylum refusals.¹²⁴ Given that ‘the autonomous meaning of civil rights has no very clear boundary’, and in light of the more firmly asserted right to asylum under the Qualification Directive, Sedley LJ suggested that it is time for Strasbourg to revisit *Maaouia*.¹²⁵ The *Maaouia* ruling is nearly twenty-years old. Domestic courts may depart from *Ullah* and decline to follow Strasbourg jurisprudence if that jurisprudence is old.¹²⁶ Sedley LJ considered that:

So long as, in the UK's dualist constitution, asylum was no more than a treaty obligation, no right at all could be said to exist. So long as its application was an

¹²⁰ R. Clayton, ‘The Human Rights Act Six Years On: Where Are We Now?’ (2007) 1 European Human Rights Law Review 11.

¹²¹ Jonathan Lewis, ‘The European Ceiling on Human Rights’ (2007) 4 P.L. 720; Francesca Klug, Helen Wildbore, ‘Follow or Lead? The Human Rights Act and the European Court of Human Rights’ [2010] 6 European Human Rights Law Review 621, 732.

¹²² *Manchester City Council v Pinnock* [2010] UKSC 45, [48]; *A v SSHD* [2004] UKHL 56, [92].

¹²³ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115, [71]. Strasbourg has so far not apparently been invited to consider the effect of the Qualification Directive. There was no reference to any argument based upon the Qualification Directive in *IN v Sweden* Application no 1334/09, (ECtHR, 15th September 2009) or *Eskilinen v Finland* (2005) 45 EHRR 43. However, Carnwath LJ, [63], speculated that, ‘it would be surprising if at least some members of the court would not have had it in mind, and referred to it if they thought it relevant.’

¹²⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Immigration Act 2014.

¹²⁵ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115 [72].

¹²⁶ *R (on the application of Quila and Others) v Secretary of State for the Home Department* [2011] UKSC 45, [43].

administrative function, its grant could be categorised as discretionary; though with the introduction of a judicial appeal system this has long since ceased to be a sufficient description. But it remained at least arguable that, while there might be a procedural right to a fair hearing, there was still no substantive right to asylum. It is distinctly possible that the Qualification Directive has changed all that.¹²⁷

If it is time to revisit *Maaouia*, then the UK courts should not wait for Strasbourg but should take the lead. In any event, the UK's asylum determination system has evolved as a legal model that invokes Article 6, even if EU law did not have direct effect.

2.3.2 A domestic legal model of asylum determination

This section discusses how the judicialisation of asylum determination in the UK also provides impetus for departing from *Maaouia*. York picks up on Sedley LJ's point about the judicialisation of asylum and immigration matters.¹²⁸ She highlights the development of a formal appellate system, expansion of judicial review, and availability of legal aid representation on appeal.¹²⁹ She argues that these developments 'amount to the state's formal relinquishing of absolute control over its borders, acknowledging that the status of migrants *as law's subjects* is no longer so sharply different from that of citizens.'¹³⁰ York concludes that, in light of the increasing formalisation and judicialisation of immigration decisions, and in the absence of fully reasoned Strasbourg jurisprudence, it is difficult to maintain the non-application of Article 6(1).¹³¹ This is especially true for the special category of asylum decision-making. Robert Thomas has similarly observed that increasing complexity of law

¹²⁷ *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115 [73].

¹²⁸ Sheona York, 'Deportation of foreign offenders - a critical look at the consequences of *Maaouia* and whether recourse to common-law principles might offer a solution' (2017) 31(1) *Journal of Immigration, Asylum and Nationality Law* 8, 17. On the judicialisation of asylum see, also, Matthew J. Gibney 'The State of Asylum: Democratization, Judicialization and Evolution of Refugee Policy in Europe', (2001) *New Issues in Refugee Research Working Paper*, No. 50. See, also *Harrison v Secretary of State for the Home Department* [2003] EWCA Civ 432, [35], confirming that the immigration and asylum appellate system 'determine' legal rights.

¹²⁹ Sheona York, 'Deportation of foreign offenders - a critical look at the consequences of *Maaouia* and whether recourse to common-law principles might offer a solution' (2017) 31(1) *Journal of Immigration, Asylum and Nationality Law* 8, 17. See also the Supreme Court decision in *Alvi* that recognises the reduced discretion in immigration decision-making. *R (on the application of Alvi) v Secretary of State for the Home Department* [2012] UKSC 33.

¹³⁰ Sheona York, 'Deportation of foreign offenders - a critical look at the consequences of *Maaouia* and whether recourse to common-law principles might offer a solution' (2017) 31(1) *Journal of Immigration, Asylum and Nationality Law* 8, 18.

¹³¹ Sheona York, 'Deportation of foreign offenders - a critical look at the consequences of *Maaouia* and whether recourse to common-law principles might offer a solution' (2017) 31(1) *Journal of Immigration, Asylum and Nationality Law* 8, 17.

and increasing judicial oversight, has judicialised asylum decision-making.¹³² Asylum appeals fall within a ‘legal model of decision-making in which hearings are adversarial contests with both sides appearing with representation, the appellant delivers oral evidence and is cross-examined.’¹³³ Normatively, this model ‘views tribunals as part of the judicial system’ and ‘prioritises the need to ensure the fair, correct and independent treatment of each individual case.’¹³⁴ The overriding objective of the asylum tribunal is to ‘deal with cases fairly and justly.’¹³⁵ Thomas has observed that ‘tribunals, as court substitutes, ought to be informed by judicial values.’¹³⁶

As explained in Chapter 2, the UK Parliament first enshrined an enforceable legal right to asylum in 1905.¹³⁷ Parliament clarified in 1993 that asylum (as defined under the Refugee Convention) is a legal right enforceable under domestic law. Parliament clarified again in 1998 (under the Human Rights Act and by virtue of Articles 2, 3 and 8 ECHR) that asylum decisions determine fundamental legal rights. The Qualification Directive and the entry into force of the Lisbon Treaty seem to settle the question of whether there is a substantive ‘civil’ right to asylum and the flawed reasoning in *Maaouia* can no longer be sustained. The existence of an asylum appeals system and legal aid provision strengthens rather than diminishes this argument. A debilitating reading of *Ullah* should be resisted as it unnecessarily stunts the development of domestic and international human rights jurisprudence.

So far, I have argued that *Maaouia* was wrong and is, in any event, out of date, as the law has evolved to engage Article 6 in respect of (non-discretionary) asylum decisions. The discussion below explores the temporal aspects of Article 6 and how the UK courts have interpreted temporal fairness despite the exclusion of Article 6. Article 6 enshrines the express requirement for decisions to be made within a reasonable time and the implied

¹³² Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) Legal Studies, 477.

¹³³ Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) Legal Studies, 477.

¹³⁴ Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) Legal Studies, 472.

¹³⁵ Unofficial consolidated version of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, as amended by S.I. 2017/1168 and reflecting the disapplication of Schedule 1 (fast track rules), s 2(1). See, also, the Franks Report which stated that tribunals should be informed by the values of openness, fairness and impartiality. The Franks Committee, *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 2018, 1957), para 41.

¹³⁶ Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) Legal Studies, 471.

¹³⁷ Aliens Act 1905.

requirement of access to legal-aid-time. In the absence of Article 6 protection, the UK courts have, nonetheless, interpreted fairness in asylum cases to include the requirements that decisions are made within a reasonable time and that there is access to legal-aid-time. The analysis finds that these temporal issues have been key factors in shaping the fairness jurisprudence but that the courts have not adequately guaranteed asylum claimants their temporal fairness rights.

3. THE TEMPORAL DIMENSIONS OF JURIDICAL FAIRNESS

3.1 Article 6 ECHR as a temporal right

The strength of Article 6 ECHR is in its temporal protections. The UK's immigration and asylum tribunal, in the starred decision of *MNM*, considered that whether Article 6(1) applied to tribunal proceedings would 'make little if any difference'.¹³⁸ The tribunal highlighted that it is an independent and impartial adjudicator, designed to give fair and public hearings. It stated that any unfairness would be corrected by the tribunal or the Court of Appeal, applying the same tests as would be applicable under Article 6(1). The tribunal admitted that '[t]he only advantage which Article 6(1) might confer is the *requirement that the hearing be held within a reasonable time*'.¹³⁹ However, the tribunal concluded that the issue 'should not, unless some disaster occurs, arise in any case having regard to the timetables and procedures laid down by the adjudicators and the tribunal.'¹⁴⁰

However, disaster has occurred. Since 2013, there has been a general trend of growing backlog and delay before the tribunal, to the point that the system has been described as on the 'verge of crisis'.¹⁴¹ The average length of time to hear and decide an

¹³⁸ *MNM v Secretary of State* [2000] UKIAT 00005, [16]. The Surendran guidelines for adjudicators on how to conduct cases in the absence of a Home Office representative were incorporated in this determination and appended. The tribunal asserted, at [19], that the Surendran guidelines 'must be observed. If they are not, there is a real danger that the hearing will be regarded as having been conducted unfairly.' *MNM* was handed down soon after *Maaouia* by Collins J. The Court of Appeal found that, 'The full Court has now determined the issue in a decision dated 5 October 2000... The Court has upheld the existing jurisprudence and decided that the distinction between public and private law rights reflected by the use of the word 'civil' means that administrative decisions concerning entry into or removal from a state are not within Article 6(1)'. *MNM v Secretary of State* [2000] UKIAT 00005, [11].

¹³⁹ *MNM v Secretary of State* [2000] UKIAT 00005, [16] (emphasis added).

¹⁴⁰ *MNM v Secretary of State* [2000] UKIAT 00005, [16].

¹⁴¹ John Hyde, 'Immigration appeal delays "shocking" as backlog reaches 63,000' (The Law Society Gazette, 22 December 2016); Robert Thomas, 'Immigration appeals and delays: On the verge of a

immigration appeal has increased to nearly a year.¹⁴² Asylum appeals are determined more swiftly (because the tribunal prioritises these cases) but the average waiting time for asylum appeals has also increased starkly. In 2012, most asylum appeals were determined within 9 weeks.¹⁴³ In 2019, the average time for an asylum appeal to be determined was 31 weeks.¹⁴⁴ There was a reduction in the number of Immigration Judges in anticipation of a decline in appeals following the withdrawal of appeal rights under the Immigration Act 2014.¹⁴⁵ Indeed, the number of appeals fell but the time taken to determine appeals (including asylum and human rights appeals) increased substantially.¹⁴⁶ In addition to the cut in the number of Immigration Judges, there were significant cuts to legal aid in 2013.¹⁴⁷ The shortage of Immigration Judges and legal representatives have no doubt prompted adjournments and delay.¹⁴⁸ Rather than decrease the asylum caseload, it is likely that the restrictions to legal aid, coupled with reduced appeal rights, will result in immigration cases being dressed up as asylum and human rights claims. As Stephen Meili's research has highlighted, 'the cuts will likely *increase* the number of asylum claims because seeking asylum will be one of the only government funded ways to seek to remain in the country.'¹⁴⁹

Notwithstanding the non-application of Article 6 ECHR, the Court of Appeal in *MK (Iran)* noted that there was a public law duty to decide asylum applications within a

crisis?' (UK Administrative Justice Institute, 18 May 2017) < <https://ukaji.org/2017/05/18/immigration-appeals-and-delays-on-the-verge-of-a-crisis/>> accessed 28 September 2019.

¹⁴² The average time to clear appeals across all categories was 46 weeks in 2018. Ministry of Justice, Tribunals and Gender Recognition Statistics Quarterly, January to March 2018 (Provisional) (published 14 June 2018), 6.

¹⁴³ Ministry of Justice, Quarterly Tribunals Statistics: 1 January to 31 March 2012 (published 28 June 2012), p. 14.

¹⁴⁴ 40 weeks for Human Rights appeals. Ministry of Justice, Tribunal Statistics Quarterly: January to March 2019 (Provisional) (published 13 June 2019), p. 5.

¹⁴⁵ Robert Thomas, 'Immigration appeals and delays: On the verge of a crisis?' (UK Administrative Justice Institute, 18 May 2017) < <https://ukaji.org/2017/05/18/immigration-appeals-and-delays-on-the-verge-of-a-crisis/>> accessed 28 September 2019.

¹⁴⁶ Robert Thomas, 'Immigration appeals and delays: On the verge of a crisis?' (UK Administrative Justice Institute, 18 May 2017).

¹⁴⁷ Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into effect on 1 April 2013.

¹⁴⁸ Frances Meyler and Sarah Woodhouse, 'Changing the immigration rules and withdrawing the 'currency' of legal aid: the impact of LASPO 2012 on migrants and their families' (2013) 35(1) *Journal of Social Welfare and Family Law* 55, 71.

¹⁴⁹ Stephen Meili, 'U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law' (2013) 36 *Boston College International and Comparative Law Review* 1123, 1138.

reasonable time.¹⁵⁰ Carnwarth LJ cited his own dicta from a previous case that, even though there were no specific time limits for the handling of asylum applications, statute implies that applications should be dealt with within a reasonable time. He noted that reasonable time is a ‘flexible concept’ but stressed that in resolving competing demands ‘fairness and consistency’ are ‘vital considerations.’¹⁵¹ Nonetheless, Carnwarth LJ highlighted that ‘the dividing line’ between reasonable time and undue delay ‘may often not be easy to define’.¹⁵² Moreover, common law fairness is nebulous and its sliding scale risks a purely administrative approach.¹⁵³ Recourse to common law fairness is, therefore, no substitute for the clearer, judicial standards of Article 6.

Procedural protections exist under EU law.¹⁵⁴ The Common European Asylum System (CEAS) is a unique regional response to asylum matters. The ongoing EU project to develop a harmonised asylum system provides enforceable protection through regulations and directives and the Court of Justice of the European Union (CJEU). The CEAS is in its third phase of development. However, the UK’s participation in the CEAS has been selective and the UK will withdraw from the CEAS following Brexit. After Brexit, some of the key CEAS measures, which the UK had opted-in to (namely, the Asylum Procedures and Asylum Qualification Directives), will continue to have effect as part of UK law (during the transitional phase and until the UK legislates to change the law).¹⁵⁵ Judgments of the CJEU will act as persuasive authority and therefore continue to have relevance.¹⁵⁶ Article 23(2) of the EU Procedures Directive requires asylum cases to be concluded ‘as soon as possible without prejudice to an adequate and complete examination’.¹⁵⁷ If a decision cannot be taken within six months, then the applicant must be informed of how long the decision will take. However, there is no obligation to decide the matter within that timeframe. Articles 15 and 16

¹⁵⁰ See also *Re HK (Infant)* 1967 1 QB 617. This immigration case cemented the duty of administrative bodies to act ‘fairly and dispassionately’ towards non-citizens.

¹⁵¹ *Home Secretary v S* [2007] EWCA Civ 546, [51].

¹⁵² *MK (Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 115 [35].

¹⁵³ See, for example, *McInnes v Onslow-Fane and Another* [1978] 1 W.L.R. 1520.

¹⁵⁴ The Common European Asylum System has developed from soft to hard law. The process of harmonisation is ongoing and continues to place further obligations on members states. See discussion in Chapter 2 on Fairness in Historical Context. Also see Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 367-434.

¹⁵⁵ Sections 2 and 4 of the European Union (Withdrawal) Act 2018 (as amended by the 2020 Act). The Qualification Directive and Procedures Directive — and EU-derived domestic law such as the Refugee of Persons in Need of International Protection (Qualification) Regulation 2006 which implement the Qualification Directive in the UK become retained EU law.

¹⁵⁶ See Colin Yeo and Susan Reardon-Smith, ‘The impact of Brexit on UK asylum law’ (2018) 32(2) *Journal of Immigration, Asylum and Nationality Law* 232.

¹⁵⁷ Procedures Directive 2005/85/EC.

of the Procedures Directive provide explicit rights to free legal representation at appeal stage for asylum-seekers. However, the right is subject to a means and merits tests and is not guaranteed in respect of any onward appeals or reviews. Unaccompanied minors are entitled to free legal representation throughout the asylum procedure. Article 39 of the Procedures Directive also guarantees a right to an effective remedy before a court or tribunal. However, Article 39 of the Procedures Directive grants member states discretion as regards the time limits of appeals. The recast Procedures Directive contains more safeguards with regard to accelerated procedures and appeal time limits. However, the UK did not opt-in to the recast Procedures Directive. Article 47 of the EU Charter echoes Article 6 ECHR and guarantees express rights to ‘reasonable time’ and ‘legal aid’.¹⁵⁸ Unlike Article 6 ECHR, Article 47 of the Charter is not restricted to the determination of civil rights. In the explanatory note to Article 47, it is stated that the wider scope is ‘one of the consequences of the fact that the Union is a community based on the rule of law.’¹⁵⁹ However, Article 47 is only binding when EU law is applicable.

As Marcelle Reneman contends, despite EU law permitting the use of accelerated asylum procedures, and failing to set minimum time limits for certain stages, EU law is violated if the speed of the process violates *substantive* EU law rights.¹⁶⁰ Namely, if speedy procedures result in the violation of the substantive right of *non-refoulement* or the substantive right to asylum.¹⁶¹ Reneman highlights that the principle of *non-refoulement* (as required by Article 3 ECHR and as interpreted by the ECtHR) is absolute and that the fundamental nature of the right to asylum implies that high procedural standards should be offered.¹⁶² Reneman’s legal arguments support the arguments made in this chapter regarding the transformative potential of EU law. The recognition of a substantive right to asylum under EU law has the potential to transform domestic asylum law by: (i) strengthening the domestic right to asylum when EU law has effect; and (ii) cross-pollination between EU law and the ECHR goes some way to compensate for the non-application of Article 6 ECHR in

¹⁵⁸ EU Charter of Fundamental Rights of the European Union (2000/C 364/01).

¹⁵⁹ Official Journal of the European Union C 303/17 - 14.12.2007.

¹⁶⁰ Marcelle Reneman, ‘Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant’s EU Right to an Effective Remedy’ (2014) 25(4) *International Journal of Refugee Law* 717.

¹⁶¹ See Article 21(1) of the Qualification Directive, Article 19 of the EU Charter, and ECJ Case C-465/07 *Elgafaji* [2009] ECR I-921, 28, and Article 18 of the EU Charter, which has binding force.

¹⁶² Marcelle Reneman, ‘Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant’s EU Right to an Effective Remedy’ (2014) 25(4) *International Journal of Refugee Law* 717, 741.

asylum cases.¹⁶³ Whether the UK decides to continue to replicate asylum standards under EU law after Brexit is yet to be seen.

It was Home Office policy to aim to process most asylum claims within six months.¹⁶⁴ The Home Office scrapped the six months target in 2019.¹⁶⁵ Inordinate delay in Home Office decision-making is notorious and widely reported, with some claimants waiting more than two decades for a decision.¹⁶⁶ Excessive delay is not the only temporal injustice experienced by asylum-seekers. A string of domestic legal challenges demonstrates that fast-tracked decisions disadvantage asylum-claimants and risk undermining fairness. Moreover, detained asylum-seekers are not guaranteed a speedy decision and there are reports of delayed decisions in detention and detainees subject to indefinite detention.¹⁶⁷ The UK is one of few countries to have no time limit on detention and uncertainty as to length of detention has been reported to have a significant impact on detainees' welfare.¹⁶⁸ The following section discusses key domestic decisions regarding the policy of detained fast-track asylum procedures.

Following *MK (Iran)*, the High Court in *MJ* found that an asylum claim made by an unaccompanied minor had not been determined within a reasonable time with disadvantageous consequences for the claimant.¹⁶⁹ This case is a good illustration of the importance of the promptness and time location of asylum decisions and the effect on substantive and procedural rights. The consequence of the three years delay was that the claimant had suffered 'conspicuous unfairness' because it meant that he lost entitlements to support, benefits, education and work.¹⁷⁰ The delay also meant that he lost an in-country right

¹⁶³ Note that application of Article 47 of the EU Charter is not contingent on citizenship.

¹⁶⁴ Introduced in 2014.

¹⁶⁵ See letter (dated March 2019) to the Home Affairs Select Committee from immigration minister Caroline Nokes, announcing the intention to abandon the six-month service standard. The Rt Hon Caroline Nokes MP, Minister of State for Immigration, Letter to the Home Affairs Select Committee, 21 June 2018.

¹⁶⁶ Kate Lyons, 'Revealed: asylum seekers' 20-year wait for Home Office ruling' *The Guardian* (17 August 2018).

¹⁶⁷ In the 2016 Shaw Report, in terms of detention timescales, the 'indefinite nature of detention was almost universally raised as making people more vulnerable and for its impact on mental health. There was strong support for a time limit for detention, starting at 28 days. A report to the Home Office by Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons* (Cm 9186, 2016), para 1.32.

¹⁶⁸ A follow-up report to the Home Office by Stephen Shaw, *Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons* (Cm 9661, 2019) para 1.18. The Government opposes a time limit.

¹⁶⁹ *MJ v SSHD* [2010] EWHC 1800 (Admin).

¹⁷⁰ *MJ v SSHD* [2010] EWHC 1800 (Admin), [47]. *S v SSHD* [2007] EWHC Civ 546 applied.

of appeal.¹⁷¹ The High Court accepted these points. The claimant's Counsel argued that the delay weakened the substantive claim due to diminished credibility over time.¹⁷² However, the High Court was not persuaded that the substantive result would have been different. The claimant was only successful in part. The High Court refused to award him damages due to the non-application of Article 6 ECHR and the fact that the EU Procedures Directive was not in force when the claimant made his asylum application.¹⁷³ The High Court considered that the obligation in EU law to determine an asylum application in reasonable time derives from both the Qualification and Procedures Directive.¹⁷⁴ Considering that timeliness was public policy and reasonable delay is a public law duty, the High Court did indicate, however, that, in the claimant's case, delay over twelve months crossed the line into unreasonable delay.¹⁷⁵ However, delay is not the only time issue to plague the UK's asylum system. Fast-track procedures have been found to be unfair and unlawful.

3.2 Accelerated procedures

For the Home Office, fast decisions became an essential characteristic of a 'fair' asylum system.¹⁷⁶ The justification was to create a speedy and efficient system that combats delays caused by 'bogus' claimants and 'abusive' appeals.¹⁷⁷ Notwithstanding the fact that 'the Home Office has itself been responsible for a substantial amount of the delays in the decision making process.'¹⁷⁸ Home Office decision-making is notoriously slow and removal of refused asylum-seekers is more likely to be frustrated by the 'lack of appropriate travel documents and the reluctance of some source countries to accept the return of their own

¹⁷¹ *MJ v SSHD* [2010] EWHC 1800 (Admin), [44]. Had the claim been determined before he turned 18 years, he would have likely been granted discretionary leave to remain for more than 12 months which would have triggered an in-country right of appeal.

¹⁷² Counsel referred to 'the embellishment of the Appellant's claim as time has gone by' and 'inconsistencies in the Claimant's account which, no doubt, were easier to expose given the length of time which had elapsed.' *MJ v SSHD* [2010] EWHC 1800 (Admin), [4].

¹⁷³ *MJ v SSHD* [2010] EWHC 1800 (Admin), [59]-[63].

¹⁷⁴ *MJ v SSHD* [2010] EWHC 1800 (Admin), [61], considering the obiter comments in *HH (Somalia) v SSHD* [2010] EWCA Civ 426.

¹⁷⁵ *MJ v SSHD* [2010] EWHC 1800 (Admin), [23] and [47]. *AA (Afghanistan) v SSHD* [2007] EWCA Civ 12 applied.

¹⁷⁶ Home Office, *Fairer, Faster and Firmer – a Modern Approach to Immigration and Asylum* (Cm 4018, 1998).

¹⁷⁷ Home Office, *Fairer, Faster and Firmer – a Modern Approach to Immigration and Asylum* (Cm 4018, 1998), para.1.18.

¹⁷⁸ Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals' (2005) 25(3) *Legal Studies*, 482.

nationals’, than length of the appeal process.¹⁷⁹ Standard appeal procedural rules already ‘stipulate tight time limits for the submission and determination of appeals.’¹⁸⁰ However, the ‘emphasis on speed is even more focused in fast-track appeal processes.’¹⁸¹ Fast-track asylum procedures were operational in the UK (in various forms) from 2002 until 2015. In 2015, the Court of Appeal ruled that the detained fast-track appeal system (in place between 2005 and 2015) was structurally unfair.¹⁸² Under this fast-track system, the Home Office detained a number of asylum-seekers and their claims, and any in-country appeal before the tribunal, were subject to accelerated procedures.¹⁸³ The administrative aim of the system was speed and efficiency.¹⁸⁴ However, as Nicol J, before the High Court, reminded and warned us, fairness must take priority and administrative objectives cannot defeat fairness.¹⁸⁵

The Home Office introduced the fast-track system in 2002 under what was known as the ‘Oakington process’.¹⁸⁶ The number of asylum applications in the UK reached an all-time high in 2002. The number of applications fell subsequently and have never since reached the record level in 2002.¹⁸⁷ The Oakington process was established to deal with ‘genuine’ and ‘unfounded’ claimants, who could be swiftly identified and given asylum or removed.¹⁸⁸

¹⁷⁹ Robert Thomas, ‘Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals’ (2005) 25(3) *Legal Studies*, 494.

¹⁸⁰ Robert Thomas, ‘Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals’ (2005) 25(3) *Legal Studies*, 477.

¹⁸¹ Robert Thomas, ‘Evaluating Tribunal Adjudication: Administrative Justice and Asylum Appeals’ (2005) 25(3) *Legal Studies*, 478.

¹⁸² *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin).

¹⁸³ At Colnbrook House (for men), Harmondsworth Immigration Removal Centre (for men), or Yarl’s Wood Immigration Removal Centre (for women) and served with the decision to refuse asylum.

¹⁸⁴ However, *Detention Action* have uncovered long periods in which asylum seekers were detained. See *Detention Action*, ‘Fast Track to Despair: The Unnecessary Detention of Asylum Seekers’ (2011).

¹⁸⁵ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [56]. There is no statutory limit on detention, however, detention may be found to be unlawful under Article 5 ECHR or unreasonable under the *Hardial Singh* principles. *R v Governor of Durham Prison ex p. Hardial Singh* [1984] 1 WLR 704.

¹⁸⁶ As those subject to the accelerated procedures were detained at Oakington Reception Centre. See s115(6) of the Nationality, Immigration and Asylum Act 2002. Section 115(6) creates a rebuttable presumption that the claims of applicants from countries listed as deemed to be safe are unfounded.

¹⁸⁷ Over eighty thousand. See Home Office, *Asylum* (Immigration Statistics, 26 May 2016). The ‘Oakington process’ was challenged in *Saadi v UK* (Grand Chamber) (2008) 47 EHRR 17. See Art 5 ECHR jurisprudence and relation to time.

¹⁸⁸ Immigration Minister, Mrs Barbara Roche, quoted by the Court of Appeal, explained: ‘Oakington will enable us to deal quickly with the straightforward asylum claims. It is in everyone’s interest that both genuine and unfounded asylum seekers are quickly identified. Genuine asylum seekers can be given the support they need to integrate into society. And those with unfounded claims can be sent home quickly thereby sending a strong signal to others thinking of trying to exploit our asylum system.’ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [34]. Reference was also made to the earlier statement of Mr Martin who stated: ‘I accept that detention at

However, only claims deemed ‘clearly unfounded’ were processed at Oakington and these rejected claimants were required to appeal from outside the UK (so that removal would not be suspended by the exercise of an in-country right of appeal).¹⁸⁹ As recognised by the Court of Appeal in 2003, if the fears of claimants are well-founded, ‘the fact that they can appeal after they have been returned to the country where they fear persecution is scant consolation.’¹⁹⁰ However, the Court of Appeal, susceptible to the political rhetoric of ‘bogus’ asylum-seekers, also commented that, ‘[i]f unsound claims are processed speedily, they will cease to clog the system, thereby delaying the processing of valid claims.’¹⁹¹ In *ZL and VL*, the first case in a long series of strategic litigation challenging the fairness of detained fast-track procedures, the Court of Appeal found that the Oakington process was not unfair *per se*.¹⁹²

While there is no prescribed procedure for processing asylum claims, the Secretary of State in *ZL and VL* accepted that ‘asylum cases frequently engaged human rights and that, since the introduction of the Human Rights Act 1998, it was...incumbent on this country to have in place fair procedures when considering such cases.’¹⁹³ The Court of Appeal also highlighted that ‘what is at stake is whether to send an asylum-applicant back to the country where the applicant claims to be at risk of persecution’.¹⁹⁴ Under the Oakington procedure, Executive Officers made asylum decisions, checked by a ‘second pair of eyes’, namely a Higher or Senior Executive Officer.¹⁹⁵ The timetable for the purely administrative processing of claims was one week.¹⁹⁶ During this period, claimants had access to on-site legal advice and representation. Despite this safeguard, according to Lester:

In essence, Oakington [was] a processing centre which enable[d] determination decisions to be made with unprecedented speed, and in this respect, it [was] an

Oakington is not based on a fear of absconding. Rather, it is in the interests of speedily and effectively dealing with asylum claims, to facilitate the entry into the United Kingdom of those who are entitled to do so and the removal from the United Kingdom of those who are not. This is very much concerned with “the prevention of unlawful immigration” and “the prevention of unauthorised entry”.’ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [35].

¹⁸⁹ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2].

¹⁹⁰ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [54].

¹⁹¹ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [37].

¹⁹² *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25.

¹⁹³ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [30].

¹⁹⁴ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [30].

¹⁹⁵ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [31].

¹⁹⁶ Seven days.

extreme example from a system which aims to limit asylum seekers' opportunity to relate the full details of their case.¹⁹⁷

Counsel for the appellants, *ZL and VL*, complained that the abbreviated Oakington process removed safeguards which were essential to fairness.¹⁹⁸ However, the Court of Appeal did not find the process to be 'inherently unfair.'¹⁹⁹ The issue for the Court of Appeal to determine was whether the tight timescales of the procedure afforded claimants a fair opportunity to demonstrate that they had an arguable case.²⁰⁰ The particular concern regarding traumatised claimants was emphasised. However, the Court of Appeal concluded, 'we do not see how any reasonable procedure can cater for the possibility that an applicant may not take advantage of the opportunity offered to put the material facts in his possession before the interviewing officer.'²⁰¹ The Court of Appeal did not properly take into account the fact that victims of trauma often experience difficulties narrating their asylum stories due to the impact of trauma upon their memory.²⁰² Moreover, UK asylum interviews can be intimidating interrogations that can inhibit the presentation of important information.²⁰³ Inappropriate questions, asked in an inappropriate manner, impedes the disclosure of relevant (and often painful) information.²⁰⁴ The conditions in detention facilities are not conducive to giving evidence, particularly for individuals who may be wary of the authorities having

¹⁹⁷ Trine Lester, 'Access to Legal Services for Asylum-seekers in Britain. An Exploratory Study of Recent Developments', (2000) Sussex Migration Working Paper No.1. Sussex Centre for Migration Research.

¹⁹⁸ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [52]. The appellants were represented by Ms Frances Webber and Ms Louise Hooper (instructed by Morgan Hall).

¹⁹⁹ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [53] (emphasis added).

²⁰⁰ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [48].

²⁰¹ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [49].

²⁰² See, for example, Isabella Mighetto, 'The Contingency of Credibility: Gender-Related Persecution, Traumatic Memory and Home Office Interviews' (2016) 3(1) SOAS Law Journal 1; David Rhys Jones and Sally Verity Smith, 'Medical Evidence in Asylum and Human Rights Appeals' (2004) 16(3) International Journal of Refugee Law 381; Juliet Cohen, 'Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers', (2002) 13(3) International Journal of Refugee Law 293; Jane Herlihy, Peter Scragg and Stuart Turner, 'Discrepancies in autobiographical memories - implications for the assessment of asylum seekers: repeated interviews study', (2002) 324(7333) British Medical Journal 324.

²⁰³ See, for example, evidence submitted to Home Affairs Committee, *Asylum* (HC 2013-14, 71-I).

²⁰⁴ See, for example, John Vine CBE QPM, 'An inspection of the UK Border Agency's handling of legacy asylum and migration cases' (Independent Chief Inspector of Borders and Immigration, March - July 2012), in which stereotyping, and sexually explicit questions were put to claimants by Home Office staff. The quality of asylum interviews has been reported as worse in the detained fast track procedure.

suffered state persecution.²⁰⁵ It takes time to build a relationship of trust to encourage full disclosure of traumatic events. As Good notes, ‘It takes skill, empathy, and time to build up the degree of trust needed for disclosure to take place.’²⁰⁶

The Court of Appeal considered that the fast-track system did not preclude claimants from obtaining expert country evidence. The judges reasoned that experts instructed regularly by organisations supporting asylum-claimants could provide ‘an update’ of previously collated country-specific information.²⁰⁷ However, this would depend upon the availability of such an expert and their ability to receive instructions, consider papers, and produce a report in one or two days. Even in situations where the expert would have to do little in terms of gathering new evidence, this is still an extremely short timeframe. The Court of Appeal stressed that it would be wrong for officers at Oakington to ‘rubber stamp’ any asylum applications as clearly unfounded. The judges highlighted that even in countries where there is enough protection, localised persecution may exist and there may be arguments against relocation. Moreover, there is always the possibility that the country situation may change.²⁰⁸ The Court of Appeal further considered, more helpfully, that ‘[w]here an applicant’s case does turn on an issue of credibility, the fact that the interviewer does not believe the applicant will not, of itself, justify a finding that the claim is clearly unfounded’.²⁰⁹ The Court of Appeal noted that in many cases the tribunal has reversed findings on credibility.²¹⁰ This continues to be the case with a high turnover of Home Office asylum refusals.²¹¹ There is evidence that the main reason for refusing asylum claims in the UK is lack of credibility but many of these assessments are flawed.²¹²

Finding that the Oakington process was not inherently unfair, the Court of Appeal’s decision in *ZL and VL* was a green light to the Home Office for the introduction of the stricter Harmondsworth fast-track system. The Harmondsworth scheme was to process ‘straightforward’ asylum claims in just three days as opposed to the one-week Oakington

²⁰⁵ See, for example, Helen Baillot, Sharon Cowan, and Vanessa E Munro, ‘Hearing the Right Gaps’: Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process’ (2012) 21(3) *Social & Legal Studies* 269.

²⁰⁶ Anthony Good, ‘Witness Statements and Credibility Assessments in the British Asylum Courts’ (2009) 12(3) *Irish Journal of Anthropology* 45, 50.

²⁰⁷ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [51].

²⁰⁸ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, [67]-[68].

²⁰⁹ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, para 60

²¹⁰ *ZL and VL v Secretary of State for the Home Department* [2003] EWCA Civ 25, para 60

²¹¹ See, for example, Amnesty International and Still Human Still Here, ‘A Question of Credibility: Why so many initial asylum decisions are overturned on appeal in the UK’ (2013).

²¹² Amnesty International and Still Human Still Here, ‘A Question of Credibility: Why so many initial asylum decisions are overturned on appeal in the UK’ (2013).

process.²¹³ The Harmondsworth process applied only to single males from countries deemed safe. Like the Oakington process, claimants had access to free on site legal advice.²¹⁴ Unlike the Oakington process, claims were not certified, although most claims were refused. Harmondsworth claimants, therefore, had an in-country right of appeal against refusal.²¹⁵

The Refugee Legal Centre (an independent not-for-profit that provided legal services to asylum-seekers and refugees) brought a legal challenge on behalf of the Harmondsworth fast-track detainees. The RLC had participated in the Oakington process but refused to participate in the Harmondsworth system because they did not consider the system capable of functioning fairly.²¹⁶ This concern was ‘echoed by the Immigration Advisory Service, the Law Society and the Immigration Law Practitioners’ Association.’²¹⁷ Counsel for the appellants submitted that the process was inherently unfair because it compressed into ‘a single day – the day after arrival – the sole interview with a legal representative and the asylum interview itself, with no formal opportunity to make supplementary representations before, next day, a written decision [was] given.’²¹⁸ Counsel illuminated that:

The applicant has first to accept and trust the stranger who is offering to advise and represent him. He has then, in less than three hours, to recount and explain what it is that has brought him to the UK to seek asylum, and in turn to understand the purpose of the official interview which is about to follow. Within possibly half an hour he then has to face the interview. Any omission to explain himself properly can be repaired only if the representative, after taking further, post-interview, instructions and, perhaps, working late into the evening, can then get the further information to the decision-maker before the decision is made – a matter of pure chance.²¹⁹

²¹³ When the scheme started, there were occasions when the asylum interview took place on the day of arrival. However, there was a review after concerns were raised that the timescale was too tight and unfair, and the practice was ended. *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [3].

²¹⁴ The Harmondsworth process included a ‘focus on high-quality decision making’. This was to be achieved by drafting in ‘[m]ore experienced officials, mainly Presenting Officers who used to represent the Home Office on appeals’ to conduct the asylum interviews. *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [1]-[2], [4] and [11].

²¹⁵ ‘Thus the whole process in the case of a refusal which is upheld by all the appellate bodies can be over within 5 weeks.’ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 [4].

²¹⁶ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [4].

²¹⁷ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [4].

²¹⁸ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [9].

²¹⁹ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [10].

This account demonstrates how time pressures can result in a system that is a lottery. Chance is anathema to common fairness but the question for the Court of Appeal to settle was whether the Harmondsworth timetable created an unacceptable risk of unfairness.²²⁰ The Court of Appeal upheld the High Court's decision that the Harmondsworth system was not inherently unfair because it operated in a sufficiently flexible way to enlarge the standard timetable in a variety of instances. The process allowed discretion to refuse to admit or to remove from the system those unsuitable for reason of complexity or due to age or presence of a medical condition.²²¹ The Court of Appeal believed that had the timetable imposed 'a three-day straightjacket' then the court would have found the system 'fraught with an unacceptable risk of unfairness.'²²² However, the Court of Appeal recommended the use of a clear, written flexibility policy 'to concentrate official minds on the proper ingredients of fair procedure'.²²³

The Court of Appeal highlighted that no system can be 'risk free' but considered that 'the risk of unfairness must be reduced to an acceptable minimum'.²²⁴ The Court of Appeal noted that the 'choice of an acceptable system is in the first instance a matter for the executive'.²²⁵ However, in the words of the Court of Appeal, the executive is 'not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency; and whether it has done so is a question of law for the courts.'²²⁶ The Court of Appeal also emphasised that 'asylum decisions are of such moment that only the highest standards of fairness will suffice.'²²⁷

The Court of Appeal considered unpersuasive the argument that the 'paucity of complaints from the participating law firms about the system' implied acceptance of the

²²⁰ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [24].

²²¹ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [11]-[12].

²²² *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [13] and [23].

²²³ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [19]. The Court of Appeal, at [18], referred to a best practice guide from the Immigration Law Practitioners' Association as an example of a 'worthwhile source of guidance'.

²²⁴ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [7].

²²⁵ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [8].

²²⁶ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [8].

²²⁷ Referencing *Thirukumar* [1989] Imm AR 402, 414, per Bingham LJ.

fairness of the procedure, observing that ‘[m]any, perhaps most, lawyers are accustomed to making the best of the conditions, however poor and stressful, in which they find themselves obliged to work.’²²⁸ While the Court of Appeal recognised that access to the specialist appeals tribunal ‘tends to reduce the risk of unfairness in the system, viewed as a whole’, it was not prepared to accept that this built-in mechanism cured any error at the initial stage.²²⁹ The Court of Appeal clarified that ‘an applicant is entitled not only to a fair appeal but to a fair initial hearing and a fair-minded decision’.²³⁰ The Court of Appeal observed that:

If the record of interview which goes before the adjudicator has been obtained in unacceptably stressful or distressing circumstances, so that it contains omissions and inconsistencies when compared with what the applicant later tells the adjudicator, the damage may not be curable.²³¹

The Refugee Legal Centre challenge raised the issue of the fairness of the accelerated asylum decision-making system. However, the fairness of fast-track asylum appeals were only considered in so far as this aspect of the determination system could correct unlawful initial decisions. A different legal strategy was taken by *Detention Action*, who directly challenged for the first time the fairness of the detained-fast-track appeal rules.²³²

3.3 The lawfulness of accelerated appeals successfully challenged

In 2015, following a string of legal challenges, the judiciary were finally willing to accept that the fast-track system was structurally unfair and unlawful.²³³ The charity Detention Action brought the challenge and it was the first time that the courts considered the legality

²²⁸ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [14].

²²⁹ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [15].

²³⁰ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [15].

²³¹ *R (on the application of Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [15].

²³² *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin).

²³³ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), before Nicol J. See, also, *Detention Action v SSHD* [2014] EWHC 2245 (Admin); [2014] EWHC 2525 (Admin); [2014] EWCA Civ 1270; [2014] EWCA Civ 1634. Ousely J in the first Detention Action case ([2014] EWHC 2245 (Admin)) identified a number of deficiencies with the detained fast track process, stating, inter alia, at [11]: ‘I accept that an applicant without the benefit of legal advice is unlikely to know about expert evidence which would support his case, and that the absence of a detailed analysis of the claim at that stage means that the judgment as to its suitability for the DFT is not made with full knowledge of the claim.’

of the fast-track appeal rules.²³⁴ Nicol J found the detained fast-track appeal system to be structurally unfair because it allowed ‘one party to the appeal to put the other at serious procedural disadvantage without sufficient judicial supervision’.²³⁵ The Court of Appeal upheld the ruling.²³⁶ In 2018, the Court of Appeal then confirmed that the 2005 Fast Track Rules, as well as the 2014 Fast Track Rules, were unlawful and that the detained fast-track-appeals system, therefore, had been operating unfairly for fifteen years.²³⁷

Detention Action found that, ‘Time is always against the asylum-seeker on the Detained Fast Track.’²³⁸ Home Office guidance set out the process of initial administrative determinations of detained fast-track cases.²³⁹ While the aim was speed, Detention Action’s research found that asylum-seekers ‘were detained for an average of two weeks before the process even started and ‘[n]early one in five waited for over a month.’²⁴⁰ However, Detention Action also observed that when the process finally started, ‘its speed pose[d] huge challenges for asylum-seekers.’²⁴¹ Under the detained fast-track rules, if the Home Office refused to grant asylum, the claimant had two days to lodge an appeal.²⁴² The hearing would normally take place within five days of the lodging of the appeal.²⁴³ Under the principal rules for non-detained-fast-track cases, the claimant had fourteen days to lodge an appeal and there is no time limit for the tribunal to hear the appeal. The Home Office processed one in four asylum claims under the detained fast-track rules and there was a ninety-nine percent refusal rate.²⁴⁴

²³⁴ Detention Action was established in 1993 to support individuals in immigration detention and to campaign on issues relevant to immigration detention. See Detention Action’s website <<http://detentionaction.org.uk/>> accessed on 2 July 2015. The claimants in the proceedings were represented by Sonal Ghelani, Natalie Lieven QC and Charlotte Kilroy, instructed by Migrants Legal Project, Islington. *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin).

²³⁴ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [69]. See, also, Detention Action ‘Fast Track to Despair’ 2011 Report.

²³⁵ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [71].

²³⁶ *The Lord Chancellor v Detention Action* [2015] ECWA Civ 840.

²³⁷ *R (TN (Vietnam) and US (Pakistan) v SSHD* [2017] EWHC 59 (Admin).

²³⁸ Detention Action, ‘Fast track to despair: The unnecessary detention of asylum seekers’ (2011), 3.

²³⁹ UKVI, Detained Fast Track Processes: Instruction, 11 June 2013.

²⁴⁰ Detention Action, ‘Fast track to despair: The unnecessary detention of asylum seekers’ (2011), p 4.

²⁴¹ Detention Action, ‘Fast track to despair: The unnecessary detention of asylum seekers’ (2011), pp. 3-4.

²⁴² Rule 19 of the Procedure Rules and rule 5 of the Fast Track Rules.

²⁴³ See rules 7 and 8 of the Fast Track Rules.

²⁴⁴ Detention Action, ‘Return to Fast Track?’ (2017).

The Tribunal Procedure Committee made the procedure rules (including the rules on fast-track appeals), and the rules were approved and given effect by the Lord Chancellor.²⁴⁵ Revealed in evidence before the High Court, when reviewing the fast-track procedure rules in 2013, that the Tribunal Procedure Committee had initially taken the view that the 2014 Rules should not include a fast-track procedure similar to the 2005 Rules. The Tribunal Procedure Committee noted ‘concerns that the current Detained Fast Track does not give appellants a reasonable opportunity to prepare and present their appeal – thereby creating injustice.’²⁴⁶ Bending to the strong will of the Home Office to maintain the fast-track appeal system, the Tribunal Procedure Committee reintroduced the 2005 fast-track procedure under the 2014 Rules, subject only to minor changes.²⁴⁷ The Home Office argued that, if left to the discretion of judges, there would be no ‘clear, consistent truncated timetable’ and there may be increased detention costs and resource implications if appellants spent longer in detention.²⁴⁸ However, despite concerns voiced by the Bar Council, acknowledged by the Tribunal Procedure Committee, that the detained fast-track-appeal procedure was at odds with the principles of fairness and justice, the system remained rooted. Nicol J highlighted the absence of any good, clear reason for the Tribunal Procedure Committee’s U-turn, stating, ‘[i]t is not entirely clear why the TPC resiled from the preliminary position in its consultation document that the Fast Track appeal process was unfair’.²⁴⁹ Following the finding of the Court of Appeal that the fast-track appeal system was unfair and unlawful, the TPC has resisted government pressure to reintroduce an iteration of the fast track system. However, the TPC’s previous U-turn indicates the risk that they might turn again.

Since the fast-track process was introduced, it has always been the Home Office who decided whether an asylum claim should be fast-tracked. The Home Office therefore determined whether any subsequent appeal would be a fast-track appeal. Following screening, the Home Office would stream cases deemed ‘uncomplicated’ into the fast-track process. Unless the Home Office decided to remove a case from detained fast-track then the appeal process would also be fast-tracked.²⁵⁰ While the Home Office has the power to set the

²⁴⁵ Under the Tribunals, Courts and Enforcement Act 2007. The 2007 Act created the two-tier tribunal system with the aim, amongst other things: ‘to complete the long process of divorcing administrative justice from departmental policy.’ See *R (Cart) v Upper Tribunal* [2012] 1 AC 663, per Baroness Hale at [54].

²⁴⁶ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), cited at [25] of the judgment.

²⁴⁷ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [26]-[31].

²⁴⁸ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [26]-[31].

²⁴⁹ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [63].

²⁵⁰ Fast Track Rules, rule 2(1).

rules for processing initial asylum claims, the key question that arose was whether the Home Office - as a party to any subsequent appeal against a refusal to grant asylum - could lawfully dictate the judicial process and place her opponent at a procedural disadvantage. As argued by *Detention Action*, '[i]ts inimical to justice that one party to adversarial litigation should be able to impose that disadvantage on her opponent.'²⁵¹

The abbreviated timetable for appeals and the curtailed case management powers presented obstacles to justice.²⁵² The tribunal has broad powers under the principal rules to extend or shorten time for complying with any rule, practice direction or direction, or to grant an adjournment. These powers were limited under the fast-track rules.²⁵³ *Detention Action* argued that a detained fast-track appeal was far more burdensome to prepare than an ordinary appeal. Within the seven working days, between service of the refusal and the appeal hearing, the legal representative would have to take instructions, prepare the appellant's statement (and the statements of any witnesses), arrange translation of any necessary documents, and arrange for any necessary expert evidence (including applying to the Legal Aid Agency for additional funding for the expert evidence). However, the task of taking instructions and preparing statements is more difficult if the client is detained and there is a very short deadline. Moreover, with a detained fast-track appeal, the legal representative would have to check whether the Home Office had properly applied the general detention criteria and make representations if the appellant was unlawfully detained. The legal representative might then have had to apply for bail and prepare for a bail hearing (which includes identifying sureties, taking instructions from them, checking their availability for a bail hearing and finding a bail address). Finally, the legal representative might be required to make an application to adjourn or for the appeal to be transferred out of the fast-track appeal procedure. The legal

²⁵¹ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin) [21]. The counter argument of the Lord Chancellor and the Secretary of State for the Home Department was that the tribunal had the power to transfer an appeal out of the fast-track appeal process if satisfied that the matter could not be justly determined within the timescales provided for under the fast track rules. See rule 14 and [35] of the judgment.

²⁵² The main procedural differences between the Principle Rules (that govern ordinary asylum appeals) and the Fast Track Rules (that govern Detained Fast Track asylum appeals) is that there are much shorter time limits and there are restricted case management powers under the Fast Track Rules. The principal rules are found in parts 1 to 6 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. The fast-track rules are found in the schedule to the The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. See [11]-[12] of the judgment of Nicol J in *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin).

²⁵³ See rule 4 of the Procedure Rules and rules 1, 5, 9 and 12 of the Fast Track Rules. Following the implementation of new tribunal procedure rules in October 2014 some of the time limits were extended under the Procedure Rules but not under the Fast Track Rules.

representative would need to be prepared to argue all these points on the day of the substantive appeal hearing.²⁵⁴ The burdensome nature of detained fast-track appeal work should not be underestimated. Legal representatives tend to juggle very busy caseloads and it is easy to see how the pressures of preparing challenging appeal cases within short timeframes affected the quality of representation. Problems of preparing an effective appeal under the detained fast-track process were exacerbated where the appellant was unable to secure legal representation and was forced to represent herself. Delay and difficulties were also brought about where the appellant was trying to establish that they satisfied the eligibility criteria for legal aid.²⁵⁵

Nicol J rejected the argument that the shortened timetable benefited appellants because they were in detention for shorter periods. He highlighted that it was the Home Office and not the appellant who controlled the procedural timeframes.²⁵⁶ Nicol J accepted, however, that *a priori* a separate category of expedited appeals is not unjust, that there would inevitably be additional costs for the Home Office if there were no fast-track system, and that a system that may produce unfair results is not necessarily unlawful.²⁵⁷ However, Nicol J stressed that legal fairness and justice are primary objectives and are to be given more weight when balanced against the competing objectives of speed and efficiency. He quoted Sedley LJ, who stated in the *Refugee Legal Centre* case, that the executive is ‘not entitled to sacrifice fairness on the altar of speed and convenience’.²⁵⁸

Nicol J reiterated previous dicta that examples of unfair outcomes are not enough for a system to be considered as inherently unfair.²⁵⁹ He considered that there must be a minimum level of fairness, or an irreducible minimum of due process guaranteed,²⁶⁰ and that only the highest standards of fairness will suffice in asylum appeals.²⁶¹ He confirmed that Article 6 ECHR was not engaged but stated that this ‘is immaterial since the common law, on which our notions of procedural fairness are based, similarly prides itself on conferring rights

²⁵⁴ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [22]-[23].

²⁵⁵ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [24].

²⁵⁶ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [55].

²⁵⁷ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [52], [54] and [56]. Nicol J acknowledged that this is a subjective assessment.

²⁵⁸ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [42], [56] and [66], citing Sedley LJ in *R (Refugee Legal Centre) v SSHD* [2005] 1 WLR 2219 (CA) at [8].

²⁵⁹ Citing Sedley LJ in *Refugee Legal Centre* at [7].

²⁶⁰ As per Sedley LJ in *Refugee Legal Centre* at [8] and Arden LJ in *FP (Iran) & MB (Libya)* [2007] EWCA Civ 13, at [59].

²⁶¹ As per Bingham LJ in *Thirukumar* [1989] Imm AR 402.

which are practical and real.²⁶² This suggests that there is considerable overlap between Article 6 and the common law in terms of content.²⁶³ However, Article 6 provides a firmer threshold of judicial guarantees. Reliance on common law principles risk lower administrative standards being applied.²⁶⁴

Nicol J concluded that what makes the DFT appeal system structurally unfair is ‘the serious procedural disadvantage which comes from the abbreviated timetable and curtailed case management powers, taken together with the imposition of this disadvantage on the appellant by the respondent to the appeal’.²⁶⁵ He explained that the ‘procedural disadvantage is not because of the client’s dilatoriness, nor because the FTT has decided that this is a fair way to proceed, but because his opponent in the appeal, the SSHD, has decided that this is what should happen’.²⁶⁶ In an adversarial legal system, in accordance with the principle of equality of arms, the state, as opponent, cannot impose time rules in a way that seriously disadvantages the other side.

Nicol J found that the power to adjourn or to transfer the case out of the fast track system were ineffective safeguards.²⁶⁷ He highlighted that the power to adjourn had a very limited role because of the stipulation that the adjourned hearing take place within ten days. The onus was on the appellant to demonstrate, within this short timeframe, that her case could not be justly decided within the fast-track procedure. Seven working days was considered ‘simply too short to assemble such an argument (and, at the same time, prepare for the full appeal in case the Tribunal decides to proceed)’.²⁶⁸ According to Nicol J, the fact that a high proportion of cases proceeded without adjournment did not demonstrate that judicial oversight was working. Rather, the fact demonstrated the difficulty of preparing a successful application to adjourn and for the substantive appeal in just seven working days.²⁶⁹ While the legal challenges in 2003 (*ZL and VL*) and 2004 (*Refugee Legal Centre*) focused on the administrative process, the 2015 (*Detention Action*) challenge focused on the legal process and was, therefore, successful.

Following the Court of Appeal’s ruling, which upheld the findings of Nicol J, the fast-track asylum appeal system was suspended. However, the government introduced new

²⁶² *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [56].

²⁶³ Martin Westgate, ‘Article 6 and Common Law Fairness’ (2006) 11(1) *Judicial Review* 57.

²⁶⁴ See *Re HK (Infant)* 1967 1 QB 617.

²⁶⁵ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [60].

²⁶⁶ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [59].

²⁶⁷ Under rules 12 and 14.

²⁶⁸ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [62].

²⁶⁹ *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin), [63].

detained asylum casework policies.²⁷⁰ Another legal challenge was brought, arguing the new detained asylum process was essentially the same as the old system but with marginal changes to timeframes. Indeed, practitioners had nicknamed the new procedures ‘slow fast-track’.²⁷¹ However, the Court of Appeal found that the system taken as a whole was not unfair and unlawful.²⁷² In reaching this decision, reference was made to the review procedures, the rule 35 process to identify those who may have been tortured, and early access to legal advice, which ‘is now a feature at the removal centres.’²⁷³ However, there was evidence of the very small number of claimants released from detention.²⁷⁴ Moreover, research undertaken by Bail for Immigration Detainees raises serious concerns about the provision of legal advice in detention centres.²⁷⁵ Problems with identifying victims of torture in detention centres is also well documented.²⁷⁶ Too much weight was attached by the Court of Appeal to the fact that a number of cases were prevented from being taken into the detained process in the first place.²⁷⁷ The Court of Appeal ruling does not prevent individuals from showing unfairness in ‘aberrant’ cases but confirms that there is high threshold to

²⁷⁰ Home Office, The Detained Asylum Casework process / Detention Interim Instruction and Process Map (‘DAC’ / ‘DII’).

²⁷¹ Anecdotal knowledge of the author.

²⁷² *TH (Bangladesh) & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2016] EWCA Civ 815. Beaton LJ, at [22], stressed: ‘My starting point is that the history of procedural fairness shows it to be the result of implying into broadly phrased powers and procedures the requirements of procedural fairness reflected in the principles of natural justice and, since the enactment of the Human Rights Act 1998, the duty of the court where possible to construe such powers, if necessary by reading them down, as compatible with the Convention rights. It is in that context and in that sense that it can be said that procedural fairness... a well established principle ingrained in public administration.’

²⁷³ *TH (Bangladesh) & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2016] EWCA Civ 815, [24], [33] and [34]. Beaton LJ, at [11], emphasised ‘the importance of access to lawyers at an early stage for securing overall fairness within the DII regime...[t]his is a feature which distinguishes the DII regime in a fundamental way from the previous DFT regime.’ Citing [2014] EWHC 2245 (Admin). See also Secretary of State for Home Department, ‘Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw’ (Cm 9186, 2016) where it was observed, at p. 185, para. 10.11, that: ‘Detainees felt that they were not given a fair hearing by someone who understood their situation, and who treated them as a real person rather than as an abstract case’.

²⁷⁴ *TH (Bangladesh) & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2016] EWCA Civ 815, [30] that highlights that even on the Secretary of State's own figures, only 0.92% of those who claimed asylum in detention were released following the screening interview.

²⁷⁵ Bail for Immigration Detainees, ‘Legal Advice Survey’ (Spring 2019).

²⁷⁶ See, for example, *Medical Justice v Secretary of State for the Home Department* [2017] EWHC 2461 (Admin).

²⁷⁷ *TH (Bangladesh) & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2016] EWCA Civ 815, para. 32.

overcome in order to impugn the system as a whole.²⁷⁸ As mentioned, the Tribunal Procedure Committee has, so far, resisted pressure from the government and, for the time being at least, will not reintroduce a fast track asylum appeals system.

In another remarkable decision, related to the Court of Appeal's finding that the detained fast track appeal system was unfair, the High Court has ordered, for the first time, the return of an asylum-claimant because they had an unfair appeal.²⁷⁹ The case concerned *PN* who had her appeal dismissed under the fast-track rules and was removed to Uganda in 2013. Even though she was granted a fourteen-days adjournment, the short timeframe meant that she was unable to adduce evidence of her lesbian relationships in Uganda.²⁸⁰ Her appeal was found to be unfair and unlawful on this basis. Despite *PN*'s the delay in raising the issue, Lewis J ordered her return to the UK because *PN* had been 'unlawfully deprived of her statutory right of appeal'.²⁸¹ The Secretary of State argued that *PN* should be refused a remedy in view of the period of time that had passed since the original determination. However, the High Court was not sympathetic to this view considering the unfair and unlawful treatment of *PN*.²⁸²

So far, the discussion has shown that, despite a lack of clarity about the applicability of Article 6 ECHR, the UK courts have identified time as a key component of fairness. Extremely short timetables create problems for accessing legal aid and obtaining and disclosing crucial evidence. Truncated timeframes also heighten the risk of error in determinations. These often-insurmountable temporal hurdles are dictated by the Home Office in order to disadvantage asylum-seekers within an adversarial system.²⁸³

3.4 Access to time in legal aid

As explained above, Article 6(1) implies a right to legal aid. Legal aid equates to the billable

²⁷⁸ Beaton LJ observed that the test of inherent unfairness to emerge was: '(a) In considering whether a system is fair one must look at the "full run" of cases that go through that system, (b) A successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases, (c) A system will only be unlawful on the grounds of unfairness if the unfairness is inherent in the system itself, and (d) The core question is whether the system has the capacity to react appropriately to ensure fairness.' *TH (Bangladesh) & Ors, R (On the Application Of) v Secretary of State for the Home Department* [2016] EWCA Civ 815, [57].

²⁷⁹ *PN v Secretary of State for the Home Department* [2019] EWHC 1616 (Admin).

²⁸⁰ *PN v Secretary of State for the Home Department* [2019] EWHC 1616 (Admin), [142].

²⁸¹ *PN v Secretary of State for the Home Department* [2019] EWHC 1616 (Admin).

²⁸² *PN v Secretary of State for the Home Department* [2019] EWHC 1616 (Admin), [85].

²⁸³ The presence of legal aid has been found to act as an important safeguard and is discussed further within the following section (3.4) and the following chapter (Chapter 6).

hours of lawyers and the remunerable time of (medical or country) experts.²⁸⁴ These points are discussed in the proceeding chapter. The UK courts have considered that legal representation is not necessarily indispensable in asylum cases.²⁸⁵ However, the following chapter explores legal-aid-time and why legal-aid-time is indispensable in asylum cases. The purpose of this section is to, briefly, highlight that the UK courts have found Article 6 ECHR jurisprudence on the provision of legal aid to apply to asylum and immigration matters. The UK courts have sought to guarantee access to legal aid by the back door of Article 8 ECHR.

In 2013, the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) removed legal aid for immigration cases, maintaining free civil legal services for asylum cases, namely claims arising from the Refugee Convention, Articles 2 or 3 of the ECHR, the Temporary Protection Directive, and the Qualification Directive, was retained.²⁸⁶ Parliament's decision to retain legal aid for asylum cases supports the argument that there is a legal model of asylum decision-making in the UK and a *right* to legal aid in asylum cases. Asylum claims often raise issues under Article 8 ECHR. However, claims under Article 8 ECHR (and, notably, claims for refugee family reunion) fall outside the scope for legal aid. Section 10 of LASPO allows applications for 'exceptional case funding' (ECF) to be made in cases that fall out of scope. However, in 2014, in the case of *Gudanaviciene*, the guidance issued by the Lord Chancellor on how to implement the ECF scheme was found unlawful.²⁸⁷ The guidance stated that:

The overarching question to consider is whether the withholding of legal aid would make the assertion of the claim *practically impossible* or lead to an *obvious unfairness* in proceedings. *This is a very high threshold.*²⁸⁸

The guidance also provided that the existing case law did not 'put the State under a legal obligation to provide legal aid in immigration proceedings in order to meet the procedural requirements of Article 8 ECHR.'²⁸⁹ Collins J found that 'the Guidance is defective in that it

²⁸⁴ In terms of chargeable units and disbursements under a legal aid contract.

²⁸⁵ In *HH (Iran) v SSHD* [2008] EWCA Civ 504, the Court of Appeal found that there was no right to publicly funded representation because the case did not disclose particularly complicated points of law.

²⁸⁶ Section 9(1) and para. 30 of Part 1 of Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

²⁸⁷ *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin).

²⁸⁸ *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin), citing para. 18 of the Guidance, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309100/legal-aid-chancellor-non-inquests.pdf. Original Emphasis.

²⁸⁹ Para. 60 of the Guidance.

sets too high a threshold and fails to recognise that Article 8 does apply even in immigration cases and, despite the exclusion of Article 6, carries with it procedural requirements which must be taken into account'.²⁹⁰ The general findings of Collins J that the ECF guidance was unlawful was upheld by the Court of Appeal.²⁹¹

The guidance applied by the Legal Aid Agency in respect of ECF applications was based upon an overemphasis of words found in the Strasbourg case of *X v UK*.²⁹² *X v UK* ruled that '[o]nly in exceptional circumstances, namely where the withholding of legal aid would make the assertion of the civil claim *practically impossible*, or where it would lead to an *obvious unfairness* in the proceedings, can such a right be invoked by virtue of Article 6(1) of the Convention.'²⁹³ The Court of Appeal accepted that the words used in *X v UK* had not been adopted elsewhere in the Strasbourg jurisprudence and found it wrong to conclude that the refusal of legal aid would amount to a breach of Article 6(1) in rare and extreme cases.²⁹⁴ The Court of Appeal concluded that the 'critical question is whether an unrepresented litigant is able to present his case effectively'.²⁹⁵

In *Gudanaviciene*, the Court of Appeal considered that the non-application of Article 6(1) in asylum and immigration cases did not matter because procedural protections available under Article 8 ECHR were applicable. The Lord Chancellor conceded that the guidance wrongly stated that there was nothing in the current case law that would put the UK under an obligation to provide legal aid in immigration and asylum proceedings in order to meet its procedural obligations under Article 8. The guidance was amended accordingly.²⁹⁶ The Court of Appeal upheld the findings of the High Court that the procedural standards under Article 8 are 'in practice' the same as Article 6. This means that the well-developed body of Strasbourg Article 6(1) case law must still be considered when determining whether legal aid should be granted. The Court of Appeal clarified that:

Whether legal aid is required will depend on the particular facts and circumstances of each case, including (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to

²⁹⁰ *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin), [51].

²⁹¹ The Court of Appeal held that the guidance was not compatible with Article 6(1) ECHR or Article 47 of the EU Charter, nor was it compatible with Article 8 ECHR in immigration cases.

²⁹² *X v UK* (1984) 6 EHHR 50.

²⁹³ *X v UK* (1984) 6 EHHR 50, [3]. Emphasis added.

²⁹⁴ *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin), [42]-[45].

²⁹⁵ *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin) [56] and [72].

²⁹⁶ The revised Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) was published on 9 June 2015.

represent himself without legal assistance, having regard to his age and mental capacity. The following features of immigration proceedings are relevant: (i) there are statutory restrictions on the supply of advice and assistance (see section 84 of the Immigration and Asylum Act 1999); (ii) individuals may well have language difficulties; and (iii) the law is complex and rapidly evolving (see, for example, per Jackson LJ in *Sapkota v Secretary of State for the Home Department* [2012] Imm AR 254 at para 127).²⁹⁷

However, asylum decisions will not always engage Article 8. *Gudanaviciene* does not, therefore, thwart the argument that the exclusion of Article 6(1) is problematic.

It is worth highlighting that, regrettably, the Court of Appeal in *Gudanaviciene* overturned the High Court's ruling that rights to refugee family reunion were in scope.²⁹⁸ The issue was whether rights to refugee family reunion are rights 'arising from' the Refugee Convention.²⁹⁹ Collins J in the High Court found that refugee family reunion was a right arising from the Refugee Convention because the unity of the family is an essential right of a refugee, enabled by the Refugee Convention, recognised under international law, and conferred by the domestic Immigration Rules.³⁰⁰ However, the Court of Appeal adopted a restrictive reading of 'arising from', reasoning that the Refugee Convention makes no reference to the right and that Parliament must have intended the narrower meaning.³⁰¹ Applicants for refugee family reunion are no longer automatically entitled to legal aid and must submit an application for ECF. The LAA must be satisfied that refusal of legal aid will breach the UK's obligations under the ECHR or the EU Charter. Legal practitioners are reluctant to assist with applications for ECF and applicants are unlikely to have the requisite legal knowledge to convince the LAA of that the absence of legal aid violates their human rights. Yet, as solicitor Julia Walsh explained:

Any immigration practitioner worth their salt knows that family reunion applications

²⁹⁷ *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin) [72].

²⁹⁸ While awaiting the decision of the Court of Appeal, the Ministry of Justice issued an update that, pending the appeal, legal aid providers were authorised to grant legal aid in respect of refugee family reunion. Accordingly, legal aid providers recommenced assisting refugee clients with applications for family reunion under legal aid. Alas, this came to an end with the Court of Appeal judgement.

²⁹⁹ In accordance with s 9 (1) and para. 30, Part 1, schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

³⁰⁰ Collins J reasoned that: (i) upon the recommendation of the UN Conference following the 1951 Refugee Convention, that the unity of the family is an essential right of a refugee, the UK Government implemented the provision for refugee family reunion in the Immigration Rules; (ii) in view of this right to family unity conferred by the Immigration Rules and as 'a matter of ordinary English, that right arises from the Convention since the Convention enabled that person to achieve the status of refugee'. See *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin) [103] and [105].

