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Post-Brexit Legal Challenges in the Cooperation against Migrant Smuggling

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I. Introduction

This chapter focuses on the smuggling of migrants in the European Union (EU) and in the United Kingdom (UK), and on the possible cooperation in tackling this crime when perpetrated by sea, under the Trade and Cooperation Agreement (TCA).¹ Section II sets out the EU's policies and legislation on smuggling and migrants, and how these were implemented in the UK when it was a Member State. Section III then analyses the extremely thin measures in the TCA for cooperation on the smuggling of migrants, alongside the possibility for cooperation through other international treaties. Section IV analyses the British law on migration and the most recent developments adopted since 2022, including the now abandoned Rwanda deal and the case law of the European Court of Human Rights (ECtHR) and of the British courts on the deal. The same section focuses on UK laws post-Brexit, pertaining to the smuggling of migrants by boat. The chapter demonstrates how the recent increase in arrivals of undocumented migrants via small boats has led the UK to implement stringent migration laws, further solidifying the externalisation of migration. The chapter concludes that an agreement with the EU on migration and asylum, which as a minimum establishes safe and legal routes to the UK and sets out fair rules on redistribution, is essential.

II. The EU's Legislation and Policy on the Smuggling of Migrants

The fight against the smuggling of migrants has reinforced policies on the externalisation of migration, which aim to keep migrants not only outside EU territory 'but also

¹Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10.

outside the material scope of European law.² The Dublin Regulations have established rules on Member States' responsibility towards asylum applicants. Initially, the responsibility was established by the 1997 Dublin Convention.³ The signatories of the Dublin Convention were the then 12 EU Member States. The Dublin Convention applied to the UK but not to the 'European territories for whose external relations the United Kingdom is responsible unless a declaration to the contrary is made by the United Kingdom.'⁴ In 2003, the Dublin Convention was replaced by a Regulation (Dublin II),⁵ which contributed to establishing the Common European Asylum System (CEAS)⁶ based on the Tampere European Council 1999 objective, which was the establishment of a CEAS founded on respect for the principle of *non-refoulement*, in accordance with the 1951 Refugee Convention,⁷ ensuring that no individuals are sent back to places where they may be persecuted.⁸ The same provision stated that all Member States of the EU could be considered safe countries. The UK took part in the adoption and application of Dublin II.⁹ This legislation established the criteria to determine the Member State responsible for examining asylum seekers' applications at the border.¹⁰ The specific parameters for determining the Member State responsible were set out in chapter 3 of the Regulation. In the case of families, for example, the Member State responsible should be determined 'on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.'¹¹ The family situation should be taken into consideration so that the Member State responsible should be the State where family members reside as refugees or, if the decision is pending, the State where the family member has lodged their application.¹² The impact was a transfer of responsibility from northern and western European Member States (the preferred destination for asylum seekers) to southern and eastern European Member States, which have less experience in dealing with high numbers of asylum seekers.¹³ The European Court of Human Rights (ECtHR) found that Greece acted in violation of Article 13 of the European Convention on Human Rights (ECHR)¹⁴ in conjunction with Article 3, because of deficiencies in the asylum procedures followed by the Greek authorities, with the consequent risk that the applicant would be transferred to Afghanistan without serious consideration of the

² T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration' (2018) 20 *European Journal of Migration and Law* 465.

³ Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention [1997] OJ C254/1.

⁴ *ibid* Art 19(4).

⁵ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

⁶ *ibid* recital (1) of the Preamble.

⁷ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 ('Refugee Convention').

⁸ Council Regulation (n 5) of the Preamble.

⁹ Council Regulation (n 5) of the Preamble.

¹⁰ Council Regulation (n 5) Art 1.

¹¹ Council Regulation (n 5) Art 5(2).

¹² Council Regulation (n 5) Arts 7 and 8.

¹³ S Peers, 'The Dublin III Regulation' in S Peers et al (eds), *EU Immigration and Asylum Law. Text and Commentary: Second revised edition* (Brill Nijhoff, 2014) 346, 347.

¹⁴ European Convention on Human Rights (1950), ETS 5.

merits of the asylum application or access to effective remedy.¹⁵ At the same time, the ECtHR sanctioned Belgium because it sent the applicant to Greece and exposed him to detention and living conditions in breach of Articles 3 and 13 ECHR due to the deficiencies of the Greek asylum procedure.

Dublin II was replaced with another Regulation in 2013 (Dublin III).¹⁶ The UK participated in the application and implementation of that Regulation.¹⁷ Dublin III states that when it is not possible to designate the Member State responsible, ‘the first Member State in which the application for international protection was lodged shall be responsible for examining it’.¹⁸ In light of the ECtHR case law, the provision added that if there are systemic deficiencies in the asylum procedures of the responsible State, the determining Member State shall continue to examine the application and the applicants should not be sent to the responsible Member State. The determining Member State becomes the responsible Member State even when no applicants can be sent to any Member State.

