

‘Undesirable and Unreturnable’ in the United Kingdom

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1. Introduction

The issue of migrants convicted or suspected of serious criminality is one that has been very high on the media and political agenda in the UK in the last two decades. One of the most notorious incidents in recent history was the revelation, in 2006, that some 1,013 foreign national prisoners had been released without consideration being given to their deportation. This led to the resignation of the Home Secretary, Charles Clarke, and prompted the incoming Home Secretary John Reid to institute a review which went far beyond the issue of foreign national offenders and extended to reform of the entire system of UK immigration regulation.¹

Another no less publicised incident occurred in 2000, when nine Afghan nationals fleeing the Taliban regime hijacked an aircraft and directed it to land in London Stansted airport. These men were subsequently convicted for hijacking the plane, although their convictions were later quashed due to misdirection of the jury. As they were considered to be at risk if returned to Afghanistan the Home Office were instructed to grant these men and their families a limited form of leave to remain in the UK.² In response the Home Secretary John Reid announced that he would introduce legislation to give the Home Office greater powers in respect of unreturnable migrants.³

The UK government’s response to asylum seekers and other migrants suspected of serious criminality is one which has attracted considerable legal, political and media attention in recent years, as will be explored in this paper. Part 2 of the paper focuses on foreign national offenders (FNOs), and outlines the scale and demographic of FNOs in the UK, the considerable barriers that exist to their removal and the measures the UK Home Office has taken to overcome these obstacles. Attention is then given to in-country approaches to unremovable FNOs, with particular focus on the use of detention and anti-terrorist control measures. Part 3 turns to another group of ‘undesirable’ migrants: asylum seekers excluded from refugee status under Article 1F of the 1951 Convention relating to the Status of Refugees (the Refugee Convention). Again the demographic and scale of this group are considered, as are barriers to removal, opportunities for prosecution in the UK and abroad and Home Office policy in respect of such individuals that cannot be removed. This examination reveals that a large amount of time, resource and political pressure has focused on subverting the legal and practical barriers to the removal of undesirable migrants from the UK. However, a viable solution is unlikely to be reached unless and until the Home Office channels further energy into exploring alternative in-country solutions which are more than temporary in nature.

2. Foreign National Offenders (FNOs)

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¹ ‘Immigration system unfit – Reid’, BBC News, 23 May 2006, available at: <http://news.bbc.co.uk/1/hi/uk_politics/5007148.stm> (last accessed 14th March 2015).

² *R v Safi (Al Ahmed)* [2003] EWCA Crim 1809.

³ ‘Judges overrule Reid in Afghan hijack case’, The Guardian, 4th August 2006, available at: <<http://www.theguardian.com/uk/2006/aug/04/immigration.immigrationpolicy>> (last accessed 14th March 2015).

The first category of unreturnable migrants to be considered are foreign national offenders (FNOs), that is, foreign nationals who have been convicted of a crime and sentenced to a term of imprisonment in the UK.

FNOs currently comprise around 13-14% of the UK prison population, standing at 10,650 in March 2014.⁴ This number has remained fairly constant over the past 8 years, representing an increase of only 4% since 2006.⁵ They come from over 150 countries – the largest contingents from Poland, the Irish Republic and Jamaica. Nationals of Romania, Pakistan, Lithuania, Nigeria and India also feature highly, as do nationals of Somalia and Albania.⁶

UK Home Office policy is to seek removal of FNOs from the UK. As noted above, the 2006 scandal which revealed a large number of FNOs had been released without being considered for removal prompted a large scale review of the immigration system, and increased attention focused on the removal of FNOs. Prior to 2006, FNOs would be deported where a court order was made or where the Secretary of State found removal “conducive to the public good”.⁷ However, following the 2006 scandal, legislation was introduced which entails ‘automatic’ deportation for all non-EEA nationals who have been sentenced to 12 months or more for an offence, or for non-EEA nationals sentenced to 24 months or more or 12 months for an offence involving drugs or violent crime.⁸ A change in the Department’s approach after April 2013 means that all FNOs are now considered for removal, not only those who meet the ‘deportation criteria’.⁹ A number of exceptions do apply however, including breach of the FNOs human rights under the European Convention on Human Rights (ECHR).

At present there are around 10 and a half thousand FNOs in prison in the UK, a number that’s remained fairly constant over last 8 years.¹⁰ Removal of FNOs has indeed increased, and stood at 5,097 in 2013-14, up from 2,856 in 2006-07, a figure which has remained broadly unchanged since 2008. The number of failed removals has also fallen from 2,297 in 2010-11 to 1,453 in 2013-14.¹¹ However, the Home Office has made slower progress than expected in removing FNOs from the UK. As noted by Amyas Morse, head of the National Audit Office:

“It is no easy matter to manage foreign national offenders in the UK and to deport those who have completed their sentences. However, too little progress has been made, despite the increased resources and effort devoted to this problem.”¹²

⁴ 2,600 of these individuals however are held on remand or have not been sentenced.

⁵ National Audit Office (NAO), Managing and removing foreign national offenders, 22nd October 2014, pp.4-5, available at: <<http://www.nao.org.uk/wp-content/uploads/2014/10/Managing-and-removing-foreign-national-offenders.pdf>> (last accessed 14th March 2015).

⁶ Ibid, p.13, Figure 1, Data correct as of March 2014.

⁷ Immigration Act 1971, s3(6), s3(5)(a).

⁸ UK Borders Act 2007, ss 32-39.

⁹ Home Office, Immigration Directorate Instructions, ‘Deporting non-EEA foreign nationals’, Version 3.1, April 2015, s.2.3, available at:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426906/Deport-non_eea_Foreign_Nationals.pdf> (last accessed 15th April 2015); NAO, Managing and removing foreign national offenders, (n 5) pp.7 and 16.

¹⁰ 10,649 individuals as of 31st March 2014. NAO, Managing and removing foreign national offenders, (n 5), p.27.

¹¹ Ibid, pp.16 and 35

¹² Statement of Amyas Morse, head of the National Audit Office, 22 October 2014

<<http://www.nao.org.uk/report/managing-and-removing-foreign-national-offenders/>> (last accessed 14th March 2015).

There are a number of legal and practical barriers to the removal of FNOs. These include human rights standards such as the UK's *non-refoulement* obligations and an individual's right to private and family life under Article 8 of the ECHR. EU law and other agreements also create certain barriers to removal. For example, there is greater protection against removal for EU/EEA nationals. Irish nationals are also not generally considered for deportation action, as it has been decided that the public interest is not generally served by enforcing their removal. Specific restrictions may also relate to certain removals, for example extradition. Another key issue is obtaining travel documents and, related to this, the cooperation of foreign governments. Administrative problems within the Home Office have also been highlighted as a major area of concern, as have administrative issues such as booking flights, arranging escorts and the other practicalities involved in removal.

There are a number of ways in which the UK government has tried to overcome these barriers to removal, as will be explored below.

2.1. Barriers to removal

2.1.1. Human Rights Barriers to Removal

Potential human rights barriers to removing FNOs are an issue that has been high on the UK's political agenda in recent years. Attention has been focused primarily on two key areas: the UK's *non-refoulement* obligations and the interpretation of FNO's right to private and family life under the ECHR.

(a) Non-refoulement

There have been attempts to modify the approach of the European Court of Human Rights (ECtHR) to Article 3 ECHR – the prohibition on torture or inhuman and degrading treatment.

The *non-refoulement* obligations of the European Convention, particularly under Article 3, were first stressed by the ECtHR in the case of *Soering* in 1989, which concerned the extradition of a German national to the United States. The court stressed that Article 3 of the European Convention represents an “absolute prohibition of torture and of inhuman or degrading treatment or punishment”, and held that an extraditing State could be responsible for breach of its Article 3 obligations where there is a real risk the person would be subject to treatment contrary to Article 3 in the receiving State.¹³ This judgment posed some difficulties for certain governments seeking to remove foreign criminals from their territory, and was not well received in the UK.

