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**RESPECTING ASYLUM SEEKERS:
CONCEPTUALISING AND
BALANCING RIGHTS AND
IMMIGRATION CONTROL IN THE
WELFARE STATE**

K BALES

PhD

2015

**RESPECTING ASYLUM SEEKERS:
CONCEPTUALISING AND
BALANCING RIGHTS AND
IMMIGRATION CONTROL IN THE
WELFARE STATE**

KATIE BALES

A thesis submitted in partial fulfilment
of the requirements of the
University of Northumbria at Newcastle
for the degree of Doctor of Philosophy

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Faculty of Business and Law

September 2015

Abstract

The presence of asylum seekers within the UK and their claims to social welfare and employment rights presents one of the greatest challenges to sovereignty and the traditional constructs of Marshallian citizenship. Yet in an increasingly cosmopolitan world the UK's obligations stretch beyond responsibility for its own citizens, as evidenced by the case of asylum seekers whom upon the declaration of seeking refuge must be admitted to the State and provided with subsistence to avoid destitution. Accordingly, the UK is bound by a number of international instruments that provide rights outside the legal constructs of UK citizenship which results in conflict between the traditional boundaries of social inclusion centred on citizenship, and those based on universal human rights.

Drawing upon a number of primary and secondary sources, including international human rights law and cosmopolitan theory, this thesis analyses the welfare and employment arrangements for asylum seekers in the UK using NGO data to ascertain the impact of policies in practise. It argues that the withdrawal of social rights from the asylum seeking community over the last two decades has resulted in a significant imbalance between the rights and interests of the State and those of asylum seekers. In light of these conclusions, the thesis recommends that the Government adopt a cosmopolitan approach to welfare provision which prioritises human need over immigration status and suggests a number of reforms which will better respect for the asylum seeking community. In doing so, it is hoped that the study will contribute to the development of an ethical asylum support system which reflects the humanity of its subjects. Within the current political climate such an exploration is considered crucial as the specific policies of the asylum support system and their impact upon human rights remain relatively unexplored within academic literature.¹

¹ This thesis reflects the law and policy as of the 1st June 2014. Where possible more recent political and legal developments are acknowledged.

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Table of Abbreviations

ASP:	Asylum Support Partnership
BCIA 2002:	Borders, Citizenship and Immigration Act 2002
CA 1989:	Children Act 1989
CEAS:	Common European Asylum System
CEDAW:	The Convention on the Elimination of All Forms of Discrimination Against Women
CERD:	Committee on the Elimination of Racial Discrimination
CESCR:	Committee on Economic, Social and Cultural Rights
COA:	Court of Appeal
CRC:	Convention on the Rights of the Child
CRPD:	Convention on the Rights of Persons with Disabilities
ECHR:	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR:	European Court of Human Rights
EEA:	European Economic Area
ESC:	European Social Charter 1961
EU:	European Union
IAA 1999:	Immigration and Asylum Act 1999
IAAA 1993:	Immigration and Asylum Appeals Act 1993

ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICJ:	International Court of Justice
ICCPR:	International Covenant on Civil and Political Rights
IS:	Income Support
JCHR:	Joint Committee on Human Rights
MOD:	Ministry of Defence
MIS:	The Joseph Rowntree ‘Minimum Income Standards’.
NAA 1948:	National Assistance Act 1948
NASS:	National Asylum Support Service
NGO:	Non Governmental Organisation
Qualification Directive:	Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
Reception Conditions Directive:	Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
Refugee Convention:	1951 Convention Relating to the Status of Refugees
SOL:	Shortage Occupation List

SHSH:	Still Human, Still Here
SHRC:	Scottish Human Rights Council
TFEU:	Treaty on the Functioning of the European Union
The Charter:	The Charter of Fundamental Rights of the European Union
UC:	Universal Credit
UDHR:	Universal Declaration of Human Rights 1948
UKBA:	United Kingdom Border Agency
UNHCR:	United Nations High Commissioner for Refugees

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United Nations High Commissioner for Refugees, *Asylum Applications in Industrialized Countries: 1980 - 1999* (United Nations High Commissioner for Refugees, 2001)

United Nations High Commissioner for Refugees, *Note on the Integration of Refugees in the European Union* (United Nations High Commissioner for Refugees, 2007)

United Nations High Commissioner for Refugees, *Guidelines on Determining the Best Interests of the Child* (United Nations High Commissioner for Refugees, 2008)

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Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved.

Approval has been sought and granted by the School of Law Research Committee on 1st February 2012.

I declare that the Word Count of this Thesis is 84,766 words

Name: Katie Bales

Signature:

Date: 04/07/2016

Chapter One

Introduction: Asylum, Exclusion and the Welfare State

1.1 Introduction to the research project

*'I would not choose to live this life here, which has reduced me to nothing... To a beggar. I cannot live without antidepressants now because it is too much for me to bear and whilst you are like that you begin to lose hope in the future.'*¹

An average of 21,500 people come to the UK each year in search of sanctuary,² fleeing from instances of persecution or humanitarian disaster in their countries of origin. Though the Prime Minister David Cameron contends that we should be proud of the UK's '*long tradition of providing sanctuary for those fleeing persecution*',³ the issue of asylum continues to be at the forefront of the political agenda in which the notion of sanctuary is offset against the threat of economic migration. As pointed out by Theresa May '*while the UK has a proud tradition of providing refuge for those who need it, we must not provide new incentives for those simply seeking to come for economic reasons*'.⁴

¹ Pauline, a Barnardo's respondent, John Reacroft, *Like any other child? Children and families in the asylum process* (Barnardo's, 2008) 17.

² The median number of asylum applications from 2009 to 2013 stands at 21523. The number of persons entering the country for the purpose of seeking refuge is also greater than this as the above figure only accounts for individual applications and does not include dependents. Home Office, *Immigration statistics, October to December 2013* (Gov.uk 2014) para 8.2.

³ Refugee Week, 'Political party Leaders show their support for Refugee Week' 2015) <<http://www.refugeeweek.org.uk/News/News/Political+Party+Leaders+show+their+supoprt+for+Refugee+Week>> accessed 23 July 2015.

⁴ Responding to the European Commission's 2015 plans to introduce national quotas for the sharing of refugees crossing the Mediterranean sea, Theresa May commented: '*We must distinguish between those genuinely fleeing persecution and economic migrants crossing the Mediterranean in the hope of a better life. While the UK has a proud tradition of providing refuge for those who need it, we must not provide new incentives for those simply seeking to come for economic reasons*'. Frances Perraudin, 'Theresa May: UK will not participate in EU migrant resettlement proposals' *The Guardian* (13 May 2015) <<http://www.theguardian.com/politics/2015/may/13/theresa-may-uk-eu-migrant-resettlement-scheme>> accessed 23 July 2015.

As a result of the heightened suspicion with which the asylum seeking community is regarded, significant legal developments concerning the UK's treatment of asylum seekers have taken place over the last two decades, including: the creation of a separate system of welfare support for asylum applicants (the asylum support system); and the implementation of stringent employment restrictions which render the majority of asylum seekers unable to access the labour market. In response, a plethora of Non Governmental Organisation (NGO) data⁵ has emerged seeking to establish the practical impact of restrictive policies upon the asylum seeking community. The extract set out above is taken from a 2008 Barnardo's study⁶ investigating the challenges faced by asylum seeking families within the UK, it recites the experiences of Pauline, an asylum seeker who had been unable to work for over six years whilst present within the UK, and forced instead to rely on State handouts. Unfortunately the sombre tone of the quote is symbolic of the many individual accounts cited within NGO research.

⁵ Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (Refugee Action, 2006); Refugee Media Action Group, *Seeking Asylum: A report on the living conditions of asylum seekers in London* (Migrants Resource Centre, 2006); Chris Hobson, Jonathan Cox and Nicholas Sagovsky, *Fit for purpose yet? The Independent Asylum Commission's Interim Findings* (Independent Asylum Commission, 2008); Chris Hobson, Jonathan Cox and Nicholas Sagovsky, *Deserving Dignity: The Independent Asylum Commission's Third Report of Conclusions and Recommendations* (Independent Asylum Commission, 2008); Chris Hobson, Jonathan Cox and Nicholas Sagovsky, *Saving Sanctuary: The Independent Asylum Commission's first report of conclusions and recommendations: How we restore public support for sanctuary and improve the way we decide who needs sanctuary* (Independent Asylum Commission, 2008); Reacroft, *Like any other child? Children and families in the asylum process*; Gareth Mulvey, *'Even among asylum seekers we are the lowest' Life on Section 4 Support in Glasgow* (Scottish Refugee Council, 2009); Richard Williams and Mike Kaye, *At the end of the line: Restoring the integrity of the UK's asylum system* (Still Human Still Here, 2010); Still Human Still Here, *What is the minimum level of support an asylum seeker needs in order to meet their essential living needs and avoid destitution?* (Still Human Still Here, 2010); The Children's Society, *Child Destitution Report: living on the edge of despair: destitution amongst asylum seeking and refugee children* (The Children's Society, 2008); Alasdair Stewart, *Over Not Out Refreshed 2012: An update on progress against the original recommendations of the Over Not Out Report (2009)* (Metropolitan Migration Foundation, 2012).

⁶ Reacroft (n 1).

Though arguably the UK Government would prefer to exclude all non-citizens from welfare provision, asylum seekers occupy a unique position as international law⁷ stipulates that asylum seekers must be admitted to the State upon the declaration of seeking refuge and granted provision to avoid destitution. Article 13(2) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers thus provides that member States should afford ‘*material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence*’. Consequently the UK Government is caught within the dichotomy of having to provide sanctuary whilst seeking to deter abusive applicants in order to protect national resources and the rights of national citizens.

The primary research aim of this thesis is to establish whether in seeking to deter abusive applicants, the UK Government has gone too far in creating onerous conditions of existence for members of the asylum seeking community, breaching the moral and legal cosmopolitan obligations owed to non-citizens. In addition, the thesis asks how and why greater levels of respect should be afforded to the asylum seeking community in light of competing rights claims from national citizens. In assessing the living conditions of the asylum seeking population, the scope of this thesis is limited to discussion of employment access and the provision of welfare benefits, recognising that both concepts are inextricably linked as restrictions on employment ultimately results in welfare dependency. Specifically, the financial support granted to asylum

⁷ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol Relating to the Status of Refugees; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L337/9; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

seekers and refused asylum seekers under the provisions of the Immigration and Asylum Act (IAA) 1999 will be explored. In order to address the primary research aims, the thesis will respond to the following research questions:

1. What are the justifications behind distinguishing between asylum seekers and citizens in the provision of welfare?
2. To what extent is citizenship justified as a basis for exclusion from the enjoyment of social rights which give rise to adequate living standards?
3. What justifications substantiate respect for the rights of the foreigner?
4. What standard of state provided welfare should the asylum seeking community receive as of right?
5. What national and international instruments afford protection to asylum seekers and how effective are they in practice?
6. To what extent does the UK Government respect, protect and fulfil the human rights of the asylum seeking community?
7. How could the UK improve standards of welfare support to better respect the dignity and rights status of the asylum seeker?

1.2 Architecture of the research project

Following the introductory chapter, chapter two of the research project will address question 1 (above) through examining the political development of the asylum support system and the implementation of employment restrictions. The previous Labour Government's (1997-2007) justifications for implementing the IAA 1999, which forms the statutory basis for the asylum support system, will then be discussed before setting out the current Government's policies of the asylum support system and their political rationale. As well as providing a contextual background to the thesis,

acknowledging the political justifications for the current measures is crucial in order to address the primary research aim which is to establish whether the balance between immigration control, sovereignty and universal rights has tipped too far in favour of the State. The Government's justifications for restrictive measures thus form a counterweight to the extension of national welfare benefits to the asylum seeking community and the fulfilment of socio-economic human rights.

The third chapter will then ask whether exclusion and immigration control have always been factors in the provision of welfare benefits or whether such policies are a result of increased globalisation. Traditionally citizenship forms a basis for inclusion into the State's community of social rights and interests. Accordingly, and with reference to question 2, citizenship theory will be examined, assessing the role and justifications for using citizenship as a basis for exclusion from the welfare state. The chapter then moves to address the other potential factors contributing to and sustaining asylum seekers' exclusion from national welfare benefits and the social entitlements afforded to citizens. An alternative to the notion that rights should be predicated upon citizenship is the theory of cosmopolitanism which calls for the prioritisation of human need over 'morally irrelevant' characteristics such as nationality or citizenship.⁸ Consequently the chapter will conclude with theoretical discussion of moral cosmopolitanism as a counterargument to citizenship discourse, focusing in particular on cosmopolitan hospitality which demands the hospitable treatment of foreigners within the State. In calling for the realisation of moral cosmopolitanism, human rights are presented as the primary method of assessing whether hospitable treatment is afforded to the asylum seeking community and further

⁸ Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' in Joshua Cohen (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996) 5.

as a means of enforcing the Government to abide by hospitable standards, providing content to the demands of question 3.

After asserting moral cosmopolitanism as the correct vantage point from which to regard decisions concerning welfare and establishing human rights as the primary tool for evaluation of hospitality, the fourth chapter will assess whether the UK provides hospitable treatment to asylum seekers through comparison of asylum support policies and their impact in practice to a number of international and European human rights instruments. In undertaking this assessment NGO data documenting asylum seekers' experience of the asylum support system will be utilised to provide insight into the personal impact of the system. NGO data was seen to be the most effective way of obtaining this information as: there was a wealth of this research already in existence at the beginning of the research project and given the vulnerable situation of asylum seekers and the ethical considerations involved in dealing with persons subjected to persecution and trauma, it was not considered necessary to conduct independent empirical research to ascertain the impact of asylum support policies when this data was already in existence. Though there is a risk that such information could be biased by the political standpoint of the researching organisations, numerous research reports and case studies were accessed which revealed a broad consensus indicating the authenticity of the research findings. For further information on the methodologies of the various research reports used to inform discussion, see appendix one. Before the rights assessment is carried out, chapter four sets out the general methods of application pertaining to the relevant European and international human rights instruments used within the analysis before specifically focusing on the application of socio-economic rights under the International Covenant on Economic, Social and Cultural Rights. Here, commonalities

in application such as non-discrimination and proportionality will be addressed as they are applied throughout the chapter. After contextualising the rights instruments, examination of the support system will then take place comparing NGO findings with human rights standards to determine whether the UK affords hospitable treatment to the asylum seeking population. Broadly, the rights analysis will be split between two issues: the right to employment and the right to an adequate standard of living. What amounts to an 'adequate standard of living' within the UK will be addressed within this section through discussion of standards of living that are deemed socially acceptable by members of the British public, drawing in particular on research conducted by the Joseph Rowntree Foundation. In doing so, this section answers the fourth research question by establishing minimum living standards for the asylum seeking community which State provided welfare benefits should meet in order to comply with the Government's international human rights obligations. The chapter will also conclude as to whether or not the State respects, protects and fulfils the human rights of the asylum seeking community addressing question 6. After determination of the UK's adherence to human rights obligations and cosmopolitan standards of morality, the remainder of chapter four will address question 5 through discussion of enforcement methods for realising cosmopolitan standards of morality and whether human rights are an effective method of protection in practise.

The penultimate chapter sets forth ways in which the UK could improve standards of hospitality and better respect the rights and dignity of the asylum seeking community, providing content to the final seventh research question. Though this chapter seeks to provide idealist solutions it will also take into account the political and social factors involved in implementing a cosmopolitan perspective. The chapter will not however supply a detailed policy framework for a new asylum support system

as the economic expertise and knowledge needed to do so fall outside the scope of the research project. After exploration of the ways in which the asylum support system could be improved, the concluding chapter will summarise the thesis and draw together findings from each of the research questions to determine the overall aim of establishing whether the onerous conditions imposed upon the asylum seeking community breach the moral and legal cosmopolitan obligations owed to non-citizens and how, in light of these findings, greater levels of respect could be afforded to the group.

1.3 Origins and significance of the research project

My interest in undertaking this doctoral research project arose in 2010 in the context of voluntary work with the North of England Refugee Service (NERS) where I advised active and refused asylum seekers on their entitlements to financial support and housing. What transpired from my voluntary work with NERS was the inadequacy and inefficiency of the asylum support system as the majority of NERS clients were living in poverty and in some instances destitution. Despite the fact that all persons are entitled to seek asylum from persecution,⁹ my experience of the UK's asylum support system did not equate to the notion of a protective and welcoming society, but rather a society which sought to punish asylum seekers for daring to claim asylum within the State.

Though adequate levels of financial support are crucial to the survival of asylum applicants, particularly in light of employment restrictions, a literature review of material related to the asylum support system revealed very little academic analysis

⁹ Article 14 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).

of the financial support offered to asylum seekers under either sections 95 or 4 of the IAA 1999. Rather, academic writing tended to focus on the draconian policies arising from the Nationality, Immigration and Asylum Act (NIAA) 2002, particularly section 55 (the withdrawal of support from late claimants)¹⁰ and the Government's ability to remove asylum seeking children from their parents where failed asylum seeking families refused to return home.¹¹ Though there is an increasing wealth of NGO data and numerous parliamentary inquiries¹² detailing the practical impact of sections 95 and 4 of the IAA 1999, such research tends to focus on the personal impact of the support system and the Government's justification for its continuance.¹³ Where human rights are addressed in relation to sections 95 and 4 of the IAA 1999, this is generally limited to civil and political rights arising under the European Convention on Human Rights (ECHR)¹⁴ as opposed to the broader set of rights afforded under international treaties such as the International Covenant on Economic and Social

¹⁰ Anna Hardiman-McCartney, 'Absolutely right: Providing Asylum Seekers with Food and Shelter under Article 3' (2006) 65 *The Cambridge Law Journal* 4; Lydia Morris, 'Civic stratification and the cosmopolitan ideal' (2009) 11 *European Societies* 603; Lydia Morris, 'Asylum, welfare and civil society: a case study in civil repair' (2009) 13 *Citizenship Studies* 365; Lydia Morris, 'Welfare, Asylum and the Politics of Judgment' (2010) 39 *Journal of Social Policy* 119; Lydia Morris, 'Rights, Recognition and Judgment: Reflections on the Case of Welfare and Asylum' (2012) 14 *British Journal of Politics & International Relations* 39.

¹¹ Dallal Stevens, 'The Nationality, Immigration and Asylum Act 2002: Secure Borders, Safe Haven?' (2004) 67 *The Modern Law Review* 616; Iain McDonald and Peter Billings, 'The Treatment of Asylum Seekers in the UK' (2007) 29 *Journal of Social Welfare and Family Law* 49.

¹² Joint Committee on Human Rights, *The Treatment of Asylum Seekers* (The Stationery Office, HL 81-I, HC 60-I, 2006-2007); Home Affairs Committee, *Asylum* (The Stationery Office, HC 71, 2013-14); Sarah Teather and others, *Report of the Parliamentary Inquiry into Asylum Support for Children and Young People* (The Children's Society, 2013).

¹³ Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (n 5); Refugee Media Action Group, *Seeking Asylum: A report on the living conditions of asylum seekers in London* (n 5); Reacroft (n 1); Hobson, Cox and Sagovsky, *Fit for purpose yet? The Independent Asylum Commission's Interim Findings* (n 5); Hobson, Cox and Sagovsky, *Saving Sanctuary: The Independent Asylum Commission's first report of conclusions and recommendations: How we restore public support for sanctuary and improve the way we decide who needs sanctuary* (n 7); Hobson, Cox and Sagovsky, *Deserving Dignity: The Independent Asylum Commission's Third Report of Conclusions and Recommendations* (n 5); Mulvey (n 5); Williams and Kaye (n 5); Still Human Still Here, *What is the minimum level of support an asylum seeker needs in order to meet their essential living needs and avoid destitution?* (n 5); Refugee Action, *Asylum Support Cuts* (Refugee Action, 2010); S Reynolds, *Your inflexible friend: The cost of living without cash* (Asylum Support Partnership, 2010); Ilona Pinter, *'I don't feel human' Experiences of destitution among young refugees and migrants* (The Children's Society, 2012); Teather and others (n 12).

¹⁴ Joint Committee on Human Rights, *The Treatment of Asylum Seekers* (n 12).

Rights (ICESCR). Though such rights may be acknowledged within the NGO data they are not thoroughly analysed with regard to the effects of the support system. Hence there appeared to be a gap in the literature relating to whether the asylum support system fulfilled the socio-economic rights of asylum seekers, specifically through sections 95 and 4 of the IAA 1999, and a further gap on how the associated policies of destitution and restrictions on working failed to conform to the socio-economic rights framework.

As already noted, this thesis draws on the theory of cosmopolitan hospitality in advocating for the standardised treatment of asylum seekers which meets international human rights requirements. The use of cosmopolitanism in addressing the situation of asylum seekers contributes to a line of existing modern literature from prominent authors such as Seyla Benhabib¹⁵ and Lydia Morris¹⁶ who were particularly influential in drawing my attention to the suitability of cosmopolitan theory in conceptualising situations encompassing asylum seekers. Although the project was influenced by this literature, a number of significant differences exist between this project and their works. Firstly, although Benhabib draws on the concept of hospitality in cross border contact she does not apply hospitality theory to the specific policies of the UK's asylum support system. In contrast, though Morris addresses cosmopolitanism with reference to the UK's asylum support system, she does not draw specifically on hospitality theory. Additionally, Morris' work does not apply cosmopolitanism to the policies of section 95 or section 4 of the IAA 1999, but instead

¹⁵ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004); S. Benhabib and R. Post, *Another Cosmopolitanism* (Oxford University Press, USA 2006).

¹⁶ Morris, 'Civic stratification and the cosmopolitan ideal' (n 10); Lydia Morris, 'An emergent cosmopolitan paradigm? Asylum, welfare and human rights' (2009) 60 *The British Journal of Sociology* 215; Lydia Morris, *Asylum, Welfare and the Cosmopolitan Ideal: A Sociology of Rights* (Routledge 2010).

focuses on section 55 of the NIAA 2002. Cosmopolitan hospitality thus provides an original theoretical framework for examination of the asylum support system.

As outlined above, the motivation for undertaking research relating to the asylum support system was based upon personal experience relating to its inadequacy as substantiated by NGO research recounting instances of poverty, prejudice and suffering. In light of these data and the rising political emphasis upon asylum policies, now is a politically significant time to review the support offered to asylum seekers and the justification for their current and future exclusion from the social and economic standards afforded to citizens. The research project gains further salience following the 2010-2015 Coalition Government's 2012 welfare reform which was regarded as crucial for 'improving the lives of citizens',¹⁷ whilst improving the lives of asylum seekers remained low on the Government's political agenda. The pressing situation in Calais, where asylum seekers are seeking entrance to the UK, and the Conservative Government's hard line on providing benefits to the group¹⁸ also renders now an extremely important time to discuss the balancing of citizens' rights against those of the asylum seeking community as foreigners within the State.

In summary, this thesis will draw from a number of primary and secondary sources in answering the research question(s) including: international conventions and treaties, primary and secondary legislation, case law, Government documents, parliamentary inquiries and debates, academic literature, NGO material and media

¹⁷ In the Coalition's White Paper 'Universal Credit: welfare that works' the Government set out their expectations for welfare reform: '*We expect as many as 350,000 children and 500,000 working age adults could be moved out of poverty by these changes...Over and above this we know that work, and the improved incomes that flow from it, have beneficial effects in terms of people's health and well being, the educational achievements of children and improvements in communities*'. Secretary of State for Work and Pensions, *Universal Credit: welfare that works* (The Stationery Office Cm 7957, 2010) 5.

¹⁸ Alan Travis, 'Asylum seekers with children to have support payments cut' *The Guardian* (16 July 2015) <<http://www.theguardian.com/uk-news/2015/jul/16/asylum-seekers-with-children-to-see-support-payments-cut>> accessed 24 July 2015.

reports. Through exploration of these sources, the thesis will conceptualise the current balance of rights, immigration control and the welfare state and provide solutions to foster greater respect for the asylum seeking community. The next chapter will set out the statutory framework of the asylum support system, its political underpinnings and the relevant definitions to be used throughout the thesis. To further aid the reader a list of abbreviations is set out at the beginning of the thesis. Chapter two provides an explanatory basis from which the remainder of the thesis can be better understood.

Chapter Two

The Statutory Framework

2.1 Introduction

The aim of this chapter is to set out the basic concepts that will be drawn upon throughout the project. It will begin by examining the right to asylum, taking into account the international, European and national instruments that provide a legislative basis for the right. After discussing asylum seekers' right to enter the UK, the chapter will expand upon the other legal obligations owed by the State to those seeking asylum, such as the duty to provide subsistence which forms a central focus of the thesis.

Following discussion of the international obligations owed by the UK, the chapter will then turn to the internal arrangements made by the State to satisfy its cosmopolitan obligations and thus the intricacies of the asylum support system. This section will begin by outlining the political and statutory history of the asylum support system (and how it has become more restrictive over the last two decades) before detailing the specific types of support available to the asylum seeking community under sections 95 and 4 of the Immigration and Asylum Act (IAA) 1999. In recognition that employment and welfare are inextricably linked, the chapter will also examine the policies regarding access to the labour market.

2.2 The right to asylum

Article 14(1) of the Universal Declaration of Human Rights 1948 (UDHR) recognises the right to '*seek and to enjoy in other countries asylum from persecution*'. Though the right entitles one to 'seek' asylum it does not recognise the right 'to be granted

asylum' or impose requisite obligations upon the State to do so. The obligation to grant asylum is now however imposed upon the UK through 'Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L337/9', commonly known as the Qualification Directive. Article 13 of the Qualification Directive states that '*Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III*'. The Directive's definition of 'refugee'¹ mirrors that of Article 1 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) which defines a refugee as someone who:

'owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

Though the Refugee Convention's definition of a refugee appears somewhat vague, it was drafted in response to the increased number of displaced persons seeking refuge in the aftermath of World War II. The original provision thus aimed to protect European refugees but was later extended to protect refugees on a global scale through the 1967 Protocol Relating to the Status of Refugees. The imprecise nature of this definition led to variance in its application amongst States seeking to interpret the definition in light of the modern causes of displacement. In an attempt to

¹ The definition of a refugee is set out in Article 2(c) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L337/9.

harmonise this definition, and standardise the treatment of asylum seekers throughout Europe, the European Union began working to create a ‘Common European Asylum System’ (CEAS) which is implemented through a number of EU Directives² and regulations.³ The CEAS was introduced in Article 73k of the Treaty of Amsterdam (1997) and sought to regularise the treatment of asylum applicants between EU member States through offering a standardised level of protection. It thus proposed a unified qualification system; high quality criteria for the reception and processing of applicants and definitive responsibility for Member States.

The Qualification Directive substantiates the definition of ‘refugee’ found within the Refugee Convention by detailing specific factors to be taken into account when determining refugee status.⁴ It also expands upon the meaning of certain protected characteristics⁵ such as race for example, which in particular, includes

² Ibid; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13; Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9; Council Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96; Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60.

³ Council Regulation (EC) 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; Council Regulation (EU) 603/2013 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) [2013] OJ L180/1; Council Regulation (EU) 604/2013 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.

⁴ See Chapters II and III of the Qualification Directive (n 1).

⁵ Article 10, ‘Reasons for Persecution’ of the Qualification Directive (n 1) thus provides:
(a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;

‘considerations of colour, descent, or membership of a particular ethnic group’. The UK is bound to give effect to the Qualification Directive via Article 288 of the Treaty on the Functioning of the European Union⁶ but is able to do so through its own methods of implementation. Consequently, the aims of the Directive are realised within the UK through the Refugee or Person in Need of International Protection (Qualification) Regulations 2006,⁷ together with amendments to the Immigration Rules, as listed on the Gov.uk website. Regulation 2 of the 2006 Regulations stipulates that an ‘application for asylum’ is in fact, a claim to be recognised as a refugee under the Refugee Convention and its 1967 Protocol Relating to the Status of Refugees, as set out above. In line with the requirements of Article 10 of the Qualification Directive, this definition is supplemented throughout the 2006 Regulations by additional sections such as section 6 which provides greater detail and clarity to the characteristics that qualify for protection from persecution.⁸

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief’.

⁶ Article 288 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C236/01 thus states: *‘To exercise the Union’s competences, the institutions shall adopt regulations, Directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*

A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.’

⁷ Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525.

⁸Section 6 *ibid* thus states:

‘6.—(1) In deciding whether a person is a refugee:

(a) the concept of race shall include consideration of, for example, colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall include, for example, the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall include, for example, membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

Asylum seekers also gain additional protection through the UK's obligation to adhere to non-refoulement which means that persons cannot be rejected from the frontier or expelled from the territory in which they sought asylum to any State where they could face persecution, now accepted as a customary norm within international law⁹ as set out in Article 33 of the Refugee Convention Relating to the Status of Refugees 1951, Article 3(1) of the 1967 United Nations Declaration on Territorial Asylum and Article 21 of the Qualification Directive.

Applicants who fall under the definition set out in Article 1 of the Refugee Convention are known as 'convention refugees', however the Qualification Directive also affords subsidiary protection¹⁰ under Article 2(e) for those who do not qualify as a convention refugee. Consequently those who experience degrading treatment but fail to fit within the established categories

(d) a group shall be considered to form a particular social group where, for example: (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
(e) a particular social group might include a group based on a common characteristic of sexual orientation but sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the United Kingdom;
(f) the concept of political opinion shall include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in regulation 3 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the person.
(2) In deciding whether a person has a well-founded fear of being persecuted, it is immaterial whether he actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to him by the actor of persecution.'

⁹ United Nations High Commissioner for Refugees, 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93' (1994) <<http://www.refworld.org/docid/437b6db64.html>> accessed 10 December 2014; Jean Alain, 'The jus cogens Nature of non-refoulement' (2001) 13 International Journal of Refugee Law 533.

¹⁰ Article 2(e) of the Qualification Directive (n 1) thus states: '*a person eligible for subsidiary protection means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country*'.

of ‘*race, religion, nationality*’ should gain protection where their expulsion would otherwise result in serious harm which is defined as: consisting of the death penalty or execution; torture or inhuman or degrading treatment or punishment; or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.¹¹ The obligation to provide subsidiary protection is fulfilled within the UK through the granting of ‘humanitarian protection’¹² as defined under Rule 339C of the Immigration Rules and ‘discretionary leave’ which is governed by the Asylum Policy Instruction: ‘*Granting discretionary leave to asylum seekers: process*’,¹³ both of which replaced the former type of subsidiary protection ‘Exceptional Leave to Remain’. Importantly the three forms of protection: refugee status; humanitarian protection; and discretionary leave form a hierarchical safeguard which should be considered by caseworkers in that order. Where a person is found to satisfy any one of the three forms of protection they are granted leave to remain, a status subject to review over a five-year period before being granted the permanent settlement status of indefinite leave to remain, or conversely deportation if their claim is no longer deemed valid. Once granted initial leave to remain, asylum seekers are categorised as refugees and

¹¹ Article 15 Qualification Directive (n 1).

¹² Rule 339C of the Immigration Rules thus states: ‘*A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:*

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
(ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
(iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
(iv) he is not excluded from a grant of humanitarian protection.’

¹³ Gov.uk, ‘Asylum policy Instructions: Granting discretionary leave to asylum seekers: process’ (Gov.uk, 24 June 2013)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257381/discretionaryleave.pdf> accessed 1 February 2014.

afforded the rights set out in Articles 20-30 of the Qualification Directive. Although rights under the Qualification Directive are also enjoyed by those granted humanitarian protection or discretionary leave, those with this type of protection are not afforded the same entitlements as convention refugees as they are unable to engage in family reunion rights.¹⁴ Once refugee status is gained, the Reception Conditions Directive and the Refugee Convention call for the full integration of refugees into the host society, including full access to civil and political and socio-economic rights. In some instances the instruments require equality of treatment between refugees and national citizens as evident in Article 23 of the Refugee Convention which states that '*contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals*'. Until recognition of status has taken place however, 'asylum seekers' are not afforded the same level of protection as refugees. This thesis focuses on the treatment of the asylum seeking community from the moment of entry into the UK until either recognition of their status as refugees or return to their countries of origin. Distinctive treatment between the two statuses of 'refugee' and 'asylum seeker' has led to much debate regarding whether the rights afforded to refugees should be granted upon application for refugee status or alternatively upon recognition. Currently the latter applies but this means that genuine refugees are offered lower standards of treatment during the period in which their applications are

¹⁴ Convention refugees enjoy family reunion rights with their spouses and dependent children and, unlike other immigrant statuses, the sponsor is not expected to meet the conditions of maintenance and accommodation. Those who have been granted humanitarian or discretionary leave cannot apply for family reunification until they are eligible to apply for indefinite leave to remain. Unlike convention refugees they are expected to meet the maintenance and accommodation conditions.

being processed which can take months or even years in some instances.¹⁵ The UK justifies the different treatment of refugees and asylum seekers on the basis that asylum seekers are not regarded as being 'lawfully' on the territory until their status is recognised.¹⁶ As most of the rights accorded to refugees within the Refugee Convention are based upon lawful presence or lawful stay, asylum seekers are thereby excluded. The Court of Appeal has also taken this approach in the case of *R. v Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants* [1997]¹⁷ which confirmed that Article 23 of the Refugee Convention (which accords refugees the same access to public relief as State nationals) does not apply to asylum seekers, but only to recognised refugees. Though asylum applicants are excluded from the majority of rights within the Refugee Convention they do however qualify for protection under Articles 31 and 33 which control the imposition of penalties for illegal entrance or presence and offer protection from refoulement.

One of the most serious effects of the differentiation in status between asylum seekers and refugees is asylum seekers' vulnerability to detention. Alongside this continued threat, asylum applicants are also subject to restrictions on employment and excluded from claiming national welfare benefits. Instead they are provided with

¹⁵ For discussion on whether 'asylum seekers' should be afforded the same status rights as refugees see James C. Hathaway, *The rights of refugees under international law* (2005), ch. 3.1.2; A Edwards, 'Human Rights, Refugees, and The Right 'To Enjoy' Asylum' (2005) 17 International Journal of Refugee Law 293, 297-330; Guy S. Goodwin-Gill and Jane McAdam, *The refugee in international law* (Oxford University Press 2007); Penelope Mathew et al, *The Michigan Guidelines on the Right to Work* (University of Michigan Law School, 2010) para 7-8; Andreas Zimmermann, Jonas Dorschner and Felix Machts, *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: a commentary* (2011), 973-978.

¹⁶ See the case of *Saadi v United Kingdom* (2008) 47 EHRR 17 at para 65 where the Court held that: 'until a state has 'authorised' entry to the country, any entry is 'unauthorised' and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so, can be, without any distortion of language, to 'prevent his effecting an unauthorised entry'. It does not accept that, as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an 'authorised' entry'.

¹⁷ [1997] 1 WLR 275 (CA).

asylum support at rates far lower than those granted to recognised refugees or European Economic Area (EEA)¹⁸ citizens under Income Support or Universal Credit. As a result, a mounting body of NGO evidence¹⁹ indicates that a number of individuals within the asylum seeking community are living in poverty, a subject to be explored throughout this thesis. Yet the obvious issue in differentiating between refugees and asylum seekers is that refugees are recognised by the State (declaratory), not created by it (constitutive), and on this basis the United Nations High Commissioner for Refugees (UNHCR) has issued guidelines encouraging States to treat asylum applicants as potential refugees until a valid determination has been made on their claim.²⁰ However this guidance has little force in bestowing rights upon the asylum seeking community as neither the UNHCR Handbook on Procedures and Criteria for

¹⁸ The European Economic Area is an internal market which is constituted by a number of States governed by the same rules. The EEA States consist of the European Union States and three of the European Free Trade Association States including: Iceland; Norway and Liechtenstein. Switzerland is not part of the EEA agreement but has a bilateral agreement with the European Union which allows its citizens to enjoy the same free movement rights as EEA citizens. Swiss nationals are therefore able to live and work in the UK in the same manner as EEA nationals.

¹⁹ Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (Refugee Action, 2006); Refugee Media Action Group, *Seeking Asylum: A report on the living conditions of asylum seekers in London* (Migrants Resource Centre, 2006); Chris Hobson, Jonathan Cox and Nicholas Sagovsky, *Fit for purpose yet? The Independent Asylum Commission's Interim Findings* (Independent Asylum Commission, 2008); Chris Hobson, Jonathan Cox and Nicholas Sagovsky, *Deserving Dignity: The Independent Asylum Commission's Third Report of Conclusions and Recommendations* (Independent Asylum Commission, 2008); Chris Hobson, Jonathan Cox and Nicholas Sagovsky, *Saving Sanctuary: The Independent Asylum Commission's first report of conclusions and recommendations: How we restore public support for sanctuary and improve the way we decide who needs sanctuary* (Independent Asylum Commission, 2008); Reacroft, *Like any other child? Children and families in the asylum process*; Gareth Mulvey, *'Even among asylum seekers we are the lowest' Life on Section 4 Support in Glasgow* (Scottish Refugee Council, 2009); Richard Williams and Mike Kaye, *At the end of the line: Restoring the integrity of the UK's asylum system* (Still Human Still Here, 2010); Still Human Still Here, *What is the minimum level of support an asylum seeker needs in order to meet their essential living needs and avoid destitution?* (Still Human Still Here, 2010); The Children's Society, *Child Destitution Report: living on the edge of despair: destitution amongst asylum seeking and refugee children* (The Children's Society, 2008); Alasdair Stewart, *Over Not Out Refreshed 2012: An update on progress against the original recommendations of the Over Not Out Report (2009)* (Metropolitan Migration Foundation, 2012); Sarah Teather and others, *Report of the Parliamentary Inquiry into Asylum Support for Children and Young People* (The Children's Society, 2013).

²⁰ United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (United Nations High Commissioner for Refugees, HCR/IP/4/Eng/REV.1, 1979 reissued 1992) para 28.

Determining Refugee Status (1979) or the UNHCR Executive Committee recommendations have the force of law. They only therefore exist as guidance and cannot overrule express legislative terms.

Though asylum seekers are excluded from the social entitlements afforded to refugees under the Refugee Convention, the State is obligated to provide a number of social entitlements to the group under the Reception Conditions Directive. The Reception Conditions Directive came into force in the UK on the 5th February 2005 through the Asylum Support (Amendment) Regulations 2005,²¹ the Asylum Seekers (Reception Conditions) Regulations 2005,²² and amendments to the Immigration Rules.²³ The Articles of most relevance to the asylum support system are those related to employment (Article 11) and subsistence (Article 13) which obligate the State to provide subsistence where applicants would otherwise be destitute and to allow access to the labour market after 12 months from the date on which the asylum application was lodged. An amended recast of the Reception Conditions Directive²⁴ was published in June 2011 but was rejected by the UK Government through its exemption under Protocol 21 of the Treaty on the Functioning of the European Union (TFEU) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice. The recast sought to extend rights granted to asylum seekers under the previous provisions,²⁵ particularly by reducing the time limit on access to the labour market and limiting immigration detention. The (then) Immigration Minister Damien Green validated rejection on the basis that the Government had ‘grave concerns’ over

²¹ Asylum Support (Amendment) Regulations 2005, SI 2005/11.

²² Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7.

²³ Changes were made to paras 357-361 of the Immigration Rules, as inserted by Statement of Changes HC 194, 4 February 2005.

²⁴ Council Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

²⁵ Ibid.

allowing asylum seekers access to the labour market as it would create ‘significant cost implications’, though he did not elaborate further on what these implications would be.²⁶ Consequently the provisions from the previous Reception Conditions Directive (2003/9/EC) continue to apply within the UK, signifying a disparity in accepted standards of treatment between the UK and other EU States, ultimately contradicting the concept of a ‘common’ European asylum system. In addition to the Reception conditions Directive, the Dublin Regulation is also of importance when considering asylum seekers treatment within the UK.²⁷ The purpose of the regulation is to determine State responsibility for asylum applicants and prevent ‘asylum shopping’: where applicants travel across different EU States to obtain the most preferential treatment. The responsible State is the one considered most central to the asylum seeker’s application and a hierarchy of factors are taken into consideration when deciding which State is responsible, including: consideration of which State was first entered illegally or legally; where the latest visa was issued; or where the applicant’s family are legally resident. Unlike the Reception Conditions Directive which bestows rights upon asylum seekers, the Dublin Regulation confines applicants to the first State in which they sought refuge, preventing them from claiming refugee status within any other European State. As a result, once asylum seekers reach the UK they must endure the conditions imposed upon them or risk persecution should they return to their countries of origin. In Parliamentary debates examining whether the UK should accept the recast of the Reception Conditions Directive, the Government’s

²⁶ HC Deb 13 October 2011, vol 533, cols 44-5WS.

²⁷ Council Regulation (EC) 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; Council Regulation (EU) 604/2013 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.

partialist preference in prioritising the rights of citizens above those of the asylum seeking community was clearly palpable in their preference for the Dublin regulation:

*‘We do not gain as directly from taking part in the existing directive as we do from our participation in the Dublin and Eurodac systems. In deciding whether to opt in to the Directive, we must make a judgement about our chances of negotiating out those parts that are not acceptable to us. We must also consider the impact that non-participation might have on our ability to persuade our partners to agree to our European objectives’.*²⁸

The above international provisions thus govern the way in which the UK must treat asylum applicants once they reach the territory of the State. As this research project is centred upon access to employment and welfare benefits, the next section will outline the framework of the asylum support system to provide a comprehensive basis for understanding its later critique. At present asylum support is granted through immigration legislation, primarily through the IAA 1999 which is administered by UK Visas and Immigration, previously known as the UK Border Agency. Consequently the welfare support that is administered by local authorities, which is available to certain categories of the asylum seeking community and national citizens, will not be addressed. This includes provision under section 21 of the National Assistance Act 1948 (NAA 1948) and provision under section 17 of the Children Act 1989 (CA 1989) which will be described in greater detail later in the chapter.²⁹ The prime focus of this thesis is the IAA 1999 and its associated policies however before examining the asylum support framework, the political developments giving rise to the IAA 1999 will first be addressed taking into account the historical and current justifications for the system. Essentially the Government’s justifications for the support system form the counter argument to calls for equality amongst citizens and the asylum seeking

²⁸ Phil Woolas, Asylum Bill Deb 10 February 2009, cols 3-16, column 6

²⁹ Text to n 133 ch 2.

community forming an important component in addressing the balance between rights and sovereignty.

2.3 Political and statutory history

Prior to the 1980s asylum seekers were entitled to the same non-contributory benefits as citizens. In the 2002 case of *R (Westminster City Council) v National Asylum Support Service*,³⁰ Lord Hoffman described the UK's departure from this seemingly altruistic position, likening the modern social construction of asylum seekers to the 'wretched of the earth', an ode to Frantz Fanon's 'Les Damnés de la Terre',³¹ a psycho-analytic reflection of colonisation and the de-humanisation of the colonized 'foreigner':

*'There was a time when the welfare state did not look at your passport or ask why you were here. The state paid contributory benefits on the basis of contribution and means-tested benefits on the basis of need...immigration status was a matter between you and the Home Office, not the concern of the social security system. As immigration became a political issue, this changed. Need is relative, not absolute...Voters became concerned that the welfare state should not be a honey pot which attracted the wretched of the earth. They acknowledged a social duty to fellow citizens in need but not a duty on the same scale to the world at large.'*³²

As apparent in Hoffman's statement the perceived scope of the UK's 'social duty' to provide welfare to those in need has contracted over the last two decades. The first group of persons to be denied income support (IS) in the UK was in 1987 where people categorised as having no right to be in the country were excluded from provision. Asylum seekers fell within this excluded category but remained entitled to claim IS³³

³⁰ [2002] UKHL 38, [2002] 1 WLR 2956.

³¹ Frantz Fanon, *Les Damnés de la Terre* (Grove Press 1961).

³² *R (Westminster City Council) v National Asylum Support Service* [2002] [19-20] (Lord Hoffman).

³³ via the Social Security Contributions and Benefits Act 1992.

and jobseeker's allowance³⁴ (JSA) at a reduced rate of 90%³⁵ on the basis that they were *urgent cases*.³⁶ Asylum applicants were also entitled to access employment after six months of lodging their initial asylum claim.

Throughout the 1980s asylum applications were generally low at less than 5000 per year,³⁷ but in conjunction with global events like the end of the Cold War and conflicts in the North East of Africa, asylum applications rose to 11,640 in 1989; 26,205 in 1990 and 44,840 in 1991.³⁸ The rising numbers of applications throughout the 1990s had not however been matched with a capacity for faster decision making and consequently a backlog of applications was created.³⁹ Increased numbers of asylum seekers in the early 1990s thus coincided with the first restrictive welfare provision directly applied to the asylum seeking community through section 4 of the Immigration and Asylum Appeals Act 1993 (IAAA 1993). This provision removed access to local authority homelessness accommodation from asylum seekers who had available for their occupation '*any accommodation, however temporary, which it would be reasonable for him to occupy*'. This was generally met with distaste by opposition Labour MPs who called for equality of treatment between asylum seekers and national citizens in the allocation of housing.⁴⁰ In the House of Commons debate of the IAAA Bill, Labour MP Mike Watson observed that the introduction of section 4 marked a first for homelessness legislation where

'a particular group of people has been singled out for the application of a lower level of rights than is enjoyed by anyone else in the country. It treats all

³⁴ Jobseekers Act 1995.

³⁵ Calculated under regulation 21 of the Income Support (General) Regulations 1987, SI 1987/1967.

³⁶ Ibid reg 21(3) and sched 7.

³⁷ United Nations High Commissioner for Refugees, *Asylum Applications in Industrialized Countries: 1980 - 1999* (United Nations High Commissioner for Refugees, 2001).

³⁸ Ibid.

³⁹ F. Webber, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto Press 2012).

⁴⁰ Paul Boateng thus stated that: '*Government say that asylum ought to be about shelter, about respite, but this obnoxious clause undermines that whole concept, and we should reject it*'. HC Deb 21 January 1992, vol 202, col 256.

*asylum seekers as a guilty group. It requires them to prove their innocence before they can have a roof over their heads’.*⁴¹

Rejecting this observation, the Conservative Government justified the use of section 4 to grant ‘fairer’ treatment to citizens who were listed for local authority housing⁴² revealing a clear divergence between the presumed importance of social rights for citizens and those of the asylum seeking community. As a result, the IAAA 1993 was the first provision within the post war welfare state to explicitly prioritise the needs of citizens above those of the asylum community.

Despite the introduction of the IAAA in 1993, asylum applications peaked again in 1995 to 43,965 due to the outbreak of war in Yugoslavia which coincided with an economic recession and increased levels of unemployment within the UK. Consequently a crackdown on social welfare began and the Conservative Government implemented section 11 of the Asylum and Immigration Act 1996 which linked all non-contributory benefits (including child benefit) to immigration status. The aim of this measure was to reduce the cost of welfare provision and limit the number of applicants coming to the UK.⁴³ Though the majority of asylum seekers remained entitled to IS, income based JSA, housing benefit and council tax benefit, those whose applications had been refused (even if seeking an appeal), or those who had failed to lodge an asylum application upon entrance to the UK, were excluded.⁴⁴

*‘The view was that bona fide asylum seekers could be expected to declare themselves as such when they arrived. Not being willing to do so was the badge of an economic migrant who should be discouraged from coming and, if here, encouraged to go home’.*⁴⁵

⁴¹ Ibid col 257.

⁴² Tim Yeo, Ibid col 261.

⁴³ Emily Fletcher, *Changing Support for Asylum Seekers: An Analysis of Legislation and Parliamentary Debates* (Working Paper No49, 2008).

⁴⁴ Regulations 3, 7 and 8 of the Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996, SI 1996/30.

⁴⁵ *R (Westminster City Council) v National Asylum Support Service* [2002] [22] (Lord Hoffman).

However in the case of *R. v Kensington & Chelsea London Borough Council (1997)*⁴⁶ the Court of Appeal deemed the destitute group of asylum seekers affected by the IAAA 1996 'vulnerable' under section 59(1)(c) of the Housing Act 1985 and thus entitled to local authority homelessness accommodation under section 65 of the Housing Act 1985. Following this judgement the Government entered into a game of cat and mouse with immigration lawyers, creating new policies to counteract or destroy the safety net of alternative provisions found by the courts to provide support. In response to the Court of Appeal's judgement, section 185 of the Housing Act 1996 was implemented to remove rights to homelessness accommodation from all persons 'subject to immigration control', though asylum seekers with an active claim who applied upon entry were exempt. Lawyers then sought further provision for the excluded and homeless group of asylum seekers via section 17 of the Children Act 1989 and section 21 of the National Assistance Act 1948 (NAA 1948) which allowed access to local authority housing for families in need or individuals in need of care and attention. However as a result of the rising backlog of asylum applications, local authorities in the most popular geographical areas began to struggle to support the mounting number of asylum claimants. In 1997 the Labour Government was elected and quickly sought to radically restructure the system of welfare support afforded to asylum seekers. Their new immigration strategy was published in the white paper '*Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum*'⁴⁷ which set out their aims for asylum support which consisted of: ensuring that asylum seekers were not left destitute; minimising economic migration; removing access to national social security benefits; minimising cash payments; and reducing the financial

⁴⁶ *R v Kensington & Chelsea London Borough Council Ex p Kihara* (1997) 29 HLR 147 (CA).

⁴⁷ Home Office, *Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum* (The Stationery Office Cm 4018, 1998).

burden on local authorities.⁴⁸ Following publication, Labour gave effect to the aims of their white paper through implementation of the IAA 1999 which gave rise to the asylum support system that remains in place today. Section 115 of the Act therefore removed entitlement to national non-contributory welfare benefits and council housing from any person *subject to immigration control*. A person subject to immigration control is defined within section 115(9) of the IAA 1999 as a none EEA national who requires leave to enter the UK but does not have it,⁴⁹ consequently asylum seekers are included within this definition. Removing access to national social security benefits offered relief to local authorities whilst at the same time aiming to provide a disincentive to economic migrants. This disincentive was furthered by a new more restrictive welfare benefits system for asylum seekers administered through the IAA1999.

The development of this legislation revealed a marked difference in the ideologies of the Labour party whilst in opposition and in power, moving from rhetoric demanding the equal treatment of asylum seekers and national citizens (whilst in opposition)⁵⁰ to the partialist statement set out in their 1998 White Paper 'Fairer, Faster and Firmer' that *'people that have not established the right to be in the UK should not have access to welfare provisions on the same basis as those whose citizenship or status gives them an entitlement to benefits when in need.'*⁵¹ Despite the earlier ethos which emphasised a more cosmopolitan style of politics, Labour's U-turn

⁴⁸ Ibid para 7, 8.12-8.26.

⁴⁹ In addition a *'person subject to immigration control'* also requires leave to enter or remain in the UK but does not have it or has leave to enter which is either: subject to the condition of no recourse to public funds; given as a result of a maintenance undertaking; or as a result of paragraph 17 of Schedule 4 of the Immigration and Asylum Act 1999. IAA 1999 s115(9).

⁵⁰ Mr Hattersley thus stated *'We believe that once an asylum seeker is allowed to enter the country, he or she should be treated like any other resident—no better, no worse. Housing authorities should treat every applicant according to need'*. HC Deb 13 November 1999, vol 198, col 1104.

⁵¹ Home Office, *Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum*, para 8.18 (n 47).

signified the development of a restrictive consensus between the Conservative party and the, then, Labour Government (1997-2010) regarding asylum which openly prioritised the needs of citizens above those of asylum seekers. This is substantiated by Fletcher who studied over 90 hours of parliamentary debates regarding the issue of asylum support, and found that the changeover in power signified '*a key turning point in the overall tone*' of the asylum debate.⁵² Following the 1997 consensus the only remaining opposition to restrictive measures derived from individual backbenchers.

Despite the introduction of the IAA 1999, ever increasing numbers of asylum seekers continued to seek refuge within the UK with numbers peaking in 2002 at 84,132 following the terrorist attacks of 9/11.⁵³ Importantly, the introduction of restrictive support policies did not therefore coincide with a reduction in asylum claims despite the fact that deterrence remains the primary justification for restrictions.

Following publication of Labour's second white paper on immigration in February 2002 'Secure Borders, Safe Haven: Integration with Diversity in Modern Britain',⁵⁴ paragraph 360 of the Immigration Rules was amended to curtail employment rights. Asylum seekers could therefore only engage in employment after seeking permission from the Home Office, which was only granted in exceptional circumstances.⁵⁵ The then immigration Minister, Beverly Hughes, justified restriction on the basis that employment was becoming 'increasingly irrelevant' as decision making was quicker than ever and restrictions prevented 'abuse' of the system. Fletcher however contends that further restrictions were largely due to the implementation of the CEAS which, amongst other things, aimed to develop minimum

⁵² Fletcher 15 (n 43).

⁵³ Home Office, *Immigration statistics, October to December 2013* (Gov.uk 2014) para 8.2.

⁵⁴ Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (The Stationery Office, Cm 5387, 2002).

⁵⁵ Home Office, *Asylum Support Policy Bulletin 72: Employment and Voluntary Activity* (Gov.uk 2005), para 2.3.

standards for the reception conditions of asylum seekers throughout the European Union. Despite the intention of the Reception Conditions Directive which was to provide increased and unified standards of treatment throughout the European Union,⁵⁶ Fletcher writes that States sought to adopt the ‘*most restrictive standards to avoid presenting a “soft” option for asylum seekers to “choose” to come to their country. Thus the UK adopted the most restrictive employment standard possible, several years earlier than it had to*’.⁵⁷

The Nationality, Immigration and Asylum Act 2002 (NIAA 2002) was then introduced which bestowed a new category of restrictions upon the asylum seeking community, including the removal of local authority assistance under the Children Act 1989 and the National Assistance Act 1948 for refused asylum seekers who refused to co-operate with removal directions.⁵⁸ Section 55 of the NIAA 2002 also denied access to support for anyone who failed to lodge their asylum application ‘*as soon as reasonably practicable*’ after arrival in the UK which is currently construed as three days, subject to exceptions.⁵⁹ The introduction of section 55 rendered huge numbers of asylum seekers destitute and resulted in the lodging of over 150 judicial review cases within the first month.⁶⁰ Though there was no right of appeal against a decision to refuse support under section 55, support was still available where denial would lead to breach of a person’s Convention rights or where children were involved,⁶¹

⁵⁶ European Commission, 'Common European Asylum System' 2014) <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm> accessed 28 August 2014.

⁵⁷ Fletcher 12 (n 43).

⁵⁸ Section 54 Nationality, Immigration and Asylum Act 2002 (hereby NIAA 2002).

⁵⁹ Home Office, *Policy Bulletin 75: Section 55 of Nationality, Immigration and Asylum Act 2002* (Gov.uk 2011) 8, para 7.6.

⁶⁰ Webber 97 (n 39).

⁶¹ Section 55(5) of the NIAA 2002 states: ‘*This section shall not prevent—*
(a) the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person’s Convention rights (within the meaning of the Human Rights Act 1998 (c. 42)),
(b) the provision of support under section 95 of the Immigration and Asylum Act 1999 (c. 33) or section 17 of this Act in accordance with section 122 of that Act (children), or

consequently a flurry of case law followed⁶² to determine the point at which a person's 'Convention rights' were engaged. The subsequent case law focused on claims arising under Article 3 (the right to be free from inhuman and degrading treatment) of the ECHR and found that treatment would reach the severity needed to engage Article 3 where charitable support was unavailable in practice and asylum seekers had no other means of support. In these instances there would be a presumption that suffering would imminently follow and thus Article 3 would be engaged.⁶³ The case law and human rights implications of these decisions will be more thoroughly explored throughout the thesis.

The NIAA 2002 was followed by the Immigration (Treatment of Claimants etc.) Act 2004. A number of the restricted provisions introduced in this Act are now redundant, including powers to withdraw support from families and conditional requirements for asylum support including the performance of community activities. Section 12 however remains in place which withdrew entitlement to back payments of the difference between asylum and IS for those who gained refugee status. The previous concession for back payments of IS recognised that genuine refugees should receive the same entitlements as citizens on the basis that they were victims of forced migration. Lower payments were therefore a disincentive to false claimants but were not aimed at 'genuine refugees' who would eventually receive the difference in payment once their status was regularised. The removal of this concession signified a shift in attitude towards refugees; that asylum seekers, regardless of the validity of

(c) the provision of support under section 98 of the Immigration and Asylum Act 1999 or section 24 of this Act (provisional support) to a person under the age of 18 and the household of which he forms part'.

⁶² *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36 ; *R (on the application of T) v Secretary of State for the Home Department* [2003] EWCA Civ 1285, [2004] HLR 254 ; *R (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

⁶³ *R (on the application of Limbuela) v Secretary of State for the Home Department* [2005].

their claims, deserve lesser standards of living than national citizens. Following the 2004 Act, the Asylum and Immigration Act 2006 was implemented which provided that support to refused asylum seekers would be granted in vouchers as opposed to cash support, representing yet another distinction on the basis of immigration status in the accessing of social entitlements.

The framework outlined above represents the fundamental statutory changes to the welfare support of asylum seekers over the last two decades and clearly demonstrates a sea change in the political perception of the asylum seeking community. Discrimination between citizens and asylum applicants, once deemed morally unacceptable, is now commonplace in the creation of social policy which is most evident in the inequalities seen within the asylum support system. Neither the Coalition (2010-2015), nor the current Conservative Government has passed any primary legislation to alter the current system finding the existing laws to be suitably restrictive. The most recent changes made to the asylum support system relate to secondary legislation as the Cameron administration wishes to reduce asylum support rates, an issue that will be discussed throughout this chapter and chapter four where the policies of the support system will be analysed in greater detail.

The next section will set out the current support arrangements for asylum seekers and refused asylum seekers whilst in the UK, touching further upon the political rationale for the system.

2.4 The asylum support system

At present those deemed *subject to immigration control* under section 115 IAA 1999 are excluded from a host of benefits⁶⁴ afforded to EEA citizens including: the provision of Universal Credit (Welfare Reform Act 2012); income related job seekers allowance (Jobseekers Act 1995); state pension credit (State Pension Credit Act 2002); and other specified benefits listed in the Social Security Contributions and Benefits Act 1992, such as income support, child benefit and housing benefit.⁶⁵ Alternative provisions for the asylum seeking community derive from the policies of the IAA 1999 which divides asylum support amongst three distinct groups: asylum seekers with an active asylum claim who are provided with cash support and/or accommodation under section 95 of the IAA 1999; refused asylum seekers who have had their asylum applications rejected but fulfil the requirements of section 4 of the IAA 1999 entitling them to non-cash support and accommodation; and refused asylum seekers who are ineligible for any support and are therefore forced into destitution.

Before examining the framework for each of these groups it is first necessary to define some of the terms that will be drawn upon throughout the thesis. Firstly, for the purposes of welfare support, the term ‘citizen’ will generally refer to EEA citizens⁶⁶

⁶⁴ Section 117 of the IAA 1999 removes the local authority duty to promote the welfare of old people under section 45 of the Health and Public Services Act 1968 from asylum seekers. Section 118 also removes entitlement to local authority housing accommodation (unless specified by the Secretary of State or in accordance with the IAA 1999). Local authorities are also exempt from making arrangements for the care or after care of asylum seekers suffering from illness or for the prevention of illness as normally required for citizens. Section 118(3) defines “Accommodation provisions” as being - (a) in relation to England and Wales, Part II of the Housing Act 1985; (b) in relation to Scotland, Part I of the Housing (Scotland) Act 1987; (c) in relation to Northern Ireland, Part II of the Housing (Northern Ireland) Order 1981.

⁶⁵ Specifically the excluded benefits are: attendance allowance; severe disablement allowance; carers allowance; disability living allowance; income support; working families’ tax credit; disabled person’s tax credit; a social fund payment; child benefit; housing benefit; and council tax benefit.

⁶⁶ An EEA citizen is a national of one of the following States: Austria; Belgium; Bulgaria; Croatia; Republic of Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Ireland; Italy; Latvia; Lithuania; Luxembourg; Malta; Netherlands; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Sweden; the UK; Iceland; Liechtenstein; and Norway. Although

on the basis that they are entitled to access national welfare benefits in the same manner as national citizens, subject to their demonstrating the right to reside and habitual residence.⁶⁷ When referring to British citizens the text will explicitly state 'British' or 'national citizen'. National citizens are differentiated from EEA citizens as they do not have to demonstrate a right to reside or that they are habitually resident unless they have been outside of the country for more than two years,⁶⁸ consequently 'British citizenship' is an elevated status. 'Asylum seeker' is defined as '*a person who is not under 18 and has made a claim for asylum which has been recorded⁶⁹ by the Secretary of State but which has not been determined*'.⁷⁰ A claim for asylum is defined within section 94(1) IAA 1999 as '*a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention, or under Article 3 of the Human*

Switzerland is not an EEA State it will be included within this definition on the basis that Swiss nationals enjoy the same rights as EEA citizens.

⁶⁷ EEA nationals can access benefits in the UK on the same basis as UK citizens provided they meet the eligibility criteria for those benefits and have demonstrated that they have a right to reside and are habitually resident in the UK. Broadly a right to reside exists if an EEA citizen is either economically active or able to support themselves. Those EEA nationals exempt from the habitual residence test include: EEA workers and self-employed workers under EC Directive 2004/38/EC, and family members of such persons; EEA nationals with a permanent right of residence in the UK, and their family members. EEA nationals who arrive as a jobseeker may also have a right to reside provided that they can demonstrate that they are looking for work, that they have a genuine chance of being engaged in work and that they are habitually resident. The habitual residency test takes into account the following factors: the length and continuity of residence; the person's future intentions; their employment prospects; their reasons for coming to the UK and where the person's 'centre of interest' lies. Each case is decided on its own merits though the primary factors are intention and the length of residence. Depending on the circumstances of the case some EEA nationals may be accepted as being immediately habitually resident whereas others may have to demonstrate a short period of residence which is normally around one to three months. EEA nationals are entitled to Income Support, income based Job Seekers Allowance, income-related Employment Support Allowance and State Pension Credit. Although Croatia joined the EU on 1st July 2013, Croatian nationals are not entitled to access welfare benefits in the same manner as other EEA nationals. To claim welfare benefits they must fall into one of the following categories: they must be working in authorised employment; have completed 12 months' authorised employment with fewer than 30 days of non-working time within that period; be self-employed; be self-sufficient; be a student or be a family member of an EEA national in the UK who has a right to reside. At present the European Commission has begun infringement proceedings against the UK and intends to refer the State to the European Court of Justice on the grounds that the right to reside requirement discriminates against EEA citizens who are not from the UK, in response the Government has stated that they intend to fight this action. Home Office, *Part 3 - Habitual residence & right to reside - IS/JSA/SPC/ESA* (Gov.uk 2014); Steven Kennedy, *People from abroad: what benefits can they claim?* (House of Commons Library, 06847, 2015).

⁶⁸ Steven Kennedy, *The Habitual Residency Test - SN/SP/416* (House of Commons Library 2011) 7.

⁶⁹ There is no specific way in which a record of the claim has to be made.

⁷⁰ Section 94(1) of the IAA 1999.

Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom'.⁷¹ If an asylum claim has been refused but the applicant has a right of in country appeal or has an appeal pending then they will still be classified as an asylum seeker.⁷² Section 94(3A) IAA 1999 also provides that a person shall continue to be treated as an asylum seeker for support purposes, despite their claim being refused, while their household includes a dependent under the age of 18 and they do not have leave to enter or remain in the UK.⁷³ Distinction shall be made throughout the thesis to asylum seekers (defined above), refused asylum seekers eligible for section 4 support (on the basis that they cannot return) and refused asylum seekers who refuse to return home. Use of the term 'asylum seeking community' refers to all three of these statuses and any dependents attached to their claims on the grounds that 'community', in its most simplistic construction, refers to a group of people with a particular characteristic in common; the common characteristic in this case is the process of seeking asylum. Though this term is used throughout the thesis to refer collectively to the above status groups the thesis does not assume that the group is a homogenous one, on the contrary there is a high level of heterogeneity amongst the asylum seeking community which will be discussed in greater detail throughout chapters four and five.

Upon application for refugee status asylum seekers are provided with temporary accommodation and support under section 98 of the IAA 1999 whilst, and until, the Secretary of State determines whether support may be provided under section

⁷¹ Thus section 48 of the IAA 1999 states that the definition of 'asylum seeker' in section 94(1) of the IAA 1999 involves both a 'claim for asylum' being 'made' and the claim being 'recorded' by the UKBA on behalf of Secretary of State. Thus the meaning of the term 'claim for asylum' incorporates both the object being claimed and the grounds upon which it is based. *R. (on the application of T (A Child)) v Newham LBC* [2013] EWHC 344 (Admin) [78].

⁷² Section 17 of the UK Borders Act 2007.

⁷³ However see Section 7A of the NIAA 2002 where Secretary of State may stop support for failure to comply with removal/return.

95 of the IAA 1999. Once approved, section 95 allows the Secretary of State to provide cash support and accommodation to asylum seekers and their dependents on the basis that they would otherwise be destitute or are likely to become destitute within a prescribed period.⁷⁴ This is in accordance with Article 13 of the Reception Conditions Directive which proscribes that member States should provide ‘*material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence*’ and the Asylum Seekers (Reception Conditions) Regulations 2005.

