**‘Undesirable and Unreturnable’ in the United Kingdom**

Sarah Singer

Lecturer in Refugee Law

Refugee Law Initiative, School of Advanced Study, University of London

School of Advanced Study, University of London

Malet Street, London WC1E 7HU, UK

Email: sarah.singer@sas.ac.uk.

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Sarah Singer[[1]](#footnote-1)\*

**Abstract:**

The issue of migrants convicted or suspected of serious criminality is one that has been high on the media and political agenda in the UK in the last two decades. This paper focuses on three categories of (suspected) criminal migrants - foreign national offenders, individuals considered to pose a security risk and those excluded from refugee status under Article 1F of the Refugee Convention - outlining the scale and demographic of these groups in the UK, governmental measures taken to facilitate their removal and the consequences for those that nevertheless remain. This examination reveals that, despite the UK’s emphasis on removal, legal obstacles and administrative problems continue to frustrate many attempts to remove such persons. As a result, large numbers of individuals are released into the community or remain in detention for often prolonged periods of time. In the case of excluded asylum-seekers, these individuals are subject to an extremely precarious form of leave. The result is these ‘undesirable’ migrants remain in a form of ‘limbo’, with no firm legal status and the prospect of removal ever present. If the emphasis remains on removal rather than looking to alternative in-country solutions that are more than temporary in nature, a viable solution to this issue is likely to remain elusive.

**Key words:** exclusion, criminal, migrant, asylum-seeker

1. **Introduction**

The issue of migrants convicted or suspected of serious criminality is one that has been high on the media and political agenda in the UK in the last two decades. One of the most notorious incidents in recent history was the revelation, in 2006, that some 1,013 foreign national prisoners had been released without consideration being given to their deportation. This led to the resignation of the Home Secretary, Charles Clarke, and prompted the incoming Home Secretary John Reid to institute a review which went far beyond the issue of foreign national offenders and extended to reform of the entire system of UK immigration regulation.[[2]](#footnote-2)

 Another no less publicised incident occurred in 2000, when nine Afghan nationals fleeing the Taliban regime hijacked an aircraft and directed it to land in London Stansted airport. These men were subsequently convicted for hijacking the plane, though their convictions were later quashed due to misdirection of the jury. Although they were excluded from refugee protection on account of their actions, the Home Office were instructed to grant these men and their families a limited form of leave to remain in the UK as they were considered to be at risk if returned to Afghanistan.[[3]](#footnote-3) In response the Home Secretary John Reid announced that he would introduce legislation to give the Home Office greater powers in respect of unreturnable migrants.[[4]](#footnote-4)

The attention focused on (suspected) criminal migrants is not likely to diminish in the near future. Indeed, the recent ‘Brexit’ campaign, calling on the UK to leave the EU, centred largely on the question of migration, including whether leaving the EU would make it easier to deport criminal EU nationals.[[5]](#footnote-5) It remains to be seen whether the UK’s renegotiated relationship with the EU will change the legal landscape in this respect. In the meantime, the UK government’s attempts to address the political ‘hot potato’ of ‘undesirable’ and ‘unreturnable’ foreign nationals are explored in this paper. Part 2 focuses on foreign national offenders (FNOs), and outlines the scale and demographic of FNOs in the UK, the considerable barriers that exist to their removal and the measures the UK Home Office has taken to overcome these obstacles. Attention is then given to in-country approaches to unremovable FNOs, with particular focus on the use of detention. Part 3 considers security cases and outlines the UK’s regime of anti-terrorist measures and how they are applied in practice to non-removable suspected terrorists. Part 4 turns to another group of ‘undesirable’ migrants: asylum-seekers excluded from refugee status under Article 1F of the 1951 Convention relating to the Status of Refugees (the Refugee Convention).[[6]](#footnote-6) The demographic and scale of this group are considered, as are barriers to removal, opportunities for prosecution in the UK and abroad and Home Office policy in respect of such individuals that cannot be removed. This examination reveals that a large amount of time, resource and political pressure has focused on subverting the legal and practical barriers to the removal of undesirable migrants from the UK. However, a viable solution is unlikely to be reached unless and until the Home Office channels further energy into exploring alternative in-country solutions which are more than temporary in nature.

It is perhaps telling that, despite the political import given to these issues, comprehensive data on these groups of ‘undesirable and unreturnable’ migrants in the UK is not easily accessible and not published by the Home Office in its quarterly statistics.[[7]](#footnote-7) Much of the data relied on in this paper is drawn from Freedom of Information (FoI) requests submitted by the present author, a recent report of the National Audit Office on FNOs in the UK and reports from the Home Affairs Committee.[[8]](#footnote-8) It is hoped that in the future the Home Office will be more forthcoming in providing such information in the public domain, allowing debate on these issues to be based on factual information rather than ‘knee-jerk’ reactions by politicians and the popular press.

1. **Foreign National Offenders (FNOs)**

The first category of unreturnable migrants to be considered are foreign national offenders (FNOs), that is, foreign nationals who have been convicted of a crime and sentenced to a term of imprisonment in the UK.[[9]](#footnote-9)

FNOs comprise over 12 per cent of the UK prison population, and stood at over 13,000 persons at the end of 2015.[[10]](#footnote-10) This number has remained fairly constant over the past 10 years, representing an increase of only 4 per cent since 2006.[[11]](#footnote-11) They come from over 150 countries – the largest contingents from Poland, the Irish Republic, Romania, Jamaica and Albania. Nationals of Pakistan, Lithuania, Nigeria, India and Somalia also feature highly.[[12]](#footnote-12)

UK Home Office policy is to seek removal of FNOs from the UK. As noted above, the 2006 scandal which revealed a large number of FNOs had been released without being considered for removal prompted a large scale review of the immigration system, and increased attention focused on the removal of FNOs. Prior to 2006, FNOs would be deported where a court order was made or where the Secretary of State found removal “conducive to the public good”.[[13]](#footnote-13) However, following the 2006 scandal, legislation was introduced which entails ‘automatic’ deportation for all non-EEA nationals who have been sentenced to 12 months or more for an offence, or for non-EEA nationals sentenced to 24 months or more or 12 months for an offence involving drugs or violent crime.[[14]](#footnote-14) A change in the Department’s approach after April 2013 means that all FNOs are now considered for removal, not only those who meet the ‘deportation criteria’.[[15]](#footnote-15) A number of exceptions do apply however, including breach of the FNOs human rights under the European Convention on Human Rights (ECHR).[[16]](#footnote-16)

 In line with this emphasis on removal, the removal of FNOs has increased and stood at 5,602 in 2015, a 6 per cent increase on the previous year (5,286) and a number that’s been steadily growing since the year ending March 2013 (4,720).[[17]](#footnote-17) The number of failed removals has also fallen from 2,297 in 2010-11 to 1,453 in 2013-14.[[18]](#footnote-18) However, the Home Office has made slower progress than expected in removing FNOs from the UK, despite an increase in resources dedicated to this area.

The number of staff working on FNO casework within the Home Office grew from less than 100 in 2006 to 550 by 2010, and stood at over 900 in 2014.[[19]](#footnote-19) The National Audit Office estimate that in 2013-14 the government spent £850 million on managing and removing FNOs.[[20]](#footnote-20) The rate of removal has not, however, matched the extensive resources dedicated to this area. As noted by Amyas Morse, head of the National Audit Office:

It is no easy matter to manage foreign national offenders in the UK and to deport those who have completed their sentences. However, too little progress has been made, despite the increased resources and effort devoted to this problem.[[21]](#footnote-21)

This sentiment was recently echoed by the Home Affairs Committee, who described the UK’s FNO population as “the size of a small town”.[[22]](#footnote-22)

There are a number of legal and practical barriers to the removal of FNOs from the UK. These include human rights standards such as the UK’s *non*-*refoulement* obligations and an individual’s right to private and family life under Article 8 of the ECHR. EU law and other agreements also create certain barriers to removal. For example, there is greater protection against removal for EU/EEA nationals.[[23]](#footnote-23) Irish nationals are also not generally considered for deportation action, as it has been decided that the public interest is not generally served by enforcing their removal. Specific restrictions may also relate to certain removals, for example extradition. Another key issue is obtaining travel documents and, related to this, the cooperation of foreign governments. Administrative problems within the Home Office have also been highlighted as a major area of concern, as have areas such as booking flights, arranging escorts and the other practicalities involved in removal.

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

* 1. **Barriers to removal**
		1. *Human rights barriers to removal*

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

* + - 1. Non-refoulement

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

The *non*-*refoulement* obligations of the European Convention, particularly under Article 3, were first stressed by the ECtHR in the case of *Soering* in 1989, which concerned the extradition of a German national to the United States. The court stressed that Article 3 of the European Convention represents an “absolute prohibition of torture and of inhuman or degrading treatment or punishment”, and held that an extraditing State could be responsible for breach of its Article 3 obligations where there is a real risk the person would be subject to treatment contrary to Article 3 in the receiving State.[[24]](#footnote-24) This judgment posed some difficulties for certain governments seeking to remove foreign criminals from their territory, and was not well received in the UK.

