In Search of Control

International comparative research on (extra-)territorial access to asylum and humanitarian protection

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Clingendael Report

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The Clingendael Institute
P.O. Box 93080
2509 AB The Hague
The Netherlands

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Email: info@clingendael.org
Website: www.clingendael.org

About the authors

Myrthe Wijnkoop is a senior research fellow at Clingendael's EU & Global Affairs Unit and a cum laude graduate in public international law and Dutch law. Her areas of expertise include international, European, and national refugee and asylum law, and the politics of asylum and migration in an EU and European context. Myrthe has more than twenty years of legal and political-strategic experience in the asylum domain from the perspective of politics, governance, civil society, international organisations as well as (policy) research. She is currently project leader of the Ukraine migration and return study and has been involved as a migration advisor in the State Commission on Demographic Developments 2050.

Stefan Kok is a senior lecturer in the HBO Law programme at Leiden University of Applied Sciences and coordinator of the Migration Lab and an associate fellow of the Clingendael Institute. He was previously a senior lecturer and researcher at the Institute of Immigration Law of Leiden University and senior international policy officer at VluchtelingenWerk Nederland (the Dutch council for refugees). Stefan has very broad experience as a researcher in the field of asylum and immigration law and access to justice. He previously led projects for the European Council on Refugees on Exiles (ECRE) on European asylum procedures and responsibility sharing. In Canada, he led a project on access to justice for the Law Commission of Ontario.

Anouk Pronk is a Junior Research Fellow at the EU & Global Affairs Unit of the Clingendael Institute, whose work focuses on international asylum and migration policies and their impact in both the EU and the Netherlands. She holds an MA in Peace and Conflict Studies from University College Dublin (First Class Honours), an LLB in Dutch Law, including European Migration and Asylum Law, and a BSc in International Relations and Organisations, both from Leiden University.

Kathleen Bush-Joseph is a Policy Analyst with the U.S. Immigration Policy Programme at the Migration Policy Institute (MPI). As a lawyer, she has experience with removal proceedings, asylum, and refugee law. Prior to joining MPI, she worked at the National Immigrant Justice Center in Chicago, consulted for the United Nations Office of the High Commissioner for Human Rights (OHCHR) in Geneva, and was a staff attorney at the Legal Aid Society in New York City.
Ms. Bush-Joseph earned her juris doctor at the University of California, Los Angeles School of Law with a specialisation in international and comparative law. She earned a Bachelor of Arts in history from Georgetown University. She is barred in the Third Department of New York

Monika Sie Dhian Ho is General Director of the Clingendael Institute and Vice-Chair of the State Commission on Demographic Development 2050. She also lectures at the Netherlands School of Public Administration in The Hague. In the field of migration she published on European asylum and migration policy, circular migration, instrumentalization of migration, and protection of Ukranian displaced people. She has also done survey research into public opinion regarding migration and demographic change.

Robin Neumann is an intern at the Clingendael Institute for the EU & Global Affairs unit, conducting research on migration policies and asylum systems. She is pursuing an MSc in International Relations & Diplomacy at Leiden University, and graduated magna cum laude in her Global Studies BA focusing on peace and conflict from the University of California, Berkeley. Prior to Clingendael she was an intern at the International Organization for Migration in Copenhagen, Denmark working for the Labour Migration and Climate Migration teams.

Contents

Executive Summary

In this study, 'In Search of Control', current developments on access to asylum procedures and humanitarian protection in five destination countries have been studied through five separate country reports. In the synthesis report, results are compared and analysed, looking at which lessons can be learned from the North American context (Canada, United States), the European context (Denmark, the Netherlands) and the context in the Pacific (Australia). Our research shows that all these destination states are facing the same balancing act in search of control of migration. Therefore, they could and should learn from each other's experiences in tackling this challenge. Firstly, there is a common humanitarian duty and responsibility to provide protection to those in need while demonstrating solidarity with regions facing heightened challenges due to refugee pressures and other geopolitical crises. Secondly, due to an aging population these states face increasing labour shortages, for which migration is needed. Thirdly, states want to remain in control over their borders and want to manage the influx and admission of migrants. Due to this balancing act, there are no 'quick fixes' in dealing with asylum migration. As these interrelated challenges are part of a global issue, innovative ways forward need to be based on solidarity and cooperation taking into account mutual interest; of those seeking protection, host countries in the region, transit countries becoming destination countries, communities within traditional destination countries, and of other destination states. To facilitate such cooperation, a clear legal framework with sound preconditions and safeguards is needed to ensure both effectiveness and the protection of the rights of refugees and migrants.

This study identifies ten policy approaches that have been initiated or considered by these 'destination states' in order to either provide or limit access to asylum procedures and other forms of humanitarian protection. These approaches vary from interdiction to legal pathways, and from procedural measures to strategic communication, as will be briefly described below.

Ten policy approaches

1. Non-entry measures

Non-entry measures, used as tools for border and immigration management and control by destination countries, include restrictive visa policies, 'carrier

sanctions' and sponsored enhanced capacities of transit or departure countries. However, the accumulation of these measures has led to unsafe situations. Refugees are often driven into the hands of criminal smuggler organizations as they are reliant on irregular routes to access protection, thereby exposing themselves to danger. The recognition exits amongst the destination countries that non-entry measures must be accompanied by legal alternative pathways. Notably, the US and Canada take the lead in this area, with a significant initiative being the 2023 United States Safe Mobility Initiative.

2. Pushbacks

Pushbacks, constituting collective expulsions and potential risks of refoulement, are in violation of state obligations under international law and European law. Australia and the US have implemented or previously employed practices which use (pre-entry) fast-track asylum processes to establish protection needs of persons arriving by sea. In cases where individuals do not meet the criteria for protection, they are returned to their country of departure. Such procedures would be legally problematic in an EU context, as the ECHR and EU law require a rigorous scrutiny of claims, procedural safeguards and effective remedies.

3. (Safe) third country agreements

Currently, in the EU the concept of safe third country agreements is given new impetus through legal discussion on the 'connection criterion' and concrete plans to refer asylum seekers to certain third countries. In North-America and the EU, 'mutual trust agreements' (the Canada-US safe third country agreement and the Dublin system respectively) are the main instruments for responsibility allocation. Even in the contexts of these arrangements between states presumed to have more advanced asylum systems, there are problems with meeting legal standards vis-à-vis asylum seekers.

Outside of the EU and North American 'mutual trust' agreements, there are several versions of safe third country arrangements which are currently piloted or proposed by countries bilaterally that are not part of the study. Examples of this are the UK-Rwanda deal or the Italy-Albania deal.

In general, for the countries in the study safe third country agreements outside of 'mutual trust' agreements do not play a significant role. Australia's agreement with Nauru is very rarely applied and the agreement with Papua New Guinea (PNG) was discontinued. The Biden administration in the US has suspended safe third country agreements with Nicaragua, El Salvador and

Guatemala, but instead seeks a more holistic immigration approach in the region. The Netherlands has no significant safe third country arrangement and Canada has only designated the US as a safe third country.

In sum, 'mutual trust' agreements need flanking solidarity mechanisms for states facing pressures. Outside 'mutual trust' agreements between developed destination countries, safe third country agreements need clear frameworks, legally, practically but also from a humanitarian and international solidarity perspective.

4. Extra-territorial processing followed by access to the territory or resettlement
There are no examples in the countries of the study of extra-territorial processing, followed by resettlement to the country of arrival in case of approval of the claim. The US Safe Mobility Offices do not play a screening role, and no other studied countries have implemented this scheme, as proposed by then UK Prime Minister Blair in 2003. The example in the EU of Italy's proposed processing centre in Albania bears some resemblance with this. In general, extra-territorial processing could complement other legal pathways, in particular resettlement. However, there are practical and legal complications when opening such an avenue outside a country's own territory, with the additional challenge of demanding substantial resources. In light of this, it is legally and practically hard to imagine that they could, also in part, replace territorial asylum, but this would depend on the specific situation and legal safeguards that are in place.

5. Resettlement
Three countries in the study (Australia, Canada and the US) have significant resettlement programmes. Lessons can be learned for the EU and its Member States, some of which lack, or have been reducing, resettlement places. While resettlement should remain a solidarity instrument with countries facing pressures and an avenue for vulnerable refugees who cannot find protection in their own region, there is potential for the EU to explore the use of complementary resettlement programmes. These may include economic or community sponsorship programmes, in addition to the trend of the EU's regional resettlement. The country study of Canada, for example, exemplifies that such resettlement programmes have had positive effects on societal support for refugees.

6. Humanitarian visas or similar (humanitarian) legal pathways

The United States, in cooperation with Canada and other countries in the region, is implementing a Safe Mobility Initiative in the Americas that started in 2023. It consists of a large number of resettlement places, humanitarian visas and complementary economic pathways for refugees and their families from the Americas. This is accompanied by a Circumvention of Legal Pathways Regulation, which also places a sanction of non-eligibility for asylum seekers who do not access the legal pathways available to them. Although these pathways seem easily accessible, they do not necessarily lead to permanent residency in the US. Therefore, it is important to consider the longer-term implications. In Canada, however, the visas under this scheme do lead to permanent residence.

All countries in the study have, or have had, a programme for Ukrainians who fled the war in Ukraine, which in the case of Australia, Canada and the US means that visas are granted for legal access. In Canada the visas allow for return and re-entry and can also be a step towards permanent residence for family or economic reasons. The policies with respect to Ukraine could serve as an example for dealing with conflicts causing sudden and longer term displacement.

7. Planning, funding and quotas

Backlogs are a main concern for Australia, Canada, the Netherlands and the US. Multiple studied countries have recently invested in the administrative systems, courts, or refugee boards, to try to limit or solve the backlogs.

Canada provides an interesting example of an inclusive and participatory planning process through its annual and multi-annual setting of targets and levels. These are based on consultation rounds with stakeholders, public surveys, research and regional (provincial/territorial) needs. The levels and targets include economic migration, family migration, and refugees (inland-applications and resettlement). Though not a guarantee for a managed asylum system, this does allow for a quick and adequate response when targets and levels are not met or exceeded.

A quota system for resettlement is the normal way of administering the resettlement programmes for all countries in the study. However, a quota for territorial asylum resulting in a rejection of a claim would of course be incompatible with international refugee law and does not exist in the countries of the study. A cap on permanent protection visas does exist in Australia, however, possibly leading to years of waiting time for a status.

8. Procedures, border procedures, detention and reception

The five countries in the study have different asylum systems and use diverse methods to examine claims. Within the EU, the EU asylum acquis and the ECHR have given a level playing field in which basic rights are given and guaranteed in those EU states with sufficient legal aid and an efficient judiciary. Denmark, through its opt-out, is only partially bound to EU asylum law, but is still bound by the standards it has accepted through Dublin and Schengen. Canada has a 'robust' asylum system. Australia has a system of long detention and deterrent practices for maritime arrivals. Both Australia and the US work with fast-track procedures at the border or at sea, problematic from the perspective of procedural fairness. It could also result in refoulement or refugees in limbo situations after returns to transit countries. The EU's proposed asylum procedures regulation allows for a wider use of border procedures, which could lead to more pressure on standards.

In Canada, the Netherlands and the US, the reception system is under significant pressure, which is also related to budget and capacity problems. Furthermore, there are political tensions between central and local authorities and there also is a negative impact on public support.

9. Eligibility grounds, rates and returns

The acceptance rates in Canada, Denmark and the Netherlands are relatively high (50% or higher in recent years), while those in the US and Australia are lower. In Australia this can be explained as only asylum seekers who can access the country legally, by air, may enter the territorial asylum process. In the US the statistics are harder to interpret because many cases are still pending. Denmark is busy reassessing and revocating protection statuses, though it has not managed to return anyone following the policy change allowing this. The Netherlands is processing cases from the backlogs, which includes cases with a probable high eligibility rate as in recent cases manifestly unfounded or inadmissible cases were prioritized.

While two countries, the Canada and the Netherlands have a system of one asylum status, the other three countries have a more complex system of different protection statuses, including temporary status offering limited rights. Legally, the diversification of status and especially the limited access to family reunification and withdrawing protection longer and more complicated procedures. Practically this puts pressure on the system overall, and the removal of persons who are integrated in society could lead to protests from communities.

In this respect, a uniform status that gives access to permanent residence has many advantages over more complex systems.

The US has been successful in brokering return agreements with countries of origin although some countries do not fully cooperate. In Canada, Denmark and the Netherlands removals of persons whose asylum claims were rejected has been more complicated and remains a challenge.

10. Strategic Communication

States engage in various ways of strategic communication, aimed at a domestic audience or an international audience or refugees and smugglers for example. Countries such as Australia and Denmark have been very vocal in their strict 'not here' narrative, consistently maintaining both the message and the policies over the years. Negative messaging may influence public support for refugees, consequentially fostering increased support for restrictive policies, as we have seen in these countries. However, this approach comes at a cost, as it positions these countries as 'outlaws', and subjects them to scrutiny from various actors vis-à-vis moral standards. Nevertheless, this seems to be the price these countries are willing to pay. However, the question remains whether the impact on migration numbers is solely attributed to the negative messaging or if it is also related to geographical location and practical barriers in applying for asylum.

Introduction

Context of the research project

Currently, the number of asylum seekers[1] using unsafe and irregular routes to reach the European Union (EU) is on the rise, after an interruption caused by the COVID-19 period. Of the record-high number of 2 million asylum applications in OECD-countries in 2022, nearly one million were made in the EU – an increase of 50% compared to 2021.[2] Around 40% were granted protection status in the first instance.[3] Furthermore, over 4 million Ukrainian refugees[4] were offered temporary protection in the EU. In 2022, 330.000 migrants entered Europe irregularly, the highest measured number since 2016.[5] Mostly due to the dangerous Mediterranean Sea routes used in attempts to reach Europe, more than 28.000 migrants[6] have gone missing since 2014.[7] Migrants that do reach Europe safely are often stuck in overcrowded refugee reception facilities and are confronted with long and costly procedures resulting in protracted situations of uncertainty and inactivity.

Destination countries are facing challenges with respect to managing spontaneous (asylum)migration of persons who claim asylum at the borders or

1 In the report, some words or expressions are used frequently. The following definition for 'asylum seeker' is used in the context of this research project: a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken.

2 TPV World, "OECD countries record highest-ever recorded permanent migration in 2022," 24 October 2023.

3 EEUA, "Almost 1 million asylum application in the EU+ in 2022," 22 February 2023.

4 In the report, some words or expressions are used frequently. The following definition for 'refugee' is used in the context of this research project: 'Refugee' is used in a broader sense, indicating a person who is in need of international protection and is outside their country of origin/country of habitual residence. 'Convention refugee' specifically means a person who falls under the definition of the 1951 Geneva Convention and its 1967 Protocol.

5 Frontex, "EU's external borders in 2022: Number of irregular border crossings highest since 2016," 13 January 2023.

6 In the report, some words or expressions are used frequently. The following definition for 'migrant' is used in the context of this research project namely to refer to the wider category of persons who are outside the country of origin/habitual residence, irrespective of the reasons for leaving this country.

7 IOM Missing Migrants Project, "28,248 Missing Migrants recorded in Mediterranean (since 2014)."

inland, sometimes to avoid forced removal. Whether these persons indeed qualify for international protection needs to be determined in an asylum procedure on the territory of the state (hence territorial asylum), unless another state assumes responsibility. The spontaneous arrival of asylum seekers is stretching the capacity of both governmental agencies and local communities. Destination states' efforts to manage the influx of asylum seekers through procedures outside their territory (hence extra-territorial asylum), have so far not resulted in a more predictable influx. Responsibility sharing between destination states, countries of first asylum and transit states has also not yielded significant results in this respect. Considering the instability in the respective regions where migrants depart from, it can be expected that the number of asylum seekers in OECD countries will remain high. Asylum migration is volatile and is determined by various factors such as persecution and conflict, lack of economic perspective, and climate change. This makes it challenging for destination countries to deal with fluctuating pressure on their external borders and numbers of asylum applications.

In this light, ongoing European and national political and public debates revolve around the organisation of asylum systems and the effective implementation of migration policies to gain (more) control of migration. Clear examples are the deal between Rwanda and the United Kingdom,[8] the new Danish safe third country legislation,[9] the Italian plans to externalise its national asylum procedure to Albania,[10] and the German and Austrian announcement that they will 'examine' the possibilities of externalisation.[11]

8 Monika Sie Dhian Ho and Francesco Mascini, *Dealen met Rwanda: dilemma's bij bescherming van vluchtelingen in derde landen*, Clingendael Institute, 30 October 2023.

9 Nikolas Tan and Jens Vedsted-Hansen, "Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law," EU Immigration and Asylum Law and Policy, 15 November 2021.

10 Lorenzo Tondo, "Italy to create asylum seeker centres in Albania, Giorgia Meloni says," *The Guardian*, 6 November 2023.

11 Jessica Parker, "Germany agrees to consider UK-style plan on processing asylum abroad," *BBC News*, 7 November 2023; Rayeev Syal, "Austria to work with UK on Rwanda-style plan for asylum seekers," The Guardian, 2 November 2023.

In the Netherlands, there have recently been several parliamentary discussions on the subject matter of externalisation. The most recent motion supported by the majority of parliament requested the government to align with the Danish government on outsourcing asylum procedures to third countries.[12] In response, the Dutch government stated that international legal obligations are the basis of the national asylum policy and that the Netherlands has to, and will, adhere to the EU asylum acquis.[13] Meanwhile, both the Supreme Court of the UK and the Australian High Court have declared (parts of) the externalisation policies of the UK and Australia respectively to be unlawful. A balance must thus be struck between upholding fundamental legal principles, such as the right to asylum and the principle of non-refoulement, and the search for control on migration.

In December 2022, the Dutch government initiated a working group focusing on the 'fundamental reorientation of the current asylum policy and design of the asylum system'. Its aim is to further structure the asylum migration process, to prevent and/or limit irregular arrivals, and to strengthen public support for migration.[14] One of the questions is whether the externalisation of the Dutch asylum procedure could be a feasible policy option through effective procedural cooperation with a country outside the EU that 'passes the legal test',[15] in other words, a country that is in conformity with international legal standards. In that context, the working group expressed the need for more insight into how other governments, with legal frameworks differing from that of the Netherlands as an EU Member State, deal with the issue of access to asylum – whether territorial or extra-territorial. This insight aims to provide ideas or angles for evidence-based policy choices by the Dutch government, both at the national and/or the European level.

12 Parliamentary documents, *Kamerstukken II*, 32317 no. 813, February 2023, submitted by Eerdmans (JA21), highlighting the promising opportunities migration partner strategies allow for. The request was additionally made for the government to engage with the Danish government with regards to moving asylum reception and procedures to partners outside of the EU. See also previously: Parliamentary documents, *Kamerstukken II*, 19637, no 2866, April 2022. This motion, submitted by Brekelmans (VVD), called on the government to work within the EU to increasingly develop migration partnerships with third countries and to contact the UK government to learn from their experiences with the Rwanda deal received a majority vote in the parliament.

13 Parliamentary documents, *Kamerstukken II*, 19637, no. 3079, March 2023.

14 Parliamentary Documents, *Kamerstukken II*, 19637, no. 3053, 23 December 2022, p. 2.

15 Central Dutch Government Information (Rijksoverheid), "Bijlage 15 BWO Presentatie deelsessie Asiel," 17 February 2023, p. 13.

Research purpose

The purpose of this comparative research project is to collect existing knowledge about the asylum systems of Australia, Canada, Denmark, the Netherlands and the United States, and to complement this with an analysis of national legislation, policy, and implementation practices, focusing on access to (extra-)territorial asylum. This synthesis report provides a comparative analysis of the respective legal frameworks and the asylum systems of those countries, and will conclude with some reflections on potential directions for Dutch policies.

The five countries for the study are selected because of their role in the global or regional asylum context. The countries represent three regions: North America, Europe, and the Pacific, and are immigration countries that currently (claim to) face challenges in managing migration. They are simultaneously dealing with the challenges posed by an ageing population and labour market shortages and increasing irregular migration pressure on their external borders. In the global context of refugees, the five countries have a tradition of being a destination for refugees, either from their own region or from other regions. They are parties to the 1951 Geneva Convention and/or its 1967 Protocol,[16] amongst other human rights instruments and need to adhere to the principle of non-refoulement. All countries have functioning territorial asylum procedures.

While there are similar challenges and experiences, each of the asylum and refugee protection systems in the study operates in different geographical situations and political contexts.

The United States plays a central role in the western hemisphere's migration and asylum movements. It has long land and sea borders that are hard to monitor. In light of the substantial number of asylum seekers arriving at the border (2.5 million in 2023) and the scale of its programmes, the impact of US policies is very considerable, and its experiences are of importance to other blocs. The US asylum system relies on spontaneous asylum procedures, although it also has a large resettlement programme. In this, it is different from the other two resettlement countries in the study, Australia and Canada, where resettlement is the main avenue for refugee protection.

16 The United States is still bound by most of the obligations of the Convention through its accession to the Protocol.

Canada is shielded by oceans and by the US, with which it has concluded a safe third country agreement. Canada is a global frontrunner and innovator in the area of resettlement and complementary pathways on labour and education. It also has developed strong planning instruments and conducts extensive research on migration and integration, including refugees. The Canadian asylum system is, in the first and second instance, conducted by an independent tribunal, the Immigration and Refugee Board, and there are further appeals with the courts. It has a 'single status' system, meaning that refugees under various admission grounds receive the same rights.

The Netherlands is part of a broader bloc of states, the EU, that takes in many refugees from neighbouring and close conflict countries and human rights crises. Within the EU, the Netherlands is a destination country for asylum seekers. The Dutch asylum context is greatly influenced by, and dependent on, border and asylum practices in other EU countries. Within the bloc, the Netherlands is a leader in the design of asylum procedures, but also an advocate of the Dublin system, which contains binding EU-criteria for allocating responsiblty for an asylum claim,[17] and exploring extra-territorial solutions for refugees with a group of like-minded states. The Dutch asylum system is a 'single status system' and is firmly rooted in EU asylum law. The jurisprudence of the EU Court of Justice is shaping its asylum practice. Dutch courts have been active in asking preliminary questions to this court, thus contributing to a growing body of European asylum law. This is also influencing the wider European region (Council of Europe) including Denmark and the UK, and even, for example, Canada's case law on safe third countries.

Denmark, although an EU state, is only partially connected to the EU asylum system, due to its 'opt-out' of the Common European Asylum System acquired after initially rejecting the Maastricht Treaty in a referendum in 1992. Although the opt-out means that Denmark is exempt from EU asylum standards, in practice, Denmark is embedded in the EU bloc through its participation in the Dublin and Schengen system (an area without inner borders and shared external borders) and, as an EU Member State, through its constant relations with other EU-countries. Despite this, Denmark has some policy autonomy to deviate from EU standards, and arguably to adopt innovative approaches. In its

17 The criteria are based on the principle that the state responsible for the entry into their combined territory – whether through granting a visa, a residence permit, or in other cases, because of being the physical point of entry – is also responsible for processing the asylum request.

asylum policies Denmark has moved towards the notion of temporary rather than permanent protection and integration of refugees.

Australia is not part of a bloc of destination countries, placing it in a unique situation. It is surrounded by seas and oceans. Australia has experienced two peaks in the number of asylum seekers by sea, in 1999-2001 (up to 5,500 persons per year) and 2012-2013 (up to 20,500).[18] The country strongly responded to this and has virtually closed its borders for spontaneous arrivals via sea through Operation Sovereign Borders. This entails maritime interdictions, a system of "offshore processing" and a policy of immigration detention, sometimes indefinitely. By lack of a supranational court and due to bipartisan support of such policies, such policies are possible in Australia. If the High Court rules a certain practice unlawful, legislation is often quickly passed (retrospectively) in response to court rulings to still enable such practices.[19] Australia's asylum system is practically only open to persons who arrive on a valid visa by air, which are solely granted to persons not originating from countries dealing with conflict and persecution. Grant rates for protection claimed by overstayers have been low. In the other countries in the study, the vast majority of asylum seekers enter the asylum system via land or sea.

Central research question and focus

The similarities and differences between the five selected countries make it interesting to analyse how each of the countries provides access to asylum procedures or other legal pathways, and to which extent operational circumstances and the legal framework influence the policy choices on asylum. Through the country reports insight is provided into how destination countries navigate access to (extra-)territorial asylum in search of control on migration. Additionally, the synthesis looks at the EU system more generally since this legal framework binds the Netherlands asylum policies.

The main question answered in the national reports is: *Which instruments are applied or proposed by Australia, Canada, Denmark, the Netherlands and the US concerning or affecting access to asylum procedures and humanitarian protection and how effective are these?*

18 Janet Phillips, "Boat arrivals and boat 'turnbacks' in Australia since 1976: a quick guide to the statistics," Australian Parliamentary Library, 17 January 2017.

19 In response to the Australian High Court ruling of November 8 deeming indefinite detention unlawful, the government is busy initiating legislation to still enabling such detention practices.

Therefore, the country research focuses on several central elements of the national asylum systems, including their access to, and implementation of, interdiction practices, border and asylum procedures and other legal pathways. These were put in a broader public, political and legal context, taking into account the countries national policy aims and objectives.

To establish what lessons can be learned from those instruments, the central question for the synthesis report is: *To what extent can current or proposed national instruments in Australia, Canada, Denmark and the United States with respect to access to asylum procedures or humanitarian protection be used in an EU context considering international legal obligations, the government agencies' capacity, and public support?*

This question will be answered through an analysis of four main policy domains and/or types of instruments:

- 'Non-entry regimes', preventing spontaneous access to the asylum procedure: (1) 'general interdiction measures', (2) pushbacks and offshore processing in excised areas, (3) safe third country concept and (4) extra-territorial processing;
- Legal pathways: (5) through resettlement, (6) humanitarian visas or similar (humanitarian) legal pathways;
- Procedural measures to manage national asylum systems: (7) measures to give rapid access to protection or to discourage spontaneous arrivals: planning, funding and quota, (8) (border) procedures, detention and reception; and (9) outcomes of systems;
- (10) Strategic communication, both aimed at an internal (domestic) audience and an external audience of asylum seekers and third countries.

Research methods and quality control

The study is based on desk research (examination of the applicable legislative and policy framework, an analysis of case law and a broad literature review), semi-structured interviews with national officials, organisations and/or researchers, and readily available expertise of Clingendael experts involved. An external advisory board, consisting of authoritative experts in the field of refugee and asylum law, linked to the selected countries, was set up for the purpose of peer review and quality control. The members of the board were: Nils Coleman, Elizabeth Collett, Maarten den Heijer, Madeline Garlick, Nikolas Tan and Huub Verbaten. Monika Sie Dhian Ho developed the idea for the research and supervised the project. The research has been conducted in the

period July-October 2023, and has been updated with the most recent relevant developments until the 30th of November 2023.

In the synthesis report, current developments will be discussed per country first, to thereafter compare the policies of these countries along relevant themes and specific topics. A short concluding chapter will sum up the main lessons and remaining questions in an area that is rapidly developing.

Stefan Kok
Myrthe Wijnkoop

Synthesis

Recent policy approaches in the five selected countries – an introduction

As described above, the specific geographical and political situation of the researched countries may explain varying approaches with respect to access to asylum procedures. Some countries in the study are considering, or have adopted, measures of discouragement if not outright deterrence of spontaneous asylum. In other researched countries the approaches are more mixed, combining restricted access to territorial asylum with the provision of alternative legal pathways. Canada, the Netherlands and the US face big pressures on their asylum systems, resulting in significant backlogs and long processing times. For Denmark and Australia this pressure is less.

This paragraph gives a brief overview of relevant policy developments in the various countries and provides insight into the national context of asylum legislative and policy approaches. The EU context is also highlighted as a relevant legal and policy framework for the Netherlands.

Australia

Australia's policies have since 2014 led to a drastic decline in the number of asylum seekers arriving by sea. Its main framework is 'Operation Sovereign Borders (OSB)', upheld with bipartisan support. This policy includes interception and return of irregular maritime arrivals, where safe to do so. If not, asylum seekers are put in immigration detention, either onshore in Australia, or offshore in regional processing centres in Nauru, a microstate in the Pacific. Until 2016, there were similar reception centres in Papua New Guinea (PNG), but these had to close after the PNG High Court ruled it unconstitutional. In addition, deterrence campaigns are run under OSB in transit countries to help prevent anyone coming to Australia by boat. Due to OSB, the relatively small number still applying for protection onshore has entered Australia via air. Recognition rates for these asylum seekers are low, partly because persons from conflict areas usually do not have the possibility to obtain a valid visa to enter Australia. The biggest part of Australia's Refugee and Humanitarian program offers protection through its offshore program for resettlement.

Canada

Canada has a longstanding tradition of welcoming migrants. It has a considerable resettlement scheme for refugees from other parts of the world and seeks support for its private sponsoring model. It has expanded its Private Sponsoring Programme at the expense of Government Assisted Resettlement. It has also added an Economic Mobility Pathways Pilot to its refugee resettlement scheme.

Although territorial asylum procedures are not the main avenue for asylum in Canada, the country operates an asylum procedure with significant resources and safeguards. There have been significant backlogs, for which the authorities were given more funding. After an increase of irregular entries and asylum requests, the country has successfully negotiated an expansion of the Canada US Safe Third Country agreement (STCA). The amended STCA, which came into force in March 2023, now also applies between points of entry. This means that asylum seekers who are intercepted at the borders may be sent back to the US. The Canadian Supreme Court held that the STCA was not unconstitutional but formulated legal conditions. The impact of the expanded agreement on access to asylum procedures still has to crystallise.

For Canada, part of the negotiated expansion of the Canada US Safe Third Country Agreement was a programme to grant 15,000 'humanitarian visas' for nationals from the American region, in particular from Colombia, Haiti and Venezuela.[1] Thus, Canada has followed the US programmes on humanitarian paroles, albeit under its own policies for permanent residence.

Denmark

In Denmark, territorial asylum procedures are the primary pathway for protection. Despite Denmark's opt-out from EU asylum standards, in practice, it largely aligns with EU asylum law and maintains a solid asylum procedure. Sometimes Denmark deviates from EU standards, for example, by setting lower standards on cessation of protection status and family reunification than the EU legislation. Despite the relatively low numbers of asylum seekers (4,500 in 2022, the highest

1 Office of the Prime Minister of Canada, "Working with the United States to grow our clean economies and create good, middle-class jobs on both sides of our border," 24 March 2023; Government of Canada, "Statement from Minister Miller on Canada's commitment to support migrants in the Americas," 10 October 2023.

number since 2016), the government has focused on withdrawal of the permanent protection status.

Denmark has, at least in its communications, but also in policy measures, adopted a "paradigm shift". Traditional norms of integration and long-term residence have given way to a new approach, wherein residence permits, including for resettled refugees, are now granted on a temporary basis with a strong emphasis on returning refugees to their countries of origin as soon as possible. The Danish 'paradigm shift' is to be distinguished from Denmark's efforts to develop an external dimension of asylum policies, which has not yet been fully clarified or implemented. Notably, a 2021 amendment to the Danish Aliens Act allows asylum-seekers to be transferred to a third state outside Europe for both processing and protection. The amendment specifically refers to Denmark's international obligations. No agreement with a third country for this kind of far-reaching cooperation has been reached yet. Although Denmark has signed a Memorandum of Understanding with Rwanda, focusing on cooperation and dialogue, there is no explicit mention of the possibility of transferring asylum seekers to Rwanda who have no connection with that country.

The Netherlands

For the Netherlands, the territorial asylum procedure is the formal main pathway for protection, but 'reception in the region' has also been a longer-term policy goal.[2] The attitudes towards refugees are mixed. On the one hand, there is significant support in society for refugees, including through many NGOs at the national and local level, exemplified by the openness to provide temporary protection to Ukrainian displaced people. On the other hand, asylum and, for the first time, also labour, study and family migration were important issues during the 2023 election campaigns. The elections resulted in a victory of the PVV-party, led by Geert Wilders, advocating an asylum stop and restrictive labour migration policies. A coalition has yet to be formed.

Considering the relatively high numbers of first asylum requests (35,000 in 2022)[3] and temporary protection for Ukrainians (100,000 in 2022), coupled with a general housing crisis, Dutch society is increasingly divided over asylum.

2 See for example the coalition agreement 2021-2025: VVD, D66, CDA and ChristenUnie, "Omzien naar elkaar," 15 December 2021.

3 CBS, "Asielverzoeken met ruim 40 procent toegenomen in 2022," 30 Januari 2023.

A 2022 Dutch government decision on asylum contained a policy delaying family reunification for refugees unless the refugee had found adequate housing.[4] This policy was, however, rapidly annulled by the courts.[5] In 2023, the Dutch coalition government 'Rutte IV' fell over a disagreement between coalition partners concerning granting less rights to beneficiaries of subsidiary protection in relation to family reunification. This would mean abandoning the Aliens Act 2000's system of a uniform asylum status on multiple grounds, giving the same set of rights to all beneficiaries of international protection.

On the external dimension the Netherlands seeks cooperation within the EU-context and with European partners. The country has especially been active in brokering the EU-deals with Turkey in 2015 and the Tunisia MoU in 2023. It has long advocated (strengthening) reception in the region and is discussing 'innovative partnerships with third countries' with a group of like-minded EU countries. The Netherlands was also one of the eight countries involved in the EU's Regional Development and Protection Programmes in Lebanon, Jordan, and Iraq for Syrian refugees.[6] There are, as of yet, no concrete suggestions if and how these regional initiatives should develop into further programs for more managed migration.

The European Union

The EU bloc is in the process of revisiting and renegotiating its asylum legislation. The so-called EU asylum acquis is based on asylum procedures in the EU Member States, as well as standards for reception and return. The EU's long-term agenda as formulated in 2016 by the European Commission is to replace 'irregular and dangerous movements with "safe and legal ways to the EU for those who need protection."[7] However, the European Commission makes it clear that for the medium- and short-term territorial asylum – often after irregular entry – remains the main channel and that '*...those who do claim asylum should have their claim processed efficiently, and be assured decent reception facilities...*'. For the first time since the adoption of the Temporary Protection Directive in 2001, the EU has

4 Ministerie van Veiligheid en Justitie, Brief besluitvorming opvangcrisis, Kamerstukken II, 19637 nr. 2292, 26 August 2023.

5 Dutch Council of State, "Uitspraak 202207360/1V1," 8 February 2023.

6 EEAS, "RDDP (Regional Development and Protection Programme for refugees and host communities in Lebanon, Jordan and Iraq)," 8 August 2016.

7 European Commission, "Proposal for a Regulation of the European Parliament and of the Council," 4 May 2016.

applied the Temporary Protection Directive with respect to Ukrainians. About 4,1 million Ukrainians in the EU have received temporary protection since the start of the war in Ukraine.[8]

The EU has, in comparison with North America, not been very proactive in providing access to its asylum procedures or providing legal pathways, for example, through resettlement and humanitarian visas. Indeed, in July 2023 the EU Fundamental Rights Agency raised its concerns about the EU's efforts to prevent and respond to deaths at sea.[9] It called for investigations, improved search and rescue at sea, clear disembarkation rules and more solidarity, as well as better protection for survivors in the asylum context, independent border monitoring and more accessible legal pathways.

The 2016 EU-Turkey deal[10] is still the clearest case of an agreement with a third state intended to manage access to asylum procedures in the EU. The agreement had a readmission and a resettlement ("1:1") component for Syrian refugees and also consisted of a financial contribution to Turkey for the reception and protection of Syrian refugees. However, a consequence in practice was that asylum seekers who arrived on the Greek islands were forced to stay in below standard and detention-like reception facilities on the islands. There were few returns. Thus, the deal mostly had a strong deterrent effect, especially for the specific route via the Greek islands. It did not have the intended significant resettlement component: about 40,000 Syrian refugees were resettled under the Deal. The Deal has, at times, also led to tensions with Turkey. In recent years many Syrians have spontaneously moved from and through Turkey to the EU states, but also chose other, and potentially more dangerous routes.[11] The legal basis of the EU-Turkey deal, the way the deal was implemented and the impact on Turkey, Greece and refugees have not been thoroughly evaluated yet.[12] The EU-Turkey deal, despite its very problematic aspects, has inspired other agreements of EU Member States with third states, for example a Memorandum

8 European Council, "Infographic - Refugees from Ukraine in the EU," 27 October 2023.

9 EU Fundamental Rights Agency, "Preventing and responding to deaths at sea: what the European Union can do," July 2023.

10 European Council, "EU-Turkey statement," 18 March 2016.

11 Frontex, "EU's external borders in 2022: Number of irregular border crossings highest since 2016," 13 January 2023.

12 See for example Kyilah Terry, "The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint," Migration Policy Institute, 8 April 2021.

of Understanding with Tunisia.[13] So far, there is no similar deal to the EU-Turkey deal.

The United States (US)

The US is facing a large influx of asylum seekers: more than 2,6 million. It operates territorial asylum procedures and resettlement schemes and is currently exploring new ways to give access to protection, through the 'Safe Mobility Initiative'. The 2023 Initiative specifically targets third country nationals in the Americas. Access is granted through humanitarian paroles and other legal pathways.[14] Part of the initiative are Safe Mobility Offices which are located in the regions from where asylum seekers move to the US. They are meant to assist (potential) migrants in accessing legal pathways. The policies also include a potentially more restrictive side for those spontaneously arriving at the US-border without using legal pathways. The 'Circumvention of Lawful Pathways regulation' contains a (rebuttable) presumption of ineligibility for asylum seekers who do not enter through the legal pathways available to them. So far in practice, most asylum seekers are deemed eligible. In addition, many persons at the borders are granted permission to enter the US through a temporary 'humanitarian parole'. After entering the country with such a parole, they would still have to seek lawful status, for example by applying for asylum.

This overview of the researched destination countries initially indicates varying contexts with respect to asylum, but also a considerable amount of policy convergence and similarities in instruments developed, or at least proposed. Furthermore, it is evident that a high level of policy activity aimed at managing spontaneous territorial asylum migration is an additional similarity. It is, therefore, of interest to compare the experiences and debates in the various regions and put these in a wider context. Can the (proposed) policies be used by other individual countries and what would the impact be on global refugee protection if the EU bloc and partners would adopt these?

13 European Commission, "Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia," 16 July 2023.

14 US Homeland Security, "Fact Sheet: U.S. Government Announces Sweeping New Actions to Manage Regional Migration," 27 April 2023.

Preventing access to territorial asylum procedures

1. Non-entry measures

In the selected countries access to territorial asylum procedures (meaning that a person in need of international protection has ccess to the territory of a state and has unimpeded access to its asylum procedures) is not a given. Together with other destination countries, they engage in a wide range of measures which are meant to prevent irregular migration to their territory. These include visa-requirements, 'carrier sanctions', 'International Liaison Officers', and other forms of border policies in third countries. For example, in October 2023 the EU Commission proposed a mechanism to suspend visa-free travel for 60 countries, if these countries do not "align their visa policy with the EU's and continue their efforts to prevent unfounded asylum applications."[15]

NGOs have remarked that the accumulation of these measures have made legal travel for many refugees virtually impossible, playing into the hands of human smugglers while forcing refugees to choose even more dangerous routes.[16] Observers have also pointed to the invisibility of these measures.

In light of the scrutiny of the asylum systems and statistics in the country reports, it can be concluded that a general opening of borders followed by increased numbers of migrants could negatively impact public support and would rapidly put high pressures on asylum systems. National and international courts have accepted that border control outside the territory of states is allowed, as long as measures are not discriminatory.[17]

For EU Member States, the most important legal framework in this respect is provided by the ECHR, complemented by EU law. The ECtHR has declared

15 European Commission, "Commission proposes a more robust suspension mechanism to visa-free travel," 18 October 2023.

16 See for example: Neil Falzon and Myrthe Wijnkoop, *Protection in Europe, Safe and Legal Access channels*, ECRE, February 2017.

17 See for example: House of Lords, *Regina v. Immigration Officer at Prague Airport*, 9 December 2004.

that states have the right to control the entry and residence of third country nationals.[18] There is, for example, no legal obligation under the ECHR or under EU law for a state to grant a humanitarian visa outside the territory if there is no connection or link of the third country national with the state.[19] As a consequence, it is common practice that asylum seekers travel to the EU via land and sea in order to apply for asylum.

Regarding Spain's enclaves in North-Africa, the European Court of Human Rights held in *N.D. and N.T. v. Spain*[20] that Spain was allowed to deny entry to irregular migrants at the borders, provided that there are other legal pathways and official points of entry which could be accessed by the migrants to apply for asylum. However, the judgement does not specify the requirements for the legal pathways. If these are merely theoretical or not effective, it is doubtful under refugee law and international human rights law, that a state can deny an asylum seeker access to its territorial asylum procedure and refer the asylum seeker back to an 'extra-territorial' procedure, on the ground that this was available to the person and should have been used.

The dangers of irregular routes for refugees are reported in all the selected countries/regions. The situation in the Mediterranean has especially led to a tragic loss of lives, traumatising experiences for refugees and migrants and overburdened arrival states. EU responses to this crisis have been mixed. On the one hand, the importance of strengthening protection of external borders and breaking the business cases of smugglers is highlighted.[21] On the other hand, there is a call for improving search and rescue operations and enlarging legal pathways.[22] In Australia, where a visa is mandatory for all incoming individuals, the imperative to curtail the loss of life at sea has been the justification for its strict interdiction measures. This strategy involves breaking the business model

18 ECtHR, *N. v. the United Kingdom*, Grand Chamber Decision, Application no. 26565/05, § 30, 27 May 2008; ECtHR, *Ilias and Ahmed v. Hungary*, Grand Chamber Decision, Application no. 47287/15, § 125, 21 November 2019.

19 ECtHR, *M.N. and Others against Belgium*, Grand Chamber Decision, Application no. 3599/18, 5 March 2020. In this specific case Denmark and the Netherlands had intervened, successfully, that in the absence of ties there is no state responsibility at, for example, embassies.

20 ECtHR, *N.D. and N.T. v. Spain*, Grand Chamber, Application nos. 8675/15 & 8697/15, 13 February 2020.

21 European Council, "Saving lives at sea and fighting human smuggling," 13 November 2023.

22 See for example: EU Fundamental Rights Agency (FRA), *Preventing and responding to deaths at sea: What the European Union can do*, 6 July 2023.

by preventing any irregular entry and sending everyone back, aimed to dissuade anyone from undertaking the journey in the first place. However, legal avenues in Australia remain limited, as the only legal option for nationals of most countries is to wait for resettlement, given that spontaneous asylum can only be applied for by people who have arrived with a valid visa.

Assessment

Although non-entry measures are tools for border and immigration management and control, the *de facto* result is that refugees and other migrants take extremely dangerous routes to access asylum procedures in destination countries. The effects of accumulated non-entry measures in the EU context in combination with territorial access to asylum can be seen in tragic statistics on dead and missing persons at its borders.[23] Furthermore, asylum statistics also tell a story as most asylum seekers entering the EU are young men and minors,[24] who by their families are likely to be considered better able to undertake the dangerous journey.

In the EU, as well as the US and Canada, the political and public debate frequently underscores the necessity for interdiction measures to be accompanied by safe legal pathways for individuals in need of protection. 'Legal pathways' refers to avenues for safe and legal access to the territory of a state, for example through a visa or permit granted outside the territory of the state. For persons in need of international protection who enter through a legal pathway, this can either directly be followed by granting international protection or another form of temporary protection, or by access to a territorial (in land) asylum procedure. The US and Canada are acting on this idea through concrete measures such as the US Safe Mobility Initiative as well as significant resettlement programmes.

2. Pushbacks and offshore processing

Pushbacks

Pushbacks are measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back without an individual assessment of their human rights

23 IOM, "Migration flow to Europe - Dead and Missing," Missing Migrants Project.
24 Eurostat, "Annual Asylum Statistics," 2022.

protection needs. This can be to the country or territory or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border.[25]

Pushbacks occur at the external borders of the bigger blocs and Australia, especially at the sea borders and high seas.[26] They often take place outside public and judicial scrutiny, although in Australia for example, they are openly part of its policy to deter irregular arrivals.

The specifics of Australia's pushback practices are shared in a limited manner with the public, as such operations at sea are considered a matter of national security. It does, however, publish the mere number of executed maritime interdictions and actual unauthorised maritime arrivals.[27] In some maritime cases, Home Affairs Protection Officers execute a pre-entry on board screening, in which an enhanced procedure should clarify whether the principle of non-refoulement brings in obligations for Australia. In the case that Australia would have protection obligations based on this assessment, asylum seekers can be brought to an offshore regional processing centre in a third country (see below) where they enter the standard protection assessment process, however, without a chance to permanently settle in Australia.[28] If asylum seekers are not deemed in need of protection, boats are returned out of Australian waters toward their country of origin or departure.[29]

25 See UNGA, *Report on the means to address the human rights impact of pushbacks of migrants on land and at sea*, A/HRC/47/30, para. 34, 21 June – 9 July 2021.

26 See also Advisory Council on Migration, *EU Borders are also our borders*, January 2022.

27 Australian Government Department of Home Affairs, *The Administration of the Immigration and Citizenship Programs*, May 2023, p. 42; Also see for example Refugee Council of Australia, *Pushback practices and the impact on human rights of migrants, submission to the United Nations special rapporteur on the human rights of migrants*, March 2021; Australian Border Force, "Operation Sovereign Borders Monthly Update: September 2023," 27 October 2023.

28 Australian Human Rights Commission, *Tell Me About: The 'Enhanced Screening Process'*," 26 June 2013.

29 The UNHCR criticises these enhanced procedures for being unfair and unreliable, with additional risks when executed at sea, see: High Commissioner's Dialogue on Protection Challenges, "Protection at Sea – Background Paper," 11 November 2014, par. 18.

In general, the EU and its Member States practices are less out in the open and even denied by the state authorities,[30] as pushbacks are considered in violation of the prohibition of a collective expulsion under ECHR and EU law, and potentially also of the principle of non-refoulement. Pushback practices in the Mediterranean by EU Member States and with the support of the EU Border and Coast Guard Agency (Frontex), are under constant scrutiny from the media, NGOs and the European Parliament. The Court of Justice of the EU (CJEU) held that the individual Member States remain responsible for violations at the external borders vis-à-vis individual migrants, even if Frontex played a significant role.[31] This complicates the attribution of state responsibility when pushbacks are implemented by actors consisting of multi-state border guards.[32]

In the landmark case of *Hirsi Jamaa and others v. Italy*, the ECtHR held that Italy's pushbacks to Libya regarding a group of migrants at high seas had violated both the principle of non-refoulement (direct and indirect) under article 3 ECHR and the prohibition of a collective expulsion under article 4 of Protocol 4 ECHR. In Libya, the human rights of asylum seekers from Eritrea and Somalia were abused and they ran a risk of refoulement. Factors considered relevant by the ECtHR were that Libya did not provide adequate protection against the risk of ill-treatment and that there were no trained staff, interpreters, and legal assistance on the boat of the Italian coast guard to assess the individual protection claims. The legal framework of the ECHR and EU-law thus contains many procedural safeguards. This has however not put an end to the pushback practice and human rights violations at the external borders, nor has that practice led to decreasing migration pressure there.

Interdiction measures and offshore processing

'Offshore processing of asylum claims', mostly in the context of arrivals by sea, refers to state practices of transferring intercepted asylum seekers to defined areas inside or outside homeland territory, and processing their claims without giving access to asylum on their territory. When this happens inside the territory, this is usually accompanied by a legal fiction that there is no full jurisdiction.

30 Helena Smith, "Greek government under fire after video shows 'pushback' of asylum seekers'," *The Guardian*, 19 May 2023.

31 Helena Smith, "Greek government under fire after video shows 'pushback' of asylum seekers'," *The Guardian*, 19 May 2023.

32 Advisory Council on Migration, *EU Borders are also our borders*, January 2022.

When this happens outside the territory, this entails an agreement with a third country.

Both Australia and the US employ special 'interdiction' mechanisms for arrivals by sea, with the US utilizing Guantanamo and Australia relying on offshore facilities in Nauru.

In the case of the US, interdiction measures by the US Coast Guard in the Caribbean are accompanied by some, but very limited, access to asylum procedures in Guantanamo Bay and potential resettlement to a third country. This is based on a perfunctory screening of the individual case. The Coast Guard reports that only one percent of people interdicted are found to be in need of protection. Generally, migrants are returned to their country of origin (mainly Haiti or Cuba) or transferred to third countries with which the US has bilateral agreements. The US 'Guantanamo' interdiction measures have a long history and were litigated since the 1990s. Recently, there have been thousands of interceptions and interdictions per year. The US case law of the Supreme Court upholds that these measures occur outside the jurisdiction of the US and that neither US law nor the Refugee Convention have extraterritorial effect.[33]

Australia's interdiction measures are openly aimed at deterring asylum seekers and migrants arriving by sea.[34] This also includes pushbacks and legal fictions of 'excised territories', through which both mainland Australia, but also Australian islands such as Christmas Island,[35] are excluded from the migration zone. This means anyone entering Australia and wanting to apply for asylum is barred from doing so, without the Minister lifting the bar first.

Both the Australian offshore processing approach and the US Guantanamo approach have an element of collective push backs. They do, however, in certain

33 David E. Ralph, "Haitian Interdiction on the High Seas: the Continuing Saga of the Rights of Aliens Outside United States Territory", *Maryland Journal of International Law*, 17:2, 1993; Inter-American Commission on Human Rights (IACHR), *The Haitian Centre for Human Rights et al. v. United States*, Case no. 10.675, 13 March 1997; US Supreme Court, *Sale v. Haitian Centers Council*, 509 U.S. 155, 1993.

34 Katrina Stats, "The Australian Way: A Critiical Review of Australia's Response to Refugees and Asylum Seekers 1901-2013," *The University of Adelaide*, June 2017.

35 Christmas Island was often used as a destination to apply for asylum in Australia, as it brings the Australian borders way closer to Java, a popular place of departure for asylum seekers coming by boat.

cases contain an element of asylum processing on 'offshore territories' next to a transfer to third countries for resettlement or return to the country of origin. The reported standards for the procedures are low. There is, in any case, a denial of access to protection in the destination state even if the refugee claimant is found to be in need of protection. As such, these approaches are also to be seen as deterrence with respect to irregular arrivals.

Assessment

From a legal perspective, it is hard to envisage that 'offshore territories' would pass regional and national judicial scrutiny in the EU context. The ECHR, in cases when there is jurisdiction (*see hereunder*), and EU law which is territorially applicable, have formulated strict legal requirements with respect to collective expulsions, the scrutiny of asylum requests, detention, safe third country arrangements and refugee rights.

From a European – and arguably also Canadian – perspective, the concept of non-jurisdiction on excised territory is not legally tenable when there is effective control of agents of a state over an asylum seeker or migrant. Once migrants establish contact with the European states' agencies at the external borders, including at high seas, the ECHR applies if the agencies exercise effective control over the migrants.[36] On EU territory, EU asylum law requires that asylum status is granted in case asylum criteria are met, unless there is a safe third country with which the asylum seekers have ties and readmission is guaranteed.

In 2011 Den Heijer, in his dissertation "Europe and extraterritorial asylum", wrote: "*...the physical and procedural 'containment' of asylum seekers raises a number of key human rights issues which have not been satisfactorily addressed in the Australian and United States' offshore processing programmes. Apart from a system which does not secure essential requirements of the rule of law (especially obstacles in the sphere of judicial review and an insufficient level of guarantees against arbitrary human rights interferences), the Achilles' heel of previously employed external processing lies in the absence of meaningful and lasting solutions for persons being processed in an extraterritorial facility.*"[37]

36 ECtHR, *Hirsi Jamaa and Others v. Italy*, Grand Chamber, no. 27765/09, §74 and 75, 23 February 2012. See on this subject matter also: Advisory Council on Migration, *EU Borders are also our borders*, January 2022.

37 Maarten den Heijer, "Europe and extraterritorial asylum," *Leiden University*, 2011.

The ECtHR's and the CJEU's consistent and recent case law in the context of the Dublin system and safe third countries confirm this view for the European context.

3. Safe third country agreements

Safe Third Country (STC) agreements are an instrument for asylum protection responsibility allocation by states, meaning that the responsibility for the assessment of the asylum claim can, other certain conciditions, be shifted by one state to another. All five countries apply the safe third country concept. Except for Australia, the researched states do not have a functioning automatic STC agreement, other than a Dublin-type agreement. Australia makes use of STC agreements with neighbouring states as part of its 'shield' to prevent sea arrivals.

Under EU law there are two types of STC agreements. The first is the Dublin-system within the EU (Dublin III Regulation), which is based on the principle that the state responsible for the entry into the territory is also responsible for processing the asylum request. Some exemptions apply because of family ties or unaccompanied minors. This means that, by and large, migration movements and geographic situation determine which state is responsible for the asylum claim. The presumption underlying this system is that each states offers a similar, at least adequate, level of protection. This is also known as the principle of mutual trust or interstate confidence. Dublin type STC agreements do not require a real connection between the responsible state and the asylum seeker. A simple entry or transit or a visa is sufficient.

The second type of EU STC agreements are bilateral agreements as provided in the (current) Procedures Directive. The main difference, apart from the presumption of mutual trust among Dublin states, is that article 38 (2) of the current applicable Procedures Directive requires that the concept shall be subject to "rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country".

The newly proposed EU Procedures Regulation that is currently being negotiated in tripartite dialogues between Commission, Council and Parliament, still contains a reference to the connection requirement. Despite discussions within the Council on possible deletion of the requirement or to explicitly stating that 'mere transit' would not suffice, the wording remained similar "only referring to "stay" (albeit in the recitals) as a possible criterion to consider in assessing the fulfilment of the reasonable connection requirement. However, as the Council

has also stated that the Regulation will be regularly evaluated, the option of retablement of the discussion remains.[38]

The connection requirement follows from UNHCR Excom Conclusion 15, a non-binding but authoritative text. The prevailing idea is that asylum should not be refused on the sole ground that protection could be granted in another state. The fear was that in that case there would be a risk that no state would take responsibility and that the refugee would be left in limbo. This would undermine the fundamental idea of refugee protection, namely that a refugee would get protection somewhere (however not per se in a country of choice). This Conclusion must be seen in the light of the 1951 Refugee Convention's aims to grant rights to refugees, but also its recognition that "the grant of asylum may place unduly heavy burdens on states" and that international cooperation between states is needed. The idea arose that if an asylum seeker already has ties with another state before applying for asylum, it would be reasonable to refer the asylum seeker to that other state to apply for asylum.

Non-EU countries have not codified the Excom Conclusion 15 and its connection requirement, nor is it directly applicable to Denmark due to its EU acquis opt-out status. It is not part of Australia's agreements with neighbouring countries. Also Canadian legislation does not distinguish between 'Dublin type' and other STC concepts. The main criteria in the Canadian (Immigration and Refugee Protection Act (IRPA)), similar to article 38 (1) of the EU procedures directive, refer only to human rights and an agreement. It does not contain a connection requirement.

Functioning of the Dublin-type agreements in the EU and North America

The Canada-US STC Agreement is currently central to Canada's national asylum procedure. The Dublin-type system is especially of great importance for the current asylum practices of Denmark and the Netherlands. This means also that, by and large, migration movements and geographic situation determine which state is responsible for the asylum claim. In the EU and North-America these movements tend to be South-North, and in the case of the EU also East-West.

38 Council of the Euroean Union, Outcome of Proceedings of the Justice and Home Affairs Council, 14 June 2023.

In theory, Denmark, the Netherlands and Canada are relatively shielded by their safe third partner states, provided that migrants are registered at the external borders or the countries themselves can provide evidence of border-crossing through a partner country. In practice, this is complicated by the abolition of internal borders in the EU. For Canada, the length of the Mexico-US and US-Canada land borders mean that asylum seekers can access its territory without being detected or stopped earlier *en route*. Thus, these three countries occasionally experience asylum pressures despite their geographical situation and the application of the Dublin system.

In the EU context there is a large discrepancy between practice and the formal criteria. Although the system's criteria for allocation of responsibility seem to heavily burden the Member States at the EU's external borders, in practice the destination Member States further North-West receive the majority of asylum requests.[39] There is also a clear 'push' for secondary movement. Many EU-states at the external borders have such deficiencies in their asylum and reception systems, that Courts in other EU countries consider that transfers back to these countries would be in violation of the prohibition of ill-treatment.[40]

In Canada, deficiencies in the US asylum and housing system have also led to an increase of asylum seekers in Canada. The 2023 expansion of the Canada-US STC agreement has given Canada the possibility to intercept asylum seekers at their borders between points of entry and apply the STC agreement more widely. The effects of the expansion are not yet clear, although a change of routes (via air rather than land) was seen after the expansion of the agreement.

39 In 2022, Germany and France received the most asylum requests in 2022 (24,7% and 15,6% respectively). Combined with Austria (12,1%), and also the Netherlands and Belgium in the top 7, the traditional "destination Member States", not at the external borders, received the most requests by far. Spain ranked third (13.2%), but this was because of Venezuelan, Colombian and Peruvian asylum seekers (45,000, 35,000 and 8,800 respectively) who had arrived by air. Thus, of the external border states only Italy (ranking 5th) received a significant number of asylum requests and also transfer requests under the Dublin III regulation because of entry via this country.

40 See on the subject matter of secondary movements also Advisory Council for Migration, *Secundaire Migratie*, 5 November 2019.

Legal Considerations – mutual trust

Both in Europe and Canada the concept of 'mutual trust' has been challenged before the courts. This case law is also relevant for other 'extra-territorial' STC mechanisms and will thus be discussed in more detail.

In the landmark judgment, *M.S.S. v. Belgium and Greece*, the ECtHR considered not only the safeguards in asylum procedures but also living conditions for asylum seekers in the responsible state (Greece) to which Belgium intended to transfer the asylum seeker. The ECtHR held that, in light of the applicant's living conditions in Greece combined with the prolonged uncertainty in which M.S.S. remained and the total lack of any prospects of his situation improving, his situation had attained the level of severity required to fall within the scope of Article 3 of the Convention. Based on the situation in Greece, the ECtHR considered that Belgium as the transferring state should have refrained from a transfer to Greece under article 3 ECHR as *...at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities.*

After this judgement, the ECtHR and national courts have held various times that asylum seekers may not be transferred to other EU Member States (mostly at the external borders) as this would be in breach of article 3 ECHR. In Dutch case law, for example, Croatia, Cyprus, Greece, Italy and Malta have at some point been considered 'unsafe' Dublin countries for asylum seekers, because of structural deficiencies in their asylum or reception systems. Bulgaria's reception capacity was deemed adequate by the Dutch Courts, as the country mainly 'serves as a transit country' and there are sufficient reception places for this reason.[41] In the case of Poland preliminary questions to the Court of Justice of the EU were asked with respect to Dublin transfers, in light of the overall situation for asylum seekers at Poland's external borders and the rule of law. Also Denmark was considered unsafe for Syrian beneficiaries of protection, until it became clear that Denmark does in fact not return Syrians.

41 According to an AIDA-report many asylum seekers in Bulgaria abscond due to the length of procedures and low recognition rates.

The concept of mutual trust has also been challenged with respect to beneficiaries of international protection. In *Jawo*[42] *v. Bundersrepublik Deutschland* the Court of Justice of the European Union (CoJEU) made it clear that no transfer may take place when *on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, [that] risk is real for that applicant, on account of the fact that, should he be transferred, he would find himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty.*"

Following the Jawo-judgement, the Dutch Council of State[43] held that, based on the information about the conditions for beneficiaries of international protection in Greece, a transfer to Greece would expose them to extreme material poverty. In the specific case, it was recognized that the large number of recognitions in Greece meant that the Greek authorities could not provide housing and basic needs to beneficiaries of international protection.
Thus the EU 'mutual trust'-principle does often not apply, or is being undermined in practice. This is partly due to the limited capacity of the Member States to host refugees in relation to the asylum pressures they face, especially for the states at the external borders. But there may also be a lack of political will of states to improve the asylum system and reception conditions, whereby asylum and a strategic position at the external borders could be used as a bargaining instrument within EU policy debates.[44]

Despite the many problems regarding the functioning of the Dublin system, the EU has not questioned the Dublin's underlying principles. However, the European Commission's 2016 Dublin IV proposal[45] did acknowledge its shortcomings and proposed solidarity mechanisms and sanctions to complement the Dublin regulation. The new proposal for a Regulation on Asylum and Migration

42 CoJEU, ECLI:EU:C:2019:218, 19 March 2019,

43 Dutch Council of State, ECLI:NL:RVS:2021:1626 and ECLI:NL:RVS:2021:1627, 28 July 2021;

44 See for example Gerasimos Tsouroupas and Sortirios Zartaloudis, Leveraging the European Refugee Crisis: Forced Displacement and Bargaining Greeces bailout Negotiotions, Journal Common Market Studies, 8 June 2021.

45 Proposal for a regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) COM (2016) 270 final, 4 May 2016.

Management also contains disembarkation and solidarity mechanisms to complement the system.[46]
This includes the relocation of eligible applicants for international protection who are rescued at sea: Under the coordination of the Commission, the European Union Asylum Agency and the European Border and Coast Guard a list of eligible persons to be relocated will be made, indicating the distribution of those persons among the contributing Member States.

These legal developments are not just European business. The Canadian Supreme Court held in 2023 that the Canada-US STCA was not unconstitutional.[47] The Court however also considered that if the Canadian authorities knew or ought to have known that – through a transfer to the US – harm could arise, this should lead to refraining from applying the agreement. The Supreme Court of Canada considered that there may be protection issues in the US, also due to detention standards and a more restrictive interpretation of the 1951 Geneva Convention. However, it held that in general the Canadian system has "safety valves" in place to address protection deficits because of the STCA.

Safe third country practices outside the 'Dublin context' – refoulement and chain refoulement

The 'mutual trust' arrangements of the Dublin system and the Canada – US STC Agreement are concluded among destination countries, on the rebuttable presumption of safety. They are to be distinguished, if not legally than practically, from safe third country arrangements with states that do not have a tradition of asylum procedures. Outside the scope of 'mutual trust' arrangements, among the countries in this study only Australia makes more extensive use of the safe third country concept with respect to third countries which are not destination countries per se.

Canada only considers the US a safe third country, with which it thus has concluded an agreement. The US also had agreements with other third counties, including Honduras, Guatemala and El Salvador, but only the agreement with Guatemala was actually implemented. The Biden Administration has suspended all three agreements.

46 See Proposal for a Regulation on Asylum and Migration Management, COM (2020) 610 final, 23 September 2020 and, for example, ECRE, *Solidarity: the Eternal Problem*, January 2023.

47 Canadian Supreme Court, *Canadian Council for Refugees v. Canada* (*Citizenship and Immigration*), 2023 SCC 17, 16 June 2023.

The concept of safe third countries is applied on a case-by-case basis in the Netherlands and Denmark. In general, the concept is in many EU MS not used widely outside of the Dublin context.[48]
EU-states at the external borders have indeed applied the STC concept with respect to their neighbouring states, thus also increasing risks of chain refoulement after Dublin transfers. Both the CJEU and the ECtHR in its judgment of *Ilias and Ahmed v. Hungary*[49] made it clear that also in the general context of STC practices European states need to thoroughly examine the standards in the third country.

As stated earlier, the legal STC framework of the EU, to which Denmark is not bound, is laid down in the Procedures Directive (2013/32) and is restricted through the connection clause (article 38 (2)). During the negotiations on the new Asylum Procedures Regulation the Netherlands, together with several other MS, intended to delete the connection criterium from this STC provision, in order to lower the threshold to broker deals with third countries. This attempt however failed for the time being.

Australia's safe third country policy

With respect to STC policies, Australia takes a rather unique position. It applies the concept of a safe third country both before and after arrival. Before arrival, Australia can send asylum seekers to Nauru (and previously, PNG), where it has set up offshore processing and detention centres. In case of a positive decision on an asylum claim in these centres, resettlement here, or else in third countries would be sought. This process often leaves the refugees in limbo for a long time. For application of the concept after arrival, Australia is deemed not to have any protection obligations when someone owed protection has the possibility to reside in another safe country. The Australian model raises issues regarding refoulement with respect to the transfer to the processing and detention centres in the partner country and indirect refoulement through returns or resettlement in yet another country. Unlike the European courts and potentially Canadian courts, the Australian High Court did not stop extremely restrictive practices with respect to transfers to the third countries Nauru and PNG. Although the High Court, in an earlier judgment, had not allowed an agreement with Malaysia, the transfers to regional processing centres in Nauru and Papua New Guinea were

48 EUAA, *Applying the concept of safe countries in the asylum procedure*, December 2022.
49 ECtHR, *Ilias and Ahmed v. Hungary*, case *47287/15* of 21 November 2019.

held to be constitutional. This was in a controversial 2014 ruling, in which the international law perspective was disregarded.[50]

In practice, Australia's arrangements with third countries have not been implemented to a large extent. In 2017, detention facilities in Manus Island, PNG, were closed following a Papuan High Court decision deeming the detainment of asylum seekers unconstitutional, violating the detainees' basic right to liberty. Although the Australian High Court did not share this view, the Australian government closed the detention centre in late 2017. Most of the detainees were forcibly relocated to alternative accommodations on the island pending a final resolution of their situation. As for the recognized refugees, some were offered resettlement in the United States under the 2016 agreement. Those whose claims were rejected were ordered to return to their countries of origin. The Australian Government ended its deal with PNG in December 2021, leaving PNG in charge of all remaining asylum seekers on their territory.

The contract with Nauru has recently been renewed to maintain the possibility of offshore detention and processing until at least 2025, even though the arrangements with Nauru and PNG have attracted a lot of criticism.[51] For nine years no asylum seekers had been sent to Nauru. In October 2023, however, the Border Force confirmed that 11 people have been sent offshore to Nauru, because they could not be sent back safely to the country of origin. While the Australian safe third country practices are very costly, the effects of sole STC agreements, which were also intended to deter arrivals by sea are not entirely clear. It is foremost the (combination with) maritime interdictions that seem to have prevented asylum seekers from entering Australia.

The 'Rwanda – option'

The United Kingdom (UK), which is not part of this research project but is in this context a relevant example, has a Memorandum of Understanding with Rwanda allowing for the transfer of asylum seekers to Rwanda where their claims would be processed and followed by a return, protection or other status in

50 High Court of Australia, *Plaintiff S156/2013 v Minister for Immigration and Border Protection & Anor*, HCA 22, 18 June 2014.

51 HRW, "Australia: appalling abuse, neglect of refugees on Nauru," 2 August 2016.

Rwanda.[52] Under this MoU the UK government intends to transfer asylum seekers to Rwanda, despite the fact that they have no connection with this country. Due to intervention of the ECtHR[53] and UK courts, including the Supreme Court,[54] no transfers have taken place thus far.

In its judgment of 15 November 2023, the UK Supreme Court follows the jurisprudence of the European Court of Human Rights. The Supreme Court considers that a (lower) court dealing with transfers must make its own assessment of whether there are substantial grounds for believing that there is a real risk of refoulement. This (lower) court is not required to accept the government's evaluation of assurances unless there is compelling evidence to the contrary. In the specific case of Rwanda, the Court put considerable weight on UNHCR's assessments. Based on UNHCR's assessment of the quality of the Rwandan asylum system the Supreme Court concludes that there is a risk of refoulement for asylum seekers. Importantly, the Supreme Court, holds that monitoring in the Rwandan context is insufficient, as '*the suppression of criticism of the government by lawyers and others is liable to discourage the reporting of problems, and so undermine the effectiveness of monitoring.*' The political context and the rule of law in the third country are relevant factors for the assessment of 'safety', according to the UK Supreme Court (under 93 and 106).

EU Member States have closely followed the outcome of the legal and political developments in the UK. Prior to the Supreme Court's ruling, Germany stated to explore whether processing outside of the EU is possible under the 1951 Convention and the ECHR.[55] However, it has not made clear whether this would indeed be 'extra-territorial processing' (see below) or the UK-Rwanda model.

Because of the opt-out, Denmark is, like the UK since Brexit, not (directly) bound by the STC concept under EU law. Denmark currently considers a UK-style agreement with Rwanda (plus some form of resettlement) and is exploring

52 UK Home Office, "Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland And the Government of the Republic of Rwanda," 13 April 2022.

53 ECtHR, *N.S.K. v. the United Kingdom*, application no. 28774/22, (formerly K.N. v. the United Kingdom) 14 June 2022.

54 UK Supreme Court, *AAA (Syria) and HTN (Vietnam) v Secretary of State for the Home Department*, UKSC 42, 15 November 2023.

55 German Government, "Einigkeit zu Migration und Deutschland-Pakt," 7 November 2023.

whether these ambitions can be realized within the EU context with likeminded countries. In June 2021 Denmark passed a legislative amendment to its Aliens Act which allows for the transfer of asylum seekers to a third state outside the EU for processing the asylum claim, protection in that state or return from there to the country of origin. The amendment entails that such transfers must take place under an international agreement between Denmark and the third country and that asylum seekers are to be transferred unless it would be in breach of Denmark's international obligations. This means that the non-refoulement principle and the right to family life, would indeed limit the possibilities to transfer asylum seekers who are already on the territory and within jurisdiction of the Danish authorities.

The Italy – Albania proposal

In November 2023 Italy has announced that it intends to set up processing centres in Albania.[56] Italy is reported to pay for the construction of two centres in Albania which can receive up to 3,000 people at a time, under the deal. If Italy rejects the asylum applications, Albania will deport them. Albania would also provide external security for the two centres, which would fall under Italian jurisdiction.

A transfer to the Italian processing centre would take place in case of 'rescue at sea' when asylum seekers fall within the jurisdiction of the Italian authorities. While being practically more feasible in practice than a processing centre that can be accessed by any person claiming protection, as Italy has control over the number of asylum seekers to be transferred to the Albanian centres, the legality of such a construction under EU law which involves a non-EU state, and the requirements under international human rights law, is unclear and needs to be further researched. This would also depend on the safeguards and conditions in the centre. In the 2014 case of *Sharifi v. Italy and Greece*[57] for example, the European Court of Human Rights held that a collective expulsion at sea from Italy to Greece was in breach of article 4 of Protocol 4 and article 3 ECHR, as it was established (by the ECtHR) that the Greek asylum procedure did not provide safeguards against refoulement.

56 *Euronews*, "Albania to host asylum seekers arriving to Italy pending processing of asylum applications," 7 November 2023.

57 ECtHR, *Sharifi v. Italy and Greece*, Application No. 16643/09, 21 October 2014.

From the outset, the Italy-Albania proposal, from what is known, would circumvent EU-asylum law and potentially Italy's obligations of non-refoulement under EU-law, as Albania would be responsible for the return of persons whose asylum application is rejected. In a first reaction EU Commissioner Yiva Johansson said that the construction would be outside the scope of EU law.[58] Other reports say the Commission cautions the agreement will have to be in compliance with international law and EU-law.[59]

Assessment

STC mechanisms are an important instrument for asylum protection responsibility allocation by states. In the EU and North-America this is executed through 'mutual trust' agreements. This can be an effective instrument for managing asylum when they are based on registration of asylum claims and preventing unjustified multiple applications by the asylum seeker ('forum shopping') or 'secondary movement' / onward travelling through safe third countries to other safe third countries.
However, when the protection standards in a country that is part to a 'mutual trust' agreement are not guaranteed, because of pressures on asylum and reception systems or due to more or less deliberate policy choices of that country not to improve the system, the agreement cannot be fully effectuated and (secondary) destination states are legally not allowed to transfer the applicants. This is currently the case in the EU: the broken Dublin system needs to be replaced or fixed by additional safeguards and solidarity mechanisms.

Outside of the context of 'mutual trust' agreements between 'destination countries', safe third country agreements are concluded on a bilateral basis. Destination countries are exploring whether cooperation with a safe third country and externalization of the asylum procedure to that third country could discourage irregular migration towards the destination country. EU law (still) contains a 'connection criterium' for this type of agreements that requires that the asylum seeker can only be sent to the third country if he or she has a connection with that country. The rationale behind the connection criterium goes back to the underlying idea of refugee law that protection must be provided so that refugees are not left in limbo, and that responsibility for refugee protection

58 Jorge Liboreiro, "Italy-Albania migration deal falls 'outside' EU law, says Commissioner Ylva Johansson," *Euronews*, 15 November 2023.
59 Alice Taylor and Federica Pascale, "Italy, Albania migration deal divides both sides of Adriatic, caution from EU," Euractiv, 7 November 2023.

should be shared between states.[60] Such a connection criterium is notably lacking in Australia's transfers to regional processing centres in third countries and in the UK's agreement with Rwanda.

Furthermore the protection in that third country should be effective ('safe'). Based on the EU acquis and interpretation thereof by the European jurisprudence the threshold of determining a country sufficiently 'safe' are high (although within the current negotiations on the Asylum Procedures Regulation under severe strain).[61] The risks for asylum seekers need to be assessed based on general and up-to-date information on the third country situation, and in individual cases on a case-to-case basis, taking the individual circumstances into account. The overall process can thus become very costly and inefficient.

In light of the above, the Australian models of offshore processing in third countries followed by resettlement in other countries, although effective from the intended objective of deterring spontaneous sea arrivals, would, from a European law perspective, be problematic. The European legal framework would require legal procedural guarantees and effective remedies, a rigorous scrutiny of risks of refoulement, and access to asylum, including living in safety and dignity, after a positive decision. Establishing processing centres in a third country with the aim of providing refugee protection in that third country could also lead to complex questions of state responsibility and jurisdiction for states that set these up. They can lead to complex challenges in the domestic jurisdiction of the transferring states. This makes 'Rwanda-type' agreements equally problematic, as has become clear from the UK-Rwanda case.[62] The political and public support for such constructions could come under strain, both from a moral perspective and from losing the public trust as political promises are not followed by actions.

60 See more on this subject matter in The Netherlands country report (paragraph on externalization).

61 ECRE, Reforming EU Asylum Law: Final Stage, August 2023.

62 See also Francesco Mancini and Monika Sie Dhian Ho, "Dealen met Rwanda, Dilemma's met bescherming van vluchtelingen in derde landen," Clingendael Institute, October 2023.

Legal pathways for access to the territory and humanitarian protection in destination states

4. Extra-territorial processing

'Extra-territorial processing of asylum applications' refers to the procedure of refugee status determination or otherwise granting international protection by a state outside its territory, giving access to its territory and national system of international protection after a positive decision.
None of the five selected countries have applied 'extra-territorial processing', in line with the Blair proposal of 2003. This entails a fully developed asylum procedure on the territory of a third state through so-called Transit Processing Centres (TPCs), followed by resettlement to the processing country or bloc of countries itself.[63]

The background of the Blair proposal was similar to some of today's analyses that support for refugee protection through large-scale irregular arrivals is lacking, that most vulnerable refugees do not have access to territorial asylum, that national asylum procedures spend considerable resources on persons not in need of protection, and that return policies are hardly effective. In the Blair-proposal, so-called transit processing centres outside the EU were suggested to address these issues. They would physically transfer the asylum procedure (and returns) outside the EU territory, accompanied by resettlement to the EU states after a positive asylum decision. The proposal has not been implemented for many practical and legal reasons. Operating such procedures would be very complex for implementing agencies. Essential procedural guarantees, such as trained staff, interpreters, legal assistance and judicial scrutiny are hard to incorporate. In an EU context they would require an agreement with a third host state and at least coordination with the EU partners and EU agencies.

63 Statewatch, "UK asylum plan for "safe havens": full-text of proposal and reactions," 1 April 2003.

The first experiences with US Safe Mobility Offices (SMOs) in third countries in South and Central America (see also below) show that even a light version of information services may experience pressures, not only on the system itself but also on host communities. In the context of processing centres, which the US SMOs are not at present, such pressures could soon lead to delays and additional pressures on reception and the host communities.

Germany has called for research on whether processing outside of the EU is possible under the 1951 Convention and the ECHR.[64] An important question related to Blair's Transit Processing Centres is whether asylum seekers can be denied access to "territorial asylum" or face other sanctions in a destination country when they did not apply for legal access at an earlier opportunity and moved on irregularly to the territory of the destination country. As these centres have not been developed, there is no jurisprudence of the European courts. In the US, this question could be raised under the the 'Circumvention of Lawful Pathways regulation.'[65]

It is still unclear how the earlier mentioned Italy-Albania agreement would work for asylum seekers who are found to be in need of protection in Italy's processing centre in Albania. If they were to be granted protection status in Italy, this would technically create an extra-territorial processing followed by access or resettlement. Since the arrangement concerns asylum seekers who were intercepted at sea by Italy itself, it is however not a complementary legal pathway, but rather a version of a safe third country agreement.

Unlike in the Blair-proposal, a transfer to the Italian processing centre would take place at the borders, when the Italian authorities already have control over the asylum seekers. While being practically more feasible, as Italy has control over the numbers of asylum seekers to be transferred to the centres, the legality of such a construction under EU law which involves a non-EU state, and the requirements under international human rights law, need to be further researched. This would also depend on the safeguards and conditions in the centre. In the 2014 case of *Sharifi v. Italy and Greece*[66] for example, the European Court of Human Rights held that a collective expulsion at sea from Italy to

64 German Government, "Einigkeit zu Migration und Deutschland-Pakt," 7 November 2023.

65 DHS, 'Fact Sheet: Circumvention of Lawful Pathways Final Rule', May 2023. See also more extensively the US country report.

66 ECtHR, *Sharifi v. Italy and Greece*, Application No. 16643/09, 21 October 2014.

Greece was in breach of article 4 of Protocol 4 and article 3 ECHR, as it was established (by the ECtHR) that the Greek asylum procedure did not provide safeguards against refoulement.

For example, the Italy-Albania processing centres, from what is known, would raise a fundamental issue of state responsibility with respect to the prohibition of refoulement, as Albania would be responsible for the removal. In a first reaction the European Commission said that the construction would be outside the scope of EU law.[67] This preliminary, legalistic response fails to address other aspects of the arrangement that would fall under EU-law, such such as border procedures, possible consequences for joint operations with EU-agencies and the principle of sincere cooperation under article 4 of the Treaty on European Union.

Lastly, it can be mentioned that the EU has given funding to UNHCR's Emergency Transit Mechanism (ETM) for refugees in Libya who were given shelter in Rwanda and Niger from where resettlement to other countries takes place.[68] Between September 2019 and 2023 about 1500 refugees and asylum seekers were evacuated out of Libya to Rwanda. About 900 refugees were resettled, notably in Sweden, France, Belgium and Finland. Since 2017 3812 persons were evacuated from Libye tot Nigerm and subsequently resettled in third countries. Due to the coup, interviews are currently only taking place remotely.[69]

Assessment

Thus far, the selected countries have not implemented external processing in the form of Transit Processing Centres (TPCs). In light of current developments in the EU, the feasibility of such centres may be of interest in the near future.

From the outset, it seems rather complicated to set up such centres in third countries, that are equipped with sufficient trained staff and facilities, and guarantee procedural justice outside a country's territory. It would require significant logistical processes and the consent of the host country, which must itself be able to protect asylum seekers during the asylum process.

67 Jorge Liboreiro, "Italy-Albania migration deal falls 'outside' EU law, says Commissioner Ylva Johansson," *Euronews*, 15 November 2023.

68 UNHCR Rwanda, "European Union increases support to people in need of international protection with additional grant of €22 million to UNHCR to operate the Emergency Transit Mechanism in Rwanda until 2026," 9 February 2023.

69 UNHCR, Operational Update Niger, October 2023.

Especially if TPCs are used to limit access to territorial asylum procedures, they would raise many complex legal questions. For EU-states it would require a basis in EU-law. For this, there are also questions to be answered with respect to state responsibility and human rights standards. For example, which state would be responsible under international law if standards in the TPC are not met or if a flawed decision results in refoulement? Which court should deal with this? If an asylum seeker whose application is rejected moves on to the 'destination state' and applies for asylum in that state, would this have to result in a review of the case? The reported recent Italy-Albania agreement on processing centres in a border context, also raises questions and needs further scrutiny as well in respect of its legality under EU law and state responsibility.

As a complementary pathway to legal avenues and resettlement, TPCs may be considered. As the US example of Safe Mobility Office shows, the centres in third countries may become overwhelmed by applications, however. Therefore, clear parameters for TPCs should be set out, so that they could be workable and indeed become an effective legal pathway, which can give access to safety, alleviate pressures on a country of first asylum, UNHCR, border controls and national asylum systems. UNHCR's ETM mechanisms could serve as an example of this.

5. Resettlement

Resettlement is the transfer of refugees from an asylum country to another State, that has agreed to admit them with a legal status ensuring international protection and ultimately grant them permanent residence, foremost in cooperation with UNHCR. Australia, Canada and the US are the world's main refugee resettlement countries. The resettlement policies are widely supported in these countries, and they are an essential part of the refugee protection narrative. Three new developments in national resettlement policies draw attention:

- Resettlement (and other legal pathways) for refugees within the Western Hemisphere;
- Private sponsorship in all three countries;
- A mixed economic migration and refugee protection approach in Canada through the 'economic mobility pathways-pilot'.

Canada

Canada is a frontrunner of refugee resettlement. Resettlement refugees form a larger part of the asylum statistics in Canada than asylum after spontaneous

arrivals. In Canada there are two main resettlement streams: private sponsorship and government assisted resettlement. The proportion of private sponsoring is currently increasing. Private sponsors can consist of larger organizations that are recognized partners of the Canadian government (sponsorship agreement holders) or smaller private groups. Sponsors are responsible for the reception of resettled refugees. Of the approximately 44,000 refugees to be resettled in Canada in 2025, 64% would be privately sponsored as opposed to 54% in 2023.

Canada has also recently introduced a resettlement programme for human rights defenders with a clear protection objective, and an "economic mobility pathways pilot". The latter is a new approach, mixing refugee resettlement and economic immigration: refugees outside Canada (for example recognized through UNHCR) can apply under a provincial stream (meeting specific criteria for provincial labour markets) or a federal stream. The federal stream normally requires a job offer.

The US

The US has an annual cap set by the president. The refugee resettlement cap for 2024 is 125,000 people. Upon arrival, refugees are geographically distributed across the United States and receive resettlement assistance. As part of the new Safe Mobility Program, there are more resettlement places from the western hemisphere, namely 40,000 in 2023 and 50,000 in 2024. Resettlement is thus part of other efforts to manage migration in the region, including the Safe Mobility Offices, which are discussed below. A further increase to 50,000 slots for refugees from the western hemisphere is anticipated in the President's FY 2024 refugee resettlement plan.

In 2023, the Biden administration also launched a smaller private sponsoring program, based on the Canadian model. The State Department aims to recruit 10,000 private sponsors to resettle 5,000 refugees in the first year of the program.

Australia

Australia has a policy for resettlement as part of its Humanitarian Program. The total program is set at 17,875 (FY 2022-2023) humanitarian visas per year. Unlike in Canada the resettlement program is not additional to in-land applications (submitted for example by visa overstayers), instead, the target is for onshore and offshore (resettlement) applications combined. As part of this number, Australia also introduced a specific quota for private sponsoring of around 1,400 places.

EU Resettlement Framework and policies

EU Member States combined do not have a significant resettlement quota. In 2023, the overall EU numbers barely reached 23,000 refugees.[70] The Netherlands has a small quota of 500 places per year. Denmark has in recent years lowered it resettlement numbers, also restricting the rights and status granted to resettled refugees. The most significant EU resettlement programme related to the EU-Turkey deal, in the context of which 40,000 Syrian refugees were resettled.

Although 'relocation' within the EU is technically not the same as resettlement, this can be seen as a complementary solidarity mechanism with Member States facing asylum pressure. However, the number of those relocations - from for example Italy to other Member States - has been extremely low.[71]

Assessment

There is no legal obligation to resettle refugees. Refugee resettlement is part of international solidarity within the refugee protection system, and is meant to give a durable solution to vulnerable refugees and share the burden of refugee protection within the international community.