The EU and its Member States have given high priority to the return of irregular migrants to their countries of origin or residence. However, for such returns to occur, the EU must enter into readmission agreements. Yet the European Court of Auditors has reported that very few agreements on this matter have been concluded with third countries.¹⁹ The result is that, between 2015 and mid-2020, only one in three migrants ordered to leave the EU complied with the request, leading to a return rate of about 29 per cent.²⁰ What is the fate of smuggled people if readmission agreements cannot be concluded? Many of them live in a state of hiding in the countries of destination with no rights, ‘barred from entering into contract relations’.²¹ Many of them are ‘accused of being “smugglers” themselves, and risk long periods of arbitrary detention, as well as exclusion from accessing asylum and other regularisation procedures’.²² They are also subject ‘to bullying practices of state authorities including dispersal policies, destruction of shelters, and the wilful destruction by state agents of tarpaulins and sleeping bags of migrants sleeping rough’.²³ In addition, the ECtHR has emphasised that many undocumented migrants are vulnerable to human trafficking.²⁴ The UK Government’s Retained

¹⁵ *MSS v Belgium and Greece* App no 30696/09 (ECtHR (GC), 21 January 2011).

¹⁶ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

¹⁷ *ibid* recital (41) of the Preamble.

¹⁸ *ibid* Art 3(2).

¹⁹ Special Report 2021/17 EU readmission cooperation with third countries: relevant actions yielded limited results.

²⁰ *ibid*.

²¹ Spijkerboer (n 1) 466.

²² PICUM, ‘Migrant Smuggling: Why we need a paradigm shift’, Briefing Paper (July 2022) available at <https://picum.org/wp-content/uploads/2022/07/Migrant-smuggling-why-we-need-a-paradigm-shift.pdf> (last accessed 17 January 2025) 3.

²³ Special Report (n 16).

²⁴ See, eg, *Chowdury and Others v Greece* App no 21884/15 (ECtHR, 30 March 2017); and *VCL and AN v United Kingdom* App nos 77587/12 and 74603/12 (ECtHR, 16 February 2021). Human Trafficking is outside the scope of this chapter.

EU Law Dashboard does not list the Dublin Regulation among the EU legal measures that will be repealed or retained.²⁵

III. The EU–UK Trade and Cooperation Agreement and the Smuggling of Migrants

Before the UK left the EU, it chose to participate in both the Facilitation Directive and in the Framework Decision, which require states to impose criminal penalties on people who commit the crime of migrant smuggling.²⁶ The terms of the Directive and Framework Decision are not replicated in the TCA, although at the point of exit the UK retained the implementing legislation from both measures. The TCA, however, does not include any provision on cooperation between the UK and the EU on asylum and migration matters.²⁷ It is focused on police and judicial cooperation in criminal matters, following the Political Declaration set out by the UK and the EU in 2018 and amended in 2019.²⁸ The Declaration is based on Article 50(2) of the Treaty on European Union²⁹ and ‘provides for ... the arrangements for the withdrawal of a departing Member State, taking account of the framework for its future relationship with the Union.’³⁰ Future cooperation between the EU and the UK will be based on principles and values established by the ECHR, whilst the EU and its Member States will continue to be bound by the Charter of Fundamental Rights,³¹ which reaffirms the rights protected by the ECHR.³² The parties will cooperate to guarantee the safety of their respective citizens and for this purpose they ‘should establish a broad, comprehensive and balanced security partnership.’³³ The partnership will also respect UK national sovereignty.³⁴ In order to preserve the reciprocal safety and security, the parties ‘will provide for comprehensive, close, balanced and reciprocal law enforcement and judicial cooperation in criminal matters, with the view to delivering strong operational capabilities for the purposes of the prevention, investigation, detection and prosecution of criminal

²⁵ HM Government *Retained EU Law and Assimilated Law Dashboard* (2024) available at <https://www.gov.uk/government/publications/retained-eu-law-dashboard> (last accessed 17 January 2025).

²⁶ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17, para 7 (Facilitation Directive); Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1, para 7 (Framework Decision).

²⁷ House of Lords, *Beyond Brexit: policing, law enforcement and security*. European union Committee (25th Report of Session 2019–21, HL 250) para. 7.

²⁸ HM Government, Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (19 October 2019) available at https://assets.publishing.service.gov.uk/media/5daaaba040f0b6598f806460/Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_European_Union_and_the_United_Kingdom.pdf (last accessed 17 January 2025).

²⁹ Consolidated version of the Treaty on European Union [2012] OJ C326/13.

³⁰ Political Declaration (n 28) Section 1.

³¹ Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

³² Political Declaration (n 28) Section 7.

³³ *ibid* Section 78.

³⁴ *ibid*.

offences.³⁵ Operational cooperation between law enforcement authorities and judicial cooperation in criminal matters will be reinforced via Europol and Eurojust.³⁶

In relation to irregular migration, the Declaration states that '[t]he Parties will cooperate to tackle illegal migration ... whilst recognising the need to protect the most vulnerable'.³⁷ This provision is very important as, in the Declaration, the parties aim to address irregular migration using a holistic approach, which includes the fight against crime and the protection of vulnerable migrants. This holistic approach is also confirmed in the other provisions included in the same part of the Declaration, which state that cooperation against irregular migration will include 'operational cooperation with Europol to combat organised immigration crime', 'working with the European Border and Coastguard Agency to strengthen the Union's external border' and establishing a 'dialogue on shared objectives and cooperation, including in third countries and international fora, to tackle illegal migration upstream'.³⁸ Irregular migration and the smuggling of migrants should be addressed not only through criminal measures and cooperation in criminal matters, but also by taking into consideration the vulnerability of migrants by protecting their human rights. As Mitsilegas has emphasised, crimes committed against migrants should be considered crimes against humanity,³⁹ given that migrants' desperation to leave their countries of origin, combined with the absence of legal routes, results in individuals' becoming vulnerable. Research has shown that tough policies 'outsourced from EU areas (Croatia) to the EU neighbourhood put migrants, who become stranded in unknown transit terrains with little social connections, in a situation of violence and precarity'.⁴⁰ Nevertheless, migrants do not seem to enjoy any protection, and they are completely in the hands of smugglers whom they see as their only hope to leave their countries of origin. Research has shown that migrants are prepared to accept very dangerous jobs around borders in order to be able to pay the costs of their journey; and if caught by border authorities, they will be highly likely to experience various forms of violence.⁴¹

