

Reframing unlawful controls: judicial impact on UK asylum and deportation policy, 1990-2012.

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Declaration

I declare that the work contained within has been composed by me and is entirely my own work. No part of this thesis has been submitted for any other degree or professional qualification.

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Abstract

Supra-national and municipal courts are increasingly involved in determining the parameters of European states' refugee and asylum policy. Yet, little attention has been paid to how and why governments choose to comply with judicial decisions which constrain their policy goals. In the UK, judicial oversight of asylum control has occasionally met with outspoken political opposition, which has even challenged the legitimacy of judicial scrutiny. Nevertheless, 'compliance' typically follows. This makes it all the more important to consider how and why judicial decisions on the lawfulness of asylum and deportation controls do nevertheless impact upon policy change and its justification by government.

To identify key mechanisms which condition the impact of judicial decisions on the politics and policies of asylum control, this thesis presents comparative qualitative case study research into UK government responses to European Court of Human Rights (ECtHR) and municipal court rulings which concern deportation and asylum control policies. Comparative consideration is given to significance attached by governments to the source of the ruling (UK / ECtHR) and whether compliance was politically contested. Politicisation and domestic rulings are each expected to allow greater governmental opposition to judicial impact on policy goals. To capture variation, my analysis differentiates judicial impact on two typological planes: governmental response and the level of generality of governing ideas 'at stake' therein. This mobilises the explanatory potential of governmental framings of 'the problem' of compliance, in terms of how constraining it is perceived to be; whether removing a policy instrument which can be readily replaced, challenging the continuity of underlying programmatic logics, or even the guiding public philosophy informing deportation and asylum control. Where more general governing ideas are at stake, governmental responses can be expected to reflect opposition to judicial impact.

Critical framing analysis of the government's discursive response is applied to four key cases, ranging from 1990 to 2012. Framing is presented as a necessarily observable process through which judicial impact is manifest within government, and can be traced. Specifically, I analyse how the 'problem' of compliance and its policy impact are framed in political rhetoric which responds to the courts and in documents through

which government interprets and inscribes the meaning and implementation of judicial decisions. My findings suggest that whilst governance of asylum and deportation in the UK may labour under a judicial shadow, this has not precluded legal risk taking and efforts to 'contain' the impact of individual rulings on the viability of the overarching policy regime. By identifying the role of governing ideas 'at stake' in governmental framings of judicial impact, I argue that it is possible to account for varying political responses to the courts, including politicisation of compliance. Where impact is framed as more general, politicisation of compliance follows. In contrast, the source of the ruling appears to have no independent significance to responses. The importance of a distinction between judicial impact on justificatory political rhetoric and the practice of administrative compliance is also reinforced.

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List of abbreviations used

AIT	Asylum and Immigration Tribunal
ATCSA	<i>Anti-terrorism, Crime and Security Act 2001</i>
BBC	British Broadcasting Corporation
COE	Council of Europe
DCA	Department for Constitutional Affairs
EC	European Community
ECJ	European Court of Justice
ECHR	<i>European Convention on Human Rights 1950</i>
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRA	<i>Human Rights Act 1998</i>
ILPA	Immigration Law Practitioners Association
IND	Immigration and Nationality Directorate
IPPR	Institute for Public Policy Research
JCHR	Joint Parliamentary Committee on Human Rights
JCWI	Joint Council for the Welfare of Immigrants
MoU	Memorandum of Understanding
MPI	Migration Policy Institute
OECD	Organisation for Economic Cooperation and Development
SIAC	Special Immigration Appeals Commission
UKBA	United Kingdom Border Agency
UKCA	United Kingdom Court of Appeal
UKHC	United Kingdom High Court
UKHL	Appellate Committee of the House of Lords
UKSC	United Kingdom Supreme Court
UNHCR	United Nations High Commissioner for Refugees

1. Introduction: the politics, administration and judicial scrutiny of asylum control in the UK.

Introduction

Subject of the thesis

Over the past twenty-five years, provision of asylum to refugees fleeing persecution has become an issue of great political importance. Supra-national and municipal courts are also increasingly involved in determining the parameters of European states' refugee and asylum policy. Judicial decisions have concerned not only whether particular individuals should be granted protection from persecution (i.e. asylum), but also the boundaries of political discretion over asylum control and constitutional debates on the role of foreign nationals' human rights. Yet, little attention has been paid to how and why governments choose to comply with judicial decisions which constrain their policy goals. In the UK, extensive judicial oversight of asylum control has occasionally met with outspoken political opposition, which has even challenged the legitimacy of judicial scrutiny. Some commentators have branded the issue "a potentially fatal fault line in the constitution" (Cavendish, 2006, p. 21; see also, Rozenberg, 1997). Nevertheless, 'compliance' typically follows even unwelcome judicial decisions. This makes it all the more important to consider how and why judicial decisions on the lawfulness of asylum controls and deportation do nevertheless impact upon policy change and its justification by government.

This thesis investigates the impact of judicial decisions from the UK municipal courts and European Court of Human Rights on reformulation of deportation and asylum control policies in the UK over a period of twenty-two years, between 1990 and 2012. Interrogating governmental responses to the courts, I seek to identify and understand the significance of factors which shape governmental attitudes towards compliance, associated changes to asylum control policies and their political justification. Although their influence has hitherto been dismissed as negligible (Joppke, 1998b, 1999) or politically contested (Rawlings, 2005), *prima facie* it seems clear that the courts have indeed influenced changes to asylum control policies. However, I will argue in this

thesis that the judiciary does not exercise a straightforward ‘constraint’ on policies and their implementation. Necessary attention must be given to the significant governmental discretion exercised in determining the meaning, significance and impact of particular judicial decisions on asylum control.

Structure of this chapter

In this chapter, I begin by setting out the potential insights to be gained from the study of judicial impact on asylum control in the UK. I then introduce asylum control in the UK according to three integral facets: the politics of asylum control, its administrative culture, and the rise of judicial scrutiny. Introducing the topic in this manner allows me to subsequently summarise the fundamental governing ideas which have underpinned asylum control during the period under review. This delineation of ‘governing ideas’ will inform subsequent consideration of judicial impact on governance of asylum throughout the thesis. I close the chapter by briefly summarising my approach to the study of judicial impact on asylum control and the structure of the remainder of the thesis.

Why this topic warrants investigation

Accounting for reluctant compliance

This thesis is motivated firstly by an empirical problem. There has been a seemingly paradoxical tendency of governments towards hard political rhetoric condemning certain judicial decisions as unwarranted or illegitimate, yet almost unfailing compliance with the courts in practice. In seeking to interrogate the relationship between such rhetoric and policy change, I build on interpretive approaches to the role of ideas in policy governance to address a related theoretical problem: there is a surprising lack of insight into *how* and *why* governments enact reluctant policy change, particularly in response to the courts. Migration scholars tend to accept a particularly significant role for the courts in constraining otherwise illiberal migration controls, although this function has not been regarded as particularly strong in the UK. Much has been said in broader political science on conditions under which governments may reject, accept or even welcome judicial input in policy making (Davis, 2010; Rosenberg, 2008; Shapiro & Stone Sweet, 2002; Silverstein, 2009; Stone Sweet, 2000). There is an even larger, somewhat sceptical literature on judicial impact on bureaucratic behaviour (summarised by Canon & Johnson, 1999; Hertogh & Halliday, 2004a; Richardson,

2004). Yet these existing approaches are not particularly instructive in cases of ‘reluctant policy change.’

In order to better understand this specific, yet seemingly common phenomenon, I embrace a broad synthesis of approaches to the study of judicial impact, policy change, and the politics of immigration and asylum, to develop a plausible theoretical model for interrogating variation in the impact of the courts on changes to asylum control policy in the UK and its political framing. By investigating judicial impact on asylum control from the perspective of the respondent government, important empirical insight can be brought to bear in addressing a gap in understanding as to how and why compliance appears to follow the courts in almost all cases (Hertogh & Halliday, 2004a).

In particular, the curious disconnect between rhetoric opposing judicial constraints and the practice of compliance makes asylum control in the UK an unusual and potentially illustrative case study. Investigation of this ‘disconnect’ between what governments say and what they do may provide significant insights into both the politics of asylum control and governmental attitudes towards the judiciary and rule of law. Attending to the reception and reaction to judicial decisions within government allows for consideration of the political forces which shape legal outcomes, whilst also considering the role played in political outcomes by law. As such, this thesis contributes to a number of existing academic debates: on the possible distinctiveness of executive attitudes to the rule of law (Daintith & Page, 1999); the role of political interpretation in government (Baachi, 2009; D. Stone, 2002; Zittoun, 2009); and their function as determinants of judicial decisions’ impact on policy change. My approach also comprises a rare ‘interpretivist’ contribution to ongoing debates in migration studies about the role of courts in constraining illiberal restrictions on immigration and asylum (Bonjour, 2011; Guiraudon, 2000; Hollifield, 1992; Joppke & Marzal, 2004; Joppke, 1998a, 1999, 2001; Kavar, 2012; Thomas, 2003, 2013).

Potential insights from studying asylum control in the UK

The UK also makes for a compelling case study of judicial impact on policy change for a number of other theoretical and methodological reasons. I wish to briefly emphasise some of these distinctive characteristics of the politics of asylum control and judicial review in the UK. I will then return to locate my research within this context in more detail below.

Over the duration of the period studied in this thesis (1990-2012), the British public, media, and successive governments and opposition political parties, have been consistently supportive of restrictions on immigration and asylum (Harvey, 2000; Jennings, 2010; L. Morris, 2010). This may suggest possible governmental intransigence towards implementation of court rulings which impede restrictions, making asylum control in the UK a possible 'hard case' (Eckstein, 1975) in which to find a constraining judicial impact on policy change. This assessment is also supported by the comparatively 'weak' form of judicial review in the UK: the British judiciary cannot 'strike down' unlawful policies and depends on the executive and parliament to initiate reforms in line with its rulings. Indeed, this constitutional fact of government in the UK emphasises the general importance of considering the role of political processes involved in determining judicial impact – for rulings of both municipal and supranational courts.

Asylum control in the UK is also an important case for studying how governments respond to unwelcome judicial pressure for reform. Immigration and asylum contribute a sizeable majority of the UK senior courts' growing case load, and are regularly considered by the ECtHR, resulting in a particularly large volume of 'adverse' rulings against UK governments (see figures 3-5 in appendix 1). On a practical level, this renders asylum conducive to empirical analysis of possible variation in judicial impact. However, asylum control is also a particularly interesting case. It is perhaps uniquely bound by a tension between discretionary political authority over individuals and the potential activation of extensive legal and human rights constraints on the exercise of such powers. Sustained judicial oversight has been transformative of asylum in the UK: from a subsidiary of immigration policy into a fully-fledged institution which is subject to strong judicial oversight, extensive procedural safeguards and human rights guarantees. This process of transformation can be traced from its initiation to fruition in the space of only twenty-five years - by analysis of a handful of landmark judicial rulings.

My investigation of judicial impact on policy change focuses particularly on deportation and removal, as well as policy alternatives pursued where such expulsion is precluded by jurisprudential constraints. Judicial oversight has been particularly impactful in this area of immigration and asylum control. A freedom of information request by *The Guardian* newspaper revealed that between 2007 and 2012, 22,079 removal orders and

1,450 deportation orders were cancelled due to successful judicial challenges. In 2012, 18% of enforced removals were ruled unlawful, and as many as 50% of all removal orders were cancelled (Taylor, 2013). These figures suggest that deportation and removal are both a significant and normatively important case for investigation of judicial constraints on state power over the individual. Courts are often a last resort for extremely vulnerable foreign nationals seeking protection, over whose fate the state exercises a very high degree of discretionary power, with potential life and death consequences.

Asylum control in the UK

Having briefly introduced the topic of the thesis and its intended added value, I now wish to locate it within the broader context of the politics, administration and judicial review of asylum control in the UK, over recent decades. Besides providing a necessary introduction to the topic, this overview also concludes by summarising and specifying consistent trends and governing ideas which have underpinned asylum control in the UK. This overview is therefore intended to facilitate subsequent chapters' interrogation of how asylum control has been impacted upon by the courts.

The restrictive politics and policies of asylum control

From 1990 to 2012, the period studied in this thesis, between eighteen and eighty-five thousand applications were made per year for asylum in the UK. These individuals sought protection from “fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” in their home state (*UN Convention Relating to the Status of Refugees 1951*, Art. 1.A(2)). As can be seen in figure one in appendix one, a large proportion of applications are unsuccessful. Some of those who fail to qualify as refugees are awarded humanitarian protection or other forms of leave in accordance with the ECHR. Ultimately, both refugee status and humanitarian protection are awarded at the discretion of the state. Yet the right to seek asylum and international protection are reinforced not only by international refugee law and its implementation in British law, but also by a plethora of human rights guarantees which are upheld by the courts – particularly the prohibition on removal of an individual to a prospect of torture, cruel, inhuman or degrading treatment (ECHR Art.3; *United Nations Convention Against Torture 1984*, Art.3(1); *International Covenant on Civil and Political Rights 1966*: Art.7). Given this cocktail of state discretion and rights

protections which characterise asylum, it is perhaps little surprise that its award, refusal and withdrawal have become subject to frequent judicial review. However, UK asylum controls are also characterised by a growing regime of restrictive policies.

Attitudes to asylum control in the UK

Notwithstanding its grounding in refugee and human rights law, in the UK, asylum has been persistently and overwhelmingly conflated with immigration control (Joppke, 1999, p. 128). Until 1993, there was no distinction in British law between immigration and asylum policy, which was handled under the *Immigration Act 1971* and non-statutory immigration rules (Macdonald & Blake, 1991). There was no opportunity to appeal initial decisions by the immigration authorities from within the UK – resulting in possible *refoulement*. This historical legacy is still reflected institutionally: immigration and asylum share a bureaucracy, policy regime and government minister. The conflation has been sustained not only in public attitudes and media reporting (Baker et al., 2008; McLaren & Johnson, 2007, p. 728, at 7) but also in political discourse over several decades (Goodman & Speer, 2007; Layton-Henry, 2004). Politicians have fixated on “good migration” versus “mass migration” (Gower & Hawkins, 2013), including perceived abuse of immigration controls by “bogus” asylum seekers (Home Office, 2005, s.27; Menz, 2009, p. 155).

As a consequence, the politics and administration of asylum have been dominated by a “rhetorical panic” over numbers, often at the expense of attention to effective administration, fairness or humanitarianism (Sanderson, 2011; Spencer, 2007, p. 341). A raft of restrictions on access to asylum has been motivated by a desire to demonstrate that the UK (or government of the day) is not a “soft touch”, and has the issue under control (Layton-Henry, 2004). That asylum has fallen within the purview of restrictive immigration control, clearly sets dominant public and political attitudes apart from the judiciary’s more recent approach to asylum as a form of humanitarian protection, often involving complex consideration of individual human rights protections.

Restrictive policies

Reduction in asylum seekers and illegal entrants was a government policy as early as 1985 (Cerna & Wietholtz, 2011, p. 212), and became an explicit political priority of Prime Minister Tony Blair, during a peak in applications in the early 2000s (Spencer, 2007). Among a multitude of restrictions on access to asylum and its enjoyment within

the country, visa restrictions and ‘carrier sanctions’ upon those transporting undocumented travellers have made legal arrival in the UK difficult (Gibney, 2004, p. 123); implementation of the *Dublin Regulation*, requiring asylum to be claimed in the first European Union country of transit, has facilitated repulsion of asylum seekers to third countries (Lavenex, 1999; Noll, 2003); there has been a marked rise in expulsion of ‘failed’ asylum seekers (Gibney, 2008) and foreign nationals suspected of threatening national security or the public good (Hampshire, 2009; Paoletti, 2010); and successive waves of new legislation have sought to diminish rights of appeal against asylum determinations – although with mixed success (Rawlings, 2005).

Particularly strong discretion to restrict migration was provided to the Home Office in the form of enhanced deportation powers by the *Immigration Act 1971* (Joppke, 1999), which was legislated in the wake of governmental pledges to end mass migration (Cerna & Wietholtz, 2011, p. 197). Whilst a commitment to zero-migration gave way to acceptance of economically beneficial “managed migration” (Home Office, 2002b) under the New Labour government of 1997 to 2010, this was accompanied by even stricter controls on unwanted migration, including asylum – driven in large part by a “race to the bottom” between political parties keen to capitalise on public unease (Cerna & Wietholtz, 2011, p. 125; Somerville, 2007, p. 126). Governmental desire to be seen to be in control is indicated in the language of Home Office documents (1998, 2002b), party political manifestos (e.g. New Labour, 1997) and the sheer volume and frequency of legislation over the past twenty years: major immigration legislation was passed in 1993, 1996, 1999, 2002, 2004, 2006, 2007, 2008, 2009 and 2014. The role or function of the asylum tribunal system was also significantly restructured in 2003, 2005 and 2010. In parallel to this legislative flurry, there has been ongoing adjustment of the immigration rules, which play a significant role in asylum control (Hansen, 2000), and have until recently been incorporated without parliamentary oversight.

Indeed, there is technically no legal route of entry to the UK for those wishing to claim asylum on arrival – a consequence of strict pre-travel identity checks and visa controls which fail to adequately distinguish between irregular migrants and those seeking asylum from persecution. Even a modest annual quota allowing legal arrival of refugees recognised by the UNHCR as in grave need of resettlement has consistently not been met (Cooley & Rutter, 2007; Home Office, 2010, p. 30). Those who succeed in arriving in the UK to claim protection can be subject to detention in prison-like conditions; may

be forcibly relocated; are not allowed to work; are subject to restrictions on welfare support; and susceptible to destitution during often extended delays in initial decision making or while awaiting subsequent removal proceedings in the likely event that their application for asylum or humanitarian protection should be refused (Schuster, 2003). Put briefly, successive British governments (like many other OECD states), appear to have disregarded the expansive normative imperative issued by international refugee law, which calls for high standards of treatment for asylum seekers and refugees, the removal of barriers against the claim of asylum, and the enjoyment of procedural safeguards against expulsion to a real risk of ill-treatment (*non-refoulement*) (Hathaway, 2005; Kneebone, 2009; O'Sullivan, 2009).

Liberal paradox

I do not wish to contest the prevalent observation that the politics and policies of asylum control in the UK are characterised by restrictions rather than expansive humanitarianism. I do, however, wish to argue that restrictions imposed upon asylum are not a consequence of governments acting outside of existing legal constraints. In this regard, I stand apart from claims made in critical security studies, that immigration and asylum control have lent themselves to government by exceptional measures, free from constraint by liberal values and institutions (Buzan, Wæver, & de Wilde, 1998; Huysmans & Buonfino, 2008; Huysmans, 2006; c.f. Boswell, 2007a). Whilst arguably not consistent with the spirit of international refugee law, British asylum control policies are governed by the domestic incorporation of refugee law in national law (Kneebone, 2009). Although there is no supranational judicial body to monitor compliance with the *Refugee Convention*, the lawfulness of immigration and asylum controls is not only overseen by a national tribunal system, but has also dominated the case load of the British senior courts.

Somewhat ironically, this frequent judicial barrier to expulsion has been considered a likely cause for increasingly restrictive barriers to entry. This has been termed a 'liberal paradox': strong liberal protections on foreign nationals' rights once present on the territory of the state have led to illiberal restrictions to preclude access to these territorially bound protections (Gibney & Hansen, 2003). Such observations of illiberal responses to liberal values espoused by the courts at once recognise a role for judicial constraint and yet indicate a political willingness to circumnavigate its effects on state

capacity to control immigration and asylum. The observation of this paradox goes some way to problematizing the common tenet in academic literature on migration that courts have imposed a judicial constraint on illiberal immigration and asylum controls (notably, Hollifield, 1992; Joppke, 1998b, 1999, among many others).

The rise of deportation

Within the broad area of British asylum policy, this thesis pays much attention to removal and deportation measures as a compelling policy area for the investigation of judicial constraint. A common unifying factor between deportation and removals is the threat or use of force to expel individual non-citizens (Gibney, Anderson, & Paoletti, 2011, p. 549). Expulsion of foreign nationals is perhaps the quintessential example of the state's coercive power over the individual: an "emphatic reaffirmation of state sovereignty itself" (De Genova & Peutz, 2010, p. 2). Deportation and removal are, however, distinct legal powers. If a person claiming asylum is not recognised to be a legitimate refugee, they may become subject to a removal order. Even recognised refugees, among other foreign nationals considered by the state to be a threat to the public good, may readily be subjected to a deportation order. Whilst removal orders are pursuant to the executive's prerogative over the entry of aliens, deportation is administratively initiated on the sole grounds of the Home Secretary's 'reasonable suspicion' and 'belief' that a person's expulsion is conducive to 'the public good' (*Immigration Act 1971: s.3(5)(a)*). In other words, this is policy area which is subject to an extremely high degree of political discretion. As removal proceedings have been shortened and rights of appeal "eroded almost to vanishing point", the result has been a significant tendency to seek judicial review (Clayton, 2012, pp. 568, 588).

Removals have always been an integral, if inconsistent and lacklustre tool of asylum control in the UK (see figure two in appendix one; Home Affairs Committee, 2003). Although long considered an impractical and potentially politically costly tool (Gibney & Hansen, 2003), there has been a doubling of those leaving the UK under a threat of removal or by its coercive implementation, between 1997 and 2009 (Gibney et al., 2011, p. 550). This is consistent with a dramatic rise in many liberal states' threat and use of such coercive powers, which has been characterised as a remarkable "turn to deportation" (Gibney et al., 2011, p. 551; Gibney, 2008). In the UK, growth in deportation has partly been justified by concerns over what to do with foreign nationals

suspected of involvement in terrorism, particularly in political rhetoric (Gibney, 2008, p. 167; Paoletti, 2010, p. 21). Although Home Office statistics (see figure two in appendix one) indicate an inconsistent and partial record of implementation of removal orders, we may note Prime Minister Tony Blair's "tipping point target" (Blair, 2004) to remove more asylum seekers than apply each month. The willingness of the government to pursue such a coercive regime of large scale expulsion, even if only by issuing paperwork to foreign nationals, is highly significant in its indication of a willingness to coercively control inclusion and exclusion within the bounds of sovereign borders.

Asylum control as a policy culture

Having indicated the importance of political discretion as a defining attribute of UK asylum controls, it is also important to note its distinctive policy culture. The impact of a judicial decision will depend on how policy makers consider it alongside a complex matrix of other potentially conflicting pressures for attention. Many words have been used to describe this context, perhaps best evoked as an "administrative soup", in which law competes with other influences. The discretion available to implementing actors (S. Halliday, 2004; Richardson, 2004, p. 127) and attitudes towards the law in general (Ewick & Silbey, 1998; Hertogh & Halliday, 2004b, p. 283) are therefore vital considerations in understanding responses to the courts. However, we may do well to remember that such factors are not merely a cognitive facet of decision makers, but also derive from the context in which discretion is exercised. In this respect, the nature of asylum control in the UK as a policy domain is highly relevant to consideration of how policy decisions are determined, including how to respond to the courts.

In practice, refugee law varies from state to state according to its domestic implementation (Kneebone, 2009). In the UK, administration of asylum control has been characterised as subject to "more or less unlimited discretion in its determination of who is a refugee and what rights they should be afforded." (Addo, 1994) This discretion has been enhanced by the particular strength of the executive under comparatively weak legislative and judicial oversight, and historic lack of an enforceable bill of rights (Hansen, 2000). Even after the *Human Rights Act 1998* (HRA) came into effect in 2000, the significance of judicial scrutiny of how rights are impacted by immigration and asylum control has been contested (Cerna & Wietholtz, 2011, p. 204; Statham & Geddes, 2006). As I will discuss further below, the boundaries

of executive discretion in immigration and asylum have become increasingly subject to judicial supervision. However, the culture of discretionary authority which has been observed in asylum control deserves consideration. Organisational orientations are often acknowledged as producing particular, “overall policy perspectives and approaches to problems, including how problems are defined – or denied – in the first place, thereby serving to shape the institutional agenda.” (Dorey, 2005, p. 93) Such organisational perspectives and approaches to problems will be of significance to subsequent interrogation of how the Home Office has responded to the courts (as the institution responsible for immigration and asylum policy).

The organisational culture of the Home Office and associated agencies

The importance of interrogating the Home Office’s response to judicial decisions on a case by case basis is reinforced by a consensus among studies suggesting that it is an inherently unpredictable and reactive organisation. The Home Office, and the various historical incarnations of the Border Agency (UKBA), have generally been characterised as “muddling through”(Simon, 1957) a relentless stream of political (and legal) controversies, in a purely reactive fashion (Boswell, 2007a; Mulvey, 2010). Successive Home Secretaries have themselves characterised life in the department in just such as fashion: absorbing “punishments”, incurred as a result of “things coming out of the blue” (Blunkett, quoted in Pollard, 2005, p. 258); UKBA and its predecessors “often caught up in a vicious cycle of complex law and poor enforcement of its own policies...” (May, quoted in Travis, 2013b). UKBA’s own documents openly characterise the law and practice of migration and asylum control as “complex” (UKBA, 2011, p. 11). This reflects the interdependency of asylum and other equally controversial political issues, such as national security, welfare, housing, education and the labour market, in addition to broad social and political values, such as humanitarianism, citizenship, and civic integration. However, the complexity of asylum control has often been cast by governments as a product of the large amount of case law flowing from the tribunal and courts. The judicial imposition of untenably “complex” and “increasingly ornate procedural requirements”, in the early 1990s (Clarke in HC Debate (02 Feb) 1992,c. 31-32) was still being decried in 2012 as “anathema to good administration”, due to judicial “unpredictability and inconsistency” (May in HC Debate (23 Oct) 2012,c. 189). From the Home Office perspective, judicial scrutiny has been presented as frustrating determinacy of policy outcomes.

Attitudes to the rule of law

Former Home Secretaries have described judicial decisions as requiring careful consideration of exactly how to comply (Clarke 2011) and legal advice as a “provisional” policy concern which is a “subject of debate” (Straw, 2010, pp. 25–6). Studies of the Home Office’s legal culture have observed a historical tendency to make decisions in isolation from the rest of government, and a propensity to take legal risks (Daintith & Page, 1999, p. 337; Kinley, 1993)—leaving the fine detail of legal questions to be determined only if and when a policy is “tested in the courts and we find there’s a problem.” (May, quoted in *The Guardian*, 2012b) This governing logic appears to have survived not only incorporation of the *Human Rights Act* as a primary consideration in policy making, but also attempts to centrally coordinate increased awareness of the role of judicial review and human rights during the tenure of New Labour in government (Daintith, 2001, p. 17; Treasury Solicitors, 2006).

Discretion necessary to such risk taking in asylum control has been facilitated by recourse to non-legislated “rules of practice” (Cerna & Wietholtz, 2011, p. 204). Until recently, the Home Secretary was not bound by these rules. Further to this, the Home Office has a poor reputation for compliance with the asylum tribunal (Thomas, 2013) and has, on rare occasions, opted to expel asylum seekers in direct contravention of a court order (UKHL 1994; Taylor, 2012). The particularly high rate of appeals against initial asylum decisions is also, arguably, illustrative of a sustained function of the courts in curtailing distinctive executive interpretations of legality (figure three in appendix one indicates the growing proportion of immigration and asylum applications to the High Court for review).

Observation of a strong will to executive discretion is consistent with how the Home Office has been characterised by comparative studies of the institutions of British government: subject to a departmental philosophy oriented around the balancing of liberty and security (Marsh, Richards et al. 2001: Ch.4). Discretion is a fundamental prerequisite to exercising authority over such a balance. Such a balancing act is also likely to be at odds with potential judicial invocation of the primacy rights and procedural justice, *ipso facto*. Where judicial decisions are interpreted by implementing actors as disruptive to a much laboured state of equilibrium between liberty and security, or discretion and constraint, compliance may be problematic, likely

engendering resistance to policy change. Intransigence may be particularly likely where the legitimacy of such an executive balancing act is brought into question. Where judicial decisions are interpreted as requiring a rebalancing of equilibrium between liberty and security, compliance may prove more likely. Such compliant changes may develop incrementally in response to rising pressure for policy change over the course of several run-ins with the courts, which serve to both elaborate and specify legal principles involved in a policy area, and also to heighten awareness of judicial scrutiny among other political actors within the policy community. Compliance with cases where the core goals of a policy are challenged is likely to be more controversial due to the implied difficulties in merely adjusting rules in response to the court.

Disparity between discretion and control

In general, studies of public policy consider the characteristic conditions of asylum control (complexity, ambiguity and potential for conflict) as tending to enhance the role of interpretation and discretion in implementation of policy change (Matland, 1995). Yet this discretion has not manifested itself in the form of demonstrable control over the outcomes of the administration of asylum. The UKBA and its predecessors have clearly not functioned as an output oriented organisation. It has consistently failed, over decades of administration, to meet targets for both the determination of initial asylum applications and removal of failed applicants. This has led to highly controversial backlogs of unresolved cases, at times in excess of 400,000 (Home Affairs Committee, 2003, 2011). The litany of condemnation the organisation has faced from within government is quite unprecedented: unfit for purpose (Reid in BBC News Online, 2006e); lacking shared understanding between policy makers and implementing actors (Independent Chief Inspector of the UKBA, 2012); a dehumanizing, “closed, secretive and defensive” organisation incapable of reform (Home Affairs Committee, in Taylor & Muir, 2010; May, in Travis, 2013b). One may readily observe that for the Border Agency, asylum has been beyond its effective control. Legitimation of its function at times of organisational crisis has typically depended upon its seemingly continuous reconfiguration and re-branding, most recently in 2013 with the outright abolition of UKBA as an independent agency. Yet, *plus ça change...* Even as the Home Secretary announced the abolition of UKBA, her Permanent Secretary reportedly reassured Home Office staff in an internal memo: “Most of us will still be doing the same job in the same place with the same colleagues for the same boss and with the same mission.”

(Travis, 2013a) Multiple historic changes to the organisational structure of the Border Agency do not appear to have resulted in changes to its organisational culture.

The recognised difficulties which the government faces in exercising demonstrable authority and control over asylum may bring uncomfortable attention to its bureaucratic decision making. Yet the politics of asylum has focused all the more on pledging demonstrable capacity. Such political rhetoric, along with the continual restructuring of the agency, may say much as to the importance of symbolic attempts to legitimate command over a policy domain which is considered not only out of control, but arguably beyond effective control. Responding to outside pressure, particularly from the public and media, to justify policies and their implementation continues to be a fundamental aspect of this process (Boswell, Geddes, & Scholten, 2011, p. 7). In this regard, when it comes to the governance of asylum control in general, and responding to the courts in particular, how policy change is transacted matters just as much as the substantive end result of that change. This is due in large part to the importance of public justification of change. Indeed, the articulation and justification of this change is perhaps one of the fundamental and instructive outputs of the process. As such, it is the primary focus of this thesis.

Judicial review in the UK

I now turn to the third and final thread which I present by way of an overview of the main factors which characterise the governance of asylum control in the UK: the role played by judicial review. In doing so, I will briefly summarise the nature and scope of judicial review in the UK, before turning to the particular significance of the courts to asylum control.

Judicial review and impact on policy change

In parallel to a rise in restrictive asylum controls over the past thirty years, there has been a dramatic growth in the scope and extent of judicial review in administrative law. Judicial confidence became increasingly emboldened in this period, extending the traditional role of judicial review from protecting the individual against abuse of governmental power towards a more expansive targeting of the exercise of executive discretion (Rawlings & Harlow, 2009, p. 98). This emboldening of judicial power developed in line with an extensive elaboration of administrative law; the UK's accession to the European Community; growth in the importance of European human

rights law, and its eventual domestic incorporation by the *Human Rights Act*. Asylum, in particular, comprised an area of governmental discretion over which the judiciary had deferred all oversight until this surge of judicial confidence in the 1980s.

The potential for a judicial decision to impact upon policy change is largely a product of the court's consideration of the legality of legislative provisions, operational guidelines and practices of implementing actors, and so is not tied to the particular outcome of a given case for the litigant. Judicial review is, however, limited to the issues raised in the specific case under consideration. Judicial review in the British courts has traditionally been limited to three grounds for challenging a decision of a government actor: illegality, irrationality (unreasonableness), and procedural impropriety (Stevens, 2004, p. 316). To these, we may add the more recent grounds provided by the *Human Rights Act* (HRA), which, since taking effect in 2000, has provided for review of the proportionality of decisions impacting upon specified civil and political rights (largely a domestic implementation of the ECHR in UK law), assessing justification for interference of a right in terms of the importance of the right interfered with. The HRA has also empowered the judiciary to consider whether statutory provisions comply with the UK's obligations under the ECHR, and to issue a declaration of incompatibility where the court cannot read the statute as compliant.

The doctrine of parliamentary sovereignty means that the courts cannot quash legislative provisions, whether found unlawful under common law or human rights law (Jones, Kavanagh, & Moran, 2007, pp. 597–8). However both parliament and the executive must consider whether to change the law in such a way as to bring it into line with the courts' interpretation of human rights requirements (HRA 1998, ss. 4, 10). Rulings cannot directly impact upon the continued implementation of policy, and require political actors to implement their content via reforms to statute (Kavanagh, 2009, p. 5). Similarly, rulings from the European Court of Human Rights require political action to implement them. Changes to policy or statute are therefore by no means guaranteed. A minister "may" order amendments "as he considers necessary to remove the incompatibility" (HRA 1998, s.10), but is not compelled to act, although parliament may press the issue (Davis, 2010, p. 91).

The role of the HRA as a point of reference in policy making is consistent with observations elsewhere that politics is becoming generally subject to careful

justification of decision making in terms of legal principles (see e.g. Jasanoff, 1995; Shapiro & Stone Sweet, 2002; Stone Sweet, 2000). Through the HRA, courts have been politically empowered to become implicated in policy making, and exert a strong normative authority and pressure upon parliament and the executive to reform legislation. Yet, as rulings may be subject to legislative overrule, the UK comprises a case of comparatively “weak” judicial review (Tushnet, 2003). Ultimately, rulings of the British judiciary could be sceptically regarded as little more than strong and authoritative advice which is hard to ignore. Whilst the HRA (along with other legal regimes, notably under membership of the European Union) may have transformed the legal and political landscape of the UK, the traditional role of the judiciary has remained largely unchanged: it cannot strike down or amend legislation; parliament has legislative supremacy; courts interpret and enforce the will of parliament (Richardson, 2004, p. 109). In this respect, there is some commonality between judicial rulings instigated on the basis of traditional grounds for judicial review, and those driven by consideration of principles deriving from the HRA; notably, that responsibility for enforcement of a judicial decision and determination of any necessary legislative change or political or administrative reforms to policy is left squarely in the hands of government and parliament, whether or not such reforms concern the protection of human rights.

The European Court of Human Rights (ECtHR)

Whilst it may be possible for the purposes of studying judicial impact on policy change to blur distinctions between case law and grounds for review which derive from the *Human Rights Act* and alternative legal principles, there is a very notable difference between judicial decisions emanating from municipal courts and those handed down from the ECtHR. Having jurisdiction only in cases where all available domestic remedies have been exhausted, the ECtHR has been considered by some as effectively comprising a de-facto constitutional court of last resort, empowered to review governmental policies and actions in terms of their impact on individuals’ human rights under the ECHR (e.g. Sadurski, 2009). In particular, processes and protocols initiated within government for reporting compliance with rulings from Strasbourg significantly pre-date more recent reporting on compliance with municipal courts to the Joint Parliamentary Committee on Human Rights, since its establishment in 2000. The supranational dynamic of the ECtHR invokes compulsory submission to the Council of

Europe of a plan of action on how the judicial decision will be implemented, thus implicating the Ministry of Justice and Foreign and Commonwealth Office in specifying a plan for compliance and in coordinating government departments involved in policy making (Ministry of Justice, 2010). This potential difference in coordinating actors involved in compliance with municipal courts and the ECtHR may also affect how decisions are made about associated policy change. However the impact of rulings from both 'sources' can be considered by recourse to the same governmental processes through which compliance is enacted: legislative change; change to operational guidelines; re-making of administrative decisions; and justification of changes by government.

Rise of judicial review of asylum

Having outlined the general nature and scope of judicial review, I now wish to indicate its particular significance to asylum control. From the late 1980s to the mid-1990s, the judiciary transitioned from a marked hands-off attitude towards asylum policy into an extensive and prolific supervisory role. In this respect, asylum became newly subject to the judicial review mechanisms which I have described above – operating to determine whether individual appellants were adversely affected by governmental failure to fulfil legal obligations, or by an overstepping of legally prescribed powers in its actions (judicial review of *ultra vires*). Until this historical juncture, asylum had been considered a diplomatic prerogative without need of public, political and legal oversight (Gibney, 2001; Grahl-Madsen, 1963, pp. 195–6; Thomas, 2003).

Remarkably, considering that the British government of the day had been central to drafting of the *Refugee Convention 1951* (Grahl-Madsen, 1963), to which the UK is a party, it was only in 1987 that the British judiciary found itself competent (or indeed, willing) to consider the implementation and effect of the *Refugee Convention* in British municipal law as a potential constraint upon immigration and asylum measures (UKHL 1987, 531). In his historical overview of judicial rulings on British asylum policy, Robert Thomas (2003) emphasises the unanticipated and rapid growth in asylum applications to the UK as a determinant of this sudden and belated interpolation of a judicial component into the governance of asylum. Between 1980 and 1990, annual applications rose from 2,352 to 26,205; more than a tenfold increase (MPI, 2009). This placed increased pressure upon existing institutional arrangements for the

administration of asylum, resulting in a decline in the procedural efficiency, consistency and perceived fairness of initial decisions on whether to grant asylum or order the applicant's removal. With between eighteen and eighty-one percent of applicants being refused both asylum and alternative statuses within the UK during this period (see figure one in appendix one), the result was an exponential rise in applications by asylum seekers to the judiciary to rectify perceived procedural injustices in the determination of these asylum decisions and precipitant detention and removal orders.

In the face of such pressures, motivated by its self-understanding as guarantor of procedural rights in public law, the judiciary has been regarded as having had little choice but to shake off its prior "self-abnegation" and assert jurisdiction over asylum (Thomas, 2003, p. 482). This historical deference of the judiciary stands in sharp contrast to recent judicial decisions, which have insisted that the Home Secretary's exercise of the royal prerogative to control entry of aliens must be subject to statutory limitations (UKSC 2012a, 2012b).

The role of the ECtHR in scrutiny of asylum control

Although the ECtHR has emphasised that it does not govern entry and expulsion of aliens, as a contracting party to the ECHR, the UK has an obligation to guarantee foreign nationals' rights under the convention (European Court of Human Rights Press Unit, 2011). This has particularly involved constraints on expulsion to a real risk of death, torture, cruel, inhuman or degrading treatment, or where there may be violation of the right to a family life in the host state.

The role of the ECtHR as a barrier to deportation and removal decisions has led to much ire among government ministers, who have decried "unelected judges" constraint of sovereign discretionary power to act in the national interest (Walters & Owen, 2013). Governmental resentment towards perceived interference by municipal and supranational courts dates back at least to the early 1990s (Griffith, 1997; Le Seur, 1996; Rozenberg, 1997). However, the recent 'turn to deportation' has led to increased political frustrations with judicial review. Ministers have even threatened to withdraw the UK from the ECtHR (Robson, 2013). The UK has a track record of occasionally delayed implementation and a substantial number of historic ECtHR judgements against it (Çalı & Wyss, 2009). However, between 2011 and 2012 (in the lead-up to threats of withdrawal), the UK lost only nine of twenty-eight cases against it at the ECtHR, whilst

the court rejected over two thousand applications against the UK as inadmissible (Council of Europe, 2011, 2013; Ministry of Justice, 2012) Nonetheless, the political challenges posed by judicial barriers to removal – for example of suspected terrorist, Abu Qatada – have posed particular challenges to the government’s ability to justify its effective capacity to exercise immigration controls.

Statistics on the significance of judicial review

Beyond the possibility that governments may be concerned over the symbolic incursion of the courts upon their objectives in asylum control, it is clear that judicial review exerts a profound and substantive pressure on the administration of asylum, which cannot be ignored. The majority of immigration judicial reviews were transferred to the Upper Tribunal of the Immigration and Asylum Chamber in November, 2013 (Ministry of Justice, 2013, p. 27). However, statistics compiled by Christopher Hood and Ruth Dixon (2012) indicate that judicial review of immigration and asylum has been the dominant contributor to a steady growth in applications to the High Court for judicial review since the municipal courts affirmed their jurisdiction in the late 1980s. These figures (see figure three in appendix one) indicate that a three-fold increase in applications for review since 1995 is largely due to immigration cases. Applications rose from 2,173 in 2000 to 13,210 in 2013, with 84% of all judicial reviews in 2012 relating to immigration or asylum (Ministry of Justice, 2013, p. 3). It may ostensibly appear that success rates are low - 6% to 14% of applications resulted in a ruling against the government between 2006 and 2011 (see figure four in appendix one). However, Robert Thomas (2013) has indicated that in 2011, 43% of immigrations cases which received a substantive hearing were successful.

Even this consideration of the pressure imposed on the executive by judicial scrutiny is most likely a gross under-estimate. Based on extensive interviews with public law practitioners, research by The Public Law Project (Sunkin & Bondy, 2009) suggests that a significant proportion of cases are resolved before commencement, simply by the solicitor threatening challenge (p.30). Of asylum cases sampled, they found a further 64% of those going forward to the court were settled before the court’s decision on permission (p.38). Such results indicate public authorities’ concession to the claim or that their case lacks merits. As such, judicial review’s true impact on governance of immigration and asylum is likely far beyond that suggested by the Ministry of Justice’s

own figures, as presented by Dixon and Hood. This extensive role in scrutinising mostly administrative actions is suggestive of the ‘expressive’ influence of judicial review as representative of rule of law principles. This is the oft-hypothesised ‘shadow’ cast by law over administrative behaviour (Cane, 2004; Rawlings & Harlow, 2009, p. 713).

Impact as implementation

This contextual and statistical overview may go some way to helping us understand why political actors have historically come to accept and not simply disregard judicial oversight of asylum. As already noted, however, the comparatively weak constitutional power of the municipal courts has led to scepticism about their authority over the executive. This is a particularly pressing concern given the great degree of discretion and appetite for illiberal restrictions which characterise the governance of asylum. Even to the extent that one may claim judicial activism, rulings could easily be dismissed as “courteous requests” to a sovereign, rather than “pronouncements of truth from on high.” (Gearty, 2006, p. 96) Under the doctrine of parliamentary sovereignty, parliament may not only nullify judicial decisions through legislation, it also has discretion to restrict the jurisdiction of the courts and conditions for accessing judicial review (Rawlings & Harlow, 2009, pp. 25–6). Moreover, recent resentful rhetoric from government ministers about the ECtHR, and indeed attempts to overturn the constraints of its jurisprudence (see Chapter 5), suggest a need for investigation of the extent to which we may observe vigorous compliance with its supranational rulings.

To some extent, governmental rejections of unwelcome judicial decisions as judge-made policy (implying an overstepping of parliamentary sovereignty) reflect the obvious political role of the courts. Jurists have observed that public law is indeed a form of political discourse (Loughlin, 2003) and that judges have always been “up to their necks in policy” (Wade, 1989, p. 78). Administrative and public lawyers also note the “mounting importance” of judicial review of high level policy decisions and compliance of legislation with EU law and the ECHR (De Smith, Woolf, & Jowell, 2007, p. 5). But simply highlighting the growth in judicial review tells us nothing of why governments would be willing to take judicial rulings on board as meaningful or authoritative, or even to pay lip-service to judicial decisions. That the courts lack material power to enforce their decisions requires investigation of rulings’ implementation as a necessarily political phenomenon. As a case study, the UK presents

an imperative to refocus attention on necessary political agency required to accept (or reject) and implement judicial decisions, including those which may impose constraints on future policy measures. The authority and meaning of judicial decisions is therefore best approached by reference to their interpretation and implementation by government. This requires investigation of the response from government to understand the significance and effect of judicial review on political and administrative outcomes – whether in terms of changes to policy or legislation, reconsideration of an administrative decision, or its impact on the rhetorical justification of compliance.

John Griffith is notable as one of the few British political scientists who have historically sought to bridge scholarship between policy making processes and the judiciary (1997). His focus on the political nature of the judiciary demonstrates some of the ire and fire with which controversial rulings have been met in Westminster and Whitehall. However, it is only by understanding the political processes underpinning the politicisation of law – or ultimately, law in context – that we may begin to account for why judgements meet with varying rhetorical responses and forms of implementation. This is to engage with the imperative for enquiry which is posed by the undeniable normative authority of law in democratic states, such as the UK. Law and judicial decisions are clearly both prescriptive and authoritative. However, it is equally clear that they are often both resented yet accepted by governments. Perhaps ironically, it is administrative lawyers, not political scientists, who have best expressed this paradoxical political authority of law and its call to empirical investigation:

it is difficult to resist the temptation to at least try to find out if and how law matters... (Hertogh & Halliday, 2004b, pp. 270–71)

By studying political responses to judicial review of deportation, removal and asylum control, this thesis seeks to avoid tendencies towards depicting politics either as labouring under an all-enveloping judicial shadow, or as subject to an intransigent political will to power, free from liberal constraints. A focus on how political actors have sought to interpret and justify their response to judicial decisions can allow us to apprehend variation in judicial impact. This allows for a more satisfactory appreciation of the potential variation in courts' influence over asylum controls, and possible factors which may account for such variation.

Specifying the ideas governing asylum control in the UK

When considering judicial impact as a function of political responses to the courts, care must be taken to have regard for what *government actors* perceive to be impacted upon by compliance. To facilitate this requirement, I now wish to summarise my overview of asylum control in the UK in terms of the consistent trends and concerns which have characterised its governance. In doing so, I will make use of Vivien Schmidt's (2008) distinction between three general levels of policy ideas engaged by political science. These provide a means of differentiating the governing ideas which have given substance and meaning to asylum control policies and their political framing in the UK over the past thirty years. This distinction may prove helpful in expressing variance in how governments have responded to the courts to reconcile judicial impact with asylum control policies. I will return to discuss this conceptual tool in greater detail in chapters 3 and 4. Briefly, however, one may distinguish governing ideas according to the following levels of generality:

1. Policies: the specific solutions proposed by policy makers;
2. The more general programmes which 'underpin' these policy ideas – the underlying programmatic logic which defines the problem to be solved; and
3. The foundational 'public philosophies' which ground these (J. L. Campbell, 1998) – the rarely contested assumptions and values on the ordering of knowledge and society. (Schmidt, 2008, p. 306)

In this manner, we may distinguish the underlying public philosophy of asylum control, its manifestation in a programmatic logic and policy tools through which governments have pursued policies of control. I consider political attitudes towards asylum control to have exemplified a relatively consistent trend towards restricting inclusion over the past thirty years. More recently, commentators have observed a decisive turn to more extensive use of deportation in the UK and other liberal states as a tool to ensure the effective policing of this goal (Gibney et al., 2011; Gibney, 2008). However, we may note the apparent willingness of a succession of governments since the late 1980s to not only pursue deportation as a tool for immigration and asylum control, but to enter into occasionally open conflict with the judiciary over the legitimate boundaries of its discretion to do so (Griffith, 1997; Hussain, 2001; Le Seur, 1996; Rawlings, 2005; Rozenberg, 1997; Thomas, 2003). The government's more recent self-imposition of targets for removals and deportations (Spencer, 2007) has entrenched a political and

organisational culture oriented around the maintenance and pursuit of administrative discretion over asylum control. Particularly striking, are the terms in which key policy papers have expressed the primacy of expedient removals and government being “seen” to be in “firm” control (Home Office, 1998, 2002b; New Labour, 1997). The symbolic performance of authority and capacity are clearly crucial factors in the politics of immigration and asylum control.

On the basis of my brief, indicative overview of the politics, administration and judicial review of asylum control, I summarise the following trends or governing ideas as foundational to governance of asylum in the UK over the past thirty years:

Public philosophy: Restrictive asylum controls.

The state seeks to exercise coercive controls necessary to restrict inclusion (and therefore enforce the exclusion) of certain foreign nationals, including asylum seekers. This is pursued in opposition to a more expansive humanitarian philosophy of asylum control.

Programmatic Logic: Executive discretion.

Demonstration of authoritative governance of inclusion and exclusion requires discretion to execute asylum controls. This is reflected in a governing logic of balancing political expediency against potential liberal constraints. The executive therefore seeks discretion over a balancing of inclusion/exclusion, individual/state, liberty/security, expediency/review.

Policy: Deportation, removal and restrictions on rights in-country.

The public philosophy and programme of asylum control are implemented by means of certain policy tools: expulsion and other forms of coercive control of unwanted foreign nationals, such as placing limitations on their human rights within the country. Policies may also seek to limit barriers to expedient and authoritative governance of asylum, notably by restricting access to judicial oversight.

My approach and structure of the thesis

In introducing the topic of asylum control in the UK above, I have endeavoured to show that its policies, administration, and associated political rhetoric are characterised by sustained judicial scrutiny. However, greater insight is required into how and why governments choose to comply with judicial decisions which purport to constrain their policy goals. In particular, I have highlighted an apparent gap between rhetorical opposition to unwelcome judicial decisions and 'compliant' policy change. Factors which shape governmental attitudes towards compliance with the courts in asylum control must be identified and investigated. Greater insight is required as to the determinants of reluctant compliance; gaps between rhetoric and practice; and variations in responses to judicial decisions which require policy change for compliance. This thesis will seek to address these gaps in knowledge about the influence of judicial decisions on policy change and its political framing in the area of asylum control.

Looking beyond questions of whether governments comply with 'adverse' judicial decisions, I employ a broader conception of 'judicial impact;' a complex of dynamic processes through which actors and institutions interpret often inconvenient judicial signals, and endeavour to justify their reconciliation with the continued, stable function of government. Judicial decisions must, after all, be translated into a politically meaningful programme for action which is intelligible to politicians and bureaucrats charged with implementation. As such, I seek to identify and explain judicial impact on policy change as exemplified in this process of sense-making and adjustment within government.

This is achieved by reference to how the political and administrative systems of government use rhetoric and documents. These practices serve not only to communicate, but also to constitute and sustain the stability and legitimacy of policy measures and political authority in response to judicial decisions which challenge prior narratives of legitimate asylum control. Judicial decisions which find against the government set into motion a process where key actors and institutions consolidate, document and express policy positions. Both political rhetoric and the production of documents by government are just such sense-making exercises, which seek to order social and political relations and meanings. Governmental documents and rhetoric serve not simply to specify and articulate policy positions in the face of judicial pressures, but also serve an ongoing process of elaborating and delimiting policies, justifying and legitimating positions proposed following challenges from the courts. Turning to the

assumptions, problem constructions and calls for action which these discursive sources express allows for interrogation of political attitudes to compliance and potential insights into the drivers and political significance of policy change in the wake of judicial decisions.

Structure of the thesis

In chapter 2, I begin reviewing the potential merits and deficiencies of existing literature which may be drawn upon to understand how judicial decisions impact changes to asylum policy and its political framing. Emphasis is placed on highlighting plausible accounts of how courts may influence political change and what form this may take. This provides a necessary starting point for identification of possible factors which may condition judicial impact.

Having highlighted the explanatory and conceptual deficiencies of existing approaches, Chapter 3 turns to consider more instructive insights into the process through which policy change happens, what such change may look like, and how it unfolds. I focus, in particular, on the role of political discourse in not only responding to and organising political pressures, but also constituting policy problems, such as compliance with the courts, as stable objects for political action. To capture variation, I call for differentiation of judicial impact on the basis of two analytic typologies: governmental response and the level of governing policy ideas which are articulated as impacted upon by compliance with the courts. I then turn to the significant role of governmental documents and political rhetoric in the process of policy change in response to the courts.

Chapter 4 advances a methodology for investigation of governmental responses to the courts, and associated impacts on policy – in the form of material actions, such as legislation and procedural rules effecting policy change, but also in the way this response is discursively articulated and justified in its political framing. I employ a qualitative case study based approach to contrast responses to judicial decisions on the basis of whether they are handed down from the European Court of Human Rights or a UK superior court, and whether compliance was politicised. I also delineate critical framing analysis as an effective tool for investigation of how the ‘problem’ of compliance and its policy impact are framed in political rhetoric and documents through which government interprets and inscribes the meaning and implementation of judicial decisions.

Chapters 5, 6 and 7 present my analysis and findings on judicial impact on policy change and its framing by government in my four chosen case studies. Particular consideration is given to significance attached by governments to the source of the ruling (UK / ECtHR) and whether compliance was politically contested. I also further marshal this data for consideration of the governmental response and the level of generality of governing ideas 'at stake' therein.

Chapter 8 draws together my empirical findings from each case study to compare the role of politicisation of compliance, source of ruling, response, and governing ideas expressed as 'at stake.' In doing so, I endeavour to elicit a deeper understanding of how and why judicial decisions impact upon changes to asylum control policy. Particular emphasis is placed on consideration of the role of governing ideas in governmental framings of judicial impact as a means of accounting for varying political responses to the courts. My findings suggest that whilst governance of asylum and deportation in the UK may labour under a judicial shadow, this has not precluded legal risk taking and efforts to 'contain' the impact of individual rulings on the viability of the overarching policy regime.

I conclude the thesis by emphasising that judicial impact is a political construct which is fundamentally predicated upon the intersection of judicial imperatives with pre-existing policy ideas. Building on my consideration of asylum control in the UK, I offer more general reflections on judicial impact on government and avenues for future research.

2. Judicial impact on policy change

Introduction

In this chapter, I consider the merits and deficiencies of existing literature which may be drawn upon to understand how judicial decisions impact upon changes to asylum policy and its political framing. I begin with debates in migration studies on the role of courts as constraints on otherwise illiberal and restrictive controls. Moving beyond the confines of this literature, I also explore potential for cross-fertilisation from a variety of disciplinary approaches to the influence of judicial power on legislators and government bureaucracies. I seek to highlight plausible accounts of how courts may influence political change and what form this may take. This provides a necessary starting point for identification of factors which may condition judicial impact. Notable deficiencies are identified in dominant approaches, which fail variously to account for compliance, non-compliance, and generally, for how and why variation exists in compliant implementation of policy changes in response to the courts. Towards the goal of better understanding the *how* and *why* of judicial impact, I draw on socio-legal scholarship which emphasises the importance of understanding ‘law in context’ – here, according to its interpretation and implementation by political actors in government. I close the chapter by summarising factors arising from existing scholarship which may plausibly help account for variation in judicial impact. I also establish a broad conceptual framework for the study of judicial impact as a product of political and bureaucratic function over time.

Approaches to the problem

Migration Literature

The academic study of liberal democratic states’ migration controls has been particularly concerned with accounting for why particular policy options are selected and why they either succeed or fail in their goals. This reflects a fundamental concern of social science, and public policy in particular – asking ‘why’ decisions are made, in order to better understand stability and change (Cairney, 2012, p. 1; Marsh, 2010). For the study of migration control, a particularly stable tendency towards political promises of management and control (Boswell & Geddes, 2011, p.

104) has led to extensive reflection on “why liberal states accept unwanted migration” (Joppke, 1998a). Also known as the policy failure thesis, this concerns the clear gap between rhetoric which specifies policy objectives and the reality of continued immigration which precludes their realisation (Boswell & Geddes, 2011, p. 112). Despite public pressures for increasing restrictions on immigration and asylum (Bommes & Geddes, 2000; Hollifield, 2004), liberal democracies have continued to accept migrants. The empirical problem of interrogating the motives and behaviour underpinning migration control has been approached both in terms of accounting for policy failures, as well as a characteristic mismatch between protectionist public opinion and more inclusive controls (Boswell, 2007b). Alongside the influence of organised lobbies, particularly on labour migration (G. P. Freeman, 1995), the role of courts as guarantors of aliens’ rights has been a central explanation for states’ apparent failure to coercively limit immigration and asylum.

As an institution oriented towards the protection of liberal universal values, including foreign nationals’ human rights, courts are typically held to impose a ‘liberal constraint’ on the restrictive tendencies of otherwise purportedly liberal democracies (Cornelius, Martin, & Hollifield, 1994; Gibney, 2001, p. 12; Guiraudon & Lahav, 2000; Guiraudon, 2000; Hollifield, 1992, p. 94, 2000; Joppke, 1998a, 1999, 2001; Soennecken, 2008). Migration scholars have therefore sought to identify sources of judicial power over entry and expulsion of aliens: judicial activism (Joppke, 2001, p. 358); an associated growth in rights for migrants (Cornelius et al., 1994, p. 9; Jacobson, 1997; Sassen, 1996; Soysal, 1994); and effective use of courts by organised advocacy groups (Kawar, 2012; Soennecken, 2008). This focus is consistent with contemporaneous, yet separate developments in the application of prior American scholarship on the relationship between courts and governments to European cases (Alter & Vargans, 2000; Chalmers, 2000; Conant, 2002; Epp, 1998; Mattli & Slaughter, 1998; North & Weingast, 1989; Shapiro & Stone, 1994; Stone Sweet, 2000). Both fields of study have delineated the incursion of courts as active policy makers into a domain previously exclusive to the executive and parliament. Christian Joppke, in particular, has held the immigrant to be “the most dramatic test case” for debates about whether individual human rights ‘trump’ majoritarian political decisions (Dworkin, 1978, p. 153; Joppke, 2001, p. 340).

Although variable across European states, this pseudo-constitutionalisation of migrants' rights has developed through repeated engagement of governments with the judiciary over the lawfulness of individual policies and administrative actions (Joppke & Marzal, 2004). Christian Joppke and Elia Marzal refer to not merely a 'division,' but "competition of powers in the liberal state", wherein legislators have come to dance around "the shadow" cast by the courts (2004, pp. 839–40, quoting Soltsez).

Migration literature on liberal constraint tends to take for granted the independence of the judiciary from public and political pressure (Boswell, 2007b, p. 83), as well as its commitment to an apolitical vision of universal legal principles (Joppke, 1999, p. 18). Yet, its liberal-judicial constraint thesis is grounded in a valid observation of growing conflict between courts and state administrations over not only the lawful exercise of state power in migration control, but also the protection of the human rights of unpopular minorities (Epp, 1998; Joppke, 2001, p. 340). However, beyond the identification of sources and forms of judicial power, little has been said as to how and why the courts exercise influence within political and administrative processes of government. Indeed, even less is offered on when judicial decisions will exert such an influence (Boswell, 2007b), and there is a notable silence on the form this may take, beyond simple 'constraint.' In recognition of this descriptive and explanatory deficiency, I wish to contribute to a more limited, recent turn towards not only questioning the presumed extent of judicial constraint of immigration and asylum control (Bonjour, 2011; Messina, 2007), but more importantly, questioning how judicial power is manifest as a constitutive influence over political values and agendas of immigration control (Kawar, 2012). I do not mean to suggest that existing insights into the role of the courts should be dismissed. In particular, I wish to give brief consideration to the main features of existing studies of the courts' influence as a starting point for consideration of alternative approaches to the problem.

Domestic courts vs supranational rights

Existing literature has debated whether illiberal migration policies have been constrained due to a growth in European human rights law (Jacobson, 1997; Sassen, 1996, 1999; Soysal, 1994) or as a result of judicial review by the domestic courts

(Guiraudon, 2000; Joppke, 1999, 2001, p. 339). Such accounts tend to appeal either to the role of liberal values “embedded” within liberal states’ identities (Hollifield, 1992, pp. 26–8) or the opportunity for migrants to appeal to an extra-national extension of human rights which are independent of their status within the host state (Soysal, 1994). Yet, the traction of both accounts for understanding policy formulation and implementation depends upon the influence of such processes upon norms, institutions and ideas at the domestic level (Çalı & Wyss, 2009; Hansen, 1999, p. 428; Joppke, 1998a; Stone Sweet & Keller, 2008). At the domestic level, we may question practical adherence to liberal universalist principles and whether states consider them applicable to foreign nationals, especially where this may interfere with perceived national interests (Boswell, 2007b, p. 86). Indeed, the activation of supranational legal principles is contingent upon domestic legal institutions which either apply them or, in failing to effectively do so, produce the opportunity for individuals to appeal to supranational courts (Acosta Arcarazo & Geddes, 2013; Stone Sweet & Keller, 2008). Only according to variation in such domestic factors can one account for the “peculiar bifurcation” between the highly restrictive treatment of asylum seekers, as compared to economically desirable migrants – united in their recourse to universal human rights, yet subject to highly differential immigration controls (Joppke, 2001, p. 342).

This debate over the sources of legal and judicial protection of migrants indicates the importance of considering not just the role of domestic institutions of the state, but their engagement with supranational institutions and the enforcement of international human rights law. In particular, jurisprudence on the *European Convention on Human Rights* has, in recent years, become instrumental to both domestic and supranational litigation by refugees and other migrants (Mole & Meredith, 2007). The source of a judicial decision, whether from the ECtHR or domestic courts, may influence how it impacts immigration and asylum control. Yet, variation in the source of rulings has not been given due consideration by existing migration literature. This is perhaps due to its tendency to focus more on comparative variation in states’ constitutional configurations as a predictor of ‘constraint’, rather than attending to actual variation in the form which such judicial influence over political outcomes may take.

When liberal constraints aren't so constraining or so liberal

The liberal constraint thesis depends for its explanatory force on the idea that liberal states comply with the law because of their inherent liberal identity (Hollifield, 1992, pp. 26–8). Although effectively tautological (Steiner, 2000), this explanation also underpins many accounts from international organisation scholarship on the ‘embeddedness’ of liberal universal principles in domestic institutions (e.g. Jacobson & Ruffer, 2003). As such, it deserves consideration as at least a point of departure in attempting to arrive at a more adequate account of why states comply with legal values, such as judicial decisions.

Such accounts make recourse to perceived path dependent behaviour of liberal states. Yet, we may enquire what it is that makes liberal states so liberal, and whether such a consistent liberal behaviour is evidenced in practice. This seems particularly important given that the apparent proclivity of liberal states to illiberal migration control is the very problem with which this literature engages. Illuminating in this respect, Matthew Gibney has postulated that the institutionalisation of liberal norms within the state may lead to a “liberal paradox” of increasingly restrictive controls on migrants’ entry to it (Gibney & Hansen, 2003; Gibney, 2001, pp. 17–18). Deportation, in particular, exposes an uneasy contradiction between the state’s principled support for universal individual rights and its sovereign will to effective immigration control (Paoletti, 2010, p. 7). Even where liberal constraints are taken as axiomatic, this does not predict their broader, often ‘paradoxical’ political effects.

The state’s (liberal) national identity is effectively an agglomerate of historically located national interests, international norms, and yet more nebulous formulations of morality, which can readily be deployed in arguments for either more or less restrictive immigration and asylum policies (Steiner, 2000). Policies and political rhetoric are grounded in and expressive of these arguments. In this regard, exclusionary immigration and asylum policies can be considered as having no less to do with liberal states’ national identity than do restrictive judicial decisions. Indeed, studies of citizenship and integration have recently emphasised the rise of “regressive liberalism”: the pursuit of disciplinary and illiberal means to achieve liberal goals (Joppke, 2007, p. 268). For example, a rejection of accommodation of

difference, in defence of “distinctively liberal ways of life”(Tebble, 2006). This is the often ignored “dark side” of cultural nationalism and “welfare state chauvinism”, according to which governments may quite reasonably justify exclusionary policies, not according to liberal universal values, but according to membership of the national community (Geddes, 2003, pp. 6, 22). These “sharp edges” of protectionist liberal identity (Boswell & Geddes, 2011, p. 114) determine the role played by liberal principles, including the rule of law and human rights, in the development and implementation of migration and asylum control policies. The role played by substantive liberal values and legal principles of human rights is therefore potentially variable on a case by case basis, and necessarily the subject of investigation of the political and administrative processes involved in policy making.

As a consequence of the presumed liberalism of the state, judicial power over political outcomes has wrongly been taken to be axiomatic. Governments may not respond to liberal ‘constraints’ in a straightforward or predictable way. An adequate theory of the judiciary’s impact on immigration and asylum controls must therefore engage with variation of outcomes, and must be capable of accounting for political opposition and illiberal responses.

Critical Security Studies on migration control

The centrality of just such illiberal tendencies in policy governance is a central tenet of critical security studies, which have observed that governmental actors may seek to circumnavigate or manipulate the meaning and effect of liberal constraints. Scholars in this field have placed particular emphasis on liberal states' tendency to treat immigration control as a potential security concern, leading to enhanced political discretion. It is held that where a framing of migration as a security threat is accepted, such "securitisation" can facilitate circumnavigation of erstwhile liberal constraints to enact exceptional measures (Bigo, 2002; Buzan et al., 1998; Huysmans & Buonfino, 2008; Huysmans, 2006). This literature also hypothesises a tendency for the executive to attempt to remove certain policies from normal political debate in order to enhance discretionary power over them.

This suggests much to be considered about what motivates the politics of immigration and asylum control, and how it is justified in political framing. However, the securitisation hypothesis says nothing directly on what fate can be expected for judicial attempts at constraint of such bids for discretion or the resulting exceptional measures. Indeed, where governments suspend the effect of a policy pending the outcome of its review by the judiciary, we may presume that appeals to exceptionalism are susceptible to irreconcilable barriers imposed by lengthy judicial processes – as has been argued of processes of democratic deliberation more generally (Aradau, 2004). Political actors may plausibly seek to enhance their discretion over a policy in many contexts, of which security is but one example. Such bids for discretion may well become subject to unwelcome judicial delays or constraints in their effect. The return of a policy issue to 'normal' democratic procedures as a result of judicial arbitration, including affirmation of the applicability of rule of law values, may well be regarded as a predictor of executive opposition to compliance with the courts.

Admittedly, this consideration of a politics of exceptionalism says little of the scope for political actors to seek to legitimate circumnavigation of liberal constraints by means of a more general discourse of 'unease' about links between migrants and

social ills, such as criminality (Squire, 2009). Yet, we should not presume that such political discretion over the terminology and justifications pursued to legitimate policies need have anything in particular to do with national security (Boswell, 2007a) or criminality. Immigration control in the UK has long been characterised by a high degree of political discretion (Legomsky, 1987). Such discretion will doubtless be applied in the subjective interpretation and application of liberal principles of government to the formulation and implementation of policies. Nevertheless, critical security studies literature places valuable emphasis on the importance of how policies are justified in relation to liberal principles. It is clearly necessary to the study of judicial influence on policy to consider the role of political contestation of compliance with the courts, and how governmental responses are justified – whether this invokes security and migrants’ rights or not.

Getting around constraints

It is also important to consider that governments may seek to circumnavigate the courts’ impact on migration controls. In their evaluation of a “constitutionalization of immigrant rights”, Christian Joppke and Elia Marzal (2004, pp. 839–40) outline three particular ways in which governments may seek to “neutralize or pre-empt” judicial intervention into policies which discriminate against migrants’ rights: self-limitation; outsourcing to avoid judicial oversight; and dressing up restrictions in terms of rights to help them weather judicial scrutiny. Implicit to consideration of such governmental tactics to avoid unwanted judicial interference in policy goals, is the recognition that judicial oversight of immigration and asylum control may be unwelcome, resented, or even opposed. Yet, the tacit assumption is once again that governments seek to avoid unwelcome judicial decisions due to an inherent and unavoidably constraining effect: this is the oft supposed judicial shadow cast over governments (Joppke & Marzal, 2004, pp. 839–40).

Yet, immigration and asylum policies, as in other areas of administrative law, often lead to a cycle of repeated litigation, adjudication, and re-formulation of policy: an iterative engagement between government and judiciary on the lawfulness of policies (on eviction powers, see Bingham, 2010; on liberty and security, see Ewing & Tham, 2008; on asylum, see Thomas, 2003). This may problematise simple one

off 'neutralisation' of judicial rulings (Hickman, 2005; Hogg, Bushell-Thornton, & Wright, 2007). A consistently high volume of judicial rulings on asylum, and "culture of pervasive challenge" to policies' legitimacy (Thomas 2003: 484), have placed growing and sustained pressure upon government and its administrative bureaucracies to take account of the judiciary's role (e.g. Treasury Solicitors, 2006). Yet, where repeated and sustained scrutiny of a policy area is unwelcome, this may lead to a partial and incremental implementation of judicial rulings on what comprises legitimate policy. In any case, the timeline of government hitherto delineated by theories of judicial constraint of immigration and asylum control has been cut too short, failing to consider the ongoing and iterative engagement which takes place between government and judiciary over the exact limits on policies' incursions upon individual rights. This engagement can be understood from a governmental perspective by recourse to how political actors articulate the meaning, significance and effects of judicial scrutiny when formulating and justifying policy change.