³⁰¹ *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin) [146]-[147].

are very rarely straightforward. In fact, they tend to be very time consuming and laborious often taking much more work than was previously remunerated to them by the legal aid agency when it was in scope.³⁰²

The same is true for the preparation time of asylum cases, discussed in more detail in the next chapter.

4. CONCLUSION

The UK courts have relied on *Maaouia* and *Ullah* to deny asylum-seekers the robust Article 6 ECHR protection of a fair hearing within a reasonable time. The majority's reasoning in the deportation case of *Maaouia* is flawed and the extension of the *Maaouia* principle to asylum cases has occurred in the absence of adequate legal reasoning. An expansive interpretation of Article 6 that enhances protection of the rights of asylum-claimants is more convincing. The guarantee of a fair judicial hearing for asylum-claimants within a reasonable time is more in line with the purposes of the ECHR and the Refugee Convention.³⁰³

As explained in discussion of this chapter, there is no clear distinction between private and public matters within the autonomous meaning of Article 6(1) and the scope of Article 6(1) continues to expand. Administrative decision-making regarding social security, asylum support, detention and bail, and the Article 8 ECHR rights of prisoners have been found to determine 'civil rights' under Article 6. Confusion over whether asylum decisions are purely discretionary decisions regarding entry or stay stems from conflating asylum and immigration.³⁰⁴ Despite the UK's recognition of a legal right to asylum as early as 1905, there has long been judicial and academic debate over whether there is a non-discretionary right to asylum. However, the increased judicialisation of asylum has weakened any argument that asylum decisions are discretionary. The question of the nature of asylum has been settled by EU law, which clearly confirms the legal right to asylum. The courts can no longer find that asylum decisions are discretionary, if they ever were.

³⁰² Julia Walsh 'Refugee family reunion and legal aid – the Gudaviciene judgment explained' (legalblavo, 25 February 2015) <<http://www.legalblavo.co.uk/news/refugee-family-reunion-legal-aid-gudaviciene-judgement-explained/>> accessed 19 March 2015. Asylum Justice, a Welsh charity that provides free legal assistance, has a success rate of 99% in refugee family reunion applications (between 2014 and 2019).

³⁰³ Refugee Convention, article 16.

³⁰⁴ See, for example, the Immigration Act 1971.

The existence of the right to appeal to the tribunal does not cure the non-application of Article 6. Nor do the availability of other procedural protections under the ECHR, EU law, or common law, render Article 6 unnecessary. If anything, the existence of rights of appeal recognises the judicial nature of asylum decisions. Parliament's decisions to retain substantive grounds of appeal and legal aid for asylum cases is further recognition of the judicial and special nature of asylum. It was with 'considerable reluctance' that the UK courts refused to extend Article 6 protection to asylum decisions. An unnecessarily debilitating reading of *Ullah* frustrates the development of international and domestic human rights jurisprudence. *Maaouia* is wrong and out of date. If Strasbourg does not revisit *Maaouia* then the UK must take the lead.

Article 6 ECHR can be characterised as a temporal right in that it protects predominantly, although not exclusively, against delay in justice systems.³⁰⁵ The express requirement that a hearing is held within a reasonable time is one of the advantages of Article 6 over other procedural protections.³⁰⁶ Article 6 also implies access to legal aid. At the heart of an entitlement to legal aid is sufficient (billable) time to prepare the case. It is argued, in the following chapter, that the provision of legal aid is essential for matters of asylum. Asylum claims tend to be legally and factually complex, and asylum claimants tend to experience multiple vulnerabilities and disadvantages affecting their ability to represent themselves.³⁰⁷ Time with a lawyer to properly prepare and present the legal asylum case is crucial. It is odd, therefore, that asylum claimants continue to be blanketly denied the temporal-judicial guarantees of Article 6. Particularly, when asylum-claimants find themselves in conflict with a powerful government adversary. Indeed, an adversary that has demonstrated a tendency to employ the temporal tactics of delay and speed to disadvantage her opponent.

The issue of unreasonable delay is prevalent at the Home Office and tribunal appeal stages. It is important to 'stress that the Home Office itself has been responsible for

³⁰⁵ See, for example, European Court of Human Rights, Factsheet – Pilot Judgments (January 2019), available at <https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf> accessed 03/09/2019.

³⁰⁶ As recognised in *MNM v Secretary of State* [2000] UKIAT 00005, [16].

³⁰⁷ Robert Thomas has observed that 'empirical research indicates that appellants benefit from representation'. Thomas further comments that, 'In light of the factual and legal complexity of many appeals, the inability of many appellants to represent themselves, the seriousness of the outcome of appeals and, for many applicants, the lack of a privately funded option, such restrictions [on legal aid] may adversely impact on the quality of the appeal process.' Robert Thomas, 'Evaluating Tribunal Adjudication: Administrative Justice and Asylum appeals' (2005) 25(3) *Legal Studies* 462, 478.

substantial delays in the decision-making process.’³⁰⁸ Restrictions to legal aid, reduced appeal rights and tribunal cuts have contributed to the increased waiting time of claimants. It takes longer for hearings to be listed and litigants in person prolong hearings and result in more adjournments and delay. As discussed in Chapter 4, delayed decisions suspend the lives of asylum-seekers, devaluing and appropriating their time. The problem of devalued and appropriated time is most pronounced for asylum-claimants who are detained and fast-tracked. Time is used bureaucratically and uncompassionately. The following and final chapter will adopt an asylum-centric approach to the philosophical and legal issue of fairness and address, amongst other points, why legal-aid-time is essential in asylum cases.

³⁰⁸ Robert Thomas, ‘Evaluating Tribunal Adjudication: Administrative Justice and Asylum appeals’ (2005) 25(3) *Legal Studies* 462, 482.

CHAPTER 6: CONCLUSION: TEMPORAL PILLARS OF FAIRNESS

*I've always been wondering, is it fair that my case only took six months when people who are suffering more hardship than me wait for years?*¹

1. INTRODUCTION

The central research problem of this thesis has been how to approach the issue of normative and legal fairness in a way that accounts properly for the rights of asylum-seekers. The category of asylum has special normative and legal significance in modern liberal democracies. In a world ordered by nation-states, a mechanism of surrogate state protection is required to avoid the disruption to the international order caused when states fail to protect citizens. It has been said that ‘the modern world operates under the motto of a state for everyone and everyone in a state.’² However, thinking about asylum-seekers as an aberration, and desiring a perfectly ordered world where there are no refugees, is empirically unrealistic and theoretically problematic. Human existence is not static and ‘[t]he idea of a system of states does not entail closed borders or immutable memberships.’³ The movement of people and the ability to change affiliation from one group to another are general facts as well as liberal ideals.⁴

Despite the state-centric premise of Rawls’s theory of justice as fairness, we can still draw important lessons from Rawls to help us to think about how a fair society should treat asylum-seekers. Rawls’s evocative thought experiment challenges us to free ourselves from our privileges and prejudices in order to design guiding principles for a politically and legally fair society. He asks us to imagine that we are behind a veil of ignorance that causes an amnesia of our personal circumstances, an unawareness of our fortunes or misfortunes. From the original position of veiled ignorance, we are simultaneously and equally invested in our personal interests and the interests of the society that we are situated in. This is the advantage

¹ CG at p. 15 (Appendix 7).

² T Alexander Aleinikoff, ‘State-Centred Refugee Law: From Resettlement to Containment’ (1992) 14(1) Michigan Journal of International Law 120, 120.

³ T Alexander Aleinikoff, ‘State-Centred Refugee Law: From Resettlement to Containment’ (1992) 14(1) Michigan Journal of International Law 120, 120.

⁴ As established in Chapter 3.

of Rawls's impartiality device over other devices.⁵ Rawls's situated but veiled decision-makers are forced to consider society from the standpoint of everyone, including the most disadvantaged member, as if this were their personal standpoint. In this regard, Rawls's device is particularly effective in empathetically overcoming divisions and otherness within a pluralist society.⁶ As Okin argues, 'the only coherent way in which a party in the original position can think about justice is through empathy with persons of all kinds in all the different positions in society, but especially with the least well-off in various respect.'⁷ This process aligns particularly well with the task of asylum determination, which requires the decision-maker to consider both subjective and objective evidence of risk of return.⁸

Rawls's thought experiment is not free from critique. We should be wary of imaginatively entering his original position without first making a few modifications. To focus on the experience of asylum-claimants highlights Rawls's inattention to their situation, inconsistent with the aims of his project. His exclusion of asylum-claimants from the original position creates tensions within his theory, permitting the unfair result of resigning asylum-seekers to a subclass. Rawls asks us to imagine at the original position a perfectly bounded community tied to a demarcated territory. This premise embeds the paradoxes of the nation-state, reinforcing sovereign borders and the notion of outsiders. Rawls stipulates a theoretically closed society to exclude the 'problem of migration'. However, this criterion fails to recognise asylum as a distinct, special moral and legal category. Rawls's closed initial situation also fails to account for free movement as a perennial fact and liberal ideal. Even though Rawls's borders take on a permeable form as he developed his international Law of Peoples, at the core of his theory's design remains the tensions between the native insider and the foreign outsider, between sovereignty and universal rights.⁹ Rooting this conflict at the

⁵ Such as the 'impartial spectator', discussed in Chapter 3. The impartial observer is distant, outside the situation and, therefore, generally objective.

⁶ A detailed critique of the meaning of othering is outside the scope of this thesis. For discussion on this see Edward W. Said, *Orientalism* (Penguin 2003).

⁷ Susan Moller Okin, 'Reason and Feeling in Thinking about Justice' (1989) 99(2) *Ethics* 229, 248.

⁸ According to the UNHCR Handbook, at para 41, refugee determination requires the decision-maker to 'take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences – in other words, everything that may serve to indicate that the predominant motive for his application is fear.' See, also, the UNHCR Handbook, paras 37-38. However, Hathaway and others find reference to distinct subjective and objective elements of the well-founded fear test unhelpful. James C. Hathaway and William S. Hicks, 'Is There A Subjective Element in the Refugee Convention's Requirement of Well-Founded Fear' (2005) 26(2) *Michigan Journal of International Law* 505.

⁹ John Rawls, *The Law of Peoples* (Harvard University Press 1999), 26.

centre of his theory obscures and undermines the full realisation of the moral and legal rights of asylum-seekers.

Nonetheless, we can re-read Rawls's abstraction in a way that helps us to overcome the otherness created by the controlled borders of nation-states. I have argued in this thesis to reimagine Rawls's original position as a bounded community, untied to territory, with porous borders. Situated within that community are members who, as in Rawls's hypothetical, are behind a veil of ignorance and deprived of knowledge of their membership status. However, unlike Rawls's veiled members, these members know that migrations happen as a general fact. These members are aware, therefore, that they could find themselves in the position of newcomers upon the veil being lifted. The adapted model challenges us to imagine what a fair society would look like from the disadvantaged position of a new arrival. I argue that, of the categories of migrants, the position of the forced migrant has special normative significance, offering a broad fairness horizon. Bringing the asylum-seeking outsider into the centre of the model shifts perspective from a state-centred to an asylum-centred view.

This fresh perspective uncovered four normative fairness pillars of contemporary liberal democratic societies. I drew upon the theories of Benhabib, Habermas and Sen to revise Rawls's original position from a state-centred to an asylum-centred account of fairness. The asylum-centred view revealed the four pillars of: situated, conscious impartiality; respect for human rights; social cooperation and caring; and inclusive public reason. These normative pillars are not to be confused with the principles of justice that representative members in an adapted original position might choose. This thesis does not seek to map out a complete theory of justice. That is because the principles of justice, and their precise content, are not fixed in time or place. They are to be worked out dialogically between the members of a society, including asylum-seeking members. Rather, the pillars are a description of the essential ingredients of an adapted (asylum-centred) original position that is normatively fair.¹⁰ From an adapted original position that centres refugees, I discerned the four (aforementioned) pillars. These pillars highlight two gaps in Rawls's thesis: lack of attention to (forced) migration and lack of attention to the empirical.

The four fairness pillars, excavated from an adapted Rawlsian original position, directed the thesis inquiry towards listening to the empirical voices of asylum-seekers.¹¹ In-

¹⁰ Rawls explains that he named his theory 'justice as fairness' not because justice and fairness are synonymous but because the title 'conveys the idea that the principles of justice are agreed to in an initial situation that is fair.' John Rawls, *A Theory of Justice* (Oxford University Press 1973) 12.

¹¹ This thesis does not endeavour to determine the full, detailed content of each of these buttressing fairness pillars, developing a fully worked out theory of fairness. The aim is, rather, in the light of the

depth interviews with asylum-seekers in Wales were conducted.¹² By putting the views of asylum-seekers at the centre of the investigation, a third significant gap in Rawls's fairness theory was exposed: lack of attention to time. The accounts of asylum-claimants revealed the important connection between fairness and time. From the participants accounts, the temporal dimensions of (un)fair treatment in the UK's asylum system became apparent. The significance of time in relation to juridical fairness was supported by analysis of empirical legal reasoning within asylum case law. The following section briefly recounts the key temporal findings from the empirical strands of the thesis inquiry. The neglect of time by contemporary liberal theorists is then highlighted. This concluding chapter continues by examining the relationship between time and the four normative fairness pillars.¹³ This contribution demonstrates the value of applying a temporal lens to juridical fairness in matters of asylum and calls for greater attention to temporal fairness in liberal theory.

2. REVEALING THE TEMPORAL DIMENSIONS OF THE (UN)FAIR TREATMENT IN THE UK'S ASYLUM SYSTEM

Through interviews with asylum-seekers about their experiences of the UK's asylum system, themes of temporal (un)fairness emerged strongly. These experiential themes were *doing time*, *unequal time* and *severed time(s)*. The research participants described the procedural phases and strict deadlines of the asylum system that severed access to temporalities such as work time, social time and family time. They complained of delay and long periods of waiting that created a sense of doing time and unequal (undervalued) time. They also complained of prejudgments and rushed decisions that further exposed unequal time between the parties in the asylum system. As a display of temporal resistance, the participants highlighted the finitude of their lives and that time was being unfairly taken from them during periods of limbo. The appropriation of their time frustrated their opportunities to rebuild their lives. With severed pasts and severed futures, the participants described the struggle to break free from a protracted present. Up until the point of analysis of the research interviews, the force of administrative-legal time within the asylum system had been hidden in plain sight. It was only by listening carefully to the voices of asylum-claimants that time and its

main empirical finding of time in chapter 4, to explore the temporal dimensions of the fairness pillars as evidenced in the UK's asylum determination system.

¹² See Chapter 4.

¹³ Developed in Chapter 3.

inextricable relation to juridical fairness became visible.

By turning to focus on time, the exclusionary nature of temporal boundaries (of dates, time-limits and waiting times) became as apparent as the exclusionary nature of territorial boundaries. Here, I give a few examples that arise from the empirical inquiry in Chapter 4. It was government policy that asylum support could be withdrawn for reason of a delayed asylum claim but the Law Lords found that this temporal rule risked inhumane and degrading treatment.¹⁴ However, it is still policy that if an asylum-seeker delays claiming asylum then this may result in a negative credibility finding against them and a refusal of asylum.¹⁵ The discrepancy between the bearing of a claimant's delay and Home Office delay upon asylum and human rights outcomes was not missed by the Law Lords in the case of *EB (Kosovo)*. The House of Lords concluded that Home Office delay may be relevant in three ways. First, 'the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community'.¹⁶ Second, a relationship entered pending a decision may be 'imbued with a sense of impermanence' but 'if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so.'¹⁷ Third, delay may be relevant 'in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes.'¹⁸ This legal test regarding Home Office delay is relevant to Article 8 (private and family life) ECHR assessments, which essentially concern time spent and strength of ties developed during that time period.

The status of asylum-seekers is considered temporary and very limited rights attach to this status.¹⁹ However, the categorisation of temporary misleads due to the reality that many asylum-seekers wait in the UK for years for an initial decision and during subsequent appeals or judicial reviews. If granted refugee status, time spent in the UK as an asylum-seeker is not considered in respect of applications for indefinite leave to remain and citizenship. Adult

¹⁴ *Limbuella v Secretary of State for the Home Department* [2005] UKHL 66, discussed in Chapter 2.

¹⁵ Asylum and Immigration (Treatment of Claimants, etc) Act 2004, s 8.

¹⁶ *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 [14].

¹⁷ *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 [16].

¹⁸ *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41 [16].

¹⁹ Further to the Immigration Act 2016, schedule 10, the status of 'temporary admission' no longer exists and non-detained asylum seekers are on immigration bail. The change took place on 15th January 2018. This replaces 'temporary admission' under the Immigration Act 1971, schedule 2, para. 21.

asylum-seekers are not entitled to benefit from the policies that apply to claimants under 17.5 years. The justification for this age limit is unclear. As per Lloyd LJ on the artificiality of strict age limits, ‘It is not easy to see that risks of the relevant kind to a person who is a child would continue until the eve of that birthday, and cease at once the next day.’²⁰ The shortcomings of age assessment methods result in the Home Office and social services regularly making incorrect age determinations, which deny child asylum-seekers procedural and substantive rights.²¹ Strict deadlines and tight timeframes imposed by the Home Office, Legal Aid Agency (LAA) and the tribunal increase the likelihood of non-compliance and the loss of procedural and substantive rights.²² Strict time rules increase the risk of refusal by limiting the ability of claimants to access legal representation in time. Even where legal representation is secured, short timeframes are likely to impede the adequate preparation and presentation of the case. Short notice for the removal of asylum support results in many asylum-seekers and refugees becoming homeless. These examples highlight that the ability of claimants to access rights is limited by temporal boundaries, demarcated by the state. Closer examination shows that the setting of temporal boundaries within the asylum system is not impartial but driven by politics of exclusion.²³ Time is used instrumentally by the state to deny rights and to exclude asylum-seekers from society.

In addition to the instrumental role of time, the symbolic role of time emerged from the case law analysis in Chapter 5. The right to a fair trial under Article 6(1) ECHR guarantees the pinnacle of legal fairness, enshrining reasonable time as a core fairness element. However, the Strasbourg Commission and Court and the UK courts have denied that the robust temporal protections under Article 6(1) apply directly to asylum determination. This exclusion signals that it is the administrative arm of the state that controls the time(s) of asylum-seekers. The denial of Article 6(1) temporal protection is also a sign of undermining the normative status of asylum-seekers. However, this is incongruent with international and domestic law which assigns special normative status to asylum-seekers. The exclusion of Article 6 rights in asylum cases also implies a residence test to access rights that are supposed to be universally applicable. The UK Supreme Court has rejected residence tests to access

²⁰ *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305 [51].

²¹ Heaven Crawley, ‘When is a Child not a Child? Asylum, Age Disputes and the Process of Age Assessment’ (ILPA 2007).

²² Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71, 78.

²³ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71.

legal aid as unlawfully discriminatory.²⁴ The UK courts, increasingly uncomfortable with the moral and legal incongruity of the non-application of Article 6(1), have relied upon Article 8 ECHR and the common law to apply, indirectly, the Article 6(1) temporal-judicial standards to asylum-seekers. However, these standards do not specify ‘reasonable time’. The UK courts have also found that the Home Office have used time to unfairly disadvantage asylum-seekers.²⁵ Analysis of judicial interpretations of fairness and time shows how the executive controls the clock much in the same way as it controls the UK border. Having crossed the territorial border, asylum-seekers are met with temporal borders that aim to prevent them from accessing rights and residence. Time is not impartial.²⁶ Just as spatial borders are politicised and used to discriminate, so too is time politicised and used to discriminate.²⁷ Rawls’s lack of attention to asylum-seekers and time(s) within his hypothetical device is, therefore, problematic.

3. THE IMPORTANCE OF TIME OVERLOOKED IN LIBERAL THEORIES OF FAIRNESS

The topic of time has been explored extensively within the social sciences, revealing different cultures, experiences, measures, patterns, structures and conceptions of time.²⁸ The dominance of Western linear, market-driven clock time has been challenged through the study of time and gender, labour, class, colonialism and race.²⁹ However, the body of legal scholarship on time is comparatively very small.³⁰ The significance of time is neglected within contemporary liberal political and legal philosophy. Time is implicit within liberal theories of justice but is seldom dealt with expressly or substantially. As Cohen highlights,

²⁴ *R (The Public Law Project) v Lord Chancellor* [2016] UKSC 39.

²⁵ *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

²⁶ Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration, and Democratic Justice* (Cambridge University Press 2018) 104.

²⁷ Ekaterina Yahyaoui Krivenko, ‘Considering time in migration and border control practices’ (2016) 2(4) *International Journal of Migration and Border Studies* 329.

²⁸ See, for example, Ronald Aminzade, ‘Historical Sociology and Time’ (1992) 20(4) *Sociological Methods and Research* 456.

²⁹ See, for example, Dan Clawson and Naomi Gerstel, *Unequal Time: Gender, Class, and Family in Employment Schedules* (Russell Sage Foundation 2014) and Homi K. Bhaba, ‘‘Race’, Time and the Revision of Modernity’ in Bart Moore-Gilbert, Gareth Stanton and Willy Maley (eds), *Postcolonial Criticism* (Routledge 1997).

³⁰ See, for example, Carol J. Greenhouse, ‘Just in Time: Temporality and the Cultural Legitimation of Law’ (1989) 98(8) *Yale Law Journal* 1989, Lior Barshack, ‘Time and the constitution’ (2009) 7(4) *International Journal of Constitutional Law* 553, John Harrington, ‘Time as a dimension of medical law’ (2012) 20(4) *Medical Law Journal* 491.

‘[i]t is not entirely clear why most contemporary theorists of political and social justice talk about procedural justice in ways that rarely contemplate time.’³¹

Apart from the issue of intergenerational justice, Rawls does not grapple with aspects of time. He only very briefly remarks upon the scheduling of life plans and that a fair society is realised sequentially over time.³² Sen, Habermas and Benhabib also focus their attention on spatial justice over temporal justice. The scarcity of discussion of time by contemporary liberal justice theorists is problematic. Time and temporalities are inherent in constitutions and the political and legal processes that regulate society. The constitutions of nation-states represent significant historical moments in time, enshrining historical cultural narratives.³³ Democratic institutions and laws are structured by significant dates, periods and cycles. Our place in time, whether we fall within one-time pattern or another, or on one side or another of a cutoff date, affects fundamental rights and entitlements. For example, between 2006 and 2011, asylum-claimants caught up in an historic backlog were treated as so-called Legacy cases and were likely to be granted Indefinite Leave to Remain.³⁴ However, this meant that for a number of claimants there was no determination of whether the criteria set out under the Refugee Convention was met. Those who met the Convention criteria but whose cases fell within the Legacy case resolution period, gained the right of stay but lost the entitlements (and the stronger protection) of Convention Refugee status.³⁵

It is worth remembering that the hegemony of nation-states has a relatively short history and there exist factors that threaten the ‘heyday of state power, the Time of States.’³⁶ For the time being, states employ various forms of ‘time-discipline’ on people to the point of making the calendar and the clock ‘seem universal, natural and fundamental.’³⁷ States impose time rules to control national borders and the people within its bounds.³⁸ Qualification for

³¹ Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration, and Democratic Justice* (Cambridge University Press 2018) 24.

³² See discussion below.

³³ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread on Nationalism* (Revised ed, Verso 2006).

³⁴ This was an effective amnesty although the Legacy criteria was unclear. See John Vine CBE QPM, ‘An inspection of the UK Border Agency’s handling of legacy asylum and migration cases’ (Independent Chief Inspector of Borders and Immigration, March - July 2012); House of Commons Home Affairs Committee, *The work of the UK Border Agency (November 2010– March 2011)* (2010-12, 9 – I).

³⁵ For example, there are more stringent rules for deporting Convention refugees.

³⁶ Charles Tilly, ‘The Time of States’ (1994) 61(2) *Social Research* 269, 271. See, also, Hannah Arendt, ‘The Decline of the Nation State and the End of the Rights of Man’ in *The Origins of Totalitarianism* (Harcourt Books 1976).

³⁷ Charles Tilly, ‘The Time of States’ (1994) 61(2) *Social Research* 269, 271.

³⁸ Charles Tilly, ‘The Time of States’ (1994) 61(2) *Social Research* 269, 286-287.

citizenship is regulated temporally by ‘minimum legal periods of residence, naturalization stages, generational links, and other mechanisms’.³⁹ However, liberal democratic theories of fairness tend to overlook the instrumental and symbolic roles of time in the turning of the institutional cogs of the state. Taking time for granted in this way treats time as neutral, masking the political nature of time. Time blindness also obfuscates the normativity of time, its multiple forms and the diverse experiences of time. The following sections return to the fairness pillars, developed in Chapter 3, to consider how time is normatively connected to juridical fairness in asylum cases. Exploring the temporal dimensions of the fairness pillars demonstrates that time is a neglected yet essential feature of each normative pillar.

As the veil of ignorance is lifted, Rawls envisages that the chosen principles of justice will guide the realisation of a fair constitution, institutions, laws and society, in a linear sequence over time. Rawls intended for his abstract theory to apply in the real, temporal world, although he offers no substantive discussion of time and temporalities. With brevity, he outlines the time structure of good life plans envisaged in the original position. He mentions the allotment of the ‘basic resources of time and energy’ to different activities.⁴⁰ Rawls thus signals that time could be included as a primary good, that is, something generally necessary for carrying out life plans to their final ends.⁴¹ However, he does not make this point explicitly and he does not consider the meanings, roles or values of time. He recognises simply that ‘[w]e try to organize our activities into a temporal sequence in which each is carried on for a certain length of time’ based upon a hierarchy of life goals.⁴² Rawls briefly specifies three ‘time related principles’ that can be used to select among life plans.⁴³ The first is the ‘principle of postponement’.⁴⁴ This principle is linked to the rejection of time preference in the original position and holds that the ‘intrinsic importance that we assign to different parts of our life should be the same at every moment of time.’⁴⁵ This frees the values from ‘the contingencies of our present perspective.’⁴⁶ The second principle is that of ‘continuity’, which ‘reminds us that since a plan is a scheduled sequence of activities, earlier

³⁹ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71, 74.

⁴⁰ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 410. Rawls acknowledges, at p.411, that his comments on good life plans and allocating time ‘are unhappily too brief’.

⁴¹ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 411.

⁴² John Rawls, *A Theory of Justice* (Oxford University Press 1973) 410.

⁴³ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 420.

⁴⁴ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 420.

⁴⁵ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 420.

⁴⁶ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 420.

and later activities are bound to affect one another.’⁴⁷ The third principle, closely related to the second, holds that ‘rising expectations over time are to be preferred.’⁴⁸ In other words, ‘we should arrange things at the earlier stages so as to permit a happy life at the later ones.’⁴⁹ I will return to these temporal principles below.

Rawls identifies the broad categories of primary goods as ‘rights and liberties, opportunities and powers, income and wealth.’⁵⁰ However, this conception seems to assume the axiom that time is money.⁵¹ Rawls discusses the notion of leisure but as the inverse of work time.⁵² He does not express leisure time, or personal time, as a primary good.⁵³ Notions of the value of personal time as a primary resource for a person to realise her life plan is left unexplored. Leaving time undertheorised is problematic because it allows the state apparatus to assume control of time. The permitted dominance of institutional time in Rawls’s theory obscures lived experiences of time and neutralises state power over the lifetimes of individuals. Left unchecked, the state can usurp time and thereby undermine a person’s fundamental rights, opportunities and sense of their own value.⁵⁴ Time, rights, and opportunities are all values that a fair liberal society should enhance, not diminish.

Before delving into the analysis, it is helpful to recall two important points made in this thesis. The first is the broad conclusion reached in Chapter 2, that fairness is a fluid and a historically contingent concept. Within the example of the development of the UK asylum system, notions of fairness shifted over time. At different periods, different appeals to fairness were made for asylum-seekers, for nations, for Commonwealth citizens and for citizens. These changing notions of fairness shaped the contemporary UK asylum regime. However, when law is enacted and enshrined, either at the international or domestic level, the historical context is obscured. The ‘dominant temporality’ becomes the ‘permanence of the law’, eclipsing the lived temporalities of the past and present.⁵⁵ This thesis has shown that historical analysis of law is an important method of critical inquiry, which reveals a more

⁴⁷ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 420.

⁴⁸ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 421.

⁴⁹ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 421.

⁵⁰ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 92.

⁵¹ Julie L. Rose, ‘Money Does Not Guarantee Time: Discretionary Time as a Distinct Object of Distributive Justice’ (2014) 22(4) *The Journal of Political Philosophy* 438, 439.

⁵² John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) 179.

⁵³ John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) 179.

⁵⁴ According to Rawls, the most important primary good is self-respect. John Rawls, *A Theory of Justice* (Oxford University Press 1973) 440.

⁵⁵ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71, 81. See, also, Sarah Keenan, ‘Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration’ (2017) 28(1) *Law & Critique* 87.

nuanced view of legal concepts, such as fairness. The following discussion situates the right to asylum and the right to a fair hearing (as rights essential to a concept of fairness) in time. Doing this exposes the temporal influences on these rights and the temporal tensions within them.

The second point to recall is that, as demonstrated in Chapter 5, despite the principles of the special category of refugeehood and the universality of human rights, in practice, asylum-seekers are treated as external to democratic societies. Policies to erode the right to asylum, and the denial of Article 6 ECHR rights in asylum cases, positions asylum-seekers as remote outsiders, even when they are physically present. This does not fit with the principle of *non-refoulement*, with case law on Article 3 and Article 8 ECHR, or with common law principles. Nor do these practices fit with an asylum-centered conception of normative fairness.⁵⁶ By centering asylum-seekers in an adapted Rawlsian original position, this thesis argues for a more expansive interpretation of asylum rights than set out by Rawls.

4. THE TEMPORAL DIMENSIONS OF FAIRNESS AS SITUATED, CONSCIOUS IMPARTIALITY

4.1 Unexplored time and temporalities behind Rawls's veil of ignorance

In Chapter 3, the first pillar to support an asylum-centered account of fairness was identified as 'situated, conscious impartiality'. This pillar was discovered by revising Rawls's original position, situating asylum-seekers within the original position and making them 'conscious' of empirical realities. As explained above, Rawls largely ignores empirical time in the design and discussion of his fairness theory. His veil of ignorance not only deprives the situated parties at the original position of knowledge of their personal circumstances, that is, their endowments and status in society. The veil also conceals the parties from knowing the particulars of their own society, including the time and temporalities of their society.⁵⁷ Rawls removes time from his thought experiment so that the parties do not know which generation they belong to. This is to encourage the parties to adopt guiding principles that will benefit the wellbeing of present and future generations. This feature of Rawls's design is particularly relevant to thinking about the issue of protracted refugee situations, the rights of long-term migrants, access to citizenship, the changing causes of refugee movements over time, and the

⁵⁶ As developed in Chapter 3.

⁵⁷ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 137 and 294.

interests of future refugees. Rawls's removal of time-preference from the original position is useful in this regard. However, Rawls's world of timelessness clouds our thinking about different temporalities. That is, the '[c]omplex diverse temporalities pertaining to different cultures, sub-systems, and spheres of action'.⁵⁸ The idea of simultaneity allows concepts of time to be hijacked by the monolith of standardised Western time. Temporal simultaneity, therefore, reinforces the dominance of the institutional clock and state-centric thinking.

4.2 Unveiling the temporalities of asylum-seekers

The first important step of this thesis has been to challenge state-centered moral and legal thinking about asylum.⁵⁹ Leaving asylum adjudication procedures to the discretion of states has allowed the enactment of 'unfair procedures which appear to be against the spirit of the [Refugee] Convention'.⁶⁰ It has also impeded the liberation of asylum law from 'the political ideology surrounding domestic immigration law'.⁶¹ Rawls's hypothetical original position, which shuts out asylum-seekers, is unexpectedly useful in thinking about fair asylum adjudication and the tensions within the asylum system. This thesis employs and expands the Rawlsian fairness device. Asylum-seekers are 'situated' at the centre of the thought experiment and made 'conscious' of empirical realities.⁶² Taking the original position of 'conscious pariah', to use Arendt's phrase, has several advantages. First, refugees cease to be conceived of as a 'problem' to be 'solved' by the international community. Second, reconceptualised at the centre of Rawls's abstraction, refugees are deemed as equal moral persons and rights-bearers. Third, the conceptual shift from outsider to insider helps to resolve the intractable tension between sovereignty and universal rights. Fourth, the approach encourages the consideration of empirical injustices experienced by asylum-claimants. Given the benefits of this approach, it is surprising that few scholars have redeployed Rawls's theoretical exercise to take account of asylum-seekers.⁶³

⁵⁸ Saulo B. Cwerner, 'Faster, Faster and Faster: The time politics of asylum in the UK' (2004) 13(1) *Time and Society* 71, 72.

⁵⁹ Part I of this thesis (Chapters 1-3).

⁶⁰ Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (Pluto Press 1996) 50.

⁶¹ Patricia Tuitt, *False Images: The Law's Construction of the Refugee* (Pluto Press 1996) 50.

⁶² See Chapter 3 discussion

⁶³ Some scholars have imagined Rawls's abstract fairness theory from the view of the immigrant and the climate refugee. See Robert S. Chang, 'Centring the Immigrant in the Inter/National (Part III): Aoki, Rawls and Immigration' (2012) 90 *Oregon Law Review* 1319 and Maxine Burkett, 'Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice' (2018) 53 *Harvard Civil Rights-Civil Liberties Law Review* 445.

The second important step has been to challenge a state-centered view of time.⁶⁴ The empirical data of this thesis demonstrated that time is prominent in the lived experiences of juridical fairness. It is important, therefore, that we also think about how time is connected to normative fairness. The narrow view of Rawls's original position eclipses both migration and temporal issues. Chapter 3 argued that migration ought to be included as 'general facts about human society', known by the situated members at the original position.⁶⁵ Similarly, having excavated time as an equally significant factor, I argue that non-simultaneous temporalities (diverse perceptions and understandings of time) are 'general facts about human society.'⁶⁶ According to Rawls, 'There are no limitations on general information, that is, on general laws and theories, since conceptions of justice must be adjusted to the characteristics of the systems of social cooperation which they are to regulate, and there is no reason to rule out these facts.'⁶⁷ Explicitly including notions of diverse temporalities in the adapted abstraction assists us to critique the normative role of state-centered clock time. This second adaptation, which incorporates the experiences of lived time(s), helps to shift our thinking from a state-centered account of fairness to a more asylum-centered account of fairness.

This thesis argues that imagining a fair society from the situation of conscious asylum-seekers, a position that is intuitive of diverse temporalities, enhances our view of normative fairness in liberal democracies. For example, from an original asylum position, we might consider Rawls's temporal principles of postponement, continuity and rising expectations, which are essential to good life plans.⁶⁸ With these temporal principles in mind, asylum policies such as detention and strict restrictions on access to housing, benefits, and employment, appear less fair and liberal. This is because such policies undermine the intrinsic importance of the entire lifespan, they fail to connect asylum as an integral sequence of refugee integration and settlement, and they diminish the full, progressive realisation of rights.

From the original position of situated asylum-claimants, our perspective is freed from the constraints of nation-state borders and Western time that neutralise policies of exclusion. The time rules of the asylum system are not impartial. Exposing and problematising state time in the context of asylum determination in the UK reveals the politics of deterrence and the false images of asylum-seekers. These temporal narratives are entrenched in UK asylum

⁶⁴ Part II of this thesis (Chapters 4-6).

⁶⁵ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 137.

⁶⁶ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 137.

⁶⁷ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 137.

⁶⁸ See above at section 3.

law, policy and practice. For example, time was a major factor in the 1990s policy of ‘Fairer, Faster, and Firmer’ asylum processing in the UK.⁶⁹ This policy of speedy asylum processes was propelled by the desire to control refugee flows and facilitate prompt removals, based upon a false belief of ‘bogus’ asylum-seekers. Noteworthy, is the misrepresentation by Kenneth Clarke, Home Secretary from 1992 to 1993, that accelerated procedures were needed to stop the ‘skillful exploitation’ of delays by the ‘undeserving’ in order to be granted leave.⁷⁰ Tuitt highlights that there is ‘scant authority for this view’ and that asylum-seekers were ‘unfairly being characterised as fraudulent.’⁷¹ Administrative-legal time is thus used as a means of border control, reinforcing negative asylum tropes that diminish the rights of asylum-seekers.

Timeframes in asylum cases are also often applied inconsistently, arbitrarily, punitively and violently. For example, some detained claimants subject to accelerated processes still experience delay. There are no deadlines for the Home Office or tribunal to make decisions and there is no clear justification why some claimants wait much longer than others for decisions. Open-ended waiting periods put lives on hold in a way that has been described as ‘punitive sanctioning of the most extreme kind’.⁷² Hasty decisions, detention and forced removals are acts of state-sanctioned violence against individuals.⁷³ These temporal aspects of the asylum regime are normatively significant because they devalue the lives of asylum-seekers. The following section contemplates how time can enhance moral and legal equality via transformative rights.

5. THE TEMPORAL DIMENSIONS OF FAIRNESS AS RESPECT FOR HUMAN RIGHTS

5.1 A temporal right to asylum

The second pillar to support an asylum-centered account of fairness is ‘respect for human rights’. This pillar was revealed by reflecting upon the bounded nature of sovereignty and the

⁶⁹ See Chapter 2.

⁷⁰ HC Deb 02 November 1992 vol 213 col 24.

⁷¹ Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (Pluto Press 1996) 147-148.

⁷² Barry Schwartz, ‘Waiting, exchange, and power: The distribution of tie in social systems’ (1974) 79(4) *The American Journal of Sociology* 841, 862.

⁷³ Liz Fekete, ‘The deportation machine: Europe, asylum and human rights’ (2005) 47(1) *Race & Class* 64.

unbounded nature of (moral and legal) human rights.⁷⁴ Rawls sets out Articles 3 to 18 of the UDHR as illustrative of the minimum standard of human rights protection that would pertain in a fair society of peoples. Although, Rawls accepts that this bare threshold is ‘not a sufficient standard for the decency of domestic political and social institutions.’⁷⁵ The significance of these universal rights is that they apply to asylum-seekers as equal moral persons. Article 14 UDHR specifies the right to seek asylum and Article 10 UDHR sets out the right to a fair hearing. However, when put in historical context, in Chapter 2, Article 14 was found, arguably, to be a watered-down expression of the right to asylum under the 1905 Aliens Act. Chapter 5 also found that the courts have unjustifiably excluded asylum-seekers from the protection of fair trial rights under Article 6 ECHR (which covers the same rights as Article 10 UDHR). In this section, I discuss the temporal elements of the right to asylum. In the following section, I discuss the temporal elements of a right to a fair asylum hearing.⁷⁶

In Chapter 2, the enshrining of the right to claim asylum under the 1905 Aliens Act was discussed. The act of enshrining law creates an illusion of permanence and neutrality. However, laws are historically contingent. Chapter 2 highlighted that the 1905 legislation embodied tensions between a xenophobically driven, and politically opportunistic, effort to control immigration, and liberal concerns that controls would exclude political and religious refugees. When viewed through a temporal lens, the legislation is a paradox of an imagined future (of burdensome, undesirable immigrants) and an imagined past (of a freedom-loving and tolerant country). Emmott, a Liberal, observed during the 1905 Parliamentary debate, that supporters of the Bill resorted ‘to prophecy, to foretell what is going to happen in the future rather than what is happening at present. They have evolved out of their own inner consciences an imaginary case, a case not supported by statistics or facts on the floor of this House.’⁷⁷ Based upon misleading immigration figures and tropes of ‘undesirable’ migrants, the government made the case for excluding those ‘likely to become a public charge’.⁷⁸ The government’s case rested upon the false belief that ‘disease, crime, and pauperism are

⁷⁴ See discussion at section 4 of Chapter 3.

⁷⁵ John Rawls, *The Law of Peoples* (Harvard University Press 1999) 80.

⁷⁶ Further analysis within the context of the asylum system could include, for example, the relationship between time and the right to liberty, or security of person.

⁷⁷ HC Deb 02 May 1905 vol 145 col 770.

⁷⁸ As per Balfour, ‘From the famous statute of Elizabeth we have taken on ourselves the obligation of supporting every man, woman, and child in this country and saving them from starvation. Is the statute of Elizabeth to have European extension? Are we to be bound to support every man, woman, and child incapable of supporting themselves who choose to come to our shores? That argument seems to me to be preposterous.’ HC Deb 02 May 1905 vol 145 col 801.

introduced here by aliens'.⁷⁹ Just as supporters of the Bill appealed to an imagined future, critics of the Bill appealed to an imagined past. Cross-party politicians appealed nostalgically to the UK's 'great tradition as a free country' of granting asylum, so as not to 'shut the door which had been open from time immemorial'.⁸⁰ However, the truth, as Balfour recognised, was that the 'picture that from time immemorial this country had been so much in favour of religious equality and the rights of conscience that it gave an asylum to the religiously persecuted of all nations...had no historical basis in fact.'⁸¹ In reality, 'the only immemorial right of asylum given by this country was to allow aliens in with whom the country agreed.'⁸² As Emmott commented, the empirical context of the 1905 Act was, 'an influx from Eastern Europe, if not for political reasons for religious reasons. It is not a large or dangerous influx, and these men become very soon peaceable and law-abiding citizens of this country.'⁸³ The novel Bill did become law, enshrining competing temporalities, and eclipsed the particularities of the plight of the refugees from Eastern Europe during the early 20th century. The embodiment of these imagined temporalities in primary legislation neutralised the political misrepresentations and incongruities of the 1905 debate and the stories of the Eastern European refugees.⁸⁴ This illustrates that law 'is not bound by any temporal order: or, more exactly, law's time exists beyond mundane temporality. Any past, any future can be integrated into its eternal presence.'⁸⁵ And so, the false images of the past and present became persistently caught up in constructing asylum law.

The enshrining of a right to asylum under the 1905 Act did, however, remove from the executive unfettered control over the admission of refugees.⁸⁶ This prerogative had previously been determined by the politics or economic needs of the time.⁸⁷ The admission of refugees was recognised as an enduring moral and legal right under domestic and international law. However, the right of asylum was expressed as an exception to

⁷⁹ HC Deb 02 May 1905 vol 145 cols 798-792.

⁸⁰ HC Deb 10 July 1905 vol 147 cols 153-154, per Mr Cripps (Lancashire, Stretford).

⁸¹ HC Deb 10 July 1905 vol 147 col 157.

⁸² Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (London: Sweet & Maxwell 2004), 32, citing HC Deb 10 July vol 147 col 156.

⁸³ This reality prompted Emmott to ask the House, using language that was telling of the attitudes of the time, 'is it worthwhile for an evil so small to introduce legislation of such a novel and startling character?' HC Deb 02 May 1905 vol 145 col 773.

⁸⁴ Ignored was 'ample evidence' of the economic contribution of 'these aliens'. HC Deb 02 May 1905 vol 145 col 771.

⁸⁵ Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992) 56.

⁸⁶ See Chapter 2.

⁸⁷ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 31.

immigration control. This shackling of asylum to immigration (and the tropes of diseased, the criminal and the pauper) has endured.⁸⁸ The historical event of the First World War ended the legal right to asylum and granted the Home Secretary complete discretionary power over all non-citizens. The Home Secretary's unfettered powers were extended until 1969, long after the emergency period that justified the powers ended. With hindsight, this very long 'void in legal protection' for asylum seekers is remarkable.⁸⁹

In response to the holocaust and the refugee movements that resulted from this historical atrocity, drafters of the Refugee Convention distinguished the special category of asylum from immigration.⁹⁰ The Convention was refugee-centred and succeeded in enshrining the universal imperative of not returning refugees to face persecution. However, the refugee definition under the Convention contained a temporal limitation, binding states to protect only those refugees resulting from 'events occurring before 1 January 1951.'⁹¹ This time limitation in the refugee definition was introduced after the US delegate complained that the absence of a dateline would create 'a blank check' that would bind states to 'undertake responsibility in advance for all possible refugees who might become such as a result of unforeseeable happenings in the future.'⁹² The inclusion of the temporal limitation was questioned at the time and the UK pushed for no time limit. The French delegate asked, 'Was it really desired that the refugees of tomorrow should not be able to enjoy the international protection which had been extended to the refugees of yesterday?'⁹³ The temporal limit was state-centred, used to protect states, not to protect refugees.⁹⁴

The passage of time tested the Refugee Convention's temporal limitation. Subsequent events and later legal analysis demonstrated the European bias of the date clause.⁹⁵

⁸⁸ The burden was also placed upon asylum seekers to prove that they were 'bona fide', reinforcing the false image of the bogus applicant. Stevens observes that '[f]or the first time in British history, the asylum applicant now had to prove his or her status as a refugee.' Dallah Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 39.

⁸⁹ Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths 2000) 155.

⁹⁰ See Chapter 2.

⁹¹ Refugee Convention, article 1(A)(2). The date limit coincided with the establishment of the office of the UNHCR.

⁹² Kazimierz Bem, 'The Coming of a "Blank Cheque" — Europe, the 1951 Convention, and the 1967 Protocol' (2004) 4(1) *International Journal of Refugee Law* 609. The date limit clause appeared for the first time in the final draft version of the Convention. Despite being vociferous in the drafting process, succeeding in including a temporal limitation in the Convention, the US did not sign the Convention after all.

⁹³ Kazimierz Bem 'The Coming of a "Blank Cheque" — Europe, the 1951 Convention, and the 1967 Protocol' (2004) 16(4) *International Journal of Refugee Law* 609, 613, citing I.C. Jackson, *The Refugee Concept in Group Situations* (Martinius Nijhoff Publishers 1999) 55.

⁹⁴ See Chapter 2 discussion on the temporal limitation under the Refugee Convention.

⁹⁵ Joan Fitzpatrick, 'Revitalizing the 1951 Refugee Convention' (1996) 9 *Harv Hum Rts J*

Notwithstanding the fact that the flight of Hungarian refugees took place in 1956, caused by the Hungarian revolution, the Hungarian refugees were considered to fall within the scope of the 1 January 1951 time limit.⁹⁶ The flight of the Hungarian refugees was linked to the earlier event of the Communist takeover in Hungary, which took place during the Second World War. The temporal limitation was also interpreted generously for other European refugees fleeing from Communist regimes. Establishing a causal link allowed the dateline to be treated as elastic. However, elastic time was applied in a Euro-centric and politically advantageous way. For example, refugees from French Algeria from 1957 were considered to fall outside the time limit and therefore outside the protection of the Convention. Elastic time and the removal of the time limit was also political advantageous in the period of the Cold War. During this time, refugees were used as pawns because they possessed ideological value.⁹⁷

Against the backdrop of the process of decolonisation in the 1960s, the emergence of new refugee situations in Africa and Asia strained the 1951 time-limit. The UNHCR concluded in 1965 that, ‘With the passage of time...it became increasingly difficult for governments to recognize the existence of (...) a long-term historical link [with events occurring prior to 1 January 1951]. This seems especially true in new refugee situations which have arisen in Africa.’⁹⁸ Accordingly, the 1967 Protocol was adopted, which removed the temporal limitation.⁹⁹ The 1951 Convention refugee definition was assigned permanence and universality, extending protection to new and future refugees. However, this act also separated law from its historical context, and thus contributed to the depoliticised discourse prevalent in refugee law and studies.¹⁰⁰

Following the repeal of the 1905 Act, it was not until 1993 that the right to asylum

229, 232.

⁹⁶ Irial Glynn, ‘The Genesis and Development of Article 1 of the 1951 Refugee Convention’ (2011) 25(1) *Journal of Refugee Studies* 134, 142 and Kazimierz Bem ‘The Coming of a “Blank Cheque” – Europe, the 1951 Convention, and the 1967 Protocol’ (2004) 16(4) *International Journal of Refugee Law* 609, 618.

⁹⁷ B.S. Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11(4) *Journal of Refugee Studies* 350, 350.

⁹⁸ Kazimierz Bem ‘The Coming of a “Blank Cheque” – Europe, the 1951 Convention, and the 1967 Protocol’ (2004) 16(4) *International Journal of Refugee Law* 609, 613, citing the 1965 Report to the UNHCR by the Colloquium on Legal Aspects of Refugee Problems with particular reference to the 1951 Convention and the Statute of the Office of the United Nations High Commissioner of Refugees’ (Bellagio, Italy, 21-28 April 1965).

⁹⁹ The US signed the 1967 Protocol.

¹⁰⁰ B.S. Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) 11(4) *Journal of Refugee Studies* 350, 350.

was enshrined once again in domestic legislation.¹⁰¹ The Asylum and Immigration Appeals Act 1993 established a distinct asylum regime, ‘helping to free refugee law.’¹⁰² However, closer inspection shows that, under the 1993 Act, the ‘distinction was always more impressionistic than bold.’¹⁰³ The kernel of the 1993 Act was to restrict access to asylum from the new arrivals to Europe from the global south. These new arrivals were perceived as economic migrants and not deserving of protection, despite fleeing conflict and human rights abuses. Stevens observes the subsuming of the special category of asylum under immigration law was ‘the legacy of aliens’ legislation dating back to the turn of the century.’¹⁰⁴ The deficiencies of the asylum regime began to be exposed in the 1980s and 1990s, in the light of increased public attention over rising numbers of asylum-seekers. For example, criticism emerged over the wide powers to detain asylum-seekers, in detention centres and prisons, without any time limit.¹⁰⁵ It is noteworthy that the Bill, purporting to offer asylum-seekers a ‘fair deal’, was announced six months prior to the 1992 general election. The time location suggests that the purpose of the 1993 Act was not to remedy the long legal void for the benefit of asylum-seekers. As with 1905 Act, the inclusion of a right to asylum (and a correlating right of appeal) was a concession in the light of increased control. The Refugee Convention was incorporated into domestic law but the right to asylum was then circumscribed temporally. The silence of the Refugee Convention on procedures for determining refugee status has permitted states to use time in unfair processes to limit the scope of the Convention’s protection. For example, denying asylum-seekers reasonable time to present their cases.¹⁰⁶ The right to asylum and the right to a fair asylum hearing are therefore inextricably connected.

¹⁰¹ Until 1993, asylum claims were treated as part of immigration law, governed by the Immigration Act 1971 and the Immigration Rules. Under the predominantly administrative framework, not all asylum claimants were guaranteed an in-country right of appeal and there was no onward right of appeal to the Court of Appeal or to the House of Lords. The remedy of judicial review was, however, available.

¹⁰² See Chapter 2 discussion. Dallal Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 *Modern Law Review* 207, 208.

¹⁰³ Patricia Tuitt, *False Images: The Law’s Construction of the Refugee* (Pluto Press 1996) 150.

¹⁰⁴ Dallal Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 *Modern Law Review* 207, 208, citing the Aliens Act 1905; Aliens Restriction Act 1914; Aliens Restriction (Amendment) Act 1919; Aliens Order 1920, SI 1920 448. Nonetheless, the Asylum and Immigration Appeals Act 1993, s 2, incorporated the 1951 Refugee Convention, recognising the primacy of the Convention over the domestic Immigration Rules.

¹⁰⁵ See, for example, Mark Ashford, *Detained without Trial – A Survey of Immigration Act Detention* (JCWI 1993) 63-65. Concerns were also raised over the government’s reactionary implementation of visa restrictions and carrier sanctions, aimed at restricting access to asylum. See the Immigration (Carriers’ Liability) Act 1987.

¹⁰⁶ The use of procedural time limits to curtail the right to asylum is discussed below at section 5.3.

Nonetheless, the process of the harmonisation of EU asylum law under the development of the CEAS has confirmed the existence of a legal right to asylum. This right is transposed into domestic law. As argued in Chapter 5, EU law has thus had a transformative effect on domestic law, helping to elevate the right to asylum. The retention of legal aid for asylum matters, and the retention of a substantive asylum right of appeal under the Immigration Act 2014, tacitly acknowledges this legal position.

5.2 A temporal right to a fair hearing

During the parliamentary debate of the 1993 Act, ‘None of the representatives of the different parties suggested that Britain cease to grant asylum. All agreed that the granting of asylum was the mark of a civilized and liberal state and that Britain had certain legal and humanitarian obligations.’¹⁰⁷ Having acknowledged the substantive, universal right to asylum, Parliament was bound to also recognised the right to a fair legal process (namely, a right of appeal) for *all* asylum-seekers. However, this broadened the scope of the right to asylum beyond the government’s restrictive aims of deterring ‘bogus’ claimants and reducing the growing backlog of asylum applications. The 1993 Act, therefore, allowed for ‘special appeal procedures’ for claims deemed by the Home Office to be ‘without foundation’.¹⁰⁸ Under the special appeal procedures, the government reduced the time limit to appeal from the standard ten-days to a ‘very tight’ two-days limit.¹⁰⁹ The government thus used time as a knife to circumscribe the legal right to asylum. Claimants were divided temporally between standard and fast-track cases, between those perceived as genuine and those perceived as bogus. Webber described ‘the spread of fast-track procedures, which contain a fraction of the normal safeguards’, as the ‘most dangerous development in refugee determination.’¹¹⁰

In practice, most cases deemed by the Home Office to be ‘without foundation’ were ‘safe third country’ cases.¹¹¹ Where a claimant had travelled to the UK via a country deemed

¹⁰⁷ Liza Schuster and John Solomos, ‘The politics of refugee and asylum policies in Britain: historical patterns and contemporary realities’ in Alice Bloch and Carl Levy (eds), *Refugees, Citizenship and Social Policy in Europe* (Palgrave Macmillan 1999) 52.

¹⁰⁸ Immigration and Asylum Appeals Act 1993, schedule 2 para. 5.

¹⁰⁹ Asylum Appeals (Procedure) Rules 1993, SI 1993 1661, para. 5(2). There was no further right of appeal against the decision of a special adjudicator. Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 168.

¹¹⁰ Frances Webber, *The War on Asylum: Preventing Entry* in *Borderline Justice The Fight for Refugee and Migrant Rights* (Pluto Press 2012) 54.

¹¹¹ Dallal Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 *Modern Law Review* 207, 209.

by the Home Office to be ‘safe’, the Home Office would return the claimant to the third country without substantive consideration of their case.¹¹² This game of human pinball had little regard for the time or safety of asylum-seekers. Shifting responsibility for determining the asylum claim to another country, reduced Home Office ‘decision time effectively to zero.’¹¹³ Passing on the (time) ‘burden’ of asylum determination to countries, that tend to receive higher numbers of refugees due to their geographical location, is against the spirit of the Refugee Convention.¹¹⁴ Stevens observed that during the six months prior to the 1993 Act, the Home Office granted most asylum claims.¹¹⁵ However, during the six months period following the Act, the new temporal rules allowed the Home Office to refuse most asylum claims.¹¹⁶ The Home Office has since continued to refuse most claims. The 1993 Act, therefore, marks the ‘hardening of attitude’ of the Home Office by the hands of the clock.¹¹⁷

The 1993 Act also heralded a period of hyper-legislation in the asylum field. Following a legal void for the most part of a century, a second statute on asylum law, the Asylum and Immigration Act 1996, was passed within just three years of the 1993 Act.¹¹⁸ The 1996 Act tightened the accelerated appeals procedure.¹¹⁹ The list of categories of ‘fast track’ appeals cases grew.¹²⁰ Stevens observed that ‘the majority of asylum applicants

¹¹² The UNHCR’s interpretation of the safe third country rule is more stringent, covering only a country where a person has already been granted some legal status to remain in the territory. UNHCR, Background paper No. 2, ‘The application of the “safe third country” notion and its impact on the management of flows and on the protection of refugees’ (Geneva: UNHCR, May 2001).

¹¹³ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71, 79.

¹¹⁴ The preamble of the Refugee Convention encourages ‘burden’ sharing between countries.

¹¹⁵ Either granted asylum or exceptional leave to remain to those who needed humanitarian protection but were not found to meet the strict criteria under the Refugee Convention.

¹¹⁶ See Dallal Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 *Modern Law Review* 207, 209, citing Refugee Council, *Increase in refusals since the Asylum Act*, 22 November 1994.

¹¹⁷ Dallal Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 *Modern Law Review* 207, 209.

¹¹⁸ There was political value for the Conservative party in introducing a second piece of asylum legislation in view of the 1997 general election. The JCWI described the 1995 Bill as ‘the most extreme vote-oriented immigration legislation since the 1960s.’ See Alan Travis, ‘Asylum Bill lists benefits cuts’ *The Guardian* (30 November 1995).

¹¹⁹ And, as under the 1993 Act, there was no further right of appeal against the decision of an adjudicator.

¹²⁰ With the important exception of cases where there was a ‘reasonable likelihood that the appellant [had] been tortured in the country or territory to which he [was] to be sent’. However, this exception was subject to the definition of torture which has altered over time. See, *Medical Justice v Secretary of State for the Home Department* [2017] EWHC 2461 (Admin).

were...covered by the 'fast track' process'.¹²¹ Under the 1996 Act, the time that the asylum claim was made was also relevant as to whether the claim would be certified as unfounded. If a claim was made after illegal entry, following a refusal of leave to enter, or following a recommendation for deportation, then the claim would be certified.¹²²

The 1996 Act controversially introduced certification of claims from countries deemed as 'safe countries', which became known as the 'white list' countries. This created a rebuttable presumption that the claims of applicants from the listed 'safe' countries were unfounded. The white list imposed territorial and temporal limitations to the right to asylum. As with the 'safe third country' rule,¹²³ the 'white list' rule effectively reduced Home Office decision time to zero, as well as accelerating the appeals process.¹²⁴ Detained 'white list' claimants had only two days to appeal.¹²⁵ The blanket and hasty decision-making engendered by the 'white list' rule is contrary to the spirit of the 1951 Convention, which considered the careful determination of cases on an individual basis. The 'safe country' presumption also increased the evidentiary burden upon the claimant, which was difficult to discharge considering the quick rejection and truncated appeal process. Stevens highlights that the chances of 'white list' claimants winning an appeal were very limited.¹²⁶ However, the fixing of 'white list' countries did not accommodate well the fact of changing country situations. Whether the 'white list' was up to date and accurate at any given point in time was, therefore, questionable.¹²⁷ Moreover, where claimants are returned directly to a country of origin deemed to be 'safe', without any substantive consideration, this, essentially reduces asylum decision-making time to zero. Like the 'zero option rules' that determine national citizenship automatically, the safe country rule marks a temporal line that differentiates members from

¹²¹ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 172.

¹²² Asylum and Immigration Appeals Act 1996, s 1.

¹²³ Established under the 1993 Act and endorsed by the 1996 Act.

¹²⁴ Saulo B. Cwerner, 'Faster, Faster and Faster: The time politics of asylum in the UK' (2004) 13(1) *Time and Society* 71, 79.

¹²⁵ Asylum Appeals (Procedure) Rules 1996, SI 1996 2070 (L. 5), r 5.

¹²⁶ She explains that the 'applicant will only win the case on appeal by persuading the special adjudicator to disagree with the certification; this is a difficult task since the adjudicator is unable to oppose the certificate on the grounds that there may be, in his or her view, serious risk of persecution in the country concerned and that the country should not be listed.' Dallal Stevens, 'The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum' (1998) 61 *Modern Law Review* 207, 212.

¹²⁷ The white list received 'inadequate scrutiny under the negative resolution procedure.' Dallal Stevens, 'The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum' (1998) 61 *Modern Law Review* 207, 213.

non-members based upon place of birth or bloodline.¹²⁸ This temporal circumscription controls numbers but also race, ethnicity and culture.¹²⁹

Stevens notes that a ‘telling change was made to the case determination times by the new procedure rules’.¹³⁰ Under the 1993 procedure rules, the time limits to determine cases were rarely adhered to. One reason was ‘the delay of the Home Office’s Appeals Support Section in sending the appeal papers to the Immigration Appellate Authorities’.¹³¹ The 1996 procedure rules therefore loosened the time limit to determine an appeal in a standard case, from 42 days *from the notice of appeal*, to 42 days *from receipt of specified documents forwarded by the Home Office*.¹³² Time limits for asylum-claimants were tightened but time limits for the Home Office and tribunal were relaxed, even though the delay in the appeals system was attributable to the Home Office.

The 1996 Act removed the in-country right of appeal for ‘safe’ third country cases.¹³³ This reversed the position of the universal in-country right, established only three years prior.¹³⁴ Most of cases that the Home Office fast-tracked were ‘safe’ third country cases. Where special adjudicators disagreed with the Home Office decision to fast-track, rather than allowing the appeals, the special adjudicators tended to refer cases back to the Home Office for reconsideration.¹³⁵ The then Home Secretary, Michael Howard, suggested that the referral of ‘safe’ third country cases to the Home Office by adjudicators for reconsideration was due, mostly, to ‘the length of time that had elapsed since the arrival in the United Kingdom of the person concerned.’¹³⁶ Stevens points out that this view was ‘not quite accurate, since there is evidence that cases were returned by special adjudicators for substantive consideration for a number of reasons, ranging from the unsafety of third countries to lack of opportunity to

¹²⁸ Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration and Democratic Justice* (Cambridge University Press 2018) 42.

¹²⁹ Prakash Shah, *Refugees, race and the legal concept of asylum in Britain* (Cavendish 2000) 101.

¹³⁰ Dallal Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 *Modern Law Review* 207, 211.

¹³¹ ‘It took an average of 63 days between an appeal being lodged with the Home Office and the appeal papers being received by the IAA, with a range from 3 to 271 days.’ Dallal Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 *Modern Law Review* 207, 211, citing KPMG Peat Marwick, *Review of the Asylum Appeals Procedure* (London: Home Office/Lord Chancellor’s Department, 15 December 1994) 15.

¹³² Asylum Appeals (Procedure) Rules 1996, r 9(1) and (2).

¹³³ Asylum and Immigration Act 1996, ss 2-3.

¹³⁴ Under the 1993 Act.

¹³⁵ Dallal Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 *Modern Law Review* 207, 214.

¹³⁶ HC Deb 11 December 1995 vol 268 col 705.

apply for asylum in the third country.¹³⁷ However, the decision to curtail rights of appeal was based, at least in part, upon a misconceived belief that claimants were using tactics of delay to try to stay in the UK.

Under the 1996 procedure rules, those deemed to have arrived from safe EU third countries had twenty-eight days after departure to appeal from abroad. As Lord Woolf recognised:

...the value of the right of appeal exercisable only from abroad in practice was likely to be highly speculative since such a country could well remove him from their territory before he had time to exercise his right of appeal to a special adjudicator in this country. It was because of that restriction on the right of appeal that it was appropriate to challenge by way of judicial review the grant of a certificate of the Secretary of State without first exhausting the process of appeal...¹³⁸

The observable unfairness of the removal of an in-country right of appeal in ‘safe’ third country cases led, therefore, to the introduction of this temporal exception to lodging judicial review complaints in asylum cases.

The pattern of Parliament legislating every three years to control asylum continued under the Labour government with the Immigration and Asylum Act 1999 and then the Nationality, Immigration and Asylum Act 2002. This has been characterised as a period of hyperactive politics and legislation.¹³⁹ Rather than undo the harsh aspects of the 1993 and 1996 legislation, the Conservative government’s motif of ‘firm but fair’ asylum law and policy was adopted by the Labour government. In 1998, the White Paper, ‘Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum’ was published as part of a ‘long-term strategy’ to control asylum and immigration.¹⁴⁰ An aspect of the new asylum policy, which was welcomed by refugee support groups, was the amnesty granted to thousands of asylum-seekers caught up in the backlog. Those who had claimed asylum before 1 July 1993 were granted settlement. Those who claimed asylum between 1 July 1993 and 31 December 1995 were granted exceptional leave to remain. The settlement application waiting period in

¹³⁷ Dallah Stevens, ‘The Asylum and Immigration Act 1996: Erosion of the Right to Seek Asylum’ (1998) 61 *Modern Law Review* 207, 214, citing Amnesty International, *Playing Human Pinball – Home Office Practice in ‘Safe Third Country’ Asylum Cases* (Amnesty International, 1995) 21-29.

¹³⁸ *R v Secretary of State for the Home Department, ex p Canbolat* [1997] 1 W.L.R. 1569, 1574.

¹³⁹ See Nick Randall, ‘Time and British politics: Memory, the present and teleology in the politics of New Labour’ (2009) 4(2) *British Politics* 188 and Gareth Mulvey, ‘When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK’ (2010) 23(4) *Journal of Refugee Studies* 437.

¹⁴⁰ Home Office, *Fairer, Faster and Firmer – a Modern Approach to Immigration and Asylum* (Cm 4018, 1998), preface.

ELR cases was reduced from seven to four years. Those granted refugee status were also granted settlement with immediate effect.¹⁴¹ This might be viewed as a temporal transaction where asylum-seekers are compensated for lost time by reducing the temporal requirements leave and settlement.¹⁴²

Under the 1999 asylum regime, the practice of certification processes was retained. The controversial ‘white list’ was removed only to be reintroduced three years later under the 2002 Act.¹⁴³ The time limits to appeal were extended.¹⁴⁴ Stevens comments that these ‘time scales were much more realistic than those provided under the 1993 Act.’¹⁴⁵ In synchronicity with the Human Rights Act 1998, appeal rights were extended under the 1999 Act by adding the new HRA ground of appeal.¹⁴⁶ However, as Colin Harvey observes, under the 1999 Act, the ‘rules on the rights of appeal reflect the attempt to reconcile expeditious procedures with the extension of appeal rights.’¹⁴⁷ As part of accelerated agenda, the 1999 Act also introduced the ‘one-stop’ appeal procedure.¹⁴⁸ This was a type of fast-track measure which required the appellant to state on the appeal form all grounds for remaining in the UK so that the adjudicator could deal with all grounds in the same appeal.¹⁴⁹ Failure to list a ground prevented the appellant from relying upon that ground in the appeal.¹⁵⁰ Stevens observes that, ‘Even if asylum were claimed after the statement had been sent, it was still open to the Secretary of State to certify that the purpose of the claim was to delay removal from the UK and there was no other legitimate reason for making the claim.’¹⁵¹ Controversially, many of the 1999 Act provisions were introduced at a later date under secondary legislation and

¹⁴¹ Under the Immigration, Asylum and Nationality 2006 Act, the immediate settlement for refugees was changed to five-year review.