Despite the Political Declaration's proposal that the future UK–EU relationship should approach irregular migration and the crime of smuggling on the basis of a multi-faced approach, the TCA only contains provisions relating to cooperation on criminal matters. Article 599(5) specifically excludes the requirement of double criminality when the crimes of human trafficking and facilitation of unauthorised entry and residence have been committed.⁴² This perspective emphasises that migrants are people who do not deserve protection from prosecution. However, such judgement can

³⁵ *ibid* Section 80.

³⁶ *ibid* Section 86.

³⁷ *ibid* Section 114.

³⁸ *ibid*.

³⁹ V Mitsilegas, 'The normative foundations of the criminalization of human smuggling: Exploring the fault lines between European and international law' (2019) 10(1) *New Journal of European Criminal Law* 74.

⁴⁰ K Augustova, H Carrapico and J Obradović-Wochnik, 'Becoming a Smuggler: Migration and Violence at EU External Borders'. (2021) 28(2) *Geopolitics* 619.

⁴¹ *ibid*.

⁴² Part Three of the TCA ('Law Enforcement and Judicial Cooperation in Criminal Matters'), Art 599(4) and (5).

only be established after an in-depth ‘individual status determination process’.⁴³ Morris and Qureshi have suggested that in the UK, almost 70 per cent of people crossing the Channel by boat since 2018 would be granted asylum if their application were to be examined appropriately.⁴⁴ As regards the EU, the United Nations High Commissioner for Refugees (UNHCR) has confirmed that although, among those coming from Africa to Europe by boat, there are migrants travelling for economic reasons, the most common countries of origin are ‘those affected by years of conflict and displacement, where human rights abuses are not uncommon, and some of the largest refugee and internal displacement crises due to conflict are in the East and Horn of Africa’.⁴⁵ Despite this situation, no agreements have been concluded by the EU and the UK on asylum and migration because there has been a reduction in mutual trust between the EU and the UK since Brexit.⁴⁶ It must be emphasised that in this area there had been UK disengagement even before Brexit, when, for example, the UK opted out from the recast of four asylum directives in 2011, because the Government was of the opinion that those directives did not give them any discretion in deciding the applicants who could be authorised to enter British territory, endangering the UK’s ability to reduce the number of asylum seekers, detect false claimants and control its external borders.⁴⁷ Conversely, when it comes to cooperation against cross-border crimes, the UK has consistently played a crucial role⁴⁸ and intends to maintain its significant involvement. This is demonstrated by the agreements that the UK has concluded with EU agencies.⁴⁹ Before Brexit, an agreement between the EU and the UK that would include repressive measures against people smuggling was never considered as problematic. Since 2020, the principle of mutual

⁴³ J Carling, ‘The phrase ‘refugees and migrants’ undermines analysis, policy and protection’ (2023) 61(3) *International Migration* 399.

⁴⁴ M Morris and A Qureshi, ‘Understanding the rise in Channell crossing’ *IPPR* (26 October 2022) available at www.ippr.org/articles/understanding-the-rise-in-channel-crossings (last accessed 17 January 2025).

⁴⁵ UNHCR, ‘No end in sight. Refugees and migrants moving irregularly to North Africa and Europe face unspeakable horrors along Mediterranean routes. The Mediterranean Situation. Yearly arrivals 2014–2021’ available at <https://storymaps.arcgis.com/stories/07502a24ce0646bb9703ce96630b15fa> (last accessed on 17 January 2025).

⁴⁶ For a more in-depth analysis on this issue, see A Neidhardt, ‘Post-Brexit EU–UK Cooperation on migration and asylum: How to live apart, together’, European Policy Centre Discussion Paper, (2022) available at www.epc.eu/content/PDF/2022/EU-UK_post_Brexit_DP_v4.pdf (last accessed 17 January 2025).

⁴⁷ N El-Enanny, ‘The Perils of Differentiated Integration in the Field of Asylum’ in B De Witte, A Ott, and J Monnet (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing, 2017) 5; S Wolff, A Piquet and H Carrapico, ‘UK’s Withdrawal from Justice and Home Affairs: a historical institutional analysis of policy trajectory’ (2022) 20 *Comparative European Politics* 604, 615.

⁴⁸ Wolff, Piquet and Carrapico (n 43) 607.