2.4 (a) Section 95 support

Under section 95 of the IAA 1999 the Secretary of State may provide asylum seekers with: accommodation (which is adequate in meeting the needs of the supported person and their dependents); food and other essential items; expenses incurred with the applicant’s claim for asylum (other than legal expenses); and support to enable the asylum seeker to attend bail proceedings in connection with detention or the detention of any dependents.⁷⁵

Section 95 is thus designed to provide for the essential living needs of able bodied⁷⁶ asylum seekers - what amounts to ‘essential living needs’ will be discussed later in this section.⁷⁷ Those whose needs are deemed ‘exceptional’ are entitled to extra provision under section 96(2) IAA 1999 and those who are ‘in need of care and

⁷⁴ A person is destitute if they do not have and cannot obtain adequate accommodation, food and other essential items. Section 95(2) and (3) IAA 1999 as amended by section 44(6) of the NIAA 2002.

⁷⁵ Section 96(1) IAA 1999.

⁷⁶ The following cases found that when the Secretary of State is considering ‘essential living needs’, needs were to be considered from the standpoint of an able bodied person.

R. (on the application of Ouji) v Secretary of State for the Home Department [2002] EWHC 1839 (Admin); *R. (Westminster City Council) v National Asylum Support Service* [2002]; *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin).

⁷⁷ Text to n 102 ch 2.

attention'⁷⁸ gain support from the local authority.⁷⁹ Section 4 of the Asylum Seekers (Reception Conditions) Regulations 2005 further stipulates that when providing support to 'vulnerable persons',⁸⁰ such as children or pregnant women, under section 95 or 98 of the IAA 1999, the Secretary of State must take into account the special needs of those persons. Consequently, the financial rates of section 95 support are split amongst five status groups,⁸¹ reflecting the categories of 'vulnerable persons' defined under the 2005 (Reception Conditions) Regulations. The rates for each group are contained within section 10 of the Asylum Support Regulations 2000 SI 2000/704, which is regularly updated. Such groups are broadly construed to account for the different needs of disparate individuals, therefore families and children are differentiated from single individuals. In July 2015, the Conservative Government announced plans to abolish the differential rates of asylum support on the basis that the existing support rates provided families with '*significantly more cash than is necessary*' to meet their essential living needs.⁸² The previous rate granted to single adults will become effective for all asylum seekers and dependents from the 10th of August 2015. Though discussion below refers to the previous rates of asylum support,

⁷⁸ See definition in *(R (M) v Slough Borough Council* [2008] 1 WLR 1808

⁷⁹ Section 21 of the The National Assistance Act 1948 provides for accommodation and accommodation related needs for those in 'need of care and attention. Where section 21 fails to provide essential living needs on account that they're not connected to accommodation, section 29 of the NAA 1949 and section 2(1) of the Chronically Sick and Disabled Persons Act 1970 were said to be sufficient to accommodate the shortfall.

⁸⁰ Section 4(3) of the Asylum Seekers (Reception Conditions) Regulations 2005, SI 2005/7 defines a 'vulnerable person' as: a minor; a disabled person; an elderly person; a pregnant woman; a lone parent with a minor child; a person who has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

⁸¹ The five groups rates are: Qualifying couple; Lone parent aged 18 or over; Single person aged 18 or over (excluding lone parents); Persons aged at least 16, but under 18 (except a member of a qualifying couple); Persons aged under 16. The rates provided to each of these groups will be set out later in the chapter.

⁸² Home Office spokesperson in Travis A, 'Asylum seekers with children to have support payments cut' *The Guardian* (16 July 2015) <<http://www.theguardian.com/uk-news/2015/jul/16/asylum-seekers-with-children-to-see-support-payments-cut>> accessed 24 July 2015.

it is safe to assume that the conditions of hardship discussed below will worsen under the new unitary rate.

Initially in 2000 the rate of section 95 support was set at 70% of IS levels on the basis that support was temporary and restrictive support policies were thought to be an effective deterrent against unwanted claims. In debate over the IAA Bill, the then Immigration Minister for the Labour Party, Mr O'Brien, confirmed that '*no one here seeks to make the circumstances of asylum seekers more onerous or difficult than is necessary to deter abusive applicants*',⁸³ adding that affording similar or higher amounts of benefit to asylum seekers over qualifying citizens would upset the electorate, which he felt would lead to Government criticism '*for showing favouritism*'.⁸⁴ The figure of 70% was deemed sufficient to meet the '*essential living needs*' of asylum seekers, as unlike citizens, asylum seekers are not required to pay for utilities such as gas and electric and are exempt from council tax payments. In response, Mr Richard Allen (a Liberal Democrat MP for Sheffield) asserted that heating and utilities only accounted for 5% of IS, indicating that the basis for the 20% cut was overestimated and unjustified.⁸⁵ Mr O'Brien responded to this comment by claiming that the figure of 5% was '*highly dubious*' but it was not disproved. In 2011 figures from the Poverty Site revealed that households were considered to be in 'fuel poverty' if they had to spend more than 10% of their household income on fuel indicating that the figure of 30% is overestimated. Consequently Fletcher concludes that the 30% difference in asylum support and IS is significant as IS was calculated to prevent poverty, asylum applicants receiving only 70% of this amount are thus '*by definition living in poverty*'.⁸⁶ As the percentages discussed are historical and

⁸³ Immigration and Asylum Bill Deb 11 May 1999, cols 1-23.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Fletcher 11 (n 43).

somewhat speculative, the lack of available evidence regarding the average utility costs of households in receipt of IS provides a topic for future research and is indeed necessary if accurate support rates are to be calculated for the purpose of future reform. Yet the fact that the Government has failed to publish any numerical data on the way in which asylum support rates are calculated casts doubt upon its previous justifications.

When section 95 support was initially implemented, a distinction was drawn between applicants who were 25 and those under 25 in parallel with the distinction drawn in IS. Rates increased annually broadly in line with IS levels which reflected changes to inflation. However in 2009 the separate rate for those over 25 was removed and instead a unitary rate was granted reflecting the lower sum previously paid to those between 18 and 24 years of age. The Government justified this decision on the basis that IS rates were higher for over 25s and lone parents as they were likely to be living independently.⁸⁷ As asylum support had already been reduced to 70% on account of utility costs, this justification is dubious, yet remains unchallenged.

In 2012 the relative rate of asylum support was further reduced as rates were frozen whilst IS rates continued to increase in line with inflation. This was justified on the basis that the current support rates were sufficient to provide for the essential living needs of the group. No increase was made for 2012/13 or 2013/14 and thus the support rates for 2014/15 remained the same as the rates granted in 2011. See Table.1 listed on the page below for the current support rates under section 95 of the IAA 1999.

⁸⁷ UK Visas and Immigration Spokesman as contained within: Alan Travis, 'Benefits for asylum seekers cut to £5 a day as government abolish higher rate' *The Guardian* <<http://www.theguardian.com/uk/2009/oct/04/asylum-seeker-benefits-cut-refugees>> accessed 30 April 2013.

Table 1. Support rates under section 95 of the Immigration and Asylum Act 1999 for the year 2014/15

Circumstances of applicant	S.95 support rate	IS rate (soon to be subsumed into UC)	S.95 support as a percentage of IS
Qualifying couple (married or in a civil partnership):	£72.52	£113.70 (The rate granted to couples both aged over 18.)	64%
Lone parent aged 18 or over:	£43.94	£72.40	61%
Single person aged 18 or over, excluding lone parent:	£36.95	£57.35 (18-24) £72.40 (25+)	64% 51%
Person aged at least 16, but under 18 (except a member of a qualifying couple):	£39.80	£66.33 (No equivalent in IS, this is the rate granted to those under 18.)	60%
Person aged under 16:	£52.96.	£66.33	80%

As evidenced by the table above, distinction is currently drawn between children who are under 16 and those aged 16/17 who are provided with lower levels of support. Granting lower levels of support to older teens is deemed appropriate by the Government for three reasons: that their overall living needs become similar to adults, making a step-change in allowance appropriate; that education for the group is not compulsory (reducing transport/equipment costs); and finally that clothing costs are reduced as they have reduced rates of growth.⁸⁸ In light of the recent implementation of Part 1 of the Education and Skills Act 2008 which makes education or work placements compulsory for under 18s, such justifications have been deemed by the High Court⁸⁹ to be misguided and inconsistent with the Secretary of State's duty to safeguard and promote the welfare of children,⁹⁰ principally because in addition to her disregard for the Education and Skills Act 2008, 'children' are conceived as being under the age of 18 within section 105 of the Children Act 1989, section 55(6) of the BCIA 2009, Article 24 of Charter of Fundamental Rights of the European Union and Article 1 of the Convention on the Rights of the Child. The distinction however remains in place revealing a tension between the UK courts and the Government which consistently arises within cases where the Government seeks to push the boundaries of restriction through reducing or removing social entitlements from the asylum seeking community.⁹¹

As well as the amounts set out above, a one off maternity grant of £300 is available to pregnant or nursing mothers in receipt of section 95 and additional weekly

⁸⁸ Evidence from the Secretary of State in *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014].

⁸⁹ *Ibid.*

⁹⁰ Section 55 Borders, Citizenship and Immigration Act.

⁹¹ *R v Kensington & Chelsea London Borough Council Ex p Kihara* (1997) 29 HLR 147 (CA) ; *R (on the application of Limbuela) v Secretary of State for the Home Department* [2010]; *R. (on the application of Tekle) v Secretary of State for the Home Department* [2008] EWHC 3064 (Admin), [2009] 2 All ER 193; *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014].

payments to pregnant women (£3 per week) and children under one (£5 per week) are granted until the child's first birthday where payments are then reduced to £3 per week until the age of three where the grant is terminated.⁹² These rates have remained unchanged since their introduction in 2003 despite a 27.9% increase in consumer price index inflation which forms the appropriate comparator for asylum support as it excludes housing costs and utilities.⁹³ Asylum seeking children are also excluded from many of the supplementary payments received by EEA citizen families such as Child Benefit,⁹⁴ Educational Maintenance Allowance (Scotland/Northern Ireland/Wales) or 16-19 Bursary Fund (England),⁹⁵ the Income Support Family Premium,⁹⁶ Disability Living Allowance and the Disabled Child Premium,⁹⁷ all of which give EEA citizen families extra money per week in addition to other benefits. Despite recognition from a Parliamentary Inquiry that it can cost up to three times as much to raise a disabled child,⁹⁸ this is not recognised within the asylum support system.

As a result of the widening gap between asylum support and IS, the original 70% link has been severed creating a widening gap between the living standards deemed appropriate for asylum seekers and those appropriate for citizens. In the case of *R (on the application of Refugee Action) v Secretary of State for the Home Department*⁹⁹ (hereby known as *Refugee Action*), the Secretary of State's decision not to increase support rates for the year 2013/2014 was successfully challenged by

⁹² Maternity grants are awarded via section 94 of the IAA 1999 and the rates are governed by Regulation 10A of Asylum Support Regulations 2000, SI 2000/704.

⁹³ *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014].

⁹⁴ Section 115(1)(i) IAA 1999.

⁹⁵ Only available to those in receipt of Income Support or Universal Credit: Gov.uk, 'Quick answer 16 to 19 Bursary Fund' (Gov.uk, 2013) <<https://www.gov.uk/1619-bursary-fund>> accessed 29 November 2013.

⁹⁶ Section 115(1)(e) IAA 1999.

⁹⁷ Section 115(1)(d) IAA 1999.

⁹⁸ Sarah Teather and others, *Report of the Parliamentary Inquiry into Asylum Support for Children and Young People* (The Children's Society, 2013) 13.

⁹⁹ *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014].

Refugee Action on two grounds: (1) that the Secretary of State's decision was irrational as she failed to take into account relevant considerations and took into account irrelevant considerations and (2) that the decision breached her duty towards children under section 55 of the Borders Citizenship and Immigration Act 2009 because, as established earlier, it failed to take into account the needs of over 16 year olds. As I have previously argued,¹⁰⁰ the judgement was significant for a number of reasons: firstly because it verified the extent of the international obligations placed upon the Government in providing asylum support; secondly because it revealed the Government's flawed construction of essential living needs; and thirdly because it dispelled a number of justifications consistently used by the Government to verify restrictive support policies. This case is crucial to understanding the framework through which section 95 support is provided and therefore the remainder of this section will discuss the issues that arose within *Refugee Action* before setting out the support framework for refused asylum seekers under section 4 of the IAA 1999 and the Government's policy of enforced destitution.

In setting the asylum support rates the Court directed that the Secretary of State was required to answer two questions: Firstly what are the essential living needs for which she is obliged to provide support under section 95? Secondly what amounts are sufficient to meet those essential living needs? Though the Court resisted giving an absolute definition of essential living needs, it held that the Secretary of State was obliged to give effect to the minimum conditions required by the Reception Conditions Directive. In the case of *Cimade v Ministre de l'Intérieur, de l'Outre-mer, des*

¹⁰⁰ Katie Bales, 'The 'essential living needs' of asylum seekers: Lessons learned from R (Refugee Action) v Secretary of State for the Home Department [2014] EWHC 1033' (2015) 37 Journal of Social Welfare and Family Law (note).

Collectivités territoriales et de l'Immigration [2013]¹⁰¹ the European Court of Justice ruled that as Recital 5 of the Reception Condition Directive's Preamble incorporates the rights and principles of the Charter of Fundamental Rights of the European Union, the provisions of the Reception Conditions Directive must be interpreted in light of the Charter. Drawing upon the French case, the High Court concluded that asylum support must, in accordance with the Reception Conditions Directive: ensure a dignified standard of living (Recitals 5/7 of Directive, Article 1 of Charter); promote the right to asylum (Recital 5 and Article 18 of Charter); ensure an adequate standard of health and subsistence (Article 13.1 of Directive); and provide for the special needs of vulnerable persons (Article 13.2 and 17 of Directive). These requirements now form the minimum objective standard for section 95 support and where support rates fail to meet these standards, the decision of the Secretary of State in setting them will be rendered unlawful and irrational. Consequently, the Secretary of State cannot approach the question of essential living needs and their associated costs from a purely subjective position, as argued in her defense within the case. This recognition is a significant step for asylum advocates as this is the first case to clearly set out the standards expected of the asylum support system using both the Directive and the Charter which can be seen to constitute an international framework for the protection of asylum seekers' socio-economic rights.

The case also exposed the Government's previously undisclosed construction of essential living needs, which consisted of: sufficient food to keep those on support in health and to avoid illness or malnourishment; suitable clothing to avoid any danger of illness; essential toiletries; the means to travel to appointments where they are out

¹⁰¹ *Case C-179/11 Cimade v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* [2013] 1 WLR 333.

of reach; some means of communication with emergency services; and access to education for children as well as a contribution to wider socialisation costs to promote their development. The court however found that the Secretary of State's decision was irrational as it failed to account for the costs of a number of needs considered to be 'essential' by the court¹⁰² which included: household goods and cleaning materials; extra costs for children such as nappies; non-prescription medical goods; and the costs associated with maintaining personal relationships and a minimum level of participation in social, cultural and religious life which is deemed necessary for the living of a dignified life (*BverfG, 1 BvL 10/10, 1 BvL 2/11, German Federal Constitutional Court, 18 July 2012*). The Secretary of State was also held to have been wrong in not considering a number of other items 'potential' essential living needs, including: the costs associated with telephone calls and transportation to progress an asylum application and writing materials for communication and the education of children.¹⁰³ The court's verification of a list of items that should be considered 'essential' provides a legal benchmark against which the Government can be held to account. Though these items may seem trivial, insufficient support levels need to be regarded in the context of a broader asylum framework in which asylum applicants are subject to indefinite detention, denied access to employment and provided with sub-standard housing. The assertion of concrete essential living needs thus represents a significant victory in an asylum system that consistently overlooks the humanity of its subjects.

Alongside the legal clarification of support standards, the High Court also found that the Secretary of State had made a number of errors when calculating the

¹⁰² *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014] [117].

¹⁰³ *Ibid* [118].

support rates necessary to provide for asylum seekers' essential living needs, which is noteworthy as many of the Government's justifications for restrictive measures were called into question. Firstly the Secretary of State claimed that asylum support rates had increased by 11.5% since 2007; however the court held that rates had actually decreased by 11.5% as the appropriate comparator against which to assess the 2013 rate was the higher rate for over 25 year olds granted in 2007, rather than support for the lower age group, which the court held to be inappropriate as the majority of asylum seekers are aged over 25 years old. In addition, the Secretary of State had failed to account for the rise in Consumer Price Index inflation which was previously used to measure the rates of asylum support. Though the Secretary of State justified distinguishing asylum support levels from IS levels on the basis that asylum support was 'temporary', the court ruled that asylum support could not be considered 'temporary' where average applications lasted 18 months. That left only the costs of utilities as justification for lower levels of asylum support, and this justification afforded no rational explanation for freezing support rates. The reliance placed on the comparison of asylum support with IS was consequently flawed. Despite the findings of the court, the Secretary of State decided not to increase support levels for 2014/15 after reviewing her decision.¹⁰⁴ Whether the current system and support rates fulfil the Reception Condition Directive's obligation '*to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence*'¹⁰⁵ will be explored throughout this thesis, but the above standards recognised by the High Court and the doubt cast upon the Government's justifications for low level asylum support

¹⁰⁴ Refugee Action, 'Home Office announces asylum support rates will remain unchanged following review, despite legal challenge' 2014) <http://www.refugee-action.org.uk/about/media_centre/our_news/1248_home_office_announces_asylum_support_rates_will_remain_unchanged_following_review_despite_legal_challenge> accessed 11 November 2014.

¹⁰⁵ Article 13(2) Reception Conditions Directive.

rates should be taken into account when considering the provision of section 95 support and its impact upon the asylum seeking community.

Section 95 support continues until the applicant ceases to be an asylum seeker which occurs after a prescribed period from the date on which the claim was determined.¹⁰⁶ Once rejected, individuals are given 21 days to leave their accommodation¹⁰⁷ and are excluded from a host of benefits listed within Schedule 3 paragraph 1 of the NIAA 2002, unless failure to provide support would breach a person's Convention rights or their rights under the Community Treaties.¹⁰⁸ Families remain exempt from this exclusion whilst there is a minor within the household. The remainder of this chapter will set out the existing support arrangements for those who are ineligible for section 95 support due to the refusal of their asylum application.

2.4 (b) Section 4 support

Under section 4(2) and (3) of the IAA 1999 the Secretary of State may provide non cash support and accommodation to failed asylum seekers and their dependents or alternatively call upon a local authority to provide support in accordance with arrangements made by her.¹⁰⁹ Unlike section 95 recipients who can access subsistence only, the refusal of accommodation under section 4 results in the termination of financial subsistence. Support is therefore conditional upon the acceptance of accommodation over which the applicant has no choice in relation to the standards of the accommodation or its location.

¹⁰⁶ The date of determination is the day on which the Secretary of State notifies the applicant in writing of the decision or if there is an appeal against the decision, the day on which the appeal is disposed of (section 94(8) IAA 1999).

¹⁰⁷ Where the Secretary of State rejects the asylum claim but notifies the applicant that he is granted limited leave to enter or remain in the UK; or an appeal has been disposed of through being allowed, the prescribed grace period (where support is continued for a period whilst the applicant finds other means of subsistence) is 28 days (section 93(3) IAA 1999, (4) as amended by section NIAA 2002).

¹⁰⁸ NIAA 2002, Schedule 3, para 3.

¹⁰⁹ Section 99(1) IAA 1999 as amended by section 43 of the Immigration, Asylum and Nationality Act 2006.

There is no duty to provide interim support whilst a section 4 application is processed and if support is either refused or terminated¹¹⁰ the Asylum and Immigration (Treatment of Claimants) Act 2004 provides a right of appeal to the First-tier Tribunal (Asylum Support). In order to qualify for section 4 support, failed asylum seekers must show that they are destitute and that they meet one of the conditions set out in section 2 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations.¹¹¹ Those conditions are:

- (a) that they are taking all reasonable steps to leave the UK or place themselves in a position enabling them to do so;
- (b) that they are unable to leave the UK by reason of a physical impediment to travel or for some other medical reason;
- (c) that they are unable to leave the UK because in the opinion of the Secretary of State there is no viable route of return available;
- (d) that they have made an application for judicial review of a decision relating to their asylum claim in England and Wales, and have been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998;
- (e) that the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998. This section only applies when a fresh human rights or asylum claim¹¹² is made

¹¹⁰ Section 10(3) Asylum and Immigration (Treatment of Claimants) Act 2004 inserting section 103(2A) into the NIAA 2002.

¹¹¹ Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, SI 2005/930.

¹¹² A fresh claim is defined within para 353 of the Immigration Rules as '*when a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i)*

and the Secretary of State is deciding whether to accept the claim. Case workers in such circumstances are only entitled to reject support where it is manifestly obvious that the human rights or asylum claim will be rejected.¹¹³ Where a fresh asylum application is accepted applicants are provided with support under section 4 IAA 1999.

Section 4 support is a cashless support system and subsistence is accessed through a payment card, known as the Azure payment card which grants each claimant and each of their dependents £35.00 per week. The regulations governing the financial amount granted under section 4 are the Immigration and Asylum (Provision of Services or Facilities) Regulations 2007¹¹⁴ and as refused asylum seekers are not protected from the provisions of the Reception Conditions Directive, or the Charter of Fundamental Rights of the European Union which is engaged by the Directive, the standards established in the case of *Refugee Action* are not applicable. In parallel to section 95, additional weekly payments are made to pregnant women and children under 3 and one off payments are offered in respect of travelling expenses incurred whilst reporting (the journey must be more than three miles),¹¹⁵ all of which must be accessed via the payment card. Asylum seeking families whose asylum applications are refused should continue to be provided with section 95 support until they leave, are removed, or the youngest child turns 18, however this does not apply to families where children are born more than 21 days after the parents' asylum claim has failed. In these instances families are instead provided with cashless support under the provisions of section 4 IAA 1999.

had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection'.

¹¹³ *R (on the application of AW) v Croydon London Borough Council* [2007] EWCA Civ 266, [2007] 1 WLR 3168.

¹¹⁴ Immigration and Asylum (Provision of Services or Facilities) Regulations 2007, SI 2007/3627.

¹¹⁵ Section 69 of the NIAA 2002.

The justification for low levels of financial support is essentially that there should be a distinction between those who are having their asylum claims processed and those who have been refused. In a February 2013 parliamentary debate regarding the 2013 inquiry into asylum support for children and young persons, former Immigration Minister, Mark Harper, stressed the importance of this distinction:

*‘It is important to distinguish that those on section 4 support are those who have been found not to require our protection. They should be leaving the country. We support those cases where there is a temporary barrier to them doing so, but frankly they should not be here. I know that that is a difficult message for people sometimes, but we have looked carefully at their cases and they do not need our protection. They should return home’.*¹¹⁶

The message Harper sends out is that lower levels of support are afforded under section 4 as a punitive response for the non-return of applicants, despite the fact that section 4 primarily applies because persons are unable, rather than unwilling to leave.

2.4 (c) Destitution

Refused asylum seekers who are unwilling to leave the UK are unable to access the labour market or claim support under sections 95 or 4 of the IAA 1999 or access benefits under the national welfare regime.¹¹⁷ Consequently the Government impose destitution upon the group as a means of immigration control to encourage return, Harper thus states that if applicants *‘are found not to require protection, it is right that they leave. That is why we have a different regime for those who have no right to be here from that for those seeking asylum’*.¹¹⁸

In the case of *Limbuela*,¹¹⁹ the destitution of active (s.95) asylum seekers unable to access either support or employment was challenged in relation to Article 3

¹¹⁶ Mark Harper, HC Deb 27 February 2013, vol 559, cols 87 and 88WH.

¹¹⁷ Section 115 IAA 1999.

¹¹⁸ Mark Harper, HC Deb, 27 February 2013, vol 559, col 88WH.

¹¹⁹ *R (on the application of Limbuela) v Secretary of State for the Home Department* [2005].

of the ECHR (the right not to be subjected to inhuman and degrading treatment).¹²⁰ The case was brought by asylum seekers with active applications against the exercise of section 55 of the NIAA 2002 which sought to withdraw support from applicants who had not made a claim for asylum as soon as reasonably practicable upon arrival. Under section 55(5)(a) however, the Secretary of State was not prevented from providing support where this was necessary to avoid breach of a person's Convention rights, the remainder of this section will discuss why destitution for active asylum seekers is seen to engage Convention rights, specifically Article 3, yet the destitution of those who have been refused asylum and refuse to return home does not. Such an explanation is important for a comprehensive understanding of the asylum support framework and its operation in practise.

Within the litigation surrounding section 55 of the NIAA 2002, the point at which 'Convention rights' were engaged was a source of contention which was first addressed in the case of *R (on the application of Q) v Secretary of State for the Home Department*,¹²¹ hereafter *Q*, where the denial of access to asylum support in conjunction with employment restrictions was affirmed to constitute positive treatment within the remit of Article 3 of the ECHR. In the case of *R (on the application of T) v Secretary of State for the Home Department*,¹²² hereafter *T*, the Court of Appeal held that for such treatment to breach Article 3, the conditions of treatment must verge on the degree of severity described in the case of *Pretty v United Kingdom*¹²³ (hereafter *Pretty*), where treatment

'attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human

¹²⁰ The principles of the case can therefore also be applied to Article 7 of the ICCPR as the wording mirrors that of Article 3.

¹²¹ [2003] EWCA Civ 364, [2004] QB 36.

¹²² [2003] EWCA Civ 1285, [2004] HLR 254.

¹²³ (2002) 35 EHRR 1 [52].

*dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.*¹²⁴

The cases of *Q* and *T* were then joined to that of *Limbuela* and reached the House of Lords. Though the court asserted that the withdrawal of support and employment restrictions did not in themselves amount to inhuman and degrading treatment, it held that such treatment would occur once the margin was crossed between destitution and the conditions described in *Pretty*. Lord Bingham asserted that this would take place where an applicant '*with no means and no alternative sources of support, unable to support himself, is by the deliberate action of the State, denied shelter, food or the most basic necessities of life*'.¹²⁵ As section 55(5)(a) was designed to 'avoid' a breach of Convention rights, the court held that it was not necessary for applicants to be in a state of destitution, but rather where applicants could show that this treatment would imminently follow, they were entitled to welfare support.¹²⁶ As will be addressed in chapter four, though the absolute destitution of refused asylum seekers parallels the conditions of homelessness and hunger addressed by Lord Bingham, refused applicants are distinguished from active asylum seekers as the Government believes they are able to return to their countries of origin.¹²⁷ Accordingly, though section 3(2)(e) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005¹²⁸ permits the Secretary of State to grant section 4 support to refused and destitute asylum seekers to avoid a breach of their Convention rights, this safety net is nullified by the perception that those who have been refused

¹²⁴ *Pretty v United Kingdom* (2002) [52].

¹²⁵ *R (on the application of Limbuela) v Secretary of State for the Home Department* [2005] [7] (Lord Bingham).

¹²⁶ Further exploration of *Limbuela* as a case which demonstrates the ability of the UK courts to use civil and political rights to protect socio-economic rights will take place in chapter four, section 4.4.

¹²⁷ For evidence of the conditions faced by those who are destitute see the text to n 233 ch4.

¹²⁸ Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, SI 2005/930.

can and should return to their countries of origin.¹²⁹ This is also documented in the Asylum Instructions offered to case workers dealing with section 4 support applications. The guidance thus makes clear that applicants are most likely to establish eligibility for section 4 support under regulation 3(2)(e) *‘if they cannot be expected to take steps to leave the UK and so avoid the consequences of destitution that might lead to them suffering inhuman and degrading treatment’*.¹³⁰ They must therefore prove that there are *‘legitimate barriers to departure or exceptional circumstances preventing departure’*.¹³¹ The ‘ability to return’ as a concept justifying harmful treatment will be further addressed in chapters four and five.¹³²

Though destitute refused asylum seekers in need of care and attention are able to apply for support from their local authority under section 21 of the National Assistance Act 1948, eligibility is restricted by section 21(1A) to that Act, Schedule 3 of the Nationality Immigration and Asylum Act (NIAA) 2002 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002. Essentially this means that refused asylum seekers may not be provided with accommodation where this need has arisen solely because of destitution or because of the physical effects, or anticipated physical effects, of being destitute.¹³³ Schedule 3 of the NIAA 2002 also restricts failed asylum seekers who have failed to comply with removal restrictions from section 21 assistance except where failure to provide support would breach a person’s Convention rights or their rights under the Community Treaties.¹³⁴ The concept of ‘care and attention’ giving rise to section 21 support is also interpreted strictly as demonstrated in the case of *R (on the application*

¹²⁹ *R (on the application of AW) v Croydon London Borough Council* [2007] [45].

¹³⁰ UK Visas and Immigration, *Section 4 support instruction* (Gov.uk 2015) 27.

¹³¹ *Ibid* 14.

¹³² Text to n 55 ch 5. For evidence of ‘harmful treatment’ see text to n 248 ch 4.

¹³³ Section 21(1A)(a) and (b) National Assistance Act 1948 (NAA 1948).

¹³⁴ Paragraph 3, Schedule 3 NIAA 2002

*of M) v Slough Borough Council [2008]*¹³⁵ where the House of Lords held that social services were not obliged under section 21 to arrange and pay for residential accommodation for an HIV positive man subject to immigration control, whose only needs, other than for shelter and subsistence, were for medication prescribed by his doctor and a refrigerator in which to keep it. Consequently section 21 fails to protect the majority of destitute applicants. As section 21 support is provided by the local authority to those in need of care and attention, its provisions fall outside of the asylum support system and thus outside of the scope of the thesis. Similarly as the local authority assumes responsibility for the support of unaccompanied children under section 20 of the Children Act 1989, this support system will also not be examined.

Provision under sections 95 and 4 of the IAA 1999 and the policy of destitution comprise the framework of the asylum support system. This thesis will examine the situation of all three types of claimant which will be referred to collectively as the asylum seeking community.

2.5 Employment

An adequate welfare support system becomes even more indispensable where stringent employment restrictions exist, yet active asylum seekers within the UK are excluded from working within the first 12 months of their asylum applications being processed and their dependents are excluded from accessing employment throughout the entire determination process.¹³⁶ After the initial 12 month period, active applicants are further restricted to applying for jobs listed under Tier 2 of the Shortage

¹³⁵ [2008] UKHL 52, [2008] 1 WLR 1808.

¹³⁶ The Immigration Act 1971, Sch 2, para 21(2) and Sch 3, para 2(5) prevents asylum seekers from working whilst their claim is being processed, however paragraph 360 of the Immigration Rules allows for asylum seekers to apply for permission to work until the final decision on their claim has been made in line with Article 11 of the Reception Conditions Directive.

Occupation List (SOL) which predominantly requires workers with high levels of skill or education to fill job vacancies such as: paramedic; geophysicist; civil engineer; secondary level maths or science teacher; or dancer at the standard of the Birmingham Royal Ballet.¹³⁷ The employment of active asylum seekers is governed by the Reception Conditions Directive which provides under Article 11(2) that employment access must be granted after 12 months, however Article 11(4) also allows States to prioritise the labour market access of EU citizens, nationals of State parties and legally resident third-country nationals over that of asylum seekers which means that restrictions such as the SOL are permitted.

All categories of refused asylum seeker are prohibited from engaging in employment whilst present in the UK,¹³⁸ and again remain excluded from protection under the limited provisions of the Reception Conditions Directive which only applies to active applicants. Though the Reception Conditions Directive represents progression in relation to enforceable socio-economic interests, the exclusion of refused asylum seekers and the permitted discrimination within the Directive severely limits the scope of its protection, a contention which will be more fully explored throughout the thesis. Restrictions on work are chiefly justified on the basis of deterring economic migration and protecting job opportunities for national citizens. A thorough exploration of the perceived necessity of such measures will be undertaken in chapter four where employment policies will be assessed in relation to their impact upon rights.

¹³⁷ Immigration Rules, para 360A; UK Visas and Immigration, *Tier 2 Shortage Occupation List Government-approved version valid from 6 April 2015* (Gov.uk 2015).

¹³⁸ Immigration Act 1971, Sch 2, para 21(2), Sch 3, para 2(5).

2.6 Summary

In summary, a historical account of the welfare provision afforded to the asylum seeking community over the last two decades reveals a regression in social entitlements. Since the 1980s, provision for asylum seekers and refused asylum seekers has moved from entitlement to welfare benefits at a broadly similar level to EEA citizens (90%) to a divided support system that on all accounts provides substantially less than EEA citizens under the provisions of IS or UC. Access to employment has also regressed as the previous system, which allowed unlimited access to employment after six months of lodging an asylum application, has been replaced by an initial twelve month exclusion from employment and application of the SOL. In addition, dependents and those asylum seekers whose applications have been refused are wholly excluded from employment access. As established, the successive Governments' primary motivations behind regression are: to deter economic migration; to evidently prioritise the needs of EEA citizens above outsiders and avoid the claim of 'showing favouritism'; to distinguish between those who have a 'right' and 'no right' to be here; and to encourage voluntary return. Though the political and social motivations behind specific policies will be addressed in greater detail throughout the rest of the thesis, the reasons listed here form the Government's primary justifications for benefit and employment restrictions upon the asylum seeking community. They thus act as a counterweight to the State's human rights obligations as evidence suggests that the current restrictive system infringes upon the rights of the asylum community. Whether the UK is upholding its rights obligations remains to be seen and will be analysed in chapter four.

Though the social entitlements of asylum seekers have clearly regressed since the 1980s, the next chapter considers whether immigration control has always been a

factor in welfare provision or whether the current restrictions are a response to increased globalisation and refugee movements; the aim being to ascertain whether internal immigration control is intrinsic to the welfare state and thus unavoidable. Additionally, the chapter will address a number of arguments in favour of citizenship as a basis for exclusion from the welfare state and explore a number of the other factors that sustain the withholding of social rights from the asylum seeking community. In contrast to theories based on exclusion and citizenship, the chapter will end by examining the theory of cosmopolitanism which calls for respect for the 'other' in foreign lands, regardless of immigration status.

Chapter Three

Balancing Citizenship and Cosmopolitanism

3.1 Introduction

The Government's resistance to providing asylum seekers and refused asylum seekers with an adequate standard of living epitomises the continuous struggle between claims of State sovereignty and the cosmopolitan obligations owed to non-citizens. Demands from foreigners upon the welfare state unequivocally raise issues of citizenship and the social rights that attach to the status of citizen. As such, this chapter will explore theories of citizenship, solidarity and cosmopolitanism, aiming to deconstruct the current hierarchy of rights and entitlements which positions the rights and needs of asylum seekers and refused asylum seekers below that of British and EEA citizens. The consequence of what has been termed 'civic stratification' by Lydia Morris¹ is that asylum seekers and refused asylum seekers live in poverty, and in some cases destitution, whilst their claims are being determined or they await deportation. Through using cosmopolitanism and human rights, this chapter questions the validity of citizenship as a precondition for welfare support, asserting the precedence of human need over citizen status as the basis for an ethical welfare state.

As discussed, the chapter will begin by charting the history of immigration control within welfare provision before turning to the concept of citizenship and its prevalence as a basis for exclusion within modern welfare provision. In assessing processes of inclusion and exclusion, the chapter will explore the additional factors that contribute to the restriction of social entitlements from the asylum seeking

¹ Lydia Morris, *Managing migration: civic stratification and migrants' rights* (Routledge 2002); Lydia Morris, 'Managing Contradiction: Civic Stratification and Migrants' Rights' (2003) 37 International Migration Review 74.

community. To reconfigure human need (as opposed to immigration status) as the principal basis for welfare provision, the third section of the chapter will explore the theory of cosmopolitanism which prioritises the rights of the individual over special claims of affiliation such as that of the nation. Cosmopolitanism will be considered in this chapter through the practical framework of the asylum support system. Consequently the validity of the nation state is not challenged but is accepted as a precondition of modern reality. As the nature of welfare support is State-centric, theories of cosmopolitan hospitality will be explored which address the treatment of foreigners within the State. The use of human rights as an appropriate measure of hospitable treatment will then be examined, providing a tool with which to evaluate the current policies of the welfare state.

3.2 Immigration control: Intrinsic to welfare?

Through tracing the historical development of the welfare state and its treatment of refugees, this section will begin by examining the relationship between welfare and immigration control. The situation of asylum applicants will then be examined, comparing historical and present welfare provision to assess whether increased globalisation has impacted upon the implementation of restrictive policies towards the asylum seeking community.

Distrust of the ‘stranger’ in the provision of welfare can be traced back to the Elizabethan poor law and the Poor Relief Act of 1662 which codified settlement regulations as a form of protection against the costs of the wandering poor. Under the Act individual parishes were responsible for the payment of poor law relief but only to their ‘own’ population. Consequently a stranger could be removed within 40 days of their arrival which appeased local rate payers who were anxious to keep poor law

costs down.² The implicit notion here was that the community were accountable for the deployment of their resources and therefore had to protect those resources from the illegitimate demands of outsiders. *'Where migration occurs across national boundaries these issues are all the more salient, and necessarily involve questions of citizenship and the social rights that follow from citizenship.'*³

The immigration controls of the early 20th century, implemented via the Aliens Act of 1905, also rested upon the notion that social rights should not be extended to foreign nationals who were categorised as 'undesirable' if they were unable to support themselves or if they were likely to become a charge upon the state. Introduced by the Liberal Government (1905-1915), the Act was passed to alleviate societal concern over the number of Jewish refugees fleeing from pogroms in Russia and Poland resulting in the synonymous association of the word 'alien' with the word 'Jew'.⁴ Hayes writes that Jews were categorised as causing social unrest and consequently the Government used exaggerated numbers to create social panic.⁵ The political consensus giving rise to the Aliens Act 1905 was founded upon the notion that increased migration would lead to an increase in competition for resources, an assumption still prevalent in the policy formation of the last two decades. Conservative MP William Evans Gordon thus stated in 1902:

*'Not a day passes but English families are ruthlessly turned out to make room for foreign invaders...Out they go to make room for Romanians, Russian and Poles... It is only a matter of time before the population becomes entirely foreign...The working classes know that new buildings are erected not for them but for strangers from abroad.'*⁶

² Derek Fraser, *The Evolution of the British Welfare State* (Palgrave Macmillan 2009) 41.

³ Lydia Morris, *Dangerous classes: The Underclass and Social Citizenship* (Routledge 1994) 137.

⁴ Debra Hayes, 'From aliens to asylum seekers: A history of immigration controls and welfare in Britain' in Steve Cohen, Beth Humphries and Ed Mynott (eds), *From immigration controls to welfare controls* (Routledge 2002).

⁵ Debra Hayes, 'Outsiders within: The role of welfare in the internal control of immigration' in Janet Batsleer and Beth Humphries (eds), *Welfare, Exclusion and Political Agency* (Routledge 2000).

⁶ Conservative MP William Evans Gordon (Hansard 29 January 1902) found in Steve Cohen, *No one is illegal: asylum and immigration control, past and present* (Trentham 2003) 81.

This negative rhetoric continued throughout the development of the welfare state and is mirrored today within right wing and centre right political discourse, evident in the UK Independence Party's 2015 manifesto:

'evidence...reveals how immigration has driven down wages and led to job losses for British workers. The sheer weight of numbers, combined with rising birth rates (particularly to immigrant mothers) and an ageing population, is pushing public services to breaking point',⁷

and the Labour Government's 1998 White Paper 'Fairer, Faster and Firmer' which gave rise to the asylum support system: *'people that have not established the right to be in the UK should not have access to welfare provisions on the same basis as those whose citizenship or status gives them an entitlement to benefits when in need'.⁸*

Under the Aliens Act 1905 those classified as '*undesirable*' were subject to refusal of entry to the State.⁹ The '*undesirables*' fell into four categories: the diseased or insane who appeared '*likely to become a charge upon the rates or otherwise a detriment to the public*';¹⁰ criminals; those with an outstanding expulsion order; and those unable to '*show that he has in his possession or is in a position to obtain the means of decently supporting himself and his dependents*'.¹¹ Any alien found, within twelve months of admittance, to be claiming parochial relief, or found '*wandering without ostensible means of subsistence*', or living in unsanitary conditions due to overcrowding,¹² was liable to an expulsion order.¹³ The Act therefore '*inevitably ensured that Jewish people excluded from the country were also excluded from the*

⁷ UK Independence Party, *Believe in Britain: UKIP Manifesto 2015* (Paul Oakden, 2015) 11.

⁸ Home Office, *Fairer, Faster and Firmer - A Modern Approach to Immigration and Asylum* (The Stationery Office Cm 4018, 1998) para 8.18.

⁹ Aliens Act 1905 section 1(1).

¹⁰ Ibid section 1(3)(b).

¹¹ Ibid section 1(3)(a).

¹² Ibid section 3(1)(b)(i).

¹³ Ibid section 3(1).

new social benefits'.¹⁴ Though refugees were exempt¹⁵ from categorisation as *undesirable*, Cohen writes that '*in reality the statutory exception for refugees was merely tokenism...and usually ignored. If it had been otherwise then the Act would have been rendered irrelevant and its whole purpose nullified*'.¹⁶ Consequently very few Jews were admitted as refugees during this decade (1900-1910), despite their widespread persecution.¹⁷ Within this period, the Liberal Government also introduced the first two major pieces of social legislation: the Old Age Pensions Act 1908 and the National Insurance Act 1911. Both Acts contained exclusions based on residence and citizenship requirements¹⁸ which prevented Jewish refugees and migrants from claiming pensions and health insurance.¹⁹ However, unemployment benefit granted under the National Insurance Act did not discriminate against aliens. In response to the exclusions inherent within the Liberal Government's welfare framework, Cohen writes that '*the Liberals...legitimised welfare as a nationalistic and racist concept*'.²⁰ Indeed exclusion on the basis of nationality continued throughout the early 20th

¹⁴ Cohen, *No one is illegal: asylum and immigration control, past and present* 90 (n 6).

¹⁵ Thus section 1(3) of the Aliens Act 1905 states: '*but in the case of an immigrant who proves that he is seeking admission to this country solely to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on account of religious belief, leave to land shall not be refused on the ground merely of want of means, or the probability of his becoming a charge on the rates*'.

¹⁶ Cohen, *No one is illegal: asylum and immigration control, past and present* 110 (n 6).

¹⁷ Cohen writes that 505 Jewish refugees were admitted to the UK in 1906; 43 in 1907; 20 in 1908; 30 in 1909; 5 in 1910. Ibid 110.

¹⁸ Thus the statutory conditions under the Old Age Pensions Act 1908 state at section 2(2) that '*the person must satisfy the pension authorities that for at least twenty years up to the date of the receipt of any sum on account of a pension he has been a British subject, and has had his residence, as defined by the regulations under this Act*'. Those wishing to claim must have therefore been both a British subject and resident in the UK for twenty years before claiming. Sickness, disablement and maternity benefit under the National Insurance Act 1911 was to be administered by 'approved societies'. Only non-British residents who had joined an approved society before 4th May 1911 (the date the Act came into force) and had been resident in the UK for five years would qualify for the full benefit (section 45(4)). For non-British citizens who joined an approved society after this date, the rates of sickness, disablement and maternity benefit were at the discretion of the approved society (section 45(2)(iii)). For non-British citizens who were not part of an approved society, a deposit scheme existed. For such '*deposit contributors*', rates were reduced from citizens rates. In the case of men this was seven-ninths and in the case of women three quarters of standard rate (section 45(1)(c)).

¹⁹ Hayes, 'Outsiders within: The role of welfare in the internal control of immigration' 73 (n 5).

²⁰ Cohen, *No one is illegal: asylum and immigration control, past and present* 90 (n 6).

Century as although the requirements of the Old Age Pensions Act 1908²¹ and the National Insurance Act 1911²² were amended to be less onerous for foreigners to meet, after the First World War a series²³ of restrictions were introduced culminating in the Aliens Restriction Act 1914 and its 1919 amendment which removed the exception granted to refugees under section 1(3) of the Aliens Act 1905.

The early restrictions implemented through the Aliens Acts, the Old Age Pensions Act and the National Insurance Act demonstrate that the early 20th Century welfare state was strongly linked to immigration status as aliens who were not self-sufficient were liable to refusal of entry. Once refugees were within the borders of the country they were also prevented from claiming the benefits available to citizens on the basis of internal restrictions and residency requirements. Consequently both external border controls (Alien Acts) and internal welfare benefits legislation were utilised by the early 20th Century Governments as a means of immigration control. Yet this situation can be contrasted with the welfare legislation implemented after the Second World War which took a more universal approach to provision, demonstrating that although welfare within the UK has traditionally been predicated on nationality

²¹ The Old Age Pensions Act 1908 was amended by the Old Age Pensions Act 1919 which reduced the requirement of citizenship from 20 to 10 years. In departing from the old act, it distinguished between British born citizens and naturalised citizens. The former only had to show 12 years residence to procure a pension, whereas the latter had to prove 20 years residence. It did however remove all restrictions on access for English women married to foreigners.

²² Section 23 of the National Health Insurance Act 1918 removed all health insurance restrictions placed on non-British citizens via the National Health Insurance Act 1911. The Government Minister who introduced the Act, Sir E. Cornwall, assured that such relief was not spawn from altruistic principles attached to welfare but because the administration of the restrictions within the original Act were complicated and expensive (Hansard 22 November 1917) as found in Cohen, *No one is illegal: asylum and immigration control, past and present* 91 (n 6).

²³ In 1918 'out of work donations' were introduced in the form of a singular payment for the unemployed who had previously engaged in war-work. This was not extended to aliens. The National Insurance Act 1911 was also amended introducing nationality requirements for access to unemployment benefits. Section 3 of the Unemployment Insurance, No.2, Act 1921 also granted the Minister of Labour power to extend unemployment benefit payments beyond 16 weeks by a further 6 weeks, though he decided that this would not be extended to aliens. Access to pension rights under the Widows, Orphans and Old Age Contributory Pensions Act 1925 was restricted by a residency requirement of 2 years. As found in Cohen, *No one is illegal: asylum and immigration control, past and present* 91 (n 6).

and immigration status, such requirements are not intrinsic to the internal workings of the welfare state.

In 1941 William Beveridge was appointed by the Labour Government as chair of a committee tasked with inquiring into a system of social insurance. The ‘Beveridge report’²⁴ was published in 1942 and claimed that national insurance was just one of the components needed for a comprehensive system of social policy aimed at attacking the five social evils of: want; disease; ignorance; squalor and idleness. Drawing on Beveridge’s recommendations, the Labour Government implemented the 1946 National Insurance Act that provided protection on the basis of flat rate contributions for flat rate benefits such as unemployment benefit; old age pensions; maternity cover; widows benefits; guardian allowances and a death grant to cover funeral expenses. Those persons who were non-insured were also covered by the National Assistance Act 1948 which granted welfare payments out of taxation to those in need. The aim of both the national insurance scheme and welfare payments was to eliminate want from society. Beveridge’s second social evil of ‘disease’ was also tackled by the National Health Service Act 1946 which provided free comprehensive healthcare to all those who required it. Though the Beveridge report was widely recognised as encompassing some of the sexist and nationalist assumptions of the previous era,²⁵ as demonstrated by its acknowledgement that *‘in the next thirty years housewives as mothers have vital work to do in ensuring the adequate continuance of the British Race and British Ideals in the World’*,²⁶ the Labour Government’s subsequent legislation did not feature nationality as a basis for exclusion. Post-war welfare provision was thus ‘universal’

²⁴ William Beveridge, *Social Insurance and Allied Services* (Cmd 6404, Macmillan 1942).

²⁵ Steve Cohen, ‘Anti-semitism, immigration controls and the welfare state’ (1985) 5 *Critical Social Policy* 73; Bakshi et al, ‘Gender, race and class in the local welfare state: moving beyond regulation theory in analysing the transition from Fordism’ (1995) 27 *Environment and Planning* 1539.

²⁶ Beveridge (n 24) para 117.

from an internal perspective as under the provisions of the National Assistance Act 1948 and the National Health Service Act 1946, mere presence within the country created eligibility for qualification. As social insurance was contributory based, individuals would only gain protection under the National Insurance Act 1946 following adequate contributions. Accordingly non-contributory welfare payments were the central benefits available to foreigners in need. Though internally social security payments were ‘universal’, exclusion remained pervasive as access to the State remained managed externally via the previous provisions of the Aliens Act 1905²⁷ and the Aliens Restriction Acts which were later consolidated under the Aliens Order 1953. Yet as was explained in the previous chapter, the 1951 Convention Relating to the Status of Refugees was created to protect European refugees in the aftermath of WWII. As a result, refugees gained protection from non-refoulement and thus immunity from external border controls and deportation where their applications were yet to be determined. Consequently asylum seekers were entitled to enter the State and claim benefits equivalent to citizens. Schuster and Bloch write that this was because it remained ‘*politically expedient to respond humanely to those fleeing...they “deserved” compassion and, by extension, access to welfare because of what they had “endured”*’.²⁸ As the welfare state developed, a series of internal exclusions based on immigration status were introduced.²⁹ Though asylum seekers and refugees remained entitled to mainstream benefits, this was altered from 1996 through a series of

²⁷ Aliens Act 1905, Aliens Restriction Act 1914, Aliens Restriction Amendment Act 1919, the Aliens Order 1920.

²⁸ Liza Schuster and Alice Bloch, 'Asylum and welfare: contemporary debates' (2002) 22 Critical Social Policy 393, 397.

²⁹ Following an increase in migration from Commonwealth countries in the 1950s restrictions were introduced to temper migration beginning with the Commonwealth Immigrants Act 1962, ending in the British Nationality Act 1981. Whilst migration in terms of family reunification continued, primary migration decreased.

provisions³⁰ culminating in the IAA 1999 which, as established in the previous chapter, excludes asylum applicants from accessing the national welfare regime. Schuster and Bloch attribute this exclusion to the change in the political climate following the collapse of the Soviet Union (1991) and the outbreak of war in Yugoslavia (1991-2001) as: *'the financial costs grew as the political benefits waned, a rigid distinction was introduced between 'genuine' refugees (still entitled to compassion) and 'bogus' asylum seekers (who should have no rights and no call on compassion).'*³¹ Accordingly *'the morally untouchable category of refugee'* was deconstructed and reframed as *'exploitative', 'criminal' and 'bogus', seeking only to 'abuse...soft-touch' Britain'*.³² Other theorists such as Delanty frame the modern targeting of immigrants through the changing ideologies of the welfare state, noting that the change in welfare rhetoric from a collectivist perspective following the Second World War, to an individualistic perspective following the election of Thatcher as

³⁰ Prior to 1993 asylum seekers received income support via the Social Security Contributions and Benefits Act 1992 and jobseeker's allowance under the Jobseekers Act 1995 at the rate of 90% of the claimants ordinary 'applicable amount' calculated under the Income Support (General) Regulations, 1987, SI 1987/1967, reg 21. Section 11 of the Asylum and Immigration Act 1996 linked all non-contributory benefits (including child benefit) to immigration status. Asylum seekers remained entitled to income support and income based job seekers allowance, housing benefit and council tax benefit, but only if the asylum claim was lodged upon entering the UK (Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996/30, regs 3, 7 and 8). Post 1996, those who failed to lodge a claim upon entrance were excluded from provision, however in a series of judgements the Court of Appeal deemed that those who were left destitute via provisions under the Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996/30, were classed as 'vulnerable' under section 59(1)(c) of the Housing Act 1985 and thus entitled to homelessness accommodation from the local authority under section 65 of the Housing Act 1985 (*R v Kensington & Chelsea London Borough Council Ex p Kihara* (1997) 29 HLR 147 (CA)). Section 185 of the Housing Act 1996 then removed rights to homelessness accommodation from all persons *'subject to immigration control'*, however those claiming asylum upon entry were exempt. Immigration lawyers fought for provision for those excluded under the 1996 Act through legislation administering support via the local authority, namely section 17 of the Children Act 1989 and section 21 of the National Assistance Act 1948. Section 116 of the Immigration and Asylum Act 1999 dealt with this by explicitly excluding those subject to immigration control from assistance under the Children Act 1989 and the National Assistance Act 1949 purely on grounds of destitution. It also withdrew entitlement to anyone subject to immigration control from non-contributory benefits and council housing under section 115. Webber F, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto Press 2012).

³¹ Schuster and Bloch (n 28) 397.

³² Ibid 397.

Conservative leader (1975), created a new understanding of the ‘good British citizen’. Thatcher’s administration emphasised individual responsibility and self-reliance targeting those who relied upon handouts from the State.³³ Consequently a new form of nationalism was created which focused upon the internal problems of the State and the targeting and exclusion of ‘undeserving’ groups such as immigrants, or indeed asylum seekers.³⁴ The faces of asylum seekers thus ‘*served as ideal, identifiable flashpoints for new repertoires of belonging and othering*’ which tended the ‘*otherwise alienated consumer-citizen’s need for inclusion and belonging*’.³⁵ Greater analysis of the social influences behind asylum seekers’ exclusion from the national welfare state will be addressed in the next section.³⁶

In summary, a historical account of the welfare state demonstrates that immigration and nationality have always been influential factors in the provision of welfare and the determination of to whom we owe redistributive duties. Throughout the 20th and 21st Centuries the law has responded to this in two ways: firstly through the use of external border controls to restrict access to the territory (and hence the welfare state), but with universally accessible welfare benefits for those within the State; and secondly through the combined use of external border controls and internal welfare restrictions as a means of immigration control and exclusion. What this conveys is that although the redistribution of resources is inherently linked to restricted migration, the internal policies of the welfare state need not be exclusionary. At present both external border controls and internal welfare policies are used in unison within the UK as mechanisms of deterrence which echoes the separatist provision

³³ Gerard Delanty, 'Beyond the Nation-State: National Identity and Citizenship in a Multicultural Society' (1996) 1 Sociological Research Online 11.

³⁴ Ibid 11.

³⁵ Jolle Demmers and Sameer Mehendale, 'Neoliberal Xenophobia: The Dutch Case' (2010) 35 Alternatives 53, 63.

³⁶ Text to n 64 ch 3.

afforded to Jews over a century ago.³⁷ Yet the universally accessible welfare benefits that were present after the Second World War demonstrate that a more cosmopolitan style of welfare provision is possible, provided that external border controls are in use. Embracing cosmopolitan welfare provision and extending benefits to all of those in need within the State however contradicts the current arrangements within the UK which determine entitlement on the basis of immigration status. Within the current hierarchy of welfare entitlement, British citizenship presides over all other immigration statuses as it grants full access to welfare benefits for those who qualify, rendering British citizenship the ultimate basis for social inclusion. Accordingly, the next section will address theories claiming that citizenship should be an exclusive basis for welfare provision before questioning the validity of this notion in light of increased globalisation and the existence of international obligations that emphasise human equality.

3.3 Citizenship as a basis for inclusion

*“Citizenship matters because it can act as a powerful exclusionary device – no citizenship, no entitlement.”*³⁸

Though the legal basis of citizenship was set out in chapter 2.3, citizenship theory looks beyond the law and examines the relationship between State and citizen, exploring the rights and duties that arise from citizenship as an exclusive status. As Kymlicka recognises, the two different concepts of citizenship are often conflated but

³⁷ See section 45(1)(c) of the National Insurance Act 1911.

³⁸ Janet Batsleer and Beth Humphries (eds), *Welfare, Exclusion and Political Agency* (Routledge 2000) 14.

discussion of citizenship should recognise both citizenship as a legal status and a theoretical model which gives rise to the possession of rights and obligations.³⁹

Theoretically, modern liberal citizenship⁴⁰ is thought to concern two major elements or features; the first is the understanding of citizenship as a package of rights and duties, and the second concerns exclusionary boundaries which are traditionally centred on nationality. As recognised by Kymlicka: '*Citizenship is intimately linked to ideas of individual entitlement on the one hand and of attachment to a particular community on the other*'.⁴¹ Bommes and Geddes also acknowledge that nation states often differentiate between citizens and non-citizens as

'the sovereignty of nation states over a given population was and still is based on the exchange of the political provision of welfare in exchange for the internal loyalty of their citizens. If loyalty is one side of the coin, then the other side is external closure at the borders of nation states'.⁴²

Specifically, this section will address the concerns and difficulties involved in extending social rights, which were traditionally construed as citizens' rights, to the asylum seeking community in terms of both the traditional obligations that arise from the granting of social rights, and the risk that extending redistribution beyond the solidarity of citizens might weaken the traditional foundations upon which the welfare state was built. The latter issue forms the primary justification for social rights as exclusive rights of citizenship.

³⁹ Will Kymlicka and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104 *Ethics* 352, 353.

⁴⁰ There are two distinct accounts of citizenship: the liberal tradition, associating citizenship with status and the possession of rights; and the civic republican tradition which associates citizenship with active participation in the pursuit of good for a particular community and thus civic duty. Batsleer and Humphries contend that the UK embraces the former liberal tradition. Batsleer and Humphries (eds) 14 (n 38).

⁴¹ Kymlicka and Norman 352 (n 39).

⁴² Michael Bommes and Andrew Geddes (eds), *Immigration and Welfare: Challenging the borders of the welfare state* (Routledge 2000) 1.

3.3 (a) Citizenship as a status bestowing rights and obligations

The most influential writer on post war citizenship is T.H. Marshall who, in his 1949 lecture '*Citizenship and Social Class*', describes citizenship as a status bestowing rights and duties.⁴³ In his lecture, Marshall charts the progressive expansion of citizen's rights over the nineteenth and twentieth century in Britain,⁴⁴ dividing citizenship into three elements: civil rights, which are those necessary for individual freedom such as the right to life, liberty and property; political rights, that are necessary for political participation such as the right to self determination, voting and a free press; and social rights, by which he means '*the right to a modicum of economic welfare and security to the right to share to the full in social heritage and to live the life of a civilised being according to the standards prevailing in society*'.⁴⁵ Marshall believed that the key element to citizens' realisation of social rights was access to the welfare state as he '*interpreted the State's welfare obligations as being tantamount to the realisation of the structural implications of the concept of citizenship*'.⁴⁶ In granting social rights to citizens, the State enabled conditions for the development of institutional equality as '*all who possess the status are equal with respect to the rights and duties with which the status is endowed*',⁴⁷ where rights were withheld, individuals would be marginalized and unable to participate in society.⁴⁸ In Marshall's eyes welfare provision was thus predicated on citizenship as social inclusion and redistribution legitimated and influenced the relationship between individuals and the State.⁴⁹ Within Marshall's work no reference is made to non-

⁴³ T.H Marshall, *Citizenship and Social Class and Other Essays* (Cambridge University Press 1950) 29.

⁴⁴ Adrian Favell, *Philosophies of Integration: immigration and the Idea of Citizenship in France and Britain* (Second edn, Palgrave 2001).

⁴⁵ Marshall 11 (n 43).

⁴⁶ Bommes and Geddes (eds) 2 (n 42).

⁴⁷ Marshall 28-29 (n 43).

⁴⁸ Kymlicka and Norman 354 (n 39).

⁴⁹ Lydia Morris, *Human Rights and Social Theory* (Palgrave Macmillan 2013) 2.

citizens. Although the reasons behind this remain unclear,⁵⁰ his failure to acknowledge their status means that his vision of citizenship precludes the concept of migration making it '*ill prepared for the question of how to include aliens in the community*',⁵¹ a question which the welfare state is now forced to address in light of increased globalisation and refugee flows.

Although Marshall recognised a number of civic obligations within his work, such as the duty to engage in compulsory education; military service; voting; taxes; work⁵² and the duty to '*put one's heart into one's job*',⁵³ he believed that the granting of citizenship rights should remain independent of any obligation. Marshall's version of citizenship is thus regarded as 'passive' by Kymlicka⁵⁴ as it centres on passive entitlement, however modern citizenship rights, particularly those concerning socio-economic entitlements, are increasingly linked to the fulfilment of obligations. The most influential critique of 'passive citizenship' came from the New Right and the Conservative Prime Minister Margaret Thatcher (1979-1990) who sought to reform the 'passivity' of the poor and cut welfare spending by promoting independence as dependence upon welfare benefits was claimed to have created an 'underclass'. This was achieved via the introduction of 'workfare' programmes, which required benefit recipients to work for their benefits, and a sustained campaign to target and prosecute

⁵⁰ Drawing on the historical content of welfare and immigration, Marshall's disregard of foreigners may have been based on the stringent external controls imposed via the Alien Acts (1905-1920) which managed entrance on the basis of self-sufficiency refusing entry to those foreigners who were unable to support themselves and who would likely become a drain upon resources.

⁵¹ Jost Halfmann, 'Welfare state and territory' in M. and A. Geddes Bommes (ed), *Immigration and Welfare: Challenging the borders of the welfare state* (Routledge 2000) 42.

⁵² Martin Powell, 'The Hidden History of Social Citizenship' (2002) 6 *Citizenship Studies* 229, 237

⁵³ The duty to work hard should not be confused with the concept of having a job at all times, the right to minimum income for Marshall was not therefore contingent upon work but rather that citizens should aim to achieve fulfilling employment. Marshall 46 (n 40). See also Amílcar Moreira, *The Activation Dilemma*: (Policy Press 2008).

⁵⁴ Kymlicka and Norman (n 39).

those guilty of benefit fraud, labelled by Sullivan as the ‘pathologising of poverty’.⁵⁵ Emphasis was placed upon citizens as self reliant, independent and responsible individuals and as unconditional access was construed as discouraging self reliance, the safety net of the welfare state was cut back, linking any remaining entitlements to obligations.⁵⁶ Social rights in exchange for duties continued to be a major focus for the Labour Government throughout the 1990s, during which the asylum support system was created. Alongside the creation of asylum support, New Labour reformed the national welfare benefits system by creating a ‘third way’⁵⁷ for welfare which emphasised social inclusion and individual advancement. *‘The maxim that rights imply duties became the central theme of ‘New’ Labour’s rhetoric on social policy’*⁵⁸ and as a result welfare to work schemes were introduced as well as sanctions for failure to seek employment. Those who were not seen as ‘vulnerable’ or ‘disadvantaged’⁵⁹ needed to earn entitlement. Employment was regarded as a key mechanism in achieving social inclusion and as Fletcher writes, this was a means for the “‘undeserving’ to become ‘deserving’”.⁶⁰ The relationship between the welfare state and citizens was thus ‘characterized by the trading of rights to services for duties; ‘no rights without obligations’’.⁶¹ The Coalition Government (2010-2015) expanded this neo-liberal stance through the implementation of Universal Credit (UC) in April 2013 which continues to be active under the current Conservative Government. Employment remains a focus as within UC financial incentives to work, such as tax

⁵⁵ Michael Sullivan, *The Development of the British Welfare State* (Prentice Hall/ Harvester Wheatsheaf 1996) 233 and 238.

⁵⁶ Kymlicka and Norman (n 39).

⁵⁷ Anthony Giddens, *The third way: the renewal of social democracy* (Polity Press 1998).

⁵⁸ Brian Lund, "Ask not what your community can do for you': obligations, New Labour and welfare reform' (1999) 19 *Critical Social Policy* 447, 451.

⁵⁹ Tony Blair, *New Britain: my vision of a young country* (Fourth Estate 1996) 60.

⁶⁰ Fletcher E, *Changing Support for Asylum Seekers: An Analysis of Legislation and Parliamentary Debates* (Working Paper No49, 2008) 5.

⁶¹ *Ibid* 5.

reductions for low earners, which are supported by a strict system of conditionality. Those who fail to take steps towards employment receive financial sanctions designed to ‘provide greater incentives for people to meet their responsibilities’.⁶² Failure to adhere to conditional duties thus results in a 4 week ban from benefits in the first instance, and a three month ban in the second, distinguishing between those EEA citizens deemed deserving of benefits and those who are undeserving and consequently subject to sanction.⁶³

One of the major issues in extending welfare benefits to the asylum seeking community is their position within this nexus of rights and obligations and the way in which this can affect public support for redistribution towards the group. Despite the fact that employment is politically construed to be a civic ‘responsibility’,⁶⁴ the stark difference between asylum applicants and EEA citizens is their lack of opportunity to work. Whereas national welfare benefits under both New Labour (1997-2010), the Coalition Government (2010-2015), and the current Conservative Government are geared towards stimulating employment, asylum seekers are explicitly excluded from the labour market until their claim has been pending for 12 months, after which they are restricted to applying for jobs from Tier 2 of the SOL. Within a society in which employment is revered as a quality of the ‘good citizen’ and a central means of

⁶² Secretary of State for Work and Pensions, *Universal Credit: welfare that works* (Cm 7957, The Stationery Office 2010) 4.

⁶³ The Coalition Government’s white paper on welfare reform sets out the sanctions for failing to adhere to welfare conditions: ‘Failure to meet a requirement to prepare for work (applicable to jobseekers and those in the Employment and Support Allowance Work-Related Activity Group) will lead to 100 per cent of payments ceasing until the recipient re-complies with requirements and for a fixed period after re-compliance (fixed period sanctions start at one week, rising to two, then four weeks with each subsequent failure to comply). Failure to actively seek employment or be available for work will lead to payment ceasing for four weeks for a first failure and up to three months for a second. The most serious failures that apply only to jobseekers will lead to Jobseeker’s Allowance payment ceasing for a fixed period of at least three months (longer for repeat offences). Actions that could trigger this level of penalty include failure to accept a reasonable job offer, failure to apply for a job or failure to attend Mandatory Work Activity’. Ibid 28.