The trend towards a more strategic use of resettlement (as is the case in North America and earlier in the EU under the EU –Turkey deal) could lead to fewer resettlement places from other regions facing refugee crises that are of less strategic relevance for destination countries, which is a concern from the perspective of global protection space. The same goes for a mixed economic pathway for refugees and the trend towards resettlement through private sponsorship. According to for example UNHCR[72] this may lead to a selection based on other criteria than vulnerability and international solidarity, such as a focus on integration possibilities. Where economic criteria and/or private sponsorship are used in a complementary manner, it can however strengthen support for refugee protection and benefit refugee communities. A balance must, therefore, be found between solidarity with vulnerable refugees and countries facing pressures and state and community interests in resettlement countries.

70 European Commission Migration and Home Affairs, "Resettlement and other pathways to protection."

71 Statewatch, "EU: Tracking the Pact: Only 207 refugees relocated so far via "voluntary solidarity mechanism", 31 January 2023.

72 UNHCR, Projected Global Resettlement Needs 2024, April 2023.

EU Member States have small resettlement quota compared to the US, Canada and also Australia The US and Canada face asylum pressures, but have maintained and in the case of Canada even increased resettlement quotas. EU Member States such as the Netherlands could thus increase resettlement quota for vulnerable refugees and, in addition, consider the strategic use of resettlement as part of a strategy for legal pathways and discouraging irregular access to territorial asylum. Community sponsoring could add to support for refugee protection in the EU. For example, in Germany a pilot of complementary community sponsoring was evaluated positively. The 'Neustart im Team' (NEsT)-pilot for 200 vulnerable refugees concluded that there was great support from civil society, as has been the experience in Canada for many years.[73]

6. Humanitarian visas or similar (humanitarian) legal pathways

With humanitarian visa or similar pathways refer to avenues for safe and legal access to the territory of a state, for example through a visa or permit granted outside the territory of the state, for the purpose of applying for or be granted asylum within that state. This is considered a complementary route to resettlement procedures through UNHCR. Especially North-American countries have opened pathways for nationals from the Americas, i.e. for the countries from where asylum seekers would normally move, including transit countries. In addition to 'regional visas' the states/blocs in the study also have humanitarian visa programmes for nationalities outside their own region.

Visas for the nationalities in the region

There is an increase of 'paroles' (permission for lawful entrance on a temporary basis)in the US and humanitarian visas in Canada for the "own region" of the US and Canada. The new US nationality-based parole programs have resulted in hundreds of thousands of migrants taking flights to enter the United States legally. Among these is a special program for Cubans, Haitians, Nicaraguans, and Venezuelans. These countries are experiencing severe political or economic turmoil and are not accepting returns of their nationals. Under the program, more than 168,000 people from these countries had been vetted and approved for travel to the United States as of mid-July. The paroles themselves do not provide for permanent residence in the US, however.

73 German Federal Office for Migration and Refugees, "Das Aufnahmeprogramm 'Neustart im Team'," 21 June 2023.

Apart from the parole programs, the US administration has started new family reunification programs for migrants from Colombia, Cuba, El Salvador, Guatemala, Haiti, and Honduras who already have filed family-based green-card applications. The program will allow an estimated 73,500 people to be considered for parole as of May, letting them enter and remain in the United States while their application is processed. The family reunification programs grant three years of parole.

Canada, with a much smaller population than the US (38 million compared to 338 million) has offered 15,000 humanitarian visas to persons from Colombia, Haiti and Venezuela. Of these, 11,000 visas will be processed as of October 2023. The countries of origin for this program are among the top asylum countries of origin for Canada. According to the Canadian government information, the visas, upon arrival, would lead to permanent residence. This means that recipients would qualify for the same rights as Convention Refugees. The Canadian scheme was part of the expansion of the Canada-US Third Country Agreement, which will be discussed below.

The US and Canadian approach to offer legal pathways as part of the Safe Mobility Pathways is new. None of the other countries in the study seem to have a visa programme for the bloc's or country's own region. Australia's policies are aimed at sending asylum seekers to the neighbouring countries rather than offering access to its own territory and protection.

Humanitarian visa for nationals from other regions

Australia, Canada and the US offer humanitarian visas of some form to nationals from other regions, i.e. regions from where they do not receive many asylum applications. These can also be part of resettlement schemes or general visas.

Australia, Canada and the US all have visa programme for Ukrainians. Perhaps somewhat different are visas for Afghans, as these concern persons who had ties with the countries' military and other organizations in Afghanistan, before the fall of Kabul.

Through *Uniting for Ukraine* (operational since April 2022), the US had paroled in more than 141,000 Ukrainians as of July 13, welcoming individuals who fled Ukraine after Russia's invasion in February 2022. Additionally, Operation Allies Welcome (operational from August 2021 to September 2022) evacuated and paroled in 76,200 Afghans after the withdrawal of the U.S. military from Afghanistan and fall of the country to the Taliban.

In the Australian system there is no clear additional stream of humanitarian visas. In 2022-2023 the country had reserved 17,875 humanitarian visas. These were allocated to the resettlement programme and particular streams under this programme. However, Australia offered visas to Ukrainians. According to government information, since 24 February 2022 the department has granted over 11,500 visas to Ukrainian nationals in Ukraine and thousands more to Ukrainian nationals displaced elsewhere. Nearly 11,400 Ukraine national visa holders have since arrived in Australia.

Canada also has visa programs for Afghans and Ukrainians. As of February 2023, it received 28,010 Afghans. Following the Russian invasion of Ukraine in 2022, Canada allowed Ukrainian nationals and their families to enter Canada and reside here as temporary visitors. The CUAET – Canada Ukraine Authorization for Emergency Travel – was announced on 22 March 22, 2022.[74] Between 17 March 2022 and 17 August 2023, over 173,000 Ukrainians entered the country under the CUAET.[75] In August, out of 1,1 million applications, over 858,000 were approved under this scheme. The CUAET ended on July 15, 2023.[76] Persons accepted can enter Canada until March 31, 2024.[77]

The Netherlands has no (formal) national policy regulating the issuance of humanitarian visas according to Article 25 (1) of the Visa Code. Also Denmark does not offer visas or other pathways from conflict regions. Granting a humanitarian visa is no legal obligation under European law and is considered to be at the national government discretion.[78] Spain for example has offered humanitarian visas to nationals from Venezuela.[79] In 2022, around 90,000 nationals from Venezuela, Colombia and Peru applied for asylum in Spain.

74 Immigration, Refugees and Citizenship, "Canada launches Pathway to reunite families and support Ukrainians," 15 July 2023.

75 Immigration, Refugees, and Citizenship Canada, "Canada-Ukraine Authorization for Emergency Travel."

76 Immigration, Refugees and Citizenship Canada, "Immigration measures and support for Ukrainians and their families."

77 Immigration, Refugees and Citizenship Canada, "Immigration measures and support for Ukrainians and their families."

78 See CJEU, *X. and X. v. Belgium*, C638/16, 7 March 2017; ECtHR, *M.N. and others v. Belgium*, Grand Chamber Decision, Application no. 3599/18, 5 March 2020.

79 UNHCR, "UNHCR welcomes residency on humanitarian grounds for Venezuelans with rejected asylum claims in Spain," 1 March 2019.

Information and access to legal pathways, including visas

Both the US and the EU have information services in third countries. In the case of the EU, such offices did not assist potential asylum seekers to access asylum, because of a lack of legal pathways.[80]

The US Safe Mobility Initiative does offer additional legal pathways. Safe mobility offices (SMOs) in countries throughout Latin America assess ('vet') possible candidates for refugee resettlement, as well as those eligible for other existing lawful pathways, such as the parole programs, and employment or family-based visas. Presently, offices with a limited set of services are open in Colombia, Costa Rica, and Guatemala. The offices are run by the International Organization for Migration and the United Nations High Commissioner for Refugees, with U.S. State Department and USCIS personnel assisting. The administration plans to open more offices in the western hemisphere, and the Canadian and Spanish governments have joined the initiative and offer refugee resettlement and employment-based visas through the offices.

Safe mobility offices only do not increase the visas available to migrants, only the US Congress can provide for those. Therefore, the primary function of the offices at present is to provide information about the limited visa options that are available to migrants, and to refer those in need of protection for screening by the United Nations High Commissioner for Refugees. Noncitizens access the SMOs via an online platform – walk-ins are not permitted. While the parole programs offer a new manner of entry, they require that migrants have sponsors, valid passports, and pay for flights into the country, limiting them to migrants with connections and resources. Safe mobility offices are not doing asylum pre-screening, likely due to legal limitations.

Host countries have expressed concerns that safe mobility offices could generate expectations about legal pathways that cannot be met. This is a critical issue in Latin America and the Caribbean, where over 6.5 million displaced Venezuelans already live in other countries. Several of these host countries have made substantial efforts to integrate them into schools, labour markets, and local communities.

80 For example African Press Organization, "Inauguration of the Migration Information and Management Centre (CIGEM) in Bamako, Mali," 6 October 2008.

Under the '*Circumvention of Lawful Pathways regulation*' the US can impose penalties, including ineligibility, for asylum seekers who have not used the lawful pathways and made online appointments.[81]

Assessment

Currently there are many initiatives offering complementary humanitarian pathways for refugees or offering prima facie temporary protection. The initiatives offer safe legal pathways and potentially access to durable solutions. One of the questions is, however, if they are followed by a refugee status or an equivalent permanent status or a temporary status with less security and fewer rights and support.

For government agencies at the borders and potentially for the agencies dealing with asylum requests, these extra-territorial pathways may decrease the operational burden to deal with territorial asylum. The use of safe and legal pathways may lead to less public protests or concerns in the destination countries, because they provide 'regulated and controlled' access to protection for those in need.

For third countries, the additional pathways could serve to alleviate the large responsibility burden they face, but as seen in the case of the SMOs, there are also concerns about 'pulls' for people not yet residing in these countries and a 'drain' with respect to integration efforts they have already made. Close cooperation and coordination with these countries and responsiveness to their concerns will be a critical success factor for these programs.

Insofar humanitarian visa programmes may be used in the future to replace asylum procedures or be accompanied by punitive measures for those who do not access such pathways at the earliest moment possible, this would raise complex legal issues vis-à-vis the burden of proof and effective remedies. An additional current point of concern is that temporary (protection) status could lead to longer term precarious immigration status and subsequent risks of exploitation and poverty.

81 See more detailed the US country report.

National (Territorial) Asylum Procedures

7. Planning, funding and quotas

Planning

Canada has a system of setting annual levels and targets, which is done in consultation with stakeholders. For the consultations stakeholders are invited to respond, and the outcomes of this consultation process are published.[82] Together with surveys among the public and labour market analyses, the outcomes of the consultations are then used for levels and targets. Provincial interests and needs for immigration are taken into account, as well as a Francophone component.

The Canadian 2023-2025 migration saldo targets for example are respectively 465,000 persons in 2023, 485,000 in 2024 and 500,000 in 2025. Of these, the economic immigration categories take up close to 60%. The 'Federal high skilled class" and the Provincial Nominee Programs make up the majority of the economic migration classes. Furthermore, family-related immigration amounts to close to 100,000 persons per year, including about 30% for parents and grandparents. Refugees, either through in-country access to asylum or resettlement, make up close to 15% of the targets.

The other countries in the research project make use of levels and targets as well. In Australia the "caps" are used in a more restrictive manner. Through an amendment aimed at limiting the asylum caseload, the number of permanent protection visas can be capped, which can lead to recognized refugees not receiving a visa until the following financial year. This has led to people having to wait years for a (decision on) a visa. On 31 August 2023, 29,246 people were awaiting their decision on their permanent protection status.

The Dutch Advisory Council on Migration recently reported on planning for the Dutch context. It mentioned the Canadian system specifically and recommended

82 See for example Immigration, Refugees and Citizenship Canada, *2023 Consultations on Immigration Levels, Final Report*, 2023.

that a planning system which sets "soft targets" would be preferrable rather than defined quotas.[83] A quota for asylum seekers as suggested by some Dutch political parties would be incompatible with EU law when applications would exceed quotas and access to asylum would be denied in individual cases. None of the countries in the research has a hard quotum for "spontaneous asylum".

Backlogs and planning

A good planning process could ensure that the government agencies dealing with asylum have sufficient capacity. Four of the five countries in the study, Australia, Canada, the Netherlands and the US, experience significant backlogs in the processing of asylum requests.

Processing times in Australia are also long, despite low numbers. The average amount of days that applicants need to wait for a decision on their permanent protection application has been rising, amounting to an average of 903 days in 2022. In appeal, the number of unresolved cases was relatively low, at 5,747 on 31 March 2023.

The numbers in the US are enormously high in absolute numbers. Two million asylum applications were pending in 2022. In the light of the US population (331 million) per capita these numbers are high in comparison with the other two countries in the study facing backlogs, but not completely incomparable. Canada with 38,2 million inhabitants had a backlog of 80,000 asylum applications and the Netherlands with 17,8 million inhabitants almost 30,000 applications.

In part, the backlogs can be related to the asylum systems, based on individual asylum procedures including appeal procedures for any person that reaches the territory of the destination country and asks for asylum. In recent years the capacity and funding were insufficient to deal with the expected number of asylum seekers. While the prognosis in the Netherlands was in 2022 a scenario between 38.700 en 55.700,[84] the budget was set for 30.000, and 31.750 in the following years, (with some additional (spare) budget).[85] The total asylum

83 Advisory Council on Migration, *Realism about Numerical Targets. Exploring immigration targets and quotas in Dutch Policy*, 21 December 2022.

84 Parliamentary Documents, "MPP-2022-2", 4 November 2022.

85 Minstry of Justice and Security, "Budget 2022", 21 September 2021.

influx was almost 48.000[86], and this year 45.000 until December 2023.[87]
In Canada, the Immigration and Refugee Board (IRB) has permanently received more funding.[88] In the US in 2022, Congress appropriated 250 million dollars additional funding to tackle the asylum backlog, but there still is a mismatch between incoming cases and funding. In 2023, USCIS proposed funding asylum adjudications by levying a 600-dollar surcharge on over 700,000 employment-based visa petitioners and beneficiaries each year.
In the Netherlands, the authorities can be confronted with a fine when time-limits are not met in asylum procedures (and administrative law procedures in general). This, however, has not clearly led to speedier decision-making, as the main problem was insufficient means and capacity which needed to be repaired.

Level and target setting – public consultations and participation

The Canadian system of setting immigration and asylum levels and targets is a good example of a participatory process, involving many stakeholders and including surveys among the public. The number of participants in the process is high and leads, likely, to an immigration and asylum policy that is more widely supported.

For a wider EU instrument, the Canadian model of incorporation of regional needs and linguistic needs could be of interest. This is especially the case if the EU would coordinate legal pathways, including with an economic element.

Hard quotas maximizing the number of asylum applications would not be compatible with international and EU refugee law. The Australian cap for granting a permit would under EU law also raise legal issues under the Qualification Directive and, for example, the European legal framework with respect to family reunification.

Assessment

The importance of adequate planning and sufficient funding is recognized in all countries of the study. Despite this, backlogs do occur. Timely responses to an increasing caseload and keeping buffers for situations of an increased influx due to the international security situations, are essential for an efficient procedure.

86 IND, "Asylum Trends", December 2022.
87 IND, "Asylum Trends," November 2023.
88 Immigration and Refugee Board of Canada, "2023-24 Departmental Plan."

In the Netherlands, the discrepancy between the capacity in the asylum system and the number of asylum applications has probably negatively impacted support for the asylum and reception systems and contributed to the fall of the cabinet and the 2023 general elections that were dominated by immigration and asylum.

The Canadian system of annual 'soft' target and level setting on all types of permanent immigration can inform policy makers and contribute to public support for resettlement and territorial asylum. In a more volatile and polarized political societal context, this process needs a clear framework, however, and be accompanied by public information on the refugee situation and challenges for agencies. Quotas on territorial asylum would be incompatible with international and EU law. For the sustainability and conherence of resettlement programmes, it is important to also set longer term targets, in close cooperation with UNHCR, third countries, civil society and provincial/municipal governments.

On an EU-level the Canadian system of incorporating provincial immigration needs, including economic pathways for refugees, could be used for an EU wide responsibility sharing or resettlement system.

8. Procedures, border procedures, detention and reception

Procedures general

Despite considerable challenges due to a disbalance between resources and numbers of applications, all five countries operate asylum procedures that are accompanied by legal safeguards such as legal assistance, interpreters, trained staff, expert advice, (some) mechanisms for swift decision making, effective remedies and adequate reception, and leading to refugee status or subsidiary protection.

There are many similarities in the asylum systems in the selected countries. This is not surprising as legal criteria are largely the same, as well as the methods for establishing the facts through interviews. Despite pressures, the asylum systems of Australia, Canada, Denmark and the Netherlands are perceived as solid, i.e., there is generally a system of high-quality decision-making if the necessary capacity is indeed in place. The US asylum system operates under significant strain.

In all countries in the study there are elements in the procedure which are specific to the systems. Canada, for example, has a system of Pre-risk removal assessment (PRRA) after, but also sometimes instead of, the regular asylum procedure. The regular asylum procedure is conducted by an independent tribunal, the Immigration and Refugee Board. The PRRA is processed by the Canadian Border Services Agency. The PRRA is critically assessed because of lower standards and quality of decision making.[89]

In the US system there is a distinction between 'affirmative' and 'defensive' claims which are examined by different agencies. In the Netherlands asylum and return decisions are made by the same agency, the IND. All systems have a form of judicial review, but the way the judiciary gives access to scrutiny and the efficiency of the process can vary. In the countries of the study there is an active civil society, and asylum lawyers organizations, NGOs and academics also engage in strategic litigation.

Especially in the US, the various systems of assessing risks and asylum claims can be internally competing. The recent focus on border management has meant that asylum officers have been redirected to conducting credible fear (upon return) interviews for recent arrivals, instead of asylum interviews for those with long pending applications.

The US and Canada do not seem to make a wide use of differentiation vis-à-vis accelerated or fast track (inadmissibility) procedures, although certain offshore and border procedures in the US described above can be considered a fast-track procedure. Canada has abandoned the use of safe country of origin legislation. By contrast, backlogs in the asylum procedures, lead to very long waiting times. In the Netherlands, extending time-limits, insofar EU legislation allows for this, has also been used as a deterrent for asylum seekers whose claim is likely to be successful, while at the same time inadmissibility 'tracks' have been prioritized. In Denmark the procedure also differentiates clearly between various categories of application based on country of origin.

Border procedures

Border procedures are different in the countries of the study, also due to their geographical situation and legal context. The Netherlands and Denmark have

89 See for example Macklin and Blum, *Country Fiche Canada*, Asile project, January 2021.

no significant external land borders as they are part of the Dublin and Schengen system. Border procedures are thus limited to a relatively small number of arrivals at the airports and by sea. For the Netherlands, the EU Asylum Procedures Directive provides guarantees for asylum seekers.

The abolition of internal borders in the Schengen area means that Denmark and the Netherlands cannot rely on border procedures for territorial asylum claims. Denmark however, until 2023, re-introduced its land borders as an exception under the Schengen system because of alleged threats, related to terrorism, the Russia and Ukraine war and the situation at the external borders. Also it has a so-called Emergency Break related to deficiencies in Dublin countries. This has not been applied in practice.

Unlike the Netherlands and Denmark, the US and Australia have their own external land and sea borders from where asylum seekers can enter directly. In Canada the situation is again different, as. in order to reach Canada by land, asylum seekers have to transit the US, with which Canada has a STC agreement.

The United States currently faces the most significant pressures at the borders of the countries under study. It has abolished the restrictive 'Remain in Mexico'-programme with detention and pushbacks at the borders, but it has adopted its 'Circumvention of Lawful Pathways regulation.' Under this policy, asylum seekers who do not enter via points of entry and make an appointment can be declared ineligible, unless they can show they submitted an asylum request in a transit country which was rejected. In other cases, the bar for a risk of persecution or torture is raised. In such cases asylum seekers can only qualify for parole or protection under the Convention Against Torture, which can result in a lesser rights i.a. lower standard of protection after acceptance. To avoid this situation, asylum seekers need to make an appointment at points of entry.

In practice, however, the US authorities often do not have the capacity to deal with applications at the borders and asylum seekers, also those who have not made an appointment and for whom a 'credible fear' assessment must be made. As a result, many noncitizens are released into the U.S. interior with a charging document known as a notice to appear (NTA) in immigration court, which schedules them for deportation proceedings. This court process typically takes years; some recent arrivals in New York City have been scheduled for initial hearings in 2027. Noncitizens can also be allowed to enter the United States temporarily via parole, which permits them to remain in the country for

a designated period. At the border, officials have used short grants of parole, up to 60 days, to alleviate overcrowding at border facilities during times of high arrivals. From January 2021, when President Joe Biden took office, to June 2023, border authorities granted parole to about 718,000 individuals encountered between ports of entry.

The impact of the Safe Mobility Initiative, combined with the Circumvention of Lawful Pathways Regulation, on a more managed immigration and asylum system needs to crystallize and requires further study.

(Border and removal) detention

Detention is part of border procedures. This can be imposed because of irregular entry for screening purposes, but also for removal purposes. With the exception of Australia, border detention does not seem to take place on a large scale or for very long period. In the European context, thus the Netherlands and Denmark, this is related to EU legislation and ECHR standards: unaccompanied minors and families with children may not be detained for example. In Canada detention is not frequently used and not for a long time.

The US have a capacity of 23,000 detention places. Recently it amended its detention policies and practices. Under the 2023 'Family Expedited Removal Management' families are not detained anymore. They are released into the interior and the head of household is placed on an ankle monitoring device and given a nightly curfew. The families are screened for credible-fear of persecution within 6 to 12 days of their arrival in the United States, and if no credible-fear is found, they are quickly removed, with the goal being removal within 30 days after their arrival. If credible fear is found, families may proceed with filing asylum applications.

Australia also makes use of detention in the Regional Processing Centres in Nauru and PNG. Australia's model of detention in regional processing centres in third countries has been deemed unconstitutional by the Supreme Court of Papua New Guinea and the detention centre was closed. However, both in Australia and in Nauru, Australia has been mandatorily detaining anyone who arrives without a visa, irrespective of age or status. This group of people remains in detention facilities for an average of about 700 days, with some having to stay there for over 10 years. However, an Australian High Court ruling on 8 November

2023 ended the legality of indefinite detention, resulting in 140 people being released from immigration detention by the end of November 2023 already.[90]

Reception

Reception conditions for asylum seekers vary in the five countries. For example, in the Netherlands reception is provided for in larger centres, for which the Reception Agency (COA) has to negotiate with private parties and municipalities. Other countries, such as Canada and the US, operate through subsidized shelters and hotels for example. The affordable housing shortage in the five countries can lead to different situations for asylum seekers, such as inadequate large scale emergency reception in the Netherlands and risks of homelessness or destitution in the US and Canada.

In the US a more complex situation exists because of the paroles. Persons granted parole at the borders have limited rights, including emergency health care and the possibility to apply for a work permit. They can freely move within the US. To secure lawful status they may have to apply for asylum. In the US, asylum seekers can only apply for a work permit 180 days after arrival. There is no federally organized distribution scheme for asylum seekers, who generally are not eligible for public benefits apart from emergency medical services. In practice this has led to risks of destitution for many migrants and local authorities urged the federal government to respond to a situation of emergency. In 2023, the government expedited the process for work permits. In addition, the government granted prima facie temporary protection to 500, 000 Venezuelans.

Some countries in the study provide some form of reception in the return stage. In Denmark, there are return centres where persons have limited rights. In the Netherlands a similar system of limited reception is given to families pending the removal process. In Canada, persons who cannot be removed for reasons beyond their control, can apply for a work permit.

Assessment

The five countries in the study all have asylum procedures in place with safeguards. However, especially at the external borders of Australia and the USA

90 Hannah Ritchie, "Australia indefinite detention unlawful, High Court rules," *BBC*, 8 November 2023; Daniel Ghezelbash and Anna Talbot, "High Court reasons on immigration ruling pave way for further legislation," *The Conversation*, 28 November 2023.

there are expedited procedures where safeguards are more problematic. For Australia and Canada, resettlement is the main avenue for refugee protection, but territorial (in land) asylum procedures are an important part of the refugee protection system in all countries in the study except Australia, as well as in the EU in general.

Especially the US has border procedures in place, which deal with the numerous asylum seekers. Offices at the external border often do not have the capacity to process a high number of arrivals, however. Practically it is hard to envisage that in the European context a system of exclusive or significant processing at the external borders could work. Practically, there are constraints due to the numbers of arrivals by sea and land. From a legal perspective, a high pressure on government agencies in "hotspots" at the EU's external borders, has led to human rights violations. The experiences with EU hotspots in the Mediterranean show that in these small areas the asylum systems could not cope with the numbers. There is extensive case law of the ECtHR on the situation at the borders, on detention but also on reception conditions on EU hotspots. These have been found to be in breach of the ECHR, for example, in the case of *A.D. v. Greece* (April 4, 2023), regarding the Samos Reception and Identification Centre and also with respect to the hotspot of Moria in Lesbos, Greece.[91]

In the EU, "hotspot solutions" also have put a lot of pressure on hosting communities, and led to public indignation about the conditions on the Greek islands. Therefore, a hot spot approach for the process of registration and first screening, for example after rescue at sea, must normally be followed by a speedy referral to (in land) centres with more resources for processing claims and adequate reception standards.

Although the asylum systems in the study do have a possibility to fast-track procedures, this does not play a significant role. The Australian system for irregular entries and the US border procedure can be considered fast-track. Inland fast track processing, for example for safe countries of origin, is limited. In some cases delaying the procedure can be a strategy. In the Netherlands, for example, extending time-limits in the asylum procedure and family reunification

91 See for example ECtHR, *H.A and others v. Greece*, Application nos. 4892/18 and 4920/18 (13 June 2023H.A. and others); and European Court of Auditors, *EU response to the hotspot approach*, Special Report, June 2017.

procedure was used as a measure of discouraging asylum seekers to enter the Netherlands.

It is hard to compare the systems or draw general conclusions, as each operates in its own legal and societal context. In general, procedural measures do not seem to be widely used for "asylum management" purposes. However, Australia does make use of very long (and until recently indefinite) immigration detention. The US Circumvention of Legal Pathways Regulation does entail a procedural punishment on irregular entry. Under the ECHR and EU law such practices would be problematic.

The reception conditions and social support for asylum seekers are a main concern in countries facing pressures, especially in Canada, the Netherlands and the US. In the return stage, denial of support or placement in return centres with limited rights can be seen as an intentional measure to pressure migrants to return. This could lead to human rights violations and in particular impact vulnerable persons, including children.

The effect of procedural discouraging measures is not always clear-cut. Denmark experienced a decline in the, already low, numbers, but these are rising again. The same goes for the Netherlands. In some cases measures could lead to burden-shifting to neighbouring countries (waterbed-effec)but this would also depend on the conditions in these other countries.

9. Eligibility grounds, rates and returns

The outcomes of the procedures are not always easy to analyse and compare as the statistics can be different and the systems can be complex. As was mentioned earlier, the absolute numbers of claims and decisions in the US asylum system are very high, compared to the other countries in the study but in relation to its population size the numbers are more comparable. In Canada, Denmark and the Netherlands, recognition rates (Refugee Convention status and subsidiary status) are relatively high. This is more than 60% in Canada in 2022, 59% in Denmark and 69% in the Netherlands. In the latter this is for a large part due to the more recent processing of the caseload with a high recognition change, amongst other Syrians, who were 'backtracked' in orde to prioritize the more unfounded applications, and the Dutch caseload does in fact consists for a larger part of applicants from war thorn region of the world. In the United States there is a very large caseload pending. For "defensive claims", which are made in removal proceedings (instead of directly upon arrival), the acceptance rate was

as low as 15% in 2023. In Australia acceptance rates for current applications are low (11%) because Australia has cut off routes for asylum seekers from conflict countries and other "refugee producing" countries. Thus, asylum seekers can only apply for asylum if they enter regularly.

There is significant variation in the way protection is provided. Canada and the Netherlands give the same rights to Convention Refugees and other beneficiaries of protection, whereas the Netherlands applies a different protection framework to Ukrainians who have a prima facie temporary status. In the United States there is a complex situation of persons with different status or a "parole", which is not a lawful status. Thus there are: humanitarian parolees, persons who have temporary protection, Convention Refugees (after resettlement), and "asylees", each status or non-status with different outcomes in terms of permanent residence. The United States provides asylum and refugee status based on the refugee definition of the 1951 Refugee Convention and the 1967 Protocol, and subsidiary protection under the Convention Against Torture. US law also allows officials to grant humanitarian parole, which enables lawful entrance into the United States, and temporary protected status may be granted for migrants already in the country. Apart from asylum and refugee status though, these protections provide no path to permanent residence in the United States.

A noncitizen in the US who has been granted asylum is called an asylee and may work indefinitely and receive approval to travel abroad. An asylum grant does not expire, but it may be terminated under certain circumstances, such as if a noncitizen is determined to no longer meet the Immigration and Nationality Act (INA) definition of a refugee. After one year as a refugee or asylee, an individual can apply to become a U.S. lawful permanent resident. Asylees and admitted refugees may petition for their spouse and/or unmarried children who are under 21 years old. Recipients of CAT protection can not petition for their family members. The goals of the U.S. protection system are to provide lawful status for those in need, and to return those deemed ineligible.

In Denmark, a new temporary subsidiary protection ground was introduced in the Aliens Acts (article 7(3)) applicable to situations of generalized violence, whereby the right to family reunification is withheld for the first two years of residence. This protection ground is mostly used for Syrians. Also, the threshold for revocation of asylum protection other than Convention refugee status was lowered: a durable improvement of the security and human rights situation in the country of origin is no longer necessary. However, in practice the re-assessment

of protection needs, revocation and return has thusfar not been very effective, although detrimental for some refugees. There are about 30.000 Syrians in Denmark: 1200 cases have been re-assessed, only a few hundred revoked, and these persons have not been returned and are still in legal limbo in the country.

In the Netherlands there is a discussion on granting less rights to beneficiaries of subsidiary protection. This would mean abandoning the Aliens Act 2000's system of a uniform asylum status on multiple grounds, giving the same set of rights to all beneficiaries of international protection.

Removals

The US has used their geopolitical power and significant partnering possibilities to leverage for brokering or providing new impetus to return agreements with countries of origin. The other countries in the study have been less successful. In Australia, despite low numbers, 75.430 people are waiting for deportation after a negative decision on their application. In Canada, Denmark and the Netherlands removals are also problematic. In Canada the Auditor General was critical about this. Also, in the Netherlands the removal practice is under scrutiny, although the complexity of the return process is recognized.

Assessment

The outcomes of asylum procedures vary because of different caseloads. In Canada, Denmark and the Netherlands the acceptance rates are fairly high, although Denmark has started to revoke protection status of Syrians, the main country of origin.

The main differences and policy approaches can be seen with respect to the uniform asylum status versus a diversified system of protection status. Canada and the Netherlands grant the same rights to all holders of protection status. This is effective for the integration of refugees, and in the Netherlands has reduced procedures for a "higher status". In a more diversified system of statuses, states have more room of manoeuver to discourage asylum seekers. Indeed, that seems to be the main purpose. There are contrasting trends in destination countries. While Denmark has introduced a stronger diversification in status and the Netherland is contemplating this, Germany – not part of the study – is reconsidering its policies and intends to give access to family reunification to holders of subsidiary protection. In the Netherlands this topic even led to the fall of the cabinet Rutte IV. Limited or delayed access to family reunification is used as an instrument by some states. However, the effectiveness of this is not clear.

Granting less rights to certain categories of international protection, does not seem to be a very effective measure from a legal, practical or moral perspective. The same is true for Denmark's system of lower standards revoking protection status. In the case of Syrians, this led to a legal limbo for refugees and questions from neighbouring states.

The countries under study face problems with the removal of persons who are found not to be in need of protection. The US seems to have had some success in removing persons, as part of the Safe Mobility Initiative that also allows for legal pathways. For the EU context it would be important to follow this development.

Strategic Communication and narratives

10. 'Stratcom'

All countries in the research have at some point engaged in strategic communication on asylum, either for external effects to stem asylum flows or to gain international political leverage or for internal effects to appease the public, give a sense of control or electoral gain.

Despite the asylum numbers being relatively low, even in times of significant global refugee crises, Australia and Denmark have formulated and continue to communicate very sound messages to advertise their restrictive asylum policies. They receive strong and broad support thereof by the general public, even 'nurturing' their 'outsider position', at least in their communication. There is at least some correlation between rhetoric, policies and asylum claims: strategic communication on the number of asylum claims may feed into the public opinion, which lead to public debate ending up in political parties initiating new policy measures which resonates the public sentiment, and are then passed in parliament. More restrictive policies may be followed or accompanied by a decrease of numbers (which can be the result of multiple circumstances) and then claimed as a success (Australia). Or it may not lead to the wanted result (Denmark: 'zero territorial asylum procedures') which only emphasizes the need for even more restrictive measures to deal with 'insufficient policies'
By contrast the current government of Denmark does not intent to be or remain 'an outsider' and it seeks EU-partners in the development of its external dimension plans, for example with respect to Rwanda. Australia also asked for international support for its restrictive asylum policies. And both Denmark and Australia have formulated a need for more immigrants, but asylum is not part of this.

In Canada, a period of more restrictive policies and messages under the Harper government was followed by more positive messages under the Trudeau government. The wider debate on migration and asylum seems more positive in Canada, also among opposition parties. The country's narrative of welcoming migration seems to resonate better than a restrictive message, provided that there is a sense of control among the public. The amendments to the Safe

Third Country Agreement aimed to do this. On a more regional and municipal level the pressures on hosting communities have been a political issue. On the international level Canada is using its positive image, also to interest other states in its 'private sponsoring programme'.

The Netherlands has been more divided, and the public opinion is more volatile on the issue of asylum. Research in 2022 showed that a majority of the Dutch population considered humane and decent reception of asylum seekers a moral obligation.[92] However, the Dutch cabinet fell over asylum in 2023, after having adopted symbolic legislation on family reunification in 2022 as a means to impose measures to control the number of asylum applications. There is at least a correlation between public support for the asylum system and the political messages of political parties and media: when a situation is consequently called or framed as a 'crisis', it is eventually starting to be a crisis which necessitates firm decisions. The local context plays a role as well, especially since reception of asylum seekers in centres, spread over the country has a direct impact on local communities.

In the US the debate is more polarized with Democrats representing a more liberal and open view and Republicans representing a more restrictive view. This is evidenced in real Republican policies, but also political rhetoric like "build the wall" under former president Trump. The US is still an immigration country and the view that there is a need for labour migration is shared by many Americans. This is also reflected in policies in support at the local level. Democrats have declared emergencies due to high migrant arrivals in major cities. In response, the Biden administration announced plans to speed the issuance of work permits and granted temporary protection to almost half a million Venezuelan migrants in September 2023, conveying the eligibility to apply for work authorization. The US have exercised significant leverage internationally among countries of origin and transit by negotiating its Safe Mobility Plan with third countries.

The internal and external dimension of 'stratcom' are not researched in-depth. There are many factors which shape public opinion, narratives and policy.[93]

92 Asher van der Schelde, "Meeste Nederlanders zien fatsoenlijke opvang asielzoekers als morele plicht," I&O Research, 18 September 2022.

93 See for example Natalia Banalescu-Bogdan, *From Fear to Solidarity - The Difficulty in Shifting Public Narratives about Refugees*, MPI, May 2022.

Assessment

It is unclear to what extent strategic communication strengthens policies and influences asylum flows. Refugees and their networks, including smugglers, will pick up on the information and the policies, and may adapt strategies, including changing their routes. In the Netherlands and the US the messages have been changing according to political developments, whereas Australia, Denmark and Canada have been more constant in their communication over the last decade. In Australia and Denmark the consistency in messaging and policy has been accompanied by consistently low asylum numbers, but this was in a context where they could shift the asylum movements onto other blocs and countries, which served as destination countries.

It should also be borne in mind that negative messaging can negatively impact support for asylum and put pressure on asylum agencies. This is seen in the Netherlands where local protests against new reception centres, have impacted the reception capacity of the Reception Agency COA.

Conclusion

This synthesis report compares and analyses the asylum systems of five destination countries varying in geographical and legal contexts, encompassing a comprehensive review of recent and proposed legislative and policy measures that impact access to asylum and humanitarian protection. It proves that all these states are dealing with similar experiences in providing access to their asylum systems. A common humanitarian duty to protect those in need exists, showing solidarity with regions facing heightened challenges. In addition to this, destination states are experiencing labour shortages due to an ageing population, for which migration forms a part of the solution. At the same time, however, countries want to remain in control over their borders, partly driven by the willingness of the population to take in asylum seekers and other migrants as concerns exists within host communities, in particular against a backdrop of global instability, economic uncertainty, demographic changes, budgetary choices, staffing shortages and housing crises. As these challenges are interrelated and part of a global issue, further solutions should be based on cooperation and solidarity. Mutual interest needs to be considered, of people seeking protection, of host countries in the region of conflict, of transit countries, of communities in destination states, and of other destination states. To come to workable solutions, destination states should therefore also share best practices in combining different approaches in order to learn from each other, rather than try to find a quick fix to this global challenge themselves.

This synthesis identifies ten policy approaches that have either been implemented or are under consideration by the researched destination states in the context of (extra)territorial access to asylum procedures or humanitarian protection. They vary from 'non-entry measures' to 'legal pathways', and from 'procedural measures' to 'strategic communication'. *To what extent can these instruments be useful for a balanced and effective approach on border control and asylum protection in the EU context taking into account legal, practical and moral considerations?*

Although there are no quick fixes to acquire control within global refugee protection and national asylum systems, there are in fact some promising initiatives for a more regulated and better managed system to give access to territorial asylum or humanitarian protection. Other measures are more

problematic, either from the perspective of international legal obligations in general and/or in the specific EU legal and practical context. When analysing the various measures within abovementioned policy domains, some more specific conclusions can be drawn.

Preventing access to territory: non-entry measures

First, although states have a sovereign right to control and protect their borders and decide who is legally allowed to enter the territory, this right is conditioned by international legal obligations states have chosen and/or need to adhere to, such as the principle of non-refoulement. In practice, the non-entry regime of the researched contexts, among others measures aimed at preventing access to the territory, has had various negative consequences: high pressure at certain points of the external borders; high costs to maintain border control; the risk of instrumentalization of migration and difficult relations with neighbouring countries; increasing criminal enterprises in the form of human smuggling; and importantly refugee human rights violations and loss of too many lives.

The extent to which measures preventing access to territory are legally possible largely depends on the specific applicable legal framework. The European and EU legal framework is built on the 1951 Geneva Convention and further specifies and complements it. It is also further detailed than other regional systems, and is complemented by supranational judicial scrutiny. The ECHR gives access to an individual complaint system and the ECtHR's judgments are binding for the member states. This is different in other regions in the world. The judgments of international committees and tribunals overseeing the UN human rights instruments are not considered binding, although they are authoritative texts for national courts. Australia and the US have or had practices which use preliminary screening processes to establish protection needs of persons arriving by sea. If not, they are rejected and returned. Such procedures would be legally problematic in an EU context, as the ECHR and EU law require a rigorous scrutiny of claims, safeguards and effective remedies. Moreover, regarding jurisdiction, the ECHR has extraterritorial effect, thereby enlarging the scope of the obligations deriving thereof.

Legislation, including EU law, can be adapted though the appropriate processes to change the parameters, such as those governing border procedures or fast track procedures. In this respect, reference can be made to the current tri-partite dialogues on the Asylum Procedures Regulation. Such a process necessitates time and compromises, and can subsequently be subjected in

itself to legal review by the European Courts to consider the conformity of the provisions with international legal standards. National legislation can be developed, nevertheless this will also be tested according to the same standards. Furthermore, Denmark, despite its 'opt-out' of the EU asylum acquis, is still bound by international and ECHR standards and indirectly, through Dublin, by EU law. For example, they had to shorten the waiting time for family reunification of person granted subsidiary protection based on article 8 of the ECHR.

From a practical perspective, there are the obvious geographical differences between the five researched countries: Australia is more difficult to reach as it is surrounded by the ocean; the US has a long and vulnerable land border with the rest of the Americas; Canada is mostly 'shielded' by the US; and the EU has both vulnerable land and sea borders, as the Mediterranean is a relatively 'small' barrier to cross (whereby it must be taken into account that both Denmark and the Netherlands do not have external borders except for (air)ports). Especially considering the high numbers of spontaneous arrivals, particularly in regions like the US or the Mediterranean, the usage of specific points or 'hot spots' where cases could be processed would lead to practical challenges. Authorities would likely not be able to cope with the numbers, putting all sorts of pressures on asylum and reception agencies and local communities. Investments in planning, sufficient capacity and the ability to provide for effective frontloading (focus all efforts at the start of the procedure in order to prevent larger cost at the end) are thus necessary to make such (pre-)border processing function effectively.

Another measure which all researched states have in their toolbox is the '(re-)allocation of responsibility', or in other words, the transfer of asylum seekers to the territory of another state which is deemed responsible for processing the asylum claim. In North-America (Canada-US safe third country) and the EU (Dublin system) these are 'mutual trust' agreements. Even within the contexts of these arrangements between states presumed to have advanced and relatively comparable asylum systems, problems remain in meeting legal standards vis-à-vis asylum seekers. These systems have thus been legally challenged, which led to extended jurisprudence of the European courts and national courts. But also Canada's Supreme Court has formulated preconditions for transfers under the Safe Third Country Agreement with the US, which could lead to an actual ban of transfers, making the allocation systems 'out of order'. In some cases, this even led to an actual ban of transfers, making the allocation systems 'out of order'. To ensure the effective functioning of 'mutual trust' agreements, significant capacity building and flanking solidarity mechanisms for states facing pressures is necessary.

Currently, in the EU, the concept of safe third country (STC) agreements is given new impetus through ongoing legal discussion on the 'connection requirement' and concrete plans to refer asylum seekers to certain third countries, exemplified by the agreement between Italy and Albania. As is the case with the 'mutual trust' agreements, a legal scrutiny of STC agreements, concerning the refugee protection and human rights situation in the third country, along with continuous monitoring of the implementation practice, can prevent the agreement from 'not passing the legal test'. See in this context the November 2023 assessment by the UK Supreme Court, which concluded that, given the current situation in Rwanda, respect for the principle of non-refoulement could not be guaranteed. Due to challenges associated with the feasibility of independent monitoring of the situation in Rwanda, the UK currently cannot send asylum seekers to the country. The fact that STC agreements currently hardly exist in practice[94] has to do with the fact that they are difficult to conclude, implement, monitor and sustain. However, it is not impossible as the legal basis for such agreements does exist: it is mostly an issue of the pre-conditions and safeguards.

In the countries in this study, there are no examples of extra-territorial asylum processing, whereby the national (or EU) asylum procedure is conducted outside its territory, and persons granted protection are subsequentially transferred to the destination state. While, in theory, it could complement other legal pathways, in particular resettlement, many legal and practical complications remain. While it is not per se prohibited by international refugee law to replace territorial asylum with this, there is no legal basis yet in regional or national law. It would require significant resources and the transfer of complete legal structures, making it hard to imagine them as a replacement for territorial asylum. In practice, such application centers could have a 'pull' affect in the region and be accessed by a large group of persons, exerting pressure on the quality of the process and the host communities.

Legal pathways

Second, to establish an effective and balanced asylum system in which the international responsibility to protect refugees is shared among countries,

94 Australia's offshoring agreement with Nauru has recently been very rarely applied, and the agreement with Papua New Guinea (PNG) was discontinued. The Biden administration in the US has suspended safe third country agreements with Nicaragua, El Salvador and Guatemala. Denmark has so far not implemented legislation allowing for processing outside Denmark. The Netherlands has no significant safe third country arrangement and Canada has only designated the US as a safe third country.

measures to prevent spontaneous asylum claims and alleviate high pressure on the borders of destination countries must be combined with more regulated legal pathways to protection. These avenues are not based on international legal obligations, but are left to the national discretion of states. The region which is most active in terms of legal pathways is the Americas.

Canada and the US, and additionally Australia, have had significant resettlement programmes for many years. Lessons can be learnt in the EU context, i.a. Denmark and the Netherlands, with far more modest frameworks and programmes. This includes resettlement from the own region as a migration management instrument; a focus on, or pilots, towards community private sponsorship; and complementary economic resettlement programmes with a regional component. While resettlement should also remain a solidarity instrument with countries facing pressures and an avenue for vulnerable refugees who cannot find protection in their own region, the EU could establish additionally complementary resettlement programmes. Experience indicates that community resettlement, in particular, has positive effects on societal support.

In 2023, the US, in cooperation with Canada and other countries in the region, is spearheading a Safe Mobility Initiative, consisting of a large number of resettlement places, humanitarian visas and complementary economic pathways for refugees from the Americas. The impact on refugee movements towards the US and the practical consequences for border agencies, as well as the agencies further in-land after entry parole, is still to be assessed and necessitates further monitoring and research. In contrast to Canada, the humanitarian visas and paroles at the US border do not per se lead to permanent residence, highlighting the need for a clearer understanding of the longer-term consequences.

Procedural measures to manage national asylum systems

Third, all researched countries apply various procedural measures to manage national (territorial) asylum systems and/or use restrictive measures aimed at decreasing the number of asylum applicants. The usage of so-called ‘caps’, restricting the number of asylum applications to a specific target number and automatically rejecting subsequent applications is incompatible with international legal standards and is not applied in the selected countries.

This, however, does not mean that working with all forms of numerical targets to retain more control over migration is unlawful. As we have seen, Canada serves as an interesting example of an inclusive and participatory planning process

through its annual and multi-annual setting of targets and levels. This is not a guarantee for a managed asylum system (as Canada currently also deals with asylum backlogs), but it does allow for a rather quick and adequate response when targets and levels are not met or exceeded.

Despite having rather robust asylum systems, next to Canada also Australia, the US and the Netherlands are dealing with backlogs. In Canada, the Netherlands and the US, the reception system is under significant pressure. In Denmark this appears to be less of a problem, as the numbers are relatively low (although on the rise again recently). Nevertheless, the Danish government aims to have 'zero' inland asylum applications, focussing on alternative measures (see hereunder). The backlogs and reception shortages in the related countries may create a certain 'crisis mode', leading to a call for more (stringent) measures in order to decrease the number of applications. However, the analysis indicates that, for instance, in the Netherlands, the backlogs were a direct consequence of policy choices as there were sufficient (legal) possibilities to improve the functioning of the system.

Legal issues do, however, arise when addressing measures such as increased fast track border procedures and detention. The EU asylum acquis and the ECHR have established clear procedural standards. Consequentially, long detention and preliminary/fast tracks border procedures with burden of proof standards akin to those in Australia and the US would not align with European legal standards. As changes are currently being made to EU legal framework on asylum procedures, it remains to be seen whether these would be legally tenable. It can, however, be concluded that the application of such procedures do not necessarily deter asylum applications, taking into account the high numbers in the US and also ongoing inland claims in Australia.

Another measure which drew attention in the comparative analysis deals with the duration of the protection status. When considering the cessation/ revocation clauses in the Geneva Convention, refugee protection is initially always temporary (also in the Netherlands it is initially five years). With the passing of time, a more durable solution such as integration and permanent residence is foreseen. However, lately, the focus of national asylum systems seems to be moving towards more temporary protection. In Denmark, there has been a recent paradigm shift from permanent residence to temporary (and more limited) protection, and from a focus on integration to an emphasis on return. Additionally, the US and Australia have complex systems of protection statuses, including temporary status and restricted rights for those who reach and access

the respective countries. Canada, similar to the Netherlands, has a single status system.[95] Such a system has indeed several advantages. The diversification of status, particularly the limited access to family reunification and the potential for withdrawing protection, could lead to more appeal procedures. These procedures, as well as increased revocation assessments, exert pressure on the system. The return of persons who have been residing for an extended time and/or come from unsafe conflict areas has additionally proven to be difficult (e.g. the Danish example).

Strategic communication

Countries such as Australia and Denmark have been very vocal in their strict 'not here' narrative, consistently maintaining both the message and the policies over the years. Negative messaging may influence public support for refugees, consequentially fostering increased support for restrictive policies, as we have seen in these countries. However, this approach comes at a cost, as it positions these countries as 'outlaws', and subjects them to scrutiny from various actors vis-à-vis moral standards. Nevertheless, this seems to be the price these countries are willing to pay. However, the question remains whether the impact on numbers is solely attributed to the negative messaging or if it is also related to geographical location and practical barriers in applying for asylum.

On the other hand, Canada has been quite consistent in its welcoming message, which also allows to focus and select those allowed to enter. Focussing on providing legal pathways as part of a managed immigration system is commendable from a moral and public perspective. This is especially true if it leads to a solid protection status and if the process does not exacerbate pressures on transit countries and host communities, in particular at the borders.

Final remarks

Can it be concluded that the measures taken in various geographical and legal contexts to deal with asylum migration management lead to a more regulated migration system? The statistics themselves do not point in that direction.

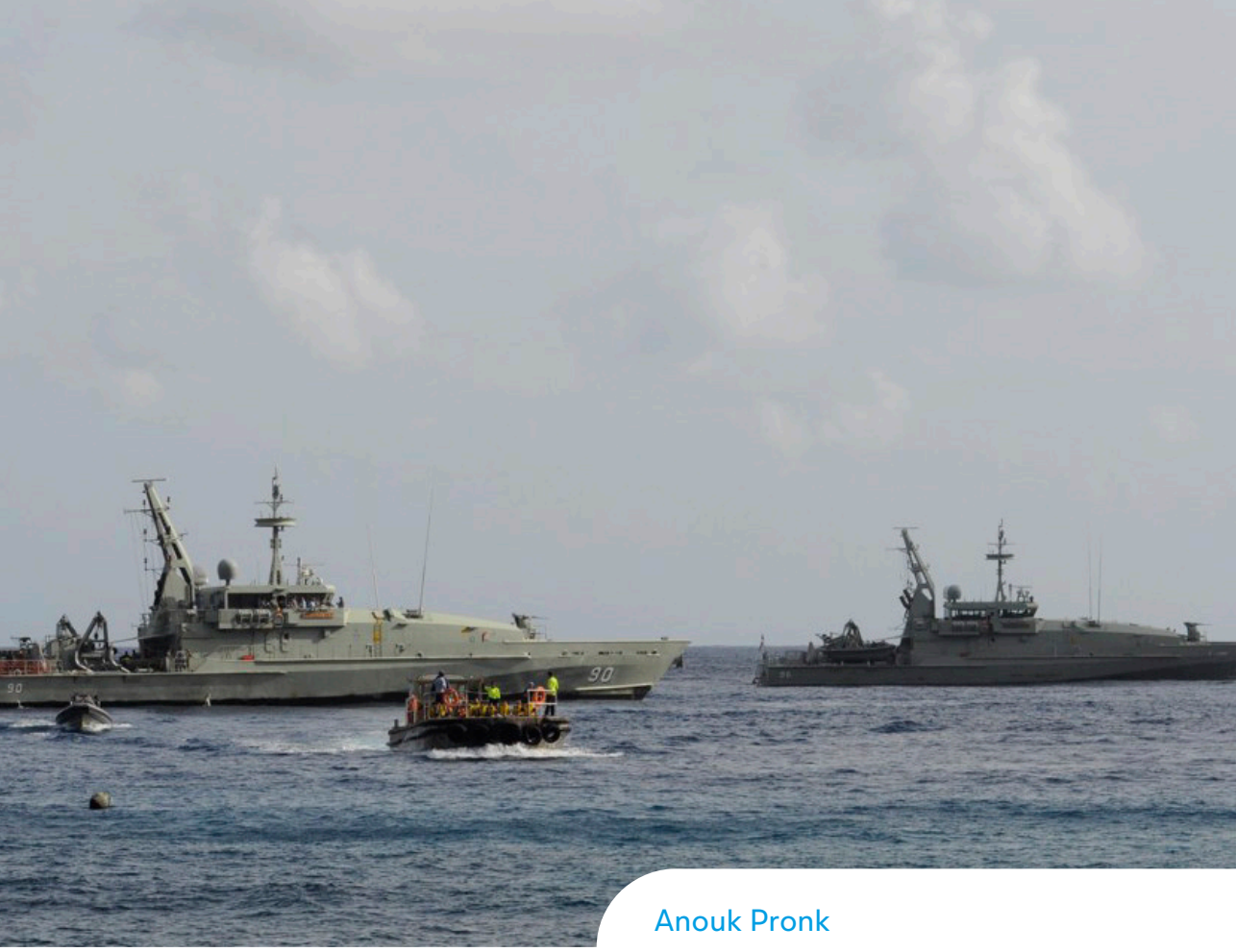
95 The EU asylum acquis entails in various legislative instruments, such as the Qualification Directive which allows a distinctive status for refugees and persons in need of subsidiary protection, so-called more favourable clauses. This means that a Member State is allowed to implement in its national legislation provisions which are considered 'more favourable' towards the applicant. This follows from the idea that the first-phase instruments were considered minimumstandards to which Member States could rise above.

The majority of asylum applicants still enter the researched countries in an irregular manner (unless intercepted and pushed back at sea like in Australia). This results in high pressure on the borders of the destination states, fosters free-rider behaviour of transit countries and leads to unwanted humanitarian consequences.

The ongoing current political and public debate in the EU context remains focussed on the notion of even higher walls and shifting the responsibility for asylum and humanitarian protection outside European territory. However, if these efforts do not go hand-in-hand with a solid legal foundation and adherence to refugee law and human rights standards, it may backfire on the European Union.

Legislation is not set in stone and can be adjusted, and jurisprudence evolves over time. However, as we have experienced in the development of the Common European Asylum System, these processes are long and complex, without any assurance of the outcome. Meanwhile, it would be (more) beneficial to invest in well-equipped and robust national asylum systems and and empirical based prognoses. The emphasis should be on exploring migration cooperation options and learning from innovative ideas and new models, such as those introduced in the US. The US is seeking a more holistic immigration approach in the region, consisting of cooperation with countries in the region, legal pathways, legislation addressing 'circumventing legal pathways' and return agreements. As developments are still ongoing and evolving rapidly, the first results of this initiative need to be monitored and researched to assess their potential applicability in a European context – considering legal, practical and public support perspectives.

The importance of the last element in this narrative should not be under-estimated. If we are building even higher walls, it is imperative that it is accompanied by substantially larger gates to realise legal and regulated pathways that are substantial and accessible. The right to asylum is a fundamental human right, and for a more effective global protection system, solidarity must form its foundation. Solidarity with those seeking protection, with host countries in the region, with transit countries becoming destination countries, and with communities within traditional destination countries such as the researched countries. Transforming the system for the better, encompassing all perspectives, requires long term investments and a solid, positive and visionary narrative. Yes we can.



Anouk Pronk

Country report
Australia

Introduction

Australia's Operation Sovereign Borders (OSB) has increasingly been referred to as an example of more restrictive asylum policies in Europe.[1] Throughout this operation, Australia has intercepted and turned back boats carrying asylum seekers – whom Australia calls 'unauthorised maritime arrivals' (UMAs)[2] – to either their country of origin or their country of arrival, often through (sometimes implicit) agreements with surrounding countries like Sri Lanka and Indonesia. Anyone who still arrives in Australian territory without a valid visa is put in immigration detention onshore or is placed in offshore processing centres in Nauru or Papua New Guinea (PNG). Despite the recent renewal of the three-year contract with Nauru, valued at A$420 million, to maintain the possibility of offshore detention and processing until at least 2025[3], the preceding nine years had witnessed no asylum seekers being sent to Nauru. During this period, the majority of asylum seekers who did stay there were either resettled in the United States, returned to Australia[4], or returned to their country of origin.[5] In October 2023, however, the Australian Border Force confirmed that 11 people have been sent offshore to Nauru, because they could not be sent back safely, aligning with the government's narrative that offshore processing remains an integral part of OSB.

1 Amy Nethery, Azadeh Dastyari and Asher Hirsch, "Examining refugee externalisation policies: A comparative study of Europe and Australia," in *Refugee Externalisation Policies: Responsibility, Legitimacy and Accountability*, ed. Azadeh Dastyari, Amy Nethery and Asher Hirsch, (London: Routledge, 2022), p. 1.

2 From early 2014 to March 2022 this group was referred to as IMAs: Illegal maritime arrivals, but this changed due to contention about the term illegal, as someone seeking asylum is not illegal under the Refugee Convention.

3 Australian Government Tenders, "Contract Notice View - CN3918654-A2,"27 January 2023; the total costs of offshore processing are way higher, amounting to A$1 billion on average per year between 2013 and 2022. See also: Madeline Gleeson and Natasha Yacoub, "Cruel, costly and ineffective: the failure of offshore processing in Australia," *Kaldor Centre for International Refugee Law (Kaldor)*, 12 August 2021.

4 The possibility to be returned to Australia only applied to arrivals coming prior to 19 July 2013, when the policy change prevented any unauthorised maritime arrivals to settle in Australia permanently.

5 Refugee Council Australia, "Offshore processing statistics," 23 July 2023, p. 2.

Several European countries are currently exploring similar policies to establish offshore processing centres for asylum seekers.[6] The UK is the most advanced herein, establishing plans for externalising their asylum processes to Rwanda. The 'Stop the Boats' slogan that has currently become famous in the UK has been used in Australia since the 2013 elections, where they now replaced it by a 'Zero Chance' slogan.[7] This refers to the fact that individuals arriving illegally have no chance of getting to Australia and settle there permanently.

OSB's aim is to deter irregular maritime arrivals and to disrupt people smuggling activities by breaking their business model, saving lives at sea.[8] Interestingly, this was initiated even though around 90% of people asking for asylum arriving by boat between 2008 and 2012 were found to be refugees.[9] Despite its significant costs, amounting to A$1,49 billion per year at its peak, offshore processing did not directly lead to a decrease in maritime arrivals, but instead first saw an increase in the number of arrivals from 4,564 in 2011 to 20,587 in 2013 at its reinitiation under the Labor government.[10] After the initiation of OSB under the Coalition government however, the readily existing offshore processing and the ban on permanent settlement was combined with returns at sea. These maritime interceptions saw a sharp decline in arrivals, with 450 people returned or sent offshore in 2014, and this number falling below 100 from 2016 onwards, all of whom were returned at sea.[11] This seems to show that interception was a more successful deterrent.[12] Nevertheless, it has attracted much international criticism as a policy that blocks asylum pathways and punishes those seeking protection.

6 Philippe Jacqué, "Outsourcing asylum gains ground in the EU," *Le Monde*, 10 March 2023; Laura Gozzi, "Europe migrant crisis: Italy to build migrant centres in Albania," *BBC News*, 7 November 2023; Jessica Parker, "Germany agrees to consider UK-style plan on processing asylum abroad," *BBC News*, 7 November 2023.

7 The Australian government provides information about this policy in a way to deter anyone from attempting the journey, see for Sri Lankan citizens: Australian Government, "Zero Chance Campaign."

8 Australian Press Office, "Transcript of Joint Press Conference," 19 July 2013.

9 Nikolas Feith Tan, *International Cooperation on Refugees: Between Protection and Deterrence* [Unpublished], May 2019, p. 32.

10 The first phase of offshore processing was initiated in August 2012. The number of arrivals over 2012 was at to 17,204.

11 Gleeson and Yacoub, "Cruel, costly and ineffective," *Kaldor*.

12 Janet Phillips, "Boat arrivals and boat 'turnbacks' in Australia since 1976: a quick guide to the statistics," Parliamentary Library, 17 January 2017.

The most severe concerns raised by several UN bodies,[13] NGOs operating in the region,[14] and legal scholars relate to Australia's non-refoulement obligations. This includes the forceful return of boats without assessing the asylum claim but also the health conditions of people in immigration detention facilities as part of Australia's 'policy of indefinite detention'.[15]

This report will examine Australia's policies over the years, going into its judicial system, national regulation surrounding asylum, and cooperation and externalisation policies on border control, refugee determination, and immigration detention. It also includes Australia's latest developments, as both the government and the High Court have recently made impactful decisions. The study indicates that Australia's ability to pursue policies freely, is facilitated by the lack of any supranational court and its remote location, being surrounded by states depending on Australia financially and politically. Though successful in its goal to reduce irregular arrivals, caution is therefore needed when studying its applicability in a European context. While Australia has an extensive resettlement programme, this is mostly offered instead of, rather than in addition to, facilitating spontaneous asylum applications. Through its resettlement programme, they offer additional, quicker pathways for refugees who are better suited to Australian life in terms of language and work opportunities.

The study has been executed in a relatively short period between July and November 2023, including most aspects of Australia's asylum system. This inevitably leads to a limited description of some parts of the system depending on its importance for this comparative study. The quality of the reports is protected by the inclusion and feedback of an Advisory Committee consisting of a group of country-experts on asylum and several experts on extraterritorial processing. In addition, interviews have been conducted with several people from the Kaldor Centre for International Refugee Law as well as with two senior officials working on immigration for the Australian Government. Lastly, a peer review has been executed by a former senior official of the Australian immigration services who has been actively involved in the development of these policies.

13 "Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment," March 2015; United Nations High Commissioner for Refugees, 24 July 2017; United Nations Committee on Economic, Social and Cultural rights, 11 July 2017, 4; United Nations High Commissioner of Human Rights, May 2015.

14 See: Medicins Sans Frontiers, Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru, December 2018.

15 Gleeson and Yacoub, "Cruel, costly and ineffective," *Kaldor*.

1 Setting the scene: general background and relevant developments

Australia's policy throughout the years

Australia's asylum policy has been a central electoral issue in domestic politics since the beginning of the 21st century. This started with the *MV Tampa affair* in 2001, where Australia refused a boat on its territory that rescued 433 Afghan refugees from an Indonesian vessel. As this was seen as a threat to national security, the *Pacific Solution* was introduced that excised Christmas Island from the Migration zone, taking away the 'automatic' right to apply for asylum. This was introduced by the Liberal-National Coalition (LNC), the more conservative government led by PM Howard. Due to this measure, the Minister would have to 'lift the bar' to enable asylum applications from anyone outside the migration zone. However, this policy had an inverse effect as more asylum seekers started to go through even more dangerous routes to reach mainland Australia instead.[16] Consequentially, once legally feasible, the entire Australian territory got excised.[17] The *Pacific Solution* including offshore processing to PNG and Nauru was ended in 2008 by Labor, but reinitiated, again under Labor, in 2012 due to a higher number of arrivals. Initially, asylum seekers sent offshore would be sent to Australia once they were recognized as refugees. This first phase was executed under a policy of 'no advantage', in which asylum seekers were told to wait as long for their application to be assessed equivalent to what they would have experienced in UNHCR's resettlement process.[18] Approximately 1,000 UMAs were sent offshore under this policy. However, refugee determination processes never occurred offshore for this group, instead

16 Interview legal expert at Kaldor.

17 For more information, see: Melissa Phillips, "Out of sight, out of mind: excising Australia from the migration zone," *The Conversation*, 17 May 2023; National Museum Australia, "Tampa affair," 28 September 2022.

18 Australian Human Rights Commission, "Asylum seekers and refugees," accessed 15 August 2023; Gleeson and Yacoub, "Cruel, costly and ineffective," *Kaldor*.

they were sent back to Australia to await their procedures there.[19] This was done to create capacity for the new arrivals under the new policy, which started on 19 July 2013, after which the Labor government stated that no unauthorised maritime arrivals would be allowed to settle in Australia permanently.[20] Under this new policy, most men were sent to Manus Island in PNG, while all women and children (and some men who were part of families) were sent to Nauru. Including the 11 people sent to Nauru in September 2023, 3,138 people have been sent offshore to Nauru or PNG since 18 July 2013.[21] At its peak in August 2014, 222 children were held in the immigration detention centre on Nauru.[22] The Australian Human Rights Commission found the treatment of children in Nauru is in breach with the principles of the Convention on the Rights of the Child.[23] From October 2015 for Nauru and May 2016 for PNG respectively, the immigration detention centres became more open, giving people some more freedom of movement.[24]

By initiation of the Medevac law, some people (called transitory persons) were temporarily allowed back in Australia more easily for medical treatment, which, due to poor health situations in the camps, led to 500 people being transferred back.[25] This was done primarily in the case of complex medical issues, as those treatments were not available in the offshore facilities.[26]

Though there seems to be bipartisan support for OSB, Labor and LNC have historically fought each other on irregular immigration throughout the years, blaming the opposite party for causing higher arrivals and a backlogged

19 The process of returns for this cohort was completed in October 2015, Elibritt Karlsen, "Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources," Parliamentary Library, 19 December 2019.

20 Australian Press Office, "Transcript of Joint Press Conference."

21 4,194 when including people sent offshore since 13 August 2012; "Offhore processing statistics," Refugee Council of Australia, 25 November 2023.

22 Karlsen, "Australia's offshore processing."

23 This concerns Article 37(b), concerning arbitrary deprivation of liberty and 3(1), concerning best interest of the child) of the Convention on the Rights of the Child (CRC). It also had serious concerns about breaches of 10 other articles of the CRC, Australian Human Rights Commission, National Inquiry into Children in Immigration Detention, 12 February 2015, p. 195; OHCHR, Convention on the Rights of the Child.

24 Karlsen, "Australia's offshore processing."

25 UNHCR, "UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates," 12 October 2018.

26 Gleeson and Yacoub, "Cruel, costly and ineffective," *Kaldor*; Asylum Seeker Resource Centre, "Medevac Bill explained," accessed 2 October 2023.

system. However, both parties use strong rhetoric emphasizing the government's authority in deciding who can enter and place a significant focus on national security that remains visible in current policies.[27] The whole policy of offshore processing and boat pushbacks fed into the existing narrative of those reaching Australia irregularly, so, by boat, were 'jumping the queue'. Refugees arriving on the territory as part of a wider resettlement scheme are instead seen as 'deserving' of their spot.[28] In 2022, right ahead of the closing of the election polls, the Liberal party sent a news-alert to almost all phones, stating that Australian border guards intercepted a vessel at sea, with a link to vote for the Liberal party.[29] Even though elections are not automatically won on asylum policies alone anymore, it is evident the issue is still used for electoral gain.

Polling shows that in 2013, at the start of OSB, 42% of Australians judged the number of immigrants accepted into Australia as too high. In the 2022 survey by the same institute, this number dropped to 24%.[30] Research from the Australian National University showed that the issue of immigration was considered the least important voting priority in 2022, while it was considered the second most important electoral issue in 2013.[31] In a 2022 polling, 18% considered boat turnbacks and asylum seekers to be a very important issue for the elections, ranking 7th (with cost of living found most important, reaching 47% ranking it very important). This can be explained by the fact that with everyone trying to reach Australian shores being intercepted, Australians no longer observe asylum seekers coming in anymore.[32]

In Australia, voting at federal elections, by-elections and referenda is made mandatory.[33] This is why voter turnout in federal elections has always been high,

27 See for example *The Coalition*, "Operation Sovereign Borders Policy," July 2013.

28 Catherine Ann Martin, "Jumping the queue? The queue-jumping metaphor in Australian press discourse on asylum seekers," *Journal of Sociology*, 57(2), 25 February 2020.

29 Elise Worthington and Ariel Bogle, "Liberal Party text alert warns voters about illegal boat interception," *ABC News*, 21 May 2022.

30 James O'Donnell, Mapping Social Cohesion, Scanlon Foundation Research Institute, November 2022, p. 59; Andrew Markus, Mapping Social Cohesion, Scanlon Foundation, 2013, p. 3.

31 Brenton Holmes, "Federal Election 2013: issues, dynamics, outcomes, Parliament of Australia," Parliament of Australia, 22 January 2014; "High cost of living top priority for most voters," Australian National University, 6 May 2022.

32 Essential research, "Importance of election issues," 2 May 2022.

33 Australian Electoral Commission, "Frequently asked questions," 24 August 2023.

around 90%.[34] The Guardian speaks of a 'seismic shift' that is noticeable lately in Australian voting behaviour, where generations no longer vote right wing as they get older.[35] Increasingly, migration is seen as necessary to handle the aging population and employee shortages. This is also reflected in the announcement of an increase in total visas for regular arrivals, raised to 190.000 per year.[36]

Labour migration

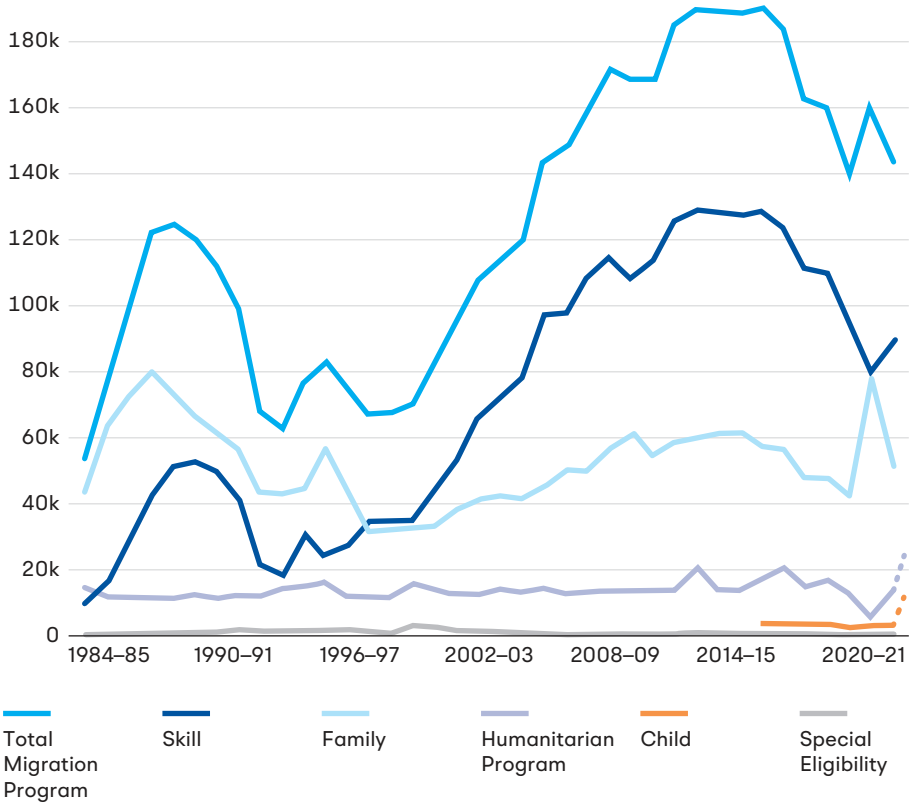
Though still tough on irregular migration, Australia has been using regular migration to fill in labour shortages. An example of this is the Priority Migration Skilled Occupation List, which offers faster procedures for those wanting to migrate who have experience in the listed jobs. For all these visas, prospective applicants first need to express an interest to apply. Application is then only possible after the person has been invited to apply by the Government. This includes Skill Independent visas (subclass 189) – enabling the family to move as well. In financial year (FY)[37] 2021-2022, 6,500 places were allocated for this stream. Like most permanent skill visas, it costs about A$ 4,000, with additional costs (depending on their English skills) for family members brought along. Next to being invited to apply, you need to have the right skills, be under the age of 45 at the time of invitation, be competent in English, score enough points,[38] and fulfil the general requirements for visas.[39] Similarly, there is a Skilled Nominated Visa(subclass 190) for state-sponsored applications, adding some requirements regarding residency in the nominated state or territory for 2 years.[40]

For temporary visas there are options for skilled applicants as well, specifically dedicated to those willing to live in regional areas. While the costs are lower here, the costs to include family members remain high.[41]

34 Australian Electoral Commission, "Voter turnout – previous events," 29 August 2022.
35 Matt Grudnoff, "Millennial voters are bringing a seismic shift to Australian politics and it spells very bad news for the Coalition," *The Guardian*, 4 January 2023.
36 Noël van Bemmel, "Australië versoepelt migratiebeleid om grote tekorten op arbeidsmarkt aan te pakken," *de Volkskrant*, 2 September 2022.
37 The Australian financial year starts from 1 July and runs through to 30 June of the following year.
38 Points are calculated on the basis of age, English proficiency, work experience, relevant education, skills of the partner, and community language skills, "Australia Adds 22 Occupations to Priority Migration Skilled Occupation List," IELTS, July 2021.
39 IELTS, "Skilled Independent Visa: Subclass 189," accessed 10 October 2023.
40 IELTS, "Skilled Nominated Visa: Subclass 190," accessed 10 October 2023.
41 IELTS, "Skilled Regional (Provisional) Visa: Subclass 489," accessed 10 October 2023.

As opposed to skills migration, the Australian humanitarian program has historically only made up a small part from the total migration program, with the percentage of this group as part of total migration also decreasing.[42]

Migration and humanitarian program visa grants since 1984-5



42 Refugee Council of Australia, "How many refugees have come to Australia?" 11 August 2023.

2 International legal framework

Legal context

Australia has ratified the Refugee Convention and Protocol, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. However, unlike Canada and the United States, Australia has not directly incorporated references to treaties relating to human rights and refugees in their domestic legal system. Due to its dualistic nature, this would be necessary to make it into national legislation. So, although Australia has signed such treaties and is therefore internationally bound by standards like non-refoulement, it is not possible to rely on these obligations in the domestic courts, nor is there a supranational court of which Australia is a member to which these cases can be brought.[43] This legal vacuum makes the Australian case almost incomparable to European states in legal terms, as domestic courts in Europe have far less judicial discretion to decide on asylum cases, and the possibility exists of appealing to a regional court if domestic remedies have been exhausted.

Applicability of international law

In *CPCF v Minister for Immigration*, the High Court confirmed that Australian domestic law applies regardless of the applicability of international law. This had to do with the on-sea detention of Tamil asylum seekers within Australia's contiguous zone for three weeks. The consideration concerning the applicability of contradictory domestic and international laws was as follows:

> Australian courts are bound to apply Australian statute law "even if that law should violate a rule of international law". International law does not form part of Australian law until it has been enacted in legislation. In construing an Australian statute, our courts will read "general words ... subject to the established rules of international law" unless a contrary intention appears from the statute. In this case, there is no occasion to invoke this principle of statutory construction. The terms of the Act are specific. They leave no doubt as to its operation.[44]

43 Interview legal expert at Kaldor.

44 High Court of Australia, CPCF v Minister for Immigration and Border Protection, 28 January 2015, para. 462.

Following the CPCF case, an amendment was passed to further enable the maritime enforcement power, with a possibility to use these powers even in the case of incompliance with international legal obligations.[45]

The principle of non-refoulement

Nevertheless, Australia provides explanations of how it complies with these international standards, arguing that these treaties do not apply extraterritorially.[46] Ghezelbash interprets this perception as hyper-legalism, stating Australia hides behind too strict of an interpretation of international law to prevent accountability.[47] For its interpretation of non-refoulement, Australia looks at a U.S. case, where the Supreme Court found that the territorial scope of non-refoulement does not apply to the high seas, enabling pushbacks under non-refoulement obligations.[48] However, several supranational courts later opposed this argument, stating that effective control is enough for a state to have jurisdiction over an area.[49]

For the general applicability of the non-refoulement principle for refugees, the High Court held that the Refugee Convention does not refer to 'asylum'; therefore the protection regime only entails people recognized as refugees by Australia.[50] However, due to the merely declaratory effect of refugee status determination,[51] scholars like Hathaway and Tan state that Convention rights should apply to everyone that is a Convention refugee, also before the

45 Parliament of Australia, "Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014," 23 October 2014.

46 The Committee Against Torture, Concluding Observations on the Fourth and Fifth Periodic Reports of Australia, 23 December 2014; United Nations Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, 1 December 2017.

47 Daniel Ghezelbash, "Australia's boat push-back policy: hyper-legalism and obfuscation in action," in *Refugee Externalisation Policies: Responsibility, Legitimacy and Accountability*, ed. Azadeh Dastyari, Amy Nethery, and Asher Hirsch, (London: Routledge, 2022), p. 74.

48 US Supreme Court, *Sale v Haitian Centres Council, 1993*.

49 Daniel Ghezelbash, "Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees," *American Journal of Comparative Law*, 4 March 2020, p. 4.

50 High Court of Australia, "Minister for Immigration and Multicultural Affairs v. Khawar," 11 April 2002; Ayse Bala Akal (2022) "Third Country Processing Regimes and the Violation of the Principle of Non-Refoulement: a Case Study of Australia's Pacific Solution," *Journal of International Migration and Integration volume*, March 2022.

51 UNHCR, "Handbook on procedures and criteria for determining refugee status and guidelines on international protection," HCR/1P/4/ENG/REV. 4, Reissued February 2019, par. 28.

Government provides them with that status.[52] This has also been recognized by several supranational courts, and is laid down in EU Qualification Directive.[53]

Going against the principle from the Convention on Law of Treaties,[54] Australian domestic law enables border officials to act against the country's international obligations:[55]

> Relevance of Australia's non-refoulement obligations to removal of unlawful non-citizens under section 198
>
> (1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.
>
> (2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.[56]

However, in 2021, this article was amended to include the notion that, in general, there is no duty to remove an unlawful non-citizen – as set out in sub (3). This has been done following the *AJL20 v Commonwealth case*, in which the Federal Court ruled removal was required if someone had exhausted remedies but was owed protection obligations.[57] Australia's Human Rights Committee urged for full removal of article 197c to prevent confusion concerning duties and powers of border control officials, but the full article remained in place.[58] Australia's Law Council welcomed the amendment – as it aligns Australia's laws with its

52 James C. Hathaway, "The Structure of Entitlement under the Refugee Convention" in *the Rights of refugees under international law*, (Cambridge University Press, March 2021); Tan, *International Cooperation on Refugees*, p. 92.

53 Hathaway, "The Structure of Entitlement under the Refugee Convention," p. 179-180.

54 Vienna Convention on the Law of treaties, art. 31.

55 Kaldor, "Kaldor Centre Principles for Australian Refugee Policy," revised March 2022.

56 Migration Act 1958, Sect 197C.

57 Kaldor, Follow-up Civil Society Report on United Nations Human Rights Committee Concluding Observations 2017 – 2019: Australia, 31 January 2022, p. 2.

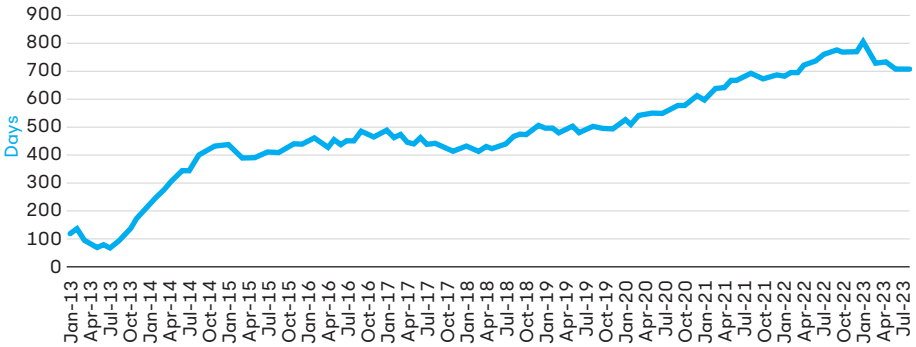
58 Australian Human Rights Commission, Review of the Migration Amendment (Clarifying International Obligations for Removal) Act 2021, 20 June 2023, p. 13.

international obligations – but did note this can simultaneously lead to more rejected asylum seekers subject to indefinite detention.[59]

Indefinite detention

Australia mandatorily detains anyone who arrives without a visa, irrespective of age or status, as well as anyone that is intercepted and cannot be sent back. The average time asylum seekers must remain in immigration detention facilities is 708 days, with some having to stay there for over 10 years.[60] This duration has increased from 445 days on average 5 years prior.[61]

Average number of days people are held in immigration detention facilities



Source: Department of Home Affairs, Immigration Detention and Community Statistics Summary, August 2023.

According to art. 9 ICCPR, nobody should be subject to arbitrary arrest and detention, and fair and prompt procedures for trial should be accessible for anyone that has been detained. Only in the case of a public emergency can states derogate from this principle (art. 4 ICCPR). In the case of *Diallo*, the International Court of Justice (ICJ) held that the type of detention

59 Law Council of Australia, "Migration Amendment (Clarifying International Obligations for Removal) Act 2021," 10 June 2021.

60 Global Detention Project, Immigration Detention in Australia: Turning Arbitrary Detention into a Global Brand, February 2022; Refugee Council of Australia, "Statistics on People in Detention in Australia," 8 January 2022.

61 Mary Anne Kenny, "The High Court has decided indefinite detention is unlawful. What happens now?" 10 November 2023.

(administrative or punitive) does not change anything about this principle.[62] In addition, art. 31 of the Refugee Convention provides that states will not impose penalties on those that come to a state party's territory illegally.

The domestic legal basis for immigration detention can be found in the Migration Act, the Maritime Powers Act, and the Australian Border Force Act. These laws entail that any non-citizens residing unlawfully – asylum seekers arriving irregularly and people with temporary visas that expired or were cancelled – should be detained until they are provided with a visa or sent out of the country. In the *Al-Kateb v Godwin* case, the High Court judged the indefinite detention of a stateless person as lawful.[63] This was because section 196 of the Migration Act states that unlawful residing non-citizens can be freed from immigration detention in the case that a valid visa, deportation, or removal will follow. Art. 198(6) includes that this needs to be done 'as soon as reasonably practicable'. The uncertainty of whether anyone will admit this stateless person, made it – according to the majority of the Court – possible to detain Al Kateb until more certainty was given. Until then, removal was deemed impossible without an outlook on a change in the situation. Similarly, in the *AJL20 v The Commonwealth case*, the Court deemed 'removal as soon as reasonably practicable' not to be bound to a time limit and possible if the object and purpose of the Act were still fulfilled. That would ensure the detention is not punitive and make it compatible with the constitution.[64] However, on 8 November 2023, indefinite immigration detention was ruled unlawful by the High Court, overturning the 20-year-old *Al-Kateb* precedent. In this recent case of *NZQY*, the High Court ruled that detainment without any real prospect of removal practicable in the foreseeable future made the detention unlawful. This has required the release of 140 people from immigration detention as of 28 November already, leading the government to propose laws to counter further releases.[65]

62 International Court of Justice, Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), November 2010, ICJ Rep. 639, 668, para. 77.

63 High Court of Australia, Al Kateb v Godwin, 6 August 2004, par. 229 and 231.

64 Library of Congress, "Australia: High Court Holds Indefinite Immigration Detention Is Lawful," accessed 13 September 2023.

65 High Court of Australia, NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs, 8 November 2023; Human Rights Law Centre, "Indefinite immigration detention unlawful: High Court rules," 8 November 2023; Hannah Ritchie, "Australia indefinite detention unlawful, High Court rules," BBC, 8 November 2023; Daniel Ghezelbash and Anna Talbot, "High Court reasons on immigration ruling pave way for further legislation," 28 November 2023.

Legal scholars and organisations pushed for a change of policy as indefinite detention has a significant mental impact on asylum seekers, caused mainly by insecurity about when or if detention will end and limited facilities for education and (mental) health support.[66] A report by Medicins Sans Frontiers (MSF) showed that existing mental healthcare on Nauru was lacking, leading to issues for both refugees and asylum seekers as well as Nauruans that were living on the island. From the 208 people MSF treated in Nauru,[67] 60% had suicidal thoughts, 30% attempted suicide, and 62% suffered from moderate or severe depression.[68] The UN Committee on Torture has shared concerns about the health situation in detention facilities, stressing the practice of detainment of minors and unaccompanied children. In addition, it was concerned about "the use of detention powers as a general deterrent against unlawful entry rather than in response to individual risk".[69]

As of 31 August 2023, 1,056 people are held in (onshore) immigration detention, and 282 are detained in the community. Of those in immigration detention, 130 have been unauthorised maritime arrivals.[70] Most people are sent to locked detention centres privately operated by Serco. This group can not leave the detention facilities and is under high security. The other option is community detention, mainly used for more vulnerable groups. Legally, this group is still in immigration detention, but in practice, they are allowed to stay in special housing in the community where they can move freely. The government, however, still holds control over them through rules for reporting and night curfew. Additionally, this group is not allowed to work. Whether someone is put in immigration detention or in community detention depends on the case and the Government's risk assessment.[71] The biggest group currently in detention facilities has had their visas cancelled. This is a consequence of failing the character test, which will lead to cancellation when the visa holder has a substantial criminal record, can be a danger to the Australian community, or

66 Anna Copeland, "SNS News Podcast," 10 November 2023.

67 Lasting 11 months, after which on 5 October 2018, MSF was sent away by the Nauruan government. The patients included both Nauruans (22%) and refugees and asylum seekers (73%).