Focusing on process to account for variation

Existing theories of migration control fail to adequately account for why political elites would accept such constraining rulings from the judiciary as binding. As already indicated, a fuller account of the judiciary's influence on policy change requires abandonment of a number of dominant assumptions: in particular, that the liberal state is necessarily liberal in its proclivities, and that judicial power is axiomatic. Moreover, insight into potential variation in how governments respond to judicial pressures requires that we move beyond the deterministic depiction of policies floating on a spectrum between absolute discretion and constraint, as implied by the liberal constraint hypothesis and to a certain extent by theories of securitisation of migration. Such approaches are notably deficient on how, when and why constraints on immigration and asylum are upheld. These questions can only be addressed by attending to qualitative processes of interpretation of rulings and reaction to the courts within government. As Antje Ellerman has noted of the implementation of deportation policy, a tendency to focus on constraints has led to a lack of attention to states' capacities, and an associated lack of regard for bureaucratic factors and the politics of implementation (Ellerman, 2009, p.

10). Understanding of judicial influence over policy change requires similar attention to the implementation of compliant policy change – in terms of the process involved, and not merely whether the outcomes demonstrate constraint. This requires a departure from existing literature from migration studies which rests its conclusions upon the content of law and judicial power as inevitable constraints upon politics, without considering their necessary political implementation.

Despite a disaggregation of the state to consider the role of the courts, there has been little engagement with potentially nuanced or varied political responses to the courts across government. Necessary agency on the part of government must be brought back into theories of judicial constraints on liberal states (Evans, Rueschemeyer, & Skocpol, 1985) in order to apprehend variation in political responses to the courts. The liberal constraint thesis perhaps understandably suffers from these deficiencies, because it seeks to explain variation in judicial constraints across many countries. The focus on variations in judicial institution (for example, whether constitutional court or common law review) as a predictive variable for cross-national comparison presents an impression that judicial impact is a two dimensional, definitive and a-temporal result, rather than something which can vary on a case-by-case basis and even develop overtime.

Recent developments in broader migration studies may help here. Academic attention has shifted from frustration over a lack of plausible insights into the “motivations, interests and behaviour of the political actors who employ state power to intervene” (Massey et al., 1998, p. 292), to seek insights at the more promising level of the policy process and its political context (Bonjour, 2011; Boswell et al., 2011; Boswell & Geddes, 2011; Boswell, 2009; Ellerman, 2009). This comprises a turn to investigate the qualitative detail of how political and bureaucratic processes involved in policy making may account for policy outcomes, such as the resilience of illiberal immigration controls. By turning to consider the governmental processes involved in shaping varied judicial influence over asylum control policies, I seek to contribute to this contextually situated approach to explaining policy outcomes.

Having outlined the need for advancement of a fuller theory of how the courts impact upon migration and asylum control policies, I now wish to begin the task of

differentiating possible variation in the influence of the courts on government. I do this by recourse to the extensive literature in administrative and public law as well as socio-legal studies on courts' impact upon bureaucratic function. In so doing, I endeavour to extrapolate to the level of both policy bureaucracy and the broader politics of asylum control.

Explaining judicial impact

Moving from constraint to judicial impact

In contrast to the judicial constraint literature from migration studies, the starting point of much administrative law and socio-legal scholarship on government is that judicial 'constraint' is not a given, nor is the response to the courts typically a straightforward distinction between compliance and non-compliance. The discipline is dominated by scepticism about the courts' influence. In particular, it has been observed that government agencies often merely creatively remake unlawful decisions (Creyke & McMillan, 2004). Although judicial review in the UK has come to be regarded as exerting a "constant and central" influence on the exercise of power (De Smith, Woolf, & Jowell, 1995, p. vii), the executive may understand this influence in its own entirely unique way (Daintith & Page, 1999, p. 10; Krygier, 2009, p. 67). Socio-legal scholars are particularly inclined towards "impact agnosticism", given difficulties collecting data on judicial impact and the lack of a general theoretical consensus on its causes (Hertogh & Halliday, 2004b, p. 269). Such scepticism also reflects concerns over the 'weak' form of UK-style judicial review (Gearty, 2006, p. 96; Tushnet, 2009), and the ECtHR's lack of enforcement mechanisms. Fundamentally, implementation matters, and tends to vary.

The first task which I believe necessary to advancing understanding about the influence of the courts on policy change is to eschew the limited concept of 'constraint' in favour of judicial impact. This facilitates a focus on variation of outcomes, which may be unexpected and not particularly constraining (Richardson, 2004). It is necessary to move beyond determinations of whether there has been compliance with the courts, to consider how and why it has taken shape in a particular way. The concept of judicial impact is borrowed primarily from consideration of literature on the influence of judicial review on bureaucratic

function (Hertogh & Halliday, 2004c). The starting point of this approach concerns firstly the determination of “impact on what?” (Richardson & Sunkin, 1996; Sunkin, 2004, p. 44) before turning to ask what impact may be observed (conceptualising variation of outcomes).

In this section, I conduct an overview of existing literature on ‘judicial impact’, with a particular focus on identifying theoretically plausible accounts of how and why changes may occur to policies which have undergone judicial review by the courts. Firstly, I emphasise that explaining policy change, which is the outcome of political processes, requires that we look beyond the content of the ruling at the political context in which it is implemented. Secondly, drawing parallels to the largely separate academic discipline of policy studies, I argue that existing accounts of judicial impact can be loosely divided into three traditions, according to the mechanisms to which they attribute primary causal significance in shaping policy outcomes: rational choice driven strategic political behaviour; the constraining power of institutions; and ‘ideational’ analyses which attend to contextual, cognitive and normative factors affecting the receptiveness and responsiveness of political actors to judicial imperatives. By relating judicial impact theories to their analogues in policy studies, I show that many existing approaches may benefit from a complementary attention to the role of ideas in shaping and constraining political behaviour. In this respect, cross-fertilisation from policy studies on the role of ideas has the potential to significantly deepen understanding of how and why judicial decisions impact upon policy change.

Focus on the response, not the ruling

Many dominant approaches to the impact of courts on politics and bureaucracy share certain of the features for which I criticised the judicial constraint hypothesis. A majority of studies focus on either mobilisation through law as a vehicle to leverage social change, or on the so called judicialization of politics (Epp, 1998; McCann, 1994; Rosenberg, 2008; Schultz, 1998; Simmons, 2009; Vanhala, 2012). Legal mobilisation literature presumes that law has a constraining effect on policy, so turns to consider when litigation is successful, rather than when it results in policy change. Judicialization literature typically concerns either the ceding of decision making

power to courts, or the gradually increasing influence of legalistic norms and discourse on strategic political behaviour (Blichner & Molander, 2008; Hirschl, 2006, pp. 721–2; Stone Sweet, 1999, p. 164, 2000). Although attempting to determine whether “courts matter” as agents of social change or are politically impotent (Schultz, 1998), such “top down” approaches tend to focus more on courts and the extension of judicial power over arbitration than on the reception of judicial decisions within government (Sunstein, 2004, p. 65) – largely due to a legacy from their origins in an introspective literature on the uniquely strong review function of the US Constitutional Court (Shapiro, 2008, pp. 768–9). Yet, even regarding the case of US-style constitutional review, there is no consensus on its impact on policy change. Influential assessments range from claiming a transformative effect of litigation on policies to the charge that courts offer only “a hollow hope” (compare McCann, 1994; Rosenberg, 2008).

First and foremost, it must be emphasised that judicial impact on policy change is a matter of government, and that we must therefore engage the role of law within politics, and not the fixation with “law and courts” which continues to attract the majority of scholarship on judicial power (Shapiro, 2008). Judicial review certainly has its own distinctive specificities as a process, in its particular decisions, and as a system of legal values and norms (Sunstein 2004: 47). As such, legal scholarship on jurisprudence seeks to distinguish law from other normative orders and forms of social control. Yet, law is both the product of the political system and the means by which government organises itself; “law is not only the product of politics but also constitutive of politics.” (Whittington, Kelemen, & Caldeira, 2008, pp. 3, 8–9) The overarching project of the majority of socio-legal and social-scientific studies on law and courts is to illustrate that law is a political construct and the judiciary make political decisions (Hertogh & Halliday, 2004a; Shapiro, 2008; Whittington et al., 2008). Similarly, when we turn to consider the impact of law and judicial decisions on government:

The subject of study ought not to be the formal, legal rules purporting to prescribe how government officials ought to act but rather the actual, real-world behaviour of officials and other politicians. (Shapiro, 2008, p. 768)

This raises an important question which must be answered. Is variation in judicial impact a product of the ruling itself, the context in which it is received and implemented, or some combination of the two? Certainly, a “rights revolution” seems more likely where litigants benefit from an effective “legal mobilisation support structure” to aid in building robust arguments for the court (Epp, 1998). The framing of legal principles and their application, as put forth by advocacy groups in court, may well influence the manner in which the judiciary rule and frame necessary implementation measures (Kawar, 2012). Different ‘juridical norms’ may impose different requirements on government (Feldman, 1988; Rawlings, 1995) – for example, a new approach to decision making, new procedures or a new policy framework (Richardson, 2004, pp. 117–8; Sunstein, 2004, p. 52). Compliance may require changes to legislation, or operational guidelines, or merely that an administrative decision be revisited. Different implementing actors and procedures for justification of compliance will be engaged according to the content of the ruling and whether it is from the British courts, or ECtHR. The invocation of constitutional principles, or the arguable pseudo-constitutional stature of the ECtHR as a last court of appeal for migrants may also suggest different obligations on state governments, potentially even making the court a ‘veto’ player (Tsebelis, 2002, pp. 222–47).

However, an explanation of why judicial decisions exert an effect on policy change requires more than an assumption that government actors perceive a guiding, hierarchical, normative authority over political behaviour in accordance with the rule of law (Canon & Johnson, 1999, p. 178). We must avoid the “upper court myth”; “the epistemological trap of simply positing a hierarchy of norms or courts” (Harrington, 2004, p. 564). This is especially important given the domestic, statutory, not constitutional implementation of the *European Convention on Human Rights* (Shapiro & Stone Sweet, 2002, p. 139).

In the UK, the academic study of policy change has conventionally held the influence of the courts as “peripheral”, since policy decisions are made and ratified elsewhere (Jones et al., 2007, p. 596). This side-lining of the significance of judicial decisions on policy change is understandable given the role of the judiciary under parliamentary sovereignty as impartial arbitrators without powers to strike down

legislation. The assumption that the courts merely arbitrate, and are not producers of judicial policy also implies that the substantive content of judicial decisions is merely a variable stimulus for political processes which respond to the courts. Approaches to judicial impact which rest upon the jurisprudential content of court rulings rather than their reception within the policy process fail to capture the nature of what policy is. Policies are not so much decisions as ongoing processes of administration, subject to a variety of influences. They are the product of subjective problem definitions by a variety of political actors, demonstrating often unexpected and potentially illogical, strategic and adaptive behaviours (Hecklo, 1972, p. 83; Hill, 2002, p. 4; Hogwood & Gunn, 1984, pp. 19–23).

Focusing on the content of judicial decisions captures none of this political response, which is inescapably a fundamental determinant of variation in judicial impact. Regardless of the content of a court ruling, governments may be willing to take legal risks with implementation (Daintith & Page, 1999, p. 337). The significance of the ruling, its features, and the hierarchical, normative authority of the court it originated from are inescapably a product of how the ruling is received in the political and administrative branches of government which are charged with implementation. In terms of their consequences for change to the content and administration of policies, the particular nature of a given judicial decision and its implications are a product of the political process of interpretation of law and its authority, and not therefore inherent features of the ruling at all (at least from the position of political actors, as opposed to the judges and lawyers involved in arriving at the ruling). As such, it is necessarily facets of political decision making and the policy process to which we must turn in order to understand judicial impact, rather than a doctrinal study of jurisprudence.

Differentiating theoretical accounts of impact and policy change

In so far as explanations of judicial impact on politics and policy change concern the entry and influence of outside stimuli into processes of political change, these can readily be considered in terms of the explicit or implied social mechanisms which they appeal to. Theories of judicial impact and policy change can be loosely grouped according to three broad trends in what they consider to be the most significant

factors influencing implementation of judicial decisions and political attitudes to law. Broadly speaking, emphasis is placed either on the agency of policy makers who respond to the courts according to strategic cost-benefit analyses; institutional constraints on policy making, which court rulings either impose or activate, shaping policy makers' options; and lastly, theories which focus neither directly on rational agency, nor limitations imposed by institutional structures, but instead on how dominant ideas which frame understandings of a given policy area will intersect with policy actors' interpretations of judicial decisions and their implementation.

Strategic responses

Dominant approaches to the relationship between the political and judicial systems focus on classical material variables in political analysis: power, interests, and rational calculations of utility as determinants of compliance with the courts. Typically, this positions the judiciary as a sectional elite interest group (Poggi, 1990), seeking to impose its preferred policies upon government. This includes studies of both legislatures' response to judicial decisions (Davis, 2010; Hiebert, 2012; Silverstein, 2009; Stone Sweet, 2000) and bureaucratic behaviour, whereby rational agents solve the problem posed by compliance with 'adverse' rulings in a context of complex coordination of competing policy goals (Sunstein, 2004, pp. 70–71).

Accounts of increasing judicial impact on 'high' politics and governance of moral issues have hypothesised a political rationale akin to that of a principal-agent arrangement. Politicians may welcome "passing the buck" for determination of contentious policies to the courts (Davis, 2010; Hirschl, 2008a), even if the courts may thereby "constrain" future strategic choices (Silverstein, 2009, p. 33). Gordon Silverstein, for example, holds that in this manner courts establish readily discernible "boundaries and frames" (2009, p. 35) within which legislators' and bureaucrats' discretion is more limited. However, he is silent on why such judicial parameters may be accepted as constraints. Such rationalist accounts of strategic use of the courts by governments are also silent on the implications for compliance where a deferral of power to the courts risks an unwelcome overstepping of political trust, or jurisdictional "slippage" (Alter, 2006, pp. 312–16). Although the courts are commonly held to be cautious of overstepping political boundaries for fear of

invoking ire or even non-compliance (Stone Sweet, 2000, p. 88), political backlash is an underdeveloped consideration in terms of its mediation of judicial impact on policy change.

In her account of Member States' implementation of rulings from the European Court of Justice, Lisa Conant observes that governments will by default endeavour to "contain" compliance to the individual case at hand, avoiding impact on broader policy guidelines, unless "persistent counterpressure" is imposed for further application of the judicial decision (Conant, 2002, pp. 32–4). A similar appeal to the role of political interests and risk-benefit analysis as drivers of judicial impact underpins Gerald Rosenberg's highly influential thesis of judicial impotence in the United States, *The Hollow Hope*: that the courts can only influence policy change where they facilitate decision makers' pre-existing desire for reform, or where compliance is induced by economic or political costs, or incentives from outside government. We are quite literally told that governments will comply if they are "willing" (Rosenberg, 2008, pp. 31–5). This process of strategic adjustment may be conceived as either a product of individual cognition or organisational function. Compliance maybe motivated by a desire not to risk triggering further scrutiny from the courts, parliament, the media or international organisations (Hiebert, 2012). However, there may be not only reputational, but also 'psychic' costs to self-image where an agency defers to "outlaw" behaviour (Canon, 2004, pp. 82, 89).

Unfortunately, rational-choice theories of political behaviour offer no insight into how exogenous pressures, of which the judiciary is but one, will lead to compliance decisions. They fail to get "inside the box" of how political actors identify and understand relevant costs and benefits imposed by the courts and other material factors (Hay, 2002, p. 10). These models largely depend upon an assumed primacy of cost-benefit calculations as the governing logic of policy change, positing that fuller implementation of judicial decisions will ensue where costs are minimal or can be deflected. Yet, judicial decisions with a potential impact on policy questions usually result from a process of litigation in which governments defend their preferred outcome and policy position through to the highest available level of appeal. In other words, by its very nature, implementation of judicial decisions would be politically

costly; overriding previous political and policy preferences, disrupting equilibrium of policy domains and potentially embarrassing those actors who may be seen as coerced into formulating policy reforms. Theories of strategic political behaviour are not therefore entirely helpful in explaining why political actors do reform policies, even if reluctantly, creatively, or symbolically. They may be more useful in accounting for rare cases where judicial decisions do not result in implementation via policy reforms.

Political actors may or may not aspire to or succeed in rationally deliberating policy alternatives in response to the courts. Yet, where such reasoning is employed, it will seek to make the best choices given the circumstances. These subjective constructions of the utility of implementation to the realisation of political interests will certainly be contingent on the opportunities and exigencies which structure evaluation of policy options (Simon, 1985). Implementation decisions may be driven as much by “inertia or pride” (Canon, 2004, p. 91) as by instrumental rationality. Whilst implementing actors’ articulation of perceived interests should not be ignored, it is clearly necessary to consider the role of structural factors which condition the interpretation and implementation of judicial decisions in the context of policy bureaucracies and legislatures.

Institutional processes and rules

It has been said that the impact of new-institutionalism on the study of public law put the idea of law into its political context (Sheingold, 2008, p. 741). In the broader academic study of public policy and political economy, approaches to rules and institutional structure as determinants of behaviour have placed varying emphases on the influence of bounded rationality, normative constraints and historical-contextual path-dependency. These have emphasised the productive outcomes of contention between “frames of meaning, scripts and symbols” (Hall & Taylor, 1996, p. 954)– for instance a judicial frame versus a prior organisational one – in potentially overcoming entrenched organisational bias (Steinmo, 1993, p. 7), world views and associated “self-images and basic preferences” (Finnemore & Sikkink, 1998; Hall & Taylor, 1996, p. 940; Trondal, 2001, p. 73).

Legal literature has paid more generalised attention to observing legal values and rules' increasing influence over institutional function and decision making (Blichner & Molander, 2008; Scott, 1998, p. 19). These studies mostly emphasise the embodiment of normative and material constraints in cognitive or organisational structures involved in policy change. Strategic policy options are thereby bracketed by legal constraints activated or imposed by judicial decisions. Such "juridification" may be wilfully accepted by political actors where legal values are a "reasonably good fit" with those of the system they regulate (Richardson, 2004, p. 122). Studies of the impact of the courts on a related "judicialization" of politics (Blichner & Molander, 2008; Stone Sweet, 2000) have traced the influence of judicial norms and discourse on political interaction (behaviour) and the normative structure of political communities (Stone Sweet, 2000, p. 13). Both juridification and judicialization are essentially questions of the development of path dependency: long-term processes whereby the law and judicial values become increasingly entrenched, taken for granted, and thus hard to deviate from. This process has its origins in the state's dependence upon the judiciary for arbitration of disputes – stabilising social, economic and political relations (Stone Sweet, 1999; Tilly, 1990; Weber, 1978, pp. 813, 1095).

In politics with strong constitutional review and a culture of rights-based litigation, Alec Stone Sweet has observed a tendency for political debate to mobilise constitutional and judicial language and norms to justify and contest the legitimacy of legislative provisions. Over time, such referents have become embedded in both legislation and political practice, leading to a wilful judicialization of politics, even if it is an outcome which most political parties would not consider desirable (A. Stone, 1992; Stone Sweet, 2000, p. 88). In such cases, judicial power has been accepted and institutionalised as a constraint on government, despite political preferences, as a means to the pragmatic realisation of policy preferences in a context of dynamic tension between government, political opposition and judicial scrutiny. Yet a necessary precondition in Stone Sweet's cases is governmental regard for the saliency of constitutional law and judicial decisions as a valid and binding constraint upon policy making.

Judicialization tells us little as to how or why legal referents are meaningful to political actors, and would be adopted as tools to legitimate policies – especially where we cannot identify a politics of opposition to government which is mobilised around demonstrating policy proposals’ implications for constitutional rights principles. Theories of judicialization are not concerned so much with explaining the conditions affecting compliant implementation of judicial decisions, as with developing a broader theory of how judicial influence may manifest within government – a more nebulous and diffuse form of indirect judicial impact. This approach may help illuminate changes in the mobilisation of political interests over time through sustained engagement with the courts. However, it does not help in explaining how and why compliance may follow judicial decisions which threaten the viability of stated political interests and policy preferences. Similarly, sociological arguments about institutional behaviour - for instance, that domestic actors respect the ECtHR due to self-perceptions as law abiding internationalists (Çalı & Wyss, 2009) - tell us nothing of how such attitudes are formed, nor how they operate differentially on a case by case basis. Accounts of judicial power and the normativity of law through the largely synonymous phenomena of ‘legalisation,’ ‘juridification’ and ‘judicialization,’ tend to de-emphasise political agency over decisions as to how, when and why to blur boundaries between following rules and exercising discretion (Shapiro, 2008, p. 772).

Nevertheless, we can take from this discussion an implicit emphasis on processes of gradual institutional change through learning. The centrality of such processes to policy studies provides an important rejoinder. We may ask whether policy makers merely ‘cope’ with judicial impact by means of minor changes, or embrace a transformation of the logic governing their political behaviour (Radaelli & Schmidt, 2004, p. 189). Judicialization may comprise just such a transformation, but it is by no means inevitable, even under conditions of sustained interaction between government agencies and the courts. Institutional and judicialization theories do, however, indicate the significance of prior normative, cognitive, and organisational frameworks at play in a given policy domain, which may make policy makers more or less amenable to implementation of a given judicial decision. Implementation may depend upon either the consistency of a judicial decision with these prior

frameworks and “institutional scripts” or its ability to otherwise unsettle these dominant practices and understandings (Mahoney & Thelen, 2010, p. 5). Conant’s observation of contained compliance, noted above, may be taken as an example of how prior policy orientations and guiding principles may prove resilient, even in the face of sustained judicial scrutiny. Judicialization of political discourse may even represent a “de-coupling” of talk about official compliance from any active, deeper transformation of beliefs and practices (Brunsson, 2002; March, 1984; Trondal, 2001, p. 19).

Such concerns are what lead to the ubiquitous observation that institutionalist theories tend to be better at explaining stasis than change. However, a desire to account for why change happens has led to a turn to ideas and discourse as indicative of how rules, norms and context are understood as both constraining and enabling by political actors responding to pressure for reform (Bleich, 2002; Genieys & Smyrl, 2008; Hay, 2002, 2004; Radaelli & Schmidt, 2004; Schmidt, 2008). Rules and institutions are taken not only as a context for political behaviour, but as contingent results of actors’ thoughts, words and actions – internal to actors, perceived as both constraining structures and as constructs which they create and change (Schmidt, 2008, p. 314 c.1). Crucially, for the purposes of political analysis, such ideas and their discursive articulation are expressive of change and its contextualised meaning.

To refer this discussion back to judicial impact – its meaning and significance may be better understood as a product of political actors’ apprehension, interpretation and enactment of court rulings alongside other policy constraints. These interpretive, “ideational factors” mediate between context and conduct (Hay, 2002, p. 167), such that a change in policy constitutes a necessary change in the ideas which govern it.

Judicial impact ‘in context’

So far, the approaches to explaining courts’ influence on political function and policy change which I have considered have tended towards a recreation of the same problematic dichotomy I observed for migration studies’ liberal constraint thesis: a tension between constraint and discretion, yet with little indication as to how and why this tension may be resolved on a case by case basis. However, insights derived from the foregoing theoretical consideration may be combined with a sensitivity to

'law in context' which is demonstrated by a smaller number of primarily socio-legal approaches to judicial impact. Research in this field has emphasised not only the significance of historical and contextual configurations of policy culture to the influence of judicial decisions on bureaucratic function, but also the central role of implementing actors in interpreting and enacting necessary policy change (S. Halliday, 1998, 2001; Hertogh & Halliday, 2004b; Hertogh, 2001; Sunkin, 2004).

This approach is close to what has historically been labelled "sociological jurisprudence": explaining law not as an abstract principle, but as "the actual effects of juridical activity" in the context of the particular social world in which it is manifest (Mather, 2008, p. 681; Tomlins, 2008, p. 725). The meaning, and therefore the impact of judicial review, 'mutates' according to administrative procedures which revolve around interpretation and reinterpretation of messages received from the courts and from other non-judicial pressures upon policy making (Halliday 1998). There may be no clear "hard edge" separating the implications of judicial review from innumerable other factors in an "administrative soup of decision making" (Sunkin, 2004, p. 71). Equally, the significance of particular court rulings may extend far beyond the direct administrative decision or policy measure under arbitration, to exert a broader, indirect impact on other areas of government (Richardson, 2004, p. 106). Such outcomes will depend on whether and how judicial decisions "resonate throughout the polity." (Sheingold, 2008, p. 743)

Judicial impact thereby concerns the form and means by which government officials secure compliance. The significance of a given judicial decision is not the product of an administrative balance between law and discretion (Dworkin, 1978), but constituted entirely by "the discretionary decisions that give it meaning." (Mather, 2008, pp. 690–1) Implementation may require a broad variety of responses from different government agencies and political actors, which may not share a common understanding of a judicial decision's implications for policy processes (Sunkin, 2004, p. 72). Such responses will vary according to who is engaged by a ruling; whether, for instance, requiring administrative decisions to be revisited, or necessitating legislative amendments in order for policy provisions to conform to the law.

Even legislative change may be the “beginning of a complex new chapter”, rather than the end of the story of judicial impact on policies (Sossin, 2004, pp. 129–30). Ongoing bureaucratic processes are typically involved in developing the scope and application of new policies. In this respect, judicial impact may develop and diverge over time (Creyke & McMillan, 2004) and across government. Indeed, it is highly challenging to isolate judicial impact as a discrete event, such that it may be considered distinct from its political and temporal context, given continuous and interdependent processes of litigation, policy development and administrative renewal (Sossin, 2004). Where it exists, such sustained bureaucratic engagement with the courts, or reflection on their impact on policy goals, may even breed contempt over time, leading to a ministerial willingness to take legal risks, rather than maintain strict compliance (Daintith & Page, 1999, p. 337; Le Seur, 1996, p. 11). Similarly, sustained exposure to judicial review may simply diminish agencies’ self-scrutiny or reflection on values relating to judicial review (S. Halliday, 2001). This suggests that judicial impact on the governance of a particular policy domain may change over time, because the policy domain, the contextually situated understanding of judicial decisions, and the role of judicial review are themselves subject to change.

Literature on judicial impact on bureaucratic function draws important attention to the need to investigate variation in political responses to the courts, including the possibility that such impact may vary across government and over time. Little attention has been paid, however, to impact at the level of policy change, as opposed to bureaucratic behaviour. In particular, the role of potential political backlash against the constraints imposed by compliance with judicial decisions requires further consideration. Nevertheless, an important concern to be taken from the judicial impact literature is that policy change is neither a product of the inherent normative authority of judicial decisions, nor necessarily of a predictably stable political rationality or institutional configuration. Rather judicial impact arises in interpretations which are contingent and potentially subject to change: “what the court proclaims is not always what the agency understands” (Canon, 2004).

As such, we should not ask whether litigation drives changes to policies without first asking what general impact and influence judicial decisions may have on various actors' interpretations of the relevant policy context and associated roles and responsibilities. In this regard, attitudes towards law in general will also shape judicial impact (Ewick & Silbey, 1998; Hertogh & Halliday, 2004b, p. 283; van der Burg & Taekema, 2004). Such factors are not merely a cognitive facet of decision makers, but also derive from the context in which discretion is exercised. In this respect, the nature of asylum control in the UK as a policy domain is highly relevant to consideration of how policy decisions are determined, including how to respond to the courts. Prior experience and knowledge of legal norms and conventions "at once constrain and facilitate, delimit and enable" (McCann, 1996, p. 467). Law functions here not as discrete rules. Through the language and practices of policy governance, law enters into implementing actors' self-understanding, explanations and negotiations of naming, blaming and claiming authority and control (McCann, 1996, p. 467).

By endorsing the potential for insights to be gained into judicial impact in these terms, I am exhorting an interpretivist approach to the subjective understanding of court rulings inside government. This agenda is motivated by a belief that subjective constructions of meaning by political actors and policy bureaucracies are both fundamentally important and observable determinants of how and why judicial decisions are implemented (Hertogh & Halliday, 2004b, p. 275). The task of analysis is therefore to identify and engage with what governmental agencies interpret compliance to mean in practice (Canon, 2004). To investigate judicial impact in such terms is to pursue what Steven Lukes has called a "three dimensional" understanding of power: not merely decision making, persuasion or inducement, but a shaping of values and interests according to norms and ideologies, manifest in social interactions, language and actions, yet not necessarily conscious or explicit (Lukes, 2005, p. 13). The power of the courts – or judicial impact – is something fundamentally internal to the politics and administration of government and its self-understanding, beliefs and desires.

I return to the specificities of how such an approach may be applied conceptually in my next chapter. In the remainder of this chapter, I firstly provide a brief synthesis of what the foregoing literatures suggest as to possible variation in the outcome of judicial impact on policy change. I then close the chapter by highlighting plausible factors arising from my review of existing approaches which warrant particular consideration of their potential role in shaping judicial impact on a case by case basis.

Typologies of change in existing literature

Judicial decisions may hypothetically impact on a variety of social and political issues, inside and outside government, including public attitudes, for example. However, given my interest in policy change and its political framing, I will now endeavour to summarise key trends and themes of studies which have sought to capture and differentiate such direct impact on government. This overview provides a spring-board for further elaboration of how judicial impact on policy change can be apprehended and contrasted in my next chapter. Here, I draw primarily upon insights from qualitative studies of bureaucratic behaviour in response to judicial injunctions to revisit administrative decisions, alter overarching decision making processes, or policy regimes. Certainly, the context of legislative change is significantly different to such bureaucratic responses. However, a suitable typological overview may be applicable to both contexts, so long as care is taken in each instance to consider relevant factors which may affect implementing actors and agencies' interpretations of judicial decisions and requisite policy change.

Firstly, it should be noted that judicial impact does not necessarily imply policy change, and will include responses designed to oppose, appease and overrule judicial decisions. As noted earlier in this chapter, expectations of reluctance and political opposition to implementation, or even a null-hypothesis, characterise much research on judicial impact (Creyke & McMillan, 2004; Hertogh & Halliday, 2004a). This scepticism is reflected in the sheer variety of indecisive and oppositional responses encapsulated in more comprehensive typologies of judicial impact on bureaucratic reform:

1. Denying the existence of the judicial decision;
2. Depreciating the decision by interpreting it to be inapplicable;
3. Dissociating from the field covered by the decision;
4. Becoming indecisive;
5. Keeping the original attitude and derogating from the law;
6. Accentuating the original attitude and derogating from the law;
7. Converting to the legal attitude;

8. Diminishing the importance of or eliminating an originally equivocal attitude.

(Canon & Johnson, 1999, based on Muir 1967 and Johnson 1967)

Only numbers seven and eight of these various responses would constitute compliance. In her consideration of implementation of rulings of the European Court of Justice, Lisa Conant (2002, pp. 32–3) has noted that non-implementation or legislative over-rule of judicial decisions is actually very uncommon. So too, however, is complete application of judicial decisions as policy. Conant has argued that following a typical period of debate or policy stagnation, during which political compromises are made, a ruling will meet with one of three common responses:

1. Contained compliance – legal interpretations are only applied to the particular individual court case which activated judicial scrutiny, and not as broader policy guidelines;
2. Restrictive application as policy – secondary legislation is used to place limits and exceptions on judicial principles' adoption as policy;
3. Pre-emption – new law is constructed in such a way as to avoid future judicial interference.

There is certainly value in Conant's emphasis on such strategic means of limiting the potential disruptive effects of adverse judicial decisions on the viability of policy goals. However, it would be advantageous to be able to articulate judicial impact on policy change in cases where compliance may indeed *constrain* policy goals.

In their overview of several decades of the study of the courts' impact on bureaucratic behaviour in the United States, Bradley Canon and Charles Johnson distinguish three phases of judicial impact: interpretation of what a ruling means; a weighing of options, driven by cost-benefit analysis; and a behavioural response (Canon & Johnson, 1999; Canon, 2004, pp. 85–95). This trifecta is intended to help explain the trajectory of judicial influence from receipt of a ruling through to a final material response. However, it also indicates the distinct importance of political actors' orientation towards a judicial decision and their subsequent rationalisation of how to respond. Bradley Canon (2004) describes the former as an "acceptance

decision” – a psychological reaction to the ruling, which depends on prior attitudes towards the policy under review, the court, and the perceived consequences of its decision. These are shaped by the decision maker’s understanding of their social role and responsibilities – for example, a career politician courting public opinion and the media, or an agency director facing potential internal dissent (Canon & Johnson, 1999, pp. 24–5). These factors are integral to the interpretation of judicial decisions, and will necessarily influence understanding of and attitudes towards possible “behavioural” responses to the court, in terms of implementing the judicial decision.

Such prior factors will, however, only be feasible objects of investigation to the extent that they are manifest in the discursive articulation of compliant policy change and its justification. Nevertheless, we may distinguish between material responses to the courts such as those outlined by Lisa Conant, and more subjective interpretive responses which reflect what implementing actors perceive to be at stake. To the extent that it can be mobilised as an object of analysis, the latter offers more scope for understanding the perceived consequences of a judicial decision for the viability of the policy regime which is subject to compliant changes, rather than simply whether or not to ‘contain’ compliance.

Such an approach must take account of the possibility that what governments perceive to be significant about judicial impact may not be limited to (or even evidenced by) reform to formal procedures, guidelines or legislation. In so far as implementing actors’ interpretations matter, impact may be significant “more in the way of impassioned argument than real change” (Canon, 2004, p. 78). In this respect, Bradley Canon notes judicial policies in the US that have met significant “resistance or evasion” by bureaucracies have nevertheless “changed the behaviour of millions of people”: desegregation, removal of prayers from schools, and legalisation of abortion, for example (2004, p. 78). Such impact may be apparent in the way implementing actors respond to the courts and justify their actions and beliefs. This is to say that change to ideas potentially matters as much as material changes to operational guidelines or legislation.

Key Factors for further consideration (insights and gaps)

Thus far, I have sought to delineate possible ways in which judicial decisions may impact on policy. I now wish to summarise central observations to be taken from this overview, which will inform my further theoretical and empirical engagement with judicial impact in subsequent chapters.

Existing migration studies on the courts' influence on controls tend towards a reductive dualism of absolute constraint or exceptional discretion (where securitisation occurs). A similarly two dimensional impression of judicial impact characterises much other political science on the relationship between government and judiciary; judicialization of politics and related conceptualisations tacitly position legal and political logics of government as discrete and potentially zero-sum. However, legal values and judicial review are inherent and constitutive of government, and this should not be ignored. Rather we should interrogate their manifestation in the practice of compliance with the courts.

Theories oriented around strategic political responses to court rulings cannot explain why political actors would accept increased constraints from the judiciary. Constraint oriented theories, in turn, face challenges in explaining how such constraints are internalised, overcome or altered by political actors to comply with judicial decisions. Theories which focus on the role of policy ideas and legality as contingent constructs may help resolve some of these deficiencies. These cut directly to the significance of interpretation of judicial rulings and their implementation in a political context. Emphasis is placed on the processes and actors involved in implementing judicial decisions – and how they structure and navigate any perceived institutional constraints, or strategic costs and benefits to be negotiated in responding to judicial decisions. Rational calculations of utility and of institutional constraints are not seen as fixed features of policy making and judicial impact. For instance, institutional structures and policy making cultures are considered to be adaptable contexts for policy making. Ideational shifts or changes to how a policy problem is framed and talked about may enhance or de-emphasise structural constraints and change operational logics at play in policy making. As such, this approach to examining policy change may supplement strategic and constraint based accounts of

judicial impact with a more refined attention to how interpretive processes at work within policy making lead to policy change. According to this model of the public policy process, judicial decisions have no inherent authority or power over government prior to their translation and reconstruction in a process of communication within and between political and administrative actors.

Emergent concerns

From my overview of literature, three general observations emerge, along with two specific factors which guide my further enquiry.

Firstly, a satisfactory account of judicial impact must be able to account for how and why the courts meet with varying responses from government. This is a resounding explanatory deficit in existing approaches, which tend to a reductive account of interests and constraints. Engagement with this question will require comparative consideration of varying responses to judicial decisions and their impact on policy change.

Secondly, a broad conceptualisation of impact must be adopted – not simply compliance, constraint or its absence. This will be necessary in accounting for variation.

Thirdly, compliance with the courts should be considered in the broad context of surrounding political and policy processes. This may involve consideration of judicial impact as a complex and varied phenomenon within government, subject to potential mutation over time.

In addition to these general observations, two specific themes emerge from my overview: the need for particular investigation of the significance of the source of the judicial decision and whether compliance is politically contested. These are not proposed as explanatory variables. Rather their appearance as potentially significant factors in existing accounts of judicial impact suggests that they matter in some way – not necessarily that they are predictive of a particular outcome. Evaluating their place in governmental responses to the courts, as part of empirical investigation of judicial impact, allows consideration of their merits for a fuller understanding of the phenomenon. Having already observed these concerns in my foregoing overview of

existing literature, I will summarise them here in brief. In doing so, I endeavour to highlight their potential role as factors which may mediate rulings' influence on how governments negotiate judicial impact to legitimate the continued stability of policies and political authority over them.

Politicisation

As I have emphasised, judicial impact is a product of political responses. However, existing literature on judicial impact suggests a number of ways in which political opposition to compliance with the courts(which I will term politicisation of compliance) may render judicial impact on policy change unlikely or more nuanced. Theories of the securitisation of migration and of bureaucratic responses to the courts each emphasise a will to discretion and tendency to oppose unwelcome constraints on policy preferences(Bigo, 2002; S. Halliday, 1998; Huysmans, 2006). Similarly, literature on constitutional review in the US and the judicialization thesis predicate judicial power on a political willingness to adopt judicial framings of a policy. Put simply, political opposition to judicial framings, even if only rhetorical, may militate against their impact on policy change. In such cases, governments may delay or minimise compliance, opting to risk further judicial scrutiny. Equally, should judicial decisions activate strong political contestation in terms of constitutional and rights based norms, such theories suggest that political interest may enhance judicial impact, potentially leading to extensive policy change in line with the courts' reasoning(Hirschl, 2008a; Rosenberg, 2008; Silverstein, 2009; Stone Sweet, 2000).

Indeed, political attention to a stimulus for reform is a fundamental pre-requisite condition in most dominant theories of policy change (Sabatier & Weible, 2007; True, Jones, & Baumgartner, 2007; e.g. Zahariadis, 2007). The presence or absence of political resistance to compliance may also reflect the level of change required, as suggested by certain socio-legal and administrative law studies(Creyke & McMillan, 2004; Sossin, 2004; Sunkin, 2004). Legislative change, for example, will require overturning previous commitments and efforts to justify reforms in a manner conducive to mobilisation of widespread public and parliamentary support. Dynamics of political legitimation are particularly likely to shift where compliance with the courts becomes the object of public, media and parliamentary scrutiny,

enhancing the importance of rhetoric and symbolic decisions to meet public approval (Boswell et al., 2011, p. 15; Brunsson, 2002; Edelman, 1988). Political posturing and endeavours to avoid blame for policy failures (Hood, 2010; Weaver, 1986) may lead to a degree of intransigent resistance to judicial impact which is perhaps less likely when compliance can be negotiated outside the public spotlight. However, unwillingness to pursue policy change need not be a pre-requisite for politicisation of compliance. Government may gladly blame the courts for unpopular policy change (Hirschl, 2008a).

Particular attention must therefore be paid to cases in which judicial decisions garner exceptional political scrutiny or controversy, in order to better understand its role in shaping the resulting form of judicial impact. Put simply, it seems likely that 'politicisation' may influence how governments negotiate and justify judicial impact on policy change.

Source of the judicial decision

When interpreting the meaning and significance of a judicial decision and its potential impact on policy objectives, the 'source' of the ruling may also be of some significance (from the perspective of the implementing actor or agency). Like 'politicisation,' the court delivering a ruling may also comprise a mediating factor in determining how governments negotiate judicial impact on policy change. Prior attitudes to the legitimacy of a court will shape responses to the rulings it hands down (Canon, 2004). Given the particular emphasis paid to constitutional rather than statutory review in much existing literature, and the contentious suggestion that the ECtHR may comprise a pseudo-constitutional court of final appeal for migrants, such potential variation in political attitudes deserves consideration.

The need for investigation on this level is also suggested by the historical ambivalence of successive British governments towards the legitimacy of the ECtHR (Bates, 2010, p. 434; Drzemczewski, 1995, p. 174; Lester, 1998; Marston, 1993) and general tendency of British politics to claim exceptionalism in opposition to 'Europeanisation' (Risse, 2001, p. 205). Consideration should be given to whether governments have sought to legitimate their political authority by posturing against 'foreign' imposition of constraints by the ECtHR in a manner which

diverges from their responses to the municipal courts. Where observed, such responses to the Court in Strasbourg may equally prove consistent with British governments' tenuous regard for the authority of the municipal courts (Griffith, 1997; Le Seur, 1996, p. 98; Rozenberg, 1997).

The significance of the source of rulings can be approached in terms of possible divergences in political and administrative reactions according to whether judicial decisions are on the vertical or horizontal plane (i.e. whether handed down from ECtHR or municipal courts). This also allows for related contribution to the debate in migration studies on whether it is domestic review or supranational human rights norms which are employed as the basis of constraints on migration and asylum controls. Notably, such supranational norms may be the basis for municipal review. It could be that political actors perceive the constraining power of rights as a product of the court adjudicating their application, or that the perceived power of the court emanates from particular political significance attached to the legal principles it invokes. As such, care must be taken in interrogating this factor.

Conclusion

This chapter began with an exposition of explanatory deficiencies in existing migration studies on courts' influence over migration and asylum control policies. Certain gaps were identified, including a need to specify variation in how judicial decisions may affect asylum controls. To this end, I have offered some preliminary insights into how governmental responses may vary, with a particular emphasis on policy change. However, the matter of how and why such variation occurs remains largely unanswered. My consideration of existing literature on judicial impact from a variety of disciplines has indicated a number of factors which require further investigation. It has also indicated the need for detailed qualitative empirical analysis in order to understand how and why governments respond to the courts in a particular manner. That is to say that we must study how change happens. This depends significantly upon the political context in which judicial decisions are interpreted and implemented. Only by careful consideration of these political processes can an understanding be arrived at as to how and why variation manifests in judicial impact on policy change and its political framing. This requires an account

of the relationship between plausible constitutive factors (such as source and politicisation) and substantive outcomes – i.e. variations in the substantive implementation of judicial impact and broader discursive responses. This is above all a phenomenon of political adjustment. As such, we must focus on processes within government.

In beginning to advance my agenda for research, I have emphasised the need to contextualise judicial impact within its broader policy and political context – to adopt a ‘broad take.’ I have also indicated the importance of taking a ‘long view’ of judicial impact, which may mutate over time. This requires abandoning the idea of a singular, definitive impact of the courts on policy change in favour of its long term development in political consciousness, policy framing and practice. Beyond the burgeoning trend in migration studies to explain policy outcomes by recourse to such political processes, my approach will also contribute to the little understood matter of how political agents cope with unwelcome change (Schmidt, 2011, p. 122).

As it is the focus of my next chapter, I have not attended to necessary distinctions between changes to policy ideas and material changes to the content of legislation and operational guidelines as indicators of policy change. Explanatory insights will come from attending to the qualitative character of political responses to judicial imperatives, rather than from searching for a particular predictive quality of material or structural triggers from inside or outside the political system. The qualitative processes through which judicial impact on policy unfolds are very much products of how the political and administrative systems of government respond to the courts, relating to how imperatives are interpreted and acted upon within government. Discursive practices, or how a policy problem, such as asylum, is talked about and framed by government therefore matter and should be considered. Political debate and policy framings not only comprise an important arena in which policy options and underlying assumptions are deployed, explored, challenged and justified. They are also important sources for political analysis of policy change. Moreover, rhetoric and practice in government, or what is said and what is done in response to the courts, may differ to the point of being contradictory. For this reason, it is worth

considering judicial impact on both planes of government, and how these may intersect or diverge.

To address these concerns and develop a suitable approach for their investigation, we must give due consideration to the nature of governmental processes involved in interpreting, enacting, coping with, and justifying change. This means looking carefully at how and why government functions in a given manner when presented with unwelcome stimuli. In doing so, my next chapter turns to consider, in detail, the inherent and constitutive role of political interpretation, or the 'sense-making' function of government, in stabilising policy meanings and legitimating their function. In particular, I turn to consideration of policy making, not as an exercise in problem solving, but as a process of constituting problems (such as compliance) as stable objects for political action.

3. Interpreting policy impact as a discursive problem

Introduction

A major factor limiting the explanatory potential of existing approaches to judicial impact has been a common tendency to focus on whether or not constraint happens. In this chapter, I argue that necessary understanding of factors leading to variation in judicial impact requires engagement with how the political and administrative systems of government respond to the courts. It is through governmental processes of interpreting, enacting, coping with and justifying policy change that judicial imperatives find political meaning and significance. In addressing these themes, this chapter presents the 'interpretivist' approach which I have argued will facilitate greater understanding of judicial impact on policy change.

I begin by conceptualising governmental function as 'sense-making' in a context of complexity and ambiguity. This concerns the inherent and constitutive role of political interpretation in stabilising policy meanings and legitimating political authority over them. I then turn to the role of political discourse in not only responding to and organising political pressures, but also constituting policy problems (such as compliance with judicial decisions). I argue that it is through discursive practices of government that not only policies, but the problems they address are meaningfully constituted and legitimated as objects for political action and policy intervention. I draw upon existing literature from rhetorical psychology and the role of discourse in the study of policy change to present two analytical typologies which allow for specification and differentiation of characteristics of this process of sense-making in government as a discursive practice which is both indicative and constitutive of policy change. Finally, I turn to the particularly significant role of governmental documents and political rhetoric in this process. Although much of this discussion of governmental function is conducted in the abstract, I endeavour to ground my engagement with policy governance in terms of how it may facilitate the study of political responses to the courts. Nevertheless, the conceptualisation of government I present may be conducive to general studies of

policy change and political adjustment in response to other unwelcome stimuli for reform.

Policy making as sense-making

From observation to interpretation

In order to understand the impact of judicial decisions on asylum control policies and their framing, we first must reconsider what policy making consists of as a process. Many conventional approaches conceive of this process in rationalist terms (notably, Sabatier, 2007), whereby an objective problem comes to policy makers' attention, has some measurable impact on the agenda of those who may observe and select to engage with it, at which time interventions to solve the problem are evaluated and selected (Bennett & Howlett, 1992; Hecllo, 1974, p. 305; Lindblom, 1959). Such approaches tend to focus on how objective problems are successfully promoted onto the political agenda (Kingdon, 1995; Sabatier & Weible, 2007; True et al., 2007; Zahariadis, 2007). Many alternative conceptualisations of policy as a response to social and political problems, notably the garbage can model (M. D. Cohen, March, & Olsen, 1972), offer a riposte to this rationalist approach - that policy makers often have preferred policy tools which they are inclined to bring to bear before fully considering their suitability as a response to the problem at hand. Such accounts of the predispositions of political agents are similar to those which affirm the importance of historical and contextual factors which institutions are typically considered to bring to bear in shaping and constraining the trajectory of a policy programme (Blyth, 2002; Hall, 1993; Krasner, 1988; Pierson, 2000)

So called new-institutionalist approaches put necessary emphasis on how policies are not a direct or logical response to real world problems which exist 'out there.' Policy formulation and implementation have conventionally been regarded as influenced by a complex array of interests, organisational protocols, habits, and normative principles (Schmidt, 2010). We may, however, go one step further to consider how, within this context, policy actors interpret the stimulus for policy change. Policy making and implementation involve a necessary process of sense-making which not only receives, but also translates a problem into a meaningful signal which can be readily acted upon within the terms of reference of the policy sub-system and its associated politics. This is an inescapable intermediary step between the observation of problems and the policy response. Policy change depends not only on the

opportunity to couple problems with solutions (Kingdon, 1995); discursive activity is required to mobilise ideas and produce arguments for this linkage, through which the very problem and solution are reformulated (Zittoun, 2009, p. 77).

The meaning of policy problems

The centrality of argumentation and its creative act of shaping the meaning of policy options are generally accepted ontological precepts of mainstream policy change theories (Benford & Snow, 1988; Kingdon, 1995, p. 482; Sabatier & Weible, 2007). Policy entrepreneurs seek to persuade government that their understanding of a problem leads necessarily to a preferred solution. In this struggle over meaning, the “primary interest” of all actors in a policy system is to secure “a monopoly on political understanding concerning the policy of interest, and an institutional arrangement that reinforces that understanding.” (Baumgartner & Jones, 1993, p. 6) A direct correlative of this pressure for political attention is that when governmental actors engage with such calls for action on “who gets what, when, how” (Lasswell, 1936), they must interpret and reflect upon the argument posed and options available; they “power” and “puzzle” (Hecl, 1974). In so far as the sovereignty of the state resides in the “power to define and make definitions stick” (Bauman, 1991, pp. 1–2), government comprises a quest for order and control over meaning (Hajer & Laws, 2008, p. 252; van Gunsteren, 1976), guided by “the lure of stability that policy actors experience” (Boswell et al., 2011; Hajer & Laws, 2008, p. 251). Yet, ambivalence and doubt are always a part of policy making (Hajer & Laws, 2008, p. 252). For example, we may recall successive governments’ characterisation of immigration and asylum control as complex and unpredictable – particularly when faced with intense judicial scrutiny (see chapter one).

In a situation involving value conflicts or conflicting interpretations of facts, such as is often the basis of arbitration by the courts, straightforward choices between clear policy alternatives may not be available or attractive. This is consistent with rationalist conceptualisations of policy making as an exercise in efficient delineation of social problems from which one may infer logical solutions. However, this requires that policy makers interpret not only competing problem definitions, but also their implicit characterisation of the *who*, *what*, *when* and *how*, which constitute

the classical vision of political decision making. This process of delineating objects of interest within the policy process seeks to specify not only the perceived problem to be acted upon, but also the actors entitled to do so. Indeed, whether a situation is construed as a policy problem at all depends upon how policy makers define it in relation to their values and aspirations (Kingdon, 1995, p. 111), as well as their self-perceived roles and responsibilities. Policy makers' puzzling constitutes the very problems upon which government acts. In doing so, the puzzling actors not only assign responsibility, but seek to legitimate their role as intervening agents (D. Stone, 2002, pp. 204, 209). The study of politics therefore becomes the study of how government interprets, understands, and actively constitutes the *who, what, when* and *how* involved in diagnosing policy problems and prescribing solutions.

From problem 'setting' to legitimating solutions

Scholars and practitioners of policy analysis and planning have long noted that conflicts over the legitimate trajectory of a policy are the product of inherent and often divergent understandings of what the problem is and what should be done about it. Martin Rein and Donald Schön (1996) have termed this the "problem-setting narrative": a story line which participants may or may not agree upon or identify with. Elsewhere, studies of social interaction and of social movements have engaged with interpretive schema: the organising framework or array of preconceptions through which individuals "locate, perceive, identify, and label" that which they encounter in their environment (Goffman, 1974, p. 24). The function of this interpretive process is not only to order and simplify social and political reality, but to mobilise support for a particular course of action which is held to follow from the schema, and to delegitimise alternatives (Benford & Snow, 1988, p. 198). As such, there is not only an interpretive function to policy making. Policy making also brings to bear a significant normative content in seeking to identify, order, stabilise and legitimate both proposed policy solutions (implicitly also the problem definition itself) and the intervening actor as arbiter and bearer of this solution. The main consequence of ambiguity in policy making is therefore a "constant struggle over the criteria for classification, the boundaries of categories, and the definition of ideals that guide the way people behave." (D. Stone, 2002, p. 11) This is to say that the meaning of social and political phenomena is dependent upon what political actors

take them to mean (Edelman, 1988). This approach to political meaning has its parallels in literary theory, which has long affirmed the constitutive role of the reader as co-author of textual meaning (Barthes, 1977). Similarly, it resonates with the tenet of psychotherapy, that “the meaning of any communication is the response it elicits.” (Maag, 1999, p. 14) Meaning, interpretation and (re)action are often coterminous.

Policy analysis must therefore “capture how policy actors deal with ambiguity and allocate particular significance to specific social or physical events.” (Hajer & Laws, 2008, p. 252) For the case of courts’ influence on policy change, this requires engagement with how government defines the impact of a court ruling on the realisation of existing policy goals, and associated endeavours to make this definition ‘stick.’ Such policy meaning is necessarily ambiguous and unstable, as it is very much a product of linguistic construction in a given social context (Fischer, 2003, p. 58). The stable meaning of policy goals, compliance and political authority over these, are all subject to this process of interpretation and legitimation. This is a process in which ideas matter – they are the content, the medium and the mode of influence (D. Stone, 2002, p. 11).

It must be emphasised that such discursive influence over the meaning and interpretation of political ideas is not necessarily an insidious bid for political discretion, as implied by some approaches to political discourse (e.g. critical discourse analysis: Fairclough, 2001; also, critical security studies: Buzan et al., 1998). The interpretation and framing of political problems and stabilisation of meanings is an inherent part of all policy making and political rhetoric in a context of complexity and ambiguity. In that policy ideas are both produced and indicated by their discursive articulation, problem definition is also a process in which political actors’ agency over meaning can be apprehended and its effects observed. As such, I suggest that consideration of the discursive process of problem definition and justification offers great potential for understanding and identifying how policy change is understood and managed by government. Discourse can be approached as both an indicator of policy change, and a substantive plane on which it takes place. I therefore turn now to consider how one may go about studying political actors’ constitutive engagement with policy problems.

Policy as problematisation

Carol Baachi's approach to policy analysis, which she sums up as asking "what's the problem supposed to be?" emphasises that policies represent problems in a particular way, rather than simply reflecting them. Her work stands against the dominant paradigm of evidence-based policy making and its problem solving approach. In doing so, it comprises an approach to policy analysis which is consistent with my argument in favour of attention to policy making as a process which is constitutive of political meaning. Baachi (2009) argues that governments do not simply react to existing problems, but in engaging with "the real world" in all its complexity, they delineate and interrogate phenomena (such as a judicial decision) in a way that fixes them as policy problems requiring interrogation and action. These "problematizations" have consequent effects upon the character and trajectory of policy programmes. Baachi's approach is very much grounded in the Foucauldian understanding of problematisation as both a social phenomenon and a methodology to expose and destabilise the assumptions which underpin it:

analysing, not behaviour or ideas, nor societies and their 'ideologies', but the *problematizations* through which being offers itself to be, necessarily thought – and the practices on the basis of which these problematizations are formed." (Foucault, 1985, p. 11)

Analysis of problematisations involves uncovering the forms which it takes, and the practices through which it is formed – an exploration of "the way in which discursive practices construct and normalize particular representations of issues" (Howarth, 2000, p. 134). Discourse theorists such as David Howarth (2000) have sought to contrast this focus on discursive practice with Jacques Derrida's deconstructive method, which seeks to reconstruct the logic and intentions of texts so as to expose their implicit "limit points"; the oppositional, conceptual boundaries and logics which provide texts with an appearance of coherence (1981, p. 16). Derrida's deconstruction thereby seeks to specify these privileged concepts and logics and their necessary repression of opposing others. However, such an "oppositional" logic, or normalisation, is shared by both textual and discursive meaning, which both seek to rhetorically delimit and render coherent a particular problematisation against implicit unstated alternatives (Billig, 1996). Both the Foucauldian and deconstructive approaches share a common goal of exposing inherent stabilisation of meaning and

its fundamental normative content in privileging one construction of social reality over alternatives. As such, both approaches – to discursive practice, and its textual artefact – are an inspiration for the project of exposing, specifying and thereby interrogating the process through which policy makers seek to delimit, stabilise and articulate their particular perspective on policy problems, valid policy interventions and appropriate intervening actors.

The logic and function of discourse

For the purposes of this thesis, an approach to policy as problematisation may comprise looking for the ‘stories’ government tells about compliance, judicial impact and asylum control. Such stories are the means through which government makes sense of and manages uncertainty, complexity and controversy (Roe, 1994, pp. ix–x). In studying these, the guiding logic and normative assumptions involved in constructing a narrative of cause and effect will be of particular interest: policy as the articulation of a “normative leap” from “is” to “ought” (Rein & Schön, 1993, p. 11) – an argument as to how a given problem leads naturally to a proposed solution. Baachi’s call to engage with how problem representations are constructed is a good starting point for the consideration of policy change. But to understand the significance rather than just the substance of policy change requires an uncovering and engagement with the underlying assumptions and logic involved in the constitution of problems. This is particularly important for interrogation of cases involving apparent controversy or conflict over compliance with courts. Insights into the guiding logic and normative assumptions which underpin policy problematisation may account for such political contestation as a product of the interpretation of judicial impact on policy. By recourse to discourse and its function in not only articulating, but assigning meaning, we may study how policy makers make sense of complex policy problems, uncovering the attitudes and assumptions involved.

Although there is no single, unified method (Zittoun, 2009), analysis of discursive data is already an accepted approach to the reconstruction and categorisation of actors’ beliefs and perspectives (Vennesson, 2008, p. 234). Turning to how political actors talk about actions or events may provide some insight into the role of underlying subjective meanings or motivations (Fischer, 2003, p. 141) driving policy

change in response to the courts. Discourse is not a transparent vehicle through which actors convey beliefs or value positions – although they will doubtlessly be privileged. Besides being the content of policy problematisations, discourse is also the tool through which such meaning is rendered from complex social and political reality, distinguishing particular aspects of a situation (Hajer, 1993, pp. 45–6). We may therefore consider how political discourse selects, organises and interprets the problems with which it engages (Fischer, 2003, p. 143), and also provides a meaning context within which we understand that problem. How a problem is constructed in political discourse can affect whether it is presented as intractable, irrelevant, or in need of imperative action (Baachi, 2009). Discursive framing is also an act of classification which attempts to render an issue stable (Hajer & Laws, 2008, p. 253), guiding perceptions towards a coherent and consistent understanding of an issue, rather than opening it up to deliberation; an attempt at persuasive definition and concrete suggestion. A judicial decision calling for policy change, or more broadly, the parameters of human rights principles as legitimate constraints on asylum control, may comprise such problems considered by government in the wake of judicial decisions – as articulated discursively in documents and rhetoric.

However, discourse is also an action-oriented practice which functions within a particular social context. For example, political discourse within government serves to coordinate and communicate policy ideas. Scope for specification of meaning and associated legitimation of problem definitions and policy interventions are provided for and bounded by established rules and relationships between speakers and audiences. This political context determines the functional logic and normative assumptions which guide the role of discourse in government. In particular, this raises the importance of what Maarten Hajer (2009) has termed “the authority question” in government: the crucial role of discourse and performance in justifying an authoritative response to a problem. Judicial decisions which challenge policies and political programmes may constitute a moment of “dislocation”, a situation “where political routines seem to be lifted from their solid institutional hinges.” (Hajer, 2009, p. 5) Such dislocation requires the “re-enactment” of political authority (Howarth, 2000). Hajer (2009, p. 7) emphasises that the highly mediatised and performative character of modern politics means that the most important aspect for the

investigation of governmental authority is the political drama and discourse which the public can see, rather than what goes on behind closed doors. However, we must remember the parallel significance of not only communicative discourses which intend to justify authority to constituents outside government, but also the coordinative discourses which serve to enact that authority within government (Schmidt, 2008). It is on both planes that government performatively re-enacts its authority as part of its inherent function. This is an ongoing process, whereby discourse serves to keep political routines firmly attached to their 'institutional hinges.' In this manner, the case studies which form the basis of my empirical research (outlined in the next chapter) comprise a reading of governmental discursive sources in terms of how they function to narrate governmental capacity, authority and control in the face of potentially destabilising changes to a policy area, such as asylum control, when presented with unwelcome interventions from the courts.

Policy as narrating political authority

By attending to politics as performance and policy as an exercise in problematisation, two notable functions are emphasised. As discursive constructs, policies order complex and ambiguous pressures for change. In doing so, they also seek to signal political authority and capacity to manage change. There is a certain paradox involved in the tense relationship between narrating the stable continuity of political authority and capacity on the one hand, and the change which it must negotiate on the other. This tension is somewhat characteristic of politics, which involves demarcating a spatial sphere over which certain actors and institutions have stable authority, as well as managing the potentially unstable relationship between present social and political experience and a "horizon of expectation" (Koselleck, 1985; Palonen, 2006a, 2006b). Government is an endeavour to claim stable authority whilst constantly shifting the balance between past and possible future policy trajectories. Political engagement with change therefore presents a challenge to stable political identity; tensions between 'experience' and 'expectations' must be addressed, or else they may appear irreconcilable. Arbitration by the legal system facilitates equilibrium by shielding the political system from potentially destabilising disputes (M. King & Thornhill, 2003, p. 112; Stone Sweet, 1999). Yet the outcomes of legal arbitration also comprise signals which may disrupt this very stability, to the extent

that they are interpreted within the political system as impinging upon realisation of prior policy expectations or political authority over them (Luhmann, 1990; Teubner, 1993).

To return to the question of judicial impact, unless policy meanings and expectations are managed in light of the experience of judicial imperatives for policy change, political authority over the future governance of the related policy problem may itself come into question. This moment, where political authority must be “re-attached to its hinges” is one where policy exists in flux. Future policy trajectories are at least momentarily uncertain. Yet this condition of flux is perhaps an ongoing, perpetual state – given the relentless stream of judicial and other stimuli for reform with which government engages. In this regard, it is the constant endeavour of politics to stabilise policy – not only in terms of the conceptual definitions and categories which particular interventions draw upon, but also the authority of a broader worldview which underpins their meaning, significance and claims to legitimacy. This is practiced by means of discursive problematisations, which organise unavoidably contingent meanings by making consequentialist arguments about cause and effect.

This tension at the heart of politics is consistent with the observation that a central function of human cognition is to narrate stable self-identity in the face of constant, ongoing and inescapable change (Ricoeur, 1981). Narrativisation of self in time stabilises identity, whilst allowing for accommodation of change, re-ascribing agency to the self. This is an understanding of sense-making in a context of ambiguity which Barbara Czarniawska has applied to the study of narrative’s role in stabilising continuity of organisational function (1997, 2004, p. 125). Here, comprehension of change involves production of meaning by “imposition of a certain formal coherence on a virtual chaos of events” (White, 1981, p. 795). At the level of government, policies as problematisations comprise just such narratives, geared not only towards managing changes to an unstable political reality, but also towards the stabilisation of political identities. In this regard, policy making performatively scripts not only the problems with which it engages, but also the identity and authority of those who do this discursive work. We must therefore engage with the narrative which is being invested in judicial impact on policy change. This is to engage with identification not

of objective policy change, but with how participants in policy change subjectively identify and produce judicial impact upon it by grasping at and manipulating meanings (Zittoun, 2009, p. 90).

Consideration of this interpretive process requires that the consequentialist arguments involved in policy as problematisation be distinguished on a case by case basis (the practicalities of how I analyse problematisation are attended to in chapter 4). Put simply, we may identify judicial impact as what policy makers and politicians say it is. This is the 'effect' which is argued to be a logical product of a 'problematised' cause; it is the *denouement* which policy makers narrate as the solution to the problem. The way in which government responds to the courts will indicate not only how it understands or 'frames' a judicial decision and its impact. It will also indicate an orientation towards judicial impact in terms of what should be done about it in enacting policy change. This discursive response serves not only to justify a conceptual definition, value assumptions, or a material response by way of policy solution; it does so in such a way as to ensure that the discursive construction of policy meaning is delimited and 'bound' with political authority. This dynamic, involving the exclusion of alternative policy meanings, whether stated or implicit, is essential to reconcile the disjuncture which a judicial decision creates between its articulation of valid policy and implementation, and an opposing view to which government was previously committed and which it sought to uphold in court. Given the adversarial political context in which government depends upon performing its authority, this inconsistency must be reconciled. Compliant policy change is therefore a clear case of dissonance between prior policy beliefs and subsequent political actions in response to the courts. As such, in order to better specify and differentiate the ways in which governments may respond to the courts to argue for policy coherence, I now turn to a discursive conceptualisation of cognitive dissonance.

Responding to Dissonance

Judicial decisions may be interpreted as a potential disruption to governmental authority where they require that compliance be reconciled with pre-existing political values or beliefs. In a fairly direct manner, court rulings present a judicial perspective

as a non-executive arbiter of valid policy, challenging government to reassert authoritative control over the meaning of policy interventions. More than this, however, where government has unsuccessfully defended its position on valid policy in court, only to receive an adverse judicial decision, there is a manifest gap between the government's stated beliefs and the requirement to act differently in compliance with the judicial decision. This is a moment where the coherence of valid political authority, and certainly the coherence of a policy are ruptured – or to paraphrase Howarth and Hajer, political authority becomes momentarily unhinged, requiring action to restore it. Judicial decisions may therefore momentarily unsettle the narrative of a policy. In so far as this requires the justification of political authority, governmental responses to the courts are analogous to the phenomenon of cognitive dissonance, if approached as a discursive rather than as a cognitive phenomenon.

Cognitive dissonance theory suggests that people feel uncomfortable if their attitudes appear inconsistent with their behaviour, especially where they may be required to justify their beliefs and conduct to others. Dissonance will be stronger the more firmly held the beliefs are, and the greater the number of discrepancies (Festinger & Carlsmith, 1959). In its psychological formulation, people are considered apt to address this discomfort by bringing either attitudes or their behaviour in line with the other, or finding some other way of discounting this discrepancy (Harmon-Jones & Mills, 1999). Limited attempts to apply a conventional behaviourist conceptualisation of cognitive dissonance theory to the problem of explaining compliance with court orders (Johnson, 1967; Muir, 1967) have been considered to offer little insight into why an individual responds in a given way (Canon & Johnson, 1999, pp. 161–2). This is an issue which I return to below, considering the importance of distinguishing the ideas articulated in a response to the court. However, rather than seeing dissonance as a 'cognitive' problem, which is difficult to access by analysing language or reported attitudes, it can be approached as a discursive phenomenon. People may be held to account for the discrepancy between their attitudes and behaviours and may be pressured into justifying them; again, they may deal with this by bringing their reported attitudes or behaviour into a state of consistency, or they may deal with this using some alternative rhetorical strategy – for example, arguing that the discrepancy is inconsequential. Politicians may be

particularly likely to be held to account for discrepancies between their stated commitments and actual behaviour, given that they are elected on the basis of what they claim to stand for. Executive agencies may be similarly held accountable to ministers and parliament. In this regard, we may also reflect on the need for government to perform authority both internally to institutional actors and externally to constituents and policy communities.

In so far as political authority is grounded in maintenance of a consistency between beliefs and actions, inconsistencies between behaviour and professed ideology, political promises and policy objectives must be addressed (Neuman & Tabak, 2003). Judicial impact may therefore produce dissonance where compliant policy change must be reconciled with pre-existing policy narratives. Governmental actors cannot easily disregard or dissociate completely from judicial decisions, as they express values subscribed to by government (procedural justice, rule of law, human rights, for example) (e.g. Cabinet Office, 2010a, 2010b). Yet, these values are articulated and applied by adverse judicial decisions in a manner which is inconsistent with the realisation of pre-existing governmental policy goals. The result is two conflicting accounts of valid policy which must be reconciled by government to prevent dissonance and the associated risk of appearing inconsistent and lacking in authority. Any such apparent inconsistency must be addressed – not only via material changes to policy, but through the discursive process of delimiting the problem of compliant policy change, so as to legitimate political authority. Such policy coherence must be justified by government in a variety of fora and to a variety of audiences. For example, in subsequent engagement with the courts, within parliamentary debate and committee hearings, to international bodies such as the Council of Europe and perhaps above all, in statements to the public and media. Future policy trajectories must be made to appear coherent with the judicial articulation of legal values, as well as pre-existing policy goals – for example, promises to control asylum. Given the frequent and ongoing involvement of the judiciary in overseeing the legal legitimacy of government actions, and the control of immigration and asylum in particular, this process of justifying the reconciliation of adverse judicial decisions and prior policy may be considered an ongoing and characteristic feature of the process of policy making, rather than an exceptional disruption to the equilibrium of a policy.