⁶⁴ Ibid 4.

fulfilling civic obligation, work restrictions upon the asylum seeking community impact upon the public's perception, and consequently their support, for the asylum seeking population. In 2008 the Independent Asylum Commission conducted the most comprehensive survey and analysis of public attitudes towards the asylum seeking community.⁶⁵ In its initial consultation labelled CITIZENS SPEAK, the Commission found an overwhelming lack of support for the asylum system amongst members of the public who linked the term 'asylum' to the concept of economic migration and believed that asylum applicants came to the UK to '*scrounge on welfare*'.⁶⁶ When asked to substantiate their opinions, respondents were unable to provide experience, evidence or knowledge to validate their claims but instead cited 'media' and 'word of mouth' as a common source of information. The CITIZENS SPEAK study was then followed by the 'Public Attitudes Research Project' which found that people in general had little trust in the asylum system believing it to be out of control and over generous, the report notes particular concern amongst respondents regarding the issue of preferential treatment. The overall consensus was that '*no-one, regardless of status, should get 'something for nothing'. Those seeking sanctuary should be expected to make some contribution through work if they are able*'.⁶⁷ The inability to engage in employment thus exacerbates negative public opinion of the asylum seeking population which in turn validates further restrictions upon the group. Accordingly, the current prohibitions on employment are credited by Bloch and Schuster as being responsible for the regression of asylum seekers' social rights which occurred '*because of the way asylum seekers (and undocumented migrants) are constructed as*

⁶⁵ Hobson C, Cox J and Sagovsky N, Saving Sanctuary: The Independent Asylum Commission's first report of conclusions and recommendations: How we restore public support for sanctuary and improve the way we decide who needs sanctuary (Independent Asylum Commission, 2008).

⁶⁶ Ibid 4.

⁶⁷ Ibid 20.

only those who take, not as real or potential contributors to public wealth'.⁶⁸ Welfare policies do not therefore simply reflect social relations but also reinforce them. The perception of asylum seekers as takers is a politically constructed one formed by social policies aimed at preventing employment thereby rendering asylum seekers through no fault of their own subject to categorisation as *undeserving* welfare recipients. This observation is substantiated by Rosemary Sales who notes that the current welfare arrangements in the UK have cast asylum seekers as 'undeserving' whilst denying them the means (employment) by which to join the ranks of the deserving.⁶⁹ As demonstrated in the previous chapter and within this section, throughout the neo-liberal era of Thatcher, Blair and Cameron, there has been a sustained emphasis upon the exaltation of citizens' rights above those of the asylum seeking community as evidenced by their exclusion from the national welfare regime and the lower levels of financial support provided to the group. Public support for such policies is maintained by dominant political rhetoric which positions the 'good citizen' as being self reliant with strong emphasis upon social rights as attached to duties and asylum seekers as individuals seeking to 'scrounge' from the State. In order to foster public support for redistribution towards asylum recipients, central obligations such as employment must therefore be taken into account as an unconditional asylum support system sits uneasily alongside the strict conditionality imposed upon citizens seeking access to welfare benefits. Whether conditionality should be imposed upon an inherently vulnerable group such as the asylum seeking community will be explored in chapter five which proposes reform of access to the asylum support system and the elimination of employment restrictions.⁷⁰

⁶⁸ Schuster and Bloch 404 (n 28).

⁶⁹ Rosemary Sales, 'The deserving and the undeserving? Refugees, asylum seekers and welfare in Britain' (2002) 22 Critical Social Policy 456, 459.

⁷⁰ Text to n 51 ch 5.

3.3 (b) Citizenship, solidarity and the welfare state

Alongside issues of rights and obligation, the second feature of citizenship is the exclusionary boundaries of the status which are traditionally drawn from nationality. As redistribution is widely perceived as a collective act of solidarity,⁷¹ a number of authors raise concern that extending redistribution beyond national citizens will weaken the foundations of solidarity upon which the welfare state was built. Within dominant welfare literature, the welfare state is regarded as both a source and a product of national identity.⁷² Titmuss thus writes that the creation of the post war welfare state was triggered by a collectivist feeling of British solidarity following the Second World War.⁷³ Sullivan asserts that this post-war solidarity was fostered through a high degree of equality and shared misery caused by the conflict and wartime policies such as the rationing of food and clothing which were applied to all within the UK regardless of class.⁷⁴ During this period economic levelling took place through a high tax on personal income, a reduction in levels of inflation and the fact that the war had significantly reduced unemployment as the previously unemployed became service men and women, producing weapons and other necessary equipment

⁷¹ Ingvar Luchen, 'Erosion of Solidarity in Modern Welfare States' (1992) 5 *Innovation* 87; Kurt Bayertz and others, 'Solidarity and the welfare state' (1998) 1 *Ethical theory and moral practice* 293; Jurgen Kruger, 'Is Welfare State Solidarity Dwindling?' (2001) 50 *Sozialer Fortschritt* 156; A. Follesdal, L. Giorgi and R. Heuberger, 'European solidarity between welfare ideologies and the European social agenda' (2007) 20 *Innovation - The European Journal of Social Science Research* 75; Oorschot, 'Solidarity towards immigrants in European welfare states' (2008) 17 *International Journal of Social Welfare* 3; Daniel Béland and André Lecours, *Nationalism and Social Policy - The Politics of Territorial Solidarity* (Oxford University Press 2008); P. De Beer and F. Koster, *Sticking Together Or Falling Apart? Solidarity in an Era of Individualization and Globalization* (Amsterdam University Press 2009); T. Horton and J. Gregory, 'Why Solidarity Matters: The Political Strategy of Welfare Design' (2010) 81 *Political Quarterly* 270; Julianne Ottman, 'Social Exclusion in the Welfare State: The Implications of Welfare Reforms for Social Solidarity and Social Citizenship' (2010) 11 *Distinktion* 23; Toomas Kotkas, 'Who needs social rights when we've got solidarity: juridification of solidarity and the depoliticisation of EU social policy' (2012) 2 *European Journal of Social Law* 84.

⁷² Richard Titmuss, *Problems of Social Policy* (The Stationery Office 1950); David Miller, *On Nationality* (Oxford University Press 1995); Michael Keating, *Nations Against the State: the new politics of nationalism in Quebec, Catalonia and Scotland* (Macmillan 1996); Nicola McEwen, 'State Welfare Nationalism: The Territorial Impact of Welfare State Development in Scotland' (2002) 12 *Regional and Federal Studies* 66; Béland and Lecours, *Nationalism and Social Policy - The Politics of Territorial Solidarity*.

⁷³ Richard Titmuss, *Problems of Social Policy* (The Stationery Office 1950).

⁷⁴ Sullivan 32 (n 55).

for the war.⁷⁵ The hazards of war carried little social discrimination which meant that Government assistance for the rebuilding of homes and other services was offered to all. Accordingly, *'the mood of the people changed and, in sympathetic response, values changed as well. If dangers were to be shared, then resources should also be shared'*.⁷⁶ The result was the election of the Clement Attlee Labour Government (1945-1951) and the creation of the British welfare state. In addition to acknowledging national solidarity as a foundation for welfare distribution, a number of authors also acknowledge the 'nation building' role of welfare provision in fostering an alliance between national citizens and the State.⁷⁷ Nicola McEwen writes that redistribution following the Second World War thus helped to unify the sub-nations of Scotland and Wales *'promoting a social conception of British nationhood which could rest alongside and stretch beyond the territory and boundaries of the Scottish nation'*.⁷⁸ It is perhaps then no surprise that the three primary pieces of welfare legislation following the election of the post WWII Labour Government: the National Insurance Act 1946; the National Health Service Act 1946; and the National Assistance Act 1948, all contained the word 'national' in the title.⁷⁹

One of the principal arguments against the extension of welfare to non-citizens is that support for redistribution throughout the welfare state will be weakened through

⁷⁵ Ibid 33.

⁷⁶ Titmuss 56 (n 73).

⁷⁷ Yael Tamir, *Liberal Nationalism* (Princeton University Press 1993); Delanty, 'Beyond the Nation-State: National Identity and Citizenship in a Multicultural Society' (n 33); Michael Keating, *Nations Against the State: the new politics of nationalism in Quebec, Catalonia and Scotland* (Macmillan 1996); Bommes and Geddes (eds) (n 42); Halfmann (n 51); Nicola McEwen, 'State Welfare Nationalism: The Territorial Impact of Welfare State Development in Scotland' (2002) 12 *Regional and Federal Studies* 66; Daniel Béland and André Lecours, *Nationalism and Social Policy - The Politics of Territorial Solidarity* (Oxford University Press 2008) 22; Richard Johnston and others, 'National Identity and Support for the Welfare State' (2010) 42 *Canadian Journal of Political Science* 349.

⁷⁸ Nicola McEwen, 'State Welfare Nationalism: The Territorial Impact of Welfare State Development in Scotland' (2002) 12 *Regional and Federal Studies* 66, 86.

⁷⁹ Ibid.

the dilution of national solidarity which underpins welfare provision. Accordingly, Charles Taylor writes that in order to prevent inequality, States must be able to create redistributive policies which

*'require a high degree of mutual commitment amongst members ...demanding much greater solidarity towards compatriots than toward humanity in general. We cannot make a success of these enterprises without strong common identification'.*⁸⁰

This is substantiated by David Miller who stresses the importance of common nationality within redistribution. Though Miller accepts that redistribution is delineated on the basis of citizenship status, he writes that it would be a mistake to assume that this type of political co-operation yields nationality irrelevant as *'the bonds of nationality give the practice (of citizenship) a different shape from the one that it would have without them'*.⁸¹ Without an ethical underpinning from nationality, Miller believes that citizenship would be a relationship based wholly on reciprocity and fairness which would endanger redistribution and care for those unable to take part in reciprocal exchange such as the sick, elderly or disabled. Similarly Freeman believes that welfare states are closed systems of individual contributions built on 'fellow feeling' drawn from the nation state.⁸²

Institutionally, the State has responded to the welfare demands of non-citizens by creating a hierarchy of social rights and entitlements linked to the differing immigration statuses of individuals. This process is labelled 'civic stratification' by Morris⁸³ which is defined as *'a system of inequality based on the relationship between*

⁸⁰ Charles Taylor, 'Why Democracy Needs Patriotism' in Joshua Cohen (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996).

⁸¹ David Miller, *On Nationality* (Oxford University Press 1995) 71.

⁸² Gary Freeman, 'Migration and the political economy of the welfare state' (1986) 485 *The Annals of the American Academy of Political and Social Science* 51.

⁸³ Morris, *Managing migration: civic stratification and migrants' rights* (n 1); Morris, 'Managing Contradiction: Civic Stratification and Migrants' Rights' (n 1); Morris, 'Civic stratification and the cosmopolitan ideal' (2009) 11 *European Societies* 603. See also the work of Lockwood: David Lockwood, 'Class and Stratification' (1993) 7 *Work, Employment & Society* 493; David Lockwood, 'Civic Integration and Class Formation' (1996) 47 *The British Journal of Sociology* 531.

different categories of individuals and the State, and the rights thereby granted or denied'.⁸⁴ Morris writes that this is evident in the three central migratory status groups of national citizens, EEA citizens and third country nationals. Whereas national citizens enjoy the highest degree of rights, including full security of residence and voting rights, EEA citizens receive a more restricted form of rights which include those of free movement, work and social security.⁸⁵ The most restricted group however are third country nationals whose rights are dependent upon their reasons for entry which includes the asylum seeking community. 'Social rights', conceived in Marshallian terms as welfare benefits enabling a civilised life, are thus afforded to those outside the remit of British citizenship, including EEA citizens and third party nationals such as refugees and asylum seekers. Governing the extension of these benefits are legal institutions and rights systems that exist outside the legal constructs of citizenship, such as the international and European human rights systems and European Union law. The result is that the boundaries of the civic State and the territorial State are no longer co-terminous as whilst *'throughout the EU a dissociation of the privileges of political citizenship from nationality can be observed for EU citizens, for third-country nationals, the ties between identities and institutions, between national membership and democratic citizenship rights, are reinforced'*.⁸⁶

⁸⁴ Morris, *Managing migration: civic stratification and migrants' rights* (n 1).

⁸⁵ The citizenship and free movement rights granted under Articles 20 and 21 of the TFEU have been used in conjunction with the right not to be discriminated against on the basis of nationality (Article 18 TFEU) to protect the interests of unemployed EU citizens claiming social security in foreign European states. Thus in the case of *Case C-456/02 Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] ECR I-7573 it was held that where an EU resident was lawfully resident in the State they are entitled to access social assistance on the same conditions as nationals by virtue of Articles 18 and 21 of the TFEU.

⁸⁶ Benhabib S, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 155-156.

Despite the relatively recent extension of welfare to EEA citizens, the apparent solidarity stemming from EEA citizenship is noted to be in decline.⁸⁷ Delanty writes that this crisis arises through anxieties about peoplehood. Thus in an era of increased European power, globalisation and diminishing national sovereignty *'both Europe and migration become linked as sources of instability for many people'*.⁸⁸ Anxiety over the inclusion of EEA citizens then serves to heighten the suspicion with which excluded others are regarded as competition over resources is seen to increase. Accordingly, many authors believe that the inclusion of EEA citizens within the remit of eligible welfare recipients has strengthened the exclusion of third party nationals⁸⁹ as national citizens are ever more resistant to share the burdens of extended redistribution. Such animosity towards the asylum seeking community is acknowledged by Delanty who notes an increase in instances of 'everyday racism'⁹⁰ within the UK where prejudice regarding race or colour is transferred to prejudice based on protecting jobs and concerns over welfare benefits.⁹¹ Goodall substantiates this position writing that *'unfortunately it is clear that there still remains a 'social acceptability' of negative attitude towards asylum seekers and refugees that is not viewed as racist'*.⁹²

⁸⁷ Ingvar Luchen, 'Erosion of Solidarity in Modern Welfare States' (1992) 5 *Innovation* 87; Jurgen Kruger, 'Is Welfare State Solidarity Dwindling?' (2001) 50 *Sozialer Fortschritt* 156; A. Follesdal, L. Giorgi and R. Heuberger, 'European solidarity between welfare ideologies and the European social agenda' (2007) 20 *Innovation - The European Journal of Social Science Research* 75; Gerard Delanty, 'Fear of Others: Social Exclusion and the European Crisis of Solidarity' (2008) 42 *Social Policy & Administration* 676.

⁸⁸ Gerard Delanty, 'Fear of Others: Social Exclusion and the European Crisis of Solidarity' (2008) 42 *Social Policy & Administration* 676, 677.

⁸⁹ A. Follesdal, L. Giorgi and R. Heuberger, 'European solidarity between welfare ideologies and the European social agenda' (2007) 20 *Innovation - The European Journal of Social Science Research* 75; Delanty, 'Fear of Others: Social Exclusion and the European Crisis of Solidarity' (n 88); Kenneth Veitch, 'Social Solidarity and the Power of Contract' (2011) 38 *Journal of Law and Society* 189.

⁹⁰ Delanty, 'Fear of Others: Social Exclusion and the European Crisis of Solidarity' (n 88); Delanty, 'Beyond the Nation-State: National Identity and Citizenship in a Multicultural Society' (n 33).

⁹¹ *Ibid.*

⁹² C Goodall, *The coming of the stranger: asylum seekers, trust and hospitality in a British city* (United Nations High Commissioner for Refugees, 2010) 6.

Public animosity towards redistribution to the asylum seeking community supports the position of authors such as Taylor and Miller who contend that extending the scope of welfare provision beyond national citizens damages redistributive solidarity. Yet it is argued that adopting this perspective is overly simplistic as it merely addresses one factor within a nexus of criteria affecting support for redistribution. Consequently, though Delanty recognises an increase in levels of everyday racism (aggravated by immigration), he attributes this to the failures of social citizenship and the deconstruction of the welfare state which has lead to feelings of widespread alienation, frustration and social division amongst citizens and foreign nationals.⁹³ Though Wolfe and Klausen argue that it is the surfacing of identity politics that has served to undermine the welfare state,⁹⁴ McEwen rejects this by asserting that *'the decline of state welfare often preceded and provoked many of these identity claims'*.⁹⁵ In discussing the 'decline of state welfare', McEwen makes reference to the election of Thatcher and the emergence of the 'New Right' which, as established, adopted a neo-liberal approach to public policy promoting a flexible, free-market economy with minimal state intervention. McEwen writes that it is this individualistic approach to state welfare which undermined the concept of nationhood upon which the welfare state was founded.⁹⁶ The point here is that a lack of support for redistribution towards non-citizens cannot be framed as a natural consequence of immigration without taking into account the social, political and economic circumstances surrounding the modern welfare state. Indeed, in a 2013 report commissioned by the Government into the impact of immigration upon British

⁹³ Delanty, 'Beyond the Nation-State: National Identity and Citizenship in a Multicultural Society' para 3.6 (n 33).

⁹⁴ Alan Wolfe and Jytte Klausen, 'Identity Politics and the Welfare State' (1997) 14 *Social Philosophy and Policy* 231.

⁹⁵ McEwen 87 (n 78).

⁹⁶ *Ibid* 69.

identity, it was found that increased ethnic diversity alone did not result in a lack of social cohesion between groups, but rather that this only occurred in combination with socio-economic deprivation.⁹⁷ Cuts to welfare benefits, increasing income divisions,⁹⁸ and the exclusionary political rhetoric surrounding the welfare state must therefore be taken into account when considering the strength of public support for extended welfare provision. Hence, Dorling writes that within a society divided by wealth

*'those at the top more often look down on others with ever greater disdain and fear... whilst those at the bottom are less likely to trust others and more likely to become fearful in a society that so clearly values them so little. Racism rises in just these kind of circumstances'.*⁹⁹

In agreement, Goodall states that 'generalised trust' is one of the most prolific factors in fostering good relations between citizens as hosts and immigrants, or asylum seekers, as guests and that the components needed for this environment begin with equality amongst the host.¹⁰⁰ The Equality Trust notes that levels of income inequality are rapidly growing in the UK finding that out of 30 OECD countries identified within the Luxembourg Income Study, the UK had the fourth highest level of income inequality and the highest level of income inequality amongst the European States surveyed.¹⁰¹ Consequently in the modern State, where the recession has lead to greater

⁹⁷ David Owen, *Future Identities: Changing identities in the UK – the next 10 years* (Foresight, 2013).

⁹⁸ Increasing income division is noted within the UK in research from the Institute of Fiscal Studies who use the Gini Coefficient method to measure inequality: *'The most widely-used measure of income inequality is the Gini coefficient. This ranges from 0 to 1, with higher numbers indicating higher inequality. During the 1960s and 1970s, the Gini fluctuated around 0.26. During the 1980s, it increased substantially, reaching 0.34 by 1990. This was the largest increase in income inequality seen in recent British history and was larger than the rise that took place in other countries at the same time. As measured by the Gini coefficient, inequality reached its highest level since at least 1961 between 2007–08 and 2009–10, before falling back sharply in 2010–11. Although inequality was unchanged in 2011–12, it was substantially lower than before the recession. The Gini coefficient stood at 0.34 in 2011–12, compared with 0.36 in 2007–08. This was a result of income changes right across the distribution, not just a consequence of falling incomes at the very top of the distribution'.* Jonathan Cribb and others, *Living Standards, Poverty and Inequality in the UK: 2013 - IFS Report R81* (Institute for Fiscal Studies, 2013) 3.

⁹⁹ Daniel Dorling, *Injustice: why social inequality persists* (Policy Press 2011) 7.

¹⁰⁰ Goodall 6 (n 92).

¹⁰¹ The Equality Trust, 'About Inequality' <<http://www.equalitytrust.org.uk/about-inequality/scale-and-trends>> accessed 16 November 2014.

economic inequality, the negative perception and inhospitality of the British public is partly explained.

Of course it is naïve to believe that the UK Government has no role to play in influencing the public's construction of the asylum seeking community as 'undeserving welfare recipients', which in turn legitimates the imposition of restrictive support policies and the prioritisation of the rights of the electorate. This is substantiated by Schneider and Ingram¹⁰² who confirm that the social construction of target populations (by which they mean the cultural characterization¹⁰³ or promotion of '*popular images of the persons or groups whose behaviour and well-being are affected by public policy*')¹⁰⁴ as either deserving or undeserving serves to

*'influence the policy agenda and the selection of policy tools, as well as the rationales that legitimate policy choices. Constructions become embedded in policy as messages that are absorbed by citizens and effect their orientation and participation'.*¹⁰⁵

A cyclical process is thereby created in which restrictive legislation and negative political rhetoric influences public opinion which subsequently serves to reinforce restrictive measures. This is acknowledged by Morris who writes that within the UK a negative cycle of discrediting target populations is exploited by politicians seeking to erode the rights of such groups; the successful implementation of restrictive policies then validates negative public perceptions ultimately feeding '*into a diminution of the public standing of the target group*'.¹⁰⁶ Schnieder and Ingram thus contend that the two most important motivations for elected officials are to produce policies that assist

¹⁰² Anne Schneider and Helen Ingram, 'Social Construction of Target Populations: Implications for Politics and Policy' (1993) 87 *The American Political Science Review* 334.

¹⁰³ *Ibid* 334.

¹⁰⁴ *Ibid* 334.

¹⁰⁵ *Ibid* 334.

¹⁰⁶ Morris, 'Civic stratification and the cosmopolitan ideal' 616 (n 83).

in their re-election whilst also addressing widely acknowledged public problems. The social construction of target groups becomes

*'part of the re election calculus when public officials anticipate the reaction of the target population itself to the policy and also anticipate the reaction of others to whether the target group should be the beneficiary (or loser) for a particular policy proposal'.*¹⁰⁷

As asylum seekers have no political rights they are politically powerless, consequently elected public officials can inflict punishment upon the group as they need fear no electoral retaliation from the group itself¹⁰⁸ and as the social construction of the group is predominantly negative, the general public approves of their punishment.¹⁰⁹ Should the Government implement positive legislative changes that recognise the asylum seeking community as persons seeking sanctuary who are deserving of adequate living standards, it is hoped that the negative and self perpetuating political cycle which posits the group as undeserving would be interrupted.

The role of the press is also highly relevant within this context as the media plays a significant role in furthering the negative construction of target populations. Greenslade¹¹⁰ thus claims that the press campaign against the asylum seeking community throughout the late 20th Century helped to generate the public's negative construction of the group which he associates with the quick succession of asylum related legislation throughout the late 1990s and early 2000s. In 2012 the Leveson inquiry into the ethics of the press confirmed that *'discriminatory, sensational or unbalanced reporting in relation to...asylum seekers is a feature of journalistic practice in parts of the press'*.¹¹¹ These findings are verified in numerous other

¹⁰⁷ Schneider and Ingram 335 (n 102).

¹⁰⁸ Ibid 336.

¹⁰⁹ Ibid 336.

¹¹⁰ R. Greenslade, *Seeking Scapegoats: The Coverage of Asylum in the UK Press* (Institute for Public Policy Research 2005).

¹¹¹ Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (The Stationery Office, HC 780-II, 2012) 673, para 8.51.

research projects examining the media's portrayal of asylum seekers¹¹² which acknowledge that '*the portrayal of refugees as an economic threat is a frequent image used in media reporting, where the arrival of people seeking asylum is associated with economic changes and with the fluctuating labour market*'.¹¹³ Accordingly the traditional image of the refugee escaping persecution is superseded by '*association with this ostensibly threatening characteristic*'.¹¹⁴ Such findings substantiate the results of the Independent Asylum Commission's consultation 'CITIZENS SPEAK',¹¹⁵ discussed within the previous section,¹¹⁶ which found that the primary source for the public's association of asylum seekers with economic migration was the national media followed by local media and word of mouth.¹¹⁷ Were positive legislative changes to be made and greater levels of public education provided regarding the meaning of terms such as 'asylum seeker' and 'refugee', such misconceptions might be avoided and support for redistribution towards the asylum seeking community as 'non-citizens' might increase. Indeed the Commission recount that respondents were unable to accurately distinguish between terms such as 'asylum seeker', 'economic migrant' or 'refugee' and that there was a strong public perception

¹¹² Article 19, *What's the story? Media representation of refugees and asylum seekers in the UK* (2003); Information Centre about Asylum and Refugees, *Media Image, Community Impact Executive Summary - Assessing the impact of media and political images of refugees and asylum seekers on community relations in London* (Information Centre about Asylum and Refugees, 2004); Information Centre about Asylum and Refugees, *Reporting asylum - The UK Press and the Effectiveness of PCC Guidelines* (Information Centre about Asylum and Refugees, 2007); Alexandria J. Innes, 'When the Threatened Become the Threat: The Construction of Asylum Seekers in British Media Narratives' (2010) 24 *International Relations* 456; Claudio Santoro, *Asylum Seekers, Refugees and Media* (Information Centre about asylum and refugees, 2012).

¹¹³ Claudio Santoro, *Asylum Seekers, Refugees and Media* (Information Centre about asylum and refugees, 2012) 13.

¹¹⁴ Alexandria J. Innes, 'When the Threatened Become the Threat: The Construction of Asylum Seekers in British Media Narratives' (2010) 24 *International Relations* 456, 462.

¹¹⁵ Hobson, Cox and Sagovsky, *Saving Sanctuary: The Independent Asylum Commission's first report of conclusions and recommendations: How we restore public support for sanctuary and improve the way we decide who needs sanctuary* (n 65).

¹¹⁶ See n 66 ch 3.

¹¹⁷ Hobson, Cox and Sagovsky, *Saving Sanctuary: The Independent Asylum Commission's first report of conclusions and recommendations: How we restore public support for sanctuary and improve the way we decide who needs sanctuary* 16 (n 65).

that the term ‘asylum’ was bad.¹¹⁸ Such respondents however felt that the UK should provide sanctuary to those fleeing persecution which demonstrates that public support could be fostered through the deconstruction of non-accurate stereotypes and the reaffirmation that asylum equates to sanctuary.¹¹⁹

A further argument in support of exclusive welfare provision to national citizens arises within the context of the territorial State. Wolfe and Klausen¹²⁰ thus note that the distinction between citizens and asylum seekers is of little surprise and an inevitable condition of a man made system which distinguishes between welfare amongst states as

*‘once claims for rights are limited to citizens of a particular country, rather than being applicable to all irrespective of place, it is just another step and one not nearly so gigantic, to the idea that groups within the nation state ought to be recognized as having legitimate claims for special rights’.*¹²¹

It is argued however that the territorial nature of the welfare state should not be used as a justification for the exclusion of non-citizens from welfare provision. Once an individual is within the jurisdiction of the State they are subject to its laws and institutions and as a result the State must assume responsibility for the rights and dignity of the individual. As Caren’s points out

*‘the principle of State sovereignty entails that States are normally responsible for what goes on in their own territory...From this perspective, it is precisely the fact that a person seeking asylum has made it to our territory that matters morally. Her physical presence creates a degree of moral responsibility that did not previously exist. The arrival of the refugees implicates us directly and immediately in their fate’.*¹²²

The prioritisation of citizens’ interests at the expense of the rights and well being of the asylum seeking community is thus unacceptable, a notion that will be explored in

¹¹⁸ Ibid 15.

¹¹⁹ Ibid.

¹²⁰ Wolfe and Klausen 231-255 (n 94).

¹²¹ Ibid 233.

¹²² Joseph Carens, *The Ethics of Immigration* (Oxford University Press 2013) 207.

the next section which posits cosmopolitanism as a more helpful vantage point from which to base claims of redistribution throughout the welfare state.

Thus far within this chapter it has been established that welfare redistribution need not be predicated on the basis of national citizenship, as evidenced by the policies of the post WWII welfare state. Though a number of theorists claim that redistribution to non-citizens sits uncomfortably within the nexus of rights and obligations that arise from citizenship status, and that redistributive solidarity will be damaged by extending redistribution, this thesis purports that such arguments are overly simplistic as they overlook the political and social factors identified within this chapter which serve to guide such propositions. This includes the asylum seeking community's inability to participate in the labour market which hinders their ability to contribute or take part in civic exchange, and the importance of public interest factors such as reciprocity, income inequality and the social construction of asylum seekers within political and media narratives. Though each of these factors currently represents an impediment to increasing the social rights of the asylum seeking community, these factors can be reoriented in the groups favour through efforts such as: increased employment access which would allow the group to contribute to the State through taxation; greater levels of education in schools regarding terms such as refugee and asylum seeker; a conscientious effort on the part of politicians to disassociate the process of seeking asylum from economic migration; the implementation of positive asylum policies to break the current cycle of negative discrediting and a conscientious effort on the part of the UK Government to reduce levels of income inequality within the State. As the non-citizen population within the UK grows, it is no longer morally defensible or realistic to predicate the satisfaction of need on the basis of national citizenship. Indeed even Miller acknowledges that from a critical perspective *'the idea that our moral*

obligations should be defined by national borders is rationally indefensible; it represents the triumph of sentiment over genuine morality. A critically reflective person must adhere to some form of cosmopolitanism'.¹²³ Disregard for immigration status in the provision of welfare therefore calls for the re-articulation of solidarity from the present boundaries, defined by citizenship, to a cosmopolitan solidarity which regards our needs and deliberations as primarily those relating to *'human problems of people in particular concrete situations'* as opposed to *'problems growing out of a national identity that is altogether unlike that of others'*.¹²⁴

3.4 Cosmopolitanism

As cosmopolitans *'one truth we hold to...is that every human being has obligations to every other. Everybody matters: that is our central idea. And it sharply limits the scope of our tolerance'*.¹²⁵

Cosmopolitanism is often used¹²⁶ to conceptualise cross border movements and to protect foreigners in their dealings with alien States as it centres on the equal importance of every human being irrespective of claims such as nationality or citizenship. As has been discussed throughout, the emphasis of this section is to further the argument that human need rather than immigration status should take priority when it comes to redistribution throughout the welfare state. In light of cosmopolitanism's

¹²³ Miller 12 (n 81).

¹²⁴ Nussbaum MC, 'Patriotism and Cosmopolitanism' in Cohen J (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996) 7-8.

¹²⁵ Anthony Appiah, *Cosmopolitanism: ethics in a world of strangers* (Penguin 2007) 144.

¹²⁶ Nussbaum, 'Patriotism and Cosmopolitanism' (n 124); Thomas Pogge, *World poverty and human rights: cosmopolitan responsibilities and reforms* (Polity 2002); Benhabib, *The Rights of Others: Aliens, Residents and Citizen* (n 86); S. Benhabib and R. Post, *Another Cosmopolitanism* (Oxford University Press, USA 2006); Morris L, 'An emergent cosmopolitan paradigm? Asylum, welfare and human rights' (2009) 60 *The British Journal of Sociology* 215; Morris L, *Asylum, Welfare and the Cosmopolitan Ideal: A Sociology of Rights* (Routledge 2010).

prescribed equality between citizen and foreigner, this theory forms a justificatory premise for prioritising need over immigration status.

The treatment afforded to newcomers within a State can fall within a spectrum of different behaviours; granting full hospitality to those who are welcome, and perhaps later allowing for naturalisation, or conversely, displaying hostility to those who are seen as unwelcome. Consequently cosmopolitanism advocates ‘cosmopolitan hospitality’ which promotes particular standards of treatment in cross border movements that takes into account the needs and interests of both the host and guest. As such, the following section will begin by addressing the moral underpinnings of cosmopolitan theory before refining analysis to cosmopolitan hospitality and the ways in which hospitality can be used to further the interests of the asylum seeking community. Whilst addressing hospitality and its meaning in practice, the suitability of human rights as a measure of cosmopolitan hospitality will be considered. Human rights reflect an institutional standard of hospitality providing a benchmark by which to assess the asylum support system. Accordingly, the respect and enforcement of rights standards for foreigners signifies conditions of hospitality as the rights and needs of the guest are accommodated.

3.4 (a) The meaning of cosmopolitanism and its relevance to asylum seekers

The term cosmopolitanism embodies a number of meanings, from moral duties owed on the basis of our common humanity, to the fluidity of culture and the eradication of national boundaries separating identity, commerce and knowledge. For some, cosmopolitanism refers to an order of norms or law, envisioning a global order or polity. Whereas moral cosmopolitanism proclaims that ‘*every human being has a global stature as an ultimate unit of moral concern*’,¹²⁷ legal cosmopolitanism is

¹²⁷ Thomas Pogge, ‘Cosmopolitanism and Sovereignty’ (1992) 103 Ethics 48, 49.

linked to a ‘*concrete political ideal of a global order under which all persons have equivalent legal rights and duties, that is, are fellow citizens of a universal republic*’.¹²⁸ As this thesis is based upon the asylum support system which exists within the context of the nation state, it will draw from moral cosmopolitanism as an aspirational framework which should be taken into consideration in the creation of welfare policies.

The philosopher Thomas Pogge¹²⁹ attributes three elements to all cosmopolitan positions. The first is the concept of individualism, which recognises the individual human being as ‘*the ultimate unit of concern*’ as opposed to categorised groups such as families, tribes, communities or states. The second, universality, attaches this status of *ultimate concern* to every living human being equally, in disregard of subsets such as gender, religion or nationality. The third, generality, means that this status has global force, thus ‘*persons are ultimate units of concern for everyone – not only for their compatriots, fellow regionalists, or such like*’.¹³⁰ Beck terms this type of thinking the ‘cosmopolitan outlook’ which provides ‘*the latent potential to break out of the self-centred narcissism of the national outlook and the dull incomprehension with which it infects thought and action*’.¹³¹ According to Beck, adopting a cosmopolitan outlook within daily life and the institutions of the State will lead to the enlightenment of human beings.

Bestowing the asylum seeking community with equivalent social rights to those of EEA citizens requires a disregard for provision based on national identity. Instead it demands that needs, innate to all humans, are prioritised so that the

¹²⁸ Ibid 49.

¹²⁹ Ibid; Thomas Pogge, ‘Cosmopolitanism: A Defence’ (2002) 5 Critical Review of International Social and Political Philosophy (CRISPP) 86; Thomas Pogge, *World poverty and human rights: cosmopolitan responsibilities and reforms* (Polity 2002).

¹³⁰ Pogge, ‘Cosmopolitanism and Sovereignty’ 49 (n 127).

¹³¹ Ulrich Beck, *Cosmopolitan Vision* (Polity Press 2006) 2.

capabilities and rights of the currently excluded groups are actualised. Presently within the UK, the accident of birthplace determines who is entitled to food in their stomach and shelter over their head, which is most apparent in the treatment of failed asylum seekers whom refuse to return home and who, as a result, live destitute. Despite the arbitrariness of birthplace, nationality determines the ability to meet the most basic of human needs. As Nussbaum asserts, if individuals are excluded from provision on the basis of ‘*morally irrelevant*’¹³² characteristics such as citizenship, what prevents us from later grounding exclusion upon other irrelevant identity categories such as gender or race? Cosmopolitanism provides the means to transcend such division, calling upon us to ‘*regard our deliberations as, first and foremost, deliberations about human problems of people in particular concrete situations, not problems growing out of a national identity that is altogether unlike that of others*’.¹³³ Cosmopolitan welfare provision would therefore re-establish human need as the correct perspective for distribution as opposed to distribution predicated on immigration status. Regarding the needs of citizens and the asylum seeking community as equally important does not however assume that all persons should be provided with uniform welfare provision, on the contrary, cosmopolitanism is centred on respecting each and every individual which means that the diversity of needs possessed by different recipients must be recognised within the system, a notion that will be more fully explored in chapter five and touched upon throughout chapter four.¹³⁴ Recognition of cosmopolitan morality does not therefore impose homogeneity but embraces the equal importance of all human beings in acceptance of difference.

¹³² Nussbaum, 'Patriotism and Cosmopolitanism' 5 (n 124).

¹³³ Ibid 7-8.

¹³⁴ See text to n 2 ch 5 and text to n 106 ch 4.

As birthplace is something over which no individual has control, cosmopolitanism is central in asserting the rights of asylum seekers who are forced to flee their countries of origin and find themselves at the mercy of foreign States. As Nussbaum powerfully contends

'the accident of where one is born is just that, an accident; any human being might have been born in any nation...Recognizing this, we should not allow differences of nationality...to erect barriers between us and our fellow human beings. We should recognize humanity wherever it occurs, and give its fundamental ingredients, reason and moral capacity, our first allegiance and respect'.¹³⁵

The cosmopolitan citizenship advocated by Nussbaum entails a moral attitude which denies the prioritisation of communal affairs above the affairs of those who are other. Consequently she opposes the claims of 'special obligation'¹³⁶ that emerge from patriotism which should never overshadow our '*love of humanity*'¹³⁷ or '*lead us to ignore the needs of others with whom we share neither culture nor descent, neither genealogy nor history*'.¹³⁸ Benhabib also endorses Nussbaum's position, stating that '*a cosmopolitical attitude lies at the core of moral universalism, and must oblige the moral agent to mediate the demands of the universal with the draw of the particular*'.¹³⁹ Kant conceptualised the mediation between the universal demands of foreigners and the particular demands of the State as the foreigner's right to hospitality, a concept that will be explored later in the chapter. Finding a fair balance between the demands of the universal and the draw of the particular is precisely what

¹³⁵ Martha C. Nussbaum, 'Kant and Stoic Cosmopolitanism' (1997) 5 Journal of Political Philosophy 1, 7.

¹³⁶ Special obligations are moral obligations which emerge from belonging to some human communities such as that of descent or genealogy.

¹³⁷ Nussbaum, 'Patriotism and Cosmopolitanism' (n 124).

¹³⁸ Benhabib, *The Rights of Others: Aliens, Residents and Citizens* 95 (n 86).

¹³⁹ Ibid 95.

this thesis aims to address in balancing the rights and interests of the asylum seeking community alongside those of citizens.

Nussbaum uses the concept of Hieroclean circles to simplify understanding of moral cosmopolitanism likening our allegiances to a series of concentric circles which start from the centre circle engulfing the self, moving systematically outwards to circles encompassing groups such as family, neighbours, community etc. until we reach the largest outside circle of humanity. Nussbaum states that our task is to draw the outward circles inwards, to *'make human beings part of our community of dialogue and concern, base our political deliberations on that interlocking commonality, and give the circle that defines our humanity special attention and respect'*.¹⁴⁰ Nussbaum's expansion of circles thus centres on moral concern for others and it is argued that in exhibiting such concern, conditions of poverty and destitution which lead to suffering cannot be ignored. The denial of basic living standards on the basis of nationality is thus unacceptable as it is based on a natural and unchangeable characteristic over which persons have no control.

In mediating the demands of the universal with the draw of the particular, Nussbaum stresses that embracing universal affiliation need not be at the sacrifice of local identification, but rather alongside it, a notion which is also supported by Beck who writes that it is a fatal error to conclude that cosmopolitan empathy should replace national empathy. Instead they *'permeate, enhance and colour each other'*;¹⁴¹ pitching one perspective against the other is a false opposition. Nussbaum illustrates this by using the example of her daughter to whom she apportions love, support and finance but specifies that *'we do not really think our own children are morally more important*

¹⁴⁰ Nussbaum, 'Patriotism and Cosmopolitanism' 9 (n 124).

¹⁴¹ Beck 6 (n 131).

than other people's children, even though almost all of us who have children would give our own children far more love and care than we give others'.¹⁴² Nussbaum's use of Hieroclean circles has not however gone without criticism. For Bok, the circles demonstrate *'the necessary tensions between what we owe to insiders and outsiders of the many interlocking groups in which we find ourselves'.¹⁴³* This is also confirmed by Walzer¹⁴⁴ who states that the clarity of such diagrammatic patterns registers his allegiances at the centre, the mediations of which work outwards rather than inwards. These assertions summarise the primary arguments in criticism of cosmopolitan theory which is the human need for affiliation whether in the form of kinship, neighbours, democratic communities or the State itself.¹⁴⁵ Such arguments are particularly salient in relation to the welfare state, which, as discussed, is held to rely on a common solidarity felt amongst a clearly defined community. The concept of identity as a prerequisite for solidarity is thus reiterated as a critique of cosmopolitan theory. Should solidarity be extended to the whole world population, De Beer and Koster point out, it may not constitute solidarity at all as

'an often neglected consequence of solidarity is that the inclusion of those people who belong to the circle of solidarity inevitably means the exclusion of others who fall outside this circle. Inclusion and exclusion are inextricably linked to each other',¹⁴⁶

¹⁴² Nussbaum, 'Patriotism and Cosmopolitanism' 13 (n 124).

¹⁴³ Sissela Bok, 'From Part to Whole' in Joshua Cohen (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996) 39.

¹⁴⁴ Walzer thus states: *'My allegiances, like my relationships, start at the centre. Hence we need to describe the mediations through which one reaches the outer circles, acknowledging the value of, but also passing through, the others...and then an effort not so much to draw the outermost circle in as to open the inner ones out'*. Michael Walzer, 'Spheres of Affection' in Joshua Cohen (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996) 126.

¹⁴⁵ Miller (n 81); Bok (n 143); Elaine Scarry, 'The Difficulty of Imagining Other People' in Joshua Cohen (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996); Amy Gutmann, 'Democratic Citizenship' in Joshua Cohen (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996).

¹⁴⁶ P. De Beer and F. Koster, *Sticking Together Or Falling Apart? Solidarity in an Era of Individualization and Globalization* (Amsterdam University Press 2009) 22.

thus in practice, showing solidarity always means dividing people and treating them differently.

At this point it is therefore necessary to substantiate the form of cosmopolitanism which will be drawn upon in advocating for welfare provision for the asylum seeking community. Though cosmopolitanism in its most extreme form calls for the elimination of borders, it is now widely accepted that cosmopolitan theory can be drawn upon to guide human interactions whilst accepting the existence of State borders.¹⁴⁷ The term ‘welfare state’ intrinsically assumes the existence of a State in which resources are to be distributed; accordingly the cosmopolitan welfare provision advocated within this thesis does not require the extension of welfare benefits to the *whole world population*, but rather that the needs of all individuals within the State are recognised and provision is granted on the basis of need as opposed to nationality. The exclusionary boundaries of the welfare state thus remain territorially defined which gives rise to a ‘defined community’ of welfare recipients: those residing within the State who qualify as being in need. In this manner, cosmopolitan redistribution recognises the equal moral worth of all individuals within the State.

*‘In the last analysis, one is a member of a world community by the sheer fact of being human; this is one’s “cosmopolitan existence.” When one judges and when one acts in political matters, one is supposed to take one’s bearings from the idea, not the actuality, of being a world citizen’.*¹⁴⁸

As explored, the concept of cosmopolitanism advocates an equal moral regard for all human beings regardless of race, nationality or local affiliation. Though the theory used in this thesis does not undermine the importance of such associations it asks for consciousness that a significant number of these characteristics are accorded to us by

¹⁴⁷ Beck (n 131); S. Benhabib and R. Post, *Another Cosmopolitanism* (Oxford University Press, USA 2006); Appiah, *Cosmopolitanism: ethics in a world of strangers* (n 125).

¹⁴⁸ H. Arendt and R. Beiner, *Lectures on Kant's Political Philosophy* (University of Chicago Press 1989) 75-76.

chance (a basis which is irrefutable). In light of the arbitrary acquisition of citizenship, which undeniably influences opportunity, cosmopolitanism promotes an ethos of generalised respect for the individual. This respect crosses all boundaries of the local, including those of citizenship and nationality. Thus in relation to the individual citizen, Nussbaum advocates mindfulness of the needs of others so that in making choices, be they political, social or economic the moral importance of the person is never undermined.

This section has thus far explained the moral underpinnings of cosmopolitanism which advocates for moral concern towards ‘others’ which should not be undermined by citizenship. The next section will show how moral cosmopolitanism can be used in encounters between foreigners and the State to temper the treatment afforded to non-citizens by examining the concept of cosmopolitan hospitality. The next section will therefore address the application of hospitality within the asylum support system. One of the founding contributors to hospitality theory was Immanuel Kant and consequently his theory will first be explored before assessing its relevance within the modern context of the asylum support system. The justifications and meaning of hospitality will then be examined before extending discussion to methods of realising hospitality, such as human rights, which provide content to the theory in practice and a benchmark against which the asylum support system can be compared.

3.4 (b) Hospitality

3.4 (b) (i) Kantian hospitality

The association of cosmopolitanism with hospitality stemmed from the writings of Immanuel Kant in his essay ‘*Perpetual Peace*’¹⁴⁹ written in 1795, in which he set out three articles promoting peaceful mutual relations amongst States: *The Civil Constitution of Every State shall be Republican; The Right of Nations shall be based on a Federation of Free States; and the Cosmopolitan Right shall be limited to Conditions of Universal Hospitality.*¹⁵⁰ As the three articles were intended to be read together, Kant’s position on hospitality is further clarified by reading the first two articles and hence a brief description of their content will be given.

The first of Kant’s articles sets out that the civil constitution of every state should be republican, to which Kant attributes three principles

*‘firstly, the principle of freedom for all members of society (as men); secondly, the principle of the dependence of everyone upon a single common legislation (as subjects); and thirdly, the principle of legal equality for everyone (as citizens).’*¹⁵¹

He thus derives State legitimacy from the implementation of a republican constitution which embraces the modern liberal understanding of sovereignty ‘*where the formal equality of States is increasingly dependent upon their subscribing to common values such as the observance of human rights...the rule of law and...self determination*’,¹⁵² his essay is therefore relevant within the current liberal climate. The second article of *Perpetual Peace* centred on what Kant termed ‘*a federation of peoples*’,¹⁵³ which essentially amounts to an international constitution created to secure the rights of each

¹⁴⁹ The following translation of Kant’s ‘Perpetual Peace’ was used in the thesis: Immanuel Kant and Hans Reiss, *Kant’s political writings* (University Press 1970). Extracts were also drawn from Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (n 86).

¹⁵⁰ Kant and Reiss (n 149).

¹⁵¹ Ibid 99.

¹⁵² Benhabib, *The Rights of Others: Aliens, Residents and Citizens* 41 (n 86).

¹⁵³ Kant and Reiss 102 (n 149).

State, *'this federation does not aim to acquire any power like that of a state, but merely to preserve and secure the freedom of each state in itself'*.¹⁵⁴ Kant distinguishes the *federation* from the notion of an undesirable *'international state'* as a federation of peoples considers *'the right of nations in relation to one another in so far as they are a group of separate states which are not to be welded together as a unit'*.¹⁵⁵ Consequently *'a federative union would permit the exercise of citizenship within bounded communities'*,¹⁵⁶ which to an extent is recognised through the institutions of the European Union and the United Nations which respect the sovereignty of each State whilst implementing overarching international objectives such as respect for human rights and economic unity. The focus of Kant's third article, on *'Cosmopolitan Right'* centres on the obligation upon States to treat foreigners with hospitality. Though Kant's justification for hospitality will be more fully explored later in this section, in brief he regarded hospitality as necessary on the premise that in exercising freedom, human beings are bound to encounter one another given the limited boundaries of the earth. Hospitality is therefore a necessary condition to achieving peace. His earlier articles also demonstrate that Kant respected the sovereignty of each State provided they adhered to specific (republican) values, Kant's cosmopolitanism does not therefore invoke open borders.

Within *'Cosmopolitan Right'*, Kant defines hospitality not as philanthropy, but as a right of the *'stranger not to be treated as an enemy when he arrives in the land of another. One may refuse to receive him when this can be done without causing his destruction; but so long as he peacefully occupies his place, one may not treat him*

¹⁵⁴ Ibid 104.

¹⁵⁵ Ibid 102.

¹⁵⁶ As found in Benhabib, *The Rights of Others: Aliens, Residents and Citizens* 39 (n 86).

with hostility'.¹⁵⁷ Hospitality is not therefore a form of kindness or generosity but a right to which all human beings are entitled. Kant refines this definition by adding that

*'it is not the right to be a permanent visitor that one may demand. A special contract of beneficence would be needed in order to give an outsider a right to become a fellow inhabitant for a certain length of time. It is only a temporary right of sojourn, a right to associate, which all men have.'*¹⁵⁸

Kant's construction of hospitality is therefore a right of 'sojourn',¹⁵⁹ or temporary stay, rather than the right to reside permanently. Conversely, as the stranger has the right to hospitality, the State has the right to exclude entrance unless failure to admit the foreigner would result in their destruction. Kant therefore considers both protections for the host and guest, reflecting the intrinsic tension between immigration and sovereignty.

A breakdown of the construction of Kantian hospitality provides a relatively narrow definition of the term based on treatment absent of *hostility*. He expands this definition later, proclaiming that by virtue of our common possession of the earth, humanity '*must tolerate the presence of each other*'.¹⁶⁰ In light of this statement, Kantian hospitality appears restricted to the toleration of the presence of foreigners within the State which makes its use in demanding positive social rights for the asylum seeking community somewhat limited. At this point it is therefore necessary to ground Kant's work in the historical context in which it was written which undoubtedly influenced his construction of hospitality. Kant wrote 'Perpetual Peace' at the end of the eighteenth century which was an era encompassing the European colonisation of America and the attempted domination of the Indian Ocean and Far East.

¹⁵⁷ As found in *ibid* 33.

¹⁵⁸ As found in *ibid* 27.

¹⁵⁹ *Ibid* 25.

¹⁶⁰ As found in *ibid* 27.

Consequently Kant's essay was articulated amongst debate surrounding colonialism and Eurocentrism and thus the potential hostility of the guest is repeatedly mentioned:

'the inhospitable conduct of the civilised states of our continent, especially the commercial states, the injustice which they display in visiting foreign countries and peoples (which in their case is the same as conquering them) seems appallingly great'.¹⁶¹

In empowering non-European States with the claim to sovereignty, Kant sought to protect the interests of inhabitants vulnerable to colonisation. Valdez¹⁶² writes that with respect to the context of the essay, Kant's use of sovereignty '*increases the capacity of colonized countries to respond to the behaviour of European powers, thereby enhancing the role of the cosmopolitan realm*' and cosmopolitan morality.¹⁶³ Kant's construction of sovereignty thus protects the native inhabitants of States from exploitation. Consequently, the notion of 'cosmopolitan right' is restricted to temporary stay and does not extend beyond the conditions necessary to allow foreigners to attempt to enter into relations with the native inhabitants. '*In this way, continents distant from each other can enter into peaceful mutual relations which may eventually be regulated by public laws, thus bringing the human race nearer and nearer to a cosmopolitan constitution.*'¹⁶⁴ This statement from Kant indicates that he construed 'cosmopolitan right' as the right to exercise freedom and cross borders. In exercising their 'cosmopolitan right' individuals are also afforded the right to hospitality which enables cross border contact by ensuring protection for both the host and guest enabling the peaceful interaction of peoples.¹⁶⁵ The relevance to asylum

¹⁶¹ Kant and Reiss 106 (n 149).

¹⁶² Inés Valdez, 'Perpetual What? Injury, Sovereignty and a Cosmopolitan View of Immigration' (2012) 60 Political Studies 95 104.

¹⁶³ Ibid 104.

¹⁶⁴ Kant and Reiss 106 (n 149).

¹⁶⁵ This interpretation is supported by Waldron who writes that hospitality '*is about relations between people and peoples, and it needs to be read in that determinedly non-state-centred way in order to capture the distinctive contribution it is supposed to make to Kant's practical philosophy*'. Waldron here is not claiming that Kant disagreed with the existence of States and territorial borders but rather

seekers is apparent; in crossing borders asylum seekers exercise their cosmopolitan right and, in turn, gain entitlement to hospitality.

Kant derives the ‘cosmopolitan right’ to cross borders from humanity’s *‘common possession of the surface of the earth where, as a globe, they cannot infinitely disperse and hence must tolerate the presence of each other’*.¹⁶⁶ Due to the finite surface of the globe, human contact is inevitable; as such human beings must learn to share global resources and coexist, which establishes a right to hospitality. This interpretation is substantiated by Flikschuh¹⁶⁷ who writes that the limited global boundaries of the earth force individuals to consider circumstances of justice which defines our conditions of agency. *‘The global boundary constitutes an objective given, unavoidable condition of empirical reality within the limits of which human agents are constrained to establish possible relations of right.’*¹⁶⁸ Benhabib extends this perspective by situating freedom as Kant’s *‘justificatory premise in the argument which leads to the establishment of cosmopolitan right’*, as in exercising our freedom we inevitably cross territorial boundaries.¹⁶⁹ Though freedom can be seen as a justification for hospitality, the need for hospitable treatment also derives from cosmopolitan morality and the premise that every person is an *ultimate unit of moral concern*. The treatment of individuals within foreign lands should thus respect and reflect this status. This construction is also supported by Benhabib who states that

‘the moral claim of the guest not to be treated with hostility upon arriving in the lands of another and his or her claim to temporary hospitality rest upon this moral injunction against violating the rights of humanity in the individual

that hospitality in its most simplistic construction involves relations and relationships between people. Jeremy Waldron, ‘Cosmopolitan Norms’ in Robert Post (ed), *Seyla Benhabib: Another Cosmopolitanism* (Oxford University Press 2006) 89-90.

¹⁶⁶ As found in Benhabib, *The Rights of Others: Aliens, Residents and Citizens* 27 (n 86).

¹⁶⁷ K. Flikschuh, *Kant and Modern Political Philosophy* (Cambridge University Press 2000).

¹⁶⁸ Ibid 133.

¹⁶⁹ Benhabib, *The Rights of Others: Aliens, Residents and Citizens* 104 (n 86).

person... this right of humanity, and the right to freedom which follows from it...serves as the philosophical justification for cosmopolitan right'.¹⁷⁰

The right to hospitality thus derives from our status as human beings and our right to exercise freedom, however the meaning of hospitality remains a vague and open concept. Accordingly, the next section will discuss the meaning of hospitable treatment beginning with the Kantian construction of hospitality as treatment absent of hostility, before considering whether this definition is appropriate within the modern day legal framework. Finally other ways in which hospitality could be conceptualised and enforced will be discussed with the aim of finding an appropriate measure to ensure that respect for the asylum seeking community is observed.

3.4 (b) (ii) Hospitality and the modern framework

The Kantian construction of hospitality asserts that States need only admit foreigners where failure to do so would result in their destruction and that once entry has been gained, the State is obliged to provide treatment absent of hostility. Within this arrangement the State retains the power to grant permanent settlement and create a '*special contract of beneficence... to give an outsider a right to become a fellow inhabitant for a certain length of time*'.¹⁷¹ This arrangement is currently paralleled in the modern context through recognition of refugee status and the concept of non-refoulement which curtails a State's right to refuse entrance if doing so would subject the applicant to persecution in their country of origin.¹⁷² Thus the '*right to universal hospitality...imposes an obligation on the political sovereign, by prohibiting states from denying refuge and asylum to those whose intentions are peaceful and if refusing them sojourn would result in their demise*'.¹⁷³ Refugee status, which allows five years

¹⁷⁰ Ibid 59.

¹⁷¹ As found in ibid 39.

¹⁷² Article 33 of the Refugee Convention, Article 3(1) of the 1967 United Nations Declaration on Territorial Asylum and Article 21 of the Qualification Directive.

¹⁷³ Benhabib and Post, *Another Cosmopolitanism* 25 (n 147).

of permanent settlement in the UK before review,¹⁷⁴ also resembles Kant's *special contract of beneficence* granting settlement for a specified period of time.

Though there are parallels between Kantian hospitality and refugee status, the global circumstances in which Kant construed hospitality have dramatically changed. The modern context can thus be distinguished from the Kantian paradigm (which identified the host/State as vulnerable) as the balance of power between host and guest has now shifted. Consequently it is now the guest who finds themselves at the mercy of the State as host which is apparent in the case of asylum seekers and refused asylum seekers, who sacrifice autonomy through surrendering all political and selected social rights upon entrance. As was recognised by Valdez,¹⁷⁵ the emphasis behind Kant's cosmopolitan right was not to empower sovereignty in States who already yield a disproportionate amount of power, but to ensure that weaker parties were not taken advantage of in the inevitable encounters taking place between individuals, societies and the State. Yet in the modern framework where the State possesses much greater power than the foreigner, admittance to the State and treatment absent of hostility does not suffice to guarantee protection or uphold the cosmopolitan value that every individual is an *ultimate unit of moral concern*. This is evidenced by the current situation of asylum seekers who lack the political influence of citizens as they are unable to engage in the election process. Asylum seekers' lack of empowerment defines their relation to the law, consequently the removal of social entitlements from the asylum seeking community is far easier to implement as the Government need not fear political retaliation from the group itself. The potential for injury within this relationship is great, particularly with regard to the asymmetry of power relations

¹⁷⁴ Those who were granted refugee status after 2005 will be permitted limited leave of five years, after which their case will be reviewed, those who were granted refugee status prior to 2005 can remain indefinitely.

¹⁷⁵ Valdez (n 162).

between asylum applicants and the State as *‘when these injuries take place within the borders of sovereign countries, the combination of the sovereign prerogative and the unilateral character of immigration regulation obscures such injuries’*.¹⁷⁶

In light of the modern power dynamic, it is therefore necessary to reconstruct the Kantian relationship between sovereignty and hospitality, building upon the foundational work of authors such as Valdez and Benhabib. Thus within the cosmopolitan realm, which is concerned with the relationship between and coexistence of States and individuals,

*‘institutional arrangements should be altered as this configuration evolves historically...Without this adaption, historical transformations result in the inversion of the effect that sovereignty and restricted hospitality right jointly have in the system of Kantian right. While in Kant’s account both work to protect individuals whose government was taken over by European powers, today they leave migrants without access to political and legal tools to assert a right to freedom.’*¹⁷⁷

Restoring Kant’s theory of hospitality to a one in which sovereignty and hospitality again complement cosmopolitan norms requires

‘acknowledging how globalization affects the communities of physical and virtual proximity that can be affected by our actions. It is this potential for contact and thus for injury which guides the Kantian injunction to enter a common lawful state that guarantees equal freedom for all affected’.¹⁷⁸

The Kantian notion of hospitality therefore needs to be expanded and reinterpreted to maintain its original spirit in light of changed circumstances, taking into account the power relations between the State and asylum seekers, which, at present, are heavily favoured towards sovereignty and exclusion.¹⁷⁹ The reconfiguration of hospitable

¹⁷⁶ Ibid 106.

¹⁷⁷ Ibid 96.

¹⁷⁸ Ibid.

¹⁷⁹ Katie Bales, 'Universal credit: not so universal? Deconstructing the impact of the asylum support system' (2013) 35 Journal of Social Welfare and Family Law 427.

treatment should also centre on cosmopolitan morality and reflect acknowledgement that every individual is an *ultimate unit of moral concern*.

Though Kant does not expand hospitality beyond treatment absent of hostility it is reasonable to infer, from this perspective, a negative duty upon the State and its citizens to refrain from subjecting foreigners to unjust institutions or practices which constitute hostile treatment. The poverty of asylum seekers is capable of being construed as enforced by the Government as the legal regime distinguishes between members of the asylum seeking community and citizens preventing access to employment and imposing welfare restrictions. This was confirmed in the case of *Q*¹⁸⁰ where the Court of Appeal found that the denial of support to asylum seekers, in combination with exclusion from employment, constituted '*positive action directed against asylum seekers and not...mere inaction*'.¹⁸¹ Whether this system is categorised as hostile or hospitable will be fully addressed within the next chapter but the question remains as to how hospitality can be measured within the modern Statist framework?

It is the contention of this thesis that human rights instruments present a suitable benchmark for determining whether such treatment is hospitable. This is supported by Pogge who writes that moral cosmopolitanism can be achieved through two approaches: an interactional and/or institutional approach. Whereas the interactional approach constrains the conduct of individuals by imposing positive duties such as the duty to provide protection or aid, the institutional approach places institutional constraints upon shared practices which is currently reflected in the legal system of human rights. The premise of interactional cosmopolitanism is that members

¹⁸⁰ *R (on the application of Q) v Secretary of State for the Home Department* [2003].

¹⁸¹ *Ibid* [57] (Lord Justice Phillips).

of the democratic body have a responsibility not to impose unjust State institutions upon other human beings. Thus

*'we are asked to be concerned about human rights violations not simply insofar as they exist at all, but only insofar as they are produced by social institutions in which we are significant participants. Our negative duty not to cooperate in the imposition of unjust practices, together with our continuing participation in an unjust institutional scheme, triggers obligations to promote feasible reforms of this scheme that would otherwise enhance the fulfilment of human rights'.*¹⁸²

The practical importance of Pogge's contribution is therefore related to the extent to which our 'social institutions' impact upon the rights of others. Where treatment fails to adhere to human rights standards it would be considered non-cosmopolitan and inhospitable. Human rights are therefore regarded as an institutional form of cosmopolitanism.

The use of human rights as an institutional means of realising cosmopolitan morality is widely recognised in academic literature.¹⁸³ Though one may question what cosmopolitan theory adds to the concept of human rights, it is contended that cosmopolitan recognition is a foundational aspect of human rights practice. As will be demonstrated in chapter four of this thesis, the ability of individuals to enforce rights contained within specific human rights instruments is dependent upon the State in question ratifying and incorporating that instrument. If the State opts for non-incorporation of that instrument, the human rights argument is weakened. Consequently it is necessary to look beyond institutional instruments and explore the moral justifications behind human rights recognition. It is contended that cosmopolitanism is one perspective from which the recognition of human rights can be morally justified as like cosmopolitanism, human rights demand respect and

¹⁸² Pogge, 'Cosmopolitanism and Sovereignty' 52 (n 127).

¹⁸³ Bryan S. Turner, 'Cosmopolitan Virtue, Globalization and Patriotism' (2002) 19 *Theory, Culture & Society* 45; Pogge, *World poverty and human rights: cosmopolitan responsibilities and reforms* (n 129); Beck (n 131); Benhabib and Post, *Another Cosmopolitanism* (n 147); Appiah (n 125).

standardised treatment for all human beings on the basis of their simply being human. Indeed Robert Fine credits the development of *human* rights from the rights of *man* to cosmopolitan critique¹⁸⁴ as although the rights of man presupposed a number of exclusions and silences '*they also provided the universalistic framework within which struggles for inclusion could take place: whether for women, slaves, servants, wage labourers, foreigners, the colonised, the racialised, the criminalised*'.¹⁸⁵ Cosmopolitan morality was therefore intrinsic to the international movement which expanded rights from the limitations of constructs such as 'man' or the 'nation', towards recognition on a human basis. On this basis Appiah considers himself a *liberal cosmopolitan*, which is defined by his acceptance of the nation state '*so long, in particular, as political institutions respect basic human rights*'.¹⁸⁶ For Appiah, the moral ideals of cosmopolitanism are translated into legal norms through the acceptance and enforcement of human rights standards, a position substantiated by Turner who construes human rights as a form of '*cosmopolitan virtue*'.¹⁸⁷

Though human rights instruments use the term 'dignity' to justify their existence (see Article 1 of the UDHR), it is argued that there are a number of parallels between our understanding of dignity and cosmopolitanism. Whilst 'dignity' is a concept lacking in explicit definition, it is understood within this thesis as a pre-moral capacity¹⁸⁸ attributed to individuals by virtue of their humanity (meaning it exists prior to and independent of moral consciousness). Dignity therefore exists independent of

¹⁸⁴ The rights of man that accompanied the eighteenth century revolutions proposed that men should be the bearer of rights through virtue of their status as men. Thomas Paine, *Rights of man* (Dover Publications 1999).

¹⁸⁵ R. Fine, 'Cosmopolitanism and Human Rights: Radicalism in a global age' (2009) 40 *Metaphilosophy* 8, 10.

¹⁸⁶ Pogge, *World poverty and human rights: cosmopolitan responsibilities and reforms* 26 (n 129).

¹⁸⁷ Turner (n 183).

¹⁸⁸ Meaning that it exists prior to and independent of moral consciousness.

any other status,¹⁸⁹ a notion described by Kant as *inalienable*.¹⁹⁰ Accordingly, those who fail to act in accordance with certain moral norms still retain their basic dignity and the standing to claim respect from others.¹⁹¹ During the drafting of the UDHR Charles Malik, the Lebanon representative of the drafting Committee, proposed that the basic underpinning of the UDHR was the ‘dignity of man’,¹⁹² which in his opinion meant that human rights should ‘*regard the human person as more important than the racial, national or other groups to which he/she may belong*’, a distinctly cosmopolitan statement.¹⁹³

Dignity therefore raises humans both vertically above other creatures and horizontally by influencing our interactions with one another, condemning treatment that involves ‘*explicit and visible humiliation*’.¹⁹⁴ By comparing the concept of dignity to the three cosmopolitan attributes identified by Pogge the parallels become clear, namely: *individualism*, as the possession of dignity means that humans are the ultimate units of moral concern, raised vertically above other beings and status groups such as citizens; *universality*, as dignity is possessed by all human beings regardless of their actions, immoral or otherwise; and *generality* as dignity applies horizontally so as to affect our interactions with all other persons as governed by the obligations attached to human rights. Benhabib thus construes cosmopolitan hospitality as referring ‘*to all*

¹⁸⁹ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655.

¹⁹⁰ Kant specified that ‘*I cannot deny all respect to even a vicious man as a human being; I cannot withdraw the respect that belongs to him in his quality as a human being*’. Kant, I, *The Metaphysics of Morals*, Edited by Mary Gregor and Introduction by Roger J Sullivan (Cambridge University Press 1996) 6:463.

¹⁹¹ Oliver Sensen, 'Dignity and the formula of humanity' in Jens Timmermann (ed), *Kant's 'Groundwork Of The Metaphysics Of Morals'* (Cambridge University Press 2009).

¹⁹² Tore Lindholm, 'Article 1' in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law International 1999) 4.

¹⁹³ Åshild Samnøy, 'The origins of the Universal Declaration of Human Rights' in Gudmundur Alfredsson and Asbjørn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law International 1999) 18.

¹⁹⁴ Jeremy Waldron, 'Dignity and Rank' (2007) 48 *Archives Européennes de Sociologie* 201, 215.

human rights claims which are cross-border in scope'.¹⁹⁵ In light of the fact that human rights instruments embrace the foundational aspects of cosmopolitan morality, it is contended, in concurrence with Robert Fine, that human rights are an institutional form of cosmopolitanism deriving from cosmopolitan moral values. This means that regardless of the practical implementation of human rights instruments, there remains a cosmopolitan moral onus upon States to respect, protect and fulfil the human rights of individuals within their jurisdiction. The significance of cosmopolitanism in relation to human rights thus lies in their universal moral grounding.