68 Medicins Sans Frontiers, Indefinite Despair: The tragic mental health consequences of offshore processing on Nauru, December 2018.

69 UN Committee against Torture, "Concluding observations on the sixth periodic report of Australia," 5 December 2022.

70 Australian Border Force, "Immigration Detention and Community Statistics Summary," 13 October 2023, p. 6.

71 Australian Border Force, "Immigration Detention in Australia," Last updated 24 January 2024.

because the Minister decides so based on "their past and present criminal or general conduct."[72]

Strategic litigation

Due to the legal context mentioned above, strategic litigation in Australia cannot be based on human rights grounds. Therefore, lawyers need to find alternative sources of law. However, due to bipartisan support of Operation Sovereign Borders, parliament can pass legislation following or even during the ruling of a High Court judgement. This happened, for example, in the case challenging Australia's lack of authority to fund and actively participate in detaining asylum seekers in Nauru before the High Court. Right after the hearing, retrospective legislation was passed, amending the Migration Act that would now make such funding legally possible.[73] The focus of the case was thus shifted to the scope of this new provision, looking at the Government's legal authority and level of control. It was decided that even though Australia was necessarily involved in detaining the plaintiff, it was Nauru, and not Australia, that held the responsibility for detaining the refugee. The distinction arose from the fact that Australia could not authorize Nauru to make laws to detain the refugee.[74] After this case, more cases followed to understand Australia's duty of care, in which the Federal Court ruled that such a duty of care for the government exists in the case of insufficient care that was available in PNG, since the treatment (abortion) was illegal and thus unsafe there.[75] Later, judgements like *SBEG v Commonwealth of Australia* ruled that while the duty of care expanded to the regional processing centres (RPC)[76], Australia did not have an obligation to release detainees in offshore processing centres, even when they are suffering and are in risk of further harm. Therefore, there was a limit to where strategic litigation could go.[77]

72 Administrative Appeals Tribunal, "The character test explained," Accessed 10 August 2023; Migration Act 1958, Sect 501.

73 Ghezelbash, "Extraterritorial processing," p. 124; "Plaintiff M68/2015 v. Minister for Immigration and Border Protection," *High Court of Australia*, 3 February 2016.

74 Gabrielle Holly, "Challenges to Australia's Offshore detention regime and the limits of Strategic Tort Litigation," *German Law Journal*, April 2020.

75 Kaldor, "Casenote Plaintiff S99/2016 v Minister for immigration and Border Protection," July 2016; Federal Court of Australia, "Plaintiff S99/2016 v Minister for Immigration and Border Protection [2016] FCA 483," (referred to by the High Court of Australia for an urgent hearing), 6 May 2016.

76 Regional processing centres is the term used by the Australian Government to refer to the offshore immigration detention centres on Nauru and Manus Island.

77 Holly, McKenzie-Murray & Davidson, "Challenges to Australia's Offshore detention regime and the Limits of Strategic Tort Litigation," *German Law Journal*, April 2020.

3 Border management in policy and practice

Border policy

The border situation in Australia is peculiar and unique because of its location. Being isolated from others enables the country to be very strict in its visa policy and check anyone coming in. Anyone arriving, irrespective of their purpose, holiday, business, or protection, needs a valid visa. This is why Australia can comparatively manage its migration more easily than the EU, where possibilities to arrive on the continent by either land or sea are endless.

To fully stay in control over who comes into the country, Australia has moved a part of its border management offshore.[78] This is an important part of the policy in which asylum seekers are prevented from arriving in Australia irregularly by boat. Anyone attempting to do so will either be turned back to their country of departure or their country of origin or transferred to a regional processing centre. The ability to do so is enshrined in the country's Maritime Powers Act 2013, which has provisions on the possibility of detaining persons on vessels that seem to go against Australia's regulations, irrespective of any international obligations.[79]

The operational aim of the interception policy is said to be taking down the business model of people smugglers.[80] Although the Government policy is not to comment on 'on water matters', since it could benefit these people smugglers, it does share the number of interceptions in their yearly administration of the immigration program.[81] Here they state that between September 2013 and March 2023, the OSB 'intercepted and safely returned 1082 potential irregular

78 Alison Mountz, "Externalizing Asylum: A Genealogy." In *The Death of Asylum: Hidden Geographies of the Enforcement Archipelago*, (University of Minnesota Press, 2020), p. 36.

79 Maritime Powers Acts, art. 72(4) and 22A.

80 Henry Sherell, The Central Role of Cooperation in Australia's Immigration Enforcement Strategy, Migration Policy Institute, March 2022, p. 5.

81 Daniel Ghezelbash, "Australia's boat push-back policy: hyper-legalism and obfuscation in action," p. 77; Department of Home Affairs, Senate standing committee on legal and constitutional affairs, February 2023.

immigrants' coming from 46 different vessels.[82] The declaratory policy is that they only do this 'where it is safe to do so', but unclarity about how this is decided remains.[83]

Since the initiation of OSB, the Government has chosen a military-led approach, with Rear Admiral Jones currently as the head of the operation. He is the commander of the Joint Agency Task Force that operates under the Department of Home Affairs. This Joint Agency consists of three groups: The Australian Federal Police leading the Disruption and Deterrence Task Group, the Maritime Border Command, supported by the Australian Defence Force, leading the Detection, Interception and Transfer Task Group, and lastly, the Department of Home Affairs and the Australian Border Force leading the Regional Processing, Resettlement, and Returns operations.[84]

Maritime assessments

In some maritime cases, Home Affairs Protection Officers execute a pre-entry on-board screening, in which an enhanced procedure should clarify whether the principle of non-refoulement brings in obligations for Australia. In the case that Australia would have protection obligations based on this quick assessment, asylum seekers can be brought to a regional processing centre where they enter the standard protection assessment process.[85] If not, boats are returned – out of Australian waters – toward their country of origin or departure.[86] As these assessments are considered a matter of national security, the details of these processes remain disclosed.

82 Department of Home Affairs, The Administration of the Immigration and Citizenship Programs, May 2023, p. 42.

83 In 2014, the Sydney Morning Herald reported this has been done through phone, in which a small group of passengers were asked some questions. This procedure has been criticized by legal scholars in a statement in 2014.

84 Department of Home Affairs "Organisational Chart, Joint Agency Task Force,"; Sherell, The Central Role of Cooperation.

85 Australian Human Rights Commission, Tell Me About: The 'Enhanced Screening Process', June 2013.

86 The UNHCR criticises these enhanced procedures for being unfair and unreliable, with additional risks when executed at sea: UNHCR, "High Commissioner's Dialogue on Protection Challenges: Protection at Sea - Background Paper," 11 November 2014, par. 18.

Regional partnerships

Australia has cooperated at the regional level to prevent unauthorised maritime arrivals. The broadest example of this collaboration is the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, acting as a non-binding forum for the Asia-Pacific region on irregular migration since 2001. This organisation now entails 47 member states and 4 member organisations: the International Organization for Migration (IOM), UNHCR, the International Labour Organisation (ILO), and the United Nations Office of Drugs and Crime.[87] The foreign ministers of Australia and Indonesia chair the forum, with Ministerial Conferences held every two years. Its regional support office provides training and assistance with the interception of migrants travelling irregularly.[88] Australia has spent A$13 billion to pay for such cooperation platforms between 2007 and 2017 alone, spent on training, data-sharing, modernization of border controls, campaigns, aligning stricter policies in the Pacific, and a returns programme under IOM.[89]

Indonesia

Bilaterally, the agreements differ in formality and scope depending on the partnering state. Australia's most important regional partner is Indonesia, the country most asylum seekers transfer from in their attempt to reach Australia. The prominence arises from the challenge of controlling a land border that is stretched out over many islands.[90] Before OSB, Indonesia had visa-free travel for people from several war-zone states. Afterwards, Indonesia increasingly restricted its visa policy, partly through Australian lobbying, leading to fewer people using Indonesia as a point of transit.[91] People still intercepted are mostly found during patrols around Christmas Island, an external territory of Australia. Located a mere 360 kilometres south of Java, the island brings the maritime borders of Australia far closer to Indonesia than mainland Australia. Boats found here are often unsuitable for longer travel, and thus people are taken aboard the coast guard's vessels where they can be quickly assessed on board. According

87 The Bali Process, "About the Bali Process", accessed on 25 September 2023.

88 Asher Lazarus Hirsch, "The Borders Beyond the Border: Australia's Extraterritorial Migration Controls," *Refugee Survey Quarterly*, 36 (2017), p. 70.

89 Hirsch, "The Borders Beyond the Border", p. 71.

90 Dastyari & Hirsch, "The Ring of Steel," *HRLR*, p. 439.

91 Interview former senior official Humanitarian and Refugee program.; James Robertson, "Indonesia tightens visa restrictions," *The Sydney Morning Harald*, 18 July 2013.

to the interviewee, this has not happened recently with people arriving from Indonesia.

Though an essential partner in maritime interdictions, Indonesia does not openly support these operations in their territorial waters. Through cooperation between the two states, Indonesia gets funding from Australia to prevent anyone from coming ashore in Australia. The main agreement, the Regional Cooperation Agreement (RCA), is conducted in direct cooperation with IOM. Under this agreement, Indonesian border guards (after Australian-funded training) intercept asylum-seekers trying to travel irregularly, and detention facilities are improved and extended for those who are found to transit through Indonesia.[92] IOM provides assistance in the context of returns and is particularly active in promoting human rights in immigration detention centres. This includes the provision of food and medical assistance, as well as training for local immigration officials and promoting cooperation between different actors dealing with irregular migration.[93]

Within the RCA, the two countries engaged in a Management and Care of Irregular Immigrants Project aimed to scale up detention facilities for people transiting through Indonesia to Australia.

Next to funding of all these projects, Australia additionally provides Indonesia with vessels, airplanes, surveillance equipment and offices for Indonesia's sea patrol.[94] Through the cooperation agreements, Indonesia has restricted its asylum policies too, seemingly copying Australia with regards to the detention of irregular arrivals.[95] However, the diplomatic relationship between the two countries has seen better times as a consequence of Australia carrying out unilateral pushbacks of boats with intercepted irregular migrants within Australian territory. Following such tensions, migrants are often left on the edge of Indonesian territory by Australian border guards, who then instruct them to

92 Savitri Taylor, "Australian funded care and maintenance of asylum seekers in Indonesia and Papua New Guinea: All care but no responsibility?," *UNSW Law Journal*, 33, no.2 (2010), p. 339.

93 IOM, Offering New Beginnings and Promoting Development: Australia and IOM, Partnerships in Action, 2015.

94 Azadeh Dastyari, Asher Hirsch, "The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy," *Human Rights Law Review*, Volume 19 (3), November 2019, P. 442.

95 Dastyari & Hirsch, "The Ring of Steel," *HRLR*, p. 443.

return to Indonesian waters on their own. By adopting this approach, Australia ensures it adheres to the principle of 'innocent passage under the International Law of the Sea', although Indonesia may possibly perceive this as Australia breaching its territorial integrity.[96]

Malaysia

A second important partner in border management is Malaysia. As with Indonesia, Australia has convinced Malaysia to implement stricter visa-regimes and work together to intercept and detain migrants travelling by sea.[97] Although Malaysia is cooperative on matters of border enforcement, refugee issues remain undiscussed due to Malaysia's policy of not officially recognizing refugees and a lack of domestic policy managing refugee procedures.[98] This should also be seen in the light of Malaysia not being a signatory of the Refugee Convention (the only exception in Southeast Asia), which had implications on the possibility of offshoring agreements with Australia, discussed later in this paper. Despite the Government's non-recognition, UNHCR is given extensive capabilities in Malaysia, leading one of the busiest UNHCR refugee status determination (RSD) processes, both in resettlement numbers and registrations.[99]

Currently, this bilateral cooperation focuses on combatting crime, with Operation Redback as an operational example. The Australian border guards work with the Malaysia coast guard, increasingly focusing on using strategic communication to deter maritime smuggling ventures.[100] Vessels are provided for by Australia to support the anti-smuggling operations. As is the case for Indonesia, Malaysia has similarly restricted its visa policy, no longer providing visas on arrival to nationals from Iran, Iraq, and Syria. It can be assumed that Australian pressure influenced this decision.[101]

96 Violeta Moreno-Lax, Daniel Ghezelbash, and Natalie Klein, "Between Life, Security and Rights: Framing the Interdiction of 'boat Migrants' in the Central Mediterranean and Australia," *Leiden Journal of International Law*, 32, no.4 (2019), p. 732; Antje Missbach and Gerhard Hoffstaedter, "When Transit States Pursue Their Own Agenda," *Migration and Society*, 3, no.1, p. 4.

97 Maggy Lee, "The externalization of border control in the global South: The cases of Malaysia and Indonesia," *Theoretical Criminology*, 26, no.4 (2022) p. 544.

98 Lee, "The externalisation of border control," p. 545.

99 Leonie Ansems de Vries, "Politics of (in)visibility: Governance-resistance and the constitution of refugee subjectivities in Malaysia," *Review of International Studies, 42*, no.5 (May 2016), p. 882.

100 Department of Home Affairs, "Cooperation with Malaysia strengthens Australian borders," The Hon Karen Andrews MP, 30 June 2020.

101 Hirsch, "The Borders Beyond the Border," p. 73.

Sri Lanka and Vietnam

Comparable strategic communication has also been used in Vietnam and Sri Lanka, extending the message of 'zero chance' across the borders. With Vietnam and Sri Lanka, Australia has also agreed on cooperation and 'consensual arrangements' through Memoranda of Understanding regarding the interception of boats. However, the border agencies have remained silent on the operational aspects of these pullbacks, and efforts to gain a better understanding through Freedom of Information provisions have failed.[102] Australia has also funded military vessels to Sri Lanka for patrol, as well as other surveillance materials.[103]

Australia has signed a Joint Declaration for a Strategic Partnership with Vietnam, with deepening strategic, defence and security cooperation as one of the three main pillars. According to the Australian Government, the two countries have had a longstanding cooperation regarding matters of immigration, border security, and law enforcement, working together to "prevent and deter people smuggling and address the challenges of irregular migration and civil maritime security."[104]

Perception and leverage third states

Australia presents its cooperation agreements with Malaysia and Indonesia as mutually beneficial; however, these states have increasingly tried to counter cooperation that does not necessarily improve their situation. Partly through a decrease in funding, Malaysia and Indonesia have become less receptive to Australia's financial leverage.[105] This shift is rooted in a backlog in these countries, caused by limited willingness of third states to resettle refugees combined with Australia's border closures. Consequentially, Malaysia and Indonesia have involuntarily become destination countries rather than transit countries. This potentially poses a bigger challenge for Australia, as the willingness to cooperate may decrease further if the number of refugees 'stuck' in Malaysia and Indonesia keeps rising while Australia keeps looking at cooperation

102 Moreno-Lax, Ghezelbash, and Klein, "Between Life, Security and Rights: Framing the Interdiction of 'boat Migrants' in the Central Mediterranean and Australia; The Hon Peter Dutton MP, Australia and Vietnam further cooperation to stamp out people smuggling, Australian Government, 12 December 2016; Department of Home Affairs, "Memorandum of Understanding between Government of Australia and Government of Sri Lanka concerning legal cooperation against the smuggling of migrants," 9 November 2009.

103 Hirsch, "The Borders Beyond the Border," p. 75.

104 Department of Foreign Affairs and Trade, "Vietnam Country Brief," accessed 29 October 2023.

105 Antje Missbach and Gerard Hoffstaedter, "When transit states pursue their own agenda," *Migration and Society*, 3, no.1 (2020), June 2020, p. 67.

predominantly from a self-interested perspective.[106] Unlike Nauru (discussed below), Indonesia is not dependent on Australian investments. This factor could possibly influence its leverage power in the context of migration cooperation. The risks of such dependency became evident in 2015, with a threat from the Indonesian coordinating minister of political, legal, and security affairs to 'release a human tsunami of 10,000 asylum seekers in Australia'.[107]

106 Missbach and Hoffstaedter, "When transit states pursue their own agenda," p. 67.

107 Ben Doherty, "Indonesia 'could release human tsunami of 10,000 asylum seekers on Australia'," *The Guardian*, 11 March 2015.

4 Access and national asylum procedures

Refugee status determination process

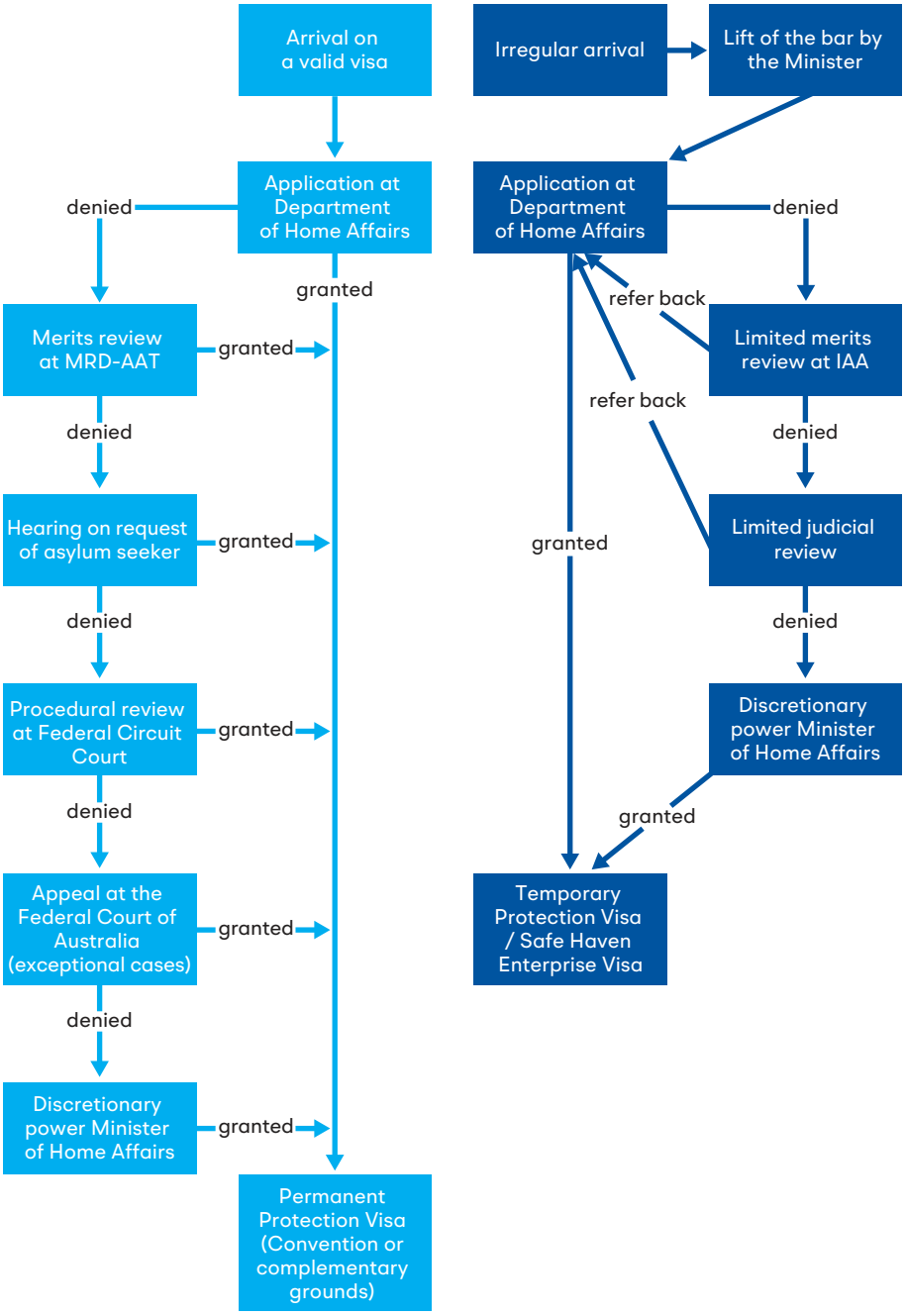
Possible pathways to protection in Australia depend on the mode of arrival.[108] Asylum seekers arriving on a valid visa go through the regular refugee status determination (RSD) process and can apply for protection. This group consists of asylum seekers who originally arrived on student, business or visitor visas, for example. Asylum seekers arriving irregularly are processed through a fast-track process instead. They can only apply for temporary protection, but due to OSB, spontaneous asylum applications on Australian territory are made impossible, as part of its *non-entrée policies*.[109] Therefore, most cases processed through the fast-track process still come from the *legacy caseload*, a term used to refer to the 31,918 people that arrived without a visa, mostly between August 2012 and January 2014, prior to the moment all boats were intercepted, that often had to wait for years to have their claims processed. Access to complementary protection is included for people not owed protection under the Convention but still face a real risk of significant harm, engaging Australia's protection obligations.[110]

108 In the research of the Refugee Council of Australia (RCOA) of 2022 for the Refugee Response Index, the first pillar, access to asylum, was given the lowest score. This assessment looked at known cases of refoulement, measures to stop access to asylum, returns, protection-sensitive systems, and rights for specific groups, amongst other measuring entities.

109 The term non-entrée policies is proposed by James Hathaway to describe the way states legalize policies to prevent access for refugees in the states' territory, Hathaway, J. (2021). "Rights of Refugees Physically Present," In *The Rights of Refugees under International Law* (pp. 312-808). (Cambridge: Cambridge University Press).

110 Department of Home Affairs, "Australia's protection obligations," 21 August 2021.

Refugee Determination Process



Permanent protection

Anyone arriving regularly might qualify for the permanent onshore protection program, the smaller leg of Australia's Refugee and Humanitarian program. The Australian Department of Home Affairs is responsible for the application, leading to a primary decision based on an asylum seeker's assessed identity, credibility, and claim made. This way, it can be decided that someone is owed protection on either Convention or complementary grounds. Appeal to this primary decision is possible at the Migration and Refugee Division of the Administrative Appeals Tribunal (MRD-AAT). This is a merits review, in which a review procedure is executed under the same criteria as the original case, practically redoing the procedure. The Tribunal needs to provide the applicant with the possibility for a hearing in case the outcome is negative here, too. Due to increased applications and an existing (and increasing) backlog, processing times have been long for the MRD-AAT. Between February and August 2023, 95% of protection cases were finalised within 2,114 days, equalling to more than 5,5 years, while 50% of cases were finalised within 1,512 days, equalling 4 years.[111] As of 31 May 2023, the Tribunal still had 39,807 cases on hand for protection cases. Most of these cases came from nationals of Malaysia (38%), China (22%), and Vietnam (6%).[112]

In case of a negative outcome, there is still a possibility to appeal at the Federal Circuit Court of Australia, purely on procedural matters. The Federal Court of Australia is the next possible step for appeal, and in exceptional cases, the option of the High Court is open to applicants as well.[113] The Minister always retains the discretionary power to decide on a more favourable outcome of any appeal procedures.[114]

Temporary Protection

The only open pathway for people arriving without a valid visa, mostly from the legacy caseload, and people who could return to Australia after being sent offshore to Nauru and PNG, is temporary protection. Due to the excision of the territory from the migration zone, these asylum seekers do not have automatic access to refugee determination processes and are instead dependent on a lift

111 For migration cases these amount to 1,577 days (95%) and 776 days (50%). "Migration and Refugee Division processing times," Administrative Appeals Tribunal, accessed 25 October 2023.
112 "Migration and Refugee Division Caseload Report," Administrative Appeals Tribunal, 3 June 2023.
113 Kaldor, "Refugee status determination," 2 November 2020.
114 Asylum Insight, "Determining refugee status," updated 2 August 2015.

of the bar by the Minister.[115] For some people, this has meant having to wait up to four years to submit their first application.[116] This group, the unauthorised maritime arrivals, are not able to settle permanently in Australia, as is made clear through the OSB website, press releases, and campaigns abroad.[117] There are two pathways for temporary protection: a (3-year) Temporary Protection Visa (TPV) or a (5-year) Safe Haven Enterprise Visa (SHEV).[118] These options also stay open when someone is refused immigration clearance at the border.[119] The reintroduction of temporary visas happened through the Resolving the Asylum Legacy Caseload bill of 2014,[120] passed in December 2014. Other than in the permanent protection scheme, temporary visas offer no possibility for family reunification and overseas travel is only allowed after written permission. The difference between these two temporary visas, other than the duration, is that SHEV requires someone to work or study in regional Australia.

Once allowed to apply for asylum, these asylum seekers are subject to a 'fast track process'.[121] This had been introduced in 2014 to handle the legacy caseload of more than 30,000 UMAs more efficiently.[122] Through this process, the Department of Home Affairs assess the claim, with a possibility for review at the Immigration Assessment Authority (IAA), usually only reviewing the documents initially available to the Department, without a chance for a hearing or interview.[123] The IAA's only option is to confirm the Department's decision or to refer them back to Department to re-assess the application. The IAA does not have the power to substitute the decision, as is possible for the AAT in the regular determination process, as is described above. State-funded legal assistance has been abolished for this group, and the merits review process is

115 Ss 46A and 46B Migration Act 1958; Due to the current policy, regulation regarding UMA all date from before the boat interceptions. Also see page 4; Administrative Appeals Tribunal, "Protection Visas" in *Guide to Refugee law in Australia*, June 2023, p. 6.

116 Kaldor, "Refugee status determination in Australia," 2 November 2020.

117 E.g. the roadshow organised in Sri Lanka to inform communities on the impossibilities to enter Australia irregularly: Australian Border Force, "Joint media release," 19 September 2023.

118 Department of Home Affairs, "Subclass 785 Temporary Protection Visa."

119 Department of Home Affairs, "About the program."

120 Originally called the Migration and Maritime Powers Legislation Amendment.

121 Kaldor, Fast Track' Refugee Status Determination, last update June 2022.

122 Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth).

123 Emily McDonald and Maria O'Sullivan, "Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime," *UNSW Law Journal*, 41, no.3 (2018), p. 1005.

not available to 'exclude fast track applicants': those whose claims are found to be manifestly ill-founded; in cases where fake identification has been used; when the applicant had access to effective protection elsewhere[124]; or if someone made an unsuccessful claim for protection in another country or to the UNHCR.[125] They only have access to a limited judicial review through which legal errors can be corrected, but where the facts of the case or the fairness thereof are no longer looked at.[126]

The Labor Party expressed the intention to abolish the temporary protection pathways, TPV and SHEV. Since temporary protection can "place refugees in an ongoing state of uncertainty and prevent meaningful settlement, creating hardship for refugees and denying Australia the benefit of their contribution", they would instead offer permanent protection to those in need of it.[127] They started with the Resolution of Status Visa, for which anyone who has received (and is still the holder of) a TPV or SHEV before 14 February 2023 is eligible to apply. The government expects to grant most of the temporary visa holders with the RoS- of which the majority should have their decision by March 2024.[128] The resolution of status prevents having to re-do the assessment process and can thus be an effective tool to move people to a permanent status quickly.[129] Most of those eligible to apply, around 19,000 refugees, have arrived prior to the 19 July 2013 prevention of permanent settlement for irregular arrivals.[130]

Refugee determination

To be recognized as a refugee in Australia, asylum seekers must fulfil the requirements of the Migration Act 1958. According to this law, a refugee is

124 The Australian government has kept a lot of ministerial discretion to decide which countries fall under the scope of 'third safe country': Ghezelbash, "Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees."

125 UNHCR, The protection of Australia's so-called 'legacy caseload' asylum-seekers, 1 February 2018. Kaldor, Fast Track' Refugee Status Determination, June 2022.

126 Kaldor, "'Fast Track' Refugee Status Determination," June 2022. See for the concerns surrounding limited judicial processes for procedural fairness: Emily McDonald and Maria O'Sullivan, "Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime," UNSWLJ 1003, 41(3), 2018.

127 Australian Labor Party, "ALP National Platform," March 2021.

128 Department of Home Affairs, "Resolution of Status," 19 October 2023.

129 Interview former senior official Humanitarian and Refugee program.

130 Nour Haydar, "Thousands of refugees to be granted permanent visas as Labor moves to fulfil election promise," ABC News, 12 February 2023.

someone who is outside of their country of nationality or, in lack of nationality, of former habitual residence and is, owing to a well-founded fear of persecution, unable or unwilling to return to their home country or to seek protection of that country based on their race, religion, nationality, membership of a particular social group or political opinion.[131] This is written in similar wording as can be found in the Refugee Convention's definition of a refugee, just like the grounds for a well-founded fear of persecution. Since December 2014, the Australian government included these reasons in its legislation instead of referring to the Convention, deleting any reference to it.[132] The differences since then include that the meaning of a 'particular social group' has been specified and that these reasons must be shown to be the 'essential and significant reasons' for the persecution. A mere causal relation is not sufficient, but due to the absence of a straightforward test to prove this, this depends on the judge's discretion.[133]

In addition, there are possibilities for complementary protection for those who face significant harm[134] but cannot be recognized as refugees based on the five persecution grounds mentioned in the Act. Since 2012, protection possibilities for this group have been laid down in Art. 36 of the Migration Act, falling under the humanitarian program.[135]

People already in Australia that want to ask for protection can apply at the Department of Immigration and Border Protection, who will process their application. Applicants who arrive in Australia are without a valid visa are instead put in immigration detention facilities where they must wait for their claims to be decided on. Arrivals whom the border forces suspect will ask for asylum after

131 Migration Act 1958, art. 5H; "Asylum seekers and refugees," Australian Human Rights Commission, accessed 9 October 2023.

132 The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014 (Cth) (No 135 of 2014) amended s 36(2)(a) of the Act to remove reference to the Refugees Convention and instead refer to Australia having protection obligations in respect of a person because they are a 'refugee'. See: Administrative Appeals Tribunal, "Guide to Refugee Law," Chapter 4, p. 2.

133 Administrative Appeals Tribunal, "Guide to Refugee Law," Chapter 5, p. 3-4.

134 Art. 36 (2A) of the Migration Act describes the cases in which a non-citizen will suffer significant harm.

135 Australian Government "Refugee and Humanitarian Program," Department of Home Affairs, 10 February 2023.

coming in on a temporary visa that is not protection-related can have their visas cancelled, after which they are subject to immigration detention, too.[136]

After someone has been qualified as a refugee or in need of on complementary protection under the Migration Act with protection obligations by the Australian government, this person needs to undergo health, security, and character checks.[137] A possible reason for not passing these checks would be involvement in serious criminality or being a danger to the country's security.

Specific situations

For nationals from Ukraine and Afghanistan, Australia has made separate arrangements. For Afghan nationals, after the Taliban takeover, 26,500 dedicated places were made available in the Humanitarian Program. Next to the humanitarian program's standard reasons for priority, Afghan nationals have more chance for a visa when they are former locally engaged employees, have immediate family members holding a humanitarian visa already, have been referred by the UNHCR, or belong to identified minority groups.[138] Australia has granted 11,500 visas to Ukrainian nationals still residing in Ukraine since February 2022, after which almost 11,400 have come to Australia. Until 31 July 2022, they were offered a temporary humanitarian stay.[139]

On 10 November 2023, the Australian government announced it would allow 280 people a year to migrate to Australia from Tuvalu, a Pacific Island state threatened by rising sea levels. This agreement was also made to ensure the security in the Pacific, as through this agreement, Tuvalu would need approval of Australia first when it wants to close deals on international security with other states like China.[140]

Safe (third) country

The Migration Act provides exceptions to the duty of protection through sections 36(3)-(7). If a non-national that satisfies the criteria for being a

136 Interview Kaldor, see: Law Institute Victoria, "Visa Cancellation under s 116," January 2018.
137 Department of Home Affairs, "Character requirements for visas," updated 3 March 2023.
138 Department of Home Affairs, "Afghanistan update," 9 October 2023.
139 Department of Home Affairs, "Ukraine visa support," 19 October 2023.
140 Kirsty Needham, "Australia signs security, migration pact with Pacific's Tuvalu," *Reuters*, 10 November 2023; Daan de Vries, "Bewoners Tuvalu krijgen klimaatasiel in Australië, eilandengroep ernstig bedreigd door stijgende zeespiegel," *de Volkskrant*, 10 November 2023.

refugee or in need of subsidiary protection has the option of residing in a safe country[141] outside Australia, Australia is deemed to have no protection obligations.[142] The applicant needs to have taken all possible steps to obtain this right. This can either be a temporary or a permanent right to stay in another country, with no minimal requirements for the duration of the temporary right.[143] There are no requirements for any connection to such a country like there are in the EU Directives. Though often interpreted as a safe *third* country, this law also applies to the country of which the non-citizen is a national.[144]

Administrative capacity

In 2014, the Coalition reintroduced temporary visas for irregular maritime arrivals after the party's attempt to do so was repeatedly opposed by the opposition parties.[145] This decision, for which UNHCR expressed deep concern due to the impossibility of family reunification and the hindering of refugees' ability to integrate and start a new life,[146] led to 30,000 claims of unauthorised maritime arrivals that needed to be processed. Most of these claims have been resolved, but as of September 2023, 1.336 people of the legacy caseload are still waiting for an initial decision.[147]

Next to the legacy caseload and appeal cases described above, backlogs are noticeable all through Australia's migration system. Recently, the Government announced an investment of A$160 million to "restore integrity to Australia's refugee protection system, providing a fair go to genuine asylum seekers and helping to break the business model of people who seek to exploit the system."[148] A recent 'Nixon Review' was set up to look at the challenges and

141 Where there is no risk of persecution or real risk of serious harm and there is no well-founded fear of deportation from that safe country.

142 Migration Act 1958, Sect. 36.

143 SZQPS v. Minister for Immigration and Citizenship showed that an applicant having two months left on his permit was considered sufficient for Australia not to have protection obligations: Administrative Appeals Tribunal, "Third Country Protection" in *Guide to Refugee Law in Australia*, p. 5, 9.

144 Administrative Appeals Tribunal, "Third Country Protection," p. 4.

145 Elibritt Karlsen, "Developments in refugee law and policy: 2014 in review," 8 January 2015.

146 UNHCR Australia, "The protection of Australia's so-called 'legacy caseload' asylum-seekers," 1 February 2018.

147 Department of Home Affairs, "UMA Legacy Caseload," 26 October 2023.

148 Department of Home Affairs, "Restoring integrity to our protection system," The Hon Clare O'Neil MP, 5 October 2023.

risks of the current system and found that the delays were allowing people to take advantage of the system.[149] The newly announced investments are meant to invest in the processing of priority applications, improve the AAT by adding 10 members to the appeals board, and appoint 10 extra judges.[150] Lastly, extra money has gone to the legal assistance of applicants.

Covid-19 caseload

On 31 August 2022, 4,800 people holding a Refugee and Humanitarian (XB) visa were waiting to be resettled to Australia, after having gained their visas between 1 July 2019 and 15 December 2021. This had to do with covid-19 restrictions that made it impossible to travel there. Unauthorised arrivals are not counted in the humanitarian program numbers, also because that is a separate category of only temporary visas.

149 Department of Home Affairs, Rapid Review into the Exploitation of Australia's Visa System, 31 March 2023.

150 In addition to the already added 93 new members, Law Council of Australia, "Investment to reduce migration backlog welcomed," 6 October 2023.

5 Extraterritorial access to asylum

Introduction

This chapter will focus on third country protection and resettlement policies, both providing access to extraterritorial asylum in varying ways. For resettlement, this entails offering permanent protection for a pre-decided number of refugees who have been 'picked out' to settle in Australia. UNHCR recommends refugees for resettlement. However, it is the Australian Department of Immigration and Citizenship that decides who is offered a place.[151]

On the other side there is third country protection, which only provides limited access to asylum procedures and protection, outside of Australia's territory, without chances to settle in Australia afterwards.[152] Tan describes such third country protection as a transfer of asylum seekers out of the destination state's jurisdiction, usually in the Global North, towards a third state in the Global South for protection through bilateral agreements.[153] This does not imply a return to a country of origin or departure, and consists of more than just a transfer, instead including involvement of the departure state in organizing protection pathways in the third state.

Malaysia solution

Before the second phase of offshore processing in 2012, the Australian government tried to arrange a third country agreement with Malaysia. This would be an arrangement to send people who arrived in Australia irregularly by boat to Malaysia in return for the resettlement of UNHCR-acknowledged refugees

151 Elibritt Karlsen, "Refugee resettlement to Australia: what are the facts?" 7 September 2016.

152 Any type of connection criterium we know from European law does not apply in any form to Australian legislation. This has made it possible for Australia to send asylum seekers offshore, to Nauru and PNG. Scholars speak of 'fourth country processing' since the refugees did not have any such connection to these countries before being sent there: Shani Bar-Tuvia, "Australian and Israeli Agreements for the Permanent Transfer of Refugees: Stretching Further the (Il)legality and (Im)morality of Western Externalization Policies," *International journal of refugee law*, vol. 30 no. 3, 2018.

153 Tan, Refugee Protection, p. 267.

from Malaysia in Australia. Differently than the offshoring plan with Nauru and PNG, the asylum seekers arriving in Malaysia would get a temporary permit automatically, with no further proceedings needed.[154] A phrase in the Migration Act stated that the Minister can declare whether a country of transit provides 'effective' procedures and protection, but the High Court opposed the statement that this could be done merely on basis of good faith.[155] Without any jurisdictional proof, shown by domestic legislation or international obligations that such requirements were met (Malaysia is no party to the Refugee Convention nor its Protocol), the High Court ruled such powers were outside of the Minister's power and thus not possible in the case of Malaysia.[156] For this reason, such an agreement with Malaysia never took off, but led to alternative arrangements with Nauru and PNG instead.

Offshore processing to Nauru and PNG

Australia reinitiated its policy to send asylum seekers to Nauru and PNG in September 2012, by moving the reception, RDP and detention (partly) offshore. The policy implemented in 2012 was only slightly different than the policy executed since 2001, since now all maritime arrivals coming ashore Australian territory were now subject to being sent offshore, instead of only those arriving at Australia's offshore excised places like Christmas Island.[157] Transfers only occurred between 2012 and 2014, after which the detention centres offshore became too full. A big concern was the lack of structures in place in both countries to assess refugee applications, as neither country had experience with refugee status determination.[158] The Australian Human Rights Commission warned beforehand such policies might have 'devastating impacts on the health, mental health and wellbeing of the people subject to it.'[159]

After the transfers, both Labor and LNC started pulling back from the offshore policy, aiming at solving the problems evident in Nauru and PNG by first emptying

154 Ghezelbash, Extraterritorial processing in: Refuge Lost, p. 117.

155 Migration Act 1958, article 198A(3)(a).

156 High Court of Australia, Plaintiff M70/2011 v Minister for Immigration and Citizenship ('Malaysian Solution Case'), 31 August 2011; Ghezelbash, Extraterritorial processing in: Refuge Lost, p. 118.

157 Ghezelbash, Extraterritorial processing in: Refuge Lost, p. 121; Human Rights Committee Australia, "Transfer of asylum seekers to third countries," Last updated 6 January 2016.

158 Gleeson and Yacoub, "Cruel, costly and ineffective," *Kaldor*.

159 Australian Human Rights Commission, "Inquiry into Australia's agreement with Malaysia in relation to asylum seekers," 14 September 2011.

the detention facilities, rather than continuing sending people there. This led to only a handful of people left in Nauru detention facilities and 64 people still held in PNG as of November 2023.[160] In 2017, detention facilities in Manus Island, PNG, were closed following a Papuan Supreme Court decision deeming the detainment of asylum seekers unconstitutional, violating detainees' basic right to liberty.[161] Although the Australian High Court disagreed, the government officially closed the detention facilities in late 2017. Most of the detainees were forcibly relocated to alternative, more open, accommodations on the island, pending a final resolution of their situation. As for the recognized refugees, some were offered resettlement in the United States under the 2016 agreement explained below. Those whose claims were rejected were told to return to their countries of origin.[162]

Nauru, on the other hand, kept the detention centres in place and Australia recently renewed this contract, which gives the country immigration detention facilities to fall back on.[163] As of February 2023, the Government statement by Pezzullo, Secretary of Home Affairs was as follows:

> It has been almost nine years since the last successful people-smuggling venture to Australia. (...) Operation Sovereign Borders, OSB, remains postured to counter maritime people-smuggling and preserve the safety of life at sea. Regional processing remains a key pillar of Operation Sovereign Borders. The number of transitory persons in Nauru has been reduced to 66, as of 1 February 2023, down from 111 as at 31 August 2022. Once this caseload is resolved through third-country resettlement, the regional processing capability will remain ready to receive any new unauthorised maritime arrivals, should that occur.[164]

160 Including the transfer of 11 asylum seekers to Nauru in October 2023, there are 16 people in immigration detention in Nauru. Of those sent offshore to PNG, 64 are still in PNG; Refugee Council of Australia, "Offshore processing statistics," 25 November 2023.

161 Supreme Court of Papua New Guinea, Namah v Pato, 13; SC1497, 26 April 2016.

162 See Library of Congress, "Australia/Papua New Guinea: Supreme Court Rules Asylum-Seeker Detention Is Unconstitutional," 2 May 2016; Maria Giannacopoulos & Claire Loughnan (2020) "Closure' at Manus Island and carceral expansion in the open air prison, Globalizations", 17:7, p. 1118-1135; Christine Inglis, "Australia: A Welcoming Destination for Some," MPI, 15 February 2018.

163 Asylum Seeker Resource Center, "Albanese Government working with US prison company until 2025 to hold refugees in Nauru," 27 January 2023.

164 Legal and constitutional affairs legislation committee, Senate Estimates, 13 February 2023, p. 29.

In October 2021, PNG and Australia ended their regional resettlement agreement. This was done through a confidential bilateral agreement with PNG, handing over the responsibility for the management and permanent (re)settlement of refugees and asylum seekers remaining in PNG.[165] The funding involved caused disputes between the two states, leading to protest by PNG, whose Chief migration office calls it an 'abandonment of refugees'. If Australia does not fund the housing and care of the 70 refugees still in PNG, the officer threatened to send these refugees back to Australia.[166]

As of 23 October 2023, the Australian Border Force confirmed during the Senate Estimates, a parliamentary inquiry session taking place multiple times per year, that 11 refugees have been sent to Nauru. This is the first transfer to Nauru in 9 years and comes only months after almost all refugees were sent elsewhere after years of detention in Nauru. In accordance with the Border Force's secrecy policy surrounding such matters due to being "operationally sensitive", no further information is shared about this group, so unclarity remains about nationality, the place of interception, or the age of these people.[167]

Influence of RPC on Nauru and PNG

The offshore processing policy has significantly influenced small island communities in Nauru and Manus Island (PNG). In both Nauru and Manus Island, the placement of big detention centres have given rise to incidents between the local community and the asylum seekers, even leading to asylum seekers asking to be detained to ensure their safety.[168]

Australia's cooperation with Nauru and PNG is based on an unequal relationship, as both states used to be under the colonial administration of Australia, either as a protectorate or colony, and are highly dependent on Australian aid investment. Investments in these states thus go beyond providing detention and processing

165 Parliament of Australia, "Finalisation of the Regional Resettlement Arrangement," 6 October 2021.

166 Rebecca Kuku, Ben Doherty and Paul Karp, "PNG threatens to send refugees back to Australia unless it keeps funding humanitarian program," *The Guardian*, 7 October 2023; Tim Swanston and Hannah Meagherz, "More than 60 refugees fear eviction as PNG and Australia disagree over 'outstanding invoices'," *ABC News*, 11 October 2023.

167 Paul Karp and Eden Gillespie, "Labor accused of 'outrageous secrecy' as border force confirms 11 asylum seekers sent to Nauru," *The Guardian*, 23 October 2023.

168 Brian Opeskin & Daniel Ghezelbash, "Australian Refugee Policy and its Impacts on Pacific Island Countries," *The Journal of Pacific Studies*, 16 February 2017.

centres, influencing the freedom with which these states can bargain with Australia. Locals have expressed disappointment with the limited amount of funding they have reaped the benefits of, and the deployment of expats to work in these centres in a country grappling with high unemployment was poorly received. Similarly, a form of 'brain drain' occurred, where well-educated professionals left their jobs in the Nauruan public service and transitioned to better-paying roles with the Australian government in the RPCs. Management positions were filled by expats, and development aid could no longer be effectively allocated to the community. The treatment of refugees in Nauru that has been widely criticised internationally also impacted the image of Nauruans, framing the inhabitants as 'cruel abusers of refugees'.[169] Nauru, being the world's smallest island state with less than 10,000 inhabitants, has been named 'effectively a client state' for Australia, considering the big investments made and Nauru's dependency on the country.[170] During the peak of asylum seekers transferred to Nauru, these refugees amounted to 12% of the total population, being already a densely populated state.[171] Nauru received a large part of its national income by managing Australia's refugees, making it dependent on Australia's financing.[172] In 2021, 15% of the workforce on Nauru was working at the regional processing centre, while an even larger part worked in the industries related to the centre.[173]

On Manus Island, both the Australian and Central Papuan governments have been criticised for failing to consult local leaders on the island before opening the processing centre, which would house hundreds of exclusively male asylum seekers. The securitisation of the refugee population and the security personnel themselves have fuelled fear and violence on Manus Island.[174] Much like the people of Nauru, the self-image of the island's inhabitants has been affected

169 Julia Morris, "As Nauru Shows, Asylum Outsourcing Has Unexpected Impacts on Host Communities," Migration Policy Institute, 29 August 2023.

170 Paul Farrell, Nick Evershed and Helen Davidson, "The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention," *the Guardian*, 10 August 2016; CIA, "Nauru- the World Fact Book," last updated 3 October 2023.

171 Opeskin and Ghezelbash, "Australian Refugee Policy."

172 Fiona Adamson and Kelly Greenhill, "Deal-making, diplomacy and transactional forced migration" *International Affairs*, Volume 99(2), March 2023.

173 Morris, "As Nauru Shows".

174 Natasha Yacoub, "Australia's 'offshore processing' for refugees as neo-colonialism in Papua New Guinea," Asylum Insight, January 2022.

by both Australian personnel and asylum seekers calling the place a disgrace.[175] Also on Manus Island, international companies received the majority of funds, rather than benefit the local communities.[176]

Resettlement

Regarding resettlement, Australia is both a destination country and a country of origin. This concerns the governmental claim to not settle any irregular arrivals permanently on the territory. Those arriving through resettlement schemes are welcomed, but anyone in need of protection who arrived irregularly is mainly left in limbo, except the group resettled to (mostly) the US or back to their countries of origin.

Resettlement to Australia: The Offshore Humanitarian Program

Australia focuses its protection obligations on enabling resettlement. In 2022, 17,325 people were resettled from other countries, placing Australia third in the ranking for resettlement numbers overall, and second in ranking per capita, next to the United States and Canada. It should be noted, however, that resettlement worldwide protected only 1% of the refugee population, which is why scholars stress it should be a complementary pathway to protection.[177]

Australia is extending the number they accept through this route every year, capping the number to 20,000 for 2024.[178] Such a visa for permanent protection in Australia can be provided through the Refugee and Humanitarian Program, set up in 1977. Due to its policy of deterring spontaneous arrivals, the largest part of the Refugee and Humanitarian program applies to the resettlement of refugees and others in need of protection, with 62,7% granted under the Refugee program and 37.3% under the Humanitarian program in FY 2021-2022. This is executed through different programs. A decline is visible in the selection of refugees through referral by the UNHCR, which selects the most vulnerable refugees. UNHCR referrals in FY 2011-12 and 2012-2013 amounted to 74% and 80% of

175 Steffen Dalsgaard and Ton Otto, "From Drifters to Asylum Seekers," *The Contemporary Pacific*, 32 (2), 2020.

176 Yacoub, "Australia's 'offshore processing'," Asylum Insight, January 2022.

177 Bernd Parusel, "Why resettlement quotas cannot replace asylum systems," *Forced Migration Review*, November 2021.

178 UNHCR, "UNHCR welcomes Australia's increase in refugee resettlement," 11 August 2023.

resettlements respectively, while in FY 2017-2018 and 2018-2019 it amounted to 25% and 23% respectively.[179]

Humanitarian visas for those in risk of human rights violations who have a link to Australia, can receive protection through the *Special Humanitarian Program* visa. Here, the strength of community links seems to be a decisive factor for protection, with family relations rather than need being the main priority in resettlement.[180] This priority makes this form of resettlement in Australia look more like a family reunification program, almost unreachable for people without such connections.[181]

A specific *Humanitarian stay* visa invites certain foreign nationals to come to Australia and apply for a Refugee or permanent visa. This process was used to evacuate Afghan nationals who used to work with the Australian government or were in other ways in more significant danger. The government of Australia applies these visas only in very limited situations. Next to 4,125 places for Afghan nationals, Australia provided 12,250 offshore places through the Refugee and Humanitarian program in FY 2022-2023, of which 1,400 places through the Community Support Program (see below), a rise of 650 places since FY 2021-2022.

Community refugee sponsorship

Like in Canada, Australia has a policy for refugee sponsorship that has been in effect since 2017 when the Community Support Programme started. Through this policy, individuals, community groups and companies can fund humanitarian visas for people they have a connection with to come to Australia. There are many requirements however, on top of the required Global Special Humanitarian Visa criteria. This means that in addition to being outside Australia and one's home country and fearing substantial discrimination in one's home country, this person needs to be between 18 and 50 years old, have a decent proficiency in English, and have job opportunities or resources to be financially independent of the State for the first 12 months after arrival. This application process happens in cooperation with Approved Proposing Organisations (APO) that offer

179 Refugee Council of Australia, "Less than one third of refugees in Australia's humanitarian program are resettled from UNHCR," 6 May 2020.

180 Refugee Council of Australia, "Less than one third of refugees in Australia's humanitarian program are resettled from UNHCR."

181 Refugee Council of Australia, *Refugee Response Index Australia*, p. 24.

workplaces.[182] The yearly limit of these kinds of sponsorships is set at 1,000 per year, 'taking away' from the total accepted amount of 17,875 (FY 2022-2023) humanitarian visas per year.[183] This is contrary to the principle of additionality, adhered to in for example Canada.[184]

Criticism has especially been voiced on the principle of additionality since it enables people with enough resources to access visas more efficiently and quickly than through other programmes. The same goes for those with family in Australia already, leading to a possible 'de facto family reunification programme'. Another criticism is that suitability for integration outweighs the protection needs, negatively impacting possibilities for refugees most in need.[185]

In 2022, a new pilot started for those without existing family linkages in Australia, the Community Refugee Integration and Settlement Pilot (CRISP). Herein, the problem of high fees for sponsors is reduced by capping it at A$ 7,760 per application, irrespective of the number of people included in the application. 1,500 people can be resettled through this programme, again as part of the total number of humanitarian resettlements.[186]

Bilateral resettlement agreements

Apart from resettling refugees on Australian territory, the country also cooperated with other states that would take over refugees from Australia or Nauru. This mostly had to do with the promise not to provide permanent settlement for those arriving irregularly, thus needing a different place for recognised refugees. In 2014, Australia tried to agree on a resettlement deal with Cambodia, in which, next to paying A$ 15 million for resettlement costs, Australia offered A$40 million for development aid when Cambodia would resettle refugees from Nauru. Because transfers could only be done voluntarily, especially following big protests amongst refugees in Nauru, Australia only managed to

182 Australian Department of Home Affairs, "Community Support Program," 6 December 2022.
183 Australian Department of Home Affairs, "Refugee and Humanitarian Program," 10 February 2023.
184 Kaldor, "Complementary refugee pathways: private and community refugee sponsorship," June 2020.
185 Kaldor, "Complementary refugee pathways," p. 2.
186 Asylum Insight, "Private and Community Sponsorship," 24 December 2022.

successfully resettle 7 refugees. Though unsuccessful, scholars argue this has formed an example for the UK-Rwanda deal.[187]

In September 2016, the United States agreed to resettle recognized refugees from offshore processing centres in Nauru and PNG. That the US agreed on a seemingly unequally profiting agreement and stuck to it even during the Trump administration (although Trump called it 'a dumb deal'[188]) shows the importance of the bilateral relationship with Australia.[189] The first transfer happened in 2017, and though delayed by Covid-19, 1084 of the agreed 1250 refugees were resettled by 31 August 2023.[190] There has been criticism that refugees are left with big debts from their journeys and are offered very limited help in their new home country.[191] As is the case of other Australians cooperation agreements, the specifics of the deal with the US have remained secret and negotiations went by silently.

New Zealand also agreed to resettle refugees subject to Australia's regional processing arrangements in Nauru or staying in Australia temporarily. The deal included 150 spots per year for a duration of three years, beginning in 2022.[192] This had been a longstanding offer from New Zealand, previously held off because of concerns refugees would still travel to Australia afterwards because of the countries' free movement policy.[193]

187 Adamson and Greenhill, "Deal-making, diplomacy and transactional forced migration,"; National Legislative Bodies, "Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, relating to the Settlement of Refugees in Cambodia," 26 September 2014.

188 Ben Winsor, "It's hard to imagine how the US-Australia refugee deal could have been handled worse," *the Guardian*, 13 December 2020.

189 Claire Higgins, "Australia's Refugee Resettlement Agreement with the United States: The Diplomacy and Uncertainty of a "Very Big Deal"," *Australian Journal of Politics and History*, August 2022, p. 1.

190 Department of Home Affairs "Regional processing and resettlement," 5 October 2023.

191 Winsor, "It's hard to imagine".

192 New Zealand Immigration, "New Zealand – Australia Resettlement Arrangement," 7 April 2022.

193 *NPR*, "After criticism, Australia accepts New Zealand's offer to resettle boat refugees," 24 March 2022.

6 Return in the context of migration cooperation

Australia has faced challenges with sending back people whose application for protection has been rejected, especially concerning nationals from Iran or Afghanistan, or stateless persons. An agreement with Iran in the past has proven ineffective, as the work and holiday visas that were offered in return led to subsequent asylum applications from Iranian nationals.[194] The inability for current workable solutions on these returns plays a role for the group living in seemingly infinite mandatory detention, as discussed above in the court case of Al-Kateb. Agreements with Sri Lanka and Vietnam have enabled some returns, with criticism regarding non-refoulement obligations.[195]

Recently, an agreement with India has been signed, possibly opening more extensive lawful access for Indian citizens in return for India taking back its own citizens after the procedure.[196] Due to secrecy around it, it is currently impossible to provide a more detailed overview of the content of any such agreements.

Cooperation with Indonesia is complemented by IOM offering assistance for returns under the Assisted Voluntary Return and Reintegration program, through which, IOM returned 5,255 irregular migrants between 2000 and 2017.[197]

194 Interview legal expert Kaldor Centre.

195 Sherell, The Central Role of Cooperation, p. 6.

196 Interview senior official Australian permanent mission; Meryl Sebastian, "Modi in Australia: Albanese announces migration deal with India," 24 May 2023.

197 Dastyari and Hirsch, "The Ring of Steel," *HRLR*, p. 458.

7 Statistics

In 2022, Australia received 29,555 protection applications, of which 1,500 were for temporary protection. In the same year, 3,923 refugees were recognised as such.[198] Among the various visas that refugees can apply for, namely Subclass 866 (Permanent Protection Visa, PPV), Subclass 785 (Temporary Protection Visa, TPV) and, lastly, Subclass 790 (Safe Haven Enterprise Visa, SHEV), individuals intending to work or study in regional Australia,[199] recognition rates were at 11,2% for the PPV (between July 2021 and June 2022),[200] 64,4% for TPV applicants, and 67,4% for those applying for SHEV. Recognition rates for those applying for protection onshore (11%) are much lower than those arriving by boat (around 65% recognition).[201]

Statistics permanent onshore protection

Through Australia's visa policy regulating access, the countries of origin for (onshore) permanent protection visa applications reflect the countries that can enter Australia legally. Only 0.27% of the total amount of Temporary visas granted between 2014 and 2022 led to such a subsequent onshore protection application.[202]

Malaysia has been the main country of origin of applicants overall between 2013 and 2022, after which India and China follow. This pattern has remained stable in the past 5 years.[203]

These countries score very low on visa grants. Overall, the grant rates for permanent protection were around 10% (11.2% in 2021-2022) with a clear outlier

198 Refugee Council of Australia, Is Australia's Response to Refugees Generous? An analysis of UNHCR Global Trends statistics from 2013 to 2022, p. 11-13.

199 Department of Home Affairs, "Safe Haven Enterprise Visa," last updated 26 October 2023.

200 Department of Home Affairs, "Onshore Humanitarian Program 2021–22," last updated 30 June 2022.

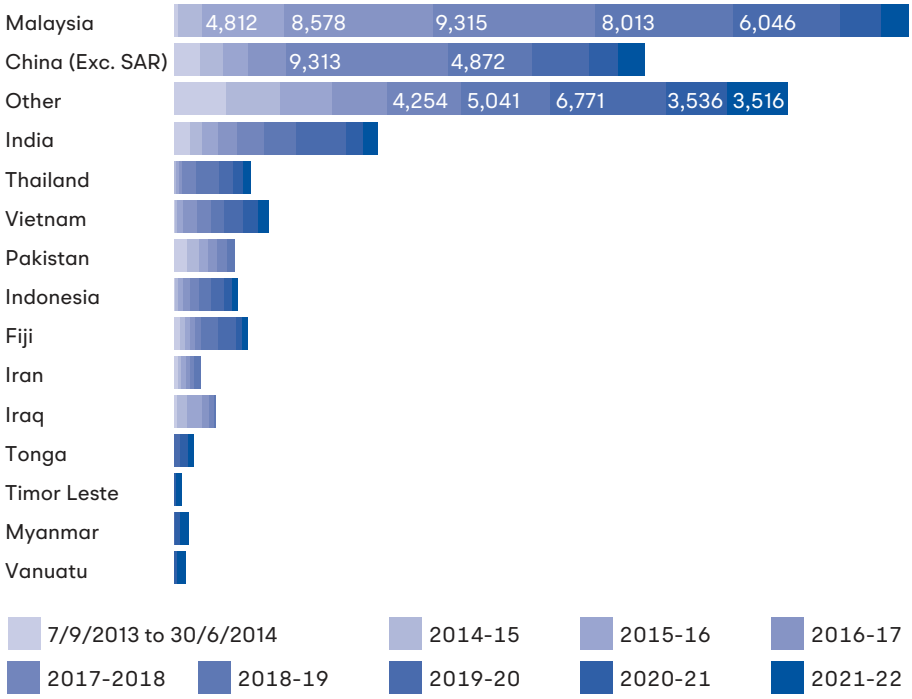
201 Refugee Council of Australia, the Refugee Response Index Australia Review, Sydney, March 2023, p. 16.

202 Department of Home Affairs, The Administration of the Immigration and Citizenship Programs, p. 34.

203 Refugee Council of Australia, "Statistics on people seeking asylum in the community," 17 September 2023, p. 3.

in 2015-2016, when the grant rate was at 32%.[204] The Humanitarian program 2021-2022 granted permanent visas to 13,307 people. 11,545 visas thereof were for the resettlement program, and 1,762 for the onshore program, for those already residing in Australia with a valid visa.[205] This is 9.27% of the total amount of permanent visas in 2021-2022.[206]

Top 10 permanent protection visa lodgments by country of citizenship



204 Refugee Council of Australia, "Statistics on people seeking asylum" p. 4.

205 Department of Home Affairs, The Administration of the Immigration and Citizenship Programs, p. 31.

206 Department of Home affairs, 2021 – 22 Migration Program Report, p. 15.

Through an amendment aimed at limiting the asylum caseload, the number of permanent protection visas can be capped, leading to recognized refugees not receiving a visa until the following financial year. This has led to people having to wait years for (a decision on) a visa. On 31 August 2023, 29,246 people were awaiting their decision on their permanent protection status. The average number of days that applicants need to wait for a decision on their permanent protection application has been rising, amounting to an average of 903 days in 2022. At the same time, 75,430 people were still awaiting deportation after a negative decision on their application. In appeal, the number of unresolved cases was at 5,747 on 31 March 2023.[207]

Of the people arriving by boat, most are now living in the community on a Bridging Visa E, a way to rectify someone's status when they are planning to leave or waiting for a decision.[208] At the end of December 2022, 27,745 people held such a visa.[209] These visas are mainly held by people from Sri Lanka, Iran, and Bangladesh.[210]

The net overseas migration forecast for the period until 2025-2026 is currently set at 235.000 per year.[211] This only includes visa holders within Australia staying for more than 12 months in a period of 16 months. Since 2006, migration has been the main driver of Australia's population growth. Throughout Covid-19, the numbers starkly dropped, but this has been made up for quickly.[212]

Statistics temporary protection

On 31 August 2022, there were 22,986 people in Australia on a temporary protection visa, amounting to 1,12% of the total amount of temporary visa holders.[213] At the end of August 2022, there were 1,146 'transitory people' on Australian territory. This group, according to the Migration Act, consists of people who have been taken to a regional processing country as part of OSB,

207 Refugee Council of Australia, "Statistics on people seeking asylum," p. 5.
208 Department of Home Affairs, "Bridging visa E (BVE)," 18 March 2021.
209 Refugee Council of Australia, "Statistics on people seeking asylum" p. 6.
210 Refugee Council of Australia, "Statistics on people seeking asylum" p. 7.
211 Susan Love, "Immigration Budget resources," Parliament of Australia, May 2023.
212 Department of Home Affairs, The Administration of the Immigration and Citizenship Programs, p. 34.
213 Department of Home Affairs, The Administration of the Immigration and Citizenship Programs, p. 9-10.

but were brought to Australia temporarily. Medical conditions were often cited as the reason for this return. These people are still considered unlawful non-citizens and, therefore, detained upon arrival. After the care they need has been provided, these people are expected to return to the processing country, but this process has been held back through active litigation. The government stresses that permanent settlement in Australia is not an option for these people. However, resettlement to the US, New Zealand, Canada or return to their home country is encouraged.[214]

At the end of September, 62% of the legacy caseload of 31,934 people was granted a temporary (or later RoS) protection visa and 4% is still on hand at the Department as of September 2023. 25% of the legacy caseload got their visas cancelled or refused, of which the majority (64%) is currently at merits or judicial review. The granting rates of this group of maritime arrivals thus is way higher than the permanent onshore applications. For the whole legacy caseload, main countries of origin are Afghanistan, Iran, Pakistan, and Sri Lanka.[215]

214 Department of Home Affairs, The Administration of the Immigration and Citizenship Programs, p. 47.

215 Mary Anne Kenny, Nicholas Procter and Carol Grech, "Temporary Protection Visas in Australia: A reform proposal," Kaldor, June 2022, p. 6.

Conclusion

In addition to strict visa requirements for those wishing to enter the country, Australia heavily relies on cooperation with partner countries for all key components of its immigration policy: the prevention of people smuggling, offshore processing, resettlement opportunities, and boat interceptions.[216] Australia's objective for its immigration policy is very clear: to provide protection to an exclusive chosen group of people while deterring spontaneous arrivals from seeking asylum on its territory. At present, access to Australia for irregular asylum seekers is made virtually impossible through interception and return procedures – with the Nauru processing centre as a back-up if anyone manages to arrive, as has happened in October 2023 with 11 asylum seekers. Throughout Operation Sovereign Borders, asylum seekers were sent offshore to Nauru or Manus Island (PNG) in order to curb boat arrivals at the borders. However, the results of this policy proved less than successful, with the number of arrivals by boat reaching a new record since the 1970s shortly after its implementation began in 2012-2013. However, a notable shift occurred when Australia started turning back boats, leading to a decrease in the number of asylum seekers arriving in Australia by boat.

Australia could therefore say that it has achieved its objective by successfully stopping unauthorised maritime arrivals, dismantling the business model of people smugglers by eliminating the 'product to sell'. Nevertheless, main aspects of Operation Sovereign Borders, such as offshore processing on Nauru and PNG, have proved more harmful and inefficient than effective. It has been detrimental to the refugees sent there, who have endured long periods of detention in appalling conditions, with serious consequences for their health. This situation has resulted in profound challenges, including suicides and serious health issues, exacerbated by the absence of a foreseeable permanent solution. Australia's policy of secrecy around these detention centres, with staff having to sign non-disclosure agreements and media not allowed into the camps, seems to indicate that the government was aware of the criticism it could receive. In addition, these policies have proved harmful to local society, with no preparation for the sudden influx of refugees, no effective procedures, and no sense of

216 Sherell, The Central Role of Cooperation, p. 1.

Australian responsibility for this group. The substantial investments have failed to benefit the local population that instead suffered from the situation, grappling with the island's bad international image and their dependence on Australia. Internationally, the policy attracted much attention and could have cost Australia its good reputation – as it breaks with international norms on, for example, non-refoulement and arbitrary detention – which the government proved was a price it was willing to pay.

The situation in Australia has proven practically incomparable with the situation in Europe, as well as being inapplicable, due to a very different geopolitical and legal situation. The lack of a supranational court to rule on human rights cases and the absence of a reference to human rights in national legislation gives Australia a great deal of leeway in processes such as offshoring, border cooperation and boat pushbacks. Policies that, under European legislation, could not be passed due to stricter procedural and safety standards for asylum seekers. In addition, in Australia, bipartisan support for the OSB means that legislation can be passed, sometimes retrospectively, to 'correct' legislation to reflect policy, preventing a court ruling from forcing a change in policy. This independency in regulation and legality should be noted when looking at the Australian case.

Geopolitically, Australia's long (colonial) history, with PNG and Nauru as former colonies or protectorates, gives it more power to impose laws that affect the migrant situation in surrounding countries. The controllable borders, like around Christmas Island, and relative willingness of several Asian transit states to help halt irregular maritime migration toward Australia can offer an example of effective cooperation on irregular migration, but with caution. The success of such policies highly depends on these states' willingness to cooperate, that, when not offered anything in return, can cause uncertain dependencies.

Though Australia has managed to gain more control over arrivals applying for protection through extraterritorial approaches in cooperation with surrounding states, Europe should consider the high societal, political, financial, and procedural costs and (unintended) consequences of such deterring policies before considering its policies as an example to be followed.

Stefan Kok

Country report
Canada

Introduction

This report provides insight into the key features of Canada's asylum policy and practice regarding access to protection, extra-territorial and territorial asylum.

There is a vast amount of information on the Canadian immigration and refugee system both from official government sources and researchers. For example, through the Asile Project, two recent reports were written on the Canadian system.[1] New developments with respect to the US Canada Safe Third Country Agreement have already been given considerable in-depth analysis from Canadian and international scholars.[2] Given the short period for this research (July-November 2023) and the overall objective of the research project, this report will describe those features and practices in Canada which could provide further guidance and insights for the Dutch and EU context.

The report will first describe the main features of the Canadian system, which will be further detailed and referenced under the specific sections. The report will then include some statistics for a better understanding of the Canadian context. It will look at the societal and demographic context. It will focus next on border management, access to the in-land asylum procedures (territorial asylum), and pathways for regular entry through extra-territorial asylum. Lastly, it will provide more statistics and look at the outcomes of the system.

Canada is openly an immigration country. It also prides itself in a tradition of offering refugee protection and a national legal system based on the rule of law and non-discrimination.

With respect to access to the Canadian asylum system, there are a number of current and specific issues which will be described in more detail, as these are also relevant for the contexts of other countries: The application of the Canada

1 Audrey Macklin and Joshua Blum, *Country Fiche Canada*, Asile Project, January 2021; Roberto Cortinovis and Andrew Fallone, *Country Report Canada, An analysis of the Private Sponsorship of Refugees (PSR) program and the Economic Mobility Pathways Pilot (EMPP)*, Asile Project, 2022.

2 Sharry Aiken and Alex Neve, *Refugee "Responsibility Sharing" – Challenging the Status Quo*, PKI Global Justice Journal, 2023.

US Safe Third Country Agreement; Canada's refugee resettlement system and complementary legal pathways; and Canada's system of target and level setting for immigrants and refugees.

The Canada – US Safe Third Country Agreement (STCA)

The Canada – US Safe Third Country Agreement (STCA) features prominently in academic, government and media debates in Canada, as well as jurisprudence in Canada. A recent increase in numbers of asylum seekers who spontaneously entered Canada via the United States between "points of entry", was the main reason for an amendment to the Agreement in 2023. This amendment expanded the scope of the STCA. In a landmark judgment of 2023, the Supreme Court of Canada held that the STCA is not unconstitutional, but it did formulate essential safeguards and conditions for the implementation of the STCA. In this, Canada's courts seem to follow the European courts' jurisprudence on safe third countries.

Refugee resettlement and legal pathways

Refugee resettlement is a key component of Canada's refugee policies. The involvement of private sponsors is widely supported in Canada. Recently, Canada has also opened complementary legal pathways. There was a visa programme for Ukrainians till July 2023 and as of October 2023 there is a permanent resident pathway for Ukrainians.[3] As part of the negotiated amendment to the Canada-US Safe Third Country Agreement, Canada introduced a humanitarian visa and permanent residence programme for its own region, which is in alignment with the *US Safe Mobility Initiative*.[4]

Target and Level setting

Canada has a system of target and level setting with respect to the 'immigration mix', including economic immigration, family immigration, refugee resettlement and in-land asylum. They follow consultations with stakeholders, labour market analyses and public surveys.

3 Immigration, Refugees and Citizenship Canada, "Program Delivery Update: Ukraine special measures," 14 June 2023; Immigration and Citizenship Canada, "Permanent residence for Ukrainian nationals with family members in Canada," 14 June 2023.

4 Immigration, Refugees and Citizenship Canada, "Statement from Minister Miller on Canada's commitment to support migrants in the Americas," October 10, 2023. See also the US country report in this research.

1 Setting the scene: general background and relevant developments

Demographic situation: immigrants and refugees

In 2022 Canada had a population of over 38,9 million people.[5] A large number of Canada's population are immigrants. Statistics Canada (Statcan) reported that in 2022 23% of the current population had a Permanent Resident status. Compared to the total number of new immigrants who annually settle in Canada permanently, the number of refugees has been relatively low. Most immigrants arrive under the economic immigration classes. For example, in 2019 this was 58% of all 341,000 permanent residents that year.[6]

Although Canada's population density is low when measured by the total size of the country, most of the Canadian population live in urban areas. Statcan reported that in 2021 over 73% of the Canadian population lived in urban areas of 100,000 persons or more.[7] In particular the largest metropolitan areas of Vancouver, Montreal and Toronto face pressures on housing, infrastructure, the environment and services. Yet, their central position in the national and regional economies make these areas also dependent on immigration and, as a result, they are main areas of settlement for immigrants, including refugees. Of the provinces, Ontario is the main area of settlement for refugees. According to Statcan, in 2016 two thirds of all protected persons (as permanent residents) who were admitted in that year, resided in Ontario in December 2016, as opposed to 40% of permanent residents of all immigration categories combined.

Of the metropolitan areas, Toronto is the main area of settlement for immigrants and refugees in Canada. In the Greater Toronto area there are 6,6 million people. In the wider area around Lake Ontario (the "Golden Horsheshoe") live 9 million

5 Statistics Canada, "Annual Demographic Estimates: Canada, Provinces and Territories, 2022," 28 September 2022.

6 Government of Canada, *2020 Annual Report to Parliament on Immigration*, 2020.

7 Statistics Canada, "Canada's large urban centers continue to grow and spread," 2 September 2022.

people. The Toronto area is situated near the Great Lakes area and includes a Green Belt Area consisting of protected farmland and natural conservation areas.[8] Thus, policies for urban growth need to take many aspects into account.[9] This can lead to political tensions between the federal and the regional governments.

Many Canadians are either first generation or second generation immigrants. To a large extent, Canada has been able to select its immigrants, based on education and skills, work experience and language. This has led to a diverse population, at least ethnically, but perhaps less so with respect to religion. According to Statistics Canada the religious make-up of Canada in 2019 was as follows: persons with a Christian religion 63.2%, persons with no religious or secular perspectives 26.3%, persons with other faiths included Muslim 3.7%, Hindu 1.7%, Sikh 1.4%, Buddhist 1.4%, Jewish 1%).[10]

Refugees are part of Canada's diversity. Although refugee protection is seen as a humanitarian obligation, the economic situation and integration of refugees is also monitored. Many refugees find access to the labour market, although this may vary per specific refugee group.[11]

Embedding of refugee policies in law and politics

Canada is a federal state. Immigration is one of the areas where, under Canada's Constitution, jurisdiction is shared between the federal and provincial/territorial governments.[12] There are formal regular consultation and cooperation structures between the federal and provincial/territorial governments. Quebec has a somewhat special status compared to other provinces/territories.[13] In the Canada-Quebec accord formal arrangements with respect to immigration are

8 See for example chapter 1 of *The 2023 Ontario Economic Outlook and Fiscal Review: Building a Strong Ontario Together*, Government of Ontario.

9 See for example article 6 of Ontario Places to Grow Act, 2005; Government of Ontario, Size and location of urban growth centres in the Greater Golden Horseshoe: Addendum 1, 2021.

10 Statistics Canada, "Religion in Canada," 28 October 2021.

11 Garnett Picot, Yan Zhang and Feng Hou, *Labour Market Outcomes among Refugees in Canada*, Statistics Canada 11F0019M no,419, 11 March 2019.

12 Parliament of Canada, "Parliamentary Institutions, The Canadian system of government."

13 Government of Canada, "Federal-Provincial /Territorial Agreements."

laid down.[14] The accord includes, with reference to the Refugee Convention, also provisions on refugee protection in S. 17-20.

While refugee resettlement is the main pillar of Canada's refugee policies, there is also significant spontaneous asylum migration, which is politically and practically more complicated. This involves many actors at various government levels (federal, provincial and municipal) and civil society.

The main legal framework for refugee protection is provided by the Immigration and Refugee Protection Act (IRPA)[15] and the Immigration and Refugee Protection Regulations (IRPR).[16] The rights granted to refugees and protected persons, whether admitted through the inland system or the resettlement system, are in principle the same. Refugees are all granted permanent residence status.

The majority of refugees in Canada arrive through resettlement.[17] According to the 2021 census, over 218,000 refugees were admitted as permanent residents between 2016 to 2021. About 70% of these refugees were resettled, either after a referral from UNHCR or private sponsors. Statistics Canada reported that close to 61,000 refugees from Syria were resettled in this period. The other important countries of origin were Iraq (15,505), Eritrea (13,965), Afghanistan (9,490) and Pakistan (7,810). Statcan points to the fact that over the period between 1980 and 2021 the nationalities and places of birth of refugees reflect conflicts and international events.

The number of refugees who, between 2016 to 2021 obtained permanent residence after an in-Canada asylum claim and subsequent recognition was approximately 30% of all refugees in that period, close to 85,000 persons.[18] In 2022, the main countries of origin whose claims were referred to the

14 Government of Canada, *Canada-Québec Accord relating to Immigration and Temporary Admission of Aliens*, 5 February 1991.

15 Government of Canada Justice Laws, *Immigration and Refugee Protection Act (S.C.2001, c. 27)*, 2001.

16 Government of Canada Justice Laws, *Immigration and Refugee Protection Regulations (SOR/2002-227)*, 2002.

17 Statistics Canada, "Immigrants make up the largest share of the population in over 150 years and continue to shape Canada," 26 October 2022.

18 Statistics Canada, "Immigrants make up the largest share of the population in over 150 years and continue to shape Canada," 26 October 2022.

Immigration and Refugee Board were Haiti (9,353), Mexico (7,483), Turkey (5,611), Colombia (4,997) and Iran (4,431).[19]

Level and Target setting: economic immigration

An important policy tool that reflects Canada's attitudes toward immigration and refugee protection are the periodical, annual or multi-annual immigration levels for all types of immigration. To set these levels annual consultations are held with a wide range of stakeholders.[20] These consultations are also organized per province and take place in municipalities.[21] The target and level setting is accompanied by extensive (longitudinal) research by Statistics Canada.[22]

The 2023-2025 targets show that economic migration remains at the heart of Canada's immigration policies.[23] The overall targets are respectively 465,000 persons in 2023, 485,000 in 2024 and 500,000 in 2025. Of these, the economic immigration categories take up close to 60%. The 'Federal high skilled class" and the Provincial Nominee Programs make up the majority of the economic classes. Furthermore, family-related immigration amounts to close to 100,000 persons per year, including about 30% for parents and grandparents. Refugees, either through in-asylum or resettlement, make up close to 15% of the targets. On a population of close to 38 million people, the annual levels for immigration are high.

Political and sociocultural context

In the last decade, the main governing political parties are the Liberal Party and the Conservative Party. The Liberal Party under prime minister Trudeau has governed since 2015 and can be characterized as more open and left. The previous Conservative Harper Government (2008-2015) could be characterized as more closed and right with respect to migration and refugee protection. However, in both government periods immigration targets and numbers of immigrants were high. There appears to be a political consensus – as was also

19 Immigration and Refugee Board of Canada, "Claims by country of alleged persecution 2022."
20 See also Advisory Council on Migration *Realism about numerical targets*, 21 December, 2022.
21 See for example Immigration, Refugees and Citizenship Canada, *2022 consultations on immigration levels – final report*, 2022.
22 See for example Statistics Canada, "Immigrants and non-permanent residence statistics."
23 Immigration, refugees, Citizenship Canada, "Notice supplementary immigration levels for the 2023-2025 Immigration Levels Plan," 1 November 2022.

noted by Picot in 2008[24] – of the importance of (economic) immigration for the Canadian national and regional economies.

Constants in Canada's approaches are thus an open attitude towards economic migration, but also a sizable number of resettled refugees, an asylum system that can be deemed robust.[25] At times, there is a more restrictive attitude towards spontaneous arrivals of asylum seekers. In the case of the Conservative Government between 2008 and 2015, this led to openly harsh policies, including amendments to the IRPA and IRPR, which aimed to deter asylum seekers from accessing Canada's asylum procedures. The Liberal government's policies with respect to spontaneous asylum seekers are more open, but they do reflect a management and control approach.

Restrictive policies which were adopted by the Harper government were, in part, abolished or not applied by the Trudeau government. The recent amendments of the Canada-US Safe Third Country Agreement show that also for the Liberals an increase in the number of asylum seekers has led to restrictive policies. However, the number of immigrants, including resettled refugees in absolute numbers and as a proportion of all immigrants, is considerably higher under the Liberals than under the Conservatives.

Attitudes under the Trudeau government (2015-current)

The language used by the Canadian Trudeau government with respect to immigration and refugee protection remains open, despite a growing number of asylum seekers in the period up to 2023 and pressures on urban areas. This is for example evidenced by the 2023-2024 report to Canadian Parliament:[26]

> *Immigration levels will drive economic growth and resiliency, reunite families, and protect democratic and human rights – all key priorities as Canada moves forward to become more prosperous and remain a world leader in refugee resettlement.*

24 Garnet Picot, *Immigrant Economic and Social Outcomes in Canada: Research and Data Development at Statistics Canada*, Analytical Studies Branch Research Paper Series Statistics Canada, December 2008.

25 Macklin and Blum, *Country Fiche Canada*, Asile Project, January 2021.

26 Immigration, Refugees and Citizenship Canada, *Departmental Plan 2023-2024*.

However, the increased influx of asylum seekers at the border with the US, has figured highly on the political agenda. The perceived 'loophole' in the Canada-US Safe Third Country agreement (STCA), which did not apply to persons irregularly entering the country between regular entry points, was criticized by the opposition and led to political responses, aimed at reducing the asylum flows. After the 2023 amendment of the STCA this criticism has faded.

In 2023, Canada's immigration policies, in general, do not seem to be questioned by the main political parties or the public. The effectiveness of the asylum system is a point of issue. For example, the Conservative Party's 2023 platform asks the public to endorse a campaign to improve the immigration system, stating: *Conservatives believe in a well-functioning immigration system that promotes family reunification and allows new immigrants to achieve their dreams.*[27] In its 2021 platform, the Conservative party said it wants an immigration system that *..[o]ffers refuge to heroic human rights defenders and those fleeing persecution who would enrich our national life.* The Conservative Party further held that the definition of refugee *... [d]oes not adequately designate internally displaced people, or those extremely vulnerable to ongoing persecution but who have not crossed a national border or fall outside the UNHCR definition.*

There does not, at this point, seem to be a strong populist party that would put asylum high on the political agenda. In 2023, the right-wing People's Party of Canada, which currently does not hold any seats in Canadian parliament, takes a strong stance against the current immigration levels.[28] It advocates a reduction of the immigration levels to 150,000 persons per year, with a focus on economic migration. Canada should, according to the People's Party of Canada accept fewer refugees and refugee protection should focus on 'persecuted groups who have nowhere to go in their countries'.

Harper governments (2008-2015)

The more recent positive language from the main political parties in Canada, is in rather stark contrast with the attitudes under the previous conservative Harper governments. Then, the aim of combating irregular migration led to restrictive legislation with respect to refugee claimants, but also negative messaging. For

27 See for example the Campaign of the Conservative Party, "You deserve an immigration system that works."

28 People's Party of Canada (PPC), *Immigration: reducing overall levels and prioritizing skilled migrants*, updated August 2023.

example, the Harper government had a critical and restrictive approach towards certain expressions of Islam and religious or cultural practices deemed 'barbaric'. It introduced specific legislation for this,[29] including measures against wearing the Niqab in public, which led to court cases.[30]

Asylum was another contentious issue during the Harper governments. There was an active government campaign to discourage Roma from EU-countries to apply for asylum[31] and a strong government response to the arrival of a boat with Tamil asylum seekers, the MV Sun Sea.[32] This was flanked by more restrictive asylum measures, for example in the Balanced Refugee Reform Act (Bill C-31)[33] and Protecting Canada's Immigration System Act.[34] Many of the policies have not been successful or at least could not be implemented because of judicial scrutiny or practical considerations. This is true for "Designated Foreign Nationals", which allows for extremely restrictive practices regarding asylum seekers who as a group of two or more arrive irregularly through smugglers. The concept was used only once, but it remains in the IRPA.[35] Resettlement practices under the Harper government were also criticized by some observers for being slow and potentially discriminatory.[36]

The strategic communication on asylum policies under the Harper government was somewhat reflected in actual practice. In 2014, for example, under the Harper government the overall immigration levels were determined to be – as a target – 261,000 persons.[37] About 10% of the levels of all immigrants were for

29 Government of Canada Justice Laws, Zero Tolerance for Barbaric Cultural Practices Act, S.C. 2015, c. 29, 18 June 2015.

30 See for example Federal Court of Appeal, *Canada vs. Ishaq*, 2015 FCA 194, 15 September 2015.

31 Sean Rehaag, Julianna Beaudoin, Julianna and Jennifer Dench, *No Refuge: Hungarian Romani Refugee Claimants in Canada*, Osgoode Hall Law Journal 52, no.3, 1 January 2016.

32 Government of Canada, "Statement on arrests of alleged organizers of the MV Sun Sea," 15 May 2012.

33 Parliament of Canada, *An Act to amend the Immigration and refugee Protection Act, The Balanced refugee Reform Act, The Marine Transportation Act, and the Department of Citizenship And Immigration Act*, Bill C-31, Assented to 28 June 2012.

34 Government of Canada Justice Laws, *Protection Canada's Immigration System Act, S.C. 2012, c. 17*, 28 June 2012.

35 See Macklin and Blum, *Country Fiche Canada*, Asile project, January 2021, online: .

36 For example Laura Lynch, "Canada considers prioritizing religious minorities in Syria refugee resettlement," *CBC News*, 12 December, 2014.

