

Editorial

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Refugee law in the UK is in a moment of flux. Recent years have seen the issue of migration in general, and ‘illegal migration’¹ in particular, as focal points of government policy. With the current fixation on ‘small boats’ being only the latest iteration of this highly politicised focus. In the two years prior to the publication of this edition, the focus on migration has resulted in two major legislative enactments, specifically the Nationality and Borders Act 2022 and the Illegal Migration act 2023. As well as these legislative enactments, the UK has signed a Memorandum of Understanding with Rwanda, and unveiled a raft of other policies aimed at deterring “illegal” entry into the UK by targeting both those who undertake journeys and those who seek to facilitate them. Rarely a day goes by where discussion of issues relating to asylum do not form a part of the news cycle. Indeed, issues in relation to migration have taken their place in a broader culture war which has also seen a more aggressive posture towards the rights of LGBTIQ+ people, with conceptual battles circulating as much around the concepts of gender and sexuality as they have around the concept of the refugee.

Even as I draft this introduction, the flux continues to be a prominent issue with the Supreme Court issuing judgment in the matter of R (On the Applications of AAA) v Secretary of State for the Home Department² on November 15th 2023. In this case, it was held that the UK’s plan to send potential refugees on to Rwanda for their asylum claim to be considered there was unlawful as there was, amongst other things, a real risk of a breach of article 3 of the European Convention on Human Rights taking place.³ This judgment was immediately followed by a raft of political announcements, such as proposals by the Conservative Party Vice Chairman that the government should simply ignore the decision and send claimants on anyway.⁴ As this suggests, far from being a mere matter of legislative concern, matters relating to migration and asylum also threaten to spill over and result in broader conflicts over the rule of law, separation of powers, and the nature of the UK as a liberal democracy (or an illiberal democracy). Of course, notwithstanding the constitutional dangers posed by the current discursive framing of migration, the moral panic around ‘illegal’ migration should also be considered in terms of the considerable harms it causes for those who come to the UK seeking international protection and find themselves faced with limbo, hostility, and a lack of accessible legal support.⁵

Given the current salience of migration and asylum as an element of the news cycle, politicians from numerous parties have placed a focus on addressing the issue of small boats

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¹ It should be noted that for many wishing to seek international protection illegal entry is effectively necessitated by the strict border policies deployed by the UK.

² [2023] UKSC 42

³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3

⁴ Christopher Sharp, ‘Send them to Rwanda Anyway!’ Lee Anderson Leads Calls to ‘Ignore’ Supreme Court Ruling (Daily Express, 15th November 2023) available at <https://www.express.co.uk/news/politics/1835322/rwanda-plan-lee-anderson-tory-mps> accessed 17/11/2023.

⁵ Jo Wilding, *The Legal Aid Market: Challenges for Publicly Funded Immigration and Asylum Representation* (Policy Press 2021).

and reducing ‘illegal’ migration into the UK.⁶ Of course, this comes on the back of broader political targets and trends, such as the Governing Conservative party’s pledge to cut immigration to the tens of thousands.⁷ The result of this is that a rather unfortunate political consensus regarding the need to act to ‘stop the boats’ seems to have emerged. In this context, it is more crucial than ever to ensure that space is provided for a considered analysis of the implications of legislation and precedent for the future functioning of the UK asylum system.

In a symbol of how fast-paced and politicised the shifts in UK have been, new legal elements such as the differential treatment provided for under the Nationality and Borders Act 2022, were shelved within 12 months of being introduced.⁸ While other elements of the Illegal Migration Act 2023 currently sit on the statute book without any clarity regarding if and when they will be brought into legal effect. The lack of certainty has had implications for asylum seekers and the organisations that support them. For example, during the period in which these policies were announced I was undertaking fieldwork focused on the experiences of lawyers who support LGBTIQ+ refugees and asylum seekers and was struck by the number of participants who reported claimants calling them anxious that they faced imminent removal to Rwanda.⁹ This anxiety, of course, forms a constituent part of a wider context within which migrants have faced the implementation of a ‘hostile environment’ and a broader raft of policies aimed at ‘detering’ people from coming to the UK. The viability of a deterrence strategy is unclear considering the evidence which suggests that alleged pull factors have a near zero effect on whether or not people come to the UK.¹⁰

