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EXPANSION AND RESTRICTION: COMPETING PRESSURES ON UNITED KINGDOM ASYLUM POLICY

ELIZABETH KEYES*

INTRODUCTION

In November 2002, the British Parliament passed new legislation reforming its asylum system. The Nationality, Immigration and Asylum Act of 2002 is only the latest in a series of recent attempts to respond to domestic political pressures created largely by the rising number of asylum-seekers in the United Kingdom. In addition to domestic pressures, the United Kingdom is finding itself increasingly implicated in European developments. As an island nation, the UK historically had a high degree of autonomy to set its immigration and asylum policies, insulated from the pressures felt by Europe during times of refugee crisis. As the UK became increasingly engaged in the process of Europeanization in the 1990s, however, this autonomy began to diminish. While debating the most recent reform to the British asylum system, the government had to contend with the prospect of literally thousands of asylum-seekers in the Sangatte refugee camp in France, poised at the gates of the Eurotunnel, waiting to cross the English Channel to apply for asylum in the United Kingdom. Sangatte in many ways symbolized the enormous number and diverse sources of new restrictionist pressures bearing upon UK asylum policy.

Such pressures, however, have simultaneously contended with the increasing commitment to the protection of human rights within the United Kingdom and across Europe. The commitment to human rights creates countervailing pressures to *expand* asylum protections even while many aspects of domestic politics call for their restriction. One indication of how such pressures have come to light in the UK was the British Parliament's passage of the Human Rights Act in 1998. This Act incorporated into domestic law the European Convention on Human Rights (ECHR), which contains several rights relevant to asylum-seekers. The Act and the enthusiastic embrace of the ECHR by British courts show how expansionist pressures are also being felt in UK asylum policy.

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Analysis of asylum policy in the United Kingdom thus requires examination of the complex interaction between domestic and international pressures, between legislative and judicial action, and between expansionism and restrictionism. In Part I, this paper considers the history of asylum in the UK through the 1990s, looking at the changes that occurred over the 20th century, and the international legal obligations at the core of the UK's asylum policy. The paper specifically addresses Britain's new commitments to European Union asylum policies, and the ways in which Britain's overall relationship with the EU affects Britain's domestic asylum policy. In Part II, the paper examines the two most significant recent changes in UK asylum law, namely the passage of the Nationality, Immigration and Asylum Act of 2002, and the passage and implementation of the Human Rights Act in 1998. Finally, in Part III, the paper situates each of these major developments in the wider context of the various forces for expansion and restriction, in the UK and Europe. The paper concludes by examining the balance that may be struck as these forces interact.

I. ASYLUM LAW IN THE UNITED KINGDOM

A. *Historical Overview*

The United Kingdom's experience with refugees goes back as far as 16th century England, when gypsies arrived having fled persecution as far away as the Balkans and Northern India.¹ The dawn of the 20th century found large numbers of Jews fleeing pogroms in Russia; these refugees provoked widespread social concerns about threats to domestic labor, housing shortages and a rise in crime.² The British parliament responded with the 1905 Aliens Act, recognizing the rights of political and religious refugees.³ In the mid-1930's, a wave of refugees fleeing Nazi Germany began to arrive, again provoking concerns that bordered on xenophobia and whose echoes can be heard in today's debates.⁴ Popular anti-Semitism was mirrored in Britain's immigration laws, which were actually tightened in the final days before the start of World War II.⁵

After World War II, the next waves of refugees came from Eastern Europe. An estimated 250,000 Polish refugees, and 50,000 other refugees from Eastern Europe arrived in the United Kingdom in the 1940's and 50's.⁶

1. PRAKASH SHAH, REFUGEES, RACE AND THE LEGAL CONCEPT OF ASYLUM IN BRITAIN 13 (2000).

2. *Id.* at 32.

3. *Id.* at 34-36 (noting that one observer at the time described this as "the most comprehensive declaration of the right to asylum that is to be found . . . throughout the civilised world").

4. Anne Karpf, *We've Been Here Before*, THE GUARDIAN (London), June 8, 2002, at 20 (comparing today's public perceptions of refugees with the "rabid intolerance" of earlier times).

5. *Id.*

6. REFUGEE COUNCIL, *ANNUAL UK ASYLUM STATISTICS* (using numbers drawn from Home Office statistics), available at <http://www.refugeecouncil.org.uk/infocentre/stats/stats001.htm> (last visited Jan. 22, 2004).

17,000 Hungarians arrived following the crushed 1956 Hungarian anti-Communist uprising. Unlike later waves of refugees, those fleeing Communism found ready welcome because they most closely matched the public's perception of what a refugee was – the Refugee Convention definition of refugee having been set up at least partially to encompass those persecuted under Communism.⁷

Starting in the 1960's, refugees arrived primarily from developing countries, particularly countries that were members of the British Commonwealth. During this period, the British Parliament made efforts to grapple with questions of citizenship and the right of Commonwealth citizens to emigrate to the United Kingdom, seldom invoking the concept of asylum.⁸ In 1962, the Commonwealth Immigrants Act introduced the first, light controls on the movement of Commonwealth citizens, requiring passports to travel and introducing punishments for such actions as producing false documents or staying beyond a permitted date.⁹ Events in East Africa soon forced a re-evaluation of this Act.

In the 1960's, restrictive anti-Asian legislation in East Africa prompted a large wave of immigrants to come to the United Kingdom.¹⁰ These immigrants – predominantly of Indian origin – were citizens of the British Commonwealth, and the first of these waves were free from immigration controls as a result of this citizenship. In 1968, however, the Parliament passed the Commonwealth Immigrants Act, restricting the rights of commonwealth immigrants to travel freely to Britain.¹¹ This policy was sorely tested during the Ugandan Asians crisis of 1972, when Ugandan President Idi Amin overnight decided to expel the substantial community of Asians living in Uganda, many of whom were second and third-generation residents of Uganda. The United Kingdom did its utmost to ensure that this overnight class of refugees dispersed to other Commonwealth countries, but ultimately accepted 27,000 of the 50,000 refugees.¹²

The British Parliament passed the 1971 Immigration Act, responding to the ongoing Asian refugee crisis through the lens of citizenship. The Act confined lawful residence to British citizens, and certain Commonwealth citizens,¹³ and established the basic administrative and appeals procedures surrounding immigration.¹⁴ It was accompanied by a series of Immigration Rules, wherein the government gave broad discretion to immigration officers to determine who did and did not fit the definition of a refugee under the

7. SHAH, *supra* note 1, at 60.

8. SHAH, *supra* note 1, at 74-77. Asylum guidelines were not part of published policies, but were instead communicated to immigration officers by unpublished directives. *Id.* at 77.

9. *Id.*

10. *Id.* at 80-94.

11. *Id.*

12. *Id.* at 86.

13. Immigration Act, c. 17, § 2(1) (1971) (Eng.).

14. *Id.* at Part III, sched. 3.

Refugee Convention and 1967 Protocol.¹⁵ The 1971 Act was amended in 1976 by the Race Relations Act, which created an exception to a general principle of non-discrimination, permitting discrimination with respect to ethnicity and nationality in the field of immigration.¹⁶ These Acts remained in place until the series of reforms in the 1990s, discussed in Section B, *infra*.

The origin and number of refugees arriving in the United Kingdom has changed dramatically over the past several decades, as the “push” factors from around the world have changed. In the 1970’s and 1980’s, the UK received a steady flow of refugees from Vietnam and from Sri Lanka.¹⁷ Sri Lankan refugees have continued to seek asylum in the UK, but by 1985 the number of refugees from the Middle East, Africa and Central Europe overtook the number of refugees arriving from Asia.¹⁸

These changes occurred in response to various international conflicts and civil wars. In 1992, at the height of the Balkans war, there was a peak in applications from the former Yugoslavia (the Federal Republic of Yugoslavia is still among the top 10 applicant nationalities as of 2002). In 2000 and 2001, almost 15,000 refugees from Afghanistan sought asylum in the UK, more than 5000 of whom were granted exceptional leave to remain in 2001.¹⁹ Following the increasing persecution of white farmers and general political repression in Zimbabwe in 2000 and 2001, more than 3000 Zimbabweans turned to the UK for asylum.²⁰ In 2002, the main sources of refugees in the UK were Iraq, Afghanistan, Somalia and Zimbabwe; these four countries comprise roughly 40% of the total applications for asylum from around the world.²¹

Even more striking than the changing origins of asylum-seekers, however, is the dramatic increase in numbers of asylum applications. From 1950 to 1980, approximately 159,000 refugees sought asylum in the UK.²² Of these, only 40,000 were individual applicants; the others were members of groups welcomed by the UK government (such as Polish and Hungarian refugees, Chileans fleeing Pinochet, etc). In the 1980s there was a slow increase in the numbers of individual applicants and then, as is reflected in the chart below, the numbers increased exponentially in the 1990s.

Thus, the UK went from 40,000 applications over 30 years, to roughly 40,000 applications *annually* (1992 through 1998) to more than 100,000 in

15. SHAH, *supra* note 1, at 104-09.

16. Race Relations Act, § 19(d) (1976) (Eng.).

17. SHAH, *supra* note 1, at 132, 137.

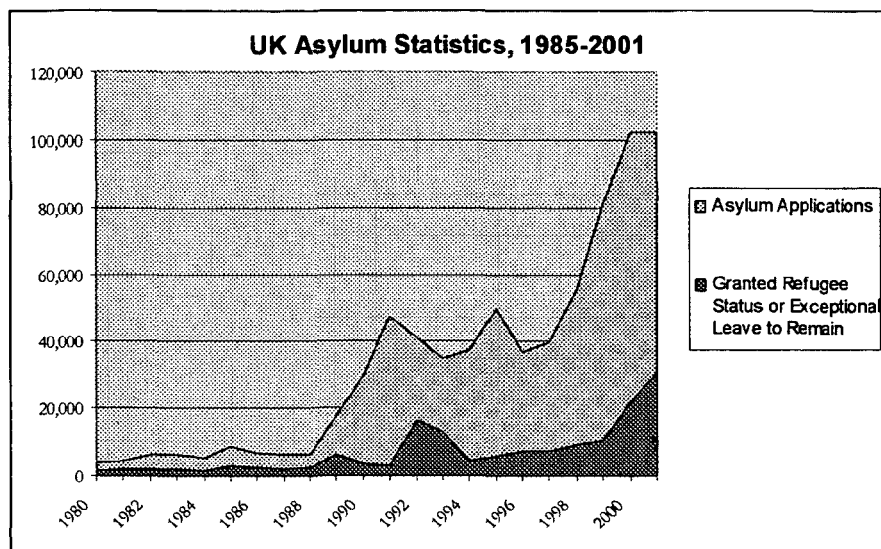
18. HOME OFFICE, *CONTROL OF IMMIGRATION: STATISTICS, THIRD QUARTER* (1985), available at <http://www.homeoffice.gov.uk/rds/immigration1.html> (last visited Jan. 22, 2004).

19. HOME OFFICE, *ASYLUM STATISTICS* (2001), available at <http://www.homeoffice.gov.uk/rds/immigration1.html> (last visited Jan. 22, 2004).

20. REFUGEE COUNCIL, *ASYLUM STATISTICS 1999 TO 2002 (FIRST QUARTER)*, available at <http://www.refugeecouncil.org.uk/infocentre/stats/stats003.htm> (last visited Jan. 22, 2004).