¹⁴² Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration, and Democratic Justice* (Cambridge University Press 2018) 140.

¹⁴³ Immigration and Asylum Act 1999 ss 147-159; schedule 4, para 9. Nationality, Immigration and Asylum Act 2002, s 94.

¹⁴⁴ For in-country appeals, the time limit to appeal was ten days after notice of the decision was received. For out-of-country appeals, the time limit was twenty-eight days after departure to appeal.

¹⁴⁵ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 179.

¹⁴⁶ Immigration and Asylum Act 1999, s 65.

¹⁴⁷ Colin Harvey, *Seeking Asylum in the UK: Problems and Prospects* (Butterworths 2000) 209.

¹⁴⁸ Immigration and Asylum Act 1999, s 74 (‘one-stop’ procedure).

¹⁴⁹ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71, 79.

¹⁵⁰ Unless the ground was asylum, human rights or discrimination, or if there was a reasonable excuse.

¹⁵¹ Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 182.

therefore were not subject to debate.¹⁵² In this way, time is used by the executive to avoid scrutiny.

The 1999 Act also introduced the concept of the ‘reception centre’ which heralded the Oakington procedure. As per Lester, ‘In essence, Oakington is a processing centre which enables determination decisions to be made with unprecedented speed, and in this respect, it is an extreme example from a system which aims to limit asylum-seekers’ opportunity to relate the full details of their case.’¹⁵³ However, as Cwerner observes, ‘it became clear to the government that the appeal system became the main battleground in its drive to speed up the asylum process.’¹⁵⁴ The momentous finding of the Court of Appeal in 2015, that detained fast-track appeals were structurally unfair, was not a spontaneous event or an inevitable evolution. The ruling was the result of the concerted, strategic efforts of a small group of activists and lawyers over a long period of time. The charity Detention Action invested a great deal of time and energy, gathering evidence of detained asylum cases and lodging successive legal challenges. Finally, through years of legal challenges, the Court of Appeal was persuaded, by the weight of evidence and legal argument, that the timeframes in the detained fast-track procedure, controlled by the Home Office, were unfair.

The Government continues to use mechanisms, such as the Dublin system, to detain asylum-claimants with the aim of removal from the UK. Under the Dublin system, a claimant is limited temporally to having one chance to make a claim and removals are made to the first ‘safe’ EU country of arrival, without processing the asylum claim.¹⁵⁵ However, removal may be frustrated resulting in prolonged detention, despite there being strict time limits imposed upon states to effect returns.¹⁵⁶ A request for a State to ‘take charge’ of an application must be made as quickly as possible and within three months of the claim being lodged in the UK, or within two months of a Eurodac fingerprint match, or within one month from the claim

¹⁵² Dallal Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) 176.

¹⁵³ Trine Lester, ‘Access to Legal Services for Asylum-seekers in Britain. An Exploratory Study of Recent Developments’ (Sussex Migration Working Paper No. 1. Sussex Centre for Migration Research, 2000).

¹⁵⁴ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71, 79.

¹⁵⁵ See Chapter 2 for discussion of the Dublin system. Not all EU countries are safe for asylum seekers. For example, in *M.S.S. v Belgium and Greece* (Grand Chamber) (2011) 53 EHRR 2, the Grand Chamber of the ECtHR found that poor asylum reception conditions in Greece meant that return of asylum-claimants to Greece violated Article 3 ECHR. See chapter 2 for discussion of the Dublin system.

¹⁵⁶ See, for example, Melanie Griffith, ‘Anonymous Aliens? Questions of Identification in the Detention and Deportation of Failed Asylum Seekers’ (2012) 18(6) *Population, Space and Place* 715.

being lodged if the claimant is detained.¹⁵⁷ A ‘take back’ request must be made as quickly as possible and within two months of a fingerprint match, or within three months of the claim being lodged in the UK if based on other evidence, or within one month if the claimant is detained.¹⁵⁸ However, there is evidence that the Home Office is manipulating these time frames to their advantage and to disadvantage asylum-seekers. Whistleblowers claim that the Home Office ‘regularly lied to other member states and manipulated the system by sending them “extra time” letters, falsely claiming asylum-applicants had launched appeals. These letters remove the deadline – usually six months – after which someone seeking asylum can no longer be removed from the UK and sent to the EU country determined to be responsible for assessing their claim.’¹⁵⁹ The Whistleblowers also claim that the Home Office ‘frequently detains applicants without the required timetable in place to deport them, meaning they are released and then detained again shortly afterwards.’¹⁶⁰ These examples demonstrate that, while time can appear standardised and fair, administrative-legal time is not impartial. Rather, administrative-legal time is employed to privilege or disadvantage by temporally circumscribing rights.

6. THE TEMPORAL DIMENSIONS OF FAIRNESS AS SOCIAL COOPERATION AND CARING

6.1 The resource of time

The third fairness pillar is ‘social cooperation and caring’ regarding human interdependence, the (intergenerational and transnational) moral and legal duties between individuals, and the sharing of basic resources. This concluding chapter argues that time should be interpreted as a basic resource (or good) to be distributed fairly in the adapted, asylum-centred original position. Conceived as such, the non-application of Article 6 ECHR (the right to a fair hearing within a reasonable time) to asylum matters is less tenable. As argued in Chapter 5,

¹⁵⁷ 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 OJ L 180, 29.6.2013 (Dublin III Regulation), article 21 and article 28(3).

¹⁵⁸ Dublin III Regulation, article 23 and article 28(3).

¹⁵⁹ Amelia Hill, ‘Home Office lied to EU states so it could deport slavery victims, say whistleblowers’ *The Guardian* (15 July 2019).

¹⁶⁰ Amelia Hill, ‘Home Office lied to EU states so it could deport slavery victims, say whistleblowers’ *The Guardian* (15 July 2019).

the denial of the temporal rights under Article 6 ECHR in asylum cases can no longer hold (and it is time to revisit *Maaouia*). The application of Article 6 ECHR to asylum decision-making is significant because it confers the requirement that the hearing is held within ‘a reasonable time’. The common law does not provide an adequate fairness standard and fast-track processes and systemic delays continue to test the fairness of asylum decision-making in the UK. The following section discusses the requirement of reasonable time as a key resource to ensure fair asylum decision-making.

While ‘we do not transfer time intergenerationally, from parents to children, as we do property, money, and other forms of privilege’, this does not mean that time is not a basic resource.¹⁶¹ Rawls does not discuss time explicitly as a primary good. That is, the social values, that every rational person is presumed to want, to be distributed equally in a hypothetical initial situation that is fair (unless unequal distribution is to everyone’s advantage). The idea of primary goods rests upon a system of social cooperation. Rawls states that primary goods ‘normally have a use whatever a person’s rational plan.’¹⁶² Rawls does not provide an exhaustive list of primary goods. He only assumes, for the simplicity of the exposition of his theory, that the chief primary goods are rights and liberties, powers and opportunities, income and wealth.¹⁶³ This illustrative list does not exclude time as a primary good. Time might be conceived as a right or a power, for example. After all, ‘time is required for almost any exercise of liberty’ and ‘time is bound deeply and inextricably to the exercise of power.’¹⁶⁴ Or, time might be conceived as a distinct social good. Rawls refers to the ‘basic resources of time and energy’ as necessary to structuring life plans. Rawls’s statement implies that a person’s lifetime is finite. However, Rawls also implies that time is equally abundant and under the control of individuals to decide how to allocate this resource in carrying out their life plans. Cohen comments that ‘[i]n contrast to something like money or aristocratic birth, clock-time is often assumed to be held in equal quantities by all.’¹⁶⁵ This view does not recognise clock-time as a resource that is directly under the control of the nation state. If we conceive of time as a primary good to be fairly distributed under the basic structure, then we have a better benchmark for judging inequalities and improvements. It is

¹⁶¹ Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration and Democratic Justice* (Cambridge University Press 2018) 10.

¹⁶² John Rawls, *A Theory of Justice* (Oxford University Press 1973) 62.

¹⁶³ John Rawls, *A Theory of Justice* (Oxford University Press 1973) 62.

¹⁶⁴ Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration and Democratic Justice* (Cambridge University Press 2018) 1-2.

¹⁶⁵ Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration and Democratic Justice* (Cambridge University Press 2018) 10.

only when we expose ‘time in the architecture’ of liberal democratic states that we can fully critique whether the legal rules and practices are fair.¹⁶⁶ Conceived as a good within the basic structure of a fair society of social cooperation and mutual caring, the problem of unequal time in an adversarial asylum system is more visible. The Home Office yield greater resources of time, capable of unfairly disadvantaging asylum seekers.

6.2 Time in legal aid as a proxy for access to rights

This section supports Cohen’s observation that ‘[f]ormulae for assigning or retracting all kinds of rights often include a temporal component.’¹⁶⁷ This section focuses on discussing the temporal elements of the resource of legal aid as critical components of the right to a fair asylum hearing (essential to realising right to asylum).¹⁶⁸ The discussion below demonstrate a system of legal aid time coercion and time rationing that diminishes asylum rights. The UK’s legal aid scheme for asylum and immigration is in sharp decline. Legal aid has been retained in principle for asylum cases but in practice, due to successive cuts, most adult asylum-seekers struggle to access a legal aid lawyer.¹⁶⁹ The legal aid scheme was established in the UK to ensure that ‘those of slender means and resources’ were able to obtain legal advice in order to ‘defend a legal right.’¹⁷⁰ As highlighted in Chapter 5, the legal right to asylum is acknowledged under EU law and is stronger than the right to seek and to enjoy asylum.¹⁷¹ According to the UNHCR, in order to ensure fair and efficient asylum determination, ‘At all stages of the procedure...asylum-seekers should receive guidance and advice on the procedure and have access to legal counsel. Where legal aid is available, asylum-seekers should have access to it in case of need.’¹⁷² However, successive cuts to legal aid have driven out quality and created a critical shortage of asylum legal aid lawyers. This means that

¹⁶⁶ Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration and Democratic Justice* (Cambridge University Press 2018).

¹⁶⁷ Elizabeth F. Cohen, *The Political Value of Time: Citizenship, Duration and Democratic Justice* (Cambridge University Press 2018) 4.

¹⁶⁸ See Chapter 5 regarding legal aid as an essential component of the right to a fair hearing.

¹⁶⁹ Jo Wilding, ‘Droughts and Deserts: A report on the immigration legal aid market’ (2019).

¹⁷⁰ Legal Aid and Advice Act 1949; Lord Chancellor’s Department, *Legal Aid and Advice Bill, 1949: Summary of the Proposed New Service* (Cmd 7563, 1948) 3.

¹⁷¹ See, EU Charter, article 18, and the Qualification Directive. In contrast to the UDHR, article 14.

¹⁷² UNHCR, *Asylum Process (Fair and Efficient Asylum Procedures)*, May 2001, EC/GC/01/12 at para 50(g). The Refugee Convention, article 16, guarantees refugees equal and ‘free access to the courts on the territory of all Contracting States...including legal assistance’. Given that refugee status is declaratory rather than determinative, arguably, article 16 applies equally to asylum seekers. See, also, UNHCR Handbook, para 28.

asylum-claimants in need regularly do not have access to legal advice and representation.

Legal aid has been available for legal representation in asylum appeals since 1998.¹⁷³ Under the legal aid regime, lawyers are ‘fee earners’ and legal work is measured in chargeable hours.¹⁷⁴ The first of four devastating rounds of cuts to legal aid for asylum and immigration cases began in 2004.¹⁷⁵ Costs limits were introduced that restricted the chargeable hours per case. Initial advice in asylum cases was limited to five hours and representation on appeal was limited to four hours.¹⁷⁶ This led Shami Chakrabarti to ask, ‘[h]ow many members of wider society would feel satisfied with that amount of advice in preparation of an acrimonious divorce, let alone a decision which might result in return to death or persecution on the other side of the world?’¹⁷⁷ Legal aid was also removed for lawyers to attend Home Office asylum interviews with their clients.¹⁷⁸ Acknowledging the critical importance of the asylum interview in the asylum decision-making process, the Court of Appeal found that, in the absence of a lawyer, asylum interviews must be tape recorded to ensure procedural fairness.¹⁷⁹ In addition to the cuts, firms and organisations with a legal aid contract were required to win forty-percent of their cases in order to keep their contracts. The effect of these funding restrictions was to undermine the quality of case preparation but also to encourage practitioners to ‘cherry pick’ cases. The new time pressures coerced lawyers

¹⁷³ Before 1998, legal aid was limited to legal advice from solicitors using the ‘green form’, or from the Home Office funded UK Immigration Advisory Service (IAS), or the Refugee Legal Centre. The green form did not cover representation at hearings but advice only. The RLC was funded in part by the UNHCR. The Legal Services Commission (LSC) succeeded the Legal Aid Board in 2000 and began to administer three forms of public funding: Legal Help for initial advice; Controlled Legal Representation (CLR) for appeal work; and Legal Aid ‘certificate’ funding for appeals to the Court of Appeal or applications for Judicial Review. The Legal Services Commission (LSC) succeeded the Legal Aid Board in 2000 and began to administer three forms of public funding: Legal Help for initial advice; Controlled Legal Representation (CLR) for appeal work; and Legal Aid ‘certificate’ funding for appeals to the Court of Appeal or applications for Judicial Review. Eligibility for all three forms of legal aid was made subject to a means test and CLR and ‘certificate’ funding was made subject to a merits test. Eligibility for all three forms of legal aid was made subject to a means test and CLR and ‘certificate’ funding was made subject to a merits test. The LSC also only awarded legal aid contracts to firms and organisations for a specified number of matter-starts.

¹⁷⁴ Adeline Trude and Julie Gibbs, ‘Review of Quality Issues in Legal Advice: Measuring and Costing Asylum Work’ (Report by ICAR, City University, London, 2010).

¹⁷⁵ See Emma Borland, ‘Fairness and the right to legal aid in asylum and asylum related cases’ (2016) 2(3) *International Journal of Migration and Border Studies* 1755.

¹⁷⁶ Constitutional Affairs Committee, *Civil Legal Aid: adequacy of provision: Fourth Report* (HC 2003-2004, 391-II). Maximum limits were also imposed for disbursements. However, it was possible to apply for an extension to both the time limit and the disbursement limits.

¹⁷⁷ Shami Chakrabarti, ‘Rights and Rhetoric: The Politics of Asylum and Human Rights Culture in the United Kingdom’ (2005) 32(1) *Journal of Law and Society* 131, 141.

¹⁷⁸ Legal aid for lawyers to attend HO asylum interviews was retained for cases where the applicant is an unaccompanied minor.

¹⁷⁹ *R (Dirshe) v SSHD* [2005] EWCA Civ 421.

into taking on cases likely to succeed without many hours' preparation, discouraging lawyers from taking on more complicated, time-consuming cases. However, it tends to be the more complicated and laborious cases that result in landmark rulings that establish important new legal principles. Time limits on legal aid work, therefore, not only affected access to quality legal aid provision in individual cases but affected the expansion of asylum legal rights more generally.

The restrictions forced experienced asylum practitioners to leave asylum work, resulting in a 'severe shortage of good quality legal advice and representation available to asylum seekers'.¹⁸⁰ The impact of the restrictions undermined the 2004 introduction of the Law Society's accreditation scheme, which aimed to improve quality of advice and representation in asylum cases.¹⁸¹ The remaining specialist asylum lawyers had little time to absorb the 2004 changes before the arrival of the 2005 cuts. Retrospective payment for appeal work was introduced.¹⁸² This funding arrangement was unique to asylum and immigration matters and required lawyers to bear the financial risk.¹⁸³ This second round of restrictions served to 'compound the difficulties faced by those seeking good-quality publicly funded legal advice and representation.'¹⁸⁴

The third and most impactful round of restrictions to the asylum sector was the introduction of fixed fees in 2007. A set fee was paid to lawyers for work done regardless of the number of hours spent on the case. This further disincentivised quality legal services. As described by Singh and Webber, the 'fixed-fee system rewards firms with a speedy turnover of cases, and discourages firms from handling complex cases or those involving vulnerable clients who cannot be hurried.'¹⁸⁵ The Constitutional Affairs Committee warned that the fixed fee arrangement was 'extremely risky' because 'providers will be faced with a stark

¹⁸⁰ Bail for Immigration Detainees, 'Justice Denied: Asylum and Immigration Legal Aid – A System in Crisis' (BID 2005).

¹⁸¹ Constitutional Affairs Committee, *Civil Legal Aid: adequacy of provision: Fourth Report* (HC 2003-2004, 391-II).

¹⁸² Home Affairs Committee, *Immigration Control: Fifth Report* (HC 2005-2006, 775-III).

¹⁸³ As of the 27th March 2015, conditional funding also applies to pre-permission judicial review work. See Civil Legal Aid (Remuneration) (Amendment) Regulations 2015. See, also, Rowena Moffatt and Carita Thomas, 'And Then They Came for Judicial Review: Proposals for Further Reform', (2014) 28(3) *Journal of Immigration, Asylum and Nationality Law* 237 for discussion of the 'chilling effect' of this reform.

¹⁸⁴ Anne Singh, 'Asylum charities accuse legal services of systematically denying access to justice' (IRR 25 May 2005) <<http://www.irr.org.uk/news/asylum-charities-accuse-legal-services-commission-of-systematically-denying-access-to-justice/>> accessed 29 November 2014.

¹⁸⁵ Anne Singh and Frances Webber, 'Excluding migrants from justice: the legal aid cuts' (Institute of Race Relations, December 2010) <http://www.irr.org.uk/pdf2/IRR_Briefing_No.7.pdf> accessed 28 November 2014.

choice between cutting by reducing staff costs and time spent on cases or leaving the legal aid market.¹⁸⁶ The Constitutional Affairs Committee were proved right. Fixed fees contributed to the forced closure of the two largest and long-standing asylum legal assistance providers, Refugee Migration Justice (RMJ) and the Immigration Advisory Service (IAS).¹⁸⁷ The closure of RMJ and IAS left thousands of asylum-seekers without legal representation. Following this major loss to the asylum sector, the tender process in 2010 awarded fewer and smaller legal aid contracts and with no regard to the quality of the providers. The consequence was expanding legal advice deserts and greater inconsistency in the quality of provision.¹⁸⁸

In addition to driving out reputable legal aid providers, the restrictions resulted in surviving providers misapplying the merits test for legal aid at the appeal stage.¹⁸⁹ Third-sector projects to help asylum-seekers refused legal aid to challenge these decisions, revealed that providers were wrongly refusing funding in two thirds of cases.¹⁹⁰ These erroneous funding decisions left a high proportion of asylum-seekers with meritorious cases without legal representation. This is significant because legal representation improves prospects of success.¹⁹¹ The fixed-fee arrangement, together with the better chances of success on appeal, meant that lawyers tended to have done little preparatory work, spending little or no time with asylum clients at the initial stage.¹⁹² Assessing merits is not an exact science and the true merits of a case often do not become apparent until the case has been prepared. In *IS v The Director of the Legal Aid Casework & Lord Chancellor*, Collins J ruled that the rigidity of the merits test and the way it was applied was wholly unsatisfactory and unreasonable.¹⁹³ Collins J found that, ‘The whole point of representation is that it will produce the chance of success which without representation will not exist’.¹⁹⁴ However, this requires lawyers to

¹⁸⁶ Constitutional Affairs Committee, *Implementation of the Carter Review of Legal Aid: Third Report* (HC 2006-2007, 223-I), para. 119.

¹⁸⁷ RMJ was formerly the Refugee Legal Centre.

¹⁸⁸ Jon Robins, ‘Legal aid lawyers facing fight to survive after tendering shake up’ *The Guardian* (14 July 2010).

¹⁸⁹ The implementation of a merits test for legal representation in asylum appeals has been resisted in Scotland where legal aid is administered by the Scottish Legal Aid Board.

¹⁹⁰ Ceri Hutton and Sue Lukes, ‘An interim external evaluation of Refugee Action’s Access to Justice Project’ (Refugee Action October 2013).

¹⁹¹ See Chapter 1.

¹⁹² See Chapter 1.

¹⁹³ *IS v The Director of the Legal Aid Casework & Lord Chancellor* [2015] EWHC 1965 (Admin) [106].

¹⁹⁴ *IS v The Director of the Legal Aid Casework & Lord Chancellor* [2015] EWHC 1965 (Admin) [96]. The civil legal aid merits regulations were amended following the judgment so that legal aid

invest hours in early preparatory work and the funding arrangement discourages this practice. Early case preparation not only helps lawyers to assess merits but helps to improve the quality of initial Home Office asylum decisions.

The Home Office's Early Legal Advice Project (ELAP), which operated in the Midlands and East of England between 2010 and 2012, was aimed at improving Home Office asylum decision-making, to improve confidence in the system and save money. Under the pilot project, lawyers met with asylum clients in receipt of legal aid at the start of the process and were allowed more time with clients to gather and present evidence to the Home Office. This gave legal aid lawyers more time to build a relationship of trust with clients and to take a full witness statement to be submitted to the Home Office before the asylum interview. Legal aid lawyers and Home Office decision-makers were encouraged to cooperate by discussing the case by telephone before the asylum interview, checking that it was appropriate for the interview to go ahead. The lawyer would also be present at the asylum interview and then would discuss the case with the Home Office decision-maker immediately after the interview. The evaluation of ELAP found that 'front-loading' the legal preparation of asylum cases increased the number of successful outcomes at first instance, thereby reducing the number of appeals. ELAP also improved decision-making in complex cases and improved the confidence of those involved in the initial decision-making process. However, ELAP was found to increase the Home Office time taken to make initial asylum decisions and was found not to save money.¹⁹⁵ The project, therefore, was abandoned and not rolled out nationally.

A fourth round of restrictions were introduced in 2013, despite the negative impacts of previous restrictions and the fact that legal aid rates had not increased since first introduced in 1998. The government reduced legal aid fees by ten percent¹⁹⁶ As Robins highlights, the 'standard fee for asylum work is lower than the amount it costs for a lawyer to do the work properly. Solicitors reckon that the average cost is as much as double the fixed fee. So those firms committed to providing a quality service to vulnerable clients risk losing money on every single standard fee case they do.'¹⁹⁷ The same year saw the fifth round of cuts. Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO),

became available in asylum appeal cases assessed as having 'borderline' (50%) or 'poor' (20%-50%) prospects of success. However, providers need to apply to the LAA in such cases to request funding.

¹⁹⁵ Mike Lane, Daniel Murray, Rajith Lakshman, Claire Devine and Andrew Zurawan, 'Evaluation of the Early Legal Advice Project Final Report' (Home Office Research Report 70, May 2013).

¹⁹⁶ The Community Legal Service (Funding) (Amendment No.2) Order 2011, SI 2011 2066. The 10% reduction took effect from 3 October 2013.

¹⁹⁷ Jon Robins, 'Justice in a time of austerity (Pt 5)' (2019) *New Law Journal* 7.

legal aid was axed for immigration cases but retained for asylum cases.¹⁹⁸ However, the substantial cuts to legal aid for immigration matters served to accelerate the attrition of specialist asylum and immigration lawyers, already ‘exhausted by the attempt to make quality pay.’¹⁹⁹ Annual statistics published by the Ministry of Justice in 2014, showed that the early impact of LASPO was a sixty-two percent drop in the number of immigration legal aid providers - from 226 (187 solicitors firms and 91 not-for-profit organisations) in 2011-12 to just 86 (76 solicitors firms and 10 not-for-profit organisations) in 2013-14. This meant that even where legal aid was in scope for asylum-seekers, in practice, many asylum-seekers were unable access legal assistance.

The impact of successive restrictions on publicly funded asylum lawyers is clear. Through time coercion, legal aid provision has become landscape is of ‘deserts and droughts’.²⁰⁰ Quality, time invested practice has been driven out. Wilding finds that the existing legal aid supply is ‘precarious’. Surviving firms and not-for-profits have been forced to make ‘financially rational’ decisions.²⁰¹ This means that firms might have matters starts available but, forced to time ration, they are turning away cases that are not financially viable.²⁰² Robins summarises that, ‘Committed practitioners refuse to compromise their services but are forced to reduce market share to limit losses to the amount they can afford to subsidise whilst those that don’t give a toss clean up and provide a rubbish service for vulnerable clients.’²⁰³ The result of time rationing, as Wilding reports, is that there is ‘virtually no chance’ of an adult asylum-claimant finding a good quality legal aid lawyer because the lawyers ‘can’t afford to do the work’.²⁰⁴ The absence of asylum legal representation has an impact upon tribunal time as ‘tribunals are forced to adjourn’.²⁰⁵ However, the most disastrous impact of the withdrawal of legal aid (through time coercion

¹⁹⁸ The Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into effect on 1 April 2013. Namely, claims under the Refugee Convention, Article 2 and/or 3 ECHR, the Temporary Protection Directive and the Qualification Directive (schedule 1, para 30(1)).

¹⁹⁹ Sheona York, ‘The end of legal aid in immigration - a barrier to access to justice for migrants and a decline in the rule of law’ (2013) 27(2) *Journal of Immigration, Asylum and Nationality Law* 106, 106.

²⁰⁰ Jo Wilding, ‘Droughts and Deserts: A report on the immigration legal aid market’ (2019).

²⁰¹ Jo Wilding, ‘Droughts and Deserts: A report on the immigration legal aid market’ (2019).

Practitioners are prioritising cases that are ‘less complex or else paid at hourly rates or else sufficiently complex to escape the standard fee scheme.’ Jon Robins, ‘Justice in a time of austerity (Pt 5)’ (2019) *New Law Journal* 7.

²⁰² Jo Wilding, ‘Droughts and Deserts: A report on the immigration legal aid market’ (2019).

²⁰³ Jon Robins, ‘Justice in a time of austerity (Pt 5)’ (2019) *New Law Journal* 7.

²⁰⁴ Jo Wilding, ‘Droughts and Deserts: A report on the immigration legal aid market’ (2019) and Jon Robins, ‘Justice in a time of austerity (Pt 5)’ (2019) *New Law Journal* 7.

²⁰⁵ Jon Robins, ‘Justice in a time of austerity (Pt 5)’ (2019) *New Law Journal* 7.

and time rationing) is the watering down of the right to a fair hearing and the right to asylum.

Legal aid is crucial in asylum cases to safeguard access to procedures that are fair. Thomas' empirical study of the UK asylum adjudication system showed that represented appellants experience a higher degree of success than unrepresented appellants.²⁰⁶ Asylum cases are factually and legally complex. This is due to hyper-legislation within the area of asylum and immigration. The legislation that was proliferated between 1993 and 2002 was very technical and obscure.²⁰⁷ Moreover, Article 8 ECHR proportionality assessments have been complicated by the provisions of the Immigration Act 2014.²⁰⁸ Thomas has, accordingly, described asylum adjudication as 'perhaps the most problematic adjudicatory function of the modern state.'²⁰⁹ High quality lawyers able to navigate the 'legal minefield' have acquired their skill and experience over time. However, they are being driven out of the system by the time pressures of the legal aid funding structure. The time of these lawyers is needed to help asylum-claimants to gather important evidence, to comply with procedural deadlines, and to present their cases in a manner that is easily comprehensible by the adversarial tribunal. Collins J reminded us that, 'there is a limit to the extent to which it is proper for a judge to assist one party to litigation and if there is either factual, legal or procedural complexity it is difficult to see how an unrepresented party who will inevitably be likely not to be able to approach the matter objectively can have a fair hearing.'²¹⁰ Collins J highlighted that an adversarial tribunal or court 'cannot obtain evidence where there are gaps in what an applicant has been able to produce. Equally, it may have difficulties if there is defective written material put before it in appreciating whether there is any substance to a claim or even if any particular human rights claim is properly raised.'²¹¹ The tribunal is able to assist litigants in person to some degree but Immigration Judges are 'able to do so only upon the basis of evidence that is placed before it.'²¹²

As discussed in Chapter 5, asylum-claimants will usually have an Article 8 ECHR

²⁰⁶ Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart 2011) 116.

²⁰⁷ Maria O'Sullivan, 'The Intersection Between the International, the Regional and the Domestic: Seeking Asylum in the UK' in Susan Kneebone (ed), *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press 2009) 236-239.

²⁰⁸ Sheona York, 'Immigration Control and the Place of Article 8 in the UK Courts - an update' (2015) 29(3) *Journal of Immigration, Asylum and Nationality Law* 289.

²⁰⁹ Robert Thomas, 'Risk, Legitimacy and Asylum Adjudication (2007) 58(1) *Northern Ireland Legal Quarterly* 49, 49.

²¹⁰ *IS v The Director of the Legal Aid Casework & Lord Chancellor* [2015] EWHC 1965 (Admin) [71].

²¹¹ *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin) [28].

²¹² *Gudanaviciene & Ors* [2014] EWHC 1840 (Admin) [91].

(the right to a private and family life) aspect to their case. Lawyers are obliged, in accordance with their professional ethics, to advise upon all aspects of a case. If a practitioner fails to advise on all aspects of their client's case then they are at risk of doing serious damage to the case, and of being subject to disciplinary proceedings and sanctions, or sued for their misconduct. However, advice and representation on Article 8 ECHR is no longer in scope under LASPO. This creates difficult ethical dilemmas for legal aid practitioners in asylum cases where there is an Article 8 ECHR claim. In such instances, to avoid malpractice, practitioners have three options.²¹³ First, practitioners may decide to charge asylum clients on a private basis for time spent advising that is not covered by legal aid. However, most asylum-seekers (who are not permitted to work in the UK) are unlikely to be able to afford to pay lawyers' hourly rates. Second, practitioners are likely to feel under pressure to offer their time spent on Article 8 casework on a *pro bono* basis. However, working for free within a financially precarious sector is unsustainable. The third option is for legal aid providers to record incorrectly the time spent on the Article 8 part of the case under the asylum part of the case, thereby being dishonest to the LAA regarding the work done on files. The cuts to Article 8 work is a further illustration of time control and coercion. This is notwithstanding the possibility of applying to the LAA for Exceptional Case Funding (ECF) to cover out-of-scope Article 8 work. ECF applications are complicated and time-consuming. Many legal aid practitioners, already overburdened with heavy caseloads and financial stress, are not prepared to do ECF applications for which their time is not remunerated. If lawyers are reluctant to do ECF applications because they are too complicated and lengthy then claimants themselves are unlikely to be able to complete the application.

Less subtle attempts to curtail legal aid from asylum-seekers have been resisted by the Supreme Court. The Lord Chancellor was unsuccessful with trying to introduce a legal aid residence test. The Ministry of Justice proposed to introduce an additional hurdle to gain access to legal aid, namely, the criterion of twelve months lawful residence in the UK. The Supreme Court upheld the rulings of the High Court and the Court of Appeal that having to prove time resident in the UK in order to be granted legal aid unlawfully discriminated against those who had recently arrived. Before the High Court, Moses LJ noted that, 'Feelings of hostility towards the alien or foreigner are common', but that discrimination could not be justified 'where all are equally subject to the law, resident or not, and equally

²¹³ Emma Borland, 'Fairness and the right to legal aid in asylum and asylum related cases' (2016) 2(3) *International Journal of Migration and Border Studies* 1755.

entitled to its protection, resident or not.²¹⁴ Moses LJ concluded that, ‘In the context of a discriminatory provision relating to legal assistance, invoking public confidence amounts to little more than reliance on public prejudice.’²¹⁵ Yet, discriminatory provision of legal aid has prevailed in a more insidious form. Incrementally, legal aid time coercion and time rationing have diminished the right to a fair hearing and the right to asylum for most adult asylum-seekers. The following section explores how the temporal curtailment of asylum rights and the devaluing of asylum lives might be resisted.

7. THE TEMPORAL DIMENSIONS OF FAIRNESS AS INCLUSIVE PUBLIC REASON

7.1 Valuing the time and temporalities of asylum-seekers

In this section, I return to examples from Chapter 4’s empirical analysis to demonstrate the importance of valuing the time and temporalities of asylum-seekers in the legal reasoning of asylum determinations and the wider political reasoning of asylum policy making. In Chapter 3, the fourth pillar to support an asylum-centered account of fairness was identified as ‘inclusive public reason’. Drawing upon the conceptions of public reason set out by Rawls, Habermas and Sen, inclusive public reason was understood as granting equal voice to asylum-seekers in liberal-democratic political and judicial processes. This conclusion opened the thesis inquiry to listen directly to the voices of asylum-seekers. In Chapter 4, the accounts of asylum-seekers revealed that the time and temporalities of asylum-seekers are not valued in the system of public reason.

The first example is the problem of inordinate delay within judicial processes. Delay is inimical to fair judicial processes. As Thomas highlights, ‘justice delayed is justice denied.’²¹⁶ One of the research participants had waited for more than a decade for his case to be resolved. He asked what he had done to be in ‘prison’.²¹⁷ The delay experienced by this participant was not unheard of and was not the longest waiting period observed. Another participant exclaimed that he had heard of some people waiting, ‘Twelve years!’ Delay was

²¹⁴ *R (Public Law Project) v the Secretary of State for Justice* [2014] EWHC 2365 (Admin) [84].

²¹⁵ *R (Public Law Project) v the Secretary of State for Justice* [2014] EWHC 2365 (Admin) [84].

²¹⁶ Robert Thomas, ‘Immigration Judicial Reviews in the Upper Tribunal (Immigration and Asylum Chamber): An Analysis of Statistical Data’ (UK Administrative Justice Institute, 21 April 2016) <<https://ukaji.org/2016/04/21/immigration-judicial-reviews-in-the-upper-tribunal-immigration-and-asylum-chamber-an-analysis-of-statistical-data/>> accessed 28 September 2019.

²¹⁷ Mohammed 2 at p. 4. (Appendix 8).

encountered at all stages of the asylum process, from the initial decision-making phase to the appeal-phases. The participants felt that waiting for a period of up to six months was reasonable but that waiting for longer than this period was unfair. Those participants who received a decision within six months considered that they had been lucky. One participant said, ‘I’ve always been wondering, is it fair that my case only took six months when people who are suffering more hardship than me wait for years?’²¹⁸ The participants highlighted that delay prolongs and exacerbates feelings of uncertainty and fear.

In addition to uncertainty and fear, the participants highlighted that delay is also problematic because it extends periods of curtailed freedoms and material hardship. When they claimed asylum, limits were placed on their access to the labour market, their mobility, their access to education, and their housing options. In the light of these restrictions, the participants likened waiting for an asylum decision to serving a prison sentence, to *doing time*. They complained of not being ‘free’ and of being at the ‘mercy’ of the administration.²¹⁹ They considered the experience of being an asylum-seeker a ‘punishment’. One participant considered writing a book entitled: ‘To be a refugee is a crime!’²²⁰

Delay prolonged the experience of forced poverty and instability. One participant explained that ‘delay ‘will put [asylum-seekers] in trauma, depression, isolation...No stabilised future for them. They can’t seek any support. They can’t do any work. So, all the time, their life is under threat.’²²¹ Indeed, all the participants talked about waiting and suffering from stress and deteriorating well-being. One participant had attempted suicide and others described having suicidal thoughts. Their accounts are stark illustrations of a dehumanising system, characterised by punishing delay. Another participant recognised the resource implications of tackling delay. However, all the participants underlined the human cost of the protracted suspension of their lives. They wanted to be seen first as human beings, whose lives were finite, and whose lived time mattered. One participant implored, ‘The time is passing, and we are human beings.’²²²

Unpicking the theme of delay, revealed other temporal elements of the asylum regime that diminishes the lived times and lifetimes of asylum-seekers. The participants were aware that the administration controlled the clock and of the clash between institutional time and

²¹⁸ CG at p. 15 (Appendix 7).

²¹⁹ Blessing at p. 33. and CG at p. 12. (Appendix 4).

²²⁰ Blessing at p. 33. (Appendix 4).

²²¹ TIB at p. 19. (Appendix 1).

²²² Blessing at p. 31. (Appendix 4).

their lived temporalities.²²³ The domination of administrative-legal time left the participants feeling that their temporalities were not valued. This exposed the theme of *unequal time*. While the participants endured lengthy processes, they were expected to comply with strict administrative-legal timeframes and time limits. Moreover, in contrast to the periods of inordinate waiting, the participants described interactions with administrative bodies, and with lawyers, where time felt rushed, and they felt prejudged and ignored. One participant believed that the Home Office ‘just want to rush...so they can get me into a plane fast and send me back.’²²⁴ At the point of the initial claim and screening, the administration routed cases depending upon perceived merit and the speed that they could be processed. None of the participants were subject to the detained fast-track procedures.²²⁵ However, even outside the temporal extremes of the fast-track process, the participants experienced the unfair temporal dynamics of slow and fast decisions. The different rates of procedural time seemed to depend arbitrarily upon nationality, with certain nationalities more likely to receive quick decision than others. The participants felt that, in hasty decisions, the individual evidence was overlooked, and the full range of vulnerabilities remained invisible. Some of the participants believed that their legal aid lawyers had not given their full attention to their cases, concerned, rather, with their hours of service.²²⁶ One participant was told by his legal aid lawyer that he was a ‘very good client’ because he did not bother her with calls and did not take up too much of her time.²²⁷ It seemed that the lawyers did little work at the initial stage in terms of helping the participants to gather and present corroborative evidence.²²⁸ The participants considered that asylum cases were a ‘special’ class of case, which required lawyers and decision-makers to take their time and pay attention to the individual claimants.²²⁹ However, it was felt that administrative-legal time eclipsed their lived temporalities.

The force of administrative-legal time also divided the participants from other temporalities, namely, their pasts and memories, family time, work time, social time, and

²²³ Cwerner also observes the ‘inevitable clashes between the lived temporalities of refugees and the institutional mechanisms that characterize the time politics of asylum.’ Saulo B. Cwerner, ‘Faster, Faster and Faster: The time politics of asylum in the UK’ (2004) 13(1) *Time and Society* 71, 81.

²²⁴ John at p. 11. (Appendix 6).

²²⁵ It is important to highlight that the detained-fast track system has been suspended following the Court of Appeal’s finding, in 2015, that the procedure rules on detained-fast-track appeals were structurally unfair and unlawful. *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840. See Chapter 5 discussion.

²²⁶ See discussion at section 6.2 of this Chapter.

²²⁷ Mr M at p. 4. (Appendix 2).

²²⁸ See discussion at section 6.2 of this Chapter.

²²⁹ See Mr M at p. 16. (Appendix 2).

future ambitions. In this way, the participants' lived experience was also one of *severed time*. The participants were conscious, for example, of the timeframes that affected their ability to tell their past stories. At the important bureaucratic moment of the main asylum interview, the participants felt that they were not asked appropriate questions to elicit their stories. Some of the participants were met with disbelief, and, in these instances, they felt that their narratives were repressed and distorted. The status of asylum-seeker kept the participants in a suspended state. They could not go back. They were separated from their families. And they could not move forward. Time was *severed*. Harsh asylum policies caused the participants to resent their asylum-seeking identities. One participant even expressed resentment towards new arrivals who he viewed as a threat to scant resources. He said, 'if you don't want people to come, you must open another system for people to not get to [the UK]. But you can satisfy all those people inside already. The way you are killing people who are inside already because of people coming. It's not fair.'²³⁰ However, despite the time rules that caused the participants to feel like they were *doing time* and that their time(s) were *unequal* and *severed*, the participants used expressions of time and temporalities to resist the force of administrative-legal time.

7.2 Temporal resistance

The participants challenged the temporal force of asylum law and practice by highlighting the temporary nature of the asylum-seeking status. The participants emphasised that they did not become asylum-seekers through choice and desired to move forward in time and beyond this status. One participant said, 'it's just the situation that I'm in at the moment.'²³¹ The participants viewed their asylum-seeking situations as transitory periods within a progressive temporal sequence towards refugee status, settlement and citizenship. The participants were aware of the media portrayals of asylum seekers as scroungers and threats to society. Those granted refugee status were eager to shed their asylum-seeking identity. The participants thus challenged negative narratives by forgetting. They tried to suppress memories of their time seeking asylum and tended to disassociate themselves with other asylum-seekers. Speaking of claiming asylum, one participant said, 'it's such a long time ago. I've tried to bury those memories...It was not pleasant. It was stressful.'²³² The participants also challenged the

²³⁰ Blessing at p. 32. (Appendix 4).

²³¹ Mohammed 1 at p. 17. (Appendix 3).

²³² CG at p. 4. (Appendix 7).

dominance of administrative-legal time by likening their experience to past struggles, by making claims to universal, eternal rights, by making claims to presence and duration, and by making claims to future permanency. The participants were eager to form new lives and identities but struggled to ‘start again’.²³³ ‘[S]tarting from scratch’ was difficult because the participants’ skills were not recognised and the asylum process confined them to the margins of society. However, the participants directly challenged the restrictive policies and delays that were barriers to their integration. They emphasised the future value of their integration. According to one participant:

[Refugees]...will educate themselves, they will build their family, they will have a new community, a new country. And the [host community] will benefit from them. If their skills [are not] sufficient, they will build their skills again. If they’ve got family, their family, their kids will be the future for this country. It will enrich this country and it will enrich the family as well.²³⁴

The participants stressed that their time and temporalities mattered and that a system that did not value their lived time was unfair.

In summary, the thesis investigation has found two sets of unfairness within the UK asylum system. That is, at the theoretical level and at the empirical level. These two strands are captured within the four, interlinked fairness pillars (as identified in Chapter 2 and applied here). What follows from the theoretical and empirical investigations in this thesis, is that you cannot investigate all unfairness at a theoretical level. There are some instances of unfairness that are only noticeable when we pay attention to the lived experiences of those within the system.

With regards to the first pillar of situated, conscious impartiality, the unfairness highlighted by critique of theory was the conceptual problem of closed borders that result in the obscured rights of asylum seekers and refugees. By excluding asylum seekers and refugees from the first original position, Rawls inadvertently inhibits the full realisation of the rights and interests of members of these generally disadvantaged groups. It is not enough to consider the interests of asylum seekers at the constitutional, legislative and judicial stages or by extension at the international level. I contend that the question of asylum is so crucial to our understanding of a fair society that it must be dealt with in the first instance. Failing to do so permits ‘othering’ which is inimical to fairness and justice. The unfairness highlighted by

²³³ Blessing at p.3. (Appendix 4).

²³⁴ TIB at p. 18. (Appendix 1).

the empirical research was the hidden temporalities of asylum seekers and refugees. This key empirical finding also drew attention to Rawls's general theoretical neglect of the empirical and, therefore, the temporal. The main theoretical recommendation made here, therefore, is to centre the lived experiences (and temporalities) of asylum seekers and refugees at the most fundamental level of theoretical enquiry. I have argued that the best approach is to centre the lives of asylum seekers and refugees within an adapted Rawlsian original position (as detailed in Chapter 3). This technique exposed a hidden bias, within liberal theory, towards state-centred time and, in practice, the unfair time rules within the UK asylum system. The legal and practical recommendation, therefore, is to problematise the fairness of seemingly neutral time rules within asylum systems. This critical approach to the fairness of time rules will, hopefully, mitigate against the disadvantaging, discrimination and exclusion of asylum seekers and refugees.

Turning to the second pillar, that is, respect for human rights, the critique of theory revealed the unfairness of tying human rights to notions of national citizenship. The empirical research highlighted the unfairness of excluding asylum seekers from democratic society by narrowly constructing human rights as the rights of citizens (the exclusion from Article 6 ECHR protection, for example). The empirical research also highlighted how rights were circumscribed temporally (the UK's discriminatory fast-track rules, for example). The recommendation made, therefore, is to reconcile human rights and national sovereignty by centring asylum seekers within liberal theory. This challenge to state-centric thinking aids the conceptual untangling of asylum and immigration control. At the legal and practical level, the recommendation is to enshrine robust substantive and procedural asylum and refugee rights, including the right to *non-refoulement*, the right to asylum and the right to a fair hearing, within domestic law. Enshrining the fundamental rights of asylum seekers and refugees acknowledges that they are equal moral persons and rights-bearers. Substantive and procedural protections are thereby heightened as they start to mirror the rights of citizens. Unfair, discriminatory time rules, thus, become easier to diagnose and challenge.

As for the third pillar, of social cooperation and caring, the critique of theory found inattention paid to the question of fair time and the fair distribution of time as a basic resource. The empirical research showed how time was used by the state coercively and to curtail rights. My recommendation for theoretical investigation, therefore, is to conceptualise time as a fundamental resource to be shared fairly, as with other fundamental goods such as wealth and power. Viewing time as a resource helps to expose insidious forms of unfair treatment and discrimination in practice.

The critique of theory captured under the fourth pillar of inclusive public reason, highlighted the unfairness of the undervaluing of the lived experiences of asylum seekers. This is closely linked to the first pillar. The empirical research highlighted that the time and temporalities of asylum seekers matter, in terms of fair adjudication and fair treatment. The theoretical recommendation, therefore, is to value the lived time of asylum seekers by centring their voices at the most fundamental level of theoretical investigation. In legal and practical terms, this means centring the narratives of asylum seekers in asylum determinations and asylum policy decisions.

8. CONCLUSION: A CALL TO TURN TO TIME IN LEGAL THEORY AND ASYLUM LAW

This chapter and this thesis conclude with a call to explore time and temporalities within legal theory and asylum law. Rawls' work, in common with that of several other contemporary liberal thinkers, lacks a substantive, critical discussion on the role of time(s). The dominance of administrative-legal time is left unchallenged, reinforcing state-centric thinking. This chapter applied the four asylum-centered pillars of fairness to explore the normative roles played by time in the UK's asylum legal system, offering a richer conception of fairness. There is some overlap between the pillars and the associated discussion of temporality.

Examining the first pillar of fairness, as situated, conscious impartiality, it was found that the atemporality of the original position allowed control of time to be assumed by the state. A further adjustment to Rawls's original position was, therefore, proposed. In addition to including the general fact of migrations in the original position, I argued for the inclusion of the general fact of multiple temporalities in the design. This alteration does not undo Rawls's exclusion of time preference. Rawls's important contribution of intergenerational justice is not, therefore, undermined. Including the general fact of diverse temporalities helps to guard against the unchecked dominance of state time. Freed conceptually from rigid territorial borders and Western clock-time, our fairness horizon is enhanced. We are less likely to fall into the trap of the uncritical reproduction of the hegemony of the nation-state. From a position of situated, conscious impartiality, in the adjusted Rawlsian original position, decision-makers are freed from prejudice, and empathically tuned to the basic rights and diverse temporalities of asylum-seekers. Asylum-seekers are thus included territorially and

temporally within the presented conception of fairness and assigned equal basic moral and legal rights and equal time.

The second pillar of fairness, as respect for human rights, was applied to explore the temporal dimensions of interrelated asylum rights, namely, the substantive right to asylum and the procedural right to a fair asylum hearing. Regarding the right to asylum, it was found that the strength of the right fluctuated over time. This was due to the right to asylum embodying the competing temporalities of an imagined past (of a fair, liberal state) and an imagined future (of burdensome, undesirable immigrants). The right to asylum has been strengthened by the transformative effect of EU law. However, to mitigate against the right to asylum being diminished in the future, it is recommended that asylum is divorced from immigration; an unhappy marriage that was fixed in 1905. As learned from the history of the 1951 Refugee Convention, the right to asylum should neither be bound territorially nor temporally. Moreover, claiming asylum should not divide asylum seekers from work time or other temporalities that would affect their basic rights, such as the right not to be subject to inhuman or degrading treatment. We must be vigilant against time rules that create the illusion of fair treatment, but which result in substantive unfairness. As evidenced, for example, by the time rule to refuse support where there was delay claiming asylum.²³⁵ A legal right to asylum carries a right to a fair legal hearing. This was confirmed in 1905 under the Aliens Act, in 1951 under the Refugee Convention, in 1993 under the Asylum and Immigration Appeals Act, in 1999 under the Immigration and Asylum Act, in 2002 under the NIAA, in 2012 under LASPO, and in 2014 under the Immigration Act.²³⁶ There have been several attempts to curtail this procedural right temporally as can be seen, for example, in the implementation of different formulations of fast-track procedures.²³⁷ The aim of accelerated procedures is to reduce decision-making time and hasten removal of asylum-seekers from the United Kingdom, thereby eroding the substantive right to asylum. However, campaigners, lawyers and judges have found legal grounds for time resistance. For example, in 2015, the

²³⁵ *Limbuela* [2005] UKHL 66

²³⁶ See Aliens Act, 1905, Section 1(2); 1951 Refugee Convention, Article 16; Asylum and Immigration Appeals Act, 1993, section 8; Immigration and Asylum Act 1999, sections 65 and 69; Nationality, Immigration and Asylum Act, 2002, sections 82-84; LASPO, 2012, schedule 1, para. 30; and Immigration Act, 2014, Part 2, section 15.

²³⁷ See Asylum and Immigration Appeals Act, 1993, schedule 2, para. 5 and the 1993 Asylum Appeals (Procedure) Rules, para. 5(2); the Immigration and Asylum Appeals (Procedure Rules) 2003, SI 2003/652 (L.16), and the Immigration and Asylum Appeals (Fast Track Procedure) Rules 2003, SI 2003/801 (L. 21); the Asylum and Immigration Tribunal (Procedure) Rules 2005, SI 2005/230 (L.1) and the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005, SI 2005/560 (L.12); and the Tribunal Procedure (First-tier Tribunal) (and Asylum Chamber) Rules 2014, SI 2014/2604.

Court of Appeal finally acknowledged that the fast-track appeals process was systematically unfair and unjust. The Court of Appeal recognises that ‘justice and fairness should not be sacrificed on the altar of speed and efficiency.’²³⁸

Temporal analysis of the third pillar, that is, fairness as social cooperation and caring, is helpful in working out how we might begin to enhance asylum rights. In other words, identify opportunities for temporal equality. Time was conceived as a basic resource, which, in accordance with the Rawlsian notion of primary goods, should be distributed fairly (maximising time for asylum-seekers who are in unfavourable situations). The fair distribution of time as a primary good is based upon the core idea of a system of mutual caring and social cooperation. These notions, of fair share and equal rights, are also at the heart of the Refugee Convention. The idea of time as a basic resource, acknowledges that clock-time is under the control of state institutions but allows the balancing of different temporalities. Adopting this view demonstrated how the uneven distribution of time can unfairly disadvantage asylum-seekers. However, by exposing how time can be a proxy for access to asylum rights, opportunities for time resistance also become more apparent. This thesis has argued for the direct application of the temporal protections under Article 6 ECHR to asylum decisions.

The final fairness pillar, as inclusive public reason, called for the time and temporalities of asylum seekers to be valued in the process of asylum determinations and asylum policymaking. The analysis of this pillar focused on the opportunities for temporal resistance. The first important step was ceasing to view asylum only as a temporary status, subsumed by immigration law and cut off from rights to settlement. Asylum-seekers are protected against *refoulement* because refugee status is declaratory and not constitutive. Refugee status is recognised, not granted. Asylum is more accurately viewed as the first step on an expedient path to permanent status.²³⁹ It is important to recognise not only the special (normative and legal) category of asylum, but also the precious nature of the time(s) of asylum-seekers. It is important to recognise that asylum-seekers are challenged with starting their lives over in a new country (and the time left at their disposal to rebuild their lives is limited). However, the time(s) of asylum-seekers is also precious in terms of the time-invested skills that asylum-seekers bring with them. In the words of one of the research

²³⁸ The Lord Chancellor and Detention Action v SSHD [2015] EWCA Civ 840, para. 49.

²³⁹ Of settlement and naturalisation. See Refugee Convention, article 34, which states that: ‘Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to *expedite* naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.’ (emphasis added).

participants, the value of the time of asylum-seekers ‘will enrich this country.’²⁴⁰ This chapter’s analysis has demonstrated the philosophical and practical merit to the study of temporal fairness in asylum law and practice. There are many rich temporal domains within the asylum system to be studied. To avoid leaving asylum-seekers ‘out of frame and out of time’, this thesis calls for a turn to time in legal theory and asylum law.²⁴¹

²⁴⁰ TIB at p.11. (Appendix 1).

²⁴¹ To borrow Tuitt’s phrase. Patricia Tuitt, *Race, Law, Resistance* (Glasshouse 2004) 60.

APPENDIX 1: TRANSCRIPT OF INTERVIEW WITH TIB

*EB: Can you tell me, in your own way, about your experience of claiming asylum in the UK?
What happened? (Q1)*

TIB: What do you mean? In my way to claim asylum in the UK? Which side of experience you want to know?

EB: If you can tell me what happened...

TIB: Where? Here or before?

EB: Let's talk about what happened in the UK. If you can talk me through what happened in as much detail as you can remember.

TIB: I think I still remember what happened when I arrived in the UK. When I landed. I wasn't believed that I landed in the UK, yes. So, until the airplane landed to the airport in London...so, straight ahead, I grabbed my passport in my hand and I was the first person who got off the airplane in that moment. Just when I entered the airplane it was just one seat available for me because all the passengers, they had their seats already. So, my seat was the first seat in the front door. And I noticed that we arrived to the UK. So, just to get off the airplane was a very important point for me. To get off and then to tell the security guard. I had my passport, very confidence, and I talked to the authorities. Please, I am this person from that country so I am seeking asylum in this country. So, this is not my passport. I just use it, just to escape. He told me, 'Ok. Just calm down, and follow me'. I followed him and he took me to the specific room. I think this was an investigative room or a detained room. I wait there until they...until they called people. And they start their investigation, asking me, and that was the first interview. Then they kept me about...until I finished. They checked all my stuff. I declared for them my position. And everything was smoothley, actually, yeah. But before to start the interview it was very important for me to let my family know where I am. Yes, this was, for me...because nobody know where I am. Even me, I don't know where I am. But I found I am in the UK so, after I asked the officer, he told me, 'you are here in the UK'. That's found it so easy. So, I let my family know. They were back in my country. I told them, I've arrived. I'm in a safe place. This is why the important message to deliver to my

family. They were very exciting, very happy, to know that I am safe now, in a safe place. So, we went through the investigation. I attend the interview. It wasn't a long interview, so, it's normal. Then after we finished they kept me for about four, five, six hours. I can't remember. Then they told me...afterwards they kept me a while, I will say in detention place, or waiting room, similar, so. We wait there and then they removed me to a hostel in the same city. I don't know where they located me, actually, I don't know. They send me somewhere else, so. It was a huge department. They put me there for a night to sleep and then told me, you will move for next day to Wales, which is Cardiff. So, I arrived to Links House.

EB: With the first interview, do you think that interview went well? Do you think that you were treated well during that interview? (Q2)

TIB: Yes, I actually was. Maybe, my background, my characters, or that confidence I got helped me to, yeah. And the investigator that interviewed me was, so, very open, very clear, so nothing too hidden, actually. So, everything for me was clear. I wasn't so panicked but I was under the stress, actually, yeah. The stress was very, very, like, huge, so. Even I were there but my whole body...Physically, I was there but my mind was in a different place, thinking. Yeah, huge pressures. I didn't know what the future would be for me, for the other relatives: my family, the close family, I mean, and my other families. So, we don't know how it will go. But the interview was very, I can't say it was simple, it was normal. I found later it was normal, actually. But it was very important to state everything with that interview, the initial one. But without that we can't go ahead. It cause a lot of issues, I think, so, it's my view.

EB: You said that you think that your background, your character, helped the first interview to go well, can you explain?

TIB: No, what I meant is my professional character gained me some ability for me to ask, to listen properly. Not to take things...take suspicion away. The ability to understand the questions. Helped to me to understand and answer clearly. You know, if I don't have that background and knowledge, it won't help me. And I think the stress level will be more higher than compared with myself. So, if somebody else were in my situation maybe the pressure would be more. I don't mean to take this thing easy. No, no, it's not easy, no. You are changing your whole life. On first trip to leave, and you are changing your whole life, and

you don't know what the future how it will be. I found that interview was the first steps, for me, for my whole life to be changed and started from scratch. So, it was the first step.

EB: Do you think that there is anything that could have happened during that first interview to make it...so that it could have gone better? Do you think that it could have been improved? I'm thinking, maybe if there was a legal adviser who you could have met with at that time? Is there any information that you think that you should have received that would have made that whole experience easier to cope with in terms of stress?

TIB: The first, it is not about big issues, it is about your case. If we talk about the case, it means legal case, if it's related to immigration. So, legal case, that means it's better to have a legal adviser, to lead you, to advise you. Because it's your life. So, we can't compare to other cases, normal cases, in normal life, when we deal with others. If there is something we need to do, we seek legal advice to do it properly. But in that moment, alone, under pressure, not normal pressure, huge pressure, losing everything, and you say, I am now in the middle of the sea, you need to risk yourself. I don't mean to create a story, no. You can say, that's your future, all your future, all your case will be built on that case, in that moment, maybe one hour, two hours, or how long it will take, I don't know. But your future will be decided upon that interview. Not the whole of your life but will be the basic and play the major role when it will go further ahead.

EB: So, did you know the importance, the significance of that initial interview, and felt the weight of that...

TIB: What do you mean? Did I know in advance? Before?

EB: Yes.

TIB: No, no, no. I didn't know how it would go. I am talking about my ability to absorb, to understand things, to, maybe...the things I came through in my country affected positively my...how to deal with issues. To be in equal situation and how to manage it with an open mind and try to solve it smoothly, you know? To do the balance between the pressure you have in that moment and to divide that pressure, and to put it away, and discuss the issue that you are facing in that moment.

EB: Sorry, do you mean that your professional experience helped you to do that?

TIB: Yes, my knowledge, my experience as a professional person helped, yes. Not to mix between a lot of things in the mean time. Just concentrate. You are dealing with main issue, just concentrate on that to solve it, to deal with it. Not to mix all things at once, you won't sort anything. This is how to manage, to separate, to divide the issues, not to mix all issues together. So, it helps, actually.

EB: Did you have an interpreter during that first interview? (Q3)

TIB: No. Yes. Yes, because I wouldn't be able to speak in English. I had an interpreter, yes. Egyptian dialect. For me it was understandable. Yes, we could understand in that moment.

EB: Do you think that your interpreter interpreted well? Were they professional?

TIB: After I had a look at that interview, I think, I don't say nothing wasn't missing from that interview but I think, yeah, everything was stated properly. But I can't say they don't do any mistake. They do a lot of mistake. Maybe one of those mistake will have big effect on the whole case and will affect badly. And every time if you are in that position you will say, this is not my fault, this is the interpretation problems. And your credibility will affect your whole case, how do you need to sort that point. This is my view. That means all the time, if you are working, there is some problems, some mistakes will happen, even if you are professional, it will happen. But the misinterpretation in those types of cases, it works like a big role. And if they can manage because I can speak such language but it requires a certain dialect, much better to provide that dialect in the initial interview. If not, a lot of misinterpretation will happen because...

EB: So, there could have been a better selection of interpreter?

TIB: Yes, it would be a better selection and more understandable for the issues. Also...

EB: So, who do you think should have been your interpreter for that interview? Who would have been best to interpret?

TIB: If he can speak my dialect it will be good but for me, personally, when I was there in that moment, the certain dialect we communicate, it was ok. It was ok. But what's the negative side might come if in the initial interview...this is my view also...because the majority of people who come to the UK, if they are coming from my country, if the interpreter was from the same country, they will feel scary. They won't be open because they

are in doubt if that person will pass information. Even if he is an interpreter, they don't trust that interpreter. They are not in a position to understand all the English, or their English was very poor, so won't pay any trust. And they will try to hide a lot of information just from the position of being defending themselves, rather than to disclose. And this a prejudice, actually, it won't work. To find that interpreter might affect, or pass wrong, or interpret wrongly, it could be happen with another interpreter if misunderstand that dialect or the meaning. But the reason the type of the crisis is the problem still exists in our country, divide all the people between, so they don't trust so much, maybe affect up to them. But more, more important to have the same dialect to understand if they are honest in such interview like this, which is so important for the person's position when they are seeking asylum in this country.

EB: You mention how important it is to have a relationship of trust with the interpreter, did you feel that you trusted the person interviewing you? (Q4)

TIB: I can't say that there should be trust. But the trust should be the information you are provided should be stated correctly. This is the trust, how it works. Not about between persons. We don't have relation in advance to say, yes, we trust them. This is a type of work, they do their work and if they are doing their work properly and they take all the procedures to protect that work to be in that certain stage, like recording everything as the proof so they done that work properly. If there is a complaint, if there is something missing, yes we have got something to support. But if those things drop down, yes, the issue will come out.

EB: So, it is trust and confidence in the process, in the procedure? Having fair and transparent procedures?

TIB: You can't say that there is trust because nobody will trust you. If there is trust, that means that they believe you, and they will give you the decision straight away. But they will listen to you, this is trust. If they are listen to you carefully. This is such type of trust. They do pay their attention to your case and they state everything correctly, yeah.

EB: Do you feel like you were listened to? (Q5)

TIB: Yes. They were listen, yeah. But I am not sure that they listen one hundred percent or not. But they were keen to listen because the things in our country were so new, so people hadn't start to feel boring about what had happened in our country, maybe. Maybe, they are interested to know to build other cases on this, with such evidence they are gathering.

EB: So, that was the first interview and then you said that you were taken to a hostel and moved to Links House, Cardiff. Can you tell me what happened after that? (Q6)

TIB: Yes, after that, after they moved me to Links House, I stayed there about, no more than two weeks, actually, yeah. I'd been told that I'm from Syria so the process won't take long. The people, not the Home Office. The Home Office won't declare that the process won't take so long. But the people who are Syrian, or the people, the refugees, who heard from the Syrian people as refugees claiming asylum, and they get the decision so quick. So, yes, I stayed in Links House for two weeks and I get within those two weeks some health issues, problems. So, yeah, maybe from the stress affected badly to my situation. They took me with the ambulance to the hospital, I think twice, or once, I can't remember. Yeah, I stayed for two weeks which I think is unusual to stay there for two weeks. It should be more. So, it's like some problem occurred between what I declared in the airport to the immigration authorities, what I possessed in my pocket, if I had some money or not. I declared everything correctly, I signed the paper. But the Home Office told me, no, you haven't declared, you hide your money. I told them, how can I hide those? There is the paper I signed on. So, that means there is no communication between the two authorities. This things affected badly to me to be kicked off from a hostel. And then during the waiting for the second interview they referred me to the legal adviser. So, I went there and we talked about the first interview. So, if there was something missing and we need to recorrect it, or preparing some correspondence between the legal adviser and the Home Office, to highlight some problems. During that, I mentioned the legal adviser what's happened from the savings, why they are telling me, the Home Office, no, you still have money, I should get out from Links House. I told them this is not true. This is what I had declared to the authorities in the airport, which is the same money that I spent those money, I bought some stuff, which is...I had all the receipts but they don't believe me up to now. Why? They said no, you're still hiding information, you still have those money. How? All those receipts. The legal adviser sending email and been in touch with the Home Office but still no solution. They ask me to get off, get out from Links House before the second interview. Why? Misunderstanding, misinterpretation. Even there is proof. I tried to sort it out, all the situation to retain the stuff I bought it, or to keep those stuff with the Home Office. Just to keep me in the hostel. They said, no, no. They asked me, why are you buying those stuff? I told them because I need to communicate with my family back home. They told me, there is a free library you can use their services. I told them about the situation in my country and when the communication would be available. You won't tell me,

you should wait to the library because the library will close at five o'clock and my contact with them will start at 11 o'clock at the night. So, it will be impossible to communicate. And they told me, no, you should have kept those money to survive on for your housing, your food. I said, no, to be in contact with my family is more important than me; to find out what's happening to them. That's why I bought those gadget. They are normal price, they are not so expensive. I haven't bought expensive gadget. But it's very important for me to communicate with them. That's why I got them. They reject all of my suggestion, all my reponse, and I went to the Refugee Council to start to communicate with the Home Office, to turn over their decision, to stay. They insist to leave. Then the legal adviser said, you should leave or it will cause you problem. They will talk to the...the police will come and they will take you. Ok, so I left the Links House. No place to go. Nothing. I stay about three days, I don't where I should go. And before the interview, the legal adviser told me, your interview with the...

EB: So, at this point, you are homeless?

TIB: Yes. Within two weeks, I become homeless. So, no place.

EB: What did you do?

TIB: I tried to manage with the other refugees, actually. Other asylum seekers, not refugees, asylum seekers, to stay with them and they..because they are from our country, also. I knew them while we were in that hostel and they remove them to other houses.

EB: How did you find the other asylum seekers?

TIB: We were together in the hostel. I met them there. We introduced ourselves to each other there. When they moved from that hostel to other houses, while they are waiting for final decision from the Home Office, I asked them if they can do a favour for me to just keep me sleep there for just a night. And they told me they were under pressure also to accept my situation. Because, they told me, it's very unacceptable situation, we can't share, it will cause us problem if we say to you that you can stay here but we will try our best. Yes, one of them told me, I am coming to visit my friend for two nights so you can take my place. It worked well, actually, yes. That was a big opportunity for me to stay inside.

EB: But that was only for two nights?

TIB: For three nights, yeah.

EB: What did you do on the other nights?

TIB: And then when I went to meet my legal adviser, the interpreter was there, they were very sympathy with me, they tried to help me to find a place to sleep because I was on the street, waiting for nothing. The interpreter was very kind, very generous. He told me, ok, I've got a property somewhere in Cardiff, yeah, so, I can give it to you for two weeks but after two weeks it will be ready for give it to another tenancy, so it will be ready to be occupied by others. I promised, I won't broke that time. I told him, when you want it, I will leave it, yes. He risked me actually to be stay out on the streets. So I found a place for two weeks for free. It was like a gift. He don't know me. From a different country. He was just doing his work as an interpreter but he got a lot of properties in Cardiff, so.

EB: So, it was very lucky?

TIB: Yes, it was very lucky at that time. Then I stayed there waiting for the process, until I get the decision. I did the second interview, yeah, and it went well and then I received the decision. They granted me.

EB: Can you tell me a bit more about the legal adviser that you were assigned, did you find them helpful and do you think that they gave you good advice? (Q7)

TIB: Actually, I don't know how confidence they deal with the case. Personally, they weren't working properly, no. So, they were just dealing with the timing rather than your personal case.

EB: Can you explain what you mean?