More broadly, the United Nations High Commissioner for Refugees has been unambiguous in outlining that the legal framework as it stands after the Illegal Migration Act 2023 is not in compliance with the obligations that the UK has agreed to under the Refugee Convention¹¹ and its 1967 Protocol.¹² Whilst the UK Government has, for some time, attempted to argue that the ‘first safe country’ concept is a key principle of the refugee framework and that, therefore, their actions are in keeping with the Convention,¹³ the intervention of the United Nations High Commissioner for Refugees clearly points to the controversy around the changes

⁶ See for example: Patrick Daly, Labour Small Boats Scheme Criticised as it Sets out Plans to Cut Asylum Backlog’ (The Independent, 15th September 2023) available at <https://www.independent.co.uk/news/uk/labour-suella-braverman-matt-wrack-yvette-cooper-the-hague-b2411956.html> accessed 06/11/2023

⁷ The Conservative Party, Invitation to Join the Government of Britain: The Conservative Manifesto 2010 (Conservative Party, 2010) 21.

⁸ Nationality and Borders Act 2022, s 12. At the time of passing, this was considered to be a major element of the legislation and received significant legal discussion. See for example: Devyani Prabhat, Raawiyah Rifath, Ann Singleton, Ruvi Ziegler, Alex Powell, Natalie Sedacca, Reconsidering Asylum Is It For Those Who Need Protection (Border Criminologies 26 May 2022) available at <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2022/05/reconsidering> accessed: 06/11/2023

⁹ It should, of course, be noted that any claimant who was already in the process of making an asylum claim prior to the passing of the Nationality and Borders Act 2022 and the Illegal Migration Act 2023 will have their claim heard according to the law as it was at the time they made their claim for asylum, rather than having it heard under the law as it now is.

¹⁰ Lucy Mayblin, Imagining asylum, governing asylum seekers: Complexity Reduction and Policy Making in the UK Home Office (2019) 7 Migration Studies 1; Lucy Mayblin, Complexity Reduction and Policy Consensus: Asylum Seekers, The Right to Work, And the “Pull Factor” Thesis in the UK Context (2016) 18 The British Journal of Politics and International Relations 812.

¹¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

¹² Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Protocol)

¹³ See for example: Sajid Javid, (HC) Deb Volume 652: Debated on Monday 7th January 2019.

introduced by the UK at a global, as well as domestic, level. Indeed, note should be taken that the right to claim asylum forms a general principle of customary international law, with the right to non-refoulement—to not be returned to a state where one’s human rights face fundamental or sustained violation—having been recognised as *jus cogens*, making it as a norm of the profound importance.¹⁴ More broadly, the ability to claim protection as a refugee is recognised as being a crucial form of ‘surrogate protection’¹⁵ essential to the idea that human rights are universal. Indeed, this status has led Hathaway and Foster to identify refugee law as the world’s most powerful human rights mechanism.¹⁶ The Supreme Court the Judges in *AAA* were very clear in stressing that the obligation on the UK not to send asylum seekers to locations where there is a ‘real risk’ of refoulement to their country of origin or a real risk of their suffering inhuman and degrading treatment arises from a range of international frameworks spanning the International Covenant on Civil and Political Rights, The European Convention on Human Rights, and the Refugee Convention, as well as being a feature of customary international law. Given the frequency with which members of the governing party now openly suggest withdrawal from the Convention, the fact that other sources of international law also obligate the UK to respect the principle of non-return is a crucial one to bear in mind.