Discursive approaches in social psychology conceive of social reality as structured around potential conflict over subjective interpretations of meaning, which individuals must negotiate in order to maintain a coherent discursive representation (Potter, 1998; Stapleton & Wilson, 2009, p. 1360). Particularly influential within this field is the work of Michael Billig (1996), who has argued that all discourse is rhetorical, in so far as its argumentation involves implicit dialogic justification of a position against potential opposing argumentative positions: “the possession of an attitude indicates a statement of disagreement as much as of agreement and it signifies an implicit willingness to enter into controversy” (Billig, 1996, p. 207). In this sense, inconsistency, or dissonance, is not a problem in and of itself. Rather it is the potential for this inconsistency to lead to damaging criticism which must be warded off (Stapleton & Wilson, 2009, p. 1361). Whether or not we agree with such social psychologists that rhetoric structures all discourse and all human thought, we may agree that it certainly has a constitutive role in the case of justificatory discourses, and that these are central to political communication. Billig’s description of the rhetorical aspect of discursive practice is certainly consistent with the delineation of bounded meaning involved in the act of problematisation as delimiting, excluding and undermining oppositional content (Derrida, 1981; Foucault, 1985). Given the importance of performing authoritative governance (Hajer, 2009), through the pursuit of stable authority over conceptual meaning (Bauman, 1991) and seeking support from the public by justifying policy change (Schmidt, 2008), notable pressure is put upon government by the public and particularly the media to provide rhetorical arguments which inherently address potential dissonance.

Incorporating dissonance strategies within problematisation

How inconsistency between compliance with the courts and prior policy commitments is discursively addressed or negated will indicate political attitudes to judicial impact. In this regard, policy makers’ engagement in the problematisation of compliant policy change will express a dialogic relationship between the judicial decision and the prior policy commitments. This is not to repeat my previous argument that analysis of policy as problematisation requires investigation of the discursive construction of cause and effect, its guiding logic and associated normative assumptions. The problem of dissonance is specifically related to how

such discourse seeks to reconcile policy incoherence and political authority. As such, in analysis of policy as problematisation, it is very important to identify and differentiate the discursive strategies involved in addressing dissonance.

Billig's objective in the study of discourse is the investigation of how competing expectations and reasons (*logoi*) are resolved or dismissed "without any fundamental changes in belief" (Billig, 1996, p. 194). Prior beliefs may in fact even be strengthened in the face of dissonance (Stapleton & Wilson, 2009, p. 1361). Whether beliefs prove more fluid in the face of controversy is, I believe, an empirical question. The beliefs, assumptions and values which structure a discourse may change in the course of justifying political authority. However, the central idea of political authority itself is certainly a pre-requisite value which must be sustained by political rhetoric. Acting in compliance with the courts to change a policy leads to the question of whether this means that the objective goals, function or anticipated impact of a policy have changed in line with compliance. Rhetorical justifications are not necessarily logical. A politician may reasonably, if not logically, argue that compliant changes to a policy will not get in the way of successfully realising the policy goals, despite the constraint imposed. As my concern is not with whether political discourse is rational, what matters most is to identify the strategic argumentation involved in resolving, disregarding or dismissing such inconsistencies.

In applying Billig's model, Karyn Stapleton and John Wilson (2009, p. 1364) identify three typical discursive strategies for dealing with dissonance:

1. Explicit denial that change has taken place;
2. Discursive reworking of what might appear to be changes (such that these, ultimately, do not constitute change);
3. Some acknowledgement that change has occurred, followed immediately by minimisation or rejection of this proposition.

Many immediate parallels are striking between these distinctions and the typologies of bureaucratic response to judicial decisions which I addressed in the previous

chapter. Notably, we may seek to relate this discursive approach to William Muir's(1967) typology of behaviour in bureaucracies which are unwillingly charged with reform by the courts:

1. Denying the existence of the judicial decision;
2. Depreciating the decision by interpreting it to be inapplicable;
3. Dissociating himself or herself from the field covered by the decision;
4. Becoming indecisive;
5. Keeping the original attitude and derogating from the law
6. Accentuating the original attitude and derogating from the law;
7. Converting to the legal attitude;
8. Diminishing the importance of or eliminating an originally equivocal attitude.

(Canon & Johnson, 1999, based on Muir 1967 and Johnson 1967)

Indecision and derogation from the law, although hypothetically possible (particularly in a bureaucratic context where public scrutiny is less pervasive), are suggestive of temporary strategies for responding to the courts. In a liberal-democratic state purporting to adhere to the rule of law, we may reasonably expect delays or derogation to be followed by further escalating litigation or judicial review, leading to mounting pressure for a more robust engagement with the problem of compliance and how it should be reconciled with other political commitments. The added value of a rhetorical approach to this issue of dissonance is the consideration that government may pursue a strategy of both dismissing a court ruling whilst keeping its original attitude, and yet also comply (not derogating from the law).

Similarly, conversion to the 'legal attitude' need not necessarily require abandoning other, potentially conflicting beliefs. As scholars of the US Supreme Court have noted, politicians may willingly emphasise the coercive effect of judicial decisions as a means of renouncing responsibility for contentious policies, or "passing the buck"(Hirschl, 2008a). In this respect, the suggestion that when responding to the courts government may seek to diminish the importance of prior, conflicting attitudes seems pertinent. Government may equally seek to diminish the apparent inconsistency of a court ruling with its ongoing commitment to prior policy

objectives, so as to 'contain' judicial impact (Conant, 2002). In accounting for these considerations, I arrive at the following typology as a basis on which to distinguish judicial impact on policy according to how government responds to the courts:

Typology of responses to a judicial decision:

- **dismissal** of the applicability of the judicial decision;
- **depreciation** of its significance to a particular policy goal;
- **dissociation** of the given political actor or institution from the domain of the decision;
- **amplification** of the coercive effects of the judicial decision, whilst keeping the original attitudes to the policy issue;
- **conversion** to the legal attitude;
- **containing impact**, by seeking to diminish the apparent discrepancy between policy before and after the judicial decision.

(Based on Canon & Johnson, 1999; Conant, 2002; Johnson, 1967; Muir, 1967; Stapleton & Wilson, 2009)

Specifying the discursive strategy pursued in response to the courts cannot directly account for why government pursued one approach over any other (Canon & Johnson, 1999, p. 162). However, it provides a compelling means to distinguish forms of judicial impact on policy change, *as understood by government*. From the identification of judicial impact according to its discursive construction, we may also identify the reasoning and assumptions involved. This is to say that we can trace the construction of cause and effect from a governmental perspective according to how judicial impact is problematised. In order to understand why government responded to the courts in a given manner (leading to a particular strategy for dealing with dissonance), it will be necessary to also distinguish the ideas 'at stake' in the rhetorical dialogue between policy and compliance. As such, I now turn to the utility of differentiating levels of generality of ideas involved in policy problematisation, as a means of distinguishing arguments which are involved in different cases of judicial impact.

Ideas as the content of problematisation discourse

Again we face the problem of explaining how and why change happens. Consideration of policy change as an exercise in problematisation will indicate significant aspects of the reasoning which motivates particular responses to judicial decisions. However, we still lack a means of concisely differentiating and expressing the factors which are at stake in motivating this response. This deficiency is analogous to that charged as characteristic of the majority of 'new-institutionalist' approaches to the study of policy change: good at describing what and when change happened, but largely silent on how and why this result came to pass. The work of political economist, Vivien Schmidt, has sought to address this problem. In particular, her engagement with the constitution of policy through discourse, and the ideational content of discourse are promising for the purposes of specifying the content of policy change in a manner which is conducive to problematisation analysis.

Ideas as mediating and constitutive of political reality

Schmidt's work, which she brands discursive institutionalism, takes as its starting point that discourse is the interactive process in which ideas are represented and exchanged. Discourse encompasses not just what is said, but also the context where, how and why it is said (Schmidt, 2008, p. 305 c.1). As such, political institutions are constituted through communication as a process of intersubjective creation of meaning. Whilst actors' cognition is important to this process, it is through the discursive articulation of ideas that politics takes place. Schmidt holds that investigating policy change according to rational calculations, path dependence or cultural norms, tends to facilitate explanations of institutional and policy stasis. However, we may do well to consider that these and other factors are both realised and enacted in a discursive meaning context. Discursive interactions in government and beyond constitute an intersubjective meaning context in which preferences, historical paths and cultural norms are not static structures which pre-figure political outcomes, but rather dynamic constructs (Schmidt, 2008, 2011). This claim is consistent with my characterisation of policy as problematisation – a discursive practice which is constitutive of political meaning.

Policy ideas expressed in discourse include actors' beliefs about both the material and normative facets of the context in which they function and their interaction with it: institutional configurations, normative constraints and prospective sanctions, roles, responsibilities, appropriate behaviour, and so on. To co-opt rationalist terms, ideas prefigure political actors' understanding of the environmental factors from which they interpret the 'rules of the game' and their role in it; they also constitute a fluid expression of the preferences to be mobilised in determining appropriate action. Context and ideas have a dialectic relationship. Context informs political actors' ideas, which in turn inform strategic behaviour which transforms the political context (Hay, 2002, p. 214). From this social-constructionist perspective, non-ideational variables "only do explanatory work when unpacked as ideas or beliefs." (Bevir & Rhodes, 2004) When it comes to political analysis, it is only to the extent that such factors are perceived as significant by political actors engaged in policy change that they have any traction in explaining it. Moreover, these ideas are only rendered meaningful and observable in their discursive articulation. We may, therefore, attach some significance to those ideas which are invoked in discourses on policy change. Ideas are the blocks which build political discourse, and such discourse is the basis for the discursive enactment of a policy domain.

This is not to say that factors such as interests, path-dependence and norms are unimportant. Rather than objective material factors, they are subjective ideas, internalised within the cognitive and discursive frameworks which govern a particular policy context. As such, they are not static factors, but changeable as a result of how actors apply ideas in a particular context, and according to their discursive abilities in communicating them. Political actors' interpretation of the world around them will also partially be inherited from political traditions (Bevir, 1999, pp. 187–99). However the scope for explaining where these beliefs come from and how they are transformed through political practice is unclear (Hay, 2004).

Ideas as a basis to interrogate policy change

Whilst it is difficult to explain why political ideas change, it is possible to consider ideas not as dependent variables, but as explanatory factors which may help us to infer the role of meaning and interpretation leading to political actions (Hay, 2002, p.

213). In calling for an explanatory role for interpretive political analysis, Colin Hay emphasises the importance of just such a shift of focus: from simply recovering “the beliefs which inform actions” (Bevir & Rhodes, 2004), which amounts to an interest in “understanding per se”, towards explaining “the role played by particular understandings in motivating the political conduct of particular actors.” (Hay, 2004) The task here is to identify how ideas lead to actions. In this case, how ideas about asylum control or judicial constraint lead to a given response to the courts. Apprehending these ideas is essential to understanding the internal trajectories which lead to divergent policy outcomes (Bleich, 2011).

Schmidt emphasises that policy making takes place through discursive interaction. As such, the most observable and meaningful factors for analysis of the policy process are the “particular set of ideational rules and discursive regularities in a given meaning context following a particular logic of communication” (Schmidt, 2008, p. 314 c.2). These discursive regularities and the associated logics and rules which underpin them are the governing ideas which constitute discourse. This comprises more than the common refrain that ideas matter (Hay, 2004, 2006); their significance to policy analysis derives from their role in structuring discursive interactions which are the driving force behind policy change. These ideas are the referents and logical units building the problematisation discourse through which political actors make sense of complex stimuli and reconcile policies with judicial decisions – whether as part of an explicit or implicit chain of reasoning.

Therefore, by studying the ideas expressed in political discourse about policy, we apprehend the content driving the process of policy change. By analysis of the process of subjective political reasoning involved in discursive problematisation, we may construct a narrative to explain links between the ideas which govern policy and the response to the courts which characterises judicial impact on policy change. This is, in effect, to expose a “constitutive logic” (Wendt, 1999), which I consider to have not only descriptive but explanatory potential (Hay, 2004; c.f. Bevir & Rhodes, 2004). This potential comes from the possibility of linking a narrative account of subjective meaning within the political system (Bevir & Rhodes, 2004) to the

rhetorical orientation adopted in response to the courts; the discursive articulation of ideas and beliefs can account for political outcomes (Hay, 2004).

Here, I am essentially posing the question of *what changes when policy changes?* Ideas comprise the building blocks of policy as problematisation, by means of which policy meanings are experimented with to maintain plausible connections between problems and solutions (Zittoun, 2009). Such ideas are therefore indicative of the subjective, strategic reasoning according to which political actors discursively identify policy change, order and impose meaning upon it. Certainly, there are material transformations to the practices of government, and the legislative, institutional and operational frameworks within which these take place. However, the composition of these material outcomes and the process through which they are both delineated and transformed are prefigured and enacted by discursive processes; through interactive and rhetorical contestation over meaning. Ideas about valid policy are rhetorically constituted and mobilised through discourse. It is these ideas which comprise the building blocks of policy, and it is therefore ideas which are the ideal indicators or units of analysis to identify policy change. These are the ideas which both constitute and govern the function of a particular policy domain. Moreover, as we apprehend their articulation by the actors involved in policy governance, they constitute a direct insight into the subjective construction of meaning by those directly involved in enacting policy change; they indicate what key actors perceive to 'be at stake' in policy change intended to comply with the courts.

Differentiating policy ideas

To derive some explanatory traction from ideas in political discourse on judicial impact and policy change, we require some means of differentiating variance in the ideas which are invoked as 'at stake' when responding to a court ruling. In this regard, I once again wish to draw upon Schmidt's distinction of three levels of generality of ideas engaged with in political science (as in chapter 1):

1. Policies: the specific solutions proposed by policy makers;
2. The more general programmes which 'underpin' these policy ideas – the underlying programmatic logic which defines the problem to be solved; and

3. The foundational ‘public philosophies’ which ground these (J. L. Campbell, 1998) – the rarely contested assumptions and values on the ordering of knowledge and society. (Schmidt, 2008, p. 306)

The cognitive and normative content of these ideas orient policy discourses in terms of what is good or bad about a situation and the actions which must be taken to deal with it (Schmidt, 2008, pp. 306–7). There are clear parallels between this specification of ideas and my previous discussion of problematisation. However, Schmidt’s typology serves to add a notable differentiation of the ideas ‘at stake’ in the problematisation discourse. Because each type is of differing fundamental generality, this provides a means of indicating how great a ‘problem’ government perceives judicial impact to be in each case. We may therefore distinguish the ‘level’ or extent to which a judicial decision is perceived within government as impacting policy coherence and political authority. This distinction may prove helpful in explaining variance in how governments have responded to the courts to reconcile judicial impact with asylum control policies.

Typology of level of impact

- Policy;
- Programmatic logic;
- Public philosophy.

Where political actors perceive the integrity or continued function of ideas governing a policy to be challenged by compliance with judicial decisions, the outcome may or may not be their constraint or reformulation. In either case, a pre-existing policy commitment at any of the above three levels of ideas may be perceived as having been brought into question by judicial decisions. Given the importance of an authoritative rhetorical response which justifies the coherence of policies, political actors are held (per the above typology of responses to the courts) to respond in such a way as to seek to reconcile policy change with the governing ideas which they have committed to. It is important to understanding the broader outcomes of judicial impact on policy change that a distinction is made as to whether governing ideas are constrained or challenged. However, the very challenge to the integrity of such ideas

may be sufficient to aid in accounting for *why* government responds in certain ways to judicial impact. As such, the typology of level of impact is not merely a useful means of descriptively articulating the ideas involved in policy discourse. It is also a tool to be used in tandem with the response typology to interrogate whether variation in the level of impact may account for variation in governmental responses.

Engaging with the ideas which political actors consider to be ‘at stake’ in policy problematisations provides a compelling way to explain attitudes and responses to judicial decisions. These substantiate a relationship between policy preferences and judicial impact, and are referents in the justification of how dissonance between them may be reconciled. However, where Schmidt’s discursive institutionalism is somewhat lacking, is the practical question of how to actually study discourse and identify ideas. In my research, this is addressed by integrating her typology of ideas within the study of discursive problematisation. However, it is still necessary to consider where and how this discursive practice unfolds. Discursive meaning is very much a product of the practices through which policy making and politics take place. As such, I now turn to governmental documents and political rhetoric as the primary discursive practices through which government publicly engages with and responds to policy problems. These provide both ‘texts’ and ‘practices’ which may be deconstructed to expose ideas invoked in the articulation and justification of policy problematisations.

Government Documents and Political Rhetoric

So far, I have largely discussed sense making and discourse in government in a fairly abstract fashion. I now wish to ground this discussion by relating it to documentation and rhetoric as the substantive practices through which policy as problematisation takes shape in government. Documents and rhetoric are both tools and processes through which government interrogates and responds to social and political complexity. Their deployment of language serves to stabilise reference points for action. They are “operational routines”, which mobilise accepted rules and norms of government to bring coherence to the social world (Hajer & Versteeg, 2005, p. 177). As discursive practices, documentation and rhetoric ground problem constructions in a meaning-context which is oriented toward very specific

institutional and political functions. Namely, this is to specify and justify policies as valid, efficacious and authoritative responses to problems, and therefore legitimate governmental capacity to control them. It is through documents and rhetoric that government specifies policy problems and justifies them; both to audiences within government, such as executive agencies and parliamentary committees, and also to outside audiences such as the public, media, policy stakeholders and international observers. In the wake of an adverse judicial decision, it is the production of documents and rhetoric responding to the courts and surrounding policy issues which construct the problem of compliance and judicial decisions' broader impact on asylum control.

As noted above, in my brief discussion of Derrida's approach, discursive texts such as documents and rhetoric can be studied for their bounding of content and exclusion of alternative perspectives. Such a powerful role is already ascribed broadly to discursive practices in the sociology of knowledge (Berger & Luckmann, 1991; Keller, 2008, 2011). However, in this section, I justify political rhetoric and government documents as ideal points of reference for the analysis of political understandings of policy change and judicial impact. I turn firstly to political rhetoric, as its role in constitution of meaning is clearer, given that one of its definitive functions is to persuade others to accept the speaker's value position or argument. I then turn to elaborate how the production of governmental documents can be considered to serve a very similar function.

Political Rhetoric

Political rhetoric often directly and explicitly seeks to justify proposed or ongoing policy change, as well as the legitimacy of the underlying political programme, institutions and government. Statements to the media and in parliamentary debates typically revolve around such justifications of political authority and capacity. I wish to emphasise that political rhetoric is not simply a transparent indicator of material policy change – which it articulates and justifies. Rhetoric can be conceived of as a distinct plane of politics which may be impacted by judicial decisions quite apart from their substantive effect on material policy change. It is a commonplace to assert

that what politicians say often has little relationship with what they do, but this should not prevent consideration of such a divergence.

Rhetoric is integral to symbolic politics, serving as a tool to manage public expectations and beliefs (Edelman, 1988). Democratic politics inevitably produces contestation between competing narrative responses to a problem. In so far as political authority is at stake, this comprises a “dilemma” (Bevir & Rhodes, 2003), in which political power depends on the capacity to influence the “dominant discourse” (Fairclough, 2000, p. 3; van Dijk, 1993, p. 254) to exercise control over not only the parameters of the issue, but how it is understood as a problem which authorises the speaker as arbiter of the appropriate response. Rhetoric may address and seek to justify substantive policy change – extant or proposed. Or it may rather circumvent the entire question of policy change, in order to focus more directly on legitimisation of the speaker, political regime or institution. Recourse may be made to the authoritative quality of rhetorical persuasion as a practice, rather than legitimating governmental authority by means of justifying the logical coherence of policy change. As such, it is quite possible for a discrepancy to exist between rhetorical and material responses to the courts, because political rhetoric is fundamentally an art of persuasion as much as it is a tool for justification of governmental practice. Notably, in a highly mediated environment, substantive changes to policy are often less visible than rhetorical statements.

Nevertheless, the persuasive structure and intent of rhetoric, as a bid to shape political meaning, is common to both the symbolic and substantive visions of its function. Political rhetoric seeks to demonstrate convincing authority over a policy problem in a bid for dominance over its discursive construction. Central to the function of rhetoric is its narrative ordering of meaning. Rhetorical arguments bid to popularise a subjective vision of “how we got here and of where we are going” (Finlayson, 2007, p. 557). Such arguments are not merely indicative of the beliefs of political actors, but also constitute actions themselves (Austin, 1962), endeavouring to bring about particular political outcomes: “acting on others by acting on their conceptions” (Finlayson, 2007, p. 553). The persuasive act of leading an audience to the necessity of a particular understanding of a problem, or a given course of action,

depends upon the creative definition and re-description of ideas, actions and events (Skinner, 1996, pp. 138–180), as well as a characterisation of who is involved, how they are involved and what they think they are doing (Riker, 1986). What appears to be a simple “statement of the facts” can therefore be understood as an endeavour to naturalise a particular narrative sequence of events with clear-cut characters, in order to “manipulate” the evaluation of outcomes towards that preferred by the speaker (Shepsle, 2003).

Classical analytical approaches to rhetoric largely focus on its persuasive potential and therefore evaluate its stylistic features (Furley & Nehemas, 1994). This is typically an exercise in taxonomy of how meaning is conveyed, and is not particularly instructive on how the construction of meaning is arrived at. My interest in political rhetoric derives more from its role as a practice of interpreting and constructing, rather than disseminating governmental meaning. This makes its substantive content apt for more general discursive analysis of the policy problematisation involved. In turn, I take this to be indicative of governmental attitudes and understandings of policy meanings and judicial impact upon them. As such, I approach political rhetoric as part of problematisation analysis by interrogating “the ways in which fundamental principles and ideas are (re)formulated, expressed and then (re)developed in argumentative action.” (Finlayson, 2007, p. 553) This approach has some parallels with critical approaches to discourse analysis which seek to uncover the reasoning behind political ideologies or common sense assumptions which are accepted by the public (Fairclough, 2000; Howarth, Norval, & Stavrakakis, 2000). However, I do not evaluate the extent to which examples of political rhetoric I engage with may have proven particularly persuasive or accepted. Rather, I interrogate their content solely for indications of beliefs and the logic behind their discursive construction. Even if we side-step the question of whether an example of rhetoric has successfully persuaded its target audience, it can still be considered as having an active role as a practice which shapes and reshapes specifically governmental narratives of meaning. This is to say that political rhetoric is indicative of a subjective ordering of meaning by political actors within government.

Governmental Documents

Similar to political rhetoric, the production of governmental documents can be understood as a discursive practice which, in the Foucauldian sense, serves a constitutive and normalising function of apprehending and stabilising meaning by specifying terms of reference for readers. Although documents are typically approached by political scientists as two-dimensional indicators of political attitudes, we may note that in media studies (McLuhan, 1964; Ong, 1982), science and technology studies (Callon, Law, & Rip, 1986; Latour, 1987), and organisational studies (Atkinson & Coffey, 1997; Cooren, 2004; R. Freeman & Maybin, 2011; Riles, 2006), there has been sustained engagement with documents as exerting a constitutive effect on meaning as agents in social life. These approaches share a common concern for documents as both mediating and performing meaning. The practice of documentation, requiring that a contextually situated format be followed for the preparation and presentation of ideas, necessarily shapes and delimits the presentation of meanings. Consistent with my engagement with discursive dissonance above, I wish to emphasise that this is a necessarily rhetorical and argumentative practice, which justifies content against implicit opposing perspectives. This is a process in which meaning takes shape through the discursive practice of engaging with stimuli from the social and political world to state beliefs on paper in preparation for their interrogation by a variety of audiences.

Documents perform a significant function in seeking to provide stable points of reference which may be drawn upon in political debate and implementation of policies, as well as their judicial scrutiny. In anticipation of contestation over meaning, political documents demonstrate a concern over conceptual categories, relationships between organisational actors involved in a policy domain, and justifying the appropriateness of policy responses. The success of a policy may hinge upon either precise and stable definitions, or a 'looseness' which provides for more discretionary interpretation and action. In either case, we may infer a common goal of seeking to enable political authority and discretion over the determination of appropriate policy measures. Governmental documents, in particular, provide a recorded legacy of how conceptual meanings and policy problematisations were represented as a basis on which to authorise policy actions. In this sense, documents

may be read not just for their content, but equally well for their function (R. Freeman & Maybin, 2011). In responding to judicial decisions and preparing policies, this function involves problematisation – whereby policy objects, rationales for intervention, roles and responsibilities are constituted and reconstituted in dialogue within and between documents. Governmental documents (like political rhetoric) act to stabilise conceptual categories, definitions, and legitimate intervening actors and actions. They serve a particular function in translating social and political pressure, and indeed judicial decisions, into meaningful referents for bureaucratic or political action.

To a significant extent, it is through a network of inter-related documents that government speaks to itself, determines and ascribes its sense of meaning and function. In this process of policy making as sense-making, documents serve both as referents to stabilise meaning and also as a discursive practice which actively performs and shapes cognition in government, with documents prepared in response to other documents. In the wake of judicial decisions, just such a network of inter-related documents is typically produced in order to articulate and manage policy meanings and strategies for action across different areas of government; notably, for the benefit of the executive and parliamentary committees. Even the oral contributions of politicians and bureaucrats to committees are documented, and inform the production of summary reports which further document the committee's interpretations, reasoning and conclusions. Such documents are intended to inform subsequent debate which may arise within government or parliament, and which will in many cases lead to the production of further documents to address outstanding uncertainties or doubts about a policy issue.

Published documents are primarily indicative of the public face of government – as opposed to the closed and inaccessible deliberations preceding public statements. However, access may also be gained to a network of inter-related internal documents which are typically prepared as part of an often lengthy process of policy problematisation before and after dissemination of more public statements by governmental departments and parliamentary committees. What political actors write and institutions publish is, of course, only part of a long process of prior and

subsequent deliberation. In particular, where there is apprehension about future accountability, documentation may be purposefully avoided in favour of informal oral discussions. Anecdotally on this matter, one government employee informed me that a notable amount of discussion about policy change is conducted by leaving post-it notes on colleagues' computer monitors, rather than sending emails to which they may later be held accountable. Documentary texts are unavoidably partial indicators of governmental reasoning. There is only so much that we can feasibly observe from outside the policy process. However, government documents, especially where several are accessible from various levels of consultation, dialogue and dissemination of policy ideas, nevertheless provide very significant indicators of what reasoning and meaning constructions governmental actors were ultimately willing to commit to type. As such, we may invest some confidence in the authority and significance of documentary discourses, so long as this involves questioning the status of texts, who wrote them and why.

In summary then, political rhetoric and documents are considered in this research not merely as vehicles for the articulation of governmental beliefs and perspectives. Rather they are understood as serving to actively shape the constitution of policy meanings. They not only indicate the puzzling that's involved in politics (Hecl, 1974); they are constitutive practices which shape and structure this process through which political actors and institutions seek to render stable meaning from an environment characterised by indeterminacy and ambiguity. As discursive practices of problematisation, their articulation of meaning is fundamentally constitutive. The practices of documentation and rhetoric are part of the cognition of government; in making sense of problems, they construct them by framing them in a particular way and proposing a particular solution as legitimate. This is especially the case where a networked body of documents and rhetoric accumulates (R. Freeman & Maybin, 2011), which together may be regarded not only as articulating, but actively shaping and delimiting policy in flux; responding to, constituting and stabilising shifting meanings. As such, they constitute excellent indicators of policy problematisations, and therefore of judicial impact on policy change as understood within government.

Conclusion

In this chapter, I have argued that policy change is ultimately best understood from the perspective of those involved in the process of making it happen. To this end, I have endeavoured to conceptualise and present a plausible agenda for the study of policy change by recourse to its discursive articulation and justification within government. Such discourses do not merely reflect, but actively constitute policy problems and seek to legitimate governmental authority over them. Judicial decisions comprise just such a policy problem, which must be interpreted, translated into a politically meaningful stimulus and then ordered as an object which can be acted upon. Judicial decisions are a potential political problem because they may challenge not only the lawfulness of policies and their implementation, but also the integrity of pre-existing narratives of governmental intervention in a policy domain. They are also a problem in the sense that they are “problematized” by governmental interrogation of their meaning, significance and effect in determining an appropriate response.

By engaging with the political construction of policy meanings (by interrogating policy as problematisation) we may expose their contingent claims to stability, and how they function to resist the potentially destabilising effects of judicial rulings and compliance on policy narratives and political authority. This requires acceptance of the associated epistemological and ontological position which underpins such concerns over problematisation: that problems do not exist out there in ‘the real world,’ but are a product of political actors’ interpretation, and that it is possible to identify and deconstruct this process by careful analysis of discursive content and practices. The judicial impact of a court ruling in this conceptualisation is not an objective truth, but a discursive construct which may even change over time according to governmental interpretations of policy meanings.

To understand the quality and perceived extent of judicial constraint on policies we must therefore look to the ideas expressed in the discursive framing of the ‘problem’ of compliance and the justification of how this should be reconciled with other policy goals. The way in which particular ideas make up this discourse can be differentiated according to whether they relate to the particular solution proposed, the logic

underpinning this policy intervention, or the public philosophy of government which the policy serves to uphold. Where present in problematisation discourse, these ideas reflect the issues which political actors believe to be of significance, and which may be perceived as 'at stake' should they be impacted upon by compliance with a judicial decision. How these ideas are expressed indicates the character of judicial impact from the perspective of government. Judicial impact on policy change is therefore most clearly indicated by the way in which government discourses express, respond to and justify the perceived challenge to these policy ideas, so as to stabilise and legitimate their meaning and governmental authority over them.

Discursive engagement with these ideas preconditions and may therefore explain governmental attitudes to judicial constraints on political discretion and prior policy goals. The product of these discourses – on what the problem of compliance is – may vary in terms of how government orients itself to reconcile the ruling with prior policy goals. Distinguishing the level of generality of governing ideas invoked in problematisation discourses, and whether they are presented as jeopardised, may well account for divergence in the way governments have responded to particular judicial decisions. Political rhetoric and government documents are central processes through which this process of managing policy change is discursively enacted.

In presenting this approach to the specification and differentiation of judicial impact on policy change and its political framing, I believe it may be the only feasible means for its observation. The significance of court rulings to the governance of a policy issue are fundamentally a product of how they are apprehended, understood and reconciled by those coping with such unwelcome calls for change. Having said much about how to conceptualise policy making as such a process of sense-making, and judicial impact as part of this process, the next chapter provides a methodology for its study.

4. Methodology

Introduction

In the preceding chapters, I have firmly characterised judicial impact as a problem relating to how government responds to the courts; not just in the form of material actions, such as legislation and procedural rules effecting policy change, but also in the way this response is discursively constituted and justified. This chapter advances a methodology for investigation and analysis of these governmental responses to the courts.

I begin the chapter with an overview of my ontological and epistemological approach to research. I then set out my use of comparison within a single case study and consider the scope for my approach in developing theoretical insights into judicial impact on policy change. I continue by narrating the process through which my research unfolded. After describing how cases were selected, I present them in the form of a table, according to politicisation of compliance and source of the ruling. These were identified in chapter two as potentially significant factors in shaping judicial impact. I then discuss how appropriate sources were identified; my chosen methods for data analysis, and the reasoning behind their selection. Finally, I close the chapter with a reminder of the analytical typologies presented in chapter three, indicating how they have been deployed in my research as a means of mobilising data from analysis of governmental discourse in response to the courts to analyse variation in judicial impact.

My ontological and epistemological position

Conceptualising judicial impact as a process whereby political actors interpret, negotiate and articulate meaning, I have not simply approached policy change in terms of substantive material alterations to policy structures (legislation, operational guidelines, etc.) but also focused in greater detail on a more extensive investigation of the discursive construction and justification of such changes by political actors. As argued in my previous chapter, investigation of this discursive component of policy change bears significant potential for gaining insights into how judicial decisions are mobilised and acted upon within government.

My dual concern for identifying material policy changes and their discursive framing is perhaps suggestive of an ontological position between realism and constructionism. However, it should be noted that my investigation of judicial impact on policy change considers material changes to policy as very much the product of how political actors interpret, respond to and act upon subjective understandings of judicial decisions. My research is therefore a study of “meaning in action” (Wagenaar, 2011). I conceive of policy problems and their solutions as constantly in a state of flux, as changing political interpretations continually reconstitute them (Bryman, 2001, pp. 17–18; R. Freeman, 2012). This is a rejection of the positivist conceptualisation that “social phenomena and their meanings have an existence that is independent of social actors” (Bryman, 2001, p. 17). As such, this research is informed by both a constructionist ontology and interpretivist epistemology, in that it seeks to understand judicial impact on asylum control as a construct enacted by political actors’ interpretation of its meaning as a guide to action. The central object of investigation is therefore the meaning which political actors ascribe to judicial decisions and policy change, within the broader context of asylum control. This is to say that political actors can and do influence the meaning and impact of judicial decisions on policy change, beyond the objective legal basis of a given court ruling.

Interpretive policy analysis

In this respect, my research follows the vision of interpretive policy analysis described by Peregrine Schwartz-Shea and Dvora Yanow. They describe interpretive analysis as like tracing the ripples caused by a stone cast into a pond. Even where the stone which caused them may no longer be visible:

we can surmise that a stone had been there when we see the ripples, and we can ‘look’ to clarify aspects of the impact it had as it passed... ‘interpretive looking’ from a position among the ripples. (Schwartz-Shea & Yanow, 2012, pp. 31–2)

To apply this metaphor to my research, the “ripples” caused by judicial decisions cast into governance of asylum are political actors’ interpretations of the ruling as a call to action. These “meanings in action” reverberate from the judicial decision, spreading throughout government. They are observable as articulated in governmental discursive sources, even though the initial impact (the stone or causal

significance of a judicial decision) is not directly observable. Given that access to governmental processes of policy making, documentation of legal advice and evaluation of policy options are all embargoed by government, and therefore unavailable to researchers, investigation of political interpretations and communication of judicial decisions' meaning and impact presents a meaningful and more importantly, feasible approach to researching the topic (Fischer, 2003, Ch.7).

Within case comparison

Given the paucity of theoretical and conceptual tools available to the study of how and why judicial decisions lead to varying impacts on policy change and its framing, my research design treads a middle path between abductive, and inductive reasoning. In designing the research, I took my starting point from the theoretically inspired factors which appeared to be potentially significant in shaping judicial impact: source of ruling and whether compliance was politicised (see chapter 2). These factors informed my selection of four 'episodes' or cases in which UK governments have responded to judicial decisions with ramifications for policy change (two cases in which compliance was politicised, two in which it was not; of these, two UK court cases, two from the ECtHR). In single case study research, explanatory leverage requires within-case comparison such as this (Collier, Mahoney, & Seawright, 2004, p. 101) to explore the processes involved in shaping variations in policy change and its framing, following judicial decisions. As discussed in my introduction to the thesis, asylum control in the UK, particularly where it concerns deportation and removal, can be considered both a hard case (Eckstein, 1975) in which to find a significant constraining judicial impact on policy, as well as a normatively important case. I must emphasise, however, that my intention was not to construct a strict comparative case study design of the sort which may be used to deductively test the significance of source and politicisation in isolation as predictive of judicial impact. By choosing to focus in detail on variation in political responses within this single case study, my aim was to arrive at detailed qualitative insights into the process by which judicial decisions impact upon substantive changes to asylum control policies and their framing in political discourse.

Consistent with my interest in arriving at detailed qualitative insights into how policy and its political framing are impacted upon by adverse judicial decisions, source and politicisation comprised a starting point to guide the research and evaluation of data. They did not serve as strictly formulated independent variables for evaluation. In this manner, I “blurred the line” between theory evaluation and theory development (Vennesson, 2008, pp. 236–7). The case study structure and selection of initial factors for investigation comprised a spring board for further investigation. The starting point in developing my research was, after all, the pursuit of an “intellectual puzzle” (Mason, 2002): that of certain cases which involved politicisation of judicial impact alongside compliant policy change. Existing theory offered little help in explaining such unwelcome judicial impact, requiring that I remain open to unexpected insights arising from the research process.

Abductive aspects of my research

Such “abductive” reasoning has been held to be a hallmark of interpretive policy analysis (Schwartz-Shea & Yanow, 2012, pp. 26–34). Characterised by a search for answers through “dialogue between data and theory mediated by the researcher” (Blaikie, 2010, p. 156), abductive reasoning is suited to research where existing theories fail to account for empirical evidence - acknowledging this puzzle and iteratively developing new concepts in an “inferential process from surprise toward its possible explanation(s).” (Schwartz-Shea & Yanow, 2012, p. 33):

we start collecting pertinent observations and, at the same time, applying concepts from existing fields of our knowledge. Instead of trying to impose an abstract theoretical template (deduction) or ‘simply’ inferring propositions from facts (induction), we start reasoning at an intermediate level (abduction). (Friedrichs & Kratochwil, 2009, p. 709)

This process is analogous to that of grounded theory:

(1) creating and refining the research and data collection questions, (2) raising terms of concepts, (3) asking more conceptual questions on a generic level, (4) making further discoveries and clarifying concepts through writing and rewriting (Charmaz, 1990, p. 1161).

Abductive reasoning leads to the execution of these tasks in an iterative fashion, alternating between theory and data. Iteration has been considered not only to

differentiate abduction from inductive approaches, but to result in theory which is “an intimate part of the research process” (Blaikie, 2010, p. 156). It strikes me as only intellectually honest to note that my position as researcher, interpreting data and seeking to derive theoretical traction for its explanation and understanding, will have a role in shaping this process. Moreover, to the extent that I endeavour not only to understand and explain historical events (Howarth, 2000, p. 131), but also to explain the qualitative character of judicial impact, this project blurs epistemologies (Miles & Huberman, 1994, pp. 4–5). This is consistent with a movement in public policy, among a variety of other fields, such as organisational studies and international relations, towards an interpretive mode of “constitutive analysis”, where context is a crucial variable in understanding how “social facts” come into being, yet which does not consign these to abject relativism (Pouliot, 2007, p. 373; Searle, 1995; Wendt, 1998). For my research, this involved the interrogation of judicial impact on a policy area as a “social fact” produced by political understandings, rather than some inherent or inevitable property of judicial rulings.

Inductive aspects of my research

In pursuing this goal of constitutive analysis, I agree with the central non-positivist tenet of interpretivist methodology: that explanations generated by research are contextually situated (by both the specificities of the data and the researcher’s subjective position). However, I do not fully subscribe to the argument that it is therefore impossible to induce more generally applicable “principles or propositions” (Schwartz-Shea & Yanow, 2012, p. 28). From emergent theory which is refined throughout the research process, ideal types can be constructed as abstract models which work towards theoretical explanations (Blaikie, 2010, p. 156). My inductive development and use of two descriptive-analytical typologies to compare the qualitative character of judicial impact across cases is an example of such a research output (I return to these below). This process of “analytical theory driven induction” (George & Bennett, 2004, pp. 240–2) was pursued as a means of providing for a nuanced typology of variance across my cases. I have used these typologies to account for the differing and complex means by which judicial decisions have impacted upon policy change and its framing in my cases. I propose that this is an example of emergent theory creation, which has the potential to advance

understanding of (albeit contextually situated) factors underpinning qualitative variation in judicial impact on asylum policy in the UK and its framing by government.

It is important to distinguish here, however, that generalizability was not the objective goal guiding the research process. Rather, theory development was a product of detailed insight into contextual factors which characterise my case study, emerging as commonalities underpinning individual episodes of judicial impact therein. In this regard, the typologies which were outlined conceptually in chapter three, and methodologically below, served to supplement my initial investigation of source and politicisation. In my final analysis, I compare findings across the four cases of judicial impact studied, to evaluate the significance of the source of judicial decisions (UK or ECtHR) and whether compliance is politicised, as key factors shaping judicial impact on policy change. Although the generalizability of my findings is necessarily limited, due to the contextual specificity of my research and the inescapable reflexive flavour which is a product of my perspective as researcher, this is typical of qualitative research in general (Blaikie, 2010, p. 217). The resultant understanding of judicial impact in my chosen case is, as Schofield says of qualitative research generally, “to produce a coherent and illuminating description of and perspective on a situation that is based on and consistent with detailed study of that situation” (1993, p. 202). This is middle-range theory, which may enhance understanding of both processes and outcomes by specifying the conditions under which these outcomes occur, contributing to “development of a rich, differentiated theory about that phenomenon.” (George and Bennett 2004: 216) The relevance of these “conditional generalizations of limited scope” (George and Bennett 2004: 216) to other policy domains or polities may be assessed in future research according to the comparative differences and similarities of the case under investigation (Blaikie, 2010, p. 217; Schofield, 1993, p. 207).

How cases were chosen

Politicisation and source as a basis for case selection

In my prior consideration of existing theoretical approaches to the impact of court rulings on government, politicisation of compliance and the source of the judicial

decision were distinguished as a starting point for selection of comparative examples for this research. As noted earlier, my intention is not to suggest these factors are explanatory variables which may directly account for variation in the form of policy change or its political framing. Rather, consideration of the significance of politicisation and source was a starting point to structure the investigation of the broader process of policy change and its political framing, which may or may not vary according to such factors. Given that politicisation and source initially appeared to be of some plausible significance to judicial impact, it could be said that they informed my selection of cases as a theoretical typology (Leuffen, 2007, p. 151), where each case corresponds to a different type for comparison. In this respect, each chosen case is inherently paradigmatic, in so far as it is “exemplary of a concept or theoretical outcome” (Gerring, 2001, p. 219). My intention was, however, to enhance theoretical and empirical insights into the process of judicial impact and its justification by using these initial types as a launch-pad for consideration of politicisation and source alongside other emergent factors of potential significance which arose during the process of data collection and analysis.

Four judicial decisions (or more accurately, the political responses these court rulings met with) were chosen for analysis. Two of these ‘cases’ involved judicial decisions from the European Court of Human Rights (ECtHR), whereas two were handed down from the British senior courts. Of these four, one of each of the ECtHR and British judicial decisions were considered to have been politicised, whereas the remaining two were not. Selection of these four cases allowed me to employ a qualitative case study based approach to contrast responses to judicial decisions on the basis of whether they are handed down from the ECtHR or a UK superior court, and whether politicisation (ostensibly due to national security concerns, in my chosen cases) was a potential mitigating factor in judicial impact. These judicial decisions were chosen so as to provide for both ‘hard’ cases in which we may expect governmental intransigence (particularly due to politicisation), and also less controversial cases, more conducive to acceptance of judicial impact on policy by government.

Consistency and comparability of cases selected

As far as possible, I sought to identify classes of potential cases which concerned common, comparable policy issues. To the extent that restrictions on asylum control and antipathy towards the courts have been consistent predilections of all UK governments from at least the late 1980s to date, I did not find it necessary to limit selection of cases to a single government for them to be considered comparable. General attitudes of the political and administrative systems have been consistently populist and restrictive of asylum, with variations from this baseline apt for consideration on a case by case basis. I also sought to identify municipal judicial decisions which were not primarily based on ECtHR jurisprudence, so to avoid diminishing the value of a comparison of ECtHR cases with municipal cases which could be considered as merely interpreting and applying ECtHR jurisprudence ‘through the back door.’

Identification of cases

To select cases on this basis, I first conducted a broad ranging overview of judicial decisions which not only ruled against the UK government, but could also be said to call for changes to the content or execution of immigration or asylum policies. The identification of such examples emanating from the ECtHR was quite straightforward, due to online cataloguing of jurisprudence by the Council of Europe. Recent annual reports by the Ministry of Justice to the Joint Committee on Human Rights, on the status of compliance with judicial decisions, were also a helpful point of reference for identification of recent cases from both the ECtHR and municipal courts. Case selection was also informed by a necessary parallel process of getting to know and understand the rather complex technical details and historical development of the law and politics of immigration and asylum in the UK, and associated human rights and procedural law. I therefore became aware of potential cases via legal textbooks, case law databases, and consultation with legal academics, immigration practitioners, and expert organisations such as the Refugee Council, Scottish Refugee Council and Immigration Law Practitioners’ Association (ILPA). This also required that I keep up to date with recent developments in immigration and asylum law via mailing lists, government and practitioner websites and blogs (for example, the UKBA website and notably, FreeMovement.org.uk and UKHumanRightsBlog.com).

This broad approach to familiarising myself with the topic benefited my research by allowing me to track the perceived significance of jurisprudence over time – as understood by practitioners and legal experts. Where more recent judicial decisions cited previous cases, these were considered (at least from a legal perspective) to be significant. I then used key word searches for these cases in online archives of government documents and parliamentary debates. This was necessary not only to assess the significance of cases to asylum politics and policy (as opposed to legal practice), but also to ensure that adequate sources were available to assess governmental responses.

Consideration was given to the limited number of cases which resulted in a declaration of incompatibility under the *Human Rights Act*, since it came into effect in 2000. Whilst these constituted the clearest examples of judicial decisions calling for policy change, I also sought to identify cases with a more general impact on legislative change (not necessarily confining myself to the HRA as a mechanism driving such change) and cases with an impact on operational policies on immigration control (i.e. not necessarily requiring changes to primary statute). This required tracing potential judicial impact beyond the abundant volume of significant new primary legislation on immigration and asylum, to identify changes to the Immigration Rules and UKBA Operational Guidelines, in line with judicial decisions.

Case selection was ultimately driven by my desire to compare cases involving reasonably similar policy questions, which could confidently be characterised as meeting with politicisation or its absence – this required identification of two apparently uncontroversial cases of compliance, and two in which government was at least discernibly reluctant, if not intransigent in responding to the courts. At the time of my case selection, limited media attention and lobbying by ILPA pointed to the failure of the government to promptly comply with a series of judicial decisions (ECJ 2008; 2011; UKCA 2010b; UKHL 2008; UKSC 2011a; 2011b). However, the policy questions addressed in the majority of these cases concerned rather technical issues relating to the implementation of a variety of areas of immigration law and European law. In contrast, the issues involved in my chosen cases can be characterised as

reasonably consistent and rather straight forward, yet fundamental to the governance of asylum control: whether or not an individual may be removed from the country, and if not, what restrictions in-country are lawful; as well as the procedural and human rights responsibilities falling upon government as a consequence.

My focus on deportation, removal and associated restrictive controls

Notable media attention has, in recent years, highlighted political controversy over the detention and deportation of children, foreign national prisoners, and suspected terrorists, as well as government capacity over removals in general. The particularly controversial issue of government capacity to expel foreign nationals where this may be legally constrained by the ECHR made deportation and removal particularly apt for identification of politicised and non-politicised cases, as well as cases which made their way to the ECtHR. The involvement of national security concerns in two of my chosen cases (*Chahal v. UK* and the Afghan Hijackers case) made compliance particularly controversial, suggesting politicisation.

My preference for cases relating to deportation and removal was motivated in part by a desire to investigate the fundamental question of judicial challenge to governmental authority over inclusion and exclusion of foreign nationals within the nation state. Moreover, certain significant rulings regarding deportation and removal have become somewhat definitive of both asylum law and asylum policy. Several of these cases may reasonably be assumed to have preconditioned governmental attitudes towards the courts (at least in the area of immigration and asylum). I therefore considered historical cases producing notable jurisprudence on asylum control, as well as more recent examples of adverse judicial decisions with potential impact on policy change. Asylum was truly differentiated from immigration control in response to an ECtHR case (1991) concerning deportation (*Vilvarajah v. UK*) – resulting in the legislation of appeal rights which institutionalised previously tenuous judicial oversight of asylum control. This case therefore presented a logical historical starting point for my research. My end point considers recent judicial decisions and government endeavours to reconcile foreign nationals' access to justice with policy goals on asylum control and expedient removals.

Cases which either directly concerned deportation or removal, or which otherwise sprung from judicial constraints upon these powers, were also a compelling subject for investigation due to their tendency to create seemingly intractable conflict between government and judiciary over the legitimate parameters of asylum control. Such cases were also compelling due to their engagement with procedural justice and human rights principles as constraints on the exercise of such sovereign powers as expulsion of foreign nationals – suggestive of probable non-compliance, yet consistently followed by implementation of the judicial decision.

My case studies as a narrative of asylum control, 1990-2012

Selection of case studies which span twenty-two years, from shortly after the genesis of asylum control as an independent policy area in the UK, to almost the present day, has allowed insights to be drawn into the development of governmental attitudes towards compliance and policy change over time. Insights into how government responded to particularly controversial judicial decisions in the past may help derive general insights into the politics of judicial impact on asylum control of potential benefit to practitioners concerned over recent examples where judicial decisions do not meet with the straightforward compliance which litigants and advocacy groups may have hoped for.

My chosen cases can be said to chart a story of the judicialization of asylum control, and an associated political backlash, which has at times led to the politicisation of law. Beginning in the early 1990s, the British government pre-empted the ECtHR's ruling in the *Vilvarajah* case (EComHR 1990; ECtHR 1991) to self-impose certain procedural constraints on its policy for the removal of asylum seekers. This pre-emptive constraint may be contrasted with the subsequent reluctant implementation of significant changes to the underlying logic of asylum removals, following the *Chahal* case (ECtHR 1997), in which the ECtHR ruled that expulsion to a prospect of torture, cruel, inhuman or degrading treatment, as prohibited by ECHR article three, would not be permissible under *any* circumstances, even where the individual concerned may pose a threat to national security. Of particular interest in considering this case, are subsequent governments' attempts to have the constraint imposed by *Chahal* overturned or diminished. In responding to decisions from the municipal

judiciary in the ‘Afghan Hijackers’ case (UKHC 2006; UKCA 2006) (on access to work and welfare where removal was barred by the ECHR), politicians lashed out at the judiciary, rejecting the legitimacy of their intervention into policy matters held to be the prerogative of a sovereign parliament. My final case introduces a less bombastic response to the *Medical Justice* rulings (UKHC 2010a; UKCA 2011a) on a policy which ostensibly sought to limit access to judicial oversight prior to the removal of certain categories of foreign national. Compliance appeared to follow this case in a somewhat straightforward manner, in sharp contrast to responses to *Chahal* and the Hijackers.

This overview of cases is presented in Table 1, below, which more clearly delineates key distinctions along the axes of politicisation, and whether the decision in question was handed down from the ECtHR or a municipal court. I also provide a brief summative indication of the issues involved in each case.

Table 1: Case studies according to politicisation and source

1. ECtHR / Politicised → *Chahal v. UK* (and subsequent ‘saga’ of responses)
Deportation at all costs;
2. UK / Politicised → ‘Afghan Hijackers’
Ad-hoc status excluding access to welfare and employment;
3. ECtHR / Non-politicised → *Vilvarajah v. UK*
Limits on access to appeals (at first in-country; latterly if ‘manifestly unfounded’); and
4. UK / Non-politicised → *Medical Justice v. S.o.S.*
Exceptions to seventy-two hours’ notice of removal as a limitation on access to legal advice and judicial oversight.

	Non-politicized	Politicized
ECtHR	<i>Vilvarajah v. UK</i>	<i>Chahal</i> saga
	Jul 1990 – Jan 1996 Justiciability of removal under ECHR in the absence of an in-country asylum appeals mechanism.	Oct 1996 – Apr 2011 <i>Chahal</i> : Unlawful to balance prohibition on <i>refoulement</i> to prospect of torture against perceived security threats. <i>Saga</i> : Backlash against <i>Chahal</i> , given increasingly limited alternatives to

		expulsion.
Domestic	<i>Medical Justice v S.o.S.</i>	"Afghan Hijackers"
	<p>Jul 2010 – Oct 2012</p> <p>Constitutional right of access to legal advice / judicial oversight prior to removal.</p>	<p>Jun 2004 – May 2008</p> <p>Ad-hoc restrictive immigration status in lieu of deportation deemed <i>ultra-vires</i>.</p>

Collection of sources

Initial challenges

In beginning my data collection, I was greatly concerned that governmental sources on judicial impact on policy change may be extremely scarce due to the thirty year embargo on public access to documents relating to policy formulation and litigation, and the complete embargo on legal advice provided to government. Given my interest in the recent and current politics of asylum control, and the fact that asylum had only truly been differentiated from broader immigration control since 1993, looking back more than thirty years was not an option. My initial strategy for dealing with this challenge was to pursue an extensive number of interviews with individuals involved in both responding to the courts and effecting policy change; notably within the Home Office, UKBA and Ministry of Justice. It was readily possible to identify and target civil servants and politicians working on asylum policy and litigation both currently and at historic junctures. I was encouraged in this endeavour by initial support from ILPA to facilitate access to key contacts in UKBA and the Home Office. Unfortunately, this support fell through when ILPA became wary of its own relationship with the government during a series of scandals involving UKBA in 2011, putting the organisation on the front page of newspapers for several weeks. My own persistent efforts to obtain willing interviewees resulted in a blanket silence on all fronts. My network of non-governmental research contacts initially made available to me one relevant contact in UKBA and one from the Ministry of Justice. However, in light of the controversies surrounding immigration and asylum control at that time, little came from these contacts.

It would have been advantageous to be able to consider the subjective articulations of meaning in interviewees' accounts of judicial decisions and policy change. However, whilst my research agenda was shaped by the impossibility of gaining interview access, thankfully it remained possible to investigate the impact of court rulings on policy change by recourse to governmental documents and political rhetoric as expressive of this change and its justification. These sources readily provided discursive data for analysis of how problems were constructed in government, even if

it was not possible to identify and interrogate the role of material processes engaged in responding to the courts.

Process tracing

Having selected my four cases for investigation, I began to trace the series of events leading up to and beyond each judicial decision. Compiling a detailed narrative of events allowed for immediate reflection on what contextual and historical factors required consideration in order to specify and understand judicial impact on policy change and its framing. This process tracing was also essential to identify what political institutions and actors were involved in responding to the courts and in implementing any pursuant changes to asylum policy. The written account of the case included within each judicial decision, and print media reports on the ruling and political response, were initially very helpful in setting out the characters and plot of this narrative. Print news articles drawing on official governmental press statements also provided notable examples of rhetorical responses to the courts and justifications of associated policy change. As each of my chosen cases had gone through at least one, if not multiple prior rounds of litigation, rising through at least the Court of Appeal before reaching a final determination, the judicial decision itself often gave an extremely candid indication of the government's response to the initial decision under appeal in the higher court. Press releases and policy primers produced by advocacy organisations, such as the Refugee Council, and Medical Justice also aided in this initial process of understanding the legal and political issues, and political 'players' involved in each case.

Identification of sources

This initial overview was followed by an exhaustive search of government databases, collecting documents and rhetoric associated with the 'impact' of each ruling. Hansard, parliamentary committee proceedings and reports, reports by government departments and Commons research reports were all iteratively searched using keywords derived from the judicial decision and from successive readings of associated legal commentaries and political sources produced in response to the courts. This process was also applied to current and archived versions of the websites of the Prime Minister's Office, the Home Office and UKBA. Citations and passing

references in one source often led to a cascade of other sources to be sought out. As the detailed chain of events became more apparent for my chosen cases, it became possible to request specific documents from the Home Office, which were not otherwise publicly available.

To my surprise, these documents were readily provided. These included a limited number of equality impact assessments and consultation letters to key ‘stakeholders.’ I chose at an early stage not to pursue Freedom of Information requests (FOIs) as a basis to obtain sources. This decision was guided partly by an initial concern not to ‘rock the boat’ before first gaining access to potential interviewees in the asylum policy and litigation strategy divisions which have in recent years floated between the Home Office and UKBA. Ultimately, all persistent requests for interviews, at all levels, were met with an enduring wall of silence. Whilst advocacy organisations suggested to me that FOIs tend to be met with a similar disregard or perfunctory dismissive response, I must note that the Home Office’s willingness to provide specified documents on request suggests that there may be merit to pursuing submission of FOIs to the Home Office as a strategy in future research – especially as it is now fully responsible for policy matters previously dealt with by the unresponsive UKBA.

Given my interest in assessing the government’s discursive articulation of judicial impact, it was necessary to follow this rather broad initial data collection by distinguishing sources which provided actual discursive data. These sources ultimately comprised a limited but rich data set for each case. Predictably, for my non-politicised cases, there were fewer sources available for analysis than for the more politically controversial cases. However, I endeavoured to ensure that all chosen cases provided for adequate sources to substantiate the government’s response to the judicial decision in question.

How data was analysed

Framing analysis

Having identified documents and rhetoric as sources for analysis, a suitable method had to be chosen to interrogate them for meaningful data on judicial impact on policy

change. This was required to be compatible with my engagement with the content and practice of documentation and political rhetoric as discursive exercises in policy as problematisation (as discussed in chapter three). As a general approach in political analysis, framing analysis seeks to discern how a given actor or institution understands or constructs a perceived problem, its causes, what should be done about it and who should intervene to do so (Baachi, 2009; Benford & Snow, 2000; Bleich, 2011; Hajer & Laws, 2008; Menashe & Siegel, 1998; Rein & Schön, 1993; Verloo & Lombardo, 2007; Verloo, 2005). Although there is a certain degree of cross-over between framing analysis and other approaches to discourse, investigation of framing fits well with the nature of the problem of judicial impact as I have posed it. Analysis of issue framing has the potential to provide great insights into sense-making (Weick, 1995) as conducted and expressed through problem definition, reasoning and justification by government (Baachi, 2009; Hajer, 2009). Specifically, I have made use of critical framing analysis, or CFA (Verloo, 2005), as a method which is particularly well suited to the task of interrogating policy as problematisation. CFA provides a very clearly articulated template for coding and analysis of the content of discursive sources, in order to understand the process of sense-making in government. This variant of framing analysis is also particularly suited to my purposes due to its amenability to the study of political interpretation of meaning, as opposed to strategic manipulation of meaning by political actors.

CFA draws on existing templates for investigation of strategic issue framing by social movements seeking to make a persuasive case for policy change, to ask how policy makers themselves understand and construct a policy problem as an object for action by government. This approach also interrogates implicit value assumptions and normative frames which are employed in arriving at such problem diagnoses and prognoses (Verloo & Lombardo, 2007; Verloo, 2005). A 'frame' may therefore be conceived of as:

1. an analytic construct which describes;
2. an act of classification (Hajer & Laws, 2008, p. 253), which is in itself;
3. a bid for legitimation of action by policy makers (Baachi, 2009).

Frames describe and enact political attempts to render understanding of an issue stable by simplifying cause and effect and specifying the parameters of legitimate interventions into the problem domain, rather than opening it up to deliberation. They represent an attempt at persuasive definition and concrete suggestion of action or inaction. My interest in frame analysis is not that of many authors concerned with identifying how one framing of a problem proves more dominant, persuasive, or incompatible with others it is in conflict with (e.g. Benford & Snow, 2000; Rein & Schön, 1996; Roe, 1994). Rather, I am drawn to the potential of CFA as a method for identifying, specifying and making explicit otherwise hidden significances in policy documents or rhetoric (Verloo, 2005). By means of CFA, I have endeavoured to make apparent the reasoning which both underpins and is elaborated in government documents and rhetoric as indicators of policy. This offers the potential to uncover and specify how governments have interpreted the meaning and significance of judicial decisions, and the reasoning and value assumptions which are deployed in an attempt to justify proposed responses to the courts.

In employing this approach, I have sought to uncover divergences in how the 'problem' of compliance with an adverse judicial decision is understood or acted upon at the levels of executive politics and administration. Conflicting or divergent ideas, values, or reasoning on how problem definitions lead to legitimate actions, who should intervene and why, may exist across government (Fischer, 2003, p. 143). This can be determined by investigating how various examples of rhetoric and documents frame the judicial decision, or to employ the language of CFA, by specifying their diagnosis, prognosis, and normative orientations. This mapping exercise may go beyond offering much needed descriptive clarity of detail on government orientations and attitudes. It may also offer insights into potential inconsistencies between the orientations and attitudes (framings) held across time towards judicial impact, and across government actors, on a case by case basis. Such analytical insights have the potential to move understanding of judicial impact beyond a perceived conflict between government and judiciary, or seemingly "intractable policy conflict" (Rein & Schön, 1996), towards deeper insights into how this conflict is a product of internal problematisations across government, where

framings are constructed in an attempt to order governmental attitudes and behavioural strategies for dealing with judicial decisions.

Application of Critical Framing Analysis

Appendix two presents a detailed template for critical framing analysis of documents and rhetoric. This template provides a specific series of questions which were considered for each governmental source. Answers to these questions, in aggregate across a body of sources, provided data which built a broader overview of governmental attitudes towards a given judicial decision, or “super-text” (as opposed to a sub-text), and its impact on policy change, elucidating key themes, which may otherwise remain implicit. In this manner, qualitative detail on problem definition, reasoning and justification of interpretations and actions were elicited from government documents and rhetoric. Frame analysis thereby interrogated what government understood the selected judicial decisions to mean in terms of necessary policy change. Without replicating the detail provided in appendix two, I will emphasise here that application of CFA primarily comprises specification of a process of sense making in government in terms of problem diagnosis and prognosis:

- what is the problem;
- who is responsible;
- what should be done about it; and
- who should do it.

This data was elicited by analysis of governmental documents and also statements by politicians (rhetoric) prepared in the wake of judicial decisions. These sources included examples which directly addressed questions of compliance with particular judicial decisions, and others which were more broadly concerned with relationships between asylum control, the role of the courts, and associated issues, such as balancing concerns over individual human rights of migrants, migration control, and concerns over collective security. Employing CFA to uncover problem diagnoses, prognoses and normative assumptions, helped to specify governmental understandings of judicial decisions and their perceived impact on asylum control; both at the level of politics and administration. I therefore present critical framing

analysis of problematisation as an effective avenue to discern and explain factors which influence how government responds to the courts.

Data on discursive problematisations obtained by CFA was considered as it related to the particular speaker or author, but also in terms of how sources could be regarded together as comprising an “aggregated narrative” of judicial impact on asylum control, which is more generalizable to processes of collective decision making (van Eeten, 2007, p. 254). In this manner, for each of my case studies, consideration was given as to whether there was evidence of a consistent trend among sources oriented towards audiences within government, towards the public, and in general. This data was then related to my theoretical typologies: how government responded to rulings to reconcile them with its past and future policy trajectory; and the level of generality of policy ideas which political actors perceived to be impacted upon by the decision and compliant policy change (see chapter three). Throughout the entire process of critical framing analysis – from engagement with individual discursive sources and the aggregation and comparison of data, to the relation of this data to my analytic typologies – consideration was given to the potential significance of politicisation of compliance and the source of a judicial decision, as well as the potential for other emergent factors to offer insights.

Application of my analytical typologies

Following critical framing analysis of documents and rhetoric, resulting data was further considered through the lens of the two analytical typologies which I outlined in chapter three. The first of these concerns the manner in which government responded to judicial decisions (the variety of response). The second concerns the level of generality of ideas underpinning asylum control and deportation which were constructed as 'at stake' in governmental discourse problematising judicial impact (the governmental perception of the 'depth' of impact). This secondary data analysis sought to build upon and articulate findings from the prior critical framing analysis, to further explore and specify governmental strategies for reconciling and justifying judicial decisions and the pursuant response in relation to policy goals. These analytical typologies performed an important function in cutting through the variety and complexity of data obtained from critical framing analysis, to provide a coherent expression of how government responded to the courts and begin questioning why it did so in a particular way.

Response

In chapter three, I combined existing approaches to differentiating governmental responses to the courts with an account of how this involves discursive dissonance relating to judicial impact on policy goals. In doing so, I emphasised that discursive responses to the courts serve not only to specify and justify a particular political solution to a problem (in opposition to alternatives, whether stated or implicit), they also seek to reconcile the disjuncture which a judicial decision makes apparent between compliant policy change and the plausibility of continued governmental authority over pre-existing policy goals. The variety of response exemplified by government has been considered in each of my case studies as indicated by the aggregate narrative of the problem of compliance arrived at by means of CFA of governmental discursive sources. This aggregate orientation elicits an account of how government proposed to deal with the perceived inconvenience of compliance. This orientation to the 'problem' concerns not so much the policy response required to implement a court ruling, but rather how to justify and reconcile what the court ruling means with what government claims to be doing in the area of asylum control. Linking evidence from frame analysis to the response typology provides a specific

account of how government has sought to position itself in relation to a judicial decision.

As detailed in chapter three, aggregated data from CFA may indicate one of the following responses:

- **dismissal** of the applicability of the judicial decision;
- **depreciation** of its significance to a particular policy goal;
- **dissociation** of the given political actor or institution from the domain of the decision;
- **amplification** of the coercive effects of the judicial decision, whilst keeping the original attitudes to the policy issue;
- **conversion** to the legal attitude;
- **containing impact**, by seeking to diminish the apparent discrepancy between policy before and after the judicial decision.

(Based on Canon & Johnson, 1999; Conant, 2002; Johnson, 1967; Muir, 1967; Stapleton & Wilson, 2009)

This classificatory exercise served to facilitate comparison of judicial impact across my case studies in terms of varying responses to the courts. On its own, such a typology cannot account for why a political actor or institution responds to the courts in a given way. However, by linking it to prior frame analysis, this provided qualitative detail of the reasoning which led to the adoption of such an orientation. For the purposes of interrogating factors leading to a particular response, my second analytical typology – relating to the level of governing ideas at stake in responding to the problem of compliant policy change – allowed for a concise articulation of the complex and diverse data obtained from CFA. This served to specify how governmental actors (in aggregate) considered the underlying ideas governing asylum control to be impacted upon, challenged or constrained by a judicial decision and compliant policy change. This is what I have termed, depth of impact.

Depth of Impact

This layer of analysis marshals data from critical framing analysis to more coherently express what political actors perceive to be ‘at stake’ in compliant policy change, responding to the courts. Depth of impact is indicated by the content of discourse. However, it is made more discernible by CFA of problematisation discourse, as

indicated by the discursive construction of what the ‘problem’ was perceived to be and what was to be done about it. It could be said that analysis on this plane concerns distinction of how fundamental the problem of policy change in compliance with the courts was perceived to be by government. As indicated in chapters one and three, I have distinguished three levels of governing ideas:

1. Policies: the specific solutions proposed by policy makers;
2. The more general programmes which ‘underpin’ these policy ideas – the underlying programmatic logic which defines the problem to be solved; and
3. The foundational ‘public philosophies’ which ground these (J. L. Campbell, 1998) – the rarely contested assumptions and values on the ordering of knowledge and society (Schmidt, 2008, p. 306).

One or more level of ideas may be challenged or constrained by compliance with a judicial decision. I have applied the typology of depth of impact, not merely as a useful means of descriptively articulating data from critical framing analysis, but furthermore, as a tool to be used in tandem with the response typology to interrogate whether variation in the level of impact may account for variation in governmental responses.

Ideas governing UK asylum control

In concluding chapter one, I sought to summarise the practice of asylum control over the past thirty years according to the three general levels of governing ideas which I have discussed above. Although this served as a descriptive exercise, I have also made the case for such classification as a basis for interrogating the ideas ‘at stake’ in how governmental actors have sought to reconcile dissonance produced by compliance with judicial decisions which impact upon the realisation of pre-existing policy goals. Before heading into my empirical analysis of case studies in the following three chapters, I will re-state these governing ideas as expressive of the governance of asylum control in the UK over the duration of my case studies:

Public philosophy: Restrictive asylum controls.

The state seeks to exercise coercive controls necessary to restrict inclusion (and therefore enforce the exclusion) of certain foreign nationals, including asylum seekers. This is pursued in opposition to a more expansive humanitarian philosophy of asylum control.

Programmatic Logic: Executive discretion.

Demonstration of authoritative governance of inclusion and exclusion requires discretion to execute asylum controls. This is reflected in a governing logic of balancing political expediency against potential liberal constraints. The executive therefore seeks discretion over a balancing of inclusion/exclusion, individual/state, liberty/security, expediency/review.

Policy: Deportation, removal and restrictions on rights in-country

The public philosophy and programme of asylum control are implemented by means of certain policy tools: expulsion and other forms of coercive control of unwanted foreign nationals, such as placing limitations on their human rights within the country. Policies may also seek to limit barriers to expedient and authoritative governance of asylum, notably by restricting access to judicial oversight.

Conclusion

I have presented critical framing analysis as a suitable and incisive method to engage with and analyse governmental discourse on policy as an exercise in problematisation. This serves as a method to look for judicial impact, both as expressed and implicit in the normative assumptions, problem diagnoses and prognoses which constitute governmental discourse on judicial decisions and policy change. Consistent with my agenda for research, this facilitates engagement with judicial impact as constructed within government, from the perspective of those engaged in its interpretation and enactment. I have also indicated the role played by my application of the response and depth typologies to data obtained by CFA of governmental documents and political rhetoric for each of my case studies. This has facilitated consideration of judicial impact in terms of how government responded to the 'problem' (to resolve it) and the governing ideas perceived to be 'at stake' in

doing so. This level of analysis also facilitates further consideration of the role of politicisation of compliance and the source of the judicial decision (as indicated by CFA of sources) in determining these forms of judicial impact.

Having set out an agenda for the study of judicial impact on asylum control policy as it is manifest in governmental discourse, and a methodology for its investigation, the following three chapters present the analysis of my four chosen case studies. By recourse to CFA of problematisation discourse in documents and rhetoric, and application of my analytical typologies, I analyse the outcome of judicial impact on policy change in each case. In chapter eight, I then compare impact across each of my four case studies in terms of typological variation and the apparent significance of politicisation and source.