TIB: They say, ok, this is your hours and we will talk for one hours. So, how, if you are dealing with a case, and it's a very important case, I don't want to say it's the biggest important case in the whole office, no, but it is a case. So, my future life will rely on. So, if they pay attention it will be ok. And I can notice what is right and what is wrong. It also comes from my background. It is affected to me to notice what is right, what is wrong. No, they wasn't pay more attention to my case properly. They do the basic because they knew that I was from that country so everything will go smoothly. But while I am going through the papers I found that she sent a response to the Home Office. I haven't told them or her about those information. So, they pass something I haven't disclosed. So, why? I asked to

correct. I haven't told them like that. So, this is...and then after I'd been granted it comes through my family reunion application.

EB: So, that problem stayed with you?

TIB: Yes. And they're supposed to carry on with their support and their works to provide for me but unfortunately they said they'd decide to refuse the case because you didn't told us all the details of where you were at, where you went when you...yes, I told them why, why I should tell you about my whole story if which is not related to my case at all? They said, no, you should tell us because we are not happy to carry on with your case. So, my family reunion application was rejected and the reasons it happened abroad in Jordan, so. The officers there, straight ahead, wasn't accept our application. So, was investigating my wife about my case which has been granted and closed here in the UK, by the UK authorities, but the officers there, she was just re-open that case and investigated further with my wife. So, why she didn't ask my wife about her relation with me? Our family reunion application form? So, the requirement, everything, just she's jumping for something is has been decided. There's been decision had been made by the UK's authorities, by the Home Office. And the reasons when it come to the final decision, all the reasons being stated in that application were contradict with all the investigation procedures. And they tried to state down one of the reasons, does my wife in genuine relation with me or not. And they presume there is no real relationship between me and her. So, how they know? So, those things, lot of things, it's caused me big stress. And my wife affected to her badly because they were obliged to run from the country, to go to the third country, from that third country, to travel to the other country in order to attend her interview. Just keep travelling between two countries, the three countries, because my wife won't be able to go back to our country. Because the border was closed and because we are from specific minority, ethnicity, it was very dangerous for her life to go back. Being controlled by extremists and our ethnicity was under target so they would be captured. So, she was stuck abroad for nine months, travelling between two countries and she won't be able to go back to our country because the border was very, very risky. Very, very dangerous for their life just because of their identity, their ethnicity.

EB: So, this whole process went on for nine months?

TIB: Yes. No. My wife left my country in order to prepare herself to attend her interview, yeah. I mean the gap between my travel and when they arrived to me took this period of time.

I assumed, when I'd been granted, it won't be so long. It would just be normal waiting, three months, normal application. Because it was smoothly, all the supporting letter, all the documentation, all the interview. All the evidence was ready to help the decision-maker to grant that application, not to reject it with no reasonable reason. So, I approached when the legal adviser firm reject my to help, so, I found myself, I can't do anything. So, I asked some people to help me. They, actually, they support me properly and they hadn't left me alone, and they took me to another legal adviser and they booked an appointment with an MP.

EB: Who helped you?

TIB: Oasis. Two particular person, they helped me. The Oasis. Then they introduced me to the legal migrant project and then they submit the application on my behalf. We did the appeal upon that rejection.

EB: This is the appeal against the refusal of the family reunion application?

TIB: Yes. Then we wait for the court hearing date and we receive the letter saying that the hearing will be in March 2014. So, and we were hoping, no, through, after you are submitting that appeal. The Home Office, the visa centres, they have the right to review the decision again. And while those process, I approached the MP and I told her what's happened and what's big mistakes been done by the officer, the clearance office for the visa in Oman. And she was really supportive. Very, very sympathy. And I provided all the evidence and she was very shocked, actually. How, she asking herself, how did that officer, he, or she, you are not in a relationship? Which all the document contradict her, or his, finding. And she start emailing or being in touch with the Home Office to find out what happened with the officer there. Why they don't do their job properly? And she was in touch with the embassy, I think, in Oman. She was keeping updating me all the time. So, and my wife obliged to go back to Turkey after she stay for two weeks, or forty days, actually. Four weeks. More than four weeks. Yeah, five weeks. And she stayed there after the appointment to take place but unfortunately it wasn't positive. The decision was negative so all the stress. And one accident happened to my daughter there while she was waiting. So, she was out of control, my wife.

EB: I can imagine.

TIB: So, she was obliged to go back to Turkey. Why? And she became hopeless. She said, ok, no more way to be rejoined. I was just keeping her just to calm down. Asking her to calm

down. There is a lot of people helping us, supporting us. And proper appeal so, hopefully, it will be supported soon. And, yes, the MP was updating me, telling me what type of message I should pass on to my wife. To tell her, you must travel again. And the embassy in Oman contacted my wife but they did not disclose what is the reason. And my wife was telling them, I don't have enough money to spend again in the way for nothing. Please, can you just declare me or just tell me why you are calling me, asking me to travel again, because it will cost me a lot and we are borrowing money to survive now. And if she will travel from Turkey to Oman, she will pay two ways. Even she will stay in Oman, she won't go back, she must pay two ways. So, that means she would ended up without nothing. She was asking him, begging him, please, just tell me why I should travel. And the MP told me, tell your wife to travel. That means, there is positive things coming around. So, and maybe she find out, or the officer told her something good, but we can't disclose it for you, you should come to take your passports. So, yes, she decide to travel again and, yes, it was, the officers, they turned over their previous decision. And they changed their mind rather than to wait up to next year in March. The hearing will take place if we wait, so that mean a long, long, long time waiting the process of the hearing in the court.

EB: When were you reunited with your wife and family?

TIB: We were reunited after about 5 months of the appeal. End of October, last day of October 2013.

EB: Have I understood this correctly: did you have the appeal hearing?

TIB: No.

EB: You didn't have the appeal hearing because they reviewed the decision? So, it was 5 months before the hearing was due to take place, is that right?

TIB: Yes, approximately, yes.

EB: You said that the Home Office hadn't done their job properly. What do you think the Home Office should have done? How could they have handled the case better? (Q8)

TIB: What do you mean? I mentioned about the legal adviser, they hadn't done their job properly?

EB: Sorry, I misunderstood.

TIB: No, the visa clearance officer, they hadn't done their job properly.

EB: Right, ok. What do you think were the mistakes made by the visa clearance officer?

TIB: They take a prejudgment on the papers. People without listen to their case or they ignore all the evidence. So, what they do...because I already mention that I used a fake passport. So, upon that information, the clearance officer, the embassy, they took that information as basic, to prejudge on all our evidence. My wife hand to them their national passports. They said, how can we say now that all those passports aren't fake? Because already your husband used a fake passport. And they throw her passport on the floor. So, why are you coming...why are you trying to join to your husband in the UK? Why you can't stay in Turkey or Oman? Or your husband could come to stay in Oman? She respond all the questions. Even though they don't believe her. And they say we are not in good contact with our country authority to find out if that was genuine or not but, in the meantime, they are dealing with the same cases: the Syrian, or other cases, with the same documents coming from the same countries. Yeah, they granted them. Yeah, just two or three days before my wife's appointment, he was my friend here. So, that's why I told my wife, it will be simple. And they didn't investigate. I know, ok, they will be different, the type of questions, and the officers will be different than their colleagues, also, or how they are investigating their client. But there should be the standard of rules. If they are new about all the documents, about Syrian country, Syrian documents, and all those documents exist on the file. They have the right to scrutinise all those documents, yes, but with concern. With proper job. Not just to take prejudgment.

EB: What do you mean by 'concern'?

TIB: With concern and to pay a lot of attention. Not to neglect. To found out, yes. It's not important. To take a decision and rush. Just counting how many files, applications, you reject. Maybe, it will be ok, thank you, you've done a proper job, you've rejected all those applications. But the majority of those applications went to the court and the court turned over all of those decisions, what would happen? We causing a lot of pressure on the families. Some families are living in danger. So, not just pressure, it costs their lives also. So, for what? For negligence, mistakes, or they don't follow the procedures to take the proper decision. I presume that the Home Office knew about this. What type evidence was submitted, support documents for each application require, and they knew about them. So,

why they don't train their staff properly? So, and in the visa centres, why they don't come through applications. If they don't train them properly, it will affect badly to the applicant, which has happened to our application and we suffered so much. It has caused to keep my family under pressure. The same I am, under pressure. To lost, to spend all our savings, just travelling. So, if we had our saving, maybe it would help us to start in our life here better. But all gone. So, my wife finally found to come to the UK, to travel from Turkey to Oman. To borrow money from somewhere else. And from Oman to here, the people from Oasis provide as a gift for me. In order to help my wife to travel to the UK. So, that means, without those support, our lives would have ended up dramatically bad and worse. So, yes, this was a bad experience for my wife and my kids, actually, for me as well.

EB: You mentioned the mistake made by the legal representative, which legal representative? When was the mistake made?

TIB: The mistake was between the correspondence between the legal representative and the Home Office, passing of informations in the wrong way.

EB: This is with the family reunion application?

TIB: No.

EB: No, this was earlier.

TIB: Yes, this was before, yeah. Before.

EB: This was the first legal representative that you had?

TIB: Yes. It caused me to recheck them and to notice them. If I am not in that position, I don't have that capacity to understand what they're meaning. That mean that other ordinary people affect badly to them because some legal firm might make some mistakes, might be honest mistakes, so they don't scrutiny properly their cases. As we do in our normal lives, we can do some mistakes. Yes. So, it affected...it caused me to re-check everythings.

EB: What do you mean?

TIB: To re-check everything with the legal adviser again. If they represent me, it doesn't mean that I shouldn't check everythings, I need to re-read everything before to resubmit it again.

EB: From these experiences, what does fairness mean to you? What do you think is fair practice, fair treatment? And what do you think is unfair? (Q9)

TIB: I can't get it, could you...

EB: Yes, so, just reflecting upon the experiences that you've had, what does fairness mean to you? What do you think is fair? What do you think is unfair?

TIB: In which process? You mean in the asylum process? The fair treatment? The fair of treatment? I don't have an idea in advance about the asylum process. About how it is, how it works. The fairness will be if you have a legal adviser at the first stage this is how it says, and how it will make sense also, because you should have a legal adviser. If you have a legal adviser then the fairness will be established from the first step. The legal adviser won't create your evidence, won't help your case but will lead you and advise you properly. So, I think the legal adviser will play an important, like a significant role through that procedures. And the staff also. The fairness if they pay more attention to the cases and listening to the cases, and they don't mix up, and they don't prejudge. They musn't generalise all the cases as the same. They should take each case separately and analyse and discuss it separately. Don't generalise if this case is coming from such country, or specific places, doesn't mean they are all similar. This will affect...the effect will be good for both sides. The consequence will be the decision will be made properly and the person will have good time to found out people who dealing with this case, they deal with carefully. It means sort of trust. So, we'll assume there is trust? No. We'll said, no, people dealing with such type of cases, they are professional, and they pay all the attention, and they try to do the proper decision, not just for you personally, but for the system should go on proper way. And, also the fairness, like quality, will be established equally between all the people in the same position also.

EB: If we imagine that you could send a message to the decision-makers now, what would you like to tell them? What information would you like them to have to help them to better understand and to treat your case, and the case with your wife, in a more sensitive way, in a more understanding way?(Q10)

TIB: The message is to be trained properly and to be provided by a proper information about the country relating to the case they are investigating, or they are coming across. And to be supported with the whole document...about...supported with the whole information about the document. And not to generalise all the cases and mix up between them. And take case in

itself and analyse it, to the proper decision within a short time. Because the timing is very important. And put our emotion aside. The negative emotion aside. And don't take advantages against the cases because, we know the media, the propaganda, might affect, but as a human, you should take the case with big responsibility because it will...the other peoples who are in relation with this case will be effected upon that decision if it is made by that person.

EB: Can I just check the time? I am mindful of the time for you. Do you have more time for me to ask a few more questions or do you have to go?

TIB: Yes.

EB: You just let me know when you have to go.

TIB: Yes, I will check. The car parking, what time will it finish? It will finish after half an hour.

EB: Ok.

TIB: Maybe less, yeah, maybe twenty-five minutes.

EB: Well, you tell me when you need to go.

TIB: Yeah, twenty-five minutes. So, twenty to, I will go.

EB: Ok. That's not a problem.

TIB: If I go down, it requires three minues and then three minutes ready to move the car.

EB: Alright, no problem at all. We haven't really talked about during that second interview, where you had your asylum interview. Can you describe that for me and tell me what happened? (Q11)

TIB: Say again?

EB: Your asylum interview with the Home Office.

TIB: Where?

EB: So, we talked a lot about the first screening interview that you had but what happened when you then went to see the Home Office for your asylum interview?

TIB: Yeah, the second one. So, I invited to that interview and I were outside the asylum support system. They told me, you should leave your accommodation. So, my health wasn't good, so, I had a bad chest problem. Infection. So, under that circumstance, I went to the interview. I attend my interview. So, the officer told me if I am willing to do that interview or not. They provide an interpreter as well. He's from Syria. He was from Syria, from my country. So, eh, I told him, yes, what happened with the Home Office. How they treated me, to let me get out of Links House. And he tried to sort it out with his boss to find out why they treated me so badly, even though I got all the evidence, all the supporting evidence. And the Home Office didn't believe me why. Even though I was very trust with them, very open, very clear. And the evidence I got from the airport, it all state in the paper. How it will contradict between what I am saying, and the paper, and the Home Office? The miscommunication between the authority in the airport and the Home Office. This cause us problem. The person who deal with my fact, I provided to them, they are stubborn. They don't want to move on at that point. They insist, I will ruin this person's life even though he has solid evidence. I got evidence from the Links House about the letter they sent to me about my interview, so, I haven't received that letter with the signature also. The Links House, through Refugee Council, they said, yes. He hasn't signed on that day as you have mentioned in your letter. He signed that letter after two days after your letters. How you are presuming I have seen that letter? I have been informed by that letter two days before my interview day. How it will work? It is not true. The evidence: this is our record, the signature. So, everything was against the Home Office, with the proof, evidence, but they did not want to accept it all. I am supporting all my argument with evidence. And later they declared the person from the Refugee Council the mistakes because I had approached my legal adviser and declared to them about the money I had possessed at the airport and I spend. The Home Office was not happy with those facts passed to them through my legal adviser. They said, why you are telling your legal adviser? Made them to be stuck, be stubborn. Don't move even on solid evidence. They insist on their decision. They say, no, this is our decision. Even the fact contradict all the opinion. They were not happy. The legal adviser involved in this part of issue, to solve it and to clarify to the Home Office. This was the response to the Refugee Council because he approached his legal adviser. He musn't do that. He must talk to us. I said, I have a right to have legal adviser to represent me and I approach them. This is what

the law is saying. And I did, I obey the law and we did, legally. So, and they wasn't happy for this approach and this is why it affect me and they kick me off and tell me you should leave. And the legal adviser told me, you should leave or you will be in trouble. So, I left the Links House.

EB: The Home Office caseowner who interviewed you, who conducted the asylum interview, you said that they were trying to help you?

TIB: Yes, they were trying to help me, if they can, to find out if the Home Office will turn over the decision and keep me in the accommodation. And he said, I tried my best but unfortunately they don't want to move on. But what the interviewer...my legal adviser contact me the same day we finish the interview, and she told me the decision has been made today, tonight. So, I think, I was lucky, maybe, I get granted the same day but it has taken the process to disclose that decision. It take about six days after. I received my card six days after my interview but I'd been granted that day. So, I was very happy. The response the legal adviser received from the Home Office, from the person dealing with my case, told her, I will try my best to let this person down but unfortunately he's been granted. So, that person insisted to ruin my life. So, something small and they put a lot of weight on that. Which is like it won't work.

EB: Did you complain about the way you were treated?

TIB: No, no one help me or suggested to complain about and tried just to move off from that, so I moved off the system. The Home Office system, the asylum support process. It went off. So, I've been the responsibility of the local council. But deliberately they delayed my national insurance number because they told me, you are supposed to stay for six weeks or eight weeks on your own spending from your pocket, which I don't have money to spend. I found out, this was my feeling, they deliberately delayed my national insurance number for forty days. Because forty days makes six weeks and they won't come through. They delayed it deliberately. I went. I suffered so much later. I went to register with the job centre. There is no insurance number at all. I went through tough process. I became homeless, also. I went to the Huggard Centre, I slept on the floor. All those supporter, a lady helped me to get my benefits and support from the job centre also. She did well, we had a good relationship with her. She supported me properly. She put me in the right way. And then I moved through a lot of hostels, different procedures, until my family returned to me.

*EB: What would your advice be to asylum seekers in the UK, in light of your experiences?
(Q12)*

TIB: From which side, advising them about what?

EB: About the asylum system in the UK.

TIB: I'm not so clear...the asylum system...for me, I won't say I broadly know about the asylum system, how it works. Nobody advise us, nobody told us about the asylum system, how it works. So, yeah, if I will say, yes, it is properly amazing but in fact, from our experience, the position I come through, from my volunteering, yes, people are suffering, a lot of people are suffering but that doesn't mean they are suffering from nothing. Because from their evidence, from their cases...but what I found, delaying with the cases and the decision won't be made until ages for such type of cases, it will affect badly for the asylum seekers. Why? It will put them in trauma, depression, isolation. It will effect badly to their future. No stabilised future for them. They can't seek any support. They can't do any work. So, all the time, their life under threaten. So, if they can proceed their case and look up their case quickly because asylum seekers, they don't want to stay in this position without nothing. They need to improve their life. If not, they need to hear their final decision. Ok, I don't have the right to stay? Leave me to go because rather than to wait. The waiting time might lead them to have mental problem, health problem, and maybe lead them to do something against the law, breach the law. Breaking the law, lead them to prison, sometimes, or involving in bad behaviours. They can't seek their education properly because they will said, right we can have the right to achieve some level of education but we can't. Because if they are wise person, so they have a lot of experience, and of course want to achieve it, why can't we as a government, why don't we invest those things? It's the resources. The people who fled their country they want to build a new future. Why don't we open the opportunity to help them to build their new future in this country. It's a chance for them to invest. Both sides will get profit. Yeah? They will seek a safe place, they will educate themselves, they will build their family, they will have a new community, a new country. And the other side will found benefit from them. If their skills wasn't enough sufficient, they will build their skills again. If they've got family, their family, their kids will be the future for this country. It will enrich this country and it will enrich the family aswell. The procedures will go quicker, which mean that will require a lot of staff to recruit but the other side, the government go to cutting, cutting, cutting. And the propaganda, and the media, they don't, they are not acting on behalf

or in favour of immigration and asylum. They can't recognise which is the benefit of the UK against the benefit of the UK, and the government and the country. If they can deal with those things with open mind, with why, what's the benefit? And all parties, all sides will get benefit from this things. So, I come across a lot of people who say, you are lucky, you are from that country because you got problem. But my life ruined here. I've been here six years, eight years, and I haven't got a decision made. Or they failed through the process, they did some claim but their credibility wasn't good, so they failed. But we shouldn't generalise of people. They are waiting. If we are concerned about the future, how to invest, I think human resources more important for us to invest in. And the people, even the asylum seekers or the local people they try to build a better life for them. Why we don't share that? Both interests. And do something good for our future and both sides will get benefit from it.

EB: That's probably a nice point to end because I'm mindful of the time...did you say twenty-five past? If we finish there, I'll turn off the recording. Thank you. That was really, really helpful.

[End of recording – 1 hr 16 minutes 5 seconds]

APPENDIX 2: TRANSCRIPT OF INTERVIEW WITH MR M.

EB: Can you tell me, in your own way, about your experience of claiming asylum in the UK? What has happened since you have been in the UK?(Q1)

MM: So you want me to tell you what has happened since I have been here, not before?

EB: Not before. What has happened since you have been in the UK and say as much or as little as you like but if you can provide details then that would be helpful.

MM: So, start when I arrived to airport or after I cross...

EB: Wherever you would like to start.

MM: Actually, I can...when you want to start, I am ready to tell. Actually, so, you need dates, or...?

EB: It's not necessary to have dates.

MM: Just go through since I claimed the asylum until I received my decision?

EB: Yes, that would be helpful, yeah. Should we maybe start at the airport?

MM: Yeah.

EB: Ok.

MM: Actually, I arrived since maybe a year and a half to Stanstead airport and then I claimed asylum and I met an officer. He asked for interpreter to help me for...to...it was the first interview. It's called, maybe, erm...

EB: The screening interview?

MM: Screening interview, yeah. And asked me about my situation and about the reason of fled my country and why I came to UK. Maybe it was, maybe, twenty or twenty-five questions and asked about my family. And then they called a taxi for me and dropped me to the London. It was in...I forget it's name. It's like hostel. Yeah, and I've been there for a week. Then they told me that I'd be moved...moved to Cardiff to start my case and to be

interviewed. So, after a week I've been here in Cardiff and to...why I forget the all names? It was, what's it called? Ah, Links Hotel. And since I arrived to this place...it was an ugly place. Because, they told me you are going to 'Links Hotel'. When I arrived, I told them, it's not hotel, it's something ugly [laughs]. No, he told me, this is Links Hotel. I said, I can't see any hotel, any sign mentioned it's a hotel, and I make my research, and I Google about this issue. It's not a hotel.

EB: [Laughs] It has been misrepresented.

MM: Yeah, I be go to register my names and all my stuff and they told me it will not be here, you will be in a flat. I told them, it's ok, it will be better. But when I saw the flat it was very, very ugly and very tough. And asked me to be in room with four guys and I told them, I have a special condition, I can't breathe because I have allergic and I can't sleep in this bad situation because I have allergic from carpet and dust. They told me, we don't have any other space, we can't afford to you, you must do accept this. I told them, ok. First two nights, I didn't able to sleep and be outside, just, and it was winter, end of November, I think, yeah. I told him, I can't stay and I spent two days outside without any sleep because I can't sleep and directly go to hospital to have my spray, nose and...

EB: You said you were outside, was that during the night aswell?

MM: Yeah, because I can't stay inside and after a week they...I talked to the manager. He told me, you will go to another place. It will be more clean. Because he saw me, I can't sleep inside it with this situation.

EB: This was the manager of Links Hotel?

MM: It's the manager, I think called John, yeah. After that I be in, it was good place, actually. I spent nearly a month. Every day we go to this place and back to Links Hotel for food and then I received a letter about the date about my main interview. Because, you know, it's the end of year so my appointment, it was after a month.

EB: Yes, ok, so you had to wait a bit longer?

MM: Yeah. So, after a month...

EB: Was this because of the holidays?

MM: Because of holidays, yeah. And after, at beginning of 2016, it was the date of my main interview and went to Home Office and met the caseworker and he was a good man. And it takes maybe two hours or less. And I think they make a decision in same day. It not takes long time. I was lucky in this procedure because it is not...since I arrived, until I receive my decision, it just take nearly two months and a half. Other friends, maybe it takes more than six months. Maybe because my case, it was clear. I bring with me genuine documents. And I answered the questions straight away and they asked me some specific questions about my country. And I was surprised about it because I told him, if you asked a Syrian guy about this question they would not able to answer it.

EB: Oh, really?

MM: Yeah, but I answer it. Because he ask me specific question about my city and it was a relationship with a Turkish city and they've been twinned cities: 'Do you know what's the name of this city?' I told him, 'I know but other guys will not be able to do it.' Maybe because I was a lawyer and I'm on this procedure, you know, and know about this issue. So, I asked him and also asked me about other question, about my city: 'It was...there is a common celebration and it's called a city of what in the area of 2000?' I told him it was a capital of Islamic civilisation in 2006. And I finished my main interview.

*EB: You said that you had a good case-owner, what do you mean by a 'good' case-owner?
(Q2)*

MM: I mean about it, he was friendly and he don't use a manner too stressful and make pressure upon me. It was a friendly meeting and he asked me...and I was free to talk about anything I want. That I want to say about this case-owner.

EB: You say that you were free to talk about anything that you wanted to, did you feel that you had the opportunity to tell your story fully, to say everything that you wanted to say?

MM: Yeah, yeah, I was free to say, yeah. Then, I think after a week, I received a call from my solicitor. She told me, 'Congratulations, you have been, your decision is made and you are granted refugee in UK for five years.' And it was good news because, you know, there is a family waiting for me and the situation in my country go worse and worse. You know, the Russian troops start to send missiles and bombs and the fighting opposition also go worse and worse. And we are as civilians been in the middle, so I was afraid about my family. So, it was

a chance to make my application for Family Reunion. And it not takes a long time aswell, it just takes three months. And then my family arrived to the UK and, you know, start to for schools and the college and universities. And to found out they have a house, a place to live in. And it's takes time but after that everything it's settled, yeah. So, any question about this issue? At this stage I can talk about more.

EB: Can I ask you about...because you mentioned your solicitor. So, you had a legal representative when you claimed asylum. When was your legal representative assigned to you? When did you first meet with your lawyer?

MM: Actually, after arrived to Links Hotel, there is next door an office, it's called...mmh...

EB: Is this Migrant Help?

MM: Yes, Migrant Help, correct. And I met them and they filled in my application on the system and then told me to then book an appointment with a solicitor. I asked them to make it any date and they tried to, with many solicitor, and then there is someone, it's called Albany. They accept to meet me after a week. And then I go to visit Sarah and she told me about the rules and about my rights and she told me your case, it's clear, and you don't need to talk about your situation, they just want to know about your nationality. For the rest, they know. And, just one time, I visit there and then next time, I received my ID. And she told me you are very good client because it's just two times and I didn't bother her by calls and to ask about my situation.

EB: So you were happy with the legal advice that you received? (Q3)

MM: Yeah. Yeah.

EB: Can you think of examples of, since you have been in the UK, when you feel that you have been treated fairly or, perhaps, examples of when you feel you have been treated unfairly?(Q4)

MM: Actually, for me, I think I treated fairly but there is another friend, other cases, I think they took a long time. I have a friend, I think we met in London, and I think we arrived, maybe same day, or after a day, I think, because I met him there. Two months ago he received his decision, after a year and three months. It takes a long time. Maybe because he was unlucky because he was in Leeds. You know, last year there was a flooding, maybe, and

maybe there were some cases, I don't know, I'm not sure. But it took a long time until he received his decision. I don't know what he said in his interview and what's the problem with him but, in general, I think it took a long time.

EB: And this is another Syrian?

MM: Yes, he's Syrian.

EB: What advice would you give to asylum-seekers coming to the UK about what to expect?(Q5)

MM: I think it's better I think to be clear and don't go in details, you know. They want to know about our nationality because they know about our background and about our story, especially for Syrian. We don't need to create our story, you know. Other nationalities, maybe they must to have a special case because maybe their country safe, you know. So, they need to have a special case to be accepted from Home Office but as we are Syrian people, all the world know about us. So, they just want to be sure you are a Syrian because some cases, we met some people, they pretend they are Syrian, you know. So, I think, Home Office, I think it's right to be sure about the people that seek asylum, you know.

EB: You mentioned before that you thought maybe someone else in your position would maybe find the questions asked difficult, so what sort of questions do you think that the Home Office should ask? So, you think it is right for the Home Office to investigate, to find out someone's nationality. What do you think is an appropriate way of doing that? (Q6)

MM: I think some people, maybe they're not able to present themselves. They don't know the procedure, you know. Maybe we have a different system and maybe if, in our country, for example, if you visit a security office or visit a police station, you'll be afraid when you meet an officer or a guy of government. Because they use a different method, you know, to receive, to look up information, you know. Maybe they have those things and maybe they have bad ways, better than, you know, discussion, maybe they use tools to find out what they are looking for. So, I think some people when they came here, they think it's the same thing going on so you need to create a story about your situation to be accepted. So, they go in details and that will confuse case-owner and he will ask more and more and more to be sure you are saying the truth, just the truth.

EB: Do you think, from your own experience, and perhaps from talking to other asylum seekers, do you think that case-owners, decision-makers, tend to be culturally sensitive when interviewing? (Q7)

MM: You know, some people say...for me, I think it was fair, for me, but for other cases I can't say. Maybe some say he was not dealing with me good and he is [inaudible] and because of our nationality or something like that. But I can't confirm that they are telling the truth. They, you know, maybe some people been refused, they will say because of the case-owner, you know, he don't want to accept it and he write something, I didn't say it, you know. But I can't confirm that they are telling the truth. But same cases happened.

EB: Can we go back to the initial screening interview that you had? Can you describe that to me in some more detail and tell me a bit about what the environment was like and how you felt on that occasion? (Q8)

MM: Actually, I was in shock because it's first time to be, to came to different country and to seek asylum. I used to travel, in my opinion, how to say it...I used to travel to many country before this action. In my country and going and present my passport. I am a lawyer and I've been respectable. But in this issue, when I arrived to airport, I don't know what I can do. I go directly to officer, I ask him, excuse me, I am Syrian, I seek asylum and I don't know what I want to do. He told me, don't worry, you are welcome [laughs].

EB: He said, 'welcome'?

MM: [Laughs] Yeah, he said, 'welcome'!

EB: And how did you feel at that moment?

MM: Yeah, I felt rest, actually, because I don't know how the procedure going on and it first time, and last time, normal times. You know, because of my family I do this issue but if I don't have family I will stay in my country because I stay until end of 2015 and we are thinking it will be finished this action. By the way, I lost my mother in this actions.

EB: I am so sorry to hear that.

MM: Yeah, it's ok. It was in the beginning of this action. But I do know what they will do. They go to a room. After, you know, it was very busy in the border. When he finished his

works we go to a room and I think he was waiting for interpreter until arrived. After that, it take maybe less than hour. Yeah, it was in the night. And then I go to it's room, is it detention? Or, it's a waiting room. It was a good room, actually. With fast food if I need anything to eat. Until morning. It just take...they took my fingerprint and photo.

EB: And was the procedure made clear to you? Were you able to understand what was going on and what was required? (Q9)

MM: Actually, I don't know. They told me, we do now this. In time, I know but before that, I don't know what's going on. But it was an easy procedure. Just they took photos and then fingerprint. And I think after, after screening interview they make this. And then they told me you can wait here until the morning. And what was going on next, I don't know. Maybe they told me but I can't remember it because you know I was in shock.

EB: Yes, of course. So, you described the waiting room that you were in, following your screening interview, as a nice room. What about when you had your asylum interview? What was the environment like there?

MM: It was a small room. Really small room, I think from here to here [gestures]. I think maybe 2 metres long length and 1 ½ metres long width. I think like this and with nearly 2 metres height.

EB: Ok, it's a very small room.

MM: Yeah, it's a small room, yeah. It's many rooms next to each other, yeah.

EB: Could you hear other people having their interviews?

MM: No.

EB: No? It was soundproofed?

MM: No, no, it is not able to hear because I think that maybe other room it was empty because I arrived at night, maybe at 11 o'clock.

EB: So, it was 11 o'clock in the evening that you had...sorry, was this the screening interview or the asylum interview? This was the screening interview?

MM: Yes, screening interview, not main interview. The main interview was in the morning.

EB: Right.

MM: At 8 and a half in the morning.

EB: Ok.

MM: And it takes one hour and then they told me you can go to the room and waiting there and they took my stuff to another place, with my phones and everything. They told me, if you want to contact anyone to tell him or tell them you are here, you have one free call. Yeah, and I was lucky because there isn't any network in our country. But I make this call in 2 minutes and I think I got my wife and I told her I arrived to UK. She was surprised because before that I did not told her.

EB: Did you know that you were coming to the UK?

MM: Actually, it was something comes by itself. I want to come to UK but I am not sure I will arrive or not. After I arrived, two days, I am not sure, is it here or not? Different place? Yeah, but after that, you know, after I have a rest and have sleep, it was ok.

EB: Can I ask you, what do you think then...because you describe the caseowner as a good caseowner...if we think about decision makers generally, whether it's a Home Office caseowner or an Immigration Judge, or even a legal representative deciding whether or not to grant legal aid in a case, what do you think makes a fair decision-maker? What qualities should they have? (Q10)

MM: I think, they are afraid just about nationality, you know. Because they have already a decision about a Syrian or maybe some Iraqis people. I think they want to be sure about nationality. And I think they've been afraid about how, you know, I came to the border and asked them about to let me in as an asylum seeker. In other hand, there is many situation, you know, some people arrive by truck or by lorries or by...maybe they arrive to police station after a month, after 20 days...I think they are confused about this situation. Maybe they think they have been here for a long time, you know, so they've been afraid and dealing with this issue, I think, they expand their investigation, especially if they have any other relative, you know. I think they are, what's the word in this situation, I think they are right in this decision because they need to save this country. Especially, you watch TV and you know about the terrorist troops and maybe guys. So, they are right in this situation. So, you asked me about

the case-owner what he need to do more or what he not aware about? What is your question because I missed it.

EB: That's ok. The question I asked was what are the qualities of a good decision-maker? Whether the decision-maker is a Home Office case-owner, or an Immigration Judge, or a legal representative refusing or granting legal aid.

MM: I think there isn't anything to, for the presenting, or for the lawyer to do it, if the case is under control of Home Office and not make any decision. They must wait for the Home Office to finish it and then they have a right to maybe ask or maybe to do anything legally. But I don't think they have any rights to contact with Home Office. I think, for the Home Office...

EB: Sorry, can you explain what you mean, 'they don't have any rights'?

MM: I mean about the solicitors. They're not able to contact the Home Office until the case-owner makes his decision in the case, I think. Maybe if you contact with them they will tell you it's in process.

EB: And you think that's a problem?

MM: There isn't a time for this process to be finished, you know. I think it must be timed.

EB: So, we need speedier decisions from the Home Office?

MM: No, maybe to make it six months maximum to make your decision as a case owner. For the asylum, for asylum seeker, not to stay for long time. He don't know what's going on with him, you know. Maybe it's better for him to make a fast decision and maybe he have a right to appeal and go to the court and this procedure to make shorter, to be shorter.

EB: What is the problem when there is delay? (Q11)

MM: Most of the asylum seekers have families. I think this is the problems for the families. Especially if they are right in this claiming asylum because there is a family waiting in a bad situation. Not for him. Because most of them are me, so they can't face this circumstance...even if it was a bad. It will not be worse than in their countries, you know.

EB: Can I ask you a question related to when you were assigned your lawyer? You say that you were happy with the legal advice that you received but do you think that asylum seekers should be able to choose the lawyer that they have to represent them under legal aid? (Q12)

MM: Actually, even if they have a right to choose, they don't have a background about the lawyer that will represent him, you know. I think he have a right in the beginning. Maybe in different way, maybe Migrant Help, I think first stage will be Migrant Help. I think it's this procedure in all UK when asylum seeker arrive he will go to Migrant Help to register his case on system and to be offered legal aid. I think he have a right but I think some stuff maybe they don't give this right to asylum seeker. But I think in the law he has this right. But maybe stuff they don't offer this right for those who seek asylum, I think.

EB: Were you given options to choose from?

MM: I think the option was about the time, not the option about the quality, you know. They have a paper with ten names of solicitors but my option about the time who is nearest, who is nearest give appointment, you know. Not about the quality of solicitor. I think that's tough also they don't know about the quality, I think. But, I think also the Home Office must to contact to good lawyer, or with good firm, you know. To be helpful for each, for the Home Office, for those who have right to be granted, so.

EB: What does it mean to you then to have a quality legal representative? What is a good legal representative? (Q13)

MM: I mean about the quality. It will comes after the decision if some behaviours. The good solicitor will comes out in this stage. If he is good lawyer or good follow the case. Some cases may be missed or some cases, some dates be missed by the solicitor. If before being refused, I think not anything they can do it for as a lawyer to help this asylum seeker but after that they have a full, you know, help they can offer for this asylum seeker.

EB: So, can I ask you then what do you think are the essential elements for a fair hearing? What do you need to have a fair hearing? (Q14)

MM: [Pause]

EB: Maybe if we go back to the case-owner, the good case-owner that you had...

MM: He not was a good case-owner, he was a fair case-owner because he did professional. They were a good quality when they make their investigative but I think because my case not takes long time and it's maybe been granted in first stage, not take to be refused and appeal, I think...what to do...

EB: Sorry, it's quite a difficult question...

MM: Yeah, because in my opinion, actually, in this stage, I think they are good, I think. Maybe for others they are not but in my opinion and they follow the rules and I think they are good, I think, in my opinion.

EB: You mentioned the problem that you had when you arrived to Links Hotel, the problem with the accommodation and the poor health that you had. Have you had any other problems since you have been in the UK? (Q15)

MM: No.

EB: Who have you encountered who has been the most helpful to you since you have been here? (Q16)

MM: Since I arrived, I engaged with Refugee Council and STAR directly to have some courses in English. Maybe, since I arrived, I helped myself and then I start to help others, you know. Especially, you now, after that, I've been volunteering in Asylum Justice. So, I think they all was lovely people. Since I arrived, you know, Refugee Council is next door to Links Hotel so I think after four days or five days after I arrived, I start to attend to English classes. I met good volunteer teachers and they offered me if you want to volunteer with us. It was good for me, for others, I don't know. Maybe they faced many problems. I think this country needs to know about its system because everything on system. You can make, write government.uk, you can find everything you want.

EB: Right, ok, so you think that information is easily accessible?

MM: Yeah, easily accessible. And everything have a guide how to use it and everything need application. I think after time you will understand that but you will be afraid from how you can deal with it, for example, you want to have opportunities like gas or electricity, if you arrived you will be in stone age, how I can deal with company? I can't see it, just in screen. In our country, I think most of other country, except European or West country, you must go

to make contract and sign contract and wait long time until decision been made and they must to visit you and be sure about the meter and everything. But in this country you can make it directly.

EB: And you find that helpful?

MM: Very helpful, very helpful.

EB: But culturally, it takes some adjusting?

MM: Yeah, until you understand this issue, it take time. The time to understand, not to use it. It's already easy to use it but understanding how to use it, it takes time. And it's a culture, you know. For us, you spend lots of time for utilities, like the electricity, water, and other stuff. Maybe, it takes two or three hours every day until you finish it. After you finish it you will face the problem and then you must carry on visit them to fix the problems. In our lives, in the previous, we spend lots of time going to utilities company and also to government department for to do our stuff. Here, you don't need to do that. You just have your laptop to do everything. But until you understand this one...

EB: It's a barrier then, isn't it? Unless you have the knowledge and you are tech savvy and you can use digital...

MM: Yeah, and now we start to understand there is online teaching and you can engage in courses online. In our country, you can't do that. Now you can and you can contact with your tutor.

EB: So, what help do asylum seekers need the most, in your opinion? (Q17)

MM: I think the most important thing is for the decision to be made shorter. I think that. For other stuff, I think about benefits and about how they get it, I don't know if it is enough or not but, for me, it was enough. Maybe because I am not smoking or drinking, so it was enough because you can just buy your stuff from Aldi or Lidl's, so it will be enough. And especially, if you have a family, there is someone to cook for us, so we can reduce our spending.

EB: I don't think that I have any other questions, I think that I have covered most of the questions there. Have you got anything that you would like to add?

MM: Actually, I...maybe my story is short and not full of actions so, and maybe because I was clear from the beginning. I just want...I heard another story about another friend and it takes time and maybe first problems. And I have story to my friend, he arrived before me a year, maybe he arrived 2014, and was he detained for six months because he came with a fake passport. Until now, his case is not finished. He has been granted a refugee but he have another case because he came with a fake passport. He been must go to court and he been in charge for six months in the prison. And now he cannot work because he has a criminal record. And he is a Syrian. So, this is one of the problems that refugees face because he don't know about rules. And he is a Syrian. How he been granted as a Syrian and now been charged from six months? He can't work because he have a criminal record. Some jobs, you know, need for a DBS.

EB: Do you think that this is an example of someone who has been treated unfairly by the system? (Q18)

MM: Yeah, because he...you granted him as a refugee, so how you being charged for use a fake passport? You sure about his nationality, he is a Syrian. So, how you...erm...how you treat him as being charged for six months? Been have a criminal record because he now not eligible to apply for indefinite leave to remain after ten years.

EB: Is he working with a lawyer to try to overturn the conviction?

MM: Yes, he now, there is a lawyer represent him and we think for a decision maybe a few days, after few days. He is still waiting for that. He been granted since two years as a refugee but until now he can't work and can't apply for any job because of that. You know, as Home Office, you accept him as a refugee so you are sure about his nationality and in the law, a refugee, he able to use anything until he fled from his bad situation to a new life. So, how you accept him refugee and now you treat him as a criminal. I think there is a missing link in this situation. I think this situation...maybe other cases, same.

EB: When you say that there is a 'missing link', what do you mean?

MM: I mean, they must, between the Home Office and the courts, something, you know...

EB: A miscommunication?

MM: No, both of them want to make this country safer. So they must work as one team not as opposition. You have this for immigration court and immigration department. This side accept him as a refugee that means he is good and we are sure about his identity. So, other side, they refused him because he used a fake passport to come to this country. Home Office who is in charge about who is eligible to be a refugee or not accept him. Why a court judge him for six months and not accept him and make him a criminal record?

EB: Do you think that there has to be a closer working relationship then between different government bodies?

MM: Yeah.

EB: I have actually got two other questions that I would like to ask if that is ok, if there is time? It is close to 3 o'clock now, do you still have some time?

MM: No problem.

EB: Tell me when you need to go.

MM: No problem, take your time.

EB: I wanted to ask about...

MM: I am happy to talk to you because for three months I just speak in Arabic because we have finished our college and our university so we stay in the home with children, with kids, and my wife, so all time in Arabic. And my English that I tried to improve it...

EB: Your English is excellent. So, tell me, when you arrived in the UK, what was your level of English?

MM: Actually, I know some English before I come but since I arrived, I told you before, since I arrived, I engaged in English classes.

EB: This was with the Welsh Refugee Council?

MM: Yeah, but after that I start to attend to church, they offer free English classes, and then start to attend to college and, you know, with Asylum Justice, I start as interpreter with Ruth and helping some clients and interpret for them. So that improved my English, actually. And I am looking to be better because I try to be legal adviser in the future, if I have chance.

EB: Yes, well that would be wonderful.

MM: Thank you.

EB: So, two questions that have come to mind, the first one that I would like to ask – actually, both from the point of view of a decision-maker – how can a decision-maker know whether someone is telling the truth? (Q19)

MM: The document is not enough if it is genuine or not, it is not enough because there is a network working to establish documents same as original and you can't be sure about it because you know, for example, Syria, you can't contact to the government to be sure about it, the document, is it genuine or not. I think it depends upon the case-owner. His, you know, he can make his decision from the question, to be sure about it. So, how to be sure, I think it depends upon the case-owner. It must be good qualified.

EB: Ok, so they have to be well qualified?

MM: Yes, I think. Because, you can't be sure about if you use something else. If the case-owner is not well-qualified, what you can over to him he will not be...he will not judge...you know...exactly his judgment.

EB: And what does a case-owner need to be well qualified?

MM: They must...it depend about...qualified comes, you know, by times, not comes directly by experience, by dealing with more and more cases and maybe some courses, I don't know. But I think it depend...the main thing, I think, in this procedure is the case-owner, I think. In my opinion.

EB: And the courses that case-owners should undertake, what kind of training do you think that case-owners need?

MM: I know many things but I think I cannot say it in English. I think it is lots of things they can engage in and one of them to treat this lawyer or innocent, I think there is course you can follow it from, I think, body language or something like this.

EB: From their demeanour?

MM: Yeah, the way he is sitting, and you can look at eyes. I think lots of things you can, it is not 100% but something helpful in your decision about client.

EB: This is linked: what information do you think a case-owner needs? Or any other decision-maker, to arrive at the correct decision, the right decision in a case?(Q20)

MM: I think it is very special case, immigration case because you don't have lots of resource because some clients come without anything, without any documents, without any ID related to them. Some cases, especially for those who come from Kuwait, it is called Bedoon, they don't have any idea. So, it's so hard to, it's hard to prove about their ID, you know. And also, the case-owner, it's hard for him to be sure about the ID. So, it's very special situation. I think they just need to do their best [laughs].

EB: [Laughs] What else was I going to ask...it's slipped my mind just now...but would it be ok, after I've typed...so, what I'll do with the interview recording, I'll then type that up and there will be an interview transcript and I can send you a copy of that...

MM: I would be happy.

EB: If there are any follow up questions that come to me...

MM: I am ready to answer it.

EB: ...that come to me as I am typing up and think, I really should have asked that!

MM: No problem, you can send, if you want me to come again, I am happy to do it.

EB: Thank you very much.

MM: So be free to do anything. If you want me to attend and if you want to send me email, I can answer it. Maybe it will have some mistake in typing but don't worry, I can.

EB: I thought of another question just while we were speaking...

MM: No problem.

EB: And this can be the last one!

MM: Take your time.

EB: If we put the question of asylum to one side, in your life, from the experiences that you've had, can you think of an example of a time when you have been treated fairly, and if you tell me what happened, and how you felt, and why you think you were treated fairly?

MM: Actually, maybe it is something related to me because I am not ready to have any hard life, you know. Maybe because I grow up like this [laughs]. Actually, I feel I treat fairly because we are here as visitors to this country. Our country refused us. And our country, you know, we can live in our country. So, it is not our country. And, because of that they accept us and treat us as national people. It's just this decision, it makes me feel I treat fairly. Because understand we lost our country. Our country refused us and we left it, we born there and we grow up there and we built this country and they, you know, refused us and we have been homeless, you know. And we left everything, everything, we left it there and this country they tell us from the beginning, 'you welcome'. And some people, they talk, yeah, they don't pay enough, but in your country nobody pay for you anything. In your country you can't have, nobody help you in your home, nobody help you in your life, so what you talk they don't pay enough for you. You don't need to think like this, you must think to be active and maybe by time to re-back this money that you have received from this country, not to get more. Because of that, I feel I treat fairly.

EB: So, fairness then is that welcome, it is the acceptance?

MM: Yeah, acceptance it's enough for us. Because our neighbours' country they refuse it and they close the border. We're not allowed to go to Saudi Arabia, we're not allowed to go to Jordan, we're not allowed to go to Lebanon. All neighbours' country they refused us and close the border. And this country they accept welcome so it's enough for us, you know.

EB: So, it's not about turning your back, it's about being open?

MM: Yeah, because of that everything they do it for us it will be as a gift, you know. Not...they don't...it's not their....they not did it to pay for us. It's something good they do it for us and they help us. And now they offer us college and university and now we attending for my children, also attending schools and maybe by time will be qualified for certificate. It's very costly this study and they offer it for us for free and it will be helpful for our real life and maybe we can find job with this certificate. So, we must be thankful for this country.

EB: What time is it now, it is just about ten past three, can I sneak in another question?

MM: Yes, take your time.

EB: Thank you. The people who you have met in the UK, have you found them to be understanding of the problems that you've had? To show empathy, to have an open-mind?

MM: Actually, most who...you mean Syrian community or in general?

EB: In general but it would be interesting to hear about the Syrian community as well.

MM: Actually, most of people I met them, they have not educated, have enough education, you know. So, we can't dealing with them as those who have education or degree. So, they need to be have more knowledge about life and about how this country helps them. Maybe by time be qualified, if not, maybe their children. But I think it's because of the quality of people most of them need to be educated. Maybe they not have a chance in them country to have knowledge. Maybe by time they accept their situation and they will be positive people.

EB: So, you are talking about the asylum seeking community?

MM: Yes.

EB: Do you find that there is - you say that over-time they will become positive people – do you find that the people who you meet within the asylum seeking community tend not to be positive?

MM: I don't know your research if you met other people, most of asylum seeker is young people and maybe some of them have family, some other not have family and stay single. So, you look at young people and look at their country situation. Maybe they not attended school so you can't judge them with equal, they can't be in same position as educated people. You must excuse them because they need time to be educated to have knowledge and then you can judge them. I think in immigration issue they face, they dealing with people, I think they looking for knowledge – they don't have it. So, if the government, or the system, they need to help them to educate themselves and to guide them to the right way. After that, maybe you can find out who is good, who is bad but from the beginning, you can't.

EB: So, when you say education, what kind of help, what kind education should people receive?

MM: I think they must...other country like Netherlands or Germany, they strict in learning for those asylum seekers or refugees. They strict about attending school, or attending college. In UK, they don't care about it. I think they must to be more strict. They have to be more strict about this issue, I think, because you'll help them, because they don't know where the right thing there is.

EB: So what knowledge to asylum-seekers need to help them?

MM: The minimum knowledge. They are not asking to be a doctor or something like that. The minimum knowledge to how to respect the other because they have a different culture about the smile, how to be polite and to talk to other. That will be a start. And if they know about these things it is easier for them to know more. But if they don't know about these things, it's hard to know more.

EB: So, you have to have – if I've understood this correctly – it's to try and have that knowledge at the beginning because that then helps you to access other resources?

MM: That's correct, yeah. If you don't have it, you can't move more. This is my opinion. To dealing with asylum seeker.

EB: Has that helped you in your experience, having those resources? So being educated and being able to adapt to a new culture.

MM: Yes, yeah. I think because after times there will be members of the community. So, they will help and they will build and be active people in this country. And I think there is need for this young people. I think it's better to be strict from the beginning to get this knowledge. Because the language, you can't get any knowledge if you don't have any idea about the language. So, start with language and then you can feed them the knowledge and culture. But, you know, the communication language it is not present now. They need to learn English, or language, and then you can start anything else. I think, yeah.

EB: So, this is what a fairer asylum system would look like?

MM: From the beginning they have to be strict about the language teaching and it must be essential. You must to have, to know about English, to be able to do more, to get knowledge. You can't get any knowledge without language.

EB: I can't remember whether or not we touched on this but it has just come to mind now. You described in some detail what happened during the screening interview, when you had your asylum interview, can you tell me about what the room was like, what the environment was like?

MM: Yeah, it was very small room.

EB: This is when you had your main interview?

MM: No, not the main, the screening. The main interview, it was big room and healthy environment. It was good, yeah.

EB: When you say a healthy environment, what do you mean?

MM: I mean it has sunlight and you can go outside [laughs].

EB: You can breathe [laughs]?

MM: Yeah, yeah. I think it's top floor, not underground.

EB: Did you have an interpreter?

MM: Yes.

EB: And could you understand your interpreter?

MM: Actually, it was Sudanese guy and if he speak in Arabic, I can understand him [laughs].

EB: So, you could understand him or you couldn't understand him?

MM: No, I can if speak, you know, we have different accent, you know. But we can if we speak in Arabic language native we can understand each other. I think he was not understand me in some points, not all. And I can understand him some points but because I was understand what the case-owner need....

EB: Ah, so you could understand what the case-owner was asking?

MM: Yeah. And waiting until the interpreter...because I must be polite when I say something. I can't say it until the interpreter say it and then I can answer. So, and the case-

owner noticed that and he said, 'it's better for you to wait until he talk, you will have your time.' The case-owner noticed that.

EB: Did it concern you at all that you had an interpreter who could speak the same language but...

MM: I think it's better to be from same country interpreter for interviews, especially Home Office interview. It's better to be in same country because we have many different accents. In Morocco and Algiers, we can, they don't speak Arabic, they speak something else. Instead of French language, they speak another accent and it's not common for us. And in Sudan, same matter and also for Libya, also they maybe speak Arabic but can't understand him, 100 %, maybe 70%.

EB: Do you think that you should have had a lawyer with you at that main interview?

MM: I think, because I have a law background, I think it's not allowed for lawyer to be in this stage because it's investigative stage. In our country system, investigative stage, it's not allowed a lawyer to be present anyone because, you know, I know about the procedure, you're now asking me about the lawyer to be present in this stage. I think it's not allowed because maybe they try to get information from the client so maybe lawyer reject or not allowed, so maybe it will be to secure this country so maybe they use their rights.

EB: So, before you went into your main asylum interview, was the procedure made clear to you?

MM: Yes.

EB: Who made the procedure clear to you?

MM: Actually, you know, we asking, we go to Refugee Council and ask others who came before. So, we notice it was clear and it's going on the right direction.

EB: But that information that you obtained from Welsh Refugee Council, from other asylum seekers, were you told by your legal representative what to expect on that day?

MM: Actually, it was a very short interview with legal representative and she told me about the procedure and she told me just wait for your interview and if you want to submit, if you make any mistake in your screening interview, to be corrected, to make correction and send

them to the Home Office. She asked me about this issue and she was clear and we review my screen interview if there is any mistakes and there isn't any. And it was a clear procedure, actually, it was a clear procedure.

EB: So, the Home Office told you what to expect?

MM: Yes, and he told me about all my rights, yeah. From the beginning.

EB: What did he tell you?

MM: He told me what is going on in this meeting, and tell me anything I said will be recorded, and tell also interpreter to be impartial and to...and he told me the interpreter just interpret what I say and he can't ask you anything. He can't ask anything if I didn't tell him and he is not...this independent person and not working with Home Office. He works for himself and this interview is a for my privacy, nobody with know about it, it will be secure, and no one dealing with it will share this information with any other party. That's it.

EB: So, did you feel then that it was a safe environment for you to disclose all the information and say everything that you wanted to say?

MM: Yes, I felt this, yeah.

EB: You used the word impartial there, referring to the interpreter...

MM: The interpreter, yeah.

EB: Do you think that asylum decisions should be made by someone who is impartial? So, rather than the Home Office.

MM: [Pause] I don't think that because it goes in empty circle. How we guarantee this impartial person and who controls this person? We go for emptiness. So, Home Office have state case-owner, he have a manager, after manager, there is steps, you know. If you go for impartial man, it will be a judge. So the judge will come out if the Home Office refuses person. So, I think, in my opinion, the decision, I think it must be from Home Office, in charge of the decision.

EB: Do you think it's important to have a right of appeal then against negative decisions made by the Home Office so it's possible then to appeal to someone who is impartial? So, to a judge?

MM: I think the right of appeal, as I know because I engage this situation with Asylum Justice, I think it is a procedure that needs to be short. Not takes long time, I think.

EB: That's the most important thing?

MM: Yeah. Just that. But everything is ok.

EB: I won't sneak in any more questions just now.

MM: No problems. Keep some for after.

EB: Is there anything that you would like to add?

MM: I am just happy in this conversation and feel I need to be helpful in this issue and if you want more I can do it, I am ready.

EB: Thank you very much, you have been very helpful. I'll turn off the recording now and then we can complete this sheet together, ok.

[End of recording – 1 hr 16 minutes]

APPENDIX 3: TRANSCRIPT OF INTERVIEW WITH MOHAMMED 1

EB: What I'll do, to protect your identity, I'll use a pseudonym. So, you get to choose a name. You get to be whoever you want to be. What name would you like to use?

MR: For my name?

EB: Yes.

MR: Mohammed.

EB: You just want to use Mohammed? Ok. That's fine. And, I'll complete this as well. So, you're male. Mohammed, how old are you?

MR: I'm 22 now. 1st January 1995.

EB: Ok, so I'll just put down 22. And your nationality?

MR: Iran.

EB: Iran. And your first language?

MR: Kurdish.

EB: Kurdish. So, I didn't know what your level of English was so that's why in my text I offered if you wanted an interpreter.

MR: My English is not that bad...

EB: It's really good.

MR...but some things I don't understand.

EB: Ok, well if there is anything that I say that you don't understand then just let me know and I'll try and rephrase it. Tell me about your education and your background. Because you arrived as a child, didn't you?

MR: Yes. I came here since I was 15...16.

EB: What about your education before you came?

MR: What do you mean?

EB: Your schooling.

MR: School...yeah, I was in school for two years.

EB: Was that in high school?

MR: Yeah, that was Cathays school.

EB: Ok, so that was Cathays.

MR: Because I've got a bad situation and, like, I started taking the tablets for it. In the night I don't sleep well, hear voices, telling me to do things. But since that, doctors seen me and they give to me tablets. I don't know the tablets names, I forgot.

EB: That's ok.

MR: Then, that's why, I was going to College as well but, like, I get like bored of things. If I go too close to people who I don't know them, I feel nervous. Like my legs go funny, getting scared.

EB: When did that start?

MR: Since like when I was 18...19, something like that. Then I lost my father. The government they executed on him.

EB: I am very sorry to hear that.

MR: It's ok. And then, like, all the time, bad happens to me. Like, my sister getting married with one Kurdish boy from Iraq, which is from Erbil, that's the capital of Kurdistan. And then he was in government, Peshmerga, that's what they call. And they were fighting with Isis and he's been killed as well. That time, my sister was pregnant, yeah, and like now my sister she's had a really bad life. And I don't have relationship...

EB: Where is your sister?

MR: She's in Iraq. I don't know where.

EB: Right.

MR: And I don't have really contact with her. Like when I used to talk to her, sometimes she's call me from other people's phones, or messenger, or something like that.

EB: So, you're really worried about your sister?

MR: Yeah. Because I've only got her, I don't have anyone else. I got my niece and my sister left. Because I was young when my mum passed away. And then when I was 18...19, my dad has been executed by which is Iranian government.

EB: That's really young to lose both of your parents.

MR: And then he like...now I get refused from everything and I don't have any benefits, I don't have any houses so, like, every night I sleep in different places. The other day, one of the Kurdish boys, he goes to the barber shop on City road and he took me to town and buy me clothes, buy me jacket because I was really cold. And he cut my hair.

EB: So, it's just relying on friends then?

MR: Yeah. And he give me money as well for food. Because I am not doing like stupid things. I don't go around people, I don't go close to people because, like I said, I feel nervous to go with someone who I don't know.

EB: Can we go back a bit and can you tell me about when you first arrived in the UK and what that was like?

MR: That time was, I don't know how to explain to you.

EB: How old were you at the time?

MR: I was 15, 16. Because of my family, still I was worried about them. Because family is everything, especially mum and dad. And I was no mum, my dad was in jail because he get arrested by the Iranian government, so I was really worried about him. And then I didn't have contact with my family for like two and a half years. And then one day, there was contact me by my friends, he was here and went back home for the holidays and give my number to him and we get to contact and then we found each other and talk to each other.

EB: Who did you find?

MR: My sister.

EB: Your sister? Ok, that's how you got in touch with your sister.

MR: She told me that my dad had been killed, she married...

EB: How old were you when you got that news?

MR: About 18, 19. That was when I was in London. And then she said, I've been married, I have a daughter. Then she started crying. So, she told me all the situation, what had happened to us, about my family, everything.

EB: At this point, were you in Cardiff?

MR: I was in London, I think, for one or two months. After that, they didn't believe me that I am as young. They send me to Cardiff. They take me to a hotel, Links House, on Newport road and there was, like, social services, they will come and see you. They see if you, like, they're going to say if you're young or older than they tell you. I was like, ok, no problem.

EB: So, you were treated as an adult even though you were a child?

MR: First, I had interview and they act like I was an adult, over 18. And then, I was crying in the interview as well. They don't even give me break. Then I told Ruth about that as well. She knows.

EB: Did you claim asylum when you arrived?

MR: Yeah.

EB: How did you arrive?

MR: Like legally, by lorry.

EB: So, you came on a lorry. Can you tell me about that experience, what happened?

MR: Like how I left Iran?

EB: No, just when you arrived in the UK.

[Friend: from France to here.]

MR: I don't know if that was France or not, I didn't see anything. They took us to the jungle. First, I went to Turkey and I was in changed three lorries, I think, two or three lorries.

EB: Did you know that you were in the UK?

MR: No, until they arrest us, the police come. And I said, where I am? They said, you're in London. Then I knows that, it's the United Kingdom.

EB: What did it feel like being arrested?

MR: I was really scared, crying. Handles, they put on my hands, like, they was really tight. And I tried to hurt myself, I said, why are you doing this to me. And I was crying because that was too tight. And they put it on the back, I couldn't move. After that, two hours, they took us to the police station, they open them, and they arrest us for 24 hours.

EB: Did you speak English then?

MR: No, not at all.

EB: Did you understand what was happening?

MR: No. Because I couldn't understand them. But then, after that, 24 hours, like, I didn't eat anything. They only bring water and some food but I don't know...because I don't eat pork or things like that, I didn't touch it. That's all I drink, water. And after 24 hours, the lady...there was a Kurdish lady or man...I can't remember, they came and they said, they arrest you and now they're going to take you to families. And they take us to families, English family. And we was with too many people in there, under 18.

EB: Were they treating you as a child at that point?

MR: Yeah but after that, no. I had lots of pictures with me, I had money with me, but when they take me to Cardiff, I left everything in there and they don't give us back.

EB: None of your belongings were returned to you?

MR: Not at all. That was my money, my photos, my clothes. So many things I left there and they don't give me back.

EB: So, you were in London with a family for about a month?

MR: About one and a half months, I think.

EB: Did you meet with a lawyer during that time?

MR: We were there and they took us to, like, I don't know, a company or something. They seen us and they said, you're not kids. I said, yeah, I'm not kids but I'm not over 18 as well, I'm 16 and you can't change my age because that's not my age you give it to me. They was like, you're not 16, you're over 16. I don't know, they do only listen to themselves, they don't listen to me.

EB: Who was it wasn't listening to you? Was it the lawyers?

MR: I think the lawyers. In London. And they took us to here. And the social service they seen me, she was name Mina. That was room like this, and table, exactly like here. I was sit and the interpreter...

EB: So quite a small room then?

MR: It was bigger than here...kind of like this. I was sitting by there, the interpreter was by me, the social was here and few, four peoples by there as well. They was talking to me, like, they asked me questions each people and after all that they said you're...they don't...they said we're going to let you know in two weeks but the interpreter told me, they talking, they said you're young. From then, I know they knows I'm young. And they said, after two weeks, we're going to let you know. And I was in sharing house with one African boy. I was really scared in the night. He didn't sleep. He was always on the laptop and I couldn't say anything. Like, somethimes, I told him...I couldn't understand...I was like, turn off the laptop. He was shouting things. I was, like, nervous because he was older than me and African boy.

EB: Sorry, where was this?

MR: In Splott, I think. After two weeks they called me, they said we accept you as 16, we know you are 16, you're not 18. I was like, thank you very much.

EB: So, it was social services who...was it the Home Office or was it social services?

MR: Social services.

EB: Did they carry out an assessment with you, this is what you were describing? They carried out an age assessment.

MR: Yeah.

EB: And they reached the conclusion that you were older...but how old did they think you were?

MR: They said, yeah, we believe that you are 16.

EB: Oh, they believed you. They accepted it, right.

MR: Yeah.

EB: Was it the Home Office who didn't believe you. Is that why you had to have the age assessment?

MR: I don't if that was Home Office or if that was in London.

[Friends interrupts: Basically it was the same that happened with me and it's the Home Office and social worker together. They just like make an interview and ask you some questions.]

MR: The situation happened in London. I don't know, at that time I didn't know which...I don't know about Home Office or anything. I didn't know about that. I can't say if it was the Home Office or not. But I don't that they don't accept me as 16, as the youngest.

EB: It sounds like you did go to see a law firm...was this before you had the age assessment?

MR: No, it was after that. When they didn't accept me all the things and I had an interview, they refused me in interview. Because I was like feel nervouse, I didn't know what to say. I was crying and they carried on with asking questions.

EB: This was your asylum interview?

MR: Yeah, not in London, in Cardiff. And I was in the hotel. That time they don't give us money or anything. I was there for like one month and they give me a room share in house. And then they refused my case and social worker they come see me and they accept me as 16. And they give me flat, they moved me from there. Because I was really scared in this house. I was in one room with one guy.

EB: How old was the guy who you were sharing a room with?

MR: Old. About 30, 35.

EB: So, they realised that wasn't appropriate accommodation and had to move you, is that right?

MR: Yeah. But when they accept me and they move me after two weeks from there and they give me my own flat. I was live on my own.

EB: And how old were you at that point?

MR: About 16 and a half.

EB: Do you mind if we talk about the very first screening interview that you had?

MR: The first one?

EB: Yeah, the very first interview. That would have happened shortly after you had arrived and you would have been in London?

MR: Yeah, when I arrived in to London. I was there for one and a half months and then they don't accept me as a 16, they accept me over 16 and they send me to...

EB: What was the reason?

MR: I don't know. I don't know. And then when I come here, they take me to hostel and they said, we're going to find you doctor, things, GP, and then I, every day they was making appointment. They make, they find me solicitor as well. Everything. So, whenever they put my name on my wall, because you have to go sign and look your name. If your name's there then you go to your appointments. And then they told me you have interview. And I went to the interview so that happened in there.

EB: And tell me about that interview, what happened?

MR: Was so horrible. They was so horrible to me because they was act like I was over 18 and they don't believe me. They don't even give me a break. I was crying and the interpreter they give so much wrong things. Say, I said, 'this is water', and they was like, 'fanta' or 'pepsi'.

So many wrong questions that happened to me and that's why they refused my case. And after all that.

EB: How did you feel after that interview?

MR: I feel like, God knows.

EB: So, you'd been given a lawyer, so it would have been a legal aid lawyer. What was their advice, were they helpful?

MR: Nothing, they was like, 'wait, wait, wait, wait', that's all they said, 'wait, wait, wait'. And I've been here, like, seven years now and nothing. They don't do anything for me. Sometimes, I feel sorry for myself because when I was in school because people would all be going to holiday and asking, why don't you come? I was like, I couldn't say, oh, I don't have a passport, I don't have anything. Because I was like maybe they will take the piss of me or they play. So, I was like I don't have money, I was making, like, excuse for myself. Because I feel like, I don't know, I don't know how to explain, like.

EB: So, you arrived when you were 15...

MR: 15 or 16.

EB: 15 or 16. You were here for a month in London and then they moved you from London to Cardiff but at this point the Home Office is saying you are older than 16.

MR: Yeah, they put me to one interview.

EB: And you had your interview in Cardiff.

MR: Yeah.

EB: And at this point when you had your asylum interview, the Home Office is still saying, you're 18. But then, when did you have the social services age assessment? Did that happen before the interview or after?

MR: After the interview.

EB: Right. Ok. So, you've got the social services age assessment. Did the Home Office accept that?

MR: Yeah. After that they give me visa for one years. Like, under 18.

EB: Right. So then you got your discretionary leave to remain until you were going to turn...

MR: 17 and a half.

EB: Yeah, 17 and a half. So, at this point, you've got a social worker but you've got a negative asylum decision, haven't you?

MR: Yeah.

EB: What support were you getting? You got a flat? But you were on your own?

MR: Yeah, I was on my own. Social worker was supporting me. They were paying for rent, and then electric I was paying, the bills, gas they was paying as well.

EB: And were you going to school during this time?

MR: Yeah, I was in school.

EB: That's when you were in Cathays?

MR: Yeah.