Alongside these shifts in law and policy, there have also been a number of concerning discursive and rhetorical shifts. This has included a strongly hostile tone towards immigration and human rights lawyers. As flagged by the Immigration Law Practitioners Association, this is incompatible with the UN established Basic Principles on the Role of Lawyers,¹⁷ Which the UK has previously endorsed,¹⁸ and leads to concerns that ‘the Government’s narrative, which may be dangerous and detrimental to the safety and well-being of immigration lawyers, poses a serious threat to our justice system... [which] relies on lawyers being free to perform their duties and maintain their independence.’¹⁹

One explicit example of this deeply politicised and aggressive posture towards lawyers can be seen in the fact that the UK Government both developed a dossier on, and wrote up media briefings against, Jacqueline Mackenzie, the Head of Immigration Law at Leigh Day. The compiling and dissemination of this dossier led the Law Society and Bar Council to issue a joint statement, which included an explicit recognition that ‘Lawyers who represent their clients are not only doing nothing wrong, they are doing exactly what they are supposed to do in playing their part in ensuring that the rule of law is upheld.’²⁰ As this interjection makes

¹⁴ Jean Allain, *The Jus Cogens Nature of Non-Refoulement* (2001) 13 *International Journal of Refugee Law* 533.

¹⁵ James Hathaway, *International Refugee Law: The Michigan Guidelines on The International Protection Alternative* (1999) 21 *Michigan Journal of International Law* 131

¹⁶ James Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press 2014) 1.

¹⁷ Immigration Law Practitioner’s Association., *ILPA Statement on the Safety and Protection of Immigration Practitioners* (ILPA, 10th August 2023) available at https://ilpa.org.uk/wp-content/uploads/2023/08/ILPA-Statement-on-the-Safety-and-Protection-of-Immigration-Practitioners_August-2023.pdf accessed 17/11/2023

¹⁸ United Nation Human Rights, *Basic Principles on the Role of Lawyers* adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 07 September 1990.

¹⁹ Immigration Law Practitioner’s Association., *ILPA Statement on the Safety and Protection of Immigration Practitioners* (ILPA, 10th August 2023) available at https://ilpa.org.uk/wp-content/uploads/2023/08/ILPA-Statement-on-the-Safety-and-Protection-of-Immigration-Practitioners_August-2023.pdf accessed 17/11/2023

²⁰ <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/law-society-and-bar-council-joint-statement-on-jacqueline-mckenzie>

clear, attacks on lawyers are not individual or mere politics, but rather point to a concerning situation in regard to the rule of law.

In this political and legal climate, analytical purchase can be hard to find. Both the pace of change and the tenor of the debate make for a situation in which narrative often has more salience than argument. However, this special issue looks to the government's broader 'New Plan for Immigration' in both its legislative and discursive guises to analyse its implications for people who are claiming asylum on the basis of Sexual Orientation²¹ or Gender Identity.²² Or otherwise put, the implications for people who would generally be identified as a part of the lesbian, gay, bisexual, trans, intersex, queer, asexual (LGBTIQA+) community. The focus on this group is all the more important because, in giving a speech in Washington DC, the then Home Secretary, Suella Braverman, turned the focus onto sexual orientation based asylum claims, suggesting that these mistook discrimination for persecution and provided a way for people to circumvent the UK immigration system.²³ As a growing and extensive literature has demonstrated, matters of evidence, credibility, and proof in sexual orientation and gender identity asylum claims are particularly acute.²⁴ As this suggests, Braverman's claims bear little relation to reality. Nonetheless, the fact that she is making them at the same time as having taken primary responsibility for the design of a fundamentally new asylum system speaks to the huge significance of analysing the way in which these changes will affect the claims of LGBTIQA+ people, as well as others whose claims for refugee status rest on the non-normativity of the individual asylum claimant, as opposed to a general condition or crisis within the country of origin.

The articles in this special issue emerge from a symposium entitled *Sexuality, Nationality and Asylum – The New Plan for Immigration*. This event, Funded by the Faculty of Humanities and Social Sciences at Oxford Brookes University and Supported by the Jean Monnet Foundation and One Pump Court Chambers, brought together academics, practitioners, and people with lived experience of navigating the asylum system as LGBTIQA+ claimants on June 14th 2023. During the day, we heard from a number of crucial voices. This included hearing drafts of the papers which form a part of this special issue. However, most importantly we heard from those who had themselves experienced the process of making an asylum claim in the UK. These narratives covered experiences of both community and isolation, charting some of the major issues as they are lived and experienced within the asylum system itself and casting light on the psychological and emotional toll that contemporary populist narratives place on those navigating the asylum system.