In subsequent cases the UK sought to alter the Court’s approach to the *non*-*refoulement* principle under the ECHR, and persuade the European Court to change their opinion and replace it with more relativist standards for protection against *refoulement:* that the threat posed by an individual to the national security of a Contracting State was a factor to be weighed in the balance when considering the issues under Article 3.[[25]](#footnote-25) However, the UK government’s efforts to modify the approach of the European Court have so far proven unsuccessful,[[26]](#footnote-26) a point that has resulted in quite a large amount of criticism being directed at the European Court by the tabloid press in the UK, and a degree of embarrassment for successive Home Secretaries seeking to remove ‘unsavoury’ individuals from the country.[[27]](#footnote-27)

In another effort to circumvent its *non*-*refoulement* obligations, the UK has adopted a practice of entering into diplomatic assurances, or memoranda of understanding (MoU), with third States relating to the treatment of individuals returned to these countries. For example, the UK has agreed MoUs with Ethiopia, Jordan, Libya and Lebanon.[[28]](#footnote-28) A case in point here is that of Abu Qatada. While not strictly speaking an FNO, having never been convicted of a crime in the UK, it is useful to consider his case at this juncture as an example of the UK’s attempts to subvert its *non-refoulement* obligations.

Abu Qatada (also known as Omar Othman) dominated newspaper headlines in the UK for over a decade. He is a Palestinian Muslim cleric of Jordanian nationality who is allegedly affiliated with Al-Qaida and involved in various terrorist-related activities. There was insufficient evidence to prosecute him in the UK. Rather, he was subject to detention and restrictions under a number of counter-terrorist initiatives pending his deportation to Jordan to face trial.[[29]](#footnote-29) For a decade, courts in the UK were engaged in assessing the safety of Abu Qatada’s return to Jordan. The key issues here were firstly whether Abu Qatada would be subject to torture or ill-treatment were he deported to Jordan to face trial there, and secondly whether evidence obtained by torture would be used in such a trial, breaching his right to fair trial.[[30]](#footnote-30) The UK entered into a MoU with Jordan, which listed a number of assurances of compliance with international human rights standards that would be adhered to while transferring someone from one country to another, in an effort to secure his removal. After 10 years of judicial challenges to his removal, Abu Qatada’s case finally came before the ECtHR.

The ECtHR ruled that Abu Qatada could not be deported to Jordan despite the MoU, as there was a real risk that evidence obtained by torture would be used in his trial there which would be a violation of his right to a fair trial under Article 6 of the ECHR.[[31]](#footnote-31) The Home Secretary Theresa May immediately began seeking re-assurances with Jordan, however the UK courts were not satisfied that there was no risk that evidence obtained by torture would be used in the trial, and refused to sanction his deportation.[[32]](#footnote-32) This provoked a furious reaction from the British government and the press.

Finally, in 2013, Abu Qatada agreed to return to Jordan following the entry into force of a ‘mutual legal assistance agreement’ between the UK and Jordan, which includes a number of fair trial guarantees for deportees and a stringent ban on the use of torture-obtained evidence.[[33]](#footnote-33) After a decade of ping-pong through the courts, Abu Qatada therefore eventually decided to return to Jordan of his own volition.[[34]](#footnote-34) This case demonstrates that, despite immense political will, the UK’s *non-refoulement* obligations make it can be extremely difficult to remove suspected foreign criminals to a third state where there are concerns surrounding that county’s human rights standards.

* + - 1. *The right to private and family life*

Another barrier to the removal of FNOs is the human rights of the individual to remain, particularly their right to private and family life under Article 8 ECHR. Again, the UK government has sought to alter the interpretation of this right.

Unlike Article 3, Article 8 is not absolute: the rights of the individual must be balanced against the public interest.[[35]](#footnote-35) However, in recent years there was a perception that a large number of appeals against removal from the UK were succeeding on Article 8 grounds. On numerous occasions the Home Secretary Theresa May strongly voiced her discontent with this situation:

We all know the stories about the Human Rights Act. The violent drug dealer who cannot be sent home because his daughter – for whom he pays no maintenance – lives here. The robber who cannot be removed because he has a girlfriend. The illegal immigrant who cannot be deported because – and I am not making this up – he had a pet cat.[[36]](#footnote-36)

In July 2012 the UK Immigration rules were amended to clarify the circumstances in which an FNO may be eligible to remain in the UK under Article 8 of the Human Rights Act (right to respect for family and private life), setting out clear criminality thresholds beyond which an offender will normally be deported.[[37]](#footnote-37) However, in 2013 the Court of Appeal made clear that the Courts had the same flexibility they had always had to make an overall assessment as to whether a person’s family life rights outweigh the State’s right to remove them.[[38]](#footnote-38) This judgment in essence meant that the Government’s intention to limit the scope of the right to family life failed.

Undeterred, in 2014 the ‘correct’ approach to considering Article 8 claims was set out in primary legislation. This specified certain matters to which courts and tribunals must “have regard” when deciding a case involving family and / or private life rights. It sets out what the “public interest” is, on the State’s side of the balancing exercise involved in Article 8. Although judges still have to answer the question of whether interference with Art 8 rights is justified on the facts of the case, the legislation states that deportation of foreign criminals is in the public interest, and there is a sliding scale where more serious crimes mean deportation is even more in the public interest.[[39]](#footnote-39)

Slightly more blunt measures aimed at reducing the number of successful appeals on human rights grounds include limiting the grounds of appeal against removal and restricting access to legal aid. Unfortunately it is beyond the scope of this paper to examine these areas in detail, but an important development introduced under the Immigration Act 2014[[40]](#footnote-40) is the “deport first, appeal later” regime which applies to FNOs subject to a deportation order. Such persons may be certified by the Secretary of State and as a result required to leave the UK to exercise their right of appeal abroad.[[41]](#footnote-41) The Government is currently extending the “deport first, appeal later” policy to all immigration appeals.[[42]](#footnote-42)

The number of appeals against removal by FNOs that have been allowed on human rights grounds have indeed declined dramatically in the last few years, falling from 379 in 2012 (representing 18 per cent of appeals lodged) to 16 in 2015 (representing only 1 per cent of appeals lodged) (see Figure 1).[[43]](#footnote-43) The number of FNO appeals lodged against removal has also fallen significantly, from a peak of 2,444 in 2013 to 1,393 in 2015 (see Table 1).

Figure 1: FNO appeals against deportation allowed on human rights grounds (2009-2015)[[44]](#footnote-44)

Table 1: FNO appeals lodged and subsequently allowed (2009-2015)[[45]](#footnote-45)

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
|  | **2009** | **2010** | **2011** | **2012** | **2013** | **2014** | **2015** |
| **No of FNO appeals lodged against removal** | 1,781 | 1,908 | 1,740 | 2,146 | 2,444 | 2,082 | 1,393 |
| **Of which: allowed** | 433 | 623 | 555 | 678 | 563 | 221 | 87 |
| **Of which: allowed on human rights grounds** | 234 | 363 | 360 | 379 | 177 | 44 | 16 |

The UK Government’s efforts to subvert the legal obstacles to the removal of FNOs therefore appears to be taking effect, both in reducing the number of appeals allowed on human rights grounds and the number of FNO appeals against removal lodged overall.

* + 1. *Administrative problems*

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

In many instances, the Home Office must seek an Emergency Travel Document (ETD) from an individual’s embassy before they can be removed from the UK. The process can be challenging as people often refuse to comply with attempts to re-document them or provide false information. Ensuring the cooperation of the embassies involved is also a key issue here. Efforts to obtain travel documents from the relevant embassy can be frustrated either because embassies do not want to provide them, or are very slow and inconsistent in doing so.

Perhaps a greater cause for concern, the Independent Chief Inspector of Borders and Immigration noted in a recent report that a large number of ETD applications had been agreed by embassies, but the Home Office had not used thousands of these documents.[[46]](#footnote-46) Some of these agreements dated back more than ten years. He stated that many of these cases were not being actively progressed, leaving individuals’ immigration status unresolved for extended periods of time.[[47]](#footnote-47) Thus, while the Home Office often complains that non-compliance with the ETD process by FNOs is a major source of delay, it seems that lack of an effective approach to this issue within the Department may account for a large number of failed or delayed removals. Indeed, an analysis of the 1,453 failed removals in 2013-14 by the National Audit Office (NAO) indicated that at least a third might have been avoided through better co-ordination of the bodies involved and fewer administrative errors.[[48]](#footnote-48) There have also been serious concerns raised surrounding the effectiveness of services that the Home Office outsources to private contractors in removal proceedings. The Independent Chief Inspector of Borders and Immigration found that inefficiency and lack of communication contribute to a waste of resources and time in removal proceedings, which resulted in as many as 40 per cent of scheduled flights being cancelled and/or rescheduled in the year 2015-15, and a loss of £1.41 million in non-refundable flight tickets.[[49]](#footnote-49)

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

* + reducing the number of FNOs entering the country and the criminal justice system;
	+ increasing removals by improving the deportation and removal process, and engaging more actively with overseas countries to facilitate returns; and
	+ changing the law where possible to increase removals and make the UK a tougher environment for FNOs.[[50]](#footnote-50)

As noted above, in May 2013, as part of the action plan, the Department began systematically targeting all FNOs for removal, regardless of whether they met the ‘automatic deportation’ criteria. The plan also identifies 17 priority countries, based on the volume of FNOs currently in the UK from each country and an assessment of the level of difficulty of removing them. Each priority country has an individual plan, which considers country specific barriers to removal, such as poor information sharing or difficulty of obtaining travel documents. However the action plan has been criticised by the NAO as seriously flawed:

the plan does not prioritise actions effectively and there are no clear links between actions, resulting change and impact on removal. FNO governance has been bolstered by the introduction of a new steering group and new directors to lead the action plan, but this work is hindered by over-complicated arrangements in the Department[[51]](#footnote-51)

There are still considerable problems with removal process and many individuals, for various reasons, cannot be removed.