21. HOME OFFICE, *ASYLUM STATISTICS, SECOND QUARTER 2002* (2002), available at <http://www.homeoffice.gov.uk/rds/immigration1.html> (last visited Jan. 22, 2004).

22. See *ANNUAL UK ASYLUM STATISTICS*, *supra* note 6.



Data source: Refugee Council, Annual UK Asylum Statistics
<http://www.refugeecouncil.org.uk/infocentre/stats/stats001.htm>

the past two years. Although asylum grant rates have generally been low (5% in 1992, 3% in 1994, and 11% in 2002), Exceptional Leave to Remain (ELR) – a humanitarian category extending temporary status to many persons not covered by the Refugee Convention, but for whom return would be dangerous – has been used quite broadly.²³ For example, during the Balkans war in 1992, only 5% of asylum applicants were granted asylum, but 63% of the applicants were granted ELR.²⁴ By 2002, when there was no single humanitarian crisis creating the disproportionate share of applications, the difference between the two rates was much smaller; 11% of applicants were granted refugee status, compared to 20% who were granted ELR.

This increase in numbers has been accompanied by an inability to deport those who receive neither refugee status nor ELR. A total of 10,785 applicants and their dependants were removed from the UK in 2001, and another 5000 were removed in the first half of 2002.²⁵ Although these are some of the fastest rates of removal on record, they fall far short of the numbers that the British government would like to see.²⁶ The British Home Secretary, David Blunkett, set a target of 30,000 removals a year and had to

23. ELR was replaced in December 2002 by “humanitarian protection,” the contours of which are not yet clear.

24. Figures drawn from HOME OFFICE, *21/95 CONTROL OF IMMIGRATION: STATISTICS, FIRST HALF OF 1995* (Oct. 19, 1995), available at <http://www.homeoffice.gov.uk/rds/pdfs2/hosb2195.pdf> (last visited Jan. 22, 2004). Exceptional leave to remain is a humanitarian category for those who do not meet the Convention definition of refugee, but for whom return would not be safe.

25. *ASYLUM STATISTICS*, *supra* note 21, at 6.

26. *Id.*

acknowledge in September 2002 that this target was “overambitious.”²⁷ This inability to remove is thus creating a system where even failed applicants know that they can quite likely remain in the UK, adding to the government’s rising sense of pressure at the scale of their asylum problems.²⁸

Finally, it should be noted that some percentage of those applying for asylum in the UK are economic migrants, not refugees.²⁹ Currently under British law, there are very few ways for migrants to establish a legal presence in the UK other than as a refugee. In January 2002, the UK launched a pilot highly-skilled migrant worker program, designed to give work permits to migrants with high educational qualifications and significant professional work experience, without requiring them to have UK employment already secured.³⁰ Other options for managed employment-based migration are under consideration by the Home Office.³¹ While those are pending, however, some undetermined number of migrants are attempting to enter the UK under the aegis of its asylum program. As will be noted below, this has fueled tremendous criticisms of “bogus” asylum-seekers and of the asylum system itself.³²

B. *UK Asylum Law and Policy*

1. *International Law Obligations*

The United Kingdom is a party to the 1951 Convention on the Status of Refugees³³ (“Refugee Convention”) and its 1967 Protocols. Article 1 of the Refugee Convention defines a refugee as a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the

27. Alan Travis, *Home Office Films Roma Deportation*, THE GUARDIAN (London), Sept. 21, 2002, at 11.

28. David Leppard, *90% of Asylum Rejects Do Not Leave Britain*, SUNDAY TIMES (London), Sept. 15, 2002, at 30.

29. Acknowledging that the figures of rejected asylum-seekers surely contain some mistaken decisions, of the 286,185 decisions made between 1985 and 2001, approximately 170,000 of those were deemed to be without merit. See REFUGEE COUNCIL, *ASYLUM BY NUMBERS: SUMMARY* (Jan. 2002), available at http://www.refugeecouncil.org.uk/downloads/stats_summary_jan_2002.pdf (last visited Jan. 22, 2004). Looking at one specific pool of refugees planning to seek asylum in the UK, namely those waiting to cross at Sangatte, UNHCR Commissioner Ruud Lubbers stated that “only a limited percentage of the people in Sangatte would prove to be refugees.” Alan Travis and Owen Boycott, *UN to Break Sangatte Deadlock*, THE GUARDIAN (London), July 6, 2002, at 1.

30. Home Office, *Highly Skilled Migrant Program*, available at http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/schemes_and_programmes/hsm.html (last visited Jan. 22, 2004).

31. HOME OFFICE, *MANAGED MIGRATION*, available at http://www.workingintheuk.gov.uk/working_in_the_uk/en/homepage/news/press/news2.html (last visited Jan. 22, 2004).

32. See e.g., Johann Hari, *Why is David Blunkett Bullying and Terrifying Asylum-Seekers?*, THE INDEPENDENT (London), Dec. 3, 2003, at 20; Anthony Browne, *The Economic Case for Immigration is More Bogus Than Any Asylum-Seeker*, THE TIMES (London), June 20, 2002.

33. 1951 United Nations Convention Relating to the Status of Refugees, G.A. Res. 429 [V], 189 U.N.T.S. 137 (Dec. 14, 1950) [hereinafter *Refugee Convention*].

country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”³⁴ Article 33 of the Refugee Convention establishes the international legal principle of *non-refoulement*, prohibiting the return of these persons to the countries where their “life or freedom would be threatened” on account of one of the categories protected under Article 1.³⁵ The Refugee Convention recognizes only two exceptions to non-refoulement: where there would be a threat to public security, or where someone who otherwise met the definition of refugee had been convicted of a particularly serious crime.³⁶ The broadness of much of this Convention language means that interpretation of Convention obligations have been effectively left to the individual states party to the Convention, resulting in a wide divergence of interpretations across states.³⁷

The UK is also a party to the International Covenant on Civil and Political Rights³⁸ (ICCPR), but with a reservation keeping for itself powers over immigration. The ICCPR articulates a number of rights – including freedom from imprisonment, right to trial, and family rights – that are relevant to many asylum-seekers.³⁹ The UK’s commitments under the European Convention for Human Rights encompass many of these rights, as will be discussed in greater detail in section II(B), *infra*.

2. *European Obligations: Law and Politics*

The European Union (EU) has developed a number of instruments and policies over the past decade relating to asylum, many of which influence the debates and the reality of asylum in the UK. The earliest were the Schengen⁴⁰ and Dublin Conventions,⁴¹ both agreed upon in 1990. The United Kingdom opted out of the Schengen Convention, which focused on strengthening EU external borders and easing internal border controls. The UK opted out because it believed that as an island nation, it could control immigration flows at its borders better than other countries in the EU, on whom the UK would otherwise depend.⁴² It sought to avoid what it saw as the abuse of

34. *Id.* at Art. 1A(2).

35. *Id.* at Art. 33.

36. *Id.* at Art. 33(2).

37. Colin Harvey, *Dissident Voices: Refugees, Human Rights and Asylum in Europe*, 9 SOCIAL AND LEGAL STUDIES 3 (2000).

38. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

39. *Id.* at §§ 9, 10, 14, 23.

40. Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, Belg.-Fr.-F.R.G.-Lux.-Neth., 30 I.L.M. 68 (1991) (Convention applying the Agreement enacted June 19, 1990) [hereinafter Schengen Convention].

41. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 ILM 425 (1991) [hereinafter Dublin Convention].

42. See *Britain and Ireland Opt Out*, BBC (Nov. 28, 1997), available at http://news.bbc.co.uk/2/hi/special_report/1997/schengen/13511.stm (last visited Jan. 22, 2004). It is interesting to note that because Ireland shares a common travel area with the UK, it was also forced to opt-out of the

asylum procedures in Europe, and preferred to keep asylum policy in its own hands.⁴³

The Dublin Convention entered into force in 1997 and set forth procedures to determine where different asylum claims should be heard in Europe.⁴⁴ Although the UK is a party to this Convention, it has not passed implementing legislation, which means that the Convention cannot be referred to in a legal challenge to a government action.⁴⁵ Because the Convention has nonetheless shaped numerous aspects of government policy, its objectives and implementation are still highly relevant to a discussion of UK asylum policy. The Convention had two stated objectives: the parties wanted first to prevent refoulement of genuine asylum-seekers, and second to stop shuffling asylum-seekers from state to state before any one state assumed responsibility to process their claim (the so-called "refugees in orbit" problem).⁴⁶ The Convention promulgated a series of criteria to assign state responsibility.⁴⁷ For most applicants, these criteria essentially established a principle of "first opportunity to make a claim," i.e. a requirement to bring the claim in the first safe country through which they passed.⁴⁸ This principle has failed to meet the Convention's two objectives.⁴⁹ States are not transferring cases more than they did prior to enactment of the Convention, and the length of time that asylum-seekers await a state's decision to process their claim has not decreased.⁵⁰

The Convention has also failed from the perspective of asylum-seekers. First, the principle reduces their ability to choose where to seek asylum, a decision that is often made based on important considerations like language, presence of family members other than spouse or child, possibility of feeling

Schengen Convention. Ireland has, however, stated its willingness to comply with Schengen as fully as it can within the confines of its Common Travel Area obligations. See Simpson, *Asylum and Immigration in the European Union*, EUROPEAN PUBLIC LAW, Vol. 5(1), at 99-101 (March 1999) [hereinafter Simpson].

43. *Id.*

44. See generally, IAN MACDONALD & NICHOLAS BLAKE, *IMMIGRATION LAW AND PRACTICE IN THE UNITED KINGDOM* (4th ed. 1995); Nicholas Blake, *The Dublin Convention and Rights of Asylum Seekers in the European Union*, in *IMPLEMENTING AMSTERDAM: IMMIGRATION AND ASYLUM RIGHTS IN EC LAW* (Elsbeth Guild & Carol Harlow, eds., 2001) [hereinafter Blake].

45. Blake, *supra* note 44, at 96.

46. UNHCR, *ASYLUM IN THE INDUSTRIALIZED WORLD*, STATE OF THE WORLD'S REFUGEES 161 (2000) [hereinafter UNHCR 2000].

47. These criteria are set forth in Articles 4-8 of the Dublin Convention. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 (entered into force Sept. 1, 1997).

48. Blake, *supra* note 44, at 104. For asylum-seekers with a spouse or child recognized as refugees by another state-party, and for asylum-seekers with a valid visa or residence permit for another state-party, their claims would be processed by those other states. Dublin Convention, *supra* note 41, at Art. 4-5.

49. Blake, *supra* note 44, at 95 (arguing that "the basic problem with the Dublin Convention . . . is that it does not really work"); Randall Hansen, *Asylum Policy in the European Union*, 14 GEO. IMMIGR. L.J. 779, 798 (2000).

50. Blake, *supra* note 44, at 95.

integrated into the society, and so forth.⁵¹ Second, it exposes asylum-seekers to the disparities in asylum law across states party to the Convention, disparities that may mean the difference between refoulement and asylum for many asylum-seekers.⁵² Finally, Article 3(5) of the Convention permits the removal of asylum-seekers to non-EU “safe third countries.”⁵³ As different states within the EU have different interpretations of what might constitute a “safe third country,” the Dublin Convention effectively erodes the protections extended to asylum-seekers under the Refugee Convention.