²¹ In other work, I have examined how the concepts of sexual orientation and sexual identity have, to an extent collapsed into one another. Therefore, I would generally avoid this terminology. However, in service to accessibility, I have deployed it here. See further: Alex Powell, *Sexuality Through The kaleidoscope: Sexual orientation, identity, and behaviour in asylum claims in the United Kingdom* (2021) 10 *Laws* 90

²² Terminology and conceptual frameworks are an important issue in regard to how sexual and gender diverse people are understood, particularly when working across cultures. As such, different authors in this issue have been given space to make their own decisions in regard to terminology.

²³ See: Tim Baker, *Being Gay or a Woman Isn't Reason Enough to Claim Asylum, Says Suella Braverman* (Sky News 26th September 2023) available at <https://news.sky.com/story/home-secretary-suella-braverman-to-question-if-refugee-convention-is-fit-for-our-modern-age-in-us-think-tank-speech-12970029> accessed 17/11/2023;

²⁴ See generally: Moira Dustin, *Many Rivers to Cross: The Recognition of LGBTIQI Asylum in the UK* (2018) 30 *International Journal of Refugee Law* 101; Lotte Wolff and Brandy Cochrane, *Queer Legibility and the Refugee Status Determination Process* (2023) 0 *Sexualities*, 1

In particular, the lived experience panel—made up of people navigating the asylum system on the basis of being LGBTIQ+—reflected the anxiety, isolation, and frustration that claimants face while attempting secure sanctuary in the UK. These emotions, we heard, had been increased by recent media narratives and the large uncertainties regarding how the government was changing the law. It is pertinent to note that the event took place during the immediate aftermath of the passing of the Illegal Migration Act 2023. As such, many of the reflections of the day were regarding the implications of this legislation, not only in a legal sense but also in terms of its social and political effects and the risks that these posed to the welfare of those currently waiting to hear the outcomes of their asylum claims.²⁵

The importance of hearing these narratives was all the more pronounced given that the voices of refugees and migrants are often forgotten, even within forums which purport to represent and speak for them. Given this, the event was an important, although by no means sufficient, way in which to give voice to the importance of lived experience to truly understanding the implications of law and legal frameworks for LGBTQ+ asylum seekers and refugees. While none of the contributors to this section have lived experience, all of us are deeply indebted to those who attended and shared their experiences with us both at the event and more broadly.

The reason for the focus of this special issue, as well as the symposium it arises from, being on people who are sexually diverse is twofold. Firstly, some of the proposed changes brought about as a part of the New Plan for Immigration have a disproportionate effect on certain types of claim. For example, academic concern has already been raised in regard to the changes to the burden of proof introduced under the Nationality and Borders Act 2022 and their potential to have a disproportionate impact on sexually diverse claimants.²⁶ Similarly, across the many countries proposed as safe there a disproportionate risks of harm up to including that of persecution for people of diverse genders and sexualities.²⁷ This includes Rwanda, the only country with which the UK has currently signed a Memorandum of Understanding to send those deemed inadmissible. Alongside these disproportionate impacts, it is argued that the focus on specific groups can also provide a useful purchase point for broader analysis of the flaws with the changes introduced as a part of the broader ‘new plan for immigration’. This is not to say that the harms identified in this volume are exclusive to sexual and gender minority claimants, far from it. However, as the articles across this issue make clear, there are a number of ways in which shifts in the UK asylum system have failed to account and recognise the

²⁵ For details of the event see: Oxford Brookes University, Sexuality, Nationality and Asylum – The New Plan for Immigration available at <https://www.brookes.ac.uk/research/networks/migration-and-refugees-research-network/events/2023/sexuality-nationality-and-asylum-the-new-plan-for> accessed 19/11/2023

²⁶ See Generally: Alex Powell and Raawiyah Rifath, Sexual Diversity and the Nationality and Borders Act 2022 (2023) First View Legal Studies 1.