EB: And you had a lawyer during this time, a legal aid lawyer. When you got refused, did you have a right to appeal, did you go to court?

MR: Yeah, I went to court. That was like really hard situation happened to me. After all that I was waiting for five years and they put me back to interview again. I had an interview, they refused me again. I went back to court.

EB: So, you had another interview as a child?

MR: No, not as a child, last year.

EB: So, you had another interview last year?

MR: First time I had interview because interpreter make wrong things. I went to court. They said, you have two option, do you want to go through on your court or are you going to apply to go back to interview. And I told my solicitor, I don't know, like, I will listen to you, you're

my solicitor. You have to choose, which one is good, I will do it, anything you want. He was like, if that was me, I would apply for the interview. I said, ok then, apply for interview. I went to the court and I was like, I want to apply for that interview, go back for interview. I went back to there, after like 10 months, I had interview. They refused again. And they send me to court. I went to court and they refused again.

EB: How long was that then, I know it's been six or seven years that you've been here? It seems like there was a lot of delay. You've got that uncertainty and that's dragged out for a long time.

MR: That was around 5 or 6 months ago. Ruth knows about that.

EB: Did you have the same lawyer throughout or did you change lawyers.

MR: They changed it.

EB: So was it a different lawyer....who was your first lawyer?

MR: I don't know the names, that was in London. Then I went to Sarah on Albany road, solicitor. And she said that I can't come to court with you and then I changed to Ruth and Ruth she give it to me to somewhere...Duncan Lewis.

EB: Did you understand why Sarah wasn't going to go to court with you?

MR: She said your case is not that strong.

EB: Was it clear what she meant, what her reason was?

MR: She was needing money and at that time I didn't have money.

EB: So you then went to Asylum Justice?

MR: Yeah, Asylum Justice. And after all that we make the case stronger and Ruth told me to go with Duncan Lewis. I went to there. They call me. And then they, when I get refused, Duncan Lewis, they send me back to Asylum Justice, with Ruth.

EB: And again, did Duncan Lewis make it clear why they weren't able to assist any further?

MR: I don't know. Anything, Ruth knows about me. I don't know much things because I keep forgetting things.

EB: I'm sorry to ask you so many questions about the process.

MR: It's ok.

EB: It's just so that I can try to understand it. It's complicated, isn't it?

MR: I think, last week we was talking, isn't it? Me and you, on message. And then I forget about today. Then you just messaged me and I said, oh my god, I have a meeting today. I didn't know if...if you don't remind me, I will forget. Because I picking up tablet in pharmacy. And last, about two years ago, I had a bit argument with doctors because all the time they told me to do this, do that. And I went to pharmacy and told them, they're no good to me. And they said ok, don't go back there again. The pharmacy phoned them. Mohammed going to pick up his tablets from here. Now, every month, there is a lady, she is so lovely. She always calls me to remind me to go to pick the tablets up, all the time. Every month, she'll remind me. Otherwise, I'll forget, I'll never go.

EB: I wanted to ask you, who have you found the most helpful since you've been here in the UK?

MR: Social worker, Ruth...Ruth, she's been kind to me...and that lady, she's working in the pharmacy, she's helped me as well. And like two or three guys on city road, they buyed me food, clothes, yeah.

EB: So, what have these people done that has been particularly helpful, particularly kind?

MR: Because like they knows me, they knows, I don't like do bad things, like taking drugs, or selling drugs, or doing stupid things...fight, or stolen things. I am nice, I'm nice to them, I'm nice to everyone. If...I don't go to be close to anyone but if someone...I'm always nice to people. If I can help, I will. It doesn't matter for me, what colour you are or anything, what religion you are. I don't really mind about anything. I think they knows because I'm a good person, that's why they help me. And Ruth as well. Ruth give me money, she give it to me money as well because they stopped my benefit for two years. And Duncan Lewis, as well. There is guy called Christopher, I think. He is really kind to me as well.

EB: Can you think of an example when you've treated most unfairly in the UK? What happened when you were treated most unfairly?

MR: During the interview. In the court as well. Because the Home Office guy was really horrible.

EB: Was that the first interview?

MR: First interview and last court. They were horrible.

EB: They guy in the court, do you mean the Home Office Presenting Officer?

MR: Yeah.

EB: What did he do or what did he say?

MR: He told me, you're lying. You did this, you did that. You have to go back to Iran. You don't have problems. Like this.

EB: What would you like to say to the Home Office to make them understand the problems that you've had? If you had the opportunity now to say to them, to try to make them understand the difficulties that you've had, what would you like to say?

MR: I'd just want to say, they knows, I came here as a baby. If I don't have problems or anything, what I will do here after seven years? I would do better in my country if I didn't have problems. Here I can't do anything. I don't even can work. I can't do anything at all. Now, I have to aske people to buy me food, ask people to buy me this. If I was in back home, I wouldn't ask anyone to buy food. Like, who make yourself like this.

[Friend interrupts: You can't working, you can't do anything you want. We just think we come from hell to heaven but we doesn't, no, we come from hell to hell.]

EB: And what impact does that have on you?

MR: What does that mean?

EB: How does it make you feel?

MR: Like, make me feel down all the time. Always make me feel down. When I see people, especially when they're going away, they're having a good laugh. When I saw them, I feel really sorry for myself. I can't do anything, like. I just go, try to sit down, cry, thinking. Nothing I can do, to be honest.

EB: And is this the reason why you're taking medication at the moment?

MR: Yeah. I'm always like stress, like in the night keep thinking, until I take the tablet and then I sleep.

EB: When did those problems start?

MR: Since my dad...

EB: Since you found out about your dad?

MR: Yeah.

EB: Remind me, how old were you at that point? That's when you got back in touch with your sister? So, you were about 16, 17? No, you were 18?

MR: 18, 19. Yeah.

EB: Do you feel that you've had people to talk to who have supported you while you've been here?

MR: Like now, nobody talk to me or support me anymore. Because I was with social worker and after they put me on job centre. They were supporting me. But now, because I get refused from the...what's it called?...court. And now they don't support me. I don't have benefits for two years now. They stopped my benefit because in job centre they ask for a passport. And the lady she was so horrible. I told Duncan Lewis about that and they talked to them. They said, this boy, he's on medication, you don't need to talk to him like this. And they write down letters and they told them, he's just going to come there, just give him the letters. Everything is on the letters, writing down. I went there and they served me straight away. I just give them the letters, they said, ok, you can go.

EB: So, the stage of the case at the moment, are you looking to put in a fresh claim?

MR: They said you can't do fresh claim until you bring proof. And I don't know how to take proof. In Duncan Lewis, we tried to call France but they give them Iraq numbers and then Sian, she said, we don't need to phone Iraq. We don't get information from them.

EB: I don't know if I've properly understood but the issue here is gathering evidence and you're not clear as to the evidence you're supposed to be gathering?

MR: We tried to get proof from Europe, we tried to phone them. Sian, she tried to get. I said, I don't mind, just find them. And then we tried...

EB: Why do you need information from Europe?

MR: Because they don't have...they have Democrat from here...the company that was working with those people but they don't have Komalah, the different party. They don't have in the UK. They have ones in Paris. We tried to ring them but they give to Sian, Iraq number.

EB: So what is happening now?

MR: I don't know, I'm still waiting. They said, 'wait, wait, wait'. They don't think how I'm going to get food, how I'm going to support myself.

EB: That's a really difficult situation. What help do you think asylum seekers need in the UK?

MR: What does that mean by?

EB: What help do you think asylum seekers need? How do you think things could be improved?

MR: I think they need proof from Komalah to prove that my dad been executed by government, by Iranian government. And they need another letter that police keep looking for me back home.

EB: Your case has been going on for such a long time.

MR: Yes, a long time.

EB: I'm just thinking to myself, why were these issues not resolved when you first arrived.

MR: Exactly. And that's how I think. That's how I feel. I think, why they don't do that, do this to me, the first time? Why after so long time? Seven years.

EB: Why do you think that is? Do you think you got proper advice when you first arrived?

MR: I don't know. I came here when I was 15, 16. And after all the time...at that time I was young and now I'm 22. Like, how can I remember all those things? Especially, all bad things. You can remember good memories but you can't really remember bad memories. When you have a bad situation, imagine that, like. I've been on tablets since I was 18,19. Nows, I'm 22. About 2 to 3 years. Understand it always makes me feel dizzy. Like, being in home, sleep. They keep asking to bring proof. How can I bring proof? I tried with them, with the solicitors. If they don't believe me, they should believe my solicitor will try to bring. We tried to like found them and they give us Iraq number. But my solicitor, I am ready if they want to call Iraq as well to bring any advice, any proof, letters. But I don't know them. I don't know what shall I tell them? What shall I say? My name is Mohammed...Yes, what do you need? I need that...I have to...I don't know all details about my dad. I don't know what my dad was on this party...because sometime my dad told us that he is no work with them anymore. Sometimes he was working with them.

EB: When you first arrived, did you imagine that these things would happen? That this would happen to your case?

MR: No. When I came here I was going to say, oh they're going to make me...they will put me in good situation, they will look after me. Of course, at that time I was a kid, 15, 16. I said, maybe they will look after me for everything. But I didn't know that was going to happen to me. Otherwise I would do something like to bring something or anything. Now, because the situation has gone far, far, far. I don't know what to do at the moment.

[Friend making noises in the background.]

EB: I'm just going to check the time. It's about 3 o'clock. Are you in a rush to get off?

MR: No.

EB: Do you think your social worker helped you to plan for different outcomes and to help to make the system clear to you?

MR: My social don't work with me anymore because I'm 22.

EB: Yeah, it stopped when you were 18.

MR: Yeah, they stopped with me when I was 18, they put me on jobcentre but they still helped me. Like, Nick and then Chris, Mina, and then one of the guys, I don't know, what was his name? Jim. They was really kind to me. They helped me with everything.

EB: I think that I've asked most of the questions that I wanted to do. But I wonder if you could take me back...because you told me about the asylum interview which went badly but your screening interview, when you first arrived, I remember that you said that you had only had some water, you were kept for 24 hours...did you have an interview when you first arrived?

MR: No, there was like really form...

EB: Just a basic interview?

MR: Yeah, like samples interview, like, how old are you? What's your name? Where you from? And then...

[Friend: ...do you want to claim asylum?]

MR: Things like this, yeah.

EB: And how did that interview go? How many people were there?

MR: That wasn't the Home Office. They asked me in the police station.

EB: So, who was interviewing you in the police station?

MR: The peoples from the police station, they asked me, how do you come here? This, this, this...And I told them all this, how I come here, what's my name. They need fingerprints from me.

EB: And did you have an interpreter?

MR: Yeah. Not straight away.

[Sound of mobile phone.]

MR: Sorry.

EB: That's ok. Not a problem.

MR: Yeah. Sorry.

EB: So, you had an interpreter but not straight away?

MR: No, not straight away. After, I don't know how many hours they bring an interpreter.

EB: It meant that you had to wait for a long time?

MR: Yeah.

EB: And you said you were feeling tired, you hadn't had any food. Ok. Was that quite a short interview?

MR: Yeah, ten to fifteen minutes, I think. Because they only ask where I come from, what's my name, why do I come here, things like this.

EB: And then with the second asylum interview that you had because the first one had gone badly, but with the second asylum interview, was there an improvement, did it go better?

MR: Second interview was really bad because that was in Home Office. First interview, that was like, I think they ask everyone when you come if you get arrested, they ask you those questions. Then second interview, that was in Home Office.

EB: In Cardiff.

MR: Yeah. That was really bad.

EB: What was the room like?

MR: The room? I think the room was like small, really small. Like, space by there. Like small table with a computer. A table like this. Like that. You come in the room, and the computer was by there, I was here, she was behind the computer by here. That's it.

EB: And it was a female interviewer?

MR: I think so. I can't remember, to be honest.

EB: Do you remember what the Home Office interviewer was like?

MR: Horrible.

EB: What do you mean by horrible?

MR: They was carry on. I was crying. They don't even give me break. Why are you crying? They don't ask any things. They kept going on and on. They carry on with the questions, asking me questions.

EB: How long did it last for?

MR: How long? That was 2011, I think.

EB: How long did the interview last for?

MR: That was about one, two hours.

EB: And you didn't get a break throughout that time?

MR: No. I think five minutes. Two hours, 5 minutes. And they carry on with questions. And then...

EB: Do you think that they were good questions? Were they difficult questions?

MR: They asked different questions and not even good. They asked me how long you was on your way to come here? I didn't know. I'm on the lorry. I didn't know what time was it. I didn't know is it day or night. How do I know? They come with questions like.

EB: Did you have a meeting with your lawyer before you had your Home Office interview? Had you met with your lawyer? Did you know what to expect? Did they advise you about...

MR: I meet the lawyers in London and they took like, the guy, I don't know, the guy was working with the solicitor. He was coming all the way down to Cardiff to pick me up and they took me 11 o'clock in the night. And he's like, he is part this kind of service. He was sleeping on the car.

EB: The lawyer was?

MR: Not the lawyer. The guy who was working with him.

EB: Sorry, I don't understand. Which guy?

MR: That was interpreter. That was the lawyer's interpreter in London.

EB: Right.

MR: He was working with the solicitor. He came all the way down, London to here to pick me up. And I went to the...I was so tired. Like, they carry on asking this, this.

EB: I imagine that the interpreter would have been tired as well.

MR: And I was like, I'm going to say anything, I just want to leave here. Because I was so tired, hungry.

EB: So, your interview was in Cardiff. Why did the lawyer in London not transfer your case to someone in Cardiff?

MR: I don't know. At that time, I didn't know. I was young. I didn't know about...if that was this time, I would like say more things. But when you're young, your brain does this much, you don't know nothing.

EB: Of course and you're experiencing it for the first time. And it's a complicated system as well.

MR: They took so long time.

EB: So, that's difficult. If your lawyer is in London and you are in Cardiff how do you meet each other and how do you talk about your case?

MR: And when they accept like when they give me visa for years, they said you have to come to London. I said, how can I come to London. I don't know anyone. You should just come London. It's not easy just go London. How can I find you? London is not like town. It's not like a small city. London is big. I don't know anywhere. And I went to London. I said, I'm in London now. I'm lost. I don't know where to go. They send me a name of the train underground.

EB: Remind me, how old are you at this point?

MR: 17, 16. Like that. No longer. And then, I went to...I was keep asking people. I tried to phone them but in the underground there is no service. I was like, I lost. I was, oh my god, what shall I do. I spent two or three tickets on there. I was coming up, putting the ticket in the machine and the ticket was gone. They don't give it to you back. You have to go and get another one. I was getting upset. I phoned them, where am I? This, this, this...like so. I was there for about four or five hours in the ground. And I spent all my money. I had like £60-£70. I spent all the money.

EB: This was given to you by social services?

MR: No that was my money. And then I went to them. They said, there's your visa, congratulations, now go. I was like, where shall I go, I don't have any money left. I have spent all my money by trains underground. I was like, what shall I do? I was there two or three hours until they gave me like £10 or £20 to come back to...

EB: Was this your solicitor?

MR: Yeah. I had a ticket. I lost the ticket. I lost the bus pass. I lost my ID. It was so horrible.

EB: How were you feeling at that point?

MR: So horrible. I had a really bad life the first time when I come here. Everything goes wrong, wrong, wrong. Nothing like goes on to me. Always bad.

EB: Do feel like that...perhaps comparing your case to other peoples' cases...or do you think that most asylum seekers have similar problems or do you think that you have been...

MR: I don't know to be honest. I can't say anything. Because you have your own situation, I have mine.

EB: And did your social worker offer to help with that trip to London?

MR: No. No, they don't.

EB: Was it made clear to you when you got your visa that it was going to be for a limited period of time? And that the expectation would be for you to return to your home country at the end?

MR: What does that mean?

EB: So when you got your visa...because at this point your asylum claim had failed...but because it was accepted that you were a child, you got to stay until you are 17.5...did you feel safe at that point or were you still worried?

MR: I was still worried because people told me that's not forever this. That's why I was keep worried about myself. I was scared to be send me back to Iran in that time.

EB: Can you tell me a bit more about the interview that you had...so, there was the police station, then there was the interview in Cardiff, but then you went to court, you had that difficult court...

MR: We cancelled the court.

EB: That was cancelled?

MR: That was cancelled, the first court. Because they sent me back to interview again.

EB: Did you have a lawyer at the court that day when it was cancelled?

MR: Yeah

EB: Who did you have?

MR: Duncan Lewis.

EB: Were they helpful?

MR: Yeah, they were alright. Kind.

EB: And then you had another interview with the Home Office, was that a better interivew?

MR: Better than the first one.

EB: In what way, how was it better?

MR: Because they knows I am on tablet and they were like whenever you need break or anything, or anything you want, please tell us.

EB: At this point, when you had the better interview, were you an adult at this point?

MR: Yes, I was an adult. That was about a year ago. Yeah, last year.

EB: And the reason for giving you another interview, did they accept that they should have interviewed you as if you were a child?

MR: Yeah. And they were horrible and the interpreter translate bad, wrong things, missing.

EB: And the interpreter for the better interview, did he do a better job as well?

MR: Yeah.

EB: I am really sorry to hear that you have had such a difficult time.

MR: It's ok. Life.

EB: And I am sorry that it's had such an effect on you, as well. And I can understand exactly why that would happen.

MR: You understand but people don't.

EB: And do you feel like that, like people don't understand?

MR: Yeah.

EB: So, my research project, what I'm looking at...I'm trying to explore the idea of fairness within the asylum system. Now, I think you can tell that I don't think it's a very fair system. But what you've told me today is really, really helpful. So, what I'll do is, with the recording, I'll type it up as a transcript. I won't use your name in it, so you can't be identified. And, if you want, I can send you a copy of the transcript. I'll use that in my PhD thesis and any publications. I can send you copy of thesis once its finished.

MR: When the copy is finished, you can call me, I'll come and pick it up. Every single time, I'm in different places. I'm still in Cardiff but all the time I'm in different places. Sometimes I go to my friends house, like from there I go to...sometimes...I'm not going to hide, sometimes I sleep in the park or things.

EB: How long has that been for?

MR: About two months now.

EB: Ok. That's a long time. And that's a lot of uncertainty as well.

MR: And, like, you can't go to everyone's house. And the other day, about Saturday, I went to one of the boy's house and I went there, like, because I'm on tablets, I didn't...I had water with me and two of the boys, like their friends, they're coming over. They was like smoking weed, drinking. I was like, oh my god, I just want to go from here. I was lucky, I didn't took the tablet. And then I was like, I'm going to go, I come back in five minutes. They was like, why you going, this, this. I said, to be honest, I can't stay here, because you guys smoke weed and I don't like these things. I will like, if I stay here maybe you smoke and maybe, I'm here, and the smoke goes on my mouth. Maybe I get drunk the same as you. And then I go out and I didn't go back to there. Then I phoned one of my friends. He didn't answer his phone. And then he ring me after like half an hour. He said sorry, I was in work, are you ok? I was like, not really but I'll be ok. He said, where are you? I said, I don't know where I am. I'm in the street. And he told me, I finish work in one hour. Come and see me. Then we go home. Then I went to see him on city road in Cardiff, yeah. Then I went back to his house and I told him about that. And then he said, don't go to those houses. They are not good people. That's why I'm saying that. I can't give you any address at the moment because like my bank, I've got a bank account...one of my friends gives me his address, which is in Cathays. And he is like living in sharing house. Everything is happened. I can't give his address to everyone. Maybe he's not going to be happy about this. He said the bank is ok but don't give it to anyone. I said, ok.

EB: It just means that life keeps on getting harder.

MR: If you like copy or anything, if you want me to come pick them up, just text me or call me.

EB: It will take a while for me to complete the PhD, to write it up.

MR: It's ok. Whenever it's ready.

EB: Ok. I've got your number and what I could do is give you my business card as well with my details on it so you've got....you say you don't use email?

MR: I've got email but I don't know how to use it.

EB: So if we just keep in touch then by phone.

MR: That time I forget...

[Friend: I use it all the time.]

EB (to friend): Right, so you could help? Great.

[Friend: I contact my solicitor using email. It's an easy thing.]

MR: I forget to save your name, your number. I will save it now. Just Emma, yeah?

EB: Emma, that's me.

MR: What shall I write to remember you?

EB: You could put my surname.

[Friend: Just write 'Emma Dr.']

EB: No, not yet. So, it's B-O-R-L-A-N-D. That's my surname. So, I'm researching here but I'm also a lecturer at Swansea University. I am also a trustee of Asylum Justice, that's how I know Ruth. But I need to make it clear that this project is separate from Asylum Justice. So, I'm wearing a different hat today. I am Emma the researcher today but sometimes I am Emma the Trustee of Asylum Justice. So the information will only be used for thesis and any publications. I'm not going to disclose this to anyone else. And, as I said, I won't use your real name, I'll just use the pseudonym...do you want to use another name or are you happy with just having Mohammed? Mohammed is ok?

MR: Yeah.

EB: If at any point you think, I don't want to be part of this study, then you just need to contact me and say, I don't want to be part of it anymore and you don't need to give a reason. Ok? Because this is your information. So this is the consent form. It's just the information that I've gone through. And there is a bit about me as well. This is just a formality for our Ethics Committee. So, you can sign it if you want, just as evidence that I've got your consent but if you don't want to sign then you don't have to.

MR: It's ok...here?

EB: Yeah, if you just want to sign there, that's fantastic. Really, this is just to keep a record...

MR: Do you want the date as well?

EB: Yeah.

MR: What's the date today?

EB: The 30th. Thanks very much.

MR: 30...10.

EB: Yeah, lovely.

EB: Do you want a final word...as I said, the project is about fairness and the UK's asylum system...how would you sum up the UK asylum system. Let's imagine an asylum seeker arriving for the first time to the UK...or if you were to go back to your younger self, what would you tell your younger self about the asylum system?

MR: I don't really get it to be honest. If you explain more to me?

EB: What do you wish you had known when you first arrived, that you know now about the system?

MR: I wish I would know that's going to happen to me. And all the situation that's happened to me, I would make it better. I wouldn't let that happen to me. But now it's too late. Because I've already had bad life. Really bad life. But I tried to not give up. But everything is going on and on and on. And I can't do...because the first thing, I'm not allowed to work. If I was allowed to work, I would find a job, work to make money and found my way. Like, make a better life. And pay for everything I want. Try to fight for my things.

EB: I was going to ask you what help you would like at this point in your life? What would you like to see happen? What help do you need?

MR: What help...I just want to bring my sister and my niece because they have really bad life over there, they're not safe. And now it's always fighting in Iraq at the moment. I'm really worried about them. And I want to like, if I can help to bring them here or if I get passport by any way to go and see them, any way. Maybe to Turkey. Go see them. Stay with them. And tell them...what they do. And come back here. And try my best to bring them over here.

EB: This is the thing, the delay and the uncertainty and the fact your case hasn't been resolved, not only are you having a difficult life because you don't have accommodation and support but you're being kept separated from your family as well. I'm really sorry to hear that.

MR: It's ok. [Appears upset.]

EB: Is there anything that you want to add? I think that's all the questions that I wanted to ask you...unless you want to say a bit more about the court hearing, or the asylum interview?

MR: I don't know what to say.

EB: Thanks so much for your time, for coming to talk to me. I really appreciate it. What you've told me is really useful.

MR: And thanking you as well.

EB: I'm sorry that I'm not able to do more. I'll turn the recording off.

APPENDIX 4: TRANSCRIPT OF INTERVIEW WITH BLESSING

EB: So, what I've put in front of you here is the information sheet which I sent to you by email, but I just wanted to flag up a few points on here. So, just to say that this...I mean, really, it's up to you to say as much or as little as you want to, but the interviews that I've conducted so far have taken, sort of, round about an hour. It's audio recorded and that's so I've got an accurate record of what's said. And then what happens is, I go away and type that recording up so I've got a transcript. But what I'll do, in order to protect your identity, if you want to choose a pseudonym, so another name, so you get to create a character, you can be whoever you want to be.

B: Yeah. Ok. No problem.

EB: Which name would you like to use?

B: Just put, eh, put Blessing.

EB: Blessing?

B: Yeah, Blessing.

EB: So, we'll do that, I'll put that down. And I can complete the rest of this later. So, the data, that will just be used form part of my PhD thesis - so, I'm looking at fairness and asylum decision making – and any other publications that might result from it, that would be written to promote the fair treatment of asylum seekers and refugees. I won't disclose anything that you tell me to anyone else, and the information, as I say, will just be used in the PhD or any other publications. And the transcript and the recording will be kept in a secure place, and, as I said, I'll use your pseudonym to protect your identity. So, participation is voluntary...sorry, this all sounds quite formal doesn't it?

B: Yeah.

EB: But it's not really. So, you're free to withdraw from the study at any point and you don't need to give a reason. And if there is any information that you feel is particularly sensitive and you don't want that to be used, then just tell me. So, it's more of a dialogue, so you tell me which information you are happy with being used and if there is any information that you

don't want to be used. And then, that bit is just a little bit about me. So, I'm doing research here at Cardiff University but I'm also a Trustee of Asylum Justice but there is no link between the study and my work with Asylum Justice, that's kept separate. And the project has received ethical approval as well. So, you don't need to sign this but if you want to just as a record for me to show to the ethics committee that I did get your consent to participate in the study...

B: I can sign here?

EB: Yeah, that'd be great. So, it's just here. Ok, fantastic. And do you mind if I just complete this quickly? And, again, this is just for my own record, so I can keep track of all the participants. So, we'll use the name Blessing. And we'll put your gender. And do you mind if I ask how old are you?

B: Come again?

EB: How old are you?

B: 42.

EB: Ok, great. And which country are you from?

B: Congo DRC.

EB: Sorry?

B: DRC Congo.

EB: Right, from the DRC. And your first language?

B: French.

EB: French. And you're happy to conduct the interview in English?

B: Yeah, no problem because I speak English, yeah.

EB: And can you tell me a bit about your education and your work background.

B: Yes, education...I get my diploma in Congo. So, I was a teacher in Congo.

EB: Oh right, ok.

B: I was teaching in a primary school in Congo. After that, I go to university of technic. I did construction. But right now I need to start again here. I need to do law and politics or criminology.

EB: You're interested in criminology?

B: Yes but I can't find it here. Maybe after that maybe you will help me to know about that?

EB: Yeah, ok, we can have a chat about that if you want to.

B: I need to start criminology.

EB: Yeah, absolutely, ok. So, what stage is your asylum matter at the moment? Have you been granted refugee status?

B: No. I was passing my interview, it was a few months ago, and I was rejected by Home Office. And I go to court, tribunal, and at the tribunal I was refusing. And after that they send me...I was calling Ruth from Asyum Justice, I said, I received a letter from tribunal, I was rejected again in the tribunal, so they send me paper. So, I'm supposed to appeal again. And I send all the details to Ruth and Ruth appealed for me and then after four days I received another letter coming from Home Office, no, from tribunal. They say, we received your letter for appeal but we send you another date for you to come to do the tier tribunal. After that it was a month, two months, I received again the letter coming from tribunal. Yeah, so they were writing something, your update, so they were rejecting me, all the proof, evidence, they were asking me, I was showing them. I think there was...

EB: This was on the papers or did you actually go to court? Did you have a court date?

B: No, after the court, they send another letter, they send to my solicitor Ruth, the send a letter to Home Office by the tribunal. So something I've got to fill, I've got to fill that small paper today with Ruth. And Ruth was calling me and said, did you receive the letter? And the way she was talking to me she was happy, you know? If it was a bad letter, you would see the attitude of somebody, you can see something, but they way she showed me, she said, 'did you receive your letter?' I said, yes, I received the letter but by the time I was reading the letter...

EB: When did she say this to you?

B: Two weeks and a half. Two weeks. By the time I received that letter. And that letter is good for me because they were writing...[inaudible].

EB: Sorry, say that again?

B: Granted.

EB: Oh, granted.

B: Yes.

EB: So, am I right in understanding that asylum has been granted?

B: Yes.

EB: Oh, congratulations. And that was two weeks ago?

B: Yes, two weeks and half, so I received that letter. They just say, you are granted but I was waiting for them maybe document, so that's why I'm waiting for them.

EB: So waiting to hear from Ruth...and you're going to see Ruth today?

B: I'll be there because I'm going to work today. I work today because I'm working by Asylum Justice.

EB: Right, are you going to go down to the office or to the drop-in?

B: No, no, I'm working here by the office in Bute house, in appointment. If there are some people to want to translate them, to want to help them, that's why I go to, Ruth call me, I come there. But every Monday, I'm working here by Asylum Justice, by the church.

EB: Great. Well, that's fantastic news. I'm really pleased to hear that. Do you mind if, for the purposes of this interview, can we jump back in time?

B: [Laughs]

EB: Can we go back...and I don't want to ask you about what happened before you came to the UK. What I'm really interested in is to find out about the experiences of asylum seekers

here in the UK. And about their experiences of the asylum system. So, could you tell me what happened when you first arrived in the UK? So, how you arrived and what that experience was like?

B: Yeah, when I came to the UK, because I was a refugee in Zimbabwe for ten years, yeah, ten years I was a refugee in Zimbabwe...in Congo first, I can start from Congo. I'm a member of UDPS. It is the party politics in Congo. It big party politics there. So, I was member since 2005. And since I was demonstrating things in the street, mobilising people to go to the march, to do everything because our country it was like solded by Kabila. And we move...[indecipherable]...for Kabila president. It was not the Congolese. But the father, Laurent Kabila Désiré, that one he was Congolese one-hundred percent. But he was a rebel in Tanzania. Was fighting ex-president Mobutu...[inaudible] who passed away...[inaudible]...After that, Kabila Laurent took his place. Then when Kabila came into power, we start to fight with Kabila, because, as we know as UDPS member, Kabila came with the Rwandese people, Burundese people and the Ugandans people, they were supporting Kabila to come to Congo to get the place to take it over. At the time they reached that side, us Congolese people, member for UDPS, and our leader, Tshisekedi, we talk to Kabila. All those people bring them here, they are not Congolese. Only thing is, give them whatever you want to give them and send them back home. We need to deal now with you to do our things as Congolese people. Not with Rwandese people. Because there was a minister in Congo who was Rwandese, like Rubella, like ...[inaudible]...there were plenty of people they were getting posts in Congo. The highest positions in Congo. And the problem, they were killing...they wanted to just kill the Kabila president, Laurent. After that they can take over everything in the Congo. But Laurent was very intelligent. He knows those people who came with them, they are not Congolese people. I am only the one of the Congolese people in top but they wanted to kill me. They start to disturb Kabila. Giving news from EU and America leaders. This guy, what you know, politics things. After that, Laurent Kabila send them back home by force. I was there and we killed more people, no Rwandese in Congo in that time. We burned them with the tyres.

EB: When was this?

B: It was in 2000, no, 1999 and 98. Because Kabila came into power in 1997. And we kill whatever we wanted to kill. We want to push them to another country and they go back. After that, they start to disturb Kabila by EU leaders because Kabila was saying everybody needs

riches from Congo. Must come in Congo, we must agree about our riches. Like a diamond, we tell you the cost of diamond, you give us money, and us, we will give you diamond. If you need gold, we give you, if you need petrol, we give you, everything you want, we give you, cobalt, everything we give you, and you pay money, because these things for Congolese people. And EU people, leaders, and American leaders, they were angry about that, you know, them they are forcing, they are imposing people. But Kabila doesn't want people forcing, to imposing by force. Because if he say, this water, you bought it for 50p, 50p. But EU people, American leader, they say, this water, you say 50p, it's not 50p, we give you 1p, by force. So, Kabila was refusing all those things. After that, they start to send the people, to send the people, to send the people. Until they kill Kabila. And the time they kill Kabila, Laurent president, the son, the one who is now in power, Joseph Kabila, but he is not Joseph Kabila. He is ...[indecipherable]... Kadende. He just took the name because Laurent Kabila, the president, the father, he was in Tanzania and he get married to one woman, she was Kabila's mother. Because Kabila, that one is a twins...[inaudible]...they your kid and they say Kabila can do nothing, he just put Kabila in the army. He put Kabila in the army and the Laurent Kabila start to give...[inaudible]...with that mother. And the time Kabila was young, the first one in the family, the father said, ah, I know, he's my wife's son, with another father, but now they are my son. The American people they impose Kabila to get the power to kill the Laurent. So now Kabila Joseph is president in Congo but he is not Congolese people. He is not Congolese. He is from Rwanda. His father is from Rwanda, his mother is from Rwanda. So, he took our place, our president's place. We start to fight, to push him away, to push him out of Congo. They start to kill Congolese. They start to kill Congolese, at all the borders they kill Congolese until we organising a big march in 2005. I was there. Because since we start in 2005, until December 2005, it was only disorder and disorder in Congo. Because we are doing everything for Kabila to leave our country. Kabila doesn't want to leave our country. We start to get arrested. The time they arrest me, they put me in the prison. They were among people who were marching, they killed some. I start to say, like this room, you cannot fit a hundred people in this room. Because if you put more than a hundred people in this room, you see some people they are going to fell down because there is no fresh air getting inside and people got to complaining too much. Inside a room like that, I was inside. I fell down, I was crying in my language. There was one, it was the leader in that place, say to me, 'why you crying?' I say, I know the way the catch me, they're going to kill me. 'Sure, they're goint to kill you'. He is asking me, 'you are from which country? From which tribe?' I say, 'I'm from Bandudu'. He said, 'me too I'm from Bandudu...[indecipherable]...I'll help

you'. The time they were arresting me in the march, I was having my UDPS membership card. The police, they took it. 'Ah, you people from UDPS, ah, we kill you, we kill you people.' Before they put you in the room, they are supposed to give you back your card, your ID member, to show you are UDPS member, you was marching, you was making demonstration, you was making disorder. The time they was giving me my card because it was my evidence. Because I can say, I'm not a member of the UDPS, I was just passing, you get me arrested. But to show I was a member of UDPS supporter, you have that card. And the time they give me back that card, I take that card and I put it in the pocket. After that, that [indecipherable] call somebody. He said, no call me that one. They called and say why you people you are making disorder like this. We know everything but they don't make disorder. Now we are fighting with the police, what, what...I said, no, us we need free country. But it's not free country. Because we have got our permission to do a march, we are asking the permission by the government of Kinshasa city. They say you can do your march. But after the march they...[indecipherable]...the police and like the CIO because in Congo they are calling them ANR, they put them in the march without uniforms, so they can start to arrest the people. Because if they are in uniforms then you cannot be close with them, but if they are not in uniforms, you can say let go, let go, let go. And sometimes they can arrest people. Sometimes we change the strategy, we say, ah. Like they are putting some people under us to start to arrest the people. Now they say any march you must stay closer to your people. If you are close with somebody you must ask him the ...[indecipherable]...of your party. UDPS Vengara, UDPS Vengara. Because I'm a member of UDPS, anybody can ask me a question about UDPS. Like UDPS member, UDPS Vengara, UDPS, winner. But if you are not a member of UDPS party, and I say UDPS, you just look at me like this. And you say, oh, this one is not a member of UDPS. So, sometimes they were arresting also people. But the time you arrest people like this, you will see, it's the police. Like the CIO. After that, that guy, that [indecipherable], he said, 'I will help you but you must be intelligent. The way you are crying, you are supposed to get water'. They put me beyond the water tap, there was a tap there for water. I go to there, I start to using water. And that see like that guy goes somewhere. [Inaudible]...this guy was saying to me, I go to help you but be intelligent. How can he leave me from ten minutes until now and he if he come again to see me, I would be like stupid. Maybe this is my chance for me to run away. [Inaudible]...and go back home after two weeks. I heard the news started coming...[inaduable]...they're looking for you, they're looking for you. If like that, I'm going to lose my life. I ran away. From there, I go to Zambia. From Zambia, I got to Zimbabwe. Zimbabwe I was staying two years and some

months in a refugee camp. And I was looking for UDPS member. They said, here we do not have UDPS member. Better if you go to Harare, Harare city. There you can find the UDPS member so you can [inaudible]. I go to Harare, I find more people from UDPS. We start to protest again. We start to do our meetings and, what, what, what. One day Kabila is supposed to come back in Zimbabwe because now Kabila and Mugabe they are close. Us, we are calling Mugabe the coach of Kabila. He is the one who is coaching Kabila about to kill people, because he is doing it also in Zimbabwe. Every news we are getting, we are calling the UDPS party in Congo. We are telling them, look at what they are planning, look at what they are planning, look at what they are planning. Because I was in Congolese community in Zimbabwe like the Secretary Administrative. I was getting [inaudible] from South Africa, from Zambia, all the Congolese people of UDPS they are memers there and we communicate, and all their news I'm sending back to Congo. Even the time there was election in Congo. It was Mugabe who was supporting that election. They send all the material for them to make like a, what can I say, the trick for election. Maybe we can do together to get election, you can get five, I too can get five, but they took my two and instead of seven I will be left with three. They trick the Congolese people...[inaudible]...all the news we are sending back that side. Even the way Kabila Laurent, he was shooted in Congo by the bodyguard, and they took the body of Kabila, they go with it in Zimbabwe. Kabila Laurent was dead in Congo. Because he was keeping his money in the bank of Zimbabwe. So that's why Mugabe said, the way they killed that Kabila president, if they bury him from there, we are going to miss all the money this guy has got. So better we support to go Mugabe because he was number one in Africa. He is a big leader, a dictator. They said they sold that to Zimbabwe, they took the body of Kabila and they go with it in Zimbabwe. And the Congolese people they were saying, no Kabila was not dead, he was feeling better now, but Kabila was dead in Congo, in Kinshasa. In Zimbabwe they go to use the [inaudible] Kabila, to open the bank, to get the money. The time the get all the money. [Inaudible]...they take the body of Kabila and they just throw it like this, in the camp. I saw the camp myself. Because there was one General from Zimbabwe who was my best friend and he was telling me every stories that is passing between Congo and Zimbabwe. Look at what, what, what. I say, sure, sure. They call Congo, to my leaders in UDPS and they say they will look at this, this, this is passing. I say, sure, sure. That evidence, I got evidence. The way I am here now talking to you, in the place they were putting Kabila. They didn't put Kabila in the mortuary. They just leave him like that. But it was the president. I meet the place like this. Kabila was here. So that General was telling me. Your President was here. I say, yes, yes. Show me the

pictures. Are these the pictures? Yes. In the phone, he showed me just the pictures. He said, you see? Your President was here. They just took the money, everything. But he said, his son, I said, that one, is not the son. He is a rebel, he is not the son. He is the one who makes everything for his father to died to get the power. He is not the President that one.

After that, they start to do the same thing in South Africa. They took the Congolese refugees in South Africa, they send back in Congo. All those Congolese people in South Africa, the ran away in Zimbabwe. They said, no, they are deporting Congolese people. If you are fighting for Kabila, they will took you, they will send you back. When they send you back, the time they put you in the airplane, you start to go there, and they called ANR, like a CIO. We find hundred Congolese shouting up because of you Kabila, in this place, this place, this place. We find them, we put them, we deport them. So when they reach you, coming to catch you, they're going to kill you. Same issue, it was happen again in Zimbabwe. I was having a meeting one day, the police was starting following me. No way I'm staying, whatever, whatever. After three days, I saw people early in the morning, they come to my house. Oh no, we need to get your book, that was having after three days. My book, you know, meeting book. It was blue, like this. They said, we need to get that one. I said, no. After three days, in three days I didn't go anywhere. I said, no. They tell me even the way I was doing meeting with people, it was in this corner, it was this place, you was wearing this. And you was catching a combi, and the time they drop you, we see the way you are going, us also we follow you, and see the way you enter. Sure, sure. That time I say, uh, I can't remember...I said this is not Congo, this is Zimbabwe. If you play, we kill you for nothing. We need the book. There was...[inaudible]...they was inside my room. One push me. He said, this one is a book that we need. They took that book and my two forms. After that when I saw them I had to fight to get that book because I know that book was writing bad issues inside. But was writing in French. But I noticed there was a CIO from Mugabe. They link with Kabila. Only thing is they're going to do that thing is translating in Congo Embassy. They tell them what we are writing. It was bad for me. The time I wanted to take that book. That one took a gun, he was having a pistol gun. He say, no, my friend, don't play. You don't know us. We kill you for nothing. This is not Congo. He took that gun and hit me here. You see that one? It's a gun and the blood, I fell down. My wife and my kids run away. The time those people they took that book and my two phones and the pictures was inside. They go. The landlord, he say, what's happening in that side. He say, me I saw these people with the pick up. There was six people. That pick up there is no plate number. So, in Zimbabwe, if the car is moving without

a plate number, it is a CIO. You can't stop them. They are CIO, in suits. The way they are wearing. After that, I say, ah, they way things they start like this, they go with that book. They'll come back. Because they wanted to know what we are writing in that book. They are going to check it in Congo Embassy to explain them they are saying this, this, this. Because there was [inaudible] of Mugabe inside. Because they were the coach of Kabila.

After that, I told my wife, we can't stay here. We leave there, I go somewhere. After that, I say, this country is too small. I know Harare. That place is very small. They can catch me. I go to report to the police. The police, they say, we don't have anything to do because the way you explain to us, we know those people, they are CIO. But we can't accuse the CIO. Nothing. Just go to the hospital. So, to the hospital, they are going to ask, who beat you? What am I going to tell them? Because in Zimbabwe, even the doctor, they are CIO. So, I decide to go to UNHCR. I go to UNHCR. There are in Zimbabwe. I tell them. They say, it's ok, it's ok but be careful. I went to Human Rights in Zimbabwe, I tell them. They say, no, be careful, you come after two days. But after two days, myself, I say, I'm in danger. Maybe those people if they came back...because they took my phone. In my phone there was contact people. They can call maybe one of friend of mine. They say, no, we are with Blessing somewhere, come and talk with Blessing. And the person go to come and they're going to arrest him. Better, I am danger, can you leave. I ran away to Zambia. After Zambia - I was also a member of the Catholic Church - I called my Priest. I said, no, I am no longer, two days, three days I'm in Zambia. 'In Zambia?' I say I was beaten by the CIO. He say, 'sure, sure'. I say, 'yes'. He said, 'there is no way for me to help you from afar. Just make your effort to come here. I'll help you.'

EB: Sorry, who was this?

B: He's a Priest. He's a Priest from Catholic Church. He say to me like that. I was having his number in my head. He said, yeah, it's ok, no problem. And I call and say, now I don't have money. I was sleeping outside. In the border of Congo and Zambia. In the pub. The owner of the pub was helping me, that Zambian guy. He was helping me with food. After people going home, he said, you can sleep here and tomorrow you come. The one who was helping me, he said, you want to go to Zimbabwe? I said, yes. I called the Priest again. He give me his phone to call. He said to me...[inaudible]...but I can go back to Zambia...to Zimbabwe. He said, are you free to go? I said yes. The way that guy say it, I know him, he's in a Catholic Church, it's secure, that side I can be free also, he's going to help me. He say, do you have

money? I say, I don't have money. The one who gave me even bread. I don't have money. He say, yeah. Truck driver or lorry driver, they were drinking beer there. He said to one of them, he say, this one is Congolese but he want to go to Zimbabwe but he don't have any money. If you can help me, the way you help this guy, when you reach there you call me, I explain to him, and you are going to call this number. He give the guy the number for the Priest so that the driver, when you reach this place, call the Priest so he can come and pick him up. Because the Priest was saying, when you reach, just call me, I will come and take you. I was reaching there, it was around, around 11, around 11, and they called the Priest. The Priest he came there with the car, took me and we go to the Church. I stayed there more than three weeks. After three weeks, he said, no, you're in danger. I saw the CIO. They are coming to the Church. They are checking. They are coming. The way you are...[inaudible]..., only thing is I can help you to travel. That was when he helped me to travel and was making me papers. It was two papers like this. It was from Catholic...[inaudible]...like a Catholic travel document. He put my picture. He told me, anywhere you present this paper you will be free. He was writing. [Inaudible]...cross from Zimbabwe and go to Mozambique together. Make me a [inaudible]...was in the car. Because the Zimbabwean car they're going to Mozambique...[inaudible]...place no one can disturb. We go there make me travelling from Mozambique back to Portugal. From Portugal, we say, no. When you reach Portugal, don't do anything. Just keep your paper. In transit. You will go to UK. Only safe place you can go is in UK. They are respecting human rights. Another country, they can't. So that's how you see me, I came here. It was 18 October 2016. I reached by Heathrow. And those things I was telling you, all those papers from Catholic. If you just pass Portugal to go to UK, don't show those papers. They will just take it straight away and destroy it and flush it in the water. Because if they get you with these papers, I'm the one who signed, so I'm the one who is going to be in trouble. So, I just help you. Only that's why I'm here in the UK.

EB: So, tell me what happened at Heathrow when you arrived?

B: Yeah, when I arrived in Heathrow it was around 11. No, around 12. Around 12, yeah. Midnight, I reached there. I go to immigration people. First, before I go there – it's my first time to reach – I don't know where I can start. I was just sitting like that. In the waiting area. And there was no more people coming. I said, no, let me sit. I sit there. I sit. There's one woman from America. I say, sorry, can I sit? She say, yeah, you can sit. I start to talk with her. She said, no, I'm from America. I'm travelling to California but I'm waiting for my

flight. I will get it at 4am. So, that's why you sit. And we start to talk. And there was one guy who was passing. Those cleaners. Airport cleaner. And he saw me disturbing black people and that lady. I think he's the one who went to let the border control know about me. Like I saw one guy that side is sitting. And by the time the guy came, he say, sir, are you ok? I said, yes, I'm ok. What are you doing here? I say, no, I'm ok, I just come in the UK. I say, I'm a refugee. I need to ask asylum seeker. He said, sure, you're an asylum seeker. They brought me to somewhere there. He said, no, come. They start to search me, they remove my clothes, everything. I was not having any evidence to me. If it's like that, you're from Congo. I say, yes, I'm from Congo. Ok, ok. And they call the interpreter. I spoke to the interpreter. They put me in detention. I go to detention, I was sleeping there. Before I go there, they take my fingerprints, they get me picture, and everything. I was...

EB: Do you feel that you were treated well?

B: Yeah, in detention I was well. I was well. Only to sleep, it was very difficult. Because there was just a seat. You can't sleep in the seat. There's just a seat. But if you want to eat, they'll give you food. If you want to bath, they give you towel, they give you soap. Everything they give you. Yeah, in detention. But I was spending more than one day and a half. In the morning, I saw one immigration come to make me the interview.

EB: So, this was at Heathrow?

B: At Heathrow, yeah. They took my picture, fingerprints. They make my interview and they send me back to detention. They say, no, it's ok...[inaudible]...you can stay here. They took me somewhere later. I stayed there. It was around 9pm.

EB: Did you meet with anyone who was able to give you any advice?

B: Come again?

EB: Did you you meet with anyone who could give you any advice at this stage? No contact with a lawyer?

B: No contact with the lawyer. No contact with the lawyer. Only immigration officer. I spoke to him first, he said to me, yeah, don't worry. You go there. Maybe we're going to arrange something for you. Find a place for you to go and stay. I said, yeah, it's ok. So, they put me back in detention. After that, it was in 9pm, they call me, Mr Blessing, come. And I come.

They said, take your bag. I was having just a small bag with one [inaudible]. They said, now, the taxi is there. They want to take you back to Croydon. From there, they took me to Croydon for three days. From Croydon, they sent me to Cardiff. From Cardiff, I came to Links House. After...

EB: Did you understand why you were being sent to these different places? Why you were going to Croydon, why you were going to Cardiff? Was it explained to you?

B: No, no. [Phone rings] Sorry.

EB: That's ok.

B: [Speaks on phone.]

EB: Sorry, I should have said at the beginning, if you want to take a break at any time then just let me know.

B: No no, no no. Yeah, from there, there was just telling me from detention to Croydon. They say, here in detention you cannot sleep for more than three days. You know, there is no bed. Better they can send you in Croydon. They took me straight to Croydon. I stayed in Croydon for just...

EB: So when you were in detention, you had no access to a bed?

B: No, there is no bed. You can see yourself, it is like this. If you want to sleep, you must sleep in the chair.

EB: And you were there for three days?

B: In detention? No, no. Just one day and a half. After there, they send me to Croydon. Croydon for three days. In three days, they say, no, you are going to Cardiff. Yes, and they took me from Croydon to Cardiff. And they came to Cardiff, they said to me, you are now in Cardiff but the process of Cardiff is like this, you must come and eat every morning, you must come and sign every day, you must come and eat breakfast, you must come and eat supper, eat lunch, three times per day. And, after twenty-one days, they can support you. The accommodation. Because you say you do not have accommodation. After that, twenty-one days, they send me the letter come to me, I will just in Cardiff. I found a house in Cardiff. Where I am staying now in [gives address]. I went there, it was 11 November. Yes. Yeah.

Until now, I'm still there. I'm still waiting for my things to be ok. Maybe I can change, I can move out. Because that house is not for Home Office. It's just they're paying for me. And, beyond that, they're giving me something like thirty-seven something every week for my food. But the money is not enough because if you want to buy soap, if you want to buy talk time, you cannot afford. But the way I was asking people, they say, they make it for you each day, you're supposed to eat something for like £5. But it's not enough. It's very small. Yeah.

EB: So, when did you have your Home Office interview? The asylum interview?

B: Yeah...the interview it was passing...it was passing, March, yeah...March.

EB: And can you tell me about that interview? What happened?

B: About the interview? The way the interview it was passing...the solicitor was very rough to me. Maybe sometimes I can say that. Sorry for me to say that but I can say...

EB: Don't apologise at all.

B: Yeah, it was very rough to me. Because the first day I meet the solicitor - it's Albany Solicitors, Jennifer - I meet her we spoke together, with the translator, explained everything. All she was asking me about was my evidence. She'd say, 'Can you show me the evidence that you were beaten by the CIO? Can you show me the evidence with the blood?' I was having all the evidence. She said, 'Are you sure that you were a refugee in Zimbabwe?' I said, 'Yes, I was a refugee in Zimbabwe for ten years.' 'Oh, you didn't work?' I said, 'No. In Zimbabwe, you can't work if you're a refugee because you are limited. You can't work.' I explained everything to her. She said to me, 'It's ok, there's no problem, we're going to talk.' Since we finished like that, I never spoke to that solicitor again.

EB: So you had one interview?

B: One interview with my solicitor. Only. Only. Myself, they send me a letter from Home Office. Sorry, maybe the time I received my evidence, I go to the office, I say, no. I see the secretary and I say, I come to drop my evidence because my solicitor she was saying to me, I was supposed to bring the evidence, if I get it. I said, yah, this the evidence, yah. And they took the copy. The copy. They give me the copy, they took the original. The time I left the office, after thirty minutes, I received a call from solicitor. 'I received the paper you left here, don't worry, I'll call you.' Ok, it's ok. After that, I received a letter coming from Home

Office. I read the letter. They say to me, you must go and get a biometric photo. You must go and get it. But if you know that your name is the wrong spelling, don't go. Yeah, because my name, it was wrong. They was writing by the first time I reached it [spells name mistakenly recorded by Home Office], since my name is [gives correct spelling of name], and it was missing [gives middle name]. They just put [gives name recorded by HO]. The time I read the letter, I can't go and reach like this because I read and see the way they are writing. I go to my solicitor. I meet the secretary. I say, now, I receive that letter but I can't go because my name is not right. Even my date of birth, is not right. I was born on [gives date of birth]. But they put [gives date of birth on HO letter]. It was not like that. We correct everything. The secretary say, no, I get the letter, I make the photocopy. I said, no, it's ok, I'll give the solicitor the letter. After three days, I received a letter coming from my solicitor. 'Now, I send already the fax to Home Office. They're going to send you another letter to go and get the biometric photo.' I say, yeah, it's ok. After that, I was having painful on that things. I was in hospital. Hospital, they say, you can go, you can well, but now you've got the trouble things, like monthly problems. But you're supposed to go and see the specialist there, to see. I go to the hopsital, they check me with the machine, everything, everything. I say, now, to solicitor, you need also that result. I say, yes, I need the result but you can send them letter to hospital. Maybe they can send you. She send the letter but the hospital they refused to give her that result. It's finished here. I received the letter coming from Home Office. I'm going to pass my interview. Myself, I go there, I meet my solicitor...not my solicitor, I meet the secretary. I say, now, I received this letter to go to interview. But since my solicitor she was telling me we meet before interview. She never call me. She never do anything until the date came. Like I pass my interview tomorrow, I received the letter today. The solicitor say, no, after your interview on Friday, come and see me on Monday at my office at 2 o'clock. Only that. And I go there, I say, I received that letter you sent me but right now, me, tomorrow, I'm going to interview. But we can't analyse everything together? She say, no, you just go. What about the picture? She say, just go. Sure, sure. It's her job. I go to interview. The first things they tell me I go to interview – I was having all my evidence...I was having the evidence.

EB: This was the same evidence that you took to your solicitor?

B: Same evidence, yes.

EB: You took copies?

B: Yes, I took copies. I go there. I meet officer. Immigration officer. He started to ask me, do you have any...correct your name? We correct the name. Everything, everything. Did you receive a paper to go to biometric? I say, yeah, I receive the paper but solicitor she was sending again the fax here. I never received any letter but she was telling me you get me picture here. But they said we can't get your picture. We give you another letter. After the interview, you go and get your picture. But the solicitor, she was telling me, they get your picture there. I see something suspect. After that, she told me do you have any evidence you can show us? I said, yes, all the evidence, I give to my solicitor. She said, what? Are you telling me the truth? I said, yes. All the evidence, I give to solicitor. Your solicitor, they answer from Home Office. Your solicitor, she didn't send any evidence to us. I say, why? She was the one who was asking for about to bring the evidence? She knows. I was with her yesterday. She knows I'm going to pass my interview. Why she didn't send you all the evidence since she sent the paper? I sense something wrong. She say, we don't have any evidence from your solicitor. I open my bag, I pull up the evidence, the copy. I start to give you, one by one. All the evidence, I give. You're taking medicine? Yes, I'm taking medicine. They say, which medicine. I say, this, this, this. Right. But they say, the evidence we didn't see. Your solicitor, she didn't send any evidence. Even the ID, the Refugee ID from Zimbabwe, my copy of status, all the evidence, I put there. We start to make the interview. They start to question me and answer, question me and answer, question me and answer. After finished there, they say to me, sit there, outside, we give you the copy of your interview and the CDs. After I see, the immigration officer come to me, she didn't give me the CDs, only the paper. I say, yeah, it's ok. The time, after three days, I go to see my solicitor. She told me, no, your interview pass well. It was good, good, good, good. But only thing, you're supposed to go and cancel your status. I said, to go and cancel my status? Yes. I say, why? She say, they're not going to give you document because of that status. I say, yes, I lose my status, but this status is from UNHCR, for under Geneva. Now you are sending me to go and cancel it. Can you help me for this? Where can I go and cancel that status. She said, you need to go to Zimbabwe Embassy. I said, you know, Zimbabwe Embassy, is the country now, I'm [inaudible] now, but you are sending me to go back in Zimbabwe embassy. You don't know in Zimbabwe Embassy there is a CIO working there. They can catch me. They send me back in Zimbabwe. That's when I said, no, no, no. Me, I can't go there. This status, I am not refusing I was a refugee in Zimbabwe. Because of this, this, this, that make me leave Zimbabwe country. But now you are sending me back to Zimbabwe. You can't see they are going to arrest me, simple.

EB: Why did your solicitor advise you to cancel your refugee status?

B: I don't know. I don't know. Only that. And I start to tell her, you know, I give you all the evidence of mine but you never send it to the Home Office. Look at the solicitor's answer to me. I can't forget that answer. She said to me, you're supposed to give me permission to send it. Me, to give you permission to send it to the Home Office. Why didn't you ask me about all those information I was giving you to send it? But only the information you sent, the evidence, you keep it. Oh no, me, I can't continue with you. I can't continue with you because, if you want, you can pay money, I can't continue with you. I say, yeah, the way you can't continue with me, is ok, no problem. But I need you to give my papers and CD. I will wait for the CDs. She looks for the CDs. More than 30 minutes. I come out of that office. I never get the CDs. That solicitor, she never give me the CDs. Oh, the CD was here, the CD was here! Where is the CD? Because the reject me. The way the reject me, only thing I see the paper from Home Office, they say, they say to me, we remember...no, we know you was a UDPS member because we saw your card – UDPS member from 2005. It was correct. Genuine. And we can't believe you was in high position in UDPS. Only that two issue. After that, they say to me, we not believe you was a refugee in Zimbabwe.

EB: Even though you had your card? [52:18]

B: Yes. No, because the card was there. To me, like they was accusing me, I did something fault. It was a fake. All those papers from Zimbabwe. Even to me, it was like a fake. Because that time I meet that lady, that solicitor, it's ok, you must give me all the things, give me the CD, because I'll find another lawyer, another solicitor, but they're supposed to have my evidence so they can hear my interview it was passing. Because I go to tribunal, I need it. From now, I never get that CD. I don't know if she have the CD, I don't know. The time I meet Ruth from Asylum Justice, only one question she was asking me, she said to me, what they say? I say, they said my card from UDPS is genuine and they can't believe I was a refugee in Zimbabwe. She said to me, why did they check the card for UDPS, they say it's genuine, but they can't check the document from Zimbabwe government and the status (because the status is coming from UNHCR)? And since I know from UNHCR, on that card there was a code, Zimbabwe code refugee. If they type that code, you will saw me in the picture. Only the code. That's why the say, oh...But why are you sending me to go to Zimbabwe Embassy? They are going to arrest me.

EB: So, you didn't go to the Zimbabwe Embassy?

B: I didn't. I didn't. No, I didn't go to Zimbabwe Embassy because they can arrest me. Because now my [inaudible] in the country and I go there to cancel my status. It's not fair, I can't go. They can arrest me for nothing. I ran away from Zimbabwe, meaning I [inaudible] there, but now you're telling me to go and cancel your status. And only status. Status they're giving in UK is the same status they're giving to Zimbabwe, same to they're giving to Norway, same to America. Because they're under UN. Why are you telling me, go and cancel your status? And the Home Office, they said...

EB: Did your solicitor put that in writing? The advice to cancel your status. Your UN status, your refugee status. Or, did she just say it to you face-to-face?

B: Face-to-face. She say to me, I send you to go to cancel that status. I say, me, bon, I don't know where to cancel but give me an idea were I can cancel it. She said, go to Zimbabwe Embassy. I said, no, this is not for Zimbabwe Embassy. It's for UNHCR. UNHCR, they can cancel my status. If I kill people, they can say he is no longer a UNHCR member. So they can cancel it. But why are you sending me to go to Zimbabwe to cancel that? They can arrest me.

EB: Tell me how you felt when you got your Home Office refusal letter, and they're saying the UDPS card, we think that's genuine, but we don't accept your UNHCR document? How did that make you feel?

B: Yeah, the time they say, we accept you are UDPS member, I was happy because there are more people, they come, they say they are UDPS member, they can reject them. They say, you are not UDPS member. And the only things they was believing, the way I was talking with them, I proved them I was a UDPS member. Because the way I was talking with UDPS and I showed them all things of UDPS. That's what they were saying. We see, you are UDPS member. Only thing they were saying, you were not in a high position. I don't know here, maybe they can say high position you can be the President of the Party? I don't know. Because every party, every post is high. Maybe [inaudible] is high position. [Inaudible] is high positin. They were saying that. Only thing I was happy was they were believing to me I'm a UDPS member. And only things again, the time they say to me, they say, you was not a refugee in Zimbabwe. That's when I was saying there was confusion. You check for UDPS

but for refugee, they didn't check. I don't know, maybe. It's your job, maybe they was keeping something.

EB: On the one hand they're saying, we believe you but then they're saying at the same time, we don't believe you. We only believe this part of your story, we don't believe the rest of your story. And they're only willing to investigate part of it but not to investigate the rest.

B: Yes, that's what Ruth from Asylum Justice was saying to me. She said they can't just check one and left one. And the way you say from Congo, before you run away, you was jumping. You know, the people who are jumping to run away, meaning, he was in danger. That one was making that effort to jump to run away. Because people like us in Congo, we are mobilising people. You see what, what, let go, let go. And me, I saw the police, the soldier, face to face. I was telling them what we need, you will be happy one day. Because the money we know you are getting, is not money. Because we know the salary of the police in Congo. We know their salary. They're taking like £20 per month. But now you're killing your brothers, your sisters. And you need something to make you also happy. One day. But you are killing them today. We are talking to them face to face. And after that we see some police and they start to explain to you, no, no, but you can do it, not fight. You see, what, why, because, it's Congo. They was protecting somebody who is not Congolese. So, we're supposed to tell them the truth of the country. We are doing everything. We can talk to them face-to-face. We see somebody with a gun, we talk. We look into like this and say...those people, sometimes they are saying truth. Because weith £20 you cannot feed your family per month. You can't. It's a little, little money. But you are getting salary for £20. Some police they can say, ah, leave them to pass. You will see there was a block of police but they push them. Meaning, we talk with them. They say, no, you can't. We don't do anything. You too, don't throw the storm. Just keep quiet. Just sing what you are singing and push, push, making us go down. We are pushing them because if we talk to them nicely then they can understand.

EB: Tell me, so your solicitor, when she said that I can't continue to represent you, you need to pay money, what were her reasons for not continuing with your case? Which reasons did she give?

B: Yeah, because, there are some solicitor...I don't know...maybe...they are doing many things with the...because the solicitor...I'm not the one who is going to pay the solicitor...it's Home Office. Home Office is the one who is paying the solicitor. Some

solicitor they can just present you but not to fight for you to get paper. Cannot go well for your. They can just present you like we are talking. Together we are talking and present me. But cannot go very far for you. Some they are like that. And if you know, if they go very far for you, you get the paper. I don't know, maybe they are doing something again with the Home Office. Us, we don't know. But, my case, the way I saw my case, with the evidence, she can't leave me. But I'm saying, why she can't believe me? Why she can leave me? Maybe there was something wrong? Since, she was thinking me, I know things, or what. I don't know. Because I was telling that [inaudible] worker, this, this this. We started, why I can give you all the evidence. You are my solicitor. Before, to send everything to Home Office, you are supposed to put all the evidence inside. You send to Home Office. Is the way the time I went to the court. To the tribunal. Home Office, they was sending all the evidence to the judge. Because I surprised the judge showing my photo. He take my photo, he give to Home Office. He said, look at that guy. He is the one. The lady looked at me and say, yes, he's the guy. The judge say, check well, he's the person. She say, yes, it's the person. He said, put it again. After that, he took again one picture. The time I was in London doing my...my...I was joining my Party in London. I was getting my picture. He said again, look at this picture. This is a UDPS flag. Home Office say, yes, it's the guy. They say, yes, he's the guy. Because if it was not me I'm supposed to say no, it's not the one. And why Home Office, they send all the evidence to the tribunal but my solicitor she doesn't want to send the evidence to Home Office? So it was hypocritic.

EB: So, what happened after you were refused legal aid by your solicitor? You went to Ruth then?

B: After that, I've got a friend of mine, she's from Burundi, no, she's from Uganda, because I was working as a volunteer for Oasis. I meet her I say, no, they reject me from Home Office. She said, sure, yes, now what's going with our solicitor? I said, my solicitor, I'm not feeling to continue together. And she say to me, she left me. I say, yes. And she said to me, can't you go to Asylum Justice? If you go there, they'll look at your paper first. If they see they can win your case, they'll continue with you. If they see they can't win, they can leave you. I say, sure, sure. And then I go to Trinity Centre. I meet Sister Ruth. She is working there. Because I am also a translator on that side. She said, no, I will send you to go and see Ruth from Asylum Justice. She is going to help you. She write me a letter and they give me a day, the time, and I go there. I meet Ruth. I present Ruth the letter. She say, oh, thank you, sit. We

start to discuss together. I say, yeah, everything is ok but give me your phone number. I gave her my phone number and we start to communicate until the day before I go to tribunal. Yeah, we talk together. She said to me, you must talk like this, like this, like this, like this, like this, everything she was telling me, I did it.

EB: Did you go to the tribunal on your own?

B: No, no. I went with Chris. Because she was telling me you will meet Mr Chris. He is a good barrister.

EB: Ok. So you were represented?

B: Yes. I go with Chris. We meet there...I didn't go with him...we meet just there. And before the tribunal, Chris called me. We went inside and we start to talk together. He told me now be quiet, don't afraid, things are going to pass well. They started to question me, everything was ok. They give Chris, he want to say something, he say. He said to the judge, he said, no, this client, what he's saying I don't have any comment again to say. He say everything. He say everything. To me, I can't believe you can send this guy back to Zimbabwe or to Congo. I can't. You can't send him back. Because Congo and Zimbabwe, the way we are talking, is the same country. The way they are killing people in Zimbabwe, the way they are killing people in Congo. There's a link between them. President Mugabe and Joseph Kabila. Because all people are watching TVs. They say to me, you must can't send this guy back. Only the way Chris was saying.

EB: Did the Home Office accept your nationality?

B: Come again?

EB: Did the Home Office accept that you're from Congo?

B: Yes, they accept that I'm from Congo. Because if I'm not from Congo then you can't be a member of UDPS. Because they were asking also that question. If you want to be a member of UDPS, how you can start. I say, you must be one hundred percent Congolese.

EB: I'm just wondering whether the Home Office were proposing, once they refused the asylum claim, to return you to the Congo or to Zimbabwe, or, perhaps, both?

B: Yes, them, they were saying, at the time they refused, you can go back to Congo or to Zimbabwe. Only that they were saying, you can go back to Congo or to Zimbabwe. But the first thing Chris was saying, no, you can't send this person to Congo and you can't send him back in Zimbabwe.

EB: And how do you think that tribunal hearing went?

B: Yeah, the way the tribunal went, to me first, the judge was, he was wrong to send me the letter first. Yeah, to send me the letter first. We reject you. Because the judge say, no, we reject you because of this. We can't believe that the Priest can buy you a ticket to fly.

EB: Right. Ok. That was the reason?

B: That the reason for the judge.

EB: For the judge, the case fell on this point? Because they didn't believe that part of the story?