Foreseeing that the Dublin Convention would not solve Europe’s asylum problems, the European Union concluded the Treaty of Amsterdam (“Amsterdam”) in 1997. Amsterdam communitarized asylum and immigration, meaning that parties were required to develop and abide by community-wide policies on these areas.⁵⁴ The United Kingdom and the Republic of Ireland again opted out of this treaty.⁵⁵ The UK strongly opposed communitarization because it feared that common policies would eventually be applied to the UK, as had happened with other policy issues.⁵⁶ Having failed to prevent the communitarization, the Blair government secured a binding guarantee that UK would always be able to control its own frontiers.⁵⁷

Despite opting out of both Schengen and Amsterdam, the UK has stayed engaged with Europe on the development of asylum policy. The reasons for this are intimately connected with the broader domestic political question of the extent to which the UK should be engaged in the European Union. Until 1997, the UK firmly resisted Europeanization. Prime Ministers Thatcher and Major both successfully inveighed against the “conspiracy to rob Britain of its history and its democracy.”⁵⁸ A movement of “Euro-skeptics” (largely aligned with the Conservative party) successfully shaped the debate as one in which Britain’s very sovereignty was at stake.⁵⁹ The Euro-skeptic view was set back by the election of the Labor government of Prime Minister Tony Blair in 1997. Since 1997, there has been an increasing governmental willingness to engage with Europe on many issues, particularly on issues of

51. *Id.* at 107-108.

52. *Id.* at 110.

53. REFUGEE COUNCIL, *THE DUBLIN CONVENTION ON ASYLUM APPLICATIONS: WHAT IT MEANS AND HOW IT'S SUPPOSED TO WORK* (Aug. 2002), available at <http://www.refugeecouncil.org.uk> (last visited Jan. 20, 2004).

54. Specifically, Amsterdam moved these issues from the inter-governmental “third pillar” of the EU governance framework, to the supranational “first pillar,” which requires member states to develop and abide by community-wide asylum policies. See generally Simpson, *supra* note 42.

55. N.P. Berkowitz & C.F. Doebbler, *The European Dimension of Asylum Law*, in UNITED KINGDOM ASYLUM LAW IN ITS EUROPEAN CONTEXT (Prakash Shah & Curtis Francis Doebbler, eds., 1999).

56. Sarah Helm, *Amsterdam Summit: Blair Forced to Sacrifice Powers on Immigration*, THE INDEPENDENT (London), June 17, 1997, at 12.

57. *Id.*

58. Philip Stephens, *Preparing to Let Go of the Past*, FINANCIAL TIMES (London), Feb. 22, 2002, at 19.

59. *Europe's Incoming Tide*, THE ECONOMIST (U.S. Edition), S12, Nov. 6, 1999.

asylum and immigration,⁶⁰ where Blair hopes he may be able to defeat the Euro-skeptics by showing how engagement with Europe will permit Britain to shape debates and policies to its advantage.⁶¹ Such a defeat is central to the Blair government's primary goal of having the UK adopt the single European currency (the Euro), which can only be done if the government manages to disarm these Euro-skeptics.⁶²

The recent EU summit in Seville shows both the ongoing UK engagement with European policies, and the way that these "Europe" debates play out in UK domestic politics. In an effort to show that the UK could set some of the terms in the European immigration debate, the Blair government put forward a restrictive proposal on illegal immigration which would condition the receipt of development aid upon efforts to cooperate with policies stemming the flow of illegal immigration.⁶³ The severity of this proposal was designed to sell the government's broader EU policy to Euro-skeptics,⁶⁴ at the price of alienating members of Mr. Blair's own government.⁶⁵ When the proposal was resoundingly defeated at the Summit, however,⁶⁶ this defeat caused Conservatives in the UK to assert that Blair's vision of changing the European debates to the UK's advantage was "shallow spin . . . For all your talk of leading in Europe and winning the argument, you have once again lost the argument and been left behind."⁶⁷ The broad implication of this failed Seville initiative is that the Blair government appears willing to use asylum policy as a point of leverage to accomplish other policy objectives.

3. *Domestic Statutes*

Asylum law in the United Kingdom is currently in a state of flux, with four major attempts to reform the law in the past ten years, including the recent passage of the 2002 Nationality, Immigration and Asylum Act.⁶⁸ This section describes some key provisions of recent statutes, leading up to passage of the 2002 Act.

60. See e.g., *Blair and Euroland*, BBC (2002), available at http://news.bbc.co.uk/hi/english/static/in_depth/uk/2001/uk_and_europe/1997_2002.stm (last visited Jan. 27, 2004).

61. See *id.*

62. Nicholas Watt, *EU Rejects Blair's Line on Asylum*, THE OBSERVER, June 23, 2002, at 2.

63. *Id.* (noting that the proposal was directed particularly at Turkey and Bosnia, two countries that "refuse to crack down on asylum-seekers passing through their borders").

64. *Id.*

65. The proposal was sharply criticized by Clare Short, then the International Development Secretary in Mr. Blair's own government, who called it "morally repugnant." See Andrew Grice, *Blair Concedes EU Summit Not Tough Enough on Migrants*, THE INDEPENDENT (London), June 25, 2002, at 8. Short later resigned her position in protest over Britain's support for the war in Iraq. Michael White, *Clare Short Resignation*, THE GUARDIAN (London), May 13, 2003, at 1.

66. George Jones, *Blair Admits EU Summit Setback Over Refugees, Asylum*, THE DAILY TELEGRAPH (London), June 25, 2002, at 8.

67. Andrew Grice, *Blair Concedes EU Summit Not Tough Enough on Migrants*, THE INDEPENDENT (London), June 25, 2002, at 8.

68. EUROPEAN COUNCIL ON REFUGEES AND EXILES, 2001 COUNTRY REPORT: UNITED KINGDOM 250 (Sept. 2002), available at <http://www.ecre.org> (last visited Jan. 27, 2004).

The existence of a large caseload of asylum applications prompted Parliament in 1993 to pass an Asylum and Immigration Appeals Act.⁶⁹ The Act incorporated the Refugee Convention into British law.⁷⁰ The Act also incorporated the safe third country principle into UK law,⁷¹ introduced carrier sanctions,⁷² and – responding to the growing backlog in cases – set forth principles for fast-track appeals. Prior to this act, all appeals were heard in a basic two-tiered system that had been set up in 1969; under this structure, there was first a set of claim adjudicators who were separate from the immigration administration, and then an appeal body known as the Immigration Appeal Tribunal.⁷³ In the new system established by the 1993 Act, asylum-seekers were now divided into two tracks; those considered to have made claims “without foundation” would receive a truncated appeals process, while other claims would go through the long-established two-tiered process.⁷⁴

The 1996 Asylum and Immigration Act fine-tuned and entrenched the principle of fast-track appeals, applying the truncated appeals process to more categories of asylum-seekers.⁷⁵ The Act included a “white list” of safe countries of origin; applicants from these countries were presumed to have “manifestly unfounded” cases, and could therefore be placed in the fast-track procedure.⁷⁶ Under this Act, safe countries included India, a country that had been found *unsafe* in a recent European Court of Human Rights case, *Chahal*.⁷⁷ The basic criteria for determining whether an origin country was safe were (1) that there be no general, serious risk of persecution, (2) that there be large numbers of asylum-applicants from that country, and (3) that many of their claims would prove to be unfounded.⁷⁸ As with earlier legislative reforms, these changes responded to the increasing pressure on the

69. SHAH, *supra* note 1, at 179.

70. Asylum and Immigration Appeals Act, 1993, § 2 (Eng.) (asserting that “nothing in the immigration rule . . . shall lay down any practice which would be contrary to the [Refugee] Convention”) [hereinafter Asylum Appeals Act].

71. *Id.* at § 1 (noting that UK obligations include those undertaken in the Dublin Convention, Articles 4-8). See also Ken McGuire, ‘No Entry’: A Critical Reading of the Asylum and Immigration Act of 1996, in UNITED KINGDOM ASYLUM LAW IN ITS EUROPEAN CONTEXT 67 (Prakash Shah and Curtis Francis Doebbler eds., 1999).

72. Asylum Appeals Act, *supra* note 70, at § 12 (Carrier’s Liability for Transit Passengers, repealed by the 1999 Immigration and Asylum Act).

73. Colin Harvey, SEEKING ASYLUM IN THE UK: PROBLEMS AND PROSPECTS 155-56 (2000) [hereinafter SEEKING ASYLUM].

74. *Id.*

75. McGuire, *supra* note 71 at 67.

76. Debbie Winterbourne and Prakash Shah, *Refugees and Safe Countries of Origin*, in UNITED KINGDOM ASYLUM LAW IN ITS EUROPEAN CONTEXT 75 (Prakash Shah and Curtis Francis Doebbler eds., 1999).

77. SEEKING ASYLUM, *supra* note 73, at 192. For a full discussion of *Chahal*, see also Blake, *supra* note 44, at 112-13.

78. HC Hansard Vol. 268 col. 703 (Dec. 11, 1995), cited in SEEKING ASYLUM, *supra* note 73, at 192. As Guy Goodwin-Gill has pointed out, these criteria are logically inconsistent; countries where claims are likely to be *well*-founded are also likely to produce far greater numbers of asylum-seekers. Guy Goodwin-Gill, *Asylum 2001: A Convention and a Purpose*, INT’L J. OF REFUGEE L. 13(1) (2001).

asylum system in the UK, and were seen as a way to more expeditiously resolve claims.⁷⁹ The “white list” approach was abandoned with the 1999 Immigration and Asylum Act.

The sweeping Immigration and Asylum Act of 1999 responded to the increasing backlog of pending asylum claims, and included important policy and procedural changes.⁸⁰ The most significant of these was the decision to distinguish between citizens and non-citizens in the provision of social welfare. The Act established a voucher system for financial support while asylum claims were pending, a system that asylum advocates described as “humiliating.”⁸¹ Another major policy change was the decision to promote dispersal, housing asylum-seekers at government expense in dispersed private accommodations so as to relieve pressure on cities targeted by many asylum-seekers.⁸² The Act also toughened the series of penalties related to carrier’s liability, some of which would later be invalidated by the courts.⁸³ Procedurally, the Act created a new right to appeal public benefits decisions to a special adjudicator, but only once; the decision reached by the special adjudicator was to be final.⁸⁴ The Act also included measures to ensure that those who represented asylum-seekers were competent, in the interests of providing asylum-seekers with the fullest opportunity to be heard.⁸⁵

The Act also maintained some troubling limits on appeal. The Home Secretary maintained the power to certify that an appeal was just being made to stall for time, or that human rights concerns about a “safe third country” were “manifestly unfounded,” thereby terminating the asylum-seekers right to further appeal.⁸⁶ Moreover, fast-tracked claims could only be heard by adjudicators, the quality of whose decisions tends not to match the quality of the higher body, the Immigration Appeal Tribunal.⁸⁷

The 1999 Act can be seen as part of a larger governmental policy to deter asylum-seeking.⁸⁸ Home Secretary David Blunkett began to pursue a multi-prong strategy under the 1999 Act, which included the use of “accommoda-

79. SHAH, *supra* note 1, at 179.

80. *See generally*, SEEKING ASYLUM, *supra* note 73 at 193-98.

81. *Id.* at 194. The voucher scheme was heavily criticized by asylum advocates who saw it as “humiliating.” Asylum Aid, *Statement by Asylum Aid on Home Office Immigration and Asylum White Paper* (Mar. 2002), available at <http://www.asylumaid.org.uk> (last visited Jan. 27, 2004).

82. SEEKING ASYLUM, *supra* note 73, at 195. A large number of those dispersed ended up in non-traditional locations like Glasgow. Scottish Refugee Council, *Briefing Figures* (2002), available at <http://www.scottishrefugeecouncil.org.uk/events> (last visited Jan. 27, 2004).