In subsequent cases the UK sought to alter the Court's approach to the *non-refoulement* principle under the ECHR, and persuade the European Court to change their opinion and replace it with more relativist standards for protection against *refoulement*: that the threat posed by an individual to the national security of a Contracting State was a factor to be weighed in the balance when considering the issues under Article 3.¹⁴ However, the UK government's efforts to modify the approach of the European Court have so far proven unsuccessful,¹⁵ a point

¹³ *Soering v United Kingdom* [1989] 11 EHRR 439 [88].

¹⁴ *Chahal v United Kingdom* (1997) 23 EHRR 41 [80]. *Saadi v Italy* (Application No. 37201/06) [2008] ECHR 179.

¹⁵ *Chahal v United Kingdom* (n 14) [80]; *Saadi v Italy* (n 14) [138]. Although the more recent decision *Babar Ahmad v UK* seems to evince a new trend. The ECtHR in this case rejected a relativist stance to Article 3 ECHR in the extradition context, finding that “the question whether there is a real risk of treatment contrary to Article 3 in another State cannot depend on the legal basis for removal to that State.” However, it then suggested that “it agrees ... that the absolute nature of Article 3 does not mean that any form of ill-treatment [treatment contrary to

that has resulted in quite a large amount of criticism being directed at the European Court by the tabloid press in the UK, and a degree of embarrassment for successive Home Secretaries seeking to remove ‘unsavoury’ individuals from the country.¹⁶

In another effort to circumvent its *non-refoulement* obligations, the UK has adopted a practice of entering into diplomatic assurances, or memoranda of understanding (MoU), with third States relating to the treatment of individuals returned to these countries. For example, the UK has agreed MOUs with Ethiopia, Jordan, Libya and Lebanon.¹⁷ A case in point here is that of Abu Qatada.

Abu Qatada (also known as Omar Othman) dominated newspaper headlines in the UK for over a decade. He is a Palestinian Muslim cleric of Jordanian nationality who is allegedly affiliated with Al-Qaida and involved in various terrorist-related activities. There was insufficient evidence to prosecute him in the UK. Rather, he was subject to detention and restrictions under a number of counter-terrorist initiatives pending his deportation to Jordan to face trial.¹⁸ For a decade, courts in the UK were engaged in assessing the safety of Abu Qatada’s return to Jordan. The key issues here were firstly whether Abu Qatada would be subject to torture or ill-treatment were he deported to Jordan to face trial there, and secondly whether evidence obtained by torture would be used in such a trial, breaching his right to fair trial.¹⁹ The UK entered into a MoU with Jordan, which listed a number of assurances of compliance with international human rights standards that would be adhered to while transferring someone from one country to another, in an effort to secure his removal. After 10 years of judicial challenges to his removal, Abu Qatada’s case finally came before the ECtHR.

The ECtHR ruled that Abu Qatada could not be deported to Jordan despite the MoU, as there was a real risk that evidence obtained by torture would be used in his trial there which would be a violation of his right to a fair trial under Article 6 of the ECHR.²⁰ However, it must be noted that they *did* consider that the assurances removed the risk that Abu Qatada himself would be subject to torture or ill-treatment contrary to Article 3 ECHR. The Home Secretary, Theresa May, immediately began seeking re-assurances with Jordan covering how Abu Qatada would be retried in Jordan. However the UK courts were still not satisfied that there was no risk that evidence obtained by torture would be used in the trial, and refused to sanction his deportation.²¹ This provoked a furious reaction from the British government and the press.

Finally, in 2013, Abu Qatada agreed to return to Jordan following the entry into force of a ‘mutual legal assistance agreement’ between the UK and Jordan, which includes a number of fair trial guarantees for deportees and a stringent ban on the use of torture-obtained evidence.²² After a decade of ping-pong through the courts, Abu Qatada therefore eventually

Article 3] will act as a bar to removal from a Contracting State.” Therefore, treatment which when inflicted on a domestic level would amount to torture might not do so when inflicted by a non-European country in the extradition context. This suggests the court may be bringing relativity into Article 3 assessment through the backdoor. *Babar Ahmad and Others v the United Kingdom* (2013) 56 EHRR 1, [168], [177].

¹⁶ See, for example, the long-running saga over the removal of Abu Qatada immediately below.

¹⁷ Assurances with Algeria took the form of exchange of letters. The MoU with Libya was struck out as unsafe in *MT, RB, and U v Secretary of State for the Home Department* [2007] EWCA Civ 808.

¹⁸ This included indefinite detention without trial under Part 4 of the Anti-terrorism Crime and Security Act 2001, introduced following the 9/11 attacks on the United States, and the subsequent regime of control orders, considered in section 2.2.2. below.

¹⁹ For a full overview of this case and the ensuing debate over the use of MoUs, see M. Giuffre, ‘An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)’ (2013) 2 *International Human Rights Law Review* 266-293.

²⁰ *Othman (Abu Qatada) v United Kingdom* 8139/09 [2012] ECHR 56 (17 January 2012).

²¹ *Othman (aka Abu Qatada) v Secretary of State for the Home Department* [2013] EWCA Civ 277.

²² Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, Signed 24 March 2013, available at:

decided to return to Jordan of his own volition. This case demonstrates that, despite immense political will, the UK's *non-refoulement* obligations can make it can be extremely difficult to remove suspected foreign criminals to a third state where there are concerns surrounding that country's human rights standards.

(b) The right to private and family life

Aside from the UK's *non-refoulement* obligations, another barrier to removal is the human rights of the individual to remain, particularly their right to private and family life under Article 8 ECHR. Again, the UK government has sought to alter the interpretation of this right.

Unlike Article 3, Article 8 is not absolute: the rights of the individual must be balanced against the public interest.²³ However, in recent years there was a perception that a large number of appeals against removal from the UK were succeeding on Article 8 grounds. The Home Secretary, Theresa May, on numerous occasions strongly voiced her discontent with this situation:

"We all know the stories about the Human Rights Act. The violent drug dealer who cannot be sent home because his daughter – for whom he pays no maintenance – lives here. The robber who cannot be removed because he has a girlfriend. The illegal immigrant who cannot be deported because – and I am not making this up – he had a pet cat."²⁴

In July 2012 the Immigration rules were amended to clarify the circumstances in which a FNO may be eligible to remain in the UK under Article 8 of the Human Rights Act (right to respect for family and private life), setting out clear criminality thresholds beyond which an offender will normally be deported.²⁵ However, in 2013 the Court of Appeal made clear that the Courts had the same flexibility they had always had to make an overall assessment as to whether a person's family life rights outweigh the State's right to remove them.²⁶ This judgment in essence meant that the Government's intention delimit the scope of the right to family life failed.

Undeterred, in 2014 the 'correct' approach to considering Article 8 claims was set out in primary legislation. This specified certain matters to which courts and tribunals must "have regard" when deciding a case involving family and / or private life rights. It sets out what the "public interest" is, on the State's side of the balancing exercise involved in Article 8. Although judges still have to answer for themselves the question of whether interference with Art 8 rights

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252502/TS.25.Cm8681.pdf
(last accessed 14th March 2015).

²³ Interference with the right to family life is permissible under Article 8(2) if it is in accordance with the law; for a legitimate aim (national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others) and; proportionate.

²⁴ Home Secretary Theresa May, Conservative Party Conference, Manchester, 4th October 2011. A video clip is available at: <http://www.telegraph.co.uk/news/politics/conservative/8806196/Conservative-Party-Conference-2011-Human-Rights-Act-has-to-go-says-Home-Secretary-Theresa-May.html> (last accessed 14th March 2015). The last sentence of this statement sparked the infamous 'catgate' affair. It later transpired that Ms May had misrepresented the facts of the case referred to here - the cat was (unsurprisingly) not a determining factor in the immigration decision.

