HOUSE OF COMMONS

Home Affairs Committee

Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU, HC 705

Wednesday 11 November 2020

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Watch the meeting

Members present: Yvette Cooper (Chair); Ms Diane Abbott; Dehenna Davison; Laura Farris; Adam Holloway; Dame Diana Johnson; Tim Loughton; Stuart C McDonald.

Questions 390 - 449

Witnesses

I: Frode Forfang, Director General, Norwegian Directorate of Immigration; and Halvor Frihagen, Lawyer, Andersen & Bache-Wiig AS.

II: Madeline Gleeson, University of New South Wales; and Professor Natalie Klein, University of New South Wales.

Examination of witnesses

Witnesses: Frode Forfang and Halvor Frihagen.

Q390 **Chair:** Welcome to this evidence session for the Home Affairs Select Committee as part of our inquiry into channel crossings, migration and asylum-seeking routes. We are grateful to our witnesses this morning, joining us first from Norway and then from Australia, as we look at international experience of asylum-seeking routes.

First we have joining us Frode Forfang, the Director General of the Norwegian Directorate of Immigration, and Halvor Frihagen, a lawyer at Andersen & Bache-Wiig. Thank you both for joining us this morning.

I will begin by asking you first to introduce yourselves in terms of the work that you do on migration in Norway, and particularly your experience of people arriving for asylum seeking but through irregular routes into Norway. I will start with Frode Forfang.

Frode Forfang: Good morning. I am the head of the Norwegian Directorate of Immigration. Part of our task is to process asylum applications in the first instance. We have had a lot of experience with asylum seekers over the years. We have had very few asylum seekers the last few years. If you take a 20-year span, Norway has had more asylum seekers coming into the country than the average in Europe per capita.

We had an especially high influx in 2015 when we had the asylum process in Europe. We had more than 30,000 asylum seekers. In the years prior to 2015, we had typically between 10,000 and 12,000 asylum seekers every year. Most of them had come through Europe, travelled through European countries, and entered into Denmark, Sweden and through the land border between Sweden and Norway.

After 2015, in recent years, the numbers have dropped quite sharply. In recent years it has been between 2,000 and 3,000 asylum seekers per year. Most asylum seekers are coming through the land border, coming through from mainland Europe, from the external borders in the south and travelling through Europe, and then they arrive in Norway. That is the typical route. There are, of course, some exceptions but that is the typical route.

Q391 **Chair:** Mostly people would use what form of travel? One of the issues we are looking at is people moving from travelling by lorry to travelling by boat.

Frode Forfang: It is difficult to say. We depend on the information given by the asylum seekers, because there is no border control between Norway and Sweden. Typically, they will show up at the police in the Oslo area, and then they will just tell us that they arrived somewhere and have been through Europe. They can travel by buses or train. Some also fly to Norway, because with the internal Schengen system it is also even

possible to fly to Norway from other Schengen countries, but most typically it would be crossing the land border. That is probably the way I think most people would arrive.

Chair: Thank you. Mr Frihagen?

Halvor Frihagen: I will just start by introducing myself. I am a lawyer and I practise as a solicitor or barrister in Oslo in refugee law but also other fields of law, including children's law. I have 19 years of experience as a solicitor. Before that I worked with Mr Frode Forfang for 18 months in the directorate, and before that in the Norwegian Parliament, the Storting.

I am a member of the Norwegian Bar Association committee on migration and refugee law and I am also the Norwegian co-ordinator for ELENA, the European Legal Network on Asylum.

I mainly agree with what Mr Forfang has informed you. The asylum seekers that I meet are mainly the minors shortly after they apply for asylum and the adults if they get a negative decision. We know only what they tell us and some from the evidence that the police find. My impression is that most hop on the bus in Gothenburg, Sweden, and take the bus to Norway. Some are caught on the bus, some take the train and are caught on the train station, but most just show up at the police and apply for asylum.

We get the very clear impression that most have travelled via Turkey and Greece. They have travelled to get into the Schengen area and from Greece to the rest of the Schengen area. A lot of them tell me that they have travelled through very dangerous routes on boats. I have seen videos of young people hanging under lorries, between the wheels of lorries, while trying to cross the border, and hiding inside lorries, of course. Where it is necessary they choose the dangerous routes to be able to go, but where it is not necessary they will just hop on a bus or a train or a car driven by someone.

Norway has a very long land border with Sweden and Finland so it is very easy to get from Finland and Sweden to Norway. There is a lot of forest and hundreds of roads, most of them without any surveillance.

Q392 **Chair:** In terms of Norway's use of the Dublin Agreement, what is the policy approach that Norway takes? Do you attempt to return everyone who has been through another European country, or only a certain proportion? What is the approach to the use of the Dublin Agreement?

Frode Forfang: I can say that the policy is that we are trying to return as many as possible who can be returned under the Dublin regulation. There have been some exceptions over the years, especially when it comes to people coming from Greece. Greece has been very difficult to return people to, and from time to time we have stopped all returns to Greece because of the reception facilities there and also because of the lack of asylum procedures. It has varied a little bit over the years when it comes to Greece, so that has been a difficult case.

There are also some other exceptions. For instance, if we have an asylum seeker coming from visa-free European countries—typically the Western Balkans or other European countries—applying for asylum in Norway, we would not apply the Dublin regulation, even if we can prove that they have gone through or been registered somewhere else in Europe. We have accelerated procedures, 48-hour procedures, for people coming from visa-free countries, which are considered safe countries, and they are being processed in 48 hours and then returned swiftly by the police to their home country. That is a much more efficient procedure than going through the Dublin regulation, which is a much more lengthy and complicated procedure.

In those cases, which we have been able to reduce because of those procedures, we are not using the Dublin regulation for European visa-free countries. I know that many other European countries have substantial problems with those same countries because quite a high proportion of asylum seekers in Europe, especially in Germany and some other countries, come from the Western Balkans and other visa-free countries, and that is increasing. We have tried to keep those numbers low, and then by using the accelerated 48-hour procedure we can return all those who fail, which are almost all of them.

Halvor Frihagen: Frode will correct me if I am wrong, but Norway does transfer a lot more asylum seekers to other Dublin countries than we receive from other Dublin countries, either through family reunion or because they have Norway as the first country of application.

I remember back in the day when I was a clerk in the asylum office that we would process asylum applications from persons who had been to three or four different countries before they came to Norway. We would very often know about it, but there was no system back then to send them back. We would have to go through the entire asylum procedure and consider whether they needed protection. It was a lot of work for us, even though they already had a negative decision or we would suspect they had a negative decision from a lot of other countries.

The Dublin system, the Dublin regulation, has been very fruitful for Norway in limiting the unnecessary work of the asylum office and reducing the number of asylum seekers to Norway who have been to other countries before.

Frode Forfang: That is mostly correct, but there have been periods, especially after the influx in 2015, when we received more people than we have sent out of the country, because we had rejected a number of asylum seekers after 2015. Some of them afterwards absconded to other European countries and then were returned to Norway under the Dublin regulations.

We also should remember that in 2015, Norway was actually the first country of entry in one particular case, and that was on the northern border with Russia, because we had a few weeks in October and November 2015 when more than 5,000 asylum seekers crossed the

border between Russia and Norway. Until we were able to stop that, more than 5,000 people entered the country. Some of those people went to other European countries afterwards and then were returned to Norway under the Dublin regulation.

Halvor Frihagen: That is important. What happened at the Russian border back in 2015, in my mind—and this is speculation that Mr Forfang cannot do—was that it was probably Russia that started allowing asylum seekers to approach the border for some domestic reason, or Norwegian-Russian policy. Before and after, the asylum seekers didn't reach the border, and then suddenly they started reaching the border—many on bicycles, for some strange reason. This is up in the very far north. A good summer's day in Storskog is like a horrible winter's day in London, and you can guess what the winter is like up there. It was a very special situation.

Most of the time this border is very heavily policed and patrolled, and only people with proper visas and so on manage to reach this border. Because of the geography and the climate, it is also impossible to cross by boat there; it is too dangerous.