B: Yes, because he was asking me the question, for you to come here, who was organising everything? I said, it was the Priest organising everything. He say, even the ticket? I say, yes, because you can't get in the airplane without the ticket. It's not like a taxi. It's not like buses. Before you enter, you must have a ticket. But he say, no, we can't believe the Priest could buy you a ticket for you to come here. But if the Priest can buy me a ticket, who buyed me a ticket? Because then I was not working. I never had cash like £500. So where am I going to get the ticket to come here? It's the Priest who made my journey to come here. But the judge was wrong. Because after the paper, I forget it, I'm supposed to bring that paper. It stays at home. I'm supposed to bring it. Because the way the secretary of the court, the tribunal state, they say, she bring every evidence, everything, everything, she gives. Everything she gives.

EB: If I understand this right, the court then refused you and then you applied for permission to appeal?

B: Yes.

EB: And who helped you with that? Was that Asylum Justice? Was it Ruth?

B: No, Ruth is the one who did for me. She's the one. And we received another letter coming from tribunal. We received your appeal. And we send you a letter and the date for you to go

back to the tribunal. After that, I sit. Three weeks, two weeks and a half, I received a letter coming from the Home Office. And that letter, no, it's coming from the tribunal. And they send one to me, and they send one to Ruth, and they send one to Home Office. By the time they were sending me a letter coming from tribunal, it was just coming to me, they never send Ruth any letter for refusing. There were sending just me. The time I received the letter, read the letter, I was rejected, again. And I communicated to Ruth. She said, no, fax me all the papers they send you...[inaudible]...no, I appeal for you, wait.

EB: How were you feeling at this time? To be rejected again...

B: No, no, no, no...it was not good news. You know? And the way I'm surviving here in the UK, I don't know where is my family. We disappear.

EB: I'm so sorry to hear that.

B: Yes, we disappear. I don't know where my wife she is. I left my wife with pregnant for one month. I don't know now which life, where they are, I don't know. They are in South Africa or...I don't know. Because the time they took my phone, they're going to check to look for my wife. I don't know. No communication. I try my wife's number. Never. I go to Facebook. She locked the Facebook. So, no way to contact my wife and my kid. I don't know which life...[inaudible]...I was having too much stress. Sometimes, I can't sleep. I was not sleeping. I can wake up from 10pm. No, I can just sit like this until tomorrow. I was not sleeping. That's when they start to give me medicine, medicine, medicine. I took medicine. They changed even the kind of medicine. It was morning. They said, not morning. You must take it now before you sleep. I take before I sleep. I never sleep. They said, you are taking too much. Just do your life to be ok. If you continue, you will die. They told me that at the hospital. If you continue thinking about things you will die. Take it easy this life. It's life, I say, but it's on my side not on your side. Life is like that. If you see somebody has lost his mum, maybe you can say, sorry, sorry about that, you can say, sorry, sorry. But if it come to you, they say sorry to you, you see what is going to happen to you now. Yeah? I'm walking but it's hit me here, you can't believe. I get beaten in the car, maybe. Because sometimes I'm walking, I'm thinking, I'm thinking. I lost control sometimes. Yeah. And life for £36, £37, no. If you want to pay a transport, the way I'm going to College in Dumballs, it's not easy by foot. By foot you must wake up early by foot, you go there. Yeah, it's not easy. It's not easy. And more people you see [inaudible] people sometimes because of those things

EB: Yes. It's a lot of stress. A lot of worries. ...So, the Upper Tribunal, did you have another hearing, did you go back again to the court?

B: Upper tribunal?

EB: Did you have a hearing before the upper tribunal? So, you were rejected by the court, Ruth helped you with the appeal, the permission to appeal, was it decided on the papers or did you have another hearing?

B: No, I didn't. Only since Ruth she appeal, she write an appeal to Home Office...to the tribunal. And the tribunal, they received that appeal and they send me a letter. They say, we received your appeal from this date but wait, we are going to send you the date of the tribunal hearing. From then, until now, I'm waiting. And after three weeks now, I'm saying, since that letter came, they say, this, this, this. Because, you know, yeah. Because the day I meet Ruth, I was at work there at Asylum Justice – only thing is, I received letter, it was Thursday – on Monday, the time she saw me writing people...she say Blessing, are you ok? Did you receive a letter? You know, if somebody tells you something happy, pleasure, you see the attitude of the person.

EB: So, she seemed excited?

B: Yes. Excited. Did you receive your letter? Yeah, yeah, yeah. But for me, if it was the wrong letter, she's supposed to call me. She said, did you get that letter? She never call me. Meaning, it's ok. Because, if it's a bad letter, she's supposed to tell me or supposed to do this, this, this.

EB: Does this mean that permission to appeal has been granted?

B: Yes.

EB: Ok. Right. So then it's waiting for another, perhaps, another court date?

B: Yeah.

EB: Right, ok. So that's the situation of your case at the moment.

B: Yeah.

EB: Ok. Tell me - because my research is about fairness and the asylum legal system – based upon your experiences do you think the asylum system in the UK is fair?

B: Yeah.

EB: Do you think you've been treated fairly?

B: No. No. It's not fair. You know, people are suffering. You know the way you see me, people are here. The time we are talking, where I come from, people are dying at the same time. The way us, we are talking, people are dying. Like now, Kabila doesn't want to leave Congo. He doesn't want to leave. If somebody doesn't want to leave, meaning, people die. Yeah. Because there were three...two hundred. It's finished. Oh no, we're supposed to do...no, no. You get yours twice. It's finished. Leave another person. Leave another person. Kabila doesn't want. That's when you see, the Secretary of State, Nikki, she went to Congo. We don't know why she talked to Kabila. We don't know. Because Kabila knows when they left the place, they're going to get her. She doesn't want to be arrested. If somebody doesn't want to be arrested, meaning what? She's supposed to remain President. Because if there is no longer President then they can catch any time. That's the problem now is passing in Congo.

EB: How did it make you feel when the Home Office didn't believe you and when the court didn't believe you?

B: Yeah, I was having pain because I'm the one who is telling the truth. I'm the one who was in the ground. Because the Home Office people, they didn't go to the ground. I'm the one who is telling them the truth. They're supposed to believe to us. They're getting news from ONG. You know? Some. ONG, they can tell you the truth. Some, they cannot tell you the truth. Because there is some ONG there in Congo, they are not up of Government. Some, they are putting them far from the [inaudible]. They are putting them far. Because they know some those people they are coming to take the picture. The journalists, they are from...from this country...from French. They give the news. We're supposed to push them from far. And they're doing something, they can kill a hundred persons from here. They can take all the body, they put them in the car, they go. By the time you people, you come, you see only two body. But there was a hundred. They took 98 the [inaudible]. You never see. But you will see there was a march on this date. There was only two people dead. But it was not true. It was

note true. Because if they leave, the journalists, they come to get the picture. They see, ah, there was not a two, they tell the truth. So, for them, they've got to push people like that.

EB: How would you compare the way you were treated by the UNHCR in Zimbabwe with the way you were treated by the Home Office in the UK?

B: Yeah, the Home Office....no, in Zimbabwe...is Africa...the money they are giving people to eat per month is something like £10 or £9. They put £9. Because that is how they are paying the U.S. dollars. £9. Are you sure somebody can survive on £9 a month? £9. And the Government of Zimbabwe, they only talk to UNHCR. The UNHCR, they cannot say something to Government. They are arresting Congolese...not only Congolese, they are arresting all the refugees. If they find you walking, they can take you and put in the prison. Before the [inaudible], the Government, they would say to UNHCR, you must buy fuel to deport this person to [inaudible] camp. You can stay there more than four months. Because UNHCR can say, no, before we put fuel for your government to deport those people, there is supposed to be twenty. Because they cannot pay for 500 U.S. dollars for one person. So there are supposed to be twenty persons or thirty persons, then the can put. So, the UNHCR in Zimbabwe, are killing also people. Refugees, the Government kills those refugees. To me, that UNHCR doesn't work. They can't feed people. They can't feed people. They can't feed people.

EB: You said that when you were in transit, you were told that you were coming to the UK and that you would be safe in the UK, that your human rights would be protected. Has that been your experience?

B: Come again?

EB: So, you were told when you were being taken, in transit, to the UK, that, in the UK, you would be safe and that your human rights would be protected? From your experience, is that true?

B: Yeah, for experience in the UK, it's a big country in the world, yeah. That I was believing. I will be free in the UK and the people will treat me well. That's why I come here.

EB: Do you feel that your human rights have been protected here in the UK?

B: Here in the UK, the only things they're supposed to do, they're supposed to know about...people are talking...and there is some confusion also coming from the interpreter, Home Office and the client. You can say this, and the interpreter says this. Like we are talking on the present, but the interpreter can say we are talking in the future, or in past. If someone says something in the past, you are supposed to put it in the past, if in the future, in the future. So, all those things is making confusion. And another issue, you're supposed to believe to people. Because, if our country was good then we would not to come here.

EB: It's interesting what you say about communication, do you feel like you've had the opportunity to explain your problems to a decision maker, and to a decision maker that listens and understands? ...Do you feel like you've had the opportunity to have your voice heard, to communicate your story?

B: Yeah, yeah. So I can go ahead? Yeah, to me, that is communication, I need to be very careful because, sometimes, like me, I was passing my interview, I said, on my area, if I organise people to go to march, I can organise more than a hundred thousand. But the translator said a hundred only. The time they leave the result, they say, oh, why I can't organise a hundred people. So, a hundred people, they cannot afford the march? In a big country like Congo. The UDPS Party. It's the first party in Congo. They take more than 80% of the population are members of UDPS. Sometimes, we can make the march, the demonstration, we can be 500, 1 million people. Because the country's area, you'll see like, in Swansea 200, in Newport 400, Cardiff 500. But that translator was saying this, this. And I was corrected. I said, no, it was not like that. It's a big country. And most people there, they need change. They need change and they don't want Kabila.

EB: And you said during the interview, no, that's not....

B: The time I met my solicitor after interview, that one, she was correcting. I said, no, this is not like that. We cannot make a march, demonstration, for a hundred person. A hundred person if we find maybe 10 police, they put you away. But if you are more than 500, 10 police, they can't afford us. They are supposed to be more.

EB: When you got your Home Office refusal letter, what did you want to say to the Home Office caseworker, to make them understand?

B: But me, I don't have a caseworker.

EB: The Home Office decision maker...so, you got your Home Office refusal letter, with the reasons refusing your asylum claim...what did you want to tell the Home Office?

B: No, to me I was proving...maybe the time I was talking with my solicitor, before we separate together, I was telling him that maybe the Home Office is supposed to believe to me. They're supposed to believe to me because I'm the one who was in the ground. The examples I was giving to my solicitor, you are here in the UK, you find a soldier going to Iraq to fight. But if the UK government send a thousand soldiers, on that thousand soldiers, you will see one soldier came to say to you, all the soldiers died, there is only me. Are you going to believe or not? You're supposed to believe! Because he is the one who is there. Because if there was a thousand or 500, only 500 to come. But if you see, say, all those people died. Only one left that was here. I came here. You're supposed to believe. Or, if you don't know what to believe, go to the ground. You see? It's the same. Like the way they are sending me that decision. To me, it was wrong. And the way they are doing that decision, they say to me, on that decision, we check you was not a refugee in Zimbabwe. Before you leave Zimbabwe, there was a census in Zimbabwe. Same year, 2016, there was a census on April. There was a census.

EB: They could have checked?

B: Yes. But I left the country, it was October. You see? And that census, if they want to remove your name, there is an issue for UNHCR computer. You must be absent for up to two years. But if they were checking it, they're supposed to see me because I was coming to make my census. But they didn't see that and they say you were not a refugee in Zimbabwe. Beyond that one, me, I was saying, my new wife, we are together now, I marry in Zimbabwe, but she's not a Zimbabwean. Them, they say, she's a Zimbabwean.

EB: The Home Office said that?

B: Home Office. But that lady, she's not Zimbabwean. She's a Congolese. We meet there and we get married there. The time my wife passed away in Congo. Because my wife, she was killed in Congo by the demonstration in 2013. The time I heard the news, I say, oh, why? And about the kid, they say, your kid, I don't know where they are. I left the kid like that, I go to do another new life in Zimbabwe with my wife and the children. But them, they say, no, your first wife...eh, your second wife, she's a Zimbabwean. The way you married in Zimbabwe you're supposed to get the nationality. My wife, she's not a Zimbabwean. Maybe

they can check again. On the UNHCR computer. You can see she's not a Congolese...eh, a Zimbabwean. She's a Congolese. So, they were doing something like...they are pretending. Do you hear what I'm saying? They're pretending things that I was doing. Because, I'm the one, I say, my wife, she's Congolese but you say, your wife, she's a Zimbabwean. So, prove me now she's a Zimbabwean. Prove!

EB: Do you feel that it wouldn't have mattered what you had said to the Home Office, they were going to disbelieve you?

B: Come again?

EB: Do you feel that it wouldn't have mattered what you had said to the Home Office, they would find a way to disbelieve you?

B: No, I ask also some people, they say, it's the way they are working, they cannot continue to believe everything. They can know this is right but they can reject it. They can know it is right but they reject it. It depends, the chance of the person, also. And depends also the person you are doing the interview together. If my thing was no good, it is supposed to take maybe one week, two weeks, they reject me. Because, I pass my interview. After one month and three weeks, they send the letter straight to my solicitor, not to me. My solicitor, she's the one who called me. They reject you because of this, this, and this. I never received any letter from the Home Office. True.

EB: And you've been here now for over a year and your case still isn't resolved. What has the impact of that delay been on you? Because it's a long time to be waiting to have your case resolved.

B: Yeah, the time they sent me that letter, your appeal has been granted, so we are waiting. There is no way to force them. But only thing they are supposed to see is the time. It is the one thing they are saying, the time cannot forgive. The time is passing. The way we are doing this interview, the time is passing. We are going to meet at one o'clock from tomorrow. The time is passing and we are human beings. We're supposed to work. But without work, nothing. Without school...[inaudible]...because if you're not working, why am I going to have a car I go to school, because school needs stuff to wash clothes, school need to eat to go to school, you need transport, how I'm going to do it? So all that issue, Home Office must be look, but you may be, you must look. They way I know you, United Kingdom, is a country of

human rights but now there is no human rights inside. They are doing something like, they don't like people to come. But one day I was walking in the streets, I saw people, I think 5 months to 7 months ago, 'Welcome refugees!', the day Trump was saying no refugees. I was in town, people was marching, demonstrating, 'Welcome refugees! Welcome refugees!' I don't know, maybe they are calling refugees to come and suffer. Why? I don't know. Because if you say, 'Welcome refugees!', you are supposed to welcome them also. But to me, like, no welcome.

EB: So, you've been made to feel like you are not welcome?

B: To me, like now, no welcome. Because I'm talking now to me, for all refugees. Because we are meeting somebody who can share with you some stories, telling you...[inaudible]...Since you're a human being, you can feel pity for her, for him. You say, why? There are some people, like when I was working in Oasis, was telling me 12 years without paper. 12 years!

EB: It's such a long time.

B: Yes. You think that person who you are pushing down, or you are putting your life down. We cannot survive with £35. We can't. We can't.

EB: So, what do you think needs to be done to improve the system? To make it better. To make people feel welcome. And not to make people feel like they're being pushed down and to suffer.

B: Yeah, if you doesn't want people to come, you must open another system for people to come to not get to UK. But you can satisfy all those people inside already. The way you are killing people who are inside already because of people coming. It's not fair. Just the way they did in Calais. Just close Calais. Put every security in Calais. No more people coming in and you finish with all people who are inside. And you'll see. But since Calais has been closed...to me it's a punishment. One day I was reading a book, I say, I need to write a book. I say, my book, the title is going to be 'To be refugee is a crime!', or, '...is a sin!', or '...you are a slave!' To me, I can say that, yeah. There's some people they are sleeping outside. Like, two friends I know, one is from Zimbabwe. They put them out from the accommodation. But you can't believe where the person goes to sleep. You can't believe where the person is going

to eat. You know why people are stealing? People are stealing because of hunger? To me, I don't know, I don't know.

EB: You mentioned, when you first arrived, you were detained. You arrived to Heathrow and you were in detention for a short period of time. But I wanted to ask you how that made you feel?

B: Yeah, the time they put me in detention, the immigration officer, the way he was talking to me, it was correct. To me, he said, no, you're a refugee. No, don't worry, we can't send you back. Because at the time they were putting me in detention, I was thinking maybe they would resend me back. Yes. I was thinking, oh, they put me in detention, maybe they are going to resend me back. When they were asking questions they said, no, we put you there, we find a way for you, you ready, we cannot send you back, welcome through. But we need to find a solution for you. What kind of solution are you going to get for me? He said, no, we need to organise an interview for you and, after that, we send you somewhere for three days or four days, we [inaudible], and then we're going to look another place for you to go and do your things. The time I go to Croydon for three days, I see, ah, what he was telling me was three days they send you to Cardiff. I say, ah, it was good. By the time I reached here, I see, I see, I see, and the way they are dealing with the refugee, it is not fair. Because we are limited the way we are living. We are limited. One day I was with a friend of mine, he said, no, let's go to the club. It was around 8. We get, maybe, one, one, and we go back. The time I present my ARC card, 'no, no, no, no...no, no, no, no', we can't accept the Home Office card.' [Laughs]. I said, no, I'm limited. Why? I'm not free.

EB: At what point did you start to feel that like that? How long were you in Cardiff when you started to feel that you weren't free?

B: No, since I came to Cardiff, I'm not free. I'm not free. Because I'm limited. Yes, I'm limited. Because the money they are giving me, if I use transport, meaning tomorrow, I'm not going to eat. Because I use the money for tomorrow. I'm not going to eat. So, I'm not free.

EB: Have there been moments, since you've been in the UK, when you feel that you have been treated fairly or treated well?

B: No, the first time I arrived in the UK, I was be treated well in detention. By the time I came here, the time I see things start to change. Things have start to change.

EB: Because that's when you start to have the problem with your solicitor, Home Office refusal, living at Links House, NASS accommodation, you're receiving a small amount of money to live on?

B: Yeah, and the accommodation that they're giving us, sometimes you can't sleep. Because there are some people there, they can make you trouble...[phone rings and Blessing answers briefly.]

EB: Sorry, I have taken up a lot of your time today.

B: No, no.

EB: But thank you so much for sharing your story. This is really, really helpful. You said about your accommodation and you can't sleep...what is the problem there?

B: The accommodation they are putting us like where me I am, the conditions are not good. I'm sleeping with no curtain, with the window like this, only the glass, like this. The manager came, I showed the manager, I say look at this since I came here, the windows like that. I'm tired. Make one year is going to be on eleven. One year sleeping without a curtain. I'm just taking like something to cover. I said, I'm in Europe. I start to do something like I'm back in Africa but in Europe. I put the curtain like this, you can't sleep. With the cold, you can't sleep. You can't sleep.

EB: I think that's all the questions I wanted to ask you. Is there anything else that you wanted to add about your experience here, or anything in general you want to say about the asylum system in the UK?

B: Yeah, only thing I can say, if somebody say something, you must believe. You must believe. Because, like me, all the things I said is true. I'm the one who was beaten. But the Home Office say, I was not beaten by the gun. But me, I said, it was a gun. So you think, myself, I can take a stone to be beaten? Myself? The way, like, life. Or the way the beating, he was beaten, he didn't die? But if someone show you a gun, us in Africa, if they show you a gun, they're going to kill you. Because if I say don't put me a gun like that, I was not in Congo, I was in Zimbabwe. For them to kill me, I'm not there brother. They can kill me for nothing. To me, it was killed already. But Home Office, they say, no, they way they beat you,

they beat you with sticks but you didn't die. There are some answers like, eh? You know what I mean?

EB: Yes. It doesn't make sense.

B: Yeah. So, for them, they are supposed for me to die? For me to not come here. The way I came here is not good. I'm supposed to die. There are some answers, maybe they are writing it, they are supposed to see first we are human beings, all of us. You must give somebody the answer, good answer, to make somebody happy. Like the way I was coming here. I met one women here, one lady, I said, please, can you show me Museum Avenue? She doesn't know, she says, 'ah, sorry brother, I'm not from this area.' It's ok, it's a good answer! But you say to me, why you didn't die...eh? To me...

EB: Did you show the Home Office your scar, here?

B: I've got picture. They've got picture. I'm supposed to prepare to bring you everything? Yeah, call me another day, I'll bring you.

EB: No, I don't need...it's not for my benefit...

B: [laughs]

EB: I just wondered whether or not the Home Office...

B: The Home Office saw the picture and the time I was making my interview. I showed the translator. The interpreter said, show the officer. I showed the officer. He see. Even that appeal granted, they write it. They write it.

EB: Ok. They made a note of that. ...I'm so sorry that you've had so many problems and life has been so difficult here in the UK aswell. As I explained in the beginning, so, my thesis is exploring fairness in the asylum system but my background – although it's been a long time since I've given immigration advice – but my background is as an immigration adviser and my experience from meeting clients is that this is a system that is really unfair. And I feel like you, that it is punishing. So, I'm hoping to write my thesis and publications to promote the fair treatment of asylum seekers. So, thank you so much for what you have said today.

B: No problem.

EB: It is really helpful. And as I explained at the beginning, I will type up the transcript. And what I can do, is I can send you copy by email if you want?

B: Yeah, ok.

EB: And hopefully there will be an accurate record of everything. And I can send you copies aswell of the thesis when it is finished. It might take me a little while to write it up [laughs and B laughs]. It's 80,000 words and I'll be looking to submit that in two years time and I can send you a copy as well if you'd like to have a look.

B: Yeah.

EB: Blessing, thank you so much.

B: No problem.

EB: That's great. Are you going to Asylum Justice now?

B: No, no, not now. I will start there at 5 o'clock. Right now I'm going to Trinity because I'm translating people there, that side. And the person is calling me. She's there. So, I'm supposed to go and translate for her.

EB: Oh, right. Thank you so much for your time. I really appreciate it.

B: Yeah, no problem.

[End 1:42: 47]

APPENDIX 5: TRANSCRIPT OF INTERVIEW WITH YONAS

EB: Did you have a chance to have a look through the information sheet?

Y: I tried, yeah. I've seen it before, I think. Not, like, a lot. Like, all of them.

EB: Ok, we can go through that quickly. And I'm going to put my phone on airplane mode as well, just in case someone tries to get in touch. Ok, so, you'll see that it just explains that the interview should last about an hour and as I say, this really depends on what you want to say, you can say as much or as little as you like.

Y: Ok, no worries.

EB: Erm, and so it's to say that participation is voluntary. So, at any point if you decide that you don't want to take part in the study, then you just let me know and you don't need to give a reason at all. So, what I'll do, the interview is recorded and I'll type that up into a transcript and I can send you a copy of that if you'd like.

Y: Ok.

EB: And then that information is used as part of my PhD thesis and it might be used as part of publications as well, which would be about promoting the fair treatment of asylum seekers. And, as I say, if you want to drop from the study at any point then you can do that without giving a reason at all. And then there is some information there about who I am. So, I am a researcher here at Cardiff University. I also have a lectureship at Swansea University, where I work. And, I'm a Trustee of Asylum Justice but this interview is not linked in any way to Asylum Justice. It is to do with my research here at Cardiff. If that makes sense? It's just about the PhD thesis. And the thesis is about fairness and asylum decision making. So, I'm interested in exploring the idea of fairness within the asylum legal system in the UK and I want to ask people who have experienced of the system about their views.

Y: Yeah, yeah.

EB: Erm, if you're happy taking part, do you mind signing...you don't have to sign if you don't want to...

Y: No, it's ok.

EB:...it's just so I've got a record of that.

Y: Which one is that? That one?

EB: Yeah, just here. That's great. 02:21 And what I didn't mention, which is also detailed in the sheet, is, what I'll do, is I'll make sure that the data is...you know...I protect your identity, so, it's anonymised. So, you get to choose a pseudonym. What would you like me to call you? So, you get to make up a character, a name.

Y: No, you can just call me my name.

EB: Just use your name? Ok, that's fine.

Y: Yeah.

EB: Do you mind if I ask how old you are?

Y: I'm 29 now.

EB: So, you're 29. Are you Eritrean?

Y: Yeah, I'm Eritrean.

EB: Ok. Erm, what's your first language?

Y: Tigrinya.

EB: Ok. And what about your background? Your educational background? Your work background?

Y: Like from Eritrea, I was just like a high school graduate and when I came here I'm still in College. Like doing 'Access' now. I'm just like, hopefully, going to Uni next year.

EB: What would you like to study?

Y: I'm doing sound engineering.

EB: Oh, right. Excellent. And where do you study that?

Y: Cardiff and Vale College.

EB: Yeah? Oh, great. I've got quite a few friends who are sound engineers and really enjoy their work.

Y: Oh, is it? In Uni, or...?

EB: They studied at the Atrium. The University of South Wales.

Y: Ok, yeah.

EB: And most of them work in Cardiff doing different...they're all musicians and they really enjoy what they do.

Y: Oh, that's cool. I don't know much more musicians but it's good to have friends like, yeah.

EB: So, what stage is your asylum matter? Have you been recognised as a refugee?

Y: Yeah.

EB: When did you get your refugee status? 04:19

Y: Erm, in 2014. Just like after a month that I came here.

EB: Would you like to see the final drafts of my thesis and any articles before they are published? So, would you like me to send you copies of them?

Y: As you wish, like. Don't worry.

EB: Alright, ok. I've got a note here as well to say, let me know if there is any sensitive information that you would like to be omitted at all. And then at the end if there is any information that you want to add...So, i'll let you get yourself comfortable.

Y: Yeah, thank you.

EB: There's some water there.

Y: It's a little bit warm here.

EB: I hope you weren't in too much of a rush to come over. So, probably a good place to start then - would you be able to tell me about what happened when you first arrived in the UK? Can you describe for me so that I can try to picture what happened when you first arrived? 05:31

Y: Just like...[inaudible]...and setting. No. Yeah. Like, because I came here on like 25th of April, the third month, innit. Yeah, we just came from France. I stayed in France for about 6 days and I arrived...

EB: Was this in 2014?

Y: Yeah, 2014. And there is, like, what's it called? Erm, an agent, you know? Like, they help us to climb through, what's it called? The lorries. Just to pass through the border.

EB: How many of you were there?

Y: I don't know all the other guys but we were all 12, at that time. And nothing happened. We just...they helped us to climb into the lorry and then, luckily, I think - because people were struggling

to just to come to here but for me it was just like one try - and we cross normally. It took us like some hours. I don't know like 2 hours. We cross the border and I think it was around Dover they let us down. Because he didn't know that we were there. Because we have to cross illegally. And then when we crossed the border, he was shocked, like. And when he saw us, 12 people, he was really shocked. And we dropped off from the lorry, and it was in the morning time, and we had to sit, like, for the police, or something. Just to rescue us. And I was looking for the police and luckily we got some police just crossing by and then I stopped them and I told them, us we just came from France and we are asylum seekers. And they just checked us. They checked everything what we have and they asked us, like, all the...who we are. And then they took us to prison. I think it was a week, or something, I stayed there in Dover.

EB: How did you feel at that time? 08:14

Y: I didn't feel that bad. I think I liked it, to be honest. Seriously. Because I was like...pass to the other situation there, it was worse than the prison I was in there. Because I experienced, like, tough at that time. Tough moments. So, when I was in the prison, I feel like safe, like normal. And, they give us everything what we need just to let the day go, you know? If you want to study, you can study. If you want to exercise, you can exercise. There was some music in the prison. Everything was there. You don't feel comfort but we just had really bad then what we were before. And, because, I was like 6 months of more, I think, in prison in Eritrea, as well. It was, like, really bad, worse than when I was in the Dover prison. It was like normal. Because if you're just a prisoner, like, for a long period of time then when you get a prison with light, and you've got a telly, you've got something to learn, then you feel like this is a campus, or something. So, I didn't feel that bad and after a week they took us to Wales. We came here.

EB: When you say, 'they took us', was it the same 12 people who you traveled with?

Y: Yeah, there were other people. I didn't know them. Just like some people, they came from like different places. They took you like 4 or 6 people. I think they make you wait until you've got a number of people to leave to reach another state or country. And, yeah, like in Cardiff, after a week from the prison, and, for me, I don't really feel bad. I didn't wait a long just to get a decision and get an interview. I didn't feel like it was a lot of time. Not like the others. Maybe, the others, they have their own experiences as well. They maybe get refused, the delay, stuff like that. There are so many different situations. And it goes like, I don't know whose fault of the country, or who the problem of the country, that where we come from. So, but, my own experience, it was really simple. I came here just after a week and, yeah, they welcomed us, we had everything. They feed you...

EB: When you say, 'they welcomed us', who welcomed you?

Y: Like when I say they welcomed us, so they give you like your own room, have what to eat, everything is ready, like, you know, every basic thing is there.

EB: Is that here in Wales?

Y: Here in Wales. So, I don't feel like...you know, like, I'm treated badly, or something. 11:35 Yeah, and then there was a College, like, free study. I started doing after a week, like, self reading at Cardiff and Vale. I was writing to improve my English...because when I came here, I understand English, and I used to speak a bit of English, but I don't really understand the British accent and stuff. It was hard for me to hear then and they were struggling to understand what I was saying as well so it was not really easy. But then, yeah, when I get the decision as a refugee status after a month, or something, after I came here. And then I just start life, like, from scratch, like, you know? You have to get work, you have to build up yourself. Get out of NASS. Everything. And it was not easy. Like, the hardest one is, like, when you are starting from scratch because you haven't got your parents here and nothing to help you and it was really hard just to understand the, erm, the system of this country as well. Because from where I came from, there is nothing like you can get from the government, or

something. You've just got like from the old system, you know. You've got to take care of the health of your parents, something like that. But when you came here, you've got to understand, even in order to get your help, or something. So, it was not really easy. Just to follow all the system. And, just like, slow, slow.

EB: Who helped you to try to understand the system? 13:29

Y: No one really. No one really. I don't think that someone helps me to understand but just like, you know, you've got some other friends, like, same like you with your stuff...and when you seek something, when you need something, you ask some people, so. Just like from people I got the system, what to do. And learn the easiest way how to get job seekers allowance, how to get housing benefit, and how to get a job, how to get to - I think the easiest way for me was - how to apply for school or for college. But the others, yeah, they have to ask some people how to get it.

EB: So, you were asking friends for advice?

Y: Yeah, you ask friends. Yeah.

EB: And your friends, are they other asylum seekers, or...?

Y: Yeah, other refugees. The asylum seekers, they didn't know that much because it has all the stages, the steps that you go. When you're an asylum seeker you only know, like, what you need to know about the asylum seekers. But when you're granted, and you've got your paper, and then you...[inaudible]..., you ask, like, what do you need to survive as well. 14:58 And then the other guys, they help you, what you ask them, not what you pick up.

EB: That's an interesting way of seeing it. So, you've got these different stages that you move through...

Y: Different stages. I can just ask some other people.

EB: And you gain knowledge as you go?

Y: That's right. Yeah.

EB: Can you talk me through that then? So, tell me...if we go back to when you first arrived, what knowledge did you have then about the different systems?

Y: Nothing. I didn't know nothing. Seriously. I came here, I just know, if I get a job then I can work and I can earn. That's only what I used to know. But it's not the same as what I used to think of it because, obviously, for working, we don't need to have a paper to work. If you've got a job then you can get work. But here you need to have papers in order to work And once you've got a paper, you know, the CV, stuff like that. And then we don't have a CV, what we experiencing here. And, even though, like, the skills that you brought from back home, they're not really qualified in here because you haven't got that paper. And then, maybe, the system is different as well, like. I was in third world and then first world, there is a difference as well. So, it was not easy really, so. What I was aiming, just, I need to learn, or maybe to get qualified with some skills, and try just to get a job. So, yeah.

EB: So, how did it feel when you first arrived and you found out that you couldn't start working straight away?

Y: You don't feel that really bad. You feel, like, you lost, like, all the rest of the years that I spent there. Because when I came here, I learned, like 12 years there but I feel like I haven't done nothing. Because it doesn't work here.

EB: Yeah, I understand. Yeah.

Y: So, I feel like I've lost 12 years or more. So, that's the difference. But if you're here and you can just build up what you want to go. But you're not from here so you don't belong to here. You belong to the country that you were from. So, you have to accept as well your situation. Once you have accepted your situation and then, what you spend there, or what you, erm, pass, like all your history, so you feel like you're more safe as well. You don't blame no one. And then you feel like you are safer as well. Because you have been in the worst place, the worst situation. So, when you come here you feel safe.

EB: Did you feel safe when you arrived to the UK?

Y: Yeah, that's the main thing that I feel. More than anything. Because I've been in Sudan, I've been in Libya, so. Even in Eritrea. You don't feel safe. 18:30

EB: Sorry, were you worried when you...you said that when you first arrived you spend a week in prison...it was comfortable, but were you worried that you might at any point be sent back?

Y: Obviously, because I understand the situation in the country. It's still in a bad situation, so, I don't really feel like they're going to send me back. Because I thought, like, or maybe I feel this country is, maybe, they have the justice or rules, stuff like that. And then they may justify me with the rule or with the situation of the country. That's what I feel. So, not only in the UK but in most of...when I reached to Europe, so, I feel like they're not going to send me. But I don't know what kind of situation they were going to give me. What kind of permit they're going to give me. That's what I've heard. And then, as I said, I feel more safer. Because when you come from such countries like Sudan, Libya, it's still very worse places there to live. 19:59

EB: Can you tell me about your asylum interview? Did you have that here in Cardiff?

Y: Yeah, I had my first, erm, interview in Dover. My first interview was in Dover, yeah. My big interview was in Cardiff at the Home Office. Yeah.

EB: Can you describe both of those for me? So, the one in Dover and then the one in Cardiff.

Y: As I said before, maybe there is a difference experience from different people but for me it's like the way to have...to pass, to process through the system. And I don't feel that bad, like. I feel like I'm...I was ok to do it. I know...just remember really how they way I passed through. Every time people need to just know about your background, I don't really feel that comfortable. But you have to tell them, just to give you what your status is as well.

EB: So, you could understand the reason for having to explain your story but that, you're saying, was uncomfortable, it was difficult?

Y: It's not really comfortable, really. Every time, I don't feel comfortable. Even now, I don't feel comfortable to remember. But then people need it, you have to give them as well. It's what you pass through.

EB: Did you access a lawyer? Did you access legal advice before your asylum interview?

Y: No. No. I didn't know how to access a lawyer. I had a lawyer, like, I don't have to pay him, I think. The government have to pay him. And I got this lawyer, I think, by some of my friends. I don't know him. Just people told me, you need to have a lawyer in order to get to the Home Office interview.

EB: So, you did meet with a lawyer?

Y: I don't know. I don't really remember but I remember that I met one of the guys who worked with a lawyer, I think, yeah. Maybe, they work the same. I don't really understand the situation. Whether he is a lawyer, or, what's it called, a solicitor.

EB: So you met with someone who gave you advice?

Y: Yeah, gave me advice and said what to say, and stuff like that. I told them my problems is the same, doesn't change.

EB: And this was before the Cardiff interview?

Y: No, not before the interview because I had already had, like, the first interview in Dover and then before the next interview in Cardiff, I think I met with some solicitor, or something. Not lawyers, maybe solicitors, or something.

EB: And they just gave some advice about what to say in the interview?

Y: Yeah. Yeah.

EB: Did you find that helpful?

Y: Erm, I don't, maybe if it's messed up your ideas then maybe he helps you but it didn't help me.

EB: Ok. Can you say a little bit more about the asylum interview? What did you think of the person who interviewed you from the Home Office? 23:36 What were they like?

Y: Erm, for me, it was like, just a ten minutes story to tell them my story. They were listen. And then it was just like narrating. So, it was, like, ok.

EB: And did you feel like you had the opportunity to say everything that you wanted to say about your story?

Y: Yeah, I told them my story but I don't feel like it helps my story. That's what I felt. I told my story and I feel like it doesn't help. Just, like, for my sake of safety or maybe...just to get the permit. So, it might help me but I don't think it does help.

EB: I'm not sure I understand. So, you did tell your story to the Home Office...

Y: Yeah, it does help me but, like, let's say your situation doesn't help, like...I don't think, like, my situation does help for the situation in the country that I came from.

EB: Right. Ok. I think I understand. So, you told your story. That helped you in practical terms because you were able your refugee status....

Y: Yeah, that's right.

EB: ...but...you mean...it doesn't help you...in what sense?

Y: What I mean is, just, like, my problem, and the other Eritreans problem is the same, I don't think that this problem has helped the country.

EB: Right. I understand. So, it doesn't help in the broader sense? Ok.

Y: Does that make sense?

EB: Yeah, that does make sense, of course. So, what would you...how would you like to see your life? What would you like to happen?

Y: Erm. I came here and I'm safer here, like I said before, because it's not a safe place that I came from. But since I'm here, I need to do what I need to go. I need to see where myself I need to be there. And I need to work as well.

EB: And, so, tell me a bit about your life now that you've got your refugee status?

Y: I get my refugee status, as I said before, I had to start everything from scratch. I have to get a job, I have to rent a house. I have to study. Because my study was to enough for me to start a job in here or maybe to get a good payment.

EB: So, you feel like you've got all this catching up to do?

Y: Yeah. Everything. And, so, I have to feel all those things at the same time.

EB: What does that feel like? Does...yeah, tell me what that's like to feel like you have to try so hard to get to where other people are?

Y: Erm, if you succeed you feel ok with all those things that you tried then everything, every time...but, like, let's say if you work hard and it doesn't work then you feel, like, sad, like and you just regret where you come from. If you don't get to where you go. And then you have to work again and again. Like, in order to get to what you want to. Life is like that but you feel like you are just going back. Like, you are still behind. But then it's alright as well. When you get up and succeed then I feel ok.

EB: Are you in touch with your family?

Y: Yeah, I'm in touch by calling them. It's been like a long time now. Like, 8 years. Yeah.

EB: And so, you said that the Home Office granted your refugee status after, erm, one month and how did you feel on that day when you found out that you'd got your refugee status?

Y: I feel more safer. Like, I felt safer when I came here and when you're granted you feel more safer as well. Because I'd been in Sudan, like, because I hadn't got that permit to stay in other...as a refugee or as a citizen. And then I have to worry every time, like, you know, you have to worry like any police can come and just bully you. Everybody can bully you. And they might ask for money or something. They might ask for everything, what they need to. They might prison you. Nothing is healthy. And, maybe, if there is some, erm, some military coming from Europe, or other country, they might take you back as well. They might send you back and then you get imprisoned. You don't know when you might get out of the prison. Worst prisons, like. So, once you have left all these things, you feel more safer. And then once you get granted, you know, like, you're going to stay for several years and you feel ok. You feel safe. Because that's the situation, or that's the thing that we lost from our...from where we come from.

EB: Does the UK feel like home now? 29:47

Y: Yeah, well, until they...until your stay is granted and they give you the paper, you feel like you don't know what going to happen. So, you feel like for a while it's safer.

EB: That period where you waited for a month to get your decision, how did you feel during that time? What sort of thoughts were you having?

Y: As I said, it's about the safety and I feel more safe and a little bit comfort.

EB: What sort of help do you think that asylum seekers need? What sort of help and support should asylum seekers have?

Y: Yeah, asylum seekers, I think, they didn't know what they are supposed to, or what the, like, what's called...sometimes when I speak long English, I messed up...

EB: It's ok. Take your time.

Y: ...like, what's their rights, what they have to have. They don't know that, so. I think they need like legal advice after they came here.

EB: When do you think that asylum seekers should receive legal advice? At what stage?

Y: Like, for example, after I came here, there is an asylum office, just behind, or beside, the Links House, the place they stay there...and you go there and you're only asked why you're seeking, why you need it...you don't know what's your rights or what you can get from there. So, I think it's when they first come there. If there is anything that they need to have or they need to know. Not only to give them food but just if you give them some advice. And they may get better...they'll have a better understanding.

EB: What advice would you then give to asylum seekers coming to the UK? 32:26

Y: Let's say they need to have a lawyer or something. Or, how they're going to stay as asylum seekers in the country. General ideas, maybe. And, yeah. Not a lot because the government does give them most of the things. But then they might get confused as well if they don't know what they need. So, if there is anything then just give them some advice, ...[inaudible]...give them some advice what they need to have. That's what they need, for me, but then I don't know. It's been a while as well since I was there.

EB: Do you think that you were treated fairly throughout the process?

Y: I think so. I don't know in detail, deeply, but I think so.

EB: You said at the beginning how your experience is different from other people, can you think of examples of stories that you've heard, where you've thought, oh, I don't think that person is being treated fairly?

Y: I don't remember. That's all. Like somebody who has been treated unfairly, I don't remember. There might be but I don't know.

EB: So, I don't know if maybe you've heard examples of people having to wait a long time to get a decision? Because you said it was only a month...do you think that was a long time or do you think that's a short period of time?

Y: As I said, mine was like going ok. It was smoothly, I can say, for myself because I didn't wait a long time. And then after me, like after several months there was even...[inaudible]...refusal. And I don't know what's the problem, what's the situation. But I think, as I said before, I think that it goes with the situation of the country, or political problems.

EB: Do you think that there is, sort of, an element of luck then depending on the country that you come from? Whether or not you're more likely to get your permit? 35:03

Y: Yeah, as I know, like, people are getting refused when the country is believed to be in a good situation. And then from...as Eritreans, we would get refused because the other two years before, I

think, because the government in the UK it...[inaudible]...group settlements. Because, I think, there was Denmark, erm....

EB: There was a Danish report, wasn't there?

Y: Yeah, there was a Danish report and they said the country is in a good situation so the people they can stay in their country. So, and then the British also accepted the report and then they start to refuse people. It doesn't even belong to individuals. They generalise every information that they get. And then, that's the thing, like they, they harm to individual people.

EB: Do you think that the Home Office had already made it's mind, it's decision, in your case before you had your asylum interview? Before it asked to hear about your story?

Y: Sorry?

EB: I was just wondering, do you think that the Home Office had already made it's decision in it's case, about giving you your permit before you had your interview?

Y: Yeah, for me because I believe the same, like, if the Home Office or maybe the UK government believe that country is in a bad situation, they are already going to accept you, no matter who you are. Because they generalise every problem. So, erm, I know like that country was not in a good situation so I told myself, I knew, they're might going to accept me. So, I had like roughly believe they're going to accept me.

EB: So, you felt quite confident when you went into your asylum interview?

Y: Not full confident but I talk like, yeah....because I understand the general ideas of the political situation.

EB: And what about the advice from the legal aid solicitor who you met with before you went to the interview? What did they say to you? Did they indicate that it's likely that you were going to be granted?

Y: They knew, yeah, they said, yeah, like, you're going to be alright because they know where you come from. And then they said, you're going to be alright, don't worry. You just need to say this and that. And then I don't feel like this solicitor, the lawyer, I don't know if his advice was going to granted me or something. I just know my situation and my problems. I don't really understand them. I don't even know that they're going to help me after I came here. I just met them after I came here. So, yeah.

EB: So, who do you think has been most helpful to you since you've been in the UK?

Y: Sorry?

EB: Who has helped you the most since you've been here?

Y: Like what?

EB: Like helped to explain things to you, to, erm....

Y: No one really. No, I don't think so.

EB: You've just had to work it out yourself?

Y: Yeah, you just have to work it out yourself. Like, as I said, for a solicitor, when I came here, I asked them, what do I need to have, and they said, you need to have a solicitor. So, how do I get him? And they say, there is this one guy, like, I can give you his number and ask him. And this is how you get the problems solved. But, like, nothing really.

EB: Sorry to go back to the asylum interview again but I'm just interested to know the types of questions that you were asked during that interview?what time do you need to go to get your car? 39:44

Y: Three.

EB: Oh, do you need to go now to get it? Ok, that's fine.

Y: Sorry about that.

EB: No, no, that's absolutely fine.

Y: Have you got many questions left?

EB: That's absolutely fine. Thank you so much for what you have said, that's really helpful.

Y: Sorry, but...

EB: No, I really appreciate that you need to go and get your car. So, what I'll do is that I'll type this up and I can send that to you so you can check it, and make sure it's accurate and let me know if you're happy with it.

Y: Ok. No problem.

EB: Is your name...am I pronouncing it right, is it Yonas?

Y: Yonas. Yeah.

EB: Ok. Alright. Yonas, it has been absolute pleasure. Thank you so much for your help. And I know that probably doesn't feel like a long time but I think that we covered a lot of ground there which is really helpful.

Y: Ah, ok, that's great. I hope you succeed in your PhD as well. My friend is doing a PhD as well but I don't think that she likes it because every time I ask her she says she's not really happy with what she is doing. She is doing some research on Cardiff Bay history or something.

EB: Oh. Ok. Interesting. Is it a history PhD?

Y: Yeah, it should be history. That's her background.

EB: I know that you need to go. Do you know where you're going? So, it's straight back downstairs...or do you want me to walk down with you? I'll come down with you. Let me just turn this off. 41:07

APPENDIX 6: TRANSCRIPT OF INTERVIEW WITH JOHN

EB: I emailed you a copy of the information sheet, didn't I?

J: No, I think I have...

EB: Is this the first time you've seen this?

J: Yeah...no, no. I've seen...I think I took this from Cardiff...

EB: Yeah, that's right.

J: ...from the Church drop-in.

EB Yeah, the drop-in, ok.

J: Yeah, so I think I had one of these, yeah.

EB: It just explains what the project is about. So, my PhD thesis is exploring the idea of fairness in the asylum legal system in the UK. And as an important part of that, I want to talk to people who have direct experience of the system, to find out their views. So far I've been interviewing people and the interviews have varied in length, the last one I had was about 40 minutes, others have lasted sort of an hour and 40 minutes. It really depends on the person and how much they want to say, or perhaps how little they want to say. So I'll be recording the interview so I have an accurate record of what's said. And then, what I'll do, is type up the interview but, in order to protect people's identity, I can use another name. So I'll ask you if you want to choose a pseudonym. So if you want to create another identity, pick a name...

J: John, john will be fine.

EB: So you'll use John, great. Erm, and so, the information is kept securely, so it's encrypted and protected on a computer and also the hard copies of documents kept in a locked file as well. And there is information here about how your participation is voluntary. So if you want to withdraw from the study at any time, you just let me know and you don't need to give a reason to withdraw. And the data used is part of my PhD thesis and it might also be used for any other publications related to the thesis for promoting the fair treatment of asylum seekers and refugees in the UK.

J: Do you know, I was a little concerned about this because, you know, the judge said to me that I'm...I'm...I think...you know they call anonymity...

EB: Uh huh. Anonymity.

J: Yes, I think something like that. You know, she explained that she will not change any information about the case, or by the judges, or by myself. I should disclose any information. Failure to do that may result in maybe prosecution. So, I don't know, that has maybe anything to do with this.

EB: No. So, my role, I'm an independent researcher. I am associated with Cardiff University, that's where I'm doing my PhD. So anything that you discuss with me today, I'm not going to disclose that anyone else.

J: This one you say, maybe, I don't know if I understood you very well but if it may be made public, you know, that's what I was worried about.

EB: What I will do, any of the information that I might use in my thesis or in publications, that would be public, I'll protect your identity, so I can use your pseudonym, John, and I can protect...I can work with you as well, so I can show you a copy of the transcript, I can show you a copy of my thesis and I can show you a copy of any publications and you can let me know if you are happy with it. And if you feel that there is any information that is sensitive, or that might protect your identity and of course I could change that. And I would of course need your permission to do that.

J: That's the reason why I was worried but that's ok. Am I doing the right thing? Should I go ahead, or should I...? Because I wasn't very sure. Let me show you...

EB: Can I be very clear, so, let's go through this - so, I'm a researcher, I'm also a Trustee of Asylum Justice in Cardiff but my research is separate from Asylum Justice. So, in the past, I used to be an immigration lawyer but in respect of this interview, I'm not able to give any immigration advice. What I'm here to do is just to have a conversation with you to find out your views, your opinions about the asylum system. So, this is not me saying very much, it's hearing from you. Is that ok?

J: Yeah, but what I was told with Emma. You are Emmy?

EB: I'm Emma.

J: Emma?

EB: Yes. I'm Emma Borland.

J: The other one? Emmy?

EB: Emmy Chater.

J: I thought she said her name was Emma, so I don't know. Anyway, she said to me that you can keep as much as permission as you can, or as you could, but at the end of the day, you know, it's like half-half. You know, you help her with her research, and then I think she will say things like, because you're a lecturer, university, I think, she would be able to help me to apply for legal aid, to find a solicitor, I think something like that. Is that not what you do?

EB: No. Your participation today is entirely voluntary. So it's about whether or not you want to take part in this research study. And the research study is completely separate from my work with Asylum Justice. I suppose I have several different hats, today I'm Emma the researcher, working on this project, other times I work at Swansea University and I'm a lecturer there, and I'm a lecturer in law, and then in my spare time I help as an Asylum Justice Trustee. And that's because - I can tell you a bit about my background - I was an immigration lawyer and I felt that the asylum system wasn't fair and I saw a lot of people suffering in the system and that's why I do the work that I do. But at the moment I'm working on my PhD, and I'm conducting research, and I'm interviewing asylum seekers and refugees about their experience.

J: But maybe I think I've got two different things, two different things, I think...what did Emmy say to me, something about Richard, is it Richard? Is there somebody Richard from the university?

EB: You're talking about Richard Owen? Yes.

J: Yes, I think it was someone like that. Because, whatever the conversation I had, she told me she forwarded it as well, by email. All I was, was asking whether you could have maybe a copy of my case or something like that so you can be updated. But I think Emma...I mean, Emmy...I don't think they do keep any information or in details about someone who just drop-in. You know, they don't do that. I let you see, you know, if they can contact me. So that one is different from you?

EB: It is. Sorry, I mean, I can tell you that at Swansea University at the Law School, they have recently opened a Law Clinic and within that there is a small project being run by the Director of the Law Clinic, who is called Richard Owen. And he is starting to work on cases where people have been...where legal aid has been taken out of scope, meaning that they have an immigration case and they can no longer get legal aid for that matter. And he is helping them with applications arguing that their case is exceptional and therefore they should have legal aid. That's different though from where you...legal aid is in scope, so say you have an asylum matter and you've had someone refuse you legal aid then you would need to challenge it with a CW4. Which is a different type of application. The best thing for you to do would be to send an enquiry to the Law Clinic to see if Richard could help. Or you could go to Asylum Justice, to one of the drop-ins.

J: I think from his email, he wants to know when is my next hearing. So that he can...

EB: Are you in touch with Richard Owen?

J: No, no, this is Emma...

EB: Emmy Chater.

J: Emmy and Richard, they are just in contact with each other. So whatever...

EB: So Emmy is contacting Richard on your behalf?

J: Yeah, I think so. Just to know briefly where I was looking for, things like that.

EB: Ok. Well, I would suggest that you continue to liaise with Emmy about that. I'm sorry if there was some confusion then about today because this is something different. And there is no...you do not need to take part if you don't want to. I've just been interviewing asylum seekers about their experiences and this is to be used as part of this PhD thesis on fairness and asylum decision-making. But, yeah, I'm afraid I can't offer you any immigration advice or practical assistance here today because not what I'm doing.

J: Ok, I think maybe I might have misunderstood.

EB: Ok.

J: But that's how what she said. She's doing her research...and...I don't know...it's fine. But from the email, the way I see it, it's like the three of you are connected some how. The way I read from the email.

EB: So, the connection is, I'm an Asylum Justice Trustee, Emmy is also an Asylum Justice Trustee. So, that's how I know Emmy. And then at Swansea University, I work at the Law School in Swansea. I'm a lecturer there. So, Richard is one of my colleagues.

J: He is an Associate Professor, isn't he?

EB: He is. Yes.

J: The way I've seen from the email. Anyway, we can carry on [yawns]. I don't mind. Well, you are here already.

EB: Ok. Well, that's very kind. Thank you very much. Ok, you don't actually need to sign this because you're consenting by speaking to me, so it's up to you whether or not you want to sign but you don't have to.

J: It's fine. If you just carry on.

EB: Right. Ok. That's grand. As I said, I'm interested in finding out about your experiences of the asylum system. So, you don't need to tell me a lot about what happened before you arrived in the UK. But that might be somewhere to start. So, if you can describe to me what happened when you first arrived in the UK?12:46

J: Oh, well, that's why I knew this was going to be a bit difficult because, yeah, I can, maybe, a bit a while back, it's a long thing ago. I came here to visit my father. He was sick. And it was 2006, around August. That's when I came. On a visitors visa. Because I hadn't been seen him for seven years when he left me there. So, it was like, he was stuck, with his illness, as well as maybe, how do you say, family problems. Because he was benefited from the treatment. Because back home it's quite expensive.

EB: Where did you travel from?

J: [Name of country]. I come from [name of country].

EB: Is that where your father is from as well?

J: Yeah. From there. When he came here he came with...because he'd married another women. She's not my mum. They had three children: [names of children]. They were all born here. They're in

[name of town]. So, still with their mum. Yeah, what else? Then, after, before, I think about two or three months and I realised that he wasn't that very bad in his condition. And I said to him, I think you can cope and I should go. Then he, you know...because - it was 2006, in 2003, his wife ran away from him - he was worried. Took all three children. They'd run away from him. It was around July, I think. 2003. Then I came three years later. So [yawns], it was a bit of worry, you know - he's in Luton, so he lives on his own. He's on medication. So he was like...I think it was difficult for him because he couldn't bear the thought of not seeing his children growing up. And not being able to participate in their upbringing. Things like that. Then, on the other hand, I was far from him. So, since I was here, he would try whatever it takes so I would stay here. So, but it didn't work. Then I said, you know, I think I should go. Just let me go and then I could seek asylum. Oh, you try this...as a parent. I couldn't understand. He was desperate just to have someone in his life.

EB: Because at this point his wife and his other three children, he doesn't have contact with them at all?

J: No, no, there is still contact but not in a good way. Because when she left, it's not like they had some agreement that she's going to leave. They just left, just like that. And then there is no...there was not sign that she would be leaving him. No, there was no sign at all. They were just talking, you know, there is no any changes in the house or the clothes packed, like that. If there are some clothes in the bags...they are still there up to now I am talking. So, it's like, maybe she planned this for a long, long, long time that maybe she will leave him. So I think that maybe he didn't know that or maybe didn't realise that. So, she left. It was 2003, I think, around July. Then I think, 2003, [name of sibling 1] was born 1992, around July, [name of sibling 2] 1994, [name of sibling 3] 1995. [Name of sibling 3] and [name of sibling 2], they were different 11 months. So they are a bit quite young all of them. So now they've grown up. They can make their own decisions, where they can go. So what happened after then, we tried so many...I met, like...enrolled in the college for 6 months...they said no, you're going to have to...the college said you're going to have to legalise your status. I said, it's not my fault. Then I said, when I talk over, I said, I can't see myself going anywhere. Of this life, you try this, you try that. This is not going to work. Then I said, ah, what am I going to do? This person just wants me to be around but then I can't stay here. I'm going to have to move out. So I moved out and then I just started my own life. But I'd be going there, use the same address as the home address. That's what he wants me to do. He said, you can't be here because now you're an overstayer, things like that. But you can always come and go, come and go. So, but then it was 2009, I met this girl. She is [nationality] as well. Her name is [name of girl]. She came for masters degree in here. Called Luton...what's the name of it? It's the University of Luton, Bedfordshire. So, she came and we met. Started a relationship. I introduced her to my father and then she...we had a child in two years afterwards. She was born, I think, 11th of November 2011 - 11/11/11. So, we were together and then my father, he was happy, because he'd say now it's this, you're a grown man now. You know, those things, every parent would love to see, you know. He's your grown child. Going through those processes as they do. So, what happened is that, after that, we stayed together at his house. So, I went back again. So, 2011, it was around March, I think. The Home Office wrote me a letter. 19:48 Then I had my passport. Because whenever you submit an application to the Home Office, so long as you have a valid visa to be in the UK, there are always going to return your passport. Always. Whatever objection, they're always going to return your passport. So I had my passport. So, this is like the year they are planning to clear the back log. It's a long time cases. Maybe to give them leave to remain. Things like that. 20:22 So without even thinking, I just took my passport, I filled in the questionnaire and I sent it back. That was the biggest mistake. Afterwards, even like one year or something like that. And then when I went to see one of solicitors in Luton. When I explained to them, they said, you shouldn't have sent that questionnaire. Because what they said, if you don't send, you don't fill the questionnaire, they're going to make a decision based on the papers they already had. So, if they didn't already have your passport then they would have made a decision and you just keep quiet. So for you, sending your passport, it was a very unwise decision. Because they knew already that you were an overstayer. So there is no way they are going to...I don't know. Because I had a mixed advice. You can send it maybe and they will granted you. Or maybe they might want to detain you, or it can be anything. So, I didn't know to be honest.

EB: Was this in 2011?

J: Yeah, that was 2011. When I send it there, it took some time. And then I think, the solicitor said, what we can do, maybe you should try to make a new application because if you, if you decided that you want to legalise your status we should find...just go with it...because they already have your

passport anyway. So there is nothing you can do about it anyway. So, just let's go with it. So she submitted a new application and then they turned down. But they still have my passport. This time they didn't give me back my passport. Because remember my passport was, the visa had expired.

EB: So, your passport is still with the Home Office?

J: Yeah. But it has already expired anyway. It was...the visa was expired February 2007 and I came August 2006. So, all those applications...the Home Office took two to three weeks, they reply...two to three weeks, they reply...two to three weeks, they reply. And they send back my passport as well. But 2011, I think they never returned my passport. I knew because I'm an overstayer. So, well, we tried again in 2011, that's why they sent me a letter I should be reporting. Go and sign at the police station. Because in Luton they don't have an immigration office, so we go to the police station. So, I go there.

EB: What was that like?

J: No, you just go and sign on. You go at like 11 o'clock. Just go and sign there. Just in order to see...

EB: Were you worried when you went to sign?

J: Of course, of course. Yeah, I was worried, yeah. Because why would they want me to sign? I've seen people, and I'm told, I've never seen anybody but I'm told that people they've been detained by going to sign, sometimes you can be detained. I say, I don't care. Let me be detained, that's fine. Because I don't like living the way I'm living, like. Wherever you go you'll be worried. You see maybe police come, they see you across there...anything to do with you...you live in fear, honestly. Let's say, what if you fell sick? You can't go to hospital. Because but then I wasn't very [inaudible], I was good. I don't know, I never fell sick. I never had the flu or anything, just you know. It's not like Africa, most of the time you have Malaria. There is no way you're going to stay there. Some people, I think it depends on their immune system and everything. Let's say maybe after two or three months, or six months, at least you have Malaria two or three times. It's normal in Africa. So, but yeah, I never had anything like that. And maybe flu, maybe just one of...that's it. [yawns] So, what happened afterwards, I said ok, now I've got a child, there is no way I'm going to hide. 24:56 I didn't hide then, I'm not going to hide now. Because if I hide, who is going to help my daughter? Because I'm going to have to provide for her. So whatever I was doing, I have to do it now. So, more open. There is no need to be worried about being detained because I'm already going to sign on. If they want to detain me, they can detain me there. So, but imagine, I was going to sign on and then, I think, the rest of time they replied, they refused, you know. And I said, ok, that's fine. What I'm going to do now, I'm going to just...it took like a while...

EB: This was an application requesting indefinite leave to remain?

J: No, I think leave to remain. That's what they said. Through that questionnaire, remember I told you. So, I think, they were saying, we know...you know, the way they replied, the way they replied, it's like we didn't send you a questionnaire. Because they called it an unsolicited questionnaire. That's what they call it in their reply. But the solicitor said, no, no, no, that questionnaire was meant to be sent to him because it was addressed to him. They've got his name, date of birth and nationality. So that was specific to him. So there is no way you're going to say this was never meant for him. So, you know, that's how they do in the Home Office. Sometimes we try, just make us, I just, maybe, dreamed and then, you know, filled the paper and send to the Home Office. It was not true. So what happened afterwards. You know, the strain, started arguing. Because when it comes to deal with solicitors and Home Office, usually it takes long. But if you just write on your own sometimes, it just takes two or three weeks. They just replied. They know that you have got no knowledge of, you know, law, you can't even quote paragraphs. You can't even refer anything. So just, you just [inaudible]. So it's easy for them. 27:10 Even anybody can just reply to them. That's what I believe. I could be wrong. So, then, where did they...I think they..what did they...I think they, yeah, I think we went to court. They refused. We appealed and went to court. The first time I went to court, I think, it was 2014. And 2014, I went me, me with my father as well, went two of us. So, we both had witness statements. My father had his, I've got mine. Even my father explained about his illness and the support he need. All the boost he have for me being around. And I had mine as well. So we went to court, I don't know what's going. So, I paid that solicitor by myself because I was working, you know, you have to work. So, I paid that

solicitor and I made for prepare everything for both me and my father and paid it as well, the barrister, to represent me in court.

EB: Do you mind if I ask how much that cost?

J: Altogether it was like £1,200, I think. Because I paid in installments. First, I think, I paid...because there is a fee to pay for the court first. That's outside. So, I paid the fee first and I gave them £500, and £400, that was for the barrister to represent me. So, that's fine. So, when I went to court, I didn't know what was going on, to be honest.

EB: Which court did you go to?

J: I think Richmond, in London. And when we went to court, what happened is that my barrister, I think, I think she had an accident so she couldn't make it that very day. So, my father was there, I was there. We were very well prepared, to be honest with you. So, that was it.

EB: What was well prepared? You felt prepared?

J: Both, yeah. Me and my father as well.

EB: In what sense? What was it that made you feel prepared?

J: I mean, in the court hearing. Because what we had is like...I mean the case, the way we planned, I think...from my opinion, that, you know, we were well prepared. I mean, we had a strong case to argue because we both were there. But before, all we did was just to allow the paperwork, or documents, to Home Office...Home Office, they always, you know, decide based on the paperwork. But this time, I mean, that time I'm talking about then, we were both there and the paperwork as well. 30:20 So if there is any doubt, anything, they could just ask us, isn't it? That's what I'm saying. So the case had to be adjourned [laughs] because of that, yeah. The judge said it's unfortunate, you know, because they are waiting for the fax from the hospital to confirm, you know, she had an accident. So they had to call off the case. See you next time.

EB: How did that feel?

J: Very bad. Very bad because I say, ok, I was thinking I'm not going to be able to, to make this time because...I know my father he is the sort of person...who says today I'm not going, I don't feel like going, I don't feel like...why should I be doing this? He is like that. You know, he change...but sometimes, the way I look at it, is like, it's due to his illness, because of medication. Every single day he has to take medication, you know. And then what he went through, and then what he is suffering from, and then the way he thinks, you know. As a parent, he might not tell me how he feels the way I live. Or how the way things...it's not the way you'd expect of a grown up child and then the kind of life...maybe it's sometimes...and that's just how I see it...I might feel the same, seeing my grown up son and then there is no, you know, he can't, you know...he wouldn't tell me but the way I see him, he's a bit of disappointed. If it wasn't for him, I would have gone, isn't it? Me, I would have gone a long time ago because I wanted so bad to go back. During that frame time, before my visa expired. But he didn't let it happen. So, it's...but then...

EB: Do you mind if I ask - because you said your father's very sick...

J: He's not very sick. He is on medication. He has to take tablets every single day. So, I think he had cancer. The cancer was there. Stomach cancer. It was around. I think that cancer came with other illness as well. So, I don't know what happened. I think he went through chemo, and I think that cancer cleared. Maybe, I think they caught it in the early stages. So, I think, that cancer cleared. No one believed that he was still alive. Because he was given like 48 hours to live. You're talking about 1998. Up until now, he's still alive. Yeah, but then, you can tell, even when you see him, that this person here has issues. Health issues. You know, he doesn't look well. So, it's been like that. 33:19 So, yeah, they adjourned. And the next hearing, I think, I didn't feel well. Maybe, it was like pressure, you know, things like that. Because nothing was going well. My ex ran away as well.

EB: Oh. I'm sorry to hear that.

J: Yeah, it was 24th September 2013. That's when she ran away. I think, at some point, I think, I don't blame her. I think because her family. I mean, her mum especially. She was like, you're wasting your time, things are not going to change. You know, it's like...the way she was...

EB: So did she go to [name of home country]?

J: That's what I wanted to find out. The moment they left...because we used to live in a different area from where my father was living. It's the same city, Luton, but there it's like half an hour walking, or 45 minutes, from my father's place. So, before she leaved we wanted our own privacy so we rented somewhere else. Something like two years. Then it started the problem. It's always difficult. When you're two, it might not be very difficult. But when you are three that's when you see the life changes. Because now there is a child involved and the child need this and that. And she, herself, she need to adjust. That transition period from the single person to be a mother, and for me to be a father. That pressure and then the circumstances still the same, hasn't changed for me. Neither of her. So, there is a lot of problems. So we were always arguing and things. And she would call the police. So there were problems. I knew, I told her, you know what, this is maybe not going to work. But that is not what I want. Because her mum will feel like, you know, you guys are wasting time there, things like that. This one has to come home. She came to study. She finished. She has to come home to work. To be honest, I didn't know what to say. Because that is not what me and [ex girlfriend's name], my baby mother, we agreed. Because when I asked her about stuff with her family, she said I'm a grown up, I know what I'm doing. I said, does your mum agree with this or does your mum happy with this. She said, forget about my mum. My mum is my family. It's like she was saying to me, leave my family alone. I will deal with it. So, there we are, they left. The mum came here. She brought another son of hers. I think the last born. To Edinburgh. I think something to do with engineering or mechanical, something, engineering. Because he...

EB: When did the mother come?

J: No, I think he came around the beginning of September that very month when they disappeared. Maybe 6th or 9th...

EB: Is this 2013?

J: Yeah, maybe 9th, that's when she came. 37:08 Then we stayed there at the apartment but I could tell something was going to happen because most of them they were in there in the bedroom, they are talking. Left alone in the sitting room, watching telly. I didn't know what to say, to be honest. But I knew something is going to happen, probably. She want to take them away. Because sometimes she would call me when she was in Africa. She would say...

EB: This is [ex's name] mother?