²⁵ The immigration rules are subordinate legislation made by the Home Secretary pursuant to the statutory duty to do so (Immigration Act 1971 s. 3(2)) and subject only to very limited parliamentary scrutiny. The Human Rights Act 1998 effectively incorporates the ECHR into domestic law.

²⁶ *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192.

is justified on the facts of the case, the legislation states that deportation of foreign criminals is in the public interest, and there is a sliding scale where more serious crimes mean deportation is even more in the public interest.²⁷

Slightly more blunt measures aimed at reducing the number of successful appeals on human rights grounds include limiting the grounds of appeal against removal and restricting access to legal aid.²⁸

The number of appeals against removal by FNOs that have been allowed on human rights grounds have indeed declined dramatically in the last few years (see Figure 1).

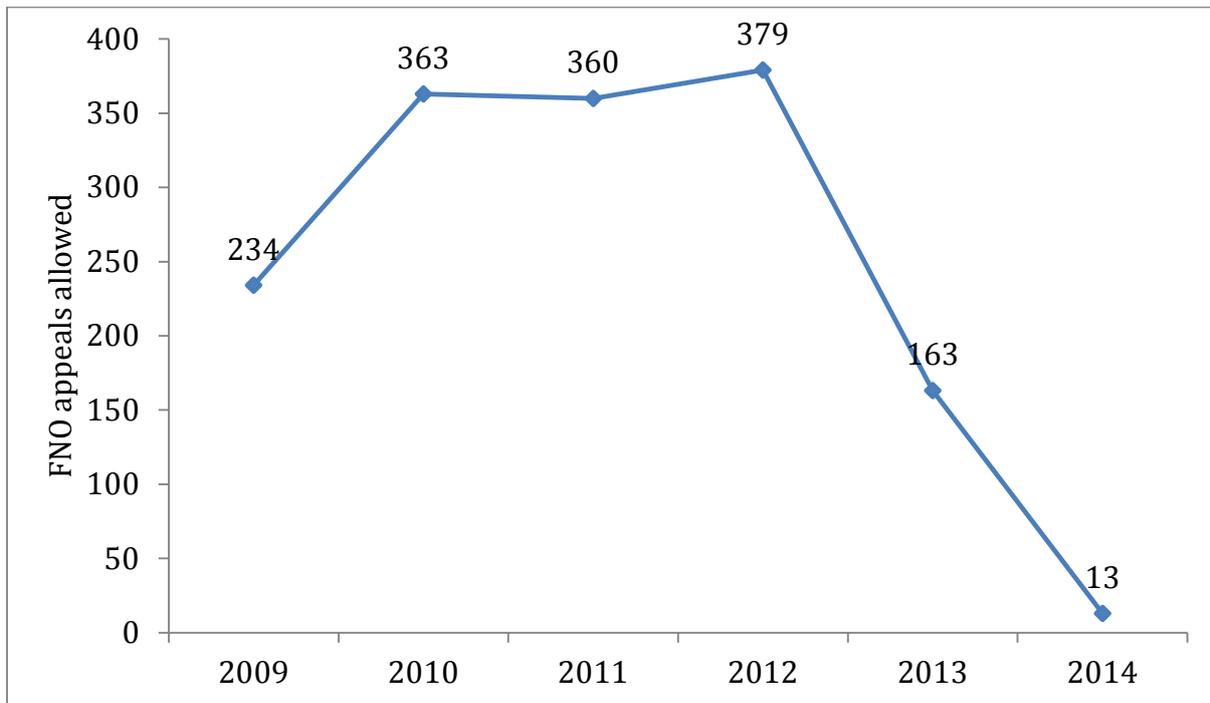


Figure 1: FNO appeals against deportation allowed on human rights grounds (2009-2014)²⁹

2.1.2. Administrative problems

While human rights are often held up by the popular press as the defining barrier to the removal of FNOs, in actual fact administrative problems are the root cause of a large proportion of failed removals.

In many instances, the Home Office must seek an Emergency Travel Document (ETD) from an individual's embassy before they can be removed from the UK. The process can be challenging as people often refuse to comply with attempts to re-document them or provide false information. Ensuring the cooperation of the embassies involved is also a key issue here.

²⁷ Nationality, Immigration and Asylum Act 2002, Part 5A, ss.117A-117D. Part 5A of the 2002 Act was inserted by s.19 of the Immigration Act 2014, which came into force on 28 July 2014. The Immigration Rules were also amended on 28 July 2014 and set out the criminality thresholds. Immigration rules, Part 13, para 398. available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370961/20141106_immigration_rules_part_13_final.pdf > (last accessed 14th March 2015).

²⁸ Unfortunately it is beyond the scope of this paper to examine these further.

²⁹ Freedom of Information (FoI) Response 34340, 9th March 2015 (held on file by author).

Efforts to obtain travel documents from the relevant embassy can be frustrated either because embassies do not want to provide them, or are very slow and inconsistent in doing so.

Perhaps a greater cause for concern, John Vine, the Independent Chief Inspector of Borders and Immigration,³⁰ in a recent report noted that a large number of ETD applications had been agreed by embassies, but the Home Office had not used thousands of these documents.³¹ Some of these agreements dated back more than ten years. He stated that many of these cases were not being actively progressed, leaving individuals' immigration status unresolved for extended periods of time.³² Thus, while the Home Office complains that non-compliance with the ETD process by individuals is a major source of delay, it seems that lack of an effective approach to this issue within the Department may account for a large number of failed or delayed removals. Indeed, an analysis of the 1,453 failed removals in 2013-14 by the National Audit Office indicated that at least a third might have been avoided through better co-ordination of the bodies involved and fewer administrative errors.³³

A cross-departmental action plan has been in development since 2013, with a particular focus on increasing the number of FNOs removed from the UK and reducing the FNO population in prison and the community. The plan has outlined around 40 actions covering:

- reducing the number of FNOs entering the country and the criminal justice system;
- increasing removals by improving the deportation and removal process, and engaging more actively with overseas countries to facilitate returns; and
- changing the law where possible to increase removals and make the UK a tougher environment for FNOs.³⁴

As noted above, in May 2013, as part of the action plan, the Department began systematically targeting all FNOs for removal, regardless of whether they met the 'automatic deportation' criteria. The plan also identifies 17 priority countries, based on the volume of FNOs currently in the UK from each country and an assessment of the level of difficulty of removing them. Each priority country has an individual plan, which considers country specific barriers to removal, such as poor information sharing or difficulty of obtaining travel documents. Nevertheless there are still considerable problems with removal process and many individuals, for various reasons, cannot be removed.

2.2. Unreturnable FNOs – in-country measures

There are currently around 5,600 FNOs who have completed their sentence but remain in the UK while the Department tries to deport or remove them. About 1,400 are detained in prison or an immigration removal centre, largely because they are appealing against their deportation, are not complying with the deportation process or the Department has not made a decision on

³⁰ The current Independent Chief Inspector is David Bolt, who took up the post on 1 May 2015 after John Vine stepped down in late December 2014.

³¹ The Home Office defines an unused ETD as one that has been promised or issued for more than 3 months without use. At the time of the inspection (September 2013), the pool of unused ETDs amounted to 6,460 cases.

³² Independent Chief Inspector of Borders and Immigration, An Inspection of the Emergency Travel Document Process, May-September 2013, available at: <<http://icinspector.independent.gov.uk/wp-content/uploads/2014/03/An-Inspection-of-the-Emergency-Travel-Document-Process-Final-Web-Version.pdf>> (last accessed 14th March 2015).