Q393 **Chair:** Your experience of the Dublin Agreement, even from outside the EU, is that you have still found that being part of the Dublin Agreement has helped you with managing asylum seeking and migration. Is that correct?

Frode Forfang: Yes, definitely, and I think that since Norway is also a part of Schengen, we are even more dependent on the Dublin regulation. As opposed to the UK, which isn't part of Schengen, we are part of Schengen. We have no borders or no border controls within Norway and the rest of Europe. There were some modifications after 2015, but generally we have common external borders and no internal borders, which makes a system like the Dublin regulation more important for a country like Norway.

Q394 **Tim Loughton:** Mr Forfang, you mentioned that before 2015 you were a very high recipient of migrants, certainly per capita of population. That has fallen substantially since 2015. At the same time, the numbers of migrants coming into other EU countries have risen substantially. Why have things changed in Norway in reverse to the trend of the rest of the EU?

Frode Forfang: It is very difficult to say, because there is no obvious reason why Norway should have so many fewer asylum seekers compared to other European countries. If you look at the composition of the influx into other European countries, that might explain part of it. What we see is that the number of people coming into Europe through the external borders—like from Africa to Italy or from Turkey to Greece—has dropped in the European Union. What has increased is typically the number of people coming from visa-free countries who also have a lot of repeat applications; 10% of all applications in the European Union are repeat applications. That is not possible in Norway in the same way. You

can ask for a reconsideration of the rejection in the appeals court, but you cannot go through the system from scratch unless you have left Europe in the meantime.

There are some procedural differences between Norway and the rest of Europe, which I think have made us less vulnerable to some of the more manifestly unfounded claims.

Q395 **Tim Loughton:** Can you give us an idea of the demographics of those people who have come to Norway? Are they people just claiming asylum? Are they people who are claiming under family reunion-type applications? I gather that Norway has quite a high migrant population—certainly higher than any other European country does. One would presume you have more people coming to you with family links, because the vast majority of people coming into France and then trying to get across the Channel tend to be young men rather than younger children or families. Is that different to Norway?

Frode Forfang: I am not sure if Norway differs so much from other countries when it comes to the composition, but family links are a more important reason for coming to Norway than asylum. There are all sorts of family links. It could also be a Norwegian marrying a foreigner somewhere, so it is difficult to say if we differ very much from other countries in that respect. We have a high level of immigration in Norway, but most of it is actually European related, like Poland, Lithuania and other European countries. When it comes to third countries, we have a lot of people who either originally came as asylum seekers or resettlement refugees, or have family relations to those people.

Q396 **Tim Loughton:** I understand that one of your highest migrant populations comes from Somalia, followed by Iraq and Syria, rather than just other EU countries. Do you take people identified as refugees directly from those countries or close to those countries? Obviously, one of the biggest migrant groups coming to the UK are those who are identified as vulnerable Syrians, for example, from refugee camps in Jordan and other places like that. Do you tend to take many genuine refugees directly or is it mostly people who then apply from another country or appear at your border?

Frode Forfang: Norway has, for many years, had a resettlement scheme, which means that we are taking people directly from refugee camps. This year the quota is 3,000. One third of them will be from Syria, there are some Congolese refugees who are located in Uganda or elsewhere in East Africa, and there are also some other groups from Sudan and so on.

The last few years the quota for resettlement has been 3,000. If you go six or seven years back in time, it used to be between 1,000 and 1,500, so it has been increased in recent years. The Norwegian Government or Parliament has endeavoured to link the number of resettlement refugees to the number of asylum seekers so that when the number of asylum seekers is low, which it is at the moment, they can increase the number

of resettlements directly from refugee camps. If the asylum influx increases considerably, then probably the Government will reduce the quota from resettlement.

Q397 **Tim Loughton:** You have a way of regulating your total amount, as it were, from different sources?

Frode Forfang: Yes, that has been the policy. Before, that was not so explicit, but after 2015 it was more explicit that you take both the spontaneous asylum influx and—

Tim Loughton: Yes, and the planned?

Frode Forfang: Yes, as a whole.

Q398 **Tim Loughton:** I have one final question. Can I just ask about your experience of the Dublin returners this year? A problem we have had in the UK is that Germany and France, especially, have said that because of the coronavirus pandemic they will take no more than 10 per week returned on planes from the UK. Many of those then get taken off planes at the last minute because of lawyers' interventions. Have you had the same experience under the Dublin scheme trying to return people?

Frode Forfang: We have had the same experience both ways. Since March when we had all the Covid-related restrictions, all sorts of returns have been much more difficult, including Dublin returns. I don't have the numbers, but it has been much more difficult during the pandemic period than it used to be before.

Halvor Frihagen: Can I add to Mr Forfang's answers?

Tim Loughton: Yes, please.

Halvor Frihagen: I would also say that the EU immigrants are by far bigger groups than the Somali, Iraqi and Pakistani. The Polish and Swedes mainly are the biggest immigrant groups to Norway. Any asylum applicants that show up physically in Norway will get their application processed and they will get protection if they fill the criteria under the Refugee Convention or the European Convention on Human Rights. There are no limits.

I will say something that Mr Forfang did not mention about the reduction after 2015. One very important point is the policing of the Danish and Swedish borders that started at this time when Schengen started functioning less well. People need to show passports when crossing from Germany into Denmark and from Denmark into Sweden. That is possibly the biggest reason for the reduction.

Combined with the coronavirus, I fear that we might suddenly see boats in the Skagerrak like you see boats in the Channel now. There has been one boat so far, which was on its way to Canada, apparently, but I do fear that we will see boats soon.

Q399 **Tim Loughton:** Coming from where, sorry?

Halvor Frihagen: Denmark to Norway, across the Skagerrak. In summer a lot of Norwegians just go there with pleasure boats. It is absolutely feasible, although it is longer than the Channel.

Tim Loughton: Whereas before they might have come across the bridge from Denmark and Sweden and across land into Norway as the more regular route?

Halvor Frihagen: Yes.

Frode Forfang: It should be added that it is correct that the border controls between Sweden and Denmark have had some influence on the influx to Norway, but still Sweden receives considerably more asylum seekers than Norway at the moment—about 10 times more. There are some other things that influence the asylum influx to Sweden. It gets more than 20,000—at least last year, it got more than 20,000 asylum seekers—while Norway got 2,000 to 3,000. Anyone who is able to access Sweden would also be able to access Norway.

Q400 **Stuart C McDonald:** If I could follow up on the issue about resettlement, spontaneous arrivals and asylum seekers, if a spontaneous asylum seeker is accepted as a refugee and awarded refugee status, is there any difference at all in the rights that they will have as compared to somebody who arrives under a resettlement programme, for example, in terms of family reunion or the length of residence permit that they have?

Frode Forfang: Typically, an asylum seeker will often be an adult male, a young person who comes alone. It could also be a whole family but more typically it is people who come alone. When we are receiving or selecting resettlement refugees, we typically are selecting whole families. That is just in order to avoid family reunification claims afterwards.

When people are selected from a refugee camp somewhere—for example, in Jordan, Lebanon or East Africa—then we will take whole families, which means whole nuclear families, like parents and minor children, that sort of family.

Q401 **Stuart C McDonald:** Are the rights that they have any different? For example, on the length of residence permit, is it permanent residence as soon as somebody is recognised as a refugee?

Frode Forfang: If you are an asylum seeker or even if you are selected for the resettlement programme, you will have in principle a temporary permit for three years and then you can have a permanent permit after three years.

Q402 **Stuart C McDonald:** So there is no real difference in how a recognised refugee is treated, depending on the means of arrival, whether it is spontaneous or—

Frode Forfang: The Government have introduced a new policy a few years ago, which means that we can withdraw a status after a few years if the situation in the home country has changed. We have told refugees about this, because the situation in Somalia has been more stable, and

we have returned some people to Somalia, even after they have first got asylum in Norway. It does not happen in many cases, but the principle that we can do it has been introduced in the Norwegian policy in recent years. But that would never apply to people who have been resettled through a resettlement scheme. That would only apply for people who have been accepted after a spontaneous asylum claim.