83. Immigration & Asylum Act, 1999, §§ 32-43, (Eng.).

84. *Id.* § 102.

85. *Id.* at sched. 4, 1999, (Eng.), cited in SEEKING ASYLUM, *supra* note 73, at 200.

86. *Id.*, § 72(2).

87. Ann Treneman, *The Asylum Lottery*, THE TIMES (London), Nov. 8, 2002, at 2(7); *see also* SEEKING ASYLUM, *supra* note 73, at 203-04. While acknowledging the overwhelming magnitude of claims adjudicators must handle, Harvey presents a troubling sense that many initial claims made by these adjudicators are not decided as carefully as their subject matter merits. *Id.*

88. SEEKING ASYLUM, *supra* note 73, at 197-98.

tion centers,”⁸⁹ fast-tracking applications,⁹⁰ and removing work privileges for asylum-seekers.⁹¹ One controversial effort to deter asylum-seekers was the video-taping of 48 failed Roma asylum-seekers as they were deported; the videotape was to be shown on Czech television to deter other Roma from seeking asylum in the UK.⁹² Given the fact that many asylum-seekers do not leave their homes intending to come specifically to the United Kingdom,⁹³ it is unclear how effective such tactics will be, but the Government’s commitment to deterrence policies and practices has not wavered.

II. RECENT CHANGES TO UK ASYLUM LAW

In the context of all the above changes and pressures, domestic and European alike, the Blair government introduced a bill in 2002 that would introduce new restrictions into the asylum system and reform immigration and nationality law. At the same time, the British courts have become increasingly active in protecting the rights of asylum-seekers in the UK, following the passage of the 1998 Human Rights Act. This section examines these competing trends, turning first to the 2002 Nationality, Immigration and Asylum Act and then to the body of case law that has developed since the Human Rights Act took effect.

A. *Secure Borders, Safe Haven: The 2002 Nationality, Immigration and Asylum Act*

In February 2002, the Blair government issued a White Paper entitled *Secure Borders, Safe Haven*.⁹⁴ This paper spelled out the government’s priorities for, among other things, reform of the asylum system in the United Kingdom. Although the title implies a balancing of security interests and refugee protection obligations, *Secure Borders* proposed to move the UK in a more restrictive direction. *Secure Borders* suggested replacing the 1999 Act’s dispersal policy with greater use of detention, and replacing the voucher system with a cash system accompanied by tight controls on asylum-seekers,

89. Alan Travis, *Blunkett Turns to Middle England for Asylum Centre Sites*, THE GUARDIAN (London), Sept. 19, 2002, at 10.

90. See Anthony Browne, *Asylum-Seekers Make Britain First Choice*, THE TIMES (London), Sept. 13, 2002, at 4.

91. See Alan Travis, *Asylum Seekers Face Curb on Work*, THE GUARDIAN (London), July 23, 2002, at 10.

92. Alan Travis, *Home Office Films Roma Deportation*, THE GUARDIAN (London), Sept. 21, 2000, at 11.

93. Jon Henley, *Britain “Ill Informed about Sangatte”: Study Shows Majority of Asylum Seekers Do Not See French Refugee Camp as Gateway to Easy Life in Britain*, THE GUARDIAN (London), June 25, 2002, at 8.

94. HOME OFFICE, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, United Kingdom Home Office (2002), available at <http://www.official-documents.co.uk/document/cm53/5387/cm5387.pdf>.

with a view to facilitating their ultimate deportation.⁹⁵ *Secure Borders* also emphasized the problems of “asylum shopping” and immigration abuse, while largely ignoring the reasons for which many asylum-seekers leave their countries of origin and because of which many of the asylum-seekers merit – and eventually gain – protection under the Refugee Convention.⁹⁶

A bill based closely on *Secure Borders*, *Safe Haven* was introduced in Parliament on April 12, 2002.⁹⁷ With modest amendments, the bill was adopted as the Nationality, Immigration and Asylum Act on November 8, 2002.⁹⁸ Home Secretary Blunkett hailed the Act as the most significant reform of immigration and asylum in decades.⁹⁹

Two central provisions of the Act indicate that the Blair government’s response to the vastly increased numbers of asylum applications, and to the political unpopularity of asylum, is to move toward greater restrictionism. First, the Act adopts a three-tiered system of arrival, accommodation and removal centers, to replace the current dispersal system. Two accommodation centers exist already, and have been used increasingly since October 2001; they have security systems equivalent to mid-level prisons.¹⁰⁰ The Government has justified the shift to using detention centers by highlighting the flight-risk posed by asylum-seekers, many of whom abscond once they arrive.¹⁰¹ The proposal to build many more of these centers has been enormously controversial. Asylum advocates oppose the ghetto-ization of asylum-seekers,¹⁰² while residents of rural areas oppose the plans to locate the accommodation centers in rural areas.¹⁰³ To secure the approval of the House of Lords, Blunkett had to make compromises to ensure that at least some of the planned centers would be constructed in urban areas, not rural areas as originally envisioned.¹⁰⁴ A separate question is whether the centers will be effective; if all centers are built, they could house a maximum of 4,000 people at a time, when the UK receives between twenty and twenty-

95. Asylum Aid, *Statement by Asylum Aid on Home Office Immigration and Asylum White Paper* (Mar. 2002), available at <http://www.asylumaid.org.uk> (last visited Jan. 27, 2004).

96. *Id.*

97. Greg Hurst, *Workplace Will Offer No Asylum to Migrants*, THE TIMES (LONDON), Apr. 13, 2002. For the full text of the bill, see <http://www.publications.parliament.uk/pa/cm200102/cmbills/119/2002119.pdf>.

98. Nationality, Immigration & Asylum Act, 2002, (Eng.) [hereinafter NIA Act].

99. Office of the Home Secretary, *Overarching Nationality, Immigration and Asylum Reform* (Nov. 8, 2002), available at http://213.121.214.245/n_story.asp?item_id=253.

100. Raekha Prasad, *Toddlers Behind the Razor Wire: Children Are the Innocent Victims of Britain’s Hardline Asylum Policy*, THE GUARDIAN (London), July 30, 2002, at 14.

101. *Id.* (noting that no data have been presented to support this claim).

102. Alan Travis, *Minister Stirs Row Over Plans for 15 New Centers*, THE GUARDIAN (London), May 15, 2002, at 4.

103. See e.g., Vikram Dodd, *Protesters Rally at Asylum Centre Site*, THE GUARDIAN (London), July 8, 2002, at 10; *Protest Over Asylum Centre*, THE OBSERVER, Sept. 1, 2002, at 4.

104. The House of Lords resoundingly spoke against these rural centers, sending the Bill back to the House of Commons for reworking on more acceptable lines. See Ben Russell, *Blunkett in Climb-Down Over Asylum Centres*, THE INDEPENDENT (London), Nov. 5, 2002, at 2; see also Editorial, *The House of Lords is Perfectly Right to Attack Mr. Blunkett’s Foolish Law*, THE INDEPENDENT (London), Oct. 10, 2002, at 20 [hereinafter Editorial].

five times that number of asylum-applicants each year. Beyond criticisms of the potential ineffectiveness of these centers, there are also human rights concerns with the centers. Children will be educated in these centers, not in local schools, which suggests a return to a discredited “separate but equal” philosophy of education.¹⁰⁵

The second set of provisions in the Act concerns appeals. The Act articulates a new appeals process for asylum-seekers, with an emphasis on speedy determination of appeals. One controversial aspect of this portion of the Act is the ability to send asylum-seekers to a safe third-country without an appeal;¹⁰⁶ moreover, there is a rebuttable presumption in the Act that the ten countries poised to join the EU under enlargement are safe third-countries.¹⁰⁷ Applicants making clearly unfounded claims will have no right to appeal in-country.¹⁰⁸ These changes have been made to advance the Government’s goal of a “fair and effective” appeals system that prevents the system being undermined by “meritless applications.”¹⁰⁹

The modest privileges extended in the Act, such as increased financial support for voluntary return, and promotion of refugee integration, fail to balance the restrictiveness of the two policies detailed above. Other restrictive provisions also litter the Act, such as the removal of social support for asylum-seekers who cannot prove that they applied for asylum “as soon as reasonably practicable” after their arrival in the UK.¹¹⁰ The National Asylum Support Service (NASS) indicates that this may affect approximately 100 cases daily.¹¹¹ The Government earlier announced that it would end its presumption that all destitute asylum-seekers would receive NASS support.¹¹²

Not all of the new policies may be fully or immediately implemented, however, because of three obstacles. First, many of the provisions, including ones related to the controversial detention centers, need to be made via ministerial orders; given the political potency of the detention centers, such orders are likely to generate tremendous opposition and ministers will thus be

105. Philip Johnston, *Asylum Plans Contain ‘14 Breaches of Human Rights’*, THE DAILY TELEGRAPH (London), June 22, 2002, at 14.

106. NIA Act, *supra* note 98, § 93.

107. NIA Act, *supra* note 98, c.41 § 115(7). See also Refugee Council, *The Nationality, Immigration and Asylum Act 2002: Changes to the Asylum System in the UK*, REFUGEE COUNCIL BRIEFING 15 (Dec. 2002) [hereinafter REFUGEE COUNCIL BRIEFING].

108. NIA Act, *supra* note 98, c.41 § 115.

109. Statement by Baroness Scotland, Minister at the Lord Chancellor’s Department, *quoted in* Home Office, *Overarching Nationality Immigration and Asylum Reform*, Press Release 294/2002 (Nov. 8, 2002), available at http://213.121.214.245/n_story.asp?item_id=253 (last visited Jan. 27, 2004).

110. REFUGEE COUNCIL BRIEFING, *supra* note 107, at 15. The Refugee Council notes the irony that this measure was first suggested in 1996 by the Conservative government, to the resounding criticism of the Labor party.

111. *Id.* at 16.

112. David Blunkett, *We are a Haven for the Persecuted, But Not a Home to Liars and Cheats*, THE TIMES (London), Oct. 7, 2002, at 18.

cautious and slow in promulgating the orders.¹¹³ Second, in October 2002, the Parliament's Joint Committee on Human Rights identified several places where the bill possibly breached human rights; these provisions are likely to face judicial challenges.¹¹⁴ The Committee's report urged the Parliament to "improve the safeguards for these rights, including the rights to freedom from inhuman or degrading treatment, to liberty, to respect for private and family life, to adequate housing, food and clothing, and to appropriate protection and humanitarian assistance for children seeking asylum."¹¹⁵ Third, as will be discussed in greater detail below, the judicial system has shown itself willing to use judicial review to question and re-interpret statutory provisions that conflict with the European Convention on Human Rights.¹¹⁶

B. *Policy Developments and Legislative Proposals in 2003*

Only one year after the National Immigration and Asylum Act received royal assent, the Blair government introduced a new Asylum and Immigration bill that seeks to remove a critical layer from the appeals structure. The bill proposes the elimination of the Immigration Appeal Tribunal, which is the second-tier tribunal in the asylum adjudication system.¹¹⁷ Because this tribunal over-turns roughly one-fifth of the lower tribunal's decisions in asylum cases,¹¹⁸ the measure would constitute a serious attack on the effectiveness and fairness of the asylum adjudication system.