³³ NAO, Managing and removing foreign national offenders, (n 5), pp.35-36.

³⁴ Ibid, p.17.

their case. In addition, some are waiting for ETDs – 136 had been waiting more than 12 months at the end of March 2014.³⁵

There are an estimated 4,200 FNOs living in the community pending removal, 1 in 6 of which have absconded (760). Over half of these (395 individuals) have been missing since before 2010.³⁶ FNOs can be released into the community at the end of their sentence if:

- an Immigration Judge has granted bail;
- a court has ordered their release; or
- the Department decides that deportation is not possible within a reasonable timescale and grants their release.

Official policy is that detention is used sparingly, and temporary admission or release or bail be granted to individuals that cannot be removed within a short timeframe.³⁷ These are limited forms of leave that will normally impose restrictions on residence, occupation or employment and recourse to public funds. Depending on the risk of absconding, ‘contact management’ might also be imposed, such as electronic tagging or a requirement to regularly report to an immigration reporting centre or police station. Another alternative, however, is detention.

2.2.1. Detention

The UK is unique in Europe in not placing an express time limit on immigration detention. This is covered by common law, what are known as the ‘*Hardial Singh* principles’.³⁸ These principles require that migrants only be detained for a reasonable period in order to remove them and not if it becomes apparent that removal will not take place within a reasonable period. There have in the last few years been a flood of cases in which it has been found that detention has breached the principles and become unlawful.³⁹ However the threshold is high: the court has found that detention for years can be lawful.⁴⁰ Without express guidelines, it is therefore very difficult to know how long an individual may be detained before such detention becomes unlawful.

A sample group of 27 FNOs⁴¹ whose cases were examined in detail by the Independent Chief Inspector of Borders and Immigration had each been locked up for an average of 563 days (more than 18 months) beyond the end of their sentences. In one case, a detainee had been held for 1,288 days (more than three and a half years) because there was no passport to send him home with.⁴² The Independent Chief Inspector Jeremy Vine noted that:

³⁵ Ibid, p.35.

³⁶ Ibid, p.37.

³⁷ Home Office Enforcement Instructions and Guidance, Chapter 55: detention and temporary release (last updated 30th January 2015). See also Chapter 56: home leave, TA, reporting restrictions and Chapter 57: bail, all available at: <<https://www.gov.uk/government/publications/chapters-46-to-62-detention-and-removals>> (last accessed 14th March 2015).

³⁸ Drawn from the case which set out important principles concerning the use of powers to detain a person for immigration purposes. *R(Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1. Endorsed by the Supreme Court in *Walumba Lumba & Kadian Mighty v Secretary of State for the Home Department* [2011] UKSC 12.

³⁹ For example *R (Sino) v Secretary of State for the Home Department* [2011] EWHC 2249.

⁴⁰ In *R(Muqtaar)* the total length of the appellant’s detention was just over 41 months. It was accepted that detention was lawful for the first 16 months but became unlawful thereafter. *R(Muqtaar) v Secretary of State for the Home Department* [2012] EWCA Civ 1270.

⁴¹ Who were classed by the Home Office as ‘non-compliant’ with the ETD process.

⁴² Independent Chief Inspector, An Inspection of the Emergency Travel Document Process (n 32), p.46. Of the 2,044 FNOs leaving detention between 1 April and 30 September 2012, 1,377 (67%) had been in detention for

“Too often the Home Office’s default approach, particularly in the case of ex-Foreign National Offenders, was to keep the individuals in detention in the hope that they would eventually comply with the ETD process. This was particularly disappointing given recommendations I had made on this issue in a number of previous reports. Given the legal requirement only to detain individuals where there is a realistic prospect of removal, this is potentially a breach of their human rights. It is also extremely costly for the taxpayer.”⁴³

A recent Parliamentary inquiry into this issue recommended a limit of 28 days on the length of time anyone can be held in immigration detention and a presumption of community-based resolutions over detention. The panel noted that the Government “should learn from international best practice and introduce a much wider range of alternatives to detention than are currently used in the UK.”⁴⁴ As such, it is hoped that in the future alternatives to detention will be more readily employed by the Home Office in respect of unreturnable FNOs.

2.2.2. *Anti-terrorist measures*

There are also a range of anti-terrorist measures that can be applied to unremovable foreign nationals who are suspected (albeit not convicted) of involvement with terrorism. Following the 9/11 terrorist attacks on the United States, the UK introduced primary legislation which included the power to detain non-nationals in prison, despite the fact that they were not at the time deportable.⁴⁵ In essence this amounted to indefinite detention. However, the House of Lords held this legislation incompatible with the European Convention in that it was discriminatory, as it applied only to foreign nationals. The measure was also disproportionate as it did not rationally address the threat posed by international terrorism.⁴⁶

Following this decision, the indefinite detention regime was replaced by a regime of control orders under the Prevention of Terrorism Act 2005, which applied to both non-nationals and UK nationals. Control orders, which were in place in the UK between 2005 and 2011, were preventative measures intended to protect members of the public from the risk of terrorism by imposing restraints on those suspected of involvement with terrorist activity. They contained restrictions including a curfew of up to 18 hours, confinement within a geographical boundary, electronic tagging, financial reporting requirements and restrictions on association and communication.

Control orders were made against 52 people over the lifetime of the Prevention of Terrorism Act 2005. All were men, suspected of involvement in Islamist terrorism. The

less than 29 days, 145 (7%) for between 29 days and two months, 159 (8%) for between two and four months, 223 (11%) for between four and 12 months and 140 (7%) for 12 months or more. Home Office, Foreign National Offenders in detention and leaving detention, 28 February 2013, Section 3, available at:

<<https://www.gov.uk/government/publications/foreign-national-offenders-in-detention-and-leaving-detention/foreign-national-offenders-in-detention-and-leaving-detention>> (last accessed 14th March 2015).

⁴³ Independent Chief Inspector of Borders and Immigration, Annual Report 2013-2014, p.18, available at: <<http://icinspector.independent.gov.uk/wp-content/uploads/2014/12/ICI-Annual-report-2013-14-FINAL-web.pdf>> (last accessed 15th April 2015) .

⁴⁴ All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom, March 2015, available at: <<https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf>> (last accessed 14th March 2015). The panel also noted that detainees often have difficulty in challenging their detention and accessing appropriate legal aid.

⁴⁵ Anti-terrorism Crime and Security Act 2001, Part 4.

⁴⁶ *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

duration of the orders was from between a few months to more than four-and-a-half years. At the start of the control order regime in 2005, all controlled persons were foreign nationals. By the end in 2011, all were British citizens. 23 of the 52 controlled persons were subject to involuntary relocation to a different town or city in the UK. By the end of the regime most control orders incorporated other restrictions including a curfew of up to 16 hours, confinement within a geographical boundary, tagging, financial reporting requirements and restrictions on association and communication.⁴⁷ However due to civil liberties concerns this regime of control orders was replaced by Terrorism Prevention and Investigation Measures, also known as TPIMs.⁴⁸

TPIMs are less onerous than the control orders which they replaced. In particular:

- (a) Control orders could be imposed on reasonable suspicion of involvement in terrorism; TPIMs required reasonable belief;
- (b) Control orders could be rolled over year on year, without limit; TPIMs last for a maximum of two years;
- (c) Curfews, initially of up to 18 hours for control order subjects, trimmed to a maximum of 16 after the intervention of the courts,⁴⁹ came down to 10 hours under TPIMs;
- (d) TPIM subjects, in contrast to control order subjects, are entitled to the use of a phone and a computer.⁵⁰

However, the removal of involuntary relocation from the TPIM regime, whereby a subject could be required, with his family if he wished, to live away from his home – was reversed in 2015.⁵¹

A total of ten persons have been subject to TPIMs. Two absconded, and most of the other TPIMs expired after reaching their two-year limit. Nine of these were transferred from control orders in early 2012 and one (the only foreign national to have been subject to the regime) was served with a TPIM notice in October 2012. This is the only TPIM currently intermittently in force.⁵² It therefore seems that these anti-terrorist measures are not predominantly being used for non-nationals at present.