Halvor Frihagen: The right to family reunion for previous family members in the home country and the right to social welfare integration support and so on will be the same for those arriving to Norway and applying for asylum and then being recognised as refugees as those who are transferred through the UN system.

Q403 **Stuart C McDonald:** That is something that I am happy to hear as a point of principle, but I take it there would be legal obstacles to trying to treat people differently as well. Mr Frihagen, do you think it would be inconsistent with, for example, the European Convention on Human Rights to try to differentiate the status of refugees depending on how they arrive?

Halvor Frihagen: It will mainly be a problem in relation to the Refugee Convention that secures family reunion so that people who receive subsidiary protection might not be entitled to all the rights as recognised refugees. You still have Article 8 of the European Convention on Human Rights that will recognise the right to family life that will, to some extent, also secure those rights for recipients of subsidiary protection.

Q404 **Stuart C McDonald:** Very briefly, the Dublin convention is obviously quite well used by northern European countries like the United Kingdom, Norway and so on, but the other side of the coin is that it means that the responsibility for processing most arrivals ends up with Greece, Italy and Spain. What was Norway's approach to proposals around responsibility sharing? Because it is outside the EU, was it even asked whether it would take part, and if it was to be asked what would its response be?

Frode Forfang: The official Norwegian policy when it comes to burden sharing is that Norway is, in principle, willing to take part in a European scheme for burden sharing but it should be a comprehensive European approach. If the European Union is agreeing on the scheme for burden sharing, Norway will consider taking part in that.

What we see as the challenge with the whole European system is that the asylum seekers have a very clear preference for certain countries over others. We saw in 2015 when two-thirds of all asylum seekers entering Europe ended up in Germany, and then Sweden became the second most interesting or second most attractive country, and Norway also became more attractive than it should be per capita. Then, of course, if you didn't have any mechanism for asylum seekers to choose, most of them would end up in Greece and Italy. That is a dilemma that the European Union is facing, but Norway will take part in and is interested in taking part in anything that is agreed on a European level.

Stuart C McDonald: That is helpful. Thank you very much.

Q405 **Chair:** Just to quickly follow up, suppose Norway was not part of Schengen, so suppose you were in a similar position to the UK's position, do you think Norway would still want to be part of the Dublin Agreement?

Frode Forfang: I think so, because we are in a different situation from the UK when it comes to the land border. We have a long, vulnerable land border with Sweden, which means that if Sweden is part of Schengen—it depends where the Schengen border is. If the Schengen border was between Denmark and Germany that would be different. But as long as Denmark and Sweden are part of Schengen, then Norway really has no choice, because it is absolutely inconceivable that we should have an external border between the European Union and Norway, between Sweden and Norway. That would be inconceivable in practice.

Q406 **Chair:** Suppose that was the case—suppose the Schengen border was somewhere different—would there be any advantage to you in being outside the Dublin Agreement?

Frode Forfang: I don't think so. Unless the situation changes considerably in the north with the border to Russia, Norway will never be the first country of entry in most cases, except if people have a visa and are overstaying a visa or applying for asylum. In large numbers, Norway will never be the first country of asylum. In that sense, it would be in Norway's interests to be part of the Dublin regulation.

The only thing that would change that would be if you had a more open border with Russia in the north that, in practice, became an open border, which is not the case. The few weeks in the autumn of 2015 were an exception. Normally, that border is closed on the Russian side and that does not pose any problem for Norway. I think it would be in Norway's interests, in any case, because of our location and the fact that we would never be the first country of entry.

Halvor Frihagen: I would just add that back in the day, while I was processing third, second, fourth asylum applications, the border was between Denmark and Germany and we did get a lot of asylum applications that we could have used the Dublin system on back then. Even with a Schengen border between Germany and Denmark, Norway would profit from the Dublin system.

Q407 **Chair:** Can you see any benefits to the UK from being outside the Dublin system?

Frode Forfang: It is very difficult to say, but I think it depends on the situation you are in when it comes to the crossings of the Channel. What we see is that the UK seems to be a very attractive destination for people who are actually already in a safe country, like France. For that reason, maybe, but it depends on the situation you are in when it comes to the influx and where they are coming from. If you have a lot of people coming directly from France or other places in Europe, I would think that would be an advantage.

Chair: An advantage of being part of the Dublin agreement or being

outside the Dublin agreement, just to clarify?

Frode Forfang: To be part of it.

Halvor Frihagen: I agree. I think that if you are not, you will have to make a lot of bilateral agreements and that would be a big job for your civil service to process all these different bilateral agreements. People will keep on coming and you will either have to process them or have an agreement with the other countries where they come from. I believe that it would be easier to have one Dublin Agreement than to have a set of bilateral agreements.

Chair: Mr Forfang and Mr Frihagen, thank you very much for your time this morning. We very much appreciate it. Thank you very much for joining us.

Frode Forfang: My pleasure.

Examination of witnesses

Witnesses: Madeline Gleeson and Professor Natalie Klein.

Q408 **Chair:** We are going to move to our second panel now and thank our witnesses very much for joining us from Australia. I would just note for anybody who is following that we will be respecting the two minutes' silence at 11.00 am to mark Remembrance Day, and we will pause the Committee at that point.

I would like to welcome Professor Natalie Klein from the University of New South Wales and Madeline Gleeson from the University of New South Wales. We are very pleased to have both of you here joining us for this morning, and this evening for you. We are really grateful, particularly given the time difference.

Can I ask each of you, just to begin with, to tell us the work that you have done on the Australian policies around turn-back and also the offshore processing of asylum seekers, and just very briefly your overall assessment of that approach, beginning with Professor Klein?

Professor Klein: Thank you, Chair. My main area of research focus is on law of the sea, so my expertise lies with migration by sea. What I have been looking at is the legality of Australia's "turn back the boats" policies in relation to different international laws that apply to that practice, and I have also looked at it with some colleagues in a comparative perspective in relation to the Mediterranean experience.

In relation to that, my key interest has been in trying to see if Australia is conforming with all the applicable international laws in this situation. That includes the UN Convention on the Law of the Sea, the Search and Rescue Convention, the Convention for the Safety of Life at Sea and the Migrant Smuggling Protocol, as well as the Refugee Convention and

human rights treaties. I note that the United Kingdom, I believe, is party to all of those agreements but, unlike Australia, the UK is also a party to the European Convention on Human Rights.

If there was one key point in assessing Australia's practice, there are many different steps that countries can take in terms of policing and trying to take actions against migrant smugglers at sea, but the key issue that you have when you are rescuing people at sea or detaining migrants at sea is that at the moment that you are exercising control over those people, then human rights obligations attach to that. That has probably been the most critical issue for Australia in terms of serious questions about whether Australia is adhering to its human rights obligations, and I think those questions are even more important for the United Kingdom given its membership of the Council of Europe.

Madeline Gleeson: I am a senior research associate at the Kaldor Centre for International Refugee Law, where I direct our project on offshore processing. While I am an international lawyer by practice and by training, my focus since 2012, since we reintroduced this policy, has been on Australia's offshore processing policies as well as the other aspects that come with that of Australian refugee policy.

In terms of a key message, there are many very serious legal and humanitarian concerns with what is called the Australian model for offshore processing and I am very happy to take the Committee to those, but the main point to make is that this does not work. It did not work in Australia. It was introduced with the goal of trying to deter people from seeking asylum in Australia by boat, but in the first 12 months of the policy we saw more people arrive in Australia by boat than at any other time in history or since. In fact, in the first three months of that policy we already had so many people arrive by boat as to outstrip the forecasted capacity of those detention centres, and so already it was abandoned and most of the people had to remain in Australia. We only saw the number of people arriving by boat drop once Operation Sovereign Borders was implemented, which is the boat turn-back policy. That also has very serious legal and humanitarian concerns, which Natalie will speak to, but the main point on offshore processing is that did not deter people from arriving in Australia by boat to seek asylum.