* 1. **Unreturnable FNOs: in-country measures**

As of March 2014 there were around 5,600 FNOs who had completed their sentence but remained in the UK while the Department tried to deport or remove them. About 1,400 were detained in prison or an immigration removal centre, largely because they were appealing against their deportation, not complying with the deportation process or the Department had not made a decision on their case. In addition, some were waiting for ETDs – 136 had been waiting more than 12 months at the end of March 2014.[[52]](#footnote-52)

There are an estimated 5,985 FNOs living in the community pending removal, over half of which have been living in the community for over two years.[[53]](#footnote-53) The UK’s Home Affairs Committee has expressed concern that this number is so high.[[54]](#footnote-54) FNOs can be released into the community at the end of their sentence if:

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

Official policy is that immigration detention is used sparingly, and temporary admission or release or bail be granted to individuals that cannot be removed within a short timeframe.[[55]](#footnote-55) These are limited forms of leave that will normally impose restrictions on residence, occupation or employment and recourse to public funds. Depending on the risk of absconding, ‘contact management’ might also be imposed, such as electronic tagging or a requirement to regularly report to an immigration reporting centre or police station. Another alternative, however, is detention.

* + 1. *Detention*

The UK is unique in Europe in not placing an express time limit on immigration detention. This is covered by common law ‘*Hardial* *Singh* principles’.[[56]](#footnote-56) These principles require that migrants only be detained for a reasonable period in order to remove them and not if it becomes apparent that removal will not take place within a reasonable period. There have in the last few years been a flood of cases in which it has been found that detention has breached the principles and become unlawful.[[57]](#footnote-57) However the threshold is high: the court has found that detention for years can be lawful.[[58]](#footnote-58) Without express guidelines it is difficult to know how long an individual may be detained before such detention becomes unlawful. The UK system is also unusual in lacking automatic judicial oversight of detention.[[59]](#footnote-59) A decision to detain is only reviewed by the courts on the application of the person detained, most often via an application for bail, many of which are refused where the individual is considered likely to abscond and/or cannot provide an address at which they will reside.

A sample group of 27 FNOs[[60]](#footnote-60) whose cases were examined in detail by the Independent Chief Inspector of Borders and Immigration had each been detained for an average of 563 days (more than 18 months) beyond the end of their sentences. In one case a detainee had been held for 1,288 days (more than three and a half years) because there was no passport to send him home with.[[61]](#footnote-61) The Independent Chief Inspector noted that:

Too often the Home Office’s default approach, particularly in the case of ex-Foreign National Offenders, was to keep the individuals in detention in the hope that they would eventually comply with the ETD process. This was particularly disappointing given recommendations I had made on this issue in a number of previous reports. Given the legal requirement only to detain individuals where there is a realistic prospect of removal, this is potentially a breach of their human rights. It is also extremely costly for the taxpayer.[[62]](#footnote-62)

The UK’s system of immigration detention has come under intense scrutiny amid concerns over conditions in detention centres and prisons (at 28 September 2015 there were 409 detainees held in prison establishments in England and Wales solely under immigration powers).[[63]](#footnote-63) For example, in a recent inspection of three detention centres, the Chief Inspector of Prisons reported a deterioration in conditions, particularly relating to health care; severe staff shortages; high levels of violence; the need for improved support for those at risk of self-harm and; the unreasonable length of detention for those pending removal from the UK.[[64]](#footnote-64) In one centre conditions were found to be “appalling”, dirty and run down, overcrowded and poorly ventilated, with toilets and showers in a “seriously insanitary condition”.[[65]](#footnote-65) In six cases the Home Office has been found to have breached Article 3 EHCR in respect of vulnerable detainees.[[66]](#footnote-66) A recent Parliamentary inquiry into this issue recommended a limit of 28 days on the length of time anyone can be held in immigration detention and a presumption of community-based resolutions over detention. The panel noted that the Government “should learn from international best practice and introduce a much wider range of alternatives to detention than are currently used in the UK.”[[67]](#footnote-67) As such, it is hoped that in the future alternatives to detention will be more readily employed by the Home Office in respect of unreturnable FNOs, particularly given the concerns that have been raised about these establishments.[[68]](#footnote-68)

1. **SECURITY CASES: ANTI-TERRORIST MEASURES**

There is also a range of anti-terrorist measures that can be applied to unremovable foreign nationals who are suspected (albeit not convicted) of involvement with terrorism. Following the 9/11 terrorist attacks on the United States, the UK introduced primary legislation which included the power to detain non-nationals in prison, despite the fact that they were not at the time deportable.[[69]](#footnote-69) In essence this amounted to indefinite detention. However, the House of Lords held this legislation incompatible with the ECHR in that it was discriminatory, as it applied only to foreign nationals. The measure was also disproportionate as it did not rationally address the threat posed by international terrorism.[[70]](#footnote-70)

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

Control orders were made against 52 people over the lifetime of the Prevention of Terrorism Act 2005. All were men, suspected of involvement in Islamist terrorism. The duration of the orders was from between a few months to more than four and a half years. At the start of the control order regime in 2005, all controlled persons were foreign nationals. By the end in 2011, all were British citizens. 23 of the 52 controlled persons were subject to involuntary relocation to a different town or city in the UK. By the end of the regime most control orders incorporated other restrictions including a curfew of up to 16 hours, confinement within a geographical boundary, tagging, financial reporting requirements and restrictions on association and communication.[[71]](#footnote-71) However due to civil liberties concerns this regime of control orders was replaced by Terrorism Prevention and Investigation Measures, also known as TPIMs.[[72]](#footnote-72)

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

(a) Control orders could be imposed on reasonable suspicion of involvement in terrorism; TPIMs required reasonable belief;

(b) Control orders could be rolled over year on year, without limit; TPIMs last for a maximum of two years;

(c) Curfews, initially of up to 18 hours for control order subjects, trimmed to a maximum of 16 after the intervention of the courts,[[73]](#footnote-73) came down to 10 hours under TPIMs;

(d) TPIM subjects, in contrast to control order subjects, are entitled to the use of a phone and a computer.[[74]](#footnote-74)

However, the removal of involuntary relocation from the TPIM regime, whereby a subject could be required, with his family if he wished, to live away from his home – was reversed in 2015.[[75]](#footnote-75)

A total of ten persons have been subject to TPIMs. Two absconded, and most of the other TPIMs expired after reaching their two-year limit.  Nine of these were transferred from control orders in early 2012 and one (the only foreign national to have been subject to the regime) was served with a TPIM notice in October 2012. At the close of 2014 this was the only TPIM intermittently in force.[[76]](#footnote-76) It therefore seems that these anti-terrorist measures are not predominantly being used for non-nationals at present. This is an interesting development given that at the start of the Control Order regime all controlled persons were foreign nationals.

1. **Excluded from refugee status**

Another category of undesirable migrants are those excluded from refugee status under Article 1F of the 1951 Refugee Convention **/** Article 12(2) of the 2004 EU Qualification Directive.[[77]](#footnote-77) Although the use of this provision has increased in the last decade, exclusion is still an exceptional measure in the UK.

 The number of individuals excluded from refugee status under Article 1F at initial decision by the Home Office between 2008 and 2015 is shown in Table 2.[[78]](#footnote-78) This data reveals that Article 1F exclusion decisions represent an extremely small number of initial decisions in the UK, on average only 0.1 per cent of initial decisions and 0.2 per cent of refusals.[[79]](#footnote-79) The vast majority of cases that are referred to the Home Office’s Special Cases Unit and ultimately excluded under Article 1F at initial decision fall under 1F(a) (war crime or crime against humanity).[[80]](#footnote-80)

Table 2: The number of Home Office Article 1F exclusions at initial decision, 2008-2015[[81]](#footnote-81)

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **Year** | **Total initial decisions** | **Total refusals under Article 1F** | **Refusals under Article 1F(a)** | **Refusals under Article 1F(b)** | **Refusals under Article 1F(c)** | **Refusals under Article 1F as a proportion of initial decisions** |
| **2008** | 19,398 | 14 | 11 | 0 | 3 | 0.07% |
| **2009** | 24,287 | 20 | 16 | 3 | 1 | 0.08% |
| **2010** | 20,261 | 26 | 26 | 0 | 0 | 0.13% |
| **2011** | 17,380 | 31 | 23 | 5 | 3 | 0.18% |
| **2012** | 16,774 | 21 | 15 | 5 | 1 | 0.13% |
| **2013** | 17,647 | 16 | 10 | 4 | 2 | 0.09% |
| **2014** | 19,782 | 10 | <5 | <5 | <5 | 0.05% |
| **2015** | 28,950 | 24 | 21 | <5 | <5 | 0.08% |

A large number of exclusion decisions concern nationals of Zimbabwe, Afghanistan, Iraq and Sri Lanka. Other nationalities which feature highly include Turkey, Sierra Leone, Rwanda, Pakistan, Libya, Iran, Eritrea, Congo and Bangladesh.[[82]](#footnote-82)

An analysis of reported UK cases concerning exclusion from refugee status reveals that nationals of Zimbabwe include those that supported the Mugabe regime, a member of the Zanu PF youth militia involved in attacks on white-owned farms, a soldier in the Zimbabwean army and a former police officer. Nationals of Afghanistan were members of various Islamic militias, particularly Jamait-e-Islami, the Taliban and Hizb-e-Islami, and also the KhAD Intelligence Service. Sri Lankan nationals were primarily members of the Tamil Tigers (LTTE), although a recent case concerned a former member of the Sri Lankan police force. Libyans also feature highly in the Home Office data, and in the case analysis relate to a member of the Libyan Islamic Fighting Group (LIFG). Although Iraq nationals featured highly in the Home Office data only one case analysed involved an Iraqi national who was a Commando under Saddam Hussein’s Regime.