⁴⁹ National Crime Agency, ‘NCA and EUROPOL sign up to a new working arrangement’ (29 September 2021) available at www.nationalcrimeagency.gov.uk/news/nca-and-europol-sign-up-to-a-new-working-arrangement (last accessed 17 January 2025); Europol, Working and Administrative Arrangement establishing cooperative relations between the competent authorities of the UK and Europol (2023) available at www.europol.europa.eu/partners-collaboration/agreements/working-and-administrative-arrangement-establishing-cooperative-relations-between-competent-authorities-of-uk-and-europol (last accessed 17 January 2025); Eurojust, Working Arrangement between Eurojust and the Home Office, on behalf of the competent authorities of the United Kingdom of Great Britain and Northern Ireland implementing the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland (10 November 2021), available at https://www.eurojust.europa.eu/sites/default/files/assets/2021_11_10_eurojust_wa_final_rev.pdf (last accessed 17 January 2025); Working Arrangement Establishing Operational Cooperation between the European Border and Coastguard Agency and the Home Office of the United Kingdom of Great Britain and Northern Ireland (23 February) available at <https://assets>

trust has gained significant importance. For the UK to participate in police and judicial cooperation with the EU, it must uphold high standards in the protection of human rights. The EU has always accorded very high importance to mutual trust, which has been confirmed by the ruling of the Court of Justice of European Union (CJEU) that, in the name of mutual trust, national Constitutions can be set aside as it can be assumed that all EU Member States respect human rights in the same way.⁵⁰ However, since the UK is no longer part of the Charter of Fundamental Rights, under Article 52(3) of which EU law is able to provide more extensive protection of human rights compared to the ECHR, the EU can no longer assume that the threshold for the protection of human rights will be high in the UK. Furthermore, the fact that the UK is adopting stringent laws on migration and asylum aggravates the situation, because lack of mutual trust may be caused by the fact that the UK may be proposing/ adopting laws incompatible with the ECHR and with the Charter. Lack of mutual trust caused by draconian legislation on asylum and migration can also endanger bilateral agreements, as EU Member States have to respect human rights as protected by the ECHR and by the Charter.

Recently, France and the UK have concluded a bilateral deal aimed at addressing small-boat crossings in the Channel that may be benefitting from the support of criminal organisations.⁵¹ The deal was agreed on 14 November 2022, but it lacks provisions that could facilitate the relocation of migrants upon disembarkation.⁵² The deal aims at preventing Channel crossings by focusing on smuggling. In the agreement, the Ministers of both countries ‘acknowledge that efforts cannot stop here and are committed to maintaining regular dialogue on what other innovative steps can be taken to address illegal migration at all levels.’⁵³ However, they failed to take into consideration that a reduction in the number of legal routes tends to result in a higher number of migrants taking more dangerous journeys and ‘a need for emergency humanitarian assistance.’⁵⁴ The UK also concluded a bilateral agreement with Greece in 2022.⁵⁵ Its

publishing.service.gov.uk/media/65d768b454f1e70011165897/Frontex-UK_WA_-_Final_version__2_.pdf (last accessed 17 January 2025).

⁵⁰For example, Case C-399/11 *Melloni v Ministero Fiscale*, ECLI:EU:C:2013:107, para 63, where the CJEU ruled that ‘allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that Framework Decision.’

⁵¹‘UK and France in “final stage” of reaching deal on Channel crossing’ *Financial Times* (7 November 2022) available at <https://www.ft.com/content/9eac9c5c-45dc-4d44-9463-2c3b92cb6b96> (last accessed 17 January 2025).

⁵²Home Office and UK Border Force, Policy paper: UK–France joint statement: enhancing cooperation against illegal migration (14 November 2022) available at www.gov.uk/government/publications/next-phase-in-partnership-to-tackle-illegal-migration-and-small-boat-arrivals/uk-france-joint-statement-enhancing-co-operation-against-illegal-migration (last accessed 17 January 2025).

⁵³*ibid.*

⁵⁴A Balch, ‘UK–France migration deal: how does Brexit factor into the plan to stop small boats’ *The Conversation* (18 November 2022) available at <https://theconversation.com/uk-france-migration-deal-how-does-brexit-factor-into-the-plan-to-stop-small-boats-194763> (last accessed 17 January 2025).

⁵⁵HM Government, ‘Joint Action Plan by the UK and Greece on migration’ *gov.uk* (27 September 2023) available at www.statewatch.org/media/3508/uk-gr-joint-action-plan-migration-4-20.pdf (last accessed 17 January 2025).

main purpose is the prevention of unlawful migration and the dismantling of migrant-smuggling networks. In terms of cooperation beyond criminal investigations, no further developments can be identified. The UK's departure from the EU has left a vacuum in the protection of asylum seekers as the UK is no longer part of the CEAS or Eurodac.⁵⁶ Eurodac is an information system that collects, transmits and compares fingerprints for the purpose of determining which EU Member State is responsible for examining an application for international protection lodged in a EU Member State by a third-country national or stateless person.⁵⁷ Dublin III and the Eurodac database aim to prevent what is usually labelled 'asylum shopping', which refers to asylum seekers applying for refugee status in different EU Member States, as well as 'refugees in orbit', where no State takes responsibility for asylum claims.⁵⁸ Through Dublin III and Eurodac, asylum seekers were distributed between EU Member States and the UK participated in the distribution. Now that the UK has left the CEAS, redistribution no longer takes place and the UK legislation has restricted access to legal routes. There is an emphasis in returning migrants to their countries of origin, rather than widening legal routes.