Q409 **Chair:** I just want to clarify when the policy was introduced and how long the numbers stayed high for. Obviously, your numbers have dropped very significantly now. What were the timings?

Madeline Gleeson: We had a first iteration of offshore processing that was introduced in 2001 for a few years. That was wrapped up by 2007, but most of the people had been resettled within a few years. When I am talking about offshore processing now, it is in its second iteration, which began in 2012. It was introduced at that time in response to what had been increases since 2009. Since about 2009 or 2010, the number of people arriving by boat had been increasing and Australia was looking for a way to respond to that. Offshore processing was introduced in August 2012, and the financial year of 2012-13 was when we had a massive

increase in the numbers. Until then the numbers had been 1,000, 6,000, 5,000. In the first year of offshore processing, it was 25,000.

Once Operation Sovereign Borders was introduced and boat turn-backs began, that dropped back down. Effectively, the numbers published are zero. That number is not accurate because we know that people have arrived by boat, been brought to Australia and then flown back to their country of origin. The number is not zero, but it is significantly less than the 25,000 people we saw in the first year of offshore processing.

Chair: You are confident in your assessment that the offshore processing was not responsible and—in terms of the timing of the introductions of other measures—there was not just a lag in terms of people understanding the impacts of policies, or things like that?

Madeline Gleeson: The lag argument could certainly hold in those first few weeks and months—that was the Government's argument at that time, that it would take some time for the communication of this policy to flow through—but not when you look at the fact that for over a year it was still going on, and it was really upon the introduction of boat turn-backs that we saw that drop off.

Other evidence that I might point to to support this claim is that the Australian Government themselves have not sent someone offshore since 2014. This has not been a policy that even Australia has pursued for about six years now. What we have been doing is trying to extricate ourselves, but because there was no exit strategy Australia has been mired in this policy for about seven years now, which is longer than it wanted to be. We have not been sending anyone new offshore. In fact, the vast majority of people who are technically subject to this policy are actually in Australia right now. They have been transferred back here because the conditions offshore were so inadequate that they have had to be returned here for health reasons and other reasons.

Q410 **Chair:** At the point at which Australia stopped taking people there from the Australian shores, were people still being taken there having been intercepted in boats in Australian waters?

Madeline Gleeson: The way the policy has played out in Australia is that people who were either intercepted or rescued at sea were all brought to Australia first and detained in Australia, at which point they went through health, identity and security screening for a certain period of time. At that point, once they had all been brought on to Australian soil and detained, that is when our obligations toward them were engaged. At some point after screening, they would then be put on planes and flown from Australia to either Nauru or Papua New Guinea. The last time that happened was in 2014.

Chair: Thank you. We want to ask some further questions about what happened, how the offshore processing centres have worked and the implications, but we will go next to some of the issues around the turn-back policy and the approach to that.

Q411 **Dame Diana Johnson:** Professor Klein, I was very interested in what you were saying about the turn-back policy. We know the Australian Maritime Powers Act 2013, which was amended in 2017, states that a maritime officer may detain a person on a vessel and take the person to a place outside Australia. This, we understand, has been taken through your court system and I think in your highest court there was a majority decision to uphold that law. You mentioned a whole array of international obligations and conventions. Could you just say something more about where that leaves Australia in terms of its obligations internationally? Could you also say something more about your comment around the Council of Europe and the UK being a signatory to the European Convention on Human Rights, and how that might be different from what is happening in Australia?

Professor Klein: Yes, Australia has the Maritime Powers Act and section 72 of that Act does provide the authority that you mentioned. It does go partway to providing Australia's implementation of the Search and Rescue Convention, in terms of setting out a requirement that when Australian officials take somebody to another location, they are to ensure that that is essentially a place of safety. That is a fundamental component of the search and rescue obligations: that you rescue someone who is in distress and take them to a place of safety.

What counts as a place of safety has been a question of discussion within Australia. The Australian Government have had a more limited approach on that. A number of commentators believe that the place of safety has to incorporate protection of human rights. The particular case that you referred to, which went to the High Court, in the end turned more on particular Executive powers. The judgment did not address the question of whether the legislation was consistent with Australia's international obligations. That aspect was not fully ventilated and resolved before the Australian High Court.

In relation to conformity with the different international obligations, Australian officials do follow the Search and Rescue convention in terms of going to the assistance of a vessel that is in distress and trying to assist the people who are there, and they have been doing that in different ways, we hear, through the turn-back policy. At one point that extended to providing people with their own life rafts in that situation.

The key difficulty that emerges for the Australian practice is that when Australian officials exercise control over the individuals concerned, then, under human rights law, that is the point at which your obligations begin in terms of the human rights law related to prohibition on collective expulsion, ensuring that there is not arbitrary detention, making sure that you are not denying these people an effective remedy, and particularly giving people access to a procedure to determine their refugee status. All of those obligations begin at the point that a state official is exercising control over that other vessel.

That obligation is true for Australia under the International Covenant on Civil and Political Rights, under the Refugee Convention, and under the

Convention Against Torture. The thing is that there are not many ways to hold Australia accountable under those particular treaties, and I think it is fair to say Australia has had a spotted record when it comes to responding to recommendations that have emerged from the committees under the treaties.

I say the situation is different for the United Kingdom because it can be held accountable before the European Convention on Human Rights. As you probably know, there was a case against Italy about the fact that it had been involved in rescuing people on a particular vessel. They held those people on that vessel for about 10 hours and they returned them to Libya, and Italy was found to be in violation of various provisions under the European Convention on Human Rights as a result of those particular actions.

The difference that I was trying to make between Australia and the UK is that Australia is not part of a regional human rights mechanism through which it is held to account. Potentially, complaints could be made through to the human rights committees, but that would entail exhausting domestic remedies and so far that whole process has not gone through the Australian system for those complaints to have emerged at the international level.

Q412 **Dame Diana Johnson:** Obviously, on a boat with an official making a decision, there is no opportunity for individuals to have any access to advice or legal counsel about what their rights are. I also noticed in our briefing that the Australian Government seem to be very reluctant to provide data and information about numbers. That is very surprising because obviously we hold Australia in high regard. Could you say something about how data are available to you to see what is actually going on?

Professor Klein: Yes. Shortly after Operation Sovereign Borders began, we went from daily briefings to monthly briefings, where the amount of information being released about Australia's operations on water was significantly restricted on the basis of security. That has been the ongoing view of the Government: that they do not want to discuss on-water operations for security reasons.

We do have some information about what has happened at sea, based on accounts of people who were returned to Indonesia. This is how we learned more about the fact that migrants and asylum seekers were placed on lifeboats provided by Australian authorities and sent back to Indonesia. We also have some statistics that have been gathered through different parliamentary committees on the numbers that have been drawn from different sources. We do have some information available about that. I have dug that out today and found that almost 900 people have been returned from 38 ventures since 2013, based on the information that has been made available so far.

Q413 **Tim Loughton:** Can I turn to the subject of international maritime law? I absolutely recognise the difference between Australia and the ECHR

provisions that we are subject to in the UK, but there has been dispute between the UK and France as to whether they can use international maritime law to intercept the boats coming across the Channel, which is the big issue of contention. I gather that under Article 17 of the UN Convention on the Law of the Sea, "Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea." That is the quote. Under what conditions is a vessel deemed to be "not innocent" for the Australian naval patrol vessels to intercept them?

Professor Klein: You will see also, under Article 19 of the UN Convention on the Law of the Sea, it goes on to list a range of different acts that are considered to be prejudicial to the peace, good order and security of the coastal state, and included in that list of acts is the unloading of persons in violation of the immigration laws. If a vessel comes through and it is unloading people in violation of immigration laws, then that vessel is no longer exercising a right of innocent passage. Under Article 25 of the UN Convention on the Law of the Sea, the coastal state can then take what is said in the Convention as "necessary steps" to prevent the passage of a vessel that is not innocent. In addition, depending on the laws that are in place within a particular country, they can exercise criminal jurisdiction over particular acts that occur within the territorial sea as well.