The Blair government also instituted or considered numerous other measures in 2003. First, the government ran a pilot project to assess the fast-track detention system at the Harmondsworth Detention Centre in London. Without evaluating whether the process worked, the government decided to continue fast-tracking.¹¹⁹ Although the government's Chief Inspector of Prisons determined that this facility was unsafe, at least in part because of the "constant flux" of people being detained there,¹²⁰ the Home Office an-

113. See Refugee Council, *Nationality, Immigration and Asylum Bill Today Receives Royal Assent* (Nov. 8, 2002), available at <http://www.refugeecouncil.org.uk/news/nov2002/curr047.htm> (last visited Jan. 27, 2004).

114. Johnston, *supra* note 105.

115. HOUSE OF LORDS/HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, 23RD REPORT, HL 176 HR 1255, Session 2001-02 (Oct. 22, 2002), available at <http://www.publications.parliament.uk/> (last visited Jan. 27, 2004).

116. Editorial, *supra* note 104.

117. Refugee Council, *The Refugee Council's Response to New Legislative Proposals on Asylum Reform* (Nov. 2003), available at http://www.refugeecouncil.org.uk/downloads/policy_briefings/leg_props_nov03.pdf (last visited Jan. 26, 2004). The full text of the bill is available on the Refugee Council's website, at http://www.refugeecouncil.org.uk/downloads/policy_briefings/leg_props_nov03.pdf (last visited Jan. 26, 2004).

118. *Id.*

119. EUROPEAN COUNCIL ON REFUGEES AND EXILE, 2002 COUNTRY REPORT: UNITED KINGDOM 251 (Sept. 2003), available at <http://www.ecre.org> (last visited Jan. 26, 2004).

120. Nigel Morris, *Detention Center Threatens Safety of Asylum-Seekers at Risk after Detention Centre Attacks*, THE INDEPENDENT (London), Sept. 29, 2003, at 2.

nounced plans to expand use of the facility.¹²¹ Second, the government made an ultimately unsuccessful proposal to the European Union to consider U.K. asylum cases in “transit processing centers” located outside the European Union.¹²² Amnesty International criticized this proposal because it would shift “asylum seekers to zones outside the EU where refugee protection would be weak and unclear.”¹²³ Bearing in mind this constantly shifting sea of new initiatives and reforms, this paper now considers the potentially stabilizing and moderating influence of the British judiciary.

C. *The Judiciary and Implementation of the Human Rights Act*

The British courts have a tradition of judicial activism in the development and interpretation of asylum law.¹²⁴ Even prior to the passage of the Human Rights Act, the courts were willing to assert the rights of asylum-seekers in the legal system.¹²⁵ Substantively, the decision in *Shah/Islam* (acknowledging that women can constitute a social group that deserves protection under the Refugee Convention) expanded the categories of asylum-seekers who could receive protection in the UK.¹²⁶ Procedurally, in 1987, the House of Lords opinion wrote in *Bugdaycay* that “when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny.”¹²⁷ In another case, *Joint Council for the Welfare of Immigrants*,¹²⁸ the Court found that a policy denying benefits to asylum-seekers put genuine asylum-seekers in the untenable position of choosing between being destitute while their claims were pending, and returning to countries where they could face persecution; this was found to violate the asylum-seekers’ right of access to the legal process under the 1993 Asylum Act. Earlier, as Colin Harvey argues,

121. Home Office, *No Let Up Combating Abuse of the Asylum System*, Immigration and Nationality Directorate News 370/2003, Dec. 17, 2003, available at <http://www.ind.homeoffice.gov.uk/news.asp?NewsID=343> (last visited Jan. 26, 2004).

122. Rory Watson, *Britain Wins Guarded Support for Establishing Asylum Camps Outside EU*, THE TIMES (London), June 4, 2003, at 14; EUROPEAN COUNCIL ON REFUGEES AND EXILES, 2002 COUNTRY REPORT: UNITED KINGDOM 256 (Sept. 2003), available at <http://www.ecre.org> (last visited Jan. 26, 2004).

123. Alan Travis, *Amnesty Condemns Safe Haven Scheme*, THE GUARDIAN (London), Mar. 28, 2003, at 16.

124. See SEEKING ASYLUM, *supra* note 73, at 157, 169.

125. Hugo Storey, *Implications of Incorporation of the ECHR in the Immigration and Asylum Context*, 4 EUR. HUM. RTS. L. REV. 453-54 (1998); SEEKING ASYLUM, *supra* note 73, at 169.

126. *R v. Immigration Appeal Tribunal and another, ex parte Shah; Islam and others v. Secretary of State for the Home Department*, 1 W.L.R. 74 (1998).

127. *Bugdaycay v. Secretary of State for the Home Department*, AC 514 (1987), 1 All E.R. 940 (1987) at 531F.

128. *R v. Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants, ex parte B*, 1 W.L.R. 275 (1997) (it is interesting to note that in the opinion of LJ Brown, perhaps the state could rethink its policy by examining the success other countries had with voucher schemes; this scheme was later introduced and much criticized by asylum-advocates).

The courts . . . stepped in to breach the gap that was opening up between the instrumental pragmatism of the government and the principles upon which a humane refugee regime should operate. In practice, the political struggle over the basic terms of asylum policy shifted into the courts.¹²⁹

This movement to protect human rights has been greatly fortified by the 1998 Human Rights Act.

1. *The Human Rights Act*

The Human Rights Act of 1998 (HRA) incorporated the European Convention on Human Rights (ECHR) into domestic law, strengthening British commitment to many of the rights relevant to refugees.¹³⁰ The ECHR most effectively complements the Refugee Convention through Article 3, which provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹³¹ The European Court of Human Rights, a judicial body in Strasbourg created to adjudicate disputes under the ECHR, has interpreted this article to mean that a state violates the ECHR when it expels an asylum-seeker who “face[s] a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he [is] returned.”¹³² Unlike the non-refoulement provision of the Refugee Convention, however, the language of this Article 3 prohibition is absolute, making no exceptions for national security or criminal convictions.¹³³ European Court interpretations have tried to limit the usefulness of Article 3 for asylum-seekers by imposing a highly individualized burden of proof,¹³⁴ but this effort says less about the content of Article 3 than it does about the Court’s wish that asylum-seekers rely primarily on national systems for protection, and its concern that the Court not become a “surrogate” for national decision-making regarding asylum and immigration.¹³⁵

The ECHR has three additional provisions relevant to asylum-seekers. Article 5 defines a right to liberty and security, which asserts that an individual put in detention must be promptly brought before the relevant authorities, and “his release ordered if the detention is not lawful.”¹³⁶ The Article specifically states that the right to liberty may be deprived for persons

129. SEEKING ASYLUM, *supra* note 73, at 151.

130. The Convention’s formal name is the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was originally signed by eight countries, including the United Kingdom, and now has 44 signatories. 213 U.N.T.S. 221 (1953) [hereinafter ECHR]. *See generally*, Stephen GROSZ, JACK BEATSON AND PETER DUFFY, HUMAN RIGHTS: THE 1998 ACT AND THE EUROPEAN CONVENTION (2000) [hereinafter GROSZ].

131. ECHR, *supra* note 130, at art. 3.

132. *Vilvarajah v. United Kingdom*, 14 Eur. H.R. Rep. 248, ¶ 103 (1992).

133. *Harvey*, *supra* note 37, at 382-83, 385.

134. *Cruz Varas v. Sweden*, 14 Eur. H.R. Rep. 24 (1991), *cited in Harvey*, *supra* note 37, at 383-4.

135. *Harvey*, *supra* note 37, at 383.

136. ECHR, *supra* note 130, at art. 5(4).

“effecting an unauthorized entry into the country” or persons facing deportation actions.¹³⁷ Article 6 articulates the right to a fair trial,¹³⁸ and has been used to overturn convictions made under the UK’s carrier sanctions laws.¹³⁹ Article 8 defines the “right to respect for family and private life.”¹⁴⁰ The enumerated exceptions to this right are what is necessary for “national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” Article 8 has been used in challenges to deportation of asylum-seekers where those deportations would negatively affect family life; the European Court for Human Rights has interpreted that under Article 8, “deportation must be justified as a proportionate response to a *pressing* social need in a state.”¹⁴¹ Most of the caselaw arising under Article 8 involves “integrated aliens,” i.e. aliens with substantial ties to their community, and it is unclear if the law will be applied more broadly.¹⁴² The rising number of cases brought under this article, however, suggest the real potential for providing individual remedies under the ECHR.

A significant limitation of the Human Rights Act is that it only indirectly incorporated the ECHR, meaning that Convention rights – like common law – will be vulnerable to any legislation seeking to directly over-ride those rights.¹⁴³ Another effect of the indirect incorporation is that the HRA does not incorporate the jurisprudence of the European Court of Human Rights in Strasbourg.¹⁴⁴ Finally, even with the HRA, the judiciary is unable to overturn legislation that is incompatible with the ECHR; it can only make a “Declaration of Incompatibility,”¹⁴⁵ and report it to Parliament.¹⁴⁶

Furthermore, the Human Rights Act does not incorporate Article 13 of the ECHR. Article 13 states that “[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” The British government thought the inclusion of this article would be redundant to the remedy section of the HRA.¹⁴⁷

137. *Id.* at art. 5(1)(f).

138. *Id.* at art. 6.

139. International Transport, Roth GmbH & Others v. Home Office, 2001 WL 1476255.

140. ECHR, *supra* note 130, at art. 8.

141. Ann Sherlock, *Deportation of Aliens and Article 8 ECHR*, EUR. L. REV., 23 SUPP HRS, 62-75 (1998) (emphasis added).

142. *See generally id.*

143. GROSZ, *supra* note 130, at 9.

144. *Id.* at 16-27.

145. Human Rights Act, § 3(1) (1998) (Eng.).

146. *Id.* § 4(2).

147. 475 PARL. DEB., H.L. (5th ser.) (1997) 475.

2. *Judicial Implementation of the Human Rights Act and Judicial Expansionism*

Notwithstanding these limitations, the British courts have embraced human rights concepts in their decisions since the passage of the HRA in 1998. The Courts have used human rights language to extend protection based on gender claims,¹⁴⁸ to reduce the likelihood of deportation under ECHR Article 8,¹⁴⁹ and to overturn certain carrier provisions aimed at reducing the number of asylum-seekers reaching the UK in the first place, under ECHR Article 6.¹⁵⁰ The courts have paid great deference to the ECHR in many of these decisions. Particularly noteworthy was the *Zenovics* case, where an asylum-seeker had both an asylum claim and an ECHR-based claim rejected, and was then told by the government that it had no jurisdiction to hear an appeal of his ECHR claim. The Court of Appeal determined that Parliament could “not possibly have intended” that his rights of appeal be less for his human rights claim than for his asylum claim, and applied a higher standard, effectively increasing access to the British courts for those making human rights claims under the ECHR.¹⁵¹ More recently, the High Court ruled that the government had acted unlawfully when it deported an Afghani family to Germany (under the Dublin Convention), saying that the family’s human rights had been breached by the government’s failure to consider the deportation’s effect on their mental health.¹⁵²

Perhaps the most important case demonstrating the judicial willingness to protect asylum-seekers’ rights is *R. v. Secretary of State, ex parte Adan*.¹⁵³ The *Adan* case dealt with the safe third country principle, and whether an asylum-seeker could be deported to France or Germany, when the asylum law of both of these countries failed to encompass persecution by non-state actors. The House of Lords court examined the issue not by turning to UK statutes, but by looking to the purpose of the 1951 Refugee Convention. In *Adan*, Lord Steyn remarked:

It is accepted, and rightly accepted, by the Secretary of State that it is a long standing principle of English law that if it would be unlawful to return the asylum seeker directly to his country of origin where he is subject to persecution in the relevant sense, it would equally be

148. *R v. Immigration Appeal Tribunal, ex parte Shah*; *Islam v. Secretary of State for the Home Department*, I.N.L.R. 144 (1999).