37 Immigration, Refugees and Citizenship Canada, "Supplementary Information to the 2014 immigration levels plan," 1 November 2013.

refugees and humanitarian grounds. In comparison, the targets for 2023-2025 under the Trudeau government show annually overall higher numbers, but also a higher proportion of refugees among all immigrant classes: close to 20% in 2023 and 16% in 2025.

Civil society and support for refugee protection in Canadian society

Civil society plays an important role in the shaping of Canada's refugee protection system. NGOs such as the Canadian Council for Refugees, Amnesty International and the Canadian Association of Refugee Lawyers (CARL) are active in strategic litigation, as is evidenced by *Canadian Council for Refugees v. Canada (Citizenship and Immigration) of 23 June 2023*, which was supported by many NGOs and lawyer's organizations. Canada's resettlement program through private sponsors is also evidence of a strong organization of civil society. Canada's consultations with respect to immigration targets and levels also shows confidence in the input from civil society and society at large.

Overall, the Canadian population which itself consists of many recent immigrants, seems to support Canada's policies to accept and encourage immigration, including resettled refugees. The platforms of the Conservative party with a focus on community based sponsorship, are also evidence of the role of civil society and support for refugee resettlement. There is a very active network of civil society and asylum lawyers who engage in strategic litigation and are involved in resettlement.

A continued focus on economic immigration

In Canadian policies, there remains a strong focus on economic immigration, based on analyses of the labour market. The relationship between refugee protection and economic potential is also highlighted in the new "Economic Mobility Pathways Pilot". This new instrument aims to combine economic migration with refugee resettlement.[38] It is part of the 2022 *Immigration Plan to grow the economy*[39], which consists of the following:

38 Immigration, Refugees and Citizenship Canada, "Economic mobility pathways pilot."

39 Immigration, Refugees and Citizenship Canada, "An immigration plan to grow the economy," 1 November 2022.

- a long-term focus on economic growth, with just over 60% of admissions in the economic class by 2025;
- using new features in the Express Entry system, such as the introduction of category-based Express Entry,[40] to welcome newcomers with the required skills and qualifications in sectors facing acute labour shortages such as, health care, manufacturing, building trades and STEM (Science, Technology, Engineering and Math);
- increases in regional programs to address targeted local labour market needs, through the Provincial Nominee Program, the Atlantic Immigration Program, and the Rural and Northern Immigration Pilot;
- reuniting more families faster;
- ensuring that at least 4.4% of new permanent residents outside Quebec are Francophone
- support for global crises by providing a safe haven to those facing persecution, including by expanding the Economic Mobility Pathways Pilot.

Based on immigration targets, Statistics Canada projects that Canada's population may grow to 47,7 million people in 2041.[41] This projected growth is mainly due to immigration. It is projected that in 2041 34% of the population will be immigrants. Due to the ageing population and the lack of birth replacement Statcan considers that migration is an essential factor for rejuvenating the ageing workforce.[42] According to Statcan, the areas of Vancouver, Montreal and Toronto will remain the main centres for immigrant settlement.

A regional component

One of the economic immigration instruments under the Canada-provincial/territorial agreements are so-called Provincial Nominee Programs (PNPs). These allow provinces to have their own criteria for immigration. Through the Provincial Nominee Programs and other regional streams, and in the case of Quebec under the Canada-Quebec accord, regional interests are reflected in

40 Immigration and Citizenship Canada, "Express Entry rounds of invitations: Category-based selection."

41 Statistics Canada, *Canada in 2041: A larger, more diverse population with greater differences between regions*, 8 September 2022.

42 Statistics Canada, "Immigrants make up the largest share of the population in over 150 years and continue to shape Canada," 26 October 2022.

Canada's immigration policies. The regional component is also part of the new Economic Mobilities Pathway under the refugee resettlement program.[43]

The Canada-provincial/territorial agreements can also take into account the role of metropolitan areas. In the Canada-Ontario agreement there is a Canada-Ontario-Toronto memorandum of understanding on immigration, which recognizes Toronto's national role in the area of newcomer settlement.[44]

Although the immigrants using the PNP-pathway will, after a provincial nomination, be granted permanent resident status under the regular federal legislation (IRPA) and are free to settle anywhere in Canada, evaluations show that the immigrants tend to stay in the province/territory which originally issued the nomination.[45] However, the evaluations also showed that there was significant overlap with federal programs and that there can be issues of procedural efficiency.

Canada recently announced plans to improve Canada's immigration system and an overdue review of the IRPA, which came into force in 2002.[46] Despite the lack of a large-scale review, the act has undergone revisions to reflect the recent demand for immigration to Canada. For example, IRPA was amended in 2022 to grant the immigration minister the authority to issue Invitations to Apply to Express Entry candidates who have a human capital attribute that aligns with one of the six newly introduced categories: Healthcare, STEM professions, Trades, Transport, Agriculture and agri-food and French language proficiency.

43 Immigration, Refugees and Citizenship Canada, "*An immigration plan to grow the economy*," 1 November 2022.

44 Immigration, Refugees and Citizenship Canada, *Canada-Ontario-Toronto, Memorandum of Understanding on Immigration*, 29 September 2006.

45 Immigration, Refugees and Citizenship Canada, *Evaluation of the Provincial Nominee Program*, Research and Evaluation Branch, November 2017.

46 Immigration, Refugees and Citizenship Canada, *An Immigration System for Canada's Future*, October 2023.

2 International legal framework

Canada is a party to many international and regional human rights instruments. The governmental manuals refer to international agreements and protocols on refugee protection, women, children, torture, slavery and forced labour, economic, civil and political rights, humanitarian law and organized crime.[47]

The relevant case law of the Supreme Court of Canada in asylum cases is based on the Canadian Charter of Rights and Freedoms (the Constitution Act, 1982). This is to be interpreted in light of Canada's obligations under international human rights law, in particular the 1951 Refugee Convention and the Convention against Torture. These conventions are also specifically mentioned in the IRPA, s. 2(1). In its judgements the Supreme Court also refers to international instruments to which Canada is not a party, including the European Convention on Human Rights.

Key provisions of the Charter of Rights and Freedoms are Section 7 and 12.

Section 7 of the Charter of Rights and Freedoms says that: *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

Section 12 of the Charter says that: *Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.*

For example in *Suresh v. Canada*[48] the Supreme Court of Canada referred to a wide range of national, regional and international instruments and standards, also from other regions. However, as *Suresh* shows, the Supreme Court of Canada derives its own Charter interpretation from international standards and legal opinions. It did not conclude *a priori* that the prohibition of torture (and the

47 See for example Immigration, refugees and citizenship Canada, "Resettlement: Legal References."

48 Supreme Court of Canada, *Suresh v. Canada* (Citizenship and Immigration), 2002 SCC 1.

principle of *non refoulement*) is absolute. This was criticized by, among others, the UN Committee against Torture.

In its 2012 report on Canada, the Committee against Torture[49] expressed its concern that Canadian law, including subsection 115(2) of the Immigration and Refugee Protection Act, continues to provide legislative exceptions to the principle of non-refoulement. In its 2018 report on Canada reiterated its concern in this respect.[50] Further concerns were with respect to the Canada – United States of America Safe Third Country Agreement and the mandatory detention for non-citizens designated irregular arrivals. However, the concept of designated irregular arrivals, has not been applied in practice under the current government and has not been litigated before the Canadian courts.

In the recent judgement *Canadian Council for Refugees v. Canada (Citizenship and Immigration)* of 23 June 2023,[51] the Supreme Court reiterated the importance of the principle of non-refoulement.

> [95] ... There is no question that a risk of *refoulement* – whether directly from Canada or indirectly after return to a third country – falls within the scope of the security of the person interest. This Court has noted that the *non-refoulement* principle is "the cornerstone of the international refugee protection regime" (*Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 18). By definition, *refoulement* exposes individuals to threats to their life or freedom (*Refugee Convention*, Article 33), torture (*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, Article 3) or other serious human rights violations. It is because these potential consequences are so grave that this Court in *Singh* considered it "unthinkable" that *refoulement* would fall outside the scope of s. 7's protections (p. 210).

The Supreme Court of Canada mentioned a great number of international instruments, but also UN General Assembly standards. It took a broad approach to refoulement and referred to other human rights standards, for example with

49 United Nations, *Report of the Committee against Torture, Forty-eighth session*, 7 May – 1 June 2012.

50 United Nations CAT, *CAT/C/CAN/CO/7*, par. 24 and 25, 21 December 2018.

51 Supreme Court of Canada, *Canadian Council for Refugees v. Canada* (Citizenship and Immigration), 2023 SCC 17.

respect to detention, and the interpretation of the 1951 Refugee Convention with respect to special social group. It did not, however, hold that the Canada-US Safe Third Country Agreements was unconstitutional. In this it also considered:

> *Further, as Canada cannot foresee all the actions that foreign authorities will take, it must be shown that Canadian authorities knew, or ought to have known, that the harms could arise as a result of Canada's actions. This foreseeability threshold can be established by a reasonable inference, drawn on a balance of probabilities.*

This is, in principle, the same criterion as that used by the ECtHR in MSS v. Belgium and Greece on the Dublin system,[52] where the ECtHR held:

> *358. In the light of the foregoing, the Court considers that at the time of the applicant's expulsion the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. They also had the means of refusing to transfer him.*

Some observers are critical, however, about the Supreme Court's reasoning, both with respect to the criterion whether there is a foreseeable risk and with respect to the "safety valves" in the Canadian system and the STCA, which may not be rigorous enough to prevent direct or indirect refoulement.[53]

52 See also the Netherlands report.

53 See for example Jamie Liew and Cheryl Milne, *The Canada-US Safe Third Country Agreement: a Lifeline from the Supreme Court*, PKI Global Justice Journal, 2023.

3 Border management in policy and practice

Canadian border management outside of Canada

Canada shares a land border with the US and is further surrounded by oceans. Nevertheless, the country has invested in practices outside of Canada to prevent asylum seekers from entering Canada. Canada uses "migration integrity specialists" at airports in other countries and works with other countries to prevent irregular migration.[54] Canadian visa policies tend to be restrictive for countries from which refugees are fleeing and for which the acceptance rates in asylum procedures are high.[55]

Border procedures and practices in Canada

Border control is a responsibility of the Canadian Border Services Agency (CBSA). The Agency's legal basis is the Canada Border Services Agency Act. CBSA is responsible for providing "integrated border services."[56] CBSA operates at Points of Entry at airports, seaports and landports.[57] In practice, border control at land borders with the US relies on the shared responsibility of, and cooperation between, several federal agencies. These are the RCMP (Royal Canadian Mounted Police), the CBSA (Canadian Border Services Agency), but also IRCC (Immigration, Refugees, Citizenship Canada) and the IRB (Immigration and Refugee Board).

Whereas crossings between ports of entry are considered irregular, other entries, where asylum seekers report at the designated points of entry or IRCC offices are considered regular. The increase in the numbers of asylum seekers, that has been reported since 2017, consists of both irregular and regular entries.[58] A consequence of an application not lodged at a port of entry is that, according

54 Macklin and Blum, *Country Fiche Canada*, *Asile Project*, January 2021.

55 Craig Damian Smith, *Visa Policies, Migration Controls and Mobility Aspirations: mixed migration as a response to global regimes of closure*, Yale Journal of International Law Online, 47, no.1, 2022.

56 Government of Canada Justice Laws, *Canada Border Services Agency Act* [S.C. 2005, c. 38], 2005.

57 Canadian Border Services Agency, "What we do."

58 Statistics Canada, "Just the Fact: Asylum Claimants," 17 May 2019.

to s. 99 (3.1) IRPA, the applicant must provide the officer, within the time limits provided for in the regulations, with the documents and information – including in respect of the basis for the claim – required by the rules of the Board.

Between 2020 and 2022 many asylum claimants arrived 'irregularly' through Quebec.[59] This trend had already started in 2021.[60] The crossing of the border between the USA and Quebec, notably at the point of Roxham Road, Quebec was the subject of heated national debate and caught international attention.[61] Reasons for irregular entry that were cited by asylum claimants were USA-policies and attitudes.[62]

The amendment to the Canada – US Safe Third Country Agreement attempted to close the "loophole" at the Quebec border. Before the amendment, the STCA applied to persons entering Canada at designated entry points, but after the amendment it also applies to persons who enter in between points of entry and claim asylum within 14 days after entering Canada. If an asylum claim is submitted by an intercepted person who irregularly entered the country, the asylum seekers are turned over by the RCMP to other agencies, namely CBSA (Canadian Border Services Agency) or IRCC (Immigration, Refugees, Citizenship Canada).[63]

Prior to the amendment to the STCA, there do not seem to have been detrimental consequences for asylum seekers because of an irregular entry between points of entry. The IRB statistics over 2017-2023 of irregular crossers show that eligibility rates have been relatively high and that detention measures were not imposed on a large scale or for a long period.[64] The first months of 2023 do not show a difference in this respect. Between April and June 2023, when the amended STCA was in effect, 8,131 claims were received by the IRB: 1,640 claims

59 Immigration and Citizenship Canada, "Asylum Claims by year – 2022."
60 Immigration and Citizenship Canada, "Asylum Claims by year – 2021."
61 Macklin and Blum, *Country Fiche Canada*, Asile project, January 2021; see also for example Caroline Plante, "Roxhamd Rd. Quebec conservatives call for common front against Ottawa," *Montreal Gazette*, 2 March 2023; Canadian Council for Refugees, "*Statement on Roxham Road Crossings*," 9 March 2023.
62 Nadine Yousif, "Why asylum seekers are choosing Canada in record numbers," *BBC News*, 20 March 2023.
63 See for example Immigration and Citizenship Canada, "Asylum Claims by year – 2023."
64 Immigration and Refugee Board of Canada, "Irregular Border Crosser Statistics."

were accepted and 434 were rejected, 25 cases were abandoned and 184 withdrawn. The other cases were still being processed at that time.

In light of the amendment to the STCA, Canada has, as of March 2023, an additional interest in intercepting persons who enter irregularly between entry points. However, it seems that migrants changed their routes quite quickly. In the first 8 months of 2023, the RCMP (Royal Canadian Mounted Police) intercepted over 14,000 asylum seekers, almost all in Quebec. Most interceptions occurred in January and March 2023.[65]

The long term effects of the STCA amendment still need to become clear. One observer notes that the number of asylum seekers entering by air has recently significantly increased.[66] A comparison of statistics over 2022 and 2023 seems to confirm this. In 2022, over 17,000 asylum seekers entered via the airports, while over 46,000 arrived via land.[67] Until August 2023, close to 21,000 asylum seekers entered via air and 22,700 at land ports of entry.[68] The increase in asylum seekers arriving by air is especially noticeable in as of June 2023. The interceptions and registrations at land borders and inland offices have been extremely low.

Detention measures

Immigrants, including refugee claimants, may be detained, but there are procedural safeguards.[69] Detention can take place when there are reasonable grounds to believe the person is inadmissible to enter Canada and is:

- a danger to the public;
- unlikely to appear (flight risk) for immigration processes;
- unable to satisfy the officer of their identity (foreign nationals only);
- upon entry, to complete an immigration examination; or,
- has been designated as part of an irregular arrival by the Minister of Public Safety (16 years of age or older only).

65 Immigration and Citizenship Canada, "Asylum Claims by year – 2023."; see also Immigration and Citizenship Canada, "Asylum Claims by year – 2022."

66 Isabelle Steiner, "Safe Third Country Agreement Expansion Causes Asylum Seekers to Explore New Routes," Wilson Center, 14 September 2023.

67 Immigration and Citizenship Canada, "Asylum Claims by year – 2022."

68 Immigration and Citizenship Canada, "Asylum Claims by year – 2023."

69 Public Safety Canada, "Detention of Foreign Nationals facing Removals," 10 March 2021.

A CBSA officer's decision to detain a person under the IRPA is subject to a review by the Immigration and Refugee Board (IRB), which is considered an independent quasi-judicial tribunal. Detainees must appear before the IRB within the first 48 hours of being detained. At a detention review, the IRB may release the person or identify conditions for release or determine that detention should continue. If the IRB determines that detention should be continued, the individual must appear in the next seven days and every 30 days thereafter. The Immigration Division of the IRB always provides reasons for its decisions, its decisions, and its decisions are subject to judicial review with leave from the Federal Court. Canada is an outlier and has no maximum term for detention. An external audit in 2017/2018 of the detention system pointed to systemic flaws.[70] In response Canada made important improvements in 2019 such as alternatives to detention and a significant decrease in detentions over one year.[71] The Chair of the IRB published guidelines on detention in August 2023, which detail procedures and safeguards.[72] The number of immigration detention measures is relatively low, however.[73]

70 Immigration and Refugee Board of Canada, *Report of the 2017/2018 External Audit (Detention Review)*.

71 Immigration and Refugee Board of Canada, "Detention review by length of detention."; Government Canada, *Alternatives to Detention Program ENF 34*, July 2018.

72 Immigration and Refugee Board of Canada, *Chairperson Guideline 2: Detention*, September 2010.

73 Immigration and Refugee Board of Canada, "Persons subject to a Detention Review."

4 Access and national asylum procedures

Outline Procedure

In Canada, asylum claims can be registered at a port of entry, at a Canada Border Services Agency (CBSA) inland office or an Immigration, Refugees and Citizenship Canada (IRCC) inland office. Claims are then referred to the Immigration and Refugee Board of Canada (IRB), which has a Refugee Protection Division for the first instance decision and a Refugee Appeal Division. During the asylum process, asylum seekers are considered non-permanent residents in Canada.

The grounds for protection through the Canadian asylum procedure are the Refugee Convention and grounds that are related to non-refoulement, also based on the Convention against Torture.

For inland applications the most important ground for ineligibility (inadmissibility) is the Canada US Safe Third Country Agreement.

Asylum seekers whose claims are not considered inadmissible will go through the first instance procedure with the Immigration and Refugee Board (IRB). Initially this is through the Refugee Protection Division, which will interview the claimant. In case of a negative decision there is an appeal with the Refugee Appeal Division. Members of the RAD are Government in Council appointed members.[74] On certain conditions, the court system provides further judicial appeal instances.

After the regular asylum procedure, there is a possibility under the pre-removal risk assessment (PRRA). The PRRA can only be requested after one year since the last negative decision and is not open to certain ineligible claimants.[75] During the one-year bar persons can be removed from Canada without further

74 Immigration and Refugee Board of Canada, "Governor in Council Appointed Members."

75 Immigration, Refugees and Citizenship Canada, "Processing pre-removal risk assessment (PRRA) applications: Intake."

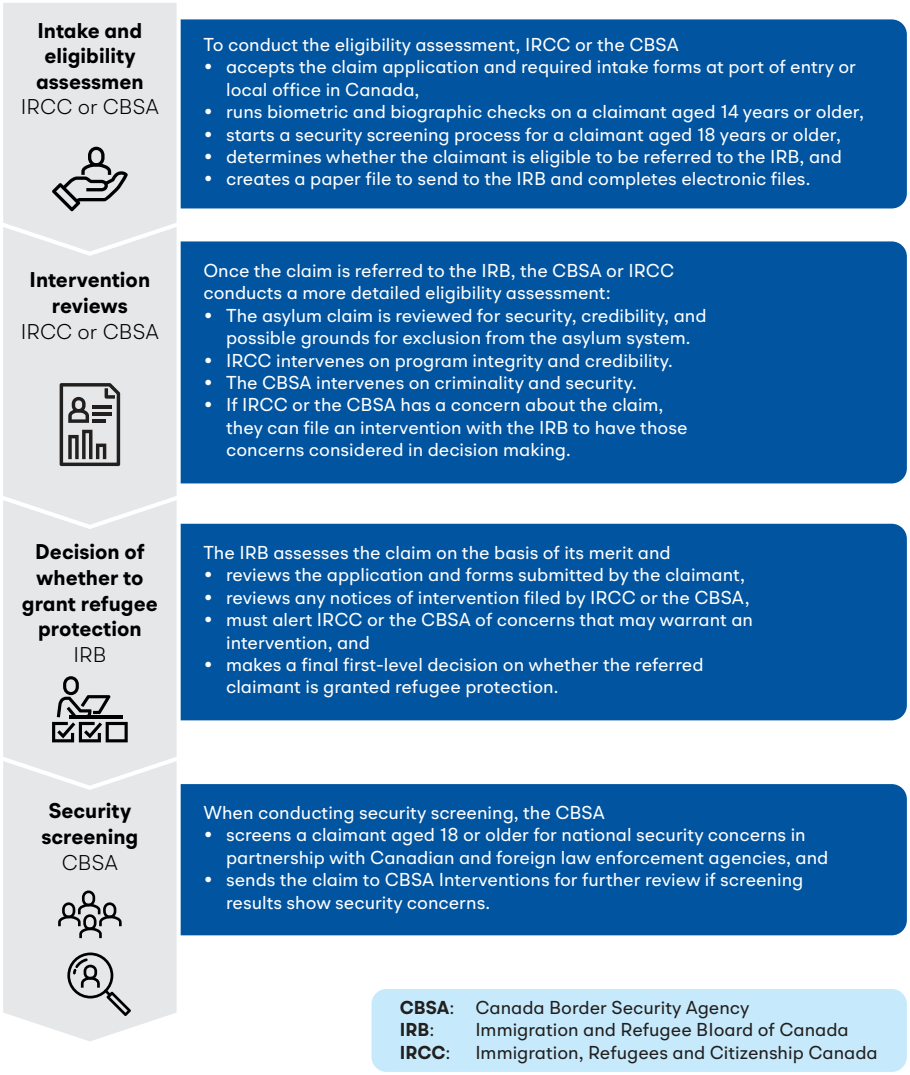
review of their risk. If a new risk has arisen, the person may request a deferral of removal until the bar on filing a PRRA is expired. The PRRA is made in the form of written submissions and almost in all cases decided without a hearing.[76] However, The evaluation of the PRRA noted that the removal process, at least in the researched period, is slow and that in practice the one year bar has limited meaning.[77] Prior to the one year bar an exemption can be requested when new evidence is available. Also, countries of origin can be exempted because of changed circumstances.[78] There are concerns about the expertise and independence of its decision-makers in the PRRA.[79]

The PRRA was, despite the concerns, evaluated positively by the authorities in 2016, although the evaluation did note that the PRRA often serves as an extra appeal instance and thus an extra step.[80]

76 Immigration, Refugees and Citizenship Canada, "Processing pre-removal risk assessment (PRRA) applications: Intake."
77 Immigration, Refugees and Citizenship Canada, *Evaluation of the Pre-Removal Risk Assessment Program*, 22 April 2016.
78 Immigration, Refugees and Citizenship Canada, "Processing pre-removal risk assessment (PRRA) applications: Intake."
79 Macklin and Blum, *Country Fiche Canada*, Asile project, January 2021.
80 Immigration, Refugees and Citizenship Canada, *Evaluation of the Pre-Removal Risk Assessment Program*, 22 April 2016.

The Auditor-General of Canada gives the following chart:[81]

Processing of asylum claims



81 Office of the Auditor-General of Canada, *Report 2 – processing of asylum claims*, 2019 spring reports.

Grounds for protection and protection status

The IRPA sets out the grounds for asylum. According to s. 107 (1) IRPA: the Refugee Protection Division shall accept a claim for refugee protection if it determines that the claimant is a Convention refugee or person in need of protection, and shall otherwise reject the claim. S. 97 (1) and (2) stipulate the criteria for a person in need of protection. This is either a designated group of persons (s. 97 (2) or, under s. 97 (1), a person whose removal would subject them:

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
  (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
  (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
  (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
  (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

The Canadian system grants the same set of rights to a person in need of protection as to Conventions refugees.[82] The wording of the IRPA seems to suggest that it excludes the ground for protection for persons fleeing generalized violence. In Canadian caselaw, it is accepted that a personalized risk can exist when this is faced by many other individuals, however.[83]

In Canada's resettlement policies and legislation it is clearly stated that protection is also open to a person *who is outside all of their countries of nationality or habitual residence and who has been, and continues to be, seriously and personally affected by civil war, armed conflict or massive violation of human rights in each of those countries.* However for inland-claims the regulations, in s. 230 (1), only refer to the possibility of a stay of removal with respect to a country or a place if the circumstances in that country or place pose a generalized risk to the entire civilian population as a result of

82 See also Immigration and Refugee Board of Canada, *Persons in need of protection Chapter 14*.
83 Immigration and Refugee Board of Canada, *Persons in need of protection Chapter 14*.

(a) an armed conflict within the country or place;
(b) an environmental disaster resulting in a substantial temporary disruption of living conditions; or
(c) any situation that is temporary and generalized.

Grounds for inadmissibility (ineligibility)

As mentioned earlier, the Canada-US Safe Third Country Agreement is the main ground for ineligibility. There are other grounds, which are set out in IRPA, in s. 101 (1).

Apart from the ground related to the Canada US Safe Third Country Agreement (s. 101 (1) (e) and public order/security grounds (s. 102 (2)), a notable ground is that of s. 101 (c1), which states that a claim is ineligible if *the claimant has, before making a claim for refugee protection in Canada, made a claim for refugee protection to a country other than Canada, and the fact of its having been made has been confirmed in accordance with an agreement or arrangement entered into by Canada and that country for the purpose of facilitating information sharing to assist in the administration and enforcement of their immigration and citizenship laws*;

The ineligibility ground of s. 101 (c1) IRPA must also be seen as a measure against spontaneous arrivals of asylum seekers via the US, before the STCA was renegotiated. Through this clause Canada attempted to restrict access to the procedure for asylum seekers in Canada, using the so-called Five Eyes agreement with Australia, New Zealand, the United Kingdom and the United States. This agreement is mainly related to security and information sharing between the five countries, but in 2019 the government also used it as a bar to asylum. Asylum seekers who have applied for asylum in one of 'Five Eyes Countries' are entitled only to a Pre-Removal Risk Assessment (PRRA). As mentioned earlier, there are concerns about the expertise and independence of its decision-makers of the PRRA. In the event of a negative decision, affected claimants face deportation prior to any form of review.[84]

84 Macklin and Blum, *Country Fiche Canada*, Asile project, January 2021.

The amended Canada – US Safe Third Country Agreement[85]

The amended Canada – US Safe third country agreement came into effect on March 24, 2023. The Agreement itself was signed in 2002 and has been in force since 2004. It is based on the European Dublin system and was concluded after the 9/11 attacks. The STCA allows for the removal of asylum seekers by the receiving country to the country of last presence. As mentioned earlier, the STCA applied, in its 2002 text, only to refugee claimants who had presented themselves at points of entry. The amendment now stipulates that it also applies "between ports of entry". As the burden of proof of entry is on the receiving state, this means that border control and interceptions at certain border crossings are important. Although the Supreme Court of Canada in its landmark judgment of June 2023 held that the STCA raises concerns, it did not consider the STCA to be unconstitutional.

The legal basis for ineligibility is s. 101(1) (e) IRPA. This ground for ineligibility now applies to asylum seekers who enter Canada:

- at Canada-U.S. land border crossings
- after crossing between ports of entry and making a claim for refugee protection less than 14 days after the day of entry into Canada
- by train, or
- at airports, only if the person seeking refugee protection in Canada has been refused refugee status in the US and is in transit through Canada after being deported from the US.

Unless one of the STCA-exemptions applies (which are similar to the EU Dublin regulation: unaccompanied minors, family members in Canada, or the possession of a Canadian visa) the consequence of the STCA in Canada is that the claimant is 'ineligible' and can be issued a removal order. This eligibility decision and removal order can, however, be challenged before the court system because of fundamental rights considerations.

85 S. 159.1 IRRR refers to this as follows: Agreement done at Washington, D.C. on December 5, 2002 between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, including any modifications or additions made in accordance with its terms.

In the system of the IRPA, the application of the Canada US Safe Third Country Agreement, must comply with the general requirements regarding safe third countries. Factors for designating a third country as safe are, according to s. 102 (2) IRPA:

(a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
(b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
(c) its human rights record; and
(d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

The IRPA requires that there is a periodic review of the situation in the third country.

The STCA, in its original and amended amended form, has been long criticized and legally challenged by Canadian NGOs and lawyers' organizations. As mentioned above, the Supreme Court of Canada, held in *Canadian Council for Refugees v. Canada (Citizenship and Immigration), 2023 SCC 17* of June 16, 2023, that the STCA itself is not contrary to principles of fundamental justice, as long as the "safety valves" are sufficient to ensure that claimants do not face risks of refoulement. Insofar the officers of the Canadian Border Services Agencies act unreasonably or unconstitutionally, then this would be subject to scrutiny. However, the Supreme Court, did acknowledge that there were serious shortcomings in the US asylum process and detention conditions. It further remitted questions with respect to gender-based persecution to the Federal Court, as this required more factual analysis.

Designation – human smuggling or other irregular arrival

The IRPA, in s. 20.1, still contains the 'Designation – human smuggling or other irregular arrival.' As mentioned above, the provision has not been used by the current government, and only once by the previous government. It is questionable whether the Canadian courts would allow its application under the Canadian constitution. The provision is as follows:

> *20.1 (1) The Minister may, by order, having regard to the public interest, designate as an irregular arrival the arrival in Canada of a group of persons if he or she*
> *(a) is of the opinion that examinations of the persons in the group, particularly for the purpose of establishing identity or determining inadmissibility – and any investigations concerning persons in the group – cannot be conducted in a timely manner; or*
> *(b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group.*

The consequences, as foreseen by the legislator, would be mandatory detention and no access to a permanent residence permit.

Deferral and suspension of removals

Canada has policy on Administrative deferral of removals (ADR). The ADR is a temporary measure to temporarily defer removals in situations of humanitarian crisis.[86] Canada also has policy on Temporary suspension of removals (TSR). The TSR program interrupts removals to a country or place when general conditions pose a risk to the entire civilian population (armed conflict or natural disaster).[87] The ADR is generally put in place within a short period of time to immediately respond to a change in country conditions.[88]

First instance and Appeals

Asylum seekers whose claims are refused by the Refugee Protection Division may appeal to the Refugee Appeal Division of the IRB. Judicial review by the Federal Court is available by leave of the court.[89] However, there are exceptions to

86 An ADR is currently in place for certain regions in Somalia (Middle Shabelle, Afgoye, and Mogadishu), the Gaza Strip, Ukraine, Syria, Mali, the Central African Republic, South Sudan, Libya, Yemen, Burundi, Venezuela, Haiti, Iran and Sudan.

87 Canada currently has a TSR in place for Afghanistan, the Democratic Republic of Congo, and Iraq.

88 Canada Border Services Agency, "Removal from Canada."

89 See for a more detailed analysis: Angus Grant and Sean Rehaag, *Unappealing: an assessment of of the limits on appeal rights in Canada's new refugee system*, Osgood legal studies research paper series, 2015.

appeal rights, for example for claimants who transited to Canada via the United States under an exception to the Safe Third Country Agreement.[90]

Processing challenges – backlogs

Under the IRPA refugee claimants are referred to the Immigration and Refugee Board for an interview on the basis of which a decision on the asylum claim is made. The timeline for an interview is 60 days after a referral. In a 2019 spring report – Pre-Covid -, the Auditor General of Canada, audited the asylum processing by the IRB.[91] The audit concluded that the system was not able to deal with the growing number of claims. In particular timelines for the interviews could not be met. The report predicted that with numbers growing (in 2017 over 50,000 and in 2018 55,000 claims) the backlogs would increase. Because of delays in the IRB's processing of claims, the moment in which a decision on an application is made, can be considerably later than the year of application.

Between 2016 and 2020, the IRB saw an unprecedented intake of inland refugee claims, which caused considerable backlogs in the asylum system. When in 2012 the Immigration and Refugee Protection Act (IRPA) was amended in Bill C-31, there were also considerable backlogs.[92] The Balanced Refugee Reform Act,[93] which came into force in 2012, was meant to address these. In March 2010, the backlog was 59,000 cases, with an average processing time of 19 months. In 2018 most of the 32,000 'legacy claims' had been processed, although some 500 cases were still pending.[94] However, under the amended IRPA, new backlogs developed. In 2023, under the new system the number of cases pending reached over 80,000 claims. Thus, the intended effects of the amendments to the IRPA in 2012, which aimed at speeding up the asylum procedure, were not met. The 2019

90 Sean Rehaag, "2018 Refugee Claim Data and IRB Member Recognition Rates," Canadian Council for Refugees, 19 June 2019. As to the substance of the claims, Rehaag's 2018 research indicates that there are considerable differences in approval of claims per adjudicator in comparable cases.

91 Office of the Auditor-General of Canada, *Report 2 – processing of asylum claims*, 2019 spring reports.

92 Office of the Auditor-General of Canada, *Report 2 – processing of asylum claims*, 2019 spring reports.

93 Government of Canada Justice Laws, *Balanced Refugee Reform Act (S.C. 2010, c. 8)*, 29 June 2010.

94 Office of the Auditor-General of Canada, *Report 2 – processing of asylum claims*, 2019 spring reports.

Auditor-General's report held that: "People seeking asylum in Canada wait about two years for decisions from a rigid system that can't adjust to volume spikes."[95]

To cope with the numbers of asylum claims and the backlogs the IRB has doubled in size and received extra funding.[96] The backlogs were reduced by more than a third and a projected wait time for refugee claimants have decreased from 22 months to 13 months in March 2022.[97]

Reception

In particular housing, services (education and healthcare) and newcomer programs, but also legal aid, are mostly a provincial/territorial and municipal competence.[98] There can be tensions between the respective governments, in particular with respect to finances. Recently such tensions also arose over irregular crossings. For example, the Auditor General of Ontario noted in a 2020 report:

> *However, the existing immigration agreement between the federal government and provincial governments does not include a provision for the federal government to compensate provincial ministries and municipalities for costs incurred in a situation like the surge in irregular border crossers that continued until the border was closed due to the COVID-19 pandemic.*[99]

It was pointed out that Quebec, facing similar pressures, had received compensation.

Both the City of Toronto and the Province of Ontario have called upon the Federal state to give more funding.[100] In July 2023, the Federal government announced

95 Office of the Auditor-General of Canada, *Report 2 – processing of asylum claims*, 2019 spring reports.

96 Immigration, Refugees and Citizenship Canada, *IRCC Minister Transition Binder 2023: Overview – Immigration and Refugee Board of Canada*.

97 Immigration, Refugees and Citizenship Canada, "CIMM – The Immigration and Refugee Board (IRB) – Inventory and Wait Times," 12 May 2022.

98 See for example, Office of the Auditor-General of Ontario, *Ontario's costs for services provided to irregular border crossers*, table (Figure 1), July 2020.

99 See for example, Office of the Auditor-General of Ontario, *Ontario's costs for services provided to irregular border crossers*, table (Figure 1), July 2020.

100 CBC news, "Province, Toronto add funding for asylum seekers, but say feds need to do more," 19 July 2023.

that it was providing funding to provinces and the city of Toronto for affordable housing for asylum seekers.[101] It also referred to the need of a timely issuance of work permits for asylum seekers:

> *IRCC implemented a temporary public policy (TPP) on November 16, 2022, that provides asylum claimants with timely access to open work permits, allowing them to enter Canada's labour market sooner and provide for themselves while they await a decision on their asylum claim. From the launch of the public policy to May 31, 2023, IRCC has issued over 53,000 initial work permits for asylum claimants. Providing asylum claimants with access to a work permit earlier on in the process will allow them to access employment opportunities, reducing their dependence on provincial and territorial social assistance and other supports.*

Under Canada's policies, persons who are under a removal order but cannot return for reasons beyond their control, can obtain a work permit.[102]

After the Covid-pandemic the Canadian authorities continued to provide temporary housing through hotels.[103] This method of housing is also used by municipal authorities.[104] Churches and shelters are also housing asylum seekers.

Although asylum seekers are allowed to work with a work permit, the lack of housing and the cost of living in Canada's cities makes them vulnerable and at risk of homelessness.[105] This can also affect Ukrainians who were allowed to enter Canada under the CUAET.[106]

101 Immigration, Refugees and Citizenship Canada, "More federal housing support for asylum claimants," 18 July 2020.
102 Immigration, Refugees and Citizenship Canada, "You need a work permit."
103 Immigration, Refugees and Citizenship Canada, "CIMM-IRCC Hotels," 18 November, 2022.
104 Dustin Cook, "Toronto to Open Hotel Rooms for 150 asylum seekers amid shelter shortages," *The Globe and Mail*, 19 July 2023.
105 See for example Ontario Council of Agencies serving immigrants (OCASI), "Community groups calling for urgent actionto addrss refugee housing crisis," 28 June 2023.
106 Hannah Schmidt, "Some Ukrainians refugees returning home due to K-W housing crisis: grassroots group," *CTV News*, 25 March 2023.

5 Extraterritorial access to asylum

Resettlement and complementary pathways

Canada's resettlement policies are a main pillar of Canada's refugee protection system. The numbers of resettled refugees exceed the numbers of asylum seekers and, of course, the number of refugees who receive permanent immigration status after an in-land application. In Canada there are initiatives to promote community sponsorship globally for example through the Global Refugee Sponsorship Initiative.[107] Besides resettlement, Canada also offers complementary pathways for refugees through humanitarian visa programmes. These do not necessarily lead to permanent residence, although they can lead to this through other streams, including economic or family streams.

The resettlement policies have a special legal basis in the IRPA and IRPR. Section 99 (1) of the IRPA stipulates that "A claim for refugee protection may be made in or outside Canada." Section 99 (2) specifies that an application outside Canada can be made for a visa as a Convention refugee or a person in similar circumstances.

Canada's resettlement programme consists of a government prong through Government Assisted Refugees (GARs), a private sponsorship program and a blended program. Discussions in Canada focus on the proportion of GARs and privately sponsored refugees.[108]

Targets and levels regarding asylum

Canada's setting of immigration levels and targets includes refugees both regarding the resettlement and the in-land applications schemes. The levels are set in consultation with regional governments, stakeholders and take

107 Global Refugee Sponsorship Initiative, "Crating opportunities for communities to welcome refugees."

108 See for example the 2021 platform of the Conservative Party, *Canada's Recovery Plan*, Summer 2021.

into account public surveys.[109] They are presented to parliament. While the resettlement levels are targets and quotas, the numbers of refugees following inland applications are not to be seen as asylum quotas. The levels and targets are a planning tool and the implementation may lead to other outcomes.[110] According to government information, the targets are usually met:[111] The levels do not include temporary residence status.

For the period 2023-2025 the government has set the following targets for refugees, including both in-land claims and resettled refugees:[112]

Target for refugees

	2023	2024	2025
Protected persons in Canada and dependents abroad	25,000	27,000	29,000
Resettled refugees-government assisted	23,550	21,115	15,250
Resettled refugees – privately sponsored	27,505	27,750	28,250
Resettled refugees blended visa.	250	250	250
Total	**76,305**	**76,115**	**72,750**

In addition, the targets include humanitarian, compassionate and other grounds for status. The targets for 2023 are 15,985 persons in 2023, 13,750 in 2024 and 8,000 in 2025. The targets do not include Ukrainians under Canada's CUAET visa program, as this visa does not necessarily lead to permanent residence.

Resettlement in the Canadian context – general process

Canada's resettlement policies involve several actors, both governmental agencies and private sponsors. For the "matching process" the *Resettlement Operations Centre in Ottawa (ROC-O)* plays a central role.[113] The ROC-O decides which city is the best match with each refugee's needs, based on criteria such

109 Immigration, Refugees and Citizenship Canada, *2023 consultations on immigration levels – final report*.

110 See for example: Canadian Immigrant, "A closer look at Canada's immigration level plan 2024-2026," 21 November 2023.

111 Immigration, Refugees and Citizenship Canada, *Departmental Plan 2023-2024*, 2023.

112 Immigration, Refugees and Citizenship Canada, "Notice supplementary immigration levels for the 2023-2025 Immigration Levels Plan," 1 November 2022.

113 Immigration, Refugees and Citizenship Canada, "The matching process."

as: language(s); availability of family and networks friends; ethnic, cultural and religious communities in the area; medical needs; availability of settlement services. It has a number of other tasks, such as receiving applications and monitoring private sponsor organizations.[114]

Refugees can be referred for resettlement in various ways:

1. Sponsor-referred:
2. Blended Visa Office-Referred/Visa office-referred

The Resettlement Operations Centre in Ottawa (ROC-O) through which private sponsorship applications must be submitted administers an inventory of cases that have been selected after initial identification by the UNHCR.

The Government-Assisted Refugees (GAR-stream) mainly relies on UNHCR referrals. The private sponsorship program is open to Convention Refugees and persons fleeing war, who do not have another durable solution available to them. A new development is the Economic Mobility Pathways Pilot, which is a complementary pathways model to Canada's resettlement program.[115] Refugees and persons otherwise in need of international protection can qualify for this pathway, which is based on qualifications and skills. In addition, there is a small programme for specific human rights defenders stream for 250 people each year, including their family members.[116]

Once a case has been referred to Canada, a Canadian visa officer will review the file. In most cases, they will interview the refugee, close to where they are located. Before acceptance for resettlement, someone must go through a medical exam, pass a criminal and security check, and give biometric information, which includes fingerprints and a digital photo.

Resettlement Canda – implementation

Under the Immigration and Refugee Protection Regulations (IRPR – s. 70 (2) persons who may qualify as refugees for Canada's refugee and humanitarian

114 Immigration, Refugees and Citizenship Canada, "The matching process."
115 Immigration, Refugees and Citizenship Canada, "Updated public policy to support the Economic Mobility Pathways Pilot – Phase 2."
116 Immigration, Refugees and Citizenship Canada, "Providing Protection to Human Rights defenders at risk."

resettlement program are grouped into 2 categories, or "classes": Convention Refugees Abroad and Country of Asylum. The criteria for Country of Asylum are laid down in s. 145-146 of the IRPR. This class includes persons who are affected by civil war, armed conflict or a "massive violation of human rights."

The Government-Assisted resettlement used to be the main pathway for resettlement. As of late the private sponsorship programme has grown.

Government-assisted resettlement (GAR)[117]

Through the Government-Assisted Refugees (GAR) programme, refugees receive support by non-governmental agencies that are funded by the government, so-called service provider organizations. The support will be for up to 1 year from the date the refugee arrives in Canada or until they are able to support themselves (whichever happens first).

Private sponsorship program refugees (PSR)[118]

The IRPR, in s. 138, contains definitions of sponsors, but also vulnerability and 'urgent need of protection'.

The following groups may submit a private sponsorship:

- **Sponsorship Agreement Holders (SAHs):** These are organizations that have signed a formal sponsorship agreement with Immigration, Refugees and Citizenship Canada (IRCC). Most current SAHs are religious organizations, ethnocultural groups, or humanitarian organizations. SAHs, which may be local, regional or national, assume overall responsibility for the management of sponsorships under their agreement.
- **Constituent Groups (CGs):** A SAH can authorize CGs to sponsor under its agreement and provide support to the refugees.
- **Groups of Five (G5):** Five or more Canadian citizens or permanent residents, who are at least 18 years of age, live in the expected community of settlement and have collectively arranged for the sponsorship of a refugee living abroad. The group's financial commitment must meet certain levels.

117 Immigration, Refugees and citizenship Canada, "Government-assisted refugee program."
118 Immigration, Refugees and citizenship Canada, "Private sponsorship program."

- **Community Sponsors (CSs):** Any organization, association or corporation can make an organizational commitment to sponsor. CSs must undergo financial and settlement plan assessments by ROC-O each time they wish to sponsor.

Sponsoring groups agree to provide the refugees with care, lodging, settlement assistance and support for the duration of the sponsorship period. Normally, this is 12 months starting from the refugee's arrival in Canada or until the refugee becomes self-sufficient, whichever comes first. In exceptional circumstances, the migration officer may determine that the refugee requires more time to become established in Canada and will ask the sponsoring group to extend the sponsorship period to a maximum of 36 months. The sponsoring group has the option of refusing the request for an extension of the sponsorship period. However, the sponsoring group risks having the case refused as a result.

The Economic Mobility Pathways Pilot

The Economic Mobility Pathways Pilots is a mix between refugee resettlement and economic immigration:[119] Refugees who have a positive refugee status determination or otherwise have proof that they are a person of concern (and some other defined cases) can apply. They can apply under several streams, either the regional EMPP or the federal EMPP. The regional EMPP consists of 3 selected economic programs:

- Atlantic Immigration Program
- Provincial Nominee Program
- Rural and Northern Immigration Program (RNIP)

The federal EMPP has two streams. A "Job Offer" stream and a – more limited number – a stream of "No Job Offer" places. There are requirements with respect to work experience, education and language.

Analysis of Canada's resettlement schemes

The shift in focus from Government-assisted resettlement to private sponsorship has received attention in literature. A comparative study between Government Assisted Refugees (GARs) and privately sponsored refugees shows that for some groups, such as women without higher education, the Private Sponsorship

119 Immigration, Refugees and Citizenship Canada, "Economic mobility pathways."

program integration works better, but this is not necessarily true for all groups of resettled refugees.[120]

In a detailed analysis, Cortinovis and Fallone describe how the proportion of privately sponsored refugees is increasing.[121] They mention some concerns regarding the private sponsoring and the Canadian system in general. These concerns are related to legal safeguards and potential biases in the system. These can be summarized as follows.

Canada's resettlement policies are discretionary and not rights based. There are, for example, no appeal mechanisms if a referred refugee is rejected. The authors further note that the" complementary pathways" (i.e. the private sponsoring program and the EMPP) may take economic potential rather than vulnerability as a central point of resettlement.[122] This is clear for the EMPP, but also private sponsors may look at integration potential of refugees, as they are liable for costs the resettled refugee makes. Some private sponsors (SAH's) do, however, explicitly take vulnerability into account, although often no precise criteria are defined.

Other potential biases in the system are that private sponsors may refer refugees whom they know – for example through family relations – or may refer refugees from their specific background, for example a religious or country or origin background. For the government scheme, there is a potential bias because they operate on the basis of UNHCR referrals. UNHCR is not present in all regions. The government scheme does take vulnerability into account, which is especially true for the small JAS program (Joint Assistance Sponsorship), where the government and SAHs work together for vulnerable refugees. The growing proportion of private sponsoring could mean that vulnerability plays less of a role in Canada's resettlement policies.

120 Lisa Kaida, Feng Hou and Max Stick, *The long term integration of resettled refugees in Canada, a comparison of Privately Sponsored Refugees and Government-Assisted Refugees*, Statistics Canada, 13 January 2020.

121 Roberto Cortinovis and Andrew Fallone, *Country Report Canada, An analysis of the Private Sponsorship of Refugees (PSR) program and the Economic Mobility Pathways Pilot (EMPP)*, Asile Project, D.4.2. Interim Report, 2022.

122 Roberto Cortinovis and Andrew Fallone, *Country Report Canada, An analysis of the Private Sponsorship of Refugees (PSR) program and the Economic Mobility Pathways Pilot (EMPP)*, Asile Project, D.4.2. Interim Report, 2022.

Despite such concerns, in the political discussion in Canada and through a wide support in Canadian society private sponsorship has gained traction. The Global Refugee Sponsorship Initiative[123] advocates private sponsorship on a global level. Canada's model of private sponsorship is included in the US and Australian programmes,[124] and also in Sweden and Denmark there are initiatives, supported by UNHCR.[125]

CUAET – Canada Ukraine Authorization for Emergency Travel

Following the Russian invasion of Ukraine in 2022 Canada allowed Ukrainian nationals and their families to enter Canada and reside here as temporary visitors. The CUAET – Canada Ukraine Authorization for Emergency Travel – was announced on March 22, 2023.[126] Between March 17, 2022 and August 17, 2023, over 173,000 Ukrainians entered the country under the CUAET.[127] In August, out of 1,1 million applications, over 858,000 were approved under this scheme. The CUAET ended on July 15, 2023.[128] Persons accepted, can enter Canada until March 31, 2024.[129]

Under CUAET Ukrainians and their family members:

- can apply for a free visitor visa and may be allowed to stay in Canada for 3 years, as opposed to the standard 6-month authorized stay for regular visitors
- have the option to apply, free of charge, for an open work permit with their visa application, enabling them to find work as quickly as possible
- will have their electronic visa application processed within 14 days of receipt of a complete application, for standard, non-complex cases.

123 Global Refugee Sponsorship Initiative, "Creating Opportunities for communities to welcome for refugees."
124 See the US and Australia country report in this research.
125 UNHCR, "Community Sponsorship programmes."
126 Immigration, Refugees and Citizenship, "Canada launches pathway to reunite families and support Ukrainians," 15 July 2023.
127 Immigration, Refugees and Citizenship Canada, "Canada-Ukraine Authorization for Emergency Travel."
128 Immigration, Refugees and Citizenship Canada, "Immigration measures and support for Ukrainians and their families."
129 Immigration, Refugees and Citizenship Canada, "Immigration measures and support for Ukrainians and their families."

For Ukrainians a number of exemptions apply under CUAET. They can leave and return at any time while their visa is valid and are, for example, eligible for primary and secondary education. The visitor visa can be a pathway to regular migration under Canada's immigration programs and streams.

The government has announced that the CUAET will be followed by a special program for Ukrainians under the CUAET to obtain permanent residence status.[130] According to government information starting October 23, 2023 the pathway will be open to Ukrainian nationals who have temporary resident status and have one or more family members in Canada. This includes grandparents, grandchildren, siblings of a Canadian citizen or permanent residents.

Humanitarian visas American Region

For Canada, part of the negotiated expansion of STCA was a programme to grant 15,000 'humanitarian visas' for nationals from the American region, in particular from Colombia, Haiti and Venezuela.[131] Thus, Canada has followed the US programmes on humanitarian paroles. A further Canadian expansion to traditional resettlement includes its mixed protection/economic streams through the economic mobility pathways pilot.

130 Christian Paas-Lang, "Canada to launch new permanent residency programs for Ukrainians fleeing war," *CBC News*, 15 July 2023.

131 Prime Minister Trudeau, "Working with the United States to grow our clean economies and create good, middle-class jobs on both sides of our border," 24 March 2023; Immigration, Refugees and Citizenship Canada, "Statement from Minister Miller on Canada's commitment to support migrants in the Americas," 10 October 2023.

6 Return in the context of migration cooperation

Canada is active in seeking cooperation with third countries. This can take various forms, from a more protection focused cooperation to "asylum management" instruments.

The US – in relation to the STCA – is the only "safe third country" under Canada's asylum legislation.
Other than this agreement, the operation and practice around cooperation with third countries seems less clear. The current initiatives do not specifically mention returns, but rather focus on general cooperation.[132]

In it 2022 annual report, the government further refers to cooperation with third countries the region of the Americas.[133] Canada has a bilateral collaboration with the US in the *Roadmap for a Renewed U.S.-Canada Partnership*, and works with the US and Mexico on migration and protection issues. It further worked with the US, Mexico and Central American countries to deter irregular migration and ensure regular pathways for protection and regular permanent and temporary migration.

Recent removal statistics are as follows:[134] In 2018-2019 the CBSA removed 9,698 individuals from Canada and in 2019-2020 it removed 11,536 individuals. According to the government information, these numbers represent the highest removal numbers in the last four years for the Agency. The Covid-pandemic has impacted removals. CBSA intends to increase the number of removals.[135]

132 See for example International Labour Organization, "The Government of Canada and ILO expand their partnership to strengthen institutional capacities in the governance of labour migration in Latin America," 16 August 2022.

133 Immigration, Refugees and Citizenship Canada, *2022 Annual Report to Parliament on immigration*, 2022.

134 Public Safety Canada, "Detention of Foreign Nationals facing removals," 10 March 2021.

135 Canada Border Services Agency, "Arrest, detentions and removals."

Persons who are inadmissible, can be detained. The duration is in itself not limited, but the statistics show that on average relatively few people are detained (around 300 or less per day) and the average time is usually relatively short (13 to 30 days).[136]

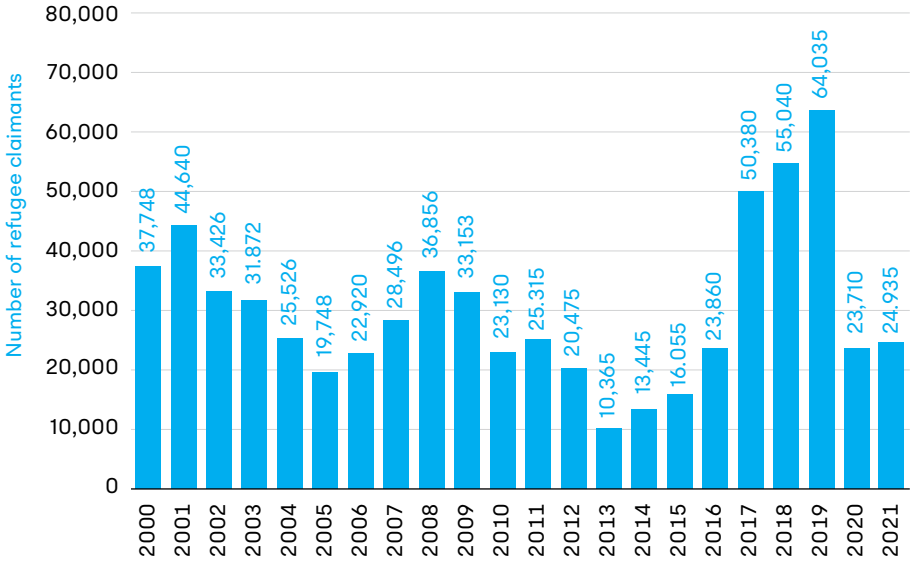
136 Canada Border Services Agency, "Annual detention statistics: 2012 to 2023."

7 Statistics

In-Canada claims

While asylum through in-Canada claims is not the main pathway for asylum, recent statistics show an increase in numbers of asylum claims in Canada, which started prior to the Covid-pandemic.

Number of Refugee claimaints



Source: Statista

In 2017 it was also reported that there was a high number and high proportion of asylum claimants who were children aged 0 to 14. Over 26% of 2017 asylum claimants were aged 0-14.[137]

The period between 2019 and 2023, which includes the Covid-pandemic shows a more volatile pattern than before this period. The IRB-statistics of these years are not entirely clear, however, as these show the cases referred to the IRB, including

137 Statistics Canada, "Asylum Claimants," 17 May 2019.

after appeals, and therefore do not necessarily reflect the numbers from the year of claim. In 2019, IRB reported that 58,379 claims were referred to IRB. In 2020 this was 18,500 claims; in 2021 24,127; in 2022 this was 60,158; during the first three months 2023 this was 28,582.[138]

In 2022, the main countries of origin whose claims were referred to the Immigration and Refugee Board were Haiti (9,353), Mexico (7,483), Turkey (5,611), Colombia (4,997) and Iran (4,431).[139]

The countries of origin can also fluctuate, of course also depending on the security situation in those countries. Statistics Canada provided an overview of 2017. In 2017 the top 5 countries of citizenship for asylum claimants (asylum seekers) and the number of claimants form other countries were as follows:[140]

Over the years, Canada's acceptance rates are relatively high as a proportion of the decisions. Recent statistics provided by the Canadian authorities are based on claims processed in a year and not yet of all claims lodged in a specific year. The asylum system faces significant backlogs.

Recent numbers do not show considerable differences in the acceptance rates although it should be mentioned that these numbers are based on the claims processed in a certain period, not on the time the claim was lodged.

On March 31, 2023 out of 28,582 referred claims in 2023, in 14,234 cases a decision was made by the Immigration and Refugee Board (IRB).[141] In 10,196 cases the claim was accepted, 2.589 cases were rejected and 547 cases were abandoned. The total number of pending cases was 84,550.

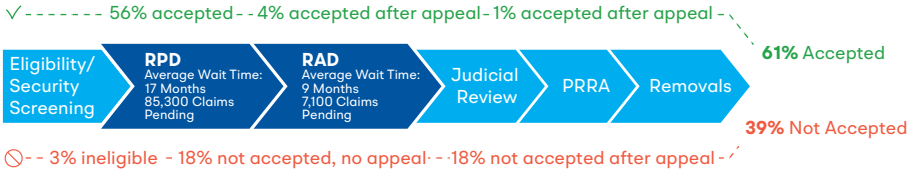
In 2022 out of 60,158 referred claims, 45,444 decisions were made.[142] In 28,272 cases the claim was accepted, 12,537 cases were rejected, 1,351 were abandoned, and 3,284 cases were withdrawn. The total number of cases was 70,223.

138 Immigration and Citizenship, "Asylum claims by year – 2023."; Immigration and Citizenship Canada, "Asylum claims by year – 2022."
139 Immigration and Refugee Board Canada, "Claims by Country of Alleged Persecution – 2022."
140 Statistics Canada, "Asylum Claimants," 17 May 2019.
141 Immigration and Refugee Board of Canada, "Claims by Country of Alleged Persecution – 2023."
142 Immigration and Refugee Board Canada, "Claims by country of alleged persecution 2022."

The IRB gave the following statistics of the 'continuum' since 2018-19:[143]

- Following decisions by RPD, 56% are approved
- An additional 5% of claimants are approved following recourse
- 4 to 5% after recourse to the RAD
  <1% after recourse to the Federal Court
- Ultimate acceptance rate is 61%

Acceptance rates



The Canadian return rates are fairly low, in comparison, with about 9,000 persons per year removed.[144] There is also a lot of uncertainty about undocumented immigrants. According to government sources this may vary between 20,000 to 500,000 persons.[145]

143 Immigration and Refugee Board Canada, "Backlog and wait times (Refugee claims and appeals)."
144 Public Safety Canada, "Detention of Foreign Nationals Facing removals," 10 March 2021.
145 Immigration, Refugees and Citizenship Canada, "CIMM – Undocumented Populations," 3 March 2022.

Conclusion

In general, Canada's laws and policies, are inspired by a spirit of openness, human rights and inclusivity towards refugees. This is evidenced by the preambles of the laws, such as the Immigration and Refugee Protection Act (IRPA) and political platforms of mainstream parties.

Canada has a long-standing tradition regarding resettlement of refugees and is also at the forefront of innovation and new initiatives, such as the Economic Mobility Pathways Pilot under the resettlement stream. The resettlement program exists complementary or parallel to an – equally sizable – inland asylum system. Both the resettlement of refugees and the inland asylum system are part of a system of planned/estimated immigration levels, based on annual levels and targets for economic, family, asylum and humanitarian immigration.

In their analysis of the Canadian system, Macklin and Blum point to Canada's resettlement policies, its 'robust' asylum system, and Canada's strong civil society and refugee lawyers' involvement, but they are critical about Canada's hidden border practices of extra-territorial preventing asylum seekers from entering Canada.[146] As recent developments show, there is also a feeling among politicians that asylum flows from the US to Canada need to be managed and restricted.

The lengthy land border between the two countries makes it virtually impossible to monitor that entirely. Canada's response to higher number of asylum seekers 'irregularly' entering via the United States was by negotiating an expansion of the scope of the Canada-US Safe Third Country in 2023. The underlying causes for the increased number of asylum seekers from the US – reports on restrictive policies and concerns about human rights violations in the US – were not addressed by this. These concerns were raised by NGOs and lawyers' organizations resulting in a landmark judgment of the Supreme Court of Canada in 2023. In general, however, the outcomes of Canada's refugee policies seem positive, in terms of societal support for, and integration and income levels of refugees.

146 Macklin and Blum, *Country Fiche Canada*, Asile project, January 2021.

Annually, Canada sets immigration and asylum levels and targets, in consultation with stakeholders and based on research and expert analyses. These are submitted to parliament. They include economic immigration as well as refugee protection through resettlement and the inland asylum procedure. The numbers can vary but have been between 400,000 and 500,000 new immigrants per year. Refugees make up a proportion of 10-15% of all immigrants. According to government information, the targets are usually met. In the recent past, under the Harper government, there were concerns that for example resettlement targets were not met.

Despite levels and targets for spontaneous arrivals of asylum seekers there have been backlogs in the asylum process. There are considerable backlogs in the asylum system and refugees, before the Covid pandemic, had to wait about 2 years for a decision. This is a persistent problem. In 2012 the Immigration and Refugee Protection Act (IRPA) was amended in Bill C-31 also to deal with the considerable backlogs. In 2023, under the new system the number of cases pending reached over 80,000 claims. Thus, the intended effects of the amendments to the IRPA in 2012, which aimed at speeding up the asylum procedure, were not met. The Immigration and Refugee Board (IRB) has recently received more funding, however.

All in all, Canada has accepted a large number of refugees and persons in need of protection on its territory through its combined resettlement, inland asylum and humanitarian policies. Between 2016 and 2021 Canada allowed entry 216,000 refugees under its combined asylum systems. The targets for the period 2023-2025 combined are over 225,000 refugees.

Critics have pointed out that Canada also has a long history of trying to reduce the numbers of spontaneous asylum seekers through both extra-territorial border measures, including visa policies, and measures related to more restrictive asylum procedures. The effects of these extra-territorial measures are not clear.

The outcomes of the inland-asylum are, like those of most asylum systems, not easy to analyze. The Canadian asylum process is rather complicated. Not only does it provide for a first instance phase and a regular appeal system through the Refugee Appeal Division (RAD) of the Immigration and Refugee Board first, and next potential appeals in the court system, it also provides for a Pre-Removal Risk Assessment (PRRA) in cases (new) evidence is submitted that the person is a Convention Refugee or faces risks of refoulement.

For the PRRA, there is a one-year bar, i.e. it can only be applied for after one year since the last decision on the asylum application. Observers are sometimes critical about the standards and quality of the decision making at the PRRA level, as well as one-year bar between the rejection of an asylum application and the possibility to apply for a PRRA.

The 2010-2012 amendments to the IRPA that took place under the Conservative government of then Prime Minister Harper had a strong restrictive component. They were aimed at speeding up the asylum process but included limiting appeal possibilities and reducing rights for claimants. They were either quashed by the courts, revoked by the Liberal government under Prime Minister Trudeau or not applied. In this respect, policies deemed "anti-refugee" by critics, have not been successful in Canada.

Acceptance rates are reasonably high in the Canadian asylum system: over the years around 50% of the cases have a positive outcome, although recent statistics are measured as a proportion of decisions, and not as a proportion of all claims in a given year. Prior to the Covid-pandemic, the number of removals was at 10,000 people. The number of undocumented persons is estimated between 20,000 to 500,000 – showing that there is wide uncertainty about the numbers in this respect. The effects of the new amendment to the Safe Country Agreement, also after the Supreme Court Judgment of June 2023, are not yet clear.

The appreciation of the outcomes of the Canadian system is, of course, open for interpretation. On the one hand, Canada can afford to be more generous, as it is a large country that is further away from conflicts and cannot be easily accessed by sea. On the other hand, the inland asylum system does face pressures. Canada's metropolitan areas host, seemingly successfully, the majority of Canada's refugees. This is done by considerable support from civil society and society at large. The position of refugees, asylum seekers and other migrant groups is not easy, especially in urban areas where the costs of living are very high.

The outcomes of Canada's immigration and refugee policies are widely researched, including by longitudinal research by Statistics Canada and official audit reports, although more research is needed. This is for example true for resettled refugees. Research on the integration and labour market position of resettled refugees shows that they initially do less well than immigrants who were

selected on economic criteria, but that – depending on many factors – refugees catch up more quickly, albeit that it takes longer to achieve the same median levels of income of all immigrants. A comparative study between Government Assisted Refugees (GARs) and privately sponsored refugees shows that for some groups, such as women without higher education, the Private Sponsorship program integration works better, but this is not necessarily true for all groups of resettled refugees.

Myrthe Wijnkoop
Anouk Pronk
Robin Neumann

Country report
Denmark

Introduction

When assessing the topic of access to (extra)territorial asylum in a European context, Denmark holds a certain 'status aparte'. Denmark joined the EU in 1973 after cautious consideration, having a carefully balanced approach towards European integration. The country's position can be characterized by a 'soft' form of Euroscepticism, making the decision to 'opt in' when there are considered benefits.[1] Denmark is not part of the eurozone and negotiated several other 'opt-outs' among which the (larger part of the) common EU rules on asylum and migration. This means that they are formally not bound by the EU asylum acquis, which provides them with a unique position as EU-Member State.

After 2015 when 1,2 million people, mostly from Syria, were seeking refuge in the European Union, the Danish government, with broad consensus in parliament, has implemented legislation and policies to further restrict asylum protection.[2] Primary aim was, and still is, to make Denmark less attractive to asylum seekers. Residence permits are now granted on a temporary basis with a view to returning refugees to their countries of origin as soon as possible, and not to integration and long-term residence: a self-indicated so-called 'paradigm shift.'[3] Moreover, the Danish government is very straightforward, and even takes 'pride' in communicating their message of pursuing a very strict (territorial) asylum policy.[4]

The explicitly stated and openly communicated target of the Danish government is furthermore to prevent asylum seekers from arriving 'spontaneously' at the territorial borders of Denmark: 'zero people should apply for asylum in the

1 Aarhus University, "An overview of Denmark and its integration with Europe, 1940s to the Maastricht Treaty in 1993," Nordics Info, accessed on 12 October 2023.

2 The restriction of rights of asylum seekers started already in 2002, when the government under Anders Fogh Rasmussen removed de facto status (with the aim to explicitly not provide protection for Somalis), ended embassy asylum, changed the Refugee Appeals Board members etc. See Aarhus University, "Danish immigration policy, 1970-1992," Nordics Info.

3 The Danish Institute for Human Rights, *You can never feel safe: an analysis of the due process challenges facing refugees whose residence permits have been revoked*, 2022; See also Jens Vedsted-Hansen, Stinne Østergaard and others, *Paradigmeskiftets konsekvenser. Flygtninge, stat og civilsamfund*, August 2023; Jens Vedsted-Hansen, *Refugees as future Returnees. Anatomy of the paradigm shift towards temporary protection in Denmark*, CMI 2022-6.

4 See also Thomas Gammeltoft-Hansen, "Refugee policy as 'negative nation branding': the case of Denmark and the Nordics", in: *Danish Foreign Policy Yearbook* 2017.

country'.[5] Of particular interest in this context is the 2021 amendment to the Danish Aliens Act. This amendment provides for the possibility to transfer asylum seekers to a third state outside the EU for processing the asylum claim, protection in that state or return from there to the country of origin (section 29).[6] This legislation fits in a long Danish tradition of focussing on the external dimension of European asylum and migration policies, including being at the forefront of the European debate on externalizing asylum procedures to countries outside the EU. Already in the 1980's Denmark put forward a plan for external processing of asylum claims during a meeting in the UN General Assembly.[7]

A factor that frequently surfaces in political and public debates on migration in other EU Member States, such as the Netherlands, is that Denmark can pursue these policy lines because of the EU asylum opt-out. And that an opt-out of the EU acquis would thus be the panacea to manage asylum better.[8] However, the fact that Denmark is indeed bound to several (other) international and European legal obligations when applying these national laws and policies in practice is often overlooked.

In this report we will look at Denmark's asylum policies and protection system, describing and analysing amongst others the applicable legal framework, the implementation of border and asylum procedures, return policies and relevant statistics. The report will also discuss in more detail any form of extraterritorial access to asylum, through legal pathways and other policies, as well as migration cooperation/partnerships with third countries in as far as they concern access to protection. To which extent are the aims of the Danish government reached, and at what costs? Are there lessons to be learned for the Netherlands (and other EU Member States), considering the opt-out position that Denmark currently holds? To what extent does the Danish 'status aparte' play a significant role in building both the policy directions and the narrative itself?

5 Ritzau, "Mette Frederiksen: The Goal is zero asylum seekers to Denmark," *Nyheder*, 22 January 2021.

6 See for a comprehensive legal assessment of this legislation: Nikolas Feith Tan and Jens Vedsted-Hansen, "Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law," 15 November 2021; Nikolas Feith Tan, "Visions of the Realistic? Denmark's legal basis for extraterritorial asylum," *Nordic Journal of International Law* 91, 2022, p. 172-181; See also Chantal Da Silva, "Denmark passes a law to send its asylum seekers outside of Europe," *Euronews*, 3 June 2021.

7 Dutch Advisory Council on Migration (ACVZ), "External processing," December 2010, p. 15.

8 Parliamentary documents, *Kamerstukken II*, 35 925, nr. 43, 23 September 2021.

1 Setting the scene: general background and relevant developments

Political and sociocultural context: paradigm shift and a 'broad national consensus'

The fact that Denmark opted out of the EU asylum acquis does not implicate that Denmark is a self-centred state. The driving force behind Denmark's accession to the EEC was the desire to become part of an open European economy, rather than support for federalism.[9] The Danish government is an active member of the European and international community and has for example a long tradition as a humanitarian actor in multilateral relations and international cooperation. Denmark is high ranking in lists of humanitarian donor countries and, at least formally, sets the standard of Official Development Assistance (ODA) at the UN goal of 0,7% GNI.[10]

At the same time, Denmark remains very keen to retain its national sovereignty in certain policy domains. It has installed multiple institutional safeguards to allow for selective participation in European integration, such as safeguards in its Constitution with respect to delegating power, and a parliamentary committee which has oversight over decisions in Europe. Since the 2022 invasion of Russia in Ukraine, Denmark however moved a bit closer to the EU again.

Denmark has thus adopted a rather pragmatic non-federalist approach towards the EU and certain policy domains such as asylum and migration. Key parliamentary decisions on European integration and related topics are made by consensus between the main political parties, regardless of the coalition in power.[11] The national political debate on asylum and migration in Denmark has in recent years become no longer a topic with a traditional left-

9 Aarhus University, "An overview of Denmark and its integration with Europe," 25 February 2020.

10 Ministry of Foreign Affairs of Denmark, *The Government's priorities for Danish development cooperation 2023-2026*, April 2023; However, in practice the government is falling short: Concord, AidWatch, *Bursting the ODA Inflation bubble*, 2023.

11 Aarhus University, "An overview of Denmark and its integration with Europe," 25 February 2020.

right political divide. Rather, parties such as the Social Democrats have begun to support stricter asylum policies and limited the access to permanent protection in the country. This has been done by addressing the discussion of cost and benefits of migration from the perspective of the national community, resulting in policies as regards territorial access to asylum that are close to those of right-wing parties such as the Danish People Party, and a national consensus on the topic of migration. Thus, a broad majority in the Danish parliament supports restrictive migration and asylum policies and strict rules for access and settlement of persons originating from outside the EU/EEAS.[12] The general focus shifted from integration to return, from permanent residence to revocation of protection: the 'paradigm shift'.[13]

A clear manifestation of this paradigm shift is that since 2015 a set of restrictive legislative and policy changes was passed by the Danish parliament.[14] A new temporary subsidiary protection ground was introduced in the Aliens Acts (section 7(3)) applicable to situations of generalized violence, whereby the right to family reunification is withheld for initially the first three (and currently two) years of residence.[15] This protection ground is mostly used for Syrians as they are the largest group to receive temporary subsidiary protection. Also, the threshold for revocation of asylum protection other than Convention refugee status was lowered: a durable improvement of the security and human rights situation in the country of origin is no longer necessary.[16] This strong focus on the revocation of asylum residence permits is rather unique in comparison to other EU Member States, as the criteria for cessation in EU acquis require a high(er) standard.[17] Other changes to the Danish asylum legislation dealt with the confiscation of

12 Nikola Nedeljkovic Gøttsche, "Folketingets partier er stort set enige om Danmarks udlændingepolitik," *Information*, 14 July 2018.

13 L 140, amendments to the Danish Aliens Act. See also Emil Søndergård Ingvorsen, "'Paradigmeskiftet' vedtaget i Folketinget: Her er stramningerne på udlændingeområdet," *DR Politik*, 21 February 2019.

14 L 87, amendments to the Danish Aliens Act.

15 The original legislation spoke about three years 'waiting time' for family reunification, except for exceptional circumstances. However, in M.A. v. Denmark (9 July 2021) the European Court on Human Rights (ECtHR) stated that this provision did not entail a reasonable balance of interests and was therefore in violation of article 8 of the Convention. The duration was then changed to two years.

16 See more extensively on these matter under 'national asylum procedure'.

17 Nikolas Feith Tan, "The End of Protection the Danish paradigm shift and the law of cessation," *Nordic Journal of International Law*, 90, 2021, p. 60-85.

assets from asylum seekers (the widely commented so-called 'jewelry-law'),[18] introduction of short-term residence permits, mandatory review of protection needs, further restrictions on family reunification, reduced socials benefits for refugees and restrictive criteria for permanent residency. This set of legislative and policy changes called for quite some criticism from refugee law experts and UNHCR.[19]

While lowering protection standards and limiting the territorial protection space, Denmark put much effort in the external dimension of asylum and migration policies. Both through migration cooperation with third countries, as for example the MoU with Rwanda, as well as a focus on exploring the possibilities of outsourcing and/or externalizing asylum procedures to countries outside the EU. This complies with a long tradition of Danish policy thinking. Already in 1986 Denmark put forward in a UN setting the idea of externalizing asylum procedures. The Danish government was one of the EU Member States supporting the 2003 United Kingdom proposal to amend EU asylum policy, stating that persons seeking asylum in EU Member States should be automatically sent to a transit and processing center outside the EU, where their applications would then be assessed.[20] And again Denmark together with the UK and the Netherlands were frontrunner EU Member States in promoting and pushing forward initiatives to strengthen refugee protection in the region such as multilateral initiatives like the *Syria Refugee Response and Resilience Plan* (3RP) and the *Ethiopia Country Refugee Response Plan* (ECRRP). Denmark is also one of the driving actors behind the concept of EU Regional Protection Programmes,[21] and had a leading role in the programme in Jordan, Lebanon and Iraq (RDPPII 2018-2021).

18 The Danish Parliament, "L 87 Forslag til lov om ændring af udlændingeloven," 10 December 2015; See also Harriet Agerholm, "Denmark uses controversial 'jewellery law' to seize assets from refugees for first time," *The Independent*, 1 July 2016; *The Local*, "Here's how Denmark's famed 'jewellery law' works," 5 February 2016; Ulla Iben Jensen and Jens Vedsted-Hansen, "The Danish 'Jewellery Law': When the signal hits the fan?", *EU Immigration and Asylum Law and Policy*, 4 March 2016.

19 UNHCR Northern Europe, "Recommendations to Denmark on strengthening refugee protection," 11 January 2021; UNHCR Nordic and Baltic States, "Observations from UNHCR on the Danish law proposal on externalization," March 2021.

20 UK Home Office, "New International Approaches to Asylum Processing and Protection," March 2003.

21 Thea Hilhorst et al., "Factsheet Opvang in de regio: een vergelijkende studie," 18 January 2021; ECRE, "EU External Cooperation and Global Responsibility Sharing: Towards an EU Agenda for Refugee Protection", February 2017.

Denmark also has one of the oldest refugee resettlement schemes in cooperation with UNHCR in Europe.[22] This fits the Danish profile of a humanitarian actor, with a focus on foreign relations and development cooperation, seeking multilateral approaches to tackle asylum and migration issues.[23] Also NGO's such as the Danish Refugee Council have large scale humanitarian programmes in regions of origin and transit.[24]

Asylum and migration nexus: economic context

Most immigrants to Denmark are however not asylum seekers, but come from other European countries, reaching almost 75,000 people in 2021.[25] Furthermore, approximately 12,000 migrant workers and around 9,000 foreign students received residence permits that year. With some of 2000 asylum applications in 2021, this constitutes the smallest group of immigrants to Denmark.[26]

In recent years, due to an ageing population, Denmark has been experiencing labour shortages, specifically skilled work, with 42% of Danish companies reporting that they face challenges filling positions in the first quarter of 2022.[27] With the Danish unemployment rate being quite low, 2.5% in August 2023,[28] Denmark has to look elsewhere to fill in the labour shortages. In March 2023, amendments to the current Danish Aliens Act were adopted to strengthen

22 The numbers of refugees which are indeed resettled in practice are significantly decreasing, and the resettlement status itself is no longer permanent. See under 'Extraterritorial asylum: legal pathways'.

23 UNHCR, "Denmark." See also the 2022 governmental agreement with references to the multilateral approaches om migration (p. 39-40).

24 The Danish Refugee Council (DRC) is an NGO which also has specific designated tasks in the Danish asylum procedure, for example on legal assistance and the manifestly unfounded cases (see further under national asylum procedures). DRC Asylum also takes part in resettlement missions and sometimes fact-finding missions. DRC Asylum's role in the Danish procedure is not linked to the international work of DRC. See website Danish Refugee Council.

25 Einar H. H. Dyvik, "Number of residence permits granted in Denmark in 2022, by reason," Statista, 8 June 2023.

26 Einar H. H. Dyvik, "Number of residence permits granted in Denmark in 2022, by reason," Statista, 8 June 2023.

27 European Commission, "Labour Market information: Denmark," 17 January 2023.

28 Trading Economics, "Denmark Net Unemployment Rate."

international recruitment of talented third-country nationals.[29] One of the changes allows companies to apply to the certification of the Fast track scheme, through which foreign skilled workers can be brought to Denmark through quicker procedures.[30] In a push to support the unionization of staff, these companies must be covered by a union association agreement. The extension of the acceptance 'positive list' for skilled work and those with higher education is another amendment, which specifically lists professions experiencing a shortage of qualified labour.[31] Lastly, a supplementary pay limit scheme was created, which requires a labour migrant to have a job offer with a minimum annual salary of DKK 375,000 (equivalent to approx. 50,200 EUR).[32]

Last year, an increase of the employment rate of non-Western immigrants was measured until 55.8%, an all-time high for Denmark.[33] While the importance of access to the labour market and gaining employment have been recognized as key elements of integration, the recent 'paradigm shift' has shifted Denmark's focus away from integration measures.[34] Currently, the asylum systems and labour migration framework are distinct domains in legislation, separated between 'asylum' and 'work'. The law states that an asylum seeker who has a pending case with immigration services and is residing in the country for at least 6 months, can apply to the DIS for approval to work for a year in the meantime.[35] This excludes asylum seekers in the Dublin procedure.[36] A contract

29 See for example on nurses from Iran: Rasmus Dyrberg Hansen, Jonas Guldberg, and Annette Jespersen, "Vejle Kommune hyrer sygeplejersker fra Iran, mens de søger godkendelse til job i Danmark," *DR*, 15 September 2023.

30 Shkurta Januzi, "Denmark Amends Its Aliens Act in a Bid to Lure More Foreign Workers & Students," *Schengen Visa*, 28 March 2023.

31 The Danish Immigration Service, "The Positive Lists."

32 See amongst others: Mads Hørkilde, "S-minister siger nej til at åbne for »ladeporte« for udenlandsk arbejdskraft," *Politiken*, 17 September 2023; *Jyllands-Posten*, "Minister afviser at lempe regler for international rekruttering," 18 September 2023; *DR*, "Løkke: Virksomheder med overenskomst skal kunne få alle de udlændinge, de vil | Politik," 29 August 2023; *Dansk Erhverv*, "Dansk Erhverv: Vi skal have et paradigmeskifte for udenlandsk arbejdskraft," 5 September 2023; *Berlingske*, "Løkke & co. med usædvanligt forslag: Vil uddanne og hente sygeplejersker og sosu'er fra Filippinerne," 6 July 2023.

33 European Commission, "Denmark: Employment level of migrants and refugees reaches record high," 7 January 2022.

34 Refugees Denmark, "Refugees are absolutely necessary for the Danish labour market," 3 November 2019.

35 The Danish Immigration Service, "Conditions for Asylum Seekers."

36 Interview with DRC d.d. 2 November 2023.

must be entered with the DIS which lays out certain conditions which must be met. However, in practice, most asylum seekers do not work due to the difficulty in obtaining work (and thus subsequent authorization) while they are placed in one of the accommodation centers. Different rules apply however for displaced Ukrainians, who are allowed to work directly under the national temporary protection scheme.[37]

37 More about rights for Ukrainians can be found here: DRC, "Ukraine: FAQ."

2 International legal framework

Convention obligations[38]

Denmark has ratified the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol, as well as the other relevant UN human rights treaties such as Convention against Torture (CAT), International Convention on Civil and Political Rights (ICCPR) and Convention on the Rights of the Children (CRC). Denmark is also party to the European Convention of Human Rights (ECHR) and is bound by the European Fundamental Rights Charter (article 18 and 19) as source of primary EU law. The legal protection obligations deriving from these treaties, with non-refoulement as a cornerstone principle, are implemented in the national legislation, more in particular, article 7 of the Danish Aliens Act. The 'convention status' or 'K-status' (art. 7(1)) refers directly to the UN Refugee Convention. Subsidiary protection (B-status or de facto-status) is granted if a person risks treatment in violation of article 3 ECHR upon return to the country of origin, including individuals who run a real risk because of mere membership of a group.[39] The third protection ground derives from European Court of Human Rights (ECtHR) jurisprudence which is subsequently integrated in Union law, and deals with general temporary protection status for reasons of indiscriminate violence and attacks on civilians in the country of origin (non-individualized violence).[40]

In general terms, the scope of the protection against refoulement in the ECHR, as interpreted by the ECtHR, is broader than under the Geneva Convention.[41] Any return of an individual who would face a real risk of being subjected to treatment contrary to these articles is prohibited. Moreover, protection against the treatment prohibited by Art. 3 ECHR has been considered more absolute

38 This paragraph equals for a large (generic) part the paragraph on convention obligations in the Dutch country report, as this part of the legal framework applies to both countries.

39 ECtHR, Salah Sheekh v. The Netherlands, 1948/04, 11 January 2007.

40 ECtHR, NA v UK, No. 25904/07, 17 July 2008.

41 Vladimir Simoňák and Harald Christian Scheu, *Back to Geneva. Reinterpreting Asylum in the EU.* Wilfried Martens Centre for European Studies, October 2021, p. 20.

in several Court rulings.[42] To prevent refoulement, it is not per se required to admit a person to the territory of a state, if sending him or her back does not lead to a situation where the person would be persecuted or runs a real risk of torture, inhumane or degrading treatment.[43] However, without assessing the individual case, it would be rather difficult to know whether someone has an arguable claim of a real risk of refoulement. So, ensuring effective access to an asylum procedure is a precondition to ensure the principle of non-refoulement.[44] In addition, article 4 of Protocol No. 4 to the ECHR prohibits collective expulsion. This prohibition also requires that there is a reasonable and objective examination of the specific case of each individual asylum seeker.[45]

If a country has jurisdiction, there is an obligation to respect and guarantee the human rights enshrined in the applicable international legislation. If Denmark, as State-party to the ECHR, violates those obligations,[46] the state can be held accountable for an 'internationally wrongful act' by the ones whose rights have been violated.[47] In the context of the ECHR jurisdiction this is not only territorial,[48] but also applied extra-territorially if there is effective (territorial, personal or

42 Chahal v. United Kingdom, ECtHR judgment of 15 November 1996, paras. 76 and 79, referring to Soering v. United Kingdom, ECtHR judgment of 7 July 1989, para. 88, Ahmed v. Austria, ECtHR judgment of 17 December 1996, Ramzy v. Netherlands, ECtHR judgment of 27 May 2007, para. 100, Saadi v. Italy, ECtHR judgment of 28 February 2008, para. 137. See Jens Vedsted-Hansen: European non-refoulement revisited, in: Scandinavian Studies in Law, 1999-2015, 272.

43 Daniel Thym, "Muddy Waters: A guide to the legal questions surrounding 'pushbacks' at the external borders at sea and at land," *EU Migration Law Blog*, 6 July 2021.

44 See on this subject matter also Monika Sie Dhian Ho and Myrthe Wijnkoop, "Instrumentalization of Migration," Clingendael Institute, December 2022.

45 ECtHR, Hirsi Jamaa v. Italy, no. 27765/09, 23 February 2012. See also the Rule 39 measures issued by the ECtHR in August and September 2021 in order to stop the expedited (collective) expulsions of Iraqi's and Afghans stuck at the Latvian, Lithuanian and Polish borders (ECtHR Press Releases of 21 August 2021 and 8 September 2021).