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

* 1. **Post-exclusion**

As Article 1F cases concern those suspected of serious criminality, indeed, those whose actions are considered to deem them ‘undeserving’ of refugee protection, it might be thought that prosecution would be the most appropriate response to an Article 1F decision (if this has not already taken place prior to the claim for asylum). The UK is under a legal obligation to prosecute or extradite serious international war crimes offenders (*aut dedere aut judicare*) and has furthermore undertaken to prevent and punish genocide.[[83]](#footnote-83) Indeed, the exercise of universal jurisdiction by States has become increasingly mandated by international treaties to include crimes of torture, hijacking, terrorism, hostage-taking and drug-trafficking. The establishment of the International Criminal Court and *ad hoc* international criminal tribunals have also led to increased opportunities to prosecute the perpetrators of serious crimes.[[84]](#footnote-84) However, the UK’s predominant approach to individuals excluded from refugee status under Article 1F does not focus on prosecution; rather, removal from the UK appears to be the preferred option. Yet human rights protections and practical considerations mean that individuals excluded from refugee status can often not be returned to their country of origin, nor removed to a third State for prosecution. These undesirable and yet unreturnable individuals are therefore often left in legal limbo in the UK; subject to a precarious legal status, the threat of removal ever-present.

* + 1. *Removal from the UK*

The UK Government’s preferred response to an Article 1F decision is to pursue removal at the earliest opportunity, whether or not to face prosecution. This is made clear in the Home Office’s Asylum Policy Instruction (API): “Those individuals refused asylum and Humanitarian Protection because Article 1F applies and there are no barriers to their removal must be prioritised for enforcement action and removal”.[[85]](#footnote-85) However, practical and legal barriers apply to the removal of failed asylum-seekers as to FNOs (see section 2.1). Since individuals may be excluded from refugee status *despite* a well-founded fear of persecution, human rights barriers to removal may be particularly pertinent to these cases.[[86]](#footnote-86) There is therefore a high likelihood that removal will not be an option, as to do so may breach the UK’s human rights obligations.

* + 1. *Extradition*

Extradition to a third state to face prosecution is also often problematic.[[87]](#footnote-87) Extradition from the UK must be compliant with the UK’s human rights obligations, particularly Article 3 (torture and inhuman or degrading treatment), Article 8 (private and family life) and Article 6 (fair trial) ECHR. Article 5 (liberty and security of person) may also be in issue in relation to pre-trial detention in the requesting state. In addition, extradition attracts a number of specific requirements which must be adhered to. That extradition may be barred on account of extraneous considerations (prosecution, detention or punishment on account of race, religion, nationality, gender, sexual orientation or political opinions) may be particularly relevant in the case of failed asylum-seekers claiming protection on one of the Convention grounds.[[88]](#footnote-88)

 A recent report from the House of Lords Select Committee on Extradition Law raised specific concerns regarding the UK’s use of assurances in extradition proceedings involving third states with questionable human rights protections / fair trial guarantees.[[89]](#footnote-89) In the words of the Committee:

[W]e believe the arrangements in place for monitoring assurances are flawed. It is clear that there can be no confidence that assurances are not being breached, or that they can offer an effective remedy in the event of a breach. […] Therefore, it is questionable, in our view, whether the UK can be as certain as it should be that it is meeting its human rights obligations.[[90]](#footnote-90)

Attempts to extradite individuals excluded from refugee status can therefore present a number of problems. A case that has received particular attention in the UK is that of four individuals sought for extradition to Rwanda to face charges of genocide, murder and crimes against humanity carried out during the Rwandan civil war in 1994. Because there was no extradition treaty between the United Kingdom and Rwanda, the two countries entered into a series of MoUs relating to the extradition of these individuals. However, in a decision which marks the culmination of a nine year battle on the part of Rwanda to secure the extradition of these men, a UK court refused their extradition on the basis that there is a real risk that the men will not be granted a fair trial in Rwanda.[[91]](#footnote-91)

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

* + 1. *Prosecution in the UK*

The UK is under a legal obligation to prosecute or extradite serious international war crimes offenders and has universal jurisdiction to prosecute grave breaches of the Geneva Conventions,[[92]](#footnote-92) torture,[[93]](#footnote-93) certain acts of terrorism,[[94]](#footnote-94) hijacking[[95]](#footnote-95) or hostage taking,[[96]](#footnote-96) even if these crimes were committed in third States.[[97]](#footnote-97) However, there’s considerable difficulty in practice in pursuing prosecution for crimes that are committed in third States, which include collating evidence, the ability of the police to carry out investigations, the lack of witnesses in the UK and the standard of proof, which is considerably higher than that required for an exclusion decision.

In the UK, the war crimes team of the Metropolitan Police Counter Terrorism Command (SO15) is responsible for the investigation of all allegations of war crimes, crimes against humanity, genocide and torture. The Counter Terrorism Division (CTD) of the Crown Prosecution Service, Special Crime and Counter Terrorism Division, has responsibility for prosecuting such crimes. The Referral Guidelines agreed between these two bodies note the inherent difficulties in investigating and prosecuting these crimes, particularly when they are committed in third states:

The crime of genocide, crimes against humanity and war crimes present a range of challenges for investigators. Their factual complexity leads to unique challenges for investigators, many of which are exacerbated by the fact that investigations to collect evidence, familiarise themselves with crime scenes, or conduct witness interviews may often need to be conducted outside this jurisdiction.[[98]](#footnote-98)

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

The prosecutor should be pro-active in identifying and bringing to an early conclusion those cases which have evidential deficiencies that cannot be strengthened by further investigation and supporting the viable investigations which will ultimately result in a prosecution.[[99]](#footnote-99)

Based on this information SO15 will decide whether a ‘safe and proportionate’ investigation is feasible.[[100]](#footnote-100)

Following completion of the SO15 investigation, the CTD must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction before taking prosecution forward.[[101]](#footnote-101) In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.[[102]](#footnote-102) The Attorney General is then asked to consent to the prosecution.

The obstacles that often occur in the investigation and prosecution of alleged crimes committed abroad is made clear in the above Referral Guidelines. Indeed, the only case concluded by the CTD since 2001 is that of Faryadi Zardad, an Afghan National and a commander within Hezb-e-Islami, who in 2005 was convicted of conspiracy to torture and conspiracy to take hostages while controlling a checkpoint in Afghanistan.[[103]](#footnote-103) Not least in the obstacles encountered by SO15 and the CTD are the costs involved in investigating and prosecuting such cases, which can be protracted and resource intensive. For example, the total cost of the investigation and trial of Faryadi Zardad is estimated to have exceeded £3 million.[[104]](#footnote-104)

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

* + 1. *Temporary solutions: Restricted Leave*

In September 2011 the Home Office brought in a new policy of Restricted Leave.[[105]](#footnote-105) The policy applies to individuals who are excluded from asylum and Humanitarian Protection for Article 1F reasons (or in the case of Humanitarian protection would be excluded were a Convention reason to apply) or refused asylum under Article 33(2) of the Refugee Convention[[106]](#footnote-106) but who cannot be removed to their home country because removal would breach their rights under the ECHR. The policy in most instances grants an individual leave to remain in the UK for a maximum of six months at a time.[[107]](#footnote-107) A number of restrictions may be attached to this form of leave, including restrictions on employment; residence; education and a requirement that the individual report to an immigration officer at regular intervals. Furthermore, individuals placed on Restricted Leave do not have recourse to public funds unless they are destitute.[[108]](#footnote-108) As explained in the Casework Instruction:

Our policy is to remove such individuals wherever possible because they are not welcome in the UK. However, in cases where removal cannot currently be enforced for ECHR reasons we will deny the benefits of refugee status and Humanitarian Protection and instead grant a short period of restricted leave to which tight restrictive conditions may be attached according to the particular circumstances of each case.[[109]](#footnote-109)

The policy is stated to have three purposes, the public interest in maintaining the integrity of immigration control; public protection to ensure monitoring of where an individual lives and works and prevent their access to positions of trust, and; upholding the international rule of law by supporting broader international obligations to remove individuals excluded from the Refugee Convention as soon as possible. This form of leave is extremely precarious, and is frequently reviewed with an eye to removing the individual from the UK at the earliest possibility. Failure to abide by any of these conditions is a criminal offence and may lead to prosecution and imprisonment.[[110]](#footnote-110)

 The number of persons on Restricted Leave has increased significantly since the policy was introduced in 2011 (see Figure 2), standing at 71 individuals as of 31 December 2015. All are required to report to the Immigration Services at regular intervals and 67 have restrictions on employment (not entering into or changing employment (paid or unpaid) without the Home Office’s prior consent), education (not entering into any course of study without the Home Office’s prior consent) and residence (not being absent from a home address for more than three nights consecutively or more than 10 nights in any rolling six month period). Two individuals have been granted Restricted Leave for more than 6 months in a single grant, while the remainder have been granted 6 months leave or less per grant.