Accepting this contention, this thesis reasons that the best means of assessing whether the UK affords cosmopolitan hospitality to the asylum seeking community is through comparison of asylum support policies to human rights standards which constitute a moral benchmark for hospitable treatment. The content of universal rights instruments, such as the right to an adequate standard of living and the right to work contained within Articles 11 and 6 of the ICESCR, thus provide meaning to hospitality within the modern day framework and will play a central role in assessing the asylum support system. As both of these rights are somewhat vague, the next chapter will elaborate on their meanings, with particular focus on what constitutes an 'adequate' standing of living in the UK's current economic climate.

3.5 Summary

So far this chapter has established that if the State is to provide a morally cosmopolitan form of welfare support, citizenship should not be a basis for exclusion. Should the boundaries of the welfare state be extended to include the asylum seeking community, the UK would not only acknowledge their status as '*ultimate units of*

¹⁹⁵ Benhabib and Post, *Another Cosmopolitanism* 16 (n 147)

moral concern’ but it would also stay true to its pledge that the *‘inherent dignity’* and *‘equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’* as contained within the preamble to the UDHR. Immigration status should thus be removed as a determinant factor in the allocation of social rights and instead welfare should be allocated on the basis of the common *human* characteristic of need. Though exclusion on the basis of nationality may appear to be a precondition of welfare, a historical account of the post WWII welfare state revealed that prior to the 1980s universal welfare provision existed within the UK. As an alternative to social entitlements based on citizenship, welfare benefits for all persons should accord to the minimum standards of human rights. Where the human rights of foreigners are respected, the State will be construed as observing cosmopolitan hospitality which advocates for standardised levels of treatment for foreigners in cross border contact. As the human rights framework embodies the cosmopolitan norms identified earlier by Pogge, it is contended that human rights provide a modern institutional benchmark for standards of hospitality against which the UK’s asylum support policies can be compared. Importantly, the ratification of international and European human rights instruments signifies that the UK accepts human rights as a minimum standard of morally acceptable treatment against which the Government’s law and policies can be measured. Yet aside from providing a moral benchmark for analysis, human rights also provide a tool for the realisation of hospitality as some rights are justiciable through a number of institutional mechanisms, including the national courts. As will be explored however, socio-economic rights are often regarded as non-justiciable by State parties reflecting the difficulties of implementing cosmopolitan norms within a state centric framework. As this thesis is also concerned with the ways in which hospitality towards the asylum

seeking community can be realised, the justiciability of socio-economic rights will be explored towards the end of the next chapter. Before doing so, the chapter must first establish whether human rights violations are taking place which would indicate an absence of hospitality.

To determine whether the UK is upholding cosmopolitan principles in providing asylum support, the next chapter will examine the impact of the asylum support system on the lives and dignity of asylum seekers. Insight into the reality in which applicants are living will be gained through analysis of NGO research exploring their living circumstances. The treatment endured by applicants will then be compared to human rights standards through examination of European and international human rights instruments to ascertain the extent of the UK's commitment to cosmopolitanism and the injury imposed upon the asylum seeking community as 'others'.

Chapter Four

The Impact of the Asylum Support System

4.1 Introduction

‘The treatment of asylum seekers is important for the men, women and children seeking asylum in the UK. But it is also important for those of us who are not asylum seekers. This is because the UK’s approach to migration – and its treatment of asylum seekers in particular – says something about the society we live in and the kind of country we want to be. The human rights principles and values of democratic societies must guide the country’s behaviour towards asylum seekers and its relationships with other countries from which asylum seekers originate.’¹

This quote was taken from the report of the House of Lords and House of Commons Joint Committee on Human Rights following their examination of the asylum support system. The emphasis of the quote denotes that our treatment of asylum seekers reflects the values of our society. In adopting this perspective, this chapter examines the treatment currently afforded to the asylum seeking community through the asylum support system, taking into account the personal effects of the system in practice as well as its impact upon human rights which will be used to determine whether the values reflected within British society are those of sanctuary and hospitality or, conversely, those of self interest.

The human rights instruments which will provide content to the meaning of hospitality throughout analysis are those that are universal in nature including: the UDHR; the ICESCR; the International Covenant on Civil and Political Rights (ICCPR); the Convention on the Rights of the Child (CRC); the Convention on the Elimination of Discrimination Against Women (CEDAW); the Convention on the Elimination of All forms of Racial Discrimination (ICERD); the Convention on the Rights of Persons with Disabilities (CRPD); and European rights instruments such as

¹ Joint Committee on Human Rights, *The Treatment of Asylum Seekers* (The Stationery Office, HL 81-I, HC 60-I, 2006-2007) para 12.

the ECHR and the Charter of Fundamental Rights of the European Union (the Charter) which applies where European Union law, such as the Reception Conditions Directive, is being implemented.² Instruments that discriminate between citizens and the asylum seeking community will not be examined within the rights analysis as they do not support or contribute to an understanding of cosmopolitan hospitality. Though the European Social Charter is relevant to assessing whether the UK provides adequate standards of welfare benefits, the rights and interests contained within the European Social Charter are not universal in scope meaning that they are not applicable to the asylum seeking community. Paragraph 1 of the appendix to the Charter thus states that *'the persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned'*, paragraph 2 also extends these rights to refugees. Yet as established in chapter two, within the UK an asylum seeker is not classed as a refugee until their status has been regularised by the State, consequently the rights afforded under the Charter cannot be enjoyed by asylum seekers. However, according to Polonca Končar, President of the European Committee of Social Rights,

'the standpoint of the Committee regarding the right to benefit from social welfare services concerns everybody lacking the capability to cope with social problems, and in particular the vulnerable groups, which may be deemed to include persons of concern to UNHCR'.³

Though this statement appears to extend ESC protection to the asylum seeking community, the explicit restriction within the treaty remains. Given the limited

² The scope of the Charter is set out in Article 51 of its provisions which states that it applies to the institutions and bodies of the EU. With regard to Member States, Charter provisions apply to individual *'Member States only when they are implementing Union law'*. The implementation of Union law refers to obligations that require States to take action and obligations that must be complied with when a State derogates from EU law. The Charter therefore only applies to the UK when implementing European legislation domestically (such as the asylum Directives). K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375.

³ Council of Europe, *Round Table on the Social Rights of Refugees, Asylum-Seekers and Internally Displaced Persons: A Comparative Perspective* (Council of Europe, 2009) 7.

application of the ESC to the asylum seeking community and the UK Government's failure to ratify either the Amending Protocol⁴ to the European Social Charter, the Revised Charter⁵ (which was designed to gradually replace the 1961 provisions), or the Additional Protocol Providing for a System of Collective Complaints,⁶ the provisions of the European Social Charter will not be discussed.

Before conducting an analysis of NGO data, the specific methods used in applying human rights instruments must be set out. It is important to acknowledge these methods because the remainder of the chapter will use institutional instruments as a means of analysing whether the UK Government is upholding its cosmopolitan obligations. On the whole, all of the instruments listed above apply similar standards and language in establishing state obligations and legitimate limitations upon rights. All human rights instruments thus require that states respect, protect and fulfil their rights obligations which will be expanded upon in the next section. In certain instances the construction of particular terms within the treaties may differ, but where such instances occur the chapter will acknowledge the different interpretations of the terms. To enable a coherent and effective analysis of the asylum support system, the following section will first address the methods of application used in applying human rights law before conducting a rights analysis of the asylum support system which is framed around the central rights of employment and an adequate standard of living.

Though hospitality is best achieved through securing the enjoyment of all human rights, analysis is limited by the scope of the thesis which focuses on welfare provision and hence socio-economic rights. The subsistence rights found within socio-economic instruments are most relevant to this study as they correlate to the underlying

⁴ Article 1 Protocol amending the European Social Charter (Turin, 21 October 1991) ETS 142.

⁵ European Social Charter (revised) (Strasbourg, 3 May 1996) ETS 163.

⁶ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Strasbourg, 9 November 1995) ETS 158.

purpose of welfare benefits which is to provide for persons essential living needs and eliminate 'want'.⁷ Subsistence rights amount to those relating to an adequate standard of living, which are enshrined in Article 11 of the ICESCR encompassing the right to food, clothing and shelter.⁸ As welfare dependence is caused, in part, by unemployment, the right to work will also be addressed as restrictions upon work deny individuals the opportunity to fulfil their own needs, creating a positive obligation upon the state to provide.⁹ The right to work and an adequate standard of living will therefore form the central framework for assessment within the chapter which will be substantiated throughout by discussion of other rights affected by the system, including those of a civil and political nature recognising that most rights are interdependent. Within the analysis, three groups of asylum seekers will be distinguished on the basis of financial provision: asylum seekers with active applications in receipt of financial support and/or housing under section 95 of the IAA 1999, refused asylum seekers in receipt of financial support and accommodation under section 4 of the IAA 1999 and refused asylum seekers who are unable to access either support or employment rendering them destitute.

4.2 The application of human rights

4.2 (a) Commonalities in application

Though the application of treaty rights differs depending on the nature of the right, as discussed, a number of commonalities exist amongst international human rights instruments. Broadly, the UK's obligations under human rights law can be divided into three duties: to respect, protect and fulfil the human rights of individuals within

⁷ William Beveridge, *Social Insurance and Allied Services* (Cmd 6404, Macmillan 1942).

⁸ Daniel P. L. Chong, 'Five Challenges to Legalizing Economic and Social Rights' (2009) 10 Human Rights Review 183, 184.

⁹ *R (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

their jurisdiction. This tri-partite obligation originated from the work of Henry Shue¹⁰ and was later developed by the United Nations Committee on Economic, Social and Cultural Rights (CESCR).¹¹ The requirement to respect the rights of individuals within the State is a negative duty which negates direct or indirect interference with rights. It therefore requires that states refrain from implementing laws or policies that negatively impact upon treaty rights. This concept is linked to the second duty of ‘protection’ which similarly requires states to protect the rights of individuals from interference by third parties, though in contrast to the need to ‘respect’ rights, this is to be achieved by the implementation of positive measures. The third duty requires state parties to ensure that individuals’ rights are fulfilled. In the context of socio-economic rights for example, this could relate to the right to food under Article 11 of the ICESCR which requires the facilitation of food and, where persons are unable to provide food for themselves, the provision of food.¹² These three duties apply to all rights instruments alongside further qualifications such as the duty not to discriminate against rights holders and additional requirements that must be met if a State seeks to impose legitimate restrictions upon qualified rights.

The principle of non-discrimination is prevalent in the majority of international and European rights instruments¹³ which forms an important component in protecting the rights of foreigners within the State. A number of rights instruments thus include a clause undertaking that State parties afford the exercise of rights without discrimination of any kind as to race, colour, sex, language, religion, political or other

¹⁰ Henry Shue, *Basic Rights* (Princeton University Press 1980).

¹¹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.12: Article 11 (The Right to Adequate Food)* (United Nations Committee on Economic, Social and Cultural Rights, E/2000/22, 1999) para 15.

¹² *Ibid* para 15.

¹³ ICESCR Article 2(2); CRC Article 2; CERD Article 1 and throughout; CMW Articles 1 and 7; ICCPR Articles 24 and 26; CEDAW Article 1 and throughout; ECHR Article 14; Preamble to the ESC; Article 21 Charter of Fundamental Rights of the European Union.

opinion, national or social origin, property, birth or other status. Within the context of the welfare state, immigration status forms a central factor for differential treatment and exclusion but whether such treatment constitutes discrimination is a question of fact which takes into account a number of considerations. Both the CESCR¹⁴ and the European Court of Human Rights (ECtHR) have affirmed that immigration status is a protected status under the facet of nationality which normally falls under the category of 'other status'. In the case of *Bah v United Kingdom*¹⁵ the ECtHR found that immigration status amounted to a ground of distinction for the purposes of Article 14 of the ECHR. The fact that immigration status is conferred by law rather than being inherent to the individual did not preclude it from amounting to a ground of discrimination, though the Court did assert that as a result of this conferral, immigration status carried less weight than a natural characteristic such as gender. The Court did however distinguish between migration based on choice and forced migration recognising that refugee movements are not optional. Forced migration is therefore elevated above other migration statuses and should be considered with equal gravity to discrimination on the basis of an inherent characteristic.¹⁶ This is confirmed by the CESCR who state that in relation to non-contributory benefits schemes, '*refugees, stateless persons and asylum-seekers, and other disadvantaged and*

¹⁴ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2)* (United Nations Committee on Economic, Social and Cultural Rights, E/C.12/GC/20, 2009) para 30.

¹⁵ In this case the claimant contended that she was discriminated on the basis of her sons' nationality. The Government argued that discrimination was justifiably based on the child's immigration status as her son had conditional leave to remain on the premise that he had no recourse to public funds. She applied for homelessness accommodation but was not considered priority need as her son was excluded from the application on the basis of immigration status. The Court held that immigration status remains a protected characteristic under Article 14 ECHR but that there was no violation of Article 14 as the discrimination to which the '*applicant was subjected was reasonably and objectively justified by the need to allocate, as fairly as possible, the scarce stock of social housing available in the United Kingdom and the legitimacy, in so allocating, of having regard to the immigration status of those who are in need of housing.*' *Bah v United Kingdom* (2012) 54 EHRR 21.

¹⁶ *Ibid* [47].

marginalized individuals and groups, should enjoy equal treatment in access...consistent with international standards' which encompasses support schemes for persons experiencing unemployment, disability and maternity.¹⁷ In contrast, the provisions of the ICERD expressly permit differential treatment between citizens and non-citizens. Article 1(2) states that the Convention '*shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens*'. Though this presents an institutional barrier to asserting equal provision between asylum seekers and EEA citizens, the Convention is further qualified by the Committee on the Elimination of Racial Discrimination (CERD) General Recommendation No.30¹⁸ which provides in paragraph 4 that any differential treatment based on citizenship or immigration status will constitute discrimination if the criteria are not applied in pursuit of a legitimate aim or are disproportionate to the achievement of that aim. This standard is fairly common when establishing whether distinctive treatment constitutes discrimination and includes assessment as to whether the aims of the measures are legitimate, whether the measures are compatible with the nature of the rights contained within the specific instrument and whether they are

*'solely for the purpose of promoting the general welfare in a democratic society.'*¹⁹
In addition, there must be a clear and reasonable relationship of proportionality

¹⁷ Paragraph 2 of United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.19: Article 9 (The Right to Social Security)* (United Nations Committee on Economic Social and Cultural Rights, E/C.12/GC/19, 2008) states that: '*social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents*'.

¹⁸ United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No.30: Discrimination Against Non Citizens* (United Nations Committee on the Elimination of Racial Discrimination, A/59/18, 2004).

¹⁹ To be construed to mean furthering the well-being of the people as a whole as per Article 52 of the United Nations Economic and Social Council, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (United Nations Economic and Social Council, E/CN.4/1987/17, 8 January 1987).

*between the aim sought to be realized and the measures or omissions and their effects’.*²⁰

In addition the CERD Committee confirm that their clause within Article 1(2) should not detract from the rights afforded to non-citizens under the UDHR, ICESCR or ICCPR.²¹ As the majority of limitations faced by asylum seekers arise on the basis of immigration status, assessment of whether such treatment amounts to discrimination will be undertaken within the rights analysis alongside evaluation of whether current restrictions infringe upon specific human rights standards.

Where states seek to impose restrictions upon human rights they must meet a number of requirements for such restrictions to be considered both morally and legally legitimate. The human rights granted within legal rights instruments are divided between rights of an absolute nature and those that are qualified. Whereas the breach of an absolute right (such as the right to be free from inhuman and degrading treatment) cannot be justified by any interest of the state,²² interference with qualified rights can be justified as long as a number of substantive requirements are met. To refrain from acting in contravention of human rights law any limitations imposed upon rights must be considered proportionate (in the broad sense) and fulfil the following standard qualifications:²³ limitations must be in accordance with the law; *and* be done to secure a legitimate aim; *and* be necessary in a democratic society. These qualifications are found within Article 4 of the ICESCR, throughout the rights attached

²⁰ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights* (Art. 2, para. 2) para 13 (n 14).

²¹ United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation 11: Non-citizens* (Art. 1) (United Nations Committee on the Elimination of Racial Discrimination, A/48/18, 1993).

²² *Chahal v United Kingdom* (1997) 23 EHRR 413.

²³ See Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012).

to the ICCPR and ECHR and in Article 52 of the Charter of Fundamental Rights of the European Union.

The meaning of necessity can be further broken down into three factors: that limitations respond to a pressing public or social need; that they pursue a legitimate aim; and that they are proportionate (in a narrow sense)²⁴ to the legitimate aim being pursued, meaning that any reduction in the enjoyment of rights must be adequately balanced against the realisation of the aim.²⁵ In expanding upon the meaning of proportionality, the ECtHR have affirmed that whether interference impairs the very essence of the right²⁶ and whether there is a less intrusive means of achieving the aim pursued are important considerations.²⁷ This is also endorsed by the United Nations Committee on Civil and Political Rights who note that in order to be proportionate, measures must be appropriate to achieve their protective function and should be the least intrusive means of achieving the desired result.²⁸ Articles 5(1) of the ICESCR and ICCPR also contain compatibility clauses which prohibit States, groups or persons from engaging in any activity '*aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant*'. On this basis a number of limitations are wholly incompatible. Thus in relation to socio-economic rights under the ICESCR the State would not be permitted to prevent persons from accessing

²⁴ Ibid.

²⁵ United Nations Economic and Social Council, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* para 60 (n 19); *Handyside v The United Kingdom* (1976) 1 EHRR 737.

²⁶ *Vereinigung Demokratischer Soldaten Österreichs und Gubi v Austria* (1994) 20 EHRR 56.

²⁷ *Campbell v The United Kingdom* (1992) 15 EHRR 137.

²⁸ United Nations Committee on Civil and Political Rights, *General Comment No.27: Article 12 (The Right to Freedom of movement)* (United Nations Committee on Civil and Political Rights, CCPR/C/21/Rev.1/Add.9, 1999) para 14.

minimum levels of food as this would be incompatible with rights.²⁹ The relation between right and restriction, norm and exception may not therefore be reversed.³⁰

The preceding methods of application apply to all UN, EU and Council of Europe instruments alongside other standards unique to each specific instrument. Where rights are engaged by the policies of the asylum support system, the chapter will draw upon these methods of application to assess whether the policies and limitations imposed conform to the necessary standards required for legitimation. Though the above discussion applies more generally to all of the international and European human rights instruments to be discussed, there are some instruments that adopt specific methods of application such as the ICESCR which employs progressive realisation in determining whether States are meeting their obligations under the Covenant. As the rights analysis within this chapter is centred upon the right to work and adequate standards of living (both drawn from the ICESCR), the methods of application relevant to the Covenant, such as progressive realisation, will first be acknowledged.

4.2 (b) Application of the International Covenant on Economic, Social and Cultural Rights

In contrast to civil and political instruments which generally impose immediately enforceable obligations, Article 2³¹ of the ICESCR allows for the

²⁹ Penelope Mathew, *Reworking the Relationship between Asylum and Employment* (Routledge 2012) 114-115.

³⁰ United Nations Committee on Civil and Political Rights, *General Comment No.27: Article 12 (The Right to Freedom of movement)* para 13 (n 28).

³¹ Article 2 of the ICESCR thus states:

'1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine

progressive realization of rights in recognition that economic disparities exist between States. This means that social policies enacted by the UK as a means of meeting rights obligations should progress in relation to the socio-economic success of the state. Though this grants a margin of appreciation to states in allocating public spending it subjects the state to three immediate obligations: ‘the minimum core’ obligation; the duty to ‘take steps’ to realise the rights found within the Covenant; and the prohibition of retrogressive measures.

The ‘minimum core obligation’ seeks to ensure the satisfaction of minimum essential levels of each right. A state in which any significant number of individuals is deprived of basic rights such as essential healthcare, food, basic shelter, housing or education is *prima facie*, failing to discharge its obligations under the Covenant.³² Where a state is failing to meet minimum core obligations due to a lack of available resources, the state must prove that every effort was made to use all available resources in order to satisfy, as a matter of priority, those minimum obligations.³³ The allocation of resources is therefore central in assessing whether the UK is upholding its obligations with respect to the Covenant, however not all ‘resources’ are seen as equal as basic needs must take priority. The Limburg Principles, which interpret key provisions in the Covenant, thus call for the right to subsistence under Article 11 to be given precedence over other types of spending. Consequently spending on food, shelter and other essential living needs should take priority.³⁴ In 2012/13 UK defence

to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.’

Though Article 2(3) of the ICESCR represents a limitation clause, this is only applicable to developing countries. As the UK is not a developing country this clause will not be explored further on the basis that the UK cannot rely on it to derogate from their obligations on this basis.

³² United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.3: The nature of State parties obligations (Art 2, par.1)* (United Nations Committee on Economic, Social and Cultural Rights, E/1991/23, 1990) para 10.

³³ *Ibid* para 10.

³⁴ The Limburg Principles clearly state that in assessing the use of available resources ‘*priority shall be given to the realization of rights recognised in the Covenant, mindful of the need to assure to*

spending totalled £34.3 billion, when considering public expenditure on social welfare and the fulfilment of minimum core rights under Article 11, spending such as this needs to be taken into account.³⁵ As the UK spends a significant proportion of its budget on none minimum core needs such as defence it cannot therefore claim to have a ‘lack of resources’ which could justify its failure to provide refused and destitute asylum seekers with minimum levels of subsistence. Essentially the minimum core represents a minimum level of treatment which is essential to upholding human dignity. Accordingly, where political agendas such as the desire to control immigration interfere with minimum core rights this could be construed as hostile treatment causing harm to the foreigner which is counter to hospitality and cosmopolitan morality. Though the minimum core represents an immediate duty, in a developed country such as the UK, rights standards should be elevated above minimum core needs in recognition that such standards are not the social norm. In relation to the right to an adequate standard of living (Article 11 ICESCR), the meaning of *adequate* is relative to the accepted social living standards and economic conditions of the UK which will be explored in greater detail at section 4.3(b).³⁶

The second requirement imposed by the ICESCR relates to the obligation upon State parties to ‘*take steps*’ to achieve the realisation of Covenant rights.³⁷ ‘*Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant*’³⁸ using all ‘*appropriate means*’ which includes the adoption of legislative measures. Consequently in addition to introducing

everyone the satisfaction of subsistence requirements as well as the provision of essential services’. United Nations Economic and Social Council, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, para 28 (n 19).

³⁵ Ministry of Defence, *UK Defence Statistics Compendium* (Ministry of Defence 2013).

³⁶ See text to n 156 ch 4.

³⁷ United Nations Economic and Social Council, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* para 16 (n 19).

³⁸ United Nations Committee on Economic, *General Comment No.3: The nature of State parties obligations (Art 2, par.1)* para 2 (n 32).

progressive measures, states must also monitor the extent to which rights are realised within their jurisdiction and devise strategies and policies for their promotion.³⁹

Finally as the Covenant requires progressive measures, any measures that are deliberately retrogressive require *'the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'*.⁴⁰ The CESCR has further commented that *'there is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant'*,⁴¹ a sustained reduction in levels of asylum support and increased prohibition on access to work is thus prohibited, which indicates that the significant regression in the asylum seeking community's social entitlements over the last two decades within the UK is prima facie in contravention of the ICESCR. Where deliberate retrogression occurs the CESCR will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.⁴² As the political justifications for restricting employment and welfare support for asylum seekers rests upon immigration control as opposed to a lack of available resources, it is unlikely

³⁹ Ibid para 11.

⁴⁰ Ibid para 9.

⁴¹ United Nations Committee on Economic, *General Comment No.19: Article 9 (The Right to Social Security)* para 42, see also para 59 (n 17).

⁴² Ibid para 42.

that the restrictions would be regarded as ‘reasonably justified’ in relation to point (a). The impact of the restrictions is yet to be explored however independent reviews of the system, which are required under part (f) of the CDESCR requirements, suggest that the asylum support system is overly restrictive and in need of reform.⁴³ Such conclusions cast doubt upon the legitimacy of the Government’s commitment to the policies of the ICESCR as the increasingly restrictive support policies imposed upon the asylum seeking community conflicts with the foundational non-retrogressive principles of the Covenant.

The methods of application as set out above in relation to the ICESCR will be utilised within the proceeding rights analysis alongside the general methods of application discussed earlier in the chapter. The remainder of this chapter will assess the asylum support system through the international and European human rights framework, drawing upon specific treaties where they are relevant to the issues raised. In doing so, the extent to which the UK either contravenes or upholds its moral and legal obligations towards the asylum seeking community will be determined before addressing the ways in the asylum seeking community can realise standards of hospitality through enforcing human rights.

To gain insight into the treatment afforded to the asylum seeking community numerous NGO reports and research materials were accessed. By examining case studies and qualitative research undertaken by NGOs the thesis is able to look beyond a general statistical analysis of the support system and engage with the impact that

⁴³ Joint Committee on Human Rights, *The Treatment of Asylum Seekers* (n 1); Hobson C, Cox J and Sagovsky N, *Saving Sanctuary: The Independent Asylum Commission's first report of conclusions and recommendations: How we restore public support for sanctuary and improve the way we decide who needs sanctuary* (Independent Asylum Commission, 2008); Hobson C, Cox J and Sagovsky N, *Fit for purpose yet? The Independent Asylum Commission's Interim Findings* (Independent Asylum Commission, 2008); Hobson C, Cox J and Sagovsky N, *Deserving Dignity: The Independent Asylum Commission's Third Report of Conclusions and Recommendations* (Independent Asylum Commission, 2008); Teather S and others, *Report of the Parliamentary Inquiry into Asylum Support for Children and Young People* (The Children's Society, 2013).

support policies have on the everyday lives of applicants. Though a number of the case studies discussed within the rights analysis focus on specific individuals and small groups, this accords with the emphasis of cosmopolitanism which centres on upholding the rights of individuals in acknowledgement that '*everybody matters*'.⁴⁴ It is therefore important to look beyond generalised data towards the circumstances of individuals in specific situations who perhaps suffer more significantly than their peers within the asylum seeking community. Such suffering might arise on the basis of specific characteristics such as ill health, gender or age, or the intersection of numerous characteristics. The acknowledgement that discrimination and discrimination of an intersectional nature is caused by uniform support policies is particularly important within the context of the asylum support system given the diverse nature of the asylum seeking community. A system seeking to achieve truly hospitable treatment must therefore account for all of the ways in which the institutions and practices of that system impact upon its members.

⁴⁴ Appiah A, *Cosmopolitanism: ethics in a world of strangers* (Penguin 2007) 144.

4.3 Rights Analysis

4.3 (a) Employment

The right to work is contained in Article 23 of the UDHR;⁴⁵ Article 6 of the ICESCR⁴⁶ and Article 27 of the Convention on the Rights of Persons with CRPD.⁴⁷ Under Article

⁴⁵ Article 23 of the UDHR states:

'(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.'

⁴⁶ Article 6 of the ICESCR states:

'(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

(2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.'

⁴⁷ Article 27 of the CRPD states:

'1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

1 of the International Labour Organization Employment Policy Convention (No. 122) 1964 the UK is also obligated to '*declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment*'. As the wording of the rights within the above instruments is universal the right to work applies to all persons within the State, including members of the asylum seeking community.

As discussed within chapter two, access to the labour market is also granted to asylum seekers with an active asylum application (including those who have lodged an appeal) under Article 11(2) of the Reception Conditions Directive after one year of the applicant's claim being lodged. Though access is granted after one year, applicants remain subject to any labour market conditions the State deems appropriate as Article 11(4) provides that States may prioritise EU citizens, nationals of State parties and legally resident third-country nationals over foreigners within the State. Though the Reception Conditions Directive is not considered a 'human rights' instrument it amounts to a legal mechanism which gives effect to the right to work. The implementation of the Directive under Paragraph 360 of the Immigration Rules also engages the Charter of Fundamental Rights of the European Union (hereby the Charter). Article 15 of the Charter⁴⁸ also grants the right to work, yet although Article 15(1) states that 'everyone' has the right to engage in work, the remainder of the Article casts doubt upon this assumption. Paragraph 3 of Article 15 thus suggests that in order to work, third country nationals must have authorisation from the State itself and this conclusion is further sustained by paragraph 15(2) which confers that every

2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.

⁴⁸ Article 15 of the Charter of Fundamental Rights of the European Union - Freedom to choose an occupation and right to engage in work states:

'(1) Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

(2) Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

(3) Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.'

EEA citizen has the right to work. The fundamental distinction between EEA citizens and non-citizens under the latter paragraphs implies that the right is not universal, which was the opinion taken by the High Court in the case of *R (on the application of Rostami) v Secretary of State for the Home Department* [2013].⁴⁹

Articles 6, 7 and 8 of the ICESCR expand upon Article 23 of the UDHR, giving more comprehensive protection for the right to work and protections whilst at work. As is demonstrated in the wording of Article 6(1), the right to work is not a right to guaranteed employment but the freedom to gain a living through work ‘*which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.*’ Accordingly, the exercise of work requires three components (implementation of which depends on the State party): availability; accessibility; and acceptability or quality.⁵⁰ Though the right to work under the ICESCR is a progressive right, the CESCR maintain that State parties have a core obligation to fulfil the minimum essential levels of each right within the Covenant.⁵¹ In relation to the right to work this core obligation encompasses non-discrimination and the need to respect, protect and fulfil the right itself which includes the following requirements: to ensure right of access to employment, permitting individuals to live a life of dignity (respect); to avoid discrimination and unequal treatment in the private and public sector, or to weaken protection from such treatment (protect); to adopt and implement a strategy and plan of action aimed at addressing the concerns of workers, to target

⁴⁹ [2013] EWHC 1494 (Admin) [54].

⁵⁰ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.18: Article 6 (The Right to Work)* (United Nations Committee on Economic, Social and Cultural Rights, E/C.12/GC/18, 2005) para 12.

⁵¹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.3: The nature of State parties obligations (Art 2, par.1)* para 10 (n 32).

disadvantaged and marginalised individuals and develop benchmarks by which to mark progression and review progress (fulfil).⁵²

As explored earlier, States must not *prima facie* discriminate amongst rights holders in upholding the right to work, equal access to employment means that the labour market must be open to everyone within the jurisdiction of the State, regardless of immigration status.⁵³ Yet as established within chapter two, within the UK a number of employment restrictions and exclusions exist on the basis of asylum seeker status including: the 12 month employment restriction, implementation of the Shortage Occupation List (SOL), prohibition on self employment and independent business⁵⁴ and the exclusion of refused asylum seekers and asylum seeking dependents from the labour market.⁵⁵ Whereas the former restrictions, such as the 12 month employment restriction and the SOL, constitute limitations upon the right to work which are capable of justification by the State (Article 4 ICESCR), it is argued that the latter exclusions prohibiting refused asylum seekers and dependents from accessing the labour market are wholly incompatible with the right to work as they completely inhibit and thus destroy any exercise of the right to work. Accordingly the next section will first examine the compatibility of the right to work with the employment exclusion of refused asylum seekers and asylum seeking dependents, before assessing whether the restrictions imposed upon asylum seekers with active applications are legitimate and in accordance with the rules upon limitation.

⁵² United Nations Committee on Economic, *General Comment No.18: Article 6 (The Right to Work)* para 31 (n 50).

⁵³ Immigration status is a protected characteristic under Article 2(2) of the ICESCR as it is included within the scope of 'nationality', a prohibited ground under the provision of 'other status'. See United Nations Committee on Economic, *General Comment No.20: Non-discrimination in economic, social and cultural rights (Art. 2, para. 2)* para 30.

⁵⁴ Immigration Rules para 360A.

⁵⁵ The Immigration Act 1971, Sch 2, para 21(2) and Sch 3, para 2(5) prevents asylum seekers from working whilst their claim is being processed, however para 360 of the Immigration Rules allows for asylum seekers to apply for permission to work until the final decision on their claim has been made in line with Article 11 of the Reception Conditions Directive.

4.3 (a) (i) The employment exclusion of refused asylum seekers and the right to work:

As established, all refused asylum seekers and asylum seeking dependents are prohibited from engaging in any employment whilst in the UK which is justified by the Government as a means of deterring economic migration in fear that granting such persons permission to work would encourage asylum applications from those without a well founded fear of persecution.⁵⁶ Blanket prohibitions on access to the labour market wholly excludes these groups from exercising their right to work.⁵⁷ Where this exclusion takes place over an extended period of time, it is contended that exclusion contravenes the minimum core obligation of ICESCR as the right to work is wholly inaccessible and thus the essence of the right is destroyed.⁵⁸ This is recognised by Mathew who writes that '*any restriction beyond the temporary denial of access to the labour market...may effectively destroy the right to work for asylum-seekers*'.⁵⁹ In the recent case of *R (on the application of Refugee Action) v Secretary of State for the Home Department* [2014],⁶⁰ it was held that 18 months was beyond the meaning of 'temporary', UNHCR have also suggested that employment exclusion should not extend beyond 6 months.⁶¹

The national courts have addressed the right to work for refused asylum seekers in the case of *Tekle v Secretary of State for the Home Department*⁶² which focused on a refused applicant seeking a fresh claim for asylum⁶³ who had been in the

⁵⁶ *R. (on the application of Tekle) v Secretary of State for the Home Department* [2008] EWHC 3064 (Admin), [2009] 2 All ER 193.

⁵⁷ The Immigration Act 1971, Sch 2, para 21(2) and Sch 3, para 2(5).

⁵⁸ Article 5(1) of the ICESCR thus states: '*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant*'. See also Mathew 114-115 (n 29).

⁵⁹ *Ibid* 119.

⁶⁰ [2014] EWHC 1033 (Admin).

⁶¹ United Nations High Commissioner for Refugees, *Note on the Integration of Refugees in the European Union* (United Nations High Commissioner for Refugees, 2007) 5.

⁶² [2008] EWHC 3064 (Admin), [2009] 2 All ER 193.

⁶³ A fresh claim is defined within rule 353 of the Immigration Rules:

UK and subject to employment restrictions for seven years. In this instance the High Court accepted that the right to work was included within the scope of Article 8 of the ECHR (right to a private and family life) as it concerned the ability to create relationships and networks through employment. Mr Justice Blake held that where the processing of a refused asylum seeker's fresh application was subject to prolonged delay at the fault of the Home Office, the positive prohibition on being able to access employment when placed alongside the inability to have recourse to cash benefits, restricted the claimant's ability to form relations either in the work place or outside it in contravention of Article 8 of the ECHR.⁶⁴ However, unlike the conclusions drawn above that employment exclusion destroys the essence of the right to work under the ICESCR, Mr Justice Blake did not regard prohibition on employment as wholly destroying the right to a private and family life under the ECHR but rather that the exclusion amounted to a limitation upon Article 8 which was capable of justification. After applying the proportionality test to the exclusionary provisions, Blake found that the restrictions upon work were disproportionate as the Home Office's inefficiency and undue delay in processing the fresh claim diminished '*the strength of immigration control factors that would otherwise support refusal of permission to work*'.⁶⁵ As a result, the labour market exclusion of refused asylum seekers who had lodged fresh claims for asylum was held to be overly broad and unjustifiably detrimental to

'353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and
(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

Even where the fresh claim is accepted for processing, the applicant remains a refused asylum seeker subject to support under section 4 of the Immigration and Asylum Act 1999.

⁶⁴ *R. (on the application of Tekle) v Secretary of State for the Home Department* [2008] [36]

⁶⁵ *Ibid* [34].

claimants who were forced to wait extensive periods for their fresh claims to be processed.

This decision was later doubted by the High Court in the case of *R (on the application of Negassi) v Secretary of State for the Home Department* [2011],⁶⁶ hereafter *Negassi*, in which a claimant with indefinite leave to remain sought damages for the period during which he was unable to work as a refused asylum seeker awaiting a decision on his fresh claim. According to the Secretary of State, the Reception Conditions Directive only afforded labour market access to those awaiting an initial decision on their claim, however this construction was rejected in the case of *R (on the application of ZO (Somalia) and others): (Respondents) v Secretary of State for the Home Department* [2010],⁶⁷ hereafter *ZO*, which extended application of the Directive to refused asylum seekers who had lodged fresh applications. Following the judgement in *ZO* *Negassi* thus sought damages on two grounds, firstly that the UK Government was liable for its failure to transpose the Reception Conditions Directive correctly and secondly that *Negassi*'s unlawful exclusion from employment during this period amounted to a breach of Article 8 of the ECHR. The claim failed on both grounds⁶⁸ which was later affirmed by the Court of Appeal.⁶⁹ The second ground relating to the Article 8 claim for damages under section 8 of the Human Rights Act 1998 expands

⁶⁶ [2011] EWHC 386 (Admin).

⁶⁷ (2010) UKSC 36.

⁶⁸ In relation to compensation for a breach of EU law the High Court in *Negassi* held that damages would only be awarded where: the rule of law breached was intended to confer rights on individuals; where the breach was sufficiently serious, meaning Member States had manifestly and gravely disregarded the limits on its discretion; and where there was a direct causal link between the breach and the damage sustained. It was held that no rights were conferred under the Reception Conditions Directive and that as the misinterpretation of the Reception Conditions Directive was not intended by the UK Government, the breach was not manifestly and gravely unlawful. It was also held that had the UK Government correctly interpreted the provisions of the Reception Conditions Directive, stringent employment restrictions (such as the SOL) would have been implemented within the time frame of the claimants claim. Consequently it would have been highly unlikely that the claimant would have been able to access the labour market, nullifying any damage which might have been claimed.

⁶⁹ *R. (on the application of Negassi) v Secretary of State for the Home Department* [2013] EWCA Civ 151.

upon the national courts construction of the right to work for refused asylum seekers as the claimant asserted a right to work under Article 11 of the Reception Conditions Directive and a further infringement of Article 8 of the ECHR on this basis. The application was refused, primarily because the Court found no right to work for refused asylum seekers under either Article 11 of the Directive or Article 15 of the Charter but rather that the Directive afforded conditional entitlement to the labour market. Mr Justice Collins doubted the decision in *Tekle* on the basis that if no positive right to work was established, prohibition on working could not amount to an Article 8 interference, however it is argued that in making this judgement Collin's overlooked the socially restrictive nature of employment restrictions in combination with non-cash provision which inhibits individuals from establishing social relationships, failing to recognise that *'human beings as social animals are dependent upon others'*.⁷⁰ Collins further asserted that should a right to work be recognised within national law, subsequently engaging Article 8, such interference would be considered proportionate as *'being in accordance with the law and necessary in the interests of the economic well-being of the country and the rights and freedoms of others'*.⁷¹ Consequently damages would not be afforded, yet no further details were considered in assessing the proportionality of the measures.

In summary, the application of the ECHR within the national courts differs from the provisions of the ICESCR as the latter instrument recognises an express right to work which is wholly inhibited by employment exclusion. The level of protection afforded under the ICESCR is therefore significantly higher which is recognised by the Court of Appeal in *Negassi*:

⁷⁰ *Huang v SSHD* [2007] UKHL 11, [2007] 2 AC 167 [18] (Lord Bingham).

⁷¹ *R. (on the application of Negassi) v Secretary of State for the Home Department* [2011] [38-40].

*‘where it is common ground that art.8 does not embrace a general right to work, I do not consider that the protected right to respect for private life embraces the right of a foreign national, who has no Treaty, statutory or permitted right of access to the domestic labour market, to an entitlement to work’.*⁷²

Consequently, though *Negassi* was unsuccessful in arguing that employment exclusion infringed Article 8 of the ECHR, the case does not preclude the conclusion that employment exclusion is incompatible with Article 6 of the ICESCR. On this basis it is contended that the current exclusionary employment policies placed upon refused asylum seekers and dependents are incompatible with the right to work under Article 23 of the UDHR and Article 6 of the ICESCR as the measures destroy the nature of the right which cannot be fulfilled by anything other than access to the labour market. In addition, it is argued that as a right to work exists within the provisions of the ICESCR, the restrictions also infringe upon the right to respect for private and family life under Articles 12 of the UDHR, 17 of the ICCPR and Article 8 of the ECHR, in conjunction with the findings in *Tekle* as the measures restrict the establishment of social relationships through work.

Though the obiter dicta in *Negassi* indicates that any restrictions on a right to work would be proportionate, it is argued that in making this judgement Mr Justice Collins overlooked the potential destruction of the right to work through extended periods of exclusion from the labour market, and in addition, failed to consider whether the measures were necessary or effective, or assess whether less restrictive measures could achieve the same aim. The balancing exercise inherent in proportionality which concerns the weighing of rights against restriction was also completely overlooked. As it is contended that the current exclusions are outrightly

⁷² *R. (on the application of Negassi) v Secretary of State for the Home Department* [2013] [38] (Lord Justice Kay).

incompatible with the right to work, proportionality will not be examined further here, however the weighing of rights against restrictions will be considered within the next section. The limited application of the proportionality principle in *Negassi* thus demonstrates that significant deference was paid to the Government as employment restrictions upon refused asylum seekers fall within the remit of immigration and socio-economic policy over which the Government, for democratic reasons, has ultimate control. This is because such issues ‘*involve the balancing of particularly important public interest factors and the rights and interests of individuals*’⁷³ including those of national citizens who have a right to work which might be displaced by the opening of the labour market to refused asylum seekers, ‘*in such areas, the courts are particularly cautious before interfering with decisions made by the State*’.⁷⁴ However from a cosmopolitan perspective, it is not acceptable to defer to the opinion of the Government at the expense of applying proportionality on the basis that the matter concerned is one of immigration as all rights are equally indispensable and, as discussed throughout, immigration status should not determine the stringency with which human rights are upheld by the courts. *Negassi* thereby reveals one of the inherent weaknesses in the application of human rights within a State centred framework, something that will be discussed in greater detail within section 4.4 of this chapter.

In addition to incompatibility with the right to work, the specific employment exclusion of dependents is documented within NGO research as being discriminatory towards married women who often make a joint application for asylum with their husband. As the husband is often registered as the primary claimant, married women

⁷³ *R. (on the application of Rostami) v Secretary of State for the Home Department* [2013] [92].

⁷⁴ *Ibid* [92].

are disproportionately rendered 'dependent' and thus excluded from labour market participation. As noted by Crawley

'it remains the case...that women who arrive as part of a family unit are sometimes not interviewed or are cursorily interviewed about their experiences, even when it is possible that they, rather than their husbands, have been the targets of persecution. Their male relatives may not raise the relevant issues because they are unaware of the details or ashamed to report them'.⁷⁵

Accordingly, it is argued that in addition to breaching asylum seeking dependents' right to work, labour market exclusion also contradicts Article 11 of the CEDAW which obligates State parties to eliminate discrimination against women in the field of employment. The Teather Inquiry also notes that the exclusion of dependent women from the labour market contributes to instances of domestic violence within the household⁷⁶ and heightened feelings of social isolation. Here it is clear that married women are particularly vulnerable to the rules governing labour market access. As explained at the beginning of this chapter, applying blanket exclusions and restrictions are likely to discriminate and isolate particular categories or groups within the asylum seeking community as the community itself is so diverse.

Whereas the preceding analysis so far has examined the exclusion of refused asylum seekers from work, the next section will address the employment restrictions

⁷⁵ See Heaven Crawley, *Refugees and gender: law and process* (Jordan Publishing Limited 2001) 199. This position is also substantiated by the Refugee Council who note that *'the vast majority of women asylum seekers do not make an independent claim for asylum, and are instead included as a dependent on their husband or partner's claim. Many women do not know that they are entitled to make an asylum claim, or access government support, in their own right. This, coupled with cultural pressures, means that refugee women are more likely to stay in abusive relationships where they face rape or sexual violence.'* Refugee Council, *The Vulnerable Women's Project Refugee and Asylum Seeking Women Affected by Rape or Sexual Violence Literature Review* (Refugee Council, 2009) 30. See also Kim Ward, Neil Amas and Jacob Lagnado, *Supporting disabled refugees and asylum seekers: opportunities for new approaches*, (2008) 59-61.

⁷⁶ The Teather inquiry thus notes that *'the enormous pressures of living in poverty, being denied the right to work and the additional stresses of the asylum process, are leading to increases in domestic violence in families seeking asylum. One local authority raised concerns about, '...women with no recourse to public funds...experiencing domestic abuse in their adult relationship'.* Teather S and others, *Report of the Parliamentary Inquiry into Asylum Support for Children and Young People* (The Children's Society, 2013) 21.

placed upon asylum seekers with active applications, comparing the 12 month time limit and SOL to the right to work. As previously addressed, any limitations placed on rights should conform to the common human rights standards of legality, necessity and compatibility as well as that of non-discrimination. Each of these standards will be examined in determining whether current provisions reflect hospitality and accord with human rights or alternatively whether they inflict injury upon members of the asylum seeking community.

4.3 (a) (ii) Labour market restrictions for active asylum seekers: Legitimate limitations or a breach of the right to work?

Employment restrictions upon active asylum applicants are justified as necessary by the Government to protect the labour market and the rights and interests of EEA citizens who would otherwise have their right to work displaced by increased competition from asylum seekers. The Government consider this a valid reason for discrimination and limitation upon the right to work which has been confirmed by the national courts as a legitimate aim.⁷⁷ However the necessity of measures also requires that they are proportionate to the aim pursued⁷⁸ which means that they must be the least intrusive means of achieving the aim and adequately balance the interests of all parties involved. In light of this requirement, the necessity of the 12 month employment exclusion and the SOL will be examined separately before fully examining the personal effect of both measures upon members of the asylum seeking community to determine whether the measures strike an appropriate balance between the aim pursued and their impact upon rights and interests.

⁷⁷ R. (on the application of Rostami) v Secretary of State for the Home Department [2013].

⁷⁸ United Nations Committee on Civil and Political Rights, *General Comment No.27: Article 12 (The Right to Freedom of movement)* para 14 (n 28).

The 12 month time limit

The UK's current 12 month restriction for active asylum seekers accessing the labour market conflicts with the reduced 9 month provision contained within Article 15(1) of the Reception Conditions Directive recast⁷⁹ which was rejected by the Coalition Government (2010-2015) through their exemption under Protocol 21 of the Treaty on the Functioning of the European Union. The Government rejected the recast Directive over 'grave concerns' that allowing asylum seekers earlier access to the labour market would create 'significant cost implications'⁸⁰ and '*encourage abuse of the asylum system by economic migrants*'.⁸¹ Though this qualifies as a legitimate aim,⁸² the divergence in time restrictions on accessing the labour market indicates that the 12 month time limit is an unnecessary requirement for immigration control and that the longer period of exclusion embraced by the UK is overly burdensome upon asylum applicants. The CESCR⁸³ have noted concern over the imposition of the 12 month time limit alongside the UNHCR⁸⁴ who believe 6 months to be appropriate. UNHCR do not elaborate as to why 6 months is desirable though it is suggested that 6 months is preferred as it is considered the ideal timeframe for the determination of an asylum application.

⁷⁹ Council Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

⁸⁰ Immigration Minister Damien Green, HC Deb 13 October 2011, vol 533, cols 44-5WS.

⁸¹ Home Office, *Impact Assessment (IA): Permission to work for asylum seekers and failed asylum seekers* (Gov.uk 2010) 8.

⁸² *R. (on the application of Rostami) v Secretary of State for the Home Department* [2013].

⁸³ The CESCR have noted concern at the 12 month employment exclusion period imposed upon asylum seekers and encourage the UK '*to ensure asylum seekers are not restricted in their access to the labour market*'. United Nations Committee on Economic, Social and Cultural Rights, *Concluding observations on the United Kingdom's fourth and fifth periodic reports on the implementation of the International Covenant on Economic, Social and Cultural Rights* (United Nations Committee on Economic, Social and Cultural Rights, E/C.12/GBR/CO/5, 2009) paras 6 and 27.

⁸⁴ United Nations High Commissioner for Refugees, *Note on the Integration of Refugees in the European Union* para 14 (n 61).

The proportionality of the measure is further questioned in light of Home Office data which shows that the top 5 countries in the year ending June 2013 receiving asylum seekers were Germany, France, Sweden, the UK and Belgium: all of which have diverging time limits on accessing the labour market.⁸⁵ Whereas Germany, France and the UK operate a 12 month restriction, Sweden and Belgium operate a 6 month time limit indicating little correlation between the period that employment is restricted and the number of asylum applications lodged.⁸⁶ Out of 21⁸⁷ EU countries who submitted information relating to labour market access for asylum seekers, 10 allowed access after 6 months; 2 after 9 months and 8 after 12 months with Lithuania offering no access.⁸⁸ Aside from challenging the effectiveness of measures, the discrepancy in policies also disrupts the continuity of the 'Common' European Asylum System which the Directives sought to achieve. In light of evidence that other EU countries implement a less intrusive 6 month time limit, the necessity and effectiveness of the 12 month policy is questioned.

Indeed research from the Home Office reveals that specific employment policies have little impact upon asylum seekers choice of destination, or that of economic migrants. In July 2002, the Home Office commissioned a research paper by Robinson and Segrott: 'Understanding the decision-making of asylum seekers' which sought to explain the reasons why asylum seekers chose to come to the UK.⁸⁹ The research

⁸⁵ Home Office, *Immigration statistics, April to June 2013* (Gov.uk 2013) para 9.12.

⁸⁶ European Commission, *Ad-Hoc Query on access to the labour market for asylum seekers* (European Commission, 9 April 2013).

⁸⁷ Though 24 countries submitted data, Austria was not included as they restricted dissemination of their data which was consequently unavailable. Malta is also discounted on the basis that answers to question 2 relating to time scales of asylum seekers labour market exclusion was referred to another body. The UK was also excluded as their system has already been addressed.

⁸⁸ European Commission, *Ad-Hoc Query on access to the labour market for asylum seekers* (n 86).

⁸⁹ Vaughan Robinson and Jeremy Segrott, *Understanding the decision-making of asylum seekers* (Home Office 2002); Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (Refugee Action, 2006) 50; Heaven Crawley, *Chance or Choice? Understanding why asylum seekers come to the UK* (Refugee Council, 2010).

refutes the Government's claim that generous policy changes to employment and welfare would increase economic migration, finding in relation to employment that: *'In the vast majority of cases employment did not play a dominant role in the decision to undertake migration from the country of origin or the choice of the UK as a decision.'*⁹⁰ Though some migrants had chosen to use the asylum route for economic means *'they had not always done so with a clear, fixed destination in mind. Romanian respondents tended to have a vision of 'the West' as a rich 'dream' rather than perceptions of specific countries'*.⁹¹ This research is supported by a 2010 study by the Refugee Council 'Chance or choice: Understanding why asylum seekers come to the UK', which also found no evidence to suggest that granting permission to work after six months would increase asylum applications.⁹² It is therefore highly unlikely that reducing labour market restrictions would lead to mass economic migration. Consequently it is contended that the UK Government reduce the time restriction on labour market access for asylum seekers from 12 to 6 months. As Home Office data demonstrates, the majority of cases have an initial decision within 6 months in the UK, thus in 2011-12, 87% of asylum applications were decided within 6 months and in 2012-13, this figure was 78%, providing an advantage to the Government who wish to keep labour participation low.⁹³ This policy does however ensure that those persons remaining in the UK after six months, who would likely experience deskilling, have greater access to the labour market. Though these rates merely reflect *initial* decisions, a faster decision making process reduces the numbers of applicants and thus the number of persons seeking access to the labour market.

⁹⁰ Robinson and Segrott 54-55 (n. 89).

⁹¹ Ibid 54-55.

⁹² Crawley, *Chance or Choice? Understanding why asylum seekers come to the UK* (n 89).

⁹³ UKBA, *Asylum 6 months initial decision rates* (Gov.uk 2013).

As the necessity of the time limit is questionable, the next section will examine the necessity of the SOL before examining the personal effects that both measures have on the lives of applicants. Through exploring the personal impact, greater perspective is gained on all of the interests infringed by restrictive measures which extend beyond the right to work, affecting additional interests such as health and dangers such as exploitation.

The Shortage Occupation List

The SOL was introduced in 2010 to prevent an increase in economic migration. Implementation followed the Supreme Court's decision in *ZO*,⁹⁴ which held that restricting the employment of refused asylum seekers, who had made further submissions on their claim, contravened Article 11(2) of the Reception Conditions Directive. This decision was supposedly going to allow 45,000 (previously excluded) asylum seekers access to the labour market so the SOL was implemented by the Coalition Government to filter this. The Tier 2 restriction was justified on the grounds that allowing labour market access to asylum seekers after 12 months without restriction was unreasonable given the Government's restrictions on the labour market access of non EU economic migrants.⁹⁵ If the policies for asylum and economic migration were not seen to be consistent, the Government feared economic migrants would displace themselves into the asylum route for easier access to the labour market. Though no evidence was provided to show that this was likely, the Government sought to prevent it on the basis that allowing such access would result in heightened competition for UK and EEA nationals. Prior to the restriction, the Government carried out a cost/benefit analysis to assess the impact of non restriction. The link

⁹⁴ *R (on the application of ZO (Somalia) and others) v Secretary of State for the Home Department* (2010).

⁹⁵ Home Office, *Impact Assessment (IA): Permission to work for asylum seekers and failed asylum seekers* (n 81).

between asylum and economic migration is continually used within the analysis as justification for restriction, yet the document provides no tangible evidence to support the Government's claims. In 2007 the Joint Committee on Human Rights addressed the Government's lack of evidence in the creation of asylum policies:

*'the Home Office Minister... stated that giving more asylum seekers the right to work would lead to a surge in abusive asylum claims, although we received no evidence from the Government to support this assertion. We recommend that in the development of asylum policy the Government should proceed on the basis of evidence, rather than assertion, which evidence should wherever possible be published.'*⁹⁶

The necessity and effectiveness of the measures is thus questionable in light of contrary evidence⁹⁷ which suggests that the intricacies of UK employment policy are of little concern to asylum seekers.

The legality of the SOL was recently challenged in the case of *R (on the application of Rostami) v Secretary of State for the Home Department* [2013],⁹⁸ hereafter referred to as '*Rostami*', on the basis that it prevented asylum seekers from exercising the right to work which was argued to exist under Article 11 of the Reception Conditions Directive. The Judge rejected this argument finding that the Directive provided no right to work in either domestic or European law. Accordingly, the court held that the SOL conformed with the provisions of Article 11(2) and 11(4) of the Directive which allows States to impose labour market conditions to prioritise national interests. Aside from using the SOL as a means of immigration control, the Government's aim in employing the list is to ensure that asylum seekers fill UK positions in which there is a skills shortage whilst correspondingly increasing the UK's work output offering '*the greatest value to the UK*'.⁹⁹ Whether this aim is fulfilled however is again questionable

⁹⁶ Joint Committee on Human Rights, *The Treatment of Asylum Seekers* 8 (n 1).

⁹⁷ Robinson and Segrott (n 89)

⁹⁸ [2013] EWHC 1494 (Admin).

⁹⁹ Home Office, *Impact Assessment (IA): Permission to work for asylum seekers and failed asylum seekers* (n 81).

as although the list seeks to achieve this aim in theory, in reality the SOL significantly reduces access to the employment market rendering it ‘*illusory and empty*’.¹⁰⁰ Though the Government claim that the SOL is sufficiently varied to conceive that ‘*some asylum seekers and failed asylum seekers will have the necessary experience and qualifications to obtain employment*’,¹⁰¹ the claimant in *Rostami* contended that there was no evidence of any asylum seekers actually accessing employment following implementation of the SOL which suggests that the policies of the SOL may destroy the essence of the right to work. Mr Justice Hickinbottom however drew attention to the fact that this evidence was not available as such records are not kept. Though he conceded that a substantial amount of asylum seekers were from professional backgrounds he acknowledged that ‘(i) *asylum seekers are less likely to have the skills necessary for a SOL occupation, and (ii) the number of asylum seekers who have in fact found employment in a SOL occupation is very small*’.¹⁰² There is currently no empirical data to suggest that asylum applicants are fulfilling Tier 2 skills shortages which makes it difficult to assess whether the measure is proportionate to the aim of offering value to the UK. The failure of the Government to evaluate the impact of employment policies however contravenes their obligation to progress the right to work and assess its implementation in the UK as confirmed by the CESCR and ILO¹⁰³ and provides a topic for future empirical research.

Despite the lack of available data, the impetus of the SOL is that it discriminates between those with high levels of qualifications and those without. As a result it is

¹⁰⁰ *R. (on the application of Rostami) v Secretary of State for the Home Department* [2013] [47].

¹⁰¹ Home Office, *Impact Assessment (IA): Permission to work for asylum seekers and failed asylum seekers* 9 (n 81).

¹⁰² *R. (on the application of Rostami) v Secretary of State for the Home Department* [2013].

¹⁰³ Article 1 of the International Labour Organization Employment Policy Convention, C122 - 1964 (No. 122) and United Nations Committee on Economic, *General Comment No.18: Article 6 (The Right to Work)* para 31 (n 50).

contended that asylum seeking women will be disproportionately affected by the SOL policy as Bloch and Atfield write that a higher percentage of refugee women, especially from certain countries such as Somalia have lower formal levels of education than their male counterparts¹⁰⁴ which is compounded by other factors such as language ability.¹⁰⁵ The intersection of policy and characteristics such as gender, nationality and/or language thus create additional barriers to labour market access for certain groups which again contravenes the UK's obligations under the ICESCR to *'increase the resources allocated to reducing the unemployment rate, in particular among women, the disadvantaged and marginalized'*.¹⁰⁶ Again in applying blanket policies to the broad category of 'asylum seeker' we see that marginalised individuals within the community suffer the greatest detriment.

The above analyses call into question the necessity of both the SOL and the 12 month time restriction on accessing the labour market suggesting that the limitations imposed infringe upon the right to work. Yet even in instances where measures are found to be necessary they should still adequately balance the interests of both parties to be considered legitimate. Policies must not therefore disproportionately affect the rights and interests of those adversely affected in fulfilling their aims. Accordingly, the next section will examine the impact of the current employment restrictions upon the asylum seeking community to determine if the adverse affects of the measures are disproportionate to the aims.

¹⁰⁴ Alice Bloch and Gaby Atfield, *The Professional Capacity of Nationals from the Somali Regions in Britain* (Goldsmiths College, University of London, 2002); Alice Bloch, *Making it Work: Refugee employment in the UK* (Institute for Public Policy Research, 2004).

¹⁰⁵ Alice Bloch, 'Refugees in the UK Labour Market: The Conflict between Economic Integration and Policy-led Labour Market Restriction' (2007) 37 *Journal of Social Policy* 21.

¹⁰⁶ United Nations Committee on Economic, *General Comment No.18: Article 6 (The Right to Work)* para 26 (n 50).

Balancing Immigration control against the rights and interests of asylum seekers: the impact of current restrictions

Exclusion from employment is documented to have significant health implications upon the asylum seeking community,¹⁰⁷ particularly for those with existing mental health issues, which constitutes a sizeable proportion of the group.¹⁰⁸ Summerfield emphasises the importance of work in helping refugees resume everyday life, noting that in terms of improving mental well being '*the longer-term fortunes of the majority of today's asylum-seekers will depend primarily on what happens in their social, rather than their mental, worlds*'.¹⁰⁹ Employment therefore forms a vital tool for recovery. This contention is supported by a Swedish study examining the recovery of 11 Bosnian refugee families in two separate communities;¹¹⁰ the families within the first community were initially offered temporary employment upon arrival and in the second community the families were given access to psychological services upon arrival. After one year, the majority of adults in the second community (offered psychological services) were on sick leave from work.¹¹¹ Thus in emphasising trauma and '*in the absence of viable opportunities for economic and social integration, the*

¹⁰⁷ Marita Eastmond and others, 'Nationalist discourses and the construction of difference: Bosnian Muslim refugees in Sweden' (1998) 11 *Journal of Refugee Studies* 161; D. Summerfield, 'Asylum-seekers, refugees and mental health services in the UK' (2001) 25 *Psychiatric Bulletin* 161; Reacroft J, *Like any other child? Children and families in the asylum process* (Barnado's, 2008); Mind, *A civilised society: Mental health provision for refugees and asylum-seekers in England and Wales* (Mind, 2009); Jo Pettitt, *The Poverty Barrier: The Right to Rehabilitation for Survivors of Torture in the UK* (Freedom From Torture, 2013).

¹⁰⁸ Still Human Still Here report that two thirds of their respondents suffer from significant anxiety or depression. Mind also assert that '*refugees and asylum-seekers experience a higher incidence of mental distress than the wider population*' and 83% of Refugee Action respondents described themselves as having serious health problems since arriving in the UK. Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK*; Mind, *A civilised society: Mental health provision for refugees and asylum-seekers in England and Wales* (Mind, 2009); Williams R and Kaye M, *At the end of the line: Restoring the integrity of the UK's asylum system* (Still Human Still Here, 2010).

¹⁰⁹ D. Summerfield, 'Asylum-seekers, refugees and mental health services in the UK' (2001) 25 *Psychiatric Bulletin* 161, 162.

¹¹⁰ Marita Eastmond and others, 'Nationalist discourses and the construction of difference: Bosnian Muslim refugees in Sweden' (1998) 11 *Journal of Refugee Studies* 161.

¹¹¹ *Ibid.*

receiving society seems to offer a sick role and a pathologized identity'.¹¹² From the refugees' perspective, their major concern was the reconstitution of 'normal life,' which meant recovering a sense of economic independence and control over their lives. Accordingly, the removal of employment structures and enforced dependence can result in a lack of purpose which can damage feelings of self worth, social integration and a loss of personal identity.¹¹³ Consequently Still Human Still Here report that

*'the unemployed and socially excluded have a lower life expectancy, resulting from a number of interconnected factors including loneliness, boredom, social isolation, loss of self esteem, anxiety and depression. For asylum seekers this may exacerbate their already vulnerable position.'*¹¹⁴

The impact of employment restrictions therefore extends beyond the right to work and also infringes upon the right to health contained within Article 25 of the UDHR,¹¹⁵ Article 12(1) of the ICESCR and Article 24 of the CRC

Restrictions on employment also effect children within asylum seeking families as Barnardo's reports that enforced poverty makes it difficult for parents to provide a happy home: *'If asylum seekers were allowed to work, we would expect to see improved family life, more opportunities for children, and families who are able to regain their pride and work their way out of poverty'*.¹¹⁶ Barnardo's position is supported by conclusions drawn from the 2013 Teather inquiry which found that employment exclusion left parents feeling powerless and vulnerable to losing their skills, leaving children without positive role models which can affect their educational attainment and aspirations for the future.¹¹⁷ In the case of asylum seeking children it

¹¹² Ibid 177.

¹¹³ Lisa Doyle, *"I hate being idle" Wasted skills and enforced dependence among Zimbabwean asylum seekers in the UK* (Refugee Council and the Zimbabwean Association, 2009) 18.

¹¹⁴ Williams R and Kaye M, *At the end of the line: Restoring the integrity of the UK's asylum system* (Still Human Still Here, 2010) 68.

¹¹⁵ Article 25 of the UDHR recognises that an adequate standard of living (including food) is intrinsic to the health and wellbeing of individuals.

¹¹⁶ Reacroft J, *Like any other child? Children and families in the asylum process* (Barnado's, 2008) 9.

¹¹⁷ Teather and others 13 (n 76).

is apparent that the requirement of Article 3 of the CRC, which states that in all actions concerning children ‘*the best interests of the child shall be a primary consideration*’, is not taken into account as immigration control is prioritised over the economic and personal well being of the group, which is perhaps most obvious in the Government’s exclusion of asylum seeking children from their pledge to halve the number of children living in poverty by 2010/2011 and eradicate it by 2020.¹¹⁸ The right to respect for private and family life under Articles 8 of the ECHR and 17 of the ICCPR is also engaged here.

In addition to infringing upon family life, welfare dependence adds pressure on applicants to engage in illegal working which can be motivated by the shame of relying on the generosity of others or the inability to provide for oneself.¹¹⁹ Consequently employment restrictions further an underground culture of illegal working which can result in exploitation and prostitution¹²⁰ where individuals risk obtaining a criminal record or imprisonment to provide an adequate standard of living, an issue that will be more fully explored within the next section.¹²¹ Exploitation as a consequence of employment exclusion is recognised by the CESCR who acknowledge that high levels of unemployment cause workers to seek employment in the informal sector of the economy. As a result ‘*State parties must take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no*

¹¹⁸ H M Government, *PSA Delivery Agreement 9: halve the number of children in poverty by 2010-11, on the way to eradicating child poverty by 2020* (The Stationery Office Ltd 2007) 3.

¹¹⁹ Doyle (n 113)

¹²⁰ Ibid.

¹²¹ A respondent to Still Human Still Here thus reports ‘*I have to work illegally just to survive. I need some good food and warmth. Maybe I have to accept that I will go to prison for working. I cannot rob anyone*’. Williams and Kaye 68 (n 114).

protection',¹²² the situation of the asylum seeking community reveals a gap in this protection.