5. The Afghan hijackers

Introduction

On the 6th of February 2000, nine members of the political opposition to the Taliban in Afghanistan arrived in the UK to claim asylum by hijacking an airliner. That same day, the Home Secretary promised to deport them. Yet, over six years later, the men were still in the UK. Having been denied asylum due to their crimes, the Asylum Tribunal invoked ECHR Article 3 as a barrier to their deportation – holding that the great publicity surrounding their escape to the UK made them liable to execution or torture should they be returned to Afghanistan. Subsequently, the High Court ruled that the Home Office’s handling of the men’s case demonstrated “conspicuous unfairness amounting to an abuse of power” (UKHC 2006). Restrictions on the men’s rights within the country in lieu of deportation, under a regime of temporary admission, were deemed beyond the powers invested in the Home Office by parliament (*ultra vires*). Having publicly promised and failed to deport the men, further obstacles to restricting their rights and status in-country presented a very serious dilemma for the government and Home Secretary: what to do about the Afghan hijackers?

In this chapter, I consider how governmental discourse framed the policy problem posed by the courts. Of particular significance to my subsequent comparative consideration of how the judicial decisions impacted asylum control policy and its framing, is the question of why compliance was ostensibly so politicised, and what significance, if any, may be attached to the municipal source of the rulings. The ‘Hijackers’ case involved a significant and highly public politicisation of compliance with municipal court rulings (UKHC 2006; UKCA 2006), in response to which prominent members of the government directly questioned the authority of the courts. In this respect, I consider the Hijackers case to be a compelling starting point for consideration of judicial impact; it appears to be an especially ‘hard case,’ in which judicial impact on policy change appears unlikely due to political opposition. The Hijackers case will also facilitate later comparison of judicial impact according to the source of the judicial decision. In this instance, the courts made recourse primarily to British common law, rather than depending significantly upon the

European Convention on Human Rights (ECHR), to rule on the lawfulness of immigration and asylum controls.

Engaging with these issues, I seek to gain insight into the phenomenon of reluctant policy change which is characterised by a tension between oppositional political rhetoric and compliance in practice. Towards this end, I interrogate judicial impact by means of critical framing analysis of “what the problem is supposed to be” from the governmental perspective (Baachi, 2009; Verloo, 2005). I begin by presenting a brief outline of the facts of the judicial decisions on the Hijackers’ status. I then locate the ruling within the context of broader governmental priorities for asylum control and its relationship towards judicial scrutiny in this area. This historical-contextual prelude sets up subsequent engagement with primary sources on judicial impact for the Hijackers case. Drawing upon this presentation of governmental framings of the issue, I then reflect on the nature and significance of the government’s response towards the Hijackers rulings, and the impact these have had on the ideas governing asylum control.

Facts of the case

On the 6th of February 2000, nine men arrived in the UK from Afghanistan by hijacking an internal flight. Surrendering to the British authorities after a three day stand-off, the men claimed asylum as opponents of the Taleban regime. They were subsequently jailed in December 2001 for the hijacking, possession of firearms and explosives, and false imprisonment of passengers on their arrival in the UK. However, in June 2003, these convictions were overturned on grounds of a mistrial, as the jury had been misdirected by the judge on the defence that the hijacking was conducted under duress (UKCA 2003). As the majority of the men had already served out the duration of their sentences, there was no retrial. At this point, the Home Secretary refused the men’s claims for asylum, Humanitarian Protection, and Discretionary Leave to Remain in the UK, on the basis that it was safe to return them to Afghanistan.

In June 2004, a panel of Adjudicators dismissed an appeal against refusal of asylum, on the grounds that the hijacking gave reason to consider the men to have committed a serious non-political crime outside the country of refuge, excluding them from the

protection of the *Refugee Convention* under Article 1F(b). However, the adjudicators upheld the men's appeal against deportation on the basis that ECHR Article 3 prohibited their expulsion to Afghanistan, no matter their conduct, as their high profile flight and political opposition to the Taleban would render them at a real risk of torture, if not death, on return (thereby applying the constraint imposed by the ECtHR in *Chahal*, to which I turn in my next chapter). This required that the Home Secretary award the men Discretionary Leave to Remain in the UK. This protection comes not from refugee law, but from application of the *Human Rights Act* and associated jurisprudence of the ECtHR and British senior courts as a constraint on deportations and removals. However, the substantive question considered in this chapter is the ruling, based primarily in common law, which arose when the senior courts subsequently ruled on the Home Office's failure to provide Leave to Remain.

The Immigration Appeal Tribunal refused the Home Secretary's appeal against the decision, which a senior Home Office official publicly described as "mind boggling" (McGrory, 2004, 4). This tone of disbelief, and implicit challenge to the legitimacy of legal arbitration, was to prove characteristic of many subsequent responses to litigation on the men's status. The Secretary of State did not, however, apply for judicial review of the decision to refuse him a right of appeal against the tribunal's decision that the hijackers should be given leave to remain in the UK. Also notable about the Home Office's response to the Tribunal's scrutiny, is its statement that "there were no reasonable grounds for regarding the individuals as a danger to the security of the UK, nor as constituting a danger to the community of the UK." (JCHR 2006b, s.2.19)

At this point, the litigation appeared to be over. The men awaited their award of discretionary leave, which should have stabilised their status in the UK. But they were to be kept waiting. Over a year after the Home Secretary had declined to pursue litigation, with no change in the men's status, the Asylum Policy Instructions on exceptions to Discretionary Leave to Remain were revised, empowering the Home Secretary to deny leave where "the person has committed... a crime considered serious enough to exclude the person from being a refugee in accordance with Article 1F(b) of the *Refugee Convention*." (Immigration and Nationality Directorate decision

letter to claimants' solicitors (03.11.05); UKHC 2006, 38). Whilst the policy recognized that ECHR Article 3 was "absolute" and required that leave should be awarded, it created a new discretionary power that:

Ministers may decide that it is inappropriate to grant any leave to a person falling within the excluded category in the light of all the circumstances of the case. Where it is decided that leave should not be granted the individual will be kept or placed on temporary admission or temporary release. (Asylum Policy Instructions on Humanitarian Protection and Discretionary Leave, 30th August 2005, s.2.6)

The revised policy was justified as follows:

The revised policy on the grant of Discretionary Leave forms part of the Government's commitment to deterring terrorists and others who pose a threat to national security, public safety and the lives of innocent people. The Secretary of State considers that it is self-evident that hijacking poses a grave threat to the life and safety of innocent passengers and crew and that there is an overwhelming public interest in deterring such activities... In making his decision, [the Home Secretary] has had regard (amongst others) to the following factors... the public interest in deterring acts such as hijacking. (Immigration and Nationality Directorate decision letter to claimants' solicitors (03.11.05), UKHC 2006, 38)

The effect of this newly devised policy of a temporary status was to indefinitely continue the hijackers' ongoing 'limbo' by prohibiting them from working, restricting access to certain welfare support, prohibiting them from applying for travel documents to meet with family in a safe third country, and imposing requirements on residence and reporting to the police (UKHC 2006, 20). The decision to devise a new policy on temporary admission, rather than comply with the Tribunal's decision, was explicitly intended to signal a symbolic political commitment to deter any future asylum seeker from employing unlawful means to enter, particularly hijacking. Beyond this symbolic gesture, the effect of the new policy was to empower the Home Secretary to make temporary admission the default position for those excluded from the *Refugee Convention*, unless he or she deemed that Discretionary Leave was appropriate. In effect, this was to empower the Home Secretary to deny the *de-jure* presence of specified foreign nationals, excluding them from access to employment and certain forms of welfare support, which are contingent upon Leave to Remain.

High Court

With the Home Office's refusal to grant leave awarded by the Tribunal, the case came before the High Court. There, the Home Office argued that its newly formulated powers were consistent with the sovereign prerogative to exercise immigration controls, and empowered by the *Immigration Act 1971*, s.21(1). In scrutinising this argument, however, Justice Sullivan argued that they constituted no less than a "paradigm of a minister being given unfettered administrative discretion to depart from published policy whenever he thinks it appropriate to do so." He branded the case one of "conspicuous unfairness amounting to an abuse of power... at the highest level", with the Home Office acting outside the law "as laid down by parliament and the courts" (UKHC 2006, 102, 121). The High Court found the Home Secretary's decision not to grant Discretionary Leave (in favour of temporary admission) to be unlawful on four grounds: for its defiance of the asylum Adjudicators' decision; as unfair and an abuse of power, in deliberately delaying a decision on status until new policy was enacted to empower refusal of Leave to Remain; for interfering with ECHR Art. 8, in being both disproportionate and not in accordance with the law; and finding both the decision and the revised Policy Instructions on which it was based to be inconsistent with the *Immigration Act 1971*, because temporary leave could only be applied pending deportation, which was unavailable in this instance. Concluding the matter of costs, Justice Sullivan also chastised the Home Office for its "inexcusable" conduct before the court proceedings, including, "a deliberate wall of silence"; submissions without "any argument of substance"; and a "wholly unacceptable" manner of defence, "far short of the standards expected of a public authority..." (UKHC 2006, 116-17) Such judicial discourse on the public interest in preventing arbitrariness of executive actions stands as an interesting contrast to the Home Office's argument that such discretionary powers served the public interest.

Court of Appeal

The Home Secretary appealed the High Court's ruling that the revised Asylum Policy Instructions of August 2005 were unlawful. In doing so, he sought to have the policy upheld, so that when the Hijackers' status next came under six monthly review, he could then move them onto the temporary status, rather than Discretionary

Leave (UKCA 2006: 3). Further revisions to the policy instructions in January 2006 had sought to make temporary status the default position in such cases, unless the Home Secretary should otherwise find Discretionary Leave appropriate (UKCA 2006: 48). Both revisions were held by the Court of Appeal to give “ministers an arbitrary, unfettered power to interfere with respondents’ rights” in a manner inconsistent with recent municipal jurisprudence on ECHR Article 8(1), on the right to private and family life. The court affirmed that provided “the arbitrary elements of it are removed”, parliament could introduce a statutory category such as that which the Home Secretary had attempted to innovate via the Asylum Policy Instructions. This was beyond the powers of the Home Secretary, without parliamentary authority, which could have been sought in the “ample” time available during the delays in providing the Hijackers with a legal status in the UK (UKCA 2006, 47, 51). In so far as this instance of judicial review did not directly concern the status of the Hijackers (on which the government had already complied with the High Court), but sought to overturn the High Court’s prior ruling against the Asylum Policy Instructions, it can be said that the government was appealing against judicial impact on policy change, and against the prospect of applying such policy constraints beyond the case of the Hijackers. This was reflected in Home Secretary John Reid’s argument to the Court of Appeal that, in general, failed asylum seekers who remain in the UK only due to ECHR rights, do not deserve Leave to Remain.

Response

In the next section, I seek to locate the Hijackers’ case within the contemporary context of governmental priorities in asylum control and the role of the courts. This provides a backdrop to subsequent detailed consideration of how the government responded to these judicial decisions. However, it is worth noting first that the substantive response from government was to seek the authority from parliament which the courts had ruled necessary for the policy to be lawful. A “Special Immigration Status” was legislated for as part of the *Criminal Justice and Immigration Act 2008*, s.130-7, providing optional restrictions on rights associated with Leave to Remain, which were consistent with the temporary status ruled *ultra-vires* by the courts. This empowered the Home Secretary to impose special restrictions upon specified foreign nationals as an alternative to deportation, where

this proved constrained by the ECHR. However, part ten of the act, which provides for use of the special status, is not currently in force. Some eight years after the Court of Appeal's ruling, the Hijackers continue to languish in limbo with regards to regularisation of their presence in the UK, pending the outcome of further judicial scrutiny of their renewable leave, which has been consistently postponed by the Home Office (interview with barrister and correspondence with solicitor).

Governmental priorities regarding asylum control and judicial scrutiny

Interpreting the government's response to the judicial decisions on the status of the Afghan Hijackers within the UK, it is impossible to set aside the context in which judicial impact unfolded. Much can be gained by distinguishing, firstly, governmental priorities with regards to the politics of asylum controls; secondly, a distinctive backlash against the 'judicialization' of this politics by sustained scrutiny from the courts. Consideration of these factors will facilitate later reflections on how governmental priorities were impacted upon by the court rulings.

Being seen to be in control of asylum

It is possible to distinguish three noteworthy preoccupations underpinning asylum controls in this period: national security; media relations; and the challenge of being seen to be in control.

As noted in my introduction to the thesis, restriction of perceived asylum "abuse" was a priority of the Labour government (see also, Home Office, 1998, p. 147; B. Kelly, 2011, p. 147). Policy documents and ministerial statements placed explicit emphasis on "control", "confidence" and expediency as objectives in building public trust in the governance of asylum (Blunkett, 2002; Home Office, 1998, 2002b, 2005; IND, 2006a). Significance was attached to not only the practical concern of asylum control *per se*, but also the broader, symbolic, political significance of being seen to be in control. Yet, despite some progress in realising Tony Blair's "tipping point target" on asylum – to halve applications and remove more applicants than arrive (Spencer, 2007) – the government had great difficulty in demonstrating that it was "in control of asylum" (Pollard, 2005, p. 290). Government policy was to pursue removals wherever possible, including returning failed asylum seekers to

Afghanistan, despite the war there (Sawyer & Turpin, 2005, p. 705). The inability to deport such high profile and iconic figures as the Afghan Hijackers fed into controversy over failures to remove hundreds of thousands of “illegal immigrants” (BBC News Online, 2006d) and epitomised by the Sun newspaper’s campaign to “rip up the Human Rights Act” (JCHR, 2006b s.2.12).

The explicit intent of the new Asylum Policy Instructions as a deterrence against entry to the UK by Hijacking reflects these symbolic concerns over control and deterrence of ‘abuse.’ Similarly, its justification according to Home Office discretion over security, the public good and asylum control sought to affirm executive authority in these areas. Nevertheless, the tabloid media and political opposition were aligned in regarding the failure to deport the Hijackers as a “policy failure”(JCHR, 2006c) and in voicing concerns that the role of the HRA as a barrier to deportation had impeded efforts to protect national security (Cameron in BBC News Online, 2006b; Davis in Slack, 2006b).

The relevance of national security concerns

Due to these evident concerns over symbolic political capacity and organisational legitimacy as they relate to immigration control, I am sceptical as to the potential for insights to be gained from considering the Hijackers’ case in terms of governmental priorities in national security and handling of foreign criminals – as has been the tendency of limited academic commentary on the case (Kneebone, 2009, p. 306; O’Sullivan, 2009, p. 260; Paoletti, 2010, p. 10). Although significant debate exists as to whether immigration and asylum controls were at this time subordinated to broader concerns over national security, there is no clear consensus (Boswell, 2007a; Hampshire, 2009; Huysmans & Buonfino, 2008; Schuster, 2005). Indeed, government sources vary on whether security was, or was definitively not a concern in the Hijackers case. Invocation of national security and public safety can, however, be regarded as subordinate aspects of the government’s evident and more fundamental desire to affirm authority to expel unwanted foreign nationals. This assertion is consistent with Paoletti’s (2010, p. 10) labelling of the type of restrictions on rights associated with Leave to Remain in the Hijackers case as “escamotage”:

where such people cannot be deported, the government's intention was to make them disappear – a form of civic death within the state, in lieu of expulsion from it.

Whether one considers security to be a trump card which government may succeed in playing to subordinate the courts, or as a gambit the judiciary is unlikely to tolerate (see e.g. Hampshire, 2009, p. 121; UKHL 2004b), parliament has shown willingness to 'overrule' judicial decisions by legislating in favour of prior governmental priorities, even in cases not involving such high politics as national security (L. Morris, 2009). What matters most, is therefore how government responds to the courts. The study of such responses will indicate much as to what motivates policy change in the wake of unwelcome judicial scrutiny.

Attitudes to judicial oversight

It must be noted that judicial review was a very important driver of the political controversy over government incapacity to deport unwanted foreign nationals. Although there was a significant rise in the number of failed asylum seekers leaving the UK at this time (Gibney et al., 2011, p. 550), the Asylum Tribunal and courts were also balancing "an expansive approach" to providing human rights based protections to asylum seekers, alongside care over a "traditional predisposition towards judicial deference." (Stevens, 2004, p. 364) Of course, this deference is not to the executive, but to parliament.

The legal substance of the High Court and Court of Appeal rulings in the Hijackers' case did not concern deportation. However, we may nonetheless consider the judiciary's involvement in deciding the legitimate treatment of unwanted foreign nationals such as the Hijackers to have frustrated the government's desire to demonstrate authoritative capacity to control asylum and deportation. This is especially pertinent in light of the Hijackers rulings' direct engagement with delineation of limits on executive discretion under parliament and the courts. Indeed, the government may be regarded as having already been highly sensitised by a prior conflict with the judiciary over restrictions on the right of late applicants for asylum to access welfare support (L. Morris, 2009; UKHL 2005). During this asylum 'welfare saga,' Home Secretary David Blunkett had accused the judiciary of breaching parliamentary sovereignty, stating it was "time for judges to learn their

place” (Constitution Committee, 2007, p. 54). His recriminations were levelled at Justice Sullivan, the same High Court judge who ruled against the Home Office in the Hijackers case. As in the Hijackers case, that decision was subject to legislative overrule (Sunstein, 2004, p. 48). Subsequent unsuccessful attempts had also been made to legislate a “revenge package”, including an ‘ouster’ clause to preclude the judiciary from jurisdiction over determinations of asylum and immigration status (Rawlings, 2005, p. 379).

In short, at the time of the Hijackers rulings, the government’s regard for the judiciary’s role in determining the legality of asylum controls had never been at a lower point. This contemporaneous political backlash against a ‘judicialization’ of asylum control should not be neglected in considering the government’s response to the Hijackers rulings. Indeed, the continuation of such recrimination towards the courts will be apparent as I now turn to consider primary sources which indicate how the government interpreted these rulings and located their meaning and significance according to the broader context of its policy agenda.

Analysis of Primary Sources

Nature of Sources

Primary sources for this case included a significant body of political rhetoric. Comments directly responding to the court ruling, in addition to more general rhetoric on human rights constraints arose in statements by leading members of the government to the media, to parliament and to parliamentary committees. Primary documents included ministerial submissions to the Joint Committee on Human Rights (JCHR), reports from the Home Office and Department of Constitutional Affairs on the role of the *Human Rights Act* and judicial oversight in government, and also the government’s official response to the JCHR’s investigation of the handling of the Hijackers case and governmental attitudes to human rights. Departmental documents and letters were also considered. These concerned both specific legislation and broader policy responses to the courts; for example, an impact assessment for proposed legislation, UKBA policy instructions, a Ministry of Justice letter to the Law Society, and a private letter from the Prime Minister to the Home Secretary which was leaked to *The Observer* newspaper. My engagement with

the complex array of policies on Leave to Remain also benefited from correspondence with immigration solicitors and barristers involved in the Hijackers case. This communication sought to ensure accurate representation of the legal facts, and was not a source of primary data.

Rationale for presentation of analytical findings

To present my findings on the impact which the Hijackers rulings have had on asylum control and its framing, I have separated governmental discourse on compliance and associated concerns into two largely sequential ‘episodes.’ These episodes broadly distinguish the immediate and longer term impact of the Hijackers ruling. The first is primarily characterised by tough political rhetoric which immediately followed the court ruling, voicing dismay at judicial interference in immigration control; yet also, a parallel process of consolidation within government, seemingly supporting the ongoing function of the *Human Rights Act* and even the legitimacy of the judicial decisions in the Hijackers case. For the purposes of analysis, I have separated these two components of the government’s response.

Where this first episode includes ostensibly contradictory responses, it is all the more important to consider the longer term substantive changes to relevant policy measures and their framing. To this end, I also consider framing of judicial impact in a second, subsequent episode, wherein new legislation and policy instructions effectively over-ruled the courts’ decisions in the Hijackers case. In delineating this episode, I give consideration to how the legislation and subsequent changes to immigration control policy were justified. This data on how the government framed the ‘problem’ posed by the Hijackers ruling will then facilitate my subsequent determination of a more unified account of how the Hijackers case impacted upon and was reconciled with broader asylum control policies.

1. Recrimination and Consolidation

A hostile first response

When considering how the government responded to the High Court and Court of Appeal rulings on the Hijackers’ status, it is crucial to recall that it had, for six years, been publicly committed to their deportation. Immediately after the arrival of the

hijackers, then Home Secretary Jack Straw, stressed to parliament that the men would be deported:

While I must and will act in accordance with the law, I am determined that nobody should consider that there can be any benefit to be obtained by hijacking. Subject to compliance with all legal requirements, I would wish to see removed from this country all those on the plane as soon as reasonably practicable... As I have made clear, we are faced with a clash of international obligations and public policy: obligations in respect of refugees, and the clearest possible obligations in respect of the prevention and deterrence of hijacking and other international terrorism. I have made it clear where I believe the balance must lie. (HC Debate (10 Feb) 2000, c.418, 442)

Straw explicitly invoked a discourse of balancing international obligations against public policy. Promising deportation before the men's criminal or asylum cases could even be arranged was a stated attempt to make it "clear" where "the balance must lie" and moreover, whom should be responsible for executing such a balancing act. It is important to bear this commitment in mind whilst considering the government's response to the court rulings which six years later required that the men be allowed Discretionary Leave to Remain in the UK. In particular, this prior commitment may help account for the consistent engagement of political rhetoric with the question of deportation, despite the substance of the court rulings being about the Home Office exceeding its powers in applying a policy of temporary admission without parliamentary authority. The judicial challenge to the legitimacy of this discretionary status is anathema to the assertion that it is for the Home Secretary to determine where "the balance must lie." As we shall see, when I turn to the second 'episode' in this case, it was coincidentally Jack Straw who seven years later, as Justice Minister, sought before parliament to justify the reinstatement of such discretionary powers (HC Debate (8 Oct) 2007, c.69). However, for present purposes, I wish to emphasise the government's explicit engagement with the question of balancing legal obligations and public policy from the outset of this case.

Direct governmental responses to the judicial decision

Above all else, what distinguishes this case study is the government's immediate and somewhat recriminatory response to the High Court ruling. As Prime Minister, Tony Blair set the tone on the day of the ruling. He charged that in denying an opportunity for deportation, the judgement was "an abuse of common sense"; it was out of touch

with the instincts of “reasonable people” in Britain (Blair, 2006b). This concern over deportation capacity arose despite the judgement not being about deportation at all. The courts’ concern was over Home Office actions as *ultra vires*, failing to correctly apply legislation on leave to enter and remain (*Immigration Act 1971*) and thereby relating to governmental respect for the rule of law. Blair’s preoccupation with human rights law as a barrier to deportation does, however, reflect the media’s misrepresentation of the case as involving the use of the *Human Rights Act* in something close to a judicial *coup d’état* (Constitution Committee, 2007 para 145). The following day, Home Secretary John Reid echoed the tone of Blair’s rhetoric by labelling the judgement both “bizarre” and “inexplicable”. In doing so, he emphasised his concern that the “system is not working to protect in favour of the vast majority of ordinary decent hard-working citizens in this country.” (BBC News Online, 2006a) Blair and Reid’s rhetoric invoked an oppositional binary between the protection of “decent” British people, and protecting the rights and safety of undeserving hijackers. Furthermore, they implied that the judicial decision was not only unsound, but beyond the bounds of reason.

The manner in which these dismissive and somewhat recriminatory claims were made is particularly interesting for what it indicates as to governmental interpretations of the issues at stake in the Hijackers’ case. Immediately striking, is Reid’s somewhat incongruent implication that the “system” of judicial oversight of immigration controls and human rights law might conceivably function to “protect... decent hard-working citizens”, as opposed to engaging with the substantive legal basis of the judicial review. The case was about the legality of government actions in the treatment of foreign nationals whom even the Home Office agreed could not be deported due to real risks of execution or torture on return. This was a clear discursive bid by Reid to reframe the meaning of protection as it functions within the context of the case. Reid’s statements to the press shift emphasis from judicial engagement with treatment of the individual (as the basis of international refugee and human rights law), to the question of perceived risk to national security and public good, over which the Home Secretary has discretion in immigration control. This is despite national security not being raised as part of the legal substance of the case. Nevertheless, Reid invoked the logic of balance between individual rights and the

public good, according to which the Home Secretary must protect the national community. By extension, Reid positioned arbitration of the Hijackers' case according to a different logic to that applied in the "system" of judicial review; a discretionary understanding of protection, the determination of which is the prerogative of the executive, not the courts. This is reminiscent of his predecessor's commitment to balance a public policy on deportation against asylum law when the Hijackers first arrived in the UK.

This framing of the judicial decision served to shift emphasis away from its substantive concern with unlawful behaviour by the Home Office. Blair's response, in particular, concerned constraint of deportation, whereas the basis of the High Court ruling was that Home Office had overstepped its discretion in applying an ad-hoc policy of temporary admission to the Hijackers. That such political rhetoric should appeal to the integrity of the national community is no less significant, given that the effect of the ad-hoc policy deemed *ultra-vires* by the courts was to prevent any form of integration into the community by the Hijackers, through access to work, welfare support, or opportunity for settlement for more than six months at a time.

Blair on battling the courts and resetting HRA's balance of powers

Reid's appeal to the supremacy of Home Office discretion in immigration control does not appear to be the full extent of what the government perceived to be at stake in the Hijackers case. Indeed, far more extensive concerns over executive discretion in the face of judicial constraints were raised.

Within a matter of days after the High Court ruling, in a leaked private letter from Blair to Reid, the PM outlined the "most urgent policy task" of rebalancing rights from the individual towards collective security (quoted in Temko & Doward, 2006). He called for new governmental powers to override the courts, as he was determined to find a way around "barmy" rulings, such as that preventing deportation of the Afghan Hijackers. Again invoking the discourse of a balancing act, Blair justified his plans as necessary to ensure that "the law abiding majority can live without fear". This, he suggested, may mean amending the Human Rights Act, or even withdrawing from certain clauses of the ECHR, to redress judicial failures to consider a "balance between the rights of the individual and the rights of the community to basic

security.” Such a requirement would clearly be in violation of the constraint imposed in *Chahal* (ECtHR 1997). However, the government was, at this time, awaiting the outcome of its intervention in cases pending before the ECtHR, to have the court overturn its *Chahal* jurisprudence (ECtHR 2009a). In this respect, upholding the policy of temporary admission which had been challenged by the Hijackers case would have facilitated immediate deportation of the men if the ECtHR ruled in favour of the government (which it did not).

Blair’s letter indicates that in light of controversy surrounding the hijackers, serious consideration was given to suspending the effect of certain ECHR rights. It is worth recalling the judicial committee of the House of Lords’ previous opinion (UKHL 2004b) that despite governmental concerns, even international terrorism did not constitute a threat to the life of the nation sufficient to invoke national security as the basis for an exception to the ECHR (to indefinitely detain foreign national terrorist suspects who could not be deported). In this respect, Blair’s reference to court rulings which put “community safety” at risk constitutes a somewhat curious shift in the discourse justifying exceptional measures to set aside human rights. There is a significant difference between this expansive and somewhat nebulous communitarian discourse of risk, and the legally circumscribed principle of a threat to the life of the nation which would be required to lawfully justify an exception to the ECHR. The implication is clear, that by association with the unpopular HRA and ECHR, it was not simply the foreign national whom the courts rule cannot be deported, but the judiciary itself which was held guilty of putting the national community at risk. Such an assessment is supported by Blair’s prior criticism of “traditional court processes and attitudes to civil liberties” as ill-suited to modern exigencies of government in an age of “vast migration” and “dangerous threats” (Blair, 2006a).

Political rhetoric in response to the High Court ruling constituted a clear attempt to reassert executive control over the discourse of risk involved in deportation; to affirm the legitimacy of executive discretion to constrain not only leave to remain in the UK (in the Hijackers case), but also certain fundamental rights, such as the absolute prohibition on removal to a prospect of torture. Blair’s letter to Reid sought to position government as arbiter between individual rights and communitarian safety.

At the heart of this dichotomy is an affirmation of the role of the government in policing inclusion and exclusion from a community of rights where it cannot physically enforce expulsion from the national community. In these respects, it is apparent that judicial constraint on executive discretion was of major concern to the government in its consideration of how to respond to the Hijackers ruling.

After the Court of Appeal ruling

Although the Court of Appeal upheld the High Court ruling against the government, the Home Secretary was effectively intransigent in his desire to apply only a temporary status not only in lieu of deportation, but also in cases of removal:

I continue to believe that those whose actions have undermined any legitimate claim to asylum should not be granted leave to remain in the UK...I plan to bring forward legislation to do this (John Reid in BBC News Online, 2006f).

Reid's public response to the Court of Appeal ruling is distinctly pragmatic in its engagement with governmental capacity to govern asylum control; particularly when contrasted with Blair's broader concern over the Hijackers case as emblematic of "dangerous threats" posed by migration. Reid promised retroactive legislation to remove Leave to Remain from the Hijackers. As observed by the courts, this perceived need for legislation was despite the fact that the government already had six years in which it had failed to do legislate. Although Reid promised to overrule the court's constraint of the existing policy on exclusion from Discretionary Leave, his determination to seek legislative approval through parliament is also consistent with the requirements of the judicial decision.

In considering this stage of the governmental response, it is important to attend to the role of security referents in the government's framing of the problem of compliance with the judicial decision. The problem of judicial impact in the Hijackers case is clearly not a straightforward concern over security. At the High Court hearing, the Home Office had "accepted that there were no reasonable grounds for regarding the individuals as a danger to the security of the UK, nor as constituting a danger to the community of the UK." (cited in JCHR, 2006b, s.2.19) However, to a significant extent, political rhetoric on the Hijackers subsequently began to merge into broader concerns over the courts' engagement with counter-terrorism policies. This

occurred not only in the government's statement of a preference for deportation of foreign national suspects, but also in response to adverse judicial decisions on the legality of the government's regime of imposing Control Orders to restrict the rights of foreign and British suspects (Clarke and Brown in Slack, 2006a). John Reid, in turn, argued that critics of the government, including the judiciary, had failed to recognise the serious nature of security threats facing Britain. Specifically, Reid claimed that the UK was "at risk in national security terms" so long as the government remained "unable to adapt our institutions and legal orthodoxy as fast as we need to." (quoted in Travis, 2006)

Even where we may observe clear executive concerns over the viability of certain counter-terrorism policies in the face of judicial scrutiny, it appears to be the underlying function of the judiciary and its application of the constraint on deportation derived from the *Chahal* jurisprudence with which the government was most concerned at the time of the Court of Appeal's ruling on the Hijackers case. Whereas Home Secretaries spoke of national security, the week after the second Hijackers ruling, Blair spoke directly of his desire for a policy of presumed deportation for foreign national prisoners, "irrespective of any claim they have that the country to which they are going back may not be safe." (BBC News Online, 2006c) At this time, the government was not merely concerned with foreign nationals suspected of terrorism, nor with its capacity to deport prisoners. Blair's comments arose in response to ongoing debates on the government's overarching capacity to remove illegal immigrants and failed asylum seekers (of which the Hijackers were a very prominent example) (BBC News Online, 2006d). Blair's rhetoric on deportation was decisive in its disregard for existing rights-based constraints on deportation and removal. The statement resulted in prominent headlines. In contrast, the more careful caveating of his position by the PM's official spokesman only appeared in reports as a diminutive, if cautious, afterthought that such a policy may not well apply in "very few exceptional cases" where there was a known threat to the individual (BBC News Online, 2006c).

This comparatively discreet qualification from within the executive was not unusual in its attempt to nuance the gross generalisations which were characteristic of

political rhetoric at this time. Indeed, I now wish to draw back from this prominent and highly charged political rhetoric, to consider other internal communications which took place between parliament and the executive regarding the Hijackers case and associated concerns over the role of the Human Rights Act.

Discourse within government on the Hijackers and HRA

In parallel to the very prominent political rhetoric on the Hijackers rulings and broader role of rights and judicial review as constraints on government, an extensive number of internal communications unfolded within and between the government and parliament. Whilst this internal discourse was less recriminatory than corresponding political rhetoric, it nonetheless supports my previous suggestion that the government was concerned over limiting judicial interference in the wake of the Hijackers rulings.

Context: JCHR investigation

A matter of days after the High Court ruling on the Hijackers status, the Joint Committee on Human Rights (JCHR), launched an inquiry into “the case for the Human Rights Act” (JCHR, 2006b s.1.3). The enquiry gave consideration at length to the government’s response to the Hijackers case, including the significance of ministerial statements that the HRA was a barrier to deportation. Only a few months before the JCHR hearings, the minister for Constitutional Affairs had openly dismissed the significance of the committee’s work (JCHR, 2006a). However, the committee successfully obtained a significant body of documentary and oral evidence from government departments and ministers from the Home Office and Department for Constitutional Affairs (DCA). The committee also considered opposition proposals that it should recommend that the HRA be scrapped (JCHR, 2006c). However, its final report focused on concerns over the government fuelling public misperceptions of the HRA; using the act “as a scapegoat for administrative failings of [government] departments”; and tacit advocacy of “deportation to face a real risk of torture or death.” (JCHR, 2006b, ss.2.18, 2.21).

The discursive content of the oral and documentary submissions to the JCHR are unsurprisingly less accusatory than the political rhetoric which both preceded the hearing, and to some extent ran in parallel to it. Presentation of evidence was liable

to further questioning from the committee, inviting justifications to be given. In this respect, submissions to the committee constitute a particularly compelling account of how certain departments and ministers sought to articulate and justify their understanding of the relationship between policy goals, including the role of the HRA, and how these were impacted by the Hijackers case.

Contrasting evidence from within government

Notable amongst the evidence submitted to the JCHR, was correspondence in which Tony Blair asked the Lord Chancellor to “devise a strategy, working with the judiciary, which maintains the effectiveness of the Human Rights Act, and improves the public’s confidence in the legislation” (quoted in JCHR, 2006b, s.1.2). The tone and content of this request is remarkably different to that of Blair’s letter to John Reid, in which he suggested the need for powers to overrule the courts and for the HRA to be re-balanced in favour of collective security (as discussed above). However, this request for Lord Falconer to manage the judicial and public mood coincided with Blair ordering a Home Office review of other EU Member States’ interpretation of the ECHR, to “consider whether primary legislation should be introduced to address the issue of court rulings which overrule the government.”(JCHR, 2006b, s.1.2). As a consequence of these dual missions on which Blair set government departments, there is discernible tension between the resulting evidence which the JCHR obtained from the Department of Constitutional Affairs and Home Office.

Before turning to these below, it is first worth noting that here, again, Blair’s justification for potential legislative changes to how the HRA is implemented concerned a desire for finality of governmental authority when faced with scrutiny by the courts. It was not primarily grounded in the seemingly subordinate question of whether there was an issue of public safety requiring such a reconfiguration of human rights (as had appeared in his letter previously leaked to the press).

Evidence from Lord Falconer and the DCA

As Lord Chancellor, Falconer’s response to the JCHR may well have been coloured by his newly acquired statutory duty to maintain the function and independence of the judiciary (*Constitutional Reform Act 2005*: s.3.1). Indeed, the JCHR considered

this very judicial independence to have been threatened by the government's response to the Hijackers case (JCHR, 2006b s.2.20). Claiming to represent the unified view in government, Falconer stated his support for the HRA, promising there were no plans for its repeal. He also confirmed to the JCHR that the Hijackers posed no threat, that they should remain in the UK due to the risks they would likely face if returned to Afghanistan, and that therefore, "the question of a balance does not arise."(JCHR, 2006c, question 1) Yet, Falconer's conclusions were offered to the committee despite having openly initiated a DCA review into "problems" with the implementation of the HRA, involving "the need for clearer cross-government guidance on the balance that needs to be struck by officials when making decisions with human rights implications, ensuring that public safety is at the forefront of decision making."(Lord Falconer, 2006)

This emphasis on rebalancing a dichotomous tension in the impact of human rights of the individual versus the safety of the national community is also reflected in the report submitted to the committee by the Department for Constitutional Affairs (DCA). In its review into implementation of the Human Rights Act, the DCA concluded that the Act had "not seriously impeded the achievement of the government's objectives on crime, terrorism or immigration, and has not led to the public being exposed to additional or unnecessary risks" (DCA, 2006, p. 4). However, it nevertheless replicated the same appeal present in political rhetoric of the time, that there was imperative need for a rebalancing of executive discretion over its application and function:

Deficiencies in training and guidance have led to an imbalance whereby too much attention has been paid to individual rights at the expense of the interests of the wider community. (p.29)

Further concerns were also raised over difficulties arising from decisions of the ECtHR (DCA, 2006, p. 10). Although the HRA was not the basis of the Hijackers decision, the broader role of the judiciary and asylum tribunal in applying the absolute constraint imposed on deportation by the ECtHR's *Chahal* ruling rendered the meaning and significance of the Hijackers case inseparable from broader debate on the HRA.

Plans to disempower judicial constraint of deportation

The predominance of this linkage within government is further indicated by evidence leaked to the BBC, and subsequently considered by the JCHR, that the Home Office was conducting an internal review into possible “examples of where the *Human Rights Act* had been found to impede decision-making.” (JCHR, 2006c, s.6) This found that:

...an area where the impact of the interpretation of the Convention is problematic and presents a blockage to the effective delivery of policy relates to the pre-Human Rights Act case of *Chahal*. In this case the European Court of Human Rights found that the absolute protection provided by Article 3 **prevents a State from considering the protection of the public as a balancing factor** when deciding whether or not to deport a dangerous person. The European Court has always recognised that the European Convention is a “living Instrument”, and we are therefore working with our partners in Europe to challenge this judgement. (Home Office, 2006a, emphasis added)

The JCHR voiced concerns over a prospect that the government was conflating public safety with national security as a basis for exceptions to constraints on deportation (2006b, s.6). However, one may go further to consider that where individual rights are framed as not legitimately a part of deportation and asylum control, the foreign national threatened with expulsion is already excluded from access to the privileges of a *national* community of rights, even before being physically cast outside of the nation’s borders.

In light of the foregoing evidence of both rhetorical challenges to the integrity of the HRA and reports from government departments calling into question its function (not to mention the scathing findings of the Committee), the executive’s official response to the publication of the JCHR report is unremarkable; expressing its pleasure with the findings and agreement with the committee that the HRA is not a significant impediment to public policy objectives after all (DCA, 2007, p. 3). Yet, despite the purported consolidation of support across government for the HRA and the judiciary, Reid and Blair continued to voice their support for a rebalancing of rights in favour of the national community. Before retiring as PM, Blair publicly lamented as “misguided and wrong” that we “have chosen as a society to put the civil liberties of the suspect, even if a foreign national, first.” (in N. Morris, 2007) Once again, the

implication was that the exercise of such a balance by the judiciary had put the rights of the British public in danger. Yet again invoking the Afghan Hijackers ruling among others constraining deportation, John Reid marked his exit from government by encouraging an inquiry into a prospective British bill of rights to reform the anachronistic ECHR, which had failed to address large scale threats to the national community (in Carlin, 2007).

Although the Hijackers were not deemed to be a threat to national security, their continued presence within the UK and place within the debate about the future of the HRA allowed invocation of the future risk of hijacking as a basis to bring public safety into the discourse on the role of rights in government. This discursive shift towards a vision of rights in terms of the right to life and safety of the national community comprised one of the most significant manifestations of the judicial impact of the Hijackers cases. It led to a direct challenge to the legitimacy of the constraint imposed by *Chahal* and to the legitimation of a broader political discourse which questioned the applicability of human rights principles to certain unwelcome foreign nationals. An apparent fixation on not only the role of human rights but also their adjudication by the courts as constraints on governance of immigration and asylum, indicate that the government was deeply concerned over maintaining its discretionary authority and capacity to control inclusion and exclusion from the national community following the Hijackers ruling – both literally, in the form of expulsion, as well as in the more abstract sense of excluding foreign nationals from the national community of rights. In support of this observation, I now wish to turn to consider the government's subsequent legislative response to the Hijackers ruling.

2. Legislative over-rule and bureaucratic policy innovation

The Special Immigration Status

Shortly after the conclusion of the JCHR's investigation, as part of a Bill primarily addressing reforms to the criminal justice system, the government proposed discretionary powers to reinstate the policy deemed *ultra-vires* a year earlier by the Court of Appeal in the Hijackers case. The timing of the Bill is interesting, following a period of extensive internal reviews and reporting on the government's support for human rights. The effect of the *Special Immigration Status* (SIS) introduced by the

Criminal Justice and Immigration Bill 2007 (part 11) was, however, to provide parliamentary authority for the Home Secretary to restrict certain foreign nationals' right to employment and welfare support associated with Discretionary Leave.¹ Although the government "reassured" parliament that the SIS would not apply to refugees (HC Committee (27 Nov) 2007, c.647), this referred simply to the fact that application of the status held where the Home Office had excluded an asylum seeker from the protections of the *Refugee Convention* according to Article 1F: "serious reasons for considering" guilt in a non-political crime contrary to the purposes and principles of the United Nations. This had been the basis on which the Hijackers were excluded from the Convention and from all other forms of Leave to Remain within the UK, including Humanitarian Protection and Discretionary Leave. Moreover, it was the basis on which the government had recently incorporated an expansive definition of engagement in or support for terrorist acts "actual or inchoate" as a means for exclusion from asylum (*Asylum, Nationality and Immigration Act 2006*, s.54). In this respect, the Home Secretary was empowered with free-standing discretion to both classify a foreign national as a threat to national security on the basis of her suspicions, and to deny both the protections of the *Refugee Convention* and alternative statuses within the UK as she saw fit.

The objective of applying the SIS to an individual or family was expressed as reducing them to a state of mere subsistence, with a guarantee of public support only where there was a risk of destitution (HL Committee (10 March) 2008, c.1353). The SIS was explicitly stated on several occasions to be a necessary response to the "anomaly" imposed by the judicial decision on the Hijackers' status in the UK (HC Committee (16 March) 2007, c.22). It was to be a means to "disentitle" the Hijackers from "all the advantages" which derive from leave to remain in the UK. (HC Committee (27 November) 2007, cc. 641-2; 645-6) Yet, in introducing the SIS to the Commons, Jack Straw (then Justice Minister) explicitly invoked public safety and national security as the basis for the new powers to control the men he had failed to deport as Home Secretary:

¹Passed into law as part 10, s.130-7 of the *Criminal Justice and Immigration Act 2008*.

...the freedoms that we enjoy in this country should never be abused. The new special immigration status will ensure that foreign criminals and terrorists who cannot be deported cannot expect a settled status in this country. (HC Debate 08/10/07: Col.69)

Despite this introductory framing of the Bill, clear emphasis was made in later readings that a perceived threat to national security was not to be a necessary condition for the SIS. Past conduct was to be the basis for determining application of the status, without “additional requirement to assess whether they currently represent a danger to the national community.” (HL Debate (30 Mar) 2008, c.284-5) This justification is consistent with the formulation of the Home Secretary’s powers to exclude a foreign national’s access to the asylum system.

In its Regulatory Impact Assessment of the Bill, the Home Office invoked the well tested distinction between good and bad migration; between “law abiding migrants” and criminality or terrorism. Arguing once more that the constraint imposed in the Court of Appeal judgement was not “right”, the document cited concerns over danger to the community (Home Office, 2007, p. 156). These were not concerns expressed at any previous juncture in the adjudication or judicial review of the case. Nor were such concerns the basis of the Ministry of Justice’s rationalisation of the new SIS in a letter to the Law Society. Rather, this emphasised the right of the executive to legislate and to maintain the integrity of immigration controls by denying leave to those excluded from the *Refugee Convention*, “whether or not they represent a continuing risk to the UK.” (Ministry of Justice, 2007, p. 25).

As an indefinite status which facilitates deportation at the first opportunity for the government to dispel concerns over ill-treatment on expulsion, it is quite apparent that the operative concern behind the SIS was not so much combatting perceived criminality or threats to security, as engaging with the problem of what to do in cases where deportation is constrained by the courts. Whereas the JCHR did not advise any revisions to the proposed SIS (JCHR, 2008), concerns were raised in parliament about the special status being unnecessary, unfair (HC Committee (27 Nov) 2007) and needlessly costly (Commons Debates (8 October) 2007, c.84). However, no changes were made.

Despite being rushed through parliament, the legislative provision for these powers has never been activated. Earlier that year, Immigration Minister, Liam Byrne joked about his purported “instinct” to “seek wide, sweeping powers... for which there was no purpose...” (HC Committee (6 March) 2007, c.204) Although the Special Immigration Status has not been put to use, this does not discount significance of its legislation as a symbolic, public response to the dual problem of what to do with the Hijackers and how to reassert Home Office authority following scathing condemnation of its conduct in the case. Equally, we may speculate that the SIS is effectively unworkable without inviting further judicial review of its operation.

To a significant extent, the justifications of the new SIS by the Home Office and Ministry of Justice were characterised by ambiguity as to whether it was grounded in concerns over national security and whether the Hijackers presented such a threat – either to the community or to national security. However, each of the seemingly disparate framings of the problem to which the SIS was posed as a solution – national security, disentitlement of asylum seekers from the *Refugee Convention*, the executive’s prerogative to legislate on Leave to Remain in the UK – are characterised by a significant degree of executive discretion. The executive had concluded from its engagement with the JCHR over the future of the HRA that the jurisprudence of the ECtHR was the true impediment to achieving its policy goals. Yet in presenting the SIS as a direct response to the Hijackers ruling, the government demonstrated clearly that it took issue with the constraint of its powers by the municipal courts. Moreover, in this case, the constraint emanated from British common law, and not the courts’ application of the HRA or ECHR jurisprudence. Given the common theme of executive discretion in the government’s justification of new powers, we may conclude that the problem at hand in responding to the Hijackers case was very much governmental capacity to appear in control of immigration and asylum.

Further Policy Instructions on Restricted Leave to Remain

As a final note on the impact of the Hijackers rulings on immigration and asylum controls, I wish to give brief consideration to later changes to Asylum Policy Instructions on Restricted Leave. Executive discretion to regulate foreign nationals’ presence has been enhanced in recent years by the creation of a variety of statuses

which provide leave to enter and remain. Although the SIS was not activated, the Home Office has recreated for itself certain analogous powers to restrict foreign nationals' access to welfare support and employment. Since September, 2011, policy instructions require that *first* consideration be given to whether "restricted leave" can be applied, rather than simply a time limited discretionary leave (Policy guidance on discretionary leave s.2.5.3-4). This applies to all asylum applicants excluded from the *Refugee Convention* under Art 1F, who cannot be deported due to the ECHR. Some restrictions of the SIS are replicated in the restricted leave policy, including the six month renewable status as a form of enforced limbo as a barrier to integration (due to the perpetual prospect of non-renewal of leave); also, via an independent board, the ability to restrict employment; and Home Office discretion to restrict the place of abode and education.

Above public security and maintenance of international rule of law, the primary justification for the policy instructions was stated as, "public interest in maintaining the integrity of immigration control (UKBA, 2012, s.1.10). In contrast to the symbolic legislation of the SIS, this bureaucratic development was a far less publicised policy innovation. Considering that it was the lack of parliamentary authority for similar restrictions which led to the adverse judicial decisions in the Hijackers case, it is quite remarkable that these Asylum Policy Instructions again lack such approval, having been self-authorised by the Home Office under the *Immigration Act 1971*, s.3(1)(c), which allows restrictions to be placed on those subject to limited leave to enter or remain. This is despite subsequent rulings of the UK Supreme Court (UKSC 2012a, 2012b) which dismissed the Home Secretary's argument that new substantive requirements of immigration control do not need to be put before parliament. Such considerations suggest a clear willingness on the part of the Home Office to take legal risks pending prospective judicial scrutiny. Nevertheless, despite the great controversy surrounding the courts' constraint of government in the Hijackers case, the Home Secretary retains discretionary powers analogous to those which the judiciary deemed unlawful.

Classification and discussion of judicial impact

Having considered key findings from critical framing analysis of primary discursive sources, I now wish to further develop my analysis of judicial impact in this case according to the analytical typologies of response and depth of impact. In doing so, I will also consider the apparent significance of politicisation and the municipal source of the rulings to judicial impact on policy change.

Beyond the material changes to the legislative regime of asylum control, which overruled the prior judicial constraint, I have endeavoured to develop a more subtle understanding of how and why government understood the meaning and significance of the judicial decision with regards to its policy agenda. I begin by specifying how the government responded according to my typology of how compliance may be reconciled with prior policy commitments. Next, I consider the level of ideas governing asylum control at which judicial impact can be established. I then move on from these classifications to build an argument that the level of ideas impacted may have significant potential to explain the government's response.

Judicial impact in terms of the government's response

In determining the government's overall response to the problem posed by the Hijackers rulings, it is first necessary to account for apparent divergences between the tone of political rhetoric and certain internal governmental communications. Prominent members of the government publicly questioned the appropriateness and even the legal legitimacy of the High Court ruling, branding it an "abuse of common sense." Yet, coordinative discourse *within* government did not follow political rhetoric in framing the Hijackers as a security threat. Furthermore, certain internal sources affirmed that there was no question of individual rights being balanced against the public good. However, in both the internal and external discourses which comprised each 'episode,' there was a consistent re-framing of the criteria invoked to justify the restriction of foreign nationals' in-country rights in lieu of deportation. This was expressed as public safety— as opposed to national security and public good, which are established principles for justifying deportation. This re-framing emphasised Home Office discretion, and comprised a somewhat 'looser' framing,

which may allow government to move more freely in its discourse between reference to the public good and national security.

Political rhetoric oriented towards the media and a majority of internal communications within government also shared a common discursive framing of human rights in terms of a tension between the national community and certain migrants undeserving of such rights protections, due to associations with criminality and security risks. This framing positioned the judicial decisions in the Hijackers case as an unwarranted and unreasonable impediment to a necessary balancing of foreign nationals' rights against collective security. Moreover, it sought to affirm the executive as the natural arbiter of this balance.

In these respects, we may identify a consistent governmental response – which was to 'amplify' the coercive effect of the judicial decision as an unwelcome impediment to this executive balancing act. In the context of intensive media scrutiny of governmental control over asylum and deportation, 'amplification' may have served to 'pass the buck' of responsibility for failures to the judiciary as a scapegoat. However, the particularly emphatic focus of political rhetoric on the importance of unfettered deportation capacity can more readily be taken to indicate an attempt to shore up the government's commitment to at least prospectively achieving authoritative control over asylum. Amplification may be considered as part of the government's symbolic plea to enhanced executive discretion over the pursuit of a policy of restricted leave, free from judicial constraint (as was realised in both new legislation and Home Office policy). Moreover, my consideration of the government's discursive construction and justification of its response indicates a desire to challenge the more general legitimacy of human rights and judicial scrutiny as constraints on governmental discretion to exercise asylum controls.

Level of impact

The policy tool of restrictions on rights associated with leave to remain within the UK was *initially* constrained following the High Court ruling that it was formulated and implemented without parliamentary authority. This prevented the Home Office from restricting access to work and welfare without new legislation. However, parliament provided for just such powers to restrict rights within the UK in lieu of

deportation, in the *Criminal Justice and Immigration Act 2008*. Although the relevant legislative provision has not been activated, the Home Office also subsequently created similar powers for itself in the form of Asylum Policy Instructions.

As such, we may surmise that the underlying logic of the government's policy programme was not constrained in responding to the Hijackers rulings. The discretionary power of the Home Office to balance migrants' rights against policy priorities was actually enhanced; both in legislation and policy instructions, and also in political framing which justified these according to an executive discretion over restrictions on rights associated with Leave to Remain. Concerns over the maintenance of this governing logic nonetheless clearly informed the government's response to the courts. Problematisation of the ruling in governmental discourse was dominantly framed in terms of a balancing act: between rights and public safety; between executive discretion and judicial scrutiny; between rights associated with inclusion in the national community, and exclusion from this community of rights. Governmental concern over this matter is also reflected in the justification of the Special Immigration Status according to the need for asylum controls – an otherwise incongruously broad and overarching policy concern, which extends beyond the need to address small numbers of foreign criminals who cannot be deported.

The core public philosophy guiding asylum control was also seriously challenged by the deeper impact of the Hijackers ruling on the appearance of the government as incapable of controlling inclusion and exclusion. Intense publicity surrounding the case made a media spectacle of the government's inability to deport the Hijackers, despite public pledges to do so. This profound impact of the judicial decisions on the governing ideas underpinning asylum controls was reflected by the fixation of much political rhetoric on the issue of deportation, irrespective of the legal substance of the case. Indeed, governmental focus on the question of deportation capacity may have served to distract attention from the very direct and substantive judicial constraint of executive powers under constitutional principles from common law (*ultra vires*), rather than the *Human Rights Act* or *European Convention on Human Rights*, which had become scapegoats for a string of government failures.

This case cannot be said to have produced a judicial constraint of the practical tools of asylum control; the restrictions on Leave to Remain were reinstated by parliament and the executive. Yet, the rulings did exert a significant impact on the government's ability to demonstrate authoritative control over immigration and asylum (due to the very public inability to deport, despite promises to do so). New symbolic powers were created, affirming executive discretion in the granting of status within the UK to foreign nationals. But these did not address governmental incapacity on deportation, which the rulings had publicly highlighted. In light of this problem posed by the Hijackers' case, the government's recriminatory rhetoric may be understood as having sought to affirm a plausible willingness to deport the Hijackers, both despite and because of the very public constraint on such a measure in practice.

The role of politicisation and source of ruling in policy impact

Politicisation and amplification as results of the level of impact

In responding to the Hijackers case, compliance was highly politicised by both government and opposition. Amplification of the rulings' perceived coercive effect was a dominant attribute of this discourse. However, this response to the courts may best be understood by attention to discursive construction of the problem of judicial impact. Politicisation of compliance reflected the effect these rulings were perceived to have upon the government's capacity to demonstrably exercise symbolic control over the inclusion and exclusion of unwanted foreign nationals; balancing their human rights and access to justice against expedient and authoritative immigration and asylum control. The Afghan Hijackers case challenged the continued and demonstrable exercise of these governing ideas. As I have already suggested, the authority of the Home Office to balance rights against the exclusion of unwanted migrants was particularly challenged. By engagement with the governing ideas impacted by judicial decisions in this manner, we can appreciate that this is an integral factor leading to politicisation of compliance.

To the extent that certain classes of deportation and removal actions involving ECHR Article 3 concerns have been constrained in practice by jurisprudence of the municipal courts and ECtHR, hard political rhetoric assuring a policy commitment to remove more migrants, faster, have sought to sustain the public legitimacy, if not the

integrity, of asylum controls. In this respect, it can be said that whilst the guiding public philosophy may have been challenged in practice by judicial scrutiny, this governing idea has certainly not been constrained in political rhetoric. This is particularly significant in the context of the highly mediated and performative character of the politics of asylum. Here, the rhetorical image of control may matter more to political legitimacy than substantive policy outputs. Indeed, such rhetoric may serve to excuse or distract from sustained public, media and political attention to deficiencies in practice.

Significance of the source of the ruling

It is similarly apparent that the source of the judicial decisions (i.e. the UK's senior courts) does not appear to have any direct significance to the subsequent judicial impact on policy framings. Governmental responses can be better understood as a consequence of the broader 'depth of impact' which the rulings had on the ideas governing asylum control. Governmental discourses on compliance with the *Hijackers* ruling revolved around the perceived excessive constraints on asylum control imposed by the ECtHR, despite the fact that the legal issue concerned common law principles relating to the executive overstepping its discretionary powers. In this respect, the mismatch between the legal substance of the ruling and much of the political framing of judicial impact in this case renders the significance of the source of ruling to judicial impact highly questionable.

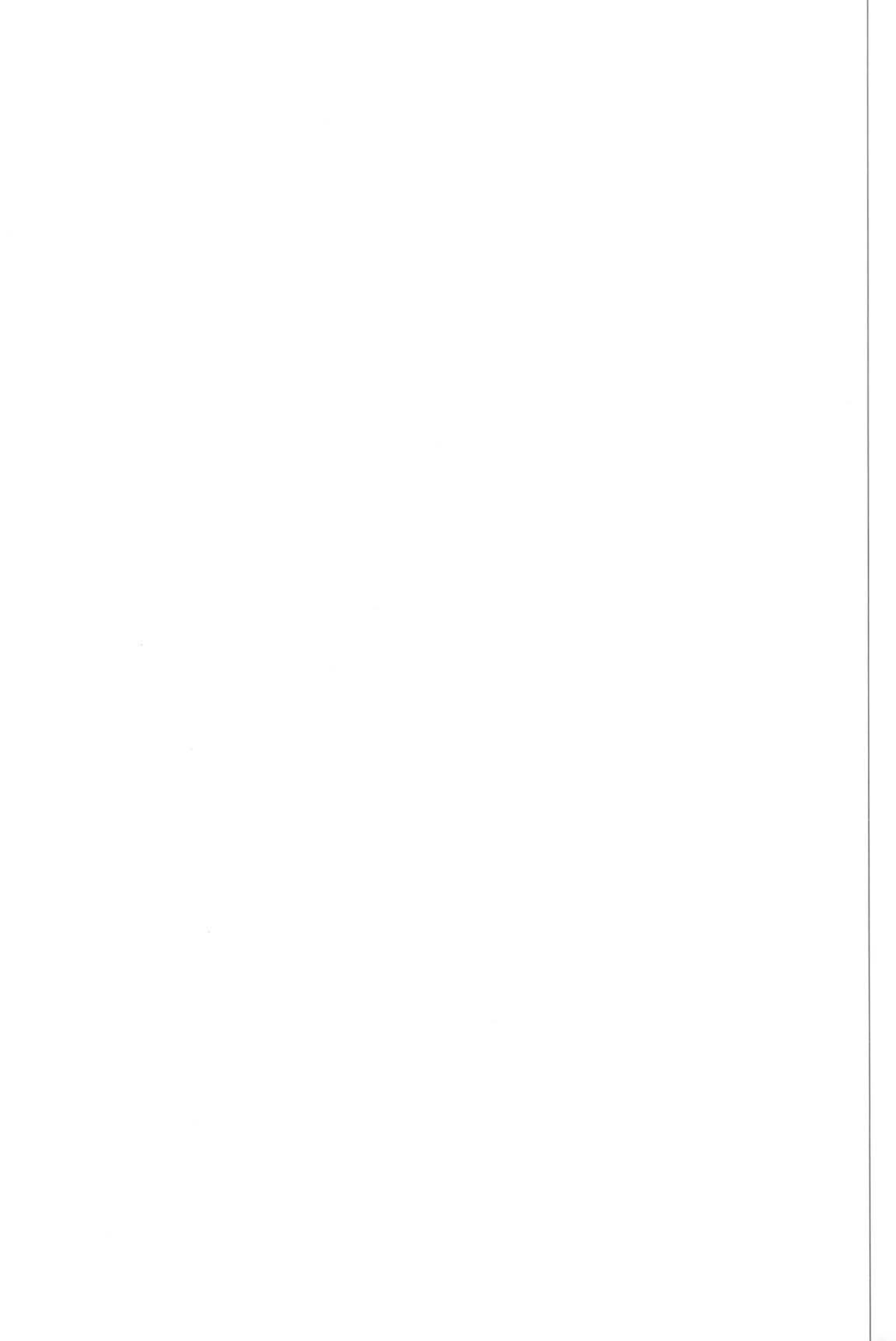
Ultimately, it is not possible to discern whether political actors truly understood the legal facts of the case. However, as already suggested, emphasis on constraints on deportation and removal imposed by the ECtHR may have served as a convenient scapegoat for government failures, as could recriminatory comments on unwarranted interference by the municipal judiciary. Both, however, may well have served to distract from the substantive constraint in common law which the courts had sought to apply. In this respect, at least, it was the sustained scrutiny of the municipal courts which resulted in the pervasive judicial impact on the policy ideas governing asylum control which is demonstrated in this case.

Conclusion

On the surface, the impact of the judicial decisions in the Hijackers case appears to be have been very limited. The rulings met with a recriminatory political response, and were overruled by parliament. In this respect, despite their stern wording in places, the rulings could easily be dismissed as “courteous requests” to a sovereign, as opposed to “pronouncements of truth from on high.” (Gearty, 2006, p. 96) Yet, on closer consideration of how government actually interpreted the significance of the rulings, and responded to them, the picture of judicial impact becomes much more nuanced and significant.

My data on discursive framing shows judicial impact in this case to have been driven by concern over political discretion – which is a common underlying facet of the politics of both security and asylum control. Whilst it is interesting that the fixation of some political rhetoric on security is not replicated in the government’s internal orientation to the ruling, it is perhaps more important to note the reframing of the issue in innovative terms of public safety. It is significant that this framing was deployed in such a way as to justify a broader regime of political discretion over asylum control. The dominance of political discourse which sought to affirm executive discretion over asylum control is perhaps unsurprising. Nevertheless, this framing was integral to the successful justification of material changes to policy following the ruling, and perhaps more importantly, is indicative of the extent to which the government was challenged in its authority over asylum control by the judicial decision. The viability of the government’s capacity to demonstrate authoritative control over asylum control appears to have been challenged in this case. This is reflected at the level of discourse which affirmed a governing logic of executive discretion to balance policy priorities and migrant rights towards the realisation of an underlying philosophy of exclusion from the national community and its associated rights.

In this high profile case, there was little judicial constraint of the practical tools of asylum control (which were legislatively reinstated). Yet, there was significant judicial impact on the government's ability to demonstrate authoritative control over immigration and asylum.



6. Chahal

Introduction

In November 1996, the European Court of Human Rights (ECtHR) ruled against the UK in the *Chahal* case (ECtHR 1996) that no matter the state's justification, it is unlawful to expel a foreign national to a real risk of torture, cruel, inhuman or degrading treatment, as prohibited by Article 3 of the *European Convention on Human Rights* (ECHR). The effect of this ruling was not simply that it was unlawful to deport a person accused of posing a threat to national security due to the particular risks which may be faced on return. The ruling strictly curtailed the discretionary authority of the Home Secretary to balance national interests in deportation and removal against the prohibition on *refoulement* to a prospect of Article 3 ill-treatment. In effect, *Chahal* prohibited deportation 'at any cost' to the individual as a tool of national security and immigration control.

Compliance with the constraint imposed by *Chahal* led to significant changes to the appeals mechanism in place for deportations driven by security concerns. More than this, however, a 'saga' of policy innovations followed, with government endeavouring to devise alternative means of restricting the movements and liberties enjoyed by foreign national security suspects who could not be deported. Such policies became subject to frequent and sustained scrutiny from the British courts – for example on indefinite detention without charge (UKHL 2004b), sufficiency of diplomatic assurances from receiving states (Larsaeus, 2006) and Control Orders designed to restrict individuals' liberties (Ewing & Tham, 2008). This saga of policy change, its engagement with further judicial scrutiny, and an associated governmental discourse on the role of judicial constraint of deportation and counter-terrorism policies, readily allows for interrogation of how successive governments interpreted the problem posed by compliance with *Chahal* over time.

In this chapter, I consider how governmental discourse framed the problem posed by *Chahal*. The government's response considered in this case study was both more complex and spanned a greater period in time than in the Afghan Hijackers case. Indeed, I trace a 'saga' of policy innovations which sought to 'fine-tune' or negotiate

the impact of *Chahal* over time. As in my treatment of the Afghan Hijackers, this chapter concerns a case in which compliance was highly politicised. Although compliance was at first rapid, comprehensive and uncontested, by considering governmental framing of the meaning and implications of *Chahal* over a longer duration (here, more than fifteen years), it is possible to observe a growing political opposition to the constraint *Chahal* imposed on deportation and removal. Indeed, the British government eventually made an unsuccessful appeal to the ECtHR to overturn the constraint (ECtHR 2009a). The *Chahal* saga also provides some important historical and jurisprudential context which helps us to better understand the events in the Hijackers case. By looking not only to the original response to *Chahal*, but also forward, beyond the events in the Hijackers case, to consider *Chahal*'s long term and enduring impact, it is possible to further contextualise and explore the question of governmental conflict with the judiciary over constraints on deportation and alternative restrictions within the state. In tracing this framing of judicial impact over time, particular attention is also paid to the significance attached in political discourse to the supranational provenance of the judicial decision, and what significance may be attached to its source in explaining governmental responses. Towards this end, I have sought to locate my analysis within the broader context in which British governments, in little over ten years, moved from incorporation of the ECHR into UK law, to eventually calling for varying degrees of radical reform to the role of human rights law, the ECHR and the ECtHR.

To some degree, my engagement with this case considers a governmental response which is the inverse of that observed in the previous chapter on the Afghan Hijackers; moving from an initial willing compliance, towards increasingly acrimonious framing of judicial impact. My focus is on interrogating the construction of judicial impact in government documents and rhetoric, over time, and within a context of how the UK's relationship with the ECHR and ECtHR are framed. Approaching governmental sources in this manner, I seek to arrive at an understanding of judicial impact according to how government oriented itself towards not just the direct question of compliance, but also upon deportation and asylum control, as well as the role of human rights and judicial review as constraints

on the realisation of executive priorities. In effect, this narrates how successive governments ‘coped’ with the constraint imposed by *Chahal*

I begin by presenting a brief outline of the facts of the case and judicial decision in *Chahal v. UK*. This is followed by briefly locating the ruling within the context of governmental attitudes towards the supervision of the ECtHR at this time. Doing so also allows consideration of expectations suggested by existing literature on the ruling, as to how judicial impact may be understood in this case. This historical-contextual prelude sets up subsequent engagement with primary sources on judicial impact. My engagement with primary sources is divided into four episodes: the initial response and policy innovations; diplomatic attempts to certify deportations; an attempt to have *Chahal* overturned by the ECtHR; and finally, consideration of an enduring political backlash against judicial scrutiny. Drawing upon this presentation of governmental framings of judicial impact, I then advance analytical reflections on the nature and significance of the government’s orientation towards the *Chahal* ruling, and its impact upon the ideas governing deportation and asylum control.

Facts of the case

In 1990, Karamjit Singh Chahal, an Indian national with Indefinite Leave to Remain in the UK, became subject to a deportation order on the grounds of national security. This was based on the Home Secretary’s suspicion that he was involved in terrorist activities against India, such that his return there for investigation was in the British national interest. Arguing that his return would put him at risk of torture by the state authorities, Mr. Chahal was unsuccessful in a claim for asylum. An asylum appeal tribunal had recently been established as part of the *Asylum and Immigration Appeals Act 1993*, against a backdrop of the case of *Vilvarajah v. UK* (ECtHR 1991). However, where a foreign national came to be labelled as a potential threat to national security, this meant that no access was allowed to the tribunal. Barred such opportunity to appeal, Mr. Chahal’s deportation was instead confirmed by the Home Office panel known colloquially within government as the “three wise men”(Constitutional Affairs Committee, 2005, p. 79), which advised the Home Secretary on such security related deportations. This panel operated in a highly secretive manner; it did not disclose the case against appellants, and did not provide

appellants or their legal representatives with security relevant intelligence on which it based its decisions.

Both the High Court and Court of Appeal dismissed claims for judicial review of the order to deport Mr. Chahal, due to the courts' limited authority to supervise the Home Secretary's decision. Although conceding that it did not have "all the relevant facts" due to the use of secret intelligence, the Court of Appeal determined that "in any event, the judicial process is unsuitable for reaching decisions on national security." As such, the court affirmed the Home Secretary's discretion in weighting a balance in favour of "risks to this country" over the safety of Mr Chahal (quoted in ECtHR 1996, para. 41).

Although previous jurisprudence required that foreign nationals may only be detained pending a reasonable prospect of their timely removal from the country (UKHC 1984), Mr. Chahal had already been detained for six years before the ECtHR heard his case. This is a notable foreshadowing of the UK government's later willingness to indefinitely detain foreign national security suspects who could not be deported.

Appealing to the ECtHR, Mr. Chahal contested the lawfulness of his deportation, as well as his detention pending deportation. Finding in favour of the appeal against deportation and for release from detention, the ECtHR also ruled that in withholding the basis for Mr. Chahal's detention, the existing Home Office panel did not constitute an effective domestic remedy for review of detention and deportation within the terms of ECHR, Article 13. With regards to the lawfulness of deportation, the court ruled that although ECHR Article 1 establishes a duty on states to secure the rights of all individuals "within their jurisdiction", the absolute character of ECHR Article 3's prohibition on torture, cruel, inhuman or degrading treatment should be taken into account. Extending its previous interpretation of ECHR Article 3 (ECtHR 1989; 1991; 1992), the court ruled that its absolute character meant that expulsion to a risk of such treatment in the receiving state would constitute a breach of the Convention by the sending state. Therefore, neither assurances from the receiving state, nor matters of national interest – even concerns over a risk posed by

the individual to national security – could be weighed against the prohibition on removal to a risk of such treatment (ECtHR 1996, para.79).