46 ECtHR, M.A. v. France, No. 9373/15, 1 February 2018; ECtHR, Salah Sheekh v. the Netherlands, No. 194/04, 11 January 2007, para. 135; ECtHR, Soering v. the United Kingdom, No. 14038/88, 7 July 1989; ECtHR, Vilvarajah and Others v. the United Kingdom, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991. See European Union Agency for Fundamental Rights, "Fundamental rights of refugees, asylum applicants and migrants at the European borders," March 2020, p. 6.

47 International Law Commission, "Draft Articles on State Responsibility, Official Records of the General Assembly," Fifth-sixth Session (A/56/10), article 2.

48 EHRM, Soering. v. United Kingdom. No 14/038/88, 7 July 1989 EHRM, Bankovic a.o. v. Belgium a.o., No. 52207/99, 21 December 2001; Hoge Raad, IS women v. the Government of the Netherlands, 26 June 2020, ECLI:NL:HR:20201148, paras. 4.16-4.18.

functional) control over another territory or over individuals who have carried out the act or omission on that territory.[49] For example in the *Hirsi v. Italy* case, the ECtHR found that a group of migrants who left Libya with the aim of reaching the Italian coast, and that were intercepted by ships from the Italian Revenue Police and the Coastguard and returned to Libya, were within the jurisdiction of Italy. According to the ECtHR a vessel sailing on the high seas is subject to the 'exclusive jurisdiction of the state of the flag it is flying'.[50]

This means that Denmark cannot exempt itself from its human rights obligations, including non-refoulement and access to asylum, by declaring border areas as non-territory or transit zones or to externalize asylum procedure to other countries: the determining factor remains whether or not there is jurisdiction, either/and through de jure or de facto control by the authorities.[51] This does however not mean that access to asylum can only be provided for on Danish territory. The 1951 Refugee Convention states that refugees must be protected, but does not in itself prohibit states negotiating cooperation agreements on where that protection is guaranteed, as long as the preconditions fulfill the legal state obligations. Furthermore, the ECtHR has in 2020 drawn a line with regards to gaining territorial access to the European Union. In its judgment in the case of *N.D. and N.T. v. Spain* it concluded that Spain did not breach the ECHR in returning migrants to Morocco who had attempted to cross the fences of the Melilla enclave. The Court reasoned that because the group had not made use of the entry procedures available at the official border posts, the lack of an individualized procedure for their removal had been a consequence of their own conduct (i.a. the use of force and being in large numbers).[52] In other words, the line of argumentation in this case does require states to deploy effective legal options and means for access to protection for third country nationals, however it also takes into account the actions of the applicants to that effect.

Denmark, when becoming signatory to the ECHR, also adhered to the interpretation of those human rights through the jurisprudence of the ECtHR. In the case M.D. and others on Syrian asylum seekers, who were denied asylum

49 See also February 2022. See also Maarten den Heijer, *Europe and Extraterritorial Asylum*, 2012; Lisa-Marie Klomp, *Border Deaths at Sea under the Right to Life in the European Convention on Human Rights*, 2020; Annick Pijnenburg, *At the Frontiers of State Responsibility. Socio-economic Rights and Cooperation on Migration*, May 2021.

50 ECtHR, Hirsi Jamaa and Others v. Italy, No. 27765/09.

51 See also Sergio Carrera, "Walling off Responsibility," *CEPS*, nr. 2021(18), November 2021, p. 12.

52 ECtHR, N.D. and N.T. v. Spain, Nos. 8675/15 and 8697/15, 13 February 2020.

in Russia, the ECtHR found that it would be a violation of ECHR Art. 2 and Art. 3 if Russian authorities returned the asylum seekers to Syria.[53] The Danish Refugee Appeals Board (RAB) has considered the judgment but did not find that there was a need to change the current practice regarding Syrian cases: according to the RAB the case dealt with specific individualized aspects of the claim rather than the general exceptional nature of the conflict and had therefore no wider impact than that particular case.[54]

EU law: asylum and migration opt-out

Where Denmark is a party to the international and regional human rights framework and thus bound by the legal obligations enshrined in the conventions, Denmark has opted out of the common European asylum and immigration policies (Title V of Part III of the Treaty on the Functioning of the European Union) and is therefore not bound by measures adopted pursuant to those policies.[55]

The Danish opt-out with respect to asylum is related to the outcome of a referendum on the Maastricht Treaty in 1992.[56] In this referendum, a majority of 50.7% of the Danish voters (with a turnout of 83.1%) rejected the Maastricht Treaty. The solution for the ratification procedure was found through the introduction of four Danish opt-outs, including no participation in majority voting in Justice and Home Affairs.[57] This meant that Denmark did not participate in the harmonization of EU asylum policies. In December 2015, Denmark held a referendum specifically on the opt-out concerning Justice and Home Affairs. The vote was to determine if Denmark would maintain the exemptions in the original opt-out or replace it with an opt-in model. Denmark voted not to modify the original opt-out.[58]

53 ECtHR, M.D. and others v. Russia, Nos. 71321/17 and 9 others, 14 September 2021.

54 Flygtningenaevnet (RAB), "Drøftelser vedrørende Syrien-praksis på møde i Flygtningenævnets koordinationsudvalg den 28. oktober 2021." 29 October 2021.

55 Articles 1 and 2 of the Protocol (No. 22) on the position of Denmark, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. See in this respect also the ECtHR in MA v. Denmark, 9 July 2021, Application number 6697/18.

56 Aarhus University, "An overview of Denmark and its integration with Europe."

57 These four opt-outs were agreed in December 1992 in the Edinburgh Agreement and confirmed in a Danish referendum in 1993 which allowed the ratification procedure to proceed. The other three opt-out were: no participation in the euro; no participation in EU defence; and no participation in European citizenship.

58 Danish Parliament EU Information Centre, "The Danish opt-outs from EU cooperation," accessed on 12 October 2023.

This means that Denmark is still not part of the Common European Asylum System (CEAS) and not directly bound by EU legislation on asylum, in particular the Qualification Directive (2011/95/EU), the Procedures Directive 2013/32/EU), the Reception Directive (2013/33/EU) and the Temporary Protection Directive (2001/55/EC).[59] The Return Directive however does apply in Denmark due to the Schengen cooperation. And Denmark decided to join the Dublin system, which contains criteria for the responsibility of a country for an asylum application, via a parallel agreement concluded with the EU in 2006.[60] In practice, the Danish participation in the Dublin system means that Denmark must observe this system's fundamental principle of *mutual trust*.[61] Denmark's asylum practices must offer at least similar procedural and reception standards to asylum seekers transferred to Denmark under the Dublin II regulation.[62]

Despite this approximation of asylum standards, the asylum systems of EU Member States on the one hand and the Danish standards on the other can differ, not only in theory (because of the opt-out) but also in practice. The impact thereof became clear in the 2022 Dutch Council of State's judgment on the legality of Dublin transfers of Syrians to Denmark. They would risk losing their asylum status in Denmark due to ceased circumstances, while the Netherlands under article 15b and 15c of the Qualification Directive had not deemed parts

59 Denmark did for example not apply the Temporary Protection Directive for Ukrainian displaced persons, but rather enacted a 'special law' in the aftermath of the Russian invasion of Ukraine. The law was intended to prepare for and accommodate a high number of asylum-seekers arriving in Denmark within a short time span. It eased the admissibility for asylum claims for Ukrainians and allowed for an expedited process to seeking and gaining employment within Denmark. The distribution of asylum-seekers was based around placement in areas where the asylum-seekers had a pre-existing network, or in areas that have higher job opportunities. It also contained measures to help Ukrainian children integrate into the Danish schooling system, while also containing provisions to ensure that they could continue to learn Ukrainian.

60 This agreement extends to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, and Council Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. See Council of the European Union, "Council Decision 2006/188/EC," 21 February 2006.

61 See also EUAA, "Background note Dublin II Appeals and Mutual Trust, Challenges related to mutual trust concerns raised in appeals within the Dublin III procedure," 5 April 2023.

62 This is evidenced by a factsheet filled out by the Danish Ministry of Immigration and Integration, which makes clear that Denmark offers similar procedural guarantees and reception to asylum seekers who are transferred under the Dublin system.

of Syria safe and grants subsidiary protection to Syrians. The Dutch Council of State held that the Syrian applicant had given sufficient evidence that a transfer to Denmark would expose him to a real risk of indirect refoulement to Syria.[63] A year later, in a judgment of September 6, 2023 the Dutch Council of State held that as the national (Dutch) policies to Syria had changed to a more individual assessment, the applicant could no longer demonstrate an evidently and fundamentally different level of protection between the Netherlands and Denmark, and thus there no longer was a risk of indirect refoulement.[64]

The above example shows that despite the Danish opt-outs on asylum, Denmark is still tied to the standards in other EU countries because of its participation in the Dublin system and its concept of "mutual trust". These standards must generally be in compliance with EU asylum legislation and the interpretation of this by the EU Court of Justice. Indeed, the Dutch Council of State in its judgment of 6 July 2022 referred to the Court of Justice judgment in the Jawo case[65] as well as judgments of the ECtHR with respect to responsibility allocation agreements. It concluded that EU law requires courts to scrutinize the level of protection in general and with respect to specific groups.

EU standards can also bind Denmark in another manner. In *MA v. Denmark* the ECtHR, while acknowledging Denmark's opt-out regarding EU immigration legislation, referred to the EU family Reunification Directive. In this case, the EU's legislative framework left a margin of appreciation to Member States. However, the fact that the ECtHR referred to EU standards is an indication that the ECHR, to which Denmark is a party, and EU law are increasingly intertwined. The ECtHR held: '*At the same time the Court notes that while Denmark was not bound by the common European asylum and immigration policies set out in the Treaty on the Functioning of the European Union, or by any measures adopted pursuant to those policies (see paragraph 42 above) it is clear that within the European Union an extensive margin of discretion was left to the Member States when it came to granting family reunification for persons under subsidiary protection and introducing waiting periods for family reunification.*[66]

63 ABRvS, ECLI:NL:RVS:2022:3797, 19 December, 2022; ABRvS, ECLI:NL:RVS:2022:1864, 6 July 2022.

64 ABRvS, ECLI:NL:RVS:2023:3286, 6 september 2023. See also the press release of the Council of State: "Nederland mag Syrische vreemdelingen weer overdragen aan Denemarken."

65 EU CoJ, Jawo v. Germany, C163/17, 9 March 2019, paras 87-93.

66 ECtHR, M.A. v. Denmark, No. 6697/18, 9 July 2021, para. 155.

3 Border management in policy and practice

Despite having government coalitions with different political backgrounds during the past decades, preserving Denmark's national identity plays a consistent central role in its migration policy, explaining its strict visa policy and integration regulations. The arrival and admittance of substantial numbers of immigrants is seen as a threat to (or destabilization of) the national welfare system and should thus be prevented.[67] This is why border controls are encouraged and are an important part of the asylum and migration system.

Schengen and border controls

Since 2001, Denmark has been part of the Schengen agreement, leading to a division between internal Schengen borders, neighbouring Schengen members Germany and Sweden, and external Schengen borders, which are the sea and air borders.[68] Denmark does not have any external Schengen land borders. The Danish police is the responsible actor in managing the borders.

With the aim of improving its border management systems of the Schengen borders, the Danish police started a collaboration with IDEMIA, a multinational technology company in November 2021. Specific solutions such as self-service kiosks, automatic border control (e-Gates), and mobile biometric tablets were implemented.[69]

Denmark has introduced temporary border controls at internal Schengen borders valid until 11th November 2023. Such temporary internal Schengen border controls are valid under the Schengen Borders Code in case of a serious threat, and only to be applied as a last measure.[70] There are currently twelve other EU-Member

67 Fondation pour l'Innovation Politique (fondapol), *Danish immigration policy: a consensual closing of borders*, February 2023.

68 Danish Police, "Border control," accessed on 17 October 2023.

69 Shkurta Januzi, "Denmark selects IDEMIA to deliver new border control solution for its external schengen borders," *SchengenVisa*, 28 November 2021.

70 Migration and Home Affairs, "Temporary Reintroduction of Border Control."; Danish Police, "Border control."

States that have enacted this exception for various reasons. In the case of Denmark, the reasons for the recently renewed directive for heightened security are 'Islamist terrorist threat, organized crime, smuggling, Russian invasion of Ukraine, and irregular migration along the Central Mediterranean route.'[71] It more specifically had to do with the Koran burnings in July 2023. The Danish ministry of Justice stated that the threat necessitated extra controls regarding who enters the country. Even those flying into the country from another Schengen country can expect extra controls.[72]

Furthermore, Denmark currently has an active border control presence at its southern border with Germany as a temporary measure. This measure has been extended multiple times since its introduction in January 2016. Similarly, Denmark introduced internal border controls at the Swedish border in November 2019 for the reason of organised crime and terrorism- executed by regular road, rail, and ferry checks. The country is currently under revision by the European Commission for the legality of such controls, due to the requirement of exceptionality for the measures.[73]

Emergency brake measure or 'Nødbremse'

Moreover, an 'emergency brake' measure was introduced in the budget legislation of 2017[74] which grants the Minister for Integration the power to reject asylum-seekers arriving at Danish borders, who have previously transited through another Dublin-country and thus effectively close the border.[75] Precondition for the activation thereof is a crisis situation where the Dublin regulation is still formally in place, but where the Danish government perceives

71 Ibid.

72 Johannes Birkebaek, "Denmark tightens border control after Koran burnings," *Reuters*, 4 August 2023; Crisis 24, "Denmark: Government extends stricter controls at border checks," 5 September 2023.

73 Bleona Restelica, "Denmark Being Investigated for Systematically Prolonging Border Controls Since 2016," *Schengenvisa*, 17 August 2023.

74 Danish Ministry of Finance, "Finanslov for finansåret 2017," 2017.

75 "*The Foreigner and Integration Minister can in Special Circumstances decide that Foreigners, that claim to fall under section 7 of the Aliens Act can be rejected entry due to prior travel from a country that is included in the Dublin agreement. The decision in taken for a period of up to 4 weeks, and can be extended for a period of up to 4 weeks at a time*'. Danske Love, "Udlændingeloven," § 28, stk. 7.

that the agreement has ceased to be enforced in practice and that it thus cannot reasonably be expected to adhere to the Dublin procedures.[76]

This would in practice result in a total ban on territorial asylum: to prevent asylum seekers that arrive at the Danish-German border, which is the main border crossing for asylum seekers, to access Danish territory. This legislation is highly controversial within Denmark, as it could also have severe impact on cross-border relations with neighboring countries.[77] Currently no policy or operational plan exists that outlines exact steps that the Ministry should take in order to physically reject asylum seekers crossing the border.[78] At this point it remains a dead letter.

Detention

The general grounds for immigration-related detention are outlined in Article 35 and 36 in the Danish Aliens Act. Specifically regarding asylum seekers, article 36 lays out that "non-citizens may be detained if non-custodial measures are deemed insufficient to ensure the enforcement of a refusal of entry, expulsion, transfer, or retransfer of a non-citizen."[79] Further provisions with respect to detention with the view of the possibility to expel rejected asylum seekers can be found in the Danish Return Act (section 14(2)).[80] This framework is being used for several groups: refugees who have had protection, while their case is being reassessed for exclusion-grounds; foreign nationals with other grounds of

76 The explanatory memorandum on this legislation highlights that such a situation would appear if several countries had in tandem begun to cease enforcing the Dublin rules, but does not specify the minimum bar for the number of countries that would have to stop enforcing the Dublin agreement in order to allow the Minister to take this measure. Udlændinge- og integrationsministeren (Inger Støjberg), the Danish Parliament, "Forslag til Lov om ændring af udlændingeloven," 15 March 2017.

77 Erik Holstein, "Mette Frederiksen har fået europæisk skyts til sin udlændingepolitik - Altinget - Alt om politik: altinget.dk," *Altinget*, 9 May 2023. It could mean that Denmark can no longer return asylum-seekers that have travelled through other Dublin countries, or who have been apprehended while traveling into Denmark. This is indeed mentioned in the explanatory memorandum but is considered a logical consequence of the fact that the emergency measure would only be introduced if the agreement in itself has ceased to function. See also Louise Halleskov, "Kort om "asylnødbremsen", *Rule of Law*, 2 March 2020.

78 Anders Sønderup "*Hvordan trækker man nødbremsen, og laver en grænse de uønskede ikke kan krydse? | Nordjyske.dk*," *Nordjyske*, 4 March 2020.

79 Global Detention Project, *Country Report: Immigration Detention in Denmark: Where officials cheer the deprivation of liberty of 'rejected asylum seekers*, May 2018, p. 7.

80 Ministry of Immigration and Integration, Return Act (in Danish), "Bekendtgørelse af lov om hjemrejse for udlændinge uden lovligt ophold."

residence, who apply for asylum after an expulsion; and for asylum seekers, who are criminally convicted and expelled before or while their asylum case is being processed. This also includes those who try to travel to or through Denmark using false documents, and who are not deemed to be covered by the protection in the Refugee Convention art. 31(1).

Time served due to convictions takes place in many different detentions and prison facilities. Asylum-seekers detained under the Aliens Act are placed at the Ellebaek Immigration Centre or at Nykøbing Falster Holding Center. In order to comply with the EU Returns Directive, Denmark introduced a time limit on immigration detention of initially maximum six months. In case of refusal of cooperation of the detainee, the court can extend this for another 12 months.[81] In 2018, the average stay lasted 32 days.[82] In Denmark the limitations to detention under Dublin also apply to Dublin cases. Once in detention, the detainee receives free legal aid.[83] DIS's yearly statistical overview does not include numbers regarding immigration-related detention.[84] The Danish Prison and Probation Service however does provide these numbers, stating that in 2021 787 detained asylum seekers were imprisoned, of which 90% were men.[85]

After a visit to Denmark in 2019, the European Committee for the Prevention of Torture (CPT) called the Danish migration detention center Ellebaek out for being "among the worst of its kind in Europe."[86] The CPT was critically concerned about the fact that migrants in detention centers were subject to prison-like (material) conditions and were bound to prison rules. Degrading treatment and incidents

81 This is in line with article 15 of the EU Return Directive.

82 Council of Europe, *Report to the Danish Government on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, 7 January 2020, p. 53.

83 Interview DRC d.d. 2 November 2023: DRC offers free legal aid and counselling, but detainees are also provided with legal representation in the form of a lawyer that can represent them in court. The possibility for detained asylum seekers to talk with DRC while in detention is regulated by the section 37 d of the Danish Aliens Act.

84 Global Detention Project, *Country Report: Immigration Detention in Denmark*, May 2018, p. 13.

85 Kriminal Forsorgen, "Kriminalforsorgen statistik 2021," 2021, p. 16

86 European Council on Refugees and Exile, "Denmark: Council of Europe shocked over conditions on Danish Detention Centers and Threatens Legal Action," 16 January 2020.

of verbal abuse by the custodial staff was furthermore highlighted.[87] The Danish Government responded that it planned some material renovation projects to its detention centers, and that it continuously strives to uphold the liberty and rights of foreign nationals in detention.[88] After having visited Denmark in June 2023, the Commissioner for Human Rights of the Council of Europe concluded that while some material conditions had been improved at Ellebaek, prison-like manner of operations was still of grave concern, including the use of disciplinary solidarity confinement.[89]

Covid-19 caseload

Between March and July 2020, Dublin transfers of asylum seekers were suspended. Due to closed borders, a historically low number of asylum seekers entered Denmark (1515). Any cases that did occur were carried out online.[90]

87 Council of Europe, *Report to the Danish Government on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, 7 January 2020, p. 53-54.

88 Council of Europe, *Response of the Danish Government to paragraph 117 of the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Denmark from 3 to 12 April 2019*, 3 March 2020.

89 Dunja Mijatovic, *Report following her visit to Denmark from 30 May to 2 June 2023, Commissioner for Human Rights of the Council of Europe*, Council of Europe, 25 October 2023.

90 European Commission, "Denmark: How has COVID-19 affected migrants?," 20 November 2020.

4 Access and national asylum procedures

The Danish Asylum Procedure

Most asylum seekers arrive in Denmark without prior consent to enter the territory, due to the difficulty of obtaining visa for humanitarian purposes.[91] In 2002 Denmark abandoned the policy option of asylum on diplomatic posts.[92] Any foreign national who is in[93] or has entered Denmark, whether illegally or with a visa, can apply for asylum. As stated in the paragraph on the applicable international legal framework, the grounds for asylum are based on Denmark's international legal obligations.[94]

Once in Denmark, a person who wants to apply for asylum has to register with the (border)police or at Reception and Application Centre Sandholm in Allerød. The practical and humanitarian work of the reception centre falls under the Danish Red Cross, while the Danish police, the Danish Immigration Service, and

91 Danish visa rules are based on nationalities. Countries whose citizens must hold visas in order to enter Denmark are divided into five main groups. Different guideline requirements for obtaining a visa apply to each group and the groups are based on the overall risk of a citizen remaining within the Schengen countries after the individual's visa expires. See The Danish Immigration Service; See also Michala Clante Bendixen "Hvor mange kommer, og hvorfra?," Refugees DK, 29 Septermber 2023.

92 See in this respect Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, *Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure*, Danish Institute for Human Rights and European Commission, 2020.

93 This means that people already with a Danish residence permit, often based on family reunification, can also apply for asylum, The Danish Immigration Service, "Adult Asylum Seeker – Who can apply for asylum?".

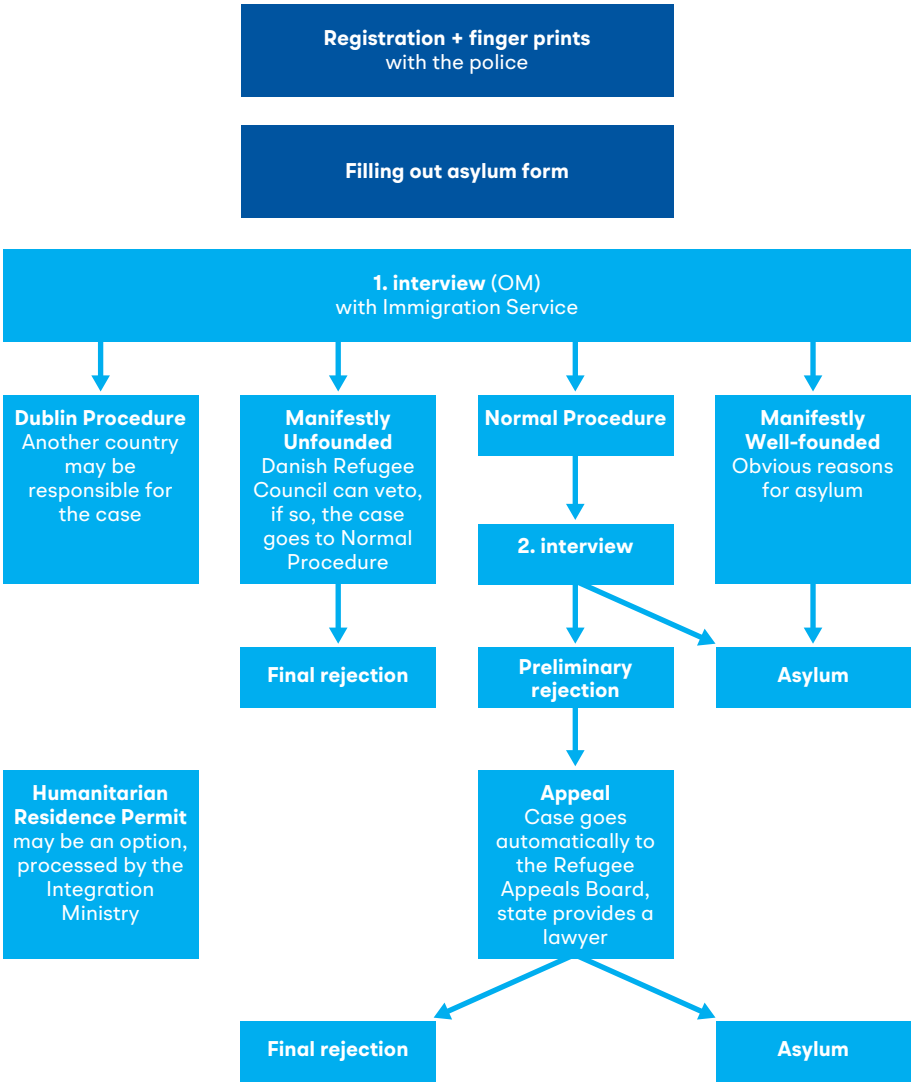
94 Danish immigration authorities can grant a temporary residence permit as a refugee in line with three provisions of Article 7 of the Danish Aliens Act: 7.1) Convention status or K-status: meeting the UN Refugee Convention's definition of refugees, linked to fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion. 7.2) subsidiary protection status or B-status: due to risk of torture or inhumane treatment in the country of origin, or 3) temporary protection status: the situation at the country of origin is characterized by indiscriminate violence and attacks on civilians. See also Danish Refugee Council, "Getting Asylum in Denmark."

the Danish Refugee Appeals board are in charge of the case management.[95] The initial phase of the procedure starts with registration of the asylum seeker after which they will be issued a specific card which serves as a personal ID. Usually they will after a couple of days be provided with accommodation in an asylum reception center, determined by the DIS. Subsequently asylum seekers are summoned by the DIS to fill out a written asylum form on the person's name, country of birth, residence, family, reasons for fleeing, fear of return, countries travelled through etc, which can be done in any language. As soon as possible, this is followed by the first personal interview, so-called "OM-samtale", with the DIS and an interpreter at Sandholm, to establish the travel route and to determine the motivation for seeking asylum.

On the basis of the written application and the interview, and a search in the common European fingerprint register, the DIS will determine whether the application should be processed in Denmark or another country according to the Dublin rules: this is solely an admissibility procedure without an examination of the merits of the case (section 29a Aliens Act) .[96] The Dublin procedure is laid down in section 29a of the Aliens Act. If the asylum seeker has been granted international protection in another Member State in the European Union, the DIS can decide to reject the processing of the application in accordance with the Danish Aliens Act section 29b. A decision to reject the processing of an asylum application can be appealed to the Refugee Appeals Board. The appeal does not have automatic suspensive effect, except for Dublin cases.[97]
In 2022, a transfer decision to another Dublin agreement country was made in 472 asylum cases.[98]

95 Danish Red Cross, "What we do in the asylum department."
96 The Danish Immigration Service, *Tal og fakta på udlændingeområdet 2021*, 2021, p. 9.
97 EDAL, "Country Profile-Denmark," 1 February 2018. See also for overviews of the Danish asylum procedure: DRC, "The Danish Asylum System," and DRC, "Overview of the Danish asylum procedure," January 2020.
98 The Danish Immigration Service, "Tal og fakta på udlændingeområdet 2022," 2022, p. 9, Table A.2.

Asylum Procedure



Source: Refugees DK

If the DIS has established that the application is admissible and will be processed in Denmark, the case can be decided to fall within the manifestly unfounded procedure (ÅG), expedited manifestly unfounded (ÅGH), or manifestly founded

procedure.[99] The latter is a faster procedure deemed for asylum applications with a high eligibility rate, most often categorized on the basis of the country of origin (such as the Syrians in 2015, before the policy change). These cases are often processed within a few months. If the application is considered well-founded, a residence permit with the according status is granted and a municipality will be assigned as the responsible actor for the integration process of the refugee/asylum permitholder.

In the 'manifestly unfounded procedure', applications are processed that are likely to be rejected. This would be the case if an asylum seeker has no valid grounds for seeking asylum, or if the applicant's grounds for seeking asylum do not warrant protection (article 53 Aliens act). If the application is likely to be rejected in the 'manifestly unfounded procedure', the case will first be put to the Danish Refugee Council (DRC).[100] The DRC has the opportunity to veto the DIS's rejection following an interview with the applicant.[101] In 2022, the DRC did not agree with the DIS's decision of manifestly unfounded cases in about 11% of the cases.[102] If that is the case the asylum seekers person receives the normal right to appeal to the RAB. If the DRC agrees with the DIS, the rejection is final without the possibility of appeal.[103]

The expedited version of this procedure is based on a list of certain (safe) countries of origin which hardly ever lead to asylum protection.[104] This list of countries is regularly reviewed by both the DRC and the DIS. These cases are often decided within a few days with no possibility for appeal to RAB. However, involvement of DRC should ensure that the case is processed in the right way.

99 The Danish Immigration Service, "Processing of an asylum case."

100 See supra note 24 for an explanation of the role of this NGO.

101 Danish Refugee Council, "The Danish asylum procedure – phase 2," December 2015.

102 The Danish Immigration Service, *Tal og fakta på udlændingeområdet 2022*, p. 69, attachment 3.

103 Ministry of Immigration and Integration, "International Migration Denmark, Report to OECD," November 2022, p. 38.

104 The Danish Immigration Service, "Processing of an asylum case,"; Countries on this list are Albania, Australia, Bosnia and Herzegovina, Canada, Georgia (with the exception of LHBTI persons and persons from Abkhazia and South-Ossetia), Iceland, Liechtenstein, Moldova, Mongolia, Montenegro, New-Zealand, Northern Macedonia, Norway, Russia (with the exception of ethnic Chechens, LHBTI persons, Russian Jews and persons who are politically active and mistreated by the authorities, Serbia, USA and Switzerland.

Most of the asylum applications are on the individual merits assessed and decided in the regular procedure. In 2022, Denmark received 4,597 asylum applications[105] of which 30.52% (1,043) were granted residence permits.[106] Of the granted residence permits issued in asylum cases, 509 were granted a K-status, 71 a B-status, and 50 received temporary protection status (as Syrians no longer receive that status).[107]

Next to this asylum process based on international protection grounds, an asylum seeker can apply for a residence permit on humanitarian grounds in accordance with Article 9b.1 of the Danish Aliens Act. This can also be submitted after a rejection of the asylum application by the DIS. As a separate procedure, this application is submitted to and processed by the Ministry of Immigration and Integration. The Danish parliament stated that a humanitarian residence permit should be an exception and is only to be granted in very specific cases, for example a severe deterioration of a serious handicap upon return to country of origin.[108] Of note, this is very rarely granted, with only 2 cases leading to an approved residence permit in 2022.[109]

Formally, and in line with international refugee law, the burden of proof in assessing the merits of the asylum claims is shared between the applicant and the government, whereby the DIS in first instance and the Refugee Appeals Board in the second has to motivate their assessment and decision. Information is initially gathered through the written application and interviews with the asylum seeker. The individuals' credibility and individual risk is assessed, in

105 The Danish Immigration Service, "Tal og fakta på udlændingeområdet 2022," 2022, p. 10, table A.1.2.

106 Ibid., table A.4.

107 Ibid.

108 The Danish Immigration Service, "Apply for residence permit on humanitarian grounds," August 2018.

109 See supra note 93. Unaccompanied minors who seek asylum (UMAs) are considered a specifically vulnerable group. Their asylum applications are in general processed within a short timeframe and they are housed in special accommodation centers. If the minor is initially viewed as too immature for the asylum process, the asylum procedure will be postponed until they are deemed as mature enough to understand and handle the procedure (The Danish Immigration Service, "Unaccompanied minor asylum seeker") If there is doubt about the proclaimed age of the minor asylum seeker – thought to be older than 18 years – an age survey, including medical assessment will be conducted to get physical proof of their age. In 2022, the DIS conducted age tests, of which 64% were assessed to be older than 18 years.

light of general 'Country of Origin Information' reports. The risk assessment in practice has been subjected to criticism for being illogical and unpredictable – specifically regarding the decision which protection status is granted in which case. For example, in 2021, 34% of granted residence permits for Syrians were based on Article 7(1)[110], whereas in 2022, 62% of Syrians gained the same status.[111] The credibility assessment has furthermore been declared too tough, following its increasingly strict policies. In comparison to other EU countries, in the first quarter of 2023, Denmark was 19th in the EU in terms of asylum seekers per capita. This is a drastic drop to Denmark's 5th place in 2014.[112]

To acquire a permanent residence permit, strict requirements must be met, also as a consequence of the recent national legislative asylum reform as part of the paradigm shift. The most important preconditions are that a person has legally resided in Denmark for at least 8 years, whereby the period during the asylum process does not count, passing the Danish 2 language test, and having been in regular full-time employment for at least 3.5 years.[113]

Accommodation

Depending on the type and/or phase of the procedure, asylum seekers are transferred to a reception center. Upon arrival, applicants stay in the Sandholm center. Dublin claimants often stay in Sjælsmark which is a return centre run by the Prison and Probation Service until they are transferred. During the asylum procedure asylum seekers reside in one of the accommodation centers which are mostly in Jutland.[114]

The DIS is responsible for providing and operating reception and accommodation centers for asylum seekers and irregular migrants based on the Danish Aliens Act

110 The Danish Immigration Service, "Tal og fakta på udlændingeområdet 2021," 2021, p. 67, attachment 3.

111 The Danish Immigration Service, "Tal og fakta på udlændingeområdet 2022," 2022, p. 69, attachment 3.

112 Bleona Restelica, "Denmark registering fewer asylum seekers than most other EU member states," 18 April, 2023.

113 Ministry of Immigration and Integration, "International Migration Denmark, Report to OECD," November 2022, p. 52.

114 After rejection of a claim, and when considered not cooperative with respect to return to the country of origin, rejected asylum seekers are moved to return and deportation centre Avnstrup (families) or Sjælsmark or Kærshovedgård. **Ellebæk is a closed center with the aim of forced return ('motivational measure'). See also under 'return'.**

section 42 a, subsection 5. However, in practice about half the accommodation centers are run by the Danish Red Cross, and the rest by municipalities.[115] Services such as a basic cash allowance, healthcare, education for adults and children, accommodation, and clothing packages are provided for (DIS) during the asylum procedure, unless the asylum seeker has sufficient own means.[116] Based on the 'jewelry law', asylum seekers must inform the authorities upon arrival if they carry possessions worthy of 10.000 Danish kroner (1344 euro's).[117] If this is the case, these valuables will be seized to cover the accommodation expenses.

Accommodation centers are open centers, with security control for visitors. All adult asylum seekers must enter a personalized contract with the accommodation center they have been assigned to. This agreement includes the context of daily tasks the asylum seeker is required to do, such as cleaning. The material rights can be diminished or revoked in case of non-compliance with the contract, or in case of any other kind of misbehavior.

Rooms and kitchen are often shared. If the application case will be processed in Denmark, the asylum seeker has to complete introductory basic Danish language and Danish cultural and social conditions courses.[118] Accommodation centers have 'in-house activities' and "out-of-house activities" such as unpaid job-training programs.[119] However in recent years, the centers have been moved more and more to rather isolated and thinly populated areas, which makes it increasingly difficult for asylum seekers to connect with Danish society and to keep themselves sufficiently occupied. In practice, asylum seekers often have to move from one center to the other, which is problematic, e.g. schooling for children, medical care, access to psychologists etc.[120]

115 Ministry of Immigration and Integration, "International Migration Denmark, Report to OECD, 2022, p. 38. Also, possibility for private accommodation under certain rules approved by DIS, but is not often used.

116 The Danish Immigration Service, Conditions for Asylum Seekers.

117 See paragraph 'setting the scene'.

118 Ministry of Immigration and Integration, "International Migration Denmark, Report to OECD," p. 40.

119 Ministry of Immigration and Integration, "International Migration Denmark, Report to OECD," p. 39.

120 Interview with DRC, 2 November 2023.

Appeals procedure

The appeals system in Denmark is two-tiered, with the DIS being the first responsible actor, and the Refugee Appeals Board (RAB - Flygtningenaevnet) the second – the highest authority in asylum cases.[121]
After a preliminary rejection, the case is automatically referred to and appealed to the RAB for a second instance review.[122] At the same time the asylum seeker is given written notice of the first instance rejection and is invited for an interview with the Danish Return Agency. This interview is referred to as a 'think pause' that aims to inform the asylum seeker about the chances of receiving asylum and to offer financial return support instead of right to appeal.[123] If the asylum seeker does not wish to withdraw the claim, the State will automatically appoint and pay for a lawyer and translator (decided by the appointed lawyer).[124]

The asylum seeker has the right to stay in Denmark until the outcome of the case. The oral appeal board hearing is generally scheduled within a few months. In Dublin cases there is usually only a written procedure, during which it is difficult in practice to get cases overturned.[125] The review process consists of three board members; the chairman – who must be an appointed judge, one appointed member by the Ministry of Refugee, Immigration and Integration Affairs, and one appointed member from the Council of the Danish Bar and Law Society.[126] Any decision taken by the RAB on whether to reverse the decision of the DIS or to reject the asylum application is final. In 2022, the cumulative waiting time for the cases was 405 days.[127] In the same year, the RAB reversed 31,48% of the DIS's decisions.[128]

121 Danish Refugee Council, "Stakeholders in the Danish asylum system," See on the working of the RAB: Jens Vedsted-Hansen, "Flygtningenævnet er blevet kompromitteret under paradigmeskiftets krydspres," *Information*, 27 September 2023.
122 Danish Refugee Council, "The Danish asylum procedure - What happens If asylum is rejected?".
123 Interview DRC d.d. 2 November 2023: According to the Danish Return Agency about 10% of the asylum seekers accepted the financial offer and withdraw their claim in Spring 2023.
124 Denmark does not provide for legal representation in the first instance. There is a right to get free legal counselling through DRC, but there is still risk that mistakes are made in the first instance procedure. See interview DRC d.d. 2 November 2023.
125 Interview DRC d.d. 2 November 2023.
126 Asylum Appeal Board, "General Information regarding the Danish Refugee Appeals Board," 19 September 2017.
127 The Immigration Appeals Board, "The Immigration Appeals Board's statistics in cases in 2022," 28 February 2023.
128 The Immigration Appeals Board, "The Immigration Appeals Board's statistics in cases in 2022," 28 February 2023.

A request can be made to reopen the asylum case after the final decision, but only when there are significant and radical changes with respect to the situation in the country of origin, when there is new evidentiary material which could not have been presented earlier, or if there is a new motive for asylum.[129] In practice, it takes a long time to get cases re-assessed, waiting times may run up to a year.[130]

Group-based protection policies

Soon after the Taliban took over in Afghanistan in 2021, Denmark evacuated people that supported the Danish authorities such as former military interpreters and employees at the embassy in Kabul in the country and offered them temporary protection.[131] By 15 September, 1,038 local staff, translators, NGO workers and local staff working for international organizations were flown over.[132] While most of these people were later resettled to the US,[133] 256 Danish temporary residence permits were granted to Afghans under the special act in 2021, and 593 in 2022.[134] Up until now, the ad hoc special regulation granted protection for two years with no possibility of extension.[135] However, on 5 October 2023, the Danish government submitted a proposal for the extension of the residence permits under the special law. The bill has yet to be adopted, but it is expected to enter into force on 27 November 2023.[136]

In February 2023, the Danish Refugee Board decided to extend protection under Section 7(1) to all women and girls from Afghanistan based on their gender: prima facie protection, which in this form is not implemented elsewhere in Europe.[137] This was applied to everyone in this category waiting for a decision, as well as retrospectively for recently denied applications by reopening these cases.[138]

129 Danish Refugee Council, "The Danish asylum procedure – phase 3."
130 Information received by DRC.
131 Pursuant under the Special Act no. 2055 of 16 November 2021.
132 ECRE, *Afghans seeking protection in Europe*, December 2021, p. 7-8.
133 Jens Vedsted-Hansen, *Refugees as future returnees? Anatomy of the 'paradigm shift' towards temporary protection in Denmark*, CMI, November 2022, p. 11.
134 Danish Immigration Service, "Tal og fakta på udlændingeområdet 2022," 2023.
135 Ministry of Immigration and Integration, "International Migration Denmark, Report to OECD," p. 8.
136 The Danish Immigration Service, Extension of residence permit under the special law for persons who have assisted Danish authorities etc. in Afghanistan, 5 October 2023.
137 Flytningenvaevnet, Flygtningenævnet giver asyl til kvinder og piger fra Afghanistan, February 2023.
138 EUAA report 2023, p. 136.

In the footsteps of the EU Directive on Temporary Protection by which Denmark is not bound through its opt-out, Denmark introduced a special act in March 2022, which has granted all Ukrainian refugees, including dependent family members, immediate residence permits for a period of two years.[139] This special act does not apply to third country nationals not considered refugees, since they are expected to return to their country of origin. Ukrainian nationals that have received a residence permit elsewhere are not eligible for temporary protection in Denmark either.[140] By November 2022, 31,000 residence permits were granted under this special act.[141]

Initially, most asylum seekers from Syria were granted protection, either refugee status, subsidiary protection or temporary protection status. However, in 2019 the Danish Government 'reclassified' Damascus as safe, and the authorities started revoking or not renewing status for specific groups from Syria. Over 1000 refugees from the Damascus region were informed that their temporary asylum status was being reassessed. This will be discussed further in the next chapter, placing it in the context of the Danish paradigm shift.

Paradigm shift: temporary nature of protection

As a response to the higher number of foremost Syrians seeking asylum in 2015, the Aliens Act was amended to introduce a new Section 7(3) for temporary protection status. The goal was to further differentiate protection for refugees fleeing due to the general situation of their country of origin and refugees who were being individually persecuted.[142] As previously discussed in the section on the political and social cultural context, the introduction of a general temporary protection status and the rules of revocation shifted Danish asylum policy towards an emphasis on returns and on a *temporary* nature of protection.[143]

139 Extension of the Special Act until March 2025, Særloven for fordrevne fra Ukraine forlænges med et år, 28 September 2023; Refugees DK, Information to and about refugees from the war in Ukraine, 15 March 2022.

140 J. Vedsted-Hansen, *Refugees as future returnees? Anatomy of the 'paradigm shift' towards temporary protection in Denmark*, CMI, November 2022, p. 11.

141 Ministry of Immigration and Integration, "International Migration Denmark, Report to OECD," p. 42.

142 Nadja Filskov et al., *You can never feel safe: an analysis of the due process challenges facing refugees whose residence permits have been revoked*, The Danish Institute for Human Rights, 2022, p. 20. See also Jens Vedsted-Hansen, CMI 2022-6.

143 Done through the Amending Act no. 153 of 18 February 2015 as from 14 November 2014.

This shift was further solidified with the introduction of Section 19a of the Aliens Act, which emphasized the temporary nature of granted residence permits.[144] The duration of protection depends on the type of status granted, with the DIS being the responsible actor that automatically decides whether the residence permit can be extended upon the expiration date. A residence permit based on convention status (7(1) Aliens Act) is granted for 2 years, with the possibility of extension for two years at a time. Status based on Article 7.2 and 7.3 of the Aliens Act are initially granted for one-year, with the possibility of extension for two-years at a time for the former, and one-year for the latter.[145] Whereas the provision with respect to the duration of the refugee convention status would be in violation of EU law (Qualification Directive), the articles with respect to subsidiary protection are indeed aligned.

A clearer distinction was furthermore made regarding the conditions that apply for revocation of status depending on the type of status initially granted. The general rules for the revocation of residence permits are laid out in Section 19 (1 and 2-5) of the Aliens Act. Convention status, in accordance with article 7(1), has the highest threshold of revocation, requiring 'fundamental, stable and durable changes in the country of origin.'[146] In contrast to this, individual subsidiary protection and temporary protection status have much lower requirements for cessation of status. For these forms of subsidiary protection, durable change in the country of origin is not required. Rather, revocation of status is possible for both, even when the general conditions of the country of origin are "serious, fragile and unpredictable – as long as the improvements cannot be considered 'entirely temporary.'"[147] This does not apply for refugees with a subsidiary protection status granted because of an individual risk (article 7(2)). In similar fashion to the appeals procedure of the asylum application, when the DIS revokes the residence permit, it is referred to the Refugee Appeals Board for review. Lastly, Denmark's international obligations must not be violated regarding revocation decisions, such as Article 8 of the ECHR.

144 Filskov et al., *You can never feel safe*, p. 20.
145 Filskov et al., *You can never feel safe*, p. 21.
146 Filskov et al., *You can never feel safe*, p. 41. See also article 1(c) sub 5 Geneva Convention.
147 The Ministry of Justice, Bill No. 72 presented on 14 November 2014 regarding proposal for an act amending the Aliens Act, Section 2.5.2.

In certain cases, despite changes in the country of origin, the DIS can decide to uphold and extend protection status. Set out in Section 26 of the Aliens Act, this is the case, for example, for families with children under the age of 18 who have a personal link to Denmark, or when the refugee has a spouse/cohabitating partner or minor child living in Denmark who is at risk of persecution in his/her home country.[148] However, following the 2019 amendments, this so-called criteria for 'assessment of attachment' to Denmark is given les consideration in the reassessed cases.[149]

As duly noted, the current revocation legislation and practice differs from the EU provisions of duration and revocation of protection status, which is legally possible because of Denmark's opt-out. While these changes are in line with Denmark's focus on the temporary nature of protection, refugees with subsidiary- and temporary protection in Denmark are now significantly less protected than elsewhere in the EU.

'Project Damascus' further exemplifies the 'paradigm shift'. In February 2019, the DIS started to review residence permits of Syrian refugees from Damascus, and later also Rif-Damascus that were granted under Section 7 (2) and Section 7(3) Aliens act due to general conditions in Syria.[150] This review was based on a RBA statement, only days after the necessary legislation passed parliament, noting that the general situation in Syria had changed, and that the risks of endangerment was reduced in certain areas. Since the summer of 2020, the Danish government holds the opinion that originating from the region of Damascus alone, is no longer sufficient ground for a protection status.[151] Similarly, in 2023 the provinces Larakia and Rif-Damascus have been considered safe enough for return. Those granted protection based on convention grounds (article 7(1)) were exempted from this new policy.[152] If the DIS decides that the ground for individual protection has ceased, the case is automatically referred to

148 The Danish Immigration Service, "Extension of a residence permit as a refugee or an ordinary quota refugee," 1 July 2019.

149 Filskov et al., *You can never feel safe*, p. 19.

150 Filskov et al., *You can never feel safe*, p. 30.

151 The decision that Damascus was considered sufficiently safe for return was heavenly criticized. See for example Human Right Watch, "Denmark: Flawed COI reports lead to flawed refugee policies," 19 April 2021; UNHCR Northern Europe, "Recommendations to Denmark on strengthening refugee protection," 11 January 2021.

152 Vedsted-Hansen, *Refugees as future returnees?*, p. 11.

the Appeals board.[153] Between February 2019 and May 2023, 2,155 cases have been reassessed from people originating from Damascus city, Rif-Damascus and Latakia.[154] Between June 2019 and December 2021, the Appeals Board overturned 49% of the cases, upheld 37% and referred back to the first instance in 14% of the cases.[155] These numbers highlight disparities of the decision made between the DIS and the RAB. Currently, 371 statuses have been revoked, forcing Syrians to return.[156] However, return remains impossible to effectuate as Denmark has no diplomatic relationship with Syria and no means to enforce those returns in practice. Following a Dutch Council of State ruling on not transferring Syrians to Denmark under the Dublin agreement because of the risk of indirect refoulement in 2022 , the Dutch government requested the Danish government for more information on their return policy to Syria.[157] The Danish authorities acknowledged that protection status could be revoked or denied in Denmark for those Syrians who only invoke the general situation in Syria, but that this was done with restraint as the security situation in Syria is still characterized by arbitrariness and unpredictability. Also, there would not be forcible returns to Syria, in light of foreign policy considerations: 'a unilateral Danish policy on forcible returns to Syria could be taken as a legitimization of the Syrian regime'.[158] The result is that Syrians remain rightless and stuck in Denmark, often in closed centres.[159] They are in fact in a legal limbo, with no durable solution or perspective of building up their lives again in sight. Denmark has taken a unique and highly criticized position on this in the EU. And it is foremost a clear signal that the paradigm-shift has perhaps provided Denmark with a tough immigration image, but substantially its policies have thus far failed.

153 Johannes Birkebaek and Nikolaj Skydsgaard, "Denmark deems Syrian province safe for returning refugees, worrying UNHCR," *Reuters*, 17 march 2023; Vedsted-Hansen, *Refugees as future returnees?*, November 2022, p. 27.

154 Ministry of Immigration and Integration, "Udlændinge- og Integrationsudvalget 2022-23," 22 May 2023.

155 Vedsted-Hansen, *Refugees as future returnees?*, November 2022, p. 27.

156 Ministry of Immigration and Integration, "Udlændinge- og Integrationsudvalget 2022-23,", p. 3.

157 Parliamenty documents *Kamerstukken II*, nos. 30 573 and 19637, nr. 195, 7 November 2022.

158 See in this light also the critical position of EEAS: Josep Borrell, "The conditions are not met to change the EU's policy on Syria," EEAS, 18 June 2023.

159 Elian Peliter and Jasmina Nielsen, These Refugees Can't Stay in Denmark, but they can't be sent home, *New York Times*, 7 March 2022.

5 Extraterritorial access to asylum

Legal Pathways: Resettlement

Denmark has a longstanding history when it comes to UNHCR resettlement schemes. Resettlement through UNHCR is the only formal Danish legal protection pathway: there are no other humanitarian admission programmes or protected entry procedures.

Since 1978, Denmark used to resettle 1500 refugees over a three-year period. Resettlement is explicitly laid down as a protection ground 'tool' in the Danish Aliens Act (section 8). Until 2016, in collaboration with UNHCR, a delegation from the DIS and the DRC selected individual refugees, often from 2-3 different countries each year. After being interviewed and declared eligible for the programme, the refugees receive basic information about Denmark and subsequently an entry visa. Upon arrival, they are directly settled in municipalities.

Also with respect to resettlement, the Danish policy and practice became stricter in recent years. In 2016, the parliament put a temporary stop to resettlement,[160] which became more definite in 2018 when legislation was passed to annul the previous multi-annual agreement with UNHCR. The quota is currently determined on a yearly basis by the Minister, and the number is depending on the total spontaneous arriving asylum seekers in Denmark. Since then, there have been very limited resettlement missions, and as of 2020 it only concerned refugees who were residing in Rwanda (2020, 2021 and 2022), and thus linked to the MoU with Rwanda (see following paragraph).[161] The Minister has set strict criteria on the profile of refugees (women and children) and in practice the quotas do not get filled. In the period from 2015 until now less than 1100 refugees were resettled.[162]

160 See Ulrik Dahlin and Jesper Løvenbalk Hansen, "Danmark går enegang med stop for kvoteflygtninge," *Information*, 12 September 2017.

161 See Ministry of Immigration and Integration, "Danmark tager 200 kvoteflygtninge fra Rwanda," 12 August 2022.

162 In 2015: 580, 2016: 85, 2017-2019: 0. See the Danish Immigration Service, "Tal og fakta på udlændingeområdet 2019,". In 2020: 31, 2021: 197, 2022: 165, 2023: 0, See the Danish Immigration Service, "Tal og fakta på udlændingeområdet 2022."

As part of the legislative 'paradigm shift' reform, also the residence permit issued to resettled refugees is currently granted on a temporary basis for a period of 2 years.[163] And since they can also be given subsidiary protection, with a lower and more generalized revocation/cessation threshold, resettlement may thus result in return. For example, 32 resettled refugees under section 8(2) have been subject to cessation procedures due to an improvement of the general situation in Somalia. This is at least at odds, but in fact in contradiction, with the concept of resettlement as a 'durable solution' for refugees in need of protection.[164] UNHCR has called for the gradual increase of the Danish resettlement quota, as well as the continued introduction of complementary pathways.[165]

Externalization of asylum procedures

As stated earlier, the focus, or 'vision' of Denmark on externalization of the asylum procedure is nothing new. Being a frontrunner from the 1980's,[166] regularly addressing the issue at regional and international tables, it was in 2018 that the concept got more concrete shape. Initiated by the Social Democrats, a policy plan ('platform') was developed for a 'new and fairer asylum system according to familiar lines:[167]

- spontaneous asylum would no longer be possible in Denmark;
- Denmark would establish a 'reception center' outside Europe preferably in partnership with other EU states, where asylum seekers would be transferred to;
- those asylum seekers found to be refugees would be further transferred to UNHCR to receive international protection, either in a UN camp or locally in the third country;
- and Denmark would offer resettlement places as an alternative to asylum.

163 L174: 'for the purpose of temporary stay'. See also UNHCR, "Observations on the Proposed Amendments to the Danish Aliens Legislation," 18 January 2019.

164 Nikolas Feith Tan, "The End of Protection," 2021, p. 80.

165 UNCHR, "Recommendations to Denmark on strengthening refugee protection in Denmark, Europe and globally," January 2021. See also UNHCR, "Preliminary Observations on the law proposal 2018," 18 January 2019, with reference to the Global Compact on Refugees that Denmark has committed to.

166 In Denmark, the 1980' Aliens Act was promoted as the most humanitarian refugees act in the world and some politicians have since used this as an argument to say that the Danes had been too generous. See also Nordics Info, "Danish Immigration Policy 1970-1992."

167 Nikolas Feith Tan, "The End of Protection," 2021.

As with previous similar 'visions', i.e. the United Kingdom in 2003, the idea received limited support in de EU, and was declared 'unrealistic' by the European Commission.[168] The Danish government consequently focussed on the legal aspects and (im)possibilities of externalization and published a legal note on the matter in January 2021.[169] Based on that note, Denmark passed in June 2021 a legislative amendment to its Aliens Act, allowing for the transfer of asylum seekers to a third state outside the EU for processing the asylum claim, protection in that state or return from there to the country of origin (section 29).[170] The amendment entails that such transfers must take place under an international agreement between Denmark and the third country and that asylum seekers are to be transferred, unless it would be in breach of Denmark's international obligations.[171] This pre-condition follows clearly from the beforementioned preparatory legal note, acknowledging that international obligations, such as the non-refoulement principle and the right to family life, do indeed limit the possibilities to transfer asylum seekers who are already on the territory and within jurisdiction of the Danish authorities.[172]

The new legislative amendment as tabled (L9226) provides for a framework for the 'externalisation model' in three phases:[173]

1. a pre-transfer 'screening' procedure in Denmark;
2. an asylum procedure in the third country with which the agreement is concluded; and
3. for those recognized as refugees, protection in that third country.

The explanatory memorandum describes the first phase in some more detail, with a two-instance individualized procedure (first the DIS, with an appeal to the Refugee Appeals Board, *see also under 'national/territorial asylum*) to assess

168 Nikolas Feith Tan, "The End of Protection," 2021.

169 Danish Ministry of Immigration and Integration, "Juridisk analyse af mulighederne for overførsel af asylansøgere til asylsagsbehandling i et tredjeland inden for rammerne af international ret," January 2021, p. 3.

170 See for a comprehensive legal assessment of this legislation: Nikolas Feith Tan and Jens Vedsted-Hansen, 2021; Nikolas Feith Tan, "The End of Protection," 2021; See also Chantal Da Silva, Denmark passes a law to send its asylum seekers outside of Europe," *Euronews*, 3 June 2021.

171 Lovforslag nr. L 226, 29 april 2021.

172 Danish Ministry of Immigration and Integration, "Juridisk analyse af mulighederne for overførsel af asylansøgere til asylsagsbehandling i et tredjeland inden for rammerne af international ret," January 2021.

173 Nikolas Feith Tan, "The End of Protection," 2021.

whether the asylum seeker can lawfully be transferred to the third country. Examples of persons exempted from transfer are nationals from the third state itself, asylum seekers with family residing in Denmark and seriously ill persons.

With respect to the second phase, the amendment states that the third country must have ratified and in fact respect the 1951 Refugee Convention and there must be access to a sound asylum procedure. It does not go into further detail on the minimum norms, protection standards, or legal rights for recognized refugees, or rejected asylum seekers. In many respects, it left key details and implementation questions unanswered.[174] For example, Denmark has thus far not worked with a list with safe third countries. And how should the minimalistic approach towards refugee rights in the explanatory memorandum be explained (stating that the third country must in practice respect the prohibition of non-refoulement in the Refugee Convention)? It is also not clear whether or not Denmark remains responsible for the operationalization of the asylum procedure in the third country, or that it will be the third country upon which that responsibility will be transferred. A relevant question when it comes to jurisdiction and legal accountability for the operation.

Another interesting legal question is related to the beforementioned 'opt-out' position of Denmark within the EU. From the parallel Dublin agreement between Denmark and the EU, it follows that Denmark may not unilaterally enter into agreements with third states that would alter the determination of responsibility for asylum applications, unless there is agreement of the Community (article 5). Generally spoken, the European Commission's reaction to the whole idea was far

174 See also for a critical assessment of the externalization legislation: Danish Refugee Council, "The Danish scheme for externalization is harmful to refugees and a threat to international refugee cooperation," 3 November 2022. ECRE, "Denmark: Parliament votes blindly on externalising asylum procedure and protection obligations," 11 June 2021; Martin Lemberg-Pedersen, Zachary Whyte and Ahlam Chemlali, "Denmark's new externalization law: motives and consequences," *Forced Migration Review*.

from positive.[175] On the other hand, the current discussion on asylum within the EU as well as the interest of other countries in externalisation models may render this less politically salient. From a legal point of view however, although it can be argued based on European jurisprudence that the Dublin Regulation does not prevent Member States (including Denmark) from transferring asylum seekers to safe third countries, it is exactly that precondition that is relevant. Denmark is not bound by the safe third country concept as laid down in the Asylum Procedures Directive and could thus be expected to have more legal space to navigate due to the absence of the connection criterium ex article 38 APD. However, it does apply indirectly, because the Dublin Regulation refers to the concept as defined and used by the Directive.[176] Currently, no reference in the Danish legislation is made to the fact that the asylum seeker should have a meaningful connection with the third country as a pre-condition for transfer.[177]

Furthermore, to operationalize or implement this legislation in practice, it all comes down to the conclusion of international agreements by Denmark with third countries. Denmark has not yet made an agreement with a third country that could lead to implementation of the law. The European Commission has repeated this reply in several answers to the European Parliament after the amendments to the Danish Aliens Act (e.g., in May 2021, July 2021 and September 2021) with the addition that "To the Commission's knowledge, no such agreement is yet concluded. To assess whether the amended Act respects Denmark's international obligations, it is necessary to also examine the content of any such agreement."

175 On 18 June 2021 Commissioner Ylva Johansson stated that "*[t]he idea of a transfer of asylum-seekers to third countries for processing and accommodation is contrary to the spirit of the Geneva Convention. A system aiming for external processes outside the EU instead of protecting right to apply for asylum in the EU would send a strong and wrong signal to the outer world: Europe is disengaging. … External processing of asylum claims raises fundamental questions about both access to asylum procedures and effective access to protection. It is not possible under existing EU rules or proposals under the New Pact on Migration and Asylum. The Pact on Migration and Asylum is based on the right to asylum as a fundamental right in the European Union, guaranteed by the EU Charter.*" See also Marie Moller Munksgaard, "The European Commission warns: As soon as Denmark sends asylum seekers to Rwanda, there will be a legal aftermath," Altinget; the Danish Parliament, "Kritik af dansk lov om modtagecentre i udlandet forud for RIA-møde," 7 June 2021.

176 See also Nikolas Feith Tan and Jens Vedsted-Hansen, "Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law," *EU Immigration and Asylum Law and Policy*, 15 November 2021.

177 See also on this matter Michael Hoppe, 'Externalisierung oder der 'Eine Ring' für Europa (editorial)' in *ZAR* (Zeitschrift fur Auslanderrecht und Auslanderpolitik), 10/2022, p. 342.

The legal assessment by the Danish Ministry noted that Denmark's obligations to the EU are not considered to be an obstacle. The legal note does however point to the risk for a potential exclusion from cooperation under the Dublin Regulation when such an international agreement is indeed implemented.[178] If such an agreement between Denmark and a third country is to be concluded, this will probably be subject to parliamentary scrutiny and democratic control as it would be considered a formal treaty, not a mere MoU.

In that respect it is relevant to point out that the MoU that was concluded between Denmark and Rwanda[179] in September 2022 is of a different nature than the one between the UK and Rwanda.[180] The Denmark- Rwanda MoU deals with general migration cooperation. The dialogue between both countries concerns support to the Emergency Transit Mechanism to Rwanda; development cooperation, and new ideas on transferring asylum seekers from Denmark to other countries.[181] This is in line with previous statements by the Danish government that *Denmark is committed to finding new and sustainable solutions to the present migration and refugee challenges that affect countries of origin, transit and destination [...] It is also the vision of the Danish Government that the processing of asylum applications should take place outside of the EU in order to break the negative incentive structure of the present asylum system.*[182] However no such model is currently in sight. In fact, the current government

178 Danish Ministry of Immigration and Integration, "Juridisk analyse af mulighederne for overførsel af asylansøgere til asylsagsbehandling i et tredjeland inden for rammerne af international ret," January 2021.

179 Although the the Organisation of the African Union issued a strong statement in response to the Danish legislative amendment, highly condemning the outsourcing of responsibility for refugee protection, Rwanda is actively seeking partnerships with European countries.

180 UK Home Office, "Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement," 14 April 2022.

181 Denmark had no previous development relation with Rwanda, however according to the Danish project office in Kigali a programme is being set up with a budget of 11 million euro for development goals, 10 million euro for climate adaptation and 6 million for a migration partnership aimed at strengthening protection capacity for refugees (Congolese and Burundians) in the region. See Monika Sie Dhian Ho and Francesco Mascini, "Dealen met Rwanda," Clingendael Institute, 30 October 2023, p. 14.

182 Ministry of Foreign Affairs and the Ministry of Immigration and Integration of the Kingdom of Denmark & the Ministry of Foreign Affairs and International Cooperation of the Republic of Rwanda, "Memorandum of understanding (...) regarding cooperation on asylum and migration issues", April 2021.

coalition declared in their trilateral agreement that they seek multilateral approaches on asylum and migration issues.[183] Therefore, an 'alleingang' on externalization, without the support and cooperation of a group of likeminded in the EU, and outside their standing legal obligations does not seem to be the path *currently* followed by the Danish government. However, the Danish Prime Minister and Minister for Immigration have both stated that Denmark is also willing to establish bilateral schemes if necessary.[184] As the amendment yet only exists on paper, it remains to be seen what will happen in practice.

183 The government position is to explore possibilities with other countries in the EU. See Prime Minister's Office, "Regeringsgrundlag 2022," 14 December 2022. See also Ebad Ahmed, "Denmark puts asylum center talks with Rwanda on back burner," *AA*, 25 January 2023.

184 Anders Redder, "Centralt papir nævner en EU-løsning: Men ny regering taler åbent om dansk enegang i Rwanda-sag," in: *Jyllands-Posten*, 15 December 2022; Morten Frich et al., "Mette Frederiksen vil samle Danmark om en udlændingepolitik, som næppe er realistisk," 6 February 2018.

6 Return in the context of migration cooperation

In Europe, the frame that the Danish focus on return is effective persists. In practice however, the government struggles, as any other country, with expelling asylum seekers whose application has been rejected or whose permit has been revoked.

Return Procedure

The Danish Return agency assumed its tasks as an agency under the Ministry of Immigration and Integration in August 2020.[185] The Danish Refugee Council and the Danish Red Cross are two official cooperation partners of the Return Agency.

In May 2023, the Danish Ministry of Immigration and Integration reported that approximately 550 asylum seekers were waiting to be deported following rejected asylum applications.[186] Those staying in Denmark without possibilities for a legal stay are in the so called 'exit position'. This group consists of those rejected in the normal asylum procedure, the manifestly unfounded (expedited) procedure, people affected by the Dublin Agreement that need to be sent elsewhere, and other grounds for expulsion such as revocation of temporary protection status. As discussed in the appeals section, first instance rejected asylum seekers have the possibility to appeal to the RAB. Once the RAB has made a final decision, the Danish Return Act states that rejected asylum seekers have only 7 days to exit Denmark voluntarily. Before this time limit of departure, the Danish Return Agency will contact the individual for a mandatory interview. During this interview, duty to cooperate is highlighted, information is provided on the next steps as well as entering a return contract with the Agency.[187]

Denmark has introduced policies to convince rejected asylum seekers to return home voluntarily These include pre-departure preparatory assistance, practical

185 The Danish Return Agency, "About Us."

186 Arta Desku, "About 550 asylum seekers in Denmark waiting to be deported, with rejection rates at the lowest since 2009," *Schengen Visa*, 23 May 2023.

187 The Danish Return Agency, "The return contract"; DRC is also providing return and reintegration support.

operational (financial) assistance in returning, pre-departure counselling services and reintegration assistance in their country of origin.[188] Those that chose for voluntary return can stay at return centres, until their departure, sometimes with a duty to report.[189] These return centers are very expensive compared to regular open accommodation centers.[190]

While legislation expects the rejected asylum-seeker to return voluntarily, reality paints a different picture. After it has been established that a rejected asylum seeker is not cooperating with return, something that is judged by the Danish Return Agency with no chance to appeal, the case is subsequently transferred to the Danish police.[191] Additionally, certain 'motivational measures' to return are implemented.[192] These include staying in a deportation centre, a halt to (financial) assistance for return, and denial of any further benefits given to those voluntarily sent back. Additionally, the rejected asylum-seeker then risks forced return to his or her home country.[193] Primary aim is to motivate people to leave, but in practice it breaks them down.[194]

Cooperation on Returns

Up until the end of the program in July 2022, Denmark was member of the European Return and Reintegration Network (ERRIN) through which cooperation on returns is arranged with countries like Iraq, sharing identification documents and providing travel visas.

Furthermore, DRC is part of the European Reintegration Support Organisations (ERSO) network which consists of European NGOs working with repatriation counselling and reintegration support. ERSO cooperates with several reintegration partners. DRC can facilitate reintegration support through these reintegration partners for people who accept to return. The Danish authorities will ask DRC to facilitate reintegration support through a local reintegration

188 Ministry of Immigration and Integration, *International migration – Denmark: report to OECD*, December 2021. p. 62-63.
189 The Danish Immigration Service, "Return Centre."
190 Interview DRC d.d. 2 November 2023.
191 DRC, "The Danish Asylum procedure phase 3 – What happens if you do not leave voluntarily?"
192 DRC, "The Danish Asylum procedure phase 3 – What happens if you do not leave voluntarily?"
193 The Danish Ombudsman monitors forced deportations.
194 Interview DRC d.d. 2 November 2023.

partner, if the Danish authorities do not have other access to cooperation with a reintegration partner in the relevant country.[195]

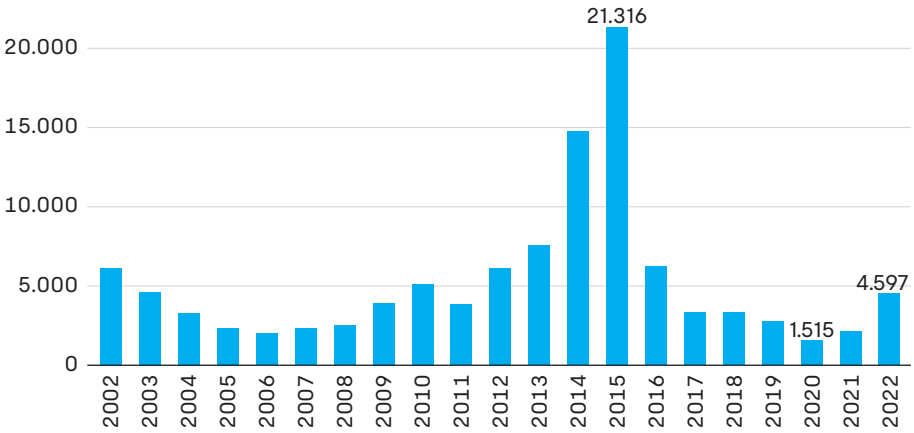
Forced return is, when possible, planned with the country of origin for readmission and reintegration arrangements.[196] However, the case of Syrian refugees who have had their status revoked or not extended exemplifies the obstacles and challenges in practice. As Denmark does not have any diplomatic relations with Syria, it lacks the capability to carry out these returns leading to a 'de facto non-enforcement' of the duty to leave. This is the result of the formal decision of the government not to engage in such relations with Assad's regime, leaving Syrian refugees in deportation centres with minimal facilities.[197] Some of these refugees decide to either live in irregular accommodation situations or move to neighbouring countries such as Germany, Sweden or the Netherlands.[198] Currently, the question rises whether or not these asylum seekers are subject to indirect refoulement when sent back to Denmark under the Dublin regulation, once they ask for protection elsewhere in the EU after having their permit revoked.[199]

195 DRC, "Countries with reintegration partners."
196 UN Migration Network, "Status on the implementation of GCM – Danish contribution."
197 Jens Vedsted-Hansen 2022, p. 35.
198 Jens Vedsted-Hansen 2022, p. 35.
199 See earlier in this report under 'international legal framework'.

7 Statistics

The number of first asylum applications in Denmark has been steadily decreasing since 2015 when over 21.000 people applied for asylum, foremost from Syria. In the years that followed, the number of asylum seekers decreased significantly, with a low point of 1515 in 2020 (Covid 19) and counted 4600 in 2022.[200]

Number of asylum seekers from 2002 – 2022



200 Einar H. Dyvik, "Number of asylum seekers in Denmark from 2012 to 2022," Statista.

Asylum applications

Nationality	Number of asylum applications in Denmark				
	2018	2019	2020	2021	2022
Ukraine	50	36	20	25	2.070
Afghanistan	115	90	69	557	379
Syria	604	493	344	325	379
Eritrea	680	486	170	379	199
Iran	195	135	86	67	123
Russia	89	72	32	17	110
Morocco	181	157	103	67	109
Iraq	119	121	61	63	103
Georgia	402	66	38	52	95
Belarus	37	33	19	27	94
Stateless*	149	204	88	65	82
Turkey	27	25	35	36	61
Nigeria	28	20	15	21	51
Uzbekistan	5	1	1	0	45
Somalia	106	166	43	40	43
Others	772	611	391	358	654
Total	**3.559**	**2.716**	**1.515**	**2.099**	**4.597**

* Including stateless Palestinians.

Number of asylum applications in Denmark from 2018 – 2022:
Source: Danish Immigration Service

The main countries of origin during the last five years are Syria, Afghanistan and Eritrea. As is the case in more European countries, due to ever-changing (country-specific) asylum policies the eligibility rates in Denmark fluctuate. In 2015 it reached a record high of 85%, in 2020 it dropped to 44%, and in 2022 it was 59%. During the first 4 months of 2023, 76% of the applicants were granted asylum in first instance.[201] This does not include appeals (second instance), so the actual recognition rate is higher.

201 Michala Clante Bendixen, "What are the chances of being granted asylum?," Refugees DK.

However, when addressing the statistics in more detail, it becomes clear that the recognition rate of asylum applications of people immediately upon arrival is much lower. So-called 'remote registered' (Syrians and Eritreans who came via family reunification, evacuated Afghans with a high-risk profile who applied for asylum at a later stage) form around half of the granted statuses.

As is mostly the case, the eligibility for asylum protection depends on where the applicant is originating from. Syrians, Eritreans and Afghans are the largest groups in the whole of Europe, also in Denmark. The recognition rate in the first instance for Syrian nationals was 99% in 2016, 96% in 2017, 99% in 2018, 94% in 2019 and in 2020 it dropped to 88%. Very few applicants from so-called safe countries arrive in Denmark in general, which explains for a large part the relatively high recognition rate in Denmark compared to the EU on average.[202] Since 2016 it became more difficult for asylum seekers from Iraq, Iran, Somalia and Afghanistan to gain protection, even more in Denmark than in the rest of Europe.[203] In 2021 only 3% of the Afghans were granted asylum.[204] Recognition rates of applications for family reunification also vary according to the country of origin.[205]

In 2021, 2,511 people got a residence permit through family reunification. This number has been going down (see figure below).[206]

202 In the EU, only 39% were granted asylum in 2022, but 50% received a permit if national forms of protection such as humanitarian stay are included. They are rarely used in Denmark.

203 Michala Clante Bendixen, What are the chances of being granted asylum? Refugees DK.

204 After Taliban seized power, the rate for Afghans has risen to over 90%, but most of the Afghan applicants in Denmark were evacuated and thus have a high-risk profile. Denmark has recently decided to grant asylum to all women and girls from Afghanistan, which will obviously make the rate stay high.

205 Statista, for 2018, depending on country: Eritrea 36%, Somalia 37%, Syria 54%, Iran 73%, Thailand 82%.

206 Ministry of Immigration and Integration, *International Migration Denmark, Report to OECD*, November 2022, p. 14.

Overview of all residence permits, etc. granted in Denmark, 2015–2021* (persons, percentage)

Category	2016	2017	2018	2019	2020	2021	Share 2021
Family reunification, etc. ** (B)	8,149	7,790	5,234	3,648	4,529	2,897	7%
Family reunification **	7,679	7,015	4,601	3,222	4,012	2,511	6%
– of which spouses and co-habitants	3,825	4,127	3,225	2,206	2,862	1,947	5%
– of which minor children	3,852	2,887	1,373	1,014	1,146	561	1%
Other residence cases (incl. adoption)	470	775	633	426	517	384	1%

Number of positive decisions on family reunification 2015–2021*

Category	2015	2016	2017	2018	2019	2020	2021*
Spouses and cohabitants (A)	4,996	3,624	3,927	2,959	1,908	2,592	1,596
– of refugees in Denmark	2,575	1,425	1,156	493	356	480	249
– of other immigrants in Denmark	228	201	256	268	219	302	181
– of which Danish/Nordic nationals in Denmark	2,193	1,998	2,515	2,198	1,333	1,810	1,166
Family reunification according to the EU rules (B)	246	218	209	289	329	296	373
– of which spouses and cohabitants (b)	237	201	200	266	298	270	351
– of which children	8	16	9	21	29	23	19
– of which parents/other family	1	1	0	2	2	3	3
Spouses and cohabitants (A+B)	5,233	3,826	4,127	3,255	2,206	2,862	1,947
Minors (C)	6,403	3,836	2,878	1,352	985	1,123	542
– children to refugees in Denmark	5,517	2,887	2,109	643	425	430	162
– children to other than refugees in Denmark	886	949	769	709	560	693	380
Total (A+B+C)	**11,645**	**7,678**	**7,014**	**4,600**	**3,222**	**4,012**	**2,511**

* 1 January - 31 August 2021

Source: The Danish Immigration Service

Conclusion

Denmark has opted out of the Common European Asylum System and is therefore not bound by the larger part of the acquis. The opt-out was a deliberate and well-considered decision at that time as the country was, and still is, keen on retaining its national sovereignty in dealing with asylum and migration from a cost-benefit ratio. At the same time, from the perspective of foreign policies and relations, the Danish have always been a frontrunner with respect to the external EU dimension of asylum and migration, as it was one of the first countries to develop and discuss ideas on externalization of asylum procedures (1986). In more recent years, the Danish asylum policy can be characterized as 'shifting' in various ways. First, a shift towards growing and eventually broad national consensus on restrictive migration policies: from the new Aliens Act of 2002 which is in contrast to a rather liberal one of 1983 and instigated by terrorist threats, to the changes in the political thinking of the Social-Democrats. This is indeed interesting as the number of asylum seekers arriving in Denmark has always been relatively low. Secondly, the so-called 'paradigm shift' after 2015: the prior legislative and policy focus of permanent residence and integration changed to perspectives of temporary protection, revocation of permits and return. And thirdly, the current government tends to shift from a somewhat unilateral approach vis-à-vis externalization of national asylum procedures to increasingly multilateral EU agreements with third countries.

What is the Danish situation with respect to access to asylum, and to what extent is the opt-out position of Denmark impactful? The national Danish asylum procedure is, in general terms, quite solid. As in the Netherlands, there is a cooperation with NGO's, such as the Danish Refugee Council (Asylum unit) which has a special role in the asylum procedure, and also with the Danish Red Cross on accommodation. The number of applications are rather low (4600 in 2022) and there are no significant backlogs, taken into account that there has been capacity to start revocation procedures. Points of criticism on procedural aspects relate mainly to the appeals procedure: amongst others, the limits to appeal options and the fact that there are currently only three members, instead of the previous five, resulting in lack of certain expertise/perspectives on case law. Moreover, the appeals procedure lacks legal representation in various stages of the proceedings. Because of the opt-out, Denmark can deviate from the Asylum Procedures Directive as it is not formally bound by it. However, in

general, Denmark's asylum system is still rather closely aligned with the EU acquis. It's national temporary protection scheme for Ukrainian displaced is quite similar to the EU TPD scheme. As Denmark is part of the Schengen and the Dublin system, it must abide by similar standards based on the mutual trust principle underlying these systems. Moreover, Denmark is a signatory to the Refugee Convention, other UN human treaties and the ECHR, including the applicable case law. Altogether, the international and regional legal framework applicable to Denmark do not greatly differ from other EU Member States.

Notwithstanding this legal framework, the 'paradigm shift' brought about several significant changes in the protection standards and focus of national asylum law and policies: differentiation in protection status, lower revocation thresholds, focus on temporary status, postponement of the right to family reunification, and return centres where persons may need to stay with limited rights without any perspective. Even the permits of resettled refugees (which is considered a 'durable solution') are nowadays temporary and can be revoked, something that was greatly objected by UNHCR. There have been legal consequences: because of Denmark's asylum policy towards Syrians i.e. the revocation of permits and expressing the intention of returning them to Syria led to hampering of the Dublin transfer. The ECtHR furthermore made clear that it was not reasonable to let asylum permit holders wait for three years for family reunification.

Next to this 'paradigm shift', the Danish government also persisted in its attempts to externalize the asylum procedure to countries outside the EU. An amendment to the Aliens Act in 2021, allows for the transfer of asylum seekers to a third state outside the EU for processing the asylum claim, protection in that state, or return from there to the country of origin (section 29). These transfers must take place under an international agreement between Denmark and the third country and asylum seekers are to be transferred unless it would be in breach of Denmark's international obligations. This still rather vague human right clause does indeed acknowledge the legal lesson learned: that the possibilities to transfer asylum seekers who are already on the territory and within jurisdiction of the Danish authorities are, in fact, limited.

Is the Danish 'model' successful? The current number of asylum seekers is obviously lower than in 2015. However, this is the case in (almost) all EU countries. In Denmark the applicants more than doubled in 2022 (4600) in comparison to 2010 (2100). The focus on re-assessed protection needs, revocation and return have clearly failed. Out of 30.000 Syrians in Denmark, only 1200 cases were

re-assessed, only a few hundred were revoked, yet no one has been returned. Instead, they are still in legal limbo in Denmark due to the absence of diplomatic relations with Syria. The only controlled and regularized way to receive persons in need of protection on Danish territory is used increasingly less. Currently, the Danish externalization law only exists on paper: there is no concrete agreement with a third state yet, and the operationalization of the law remains shrouded with legal and practical uncertainties and questions.

The message sent by the Danish government to the outside world, however, is quite clear-cut: if you come to Denmark, we will take your valuables and put you on remote islands to await your return. If you are in need of protection, this is only temporary, and you will be sent home as soon as possible. Or we will send you to another part of the world let your asylum claim be processed. This direct and harsh narrative of an unwelcoming state is a conscious political strategy choice. Danish leaders have repeatedly stated: we want zero asylum seekers irregularly on Danish territory.

Given the perceived failure of the paradigm shift and Denmark's continued inclination to limit territorial asylum as much as possible (reverting to zero), there may be a heightened focus on and efforts towards externalizing the asylum procedure. The current Danish government is seeking 'external dimension' solutions with like-minded EU countries, which fit the existing EU legal framework of the safe third country concept, screening procedures at the borders, and multilateral deals such as with Turkey.

The question is however, what will Denmark do when this approach will not deliver any desired result in the near future? What if Denmark leaves their multilateral approach, falls back to unilateral engagements, and goes ahead with a partner like Rwanda, as the United Kingdom did as a non-EU Member State. Will this amount to a de facto withdrawal of Denmark from the Dublin system? What are the consequences for the current status aparte of Denmark in the EU? What kind of national legislative and policy decisions will follow, and how do they interact with the Danish ECHR obligations, to which it is, like thew UK, signatory? After the UK Supreme Court ruling that the deal was unlawful due to the risk of indirect refoulement,[207] the UK government has issued emergency

207 UK Supreme Court, R and others v. Secretary of State for the Home Department, no 2023/0093, 15 November 2023.

legislation to fill that protection gap and determine Rwanda a safe third country in order to go ahead with their flagship asylum policy. But as British media stated: declaring a country safe is not the same as proving to a court that it genuinely is. The outcome will also depend on further ECtHR rulings on the legality of the transfer agreement in the UK-Rwanda deal.

These are indeed untested legal waters, which are still quite muddy.[208]

208 With reference to the title of the article by Daniel Thym ('Muddy Waters: A guide to the legal questions surrounding 'pushbacks' at the external borders at sea and at land,' EU Migration Law Blog, 6 July 2021.)

Myrthe Wijnkoop
Anouk Pronk
Robin Neumann

Country report
The Netherlands

Introduction

In December 2022, the Dutch government announced the start of a trajectory for the 'fundamental reorientation of the current asylum policy and design of the asylum system.' Its aim is to further structure the asylum migration process, to prevent and/or limit irregular arrivals, and to strengthen societal support for migration.[1] In light of these aims, political and public discussions about the possibilities for the 'externalisation' of the asylum procedure are ongoing, based on the assumption that these will be reached through effective procedural cooperation with a country outside the EU that 'passes the legal test'.[2]

The purpose of this comparative research project is to collect existing knowledge about selected countries (The Netherlands within the EU, Denmark within the EU with an opt-out, the United States, Canada, and Australia) and to complement this with an analysis of national legislation, policy, and implementation practices, focusing on (extra-)territorial asylum. The results of the country studies will be assembled in a synthesis report with options for Dutch courses of action based on a comparative analysis of applied legal frameworks and the asylum systems of the five countries.

The legal framework applicable to the Netherlands, as well as its national policy and practice with respect to access to (extra)territorial asylum will be the starting point or 'base line' for the comparative analysis. Although the Dutch context is of course well known to the primary interested parties, we still included it for the purpose of comparison and because this research project, with its findings and conclusions, may be of interest to other (EU Member) States. For this reason, we will follow the same outline as applied to the other researched countries, aiming to provide insight into how the Netherlands manages access to its asylum system to third country national asylum seekers.

The main focus point of this report will be the applicable legal framework, including the EU asylum acquis, the Luxembourg court rulings and the interpretation of the ECHR obligations as interpreted by the Strasbourg

1 Parliamentary Documents, *Kamerstukken II*, 19637, no. 3053, 23 December 2022, p. 2.

2 Rijksoverheid, "Bijlage 15 BWO Presentatie deelsessie Asiel," 17 February 2023, p. 13.

jurisprudence. Secondly, it will focus on the particularities of the Dutch asylum system within that legal framework, and the extent to which the Netherlands differs from other EU Member States when dealing with access to asylum, including the impact thereof.

The first paragraph will set out the scene on relevant development on asylum in both the Netherland and the EU. In the second paragraph the applicable international legal framework will be briefly assessed, followed by border management (3) and asylum systems (4) from a Dutch and EU perspective. Paragraph 5 will discuss the issue of externalization of asylum procedures. In paragraph 6 some remarks will follow on return in relation to migration cooperation, followed by statistical information (7) and a conclusion.

1 Setting the scene: general background and relevant developments

Aliens Act 2000 and Tampere 1999: new asylum systems

In the late nineties, the Netherlands adopted a new legal framework on asylum and migration: the Aliens Act 2000.[3] Rather than to change the whole migration system, the focus of the new legislation was to modernise the national asylum procedure, taking into account the experiences of the nineties (high number of asylum seekers from i.a. the Balkan, shortages of reception and shelter and enormous backlogs in the procedures).[4]

Main aims of the Aliens Act 2000 were (1) to simplify the asylum system, with less variation in permits (a single-status system) and less administrative burden; (2) to fasten, shorten and reduce the number of procedures in first and second instance (introduction of an 48-hours procedure and a normal procedure); and last but not least, (3) to enable the procedure to result in either legal stay in the Netherlands or return to the country of origin (or elsewhere).[5]

Around the same time, EU Member States (MS), including the Netherlands, agreed to develop a Common European Asylum System (CEAS) at a Council meeting in Tampere, Finland, in 1999. The main objective was to harmonise national asylum systems (procedure, qualification for (temporary) protection, reception, and return) through common minimum standards, and to allocate responsibility for the processing of asylum applications, the so-called Dublin system. The general aim of the harmonisation was twofold: first, to improve existing asylum systems and provide a higher level of protection, and second,

3 Vreemdelingenwet 2000, Aliens Act 2000.

4 Parliamentary documents, *Kamerstukken II*, 26732, no. 3, 22 September 1999; See also WODC, "Evaluatie Vreemdelingenwet 2000: Achtergrond en opdracht," 2006, p. 33 ff.