Figure 2: Number of individuals granted Restricted Leave (2012-2015)[[111]](#footnote-111)

A key underlying purpose of this policy is to make it as uncomfortable as possible for excluded persons to remain in the UK, and ensure that they do not form strong ties to the UK which could lead to their settlement and/or a successful Article 8 ECHR claim in the future.[[112]](#footnote-112)

Such cases will be reviewed regularly with a view to removal as soon as possible and only in exceptional circumstances will individuals on restricted leave ever become eligible for settlement or citizenship. Such exceptional circumstances are likely to be very rare.[[113]](#footnote-113)

There have been a number of challenges to the policy since it was brought into force. The *Kardi* case concerned a Tunisian national who argued that the conditions he was placed under as a result of the Restricted Leave policy constituted a disproportionate interference with his rights under Article 8 ECHR. The Court of Appeal, however, held that this was a proportionate interference with his Article 8 rights:

Whether one looks individually or cumulatively at the limitation on the period of leave and at the restrictions imposed, they give rise to only a limited interference with the appellant's private life and their imposition was justified, in terms of legitimate aim and proportionality.[[114]](#footnote-114)

The court noted that the grant of short periods of leave emphasised the intended impermanence of the individual’s stay in the country and made it more difficult to put down roots and to build up a private life, thus reducing the prospect of removal being prevented on Article 8 ECHR grounds in the future. Interestingly, the court did seem to indicate that there might be a cap on the use of the policy. The court noted that “there may of course come a point where the appellant has been in the United Kingdom for so long and/or the prospect of his removal to Tunisia is so remote, that the only course reasonably open to the Secretary of State is to grant him indefinite leave to remain”.[[115]](#footnote-115)

This decision was followed in a challenge to the Home Office’s Restricted Leave policy before the UK immigration tribunal. In contrast to earlier cases which challenged the application of the policy in the particular case of an individual, among the issues the tribunal considered is the argument that the automatic application of the Restricted Leave policy following an exclusion decision leaves no room for the assessment of whether, on the facts of the case, there is any meaningful nexus between the aims of the policy and the serious interference with the rights of the individual concerned and his family under Article 8 ECHR. The tribunal however rejected this argument, noting that there is sufficient flexibility in the policy to allow the Secretary of State to consider which conditions are appropriate in a particular case and whether or not a point has been reached where the only reasonable course open is to allow the individual indefinite leave to remain in the UK. The latter will depend on a variety of factors, including (but not limited to):

(a) the reasons why the individual was excluded from the Refugee Convention;

(b) whether the applicant has remained blamelessly in the United Kingdom for a lengthy period of time;

(c) the prospect of removal of the applicant to his or her home country, involving an appraisal of the political circumstances of the home country bearing in mind that the international reputation of the United Kingdom which can be in point in these cases and

(d) the particular circumstances of the applicant and his life in the United Kingdom.[[116]](#footnote-116)

The tribunal noted that it will be in relatively rare cases that an end point is reached, and in some cases “the end point may never come”.[[117]](#footnote-117) Although the tribunal did note that it is necessary for decision-makers to consider the impact of the policy on the best interests of any children concerned, “[v]ery strong evidence would be needed to prevail over the public interest and public protection considerations which are given effect in [the Restricted Leave policy] so as to make it unreasonable for the respondent not to grant RLR for more than six months or not to impose the usual conditions.”[[118]](#footnote-118)

Despite the often severe consequences of the application of this policy in practice, courts and tribunals in the UK seem reluctant to hold that the policy constitutes a disproportionate interference with the rights of the individuals concerned. Similarly the courts appears reluctant to place a firm time limit on the application of the policy, merely noting that in some cases and end point may be reached, though these are likely to be extremely rare in practice. It is therefore rather surprising that the tribunal recently considered an Article 1F-excluded individual suitable for settlement in the UK. This case concerned a Rwandan national who was excluded from refugee status as “his acts and omissions during the period of the Rwandan genocide gave serious reasons for considering that he was guilty of the crime of genocide”.[[119]](#footnote-119) He claimed entitlement to settlement on grounds of long residence, having resided in the UK for over 10 years. The tribunal considered the conditions for settlement set out in the Immigration Rules, specifically whether the claimant's character, conduct or associations rendered him unsuitable or ineligible for further leave, tests that the tribunal considered “involve a consideration that goes beyond looking at the past”.[[120]](#footnote-120)

Having regard to his conduct following the genocide, the tribunal noted the applicant had returned to Rwanda in order to help with reconciliation, taken part in memorial events and had issued a statement acknowledging his failings and apologising. It was also noted that had never been indicted, did not appear on any of the lists of those wanted for genocide and was looked upon by the Rwandan government as one of its leading expatriate citizens, holding a number of important international posts and attending significant diplomatic events including official meetings with the president of Rwanda. Furthermore the Tribunal noted that all these events had taken place against a background of disclosure of, and concern about, his activities during the period of genocide. Given the level at which the claimant's status and position has been recognised, the tribunal held that it was open to conclude that, despite his history, he was not a person whose character, conduct and associations make it undesirable to grant him indefinite leave to remain in the UK.[[121]](#footnote-121)

Given the severity of the crime in issue, this is a curious conclusion from the tribunal. It is important to note that in their decision the tribunal did not refer to the stated policy aims of the Restricted Leave policy, nor relevant case law on the policy, considered immediately above. Permission has been granted to appeal this decision and so we await determination by the higher courts.

What this case law does seem to indicate is that there is an ‘end point’ beyond which it is unconscionable to continue to apply the Restricted Leave policy. However, given the current political climate and the sensitivity of the topic, it is unlikely that the Home Secretary will engage in the task of articulating a coherent approach to long-term Article 1F unremovables unless forced to do so by the courts. Given the significant increase in the application of the policy since it was introduced in 2011, it is concerning that there has not been more of an effort on the part of the Home Office to provide clear information on the use of the policy in practice, nor articulate a clear approach to those who have been subject to policy for such a long period of time, and the prospect of removal so remote, that it would be inequitable to continue to subject the individual to a policy intended to be only temporary in nature.

1. **Conclusions**

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

 The focus on the removal of undesirable migrants is set to continue in the UK. Indeed, the issue is likely to gain traction in discussions surrounding the UK’s renegotiated relationship with the EU. As such, this is likely to remain a fast developing area of law and policy, though if the emphasis remains on removal rather than looking to alternative in-country solutions that are more than temporary in nature, a viable solution to this issue is likely to remain elusive.