Governmental priorities regarding deportation, asylum control and judicial scrutiny

In setting up contextual expectations as a lead into subsequent analysis of primary sources, I will focus upon governmental attitudes and priorities with regards to deportation, asylum control and supranational judicial supervision of policies at the time of the *Chahal* ruling. I also consider contentious debate as to the implications of *Chahal* for the politics of national security.

A rising tension between humanitarian protection and restrictive asylum

Previous to the *Chahal* ruling, the Conservative government had recently implemented an array of severe restrictions on access to and enjoyment of asylum in the UK on the basis of the *Refugee Convention*. This trend towards more restrictive asylum controls was continued under the subsequent New Labour government (Bloch, 2000), making international protection more temporary and increasingly conditional upon conduct requirements imposed by the state (Joly, 1999). Although appeals against initial asylum decisions were instituted in the *Asylum and Immigration Appeals Act 1993*, this legislation, and the *Asylum and Immigration Act 1996* had enhanced the Home Secretary's discretion to 'fast track' a variety categories of applications and appeals, so as to expedite removals (Stevens, 2004, pp. 170–74). As noted in my discussion of the Hijackers' case, a discourse emphasising the importance of demonstrable control and capacity over asylum and deportation flourished in government throughout the 1990s and 2000s.

Against this backdrop of growing executive discretion over restrictions on asylum seekers, the effect of the *Chahal* ruling was remarkable in offering a greater degree of protection than was offered by the *Refugee Convention* (Harvey, 1997). Whereas *Chahal* affirmed an absolute prohibition on *refoulement* in cases involving a real risk of Article 3 ill-treatment, executive discretion over the public good provided a basis for exclusion from all protections offered by the *Refugee Convention*. It is no wonder that commentators pondered the gap between the UK's increasingly restrictive asylum controls and the developing importance of Article 3 as a basis for

humanitarian protection. Matthew Gibney speculated that these historical developments “may well signal the beginning of the end for the kind of discretionary authority that has been characteristic of state practice since 1945.” (2004, p. 128) Whilst hindsight suggests that political support for restrictive asylum controls has proven unchanged, the British judiciary have not merely had regard for *Chahal* jurisprudence, but required that it be consistently applied (UKHL 2004a).

A tenuous relationship with the judiciary at home and in Strasbourg

During the 1990s, growing confidence on the part of the British judiciary over administrative law, including deportation and asylum support, met with uneven compliance (UKHL 1994) and legislative overrule (UKCA 1996). Judicial scrutiny was not at all welcome. Only a year before the judgement in *Chahal*, the municipal judiciary met with “hostile” and “vitriolic” criticisms from the Home Secretary and backbench MPs (Le Seur, 1996, p. 8). As regards the ECtHR, although the UK had since 1966 recognised the right of individual petition, in 1994 British diplomats advocated withdrawal of the right, leading to debates at cabinet level in 1996 (Bates, 2010, p. 434; Drzemczewski, 1995, p. 174). Clearly, the scrutiny of the ECtHR was no more welcome at this time than was that of the British courts.

It has often been noted that successive Home Secretaries and Prime Ministers came to revile the constraint imposed by *Chahal* (e.g. Bonner, 2012; T. Kelly, 2012; O’Sullivan, 2009). Yet, at first, and despite clear antipathy towards the ECtHR, *Chahal* met with almost immediate and full compliance. David Erdos (2009) has noted a tendency for new governments to wash away the sins of their predecessor with enhanced guarantees of human rights. Given the recently elected New Labour government’s incorporation of human rights into UK law, compliance with the ECtHR on *Chahal* is perhaps unsurprising. Before the *Human Rights Act 1998* came into effect, the UK had been one of the most frequent defendants before the ECtHR – arguably due to the British courts’ reluctance to review extensive executive discretion (Jackson, 1997) and lack of a domestically enforceable bill of rights. The result was a higher than average number of judgements on the right to a fair trial (Council of Europe, 2011, 2013). Incorporation of the ECHR into UK law as well

as legislation to comply with *Chahal* arose against the backdrop of this strain on the UK's relationship with the ECtHR.

However, much explaining remains to be done as to how and why the government's attitude towards the impact of the *Chahal* ruling changed over time from acceptance to acrimony. Incrementalism in the ECtHR's jurisprudence may have enhanced its authority over interpretation of Article 3 (Helfer & Slaughter, 1997, p. 314), preparing the UK for acceptance of *Chahal*. However, this says nothing of how the government interpreted and adjusted to its effects on deportation and asylum control. Ostensible compliance has given rise to the view that supranational courts' jurisprudence, including *Chahal*, has become "embedded" in the UK's institutional function, as policy guidelines, for example (Jacobson & Ruffer, 2003, pp. 88–9). Yet this embeddedness must be interrogated as a question of how actors within such institutions of the state interpret and act out the constraint in practice (Çali, 2009; Wagenaar, 2004).

The intersection of security with deportation and asylum control

It cannot be ignored that the *Chahal* ruling related to an act of government justified in terms of interests in national security. A commonality between governmental attitudes to judicial scrutiny at this time, and the governance of security is, however, an appeal to political discretion free from the imposition of external constraints. Indeed, this is a central tenet of literature claiming that immigration control in the UK was at least briefly 'securitised;' whereby labelling of foreign nationals as a threat to the national community was pursued to enhance political discretion to enact exceptional measures (e.g. Hampshire, 2009; Huysmans & Buonfino, 2008; Squire, 2009). Yet, even where such a security framing is pursued this does not mean that we should assume it prevails. For example, although the New Labour government under Tony Blair appealed to exceptional circumstances relating to counter-terrorism to detain foreign nationals whom it could not deport (Hampshire, 2009), this policy measure met with stern judicial condemnation leading to its withdrawal (UKHL 2004b; ECtHR 2009b). Moreover, these exceptional measures were justified in terms of necessity caused by judicial constraints on deportation. To the extent that such measures relate as much to immigration control as to security concerns, it would be

imprudent to presume the dominance of a 'securitarian' framing in government (Boswell, 2007a) when considering responses to *Chahal's* constraint of deportations. As such, I consider national security as pertinent to this case study only where it comprises part of the government's interpretation of judicial impact; in particular, the constraint placed by courts on governmental discretion to apply matters of national interest to deportation and restrictions on foreign nationals' human rights.

Without reducing the matter to sole consideration of national security, Tobias Kelly (2012, ch.4) has argued that the British government's approach to deportation and removal throughout this period was characterised by an attempt to reframe the absolute prohibition on torture as a function of risk. Unlike a delimited appeal to exceptional circumstances (as postulated by many studies of securitisation), this comprises a generalised discourse, seeking to affirm governmental discretion to pursue deportation, provided it can either justify or mitigate such risk to the deportee. This approach to judicial scrutiny may be interpreted as indicating a desire to circumnavigate the constraint imposed by *Chahal*. However, David Bonner (2012) has argued that the government's counter-terrorism policy, including deportations, following *Chahal* were characterised by adapting to its constraint, recognising and reluctantly working with judicial constraints. In contrast, Adam Tomkins (2010, p. 548) has argued that governmental discretion may have been unintentionally enhanced by the judicialization of security deportation, due to subsequent municipal jurisprudence (UKHL 2003a) that decisions on what is in the interests of national security are exclusive to the Home Secretary and not reviewable. Whilst such discretion over the definition of national security may have been retained, this cannot necessarily be said for executive discretion over any pursuant deportation order.

As we shall see from attending to primary sources, the government's discursive bid to reframe the debate in terms of a manageable risk (T. Kelly, 2012), facilitating its discretion over a balancing of foreign nationals' rights against their deportation and detention was not entirely successful. Indeed there is much to suggest that such discretion has been supervised by judicial oversight. As I have sought to suggest in this contextual prelude to my primary analysis of governmental discourse on judicial

impact, much remains to be understood about changes in how successive governments understood the constraint imposed by *Chahal*. It is by turning to interrogate the manner in which this constraint was constructed in political discourse, that I propose to uncover deeper insights into the impact *Chahal* exerted over time on the ideas governing deportation and asylum control.

Analysis of Primary Sources

Nature of sources

Legislative change in response to *Chahal* occurred at the beginning of New Labour's term in government. This was a period during which many subsequently standardised processes of publicly documenting and consulting upon policy change were not yet implemented. Although it did document compliance as part of monitoring by the Council of Europe, the government had not yet made moves towards transparency that it would in subsequent years. As such, the balance of primary discursive sources considered for this case study has, in places, tended more towards political rhetoric than documents. Such rhetoric included parliamentary debates in which ministers sought to justify relevant legislative change, as well as government policy on deportation, national security and the UK's relationship with the ECtHR. Where governmental documents indicative of the reasoning leading up to certain examples of policy change proved more scarce, my analysis has relied in places upon tracing a series of material policy changes developed in light of the constraint imposed by *Chahal*. In doing so, however, particular attention was given to these policies' wording, construction and justification, to consider how compliance with *Chahal* was framed in relationship to the parallel realisation of other policy goals, such as effective immigration and asylum controls. Insight into the long-term impact of *Chahal* was also facilitated by analysis of how the government worded its failed attempt to convince the ECtHR to overturn its jurisprudence and by reference to subsequent documents and rhetoric indicating the government's priorities regarding future scrutiny by the Court.

1. Domestication of constraints

In *Chahal*, the ECtHR ruled on three points: the unlawfulness of deportation to a prospect of ill-treatment prohibited by ECHR Article 3; detention pending such

expulsion; and, notably, that existing mechanisms provided by British asylum policy for appeals against deportation in security cases were inadequate to ensure protection of ECHR rights. Although Mr. Chahal and several others in a similar legal position to him were quickly released from detention, and given leave to remain in the UK, it took a change of government in 1997 before measures were legislated to provide an ECHR compatible system of reviewing security deportations. Within only a year of entering government, New Labour produced legislation for creation of The Special Immigration Appeals Commission (SIAC). This body provides hearings for individuals subject to deportation orders issued as conducive to the public good on the grounds of the Home Secretary's belief that their continued presence poses a potential threat to national security. Unlike the advisory function of the 'panel of three wise men,' which previously reviewed security deportation decisions, SIAC is a superior court of record with authority to review both matters of law and facts of the case (UKCA 2000). In this respect, the creation of SIAC has involved a ceding of final discretion over deportation decisions from the Home Office to a quasi-judicial body, from which appeals may be made to the senior courts. SIAC therefore constitutes both a significant example of legislative and institutional change in response to *Chahal*, as well as an increase in judicial scrutiny over certain deportation decisions.

The *Chahal* ruling had explicitly prohibited an executive balancing of concerns over national security against the protection of the individual from Article 3 ill-treatment. However, it must not be neglected that SIAC's function was carefully designed to facilitate consideration of executive concerns over security, albeit in a quasi-judicial forum which also attended to human rights protections. Of the three presiding members of a SIAC hearing, one must have experience of dealing with intelligence, whilst the other two comprise a High Court judge, and a judge with experience from the Asylum and Immigration Tribunal (AIT). SIAC's role, as compared to the AIT, is specifically to review decisions which the Home Secretary has based on information which she wishes to keep secret for reasons of national security, diplomatic, or public interest. It is at the Home Secretary's discretion to withhold such information from the appellant, in which case, the information is reviewed in a closed session. In such cases, the appellant may not therefore be fully aware of the

case made against them as cause for deportation. Instead, a ‘special advocate’ (a security vetted legal practitioner) privately represents their interests. Only this advocate is allowed to see the closed evidence, the appellant and their chosen legal representative are not (The Special Immigration Appeals Commission (Procedure) Rules 2003).

Early debates on formulation of the *Special Immigration Appeals Commission Bill* indicate uneasiness over the function of appeals and judicial review of the Commission’s decisions. These revolved around two issues; protecting secret intelligence, and whether the Commission’s ruling would be final. Only after extensive debate in the Lords, was a right of appeal provided – on points of law, not fact (HL Debate (02 Dec) 1997, c.1247-50). This early intention of precluding appeals is particularly surprising given the *Chahal* ruling’s requirement that there be adequate domestic remedies available to ensure compliance with the ECHR. However, it is suggestive of a desire to limit the extent to which authority is ceded from the executive to the courts over the substantive basis on which a foreign national is rendered liable to deportation. This is also reflected by ministerial concern to develop SIAC as a more “appropriate” alternative to the High Court, to ensure intelligence information be kept confidential (HC Debate (21 November) 2001, c.377). Alongside the innovation of closed material proceedings and special advocates, the framing of legislative change in terms of limiting the dispersal of power to the courts indicates that the Home Office was concerned to ensure that even if compliance with *Chahal* required that risk to the individual must be attended to, executive concerns over security would not be neglected. This comprised, at once, recognition of the constraint imposed by *Chahal* and yet an endeavour to comply with its constraint in a forum which is best suited to consideration of the Home Secretary’s argument, with serious potential prejudice to *equality of arms* as a result of restrictions on appellants’ access to the case made against them.

SIAC as a microcosm of a broader ‘bringing rights home’

Implementation of *Chahal* notably coincided with the creation of the *Human Rights Act 1998* (HRA) as a means of domesticating the ECHR by “bringing rights home” (Straw 1996). This legislation was significant, as the first implementation of the

ECHR directly in British law. It affirmed the importance of long-standing European law on human rights to British law, politics and society. However, this move is commonly accepted as motivated in large part by a desire to limit the number of embarrassing rulings from the European Court by allowing individuals to appeal to the British judiciary on human rights matters (e.g. Forsythe, 2006; Rask-Madsen, 2004). The implementation of *Chahal* by means of SIAC can be approached as a microcosm of this broader trend towards domestication of international human rights law; creating a special institution designed explicitly to combine consideration of political concerns (here over security) with attention to constraints imposed by jurisprudence from the ECtHR. In this way, creation of SIAC may best be considered as evidence of an executive view of law as a mechanism for coordination of domestic political concerns in a context of intensified judicial scrutiny from the ECtHR. After *Chahal*, security deportations would likely be subject to litigation and hence, judicial scrutiny in any case.

In its justification of compliance with *Chahal* to the Council of Europe, the government emphasised the incorporation of the ECHR into British law by the *Human Rights Act 1998*. The HRA was presented as guaranteeing compliance with *Chahal* on ECHR Articles 3 and 5, under a requirement that the ECtHR's jurisprudence be taken into account by government and the courts. The Council of Europe was also explicitly assured that the Home Secretary and SIAC would not pursue the type of balancing act prohibited in *Chahal*:

...where a deportation case raises an issue under Article 3 of the Convention, the issue is considered on the basis of the risks of treatment contrary to Article 3 and without reference to other considerations such as national security. (Reported in Council of Europe, 2006, pp. 272–4)

It is little surprise that the government would wish to convince the Council of Europe that it had complied with the ruling in no uncertain terms, in order to bring an end to monitoring of compliance. The rejection of a framing of deportation in terms of a balancing of individual rights against security is clear – especially in contrast to the previous government's view that “advice” on deportees' rights merely had to be “considered”(HC Report (21 February) 1996, c.429). However, this seeming affirmation of Article 3 as a ‘trump card,’ which would preclude need for

consideration of concerns over national security, is at odds with the importance governmental statements attached to maintaining a security oriented review function in SIAC's operational procedures, as discussed above. SIAC was specifically designed to make reference to "considerations such as national security". Dual consideration of the prospect that deportation would violate ECHR Article 3, alongside the merits of the Home Secretary's argument in favour of deportation in the interests of national security serves to emphasise that were it possible and justifiable, such aliens should be deported. Although SIAC is empowered to affirm or refute the Home Secretary's judgement, the centrality of this discretionary authority to certify deportation on grounds of national security is retained in the creation of SIAC.

However, the creation of SIAC matters not only in itself as a mechanism for mixing the law and politics of security deportations, but also because its rulings can be appealed to the Court of Appeal. Subsequent review can therein consider where responsibilities lie in matters relating to deportation – with SIAC and the senior courts, or with the Home Secretary. The transformation of reviews of security driven deportation into a judicial matter has also spawned an increase in cases of judicial review concerning appeals against SIAC decisions before upper courts in the UK and ECtHR. As a consequence, governance of such deportations has become highly judicialized, involving extensive scrutiny of governmental reasoning for compatibility with the constraint imposed by *Chahal*. Senior courts have therefore been empowered to overturn aspects of SIAC rulings which deferred to the Home Secretary's judgement on the prospective safety of the deportee (e.g. UKCA 2013); policing both SIAC's function as well as that of the Home Secretary.

The turn towards detention

I have proposed that there was an uneasy tension between the governmental framing of SIAC's function and its provision of a fair hearing against deportation and detention, in compliance with *Chahal*. The importance given to security aspects in SIAC hearings may, however, be better understood in light of the Commission's developing role in overseeing the detention of foreign nationals suspected of terrorism. SIAC was set up to hear appeals against deportation decisions, and also the

detention endured pending expulsion. However, as the government's search for policy alternatives in lieu of deportation to a prospect of Article 3 ill-treatment shifted towards detention, so did the function of SIAC. Where compliance with *Chahal* precluded deportation, the *Anti-terrorism, Crime and Security Act 2001* (ATCSA), accompanied by a reservation to ECHR Article 5 on liberty (as part of a claim that international terrorism caused a state of national emergency) provided for indefinite detention pending a prospective future deportation, subject to the Home Secretary's 'suspicion' that the individual may be a terrorist, or the 'reasonable belief' that their presence is a risk to national security. ATCSA section 34 also provided for the exclusion of security deportees from the protection of the *Refugee Convention*, meaning that fear of persecution need not be balanced against exclusion (Blake & Husain, 2003, p. 339). Between 2001 and 2003, sixteen men were detained under the ATCSA (Privy Counsellor Review Committee, 2003, p. 51). The shift of governmental policy towards detention rather than deportation of unwelcome foreign nationals indicates both the constraining impact of *Chahal* and yet its failure to impact on a broader executive framing of foreign nationals' fundamental rights as subordinate concerns in an executive balancing of national security.

Although SIAC had been created to ensure an effective domestic remedy to violation of ECHR rights by deportation, the fairness of SIAC procedures in detention and terrorism certification came under review (Constitutional Affairs Committee, 2005; later, by JCHR, 2007). In responding to parliamentary scrutiny of the role of special advocates and secret evidence in SIAC proceedings, Lord Goldsmith, the Attorney General, justified the regime in terms of protecting the public interest, whilst providing a forum for appeals representing the interests of the appellant (i.e. an effective domestic remedy). In turn, Lord Carlisle, reviewer of the government's counter-terrorism legislation, made explicit this otherwise tacit return to the logic of a balancing act. SIAC served to "maintain a reasonable balance between fair proceedings and the reality of life-threatening risk to the public and to law enforcement agencies. The special advocate is a valuable lever in ensuring that balance. SIAC itself is the vigilant fulcrum" (Evidence to the Constitutional Affairs Committee, 2005, pp. 84, s.11).

To the extent that SIAC's consideration of the risk of ill-treatment in the proposed receiving country may have precluded deportation, where the security case was considered valid, this rendered the prospective deportee subject to an alternative restriction on their ECHR Article 5 right to liberty. A derogation to Article 5 comprised a weaker link in the chain of rights protections than the absolute character of Article 3. The role of ECHR Article 8, on the right to private and family life, as a barrier to deportation and removal has more recently come under similar pressure – with government ministers arguing it should only apply in exceptional cases (HC Debate (19 June) 2012, c.761). Such attempts to circumnavigate rights constraints are suggestive of what critical scholars of security have considered an inherent tendency of security politics towards finding a caveat to “the weakest rule” in the broader regime (Bright, 2012). In this manner, the Home Secretary was able to perpetuate the governing logic behind deportation policy as a mechanism for control of immigration and asylum control as it intersects with national security – that of an executive balancing of rights versus discretionary matters such as the public good.

Although such a balancing act had been constrained with regards to Article 3 by compliance with *Chahal*, the Home Office's desire to exercise authority over such a balancing act was actually enhanced by the grounding of SIAC in consideration of risks; serving as a mechanism to validate the effective imprisonment of those who could not be literally expelled from the country. The capacity of the government to pursue such detention through SIAC has been enhanced by its facility for closed material procedures and special advocates. Following the House of Lords' ruling that indefinite detention of foreign nationals was discriminatory and in violation of their human rights (UKHL 2004b), similar provisions for special advocates and closed material proceedings have been carried over into the government's subsequent regimes of Control Orders and Terrorism Prevention Investigation Measures (forms of de-facto house arrest) (Equality and Human Rights Commission, 2012, p. 59). Doubt has subsequently been cast on the extent to which compliance with *Chahal* by means of SIAC may have impinged upon not only the right to liberty, but also the common law right to a fair hearing, as appellants are unable to challenge undisclosed allegations against them (UKHL 2009; ECtHR 2009b; cf. ECtHR 2001: that ECHR Art. 6, the right to a fair trial, does not apply to immigration proceedings). A similar

question to that arising in *Chahal* – as to the scope for foreign nationals to effectively challenge restrictions on their ECHR rights – has persisted in the form of detention and then Control Orders, restricting the right to liberty.

2. 'Fine-tuning' in response to *Chahal* and Memoranda of Understanding

Although the *Chahal* ruling was handed down by the ECtHR, a subsequent 'saga' of policy alternatives pursued as alternatives to deportation came under scrutiny in the municipal courts. In these municipal cases, the vicarious 'voice' of the ECtHR came into play through the HRA and the courts' application of the *Chahal* jurisprudence. I now turn to this 'saga' of policy innovation and municipal review for indication of how the government negotiated, or 'fine-tuned,' the impact of *Chahal*.

A saga of policy change

Whereas *Chahal* constrained deportation, subsequent policy to deal with foreign nationals suspected of terrorism implemented mechanisms for their indefinite detention without trial (*Anti-Terrorism, Crime and Security Act 2001*: Part 4). This policy was, in turn, condemned by the judiciary (UKHL 2004b), resulting in the government rushing to legislate its best policy alternative – 'Control Orders' designed to detain suspects at home, and to vest the state with powers to scrutinise and curtail most aspects of their everyday life – in a manner intended to work within the framework of the ECHR (Ewing & Tham, 2008). Significantly, legislation required any Control Order intended to deprive liberty in contravention of the ECHR to be authorised by the judiciary – a notable example of judicial constraint (*Prevention of Terrorism Act 2005*). A series of judicial rulings by the House of Lords have also resulted in modifications to the conditions for Control Orders' implementation (Ewing & Tham, 2008). It could be said that this iterative saga of policy innovation, judicial condemnation and further legislative reform is an apposite example of the process of judicialization at work: one case at a time, the nature of legal constraint upon deportation and subsequently, the detention of foreign nationals, has become differentiated and specified. However, it may be more

accurate to observe that the government was willing to pursue a series of modified policy tools intended to perpetuate a balancing of foreign nationals' rights against national security. This is a saga of legal risk taking – where the Home Office has creatively complied with each ruling, leaving the lawfulness of new policies for the courts to decide, should their scrutiny be activated by any future litigation. The policy tools have changed, but the governing logic behind them has persisted. The underlying premise has been consistent: that the Home Office should be empowered to limit foreign nationals' enjoyment of ECHR rights where the Home Secretary believes this to be in the national interest.

Memoranda of Understanding

Perhaps the most remarkable policy innovation in this context was the movement towards seeking to convince SIAC and the senior judiciary that Article 3 risk could be avoided by seeking 'Memoranda of Understanding' (MoUs) from receiving countries, which promised there would be no torture, cruel, inhuman or degrading treatment. Ostensibly, this move comprised an acknowledgement of the constraint imposed by *Chahal*. However, brief attention to the political framing of its use casts serious doubts on the extent to which the government felt bound to protect foreign nationals from risk on return.

In 2003, in the wake of the UK's derogation from ECHR article 5 to facilitate provisions to detain foreign nationals suspected of terrorism, Tony Blair suggested that the government would "fundamentally" re-examine its obligation under the ECHR not to deport to a prospect of torture, if it could not otherwise reduce the number of asylum seekers arriving in the UK (Daily Telegraph, 2003). As Home Secretary, David Blunkett downplayed this suggestion, for fear that it make the UK an international pariah (The Independent, 2003). Blunkett had previously stated a preference for persuading the judiciary to ease barriers to deportation, of "dangerous individuals" rather than de-ratify the ECHR to register a reservation to Article 3. Directly responding to opposition criticisms of the "legislative problem" posed by *Chahal*, he stated that judicial cooperation in speeding up review of expulsions would be essential, "to ensure that democracy in all its guises can operate fairly and openly, rather than be held up to ridicule by those who should be upholding it." (HC

Debate (15 October) 2001, c.926-8). The policy decision was to derogate from Article 5 on liberty, opting for detention in-country rather than go up against *Chahal*. However, Blunkett's implication also seems to be that the courts were indulging vexatious litigation from aliens; frustrating, or at least delaying, the will of an elected government that such individuals should be deported.

Following terrorist attacks on London in July 2005, pressure on government to execute security deportations rose yet further. Tony Blair instituted a twelve point plan expanding the grounds on which deportation orders could be made. In his "rules of the game are changing" press conference, Blair again threatened both to amend the Human Rights Act's interpretation of ECHR Article 3 if faced with "legal obstacles", and to institute non-suspensive appeals for deportations (The Guardian, 2005). This constituted a promise of deportation to a risk of torture, leaving the courts to decide if it was lawful only after the fact. Yet, in this press conference, Blair also emphasised the government's belief in the use of Memoranda of Understanding as a proposed safeguard against Article 3 ill-treatment by receiving countries (The Guardian, 2005). In contrast to circumventing judicial barriers to deportation, MoUs can be regarded as an effort more consistent with Blunkett's desire to persuade the judiciary to be more sympathetic to the lawfulness of deportation orders.

Throughout the duration of the New Labour government (from 1997 to 2010), MoUs were arranged with states to which it sought to expel both failed asylum seekers and foreign nationals suspected of terrorism. Three such MoUs were concluded, with Jordan, Libya, and Lebanon, in addition to negotiations with other states in the Middle East and North Africa (JCHR, 2006d, p. 105). Concluded with heads of state, these agreements comprised a framework for subsequent diplomatic assurances specifying that a given deportee would be admitted to the state and not be treated inhumanely. Diplomatic assurances are not legally binding, and offer the individual no recourse against their breach, as they can only be enforced through diplomatic channels. Paradoxically, the very fact that the British government felt compelled to seek diplomatic assurances against ill-treatment is an acknowledgement that there is a "real risk" of ill-treatment in the state concerned. Indeed, the government openly acknowledged that without them, deportation to these countries would be contrary to

its international obligations, due to consistent patterns of human rights abuses in the states concerned (JCHR, 2006d, p. 98). The regime of MoUs is essentially an attempt to avoid direct responsibility for *non-refoulement* – leaving the protection of the deportee’s rights entirely at the discretion of the receiving state. Beyond this, however, MoUs are also an attempt at persuading the judiciary that it is safe to deport, despite the appellant’s fears about ill-treatment. They are a creative way of both recognising the constraint imposed by *Chahal* and yet also circumnavigating relevant concerns over the balance of risk involved in deportation.

The sufficiency of diplomatic assurances has been considered by the courts on a case by case basis. For instance, the ECtHR (2012) agreed that such an assurance from Jordan allayed concern over the deportation of the radical preacher, Abu Qatada, after ten years of intermittent detention in the UK. As a means of influencing the judicial interpretation of risk, recourse to MoUs represented a compromise between legal procedure and manifest political frustration. Yet we may still question the extent to which these frustrations allowed for a genuine ceding of authority to legal and judicial safeguards, as required by *Chahal* and rule of law principles. In particular, judicial scrutiny of orders for deportation of suspected terrorists to Egypt brought to light Blair’s confidential annotation of inter-departmental correspondence on diplomatic assurances: “why do we need all these things”; “get them back [out]”; “Speak to me”; and a reported willingness to accept very basic assurances as sufficient, ultimately failing to secure them (UKHC 2004).

The government’s engagement with MoUs suggests that although willing to comply with the literal constraint imposed by *Chahal*, the underlying desire to deport unwanted foreign nationals to a risk of torture persisted. The regime of MoUs comprised an executive endeavour to exercise authority over the management of this risk. However, the sufficiency of such endeavours was ultimately subject to judicial considerations of risk; the judiciary remained arbiter of the balancing act between national security and the risk to the deportee.

Given the persistence of this underlying logic of an executive discretion over what constitutes safe expulsion, and purported openness to deportation even to a risk of Article 3 ill-treatment, it is perhaps unsurprising that the regime of MoUs was not the

government's only strategy. Beyond attempting to influence the judicial balancing act on a case by case basis, the government sought to reclaim authority over it, by intervening before the ECtHR. This challenge came directly "from the political centre of government" (Home Office Lawyer, quoted in T. Kelly, 2012, p. 104), to argue that the court should overturn the *Chahal* ruling's prohibition of an executive balancing of Article 3 risk against security.

3. Litigation against *Chahal*

Although Blair had clearly been frustrated over *Chahal*'s constraint on deportation for some time, the July 2005 Bombings in London added further pressure on the government to demonstrably deal with foreign nationals suspected of terrorism by deporting them. At this time, Tony Blair voiced a particularly striking opinion of British exceptionalism with regards to the constraints imposed on government by the ECHR: "in view of changed conditions in Britain", he hoped to secure a reinterpretation of international law (The Guardian, 2005). Alternatives to outright deportation of unwelcome foreign nationals had been frustrated by the saga of municipal judicial review noted above, and MoUs' efficacy proved contingent upon the acceptance of a judiciary prone to extensively delay deportations whilst it deliberated. As newly appointed Home Secretary in charge of revitalising the credibility of both the Home Office and immigration controls, John Reid openly criticised *Chahal* as "imbalanced", a "gross misjudgement" (HC Debate (25 July) 2006, c.743), "disproportionate" and simply "outrageous" (HC Debate (24 May) 2007, c.1433). Whereas his predecessors as Home Secretary had often been reluctant or ambiguous about reform of international human rights law (Bonner, 2012, p. 77), Reid echoed Blair's previous threats to overturn legal obstacles, openly proposing to parliament that protection against deportation to a prospect of torture must be weighed against the public interest (HC Debate (24 May) 2006, c.1434). Advancing his predecessor's arguments to the European Parliament (C. Clarke, 2005), that application of the ECHR required individual human rights to be rebalanced against collective security, Reid lodged an intervention into cases pending before the ECtHR to argue for *Chahal* to be overturned.

After some delay, the UK's submission to the court was heard in 2007 and 2008, as an intervention into the case of *Saadi v. Italy* (ECtHR 2009a). In this case, Mr. Saadi appealed against the Italian government's claim that diplomatic assurances from the Tunisian government ensured compliance with its obligations under Article 3 not to return him to a prospect of ill-treatment. These assurances promised a fair trial and that Tunisian law on treatment of prisoners would be upheld. In its intervention, the UK argued that for suspected terrorists (such as Mr. Saadi), the constraint imposed by *Chahal* was too "rigid" and should be altered; the community interest in national security should be weighed against the risk to the individual in the receiving state. This would give a high degree of discretion to the state to balance the perceived "dangerousness" of an individual against an executive assessment of the risk faced on return, subject to diplomatic assurances. A high burden of proof would therefore be required of the individual that deportation would more likely than not lead to Article 3 ill-treatment.

Although rejecting the sufficiency of diplomatic assurances against ill-treatment of Mr. Saadi, the court held that they may be sufficient in some cases. The court also recognised the challenges faced by states in protecting their national security. However, it sternly rejected the UK's argument, to affirm that Article 3 is an absolute right, even where prospective ill-treatment may be at the hands of another state; that the criterion for assessment is that of "real risk", as opposed to being "more likely than not"; and that no reason whatsoever, including concerns over national security should be weighed against this risk (ECtHR 2009a: 138-40). The court emphasised that national security and individuals' human rights are incommensurable, cannot and should not be balanced against each other. The UK's intervening argument clearly drew the ire of certain judges. Judge Zupančič stated his opinion that the only way one could agree with the UK's argument against protections pursuant to "the categorical imperative protecting the rights of the individual" would be "to maintain that such individuals do not deserve human rights... because they are less human." The judgement held the UK's argument to be "intellectually dishonest" and contrary to the spirit and intentions of the ECHR itself – to "protect the individual from the unbridled 'interest' of the executive branch or sometimes even of the legislative branch of the State." The UK had attempted to do

away with protection of the individual in pursuit of the interests of the executive branch (ECtHR 2009a, 2)

By turning to consider how the Home Office and government lawyers framed their intervening argument, we may move beyond the ire of the court to consider how government understood the impact of *Chahal* on its governance of asylum and deportation.

The UK's argument in Saadi

What is perhaps both unsurprising yet no less remarkable, is the particular care with which the UK's intervention was expressed in terms of a discourse of rights to defend its desired deportation policy. The wording of the British government's submission to the court (published in JCHR, 2006c Annex 2, ss. 3-6) suggests a profound acceptance of the existence and legitimacy of a constraining framework of legal norms within which policy measures must be articulated. Whilst affirming the "absolute nature of the prohibition in Article 3" (s.3) as it impacts states' treatment of individuals, the government stated its position that:

the context of removal involves assessments of risk of ill-treatment, and needs to afford proper weight to the fundamental rights of the citizens of Contracting States who are threatened by terrorism...[s.3] [And whilst] It is necessary to start by identifying the Convention rights and obligations that are in play in this situation. [s.4] The first set of rights comprises those of the citizens of the Contracting State. [s.5]

Here, it was the "core values the Convention [ECHR] is designed to protect", which were purported to be under threat by foreign nationals suspected to be involved in terrorism; specifically, citizens' "right to life" as "the necessary foundation for the enjoyment of any human rights" (s.5).

This, the government's representation argued, resulted in a:

corresponding obligation on Contracting States, and their democratically elected governments, to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially those threatening the right to life...' [s.6]

In other words, the government argued, by reference to normative principles of human rights law, that it was under a legal obligation to deport such individuals – fulfilment of which was hindered by the legal obligations which the government recognised as imposed upon it by jurisprudence of the ECtHR in *Chahal*. The government’s use of such legal norms and discourse to frame an attempt to circumnavigate the law may seem perverse. The Court called it “intellectually dishonest” (ECtHR 2009a). Nevertheless, it illustrates a belief that it was in the best interest of policy makers to deploy such framing in order to justify policies to the judiciary.

The government paid lip-service to the rulings of the court as requiring obedience, yet sought to have just such a ruling overturned. Indeed, the UK’s submission to the Court made particular use of normative language of obligation. As such, although the government may not have agreed with the court as to the desirability of certain existing constraints on deportation, it nevertheless emphasised the legitimacy of legal and judicial norms as binding upon policy and government more generally. What is more, the manner in which this recognition was articulated demonstrated a willingness of the government to deploy legal norms and discourse as constitutive referents for the articulation and justification of immigration policy measures. This could arguably be taken to indicate the internalisation of the legitimacy of such rights discourse, such as has been hypothesised by theories of judicialization. Yet, the phenomenon may perhaps be better understood as a limited discursive tactic, bound to the particular context of a judicial audience.

That the intervention couched an expression of highly communitarian values in references to the ECHR and a discourse of the state’s duty to protect rights, indicates a peculiar vision of such rights and duties. The meaning of the *Chahal* jurisprudence was re-framed in terms of “rights brought home” – as was the government’s understanding of the incorporation of the ECHR into UK law (Straw, 1996). This was reflected in Blair’s rhetoric of British exceptionalism; in the reservation to ECHR Article 5 to deny foreign nationals their liberty; and ultimately in the *Saadi* intervention’s affirmation of executive discretion to protect the British national community as a higher order value than a foreign national’s right to life and freedom

from torture. The *Saadi* intervention's appeal to the prioritisation of collective national security over individuals' human rights constituted an implicit claim for enhanced executive discretion, which I believe to be its most significant feature. The intervention appealed directly to the court to empower an executive balancing of rights against political exigencies, such as security. It appealed for the reinstatement of executive authority over the governance of deportation and asylum control; to do away with the need to convince the courts of their case in favour of expulsion. Success in this case would have significantly empowered the Home Secretary as arbiter over life and death for those considered undeserving of protection.

Further reflections on Saadi

The *Saadi* intervention was manifestly a backlash against judicial constraint of the governing logic of asylum control – that of executive discretion over balancing legal constraints against its execution of immigration and asylum controls. Yet, the discursive framing of the intervention clearly indicates the government's awareness of the extent to which a profound judicial constraint had been imposed on immigration controls. This was not simply a function of the *Chahal* ruling itself, but also of the municipal and Strasbourg courts' application of this jurisprudence and the ECHR principles which underpinned its reasoning. The saga of policy innovation and judicial constraint leading to the *Saadi* intervention undoubtedly comprised a journey of reflection by government on the nature and extent of this constraint.

Unsurprisingly, the Court's ruling was not well received by the UK government. In a subsequent documentary on human rights, John Reid told the BBC that he regretted the UK's adoption of the ECHR entirely, as no individual should have "absolute rights." (BBC, 2012) These sentiments were openly grounded in a fear over a potential public backlash against government failures to deport suspected terrorists. The startling implication of Reid's reflections is that he would rather there be no incorporation of human rights in UK law at all, than allow a public failure to persist in the governance of the UK's immigration controls.

The challenge against the constraint imposed by *Chahal* was clearly highly politically charged. Its failure left the government dependent upon the courts' acceptance of MoUs as sufficient to ensure deportations complied with the ECHR.

However, the simmering resentment of the constraint imposed by the courts did not dissipate. I now wish to turn briefly to the government's subsequent, broader attitudes towards judicial scrutiny which developed following the *Saadi* ruling, before moving on to consider the *Chahal* saga in terms of my analytical typologies of judicial impact.

4. Backlash against the courts

Whilst the ECtHR in *Saadi* emphatically affirmed that Article 3 was absolute, subsequent UK governments have since pursued a restrictive interpretation of Article 8, on the right to private and family life as a potential barrier to deportation and removal. This has led to a battle over authoritative interpretation of the HRA and ECHR between government and the courts, on what weight should be given to concerns over the public interest in qualifying the right as a barrier to removal. Very clearly, this replicates the same concern over executive discretion over a balancing act in executing deportation, as was evidenced in the *Saadi* intervention. However, in Article 8(2), the government has sought to claim authority over the interpretation of a right which is not absolute, but open to governmental reservations in the interests of security, public safety and economic well-being of the country, among other criteria.

As Home Secretary for the coalition government, Theresa May has argued that executive interpretation of national interests, and "parliament's public policy intent" should not be "negated" by the "view" of a judge (Secondary Legislation Scrutiny Committee, 2012; HC Debate (19 June) 2012, c760). The unwillingness of the courts to bend to the Home Secretary's interpretation of Article 8 has led to a battle against judges, whom May has held to be undemocratic and "subverting the law" by failing to implement the will of executive and parliament for deportation in all but "extraordinary" cases (The Guardian, 2013; The Immigration Act 2014). We may reasonably take such extraordinary cases to mean those involving a risk of death or torture. In this respect, *Chahal* appears to be an internalised constraint on deportation. However, there has been no deeper impact on the Home Secretary's articulation of deportation policy in accordance with spirit of the rulings in *Chahal* and *Saadi* that public policy and executive interests should not be balanced against the rights of the individual. Indeed, May has promised to innovate further

policy measures if the courts should “test” existing rules (The Guardian, 2012b). The communitarian exception she has sought to apply in this instance, indicates that having a British family, or established family life in the UK does not make one a member of the national community, nor the community of rights which its members enjoy.

These more recent developments with regards to the balance between human rights and deportation and removal, have unfolded in a context of growing political animosity towards the ECtHR. This was driven forward in part by cross-party opposition to implementation of its rulings on the right of prisoners to vote in elections (HC Debate (11 Feb) 2011, c.497). However, the ECtHR attracted particular “disappointment”, if not resentment, for preventing the deportation of the radical preacher Abu Qatada to Jordan, as well as requiring that the government financially compensate him for the deprivation of liberty he endured (Home Secretary Jacqui Smith in The Guardian, 2009; ECtHR 2009b; 2012). Whilst tabloid newspapers railed against the European Court’s judges as “unelected dictators” (The Sun, 2011), heated yet indirect exchanges took place between government ministers and the British senior judiciary through public lectures and comments to the media on the relationship between the executive, parliament, and the British courts in matters of compliance with the ECtHR (Lord Neuberger, 2011; e.g. Justice Minister, Ken Clarke on the Today Programme, 2011).

Whilst consulting on a revision of the incorporation of human rights in UK law (Coalition Programme for Government, 2010, p. 11), Prime Minister David Cameron diverged from the tactics of his predecessor, Tony Blair, in proposing not radical reform of the interpretation of the ECHR, but revisions to its relationship with Member States’ judiciaries. At the Council of Europe’s Izmir conference on the future of the ECtHR, Justice Minister Ken Clarke promised to use the UK’s impending chairmanship of the Council of Europe to reform the Court. After a preamble affirming the British people’s “unshakeable belief in individual liberty, freedom, fairness and a sense of what is right”, Clarke suggested the only way the court could be effective and secure legitimacy with the public is if guarantees “due respect for the decisions of national courts and of democratic national parliaments.”

(K. Clarke, 2011) Clarke's statement to the Izmir Conference suggests that whilst the UK recognises the principles embodied by the ECHR, it has serious problems accepting the scrutiny of the court. The UK is not alone in Europe in having such concerns; indeed, the conference declaration explicitly emphasised that the ECtHR is not intended as a court of appeal for immigration (Committee of Ministers of the Council of Europe, 2011, s.A.3).

Upon the UK's commencement of the rotating chairmanship of the Council of Europe, Cameron addressed the ECtHR directly, accusing it of having become "a small claims court" (Cameron, 2012a). He argued that the Court should focus its limited resources on states and cases involving the "most serious violations of human rights." Otherwise, "the national decision" should stand, provided it "has been subjected to proper, reasoned democratic debate" and scrutiny by the national courts (Cameron, 2012a). In an early draft of the Brighton Declaration on the future of the ECtHR, the government initially proposed to restrict admissibility criteria, to limit access to the Court (published in *The Guardian*, 2012a). Once again, such framing of the Court as unduly interfering with the UK's sovereign prerogatives is reminiscent of a British exceptionalism; that the ECHR was Churchill's gift to post-war Europe, and that where it has deviated from this vision, such rights should be brought home. The emphasis placed upon national processes as 'reasonable' indicates Cameron's view that the ECtHR serves, by contrast, as an unreasonable and unnecessary imposition on British democracy.

By way of a final comment on this protracted period of growing political recrimination towards the courts, particularly the ECtHR, it could be said that such governmental rhetoric may serve to deflect attention from its policy failures where faced with an adverse judicial decision. Deportation is now but one area of public policy for which the government faces unwelcome judicial scrutiny – albeit a particularly enduring and prominent one. Governmental framing of judicial scrutiny as anti-democratic, unnecessary, and at times unreasonable, has served to shift political attention away from policy failures onto symbolic questions of constitutional authority – namely, who should have the final say, government or the courts. In this respect, recent debates over the judgement and responsibilities of the

British and European judiciary indicate that little has changed since the government's initial argument in *Chahal*: a will to political discretion over human rights' role in constraining public policy, manifest in the government's desire to reclaim political discretion from the courts.

Classification and discussion of judicial impact

Beyond narrating the saga of iterative policy innovations following judicial review, I have endeavoured to uncover more nuanced insights into how the government understood the impact of these judicial decisions, and how it justified its policy responses. Having considered key insights from critical framing analysis of primary discursive sources, I now wish to further develop my analysis of judicial impact in this case according to the analytical typologies of response and impact. In doing so, I also consider the possible significance of politicisation and the source of the ruling in shaping judicial impact. I begin by specifying the manner in which the government responded according to my typology of how compliance may be reconciled with policy objectives; further reflecting on the significance of changes in the government's understanding of the *Chahal* jurisprudence as a constraint on deportation. I then turn to consider the level of ideas governing asylum control at which judicial impact can be established in this case. Finally, I suggest that these classifications of judicial impact can help account for a marked divergence between intransigent political rhetoric and a significant judicialization of deportation in practice.

Judicial impact in terms of the governments' response

Each episode in this 'saga' demonstrated a profound framing of deportation in terms of substantive ECHR rights. This framing arose in a variety of contradictory manners; the ECHR as an expression of British rights, to be exercised according to their interpretation by the authorities of the British state; the ECHR as an illegitimate impediment to effective governance of security and immigration; and these very rights as the vehicle according to which the government sought to justify the imperative need for political discretion to protect the national community against dangerous foreign nationals, denying them protection of their rights in the process. Such discursive framing of human rights as constraints on government often implied

that they did not extend beyond a British community of rights, from which the government sought to expel the deportee. Indeed this framing is consistent with the highly suggestive title of the policy paper which brought forward the incorporation of the ECHR into UK law; “bringing rights home” (Straw, 1996). The implication was very much that the Home Secretary’s certification of a deportation order comprised not merely an intention to expel the foreign national in question from the borders of the community, but from the associated community of rights.

The government initially responded to *Chahal* by seeking to justify thoroughly compliant policy change. SIAC was legislated for in parallel to incorporation of the HRA. As analogues in the domestication of prospective future judicial scrutiny, these significant legislative reforms may have been understood as posing little risk. In its peculiar formulation as a quasi-judicial body, SIAC ensured that a security and intelligence presence was maintained in the arbitration of appeals against removal of security suspects. Were this the extent to which the impact of the ruling was considered, such reforms may appear suggestive of a conversion in government to the legal attitude espoused by the ECtHR. However, the pursuant series of policy tools devised as an alternative to outright deportation, to deal with security suspects though detention and other curtailment of their liberties, such as Control Orders suggests otherwise.

Although the principled prohibition on expulsion to Article 3 ill-treatment was respected, the effect of these policy innovations was to depreciate the significance of *Chahal* as a constraint on the governance of national security where a perceived threat was posed by foreign nationals. Above all of the other pursuant policy innovations, the use of Memoranda of Understanding indicates that immigration and asylum control were regarded by the government as central concerns. Their use and justification demonstrate that the government was determined not to allow judicial application of the constraint imposed by *Chahal* to prevent an expanded programme of deportation as a means of controlling immigration and national security.

The saga of policy innovations through which the impact of *Chahal* was ‘fine-tuned’ over time, is highly suggestive of legal risk taking by the Home Office. A succession of policy tools, all of which shared a common objective of empowering the Home

Secretary to balance foreign nationals' rights against national security, came under judicial scrutiny. Such an attitude to lawfulness may have precedent in the Home Office (Daintith & Page, 1999, p. 337) as part of an organisational culture of 'muddling through' a series of punishing judicial decisions (Pollard, 2005, p. 258; Simon, 1957). However, legal risk taking may also have comprised an effective strategy for containing the impact of the courts on the underlying objectives which motivated a particular measure. In each instance, despite necessary legislative declarations of compatibility with the HRA, fuller consideration of the lawfulness of highly restrictive policies was left to the courts, as and when they turned to retrospectively determine whether individuals' human rights had indeed been violated.

Nevertheless, sustained judicial scrutiny of not only deportation orders, but the policies devised to deal with those who could not be deported, led to rising resentment of the constraints imposed by *Chahal*. Such resentment even extended towards the legal regime of rights and their judicial oversight, which had been enhanced by HRA and grown partly as a consequence of onward appeals from SIAC to the senior courts. In this manner, the government's response to the impact of *Chahal* moved towards 'amplification' of its coercive effect upon the governance of national security and immigration control. This changed understanding of *Chahal's* implications is, of course, best reflected by the *Saadi* intervention, as an attempt to reinstate governmental discretion over the balancing of ECHR Article 3 as a barrier to deportation. However, it is also reflected in subsequent comments in which the government called for the municipal courts and ECtHR to defer to certain governmental policies on deportation and removal. This discourse of a coercive supranational judiciary has carried over into more recent debates on the future of the ECtHR, extending beyond the matter of deportation in its concern over more profound matters of national sovereignty and judicial oversight of executive abuse of power.

Level of Impact

The policy tool of deportation at all costs was constrained at first and then, again, when the government latterly fought to have it rendered lawful. The saga of legal risk

taking, which I have described above, reflects an unwillingness to adjust the underlying goals of each policy: to facilitate the balancing of foreign nationals' rights against executive priorities. Gradually, the underlying programmatic logic of a balancing act, allowing executive discretion to prioritise security concerns over migrant rights, has been greatly constrained by repeated judicial review. One of the most pervasive features of this saga is the extent to which the lawfulness and implementation of deportation and counter-terrorism policies targeted at foreign nationals have been rendered subject to judicial oversight and review.

Ultimately, as the ECtHR rejected the government's bid to reverse *Chahal*, the underlying philosophy of asylum control has been constrained in practice – but only for those cases where Article 3 issues are raised. Other ECHR rights have proven more amenable to successful imposition of reservations on their applicability to foreign nationals. However, such restrictions have been challenged in a highly symbolic and pervasive fashion by judicial review. The rising confidence of municipal courts in judicial review under the *Human Rights Act* has been significant in this regard. Sustained municipal review of policies devised in the wake of *Chahal* has affirmed the authority of the British judiciary as an institution, as well as providing a forum for the passive voice of the ECtHR to be heard, in consistently applying the court's jurisprudence as a constraint on government. The consequence of this rising tide of judicial scrutiny has been that the government often does not maintain final discretion over individual cases of inclusion and exclusion from the state. It may often have the last word, with a tendency towards recriminatory rhetoric, but a significant diminution of its authority over deportation and immigration control is evident in the limits placed on its ability to balance migrant rights against political priorities in practice.

This has posed a significant challenge to the government's ability to demonstrably realise the governing public philosophy of asylum control: to claim authoritative executive control over inclusion and exclusion. This challenge is reflected in the intensity of political rhetoric which has continued, despite significant judicialization of deportation, to affirm governmental will and capacity to not only effect, but expand, use of deportation as a tool for both national security and immigration

control. Such rhetoric has made particular recourse to symbolic constitutional matters relating to the balance of powers between the executive, judiciary and ECtHR. In so far as these issues have, and continue, to grab media headlines and dominate political debate, they may well have detracted attention from the substantive diminution of executive control over deportation as a consequence of sustained judicial oversight.

The role of politicisation and source of ruling in policy impact

Significance of politicisation

Although initially straightforward, long-term compliance with *Chahal* proved to be highly politicised. By turning to consider successive governments' discursive construction of the problem posed by compliance, judicial impact in this case can be better understood as a problem of executive discretion and authority in the face of the courts. The problem faced was not simply one of realising a desire to expel foreign nationals suspected of posing a threat to national security. Indeed, as the Law Lords pointed out, there were British born security suspects who could not conceivably be deported (UKHL 2004b). A definitive aspect of the government's problematisation of continued compliance with *Chahal* was its concern over gradually ceding authority over deportation to judicial arbitration. As it appeared that the Home Office was losing final say over when ECHR rights should be legitimately considered a barrier to deportation, political rhetoric increasingly sought to at least have the final word.

Politicisation of compliance appears to have been a function of the level at which *Chahal* impacted the ideas governing asylum control. Compliance with *Chahal* challenged the government's control over not only the implementation of deportation orders, but its discretionary authority to control inclusion and exclusion. Moreover, this challenge involved a public failure to exercise control over immigration in a context of concerns over national security (the desire to deport foreign terrorists). Engaging with the judicial impact of *Chahal* on these fundamental ideas governing asylum control – the logic and philosophy of its function – allows deeper appreciation of the process leading towards politicisation of compliance. Political rhetoric questioning the legitimacy of the ECtHR and ECHR as constraints on domestic policy concerns has affirmed the executive will to effective control. The

significant gap between this rhetoric and less ambitious substantive interventions as to the future function of the court is ultimately indicative of the extent to which the government has, in practice, reluctantly accepted the oversight of the ECtHR. As in my consideration of the case of the Afghan Hijackers, however, this constraint is not reflected in political rhetoric, which has sought to legitimate governance of security, immigration and asylum.

Significance of the source of the ruling

That the ECtHR ended up scrutinising the *Chahal* case had much to do with the reluctance of the British municipal courts to engage in review of matters relating to national security. However, in assessing whether governmental interpretations of *Chahal* were influenced by its being handed down by the ECtHR, as opposed to the municipal courts, the prevalence of a discourse of national exceptionalism cannot be ignored. This ranged from the notion of rights brought home through Blair's appeal to exceptional circumstances, including a reservation to ECHR Article 5; discriminatory efforts to detain, control and restrict fair trial rights of foreign nationals, which were not applicable to British subjects (UKHL 2004b); and ultimately, an appeal to the integrity of a national community of rights as endangered by the effect of *Chahal* in impeding the government in its duty to protect all from foreign nationals who it believed a threat to national security. These appeals to the supremacy of the national community, alongside more recent emphasis on reform of the balance of power between the executive, British courts and ECtHR, may suggest a belief on the part of government that the municipal judiciary are more sympathetic, or at least easier to deal with. In turn, this suggests that the ECtHR was a problem. However, it was the municipal courts' sustained scrutiny of alternatives to deportation which drove the government to seek the overturning of *Chahal*. It is undoubtedly significant that the ECtHR upheld its previous jurisprudence. However, the municipal courts and Asylum Tribunal had also been upholding *Chahal* as a constraint on deportation and removal orders for over a decade. Moreover, in the case of further governmental restrictions to foreign nationals' ECHR rights beyond Article 3, such as their right to liberty and family life, it has been the UK courts which have been the primary interlocutor with government on the legitimate

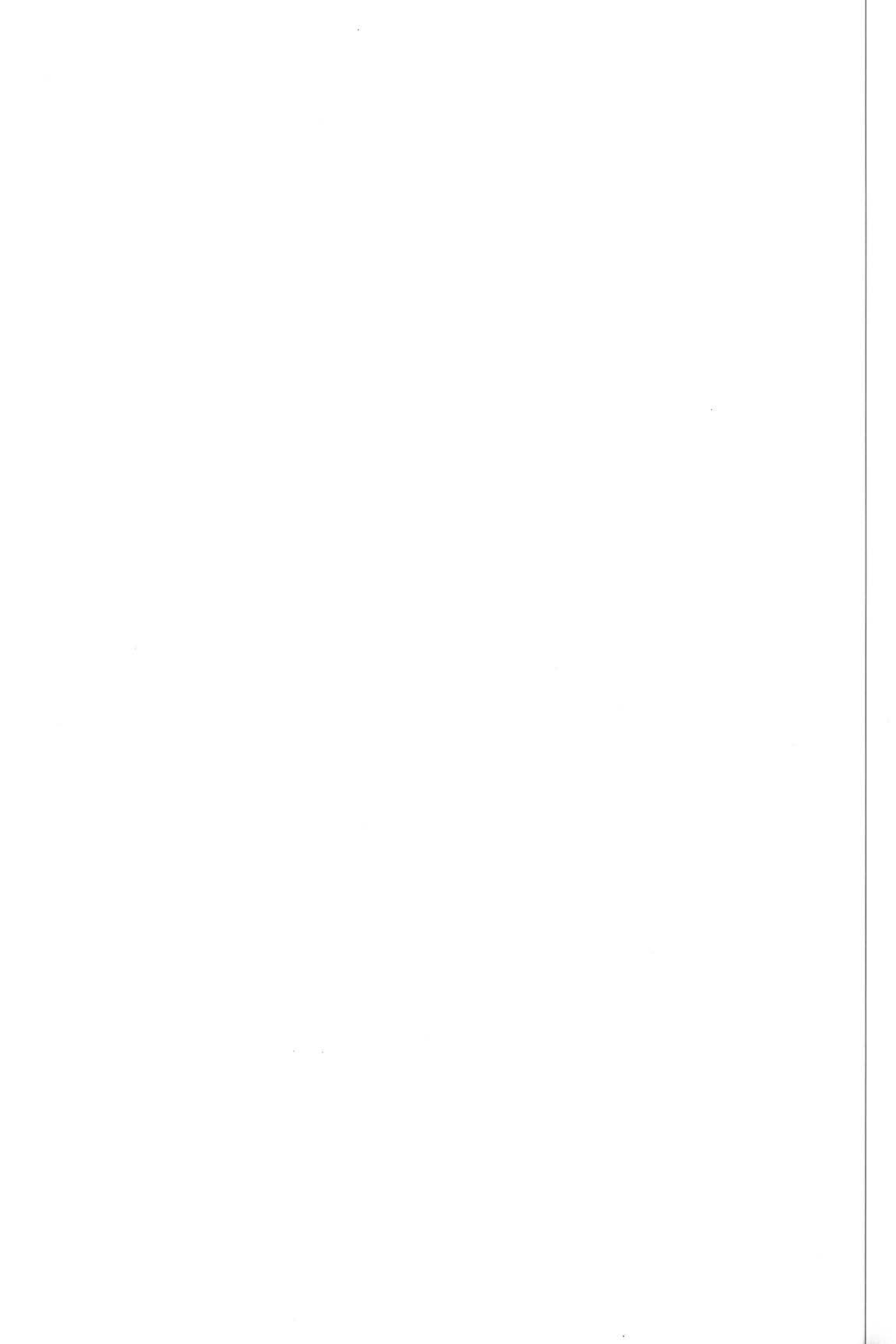
boundaries of executive discretion to balance foreign nationals' human rights against their expulsion.

Ultimately, successive governments have, since the *Saadi* intervention, been willing to pass the buck for failed deportation – blaming the ECtHR. As already noted, deliberate targeting of the Court's legitimacy, particularly in political rhetoric, may have more to do with the government's desire to deflect attention from the true extent to which deportation and removal have been constrained. This constraint is not only an effect of the *Chahal* ruling, but of extensive, pervasive, and iterative scrutiny of immigration and asylum control by the municipal judiciary. It could be said, however, that attacks on the European Court of Human Rights have sought to cut off the prospect of similar such problem rulings as *Chahal* at the root, rather than fighting each of the many consequences which branch off into municipal review over time.

Conclusion

At first glance, the impact of *Chahal* on immigration and asylum control appears profound. Its implementation has led to extensive judicial oversight of executive measures not only in deportation and immigration control, but in their related use as tools of national security policy. One may reasonably talk of a judicialization of deportation and asylum control. However, such an impactful bearing upon government has not been straight forward. The relationship between executive discretion to balance the human rights of foreign nationals against objectives such as asylum control and national security is still fluid, and subject to ongoing deliberation in court on a case by case basis. Nonetheless, it is highly significant that these boundaries of political discretion are being challenged in court. That is a truly significant move away from the free standing authority over deportation once enjoyed by the Home Office before *Chahal*. In the *Saadi* intervention, the government all but confessed to being incapacitated with regards to its policy objective of deporting unwanted foreign nationals.

This challenge to governmental authority over deportation has not been without significant consequences for foreign nationals subject to deportation and removal orders. The court in *Saadi* may have implied that the UK failed to consider foreign nationals suspected of terrorism to be human. However, they and many other foreign nationals subject to deportation and removal orders, share the prior feature of simply being unwelcome aliens whom the British government cannot expel. Although they cannot be deported to a risk of torture, cruel and degrading treatment, their nationality has, in effect, become a basis for depriving the benefits and protections of human rights, such as liberty, family life and a fair trial – rights intended to be enjoyed simply by virtue of one's humanity.



7. Vilvarajah & Medical Justice

Introduction

This chapter considers the impact of judicial decisions from two episodes in the history of British immigration and asylum control; from the early 1990s, and twenty years later, circa 2011. In this period, the UK transitioned from there being no right of appeal prior to asylum removals, to heated engagement in the courts over the government's failure to protect a constitutional right of access to justice for foreign nationals, which had since developed in English common law. This chapter looks further back in time, beyond the events described in the previous chapter, to consider how the government responded to *Vilvarajah v. UK* (EComHR 1990; ECtHR 1991). It also turns to consider the recent *Medical Justice* case (UKHC 2010a; UKCA 2011a). These cases share a common concern for long standing debates over a fundamental right of access to justice for migrants which renders them amenable to consideration within one chapter. In essence, this concern for judicial safeguards against unlawful removal is definitive of all my case studies. Even where it is not the direct matter of law addressed by the courts, it is of course the concern which drives litigation. In this respect, *Vilvarajah* and the *Medical Justice* case provide historically meaningful bookends to my analysis of judicial impact on asylum and removal policy.

However, these judicial decisions have been chosen not for their similarity to one another, but rather as a counterpoint to the *Chahal* and Hijackers case studies. The governmental responses to *Medical Justice* and *Vilvarajah* were largely absent of the politicisation of compliance which was so characteristic of my prior case studies. Also, as the *Vilvarajah* case concerns governmental responses to a ruling from the ECtHR, whereas the *Medical Justice* case was handed down by the British senior courts, these cases may facilitate interesting comparison, not only according to the presence or absence of politicisation, but also according to the source of ruling (whether domestic or ECtHR). As in preceding case studies, critical framing analysis of governmental documents and political rhetoric has been conducted, so as to elicit data on implicit problem definitions which indicate how government understood and

responded to the judicial decision as well as its broader impact on existing policy priorities.

Vilvarajah v U.K.

In this section, I consider the impact of *Vilvarajah v. UK* on asylum control, including the creation of an in-country right of appeal for asylum seekers. This significant change took place against a backdrop of two significant, but potentially conflicting pressures for asylum reform: on the one hand, rising judicial scrutiny of asylum determination, including governmental anticipation of an adverse ruling from the ECtHR on failure to provide asylum seekers with adequate rights of appeal; on the other hand, the beginning of a highly charged political concern over numbers of asylum seekers, as part of broader immigration control.

Facts of Case

In 1989, the independent immigration adjudicator overturned a Home Office decision to remove five Sri-Lankan asylum seekers. The men had already been returned to Sri-Lanka. As a result, the government was charged with the embarrassment and expense of bringing the men back to the UK “with the minimum delay” (Carvel, 1989). In response to parliamentary questions following the ruling, Lord Renton asserted that the government had no plans to review asylum policy and stated his intention to appeal against the adjudicator’s ruling (HC Answer (6th June)1989,c.43). Subsequently, the municipal judiciary ruled that it had no jurisdiction over the facts of asylum determination, and that review was not required as to the ‘reasonableness’ of the Home Secretary’s decision to remove the men. In 1990, the European Commission of Human Rights ruled against the UK on the matter, forwarding the case for consideration by the ECtHR. This was on the basis that the UK was in breach of ECHR Article 13, as judicial review did not provide an “effective remedy” against perceived violations of ECHR rights – particularly ECHR Article 3 prohibiting expulsion to a prospect of proscribed ill-treatment (EComHR 1990).

Due to a failure to incorporate the ECHR into domestic law, the UK was at a serious disadvantage to prove that ECHR rights could be considered by any means other than judicial review (Jackson, 1997, pp. 98–9). Given that there was no in-country mechanism to consider the facts of an asylum case before removal, a central concern in *Vilvarajah* was consideration of British judicial review's limitation to determining whether a ‘reasonable’ Home Secretary would have considered the necessary facts of

the case. This is related to questions surrounding British judicial review under administrative law being much more limited than constitutional judicial review in many continental European jurisdictions, where courts may be empowered to consider facts, amend and annul policies and administrative actions. At stake for the British government in *Vilvarajah*, was therefore the potential political fall-out of a supranational challenge to the institutional legitimacy of British judicial review for enforcement of the ECHR. The British government took action before the ECtHR could consider the case. Preparation of the *Asylum Bill 1991* has been regarded as a “damage limitation exercise” by the Home Office, in anticipation of “substantial likelihood” of defeat (Randall, 1994, p. 221). Ironically, the ECtHR subsequently found no breach of the Convention (ECtHR 1991).

In considering the impact of the Commission and ECtHR on reforms to UK asylum control in this case, I draw primarily upon governmental sources pertaining to the *Asylum Bill 1991* and its later legislative enactment as the *Asylum and Immigration Appeals Act 1993*. However, before turning to consider primary sources, I firstly wish to make reference to the particular context in which this legislative change took place; in particular, the significance of rising judicial pressure on asylum control, and parallel political pressure to reduce numbers of applicants.

Governmental priorities regarding asylum control and judicial scrutiny

In my introduction to the thesis, I said much about the context of growing restrictions on asylum as it was conflated with immigration control. In addition to this, I also noted the parallel rise of judicial scrutiny of asylum control as part of a general emboldening of the courts under administrative law. I will not therefore replicate that discussion at great length here. However, it must be noted that the impact of *Vilvarajah* on asylum control unfolded at a crucial point in this early development of tensions between political restrictions on asylum and its legal liberalisation in response to rising judicial pressure.

Control over asylum as part of immigration flows

Asylum control had not been politically important prior to the late 1980s. Restrictions on asylum as part of broader immigration controls had gone relatively

unopposed (Steiner 2000, 103). For example, in 1985, Sri-Lanka (to which the government sought to return Mr. Chahal) was among the first countries on which visa requirements were imposed as a means of reducing asylum applications. However, a seemingly exponential growth in numbers of applications for refuge throughout this period led to the politics of asylum control being driven by a desire to demonstrate control, leading to conflation of asylum with broader immigration. In this regard, the government claimed no duty of care for “economic refugees” arriving “simply to better themselves”(Conservative Party, 1989, 1991).

This discursive shift has been considered as both a means to legitimate more restrictive asylum controls and as a product of Home Office influence upon the media to legitimate its role in immigration control, including proposed policy reforms (Kaye, 1994, p. 150). Throughout the late 1980s and early 1990s, tabloid newspapers reported on a series of expulsions of “lying” refugees and crackdowns on “would-be immigrants” (Kaye, 1994, p. 150). Subsequent passage of *The Asylum and Immigration Appeals Act 1993* through parliament in July 1993, was shrouded in a moral panic by tabloid reports on “bogus refugees” (Dunstan, 1995, p. 609).

Although the government regarded the high rate of refusals of asylum as a sign of its ‘abuse’, this also led to pressure for the judiciary to find jurisdiction over asylum. The inability of existing institutional arrangements for administration of asylum to deal with rising applications led to an increased use of detention (Dunstan, 1995, p. 609) and a decline in the procedural efficiency, consistency and perceived fairness of initial decisions on whether to grant asylum or order the applicant’s deportation (Thomas, 2003). In the absence of a dedicated appeals mechanism to scrutinise the accuracy and fairness of initial administrative decisions on the award of asylum, the result was an exponential rise in applicants seeking judicial review to rectify perceived procedural injustices in these asylum determinations and precipitant removal orders. Although the ECtHR’s consideration of *Vilvarajah* reflected a refusal of the municipal judiciary to engage with the factual basis of refugee claims, the rise of judicial review of the administration of asylum in this period may be regarded as a significant pressure on government.

Growth in judicial review and a politics of rights

Litigation in *Vilvarajah* took place during an early period of increasing involvement of the British judiciary and ECtHR in oversight of procedural justice (i.e. fairness), and to a lesser extent, protection of human rights in asylum determinations. Alongside the increasingly apparent problems in the administration of asylum, this rise in judicial power and confidence led the judiciary to shake off its prior “self-abnegation” and assert jurisdiction over asylum (Thomas, 2003, p. 482). From the late 1980s to the mid-1990s, the British judiciary transitioned from a markedly hands-off attitude towards asylum policy into an extensive and prolific supervisory role (UKHC 1985, 1988; UKCA 1989; UKHL 1987, 1994). The emboldened attitude of the courts is perhaps most clearly indicated by the handling of a failure to stay removal pending judicial review in *M v. Home Office* (UKHL 1994): the judicial House of Lords affirmed the courts’ jurisdiction to grant mandatory interim injunctions in judicial review, and that a minister exercising Crown powers may be held in contempt of court for breaching an injunction.

This rise in ‘juridification’ of asylum and public law more generally took place alongside broader political developments in support of empowering the municipal courts to review the compatibility of government acts with the ECHR. Between 1989 and October 1991, Liberty re-branded itself as one of a growing number of human rights organisations. It began to have significant impact on the opposition political agenda (IPPR, 1990), entering into “discussions behind the scenes” with the Labour party about incorporation of the ECHR into British law (Rask-Madsen, 2004, p. 83). Constitutional reform was increasingly regarded as a platform for opposition to Thatcherism (Erdos, 2009, p. 805; Rask-Madsen, 2004, p. 82). Labour thereby broke with previous cross-party consensus that a bill of rights would risk “government by judges” beyond parliamentary control (Rask-Madsen, 2004, p. 82 at 73). The development of a politics of rights directly coincided with the commencement of parliamentary debates on the *Asylum Bill*, in November 1991. Such an opposition politics of human rights may suggest potential for robust compliance with the *Vilvarajah* ruling. However, there is little to indicate governmental concern for human rights guarantees. At the time of the *Vilvarajah* case, the UK was the most

frequent litigant before the ECtHR, and had accrued more rulings against it than any other Member State (Jackson, 1997, p. 17; Rask-Madsen, 2004, pp. 80–81).