The EU and the UK should work together and try to find solutions by focusing on partnerships with third countries, opening legal routes, facilitating the return of migrants who have reached the UK unlawfully, seeking solutions that respect human rights, and at the same time improve the management of migration.⁵⁹

IV. Undocumented Migrants in the UK Post-Brexit and Cooperation with the EU

Access to the UK has become very difficult for third-country nationals seeking asylum. The UK enacted the Nationality and Borders Act 2022. Part 3 of this Act focuses on immigration controls and on the fight against the smuggling of migrants. Section 40 of the Act creates two new offences of arriving in the UK without a valid entry clearance or electronic travel authorisation (ETA) where required, in addition to the existing offence of entering without leave.⁶⁰ These offences cover all asylum claimants and refugees who arrive without the necessary entry clearance or ETA.⁶¹ Section 41 amends the facilitation offences in sections 25 and 25A of the Immigration Act 1971, raising the maximum

⁵⁶M Gower, *Brexit: The End of the Dublin Regulation III in the UK*, House of Commons Library (21 December 2020) available at <https://researchbriefings.files.parliament.uk/documents/CBP-9031/CBP-9031.pdf> (last accessed 17 January 2025).

⁵⁷Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) OJ L 180/1.

⁵⁸*ibid* 6.

⁵⁹*ibid*.

⁶⁰Immigration Act 1971, s 24(1)(a).

⁶¹Immigration Act 1971, s 28LA(1), as amended by s.40 Nationality and Borders Act 2022, Explanatory Notes, para 399.

penalty from 14 years' to life imprisonment and removing the requirement of facilitation being 'for gain' in relation to section 25A. The Act distinguishes between legal and illegal migrants⁶² and asylum seekers belong to the latter category.

Furthermore, the Immigration Act 1971, section 28LA(1), as amended by section 45 of the Nationality and Borders Act 2022, expands current maritime enforcement powers enabling maritime enforcement action to take place outside of UK waters in order to detect, prevent, investigate and prosecute the illegal entry of migrants as well as its facilitation. It includes powers to require migrant vessels to leave UK waters as well as powers intending to support the disembarkation of non-compliant passengers in a non-UK Ports.⁶³ An act is not considered to constitute assisting unlawful immigration if the act was done with the aim of assisting the migrant 'at any time between the time when the assisted individual was first in danger or distress at sea, and the time when the assisted individual was delivered to a place of safety on land'.⁶⁴ The vessels that can be subject to maritime enforcement actions are:

- (a) a United Kingdom ship,
- (b) a ship without nationality,
- (c) a foreign ship,
- (d) a ship registered under the law of a relevant territory⁶⁵

and the enforcement powers can only be exercised 'for the purpose of preventing, detecting, investigating or prosecuting a relevant offence'.⁶⁶ This new offence was introduced because, since 2020, the assistance provided to unlawful migrants crossing the English Channel has increased.⁶⁷ Criminal organisations have become more sophisticated, with smugglers 'increasing the size of vessels used to facilitate illegal entry to the UK'.⁶⁸ Therefore, the 2022 Act has strengthened the maritime enforcement powers by authorising investigation of the crime extraterritorially.

The 2022 Act has reinforced the externalisation of migration by widening the power of immigration officers beyond territorial waters. Migrants may not even be given the opportunity to report their smugglers, if they have committed crimes against them during their journeys, as their expulsion will be automatic if it is ascertained that they are unlawful. In addition, people entitled to asylum may not have the opportunity to claim it in the UK.

The Nationality and Borders Act was passed at the same time the UK was negotiating the UK–Rwanda treaty.⁶⁹ This aimed to create a mechanism for relocating

⁶² E Reyes, 'All at sea' *Law Gazette* (15 July 2022) available at www.lawgazette.co.uk/features/all-at-sea/5113152.article (last accessed 17 January 2025).

⁶³ Immigration Act 1971, s 28LA(1), as amended by the Nationality and Borders Act 2022, Explanatory Notes, para 453.

⁶⁴ Immigration Act 1971, s 28LA(1), as amended by the Nationality and Borders Act 2022, s 41(2).

⁶⁵ Immigration Act 1971, s 28LA(1), as amended by the Nationality and Borders Act 2022, sch 7.

⁶⁶ Immigration Act 1971, s 28LA(2)(a), as amended by the Nationality and Borders Act 2022, sch 7.

⁶⁷ Immigration Act 1971, s 28LA(1), as amended by the Nationality and Borders Act 2022, Explanatory Notes, para 454.

⁶⁸ Immigration Act 1971, s 28LA(1), as amended by the Nationality and Borders Act 2022, Explanatory Notes, para 455.

⁶⁹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership to strengthen shared international commitments on the protection of refugees and migrants. (published 5 December 2023).