The main thing that you need to bear in mind in terms of the right of innocent passage is that if a vessel is in distress, then that is an acceptable basis for a vessel to enter the territorial sea and, indeed, to enter into the port of a state, even if that state is attempting to close its port to certain vessels or to particular countries. An exception applies in that situation if the vessel is in distress, and it is for those on the vessel to determine whether it is in distress or not and to make that case as the justification for entering into port when it might not have otherwise been allowed to do so.

Q414 **Tim Loughton:** I understand. The problem we have in the Channel is that only when dinghies generally are in distress and at risk of sinking will they then allow, say, the French authorities to take them aboard and then return them to France. You presumably would regard those dinghies that are coming across the Channel from France to England as "not innocent" vessels and, therefore, subject to prosecution of whoever is facilitating what potentially could be a crime: landing people in the UK—as opposed to Australia—who have no right to be there automatically. Is that your definition?

Professor Klein: Yes, that is correct in terms of the exercise of authority, because a state has sovereignty over its territorial sea. It can take those steps to police what is happening in its water. What you also have to remember is that the layer over all of this is that because a state has authority over its territorial sea, its human rights obligations also apply. While it can take the steps necessary for policing against people smuggling, at the same time it also has to respect the human rights of

the people who are on board those vessels and who are not the smugglers.

Q415 **Tim Loughton:** Under what circumstances do the human rights of those people being trafficked trump the vessel's innocence being compromised by criminal activity?

Professor Klein: I am not sure that I would talk about it in terms of one trumping the other, but rather the vessel itself loses its right of innocent passage because it is in the process of trying to unload people unlawfully for migration purposes. At the point when you move to arrest a vessel or take other steps against it, if the people on those vessels are claiming asylum, they have a right to have their claim to asylum assessed.

Q416 **Tim Loughton:** Where does their right to have it assessed occur? Is it at the point of departure or at the point of intended destination?

Professor Klein: If they were coming from France, they still had that right at the point that they were in France, as I understand your question. I hope I am following it correctly.

There has been an ongoing debate about whether the Refugee Convention applies in maritime areas. This is a position that the United States has argued against, but the weight of authority has gone against the United States' position now, in terms of the Refugee Convention having application at sea at the point that a Government are exercising authority over a particular vessel and those on board.

Q417 **Tim Loughton:** My understanding of the 1951 Refugee Convention is that migrants seeking asylum are only deemed to be lawfully doing that if they are coming directly from a dangerous country. Clearly, that is not the case with those coming from France across to the UK. You see, the problem we have is that the French authorities seem to be challenging whether they have the power to intercept or detain those migrant boats that are in French territorial waters setting out for the UK. They claim that they do not have the power to do that. What you have said suggests that they have. They also claim the fallback of the Convention on Human Rights, but there is a grey area as to where that applies if you are mid-Channel, effectively.

Just to get it clear, my understanding is that if you were the French, you would say that they do have the power under the Conventions that we have just discussed to intercept and detain those migrants. It is then less clear what the rights of those migrants are in being allowed to carry on with their journey or resist being taken back to where they started under the Convention on Human Rights, and that they would not have an automatic right under the Refugee Convention of 1951 to enter the UK legally because they are not coming from a dangerous country. Is that a fair surmise of what you have said?

Professor Klein: Yes, on the whole, I think, because in that situation I think you are correct that France does have that authority to exercise and, indeed, it also has an obligation to respect the human rights of the people on board. In that particular context, France also has its

responsibilities and should be undertaking the assessments and providing protection in that context. I do not know whether Madeline wants to say more about the point at which the Refugee Convention applies in arrival to a particular state.

Q418 **Tim Loughton:** Yes. Sorry, Ms Gleeson, I did not mean to monopolise this with the professor. Do you concur with those thoughts as well?

Madeline Gleeson: Would you mind rephrasing for me exactly what the question is that you would like advice on?

Tim Loughton: There are three points. First, my understanding is, if we apply the professor's interpretation of the UN Convention on the Law of the Sea, that France does have the right to intercept and detain people caught in French territorial waters heading for the UK. That is effectively what Australia has done. Secondly, there is this rather more grey area of what rights those migrants have under the European Convention on Human Rights. Thirdly, there seems to be a grey area of whether they can have those rights applied back on French territory, having set out on a boat, if they are intercepted mid-Channel in French territorial waters. Would you agree with those three scenarios?

Madeline Gleeson: Understood. I would defer to the experts in the law of the sea and the experts in European law on most of those points. I have only two comments to add.

The first was that I may have misunderstood, but I think when you were describing the proposed French conduct, you compared that to what Australia is doing. In fact, it is the opposite. Australia is not preventing people from leaving our waters; we are preventing them from entering, or, once they have entered, we are then returning them. It is not directly comparable in that sense.

Then, in terms of referencing the Refugee Convention, I am not sure if it was Article 31 that you were referring to, which was that contracting states will not impose penalties for having entered illegally on refugees who came directly from a territory where their life is threatened. I am not sure if I heard that language about coming directly from the place where your life is threatened. If so, Article 31 says that the UK, say, in that instance, being the country that would be receiving them, cannot penalise them simply on account of them having entered unlawfully as per UK migration law. I am not sure if that is on point with what you are really asking, which is about the conduct of the French in terms of the vessels. That is possibly a different point, on which I will defer to the experts.

Q419 **Tim Loughton:** I may be wrong here, but my understanding is that it is illegal and you are committing an offence if you try to enter the UK unlawfully, if you have no right to enter the UK and you are doing it covertly, unless you are an asylum seeker or genuine refugee coming directly from a dangerous country. Clearly, we do not have that issue because we do not have people coming by boat, for example, directly from Syria or from other dangerous countries. They come from other safe

EU countries. Therefore, anybody coming across in a boat is potentially committing an unlawful act, as well as the people who are facilitating that, because they are not coming directly from a dangerous country.

Professor Klein: I think that is mostly correct, though it would also be worth bearing in mind that in the Migrant Smuggling Protocol, to which the United Kingdom is also a party, there are strong provisions around the fact that the people who are being smuggled are to be treated differently to those who are undertaking the smuggling operations, so that even if they have committed a migration offence, that does not, in and of itself, deprive them of rights that they would otherwise have under international human rights law.

Q420 **Adam Holloway:** You may not be the correct people to ask, but my understanding is that under French law you are generally required to assist a person in danger, and to operate a boat above 5 horsepower in France you require something called a Carte Mer. Is it not the case that the French authorities should indeed pick these people up because they are operating boats illegally?

Professor Klein: I definitely cannot speak to French law on that. I would have to defer to other witnesses who are more familiar with the French law.

Chair: Do not worry, we are going to be pursuing that at a future evidence session.

Q421 **Ms Diane Abbott:** I wanted to return to the subject of offshore processing of asylum seekers. First of all I wanted to establish something with Ms Gleeson. You said that most of the people are not offshore, but they are in Australia. How many are still in Papua New Guinea and Nauru?

Madeline Gleeson: Less than 150 in each place.

Q422 **Ms Diane Abbott:** Is Papua New Guinea being paid to facilitate this or has it agreed to do it of its own free will?

Madeline Gleeson: It is incredibly difficult to get clear, accurate and specific answers as to the money and the funding of this entire scheme, and it has been from the beginning. We are able to get certain figures about what offshore processing has cost Australia in terms of the direct management of the centres and so on. In terms of what parallel aid agreements are in place with Nauru and Papua New Guinea, it is a lot harder to speak to the specifics of that, but suffice to say that Australia has to offer something to these countries for them to agree to what has also been a very difficult policy for them to implement and for them to host these centres in their countries.

The specifics of exactly what that aid is, and whether there are conditions tied to it or if it is more of an agreement, are harder to pin down. That is partly about the fact that in the Pacific, Australia supports many of our Pacific neighbours, so it can be hard to fully disentangle the offshore

processing aspect from the broader relationship that Australia has with Papua New Guinea and Nauru but also other Pacific island nations.