5 Ibid.

to prevent asylum 'shopping' by creating a more equal level playing field among EU MS.[6]

It is beyond the scope of this report to provide for an in-depth and complete overview of almost twenty-five years of CEAS developments.[7] In short it has been, and still is, a long, politically difficult and legally complicated journey, mainly due to different interests and goals of MS.[8] It took about five years to achieve results on the first-phase instruments with minimum standards,[9] leaving large margins of appreciation for the implementation in each national legal order. As large discrepancies between the various national asylum systems continued to exist, a recast of the legislative instruments proposed by the European Commission started almost immediately after the initial phase.[10] Next to a further definition and renegotiation of the directives, this second phase also focussed on so-called practical cooperation to further the harmonisation of national asylum systems, amongst others to establish EU agencies such as the European Asylum Support Office (EASO, currently the European Union Asylum Agency (EUAA)) and Frontex.[11] With the Lisbon Treaty, the role of the European Court of Justice (CJEU) in interpreting the legal framework became more influential, as not only the highest national courts, but all judiciaries were able to refer legal questions to the CJEU.[12] At the same time, the EU Fundamental Rights Charter came into force, containing legally binding obligations, including article 18 on the right to asylum.[13] While at a practical level the European cooperation was gaining more ground, the so-called second (legislative) phase of harmonisation became

6 European Council, "Tampere European Council Presidency Conclusions," October 1999; See also: International Association of Refugee Law Judges, *An Introduction to the Common European Asylum System for Courts and Tribunals*, EASO, August 2016, p. 14-15, 22.

7 See for a comprehensive overview: C. Dumbrava, K. Luyten and A. Orav, "EU Pact on Migration and Asylum: State of Play," European Parliamentary Research Service, June 2023.

8 Advisory Committee on International Affairs (AIV), *Het Europese asielbeleid: twee grote akkoorden om de impasse te doorbreken*, 1 December 2020.

9 European Parliamentary Research Service, *Briefing on EU Pact on Migration and Asylum: State of Play*.

10 European Parliamentary Research Service, *Briefing on EU Pact on Migration and Asylum: State of Play*.

11 European Parliamentary Research Service, *Briefing on EU Pact on Migration and Asylum: State of Play*.

12 "Amending the Treaty on European Union and the Treaty establishing the European Community," *OJ C 306*, 17 December 2007.

13 M.E. Wijnkoop, "Zoeken, genieten en/of garanderen. Het recht op asiel nader beschouwd," *A&MR*, no. 7, October 2013, p. 327-336.

somehow a never ending circle of discussions, interrupted by large impact crisis situations such as humanitarian disasters in the Mediterranean.

Since the 2015 "Syria crisis", the EU got stuck in a political impasse and the prospect of a genuinely harmonised EU asylum system seemed further away than ever.[14] New attempts to deal with asylum migration management were done through setting up new comprehensive policy agendas such as the European Migration Agenda 2015, with short (intra-EU relocation through hotspots procedures in Greece and Italy) and longer term (2016 redraft of the recast of the legislative package) measures.[15] But yet again: the hotspot procedures were criticised[16] and did not prove to be the ultimate blueprint for 'joint-processing',[17] relocation was not supported by all MS and appeared to be complicated in the operation,[18] and the negotiations on the legislation got stuck, again. From 2016 onwards the number of asylum applications in the EU decreased significantly. However, secondary movement of asylum seekers within the EU was considered problematic by several MS, including the Netherlands.[19] The differences between national asylum systems remained. The lack of intra-EU solidarity resulted in boats with migrants stuck at sea because MS could not agree on how to deal with the disembarkation and responsibility sharing, Dublin was still failing and ineffective and the humanitarian crisis at the Greek islands remained unsolved. In recent years the number of irregular migratory movements is increasing again.

14 Advisory Council on Migration, "Policy brief EU-Pact Migratie en Asiel: Na woorden nu daden," 9 November 2020; See also AIV, "Het Europese asielbeleid: twee grote akkoorden om de impasse te doorbreken," December 2020.

15 European Commission, "COM(2015) 240 final," 13 May 2015. See also the recast proposals: COM (2016) 270, COM (2016) 271, COM (2016) 272, COM (2016) 465, COM (2016) 466, COM (2016) 467, COM (2016) 468, COM (2018) 634.

16 See for comments for example the European Union Agency for Fundamental Rights (FRA), "Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy," March 2019.

17 The follow-up proposals regarding 'closed centres' did not get sufficient support either. See: European Commission, "Non-paper on "controlled centres" in the EU-interim framework," 27 July 2018.

18 Council of the European Union, "Council Decision (EU) 2016/1754," 29 September 2016; See also Advisory Council on Migration (ACVZ), *Realism about Numerical Targets. Exploring immigration targets and quotas in Dutch policy*, 21 December 2022, p. 129.

19 Ministry of Foreign Affairs, "A renewed European agenda for migration 2019-2024," March 2019, 2; ACVZ, "Secundaire Migratie," 5 November 2019.

To prevent CEAS from remaining in vicious political circles and reaching a dead-end, the European Commission initiated new dialogues with MS in order to re-open negotiations. In September 2020 the EU Migration and Asylum Pact was published: an extensive programme with no less than nine proposals, including five legislative proposals.[20] In December 2023 the Council, Commission and European Parliament reached a political agreement on the main aspects such as the border procedures and solidarity mechanisms.[21]

The Netherlands is one of the founding states of the European Community and has been an active Member State ever since. The country has been a strong advocate of European cooperation to tackle the many challenges faced both on the continent and for Europe in the world.[22] The Netherlands has been pushing forward EU harmonisation and cooperation within the field of asylum, considering it the only way to deal effectively with this issue in an EU without internal borders.[23] With respect to asylum procedures, the Netherlands aimed to 'duplicate' its national asylum procedure into the CEAS minimum standards also to refrain from extensive implementation legislation.[24] Examples of Dutch points of interest are the accelerated procedure, border procedures, inadmissibility clauses such as the safe countries concept (including the strive for common EU lists of safe countries), credibility and risk assessments, and strict criteria for subsequent and repeated applications.[25]

External dimension of EU asylum policy and role of the Netherlands

Apart from the internal dimension there have also been developments in the last two decades in the external dimension of the EU asylum and migration policy, which affect the access to asylum. Since the 1990's, European asylum policies and responses to refugee crises have increasingly focused on stemming flows rather than managing them. Visa restrictions, carrier sanctions and cooperation with third countries in border management through the posting of liaison officers abroad, have resulted in a gradual shifting of border controls

20 European Commission, "COM (2020) 609 final," 23 September 2020.
21 European Commission, "Historical Agreement on EU Pact Migration and Asylum," 20 December 2023.
22 Ministry of Justice and Security, *Staat van Migratie 2023*, 6 October 2023.
23 Ministry of Foreign Affairs, "A renewed European agenda".
24 Advisory Council on Migration, "De onvolledige implementatie van Europese Richtlijnen," 10 March 2023, p. 15.
25 Ministry of Foreign Affairs, "A renewed European agenda".

beyond the traditional physical State borders (non-entrée regime) making the journey for protection increasingly perilous and costly.[26] All those measures taken together limit the possibilities to find accessible legal and safe routes to European territory, leading people seeking protection to take irregular routes, putting their lives into the hands of criminal human smuggling networks. Tackling and preventing irregular migration thus became an important pillar of (broader) migration cooperation with countries outside the EU. Agendas and policy frameworks for such migration partnerships have been numerous over the years.[27]

One element of the 'external dimension of EU asylum policy' has also been key to Dutch (foreign) policy efforts, namely the strengthening of refugee protection in the regions of origin. Already in response to the 2003 Blair externalisation proposals, the Netherlands put more emphasis on the idea of 'regional protection' than the proposition of transit processing centers. Like Denmark, the Dutch government has been a frontrunner in promoting and pushing forward multilateral initiatives on asylum capacity building, investing in sustainable livelihoods and durable local integration, amongst other through the development of EU Regional Protection Programmes.[28] Currently, the so-called Prospects-programme forms the cornerstone of the Dutch policy on protection in the region.[29]

26 European Council on Refugee and Exiles (ECRE), *Protection in Europe: Safe and Legal Access Channels*, February 2017.

27 See for example "The EU Global Approach to Migration and Mobility (GAMM)," COM (2011) 743 final, 18 November 2011.

28 Thea Hilhorst et al., "Kennisagenda 2021 - Opvang in de regio," Tweede Kamer, 18 January 2021; ECRE, "EU External Cooperation and Global Responsibility Sharing: Towards an EU Agenda for Refugee Protection," February 2017. See also various Commission documents on past developments: COM(2003) 152, 26 March 2003; COM(2003) 315, 3 June 2003; COM(2004) 410, 4 June 2004; COM(2005) 388, 1 September 2005; COM(2008) 360, 17 June 2008. For a critical note on these Regional Protection Programmes: Aspasia Papadopoulou, "Regional Protection Programme: an effective policy tool?," ECRE, January 2015.

29 Parliamentary documents, *Kamerstukken II*, 35570 XVII, no. 52, 25 January 2021.

These Dutch and EU efforts to strengthen refugee protection in the region should clearly be distinguished from the various externalisation proposals[30] that have been put on the table throughout the years but never materialized.[31] In essence, such proposals postulated that claims for protection should be exclusively processed in centres located outside the European Union, meaning that anyone applying for asylum on the territory of an EU Member State should be returned to one of these centres. The European Commission has always been very clear on the topic-matter: any model of external processing should be *complementary* to the right to asylum in Europe, emphasising the non-refoulement as cornerstone of European values.[32] The Dutch government stated in reaction to the recent motions in the national parliament on externalisation plans that Duitch asylum policy should be in conformity with international legal standards.[33]

Changes in Dutch national asylum law

Since the implementation of the Aliens Act 2000, the national asylum system has been (further) revised on several occasions.[34] In conjunction with the first large revision following a parliamentary motion, a large group of asylum seekers (28.000) who were initially rejected, but remained in the Netherlands for many

30 With 'externalisation of asylum' or 'external asylum processing' is meant any arrangement allowing for the assessment of the merits of asylum application in processing centers outside its own territory (extra-territorial) and subsequently admit only those who are successful, thus excluding the possibility to apply for asylum on the territory. See Advisory Council on Migration Affairs, "External processing," December 2010, at p. 12, a definition is laid down of EU external processing: any arrangement allowing for the exclusive joint assessment of the merits of asylum applications by, or under, the responsibility of the EU or two or more of its Member States in processing centers outside EU territory.

31 See paragraph on 'externalisation' in this report.

32 See also the reluctant response of the European Commission to the Danish new legislation on externalisation: On 18 June 2021 Commissioner Ylva Johansson stated that "*[t]he idea of a transfer of asylum-seekers to third countries for processing and accommodation is contrary to the spirit of the Geneva Convention. A system aiming for external processes outside the EU instead of protecting right to apply for asylum in the EU would send a strong and wrong signal to the outer world: Europe is disengaging. … External processing of asylum claims raises fundamental questions about both access to asylum procedures and effective access to protection. It is not possible under existing EU rules or proposals under the New Pact on Migration and Asylum. The Pact on Migration and Asylum is based on the right to asylum as a fundamental right in the European Union, guaranteed by the EU Charter.*"

33 See paragraph 'externalization' in this report.

34 The first evaluation of the Aliens Act 2000 in 2006 (Commission Scheltema) did not conclude that the procedures were indeed shorter and the quality of the decision making in first instance higher.

years, were regularised in 2007. The main aim of this 'pardon' policy, apart from the humanitarian aspect was to relieve the asylum system of this large burden of caseload, and to move forward with a 'clean slate'.[35] As the return policy did not become more effective in practice, in 2007 a separate governmental organisation was installed to focus solely on the return process: the Return and Repatriation Service (*Dienst Terugkeer en Vertrek* DT&V). Subsequently in 2010 PIVA (Programme implementation improved asylum procedure) was implemented, with five objectives: to further shorten the asylum procedure, provide a higher quality fast procedure, reduce the number of subsequent and/or repeated asylum procedures; reduce the number of asylum seekers who are no longer entitled to reception, and thus left undocumented in the municipalities and increase the return of rejected asylum seekers.[36]

This programme was almost immediately followed by the next in 2011: Programme streamlining asylum procedures (PST)[37] which included a recast of protection grounds. [38] Originally article 29 of the Aliens Act entailed four separate protection grounds: (a) refugee convention status; (b) subsidiary protection[39]; (c) exposure to a traumatic experience; and (d) categorial group based protection (a form of prima facie protection based on the general situation in a certain country or part of that country). In this recast, (c) and (d), the grounds for protection based on national legislation, were deleted, (a) and (b), the 'international' grounds, remained. The main argument of the government was that the protection system would thus be more aligned with the EU acquis. As also followed from the CJEU Elgafaij case,[40] subsidiary protection ex article 15 Qualification Directive (QD) would be granting protection to persons facing a real risk of suffering serious harm also from generalized armed violence, making categorial protection obsolete. The c-ground would be considered under regular

35 De *Regeling ter afwikkeling nalatenschap oude Vreemdelingenwet (RANOV)* entered into force 15 June 2007.

36 Parliamentary documents, *Kamerstukken II*, 29 344, no. 67, 24 June 2008. See also WODC, "Eindrapport evaluatie herziene asielprocedure," September 2014.

37 Parliamentary documents, *Kamerstukken II*, 19637, no. 1597, 21 December 2012.

38 The process of this deletion of protection grounds took several years and received many critical comments from experts and refugee organization as reasons of limiting protection space. The legislative proposal also included changes in the family reunification procedure. See Parliamentary documents, *Kamerstukken II* 33923, no. 1 and ff. The amended legislation was published on 24 December 2013 and entered into force on 1 January 2014.

39 Based on article 2 and 3 of the ECHR, and article 15 Qualification Directive ('serious harm').

40 CJEU, *Elgafaji v. The Netherlands*, C465/07, 17 February 2009.

permit for humanitarian reasons.[41] Furthermore the PST programme focussed, among others, on improving the initial stages of the procedure for example whereby all relevant circumstances of the case should be considered at the earliest opportunity in the procedure.[42]

After the 2015 increase of asylum applications (from 27.000 in 2014 to 54.000 in 2015), the so-called 'tracks' policy was implemented with the official aim to shorten the waiting time for asylum seekers and increasing the efficiency of the process. In practice most efforts were focused on the Dublin track and the manifestly unfounded track, and not on manifestly well-founded, which indeed meant that Syrians asylum seekers who were in general eligible for subsidiary protection had to wait a very long time before their claim was assessed.[43]

Since 2016, the number of asylum applications in the Netherlands decreased, as everywhere else in the EU. Based on political and financial considerations, reception centres were closed and the relevant operational services had to deal with cuts, resulting in backlogs, huge capacity problems and a reception crisis.[44] After many internal and external investigations and reports into the functioning of the asylum services,[45] extra financial support has been provided to the operational actors in the asylum system.[46]

However, thus far, and meanwhile also accompanied by the increase in the numbers of asylum applications since 2022, this has not led to solving the backlogs in assessing asylum claims nor the reception crises, whereby the government is also depending on municipalities for actual accommodation

41 As a result of a parliamentary motion this ground for protection was again included under subsidiary protection, article 29(b) Aliens Act. See also article C1/3.3 Aliens Circular 2000.

42 Anita Böcker et al., *Eindrapport evaluatie herziene asielprocedure*, WODC, December 2014.

43 See further the paragraph on national asylum process in this report.

44 ACVZ, *Peaks and Troughs. Towards a sustainable system for the reception of asylum seekers and the housing and integration of asylum residence permit holders*, (executive summary) 23 July 2017.

45 See amongst others: Significant Public, "Doorlooptijden IND: Definitieve rapportage," February 2020; EY, "Eindrapportage doorlichting IND. Verbetermogelijkheid IND met aandacht voor het asielproces," 20 May 2021; EY, "Eindrapportage doorlichting Vreemdelingenketen: Verbetermogelijkheden ter bevordering van effectiviteit en efficiëntie van de Vreemdelingenketen," 20 May 2021.

46 Ministry of Finance, Financieel Jaarverslag Justitie en Veiligheid 2021.

locations.[47] Not all municipalities are very keen to provide for such locations for a variety of reasons: lack of local political and public support, little or no trust in the central government due to past experiences (for example when a location had to close suddenly notwithstanding running agreements), differences of opinion about the scale of the centres (smaller receptions centres are often preferred by municipalities, but have a different cost-benefit ratio).[48] On the 1st of October 2023, there was a reception shortage of almost 21.000,[49] necessitating the Central Agency for Asylum reception (COA) to call for urgent action as the central registration centre in Ter Apel was overrun again because asylum seekers could not be transferred to reception locations.[50] The reception crisis is further exacerbated and complicated by the task of municipalities to provide for accommodation of displaced Ukrainians under the Temporary Protection Directive. Since February 2022, more than 100.000 displaced Ukrainians have been registered in the Netherlands, of which almost 84.000 also received accommodation under the responsibility of the municipalities, thus creating a tension between demand and supply.[51] Certain municipalities (local government and city councils) tend to be more positive towards receiving displaced Ukrainians than to opening a 'regular' asylum reception centre.[52]

Relation between asylum and labour (migration)

Traditionally the Dutch migration policy has upheld and maintained a strict distinction between asylum and other (regular) migration, such as labour migration. It is for example impossible to 'switch lanes' with respect to the grounds for a legal stay without significant consequences such as returning to the country of origin to apply for a work visa before allowing to work in the

47 ACVZ and Raad voor het Openbaar Bestuur, "Opvang uit de crisis," June 2022; Dutch Council for Refugees (DCR), "Derde quickscan noodopvang," October 2022; DCR, "Wegkijken en vooruitschuiven," June 2023. See also news reports on the website of the Central Agency for the reception of asylum seekers (COA).

48 Ibid. See also Gert Janssen, "Burgemeesters tegen COA: stop met 'overvaltactiek' voor asielopvang in hotels," *NOS*, 14 December 2022.

49 Almost 71.000 places are needed, and less than 50.000 available, see: COA, "Capaciteit en bezetting," November 2023.

50 See news reports on the COA website.

51 Central Government information, "Reception and protection Ukrainian displaced in numbers," accessed on 6 November 2023.

52 National Human Rights Institute (College voor de Rechten van de Mens): "Municipalities which only want to accommodate Ukrainian displaced are acting discriminatory", 29 June 2022.

Netherlands.[53] Until recently asylum seekers are only allowed to work for a maximum of 24 weeks per year.

Recently this distinction seems to become less strict. There has been a slight economic growth since the 2020 pandemic, with a moderate 0.9% growth projected for 2023, rising to 1.4% in 2024.[54] The Netherlands has been struggling with labour market shortages since mid-2021,[55] with a relatively low unemployment rate of 3.7% in September 2023 and an expectation of a need of labour force in an ageing society. This has raised the question whether one could also make better 'use' of asylum seekers and their employability, talent, experiences, and skills.[56] Moreover, research has shown that longstanding inactivity has severe consequences for the wellbeing, mental health and longer-term integration prospects of asylum seekers.[57]

Unlike asylum seekers, displaced Ukrainians do have the right to work (without a separate work permit) under the temporary protection scheme.[58] It will be interesting to see what lessons can be learned and whether this might lead to a 'paradigm change' with respect to asylum and access to the labour market.[59] Due account has to be taken of the fact that the current economic climate is indeed stimulating in the sense that there is great need for labour force. It is also likely that employers are somewhat more inclined to hire the European Ukrainians. In September 2023, 50% of the 68,000 Ukrainian refugees in the Netherlands was employed. However, most are employed parttime, and a

53 See the systematic division between chapters within the Aliens Act 2000 ('regular' and 'asylum' permit). See also ABRvS, 201004851/1/V2, 18 October 2010, JV 2010/470.

54 OECD, "Economic Survey of the Netherlands," (executive summary) June 2023, p. 3. Rising inflation has been an ongoing challenge in response to the COVID-19 pandemic and the war on Ukraine, hitting its peak in +14.5% in September in 2022. A downward trend has been recently observed, measured at -0.4% in October 2023. See Central Statistical Office (Centraal Bureau voor de Statistiek CBS), "Dashboard economie."

55 CBS, "Spanning op de arbeidsmarkt."

56 ACVZ, "From asylum seeker to healthcare provider," (summary), 11 May 2021.

57 Ibid. See also for example Godfried Engbersen et al., *Geen tijd te verliezen: van opvang naar integratie van asielmigranten*, Scientific Council for Governmental Policy (Wetenschappelijke Raad voor Regeringsbeleid (WRR)), Policy-brief 4, 2015.

58 IND, "Richtlijn Tijdelijke Bescherming Oekraïne," October 2023.

59 The WODC is currently conducting longitudinal research with respect to the reception and residence of Ukrainian displaced in the Netherlands: See for more information: WODC, "Longitudinaal Onderzoek Cohort Oekraïense Vluchtelingen (LOCOV)."

majority works in the corporate service industry. A recent study concluded that only 30% of the 900 interviewed Ukrainian refugees is satisfied with their job in the Netherlands, with many others struggling to find work in their field and at their level.[60] Of additional concern is the possible exploitation of Ukrainian refugees. In March 2023, FairWork reported an increase in registered cases of labour exploitation.[61] An increase in Ukrainian victims of human trafficking was furthermore reported, raising from 7 in 2021 to 51 in 2022, almost all of which involved cases of labour exploitation.[62]

Currently, asylum seekers in the Netherlands may work when their asylum application has been pending for at least six months and no final decision has thus far been made. The Cabinet's main point is that employment in the Netherlands should not hinder the possible return to the country of origin.[63] Up until November 2023, Article 11 of the Foreign Nationals Employment Act (*Wet Arbeid Vreemdelingen* WAV) held that asylum seekers were not allowed to receive a temporary work permit for more than 24 weeks a year, to prevent asylum seekers gaining a right to unemployment benefits.[64]

Recently, a shift occurred in response to a legal case initiated in March 2023 against the Netherlands challenging the 24-week rule. The case was brought forth by an asylum seeker from Nigeria, prompting a reconsideration of the existing policy. In April 2023, the Court ruled that the Employee Insurance Administration (*Uitvoeringsinstituut Werknemersverzekeringen*, UWV), may no longer refuse an employer a work permit for an asylum seeker if, as a result, the 24-week time-limit is exceeded,[65] but the UWV appealed the matter to the Council of State for a final ruling.[66] On the 29th November 2023, the Council of State's final conclusion was that the previous Court's ruling must be upheld,

60 Hogeschool InHolland, "Oekraïense vluchtelingen en hun toegang tot basisvoorzieningen," October 2023.

61 FairWork, "Oekraïense vluchtelingen benadeeld en uitgebuit in Nederland," 22 March 2023.

62 Dutch Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, *Jaarcijfers Mensenhandel 2022*, 18 October 2023, p. 5.

63 Ministry of Social Affairs, "Advies verenigbaarheid 24-weken-eis met de Opvangrichtlijn," 10 December 2021.

64 Wettenbank, "Wet arbeid vreemdelingen," 1 January 2023.

65 De Rechtspraak, "Rechtbank oordeelt dat de wetbeperking van 24 weken voor asielzoekers in strijd is met Europees recht," 18 April 2023.

66 Omroep Gelderland, "Mogen Asielzoekers langer werken? Elvis uit Harderwijk vindt van wel," 7 September 2023.

stating that the 24-week rule disproportionately hinders access to the labour market for asylum seekers.[67] The UWV proclaimed it would adjust the 24 week work permits and the outgoing Government said it would adopt the rules.[68] This adoption brings Dutch policy in line with the EU Reception Directive.[69]

Political and public debate: urge to 'take (more) control' of migration

Migration is the main cause of population growth, with an increase of more than 220.000 in 2022, also due to the arrival of around 87.000 displaced Ukrainians last year.[70] In general, more than half of the migrants arriving in the Netherland originates from within the EU and the European Free Trade Association (EFTA).[71]

Migration, and asylum in particular, has always been a contentious issue in Dutch politics. More recently however, this seems to be even more the case, fuelled by an 44% increase in the number of first asylum applications (35.500) in the Netherlands in 2022 compared to 2021,[72] a national 'crisis-mode' due to shortage of reception and backlogs, and constant messaging of seemingly uncontrollable, irregular arrivals of (asylum)migrants at the external EU borders.[73] In that context the governmental working group on the fundamental reorientation of the asylum system has been initiated.[74] Meanwhile the political debate over the last year has been intensified with various outcries for urgent measures such as increasing internal border controls and reopening the debate on externalisation of asylum procedures.[75]

67 NU, "Asielzoeker mag langer werken: hoogste rechter haalt streep door '24 wekeneis'," 29 November 2023.

68 José Boon, "Kabinet grijpt direct in na uitspraak rechter: asielzoekers mogen hele jaar werken," *NU*, 29 November 2023.

69 José Boon, "Kabinet grijpt direct in na uitspraak rechter: asielzoekers mogen hele jaar werken," *NU*, 29 November 2023.

70 CBS, "How many people immigrate to the Netherlands?," accessed on 6 November 2023.

71 Parliamentary documents, *Kamerstukken II*, 364120, no. 1, 19 September 2023.

72 IND, "Asylum Trends," January 2023.

73 See paragraph 'setting the scene' in this report: Administrative capacity is a big problem in the Netherlands, partly due to governmental budget cuts in all parts of the asylum system and a lack of a buffer to process larger numbers of refugees in times of crisis.

74 See the introduction of this report.

75 See paragraph 'externalisation' in this report.

In July 2023, the Dutch government stepped down as the coalition parties could not reach agreement on further family reunification restrictions of holders of international protection in an effort to decrease the number of asylum applications. The fact that this topic led to the fall of the government shows the politicisation of asylum migration in the national public debate, as the impact in decreasing actual numbers due to this particular measures would be relatively small.

Migration was one of the most important topics in the campaign in the run up to the recent November 2023 general elections.[76] Public opinion polls indicated that Dutch citizens think the elections should primarily address inflation (34%), health care (28%), asylum and integration (27%), the housing market (27%) and climate (21%). Immigration and asylum are mostly important issues for the right-wing electorate (44%), while the left wing does not consider it a priority (13%).[77] Overall, the Dutch population has become more negative towards the arrival of (asylum)migrants, expressing serious concerns over the impact of migration on Dutch society and welfare state.[78] These concerns have been translated in the result of the election, whereby the Freedom Party (PVV) of far right politician Wilders became by far the largest party in parliament, gaining the right to initiate the coalition negotiations. The PVV has a clear anti-immigration agenda, and the current state of play is that a coalition government with other (right-wing) parties with a strong focus on migration control, preventing access to asylum and lowering the number of asylum seekers will likely be negotiated in the coming months.

76 NOS, "Peilingwijzer: VVD, NSC en GL/PvdA houden elkaar in evenwicht," 26 October 2023.

77 Sjoerd van Heck, "Politieke barometer week 39," Ipsos, 27 September 2023; Politieke Barometer on X, 2 October 2023.

78 Bram Geurkink, Emily Miltenbrug en Josje den Ridder, "Burgerperspectieven 2023 Extra Verkiezingsbericht," Sociaal en Cultureel Planbureau (SCP), 24 October 2023, p. 16.

2 International legal framework

Convention obligations[79]

The Netherlands is a signatory to the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol, as well as to the other UN human rights treaties such as Convention against Torture (CAT), International Convention on Civil and Political Rights (ICCPR) and Convention on the Rights of the Children (CRC). The Netherlands is also party to the European Convention of Human Rights (ECHR). The legal protection obligations deriving from these treaties, with non-refoulement as a cornerstone principle, are implemented in Dutch national legislation, more in particular, Article 29 of the Dutch Aliens Act 2000. Article 29(1)(a) refers to Refugee Convention protection. Protection based on Article 29(1)(b) is granted if a person risks 'serious harm' upon return to the country of origin (subsidiary protection). This (sub)article implements article 15 of the EU Qualification Directive, which covers treatment in violation of Article 2 and 3 ECHR, including individuals who are at real risk because of mere membership of a group[80] and/or for reasons of indiscriminate violence and attacks on civilians in the country of origin (non-individualised violence).[81]

The scope of the protection against refoulement in the ECHR, as interpreted by the European Court of Human Rights (ECtHR), is broader than under the Geneva Convention.[82] Any return of an individual who would face a real risk of being subjected to treatment contrary to these articles is prohibited. Moreover, the need for protection against the treatment prohibited by Art. 3 ECHR has

79 This paragraph equals for a large (generic) part the paragraph on convention obligations in the Danish country report, as this part of the legal framework applies to both countries.

80 ECtHR, *Salah Sheekh v. The Netherlands*, no. 1948/04, 11 January 2007.

81 ECtHR, *NA. v. United Kingdom*, no. 25904/07, 17 July 2008. See also Article 15c EU Qualification Directive and the interpretation thereof in the CJEU *Elgafaji* case. The current protection grounds in Dutch legislation are limited to these so-called 'international protection grounds.' See further paragraph 'setting the scene.'

82 Vladimir Simoňák and Harald Christian Scheu, *Back to Geneva: Reinterpreting Asylum in the EU*, Wilfried Martens Centre for European Studies, 2021, p. 20.

been considered absolute in several Court rulings.[83] To prevent refoulement, it is not necessarily required to admit a person to the territory of a state, if sending him or her back does not lead to a situation where the person would be persecuted or runs a real risk of torture, inhuman or degrading treatment.[84] However, without assessing the individual case, it would be rather difficult to know whether someone has an arguable claim of a real risk of refoulement. So, ensuring effective access to an asylum procedure is a precondition to ensure the principle of non-refoulement.[85] In addition, article 4 of Protocol No. 4 to the ECHR prohibits collective expulsion. This prohibition in itself also requires that there is a reasonable and objective examination of the specific case of each individual asylum seeker.[86]

If a country has jurisdiction, it is obliged to respect and guarantee the human rights enshrined in the applicable international legislation. In case the Netherlands, a State-party to the ECHR, violates those obligations,[87] it can be held accountable for an 'internationally wrongful act' by the ones whose rights have been violated.[88] In the context of the ECtHR jurisdiction this is not only territorial,[89] but also applied extra-territorial if there is effective (territorial,

83 ECtHR, *Chahal v. United Kingdom*, 15 November 1996, paras. 76 and 79, referring to ECtHR, *Soering v. United Kingdom*, 7 July 1989, para. 88; ECtHR, *Ahmed v. Austria*, 17 December 1996, ECtHR, *Ramzy v. Netherlands*, 27 May 2008, para. 100, ECtHR, *Saadi v. Italy*, 28 February 2008, para. 137. See Jens Vedsted-Hansen, "European non-refoulement revisited", *Scandinavian Studies in Law*, 1999-2015, p. 272.

84 Daniel Thym, "Muddy Waters: A guide to the legal questions surrounding 'pushbacks' at the external borders at sea and at land," *EU Immigration and Asylum Law and Policy*, 6 July 2021.

85 See on this subject matter also Clingendael Institute, Monika Sie Dhian Ho and Myrthe Wijnkoop, "Instrumentalization of Migration," December 2022.

86 ECtHR, *Hirsi Jamaa v. Italy*, no. 27765/09, 23 February 2012. See also the Rule 39 measures issued by the ECtHR in August and September 2021 in order to stop the expedited (collective) expulsions of Iraqi's and Afghans stuck at the Latvian, Lithuanian and Polish borders (ECtHR Press Releases of 21 August 2021 and 8 September 2021).

87 ECtHR, M.A. v. France, no. 9373/15, 1 February 2018; ECtHR, *Salah Sheekh v. the Netherlands*, no. 194/04, 11 January 2007, para. 135; ECtHR, *Soering v. the United Kingdom*, No. 14038/88, 7 July 1989; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991. See FRA: "Fundamental rights of refugees, asylum applicants and migrants at the European borders," 2020, p. 6.

88 International Law Commission, "Draft Articles on State Responsibility, Official Records of the General Assembly," Fifth-sixth Session (A/56/10), Article 2.

89 ECtHR, *Soering. v. United Kingdom*. No 14/038/88, 7 July 1989; ECtHR, *Bankovic a.o. v. Belgium a.o.* no. 52207/99, 21 December 2001; Hoge Raad, *IS women v. the Government of the Netherlands*, 26 June 2020, ECLI:NL:HR:20201148, paras. 4.16-4.18.

personal or functional) control over another territory or over individuals who have carried out the act or omission on that territory.[90] For example in the *Hirsi v. Italy* case, the ECtHR found that a group of migrants who left Libya with the aim of reaching the Italian coast, who were intercepted by ships from the Italian border police and the coastguard and returned to Libya, were within the jurisdiction of Italy. According to the ECtHR a vessel sailing on the high seas is subject to the 'exclusive jurisdiction of the state of the flag it is sailing'.[91]

This means that the Netherlands cannot be exempted from its human rights obligations, including non-refoulement and access to asylum, by declaring border areas as non-territory or transit zones or to externalise asylum procedure to other countries: the determining factor remains whether or not there is jurisdiction, either/and through de jure or de facto control by the authorities.[92] This does however not mean that access to asylum can only be provided for on Dutch territory. The 1951 Refugee Convention states that refugees must be protected but does not in itself prohibit that states negotiate cooperation agreements on *where* that protection is guaranteed, as long as the preconditions fulfil the legal state obligations. The ECtHR has accepted that states have the right to control the entry and residence of third country nationals.[93] Furthermore, the ECtHR has in 2020 drawn a line as to gaining territorial access to the European Union. In its judgment in the case of *N.D. and N.T. v. Spain* the Court concluded that Spain did not breach the ECHR in returning migrants to Morocco who had attempted to cross the fences of the Melilla enclave. The Court reasoned that because the group of migrants had not made use of the entry procedures available at the official border posts, the lack of an individualized procedure for their removal had been a consequence of their own conduct (i.a. the use of force and being in large numbers).[94] In other words, the line of argumentation in this case does require states to deploy effective legal options

90 See for an analysis of extra(territorial)jurisdiction and effective control: Advisory Council on Migration (ACVZ), "EU borders are common borders. Member States' responsibility for human rights protection at the EU's external borders," February 2022. See also Maarten den Heijer, *Europe and Extraterritorial Asylum*, 2012; Lisa-Marie Klomp, *Border Deaths at Sea under the Right to Life in the European Convention on Human Rights*, 2020; Annick Pijnenburg, *At the Frontiers of State Responsibility. Socio-economic Rights and Cooperation on Migration*, May 2021.

91 ECtHR, *Hirsi Jamaa v. Italy*, no. 27765/09, 23 February 2012.

92 See also Sergio Carrera, "Walling off Responsibility," *CEPS*, nr. 2021(18), November 2021, p. 12.

93 ECtHR, N. v. the United Kingdom [GC], no. 26565/05, 2008, para 30; ECtHR, Ilias and Ahmed v. Hungary [GC], no. 47287/15, 21 November 2019, para. 125.

94 ECtHR, *N.D. and N.T. v. Spain*, nos. 8675/15 and 8697/15, 13 February 2020.

and means for access to protection for third country nationals, however it also takes into account the actions of the applicants to that effect.

The Netherlands, when becoming signatory to the ECHR, also adhered to the interpretation of the convention provisions through the jurisprudence of the Strasbourg Court. The ECtHR rulings have had significant impact on procedural and material asylum law in the Dutch national legal order and the operationalisation thereof. The ruling on the *M.S.S.* case for example led to long term suspension of Dublin transfer to Greece.[95] And with respect to the assessment who would (not) be entitled to protection (the scope of protection), the rulings in Salah Sheekh and NA form cornerstone jurisprudence. The general security and human rights situation have increasingly been taken into account by the Court in assessing the risk of a violation of article 3 ECHR upon return. In 2007 the Court stated that the mere membership of an ethnic minority which is systematically treated in a manner contrary to article 3 ECHR, is sufficient to conclude such a violation.[96] A year later, the scope of article 3 was broadened in the N.A. v. UK case, whereby extreme situations of generalized violence invoked the application of article 3 ECHR.[97] Next to including deterioration of medical conditions[98] in the case of Sufi and Elmi[99], the interpretation of non-refoulement seemed to be extended to also cover the risk of being exposed to certain inhumane socio-economic circumstances, in this case referring to the humanitarian situation in IDP/refugee camps.[100]

95 ECtHR, *M.S.S. v. Greece and Belgium*, no. 30696/09, 21 January 2011.

96 ECtHR, *Salah Sheekh v. The Netherlands*, no 1948/04, 11 January 2007.

97 ECtHR, *N.A. v. United Kingdom*, no. 25904/07, 17 July 2008. See also Rechtspraak Vreemdelingen (RV) 2008-1, commentary M.E. Wijnkoop.

98 However, the threshold in these cases is high. A breach of Article 3 would only be found in the most exceptional circumstances, namely where there were compelling humanitarian considerations such as an applicant being critically ill and facing mental and physical suffering and hastened death upon removal (ECtHR, *Paposhvili v. Belgium*, no. 41738/10, 13 December 2016.

99 ECtHR, *Sufi and Elmi v. United Kingdom*, nos. 8319/07 and 11449/07, 28 June 2011.

100 See also the development of the scope of the non-refoulement principle: Cornelis Wolfram Wouters, *International legal standards for the protection from refoulement: A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture*, 2009.

In the Netherlands, the policy rules were adapted as a result of Court rulings. This led throughout the years to a rather complicated variety of group-based policies with different standards of risk assessment, highly influenced by Country of Origin reports.[101] The Dutch government recently expressed the opinion that the system is over-legalistic and far too complicated, not only with respect to the scope of protection but also regarding the administrative and procedural conditions for return decisions and Dublin cases.[102] The government claims that this increasing complexity contributes to the backlogs, and the current high eligibility rate.[103]

Meanwhile, the importance of a thorough substantial investigation of all relevant elements of a case to assess the credibility of the claim and the risk upon return has recently been illustrated in the case of the Bahrein national who was sentenced to years of imprisonment after deportation by Dutch authorities. The ECtHR unanimously found a violation of article 3, holding the Netherlands legally accountable and imposed a fine of 50.000 euros.[104]

European Union law

As stated previously, the Dutch asylum system is in general terms closely linked to the minimum standards of the EU acquis on asylum procedures and reception conditions.[105] The interpretation of protection grounds has invoked some interesting legal questions on the scope and content of protection grounds.

The EU Qualification Directive refers to two forms of protection: 1) refugee status based on the 1951 Convention, and 2) subsidiary protection in case of a real risk of serious harm. Article 15 defines three specific types of harm which constitute

101 See also paragraph 'national asylum system' in this report.

102 Not only the Strasbourg, but also the Luxembourg court.

103 Parliamentary documents, *Kamerstukken II*, 19673, no. 3100, 28 April 2023. See also the attachments.

104 ECtHR, *A.M.A. v. The Netherlands*, no. 23048, 24 October 2023.

105 This does not mean that they are completely synchronized or that there is no legal debate on the implementation or interpretation of certain aspects of the Dutch procedure in light of the EU rules. See for example the discussion between the Netherlands and the European Commission the Schiphol procedure (see under 'border management'), and the discussion on the starting point of various phases at the beginning of the procedure (lodging, registration, submittance). See on this matter the preliminary questions of the regional court Haarlem of 20 October 2023, ECLI:NL:RBDHA:2023:15961. The same goes for reception conditions: see for example the discussion on the 24 weeks limitation for asylum seekers to work.

the qualification for subsidiary protection, based on article 2 and 3 ECHR, as interpreted by the Strasbourg jurisprudence. It has been an extensive discussion whether or not article 15 c (a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict) indeed intended to extend the grounds of protection or that is was merely a codification of existing asylum law.[106] In the Elgafaij case, the CJEU considered the scope and interpretation of article 15c in light of the ECtHR interpretation of article 3 in the NA. v UK case. The Court held that the term 'indiscriminate' implies that the violence 'may extend to people irrespective of their personal circumstances' when: '[...] the degree of indiscriminate violence characterizing the armed conflict taking place ... [must reach] such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.'[107] It also stated that article 15c QD should be applied and interpreted autonomously from article 3 ECHR as the content differs (para. 28).[108] In a very recent verdict of November 2023, the CJEU stated that, in contrary to the views of the Dutch Council of State jurisprudence and the government, article 15c does not only apply in 'exceptional circumstances', but that individual circumstances of the individual applicant should also be considered in the assessment whether an article 15c situation is present ('any other element'). This could be read as a 'gliding scale' of situations in which article 15c is applicable.[109]

106 See also EASO, *Article 15c Qualification Directive. A judicial analysis*, December 2014; For the debate in Dutch parliament: Parliamentary documents, *Kamerstukken II* 30925, no. 25, p. 1047 and ff.

107 CJEU, *Elgafaij v. The Netherlands*, C465/07, 17 February 2009, para. 37. Other relevant jurisprudence: In Diakité, the CJEU concludes that the concept of 'internal armed conflict' under Article 15(c) QD must be given an interpretation, which is autonomous from international humanitarian law. (CJEU, Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides, C-285/12, 30 January 2014, para. 25). The judgment CF and DN is of particular importance for the interpretation of the concept of 'serious and individual threat to a civilian's life or person' in the context of an international or internal armed conflict under Article 15(c) QD (*CJEU, CF and DN v Bundesrepublik Deutschland*, C-901/19, 10 June 2021).

108 See also para. 39 where the Court states that the more evidence that a person in affected for personal reasons, the lower the threshold of indiscriminate violence has to be in order to grant subsidiary protection.

109 CJEU, *X. Y. and others v. The Netherlands*, no. C-125/22, 9 November 2023.

Next to decisions on the meaning of article 15 c QD, the CJEU has also delivered landmark decisions on the scope and interpretation of the refugee convention status (article 15(a)), more in particular regarding persecution grounds of "social group"[110] and "political opinion."[111] This again illustrates the (legal) complexity of the scope and interpretation of circumstances amounting to the need for protection, and the implementation thereof in the national legal system.

Dutch deviation from (minimum) EU standards

These are some interesting aspects of asylum law and policy where the Netherland deviates from the general minimum norms laid down in the EU asylum acquis.

Whereas free *legal aid* is not required in the first instance procedure under the EU acquis, and only under certain conditions in the appeals procedure, in the Netherlands, it is provided by the state, at least during the first asylum application.[112] This is based on the consideration that the provision of legal aid in the early stages of the asylum procedure increases the efficiency of the process by allowing decision making authorities to assess a complete and accurate file, reduces the burden on decision-makers, prevents unnecessary procedures and better safeguards the right to non-refoulement. Critics have stated that the involvement of legal aid throughout the whole procedure has indeed had the opposite effect, being even more 'juridification' of the asylum process, and has led to more legal proceedings. Despite several policy debates and although access to legal aid has been restricted in subsequent and repeated applications,[113] free legal aid in first instance proceedings has still remained.[114]

The Netherlands has a *single status* system since the introduction of the Aliens Act 2000. This means that the permits based on refugee and subsidiary protection[115] are accompanied by the same set of material rights. The rationale

110 CJEU, *X.Y.Z. v. The Netherlands*, C 199/12, 200/12, 201/12, 7 November 2013.

111 CJEU, *S.A v. The Netherlands*, C151/22, 21 September 2023.

112 "ECRE/ELENA Legal note on access to legal aid in Europe," European Legal Network on Asylum, November 2017.

113 Government coalition agreement 2017-2021 "Confidence in the Future" mentioned the intent to withdraw free legal aid in the first instance asylum procedure.

114 DCR, "Blij met behoud rechtsbijstand asielzoekers," 9 April 2020.

115 As the former 'c-' ground relating to traumatic experiences is also included under subsidiary protection in the national policy rules, this can also be considered a more favourable standard then required by EU law. See paragraph 'setting the scene'.

behind this system is that asylum seekers would then have no reason to continue legal proceedings. The refugee status does not provide for additional rights or a 'stronger' status and is thus no more attractive than subsidiary protection. Since its introduction in 2001, the single-status system has helped to simplify the asylum procedure, reduce the administrative burden and reduce delays due to further legal appeals. According to many experts, such as the Advisory Council on Migration, abolishing the single-status system would result in significant litigation by persons with subsidiary protection status, as is indeed the case in for example Denmark[116] and Germany. This would result in a lot of additional work for the Immigration and Naturalisation Service (IND) and the judiciary.[117]

As we have seen with the March 2022 activation of the EU *Temporary Protection* Directive for Ukrainian displaced persons, the Netherland has made a rather unique choice in the way it has implemented this Directive two decades ago. Instead of using the at the time still existing national categorical or *prima facie*-based protection grounds,[118] the government decided to 'grant' temporary protection by way of postponing the decision making process ('moratoria') and providing the displaced person with the status of asylum seeker.[119] As the categorical protection ground was removed from article 29 Aliens Act in 2012, formally the Netherlands system does not provide for a temporary protection status.[120]

However, all forms of protection are indeed temporary at first, and can currently end, be revoked or extended.[121] In the Netherlands, a protection status is initially granted for a duration of five years. This goes beyond the minimum norms in the EU acquis: Article 24 of the QD states that refugee status should be granted for at least three years, and subsidiary protection status for at least one year, or two years in the case of an extension. The Rutte III) government stated in its coalition agreement that the duration of the protection status would be brought

116 See country report Denmark.

117 Advisory Council on Migration, December 2022, p. 132.

118 Which could be revoked relatively easy in case of improvement of the security and human rights situation in the country of origin. See paragraph 'setting the scene' in this report.

119 Article 43a Aliens Act 2000. See for the Explanatory Memorandum to the legislative proposal: Parliamentary documents, *Kamerstukken II*, 29031, no. 3. See for an extensive legal analysis on the implementation of the Temporary Protection Directive in Dutch legal order: Karina Franssen, *Tijdelijke Bescherming van asielzoekers in de EU*, (Den Haag: Boom Juridische uitgevers) 2011.

120 See paragraph 'setting the scene.'

121 Article 32 Aliens Act 2000; Article 3.105c Aliens Decree 2000; C2/10.4 Aliens Circular 2000.

back from five to three years.[122] This legislative proposal dates from 2020 and has yet to be discussed in parliament.[123] Several legal experts have been critical of the proposal, both because of the lack of (legal) necessity and the practical consequences for both refugees and persons with subsidiary protection (impact on integration) and the high administrative burden for the decision making authorities and judiciary.[124]

Current state of play: The EU Pact and the Dutch position

As stated, in September 2020 the European Commission launched an extensive package of new proposals to revive and move forward the CEAS, the EU Migration and Asylum Pact: '*a fresh start on migration, to build confidence through more effective procedures and strike a new balance between collective responsibility and solidarity*'.[125] This Pact includes five legislative proposals: the Asylum and Migration Management Regulation (which includes a solidarity mechanism), the Screening Regulation, the Asylum procedures regulation, amended proposal Regulation on Eurodac and a Crisis Management Regulation.[126] These are the new ones, next to existing files such as instrumentalisation,[127] the Schengen Border Code and others:

122 Government coalition agreement 2017-2021, "Confidence in the Future".

123 Parliamentary documents, *Kamerstukken II*, 35691.

124 Council of State, Advisory Council of Migration, Legal Bar Association, and several legal and human rights organisations, see: Parliamentary documents *Kamerstukken II*, 35691, attachments.

125 See for various (critical) assessments and comments on the EU Migration and Asylum Pact: ACVZ and AIV, *Het Europese asielbeleid: twee grote akkoorden om de impasse te doorbreken*, 1 December 2020; Hanne Beirens, "The EU Pact on Migration and Asylum. A bold move to avoid the abyss?" MPI Europe, October 2020; CEPS, "ASILE Project" and various blogs via EU Immigration and Asylum Law and Policy.

126 European Commission, "Migration and Asylum Package."

127 Monika Sie Dhian Ho and Myrthe Wijnkoop, "The instrumentalization of migration. A geopolitical perspective," Clingendael Institute, December 2022.

Overview of current state of play reform CEAS – EU Migration and Asylum Pact

	Commission's proposal	Parliament's report	Council's mandate	Negotiations (trilogues)	Adopted legislation
Instrumentalisation (2021)		Under discussion	Under discussion		
Schengen borders code (2021)		Draft (Nov.2022)	June 2022		
Migration management (2020)		March 2023	June 2023	Ongoing	
Asylum procedure (2020)		March 2023	June 2023	Ongoing	
Border screening (2020)		April 2023	June 2023	Ongoing	
Crisis & force majeure (2020)		March 2023	Under discussion		
Eurodac (2020-amended)		Dec. 2022 (update)	June 2022	Ongoing	
EU asylum agency (2018)		Nov. 2021	June 2021	Completed	December 2021
EU asylum agency (2018)		Draft (Feb. 2020)	Partial (June 2019)		
Asylum qualification (2016)		June 2017	Dec. 2022 (amended)	Provisional agreement	
Asylum procedure (2020)		May 2017	Dec. 2022 (amended)	Provisional agreement	
Union resettlement (2016)		June 2017	Dec. 2022 (amended)	Provisional agreement	

Source: DG Migration and Home Affairs, European Commission

The Netherlands prepared a Strategic agenda which outlines the focus and position of the Dutch government in this CEAS reform.[128] With respect to the current negations on the Pact, the Dutch government, with a view on preventing secondary migration within the EU, is pushing for a stronger *Dublin* system through better alignment of national asylum policies across Member States, faster procedures,[129] the extension of the period of responsibility under the Dublin

128 Ministry of Foreign Affairs, "A renewed European agenda for migration 2019-2024."

129 The Dutch government has for example signed Memoranda of Understanding with both Belgium and Germany to implement faster Dublin transfers: Parliamentary documents, *Kamerstukken II*, 32 317, no. 860, 20 October 2023.

system, and the possibility to detain Dublin claimants awaiting their transfer. States that do not fulfil their Dublin responsibilities should not be able to benefit from the solidarity mechanism until they do so.[130] It also supports a fairer division of responsibility, where border states can expect solidarity in times of crisis.[131]

The Dutch government considers the *Crisis Regulation* useful for dealing with large numbers of asylum seekers, as long as attention is paid to the protection of fundamental rights.[132] To ensure this, the government pushed for a stricter formulation of when a crisis situation can be invoked.[133] MS should not be able to decide unilaterally when a situation is considered to constitute a 'crisis' in order to prevent abuse, but on the other hand the decision-making process should also not be completely dependent of the Commission actions.[134] The Netherlands wants to retain the possibility to impose internal border controls if necessary.[135]

The Government is in favour of a *pre-screening* assessment to quickly distinguish between those in need of protection and those who are not. It supports the proposed changes to the Asylum Procedures Directive as they could limit the number of people who arrive irregularly and have no right to protection entering the EU, while also increasing returns. Fearing that unaccompanied minor asylum seekers would be sent ahead if they were not included in the pre-screening measure, the Dutch government aimed for including them into the border procedures,[136] but this position was not sufficiently supported by other MS. The government furthermore pushed for a broadened connection criterium in

130 Parliamentary documents, *Kamerstukken II*, "Verslag van de formele bijeenkomst van de Raad Justitie en Binnenlandse Zaken, 8 en 9 juni 2023," 19 June 2023.

131 Parliamentary documents, *Kamerstukken II*, 22 112, no. 2955, 4 November 2020.

132 Parliamentary documents, *Kamerstukken II*, 22 112, no. 2955, 4 November 2020.

133 Parliamentary documents, *Kamerstukken II*, 22112, nr. 2963, 16 November 2020.

134 Parliamentary documents, *Kamerstukken II*, 32 317, no. 860, 20 October 2023. This requires a robust legal framework with clear definitions and possibilities for derogation – with proportionate measures that are limited in time. See also: "Verslag van de informele bijeenkomst van de Raad Justitie en Binnenlandse Zaken," Ministerie van Justitie en Veiligheid," 29 August 2023, p. 5.

135 In response to the Council's political agreement of 4 October 2023 on the Crisis Management Regulation, which includes instrumentalisation, ECRE was highly critical about the Council's decision to allow Member States national discretion to deviate from the Regulation in various situations. ECRE, "Editorial: So that's it Then? Agreement(s) on the EU Asylum Reform," 6 October 2023.

136 According to the Dutch government, this would have a deterrent effect on minors who would be sent by their families to obtain a permit and apply for family reunification.

the safe third country concept with the aim of creating more possibilities for application of that concept.[137] More on this topic can be found in the paragraph on 'externalisation'.

Cooperation with partner countries should be focused on mutual benefits. The Netherlands calls for broad partnerships with third countries on a case-by-case basis, in which migration should be one of several pillars, as in the agreement with Tunisia.[138] In order to prevent instrumentalization of migration, the government does not exclude the possibility of negative instruments such as tariff preference schemes or visa measures following the lack of cooperation on return. Cooperation agreements to externalise certain dimensions of migration policy, are deemed to be necessary for an effective European policy.

On 20 December 2023 the Council, Commission and European Parliament reached a political agreement on the main aspects such as the border procedures and solidarity mechanisms.[139] Once these proposals are formally adopted by the European Parliament and Council, the pillars of the New Pact on Migration and Asylum will be in place. Then, specific legislative acts will be adopted, and Member States will need to implement the new rules in their national legislation.

137 Parliamentary documents, *Kamerstukken II*, "Verslag van de formele bijeenkomst van de Raad Justitie en Binnenlandse Zaken, 8 en 9 juni 2023," 19 June 2023.

138 Parliamentary documents, Kamerstukken II, 32 317, no. 860, 20 October 2023.

139 European Commission, "Historical Agreement on EU Pact Migration and Asylum," 20 December 2023.

3 Border management and procedures

In accordance with the Schengen agreement, the Netherlands does not conduct any internal Schengen border controls. Border controls do occur at the external borders at airports, seaports, and along the coast.[140] The responsible actor for border management control and initial receipt of asylum seekers is the Royal Netherlands Military Police (KMar).[141]

The Netherlands has an asylum border procedure for those arriving at external Schengen borders, based on article 43 of the Asylum Procedures Directive.[142] They are denied entry and, in principle, held in border detention for the purpose of assessing their asylum claim. During the recast of the Directive in 2012, a discussion between the European Commission and the Dutch government arose regarding whether the Netherlands did indeed have border procedures as articulated in the Procedures Directive.[143] Despite the Netherlands' proclaimed reservation at the time, the government now recognises it as a border procedure which should be conducted according to the provisions in the Directive.

The police (seaport) or the KMar (airport) transfers those seeking asylum at the external border to the responsibility of the IND at the Judicial Centre at Schiphol Airport. In 2022, 1,550 asylum seekers filed an application at the border, a 38% increase in comparison to 2021.[144] Nationality and identity assessments are initiated, as well as a medical examination. Subsequently a six day rest and preparation time (RVT) starts,[145] after which the accelerated asylum procedure begins (again 6 days), during which the asylum seeker is held in the immigration

140 According to the Council agreement concluded on 8 June 2023 border screening and border procedures at the external Schengen borders are mandatory. Ministry Justice and Security, *De Staat van Migratie 2023*, 6 Oktober 2023, p. 22.

141 Asylum Information Database Europe (AIDA), *Country Report The Netherlands*, Update 2022, May 2023, p. 23.

142 AIDA, *The Netherlands*, 2023, p. 56 ff.

143 DCR and UNHCR, "'Pas nu weet ik: vrijheid is het hoogste goed': Gesloten Verlengde Asielprocedure 2010-2012", April 2013, p. 9.

144 Ministry Justice and Security, *De Staat van Migratie 2023*, 6 Oktober 2023, p. 103.

145 DCR, "Uw asielaanvraag," March 2021, p. 6.

detention centre at Schiphol.[146] There are various groups that are exempted from the asylum border procedure and are thus not subjected to border detention: unaccompanied children, families with children, and vulnerable persons who are in need of special procedural guarantees (for example victims of torture or rape). They are automatically referred to the general asylum procedure.[147]

The IND can legally extend its decision up to 28 days. Upon a positive decision, the refugee will be moved to a reception centre until housing in a municipality becomes available. If the IND needs more time to assess the asylum application, or if the IND decides the asylum application needs to continue in the General Asylum Procedure, the asylum seeker is transferred to a reception centre to await the asylum procedure.[148] Upon a negative decision, based on being inadmissible, manifestly unfounded, or unconsidered due to another Dublin country's responsibility, the asylum seeker technically has to leave the territory, though they have the right to appeal the decision.

During ongoing EU-level debates regarding the EU Pact on asylum and migration, the Netherlands has been a strong proponent for strengthening external Schengen border management. The Dutch cabinet has particularly called for the release of additional funding for external border management, the establishment of asylum border procedure pilots,[149] and the full utilisation of Frontex.[150]

146 Unaccompanied children, families with children, and those who cannot be detained due to personal needs, are excluded from this detention policy.

147 AIDA, *The Netherlands*, 2023 p. 57.

148 IND, "Asielprocedures in Nederland," July 2023.

149 Parliamentary documents, *Kamerstukken II*, "Geannoteerde agenda voor de Europese Raad van 29 en 20 Juni 2023," June 2023, p. 5.

150 Parliamentary documents, *Kamerstukken II* Bijlage 35 BWO Pakket Migratiestroom asiel JenV, July 2023, p. 1.

4 Access and national asylum procedures[151]

The Dutch asylum procedure

In the Netherlands, anyone who claims to be in need of protection can apply for asylum. As mentioned before, Dutch asylum protection is based on a single-status system. Whatever the grounds – convention-refugee (A-status) or subsidiary protection (B-status) –, everyone granted protection receives the same legal status with the same material rights and benefits.[152] First the claim will be assessed on the merits of a refugee status. If the grounds for refugee protection are not fulfilled, the assessment on subsidiary protection will be conducted.[153]

The IND is the responsible decision-making authority for asylum applications (both at the border and on the territory). Other actors are the KMar (responsible for registration at the Dutch border, *see above*), the Aliens police (responsible for registration on the territory), the Central Agency for the reception of asylum seekers (COA) and the Return and Departure Service (DT&V).[154]

Asylum seekers arriving from non-Schengen countries by plane or boat can apply for asylum at Schiphol Airport application centre, which is a closed border procedure. Others arriving via land borders are directed to Ter Apel, the central registration centre. However, due to the recent capacity issues and backlogs, it was, and is, not always possible to provide for sufficient accommodation, and instead asylum seekers are sent to any reception centre that has available capacity.[155] In order to manage the crisis situation COA can also use temporary

151 In this paragraph a descriptive overview will be given of the characteristics of the Dutch national asylum system for the purpose of this research project. It is not intended nor possible to address all particularities, elements or factors of the national procedure. See AIDA, *The Netherlands*, 2023, for an extensive overview of the Dutch asylum procedure.

152 IND, "Apply for asylum in the Netherlands," 25 April 2023. Also direct family members who reunite within the three-month period after the status of the referent is granted receive an asylum status.

153 AIDA, *The Netherlands*, 2023, p. 22.

154 AIDA, *The Netherlands*, 2023, p. 18.

155 AIDA, *The Netherlands*, 2023, p. 18.

(crisis) emergency locations (*noodopvang*), which include locations such as sport halls, cruise ships, and hotels.

Once someone has registered and applied for asylum (a process that in principle should last three days) he or she is sent to a Process Reception Centre (POL). In January 2019, a new registration process was introduced, that requires every asylum seeker to complete an extensive form at the start of the registration procedure.[156] The completed form is followed by a registration interview (Aanmeldgehoor). During the registration interview, questions can be asked about identity, nationality, travel route and family members. Additionally, the IND briefly questions the asylum seeker as to their reasons for requesting asylum, to judge the complexity of the case, to better prepare for subsequent steps to be taken during the rest of the procedure, and to assess whether the asylum seeker is in need of specific procedural guarantees.[157]

Due to the ongoing capacity problems in Ter Apel,[158] the IND temporarily followed an alternative procedure in which they grouped asylum seekers based on a quick first assessment (first time applicants, unaccompanied minor refugees, family members subject to family reunification, and a rest category). The first group was then transferred to an alternative centre elsewhere first, to await the possibility to register.[159] Once registered, they were transferred to a reception centre to await their interview, while the other groups were waiting in Ter Apel. This alternative location was closed in March 2023.[160]

Legal assistance is available to asylum seekers from the first instance onwards, though sometimes the available time for the lawyer and asylum seeker is in practice limited. Asylum seekers are also allowed to appoint their own lawyer, that is paid by the Legal Aid Board if they fulfil the criteria. The Dutch Council for Refugees (DCR) has an official position within the procedure to

156 This form contains questions on their (1) identity; (2) place and date of birth; (3) nationality, religious and ethnic background; (4) date of leaving the country of origin; (5) arrival date in the Netherlands; (6) remains/stay in one or more third countries when appropriate; (7) identity cards or passport; (8) itinerary; (9) schooling/education; (10) military services; (11) work/profession; and (12) living environment and family.

157 AIDA, *The Netherlands*, 2023, p. 26-27.

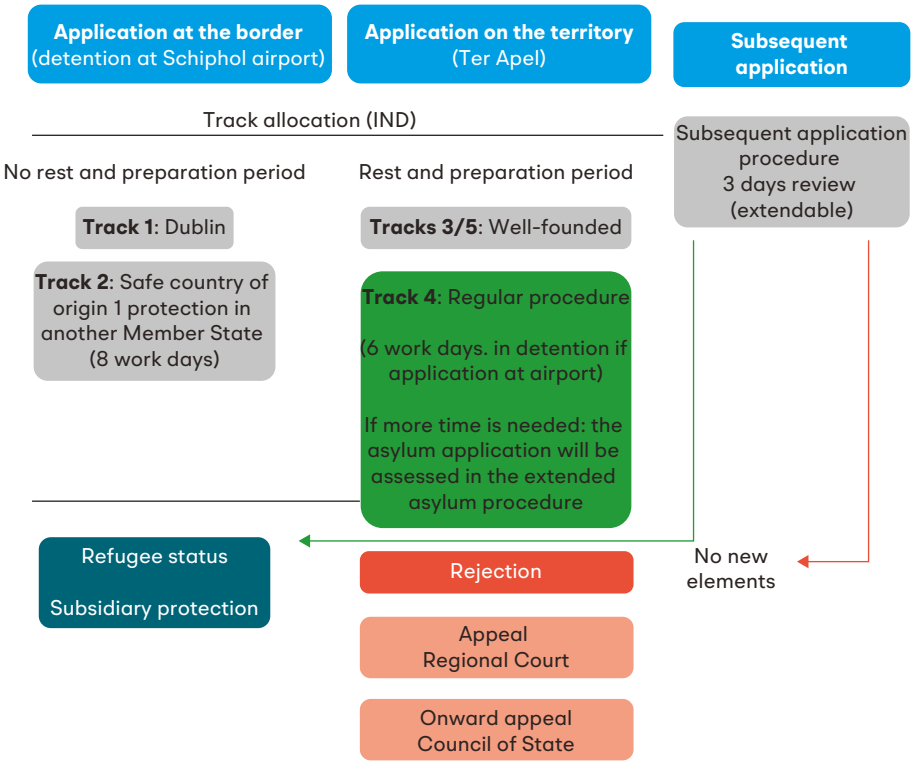
158 See paragraph 'setting the scene' in this report.

159 AIDA, *The Netherlands*, 2023, p. 104.

160 AIDA, *The Netherlands*, 2023, p. 20.

provide information about the asylum procedure and can offer legal advice to asylum seekers, both during the preparation period and during the procedure. Upon request, the asylum seeker or their lawyer can ask a representative of the DCR to attend the interview.

The Asylum procedure in the Netherlands. Source: AIDA, p. 17.



One status, different tracks

Following an increase of asylum applications in 2015, the IND developed a processing system for different (group)categories, or 'tracks', allowing for a more targeted procedure depending on the caseload.[161] This new policy came

161 In addition to the track procedures, the IND also rolled out various pilots for specific targeted groups, including for example brief hearings. See for more information in English: AIDA, *The Netherlands*, 2023, p. 36.

into force in March 2016.[162] The aim of including a track for cases not likely to be granted protection should prevent overcrowded reception centres.[163]

- Track 1: the Dublin procedure, is for people that applied for asylum in another European country or should have done so. This is mostly verified through Eurodac, a database where asylum seekers are registered.
- Track 2: the safe third country procedure, is meant for people from safe countries of origin or those who have already received protection elsewhere.
- Track 3: the fast track for manifestly well-founded, is meant for people expected to be granted a status, but this has not been applied thus far.
- Track 4: the regular route, 'Algemene Asielprocedure (AA)' (possibly followed by the extended procedure 'Verlengde Asielprocedure (VA)), is meant for all applications not filtered out by other tracks.
- Track 5: the manifestly well-founded applications with short investigation, this track is for those cases where more investigation into someone's identity is needed for track 3 applicants (not applied yet).[164]

In 2022, 80% of the claims were assessed in track 4, 17% in track 1, and 3% in track 2.[165]

Dublin procedure (track 1)

In this procedure, asylum seekers are given one interview, which starts as soon as possible, without a rest or preparation period (RVT) beforehand. This interview does not give the asylum seeker the opportunity to discuss the reason for their asylum application but is rather designed to allow the asylum seeker to explain why they are applying in the Netherlands and not in the country responsible under the Dublin Regulation. In addition, the interview is used to verify the person's identity and travel route. After that, the IND will either decide on a preliminary refusal or transfer the case to the general asylum procedure. In the first case, the IND asks the responsible country to assess the claim. Together with a lawyer, an asylum seeker who has been provisionally refused can request further investigation. After a final rejection, the asylum seeker must leave the

162 The 'five tracks' policy does not fully follow the structure of the Directive in terms of regular procedure, prioritised procedure, and accelerated procedure.

163 IND, "Werkinstructie SUA," 25 June 2021. Parliamentary documents, *Kamerstukken II*, "Bijlage 42 BWO Factsheet Sporenbeleid IND," 10 July 2023.

164 AIDA, *The Netherlands*, 2023, p. 21.

165 Ministry Justice and Security, "*De Staat van Migratie 2023*," 6 Oktober 2023, p. 12.

country within four weeks, but the appeal remains open for one week. After the appeal, the asylum seeker is expected to return to the responsible Dublin country, but in the meantime, they can stay in a reception centre. If the IND decides to fully assess the claim, the application will be transferred to the general asylum procedure.[166]

The fast asylum procedure (track 2)

In this fast-track procedure the IND quickly assesses a possible need for protection mostly based on the nationality and/or travel route. An asylum application can be declared inadmissible in case a third country is regarded as a safe third country for the asylum seeker (article 30a (1)c Aliens Act). The Netherlands has a list of safe countries of origin[167], but not of safe third countries. Whether a country is a safe third country for that asylum seeker is instead assessed on a case-by-case basis. However, the IND does work with 'internal information messages' on the general safety of the certain countries.[168] If someone has already received protection elsewhere, the IND will only assess the reason why the asylum seeker cannot reasonably be expected to return. If more information or time is needed to assess the claim, the case is referred to the AA or the Extended Asylum Procedure (VA). A refusal can be appealed. If the appeal fails, the asylum seeker must leave the country immediately and is subject to a re-entry ban. Rejected applicants are either held in reception centres pending their return, or in immigration detention if removal is impossible but is expected to be possible within a reasonable time. If the appeal is successful, the case continues in the extended procedure.[169]

The general procedure (AA > VA) (track 4)

This procedure should last 6 days, falling under AA+ when it takes up to 9 days. This may be followed by an extended procedure, *verlengde Asiel procedure (VA)*, taking up to 6 months, with possibilities to extend for another 9 and then 3 months. It is the only track where the asylum seeker has the right to preparation and medical examination time (of minimal 6 says). During this time, the asylum

166 IND, Asylum procedures in the Netherlands, 25 July 2023; Berte Advocaten, "The Dublin procedure (track 1)," accessed 18 October 2023.

167 AIDA, *The Netherlands*, 2023, p. 86 ff.

168 AIDA, *The Netherlands*, 2023, p. 84. See for the national application of the STC concept also paragraph 'externalization' of this report.

169 IND, Asylum procedures in the Netherlands, 25 July 2023; Berte Advocaten, "The Dublin procedure."

seeker receives information and advice from the Dutch Council for Refugees and legal aid.[170]

After the registration (including an interview about the nationality and identity of the asylum seeker) and rest and preparation time, the asylum-seeker can be called in for the procedure on the merits of the asylum claims. An interpreter, a lawyer and a volunteer from the Refugee council may be present here. After the asylum interview, the IND can either grant asylum or decline the application preliminarily, after which a lawyer again can offer an alternative view in writing,[171] followed by a definite decision by the IND. This process is meant to last 5 days[172] after which three options remain:

1. the asylum seeker has a right to asylum and is granted a permit for 5 years. After this decision, the person moves to an asylum seekers centre (asielzoekerscentrum (azc)) until a municipality has place for housing;
2. The IND needs more time to assess the claim, for which the asylum seeker is moved to the extended procedure. The asylum seeker possibly moves to an azc at this stage;
3. The asylum request is rejected, after which there is the possibility of appeal (see below).[173]

Extended procedure

The extended procedure is intended not only for cases where more time is needed to assess the application, but also for unaccompanied minors under 12 years and persons who are too ill to attend an interview. During this procedure, all asylum seekers are transferred to a regular asylum reception centre. If the application is provisionally rejected, the asylum seeker has 4-6 weeks to submit an appeal. The IND then has a maximum of 6 months to decide, with the possibility of extension.[174]

170 AIDA, *The Netherlands*, 2023, p. 27.

171 Lawyers are not obliged to do so if they expect the case to fail. In that case the asylum seeker can still request a second opinion by another lawyer.

172 There are different grounds for extending this period with a set amount of days (amounting up to 29 days max.), this is laid down in art. 3.115 Aliens Decree.

173 COA, "Aanmeldgehoor," accessed on 18 October 2023; AIDA, *The Netherlands*, p. 32.

174 With possibilities for extension in the case of heavy caseloads, complex cases, or other specific circumstances. This extension cannot lead to a processing time of more than 21 months.

In general, procedural safeguards are in place for unaccompanied minors, families with children, and victims of torture or violence. Due to their vulnerability, these groups are also not subject to border procedures, including detention. For other groups it depends on whether the asylum seeker's particular individual circumstances constitute a disproportionate burden.[175] Asylum seekers who claim to be minors without any credible evidence must undergo an age assessment by the Royal Police (KMar) or the Immigration police (AVIM) together with IND staff. These assessments are carried out independently of each other, to ensure a fair assessment.[176]

Burden of proof: credibility and risk assessment

Art. 31 of the Aliens Act regulates the burden of proof and credibility assessment for asylum seekers. Although the asylum seeker does not bear the burden of proof, he or she must provide credible evidence of the fear of persecution.[177] However, the IND has an active duty to investigate, in line with EU law.[178]

The IND will first make a factual assessment of the asylum claim. The IND performs an 'integral weighting' of all the elements of the claim. Using credibility indicators, the IND assesses how much and by what circumstances the credibility of the relevant element is affected or enhanced. The IND would then assess whether the credible relevant elements and the associated plausible presumptions are of a such weight that they must be qualified as well-founded fear of persecution within the meaning of the Refugee Convention or a real risk of violation of Article 3 ECHR.

Within the Dutch asylum procedure, much emphasis is put on the credibility of an asylum seeker's identity and nationality. This is assessed prior to the fear of persecution and/or real risk of serious harm: a *conditio sine qua non*. As most asylum seekers are not in the possession of sufficient documentation, it is a

175 Art. 5.1a (3) Aliens Act 2000; AIDA, *The Netherlands*, 2023, p. 64-67.

176 AIDA, *The Netherlands*, 2023, p. 61.

177 Art. 31 (6) Aliens Act 2000.

178 "In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application," QD Art. 4(1).

complex part of the procedure to establish nationality and identity.[179] Due to that complexity, there have been and still are quite some legal and policy debates on the emphasis, functioning and practice with respect to this issue within Dutch asylum system, and whether the benefit of doubt principle is duly applied.[180]

Group protection policies: 'at risk' and 'vulnerable minority' groups

In general, claims from nationals of 'safe countries of origin' are considered to be manifestly unfounded, which is why these people are referred to the accelerated procedure, Track 2. However, some groups are excluded from this rule. These include certain ethnic groups, unaccompanied minors or LGBTI asylum seekers.

In addition, the Dutch government has a country-specific policy for 35 countries that identifies groups at risk.[181] These people are more likely to be persecuted in a particular country. Although not always visible through grant rates, this group should face a lower burden of proof and gain access to refugee protection more easily.[182] 'Limited indications' should be sufficient to make a plausible case for protection based on a risk of serious harm. To assess this, the IND looks at the individual or their immediate relatives, examining what the asylum seeker has been through or what harm has been suffered by people in the same group.[183] Such groups at risk may be a particular ethnic, religious or social group.
For people who are more severely in danger, the government can classify a group as being at risk of group persecution. Being a member of such a group is sufficient to qualify for refugee protection, as was the case with Uyghurs from China.[184] A similar possibility exists for groups facing serious harm and that are thus eligible for subsidiary protection.

179 After the registration process, the asylum seeker will be interviewed regarding nationality, identity and migration route. In case of doubt, an investigation into the country of origin is initiated. To do so, someone's knowledge of their supposed country of origin can be tested. The person may also be subjected to a linguistic analysis.

180 See for more information on this issue and the critiscm: Advisory Council on Migration, "Naar een gelijker speelveld bij de vaststelling van nationaliteit en identiteit," 11 April 2022. Amnesty International-NL, "Bewijsnood, wanneer nationaliteit en identiteit ongeloofwaardig worden bevonden," November 2020. DCR, "Wegkijken en vooruitschuiven," 28 June 2023.

181 In 2022.

182 AIDA, *The Netherlands*, 2023, p. 91.

183 DCR, "Wegkijken en vooruitschuiven," 28 June 2023, p. 9.

184 AIDA, *The Netherlands*, 2023, p. 91.

These rather complicated country and group-based protection policies have been developed in response to various European judgements on the scope of protection and assessment of risks to serious harm (see also the paragraph in 'international legal framework' above), and occasionally raises the question whether in fact Dutch asylum policy has in fact become overly complicated with too many guidelines and everchanging policy rules.[185]

Appeal

In the Netherlands it is in general possible to not only appeal to the first instance decision by the IND, but also to the judgement of the courts. The Council of State Judiciary is the national highest court in asylum cases.[186]

Appeal to a rejection of the claim is possible in all track-procedures, though the rules on time limits and rights during this process may differ. For the AA procedure, asylum seekers have one week to appeal. Asylum seekers in extended procedures have 1-4 weeks[187] to lodge their appeal. Manifestly unfounded or inadmissible claims need to be appealed in one week. Usually, appeal has an immediate suspensive effect, with some exceptions.[188]

The intensity of the judicial review conducted by Regional Courts (administrative judges) changed in 2016.[189] Administrative authorities, in their factual assessment of an asylum claim, have a certain amount of discretion as to whether the statements of the asylum applicant are to be considered credible. As a result of this discretion, judicial review of the credibility assessment in Dutch asylum cases is restricted.

185 See for example the conclusion and recommendations in the report "Onderzoekscommissie Langdurig verblijvende vreemdelingen zonder bestendig verblijfsrecht," by the Van Zwol-Commission in 2019 on the protracted residence of foreign national without legal stay. See also on the subject matter of the relation between European jurisprudence and Dutch protection guidelines: Parliamentary documents, *Kamerstukken II*, "Actuele situatie asielketen," 28 April 2023.

186 See more extensively on appeals procedure: AIDA, *The Netherlands*, 2023, p. 38 ff.

187 Depending on the grounds.

188 AIDA, *The Netherlands*, 2023, p. 38: "Except for situations where the claim is deemed manifestly unfounded for reasons other than irregular presence, unlawful extension of residence or not promptly reporting to the authorities".

189 Council of State, ECLI:NL:RVS:2016:890, 13 April 2016.

The Regional Court is in general not allowed to do a full intensive review of the overall credibility of the statements of the asylum seeker.[190] Regional courts thus rule whether the grounds of a decision of the IND are valid, taking into account the grounds for appeal from the asylum seeker and the arguments of the IND: In terms of Dutch asylum law, the assessment of the credibility of an asylum claim is reviewed on the basis of the (un)reasonableness of the findings of the administrative authorities.[191] This is referred to as a restricted, or marginal, review. If the decision is not considered reasonable, the IND has to take a new decision. Furthermore, when assessing the appeal is examined by the Regional Court *ex nunc*, meaning it takes into consideration all new facts and circumstances which appear after the decision issued by the IND.

After the Regional Court issues a judgment on the decision from national asylum authorities, the asylum seeker and/or the IND may appeal against the decision of the Regional court to the Council of State. The Council of State carries out a marginal ex nunc review of the (judicial) judgment of the Regional Court and does not examine the facts of the case. An onward appeal does not have automatic suspensive effect. As a result, a provisional measure from the President of the Council of State is needed to prevent expulsion.[192] The Council of State changed its course as a result of the ECtHR judgment in A.M v. The Netherlands which stated that the onward appeal to the Council of State did not qualify as an effective remedy.[193]

All decisions of the appeal body are public and some are published. There are no obstacles in practice with regard to the appeals in asylum cases. In the case of a rejection of an asylum application, the asylum seeker can submit a repeat asylum application, on the condition that the circumstances that are relevant for the applicant changed.[194]

190 This is, according to the Council of State, due to the fact that the IND has specific expertise to verify statements of the asylum seeker and is therefore in general in a better position to examine the credibility of the claim. An administrative judge can never substitute their own opinion on the credibility of the asylum seeker's statements to the authorities.

191 Karen Geertsema, *Rechterlijke toetsing in het asielrecht: Een juridisch onderzoek naar de intensiteit van de rechterlijke toets in de Nederlandse asielprocedure van 2001-2015*, (Den Haag: Boom Juridisch), 2018.

192 Council of State, ECLI:NL:RVS:2019:1072, 19 February 2019.

193 ECtHR, *A.M. v. The Netherlands*, no. 29094/09, 5 July 2016.

194 IND, "Repeat asylum application (HASA)," 1 July 2022. See on the right to an effective remedy also CJEU, Ghezelbash v. The Netherlands, C63/15, 7 June 2016.

Material rights during the procedure

In accordance with the Regulation on benefits for asylum seekers and other categories of foreigners 2005 (RVA), an asylum seeker is entitled to certain (non-)material reception rights during the procedure. The responsible actor for this is the COA.[195] These rights include a weekly allowance for food, clothing and personal expenditures, a public transportation card to visit a lawyer, healthcare insurance, the right to work[196], and education for children.[197] The weekly allowance depends on how large the household is and whether the asylum seeker takes the meals at the reception centre or not. For example, if the asylum seeker decides to provide for their own food, the weekly allowance is € 37,59, with a fixed €12,95 per person for clothing and personal expenditure. The law clearly states that the right to material reception conditions is only extended to those who lack resources.[198] Additionally, those being processed in Track 2, do not receive financial allowance and are instead given frozen microwave meals.[199]

Duration of permit

Irrespective of the basis for protection, a temporary permit is granted for 5 years. After this time, a status holder can apply to obtain either an EU long-term residence permit, or, and this is used more, a permanent asylum status. Requirements for these two pathways are similar, although in the first case a requirement of sufficient means is included, and for permanent asylum status there still needs to be a ground for asylum. Once somebody has a permanent residence permit, they can apply for naturalisation. For this, someone needs to be at least 18 years old,[200] have lived uninterruptedly in the Netherlands for at least 5 years, have a valid residence permit, be sufficiently integrated,[201] not have been convicted of a crime,[202] and denounced their current nationality.[203]

195 AIDA, *The Netherlands*, 2023, p. 95.

196 Information on the right to work has been previously discussed in the paragraph 'setting the scene: paradigm shift?' in this report.

197 Wettenbank, Article 9(1) "Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005."

198 Wettenbank, Article 2(1) "Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005."

199 AIDA, *The Netherlands*, 2023, p. 104.

200 Otherwise, an application is submitted together with a parent.

201 Tested through the civic integration examination at A2 level.

202 Leading to a prison sentence, training, or community service or order to pay a large fine (>€810).

203 Persons on a permanent asylum residence permit are exempted from this rule. AIDA, *The Netherlands*, 2023, p. 136-138; Articles 8 and 9 "Vreemdelingenwet 2000," Aliens Act 2000.

Revocation

The grounds for revocation are set out in Art. 32 of the Aliens Act. A status can be revoked when the status holder has provided incorrect information or withheld information that would have led to the rejection of the original application, poses a threat to public order or national security, or has established their main residence abroad. Other reasons for revocation are if the ground for granting a status has ceased to exist or if the ground for granting the permit was based on a family bond that no longer exists. The grounds for a revocation of the asylum status apply both to recognised refugees and people provided subsidiary protection.[204] Once there is an intention to revoke the temporary asylum status, the status holder will be informed in writing. The status holder then has six weeks to bring forward his or her view on this intention. If the IND remains committed to revoke, a hearing takes place, where the status holder can share their views, in attendance of a lawyer when requested. After the eventual cessation decision, the status holder has four weeks to leave the country, the same time period this person has to appeal the decision. If this is done in a timely manner, the right to lawful residence is extended up until the Court's decision.[205]

Capacity problems

The Netherlands has a structural problem with reception facilities and housing for asylum seekers and those with a protection status.[206] The COA repeatedly called for the need of more places, succeeding in extending at least the temporary facilities with 6000 places in 2021. According to the COA, this increased need was caused by the rise in arrivals, the lack of flow between temporary and permanent housing due to the situation on the housing market,[207] and the arrival of people evacuated from Afghanistan that were housed in military emergency facilities but that needed to move out from there. In 2022, emergency reception locations have increasingly been used to house people, but even this was not enough. This meant that the government pleaded municipalities to offer temporary reception through crisis emergency locations. Following this situation, the Minister for Migration, Eric van der Burg, proposed a law

204 AIDA, *The Netherlands*, 2023, p. 138.

205 AIDA, *The Netherlands*, 2023, p. 141.

206 EUAA was requested to assist during reception crisis. See also: EUAA & the Netherlands, "Operational Plan 2022-2023 Agreed by the European Union Agency for Asylum and the Netherlands," December 2022.

207 As is the case in many European states, the Netherlands has a significant shortage of (social) housing: COA, "Update: Benodigde opvangcapaciteit COA," 10 September 2021.

that would make creating reception facilities in municipalities mandatory, the 'Spreidingswet'.[208] This would enable the Minister better to distribute people in need of housing throughout the country. The parliament voted in favour of the law, but protest is expected from the Senate.[209] The COA said to be needing 75.500 places by the end of 2023, which is an increase of 20.500 since the end of 2021.[210]

In 2020, the Dutch government installed a task force that should speed up refugee assessment processes to deal with the backlogs. This experiment failed, as inexperienced people were put on complicated cases, sometimes leading to the case being referred to the extended process after all. Additionally, reasons for rejection of applications were poorly motivated. This resulted in questions about validity of the rejected applications.[211] In 2022, the IND had to pay 3,5 million euros worth of legal penalties for not timely deciding on asylum applications. In the first 4 months of 2023, the penalties were reduced to 2 million euros. A former law (temporarily) suspending such penalties imposed by the judiciary was found in violation with Union law and was thus cancelled.[212]

208 Legislative proposal ('Spreidingswet') on allocating reception for asylum seekers. Parliamentary documents, *Kamerstukken II*, no.36333, 28 March 2023.

209 Loes Reijmer, "De Tweede Kamer is voor, maar in de Eerste Kamer ziet het er somber uit voor Van der Burgs spreidingswet," *De Volkskrant*, 3 October 2023.