Tensions between restrictions and rising judicial power

Existing academic studies of the politics of asylum control in this period tend to voice dismay at the government's opposition to a more liberal, humanitarian duty towards refugees (Bloch, 2000; R. Cohen, 1994; Dunstan, 1995; Kaye, 1994; Randall, 1994). In his comparative study of judicial restriction of illiberal immigration controls, Joppke (1998c, 1999) dismissed such a role for the British judiciary. Yet jurists have noted the significance of rising judicial scrutiny during this period in provoking governmental reflection on both administration of asylum and associated policies (Jackson, 1997; Thomas, 2003). Indeed, the rise in judicial power to impose unwelcome duties to asylum seekers may have encouraged illiberal restrictions on entry (Gibney & Hansen, 2003). By attending to the government's discursive construction of the problem posed by judicial impact on asylum control, it is possible to actually engage with this hypothesis. Moreover, it is possible to determine the manner and extent to which the ruling in the *Vilvarajah* case (as an important example of the juridification of asylum) impacted upon asylum control and its political framing.

Analysis of primary sources

Nature of Sources

Due to my focus on legislative change in response to the *Vilvarajah* case, primary sources for this case included a significant amount of political rhetoric in parliamentary debates. During the early 1990s, government did not pursue the more extensive degree of documented consultation and assessment of policy proposals which provided material for my more recent case studies. For example, consultation on the introduction of asylum appeals consisted of circulating the already drafted policy, with a purported willingness to receive comments (Lord Chancellor's Department, 1992). Further documentary sources comprised of political manifestos and treatment of the case in subsequent parliamentary research papers.

Policy change in response to judicial pressure

Prior to the *Vilvarajah* case coming under scrutiny in Strasbourg, the Home Office had sternly sustained its refusal to subject asylum to a constraining legal framework. This initial intransigence was predicated on the explicit fear that in-country asylum appeal mechanisms would “risk... encouraging abusive asylum applications” (HC Answers (1 Nov) 1989, c.184w) and lead to “unmeritorious appeals in order to delay removal.” (IND, 1984). The government’s initially intransigent opposition to asylum reforms suggests that escalating judicial involvement in the *Vilvarajah* case may be a factor leading to subsequent reforms. One of the most surprising aspects of the government’s response to the *Vilvarajah* case is the development of legislation intended to pre-empt an adverse ECtHR ruling: the *Asylum Bill 1991*, which eventually led to the creation of an in-country right of appeal in asylum cases under the *Asylum and Immigration Appeals Act 1993*. These reforms were intended to meet obligations under ECHR Article 13 – to provide an “effective remedy” prior to removal – in anticipation of an adverse ruling by the ECtHR (Thorp & Young, 2003).

Parliamentary debates indicate that at the time of the European Commission of Human Rights’ ruling on *Vilvarajah*, there was a growing political awareness of the pressure exerted by the municipal judiciary’s “anxious scrutiny” (UKHL 1987, 952) of the administration of asylum. Home Secretary Kenneth Baker met with calls for his resignation and for the abandonment of the 1991 *Asylum Bill*, over his removal of an asylum seeker to Zaire in defiance of an injunction from the Court of Appeal (UKHL 1994; HC Deb (02 December) 1991, c.33). Baker’s assertions of rectitude in disregarding judicial authority and legal principles are suggestive of a vision of law proffered by in-house legal advice, within the Home Office, rather than that suggested by the courts. Some significance may, however, be attached to the escalation of judicial scrutiny to the ECtHR, as opposed to municipal review. Pre-emptive compliance mitigated the fallout of an adverse ruling of the ECtHR, which could have fuelled political debate on domestic incorporation of the ECHR and extensive publicity given to ECHR cases by the British media at that time (Lester, 2004, p. 10). Such regard is also indicated by contemporaneous questions in

parliament, seeking statistics on supra-national, judicial dictation of policy (e.g. HC (18 Mar) 1993, c.353; HC (17 Dec) 1993, c.960).

Whilst the Home Office under Baker may have been unhappy about judicial scrutiny of asylum control, greater significance may be attached to the manner with which Home Secretary Ken Clarke justified legislative reforms as a tool which “cuts through” perceived judicial pressure on the administration of asylum:

We cannot continue with the complexity of the procedures that we operate. The courts have intervened on the ground of lack of appeal rights in many cases. Their decisions have added yet more increasingly ornate procedural requirements to our decision making. This Bill cuts through all that. The new appeal rights will be the key to procedural simplicity and decision-making finality. Strict time limits, together with a streamlined channel for clearly groundless cases, will prevent abuse. (HC Deb (2 Nov) 1992, c. 31-32)

Although offering appeal rights, early formulations of the Bill sought to withdraw all access to legal aid for asylum appeals (e.g. HC Deb (13 November) 1991, c.1131). This may appear to be a punitive response to rising litigation on asylum. However, parliamentary debates on the Bill indicate that whilst judicial pressure was a factor, policy change was primarily intended to deter asylum applicants from targeting the UK. Whilst at times driven by concern as to whether such restrictions were racist, debates were largely characterised by two issues; conflation of asylum and broader immigration control; and development of a distinction between real refugees and bogus asylum seekers. It is to these debates that I now turn, in order to understand how the extension of appeal rights for asylum seekers was located within a broader political context of restrictions upon asylum as a variety of immigration, rather than humanitarian protection.

Reform subsumed by restrictions

Whereas the problematisation of asylum as a matter of legal obligation was limited within government, its presentation as a point of weakness in the broader regime of border control was extensive. The Foreign Secretary called for fast action to close “weak” European borders, or else Britain would be “swamped” (Hurd, 1991). The Home Secretary suggested “rapid rejection” and enforcing “early departure” as strategies for “detering further abuse of the [asylum] process.” (HC Deb (2 July) 1991, c.167). From the vantage of hindsight, these very strategies led to increases in

judicial scrutiny. However, as noted above, the *Asylum Bill* arose at a peak in significant increases in asylum applicants. Parliamentary rhetoric justified the Bill as a means of dealing with increased pressure on administration of asylum by deterring further applicants from coming to the UK. This was facilitated by parliamentary support for measures empowering the Home Secretary to more rapidly remove those present in the UK. A rhetoric of disbelief in the humanitarian motives of asylum seekers met with cross-party political consensus, oriented around the perceived problem of large numbers of “bogus” applicants. Justification for what ultimately became the 1993 *Asylum and Immigration Appeals Act* was claimed in terms of preventing abuse of the immigration system. This tougher approach to asylum control was predicated upon a new, dualistic reconfiguration of the figure of the asylum seeker with dubious motives, as opposed to the refuge seeking humanitarian protection. Opposition concerns were limited to the risk that new legislation may adversely affect “genuine” asylum seekers (HC Deb (2 Nov) 1992, c.36), but did not regard it as having a deleterious effect on access to asylum or an effective remedy in cases of removal.

Although the 1993 Act introduced an in-country right of appeal for asylum seekers, it also instituted a procedure to “fast-track” removal of applicants whose case the Home Secretary considered to be “manifestly unfounded.” This mitigated delays imposed on many removals by the “ornate procedural requirements” of judicial review, which the Home Secretary had decried in parliament. Included within this system, were those deemed to have transited through a “safe third country” *en route* to the UK. These applicants were to be returned to such transit countries without consideration of their claim, on the assumption that asylum should be sought there. In this regard, the UK applied a broader scope than was proposed by the European Community's Dublin Convention, which had not yet been applied, and which limited such expedited removals to countries within the EC (Home Office, 1992). In the UK, such asylum seekers were given only two days prior to removal in which to lodge an appeal to an adjudicator. In such cases, the adjudicator was restricted to consideration of the return to the safe third country, and excluded from considering the merits of the underlying asylum claim (schedule 2). Whereas the Home Secretary was allowed a further right of appeal against the Special Adjudicator's decision in

such cases, applicants were required to appeal from outside the UK— in other words, after they had been removed to a another country, with no assurance that their asylum claim would be considered there. The discursive distinction between genuine and abusive asylum seekers thus became a statutory distinction between those with full rights of appeal, and those whose removal could be expedited.

As a consequence, refusals almost doubled between 1993 and 1994, from 46% to 79% (see figure one in appendix one). Detentions also doubled (Joppke, 1999, p. 133). However, asylum applications continued to rise in 1994 and 1995 as did the proportional contribution of immigration and asylum to the case load of the High Court (figures one and three in appendix one). The 1993 Act's specification of asylum according to the *Refugee Convention* also led to a profound reduction in the award of alternative forms of humanitarian protection from risks other than persecution, such as wars and disaster. Such "exceptional leave" had, until then, been by far the predominant form of asylum in the UK (ECtHR 1991, 97). In practice, the scope of asylum was thus paradoxically delimited and reduced as a consequence of the incorporation of a statutory right of appeal grounded in the Geneva Convention's definition of the refugee.

Ironically, these attempts to steer asylum seekers clear of the superior courts on a rapid road out of the country were to backfire, as the courts found them "so unfair as to be unlawful" (UKCA 1994). The measures were nevertheless consolidated by *The Asylum and Immigration Act 1996*, which also instituted a presumption against asylum seekers arriving from a "white list" of countries, considered by the Home Office to pose "no serious risk of persecution." (s.1(2)) Both the regime of expedited and circumscribed appeals, and its subsequent extension in 1996, indicate that judicial concerns relating to the appeal rights of asylum seekers had little impact on governmental attitudes guiding the policy and administration of asylum control. With the ECtHR ultimately finding in favour of the UK in *Vilvarajah*, profoundly restrictive legislation in 1996 may have constituted a resolute step back from the development of a limited system of appeals for asylum seekers, which had initially sprouted under the shadow of judicial scrutiny at home and in Strasbourg. Indeed, political rhetoric increasingly came to supplant the figure of the refugee with that of

the bogus asylum seeker, or simply, “illegal immigrants” (HC Deb (20 Nov) 1995, c.338). Contrary to concerns voiced by the judiciary over the fairness and efficiency of initial asylum determinations, the high rate of initial refusals of asylum continued to be heralded by government ministers as a clear indication that most asylum seekers were indeed economic migrants (HC Deb (11 Jan) 1996, c.331).

Preliminary conclusions on *Vilvarajah*

I will reserve full analysis of the government’s response in this case until after I have presented my primary data on the *Medical Justice* case, below. However, the central observation which I wish to emphasise is that although asylum control was liberalised by creation of an in-country right of appeal, executive discretion over asylum seekers’ access to this appeal mechanism was greatly enhanced, with dramatic consequences for the success rate of applicants. The significance of this legislative restriction is made apparent by recourse to its discursive construction in governmental sources: it responded to judicial pressure which had impeded the government in its desire to expediently remove asylum seekers as a means to deter applicants by demonstrating vigorous control. In this respect, the ostensible impact of *Vilvarajah* on liberalisation of asylum control in the UK is highly questionable. Indeed, access to justice for many asylum seekers was significantly impeded in the wake of the ruling.

Medical Justice

In this section, I leap some twenty years forward in time, to consider the impact of a string of judicial decisions involving foreign nationals' access to judicial safeguards against unlawful detention and removal. My central focus is on the government's response to the *Medical Justice* case (UKHC 2010a; UKCA 2011a), which is taken as particularly indicative of governmental attitudes towards judicial scrutiny of removal decisions. After presenting the facts of the case, I seek to locate it within the context of not only contemporary governmental priorities on asylum control and judicial oversight, but also a significant prior build-up of related jurisprudence. Primary sources on the problematisation of compliance with the *Medical Justice* are then analysed. In doing so, I consider whether the case comprised a denouement in engagement between government and judiciary, with discernible impact on policy and attitudes in government on access to judicial safeguards against unlawful removal.

Facts of Case

Policy exceptions on notice prior to removal

In 1999, the Home Office agreed a 'concordat' with the High Court that it would wait a minimum of seventy-two hours between delivery and enforcement of removal directions (Home Office, 2002a). This was intended to allow foreign nationals ineligible for Leave to Remain in the UK a brief window of opportunity to seek legal advice, and potentially to apply for judicial review of the lawfulness of their removal. If judicial review proceedings were confirmed, then removal would be suspended pending a ruling from the court. In March 2007, the Home Office unilaterally applied exceptions to this concordat, excluding certain categories of individuals from provision of seventy-two hours' notice prior to removal. This regime of exceptions was justified as necessary to the best interests of the 'removee:' for their medical needs, or child welfare (IND, 2007). In January 2010, it was extended to include three further categories: those seen as posing a threat to others, those considered seriously disruptive, or who consented to expedited removal (UKBA, 2010a, Ch.60, ss.3.1.1 – 3.1.5).

The policy on exceptions was clearly written with an awareness of their legal sensitivity. Their use required that UKBA's Litigation Management Unit be informed (UKHC 2010a: 27). UKBA's director also explicitly recognised that "[w]hen applying exceptions we are acutely aware that we are making the task of legal representatives more difficult." (UKBA, 2009) Despite prior UKBA promises of transparency, this was initially a "secret" policy, which was neither publicised nor announced to partner organisations (ILPA, 2012, p. 5; UKHC 2009). This is suggestive of UKBA exercising caution by means of secrecy, rather than procedural safeguards and of prioritising the defensibility of removal actions in terms of success rather than justice. Such was the judicial dismay when the secret policy came to light that the judge concluded the only plausible account, on the evidence, was that "litigation is now often necessary to enable even the government to discover what its immigration policies are." (UKHC 2009, p.8)

The Medical Justice case

The legality of the policy of exceptions as a means to facilitate accelerated removals came under review in the *Medical Justice* case (UKHC 2010a; UKCA 2011a). Medical Justice, the advocacy group supporting the litigants branded the policy "deportation without warning of suicidal people and unaccompanied minors." (Medical Justice, 2010) In 2011, the Court of Appeal upheld the High Court's ruling that the UKBA policy of accelerating certain removals was unlawful. The courts held the policy to have risked preventing access to a lawyer, abrogating a constitutional right of access to court, which had developed in municipal jurisprudence prior to incorporation of the HRA. The policy was therefore found unlawful due to "a very high risk if not an inevitability that the right of access to justice is being and will be infringed." (UKHC 2010a: 171-2) The regime of exceptions was held to be fundamentally unjust and contrary to rights which are "inherent and fundamental to a democratic society." (UKHC 2010a: 44)

In arriving at its ruling, the High Court highlighted prior comments of both the Home Secretary (in a 2007 policy document) and Chief Executive of UKBA (in a letter of 2007), recognising the applicability of such rights to those subject to enforced removals: "to balance the need to ensure proper access to court with the public

interest in establishing a robust removal process” (quoted in UKHC 2010a: 45, 63). As in my previous case studies, we may observe the discourse of a balancing act here; an uneasy metaphor, characteristic of prior governmental attempts exercise discretion over the application of fundamental rights as constraints on government policy.

Also at stake in the *Medical Justice* case was consideration of whether it was justified at all for the judiciary to rule on the policy of exceptions. The court claimed jurisdiction on the basis of recent judicial claims of authority “to obviate in advance a proven risk of injustice which... inheres in the system itself.” (UKHC 2010a: 33) The alternative would have been for the court to await individual challenges from those persons adversely affected by the policy – a position rejected by the courts, due to the case’s definitive concern over problems accessing judicial review (UKHC 2010a: 173). In light of consideration in this case of what is effectively a matter of public interest, it is worth noting that the Home Secretary had attempted to overturn liability for costs incurred by Medical Justice in obtaining legal representation for the Home Secretary’s appeal against the initial ruling of the High Court (UKCA 2011b). Whilst the court rejected this attempt to impose a barrier to defence, it is consistent with contemporaneous governmental acquiescence in the closure of the two largest providers of legal advice to migrants – due to delays in provision of state funds and changes to the system of legal aid (BBC News Online, 2010; Bowcott, 2011). One may even read the Home Office position in *Medical Justice* to be that such organisations should not be allowed to challenge government policy before the courts. Indeed, the government’s argument to the Court of Appeal against a general duty to ensure access to legal advice in removals cases, sounds rather like a threat; suggesting that such a responsibility, “would have significant implications for the provision of legal services in this country and for the availability of public funding for legal advice.” (UKCA 2011a, 7) These words are reminiscent of previous policy propositions to deny legal aid to migrants, such as those in the *Asylum Bill 1991*, considered above. Unsurprisingly, The Law Society (2011) linked the *Medical Justice* case to concerns over the impact of cuts to legal aid; effectively limiting migrants’ access to judicial oversight without need for a regime of exceptions limiting notice of removal.

Governmental priorities regarding asylum control and judicial scrutiny

Concerns over expediency and welfare in removals

By the late-2000s, lingering scandals plagued the immigration and asylum agenda. Pressure for reform was so great as to lead the Home Secretary to signal a willingness to effect change by labelling the Home Office and Border Agency “unfit for purpose.” (Reid in BBC News Online, 2006e) Regular and highly publicised scrutiny by the Home Affairs Select Committee and Independent Chief Inspector of the UKBA put particular pressure on the Border Agency to demonstrate it was in control of the removal of foreign nationals without leave to remain. The scale of UKBA's perceived inability to manage asylum and removals at this time, was symbolised by a backlog of over 450,000 unresolved “legacy” asylum cases, accumulated over many years (Home Affairs Committee, 2011). Perhaps more than at any other point in the history of immigration and asylum control in the UK, governments were exposed to extremely high expectations on effective asylum control and removals. This pressure was further exacerbated by a particularly vitriolic demonization by the print media of not only asylum seekers and immigrants, but also of their opportunity to make recourse to the courts to protect their procedural and human rights (JCWI, 2012).

Despite asylum applications being at a record low, particular emphasis was placed upon both rhetoric and practice of enhanced expulsion capacity (Gibney et al., 2011, p. 550). Governmental concerns over demonstrating control were reflected by rhetorical promises under the Labour government to “remove more [immigration offenders], and remove them faster” (Byrne, quoted in *The Daily Mail*, 2008), as well as the newly elected Conservative-led coalition government's highly symbolic pledge to reduce net-migration from hundreds of thousands per year, to tens of thousands (Conservative Party, 2010, p. 21).

Although controversial among lawyers and asylum support groups (e.g. ILPA, 2006, 2012), ‘no-notice’ removals did not attract particular political controversy. This is

despite previous public expression of concerns by the judiciary (BBC News Online, 2005) and occasional concern among MPs and in the media over the legality and even morality of certain removals (BBC News Online, 2009). The ruling in *Medical Justice* was ostensibly concerned with the minutiae or procedural arcana of removals policies – questions of how, rather than why, to expel a foreign national. It may be fair to assume that, in general, public, the media, and politicians support the necessity of removals policies as part of a fair and effective asylum system. However, experts and activists in asylum law were acutely concerned by a long track record of inefficient and unjust UKBA decisions, which were only remedied by judicial oversight – indicated by the large proportion of initial decisions overturned on appeal (ILPA, 2006, 2012; Medical Justice, 2010). Such concerns over the welfare of vulnerable individuals speak directly to UKBA's attempt to justify the exceptions in terms of the best interests of the individual subject to forcible removal. The case put by government to the Court of Appeal in *Medical Justice*, outlined above, is a clear indication that the coalition government inherited New Labour doubts as to the existence of a right of access to justice to review the legality of removal decisions.

Rising judicial pressure on foreign nationals' access to justice

As under the previous government, judicial scrutiny of removal and deportation were particularly unwelcome among the Conservative-led cabinet. Whilst Blair had decried the courts as a barrier to “common sense” expulsions (Blair, 2006b), Conservative Home Secretary Theresa May characterised them as “anathema to good administration” (HC Debate 23.10.12: Col. 189) and called for the *Human Rights Act* to be “scrapped” due to its role in preventing deportation (in Hennessy, 2011). Similarly, the coalition government increased restrictions on legal aid in immigration cases (*Legal Aid, Sentencing and Punishment of Offenders Act 2012*) which the prior Labour government had employed to limit access to legal advice after failing to ‘oust’ the courts from reviewing certain aspects of immigration control (Woolas in Barkham, 2008; Rawlings, 2005; Blair in Wintour, 2003).

Leading up to the *Medical Justice* case, a string of judicial rulings affirmed the importance of foreign nationals' access to justice for redress against unlawful government actions, general failures to follow policies on detention and removal, and

an inherent unfairness of the system of asylum decision making (systemic questions, in UKCA 2004, 2009; detention in UKHL 2003b, at 26; ECtHR 2008; on removals, UKHC 2009, 2010b; UKCA 2010a, 2011b). The High Court ruled there was “no conceivable justification for same day removals” (UKHC 2010b, 5) and that exemptions to the provision of seventy-two hours’ notice were unlawful, as were Home Office attempts to mislead lawyers representing individuals subject to removal orders (UKHC 2009). As can be discerned from the facts of *Medical Justice*, no-notice removals continued despite this judicial condemnation. In implementing this string of judicial decisions, the Home Office dealt with the redetermination of individual administrative decisions and paid damages and costs as required. Yet, it failed to adopt a more robust attitude towards legal safeguards, persisting in what came to be regarded by immigration law practitioners as an “institutionally unlawful” culture of regular failures by UKBA to follow its own rules and guidance (Free Movement, 2009).

These cases took place against a backdrop of attempts by the Home Office to limit access to judicial review as an explicit tactic for, “minimising the number of bogus judicial review applications we get against deportation” as a means “to deter, detect, detain and remove illegal migrants” (Home Office, 2006b). The reasoning linking access to judicial review and migration control is made clear by a consultation on discontinuing the practice of suspending removal when an application for judicial review is lodged with the High Court. This stated the Immigration and Nationality Directorate’s view “that judicial review is often used purely as a tactic to disrupt the removal process when the underlying claim has no merit.” (IND, 2006b) Consummate with this view was the tendency of the IND to refer to bids for judicial review as a “threat” (ILPA, 2006).

These statements and the government’s minimal response to this body of prior jurisprudence suggest that at an organisational level, immigration officials were highly sceptical about the legitimacy and necessity of judicial oversight of not only some, but the majority, of removal actions. They also suggest the IND’s confidence in its own capacity to determine and arbitrate such legal questions as may constitute a barrier to removal, without deference to outside legal or judicial authority. At best,

we may discern the existence of an organisational culture which considers legal questions best addressed by government officials, in-house. At worst, we may consider the prospect of an organisational disregard for the applicability and legitimacy of legal and judicial constraints on removal. The judiciary for its part, voiced, “despair at the manner in which the system [of asylum control] operates...” (UKCA 2009, 2); elsewhere observing that despite “outrageous and arbitrary exercise of executive power”, “it is difficult to foresee how such arbitrary conduct can be deterred in the future...” (UKCA 2010a, 84, 77).

Even prior to the direct challenge to the lawfulness of the policy of exceptions in the *Medical Justice* case, judicial pressure had been mounting on the issue of access to court, and the importance of judicial safeguards against unlawful detention, deportation and removal. Prior ‘containment’ of these rulings by government may suggest that the *Medical Justice* case would have little impact on governance of asylum. However, in contrast to these prior rulings, *Medical Justice* comprised a direct challenge to the legality of government policy. Given the great degree of pressure and scrutiny of the government’s record in fulfilling promises to quickly expel increasing numbers of foreign nationals, as well as the apparent culture of disbelief in foreign nationals’ requirement of legal advice, extensive compliance with the *Medical Justice* ruling may appear unlikely. By turning now to consider how the government problematized judicial impact in this case, it is however, possible to identify a particularly nuanced response which is neither a straightforward example of constraint, nor suggestive of a particularly profound impact on the more fundamental agenda of expedient removals at executive discretion.

Analysis of primary sources

Nature of Sources

The predominance of internal government documents among my primary sources reflects the lack of political controversy over compliance in this case. Implementation of the *Medical Justice* ruling did not require changes to primary statute, so was handled within the executive, without recourse to parliament. Justification of policy change was primarily directed towards internal executive procedures and legal advocacy groups. This included equality impact assessments of policy change and letters to “corporate partners,” drafted by the Ministry of Justice and Home Office Immigration and Border Policy Directorate. Attention was also paid to political rhetoric – both directly in response to the *Medical Justice* ruling, and on the broader, related topic of expedited removals.

Initial response

In response to judicial scrutiny in the *Medical Justice* case, UKBA readily suspended operation of the policy of exceptions. Announcing its intention to appeal the High Court ruling, the Home Office simply expressed itself to be, “disappointed with the court’s judgement”, against, “an important element” of its management of removals. It also emphasised an enduring commitment, “to removing individuals with no right to be in the UK as quickly as possible.” (quoted in The Daily Mail, 2010) When questioned about the ruling’s impact on “fast track deportation,” The Prime Minister's Spokesman echoed the Home Office statement, before dismissing suggestions that the ruling threatened the Immigration Minister's assertion that the UK should not be seen as “a soft touch” (Prime Minister’s Office, 2010). Although a public statement of “disappointment” may seem strong language, it is typical of governmental responses to several rulings on removal actions and human rights around this time (e.g. Davies, 2012; Prime Ministers Questions (16 Feb) 2011), and a regular feature of parliamentary discourse on immigration control (Home Affairs Committee, 2010, Ev.28). When compared to hard rhetoric attacking the courts in my previous case studies, notably the Hijackers case, the government's official response to *Medical Justice* is suggestive of reluctant acceptance. Reference to disappointment is ironically reminiscent of the more historic meaning of the word, in

terms of which the Home Office had been dispossessed of its position of authority over the regime of exceptions.

In its official statement, the Home Office made a direct claim to be managing the situation. Its implication was that efficient management requires removals to be executed “as quickly as possible”, and by extension, that in the absence of perceived legal barriers to removal, intervention by the courts is an unfortunate inconvenience. In light of concerns over the UK being seen to be a “soft touch” on migrants, it is worth noting that before the constraint on removal directions had been considered at appeal, an early day motion was afoot in parliament expressing a desire for government to expel foreign nationals, regardless of constraints imposed by human rights law (EDM 1226 - Field, 2010). *Medical Justice* concerned a constitutional right in common law as a safeguard of procedural justice. However, the Home Secretary’s willingness soon after the ruling to question the legitimacy of human rights protections as a barrier to deportations may be taken to indicate a low regard for the role of the courts in overseeing their legality (May in Hennessy, 2011).

Implementation

Governmental reservations about the role of the courts in overseeing removal actions are indicated by the nuanced manner in which the Home Office sought to implement the *Medical Justice* ruling. Following the High Court ruling (UKHC 2010a), the exceptions to seventy-two hours’ notice were removed from UKBA enforcement instructions and guidance, even although the Home Secretary subsequently appealed against the ruling (UKBA, 2010b). Whilst such a compliant response is arguably routine in cases of judicial review where the court issues an injunction, it is by no means always the case that government agencies comply. It is reputedly not uncommon for policies to continue to be applied until (and occasionally even after) the appeals process has concluded.² The revised policy rendered compliance with *Medical Justice* dependent upon the discretion of case owners responsible for deciding whether to delay removal pending a prospect of judicial review (UKBA, 2010b, s.41, 50). Confidence in such administrative compliance is not encouraged by

²Personal correspondence by e-mail with Alison Harvey, Legal Director of ILPA.

the track record of litigation discussed above, nor by Parliamentary investigation at the time into whistle-blower accounts of a pervasive “culture of disbelief and discrimination” in UKBA's processing centres (Vaz in Taylor & Muir, 2010). Such concerns were echoed by the UKBA Independent Chief Inspector’s investigation of the agency’s decision making, indicating a culture of unfair and potentially unlawful handling of cases (2011).

Above all, a will to minimise the impact of *Medical Justice* on the core policy goal of expediting removals was evidenced in a Home Office consultation letter proposing to waive the requirement of seventy-two hours’ notice prior to removal, where this is “consented” to by the migrant (Home Office, 2012). In October 2012, the Home Office was still, “considering how we take policy forward in this area.” It was, however, “keen” to resume expedited removals.³ This consultation indicates the continued unwillingness of UKBA to seek informed consent via the legal representative of the individual subject to removal. The document employed a language of safeguards which directly invokes the Court of Appeal’s ruling in *Medical Justice* (UKCA 2011a, at 30, 34). Its recourse to discussion of safeguards attempts to justify governmental authority over removals in terms of fairness in the administration of asylum, which had been cast into doubt. The consultation has, however, been attacked by UKBA's partner organisations as but one of no less than eighty-five practices which have habitually sought to exclude the migrant’s legal advisor from official proceedings, potentially expediting removal by encouraging withdrawal of existing legal challenges (Law Society, 2012). The very title of the letter, “Illegal migrants who wish to leave the United Kingdom, waiving their legal rights beforehand”, is indicative of the Home Office view on whether those consenting have a lawful basis to remain (ILPA, 2012, p. 2). The Home Office manifestly continues to believe that those subject to removal have no need of recourse to the courts, since they have no right to be in the UK. Whilst the consultation explicitly recognises the binding constraint imposed in *Medical Justice*, its implicit goal is to empower the Home Office to remove as many unwanted

³ Personal correspondence by e-mail with an Enforcement Policy officer in the Home Office, Immigration and Border Policy Directorate.

foreign nationals as possible, as quickly as possible. Crucially, it proposes to do so lawfully – albeit by proposing changes to secondary legislation so as to redefine such removals as within the bounds of the law. This is a clear bid to legitimate the subordination of questions of legality to administrative discretion, rather than to a prescribed deference to legal and judicial procedures.

Classification and discussion of judicial impact

Having considered key findings from critical framing analysis of primary discursive sources, I now wish to further develop my analysis of judicial impact in both cases according to the analytical typologies of response and depth of impact. Beyond the material changes to policies governing access to justice prior to removal, I have endeavoured to elicit more substantial insights into the government's deeper understanding of the significance of the *Medical Justice* and *Vilvarajah* to its broader objectives in asylum control and removal. In this section, I specify the government's response in each case according to my typology of how compliance may be reconciled with policy objectives. I then turn to consider the level of ideas governing asylum control at which judicial impact can be established in each case, before considering whether significance may be attached to the source of the ruling, or lack of politicisation of compliance in these cases.

Judicial impact in terms of the government's response

Although nearly twenty years passed between the events surrounding *Vilvarajah* and *Medical Justice*, certain common themes are apparent. The government's response in both cases was ostensibly suggestive of regard for the institutional legitimacy of the judiciary. The substantive content of each ruling was implemented (or for *Vilvarajah*, anticipated) by means of compliant policy change. Yet, further attention to primary discursive sources through which the government responded indicates that in both cases, the overarching response was to diminish the disruptive effect of compliance on pre-existing policy goals. In both cases, governmental framing of immigration and asylum demonstrated a persistent will to delimit the parameters of foreign nationals' access to judicial review.

Vilvarajah

In the case of *Vilvarajah*, in particular, judicial impact initially seems to have been significant. The government responded by pre-empting the ECtHR's ruling to provide the first true differentiation of asylum from immigration control, in the legislation of a legal mechanism for in-country asylum appeals. Ministers briefly reflected upon sustained judicial scrutiny as a nuisance, requiring structural reforms to the architecture of asylum controls. However, legislative change was

predominantly justified by a discourse problematizing deserving / undeserving migrants. This led to the creation of new powers for the Home Office to class certain asylum applications as manifestly unfounded, abrogating appeals – leading to a two tier asylum system; one for those whom the executive decided should be fast tracked out of the country without access to the new appeals mechanism, and another for those whom it felt should benefit from access to it.

Providing for an appeals mechanism sought to reduce the volume of judicial review of administrative decisions. However this liberalisation of asylum was subsumed within an illiberal framing of asylum seekers as either deserving or undeserving migrants. This framing prevented the *Vilvarajah* ruling from having any broader constraining impact on asylum control. In these respects, the government responded by ‘depreciating the significance’ of the ruling, which was subordinated within broader efforts to realise restrictive immigration controls.

Medical Justice

As in *Vilvarajah*, the government’s response to the *Medical Justice* case provides a clear illustration of the distinction between compliance and judicial impact. Direct compliance with the ruling was full and rapid, even though the initial judicial decision was appealed. However, the long term impact of the ruling, even on the question of exceptions to provision of a minimum period of notice prior to removals, is not clear cut. Whilst the specific exceptions ruled on by the courts were suspended, the Home Office continued to explore possibilities for re-enacting a caveated version of the policy. Moreover, the ruling on the importance of foreign nationals’ access to justice was subsumed by rhetoric which not only positioned rights and review in tension with high priorities of executive expediency, but even questioned the future of migrants’ human rights. The *Medical Justice* ruling, and preceding jurisprudence on access to legal advice and judicial oversight of detention and removal, have had no broader impact on cognate operational policies and practices which serve to restrict foreign nationals’ access to legal advice prior to removal. Neither policies nor governmental attitudes on expedient removal and the role of judicial scrutiny have changed in response to *Medical Justice*. The minimalist reforms implemented in response to these cases can be considered a definitive case of containing impact:

implementation of the courts' direction to reconsider individual administrative decisions and revise particular operational protocols, without broader changes to the underlying policy programme. This response is also reflected by the government's argument to the Court of Appeal in *Medical Justice*, that the jurisdiction of the court should be limited to the legality of individual administrative decisions, rather than the over-arching policy regime.

Level of Impact

Vilvarajah

Perhaps most remarkable about *Vilvarajah* and the *Asylum and Immigration Appeals Act 1993* is their indication of the politics and law of asylum control having moved in opposite directions: an increasingly elaborate and specified appeals system, oriented around the primacy of the Geneva Convention; yet increasingly operating through legislative constraints which excluded large proportions of applicants from full access to this system. *Vilvarajah* impacted upon the administration of asylum by constraining the policy tool of automatic removal of failed applicants as a means of effective border control. However, the underlying programmatic logic was maintained; according to which asylum was governed through an executive balancing of asylum seekers' rights against restrictive immigration controls. Although challenged by the requirement to subject administration of asylum to oversight by a tribunal, executive discretion was ultimately enhanced, in so far as the Home Office was empowered to shape access to legal review of its decisions by deciding which claims were 'unfounded.' The result was a substantial increase in the number of applications rejected. The public philosophy of restrictive asylum control was thereby sustained despite its 'juridification' in the form of enhanced jurisdiction for the tribunal and courts. The maintenance of governmental authority over inclusion and exclusion within the state was particularly emphasised by a discursive framing of asylum as requiring state intervention to prevent the undeserving from delaying their expedient removal in court, and by the right to expel those considered as lodging manifestly unfounded claims.

Medical Justice

With the suspension of the regime of exceptions to provision of seventy-two hours' notice prior to removal, the government's policy tool was in this case constrained. However, the underlying logic governing the programme of removal clearly was not. The Home Office emphatically affirmed belief in its role as arbiter of a balancing act between expedient removal and its constraint by legal principles. Executive discretion over removal has not been affected, even if one of the tools through which it was pursued has been constrained. This discretion was further emphasised by the Home Office consultation on possible further exceptions to the required notice before removal. This sought to affirm the authority and capacity of UKBA to determine where and when access to legal arbitration is necessary, and posits UKBA as final judge of the role of justiciable rights in governing inclusion/exclusion. This is clearly part of an on-going programme of ensuring expedient removal; an attempt to uphold the philosophy of restrictive asylum control, despite judicial constraints.

The role of politicisation and source of ruling in policy impact

Significance of the source of the ruling

Pre-emptive policy change in the shadow of an anticipated adverse ruling by the ECtHR suggests that the government regarded the supranational provenance of the *Vilvarajah* ruling to be of some significance. This may reflect concern to prevent the ruling from fuelling opposition politics which were newly oriented towards domestic incorporation of the ECHR. However, I have also sought to emphasise that governmental discourse framing compliant policy change indicated more explicit regard for rising pressure from a newly activist municipal judiciary, which had found jurisdiction over asylum under common law. Such self-activation of jurisdictional competence, and the development of constitutional rights through litigation in the British senior courts, was also the basis of the adverse ruling in *Medical Justice*. These cases suggest that governmental framings of immigration control which sought to diminish the legitimacy of legal constraints on executive discretion are motivated not by ostensible concerns over the role of the HRA or ECHR, but rather the entire system of judicial review of government actions and policies. In this respect, it is the intensive and consistent scrutiny of the municipal courts which

exerts more pressure on government than does the ECtHR. Nevertheless, it has been shown in this chapter that the significance of both to asylum control can be subject to significant discretionary framing of judicial impact in terms conducive to enhancing governmental discretion.

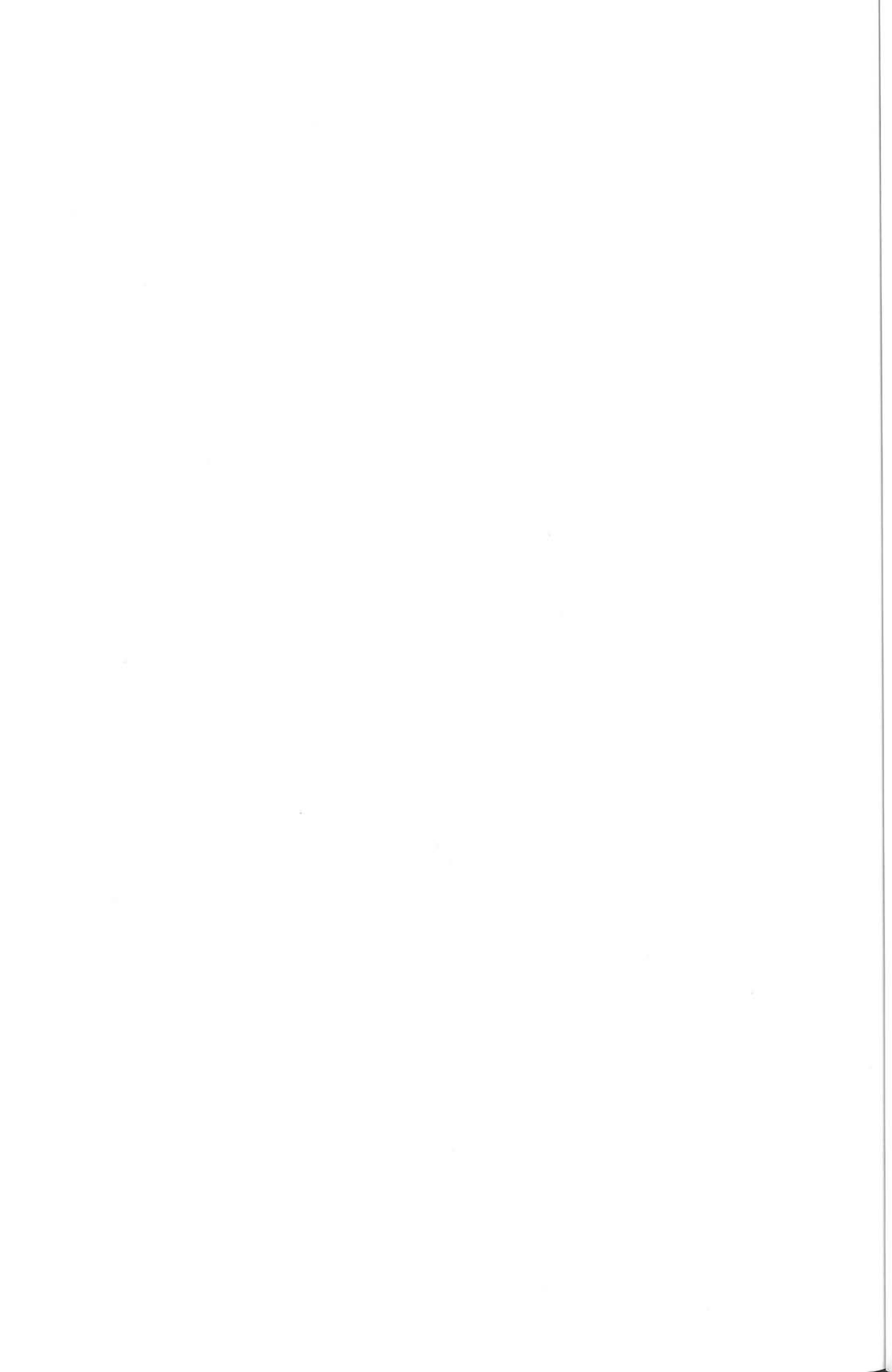
Significance of politicisation

Governmental responses to *Vilvarajah* and *Medical Justice* involved no notable politicisation of compliance. As such, they will be considered as a kind of litmus-test in the next chapter, in which I compare the role of politicisation and source across all four of my cases to consider whether they condition judicial impact on policy change.

Conclusion

In both *Vilvarajah* and *Medical Justice*, foreign nationals' right to access judicial safeguards against unlawful actions of the state were considered by the courts. Both the policy measures leading to judicial scrutiny, and the diminutive governmental responses with which the rulings met, suggest an intransigent unwillingness on the part of successive governments to accept an expansive right of access to court for foreign nationals in cases of removal. For the cases considered within this chapter, this may plausibly be considered indicative of a qualification to the universal applicability of constitutional and European Human rights on the grounds of nationality. The municipal judiciary and ECtHR have not failed to intervene on the legality of those governmental actions which have extended governmental claims to discretionary power over asylum control and removals to the point of unlawful behaviour. However, the administrative and political record presented in this chapter suggests an alarming capacity of governments to effectively contain the dissenting voice of the courts beneath a blanket of legislative caveats, which seek to subsume the content and even authority of this judicial message. Against this backdrop, a style of compliance with the courts has developed in which the direct letter of the law in judicial decisions has been largely heeded. Yet, there has been little, if any, discernible judicial impact on an underlying illiberal attitude towards the rights of foreign nationals, and a willingness to take legal risks in implementation of asylum determinations and removals.

There is certainly a paradoxical tension between increased legal-procedural requirements imposed on asylum control in response to the courts and parallel restrictions on barriers to expedient removal by government. Yet, it would be overly ambitious to say of the cases considered in this chapter that governance of asylum and removal had been constrained by the courts. As predicted by Gibney, restrictive policies appear to have been paradoxically driven forward by judicial affirmation of liberal principles. We may, however, do well to note that this illiberal spread has applied not only to access to asylum and expulsions, but access to the courts themselves.



8. Comparative discussion of judicial impact

Introduction

In the preceding three empirical chapters, I have argued that judicial impact on policy change is best understood according to how the problem of compliance and broader policy change were framed within government. I sought to identify and understand factors which shaped governmental attitudes towards compliance with the courts in asylum control. Particular emphasis was placed on the importance of how key governmental actors perceived the ideas governing asylum control to be impacted by compliance; whether challenging or constraining the viability of a policy instrument, or more fundamentally, the governing logic or underlying public philosophy of asylum control. In this chapter, I further consider the role of these governing ideas alongside other factors which I identified in chapters two and three as potentially significant to understanding judicial impact on policy change and its governmental framing. By comparing the role of politicisation of compliance, source of ruling, depth of impact and response across each of the four cases, I endeavour to elicit a deeper understanding of how and why judicial decisions impact upon changes to asylum control policy. I then consider trends and themes in the nature and process of judicial impact on policy and its framing which have emerged across the body of my case studies. In doing so, I return to the puzzling tension between oppositional rhetoric and compliant policy change which first motivated this research, to reflect on the distinctive roles of political rhetoric and bureaucratic responses in negotiating judicial impact on policy change.

Comparative analysis of depth of impact

For each of the judicial decisions which I have considered, the courts engaged with different primary legal issues. *Vilvarajah* and *Medical Justice* concerned access to justice. *Chahal* was the only case directly concerning the boundaries of ECHR Article 3 as a constraint on expulsion (although Article 3 was a background factor in each case, due to my focus on deportation and removal). Finally, the Hijackers case concerned the boundaries of executive power under parliament. Although the legal

principles varied, there are consistencies between these cases, even simply by virtue of the constitutional function of judicial review of executive acts. Firstly, all of the cases are expressive of the right of access to justice for foreign nationals, even where this was not the substance of litigation. Secondly, they all concern the boundaries of executive discretion – whether over policy formulation, or its implementation. In the governance of asylum, these principles inescapably operate in tension with each other. Executive discretion over expedient asylum control has often been pursued by imposing impediments upon foreign nationals’ access to and enjoyment of certain rights, including access to justice. In each case I have considered, judicial impact has related to such a balancing of the rights of unwanted migrants and asylum seekers against a policy commitment to expedient expulsion or restricted presence within the state. However, the level of impact on such controls has varied, as indicated by the critical framing analysis presented in Table 2, below.

This variation is potentially highly instructive as to how and why governments respond to the courts in a given manner. In particular, we may distinguish between responses which amplify the coercive effect of rulings, and responses which depreciate or contain rulings’ significance for the broader governance of asylum controls. Having posited that understanding judicial impact depends upon interrogating the discursive construction of the ‘problem’ of compliance, I now wish to draw comparative explanatory insights from my analysis of how this was framed in each case. I focus on the perceived affect these rulings had upon the governing philosophy and programmatic logic of asylum control; the government’s capacity to demonstrably exercise symbolic control over the inclusion and exclusion of unwanted foreign nationals; balancing their human rights and access to justice against the execution of policy commitments.

As the jurisprudential and political facts of each of my chosen cases have already been presented in the preceding empirical chapters, I will not repeat them at length here. Table 2 collates the key findings about judicial impact in my analytical chapters according to politicisation of compliance, the source of the ruling, the response from government, and the perceived depth of impact. Due to its particular significance in

the forthcoming comparison of my findings, I will, however, briefly restate my formulation of ‘depth of impact’ as a significant explanatory factor.

Levels of impact

These levels provide for concise articulation of how governmental discourse is expressive of the underlying political understandings about policy in flux. As such, they provide a useful conceptual vocabulary through which to discuss judicial impact from the perspective of government.

Public philosophy: Restrictive asylum controls.

The state seeks to exercise coercive controls necessary to restrict inclusion (and therefore enforce the exclusion) of foreign nationals, including asylum seekers. This is pursued in opposition to a more expansive humanitarian philosophy of asylum control.

Programmatic Logic: Executive discretion.

Demonstration of authoritative governance of inclusion and exclusion requires discretion to execute asylum controls. This is reflected in a governing logic of balancing political expediency against potential liberal constraints. The executive therefore seeks discretion over a balancing of inclusion/exclusion, individual/state, liberty/security, expediency/review.

Policy: Deportation, removal and restrictions on rights in-country.

These are the means through which the public philosophy and programme of asylum control are implemented: expulsion and other forms of coercive control of unwanted foreign nationals, such as placing limitations on their human rights within the country. Policies may also seek to limit barriers to expedient and authoritative governance of asylum, notably by restricting access to judicial oversight.

Table 2: Cases according to factors of interest

Case	Source	Politicised	Depth of Impact	Response
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<i>Vilvarajah v. UK</i>	ECtHR	No	Tool constrained; Logic challenged.	Depreciate significance
Chahal saga	ECtHR	Yes	Tool constrained; Logic constrained (latterly); Philosophy constrained in practice by <i>Saadi</i> but rhetoric sustained.	Amplify coercive effect
Hijackers	UK	Yes	Philosophy challenged	Amplify coercive effect
<i>Medical Justice</i>	UK	No	Tool constrained	Containment

Variation in the nature of sources

Before proceeding to compare the outcome of judicial impact across cases, it is first worth noting that variation in the nature of sources available for each case is itself a potentially significant finding. More internal government documents were produced in ‘politicised’ cases. This suggests an enhanced role for government bureaucracies in stabilising problem definitions through document production under contested political conditions. Unsurprisingly, there was also more political rhetoric in response to judicial decisions in such cases.

There has also been a significant development in the nature and volume of internal governmental sources across the period covered by my case studies. *Vilvarajah* and *Chahal* were decided by the courts prior to the emphasis placed by the New Labour government on governmental transparency, particularly associated with the *Freedom of Information Act 2000* which came into force in 2005. In the early 1990s, before this opening up of government, ‘consultation’ ahead of proposed policy change consisted of circulating the already drafted policy, with a purported willingness to receive comments (e.g. Lord Chancellor’s Department, 1992). This differs greatly from the extensive consultation of ‘stakeholders’ which is now typically undertaken; for example, in the wake of the *Medical Justice* ruling. These developments reflect a trend towards increased justification of governmental actions both within

government and parliament, as well as to the public. Scrutiny by the media and requirements to report to the Council of Europe and JCHR on compliance have also increased over time, enhancing the role of documentary sources in justifying governmental responses to the courts.

The nature of governmental discursive sources produced following judicial decisions can also be understood as a function of the perceived depth of impact upon governing policy ideas. Variation in the nature of discursive material produced, including the extent of political rhetoric, speaks to the nature of judicial impact. The *Chahal* jurisprudence produced a far greater and more extensively documented response in government than was the case for *Vilvarajah*, not simply because of different historical conditions of transparency in government, but also due to interpretation of *Chahal* as a profound constraint on deportation and removal policy. The predominance of brief, private letters from the Home Office and Ministry of Justice as a means of justifying the governmental response to *Medical Justice* speaks to the absence of any politicisation of implementation of the court's decision. This contrasts sharply with the extensive role played by detailed departmental reports prepared in the wake of the highly politicised Hijackers ruling. The role of documents in orienting and justifying governmental responses to the courts also depends upon the nature of the material policy changes required for compliance. For example, whether modification of the Immigration Rules (as in *Medical Justice*) or legislative change (as in the Hijackers case). However, the willingness of the executive to initiate legislative change is itself a product of the perceived impact that compliance with the ruling was seen to have on realisation of the governing ideas of asylum control.

In a similar fashion, the function of political rhetoric is also intrinsically linked to the matter of politicisation, and related to not only an inferred electoral salience of policy issues, but the political framing of their importance. This includes the perceived importance of performing political authority via the media (Hajer, 2009). The rising importance of such a politics of spectacle is reflected by the shift in political rhetoric over my case studies: from the dominance of justificatory comments within parliament in the early 1990s as to the inconvenience of judicial scrutiny, through

recriminatory public statements in the mid-2000s, and more recently, pledges to revise the constitutional balance of powers between parliament, the municipal judiciary and the ECtHR in Strasbourg. Rhetoric in response to the courts has not only become more resentful over time, but has turned responses to particular judicial decisions into a matter of policy pledges on the role of judicial scrutiny itself. Governmental actors have thereby not simply justified judicial impact on specific policy measures, but sought to justify political authority under a judicial shadow.

Procedural versus principled rulings and politicisation

Having considered the occasional tendency of political rhetoric to oppose judicial oversight of government, it could be argued that the cases I have drawn upon in this thesis suggest increased oversight of asylum control has been most extensive where judicial norms are already accepted as legitimate constraints on government: at the level of procedural fairness in implementation of policy. *Vilvarajah* and *Medical Justice* did not specify general rules for whom or under what conditions a foreign national could or could not be expelled. Rather, they imposed procedural requirements for review. In doing so, they affirmed judicial authority to scrutinise matters otherwise subject to executive discretion. However, despite the fixation of political rhetoric on the role of rights as constraints on deportation, the Hijackers case also concerned a procedural matter – that the executive had overstepped its authority in developing and applying restrictions on Leave to Remain. Moreover, *Medical Justice* also affirmed the development of a common law constitutional right of access to justice for foreign nationals – a potentially powerful barrier to executive constraints on fundamental rights and freedoms which the government’s legal representatives sought to refute.

Similarly, rhetorical opposition to judicial oversight (or politicisation of compliance) in the case of the Hijackers and Chahal saga may appear to be a product of the courts’ invocation of constitutional law and ECHR rights at the level of the lawfulness of policies (as opposed to procedural requirements). These cases related to not merely how, but who could be expelled and when rights could be restricted – resulting in significant legislative change. Governmental opposition to compliance may reflect the comparatively recent and politically unwelcome role of the judiciary

as arbiter of human rights as constraints on government, and indeed its willingness to find significant standing for aliens in the constitution.

However, I do not believe that the most meaningful determinant of political opposition to compliance with the courts is whether a decision requires procedural reforms or legislative change; nor whether human rights principles were invoked. Indeed, *Vilvarajah* required procedural and legislative reforms and invoked ECHR rights, yet did not lead to politicisation. Whilst the rulings in *Vilvarajah* and *Medical Justice* resulted in policies being constrained and the institution of asylum control being liberalised, their impact was not understood within government as a challenge to the governing logic or public philosophy of asylum control. It is by recourse to such perceived depth of impact on the ideas governing asylum control that I believe we may more adequately explain varying governmental responses.

The role of governing ideas in responses for non-politicised cases

Medical Justice

Compliance with the *Medical Justice* ruling did not impinge upon a broader regime of executive discretion over when and how foreign nationals should be allowed access to legal advice prior to removal. A constitutional right of access to justice was affirmed by the courts, which not only precluded the policy tool of no-notice removals, but could be considered a potential barrier to expedient removals by empowering foreign nationals to seek judicial review. However, the jurisprudence did not constrain a broader regime of several dozens of UKBA practices which The Law Society regarded as indicative of a general will to impede access to timely legal advice. Nor has compliance with the *Medical Justice* ruling prevented Home Office consultations on potential caveats to its constraint on no-notice removals. The absence of a 'deeper' impact on the idea of executive discretion in governing asylum control is perhaps a product of the ruling being about procedural requirements of removal, rather than the broader discretion to initiate expulsions. However, the Home Office's confidence in its role as arbitrator of legitimate need for legal advice in the latter stages of removal proceedings indicates that even on the level of discretion over the procedural legitimacy of removal proceedings, there has been no great constraint of the governance of asylum removals. Governmental justifications of

changes to the Immigration Rules emphasised the authority and capacity of the Home Office to make decisions about the balance between expedient removal and access to justice.

Vilvarajah

On one level, the impact of *Vilvarajah* was to insert an enhanced judicial role in balancing removal against protection of the individual, through the asylum tribunal. However, as in the response to *Medical Justice*, the liberalising effects of *Vilvarajah* upon asylum control were absorbed within a broader empowerment of executive discretion to restrict access to appeals prior to expulsion. This was justified in terms of necessary discretion to differentiate between deserving and undeserving (so called, manifestly unfounded) applicants. Impact was effectively absorbed by the government's ability to discursively frame the problem of compliance in terms which enhanced its discretion over asylum control. For *Vilvarajah*, discursive justification of policy change emphasised the public philosophy of more restrictive outcomes in asylum control, empowering Home Office discretion over its expedient realisation.

Summary

Observation of material changes to procedural rules governing appeals and removal in response to these rulings might suggest judicial impact as causing increased concern in government over procedural legitimacy and a consequent liberalisation of asylum control. Yet, attention to the discursive framing of change indicates an intransigent affirmation of the public philosophy and governing logic of asylum control: the primacy of exclusion (as opposed to inclusion) and executive discretion to balance rights and review against its expedient execution. The policy tools – of automatic removal and exceptions to notice prior to removal – were constrained. However, the more fundamental governing ideas were not. This explains the lack of politicisation of compliance in these cases, and the response with which they met. It was possible to depreciate the significance of *Vilvarajah* and the institution of in-country appeals to effective asylum control because even although the institution of asylum had been further subjected to legal constraints, executive discretion was enhanced. It was possible to contain the impact of the *Medical Justice* ruling to the matter under review – the exceptions to notice – because the ruling was not

understood in government as imposing upon the broader regime of policy measures which could be considered attempts to prevent last-minute ‘vexatious’ litigation as a barrier to expedient removal.

The role of governing ideas in responses for politicised cases

In contrast, compliance with the courts in the Afghan Hijackers case, and most notably, *Chahal* was indeed framed as challenging the continued and demonstrable exercise of these governing ideas. In particular, the authority of the Home Office to balance the rights of unwanted migrants against asylum control was directly challenged.

Chahal

The tool of deportation ‘at all costs’ was immediately constrained in compliance with *Chahal*. Gradually, the underlying programmatic logic of a balancing act, according to which the executive prioritised security concerns and demonstrable deportation capacity over migrant rights, was greatly constrained by repeated judicial review which applied the *Chahal* jurisprudence, broader ECHR principles, and British common law principles to the implementation of policies which sought to coercively restrict the freedoms of foreign nationals who could not be expelled. Realisation that the public philosophy of asylum control was challenged by such symbolic failures may explain the move from acceptance to amplification. Ultimately, as the ECtHR rejected the government’s bid in *Saadi* to overturn *Chahal*, the underlying philosophy of asylum control as control over inclusion and exclusion was constrained in cases where ECHR Article 3 issues are raised. The government often no longer has the practical discretion it would like over inclusion/exclusion and the role of certain rights as potential policy constraints. Moreover, judicial constraint of coercive alternatives to deportation presented a serious challenge to the executive in its desire for an effective and authoritative response to the policy problem of unwanted foreign national security suspects.

This challenge to governmental capacity extends beyond the nexus of migration and security. *Vilvarajah* had led to a role for the adjudicator as an arbiter of whether safe return was allowed under domestic interpretation of international refugee law. This imposed a balancing act which involved comparatively minimal consideration of the

ECHR until its function was dramatically impacted by the requirement to consider and implement the *Chahal* jurisprudence. The constraint imposed upon asylum control by the tribunal had been partially diminished by restrictions on the domestic implementation of refugee law: a regime of ‘safe countries of origin’ and safe third countries of transit as a means of restricting access to appeals against removal from within the UK. For cases invoking a risk of ECHR Article 3 ill-treatment on return, *Chahal* supervened such restrictions, facilitating rights-based adjudication as a delay or barrier to removal. Considering *Chahal* alongside *Vilvarajah* highlights its impact not just in terms of judicial oversight over expulsion of security suspects, but also as an affirmation of the ECHR as a necessary consideration in determining the legitimacy of removal. By providing an extra layer of protection within the state (at least where there is a real risk of article 3 ill-treatment), *Chahal* effectively brings international protection back into the gap left by minimalist legislative application of the *Refugee Convention*. The role of the tribunal was shifted beyond simply determining whether expulsion would be lawful, to consideration of the need for alternative humanitarian protection within the host state, regardless of whether an applicant qualified under the narrow terms of the domestic incorporation of the *Refugee Convention*.

In this respect, it is not simply in high profile cases involving failures to deport security suspects, but the adjudication of rights as a barrier to removal in general, that effective realisation of the public philosophy of asylum control has been greatly challenged by the impact of *Chahal*. Political rhetoric has not, however, reflected this practical restraint. Rather, in amplifying constraint, rhetoric has sought to claim the necessity of enhanced executive control, free from legal constraints, in order to exercise governmental capacity to realise the public philosophy of asylum control. This rhetoric has also sought to legitimate claims to executive authority by displacing attention from policy outputs (failures to expel unwanted foreigners) onto symbolic debates about constitutional balance of powers between executive, judiciary and ECtHR.

Given the politicisation of long-term compliance with *Chahal* and associated amplification of its coercive effect on effective asylum control, we may perhaps infer

a governmental desire for a return to the more circumscribed and discretionary function of asylum in the past. The persistence of a governing logic of executive control over expedient removal is certainly demonstrated by the programme of exceptions to legal advice (and therefore judicial scrutiny) which has largely survived the *Medical Justice* ruling.

Afghan Hijackers

Beyond the direct constraint the *Chahal* ruling has imposed in cases involving prospective removal to a real risk of torture, cruel, inhuman or degrading treatment (under ECHR Art.3), the inability of the government to expel such high profile *personae non-gratae* as the Afghan Hijackers dealt a significant blow to its symbolic authority over asylum control in general. Compounding the constraint imposed on deportation by *Chahal* with further requirements relating to the provision of status and associated rights to non-deportable migrants, the Hijackers ruling seriously challenged the integrity of the underlying philosophy guiding asylum control. In that the government had pursued a de-facto excision of the Hijackers from state and society by denying their legal presence, the ad-hoc policy ruled *ultra-vires* in the Hijackers cases is perhaps the purest expression of the restrictive philosophy governing asylum. The judicial decision's *inclusion* of the men in the UK (both as legal agents despite their lack of political agency, and as deserving of recognition by the Home Office with precipitant economic access to welfare and employment), not only challenged the ad-hoc special immigration status as unlawful, but also the underlying programme of abrogating migrants' rights and foundational worldview that the Home Secretary should regulate inclusion and exclusion.

Hard rhetoric affirming governmental will to discretion and control sought to fill this breach, to sustain an image of political authority required to satisfy the demands of the restrictive public philosophy of asylum. This goes some way to accounting for the emphasis in political rhetoric on deportation capacity, even where this was not a substantive legal fact addressed by the judicial decision. Indeed, governmental focus on the question of deportation capacity may have served to distract attention from the very direct and substantive judicial constraint of executive powers under constitutional principles from common law (*ultra vires*), rather than the HRA or

ECHR, which had become scapegoats for a string of government failures. To the extent that certain classes of deportation and removal invoking ECHR Article 3 concerns have been constrained in practice, hard political rhetoric assuring a policy commitment to remove more migrants, faster, has sought to shore up claims as to the legitimacy, if not the integrity, of asylum controls. The constraint of executive discretion to innovate restrictive policies in the Hijackers rulings also goes some way to explaining politicisation of compliance, which may potentially even have served as a means of distracting public and political attention from executive abuse of power. The government's *ad hominem* response vilified the judiciary as overstepping its authority under parliament in just the manner which the courts had found the Home Office to have done. Politicisation here speaks not to the inconvenience of legislating for executive authority to restrict rights associated with immigration status, but to the unwelcome judicial challenge to executive authority and discretion.

Politicisation of compliance as subordinate to depth of impact

By engaging with the governing ideas impacted by judicial decisions in this manner, we can more adequately appreciate that their articulation in governmental interpretations of judicial impact is an integral factor accounting for politicisation of compliance. This is reflected in my analysis by discursive responses to rulings which sought to 'amplify' the coercive effect of *Chahal* and the Hijackers jurisprudence as unwarranted constraints on the effective governance of asylum and immigration. Compliance in these cases could not be 'contained' or diminished, due to the highly publicised deficit between the practical scope for asylum control, subject to judicial scrutiny, and political commitments to deportation, removal and control. As such, the coercive effect of the rulings was amplified. In doing so, the underlying commitment of the government to removal was therefore restated, regardless of the deficiency of policy outputs.

To the extent that such hard rhetoric persists in publicly opposing judicial constraints on balancing foreign nationals' rights against political commitments to deportation and removal, it can be said that whilst the guiding public philosophy may have been challenged in practice, it has certainly not been constrained in political rhetoric. This is particularly significant in the context of the performative character of the politics

of asylum. In this context, the rhetorical image of control may matter more to political legitimacy than substantive policy outputs. Indeed, such rhetoric may serve to excuse or distract from sustained public, media and political attention to deficiencies in practice, avoiding the need to more fully justify the consistency of substantive asylum controls with the ideas which govern it – legitimisation by means of a “de-coupling” of rhetoric and practice (Brunsson, 2002). Politicisation is not therefore a factor which can explain judicial impact, but is rather a significant facet of its manifestation within the negotiation and justification of policy change and governmental control.

Indeed, politicisation appears to be a means through which governments have sought to reconcile unwelcome constraints with the continued viability of policy goals – at least at the level of rhetorical promises. Politicisation of compliance also appears to be an expression of frustration over the judicial constraint of executive discretion which has historically been central to the exercise of this control in practice. In particular, the courts have impinged upon the executive’s authority over the legitimate balance between the individual’s rights and the execution of deportation and removal policies as well as similarly coercive restrictions within the state. Ostensibly, politicisation has comprised an affirmation of executive leadership in the formation and execution of asylum policy, by opposing judicial interference. However, it also indicates that legitimisation of such control has been displaced from practical implementation into rhetorical assertions of a will to discretion, authority and capacity. Recriminatory comments implying constitutional illegitimacy of judicial interventions have served as a rhetorical shield intended to prevent debate. This has constituted a reconfiguration of discursive categories in order to legitimise asylum controls which have ultimately proven not to be lawful. Although this is the political ontology proposed by theories of securitisation of migration control (Buzan et al., 1998, pp. 24–5), such bids for discretionary power are clearly not limited to security concerns.

Source of rulings (UK and ECtHR) as subordinate to depth of impact

It is similarly apparent that the source of the judicial decisions I have considered in this thesis does not appear to have any direct significance for judicial impact on

policy framings. Rather, the source appears significant only as it intersects with the depth of impact each ruling had on the ideas governing asylum control.

Governmental discourses on compliance with the Hijackers ruling revolved around the perceived excessive constraints on asylum control imposed by the ECtHR in *Chahal*, despite the fact that the legal substance of the Hijackers case concerned common law principles on the boundaries of the executive's discretionary powers. The substance of the case is, however, consistent with the response in their shared concern over executive discretion to balance foreign nationals' rights against executive prerogatives. The constraint imposed by the *Chahal* ruling percolated into political understanding over a period in excess of a decade, as successive governments realised the extent to which practical discretion over deportation and alternative restrictions in-country were constrained by the British courts. In both cases, it was the sustained scrutiny of the municipal courts which resulted in judicial impact on the logic and philosophy governing asylum. This confounds any simple assertion that the ECtHR is uniquely significant to judicial impact.

The impact of both *Vilvarajah* and *Chahal* involved compliance with the ECtHR by means of increasing the complexity and jurisdiction of domestic judicial supervision. In both cases, it may be argued that the government perceived this increasing juridification of asylum as a means of shielding asylum control from further unwelcome interference from the ECtHR. This suggests a profound impact of the ECtHR on asylum control. Yet, the counter-balancing of compliance with enhanced executive discretion over access to appeals following *Vilvarajah* cannot be neglected for its role in diluting any liberalisation as a consequence of the ECtHR's scrutiny of asylum procedures. Following *Chahal*, later governments' will to discretion over balancing foreign nationals' rights was clearly unperturbed, leading to the *Saadi* intervention as well as to substantive restrictions on a range of ECHR rights for certain foreign nationals. The government's rhetorical invocation of the importance of the integrity of domestic authority, in particular, speaks to the programmatic logic of asylum control. This was also reflected by the UK's intervention in the Izmir declaration of the Council of Europe, denouncing any role for the ECtHR as a last court of appeal for migrants. The government's willingness to intervene in these fora

suggests that it does not regard ECtHR jurisprudence as the final word on the lawfulness of asylum controls, and does not intend to allow the Court such authority in future. This is also indicated by an acceleration of political rhetoric denouncing the political legitimacy of supranational adjudication by the court.

One may further question whether the supranational basis of the ECtHR leads to it being perceived as more significant than municipal courts by political actors. A defining feature of the long term impact of *Chahal*, was its initiation of a saga of legal risk taking, where restrictive policies in lieu of expulsion were trialled and adjusted in response to municipal judicial scrutiny. The continued exercise of an executive balancing of rights suggests ambivalence at best towards the legal principles and authority of the ECtHR expressed in *Chahal*. Nevertheless, sustained domestic judicial scrutiny in the Hijackers cases and throughout the *Chahal* ‘saga’ was precipitated by governments’ compliance with the prior constraint which *Chahal* imposed on expulsion. However, in affirming both *Chahal* and the ECHR’s constraint on executive actions, it was domestic rulings which both emphasised and extended the ECtHR’s constraint of executive discretion over asylum control.

The ECtHR has had a significant effect on reconfigurations of asylum control in the UK. However, this appears to be a function of governments’ desire to contain discretion over asylum control within the nation state by complying with the ECtHR through significant institutional reforms which empowered domestic scrutiny of controls. It has been argued that the UK’s reforms to the institutional structure of review sought to bring about “a distinct national vision in response to the imposition of supranational instruments.” (A. King, 2010) This may include the pre-emptive development of the asylum tribunal ahead of the ECtHR’s ruling in *Vilvarajah* and legislation of SIAC after *Chahal*. Both are significant manifestations of judicial impact on policy change. However, these developments can also be interpreted as attempts to contain the impact of rising domestic judicial review by redirecting litigants through tribunals. Scrutiny by the ECtHR may comprise a critical juncture, spurring on policy change. However, it may well be the case that it is simply the critical mass of judicial scrutiny at the domestic level required to activate supranational jurisdiction as a further layer of appeal that explains such pressure for

reform. Significance should not be attached to political regard for constraints originating from the ECtHR without also attending to the importance of the associated empowerment of municipal review, upon which application of the majority of European jurisprudence depends.

The British senior courts have exerted their own significant effect on asylum controls, independent of human rights principles and jurisprudence of the ECtHR. Whilst the impact of the *Medical Justice* case was largely contained within the world of the Border Agency and immigration law practitioners, it is significant that judicial constraint derived not from the ECHR or jurisprudence of the European Court, but from the British judiciary's finding of a constitutional right of access to courts for foreign nationals in common law. The capacity of the domestic courts to upset governmental policy objectives is clearly indicated by the Hijackers case, which also drew authority over the lawfulness of executive actions from common law. The ruling directly challenged Home Office authority over foreign nationals' status within the UK. However, it was the constraint imposed on deportation by *Chahal*, that political rhetoric engaged with following the ruling.