asylum seekers whose claims were not to be heard in the UK to Rwanda.⁷⁰ Human Rights Watch described the deal between Rwanda and the UK as ‘cruel’ and added that ‘Rwanda’s appalling human rights record is well documented.’⁷¹ The UNHCR criticised the UK–Rwanda deal, as the Refugee Agency is against shifting asylum responsibilities to third countries.⁷² The UK–Rwanda deal has been described as ‘nothing other than mass deportation.’⁷³ The ECtHR issued urgent interim relief in favour of an Iraqi national who travelled from Iraq to Turkey and then across Europe before reaching the UK by boat across the English Channel.⁷⁴ Subsequently, he made an asylum claim in the UK, which was considered inadmissible, and was set to be relocated to Rwanda. The High Court refused to grant him an interim relief, an appeal was dismissed and the UK Supreme Court refused permission for an appeal. The ECtHR took into consideration the UNHCR report stating that asylum seekers transferred to Rwanda ‘will not have access to fair and efficient procedures for the determination of refugee status.’⁷⁵ It also considered the High Court’s question, on whether Rwanda should be treated as a safe country, to be ‘irrational or based on insufficient enquiry’, and as giving ‘rise to “serious triable issues”’.⁷⁶ Therefore, the ECtHR decided to grant an urgent interim relief on the basis of the fact that Rwanda could not guarantee and protect rights recognised by the ECHR, as Rwanda was not a State Party of the Convention and thus not legally bound by it. In addition, the interim relief was granted because of a mechanism allowing the return of the applicant to the UK ‘in the event of a successful merits challenge before the domestic courts.’⁷⁷ Subsequently, the High Court dismissed the challenges against the UK Government but overturned the decision in each individual case, as asylum seekers were not given the opportunity to argue about the safety of Rwanda, were not permitted access to legal advice, and had only seven days to argue their case and five days to apply to the Court.⁷⁸ The Court of Appeal, on the other hand, ruled by majority that the UK policy on Rwanda was unlawful because Rwanda was not a safe country and there was the real risk that the principle of *non-refoulement* could be breached.⁷⁹ The Supreme Court agreed with the Court of Appeal, stating:

[W]e conclude that the Court of Appeal was correct to reverse the decision of the Divisional Court, and was entitled to find that there are substantial grounds for believing that the

⁷⁰ Home Office, Statement concerning the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership to strengthen shared international commitments on the protection of refugees and migrants (April 2024).

⁷¹ Human Rights Watch, ‘UK Plan to Ship Asylum Seekers to Rwanda is a cruelty’ (14 April 2022) available at www.hrw.org/news/2022/04/14/uk-plan-ship-asylum-seekers-rwanda-cruelty-itself (last accessed 17 January 2025).

⁷² UNHCR ‘UN Refugee Agency opposes UK plan to export asylum’, Press Release (14 April 2022) available at www.unhcr.org/uk/news/press/2022/4/62585e814/un-refugee-agency-opposes-uk-plan-export-asylum.html (last accessed 17 January 2025).

⁷³ ‘Offshoring the asylum process: a dangerous move for health’ *The Lancet* (30 April 2022) available at [www.thelancet.com/journals/lancet/article/PIIS0140-6736\(22\)00772-3/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(22)00772-3/fulltext) (last accessed 17 January 2025).

⁷⁴ ‘The European Court grants urgent interim measure in case concerning asylum seeker’s imminent removal from the UK to Rwanda’, Press Release (14 June 2022).

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *AAA & Ors v Secretary of State for the Home Department CO/2032/2022 & Or [2022] EWHC 3230 (Admin)* [414]–[426].

⁷⁹ *R (AAA) v Secretary of State for the Home Department [2023] EWCA Civ 745 [492]* et seq.

removal of the claimants to Rwanda would expose them to a real risk of ill-treatment by reason of refoulement. It was accordingly correct to hold that the Secretary of State's policy is unlawful. The Secretary of State's appeal is therefore dismissed.⁸⁰

Following the Supreme Court's ruling, the UK passed the Safety of Rwanda (Asylum and Immigration) Act 2024. The UK/Rwanda deal was replaced by a Treaty with the aim of preventing unlawful migration, as all migrants without the right to enter British territory were to be sent to Rwanda.⁸¹ The Act indicated the steps to be taken to consider Rwanda a safe country. For this purpose, s 1(3) of the Act stated that the Republic of Rwanda had agreed:

- (a) not to send any persons removed from the UK to another country;
- (b) to relocate individuals and return them to the UK following a request from the British Government;
- (c) to improve 'the system for the processing of protection claims by relocated individuals';
- (d) to treat relocated individuals equally, irrespective of the status that they are granted in the Republic of Rwanda;
- (e) to provide legal assistance to individuals' claims and appeals;
- (f) to monitor independently that these provisions will be respected and 'subject to a form of binding dispute settlement'.

Section 1(6) stated that the UK would act in compliance with the major international Conventions, including, amongst others, the Refugee Convention and the ECHR. However, the UNCHR stated that despite improvements introduced by the Act in relation to the establishment of a Treaty between the UK and Rwanda, there remained issues, as the asylum system did 'not overcome continued procedural fairness and other protection gaps' that could only be addressed by 'long-term and fundamental engagement and changes in institutional culture'.⁸²

Following the 2024 General Election, the Labour Government took the decision, in July, to cancel the Rwanda asylum scheme and repeal the 2024 Act, putting an end to any discussions on whether asylum seekers were to be sent there.⁸³ No migrants were ever forcibly relocated to Rwanda under the policy, but a small number did relocate voluntarily. Denmark's plan to transfer asylum seekers to Rwanda was also put on hold.⁸⁴ Italy often refuses to allow rescued migrants to disembark, in a lengthy saga with the EU and

⁸⁰ *R (AAA) v Secretary of State for the Home Department* [2023] UKSC 42 [149].

⁸¹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership to strengthen shared international commitments on the protection of refugees and migrants (published 5 December 2023) available at www.gov.uk/government/publications/uk-rwanda-treaty-provision-of-an-asylum-partnership/uk-rwanda-treaty-provision-of-an-asylum-partnership-accessible (last accessed 17 January 2025).

⁸² UNHCR, Analysis of the Legality and Appropriateness of the Transfer of Asylum-Seekers under the UK-Rwanda arrangement: an update (15 January 2024) available at www.refworld.org/legal/natlegcomments/unhcr/2024/en/147086 (last accessed 17 January 2025) para 20.