J: Yeah, she would call me and say, where are you? Sometimes I would go to London. Sometimes it depends on where a job is. Wherever there is a job, I just go. Ipswich...I could be anywhere. She said to me, you know...she would say things like, maybe I'm aware what's going on without realising that she is giving me a hint about what's going to happen. So, where are you going to live? Where are you going to stay? She was asking me those questions. I said, what do you mean, where am I going to stay? No, I mean, I was just asking because I don't know. Have you spoken to [ex's name]? I said, no. She hasn't talked about it. So I ask her, what's going on? She said, oh no, forget about that. So, I said, there is something going to happen. So, I came back and I said to her, what's going on? She said, nothing. I said, your mum said to me that where I'm going to live. As if you guys were moving. Then I said to her, whatever you are going to do, yeah, think about our daughter. Because I know, I know there has been a lot of pressure from your mother, from outside, I don't know but think about her life. Because if you want to take her away, think where you are taking her away to. Because I think that was going in one ear and out the other. Because I didn't know what to think anyway. Because you know when someone wants to have something in their mind, and they don't want to say it. They just keep, just you know, just be kept secret. You're just kept in the dark. You don't know. I mean, it's like, then I say, ok. I just get on with my life as usual but at least I've told her. And I've warned her. Ok, I've said to her then there is nothing I can do. If someone has planned something, there is no way you're going to stop it. Because the mum she is the one dictating it. She is the one

who has got money, the one she's got say, the one she's got convincing. But that's what I came to realised from that very family. That the mum, she's the one who engineered everything, you know. Even when the father was alive, she was just like that. So, like head of the family. So whatever she says, she says. And in most African families, you don't live like that. 40:10 We believe father is the head of the family. No matter how low the rank or the financial status of the person, but still it's father. But, in this house, it was the opposite. So, I came to realise...they grew up knowing that the mother, she is powerful, she has got money, she pays our school fees, she's the one to deserve more respect than the father, that's how they grew up. So, that mentality they want to transfer, to pass on to me. So after that...I think, ok But I'm not going to accept that, to be honest with you. If that's...because she always tells me about the family and how they grew up, and things like that. And how the mum, you know, used to treat the father, or how the father treat mum. But I say, I'm not treat you that bad, isn't it? I was asking her. She said, no, I mean, I'm just telling you.

EB: So after [ex's name] left with your child, have you had any contact with them since?

J: What I tried to do, I emailed a number of times. I tried to call her, she never replied my calls, she never pick up the phone. She never even reply my emails. I went to the police a number of times. Police, they say, you know where...they went to the address to confirm whether they were there or not. They were not there. They were nowhere to be seen. Then the police say to me that, you know, if there were criminal activities that have taken place they would get involve. But there is no criminal activities at all. So, they say to me that I should go to social services. I went to social services. This was behind the police station. I went there and explained to them, so we're going to have to tell the police. I said, the police, they've been, they've saw, they're not in the area. 42:06 So, ok, they're not in the area. I mean, you know what they said? They're not in the area and there is nothing we can do about it. What was her name? Anyway, forget about it. She was telling me, it's not them who moved. If I was like, maybe, violent...I mean, a violent person. You know, probably they would have getting moved. And be moved for their own safety to keep away from me. If I wanted access, I would have to go through them. But there is nothing....they say, it's themselves, they've gone. So, they say to me, for you to get access you have to find a private solicitor. Because you're not on benefits, you're not entitled to. So that's what it was. So I went to see that [inaudible]. I explained to them. They offered me half an hour. You know those, like, half an hour, legal, you know.

EB: Sorry, where did you go?

J: Citizens Advice Bureau. Then they said, ok. In this case, you are going to...if you...I mean to get a solicitor, you're going to have to pay for your own solicitor. They give me break down, took almost £2,000. I said, I'm not going to have this money. They say, you're going to have to write to court, before that, you have to go through, is it mediation, or something like that. Because that's what they advise before you go to any hearing. Before you used to be like...you do it voluntary...but now I think it's mandatory. You have to go by that process. So, all those things, I went there, I say, ah, I don't know what I'm going to do. So that's why, you know what? I'm not going to do it. That's when I developed depression. So I was thinking, if they're here...

EB: This was towards the end of 2013?

J: Yeah, I was thinking, ok, what am I supposed to do? Because I can't have that money to locate her. And then there is no way I'm going to be able to see them because I've tried even to email her. You know sometimes you can just email someone and it's ok. If we had our differences, can you just put aside. And I even suggested, if she could get the police involved. I said, because I didn't mind. I didn't mind to see them even in the police presence. I don't mind. No. You know, I came to realise...I came to realise that I made a big mistake in my life. This is the biggest mistake. Having a child with someone so cruel like that. It was the biggest, biggest mistake in my life. I know we are Christians. I know Christian is about patience and love and affection, so. If you don't feel that someone is in need, the same as I do, what kind of Christian are you? Because you have to realise that I'm her father. I've got a heart as well. Because that child, since she was born, during the pregnancy, all the complications, went to Hemel Hempstead, go to see all those specialists, for the hormone imbalance, all those complications, we were hand in hand. So, why people change the moment the child is born? That's when she changed. She was not the same. Every little thing. 46:13 Anyway, from that...2014...

EB: What was the outcome of your tribunal hearing? It was adjourned and then what happened?

J: It was adjourned and then I couldn't go because I felt hopeless. And because she left. They left September, 24th, 2013. The tribunal was July, I think. I didn't go. I didn't see the point. Because I didn't have the strength.

EB: So you didn't go to the adjourned hearing? So, you went to the first hearing when the barrister had the accident.

J: It was me and my father. And this one, because that's when I started to have difficulties with my father as well. Because, yeah, I had some difficulties...there is no understanding each other, there is no...there is no peace. I asked him whether he would come with me or not. He said, ah, I don't think I'm going to come. I said, ok, that's fine. So, if you're not come, I'm not going to come. When I went back to solicitor, I said, he's not coming, they said, it's ok, if you can convince him to come to the office so we can have a chat with him. To see why he is not coming. Then one of the solicitors, I think the caseworker, she said if [father's name] doesn't go, there is not point in this. You did go before so you have to...you have started, you have to finish. If you don't go, you will make this case very weak. Because you are the one who wanted him to stay in the very beginning. Because, they have caught fire, so they know from the very beginning, there are things in the house that...you know, as you are asking me about the history, so you know the nature of the case...so, if you're not going, you're going to make this case weak. Unless you provide a report from the doctor that you are sick. You can't make it. That will be understood. That's understandable. But if you cannot go and then nothing happens. Like, maybe, a letter from the doctor saying why you're not going. Just like that. That's it. There are no chances. 48:39 Even the chance now, there will be no chances. I was just saying, don't worry about it. Because even myself I was just frustrated because I can't see my daughter. The family is falling apart. It's like, I thought, he would have been on my side in this particular period. But he was against it. Because there is something on that letter. She didn't want them. It's in the statement. I mean, maybe, I'm exposing him. I mean, his medical...but that's real. That's the reason why he has to hold it by his own hands, not me. I haven't read his. But he read mine. I didn't want to read his. Because I knew everything but I didn't want to read his, you know. So, I said, ok. So, it went ahead without our presence. I mean the barrister was there and then judge just dismissed it. It's easier to dismiss a case like that because none of us were there, isn't it? So, it's straight forward. No matter how the barrister tried to say, oh, this [inaudible]. So, from that moment, it had just passed 2014, 2015, I said, you know what, I'm not going to put up with this anymore. I'm going to have to go. I contacted this assisted return...assisted voluntary return, I think, you know that, what it is. I contacted them and I said...

EB: Sorry, when was that? 50:22

J: It was, maybe, around October 2015. So, I've contacted them and expressed my desire to going back voluntary. And they said, ok, why are you thinking you're going to do that. I just made up my mind. Because I can't live like this. And then there is no way, I can't see my side of, you know, live in this. In this particular situation for another five years. No. Five or six years. I don't see it that way. Because, you know, the more you grow older, the weaker you are maybe...[inaudible]...maybe your strength or anything. It gets...Because you'll have as much strong [inaudible] as when you are young as when you are...[yawns]. So, I think I should maybe...[inaudible]...I said, ok, as you are finalising...because they have contacted me by email to say thank you for contacting us, and things like that. And then...before that, I think, it was the end of 2014, one of the immigration officers came to the police station. I remember....

EB: You were still signing?

J: Yeah, I'm still signing. I haven't stopped it.

EB: Was that on a weekly or fortnightly or monthly basis?

J: Monthly. It was every 1st of each month. So, I mean, yeah, I think it was the 31st of December 2014. I think, yeah. When I went to sign he said, Mr J...you know when you go and sign and then because the police officers give you the paper, they are always there. So they said, ah, the [inaudible] is not here, wait for me. And then all the immigration officers open it. They come like four or five. Like four. They said, can you come with us, please? I said, no problem. I just went with one, I can't do

anything. I just say, ok, this, I was expecting this. Because I knew my passport would be expired on 2016. So that was the end of 2014. That's what they do sometimes. They just go there and....I said, ok. They said, let's go to the room. They said, Mr J, you are here because the reason why I want to detain you is because you will be sent back to [name of home country]. I said, ok, that's fine, yeah.

EB: You were happy with that at that point?

J: Eh?

EB: You were happy with that?

J: Yeah, I was satisfied. I can do that, yeah. So, can you tell us about your date of birth, bla bla, tell us where is your family and things like that. Ok. I explained to them. I said, you know what, I think in your records you have got everything about me. You know my date of birth, you know my family and everything. All I'm asking you, yeah, if you could just help me to locate my daughter. Tell me whether she is still in the country or if she is not there. Because you've got the power to tell me. Because if they went back then you should have known in their records they've gone. Just tell me that. If you can help me then I'm not going to ask for anything from the Home Office. All I can say to...get me her, yeah. Or get me where she is, or give me some information and then to know where she is, her whereabouts. Then they will take things from there. And then file the paperworks, [inaudible] my GP, contact my GP, and then take it from there. I said, if you can do that, you can always, you know, work together. They said, ok, we need to make some phone calls, bla bla. Things like that. I said, ok, that's fine. They put me in the cell. In the cell, there was a camera in there, bla bla. So that was December. Before that, I think beginning of November. I think six days after I went to sign on, I tried to commit suicide but it didn't work. 55:20 I took like twelve ibuprofen, I put in there, and the alcohol. You know those cans? I put them in. I ended up sleeping for 15 or 16 hours. When I woke, I had a very, very bad headache. Then the headache continued for like one to two weeks and then disappeared. When I woke up I really regretted it. I said, why did I do that? And it didn't work. So, after that. A month later. They detained me there. They've got all the records from when they contact my GP. They were asking for the medical reports. And they wouldn't give them because they want my consent. So, whatever, it was 11 o'clock in the morning...

EB: Did you get any medical attention after you tried to commit suicide?

J: Yes, I went for counselling and they gave me...because I had problems sleeping. Insomnia. And I was suffering with insomnia and depression at that point. I had some. It was Sytron, I think, for depression. Even now I'm taking it, something like that. Propranolol, I think. So, it's from that very moment because they couldn't get the answer from my GP. And I think they just want to rush that thing so they can get me into a plane fast and send me back. So when I mentioned that I hadn't seen my daughter, they pretend as if they didn't know about anything. They didn't know that I've got a daughter. They didn't know that I've got my father, they didn't know that I've got siblings. That's what they do. I know they know about it but sometimes...that's all they do. Without realising...if...let's say, if someone can explain, or cannot express, maybe the fear or maybe the concerns which means they will lose out before they will send out. That's what they do to some people. 57:41 Because you don't know how to stand for your rights...ok...I want a, b, c. Because that's inhuman. Because I believe the UK they always lie. You know, human rights, human rights. I want them to exercise, to give people rights. Whether to save somebody. They've got family. They are entitled to their family. They are entitled to live wherever they want to live so long as they've got family ties. But still they will be treated like they've got nothing, you see. That's when I told them in the cell. I said, me, I've got a child. I've been to the police, they couldn't help. Social services, they couldn't help. It's not my fault to work, to be able to support to myself. I could support myself if I was allowed to work. But I'm not allowed to work. So, now, you are telling me, go and find your private solicitor. How am I going to find a private solicitor? I can't work. Ok, that's fine then. Ok, where is the human rights? I can't even see my child. If I was the one who had taken her away, I would have been found by now. But because she is a woman, I think you think that maybe she's entitled to all rights. But that is not fair. 59:16 I was the one looking after that child more than the mother. Only she knew, the first thing she wakes up in the morning, was to grab the laptop in her lap. Instead of maybe deal with to prepare breakfast, that's only she knew. She couldn't wash up, she couldn't [inaudible] on time, she couldn't cook. I would do all those kind of things but no one was listen. That's the reason why whenever she called the police, even the police asked her, what's wrong with J, what happened? No, he's been drinking, he's been

aggressive, these details. I never touch you. Is he a good father? Very good father. So why you calling her? Six times. So, it was...I couldn't stand her mum always meddling in the relationship, saying do this, do that. We got everything here. We need help with our child, we've got a health visitor. We had midwives. We did any help we might need. Why are we having to listen to your mum? Why does your mum always have to instruct how to raise our child? I never agree with that. That's where the problems began. Because I didn't want to. I want her to be a grown up woman, to take care of her like a mother. Mother, father, that's it. I wasn't biased by her mum's advice but it shouldn't be number one priority. It shouldn't be taken into account every now and then. No, no, no. We can only ask her when there is no way we're going to be helped here, isn't it? But then everything, let me ask mum, let me ask mum, let me ask mum. Anyway, I don't want to go back there. So, that's...

EB: Do you mind if I ask how you ended up in Swansea?

J: Yeah, that's where I was coming from. After...when I say I want to go back voluntarily in 2015, around October, then I said, before I go ahead with this plan let me call one of my friends back home. The choice was my co-worker. My colleague. So, I called him up and I asked him about all things. Because I was working in water supply as a debt collector. So I just wanted to know if there were still posts, positions that I could join, something like that. He was saying to me that he is no longer there anyway because he had to quit because...you know this kind of debt collector? We were collecting bad debts with the customers. The customers were reluctant to come to pay water bills. You know people they don't feel like water...you know, they feel like water is free. Why should they pay for water? That's what some people they feel like. 1:02:29 And then, so, our job was going there and trying to convince them to pay for the service they're using because it takes a lot more than saying that water is from the God. But then God doesn't bring water in the houses. There is a process that has to be followed. I mean, the chemicals...because water comes from far, far away to get to your house. So we tried to educate people in order to pay their water bills. Some they agreed, some not. So, to those who were very difficult, you have to find a way to convince them to pay. Maybe, come to an agreement to pay by instalment. At the same time, you pay your debt. And keep up with your monthly charge. Let's say your debt with us is £50, your monthly, let's say, £5. So you've got to pay maybe £8. So, you pay off the debt to stop that from going. Some they agreed, some they don't want it. Because initially, the other workers, they go through those places, some are maybe hospitals, maybe restaurants, or maybe some barrister's office, or maybe government office, it takes a long time to pay. Because it depends on the government budget. So, you can't just get there...they have to wait for the budget in order to pay. But for this private sector where people own a hotel, restaurant, things like that...some people they used to go in, get tips, it's not tips, it's corruption. You're corrupt and you be bribed. Or you just take this and then go home. To some, consider our financial status, to most people we are poor, so somebody gives you, maybe, half of your salary every month. So when you top up your salary then you are well off, isn't it? 1:05:04 So, someone who would rather take that money, that bribe, instead of convince that person...because to be honest, they're not really helping each other. That's the reason we introduced a new company. We were a bit serious about this because we would only get paid commission. Although our salary was fixed, but the more we collect, the more our company...we still did not get a lot of money, our salary was really fixed...maybe you install faith by giving the contracts. So it's...that's what happened. I don't know what happened, one of those days, it was back...I came here 2006 and it was 2013, I was ready anyway...so, before I left we encountered one of these customers. He was a very rich person. He owns hotels. So he wanted us to help him to cut the debt completely. So, but I said we're not going to be able to do that but we can come to an agreement for you to pay by instalments. No, he didn't want that because he said that some people who used to go there, same people in the same work but a different company, they used to go and he'd give them money....

EB: Is this an offer of a job to go back to [Home Country]? I'm a bit confused.

J: Say it again?

EB: So, this person...so, you were in the UK, you were talking to them...

J: The one he was my colleague I was working with. So this is to know whether the position is still there or maybe I can...things like that. Because you can't just say, I'm going. You don't know what you're going to do there. So that, I wanted to know if I had something to hold...when I find something...you know. So he said to me that...because when I was there, I couldn't agree with the

guys proposal. Saying that you have to cut completely the debt. That's not possible. Because he is still using the service, the water is still running there. Because there is no way you're going to stop the water from the hotel. So, what he was suggesting, it was difficult for us to do it. But my friend, I think he went back....what he wanted was to erase the debt completely...which was not going to be possible. My friend went back by himself and he agreed and he took....let's say he was robbed. He wasn't robbed because he knew what he was doing. I think he took a bribe. It was a lot of money. He played...I don't know how he did it behind my back and then succeeded. He had the debt erased completely. Because when you do that you're going to have to wait two to three months, wait for the new bill to come out. Printed bill. So you see all, 000, written. That's what it's supposed to read, isn't it? You're not supposed to have those millions anymore. To do that you're going to have to do a long process. You're going to have to see branch manager, you're going to have to see accountant, you're going to have to see [inaudible] manager. All those people you're going to have to talk with them to see, because...people, billing managers. You have to go and prepare bills for all of them. Because someone who prepares the bill they can do anything with it. If they don't want it to be on the bill, they delete the debt, as simple as that. So, he went through that sort of things. He never told me. So after a while he told. He told me when I was planning to come away. I said to him, I'm going to have to quit this job, I'm going to have to see my old man, he's not well. He told me, I did this. Did he? That's ok....

EB: When did you have this conversation?

J: Last year....no....

EB: 2015?

J: 2015, yeah. We always had a chat on Whatsapp, like that. And then that 2015...2015, when I was contacting the Home Office for Assisted Voluntary Return, that's when I contacted him again to ask him what it's like there. So, he was saying to me if I could remember last time I was there, we were working together, the customer we approached, and then he went back behind my back, and then took the bribe. I don't know what happened. It was sometime...they do a shuffle...the management, or something like that. So now there is new management. I don't know what went wrong. The debt resurfaced. So the customer was extremely angry. Very upset. So was looking for him. But you know the mistake that he did, because we always work together, we have been there twice, but when he was proposing how he could help him...me, I said, we're going to have to go and think...but I never went back there...so my friend went back. When I said let's go and see...he said don't worry about him, let's forget about it. 1:11:16 Because he knew what he did. So he didn't want me to go there. So, what he said to me after the debt resurfaced, so he was just...he went back there...just like your normal visitation...the guy called him and said I need you to come very quickly. This bill, it's a new bill came with all the debts. So, what are you going to do? The guy said that he was going to try to fix it but he couldn't. Because to fix that you're going to have to have money to fix it. To go to give all those who he already gave before. So he couldn't. I'll fix it, I'll fix it. He couldn't. So all of a sudden he said he was attacked, it was around 2013. 1:12:02 I'm trying to give you the story of what really happened but I should have made it short. Because...ok. When I talked to him on 2015, he said he was attacked 2013. Because he...he didn't even say the reason why he was quitting the job from the office. Because if the office had known what he did, he would be in a very, very bad situation. Because maybe they would take him to the police or maybe persecuted him or things like that. So he just kept it to himself. So, I've resigned from this office, I'm no longer coming. So he was on the street. Because if he was still engaged with that job, he would be sent to the very same areas, so it would be easy to be seen. So, for him to escape it. You know, just to quite the job completely. So, without realising that the guy, he knew him, because he is a big business man...he's got money, he's influential, he's got people around, he's got...I don't know...I think he was caught up somewhere, I don't know where. He said he was beaten up, they broke his tibia....

EB: Am I right in understanding, did you claim asylum and is this....

J: Yes, that's the reason why. He said to me that for you to come back...he said I could come back but not to go to [name of area]. But [name of area], that's where I grew up, that's where I was born, I'm not going to go anywhere else other than [name of area]. Because [name of area]...you know, here is different from Africa. You know, if you can go to, let's say, Manchester, wherever the social services...let's say maybe schools or hospitals, they are more likely the same. But back home it's different from region to region. If you to [name of area], grow up in [name of area], it's going to be very

difficult for you to go to other areas. Because you've got no network. You know no one. Here is different. So [yawns], what I'm trying to say is through that story...it was said to me, I'm so sorry but...he wrote me some covering letter, I'm so sorry...things like that. I said, ok. Because you've put me on this place, what I'm going to do, I'm going to see if I can get help. But the amount he wants, I'm not going to have that money. You see, the problem is, him and me, we know, that's me and him, that me, I didn't get that money. Not even a single penny. But him the business man, he doesn't know that. So that's where the problem is. Even if I could confront him, I'd say, I'm not part of it. He wouldn't believe me. That's where the problem is. When I said to him that, you see where you put me. You went behind me, you did all the deals, so now I'm on it. So, how are you going to help me? He said to me, I can help you what I can. If anything...so, I said, ok. When I spoke to one of the solicitors, he said to me, you're going to have to have proof. 1:15:24 I went to think...You're going to have to have proof. Medical reports from the doctor to say the scale of the injuries, how it was sustained, things like that. And then a statement from himself saying those things. 1:15:42 And then how...how this may effect...you know, things like that. You know, it's complicated. When I try to...

EB: Sorry, when did you claim asylum and how?

J: it was last year.

EB: 2016?

J: 4th of August.

EB: And how did you claim asylum?

J: I went to...I went to...I phoned them. Because when I explained that to the voluntary return, they said, if you fear going back, based on anything, you're going to have to apply for asylum. If you fear. That's what they said to me. So when I called the local immigration, the one they come to take me, I called them as well. I explained to them. Because they were aware already that I wanted to go back. They said you're going to have to legalise your status because at the moment you don't have any application so far in our system. Then if you fear going back...When I said to them, will you assure me that nothing is going to happen to me? They say, we can't guarantee that. Because we are not there. The only thing you can do, if you have fear, you're going to have to apply for asylum. That's what I did. But it hasn't been easy because when I went to court, they said, ok, if these things happen when you were there, and now it's 2016...so, this fear is still alive? I said, yes, of course. So long as the money is alive and the debt has been erased and resurfaced, and the guy is nowhere to be seen, the debt is still there. That's what I said to them. So, it's like...what they look at, the duration, the look at the period. It's like maybe the time has passed so many years, why now? But I say, ok, I wish, I don't know, I didn't have...maybe I'm going to print out...I mean the email from my sister, you know, every time. Because they contact...so maybe that one will help. That's it. I made the effort. I went after this. So, it's complicated to be honest. So, after that when I went to court, remember I didn't have a solicitor, the one...

EB: Can you tell me about...so you've claimed asylum by calling the Home Office, that's how you made your application...can you tell me about the interviews that you had with the Home Office?

J: Yeah, it was in Cardiff. It was around August last year. That's when I had my interview.

EB: And when you claimed asylum you were in Luton?

J: I was in Luton when I rang them. Then they asked some questions and they said, ok, you're going to have to...because usually they will call you to tell you the date of which you go to, I think, is...what's the name of that place...Lunar House, I think. Is it Croydon? Yeah, I think you go there. It was 4th of March. That's when I went for the screening interview. So, after there, I said I need accommodation and things like that. They say, you can't just ask about this thing, you're going to have to give us time, you should applied prior to your interview. 1:19:37 So we'll have time, you know, to consider. So, I went back to Luton and then I used to go to Red Cross.

EB: So you needed accommodation but they said that you should have applied before you went to Lunar House?

J: Yeah.

EB: So you had to go back to Luton?

J: Yeah, I had to go back to Luton.

EB: And where were you living at that time?

J: I was living with a friend. Yeah, with a friend. I wasn't living at my father's place anymore. Because we had problems there and it's better for me to live far, you know...not really far...it's very, very same area. But at a different address.

EB: Did you seek legal advice before you claimed asylum? 1:20:20

J: Yeah. Yeah, I went to this, the same solicitor I used see, and she said, why have you claimed asylum? You know, it's like, they were saying to me [name of home country] is a peaceful country, and things like this. But I say, you know, I don't know if maybe they took me seriously, or something like that because, you know, usually, you don't need a solicitor when you make an application for asylum, isn't it? Because you can seek asylum if you believe you have got reasons. You go ahead. And then as you're progressing that's when you have solicitors, isn't it? I don't know...I mean...because I was still using the same solicitor, the one in Luton. Even when I got here.

EB: Did you pay at that time?

J: No, no, no. I didn't pay that one. So, it's...but in this particular asylum claim, I didn't pay anything. Even when I went to court, after interview, when they were saying to me that, you know, because they've sent that interview as well, that decision to Rodman Pearce Solicitors, the one in Luton. So when I talked to them they said, you know, since you are very far, you're going to have to find a solicitor in that area. So, I went to NLS Solicitors. When I went to NLS Solicitors, they said, you know, you're going to have a letter from your colleague, you're going to have to have a medical report, you know, things like that. And then we'll take things from there. That, it was very difficult to find. Because what he was saying, when I was texting him, is he going...because he was worried about what's going to happen to me there...and I said I'm going to...those kinds of things, like. He doesn't want anything to do with the law because that was corruption. It's against the law in [name of home country] to receive or to give corruption. Both are committing a crime. So, he is worried, like. He wants someone to explain to him in details what it's going to be like he gives me those supporting evidence. So, I couldn't get anything. So, when I went to court I only had a letter from my employer back home.

EB: Do you mind if we go back a bit and can I ask you to tell me about the asylum interview, what that was like?

J: Well, it was...yeah, it was a difficult one. It was difficult. And I think that's where the mistake happened. Because I didn't have any supporting documents for what I was claiming for. 1:23:28 And then...

EB: What do you mean? It was difficult in what respect? How was it difficult?

J: Ok, so let's say, ok, you say that you fear to go back home because of your colleague was attacked. Do you have any evidence to support the claim? No, I didn't have any medical report. And then, they asked me another question....there are so many questions. It's like, why you didn't raise this fear before when you went to court in Richmond? But I said, the first hearing didn't happen. The second one, I didn't go either. As a result, I didn't raise that concern. You know, it's like, why you didn't say that? Even if you didn't say that, you'd have instructed your solicitor to put that on the file. I said, no, no, no. Because I was I telling them, this is asylum, then I didn't have any fear. I was thinking then...because when you have a claim...when you have a different claim from the one I just...what I was trying to say...they asked me why I didn't mention it. It's like all the time, trying to put back the same questions in different ways. If you had that fear, why wait so long? You know, because I have to explain all over again that, you know, I wanted to go back and then after I found out what was going to happen to me, that's the reason why I claimed asylum. 1:25:14 And then they said, ok, your father's name? Your siblings? Your daughter as well about? Medical? And then whether I'm affiliated with any

political party....I do but I wasn't that frontline. I was just...so, they wanted to know in details. Things like that. Whether I had fear there. I said no, I have no fear about that. It's just normal in our country as opposition party, you could be arrested, released, arrested, released. It's very normal back home. So, they asked whether that's the fear. I said, I don't have fear to be arrested or anything like that. My fear is to be...to be assaulted...or ill-treatment...things like that. That's why I'm worried. Because I wasn't that front line, I was just, you know, going to the meeting and then, you know. So, they asked about the notable members of the political party, the one I was supporting. So, I mentioned them. They asked the year it was founded. I mentioned it. So, I was asked to tell about my tribe back home. So, you know, most things, the way they asked, I think, to me, I found very irrelevant. Because my tribe...

EB: Did you say irrelevant?

J: I found it irrelevant, to be honest. Because if I told you this is my fear. I would expect you to ask me from that very area. Not to move around, my family, then talk about my tribe, talking about describe about the tribe, that has got nothing to do with this asylum claim. Because what they're trying to do, they don't find any area where they can, you know, because [inaudible] they would focus on that very area where the fear was. Maybe, I don't know, I don't know what would happen because they keep on focus on my family, where is your daughter, your health, any medical records, are you on medication, and describe about the tribe, you know, things like that.

EB: How do you feel that you were treated during that interview?

J: It's not fair, at all. Because instead of focus on the subject, why do they try...you know...what I found is they try to find a loophole where they can pin you and maybe get some answers they want. Because my fear has got nothing to do with my tribe, is it? Me, I've got problems as an individual. It's not about my tribe. So, I thought that they should have focused on me as an individual and the company that I was working for. Whether the company existed or not. I gave them the letter from the company so that she was our, our stuff, the work very well, things like that. I had it. In the court, the same thing. I had a letter.

EB: Did NLS, when you got your Home Office refusal letter, did they continue to represent you?

J: No, no, no. NLS never represented me.

EB: You went down and asked for advice?

J: I went there and that's when they asked me if I could have some more evidence, you know, to support. Like a medical report.

EB: When did you go to NLS? Was it after you go the Home Office refusal?

J: Yeah, after that.

EB: So you didn't have any legal advice from...

J: So, I contacted the other solicitor, the one in Luton. I explained to them. They said, ah, you know, J, that's very far, you're going to have to find a new solicitor in the local area. They said, we haven't applied for legal aid so this...because we don't want to ruin your chances to get it...

EB: So they weren't going to put legal aid in place? Your original solicitors in Luton?

J: Yeah, in Luton. So, it's like...and then they wrote to me with a witness statement for me to rely on in court. [1:29:59](#) I mean, they said it was a good will.

EB: They did that as a good will gesture?

J: Yeah, like three pages. But that very...that's the one I used. I took some paragraphs to submit in my application to the upper tribunal. I took some of the paragraphs there and some notes, I sent to the first-tier tribunal. By this time, I had a letter from my...because what they said on...you know when you

apply for permission to go to upper tribunal, they want to you to give the reasons, or what documents, the ones you didn't have before, you know the letter from Oxfam bookshop where I do voluntary work, and from the doctor from back home in Africa, I had that one this time. And the statement from my father himself, I had it. And my siblings as well. I put together. I send to Loughborough. It was around June 2014, 2015. That's where I sent it. And I received it...

EB: Where did you send it?

J: To Loughborough. So, I applied to go to the upper tribunal.

EB: Ah, so your hearing wasn't at Newport?

J: It was Newport. But I think when you apply for permission, I think it goes to Loughborough.

EB: Ah, right.

J: I think it's the same division, the first tier tribunal, isn't it? Yeah, I got the response, I think, last month. It was around the 5th of October. So the permission is granted.

EB: Did you have any assistance with writing that application?

J: No, I just do myself. 1:32:04 Yeah, I just do myself.

EB: And was the reason for granting permission?

J: That's the one I've got here. Do you want to see it?

EB: Yes, ok.

J: So, they say it's...[opening envelope]...yeah, I think....

EB: Ok, so this is saying that there was a decision in June of this year, so that was the first-tier tribunal, dismissed your appeal...ok...[long pause]...right, ok....so, they're saying that the grounds that you submitted yourself for permission to appeal...they're saying for the most part it's a reiteration of your claim and your appeal...that you didn't identify an error of law...did you know what how to identify an error of law?

J: Yeah, I did.

EB: Ok...so, here, it says...the judge hadn't considered paragraph 276ADE(vi) of the immigration rules. They say this is arguable. This is to do with long residence rules. Ok, and establishing family life in the UK. Ok...and integration in [home country]. Did you have any help whatsoever with drafting the application?

J: No, it's here. Let me show you....that's what I did.

EB: This is based on the fact that the judge had made an assumption, and there was no proof of that relating to the relationship with the mother of your daughter....Ok, and you actually mention paragraph 276ADE. So, did you read the immigration rules?

J: Yeah. I used the previous note before. The one I had. You know the one from the solicitor. That's the one, I think. I went through it.

EB: So, it's papers from a previous solicitor.

J: This is the one, yeah. This is the interview. No, it's not that one. I think I had the paperwork from my previous solicitor. He quoted the same paragraphs. This is a letter from....that's a copy of my daughter's birth certificate...I think this one...

EB: I wanted to ask you about this...because you mention here in your statement that asylum support is only offered on a no choice basis...tell me what that experience has been like...when you apply for asylum and then you don't have any choice about where you live, and being sent to South Wales. What was that like?

J: A very bad experience. Yeah, very bad experience because you see like the house I'm living in, I don't have any interactions due to language barrier and then, what else...you know, it's...

EB: Sorry, I don't understand. You don't have any interactions with...?

J: With my other housemates. Because we are all in the same situation. So most are from Iran, Iraq, the middle east. So they speak Arabic. I don't speak Arabic. I speak Swahili, English, and another dialect. But then they don't speak English. I don't speak Arabic. So, it's...you find yourself very much on your own. Especially if you don't share the culture. Arabs have a different culture from us. You know...even the treatment of [inaudible] is different...you know, it's like me, I'm the only African in the house. I'm the only one who has dark skin. It's a bit of challenge because, yes, we are in the house but you're very much on your own. You go to watch telly, because I can watch telly, or maybe come to the library sometimes. Then going home. That's it. There is no interaction because of their language and then the whole thing is difficult. It's like being taken from one place and getting dumped in the desert. Because if there is no interactions, there is no life. Because for me to get people to talk to, maybe I need to go to...only I can find them if I go out. Go out to the Church. Or maybe where I volunteer at Oxfam. Now I've stopped. That's all.

EB: Why did you stop volunteering?

J: After I received this I thought maybe I should focus...

EB: On your case?

J: ...on my case. Because I don't seem to find help, any help. I don't seem to find a solicitor. I don't seem to find any help. So, it's very much on my own. So, if I don't...

EB: What was the advice when you went to Asylum Justice, to the drop-in? 1:39:15

J: [mumbles]

EB: How many times have you been to Asylum Justice?

J: Twice.

EB: Twice. And was it helpful at all?

J: To be honest, when I went there the first time, it was June. When the court dismissed my case...this is the one where the court dismissed my case...so, I went through it, I read it and then...this one tells how many times I've applied. And then, when I explained to Chris. I said, Chris, I need to make an application to go to the upper tribunal. I don't feel like the trial was fair, to be honest. It took like three hours, I didn't have a representative, I didn't have any help, so...so even prior to the hearing, I explained to the judge, I said, look, I don't have very much to say...I don't have big bundles...ever her, when I seek asylum, she say, you don't have to have...I said unfortunately I don't have because I didn't know what to bring, since I didn't have a solicitor, I don't have any one to lead me to explain to me what to do. She said, don't worry, it's a bit of this and...that's what she was saying. Because I knew...that's what they say, anyway. So, but I knew I was going to have a difficult time because I had all this paper work with me, all the documents, like that. It took like three and a half hours the feeling. And then at the very last, I started to get tired and I was a bit, you know, confused, because this immigration judge...no, no...Home Office lawyer, I think, barrister, was on the left, asking questions...the judge as well. It's my first time having this experience. So, the way they were throwing those questions. Initially, yes, I would go with them...but as time, I felt, no, no, no...this is quite difficult. Sort of questions, like, someone ask you, is your father a nice person, a good person? Say yes, or no. I can't answer that question. I say, I can't answer that question. They say, why? I cannot answer that question. They say, ok. So, like, maybe I should have said, yes. Or maybe, no. But I didn't know what to say. 1:42:06 But if I had a solicitor, they could have told me what I should or shouldn't say. Because maybe I should have said 'no'. But if I say 'no' then they'd say, 'how come you live here? Your father has a house in Luton.' Do you understand? Maybe that question would be raised. But to avoid those kind of questions, I say, I cannot answer it. People...

EB: Did it feel like a minefield?

J: Yeah, that's what I feel. I feel like, people, they have differences, isn't it? But those differences, it doesn't take the parenthood, it doesn't take the family thing. If they are family, blood related, you can never take it away. People, they have differences, everyone...you see, that's the same thing I mentioned on my application for appeal. I feel like I've been judged based on what I've said. Because when it comes to family, the family feud or family issues, should be left alone. That doesn't take away the rights of blood related, does it? But I speak to my father all the time. I speak to siblings all the time on the phone, things like this. Because they ask questions, like, 'how many times do you speak?' What kind of question is that? If...how many times...it doesn't have to count anything on this...we're blood related. I've told you we're related. I have my brothers, I have my sisters, I have my father. So, how many times do you speak? Does it really matter, to be honest? If they are not that committed, the family related people, they wouldn't have given this letter as well. Because they wrote a supportive letter as well. To support the application.

EB: Can I ask, what was the immigration judge like?

J: Erm...I would say unfair. Very unfair. Because she said at the very end. J, I'm going to dismiss your case because she was asking me constantly the questions and I felt like if I say what she wants, expects me to say, it's like I'm cutting myself off from the family. And that's what she would have put. If they...[inaudible]...and then that it would have made me feel guilty for the rest of my life. 1:44:53 It's...I mean, that's what I felt.

EB: Why would you have felt guilty for the rest of your life?

J: Because if I say my father is the bad person, just because for a few mistakes, that's not fair, is it? I won't say that he's a bad person even if I take a phone and ring, you pick up the phone. I say, are you ok? This and that. If he got my letter...sometimes some post still come to that address. He know where I live [gives address]. He will send that letter here for me. So, you know, we had some ups and downs but he it doesn't mean that we don't speak. No, I haven't reached that point. So, I felt like, trying to justify her reason for refusing me...I have to agree that the family has fallen apart. So, me, I've got nothing to rely on or to back me up. Which, that is not true. That's what I felt. And then the other thing is, I wish I had...sometimes...you can make choices in your life, isn't it, as an adult? Maybe my choices doesn't appeal to my father. Maybe that's the reason why. Do you understand? But the judge won't take that. If I make choices that goes against my father's, he won't accept it, isn't it? That's where the line has been crossed. That's what he's not happy about. But it doesn't mean that he is not my father, no. That's where I was coming from, yeah. 1:46:46

EB: So, the stage of your case at the moment is that this application for permission to appeal has been granted...that was in October...so, the appeal to the upper tribunal, is that on the papers or are you going to have another hearing date?

J: Yeah, that's what they say.

EB: Ok...

J: They haven't said when it's going to be. This is when I came to see Asylum Justice, if they could help me translate this for what it means.

EB: What did Asylum Justice say?

J: Chris, according to Chris, he said I shouldn't be worried about this. As Home Office, they're going to write to me. And they did. This one, it's this one. So, I wanted to know because here they asked something like whether I should...from my understanding...if I have another evidence that I didn't submit before...then I should reply to them within 30 days. So, I didn't understand this part.

EB: Was it made clear after you spoke to someone from Asylum Justice?

J: What it was said to me, I shouldn't worry about this. ...I think something like 24...where is 24? He said to me that...you know, to be honest, I've never really get...I've never really get the help I need, to be honest. All from the very beginning until now, I've never really get the help I needed. Because I need someone...you see the time you have taken here, you know, for your research, I need someone who can tell me vividly...you know, tell me a, b, c...this is what it means, what you should do. That's it. I don't know why it's so difficult. Even if it's somewhere you volunteer, or something, you know, someone comes there, they need, why can't you just explain in details and say this is what you should do. I know voluntary or something, you just go there to sell yourself out. Maybe it's like...he's a professional, a solicitor himself. So he could probably maybe take onboard my case if he feels maybe there are chances. I mean, that's how I felt, you know. But then, again...

EB: What do you mean, sell himself out? You mean be there volunteering but trying to find cases that he could then take on? Is that what you mean?

J: Yeah, sometimes that's what they do, isn't it? The same too at Citizens Advice Bureau. They do the same thing. 1:49:51 You know, they only give, like, half an hour of their time but if they have to take on your case then you're going to pay privately. It's the same thing. That's what I see. This one indicated the nature of the evidence and explained why it was not submitted to the first-tier tribunal. And this considers...[reading papers]...and when consider whether to admit the evidence that was not before the first-tier tribunal, the upper tribunal must have regard to whether there has been a reasonable delay...see like this what I would have said...it was very difficult because communication from [home country] to here it's let straightforward...it's not straightforward...and most people will they don't own computers, they don't have stationary and things in their homes. So, they're going to go to outside to pay for it. You know, you can write a letter roughly and then you're going to have to get someone to type it. Or if you go to library to type it and print it, then you're going to have to pay for it. Maybe someone might not have money. They're going to have to find money. And maybe to move from one area to another to find those facilities. So, it's not straightforward like here. So, I could have mentioned but I don't know whether they needed this, or maybe I didn't understand that. So, they say, don't worry about this. They going to...this one...what do you understand about this? This one came after...

EB: You're asking me for immigration advice and I can't give it to you, I'm sorry. The reason I can't is because in this capacity I'm not...I can't give you any advice that you might rely upon. Ok? So, I can't comment on your notice. I'm sorry.

J: This one? He was say that they lie to you about the appeal under rule 24. No, I just wanted you to...

EB: Tell me how are you feeling at this stage of your asylum claim?

J: I'm in limbo. I'm in limbo situation. Because I'm unable to provide [begins to read from papers] a 'response to the claimant's grounds to challenge the first-tier tribunal judge's [inaudible] determination'...[inaudible]...this is because of anonymity.

EB: Can you explain that to me?

J: From my understanding, this one, the directions, response from the Secretary of State, this one will also help you in your research as well because even though you say you can't really...I'm going to read it myself...because if someone receives something like this, they don't know what to do. 1:52:55 And they can't get the help they need for this because they don't have solicitors. From my understanding because this one is like...because Chris said to me that Home Office they will write to you. When you look at the case and what the judge is saying...yeah, this one...[inaudible]...so this one and the very last...[inaudible]...that's the very point I took it and submit it...this one...[quotes numbers]...so this one the judge, what he say, bear with me a second...yeah, the directions have got an anonymity rule 50, 45...by asylum and immigration tribunal...proceed to...[inaudible]...and they said until the tribunal or court directs otherwise, the appellant is granted anonymity. 'No report of these proceedings shall directly or indirectly identify him.' Eh? '...or any member of their family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.' So, that's what I was...because of this...that's why they couldn't locate this.

EB: Sorry, they couldn't locate what?

J: This one...hang on a second...yeah, this one, number 73, before this one...'Finally, in view of the measure of the claim and the evidence which has been given, I consider it not to be appropriate that the appellant's details be in the public domain. And consider that the existing order of anonymity should continue.'

EB: Why are you concerned about the tribunal's decision to issue a direction saying that your details shouldn't be made public, that your identity should be protected?

J: Why am I concerned? It's not me. That's what the judge felt it should be like that. Yeah, because why they have to be in the public domain? Because the judge felt that way. Because of the nature...she explains here in details. I'm not going to read everything what is there. Because...

EB: Can I ask you a question? How much time do you spend working on your case and thinking about your case?

J: To be honest with you, I haven't touched these papers since I came back from Asylum Justice on the 23rd of last month. I only touch it when I've got, you know, need of doing that but other than that, I don't. Because everything...[inaudible]...many, many times. I've tried to read every time to understand what is there. But then you can read, and read, and read, and read. I don't have law books. I don't have immigration books. You just have to read and try to understand. But sometimes it doesn't really help. Because if you don't understand the interpretation...[inaudible]. 1:57:29

EB: What do you hope will happen? What's the outcome that you want?

J: Positive. Everyone wants a positive outcome, isn't it? That's what I'm hoping. What do they expect for someone like me?[inaudible]...No one wants to live...if I had a guarantee that nothing would happen to me. I would have gone home a long time ago. Yeah, you see, the problem now, I want to be certain that my daughter she is not here. Or, if she is not here, where she is. But I'm not certain. That's another problem. Because I've tried, I've tried to locate her but it seems like...it's like I don't have hands, I don't have hands. Because you need to have access to the funds, I think. Because I'm going to need money to get a solicitor to try to...because they are saying you're going to have to write to court. The only way you can find disclosure from someone, details, is through court. You can't...that's what they said to me. They said the only way...you may go to Barclay's bank because she had an account with Barclay's. Still they won't give you. Because when someone owns the bank card, they can tell where this bank card is being used in this particular moment. But that information cannot be given to me. Only through court. That's what the solicitor was telling me. Because to have that access, you're going to have to go through court. And I couldn't. So, it's very difficult. Left. Right. You see, I've got grey hair more than someone my age.

EB: I cover mine up. I dye it.

J: Is it?

EB: So you describe yourself - you said at the moment you feel like you're stuck in limbo. Can you say a little bit more about what that feels like?

J: Do you know...because I've been going through this for the last year...4th of March, I think. I mean, the process is extremely slow. 2:00:31 Especially when you start to go to court hearings it's very, very slow.

EB: How long were you waiting for your court date? When you went before the first-tier tribunal. Did you have to wait a long time?

J: Three or four months. Yeah, because it was February.

EB: February?

J: Yeah. The hearing, I went. Beginning of February, I think. And then the decision came in June. Unlike my other housemates, so, in a matter of weeks they got a response. So, when I applied for permission in June, I got a response last month. Let's say, minimum of three months or something like that. Ok, when I went to interview in August, they sent me a letter....it was August 2016...it was my substantive interview...that's where I went in Cardiff. Then in September they wrote me a letter. They said they were unable to make, you know, decision until another 6 months. That's what they say to me. I say, ah. But the rest of the house, 10, 12 days. Letter. 10, 12 days. Letter. Why do I have to wait 6 months? It's been like a....sometimes I feel like, what are they looking for? Because what's the difference between me and the rest? Because, for me, I would expect it to be straightforward. Because they've got my file all along. Because they just go there and look at that, that's J. I don't know what they're looking to. Because maybe they're looking to very wide angles. I don't know. Maybe they look at the family...maybe...I don't know what they're looking to, to be honest. Something that's really frustrating. So, that time I was very frustrated. I was very depressed. 2:02:48 I went to my GP and then...because they consider...so I wrote a letter to the Home Office to explain that I was very depressed and distressed. My GP wrote a letter that very month to say...the Home Office, they replied 8 days afterwards. It's not 6 months anymore. So I say what are you waiting for? You see? It's like that letter from the GP made them to make a decision. That's what I'm thinking. I knew...[inaudible]. So when I explained that to the solicitor in Luton, they said, why are you chasing them? I said, it's not chasing them, it's just, I grow impatient because things are taking longer than normal.

EB: Why might need to finish there because we have room booked until half past. So it might be a nice time to finish. Before I turn this off, do you want to have a final word, is there anything that you want to say?

J: Erm, yeah, I think there should be more compassionate when it comes to make decisions. I mean, that's how I feel. I don't think they...I'm not ask them to be lenient, no, no. I ask them to be more compassionate. Because some people they have genuine reasons to remain but then because of, I don't know, maybe it's...they have targets, maybe...that's how I feel sometimes...how many people they should let in or they should refuse, I don't know. Some people they may fall into that table. That's why they're unfair. That's where the unfairness comes from. 2:04:41 I believe some people, they lack support. This legal aid withdrawn, I believe a lot of people are genuine, they've got genuine reasons, they've been left out. Which is not fair. You see? They should look at you, look at the interview, I mean, to be honest, that's how I feel. To be more compassionate when it comes to...because, the way I feel, like, they're just doing it to get rid of people. Even the interview, sometimes I don't feel like the kind of questions they ask, they're not asking to help you to answer the question, they're hindering you. You know, to make some mistakes. Or they expect, ok, they're going to use that one to deny you. So there is no way of telling somebody whether he is telling the truth or not. For this kind of questions. Maybe someone is genuine but because the way you ask the questions, maybe to forget the answers. Because they create fear from the very beginning. It's like, when you first say this....I might be wrong. Because those questions, the way they've been designed they've been set to fail you, to be honest. Not to helping you. Even though they've got that book, the small book on immigration, and how to apply it and something like that. They've said, you might be told by your solicitor not to say a, b, c, d. Eh? But they say to you, it's better to say the whole truth. The whole truth. Maybe it might help you. But then, to be honest, sometimes it's good to withhold some information. 2:06:34 So that you can take the to court. That's why I feel even more free to explain whatever I want to explain in court than to the Home Office. Because remember it's the same, I mean, it's the same people who've been fight against some people to stay in the country. Because they try to minimise the number of people who stay. I know it's in their blood. I know that. But people have got legitimate reasons. They should look to...they should look at the big picture rather than focus on the targets or whatever the person...that's not fair. You end up leave people who have legitimate reasons outside. I've seen a lot of people now, they are homeless. They have got no status. 2:07:32 They are...a lot, a lot of people here in Swansea. I've seen them. Because of that. People they've got no house, no where to live. They don't know what to do. Once your case is exhausted, like you see now, I'm going to upper tribunal, after the tribunal, once it's dismissed, and they say, your case is exhausted, you don't know what to do anymore. If you go to solicitor, it's very, very, very rare to get help once your case is exhausted. The only thing you can do, if you've got new evidence, new evidence, you have to submit it...that you didn't have before. You have to submit in person to Newcastle. And you are more likely to be detained, that's what they said. When you go to Newcastle in person. So, look at that. Who will take the chances? Because there is no way of knowing when they are going to be detained. Once they refuse that new evidence, once you're refused, they're more likely to send you back. 2:08:48 And then they say clearly that you can never...you can never

apply...you can never submit new evidence until...if they've tried all other means...in the court...I mean you've finished with the court, that's when you can go in person to Liverpool. But that is not what you are told when you go to the solicitor. They don't tell you that. I went to NLS before - if I come to Cardiff - do you know what they told me, the solicitors? Because I've been there before trying to get help. They couldn't help me. They said bring the [inaudible]. That's fine. I left. I did apply myself to go to court. I've got permission now to go to upper tribunal. I went back. Thinking maybe this time they'll take on my case. One of those caseworkers said to me. Ah, you know, J, forget about this. Why can't you bring another evidence and deliver in person. That's what he said to me. But then that's what you say....it's not what it says in immigration law. But they don't tell you that. So if you do read yourself you would know because they said if you've tried all the court, and it's been exhausted, you finish all the area, that's where you go. But they don't tell you to go to solicitors. So, what he was saying...

EB: I was going to ask you if you, with the knowledge that you have now, what would you advise your younger self? What is the advice that you would give? About the asylum system.

J: For who? Say it again?

EB: If you were able to advise your younger self, if you could travel back in time, what would your advice be to yourself about the asylum system?

J: [Shows EB papers]

EB: Yeah, this is about making fresh claims.

J: But this is...yeah, ok, what I would advise is...[reads from papers] you can only submit new evidence if you've been through every available appeal process. You can't submit new evidence from outside the UK. You can submit new evidence if your asylum claim has been refused or withdrawn and you have no more rights to appeal. This is called further submission. The new evidence must be something that you didn't have until now. But then this is not, this information is not available with the solicitors. They say forget about this. So, when someone was telling me that, you know, J, forget about this, bring a, b, c, d, you go in person there...but then when I asked him, ok, what if this one fails there, will I be able to come back for this appeal? He said, no. So, I said, that's fine. For that reason, I'm not going to take your advice. I would rather take my chances to go to upper tribunal, once that one failed, probably I'm going to have new evidence, so I will take that in person. So, what do you think? Because what you're trying to advise me to take a short cut. This short cut, it might not work out for me. I would rather take this chances to go myself to court. If court is exhausted then I can come back to what you've suggested. That's what I said. That's fine. Whatever you think. So, it's not fair, to be honest. Me, I didn't know this. I knew this when I say let me check what immigration say about new submissions or fresh, something like that. When I saw that link, I said, ah, but they don't tell you these things. Because you entirely rely on them to know their job properly. 2:13:46 Because they know their job, when you go there you allow them to tell you what to do, what not to do.

EB: Are you talking about solicitors?

J: Solicitors. Yeah. You say to me, if I had to go back to time, what would I advise? What I would advise is they have to do the research. 2:14:07 Do research themselves and make sure what they are claiming, do they have back up? See, like this one, we were talking about, this fresh claim. Because the Home Office they keep updating every year. The last one the date was August this year. If a fresh claim, like new evidence, they have to know whatever the situation, like 8 pages, I think, if that situation maybe from back home, how does it affect you? If it's political or something like that. As a person, how does it affect you. Or maybe circumstances have changed. Maybe you have family, you've got a child here. How does that, you know, hold you? Things like that. Maybe you love to stay with your family, your child, things like that. So anything to back you, you'll say, circumstances have changed, there's some new evidence. How does that affect you? They want to have some evidence to support that. Maybe the political party the one you used to be affiliated with. Now it's people they've been kidnapped, maybe killed. There was some evidence to show it really happened. Things like that. Maybe a piece of paper, maybe a newspaper, a photo, things like that. So you've got to be really, really prepared. But not everyone can read, not everyone can read access...I'm not saying internet here, internet is everywhere...not everyone can understand the language. Most people they speak Arabic. The Home Office website is in English. 2:15:44 So I don't know how they're going to

have...until they can get someone who can translate that to their language. I don't know if you can translate the whatever is on the Home Office website in Arabic. You can do that, isn't it?

EB: I don't see why not. That would be helpful to make it available, wouldn't it?

J: Yeah. You see now what they do...they call it...

EB: I'm sorry to stop you there, J, but we've gone over...I think we've booked the room until half past four. No one has come to kick us out which is quite nice. I think we'll need to finish there, if that's ok? Thank you very much for talking to me, it's an absolute pleasure to meet you and thank you for sharing your story with me. I'm sorry that I can't give you immigration advice and I'm sorry if you thought that's what was going to happen today. What you could do...

J: I should come back, isn't it? I should come back to Asylum Justice.

EB: Well, yes. Asylum Justice drop-ins for advice. If you wanted advice...so, the law clinic in Swansea, at the University, they don't provide immigration advice, they're not qualified to do that. But advice in relation to other matters. So, if you have access to the internet then you can have a look at the website. So, Swansea University, it's the law school and then it's the law clinic.

J: Do you...erm...what am I going to do? Maybe I should talk to Emmy again.

EB: Yeah, I think that would be a good idea.

J: You know, she said, she was asking whether Richard has contacted me. And I said, no. He hasn't. Because Richard wanted something like, I probably, you might have seen it? You're not going to say anything, even if you've seen it or not.

EB: Sorry, what are you talking about?

J: Because, you know, the way we were communicating by emails, Emmy was forwarding that email to me as well.

EB: Right. Ok.

J: So Richard was asking if he could see the paperwork for me. So Emmy said no usually we don't keep the details of our...

EB: Perhaps it would be a good idea to ask Emmy to put you in touch directly with Richard Owen from the law clinic and then you could show him the papers. That would be the best thing to do. So I would ask Emmy if...

J: Because what I would like to...because they said they might apply for me for the legal aid or something like that. That's what I was told.

EB: So the project, and it's just a pilot project at the moment, tries to assist people for exceptional case funding. So...

J: That's what Chris said to me. He said my case was exceptional.

EB: In that case the best thing to do would be to ask Emmy to put you in touch directly with Richard Owen.

J: You say you're not going to give me any advice because I was asking, do you think, how long this might take to send me the hearing? I know you do but you choose not to.

EB: No, no, not at all, that's not the case. So, my background is, I was an immigration lawyer, I'm now a law lecturer. I've been a volunteer with Asylum Justice for a long time now. And I'm a Trustee of Asylum Justice but I haven't been giving advice for a while now. So, I don't practise anymore. So, while I'm still on paper qualified - and in this context as well, I can't ethically give you immigration advice - so there is two legitimate reasons there. So one, I'm acting in the capacity as a researcher, and the other is the fact that I'm not giving advice at the moment. I'm not practising. So, yeah...best thing to do for further immigration advice from people who are

qualified immigration lawyers: Asylum Justice. At the law clinic, they are not qualified immigration lawyers but because it's not about immigration advice, it's about trying to help with an application to get legal aid, then you've got to contact Richard. And you could ask Emmy to put you in touch with Richard. I think that's the best way of doing it.

J: Yeah, I think I will do that. Maybe I will call tomorrow. I mean it's late now. I'm going to call her maybe tomorrow to see if, yeah.

2:21:18

APPENDIX 7: TRANSCRIPT OF INTERVIEW WITH COLOSSO GOLOMBAT (CG)

EB: So, today is the 5th, isn't it?

C: Mmhmm.

EB: This is a difficult week for me because I turn 32, which I'm not ok about.

C: You don't look it.

EB: That's very kind of you to say. The thing was...

C: You don't look 32. I look older than you.

EB: That's not true at all.

C: ...that says more about me than about you though.

EB: That's very kind of you to say. Yeah, so, turning 30, I was fine with that, turning 31, I was like, ok, 32 is when I realise that I am too far away from my 20s...I'm like, ok...they're starting to feel like a distant memory. But it's fine...I'm going to have a nice and quiet birthday, not make too much of a fuss about it, because that's on the Thursday, and then on Friday I go into Swansea and teach for the day. I'm going to go and have a few days break after that. So, that will be quite nice. Ok, so, yeah, the information sheet explains the purpose of the research - so, I'm looking at fairness and asylum decision making - what happens to the data is, it's kept securely, I'll then transcribe it, so I'll type up so that there is a written record. I will use a pseudonym to protect your identity, so you get to choose who you would like to be. What would you like your name to be? This is where you can be creative. This could be your alter ego.

C: Colosso Golombat. I don't know, there is something about it.

EB: Ok. Right, so....

C: Colosso Golombat.

EB: So, C-o-l-o-s-s-o?

C: Mmh.

EB: Uh huh. And then?

C: Golombat. G-o-l-a-m...no, that's Golam. Golom - l-o-m-b-a-t.

EB: What is Golombat?

C: I don't know...

EB: That just came out? Ok. I like it. I think it sounds good. Ok...so we have 'Colosso'...erm...so, what I'll do is I'll use the pseudonym and that will form the basis...it will be data that I will then use in my thesis. But it will only be used for my thesis or any publications that then come from the thesis, it won't be used for anything else. It certainly won't be shared at all. And you are welcome to see copies of the final thesis, if you won't to, or any publications as well.

C: Ok.

EB: Erm, and then I already highlighted - so, if you do change your mind then you just need to let me know and say, I don't want to take part in the study anymore. You don't need to give a reason. Then that's absolutely fine.

And, you know, it's a conversation as well, so, if there is anything that you feel is sensitive and you don't want to be used then that's ok. So, we can have a chat about that.

C: You know yet when it will be released?

EB: Erm, so it will be...well, I have to finish my thesis within the next two years. So, it will be within that time and then, in terms of publications, I mean that could be, maybe a year after that. So, the outputs within the next, sort of, two to three years.

C: Alright.

EB: She said confidently [laughs].

C: Meanwhile, if...I might write a book with that pseudonym. You know something great might happen for Colosso.

EB: Yeah, exactly! And yeah, well, you know this stuff about me, so, you know that I'm an Asylum Justice trustee but this project isn't related at all to Asylum Justice. This is...so, I'm here at Cardiff University, funded by the ESRC. And again, it's separate from my job at Swansea.

C: Ok.

EB: Right. So, really what I'm interested to find out is about your experiences of the asylum system. So, your own personal experiences, if you want to talk about that, but also other knowledge that you've picked up, so, other stories that you've heard from the people that you've met, that you've maybe worked with, who have experienced the asylum system. And really just as much detail and description that you can give me, that would be fantastic. So, where would you like to start?

C: Oh, well, how about the beginning?

EB: Ok.

C: When I started my asylum claim, I was still in school. 05:27 In high school in Wolverhampton. And I had found out - I didn't have my passport with me and I didn't know what was going on with my immigration. So, I was told by my house master that my passport and my visa were about to expire and I needed to call the Home Office to ask for asylum.

EB: Right. Ok.

C: Seeing now, maybe I should have left the country and asked for another visa or something. Because I was still a student. But...so, my asylum claim, my asylum case, didn't take very long. It lasted from the first time I managed to call them to my first screening interview, it probably took less than a year or so. Yeah, less than a year.

EB: What was it like when you called the Home Office to say that you wanted to claim asylum?

C: Er, it took a while. It took about three days, or three or four days for me to get to reach them. I only had a set amount of time in which I could call them because I still had to get as much studying as I could....erm...I was a bit stressed out because I was worried about what I was going to say and all that. But after...by the time I got to my screening interview, I was not that stressed out. It was...all I could do was tell the truth, which was kind of relieving, actually. Because, well, my case was very straight forward. Like, all the evidence was very easy to get because...well, because of who my father was in [name of country]. It was very simple for me to get evidence as to why I could not go back to that country. So, erm...

EB: Do you mind if I ask, is this part of the reason...did your parents make the decision for you to come and study in the UK?

C: Yes. They made the decision but my father passed away...but that was two years prior to me claiming asylum. Yeah, they made the decision for me to come to the UK in 2006 or 2007, I think. And, well, for the beginning that's all I've got to say.

EB: Yeah, ok...so, you called up, you said it was difficult for you to get hold of the Home Office, erm, but then you had your screening interview - can you tell me a bit about your screening interview? What happened?

C: Well, the Home Office lady was mild. She was neither aggressive towards me or particularly nice towards me. She was mild, I guess you could say. 09:07 I know she...no particular issue with that but I didn't like her either.

EB: Why was that?

C: As I said, I could feel no warmth from her, so, erm, but I don't think she tried to make things difficult for me because, I don't think there would have been a point. My case, or the reasons why I wanted to remain in the UK were not superfluous. I did not have any, like I've seen in Asylum Justice, sometimes I see clients saying that things happened to them but they don't have any proof. Or, they have no proof or...

EB: But you had evidence?

C: Yeah, I had evidence. Evidence was very easy for me to get. Because when...since my father was a high profile figure in my country, it was...in [name of country], it came with no questions that there were people who wanted him ill. People can be petty. So, for the things he did, I might as well pay for them as well.

EB: Did you have a lawyer at that time when you went to the screening interview?

C: Yes. I received legal aid, luckily. From a lady that is called [name of lawyer]. But I forget the name of the agency she worked for. She was very helpful.

EB: Was this in Wolverhampton?

C: No, it was in London. I moved to London to deal with my asylum claim.

EB: How old were you at that time?

C: I was 19, I think. Yeah, I was 19, yeah. And turned 20 on while my asylum claim was happening. But you'd arrived in the UK when you were younger, you'd come as a child to study. I had come when I was 14, 13. I started a foundation course for GCSE to learn English and that was in my first year. In the second year, I did my GCSEs. And in the third year I started with my A Levels.

EB: And, so, did you have a conversation with your family, when you first came to study, about claiming asylum? Or about the...

C: No, by that point, me and my family were estranged. There are many things that happened after my father passed away that caused us to break up...all I have right now...the only family member I have right now is my brother. But my older brothers and sisters and my mother, I haven't talked to since I was 19.

EB: I'm sorry to hear that.

C: I get used to it.

EB: Yeah, families can be difficult, can't they... Ok, so, when you first came, did you think that you were then going to go back to [name of country], when you first arrived?

C: When I first arrived in the UK? Yeah, I thought...

EB: So, you had really thought about claiming asylum?

C: I didn't think of it. The first time I thought of claiming asylum was when my house master advised it to me. Before then, when it was the easy life, everything was done for me, I didn't even know my asylum claim...my immigration status was in jeopardy.

EB: Had you heard about...had you heard the word 'asylum' before? What was your understanding?

C: It never crossed my mind. I knew there were refugees and asylum seekers but I never thought that I would be in that situation.

EB: What was that like then when your house master said, I think you should claim asylum?

C: I thought, ok, that's what I should do.

EB: Right.

C: I did not really think of the implications of it. Like, I would not be allowed to travel anymore. For a certain length of time, I would not...that my social status would change in society because my friends treated me differently when I was in school. Which is why, for a while, I didn't talk to them. After, when I was claiming, I just did that and then got back to school after I finished. And then, what else happened? It's such a long time ago. I've tried to bury those memories.

EB: So it was a difficult time. Was it a stressful time?

C: It was not pleasant. It was stressful. I kept thinking, during the first month or so, I kept thinking, I kept watching videos where immigration...YouTube videos where the immigration police caught illegal refugees and that stressed me out a lot.

EB: Yeah, I can imagine.

C: I nearly failed my exams because I could not study.

EB: Yeah, so, you're trying to focus on your studies but then you're worried about your immigration status.

C: And sometimes I asked myself, what would be the point if get...even though my case was strong, I was still worried...until the moment, basically, until the moment I received my residence permit, I was stressed out. I'm still stressed out sometimes. But...

EB: What were your lawyers like? The legal aid lawyer that you had. Were they helpful?

C: They must have been good because I got the status but it was more after, after I got the asylum...the residence permit, they were not so helpful anymore. Because I would have liked help to understand what I should be doing now. Because I had no guidance as to what I should be doing after I finished my A Levels. I could have gone to university, which I did, but as to how life would be for me now, I did not know. I did not know anything about benefits, how I could have used them. How it would have been helpful for me. 17:15 And I must explain something, that the...in the environment that I grew up in, now I was...I will sound like a brat right now, I know, but I was surrounded by a lot of rich kids, basically. And they frowned upon benefits. And when it was my time to claim them at the beginning, within the first six months, or so, I thought I was above it but then by the time I decided, ok, maybe I should just...maybe I should just stop being so posh and just do what I should be doing to survive, you know. By that time, my...a friend of my family told me that he would help me out so I had money for whatever I needed. So, I trusted him and...for many of the reasons that don't have much to do with my case, I should not have trusted that man because...I trusted that man because, erm....

EB: Is this when you were 19?

C: That was when I was around 19, 20. I had a late start in life when it comes to understanding how reality is. I had a bit of a late start because I was really sheltered. But I think it would have been more useful for me if I had just done it on my own without financial help from somebody whom, I now

understand, did not have my best interests at heart. But that does not have that much to do with my asylum claim, actually.

EB: So, at the time that you met this guy...were you still waiting for a decision on your asylum claim or had you been granted?

C: He has been around since...I met him since...a few weeks after my father died. He got...he...I think he might be someone who my mum used to have a relationship with. And I don't really get that because she has been married to my Dad all her life but I try not to think too much about that. And then, well, he came around straight away after my father died and took charge of the family's finances. And one thing lead to another and now I'm left with nothing.

EB: Sorry to hear that.

C: It's family money so I can't really complain since I did not work for it. But still it leaves a bad taste in my mouth that someone else has it, and uses it, and buys a car with it, and at the same time, is dating my mum and have two children that I've never met.

EB: Right, is this part of the reason why the relationship with your family broke down?

C: It broke down because he got into the picture and took charge of the family. At the beginning, I believed that he was doing a good job but not now. And that's why I realised now that I would have better been served asking for a student visa back then, instead of asylum because he told my house master that I should claim asylum. And as a result I was stuck in the country for five years and I did not meet my family and we became estranged. And that's it pretty much. And apart from, I don't know how much I can really claim...how much I can tell you about how my asylum case went because it was over very quickly.