Despite political debate which is anxious of the ECtHR, sustained domestic judicial scrutiny appears to be highly significant. In this respect, I agree with Christian Joppke (2001) that municipal review can be particularly significant in accounting for 'constraint' of illiberal immigration and asylum controls. Yet, in providing an updated account of its function in the UK context, I disagree with Joppke's claim that the British municipal courts have had little impact on asylum control (1998c, 1999). This is particularly due to the British judiciary's proven ability to challenge the governing logic of executive discretion over asylum control. However, the power of much domestic review has also resided in its sustained application of European human rights principles (Jacobson, 1997), challenging the government's ability to contain the impact of rulings by building sustained pressure for policy change – as demonstrated over the course of the *Chahal* saga. This stands in distinct contrast to the handling of the *Medical Justice* ruling, which did not invoke European Rights and was effectively 'contained' despite pressure for reform from a significant body of jurisprudence. Nevertheless, primary significance should not be attached to the

rise of human rights principles, but instead to the rise of the municipal judiciary as a sustained interlocutor with the government's asylum controls – both in terms of constitutional principles and human rights law.

Why and when amplification vs containment?

I began my comparative consideration of cases by suggesting that it is necessary to consider why political actors may wilfully amplify the coercive effect of some rulings yet seek to diminish or contain the impact of others. This is to ask when and why government seeks to keep judicial impact quiet and when it makes a fuss about it. In my foregoing discussion, I suggested that divergent responses can be understood according to the level of generality of governing ideas which are interpreted within government as at stake in compliance with a ruling. On this basis, more may be said about the tension between containment and amplification as characteristic of the political negotiation of judicial impact.

As a strategy for managing the disruptive effect of judicial impact on policy governance, containment is characterised by a quiet probing of the parameters of constraint, primarily by administrative actors responsible for the justification of minor, incremental policy change by means of documents, such as reports to parliamentary committees and letters to stakeholders. Depreciation of significance is similar, but endeavours to justify more substantive changes to policy. In contrast, amplification typically involves rhetorical denunciation of constraint; it expresses a vision of judicial impact as a dialectic process, where the clash between pre-existing policy ideas and the interpretation of judicial decisions is productive of policy change. In proceeding, I will pay particular attention to containment and amplification, as contrasting responses.

By drawing insights from the *Chahal* saga of sustained review of policy alternatives to outright deportation, we may infer that amplification of the constraint imposed by *Chahal* in the *Saadi* intervention came to pass where containment of domestic judicial constraints on policy alternatives was no longer considered viable. The saga was comprised by government taking a series of legal risks: a series of policy innovations which restricted the rights and freedoms of foreign nationals were legislated under the shadow of highly probable judicial scrutiny of their lawfulness.

It appears highly likely that where opportunities for containment or legal risk taking are exhausted, unavailable, or undesirable as a means of sustaining the viability of asylum controls in the face of judicial pressure for reform, justification of the coherence of such policy goals will be sought by amplification of the coercive constraint imposed upon them by the courts. In the cases reviewed in this thesis, such amplification has occurred where the courts have succeeded in challenging the lawfulness of not only policy tools such as deportation, detention, or restrictions on rights and freedoms, but the more fundamental executive discretion over determination and restriction of such rights as constraints on asylum control.

Amplification as discursive dissonance in action

In these cases, opposition politics and media attention tended to focus on the lack of governmental control or authority. However, governments also willingly amplified the coercive impact of rulings as a strategy for dealing with policy incoherence caused by judicial decisions. Governmental actors cannot disavow the constitutional and procedural constraints imposed by the rule of law, including regard for judicial review. However, the substantive articulation of law and judicial authority in certain rulings produces some degree of discomfort in government. Such responses (ranging from 'disappointment' to recrimination) are not necessarily intended to question the legitimacy of the judiciary or of legal principles, such as human rights, *per se*, but rather the particular manner in which judicial scrutiny and its interpretation of rights are expressed as constraints on the executive or its policies. In this regard, amplification of the coercive effect of rulings seeks to both recognise that judicial decisions are lamentably binding, yet emphatically restate continued commitment to prior policy goals. As such, amplification exemplifies dissonance in action: an attempt to justify coherence between adherence to the rule of law and refusal to accept this as requiring modification of beliefs or actions. From this dissonance perspective, rhetoric serves not merely as a policy instrument, intended to reframe the continued viability of existing policy programmes. It also serves as an assertion of the political authority and legitimacy of the governmental actors responsible for the policy programme.

Theoretical contribution of the dissonance approach to judicial impact

The tension between judicial and political ideas as to the legitimate governance of asylum has been one of the central concerns of this thesis. Indeed, I believe that attention to this dynamic is fundamental to explaining how government responds to the courts to not only mediate judicial impact on policy change but also to legitimate political authority in the face of legal challenges. Engagement with governmental responses to the courts as a manifestation of discursive dissonance informed the basis of my analytical typologies, by recourse to which I have sought to account for varying governmental responses to the courts. As such, I held that it is the particular manner in which governmental actors interpreted judicial decisions as constraints on policy ideas that explains governmental responses. Governmental actors are not intrinsically opposed to judicial scrutiny, the rule of law or human rights, just its occasional inconvenience to the realisation of highly symbolic political commitments. Yet these dual concerns – over particular policy objectives as well as the rule of law – are not always compatible when faced with an adverse judicial decision. Unease is caused by dissonance, which is manifest in discursive processes of interpretation and justification of judicial impact and policy change intended to reconcile compliance with pre-existing ideas about the governance of asylum.

Adoption of this approach has allowed for investigation of the process and reasoning behind the otherwise paradoxical tension between parallel legal-liberalisation of asylum procedures, yet increasingly restrictive and coercive policies for asylum control (Gibney & Hansen, 2003). Dominant theories of the impact of law on politics have missed this correlative politicisation of legal constraint. Processes through which political actors reconcile unwelcome judicial power within policy governance should be a necessary consideration when considering the possibilities of a judicialization of politics (Hirschl, 2008b; Stone Sweet, 2000). My attention to judicial impact as a function of political interpretation and reconciliation of dissonance in policy discourses shows that judicialization of asylum control and politicisation of both asylum and judicial scrutiny are not inconsistent or incompatible. They are two sides of the same coin. Tensions between these outcomes have been shown to be the subject of governmental efforts to either amplify or contain the effects of judicial decisions on governing ideas.

Correspondence between amplification and containment

Although containment and amplification are both manifestations of this process of judicial impact in terms of governmental efforts to reconcile dissonance, amplification has proven to be particularly dominant in political rhetoric. Moreover, my analysis indicates that the amplification of constraint in such public statements often fails to reflect substantive legal-procedural constraints imposed on the policies and practices of asylum control.

Although a radically different strategy for reconciling the disruptive effects of judicial impact on policy, containment of compliance is the natural administrative product and parallel of this rhetorical politics. It is an exercise of the discretion which such rhetorical politics has sought to affirm and legitimate. It allows for management of pressure for change, and limits the need to send disruptive legal signals further up the political ladder for consideration of compliance by the cabinet or in parliament. At root, this comprises a rejection of new interpretive frames from outside the administration of asylum control (DiMaggio & Powell, 1983). Containment and amplification therefore comprise complementary strategies for sustaining the resilience of policy goals in the face of judicial pressure.

By engaging with containment and amplification as dissonance strategies, it is possible to understand how depth of impact can account for variation in judicial impact. The more fundamental the ideas governing asylum control that are challenged by compliance with a judicial decision, the more extensive will be the role of discursive dissonance in governmental efforts to reconcile the coherence of policy goals and authority of political actors responsible for them. Conflicting judicial and governmental accounts of asylum control must be reconciled to prevent dissonance – the appearance of inconsistency between beliefs and actions. In this respect, whilst I initially posited politicisation of compliance as a potential intervening factor in determining the impact of court rulings on legitimation of policy change, it can also be understood as an indicator of judicial impact upon these more fundamental governing ideas. It is expressive of the discursive strategy of amplification of impact pursued in seeking to reconcile dissonance. In such cases, policy incoherence is blamed on the courts. Ran Hirschl (2008a) has hypothesised

that political actors are increasingly willing to blame courts for making unwelcome decisions, so as to avoid the electoral consequences of accepting governmental responsibility for unpopular policy choices. Yet, the phenomenon I am describing here is markedly different. Amplification of the courts' coercive effect upon the governance of asylum comprises a bid for more political authority and discretion to make policy choices, not less.

The administration of asylum control policies has been 'juridified' (Blichner & Molander, 2008) in so much as greater legal constraints have been imposed on their function. This is particularly manifest in material policy changes which recognised and enhanced judicial scrutiny in *Vilvarajah*, *Chahal*, and *Medical Justice*. It is also apparent at the level of governmental discourse which recognised judicial constraints, even if indicating they were unwelcome. However, this has not conferred an associated 'judicialization' of justificatory political discourse in terms of referents borrowed from the courts, in the sense that Alec Stone Sweet (2000) has suggested may serve strategic political goals of legitimating policies under conditions of extensive judicial scrutiny. Whilst judicial power has been recognised, there has been a political contestation over the ceding of final authority to the courts. Where faced with a judicial decision which challenged a particular policy or administrative action, politicians and bureaucrats have behaved as we might expect – seeking to justify their authority and capacity to govern effectively. In the cases I have considered, this has comprised a discourse of fundamental political discretion and authority, even where ideas concerning rights based constraints and judicial power were invoked (for example, in *Saadi*). As such, to the extent that judicial and legal norms and discourse have been co-opted in government discourse and the courts have been successful in 'reining in' certain illiberal aspects of the governance of asylum, this cannot be regarded as a judicialization of politics.

The distinctive role of rhetoric in performing asylum control

Having outlined the tensions between and coherence of amplification and containment as complementary governmental strategies for dealing with judicial impact, I now wish to give further consideration to the striking divergence between

internal governmental discourse and political rhetoric which has been indicated in my case studies.

Whereas there appears to have long been an acceptance within government bureaucracies that judicial review must be internalised as a consideration in policy making (Treasury Solicitors, 2006), political rhetoric has been markedly intransigent in rejecting judicial decisions as unwelcome and even invalid sources for government policy. This rhetoric has sought to sustain the integrity of the ideas governing asylum control in the face of judicial challenges. In this respect, legitimisation of the government's capacity to implement restrictive controls in line with the governing philosophy of asylum control has often been displaced from practical implementation into the area of political rhetoric.

Judicial oversight has dispersed authority for the administration of asylum and removal decisions from what was once a near exclusive preserve of the Home Secretary's discretion. The result has been a hollowing out of executive discretion over deportations and removals, as well as constraint of the freestanding authority of administrative actions, policy instructions, and even legislative provisions, in the face of judicial scrutiny of their consistency with the requirements of procedural justice and human rights principles. The vacuum left at the core of executive power to control asylum and migration through expulsion, is perhaps being filled by hard rhetoric. Such rhetoric is performative in the sense that discourse is constitutive of problems, interventions and intervening actors, but also in the sense that the very rhetorical act itself performs a function – it bids for authority in an attempt to convince its audience of the competence and capacity of the speaker. Such rhetoric may therefore be understood as seeking to fill the authority gap left by the enduring inability of successive governments to confidently ensure realisation of the intended outcome of executive orders and even policies on deportation and removal, in the face of their scrutiny by the judiciary.

The apparent sincerity of consistent pledges to control asylum and expulsions is of at least as much significance as manifest failures to follow through in practice. For example, Blair's "tipping point target" (Blair, 2004) of removing a few tens of thousands of failed applicants for asylum was of great symbolic significance. On one

level, this comprised a genuine effort to improve ‘outputs’ in the governance of asylum, arguably making it an exceptional moment in the politics of immigration and asylum in the UK (Boswell, 2014). However, this measure was also clearly intended to legitimate political authority over asylum in the face of enduring scandals over its inefficient administration giving rise to several hundreds of thousands of cases in which the Border Agency had failed to execute removal proceedings (Home Affairs Committee, 2011). Political rhetoric has served the ends of symbolic politics. It has been largely detached from other actions taken in response to the courts, in serving an “ever present underlying objective” of life in government: “to reassure the populace and reassert control... to market its competence; to manage the appearance of rule.” (Rhodes, 2011, p. 276) However, for asylum control, this has not comprised a willingness to negotiate policies with stakeholders outside of the executive government (cf. Rhodes, 1997). In particular, the input of the judiciary has been minimised. Rather, rhetoric has served as an attempt to perform the authority of the state.

Consideration of the government’s response to the courts in this thesis suggests that the politics of asylum control have been displaced into politics as performance of the authoritative governance of asylum (Hajer, 2009). Governmental rhetoric has sought to displace attention from capacity to realise substantive policy outputs into a rhetorical image, or spectacle, of political will to control. This rhetorical performance seeks to manage public and political expectations about future policy trajectories. It is fundamentally a bid for acceptance of the sincerity of governmental actors in order to legitimate enhancement of their discretion. As such, it emphasises emotions, beliefs and intentions. This is not a matter of political performance in terms of service delivery or efficient realisation of policy outcomes. It is a politics of performance in terms of appearances; the objective is to appear in control. In this function of government, it is more important to appear credible and trustworthy than to claim legal legitimacy or efficacy. In this regard, asylum and immigration are not truly ‘valence’ issues, as has been claimed of British politics in the late 2000s (H. D. Clarke, Sanders, Stewart, & Whiteley, 2009). No government has realistically been able to legitimate itself in terms of actual policy outputs. Even the increase in removals in response to Blair’s target setting exercise did little to convince the public

that the government was in control of asylum (Spencer, 2007, p. 360) or to address seemingly insurmountable backlogs. It was by rhetorical gestures of sincerity that public confidence in political capacity was solicited, rather than by demonstrating actual competence.

Government ministers and the Home Office have sought to legitimate discretionary power over asylum according to a public philosophy of restrictive controls, which persists, even if it is irrational or implausible in light of manifest failures of political control in practice, over not only recent years, but decades (Boswell, 2007a, pp. 603–4; Brunsson, 1985). Such rhetoric is an expression of the identity of the polity, in terms of what it values (Yanow, 1996, p. 22), validating beliefs about the importance of asylum control, and therefore the status attached to government in this role. Whilst a network of documents within government have guided and constituted stable conceptual categories of meaning and political order as part of processes of policy change, political rhetoric has served symbolic politics, managing the threat posed to the stability, coherence and acceptance of government by events such as judicial review. In many cases, governmental documents may be read as retrospective exercises in justification of the substantive trajectories of policies implied by such a politics of spectacle.

In cases of amplification of judicial impact, leadership has been positioned by opposition to a judicial ‘enemy’ as justification for enhanced political authority (Edelman, 1988, p. 88). Just as the myth of rationality is central to viable organisational function (Putnam & Mumby, 1993), the mythology of control is central to the legitimacy of the state as arbiter of asylum. This rhetorical legitimation seeks to cope with judicial scrutiny by seeking to maintain and coordinate an appearance of rule by opposition. It does not strategically plan rational policy responses to social and political problems. Arguably, as a public reification of the symbolic identity of the state, this phenomenon may serve as a mask which obscures scrutiny of underlying political practices (Abrams, 2006, pp. 125–6; Brunsson, 2002) which have failed to control asylum. In particular, we may note rising political rhetoric on the legitimate role of the judiciary and supranational human rights has

displaced substantive concerns over lawful and efficacious government into a symbolic constitutional question which is open ended.

Performance of authority may account for stasis of ideas governing asylum

Political rhetoric on asylum control has been remarkably consistent over a period of twenty-five to thirty years. Similarly, policies have consistently been developed in order to sustain the underlying public philosophy and programmatic logic of asylum control. Governments have been uniformly restrictive in their interpretation of asylum, and consistently declared a vision to enact firm controls. Speaking of similar tendencies in law and order, Loic Wacquant has characterised performance of authoritative governance as a pornographic spectacle which tends towards predictable re-enactment:

rampant gesticulation over law and order is conceived and carried out not so much for its own sake as *for the express purpose of being exhibited and seen*, scrutinised, ogled: the absolute priority is to put on a spectacle, in the literal sense of the term. For this, words and deeds proclaiming to fight... disorders must be methodically orchestrated, exaggerated, dramatized, even ritualized. This explains why, much like the staged carnal entanglements that fill pornographic movies, they are extraordinarily repetitive, mechanical, uniform, and therefore eminently predictable. (Wacquant, 2009, pp. xi–xii, emphasis in original)

Although I have not set out to study it as such, it is plausible to conceive of the political rhetoric of asylum control in the manner Wacquant describes: a repetitive and ritualised performance of the spectacle of authoritative governance; its predictable words and deeds proclaim the will to fight; they exaggerate and fetishize asylum as the object of necessary governmental intervention to enforce its just administration. Such ritual performance of governmental authority may explain why so little has changed in the fundamental trajectory of restrictive asylum controls and its illiberal political framing, despite the incorporation of a significant, conflicting judicial perspective within its governance.

On the possible limits of this symbolic politics

The scope for political actors to pursue symbolic politics may be limited to policy domains where governments are less likely to be held to account in terms of visible indicators or observable failures to deliver on promises (Boswell, 2012). Yet, the

examples of judicial impact considered in this thesis have indicated that even in the case of manifest failures by successive governments to demonstrate control over asylum control and removals, the role of political legitimisation through symbolic rhetoric has been enhanced, not diminished. Nevertheless, the divergence of the rhetoric and practice of asylum presents a serious problem for government, and its reconciliation may not be possible.

Governments have tended to pursue adjustments to existing policies by taking legal risks which seek to minimise judicial impact (containing compliance). I have suggested that this strategy for maintaining maximal executive discretion is a complement to political rhetoric which promises state capacity. Yet, in practice, this capacity and authority have become increasingly hollowed out. Indeed symbolic rhetoric may explain why asylum has become so politicised. In turn, legal risk taking may explain why the UK government is subject to such frequent and extensive judicial scrutiny of the lawfulness of its administration and policies in asylum control. In practice, some significant governing activity has been dispersed to the municipal and supranational courts.

A similar dispersal of political power has been observed as a consequence of migration of decision making powers due to Europeanisation. This has been considered more disruptive to 'simple' polities such as the UK, which are used to a tradition of highly concentrated centralised authority. We may note that a similar such tradition in asylum control has been challenged by the courts. The observation of Europeanists here may be insightful. Vivien Schmidt (2006) has argued that states have faced 'problems' with dispersal of power not simply where governing practices have changed, but where governing ideas and discourse have not – in other words, where the ideas and discourse governing a policy regime have diverged from the reality of its governance. Centralised political discretion under a crown prerogative over asylum control has certainly been challenged by the rise of human rights and judicial oversight as constraints on its execution. Yet, despite the capacity of the UK's strong central government to communicate an altered vision of the ideas which increasingly govern asylum as a function of rights and constitutional principles of procedural justice under judicial scrutiny, successive regimes have chosen not to.

The practical administration of asylum has changed over the past thirty years into an institution which is subject to a uniquely high degree of judicial oversight. Yet governmental discourse communicating policies for asylum to the public has not changed to reflect this. This rhetoric reflects a retrograde desire to hold onto the relics of a traditional political discretion and crown prerogative which are increasingly being eroded in the courts. This rhetoric does not seem sustainable, due to its increasing divergence from the practice of asylum control under judicial scrutiny. Arguably, the recriminatory tone of rhetoric on the role of the courts reflects this tension.

Conclusion

Attention to the processes of interpretation and justification through which judicial impact is exercised within governance of asylum policy provides valuable insights into policy making as a process which is contingent, recursive, and a hybrid of law and politics. Judicial rulings clearly require political implementation, and policy making clearly includes input from the courts. This realisation engenders two significant advances to our understanding of not only asylum control measures, but also the constitutional relationship between judicial and political branches of government in this area: firstly, that judicial power has a constitutive influence over and within asylum policy and its associated politics; secondly, that despite frequent academic assumptions that the politics of asylum is characterised by increasing exercise of extra-legal discretion to diminish its protections for refugees (as noted in my introduction), I have identified evidence of extensive political articulation and justification of asylum controls within and according to a constraining legal framework.

Nevertheless, whilst it is indeed the case that governance of asylum in the UK has laboured under a judicial shadow (cf. Joppke, 1999), this has not precluded legal risk taking in asylum control and efforts to ‘contain’ the impact of individual rulings (Conant, 2002). The empirical detail of judicial impact on policy change uncovered in my case studies suggests that the stability and legitimacy of government in this area are highly tenuous and often contingent upon minor, incremental shifts in policy structure. Also notable, is the apparent disjuncture between the rhetoric and practice

of asylum control and deportation. Despite significant and variegated jurisprudence imposing constraints on deportation and removal, in line with constitutional principles of procedural justice and provisions derived from the *European Convention on Human Rights*, this constraint is not reflected in political rhetoric promising authoritative control over asylum, deportation and removal. This can be explained by recourse to my typological analyses. Where it has not been possible to contain judicial impact on the governing logic and philosophy of asylum control, occasionally emotive and recriminatory political rhetoric has sought to shore up the plausibility of not only political commitments to asylum control, but also political authority over them. Authoritative governance of asylum has increasingly come to be performed by means of political rhetoric which seeks to uphold credible intentions to control, as opposed to substantive control over asylum and deportation in practice. This explains the apparent empirical paradox which first motivated this research: that of hard rhetoric against judicial decisions, yet compliance in practice. Rhetoric has served both to make up for an apparent lack of governmental capacity due to growing constraints, and also to legitimate greater discretion to exercise authoritative controls.

By identifying the role of governing ideas 'at stake' in governmental framings of judicial impact, I have argued that it is possible to account for varying political responses to the courts, including politicisation of compliance. Where impact is framed as more general, politicisation of compliance follows. In contrast, the source of the ruling appears to have no independent significance to responses, although the domestic courts have had a particularly important role in sustaining judicial scrutiny of asylum control. As such, judicial impact on the governing ideas of a policy domain is presented as a vital consideration for future research.

9. Conclusion

This thesis has argued that judicial impact on policy change is best understood according to how the problem of compliance and reform are framed within government. I sought to identify and understand factors which shape governmental attitudes towards compliance with the courts in asylum control. Particular emphasis was placed on the importance of how key governmental actors perceive the ideas governing asylum control to be impacted by judicial decisions; whether challenging or constraining the viability of a policy instrument, or more fundamentally, the governing logic or underlying public philosophy of asylum control. In this manner, I have argued that judicial impact on asylum control policy has been discernible in the UK over the past twenty-five years. The courts have imposed significant procedural and rights based requirements upon government in this area. However, I have also shown that governments have exercised significant discretion in their interpretation and implementation of judicial rulings, resulting in variation in policy change and its framing. An adequate understanding of the impact of judicial decisions therefore requires attention to how legal requirements are reconciled with broader policy objectives and how this relationship develops over time. Judicial impact is not a definitive phenomenon, but a fluid political construct which may change over time, subject to developments in the politics and administration of asylum control.

My research analysed a period of British political history which involved particular controversy over the role of the judiciary in reviewing immigration, asylum and national security controls. I have challenged assumptions that the politics of asylum control during this period were primarily motivated by concerns over national security. Rather, underlying symbolic concerns over sovereign capacity to control inclusion and exclusion of foreign nationals and associated governing ideas explain much about the UK's recent and historic asylum control policies and their political framing. Although political debate in the UK is still concerned with questions of rights, judicial review and expulsion, there has been a marked shift in recent years away from asylum control towards broader concerns over net migration. The politics of judicial review have also shifted - following not only governmental priorities in immigration control, but also sustained controversy over the future of domestic and

European human rights in British public life. In particular, the role of rights as guarantors of fair and just treatment of not only foreign nationals, but as general constraints on government, appears very much in question. With these concerns in mind, this concluding chapter builds upon my previous consideration of judicial impact on asylum control policy to offer some brief reflections on what my research offers to future analysis of judicial impact on politics and policy change. Firstly, I discuss implications for understanding of judicial impact in the UK. I then tentatively offer limited normative reflections based on the findings of my research. Finally, I draw out broader implications for future research.

Judicial impact in the UK

My focus on the single case of the UK was informed by the need for contextually specific approaches to the study of policy change (as discussed in chapters 2 – 4). This necessarily limits the generalizability of my conclusions. Bounded insights may, however, be drawn from this research. I have endeavoured to elicit comparative tensions and consistencies which characterised the politics and administration of asylum control in the context of rising judicial scrutiny since its inception as a distinct institution of government in the early 1990s. This has allowed for insights to be drawn into governance of this politically controversial policy domain which move beyond a reductive dichotomy between exceptional political discretion on the one hand, and its constraint under a judicial shadow, on the other. I hope that this will facilitate a less partisan approach to analysis of judicial impact, which is less inclined to cast either the executive or judiciary as to blame for retrograde politics. This tendency is unfortunately somewhat characteristic of some debates over the normative desirability of judicial power – or political constitutionalism versus legal constitutionalism (Bellamy, 2007).

My central argument has been that judicial impact is fundamentally political. Even in cases which demonstrate a strong judicial assertion of authority over the legitimacy of policies and their implementation, subsequent political interpretation and enactment have imposed variation in the outcomes of judicial impact. In my comparative analysis, I have demonstrated that such judicial impact can be nuanced, variable and unstable over time. More than this, certain key themes have emerged

from my analysis. In particular, tensions between governmental responses which contain the impact of unwelcome rulings and those which amplify the coercive effect of rulings.

The current politics of judicial review

Governmental responses which amplify the perceived coercive effect of judicial decisions are certainly not unique to the governance of asylum control. Indeed, they are a highly visible attribute of a rising brand of visceral and emotive ‘gesture politics,’ which has been highly prominent in government discourse on human rights and judicial scrutiny in the UK in recent years. The current Prime Minister has variously declared himself to be “uneasy”, “appalled” and “physically sick” in response to recent unwelcome rulings of the British judiciary (in BBC News Online, 2011; HC Deb (16 Feb) 2011, c.955; Kirkup, 2011). The Conservative-led coalition’s plans, since 2012, to implement significant cuts to both the scope of judicial review and opportunities to access it are also highly significant. In my introduction to the thesis, I contested the accuracy of much recent commentary on the seemingly low success rate and significance of applications for judicial review. Yet this does not detract from governmental claims that the majority of a growing volume of applications for review are “ill-conceived”, “have no chances of success” and impose unnecessary costs and delays upon government (PM and Justice Secretary, in Bowcott, 2012). In his argument for “cutting back on judicial reviews”, David Cameron invoked the rhetorical image of a “revolution” in government during World War Two (Cameron, 2012b). His so called “war” on judicial review was subsequently reviled by legal practitioners (Jowell, 2012; Wagner, 2012). Yet, under parliamentary sovereignty, there is nothing unlawful about the government seeking approval from the legislature to curb judicial supervision by “clipping the courts’ wings” (Elliot, 2012).

In light of this development of an increasingly oppositional governmental attitude towards procedural and human rights and their application by the judiciary, I will now tentatively offer some important normative reflections arising from the findings of this thesis. I will then return to the matter of how my research may inform future research.

Normative reflections on the politics of judicial impact and asylum control

It would perhaps be irresponsible of me to have argued at length in this thesis that judicial decisions' meaning and impact on government are open to interpretation without offering some suggestions as to the normative implications of this for governance of asylum and the rule of law. I have endeavoured to have regard for the right of the executive in the constitution, and of the state in international law, to control borders and determine whom should be granted asylum, international protection, or Leave to Remain. As noted, the executive has the right to seek parliamentary approval for restrictions on the effect of not only particular judicial decisions, but even the jurisdiction of the courts. However, it cannot be ignored that a startling extent of the administrative actions and policy measures reviewed by the courts and considered in this thesis were not only unlawful, but involved gross abuse of power by the Home Office. This is not just my judgement, but that of the courts.

Reflections on the governance of asylum in the UK

Asylum control stands as a powerful example of how successive governments have treated the most disadvantaged individuals under their jurisdiction. Over the past thirty years, British governments have subordinated the welfare, human rights, and even prospects of survival, of many such foreign nationals. Moreover, analysis of the reasoning and justifications for such policies and actions suggests that they were pursued for reasons of political expediency and often motivated more by concerns over electoral or organisational legitimacy than legitimate or lawful asylum control.

My findings on the practice and governing ideas of asylum control also suggest the importance of a reconfiguration of powers in its governance. The Home Office, UKBA and its predecessors have shown themselves to be enduringly inefficient, ineffective and unfair in their administration of asylum controls. This is reflected statistically, in the high proportion of initial decisions overturned; in the content of particular judicial decisions; and by the government's response to many judicial decisions. An apparent lack of control over asylum has characterised successive governments' efforts spanning at least thirty years: a lack of control, both in terms of failures to realise stated objectives on expediting removals, and in terms of

procedural fairness and lawful administration. During this time, asylum and immigration more broadly have developed into a highly symbolic issue of state authority and capacity to govern. This has been to the detriment of both effective asylum control, and the welfare of a great number of refugees. In my analysis of judicial impact on asylum control, I have argued that governmental desires to demonstrate control have often motivated more restrictive policies and minimalist application of legal principles. It may seem extreme to suggest that governments appear to have been driven by an apparent fear of losing control of powers over foreign nationals entirely. Yet, in recent years, more extensive lack of effective control over the processing and treatment of asylum seekers in Greece led to a loss of international confidence in state capacity and to the government conceding authority over reforms to the policy regime to academics, NGOs and the UNHCR (UNHCR, 2009). It may be said that it is just such a transfer of authority over governance of asylum to the courts, which successive governments have wrestled against in the UK over the past twenty-five years.

Fundamentally, asylum control should be a matter of humanitarian protection, and therefore inclusive refugee policies. Restrictions on the rights of asylum seekers should be a last resort, and should not detract from respect for the principle of humanitarianism (Gibney, 2004, p. 254). Removal of Home Office responsibility for asylum control may bring an end to the unfortunate structural conflation between immigration and asylum, and may facilitate changes to its discursive associations in the political, public and media imagination. To this end, administration of asylum may be better managed by an agency independent of government, which represents not only governmental interests, but also views of the UNHCR, Refugee Council, and judiciary.

Reflections on the role of constitutional review

A striking feature of my case studies is the importance of sustained judicial scrutiny to reversing egregiously unlawful decisions and effecting (albeit limited) policy change. In contrast, governmental responses to reports of the JCHR on compliance with human rights principles and judicial decisions appear to float between dismissal and lip-service. On the basis of my research into the construction and justification of

asylum control policies, the importance of enhanced constitutional review of the lawfulness of government policies must be emphasised. This would be best served by means of constitutional preview. Otherwise, retroactive scrutiny of government actions' lawfulness risks remedying bad policy or maladministration only after irreversible harm has been done to individuals. To the extent that profound political opposition exists to enhancing the role of the courts in this regard, pre-legislative abstract constitutional preview could be enacted within parliament, as in Sweden and Finland, for example (Bull, 2011; Husa, 2011). This would, however, require strong powers beyond those currently held by the JCHR, to either quash policy measures or to require a parliamentary vote on their continued effect.

Future directions for research

As indicated above, the importance of further study of the courts' impact on government is only overshadowed by the greater need for investigation of the politicisation of law and judicial scrutiny which has arisen in response. Whilst the generalizability of my findings is necessarily limited, they suggest the need for further research which compares the causes of divergent responses to the courts in government along the axis of containment and amplification. To this end, I believe that my approach based in interpretive policy analysis of the practice of discursive problematisation in government offers much potential as a method.

Methodological contributions

Governmental actors are often unwilling or indeed not permitted to talk about the role of legal interpretation and advice in their deliberations on policy change. Moreover, I have argued that political responses to the courts may be fundamentally subject to a form of rhetorical dissonance, which suggests that we cannot ignore the role of interpretation in government in a vain hope to ascertain an empirical truth about judicial impact. As such, my deconstructive approach to the subjective construction and justification of policy meaning in government offers much potential as both a feasible and instructive means of engaging with this problem. In the case of research on less politically controversial policy areas for which governmental bureaucracies are more open to academic collaboration, a greater diversity of documentary sources may be obtainable as indicators of the drivers of policy change

and compliance with courts. In such cases, my approach to documents and rhetoric may also be enhanced by interview accounts. These would be no less amenable to analysis of discursive problematisation. Where such enhanced access to governmental sources is possible, it may be desirable to pursue a stronger comparative assessment of the role and significance of differing sources than was possible in this thesis.

I have also endeavoured to show the importance of going beyond mere recording of material changes to the structure of policies (such as legislation and operational guidelines) to interrogate how these have been articulated, and ascribed significance by discursive sources in government. Attention to the framing of policy change in this manner offers much potential for contribution to broader literature on the role of interpretation in government and of ideas in policy change. I present this approach as a plausible means of accounting for varying responses to the courts. In particular, my use of a modified version of Vivien Schmidt's (2008) typology of governing ideas which underpin a policy regime may comprise an effective means of interrogating and explaining variation in judicial impact on government. The contextual specificity of such a tool as an expression of a particular policy domain does, however, limit its practical use to qualitatively detailed studies such as employed in this thesis.

Further empirical investigation

Interpretive analysis of policy and politics

In chapter 8, I offered reflections on how my research has advanced theoretical analysis of judicial impact. Here, I would like to offer some reflections on how my research may inform further empirical investigations. By attending to judicial impact as the product of political interpretations of meaning in action, my research contributes to existing debates in interpretive policy analysis, particularly on policy change as a discursive problem (Baachi, 2009; Hajer & Laws, 2008; Schmidt, 2008; D. Stone, 2002; Verloo & Lombardo, 2007; Verloo, 2005; Wagenaar, 2011; Zittoun, 2009). This has been made possible by use of critical framing analysis to look at policy change as a process which constructs problems by defining them as objects for political intervention.

In particular, I agree with Maarten Hajer (2009) on the importance of political analysis which attends to government as an exercise in legitimation through performance of symbolic authority. This requires that we move beyond attempts to measure the substantive outputs of policy as a criterion for evaluation of the character or efficacy of policy processes and governmental behaviour. Symbolic politics may be at least as important as material actions to policy processes and their communication and coordination by government. The scope for political actors to pursue symbolic politics may be limited to policy domains where governments are less likely to be held to account in terms of visible indicators or observable failures to deliver on promises (Boswell, 2012). Yet, my research on judicial impact has indicated that even in the case of manifest failures by successive governments to demonstrate control over asylum control and removals, the role of political legitimation through symbolic rhetoric has been enhanced, not diminished. This phenomenon deserves further investigation, preferably in a comparative context which may facilitate analysis of potentially varying political interpretations and justifications of factors motivating symbolic politics as opposed to outcome oriented government. My observation of tensions between amplification and containment of judicial impact is one example of such analysis.

Migration studies on judicial impact

By way of contribution to debates in migration studies on whether courts constrain illiberal policies, I have offered a detailed account of how and why governments respond to judicial decisions which may be regarded as constraints. I have argued for the necessity of such an account of how and why governments implement judicial decisions as part of immigration and asylum control. Attending to political context and policy processes is certainly a promising avenue for explaining otherwise paradoxical tendencies in government: for instance, the gap between promised controls and implementation; or the tension between liberal judicial principles and illiberal asylum controls. Whilst my investigation of the UK case study suggests the need to update previous assessments of the extent of judicial impact on immigration and asylum control – if for no other reason than their age – this task would not be simple if it were to be applied to multiple jurisdictions. This is due to the importance of contextually specific sensitivity to the historical, political and organisational imperatives which govern policy processes and their political framing. Nevertheless, I have suggested that further research should attend more to such variations within government, than to variation in the constitutional powers of differing polities as a predictor of judicial impact on immigration control.

Conclusion

It is by no means possible to declare that there has been a straightforward judicial constraint of illiberal asylum controls in the UK. Nor would it be accurate to suggest that governments have succeeded in freeing themselves from the constraint of legal principles derived from judicial review. Yet, there is clear evidence of a complex and significant judicial impact on changes to asylum control policy and its governmental framing. Even though brokered by government, much of this impact has been politically unwelcome. My overview of governmental responses to judicial scrutiny of asylum controls suggests that despite consistent political attempts to decrease the courts' jurisdiction and influence, it is likely to continue to grow. Meanwhile, inflammatory tensions between governmental discretion and judicial scrutiny have become a matter of public interest. I began this thesis by observing concerns that such conflict may comprise “a potentially fatal fault line in the constitution” (Cavendish, 2006, p. 21). Growing political animosity towards the judiciary in the

UK and in Strasbourg, and their application of not only human rights principles, but UK common law, suggests an impending critical juncture in the role of law in government. One of the central messages of this thesis is that the causes of this constitutional conflict can be attributed not only to the role of rights and specific policy issues, such as asylum control, but to the fundamental challenge to authoritative governance which the courts represent. This symbolic performance of government under a judicial shadow and its politicisation of law are therefore pressing concerns for further enquiry.

Appendix 1: Tables of statistics on asylum, deportation and judicial review

Figure 1: Applications and decisions on international protection for the UK, 1984 - 2013.

Year	Total applications	% received in-country	Total initial decisions	Total refusals (No status awarded)	% decisions refusals	% Grants under IRL *	Total withdrawals
1984	2,905	..	1,431	347	24%	42%	175
1985	4,389	..	2,635	502	19%	27%	201
1986	4,266	..	2,983	533	18%	14%	164
1987	4,256	..	2,432	635	26%	15%	200
1988	3,998	..	2,702	496	18%	28%	281
1989	11,640	..	6,955	890	13%	36%	350
1990	26,205	..	4,025	705	18%	28%	370
1991	44,840	..	6,075	3,380	56%	19%	745
1992	24,605	..	34,900	18,465	53%	7%	1,540
1993	22,370	..	23,405	10,690	46%	13%	1,925
1994	32,831	..	20,988	16,501	79%	18%	2,391
1995	43,963	..	27,006	21,301	79%	23%	2,564
1996	29,642	..	38,962	31,669	81%	31%	2,926
1997	32,502	..	36,044	28,944	80%	56%	2,065
1998	46,014	..	31,571	22,316	71%	58%	1,469
1999	71,158	..	33,722	11,024	33%	76%	732
2000	80,315	..	109,206	75,679	69%	47%	1,721
2001	71,027	65%	120,949	89,308	74%	36%	2,399
2002	84,132	68%	83,540	55,132	66%	29%	1,492
2003	49,407	72%	64,941	53,867	83%	35%	1,837
2004	33,960	78%	46,021	40,463	88%	28%	2,204
2005	25,712	84%	27,393	22,654	83%	41%	2,546
2006	23,608	85%	20,930	16,458	79%	48%	1,779
2007	23,431	84%	21,775	16,032	74%	62%	1,230
2008	25,932	90%	19,398	13,505	70%	63%	2,742
2009	24,487	92%	24,287	17,545	72%	62%	3,345
2010	17,916	90%	20,261	15,066	74%	67%	2,891
2011	19,865	88%	17,380	11,731	67%	76%	2,419
2012	21,843	88%	16,774	10,715	64%	85%	2,142
2013	23,507	88%	17,647	11,105	63%	88%	2,411

.. Not available

* Protection under the *Refugee Convention*, as opposed to other statuses.

Source: Home Office Immigration Statistics (2014).

Figure 2: Removal statistics for the UK, 2004 - 2013.

Year	Potential removals (asylum)*	Total removals & departures (asylum)	Enforced removals (asylum)	Voluntary departures (asylum)	% Potential removals executed (asylum)	% Potential forcible removals executed (asylum)**	Enforced removals (non-asylum immigration)
2004	42,667	14,913	11,743	3,170	35%	30%	9,682
2005	25,200	15,685	11,381	4,304	62%	54%	9,427
2006	18,237	18,280	10,881	7,399	100%	100%	8,491
2007	17,262	13,705	8,047	5,658	79%	69%	9,723
2008	16,247	12,874	7,169	5,705	79%	68%	10,070
2009	20,890	11,636	6,432	5,204	56%	41%	8,820
2010	17,957	10,394	6,174	4,220	58%	45%	8,680
2011	14,150	10,077	5,774	4,303	71%	59%	9,289
2012	12,857	9,031	5,068	3,963	70%	57%	9,579
2013	13,516	8,660	4,671	3,989	64%	49%	8,380

*Total refusals plus total withdrawals (see figure 1).

** Based on potential removals (asylum) minus voluntary departures (asylum).

Source: Home Office Immigration Statistics (2014).

Figure 3: Proportion of immigration / asylum related applications to the High Court

Year	Total Applications	Immigration Applications	% Immigration
1987	1529	697	46%
1988	1229	359	29%
1989	1580	419	27%
1990	2129	569	27%
1991	2089	506	24%
1992	2439	544	22%
1993	2886	668	23%
1994	3208	935	29%
1995	3604	1220	34%
1996	3901	1748	45%
1997	3848	1929	50%
1998	4539	2518	55%
1999	4959	2769	56%
2000	4247	2120	50%
2001	4752	2421	51%
2002	5377	3286	61%
2003	5949	3848	65%
2004	4208	2221	53%
2005	5382	3149	59%
2006	6485	4084	63%
2007	6690	4344	65%
2008	7169	4643	65%
2009	9097	6660	73%
2010	10548	8122	77%
2011	11200	8649	77%

Source: (Hood & Dixon, 2012b)

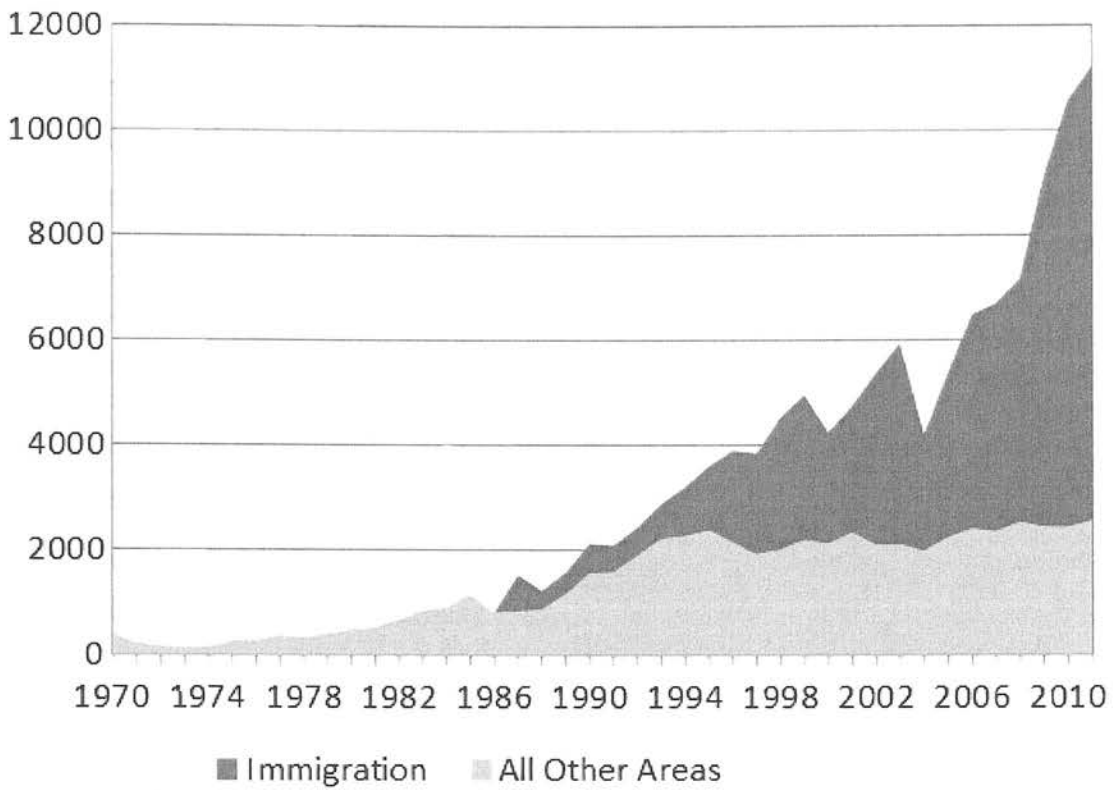
Figure 4: Success rate of judicial review applications to the High Court

Area	Year	Apps received	Apps granted	Apps refused	Apps dropped or conceded or settled	% Apps			Decision: review allowed by court	% Review Allowed*
						% Apps Granted	% Apps Refused	% Apps Dropped or Settled		
Immigration / Asylum	2006	4,084	278	1,743	2,063	7%	43%	51%	38	14%
Total	2006	6,458	752	2,638	3,068	12%	41%	48%	131	17%
Immigration / Asylum	2007	4,344	310	2,306	1,728	7%	53%	40%	20	6%
Total	2007	6,690	847	3,269	2,574	13%	49%	38%	162	19%
Immigration / Asylum	2008	4,643	353	2,677	1,613	8%	58%	35%	46	13%
Total	2008	7,169	914	3,886	2,369	13%	54%	33%	199	22%
Immigration / Asylum	2009	6,660	344	2,501	3,815	5%	38%	57%	52	15%
Total	2009	9,097	862	3,610	4,625	9%	40%	51%	192	22%
Immigration / Asylum	2010	8,122	613	3,967	3,542	8%	49%	44%	61	10%
Total	2010	10,548	1,100	5,185	4,263	10%	49%	40%	194	18%
Immigration / Asylum	2011	8,649	607	4,604	3,438	7%	53%	40%	54	9%
Total	2011	11,200	1,220	6,391	3,589	11%	57%	32%	174	14%

* Of those cases granted permission for review.

(Based on Hood & Dixon, 2012b)

Figure 5: Graph of immigration and other applications for High Court review



Source: (Hood & Dixon, 2012a)

Appendix 2: “Super-text Template” for Critical Frame Analysis

The context of each document and example of political rhetoric was recorded, in terms of its relationship with other documents, rhetoric, processes of review by the courts and parliamentary committees, and policy making in government. The following specific questions were then asked of each example of a governmental document or political rhetoric, to elicit how it contributed to a definition and response to the problem of judicial impact on asylum policy.

1. **Problem Diagnosis**

What is represented as the problem?

Why is it seen as a problem?

What is seen as the cause and effect?

What categories, mechanisms, norms or symbols are invoked?

2. **Diagnosis of Roles**

Who is seen to have caused the problem?

Who's responsibility is the problem?

Normative groupings – is there a problem group?

Active/passive roles (perpetrators/victims)

Legitimation of non-problems

3. **Prognosis**

What to do?

Hierarchy/priority of goals

How to achieve goals (strategy/means/instruments)

What categories, mechanisms, norms or symbols are invoked?

4. **Prognosis & Roles**

Who should/should not do what?

Who has a voice in suggesting possible actions?

Who is acted upon?

Legitimation of non-action.

5. Normativity

What is seen as good/bad?

How/where do norms function in the text (diagnosis/prognosis/elsewhere)?

6. Balance

Emphasis on different dimensions/elements (e.g. more prognostic...)

Frictions or contradictions within dimensions/elements.

Based on Verloo (2005).

Bibliography

- Abrams, P. (2006). Notes on the Difficulty of Studying the State. In A. Sharma & A. Gupta (Eds.), *The Anthropology of the State: a Reader*. Oxford: Blackwell, 112–130.
- Acosta Arcarazo, D., & Geddes, A. (2013). The Development, Application and Implications of An EU Rule of Law in the Area of Migration Policy. *Journal of Common Market Studies*, 51(2), 179–193.
- Addo, M. K. (1994). The Legal Condition of Refugees in the United Kingdom. *Journal of Refugee Studies*, 7, 96.
- Alter, K. (2006). Delegation to International Courts and the Limits of Re-Contracting Political Power. In D. G. Hawkins, D. A. Lake, D. L. Nielson, & M. J. Tierney (Eds.), *Delegation and Agency in International Organizations*. Cambridge: Cambridge University Press, 312–340.
- Alter, K., & Vargans, J. (2000). Explaining Variation in the Use of European Litigation Strategies. *Comparative Political Studies*, 33(4), 452–482.
- Aradau, C. (2004). Security and the Democratic Scene: Desecuritization and Emancipation. *Journal of International Relations and Development*, 7, 388–413.
- Atkinson, P., & Coffey, A. (1997). Analysing Documentary Realities. In D. Silverman (Ed.), *Qualitative Research: Theory, Method and Practice*. London: Sage, 45–62.
- Austin, J. L. (1962). *How to Do Things with Words*. Oxford: Clarendon Press.
- Baachi, C. (2009). *Analysing Policy: What's the Problem Represented to Be?* French's Forest, NSW: Pearson Education.
- Baker, P., Gabrielatos, C., Khosravini, M., Krzyżanowski, M., McEnery, T., & Wodak, R. (2008). A Useful Methodological Synergy? Combining Critical Discourse Analysis and Corpus Linguistics to Examine Discourses of Refugees and Asylum Seekers in the UK Press. *Discourse & Society*, 19(3), 273–306.
- Barkham, P. (2008, November 18). Asylum-Seeker Charities Are Just Playing the System, Says Woolas. *The Guardian*. Retrieved from <http://www.theguardian.com/uk/2008/Nov/18/Immigration-Policy-Health-Politics> (Accessed July 7, 2014).
- Barthes, R. (1977). The Death of the Author. In *Image, Music, Text*. London: Fontana Press, 142–9.
- Bates, E. (2010). *The Evolution of the European Convention on Human Rights*. Oxford: Oxford University Press.
- Bauman, Z. (1991). *Modernity and Ambivalence*. Cambridge: Polity.
- Baumgartner, F. R., & Jones, B. D. (1993). *Agendas and Instability in American Politics*. Chicago: Chicago University Press.

- BBC. (2012, April 24). Rights Gone Wrong? Retrieved from <http://www.bbc.co.uk/Programmes/B01dk5s9> (Accessed May 15, 2014).
- BBC News Online. (2005, December 19). Judge Attacks Deportation Tactics. Retrieved from <http://news.bbc.co.uk/1/hi/uk/4544098.stm> (Accessed July 2, 2014).
- BBC News Online. (2006a, May 11). Government Appeal Over Hijackers. Retrieved from http://news.bbc.co.uk/1/hi/uk_politics/4760873.stm (Accessed July 2, 2014).
- BBC News Online. (2006b, May 12). Tory Pledge on Human Rights Act. Retrieved from http://news.bbc.co.uk/1/hi/uk_politics/4765861.stm (Accessed July 2, 2014).
- BBC News Online. (2006c, May 17). Blair Sparks New Deportation Row. Retrieved from http://news.bbc.co.uk/1/hi/uk_politics/4988756.stm (Accessed July 2, 2014).
- BBC News Online. (2006d, May 18). "10 Years" to Deport all Illegals. Retrieved from http://news.bbc.co.uk/1/hi/uk_politics/4992298.stm (Accessed July 2, 2014).
- BBC News Online. (2006e, May 23). Immigration System Unfit - Reid. Retrieved from http://news.bbc.co.uk/1/hi/uk_politics/5007148.stm (Accessed July 2, 2014).
- BBC News Online. (2006f, August 4). Reid Loses Afghan Hijack Ruling. Retrieved from <http://news.bbc.co.uk/1/hi/uk/5244936.stm> (Accessed July 2, 2014).
- BBC News Online. (2009, October 17). Iraq Deportees in UK Await Fate. Retrieved from <http://news.bbc.co.uk/1/hi/uk/8312378.stm> (Accessed July 2, 2014).
- BBC News Online. (2010, June 15). Migrant Charity in Administration Amid Cash Problems. Retrieved from <http://www.bbc.co.uk/news/10324774> (Accessed July 2, 2014).
- BBC News Online. (2011, April 21). Cameron "Uneasy" About Use of Injunctions. Retrieved from <http://www.bbc.co.uk/news/uk-13158087> (Accessed July 2, 2014).
- Bellamy, R. (2007). *Political Constitutionalism*. Cambridge: Cambridge University Press.
- Benford, R., & Snow, D. (1988). Ideology, Frame Resonance, and Participant Mobilization. *International Social Movement Research, 1*, 197–218.
- Benford, R., & Snow, D. (2000). Framing Processes and Social Movements: An Overview and Assessment. *Annual Review of Sociology, 26*, 611–39.
- Bennett, C. J., & Howlett, M. (1992). The Lessons of Learning: Reconciling Theories of Policy Learning and Policy Change. *Policy Sciences, 25*(3), 275–294.
- Berger, P., & Luckmann, T. (1991). *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. London: Penguin.
- Bevir, M. (1999). *The Logic of the History of Ideas*. Cambridge: Cambridge University Press.

- Bevir, M., & Rhodes, R. A. W. (2003). *Interpreting British Governance*. London: Routledge.
- Bevir, M., & Rhodes, R. A. W. (2004). Interpretation as Method, Explanation and Critique: A Reply (The Interpretive Approach in Political Science: A Symposium). *British Journal of Politics & International Relations*, 6(2), 192–264.
- Bigo, D. (2002). Security and Immigration: Toward a Critique of the Governmentality of Unease. *Alternatives*, 27(Special Issue), 63–92.
- Billig, M. (1996). *Arguing and Thinking: A Rhetorical Approach to Social Psychology* (2nd Ed.). Cambridge: Cambridge University Press.
- Bingham, T. (2010). *The Rule of Law*. London: Allen Lane.
- Blaikie, N. (2010). *Designing Social Research (2nd Ed.)*. Cambridge: Polity.
- Blair, T. (2004). Speech to the Labour Party Conference. Retrieved from http://news.bbc.co.uk/1/hi/uk_politics/3697434.stm
- Blair, T. (2006a). I Don't Destroy Liberties, I Protect Them. *The Observer*, 26th February.
- Blair, T. (2006b, May 10). Press Conference with the French Prime Minister. Prime Minister's Office Web Archive. Retrieved from <http://webarchive.nationalarchives.gov.uk/20071104170014/http://number10.gov.uk/page9443> (Accessed February 7, 2014).
- Blake, N., & Husain, R. (2003). *Immigration, Asylum and Human Rights*. Oxford: Oxford University Press.
- Bleich, E. (2002). Integrating Ideas into Policy-Making Analysis: Frames and Race Policies in Britain and France. *Comparative Political Studies*, 35(9), 1054–1076.
- Bleich, E. (2011). Social Research and “Race” Policy Framing in Britain and France. *British Journal of Politics & International Relations*, 13(1), 59–74.
- Blichner, L. C., & Molander, A. (2008). Mapping Juridification. *European Law Journal*, 14(1), 36–54.
- Bloch, A. (2000). A New Era Or More of the Same? Asylum Policy in the UK. *Journal of Refugee Studies*, 13(1), 29–42.
- Blunkett, D. (2002, October 7). Home Secretary's Speech to the Labour Party Conference. Home Office. Retrieved from <http://webarchive.nationalarchives.gov.uk/20041123043116/http://homeoffice.gov.uk/docs/blunkettspeech01.html> (Accessed February 7, 2014).
- Blyth, M. (2002). *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century*. Cambridge University Press.
- Bommes, M., & Geddes, A. (2000). Introduction: Immigration and the Welfare State. In M. Bommes & A. Geddes (Eds.), *Immigration and Welfare: Challenging the Borders of the Welfare State*. London: Routledge, 1–12.

- Bonjour, S. (2011). The Power and Morals of Policy Makers: Reassessing the Control Gap Debate. *International Migration Review*, 45(1), 89–122.
- Bonner, D. (2012). If You Cannot Change the Rules of the Game, Adapt to Them: United Kingdom Responses to the Restrictions Set by Article 3 ECHR on “National Security” Deportations. In R. Dickinson, E. Katselli, C. Murray, & O. Pedersen (Eds.), *Examining Critical Perspectives on Human Rights*. Cambridge: Cambridge University Press, 61–86.
- Boswell, C. (2007a). Migration Control in Europe After 9/11: Explaining the Absence of Securitization. *Journal of Common Market Studies*, 45(3), 589–610.
- Boswell, C. (2007b). Theorizing Migration Policy: Is There a Third Way? *International Migration Review*, 41(1), 75–100.
- Boswell, C. (2009). *The Political Uses of Expert Knowledge: Immigration Policy and Social Research*. Cambridge: Cambridge University Press.
- Boswell, C. (2012). How Information Scarcity Influences the Policy Agenda: Evidence from UK Immigration Policy. *Governance*, 25(3), 367–389.
- Boswell, C. (2014). Disciplining or Signaling? the Uses of Targets in UK Immigration and Asylum Policy. Political Studies Association Annual Conference, Manchester, 14-16 April 2014. Retrieved from <https://www.psa.ac.uk/sites/default/files/conference/papers/2014/boswell%20psa%202014%20paper.pdf> (Accessed July 20, 2014).
- Boswell, C., & Geddes, A. (2011). *Migration and Mobility in the European Union*. Houndmills, Basingstoke: Palgrave Macmillan.
- Boswell, C., Geddes, A., & Scholten, P. (2011). The Role of Narratives in Migration Policy-Making: a Research Framework. *British Journal of Politics & International Relations*, 13(1), 1–11.
- Bowcott, O. (2011, July 11). Tens of Thousands Lose Support as Immigration Advisory Service Closes. *The Guardian*. Retrieved from <http://www.theguardian.com/law/2011/jul/11/immigration-advisory-service-closes-blames-government> (Accessed February 7, 2014).
- Bowcott, O. (2012, November 19). PM’s Attack on Red Tape “Will Make it Harder to Challenge Government.” *the Guardian*. Retrieved from <http://www.theguardian.com/law/2012/nov/19/pm-red-tape-challenge-government> (Accessed February 7, 2014).
- Bright, J. (2012). Securitisation, Terror, and Control: Towards a Theory of the Breaking Point. *Review of International Studies*, 38(4), 861–79.
- Brunsson, N. (1985). *The Irrational Organization: Irrationality as a Basis for Organizational Action and Change*. Chichester: John Wiley and Sons.
- Brunsson, N. (2002). *The Organization of Hypocrisy: Talk, Decisions and Actions in Organizations*. Oslo: Abstrakt.
- Bryman, A. (2001). *Social Research Methods*. Oxford: Oxford University Press.

- Bull, T. (2011). Judges Without a Court: Judicial Preview in Sweden. In T. Campbell, K. D. Ewing, & A. Tomkins (Eds.), *The Legal Protection of Human Rights: Sceptical Essays*. Oxford: Oxford University Press, 392–419.
- Buzan, B., Wæver, O., & De Wilde, J. (1998). *Security: a New Framework for Analysis*. London: Lynne Reiner.
- Cabinet Office. (2010a). Draft Cabinet Manual. Retrieved from <http://www.cabinetoffice.gov.uk/sites/default/files/resources/cabinet-draft-manual.pdf> (Accessed July 7, 2014).
- Cabinet Office. (2010b). Ministerial Code. Retrieved from <http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf> (Accessed July 7, 2014).
- Cairney, P. (2012). *Understanding Public Policy*. Houndmills, Basingstoke: Palgrave Macmillan.
- Çali, B. (2009). On Interpretivism and International Law. *European Journal of International Law*, 20(3), 805–22.
- Çali, B., & Wyss, A. (2009). Legitimacy, Authority and Persuasiveness of the European Court of Human Rights Amongst British Political Elites. In *Paper Presented at the 59th Political Studies Association Annual Conference, Challenges for Democracy in a Global Era, 7 – 9 April 2009*. University of Manchester. Retrieved from <http://ssrn.com/paper=1462281> (Accessed July 7, 2014).
- Callon, M., Law, J., & Rip, A. (Eds.). (1986). *Mapping the Dynamics of Science and Technology: Sociology of Science in the Real World*. London: Palgrave Macmillan.
- Cameron, D. (2012a, January 25). Speech on the European Court of Human Rights. Retrieved from <https://www.gov.uk/government/speeches/speech-on-the-european-court-of-human-rights> (Accessed July 7, 2014).
- Cameron, D. (2012b, November 19). Prime Minister's Speech to CBI. Prime Ministers Office. Retrieved from <https://www.gov.uk/government/speeches/prime-ministers-speech-to-cbi> (Accessed July 7, 2014).
- Campbell, J. L. (1998). Institutional Analysis and the Role of Ideas in Political Economy. *Theory Society*, 27(3), 377–409.
- Cane, P. (2004). Understanding Judicial Review and Its Impact. In M. Hertogh & S. Halliday (Eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press, 15–42.
- Canon, B. C. (2004). Studying Bureaucratic Implementation of Judicial Policies in the United States: Conceptual and Methodological Approaches. In M. Hertogh & S. Halliday (Eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press, 76–100.
- Canon, B. C., & Johnson, C. A. (1999). *Judicial Policies: Implementation and Impact (2nd Ed.)*. Washington D.C.: CQ Press.

- Carlin, B. (2007). John Reid Calls for Human Rights Law Reform. *The Telegraph*. Retrieved from <http://www.telegraph.co.uk/news/uknews/1563347/john-reid-calls-for-human-rights-law-reform.html> (Accessed July 7, 2014).
- Carvel, J. (1989). Deported Tamils Return to Britain. *The Guardian*, 5th October.
- Cavendish, C. (2006). The Judges Against the Government: the Rights and Wrongs of a Very British War. *The Times*, 1 June 2006.
- Cerna, L., & Wietholtz, A. (2011). The Case of the United Kingdom. In G. Zincone, R. Penninx, & M. Borkert (Eds.), *Migration Policymaking in Europe: the Dynamics of Actors and Contexts in Past and Present*. Amsterdam University Press.
- Chalmers, D. (2000). The Positioning of EU Judicial Politics Within the United Kingdom. *West European Politics*, 23, 169–210.
- Charmaz, K. (1990). “Discovering” Chronic Illness: Using Grounded Theory. *Social Science & Medicine*, 30(11), 1161–1172.
- Clarke, C. (2005). Speech to the European Parliament, 7th September 2005. Retrieved from <http://charlesclarke.org/archives/364> (Accessed July 7, 2014).
- Clarke, H. D., Sanders, D., Stewart, M. C., & Whiteley, P. F. (2009). *Performance Politics and the British Voter*. Cambridge: Cambridge University Press.
- Clarke, K. (2011). Speech By Rt Hon Kenneth Clarke QC MP, United Kingdom Secretary of State for Justice & Lord Chancellor. *Izmir High Level Conference on the Future of the European Court of Human Rights, 26 – 27 April 2011*. Retrieved from <http://www.coe.int/t/dghl/standardsetting/conferenceizmir/speeches/speech%20uk.pdf> (Accessed July 7, 2014).
- Clayton, G. (2012). *Textbook on Immigration and Asylum Law*. Oxford: Oxford University Press.
- Coalition Programme for Government. (2010). The Coalition: Our Programme for Government. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf (Accessed July 2, 2014).
- Cohen, M. D., March, J. G., & Olsen, J. P. (1972). a Garbage Can Model of Organizational Choice. *Administrative Science Quarterly*, 1–25.
- Cohen, R. (1994). *Frontiers of Identity: the British and the Others*. London: Longman.
- Collier, D., Mahoney, J., & Seawright, J. (2004). Claiming Too Much. In H. E. Brady & D. Collier (Eds.), *Rethinking Social Inquiry: Diverse Tools, Shared Standards*. Oxford: Rowman & Littlefield, 85–102.
- Committee of Ministers of the Council of Europe. (2011). Izmir Declaration on the Future of the European Court of Human Rights. Retrieved from http://www.coe.int/t/dgi/brighton-conference/documents/izmir-declaration_en.pdf (Accessed July 7, 2014).

- Conant, L. (2002). *Justice Contained: Law and Politics in the European Union*. New York: Cornell University Press.
- Conservative Party. (1989). Conservative Campaign Guide. Margret Thatcher Foundation. Retrieved from <http://www.margaretthatcher.org/archive/displaydocument.asp?docid=110802> (Accessed July 7, 2014).
- Conservative Party. (1991). Conservative Campaign Guide. Conservative Party Archive, Bodleian Library, University of Oxford: PUB 224/29.
- Conservative Party. (2010). The Conservative Manifesto 2010: Invitation to Join the Government. Retrieved from <http://www.conservatives.com/~media/files/activist%20centre/press%20and%20policy/manifestos/manifesto2010> (Accessed July 7, 2014).
- Constitution Committee. (2007, July 26). Sixth Report: Relations Between the Executive, the Judiciary and Parliament. HL 151. Retrieved from <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf> (Accessed July 7, 2014).
- Constitutional Affairs Committee. (2005). The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates: Volume 2, Oral and Written Evidence (Seventh Report of Session 2004-5). HC 323-II. Retrieved from <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323ii.pdf> (Accessed July 7, 2014).
- Cooley, L., & Rutter, J. (2007). Turned Away? Towards Better Protection for Refugees Fleeing Violent Conflict. *Public Policy Research*, 14(3), 176–180.
- Cooren, F. (2004). Textual Agency: How Texts Do Things in Organizational Settings. *Organization*, 11(3), 373–393.
- Cornelius, W. A., Martin, P. L., & Hollifield, J. F. (1994). Introduction: the Ambivalent Quest for Immigration Control. In W. A. Cornelius, P. L. Martin, & J. F. Hollifield (Eds.), *Controlling Immigration: a Global Perspective*. Stanford: Stanford University Press, 3–41.
- Council of Europe. (2006). General Measures Adopted to Prevent New Violations of the European Convention on Human Rights: Stock-Taking of Measures Reported to the Committee of Ministers in Its Control of Execution of the Judgments and Decisions Under the Convention. H/Exec (2006) 1. Retrieved from [http://www.coe.int/t/dghl/monitoring/execution/source/documents/docs_a_propos/h-exec\(2006\)1_gm_960_en.doc](http://www.coe.int/t/dghl/monitoring/execution/source/documents/docs_a_propos/h-exec(2006)1_gm_960_en.doc) (Accessed July 7, 2014).
- Council of Europe. (2011). Statistics on Judgements by State. Retrieved from http://www.echr.coe.int/documents/stats_violation_1959_2010_eng.pdf (Accessed July 7, 2014).
- Council of Europe. (2013). Violations By Article and By States. Retrieved from http://www.echr.coe.int/documents/stats_violation_1959_2013_eng.pdf (Accessed July 7, 2014).

- Creyke, R., & McMillan, J. (2004). The Operation of Judicial Review in Australia. In M. Hertogh & S. Halliday (Eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press, 161–189.
- Czarniawska, B. (1997). *Narrating the Organization: Dramas of Institutional Identity*. Ann Arbor: University of Chicago Press.
- Czarniawska, B. (2004). *Narratives in Social Science Research*. London: SAGE Publications.
- Daily Telegraph. (2003, February 27). Blair Ready to Pull Out of Asylum Deal.
- Daintith, T. (2001). Organizing Legal Advice and Litigation: the Human Rights Challenge. *Public Money & Management*, 21(3), 13–18.
- Daintith, T., & Page, A. (1999). *The Executive in the Constitution: Structure, Autonomy and Internal Control*. Oxford: Oxford University Press.
- Davies, C. (2012, November 30). Judge Overturns Decision to Deport Transplant Patient. *The Guardian*. Retrieved from <http://www.theguardian.com/uk/2012/Nov/30/Transplant-Patient-Deportation> (Accessed July 2, 2014).
- Davis, F. (2010). The Human Rights Act and Juridification: Saving Democracy From Law. *Politics*, 30(2), 91–97.
- DCA. (2006, July). Review of the Implementation of the Human Rights Act. Department for Constitutional Affairs. Retrieved from http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/peoples-rights/human-rights/pdf/full_review.pdf (Accessed July 2, 2014).
- DCA. (2007). The Human Rights Act: the DCA and Home Office Reviews. Government Response to the Joint Committee on Human Rights' Thirty-Second Report of Session 2005-06. Department for Constitutional Affairs. Retrieved from http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/publications/reports_reviews/human_rights_act_reviews.pdf (Accessed July 2, 2014).
- De Genova, N., & Peutz, N. (Eds.). (2010). *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement*. London: Duke University Press.
- De Smith, S. A., Woolf, H., & Jowell, J. A. (1995). *Judicial Review of Administrative Action (5th Ed.)*. London: Sweet & Maxwell.
- De Smith, S. A., Woolf, H., & Jowell, J. A. (2007). *Judicial Review (6th Ed.)*. London: Sweet & Maxwell.
- Derrida, J. (1981). *Positions*. Chicago: Chicago University Press.
- Dimaggio, P. J., & Powell, W. W. (1983). The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields. *American Sociological Review*, 48, 147–160.
- Dorey, P. (2005). *Policy Making in Britain*. London: Sage.