2.3. Conclusions

While the primary policy of the Home Office is to seek removal of FNOs from the UK, a number of barriers to the removal of such individuals exist. The UK has sought to overcome

⁴⁷ Independent Reviewer of Terrorism Legislation, Control Orders in 2011, Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005, March 2012, available at: <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/control-orders-2011.pdf> (last accessed 14th March 2015).

⁴⁸ Introduced by the Terrorism Prevention and Investigation Measures Act 2011

⁴⁹ *Secretary of State for the Home Department v. JJ and others* (FC) [2007] UKHL 45. The majority concluded that the most severe orders, which subjected controlees to 18-hour home curfews, did amount to a breach of the individuals' human rights.

⁵⁰ Though with certain restrictions. Independent Reviewer of Terrorism Legislation, Terrorism Prevention and Investigation Measures in 2014, Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011, March 2015, s. 1.4, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411824/IRTL_TPIMs_2014_final_report_web.pdf (last accessed 15th April 2015).

⁵¹ Counter-Terrorism and Security Bill 2015, ss.16-17:

⁵² Independent Reviewer of Terrorism Legislation, Terrorism Prevention and Investigation Measures in 2014, (n 50), s.2.

these barriers, to greater and lesser degrees of success, particularly as regards the interpretation of the UK's *non-refoulement* obligations and an individual's right to private and family life under the ECHR. The number of successful appeals on human rights grounds has indeed decreased dramatically in the last two years. Administrative problems have also been highlighted as a key obstacle in the removal of FNOs. While non-compliance of the individual and/or foreign government accounts for a proportion of these problems, a large number of failed removals appear to stem from lack of an effective approach within the Home Office itself. To address this concern, a cross-departmental action plan is currently in development. Nevertheless, for a large number of individuals removal is simply not possible.

Official policy regarding unremovable FNOs is that detention is used sparingly, and only where a reasonable prospect of removal exists. However, lack of clear guidelines regarding the suitability of and time limits relating to detention has contributed to a culture in which individuals are sometimes detained for long periods of time even where there is no clear prospect of removal. It is hoped that in the future the UK will look more readily to alternatives to detention, as recommended by a recent Parliamentary enquiry into this issue. A range of anti-terrorist measures also exist by which conditions can be imposed on individuals suspected of involvement with terrorism. Interestingly, although originally introduced to target non-nationals, these measures are not predominantly being applied to non-nationals at present

3. Excluded from refugee status

Another category of undesirable migrants are those excluded from refugee status under Article 1F of the 1951 Refugee Convention / Article 12(2) of the 2004 EU Qualification Directive.⁵³ Although the use of this provision has increased in the last decade, exclusion is still an exceptional measure in the UK.

The number of individuals excluded from refugee status under Article 1F at initial decision by the Home Office between 2008 and 2013 is shown in Table 1 below.⁵⁴ This data reveals that Article 1F exclusion decisions represent an extremely small number of initial decisions in the UK, on average only 0.1% of initial decisions and 0.2% of refusals.⁵⁵ The vast majority of cases that are referred to the Home Office's Special Cases Unit and ultimately excluded under Article 1F at initial decision fall under 1F(a) (war crime or crime against humanity).⁵⁶

Table 1: The number of Home Office Article 1F exclusions at initial decision, 2008-2013⁵⁷

Year	Total initial decisions	Total refusals	Refusals under	Refusals under	Refusals under	Refusals under Article 1F as a

⁵³ Article 1F provides that that the 1951 Refugee Convention 'shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity ...

(b) he has committed a serious non-political crime ...

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations'.

⁵⁴ Unfortunately this data isn't totally representative, as it relates to initial decisions of the Home Office and therefore doesn't include Article 1F decisions that were made at a later date, on appeal or to revoke refugee status that had previously been granted.

⁵⁵ Data on the total number of refusals were also included in the data provided by the Home Office but due to space constraints have not been included in Table 1.

⁵⁶ Between 2008 and 2013, Article 1F(a) was relied upon by the Home Office in nearly 80% of exclusion decisions.

⁵⁷ Data for 2012 and 2013 is provisional. FoI response 31155, 14th April 2014 (held on file by author).

		under Article 1F	Article 1F(a)	Article 1F(b)	Article 1F(c)	proportion of initial decisions
2008	19,398	14	11	0	3	0.07%
2009	24,287	20	16	3	1	0.08%
2010	20,261	26	26	0	0	0.13%
2011	17,380	31	23	5	3	0.18%
2012	16,774	21	15	5	1	0.13%
2013	17,647	16	10	4	2	0.09%

A large number of exclusion decisions concern nationals of Zimbabwe, Afghanistan, Iraq and Sri Lanka, as demonstrated in Figure 2, which shows the number of Home Office Article 1F exclusion decisions between 2008 and 2013, divided by country of nationality.