Q423 **Ms Diane Abbott:** It is interesting to know that there are only 150 in Nauru and another 150 in Papua New Guinea. As you will know, back in 2014 the United Nations Committee Against Torture expressed its concern about the policy of offshore processing and in particular expressed its concern about what it described as, "the harsh conditions prevailing at the centres, including mandatory detention, including for children; overcrowding; inadequate health care; and even allegations of sexual abuse and ill-treatment." Is that still the case? Has there been any improvement in conditions?

Madeline Gleeson: There has certainly been no improvement. I believe what you cited was from about 2014. To give a bit of an indication, in 2016 UNHCR medical experts found that the cumulative rates of depression, anxiety and PTSD among the refugees in both places were the highest recorded in the medical literature to date, with over 80% in both locations. That was in 2016. Still the policy continued. Then in 2018, Médecins Sans Frontières said that the mental suffering on Nauru was among the worst they had seen, including in its projects that provide care for victims of torture. Obviously, MSF works around the world in some very difficult settings, and the fact that these centres were up there as the highest rates of mental suffering they had seen I think indicates the level of harm that continued to exist for those people.

As I said, the vast majority of the people are now back in Australia. About 1,200 people have been transferred back to Australia. For the vast majority of them, the cause for the transfer back to Australia was physical and mental health suffering offshore. It finally reached the stage where there was no choice but to bring them back to Australia after all, although for many, if we think those conditions were already identified in 2014—and, in fact, earlier, in 2012—by the time they were brought back to Australia, much additional harm was done that could have been avoided, and for some that harm may be irreparable.

Q424 **Ms Diane Abbott:** Thank you for that information about the level of harm. If there is anything that you could write to the Committee about in relation to the two reports that you have referenced, that would be helpful.

As you are probably aware, here in the UK the media was reporting that our Home Secretary, Priti Patel, was considering looking at the Australian system of offshore processing. We wrote to her about this, and she wrote back and gave quite a bland reply, "Government officials have been looking at a whole host of measures other countries deploy to inform a plan for the UK and bring innovations into our system". As she is looking at a whole host of measures, what would you say to our Home Secretary about the Australian experience of offshore processing of asylum seekers?

Madeline Gleeson: It is deeply concerning that any country would consider trying to replicate what Australia has done. I made the point

earlier that it was not effective in the policy goal that it was seeking to achieve, and on top of that, the legal and humanitarian concerns should be cause for great pause, certainly for any state that is a signatory to international conventions, but more than that, any state that considers itself to be a democratic society based on respect for common decency.

In reflecting on those statements, which I also read, I thought about a few of the structural aspects of offshore processing that the UK would need to be willing to commit to if they wished to pursue this model, and the first is an unwavering commitment to deterrence as your core objective. Australia is admittedly in a different position from the UK geographically, but that means that Australia had to be willing to subject people to worse conditions than those they were fleeing. If Australia wanted to deter people from coming by boat to seek asylum, we had to be promising them in Australia that they would meet something worse than what they were currently in.

You have to be willing to deport and detain children, pregnant women, the elderly, disabled, victims of trafficking; there can be no exceptions, because if vulnerable people are exempt from this policy then its core objective of deterrence will fall down. You will need to have no national or regional human rights framework whatsoever, no national or regional court that could adjudicate claims based on violations of human rights, as we do not have in Australia.

You would need to introduce laws and policies that impose strict secrecy requirements. For example, in Australia, if somebody working in one of these offshore centres were to talk publicly about what was going on in that centre, they would be subject to two years' imprisonment for having spoken about that. That is not speaking about classified national security information; that is talking about the common comings and goings of the day. They could be subject to two years in prison. It also originally covered doctors who might be raising concerns that they were seeing with patients there.

You would need a place that could accommodate an unlimited number of arrivals, otherwise you are going to get the problem that we did 12 weeks in that if people come in too large a number, they are going to outstrip your capacity.

Finally, you would need to have a lot of money. A conservative estimate is that this costs Australia roughly $1 billion per year. To bring us back to those numbers at the beginning, for the financial year 2020-21, it is estimated to be above $1 billion. That is for 300 people. I guess the UK would need to calculate how many people this is going to be for and what the taxpayer cost will end up being for a policy that still might not work.

Q425 **Ms Diane Abbott:** Sorry to interrupt you. Why is it such an expensive policy?

Madeline Gleeson: It is incredibly difficult and expensive to, at the front end, establish these centres in remote places. We have then contracted

private companies to manage the centres and provide all of the services. Holding people in detention is always far more expensive than providing them a residential alternative. Then there are other costs.

The big issue for Australia is that we have never had an exit strategy. There has never been an answer for what will happen to people once they are found to be a refugee. There was an aborted attempt to enter into a resettlement arrangement with Cambodia whereby Cambodia was going to be paid by Australia to accept people who had been found to be refugees on Nauru. That was earmarked in the budget at $55 million and only seven people went, of whom at least five then left. That is up to $55 million for two people to go to Cambodia. The costs blow out in a policy like this.

Ms Diane Abbott: That is very useful. No doubt the Home Secretary will be reading our report and your remarks.

Q426 **Stuart C McDonald:** Just to follow up on Diane Abbott's questions there about the offshoring policy, could I just seek some clarity about what happened to people who were on these islands but refused asylum, but at the same time could not be returned to their countries of origin, perhaps because the Governments were not taking them back? Secondly, given the conditions on these islands, to what extent would folk voluntarily, in a very loose sense of the word, then choose to be returned home, and what steps were taken, for example, to make sure that they were safe if they were being returned to Afghanistan or other countries like that?

Madeline Gleeson: That is a really important question. It has been a problem from the beginning. If I can go back to 2012, when people were first sent offshore at that time the understanding was that they would be processed under the laws of Nauru and Papua New Guinea, but neither country had laws in place for refugee status determination, nor did they have any capacity to do RSD. People were sent to these camps with no answer of what the process would be, when it would start or how long it would take. As I said, there was no answer to what would happen if they were found to be a refugee.

For many people there was no end in sight, and for those who had come without their families they were facing the prospect of indefinite detention in incredibly difficult situations physically, separated from their family. Many people chose to return back to the places they had fled, despite, I would argue, having a high likelihood of success in a refugee claim, simply because the entire environment was set up to deprive people of hope that there would ever be a solution. That has been a fundamental feature of offshore processing from the beginning.

Quite often, when there were flashpoints or tension points in the policy, people would come and seek clarity of what was happening to their case or what the future was going to hold, and most commonly the answer would be, "We have no answer for you on that but if you would like to return home, please go and speak to these people over here and they will facilitate it for you". That includes return to Syria. In the peak time when

nobody was returning anyone to Syria, Syrians were being encouraged to return home and some Syrians did.

Q427 **Stuart C McDonald:** Do we know very much about what happened to people who voluntarily returned? I take it that it was just see them off and then that is it—no more interest?

Madeline Gleeson: Very little is known. We focus on boat turn-backs, and that is obviously the people who are at sea who are either pushed back to Indonesia or potentially handed over at sea to the authorities of another country, such as Sri Lanka. There are also people who are intercepted at sea, brought to Australia and then flown back to, say, Vietnam, perhaps, or China. Similarly, we find it very difficult to follow what has happened to any of those people once they have been returned. Policies that involve forcibly returning people to places they have fled, and places where they face harm, with no adequate follow-up of what has happened to them, are not unique to the offshore processing component of Australian policy.

Q428 **Stuart C McDonald:** If people arrive now in Australia by boat, as I understand it, very different procedures and policies apply to them as compared with, say, an asylum seeker who has flown in on a different type of visa and then subsequently makes an asylum claim. Am I right in understanding that?

Madeline Gleeson: Absolutely right.

Stuart C McDonald: Could you just describe some of the differences? I think there is some sort of delay before you can apply, and there are different rights in terms of the length of residence that you will get, access to legal assistance and family reunion rights, for example.