149. *Ahmadi v. Secretary of State for the Home Department*, 2002 WL 2029260 (Article 8 right to life was being interfered with, since Mrs. Ahmadi’s post-traumatic stress was likely to worsen if she were deported to Germany).

150. *International Transport Roth GmbH and Others v. The Home Office*, 2001 WL 1476255.

151. *Zenovics v. Secretary of State for the Home Department*, 2002 WL 237072.

152. *Ahmadi*, *supra* note 149.

153. *R. v. Secretary of State, ex parte Adan*, 4 All E.R. 774 (1999).

unlawful to return him to a third country which it is known will return him to his country of origin.¹⁵⁴

Adan was a landmark case, and confirmed the British judiciary's willingness to take a more expansive approach to refugee protection than the Parliament. The Home Secretary responded to this decision by amending the 1999 Immigration Act to create a presumption that other EU member states are, by definition, safe.¹⁵⁵ Despite this legislative setback, the "question of a true interpretation" is likely to be re-litigated,¹⁵⁶ especially with the 2002 Act's affirmation that the presumption applies to the ten states entering the EU under enlargement.

The judiciary's interpretations do not uniformly benefit asylum-seekers. A number of recent decisions have been criticized, including the *Saadi* case, which considered the deprivation of liberty involved with detaining four Kurdish asylum-seekers from Iraq, who argued that their detention was a violation of Article 5 of the ECHR. Acknowledging that any detention involves a deprivation of liberty, the Court nonetheless said that the brief detention (a matter of days only) was justified by the government's policy objective of speedily processing their claims.¹⁵⁷

The central point, however, is not the uniformity of outcomes, but the fact that the Courts are willing to interpret legislation in ways that protect asylum-seeker rights, and do not fear the counter-majoritarian problems of undermining the legislature when they see that legislation has violated the human rights of asylum-seekers.¹⁵⁸ In this vein, the Courts concern themselves more with the purpose and goals of international law than with the politics behind particular pieces of legislation. As Guy Goodwin-Gill has written, "there is much practical common sense in many of the rulings recently handed down by UK courts . . . the object and purpose of the Convention as a whole, not any narrow, purely linguistic guide, are seen as the best aids to interpretation." The political fallout from this judicial role appears not to worry the judiciary. Lord Chief Justice, Lord Woolf, stated in a public speech that it was the duty of the judiciary to protect human rights for unpopular minorities like asylum-seekers if the government would not, specifically stating that "the temporary unpopularity of the judiciary is a price well worth paying if it ensures that this country remains a democracy committed to the rule of law."¹⁵⁹

154. *Id.*, at 515C.

155. Guy Goodwin-Gill, *Cases and Comments – The Margin of Interpretation: Different of Disparate?*, 11 INT'L J. OF REFUGEE L. 730 (1999).

156. *Id.*

157. *R. v. Secretary of State, ex parte Saadi*, UKHL 41 (2002).

158. See Harvey, *supra* note 37, at 383.

159. Arifa Akbar, *Judges Will Protect Minorities*, THE INDEPENDENT (London), Oct. 16, 2002, at

III. COMPETING FORCES: HUMAN RIGHTS EXPANSION AND ASYLUM RESTRICTION

A. *Forces for Restriction: Sangatte and Its Aftermath*

The forces for restricting asylum law in the UK are most clearly embodied by the interplay between domestic and European pressures during the stalemate at the Sangatte camp in France. Sangatte is a refugee camp near the entrance to the Eurotunnel through which trains from France to England pass. The tunnel is at the “frontline of Britain’s defences against illegal immigration.”¹⁶⁰ In the two years that the camp was in operation, dozens of asylum-seekers each week used Sangatte as a springboard for attempts to enter the United Kingdom,¹⁶¹ and it was a major center of trafficking.¹⁶²

For many in the UK, Sangatte became the symbol of all that was wrong with UK asylum policy. Home Secretary David Blunkett – the man politically accountable for asylum policy – came under enormous criticism from the media and from opposition party members who argued that Sangatte was only a “symptom, not a cause of the problem.”¹⁶³ An editorial in the conservative Sunday Telegraph opined that thanks to the “failure of British and French governments to get to grips with the crisis,” Sangatte was “now having a tangible and deleterious effect on people’s lives in the southern counties,” and went on to blame the illegal immigration on attractive government benefits and the government’s failure to evict illegal immigrants who “know that, once they are here, they will almost certainly be allowed to stay.”¹⁶⁴

The camp also created enormous foreign-policy tension between France and the UK. France accused the UK of attracting asylum-seekers with lax policies, and the UK criticized France for operating the camp so close to the tunnel, where it was a magnet for asylum-seekers.¹⁶⁵ The Interior Minister for France, Nicolas Sarkozy, criticized the UK’s “lax regime for asylum seekers,” and pointed to the need for harmonization within Europe to avoid such problems.¹⁶⁶

160. Comment, *Close Sangatte*, THE INDEPENDENT (London), Aug. 23, 2001, at 3.

161. See, e.g., *The Relief of Sangatte*, SUNDAY TELEGRAPH (London), Mar. 17, 2002, at 26.

162. Adam Sage, *Crackdown in Sangatte Smashes Refugee Smugglers*, THE TIMES (London), Nov. 1, 2002, at 17.

163. Philip Delves Broughton and Andrew Sparrow, *Blunkett Shuts the Gate at Sangatte*, DAILY TELEGRAPH (London), Sept. 27, 2002, at 2.

164. *The Relief of Sangatte*, SUNDAY TELEGRAPH (London), Mar. 17, 2002, at 26.

165. Philip Johnston, *Sangatte to Close but UK May Take Migrants*, THE DAILY TELEGRAPH (London), July 13, 2002, at 1.

166. Philip Delves Broughton and Andrew Sparrow, *France Blames Lax UK for Sangatte Chaos*, THE DAILY TELEGRAPH (London), June 1, 2002, at 1.

On September 27, 2002, Blunkett and Sarkozy announced a resolution to the Sangatte situation: the camp would close,¹⁶⁷ and France and the United Kingdom would evenly divide the responsibility for processing the asylum claims and divide the financial responsibility to encourage adults and children to return home.¹⁶⁸ As soon as one problem was thus resolved, the press pointed to likely new points of pressure on the UK, from Cherbourg to Calais.¹⁶⁹

Sangatte focused UK attention on fears of the UK being swamped by refugees and fears of abuse of the asylum system by economic migrants, and it also furthered convictions that the UK system was grossly inefficient. These fears and convictions shaped the politics fueling the passage of the 2002 Act, which emphasized the same three concerns: swamping, abuse, and inefficiency. Blunkett himself referred to the swamping concern when he appeared on the BBC to defend his Bill, saying that refugee children should not be swamping British schools.¹⁷⁰ Blunkett also played to fears of abuse by emphasizing many of the new efforts to deter asylum-seekers by making asylum in the UK look less attractive; he described these efforts as “stringent measures aimed at making Britain less attractive to unjustified asylum-seekers.”¹⁷¹ Finally, Blunkett was particularly sensitive to criticisms of the inefficiency of the asylum process.¹⁷² During his tenure, it had become clear that the 1999 reforms instituted by his predecessor, Jack Straw, were failing; despite the tough measures aimed at deterring asylum seekers, Blunkett faced headlines proclaiming that the UK was the favored destination of all asylum-seekers, and that the numbers had risen in the UK when they were declining elsewhere.¹⁷³ From this political climate, it is easy to see how the Parliament could pass an act that drastically cut back rights of appeal and placed unprecedented emphasis on expedited processes.

167. The closure ultimately happened in December 2002. European Council on Refugees and Exiles, COUNTRY REPORT 2002: UNITED KINGDOM 255 (Sept. 2003), available at http://www.ecre.org/country02/uk_247-256.pdf (last visited Jan. 26, 2004).

168. *Id.* (noting that adults would be offered roughly \$2,000, and children \$500 to encourage them to depart the camp).

169. *See, e.g., Symbolism of Sangatte*, THE INDEPENDENT (London), Nov. 12, 2002, at 16.

170. Philip Rudge, *Reconciling State Interests with International Responsibilities*, 10 INT'L J. OF REFUGEE L. 14 (1998). Blunkett himself used this term when promoting his bill. Andrew Grice, *A Tide of Tough Rhetoric, But No Sign of Joined-Up Policy on Immigration*, THE INDEPENDENT (London), Apr. 25, 2002, at 15; Oliver Wright, “Swamped” Doctor Claims Health Policy Is Racist, THE TIMES (London), Apr. 25, 2002.

171. Philip Webster, *Labour's New Iron Curtain for Refugees*, THE TIMES (London), Oct. 7, 2002, at 1.

172. Following a week when a conservative immigration watch group published statistics showing that 90% of failed asylum-seekers remain in Britain, Blunkett himself wrote an op-ed responding to charges of over-sensitivity, and trying to forestall further attacks. *See* David Blunkett, *Rather than Compete in a Rush to Judgment, the Media Should Wait for the Facts*, THE TIMES (London), Sept. 18, 2002.

173. *See, e.g., Anthony Browne, Asylum-Seekers Make Britain First Choice*, THE TIMES (London), Sept. 13, 2002, at 4. The irony of these numbers rising for Britain but falling for Europe is heightened by the fact that Britain opted out of Schengen precisely because it believed itself far better able to police its borders than Europe would be able to police Europe's borders.

The battle for the passage of the 2002 Act was hard fought in the pages of the British media and went far beyond the three specific concerns enumerated above. In editorials, op-eds, and letters to the editor, it was clear that public reaction to asylum-seekers was increasingly negative. Although some commentators saw the influx of asylum-seekers, both skilled and unskilled, as a vital source of new labor,¹⁷⁴ others worried about the asylum-seekers' impact on the labor market.¹⁷⁵ Elected officials spoke of "gun-toting" asylum-seekers,¹⁷⁶ and warned of the crisis brewing because the asylum-seekers "do not live in accordance with local people's social habits."¹⁷⁷ Asylum-seekers themselves recounted tales of being accused of "sucking up taxpayers' money."¹⁷⁸ Perhaps not coincidentally, violence against refugees was at higher level than ever before, with more than 2000 incidents reported in the two years of the Government's dispersal program.¹⁷⁹ Blunkett justified his reforms by saying that these concerns reflected an underlying lack of confidence in the asylum system, and that to increase support for asylum in the long-term, the Government needed to cut down on abuse to restore people's faith in the system.¹⁸⁰

The shape of the government's 2002 Act was also influenced more generally by the trends in asylum law across Europe. Many national asylum policies are becoming more restrictive as governments in Europe are facing domestic political pressures to limit the numbers of refugees seeking and gaining asylum in their countries. Much of the European political pressure for restriction comes from extreme right parties. The ability of these parties to manipulate popular fears about asylum into electoral success – what Matthew Gibney calls the "low politics" of asylum – has led mainstream parties, conservative and liberal, to adopt some of the same rhetoric of toughness. It is unclear whether this represents attempts to forestall extreme right victories,¹⁸¹ or from a "loss of nerve" regarding social and economic

174. Richard Woods, *Asylum Isn't Working*, SUNDAY TIMES (London), May 26, 2002 (noting that with a shortage of thousands of workers in the national health service, qualified migrants play an important role).