210 EUAA & the Netherlands, "Operational Plan 2022-2023," December 2022.

211 Justice and Security Inspection, "Vooral snelheid telde bij asielbesluiten taskforce IND," 7 January 2022.

212 Council of State, "Afschaffen rechterlijke dwangsom in asielzaken in strijd met Europees recht," 30 November 2022.

5 Extraterritorial access to asylum

Legal Pathways

Since 2015, discussions and negotiations about quotas for resettlement at the European Union level have been ongoing, including the European Resettlement Framework. However, any plan will not include specific targets or quotas as each Member State has the prerogative to decide on resettlement numbers.[213]

The Netherlands has a long tradition of UNHCR resettlement, although on a relatively modest scale. In the 1970s a Dutch resettlement policy framework was developed, and since 1984, a quota was introduced to be conducted in partnership with the UNCHR.[214] Refugees are identified and nominated by UNCHR, after which the IND tests whether that person is eligible for international protection according to Dutch asylum policy.[215] The Dutch resettlement policy aims to provide protection to victims of torture, women, children, single parents people with medical problems, human rights activists, and LBGTI+ people.[216] The Netherlands has furthermore resettled refugees from Turkey under the EU-Turkey deal.[217]

Since 1987, the Netherlands national quotum is determined at 2000 refugees per four years, averaging 500 refugees per year. In 2021, 480 refugees were resettled, while in 2022, in response to ongoing backlogs of the national quota due to COVID-19, 1,420 arrivals of resettled refugees were achieved.[218] Most of these refugees were of Syrian origin. Resettlement is not a binding legal obligation, but rather a voluntary contribution based on international solidarity with large refugee hosting countries and the most vulnerable refugees. However precisely because of the voluntary nature, resettlement has in

213 Advisory Council on Migration, *Realism about numerical targets*, December 2022, p. 151.
214 Parliamentary document, *Kamerstukken II*, 19 637 no. 2608, 26 May 2020.
215 Ministry Justice and Security, *De Staat van Migratie 2023*, 6 October 2023, p. 66.
216 Advisory Council on Migration, *Realism about numerical targets*, December 2022, p. 160.
217 Marcelle Reneman, "Het Nederlandse uitnodigingsbeleid weer teruggeschroefd," VU Verblijfblog, 15 March 2019.
218 Ministry Justice and Security, *De Staat van Migratie 2023*, 6 October 2023, p. 80.

recent years been a politically volatile issue. In January 2019, the government announced it would reduce the number from 750 to 500 per year.[219] Then, in 2021, the Dutch coalition agreement stated that it would increase its quotum up to 900 per year until 2025.[220] In August 2022, however, it was announced that in response to the distressing situation in Ter Apel, the government would reduce the number of resettlement places. At the same time, the government temporarily suspended all resettlements under the EU-Turkey deal.[221]

A consortium of various Dutch actors and organisations has recently, in September 2023, started with a project 'community sponsorship'. Instead of providing for a complementary legal pathway to resettlement, this project focusses on the closer involvement of local communities with the arrival and integration of resettled refugees, and on gaining more societal support for resettlement.[222]

Other legal pathways are not (yet) available. Diplomatic asylum or 'asylum at the post' has been abandoned since the Aliens Act 2000. Granting a humanitarian visa is no legal obligation under European law,[223] and the Netherlands has no (formal) national policy regulating the issuance of humanitarian visas according to Article 25 (1) of the Visa Code. There is a legal option through so-called d-visa or 'long-stay' visa, which are also granted to refugees who are selected under the resettlement scheme. However, they are hardly ever used other than for that purpose.[224] The only known exception regarding visa for asylum are the working agreements between the Ministries of Defence and Foreign Affairs, and the IND for Afghans since 2014. Afghan interpreters and high-profile employees that worked for the Dutch military in Afghanistan could apply to the Dutch embassy in Kabul for potential relocation to The Netherlands. After a positive advice from

219 Parliamentary documents, *Kamerstukken II*, 19637, no 2459, 1 December 2019.

220 Government coalition agreement 2021-2023, "Omzien naar elkaar, vooruitkijken naar de toekomst," 15 December 2021, p. 44.

221 Ministry Justice and Security, *De Staat van Migratie 2023*, 6 October 2023, p. 23.

222 Based on information shared by the DCR on 8 november 2023. See also on the issue on community sponsorship: Share Network & International Catholic Migration Commission (ICMC), *Fostering Community Sponsorship across Europe*, November 2019.

223 See CJEU, *X. and X. v. Belgium*, C638/16, 7 March 2017; ECtHR, *M.N. and others v. Belgium*, no. 3599/18, 26 5 March 2020.

224 Governmental working group 'Brede Maatschappelijke Heroverwegingen' (BHM), *Naar een wendbare migratieketen*, 20 April 2020, p. 54. DCR is also not familiar with any cases which have been granted a visa on humanitarian grounds.

the IND a visa would be granted, and the interpreters would apply for asylum after arriving in The Netherlands. But formally, this is not a structural program or regulation. [225]

Externalisation of asylum procedures

The concept of 'external asylum processing' within the European context already has a long history of political, public and academic debates. Already in 1986 (Denmark) and 1993 (The Netherlands) plans were tabled to send asylum seekers to (transit) processing centres in their region of origin to have the applications processed there.[226] Since the start of the new millennium, discussions on external processing come and go at the EU level.[227] These ideas however never materialised into actual legislative proposals, nor were they operationalised in practice. The 2004 The Hague Programme on the multiannual JHA agenda[228] and the 2008 EU Policy Plan on Asylum[229] mentioned a feasibility study on EU joint external processing which was never implemented. The explicit terminology of 'external processing' is completely lacking in the Stockholm Programme (2010-2014),[230] which refers to investing in regional protection programmes, resettlement schemes and '*new approaches to accessing asylum procedures targeting main countries of transit*.' The European Commission's communication on the Taskforce for the Mediterranean refers again to the possibility of exploring external processing of asylum applications in 2013 while stating that this exercise

225 Commission Research Evacuation operation Kabul, *Reconstructie en analyse van de evacuatie uit Kaboel in augustus 2021*, 6 October 2023.

226 Advisory Council on Migration, *Advisory report: External Processing*, 9 September 2015; ECRE, *Protection in Europe: Safe and Legal Access*, February 2017; Pauline Endres Oliveira & Nikolas Tan, "External Processing: a tool to expand protection or to further restrict territorial asylum," MPI, February 2023.

227 For example the Blair proposals in 2003: Home Office, "New International Approaches to Asylum Processing and Protection and New Vision for Refugees," 10 March 2003; and the German and Italian proposal to create 'safe zones' in North-Africa in 2005: Bundesministerium des Innern, "Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration – Überlegungen des Bundesministers des Innern zur Errichtung einer EU-Aufnahmeeinrichtung in Nordafrika," Berlin, 2005.

228 Council of the European Union, "The Hague Programme: strengthening freedom, security and justice in the European Union," 3 March 2005.

229 European Commission, "COM(2008) 360 final: EU Policy Plan on Asylum," 17 June 2008.

230 European Council, "The Stockholm Porgrame: an open and secure Europe serving and protecting citizens," 4 May 2010.

could only be done "without prejudice to the existing right of access to asylum procedures in the EU."[231]

External processing gained new ground after the higher number of asylum applications in the European Union due to the Syria crisis. A proposal was put forward by the Austrian Minister of Foreign Affairs in 2016 to establish "protection zones" in or close to regions of origin,[232] followed by a MS non-paper on a 'Mobile Protection Scheme' consisting of EU and/or MS officials assessing claims outside the EU.[233] The Danish Social Democrats published a 'vision' along the same lines: asylum would no longer be possible in Denmark.[234] Also in the Netherlands, ideas on 'more effective' refugee protection schemes were put forward, although more based on the 'safe third country (STC)' concept than on fully externalizing asylum procedures: investing and improving the circumstances in the region of origin to such extent that it could be denominated 'safe'.[235]

This emphasis on the application of the STC concept rather than externalisation in the strictest sense of the wording, is also reflected in the more recent EU approaches. Most obvious example is the Joint EU-Turkey statement:[236] asylum seekers travelling for Turkey to Greece could be sent back to Turkey (being a 'safe' third country where they already 'stayed'). The application of the concept has been disputed, by raising the question to which extert Turkey was indeed considered 'safe'.[237] Apart from the proposal for disembarkation platforms and subsequent processing in North Africa ('safe ports'),[238] which never got further than the Brussels political discussions, no concrete plan or measures got

231 European Commission, "COM(2013) 869 final: Taskforce Mediterranean," 4 December 2013.

232 Ralph Atkins and James Shotter, "EU refugee policy helps people's smugglers, says Austria," *Financial Times*, 4 November 2015.

233 Austrian Federal Ministry of Interior and Danish Ministry of Immigration and Integration, "Vision for a better protection system in a globalized world," October 2018.

234 See also Nikolas Tan, "Visions of the Realistic? Denmark's legal basis for extraterritorial asylum," *Nordic Journal of International Law*, 91, 26 October 2022.

235 Parliamentary documents, *Kamerstukken II*, 19 637, nr. 2030, 8 September 2015.

236 European Council Press release, "EU-Turkey Joint Statement," 18 March 2016.

237 See for example, UNHCR Greece, "UNHCR's Position and Recommendations on the Safe Third Country Declaration by Greece," 2 August 2021; Mariana Gkliati, "The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees," in *Movements Journal*, Vol 3(2), 2017; Orçun Ulusoy, "Turkey as a safe third country?" *Oxford Law blog*, 29 March 2016.

238 European Council, Meeting Conclusions, 28 June 2018; UNHCR-IOM, Joint Letter to the European Council, 27 June 2018.

tabled.[239] Externalisation is not part of the 2020 EU Migration and Asylum Pact; the STC concept is however being renegotiated in the context of the new Asylum Procedures Regulation.[240]

At the backdrop of the pressing humanitarian refugee situation in regions of origin, transit countries, external EU borders and within the EU in recent years, the idea of making more use of the STC concept in combination with approaches to outsource asylum procedures to third countries is also being explored by destination countries, in the form of 'innovating partnership with third countries. Clear examples are the deal between Rwanda and the United Kingdom (non-EU Member),[241] the new Danish STC legislation (CEAS opt-out),[242] the Italian plans to externalise its national asylum procedure to Albania;[243] and the German announcement that they will 'examine' the possibilities.[244] In the Netherlands, there have recently been several parliamentary discussions on the subject matter of externalisation, with the most recent motion supported by the majority of parliament requesting the government to align with the Danish government on outsourcing asylum procedures to third countries.[245] Furthermore, several political parties who might become part of the next Dutch coalition government refer in their political programmes to 'protection in the region', outsourcing or

239 The recent EU-Tunisia deal should be clearly distinguished from the EU-Turkey statement, as the first only involves the transfer or return of Tunisian nationals. The Tunisian government was very resolute in declining to suggestion of 'taking over' asylum seekers from the EU.

240 COM/2020/611, 23 September 2020.

241 Monika Sie Dhian Ho en Francesco Mascini, "Dealen met Rwanda: dilemma's bij bescherming van vluchtelingen in derde landen," Clingendael Institute, 30 October 2023.

242 Nikolas Tan and Jens Vedsted-Hansen, "Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law," 15 November 2021.

243 Lorenzo Tondo, "Italy to create asylum seeker centres in Albania, Giorgia Meloni says," *The Guardian*, 6 November 2023.

244 Jessica Parker, "Germany agrees to consider UK-style plan on processing asylum abroad," *BBC News*, 7 November 2023.

245 Parliamentary documents, *Kamerstukken II* 32317 no. 813, February 2023, submitted by Eerdmans (JA21), highlighting the promising opportunities migration partner strategies allow for. The request was additionally made for the government to engage with the Danish government with regards to moving asylum reception and procedures to partners outside of the EU. See also previously: Parliamentary documents, *Kamerstukken II*, 19637, no 2866, April 2022. This motion, submitted by Brekelmans (VVD), called on the government to work within the EU to increasingly develop migration partnerships with third countries and to contact the UK government to learn from their experiences with the Rwanda deal received a majority vote in the parliament

externalizing asylum procedures.[246] Thus far the formal response of the current (fallen) Dutch government to these ideas has been somewhat reluctant, stating that international legal obligations are the basis of national asylum policy and that the Netherlands has to and will adhere to the EU asylum acquis (which is not binding to Denmark).[247]

Reasons for no external processing in practice

The main reason why external asylum processing proposals in all those years never materialized within the EU context are the various legal limitations, impracticalities, and objections of a more principled or ethical nature against this concept.[248]

Legal aspects[249]

The applicable legal framework depends on the form in which an external processing scheme is operationalised. If it is an EU arrangement, it is rather unclear and uncertain whether there is a sufficient *legal basis in Union law* for the EU to have actual competence to regulate such schemes. Article 78 on the scope of the competencies of the EU with respect to developing a common asylum system does not refer to extraterritorial asylum. And while paragraph 2 does not refer to any territorial scope, it could well be read that the wording

246 Fadi Fahad, "Internationale dimensie van verkiezingsprogramma's," VU Verblijfblog, 6 October 2023.

247 Parliamentary documents, *Kamerstukken II*, 19637, no. 3079, March 2023.

248 See for example: UNHCR, Preliminary comments on UK proposals on regional protection and off territory processing zones, February 2003; Amnesty International, "Observations on UNHCR consultations on Convention Plus," March 2003; Amnesty International, "UK/EU/UNHCR Unlawful and Unworkable- Amnesty International's views on proposals for extraterritorial processing of asylum claims," June 2003. ECRE Statement on the Asylum and Access Challenge, 7 April 2003; ECRE, "Comments of the European Council on Refugees and Exiles on the Communication from the Commission to the Council and the European Parliament Towards a more accessible, equitable and managed international protection regime," (COM(2003) 315 final); House of Lords European Union Committee, "Handling EU Asylum Claims: New approaches examined: Report with evidence," Session 2003-2004 Report 11, London 2004; Gregor Noll, "Visions of the Exceptional: Legal and theoretical issues raised by Transit Processing Centres and Protection Zones," *European Journal of Migration Law* no. 5, 2003, p. 303-341. Madeline Garlick, "The EU Discussions on Extraterritorial Processing: Solution or Conundrum?" *International Journal of Refugee Law*, 2006, p. 619 ff; Advisory Committee on Migration (ACVZ), "External Processing," December 2010; Violeta Moreno-Lax, "Europe in Crisis: Facilitating Access to Protection, (Discarding) Offshore Processing and Mapping Alternatives for the Way Forward," Red Cross EU Office, December 2015, p. 21-30.

249 ACVZ, "External Processing," December 2010.

explicitly focusses on intra-EU asylum processing, most clearly in subsection (e) on dividing the responsibility for considering asylum applications between Member States.

Assuming that the EU is not competent, an external processing scenario is excluded from the scope of the subsidiary legislation (i.e., directives and regulations). If somehow the EU is competent, then the wording of the directives and regulations are decisive. Both the Asylum Procedures and Reception Conditions Directive refer to applications and procedures in the Member States, whereas the scope of the Qualification Directive has no explicit territorial limits (but is rather connected to the Asylum Procedures Directive). However, article 3 of the APD states that it is applicable to all applications made on the territory or at the border.[250] This could mean that if a person has submitted an asylum application and is subsequently transferred to the external processing centre, based on Article 3 the Directive's standards also apply to procedures taking place there. In sum, there is clearly a lack of clarity on whether the EU is competent and whether EU law applies to externalisation processes. In any case, if it is left to the competence of individual MS, they are still bound by international legal obligations and (general principles of) EU law, such as non-refoulement, human rights standards, and effective remedies.

Moreover, there are also more general legal obstacles and constraints. These foremost concern jurisdiction[251] and transfer of persons intercepted to the territory of the third state where the processing centre is located. With respect to the latter: according to Article 9 of the current Asylum Procedures Directive, an asylum seeker has the right to remain in the MS assessing the application to await the outcome at first instance, either on the merits of the claim or transfer to a safe third country. This might stand in the way of transfer to a processing centre outside the EU for an assessment of the merits of the application, *unless* such a transfer is considered as an application of the STC concept. Article 33(2) sub c APD states that MS may declare an asylum application inadmissible in case there

250 Both the proposal of 2016 and 2020 for the Asylum Procedure Regulation changes that scope: Article 2 refers To: 'all applications for international protection made in the territory of the Member States, including at the external border, in the territorial sea or in the transit zones of the Member States, and to the withdrawal of international protection […]This Regulation does not apply to applications for international protection and t requests for diplomatic or territorial asylum submitted to representations of Member States'.'

251 See paragraph 2 'international legal framework' in this report.

is a safe third country for the asylum seeker. Preconditions for the STC concept are laid down in Article 38 APD. Paragraph 2 (a) determines that an asylum seeker may only be transferred to a safe third country if he has a *meaningful connection* with that country, meaning for example that the person spent some time there.[252] According to the CJEU, in order to apply the STC concept, there must be a sufficient or significant connection and that 'mere transition' does not reach that threshold.[253]

Connection clause: historical background

The core of the safe third country concept is that an asylum seeker, even if he or she is entitled to protection, may be refused entry in the country of arrival because he or she can go to a safe third (i.e., other) country: he or she is 'in the wrong place' to apply for asylum. In the context of international law, the application of the 'safe third country' is generally legally justified if the prohibition of direct and indirect refoulement is respected and as long as the protection component is not compromised.[254]

The idea of a 'safe third country' as a legal concept is not entailed in the 1951 Refugee Convention of 1951, but it can indeed be deduced from the *travaux preparatoires* and literature. It follows that the STC concept is not intended to prevent refugees from crossing several countries before applying for asylum. They are granted a certain 'transit time'. In the literature, this has subsequently been described as 'without undue delay' and even more concretely via a period of 14 days 'stay'.[255]

252 The Asylum Procedure Regulation also still mentions the meaningful connection claim in (new) Article 45 on the safe third country concept.

253 CJEU, L.H. v. Hungary, C564-18, 19 March 2020: '[..] the obligation imposed on Member States by the EU legislature, for the purposes of applying the concept of 'safe third country', to lay down such rules could not be justified if the mere fact that the applicant for international protection transited through the third country concerned constituted a sufficient or significant connection for those purposes. If that were the case, those rules, along with the individual examination and the possibility for that applicant to challenge the existence of the connection for which those rules must make express provision, would be devoid of any purpose.' paragraph 49.

254 Karin Zwaan, *Veilig derde land. De exceptie van het veilig derde land in het Nederlandse asielrecht*, 2003; UNHCR, "Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting A/CONF.2/SR.35," 3 December 1951; Travaux III, p. 347.

255 Karin Zwaan, "*Veilig derde land*."

According to, non-binding but authoritative, UNHCR guidelines: '*Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.*'[256]

The prevailing idea is that asylum should not be refused on the sole ground that protection could be granted in another state. The fear was that in that case there would be a risk that no state would take responsibility and that the refugee would be left in limbo, fundamentally undermining the idea of refugee protection. The idea arose that if an asylum seeker already has ties with another state before applying for asylum, it would be reasonable to refer the asylum seeker to that other state to apply for asylum.[257] Herewith States must consider the duration and nature of the asylum seeker's stay in other countries.[258]

Under current applicable EU legislation, a transfer to another country for the purpose of assessing a protection claim without meaningful link to that specific country would be unlawful. The Dutch government has tried, together with like-minded countries, to exclude the connection criterium from the new provision 45 on STC concept in tzsdhe Asylum Procedures Regulation to broaden the possibilities for future outsourcing schemes. However, as France and Germany opposed, the criterium remains applicable.[259]

256 UNHCR, "ExCom-Conclusion No. 15," sub h(iv), 1979.

257 Myrthe Wijnkoop, "Zoeken, genieten en/of garanderen. Het recht op asiel nader beschouwd," *A&MR*, 2013(7). This conclusion did not come out of nowhere, but stems from the negotiations that have been conducted in the years leading up to a Convention on Territorial Asylum. A convention that, in addition to the Refugee Convention, should say something about the granting of asylum, the determination of status and the allocation of responsibility. However, this treaty was never concluded.

258 As implicitly follows from the legislative history of Article 31 of the Refugee Convention. See also UNHCR, "A/AC.96/660, Note on International Protection 1985," sub 13.

259 European Council Conclusions, "Amended proposal for a Regulation of the European Parliament and of the Council," 13 June 2023.

Next to the 'meaningful connection', the third country must also be considered 'safe'.[260] This means in short that the non-refoulement principle and other human rights are respected, that there is access to an asylum procedure, and that if a permit is granted, protection is offered according to international legal standards.[261]

STC in the Dutch national asylum system

Article 33 of the APD has been implemented in the Netherlands Aliens Act by means of Article 30a(1)(c): an asylum application is declared inadmissible if a third country is considered to be a safe third country for the asylum seeker. This ground for rejection is further elaborated in regulations. Article 3.106a(2) of the Aliens Decree states that the application is to be declared inadmissible only if the asylum seeker has such a connection with the third country concerned that it would be reasonable for him to go to that country. There is no list of safe third countries. The decision-making authority decides on a case-by-case

260 See in this context also the preliminary questions by the Greek Council of State to the CJEU on the assessment of the STC principle. Greek Council of State, ruling 177/2023, 3 February 2023. See also Refugee Support Aegean Press release, "Greek Council of State: Preliminary questions regarding Turkey as a safe third country," 6 February 2023.

261 Current Article 38 (1) APD: Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned: (a)life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e)the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention. Newly proposed article 45 significantly alters this last paragraph in the sense that its lowers the standard of protection that may be expected in the particular country, namely to: 'the possibility exists to receive protection in accordance with the substantive standards of the Geneva Convention or sufficient protection as referred to in Article 44(2), as appropriate.' It does however complement the article with reference to the sources on the basis of which a country may be designated 'safe': The assessment of whether a third country may be designated as a safe third country in accordance with this Regulation shall be based on a range of sources of information, including in particular information from Member States, the European Union Agency for Asylum, the European External Action Service, the United Nations High Commissioner for Refugees, the Council of Europe and other relevant organizations.'

individual basis whether a country is a safe third country for the specific asylum seeker, and this must be done in a thorough manner.

This also follows from paragraph C2/6.3 of the Aliens Circular: it is the task of the IND to investigate whether there is such a link. The IND must consider certain sources of information about the general situation in a particular country in its assessment and must also provide insight into the investigation carried out and motivate the conclusion.

In assessing whether there is a connection, all relevant facts and circumstances shall be considered, including the nature, duration, and circumstances of the previous stay. The presence of a safe third country link shall in any case be presumed in cases where the asylum seeker has a spouse or partner of the nationality of the third country, or where there is a first-line or immediate family living in that country with whom the asylum seeker is still in contact, or in the case that the asylum seeker has previously resided in the country. The assessment is based on the combination of these factors: their weighting is set out in further operational guidance rules.[262] The mere transit through the third country is generally insufficient to establish a link unless there are other factors on the basis of which that link can be assumed.

In the absence of other factors based on which a link can be assumed, previous residence in the third country will generally have to have been at least six months, considering the circumstances of the person's stay in the third country. This is not an exhaustive list, so other circumstances that lead to the adoption of a bond are conceivable. If such situations arise, it will be necessary to provide individual justification for the establishment of a link.

Judgments of the Administrative Jurisdiction Division of the Council of State, the highest national court that adjudicates on asylum cases, have provided a more detailed explanation and application of the legislation

262 IND, "Beoordeling veilige derde landen in de asielprocedure – bewijslast en landeninformatie," IB 2021/8.

and regulations on the safe third country exception:[263] the three most important conditions are the connection criterion, admission to the country and the security and human rights situation.

The connection criterion is the first to be assessed. After all, if there is no meaningful link, the application can be rejected on that ground as the other conditions are no longer relevant. The case law mainly concerns the so-called 'reasonableness test': under what circumstances is the connection with the third country such that it would be reasonable for the asylum seeker to go to that country. Landmark case law states: "The scope of the reasonableness test, as described above, includes a duty on the State Secretary to properly substantiate that it is reasonable to expect a foreign national to travel to a safe third country and apply for asylum there, taking into account all the individual circumstances relevant to the assessment of the link that a foreign national has with the security invoked against him. In this case, this includes the circumstance that, unlike during the period of residence of the foreign national in the safe third country, as invoked by the State Secretary, the family of the foreign national is no longer present there.

Contrary to what the District Court considered, the fact that this circumstance also affects the foreign national's interest in pursuing her family life in the Netherlands is not sufficient to exclude that circumstance altogether in the context of the test of reasonableness."[264]

Practical issues

There are several practical or operational obstacles mentioned in numerous comments on the various externalisation proposals. First on the location where an external processing centre would be established, the 'partner' state where the asylum seekers would be transferred to. From a practical point of view, these should be countries capable of hosting extensive amounts of asylum seekers, and to a certain extent having a comparable level of living conditions for such a centre to be accepted by the hosting community. The concept of asylum

263 Council of State, ECLI:NL:RVS:2017:3378, 13 december 2017. See also ECLI:NL:RVS:2017:3379, 9 November 2016, ECLI:NL:RVS:2017:3380, 13 December 2017 and ECLI:NL:RVS:2017:3381, 13 December 2017.

264 Council of State, ECLI:NL:RVS:2021:2124, 21 January 2021, para 2.3.

externalisation raises questions relating to the possible 'pull-factor' of both local communities and of other migrants from neighbouring countries, including the risk of such centres becoming attractive hubs for smuggling and trafficking networks to offer their services to those whose application is rejected. Access to the location is thus also something which should be thoroughly considered, as it may also take different forms, depending on the specifics of the scheme. Is the centre only accessible for asylum seekers transferred from the EU? Or also directly (issue of numbers and pull factor)? What are the conditions of the transfer? Which rules apply? How to deal with particular vulnerable groups? As a preliminary assessment of the asylum seekers situation is a pre-condition following the non-refoulement principle, how to deal with persons clearly having no right to international protection?

An agreement with a third country is thus an important pre-condition. Secondly several other (practical) questions deal with the operationalisation of the asylum procedure, such as:

- Reception/accommodation of asylum seekers in the external processing centre. Bearing in mind the situation that the asylum seekers have been transferred from EU territory, the reception conditions should be equivalent to those in the EU, thus at least the minimum standards of EU law should govern the conditions of the facilities. Who will pay for those centres? Are these open centres, as detention is considered an *ultimum remedium*? How to deal with possible pull-effects for local residents and/or other migrants?
- Procedural aspects: the (legal) infrastructure of an asylum procedure must be in place, including trained staff, legal aid, translators, legal remedies, courts etc. Who will provide for this capacity? Who is responsible for quality control?
- Arrangements should be in place following the outcome of the procedure: what will happen with the persons granted international protection? Will they be resettled to the EU/Member states, will they reside and integrate in the host country? Will there be a distribution key? And what will happen with asylum seekers whose application was rejected? As the situation of return is something we all know too well entails many legal and practical challenges.

Principled/ethical arguments

One of the most principled arguments used in the 'external asylum processing' is the argument of shifting responsibility of 'western' states to the regions of origin who already bear the largest burden of refugee protection (and often are low-income countries), and/or have to deal with irregular (mixed) migration themselves. In other words, the denial of the legal responsibility of EU Member

States for persons in need of protection, thereby limiting global protection space. States pushing for externalisation often lose sight of the fact that a good sense of solidarity, not only in words but in deeds, is also in their self-interest.[265] Notwithstanding the current position by the Rwandese government:[266] the absence of serious and substantial dialogue with the third countries where EU States suggested to locate processing centres has not helped. See for example the sharp response of the African Union on the Danish outsourcing plans (discussed in paragraph 3).

265 Monika Sie Dhian Ho and Myrthe Wijnkoop, "Instrumentalization of Migration."
266 Monika Sie Dhian Ho and Francesco Mascini, "Dealen met Rwanda," October 2023.

6 Return in the context of migration cooperation

Voluntary return

After a definitive rejection of the asylum application, assisted voluntary return is the preferable return option.[267] The rejected asylum seekers have 28 days to leave the territory.[268] During that period, the rejected asylum seekers still receive financial support and can remain in the reception facility. Return preparations and counselling is supported by COA, the Return and Departure Service (DT&V) and the International Organization for Migration (IOM).[269] IOM is a partner for the Dutch Government regarding voluntary returns. Through its assisted voluntary return project (AVRR), under certain conditions, IOM offers organisational, financial and reintegration support.[270] Additional supplementary assistance is offered through the Return and Reintegration Regulation (HRT), through which adults are, for example, offered € 1,750 as a reintegration contribution.[271] If countries of origin do not cooperate, e.g. by refusing to issue necessary travel documents, the rejected asylum seeker can submit a request for mediation support through the DT&V.[272] The DT&V can subsequentially advise the IND to issue a 'no-fault' permit, allowing the person to stay longer in the Netherlands.[273] Up until August 2023, 15,800 rejected asylum seekers departed the Netherlands. Of these departures, 31% left on their own accord.[274]

267 European Migration Network, "Returning rejected asylum seekers: policy and practices in the Netherlands," May 2017, p. 26.

268 IND, "Terugkeerbesluit," 1 November 2023.

269 DT&V, "Leidraad Terugkeer en Vertrek."

270 IOM, "Voluntary Return and Reintegration Assistance from the Netherlands," 2021.

271 European Migration Network, "Returning rejected asylum seekers: policy and practices in the Netherlands," May 2017.

272 DT&V, "Hulp van DT&V."

273 Central Government Information, "Wat gebeurt er met afgewezen asielzoekers?," accessed 19 October 2023.

274 Central Government Information, "Kerncijfers Asiel en Migratie Augustus 2023," Augustus 2023, p. 6.

Forced return

When rejected asylum seekers do not leave voluntarily within 28 days, the DT&V initiates a process of forced return. Various measures are implemented to 'motivate' the asylum seeker to indeed cooperate with return. First, these rejected asylum seekers are placed in so-called 'freedom-restricting centres' (VBL) with a duty to report.[275] The maximum permitted stay at a VBL location is 12 weeks. Additionally, a Government issued security deposit can be imposed that will only be given back upon departure.[276] Additionally, freedom-restricting measures can be imposed, with those deemed to risk evading supervision placed in detention centres in Zeist, Rotterdam, or Schiphol airport as a last resort measure to ensure the rejected asylum seeker is readily available for forced return. The maximum period of allowed detention is 18 months.[277] Challenges regarding forced returns include the lack of cooperation of the countries of origin, the concealing of identity or obstruction of travel documents.[278] The actual forced return is mostly operationalised through (sometimes assisted) flights. There has been a trend of increasing cooperation with the EU, supported organisationally and financially by Frontex.[279] In 2022, 570 cases of forced return were documented.[280]

While undocumented migrants residing in the Netherlands remain a salient issue, the Dutch government reported a downwards trend in 2020. The latest reported estimate of the number of migrants staying in the Netherland without legal permission was between 23,000 and 58,000 in the period 2017-2018.[281] In an attempt to combat the consequences of undocumented stay on a local level, the government launched the pilot project 'the National Aliens Facility' ('*Landelijke Vreemdelingen Voorzieningen*', LVV) in 2019 together with the Association of Netherlands Municipalities (VNG). The aim of this cooperation agreement was to achieve permanent and durable solutions for undocumented migrants without the right of residency in the Netherlands, with a strong emphasis on return. 2065 migrants participated in the pilot project which ended in 2022.

275 DT&V, "Pre-departure accommodation."
276 European Migration Network, Returning rejected asylum seekers: policy and practices in the Netherlands," May 2017, p. 28.
277 DT&V, "Vreemdelingenbewaring."
278 European Migration Network, Returning rejected asylum seekers: policy and practices in the Netherlands," May 2017, p. 28.
279 DT&V, "Gedwongen Terugkeer."
280 European Migration Network, *Migration and asylum in the Netherlands*, August 2023, p. 58.
281 Central Government Information, "Estimates of numbers of illegal immigrants show downwards trend," December 2020.

The final evaluation concluded that durable solutions were found for 18% of the participants; a residence permit was granted anyway, the independent return was assisted to their country of origin, or there was onward migration to another country.[282] In May 2023, State Secretary van der Burg announced that the LVV will be expanded to a nationwide network in continued cooperation with various municipalities.[283]

Return agreements

In 2021, in partnership with IOM, the MFA launched the project 'Cooperation on Migration and Partnerships for Sustainable Solutions initiative (COMPASS) – a global initiative in cooperation with 12 countries: Afghanistan, Chad, Egypt, Ethiopia, Iraq, Lebanon, Libya, Mali, Morocco, Niger, Nigeria, and Tunisia. The focus of the project is facilitating voluntary returns in a sustainable manner, as well as combatting human trafficking.[284]

On the EU-level, the Netherlands is a part of the European Return and Reintegration Network (ERRIN), through which support is given for sustainable reintegration in the country of origin.[285]

The government is in dialogue with various origin- and transit-countries to build broad migration partnerships, also to encourage and manage returns.[286] The aim of these partnerships is establishing cooperation for returns, as well as border management, countering human trafficking, protecting vulnerable migrants, and creating pathways for regular migration. Current dialogue countries include Egypt, Morocco, and Nigeria.[287] Morocco has, for example, aided the Dutch authorities in determining the nationality of Moroccan nationals.[288]

282 WODC, "Pilot Landelijke Vreemdelingenvoorzieningen vond voor 18% van deelnemende migranten 'bestendige' oplossing," November 2022.

283 Ministry of Justice and Security, "Kamerbrief over Landelijke Vreemdelingen Voorziening," 9 May 2023.

284 EMN, "The Netherlands 2021," August 2022.

285 DT&V, "Mogelijke ondersteuning bij vertrek."

286 See also various reports of the Advisory Council on Migration on this issue, recently in *Realism about Numerical Targets, exploring immigration targets and quotas in Dutch policy*, December 2022, p. 153.

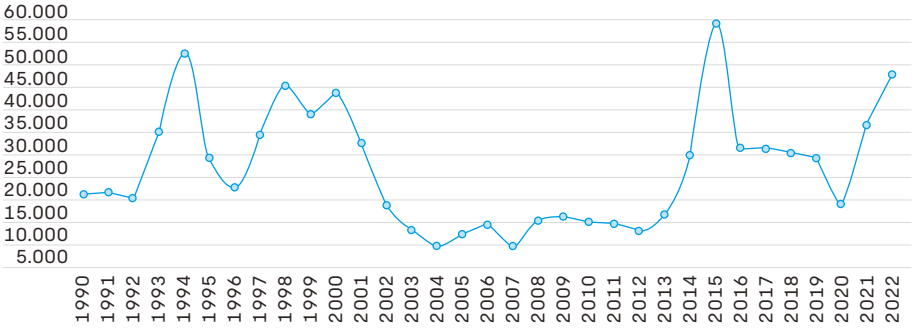
287 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 22.

288 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 27.

7 Statistics

Migration is the main cause of population growth in the Netherlands with a net migration of 223,789 in 2022. Asylum migration however accounted in the period 2013-2022 for only 11% of migrants entering the country.[289] From a demographic perspective the importance of asylum is however more substantial than these 11% suggest, since asylum migrants tend to stay longer in the Netherlands than labour or study migrants. A further 6% fell under the temporary protection scheme for Ukrainians. Asylum applications in the Netherlands make up 4% of the total number of asylum applications in the EU in 2022.[290]

Total number of asylum applications 1990-2022, Source: Vluchtelingenwerk Nederland[291]



In 2022 there were 35,535 first time applicants, with a 12,8% rejection rate. A majority was granted refugee protection (53,1%) followed by subsidiary protection (29%) and forms of humanitarian protection (5,1%). By far most applicants were from Syria (12,648, 36 %), followed by Afghanistan (2,732, 8%), Turkey (2,648, 8%) and Yemen (2,428, 7%). This order remained the same when including family reunification numbers.[292] Unaccompanied minors made up 12% of the applicants, mostly coming from Syria (58%) and Eritrea (14%).[293]

289 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 12.

290 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 11.

291 This is the total amount of first and subsequent applications, with family reunification numbers included in the total amount: DCfR, "Bescherming in Nederland: Asielverzoeken in cijfers."

292 AIDA, *The Netherlands*, 2023, p. 8.

293 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 12.

35% of asylum seekers arriving between September 2022 and August 2023 were from Syria. Other main countries of origin are Turkey (7%), Yemen (6%), Eritrea (5%), and Somalia (5%).[294] Currently, more than 100.000 displaced Ukrainians are residing in the Netherlands under the Temporary Protection Directive that are not included in the general numbers for asylum.[295]

Eligibility rates have increased up to 69%.[296] This comes at a time when the number of first-time asylum applications in 2022 is highest since 2015, with 35,540 applications. This is an increase of 44% compared to 2021,[297] with the lowest number in 2020 at 13,670 first time applicants due to Covid-19.

Asylum applications in the Netherlands

Year	Total	First	Decisions	Granted
2019	31.340	22.530	18.190	25%
2020	19.610	13.670	17.350	49%
2021	37.150	24.690	19.910	59%
2022	49.420	35.540	23.890	78%

About 80% of first-time applicants have been assessed under the Track 4 procedure, 17% under the Dublin-track (Track 2), and 3% under the Safe country-track (Track 1).

Due to the lack of housing available to persons granted protection, the outflow from reception facilities has been hampered. This led to a 41% increase of occupancy of reception facilities in 2022 compared to 2021.[298] In 2022 people stayed in COA reception facilities for an average of 10,41 months.

294 Central Government Information, "Rijksoverheid Kerncijfers asiel en migratie," Augustus 2023

295 Central Government Information, "Cijfers opvang vluchtelingen uit Oekraïne in Nederland," accessed December 2023.

296 According to EU definitions, in which Dublin referrals are not included in the rejections, this number is 87%.

297 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 80.

298 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 84.

In 2022, 10,930 applications for family reunification were granted,[299] 19,230 migrants without a valid permit left the Netherlands, of which 58% with a known destination. Of this group 2,930 were forcibly returned to leave.[300] 64% of the registered departures go back to their country of origin, 23% to another member state under Dublin, and 14% to other third countries.[301] It is estimated that between 23,000 and 58,000 people in the Netherlands reside illegally. This would mean a substantial decrease in the last decade.[302]

The Ministry of Justice and Security's 2023 'multi-year production forecast' projected that, under a moderate scenario, the Netherlands would receive a combined total of 67,000 asylum seekers (comprising asylum applications and family reunification), with a high-end estimate suggesting this number could reach 77,000.[303] Thus far in 2023 (until September 2023), there has been a total of 33,615 asylum applications (including first and repeat) in the Netherlands.[304] The influx of family reunification is at 7,129 persons. Given the 2023 figures thus far, UNHCR concluded that both the moderate and high-end estimate seems highly unlikely. The low-end projection of 49,000 seems to be the more accurate prediction.[305]

299 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 84.
300 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 112.
301 Ministry Justice and Security, *De Staat van Migratie 2023*, p. 113.
302 This research was based on the period 2017-2018: Central Government Information, "Dalende trend zichtbaar in illegalenschattingen," 16 December 2020.
303 Ministry of Justice and Security, "Meerjaren Productie Prognose (MPP) 2023-1."
304 IND, "Asylum Trends – Monthly report on asylum applications in the Netherlands," September 2023, p. 4.
305 UNHCR, "Waar of niet waar: 'In 2023 komen er 67.000 asielzoekers naar Nederland," 20 July 2023.

Conclusion

Article 18 of the European Charter of Fundamental Rights, a source of primary EU law, states: '*the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union*.'

EU Member States, such as the Netherlands, shall guarantee the right to asylum within the boundaries of the abovementioned legal framework. The right to asylum, which is at the absolute minimum an assessment of the asylum claim, thus constitutes a legal obligation. Given the content of that legal framework, this refers to territorial asylum (procedures), or at least it does not allow exclusive operationalisation of asylum protection extra-territorially.

The Netherlands has, at least on paper, a well-considered and functioning asylum system. Important features are, amongst others, the centralised registration process, the focus on and investments in the initial phase of the procedure including the RVT, NGO information, legal aid, case management, and the single status system. The current crisis mode has little to do with the set-up of the national asylum system in general, but rather with decision making on budget cuts and capacity policy. Beyond reception shortages and backlogs, the central issues in the Dutch political and public migration debate revolve around questions and concerns related to the volatile nature of asylum, particularly the recent increase in asylum applications. The broadly shared sense of insufficient national and European control over (asylum) migration is further reinforced by the practice of mixed migration. Alongside with the experienced pressure on the welfare state and the perceived legal complexity of the national procedure exacerbated by the impact of the European judiciary, these factors give rise to both societal and political concerns.

Several policy options or solutions regularly surface in the political debate. First, the relevance and role of the 1951 Refugee Convention in asylum policy has repeatedly been questioned. In 2021, a preliminary study was published on the question whether, and if so how, the Refugee Convention should be adapted in order to provide for a sustainable legal framework to deal with contemporary challenges with respect to (access to) asylum. The conclusion was that the

Convention is dated, but not outdated. Changing the Convention would not be the key for effectively dealing with contemporary asylum challenges, this rather lies with EU law and European cooperation which is more detailed and binding for the Dutch government.

Another issue is whether working with quota/caps/numerical targets, or ending territorial asylum all together, would be a solution in taking back control of migration. The Dutch Advisory Council on Migration concluded last year that the international legal framework does not allow for rigid caps on asylum protection, but rather referred to the various direct and indirect mechanisms to steer and control asylum migration. One element of increasingly controlling migration would be to make more use of regulated legal pathways such as resettlement (the Netherlands has a rather modest yearly quota of 500 per year) and labour migration (the Netherlands only applies those routes for highly skilled labour).

The third focus in current discussions concerns externalisation of asylum procedures, which again has entered the national political debate through several parliamentary motions dealing with various 'models': from exclusively processing in countries outside the EU, to applying the STC concept through a new deal, to broader migration partnerships including asylum protection cooperation. These models however raise many legal and practical questions which are partly untested yet. What is in fact clear is that in case of (exclusive) extraterritorial processing or the transfer of persons with no prior 'connection' to the country to which they are sent as part of the migration partnership, will require changes in EU law, and likely also in national legislation of the Member States concerned. This may well feed into the present idea within the current political and public debate that the international and European legal framework is 'standing in the way' of effectively dealing with asylum.

This is not the case per se. The Netherlands applies some more favourable standards than required by EU asylum acquis (such as legal representation throughout the procedure, the single status system and the chosen duration of the temporary permit), which means the Netherlands still has legal room for manoeuvre. However, it is relevant to state that these standards are carefully considered and well-thought parts of the national asylum system. They are implemented precisely for reasons of efficiency and effectiveness of the procedure. There is no empirical evidence that they attract (more) asylum seekers, while withdrawing them from the system would indeed lead to more legal proceedings and heavier burden on the operation of the system.

In order to get out of the crisis mode and to regain control over the functioning of the asylum system, it follows from the analysis that (further) investments in the initial phase of the procedure, sufficient processing capacity and quality of decision-making, and simplifying rather than complicating policy rules and procedures are necessary. The system as put forward after the first evaluation of the Aliens Act 2000 (PIVA) provides for a solid system. Furthermore, valuable lessons can be drawn from the distinctions between the protection scheme applied to Ukrainian displaced persons and asylum seekers, such as the non-application of the Dublin rules and the immediate access to the labour market.

European and international cooperation is inevitable and indispensable to effectively deal with asylum migration, allocate responsibilities, and provide solid protection. The external dimension of EU asylum policy is an undeniable part of the process for better and more workable solutions. The Netherlands has always been a frontrunner, and should remain so, in strengthening protection capacity in the region. Meanwhile, it is the reality that both old and new ideas and models for providing asylum outside the EU are actively discussed and put on the table.

However, the analysis of externalisation in an EU (law) context in this report, indicates that the introduction of external processing will not mean that national procedures and reception facilities in the member states, i.e. territorial asylum, can be completely abolished, as the principle of non-refoulement would prohibit that. There is no empirical evidence (yet) in the European context that externalisation has a substantial deterrent effect to those not in need of protection or to those who can find protection elsewhere. And, as we have seen with the EU-Turkey deal, migration partnerships which include asylum protection schemes may also lead to the risk of instrumentalization of migration.

What would then be necessary (basic red lines) to provide a model of externalisation, complementary to at least some form of asylum claims assessment on EU territory? First, as current EU (and national) law does not allow for the transfer of an asylum seeker to a location outside the EU: the legislation, including EU primary law, needs to be changed amongst others to clarify competencies, uplift the territorial scope of the acquis and deal with the connection clause. Thorough scrutiny is necessary of the human rights and refugee protection track-record of the possible partner country, also in relation to possible legal responsibility for violations of international obligations by that state. And any attempt should be combined with sufficient financial means and burden sharing in the form of resettlement and legal pathways.

Kathleen Bush-Joseph

Country report
The United States of America

Introduction

The United States has a long tradition of providing refuge and has welcomed millions of refugees and asylum seekers fleeing their countries. However, at a time of mass displacements around the world, including unprecedented numbers and new flows in the Western Hemisphere, the country's humanitarian protection system is under greater strain than ever with record numbers of migrants seeking asylum. In the face of nearly 2.5 million irregular arrivals at the U.S.-Mexico border in fiscal year (FY) 2023 and a backlog of 2 million asylum applications,[1] the Biden administration has put new measures into place that restrict access to asylum for some. And the U.S. Congress is debating statutory changes to asylum law that would provide major funding infusions for border control but would also tighten asylum provisions that have been in place for decades. The pressure to adapt to this new era of migration will continue to grow.

Repudiating President Donald Trump's restrictive immigration and asylum policies, President Joe Biden's administration has recommitted the U.S. immigration system to welcoming migrants and has created new programmes for people to arrive through orderly processes. Simultaneously, his administration has ushered in a new border management system that seeks to establish incentives for asylum seekers to enter the United States at legal ports of entry and disincentives to crossing illegally, including by restricting access to asylum.

The goals of the U.S. protection system continue to be to provide lawful status to those in need, and to return those deemed ineligible to remain. The United States grants asylum and refugee statuses, which offer permanent residence, based on the definitions included in the 1951 Refugee Convention and the 1967 Protocol, and subsidiary protections under the Convention Against Torture. But U.S. law differs from international law in that it stipulates that asylum is discretionary, and government officials utilise this legal latitude in administering the asylum

1 U.S. Customs and Border Protection (CBP), 'Southwest Land Border Encounters', accessed October 21, 2023; 1 million cases were pending at U.S. Citizenship and Immigration Services (USCIS) as of November 2023 and another 1 million at the immigration courts as of October 2023. See USCIS, 'Asylum Quarterly Engagement Fiscal Year 2023, Quarter 4, Presentation, September 19, 2023', September 19, 2023; Transactional Records Access Clearinghouse (TRAC), 'Immigration Court Asylum Backlog', accessed November 25, 2023.

system. U.S. law also allows officials to grant humanitarian parole, which enables lawful entrance into the United States on a temporary basis, and Temporary Protected Status (TPS) may be granted to migrants already in the country who lack authorisation to be there. The temporary protections may be more vulnerable to litigation and to being cancelled by a future administration.

Without a more efficient system and resources for adjudicating asylum cases and expanded lawful pathways to meet the growing protection needs, the nation's immigration courts and asylum offices will become increasingly overwhelmed and individuals in need of protection will not receive it in a timely manner. Yet U.S. immigration laws, written decades ago, that would provide other avenues for being admitted to the United States remain stuck in the past and are no longer fit for purpose.

Immigration issues have become so politically charged that Congress has been unable to update key asylum and immigration laws since the 1990s, making large-scale reforms nearly impossible. Facing this logjam, the Biden administration has utilised its executive authority to modernise immigration processes and introduce large-scale programmes to provide temporary protections for hundreds of thousands of irregular arrivals.

This report examines the current state of the U.S. protection system, with a particular focus on recent changes the Biden administration has been making in asylum processes and temporary protections, as well as the challenges and lessons the U.S. experience may offer for other systems and countries.

The report begins by outlining the applicable legal framework and the rapid changes in migration flows at the U.S.-Mexico border that have accelerated since 2014. Reviewing the adjudication system for asylum claims, the report underscores the growing gap between resources and the record numbers of recent arrivals seeking asylum and work authorisation. Next, it analyses new nationality-based parole programmes and the introduction of Safe Mobility Offices (SMOs), which aim to provide greater access to protection in the Western Hemisphere. Finally, the report examines the United States' increased capacity for returns, which relies heavily on cooperation from Mexico. The analysis reflects research and conversations with a diverse group of stakeholders—current and former government officials, immigration lawyers and advocates, legal service providers, academics, and others who have administered and studied the U.S. immigration system.

1 Background and Relevant Developments

The number of asylum applications filed in the United States has risen dramatically in recent years, driven by record encounters at the U.S.-Mexico border. In fiscal year (FY) 2022 (October 1, 2021 to September 30, 2022), U.S. officials recorded just under 2.4 million encounters[2] at the Southwest border, with many migrants released into the country and allowed to apply for asylum. In FY 2023, there were nearly 2.5 million encounters.[3]

The United States operates two asylum processes—affirmative and defensive—depending on how individuals enter the country and how border officials process them. Those crossing the border without authorisation or who are in the United States and placed into removal proceedings in immigration court are generally in the defensive asylum process, while individuals who are not in removal proceedings may apply for asylum affirmatively at U.S. Citizenship and Immigration Services (USCIS). Regardless of which process they are in, migrants must apply for asylum within one year of U.S. entry.[4] Defensive asylum applications are heard by immigration judges at the Executive Office for Immigration Review (EOIR) as part of the overall removal proceeding.

Both USCIS and EOIR received record numbers of asylum applications in FY 2023. USCIS received 431,000 affirmative asylum applications, with Venezuelans, Cubans, Colombians, Nicaraguans, and Haitians the top nationalities.[5] EOIR received 316,000 defensive asylum applications as of

2 Encounters is the term used by CBP to encompass apprehensions occurring at and between ports of entry under Title 8 of the U.S. Code, as well as the expulsions that were carried out between March 2020 and May 2023 under Title 42, a public health authority that was activated during the COVID-19 pandemic.

3 CBP, 'Southwest Land Border Encounters'.

4 There are limited exceptions to this requirement, such as for unaccompanied children and migrants who can show changed or extraordinary circumstances. See USCIS, 'The Affirmative Asylum Process', updated September 13, 2023.

5 USCIS, 'Asylum Quarterly Engagement Fiscal Year 2023, Quarter 4, Presentation, September 19, 2023'.

the third quarter of FY 2023 (nationality data are unavailable).[6] Given each application can cover multiple individuals, the total number of people seeking asylum could be higher.[7] By comparison, in FY 2013, USCIS received 44,000 asylum applications and EOIR received 24,000.[8]

Most asylum seekers today arrive at the U.S.-Mexico border without authorisation but are not screened for eligibility for protection there due to resource constraints. Instead, border officials release migrants into the country to await removal proceedings in the immigration courts. Whether screened at the border or not, asylum seekers must file their asylum applications in the U.S. interior with USCIS or EOIR.[9]

Adjudications have not kept up with applications, and backlogs have ballooned as a result. USCIS now has more than 1 million pending affirmative asylum applications,[10] with some applicants waiting years for an interview. At EOIR, there were 851,000 pending asylum cases as of the third quarter of FY 2023, out of 2.16 million immigration court cases.[11] These numbers do not capture migrants who have been allowed to enter the country but have not yet filed an asylum claim, whether defensively before EOIR in connection with removal proceedings or affirmatively before USCIS. It is difficult to determine asylum eligibility rates due to a variety of factors reviewed below, but in FY 2022, USCIS granted asylum

6 Department of Justice (DOJ), Executive Office for Immigration Review (EOIR), 'Defensive Asylum Applications' (fact sheet, July 2023).

7 Data on repeat applications are not available. An example of a repeat application could include when a migrant or their representative files an asylum application online with USCIS after having already filed a paper application. This reportedly occurred when USCIS had a 'frontlog' that caused months-long wait times for receipts for paper applications and the option to file online was introduced in November 2022. See USCIS, 'USCIS Announces Online Filing for Affirmative Asylum Applications', November 9, 2022; Department of Homeland Security (DHS), CIS Ombudsman, 'June 28, 2023: Defensive Asylum Applications (Form I-589)', accessed November 21, 2023.

8 Andorra Bruno, *Immigration: U.S. Asylum Policy* (Washington, DC: Congressional Research Service, 2019), 33; EOIR, 'Defensive Asylum Applications'.

9 The small number of border arrivals processed under the June 2022 asylum officer rule, which is discussed below, are the exception. Their border screening interviews are treated as asylum applications, therefore they do not need to file separate applications, though they may submit additional evidence.

10 USCIS, 'Asylum Quarterly Engagement Fiscal Year 2023, Quarter 4, Presentation, September 19, 2023'.

11 Irene Gibson, *Annual Flow Report Refugees and Asylees: 2022* (Washington, DC: DHS Office of Homeland Security Statistics, 2023).

to about 14,000 individuals and the immigration courts granted asylum to 22,000.[12]

Regional dynamics have played a strong role in shaping the trends of increasing arrivals and diversifying flows. Until 2014, migrants encountered at the U.S.-Mexico border were mostly single, Mexican men seeking to enter for work. Today, record numbers of families ('family units' in U.S. Customs and Border Protection parlance) from Latin America and beyond are arriving at the Southwest border in search of protection, as are high levels of unaccompanied children. Violence, poverty, political instability, and environmental factors and the economic and other destabilising effects of the COVID-19 pandemic are among the drivers of mass displacement of Cubans, Haitians, Nicaraguans, and Venezuelans, as well as ongoing high migration from northern Central America. At the same time, a growing number of individuals from beyond the Western Hemisphere ('extracontinental' migrants) have sought asylum in the United States.

The Migration Policy Institute (MPI) estimates that there were 11.2 million unauthorised immigrants in the United States as of 2021, the most recent year for which data are available.[13] The number is expected to grow based on the high number of recent unauthorised arrivals.

Political and Economic Context

Politically, asylum has become a fraught issue in the United States, as in other key destination countries. President Donald Trump, a Republican, campaigned on a promise to 'build the wall' at the U.S.-Mexico border, and his administration attempted to enact a range of policies restricting access to asylum, most of which were blocked by the courts. Since coming to office in 2021, Biden, a Democrat, has reiterated the U.S. commitment to providing protection to those in need, but he has faced challenges reversing the Trump agenda, in part due to litigation by Republican-led states.

12 EOIR, 'Total Asylum Applications'; USCIS, 'Immigration and Citizenship Data Asylum Division Monthly Statistics Report Fiscal Year 2022, October 2021 to September 2022', accessed September 27, 2023.

13 Jennifer Van Hook, Julia Gelatt, and Ariel G. Ruiz Soto, 'A Turning Point for the Unauthorized Immigrant Population in the United States', Migration Policy Institute (MPI) commentary, September 2023.

Local officials have declared emergencies due to high migrant arrivals in major interior cities. While Democrats have historically been the more welcoming political party on immigration, Democratic officeholders have criticised the federal government for a lack of coordination and funding for shelter services in particular. Party leaders have called for expediting work permits to allow recent arrivals to support themselves and move out of shelters. In response, the Biden administration announced plans to speed the issuance of work permits and in September 2023 granted almost half a million Venezuelan migrants the opportunity to apply for temporary protection and work authorisation.[14]

Republicans, who are generally more focused on border enforcement, have implemented state policies in Texas and Florida to crack down on unauthorised migration. At the national level, congressional Republicans have introduced legislative proposals that would permanently bar access to asylum for many individuals, curtail the executive branch's ability to create alternative lawful means of entry for asylum seekers and others, and limit the ability to provide temporary protection to those already present in the United States without legal status. Republican presidential candidates have also called for extreme measures, including bombing cartels in Mexico, to stop what some call an 'invasion' at the Southwest border.[15] With publics increasingly anxious over record arrivals at the border and in cities in the U.S. interior, immigration will undoubtedly feature prominently in the 2024 presidential election cycle.

The politicised nature of the issue notwithstanding, polls indicate that the majority of the U.S. public expresses support for keeping immigration overall at current or increased levels as the country's unemployment rate remains low and population aging rises, reducing the number of working-age adults.[16] The overarching legal framework for immigration, which rests on the pillars of laws enacted in 1952 and 1965, has not changed significantly since the 1990s. There are 1.8 million applicants in the employment-based backlog for legal permanent residence, meaning that wait times stretch to decades to obtain a

14 DHS, 'The Biden-Harris Administration Takes New Actions to Increase Border Enforcement and Accelerate Processing for Work Authorizations, While Continuing to Call on Congress to Act' (fact sheet, September 2023).

15 *The Economist*, 'Why America's Republicans Want to Bomb Mexico', The Economist, September 14, 2023; The New York Times, 'Where the Republican Candidates Stand on Immigration', The New York Times, accessed November 22, 2023.

16 Lydia Saad, 'Americans Still Value Immigration, But Have Concerns', Gallup, July 13, 2023.

green card (and for many to lawfully enter the United States).[17] While the asylum system is separate from the employment one in law, the two have become intertwined as asylum seekers fill U.S. job vacancies and many work without authorisation soon after arrival. Individuals are eligible to receive a work permit no sooner than 180 days after filing an asylum application (and must file a separate application for a work permit), and as wait times for asylum adjudication stretch on for years, the asylum system is increasingly functioning as a new proxy for labour migration in the United States.

17 David Bier, '1.8 Million in Employment-Based Green Card Backlog', CATO Institute blog, August 29, 2023.

2 International Legal Framework

One of the main reasons that the U.S. asylum system is in crisis today is the rigidity of the legal framework for U.S. immigration. The immigration system is made up of four streams: family reunification; employment-based, with quotas that were set in 1990; humanitarian protection, which is an area that is numerically flexible; and a diversity lottery of 55,000 visas for countries under-represented in the other categories. The lack of flexibility in the non-humanitarian areas of immigration law means that in addition to migrants who need protection, many others have applied for asylum as a means to reunite with family members and/or work in the United States. Moreover, some migrants may have multiple motives that include requesting protection and seeking opportunity for themselves and their family members.

The humanitarian protection stream encompasses refugee admissions from abroad through an established resettlement system and, more recently, people applying for asylum from within the United States. The main types of protection available are based on the 1951 United Nations (UN) Convention Relating to the Status of Refugees ('the 1951 Convention'), and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Convention Against Torture'). U.S. law also provides temporary forms of protection such as humanitarian parole for those seeking admission, and Temporary Protected Status (TPS) and Deferred Enforced Departure (DED) for migrants already residing in the country without authorisation. The system is largely based on laws from the 1980s and 1990s, when most asylum applicants flew to airports and border arrivals were predominantly economic migrants from Mexico. Congress' failure for more than three decades to update immigration laws and adequately fund all aspects of the immigration system has resulted in a system that is no match for today's realities. Therefore, presidents have increasingly relied on their executive authority to change administrative rules. But resource and litigation constraints, combined with the inherently limited changes that can be made through executive action within the existing statutory structure, have limited their effects.

International Treaties

The United States has a federalist system of government, and immigration enforcement is generally the purview of the federal government (though this right has not gone uncontested, including at present). As originally enacted, U.S. immigration laws, which are incorporated into the Immigration and Nationality Act, did not contain refugee or asylum provisions.[18] In 1968, the United States acceded to the UN Protocol Relating to the Status of Refugees (the '1967 Protocol') and, by incorporation, Articles 2-34 of the 1951 Convention.[19] The United States ratified the Convention Against Torture in October 1994.[20] The United States is not party to binding regional agreements that provide other legal bases for international protection beyond the refugee definition as, for example, Latin American countries are under the Cartagena Declaration on Refugees or European countries under the European Convention on Human Rights.

Domestic Implementing Legislation: The Refugee Act of 1980

Despite becoming a party to the 1967 Protocol, the United States did not enact domestic implementing legislation with a conforming definition for 'refugee' or a mandatory nonrefoulement[21] provision until the passage of the Refugee Act of 1980.[22] The main intent of the Refugee Act was to provide a legal basis for external processing for refugee resettlement, not asylum. This was because the United States was not receiving high numbers of asylum seekers then, but since the 1950s had been relying on humanitarian parole to provide protection for groups fleeing conflict or instability.[23]

As amended by the Refugee Act, U.S. immigration law provides for the granting of asylum to a person who applies in accordance with applicable requirements

18 Bruno, Immigration: U.S. Asylum Policy, 9.

19 Bruno, Immigration: U.S. Asylum Policy, 8.

20 Michael John Garcia, *The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens* (Washington, DC: Congressional Research Service, 2006).

21 The principle of nonrefoulement prohibits countries from 'returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.' See Sir Elihu Lauterpacht and Daniel Bethlehem, 'Refugee Protection in International Law: The Scope and Content of the Principle of Non-Refoulement: Opinion (2.1)', United Nations High Commissioner for Refugees (UNHCR), accessed November 21, 2023.

22 Bruno, Immigration: U.S. Asylum Policy, 9.

23 Julia Gelatt and Doris Meissner, 'Straight Path to Legal Permanent Residence for Afghan Evacuees Would Build on Strong U.S. Precedent', MPI commentary, March 2022.

and is determined to be a refugee. A refugee is defined as a person who is outside their country of nationality and is unable or unwilling to return to, or to avail themselves of the protection of, that country because of persecution or a well-founded fear of persecution based on one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.[24]

Notably, the U.S. statute varies from international law in that a grant of asylum or refugee status is discretionary, while the 1967 Protocol and the 1951 Convention stipulate that someone who meets the relevant standards 'shall' be considered a refugee.[25] As with the Trump administration before it, the Biden administration has justified regulations that restrict access to asylum based on this element of discretion, though federal courts have repeatedly struck down such rules as contrary to other provisions of U.S. asylum and administrative law, and the 1951 Convention.[26]

U.S. law distinguishes between applicants for asylum or refugee status based on their physical location. Refugee applicants are outside the United States, while applicants for asylum are physically present in the country, either at the border or in the U.S. interior. USCIS and the State Department grant refugee status outside the country. Asylum can be granted by USCIS, a branch of the Department of Homeland Security (DHS), or EOIR, the administrative courts division within the Department of Justice (DOJ), depending on the type of application filed. There are no numerical limitations for those seeking asylum within the U.S. territory, but the number of refugees admitted from overseas is subject to an annual cap set by the president following a required consultation with Congress. The refugee resettlement cap for FY 2024 was set at 125,000, the same level as earlier Biden

24 United Nations (UN) Convention Relating to the Status of Refugees ('the 1951 Convention'), 'Article 1 Definition of the Term "Refugee",' 1951.

25 UNHCR, Comments of the United Nations High Commissioner for Refugees on the Proposed Rule from the U.S. Department of Justice (Executive Office for Immigration Review) and the U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services): 'Circumvention of Lawful Pathways' (UNHCR statement, March 20, 2023), 4; federal courts have held that the 1967 Refugee Protocol is not directly enforceable in U.S. courts. Therefore, the protocol does not confer judicially enforceable rights or duties in and of itself, beyond those granted by the domestic implementing legislation. See Hillel R. Smith, *The Biden Administration's Final Rule on Arriving Aliens Seeking Asylum (Part Two)* (Washington, DC: Congressional Research Service, 2023).

26 See discussion of the circumvention of lawful pathways regulation in the Border section of this report.

years.[27] Upon arrival, refugees are geographically distributed across the United States and receive short-term resettlement assistance. By contrast, there is no federally organised distribution scheme for asylum seekers, who generally are not eligible for public benefits apart from emergency medical services.[28]

Withholding of Removal and Convention Against Torture Protection

To make U.S. law consistent with the 1951 Convention language on nonrefoulement, the Refugee Act also revised a provision of U.S. law on a lesser form of protection—withholding of deportation, which is now referred to as withholding of removal.[29] Thus, if a migrant is found ineligible for asylum, the individual may be considered for withholding. Per the Refugee Act, officials are prohibited from removing a noncitizen whose life or freedom would be threatened because of one of the five protected grounds.

Apart from asylum and withholding, a migrant may receive protection under the Convention Against Torture by showing it is more likely than not that they will be tortured in the country of removal. The protection received is deferral of removal from the United States, which is granted after a formal order of removal is entered in immigration court.

Recipients of withholding or CAT protection are not permitted to adjust to lawful permanent resident status; individuals granted asylum may adjust to lawful permanent residence (known as getting a green card) after one year.[30] Refugees are required to apply for lawful permanent residence within a year of U.S. arrival.[31] Regulations provide that an individual granted withholding or deferral of removal may apply for work authorisation, and that U.S. officials may remove an individual granted such protections to a third country.[32]

27 MPI Data Hub, 'U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present', accessed November 25, 2023.

28 In addition to emergency medical services, asylum seekers are generally eligible for non-cash disaster relief assistance and English language instruction. Certain groups (such as asylum seekers who are pregnant, children, or youth who meet certain criteria) are eligible for additional medical, nutritional, early childhood development, and financial support. See Essey Workie, Lillie Hinkle, and Stephanie Heredia, The Missing Link: Connecting Eligible Asylees and Asylum Seekers with Benefits and Services (Washington, DC: MPI, 2022).

29 Bruno, Immigration: U.S. Asylum Policy, 9, 16.

30 Bruno, Immigration: U.S. Asylum Policy, 2.

31 USCIS, 'Green Card for Refugees', updated June 26, 2017.

32 Bruno, Immigration: U.S. Asylum Policy, 20.

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act

Asylum Provisions

In response to growing numbers of asylum filings and calls to reform access to work authorisation for asylum seekers, Congress in 1996 passed the *Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).*[33] The law established that a noncitizen who is present or arrives in the United States, regardless of whether they arrived with authorisation or not, can apply for asylum. Under IIRIRA, an asylum seeker must apply for protection within one year of arriving; an individual is ineligible to apply if their prior asylum application was denied.[34] The law also provided that a person is ineligible to apply for asylum if removable pursuant to a safe third country agreement.[35] IIRIRA also added grounds for denying asylum (listed in the Asylum section below).[36]

IIRIRA established that asylum seekers who are not otherwise eligible for employment shall not be granted work authorisation until 180 days after filing an asylum application. The law codified the intent that the government adjudicate the application within 180 days of filing. Asylum seekers are generally ineligible for federal public benefits, whether during this 180-day period or afterwards, leaving local governments and nonprofit organisations responsible for providing services for those who otherwise lack support.

Expedited Removal and Credible Fear of Persecution Screenings

In the context of then rising U.S.-Mexico border encounters of mostly single Mexican men seeking to enter the United States illegally to work, IIRIRA established a new immigration enforcement mechanism known as expedited removal. This process allows officials to quickly remove arriving migrants without a hearing before an immigration judge provided the individual lacks an entry document or used counterfeit, altered, or otherwise fraudulent or improper documents. Under IIRIRA, unlawful re-entry is a criminal offense, and migrants

33 *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Public Law 104–208, *U.S. Statutes at Large* 110 (1996): 3009-546.

34 An exception to both restrictions applies if a noncitizen can show changed circumstances.

35 The United States has only one safe third country agreement, which is in effect with Canada. The agreement provides that migrants must seek asylum in the first country of arrival unless they meet an exception. See Muzaffar Chishti and Julia Gelatt, 'Roxham Road Meets a Dead End? U.S.-Canada Safe Third Country Agreement Is Revised', Migration Information Source, April 27, 2023.

36 Bruno, Immigration: U.S. Asylum Policy, 15.

deported under expedited removal are barred from re-entering the country for five years.[37] IIRIRA included an exception to the expedited removal process by which a migrant seeking protection would be screened for a credible fear of persecution. This exception was established at a time when airports were the primary entry point for asylum seekers. Since most border arrivals were economic migrants at the time, officials did not expect that the credible-fear screening would be frequently used.

Today, most migrants arriving at the U.S. border turn themselves in to officials in order to seek protection. Under U.S. law, as amended by IIRIRA, an individual subject to expedited removal who claims a fear of return to their home country is to be interviewed by an asylum officer to determine if a credible fear of persecution exists.[38] Credible fear means that 'there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum'.[39]

Individuals found to have a credible fear generally are referred to immigration court, where they can apply for asylum before an immigration judge as part of the overall removal proceeding. If an asylum officer finds that the migrant did not have a credible fear, an immigration judge may review the negative finding. In order to be granted asylum at USCIS or the courts, asylum seekers must show that there is a reasonable possibility of past persecution or a well-founded fear

37 The executive branch may expand the application of expedited removal to individuals who entered without inspection and who have been in the United States for less than two years per a different statutory authority. Officials have used this authority at various points to apply to arrivals by sea and near the U.S.-Mexico border. See Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, The U.S. Asylum System in Crisis: Charting a Way Forward (Washington, DC: MPI, 2018), 2; Jessica Bolter, Emma Israel, and Sarah Pierce, *Four Years of Profound Change: Immigration Policy during the Trump Presidency* (Washington, DC: MPI, 2022), 45.

38 Special procedures apply to migrants arriving in the United States from Canada in accordance with the U.S.-Canada Safe Third Country Agreement. Otherwise, individuals who have previously been ordered removed and are taken into custody are screened using a higher standard—reasonable possibility of persecution or torture—in reinstatement of removal proceedings, another expedited procedure for removing migrants without a court hearing. Migrants who pass the screening may seek withholding of removal or deferral of removal in immigration court. See Meissner, Hipsman, and Aleinikoff, The U.S. Asylum System in Crisis, 2.

39 *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*: 3009-582.

of future persecution on account of a statutorily protected ground, a higher standard than the credible fear screening.[40]

Post-1996 Statutory Provisions

The IIRIRA asylum provisions remain largely in place, though subsequent legislation amended other immigration laws. The United States and Canada signed a safe third country agreement in 2000, which went into effect in 2004 and is the only existing formal safe third country agreement that the United States has in effect today.[41] Under the agreement, asylum seekers must request protection in the first of the two countries that they arrive in unless they qualify for an exception. The agreement applied only to asylum seekers arriving at ports of entry until 2023, when it was expanded to cover the rising numbers of migrants arriving between ports.[42]

The Real ID Act of 2005 added 'burden-of-proof' provisions that require an asylum seeker to show that 'race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant' to meet the definition of a refugee.[43] The law also set forth standards for making determinations about an applicant's credibility and the need for corroborating evidence. The law eliminated annual caps on the number of asylees who could adjust to lawful permanent residence.[44]

Facing concerns that DHS was not adequately screening unaccompanied migrant children for evidence of trafficking or persecution, Congress in 2008 passed the *William Wilberforce Trafficking Victims Protection Reauthorization Act* (TVPRA).[45] The law made certain statutory restrictions on applying for asylum inapplicable to unaccompanied children, such as the requirement that an individual generally apply for asylum within one year of their last entry to the country. It also provided that a USCIS asylum officer would have initial jurisdiction over any asylum application filed by an unaccompanied child,

40 Bruno, Immigration: U.S. Asylum Policy, 16.
41 Chishti and Gelatt, 'Roxham Road Meets a Dead End?', Migration Information Source.
42 Chishti and Gelatt, 'Roxham Road Meets a Dead End?', Migration Information Source.
43 *REAL ID Act of 2005*, Public Law 109-13, *U.S. Statutes at Large* 119 (2005): 303.
44 Bruno, Immigration: U.S. Asylum Policy, 20.
45 Congressional Research Service (CRS), *Unaccompanied Alien Children: An Overview* (Washington, DC: CRS, 2021), 6.

even if the minor was in removal proceedings in immigration court.[46] As such, unaccompanied children may apply for asylum affirmatively at USCIS, and if they are not granted asylum there, they are referred to immigration court, where their claim will be heard by a judge. The arrival of unaccompanied children has increased dramatically in recent years. In FY 2022, unaccompanied minor encounters reached a high of 149,000, almost double the 76,000 encountered in FY 2019.[47]

Regulations on Asylum Eligibility and Procedures

Although U.S. asylum statutes remain largely unchanged from the 1990s, the government has issued a number of regulations governing asylum procedures. One notable rule that was issued in 2000 and remains in effect provides that an asylum applicant is not considered to have a well-founded fear of persecution if they could relocate within their home country and 'under all the circumstances it would be reasonable to expect the applicant to do so'.[48]

The Trump administration issued regulations that restricted access to asylum, including rules that barred from eligibility for asylum those who crossed the U.S.-Mexico border without authorisation. A separate rule made ineligible for asylum migrants who transited through a third country and did not apply for asylum there and have their application denied. These rules were eventually blocked by the courts.[49]

The Biden administration has promulgated a number of rules relating to asylum, including one known as the asylum officer rule, which allows USCIS to adjudicate border asylum cases that would normally go to immigration judges after an individual processed through expedited removal has established the requisite

46 Bruno, Immigration: U.S. Asylum Policy, 20.

47 William A. Kandel, *Increasing Numbers of Unaccompanied Children at the Southwest Border* (Washington, DC: CRS, 2023), 1.

48 The U.S. Code of Federal Regulations, 8 CFR 208.13(b)(3) provides that factors adjudicators should consider include, but are not limited to, 'whether the applicant would face other serious harm in the place of relocation; ongoing civil strife in the country; administrative, economic, or judicial infrastructure; geographic limitations; and social and cultural constraints such as age, gender, health, and social and family ties'. See U.S. Immigration and Naturalization Service (INS), 'Asylum Procedures', *Federal Register* 65, no. 235 (December 6, 2000): 76121-38.

49 Bolter, Israel, and Pierce, *Four Years of Profound Change*, 16-19, 80-81.

level of fear of persecution.[50] By allowing asylum officers to adjudicate the entire case rather than just the initial credible-fear interview, the rule shortens the adjudication process to months, instead of years. First implemented in June 2022, the rule was paused in May 2023 due to resource constraints. It was restarted in October 2023, but the number of migrants processed through it is expected to remain low. Fewer than 6,000 migrants had gone through this revised process as of June 2023.[51] Another rule, the circumvention of lawful pathways regulation, restricts eligibility for asylum for those crossing between ports of entry (see Border section for more details). These regulations have been challenged in the courts but remained in effect at the time of this writing.

Case Law on Asylum

In the absence of updates to U.S. immigration laws, the U.S. Supreme Court and lower-level courts have played an outsized role in deciding the legality of government actions relating to asylum, as well as interpreting existing laws. Decisions issued by the Supreme Court have addressed the detention of asylum seekers; Biden administration efforts to terminate the Trump-era Migrant Protection Protocols (informally known as the Remain in Mexico programme), which forced migrants to wait for their U.S. court hearings in Mexico;[52] and DHS' exercise of prosecutorial discretion to prioritise certain migrants for removal and decline to prosecute others.

The attorney general, the head of the U.S. Department of Justice, also has the authority to issue precedent decisions for how USCIS and the immigration courts apply immigration law. These attorney general referral and review decisions have been influenced by political forces, with successive administrations issuing decisions overturning past ones—leading to inconsistency in adjudications.[53] Additionally, federal appellate courts have issued decisions that apply only to their jurisdictions, the result being a complex patchwork of applicable standards and considerations in asylum case law. The courts may consider the positions of

50 The rule draws in part on proposals made in an earlier MPI report: Meissner, Hipsman, and Aleinikoff, *The U.S. Asylum System in Crisis.*

51 DHS, 'Asylum Processing Rule Cohort Reports', accessed October 27, 2023.

52 The Migrant Protection Protocols began in January 2019 and required migrants, including asylum seekers, to wait in Mexico while their immigration cases were adjudicated. See Bolter, Israel, and Pierce, *Four Years of Profound Change*, 25, 34-35.

53 Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review* (Washington, DC: MPI, 2021).

the UN High Commissioner on Refugees (UNHCR) and international treaty bodies but assess the weight of submissions on a case-by-case basis.

The precedential decisions by the attorney general and the courts have become increasingly important not only due to the lack of congressional action, but also as the nature of asylum claims themselves have changed. The persecution claims long seen in the post-World War II era, which centred on state actors, today have significantly given way to claims of persecution by non-state actors, with Central Americans typically seeking asylum based on gang or gender-based violence under the protected ground of 'particular social group'. During the Trump administration, Attorney General Jeff Sessions issued a decision known as *Matter of A-B-* that largely eliminated gang and domestic violence as reasons to grant protection. Attorney General Merrick Garland, a Biden appointee, overturned that decision in 2021.[54] The Biden administration has also pledged to issue a rule defining particular social group, which would be an important step toward standardizing how such groups are defined across jurisdictions and speeding decisions. The rule had not been issued at this writing.

54 Matter of A-B-, 28 I&N December 307 (Attorney General, June 16, 2021).

3 Border Management in Policy and Practice

To improve border management, the United States needs a functioning asylum system so that people eligible for protection can receive it, and those who are ineligible can be quickly removed after fair review of their claim. There is widespread recognition that the asylum system is being used by substantial numbers of people without meritorious protection claims because they have no other means by which to immigrate to the United States for work or the opportunity to join family members. In response, the Biden administration has used its parole authority to significantly expand lawful pathways to channel intending migrants through safe, orderly, and humane processes so that they do not seek to enter without authorisation.[55] Presently, the arrival of record numbers of asylum seekers at the U.S.-Mexico border, the outdated legal framework for adjudicating their claims, and resource allocations that do not prioritise adjudications mean that the asylum system faces unprecedented strain. Since border officials are unable to quickly remove most border arrivals, nearly 2.5 million were released into the country to await immigration court proceedings between January 2021 and March 2023 and had no confirmed departure.[56]

Against this backdrop, the Biden administration ushered in a new era of migration management policies in May 2023 when it lifted the Title 42 public health authority that the Trump administration imposed in March 2020, citing the COVID-19 pandemic. Title 42 had authorised quick expulsions of many arriving unauthorised migrants (there were almost 2.8 million expulsions during its 38-month use);[57] it effectively blocked access to territorial asylum while it was in use because migrants can only apply for asylum once they are on U.S.

55 Andrew Selee, 'Regional Processing Centers: Can This Key Component of the Post-Title 42 U.S. Strategy Work?', MPI commentary, May 2023.

56 U.S. House Judiciary Committee Subcommittee on Immigration, Integrity, Security, and Enforcement, *The Biden Border Crisis: New Data and Testimony Show How the Biden Administration Opened the Southwest Border and Abandoned Interior Enforcement* (Washington, DC: House Judiciary Committee Subcommittee on Immigration, Integrity, Security, and Enforcement, 2023).

57 CBP, 'Nationwide Encounters', accessed November 26, 2023.

territory. The post-Title 42 strategy entails offering new lawful means of entry for asylum seekers through official crossing points and nationality-specific parole programmes; restricting asylum eligibility and imposing consequences for migrants crossing the border without authorisation; and launching a network of Safe Mobility Offices (SMOs) in countries in South and Central America to provide screening and information for intending migrants closer to their home countries.[58]

Still in its nascent stages and under legal challenge from liberal and Republican-affiliated groups, this new approach aims to create order and predictability at the border by incentivising arrivals at ports of entry and disincentivising irregular crossings in tandem with longer-term regional migration management coordination across the Western Hemisphere. For example, the Los Angeles Declaration on Migration and Protection, signed by the United States and 20 other countries, has set the framework to increase regional cooperation.[59] These policy changes represent a paradigm shift in the U.S. response to unprecedented new realities in irregular migration. But it remains a significant challenge to achieve a balance between expanding legal manners of entry and access to asylum, along with imposing additional consequences to deter irregular migration.

There were nearly 2.8 million encounters of migrants at all U.S. borders and ports of entries, including airports, in FY 2022. The number reached a record-breaking 3.2 million in FY 2023, though these figures include Title 42 expulsions, which had a high rate of repeated attempts by earlier-expelled migrants (and represent *events*, not individuals).[60] The United States encountered increasing numbers of families and unaccompanied children, as well as a sharp diversification in nationalities from beyond Mexico and northern Central America. Together these shifts have caused significant strain on the U.S. immigration enforcement system. At the Southwest border, families and unaccompanied children increased to 29 per cent of encounters in FY 2022, up from 21 per cent in

58 Selee, 'Regional Processing Centers'.

59 The White House, 'Los Angeles Declaration on Migration and Protection', June 10, 2022.

60 'Nationwide encounters are the sum of CBP encounters across all areas of responsibility including Northern Land Border, Southwest Land Border, Office of Field Operations non-land border ports of entry (e.g., airports, seaports), and U.S. Border Patrol sectors that do not share a land border with Canada or Mexico (e.g., Miami Sector)'. See CBP, 'Nationwide Encounters', updated October 21, 2023.

FY 2020.[61] Additionally, there were 571,000 unauthorised arrivals of Venezuelans, Cubans, and Nicaraguans in FY 2022. These numbers eclipsed the 521,000 arrivals of northern Central Americans, with El Salvador, Guatemala, and Honduras previously the top countries of irregular migration after Mexico.[62] The record encounter numbers in part represent a change that began in 2014, when migrants went from largely trying to avoid U.S. border officials to turning themselves in so that they could seek protection.

The rapid increase of migrants traveling through the dangerous Darién Gap between Colombia and Panama en route to the United States illustrates the swiftly changing flows. Some 409,000 migrants had crossed the gap during the first nine months of 2023, surpassing the previous record of 250,000 crossings in 2022 and a far cry from 2019, when 22,000 migrants crossed.[63] While neighbouring countries in Latin America and the Caribbean harbour approximately 6.5 million Venezuelans who have fled their country since 2015,[64] pandemic-related economic losses have caused hundreds of thousands of them and other nationalities such as Haitians to engage in secondary migration toward the United States at the same time as some Venezuelans and others leave directly from their countries of origin due to ongoing instability.[65] The real-time spread of information through social media and other platforms has helped facilitate and demystify aspects of the migration process, in addition to the professionalisation (and control) of smuggling routes wielded by criminal organisations.[66]

61 CBP, 'Nationwide Encounters'.

62 Ariel G. Ruiz Soto, 'Record-Breaking Migrant Encounters at the U.S.-Mexico Border Overlook the Bigger Story', MPI commentary, October 2022.

63 Caitlyn Yates and Juan Pappier, 'How the Treacherous Darien Gap Became a Migration Crossroads of the Americas', Migration Information Source, September 20, 2023; UNHCR, 'Darien Panama: Mixed Movements Protection Monitoring October 2023' (fact sheet, October 2023).

64 UNHCR, 'Over 4 Million Venezuelan Refugees and Migrants Struggle to Meet Basic Needs Across the Americas' (press release, September 12, 2023).

65 UNHCR, 'Over 4 Million Venezuelan Refugees and Migrants Struggle to Meet Basic Needs Across the Americas'.

66 Julie Turkowitz, 'A Girl Loses Her Mother in the Jungle, and a Migrant Dream Dies', *The New York Times*, updated June 20, 2023.

Border Agencies

U.S. border management policy focuses mainly on the border with Mexico, as the vast majority of encounters occur there as compared to the U.S.-Canada border and at sea. DHS is charged with border management through its CBP component; another component, the U.S. Coast Guard, conducts interdictions at sea. At land borders, CBP divisions manage different aspects of migrant arrivals. Ports of entry—the lawful access points for people and cargo to reach U.S. territory—are managed by CBP's Office of Field Operations. Between ports of entry, the Border Patrol apprehends migrants attempting to enter without authorisation. CBP works to quickly process migrants encountered at or between ports of entry and to hold people in its custody for no more than 72 hours.

Another component of DHS, U.S. Immigration and Customs Enforcement (ICE), manages the longer-term detention of migrants at facilities along the Southwest border and in the U.S. interior. ICE is also responsible for arresting unauthorised migrants living in the U.S. interior as well as noncitizens charged with criminal activities; it also manages removals and returns. Asylum officers from USCIS, also a component of DHS, conduct credible-fear screenings of migrants who are placed in expedited removal proceedings and express a fear of return to their home country.