Madeline Gleeson: Certainly. There are many differences that are essentially based on trying to penalise those who arrive by boat, based on their mode of arrival. Family reunion is the big one. Here it is difficult to say with exact precision because there are so many cohorts of people who have arrived, and our Migration Act has been amended so many times that to work out exactly what policy applies to which person can be a very complicated task but, in general, if you arrive by boat you are unlikely ever to be reunited with your family. That is either because you are outright prohibited from having family reunion, or it is because your application for family reunion will go to the bottom of the priority list, and with cases always coming to the top, that means they are never going to get to your family. For one reason or another, the practical effect is no family reunion.

The other critical issue we have at the moment is that if you arrive by boat, under the current policy you will not stay in Australia; you will be returned, but if you arrived by boat previously then you are subject only to temporary protection visas, potentially forever, and you have no pathway at any point to permanent residency or citizenship. This is a policy that Australia had previously under John Howard as part of the Howard-era package of policies, which also was the first time we had

offshore processing. There have been extensive reports on the damage it does to people and to communities to have large groups of people on rolling temporary visas rather than ever having a pathway to permanent residency. That is just another example. The temporary visas and the lack of family reunion are probably the two biggest differences that cause the greatest impact for people.

Q429 **Stuart C McDonald:** Are there legal questions over whether or not that is really consistent with the Refugee Convention? I do not know what other international laws might apply. Has that been challenged?

Madeline Gleeson: There are absolutely questions. The answer always comes back to the fact that in Australia we have absolutely no Bill of Rights or charter of rights. Our courts cannot hear these claims to the extent that they go to a violation of our international obligations. Any attempts to get cases up to the courts need to try through other routes, but they are not successful because they cannot bring a direct claim. That is a very real issue that we face.

Q430 **Stuart C McDonald:** Do the Government try to say that this has had a deterrent effect and that that justifies it?

Madeline Gleeson: They do. The second part of my answer to your previous question, which I should mention, is that our laws have been amended to explicitly state in various parts that the powers they grant are valid—validly executed, validly acted upon—even if they violate Australia's international obligations. Besides the fact that we do not have the legal framework or the courts to challenge violations of human rights, we have legislation that explicitly states that conduct by Australian officers is valid even if it is contrary to our international obligations. That is another concerning aspect to it.

In terms of the deterrent effect, yes, that is the argument. The argument is, "In 2012 to 2013, we had 25,000 people coming on boats, and now we have zero". As Professor Klein and I have mentioned, the number is not zero, but it is still less than 25,000. So long as they report it as zero, the justification is, "The Australian model worked".

Stuart C McDonald: Do you attribute the fall in numbers to that? I think earlier you were saying it was really the policy around pushbacks that had made the biggest difference.

Chair: I am just going to interrupt you before you answer that question. We are coming up to the two-minute silence, and the parliamentary bell will go in a minute for us to mark it. Ms Gleeson, could I ask you to hold that thought there and respond to Stuart's question after the two-minute silence?

Madeline Gleeson: Absolutely.

The Committee observed a two-minute silence.

On resuming—

Chair: We return to our evidence session. Thank you to everyone for observing the remembrance, and for the time we spent to think of those who gave their lives to keep us safe. To return to the questions that we were asking, we had had Stuart McDonald's question. Madeline Gleeson, do you need the question again or are you ready to answer?

Madeline Gleeson: That is fine, I can answer. The question was, as I understand it, whether the deterrence effect can be put down to the boat turn-backs alone or whether it is all of these policies as well.

Q431 **Stuart C McDonald:** I just wanted to know if there is anything to back that up. On one level, we can have this discussion on the point of principle about whether they are right to do it, and whether it is legally justifiable or morally justifiable. I just want to know: is what the Australian Government are saying about it having a deterrent effect backed up by evidence? Can it be attacked in a different way?

Madeline Gleeson: I understand that the Australian Government were originally going to appear on this panel, and it is unfortunate that they have not, but perhaps I can start by giving their response to that question and then critique it afterwards.

The Australian Government's position on this point is that you need every one of these policies working together in order to create the deterrent effect. You cannot be seen to show any humanity or any chink in the armour, as they might put it, on any of these policies. Family reunion, detention offshore, boat turn-backs—all of it is required to deter people from coming by boat.

I do not think there is evidence to support that claim. I do not think there is any evidence to support the fact that putting someone in detention for a few years is going to have a deterrent effect, because we saw when we had that policy alone that it did not work.

In terms of temporary protection visas and so on, when we look at the reality of the people who are coming to Australia, the vast majority of people who come to Australia by boat are found to be refugees and they are coming either directly from a place where they fear harm or from a place like Indonesia, where they do not necessarily fear harm but they have no prospect of protection; therefore, they have to move on to somewhere else. People have no option where they are, and I do not think there is any evidence to support the claim that if you come to Australia and you are subjected to difficult policies for five years or even 10 years, people would not still take that chance, thinking that in time there might be a policy change or an opportunity might present itself. At least you are in Australia; at least you are here.

I think the only thing that is actually serving as a deterrent is the fact that there is no point getting on a boat because you will be turned back around or you will be flown back. There is no evidence to prove one bit or

another because they have never been properly tested one by one. All we can say is that offshore processing did not do it.

Q432 **Stuart C McDonald:** I have two final questions. On the one hand, that is a critique of the justification about deterrence, but stripping asylum seekers of those rights must have a pretty horrible impact on their lives in the meantime. Has that been looked into and documented?

Madeline Gleeson: It has. Certainly, the first time around that we had temporary protection visas, there were comprehensive studies of, as I said, the damage that it does—not just to the people who are on those visas, I should say, but also to the communities they are in. If you come at this issue from a community cohesion perspective, if you are looking at having Australian societies that work well together and where all members of those societies participate equally and buy into the social contract of their community, there are strong advantages to having people who are permanently here with rights, engaging in Australian society and becoming Australian citizens. There is far more advantage to that than having people in indefinite temporary, precarious situations.

Q433 **Stuart C McDonald:** Finally, could I just take you back to the earlier discussion about Article 31 of the Refugee Convention and how it would apply to people in the Channel? My understanding is that it would only be if the people crossing the Channel had been granted refugee status and settled in a country in between times that the use of the term "illegal" would apply to them, but that if somebody had not been granted asylum or recognised as a refugee between the country they have escaped from and the United Kingdom, the use of the term "illegal" for that crossing would not apply at all. Is that right?

Madeline Gleeson: That would be my understanding, yes.

Q434 **Dehenna Davison:** One of my key questions is about public opinion, both of migration as an issue in itself but also of the Australian Government's handling of migration, particularly since 2012 or 2013. If you could you give a steer on how public opinion has been reflected, that would be appreciated.

Madeline Gleeson: Public opinion generally, I will say, was either neutral or supportive of these policies. There is a strong preoccupation in Australia with people arriving by boat and perhaps a sense of the uncontrolled border and what might happen if we do not regulate the number of people who are coming by boat and the way in which people come to this country. That is a preoccupation that predates any of these policies. It is something that has been long in the Australian consciousness. So, when a Government come in and play up those fears and then offer what seems to be a solution, that is certainly something that is generally politically quite popular in public opinion.

That said, I mentioned earlier the secrecy that has been required around this policy, and I do think that playing to those fears only gets you so far. Part of the reason it has been able to get so far in Australia is because the detention centres that we have had in Australian territory traditionally

are in quite remote areas where people do not really see what is going on. Christmas Island, which is Australian territory in the middle of the ocean, is one of the main areas where we have traditionally kept asylum seekers. That is completely inaccessible to the average Australian person.

Then, obviously, Nauru and PNG are remote. There was a long time when, with our offshore processing policy, there was no access to those centres. Media could not get in. Even independent observers that internationally you would expect to be able to access those camps faced difficulty getting in. There was intimidation. There were threats. We then had the introduction of that law that imposed two years' penalty on anyone who spoke up, so there was a lot of pressure not to disclose what was really going on in those camps.