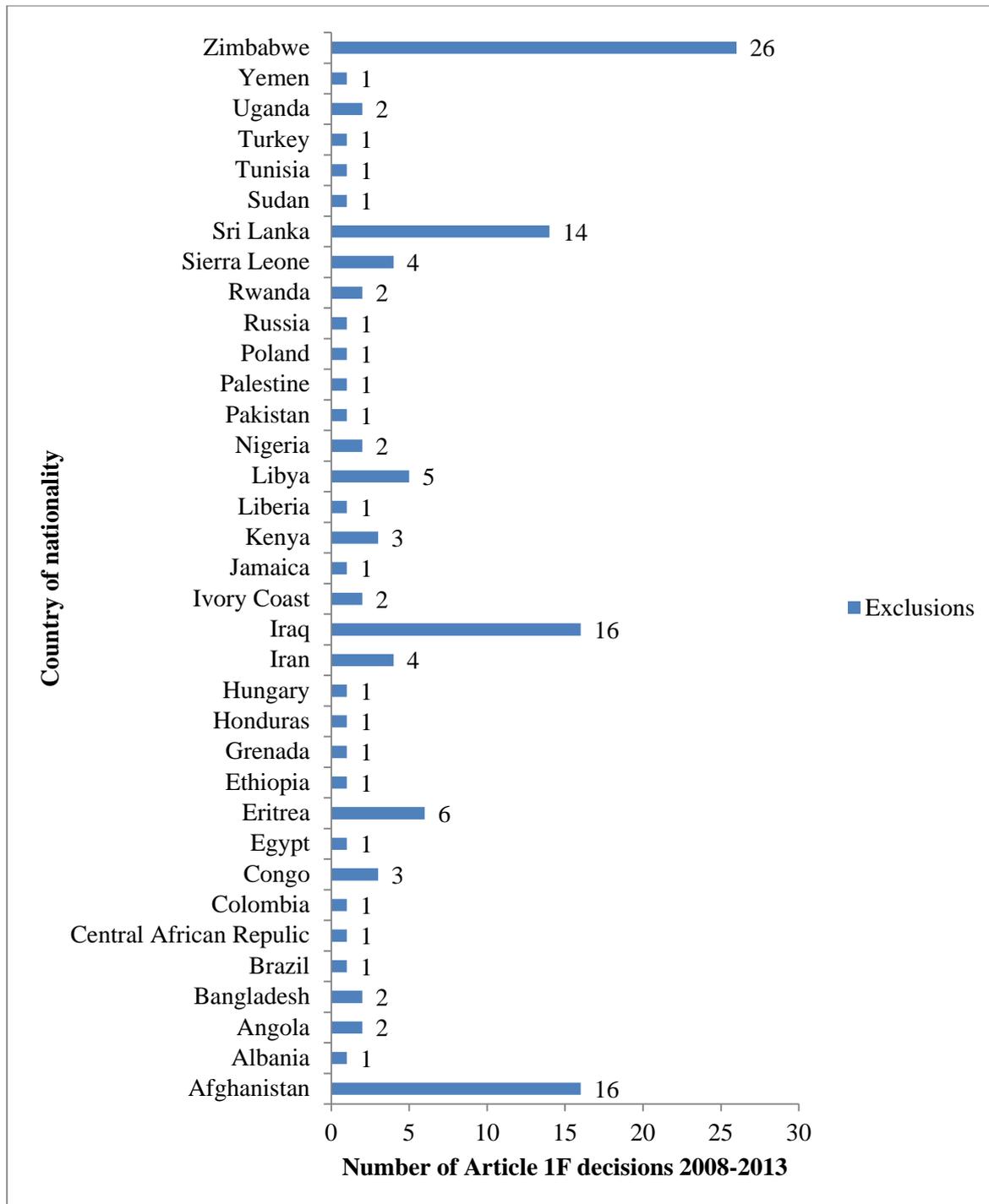


Figure 2: The number of Home Office initial Article 1F decisions from 2008-2013, divided by country of nationality (n=128)⁵⁸

An analysis of reported UK cases concerning exclusion from refugee status reveals that nationals of Zimbabwe include those that supported the Mugabe regime, a member of the Zanu PF youth militia involved in attacks on white-owned farms, a soldier in the Zimbabwean army and a former police officer. Nationals of Afghanistan were members of various Islamic militias,

⁵⁸ FoI response 31155, 14th April 2014 (held on file by author).

particularly Jamait-e-Islami, the Taliban and Hizb-e-Islami, and also the KhAD Intelligence Service. Sri Lankan nationals were primarily members of the Tamil Tigers (LTTE), although a recent case concerned a former member of the Sri Lankan police force. Libyans also feature highly in the Home Office data, and in the case analysis relate to a member of the Libyan Islamic Fighting Group (LIFG). Although Iraq nationals featured highly in the Home Office data only one case analysed involved an Iraqi national who was a Commando under Saddam Hussein's Regime.

Once excluded from refugee status, questions remain as to the best method of addressing the (alleged) criminality of such individuals.

3.1.Post-exclusion

As Article 1F cases concern those suspected of serious criminality, indeed, those whose actions are considered to deem them 'undeserving' of refugee protection, it might be thought that prosecution would be the most appropriate response to an Article 1F decision (if this has not already taken place prior to the claim for asylum). The UK is under a legal obligation to prosecute or extradite serious international war crimes offenders (*aut dedere aut judicare*) and has furthermore undertaken to prevent and punish genocide.⁵⁹ Indeed, the exercise of universal jurisdiction by States has become increasingly mandated by international treaties to include crimes of torture, hijacking, terrorism, hostage-taking and drug-trafficking. The establishment of the International Criminal Court and *ad hoc* international criminal tribunals have also led to increased opportunities to prosecute the perpetrators of serious crimes.⁶⁰ However, the UK's predominant approach to individuals excluded from refugee status under Article 1F does not focus on prosecution; rather, removal from the UK appears to be the preferred option. Yet human rights protections and practical considerations mean that individuals excluded from refugee status can often not be returned to their country of origin, nor removed to a third State for prosecution. These undesirable and yet unreturnable individuals are therefore often left in legal limbo in the UK; subject to a precarious legal status, the threat of removal ever-present.

3.1.1. Removal from the UK

The UK governments preferred response to an Article 1F decision is to pursue removal at the earliest opportunity, whether or not to face prosecution. This is made clear in the Home Office's Asylum Policy Instruction (API):

“Those individuals refused asylum and Humanitarian Protection because Article 1F applies and there are no barriers to their removal must be prioritised for enforcement action and removal.”⁶¹

⁵⁹ See Articles 49, 50, 129 and 146 of the four Geneva Conventions of 1949, supplemented by Additional Protocol I relating to the Protection of Victims of International Armed Conflicts and Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts of 1977. See also the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Article 1.

⁶⁰ The complementarity principle of these tribunals grants States jurisdiction to try international crimes referred to in these Statutes and, in the case of the International Criminal Court, emphasises that States have a *duty* to prosecute international crimes when other States that have jurisdiction are unable or unwilling to do so. Statute of the International Criminal Tribunal for the former Yugoslavia 1993, Article 9; Statute of the International Tribunal for Rwanda 1994, Article 8; Rome Statute of the International Criminal Court 1998, Articles 17.3 and 17.2.

⁶¹ Home Office, Asylum Policy Instruction (API), Restricted leave, 23 January 2015, s.3.1.2., available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397502/API_Restricted_Leave_Article_1F.pdf> (last accessed 14th March 2015).

However, practical and legal barriers apply to the removal of failed asylum seekers as to FNOs (see section 2.1). Since individuals may be excluded from refugee status *despite* a well-founded fear of persecution, human rights barriers to removal may be particularly pertinent to these cases. There is therefore a high likelihood that removal will not be an option, as to do so may breach the UK's human rights obligations.

3.1.2. Extradition

Extradition to a third state to face prosecution is also often problematic.⁶² Extradition from the UK must be compliant with the UK's human rights obligations, particularly Article 3 (torture and inhuman or degrading treatment), Article 8 (private and family life) and Article 6 (fair trial) ECHR. Article 5 (liberty and security of person) may also be in issue in relation to pre-trial detention in the requesting state. In addition, extradition attracts a number of specific requirements which must be adhered to. That extradition may be barred on account of extraneous considerations (prosecution, detention or punishment on account of race, religion, nationality, gender, sexual orientation or political opinions) may be particularly relevant in the case of failed asylum seekers claiming protection on one of the Convention grounds.⁶³

A recent report from the House of Lords Select Committee on Extradition Law raised specific concerns regarding the UK's use of assurances in extradition proceedings involving third states with questionable human rights protections / fair trial guarantees.⁶⁴ In the words of the Committee:

“we believe the arrangements in place for monitoring assurances are flawed. It is clear that there can be no confidence that assurances are not being breached, or that they can offer an effective remedy in the event of a breach. ... Therefore, it is questionable, in our view, whether the UK can be as certain as it should be that it is meeting its human rights obligations.”⁶⁵

⁶² Extradition in the UK is covered by the Extradition Act 2003. Part 1 of the Extradition Act implements the European Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, while Part 2 streamlined the judicial mechanism for extradition to non-EAW countries with which the UK has bilateral or multilateral extradition treaties 'category 2 territories'. There are many countries with which the UK does not have any extradition arrangements. Where necessary, *ad hoc* extradition arrangements can be brought into force. Under such *ad hoc* arrangements, once the Home Secretary has recognised a request from a territory with no standing arrangements, extradition follows the same process as for a Part 2 request.

⁶³ Extradition may be barred on account of: double jeopardy (where a person has already been convicted for or acquitted of the relevant offence); extraneous considerations (prosecution, detention or punishment on account of race, religion, nationality, gender, sexual orientation or political opinions); the passage of time since the alleged offence; the age of the offender (where the offender was so young at the time of the offence that he or she would not be criminally liable in the UK); a lack of arrangements to prevent the Requested Person being prosecuted by the Issuing State for a crime other than that for which they were extradited (this is known as 'specialty'); physical and mental health considerations which would make extradition unjust or oppressive. This list is not exhaustive. It must also be noted that a proportionality bar has been introduced for EAW accusation cases, in response to concerns over the number of EAWs received for trivial matters.