Issues also arise regarding the future employment prospects of the asylum seeking community should their status be regularised in the UK. Though the above restrictions supposedly constitute short term restrictions on working, evidence suggest that prolonged periods outside of employment lead to a loss in employable skills, a process labelled 'deskilling', which has long term repercussions on obtaining future work, particularly in certain skilled professions such as medicine.¹²³ Doyle thus found that due to loss of skill whilst claiming asylum, 53% of respondents felt their skills were insufficient to carry out the work they had previously undertaken in their countries of origin and 63% felt unable to maintain or improve their skills whilst in the UK.¹²⁴ This position was emphasised by a Barnardo's respondent who stated that the skills he had on arrival had deteriorated resulting in unemployment and poverty: *'I am poor because the Government wants me to be poor... Asylum has made me redundant'*,¹²⁵ his documented period of unemployment was the first he had ever experienced since leaving University. The difficulties refugees face in finding employment is further revealed by comparison of the Crawley study, which shows a high level (90%)¹²⁶ of employment amongst asylum seekers within their countries of origin, to the Cabinet Office figures on refugee employment within the UK which show that refugees have lower rates of employment and average hourly pay than ethnic minorities and the population in general.¹²⁷ This indicates that low levels of refugee

¹²² United Nations Committee on Economic, *General Comment No.18: Article 6 (The Right to Work)* para 10 (n 50).

¹²³ Bloch, *Making it Work: Refugee employment in the UK* (n 104); Bloch, 'Refugees in the UK Labour Market: The Conflict between Economic Integration and Policy-led Labour Market Restriction' (n 105); Doyle (n 113).

¹²⁴ Doyle 6 (n 113).

¹²⁵ Reacroft 51 (n 116).

¹²⁶ Crawley, *Chance or Choice? Understanding why asylum seekers come to the UK* (n 89).

¹²⁷ Cabinet Office, *Ethnic Minorities and the Labour Market* (The Stationery Office 2003).

employment cannot be attributed to employability or the work ethic of the community but rather that structural barriers within the UK are preventing refugees from accessing the labour market. Though a number of factors undoubtedly contribute to high levels of unemployment amongst refugees, such as the language barrier, difficulties in transferring qualifications from abroad, and refugees' lack of evidence relating to their qualifications,¹²⁸ deskilling remains a contributory factor which could be relieved by the removal of labour market restrictions.¹²⁹

As the impact of employment restrictions stretch beyond the right to work and also infringe upon a number of other rights and interests, it is contended that the measures have a disproportionately negative impact upon asylum seekers in seeking to curb migration. Whether the measures actually succeed in fulfilling the aim of immigration control is also debateable in the face of inconclusive evidence and contrary data which suggests that restrictive measures have little effect.¹³⁰ Accordingly both the SOL and the 12 month time limit breach the right to work under Articles 6 of the ICESCR, 23 of the UDHR and 27 of the CRPD. The extension of the time limit for employment exclusion from 6 to 12 months¹³¹ and the implementation of the SOL also constitute retrogressive policies which must be '*duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the States parties' maximum available resources*'.¹³² As the necessity of

¹²⁸ Bloch, 'Refugees in the UK Labour Market: The Conflict between Economic Integration and Policy-led Labour Market Restriction' 30 (n 74).

¹²⁹ Doyle (n 112).

¹³⁰ Robinson and Segrott (n 89); Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (n 89); Crawley, *Chance or Choice? Understanding why asylum seekers come to the UK* (n 89).

¹³¹ The concession which permitted asylum seekers to obtain permission to work if their application for asylum had not been determined within six months was withdrawn on 23 July 2002. Ian A Macdonald QC and Frances Webber (eds), *Macdonald's Immigration Law and Practice* (Sixth edn, LexisNexis Butterworths 2005) 954, para 13.208.

¹³² United Nations Committee on Economic, *General Comment No.18: Article 6 (The Right to Work)* para 21; United Nations Committee on Economic, *General Comment No.3: The nature of State parties obligations (Art 2, par.1) para 9*.

the measures is questioned, it is doubtful that the UK can ‘duly justify’ its retrogressive restrictions by reference to the totality of rights. Such treatment conflicts with the notion of cosmopolitan morality as it constitutes a negative and hostile policy that is implemented on the basis of immigration status, a *morally irrelevant*¹³³ characteristic from a cosmopolitan perspective. Discriminatory treatment which infringes upon human rights and causes injury to the foreigner thus epitomises hostility which indicates that the UK is failing to embrace cosmopolitan values.

Importantly, exclusion and restrictions upon employment should not be regarded in isolation but must be seen within the wider context of the asylum support system. The inability to access the labour market thus results in either state enforced destitution or reliance on asylum support which has repercussions in terms of applicants’ standards of living, health, and social and cultural integration. These effects must also be taken into account when exercising the proportionality exercise of balancing the impact of employment restrictions against the Government’s aim of immigration control. Accordingly, the asylum support system will now be analysed through examination of NGO data, comparing the effects of current policies with human rights which form a benchmark for measuring basic levels of hospitality. The central right to an adequate standard of living will form the central basis for analysis, though other rights will be addressed throughout where appropriate.

¹³³ Nussbaum MC, 'Patriotism and Cosmopolitanism' in Cohen J (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996) 5.

4.3 (b) An adequate standard of living

As the asylum seeking community are primarily prevented from working within the UK, the levels of financial provision granted under the asylum support system determine the quality of living standards for the group. Sufficient levels of support are particularly crucial for the group as the majority of asylum seekers are unable to rely on friends or family as an alternative form of support, which many UK citizens have as a safety net.¹³⁴ A hospitable welfare state is therefore one which provides accessible and adequate levels of financial provision to enable members of the asylum seeking community to live their lives in dignity, free from conditions of poverty which inhibits free choice and infringes upon human rights. Accordingly, throughout this section the asylum support system will be assessed through the right to an adequate standard of living to determine whether the UK affords hospitable treatment. As the meaning of ‘adequate’ is relevant to the social and economic conditions of the UK, the following section will discuss the national measures used to assess living standards and address the needs which must be satisfied in order to live an ‘adequate’ life. Such measures will form a benchmark for analysis of the right to an adequate standard of living.

The right to an adequate standard of living is found within Article 25 of the UDHR and Article 11 of the ICESCR. Article 5(e) of the ICERD also grants the right to economic and social rights, including the right to employment, housing, medical care and social security as supported by CERD General Recommendation 30¹³⁵ which states at paragraph 29 that States should *‘remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the*

¹³⁴ 80% of Refugee Action respondents stated they had absolutely no alternative to asylum support. Refugee Action, *Asylum Support Cuts* (Refugee Action, 2010).

¹³⁵ United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No.30: Discrimination Against Non Citizens* (n 18).

areas of education, housing, employment and health'. Under Article 13 of the Reception Conditions Directive the UK is also obligated to provide material reception conditions that '*ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence*'. This is further qualified by the preamble to the Directive which states that reception conditions should suffice to ensure asylum seekers a '*dignified standard of living*',¹³⁶ and Article 34 of the Charter which '*respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources*', though this is in accordance with the rules of national practice which, as explored earlier, accepts differentiation between citizens and the asylum seeking community. Women are afforded extra protection under Article 13 of CEDAW which calls upon State parties to take measures to '*eliminate discrimination against women in other areas of economic and social life*' and Article 14(2)(h) which grants the right to '*enjoy adequate living conditions.*'

A number of instruments also grant additional protection to children on the basis that they are particularly vulnerable and have additional needs. As the needs of children differ from adults, children demonstrate the necessity for a malleable definition of hospitality. Hospitality is not therefore a uniform concept but must adapt to the specific needs of individuals, recognising that every individual resides at an intersection of identities, for example through their status as both 'asylum seeker' and 'child', or 'asylum seeker' and 'married woman'. To an extent the special needs of children are recognised by the Government who provide supplementary payments to children and mothers alongside standard provision, yet despite the fact that distinction amongst children on the basis of nationality is prohibited under Article 2 of the CRC

¹³⁶ Para 7 of the Preamble to the Reception Conditions Directive.

(non-discrimination), distinctions between the children of asylum seekers and citizens remain as children in receipt of section 95 support receive 81% of the amount provided to the children of EEA citizens, and asylum seeking mothers receive up to £250.00 less than EEA citizen mothers in maternity grants.¹³⁷ Extra support for disabled children is also not recognised within asylum support rendering many families struggling to cope with the *‘additional challenges in mental health and either parental disability or a child in the family who needs support. Their lives are significantly complex and this core financial support is not sufficient’*.¹³⁸ This contravenes Article 23(2) of the CRC which recognises the right of disabled children to special care and provides that State resources should be extended as *‘appropriate to the child’s condition and to the circumstances of the parents or others caring for the child’*. In examining adequate living standards, Article 25 of the UDHR affords special care and assistance to mothers and children.¹³⁹ The right to an adequate standard of living is also specifically afforded to children under Article 27 of the CRC, which recognizes *‘the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’* which is further supported by Article 4 which provides that *‘States Parties shall undertake such measures to the maximum extent of their available resources’*. National law also prioritises the needs of children as under section 55 of the Borders, Citizenship and Immigration Act 2002 (BCIA) the Secretary of State must ensure that immigration, asylum, nationality and customs functions are discharged with regard to the need *‘to safeguard and promote the welfare*

¹³⁷ EEA citizen women in receipt of either IS or UC receive £500.00 to meet maternity expenses known as a Sure Start Grant, this provision will also continue under Universal Credit. Asylum seeking mothers in receipt of section 95 support are granted £300.00 and those in receipt of section 4 receive £250.00. See: Home Office, *Asylum Support Policy Bulletin 37: Maternity Payments* (Gov.uk 2003); Social Fund Maternity and Funeral Expenses (General) Regulations 2005, SI 2005/3061; Social Fund (Maternity and Funeral Expenses) Amendment Regulations 2013, SI 2013//247.

¹³⁸ Teather and others 18 (n 76).

¹³⁹ Article 25(2) UDHR.

of children who are in the United Kingdom'. This provision aims to transpose Article 3 of the CRC which states that in all actions concerning children '*the best interests of the child shall be a primary consideration*' as supported by the Supreme Court ruling in *ZH (Tanzania) v Secretary of State for the Home Department* (2011).¹⁴⁰ Under section 55(3) of the BCIA, public officials exercising duties in relation to immigration must also have regard to the UKBA statutory guidance '*Every Child Matters*'¹⁴¹ which acknowledges the importance of the CRC and other international instruments including the ECHR, ICCPR, ICESCR and the EU Reception Conditions Directive which is substantiated by Chapter 45 of the UKBA's enforcement instructions and guidance. In relation to specific actions such as the separation of children from their parents (protected under Article 9 CRC), the best interests of the child must be the determining factor. In relation to all other actions affecting children, their best interests must be a primary, but not the only, consideration.¹⁴² Accordingly, in the creation and application of policies relating to employment and asylum support, the best interests of the child must be taken into account but other factors such as immigration control can also be considered. This principle was affirmed in the deportation case of *EV (Philippines) and others v Secretary of State for the Home Department* [2014]¹⁴³ which engaged section 55 of the BCIA 2002 but held that although it was in the best interests of the children concerned to remain in the UK (for the purposes of continuing their education), deportation was a proportionate response in the overriding interest of the economic wellbeing of the country.

¹⁴⁰ [2011] UKSC 4 [23] (Baroness Hale).

¹⁴¹ UKBA, *Every Child Matters: Change for Children. Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children* (The Stationery Office 2009).

¹⁴² United Nations High Commissioner for Refugees, *Guidelines on Determining the Best Interests of the Child* (United Nations High Commissioner for Refugees, 2008) para 1.1.

¹⁴³ [2014] EWCA Civ 874.

As is the case with all asylum support policies, reduced levels of support are justified by the Government as a means of deterrence and immigration control in order to protect the economic wellbeing of the country. Yet although ‘economic wellbeing’ may be considered a legitimate aim in promoting the general welfare of society, it is contended that inducing instances of poverty, hunger and malnutrition can never be justified by the State as such measures breach minimum core rights rendering them incompatible with human rights law. This is not to say that the general concept of immigration control is incompatible with moral cosmopolitanism, as discussed throughout the thesis does not call for the elimination of State borders,¹⁴⁴ but rather that using immigration status to determine the satisfaction of basic rights within the State contravenes the principle that every person is an ultimate unit of moral concern as such measures impose suffering on the basis of nationality. It is also argued that even if immigration status was seen as a valid justification for the limitation of rights, the negative impact of the current system upon the asylum seeking community is hugely disproportionate to the costs of allowing access for the purposes of immigration control.

As a result, the next section will assess the impact of the support system upon the asylum seeking community as a whole, framing the discussion through the right to an adequate standard of living which will be divided into two core themes: food and essential living needs. Throughout these sections children will be addressed alongside adults and where specific protections regarding children arise, they will be acknowledged. Though an adequate standard of living comprises three areas: food, clothing (or other essential living needs), and housing, the scope of this thesis is limited to assessing the financial support afforded to the asylum seeking community

¹⁴⁴ See earlier discussion of Appiah’s ‘liberal cosmopolitanism, n 186 ch 3.

and their access to employment. Consequently policies relating to housing fall outside of the remit of assessment and will not be addressed. It is however acknowledged that there are major underlying issues with asylum seeker housing¹⁴⁵ which exacerbate poor living conditions and pitiful levels of financial provision.

4.3 (b) (i) Asylum support in practice: An adequate standard of living?

Within the UK there is no standard definition of an ‘adequate standard of living’ or a recognised list of the specific goods needed to achieve this standard. Though financial provision through the asylum support system is designed to provide for the ‘essential living needs’¹⁴⁶ of the asylum seeking community, as established in chapter two, there is currently no statutory definition of the term which has led to debate regarding its definition. In the case of *Refugee Action*¹⁴⁷ the Government, for the first time, elaborated on the meaning of essential living needs, however the requisite costs of satisfying these needs remains unknown. The question that arises within the context of asylum support is whether the satisfaction of ‘essential living needs’ equates to the satisfaction of an ‘adequate standard of living’? And whether either of these standards are satisfied by the current asylum support rates?

In relation to the first question it was asserted earlier that ‘adequate’ living standards are relative to the socially accepted standards of the State in which they are sought.¹⁴⁸ As Dorling writes, poverty ‘*is a relative measure; people are poor because*

¹⁴⁵ NGOs thus record instances of applicants living in damp, dirty, cold accommodation with rotting floorboards, locked windows and poor heating, often infested by insects, rats or mice. Joint Committee on Human Rights, *The Treatment of Asylum Seekers* (n 1); Reacroft (n 116); Hobson C, Cox J and Sagovsky N, Fit for purpose yet? The Independent Asylum Commission's Interim Findings (Independent Asylum Commission, 2008); Michael Bell and Cole Hansen, *Over Not Out: The housing and homelessness issues specific to lesbian, gay, bisexual and transgender asylum seekers* (Metropolitan Support Trust, 2009); Mulvey G, *Even among asylum seekers we are the lowest' Life on Section 4 Support in Glasgow* (Scottish Refugee Council, 2009); Pettitt J, *The Poverty Barrier: The Right to Rehabilitation for Survivors of Torture in the UK* (Freedom From Torture, 2013); Teather and others (n 76)

¹⁴⁶ IAA 1999, section 96(1)(b).

¹⁴⁷ *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014].

¹⁴⁸ Text to n 36 ch 4.

*they cannot afford to take part in the norms of society*¹⁴⁹ and thus poverty that ‘*results from inequality comes in the form of a new kind of exclusion: exclusion from the lives, the understanding and the caring of others*’.¹⁵⁰ Virginia Mantouvalou substantiates Dorling’s position by adding that our understanding of dignity is linked to the society in which one lives, thus ‘*a desperately needy person that lives in a society where the others are well off will probably feel this loss of self respect and the respect of others*’.¹⁵¹ Accordingly living standards that are regarded as socially acceptable provide an indication of the meaning of ‘adequate’ in the UK.

The Government define income poverty (which indicates the inability to meet essential living needs) as having a net household income below 60% of median net household income,¹⁵² yet research from the Scottish Refugee Council reveals that current asylum support rates stand at less than 31% of this level.¹⁵³ The difficulty with defining poverty in terms of income is that it gives little indication as to the goods or needs that must be satisfied in order to prevent poverty or provide an adequate living. Although the judgement in *Refugee Action* has provided content to the goods needed to meet this requirement there remains no cohesive list of costs to which the Government allocate these needs. As an alternative to the Government’s poverty indicator, a number of reports¹⁵⁴ recommend using the Joseph Rowntree ‘Minimum Income Standards’ (MIS)¹⁵⁵ as a means of calculating the cost and basis of essential living needs within Britain. The MIS reflects the minimum standard of

¹⁴⁹ Dorling D, *Injustice: why social inequality persists* (Policy Press 2011) 27.

¹⁵⁰ Ibid 91.

¹⁵¹ Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart Publishing Ltd 2011) 59.

¹⁵² Child Poverty Act 2010, section 3(2).

¹⁵³ The Scottish Refugee Council stated that the level of income most widely used as a signifier of living in poverty is below 60% of male median income. Asylum support stands at less than 31% of that level. Mulvey G, ‘*Even among asylum seekers we are the lowest*’ *Life on Section 4 Support in Glasgow* (Scottish Refugee Council, 2009).

¹⁵⁴ Williams and Kaye (n 114).

¹⁵⁵ Donald Hirsch, *A Minimum Income Standard for the UK in 2013* (Joseph Rowntree Foundation, 2013).

living considered socially acceptable within Britain and is drawn from public opinion on the goods and services that are necessary in meeting basic needs and enabling participation in society.¹⁵⁶ Thus ‘*a minimum standard of living in Britain today includes, but is more than just, food, clothes and shelter. It is about having what you need in order to have the opportunities and choices necessary to participate in society*’.¹⁵⁷ Though the MIS constitutes more than mere needs for survival, it covers ‘*needs not wants; necessities, not luxuries; items that the public think people need in order to be part of society*’.¹⁵⁸ Accordingly, it is contended that the MIS is a truer reflection of an adequate standard of living than the currently undefined notion of essential living needs and their requisite costs. Though the MIS does not claim to calculate the poverty threshold, it is relevant to poverty as almost all households that are classified as being in income poverty are also below the MIS. The ‘adequacy’ of living standards will thus be determined within this chapter by reference to the standards established by the Joseph Rowntree MIS. If the asylum support system is shown to grant access to the needs and requisite costs recognised by the MIS this indicates that the Government provide hospitality to the asylum seeking community as in doing so they recognise that basic human needs are not founded upon nationality.

The MIS in its basic form is made up of 17 associated costs of living. Within this list certain items have been excluded such as fuel, rent and motoring to reflect the judgement in *Refugee Action* and the concession that asylum seekers in receipt of section 95 and section 4 support have certain costs (such as rent and utilities)

¹⁵⁶ In detailing the specifications needed for an acceptable living standard, the public are advised by experts who feedback to participants on whether specifications meet basic criteria such as nutritional value etc.

¹⁵⁷ Hirsch (n 155).

¹⁵⁸ Ibid 8.

provided for by the Home Office. Two totals are provided within the table, the first labelled ‘essential’ includes only food, clothing and household goods in recognition that the Government construe the satisfaction of these needs as adequate. The second total, labelled ‘non essential’, includes costs such as travel and cultural participation on the basis that wider research,¹⁵⁹ including the public surveys conducted by Joseph Rowntree, consider such needs necessary for an adequate life within the UK. The cost breakdown is as follows and is based on a weekly budget:

Table 2. The Joseph Rowntree Minimum Income Standard for 2013/14

Joseph Rowntree, a Minimum Income Standard for 2013				
	Single	Couple	Couple, 2 children (1 aged 2-4; 1 primary school age)	Lone Parent, 1 child (aged 0-1)
Food	£50.11	£62.78	£103.38	£53.80
Clothing	£9.92	£12.88	£41.21	£20.39
Personal Goods and Services	£11.94	£20.83	£42.29	£28.82
Household Goods	£11.74	£13.79	£27.26	£22.94
Travel Costs	£22.86	£13.79	£14.06	£1.15
Social and Cultural participation	£47.81	£52.91	£99.65	£44.35
Total (essentials):	£71.77	£89.45	£171.85	£97.13
Total (inc non-essentials)	£154.38	£176.98	£327.85	£171.45

The asylum support rates for section 95 and section 4 support are set out in chapter one.¹⁶⁰ It is clear from comparing asylum support rates with the MIS that provision for all members of the asylum seeking community falls far below what is deemed to be a socially acceptable standard of living in the UK. Single adults in receipt of section 95 support receive only 51% of the amount considered necessary to

¹⁵⁹ Williams and Kaye (n 114); Teather and others (n 76); Hirsch (n 155); Pauline Carnet, Catherine Blanchard and Jonathan Ellis, *The Azure Payment card: The humanitarian cost of a cashless system* (British Red Cross, 2014).

¹⁶⁰ For section 95 support rates see table 1, section 2.3(a) ch 2. For section 4 support rates see the text to n 114 ch 2.S

purchase essential items under the MIS. This suggests that from a purely financial perspective the UK Government is breaching its obligations under the UDHR, ICESCR, ICERD, CEDAW, the CRC, the Reception Conditions Directive and Charter of Fundamental Rights of the European Union as it is failing to provide access to an adequate standard of living for the asylum seeking community. From the litigation that took place in the case of *Refugee Action* it is clear that the Government would refute this as it considers the current levels of support to be sufficient in providing for the needs of asylum seekers. Consequently the next section will look beyond the numerical figures of support rates to data collected from NGO groups which accounts for the personal impact of the system in practice. This insight will shed light on whether the system treats asylum applicants with respect and hospitality or whether individuals suffer under a hostile regime. It will also indicate whether the system has a disproportionately negative impact upon the asylum seeking community in seeking to fulfil the aim of protecting the economy which would render the restrictions illegitimate from a human rights perspective. The section will divide analysis between issues relating to food and other essential living needs which, alongside housing, comprise the right to an adequate standard of living.

Food

In addition to the right to food encompassed within Articles 25 of the UDHR, Article 27 of the CRC and Article 11(1) of the ICESCR, Article 11(2) of the ICESCR grants the '*fundamental right of everyone to be free from hunger*'. Under Article 24(2)(c) of the CRC the State must also take all measures to combat malnutrition in children through the provision of adequate nutritious foods. The CESCR write that the '*right to adequate food is realized when every man, woman and child, alone or in community*

*with others, has physical and economic access at all times to adequate food or means for its procurement.*¹⁶¹

In 2010 Refugee Action reported that almost 50% of respondents in receipt of section 95 support were unable to buy enough food for themselves and their dependents on a weekly basis and a further 70% were unable to buy fresh fruit or vegetables. Consequently 50% of individuals reported feelings of hunger as a result of low levels of support.¹⁶² In 2010 the Asylum Support Partnership carried out similar research for recipients of section 4 support. The results are analogous as section 4 recipients were also unable to provide adequate levels of food,¹⁶³ findings that were paralleled by research undertaken by the British Red Cross¹⁶⁴ and Freedom from Torture who found that seven out of nine respondents worried about the inability to meet essential living needs.¹⁶⁵ Hunger is also cited by the Children's Society as a consequence of section 4 support who note that some children eat only once a day and that parents often go hungry to provide food for them.¹⁶⁶ Asylum support under sections 95 and 4 of the IAA 1999 is designed to be austere as a deterrent and to persuade applicants to return, the best interests of the child are not therefore the primary consideration in the provision of asylum support despite the fact that children have no control over their immigration status or decisions relating to their return.

¹⁶¹ United Nations Committee on Economic, *General Comment No.12: Article 11 (The Right to Adequate Food)* para 6 (n 11).

¹⁶² Refugee Action, *Asylum Support Cuts* 3-4 (n 134).

¹⁶³ Accordingly 26% of respondents reported the inability to purchase enough food to feed themselves and their dependents. Reynolds S, *Your inflexible friend: The cost of living without cash* (Asylum Support Partnership, 2010) 26.

¹⁶⁴ Out of 74 service provider organisations contacted by The British Red Cross, 85% of survey respondents reported that clients were left hungry due to the insufficient amount provided under section 4 support. Pauline Carnet, Catherine Blanchard and Jonathan Ellis 28 (n 159).

¹⁶⁵ Pettitt J, *The Poverty Barrier: The Right to Rehabilitation for Survivors of Torture in the UK* (Freedom From Torture, 2013) 35.

¹⁶⁶ A respondent to the Teather inquiry told the inquiry panel: 'I would buy one meal which I will share with my son. My son, is my priority, therefore I will provide his nutritional needs before my own and occasionally starving myself'. Teather and others 11 (n 76). See also The Children's Society, *Child Destitution Report: living on the edge of despair: destitution amongst asylum seeking and refugee children* (The Children's Society, 2008).

The type of food that is affordable under the asylum support system also raises issues as nutritious foods such as fresh fruit, meat and vegetables are often too expensive to buy under the current support rates.¹⁶⁷ For mothers suffering from HIV no additional support is offered for formula milk despite the fact that they should not breastfeed.¹⁶⁸ The additional payment of £5.00 per week for children under 3 is supposed to cover this, yet the Teather inquiry heard that such additional payments were pitiful in terms of meeting the costs of a new baby.¹⁶⁹ Administrative delays in provision can also result in delayed support payments causing hunger amongst members of the asylum seeking community.¹⁷⁰ As support levels are currently inadequate, applicants describe sacrificing food to provide for other essential items such as winter clothing,¹⁷¹ however the CESC clearly state that sufficient economic access to food implies that the costs associated with the acquisition of food should not compromise the provision of other basic needs through its satisfaction.¹⁷² Gaining relief from hunger through the sacrifice of clothing does not therefore satisfy an adequate standard of living.

¹⁶⁷ The Teather inquiry found that *'families on asylum support are unable to afford nutritious food on a regular basis, particularly fresh fruit, meat and vegetables as these items are too expensive'*. Teather and others 12 (n 76).

¹⁶⁸ Avert, an HIV prevention organisation assert that: *'National health agencies and the WHO (World Health Organization) 2013 guidelines recommend that HIV-positive mothers in high-income countries: avoid breastfeeding as the risk of HIV transmission is far greater than the risk of replacement feeding replacement feed...Replacement feeding means giving a baby commercial infant formula (prepared from powder and boiling water) or home-modified animal milk (boiled with added water, sugar and micronutrients) instead of breast milk. In regions of the world where clean water and facilities are available; it is usually promoted as the only option'*. AVERT - AVERTing HIV and AIDS, 'HIV and Breastfeeding' <<http://www.avert.org/hiv-and-breastfeeding.htm>> accessed 9 July 2014.

¹⁶⁹ Teather and others 18 (n 76).

¹⁷⁰ A respondent to the Teather inquiry addressed this issue: *'Every time a move occurs they stopped weekly allowance for about three or four weeks...so it means that for this period of time I am actually left with no support, no finances at all, which is really difficult sometimes because I have a child who is six years old'*. Ibid 15.

¹⁷¹ Ibid 12.

¹⁷² United Nations Committee on Economic, *General Comment No.12: Article 11 (The Right to Adequate Food)* para 13(a) (n 11).

For refused asylum seekers who are restricted from accessing any support, hunger is widely reported,¹⁷³ with most surviving on food parcels donated by charity organisations and faith groups.¹⁷⁴ Out of 26 destitute respondents from Freedom from Torture, 19 reported never being able to, or often being unable to eat adequate food of sufficient quality.¹⁷⁵ Still Human Still Here record the experience of Tamba, a destitute refused asylum seeker from Liberia: ‘*Sometimes I eat once a day, sometimes once every two days. I survive eating cheap custard cream biscuits that cost 26p per packet*’.¹⁷⁶ They also feature the story of Hamid, a refused asylum seeker from Iran who has attempted suicide three times since arriving in the UK: ‘*Sometimes I begged for £1 or £2 to buy food, but begging made me feel very ashamed*’,¹⁷⁷ and Geraldine from Zimbabwe who survived on a bowl of porridge a day resulting in her hospitalisation for treatment related to malnutrition.¹⁷⁸

Lack of access to adequate food which results in widespread hunger demonstrates that the State is failing to uphold its core duty to mitigate and alleviate hunger in violation of Article 25 of the UDHR, Article 11 of the ICESCR and Articles 24 and 27 of the CRC. Unlike some developing countries which experience natural disasters, drought and famine, the UK does not lack food, but rather certain categories of persons are prevented from accessing food on the basis of their immigration status. The UK Government is therefore able to provide food to those unable to procure it but is unwilling to do so for purposes of immigration control. Such measures can never be

¹⁷³ Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (n 89); Williams and Kaye (n 114); Crawley H, Hemmings J and Price N, *Coping with Destitution: Survival strategies of refused asylum seekers living in the UK* (Centre for Migration Policy Research, Swansea University, 2011); Pettitt (n 165); Teather and others (n 76).

¹⁷⁴ Crawley, Hemmings and Price (n 173); Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (n 89).

¹⁷⁵ Pettitt 54 (n 165).

¹⁷⁶ Williams and Kaye 31 (n 114).

¹⁷⁷ Ibid 33.

¹⁷⁸ Ibid 55.

legitimated or in accordance with the ICESCR as they breach minimum levels of acceptable treatment. As the UK is also a developed State the obligation to provide adequate food extends beyond the relief of hunger and is directed to food that is sufficiently nutritious and culturally appropriate which as demonstrated, asylum support levels are failing to produce as applicants are unable to purchase goods such as fresh fruit and vegetables.

*‘Furthermore, any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race or...national or social origin with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant’.*¹⁷⁹

In discriminating against the asylum seeking community on grounds of immigration status (aka nationality), the Government is therefore breaching the non-discrimination provision under Article 2(2) of the ICESCR.

Worryingly, the impact of low levels of financial support and destitution extend beyond infringement of the right to food and encroach upon a host of other rights and interests, suggesting that even if restrictions were not considered outrightly incompatible with the right to an adequate standard of living, they would still be regarded as disproportionate given their broad negative impact on members of the asylum seeking community. The right to health is thus infringed by inadequate standards of food which cause hunger and malnutrition. This is particularly damaging for those who suffer from diseases such as HIV or cancer where healthy diet is part of their treatment plan, the denial of which can worsen existing illnesses.¹⁸⁰ Some refused asylum seekers also qualify for section 4 support on the basis that they are too sick to travel; the effect of low level payments therefore denies them *‘the resources they need*

¹⁷⁹ United Nations Committee on Economic, *General Comment No.12: Article 11 (The Right to Adequate Food)* para 18 (n 11).

¹⁸⁰ Reynolds 22 (n 163).

for their health to improve sufficiently to allow them to return,¹⁸¹ encouraging a cycle of sickness and dependency.¹⁸² This contravenes Article 25 of the UDHR which recognises that an adequate standard of living is intrinsic to health and wellbeing and the right to health specifically granted under Article 12(1) of the ICESCR and Article 24 of the CRC. Article 12(2) of CEDAW also recognises the right to health for women, acknowledging that health services include *'adequate nutrition during pregnancy and lactation'* which the Government currently fails to account for as pregnant refused asylum seekers remain destitute for a significant period of their pregnancy before section 4 support commences.¹⁸³ Where delays in the processing of payments takes place, some mothers have also been recorded as giving birth whilst homeless.¹⁸⁴ Refugee Action and the Children's Society note concern over this issue as medical evidence indicates *'that foetal development is affected by malnutrition, anxiety and other stresses throughout pregnancy'*¹⁸⁵ which can lead to increased infant mortality and maternal death.¹⁸⁶ Maternal deaths within the UK are significantly higher amongst refugee and asylum seeking women than the general population¹⁸⁷ as they *'are seven times more likely to develop complications during pregnancy and childbirth and three times more likely to die than the general population'*.¹⁸⁸ Contributory factors include poor access to antenatal care (exacerbated by insufficient support), malnutrition and high levels of gender related persecution in their countries of origin.

¹⁸¹ Ibid 22.

¹⁸² Mulvey (n 153).

¹⁸³ Teather and others 17 (n 76).

¹⁸⁴ Lewis H, *Still destitute. A worsening problem for refused asylum seekers* (Joseph Rowntree Charitable Trust, 2009); The Children's Society 19 (n 166).

¹⁸⁵ Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* 99 (n 89).

¹⁸⁶ *'In the UK, 46% of stillbirths and deaths in the first year are due to low birth weight; there are clear links to malnourishment, poor accommodation and a lack of cash-support, all of which are far more likely to be experienced if you are an asylum seeker'*. Teather and others 17 (n 76).

¹⁸⁷ Nancy Kelley and Juliette Stevenson, *First do no harm: denying healthcare to people whose asylum claims have failed* (Refugee Council and Oxfam, 2006) 9.

¹⁸⁸ Williams and Kaye 52 (n 114).

Immigration status, gender and personal experience within the woman's country of origin thus intersect with the policy of restricted support to increase health risks which are not acknowledged within the current system despite powerful evidence that current arrangements are failing pregnant women and mothers.

Though adequate food must satisfy the different dietary needs of individuals,¹⁸⁹ evidence suggests that asylum support levels fail to account for cultural and religious diversity as 90% of Refugee action respondents in receipt of section 95 support reported being unable to buy the food they wanted or needed to eat in light of religious, cultural or dietary requirements;¹⁹⁰ findings that are mirrored within section 4 provision.¹⁹¹ Use of the Azure payment card which restricts shopping to designated stores also exacerbates this problem for section 4 recipients as food such as halal meat is not always available.¹⁹² Though UK Visas and Immigration runs an affiliation scheme for different Halal retailers,¹⁹³ strict criteria apply¹⁹⁴ which can deter a number of retailers from signing up. Whilst such schemes exist as an exception, the easiest way to guarantee access to Halal meat would be to provide refused asylum seekers with increased levels of cash subsistence which would give them the freedom to shop

¹⁸⁹ The CESCR note that the precise meaning of 'adequate food' implies '*the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals*'. *United Nations Committee on Economic, General Comment No.12: Article 11 (The Right to Adequate Food)* para 8(a) (n 11).

¹⁹⁰ Refugee Action, *Asylum Support Cuts* 3-4 (n 134).

¹⁹¹ The Asylum Support Partnership found that 40% of section 4 respondents were unable to purchase food that met their dietary, religious or cultural requirements. Reynolds 4-5 (n 160). In addition, 93% of service provider respondents to the British Red Cross reported that clients had to some (30%) or to a large (63%) extent difficulty in accessing culturally appropriate food due to the limitations of the Azure Payment Card. Carnet, Blanchard and Ellis 30 (n 159).

¹⁹² The Asylum Support Partnership cite a number of case studies in which clients were unable to obtain halal meat, in addition they found that refugee agencies in both Stoke and Manchester complained of difficulties in sourcing halal meat for clients, suggesting that the problem is widespread and prevalent in a number of UK cities. Reynolds 20-22 (n 163). See also Williams and Kaye 38 (n 114).

¹⁹³ Melanie Gower, *Asylum: Azure payment cards* (House of Commons Library 2010).

¹⁹⁴ There must not be an existent approved Azure retailer selling meat within a three mile radius of the individual's accommodation. The shop must also be able to process Visa payments online, sign a declaration that all employees are legally entitled to work and agree to refrain from issuing cash to asylum customers. UKBA, *Azure Section 4 Payment Card: Process and Criteria for the nomination of specialist Halal meat suppliers* (Gov.uk).

in stores of their choosing. Individual freedom is a central component of cosmopolitanism as rights are vested within the individual. Uniform policies which fail to account for diversity and discriminate against individual members of the asylum seeking community could thus be construed as inhospitable. Indeed the inability to access religiously appropriate food infringes upon the freedom to manifest one's religion under Article 9 of the ECHR, Article 14 of the CRC, Article 18 of the UDHR and Article 18 of the ICCPR¹⁹⁵ which encompasses a broad range of acts including '*not only ceremonial acts but also such customs as the observance of dietary regulations*',¹⁹⁶ the eating or avoidance of particular food is hence considered a form of manifestation.¹⁹⁷

As addressed in relation to restrictions on employment, hunger can also encourage individuals to seek support from other sources leading to increased cases of prostitution and sexual exploitation amongst female destitute asylum seekers or those in receipt of section 4 support.¹⁹⁸ Still Human Still Here cite the case study of Thania, who sought asylum after her parents were murdered and she was raped by Congolese soldiers at the age of 15: '*The worst thing for me was living on the streets and selling sex...Sometimes I thought about killing myself. Every day I had to have sex so I could eat. I was hearing voices. I couldn't sleep. All I could think about was hunger*'.¹⁹⁹ Sexual exploitation is also particularly prevalent amongst mothers who

¹⁹⁵ Article 9 of the ECHR, Article 18 of the ICCPR and Article 18 of the UDHR thus provide that: '*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom...to manifest his religion or belief, in worship, teaching, practice and observance.*'

¹⁹⁶ United Nations Committee on Civil and Political Rights, *General Comment No.22: Article 18 (The Right to Freedom of Thought, Conscience and Religion)* (United Nations Committee on Civil and Political Rights, A/48/40, 1993) para 4.

¹⁹⁷ *Eweida v United Kingdom* (2013) 57 EHRR 8 para OII – 3.

¹⁹⁸ Reynolds 36 (n 163); Williams and Kaye 37 (n 114); Crawley, Hemmings and Price 41 (n 173); Kamena Dorling, Marchu Girma and Natasha Walter, *Refused: The experiences of women denied asylum in the UK* (Women for Refugee Women, 2012); The Children's Society 8 (n 166); Teather and others (n 76).

¹⁹⁹ Williams and Kaye 37 (n 114).

feel the need to provide for their children,²⁰⁰ the characteristics of gender, motherhood and immigration status thus intersect to place this group at particular risk. Under Article 6 of CEDAW the UK are obligated to suppress prostitution and sexual violence. The Committee on the Elimination of Discrimination Against Women thus recognise that *'poverty and unemployment force many women, including young girls, into prostitution'*²⁰¹ yet this factor is overlooked by the Government in the name of immigration control.

In analysing the asylum support system through the right to food, it is clear that the current system fails to meet minimum core standards as feelings of hunger are recorded within a significant number of NGO reports. Due to inconsistencies amongst data²⁰² it is impossible to ascertain the exact scale of food insufficiency, however the prevalence of findings indicates that insufficient food is a major issue, the effects of which ricochet onto a number of other rights and interests including those of religion, health, and the non-exploitation of individuals. In addition to food, asylum support is also supposed to cover other essential living needs such as clothing and household goods which form the second component of an adequate standard of living. Accordingly the next section will address whether current support levels are compatible with human rights and whether the negative impact of the measures renders them disproportionate in achieving economic protection for the state.

²⁰⁰ Lewis 19 (n 184); Mulvey 27 (n 153); Reynolds 36 (n 163); Teather and others 13 (n 76).

²⁰¹ United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19: Violence against women* (United Nations Committee on the Elimination of Discrimination Against Women, A/47/38, 1992) para 15.

²⁰² In the Still Human Still Here report by Williams and Kaye, 50% of section 95 recipients reported regular feelings of hunger, whereas within the 2010 Asylum Support Partnership research by Reynolds only 26% of section 4 recipients reported regular feelings of hunger. As section 4 support provides lower levels of financial provision than section 95 one would expect a higher percentage of persons in receipt of Section 4 to claim feelings of hunger. Williams and Kaye (n114); Reynolds (n 163).

Clothing and other essential items

In 2010 research by Refugee Action revealed that a significant number of asylum seekers in receipt of section 95 support were unable to provide for the needs identified as 'essential' by the Government, including: 70% of recipients who were unable to buy necessary toiletries or sanitary products; 60% of respondents who needed but could not afford non prescription medical goods such as pain killers; 81% of respondents who were unable to buy necessary cooking and kitchen utensils, bedding or cleaning materials (exacerbated by the lack of amenities within asylum accommodation); and a staggering 94% of respondents who were unable to buy clothing.²⁰³ Consequently one family were recorded as wearing the clothes and shoes in which they had fled their country of origin.²⁰⁴ As recipients of section 4 support receive even less than those on section 95, such problems are paralleled throughout the two systems.²⁰⁵ For refused asylum seekers with no means of support, research demonstrates²⁰⁶ that most survive on donations of food and clothing from charity organisations and faith groups. Accordingly the asylum support system is failing to provide sufficient clothing and other requisite needs for an adequate standard of living within the UK which once again demonstrates that the Government is in breach of its minimum core obligations under Article 25 UDHR, Article 11 of the ICESCR and Article 27 of the CRC.

Though there is no statutory definition of essential living needs, regulation 9(1) of the Asylum Support Regulations explicitly excludes from this definition: the cost of faxes; computer facilities; photocopying; travel expenses;²⁰⁷ toys and other

²⁰³ Refugee Action, *Asylum Support Cuts* 4 (n 134).

²⁰⁴ Ibid 4.

²⁰⁵ Reynolds (n 163).

²⁰⁶ Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (n 89); Crawley, Hemmings and Price (n 173).

²⁰⁷ Except the expense of an initial journey from a place in the UK to asylum support or to an address in the UK which has been notified to the Secretary of State as the applicants permanent address.

recreational items and entertainment expenses.²⁰⁸ The Government's exclusion of certain items from this definition, such as toys for children and travel expenses is a contentious matter, particularly where applicants receive asylum support for substantial periods of time. As will be explored within the NGO material, the inability to travel causes particular hardship for applicants and is consequently included within the Still Human Still Here definition of essential living needs²⁰⁹ and the Joseph Rowntree MIS;²¹⁰ the distinction between what the Government deem to be essential and what is socially considered as adequate is thus apparent.

Findings of insufficiency run throughout the NGO data as the minimal amount granted in support not only impacts upon adults needs, but also affects parents' ability to provide the resources necessary for their children's development. Consequently, Refugee Action report that 100% of respondent parents in receipt of section 95 support were unable to buy items such as toys, thermometers or pushchairs for their children.²¹¹ Although the Government exclude toys from their definition of 'essential living needs', the Teather Inquiry argues that *'for children to grow, develop and learn effectively, additional resources are required beyond merely food, shelter and clothing'*²¹² as children also need resources to support their education, social and physical development.²¹³ The development of asylum seeking children is therefore hampered through parents' inability to provide the space, resources or opportunities for play²¹⁴ which is exacerbated by asylum seeking children's inability to participate

²⁰⁸ Asylum Support Regulations 2000, SI 2000/704, reg 9(4).

²⁰⁹ Still Human Still Here, *What is the minimum level of support an asylum seeker needs in order to meet their essential living needs and avoid destitution?* (Still Human Still Here, 2010).

²¹⁰ Hirsch (n 155).

²¹¹ Refugee Action, *Asylum Support Cuts* 3 (n 134).

²¹² Teather and others 11 (n 76).

²¹³ Ibid 11.

²¹⁴ As the Children's Society report *'children were not able to learn English or to read and write in any language. One parent described how her child did not understand how to play with toys because she did not have any.'* The Children's Society 18 (n 166).

in paid out of school activities.²¹⁵ Acquiring items such as school uniforms,²¹⁶ PE kits, books, desks and stationery is also problematic for parents in receipt of section 4 support who do not qualify for passported benefits such as hardship funds, free school meals or the pupil premium. Instead the availability of such payments is left at the discretion of the school. As a consequence, it is contended that the Government are failing to provide hospitality as the system does not account for the additional needs of children, primarily because their status as children is overshadowed by their status as asylum seekers, contrary to the anti discrimination provisions within Article 2 of both the ICESCR and CRC. Though the provision of toys may not appear crucial for an adequate standard of living, this policy needs to be regarded within the full spectrum of policies relating to asylum seeking children and the cumulative effect this has on children's dignity, mental health, emotional well being and longer term fortunes.²¹⁷ The impact of low level support thus extends beyond an adequate standard of living and also engages the right to education under Article 28 of the CRC and the obligations found within Article 3 of the CRC which affirm that the best interests of the child should be a primary consideration. The obligation under section 55 of the BCIA 2009 to pay due regard to the welfare of children in the creation of immigration policy has thus had little impact, particularly as the Government recently unveiled

²¹⁵ Hobson C, Cox J and Sagovsky N, Fit for purpose yet? The Independent Asylum Commission's Interim Findings (Independent Asylum Commission, 2008); Reacroft, *Like any other child? Children and families in the asylum process* 83 (n 116); Teather and others (n 76).

²¹⁶ The Teather inquiry found that the use of section 4 support within designated supermarkets restricts the availability of specific uniform items. Teather and others 19 (n 76). This is substantiated by research from the Asylum Support Partnership which notes the case study of Halima and Joseph who were unable to buy the specific uniform needed for their child. The school refused to help with the cost as their hardship fund was only available to people on housing benefit, fortunately the family were eventually given the money by a charity for the tie, blazer, jumper, sports kit and logo. Reynolds 8 (n 163).

²¹⁷ As addressed by Dr. Elaine Chase in the Teather inquiry, factors such as '*not having enough food to eat, parents going without food, not having a warm coat to wear in the winter, dealing with their day-to-day stress and anxieties of their parents living in poverty and not being able to provide adequately for them...Those day to day feelings of being excluded, not being good enough...have a long term effect on children and young people's wellbeing*'. Teather and others 16 (n 76).

plans to decrease section 95 support levels for asylum seeking children by 30% indicating the direction of future policy under the Conservative Government.

Low levels of cash support under section 95 also inhibit the ability of applicants to travel which restricts social contact and access to services and organisations such as medical care, religious groups, the immigration service and legal services which can affect access to legal advice for applicants asylum claims.²¹⁸ The inability to prepare for an asylum application impacts upon individuals rights under Article 14(1) of the ICCPR which states that ‘all persons shall be equal before the courts and tribunals’, Article 6 of the ECHR which provides the right to a ‘fair and public hearing’ and Articles 13 of the UDHR and 18 of the Charter which grant the right to asylum.²¹⁹ The right to freedom of religion under Articles 9 of the ECHR; 18 of the UDHR; 14 of the CRC and 18 of the ICCPR is also infringed by travel restrictions which inhibit the access of places of worship such as mosques, churches and temples, restrictions which are exacerbated by the dispersal policy which allocates housing on a no-choice basis.²²⁰

The provision of non cash support under section 4 of the IAA 1999 also creates numerous difficulties for refused asylum seekers who are unable to return which has led to the publication of two NGO reports detailing the impact of the Azure payment card. The difficulties listed include the inability to pay for and thus access transportation using the payment card which, in turn, inhibits social contact²²¹ and

²¹⁸ Consequently 80% of Refugee Action respondents in receipt of section 95 support reported the inability to attend social engagements, 75% struggled to do their shopping, 50% faced difficulties in reaching a doctor, 65% could not travel to appointments with their solicitor and 44% had difficulty contacting their solicitor given their finances. Refugee Action, *Asylum Support Cuts* 5 (n 134).

²¹⁹ *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014].

²²⁰ The Teather inquiry thus reports the case study of a Sikh family housed in a property with no access to a Gurdwara [place of worship], causing high levels of anxiety for the whole family. Teather and others 22 (n 76).

²²¹ The ASP report that 48% of their respondents (including 13 families) were unable to visit friends and family and 20% could not afford telephone credit whilst receiving Section 4 support. Reynolds 5 (n 163).

restricts the undertaking of everyday activities²²² and access to services including that of medical care.²²³ Though applicants in receipt of section 4 support can claim additional payments for necessities such as travel or phone calls under the Immigration and Asylum (Provision of Services or Facilities) Regulations 2007,²²⁴ evidence demonstrates that such payments are often late, if granted at all.²²⁵ In the case of maternity grants, a female respondent to the Asylum Support Partnership reported waiting 10 weeks for additional support for her newborn baby,²²⁶ findings that are mirrored in research from the Teather Inquiry which documents the case study of Mary whose maternity grant was received two months after the birth of her child. As a result

²²² Lack of transportation is also especially difficult for parents who report having to walk with their children for miles each day to attend school or even just to buy milk. School journeys are long and arduous where children are schooled outside of the catchment area which in some instances results in their absence. The Asylum Support Partnership thus report that one child was placed '*into a school which was the 17th nearest primary school...a five mile journey*', as the school was outside of the catchment area the mother doesn't qualify for local authority travel costs despite having two young twins and a baby. As she had no access to transport her children were never in school. Ibid 31.

²²³ 53% of ASP respondents were unable to pay for travel to essential appointments with their doctor or to visit the nearest hospital. Ibid 5.

The Teather inquiry also reports that restrictions on travel and phone contact make the continuity of maternal care particularly difficult, which is exacerbated by frequent moves and the policy of dispersal which involves the allocation of new hospitals and midwives. Dr. Jenny Phillimore of the University of Birmingham thus reported to the inquiry that asylum applicants '*have not got the cash to ring up the doctor. They are not attending any of their antenatal appointments...We were finding women who were being dispersed at 38 and 39 weeks of pregnancy...One woman started to go into labour, did not have a midwife, did not know where the hospital was, and it was only the kindness of strangers in the street that got her to hospital... Dispersal breaks the continuity of care.*' Teather and others 17 (n 76).

The difficulty in accessing health care services is further evidenced in a Scottish Refugee Council case study in which a man whose wife had undergone a heart bypass had no money to take her to hospital in a taxi. These findings are substantiated by the Asylum Support Partnership to which one respondent confirmed that '*this card is not useful to me or my family. I have two daughters – sometimes we need a taxi to attend hospital appointments and go to surgical appointments. Everything is so very difficult with this card*'. Mulvey 23 (n 153).

²²⁴ Immigration and Asylum (Provision of Services or Facilities) Regulations 2007, SI 2007/3627.

²²⁵ The Asylum Support Partnership report that 26% of respondents entitled to additional payments experienced delays. Reynolds 6 (n 163).

The Teather inquiry also reports the case study of a family with premature twins, one of whom died in hospital. The other baby was released but had significant health needs and so regular trips to the hospital were necessary. As the family were section 4 recipients they were unable to access transportation and consequently had to walk to the hospital with their new born for appointments. Though the family applied for additional payments they rarely received them on time. Teather and others 12 (n 76).

In addition a Scottish Refugee Council respondent reported that, despite his severe mobility problems, he was required to walk for 2 hours to reach Asda to buy the few items he was able to walk home with, a trip he had to undertake several times a week. Mulvey 23 (n 153).

²²⁶ Reynolds 6 (163).

of having ‘no money to buy a buggy, or to pay for a taxi, she had to walk home from hospital in the snow with her newborn baby in her arms’.²²⁷ Restrictions on travel are also particularly detrimental to asylum seeking fathers as the inability to access transportation can prevent fathers from visiting their separately housed children or partners, an arrangement that often occurs where parents lodge separate asylum applications.²²⁸ Under Article 9 of the CRC children should not be separated from their parent(s) against their will ‘*except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child*’. Where children are to be separated from their parent(s), the best interests of the child must be the determining factor,²²⁹ yet in the case of asylum seeking families immigration control is prioritised over the best interests of the child, which in this instance would be family unification. Such separation also impacts upon Article 8 of the ECHR and Article 17 of the ICCPR, which grants the right to respect for private and family life.

As only one Azure card is issued per household (often in the name of the husband), the card is also recorded as disproportionately impacting upon married women who are unable to use the card in the absence of their husbands. Not only is this situation ‘*impractical, distressing and unfair...it exclusively penalises women who*

²²⁷ Teather and others 15 (n 76).

²²⁸ The Teather inquiry suggests that the ‘*separating of families appears to be commonplace within the asylum system*’, particularly for couples who are not married or do not pass the two year cohabitation period and where the father is either not an asylum seeker or has a separate asylum application from the mother. Where such circumstances combine with the dispersal policy, the inability to travel prevents a number of fathers from seeing their children. This also applies to those in receipt of section 95 support as low levels of provision mean that many applicants cannot allocate money towards travel costs. The Teather inquiry thus details the case study of Waseem who obtained a court order for visiting rights to his children, yet this was conditional upon maintaining contact at least once a week. Waseem is housed away from his children and as he receives Section 4 support he is unable to visit his children. Though UKBA have agreed to relocate him, in the interim he is worried he will lose access to his children. Teather 22 (n 76).

²²⁹ United Nations High Commissioner for Refugees, *Guidelines on Determining the Best Interests of the Child* para 1.1 (n 142).

are forced to be entirely dependent on their husbands in order to conduct the weekly shopping'.²³⁰ Marital status is recognised as a ground of discrimination under Article 2 of the ICESCR and thus the CESCR note that discrimination occurs where individuals are unable to access social security on the basis of marital status or are unable to exercise a right without spousal consent.²³¹ The Azure payment card therefore indirectly discriminates against married women in contravention of the Government's obligations under Article 2(2) of the ICESCR and specifically under Article 13 of CEDAW which purports that State parties should take measures to eliminate discrimination and ensure equality between men and women in areas of economic and social life. In addition to the discrimination experienced by married women, a number of applicants also claim to have experienced prejudice from shopkeepers as the Azure payment card reveals their identity as refused asylum seekers. In some instances this has led to the denial of necessary goods²³² which results in feelings of distress, shame, anxiety, social isolation and a chronic dread of shopping for some.²³³ Forced exposure of this nature is a breach of privacy under Article 8 of the ECHR and Article 17 of the ICCPR. In protecting a person's right to privacy the State must protect from all *'interferences and attacks whether they emanate from State*

²³⁰ Reynolds 38 (n 163).

²³¹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.20: Non-discrimination in economic, social and cultural rights* (Art. 2, para. 2) para 31 (n 14).

²³² In some instances shopkeepers wrongly interpret UK Visas and Immigration guidance on the payment card as being *'valid for "food and essential toiletries only"*. As a result, users have been refused household items, phone cards, toiletries and children's clothing. In one case, a man was refused socks, underpants and orange juice on the basis that these were not *'essential food items'*. In one incident *'a staff member on the till didn't recognise the card and eventually the woman had to explain why she had it, that she was on section 4, what section 4 was, that she was a refused asylum seeker and the woman on the till refused to accept it because she said 'if you're refused why should you be getting payments? I don't agree with that.'* So she was really humiliated'. Accordingly 38% of Asylum Support Partnership respondents reported negative treatment by shop staff in response to the card and 33% reported hostility from other shoppers. Reynolds 24 and 34 (n 163). This is also supported by the findings of the British Red Cross, as 70% of service provider respondents reported that clients had to some extent received poor treatment from staff as a result of using the Azure payment card and 72% reported instances of the card being refused altogether. Carnet, Blanchard and Ellis 32 (n 159).

²³³ Pettitt 35 (n 165) Reynolds 35 (n 163).

authorities or from natural or legal persons’,²³⁴ the Government is therefore failing to uphold their obligations with respect to the right to privacy as the cards reveal a specific personal aspect of identity.

A number of unique challenges also prevent refused and destitute asylum seekers from fulfilling their essential living needs. Whereas reduced levels of support under sections 4 and 95 of the IAA 1999 are used to deter future applicants from accessing the system, the destitution of those who refuse to return is used as a method of coercion to force them to return to their countries of origin. Those who continue to refuse endure the punitive effects of destitution. In a 2009 four week study²³⁵ of destitute asylum seekers in Leeds, 85 instances of rough sleeping were recorded with 100 individuals claiming to have been destitute for one year or more. On average Refugee Action found that respondents were generally destitute for an average of 21 months²³⁶ due to a number of reasons, but primarily because: they were waiting for section 95 or section 4 support to begin; they had broken support conditions; they lacked understanding of support options; there were administrative errors in the provision of support; or the individual’s asylum application had failed. Despite the fact that all asylum seeking families are entitled to seek financial help under sections 4 or 95 of the IAA 1999, instances of destitution amongst families are recorded. In 2013 the Teather inquiry revealed that in some areas children made up between 13-20% of the destitute asylum population which is substantiated by research from Lewis, who in a 2009 four week study of destitute asylum seekers in Leeds, found 21 families

²³⁴ United Nations Committee on Civil and Political Rights, *General Comment No.16: Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation)* (United Nations Committee on Civil and Political Rights, A/43/40, 1988) para 1.

²³⁵ Lewis (n 184).

²³⁶ Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (n 89). This is supported by evidence from Freedom From Torture who note that 27% of their respondents reported sleeping rough, see Pettitt 9 (n 165).

with 30 dependents living destitute. Six families had been destitute for one to two years and five had been destitute for over two years.²³⁷ Whereas some children became destitute in the move from asylum to mainstream support²³⁸ others were born into destitution, the primary motivation being fear of deportation.²³⁹

Unfortunately sexual assault, harassment and violence are common occurrences amongst those who are destitute.²⁴⁰ Hence in a 2012 survey, Women for Refugee Women found that 16% of homeless female respondents had experienced sexual violence whilst destitute,²⁴¹ the effects of which are exacerbated by health care restrictions which deny some women treatment for long-term serious injuries resulting from violence such as rape.²⁴² Where people have no alternative to destitution they often turn to friends for support and accommodation which causes feelings of

²³⁷ Lewis 4 (n 184).

²³⁸ The Teather inquiry thus reports the case study of ‘Nicole’ in touch with the Refugee Council whom ‘*applied for Section 4 support at the beginning of January 2012 but her application was not accepted until June. During these five months, she and her two children aged six and three were sleeping on the floor of a mosque and surviving on hand-outs from people attending the mosque.*’ Teather and others 9 (n 76).

²³⁹ Crawley, Hemmings and Price (n 173).

²⁴⁰ Refugee Action report that ‘*sexual harassment and assault is taking place among those people having to resort to temporary sleeping arrangements. Many fear approaching the police to report such incidents and seek to avoid contact for fear of being picked up, put in detention and deported.*’ Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* 76 (n 89).

²⁴¹ Refugee Council, *The Vulnerable Women’s Project Refugee and Asylum Seeking Women Affected by Rape or Sexual Violence Literature Review* 52 (n 75).

²⁴² Under the National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306, as amended by the National Health Service (Charges to Overseas) Visitors Regulations 2011/1556, destitute refused asylum seekers remain liable for charges for secondary health care (reg 4). Under Regulation 6 some services remain free regardless of immigration status, this comprises accident and emergency services; family planning services; treatment for certain diseases seen as necessary to protect public health; treatment for sexually transmitted diseases, including HIV treatment; treatment for those detained under the provisions of the Mental Health Act 1983 or other legislation authorising detention in a hospital because of a mental disorder; and finally treatment imposed by or included in a court order. NHS bodies must also ensure that treatment which is considered to be urgent or immediately necessary (including all maternity treatment) is provided regardless of whether payments have been made in advance. ‘*Immediately necessary treatment is that which a patient needs: to save their life; or to prevent a condition from becoming immediately life-threatening; or to promptly to prevent permanent serious damage from occurring.*’ Consequently, medical matters such as the long term effects of rape or torture, which are not considered to be of urgency or an emergency are excluded. See Department of Health, *Guidance on implementing the Overseas Visitors Hospital Charging Regulations* (Gov.uk 2013) para 4.5.

shame,²⁴³ *‘a lack of social confidence, a perception that people look down on you, and the feeling that you are ‘nobody’*’;²⁴⁴ Freedom from Torture report that respondents *‘talked about feeling de-humanised and completely abandoned by humankind’*.²⁴⁵ Existing mental health conditions and feelings of depression or anxiety are consequently worsened by feelings of hopelessness, social isolation and abandon²⁴⁶ which worsens the longer refused asylum seekers remain destitute.²⁴⁷ Thus when asked the meaning of destitute, a respondent to Crawley stated that he *‘felt like he’d been abandoned by the human race. As a destitute he has no hope in life, destitution makes people feel hopeless’*,²⁴⁸ which results in the contemplation of suicide for some.²⁴⁹ In addition to the deterioration of mental health, Lewis²⁵⁰ found that long term destitution also increases rates of alcohol and drug related dependency amongst refused asylum seekers. Medical intervention for such conditions is seen to be pointless as in order to recover *‘they need relief from their circumstances’* which is not granted under the current policy framework.²⁵¹ Other physical effects caused by destitution include malnourishment and conditions such as pneumonia as reported by GP Dr Angela Burnett who responded to a call for data from the Independent Asylum Commission, recounting the case of a homeless patient she found to be

²⁴³ Mulvey 27 (n 153).

²⁴⁴ This is also supported by research from Freedom From Torture who assert that the State enforced destitution of asylum seekers creates dependency, reinforcing a torture victims position as ‘victim’, such dependency leads to anxiety and shame. Crawley, Hemmings and Price 23 (n 173); Pettitt 57 (n 165).

²⁴⁵ Pettitt 57 (n 165).

²⁴⁶ This is particularly acute for torture survivors as destitution *‘can lead to deterioration in their mental health and/or to an increased risk of suicide. It can also have a long term impact on their ability to recover from their past trauma, even after they are no longer in destitute circumstances’*. Ibid 58.

²⁴⁷ Mind, *A civilised society: Mental health provision for refugees and asylum-seekers in England and Wales* (Mind, 2009); Crawley, Hemmings and Price (n 170).

²⁴⁸ Crawley, Hemmings and Price 23 (n 170).

²⁴⁹ Pettitt (n 165); Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (n 89).

²⁵⁰ Lewis (n 184).

²⁵¹ Ibid 18.

*‘severely anaemic due to a restricted diet, and having to walk approximately ten miles to report to the Home Office every week. Profoundly depressed and with symptoms of epilepsy, I would normally have referred her to hospital, but because she would have been faced with a bill she could not pay, a torture survivor was denied vital treatment’.*²⁵²

As addressed within chapter two, the conditions experienced by destitute asylum seekers such as street homelessness, hunger and exploitation were held to engage Article 3 of the ECHR in the case of *Limbuela*, however the application of Article 3 is negated in terms of destitute asylum seekers who are construed as being able to avoid these conditions through return to their countries of origin.

What is apparent from the above assessment is that the denial of essential living needs to the asylum seeking community creates unnecessary hardship. In a group that disproportionately suffers from mental health issues, Mind contend that Government policy is ‘*inherently contradictory*’ as ‘*on the one hand mental health policy recognises the increased vulnerability of asylum-seekers and refugees and the need to support them*’ whilst on the other hand asylum and immigration policy has ‘*a devastating impact on the mental health, wellbeing and long-term integration prospects of refugees and asylum-seekers*’.²⁵³ As was established in relation to employment, the inability to engage with normal everyday activities restricts recovery from trauma though preventing settlement and the acting out of familiar behavioural patterns which are seen to aid with recuperation and integration. Accordingly it is often refugees’ ‘*experiences in the country of resettlement that have a much greater impact on their mental wellbeing*’.²⁵⁴ In order to aid the resettlement and long term integration of refugees, sanctuary should therefore be provided upon entrance to the State as

²⁵² Hobson, Cox and Sagovsky, *Fit for purpose yet? The Independent Asylum Commission's Interim Findings* 93 (n 215).

²⁵³ Mind 10 (n 247).

²⁵⁴ Caroline M. Mann and Qulsoom Fazil, 'Mental illness in asylum seekers and refugees' (2006) 4 *Primary Care Mental Health* 57, 60.

opposed to the current system which only affords conditions of hospitality and sanctuary once refugee status is granted, which can take several months or even years.

From a cosmopolitan perspective, the Government's positive implementation of employment and welfare restrictions makes them moral conversationists in the impact that restrictions have upon the welfare and well being of the asylum seeking community, and as demonstrated throughout, the current system infringes upon numerous rights extending beyond the right to adequate living standards and the right to work. Though NGO evidence is based on samples of individual experiences, taken together they provide a fairly consistent narrative. It is not therefore unreasonable to think that such experiences are representative of many other asylum seekers in the same or similar positions.

Consequently it is contended that the UK Government is failing to respect, protect or fulfil its obligations under the ICESCR in relation to adequate living standards for the asylum seeking community which impacts upon a number of other rights including the right to health,²⁵⁵ asylum,²⁵⁶ freedom of religion,²⁵⁷ education,²⁵⁸ to a fair and public hearing²⁵⁹ and to respect for private and family life.²⁶⁰ It is argued that in implementing the IAA 1999 the UK Government contravened its obligation to respect the right to an adequate standard of living as the IAA 1999 altered the former, more generous, welfare arrangements for the asylum seeking community which provided recipients with support at approximately 90% of the rate afforded to citizens. Accordingly the IAA 1999 constitutes a regressive and more restrictive policy which interferes with the right to an adequate standard of living. The rights analysis also

²⁵⁵ Found within Articles: 25 UDHR; 12 ICESCR; 24 CRC.

²⁵⁶ Found within Article 14 UDHR.

²⁵⁷ Found within Articles 18 UDHR; 18 ICCPR; 14 CRC; 9 ECHR.

²⁵⁸ Found within Article 28 CRC.

²⁵⁹ Found within Articles: 13 UDHR; 14(1) ICCPR; 6 ECHR.

²⁶⁰ Found within Articles: 12 UDHR; 17 ICCPR; 8 ECHR.

demonstrated that the Government has failed to protect the rights of the asylum seeking community from interference from other individuals and enterprises. Such interference is evident in the inability of certain section 4 recipients to access goods and essential living needs due to the exposure of prejudice from shopkeepers on presenting them with the Azure payment card and through Sodexo's (the private card provider) negligent administration of the payment card which, in some instances, prevents applicants from purchasing the material goods necessary for an adequate living. Such issues are well documented within NGO research which means that the Government should have an awareness of these difficulties.²⁶¹ As established at the beginning of this chapter, the fulfilment of the right to an adequate standard of living incorporates the facilitation as well as the provision of food, clothing and other essential needs imposing a positive duty upon the state to provide for such needs where individuals are unable to do so themselves. In implementing employment restrictions and minimal levels of subsistence which deny members of the asylum seeking community access to essential living needs, it is argued that the Government is thus failing to fulfil its obligations under the ICESCR, and that rather, the Government is actively frustrating asylum applicants' access to food, clothing and other essential items. Though it is conceded that the UK has suffered from economic recession within the last decade, the CESCR²⁶² note that the obligations under the Covenant continue to apply, and are perhaps even more pertinent, during times of economic contraction. A general decline in living and housing conditions which is directly attributable to policy and legislative decisions by the Government, such as tax reductions for high

²⁶¹ Reynolds (n 160); Carnet, Blanchard and Ellis (n 156).