175. Anthony Browne, *The Economic Case for Immigration is More Bogus Than Any Asylum Seeker*, THE TIMES (London), June 20, 2002 (arguing that "large-scale and unskilled immigration is likely to harm the unskilled and unemployed," among other groups).

176. W.F. Deedes, *From Sleepy Market Town to Urban Jungle*, THE DAILY TELEGRAPH (London), Aug. 3, 2002, at 8.

177. Woods, *supra* note 174.

178. Colin Cottell, *Asylum Seekers: Would You Flee the Land of Your Birth For This?*, THE GUARDIAN (London), Oct. 27, 2001, at 22 (interviewing Ethiopian asylum-seekers who would like to work while their claims are pending so that people would not think they were wasting government resources).

179. Ian Burrell and Paul Peachey, *Violence Against Refugees New High*, THE INDEPENDENT (London), Sept. 16, 2002, at 1.

180. Webster, *supra* note 171.

181. John Hooper, *Stoiber Uses Race to Drum Up Votes*, THE GUARDIAN (London), Sept. 17, 2002, at 13 (noting that "From the start the conservatives have been faced with a difficult choice: whether to go for the votes of the broad centre, or try to ride the Europe-wide surge of the populist right which carried Pim Fortuyn's followers into office in the Netherlands"); *see also* Andrew Grice,

policies.¹⁸² What is clear is that the shift is occurring.

Although the political pressure is often driven by extreme right politicians,¹⁸³ the anti-refugee rhetoric has become increasingly mainstream,¹⁸⁴ largely because of the dramatic increases in asylum claims being made. In the 1970s, 13,000 asylum applications were made annually across Western Europe, but in the year 2000, 412,000 claims were made in a single year.¹⁸⁵ Facing dramatically increased numbers of arrivals, governments are seeking measures that would effectively stem this flow of would-be migrants and are trying to correct the failures of the Dublin Convention through the harmonization of policies under Amsterdam.¹⁸⁶ While the 2002 Act was being debated, for example, Denmark announced the imposition of the strictest asylum policies in its history, eliminating welfare benefits for asylum-seekers and strengthening the threshold that asylum-seekers would need to meet for a successful claim.¹⁸⁷ The Danish bill also portrayed immigrants in a "negative light, thereby aggravating public stereotyping of all immigrants, including refugees and asylum-seekers."¹⁸⁸

UNHCR points to four different strategies being used across Europe to restrict the numbers of asylum claims being made. First is the promotion of non-arrival policies, implemented through carrier sanctions and visa requirements.¹⁸⁹ Second is the safe third-country policy, which is intended to divert asylum-seekers who do arrive in a country; essentially, this policy corrects the weaknesses of the Dublin Convention and permits the deportation of an asylum-seeker to another country where she or he would not face persecution.¹⁹⁰ Third is governments within the European Union applying the 1951 Refugee Convention increasingly restrictively, precluding claims based on

A Tide of Tough Rhetoric, But No Sign of Joined-Up Policy on Immigration, THE INDEPENDENT (London), Apr. 25, 2002, at 15.

182. Rudge, *supra* note 170, at 11.

183. Consider, for example, assassinated Dutch politician List Pim Fortuyn, and Jean Marie LePen in France. See, e.g., Michael Gove and David Charter, *Straw Puts Asylum at Top of the EU Agenda*, THE TIMES (London), June 20, 2000 (noting the influence of LePen and Fortuyn on British Foreign Secretary Jack Straw); Quentin Peel, *Europe's Immigration Muddle: The EU's Constitutional Convention needs to Develop a Common Framework to Simplify Policy on Asylum Seekers*, FINANCIAL TIMES (London), June 24, 2002, at 23.

184. Matthew J. Gibney, *The State of Asylum: Democratization, Judicialism and Evolution of Refugee Policy*, in THE REFUGEES CONVENTION 50 YEARS ON 20-22 (Susan Kneebone ed., 2003).

185. *Id.* at 22-23. Levels in the 1990s were occasionally even higher, as the crisis in the Balkans created successive waves of refugees. *Id.*

186. See generally Blake, *supra* note 44. One of Blake's central arguments is that Dublin's greatest flaw was being implemented at a time when there were no harmonized standards across the EU; because of the problems with Dublin, the "goal of a harmonised asylum policy within the [Treaty of Amsterdam] remains as necessary as ever." *Id.* at 117.

187. Michael Mann, *Uproar Over Asylum May Fail to Add Up*, FINANCIAL TIMES (London), June 11, 2002, at 9.

188. UNHCR, *Western Europe: Recent Developments*, UNHCR MID-YEAR PROGRESS REPORT 214 (2002).

189. UNHCR 2000, *supra* note 46.

190. *Id.*

gender or persecution by non-state actors.¹⁹¹ Last is governments hoping to deter asylum-seekers through their asylum-processing procedures; in this effort, governments have promoted detention for those whose claims are pending, and have denied benefits including the ability to work while claims are pending.¹⁹² All but the third of these strategies are advanced by the 2002 Act in the UK. The 2002 Act, with its emphasis on deterrent measures, limited judicial review, and reduced benefits establishes the extent to which the legislative branch of government has internalized the European far right's approach to asylum.¹⁹³ The UK government's proposal in Seville to condition aid upon progress toward combating illegal immigration likewise indicates the willingness of the government to embrace the view of the right.¹⁹⁴ Fortunately for the rights of refugees, the judicial branch is moving in an altogether different direction.

B. *Forces for Expansion: The Human Rights Act and Its Effects*

The most dynamic force for expansion of asylum protection in the UK is the 1998 Human Rights Act ("HRA") detailed above. Despite the fact that it is only indirectly incorporated and does not incorporate Strasbourg jurisprudence, the HRA is already having a significant impact in the UK and is likely to be a powerful force for expansion of asylum protections in the UK for three reasons. First, the Strasbourg jurisprudence, although not binding, will be highly persuasive within British courts.¹⁹⁵ Second, courts will generally exercise a presumption that Parliament has not intended to overrule international law, and will issue interpretations that permit a statute to be in compliance with international law.¹⁹⁶ Finally, the Courts' ability to make declarations of incompatibility will provide the kind of "sunshine" technique that will encourage compliance;¹⁹⁷ the declarations will be rallying points for human rights groups and others concerned with immigrant rights inside the United Kingdom.¹⁹⁸

191. *Id.* at 162.

192. *Id.*

193. See comments by Nick Hardwick, Executive Director of the Refugee Council, quoted in Treneman, *supra* note 87.

194. Michael Gove and David Charter, *Straw Puts Asylum at Top of the EU Agenda*, THE TIMES (London), June 20, 2002.

195. See GROSZ, *supra* note 130, at 16-27.

196. For a compelling discussion of this point, see Curtis Doebbler, *Myths and Realities: International Human Rights Law Relevant to Asylum in Europe*, in UNITED KINGDOM ASYLUM LAW IN ITS EUROPEAN CONTEXT (Prakash Shah & Curtis Francis Doebbler eds., 1999).

197. For full discussion of the role sunshine techniques play in compliance with international law, see Harold K. Jacobson & Edith Brown Weiss, *Assessing the Record and Designing Strategies to Engage Countries*, in ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 1998).

198. Christina M. Kitterman, *Note and Comment: The United Kingdom's Human Rights Act of 1998: Will the Parliament Relinquish its Sovereignty to Ensure Human Rights Protection in Domestic Courts?*, 7 ILSA J INT'L & COMP L. 583, 592 (2001), citing John Wadham & Helen Mountfield, BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998 (1999).

The expansionism of the judiciary is supported by several vocal domestic pressure groups, as well as churches, trade unions, and certain political figures.¹⁹⁹ Among the most vocal pressure groups are Asylum Aid and the Refugee Council. Both groups have issued frequent detailed critiques of each new proposed piece of legislation and policy²⁰⁰ and often provide reactions to judicial decisions as well.²⁰¹ In response to the 2002 Act, for example, Asylum Aid offered briefing notes on two provisions of particular concern, the “draconian and dangerous” new appeals measures²⁰² and the three-tiered detention centers.²⁰³ The Refugee Council offered similarly strong language in reaction to a last-minute change made in order to pass the 2002 Act: “These measures . . . have all the feel of a Government in a state of panic . . . [the change] constitutes a fundamental breach to the very core of the United Nations Refugee Convention.”²⁰⁴ The Church of England and the Church of Scotland have both issued statements decrying the Government’s immigration and asylum policies,²⁰⁵ although the effectiveness of these statements is in some doubt.²⁰⁶ Some political figures have also spoken out in favor of increased protections for asylum-seekers, including some within Prime Minister Blair’s Labor Party. Glenda Jackson, Labor MP, attacked the act as it neared passage in Parliament. As the London Times reported, “[t]he asylum Bill left the Commons in the unusual circumstances of Mr Blunkett receiving praise from opposition parties but being heckled from his own back benches as Glenda Jackson attacked its provisions to educate refugees’ children

199. See, e.g., *Church of England’s View on Race Relations and Immigration*, available at <http://www.cofe.anglican.org/view/index.html> (last visited Jan. 23, 2004); and the views of the Church of Scotland: *Church Criticizes Blair Asylum Pledge*, BBC News (Feb. 9, 2003), at http://news.bbc.co.uk/2/hi/uk_news/scotland/2741987.stm (last visited Jan. 23, 2004) (noting that “the Church of Scotland’s moderator has said he was ‘dismayed’ by Tony Blair’s desire to halve the number of asylum seekers in the UK”).

200. See, e.g., Refugee Council, *Government Announcement and Proposals Since Its White Paper on Asylum*, REFUGEE COUNCIL BRIEFING (July 2002), available at <http://www.refugeecouncil.org.uk> (last visited Jan. 23, 2004); Asylum Aid, *Asylum Aid’s response to the Government’s extension of the asylum ‘safe list’ countries* (June 18, 2003), at http://www.asylumaid.org.uk/Press%20statements/white_list_June_03.htm (last visited Jan. 23, 2004).

201. Press Release, Refugee Council, *Response to the Ruling Won by Hauliers Challenging Carrier’s Liability Fines* (Dec. 7, 2001), available at <http://www.refugeecouncil.org.uk> (last visited Jan. 23, 2004); Press Release, Refugee Council, *Law Lords Rule that Detention of Asylum Seekers whose Cases are being Considered does not Break with Human Rights Legislation* (Nov. 1, 2002), available at <http://www.refugeecouncil.org.uk> (last visited Jan. 23, 2004).

202. Asylum Aid, *Briefing Note: Abolishing In-Country Appeals* (June 18, 2002), available at <http://www.asylumaid.org.uk> (last visited Jan. 23, 2004).

203. Asylum Aid, *Briefing Note: Accommodation Centers* (June 18, 2002) available at <http://www.asylumaid.org.uk> (last visited Jan. 23, 2004).

204. Press Release, Refugee Council, *Statement in Response to Home Secretary Proposals* (Oct. 7, 2002), available at <http://www.refugeecouncil.org.uk> (last visited Jan. 23, 2004).