⁶⁴ The Committee noted that such assurances must be considered in light of the ECtHR guidance on factors relevant to assessing the quality and weight to be given to assurances in *Othman v UK* (n 20), considered above in section 2.1. House of Lords, Select Committee on Extradition Law, 2nd Report of Session 2014–15, Extradition: UK law and practice, 10 March 2015, available at:

<<http://www.publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/126.pdf>> (last accessed 15th April 2015). See particularly paras 88-94.

⁶⁵ *Ibid*, paras 89-90.

Attempts to extradite individuals excluded from refugee status can therefore present a number of problems. A case that has received particular attention in the UK is that of four individuals sought for extradition to Rwanda to face charges of genocide, murder and crimes against humanity carried out during the Rwandan civil war in 1994. Because there was no extradition treaty between the United Kingdom and Rwanda, the two countries entered into a series of MOUs relating to the extradition of these individuals. However, it was considered there was a real risk that the four men would not be granted a fair trial in Rwanda: there was a real risk that they would suffer ‘a flagrant denial of justice’ in contravention of Article 6 ECHR.⁶⁶ UK courts are currently considering a renewed application for the extradition of the four Rwandans, alongside a fifth suspect, following their initial denial of extradition in 2009.⁶⁷

In light of the barriers involved in extraditing excluded asylum seekers to third states to face prosecution, another option may be transfer to face prosecution before an international criminal tribunal. However, arrest warrants from international criminal tribunals and courts aren’t particularly forthcoming apart from the most high-profile cases. Given that many Article 1F cases involve low ranking members or supporters of particular organisations or regimes, this route is unlikely to be available in many cases. Another option might therefore be prosecution in the UK.

3.1.3. Prosecution in the UK

The UK is under a legal obligation to prosecute or extradite serious international war crimes offenders and has universal jurisdiction to prosecute grave breaches of the Geneva Conventions,⁶⁸ torture,⁶⁹ certain acts of terrorism,⁷⁰ hijacking⁷¹ or hostage taking,⁷² even if these crimes were committed in third States.⁷³ However, there’s considerable difficulty in practice in pursuing prosecution for crimes that are committed in third States. These include collating evidence, the ability of the police to carry out investigations, the lack of witnesses in the UK and the standard of proof, which is considerably higher than that required for an exclusion decision.

In the UK, the war crimes team of the Metropolitan Police Counter Terrorism Command (SO15) is responsible for the investigation of all allegations of war crimes, crimes against humanity, genocide and torture. The Counter Terrorism Division (CTD) of the Crown

⁶⁶ *Brown (aka Vincent Bajinja) & Others v Government of Rwanda & Ors* [2009] EWHC 770 (Admin) (08 April 2009).

⁶⁷ *VB & Others v Westminster Magistrates’ Court, The Government of Rwanda & Others* (2014) UKSC 59.

⁶⁸ The Geneva Conventions Act 1957 gives UK courts jurisdiction over grave breaches of the four Geneva Conventions and Additional Protocol I. The act applies to a person of any nationality acting in the UK or elsewhere. An amendment in 2009 now covers grave breaches of Additional Protocol II in respect of perfidious use of certain emblems in non-international armed conflicts.

⁶⁹ The UK is bound by the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984. Section 134 of the Criminal Justice Act 1988 brought its provisions into domestic law with the result that prosecutions can be brought wherever the offence occurred, if the accused is a public official of any state.

⁷⁰ Part IV of the Terrorism Act 2000 provides for universal jurisdiction over terrorist bombing and terrorist financing offences.

⁷¹ Parts I and II of the Aviation and Security Act 1988 provide for universal jurisdiction over hijacking an aircraft or ship.

⁷² Section 1 of the Taking of Hostages Act 1982 provides for universal jurisdiction over hostage taking in order to compel a state, international governmental organisation or person to do or abstain from doing any act.

⁷³ Other international crimes are justiciable in the UK as a result of the International Criminal Court Act 2001 (as amended in 2009) if they took place after 1 January 2001. This Act provides jurisdiction over genocide, war crimes and crimes against humanity committed overseas by persons who are resident in the UK, including persons who were not resident in the UK at the time of the offence but who subsequently become UK residents. The International Criminal Court (Scotland) Act 2001 makes equivalent provision in respect of Scotland.

Prosecution Service, Special Crime and Counter Terrorism Division, has responsibility for prosecuting such crimes. The Referral Guidelines agreed between these two bodies note the inherent difficulties in investigating and prosecuting these crimes, particularly when they are committed in third states:

“The crime of genocide, crimes against humanity and war crimes present a range of challenges for investigators. Their factual complexity leads to unique challenges for investigators, many of which are exacerbated by the fact that investigations to collect evidence, familiarise themselves with crime scenes, or conduct witness interviews may often need to be conducted outside this jurisdiction.”⁷⁴

As such, when a referral is received the SO15 investigative team will conduct a ‘scoping exercise’ in order to make an informed decision on whether to conduct an investigation. This includes an examination of the (verifiable) identity, nationality and location of the suspect; the identification of victims/witnesses; and consultation with International Criminal Court and ad hoc tribunals to establish whether there are any outstanding investigations in relation to the suspect or any witnesses. Considerable emphasis is given throughout on whether mutual legal assistance will be provided by the third state in question (where applicable) in relation to identifying the suspect, victims and witnesses; conducting interviews, and whether SO15 can carry out a safe and effective investigation in that country. Factors which may not allow a safe and effective investigation include: the country being involved in armed conflict; the country being politically unstable, and/or; risk of harm to victims or witnesses. As such, the situation in and cooperation of an involved third country will often be pivotal in the decision of the SO15 investigative team. In some cases the SO15 team will be allocated a specialist CTD prosecutor to provide early investigative advice. The guidelines stress that:

“The prosecutor should be pro-active in identifying and bringing to an early conclusion those cases which have evidential deficiencies that cannot be strengthened by further investigation and supporting the viable investigations which will ultimately result in a prosecution.”⁷⁵

Based on this information SO15 will decide whether a ‘safe and proportionate’ investigation is feasible.⁷⁶

Following completion of the SO15 investigation, the CTD must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction before taking prosecution forward.⁷⁷ In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.⁷⁸ The Attorney General is then asked to consent to the prosecution.

The obstacles that often occur in the investigation and prosecution of alleged crimes committed abroad is made clear in the above Referral Guidelines. Indeed, the only case concluded by the CTD since 2001 is that of Faryadi Zardad, an Afghan National and a commander within Hezb-e-Islami, who in 2005 was convicted of conspiracy to torture and

⁷⁴ Crown Prosecution Service, War Crimes/Crimes Against Humanity Referral Guidelines, section A, available at: <https://www.cps.gov.uk/publications/agencies/war_crimes.html> (last accessed 15th March 2015).

⁷⁵ Ibid, section B

⁷⁶ Ibid, section C. Issues of immunity may be a factor taken into account when considering whether it is proportionate to conduct an effective investigation.

⁷⁷ Ibid, section D

⁷⁸ Though the guidance does note that “If there is sufficient evidence of these crimes it is highly likely that a prosecution would be in the public interest.” Ibid, section D.

conspiracy to take hostages while controlling a checkpoint in Afghanistan.⁷⁹ Not least in the obstacles encountered by SO15 and the CTD are the costs involved in investigating and prosecuting such cases, which can be very protracted and resource intensive. For example, the total cost of the investigation and trial of Faryadi Zardad is estimated to have exceeded £3 million.⁸⁰

In practice, therefore, prosecution in the UK is not always the most feasible means of addressing those excluded from refugee status. Indeed, it might be doubted whether the political will to pursue prosecution of such individuals exists. Rather, priority appears to be removal of these individuals from the UK, a route which also entails significant legal and practical obstacles. In the interim, therefore, such individuals will likely remain in the UK.