²⁶² United Nations Committee on Economic, Social and Cultural Rights, *General Comment No.2: International technical assistance measures* (United Nations Committee on Economic, Social and Cultural Rights, E/1990/23, 1990) para 9.

earners, are thus inconsistent with the obligations imposed by the Covenant.²⁶³ By failing to uphold its duties under the ICESCR, the UK is also failing to adhere to Article 27 of the Vienna Convention on the Law of Treaties (1969) to adhere to and observe treaty law.

Though immigration control is considered a legitimate aim by the UK courts in restricting the socio-economic rights of the asylum seeking community,²⁶⁴ it is asserted that the Government have failed to establish ‘a pressing need’ for restrictions as there is no credible evidence to substantiate claims of the ‘pull’ factor which lie at the heart of restrictions or indeed that restrictive measures have any impact upon the numbers of applicants coming to the UK. Such evidence is particularly crucial in light of contradictory evidence that disputes the validity of this argument²⁶⁵ and requests from the Joint Committee on Human Rights that the Government produce evidence to substantiate their position.²⁶⁶ In the Home Office research paper ‘Understanding the decision making of asylum seekers’²⁶⁷ the authors found that most respondents had very limited knowledge of the financial support arrangements they would be entitled to upon arrival in the UK and that receiving benefits was not a major factor influencing their choice of destination. Thus ‘*knowledge of the assistance asylum seekers received was limited and characterised by general expectations rather than information on particular entitlements*’.²⁶⁸ These findings are also supported by Refugee Council Research which found that approximately three quarters of respondents had no knowledge of the UK’s welfare benefits system and that there was no evidence to

²⁶³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 4: Article 11(1) (The Right to Adequate Housing)* (United Nations Committee on Economic, Social and Cultural Rights, E/1992/23, 1991) para 11.

²⁶⁴ *R. (on the application of Rostami) v Secretary of State for the Home Department* [2013].

²⁶⁵ Robinson and Segrott (n 89); Crawley, *Chance or Choice? Understanding why asylum seekers come to the UK* (n 89).

²⁶⁶ Joint Committee on Human Rights, *The Treatment of Asylum Seekers* 8 (n 1).

²⁶⁷ Robinson and Segrott (n 89).

²⁶⁸ *Ibid* 52.

suggest respondents considered the UK to be more generous than other European countries, asserting that though *'the pull factor argument is misguided it continues to block positive policy change to improve the lives of those already here'*.²⁶⁹ The fragile justificatory premise on which support restrictions are built is further undermined when compared with the hugely negative impact that support and employment restrictions are having upon the asylum seeking community and the fact that the current policies are retrogressive as entitlements have slowly been stripped from the asylum seeking community over the last two decades.

Accordingly, though the ratification of core legal instruments and the acceptance of asylum seekers into the State signifies a cosmopolitan solidarity recognising persecution as an evil from which all humanity deserves protection, the UK asylum system contradicts this ethos. The UK thus offers no ethics of hospitality but

'rather, the disbursement of essentials is structured in terms of services to be rendered, begrudgingly. What must be relentlessly evaded is hospitality: don't expect refuge, only shelter; don't expect nourishment, only food; don't expect comfort, only harassment. All these practices position refugees as interlopers parasiting the body of the nation'.²⁷⁰

If the position of those unlawfully present within the UK is the ultimate test of the reach of universal rights,²⁷¹ the implications of the asylum support system demonstrates that sovereignty and State interest take precedence, indicating *'how readily the rights of man can be subordinated to emergent forces of nationalism'*.²⁷² Though Kantian hospitality seeks to strike a fair balance between the interests of host

²⁶⁹ Crawley, *Chance or Choice? Understanding why asylum seekers come to the UK* (n 89).

²⁷⁰ Joseph Pugliese, 'Penal asylum: refugees, ethics, hospitality' (2002) 1 *Borderlands E-journal* para 21.

²⁷¹ Morris L, 'Managing Contradiction: Civic Stratification and Migrants'Rights' (2003) 37 *International Migration Review* 74.

²⁷² Fine R, 'Cosmopolitanism and Human Rights: Radicalism in a global age' (2009) 40 *Metaphilosophy* 8, 11.

and guest, '*universal hospitality is sacrificed on the altar of State interest*'²⁷³ revealing that '*States in reality are not at the service of global moral values, but are primarily motivated by their own survival and exist precisely to serve those who elected them.*'²⁷⁴

Now that it is established that the UK Government is actively pursuing hostile as opposed to hospitable policies towards the asylum seeking community, the question remains as to how standards of hospitality that abide by human rights can be enforced. As briefly mentioned at the beginning of this chapter, human rights do not only constitute a moral benchmark against which we can measure the policies of the asylum support system, they also provide a route for enforcement. However the enforcement of rights and thus hospitality is a contentious matter as it primarily relies upon co-operation from the offending state which first requires the state to recognise the rights contained within the relevant treaty, and acknowledgement from the state that those rights extend to members of the asylum seeking community. The most effective method of enforcing human rights within the UK is also through the national courts which requires rights to be transposed within national law, and where international mechanisms of enforcement do exist, the UK must agree to give effect to these institutions. Issues also arise as state parties often distinguish between socio-economic and civil and political rights, regarding the latter as justiciable and the former as mere guiding principles against which the State cannot be held to account. Though Pogge recognises the utility in using human rights as a measure of cosmopolitan morality he thus concludes that the primary limitation of institutional human rights is that they are contingent upon the existence of social institutions, in the absence of which human

²⁷³ Benhabib S, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 177.

²⁷⁴ Fletcher E, *Changing Support for Asylum Seekers: An Analysis of Legislation and Parliamentary Debates* (Working Paper No49, 2008).

rights violations do not exist, confirming that *'as long as there is plurality of self-contained cultures, the responsibility for such violations does not extend beyond their boundaries'*.²⁷⁵ The next section will further explore the ways in which the asylum seeking community can realise hospitality within the UK examining the advantages and drawbacks of using human rights as a method of enforcement.

4.4 Realising hospitality

In the context of the asylum support system, enforcing standards of hospitality through the human rights framework is difficult as the primary rights around which the thesis is situated: the right to an adequate standard of living and the right to work, have not been incorporated within domestic law which means that they cannot be directly enforced within the national courts. Though specific mechanisms for the enforcement of such rights exist under the ICESCR, the UK has not signed or ratified the Optional Protocol to the ICESCR²⁷⁶ which sets out numerous methods of accountability including the process of individual and group communications to the CESCR,²⁷⁷ an inter-state communications procedure²⁷⁸ and an inquiry procedure

²⁷⁵ Pogge T, 'Cosmopolitanism and Sovereignty' (1992) 103 Ethics 48, 51.

²⁷⁶ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

²⁷⁷ Individual or group communications to the Committee will only be accepted where domestic remedies have been exhausted and communications must also conform to the other admissibility rules set out in Article 3 of the Protocol. Where the authors of complaints have not suffered a clear disadvantage the Committee may decline to consider the complaint (see Article 5 of the Protocol). With regards to remedy, where irreparable harm is imminent with regards to the author of the complaint, the Committee may transmit an urgent request to the State that the State take interim measures as are necessary for its avoidance (Article 5 of the Protocol). In all other cases the Committee will transmit its views and recommendations on the communication to the relevant State party. The State party must consider the views and recommendations by the Committee and respond within six months with written explanations or statements clarifying the matter and the remedy, if any, that has been provided. Article 9 of the Optional to the International Covenant on Economic, Social and Cultural Rights.

²⁷⁸ Where a State believes that another State party is not fulfilling their obligations under the Covenant they may make a written communication to bring the matter to the attention of that State party. Communications may only be submitted by a State who has acknowledged the competence of the Committee. Within three months of receipt, the offending State should send an explanation or any other statement in writing clarifying the matter including the domestic procedures or remedies undertaken in response. If the matter is not settled to the satisfaction of both States concerned, the

which allows the CESCR to conduct inquiries where they receive information indicating grave violations of ICESCR rights.²⁷⁹ As the UK has not ratified the Protocol it is only accountable to the CESCR on the basis of State reports,²⁸⁰ which significantly limits implementation of the Covenant. Though the UK claims that prior to, and since, the operation of the Covenant, it has *'taken measures, including legislation and the adoption of policies and programmes, which advance the same principles and objectives as are set out in the Covenant'*,²⁸¹ such social policies are not universal which is illustrated by asylum seekers' restriction in accessing welfare benefits and the limited access of refused asylum seekers to the NHS.²⁸² Much to the dismay of the CESCR,²⁸³ the UK construes the greater part of provisions within the ICESCR as failing to *'purport to establish norms which lend themselves to translation into legislation or justiciable issues'* but rather as *'statements of principle and*

communication may be referred to the Committee by notice given to the Committee and the other State who will then issue a declaration regarding their findings. Article 10 of the Optional to the International Covenant on Economic, Social and Cultural Rights.

²⁷⁹ Where an inquiry is conducted the Committee will transmit their findings to the State party concerned together with any comments and recommendations. Within six months the State party must submit its observations to the Committee and after consultation with the State party, the Committee may include a summary account of the proceedings in its annual report provided for in article 15 to the Protocol. Article 11 of the Optional to the International Covenant on Economic, Social and Cultural Rights.

²⁸⁰ State reports are the periodic reports that States must submit to the Committee on Economic, Social and Cultural Rights detailing their compliance with the ICESCR. After submission the Committee may seek further clarification regarding or supplementary information regarding the report and in some instances will hold hearings to consult on matters that are to be raised with the Government with the ultimate aim of encouraging a dialogue between the Committee and the State party's representatives. The concluding observations and recommendations of the Committee reflect the assessment of the report.

²⁸¹ United Nations Committee on Economic, Social and Cultural Rights, *Third periodic report: United Kingdom of Great Britain and Northern Ireland* (United Nations Committee on Economic, Social and Cultural Rights, E/1994/104/Add.11, 1996) para 9.

²⁸² The founding principle of the NHS was the provision of comprehensive free treatment at the point of delivery to those on the basis of need, as expressed in section 1 of the National Health Service Act 2006. However this was altered by the National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306, as amended by the National Health Service (Charges to Overseas Visitors) Regulations 2011, SI 2011/1556 which introduced charges for NHS treatment for overseas visitors falling within regulation 4.

²⁸³ United Nations Committee on Economic, Social and Cultural Rights, *Concluding observations on the United Kingdom's fourth and fifth periodic reports on the implementation of the International Covenant on Economic, Social and Cultural Rights* (United Nations Committee on Economic, Social and Cultural Rights, E/C.12/GBR/CO/5, 2009) paras 12-14.

objectives'.²⁸⁴ The reluctance of the Government in incorporating ICESCR provisions was addressed by the Foreign and Commonwealth Office²⁸⁵ in 2003 who asserted that the non justiciability of socio-economic rights within the UK rests on four grounds. Firstly, in relation to the progression of rights, it is unclear how a judge would determine whether progression had taken place in a particular case. Secondly, as the allocation of spending is considered to be a political rather than legal task, the progressive realisation of socio-economic rights (which must be achieved on a finite budget), is considered to be a matter for the Government and not the courts. The Government thus fear that allowing judges to make such decisions would *'take the decision making on the basic policy agenda and priorities away from an elected Government, counter to fundamental principles of democracy'*.²⁸⁶ Substantiating this position, the Government's third justification is that decisions regarding the best means of progressing the realisation of socio-economic rights remain policy choices *'which do not lend themselves to justiciable procedures'*.²⁸⁷ And finally the Government's fourth contention is that due to the ambiguity of ICESCR Articles, it is unclear how judges would determine whether Covenant standards had been fulfilled, such as the highest attainable standard of health for example.²⁸⁸ The preceding justifications have however been met with criticism from academics who suggest that

²⁸⁴ United Nations Committee on Economic, *Third periodic report: United Kingdom of Great Britain and Northern Ireland*, para 9 (n 281).

²⁸⁵ Foreign & Commonwealth Office, *The Annual Report on Human Rights 2003* (Foreign & Commonwealth Office 2003) 143-147. See also the justifications of the Labour Government in 2009 against the constitutional protection of socio-economic rights: *'While many specific welfare entitlements are legally enforceable, the Government believes that such policy matters should generally be developed by democratically accountable elected representatives, rather than by the courts. Decision-making in economic, social and cultural matters usually involves politically sensitive resource allocation and if the courts were to make these decisions, this would be likely to impinge on the principles of democratic accountability as well as the separation of powers between the judiciary, the legislature and the executive which underpins our constitutional arrangements.'* Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (The Stationery Office 2009).

²⁸⁶ Foreign & Commonwealth Office 145 (n 285).

²⁸⁷ Ibid 146.

²⁸⁸ Ibid 146.

the FCO '*grossly exaggerates the idea that the courts will arrogate for themselves the role of executive and Parliament*'.²⁸⁹ Further discussion of these arguments will take place in the next chapter where the incorporation of socio-economic rights within national law will be examined.

In addition to the ICESCR, a number of the other socio-economic instruments discussed throughout the rights analysis cannot be enforced within the UK courts. This includes: the UDHR which as a declaration is not legally binding, though both the ICJ and national courts have employed the Declaration as either an interpretive tool,²⁹⁰ or as customary law;²⁹¹ the socio-economic rights under the CRC;²⁹² and the socio-economic obligations under part III of CEDAW. Though institutional mechanisms aiming to enforce socio-economic rights exist under both the CRC and CEDAW,²⁹³

²⁸⁹ Ed Bates, 'The United Kingdom and the International Covenant on Economic, Social and Cultural Rights' in Mashood A. Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press 2007) 285.

²⁹⁰ Rhona K.M. Smith, *International Human Rights*, vol 5 (Oxford University Press 2012) 39.

²⁹¹ See the dicta from Vice President Judge Ammoun in his separate opinion in 'Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)' which states that: '*Although the affirmations of the Declaration are not binding qua international convention within the meaning of Article 38, paragraph 1 (a), of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1 (b) of the same Article, whether because they constituted a codification of customary law as was said in respect of Article 6 of the Vienna Convention on the Law of Treaties, or because they have acquired the force of custom through a general practice accepted as law, in the words of Article 38, paragraph 1 (b), of the Statute*'. *Separate Opinion of Vice-President Ammoun - Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (ICJ) 64.

²⁹² Though the entirety of the CRC has not been specifically incorporated within UK law, a number of the rights have been transposed. Article 3 of the CRC thus states that in all actions concerning children '*the best interests of the child shall be a primary consideration*' which is mirrored within national legislation by section 11 of the Children Act 2004. Section 11 imposes a duty on a wide range of public bodies to carry out functions with regard to the need to safeguard and promote the welfare of children, in addition where services are provided by another person pursuant to arrangements made by the person or body in the discharge of their functions, such services must be provided with regard to section 11. Up until 2008 children subject to immigration control were excluded from this protection as the UK had a reservation lodged with the CRC on matters relating to immigration control, however this reservation was lifted on 18/11/2008 and consequently section 55 of the Borders, Citizenship and Immigration Act 2009 provides that the Secretary of State must ensure that immigration, asylum, nationality and customs functions are discharged with regard to the need '*to safeguard and promote the welfare of children who are in the United Kingdom*'.

²⁹³ Under Article 44 of the CRC and Article 18 of the CEDAW the UK is obligated to submit State reports on the measures adopted within national law that give effect to Convention rights. The reports will then be considered by the Committees of the relevant Convention who issue recommendations and suggestions as guidance, though such conclusions do not have the force of law and merely act as guiding principles. In addition the State has accepted and enforced the Optional Protocol to the

neither Conventions are justiciable in the sense that they cannot be enforced within a court of law.

Though the right to work and adequate living standards cannot be directly enforced within the domestic courts, the socio-economic policies of the asylum support system have been challenged within the UK through use of the European Convention on Human Rights in conjunction with the Human Rights Act 1998. As discussed in chapter two, in the case of *Limbuela* the withdrawal of welfare support from late claimants alongside employment restrictions under section 55 of the NIAA 2002 was held to be incompatible with Article 3 of the ECHR where Government policy resulted in asylum applicants' rough sleeping, hunger and the inability to satisfy basic hygiene requirements.²⁹⁴ In addition to enforcement within the national courts, individuals are also able to seek a remedy for violations of ECHR rights from the European Court of Human Rights due to the UK's opt-in and ratification of the right to individual petition in 1965, providing another avenue for the realisation of hospitality. However in cases regarding socio-economic issues the State is granted a wide margin of appreciation by the European Court of Human Rights,²⁹⁵ recognising that States are in the best position to assess the necessity of measures within their country, '*by reason of their direct and continuous contact with the vital forces of their countries*'.²⁹⁶

CEDAW that allows for individual communications, providing some method of reparation for victims of rights violations. Yet despite ratification, the Committee on the Elimination of Discrimination Against Women notes that neither the provisions of the Convention nor the Optional Protocol are sufficiently known amongst the general public or within all branches of Government. Additionally it reports that the communications and inquiry procedures provided by the Optional Protocol and the observations of the Committee are not widely known or utilized by women. See the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women; United Nations Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the fifth and sixth Periodic Reports of the United Kingdom of Great Britain and Northern Ireland* (United Nations Committee on the Elimination of Discrimination Against Women, A/63/38, 2008).

²⁹⁴ Text to n 119 ch 2.

²⁹⁵ *Hatton and others v UK* (2003) 37 EHRR 28.

²⁹⁶ *Handyside v The United Kingdom* (1976) 1 EHRR 737 [48].

Where civil and political rights are used by the courts to enforce inherently socio-economic entitlements, this is known as the integration approach which can be either substantive or instrumental.²⁹⁷ Whereas the former recognises that socio-economic rights are of equal value to civil and political rights, the latter approach acknowledges that socio economic rights are instrumental in the protection of civil and political rights as the right to freedom in the absence of access to food for example, is rendered meaningless. The result is the permeation of different human rights instruments where the norms of one treaty, dealing with a certain category of right, can be extended to protect the norms of another treaty dealing with a different category of right, primarily because rights are interdependent and indivisible.²⁹⁸ This was evident in *Limbuela* where the denial of socio economic entitlements impacted upon the civil and political right to be free from inhuman and degrading treatment. Yet although a degree of socio-economic protection is prevalent within the provisions of the ECHR, there are a number of issues in using this approach to enforce the rights of the asylum seeking community, as primarily, the severity of treatment needed to engage Article 3 of the ECHR is considerably higher than that needed to engage socio-economic rights under the ICESCR. The right to an adequate standard of living (Article 11 ICESCR) should thus be distinguished from the right to be free from inhuman and degrading treatment (Article 3 ECHR) as although the latter acts as an ultimate safety net from hostile State treatment, it is not equivalent to the provision of an adequate living. This issue was addressed in the case of *R (on the application of EW (Eritrea)) v Secretary of State for the Home Department* [2009]²⁹⁹ which reaffirmed that although poor living conditions could amount to inhuman and

²⁹⁷ Virginia Mantouvalou, 'Work and private life: Sidabras and Dziautas v Lithuania' (2005) 30 European Law Review 573.

²⁹⁸ Ibid.

²⁹⁹ [2009] EWHC 2957 (Admin).

degrading treatment under Article 3 of the ECHR, the Article did not provide a minimum standard of treatment, financial social support or accommodation for those within its jurisdiction as such issues were held to be a matter for social legislation, not the courts.³⁰⁰ The Court thus found that minor deprivations and restrictions would not amount to a breach of Article 3. As a result, the hardship asylum seekers experience whilst in receipt of section 95 and section 4 support would not satisfy the degree of severity needed to engage Article 3. The Government's perception that refused asylum seekers should return home also negates application of Article 3 of the ECHR to their experiences, despite acknowledgement that homelessness and hunger arising from State enforced destitution engages the right. The position of the courts in the case of *R (on the application of EW (Eritrea)) v Secretary of State for the Home Department* [2009]³⁰¹ demonstrates the reluctance of the judiciary to enforce socio-economic rights within the national courts, instead paying greater deference to the Government where issues of either immigration or socio-economic policy arise.

Another method of enforcing the socio-economic interests of the asylum seeking community within the national courts is through use of the Reception Conditions Directive, the Preamble of which also incorporates the Charter of Fundamental Rights of the European Union which can be relied upon by the asylum seeking community based on the direct effect of EU law.³⁰² Both instruments were recently utilised in the case of *Refugee Action* which established minimum content to the Government's construction of 'essential living needs'.³⁰³ In light of the conclusions

³⁰⁰ Ibid [29]. This case concerned an application for judicial review on the basis that the decision to remove the claimant contravened his rights under Article 3 ECHR as the conditions in Italy (where he was due to be removed to) were such as to infringe upon Article 3 rights. A narrow definition of Article 3 was read and the Judge held that the minimum standards afforded under Article 3 were to be left to the Government.

³⁰¹ Ibid.

³⁰² Case C-32/84 *Van Gend en Loos v Nederlandse Belastingadministratie* [1964] C.M.L.R. 423.

³⁰³ *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014].

drawn from the rights analysis and the fact that the Conservative Government intend to further reduce section 95 support levels for asylum seeking families,³⁰⁴ the Reception Conditions Directive and Charter thus provide a justiciable mechanism through which future claimants can object to the arrangements of the asylum support system. This includes arguing that reduced support levels contravene European Union law through infringement of the State's obligations to: provide a dignified standard of living (Recitals 5/7 of Directive and Article 1 of Charter); promote the right to asylum (Recital 5 and Article 18 of Charter); ensure an adequate standard of health and subsistence (Article 13.1 of Directive); and/or provide for the special needs of vulnerable persons such as children or pregnant women (Articles 13.2 and 17 of Directive). However, although the combined use of the Directive and Charter provide a comprehensive basis for demanding improved socio-economic conditions for asylum seekers,³⁰⁵ the major drawback of the Reception Conditions Directive is that it does not protect the rights of the entire asylum seeking community, but rather only asylum seekers with active applications. The Directive also affords little protection for the right to work because, as addressed in chapter two, the acceptable prioritisation of national, EEA citizens and legally resident third parties renders access to the employment market illusory. The extent to which the national courts would interfere with the Government's decisions regarding asylum support is also questionable as although the case of *Refugee Action* was significant in rejecting the decision making process of the Secretary of State, Mr Justice Popplewell clearly asserted that any judgement relating to the appropriate amount needed to meet the essential living needs of asylum seekers '*does not lie with the unelected judges, but is vested by Parliament*

³⁰⁴ Travis A, 'Asylum seekers with children to have support payments cut' *The Guardian* (16 July 2015) <<http://www.theguardian.com/uk-news/2015/jul/16/asylum-seekers-with-children-to-see-support-payments-cut>> accessed 24 July 2015.

³⁰⁵ *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014].

in the elected Government of the day. The latter's decision can only be challenged on well recognised public law principles'.³⁰⁶ Consequently, although institutional mechanisms for reparation exist, in reality sovereignty outweighs the realisation of socio-economic rights.

Outside of the national courts, the Directives within the CEAS and the Charter can also be enforced through the institutional mechanisms of the European Union. Accordingly if the UK fails to comply with the provisions of the CEAS Directives or the Charter, the European Commission may institute enforcement proceedings against the UK,³⁰⁷ including bringing an action against the UK before the European Court of Justice. Whereas the Commission may issue opinions and request the State to comply, the European Court of Justice offers a further method of courts based enforcement; under these provisions it is ultimately possible to fine the State, but no remedy to individual asylum applicants is available, as seen in *Case C-256/08 Commission v United Kingdom of Great Britain and Northern Ireland [2009] ECR C153/27*, where the UK was ordered to pay costs for failing to correctly implement the Qualification Directive within the prescribed time period.³⁰⁸ However in relation to enforcing the Reception Conditions Directive, it is acknowledged that the UK Government is afforded a wide margin of discretion in implementing

³⁰⁶ Ibid para 3.

³⁰⁷ The first stage of action is the pre-litigation administration phase, called the infringement proceedings. The purpose of infringement proceedings is to allow the State to conform with the Treaty requirements. Failing compliance, a letter of formal notice will then be issued during which the Commission requests the State to submit its observations regarding the identified problem. The Commission will then issue a reasoned opinion setting out the Commission's position regarding the infringement and requesting compliance. The opinion will give a detailed statement as to why the Commission has concluded that the State is failing to fulfil its obligations under the treaty or secondary legislation. It will then refer the case to the European Court of Justice for the litigation procedure, however such referral is a discretionary power. See: European Commission, 'Application of EU law - Infringements of EU law' (2013) <http://ec.europa.eu/eu_law/infringements/infringements_en.htm> accessed 22 August 2014.

³⁰⁸ *Case C-256/08 Commission v United Kingdom of Great Britain and Northern Ireland [2009] ECR C153/27*.

Directive provisions, particularly when legislating on matters considered to be politically or economically complex. In such instances the State will only be held to have acted disproportionately if the measures adopted are ‘*manifestly inappropriate having regard to the objective which (it) is seeking to pursue*’.³⁰⁹ As a result it is highly unlikely that the European Court of Justice would declare a reduction in asylum support rates to be in contravention of the Reception Conditions Directive.

A further limitation in implementing EU law concerns enforcement of the Charter within the UK due to Protocol No.30 of the Treaty on the Functioning of the European Union,³¹⁰ Article 1(1) of which provides that the

‘Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms’.

Article 1(2) goes further in affirming that in particular, the socio-economic rights found within Title IV of the Charter are non-justiciable within the UK, except in so far as national law provides for these rights. Further light has been cast upon application of the Charter within the UK through the case of *N. S. v Secretary of State for the Home Department*³¹¹ where the European Court of Justice held that the UK owed obligations to asylum seekers via the Charter through application of the Dublin II Regulation. Rejecting the notion that the Protocol constituted an ‘opt out’ of Charter provisions for the UK, the Court made clear that Article 1(1) of the Protocol simply reaffirmed the scope of the Charter as set out in Article 51(2) of the Charter itself

³⁰⁹ *Case C-331/88 R v Ministry of Agriculture, Fisheries and Food Ex p. Federation Europeene de la Sante Animale* [1990] ECR I-4023 [13-14].

³¹⁰ Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom [2010] OJ C 83, para 313.

³¹¹ *Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and M.E and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011].

which purports that the powers of EU institutions are not extended outside the remit of European Union law, meaning that the European Court of Justice cannot rule on any non EU matter.³¹² The Protocol does not therefore act as an opt out but merely clarifies application of the Charter. The wording of Article 1(2) of the Protocol is however more specific and clearly states that the rights found within Chapter IV of the Charter are non-justiciable within the UK. As the majority of provisions within Chapter IV are categorised as principles as opposed to rights,³¹³ they are categorised as non justiciable anyway but Article 1(2) verifies this position with regard to the UK and rules out the possibility of new EU rights or entitlements being derived from Articles 27 to 38 of the Charter, on which those entitled could rely against the UK. The Advocate General confirmed this construction, stating that

*‘Article 1(1) of Protocol No 30 does not call into question the validity of the Charter of Fundamental Rights, but should merely be regarded as an express confirmation of the normative content of Article 51 of the Charter of Fundamental Rights, Article 1(2) of Protocol No 30 appears to seek to clarify the validity of individual provisions of the Charter in the legal orders of the United Kingdom and Poland. Under Article 1(2) of Protocol No 30, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as such rights are provided for in their respective national laws’.*³¹⁴

³¹² See *ibid* [119-120]: ‘According to the wording of that provision, as noted by the Advocate General in points 169 and 170 of her Opinion in Case C-411/10, Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles. In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.’

³¹³ Distinction should be drawn however between rights granted under the Charter and principles. Whereas rights are considered justiciable under the Charter and thus capable of enforcement, principles are not directly enforceable but are generally considered to be progressive. As a general rule, the explanation to the Charter categorises civil and political matters as rights and economic and social issues as principles, such as Articles 34 and 35 relating to social security and healthcare. Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/02.

³¹⁴ Opinion of Advocate General Trstenjak *Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and M.E and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] para 173.

This construction of the Charter is also supported by recent case law within the UK.³¹⁵ However, as use of the combined Directive and Charter rights outlined above³¹⁶ fall outside the scope of Chapter IV, Protocol 30 does not present an issue regarding the challenge of asylum support measures. Rather, the most significant limitation in using either the Directive or the Charter to enforce the socio-economic interests of asylum seekers is the significant margin of discretion afforded to the UK by the European Court of Justice and the deference paid to the Government within the national courts where matters concern socio-economic and immigration policy.

As evidenced by the preceding analysis, the existence of State-centric human rights institutions and the comparative strength of sovereignty when weighed against the rights of outsiders means that some of the ‘presupposed exclusions’ prevalent in the era of the rights of man continue to exist as States seek to prioritise citizens’ rights and interests above those of foreigners. This is the case in the UK where the universal rights accorded to the asylum seeking community through mechanisms such as the ICESCR are not reflected within State practices and the socio economic entitlements afforded under enforceable instruments such as the Directive have little effect in enforcing adequate standards of living in practice. The limitations facing the enforcement of human rights thus presents a challenge to the realisation of hospitality. This construction of rights also accords with the conclusions of Hannah Arendt³¹⁷ as although Arendt advocated that rights should be founded upon humanity as opposed to predication on citizenship or membership of some bounded community, she

³¹⁵ Ibid; *R. (on the application of Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin); *R. (on the application of AB) v Secretary of State for the Home Department* [2013] EWHC 3453 (Admin).

³¹⁶ i.e. Article 1, Article 13(2) and Article 18 of the Charter.

³¹⁷ Hannah Arendt, *The origins of totalitarianism* (Schocken Books 2004).

acknowledged that the ‘*right to have rights*’,³¹⁸ *‘that is, to be recognized by others, and to recognize others in turn, as a person entitled to moral respect and legally protected rights in a human community’*,³¹⁹ rested upon inclusion, normally within a political community. Benhabib also admits that despite the construction of *human* rights as attaching to every individual, such norms can only be fully realised when incorporated into national legislation.³²⁰ Consequently as matters have developed, *‘the having of rights depends on receipt of a special sort of social recognition and acceptance – that is, of one’s juridical status within some particular concrete community’*.³²¹ For Benhabib asylum seekers’ lack of enforceable rights throughout the EU signifies that the asylum seeking community are denied the ‘right to have rights’. Consequently, whilst the group’s civil rights are protected under the ECHR, their political and social rights fail to be respected or regarded as equal to the rights of citizens, posing a significant difficulty in the enforcement of hospitality. As a result,

‘refugees and asylees are treated as if they were quasi criminal elements whose interaction with the larger society is to be closely monitored. They exist at the limits of all rights regimes and reveal the blind spot in the system of rights, where the rule of law flows into its opposite: the State of exception and the ever present danger of violence’.³²²

Accordingly, human rights can be interpreted in two ways, as an aspirational (and cosmopolitan) moral standard by which all human beings *should* be treated, and as terms of endowment which grant legal, institutional and political standing. The former,

³¹⁸ Arendt’s well known statement that *‘the right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself’*, recognises the two distinct interpretations of the term ‘right’. The first use of the term ‘right’ in this phrase denotes privilege, relating to inclusion within the granting of a benefit to a specific group. The second ‘right’ addressed by Arendt is the substantive right itself, deriving from an Article within a specific treaty for example. Ibid 296-7.

³¹⁹ Seyla Benhabib, *Another Universalism: The Unity and Diversity of Human Rights* (American Philosophical Association, 2007) 9.

³²⁰ S. Benhabib and R. Post, *Another Cosmopolitanism* (Oxford University Press, USA 2006) 155.

³²¹ Frank Michelman, ‘Parsing “A Right to have Rights”’ (1996) 3 *Constellations* 200, 203.

³²² Benhabib, *The Rights of Others: Aliens, Residents and Citizens* 163 (n 273).

seek ‘*to protect human beings as persons rather than as citizens of particular states*’, which does ‘*not depend for authority on the democratic will of particular states*’.³²³ Consequently even where legal rights are unfulfilled they continue to exist on a moral level, a concept supported by Sen who wrote that ‘*the current unrealizability of any accepted human right, which can be promoted through institutional or political change, does not, by itself, convert that claim into a non-right*’.³²⁴ Whilst issues of enforcement within the human rights framework exist, this does not therefore negate the value of rights as a moral benchmark to which institutions and democracies can aspire. Benhabib terms the conflict between universal human rights claims and the particularist claims of the democratic majority ‘*the paradox of democratic legitimacy*’.³²⁵ Though she admits that ‘*this paradoxical structure can never be fully resolved*’ she believes ‘*its impact can be mitigated through the renegotiation and reiteration of the dual commitments to human rights and sovereign self determination*’.³²⁶ Benhabib thus accepts that cosmopolitan norms embody both those which ‘ought’ to be, and those that ‘are’ and writes that ‘*these norms are neither merely moral nor just legal...They signal the eventual legalization and juridification of the rights claims of human beings everywhere, regardless of their membership in bounded communities*’.³²⁷ It is through the establishment of such standards or ‘cosmopolitan norms’ that enforceable norms are recognised, a process which Benhabib labels ‘democratic iterations’. Put simply, democratic iteration hinges on the desire of the democratic body to extend cosmopolitan norms to those who are excluded. Benhabib asserts that democracies by nature translate the desires of citizens

³²³ Benhabib and Post, *Another Cosmopolitanism* 2 (n 320).

³²⁴ Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy and Public Affairs* 315, 320.

³²⁵ Benhabib and Post, *Another Cosmopolitanism* 35 (n 320).

³²⁶ *Ibid* 35.

³²⁷ *Ibid* 20.

into positive laws of the State which in turn translates cosmopolitan norms into enforceable law. Human rights are therefore essential to the realisation of hospitality as regardless of whether they are actively enforced, human rights provide a platform for activism which encourages their future realisation. Benhabib does not however expand upon why citizens would choose to progress the rights of the excluded as opposed to reduce them, a notion that is particularly problematic in light of the regression of asylum seekers' social entitlements over the last 30 years in the UK.

The responsibility of the public in correcting injustice is however addressed in wider cosmopolitan theory which purports that all persons should abide by the norms of cosmopolitan morality and respect other human beings as ultimate units of moral concern. In directly causing injury to the foreigner through the policies of the asylum support system, both citizens and the Government have a moral responsibility to pursue policies and practices which correct these injustices and ensure that the asylum seeking community are treated with hospitably, a standard that can be measured through the application of human rights. Such associative duties are not only grounded upon cosmopolitan interaction and morality but ultimately through injury caused by the positive implementation of unjust policies

and institutions. *'Put sharply, every person, and every moral agent, who has interests and whom my actions and the consequences of my actions can impact and affect in some manner or another is potentially a moral conversation partner with me'*.³²⁸ As asserted by Pogge, where institutions or practices are inhospitable and violate human rights, the negative duty to refrain from hostile treatment triggers the obligation to protect the visitor. As the UK is a democracy, citizens have the capacity to press for the reform of legal institutions believed to be unjust or inhumane which can apply to

³²⁸ Ibid 18.

policies at both micro and macro levels. Thus where the actions of government institutions, such as the UK Visas and Immigration department, negatively impacts upon the rights of the asylum seeking community, responsibility is bestowed upon the democracy to reform the system in respect of human rights. This is particularly crucial in the case of asylum applicants who lack civil or political rights and upon entrance to the UK (or any other EU state) are prevented from travelling elsewhere under the Dublin Regulation,³²⁹ effectively confining them to the conditions imposed upon them in the first state in which they sought refuge. Though the injuries caused by the asylum support system are institutionally imposed by UK Visas and Immigration, citizens are still implicated and accountable for the injuries inflicted by the policy choices of their democratically elected Government. In order to abide with cosmopolitan standards, citizens must therefore demand reform of the asylum support system so that it better respects the human rights of the asylum seeking community.³³⁰

4.5 Summary

In summary, examination of the impact that employment restrictions and asylum support policies have upon the asylum seeking community through the exploration of NGO data indicates that the UK Government is failing to respect, protect or fulfil the human rights of the asylum seeking community, particularly the right to work and the right to an adequate standard of living. It is therefore argued that the State is failing to abide by cosmopolitan standards of morality, as evidenced by the wealth of NGO data explored which demonstrates the significant harm caused by

³²⁹ Council Regulation (EU) 604/2013 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.

³³⁰ Pogge T, *World poverty and human rights: cosmopolitan responsibilities and reforms* (Polity 2002) 172.

restrictive support and employment policies. So far throughout the thesis, it has been maintained that both the Government and citizens have a moral responsibility to reform policies and institutions that cause direct injury to others, injury that is identified where the violation of human rights takes place. As this chapter contends that the violation of rights is common place within the asylum support system, the following chapter explores the ways in which the asylum support system could be improved to enhance the fulfilment of human rights and increase levels of hospitality. Though the chapter puts forward a number of recommendations, the emphasis here is not to propose a detailed plan for policy reform but rather to draw attention to the ways in which changes to the current system could improve access to rights and promote an ethics of cosmopolitan hospitality.

Chapter Five

Moving forward: The need for reform

5.1 Introduction: ‘Not welcome’ - An inhospitable support system in need of reform

So far the thesis has advocated that in providing welfare to asylum seekers, the State should take a cosmopolitan approach which affords hospitable treatment to asylum seekers as guests in the receiving State. Such treatment can be achieved through the respect, protection and fulfilment of human rights obligations. Yet it has been established that at present the asylum support system infringes upon a number of applicants’ human rights as the interests of the State take precedence over the rights of the asylum seeking community. In order to redress this balance and reduce instances of rights violations, it is argued that three processes must take place: *recognition* of the current policies causing rights violations; *reform* of the system to resolve or reduce the rights infringements caused by the asylum support system; and *preventative action* to ensure that future rights violations do not take place, and where violations do occur, that effective mechanisms of redress and accountability exist. Recognition, reform and preventative action can be accommodated by the implementation of five proposals which will be explored throughout the chapter:

Recognition:

- Proposal 1 - An intersectional analysis of the current asylum support regime.

Reform:

- Proposal 2 - The reform of cash based support.
- Proposal 3 - The reform of employment restrictions.

Preventative action:

- Proposal 4 - The annual intersectional analysis of support policies.
- Proposal 5 - The incorporation of socio-economic rights within national law.

The chapter will begin by addressing the first of these proposals. It will argue that if the Government seeks to reveal the policies giving rise to human rights violations then it must undertake a detailed Government analysis of current policies. In analysing the impact of the support system it is recommended that the Government employ an intersectional analysis to look beyond the general impact of the system. Intersectional analysis seeks to address the ways in which policies disproportionately impact upon certain individuals, recognising the complexity and plurality of human nature, and that often a number of characteristics intersect to create disadvantage. This is particularly important if conditions of hospitality are to be achieved. As explained in chapter three,¹ cosmopolitanism is centred on the premise that every individual is of moral concern which means that all persons affected by the asylum support regime deserve recognition. Pogge² terms this attribute ‘universality’: that the cosmopolitan status of *ultimate concern* attaches to every living human being equally. Intersectional analysis thus seeks to reveal the plight of those who are traditionally silenced by existing hierarchies within the broader category of ‘asylum seeker’. Establishing data through intersectional analysis would identify the policies causing disproportionate disadvantage whilst also recognising the plight of those most susceptible to discrimination. This research would provide a comprehensive basis of data which could be used to inform future policy reforms and means of implementing those reforms. Evidence suggests that the findings of such an analysis would also

¹ Text to n 129 ch 3.

² Pogge T, 'Cosmopolitanism and Sovereignty' (1992) 103 Ethics 48, 49.

substantiate justification for the future policy reforms proposed within this chapter, which will subsequently be addressed. As such, the following section will explain why intersectional analysis is needed and how it could be carried out by the Government.

Policy reform constitutes the second process deemed to be necessary in achieving hospitable conditions for the asylum seeking community. On this basis the chapter puts forward two recommendations: greater access to, and increase in, the provision of cash support, and the relaxation of current employment restrictions. Alongside justification for these reforms, details regarding their implementation will be addressed as will their numerous advantages to both society as a whole and members of the asylum seeking community.

The final process addressed in the chapter is that of preventative action. In this regard the chapter puts forward two proposals. The first links back to intersectional analysis and calls for the annual intersectional analysis of future support policies to ensure their conformity with human rights principles. The final, and perhaps most radical proposal put forward is to establish and implement a system of accountability and redress for future socio-economic rights violations which would act as both a deterrent to successive Governments seeking to execute draconian policies, and as a means of reparation for victims. It is contended that the greatest way of securing these aims is through incorporation of universal socio-economic rights within national law.

Before discussing each proposal in turn, and to better illustrate the advantages of reform, a fictional case study will be set out. There are several advantages to using a case study as a vehicle for discussion. Firstly, the necessity of an individualistic approach is better elucidated through use of practical examples that demonstrate the ways in which individual characteristics intersect to cause hardship. Secondly, though individual policies may not appear particularly damaging when viewed in isolation,

the use of a case study demonstrates that in reality individuals are subject to a number of measures that combine to cause distress and the degradation of dignity. Policy makers should therefore recognise that certain policies frustrate others, causing disproportionate hardship for certain service users. Finally, the case study provides an opportunity to give tangible examples of the advantages of reform and the ways in which policy changes can better accommodate individual needs and respect for human rights. Though the case study is fictional, the instances discussed within it are drawn from real findings within NGO research and thus reflect the true struggles faced by members of the asylum seeking community, hence the case study is footnoted throughout with evidence to support the issues explored. After setting out the parameters of the case study, each resolution will be discussed in turn, using the case study to expand upon why the resolution is needed and the practical advantages of implementation.

5.2 A case for change: the situation of Hani

Hani is a female asylum seeker who fled to the UK from Somalia three years ago with her husband Amir. Both Hani and Amir are HIV positive and speak limited English. Amir also has poor mental health due to trauma suffered in his country of origin. Amir is classified as the primary claimant for the asylum claim and Hani is registered as his dependent.³ Eighteen months ago the couple's asylum claim was rejected and as a result, their section 95 support was terminated. As there was no viable route of return to their country of origin, the couple avoided destitution and instead were provided

³ Crawley considers instances in which women's applications are not considered independently of their husbands which could be due to shame regarding their experience of persecution. Crawley H, Refugees and gender: law and process (Jordan Publishing Limited 2001) 199.

with support under section 4 IAA1999.⁴ This example therefore focuses on section 4 provision.

As Hani and Amir are HIV positive, a healthy and nutritious diet is considered a vital part of their treatment plan, yet this is inhibited by the financial amount granted under section 4 which prevents them from purchasing sufficient fruit, meat and vegetables. Access to food and other essential living needs is further restricted by use of the Azure payment card which is issued at one card per household and granted in the name of the 'head of the household'. As this was issued in Amir's name, Hani is unable to use the card as when she attempted to do so, the checkout assistant refused to serve her on the basis that the card was issued in a male name, restricting her already limited freedom. As Hani speaks limited English she found the situation confusing and distressing.⁵ The hardships of the one card policy are further exacerbated by the inability to use public transport and the confinement to shopping in designated stores. The nearest designated supermarket to the couple's home is three miles away, which is a six mile walk in total. Consequently in instances where Amir is feeling too sick to walk to and from the designated supermarket,⁶ the couple are unable to purchase goods which results in hunger and a deterioration in physical and mental health.

⁴ Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, SI 2005/930, reg 3(2).

⁵ Reynolds reports that applicants are required to provide proof of identity to demonstrate they are the named card owner. Wives have thus been refused service on the basis that the card is in their husband's name. See: Reynolds S, *Your inflexible friend: The cost of living without cash* (Asylum Support Partnership, 2010) 38.

⁶ The Asylum Support Partnership cite the case study of Amir who suffers from HIV and lives approximately a mile from his local supermarket, 'on two separate occasions he has been too sick to travel to the supermarket and he has lost most of his weekly allowance as a result. There is another supermarket less than 100 metres from his accommodation but he is not allowed to use his payment card there'. Ibid. In addition, 82% of asylum support advisors who responded to a British Red Cross survey reported that their clients had difficulty in accessing the shops due to health reasons. Carnet P, Blanchard C and Ellis J, *The Azure Payment card: The humanitarian cost of a cashless system* (British Red Cross, 2014) 38.

Frustratingly, there are a number of shops 100 metres from the couple's home, however the Azure card is not accepted there.⁷

Six months after their asylum application was refused, Hani gave birth to a baby girl named Alma, for whom they received a baby grant of £250.00 and an extra £5.00 per week (until she turns one), alongside the standard section 4 support payments.⁸ As Hani is HIV positive she is unable to breast feed Alma⁹ but receives no extra payment for the cost of formula milk. Unable to work, and despite the extra £5.00 per week granted in support,¹⁰ the couple are often forced to sacrifice their own food to cover the additional costs of formula milk, exacerbating feelings of hunger and their already poor health.¹¹

The above case study will be drawn upon throughout the proceeding discussion to better elucidate why reforms are necessary and the impact that reform would have in practice.

5.3 Recognition: Proposal 1 - Analysing existing policies through intersectional analysis

Analysis through an intersectional lens provides a better understanding of the factual situation and lived experience of asylum seekers, acknowledging that the current 'one

⁷ Reynolds 8 (n 5).

⁸ Though most families are to be granted cash support and accommodation under Section 95 IAA 1999, this does not apply to families where children are born more than 21 days after the parents asylum claim has failed. In these Section 4 support applies.

⁹ It is recommended that HIV mothers in high income countries avoid breastfeeding all together to eliminate the risk of transmission. AVERT - AVERTing HIV and AIDS, 'HIV and Breastfeeding' (<<http://www.avert.org/hiv-and-breastfeeding.htm>> accessed 9 July 2014).

¹⁰ The Teather inquiry reports that the additional £5.00 per week for children is insufficient to meet the costs of a new baby. Teather S and others, *Report of the Parliamentary Inquiry into Asylum Support for Children and Young People* (The Children's Society, 2013) 8.

¹¹ The Children's Society record instances of parents going hungry to provide food for their children whilst receiving Section 4 support payments. The Children's Society, *Child Destitution Report: living on the edge of despair: destitution amongst asylum seeking and refugee children* (The Children's Society, 2008) 17.

size fits all' approach taken by the Government (through implementation of policies such as the Azure payment card) fails to account for the diverse needs and characteristics of the asylum seeking community. Demand for an intersectional critique of the Government's social policies is mirrored in the recent work of Bassel and Emejulu who make a '*call for arms for a vigorous intersectional critique of austerity in order to understand its asymmetrical impacts*'.¹² Though Bassel and Emejulu focus on austerity cuts as opposed to asylum support, their research demonstrates the growing application of intersectional analysis to Government policy in order to reveal the existence of discrimination in an increasingly diverse society.

The term '*intersectionality*' is generally attributed to Kimberlé Crenshaw¹³ who rejected the compartmentalisation of identity categories when assessing discrimination, asserting that the experiences of black women within society were fundamentally different to the experiences of white women. Intersectionality therefore recognises the heterogeneity within identity categories and their hierarchical structures which often render those at the bottom of the hierarchy voiceless; affecting the ability of some to make their knowledge or experience heard, or taken as legitimate.¹⁴ Crenshaw thus purported that the singular gendered experience of sexism advocated by middle class white women (who reside at the top of the female hierarchy), failed to reflect the sexist experiences of working class black women (residing at the bottom). Similarly, the status of 'asylum seeker' can be compared to the category of 'women'

¹² Such a demand derives from data indicating that austerity measures are found to disproportionately impact upon the employment of women though Bassel and Emejulu seek to address which women are affected and to what extent in order to challenge the disadvantages exacerbated by austerity measures. Leah Bassel and Akwugo Enejulu, 'Solidarity under Austerity: Intersectionality in France and the United Kingdom' (2014) 10 *Politics and Gender* 130, 135.

¹³ Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 *Stanford Law Review* 1241.

¹⁴ Momin Rahman, 'Theorising intersectionality: identities, equality and ontology' in Emily Grabham and others (eds), *Intersectionality and Beyond: Law, power and the politics of location* (Routledge Cavendish 2009).

as residing within the category of ‘asylum seeker’ are individuals with different characteristics which intersect to create fundamentally different experiences in accessing employment or enjoying welfare support. The complexity of an individual’s lived experience may thus be affected by their gender, education, culture, religion, age or sexual orientation which may simultaneously intersect and contribute to their silencing, marginalisation, isolation or disadvantage. Failure to acknowledge intersectionality assumes homogeneity within identity groups, which is a false perception as demonstrated throughout the rights analysis by the situation of married female asylum seekers who were consistently documented as suffering disproportionately under the current regime.¹⁵ Thus ‘*within each category there are subgroups which are more disadvantaged than others, and these subgroups more often than not are those which intersect with other groups.*’¹⁶ Intersectional analysis is therefore a means of revealing diversity and power structures within identity groups to combat the marginalisation of minorities. As will be demonstrated through the case study of Hani, evidence suggests that at present a number of asylum support policies fail to account for the intersection of characteristics such as gender and culture indicating the implicit universalisation of the asylum seeker identity within the asylum support framework.¹⁷ Consequently it is necessary for the Government to carry out an intersectional analysis of the asylum support system to reveal the scale and impact of intersectional discrimination within the current system and to gain data and so that effective policy reform can take place.

¹⁵ See ch 4 text to notes; 75; 104; 105; 187; 200; 230.

¹⁶ Sandra Fredman, ‘Positive Rights and positive duties: Addressing intersectionality’ in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative perspectives on multidimensional equality law* (Routledge Cavendish 2009) 82.

¹⁷ Rahman 357 (n 14).

There are a number of considerations to take into account when contemplating intersectional analysis. These relate to the aims of the research, the identification and composition of the study group, whether the data to be gathered is quantitative or qualitative in nature and how characteristics and disadvantage are to be identified and measured.¹⁸ Though these considerations can often complicate the prospect of intersectional research, they can be clearly addressed in relation to future analysis of the asylum support system as the purpose is clearly defined: to identify the asylum support policies causing significant discrimination and rights violations amongst the asylum seeking community. It is contended that in undertaking intersectional analysis, the Government should use a cross sample of the asylum seeking population and carry out qualitative case study research to gain insight into the personal impact of the system. Case studies are frequently used as a vehicle for intersectional analysis as they *'have always been distinguished by their ability to delve into the complexities of social life – to reveal diversity, variation, and heterogeneity where quantitative researchers see singularity, sameness and homogeneity'*.¹⁹ It is hoped that in employing this methodology those who are traditionally silenced or overlooked would have the opportunity to make their voice heard, a crucial element in achieving true standards of hospitality for the asylum seeking population.

The further issue in carrying out an intersectional analysis is how to identify different categories of identity and whether identity categories should be codified at all. Leslie McCall²⁰ puts forward three methodological approaches to this issue which

¹⁸ Rita Kaur Dhamoon, 'Considerations on Mainstreaming Intersectionality' (2011) 64 Politics Research Quarterly 230.

¹⁹ Leslie McCall, 'The complexity of Intersectionality' in Emily Grabham and others (eds), *Intersectionality and Beyond: Law, power and the politics of location* (Routledge- Cavendish 2009) 57.

²⁰ Leslie McCall, 'The complexity of Intersectionality' (2005) 30 Signs 1771.

she labels the anti,²¹ intra and inter²² categorical complexities which adopt different perspectives to the categorisation and labelling of identity characteristics. McCall's methodologies are best understood as constituting a scale, at one end advocating the full deconstruction and elimination of existing identity categories (anti-categorical), whilst at the other embracing the full adoption of existing identity categories which are recognised within current anti-discrimination law (inter-categorical).²³ Intra categorical complexity resides in the middle of the two, using identity categories as a means of analysis but remaining sceptical with regards to their construction.

The intra-categorical complexity is the most appropriate method to adopt when considering identity categories within analysis of the asylum support system as it neither rejects nor fully embraces the existing codified characteristics acknowledging that existing categories are not exhaustive. Traditional categories may therefore be used initially but the method can also construct new categories applicable to the

²¹ McCall's first methodology, 'anti-categorical' complexity, seeks to deconstruct all analytical categories on the premise that life is too complex to be filed into fixed categories which *'have no foundation in reality: language creates categorical reality rather than the other way around. The methodological consequence is to render suspect the process of categorisation itself...because it inevitably leads to demarcation, and demarcation to exclusion, and exclusion to inequality'*. McCall, 'The complexity of Intersectionality' (2009) 53-54 (n 19). In deconstructing gender, for example, this methodology would first acknowledge the typical categorisation that takes place between male and female. The anti categorical methodology would then aim to deconstruct the category, taking into account factors such as history, geneology, literature and anthropology to analyse and determine the distinguishing factors between the male and female groups. The anti-categorical methodology calls for the elimination of identity categories and as a result is best suited to research theorising and interrogating their construction. The reflective nature of the anti-categorical complexity thus renders it inappropriate for a Government study of social policy

²² McCall's third methodology is 'inter-categorical' complexity which uses the current analytical categories of discrimination seen in anti-discrimination law to document inequality and minimize complexity. This is perhaps the most useful method when undertaking quantitative large scale research and often uses a multiple, comparative study group. With the introduction of a new category the study group is multiplied which McCall admits can lead to broad research. However the complexity and size of the study group can be minimised through reducing groups within categories, such as restricting religion to study of Muslims and Christians rather than Muslims, Christians, Hindus, Jews, Sikhs, Buddhists etc. Within this methodology, the relationships of inequality form the structure of analysis and thus it differs greatly from the single group analysis used in the intra methodology.

²³ The following characteristics are protected under section 4 of the Equality Act 2010: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

individual or group, often using lived experience as a basis for construction and analysis. Thus though

*‘broad racial, national, class and gender structures of inequality have an impact and must be discussed, they do not determine the complex texture of day to day life for individual members of the social group under study, no matter how detailed the level of disaggregation’.*²⁴

Inhibiting the identification of characteristics to those that are traditionally recognised within discrimination law may therefore ignore or disguise characteristics that are a source of disadvantage such as educational background for example or experience of torture in one’s country of origin. The full rejection of identity categories however would make it difficult to identify those suffering disadvantage. As asylum support is essentially a service, policies must be delineated through language which distinguishes amongst service users. If the categorisation of service users is fully deconstructed, it would be impossible to recognise diversity within practice and distinguish amongst the needs of the asylum seeking community. Accordingly the intra-categorical methodology is the most appropriate method for analysis of the asylum support system as, in attempting to improve support policies, it would be counter-productive for the Government to disregard factors cited by individuals as causing discrimination on the basis that they do not fit neatly into the protected characteristics recognised within existing anti-discrimination law.

The final issue to address when considering how to undertake an intersectional analysis of the asylum support system is how the Government would identify disadvantage amongst the asylum seeking community. As the purpose of this chapter is to improve the respect afforded to the rights of the asylum seeking community and increase levels of hospitality, it is argued that disadvantages arise where the rights of

²⁴ McCall, 'The complexity of Intersectionality' (2009) 57 (n 19).

individuals are infringed, which as established in the previous chapter, is a common occurrence within the current system. To further elucidate why intersectional analysis is necessary for improvement to existing support policies, intersectional analysis will be applied to the case study of Hani. As will be shown, in applying an intersectional analysis to Hani's scenario it is clear that a number of section 4 policies cause intersectional discrimination. This occurs not only through the intersection of Hani's personal characteristics, but also through the intersection of the policies themselves. In the case of *Ministry of Defence v Debique* [2010],²⁵ the Employment Appeals Tribunal recognised that the combined effect of two Ministry of Defence (MoD) employment policies served to discriminate against Ms Debique, finding that if either of the policies were relaxed, the discrimination would disappear. The first of the MoD policies required that Ms Debique be available for deployment 24 hours a day, 7 days a week. The second policy prevented foreign and Commonwealth soldiers from inviting relatives to share their service accommodation in order to help with childcare. The Employment Appeals Tribunal found that the 24/7 policy did not constitute indirect discrimination against women as it was a proportionate means of achieving a legitimate aim. The Tribunal did however find that when combined, the effect of the two policies was to put Ms Debique at a disadvantage and that the MoD had not proved that the immigration policy either by itself, or combined with the 24/7 policy, was a proportionate means of achieving a legitimate aim. As will be demonstrated by the case study of Hani, this type of procedural intersectional discrimination is also present within the asylum support system where several policies overlap to cause disadvantage.

²⁵ [2010] UKEAT 49 [2010] IRLR 471.

It is also important to note here that although the case study of Hani focuses on Hani as an individual, many other asylum seekers within the system are likely to encounter the negative effects of intersectional discrimination as outlined in footnotes 27-31 of this chapter.

5.3 (a) Application to Hani

The one card policy restricts Hani from visiting the shop unaccompanied by her husband. In this instance we see that it is not Hani's gender alone that causes disadvantage but rather the intersection of her gender, marital status, civil status as a refused asylum seeker and cultural background which undermines her independence as a woman,²⁶ preventing her from being named the primary claimant or 'head of the household'. Intersectional recognition in this instance is important as if discrimination were analysed from a singular perspective such as gender, the experience of single women using the service would suggest that discrimination does not occur, as would general analysis from the perspective of a married woman who came from a country with greater levels of gender equality than Somalia. The inability of Hani to purchase household goods independently from her husband restricts control over her daily routine and her already limited personal freedom which infringes upon the right to respect for private and family life under Articles 8 of the ECHR and 17 of the ICCPR. Though this is a qualified right, it was argued in the previous chapter that the one card policy is disproportionate with regard to the personal impact it has in practice. This finding is substantiated by intersectional analysis which reveals that the card has a

²⁶ The UN reports that in Somalia 'women bear unequal brunt of the hardships occasioned by poverty, conflict, natural disaster and a deeply clan-based culture which promotes strict male hierarchy and authority...This is further exacerbated by religious and cultural limitations on the role and status of women in Somali society. As a result, deeply rooted gender inequality prevails; Somali women are either excluded from decision making and asset ownership or operate through a patriarchal filter.' United Nations Development Programme, *UNDP Somalia, Gender Equality and Women's Empowerment Strategy, 2011-2015* (United Nations, 2011) 4.

disproportionate impact upon certain groups within the asylum seeking community. Implementation of the policy also contravenes the UK's obligations under Article 13 of CEDAW which purports that State parties take measures to '*eliminate discrimination against women in other areas of economic and social life*'.

Hani's scenario also demonstrates how the intersection of characteristics and multiple policies combine to cause disadvantage as the one card policy is further frustrated by measures such as the restriction of having to shop in designated stores and the inability to access transport. In instances where Amir is too ill to access the shops, the combination of these policies with Amir's HIV status and Hani's characteristics inhibit their access to food and other essential living needs exacerbating feelings of hunger and poor health which impacts upon the right to health under Articles 25 UDHR, 12(1) ICESCR, 24 CRC, 12(2) CEDAW, and the right to an adequate standard of living under Articles 25 UDHR, 11 ICESCR, 27 CRC and 14(2)(h) of CEDAW. This type of disadvantage can only be identified through intersectional analysis as there are numerous characteristics and policies contributing to the infringement of rights.

Intersectional discrimination is also evident in Hani's inability to provide breast milk for Alma which results in the sacrifice of food to cover the cost of formula milk.²⁷ In this scenario, the combination of motherhood, HIV status and Hani's civil status as a refused asylum seeker intersect to create particular hardship. Again this impacts upon the right to health and adequate living standards set out above and also contravenes Article 12(2) of CEDAW which affords special protection for the nutrition of nursing and expectant mothers. As addressed in the previous chapter,

²⁷ HIV positive mothers in high income countries where formula milk is readily available are advised not to breast feed in order to eliminate the risk of transmission of HIV from mother to baby. See the AVERT website for more info (n 9).

parents health and well being is extremely important for children's development²⁸ and thus with regard to Alma, the intersection of her parents' characteristics with her civil status as a refused asylum seeking child creates additional hardship. All of the scenarios set out above remain exacerbated by restrictions on employment which inhibits individuals from obtaining greater income to satisfy their needs.

Intersectional analysis of the fictional case study demonstrates that a number of policies within the asylum support system cause unnecessary hardship, disadvantaging individuals in a number of different ways. Though a select number of examples and characteristics were chosen for use within the case study, intersectionality is a universal condition and thus a broader analysis of the system would likely reveal a host of characteristics that intersect to cause disadvantage. Other intersections apparent within the rights chapter are immigration status in conjunction with: gender, marital status and culture;²⁹ religion;³⁰ motherhood;³¹ language³² and

²⁸ Text to n 213 ch4.

²⁹ Research suggests that as a result of social and cultural norms governing gender relations, women may not want to be interviewed as the principle applicant for refugee status, even in cases where they have stronger grounds for claiming asylum than their male relative. Consequently married women are often filed as a dependent and as a result, the current employment restrictions placed upon dependents disproportionately impacts upon married women. See: Alice Bloch, Treasa Galvin and Barbara Harrell-Bond, 'Refugee Women in Europe: Some Aspects of the Legal and Policy Dimensions' (2000) 38 International Migration 169; Crawley, *Refugees and gender: law and process* (n 3).

³⁰ The Azure payment card restricts applicants from using public transport which can be difficult for families seeking to access places of worship particularly as dispersal is on a no choice basis. This also impacts upon the right to freedom of religion as enshrined in Articles 9 of the ECHR; 18 UDHR; 14 CRC and 18 ICCPR. Teather and others 22 (n 10).

³¹ Maternity grants are set at different rates dependent upon immigration status. Consequently mothers in receipt of section 4 receive substantially less than EEA citizens or those on section 95 support despite the fact that the cost of raising a baby remain the same.

³² Where payments are mistakenly taken, Sodexo (the card provider) should refund it within 24 hours, however the Asylum Support Partnership reports instances where it has taken up to 14 days to reimburse the card, in the interim people are left with no support, leading to hunger. Where technical difficulties prevent use of the card applicants must contact the Sodexo helpline to resolve the problem. Though the helpline is free to call it is an English based line. The directions of usage are also issued in English and consequently a number of applicants are unable to use the service. Accordingly 26% of ASP respondents did not understand how to use the helpline, 29% reported never using it to check their balance and 80% did not understand the instructions enclosed with the card. Reynolds 6 (n 5).

age.³³ It is therefore submitted that the Government should undertake an intersectional analysis of current asylum support policies as it is indisputable that everybody occupies multiple identity categories. To ignore the multi-faceted existence of the human being and the ways in which this contributes to disadvantage, particularly within a service as crucial as welfare support, is paradoxical to upholding individual dignity and providing adequate living standards. This is particularly important amongst the asylum seeking community as their only common denominator is immigration status. The group is therefore extremely diverse with regard to age, gender, sexuality, religion, marital status, cultural background, language, health and education. Policies that transpire from the future analysis as commonly causing intersectional discrimination and the infringement of rights must be revised. Such policies are most likely to be those that restrict freedom and impose certain life style choices upon the asylum seeking community such as the Azure payment card which is a primary target for reform as it inhibits free choice and restricts diversity.

It is argued that the brief intersectional analysis of Hani's case study supports two policy reforms in particular: to increase and expand the cash support system and to relax current employment restrictions. Though both of these reforms are general, they would reduce instances of intersectional discrimination on a macro scale by providing greater flexibility and a wider range of choices to individuals accessing support. As such, the next section will discuss why each of these reforms is needed before outlining how they could be implemented. The section will then go on to consider the advantages of reform to both the asylum seeking community and wider society, using the case study of Hani to further explicate their benefits.

³³ Asylum seeking children are placed at significant disadvantage from their peers as toys are not considered an essential living need which is deemed to significantly hamper their development. The Children's Society 18 (n 11).

5.4 Reform: Policy changes

‘Most people do not leave their home country and file an asylum claim lightly. There are almost always push factors, things driving them out, as well as pull factors, things attracting them to the new place. So, the picture of the failed claimant as ipso facto an asylum abuser is a gross distortion of reality.’³⁴

The previous chapter established that restrictions upon accessing employment and low levels of financial provision were the primary cause of rights violations amongst members of the asylum seeking community. The rights infringed included both socio-economic and civil and political rights, including the right to an adequate standard of living,³⁵ health,³⁶ freedom of religion,³⁷ education,³⁸ asylum,³⁹ a private and family life,⁴⁰ non-discrimination in the enjoyment of rights⁴¹ and to a fair and public hearing.⁴² Though all of these rights are qualified meaning that interference from the state can be justified in specified circumstances, the previous chapter argued that the justifications provided by the Government are questionable as they are not supported by tangible evidence. It also suggested that employment and asylum support restrictions are unnecessary and that they have a disproportionately negative impact upon the interests of members of the asylum seeking community. The negative impact of the current employment and financial arrangements within the asylum support system exposes the inhospitality of the UK’s asylum policies and reveals that the Government is failing to respect the cosmopolitan status of asylum seeking individuals as ultimate units of moral concern. This was recognised by the Independent Asylum

³⁴ Carens J, *The Ethics of Immigration* (Oxford University Press 2013) 211.

³⁵ Found within Articles: 25 UDHR; 11 ICESCR; 5(e) ICERD; 27 CRC.

³⁶ Found within Articles: 25 UDHR; 12 ICESCR; 24 CRC.

³⁷ Found within Articles 18 UDHR; 18 ICCPR; 14 CRC; 9 ECHR.

³⁸ Found within Article 28 CRC.

³⁹ Found within Article 14 UDHR.

⁴⁰ Found within Articles: 12 UDHR; 17 ICCPR; 8 ECHR.

⁴¹ Found within Articles: 7 UDHR; 2(2) ICESCR; 24 and 26 ICCPR; 2 CRC; 14 ECHR.

⁴² Found within Articles: 13 UDHR; 14(1) ICCPR; 6 ECHR.