⁸³ S Francis, 'Starmer confirms Rwanda deportation plan dead' *BBC News* (6 July 2024) available at www.bbc.co.uk/news/articles/cz9dn8erg3zo (last accessed 16 January 2025).

⁸⁴ Bleona Restelica, 'Denmark Puts on Hold Plans to Transfer Asylum Seekers to Rwanda' (16 January 2025) https://schengen.news/denmark-puts-on-hold-plans-to-transfer-asylum-seekers-to-rwanda/#google_vignette <last accessed 17 January 2025>.

its Member States that began in 2019.⁸⁵ The Italian Government's actions appear to be in violation of the law as, under international law, once migrants have been rescued, they have the right to be disembarked in a safe country, which, in this case, would be the country that conducted the rescue.⁸⁶

As states impose stricter restrictions, criminal organisations are more likely to exploit migrants who are willing to take risks in pursuit of a better life.⁸⁷ The UK is only targeting irregular migrants with restrictions. Parliament has also enacted the Illegal Immigration Act 2023, which establishes a duty for the Secretary of State to make arrangements to remove 'certain persons who enter or arrive in the United Kingdom in breach of immigration control as soon as is reasonably practicable after their entry or arrival'.⁸⁸ These restrictions have been adopted 'to deter unlawful migration'.⁸⁹ The title of the Act has negative connotations as it contributes to stereotyping all migrants who enter the UK irregularly, or who overstay, and presents them as deserving of punishment as criminals. However, further restricting access to British territory is likely to cause an increase in migrants trying to reach the UK irregularly, as it has been reported that increased maritime surveillance and the abolition of legal routes will not discourage people from trying to cross the Channel.⁹⁰ With a reduction in the number of available legal routes for asylum, more people will try to cross the border by embarking on more dangerous journeys.⁹¹ Not only will they risk perishing along the way, they will also risk becoming victims of human trafficking. In September 2023, the Human Rights and Equalities Commission in Northern Ireland launched a legal challenge against the Act, as it neglects to protect the most vulnerable people, such as victims of human trafficking and children, and is therefore incompatible with the ECHR.⁹² In May 2024, a judge at Northern Ireland's High Court ruled that parts of the Act should not apply in

⁸⁵ A Binley, 'Standoff as Italy stops male migrants from disembarking rescue ships' *BBC News* (6 November 2022) available at www.bbc.co.uk/news/world-europe-63533769 (last accessed 16 January 2025). See also ANSA, 'Salvini claims he acted 'his role' in Rackete defamation case' (13 June 2022) available at www.infomigrants.net/en/post/41132/salvini-claims-he-acted-his-role-in-rackete-defamation-case (last accessed 17 January 2025); J Barigazzi, 'Brussels steps in as Italy and France fight over migrant boats' (11 November 2022) available at www.politico.eu/article/eu-italy-france-fight-migrant-boat-ocean-viking-margaritis-schinas/ (last accessed 17 January 2025).

⁸⁶ International Convention on Maritime Search and Rescue (SAR), adopted 27 April 1979, entered into force 22 June 1985, 1405 UNTS 97; United Nations Convention on the Law of the Sea (UNCLOS), adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397; International Convention for the Safety of Life at Sea (SOLAS), adopted 1 November 1974, entered into force 25 May 1980, 1184 UNTS 278. The SOLAS Convention, for the safety of ships at sea, was adopted by the IMO and came into force on 25 May 1980 and was amended in 2004. See also the following ECtHR cases: *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012); and *Khlaifia and Others v Italy* App no. 16483/12 (ECtHR, 1 September 2015).

⁸⁷ UNODC, 'Smuggling of migrants: the harsh search for a better life' available at www.unodc.org/toc/en/crimes/migrant-smuggling.html (last accessed 17 January 2025).

⁸⁸ Illegal Immigration Act 2023, s 1(2)(a).

⁸⁹ Illegal Immigration Act 2023, s 1(1).

⁹⁰ Neidhardt (n 41).

⁹¹ Balch (n 49).

⁹² Northern Ireland Human Rights Commission, Northern Ireland Human Rights Commission begins a legal challenge of the Illegal Migration Act (3 October 2023) available at <https://nihrc.org/news/detail/northern-ireland-human-rights-commission-begins-a-legal-challenge-of-the-illegal-migration-act> (last accessed 17 January 2025).

Northern Ireland because they were incompatible with the European Convention on Human Rights⁹³ and caused a significant diminution of the rights enjoyed by asylum seekers residing in Northern Ireland under the terms of the Good Friday Agreement.⁹⁴ As part of the EU Withdrawal Agreement, the UK Government is required to ensure that there is no diminution of certain human rights and equality protections contained within the Belfast (Good Friday) Agreement.⁹⁵ Member States of the EU and the UK should cooperate to redistribute irregular migrants fairly and, where possible, give them the opportunity to legalise their status by granting them the right of residence if a claim can be made out.⁹⁶ All EU Member States are considered safe countries by the Dublin Regulations (see section II of this chapter). Therefore, the UK and the EU should reach an agreement in order to redistribute asylum seekers and other migrants. The Confederation of British Industry has recently revealed that three-quarters of British companies have been impacted by labour shortages, which are threatening their ability to operate at full capacity.⁹⁷ Lord Wolfson, a Conservative peer and a prominent Brexit advocate, affirmed that the Government should approach migration differently in order to attract more foreign workers into the UK to ease labour shortages.⁹⁸ Legal routes could give many migrants the opportunity to travel regularly, gain a working visa, become employed and escape from a situation of vulnerability. The smuggling of migrants could be defeated by facilitating such policies, and the EU and the UK need to cooperate to achieve this result.