Reception Process

To the greatest extent possible, DHS places migrants arriving without authorisation into expedited removal, which allows for relatively quick removal without a court hearing.[67] During the expedited removal process, individuals who request asylum or otherwise express a fear of persecution are entitled to a credible-fear interview to determine whether there is a significant possibility that they will be able to establish eligibility for asylum or other form of protection under the Convention Against Torture in a later proceeding. If they pass this first step, they may be released into the U.S. interior to file an asylum application and await removal proceedings in immigration court.[68] Those who do not seek asylum protection or who are unable to establish a credible fear may be removed to their

67 The time to removal depends on nationality, available flights, travel documents, and other factors.

68 DHS determines whether to release noncitizens based on factors such as security concerns. Migrants processed under the asylum officer rule follow a different adjudication process.

country of origin. Most asylum seekers pass this initial step; before the pandemic, about 85 per cent of those screened were deemed to have a credible fear.[69]

Resource capacity plays a major role in processing. At times of high border arrivals, DHS lacks sufficient holding capacity and personnel to place all eligible individuals into expedited removal. As a result, many border arrivals are released into the U.S. interior with a charging document known as a notice to appear (NTA) that schedules them for removal proceedings in immigration court. At times of exceptionally high border arrivals, DHS has resorted to issuing NTAs with placeholder information or has released people without NTAs but with instructions to report within a period of days or weeks to immigration enforcement personnel inside the country for further processing. The immigration court process typically takes years; some 2023 arrivals to New York City have been scheduled for initial hearings in 2027.[70]

Humanitarian Parole

One of the most innovative and important aspects of the Biden administration's border management strategy has been its unprecedented use of humanitarian parole. DHS is authorised by statute to allow inadmissible noncitizens to enter the United States temporarily via parole, which permits them to remain in the country for a designated period. At the border, officials have used short grants of parole, up to 60 days, to alleviate overcrowding at border facilities during times of high encounters. From January 2021, when Biden took office, to June 2023, border authorities granted parole to about 718,000 individuals encountered between ports of entry.[71]

Litigation by Florida, a Republican-led state, has mostly halted these short-term parole grants, as a lower court judge found that officials had exceeded their statutory authority to release migrants rather than detain them. The Department

69 Declaration of Blas Nuñez-Neto, Assistant Homeland Security Secretary, Border and Immigration Policy, *M.A. et al v. Alejandro Mayorkas* (U.S. District Court for the District of Columbia, October 2023), 8; On average, immigration judges overturn about 25 per cent of asylum officers' negative credible-fear determinations, leading to higher fear-found rates than those initially reported. See TRAC, *Immigration Judge Decisions Overturning Asylum Officer Findings in Credible Fear Cases* (Syracuse, NY: Syracuse University, 2023).

70 See, e.g., Elliot Spagat, 'Immigrants Waiting 10 Years in US Just to Get a Court Date', Associated Press, April 26, 2023.

71 Muzaffar Chishti and Kathleen Bush-Joseph, 'In the Twilight Zone: Record Number of U.S. Immigrants Are in Limbo Statuses', Migration Information Source, August 2, 2023.

of Justice appealed the decision, but pending resolution of the case, officials are forgoing short-term parole grants. Instead, they are issuing NTAs, which take one to two hours per person to process given legal requirements for proper service, versus 15 minutes to process someone using parole.[72]

In addition to the significant rise in the use of parole, DHS has dramatically changed how the authority is operationalised. In January 2023, the department began incentivising migrants to arrive at official ports of entry by allowing them to schedule appointments at certain ports through the CBP One mobile app. Unlike people encountered crossing irregularly, those who receive CBP One appointments generally are granted one to two years of parole. The number of scheduled appointments has increased to 1,450 per day, but demand continues to outstrip supply as thousands of migrants arrive at the U.S.-Mexico border per day, limiting the incentive power of the app. Nonetheless, DHS has been able to vastly expand processing capacity and the ports of entry can now process four to five times as many people as before the pandemic.[73] About 140,000 migrants had made appointments through June 30, with the largest numbers coming from Haitians, Venezuelans, and Mexicans.[74]

Regardless of how migrants enter the United States, they still face removal proceedings and can be deported unless they have a basis to seek a more permanent lawful status, such as asylum. Migrants may choose where in the country they would like to go and notify border officials of their intended address, if any.

In April 2022, the governors of Texas and Arizona began busing recent border arrivals to immigrant-friendly jurisdictions (often labelled sanctuary cities) in the U.S. interior, citing a lack of federal coordination and the need for other states to share the costs of receiving migrants. As of October 2023, Texas had bused more than 50.000 migrants to cities run by Democratic elected officials.[75] This system

72 Justice Action Center Litigation Tracker, 'Florida v. Mayorkas (FL Detention II) – District Court', accessed November 25, 2023.

73 Comments by Blas Nuñez-Neto, Assistant Homeland Security Secretary, Border and Immigration Policy, at the Immigration Law and Policy Conference, 'State of Play: Dynamism and Disorder' panel, September 18, 2023.

74 Chishti and Bush-Joseph, 'In the Twilight Zone'.

75 Office of the Texas Governor, 'Operation Lone Star Buses Over 50,000 Migrants to Sanctuary Cities' (press release, October 6, 2023).

supplemented the pre-existing process by which nonprofit organisations would help migrants arrange travel to their U.S. destinations, with many migrants paying for their own tickets.

The Circumvention of Lawful Pathways Rule

The Biden administration ended or significantly scaled back controversial border control measures imposed during the Trump era, such as the Migrant Protection Protocols, detention of families, and border wall construction.[76] But the administration continued to use the Title 42 border expulsions authority until May 2023 to manage ongoing high border arrivals, and a new rule includes aspects of Trump policies limiting access to asylum.

The circumvention of lawful pathways regulation, which went into effect in May 2023, incentivises people to come to ports of entry after making CBP One appointments, and disincentivises crossing between ports, with the intent of creating order and predictability. The rule declares that migrants (not including unaccompanied minors) who come to a port of entry without an appointment or who cross irregularly will be presumed ineligible for asylum unless they applied for and were denied asylum in a transit country.[77] Such individuals can establish an exception to the presumption if they came to a port of entry without an appointment but can establish that it was impossible to use the CBP One app due to a language barrier, technical failure, illiteracy, or some other serious obstacle. Individuals also may be able to rebut the presumption of ineligibility for asylum by demonstrating exceptionally compelling circumstances pertaining to themselves or a traveling family member, such as a medical emergency, imminent and extreme threat to life and safety at the time of entry, or that they are a victim of a severe form of trafficking.

Migrants who cannot rebut the presumption of ineligibility may pursue a protection claim only if they can demonstrate a 'reasonable' possibility of persecution or torture—the higher screening threshold that otherwise applies

76 Other measures introduced by the Trump administration sought to deter migrants from crossing the Southwest border without authorisation through a 'zero-tolerance' approach, including by prosecuting first-time border crossers and asylum seekers for illegal entry into the United States. Children were separated from their parents when this policy was applied to families, leading to public backlash. The administration rescinded the policy and detained families together after a federal court order. See Meissner, Hipsman, and Aleinikoff, The U.S. Asylum System in Crisis, 1.

77 DHS, 'Fact Sheet: Circumvention of Lawful Pathways Final Rule' (fact sheet, May 2023).

to people who are only allowed to access withholding of removal or protection under the Convention Against Torture, which are lesser forms of relief.[78] The circumvention of lawful pathways rule applies to people who are subject to its provisions regardless of whether they are processed through the expedited removal process at the border or are released into the country.

But DHS's ability to implement the new asylum rule—much like its ability to implement the earlier asylum officer rule—is hampered by longstanding capacity constraints both at and between lawful points of entry. The ports of entry lack the physical space and personnel to process the current level of migrant arrivals. Individuals with CBP One appointments are screened only for security concerns in connection with the parole determination and quickly released into the country with two years of parole and a notice to appear in immigration court for removal proceedings. Migrants who arrive without an appointment may also be issued parole and an NTA, though if ICE or Border Patrol have capacity, individuals deemed threats to national security or public safety could be placed into expedited removal. Therefore, officials are encouraging asylum seekers to arrive at ports of entry, but minimal processing occurs there.[79]

To speed processing and increase the ability to return migrants quickly, DHS in April 2023 resumed conducting some credible-fear determinations in Border Patrol temporary facilities along the border, without first transferring the migrants to ICE detention. When the Trump administration used this faster process, just 23 per cent of migrants met the credible-fear standard.[80] Initial data show that about 59 per cent of the 58,000 migrants screened from May to September, since the new asylum rule went into effect, were deemed to have a credible fear of persecution.[81]

CBP's short-term detention capacity remains well below present needs. When migrants rushed to enter before Title 42 ended, the Border Patrol held about

78 Those who meet this higher screening threshold under the rule are permitted to also seek asylum in immigration court.

79 Muzaffar Chishti and Kathleen Bush-Joseph, 'U.S. Border Asylum Policy Enters New Territory Post-Title 42', Migration Information Source, May 25, 2023.

80 Kate Huddleston, 'Ending PACR/HARP: An Urgent Step Toward Restoring Humane Asylum Policy', Just Security, February 16, 2021.

81 Declaration of Blas Nuñez-Neto, Assistant Homeland Security Secretary, Border and Immigration Policy, *M.A. et al v. Alejandro Mayorkas*.

29,000 people at its soft-sided tent facilities, well above the capacity range of 18,000 to 20,000.[82] ICE's longer-term detention capacity was limited by pandemic-related measures to a daily average population of about 24,000. As of November 2023, the agency held thousands more, approximately 40,000 per day, including detainees from its interior enforcement operations.[83]

The number of credible-fear interviews conducted per day is also limited by the number of asylum officers available. The government planned to have 1,100 asylum officers conduct interviews after Title 42 ended.[84] Previously, the most credible-fear interviews DHS ever conducted was 103,000 in FY 2019.[85] In FY 2023, USCIS received a record 143,000 credible-fear interview referrals (see Figure 1).

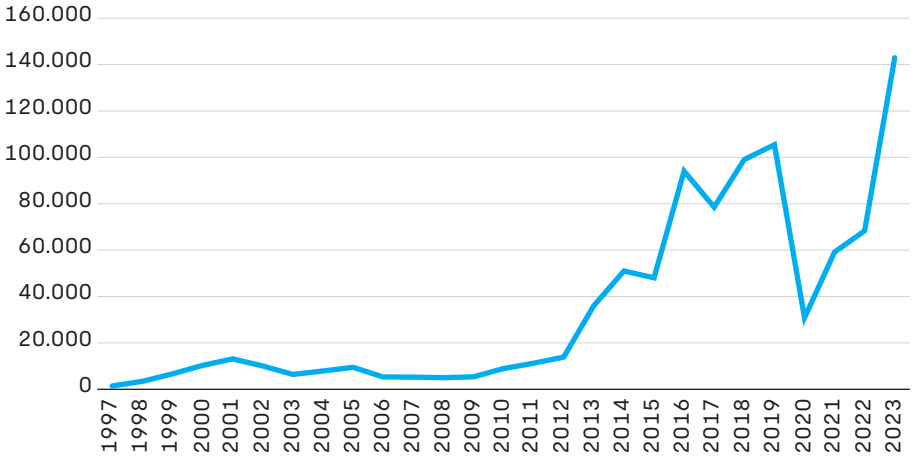
82 Chishti and Bush-Joseph, 'U.S. Border Asylum Policy Enters New Territory Post-Title 42'.

83 TRAC Immigration, 'Immigration Detention Quick Facts', accessed November 27, 2023

84 Chishti and Bush-Joseph, 'U.S. Border Asylum Policy Enters New Territory Post-Title 42'.

85 DHS, Office of Homeland Security Statistics, 'Credible Fear Cases Completed and Referrals for Credible Fear Interview', accessed November 22, 2023.

Credible-Fear Interview Referrals to USCIS from CBP and ICE, by Fiscal Year, 1997-2023



Note: Data represent individuals.

Sources: Andorra Bruno, Immigration: U.S. Asylum Policy (Washington, DC: Congressional Research Service, 2019), 37; U.S. Citizenship and Immigration Servies (USCIS), 'Semi-Monthly Credible Fear and Reasonable Receipts and Decisions', accessed November 1, 2023; USCIS, 'Asylum Quarterly Engagement Fiscal Year 2023, Quarter 4, Presentation, September 19, 2023', September 19, 2023.

Litigation has also threatened the administration's post-Title 42 border plans. The American Civil Liberties Union (ACLU) and other immigrant-rights groups challenged the circumvention of lawful pathways rule, contending that it marks a return to the Trump administration's practices, especially the restrictions on access to asylum and screenings in custody without legal counsel.[86] A federal judge found the rule unlawful, but it remains in place during appeal proceedings, which may ultimately reach the Supreme Court.[87]

86 Priscilla Alvarez, 'Federal Judge Blocks Biden's Controversial Asylum Policy in a Major Blow to Administration', CNN, July 26, 2023.

87 Chishti and Bush-Joseph, 'U.S. Border Asylum Policy Enters New Territory Post-Title 42'.

4 Access and National Asylum Procedures

The U.S. asylum adjudication system faces greater strain than at any time in its history. With each passing year, application filings break records as recent border arrivals seek asylum, in some cases to be able to obtain work permits. Adjudications cannot keep up with the rapidly increasing number of incoming cases, especially as resources are focused on border screenings to facilitate removals. In the 1990s, the immigration service tackled backlogs by scheduling cases on a 'last-in, first-out' basis and by hiring more adjudicators. Today, however, USCIS and the immigration courts have not received adequate funding, nor can they hire quickly enough to deal with vastly different populations of asylum seekers and more complex asylum law. Various projections suggest it could take a decade or more for the courts to become current on their dockets, for example.[88] These delays mean that asylum seekers in need of protection do not receive it in a timely manner and the efficacy of border management policies is undermined, since asylum seekers cannot be removed until their applications are denied, which currently takes years. Delays also incentivise the use of the asylum pathway by individuals who may not have a protection need.

The pandemic and related shutdowns of government services exacerbated these long-standing issues and backlogs ballooned as a result. But the pandemic also accelerated the adoption of technology and has led to increased efficiencies, in particular at the immigration courts. The Biden administration has introduced reforms such as the asylum officer rule, which allows for faster, nonadversarial adjudication of asylum applications, as well as various court management procedures. But progress has been stymied by a singular focus on lowering border arrival numbers and the lack of congressional action.

The U.S. Asylum System

U.S. law provides that asylum may be granted to an asylum seeker who applies in accordance with applicable requirements and is determined to be a refugee.

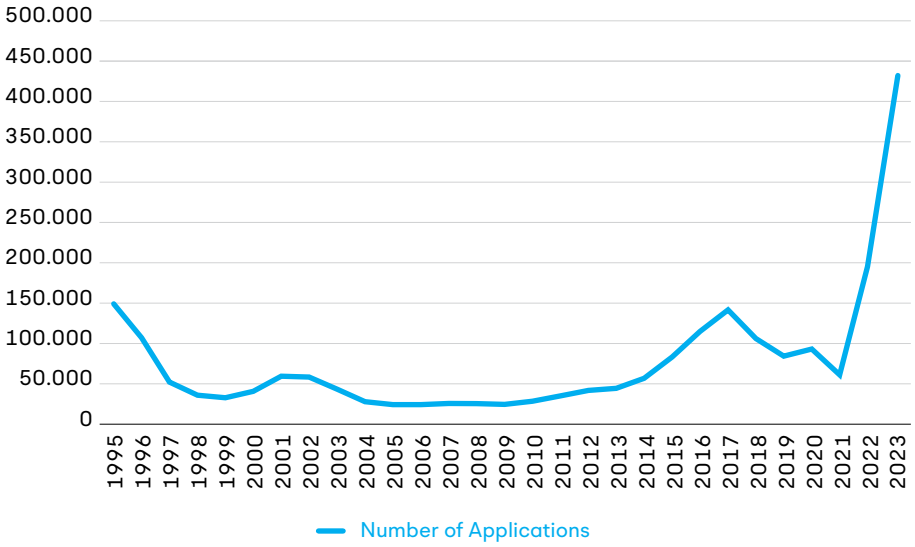
88 Holly Straut-Eppsteiner, *Immigration Judge Hiring and Projected Impact on the Immigration Courts Backlog* (Washington, DC: CRS, 2023).

The law defines a refugee as a person who is outside their country of nationality and is unable or unwilling to return to, or avail themselves of the protection of, that country because of persecution or a well-founded fear of persecution based on one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.[89] Asylum applications are decided on a case-by-case basis.

As was described in the legal framework section above, the evolution of U.S. asylum law through the issuance of regulations and court decisions has meant that cases are incredibly complex to prepare and adjudicate. Asylum applications are filed in the U.S. interior at USCIS asylum offices or EOIR, the immigration court system, depending on whether a noncitizen is in removal proceedings. There is no fee for applying for asylum and U.S. law states that cases are to be adjudicated within six months, though backlogs have prevented this from happening for years.

89 *Immigration and Nationality* Act, Section 101(a)(42).

Affirmative Asylum Cases Filed at USCIS, by Fiscal Year, 1995-2023



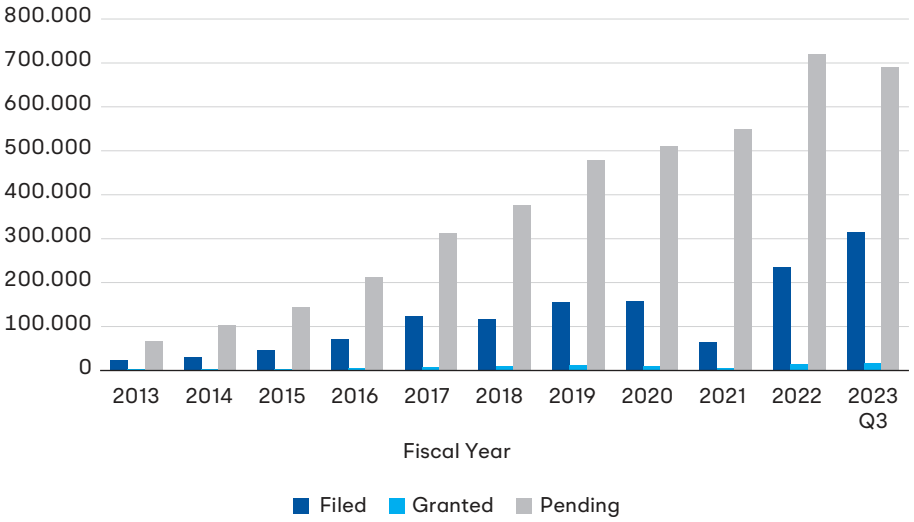
Notes: Data represent applications, which can cover multiple individuals, and are limited to new filings. Reopened applications are not included.

Sources: Bruno, Immigration: U.S. Asylum Policy, 33; USCIS, 'Affirmative Asylum Statistics FY 2019', accessed October 2, 2023; USCIS, 'Number of Service-wide Forms Fiscal Year to Date by Quarter and Form Status Fiscal Year 2020', accessed October 2, 2023; USCIS, 'Number of Service-wide Forms Fiscal Year to Date by Quarter and Form Status Fiscal Year 2021', accessed October 2, 2023; USCIS, 'Number of Service-wide Forms By Quarter, Form Status, and Processing Time July 1, 2022 – September 30, 2022', accessed November 27, 2023; USCIS, 'Asylum Quarterly Engagement Fiscal Year 2023, Quarter 4, Presentation, September 19, 2023' (September 19, 2023).

Individuals already present in the United States who are not in removal proceedings in immigration court may apply for asylum affirmatively with USCIS, provided they do so within one year of U.S. entry. These cases are adjudicated by asylum officers who either grant the application or refer certain unsuccessful applicants to the immigration courts. Individuals whose cases are referred to the immigration courts then have their asylum claims heard anew by an immigration judge as a defence against removal.

Noncitizens who have been apprehended and placed in removal proceedings, and whose cases are thus already before an immigration judge, may apply for asylum defensively, as a defence against being removed. Immigration judges hear these cases and ICE attorneys generally prosecute the government case for removal.

Defensive Asylum Applications Filed, Granted, and Pending at U.S. Immigration Courts, FY 2013-23



Notes: Data for fiscal year (FY) 2023 are through the third quarter. These data represent defensive asylum applications filed in removal, exclusion, and asylum-only proceedings and are for U.S. federal government fiscal years, which run from October 1 to September 30.

Sources: EOIR, 'Executive Office for Immigration Review Adjudication Statistics: Defensive Asylum Applications', accessed September 29, 2023.

Noncitizens who express a fear of return to their home country at or near the U.S. border may be placed in expedited removal and receive a credible-fear screening by USCIS asylum officers. The screening determines whether a migrant has a 'significant' possibility of establishing eligibility for asylum, withholding of removal, or protection in the United States under the Convention Against Torture. Those who pass this credible-fear screening generally are placed in immigration removal proceedings and may apply for asylum defensively in court.

As described above, under the asylum officer rule that is being applied to a limited number of cases, certain applicants who are found to have demonstrated a credible fear of persecution are referred for a nonadversarial asylum merits interview with a USCIS asylum officer and may be granted asylum without ever being placed in removal proceedings. Also as described above, under the circumvention of lawful pathways rule, noncitizens who arrive without authorisation are generally deemed ineligible for asylum. They are screened for fear of persecution under a higher standard than normal (reasonable fear) and may only be eligible for withholding of removal or protection under the Convention Against Torture.

Children under age 18 traveling without a parent or guardian are not subject to expedited removal and are instead processed in accordance with a special protective procedure established by the *William Wilberforce Trafficking Victims Protection Reauthorization Act* of 2008. Unaccompanied minors from countries other than Mexico or Canada are placed into immigration court proceedings, but may still apply for asylum affirmatively at USCIS, which retains jurisdiction of their applications while they are deemed unaccompanied. Unaccompanied children from Mexico and Canada who are determined not to have been a victim of trafficking or have a fear of persecution in their home country, and have the capacity to make an independent decision to withdraw their application for U.S. admission may be quickly returned.

Asylum applicants who are not otherwise eligible to work in the United States can be granted a work permit 180 days after filing their asylum application and are generally ineligible to receive federal public benefits. A migrant who has been granted asylum (an 'asylee') may work indefinitely and receive approval to travel abroad. An asylum grant does not expire, but it may be terminated under certain circumstances, such as if the asylee is determined to no longer meet the legal definition of a refugee. After one year as an asylee, an individual can apply to become a U.S. lawful permanent resident (refugees are required to apply for such status within a year of U.S. entry). Asylees and admitted refugees may petition for their spouse and/or unmarried children who are under age 21 to join them in the United States. Recipients of withholding and CAT protection may not petition for their family members.

Affirmative Asylum Application Process

At USCIS, migrants apply for asylum by filing a form online or by mail with supporting evidence, which may include written affidavits, country conditions

evidence, and police or medical records from the country of origin. Applications can include spouses and minor children as derivative applicants.[90] Asylum applicants must be interviewed by asylum officers in a 'nonadversarial manner'.[91] During the pandemic, USCIS provided interpretation by phone, but as of September 2023, applicants must again provide their own in-person interpreter. USCIS policy is to schedule interviews on a 'last-in, first-out' basis, to try to reduce the incentive to file an asylum application just to receive work authorisation while the case is pending. Due to resource constraints discussed below, this scheduling policy has been ineffective recently, though it helped with backlog reduction in the 1990s.

Supervisors review asylum officers' decisions on asylum applications and may refer them for additional review.[92] If asylum is granted, USCIS issues the individual a letter and form documenting the grant. If the asylum officer determines that an applicant is not eligible for asylum or is not granted asylum based on discretion and the individual appears to be removable, USCIS refers the case to the immigration courts where the asylum application is assessed again during removal proceedings.[93] Asylum officers approved about 28 per cent of asylum cases in FY 2020, though it is important to note that the immigration courts grant a high percentage of cases that USCIS does not approve.[94] In FY 2021, immigration judges granted two-thirds of cases that USCIS had referred.[95]

There are 11 asylum offices around the country and as of September 2023, USCIS had 760 asylum officers, with authorisation to reach a total of 1,028.[96] In FY 2023, more than 431,000 affirmative asylum applications were filed at USCIS.[97]

90 Dependants can also file their own applications as principals (as some may have independent bases for their claims to asylum).

91 Applicants may opt to waive their interview. This option has been offered to and exercised by applicants seeking a status called cancellation of removal, which requires being placed in removal proceedings. See Meissner, Hipsman, and Aleinikoff, The U.S. Asylum System in Crisis.

92 Bruno, Immigration: U.S. Asylum Policy, 4.

93 Bruno, Immigration: U.S. Asylum Policy, 4.

94 Human Rights First, 'USCIS Records Reveal Systemic Disparities in Asylum Decisions' (fact sheet, May 2022).

95 Human Rights First, 'USCIS Records Reveal Systemic Disparities in Asylum Decisions'.

96 USCIS, 'Asylum Quarterly Engagement Fiscal Year 2023, Quarter 4, Talking Points from September 19, 2023' (September 19, 2023).

97 USCIS, 'Asylum Quarterly Engagement Fiscal Year 2023, Quarter 4, Presentation, September 19, 2023', September 19, 2023.

Given the fact that asylum officers adjudicated about 50,000 cases that year, the backlogs are only going to continue growing. As of September 19, 2023, there were more than 1 million pending affirmative asylum cases, a record.[98]

Asylum officers must also handle asylum merits interviews for cases processed pursuant to the 2022 asylum officer rule, although few cases are being processed in that manner.[99] Asylum officers must also handle credible-fear screenings at the border, which are conducted remotely with officers calling into CBP and ICE facilities. Credible fear-receipts have reached unprecedented highs, with USCIS receiving 143,000 referrals in FY 2023.[100]

Indeed, the Biden administration's focus on the border has meant that asylum officers have been redirected to conducting credible-fear interviews for recent arrivals, instead of asylum interviews for those with long-pending applications. Asylum interviews were cancelled in May 2023 as the government prepared for an influx of migrant arrivals with the end of the Title 42 expulsions policy. Given the competing demands for asylum officer time and resources, applicants can wait years for an asylum interview. Congress mandated deadlines for the adjudication of Afghan asylum cases after the emergency evacuation from Kabul in fall 2021, but USCIS has not met those deadlines and immigrant-rights advocates brought a lawsuit to try to speed adjudications.[101]

Funding for asylum processes has been insufficient in recent years. USCIS is largely a fee-funded agency (unlike most agencies in the federal government), with fees from nonhumanitarian applications supporting the work of the humanitarian section, including for asylum adjudications. In the early 1990s, when the U.S. government decided to not require a fee for asylum applications, humanitarian case work represented a much smaller percentage of the caseload. Today, that portfolio has ballooned, and the humanitarian parole programmes are also free for applicants. In FY 2022, Congress appropriated $250 million

98 Comments made by a government official during USCIS Asylum Quarterly Engagement, Fiscal Year (FY) 2023 Quarter 4 conference call with nongovernmental representatives, September 19, 2023.

99 As of June 2023, about 6,000 cases had been screened under the asylum officer rule. See DHS, 'Asylum Processing Rule Cohort Reports', accessed October 27, 2023.

100 USCIS, 'Asylum Quarterly Engagement Fiscal Year 2023, Quarter 4, Presentation, September 19, 2023', September 19, 2023.

101 National Immigrant Justice Center, 'Ahmed Et Al. V. DHS Et Al', September 11, 2023.

to tackle the asylum backlog, but the mismatch between incoming cases and funding means that the pending caseload has continued to grow. In 2023, USCIS proposed funding asylum adjudications by levying a $600 surcharge on the more than 700,000 employment-based visa petitioners and beneficiaries who apply each year.[102] That proposal is part of a fee rule expected to be finalised within the next year.

Defensive Asylum Application Process and Appeals

An asylum seeker applies in the immigration courts by filing an application form online or on paper. Asylum is a defence to removal, and proceedings in the courts are adversarial, with an ICE attorney generally prosecuting the case for removal. The migrant or their representative may present evidence and call witnesses. If the asylum application was referred from USCIS, the applicant may supplement the evidence filed. The immigration courts provide interpreters for court proceedings. An immigration judge decides whether to grant asylum or other form of relief, or orders the noncitizen removed.

During the proceedings, an ICE attorney can agree to exercise prosecutorial discretion and stipulate to a grant of asylum or other relief, or to particular aspects of the case. Prosecutorial discretion is used for reasons including the efficient allocation of limited resources and the sitting administration's priorities for removal. Similarly, immigration judges can decide to administratively close or terminate a case if they determine that a case is not ripe for adjudication—for example, because an unaccompanied child has a pending asylum application at USCIS that must be decided before a judge can order the child removed, or because ICE has agreed to exercise prosecutorial discretion in the case.

The exercise of prosecutorial discretion, termination of cases, and appeal rates mean that it is difficult to determine grant rates for relief from removal, especially since an individual's asylum application may not be adjudicated or even filed with the immigration courts before a case is closed. As of the third quarter of FY 2023, the immigration courts had granted 24,000 asylum applications, a rate of 15 per cent; an additional 110,000 cases were not adjudicated or were administratively closed, among other options.[103]

102 American Immigration Council (AIC), *Beyond a Border Solution: How to Build a Humanitarian System that Won't Break* (Washington, DC: AIC, May 2023), 22.

103 EOIR, 'Asylum Decision Rates' (fact sheet, July 2023).

Within 30 days of an immigration judge's decision, the individual or ICE may appeal to the Board of Immigration Appeals, which is also housed within the Justice Department. The board generally does not require parties to appear, instead conducting paper reviews of cases. If the board affirms a removal order, the individual has 30 days to file a petition for review at a federal court of appeal, though there is no automatic stay of removal during the pendency of such an appeal absent a court-issued stay.[104] Finally, a case may be appealed to the Supreme Court, which has discretion to decide whether to hear such a request.

There are about 70 immigration courts nationwide and 660 immigration judges.[105] The Board of Immigration Appeals has 23 judges.[106] The immigration courts had 2.16 million removal cases pending as of July 2023, of which 851,000 were asylum cases, a number that is expected to rise as recent border arrivals file asylum applications.[107] As of July 2023, the Board of Immigration Appeals had 107,000 pending cases.[108] In FY 2020, more than one in five immigration court decisions were appealed to the Board of Immigration Appeals.[109] The enormous number of cases pending means that asylum seekers wait an average of four years for their asylum merits hearing to be scheduled, and it can take years after that to reach a final decision given possible appeals.

104 Holly Straut-Eppsteiner, *U.S. Immigration Courts and the Pending Cases Backlog* (Washington, DC: CRS, 2022), 11.

105 EOIR, 'Immigration Court List – Administrative Control', updated October 30, 2023; EOIR, 'Immigration Judge (IJ) Hiring', July 2023.

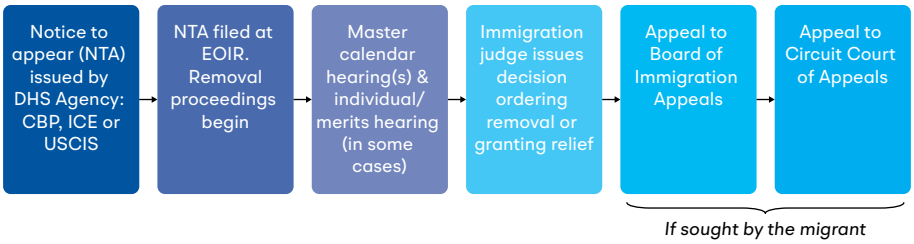
106 EOIR, 'Board of Immigration Appeals', updated September 7, 2023.

107 EOIR, 'Executive Office for Immigration Review Adjudication Statistics: Pending Cases, New Cases, and Total Completions' (fact sheet, July 2023); EOIR, 'Total Asylum Applications' (fact sheet, July 2023).

108 EOIR, 'Case Appeals Filed, Completed and Pending' (fact sheet, July 2023).

109 Muzaffar Chishti et al., *At the Breaking* Point: Rethinking the U.S. Immigration Court System (Washington, DC: MPI, 2023).

Removal Proceeding Process for Asylum Cases in Immigration Court and Appeals



Source: Adapted from Muzaffar Chishti et al., *At the Breaking Point: Rethinking the U.S. Immigration Court System* (Washington, DC: MPI, 2023), based on Hillel R. Smith, "Formal Removal Proceedings: An Introduction" (In Focus Brief, Congressional Research Service, Washington, DC, June 2021).

During the pandemic, the immigration courts rapidly expanded the use of video teleconference and internet-based hearings so that proceedings could continue remotely, with parties being able to appear from different locations. Officials have indicated that this has made the courts more efficient, though due process concerns remain, particularly for vulnerable groups such as children.[110] In FY 2022, 324,000 hearings were conducted by video teleconference and 339,000 via internet platform, up from 252,000 video teleconference and 75 internet-based hearings in 2019.[111] In combination with docket management strategies, these measures allowed judges to complete an estimated half a million cases in FY 2023— more cases than ever before.

EOIR's budget has grown to $860 million, up from $188 million in 2003. This funding has not kept pace with the influx of new cases being filed by DHS' enforcement components, which have received vast infusions of new resources over the past two decades.[112]

110 American Immigration Lawyers Association, 'Use of Video Teleconferences During Immigration Hearings', May 5, 2022.

111 EOIR, 'Hearings Adjournments by Medium and Fiscal Year' (fact sheet, July 2023).

112 DOJ, 'Summary of Budget Authority by Appropriation, 2003-2005', data tables, March 2004; EOIR, 'FY 2024 Budget Request at a Glance' (fact sheet, March 2023).

Standards for Granting Asylum and Limitations on Access

Limitations on Applying for Asylum

U.S. laws provide limitations on the ability to apply for asylum and the ability to be granted asylum. Bars to applying for asylum include: not meeting the deadline to apply within one year of U.S. entry, previous denial of asylum in the United States, and when an individual may be removed pursuant to a safe third country agreement to a country where they would have 'access to a full and fair procedure' for seeking asylum.[113] The United States and Canada maintain a safe third country agreement that was recently upheld by the Supreme Court of Canada.[114]

Limitations on Grants of Asylum

A migrant who may otherwise be eligible for asylum could still be barred if: they persecuted others, have been convicted of a particularly serious crime, there are 'serious' reasons to believe that the individual committed a serious nonpolitical crime outside the United States, there are 'reasonable grounds for regarding the alien as a danger to the security of the United States', an applicant is subject to certain terrorism-related grounds of removability, or the individual was firmly resettled in another country prior to U.S. arrival.[115] If the U.S. government presents evidence that a bar applies, the applicant must prove that it is more likely than not that the bar does not apply.[116]

U.S. law provides that the government may impose additional limitations and conditions under which an asylum seeker shall be ineligible for asylum, and both the Trump and Biden administrations cited this provision when promulgating regulations limiting access to asylum. Federal court orders blocked the Trump rules; court challenges to the Biden administration's circumvention of lawful pathways rule, among others, are ongoing.[117]

113 Hillel R. Smith, An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part One) (Washington, DC: CRS, 2022), 3.

114 Honourable Sean Fraser, Minister of Immigration, Refugees, and Citizenship, 'Statement from Minister Fraser Concerning the Supreme Court's Decision on the Safe Third Country Agreement' (news release, Government of Canada, June 16, 2023).

115 Hillel R. Smith, An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part Two) (Washington, DC: CRS, 2022), 1-5.

116 Smith, An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part Two), 1.

117 Bolter, Israel, and Pierce, *Four Years* of Profound Change.

Withholding of Removal and Protection Under the Convention Against Torture

Individuals barred from applying for or being granted asylum may seek protection in the form of withholding of removal, or under the Convention Against Torture. When filing for asylum, an applicant checks a box on the application form indicating that they also seek to be considered for subsidiary forms of protection: withholding of removal and Convention Against Torture protection. These statuses can be granted if the individual is found ineligible for or is deemed undeserving of a discretionary grant of asylum; USCIS has no authority to adjudicate such claims. Immigration judges decide whether to grant withholding or Convention Against Torture protection during removal proceedings, either after an applicant has been referred from USCIS following an affirmative asylum interview or asylum merits interview conducted pursuant to the asylum officer rule, or if the noncitizen applied defensively in the immigration courts.

Withholding requires showing that it is 'more likely than not' that the applicant will be persecuted because of one of the five protected grounds, which is a higher burden of proof than the well-founded fear standard for asylum. There are also statutory bars to the grant of withholding, and some overlap with the asylum bars, including a conviction for a particularly serious crime.

An individual ineligible for asylum may also seek protection under the Convention Against Torture—deferral of removal. The applicant must show that it is 'more likely than not' that they will be tortured by a public official or other person acting with the consent or acquiescence of an official. The applicant need not show that the torture would be based on one of the five protected grounds for asylum or withholding.

Withholding and Convention Against Torture protection are mandatory forms of relief and may not be denied as a matter of discretion, unlike asylum (as was mentioned above, U.S. law varies from international law in that officials may deny asylum even for those who are found eligible). But these protections do not provide a path to lawful permanent residence, and only prevent return to the country where the noncitizen fears persecution or torture. U.S. officials could remove a grantee to a third country.[118] In FY 2023, the immigration courts granted withholding to about 1,100 individuals and Convention Against Torture

118 Smith, An Overview of the Statutory Bars to Asylum: Limitations on Granting Asylum (Part One), 2.

protection to about 200 noncitizens, though as with asylum cases, the exercise of prosecutorial discretion and administrative closure or termination of cases may mean that other eligible individuals' claims were not adjudicated.[119] Individuals who are granted withholding or protection under the Convention Against Torture are authorised by regulation to request work permits.

Other Protections for Unauthorised Migrants Already in the United States

In addition to asylum, withholding, and Convention Against Torture protection, U.S. immigration laws provide the executive branch the authority to grant temporary forms of protection for certain noncitizens already in the United States without authorisation, as well as temporary lawful entrance into the country (see Extraterritorial Access to Asylum section below). The Biden administration's embrace of these protections has resulted in a growing number of individuals who hold such temporary statuses; as of November 2023, there were about 2 million such migrants, including many who were already living in the United States without authorisation.[120] These liminal (or "twilight") immigration statuses do not confer a path to legal permanent residence, but temporarily shield recipients from deportation for at least one year, and in many cases, offer permission to work legally.

Temporary Protected Status and Deferred Enforced Departure

U.S. immigration laws grant the Homeland Security Secretary the authority to designate certain countries—or parts of countries—for Temporary Protected Status (TPS). Noncitizens who are nationals of a designated country—or stateless individuals who last habitually resided in a designated country—may be granted TPS depending upon when they arrived in the United States. TPS provides relief from deportation for up to 18 months at a time and eligibility to apply for work authorisation. TPS can be offered to nationals of countries facing conditions that prevent their safe return, including natural disaster or war.

The TPS authority was first enacted in 1990 and every administration—Democratic and Republican alike—has granted and/or extended TPS designations. In total, 28 countries have at some point been designated for TPS.

119 EOIR, 'FY 2023 Third Quarter Decision Outcomes' (fact sheet, July 2023).

120 It is likely that some of these individuals have switched between temporary statuses or been able to obtain a more permanent status, such as asylum. Updated from author's calculations in Chishti and Bush-Joseph, 'In the Twilight Zone'.

Hundreds of thousands of individuals from countries such as El Salvador, Somalia, and Nicaragua have had TPS for more than 20 years and a small number of Somali individuals have had TPS for more than 30 years.[121] Approximately 611,000 immigrants held TPS as of March 2023, but hundreds of thousands more were eligible to apply as a result of recent redesignations for Afghanistan, Cameroon, South Sudan, Sudan, Ukraine and Venezuela, which allow individuals who arrived after the cutoff date for the previous designation to apply.[122]

Under the Biden administration, new TPS designations have been issued for six countries (Afghanistan, Cameroon, Ethiopia, Myanmar [also known as Burma], Ukraine, and Venezuela), and extended for ten others (El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, and Yemen). The government has also granted or extended a similar protection, Deferred Enforced Departure (DED), for certain people from Hong Kong and Liberia, with an estimated 3,900 and 2,800 covered respectively. USCIS and the immigration courts can adjudicate TPS applications. Processing delays have significantly affected the issuance of TPS and associated work authorisation, with wait times stretching to 20 months for USCIS to process an application for a Venezuelan national, a longer period than the status itself.[123]

Deferred Action

Deferred action is another form of protection used to defer the removal of certain unauthorised migrants already in the United States. It is based on the executive branch's prosecutorial discretion authority and is granted by DHS. Among the most well-known deferred action initiatives is the Deferred Action for Childhood Arrivals (DACA) programme, which was established in 2012. DACA was created to protect from deportation certain young adults who were brought to the United States as children and to provide them with work authorisation for temporary, renewable periods. DACA has been the subject of litigation that has resulted in court orders keeping the programme alive amid efforts by the Trump administration and Republican led states to terminate it but blocking new applications. Approximately 800,000 people have benefitted from the programme over its lifetime, and 579,000 were registered as of March 2023.[124]

121 Jill H. Wilson, *Temporary Protected Status and Deferred Enforced Departure* (Washington, DC: CRS, 2023).

122 Chishti and Bush-Joseph, 'In the Twilight Zone'.

123 Chishti and Bush-Joseph, 'In the Twilight Zone'.

124 USCIS, 'Count of Active DACA Recipients', various dates.

The government has granted deferred action to tens of thousands of other unauthorised immigrants, also protecting them from removal and allowing them to apply for work permits. As of August 2023, nearly 78,000 witnesses or victims of crimes with a U visa application that the government has deemed bona fide had received deferred action for four years, along with about 80,000 abused, abandoned, or neglected youth granted Special Immigrant Juvenile status (SIJS).[125] These programmes address the waits migrants face due to annual numerical caps set by Congress—resulting visa backlogs can prevent migrants from obtaining lawful permanent residence for years.[126]

Legal Representation

The lack of legal representation is a critical issue plaguing the U.S. asylum system and other forms of protection. Immigration proceedings are civil in nature and most noncitizens in are not entitled to government-provided legal counsel, as defendants in criminal proceedings are. Nonetheless, migrants can face life-threatening circumstances upon being ordered removed. Repeatedly, studies have found that representation in immigration proceedings improves due process and fair outcomes.[127] Representation also increases efficiency as migrants with counsel move more quickly through immigration court. Lawyers, accredited representatives, immigration help desks, and legal orientation programmes aid some noncitizens. However, many migrants are unable to obtain or afford counsel. The lack of access to counsel and case management assistance means that many eligible migrants do not apply for the various forms of protection and/or work permits.[128]

Legislation effectively barred federal funding for representation of individuals in removal proceedings, though at state and local levels, public funding has increased the availability of representation for some. Nonprofit legal services organisations and pro bono law firm resources provide representation to some

125 Chishti and Bush-Joseph, 'In the Twilight Zone'.

126 Chishti and Bush-Joseph, 'In the Twilight Zone'.

127 Studies from 2015 and 2018 found that legal representation led to more efficiency in immigration proceedings. Migrants with representation sought fewer unmeritorious claims, had a greater chance of being released from detention, and were more likely to appear at hearings following release. See Ingrid V. Eagly and Steven Shafer, 'A National Study of Access to Counsel in Immigration Court', *University of Pennsylvania Law Review* 164, no. 1 (2015): 59–75; Emily Ryo, 'Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings', *Law and Society Review* 52, no. 2 (2018): 503–31.

128 Chishti et al., Rethinking the U.S. Immigration Court System, 2-3.

migrants. Yet given the scale of the need, representation remains fragmented and insufficient.[129]

Significant disparities between outcomes for represented and unrepresented respondents demonstrate the need for increased access to legal representation. Of noncitizens who were granted relief in immigration court cases started between FY 2011 and FY 2019, 92.8 per cent were represented, and 7.1 per cent were not. Of those who were ordered removed during the same timeframe, 18.8 per cent were represented and 81.1 per cent were not.[130] Since FY 2018, the proportion of respondents who were represented at some point in the immigration court process has generally decreased.[131] As of July 2023, 43 per cent of respondents in pending removal proceedings were represented.[132] Data on the rate of representation at USCIS are not available.

Increasingly, experts recognise the ability of non-lawyer legal service providers to increase access to justice, and the Biden administration has taken measures to increase the number of accredited representatives available to assist individuals in proceedings. Accredited representatives are non-lawyers authorised by EOIR's Office of Legal Access Programs to represent noncitizens who are unable to afford a lawyer in deportation proceedings and other immigration matters. However, more efforts will be needed to expand access to legal representation, including through the expanded use of technology and public-private partnerships.

129 Chishti et al., Rethinking the U.S. Immigration Court System, 3.

130 TRAC Immigration, 'Details on Deportation Proceedings in Immigration Court', accessed June 14, 2023.

131 EOIR, 'Current Representation Rates' (fact sheet, July 2023).

132 EOIR, 'Current Representation Rates'.

5 Extraterritorial Access to Asylum

Extraterritorial access to protection in the United States has historically come primarily through humanitarian parole and the refugee resettlement programme. Under the Biden administration, DHS and the State Department have launched innovative programmes to increase access to protection closer to home, targeting groups from Latin America and the Caribbean that are likely to attempt the often-dangerous journey to the United States. For the first time, migration to the United States is truly hemispheric in nature and the U.S. government is reinforcing commitments made in support of the Los Angeles Declaration on Migration and Protection with other governments in the region. To this end, the United States has expanded labour migration options for Central Americans in the few ways possible without congressional action, with seasonal agricultural and nonagricultural employment visas increasing from 275,000 in 2020 to more than 422,000 in 2022.[133]

The largest expansion of options for entry has come through various sponsorship-based parole initiatives. These programmes allow U.S citizens and lawful permanent residents to request entry for certain migrants, provided they sponsor them financially; these have resulted in the arrival of hundreds of thousands of individuals. Newly established Safe Mobility Offices in Colombia, Costa Rica, Ecuador, and Guatemala, with future ones planned in other parts of Latin America, are also part of the strategy to reach migrants in their countries of origin to screen them for protection, employment, and other pathways in the United States, Canada, and Spain, though the initiative remains in the early stages.[134]

Refugee Resettlement Programme and Humanitarian Parole Authority

The United States does not conduct pre-screening for asylum outside the country, but the *Immigration and Nationality Act* allows the government to

133 Andrew Selee, 'The Border Crisis That Wasn't: Washington Has Found a Formula for Managing Migration—and Now Must Build on It', Foreign Affairs, August 9, 2023.

134 DHS, 'U.S. Government Announces Sweeping New Actions to Manage Regional Migration' (fact sheet, April 2023).

grant parole to migrants facing urgent humanitarian concerns or for significant U.S. public benefit. Parole provides lawful entrance to the United States and eligibility to request work authorisation. Before the establishment of a formal refugee resettlement system in the 1980s, the government granted parole to large numbers of people fleeing conflict or persecution, including to 30,000 Hungarians in the 1950s, 15,000 Chinese in the 1960s, and more than 120,000 Vietnamese in the 1970s.[135]

Congress passed the *Refugee Act* in 1980 partly in response to those situations, recognising the growing need for a more routinised process to provide protection to refugees and other displaced people, particularly those fleeing communism. Since 1980, the United States has admitted more than 3 million refugees.[136] Under U.S. law, the president sets an annual cap on the number of refugees who may be admitted following a required consultation with Congress. The Biden administration set a cap of 125,000 refugees for FY 2023, but admitted just 60,000, partly due to Trump-era actions that dramatically reduced resettlement capacity.[137] Under the Trump administration, just 11,411 refugees were admitted in FY 2021—the lowest level in the resettlement programme's four decades.[138]

The Western Hemisphere has not historically been a priority region for refugee processing and the Biden administration announced plans in 2023 to double the number of refugees admitted from the region, up to 40,000, in conjunction with its other efforts to manage migration in the region, including the Safe Mobility Offices.[139] The FY 2024 refugee resettlement allocation included a further increase to 50,000 slots for refugees from the hemisphere.[140]

135 Chishti and Bush-Joseph, 'In the Twilight Zone'.

136 State Department, 'The Presidential Determination on Refugee Admissions for Fiscal Year 2024' (press release, September 29, 2023).

137 Comments made by government official during USCIS and State Department Quarterly Refugee Processing Engagement conference call with nongovernmental representatives, September 20, 2023.

138 Camilo Montoya-Galvez, 'U.S. Aims to Resettle up to 50,000 Refugees from Latin America in 2024 under Biden Plan', CBS News, September 20, 2021.

139 Montoya-Galvez, 'U.S. Aims to Resettle up to 50,000 Refugees from Latin America in 2024 under Biden Plan'.

140 Montoya-Galvez, 'U.S. Aims to Resettle up to 50,000 Refugees from Latin America in 2024 under Biden Plan'.

The administration has undertaken efforts to rebuild and modernise the refugee resettlement system that have resulted in higher admissions and much faster processing than before. USCIS and the State Department's Bureau of Population, Refugees, and Migration (PRM) work together to adjudicate refugee applications, which are now processed online. PRM typically arranges for U.S. embassy contractors and nonprofit or international organisations such as the United Nations High Commissioner for Refugees (UNHCR) to refer applicants and manage resettlement support centres that assist in refugee processing.[141] An important difference between asylum and refugee processing is that refugee applicants do not face the same evidentiary requirements. Asylum seekers are expected to produce 'corroborating evidence', while the refugee process relies on the screening and referrals done by support centres to identify potential applicants, which takes place before interviews with USCIS refugee officers.[142]

Another important advance in U.S. refugee admissions has been the introduction and expansion of concurrent processing, which is now taking place at sites in 14 countries. With concurrent processing, steps such as application review and medical evaluations, which would normally be done consecutively, are done at the same time. This has sped up processing times to as short as three months in some cases, down from a year or more.

In 2023, the Biden administration launched the Welcome Corps initiative, which is modelled after Canadian refugee sponsorship programmes and allows groups to sponsor refugees if they raise $2,425 per refugee, pass background checks, and submit an assistance plan.[143] The sponsors agree to take on the role of traditional resettlement agencies for at least 90 days after a refugee arrives and help with accessing housing, food, medical services, education, and public benefits. The initiative is beginning with refugees already in the pipeline, but there are plans to allow sponsors to identify individuals. The State Department

141 Name redacted, *Refugee Admissions and Resettlement Policy* (Washington, DC: CRS, 2018).

142 The *REAL ID Act* of 2005 established a requirement for corroborating evidence that applies to asylum seekers' interviews at USCIS asylum offices and in immigration court. Regardless of whether an asylum seeker testifies credibly, 'an adjudicator may deny the application simply because the applicant did not supply sufficient corroboration'. See Philip G. Schrag, Jaya Ramji-Nogales, and Andrew I. Schoenholtz, 'The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem', forthcoming, Howard Law Journal 66, no. 3, (2023), Temple University Legal Studies Research Paper No. 2022-25, 43-44.

143 State Department, 'Fact Sheet—Launch of Welcome Corps-Private Sponsorship of Refugees' (fact sheet, January 2023).

aimed to recruit 10,000 private sponsors to resettle 5,000 refugees in the first year of the programme.[144]

USCIS hired and trained many new refugee officers in FY 2023 and there were 370 refugee officers as of September 2023.[145] Despite these improvements, a backlog remains. Some 50,000 refugee applications filed before 2018 were pending as of September 2023.[146] While complementary pathways for admission have been considered alongside resettlement, labour and education visas available in the United States are not suited for many refugees due to barriers such as the requirement for applicants to prove they intend to return to their home country and limited access to permanent residency.[147] Instead, the government has allowed for the admission of refugees who qualify for education and work opportunities under the Welcome Corps programme, in the resettlement stream.

Although the refugee resettlement system has improved since reaching a resettlement low in FY 2021, the Biden administration has turned to humanitarian parole to much more quickly process the entry of people who might otherwise be admitted as refugees and/or face an urgent need for protection, such as some Afghans and Ukrainians fleeing war.[148] Additionally, DHS has used parole to reduce the number of unauthorised crossings and increase order, with it serving as an alternative for some migrants. As such, the government's use of parole under the Biden administration has vastly outstripped past practice.[149]

Parole Programmes for Certain Nationalities

New nationality-based parole programmes have resulted in hundreds of thousands of migrants entering the United States legally via flights. These processes began in October 2022 for Venezuelans and in January 2023

144 Camilo Montoya-Galvez, 'U.S. Launches Pilot Program to Allow Private Sponsorship of Refugees from around the World', CBS News, January 19, 2023.

145 Comments made by government official during USCIS and State Department Quarterly Refugee Processing Engagement, September 20, 2023.

146 Comments made by government official during USCIS and State Department Quarterly Refugee Processing Engagement, September 20, 2023.

147 Susan Fratzke et al., *Refugee Resettlement and Complementary Pathways: Opportunities for Growth* (Geneva and Brussels: UNHCR and Migration Policy Institute Europe, 2021).

148 Chishti and Bush-Joseph, 'In the Twilight Zone'.

149 Chishti and Bush-Joseph, 'In the Twilight Zone'.

for Cubans, Haitians, and Nicaraguans.[150] All four of these countries are experiencing severe political or economic turmoil and the U.S. government has been sharply constrained in its ability to remove nationals to these countries. In April 2023, a limited number of removals to Cuba resumed for the first time since 2020, and in October 2023 a limited number of removals to Venezuela also resumed. Removals to Haiti have taken place haltingly, given conditions on the ground in that country, but remain relatively low.

Under these parole processes for the four nationalities (known as the CHNV programme), more than 168,000 people had been vetted and approved for travel to the United States as of mid-July.[151] Migrants who cross the U.S.-Mexico border without authorisation are generally barred from the programme, which allows the entry of up to 30,000 of the four nationalities collectively each month. An equivalent number found to have crossed the border without authorisation may be expelled to Mexico, which has initially resulted in decreases of encounters with the programme nationalities at the U.S.-Mexico border, except for Venezuelans who reportedly lack the required sponsors and valid passports.

After the withdrawal of the U.S. military from Afghanistan and fall of Kabul to the Taliban, Operation Allies Welcome evacuated and paroled in 76,200 Afghans from August 2021 to September 2022.[152] The U.S. government also paroled in more than 141,000 Ukrainians from April 2022 to July 2023 through Uniting for Ukraine, which was set up to receive individuals who fled Russia's invasion in February 2022.[153]

Migrants arriving through these programmes typically receive two years of parole and can apply for work permits, but they must seek another avenue to become lawful permanent residents. DHS has discretion to extend parole repeatedly, and USCIS has allowed Afghans and Ukrainians to temporarily extend their parole, but extensions have not been announced for other nationalities.[154]

150 DHS, 'Data From First Six Months of Parole Processes for Cubans, Haitians, Nicaraguans, and Venezuelans Shows That Lawful Pathways Work' (fact sheet, DHS, July 25, 2023).
151 Camilo Montoya-Galvez, 'U.S. Has Welcomed More than 500,000 Migrants as Part of Historic Expansion of Legal Immigration Under Biden', CBS News, July 18, 2023.
152 Montoya-Galvez, 'U.S. Has Welcomed More than 500,000 Migrants'.
153 Montoya-Galvez, 'U.S. Has Welcomed More than 500,000 Migrants'.
154 Chishti and Bush-Joseph, 'In the Twilight Zone'.

While the above parole programmes do not provide a direct path to lawful permanent residence, the administration has restarted family reunification programmes for certain migrants from Cuba and Haiti who are the beneficiaries of approved family-based immigrant visa petitions but who would otherwise be forced to wait abroad for a visa to become immediately available. The Biden administration has also recently created new family reunification programmes modelled on these earlier ones for certain nationals from Colombia, Ecuador, El Salvador, Guatemala, and Honduras. The programmes will allow more than 70,000 people to be considered for parole, letting them enter and remain in the United States while their application is processed.[155] The family reunification programmes grant three years of parole while applicants await processing of their application for lawful permanent residence.[156] In October 2023, the administration announced the Ecuador programme shortly before the country agreed to open Safe Mobility Offices, suggesting a *quid pro quo* arrangement.[157]

Safe Mobility Offices

As part of its effort to screen migrants for protection closer to home, the administration announced its intention to open Safe Mobility Offices[158] (SMOs) in countries throughout Latin America to vet possible candidates for refugee resettlement as well as other existing lawful pathways, such as parole programmes and employment or family-based visas. Presently, offices with a limited set of services are open in Colombia, Costa Rica, Ecuador, and Guatemala. The offices are run by the International Organization for Migration (IOM) and UNHCR, with State Department and USCIS personnel assisting. The administration plans to open more offices in the hemisphere, and the Canadian

155 DHS, 'DHS Announces Family Reunification Parole Processes for Colombia, El Salvador, Guatemala, and Honduras' (press release, July 7, 2023).

156 Several other smaller programmes have also provided parole for certain groups, including the Central American Minors programme, an initiative for veterans who were previously deported, and an initiative to reunite separated families. Noncitizens can also request that DHS grant them parole or deferred action on an individual basis.

157 'As part of ongoing negotiations over the establishment of Safe Mobility Offices (SMOs) in Ecuador, the Government of Ecuador has repeatedly emphasised the critical importance of lawful pathways to the United States for Ecuadorians, including labour and family reunification pathways'; see DHS, 'Implementation of a Family Reunification Parole Process for Ecuadorians', *Federal Register* 88, no. 220 (November 16, 2023): 78767; DHS, 'DHS Announces Family Reunification Parole Process for Ecuador' (press release, October 18, 2023); State Department, 'Announcement of Safe Mobility Office in Ecuador' (press release, October 19, 2023).

158 UNHCR, 'General Information on the "Safe Mobility" Initiative', accessed November 24, 2023.

and Spanish governments have joined the initiative and offer screening for refugee resettlement and employment-based visas.[159]

SMOs do not in and of themselves increase the number of visas available to migrants—only Congress can do that. Therefore, the primary function of the offices at present is to provide information about the visa options and other pathways that are available to migrants, and to refer those in need of protection for screening by UNHCR.

Noncitizens access the SMOs via an online platform—walk-ins are not permitted and the offices' addresses are not publicly available, likely to prevent people from gathering outside them as has happened at regular visa processing facilities in Mexico.[160] While the U.S. parole programmes offer a new manner of entry, they require that migrants have sponsors, valid passports, and pay for flights to the United States, limiting them to migrants with connections and resources. SMOs are not doing asylum pre-screening, likely due to legal limitations. Currently, specific penalties are not being imposed on migrants who visit the offices and then later travel to the U.S.-Mexico border without authorisation. However, the circumvention of lawful pathways rule and pre-existing U.S. immigration laws mean that these migrants face removal proceedings and potential ineligibility for asylum.

Host countries have expressed concerns that SMOs could generate expectations about migration that cannot be met, and initial reporting indicates that the offices' capacity is limited. As of August 2023, 260 of the 29,000 applicants to the Colombian SMOs entered the U.S. refugee programme.[161] To avoid the presence of an SMO incentivising additional people to migrate to the country where the office is located, host countries have set criteria making the offices available only to migrants who were already present at the time of the offices' announcement. Each country also has limited the nationalities that may access

159 Selee, 'The Border Crisis That Wasn't'; DHS, 'United States and Canada Announce Efforts to Expand Lawful Migration Processes and Reduce Irregular Migration' (press release, March 24, 2023).

160 Jules Ownby, 'A Three-Month Wait: New US Immigration Plan Marred by Secrecy and Uncertainty', *El Pais*, October 2, 2023.

161 Ownby, 'New US Immigration Plan Marred by Secrecy and Uncertainty'.

the SMOs, with most barring their own nationals from using them, Guatemala being the exception.[162]

Capacity and migrant expectations are critical issues in Latin America and the Caribbean, where most of the 7.7 million Venezuelans displaced from their country remain, with many of the host countries having made substantial efforts to integrate them into schools, labour markets, and local communities.[163] To effectively target groups in the region who seek to migrate to the United States, the Biden administration is considering building up the capacity of SMOs and the participation of destination countries in addition to Canada and Spain could also expand the legal pathways available to applicants.

Central American Minors Programme

In 2014, the Central American Minors (CAM) programme was created to allow certain children from El Salvador, Guatemala, and Honduras to enter the United States as refugees or parolees to join their U.S.-based parents.[164] Created during an era of rising arrivals of unaccompanied children, in particular from northern Central America, the programme seeks to provide a safer pathway for children who might otherwise seek to travel to the United States unaccompanied. The Biden administration relaunched the programme with expanded eligibility in 2021, after the Trump administration had halted it in 2017.[165]

CAM allows certain parents in the United States to request that their child, who may be up to 21 years old, be considered for refugee status, or if ineligible, to be considered for humanitarian parole. Parents are eligible to request consideration for their children if they hold lawful permanent resident status, Temporary Protected Status, parole, Deferred Action for Childhood Arrivals, other form

162 UNHCR, 'General Information on the "Safe Mobility" Initiative'; see, for example, 'During its initial phase, Ecuador's SMO services will prioritise Cuban, Haitian, Nicaraguan, Venezuelan, and Colombian nationals present in Ecuador as of October 18 and who qualify as asylum petitioners or have registered with Ecuador's Ministry of Interior for a Certificate of Migratory Permanence'. See also State Department, 'Announcement of Safe Mobility Office in Ecuador' (press release, October 19, 2023).

163 Inter-Agency Coordination Platform for Refugees and Migrants from Venezuela, 'Key Figures', August 5, 2023.

164 DHS, 'Departments of Homeland Security and State Announce Enhancements to the Central American Minors Program' (press release, April 12, 2023).

165 Mark Greenberg et al., *Relaunching the Central American Minors Program: Opportunities to Enhance Child Safety and Family Reunification* (Washington, DC: MPI, 2021).

of deferred action, Deferred Enforced Departure, or withholding of removal. In 2023, the Biden administration expanded the criteria to include certain parents with pending applications for asylum, U visas (for victims or witnesses to certain serious crimes), or T visas (for victims of trafficking).[166] To begin the process, a parent contacts a designated refugee resettlement agency. Children are processed in-country and undergo interviews and DNA testing to verify their relationship with the applicant. Under CAM, USCIS generally grants parole for a three-year period and working-age recipients may apply for work authorisation.[167]

Republican-led states have challenged the programme in the courts, alleging that officials have exceeded their statutory parole authority. Only small numbers of children have benefitted from the programme. In FY 2023, USCIS interviewed 600 new CAM applicants; most approved for travel were recommended for parole, not admission as refugees.[168] Therefore, CAM recipients face the same challenges as other parolees: a grant of temporary status that does not open the door to legal permanent residence.

166 DHS, 'Departments of Homeland Security and State Announce Enhancements to the Central American Minors Program' (press release, April 12, 2023).

167 USCIS, 'Central American Minors (CAM) Program', updated June 23, 2023.

168 USCIS and State Department Quarterly Refugee Processing Engagement call, September 20, 2023.

6 Return in the Context of Migration Cooperation

The COVID-19 pandemic fundamentally changed how the United States conducted removals and returns. The Trump administration activated the Title 42 public health policy to block access to asylum by allowing for the rapid expulsion of border arrivals to Mexico or to their home country. Under Title 42, border officials expelled noncitizens 2.7 million times at the Southwest border from FY 2021 to FY 2023.[169] Never before had Mexico accepted the return of so many third-country nationals.

Upon taking office, the Biden administration faced immediate calls to lift Title 42; it left the policy in place due to high border arrivals and litigation that reached the Supreme Court. When it ended Title 42 expulsions in May 2023, the U.S. government negotiated with Mexico to continue accepting the returns or removals of Cubans, Haitians, Nicaraguans, and Venezuelans under standard U.S. immigration laws. Overall, though, the Biden administration has not carried out as many removals as past administrations, and the inability to return certain nationalities to their countries of origin continues to limit removal numbers.[170] This matters because data have shown that if a noncitizen is not removed within a year of arrival, it is unlikely that they will be removed later.[171]

169 CBP, 'Nationwide Encounters', accessed November 26, 2023.

170 Muzaffar Chishti and Kathleen Bush-Joseph, 'Biden at the Two-Year Mark: Significant Immigration Actions Eclipsed by Record Border Numbers', *Migration Information Source*, January 26, 2023.

171 Nadwa Mossaad, Sean Leong, Ryan Baugh, and Marc Rosenblum, *Fiscal Year 2021 Enforcement Lifecycle Report* (Washington, DC: DHS Office of Immigration Statistics, 2022), 2-5. '[N]oncitizens who are not repatriated within 12 months of being encountered are rarely repatriated after that. For individuals encountered in 2013 to 2016 who had been repatriated at any point within five years of an encounter, 95 percent of those repatriations occurred within the first 12 months of apprehension'.

International Agreements to Accept Returns

The United States has returned noncitizens to more than 150 countries based on negotiations and agreements with other governments.[172] Many countries accept return of their nationals, but others have been considered 'noncompliant', such as Venezuela and Nicaragua. However, Venezuela began accepting limited returns in October 2023 in return for the lifting of certain sanctions.[173] The United States and Cuba have a complex diplomatic history, but there have been various periods of agreements to accept returns in exchange for allowing Cubans to come to the United States legally.[174] Other countries, including China, India, and Nigeria, are technically compliant, but have been slow at accepting returns in the past.[175]

The conditions that countries require for establishing the nationality of would-be returnees is a critical aspect of conducting returns. In the 1990s, for example, many asylum seekers destroyed their identification documents during their journeys so that U.S. officials could not prove their nationality and swiftly return them. The United States now collects biometric data and shares information with countries such as Mexico, Guatemala, Honduras, and El Salvador to identify migrants who present security concerns.[176]

The United States and Canada also have a Safe Third Country Agreement, as discussed earlier. In conjunction with the March 2023 agreement update to also cover migrants arriving between ports of entry, Canada agreed to accept 15,000 migrants from Latin America and the Caribbean (using the Safe Mobility Offices to identify some of them). Initial reporting suggests that since the Safe

172 Mossaad, Leong, Baugh, and Rosenblum, *Fiscal Year 2021 Enforcement Lifecycle Report*, 2-5. 'As of the latest data available for this report, 60 per cent of all Southwest border enforcement encounters from 2013 to 2021 resulted in expulsions or repatriations, 28 per cent were still being processed pursuant to the immigration enforcement provisions in Title 8 of the U.S. Code, 6 per cent had resulted in unexecuted removal orders or grants of voluntary departure, and 5 per cent had been granted relief or other protection from removal'.

173 Eileen Sullivan and Frances Robles, 'First Venezuelans Sent Back Under New U.S. Policy Arrive in Caracas', The New York Times, October 18, 2023.

174 Governments of the United States and Cuba, 'Joint Statement between Government of the United States and Cuba', January 12, 2017.

175 See, e.g., Mark Hosenball and Tim Reid, 'Exclusive - U.S. to China: Take Back Your Undocumented Immigrants', Reuters, September 11, 2015.

176 Lauren Burke, Anastasia Strouboulis, Erok Yayboke, and Marti Flacks, 'Tracked: Stories at the Intersection of Migration, Technology, and Human Rights', Center for Strategic and International Studies feature, accessed November 24, 2023.

Third Country Agreement updates, some asylum seekers are seeking to cross into Canada in more dangerous areas to avoid detection.[177]

Previously, the Trump administration signed safe third country agreements (referred to as Asylum Cooperative Agreements) with Guatemala, Honduras, and El Salvador. These accords enabled DHS to transfer asylum seekers to those countries rather than assess their claims for protection in the United States.[178] The agreement with Guatemala was the only one implemented, and the Biden administration suspended all three accords in 2021.[179]

Countries that accept the return of their nationals (or others) can face political difficulties, as has been seen with the Mexican government receiving backlash for accepting the return of third-country nationals. Nonprofit organisations brought suit in Mexico over the government's cooperation with the U.S. Migrant Protection Protocols programme. The Mexican Foreign Ministry announced in October 2022 that it was ending its participation in the programme and Mexico's Supreme Court found that the government acted unlawfully in not issuing regulations to provide for migrants' rights.[180] Colombia also halted return flights temporarily due to allegations of 'degrading treatment' of returnees by ICE.[181]

Regarding Mexico's latest agreement to accept the return of up to 30,000 Cubans, Haitians, Nicaraguans, and Venezuelans monthly, the government has explicitly conditioned its cooperation on the continuation of U.S. parole processes for an equivalent number of the same nationalities. The U.S. parole processes are being challenged in U.S. courts and could be blocked. It remains to be seen how Mexico would react.

177 Isabelle Steiner, 'Safe Third Country Agreement Expansion Causes Asylum Seekers to Explore New Routes', Wilson Center blog post, September 14, 2023.

178 DHS, 'DHS Announces Guatemala, El Salvador, and Honduras Have Signed Asylum Cooperation Agreement', December 29, 2020.

179 Bolter, Israel, and Pierce, *Four Years* of Profound Change.

180 Secretaría de Relaciones Exteriores, 'Finaliza el Programa de Estancias Migratorias en México bajo la Sección 235 (b)(2)(C) de la Ley de Inmigración y Nacionalidad de EE. UU., Comunicado No. 401', October 25, 2022; Suprema Corte de Justicia de la Nacion, 'La Primera Sala Ordena Publicar los Lineamientos para la Atencion de las Personas Migrantes que Se Encuentran Temporalmente en Nuestro Pais, Bajo El Programa "Quedate en Mexico",' October 26, 2022.

181 Al Jazeera, 'Colombia Resumes 'Removal' Flights Repatriating Citizens from US', Al Jazeera, May 5, 2023.

The U.S. government's ability to physically remove individuals has its own resource constraints, as DHS lacks the necessary capacity to return all removable noncitizens. It has increased the number of removal flights conducted post-Title 42 to increase deterrence,[182] and from May to September 2023 removed or returned 253,000 individuals.[183] The United States also does not have sufficient detention capacity to hold all removable noncitizens, and it is much harder to arrest and remove people once they are released into the interior.[184] ICE has a daily holding capacity of approximately 40,000, and Border Patrol facilities, which are designed for short-term detention, can now hold about 23,000.[185] In August 2023 alone, border officials encountered noncitizens 230,000 times.[186]

In 2021, the Biden administration ended the practice of detaining families that had begun under previous administrations.[187] In light of increasing family arrivals, the Biden administration began a programme in May 2023 called Family Expedited Removal Management (FERM), wherein families are released into the U.S. interior and the head of household is placed on an ankle monitoring device and given a nightly curfew.[188] The families are screened for credible fear of

182 For the first 11 months of fiscal 2023, ICE Air Operations had completed 4,282 commercial airline removals, an 85 per cent increase from the same period in FY 2022. See testimony by Daniel Bible, Deputy Executive Associate Director, Enforcement and Removal Operations, ICE, 'After Apprehension: Tracing DHS Responsibilities after Title 42', before the Senate Committee on Homeland Security and Governmental Affairs Subcommittee on Government Operations and Border Management, 118th Cong., 1st sess., September 6, 2023.

183 DHS, 'Fact Sheet: The Biden-Harris Administration Takes New Actions to Increase Border Enforcement and Accelerate Processing for Work Authorizations, While Continuing to Call on Congress to Act'.

184 For more on the detention of noncitizens, see Randy Capps and Doris Meissner, *From Jailers to Case Managers: Redesigning the U.S. Immigration Detention System to be Effective and Fair* (Washington, DC: MPI, 2021); Straut-Eppsteiner, *U.S. Immigration Courts and the Pending Cases Backlog*.

185 TRAC Immigration, 'Immigration Detention Quick Facts', accessed November 27, 2023; DHS, 'Fact Sheet: The Biden-Harris Administration Takes New Actions to Increase Border Enforcement and Accelerate Processing for Work Authorizations, While Continuing to Call on Congress to Act'.

186 CBP, 'CBP Releases August 2023 Monthly Update', September 22, 2023.

187 Court orders set forth standards of care for migrant children held in immigration facilities, including those who are held with adult family members, and prohibit the detention of children for more than 20 days. See John Sciamanna, 'History and Update on Flores Settlement' (fact sheet, Child Welfare League of America, n.d.).

188 ICE, 'ICE Announces New Process for Placing Family Units in Expedited Removal', May 10, 2023.

persecution within six to 12 days of their arrival, and if no credible fear is found, they are quickly removed, the goal being removal within 30 days of their arrival. If credible fear is found, families may proceed with filing asylum applications, though the circumvention of lawful pathways regulation and its presumption of ineligibility for asylum applies, so they may only be eligible for withholding or Convention Against Torture protection. The FERM programme is operational in 40 cities. As of September 2023, DHS had processed 1,600 families, with plans to continue scaling up the programme.[189]

189 DHS, 'Fact Sheet: The Biden-Harris Administration Takes New Actions to Increase Border Enforcement and Accelerate Processing for Work Authorizations, While Continuing to Call on Congress to Act'.

7 Statistics

President Barack Obama inherited a better resourced immigration enforcement regime than his predecessors and focused on removing from the U.S. interior noncitizens who had been convicted of serious crimes and recent arrivals, earning the nickname 'deporter in chief'.[190] His administration conducted a record number of removals, averaging 344,000 per year. Despite broadening the scope of migrants prioritised for enforcement, the Trump administration deported fewer total migrants, averaging 233,000 per year, partly because local jurisdictions pulled out of or limited their participation in information sharing and immigration enforcement cooperation agreements with ICE.[191] Starting in March 2020, U.S. officials used the Title 42 public health policy to carry out more than 2.8 million expulsions, and ICE officers were diverted from interior removal operations to assist CBP at the border.

Since the Title 42 policy ended in May 2023, DHS has returned more than 300,000 noncitizens (that figure includes migrants who opted to voluntarily return to their home country or to Mexico).[192] Voluntary return allows an individual to avoid the five-year bar on re-entry associated with an unlawful entry into the United States, and was used extensively from the 1980s well into the early 2000s for Mexican migrants. DHS doubled ICE international removal flights from the first half to the second half of FY 2023 and formed new agreements with countries to streamline returns. DHS has removed 17,000 third-country nationals to Mexico since May 2023, and stated that this was a critical deterrent for hard-to-remove nationalities.[193]

190 Muzaffar Chishti, Sarah Pierce, and Jessica Bolter, 'The Obama Record on Deportations: Deporter in Chief or Not?', *Migration Information Source*, January 26, 2017.

191 Muzaffar Chishti and Kathleen Bush-Joseph, 'Biden at the Two-Year Mark: Significant Immigration Actions Eclipsed by Record Border Numbers', *Migration Information Source*, January 26, 2023.

192 DHS, 'DHS Continues Direct Repatriations of Venezuelan Nationals' (press release, October 24, 2023).

193 DHS, 'Fact Sheet: The Biden-Harris Administration Takes New Actions to Increase Border Enforcement and Accelerate Processing for Work Authorizations, While Continuing to Call on Congress to Act'.

Interdictions

While the primary challenges that the United States faces today concern unauthorised land arrivals, increased border enforcement in prior periods has led to more migration at sea and the trend may be repeating. Recent maritime flows of Cubans and Haitians to the United States have reached the highest levels since the 1990s. In FY 2022, 7,000 Haitians and 6,000 Cubans were interdicted at sea by U.S. officials, and initial data show similar numbers in FY 2023.[194] The U.S. Coast Guard estimated its interdiction success rate was 56.6 per cent in FY 2022, meaning thousands of people likely reached U.S. shores without being intercepted.[195] The Coast Guard is a sub-agency of DHS, and its sister agency CBP assists with interdictions.

U.S. interdictions of migrants arriving on small boats began in force in the 1980s and were bolstered by a 1981 agreement between Haitian President Jean-Claude Duvalier and U.S. President Ronald Reagan. Agreements such as this were the forerunner of today's multilateral pacts, which typically do not provide interdicted migrants access to asylum in the United States.

As with migration on land, the Biden administration has increased regional cooperation in the Caribbean to return migrants at sea. The Bahamas and Turks and Caicos are key U.S. partners for maritime enforcement and as part of the partnership, these countries provide real-time operational intelligence to the Coast Guard. Since 1982, the United States, The Bahamas, and Turks and Caicos have had a trilateral agreement called Operation Bahamas, Turks and Caicos (OPBAT). Initially focused on narcotics interdiction, the operation in 2004 grew to incorporate coordination on interdicting migrants at sea.

OPBAT allows the Coast Guard, the Royal Bahamas Police Force (RBPF), and the Royal Turks and Caicos Police Force (RTCPF) to enter each other's territorial waters to enable coordination and information sharing. These agencies share navigational software and work together on search and rescue, migrant

194 Authorities interdicting migrants include the U.S. Coast Guard, CBP, and foreign navies. See Muzaffar Chishti, Kathleen Bush-Joseph, and Colleen Putzel-Kavanaugh, "Can the Biden Immigration Playbook Be Effective for Managing Arrivals via Sea?" Migration Information Source, October 25, 2023; Muzaffar Chishti and Jessica Bolter, "Rise in Maritime Migration to the United States Is a Reminder of Chapters Past," *Migration Information Source*, May 25, 2022.

195 DHS, *U.S. Coast Guard Budget Overview: Fiscal Year 2024 Congressional Justification* (Washington DC: DHS, n.d.).

interdictions, and anti-smuggling operations. The Coast Guard also offers training and resources such as ships to the RBPF and RTCPF. Because of this cooperation, many interdictions occur in Bahamian waters, and migrants are transferred to Bahamian authorities for repatriation to their country of origin.

Regional pacts such as OPBAT allow authorities to carry out interdictions in other countries' waters, so migrants can be returned as close as possible to where they are encountered. If held by the U.S. Coast Guard, interdicted migrants are typically kept on deck, separated by gender. Coast Guard personnel visually assess maritime arrivals for protection needs. For example, if migrants appear to be in distress or they assert fear of return to their home country, they will be screened for humanitarian protection. As with migrants encountered on land, USCIS asylum officers conduct interviews (by phone or in person) to determine whether migrants have a credible fear of persecution or torture in their origin country; if so, they may be processed for resettlement in a third country. The rest are summarily returned.

For more than 30 years, DHS and the State Department have used the Migrant Operations Center located on a U.S. naval base at Guantanamo, Cuba to process individuals interdicted at sea. In anticipation of a possible new upswing of Haitian arrivals, the Biden administration in 2022 reportedly considered doubling the migrant holding capacity at Guantanamo to 400 beds. ICE is responsible for caring for maritime arrivals awaiting USCIS screenings as well as those found ineligible for protection who are awaiting repatriation. The State Department is responsible for the care of migrants eligible for refugee resettlement abroad.

Only about 1 per cent of people interdicted are found eligible for protection, according to the Coast Guard, though immigrant-rights advocates have long claimed the lack of systematic screening and access to asylum violate international law.[196] In January, the DHS Office for Civil Rights and Civil Liberties opened an investigation into interdiction practices, protection screening, and migrant care, after almost 300 nonprofit organisations alleged that U.S. operations discriminated against migrants traveling at sea and create a dangerous precedent for other countries.

196 Comments made by U.S. Coast Guard officials during July 2023 meeting with nonprofit organisations.

Despite decades of increased budgets for migration enforcement on land, the U.S. government has been less willing to significantly increase spending on maritime interdiction. For example, the total Coast Guard budget went from $11 billion in FY 2013 to $13.9 billion in FY 2023, meanwhile CBP's budget increased from $11.7 billion in FY 2013 to $20.9 billion in FY 2023, and ICE's increased from $5.6 billion in FY 2013 to $9.1 billion in FY 2023.[197]

Monitoring and Compliance with International Standards

The United States does not conduct extensive monitoring of the situation of returnees or compliance with international standards. Country-of-origin information factors into the adjudication of asylum applications though and the United States maintains a physical presence of 173 embassies and 88 consulates that monitor country conditions.[198] The development of Safe Mobility Offices in countries of origin and associated networks of local civil-society organisations may bolster the ability to monitor the situation of returnees.

197 Chishti, Bush-Joseph, and Putzel-Kavanaugh, 'Can the Biden Immigration Playbook Be Effective for Managing Arrivals via Sea?'.

198 VisaPlace, 'US Embassy and US Consulate Listings for Immigration and Visas to the United States', accessed November 24, 2023.

Conclusion

By most measures, the U.S. asylum system does not meet its objectives. Those eligible for asylum do not receive it in a timely manner, and migrants deemed ineligible are not returned to their countries of origin. Increasing arrivals at the U.S.-Mexico border continue to overwhelm enforcement and protection screening capacity, and asylum adjudications cannot keep up with new filings. Although the immigration courts completed an estimated record half a million cases in FY 2023, more than 1 million new cases were funnelled onto a docket that now exceeds 2 million cases. Thus, many migrants in need of protection will continue to face years of uncertainty. Nor can U.S. officials remove most migrants found ineligible for asylum, despite returning record numbers in FY 2023. Experience shows migrants who are not removed within one year of arrival are not likely to be removed at all, and this systemic failure serves as a strong pull factor for continuing irregular migration.

In responding to these challenges, the Biden administration has issued the circumvention of lawful pathways rule, which establishes a presumption of ineligibility for asylum for those entering the country illegally between ports of entry, while officials are also providing humanitarian parole and two-year stays in the United States for asylum seekers who enter the country using the CBP One app. Critics have charged that the new rule's limitations on long-established territorial asylum practices violate international law and principles; lawsuits challenging the rule are moving through the federal court system.

Alongside the circumvention of lawful pathways rule, the administration has rebuilt and modernised aspects of the U.S. protection system. Migrants can now file applications for asylum and work permits online, and U.S. Citizenship and Immigration Services quickly processes requests for humanitarian parole, allowing hundreds of thousands of migrants to enter the country on temporary status. The administration has also vastly expanded access to Temporary Protected Status (TPS), permitting hundreds of thousands of migrants already in the country without authorisation to stay and work. But TPS does not come with a pathway to permanent residence, which only Congress can provide.

Adopting a cooperative approach to migration in the Western Hemisphere, the administration has pressed neighbouring nations to collaborate in developing

a new regional migration management system that includes a network of Safe Mobility Offices (SMOs) throughout the hemisphere. The goal is to provide intending migrants with opportunities to apply for refugee processing closer to their home countries and get accurate information on other migration pathways to the United States, Canada, and Spain. The SMOs are a work in progress that can, in the near term, address only a fraction of the need, but that represent an element of a longer-term vision for regionwide shared responsibility.

The administration has also sought to expand pathways by restoring the refugee resettlement system, which had been largely dismantled under the prior administration. The refugee resettlement programme is on track to reach the target of 125,000 refugee admissions in FY 2024 through the digitisation of applications and concurrent processing, which allows officers to conduct multiple parts of the screening process simultaneously. The immigration courts also now utilise technology to conduct hundreds of thousands of remote videoconference and internet-based hearings.

Nonetheless, the government's efforts are insufficient to meet the scale of the challenge. A new era of global displacement is underway that includes major movements within the Western Hemisphere. Insufficient resources and litigation largely dictate policy on the ground, and the pressures on destination cities that are receiving tens of thousands of migrants for which they have not been prepared has shifted public opinion even among strongly pro-immigration elected leaders, who are calling for more effective border enforcement measures, reduced numbers of asylum seekers, and increased federal funding to support migrant services.

Looking ahead, only Congress can update U.S. immigration laws and more lastingly fortify steps that the executive branch has made, including providing immigration pathways apart from applying for asylum. In the near term, congressional approval of a $13.6 billion appropriations request the administration made in October 2023 would generate the massive infusion of resources needed to properly support the asylum system across all its elements. That would, in turn, provide the necessary foundation for increased regional cooperation that is essential to manage migration over the longer term, given that the phenomenon of large-scale movements within the Western Hemisphere are unlikely to end soon.

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Respondents

Country report	Name	Position
Australia	Madeline Gleeson	Senior Research Fellow at the Kaldor Centre for International Refugee Law, UNSW Sydney
Australia	Daniel Ghezelbash	Associate Professor and Deputy Director of the Kaldor Centre for International Refugee Law, UNSW Sydney
Australia	David Wilden	Former First Assistant Secretary of the Refugee, Humanitarian, and Settlement Division and former executive in the Department of Home Affairs covering immigration and citizenship policy
Australia		Senior official at the Australian Permanent Mission to the United Nations
Canada	Huub Verbaten	Senior advisor Advisory Council of Migration
Denmark	Nikolas Tan	Senior Protection Officer, UNHCR
Denmark	Camilla Nygaard Bæhring	Senior legal advisor Asylum & Refugee Rights Division Danish Refugee Council
Denmark		Government officials
the Netherlands	Jasper Hoogendoorn	Head Asylum, Reception and Return Unit Migration Policy Department Justice and Security
the Netherlands	Huub Verbaten	Senior advisor Advisory Council on Migration
the Netherlands	Sadhia Rafi	Senior legal advisor Dutch Council for Refugees, programme manager Strategic Litigation
United States		Current and former government officials from the U.S. Department of Homeland Security and Department of Justice; legal service providers, academics, and nonprofit organizations