Commission who noted in 2008 that the treatment of the asylum seeking community within the UK *'falls seriously below the standards to be expected of a humane and civilised society'*.⁴³ From the perspective of Pogge,⁴⁴ individuals are under a moral obligation to adhere to 'interactional' cosmopolitanism and thus ensure that certain moral principles are respected in our interactions with others. This responsibility extends to the imposition of institutional rules and thus UK citizens have a responsibility not to impose unjust institutions upon the asylum seeking community as fellow human beings. Consequently, the negative impact of the asylum support system outlined in the previous chapter triggers the obligation to promote feasible reforms of the asylum support system.⁴⁵ The next section suggests that reforms should take place firstly with regard to the provision of cash support and secondly to increased access to the labour market. Each proposal will be dealt with in turn beginning with the ways in which the reforms could be implemented before applying the reforms to the case study of Hani and finally addressing the advantages of reform to both the asylum seeking community and wider society.

5.4 (a) Proposal 2 - A unified cash based support system

5.4 (a) (i) Implementation of a unified cash based support system

An obvious solution to reducing the rights violations caused by restrictions on accessing cash support is to provide unified access to cash support and/or accommodation to all persons within the asylum seeking community. This would eliminate the current distinctions that are based upon immigration status which are deemed *morally irrelevant*⁴⁶ from a cosmopolitan perspective. Consequently asylum

⁴³ Hobson C, Cox J and Sagovsky N, *Fit for purpose yet? The Independent Asylum Commission's Interim Findings* (Independent Asylum Commission, 2008) 2.

⁴⁴ Pogge T, 'Cosmopolitanism and Sovereignty' (n 2).

⁴⁵ Ibid 52.

⁴⁶ Nussbaum MC, 'Patriotism and Cosmopolitanism' in Cohen J (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996) 6.

seekers with active applications, refused asylum seekers unable to return home, dependents and those who refuse to return home would all be entitled to cash support and/or accommodation until they are granted either a protective status, or return to their country of origin. This suggestion is supported by the House of Commons Home Affairs Committee⁴⁷ and the Parliamentary Joint Committee on Human Rights who found ‘*no justification for providing varying standards of support*’ amongst the asylum seeking community recommending ‘*the introduction of a coherent, unified, simplified and accessible system of support for asylum seekers from arrival until voluntary departure or enforced removal*’.⁴⁸

To ensure that persons are enjoying an adequate standard of living an increase to the financial rates of asylum support should also take place so that the rates received by members of the asylum seeking community mirror that of EEA citizens in receipt of Income Support (IS) or Universal Credit (UC). This is necessary as low levels of support cause a number of rights violations including the inability to provide enough food or adequate clothing, contrary to Article 25 of the UDHR, 11 of the ICESCR and 27 of the CRC. Additionally, the extra payments currently available to EEA citizens, such as maternity grants, healthy start vouchers⁴⁹ and other supplementary benefits,⁵⁰ should be afforded to the asylum seeking community on the basis that the costs arising

⁴⁷ Home Affairs Committee, *Asylum* (The Stationery Office, HC 71, 2013-14) Home Affairs Committee 36, para 82.

⁴⁸ Joint Committee on Human Rights, *The Treatment of Asylum Seekers* (The Stationery Office, HL 81-I, HC 60-I, 2006-2007) 42, para 12.

⁴⁹ Healthy Start vouchers are available for citizens who are at least 10 weeks pregnant or have a child under four years old and are in receipt of Income Support, or Income-based Jobseeker’s Allowance, or Income-related Employment and Support Allowance, or Child Tax Credit and have an annual family income of £16,190 or less (2014/15). Vouchers can be used to buy cows milk, formula milk for babies and fresh fruit and vegetables. See <http://www.healthystart.nhs.uk/> for more information.

⁵⁰ Supplementary benefits include: Child Benefit; Educational Maintenance Allowance (Scotland/Northern Ireland/Wales) or 16-19 Bursary Fund (England); the Income Support Family Premium; Disability Living Allowance or the Disabled Child Premium.

from human need or circumstance, such as those of raising a baby, remain the same regardless of immigration status.

Throughout the thesis the provision of accommodation has not been addressed as it falls outside the scope of the research project. However, in calling for the equality of cash provision between members of the asylum seeking community, the thesis also calls for equality of accommodation so that refused asylum seekers gain entitlement to the same accommodation as section 95 recipients, where they would otherwise be destitute. At present asylum seekers in need of accommodation are housed by contractors of UKBA which means that they are not required to pay for rent or the cost of utilities. Accordingly the costs of utilities would have to be deducted from the increased amount of asylum support to reflect the net income of EEA citizens. Though this policy was the original strategy of the Labour Government (1997-2010) when they introduced the asylum support system, evidence suggests that the current deductions from asylum support fail to reflect the true costs of utilities for EEA citizens and the Government has published no calculations to prove otherwise. Any deductions made from asylum support levels must accurately reflect the utility costs of recipients of IS or UC as there should be no distinction between the financial benefits afforded to either group, keeping in mind that citizens in receipt of these benefits also have access to housing and council tax benefit. Though the thesis advocates that the asylum seeking community should be provided with support equal to that of EEA citizens, it does not declare that the current amount afforded to citizens under IS or UC is sufficient to provide an adequate standard of living. Rather it purports that financial discrimination between asylum seekers and EEA citizens on the basis of immigration status is unacceptable and anti-cosmopolitan. Whether the current amount granted under IS or UC is sufficient to provide adequate living standards is beyond the scope

of the thesis as this requires economic knowledge and thorough research into the real costs of living within the UK. Accordingly, it is recommended that the Government conduct detailed research into living costs within the State and give statutory definition to the meaning of ‘an adequate standard of living’ so that support levels reflect the real costs of living. In doing so the Government should take into account the research from the Joseph Rowntree Foundation on MIS which was used within the rights analysis to verify that financial support rates under asylum support fall below that which is seen to be socially acceptable. The income level needed to provide for an adequate standard of living and the calculations used to satisfy this test should also be reviewed and published on an annual basis to ensure transparency and to enable the alteration of support levels in line with the changing costs of living within modern society.

Whether welfare benefits for the asylum seeking community are provided through either the UC system or continued through section 95 of the IAA 1999 is not suggested within this section, however it is recognised that the legal distinction between citizens and the asylum seeking community through a separate support system can further their construction as those who are ‘other’, a concept that will be discussed later in this section where the benefits of expanded cash provision will be explored in relation to wider society.⁵¹ Though welfare provision through a unified system may appear ideal, it is acknowledged that fundamental differences exist between the national welfare benefits system and that of the asylum support system as the former system is predicated on furthering market imperatives through encouraging employment. This is evident in the strict conditionality imposed upon unemployed citizens accessing UC and the increasingly restrictive capability assessments imposed upon those seeking Employment Support Allowance which will also be conducted in

⁵¹ Text to n 66 ch 5.

relation to the work capability element of UC. Consequently, were the asylum seeking community to be provided with benefits under the national benefits system, access to employment would have to be considered in line with the ethos of the Coalition Government's welfare reform.⁵²

Imposing employment and capability conditions upon the asylum seeking community however would likely cause problems as many individuals would be unable to work due to a number of factors including: the mental and physical demands of seeking refuge which would likely rule out employment upon arrival; trauma experienced in an individual's country of origin and the health implications of such trauma; issues relating to language and the transposition of educational achievements; and finally the demands of child care. As a number of these considerations are already taken into account within the national benefits system through the provision of Employment Support Allowance, Disability Living Allowance (due to be taken over by Personal Independence Payment) and IS (which is now subsumed within UC), it is possible that the system could be revised to accommodate the needs of the asylum seeking community, however it is questionable whether the national benefits system, which imposes strict tests of eligibility and conditionality (even upon recipients of disability benefits), would be an appropriate forum for the provision of benefits to those who have recently experienced significant trauma and have little or no income or savings with which to support themselves. The fact that asylum seekers were previously provided welfare benefits through the IS system however demonstrates that such provision is possible. In light of the potential issues concerning conditionality within the current benefits system afforded to citizens, the thesis does not advocate a

⁵² Secretary of State for Work and Pensions, *Universal Credit: welfare that works* (The Stationery Office Cm 7957, 2010).

particular preference with regards to the means of provision as significant changes would have to be made to the national system in order to accommodate the needs of the asylum seeking community. Rather the thesis calls for an increase to the rate of financial support afforded to the asylum seeking community and an expansion of the eligibility criteria so that the entire asylum seeking community are able to access support. Such reforms would provide the group with the means to enjoy an adequate standard of living which, as established in the rights analysis, they are currently denied. Cash provision as opposed to a payment card system would also allow refused asylum seekers the greater freedom to make choices that reflect their personal needs, which in turn would reduce instances of rights violations and instances of intersectional discrimination which will be demonstrated by application of the policy reform to Hani.

5.4 (a) (ii) The advantages of cash support

Application to Hani

If increased levels of cash support were provided to Hani, the instances of intersectional discrimination identified in the previous section would be reduced. Firstly, if support were provided in cash, the policies relating to the Azure payment card would be eliminated meaning that both Hani and Amir could access cash support for the purchase of necessary goods. Additionally, the family would be able to access any shop of their choosing, meaning that in instances of illness or the inability to travel, the couple could utilise convenience stores close to their accommodation as opposed to embarking on arduous journeys to obtain shopping. Such issues are also offset by the ability to pay for transportation, should an individual choose to do so. Access to supplementary benefits also means that Hani is entitled to healthy start vouchers which can be used to purchase formula milk for Alma, allowing the couple greater

expenditure on food and other essential living needs. A unified and increased cash support system thus provides greater freedom to applicants as opposed to the current policies of the support system which fail to account for diversity of lifestyle amongst the asylum seeking community.

The asylum seeking community

In addition to the advantages demonstrated in the case study of Hani, there are wider advantages to the asylum seeking community in extending and increasing cash support. Perhaps the most obvious advantage is to destitute individuals who have been refused protection in the UK and refuse to return to their countries of origin as reform would significantly reduce, if not abolish, the current destitution and street homelessness of refused asylum seekers. The previous chapter established that destitution causes and encourages instances of poor health, malnutrition, harassment, violence, sexual assault, prostitution and illegal working, all of which contribute to the erosion of dignity and, as one individual voiced, the feeling that you are ‘*de-humanised and completely abandoned by humankind*’.⁵³ Through providing accommodation and sufficient levels of support it is hoped that both the physical and mental health of individuals would be improved through greater access to shelter and nutritious and appropriate foods which would also reduce instances of exploitation which, primarily, arise from the need to survive. In addition, the alleviation of anxiety regarding means of survival would also promote better standards of mental and physical health.

The provision of support and accommodation to refused asylum seekers also acknowledges that the primary factor preventing return is fear, demonstrating a greater

⁵³ This is also supported by research from Freedom From Torture who assert that the State enforced destitution of asylum seekers creates dependency, reinforcing a torture victims position as ‘victim’, such dependency leads to anxiety and shame. See Crawley H, Hemmings J and Price N, *Coping with Destitution: Survival strategies of refused asylum seekers living in the UK* (Centre for Migration Policy Research, Swansea University, 2011) 23; Pettitt J, *The Poverty Barrier: The Right to Rehabilitation for Survivors of Torture in the UK* (Freedom From Torture, 2013) 57.

form of cosmopolitan understanding and compassion as to the circumstances and barriers preventing individuals from returning to their countries of origin. In 2013 the top countries from which individuals sought asylum were (in order of numbers): Pakistan; Iran; Sri Lanka; Syria; Eritrea; Albania; Bangladesh; Afghanistan; India and Nigeria,⁵⁴ countries experiencing continued civil unrest, indiscriminate violence and persecution. The notion that such persons are scared to return is substantiated by the significant length of time persons are choosing to remain destitute,⁵⁵ indicating that the current policy of targeted destitution is failing to increase voluntary returns. In 2013 only 3959 refused asylum seekers and their dependents departed voluntarily from the UK which is fairly minimal considering that 11,105 initial asylum applications were refused in this time and that consequently the number of those persons who refuse to return grows each year.⁵⁶ There is also no data to suggest that these persons were motivated to return for reasons of destitution within the UK. SHSH thus write that *'no matter how difficult living conditions are made for asylum seekers in the UK, they are unlikely to outweigh the fear of what awaits them if they return home'*.⁵⁷ Offering support to refused asylum seekers also recognises that a number of applicants will eventually have their status recognised on appeal as in 2013 25% of appeals against refusal of status were accepted.⁵⁸ Support throughout the entire asylum process ensures that nobody is left destitute where time lapses occur during appeal or the transfer of support from section 95 to section 4, which was identified in the

⁵⁴ Home Office, *Immigration statistics, October to December 2013* (Gov.uk 2014).

⁵⁵ In a 2009 four week study of destitute asylum seekers in Leeds, 100 individuals were recorded as being destitute for one year or more. Refugee Action also found in 2010 that persons remained destitute for an average of 21 months. Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (Refugee Action, 2006); Lewis H, *Still destitute. A worsening problem for refused asylum seekers* (Joseph Rowntree Charitable Trust, 2009).

⁵⁶ Refugee Council, *Refugee Council Information: Asylum Statistics* (Refugee Council, 2014).

⁵⁷ Williams R and Kaye M, *At the end of the line: Restoring the integrity of the UK's asylum system* (Still Human Still Here, 2010) 46.

⁵⁸ Home Office, *Immigration statistics, October to December 2013* para 8.5 (n 54).

previous chapter as a primary cause of destitution.⁵⁹ Extending provision also recognises that since 2002 the scope of protection within the UK has been narrowed through removal of the ‘Exceptional Leave to Remain’ status which was replaced by Humanitarian Protection and Discretionary Leave. The new forms of protective status offer protection on the basis of more restricted criteria and consequently those who might have qualified for exceptional leave to remain in the past may well fail to meet the current higher threshold for humanitarian protection or discretionary leave which perhaps authenticates the genuine fear that applicants’ possess over return.

Implementation of a unified cash support system would abolish use of the Azure payment card and the policies arising from it including the one card policy, the carry over policy and the restriction to shopping in designated shops. As explored in the preceding chapter and through the case study of Hani, these policies inhibit the freedom of a number of section 4 recipients which can in turn impact upon a host of rights.⁶⁰ Consequently removing this restriction would help to foster an environment of sanctuary as opposed to hardship, taking into account the right of all persons to seek asylum⁶¹ by providing treatment conducive to seeking refuge which upholds the spirit of cosmopolitan morality and hospitality.

Though the Government argue that until recognition, forced migration remains undetermined, it is undisputed that genuine refugees suffer within the system until their applications are granted. In 2013, 37% of initial asylum applications were granted

⁵⁹ Text to n 236 ch 4. See also Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* (Refugee Action, 2006).

⁶⁰ This includes: the right to health contained within Article 25 of the UDHR, Article 12 of the ICESCR and Article 24 of the CRC; the right to an adequate standard of living contained within Article 25 of the UDHR, Article 11 of the ICESCR, Article 5(e) of the ICERD as supported by CERD General Recommendation XXX, para 29, Article 14(2)(h) of CEDAW, Article 27 of CRC; the freedom to manifest one's religion contrary to Article 18 of the UDHR, Article 18 of the ICCPR, Article 14 of the CRC and Article 9 of the ECHR; and the right to a private and family life contrary to Article 12 of the UDHR, Article 17 of the ICCPR and Article 8 of the ECHR.

⁶¹ Article 14 UDHR.

and a further 25% were granted on appeal meaning that a significant number of refugees were subjected to low levels of asylum support whilst their applications were processed.⁶² Such treatment conflicts with advice from UNHCR who proclaim that States should treat asylum applicants as potential refugees until a valid determination of their claim has been made.⁶³ Benhabib also supports equality amongst citizens and the asylum seeking community as she regards the Government's current distinction between the two groups as contributing to the criminalisation of the act of seeking asylum. From this perspective, welfare restrictions are a punitive response applied to those who dare seek asylum in the UK. Promoting equality through a unified cash support system thus acknowledges the cosmopolitan premise '*that crossing borders and seeking entry into different polities is not a criminal act but an expression of human freedom and the search for human betterment in a world which we have to share with our fellow human beings*'.⁶⁴ The reform of punitive policies constitutes one step towards decriminalizing the act of seeking asylum in line with Article 31 of the Refugee Convention which provides that contracting States

'shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization'.

At the beginning of the previous chapter, a quote was cited from the Joint Committee on Human Rights, asserting that the treatment we afford to the asylum seeking community says something about the society in which we live and the type of

⁶² Home Office, *Immigration statistics, October to December 2013* paras 8.2 and 8.5 (n 54).

⁶³ *Khaboka (Alimas) v Secretary of State for the Home Department* [1993] Imm AR 484 [487] (Lord Justice Nolan); United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (United Nations High Commissioner for Refugees, HCR/IP/4/Eng/REV.1, 1979 reissued 1992).

⁶⁴ Benhabib S, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 177.

country we aspire to be.⁶⁵ Promoting an ethics of cosmopolitan hospitality through reform thus denotes that the values underpinning our society are those based on equality, understanding, dignity and rights as opposed to the current system which reflects self interest, political popularity and the prioritisation of citizens' rights above those seeking refuge. Improving the asylum support system presents an opportunity to morally progress the nature of society by providing hospitality to those seeking refuge within our borders.

Wider Society

Though it is acknowledged that implementing an expanded and increased cash support system will incur financial costs, in 2010 Still Human Still Here compiled data on the financial savings to be made from subsuming asylum seekers and refused asylum seekers into a singular cash-based support system, which was to be administered through the existing section 95 support framework. They concluded that a number of savings would be made, the first of which would arise through cutting the administrative costs of employing UK Visas and Immigration staff to assess entitlement for section 4 support and attend appeal hearings which they believe would free up more than 4,000 staff working days to be redeployed within the UK Visas and Immigration department. Savings on the costs of administering section 4 appeals to the First Tier Tribunal could also be made, which in 2010 accounted for 85% of support appeals, at an estimated cost of £700,000 per year. In addition, Still Human Still Here suggest that savings on accommodation are possible as at present, persons accessing section 4 support must also be accommodated by UK Visas and Immigration, accordingly costs would be cut by providing those who are willing to receive subsistence only with cash support, which, it is estimated, could save around

⁶⁵ Joint Committee on Human Rights, *The Treatment of Asylum Seekers* 5, para 12 (n 48).

£11.5 million pounds per year. Savings would also be made from removing the costs of implementing and running the Azure payment card system and through an increase in the number of voluntary returns, which Still Human Still Here believe is possible through affording individuals greater lengths of time to prepare for return and through promoting stable living conditions so that those willing to return could fully engage with the returns process. If 1,000 more voluntary returns took place each year, savings of around £10 million per year would be expected.⁶⁶

The unnecessary costs of running the section 4 support system were also recognised by the House of Commons Home Affairs Committee who acknowledged that given the fact ‘*that resources are constrained across Government at this time, the allocation of funding and staff to running a parallel support system (under section 4) seems excessive.*’⁶⁷ Savings made from streamlining the existing asylum support system would therefore offset the additional costs of supporting a greater number of eligible recipients, reducing the overall costs of reform.

In terms of destitute asylum seekers the benefits of reform explored in the previous section, such as a reduction in street homelessness, illegal working and sexual exploitation, would also reduce public expenditure upon services such as health care and policing. In a 2014 report from the Public Accounts Committee⁶⁸ it was established that the Government have lost track of over 50,000 people who are ‘illegally’ within the UK. Included within this figure are refused asylum seekers whose location remains unknown making it increasingly difficult to encourage or enforce return. One of the advantages in providing welfare benefits to those who have been refused asylum is that it continues the connection between the Government and the

⁶⁶ Williams and Kaye 47- 48 (n 57).

⁶⁷ Home Affairs Committee, *Asylum*, para 81 (n 47)..

⁶⁸ House of Commons Committee of Public Accounts, *Reforming the UK border and immigration system* (The Stationery Office, HC 584, 2014).

applicant after the refusal of status. This allows persons to engage with case workers regarding preparation for their return and ensures that the Home Office do not lose track of individuals who, without access to employment or benefits, are likely to engage in the black market economy or become subject to exploitation.

In addition to the economic advantages of reform, it is argued that acknowledging that the asylum seeking community have equal worth and equal needs to those of EEA citizens would foster an environment of social inclusion and acceptance amongst national citizens as the current distinction in living standards imposed by the Government promotes the social construction of asylum seekers as 'other' and a threat to society. This observation is substantiated by De Swaan⁶⁹ and his work on 'deserving' and 'undeserving' welfare recipients. De Swaan thus writes that the boundaries of the welfare state divide those who are seen to belong to 'us' (deemed deserving of welfare) from outsiders who are categorised as undeserving.⁷⁰ Once this social hierarchy is formed, our position in the hierarchy *'affects who we see as part of the in-group and who as the out-group...affecting our ability to identify with and empathize with other people'*.⁷¹ Accordingly, empathy is afforded to fellow in-group members which might result in an unwillingness to support needy people from ethnic minorities or foreign residents in general.⁷² In imposing institutional reform it is hoped that some of the status barriers between the asylum seeking community and citizens which sustain the social hierarchy will be weakened, furthering a culture of respect and the offering of hospitality. Aside from reform to the asylum support

⁶⁹ De Swaan A, *In Care of the State: Health Care, Education, and Welfare in Europe and America During the Modern Era* (Oxford University Press 1988).

⁷⁰ Ibid 16.

⁷¹ Richard G. Wilkinson and Kate Pickett, *The spirit level: why greater equality makes societies stronger* (Bloomsbury 2011) 51.

⁷² Wim van Oorschot, 'Who should get what, and why? On deservingness criteria and the conditionality of solidarity among the public' (2000) 28 Policy & Politics 33, 35.

system, it is also argued that in order to improve respect for the asylum seeking community and the upholding of cosmopolitan principles, the UK Government should remove restrictions upon accessing the labour market.

5.4 (b) Proposal 3 - Access to employment:

Greater access to the employment market is the third proposal put forward in this chapter which would reduce the associated costs of welfare provision by reducing the number of individuals claiming welfare benefits. The impact and effects of the support system should not be viewed in isolation from employment exclusion as reliance on State benefits arises as a direct consequence of labour market exclusion which prevents applicants from establishing their own sources of income. As demonstrated by the previous chapter, employment exclusion also has a number of additional negative effects outside infringement of the right to work⁷³ which primarily relate to the erosion of mental health and the inability to resume a 'normal life'.⁷⁴ It is therefore argued that the Government should remove application of the SOL and reduce or eliminate the twelve-month time restriction upon accessing employment which currently restricts asylum seekers with active applications from accessing work. In addition, it is put forth that employment access be expanded to encompass refused asylum seekers and asylum seeking dependents over the age of 16.

The purpose of such reforms is not to achieve guaranteed employment for every member of the asylum seeking community, but rather to reduce the barriers preventing them from accessing employment. Aside from institutional restrictions, members of the asylum seeking community face a number of additional barriers to accessing employment such as: language proficiency; whether they have been able to take part in training within the UK; the location of their dispersal destination (as there

⁷³ Contrary to Articles: 23 UDHR; 6 ICESCR; 27 CRPD.

⁷⁴ See n 107 ch 4.

is regional variation amongst job opportunities);⁷⁵ the inability to transfer qualifications from their countries of origin; and the prejudice of employers.⁷⁶ Women face additional difficulties with regards to child care provisions, educational history and cultural norms that discourage female independence.⁷⁷ Though removal of the current restrictions would thus increase the job opportunities for some asylum seekers, there are a number of other intersecting factors and characteristics that must be addressed if employment opportunities are to be equally accessed amongst the asylum seeking community. Before this occurs however, the direct institutional restrictions placed upon the community must be removed which forms the content of this proposal. The next section will provide further details regarding implementation of the reform before applying the policy proposal to the case study of Hani. The section will then go on to examine the advantages to both the asylum seeking community and wider society in increasing access to the labour market.

5.4 (b) (i) Implementation

Permission to work should ideally be granted on the first day of lodging an asylum application but no longer than six months after. This takes into account the Government's concerns regarding the 'floodgate' argument. Though it remains the position of this thesis that the floodgate concern is unsupported by any concrete evidence, a six month time limit would align the UK with the provisions of other EU member states who also apply a six month restriction.⁷⁸ Accordingly, in 2013 out of 21 EU countries who submitted information to the European Commission regarding the

⁷⁵ Alice Bloch, *Refugees' opportunities and barriers in employment and training* (Department for Work and Pensions, 2002) 92.

⁷⁶ Bloch A, 'Refugees in the UK Labour Market: The Conflict between Economic Integration and Policy-led Labour Market Restriction' (2007) 37 *Journal of Social Policy* 21, 30-31.

⁷⁷ *Ibid.*

⁷⁸ European Commission, *Ad-Hoc Query on access to the labour market for asylum seekers* (European Commission, 9 April 2013).

labour market access of asylum seekers within their state, ten states allowed access to employment after six months of the applicant lodging their asylum claim. Though admittedly within these ten states other restrictions are applied, Belgium,⁷⁹ Italy,⁸⁰ the Netherlands,⁸¹ Poland,⁸² Spain,⁸³ Sweden⁸⁴ and Norway⁸⁵ all allow labour market access after six months and do not apply Article 11(4) of the Reception Conditions Directive which allows for the labour market prioritisation of EU citizens and other legally resident third country nationals over the asylum seeking community. Should the UK implement the employment reform proposed in this thesis and reduce the time limit from twelve to six months, the UK's employment policies would be in harmony with the European States listed above and would also align with the aims of the amended recast of the Reception Conditions Directive, which calls for a maximum nine month limitation upon employment access.⁸⁶ A reduction in the exclusion period

⁷⁹ Asylum seekers in Belgium are issued with a Labour Card C which needs to be renewed every 12 months. Asylum seekers can work in whatever job they choose until their status is determined, though they are restricted to working a total of 24 weeks per year. Ibid 2.

⁸⁰ In Italy Article 11 of Legislative Decree n. 140/05 allows work until determination of status. See ibid 7.

⁸¹ Though third country nationals and asylum seekers within the Netherlands need a work permit to work, asylum seekers are not subject to the labour market check applied to other third country nationals which provides that work permits are only granted if there are no Dutch or EU citizens available to complete the vacancy. Consequently asylum seekers are exempt. Ibid 9.

⁸² In Poland applicants are entitled to enter the labour market after six months of lodging their asylum application without any work permit and in any job of their choosing provided they possess a document issued by the Chief of Office for Foreigners stating that the delay in processing the application is not the fault of the applicant. See ibid 10.

⁸³ After six months of their application, all asylum seekers are allowed to work in Spain in any employment with no prioritisation of EU citizens. Ibid 11.

⁸⁴ In Sweden asylum seekers can apply for work at any point after lodging an application for refugee status, provided that: the applicant has established their identity by means of identification documents; or if they have helped the Migration Board to establish their identity as far as possible; and the case is to be considered in Sweden; the application is not obviously unfounded (i.e. it is obvious that they have no grounds for asylum and will not be granted a residence permit on other grounds). An asylum seeker can work from the beginning of the asylum process until they get a residence permit or until they leave the country, given that they cooperate with the processes of return. Ibid 11.

⁸⁵ In Norway asylum seekers have access to the labour market at any point after lodging an asylum application provided that they can document their identity i.e. through means of a passport etc. Ibid 11.

⁸⁶ Reception Conditions Directive; Reception Conditions Directive (recast).

also conforms with guidance from the UNHCR⁸⁷ who believe six months to be the appropriate time limit for restriction.

As of January 2014 there were 30.15 million people employed and 2.32 million people unemployed within the UK which constitutes 32.47 million people within the State who are eligible to work.⁸⁸ At the end of December 2013 there were 23,459 asylum seekers and their dependents being supported under section 95 support and 4,831 failed asylum seekers and their dependants in receipt of section 4 support. The amount of people who have been refused asylum and live destitute is unknown and unpublished, yet should every asylum seeker and dependent currently in receipt of support gain access to employment they would make up 0.04% of the eligible employment market. In reality this number would also be significantly reduced as many asylum seekers and their dependents would be unable to work for reasons relating to health and age as the composition of figures relating to accessing support includes children. The additional barriers discussed earlier such as language and education are also likely to hinder employment access indicating that the potential number of asylum seekers seeking access to (and able to engage in) work is relatively low in comparison to the wider scale of employment within the UK.

5.4 (b) (ii) The advantages of greater access to employment

Application to Hani

Were Hani and Amir able to obtain employment and gain sufficient income to provide an adequate standard of living, many of the issues faced regarding poor nutrition and the freedom to access goods and shops of their choosing would be removed. The removal of restrictions upon refused asylum seekers and dependents

⁸⁷ United Nations High Commissioner for Refugees, *Note on the Integration of Refugees in the European Union* (United Nations High Commissioner for Refugees, 2007) para 14.

⁸⁸ Office for National Statistics, *Labour Market Statistics, January 2014* (Office for National Statistics, 2014).

means that, on an institutional level, both Hani and Amir are able to work. However, as Amir suffers from anxiety and depression, induced by persecution in his country of origin, it is unlikely he would be able to do so. Additionally, Amir is not comfortable with Hani working as he feels this is demasculating. Hani is also uncomfortable leaving Alma with Amir in light of his illness and is concerned that her English is not proficient enough to obtain a job.

Though the institutional barriers have been removed, it is thus still apparent that a number of characteristics, both isolated and intersectional, contribute to the continued unemployment of Hani and Amir. Though the following suggestions do not form part of this reform proposal: an increase in the provisions of accessible ESOL classes; accessible child care facilities; and the targeted education and training of the asylum seeking population would provide some means of relieving the barriers to employment identified above. The case study of Hani thus demonstrates how institutional change is just one step towards achieving employment access for the asylum seeking community and that a number of considerations need to be taken into account. This however does not undermine the importance of institutional change, without which access to employment is fully destroyed.

The asylum seeking community

Removing institutional barriers to accessing employment would increase levels of hospitality within the UK by demonstrating a greater respect for human rights, most obviously the right to work as contained within Articles 23 UDHR, Article 6 ICESCR, Article 27 CRPD and Article 1 of the International Labour Organization Employment Policy Convention. Though the Government argue that the right to work acts as a disinclination to voluntary return, research published by the Home Office does *‘not support the notion that restricting the employment of asylum seekers in the*

*UK increases the likelihood of return, nor does it indicate that granting permanent status in the UK reduces the likelihood of return.*⁸⁹ Allowing labour market access within six months of application for refugee status would also reduce instances of deskilling and provide opportunity to develop language skills and social integration which in turn increases the likelihood of future employment,⁹⁰ a premise that is particularly important for those who receive a positive decision on their asylum application. As ill health was consistently recorded throughout the rights analysis as a consequence of exclusion from the labour market, it is hoped that removing institutional barriers to employment would also help to improve the health of those wishing to integrate, recognising that employment is a significant characteristic of personal identity.⁹¹

As established in chapter three, the stringent employment restrictions placed on asylum seekers also substantiates their social construction as only those who take which in turn increases instances of everyday racism towards the group.⁹² A number of reports⁹³ thus note respondents' awareness

*'of the fact that their dependency on statutory support was exploited by certain sectors of media where asylum seekers were portrayed as lazy and a drain on Britain's resources. This made them feel humiliated about their status and impacted upon feelings of acceptance, ability to seek friends and feel safe'.*⁹⁴

⁸⁹ Richard Black and others, *Understanding voluntary return: Home Office Online Report* (Gov.uk 2004) 5.

⁹⁰ Doyle, *"I hate being idle" Wasted skills and enforced dependence among Zimbabwean asylum seekers in the UK*.

⁹¹ Ibid 18.

⁹² As noted by the Teather inquiry: *'This approach also risks perpetuating the misconception that asylum seekers are 'milking the system', leading to greater intra-community tension and resentment towards asylum seekers. We find this policy entirely at odds with other government policies aimed at tackling child poverty and encouraging work'*. Teather and others 14 (n 10).

⁹³ Kavita Brahmhatt and others, *Refugees' Experiences of Integration: Policy related findings on employment, ESOL and vocational training* (Refugee Council and University of Birmingham, 2007); Reacroft J, *Like any other child? Children and families in the asylum process* (Barnado's, 2008); Teather and others (n 9).

⁹⁴ Brahmhatt and others 23 (n 93).

Increasing labour market access would therefore benefit both the interests of the asylum and democratic community by fostering integration and social inclusion.

Wider Society

In addition to increasing social integration and cohesion amongst the national and asylum community, from a financial perspective greater levels of employment are likely to equate to greater levels of taxation and lower financial demand upon the welfare state. Providing asylum seekers with the opportunity to engage in work may also alleviate many of the reciprocal concerns identified by the public in chapter three which centred on the premise that nobody should get ‘*something for nothing*’,⁹⁵ which again could improve social cohesion. At present the asylum seeking community receive the same labour market access rights as economic migrants which, it is argued, blurs the distinction between the two statuses which was demonstrated by the public’s association of the word asylum with economic migration,⁹⁶ a misconception which the Government perhaps wishes to perpetuate. Hopefully distinguishing between the two groups in terms of employment access would help to realign the public’s construction of asylum with the notions of refuge and sanctuary. Though the Government fear that increased access to employment for the asylum seeking population would encourage economic migrants to displace themselves into the asylum route, this rhetoric overlooks existing methods of external immigration

⁹⁵ The overall consensus from research conducted by the Independent Immigration and Asylum Commission into public attitudes regarding asylum was that ‘*no-one, regardless of status, should get ‘something for nothing’. Those seeking sanctuary should be expected to make some contribution through work if they are able*’. See Hobson C, Cox J and Sagovsky N, *Saving Sanctuary: The Independent Asylum Commission's first report of conclusions and recommendations: How we restore public support for sanctuary and improve the way we decide who needs sanctuary* (Independent Asylum Commission, 2008) 20.

⁹⁶ The overall consensus from research conducted by the Independent Immigration, Asylum Commission into public attitudes regarding asylum was that ‘*no-one, regardless of status, should get ‘something for nothing’. Those seeking sanctuary should be expected to make some contribution through work if they are able*’. See *ibid* 20.

control, including use of the 'safe list'.⁹⁷ Accordingly where an applicant originates from a country listed on the safe list, the asylum application is automatically judged to be unfounded, unless the caseworker dealing with the application is satisfied that the case is clearly not unfounded. In such instances individuals are liable to detention from the date of their screening interview and categorised under the detained non-suspensive appeals category. The decision making process is aimed to take between 10-14 days and where an application is rejected appeals can only be made from outside the UK.⁹⁸ The 'safe list' policy would therefore reduce instances of economic migration by screening applications based on countries regarded as safe. Encouraging a distinction between asylum and economic migration could thus reduce the construction of seeking asylum as a calculated and criminal act, promoting community cohesion through greater understanding of the asylum process and increased social interaction within the work place. This is substantiated by Edwards who writes that providing asylum seekers with access to the labour market would '*promote the general welfare of society, enhance understanding and build confidence toward such groups, and generally contribute to their sense of self worth and dignity.*'⁹⁹

Thus far the above sections on reform have outlined the numerous advantages of alteration to the provision of cash support and increased access to the labour market. The chapter has argued that in implementing reform, the UK Government would greatly improve the living standards of the asylum seeking community and reduce rights infringements including those related to: an adequate standard of living;¹⁰⁰

⁹⁷ See section 94, NIAA 2002.

⁹⁸ UK Visas and Immigration, *Detained fast track processes: instruction* (Gov.uk 2014).

⁹⁹ Edwards A, 'Human Rights, Refugees, and The Right 'To Enjoy' Asylum' (2005) 17 International Journal of Refugee Law 293, 327.

¹⁰⁰ Contrary to Articles: 25 UDHR; 11 ICESCR; 27 CRC

work;¹⁰¹ health;¹⁰² religion;¹⁰³ education;¹⁰⁴ asylum;¹⁰⁵ a fair and public hearing;¹⁰⁶ respect for private and family life;¹⁰⁷ and the right to non-discrimination in the enjoyment of rights.¹⁰⁸ Employing broader rather than restrictive policies through the removal of onerous restrictions is also likely to reduce instances of intersectional discrimination as unlike the current system, cash based support and open employment access do not inhibit the exercise of personal freedom. Reducing the negative impact of social policies through reform thus constitutes a step towards increasing levels of hospitality within the UK through the fostering of sanctuary as opposed to hardship. However, although these recommendations constitute an immediate solution, their implementation only ensures relief from the current policies of the asylum support system. To secure hospitable treatment for future generations of asylum seekers it is argued that additional changes must be made including the intersectional analysis of future asylum support policies and the constitutional protection of socio-economic rights within domestic law. Accordingly, the next section will examine each of these recommendations and explain why they are necessary to secure the well being of future generations of asylum seekers.

5.5 Preventative action: Securing future hospitality

So far this chapter has discussed the ways in which rights violations could be identified and has recognised two means of reforming the current asylum support system, yet little has been mentioned with regards to preventing future rights

¹⁰¹ Contrary to Articles: 23 UDHR; 6 ICESCR; 27 CRPD.

¹⁰² Found within Articles: 25 UDHR; 12 ICESCR; 24 CRC.

¹⁰³ Found within Articles: 18 UDHR; 18 ICCPR; 14 CRC; 9 ECHR.

¹⁰⁴ Found within Article 28 CRC.

¹⁰⁵ Found within Article 14 UDHR.

¹⁰⁶ Found within Articles: 13 UDHR; 14(1) ICCPR; 6 ECHR.

¹⁰⁷ Found within Articles: 12 UDHR; 17 ICCPR; 8 ECHR.

¹⁰⁸ Found within Articles: 7 UDHR; 2(2) ICESCR; 24 and 26 ICCPR; 2 CRC; 14 ECHR.

violations and securing future hospitality. This section addresses this gap by focusing on how the State could secure future conditions of hospitality, putting forward two final proposals: the annual intersectional analysis of the asylum support system and the incorporation of socio-economic rights within domestic law.

5.5 (a) Proposal 4 - The annual intersectional analysis of the asylum support system

The benefits of intersectional analysis were outlined in section 5.3 of this chapter which emphasised the need to expose policies that cause disadvantage through the intersection of specific characteristics and policy. Section 5.3 employed the case study of Hani to illustrate firstly, the existence of intersectional discrimination within the current asylum support framework, and secondly to reveal why intersectional analysis is favoured over more general forms of analysis in revealing complex and multi-layered forms of discrimination. Finally section 5.3 called upon the Government to undertake an immediate intersectional analysis of the asylum support system; this section takes that recommendation one step further by calling for the annual intersectional analysis of the asylum support system and its future policies.

Though a review of current policies is the first step towards achieving better living standards for individuals within the asylum support system, future reviews must also take place to ensure that new support policies do not disproportionately disadvantage particular groups or individuals receiving support. It is hoped that by introducing more flexibility into the asylum support system through the above reforms instances of intersectional discrimination will be reduced, however the annual analysis of policies enables the Government to adjust future support measures that might cause unnecessary hardship. The preferred methodology for future analysis of the asylum support system is through the use of qualitative case study research using Leslie McCall's intra-categorical methodology for the recognition of identity characteristics.

As established this enables research into the personal impact of the system through the use of case studies which allows individuals to voice their experience, recognising that ‘everybody matters’.¹⁰⁹ However, although an annual intersectional analysis of the asylum support system is one method of monitoring prospective welfare policies, it provides little redress for the victims of future rights violations. It also fails to hold the Government to account where policies infringe upon human rights. Consequently it is argued that constitutional protection should also be afforded to socio-economic rights within domestic law as simply providing adequate living standards

‘is a necessary but not sufficient condition for economic and social rights fulfilment. These rights must be made justiciable, meaning that individuals and groups can demand them in courts or other arenas and receive an appropriate remedy.’¹¹⁰

Giving justiciable status to socio-economic rights adheres to section 19 of the Limburg Principles¹¹¹ and the recommendations of the CESCR who strongly urge incorporation of the ICESCR within national law. As established throughout, the human rights framework provides a bench mark for conditions of hospitality, the justiciability of rights therefore provides a legislative basis upon which conditions of hospitality can be demanded. Accordingly, the next section will address how greater protection can be afforded to socio-economic rights within the UK.

¹⁰⁹ Appiah A, *Cosmopolitanism: ethics in a world of strangers* (Penguin 2007) 144.

¹¹⁰ Chong DPL, ‘Five Challenges to Legalizing Economic and Social Rights’ (2009) 10 Human Rights Review 183, 184.

¹¹¹ Paragraph 19 of the Limburg Principles states: ‘States parties shall provide for effective remedies (for violations of ESC rights) including, where appropriate, judicial remedies’. United Nations Economic and Social Council, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*.

5.5 (b) Proposal 5 - Realising economic and social rights

Over the last decade, the codification of the UK constitution¹¹² and the creation of a constitutional Bill of Rights¹¹³ have been popular topics within British politics which renders now a politically significant time to address the justiciability of socio-economic rights within the UK constitution. It is argued that the constitutional protection of universal socio-economic rights is necessary within the UK as their current lack of recognition within domestic law means that socio-economic entitlements are easily removed from groups who are politically unpopular, as evidenced by the sustained withdrawal of welfare from the asylum seeking community.

Though the current constitutional framework affords some protection for socio-economic interests through use of judicial review,¹¹⁴ an expansive definition of civil and political rights and use of European Union Directives such as the Reception Conditions Directive, as established, these methods of enforcement have severe limitations. Firstly, judicial review can only be used to challenge the decision making process rather than the actual decision itself. Though admittedly substantive

¹¹² In 2010 the Political and Constitutional Reform Committee was established to consider the constitutional reform of the United Kingdom. Since then they have published a number of reports exploring whether the UK should codify its constitution. The second report puts forward three potential frameworks for constitutional change and discusses the arguments for and against a codified constitution. See House of Commons Political Constitutional Reform Committee, *A new Magna Carta?* (The Stationery Office, HC 463, 2014).

¹¹³ Lucinda Maer and Alexander Horne, *Background to proposals for a British Bill of Rights and Duties* (House of Commons Library 2009).

¹¹⁴ The case of *R v East Sussex CC Ex p. Tandy* [1998] AC 714 concerned education. The House of Lords quashed a decision of the Local Education Authority to reduce the hours of home tuition for a sickly child through judicial review on the basis that irrelevant considerations were taken into account. Such considerations included the limitations of the Local Education Authority's resources. The case of *R v North and East Devon HA Ex p. Coughlan* [2001] QB 213 concerned housing. The Court of Appeal held that in promising Ms Coughlan a 'home for life', the health authority had induced a substantive legitimate expectation that she would be able to reside in Mardon House for the remainder of her life. Where a public body exercising a statutory function made a promise as to future behaviour which induced a legitimate expectation of a substantive benefit (rather than merely procedural, to frustrate that expectation would amount to an abuse of power. The court held that there was not a sufficient overriding interest to justify a departure from the promise to Ms Coughlan and ordered that Mardon House remain open at the expense of the National Health authority.

considerations are taken into account when considering the compatibility of decisions with section 6 of the HRA 1998, from a strictly legalistic perspective, the scope of judicial review is limited to questions of process.¹¹⁵ Secondly, as addressed in the previous chapter, the threshold for engaging civil and political rights under the ECHR is far higher than that of socio-economic rights under instruments such as the ICESCR as evidenced by the conclusions drawn in *R (on the application of EW (Eritrea)) v Secretary of State for the Home Department (2009)*,¹¹⁶ where the court acknowledged that unlike Article 11 of the ICESCR, Article 3 of the ECHR affords no general right to minimum living standards.

Accordingly, the current limitations within the constitutional framework hinder the protection of socio-economic rights as the ECHR fails to explicitly recognise interests such as shelter and food. As explored in chapter four, the Reception Conditions Directive provides the most comprehensive basis upon which the socio-economic rights of the asylum seeking community can be demanded. However the protection afforded under this instrument is inherently weaker than that afforded under the ICESCR as its application is limited to those with active asylum applications and the provisions of the Directive afford no right to work. The disparity of treatment received by the asylum seeking community throughout European Union member States also suggests that even if the labour market restrictions were removed from the Reception Conditions Directive and the rights thereby granted were extended to encompass asylum seeking dependents and refused asylum seekers, the UK would still be granted a significant margin of discretion in implementing European Union law, affording little protection to asylum seeking community.

¹¹⁵ Aileen Kavanagh, 'Reasoning about proportionality under the Human Rights Act 1998: outcomes, substance and process' (2014) *Law Quarterly Review* 235.

¹¹⁶ [2009] EWHC 2957 (Admin).

Though numerous socio-economic rights are reflected within national legislation, such instruments are not universal in scope meaning that members of the asylum seeking community are subject to exclusions.¹¹⁷ This is noted by the CESCR who express concern that despite the UK's adoption of numerous laws regarding socio-economic rights, the Covenant has not been incorporated and accordingly cannot be directly invoked within the UK courts. The CESCR also note the absence of any significant factors or difficulties impeding the Covenants effective implementation.¹¹⁸ General statutes giving effect to socio-economic interests in the UK are also subject to implied repeal which means that they do not enjoy the equivalent constitutional protection afforded to civil and political rights under the HRA 1998 which can only be repealed expressly.¹¹⁹ In order to afford greater protection to the rights of the asylum seeking community it is therefore contended that socio-economic rights be incorporated within domestic law, however incorporation raises a number of questions: Firstly how would the UK give effect to socio-economic rights within national law? Secondly why are the Government reticent to incorporate socio-economic rights within domestic law, and are these concerns substantiated? The remainder of this chapter will address each of these questions.

5.5 (b) (ii) How would the UK give effect to socio-economic rights?

There are a number of different ways in which socio-economic rights can be incorporated and made justiciable within the UK, this thesis will focus on three central

¹¹⁷ This is evident in the restricted access to national health services. The National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306, as amended by the National Health Service (Charges to Overseas) Visitors Regulations 2011, SI 2011/1556 introduced charges for NHS treatment for overseas visitors falling within regulation 4.

¹¹⁸ United Nations Committee on Economic, Social and Cultural Rights, *Concluding observations on the United Kingdom's fourth and fifth periodic reports on the implementation of the International Covenant on Economic, Social and Cultural Rights* (United Nations Committee on Economic, Social and Cultural Rights, E/C.12/GBR/CO/5, 2009) para 13.

¹¹⁹ *Thoburn v Sunderland City Council* [2003] QB 151 [62-3]. See also House of Commons Political Constitutional Reform Committee, *A new Magna Carta?* (n 112).

propositions: the extension of the meaning of 'Convention rights' within section 1 of the HRA 1998 to include the rights contained within the ICESCR; ratification of the Optional Protocol to the ICESCR allowing for a system of individual complaints; and finally a codified Bill of Rights within the UK to give effect to universal socio-economic rights. Each of these methods of incorporation will be examined in turn.

The extension of 'Convention rights' under the HRA 1998

If the meaning of 'Convention rights' within section 1 of the HRA 1998 was expanded to include rights from the ICESCR, socio-economic rights would be incorporated within the UK's constitution. The ICESCR is argued to be the appropriate instrument from which to derive rights as it grants rights to *all* persons within the State's jurisdiction which accords with the cosmopolitan proposition that moral concern should be afforded to all persons, satisfying the universal aspect of cosmopolitan theory identified by Pogge.¹²⁰ Incorporation of the ICESCR would also align the UK with the recommendations of the CESCR who have repeatedly called for its incorporation within national law.¹²¹ As addressed in chapter four, the ICESCR is preferred to other socio-economic instruments such as the ESC as paragraph 1 to the appendix of the ESC restricts rights to foreigners only in so far as they are lawfully resident or working regularly within the territory. Though refugees are exempted from this restriction under paragraph 2, as established in chapter two, the protection granted to refugees does not extend to asylum seekers as UK law legally differentiates between

¹²⁰ Pogge, 'Cosmopolitanism and Sovereignty' 49 (n 2).

¹²¹ See United Nations Committee on Economic, Social and Cultural Rights, *Concluding observations on the United Kingdom's fourth and fifth periodic reports on the implementation of the International Covenant on Economic, Social and Cultural Rights* para 8 (n 118); United Nations Committee on Economic, Social and Cultural Rights, *Concluding observations on the third periodic report of the United Kingdom of Great Britain and Northern Ireland on articles 1 to 15 of the Covenant* (United Nations Committee on Economic, Social and Cultural Rights, E/1994/104/Add.11, 1998); United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant* (United Nations Committee on Economic, Social and Cultural Rights, E/C.12/1998/24, 1998).

asylum seekers and refugees until the latter's status has been affirmed and recognised by the State. Equally, though the Charter of Fundamental Rights of the European Union provides rights to all persons within the UK's jurisdiction, it can only be applied whilst the state is implementing European Union law and thus has inherent limitations, restricted further by the UK's opt out from rights and principles found within Title IV of the Charter.

Including ICESCR rights within the 'Convention rights' listed in section 1 of the HRA 1998 would give socio-economic rights equal statutory protection to those of a civil and political nature recognising that '*human rights and fundamental freedoms are indivisible and interdependent*' and that as a result '*equal attention....should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights*'.¹²² The HRA 1998 is an ideal mechanism for the incorporation of socio-economic rights as it already has an established framework of implementation measures including: an existing obligation upon the courts to construe domestic legislation in conformity with socio-economic rights (s.3 HRA); provision to allow individual claimants to take direct action against the Government and public authorities for breaches of Convention rights (ss.6-7 HRA); and finally provision that allows the courts to make a declaration of incompatibility in respect of legislation deemed to be incompatible with Convention rights (s.4 HRA). Use of the compatibility clause under section 4 of the HRA 1998 ensures that the sovereignty and democratic legitimacy of the state remains intact as ultimately Parliament retains the ability to pass, alter or repeal the law,¹²³ the courts cannot therefore override the will of Parliament by striking down legislation.

¹²² United Nations Economic and Social Council, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (n 111).

¹²³ Section 3(2)(b) and (c) of the HRA 1998.

Incorporation of ICESCR articles within the HRA raises the question of which rights would be included as at present not all ECHR rights are reflected within the HRA. It is contended that the greatest extension of hospitality and human rights protection would be achieved through including all of the ten substantive ICESCR rights, found within Articles 6-16, to be read in conjunction with the progressive realisation and anti-discrimination clauses found within Article 2 and Article 4 of the Covenant. This would ensure that basic needs such as food, water, shelter, health, work and education were met whilst also affording extra protection to workers. As this thesis recommends that the asylum seeking community be granted permission to work whilst in the UK, any protection afforded to workers is conducive to the notion that all individuals be treated with respect.¹²⁴ Article 2 of the ICESCR also provides the means to transcend division by prohibiting discrimination on the basis of protected characteristics such as race, colour or gender which reduces the capacity of the state to erect barriers between us and our fellow human beings, aligning the concept of need as arising from our status as human beings as opposed to the status of citizenship.¹²⁵

As rights within the ICESCR are progressive, the Government and the courts would have to determine the threshold for engaging rights, for example when considering the right to adequate living standards under Article 11, content would have to be provided to the meaning of ‘adequate living’ within the UK and ‘minimum core’ rights which would be partly determined by the UK’s socio-economic conditions. The progressive nature of rights within the ICESCR takes into account resource limitations and the need to apportion resources amongst fellow rights holders. It is argued that the Government could influence the courts in this regard by providing legislative content

¹²⁴ See the preamble to the ICESCR which recognises ‘*that these rights derive from the inherent dignity of the human person*’.

¹²⁵ Nussbaum MC, ‘Kant and Stoic Cosmopolitanism’ (1997) 5 *Journal of Political Philosophy* 1, 7.

to terms such as ‘essential living needs’ as the will of Parliament cannot be expressly disregarded in the development of common law principles. From a comparative perspective, the Indian Supreme Court has been forthcoming in providing content to the meaning of socio-economic rights, such as the right to food which was specified as comprising at least one cooked midday meal with specific calorie content.¹²⁶ Though this is international jurisprudence, the case demonstrates the ability and capacity of the judiciary to set precedents within the common law regarding the content of socio-economic rights, which to an extent the UK courts have already established in the case of *Limbuela*, where a minimum level of socio-economic deprivation was held to engage the right to be free from inhuman and degrading treatment under Article 3 of the ECHR. However it is precisely the exercise of this freedom which the Government deem inappropriate and undemocratic¹²⁷ as it would allow the courts to make decisions which would have repercussions for public spending. To an extent these concerns would be alleviated however by incorporation of the ICESCR through the HRA which would restrict the courts to use of section 3 or 4 of the HRA 1998. Parliament would also remain free to legislate against the decisions of the Courts should they choose to do so and thus the doctrine of Parliamentary sovereignty would remain intact. Accordingly, the expansion of ‘Convention rights’ under the HRA would not enable the absolute enforcement of socio-economic rights, but rather would encourage dialogue between Parliament and the courts with regard to issues such as minimum living standards hoping to achieve an adequate balance between rights and sovereignty. Such a balance is currently

¹²⁶ *People's Union for Civil Liberties v Union of India & Ors (Civil) 196/2001*. In this case the court specified that every child should be provided with one cooked midday meal and provided further details as to the amount of calories and protein each meal should contain.

¹²⁷ Foreign & Commonwealth Office, *The Annual Report on Human Rights 2003* (Foreign & Commonwealth Office 2003).

reflected within litigation concerning civil and political rights under the ECHR. Increased dialogue between the Government and the courts concerning socio-economic rights is perhaps also now a crucial conversation in light of rising income inequality in the UK and the reform of national welfare benefits.¹²⁸

The rights within the ICESCR are also not absolute but constrained by Article 4 which allows for limitations upon rights. As a result, where rights infringements take place the Courts will have to determine whether the interference is justified, something commonly considered in terms of civil and political rights under the ECHR. The UN Human Rights Committee and the Limburg principles¹²⁹ indicate that when considering whether limitations upon rights are justified, the proportionality test should be applied which means that measures '*must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected*'.¹³⁰ This is a fairly stringent test which means that the Courts would have to consider policy alternatives or at least see evidence from the Government that alternative, less intrusive limitations were considered in the creation of policy. As some socio-economic entitlements represent the bare minimum needed for survival, it is perhaps appropriate that a high threshold be met when considering limitations upon socio-economic rights, as demonstrated by the hardship and abuse incurred currently by refused asylum seekers who are homeless and destitute within the UK. Though such an assessment might be a difficult task for the courts, particularly where the

¹²⁸ For further information see The Equality Trust, 'About Inequality'

(<<http://www.equalitytrust.org.uk/about-inequality/scale-and-trends>> accessed 16 November 2014.

¹²⁹ See para 60 of the Limburg principles. United Nations Economic and Social Council, *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (n 111).

¹³⁰ United Nations Committee on Civil and Political Rights, *General Comment No.27: Article 12 (The Right to Freedom of movement)* (United Nations Committee on Civil and Political Rights, CCPR/C/21/Rev.1/Add.9, 1999) para 14.

quantum of available resources is concerned, proportionality encourages the courts to ‘be vigilant to ensure that...policies do not impact disproportionately on vulnerable sectors of society, especially where less restrictive alternatives exist’.¹³¹

Proportionality is not the only test however that could be applied by the courts in determining the legitimacy of State interference with socio-economic rights. In the South African case of *Government of the Republic of South Africa and Others v Grootboom and Others*¹³² (hereby *Grootboom*), the South African Constitutional Court considered how best to assess State interference with socio-economic rights. The case concerned the right of access to adequate housing and the rights of children to basic nutrition, shelter, health care and social services under sections 26 and 28 of the South African Constitution. In determining whether the housing policy of the State was unconstitutional, the Court took the reasonableness approach, asking whether the measures taken by the State in attempting to realise the right to adequate housing were

¹³¹ Anashri Pillay and Murray Wesson, 'Recession, recovery and service delivery: political and judicial responses to the financial and economic crisis in South Africa' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press 2014) 352.

¹³² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). See also: *Soobramoney v Minister of Health (Kwazulu-Natal)* (1) SA 765 (CC) which concerned the case of Mr. Soobramoney who claimed that he had a constitutional right to receive kidney dialysis treatment, relying on section 27(3) and 27(1)(a) of the South African Bill of Rights which provides that no-one may be refused emergency medical treatment and that everyone is entitled to have access to health care services provided by the State. The Constitutional Court rejected this claim on the basis that the cost of Mr Soobramoney's treatment had to be balanced against the healthcare needs of others. The court held that the health budget and prioritising health needs within this budget remained the responsibility of the political organs of the State and the medical authorities unless irrational or taken in bad faith; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) which concerned the failure of the South African government to make available the anti-retroviral drug nevirapine, which would prevent the transmission of HIV from mothers to babies. The Constitutional Court found this to be an unreasonable denial of rights to healthcare and to children's healthcare under sections 27 and 28 of the Constitution; *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (6) SA 505 (CC) where the applicant claimed that the exclusion of permanent residents as non-citizens from social grant entitlements was unconstitutional on the basis of sections 9, 10, 11, 27 and 28 of the South African Constitution. The court found that the Government's scheme, which excluded permanent residents from social security, to be unreasonable under section 27(2) and that the importance of providing access to social assistance to all living in South Africa and the impact of failing to do so in relation to dignity far outweighed the financial and immigration considerations of the State. The Court ordered that the relevant legislative provisions be read as though the words "or permanent resident" appeared after "citizen".

reasonable. In determining reasonableness, the Court held that minimum core obligations could be taken into account as could the availability of resources, however they would not ‘*enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent*’.¹³³ The court also emphasised that any decision regarding the content of the minimum core should be determined by the democratically elected Government. In *Grootboom* the court found that the social programmes put in place by the State failed to meet its constitutional requirements under section 26(2) of the Constitution as there was no housing relief for those desperately in need concluding that such needs should not be ignored in the interests of an overall housing programme focused on medium and long term housing objectives. Consequently the Court made a declaratory order requiring the State to meet its obligations under section 26(2) which included the duty to devise, fund, implement and supervise measures to provide relief to those in need.¹³⁴ Increasingly the case law in South Africa suggests that the Courts are taking a procedural approach to socio-economic rights claims through judicial review style judgements based upon the way in which the decision was made.¹³⁵ Judicial review claims would also be available concerning the conflict of decisions with ICESCR rights within the UK if ‘Convention rights’ are expanded.

If the UK courts applied the reasonableness test to interference with socio-economic rights it is contended that very little protection would be afforded to the asylum seeking community where welfare entitlement is concerned. As has been the case for the last two decades, the Government would justify restrictive policies on the

¹³³ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) 33 [41]

¹³⁴ *Ibid* [96].

¹³⁵ See *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) ; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) ; Pillay and Wesson (n 131).

basis of catch all justifications such as immigration control and the need to protect the rights of citizens which would likely be considered 'reasonable'. The proportionality test however would require the Government to justify restrictive measures and establish evidence to support these justifications. It would also allow the courts to fully consider the impact of restrictions upon the rights and interests of the asylum seeking community, which, as demonstrated in the rights analysis is significant, and examine whether less restrictive measures could have been used to in achieving the Government's objectives. A higher level of protection is therefore afforded to the rights of individuals where proportionality is employed,¹³⁶ yet it is conceded that such a high level of scrutiny may not be appropriate in all cases, particularly where the interests concerned are minimal. Consequently the stringency of the test applied should be flexible, depending on the nature of the interests involved and the gravity of the interference. This is currently the way in which limitations upon ECHR rights are regarded by the national courts where the greater the interference with the right, the greater the stringency of assessment, ranging from the application of the reasonableness test¹³⁷ to anxious scrutiny and proportionality¹³⁸ which is a more

¹³⁶ Kavanagh (n 115); *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532.

¹³⁷ The test of 'reasonableness' was developed in the case of *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (HL) which gave rise to the Wednesbury reasonableness test which asks whether 'a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it' [230] (Lord Greene). This test was later developed in the case of *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 (HL) which required a more heightened form of scrutiny. See Lord Bingham at para 554: 'The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable.' However the 'reasonable' test remains a relatively weak form of scrutiny giving the State a wide margin of appreciation in imposing limitations.

¹³⁸ See *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (HL) [80] (Lord Clyde) where the Privy Council adopted a three-stage test to legitimate interference with rights. Thus in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective'. See also *Smith and Grady v United Kingdom* (2000) 29 EHRR 493.

structured and intense form of review,¹³⁹ primarily because proportionality requires the courts to determine whether the decision maker has struck a balance between competing rights and interests, not merely whether the decision was within a range of rational or reasonable responses. Thus within the UK courts *'there is, rather, what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required'*¹⁴⁰ Consequently it is advised that the courts, when considering limitations upon socio-economic rights, apply a similar level of scrutiny to that employed when considering interferences with ECHR rights. This approach is also endorsed by Wesson¹⁴¹ who writes that generally courts should apply *'the less demanding standard of reasonableness in social rights adjudication, with the potential for this to harden into proportionality in particular types of cases'*.¹⁴² Wesson puts forwards four instances in which heightened scrutiny might apply and the court should perform a more searching inquiry.¹⁴³ The first consideration is the position of the claimant in society: where the claimant is marginalised due to poverty, stereotyping, lack of political representation or some other factor, the courts should apply heightened scrutiny. As the asylum seeking community suffer from stereotyping, marginalisation and state induced instances of poverty, any policies impacting upon them may be subject to Wesson's stricter form of review. Secondly, the adjudication of urgent needs such as emergency medical care or treatment require the application of heightened scrutiny. The third consideration is where policies impact upon

¹³⁹ See the judgement from Lord Bingham of Cornhill in *R (Daly) v Secretary of State for the Home Department* [2001].

¹⁴⁰ *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 (CA) [19].

¹⁴¹ Murray Wesson, 'Disagreement and the Constitutionalisation of Social Rights' (2012) 12 Human Rights Law Review 221.

¹⁴² Ibid.

¹⁴³ Ibid 246.

numerous other rights, in such instances a more searching inquiry should be triggered as the courts should be particularly concerned in cases where there appear to be multiple rights violations. As demonstrated within the rights analysis, a number of the asylum support policies, including destitution, the financial rate of provision and restrictions upon employment, impact upon multiple rights which renders it most likely that such policies would be scrutinised using the heightened test of proportionality under Wesson's criteria. The final criteria put forward by Wesson is where socio-economic policies are retrogressive, though this is approached with some trepidation.¹⁴⁴ Drawing on the work of the CESCR, Wesson concludes that retrogressive steps should impose a heightened burden of accountability upon the State which, in essence, amounts to a presumption against reductions in benefits. Wesson's criteria provides a structure for the judiciary in applying levels of scrutiny to Government policies whilst maintaining a sensible distinction between claims that require rigorous scrutiny and those that do not. Application of Wesson's scrutiny criteria to the asylum seeking community indicates that the proportionality test would be used to analyse the existing asylum support policies where rights claims arise. Though a system of review based on various levels of intensity affords a great deal of discretion to the courts, such discretion is already successfully exercised in relation to civil and political rights.¹⁴⁵

Under section 2(1) of the HRA 1998 '*a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European*

¹⁴⁴ '[A] degree of flexibility is needed as the duty of non-retrogression should not constitute a rigid 'ratchet' mechanism that precludes all welfare reform'. Ibid 253.

¹⁴⁵ For example with regard to Article 14 of the ECHR, the case law of the courts indicates that differential treatment based on sexual orientation requires particularly serious reasons by way of justification (see, for example, *Smith and Grady v United Kingdom* (2000) 29 EHRR 493; *Karner v. Austria*, (2003) 38 EHRR 24).

Court of Human Rights'. In conjunction with this provision it is suggested that section 2(1) be extended to include recommendations of the CESCER so that the UK courts are able to draw upon guidance from the CESCER. For the extension under section 2(1) to have full effect, this must also coincide with ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights which, amongst other things, allows individual and group communications to the CESCER effectively acting as a mechanism for appeal. Although the recommendations of the Committee would not be enforceable it would provide greater guidance to implementation of socio-economic rights within the UK.

Ratification of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

The individual and group communications mechanism of the Optional Protocol allows individual or group complaints to the CESCER after all domestic remedies have been exhausted. Consequently where complainants are unhappy with the domestic remedy offered they can submit a communication to the CESCER. Where communications are accepted, the Committee can offer recommendations to the State providing an additional source of expertise and redress. The complaints process allows the CESCER to provide decisions and guidance on specific cases or issues, which would increase dialogue between the UK courts and the CESCER, should socio-economic rights be incorporated within national law. This in turn, may contribute towards the development of socio-economic jurisprudence within the UK. In addition, the Protocol provides two further sources of protection through the inter-state communications procedure¹⁴⁶ and the CESCER inquiry process. However, it is highly

¹⁴⁶ Where a State believes that another State party is not fulfilling their obligations under the ICESCR they may make a written communication to bring the matter to the attention of that State party. Communications may only be submitted by a State who has acknowledged the competence of the Committee. Within three months of receipt, the offending State should send an explanation or any other statement in writing clarifying the matter including the domestic procedures or remedies

unlikely that the inquiry process of the CESCER would be triggered by the provisions regarding the asylum support system as this system is only engaged where grave violations of rights, such as genocide, take place. The emphasis of ratifying the Additional Protocol is not therefore to create a higher form of authority than that possessed by Parliament, nor to enable the CESCER to strike down offending legislation, but rather to encourage dialogue between the UK courts, the CESCER and Parliament to better the protection of socio-economic rights within the UK for the benefit of both the asylum seeking community and citizens.

As an alternative to the provisions of the ICESCR, socio-economic rights could also be incorporated within the UK through establishing a 'British Bill of Rights'. The current Conservative Government have indicated that such a mechanism would be its preferred means of rights adjudication as opposed to the enforcement of civil and political rights through the HRA 1998.¹⁴⁷ Accordingly the next section will address this prospect before concluding as to which method of incorporation is preferred.

A British Bill of Rights

Over the last decade both the Labour and Conservative parties have discussed the introduction of a 'British Bill of Rights' which could provide a means for incorporating socio-economic rights within the UK's constitution and, in turn, protect the asylum seeking community from future rights violations. In terms of including socio-economic rights within such a statute, many of the questions that arose with regards to the incorporation of rights under the HRA 1998 arise here, including: which rights should be included under the Bill? And how such rights would best be

undertaken in response, If the matter is not settled to the satisfaction of both States concerned, the communication may be referred to the Committee by notice given to the Committee and the other State who will then issue a declaration regarding their findings (Article 10 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights).