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1. \* Refugee Law Initiative, School of Advanced Study, University of London. Email: sarah.singer@sas.ac.uk. [↑](#footnote-ref-1)
2. “Immigration system unfit – Reid”, *BBC News*, 23 May 2006, available at: <http://news.bbc.co.uk/1/hi/uk_politics/5007148.stm> (last visited 5 May 2016). [↑](#footnote-ref-2)
3. *R v Safi (Al Ahmed)* [2003] EWCA Crim 1809. [↑](#footnote-ref-3)
4. J. Sturcke, “Judges overrule Reid in Afghan hijack case”, *The Guardian*, 4 Aug. 2006, available at: <http://www.theguardian.com/uk/2006/aug/04/immigration.immigrationpolicy> (last visited 5 May 2016). [↑](#footnote-ref-4)
5. Ben Riley-Smith and Laura Hughes, “EU rules stopped Britain deporting murderers, rapists and violent criminals”, The Telegraph, 6 June 2016, available at: <http://www.telegraph.co.uk/news/2016/06/06/eu-rules-stopped-britain-deporting-murders-rapists-and-violent-c/> (last visited 23 Jul. 2016); “Failure to deport foreign criminals casts doubt on EU – MPs”, BBC News, 3 Jun. 2016, available at: <http://www.bbc.co.uk/news/uk-politics-eu-referendum-36441188> (last visited 23 Jul. 2016). C. Cooper, “EU referendum: More than 13,000 foreign criminals awaiting deportation from UK”, *The Independent*, 3rd Jun. 2016, available at: <http://www.independent.co.uk/news/uk/home-news/eu-referendum-more-than-13000-foreign-criminals-awaiting-deportation-from-uk-a7063026.html> (last visited 5 Jun. 2016). [↑](#footnote-ref-5)
6. Convention relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954). [↑](#footnote-ref-6)
7. Home Office statistics on migration are available here <<https://www.gov.uk/government/collections/migration-statistics>> (last visited 14 Jun. 2016). [↑](#footnote-ref-7)
8. National Audit Office (NAO), *Managing and removing foreign national offenders*, 22 Oct. 2014, 4-5, available at: <http://www.nao.org.uk/wp-content/uploads/2014/10/Managing-and-removing-foreign-national-offenders.pdf> (last visited 5 May 2016). Due to the limited data available, in some sections of this paper multiple sources are relied upon. [↑](#footnote-ref-8)
9. Although foreign nationals suspected of committing a criminal offence (even if acquitted or not charged) may also be subject to removal proceedings (see n 14 below). [↑](#footnote-ref-9)
10. House of Commons Home Affairs Committee (Home Affairs Committee), *The work of the Immigration Directorates (Q4 2015), Second Report of Session 2016–17*, 25 May 2016, 44, available at: <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/22/22.pdf> (last visited 17 Aug. 2016); Home Affairs Committee, *The work of the Immigration Directorates (Q1 2016), Sixth Report of Session 2016–17*, 19 Jul. 2016, 38, available at: <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/151/151.pdf> (last visited 17 Aug. 2016). [↑](#footnote-ref-10)
11. NAO, *Managing and removing foreign national offenders*, (n 7), 4-5. [↑](#footnote-ref-11)
12. *Ibid*., 13, Figure 1; Home Affairs Committee, *The work of the Immigration Directorates (Q1 2016)* (n 9), 39. [↑](#footnote-ref-12)
13. Immigration Act 1971, s.3(6), s.3(5)(a). [↑](#footnote-ref-13)
14. UK Borders Act 2007, ss. 32-39. [↑](#footnote-ref-14)
15. Home Office, Immigration Directorate Instructions, *Deporting non-EEA foreign nationals*, Version 3.1, Apr. 2015, s.2.3, available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426906/Deport-non_eea_Foreign_Nationals.pdf> (last visited 5 May 2016); NAO, *Managing and removing foreign national offenders*, (n 7), 7 and 16. There remains a power for the Secretary of State to deem an individual’s deportation ‘conducive to the public good’ regardless of whether or not that individual has a criminal conviction. Operation Nexus, a collaboration between the Metropolitan Police Service and the Home Office launched in 2012 to try and deport more foreign nationals from the UK, deals with individuals whose deportation is said to be ‘high harm’. Metropolitan Police, *Operation Nexus launches*, 10 Nov. 2012, available at: <http://content.met.police.uk/News/Operation-Nexus-launches/1400012909227/1257246741786> (last visited 6 Jan. 2016). However there is no definition of the level of harm and it is clear that Operation Nexus has targeted individuals who are merely suspected of having committed a criminal offence, and have been acquitted or not even charged. Luqmani Thompson & Partners, *Operation Nexus: Briefing Paper*, 1 Sep. 2014, available at: <http://www.luqmanithompson.com/Operation-Nexus-Briefing-Paper.pdf> (last visited 6 Jan. 2016). [↑](#footnote-ref-15)
16. European Convention on Human Rights, ETS No. 005, 4 Nov. 1950 (entry into force: 3 Sep. 1953). [↑](#footnote-ref-16)
17. Home Affairs Committee, *The work of the Immigration Directorates (Q4 2015)* (n 9), p.43. [↑](#footnote-ref-17)
18. NAO, *Managing and removing foreign national offenders*, (n 7), 35. [↑](#footnote-ref-18)
19. *Ibid*., 15. [↑](#footnote-ref-19)
20. (in a range of between £770 million and £1,041 million) *Ibid*., 15. [↑](#footnote-ref-20)
21. Statement of Amyas Morse, head of the National Audit Office, 22 Oct. 2014, available at: http://www.nao.org.uk/report/managing-and-removing-foreign-national-offenders/ (last visited 14 March 2015). [↑](#footnote-ref-21)
22. Home Affairs Committee, *The work of the Immigration Directorates (Q4 2015)* (n 9), 44 [↑](#footnote-ref-22)
23. It seems that around half of FNOs in prison come from EU countries and would therefore rely on EU law rather than human rights law to resist deportation. NAO, *Managing and removing foreign national offenders*, (n 7), 13. The Home Affairs Committee described the Home Secretary’s suggestion that remaining a member of the EU will make it easier to remove EU-national FNOs from the UK as ‘unconvincing’. Home Affairs Committee, *The work of the Immigration Directorates (Q4 2015)* (n 9), 45. Unfortunately it is beyond the scope of this paper to consider the specific protection that this group of persons enjoy. [↑](#footnote-ref-23)
24. ECtHR, *Soering v United Kingdom* [1989] 11 EHRR 439, para 88. [↑](#footnote-ref-24)
25. ECtHR, *Chahal v United Kingdom* (1997) 23 EHRR 41; ECtHR, *Saadi v Italy* (Appl. No. 37201/06) [2008] ECHR 179. [↑](#footnote-ref-25)
26. *Chahal v United Kingdom* (n ), para 80; *Saadi v Italy* (n ), para 138. See J. Vedsted-Hansen, “The European Convention on Human Rights, Counter-Terrorism, and Refugee Protection”, Refugee Survey Quarterly, 29(4), 45-62. [↑](#footnote-ref-26)
27. See, for example, the long-running saga over the removal of Abu Qatada immediately below. [↑](#footnote-ref-27)
28. Assurances with Algeria took the form of exchange of letters. The MoU with Libya was struck out as unsafe in *MT, RB, and U v Secretary of State for the Home Department* [2007] EWCA Civ 808. For more see M. Giuffré, “Memoranda of understanding” *Journal of International Criminal Justice* (forthcoming) [↑](#footnote-ref-28)
29. This included indefinite detention without trial under Part 4 of the Anti-terrorism Crime and Security Act 2001, introduced following the 9/11 attacks on the United States, and the subsequent regime of control orders, considered in s 3. below. [↑](#footnote-ref-29)
30. For a full overview of this case and the ensuing debate over the use of MoUs, see M. Giuffre, “An Appraisal of Diplomatic Assurances One Year after *Othman (Abu Qatada) v United Kingdom* (2012)” *International Human Rights Law Review,* 2, 266-293. [↑](#footnote-ref-30)
31. However, it must be noted that they *did* consider that the assurances removed the risk that Abu Qatada himself would be subject to torture or ill-treatment contrary to Article 3 ECHR. ECtHR, *Othman (Abu Qatada) v United Kingdom* 8139/09 [2012] ECHR 56, 17 Jan. 2012. [↑](#footnote-ref-31)
32. *Othman (aka Abu Qatada) v Secretary of State for the Home Department* [2013] EWCA Civ 277. [↑](#footnote-ref-32)
33. Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, Signed 24 Mar. 2013, available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252502/TS.25.Cm8681.pdf> (last visited 14 Mar. 2016). [↑](#footnote-ref-33)
34. Abu Qatada has since been cleared of all criminal charges by the Jordanian courts, and has actively spoken out against the activities of ISIS. S. Malik and A. Su, ”Abu Qatada cleared of terror charges by Jordan court and released from jail”, *The Guardian*, 24 Sep. 2014, available at: <http://www.theguardian.com/world/2014/sep/24/abu-qatada-cleared-terror-charges-jordan-court> (last visited 7 Jan. 2015). [↑](#footnote-ref-34)
35. Interference with the right to family life is permissible under Article 8(2) ECHR if it is in accordance with the law; for a legitimate aim (national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others) and; proportionate. [↑](#footnote-ref-35)
36. Home Secretary Theresa May, Conservative Party Conference, Manchester, 4 Oct. 2011. A video clip is available at: <http://www.telegraph.co.uk/news/politics/conservative/8806196/Conservative-Party-Conference-2011-Human-Rights-Act-has-to-go-says-Home-Secretary-Theresa-May.html> (last visited 14 Mar. 2016). The last sentence of this statement sparked the infamous ‘catgate’ affair. It later transpired that Ms May had misrepresented the facts of the case referred to here - the cat was (unsurprisingly) not a determining factor in the immigration decision. [↑](#footnote-ref-36)
37. The immigration rules are subordinate legislation made by the Home Secretary pursuant to the statutory duty to do so (Immigration Act 1971 s. 3(2)) and subject only to very limited parliamentary scrutiny. The Human Rights Act 1998 effectively incorporates the ECHR into domestic law. [↑](#footnote-ref-37)
38. *MF (Nigeria) v* *Secretary of State for the Home Department* [2013] EWCA Civ 1192. [↑](#footnote-ref-38)