205. See, e.g., *Church of England’s View on Race Relations and Immigration*, *supra* note 199.

206. Nicholas Pyke, *The Church Militant: C of E – The New Archbishop Will Face a Church Riven by Warring Tribes*, INDEPENDENT ON SUNDAY (London), July 28, 2002, at 20 (noting that “The Church of England – along with all the other Christian churches – has maintained a consistent and principled opposition to the immigration and asylum policies of successive governments, without, apparently, bringing its influence to bear at all”).

separately in centres, not local schools.”²⁰⁷ The Liberal Democrats, Britain’s third major party, have issued a series of statements against the Government policies, saying with regard to the Seville suggestions that “common cross-Europe policies for dealing with asylum seekers is a good objective. Building a wall around some of the richest countries in the world is an entirely unacceptable one.”²⁰⁸

Although there are European political pressures for restriction, there is also an increasingly robust human rights movement in the European Union, comprising intergovernmental and international non-governmental organizations, calling for increased protection of refugees and asylum-seekers. Groups and networks such as the European Council on Refugees and Exile and the European Network Against Racism monitor the legal and policy developments affecting migrants in the hopes of influencing national and European debates on these issues.²⁰⁹ As the European Parliament assumes some role in the formulation of EU asylum policy, the importance of these groups will only increase; the European Parliament provides the greatest access and most accountability of the various EU institutions.²¹⁰

The judiciaries of different European countries are also making contributions toward the protection of refugees. In February 2002, the Federal Administrative Court in Germany issued a landmark opinion in a refugee case brought by someone who had fled Taliban persecution in Afghanistan.²¹¹ The court held that an authority that can provide protection can also persecute, thus over-ruling the long-standing German interpretation that the Refugee Convention covered only persecution by state actors.²¹² In April 2003, the German courts held that it violated “essential civil liberties” to detain individuals pending deportation when there had been no court decision on their cases.²¹³ France, in a series of cases in 2002, recognized valid claims of persecution where authorities “intentionally tolerated” practices like

207. Greg Hurst, *Peers back Concessions on Asylum and Farms*, THE TIMES (London), Nov. 8, 2002, at 16.

208. Press Release, Liberal Democrats, Blunkett Must Not Build a Wall Around Europe (June 26, 2002), available at <http://www.libdems.org.uk/index.cfm/page.homepage/section.home/article.3014> (last visited Jan. 23, 2004).

209. See, e.g., European Council on Refugees and Exiles, *ECRE Observations on the Presidency Conclusions of the European Union Council Meeting, 21 and 22 June 2002*, available at <http://www.ecre.org.uk> (last visited Jan. 23, 2004); THE AMSTERDAM PROPOSALS OR HOW TO INFLUENCE POLICY DEBATES ON IMMIGRATION AND ASYLUM (Jan Niessen & Susan Rowlands eds., 2000), available at <http://www.enar-eu.org/en/publication/4thpube.pdf> (last visited Jan. 23, 2004).

210. See generally Pavlos Eleftheriadis, *The European Constitution and Cosmopolitan Ideals*, 7 COLUM. J. EUR. L. 21 (2001).

211. See European Council on Refugees and Exiles, *Country Report 2001: Germany* (Sept. 2002), available at <http://www.ecre.org/country01/Germany.pdf> (last visited Jan. 23, 2004).

212. A bill codifying this ruling is currently pending in the German legislature. European Council on Refugees and Exiles, *Country Report 2002: Germany* 112-13 (Sept. 2003), available at http://www.ecre.org/country02/germany_107-120.pdf (last visited Jan. 23, 2004).

213. *Id.* at 116.

anti-Semitic attacks and female genital mutilation.²¹⁴ The judiciary is not uniformly protective of refugee rights in Europe: a case in Ireland upheld the validity of fairly minimal due process for an asylum-seeker from Russia.²¹⁵ Nonetheless, judiciaries outside the UK seem to mirror what is happening with the British judiciary – willingness to use judicial review to constrain the restrictions of the political process. As much of human rights interpretation evolves into customary international law, the increasing emphasis on refugee protection will support the increasingly activist views of the British judiciary.

Finally, despite the political pressure to erode refugee rights, the United Kingdom has substantive, formal obligations under numerous treaties and conventions above and beyond those which it has incorporated into its domestic law through the Human Rights Act. The UK is a party to the Refugee Convention,²¹⁶ the International Convention on Civil and Political Rights,²¹⁷ and the Convention Against Torture²¹⁸ among others. Moreover, many of the human rights obligations embodied in the ECHR have become *erga omnes* obligations under international law.²¹⁹ As noted above, courts will seek to interpret statutes in ways that do not violate such international obligations.

C. *What Balance May Be Struck?*

Excepting for a moment the role of the judiciary, it appears that the alignment of domestic forces for expansion and restriction of refugee protections is substantially unbalanced in the UK. The voices for expansion are persistent, but are frequently drowned out by the voices of those who point to the variety of problems – both real and imagined – created by vastly increased numbers of asylum-seekers. Thus, if left to majoritarian processes, the tide in the UK would likely turn against refugees and asylum-seekers. What emerges from the foregoing presentation, however, is that the judiciary can restore the forces to a more even balance, with the potential to neutralize many of the excesses of the majoritarian process.

This note argues, however, that domestic pressures are not the only ones being felt by the British government in recent years. From Sangatte to Seville, the British government has been closely involved in emerging European policy, knowing that its insulation from Europe is diminishing

214. See generally European Council on Refugees and Exiles *Country Report 2001: France* (Sept. 2002), available at <http://www.ecre.org/country01/France.pdf> (last visited Jan. 23, 2004).

215. European Council on Refugees and Exiles, *Country Report 2001: Ireland* (Sept. 2002), available at <http://www.ecre.org/country01/ireland.pdf> (last visited Jan. 23, 2004) (describing the July 2001 case, *Zgnat'ev v. Minister for Justice, Equality and Law Reform*).

216. Refugee Convention, *supra* note 33.

217. ICCPR, *supra* note 38.

218. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 23 I.L.M. 1027 (1984), as modified 24 I.L.M. 535 (1985).

219. See Doebller, *supra* note 196.

steadily.²²⁰

On the European stage, despite the influence of extreme right parties, it is less clear that the balance tips toward restrictionism. Asylum advocates such as the European Council on Refugees and Exile (ECRE) do see various European measures as embodying a “Fortress Europe” model, which betrays the spirit of the 1951 Refugee Convention.²²¹ Rights groups and others fear the possibility of asylum policies converging at the lowest common denominator of protection.²²² It remains, however, an open question whether asylum law will indeed converge at the lowest common denominator. First, the commitments made at the Tampere Summit in 1999 suggest that European governments are imposing self-restraint as they consider the formulation of a common policy. At Tampere, the EU heads of state recognized “an absolute respect for the right to seek asylum.”²²³ They also pledged to maintain the principle of non-refoulement, ensuring that “nobody is sent back to persecution.”²²⁴ Second, the defeat of the British illegal immigration proposal in Seville suggests that there are forces at play other than those propelling “Fortress Europe.” Third, the judiciaries of these European countries, as noted in section (B) *supra* are bound by the same ECHR that has empowered the British judiciary to protect the rights of asylum-seekers.

Despite fears about Fortress Europe, both UNHCR and ECRE maintain that harmonization of asylum policies in Europe could, in theory, lead toward greater protection for refugees. Ruud Lubbers, the UN High Commissioner for Refugees, responded to the Seville Summit by arguing that “Europe’s national asylum systems are badly in need of harmonization . . . harmonized standards could remove many of the reasons why people keep shifting from one country to another,” and asserting a vision of harmonized procedures that are of sufficiently high quality that procedures facilitate both efficiency and rapid refugee integration.²²⁵ Even more striking, the European Parliament itself – an entity that as yet has had no institutional role on asylum policy, but that will become more important under Amsterdam²²⁶ – has urged that harmonization converge toward higher standards. In January 2000 recommendations, the Parliament urged the Committee of Ministers to move toward

220. See, e.g., Helm, *supra* note 56.

221. European Council on Refugees and Exile, *Comments on the European Commission Staff Working Paper Revisiting the Dublin Convention* (June 2000), available at <http://www.ecre.org/statements/dcomments.html> (last visited Jan. 23, 2004). See also Berkowitz and Doebbler, *supra* note 55, at 19.

222. Simpson, *supra* note 42, at 113; UNHCR 2000, *supra* note 46.

223. See European Council on Refugees and Exile, *Observations on the Presidency Conclusion of the European Council Meeting* (June 22, 2002), available at <http://www.ecre.org.uk> (last visited Jan. 23, 2004).

224. Presidency Conclusions, Seville European Council, SN 200/02 (June 21-22, 2002), available at http://www.europa.eu.int/european_council/index_en.htm (last visited Jan. 23, 2004).

225. Ruud Lubbers, *Tackling the Causes of Asylum*, THE OBSERVER (London) (Online Edition), June 23, 2002, at <http://observer.guardian.co.uk/comment/story/0,6903,741848,00.html> (last visited Jan. 23, 2004).

226. *Id.*; see also Simpson, *supra* note 42.

harmonization that would improve the standard of protection for asylum-seekers.²²⁷ Thus, there is some reason to believe that the negative predictions of Fortress Europe will prove unfounded.

Perhaps the most significant factor in determining the ultimate direction of Britain's asylum policy is one that is little discussed in the laws and the public debates, namely the underlying causes of the vastly increased numbers of asylum applications. There are two possible responses that would address this problem from different directions. The first is to acknowledge that at least some portion of asylum-applicants seek asylum because they are unable to come to the UK under any other legal status, and yet would like the economic opportunities available to immigrants in the UK.²²⁸ Recent moves to create a kind of "green card" equivalent for highly-skilled migrant workers is a start, but should be much expanded. Such a policy would take the fuel out of the public perception that asylum-seekers are ill-deserving of government protection, which would greatly deflate restrictionist pressures. The second response would be to redouble efforts to improve governance and human rights conditions in the countries from which refugees are fleeing. As Ruud Lubbers pointed out following the failed British proposal in Seville, removing aid from countries with illegal immigration problems is exactly the *wrong* tactic; the UK should be improving the conditions in those countries so that fewer people will be forced to leave.²²⁹ Although enormously difficult, this approach has the advantage of honestly living up to the spirit of the Refugee Convention, while other measures to prevent arrival of asylum-seekers, such as carrier sanctions, provide only technical compliance. If the Blair government explored either of these approaches, the terms of the debate discussed above would change dramatically, and the forces for expanded protections for asylum-seekers would be greatly strengthened.

CONCLUSION

Asylum policy in the United Kingdom is poised at a significant crossroads between political forces seeking restriction and human rights forces seeking expanded protection. The sources of these diverging forces are complex; they derive from differences within the governing party, across the spectrum of parties, in the judiciary, in the media, among domestic and international asylum advocacy groups, with governments of other European countries, and across the general public in both the United Kingdom and Europe. Any prediction as to how these forces will balance out would be facile, but it is at

227. Guy Goodwin-Gill, *The Individual Refugee. 1951 Convention, the Treaty of Amsterdam, in IMPLEMENTING AMSTERDAM: IMMIGRATION AND ASYLUM RIGHTS IN EC LAW* (Elsbeth Guild & Carol Harlow eds., 2001).

228. See Discussion in § I, *infra*.

229. Press Release, UNHCR, Editorial Opinion: Time for Action in Seville (June 20, 2002), available at <http://www.unhcr.ch> (last visited Jan. 23, 2004).

least a reasonable possibility that the ultimate balance will be struck at a protective level, thanks to both the increasing activism of the judiciary and the possibility that harmonization of asylum policies across Europe may not occur at a “least common denominator” level. For this possibility to be realized, the British government must look more at the underlying causes of its asylum problems and less at short-term responses that at best only borrow time.