¹⁴⁷ Conservatives, *Protecting human rights in the UK: The Conservatives' proposals for changing Britain's human rights laws* (Alan Mabutt, 2014).

adjudicated within the courts? Unlike the incompatibility and interpretive mechanisms under the HRA 1998, which have been developed over the last two decades, the best means of implementing a British Bill of Rights remains somewhat unknown. It is not the intention of this section to set out a specific plan for implementation of the instrument but rather to address whether socio-economic rights could be included within such a mechanism.

Were a British Bill of Rights to be established, it is contended that similar rights to the rights found within Articles 6 to 16 of the ICESCR, in conjunction with Articles 2 (anti-discrimination) and 4 (progressive measures), should be included. The progressive nature of socio-economic rights was addressed by the Joint Committee on Human Rights in their document ‘A Bill of Rights for the UK?’¹⁴⁸ which suggested that a Bill of Rights should ‘*initially include the rights to education, health, housing and an adequate standard of living. Government would have a duty to progress towards realising these rights and would need to report that progress to Parliament*’.¹⁴⁹ The Committee however do not believe that socio-economic rights should be made justiciable within the UK courts as they contend that the UK courts lack the sufficient expertise, institutional competence or authority to rule on cases concerning social policy.¹⁵⁰ Rather the Joint Committee on Human Rights recommends that the courts should be able to review any Government measures that restrict socio-economic rights and evaluate the reasonableness of those measures subject to a number of additional considerations such as the availability of resources, the progressive realisation of socio-economic rights and discrimination.¹⁵¹ The

¹⁴⁸ Joint Committee on Human Rights, *A Bill of Rights for the UK?* (The Stationery Office, HL 165-I, HC 150-I, 2007-2008).

¹⁴⁹ *Ibid* 5-6.

¹⁵⁰ *Ibid* 47, para 167.

¹⁵¹ The Joint Committee on Human Rights propose that when evaluating the reasonableness of the measures taken by the Government to achieve the progressive realisation of the rights in this schedule,

Committee add that were their proposal to be implemented, it would not give rise to a panacea of litigation concerning all economic and social ills but rather that it could have a practical impact on situations such as *'the use of destitution as an instrument of policy to deter asylum seekers'*¹⁵² by commanding greater respect for the right to an adequate standard of living. The Committee's explicit recognition that the enforced destitution of the asylum seeking community is a measure worthy of review indicates that the 'reviewing' mechanism proposed would be exercised to the advantage of the asylum seeking population.

Though neither the Labour party nor the Conservative Government have proposed that socio-economic rights should be included within a British Bill of rights, both parties have considered their inclusion. Thus, when the previous Labour Government was in power, it considered whether socio-economic principles should be included in a future Bill of Rights, writing that although

*'the Government would not seek to create new and individually enforceable legal rights in addition to the array of legal protections already available... it welcomes discussion on whether there could be advantages in articulating constitutional principles which can be drawn from existing welfare provisions'.*¹⁵³

Labour's statement however indicates that were they to include socio-economic provisions within a British Bill of Rights, such provisions would be regarded as

the courts shall have regard to the following relevant considerations: '(a) the availability of resources; (b) the latitude inherent in a duty to achieve the realisation of the rights progressively; (c) the fact that a wide range of measures is possible to meet the Government's obligations; (d) the availability of an alternative means of realising the rights is not, of itself, an indication of unreasonableness; (e) whether the measures include emergency relief for those whose needs are urgent; (f) whether the measures are discriminatory; (g) whether the measures have been effectively made known to the public; (h) whether the measures are capable of facilitating the realisation of the relevant rights; (i) whether any deprivation of existing rights is demonstrably justifiable in accordance with s. 5 of this Bill (Limitation of Rights)'. Ibid 54.

¹⁵² Ibid.

¹⁵³ Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (The Stationery Office 2009) 43, para 3.53. The remainder of the document stresses the civil and political nature that a Bill of Rights would embody suggesting the resistance of the Labour party to acknowledge socio-economic rights.

guiding principles rather than enforceable rights in line mechanisms such as the Charter of Fundamental Rights of the European Union which includes civil and political rights and socio economic ‘principles’. The Labour party have now however moved away from the idea of a ‘British Bill of Rights’, pledging their allegiance instead to the existing provisions of the HRA 1998.

On the 18th March 2011 the Coalition Government established the ‘Commission on a Bill of Rights’ to undertake consultations regarding the introduction of a British Bill of Rights within the UK. The Commission found that there was strong public support for the inclusion of socio-economic rights within the Bill, particularly those relating to healthcare. Alongside rights for children, socio-economic rights were the second most popular public choice of rights to be included, in addition to other rights such as rights for the disabled, environmental rights and equality rights.¹⁵⁴ There were more mixed views however with regard to the justiciability of socio economic rights. Whereas some favoured an aspirational set of rights, others preferred the progressive realisation model or the full justiciability of rights, reflecting a wider discontent felt towards turning an aspirational socio-economic agenda into concrete and enforceable norms. Despite the clear public support for socio-economic rights revealed by the Commission, the Conservative party failed to include any discussion of socio-economic rights within their recent policy document ‘Protecting human rights in the UK: The Conservatives' proposals for changing Britain's human rights laws’, instead focusing centrally on the implementation and adjudication of civil and political rights.¹⁵⁵ The point here however is that the existence of public support for socio-

¹⁵⁴ The Commission report that ‘*approximately 100 respondents to our two consultations expressed a view on the possibility of including socio-economic rights in a UK Bill of Rights. Of those who did the majority were in favour of such rights, though some were equivocal and a small number opposed their inclusion*’. Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us Volume I* (Commission on a Bill of Rights 2012) paras 8.25, 38 and 53.

¹⁵⁵ Conservatives (n 147).

economic rights demonstrates that the justiciability of socio-economic rights within the UK's constitution is becoming increasingly viable, particularly in a political era increasingly focused on the issue of rights and their impact upon sovereignty.

In summary, the preceding discussion demonstrates that it is possible for socio-economic rights to be made justiciable within the UK through two major routes, incorporation under the HRA 1998 or via a British Bill of Rights which could be used to protect members of the asylum seeking community from future rights violations. As the Bill of Rights remains a fairly undeveloped area of policy, the HRA 1998 provides a more comprehensive and systematic means of giving force to socio-economic rights rendering it the preferable option. Indeed the campaigning organisation Liberty fiercely oppose a British Bill of Rights, preferring use of the HRA which allows public authorities to be held to account whilst ensuring that the sovereignty of Parliament is preserved.¹⁵⁶ Liberty's primary concern is that the introduction of a British Bill of Rights would lead to the reduction of civil and political rights currently recognised under the HRA 1998 and additionally, that rights under the Bill would be restricted to citizens as opposed to the universal rights currently afforded under the HRA 1998, substantiating justification for the incorporation of ICESCR rights through the HRA 1998. Despite the complexities involved with incorporating socio economic rights, the above considerations demonstrate that such a proposal is possible and a concept that is increasingly gaining the attention and support of the public, yet the Government remain reticent to incorporate socio-economic rights within domestic law. Accordingly the next section will address the Government's

¹⁵⁶ Liberty, *Human Rights or Citizens Privileges? Liberty's response to the Commission on a Bill of Rights Discussion Paper: Do we need a UK Bill of Rights?* (Liberty, 2011) 7-8.

concerns over incorporation and assess the strength of these concerns in outweighing the benefits of incorporation.

5.5 (b) (iii) Concerns relating to the incorporation of socio economic rights

The primary arguments against the incorporation of socio-economic rights were set out in the previous chapter which identified a number of the Government's concerns,¹⁵⁷ summarised as follows: that transferring power concerning social spending from the Government to the judiciary is counter to the fundamental principles of democracy;¹⁵⁸ that socio-economic policies which concern public spending do not lend themselves to justiciable procedures;¹⁵⁹ that the judiciary would struggle to determine whether progression had taken place when hearing particular cases; and that the ambiguity of ICESCR Articles renders it difficult for judges to determine whether Covenant standards are being fulfilled.¹⁶⁰ Each of these issues will now be addressed in turn, beginning with the concept of democratic accountability.

The first concern of the Government relates to sovereignty and the notion that decisions regarding public money should be made by the democratically elected and accountable Government. Yet the foundations of this concern would be addressed through the incorporation of ICESCR rights via the HRA 1998. As already established, including socio-economic rights within this mechanism would not allow the courts to supersede the power of Parliament as the courts would be limited to declaring legislation that violated socio-economic rights incompatible with Convention rights. Though this limitation somewhat curtails the absolute protection of socio-economic rights for the asylum seeking community, it also takes into account and balances

¹⁵⁷ Text to n 286 ch 4.

¹⁵⁸ Foreign & Commonwealth Office 145 (n 127).

¹⁵⁹ Ibid 146.

¹⁶⁰ Ibid 146.

considerations of sovereignty, democratic legitimacy and the right to self determination. Rather than granting the courts power to overrule the will of Parliament it would encourage responsible decision making by holding the Government to account for implementing policies that infringe upon rights and discriminate against unpopular minorities, such as asylum seekers. In addition, when the HRA 1998 was created, Parliament granted the judiciary clear jurisdiction to adjudicate human rights disputes, *'making a conscious, political choice that, in most- although not all- instances, the courts were best placed to decide upon human rights'*.¹⁶¹ Were the Government to incorporate socio-economic rights within the HRA 1998 and grant the courts jurisdiction to rule on socio-economic matters, such jurisdiction could not be condemned as undemocratic as the power would be conferred upon the judiciary by the democratically elected Government. Despite the Government's concerns relating to accountability, it is contended that as ICESCR rights would ultimately be bound by sovereignty, the non-accountability of the judiciary presents an advantage for the just adjudication of socio-economic rights. This is substantiated by Justice Albie Sachs who notes that when dealing with marginalised communities (who may be the target of majoritarian prejudice) the independence of the judiciary is an advantage as it ensures the protection of those who are politically unpopular.¹⁶² Consequently if the UK seeks to embody a society that recognises the *'inherent dignity'* and *'equal and inalienable rights of all members of the human family'*,¹⁶³ the adjudication of rights must remain objective and independent so that the rights of all persons, including the asylum seeking community remain protected.

¹⁶¹ Mark Elliott and Robert Thomas, *Public Law* (Second edn, Oxford University Press 2014) 692.

¹⁶² Albie Sachs, *'Enforcement of Social and Economic Rights' Draft transcript*, (London School of Economics, 27 February 2003).

¹⁶³ Universal Declaration of Human Rights, Preamble.

The remaining concerns of the Government are based upon the way in which socio-economic rights would be enforced and centre on the premise that: socio-economic rights are non-justiciable in nature; that the judiciary would struggle to determine whether progression had taken place; and that the judiciary would find it difficult to determine whether rights had been fulfilled. Many authors believe that this critique is now however defunct in light of the existing, though disparate, body of international case law which demonstrates the successful adjudication of socio-economic rights.¹⁶⁴ The Indian courts have thus ruled on the rights to food,¹⁶⁵ education,¹⁶⁶ housing¹⁶⁷ and health,¹⁶⁸ which is mirrored within South African jurisprudence where the courts have considered the rights to housing,¹⁶⁹ water,¹⁷⁰ health¹⁷¹ and education.¹⁷² Such judgements prove that the courts are able to recognise retrogression where it occurs and that the judiciary are capable of providing content to the meaning of rights such as the right to food or adequate living standards. As already established, the UK's judiciary currently pass judgement on a wide range of cases that

¹⁶⁴ Cass Sunstein, 'Social and Economic Rights? Lessons from South Africa' (2001) University of Chicago, Public Law Working Paper No 12; University of Chicago Law & Economics, Olin Working Paper No 124 Available at SSRN: <http://ssrncom/abstract=269657> or <http://dxdoiorg/102139/ssrn269657>; Mark Tushnet, 'Social welfare rights and the forms of judicial review' (2004) 82 Texas Law Review 1895; Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights* (The Stationery Office, HL 183, HC 1188, 2003-2004) para 54; Frank Michelman, 'Socioeconomic rights in constitutional law: Explaining America away' (2008) 6 International Journal of Constitutional Law 663; Aofie Nolan, *Children's Socio-Economic Rights, Democracy and the Courts (Human Rights Law in Perspective)* (Hart Publishing 2014).

¹⁶⁵ *People's Union for Civil Liberties v Union of India & Ors (Civil) 196/2001*.

¹⁶⁶ *Unni Krishnan, J.P. & Ors. v. State of Andhra Pradesh & Ors (1993) SCC 1 645*.

¹⁶⁷ *Sudama Singh and Others v Govt of Delhi and Another WP(C) 8904/2009*.

¹⁶⁸ *Laxmi Mandal v Deen Dayal Harinagar Hospital & Ors WP(C) 8853/2008*.

¹⁶⁹ *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)*.

¹⁷⁰ *Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)*.

¹⁷¹ *Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC)*.

¹⁷² *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa and Other 2008 (5) SA 87 (WCC)*.

have consequences for social spending.¹⁷³ The Joint Committee on Human Rights addressed this issue in 2004 and noted that as a result of existing legislation relating to social welfare, the courts have accumulated experience on the application and limitations of economic and social rights.¹⁷⁴ The fact that socio-economic rights involve public spending should also not render them non-justiciable as decisions of a civil and political nature can also have cost implications such as the right to a fair hearing under Article 6 of the ECHR, the facilitation of which costs tax payers money. Consequently, it is argued that the incorporation of socio-economic rights within domestic law would not confer a task upon the judiciary which is that dissimilar to the responsibilities already exercised under the provisions of the HRA 1998.¹⁷⁵ Socio-economic rights are not therefore inherently non-justiciable, but rather are categorized as being so *'because of the way rights have been conceptualized in public discourse and interpreted by the courts'*.¹⁷⁶ In order to secure future conditions of hospitality and respect for the asylum seeking community it is therefore contended that the traditional misconceptions concerning socio-economic rights be overcome so that socio-economic rights can be enforced by all of those within the State whose needs are disregarded or violated by Government policy.

¹⁷³ *R v East Sussex CC Ex p. Tandy* [1998] AC 714; *R v North and East Devon HA Ex p. Coughlan* [2001] QB 213; *R (on the application of Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

¹⁷⁴ Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights* (The Stationery Office, HL 183, HC 1188, 2003-2004) 10-11.

¹⁷⁵ This principle was recognised in a South African case which examined the relationship between the South African Constitution, the separation of powers and public spending. The Ex Part Chairperson of the Constitutional Assembly thus held that although the inclusion of socio economic rights may result in Court orders relating to budgetary matters: *'even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits...In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers'*. *Certificatoin of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC)*.

¹⁷⁶ Chong, 'Five Challenges to Legalizing Economic and Social Rights' 190 (n 110).

5.6 Summary

In summary it is clear that the UK could undertake a number of measures to ensure and secure the current and future provision of hospitality to the asylum seeking community. Improving hospitality and better respect for human rights thus rests upon: the *recognition* of rights violations and discrimination through intersectional analysis; the *reform* of the support system via increased and expanded cash provision and greater access to employment; and the *prevention* of future rights violations through the annual intersectional analysis of policies, the extension of ‘Convention Rights’ under the HRA 1998 to include ICESCR rights, and ratification of the Optional Protocol to the ICESCR.

Though the five proposals discussed may appear radical it is important to remember that prior to the 1980s access to employment and national welfare benefits was granted to all members of the asylum seeking community. Though cross border migration has increased since then, the policies relating to external border controls have also increased. What is apparent from the rights analysis within the last chapter is that failure to recognise injustice is causing immeasurable hardship to certain categories of person within the UK. Accordingly, injustice and poverty in the modern world is caused less and less by a lack of resources and is instead increasingly maintained by widespread beliefs that propagate it,

‘these beliefs are often presented as natural and long standing, but in fact they will often be seen as unjust tomorrow. Changing what is understood by injustice today means telling some people, usually those in positions of power, that what they consider to be fair is in fact in many ways unjust...The five tenets of injustice are that: elitism is efficient, exclusion is necessary, prejudice is natural, greed is good and despair is inevitable.’¹⁷⁷

¹⁷⁷ Dorling D, *Injustice: why social inequality persists* (Policy Press 2011) 1.

The tenets set out above by Dorling are evident in the asylum regime today: that a neo-liberal emphasis on labour market inclusion is efficient; that the exclusion of the asylum seeking community is necessary for the enjoyment of citizens' rights; that prejudice against third country nationals is natural and justified; that greed in terms of the protection of the labour market and national resources is good for the preservation of national interests; and that the despair of the asylum seeking community is inevitable, particularly amongst those whom refuse to return. The promulgation of the suggested solutions would hopefully begin to rectify some of these injustices and allow the asylum seeking community to live in dignity, a central component of hospitality.

In a political environment that is increasingly focused on nationalist politics it is important to assert the rights of those seeking, or those who have sought refuge in our country, which can be progressed by changing the way in which we treat those seeking asylum. Xenophobia cannot be addressed through the continued implementation of exclusionary policies that draw distinctions on the basis of nationality. What is required is a cosmopolitan ethos which recognises the act of seeking asylum as the exercise of a right¹⁷⁸ which in turn places an obligation upon the State and its citizens to treat the asylum seeking community with respect. Specific needs such as food and clothing must therefore be accepted as needs that are inherent to all, not just the British public. The next decade represents a critical period in the balancing of state interests against the rights of the asylum seeking population. The UN High Commissioner for Refugees, António Guterres, has declared the refugee

¹⁷⁸ The right to seek asylum is contained within Article 14 of the UDHR. Kant also recognised the act of seeking asylum as the exercise of cosmopolitan right. Immanuel Kant., *Perpetual Peace: A Philosophical Essay*, Translated with introduction and notes by M. Campbell Smith (1972) (Garland Publishing 1795).

crisis in Syria as '*the biggest humanitarian emergency of our era*',¹⁷⁹ indicating that the issue of refugee movements is not going to reduce or fade away. Amongst grand media narratives that welfare benefits in Britain constitute an '*El Dorado*'¹⁸⁰ for asylum seekers, it is easy to lose sight of the evidence which demonstrates that restrictive support policies within the UK have little impact upon choice of destination. The primary justification behind the restrictive support system is thus flawed, yet the implications of the system continue to contribute to human misery and the violation of basic human rights. The reassertion of our common humanity in this increasingly intolerant environment is crucial: the UK can continue to distinguish, exclude and degrade the status of asylum seeker or reassert the standards of a humane and civilised society, standards that are recognised through our commitment to international human rights. The implementation of policy reforms constitutes one small step towards achieving this goal.

¹⁷⁹ United Nations High Commissioner for Refugees, 'Number of Syrian refugees tops 2 million mark with more on the way' 2013) <<http://www.unhcr.org/522495669.html>> accessed 2 November 2014.

¹⁸⁰ On the 28 October 2014, Natacha Bouchart, the Mayor of Calais and member of the central right wing party in France, the Union for a Popular Movement, gave evidence to the Home Affairs Select Committee regarding immigration to the UK from Calais. Within her evidence she claimed that the UK benefits system acted as an '*El Dorado*' for migrants who were '*willing to die*' to enter the State. www.parliament.uk, 'The Home Affairs Committee takes evidence on immigration from the Mayor of Calais and officials on Tuesday 28 October 2014.' 2014) <<http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/141024-calais/>> accessed 2 November 2014. The Daily Mail followed Bouchart's statement with headlines such as '*Britain an El Dorado for migrants: Mayor of Calais blames our generous benefits for luring thousands to Channel ports*' stating that we should follow France's example where due to poor administration most asylum seekers sleep homeless every night. See: Ian Drury, 'Britain an El Dorado for migrants: Mayor of Calais blames our generous benefits for luring thousands to Channel ports' *Daily Mail* (<<http://www.dailymail.co.uk/news/article-2810936/Immigrants-ready-prepared-die-Britain-huge-handed-benefits-says-Calais-Mayor.html>> accessed 2 November 2014.

Chapter six

Conclusions

In conclusion

The material explored throughout the preceding chapters of this thesis demonstrates the importance of uninhibited access to the labour market and effective welfare provision, without which struggles to meet basic human needs become commonplace. Fortunately, the majority of citizens within the UK are not faced with this situation, yet those seeking sanctuary within the State have numerous welfare and employment restrictions imposed upon them as a means of deterring future asylum applicants and economic migrants from coming to the UK. This study was inspired by personal contact with members of the asylum seeking community which indicated that increasingly restrictive welfare and employment policies were a source of suffering. The primary aim of this thesis was therefore to establish whether in seeking to control immigration and deter abusive applicants, the UK Government imposes overly onerous reception conditions upon the asylum seeking community in breach of the moral and legal obligations owed by the state to non-citizens. In addition, the thesis sought to establish how and why, in light of these findings, greater respect should be afforded to the asylum seeking community. From a contextual perspective, the necessity of such research is considered particularly important given the impact of restrictive support and employment policies and the growing intolerance of UK citizens to claims from foreigners seeking access to the welfare state, intolerance that is mirrored within right wing and centre left political discourse and pending plans from the Conservative Government to cut asylum support levels further.

In fulfilling the primary research aims, the thesis answered seven central research questions¹ which enabled a fuller understanding and assessment of the current issues faced by the asylum seeking community and the intrinsic difficulties involved in balancing the universal rights and interests of the asylum seeking community against those of the state and its citizens, arguing that ultimately, basic standards of treatment should prevail in all encounters between the State as host, and asylum seekers as guests. This concluding chapter will demonstrate how each of the seven research questions was answered throughout the thesis, articulating the practical and theoretical conclusions drawn from the preceding analysis.

The first research question posed sought to interrogate the justifications for distinguishing between members of the asylum seeking community and citizens within the provision of welfare benefits. Chapters two and three answered this question by examining the political justifications for the series of welfare restrictions introduced throughout the 1990s by the respective Conservative (1979-1997) and Labour (1997-2010) Governments, which culminated in the IAA 1999. The thesis established that welfare restrictions were introduced throughout the 1990s in response to rising immigration numbers and the inability of local authorities to cope with increased claims for accommodation. Additionally, the Government feared that unrestricted access to welfare benefits and employment could result in heightened numbers of

¹ The questions were set out in the introduction and are as follows:

1. What are the justifications behind distinguishing between asylum seekers and citizens in the provision of welfare?
2. To what extent is citizenship a basis for exclusion from social welfare and what other factors contribute to such exclusion?
3. What justifications substantiate respect for rights of the foreigner?
4. What standard of State provided welfare should the asylum seeking community receive as of right?
5. What national and international instruments afford protection to asylum seekers and how effective are they in practice?
6. To what extent does the UK Government respect, protect and fulfil the human rights of the asylum seeking community?
7. How could the UK improve standards of welfare support to better respect the dignity of asylum seekers?

asylum applications and the displacement of economic migrants into the asylum regime on the basis that migrants would abuse the asylum route as an easier means of accessing welfare benefits and the labour market. After the initial segregation of the asylum seeking community from citizens through the IAA 1999, the fear of economic migration continued to perpetuate the introduction of further restrictive policies including: implementation of the Azure payment card for section 4 recipients; the continued reduction of financial payments in real terms; and increased employment restrictions comprising the 12 month time limit and the SOL. Though the rhetoric of economic migration and increased asylum applications has had a major impact on the welfare policies and social entitlements of the asylum seeking community, the study revealed that none of the successive UK Governments have provided evidence to show the extent of the economic threat posed, despite evidence questioning the authenticity of this justification.² Though restrictive policies were introduced in the hope of curbing increasing numbers of asylum applications, figures reveal that the IAA 1999 failed to reduce application numbers which continued to increase following the statutes implementation, with numbers peaking to their highest level in 2002 following the aftermath of 9/11. This increase demonstrates that the levels of asylum applications annually received in the UK correlate to global events rather than the implementation of restrictive policies which have little impact upon where asylum seekers choose to make their claim. It is thus highly unlikely that when fleeing their countries of origin, asylum applicants would possess detailed knowledge of the intricacies of British social policy or indeed that such knowledge would influence their choice of destination over

² Robinson V and Segrott J, *Understanding the decision-making of asylum seekers* (Home Office 2002).

other factors such as family ties or language, which of course rests upon the premise that applicants have any choice in determining their destination.

In light of the current restrictive regime, the thesis then addressed the second research question which asked whether citizenship has always been a basis for exclusion from the welfare state and what additional factors contribute to the continued exclusion of the asylum seeking community from State welfare. Charting the historical relationship between immigration control and welfare provision over the last century, the third chapter found that immigration control has always been a prevalent factor in the creation of modern social policy within the UK, which is evident in the early legislation of the Aliens Act of 1905 which sought to manage entrance on the basis of self sufficiency. Surprisingly, the political rhetoric which justified the introduction of restrictive measures over 100 years ago was found to mirror the political rhetoric of modern restrictions, based on increased numbers, self interest and the need to protect the labour market and welfare state from outsiders for the secure enjoyment of citizens. Examination of the welfare legislation implemented after the Second World War however demonstrated that welfare benefits need not exclude non-citizens provided that external border controls are engaged to manage entrance to the State. Citizenship has therefore always been linked to welfare exclusion, but as globalisation has increased the boundaries of citizenship have been extended and reformed to include EEA citizens. The result is a welfare system based on civic stratification which grants a complex web of social rights and entitlements depending on the immigration status of the individual. Though the concept of citizenship has expanded, this does not correlate to the notion of a more welcoming and open society, in fact extending the boundaries of the welfare state to include EEA nationals has strengthened the boundaries of exclusion towards third party nationals. Within the

third chapter, public resistance to the extension of welfare to non-citizens, including the extension of benefits to the asylum seeking community, was seen to substantiate the position of authors such as Taylor³ and Miller⁴ who contend that the primary justification for excluding non-citizens from welfare provision is that the foundations of the welfare state are built upon, and require, a strong sense of national solidarity. Extending provision to non-national citizens would thus weaken support for redistribution throughout the welfare state. In response, the chapter argued that this perspective was overly simplistic as a number of social and political factors guide the public's resistance to providing welfare to the asylum seeking community. This included: sustained negative political and media rhetoric regarding asylum which perpetuates and serves to reinforce the construction of asylum seekers as undeserving welfare recipients; the legitimization of fears concerning economic migration through the implementation of restrictive policies; a public lack of knowledge regarding the meaning of terms such as 'refugee' and 'asylum seeker'; the inability of the asylum seeking community to engage with employment; and high levels of income inequality within the UK. Were some of these factors to be addressed, it was argued that public support for redistribution to non-citizens would likely increase.

After setting out the factors and circumstances leading to exclusion, chapter three then addressed the third research question which asked what justifications substantiate respect for the rights of the foreigner. As the theory of cosmopolitanism forms a counterweight to exclusion on the basis of citizenship, cosmopolitan hospitality was posited as the correct perspective from which to regard the internal claims of foreigners to state welfare as it maintains that every human being is an

³ Taylor C, 'Why Democracy Needs Patriotism' in Cohen J (ed), *For Love of Country: Debating the Limits of Patriotism*, Martha C Nussbaum with respondents (Beacon Press 1996).

⁴ Miller D, *On Nationality* (Oxford University Press 1995).

ultimate unit of moral concern deserving of treatment that reflects this ethos. Birthplace was thus construed as a matter of luck which should have little impact with regard to the granting of social rights which are deemed essential for survival and the living of a dignified life. The moral underpinning of cosmopolitanism was found to mirror the concept of dignity, understood to be a pre-moral capacity attached to every human being through virtue of their humanity. As asylum seekers are foreigners within the State, cosmopolitan hospitality was used to advocate for standardised treatment seeking to protect foreigners in cross border movements. Hospitality takes into account both the needs of the foreigner as guest and the sovereignty of the State, though at present the disproportionate power wielded by the UK was argued to necessitate the protection of the asylum seeking community as the Government are able to inflict harmful policies upon the group with little fear of political retaliation, as evidenced by the conclusions of the rights analysis. Within chapter three human rights were conceptualised as a central means of measuring whether the Government afford hospitality to the asylum seeking community as they are grounded upon the inherent and inalienable dignity of all human beings.

After situating rights as an appropriate benchmark for hospitable treatment, the fourth chapter addressed the fourth, fifth and sixth research questions. In answering question four, the chapter drew upon material from the Joseph Rowntree Foundation to establish a minimum standard of living which, it was argued, should be satisfied as of right within the UK. The chapter then compared NGO material detailing the impact of employment and asylum support policies to relevant human rights standards (including the adopted standard of living outlined above), concluding that the IAA 1999 and its associated policies infringe upon both civil and political and socio-economic rights. In response to research question six, the chapter highlighted the

Government's implementation of regressive support and employment policies, asserting that as a result of such measures, the Government is failing to respect the rights of the asylum seeking community. It was also asserted that the Government is failing to protect the rights of the asylum seeking community in exposing the group to prejudice and harm via the implementation of support policies such as the Azure payment card which reveals the immigration status of individuals and through the imposition of destitution upon refused asylum seekers, exposing certain individuals to instances of abuse, violence and exploitation. In actively pursuing hostile social policies and inhibiting access to work and adequate living standards, the Government were also argued to be failing to fulfil the rights of the asylum seeking community in contravention of cosmopolitan morality. Instances of intersectional discrimination were also exposed within chapter four as the inflexibility of the asylum support system fails to account for the complex and diverse nature of the asylum seeking community resulting in disparity of access within the 'one size fits all' framework. Accordingly, the chapter affirmed that the Government is in breach of its legal human rights obligations and thereby its moral obligations as the cosmopolitan principle that *every person is an ultimate unit of moral concern* is not reflected within Government policy regarding employment access or asylum support.

Having revealed that the current balance between universal rights and sovereignty is disproportionately weighted in favour of the State, the remainder of chapter four addressed the enforceability of socio-economic rights within the UK and thus hospitable standards of treatment for the asylum seeking community. Although rights morally attach to everyone regardless of nationality, it was held that their enjoyment depends upon the observance and implementation of rights instruments by States. As a result, though the protection of social rights for the asylum seeking

community has progressed on an international level,⁵ such progression is not reflected within the practise of the UKs asylum policies as over the last two decades the social rights and entitlements of the asylum seeking population have regressed, perhaps owing to the non-justiciability of socio-economic rights within the UK which inhibits the development of litigation relating to support standards. In spite of the State dependent nature of institutional human rights and their issues relating to enforcement, it was argued that human rights remain a vital component in realising cosmopolitan morality as they are the most widely accepted form of institutional cosmopolitanism and they provide a benchmark against which State practices can be compared providing a platform for future activism.

The fifth chapter then sought to answer the seventh research question by addressing the ways in which the UK could improve the asylum support system to better respect the dignity of the asylum seeker and enhance standards of treatment conducive to hospitality. It argued that a number of processes must take place, beginning with the recognition of rights violations within the asylum support system through intersectional analysis of the current asylum support framework. Should the Government undertake an intersectional analysis of current employment and support policies, it is hoped that the experiences of those most marginalised by the current measures would be exposed, enabling the future reform of offensive measures. Two broad suggestions for policy reform were then proposed relating to the expansion of increased cash based support and the removal of employment restrictions to enable access to the labour market for all members of the asylum seeking community. A cosmopolitan welfare system must respect, protect and fulfil human rights, going

⁵ Through the implementation of instruments such as the Reception Conditions Directive and Charter of Fundamental Rights of the European Union.

beyond minimum core obligations to provide adequate living standards that reflect socially acceptable standards of living within the UK. Poverty and destitution as a punitive response to immigration control was therefore considered to be unacceptable. Though increasing levels of asylum support and expanding the scope of welfare provision would come at a cost to the UK, it was asserted that minimum core obligations should take priority regarding expenditure. Finally, the chapter called for preventative action to secure the rights of future generations of asylum seekers within the UK, putting forward a number of recommendations to help safeguard their rights. This included: the annual intersectional analysis of the support system to ensure its compatibility with human rights standards; the incorporation of social rights within the UK through the extension of 'Convention Rights' under the HRA 1998 to include ICESCR rights; and finally the ratification of the Optional Protocol to the ICESCR to enable individual complaints to the CESC and encourage dialogue between the UK courts, the CESC and Parliament. Incorporation of ICESCR rights was argued to provide a legislative basis upon which future rights could be demanded, encouraging the Government and future elected parties to respect, protect and fulfil the rights of all persons, including those who are traditionally politically unpopular which would hopefully act as a counterweight to self-interest and the prioritisation of citizens' rights.

What has transpired through exploration of the various research questions is that exclusion from welfare provision on the basis of immigration status need not remain a traditional feature of welfare policies as evidenced by the provisions of the post WWII welfare state. It is thus possible to manage migration through external border controls whilst internally allowing more porous and cosmopolitan access to welfare benefits and the labour market. Though two disparate welfare systems are at

work within the UK, both are framed by the discourse of human rights and the recognition that the '*inherent dignity and...the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*'.⁶ The human rights framework should thus temper the way in which we treat other human beings within our borders, yet it is clear that the asylum support system fails to reflect this ethos as significant numbers of the asylum seeking community live in poverty and depression, risking exploitation as a means of survival. Though the policies of the welfare state and immigration control are complex, internal concerns such as those regarding the labour market should not override the basic obligations we owe to each other as human beings on a shared earth. In tumultuous times and continued civil unrest we need to affirm the basic principles that ground our society. If the Government truly believes in the equal dignity of all persons then the human rights of all persons must be given effective protection within the UK. The true measure of our society is gauged by how we treat foreigners within our State; the positive reform of the asylum support system would demonstrate that the UK recognises the men, women and children seeking asylum within our borders as deserving of sanctuary and equal moral concern.

⁶ Universal Declaration of Human Rights, preamble.

Appendix One

The methodologies of relevant NGO and research material

Listed below are the methodologies of the reports that detail empirical evidence used to conduct the rights analysis in chapter 4. The descriptions of the methodologies have been taken directly from the reports themselves with minor changes made for the purposes of syntax. The reports are listed in ascending order of date. The reports that drew on secondary evidence have not been included and consequently the following reports are not addressed: Caroline M. Mann and Qulsoom Fazil, 'Mental illness in asylum seekers and refugees' *The Journal of Primary Care Mental Health*, Radcliffe Publishing Ltd (2006); Sophie Haroon 'The health needs of asylum seekers: Briefing Statement' Faculty of Public Health (2008). Though the report 'At the end of the line: Restoring the integrity of the UK's asylum system' (2010) by Richard Williams and Mike Kaye in conjunction with Still Human features a number of case studies, the report does not provide a methodology as to how such case studies were received, consequently this report is also not included within this section.

Author(s)	Alice Bloch and Gaby Atfield
Institution	Goldsmiths College, University of London
Title of research	The Professional Capacity of Nationals from the Somali Regions in Britain
Purpose of research	The research aimed 'to obtain a profile of the professional capacity of Somali nationals living in Britain.'
Date(s) of research	March and April 2002
Publisher	Goldsmiths College, University of London
Year of publication	2002
Number of respondents	200
Type of respondents	Somali refugees
Methodology	150 self-completed questionnaires and 50 face-to-face interviews. The interviews helped to ensure that individuals with low levels of literacy were included in the research. The appendix gives the names of the 'gatekeeper organisations' involved in the report. The fieldwork utilised two male and two female bi-lingual interviewers to translate the questionnaire and to conduct the interviews in seven British cities, those being: London; Birmingham; Cardiff; Bristol; Sheffield; Manchester; and Liverpool, each of which had an established Somali community and gatekeeper organisations that assisted with the research. In total, 26 organisations took part, with a greater proportion based in London, which reflected the size of the community there. ¹

¹ Bloch and Atfield, *The Professional Capacity of Nationals from the Somali Regions in Britain* 7.

Author(s)	Emma Stewart
Institution	United Nations High Commissioner for Refugees
Title of research	A bitter pill to swallow: obstacles facing refugee and overseas doctors in the UK. Working Paper No. 96
Purpose of research	To summarise the main difficulties facing refugee doctors in the UK. The results aimed to tell the migrant's story, their subjective history, their feelings and thoughts, how they see life and what their opinions are.
Date(s) of research	Throughout 2001.
Publisher	United Nations High Commissioner for Refugees
Year of publication	2003
Number of respondents	300 postal respondents, 42 interviewees
Type or respondents	Doctors who were either refugees, asylum seekers or those who had left countries where they faced persecution or warfare, but did not consider this the main motivation for their mobility. Refugee doctors from 16 different countries were interviewed but the largest proportion were from Iraq. According to the British Medical Association this is the top nationality of refugee doctors in the UK. All levels of medical doctor were interviewed including those employed and unemployed.
Methodology	<p>Postal questionnaire and interviews.</p> <p>In order to contact refugee doctors personally, a variety of avenues were pursued. The main tool used was a postal questionnaire which aimed to contact refugee doctors employed in the UK. A questionnaire of five pages was distributed to 1000 overseas qualified doctors. The names were chosen at random (using statistical random number tables) from the British Medical Register. During this time over 300 individuals responded. The results from this questionnaire have been statistically analysed.</p> <p>Respondents to the questionnaire, who were employed refugee doctors, were interviewed. To contact unemployed refugee doctors. An advert was placed in the 'Refugee Doctors News' distributed by the British Medical Association requesting help with the project. Therefore, a sub sample of respondents to the postal questionnaire were interviewed in addition to unemployed refugee doctors who responded to the advert. In addition, there were some individuals who were</p>

contacted by means of snowballing techniques. As a result, all of the subjects interviewed were self-selected or recommended by other persons previously interviewed. Forty-two in-depth interviews were conducted with overseas qualified doctors and typically lasted one to two hours. Interviews were carried out in various parts of the UK to minimise regional biases. The interview schedule was adapted from one interview to another, for example those individuals still living as refugees or asylum seekers differed to those presently employed in the UK. The interviews were semi-structured and basic areas that were explored included: Basic Information, Arrival to the UK, Asylum Application, Professional Experiences as Refugee Doctor, Personal Experiences in UK, Migration event, Experiences in Homeland, Your Future Plans.¹

¹ Emma Stewart, *A bitter pill to swallow: obstacles facing refugee and overseas doctors in the UK* (United Nations High Commissioner for Refugees, 2003) 4-5.

Author(s)	Alice Bloch
Institution	Institute for Public Policy Research
Title of research	Making it Work: Refugee employment in the UK
Purpose of research:	Draws together findings from empirical research summarised in the 2002 report ' <i>Refugees' opportunities and barriers in employment and training</i> ' by Alice Bloch in association with Goldsmiths College, University of London and the Department for Work and Pensions. The purpose of the research was to provide a greater understanding of the barriers to employment and the training needs of refugees and asylum seekers than is currently the case'. 'It aims to determine whether the training and employment support for forced migrants who are eligible to work is sufficient and appropriate'.
Date(s) of research	Throughout 2001
Publisher	Institute for Public Policy Research
Year of publication	2004
Number of respondents	400
Type or respondents	Refugees with access to the labour market. Respondents came from the Somali regions, Iraq, Turkey, Kosova and Sri Lanka who were living in five regions of the UK: London, Yorkshire and Humberside, North West, North East and Midlands.
Methodology	The research used multiple approaches to data collection. Six focus groups with a range of organizations that provide advice, support and training to refugees and ethnic minority groups were carried out. Focus groups took place in Birmingham, London (two), Manchester, Leeds and Newcastle and a total of 29 people took part. Consecutive data sets (spring, summer, autumn 2001) from the Labour Force Survey were combined for the purpose of secondary analysis to provide comparative data about participation in the labour market and training among ethnic minority people and refugees and asylum seekers. A survey was carried out with 400 refugees and asylum seekers living in England. Interviews were carried out in Birmingham, Manchester, London, Newcastle, Leeds and Sheffield. Survey interviews were carried out in community languages using translated questionnaires. In order to maximize the extent to which the sample was

representative of the diversity of the refugee experience, quotas were set up and respondents were identified for inclusion in the study so as to ensure that key explanatory variables were included. Such key explanatory variables included pre-migration experiences, migration patterns, social and community networks, English skills and knowledge about the UK, length of residence, gender, age, region of settlement and country of origin. Data was also gathered using secondary sources of literature. References used are given in the body of the main text and at the end of the report. Appendices include details of the focus group attendance and organisational involvement in the survey.¹

¹ Bloch, *Refugees' opportunities and barriers in employment and training 1*.

Author(s)	Refugee Action
Institution	Refugee Action
Title of research	The Destitution Trap: Research into destitution among refused asylum seekers in the UK
Purpose of research	To explore the causes and affects of destitution amongst the asylum seeking community.
Date(s) of research	A ten month period between December 2005 and September 2006.
Publisher	Refugee Action
Year of publication	2006
Number of respondents	125
Type or respondents	Individual destitute asylum seekers.
Methodology	<p>Information was gathered from the following sources: meetings with service providers, destitution projects and refugee networks in areas where the research was to be carried out; interviews with 125 individual destitute asylum seekers, including 17 who were receiving section 4 support; two focus groups with members of refugee communities (32 individuals in all).</p> <p>Interviews were concentrated in towns and areas where Refugee Action is operational, those being: Bolton; Bristol; Derby; Nottingham; Leicester; Liverpool; Manchester; Plymouth; Portsmouth; and Southampton. A parallel study of destitute asylum seekers in London was carried out by Amnesty International UK.¹</p>

¹ Refugee Action, *The Destitution Trap: Research into destitution among refused asylum seekers in the UK* 113.

Author(s)	Refugee Media Action Group
Institution	Migrants Resource Centre
Title of research	Seeking Asylum: A report on the living conditions of asylum seekers in London
Purpose of research	The report examined the living conditions of asylum seekers, living in and around London, in an attempt to provide greater insight into their lives, as well as a different perspective from that which is often depicted in the media.
Date(s) of research	Between May 2005 and February 2006
Publisher	Migrants Resource Centre
Year of publication	2006
Number of respondents	50
Type or respondents	Asylum seekers.
Methodology	Interviews and Questionnaires. 50 asylum seekers were interviewed who volunteered to answer a questionnaire based on their background, circumstances and experiences. The participants in the research were invited to take part by random selection. They were all living in and around London. Many of them were and continue to be service users of the Migrants Resource Centre, and the rest were known to, or approached by members of the Refugee Media Action Group, themselves asylum seekers and refugees. A number of participants opted out of filling in the questionnaire themselves. Participants also had the option of opting out of any question they did not wish to answer, and were also invited to provide any additional information that they felt relevant. ¹

¹ Refugee Media Action Group, *Seeking Asylum: A report on the living conditions of asylum seekers in London* 6.

Author(s)	Kavita Brahmhatt Gaby Atfield Helene Irving James Lee Therese O'Toole
Institution	Refugee Council and University of Birmingham
Title of research	Refugees' Experiences of Integration: Policy related findings on employment, ESOL and vocational training
Purpose of research	The aim of the study was to explore the social aspects of refugees' and asylum seekers' integration, particularly in relation to how these were experienced in two different localities and across different groups of refugees.
Date(s) of research	Not specified.
Publisher	Refugee Council
Year of publication	2007
Number of respondents	116
Type of respondents	Refugees
Methodology	Interviews. Evidence was collected by conducting 116 semi-structured qualitative interviews with refugees in Haringey and Dudley, comprising 45 initial interviews in each area, with a further 26 follow-up interviews with a sub-sample of respondents. In both areas, the research team gathered profiling information and data on: refugee populations (i.e. size, distribution, composition, etc.); the nature and development of statutory refugee services and integration policies; and the presence and work of third sector voluntary and community organisations working with refugees. This data was used to inform the research agenda and policy recommendations. ¹

¹ Brahmhatt and others, *Refugees' Experiences of Integration: Policy related findings on employment, ESOL and vocational training* 4.

Author(s)	House of Lords and House of Commons Joint Committee on Human Rights
Institution	N/A
Title of research	The Treatment of Asylum Seekers, Tenth Report of Session 2006-07, HL Paper 81-I, HC 60-I
Purpose of research	To consider the human rights issues raised by the treatment of asylum seekers within the UK, from the time when they first claim asylum in the UK, through to either the granting of asylum, or, for asylum seekers whose claims are refused, their departure from the UK. ¹
Date(s) of research	Throughout 2006 and 2007.
Publisher	The Stationery Office
Year of publication	2007
Number of respondents	Not specified.
Type or respondents	A wide range of organisations and individuals who have experience or expertise on the asylum system, including (but not limited to) charity workers, academics, medical professionals and individual asylum seekers. The lists of contributors are cited at the end of the report.
Methodology	Written evidence, oral evidence and interviews. Written evidence was received from many organisations and individuals which was used to inform the inquiry and is published in full in a separate report. The transcripts of the oral evidence sessions are also published in a separate volume. In January 2007 members of the Committee visited Yarl's Wood immigration removal centre where they met and talked to staff and to families and individuals being detained there. ²

¹ Joint Committee on Human Rights, *The Treatment of Asylum Seekers* 5.

² Ibid 9.

Author(s)	Chris Hobson Jonathan Cox Nicholas Sagovsky
Institution	Independent Asylum Commission
Title of research	<ol style="list-style-type: none"> 1. Saving Sanctuary: The Independent Asylum Commission's first report of conclusions and recommendations: How we restore public support for sanctuary and improve the way we decide who needs sanctuary 2. Fit for purpose yet? The Independent Asylum Commission's Interim Findings 3. Deserving Dignity: The Independent Asylum Commission's Third Report of Conclusions and Recommendations
Purpose of research	The Independent Asylum Commission conducted a nationwide citizens' review of the UK asylum system. The Commissioners aim to make credible and workable recommendations for reform that safeguard the rights of asylum seekers but also command the confidence of the British public.
Date(s) of research	Throughout 2007 and 2008.
Publisher	The Independent Asylum Commission
Year of publication	2008
Number of respondents	Not specified
Type or respondents	A wide range of respondents including organisations and individuals. See below for further detail.

Methodology

The Commission used a number of methods to ensure that the widest possible range of voices was heard: from those concerned that the asylum system is too generous, through to those concerned that the rights of asylum seekers are not being respected.

The Independent Asylum Commission sought a constructive dialogue with the UK Visas and Immigration (UKBA) and other stakeholders, and adopted the following formula: to identify key issues of concern and good practice to affirm; to present the supporting evidence from hearings and written testimony; to seek a response on each issue from the UK Visas and Immigration; to assess the UK Visas and Immigration response; to publish final conclusions and recommendations. On March 27th 2008 the Independent Asylum Commission launched its Interim Findings in the Grand Committee Chamber, House of Commons. That report set out the Commissioners'

provisional assessment of the asylum system based upon evidence gathered from across the UK.

The Commissioners' conclusions and recommendations should be read alongside the evidence presented in those Interim Findings.

Over an 18 month period the Commission held seven themed public hearings across the country; held a special hearing in Belfast; held seven closed evidence sessions at Westminster Abbey; commissioned the Information Centre about Asylum and Refugees to produce comprehensive thematic briefings on all aspects of the UK asylum system; received over 180 submissions to the call for evidence; received over a hundred video submissions; held key stakeholder interviews on public attitudes to asylum in eight locations across the UK; held focus groups in eight locations across the UK; held the CITIZENS SPEAK consultation asking for the public's views on sanctuary in the UK; held over 50 People's Commissions across the UK to recommend the values and principles that should underpin UK asylum policy.

Along with the CITIZENS SPEAK consultation, the Commission also commissioned an opinion poll and focus group research in order to gain a better understanding of public attitudes to asylum

Author(s)	John Reacroft
Institution	Barnardo's
Title of research	Like any other child? Children and families in the asylum process
Purpose of research	To investigate the impact of the asylum regime on asylum seeking children and families.
Date(s) of research	Throughout 2007
Publisher	Barnardo's
Year of publication	2008
Number of respondents	17 families
Type or respondents	All of the families interviewed used services provided by Barnardo's. The interviewees included in the report are either asylum seekers, or have leave to remain in the UK following a successful asylum application. 17 families were interviewed, 16 of whom had made asylum applications.
Methodology	Interviews: The interviews took place in: Belfast; Cardiff; Glasgow; London and Manchester during 2007 and were arranged by Barnardo's projects in each of those areas. Families were asked to speak about: their experiences of seeking asylum in the UK; the effects on children of these experiences; things which they would have liked to be different. Within these three areas, the interviews were conducted using a semi-structured model which has some similarities to counselling methods. The interviews were fully transcribed and then minimally edited to ensure that they were comprehensible narratives and to reduce their length. Finally, brief commentaries were added.

Author(s)	Lisa Doyle
Institution	Refugee Council and the Zimbabwean Association
Title of research	"I hate being idle" Wasted skills and enforced dependence among Zimbabwean asylum seekers in the UK
Purpose of research	To provide empirical research to promote asylum seekers' access to work.
Date(s) of research	January and February 2009
Publisher	Refugee Council and the Zimbabwean Association
Year of publication	2009
Number of respondents	292
Type or respondents	Zimbabwean asylum seekers
Methodology	Survey and Interviews. During January and February 2009, 292 Zimbabweans living in the UK responded to a survey about their education, skills and work experience, and the impact of life in the UK on their skills. Six detailed interviews were also carried out to learn more about the key issues. ¹

¹ Doyle, *"I hate being idle" Wasted skills and enforced dependence among Zimbabwean asylum seekers in the UK* 4.

Author(s)	Mind
Institution	Mind
Title of research	A civilised society: Mental health provision for refugees and asylum-seekers in England and Wales
Purpose of research	To outline the major factor contributing to mental distress among asylum seekers and refugees after their arrival in the UK.
Date(s) of research	Throughout 2008 to 2009.
Publisher	Mind
Year of publication	2009
Number of respondents	96
Type or respondents	A diverse range of mental health service providers from the statutory and voluntary sector.
Methodology	Literature review, data collection and case studies. Data was collected from a combination of face-to-face and telephone interviews over a three-month period in winter 2008/2009. Voluntary and statutory mental health service providers and refugee agencies from dispersal areas were identified and further individuals and organisations to interview were identified by snowball sampling. A wide range of professionals were interviewed, including: staff within local Mind associations; staff in other voluntary organisations working with refugees and asylum-seekers; Asylum-seeker Health Teams; Equality and Diversity Leads; Community Development Workers; GPs working in specialist GP practices; and staff working within detention centres. In total 96 interviews were carried out. These included 33 interviews with individuals working within 20 different primary care trusts and local health boards across England and Wales. Fifty eight individuals working within voluntary sector organisations were also interviewed. These ranged from mainstream and specialist mental health organisations to local and national refugee support agencies. Good practice organisations and service providers were identified from the consultations and case studies from these are included in the report to illustrate how barriers are being overcome in different areas of England and Wales. ¹

¹ Mind, *A civilised society: Mental health provision for refugees and asylum-seekers in England and Wales* 29.

Author(s)	Gareth Mulvey
Institution	Scottish Refugee Council
Title of research	'Even among asylum seekers we are the lowest' Life on Section 4 Support in Glasgow.
Purpose of research	To explore the issue of longevity for recipients on section 4 support. To analyse some of the resulting experiences, but also the administrative issues that accompany this process; the reasons for being on section 4; the time both on section 4 support and the time with no support; the process of going off and on section 4, sometimes multiple times; and the 'end' of the process principle. ²
Date(s) of research	Throughout 2009.
Publisher	Scottish Refugee Council
Year of publication	2009
Number of respondents	11 individuals were interviewed.
Type or respondents	Section 4 support recipients.
Methodology	Quantitative data and Interviews. The quantitative data emanates from an Excel database established by Scottish Refugee Council caseworkers in order to keep track of developments with clients applying for section 4 support. Its purpose evolved and the data captured at different points in time reflected the needs of caseworkers to perform their casework, and not to provide statistical analysis. Therefore, for the purposes of analysis there were significant data gaps, particularly for the earlier periods in which caseworkers were advising section 4 clients. The database was transferred into SPSS, duplicates were removed and gaps in data filled wherever possible. However, significant data gaps remained. This means that many of the findings cannot be defined as being statistically significant in relation to full statistical analysis. Nevertheless, the results are suggestive and indicate certain trends in section 4 provision. On analysing this quantitative data some of the trends that emerged were felt to require qualitative investigation. Therefore caseworkers identified a cross section of clients with a variety of experiences among section 4 clients for interview. In total 11 interviews were conducted involving 7 men and 4 women. There were 2 families and

² Mulvey, 'Even among asylum seekers we are the lowest' Life on Section 4 Support in Glasgow 5.

one lone parent included in the interview process. Most interviewees spoke English and were from countries that figure prominently among section 4 clients. 10 interviewees were on section 4 at the time of interview, while one had leave to remain. A further interviewee has subsequently been given leave to remain. Interviews were conducted in September and October 2009. All interviewees were offered a £20 shop voucher of their choice or phone card as a thank you for participating in the research. Interviews were semi-structured, allowing some commonality across the sample but also providing space for interviewees to raise the issues most prescient to them. This allowed certain issues to develop more organically through the interview process, particularly in relation to living without cash and problems with accommodation.³

³ Ibid 5-6.

Author(s)	Heaven Crawley
Institution	Refugee Council
Title of research	Chance or Choice? Understanding why asylum seekers come to the UK
Purpose of research	To investigate the reasons why asylum seekers come to the UK.
Date(s) of research	Not specified.
Publisher	Refugee Council
Year of publication	2010
Number of respondents	43
Type or respondents	<p>Asylum seekers and refugees living in the UK. Ten of the respondents arrived as separated children. The demographic characteristics of research participants broadly reflected those of all asylum seekers coming to the UK. The research participants came from a wide range of countries including: Zimbabwe; Democratic Republic of Congo; Eritrea; Iraq and Iran. Nearly 70 per cent originated from the top-ten refugee producing countries. All of those who participated in this research applied for asylum in the UK since 2003, with the majority (80 per cent) applying between 2004 and 2007. Around three quarters of respondents applied for asylum in-country. One in five had been granted refugee status. Around a third of respondents were waiting for an initial decision at the time of the research and a further third had been refused, around two thirds of whom were awaiting an appeal.</p>
Methodology	<p>Literature review, semi-structured interviews and focus group discussions. Interviews were conducted with all 43 respondents. Research participants were asked about their knowledge of the UK before their arrival, whether they planned to come to the UK or wanted to go somewhere else, and how they thought they would survive. Not all topics were covered in equal depth in all interviews: the particular experiences of respondents meant that different areas were of more or less relevance. The average length of the interviews was just over an hour. The majority of the interviews (80 per cent) were undertaken in English and without the use of an interpreter. The interviews were undertaken in Brighton, London and Swansea. Access to</p>

research respondents was made possible with the assistance of a number of organisations. Many of these organisations also provided a space in which the interview could be conducted and, in some cases, made arrangements for interpreters. Written informed consent was obtained from all those who participated. Where interviews involved asylum seekers under 18 years of age, permission was also sought from the child's social worker. Potential participants were given an information sheet providing details about the aims of the research (Appendix 1). Potential respondents were reassured that information provided during the course of the interview would be confidential and anonymised. In addition to the semi-structured interviews, three focus groups were held with asylum seekers and refugees living in Brighton. The focus groups were structured around three main themes: the knowledge that participants had about the UK before coming here, whether they planned to come to the UK or wanted to go somewhere else, and how they thought they would survive. A total of 25 people from a number of different countries of origin participated in the focus groups. One of the focus groups consisted of seven people from Zimbabwe. A second group of ten people consisted primarily of those from Sudan but included one person from the Democratic Republic of Congo and one from Yemen. The third focus group was a mixed group with participants from Zambia, Algeria, Ethiopia, Nigeria and China. The information gathered through the focus groups is less detailed than that gathered through the semi-structured interviews but confirms the findings and is referred to where appropriate.

Author(s)	Sile Reynolds
Institution	Asylum Support Partnership
Title of research	Your inflexible friend: The cost of living without cash
Purpose of research	The Partnership decided to monitor the UKBA's implementation of the payment card scheme and the impact on users' ability to meet their essential living needs, building on previous evidence gathered by the Partnership, and other agencies, on the subject of section 4 support, vouchers and destitution.
Date(s) of research	November 2010

Publisher	Asylum Support Partnership comprising of the Refugee Council, Scottish Refugee Council, Welsh Refugee Council and the North of England Refugee Service.
Year of publication	2010
Number of respondents	90 asylum seeking clients from the four participating OSS agencies completed the survey.
Type of respondents	All survey respondents were recipients of section 4 support and consequently used the Azure payment card as a means of accessing support. 62 per cent (56) were male, 37 per cent (33) were female and one did not disclose. 70 per cent (63) are single and 28 per cent (25) reported having dependents on their Section 4 support. Interviews were conducted with representatives from 13 non-Partnership agencies based in: Glasgow; Birmingham; Stoke; London; and Manchester. These agencies were: the Refugee Mentoring Project at the Terence Higgins Trust; Southwark Day Centre for Asylum Seekers; Citizens for Sanctuary; Pierce Glynn Solicitors; Jesuit Refugee Service; British Red Cross; Boaz Trust; Asylum Support Housing Advice (ASHA); Scottish Refugee Policy Forum; Asylum Support and Immigration Resource Team (ASIRT); RESTORE (a project within Birmingham Churches Together); and Stoke Citizens Advice Bureaux.
Methodology	<p>Survey questionnaire with section 4 support recipients and interviews with service providers.</p> <p>Between December 2009 and April 2010, frontline staff in the One Stop Services of the four agencies of the Asylum Support Partnership (including advice workers and volunteers working under their supervision) completed the survey questionnaire with every consenting client in receipt of section 4 support who visited their services. The survey was piloted in Glasgow in the second week of the payment card's implementation in Scotland. It was then conducted in each office for a period of one-month, and was staggered to follow the UKBA roll-out of the payment card which had a phased introduction across the UK. Staff began completing the survey with clients approximately three weeks after it was rolled out in that region by the UKBA. The survey was conducted twice in Scotland, in order to also capture the experiences of clients using the card once it had been in place for three months.</p>

The questionnaire, which is attached at the end of the report, was designed in consultation with the staff of the Partnership agencies, and was completed either on paper or through an online survey facility. The results were then collated and analysed to produce the figures shown in the report. The survey sought to capture the impact of the payment card on refused asylum seekers. In order to capture data on as many relevant and consenting clients as possible, the questionnaire needed to be easy and quick to complete. To enable quantitative analysis most of the questions asked were closed (the answers were restricted to a limited number of options) and, for this reason, the questionnaire did not allow for the collection of much qualitative data such as the extent of ill-health, hunger, anxiety or isolation experienced by users of the payment card. It was not possible to complete the survey with every client in receipt of Section 4 support due to a lack of staff capacity and because people who are receiving Section 4 support, who have no cash to travel and so only do so when absolutely necessary, often stop coming in to the One Stop Service once they receive support. As such, this research consists of a snapshot study with a sample of One Stop Service clients and can be considered indicative of the experience of refused asylum seekers supported under Section 4. From this sample, we have been able to identify trends and commonalities which can be taken as broadly reflecting the experience of people in receipt of Section 4 support. To avoid double-counting each agency identified a mechanism for marking the file of each client who completed the survey, either on paper or on the database so that they could verify at the start of the survey whether the client had previously completed it.

Semi-structured interviews were also conducted with other agencies as part of the research to gather information on the impact of the payment card on their clients and services. The information gathered during these interviews informed the analysis in the body of the report. The method used was successful in capturing a large amount of data about visits by clients in receipt of section 4 support during a one month period. The results are a good indication of the experience of using the payment card and the impact on the agencies. The non-Partnership advice agencies interviewed all had a very

mixed client base consisting predominantly of single males but also including families, women-headed households, pregnant women, people with HIV/AIDS, age-disputed young people, people with mental health problems and victims of torture and trauma. Some of the agencies interviewed also provided services to people who consider themselves to have a disability but are not supported under section 21 of the National Assistance Act or section 12 of the Social Work (Scotland) Act 1968. Depending on the size of the organisation and the service provided, they report seeing anything up to one hundred people who are in receipt of section 4 support per month. The services they provide range from day centres, drop-ins and social activities to legal casework, referral, advocacy and advice. Many of the agencies distribute food or clothes or have a hardship fund that they can access for particularly vulnerable cases, including clients on Section 4 support.¹

¹ Reynolds, *Your inflexible friend: The cost of living without cash* 10-11.

Author(s)	Still Human Still Here
Institution	Still Human Still Here
Title of research	What is the minimum level of support an asylum seeker needs in order to meet their essential living needs and avoid destitution?
Purpose of research	To determine the financial amount of support needed for asylum seekers to meet their essential living needs.
Date(s) of research	Not specified.
Publisher	Still Human Still Here
Year of publication	2010
Number of respondents	N/A
Type or respondents	N/A
Methodology	Doctrinal. In seeking to calculate how much an asylum seeker would need to meet their essential living needs in the UK we have used the 2008 detailed budget spreadsheets of basic goods which have been compiled by the Joseph Rowntree Foundation as part of their research for minimum income standards in Britain. These tables have been tailored to the position of asylum seekers by taking out items that would not generally be considered essential to avoid absolute poverty. The minimum level is about <i>needs</i> , not wants and was identified by the UK general public. The groups who came up with this definition were drawn from all walks of life. For the full budget spreadsheets see: http://www.minimumincomestandard.org/budget_summaries.htm ¹

¹ Still Human Still Here, *What is the minimum level of support an asylum seeker needs in order to meet their essential living needs and avoid destitution?* 2.

Author(s)	Ilona Pinter
Institution	The Children's Society
Title of research	'I don't feel human' Experiences of destitution among young refugees and migrants
Purpose of research	This report looks at the available data on the extent and impact of destitution and, based on findings from our services, sets out the devastating impact it has on children, young people and families.
Date(s) of research	Not specified
Publisher	The Children's Society
Year of publication	2012
Number of respondents	Not specified
Type or respondents	Children with asylum seeker or refused asylum seeker status and Children's Society practitioners.
Methodology	The report is based on a review of existing literature, a consultation carried out with practitioners from The Children's Society's programmes across England and other partner organisations. Crucially it was informed by a series of case studies of the young people and families supported by our projects. ¹ No additional data is given with regards to the methodology for the research.

¹ Pinter, 'I don't feel human' Experiences of destitution among young refugees and migrants 2.

Author(s)	Sarah Teather Neil Carmichael Nic Dakin Caroline Dinenage Virendra Sharma Lord Eric Avebury, Baroness Ruth Lister, The Rt. Reverend John Packer Nadine Finch Matthew Reed
Institution	N/A
Title of research	Report of the Parliamentary Inquiry into Asylum Support for Children and Young People
Purpose of research	The inquiry set out to examine whether asylum support provided by the Home Office for those seeking protection in the UK meets the needs of children, young people and families.
Date(s) of research	Throughout 2012
Publisher	The Children's Society
Year of publication	2013
Number of respondents	211
Type or respondents	The panel heard from refugee and asylum organisations; poverty and health experts; housing organisations; local councils; social workers and academics; as well as young people and families who have direct experience of the asylum support system. The ministers responsible for child poverty and immigration, who were unable to give oral evidence, submitted a written outline of the government's position. ²
Methodology	Oral and written evidence and submissions from targeted service providers. Through an open call for evidence, the panel heard oral evidence from 21 witnesses including families themselves, which are listed within Appendix A of the report, and received 40 written submissions, listed within Appendix B. Following targeted requests for information to the Department for Education and key local areas in England, Scotland and Wales, including dispersal areas, the inquiry also received over 150 responses from local authorities, safeguarding boards, child protection committees and a government department, listed in Appendix C of the report. ³

² Teather and others, *Report of the Parliamentary Inquiry into Asylum Support for Children and Young People* 6.

³ Ibid 6.

Author(s)	Pauline Carnet Catherine Blanchard Jonathan Ellis
Institution	The British Red Cross
Title of research	The Azure Payment card: The humanitarian cost of a cashless system
Purpose of research	To explore the effectiveness of the Azure card in providing support to refused asylum seekers, from the viewpoint of organisations that work with them. To understand refused asylum seekers' lived experience of using the Azure card.
Date(s) of research	N/A
Publisher	The British Red Cross
Year of publication	2014
Number of respondents	74 service providers, 11 individuals who had used or were using the Azure card.
Type or respondents	Service providers for asylum support, refused asylum seekers and refugees who had used the Azure payment card within six months of the interview date.
Methodology	<p>Questionnaire and Interviews. A short questionnaire was designed. It was distributed to organisations that work with people on section 4 support in the UK, including British Red Cross refugee services. In order to distribute the questionnaire, the researchers first had to build a database of relevant organisations. Red Cross refugee services were contacted to establish which ones had clients on section 4 support. They were also asked to identify other organisations who work with refused asylum seekers. These organisations were also contacted to see which ones had clients living on section 4 support – and asked to spread the word about the research. In addition, the Red Cross put out a call for respondents on the Migrants' Rights Network (MRN) website. In total, 104 questionnaires were sent out. The questionnaire explored, from the viewpoint of organisations working with refused asylum seekers, the main difficulties that clients experience when using the Azure card and living on section 4 support. Of the 104 questionnaires sent out to organisations working with refused asylum seekers, 74 questionnaires were fully completed (a response rate of 70%). Four questionnaires were partially completed and were excluded from analysis.</p> <p>Eleven in-depth interviews were conducted: nine with refused asylum seekers currently using the Azure payment card; and two with refugees who had previously used it. All the interviewees had used the Azure card in the six months prior to being interviewed. Staff from the</p>

Red Cross refugee services identified the interviewees. The in-depth interviews allowed us to gather rich data from these Azure card users about their experience of using the card and living on section 4 support.

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