²⁷ For example, Schedule 1 to the Illegal Migration Act which lists countries to which a person may be removed includes, inter alia, ‘Kenya (in respect of men) and Nigeria (in respect of men) both of which currently criminalise same sex sexual activity with very severe penalties, including the death penalty in Nigeria. See: UK Visas and Immigration, Country Policy and Information Note: Sexual Orientation and Gender Identity or Expression, Nigeria, February 2022 available at <https://www.gov.uk/government/publications/nigeria-country-policy-and-information-notes/country-policy-and-information-note-sexual-orientation-and-gender-identity-or-expression-nigeria-february-2022-accessible-version> accessed 17/11/2023; UK Visas and Immigration, Country Policy and Information Note. Kenya: Sexual Orientation and Gender Identity Expression, April 2020 available at https://assets.publishing.service.gov.uk/media/5e96ed80d3bf7f4128b01ee1/Kenya_-SOGIE-CPIN-v3.0__GOV.UK_.pdf accessed 17/11/2023

potential additional harms that those who face intersectional forms of oppression, such as sexual and gender diverse asylum seekers, may be exposed to.

To this end, this issue brings together four articles which look at the impact of the UK Government's New Plan for Immigration and the discourses in terms of their implications for LGBTIQ+ refugees and asylum seekers. The issue opens with Kay Lalor, Rossella Pulvirenti, and Catherine Jaquiss using the framework of an Equality Impact Assessment to critically consider the implications of the Memorandum of Understanding between the UK and Rwanda in terms of its implications for people who are sexually diverse. This article critically calls attention to the fundamental deficiencies in terms of safe guards against the risk of sending people who are sexually diverse into a country which has, even in recent years, been a source country for LGBTIQ+ claims. Using the framework of an Equality and Diversity Impact assessment, the paper exposes the additional forms of vulnerability to which the shifting UK framework exposes sexual and gender minorities and proposes methods by which the scheme of protection offered to sexual and gender minority asylum seekers under the framework of the European Convention on Human Rights might be expanded.

Alongside the expansion of inadmissibility and the proposal to send claimants to third countries such as Rwanda for their asylum claims to be processed, the Illegal Migration Act 2023, also provides for a major expansion in the use of administrative detention for those who are deemed to have entered the UK unlawfully. This element of the New Plan forms the subject matter of the second article, by Claire Fletcher, who argues that the heteronormative assumptions regarding the accommodation of refugees and asylum seekers has concerning consequences for sexual and gender minorities and that the current framework has a lack of adequate protections to ensure that claimants are not placed into situations where they face discrimination and harassment.

As addressed above, a major element in the New Plan for Immigration is the broader discursive context from which it emerges. In charting this, Katherine Langley reflects on how rhetorical devices and the framing of migration narratives impacts asylum claimants. Drawing on semi-structured interviews with solicitors and barristers practicing in the asylum field, she argues that the discourses associated with the New Plan actively undermine the ability of claimants, particularly those with complex identities, such as LGBTIQ+ claimants, to navigate the asylum system.

Finally, my contribution looks more broadly at the totality of the changes which form the 'New Plan for Immigration', arguing that what we have seen is a shift in the underlying rationale for international protection. Specifically, I chart how we have retreated from the Convention conception of a refugee as someone who for reasons pertinent to them individually has left their country of nationality and is seeking protection to a system premised on bespoke arrangements to address the needs of groups fleeing a crisis. I then examine the implications of this for LGBTIQ+ people, a group whose oppression is fundamentally rooted in a form of normativity and does not, therefore commonly read as a form of crisis.

Together, these articles contribute to the literature on LGBTQ+ asylum by beginning to offer an analysis of how the cluster of policies which come together in the form of the 'new plan for immigration' impact the ability of LGBTIQ+ people to rely on international protection in the UK.