- Drzemczewski, A. (1995). a Major Overhaul of the ECHR Control Mechanism: Protocol 11. In *Collected Courses of the Academy of European Law, Vol. VI Bk2*. Oxford: Oxford University Press.
- Dunstan, R. (1995). Playing Human Pinball: the Amnesty International United Kingdom Section Report on UK Home Office “Safe Third Country” Practice. *International Journal of Refugee Law*, 7(4), 606–652.
- Dworkin, R. (1978). *Taking Rights Seriously*, (London: Duckworth, 1978). London: Duckworth.
- Eckstein, H. (1975). Case Studies and Theory in Political Science. In F. Greenstein & N. Polsby (Eds.), *Handbook of Political Science*. Reading: Addison-Wesley.
- Edelman, M. (1988). *Constructing the Political Spectacle*. Chicago: Chicago University Press.
- Ellerman, A. (2009). *States Against Migrants: Deportation in Germany and the United States*. Cambridge: Cambridge University Press.
- Elliot, M. (2012). Judicial Review – Why the Ministry of Justice Doesn’t Get It. UK Constitutional Law Association (16th December 2012). Retrieved from <http://ukconstitutionalaw.org/2012/12/16/Mark-Elliott-Judicial-Review-Why-The-Ministry-Of-Justice-Doesnt-Get-It/> (Accessed July 7, 2014).
- Epp, C. R. (1998). *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. London: University of Chicago Press.
- Equality and Human Rights Commission. (2012). The UK and the European Court of Human Rights. Retrieved from http://www.Equalityhumanrights.com/Uploaded_Files/Research/83._European_Court_Of_Human_Rights.pdf (Accessed July 7, 2014).
- Erdos, D. (2009). Postmaterialist Social Constituencies and Political Triggers: Explaining Bill of Rights Genesis in Internally Stable, Advanced Democracies. *Political Research Quarterly*, 62(4), 798–810.
- European Court of Human Rights Press Unit. (2011). Fact Sheet: Expulsions and Extraditions. Retrieved from http://www.Echr.coe.Int/Documents/FS_Expulsions_Extraditions_ENG.pdf (Accessed July 7, 2014).
- Evans, P. B., Rueschemeyer, D., & Skocpol, T. (Eds.). (1985). *Bringing the State Back in*. Cambridge: Cambridge University Press.
- Ewick, P., & Silbey, S. (1998). *The Common Place of Law: Stories from Everyday Life*. Chicago: Chicago University Press.
- Ewing, K., & Tham, J. C. (2008). The Continuing Futility of the Human Rights Act. *Public Law, Winter*, 668–93.
- Fairclough, N. (2000). *New Labour, New Language?* London: Routledge.
- Fairclough, N. (2001). *Language and Power*. Pearson Education.

- Feldman, D. (1988). Judicial Review: a Way of Controlling Government? *Public Administration*, 66, 21.
- Festinger, L., & Carlsmith, J. (1959). Cognitive Consequences of Forced Compliance. *Journal of Abnormal and Social Psychology*, 58, 203–211.
- Field, F. (2010, December 20). Early Day Motion 1226: Deportation Rights. House of Commons Business Papers. Retrieved from <http://www.parliament.uk/Edm/2010-12/1226> (Accessed July 7, 2014).
- Finlayson, A. (2007). From Beliefs to Arguments: Interpretive Methodology and Rhetorical Political Analysis. *British Journal of Politics & International Relations*, 9(4), 545–563.
- Finnemore, M., & Sikkink, K. (1998). International Norm Dynamics and Political Change. *International Organization*, 52(4), 887–917.
- Fischer, F. (2003). *Reframing Public Policy: Discursive Politics and Deliberative Practices*. Oxford: Oxford University Press.
- Forsythe, D. P. (2006). *Human Rights in International Relations (2nd Ed.)*. Cambridge: Cambridge University Press.
- Foucault, M. (1985). *The History of Sexuality, Vol.2: the Use of Pleasure*. New York: Pantheon.
- Free Movement. (2009). New Removals Policy. Retrieved from <http://www.freemovement.org.uk/New-Removals-Policy/> (Accessed July 7, 2014).
- Freeman, G. P. (1995). Modes of Immigration Politics in Liberal Democratic States. *International Migration Review*, 24(4), 881–902.
- Freeman, R. (2012). Reverb: Policy Making in Wave Form. *Environment and Planning-Part A*, 44(1), 13.
- Freeman, R., & Maybin, J. (2011). Documents, Practices and Policy. *Evidence & Policy*, 7(2), 155–170.
- Friedrichs, J., & Kratochwil, F. (2009). On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology. *International Organization*, 63(Fall), 701–31.
- Furley, D. J., & Nehemas, A. (1994). *Aristotle's Rhetoric: Philosophical Essays*. Princeton: Princeton University Press.
- Gearty, C. (2006). *Can Human Rights Survive?* Cambridge: Cambridge University Press.
- Geddes, A. (2003). *The Politics of Migration and Immigration in Europe*. London: Sage.
- Genieys, W., & Smyrl, M. E. (Eds.). (2008). *Elites, Ideas, and the Evolution of Public Policy (First Edition)*. New York: Palgrave Macmillan.

- George, A. L., & Bennett, A. (2004). *Case Studies and Theory Development in the Social Sciences*. London: MIT Press.
- Gerring, J. (2001). *Social Science Methodology*. Cambridge: Cambridge University Press.
- Gibney, M. J. (2001). The State of Asylum: Democratization, Judicialization and Evolution of Refugee Policy in Europe. UNHCR, New Issues in Refugee Research, Working Paper, No. 50. Retrieved from <http://www.Unhcr.org/3bf102204.html> (Accessed July 7, 2014).
- Gibney, M. J. (2004). *The Ethics and Politics of Asylum*. Cambridge: Cambridge University Press.
- Gibney, M. J. (2008). Asylum and the Expansion of Deportation in the United Kingdom. *Government and Opposition*, 43(2), 146–167.
- Gibney, M. J., Anderson, B., & Paoletti, E. (2011). Citizenship, Deportation and the Boundaries of Belonging. *Citizenship Studies*, 15(5), 547–563.
- Gibney, M. J., & Hansen, R. (2003). Deportation and the Liberal State (UNHCR Working Paper No.77). Retrieved from www.unhcr.org/research/ (Accessed 10/01/12).
- Goffman, E. (1974). *Frame Analysis: An Essay on the Organization of the Experience*. New York: Harper Colophon.
- Goodman, S., & Speer, S. A. (2007). Category Use in the Construction of Asylum Seekers. *Critical Discourse Studies*, 4(2), 165–185.
- Gower, M., & Hawkins, O. (2013). Immigration and Asylum Policy: Government Plans and Progress Made. Commons Library Standard Note SN05829. Retrieved from <http://www.parliament.uk/Briefing-Papers/SN05829/Immigration-and-Asylum-Policy-Government-Plans-and-Progress-Made> (Accessed July 7, 2014).
- Grahl-Madsen, A. (1963). *Commentary on the Refugee Convention*. Geneva: UNHCR. Retrieved from <http://www.Unhcr.org/Publ/PUBL/3d4ab5fb9.pdf> (Accessed July 7, 2014).
- Griffith, J. A. G. (1997). *The Politics of the Judiciary (5th Ed.)*. Bury St. Edmonds: Fontana Press.
- Guiraudon, V. (2000). The Marshallian Triptych Reordered: the Role of Courts and Bureaucracies in Furthering Migrants' Social Rights. In M. Bommes & A. Geddes (Eds.), *Immigration and Welfare: Challenging the Borders of the Welfare State*. London: Routledge.
- Guiraudon, V., & Lahav, G. (2000). a Reappraisal of the State Sovereignty Debate. *Comparative Political Studies*, 33(2), 163–195.
- Hajer, M. (1993). Discourse Coalitions and the Institutionalisation of Practice: the Case of Acid Rain in Great Britain. In F. Fischer & J. Forester (Eds.), *The Argumentative Turn in Policy Analysis and Planning*. London: Duke University Press, 43–67.
- Hajer, M. (2009). *Authoritative Governance*. Oxford: Oxford University Press.

- Hajer, M., & Laws, D. (2008). Ordering Through Discourse. In R. E. Goodin, M. Rein, & M. Moran (Eds.), *The Oxford Handbook of Public Policy*. Oxford: Oxford University Press, 251–268.
- Hajer, M., & Versteeg, W. (2005). a Decade of Discourse Analysis of Environmental Politics: Achievements, Challenges, Perspectives. *Journal of Environmental Policy & Planning*, 7(3), 175–184.
- Hall, P. (1993). Policy Paradigms, Social Learning, and the State: the Case of Economic Policymaking in Britain. *Comparative Politics*, 25(3), 275–296.
- Hall, P., & Taylor, R. (1996). Political Science and the Three New Institutionalisms. *Political Studies*, 44, 936–957.
- Halliday, S. (1998). Researching the “Impact” of Judicial Review on Routine Administrative Decision-Making. In D. Cowan (Ed.), *Housing: Participation and Exclusion*. Dartmouth: Aldershot.
- Halliday, S. (2001). Internal Review and Administrative Justice. *Journal of Social Welfare and Family Law*, 23, 473.
- Halliday, S. (2004). *Judicial Review and Compliance With Administrative Law*. Oxford: Hart.
- Hampshire, J. (2009). Disembedding Liberalism? Immigration Politics and Security in Britain Since 9/11. In T. Givens, G. P. Freeman, & D. L. Leal (Eds.), *Immigration Policy and Security: U.S., European and Commonwealth Perspectives*. Oxon: Routledge, 109–129.
- Hansen, R. (1999). Migration, Citizenship and Race in Europe: Between Incorporation and Exclusion. *European Journal of Political Research*, 35, 415–444.
- Hansen, R. (2000). *Citizenship and Immigration in Post-War Britain: the Institutional Origins of a Multicultural Nation*. Oxford: Oxford University Press.
- Harmon-Jones, E., & Mills, J. (Eds.). (1999). *Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology*. Washington, D.C.: American Psychological Association.
- Harrington, C. (2004). Review: on Law, Politics and Judicialization. *International Journal of Constitutional Law*, 2(3), 564.
- Harvey, C. (1997). Expulsion, National Security and the European Convention. *European Law Review*, 22(6), 626–33.
- Harvey, C. (2000). *Seeking Asylum in the UK: Problems and Prospects*. London: Butterworths.
- Hathaway, J. (2005). *The Rights of Refugees Under International Law*. Cambridge: Cambridge University Press.
- Hay, C. (2002). The Discursive and the Ideational in Contemporary Political Analysis: Beyond Materialism and Idealism. In *Political Analysis: a Critical Introduction*. Houndmills, Basingstoke: Palgrave Macmillan, 194–215.

- Hay, C. (2004). Taking Ideas Seriously (The Interpretive Approach in Political Science: a Symposium). *British Journal of Politics & International Relations*, 6(2), 192–264.
- Hay, C. (2006). Constructivist Institutionalism. In R. A. W. Rhodes, S. A. Binder, & B. A. Rockman (Eds.), *The Oxford Handbook of Political Institutions*. Oxford: Oxford University Press, 56–74.
- Hecló, H. (1972). Review Article: Policy Analysis. *British Journal of Political Science*, 2, 83–108.
- Hecló, H. (1974). *Modern Social Politics in Britain and Sweden: From Relief to Income Maintenance*. London: Yale University Press.
- Helfer, L., & Slaughter, A. (1997). Toward a Theory of Effective Supranational Adjudication. *Yale Law Review*, 107(2), 273–391.
- Hennessy, P. (2011, October 1). Home Secretary: Scrap the Human Rights Act. *The Telegraph*. Retrieved from <http://www.Telegraph.co.uk/news/Politics/8801651/Home-Secretary-Scrap-The-Human-Rights-Act.html> (Accessed July 7, 2014).
- Hertogh, M. (2001). Coercion, Cooperation and Control: Understanding the Policy Impact of Courts and the Ombudsman in the Netherlands. *Law and Policy*, 23, 47–67.
- Hertogh, M., & Halliday, S. (2004a). Introduction. In M. Hertogh & S. Halliday (Eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press, 1–12.
- Hertogh, M., & Halliday, S. (2004b). Judicial Review and Bureaucratic Impact in Future Research. In M. Hertogh & S. Halliday (Eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press, 269–284.
- Hertogh, M., & Halliday, S. (2004c). *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press.
- Hickman, T. (2005). Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998. *Public Law*, (Summer), 306–335.
- Hiebert, J. (2012). Governing Under the Human Rights Act: the Limitations of Wishful Thinking. *Public Law*, (Jan), 27–44.
- Hill, M. J. (2002). *Implementing Public Policy: Governance in theory and in Practice*. London: SAGE Publications.
- Hirschl, R. (2006). The New Constitutionalism and the Judicialization of Pure Politics Worldwide. *Fordham Law Review*, 75(2), 721–754.
- Hirschl, R. (2008a). The Judicialization of Mega-Politics and the Rise of Political Courts. *Annual Review of Political Science*, 11.

- Hirschl, R. (2008b). The Judicialization of Politics. In K. E. Whittington, R. D. Kelemen, & G. A. Caldeira (Eds.), *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 119–141.
- Hogg, P. W., Bushell-Thornton, A. A., & Wright, W. K. (2007). Charter Dialogue Revisited - Or “Much Ado About Metaphors.” *Osgoode Hall Law Journal*, 45, 1–65.
- Hogwood, B. W., & Gunn, L. A. (1984). *Policy Analysis for the Real World*. Oxford: Oxford University Press.
- Hollifield, J. F. (1992). *Immigrants, Markets and States: the Political Economy of Postwar Europe*. Cambridge, MA: Harvard University Press.
- Hollifield, J. F. (2000). The Politics of International Migration: How Can We “Bring the State Back IN”? in C. B. Brettell & J. F. Hollifield (Eds.), *London*. London: Routledge, 137–185.
- Hollifield, J. F. (2004). The Emerging Migration State. *International Migration Review*, 38(3), 885–912.
- Home Affairs Committee. (2003, July 18). Fourth Report: Asylum Removals. HC 654-I. Retrieved from <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhaff/654/654.pdf> (Accessed July 7, 2014).
- Home Affairs Committee. (2010, March 23). UK Border Agency: Follow-Up on Asylum Cases and E-Borders Programme - Twelfth Report of Session 2009-10. House of Commons, HC 406. Retrieved from <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/406/40602.htm> (Accessed July 7, 2014).
- Home Affairs Committee. (2011, May 16). The Work of the UK Border Agency: Government Response to the Committee’s 4th Report of Session 2010–12. House of Commons, HC 1027. Retrieved from <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/1027/1027.pdf> (Accessed July 7, 2014).
- Home Office. (1992). Home Office Explanatory Note, Dated Nov. 1992, on the Draft Immigration Rules on Asylum Accompanying the Asylum and Immigration Appeals Bill 1992.
- Home Office. (1998, July). Fairer, Faster and Firmer - a Modern Approach to Immigration and Asylum. Retrieved from <https://www.gov.uk/government/publications/fairer-faster-and-firmer-a-modern-approach-to-immigration-and-asylum> (Accessed July 7, 2014).
- Home Office. (2002a). Letter to the Committee From Lord Filkin, Parliamentary Under Secretary of State for the Home Office Re the Nationality, Immigration and Asylum Bill. Joint Committee on Human Rights Twenty-First Report of 2001-2. Retrieved from <http://www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/159/15907.htm> (Accessed July 7, 2014).

- Home Office. (2002b, February). Secure Borders, Safe Haven Integration With Diversity in Modern Britain. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/250926/cm5387.pdf (Accessed July 7, 2014).
- Home Office. (2005). Controlling Our Borders: Making Migration Work for Britain - Five Year Strategy for Asylum and Immigration. Cm 6472. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251091/6472.pdf (Accessed July 7, 2014).
- Home Office. (2006a). Summary of the Home Office Review of Decision Making in the Criminal Justice System, Immigration and Asylum Systems. JCHR Minutes of Evidence Annex 1. Retrieved from <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrightts/278/6103014.htm> (Accessed July 7, 2014).
- Home Office. (2006b, November 20). Press Statement: Additional Measures to Deter, Detect and Remove Illegal Immigrants.
- Home Office. (2007, June). Regulatory Impact Assessment: Special Immigration Status. Retrieved from <http://webarchive.nationalarchives.gov.uk/20081105143757/http://justice.gov.uk/docs/regulatory-impact-assessments.pdf> (Accessed July 7, 2014).
- Home Office. (2010). Control of Immigration Statistics: United Kingdom, 2009. Research Development and Statistics Directorate. Retrieved from <http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs10/hosb1510.pdf> (Accessed July 7, 2014).
- Home Office. (2012, March 13). Letter to Corporate Partners: Illegal Migrants Who Wish to Leave the United Kingdom, Waiving Their Legal Rights Beforehand. Home Office Immigration and Border Policy Directorate.
- Home Office. (2014). Immigration Statistics. Retrieved from <https://www.gov.uk/government/publications/tables-for-immigration-statistics-january-to-march-2014> (Accessed July 7, 2014).
- Hood, C. (2010). *The Blame Game: Spin, Bureaucracy, and Self-Preservation in Government*. Princeton: Princeton University Press.
- Hood, C., & Dixon, R. (2012a). How Applications for Judicial Review Have Changed Since 1970. Xgov Project: Reshaping Executive Government. Retrieved from <http://xgov.politics.ox.ac.uk/materials/data/hood-dixon-2012-applications-for-jr.xlsx> (Accessed July 7, 2014).
- Hood, C., & Dixon, R. (2012b). Summary Statistics on Judicial Review Applications. Xgov Project: Reshaping Executive Government. Retrieved from <https://docs.google.com/spreadsheet/ccc?key=0aonyzs4mzlbdc1ta3dctg1sadhzwfbgbelwd2eyrle#gid=0> (Accessed July 7, 2014).
- Howarth, D. (2000). *Discourse*. Buckingham: Open University Press.
- Howarth, D., Norval, A. J., & Stavrakakis, Y. (Eds.). (2000). *Discourse Theory and Political Analysis: Identities, Hegemonies and Social Change*. Manchester: Manchester University Press.

- Hurd, D. (1991). Speech to Conservative Party Conference. Conservative Party Archive, Bodleian Library, University of Oxford: PPB 146.
- Husa, J. (2011). *The Constitution of Finland*. Oxford: Hart.
- Hussain, A. M. (2001). *British Immigration Policy Under the Conservative Government*. Ashgate.
- Huysmans, J. (2006). *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. London: Routledge.
- Huysmans, J., & Buonfino, A. (2008). Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK. *Political Studies*, 56(4), 766 – 788.
- ILPA. (2006, November 24). ILPA's Response to the Consultation on the Draft Practice Direction on Applications for Permission to Apply for Judicial Review in Immigration and Asylum Cases. Retrieved from <http://www.ilpa.org.uk/data/resources/13131/06.11.624.pdf> (Accessed July 7, 2014).
- ILPA. (2012, May 13). ILPA Response to the UK Border Agency Letter of 13 March 2012 Re Waiver of 72 Hours' Notice of Removal in Cases Where a Person Consents to the Waiver of Notice. Retrieved from <http://www.ilpa.org.uk/data/resources/14699/12.05.13-ilpa-to-ukba-re-72-hours-public.pdf> (Accessed July 7, 2014).
- IND. (1984). *a Report on the Work of the Immigration and Nationality Department*. Home Office.
- IND. (2006a, July). Fair, Effective, Transparent and Trusted – Rebuilding Confidence in Our Immigration System. Immigration and Nationality Directorate. Retrieved from <http://webarchive.nationalarchives.gov.uk/20100403011144/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/indreview/indreview.pdf?view=binary> (Accessed July 7, 2014).
- IND. (2006b, November). Consultation on the Draft Practice Direction on Applications for Permission to Apply for Judicial Review in Immigration and Asylum Cases. Immigration and Nationality Directorate.
- IND. (2007, March). Detention Service Order 07/2008. Immigration and Nationality Directorate.
- Independent Chief Inspector of the UKBA. (2011, May). a Thematic Inspection of How the UK Border Agency Manages Foreign National Prisoners. Retrieved from <http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/thematic-inspection-report-of-how-the-agency-manages-foreign-national-prisoners.pdf> (Accessed July 7, 2014).
- Independent Chief Inspector of the UKBA. (2012). Investigation Into Border Security Checks,. Retrieved from <http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/investigation-into-border-security-checks-20.02.121.pdf> (Accessed July 7, 2014).

- IPPR. (1990). *a British Bill of Rights*. London: Institute for Public Policy Research.
- Jackson, D. (1997). *The United Kingdom Confronts the European Convention on Human Rights*. Gainesville, FL: University Press of Florida.
- Jacobson, D. (1997). *Rights Across Borders: Immigration and the Decline of Citizenship* (2nd Ed.). Baltimore: John Hopkins University Press.
- Jacobson, D., & Ruffer, G. (2003). Courts Across Borders: the Implications of Judicial Agency for Human Rights and Democracy. *Human Rights Quarterly*, 25(1), 74–92.
- Jasanoff, S. (1995). *Science At the Bar*. Cambridge, Mass.: Harvard University Press.
- JCHR. (2006a). Oral and Written Evidence: Human Rights Policy. HL 143/HC 830-I. Retrieved from <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/143/6011601.htm> (Accessed July 7, 2014).
- JCHR. (2006b). The Human Rights Act: the DCA and Home Office Reviews: 32nd Report of Session 2005-6. HC 1716. Retrieved from <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/278.pdf> (Accessed July 7, 2014).
- JCHR. (2006c). Thirty-Second Report of the Joint Committee on Human Rights: Minutes of Oral Evidence. Retrieved from <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/6103001.htm> (Accessed July 7, 2014).
- JCHR. (2006d). UN Convention Against Torture, 19th Report of the Joint Parliamentary Committee on Human Rights. Retrieved from <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18502.htm> (Accessed July 7, 2014).
- JCHR. (2007). Counter-Terrorism Policy and Human Rights: 28 Days, Intercept and Post-Charge Questioning. Nineteenth Report of Session 2006-07. HL Paper 157, HC 394.
- JCHR. (2008). Proposed Committee Amendments: Criminal Justice and Immigration Bill. Joint Committee on Human Rights. Retrieved from <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/37/3706.htm> (Accessed July 7, 2014).
- JCWI. (2012). Submissions on Behalf of Joint Council for the Welfare of Immigrants to the Leveson Enquiry. Joint Council for the Welfare of Immigrants. Retrieved from <http://www.jcwi.org.uk/sites/default/files/leveson%20inquiry.pdf> (Accessed July 7, 2014).
- Jennings, W. (2010). Bureaucratic Performance and Control in British Politics: Asylum Policy 1994–2007. *British Journal of Politics & International Relations*, 12, 539–568.
- Johnson, R. (1967). *The Dynamics of Compliance*. Evanston, IL: Northwestern University Press.

- Joly, D. (1999). A New Asylum Regime in Europe. In F. Nicholson & P. Twomey (Eds.), *Refugee Rights and Realities*. Cambridge: Cambridge University Press, 336–56.
- Jones, B., Kavanagh, D., & Moran, M. (2007). *Politics UK (6th Ed.)*. Longman.
- Joppke, C. (1998a). Asylum and State Sovereignty: a Comparison of the United States, Germany and Britain. In C. Joppke (Ed.), *Challenge to the Nation-State: Immigration in Western Europe and the United States*. Oxford: Oxford University Press, 109–152.
- Joppke, C. (1998b). Immigration Challenges the Nation-State. In C. Joppke (Ed.), *Challenge to the Nation-State: Immigration in Western Europe and the United States*. Oxford: Oxford University Press, 5–46.
- Joppke, C. (1998c). The Decline of Sovereignty: a Comparison of the United States, Germany, and Britain. In C. Joppke (Ed.), *Challenge to the Nation-State: Immigration in Western Europe and the United States*. Oxford: Oxford University Press, 109–152.
- Joppke, C. (1999). *Immigration and the Nation-State: the United States, Germany and Great Britain*. Oxford: Oxford University Press.
- Joppke, C. (2001). The Legal-Domestic Sources of Immigrant Rights: the United States, Germany and the European Union. *Comparative Political Studies*, 34(4), 339–366.
- Joppke, C. (2007). Transformation of Immigrant Integration: Civic Integration and Antidiscrimination in the Netherlands, France and Germany. *World Politics*, 59(2), 243–73.
- Joppke, C., & Marzal, E. (2004). Courts, the New Constitutionalism and Immigrant Rights: the Case of the French Conseil Constitutionnel. *European Journal of Political Research*, 43(6), 823–844.
- Jowell, J. (2012, November 19). Diminishing Judicial Review Will Reverse 50 Years of Legal Progress. *The Guardian*. Retrieved from <http://www.theguardian.com/Law/2012/Nov/19/Diminishing-Judicial-Review-Reverse-Legal-Progress> (Accessed July 7, 2014).
- Kavanagh, A. (2009). *Constitutional Review Under the U.K. Human Rights Act*. Cambridge: Cambridge University Press.
- Kawar, L. (2012). Juridical Framings of Immigrants in the United States and France: Courts, Social Movements, and Symbolic Politics. *International Migration Review*, 46(2), 414–455.
- Kaye, R. (1994). Defining the Agenda: British Refugee Policy and the Role of Parties. *Journal of Refugee Studies*, 7(2/3), 144–59.
- Keller, R. (2008). *Wissenssoziologische Diskursanalyse: Grundlegung Eines Forschungsprogramms*. Wiesbaden: VS Verlag.
- Keller, R. (2011). The Sociology of Knowledge Approach to Discourse (SKAD). *Human Studies*, 34, 1–23.

- Kelly, B. (2011). Law Lords V New Labour: Did the Highest Court Frustrate the Government's Attempts to Control Immigration. *Journal of Immigration, Asylum and Nationality Law*, 25(2), 146–167.
- Kelly, T. (2012). *This Side of Silence: Human Rights, Torture and the Recognition of Cruelty*. Philadelphia: University of Pennsylvania Press.
- King, A. (2010). a Supreme Court, Supreme Parliament, and Transnational National Rights. *Yale Journal of International Law*, 35, 245–249.
- King, M., & Thornhill, C. (2003). *Niklas Luhmann's Theory of Politics and Law*. Houndmills, Basingstoke: Palgrave Macmillan.
- Kingdon, J. W. (1995). *Agendas, Alternatives and Public Policies (2nd Ed)*. New York: Harper Collins.
- Kinley, D. (1993). *The European Convention on Human Rights: Compliance Without Incorporation*. Aldershot: Dartmouth.
- Kirkup, J. (2011, February 9). Does Ken Clarke Make David Cameron Nauseous? the *Telegraph*. Retrieved from <http://Blogs.Telegraph.co.uk/news/Jameskirkup/100075291/Does-Ken-Clarke-Make-David-Cameron-Nauseous/> (Accessed July 7, 2014).
- Kneebone, S. (2009). The Rule of Law and the Role of Law. In S. Kneebone (Ed.), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*. Cambridge: Cambridge University Press.
- Koselleck, R. (1985). *Futures Past: on the Semantics of Historical Time*. Cambridge, Mass. ; London: MIT Press.
- Krasner, S. D. (1988). Sovereignty An Institutional Perspective. *Comparative Political Studies*, 21(1), 66–94.
- Krygier, M. (2009). The Rule of Law: Legality, Teleology, Sociology. In N. Walker & G. Palombella (Eds.), *Relocating the Rule of Law*. Oxford: Hart, 45–71.
- Larsaeus, N. (2006). The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment. Refugee Studies Centre Working Paper, No. 32. Retrieved from <http://www.Rsc.Ox.Ac.uk/Publications/The-Use-Of-Diplomatic-Assurances-In-The-Prevention-Of-Prohibited-Treatment> (Accessed July 7, 2014).
- Lasswell, H. (1936). *Politics: Who Gets What, When, How*. Cleveland: Meridian Books.
- Latour, B. (1987). *Science in Action: How to Follow Scientists and Engineers Through Society*. Cambridge, Mass.: Harvard University Press.
- Lavenex, S. (1999). *Safe Third Countries*. Budapest: Central European University Press.
- Law Society. (2011, November 22). Law Society Backs Court of Appeal Ruling Upholding Access to Justice for Migrants. Retrieved from <http://www.Lawsociety.org.uk/news/Press-Releases/Law-Society-Backs-Court-Of-Appeal-Ruling-Upholding-Access-To-Justice-For-Migrants/#Sthash.Qdl3vph2.Dpuf> (Accessed July 7, 2014).

- Law Society. (2012, September 25). Immigration Law Committee Meeting. Retrieved from http://Governance.Lawsociety.org.uk/Secure/Meeting/199797/Immigration_Nlaw_Committee_25_September_Papers-Part1.pdf (Accessed July 7, 2014).
- Layton-Henry, Z. (2004). Britain: From Immigration Control to Migration Management. In W. A. Cornelius (Ed.), *Controlling Immigration: a Global Perspective*. Stanford University Press, 297–333.
- Le Seur, A. (1996). The Judicial Review Debate: From Partnership to Friction. *Government and Opposition*, 31, 8–26.
- Legomsky, S. (1987). *Immigration and the Judiciary: Law and Politics in Britain and America*. Oxford: Clarendon Press.
- Lester, A. (1998). U.K. Acceptance of the Strasbourg Jurisdiction: What Really Went on in Whitehall in 1965. *Public Law*, (Summer), 237–253.
- Lester, A. (2004). History and Context. In A. Lester & D. Pannick (Eds.), *Human Rights: Law and Practice*. London: Lexisnexis.
- Leuffen, D. (2007). Case Selection and Selection Bias in Small-N Research. In T. Gschwend & F. Schimmelfennig (Eds.), *Research Design in Political Science*. Basingstoke: Palgrave Macmillan, 145–160.
- Lindblom, C. E. (1959). The Science Of “ Muddling Through.” *Public Administration Review*, 79–88.
- Lord Chancellor’s Department. (1992, January 21). Asylum Appeals (Procedure) Rules 1992 Consultation Draft. House of Commons Information Office, Deposited Business Paper No. 7773.
- Lord Falconer. (2006, July 19). Letter to the JCHR From the Rt Hon Lord Falconer of Thornton, Secretary of State for Constitutional Affairs and Lord Chancellor. Retrieved from <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/6103009.htm> (Accessed July 7, 2014).
- Lord Neuberger. (2011, June 4). Who Are the Masters Now? Second Lord Alexander of Weedon Lecture. Retrieved from <https://www.Judiciary.gov.uk/Resources/JCO/Documents/Speeches/Mr-Speech-Weedon-Lecture-110406.pdf> (Accessed July 7, 2014).
- Loughlin, M. (2003). *The Idea of Public Law*. Oxford: Oxford University Press.
- Luhmann, N. (1990). *Political Theory in the Welfare State*. (J. Bednarz, Trans.). Berlin: De Gruyter.
- Lukes, S. (2005). *Power: a Radical View (2nd Ed.)*. Basingstoke: Palgrave Macmillan.
- Maag, J. (1999). Why They Say No: Foundational Précises and Techniques for Managing Resistance. *Focus on Exceptional Children*, 32(1).
- Macdonald, I. A., & Blake, N. J. (1991). *Immigration Law and Practice in the United Kingdom* (Third Edition.). London: Butterworths.

- Mahoney, J., & Thelen, K. (2010). a Theory of Gradual Institutional Change. In J. Mahoney & K. Thelen (Eds.), *Explaining Institutional Change: Ambiguity, Agency and Power*. Cambridge: Cambridge University Press.
- March, J. G. (1984). How We Talk and How We Act: Administrative Theory and Administrative Life. In T. J. Sergiovanni & J. E. Corbally (Eds.), *Leadership and Organizational Cultures*. Urbana: University of Illinois Press.
- Marsh, D. (2010). Stability and Change: the Last Dualism? *Critical Policy Studies*, 4(1), 86–101.
- Marston, G. (1993). The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950. *International and Comparative Law Quarterly*, 42, 796–826.
- Mason, J. (2002). *Qualitative Researching*. London: Sage.
- Massey, D. S., Arango, J., Hugo, G., Kouaouci, A., Pellegrino, A., & Taylor, J. E. (1998). *Worlds in Motion: Understanding International Migration At the End of the Millennium*. Oxford: Oxford University Press.
- Mather, L. (2008). Law and Society. In K. E. Whittington, D. R. Kelemen, & G. A. Caldeira (Eds.), *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 681–697.
- Matland, R. E. (1995). Synthesizing the Implementation Literature: the Ambiguity-Conflict Model of Policy Implementation. *Journal of Public Administration Research and Theory*, 5(2), 145–174.
- Mattli, W., & Slaughter, A. (1998). Revisiting the European Court of Justice. *International Organization*, 52(1), 177–209.
- McCann, M. W. (1994). *Rights At Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: Chicago University Press.
- McCann, M. W. (1996). Causal Versus Constitutive Explanations (Or, on the Difficulty of Being So Positive...). *Law and Social Inquiry*, 21, 457.
- McGrory, D. (2004, July 14). Afghan Hijackers Allowed to Stay in UK. *The Times*.
- McLaren, L., & Johnson, M. (2007). Resources, Group Conflict and Symbols: Explaining Anti-Immigration Hostility in Britain. *Political Studies*, 55(4), 709–732.
- McLuhan, M. (1964). *Understanding Media*. London: Routledge.
- Medical Justice. (2010, July 22). Update - MJ JR ; Judge Halts Deportation Without Warning of Suicidal People and Unaccompanied Minors. Retrieved from <http://www.Medicaljustice.org.uk/news/Mj-News/1277-Update-Mj-Jr--Judge-Halts-Deportation-Without-Warning-Of-Suicidal-People-and-Unaccompanied-Minors.html> (Accessed July 7, 2014).
- Menashe, C., & Siegel, M. (1998). The Power of a Frame: An Analysis of Newspaper Coverage of Tobacco Issues - United States, 1985-1996. *Journal of Health Communication*, 3, 307–325.

- Menz, G. (2009). *The Political Economy of Managed Migration Non-State Actors, Europeanization, and the Politics of Designing Migration Policies*. Oxford: Oxford University Press.
- Messina, A. (2007). *The Logics and Politics of Post-WWII Migration to Western Europe*. Cambridge: Cambridge University Press.
- Miles, M. B., & Huberman, A. M. (1994). *Qualitative Data Analysis (2nd Ed)*. London: Sage.
- Ministry of Justice. (2007, October 13). Ministerial Correspondence With Stakeholders [Letter From Minister of State for Justice, David Hanson, to Andrew Holroyd, President of the Law Society]. Retrieved from <http://Webarchive.Nationalarchives.gov.uk/20081105143757/http://Justice.gov.uk/Docs/Crim-Justice-Min-Corres.pdf> (Accessed July 7, 2014).
- Ministry of Justice. (2010, July). Responding to Human Rights Judgments: Government Response to the Joint Committee on Human Rights' Fifteenth Report of Session 2009-10. Retrieved from <http://www.Justice.gov.uk/Downloads/Publications/Policy/Moj/2010/Responding-Human-Rights-Judgements-2009-2010.pdf> (Accessed July 7, 2014).
- Ministry of Justice. (2012). Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government Response to Human Rights Judgments 2011–12. Retrieved from https://www.gov.uk/Government/Uploads/System/Uploads/Attachment_Data/File/217308/Responding-Human-Rights-Judgments.pdf (Accessed July 15, 2014).
- Ministry of Justice. (2013). Court Statistics Quarterly: October to December 2013. Retrieved from https://www.gov.uk/Government/Uploads/System/Uploads/Attachment_Data/File/297960/Court-Statistics-Oct-Dec-2013.pdf (Accessed July 15, 2014).
- Mole, N., & Meredith, C. (2007). *Asylum and the European Convention on Human Rights*. Strasbourg: Council of Europe.
- Morris, L. (2009). Welfare, Asylum and the Politics of Judgment. *Journal of Social Policy*, 39(1), 119–138.
- Morris, L. (2010). *Asylum, Welfare and the Cosmopolitan Ideal: a Sociology of Rights*. London: Taylor & Francis Group.
- Morris, N. (2007, May 28). Blair Accuses Courts of Putting Rights of Terror Suspects First. *The Independent*.
- MPI. (2009). *Migration Policy Institute Immigration Data Hub: Country and Comparative Data*. Retrieved from <http://www.Migrationinformation.org/Datahub/Countrydata/Data.Cfm> (Accessed July 15, 2014).
- Muir, W. (1967). *Prayer in Public Schools: Law and Attitude Change*. Chicago: Chicago University Press.

- Mulvey, G. (2010). When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK. *Journal of Refugee Studies*, 23(4), 437–462.
- Neuman, Y., & Tabak, I. (2003). Inconsistency as An Interactional Problem: a Lesson From Political Rhetoric. *Journal of Psycholinguistic Research*, 32, 251–267.
- New Labour. (1997). New Labour Because Britain Deserves Better. Retrieved from <http://www.Labour-Party.org.uk/Manifestos/1997/1997-Labour-Manifesto.Shtml> (Accessed July 15, 2014).
- Noll, G. (2003). Securitizing Sovereignty? States, Refugees & Regionalisation of International Law. In E. Newman & J. V. Selm (Eds.), *Refugees & Forced Displacement*. New York: UN Press.
- North, D., & Weingast, B. (1989). Constitutions and Commitment: the Evolution of Institutions Governing Public Choice in 17th Century England. *Journal of Economic History*, 49(4), 803–832.
- O’Sullivan, M. (2009). The Intersection Between the International, the Regional and the Domestic: Seeking Asylum in the UK. In S. Kneebone (Ed.), *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives*. Cambridge: Cambridge University Press.
- Ong, W. (1982). *Orality and Literacy: the Technologizing of the Word*. London: Routledge.
- Palonen, K. (2006a). *The Struggle With Time: a Conceptual History of “Politics” as An Activity*. Hamburg: Lit.
- Palonen, K. (2006b). Two Concepts of Politics: Conceptual History and Present Controversies. *Distinktion: Scandinavian Journal of Social Theory*, 7(1), 11–25.
- Paoletti, E. (2010). Deportation, Non-Deportability and Ideas of Membership. *Refugee Studies Centre Working Paper*, 65.
- Pierson, P. (2000). Increasing Returns, Path Dependence, and the Study of Politics. *American Political Science Review*, 251–267.
- Poggi, G. (1990). *The State: Its Nature, Development and Prospects*. Cambridge: Polity.
- Pollard, S. (2005). *David Blunkett*. London: Hodder & Stoughton.
- Potter, J. (1998). Discursive Social Psychology: From Attitudes to Evaluative Practices. *European Review of Social Psychology*, 9, 233–266.
- Pouliot, V. (2007). “Subjectivism”: Toward a Constructivist Methodology. *International Studies Quarterly*, 51, 359–384.
- Prime Minister’s Office. (2010, July 26). Number 10 Press Briefing - Afternoon From 26 July 2010. Retrieved from <https://www.gov.uk/Government/news/Number-10-Press-Briefing-Afternoon-From-26-July-2010> (Accessed July 15, 2014).
- Privy Counsellor Review Committee. (2003). Anti-Terrorism, Crime and Security Act 2001 Review: Report. HC 100. Retrieved from

<http://www.Statewatch.org/news/2003/Dec/Atcsreport.pdf> (Accessed July 15, 2014).

- Putnam, L. L., & Mumby, D. K. (1993). Organizations, Emotion and the Myth of Rationality. *Emotion in Organizations*, 36–57.
- Radaelli, C., & Schmidt, V. A. (2004). Policy Change and Discourse in Europe: Conceptual and Methodological Issues. *West European Politics*, 27(2), 183–210.
- Randall, C. (1994). An Asylum Policy for the U.K. In S. Spencer (Ed.), *Strangers & Citizens*. London: Rivers Oram Press, 202–231.
- Rask-Madsen, M. (2004). France, the UK, and the “Boomerang” of the Internationalisation of Human Rights (1945-2000). In Simon Halliday & P. Schmidt (Eds.), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*. Oxford: Hart, 57–86.
- Rawlings, R. (1995). Litigation and Political Action. In I. Loveland (Ed.), *a Special Relationship? American Influences on Public Law in the UK*. Oxford: Clarendon Press.
- Rawlings, R. (2005). Review, Revenge, Retreat. *Modern Law Review*, 68(3), 378–410.
- Rawlings, R., & Harlow, C. (2009). *Law and Administration (3rd Ed.)*. Cambridge: Cambridge University Press.
- Rein, M., & Schön, D. (1993). Reframing Policy Discourse. In F. Fischer & J. Forester (Eds.), *The Argumentative Turn in Policy Analysis and Planning*. London: Duke University Press, 145–166.
- Rein, M., & Schön, D. (1996). Frame-Critical Policy Analysis and Frame-Reflective Policy Practice. *Knowledge and Policy*, 9, 85–104.
- Rhodes, R. A. W. (1997). *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*. Buckingham: Open University Press.
- Rhodes, R. A. W. (2011). *Everyday Life in British Government*. Oxford: Oxford University Press.
- Richardson, G. (2004). Impact Studies in the United Kingdom. In M. Hertogh & S. Halliday (Eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press, 269–284.
- Richardson, G., & Sunkin, M. (1996). Judicial Review: Questions of Impact. *Public Law*, 79.
- Ricœur, P. (1981). *Hermeneutics and the Human Sciences: Essays on Language, Action and Interpretation*. Cambridge: Cambridge University Press.
- Riker, W. H. (1986). *The Art of Political Manipulation*. New Haven: Yale University Press.
- Riles, A. (2006). *Documents: Artefacts of Modern Knowledge*. Ann Arbor: University of Michigan Press.

- Risse, T. (2001). a European Identity? Europeanization and the Evolution of Nation-State Identities. In M. G. Cowles, J. A. Caporaso, & T. Risse-Kappen (Eds.), *Transforming Europe: Europeanization and Domestic Change*. Cornell University Press, 198–216.
- Robson, S. (2013, September 3). Theresa May Pledges Conservatives Will Scrap Human Rights Act If They Win the Next Election. *The Daily Mail*. Retrieved from <http://www.Dailymail.co.uk/news/Article-2290802/Theresa-May-Pledges-Conservatives-Scrap-Human-Rights-Act-Win-Election.html> (Accessed July 15, 2014).
- Roe, E. (1994). *Narrative Policy Analysis: Theory and Practice*. London: Duke University Press.
- Rosenberg, G. N. (2008). *The Hollow Hope: Can Courts Bring About Social Change? (2nd Ed)*. London: University of Chicago Press.
- Rozenberg, J. (1997). *Trial of Strength: the Battle Between Ministers and Judges Over Who Makes the Law*. London: Richard Cohen Books.
- Sabatier, P. A. (2007). The Need for Better Theories. In P. A. Sabatier (Ed.), *Theories of the Policy Process (2nd Ed.)*. Boulder, CO: Westview Press, 3–20.
- Sabatier, P. A., & Weible, C. (2007). The Advocacy Coalition Framework: Innovations and Clarifications. In P. A. Sabatier (Ed.), *Theories of the Policy Process (2nd Ed.)*. Boulder, CO: Westview Press, 189–222.
- Sadurski, W. (2009). Partnering With Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments. *Human Rights Law Review*, 9(3), 397–453.
- Sanderson, M. (2011). Book Review of Lydia Morris , *Asylum, Welfare and the Cosmopolitan Ideal: a Sociology of Rights*. *International Journal of Refugee Law*, 23(2), 434–440.
- Sassen, S. (1996). Beyond Sovereignty: Immigration Policy Making Today. *Social Justice*, 23(3), 9–20.
- Sassen, S. (1999). Beyond Sovereignty: De-Facto Transnationalism in Immigration Policy. *European Journal of Migration and Law*, 1(2), 177–198.
- Sawyer, C., & Turpin, P. (2005). Neither Here Nor There: Temporary Admission to the UK. *International Journal of Refugee Law*, 17(4), 688–728.
- Schmidt, V. A. (2006). *Democracy in Europe the EU and National Polities*. Oxford: Oxford University Press.
- Schmidt, V. A. (2008). Discursive Institutionalism: the Explanatory Power of Ideas and Discourse. *Annual Review of Political Science*, 11, 303–26.
- Schmidt, V. A. (2010). Taking Ideas and Discourse Seriously: Explaining Change Through Discursive Institutionalism as the Fourth “New Institutionalism.” *European Political Science Review*, 2(01), 1–25.

- Schmidt, V. A. (2011). Speaking of Change: Why Discourse Is Key to the Dynamics of Policy Transformation. *Critical Policy Studies*, 5(2), 106–126.
- Schofield, J. W. (1993). Increasing the Generalizability of Qualitative Research. In M. Hammersley (Ed.), *Social Research: Philosophy, Politics and Practice*. London: Sage, 200–25.
- Schultz, D. A. (Ed.). (1998). *Leveraging the Law: Using the Courts to Achieve Social Change*. New York: Peter Lang.
- Schuster, L. (2003). *The Use and Abuse of Political Asylum in Britain and Germany*. London: Frank Cass.
- Schuster, L. (2005). a Sledgehammer to Crack a Nut: Deportation, Detention and Dispersal in Europe. *Social Policy & Administration*, 39(6), 606–621.
- Schwartz-Shea, P., & Yanow, D. (2012). *Interpretive Research Design: Concepts and Processes*. London: Routledge.
- Scott, C. (1998). The Juridification of Relations in the UK Utility Sector. In J. Black, P. Walker, & P. Muchlinski (Eds.), *Commercial Regulation and Judicial Review*. Oxford: Hart.
- Searle, J. (1995). *The Construction of Social Reality*. New York: Free Press.
- Secondary Legislation Scrutiny Committee. (2012). Statement of Changes in Immigration Rules. HC 194. Retrieved from <http://www.publications.parliament.uk/pa/Ld201213/Ldselect/Ldsecleg/26/26.pdf> (Accessed July 15, 2014).
- Shapiro, M. (2008). Law and Politics: the Problem of Boundaries. In K. E. Whittington, R. D. Kelemen, & G. A. Caldeira (Eds.), *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 767–774.
- Shapiro, M., & Stone, A. (1994). The New Constitutional Politics of Europe. *Comparative Political Studies*, 26(4), 397–420.
- Shapiro, M., & Stone Sweet, A. (2002). *On Law, Politics and Judicialization*. Oxford: Oxford University Press.
- Sheingold, S. A. (2008). The Path of the Law in Political Science: De-Centering Legality From Olden Times to the Day Before Yesterday. In K. E. Whittington, D. R. Kelemen, & G. A. Caldeira (Eds.), *Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 737–51.
- Shepsle, K. A. (2003). Losers in Politics (and How They Sometimes Become Winners): William Riker's Heresthetic. *Perspectives on Politics*, 1(2), 307–315.
- Silverstein, G. (2009). *Law's Allure: How Law Shapes, Constrains, Saves and Kills Politics*. Cambridge: Cambridge University Press.
- Simmons, B. A. (2009). *Mobilizing for Human Rights: International Law in Domestic Politics*. Cambridge: Cambridge University Press.
- Simon, H. (1957). *Models of Man: Social and Rational*. New York: John Wiley and Sons.

- Simon, H. (1985). Human Nature in Politics. *American Political Science Review*, 79, 293–304.
- Skinner, Q. (1996). *Reason and Rhetoric in the Philosophy of Hobbes*. Cambridge: Cambridge University Press.
- Slack, J. (2006a, July 4). Clarke Attack on Judges as the Storm Over Terror Laws Rages. *The Daily Mail*, P. 20.
- Slack, J. (2006b, August 4). Home Secretary Loses Afghan Hijacker Appeal. *The Daily Mail*. Retrieved from <http://www.Dailymail.co.uk/news/Article-399071/Home-Secretary-Loses-Afghan-Hijacker-Appeal.html> (Accessed July 15, 2014).
- Soennecken, D. (2008). The Growing Influence of the Courts Over the Fate of Refugees. *Review of European and Russian Affairs*, 4(2), 10–43.
- Somerville, W. (2007). *Immigration Under New Labour*. Bristol: Policy Press.
- Sossin, L. (2004). The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada. In M. Hertogh & S. Halliday (Eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press, 129–160.
- Soysal, Y. (1994). *Limits of Citizenship*. Chicago: University of Chicago Press.
- Spencer, S. (2007). Immigration. In A. Seldon (Ed.), *Blair's Britain, 1997–2007*. Cambridge: Cambridge University Press, 341–360.
- Squire, V. (2009). *The Exclusionary Politics of Asylum*. Houndmills, Basingstoke: Palgrave Macmillan.
- Stapleton, K., & Wilson, J. (2009). Discourse and Dissonance: Making Sense of Socio-Political Change in Northern Ireland. *Journal of Pragmatics*, 41, 1358–1375.
- Statham, P., & Geddes, A. (2006). Elites and the “Organised Public”: Who Drives British Immigration Politics and in Which Direction? *West European Politics*, 29(2), 248–269.
- Steiner, N. (2000). *Arguing About Asylum: the Complexity of Refugee Debates in Europe*. New York: St Martin's Press.
- Steinmo, S. (1993). *Taxation and Democracy: Swedish, British and American Approaches to Financing the Modern State*. New Haven ; London, UK: Yale University Press.
- Stevens, D. (2004). *UK Asylum Law and Policy: Historical and Contemporary Perspectives*. London: Sweet & Maxwell.
- Stone, A. (1992). *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective*. New York: Oxford University Press.
- Stone, D. (2002). *Policy Paradox: the Art of Political Decision Making (Revised Edition)*. New York: W.W. Norton.
- Stone Sweet, A. (1999). Judicialization and the Construction of Governance. *Comparative Political Studies*, 32(2), 147–184.

- Stone Sweet, A. (2000). *Governing With Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press.
- Stone Sweet, A., & Keller, H. (2008). *The Reception of the ECHR in National Legal Orders*. Oxford: Oxford University Press.
- Straw, J. (1996). *Bringing Rights Home: Labour's Plan to Incorporate the European Convention on Human Rights Into United Kingdom Law*. London: Labour Party.
- Straw, J. (2010). Oral Evidence to Chilcot Inquiry on Iraq - Monday, 08 February 2010. Retrieved from <http://www.Iraqinquiry.org.uk/Media/49448/20100802-Straw-Final.pdf> (Accessed July 15, 2014).
- Sunkin, M. (2004). Conceptual Issues in Researching the Impact of Judicial Review on Government Bureaucracies. In M. Hertogh & S. Halliday (Eds.), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives*. Cambridge: Cambridge University Press, 43–75.
- Sunkin, M., & Bondy, V. (2009). The Dynamics of Judicial Review Litigation: the Resolution of Public Law Challenges Before Final Hearing. The Public Law Project. Retrieved from <http://www.publiclawproject.org.uk/Data/Resources/9/TheDynamicsOfJudicialReviewLitigation.pdf> (Accessed July 15, 2014).
- Taylor, D. (2012, April 30). Theresa May Rebuked Over Illegally Deported Asylum Seeker. *The Guardian*. Retrieved from <http://www.theguardian.com/uk/2012/Apr/30/Theresa-May-Deported-Asylum-Seeker> (Accessed July 15, 2014).
- Taylor, D. (2013, March 22). Ministers Admit Trying to Forcibly Remove Tens of Thousands of People. *The Guardian*. Retrieved from <http://www.theguardian.com/uk/2013/Mar/22/Ministers-Forcibly-Remove-People> (Accessed July 15, 2014).
- Taylor, D., & Muir, H. (2010, February 2). Border Staff Humiliate and Trick Asylum Seekers – Whistleblower. *The Guardian*. Retrieved from <http://www.theguardian.com/uk/2010/Feb/02/Border-Staff-Asylum-Seekers-Whistleblower> (Accessed July 15, 2014).
- Tebble, A. (2006). Exclusion for Democracy. *Political Theory*, 34(4), 463–87.
- Temko, N., & Doward, J. (2006, May 14). Revealed: Blair Attack on Human Rights Law. Letter to Reid Demands Urgent Action. *The Guardian*. Retrieved from <http://www.theguardian.com/Politics/2006/May/14/Humanrights.ukcrime> (Accessed July 15, 2014).
- Teubner, G. (1993). *Law as An Autopoietic System*. (A. Bankowska & R. Adler, Trans., Z. Bankowski, Ed.). Oxford: Blackwell.
- The Daily Mail. (2008, May 19). Government Unveils Plans for New Immigration Detention Centre With 400 New Places. Retrieved from <http://www.dailymail.co.uk/news/article-1020480/government-unveils-plans-new-immigration-detention-centre-400-new-places.html> (Accessed July 15, 2014).

- The Daily Mail. (2010, July 26). Border Policy in Turmoil as Fast-Track Deportations for Asylum Seekers Are Ruled Illegal. Retrieved from <http://www.dailymail.co.uk/news/article-1297722/fast-track-deportations-asylum-seekers-ruled-illegal.html> (Accessed July 15, 2014).
- The Guardian. (2005, August 5). Full Text: the Prime Minister's Statement on Anti-Terror Measures. Retrieved from <http://www.theguardian.com/Politics/2005/Aug/05/uksecurity.terrorism1> (Accessed July 15, 2014).
- The Guardian. (2009, February 20). Civil Rights Groups Defend Qatada Payout. Retrieved from <http://www.theguardian.com/world/2009/feb/20/civil-liberties-abu-qatada-compensation> (Accessed July 15, 2014).
- The Guardian. (2012a, February 28). Draft Brighton Declaration on the Future of the European Court of Human Rights. Retrieved from <http://www.theguardian.com/law/interactive/2012/feb/28/echr-reform-uk-draft?fb=ative> (Accessed July 15, 2014).
- The Guardian. (2012b, August 4). Theresa May Pledges to End "Family Rights" Bar on Deportation. Retrieved from <http://www.theguardian.com/politics/2012/apr/08/theresa-may-end-deportation-bar> (Accessed July 15, 2014).
- The Guardian. (2013, February 17). Theresa May Attacks Judges Over Deportation Rules. Retrieved from <http://www.theguardian.com/politics/2013/feb/17/theresa-may-attacks-judges-deportation> (Accessed July 15, 2014).
- The Independent. (2003, February 5). Parliament and Politics: Blunkett Says UK to Stay in Human Rights Convention.
- The Sun. (2011, November 2). Do Us Rights. Retrieved from http://www.thesun.co.uk/sol/homepage/news/sun_says/3407431/the-sun-says.html (Accessed July 15, 2014).
- Thomas, R. (2003). The Impact of Judicial Review on Asylum. *Public Law*, 479–510.
- Thomas, R. (2013). Immigration Judicial Reviews. UK Constitutional Law Association (12th September 2013). Retrieved from <http://ukconstitutionallaw.org/2013/09/12/robert-thomas-immigration-judicial-reviews/> (Accessed July 15, 2014).
- Thorp, A., & Young, R. (2003). *House of Commons Library Research Paper (RP03/88), Asylum and Immigration: the 2003 Bill*. Retrieved from <http://www.parliament.uk/commons/lib/research/rp2003/rp03-088.pdf> (Accessed July 15, 2014).
- Tilly, C. (1990). *Coercion, Capital, and European States, AD 990-1990*. Oxford: Basil Blackwell.
- Today Programme. (2011, September 2). Justice Secretary Kenneth Clarke Responds to Claims that the System Might Affect the Independence of the Judiciary. BBC Radio 4. Retrieved from http://news.bbc.co.uk/today/hi/today/newsid_9391000/9391740.stm (Accessed July 15, 2014).

- Tomkins, A. (2010). National Security and the Role of the Court: a Changed Landscape? *Law Quarterly Review*, 126(Oct), 543–567.
- Tomlins, C. (2008). Law and History. In K. E. Whittington, D. R. Kelemen, & G. A. Caldeira (Eds.), *Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 723–34.
- Travis, A. (2006). Anti-Terror Critics Just Don't Get It, Says Reid. *The Guardian*. Retrieved from <http://www.guardian.co.uk/politics/2006/aug/10/terrorism.humanrights> (Accessed July 15, 2014).
- Travis, A. (2013a, March 26). UK Border Agency Abolition Is Another Sign of Politicians Spooked By UKIP. *The Guardian*. Retrieved from <http://www.theguardian.com/uk/2013/mar/26/uk-border-agency-abolition-ukip> (Accessed July 15, 2014).
- Travis, A. (2013b, March 26). UK Border Agency to Be Abolished, Theresa May Announces. *The Guardian*. Retrieved from <http://www.theguardian.com/uk/2013/mar/26/uk-border-agency-broken-up> (Accessed July 15, 2014).
- Treasury Solicitors. (2006). The Judge Over Your Shoulder (4th Ed.). Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/256111/judge.pdf (Accessed July 15, 2014).
- Trondal, J. (2001). Is There Any Social Constructivist-Institutionalist Divide? Unpacking Social Mechanisms Affecting Representational Roles Among E.U. Decision-Makers. *Journal of European Public Policy*, 8(1), 1–23.
- True, J. L., Jones, B. D., & Baumgartner, F. R. (2007). Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policymaking. In P. A. Sabatier (Ed.), *Theories of the Policy Process (2nd Ed.)*. Boulder, CO: Westview Press, 155–187.
- Tsebelis, G. (2002). *Veto Players: How Political Institutions Work*. Woodstock: Russell Sage Foundation.
- Tushnet, M. (2003). New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries. *Wake Forest Law Review*, 38, 813.
- Tushnet, M. (2009). *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton: Princeton University Press.
- UKBA. (2009, December 21). Untitled Letter to Stakeholders, From Dee Bourke, Director of Central Operations and Performance. Retrieved from <http://freemovement.files.wordpress.com/2009/12/091208-announcement-letter-to-stakeholders-v21-ae23.pdf> (Accessed July 15, 2014).
- UKBA. (2010a). UKBA Enforcement Guidance and Instructions on Detention and Removals. UK Government Web Archive of UKBA Website. Retrieved from http://webarchive.nationalarchives.gov.uk/20100503160445/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter60_11012010.pdf?view=binary (Accessed July 15, 2014).

- UKBA. (2010b, July 26). Detention Service Order (Removal Directions). Immigration and Nationality Directorate. Retrieved from <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/detention-services-orders/removal-directions-detainees?view=binary> (Accessed July 15, 2014).
- UKBA. (2011). United Kingdom Annual Policy Report 2010, Prepared for the European Migration Network. United Kingdom Border Agency. Retrieved from <http://emn.intrasoft-intl.com/downloads/> (Accessed July 15, 2014).
- UKBA. (2012, May 28). Asylum Casework Instruction on Restricted Leave. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257436/restricted-leave-article-1f-pdf.pdf (Accessed July 15, 2014).
- UNHCR. (2009). Observations on Greece as a Country of Asylum. Office of the United Nations High Commissioner for Refugees. Retrieved from <http://www.refworld.org/pdfid/4b4b3fc82.pdf> (Accessed July 15, 2014).
- Van Der Burg, W., & Taekema, S. (Eds.). (2004). *The Importance of Ideals: Debating Their Relevance in Law, Morality, and Politics*. New York: Peter Lang.
- Van Dijk, T. (1993). Principles of Critical Discourse Analysis. *Discourse and Science*, 4(2), 249–283.
- Van Eeten, M. (2007). Narrative Policy Analysis. In F. Fischer, G. Miller, & M. Sidney (Eds.), *Handbook of Public Policy Analysis: Theory, Politics, Methods*. Boca Raton, FL: CRC Press.
- Van Gunsteren, H. R. (1976). *The Quest for Control: a Critique of the Rational-Central-Rule Approach in Public Affairs*. Chichester: Wiley.
- Vanhala, L. (2012). Legal Opportunity Structures and the Paradox of Legal Mobilization By the Environmental Movement in the UK. *Law & Society Review*, 46(3), 523–556.
- Vennesson, P. (2008). Case Studies and Process Tracing. In D. Della Porta & M. Keating (Eds.), *Approaches and Methodologies in Social Science: A Pluralist Perspective*. Cambridge: Cambridge University Press, 223–239.
- Verloo, M. (2005). Mainstreaming Gender Equality in Europe, a Critical Frame Analysis Approach. *The Greek Review of Social Research*, 117(B), 11–34.
- Verloo, M., & Lombardo, E. (2007). Contested Gender Equality and Policy Variety in Europe: Introducing a Critical Frame Analysis Approach. In *Multiple Meanings of Gender Equality. a Critical Frame Analysis of Gender Policies in Europe*. Budapest: Central European University Press, 21–49.
- Wacquant, L. (2009). *Punishing the Poor: the Neoliberal Government of Social Insecurity*. London: Duke University Press.
- Wade, W. (1989). *Constitutional Fundamentals*. London: Stevens.
- Wagenaar, H. (2004). “Knowing” the Rules: Administrative Work as Practice. *Public Administration Review*, 64(6), 643–655.

- Wagenaar, H. (2011). *Meaning in Action: Interpretation and Dialogue in Policy Analysis*. London: M.E. Sharpe.
- Wagner, A. (2012, November 19). a War on Judicial Review? UK Human Rights Blog. Retrieved from <http://ukhumanrightsblog.com/2012/11/19/A-War-On-Judicial-Review/> (Accessed July 15, 2014).
- Walters, S., & Owen, G. (2013, February 16). Judges “Sabotaged” MPs’ Bid to Deport Rapists and Thugs... But Theresa May Vows to Crush Judges’ Revolt By Rushing Through Tough New Laws. *The Daily Mail*. Retrieved from <http://www.dailymail.co.uk/news/article-2279842/theresa-may-home-secretary-vows-crush-judges-revolt-rushing-tough-new-laws.html> (Accessed July 15, 2014).
- Weaver, R. K. (1986). The Politics of Blame Avoidance. *Journal of Public Policy*, 6(04), 371–398.
- Weber, M. (1978). *Economy and Society*. (G. Roth & C. Wittich, Eds.). London: University of California Press.
- Weick, K. E. (1995). *Sensemaking in Organizations*. London: Sage.
- Wendt, A. (1998). On Constitution and Causation in International Relations. *Review of International Studies*, 24(Special Issue), 101–117.
- Wendt, A. (1999). *Social Theory of International Politics*. Cambridge: Cambridge University Press.
- White, H. (1981). The Narrativization of Real Events. *Critical Inquiry*, 793–798.
- Whittington, K. E., Kelemen, D. R., & Caldeira, G. A. (2008). The Study of Law and Politics. In K. E. Whittington, D. R. Kelemen, & G. A. Caldeira (Eds.), *The Oxford Handbook of Law and Politics*. Oxford: Oxford University Press, 3–18.
- Wintour, P. (2003, October 20). Asylum Savings “Limited.” *The Guardian*. Retrieved from <http://www.theguardian.com/news/2003/oct/20/immigrationasylumandrefugees.politics> (Accessed July 15, 2014).
- Yanow, D. (1996). *How Does a Policy Mean?: Interpreting Policy and Organizational Actions*. Washington, D.C.: Georgetown University Press.
- Zahariadis, N. (2007). The Multiple Streams Framework: Structure, Limitations, Prospects. In P. A. Sabatier (Ed.), *Theories of the Policy Process (2nd Ed.)*. Boulder, CO: Westview Press, 65–92.
- Zittoun, P. (2009). Understanding Policy Change as a Discursive Problem. *Journal of Comparative Policy Analysis: Research and Practice*, 11(1), 65–82.

Cases, legislation & international agreements cited

Cases cited

Cases are listed by date of publication, not by date of decision.

United Kingdom Courts

High Court

- UKHC 1984, *R v Governor of Durham Prison ex parte Hardial Singh*. [1984] 1 WLR 704
- UKHC 1985, *The Queen v. Secretary of State for The Home Department, Ex parte Selladurai Jeyakumaran*, CO/290/84
- UKHC 1988, *R v. Secretary of State for the Home Department, ex parte Yemoh* [1988] Imm AR 595
- UKHC 1995, *R. v Immigration Appeal Tribunal Ex p. Omar Mohammed Ali* [1995] Imm.A.R. 45
- UKHC 2004, *Youssef v. Home Office* [2004] EWHC 1884 (QB)
- UKHC 2006, *S & Ors, R (on the application of) v Secretary of State for the Home Department* [2006] EWHC 1111 (Admin)
- UKHC 2009, *R (N) v Secretary of State for the Home Department* [2009] EWHC 873 (Admin).
- UKHC 2010a, *R (Medical Justice) v. Secretary of State for the Home Department* [2010] EWHC 1925 (Admin)
- UKHC 2010b, *R (on the application of T) v Secretary of State for the Home Department* [2010] EWHC 435

Court of Appeal

- UKCA 1989, *Marion Mamei Gaima v. Secretary of State for the Home Department* [1989] Imm AR 205
- UKCA 1994, *Secretary of State for the Home Department v. Khalif Mohamed Abdi and Another* [1994] Imm AR 402
- UKCA 1996, *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385
- UKCA 2000, *Home Secretary v Rehman* [2000] 3 All ER 778
- UKCA 2003, *R v S & Ors* [2003] EWCA Crim 1809
- UKCA 2004, *The Refugee Legal Centre, R (on the application of) v Secretary of State for the Home Department* [2004] EWCA Civ 1481
- UKCA 2006, *S & Ors v Secretary of State for the Home Department* [2006] EWCA Civ 1157
- UKCA 2009, *MA (Nigeria) v. Secretary of State for the Home Department* [2009]

EWCA Civ 1229

- UKCA 2010a, *Muuse v. Secretary of State for the Home Department*, [2010] EWCA Civ 453
- UKCA 2010b *Secretary of State for the Home Department v Pankina* [2010] EWCA Civ 719 (23 June 2010)
- UKCA 2011a, *Medical Justice, R (on the application of) v Secretary of State for the Home Department* [2011] EWCA Civ 1710
- UKCA 2011b, *Medical Justice, R (on the application of) v Secretary of State for the Home Department* [2011] EWCA Civ 269
- UKCA 2013, *Jl v. Secretary of State* [2013] EWCA Civ 279

House of Lords

- UKHL 1987, *Bugdaycay v Secretary of State for the Home Department* [1987] A.C. 514
- UKHL 1994, *M v Home Office* [1994] 1 AC 377
- UKHL 2003a, *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153
- UKHL 2003b, *Anufrijeva, R (on the application of) v SSHD & Anor* [2003] UKHL 36 (26 June 2003)
- UKHL 2004a, *R (Ullah) v Special Adjudicator* [2004] UKHL 26
- UKHL 2004b, *A & Oths. v. Secretary of State for the Home Department* [2004] UKHL 56
- UKHL 2005, *Regina v Secretary of State for the Home Department (ex parte Limbuela)* [2005] UKHL 66
- UKHL 2008 *Baiai & Ors, R (On The Application of) v Secretary of State For The Home Department* [2008] UKHL 53 (30 July 2008)
- UKHL 2009, *Secretary of State v. AF & Others* [2009] UKHL 28

Special Immigration Appeals Court

- SIAC 2006, *Y v Secretary of State for the Home Department* [2006] SIAC SC/36/2005

Supreme Court

- UKSC 2011a, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 (1 February 2011)
- UKSC 2011b, *Quila & Anor, R (on the application of) v Secretary of State for the Home Department* [2011] UKSC 45 (12 October 2011)
- UKSC 2012a, *Munir & Anor, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 32
- UKSC 2012b, *Alvi, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 33

The European Commission of Human Rights

EComHR 1990, *Vilvarajah & Oths. v. U.K.* App. Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 8 May 1990

The European Court of Human Rights

ECtHR 1989, *Soering v United Kingdom* (1989) 11 EHRR 439

ECtHR 1991, *Vilvarajah v. United Kingdom* (1991) 14 EHRR. 248

ECtHR 1992, *Cruz Varas v Sweden* (1992) 14 EHRR 1

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

ECtHR 2001, *Maaouia v France* (2001) 33 EHRR 42

ECtHR 2008, *Saadi v. The United Kingdom*, Application no. 13229/03 [not yet reported] (27 September 2005)

ECtHR 2009a, *Saadi v. Italy* 49 EHRR 30

ECtHR 2009b, *A & others v. The United Kingdom*, 49 EHRR 695

ECtHR 2012, *Othman (Abu Qatada) v. The United Kingdom*, 8139/09 [2012] ECHR 56

The European Court of Justice

ECJ 2008, *Metock and Others (Area of Freedom, Security and Justice)* [2008] EUECJ C-127/08 (25 July 2008)

ECJ 2011, *Gerardo Ruiz Zambrano v Office National de l'Emploi* [2011] Case C-34/09 (8 March 2011)

Legislation cited

Anti-terrorism, Crime and Security Act 2001
Asylum and Immigration Appeals Act 1993
Asylum and Immigration Act 1996
Asylum and Immigration (Treatment of Claimants) Act 2004
Asylum, Nationality and Immigration Act 2006
Constitutional Reform Act 2005
Criminal Justice and Immigration Act 2008
Freedom of Information Act 2000
Human Rights Act 1998
Immigration Act 1971
Immigration Act 2014
Legal Aid, Sentencing and Punishment of Offenders Act 2012
Nationality, Immigration and Asylum Act 2002
Prevention of Terrorism Act 2005
UK Borders Act 2007

International agreements cited

European Convention on Human Rights 1950
International Covenant on Civil and Political Rights 1966
Refugee Convention 1951 [United Nations Convention and Protocol Relating to the Status of Refugees]
United Nations Convention Against Torture 1984