3.1.4. *Temporary solutions: restricted leave*

In September 2011 the Home Office brought in a new policy of restricted leave. The policy applies to individuals who are excluded from asylum and Humanitarian Protection for Article 1F reasons (or in the case of Humanitarian protection would be excluded were a Convention reason to apply) or refused asylum under Article 33(2) of the Refugee Convention⁸¹ but who cannot be removed to their home country because removal would breach their rights under the ECHR.⁸² The policy grants an individual leave to remain in the UK for a maximum of six months at a time.⁸³ A number of restrictions may be attached to this form of leave, including restrictions on employment; residence; education and a requirement that the individual report to an immigration officer at regular intervals. Furthermore, individuals placed on restricted leave do not have recourse to public funds unless they are destitute.⁸⁴ As explained in the Casework Instruction:

“Our policy is to remove such individuals wherever possible because they are not welcome in the UK. However, in cases where removal cannot currently be enforced for ECHR reasons we will deny the benefits of refugee status and Humanitarian Protection

⁷⁹ He was sentenced to 20 years imprisonment with a recommendation that he should be deported when he has served his sentence.

⁸⁰ Memorandum submitted by the Ministry of Justice, ‘Offences of Genocide, Torture and Related Offences’ in Joint Committee on Human Rights, Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims, Twenty-fourth Report of Session 2008–09, 21 July 2009, para 18, available at: <<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/153.pdf>> (last accessed 14th March 2015).

⁸¹ Article 33(2) of the Refugee Convention provides: “The benefit of the present provision [protection against *refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”. Though not strictly speaking exclusion from refugee status, as this is a disapplication of States’ Article 33(1) non-*refoulement* obligations, Articles 33(2) and 1F have often been confused and merged in practice. See, for example, Article 14(4) and (5) of the 2004 EU Qualification Directive, which instructs Member States they may “revoke, end or refuse to renew” or “decide not to grant” refugee status where the conditions of Article 33(2) Refugee Convention are met.

⁸² The most recent Policy Instruction was published on 23 January 2015. Home Office, Asylum Policy Instruction (API), Restricted leave, 23 January 2015, s.3.1.2., available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397502/API_Restricted_Leave_Article_1F.pdf> (last accessed 14th March 2015).

⁸³ ‘to emphasise its short-term nature and because it would be at odds with the aim of this policy to permit such a person to re-enter the UK’, *Ibid*, s.4.2.1.

⁸⁴ *Ibid*, s.4.3.1.

and instead grant a short period of restricted leave to which tight restrictive conditions may be attached according to the particular circumstances of each case.”⁸⁵

This form of leave is extremely precarious, and is frequently reviewed with an eye to removing the individual from the UK at the earliest possibility. Failure to abide by any of these conditions is a criminal offence and may lead to prosecution and imprisonment.⁸⁶ There are currently 56 people on Restricted Leave, all have reporting, education and residence restrictions. 54 of these also have employment conditions attached to their leave.⁸⁷

The primary purpose of this policy is to make it as uncomfortable as possible for excluded persons to remain in the UK, and ensure that they do not form strong ties to the UK which could lead to their settlement and/or a successful Article 8 ECHR claim in the future.

“Such cases will be reviewed regularly with a view to removal as soon as possible and only in exceptional circumstances will individuals on restricted leave ever become eligible for settlement or citizenship. Such exceptional circumstances are likely to be very rare”⁸⁸

There have been a number of challenges to the policy since it was brought into force. A recent case that came before the Court of Appeal is *Kardi*, which concerned a Tunisian national.⁸⁹ The conditions he was placed under were that he must acquire consent before taking on or changing employment; notify of his home address and any change in address; report on a monthly basis, and; he was not permitted to take up any courses of study. He argued this was a disproportionate interference with his rights under Article 8 ECHR.

The Court, however, held that this was a proportionate interference with his Article 8 rights:

“Whether one looks individually or cumulatively at the limitation on the period of leave and at the restrictions imposed, they give rise to only a limited interference with the appellant's private life and their imposition was justified, in terms of legitimate aim and proportionality”⁹⁰

The court noted that the grant of short periods of leave emphasised the intended impermanence of the individual's stay in the country and made it more difficult to put down roots and to build up a private life, thus reducing the prospect of removal being prevented on Article 8 grounds in the future.

Interestingly, the court did seem to indicate that there might be a cap on the use of the policy. The court noted that “there may of course come a point where the appellant has been in the United Kingdom for so long and/or the prospect of his removal to Tunisia is so remote, that the only course reasonably open to the Secretary of State is to grant him indefinite leave to remain.”⁹¹ However it is not clear how or whether this might come in to effect.⁹²

⁸⁵ Ibid, s.1.2.2.

⁸⁶ Ibid, s.2.2.1

⁸⁷ FoI response 34343, 11th March 2015 (kept on file by author).

⁸⁸ Home Office, Asylum Policy Instruction (API), Restricted leave (n 82), s.1.2.5.

⁸⁹ *R(Kardi) v Secretary of State for the Home Department* [2014] EWCA Civ 934 (10 July 2014).

⁹⁰ Ibid, [47].

⁹¹ Ibid, [32]

⁹² See also the case *R(N)*, which concerned one of the Afghan hijackers mentioned in the introduction to this article. This case concerned the previous policy of discretionary leave, however the principles might be thought to equate to the current restricted leave policy. The Court in this case noted that: “Accordingly, in principle, to award only six months is not in the least unreasonable. But the policy has, as it were, a cap. It is recognised that

In the meantime, we have individuals being placed on this form of leave for what may be an extremely long period of time.⁹³

4. Conclusions

The issue of unreturnable migrants suspected or convicted of criminal activities is one which has received a large amount of attention in the UK. This interest has undoubtedly been largely due to the coverage of such issues by the tabloid press, which has been taken up and acted upon by successive UK governments. Nevertheless, the issues posed by these migrants remains in large part unsolved: despite the emphasis on removal, legal obstacles and administrative problems continue to frustrate many attempts to remove such persons from the UK. As a result, large numbers of individuals are released into the community or remain in detention for often prolonged periods of time. In the case of excluded asylum seekers, these individuals are subject to an extremely precarious form of leave. The result is these undesirable migrants remain in a form of 'limbo', with no firm legal status and the prospect of removal ever present.

The focus on the removal of undesirable migrants is set to continue in the UK. Indeed, the current Conservative government's plans to "scrap" the Human Rights Act and potentially withdraw from the European Convention appear to revolve squarely around the issue of foreign criminals resisting deportation on human rights grounds.⁹⁴ As such, this is likely to remain a fast developing area of law and policy, though if the emphasis remains on removal rather than looking to alternative in-country solutions that are more than temporary in nature, a viable solution to this issue is likely to remain elusive.

there will come a time when - provided the individual has behaved himself in this country - it would be proper to regard him as having put behind him, as it were, the original offending. Thus if someone has been here for ten years and subjected to a series of discretionary leaves for that period he will normally be able to remain here indefinitely. He will, after all, be expected by then to have made his life in this country, to have settled here, perhaps to have established family life here." *R(N) v Secretary of State for the Home Department* [2009] EWHC 1581 [22].

⁹³ A challenge to the Home Office's restricted leave policy is currently before the Court of Appeal. In contrast to earlier cases which challenged the application of the policy to the particular case of an individual, among the issues the court will have to consider is the argument that the automatic application of the policy following an exclusion decision leaves no room for the assessment of whether, on the facts of the case, there is any meaningful nexus between the aims of the policy and the serious interference with the rights of the individual concerned and his family.

⁹⁴ 'Conservatives to push forward on manifesto and scrap Human Rights Act', *The Guardian*, 10th May 2015, available at: <<http://www.theguardian.com/politics/2015/may/10/conservatives-to-push-forward-on-manifesto-and-scrap-human-rights-act>> (last accessed 15th May 2015).