EB: Right, yes. So, you had the screening interview and what sort of questions were you asked during the screening interview? 22:09

C: Erm, I should have brought it with me actually. I can show you an email but...

EB: If you can sort of just remember roughly the...

C: Well, the lady asked me about my life, how I lived my life so far, who was my father, my parents, what they did for work, and...

EB: Did you have a lawyer with you at that interview?

C: No, I was alone. She asked me, she just wanted to know how I'd been living the past...how I had been living all my life. That's it. And I just told her, I guess. I didn't have anything to add at that time.

EB: And then did you have to wait a long time to have the full asylum interview with the Home Office?

C: It did not take more than seven months from the first time I got my screening interview to when I got my residence permit. It was over very quickly.

EB: And were you living in London this whole time?

C: Yes. Actually, not. I was living in London until the Home Office told me that it was ok for me to return to school. So, by that time I realised that, well, I could not fail so I worked really hard. I realised that if I failed then I would not really have anything to show for it after.

EB: So you felt more pressure on you than other students. Because all students feel pressure, don't they, to do well but...

C: All students feel pressure but I was worried that if I did not even pass that...although I, truthfully, only had...while they had 9 months of school, I had around 5 or 4...so, I had to work harder just to make it by.

EB: I'm trying to understand why...because you were at school in Wolverhampton...you claim asylum...why did you have to move to London?

C: That's what the family friend - who I just told you about - told me that I should be doing. So, I did that but could I have stayed in Wolverhampton? I had no idea.

EB: What year was that? When did you claim?

C: 2011, 2010.

EB: And were you being supported by your family while you were waiting for your asylum claim? Were you claiming asylum support?

C: Yes, I was supported by my family.

EB: You were supported by your family. Ok. Well, in that case, because...It's only if you ask for asylum support, that's when you're dispersed and you don't have any choice about the accommodation you are in or where you are in the country. But because you were being supported, that's why you were there in London.

C: The only thing that's unfortunate is, during that time, when I was doing my screening interview, I could not stay in school. That's my only regret for that time.

EB: Yes, of course. Yes, because once you claim asylum..yeah.

C: Apart from that, I kind of got a holiday, I guess. A long holiday I didn't actually want but...

EB: You said before - it's really interesting - about how your...once you claimed asylum, your friends were treating you differently. What happened?

C: Yeah, I was trash, basically. For a while, it took my friends a while to get used to the idea of, well, it's just his status that's changed, not him. So, erm, I did not hold it against them for a long time. I was a bit annoyed but I got used to it. And it was not really my friends in Wolverhampton whom I went to school with. At the time, it was my friends that I made before when I was, when I lived in Taunton. And I told some of them that I had become an asylum seeker. And I realised a bit later that was a mistake because another one of my friends led me to a page where they were making fun of me. And I thought, ok, that's turned a little bit. But it was just because I was an asylum seeker and I was someone to avoid. 27:38 So, that happened but I got over it because, well, what else was I going to do.

EB: Do you think that those negative images of asylum seekers, is that quite common? Have you found that?

C: I think it's old fashioned people whom...because my friends would only be thinking about me that way if their parents thought about it that way. That's why I didn't hold it against them for a long time.

EB: That's very gracious of you.

C: I've had to learn to be gracious. It's a method of survival only. So, yeah, it's like how people used to think about the LGBT, you could say. It's an old fashioned kind of thinking and lack of understanding. Like, it's not...if I could trade living in this country, which is great, with my father being alive and being with him, I would trade it [clicks fingers] like that. But asking for asylum, it seemed was my only option at the time and I took it. And, as some people did not really understand, I did not, I did not come from a war infested country, and I did not come here with the possibility of being a dangerous person, and even for the majority of people like that, it's not like they're just fleeing from hardships. But for me it was...the possibility of me being that way was non-existent because my friends had seen me grow up. I had grown up with them. I spent pretty much half my life in boarding school. At that time.

EB: Boarding school in the UK?

C: In the UK. And, actually, in the UK and...I had spent pretty much time all of my childhood away from my parents because they were busy in [name of country]. But...well, my friends have seen me grow up so it's turned a little that they thought I could be that way. They took it in strides but I understand now that kids are just nasty, that's it. It's not really something that I should feel personal about but it still feels like that.

EB: So, the Home Office recognise, because of the high profile of your father, that you'd be at risk if you had to go back to [name of country].

C: That was no question. The current president is someone my father treated badly so it would not be a good idea for me to return even now. Because even if he told me that if I went back to my country right now, and I say him again, and he was all nice and happy, the very next thing I would do is cross the border on foot if I have to. There is no way that I can stay. I don't think that I can feel safe in [name of country]. Even now. And there are too many people whom have benefited from my father passing away. Like, his estates or the plantation fields. People will say that belongs to the people of [name of country], and it does, but someone will feel...it could be argued that because it belonged to my father, it does not exactly belong to me, it should go to the people, which is fair. But even if we think like that it has not gone to the people, it has gone from one rich person, my father, to another. And even the business men [name of country] have a reason for me not going back there because I could claim what's mine. So, yeah, it's not safe.

EB: Tell me what that feels like, that realisation of not being able to go back to your home country?

C: It's a bit different for me. In part, I feel a little bit wretched because that's my father's heritage. He left some things for his children to have and, well, I don't know about my other brothers and sisters whom I've been estranged with. But I've seen none of it, so. It stings a little bit. It would have made life here easier. But that's ok, I guess. As to, all the sentimental values, I've never actually lived in [name of country] for extended periods of time until after I was four years old. I don't speak the language. I don't really know of the prefectures names. I have no contacts there. The only reputation that I have in that country is as somebody's son and I don't feel like anything there is my own. I don't feel like I belong there because I have not grown up there. When...after...because the first time I moved away from my parents was when I moved to Switzerland for around four years. From when I was 4 until I was 6. From 6 to 13, I lived in Morocco. And then I came to the UK. So...

EB: Gosh, you've travelled a lot.

C: Yeah, well, so, I don't really remember [name of country]. I just went back to the country to meet my parents but now that they are not there anymore, I don't really have a reason to go back.

EB: Where is home?

C: I don't really know, frankly. I want to say England but, well, I don't have a passport, that would be a bit weird if I said that. Apart from England, the one place that I remember most of all is Morocco. And it's the one place I've had a house there. But I'm pretty sure it's been sold off my now. I don't know...yeah, I think that's my answer, I don't know where is home. I don't know.

EB: So, when you got the positive decision from the Home Office, how did you feel when you received that news? 36:48

C: I was glad that I would not have to move away. That I would get to finish my studies. But, erm, I realised at some point that taking care of my family was my motivation to be...for some day to take care of my family was my motivation to work harder. But that system that I had was gone. I spent a year or two a bit lost as to what I should be doing because...well, I had lost my motivation to try harder.

EB: Tell me what happened during that period? What was life like? What were you doing?

C: Is it ok to say that aloud? Because I did not do anything that you would consider legal.

EB: It's completely up to you about what you want to say.

C: I did a lot of drugs, basically. Nothing that would be considered over the top. Like I met my friends, I had fun. Like I was trying to find myself again. But I just wasted two years of my life doing nothing, I think. That's what I could call it. That's pretty much, yeah...that's pretty much it.

EB: And, so, do you feel...tell me what's happening with...so, you've got your refugee status. You've had that for how many years?

C: Five years.

EB: Five years. Ok. Which means that you can then apply for indefinite leave to remain. Is that your plan?

C: I did that but, well, there has been extenuating circumstances. Which, I guess we could get to a bit later when I'm ready to talk about it.

EB: Alright. Ok. Could you perhaps then...I'd be really interested to hear a little bit more detail about what it was like when you had the interview with the Home Office. You described the person interviewing you as, sort of mild, not being overly warm...I'm interested to know about the environment...you know, what's it like when you go in to have your interview? What's the setting like?

C: If it was another person...for me I did not feel much difficulty because I'm fluent in English. And, well, my story rolls off my tongue, so. It was very easy to talk about...well, not very...not the emotional part...I mean, you see me right now, I get emotional even talking about it. But...er...it's er...there is nothing that is too difficult to talk about...there was nothing that was too difficult for me to talk about at my screening interview. And...I have to admit, I did feel a little bit intimidated because it was just me, and the lady, and the tape recorder in that closed room. It was all white. When I looked around, I thought, is this where...as I saw on...I saw episodes of immigration police before. I wish I shouldn't have. It's like going out at night after having watched a horror movie. 41:13 And I was wondering, is this where they're going to put me in chains or something? And I was a bit stressed out but I got over it quickly.

EB: I hope that this room with the tape recorder isn't reminiscent of...

C: No, it's fine. This feels like a classroom. There is...you picked a good room. So, it's fine. It's fine.

EB: Because I've been to the Home Office before with clients who are unaccompanied asylum seeking children, because...this is when I was working as a legal aid lawyer...and I remember there being a lot of security and the people who worked there being quite serious and hostile, and it felt like quite a severe environment...I don't know if you felt the same?

C: There was...my screening interview was not difficult but the first time I came to the Home Office to make that appointment, you know, at, what was it called?

EB: Was that in Croydon?

C: Yeah, in Croydon. The first time...

EB: Is it Lunar House?

C: Something House...but...'something' house [laughs].

EB: It was a long time ago.

C: It was a long time ago, yeah. But, erm, the first time I went physically to claim asylum, the staff was difficult. I talked to an elderly lady that was opposite, on the other side of the screen. She was asking me the wrong questions. I felt that way. She had a set of questions that I was supposed to answer straight forwardly, as I was told. But the questions did not work for my mindset. If you understand what I am trying to say. Like, why are you claiming asylum? At that time, I did not understand the answer that was expected of me. Like, because it's dangerous for me to return to my country. Which it was. But the issue is that it has always been dangerous for me to return to my country because my

Dad was president. So, my mindset at the time was...why haven't you returning to [name of country]? Because I don't have money. My mindset was I don't have the money you need to pay for bodyguards and stuff like that. I felt like she was asking me the wrong questions but I didn't get at that time that, well, it's me that's not understanding my situation properly.

EB: Right, ok. Did your lawyer tell you about the types of questions to expect?

C: Erm, I don't...I think she might have but I'm not sure...but I don't think she was very thorough or else I would not have felt like that at the time. 44:48

EB: Would it have been helpful having a lawyer there with you?

C: Yes. Definitely. I would have felt a lot less stressed out and...I knew I was going to be ok. I knew that was just a meeting. Like, she kept reassuring me after I told her my story, that I would not face problems because my case was very straightforward and I had all the evidence ready, there was no reason to say no. But I still had a lawyer, so I can't imagine how it's like for someone who does not speak the language. People who come at Asylum Justice, when they come, the reason why I have empathy is because I have been through that and I feel like it's been a lot easier for me than it is on them right now. That's why I...one of the volunteers there once praised me about my empathy. I told him, I am not really empathic, I just understand he's got it worse than I do. That's it.

EB: It's interesting that you use the word empathy, do you think that the Home Office...

C: Lack empathy?

EB: Well, yeah, this is where I am going, really....and, you know, I wonder whether the other people who you've met, you encountered...such as your legal aid lawyer...did you feel like they were empathetic? Do you feel like they understood what you were going through?

C: I was trying to make myself understood but it's hard...unless you allow someone to tell you the whole story in every detail without interrupting them, especially for me at that time, I feel...it's difficult to feel sorry for a rich kid who finds himself out of place. And...man, I'm shaking.

EB: Well, actually it's quite cold in this room...I was about to put my jacket back on...because...it's nice and bright in here but...

C: I think it...I felt annoyed at the Home Office ladies because...the Home Office lady who I was talking to at the time...because she would not allow me to tell them...like...to tell them what I as here for. She had a strict...she had a set of questions. But I was eager to tell them everything but she would not...and the relevant information about myself that I was ready to tell her, she would not hear it. Until I told her, ok, my Dad was president of [name of country]. And then she was quiet and, ok, I'll just sit down and listen what he has to say. Until I said that, she did not really try to listen to me.

EB: Ok, that's quite interesting. Because the Home Office has these set questions, so she was trying to manage your story and make you tell it the way she wanted to hear it.

C: And it would not work for me because the straightforward answers that she wanted would not really make a lot of sense to me at that time.

EB: Yeah, of course. So, eventually, once you made your point, she then sat back and listened and let you tell your story?

C: Because at that time I felt like, I know why I'm here, let me tell you. Don't ask me questions when you don't know the story. Then ask me questions.

EB: Can you tell me a bit more about your work with Asylum Justice and some of the things you've learned from meeting other asylum seekers who've had their cases refused by the Home Office, dismissed by the courts, had legal aid lawyers say they're not going to represent them anymore...

C: Well, now I understand why set questions are important because everyone has [inaudible]. I was a bit impatient when considering that I was the one who was asking for help. I don't think that I should have been so impatient. 49:37 But, yeah, what did you say about the lawyers?

EB: So, people who have just been told no by the Home Office, the courts, by their lawyers...and what you've learned by meeting these clients? In addition to your own experiences, about the system.

C: There is definitely something wrong because there are too many delays with the Home Office. I think they must either be really backed up with so many immigration cases, or someone is just being lazy. I think it's the former. Yeah, I just feel bad for the asylum seekers because they...we...we...

EB: Does that feel strange saying that?

C: It feels strange saying that again because my case has changed since the five years have passed. I'm still waiting for the Home Office to get back to me about my indefinite leave to remain. So, I have to say 'we'.

EB: So, you feel back in the system?

C: Sort of. And I really don't like it. I'm not allowed to work at the moment. That's one of the things I feel bad about. Something I did not feel when I first claimed asylum. Being not allowed to make a living. It really scrapes on your back, sometimes. I don't know exactly how else to explain it. It's, for me, I think the hardest part right now. Not...because I used to work for a little while, here in Cardiff. And, after I started working, and then I had to stop. It feels like I'm being allowed to drink a cup of water after being very thirsty for a long while but then I'm not allowed seconds.

EB: And I suppose it reminds you of what happened before. Because you were studying and then that had to stop. Life was put on hold.

C: I hate when things get cut half way. It messes up my whole system. Change that happens like that, I've never, I've never been able to manage it well. Certain change. So, I cannot really say it was sudden. I was not expecting the Home Office...I was not expecting not to be able to work for, I think it's been three months now.

EB: So, you weren't really given clear information when you became a refugee about what was going to happen next?

C: No. I did not really know...I did not know how I should look for work or if I should be claiming benefits, if I was entitled to them. My legal advisor at the time told me that I was but, at the time, I did not know how to go about it. And I remember emailing her about it but she told me that she does not represent me anymore, so, deal with it yourself. And, well, to be fair...

EB: What was that like?

C: To be fair to her, it had been a long time since we had met and she did not work in the same department anymore. But it did not feel good because that lady knows pretty much everything about me. And I had told her everything. Even the things I would not tell a girlfriend or a best friend. Because she was my legal advisor. So, when she said that, I realised, ok, maybe she's my legal adviser, she's not my mum, I should not...I should deal with it myself. 54:35 It did not feel good. It did not feel good.

EB: And that must be very difficult as well...I mean...thank you so much for talking to me today and sharing your story with me....but that must be really difficult telling your....

C: I'm shaking inside.

EB: Yeah. Yeah. And you've had to tell that story to the Home Office, to your lawyer...

C: To the Home Office, to my lawyers...I've had to tell it to that family friend I talked about...and I told it to the people I used to live with when I was in London because it was expected of me. I did not want

to tell it to them but it was expected that I tell them why I was here. Since, well, since I was...since that family friend said that he would pay my finances, while I was there it did not always come through. I felt like I should at least give them that much respect...eh...that bit of respect since he did not come through, I had to give them something. So, when they asked me questions about what was going on with me, I did not do the really smart thing and I told them everything. And it kind of messed up my relationship with them because once you know too much about somebody, it's difficult to have a normal relationship with them. Well, we don't talk anymore. That's proof of it.

EB: So, you felt that they knew too much about you and that made the relationship difficult?

C: Yeah, pretty much. But, to be fair on everybody else, I think I generally speak too much about myself when I meet people. That's a bad habit of mine that I've never gotten rid of. I am a bit too truthful, I'm told. And I sort of rub people the wrong way, I guess.

EB: From your experience of working with clients of Asylum Justice, do you think asylum seekers get enough support and help as they navigate their way through the asylum system?

C: I think that some do but the majority don't because, well, from the people I've seen, let's call it the Home Office's default system is to start them without...is to allow them to remain with a certain amount of financial help but they don't call that benefits, do they?

EB: It's asylum support, yeah.

C: Asylum support, it's benefits?

EB: Yeah but it's not the same as the benefits that other people claim, so, it's a smaller amount.

C: Yeah, it's like £30 a week?

EB: Yeah, it works out for a single person about £5 per day.

C: So, yeah, if they're given accommodation, if everything else is met, including food, then maybe I can understand but it's still not a lot of money. And it does not allow...it does not allow for much hope as to doing something else with that money. Instead of...the only thing they can do is buy food. And it's even worse if you're a smoker.

EB: Yeah, then it's gone. You need to make some difficult decisions.

C: Yeah...when people are in that situation, hope will go a long way...a lot further than a couple more meals...I think the worst thing for an asylum seeker is not knowing what will happen.

EB: The uncertainty?

C: The uncertainty of it all. Like, being steady on their feet. I think that's the really frightening thing about the Home Office. You don't know what they are going to do to you. [59:52](#)

EB: Yeah, you're very much at the mercy of the Home Office.

C: And I very much dislike that, being at the mercy of somebody else that I don't know. But I guess that everyone is like that, somehow, in some way.

EB: What do you think is the most important help and information that asylum seekers should receive?

C: Where they are going to live, how much they are allowed to do, like, being told in detail, are you allowed to work, if you want to work, how you can go about it. For example, when the Asylum Justice clients receive their residence permit and the work permit, two of them have asked me in the past, so, how do I look for a job. And, I thought, that's surprising that he did not know because people are just expected to just know how to do that. So, I told them about the websites but...the various websites where they can look...but they were middle aged, they did not know how technology worked. So, I

went with them to the central library and I told them...and I tried to teach them how to look for a job. And, I gave them an email address...

EB: So, they didn't have an email address set up?

C: They didn't have an email address set up, so, I got them to the 21st century but I don't think they've really used it. I think they...because I asked them to email me when they found a job. But they still haven't done that, so I think that they must have gotten a job through word of mouth, or they just did not feel like using technology anymore.

EB: This is quite a big problem, isn't it. And it's a barrier to accessing services, if you don't have that digital literacy.

C: One of them did not have a bank account. That was before I started. The person who did not have a bank account, that I tried to help but I was unable to, that was before I started working for Asylum Justice. Erm, he did not have a current address. He lived at a housing charity, like the Salvation Army, or something like that. One of those charities. But he could not keep their address without a letter or something saying that he lives there. I can't really remember the details but it was difficult for him to get. So, because of that as well, he could not get a job because they want your bank account details.

EB: I meant to ask you, how did you end up in Cardiff?

C: I moved with my brother.

EB: Right, ok. So, you've got your brother here with you in the UK.

C: I've got my brother [brother's name] in the UK. And, well, I'm Colosso, he's Falosso. I will just call him [brother's name], it's a lot easier for me. But he, he studies business and law, I think, here and he's really hard working. But thankfully he does not have the problems that I have right now so I'm happy for that.

EB: So, does he have British citizenship?

C: French, I think. He went to France because...to ask for the nationality because he found his birth certificate but I could not find mine. And at a certain time, I think it's too late for me to do that now. Well, I read in the British, the French...because I want to live here.

EB: So, you'd like to have British nationality?

C: Because I want to live here, I don't feel particularly close to France. Although I speak the language, I don't want to live there some day. I want to live here. 1:05:17

EB: What advice would you give to the Home Office on how to best handle asylum claims?

C: Empathy. It goes a long way. I mean, when someone is being...when someone is being...when a person of authority, which pretty much to asylum seekers, every Home Office staff is...you are already scaring us...scary enough..they don't have to add on top of that and some, I've noticed and heard about some being unkind or mean. And I think that's not helpful at all. If you want someone to tell you about their problems and be truthful, empathy goes a long way. I mean, there was a client at Asylum Justice, he could not...I think he was hearing impaired and he could not speak. Only one volunteer could speak sign language but it was the wrong kind of sign language. And, I tried speaking to him but I could not. I just sat down with him and tried to be empathetic...tried to make communication. And somehow I managed to get some information as to where he lived and what he needed from us. I would not have been able to do that if I was being forceful. Like, thankfully, I was not in a rush or anything like that. I understand that some people are but...yeah, the Home Office takes its time when it first meets an asylum seeker because being animosity...having animosity when you meet someone like that for the first time who probably has low self esteem, is not any kind of helpful.

EB: Do you think that's quite common when people claim asylum, that feeling of low self esteem? 1:08:04

C: Of course. Because I don't know what most people have to go through in order to claim asylum but I feel, personally, that being so down on your luck that you have to beg someone for a sense of identity, is pretty shameful. And to add on top of that is kind of unfair.

EB: That was really interesting something you said at the beginning about how claiming asylum seems to be a last option. And I know you did it because you were advised to do it, but you hinted that maybe, if there had been a different route, if you could have maybe gone through a different immigration route then you might have done that, even though you have such a strong asylum case, that you are a refugee, that you fit that definition of the Refugee Convention, that you still thought that you would rather...

C: I still would rather, at that time, not now, I'm less childish, but at that time I felt that it was not the right...I felt that I would have rather done something else because I did not want my acquaintances, the people I knew, to think less of me because of being a refugee, claiming asylum and everything like that.

EB: And I suppose the systems in place don't help with that image because they put people in very difficult circumstances.

C: Not really. I met some...I met a random person once in the street. I was by the bus stop, I think it was two years ago and, as I've told you, I'm a bit used to telling everyone everything about me when I first meet them. So, I told him I'm a refugee and he was ethnic, so it's not like he was white and racist, like that. He was ethnic and he told me, no, I don't like refugees, and stuff like that. And I told him that it's not your business to like it. It's just, like, you're asking me why my skin is dark, it's just the situation that I'm in at the moment. It's not something that I chose. It's just something that had to happen for me to live and be ok.

EB: Do you think that you were treated well in the system, or do you think that you were treated badly, could you have been treated better? ...sorry, that was three different questions...

C: That's ok. I think that all can be...it's three different questions that need one answer, so it's ok. Erm, I don't think that I was treated badly because I did not ask the system for money. If I claimed asylum support or benefits at that time, and all of that, I don't think I could have gotten away with my...erm...my screening interviewer being mild with me. Because people, when you take something from somebody, an institution or something like that, and that somebody feels like you owe them something in return, I think that when you owe somebody something, you will let that someone treat you unkindly. And some people will take advantage of that. I don't know...am I explaining it correctly?

EB: Yeah, I think that you're explaining it really well. I think that's a really interesting idea. If people feel indebted then it puts them in a vulnerable position and they can be taken advantage of.

C: And they can be taken advantage of or, things like that. So, yeah, usually when someone has been unkind to asylum seekers, it's because the asylum seekers will take it because they are taking something and they feel like if they can repay that way, by just taking the shit then I might as well. But that's the way I feel about it, I think. Yeah. [1:13:49](#)

EB: Do you see that? Do you see that at Asylum Justice? Do you see that people put up with being treated badly because they think, well...

C: Frankly, people everywhere put up with things like that but I think that when you are an asylum seeker, as I said, that status or, I don't know, who you might be or where you might come from but I think that status will always come with a bit of low self esteem. Even a tiny amount. Because you are asking for help, so it's difficult to be in a situation, a position of strength. So, that I didn't talk to the occasional, er, I'm going to call it 'shit-taking'. I don't know what side of the euphemism I can use without cursing. But, er, I think...

EB: I think that's probably the most appropriate way to put it, yeah. Taking a lot of shit.

C: I think that low self-esteem doubled with that shit-taking is a bit harder to swallow than when you are just working somewhere and your employer is being unkind to you. Because you can quit and get another job. But you cannot quit being an asylum seeker. You just have to stay.

EB: Wouldn't it be wonderful if we could just radically change the way we think about asylum seekers and refugees and treat asylum seekers and refugees? And wouldn't it be great if we could see - this is what I would like to see...

C: It would be nice but a change like that would take decades but what's happening in Europe and America is great. The LGBT and all that have been accepted but even that took years and it's still in process of people understanding them and for asylum seekers the issue is that, it's not something that, I don't think, makes people feel disgusted. I don't think it disgusts. It's just that they have to pay taxes. More taxes and it makes their life harder. For the LGBT it's different. Because it's just the way they are and people don't like the way they are. But when it takes something from someone's pocket...I'm trying to be understanding but I think that people do not like the fact that they have to pay for someone else to stay here. And I understand that and that's why it's difficult for them to accept. But I don't want to think of a world where someone hurts somebody without any reason whatsoever...it's just they hate it...although I know that there are people like that, I don't want to make too much of an argument for it. Like, I can rationalise what I've just said but the other thing, I don't want to try to defend it, I'm not that kind of person.

EB: I think that I've asked all the questions that I wanted to ask you. I don't want to keep you all morning, because I'm sure that you've got other things that you need to do, but what would you like....would you like any final words about your thoughts on the UK asylum system?

C: Hmm...

EB: So the thesis is about...I'm exploring the concept of fairness in the asylum system, the asylum legal system, and I wonder if you have any final words that you want to say on that?

C: Fairness...

EB: It's a difficult and abstract idea, isn't it, but just how you encountered...whether you think it's present at all or is it not, is it absent?

C: If fairness is present? I don't know. I've always been wondering is it fair that my case only took six months when people who are suffering more hardship than me wait for years. Now, I know that I had all the evidence so it was able to be rushed. And because it was my case, I don't want to feel sorry for it but since working for Asylum Justice, I get a different perspective, like. Yeah, people have gone through a lot of stuff to get here and, er, so, I can say much about fairness concerning that. How some people's cases take a very little while. While others take a lot but there are also other people whom it is obvious that they have suffered hardships, like a few of the clients at Asylum Justice have been tortured and it is obvious on their body that they have been tortured. And I know, I've seen pictures and I did not want to look at them. When I see that, I wonder why don't they have a residence permit yet. They should not be kept on the balance as to, will I have to go back to that? Like, thinking about it. It much be so much harder for them than it was for me. And I think it would be a lot fairer if they were given priority. Because unless there is some thought as to whether they might bring harm to this country, as in, are they a terrorist, unless there is some thought to that, I don't think it's fair to keep people like that in the balance.

EB: It seems like quite a cruel trial, doesn't it. That waiting.

C: It just, yeah, exactly what you said. It seems unnecessary to keep them waiting because...it feels like...ok, I'm going to go with another analogy again. I like making analogies. You don't have to be super smart to make them. It feels like, imagine a cow awaiting the slaughter, like just, you take one of the other cow's out of the den and you allow the cow to see it's friend being slaughtered and imagine being that cow and just waiting for your turn. I think that's how it feels like when you've been tortured and you're waiting for your asylum case to move along and be granted asylum.

EB: Are you surprised to see cases like that at Asylum Justice? Because these are people who, as you say, you can see that they have evidence that they've been tortured. It's clear to you...

C: Surprised? Not really.

EB: Why don't they have legal aid lawyers?

C: I've heard about atrocities....As in why they don't have legal aid lawyers?

EB: Yeah, and why has the Home Office not accepted them, why has the Home Office refused them, why have they not got a lawyer, why are they in that situation?

C: That surprised me a lot, actually. I don't really understand...I have to admit, I don't really know about the whole system and how they work. But when someone has been through that and they are not...it's pretty obvious that they cannot go back to their country. The marks are on their body it is not anything to do with a lack of evidence, they walk with the evidence on their body everywhere they go. It's not, it's not something that really needs to be think about thoroughly...thought about thoroughly. Because we have the proof there. It's there. Yeah, it cuts at me every time I think about it because....

EB: And do you think that asylum seekers get enough help? Because you talk about the marks that they've got on their body but what about the scars that they don't show? So...

C: Mental health?

EB: Yeah.

C: I've heard of asylum seekers at Asylum Justice having mental issues. I have never heard about any one of them getting mental help. I know that they get GPs but so maybe they talk to their GPs about it. But I've never heard of any one of them going to see a professional in that particular area. So, I cannot say much about that subject.

EB: C, thank you so much. We've covered a lot of ground.

C: I've tried. You've seen that I've been kind of nervous.

EB: And also it is actually really cold in this room, isn't it? I'm feeling quite cold. Yeah, but thank you because we've covered a lot of ground there. Shall I turn this off? 1:25:10

APPENDIX 8: TRANSCRIPT OF INTERVIEW WITH MOHAMMED 2

EB: I will, yeah, of course, I'll speak slowly and if there is anything that I say that you don't understand then please ask me to repeat it.

M: Ok.

EB: OK, so here's the information sheet and it explains the purpose, the aim of the research. So, erm, this is for my PhD thesis and what I want to do is speak to asylum seekers and refugees about their experiences and views of the asylum legal system here in the UK. So, I don't need to know about what happened before arriving to the UK. It's about what's happened since...

M: When I'm here?

EB: Yeah, after arriving.

M: Very good. That's very good because if I told you now I've been here 11 years...

EB: You've been here for 11 years?

M: 10 years...because I came here in 15/2/2008.

EB: In 2008? Right.

M: To this month. I come here...this is a little bit...I come here looking for peace in life but I find everything is very bad for my life. This is my mistake, how I come here. This is big mistake how I come here to UK. I know...what can I really say about UK...UK, she not doing anything for my country or my people or for my....before 100 years...and she will do something good for me? I don't know. I don't, er, think that. Then I am stupid because I think I'm coming here...it's not, you know, the people, the UK people, they are very, very nice people, very nice. Only governments, they thinking, I don't know, who plays by the mind of the governments...I think you understand me...for the politic, that's I mean. Because, you know, before, what before, you know what you say for the Israelian, you give our land for him and you go like this....but now, some problems happen to me. After 40 years working in my job - and I'm General in my country, everybody respected me, everybody liked me, I liked everybody, I make everything for the people, I don't make anything wrong in my life, I don't know - but when I come here I see myself...I not find the [inaudible] subjected to put myself in this side. Like the prisoner, you know? I told them in the immigration, why are you not put tag on my leg to know where I go and where I sleep? Because 10 years here without giving me my paper or something, if I am terrorism or something, show me! Show me what I do. If you have information or something like this. Told me then! They said, that's it, that's it, that's. Every time, every time, now....10 years. And this time I told you exactly...my daughter, she lives here...when I go to town I go from [inaudible] to Ely, two times in the day, walking. I really good walking, you know, the soldiers, no? And every things. After now, I get from the bus to here, I think I resting on 20 times. Sit and walking. Sit and walking. 10 years. 10 years.

EB: Yes, it's a very long time.

M: A very long time.

EB: How did you arrive to the UK? So, you arrived 2008 - can you tell me what happened when you arrived? Can you describe what happened?

M: You want to know when I come here to the UK? Ok. Ok. We start from when I coming. Yes. When I coming...

EB: So I can get a rich picture of what happened.

M: I'm not want to say about why I came here but the reason is very clear because the [inaudible], the semi [inaudible] in our country and they send the army. They want to kill me and they shoot me. They try to find me. For three months, I am hiding. And after, I go to Tunisia and I take visa and I come here to UK because my daughter is in here. And I go to the immigration to asylum seeker here. I want to be refugee. And the first time, the first interview there is - I give you the names. There is a lady, her name is Emma, I have her name in my cases, she made the interview with me. The first one. And the solicitor...she phoned the solicitor after, she told them, it's ok, Mohammed, he gets his papers and he is very good man and for this we [inaudible]. In the first interview. The solicitor called me and he coming to my face, I go to him, he told me, your case-owner, she phoned me and she told me after two weeks you will get your papers. I'm happy. Because I get my papers...

EB: This was in 2008?

M: Yes. After two weeks the papers not coming. One month, the papers not coming. I go to the solicitor, 'You told me two weeks'. He said, ok, he phoned for the status...for the case-owner, she said, I'm sorry, I have baby now, I'm in holiday and my friend he take his case and he sees something he wants to ask him about it but I am sorry about him. He told me the Home Office, she'll return back to ask you some questions or something. I said, ok, if they want to ask us. They sent for me a letter after six months. I am waiting this letter.

EB: Where you in Cardiff?

M: In Cardiff. Yes. When they sent for me, I go to the immigration...another case-owner. His name is Sam. Sam. He told me, first, he told me, I am sorry, we have some questions, to ask you about these questions. Not from me or from immigration here, she's coming from London. These papers, like this, 500 questions.

EB: 500 questions?

M: 500 questions. I said, ok, any question...I can answer you any question. When he asked me...yes?

EB: Sorry, what kind of questions were they asking you?

M: Listen, when he asked me about these questions, not any question about my life or about me. He asked me, for example, about you...[inaudible]...if you are my friend. Are you, for example, if she's stupid question, that's it. They asked me, for example, there was an Ambassador of the Palestinian law, President of the law in Palestine, he make decision, any Palestinian man, he sell his land for the Israelian, he will be hang him, like this. He said, why you agreed about this? Did I have decision about that? This is a Minister, I am an Officer. Why you ask me this question? Go and ask him. Go to him and ask him why you take this decision. All these questions like this, not any questions for my life. Why you coming here? How is your life? How is your health? Only these questions for the people, for the [inaudible], for every thing like this, not for me, for my life. I gave him the answers. From this time, from 2009, and now 2018, you see now how much wait...

EB: And you've been waiting...

M: I'm waiting, waiting, waiting...I go to the MP, Mr Kevin.

EB: Oh, Kevin Brennan?

M: Yes, and I go to many, many people like...they looking for the asylum, what happened to him, or something like this. Not anybody can do anything.

EB: So, did the Home Office, did they make a decision?

M: Them, if you see the papers, if you see the papers, soon we'll send the decision, soon we'll send the decision, sooner, sooner, we'll send the decision, sooner, sooner, we'll send the decision...maybe I have like this. Maybe, 10 or 11 letters. The judge of the court, he give me allow for the decision. I can...after one month, the same decision, he destroy, dismiss. And this is law. How can you get the law, and after you get dismissed? By the judge. But why?

EB: When did you go to see the judge?

M: 2010.

EB: 2010. Ok. And did you have a lawyer to help you when you went?

M: Now it's stopped. Not any lawyers.

EB: No lawyers?

M: No lawyers, yes. I go to the Church here, there is a church here, they help the people. I go before, maybe three months now, they told me we will help you and they take some papers like this from me but not answer me from three months now.

EB: Which Church?

M: The Church here, where's the Capitol.

EB: Alright. Windsor Place?

M: Yes.

EB: So you went to see Asylum Justice?

M: Yes, I went to see somebody there but...And they told me, we will help you like this but I am not receive anything to this moment from this. This is not...happen with me with the Home Office...but if you know how I live, for example, for my life, how can I told you...I take, for example, the Home Office give me a flat to live, I live by my own from 10 years in the flat. It's good. That's good.

EB: In the same flat for 10 years?

M: No. They changed. Yes. Two flats. Before, I lived here in Canton, before. And they sent me now to Ely Road. Yes. Seven years now in the Ely Road, I live. And the doctor, I go to the doctor, he is good, they help me by the doctor, anythings I need they take me by hospital. Now my age is 73 years now. Maybe, somebody every day knock my door to think I still alive or dead because yes, normal, they coming and see me like this. And they give me £35 a week. I am smoking. If I am smoking this £35 is not enough for me. And to eat, clothes, for example, perfume, something like this. It is not enough. I am not lying about that, my son helps me. I have two sons, three sons. When I said I have no money, they send for me, £100, £200, £300, they send for me money. Every time they send money for me because they give me £35 which is not enough...but...

EB: So, I'm just trying to understand what's happened with your case...so, because you said you went to court...so, the Home Office must have....so, you went to see the first case-owner and she indicated that you were going to be granted refugee status....

M: If you want...that's what happened...I have because...when they make the interview, they make copy for interview. They give me the interview and they take one. I have all of them. I can send it for you. Or I bring it for you and you read it as you like. One month, you take one month...because there is something is not....because they want to send me to...something happened for 6 months...6 months?...3...before 7 months. I tried to make something. I didn't want to stay like this. I want to return back to any country. I don't want to stay here in the UK. Why they do that with me exactly? Why? I'm not understand. 14:00 I try. I make my way and I go by my way to Tunisia for 7 months. By any way, I go.

EB: So, you want to go to Tunisia?

M: I tried to go to Tunisia because I came to Tunisia when I take the visa from Tunisia. Tunisia, when I go there, they give me 15 days only to stay in Tunisia. 15 days and you must leave. After 15 days,

the police is coming and take back by cars to the airport and put me in the airplane to return to back from where I came. I came from UK, they return to UK.

EB: Ah, so this was 7 months ago? So, 7 months ago you travelled from the UK to Tunisia? And you travelled yourself?

M: By myself. Yes.

EB: By yourself.

M: Without any ask anybody.

EB: Why did you go to Tunisia?

M: Because I want to go to any country.

EB: You don't want to be in the UK.

M: You see, I told you, 10 years now, it's too much for me. 10 years is killing me. Now, I talk with you, I see somebody make like this and my health is very bad. I see myself now. They want to make operation for 1 year. They cannot make it because my heart is very bad. And when I came from Tunisia, they put me in the jail and they...get [inaudible]...the jail...the airport jail. They put me 5 days and they take me to the airport to return me to Tunisia. Tunisian government and the airplane, they refuse. They drop me in the airplane. And they return me here. And I be back here, I received the letter from Liverpool. They [inaudible] me. They told me, we need to talk with you. Not interview. But we want to talk. Like you and me. I said, ok. I come. I go to Liverpool. I see ladies there some person. And they told me, we're not going to ask you something about...why you cannot live in Tunisia. I said Tunisia is not my country. Tunisia is not my country. How can the Tunisian, they go from Tunisia. And you know what happened in Tunisia. And I tried to live there but they not want me. They take me and they put me in the airplane. What can I do? This is worst. And the worst is I cannot go because the Israelian closed the Jordan she is not give me time to go from Jordan to West Bank. And Egypt closed to Gaza, closed it. And she not accept me. Where I go now? If you see some place took me to another country, for example, Canada, America, any country, you not want me here, send me. Send me, please! I told them, please, send me, I not want. Before three weeks, I told them, I write letter. I will stop eating or like this. You understand the grief. Stop not eating.

EB: And you said that to the Home Office? 17:44

M: Yes. They said, go, do anything as you like. What you want to do, do. They not care. They not care. But if I do it, I do it. But I not do it now. I will not do it now because if I do it then I will be very stupid if I do that now. Because the prisoner, you know, if you go in the prison, you make something wrong and they put you in the prison, for example, and you know yourself in the prison. But what I do? I am in the prison now.

EB: You feel like you're in a prison?

M: Exactly. Exactly. I'm in the prison. Because what I can do? I go to, for example, I get internet because if I have not internet in my house then I cannot talk maybe with my family, my friends. I see pictures. Many things like this. They told me, you will need a debit card. Account bank. If you have account bank you will pay, for example, £27 monthly. If you have not, you will pay £45. You know how much the difference between...yes, I cannot have [inaudible], I cannot have debit card, I cannot have anythings to do...

EB: Do you have to go to the Home Office to report?

M: [Inaudible]

EB: How often do you have to go to the Home Office? 19:28

M: Every week now. Every week I go sign there. Every week.

EB: What's that like?

M: I go to the Home Office, they want to see me, I can't...[inaudible]....

EB: Can you tell me about the first meeting you had with the Home Office when you met with the female case-owner? How did that interview go? What happened during that interview?

M: Yes. Only thing...she asked me many questions and I answered her truth. I am not lying here. I told them, I am Officer in the army. I am the...[inaudible]...I am the...[inaudible]...but not me, I have my soldiers, they protect him, protected some places, protected there...but something is wrong...not wrong...not wrong because...I am responsible for a country like Cardiff. I am the leader of a Country like this.

EB: So, a large region...

M: Many, many officers, many soldiers. Maybe any soldiers he makes something wrong or something. But I have three, for example, three jails on this side, in this area, I have three jails. But these jails, not I put it. I not do it. These jails are for the [inaudible], for the stealing, for killing for everything like this. You must have the safety for the people. Somebody, I think, I understand something because, you know, the life teaches you something, many things, now I am 73 years but every day, I take lessons. The driver, my driver for five years...

EB: In Palestine?

M: In Palestine. Yes. He is come here to UK and he takes nationality and after he comes and visits us. He sees my daughter. My daughter she is young. 18 years before. He knows her when she's small. Be he my driver, my driver. And make something in her mind, she married him.

EB: Right, so she married him?

M: Yes, she married him. Without I know. If that happened - excuse me for that - if that happened, you know, in our country, our religion, our people, what they say, what they do for the girl if she do that without permission from me....ok...but I don't do anything. I said, ok, this is her decision. Not anybody can do with me anythings.

EB: Can I ask, what would happen to her in Palestine if she married without permission?

M: She's coming here to the UK without...he made the paper because this is big story because she finished the school...I want her...like decision...for example, to send some people for teaching, some countries, and I want to send her to teach...I think I send her because he lived here this driver and married an English women and they have a girl and she come to visit us two times. And I [inaudible] for her, I like her too much, she is very good woman. And she told me, if you want [daughter's name] live in UK and she teach and she will come in my house, or like this. I said, ok, that's good. I sent her to the UK. It's my fault because...It's my fault because I agreed to she come here. When she coming here that's what happened. This person, I think he do everything with immigration. You know. Because he knows every things, he knows every things I do it but I am not do anything wrong. When I sit by myself like this and looking, what I do something wrong? Did I make something wrong? No, nothing. My feeling on my life, the things, I helped the peoples. I help everybody. I cannot...if something happened to any person looks like happened to me, I will do something for the people. That's what...maybe he do something or he lying about me to immigration, or something else. That's what I think. For the immigration, to this moment, not make any decisions for me. But the truth, I don't do anything wrong.

EB: Because you told your story and you were honest and you answered the questions...

M: I told them the true story about my life. From the beginning to this moment when I come here to the UK. Now, I think...10 years...[inaudible]...

EB: And you had a solicitor helping you when you first claimed asylum and you went to the Home Office?

M: Yes. The solicitor Michael...Michael...solicitor and Sarah...there were two solicitors. And after, she sent for me, we stop now because the government stop paying money. They stopped. And I told her, I have no money to see any solicitor now. If you want to sit, we will do you one hour, they want £200 to speak with him. I have no money to see solicitor.

EB: Did your solicitors explain why they weren't representing you anymore, why they stopped?

M: No. No. Not anybody explained for me why or what happened. This is what happened. Not anybody can ask me and told me.

EB: Did you find asylum justice helpful when you went to see the lawyers at the Church?

M: Yes, they told me we will help you. I go there. How can they help me? Maybe the lady there she take the paper and she told me I will send to the barrister and he will read the paper, this paper, and he will do something for you but you need time. I said, ok, what I do. And from this, now, three months. I am not have any news from here. Maybe today, 6 o'clock because every, every Monday at 6 o'clock, they're here at the Church. Because today I have a piano...you know piano? I have somebody give me a piano. I don't want...my house is small...I want to give it for the Church. I want to go to the Church and told them if you they coming and can take it free.

EB: Do you play the piano?

M: If you want it, come.

EB: I'm not musical, I'm afraid.

M: Because I am not musical and she is very heavy. You need four man to take it. I want to give it for the Church today. I came for the Church and give it for the Church. I hope they accept it.

EB: That's very kind. Can you tell me more about what happened when the Home Office tried to take you to Tunisia? Can you describe what happened?

M: They take me from...

EB: So, that was 7 months ago....27:45

M: Yes...not 7 months...yes, 7 months...6 months...I have the date. They put me in the Gatwick prison there in the airport.

EB: How did you receive the news that they were going to take you from the UK?

M: They take me.

EB: They just took you? When? When you were going to sign? When you went to report?

M: No, no. When I came from Tunisia. When I came by the airplane.

EB: Ah, when you first arrived? Sorry.

M: They take me and they put me in the jail. And after she waiting, the airport...

EB: This was in 2008?

M: Yes...no. Not 2008.

EB: This was 7 months ago?

M: 2017. Yes.

EB: 2017?

M: Yes.

EB: So, you were...what I don't understand is...did the Home Office...did they take you from the UK to Tunisia?

M: No. They take me from the prison. When I came from Tunisia. First time, when I go, I go by myself. I make the papers by myself. And I go to Tunisia. Tunisia give me 15 days to stay. After 15 days the police coming and take me to the airport. After 15 days, finished here in Tunisia.

EB: If I understand this properly, so you arrive in the UK in 2008..

M: No. 2017.

EB: Yes, but you first arrived in the UK in 2008...but...you stayed in the UK from 2008 to 2017...you're in the UK...and then you travelled by yourself...you though, I've had enough...I'm going to Tunisia...

M: That's enough, yes. I want to go...

EB: So, you paid yourself to travel to Tunisia?

M: Yes, I get the ticket, everything, by myself. And when I go to Tunisia, the government of Tunisia not accept me. They return me to the UK. The UK, when I come to the stamp the papers. They catch me and put me in the Gatwick prison. And 5 days and they told me, you will be back to Tunisia. I said ok, send me to any place. I don't care. Tunisia, Morocco, Jordan...erm...any country that will accept me, send me. Because I not want to stay here. When they take me, they take me to the airport. And we go to the airplane. Because I see the pilot and the driver of the airplane and he talk with me.

EB: So, they tried to send you to...so, you'd been in Tunisia, you'd come to the UK, because the Tunisian government had sent you to the UK...now the UK government is trying to send you back to Tunisia?

M: That's it, yeah. Yes.

EB: Ok, so you're going to the flight...

M: The flight...the driver, he said, I cannot take him because this is not his country, he is not Tunisian. How can I take him to Tunisia? They will return him back and I am not...he refused. And he talk with Tunisia and Tunisia refused. They told him don't bring him. That's what happened. They put me...and the same day...in the same day, the sent me to Cardiff...return back to my flat. I stay in my flat.

EB: How did that make you feel?

M: My feel?

EB: How did it make you feel?

M: What do you think? I don't know...sometime...something the religion has got because she gives you something for thinking about at last. If you kill yourself, kill yourself. For example. But what do you accept? You not accept anything now. And you will not accept anything at last. Because the health will not forgive you if you kill yourself. And I think because, I believe in God, I believe it. For that, I said I'm not do anythings. I'm not do anythings. But, you know, maybe something one time [speaks in Arabic]. You see, I see here, in the UK, Egyptian, Egyptian people, they come and say, I am Palestinian, they give him papers. Iraquian, they said, I'm Palestinian, they give him paper. Kurdish, I'm Palestinian, they give him paper. But the Palestinian, the real Palestinian, they don't give it for him. I don't know why.

EB: So, you feel that you have been treated badly by the Home Office? Do you still fear returning to Palestine?

M: If I go, I'm very happy. But I think, you know, every day, you see the news, you heard the news, everythings now for the bad. Tomorrow or after tomorrow, for example, the politic, but I'm not want to

talk about the politic. Trump. He want to take decision about Jerusalem. But if he make that, she will...everything will be [inaudible]...you know [inaudible]? Everything will be destroyed. She's not good. Not anything good happens there.

EB: Have you met anyone in the UK who you have found helpful? 34:06 Have you met people or organisations in the UK who have been helpful?

M: No, I've not, no. Because I'm not believe anyone now. Believe me, I'm not believe anyone.

EB: You don't trust people?

M: That's it. I'm not trust people. Some people, I cannot trust people. No. No. Because, I told you, now I'm 73, the life teach me every day teach me some things. Yes.

EB: And this is the Home Office that's made you feel this way because they...you were honest with them and...

M: If anything happens to me, the Home Office is responsible. If anything happens to me. I write some letters. If anything happens to me, the Home Office is responsible about that. I don't know why. Why? Face-to -face, come on, told me what I do? What do you see me doing or...before...send me to the [inaudible] to hang me or to do something if I do something wrong.

EB: What's this? 35:32

M: I show you something...some friend he found these, I bring it for him. Like the journalist. You want to see something? You see this? This paper. These people is the leaders and the organisation of Fatah in Palestine. You know how much live or die from these? This is in 2007, coming, this. All these must be die. They send this paper...

EB: Everyone here is deceased?

M: Yes. They must be die. I am one of these persons here. This is my picture.

EB: That's you there?

M: Yes, this is my picture with the leaders [gives names]. All these leaders they must be die here. And maybe half is die, yes. Many of them. And there is somebody in jail now with these people. Now, if they catch me in any place they can take me, or shoot me, or kill me. But I am here, I think, I am looking here nobody can make anything for me in the UK.

EB: And you showed this to the Home Office?

M: Yes. I show them everything.

EB: You said that you went to see your MP, Kevin Brennan, was he helpful?

M: He tried to do many things. For example, this is...for that...I am Officer for Fattah and I am as the leader of the authority of the Tunisian and Palestinian. You understand the people to make the how the Tunisian help the poor Palestinian or something. I have make this, this group. And I do it for the people. I make some group...not government.

EB: Another organisation...a non-governmental organisation?

M: Yes. I make that. And I have the proof for that. For example, I say this is...

EB: So, this card you have here, this is for the organisation that you were involved with...the Tunisian and Palestinian...

M: Yes. This I am the leader, the President of this....This is when I've been in the army, when I've been Captain, General, one by one. When I go to the...in my country...like this...

EB: Are these the translations here?

M: Yes.

EB: So, this says that you are the Chairman of the Executive Committee of the PLO.

M: Yes. That's what I...and this is the decision of Yasser Arafat, the leader of Palestine.

EB: So, you're still not clear as to why the Home Office hasn't granted you refugee status? So, you've provided all of the evidence. You've explained your story but the Home Office...

M: I explained for them everything. And all this paper with the Home Office. All these papers with the Home Office. But the Home Office, she not do anything for me. I don't know why. That's what I'm thinking. Why he do that, I don't know.

EB: And then the judge, you said, the judge indicated that you were to be accepted but then...I don't really understand what happened?

M: I not understand but when I go, I go to another court and that other court I told him the judge he made like this. They said, ok, the judge he is make this is good for you. How he is good for me? They said, because he made decision for you, not anybody can take you outside the UK. You stay in UK. But not anybody can take you outside of UK. This is what the judge he mean by this. They can't say the judge is wrong. They can't say. If I am...[inaudible]...they say he is true, he make true.

EB: So, the Home Office, they accept that you are Palestinian?

M: Yes.

EB: And do they accept that you are who you say you are?

M: Yes. They accept. They know what I am exactly. Because they bring the information from Palestine. Not from me only. They bring information from Palestine about me. Yes.

EB: So, they collected, they gathered information? 41:07

M: And about the...yeah about my job, about my life, they know everything, and the truth, not lying about things. But they do not want to help me, I don't know why.

EB: Do they still want to send you to Tunisia?

M: They try but Tunisia is not accept me. I hope but they not accept me. If I go to Tunisia, I'm happy if I go there. But Tunisia do not accept me.

EB: So your MP tried to help but hasn't been able to?

M: Yes, the MP sent many letters. I have many letters in my house. I told you, if you want to read this file, I have, like this. Yes.

EB: And you told me that you have poor health at the moment?

M: My health? You know, now I take warfarin for the blood. I make three times for the heart. What's the meaning of...they not open the heart but they put something in the heart, inside. Three times I make attack, the heart.

EB: Oh, you've had three heart attacks?

M: Yes. And I have honey now. And I have prostate, I cannot go to the bathroom without the...without this. I cannot go to...I don't know why I'm alive. I don't know. Maybe...

EB: And have you found the waiting, the uncertainty about your status in the UK, has that been stressful? I imagine having to wait for such a long time, without having your case resolved, that must be very stressful and difficult.

M: You know, I want to go to human rights. To the Court of Human Rights. To make...what's the meaning of...to ask him...ask Home Office why they suffer me. I want to go but I want somebody to show me how I can go. If somebody show me, I'll go, I'll go, I'll go to seek.

EB: This is a problem, isn't it, because your solicitor stopped representing you...

M: Stopped representing me. I have no solicitor.

EB: When was that?

M: Michael.

EB: When did they stop helping? Which year?

M: Maybe, five months.

EB: About five months ago? Ok.

M: They sent letter for me. We cannot stay with you because the government stop this.

EB: Ok. So, it's a difficult position because your case isn't resolved, now you don't have a lawyer to assist. The Home Office, do they answer your letters?

M: The Home Office. Here they are not doing anythings for me. When I go to Liverpool I see the lady, she told me, she asked me, you not need anything from you, only we need...we need something...I hope I have it to show you. I have....this is in Arabic...the solicitor...the...there is paper in English...

EB: This is when you went to Liverpool?

M: Yes, when I go to Liverpool.

EB: So, did they send you a letter advising you for....

M: Yes, I have the letter. Yes. This is like the same letter but what he say here? He say, I must see a lawyer. Why I cannot go to Tunisia? They want me to write this for them. Why I cannot go to Tunisia. And why I cannot go to the West Bank, Palestine. And six months from the hospital. And my daughter and her son...they are breach...they want me to write this for them and sent it for this lady. That's what they want from me. I sent, I make that, and I sent for them this but nobody answer me.

EB: And when did you send that?

M: From, maybe, three months.

EB: What do you think of these questions?

M: I answer these questions. I told them, I have the answer, I write the answer for them.

EB: But the first question...they said to see a lawyer?

M: Yes, that...I must see a lawyer. But now, I think, I must be see a lawyer. I tried to find how I can find a lawyer. I need for the lawyer, maybe I make a document with him for that. Why I cannot go to Tunisia. This is a very easy question, because she is not my country. Why I cannot go to West Bank, Palestine, because Jordan or Israel send me to the...they want a sick note from the hospital...big sick note...I have the sick note and I sent it. And I have another sick note. And about my daughter with her son, I have the passport with my daughter and my grandson. I put it and I sent it for them. They not answer.

EB: Can I ask you a question? If the Home Office were to finally give you papers. How would you feel? Would you feel happy?

M: Of course. Because I told you if I can't take the paper from the Home Office, I can't move. You understand? Like some big person make accident and then the chair, somebody take him and [inaudible]. And, when he be ok he can walk very well...he can go to see you, and coming here, your brother, he can move to any place. If I take the paper from the Home Office, I can make, for example, a travel document, for example. I can make a sick note, I can get a drivers license. Without I come here, I told you, 20 times I sit. I can't say five minutes I will be there if I have an appointment. If I want to go to the shop. I can go two minutes for shopping. I go to the doctor. Because it makes me many, many things for me if I take the paper. The past 10 years, not so much.

EB: I think that's actually a really good analogy that you've made between someone in your position and, erm, someone who is, perhaps, you know, in a wheelchair, because it...the Home Office are limiting you.

M: The problem between the Home Office...I don't know what is it. I don't know what is the problem between me and the Home Office. Because, I am...I don't understand. I don't understand why. Why they...10 years. I see the same situation. My situation. I see friends here. They are 3 months they take their papers. I see. I see some person. He is my friend. My job. The same job, the same life, the same...he take the papers.

EB: What's that like when you see other people get their papers?

M: What do you think?

EB: Yeah. Does it make you feel frustrated?

M: Upset. Much.

EB: Upset.

M: Too much.

EB: Yeah.

M: Upset too much. And they thinking to do something by himself but I told you, I'm thinking about..[inaudible].

EB: What would you like...what do you want to say to the Home Office?

M: If I want to say them, I told him, if I made something wrong...it's 10 years, it's enough....if I make something but I not make anything wrong. And the...what can I say for him...thank you for everything because they make something good for me, for example, the doctor and the house and they protected me. I will say thank you very much. That's what they can do for me but if they can do more than this, help me for my paper, it would change my life. They will be more...what's the meaning...they will move me from die to life. You understand what I mean?

EB: Yes. What advice would you give your younger self? So, if you could speak to yourself 10 years ago, what advice would you give yourself?

M: My advice? For myself or for somebody like me?

EB: For yourself but to other people who want to claim asylum in the UK.

M: I say for everybody. Stay where you are. And accept what the God give it to you. If you will be good life, or if you will be die, or stay alive, you must accept that. Because you will not change anything. I tried to change my life but it has not changed anything. I tried to change it for the better but it's worse now. I have no nothing.

EB: I am very sorry that your case has not been resolved for such a long time. And I understand that must very, very difficult.

M: [speaks in Arabic]

EB: And I hope, I hope that it is resolved soon and that Asylum Justice is able to help in some way.

M: I hope...I speak to people now...I'm looking...you know the man, somebody drop him in the river and you can help me help him up find anything, maybe, he find some stick, a stick cannot get him out the river but I'm like this....I'm looking for to the stick...take me to this, take me out the river. Because I need the help from anybody for my case. Only for my case. Because now 10 years and it will start 11 years. Too much. Too much.

EB: Please do go to Asylum Justice and ask them for their advice. For their help. And please speak to your doctor, to your GP as well. And tell your GP how you're feeling and see what they can do to help.

M: If you ask the GP if you take...[inaudible]...if you see how much I go...I'm not sleeping at night. I don't know. I'm not sleeping very well. I told him, the GP. Before I had three days off for this, I have appointment there and I told the doctor, give me tablet for sleeping. For sleeping. I'm crying [inaudible]. Sometimes I [inaudible], sometimes I go outside, sometime I sit there, sometime I'm sleeping...this is not working for you, very bad. Very bad. And, some pain in my legs. My legs. Somebody here. Somebody here take it. I hope, I hope she coming from the God, you understand what I mean? From the God, not from the human. From the God, she is coming.

EB: Do you speak to your family?

M: Yes. I have ten children. Ten children. One of them she is dying.

EB: I'm sorry to hear that.

M: All of them are married now. Yes, there are two who are not married. One 14 and the other one 19, they are not married these girls. And they live better than me. This is my fault. If I take my family before and go to Canada or in Europe...now, 10 years...could make something.

EB: Do you think that things would have been different if you were in another country?

M: Yes, very different. I see because I see many people. I see the thieves, the killers, every things, they go and they take papers. And we not do anythings, we not take papers. Why? I am ask myself, why? Did they find me something wrong? It's very difficult.

EB: It seems unfair.

M: It's very difficult.

EB: Thank you so much for talking to me and for...

M: Thank you for everything you are...when I talk, you know, when somebody who needs to talk is listened.

EB: Well, what you have said is very helpful. So, my thesis, it's in three parts. So, the first part, erm, is the theoretical chapter about fairness and then I look at the law, the legal system. And then I have my study where I'm interviewing asylum seekers and refugees about their experiences.

M: Yes, but please, if you, in the future, if you take the responsibility about the people like me, like this, looking for help from...look inside, not outside...because I hope for you a good future, inshallah.

EB: Thank you.

M: I hope.

EB: And I hope for you too.

M: For these people, they need your help. If they need...why they coming here? Why are they coming here? 57:32 If they not need help, why they come here? They need help.

EB: Yes, people don't leave their homes lightly. They leave because they have to.

M: Leave their homes, friends, something...I am cooking very well. Very well cooking arabic food. Because in the army, you know...I show you something...in the army, I cook...[laughs]...everything for the...

EB: What kind of dishes do you make?

M: This is yesterday, I think. I cook this yesterday.

[Both laugh]

EB: Oh, what is it?

M: It is the chicken. And this is beans. This is beans with chicken. The chicken outside of the oven, like this. Inside of the chicken is rice, with the onion, with the bay leaf...

EB: That sounds delicious.

M: You cook something inside and after...

EB: Oh, so it's stuffed inside the chicken...

M: And rice, yes. You can take the rice from inside...it's very beauty. And if you go now and see like I try to eat and cannot eat.

EB: You won't eat?

M: I won't eat.

EB: You just don't have an appetite?

M: No, because...

EB: This food looks delicious.

M: This is yesterday, for example. I do when I'm in my job, my work.

EB: So that's when you learnt to cook?

M: [laughs]

EB: It's a good skill to have. I like cooking as well.

M: You like cooking?

EB: But, erm...yes, but I don't have a big repertoire...I have a few dishes that I do cook for myself and maybe for friends.

M: I cooking too much things...too much. Many, many things I cooking. Many, many.

EB: What I really like, because I'm Scottish, and my mother used to make a lentil soup...but I spent some time in Egypt so I make my soup the Egyptian style.

M: This is my picture there with Yasser Arafat.

EB: That's Yasser Arafat there...

M: This is my picture. It's two-thousand and [inaudible]. And after I take, I take this. Yes.

EB: Oh gosh. And these are pictures of your family?

M: This is my daughter. Yes.

EB: Oh, beautiful.

M: This is when she finished school.

EB: You must be very proud.

M: Yes, yes. She is a beauty not like me [laughs].

EB: She is beautiful.

M: Very beautiful. And yes she have son. And this is my son. This the other daughter. And they are working. And this is my daughter. My brother.

EB: And how many of your children are in the UK?

M: One child.

EB: Ah, just one. One daughter.

M: Yes. She is. ...[inaudible]

EB: A big family.

M: One person...forty-five person from one person.

EB: Oh gosh. As is said in Scotland, that's a clan.

M: And I wanted to get outside of the country, you see? If I am 45 person, if I am, only me, 45 person. There are very stupid if they want me to get outside of the country.

EB: Mohammed, what I'll do is...I've recorded the interview, I'll then transcribe that. I'll type it up. And I have your email address so I can send that to you by email...

M: Yes, ok.

EB: ...for you to check and make sure that it is accurate and that you're happy. And then I'll make sure that I don't use your name.

M: If you want me to write for you my name, I can give you my name.

EB: I want to protect your identity. So, would you like to choose....so, when I'm typing up the information, I'll use another name...would you like to choose a name?

M: No, no. As you like. Suit as you like.

EB: Ok. Are you happy using Mohammed? Is that ok?

M: Yes, very happy.

EB: Alright. That's fine. So, the data will only be used in my thesis and any publications related to my thesis and I can send you copies of them so that you're happy, happy with that. Your participation in the project is voluntary so at any time, if you change your mind, and you want to withdraw from the study, you can just let me know and you don't need to give a reason.

M: Sorry, I want to tell you something.

EB: Yes?

M: You know, I am a solicitor.

EB: Right. Ok.

M: I have my papers here. I have it. From 42, 43 years. But I'm not...

EB: Practising?

M: Practising. Yes. If I take the paper then I will try to start again. And help without papers...volunteer. I will do that.

EB: Well, we're always looking for volunteers at Asylum Justice.

M: But the language, I will try detail...first...first I will try to learn the language very well.

EB: You speak English very well.

M: No, not very well. But I will be because I forget too many words, but I will try to teach more. And after, I will work volunteer. Inshallah.

EB: Yeah...I haven't actually...so I trained as an immigration lawyer, erm, but I haven't practised for a while. So, I moved to Cardiff in 2011 and that's when I found out about Asylum Justice and I started volunteering with Asylum Justice. And I would help at the drop-ins but I've...since then I've been doing my PhD and teach in Swansea as well...but with this area of law it's so complicated...immigration and asylum law...so, if you're not practising for a few months then you're not up to date. So, it's...erm...yeah. It's a difficult area of law. ...but thank you so much for talking to me today.

M: You're welcome.

EB: I can turn the recorder off.

1:04:11

APPENDIX 9: INFORMATION SHEET AND CONSENT FORM

INFORMATION SHEET FOR RESEARCH PARTICIPANTS

I would like to talk to you because I am doing research into fairness and asylum decision-making.

Before deciding to take part, it is important that you understand the aim of the research, what it will involve, and what will happen to your information. **Please take the time to read this sheet carefully** and do not hesitate to talk to other people about the study.

The aim of the research

I would like to know what asylum seekers/refugees think is essential for asylum claims to be heard fairly.

Taking part

Current or former clients of Asylum Justice (represented after January 2015) are invited to take part in this project. Participants must be over the age of 16. If you choose to take part, I would like to talk to you face-to-face about your experiences and views of the asylum system.

Interviews are anticipated to last about 1 hour. We can discuss where, when and how you would like the interview to take place. The interview will be audio recorded so that I have an accurate record of what is said. If you need an interpreter, or if you have any other special requirements, then please let me know before the interview. You can help to choose who you would like to interpret for you. Your signed consent will be needed before the interview can take place.

Your information

I will type up the interview recording and if you are interested I will give you a copy of the typed record. The information will be used for my PhD thesis and might also be used in academic publications for the purpose of promoting the fair treatment of asylum seekers. You are welcome to see the final thesis and/or a copy of any articles before they are published.

You can say as little or as much as you wish. I will not disclose what you tell me to the Home Office or to any other authority, organisation or person. The interview record will be kept in a secure place. I will not use your real name and I will make every effort to protect your identity. Please let me know at any stage if there is any sensitive information that you do not want to be used.

Changing your mind

If you decide to take part then this is your voluntary decision, therefore you are also free to withdraw from the study at any point you wish, without giving a reason.

About the researcher

My name is Emma Borland. I am a PhD candidate at Cardiff University funded by the Economic and Social Research Council. I am a Trustee of Asylum Justice, Cardiff but this research project is independent from Asylum Justice. I am also an accredited immigration adviser but I am unable to provide any advice or assistance as part of this research project.

My email address is: borlandej@cardiff.ac.uk. My supervisor is Dr Lydia Hayes (hayesl@cardiff.ac.uk).

This project has received ethical approval from the Cardiff School of Law and Politics Research Ethics Committee (SREC) on 08/06/2015 (Internal Reference: SREC/130515/17).

The Cardiff School of Law and Politics Research Ethics Committee (SREC) can be contacted at:

School Research Officer, Cardiff School of Law and Politics, Cardiff University, Law Building,
Museum Avenue, Cardiff CF10 3AX

Email: LAWPL-Research@cardiff.ac.uk

I confirm that I have read / have had read to me and have understood this information sheet and had any questions about the research answered to my satisfaction. I give my **consent** to take part in the study. I understand that I can say as little or as much as I want to and I can withdraw from the research at any time.

Person participating in the study:

.....(Print name)

Signature.....Date.....

I confirm that I have read the attached information sheet to.....in a language that s/he understands and that the information has been understood and any questions about the research have been answered to their satisfaction. I confirm that I am competent in both languages and will interpret accurately and impartially, that I am bound by confidentiality and that I will declare any conflict of interest that I may have.

Interpreter (if applicable):

.....(Print name)

Signature.....Date.....

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