39. Nationality, Immigration and Asylum Act 2002, Part 5A, ss.117A-117D. Part 5A of the 2002 Act was inserted by s.19 of the Immigration Act 2014, which came into force on 28 July 2014. The Immigration Rules were also amended on 28 July 2014 and set out the criminality thresholds. Immigration rules, Part 13, para 398, available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370961/20141106_immigration_rules_part_13_final.pdf> (last visited 14 Mar. 2016). [↑](#footnote-ref-39)
40. Amending s.94B Immigration, Nationality and Asylum Act 2002. [↑](#footnote-ref-40)
41. Unless this would cause “serious irreversible harm”. Section 94B Immigration, Nationality and Asylum Act 2002. In the first year that the Immigration Act 2014 was in force (Jul. 2014 – Jun. 2015), over 230 foreign national offenders were deported before their appeal was heard. 67 of these lodged an appeal, of which three have been determined and were dismissed. In addition, over 1,200 EEA foreign national offenders were removed under equivalent powers and 288 lodged an appeal. Home Office, Immigration Bill 2015/16 Factsheet – Appeals (clauses 34-36), Dec. 2015, available at: <https://www.gov.uk/government/publications/immigration-bill-part-4-appeals> (last visited 5 May 2016). [↑](#footnote-ref-41)
42. Immigration Act 2016, Part 4, available at: http://www.legislation.gov.uk/ukpga/2016/19/contents/enacted (last visited 5 May 2016). [↑](#footnote-ref-42)
43. Though it must be noted that these figures may change as those appeals still in the appeals process are concluded. [↑](#footnote-ref-43)
44. Source: Freedom of Information (FoI) Response 37933, 4 Apr. 2016 (held on file by author). [↑](#footnote-ref-44)
45. *Ibid.,.* [↑](#footnote-ref-45)
46. The Home Office defines an unused ETD as one that has been promised or issued for more than 3 months without use. At the time of the inspection (Sep. 2013), the pool of unused ETDs amounted to 6,460 cases. [↑](#footnote-ref-46)
47. Independent Chief Inspector of Borders and Immigration, *An Inspection of the Emergency Travel Document Process, May-September 2013*, Mar. 2014, available at: <<http://icinspector.independent.gov.uk/wp-content/uploads/2014/03/An-Inspection-of-the-Emergency-Travel-Document-Process-Final-Web-Version.pdf>> (last visited 14 May 2016). [↑](#footnote-ref-47)
48. NAO, Managing and removing foreign national offenders, (n 7), 35-36. The majority of the remaining two thirds of failed removals are due to ongoing representations or appeals by the FNO; disruption of the part of the FNO or home country circumstances preventing removal; or cancellation of flight or refusal of flight operator to travel. [↑](#footnote-ref-48)
49. Independent Chief Inspector of Borders and Immigration, *An Inspection of Home Office Outsourced Contracts for Escorted and Non-Escorted Removals and Cedars Pre-Departure Accommodation, July – November 2015*, Mar. 2016, 13-15, available at: http://icinspector.independent.gov.uk/wp-content/uploads/2016/03/ICIBI-report-on-Outsourced-Contracts-and-Cedars-Final.pdf (last visited 8 Aug. 2016). [↑](#footnote-ref-49)
50. NAO, Managing and removing foreign national offenders, (n 7),17. [↑](#footnote-ref-50)
51. *Ibid*., 9. [↑](#footnote-ref-51)
52. *Ibid*., 35. [↑](#footnote-ref-52)
53. Home Affairs Committee, *The work of the Immigration Directorates (Q1 2016)* (n 9), 39. [↑](#footnote-ref-53)
54. *Ibid.,* [↑](#footnote-ref-54)
55. Home Office Enforcement Instructions and Guidance, *Chapter 55: detention and temporary release* (last updated 30 Jan. 2015). See also *Chapter 56: home leave, TA, reporting restrictions* and *Chapter 57: bail*, all available at: <https://www.gov.uk/government/publications/chapters-46-to-62-detention-and-removals> (last visited 14 Mar. 2016). [↑](#footnote-ref-55)
56. Drawn from the case which set out important principles concerning the use of powers to detain a person for immigration purposes. *R(Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1. Endorsed by the Supreme Court in *Walumba Lumba & Kadian Mighty v Secretary of State for the Home Department* [2011] UKSC 12. [↑](#footnote-ref-56)
57. For example *R (on the application of Sino) v Secretary of State for the Home Department* [2016] EWHC 803 (Admin). [↑](#footnote-ref-57)
58. In *R(Muqtaar)* the total length of the appellant's detention was just over 41 months. It was accepted that detention was lawful for the first 16 months but became unlawful thereafter. *R(Muqtaar) v Secretary of State for the Home Department* [2012] EWCA Civ 1270. See also *Machnikowski v Secretary of State for the Home Department* [2015] EWHC 54 (Admin) (22 Jan. 2016), where a man held in immigration detention for three years was found not to have been unlawfully detained. [↑](#footnote-ref-58)
59. Although recently tabled as an amendment to what is now the Immigration Act 2016, automatic judicial oversight of detention was not included in the final Act. [↑](#footnote-ref-59)
60. Who were classed by the Home Office as ‘non-compliant’ with the ETD process. [↑](#footnote-ref-60)
61. Independent Chief Inspector, *An Inspection of the Emergency Travel Document Process* (n ), 46. Of the 2,044 FNOs leaving detention between 1 April and 30 September 2012, 1,377 (67 per cent) had been in detention for less than 29 days, 145 (7 per cent) for between 29 days and two months, 159 (8 per cent) for between two and four months, 223 (11 per cent) for between four and 12 months and 140 (7 per cent) for 12 months or more. Home Office, *Foreign National Offenders in detention and leaving detention*, 28 Feb. 2013, s 3, available at: <https://www.gov.uk/government/publications/foreign-national-offenders-in-detention-and-leaving-detention/foreign-national-offenders-in-detention-and-leaving-detention> (last visited 14 Mar. 2016). [↑](#footnote-ref-61)
62. Independent Chief Inspector of Borders and Immigration, *Annual Report 2013-2014*, 18, available at: <http://icinspector.independent.gov.uk/wp-content/uploads/2014/12/ICI-Annual-report-2013-14-FINAL-web.pdf> (last visited 15 April 2016). [↑](#footnote-ref-62)
63. Home Office, *National Statistics: Detention*, 26 Nov. 2015, available at: <https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2015/detention> (last visited 5 Jan. 2016); Information on the number held in Scotland and Northern Ireland is not available. [↑](#footnote-ref-63)
64. HM Chief Inspector of Prisons, *Report on an unannounced inspection of Yarl’s Wood Immigration Removal Centre, , 13 April – 1 May 2015*, available at <<https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2015/08/Yarls-Wood-web-2015.pdf?utm_source=Weekly+Legal+Update&utm_campaign=21d1c66872-WLU_14_08_2015&utm_medium=email&utm_term=0_7176f0fc3d-21d1c66872>> (last visited 6 Jan. 2016); HM Chief Inspector of Prisons, *Report on an unannounced inspection of The Verne Immigration Removal Centre, 2–13 March 2015*, available at: <http://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2015/08/The-Verne-web-2015.pdf?utm_source=Weekly+Legal+Update&utm_campaign=21d1c66872-WLU_14_08_2015&utm_medium=email&utm_term=0_7176f0fc3d-21d1c66872-> (last visited 7 Jan. 2016); HM Chief Inspector of Prisons, *Report on an unannounced inspection of Heathrow Immigration Removal Centre, Harmondsworth site, 7–18 September 2015*, available at: <https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2016/02/Harmondsworth-web-2015.pdf> (last visited 5 May 2016). [↑](#footnote-ref-64)
65. HM Chief Inspector of Prisons, *Report on an unannounced inspection of Heathrow Immigration Removal Centre* (n 65), 5 [↑](#footnote-ref-65)
66. Stephen Shaw, *Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw* (Shaw Report), Jan. 2016, available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf> (last visited 5 May 2016) [↑](#footnote-ref-66)
67. All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom*, March 2015, available at: <https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf> (last visited 14 Mar. 2016). This aspect of the proposals were unfortunately not taken up on the most recent Immigration Bill, and there remains no specific time limit on immigration detention. The panel also noted that detainees often have difficulty in challenging their detention and accessing appropriate legal aid. [↑](#footnote-ref-67)
68. Detention Action’s Alternative to Detention Community Support Project is a good example of an alternative to detention project for young migrant ex-offenders at risk of indefinite immigration detention. The project demonstrates that, with reintegration support, ex-offender migrants rarely abscond or reoffend, and therefore that the long-term detention of ex-offenders with barriers to removal is unnecessary. An evaluation of the project is available here: <http://iars.org.uk/sites/default/files/FINAL%20IARS%20DA%20evaluation%20report%20July%202015.pdf> (last accessed 5 May 2016). [↑](#footnote-ref-68)
69. Anti-terrorism Crime and Security Act 2001, Part 4. [↑](#footnote-ref-69)
70. *A and Others v Secretary of State for the Home Department* [2004] UKHL 56. [↑](#footnote-ref-70)
71. Independent Reviewer of Terrorism Legislation, *Control Orders in 2011, Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005*, Mar. 2012, available at: <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/control-orders-2011.pdf> (last visited 14 Mar. 2016). [↑](#footnote-ref-71)
72. Introduced by the Terrorism Prevention and Investigation Measures Act 2011. [↑](#footnote-ref-72)
73. *Secretary of State for the Home Department v. JJ and others* (FC) [2007] UKHL 45. The majority concluded that the most severe orders, which subjected controlees to 18-hour home curfews, did amount to a breach of the individuals’ human rights. [↑](#footnote-ref-73)
74. Though with certain restrictions. Independent Reviewer of Terrorism Legislation, *Terrorism Prevention and Investigation Measures in 2014, Third Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011*, March 2015, s. 1.4, available at:

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411824/IRTL_TPIMs_2014_final_report__web_.pdf> (last visited 15 Apr. 2016). [↑](#footnote-ref-74)
75. Counter-Terrorism and Security Bill 2015, ss.16-17. [↑](#footnote-ref-75)
76. Independent Reviewer of Terrorism Legislation, *Terrorism Prevention and Investigation Measures in 2014*, (n 5), s.2. [↑](#footnote-ref-76)
77. 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, 30 Sep. 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC. Article 1F provides that that the 1951 Refugee Convention “shall not apply to any person with respect to whom there are serious reasons for considering that:

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

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

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

This is largely mirrored in Art 12(2) of the EU Qualification Directive.

It must also be noted that it appears the UK is excluding individuals from refugee status pursuant to Art. 33(2) Refugee Convention / Art. 14 QD (see n 107 below). Home Office, *Exclusion (Article 1F) and Article 33(2) of the Refugee Convention*, Version 6.0, 1 Jul. 2016, 31, available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/534985/exclusion_and_article_33_2__refugee_convention.pdf> (last visited 8 Aug. 2016). Unfortunately data on any individuals who may have been excluded from refugee protection on this basis is not available. [↑](#footnote-ref-77)
78. Unfortunately this data isn’t totally representative, as it relates to initial decisions of the Home Office and therefore doesn’t include Article 1F decisions that were made at a later date, on appeal or to revoke refugee status that had previously been granted. [↑](#footnote-ref-78)
79. Data on the total number of refusals were also included in the data provided by the Home Office but due to space constraints have not been included in Table 2. [↑](#footnote-ref-79)
80. Between 2008 and 2015, Article 1F(a) was relied upon by the Home Office in nearly 80 per cent of exclusion decisions. [↑](#footnote-ref-80)
81. Data for 2015 is provisional. Sources: FoI response 31155 (held on file by author), 14 Apr. 2014; FoI response 37933 (n 44). [↑](#footnote-ref-81)
82. See S. Singer, *Terrorism and Exclusion from Refugee Status in the UK: Asylum seekers suspected of serious criminality*, Nijhoff, Brill, 2015, 193-196, for a detailed breakdown of nationalities. [↑](#footnote-ref-82)
83. See Arts. 49, 50, 129 and 146 of the four Geneva Conventions of 1949, supplemented by Additional Protocol 1 relating to the Protection of Victims of International Armed Conflicts and Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts of 1977. See also the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), Art. 1. [↑](#footnote-ref-83)
84. The complementarity principle of these tribunals grants States jurisdiction to try international crimes referred to in these Statutes and, in the case of the International Criminal Court, emphasises that States have a *duty* to prosecute international crimes when other States that have jurisdiction are unable or unwilling to do so. Statute of the International Criminal Tribunal for the former Yugoslavia 1993, Art. 9; Statute of the International Tribunal for Rwanda 1994, Art. 8; Rome Statute of the International Criminal Court 1998, Arts. 17.3 and 17.2. [↑](#footnote-ref-84)
85. Home Office, *Asylum Policy Instruction (API), Restricted Leave*, 23 Jan. 2015, s.3.1.2., available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397502/API_Restricted_Leave_Article_1F.pdf> (last visited 14 Mar.ch 2016). [↑](#footnote-ref-85)
86. UK legislation provides that exclusion under Article 1F should be considered before an inclusion decision, which could potentially mean a number of Article 1F-excluded individuals for whom there are not human rights barriers to removal. However, in practice this ‘exclusion before inclusion’ approach does not appear to be used by decision makers, who prefer to consider an asylum application in the round. An exclusion decision is therefore unlikely to be made in the absence of a well-founded fear of persecution. S Singer, *Terrorism and Exclusion from Refugee* Status in the UK (n 83), 223-225. [↑](#footnote-ref-86)
87. Extradition in the UK is covered by the Extradition Act 2003. [↑](#footnote-ref-87)
88. See G. Gilbert, “Extradition”, *Journal of International Criminal Justice* (forthcoming). [↑](#footnote-ref-88)
89. House of Lords, Select Committee on Extradition Law, *2nd Report of Session 2014–15, Extradition: UK law and practice*, 10 Mar. 2015, available at: <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/126.pdf> (last visited 15 Apr. 2016). See particularly paras 88-94. [↑](#footnote-ref-89)
90. *Ibid*., paras 89-90. [↑](#footnote-ref-90)
91. BBC News, ”Rwanda genocide: UK judge rejects extradition bid”, 22 Dec. 2015, available at http://www.bbc.co.uk/news/uk-35162188 (last visited 8 Jan. 2016). [↑](#footnote-ref-91)
92. Geneva Conventions Act 1957. [↑](#footnote-ref-92)
93. Criminal Justice Act 1988, s 134. [↑](#footnote-ref-93)
94. Part IV of the Terrorism Act 2000 provides for universal jurisdiction over terrorist bombing and terrorist financing offences. [↑](#footnote-ref-94)
95. Parts I and II of the Aviation and Security Act 1988 provide for universal jurisdiction over hijacking an aircraft or ship. [↑](#footnote-ref-95)
96. Taking of Hostages Act 1982, s 1. [↑](#footnote-ref-96)
97. Genocide, war crimes and crimes against humanity are justiciable in the UK as a result of the  [International Criminal Court Act 2001](http://www.lexisnexis.com/uk/legal/docview/getDocForCuiReq?lni=4ST8-BNB0-TWPY-Y0G8&csi=274768&oc=00240&perma=true&elb=t) (as amended in 2009) if they took place after 1 January 2001. [↑](#footnote-ref-97)
98. Crown Prosecution Service, *War Crimes/Crimes Against Humanity Referral Guidelines*, s A, available at: <https://www.cps.gov.uk/publications/agencies/war_crimes.html> (last visited 15 Mar. 2016). [↑](#footnote-ref-98)
99. *Ibid*., s B. [↑](#footnote-ref-99)
100. *Ibid*., s C. Issues of immunity may be a factor taken into account when considering whether it is proportionate to conduct an effective investigation. [↑](#footnote-ref-100)
101. *Ibid*., s D. [↑](#footnote-ref-101)
102. Though the guidance does note that “If there is sufficient evidence of these crimes it is highly likely that a prosecution would be in the public interest.” *Ibid*., s D. [↑](#footnote-ref-102)
103. He was sentenced to 20 years imprisonment with a recommendation that he should be deported when he has served his sentence. [↑](#footnote-ref-103)
104. Memorandum submitted by the Ministry of Justice, “Offences of Genocide, Torture and Related Offences” in Joint Committee on Human Rights, *Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims*, Twenty–fourth Report of Session 2008–09, 21 Jul. 2009, para 18, available at: <http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/153/153.pdf> (last visited 14 Mar. 2016). [↑](#footnote-ref-104)
105. The most recent Policy Instruction was published on 23 Jan. 2015. Home Office, *Restricted Leave* (n 83). [↑](#footnote-ref-105)
106. Article 33(2) of the Refugee Convention provides: “The benefit of the present provision [protection against *refoulement*] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”. Though not strictly speaking exclusion from refugee status, as this is a disapplication of States’ Article 33(1) *non-refoulement* obligations, Arts. 33(2) and 1F have often been confused and merged in practice. See, for example, Art. 14(4) and (5) of the 2004 EU Qualification Directive, which instructs Member States they may “revoke, end or refuse to renew” or “decide not to grant” refugee status where the conditions of Article 33(2) Refugee Convention are met. [↑](#footnote-ref-106)
107. “to emphasise its short-term nature and because it would be at odds with the aim of this policy to permit such a person to re-enter the UK. If someone with leave for six months or less travels outside the UK, their leave will lapse.” Home Office, *Restricted Leave* (n 86), s.4.2.1. [↑](#footnote-ref-107)
108. *Ibid*., s.4.3.1. [↑](#footnote-ref-108)
109. *Ibid*., s.1.2.2. This policy of restricted leave resembles the ‘special immigration status’ set out in ss. 130–137 of the Criminal Justice and Immigration Act 2008, which was the government’s response to defeat in the High Court and Court of Appeal over the longstanding failure and ultimate refusal of the Home Office to grant discretionary leave to the group of Afghan nationals mentioned in the introduction to this paper, who hijacked an aircraft to travel to the UK. However, this section of the 2008 Act has not come into force. See S. Symonds , “The special immigration status”, *Journal of Immigration Asylum and Nationality Law*, 22(4), 333–349 [↑](#footnote-ref-109)
110. Home Office, *Restricted Leave* (n 86), s.2.2.1 [↑](#footnote-ref-110)
111. Sources: FoI response 37933 (n 44); FoI response 34343, 11th Mar. 2015; FoI response 31164, 29th Apr. 2014; FoI response 28840, 9th Oct. 2013 (all held on file by author). [↑](#footnote-ref-111)
112. As noted by the Court of Appeal in *R(Kardi) v Secretary of State for the Home Department* [2014] EWCA Civ 934 (10 July 2014), considered below. [↑](#footnote-ref-112)
113. Home Office, *Restricted Leave* (n 86), s.1.2.5. [↑](#footnote-ref-113)
114. *R(Kardi)* (n 113), para 47. [↑](#footnote-ref-114)
115. *Ibid*., paras. 47 and 32. See also the case *R(N)*, which concerned one of the Afghan hijackers mentioned in the introduction to this article. This case concerned the previous policy of discretionary leave, however the principles might be thought to equate to the current Restricted Leave policy. The Court in this case noted that: “Accordingly, in principle, to award only six months is not in the least unreasonable. But the policy has, as it were, a cap. It is recognised that there will come a time when - provided the individual has behaved himself in this country - it would be proper to regard him as having put behind him, as it were, the original offending. Thus if someone has been here for ten years and subjected to a series of discretionary leaves for that period he will normally be able to remain here indefinitely. He will, after all, be expected by then to have made his life in this country, to have settled here, perhaps to have established family life here.” *R(N) v Secretary of State for the Home Department* [2009] EWHC 1581, para 22. [↑](#footnote-ref-115)
116. *R(MS) v Secretary of State for the Home Department* *(excluded persons: Restrictive Leave policy)* [2015] UKUT 539, para 145. [↑](#footnote-ref-116)
117. *Ibid*., para 144. [↑](#footnote-ref-117)
118. *Ibid*., para 132. [↑](#footnote-ref-118)
119. *Ruhumuliza (Article 1F and "undesirable": Rwanda)* [2016] UKUT 284 (IAC), para 5 [↑](#footnote-ref-119)
120. Para 11 [↑](#footnote-ref-120)
121. Para 14 [↑](#footnote-ref-121)