V. Conclusions

Migrant smuggling may only be defeated by effectively deterring migrants from reaching out to criminal organisations. Fighting the smuggling of migrants as a serious crime alone is currently not leading to its reduction. In fact, the adoption of a criminal justice approach simply means that smugglers are becoming ever more sophisticated. The Facilitation Directive and its implementation in the UK alongside the Dublin Regulations has created a hostile environment for migrants, which encourages undocumented migrants to seek out sophisticated networks to help them make their journeys.

⁹³The court granted section 4 of the Human Rights Act 1999 declarations of incompatibility in respect of ss 2(1), 5(1), 6(3), 6(7) as they impose a duty to remove, ss (1), 5, 6 and 22 insofar as they relate to potential victims of modern slavery or human trafficking and ss 2(1), 5(1) and 6 relating to children.

⁹⁴In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review in the matter of an application by JR295 for Judicial Review and in the Matter of the Illegal Migration Act 2023 [2024] NIKB 35.

⁹⁵Northern Ireland Human Rights Commission, 'Call for Expression of Interest on Remedies and Windsor Framework Article 2' (July 2024) available at <https://nihrc.org/assets/uploads/Call-for-Expression-of-Interest-on-Remedies-and-Windsor-Framework-Article-2-PDF.pdf> (last accessed on 16 January 2025).

⁹⁶KF Hinterberger, 'An EU Regularization Directive. An effective solution to the enforcement deficit in returning irregularly staying migrants' (2019) 26(6) *Maastricht Journal of European and Comparative Law* 740.

⁹⁷Confederation of British Industry, 'Three-Quarters of UK Companies hit by Labour Shortages in Last 12 Months' (2022) available at www.cbi.org.uk/media-centre/articles/three-quarters-of-uk-companies-hit-by-labour-shortages-in-last-12-months-cbiptemps/ (last accessed on 17 January 2025).

⁹⁸S Jack, 'Brexit-backing Next boss says UK needs more overseas workers' *BBC News* (10 November 2022) available at www.bbc.co.uk/news/business-63573988 (last accessed 17 January 2025).

Only the Residence Permit Directive⁹⁹ offers some protection to undocumented migrants and recognises their vulnerability. The EU has made return to country of origin a primary objective of its migration policies, as has the UK. However, the EU has only managed to conclude a small number of readmission agreements with third countries, which have had very limited success. In the five years leading up to Brexit, only one in three migrants ordered to leave the EU complied with the request, leading to a return rate from the EU to countries of origin of about 29 per cent. Problems in controlling migration and in the operation of the terms of the Dublin Agreement meant that the UK chose not to try to re-join the Dublin system post-Brexit. The TCA therefore contains no provisions on cooperation in asylum and immigration. There are only thin, non-binding commitments to ensure good management of migratory flows. One positive aspect of the TCA is that it has continued to facilitate cooperation with Europol and its European Migrant Smuggling Centre.

Post-Brexit, there are no longer safe and legal routes for asylum seekers, and the UK has experienced an unprecedented rise in arrivals by boat across the English Channel. Those wishing to be reunited with their families have no choice but to make the deadly journey. There is evidence that criminals have professionalised their activities. The UK and the EU need to work together to stamp out this practice. Post-Brexit there has a widening of the policy gap between the two. As the EU seeks to develop a new pact on migration and asylum aimed at addressing perceived imbalances in the Dublin Regulations, the UK has focused on creating a more hostile environment through the Nationality and Borders Act 2022 and the Illegal Migration Act 2023. Although the legislation is premised on there being safe and legal channels, '[t]here are no visa routes to enable people to claim asylum in the UK from overseas'.¹⁰⁰ The UK's agreement with Rwanda was heavily criticised as a breach of the UK's international obligations. Although argued to be the UK's answer to 'taking back control of its borders', it was deeply flawed, and there was no evidence that, even if it had become operational, it would have decreased the number of small-boat crossings.

The UK and the EU have deep economic, cultural, historical and political ties. The need for a comprehensive and balanced relationship has not diminished because of Brexit. Without an EU-wide agreement or bilateral agreements with neighbouring coastal states, the UK cannot remove individuals to EU Member States, leaving people in legal limbo and exposed to exploitation. Cooperation is in the interests of both the UK and EU, as both need to reduce the incentives to cross the English Channel on small boats. This cannot be done without creating safe and legal channels from the EU and a coherent policy on returns of third-country nationals. Such solutions will be much more stable if they respect the UK's international obligations, including its commitment to protect human rights.

A way to achieve this objective is not to consider the arrival of smuggled migrants in Europe as an emergency that should be tackled by emergency measures. Agreements with third countries should rather concentrate on long-term policies that aim to prevent people from leaving their countries of origin and residence in the first place.

⁹⁹ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19.

¹⁰⁰ Home Office, 'Safe and Legal Routes' (20 July 2023) available at www.gov.uk/government/publications/illegal-migration-bill-factsheets/safe-and-legal-routes (last accessed 17 January 2025).