Since they started to open up and information started to get out, there have been small shifts in public opinion. I won't say it is widespread, but there are, particularly around certain issues. Children was the big one, because the impact of these policies on children has been devastating, and I think that "devastating" is an understatement. Certainly, I would say if the UK is seriously considering this policy that it should seek evidence from the child psychiatrists who have worked with the children on Nauru who have resignation syndrome, to get a sense of what the impact of this policy is. Once the impact on children started to come to light, there was a particular shift around that and ultimately that translated into the Government being forced to remove all children from Nauru.

Similarly, there were cases of sexual abuse and rape of women in Nauru. A certain number of them fell pregnant as a result of those rapes. There were then some highly publicised cases where they had to be flown to Australia to terminate those pregnancies. These types of issues captured sentiment and attention and we got small bits of change around that, so there was some scope for change once the information started to come out, but as a general rule Australians remain very preoccupied with people coming by boat.

Q435 **Dehenna Davison:** Thank you. Professor Klein, would you agree with that analysis?

Professor Klein: Yes, I would. I would not have anything to add to what Ms Gleeson has said.

Q436 **Dehenna Davison:** Thank you. A final question from me. If you could speak to the UK Government, who are certainly looking into policies like "turn back the boat" and seeing if the UK could introduce its own version, what advice would you offer, Professor Klein?

Professor Klein: My advice would be two-fold. There is some progress that could be made around improving policing operations and there is scope for change in that regard. Obviously, a key aspect would be enhancing co-operation with France, particularly at the point of the Channel where the territorial seas overlap in that regard. There should be

a way to co-ordinate policing efforts in a way that would still respect the rights of those who are on those particular ships.

I am aware that there are certainly improved technologies. Some of those are being deployed in the Channel as well to try to detect boats that are coming in, and to be able to determine from the movement of the vessel whether they are in distress or not, and to be able to render assistance more promptly than has perhaps been the case in the past.

The other key point is to always bear in mind that there is a very strong humanitarian dimension and that there are, as we say in the law of the sea, elementary considerations of humanity that apply to people who are at sea, particularly those who are in need of assistance. That assistance needs to be afforded. When you are rescuing people who are in distress, they need to be taken to a place of safety and they need to have their rights respected in that, so it is a matter of trying to find the balance.

A lot of the approaches around dealing with migration by sea are very much focused only on the policing aspects and on concerns about security, rather than also taking into account the very real humanitarian aspects that are inevitably involved there, too.

Q437 **Dehenna Davison:** Ms Gleeson, what about yourself? What advice would you offer to the Government?

Madeline Gleeson: It is an excellent question. Obviously, the challenges of forced migration are very real and many countries around the world are grappling with them. It is a good thing to look at what other countries are doing and see what lessons there might be that could apply in your own country.

I think there are two lessons to take from the Australian context: the first is that we unfortunately fell into a trap where there was this dichotomy or divide between so-called principle and pragmatism. You had the people advocating for human rights and humanitarian issues and the law on one side, and then you had the pragmatic people who realised this was a genuine problem and were just getting on with fixing it. You had to fall into one or the other.

That is a very dangerous division to allow to take root because what it gets to is, "Well, we are going to do this deterrent policy that has terrible consequences" or "We are going in that direction", and from the outset it gives up any hope of finding an option that is practical and addresses the very real challenges that your country is facing, but in a way that respects international and UK law and human rights. Therefore, do not fall into the trap of feeling like it has to be one or the other, because there are routes forward. It just takes a bit of time to find them.

The second lesson is something that we strove for in 2012, but we lost it. We went off course. That was the idea of incentive and disincentive. Australia went too far on the track of deterring irregular migration and not enough on looking at the other side of that coin, which is about creating safe, lawful, accessible pathways to protection for those who are

in need of it or for children who are joining family members, and so on. Often, I think where the balance gets thrown out is—a similar point to Natalie's—there is too much emphasis on how to stop the irregular migration and not enough on looking at what the issue is, looking realistically at what the UK could do to address it and then creating pathways so that people do not need to get on boats because there is another option open to them.

Q438 **Laura Farris:** Can I pick up on your last answer about the tension that you saw between human rights and pragmatism, and can I first clarify one of your earlier answers? I think I misunderstood or misheard you. You were talking about the refugees who would be relocated to one of the various designated locations, and I think you said that they would then be processed by the asylum laws that were applicable to that jurisdiction. Is that correct?

Madeline Gleeson: That is correct. That is a difference. In 2001 it was Australian officers and a few UNHCR officers doing it effectively under Australian procedures, but the second time around, from 2012, the idea was that Nauru and Papua New Guinea should each create their own laws and their own officers that would do it themselves.

Laura Farris: Picking up on that, we have a web of human rights laws that are applicable in this country. Could you see a scenario where the United Kingdom, in principle, found an offshore location, created some sort of detention facility that was compliant with the Article 3 obligations under the European Convention—in our case you could even have, for example, something like the UN special rapporteur, who would observe that and verify that conditions were adequate—and then, if you make an asylum claim in the United Kingdom in accordance with domestic laws, a timeframe in principle in which everybody would have their first application heard? Would a framework like that alleviate some of the very serious problems that you have identified with this process?

What I am suggesting is a detention centre that is, in effect, of the same quality as a domestic detention centre would be, and clear and well-published asylum laws. You would make your application in accordance with those laws and obviously in accordance with the Human Rights Act, which would be applicable. There would be a timeframe in which you would be guaranteed to have a decision and, I guess, a right of appeal as well. Again, in principle you could have the same timeframe for that to be determined. At that point, the asylum seekers would know whether or not they had had their claim accepted and they would either be admitted to the United Kingdom and on the pathway to citizenship, or they would not be. Do you think that could work in principle?

Madeline Gleeson: That is an excellent question. It is certainly something that I have spent many nights thinking about since 2012. If we could go back to August 2012 and do things differently, could we have done it better? Could this policy have been done in a way that wasn't so detrimental?

The issue in Australia—there might not be the same issue in the UK, so this is where there could be a difference—as I have said, was that the main purpose of doing this offshore was to punish the people who had come that way and to instil fear into those who might come that way in the future. Deterrence was our main policy. We had physical capacity at all times . The most we are talking about at any one time was, say, 2,000 people, or perhaps 3,000 people. At all times, we had physical capacity to host those people in Australia and process them here. It was never a matter of physical capacity; it was deterrence.

I cannot see how what you are proposing there would serve the deterrent effect, because they would come and they would have a fair and efficient process. If found to be refugees, they would have access to protection, and it sounds like there are guarantees of law. The conditions of detention, I presume, would be time-bound, not punitive. In that case, I cannot see how it would serve a deterrent effect so, unless there is some other reason for doing it offshore, doing so just runs you into all the expense, the complication and the difficulty of doing it in a remote location.

The big question mark I would have is where that location is, because the remoteness of our offshore centres contributed to deaths. When people got sick and could not get to help in time, deaths resulted. It would have to be somewhere that had sufficient healthcare and all of those things. If the conditions they were facing were identical to what they would be in central London, I guess it would be for the UK to decide whether it was worth all the expense of putting them elsewhere.

Q439 **Laura Farris:** Just to come back a bit—and I do not know that this is the Home Office's thinking—it could be the case that the basic fact that you do not land on UK soil means you are never part of domestic arrangements. This would require some kind of carve-out, but perhaps it could be a case of: you are either admitted because you cross the threshold of our asylum laws, and you are treated as an asylum seeker and properly and lawfully admitted to the United Kingdom; or, if you are not, we have no responsibility for you and it is essentially a process of return. In principle, do you think that could have a deterrent effect? I suppose the idea is that there is no guarantee. All you are guaranteed is the right to make an asylum claim. Let me put the question a different way: none of the rights that would come from having landed on UK soil, and there are rights—

Madeline Gleeson: It did not have a deterrent effect in Australia for the people that were subject to that policy in 2012. When they compared it to their alternative, whether they were in Nauru or Australia, if the end result was that they would be in Australia within a few years and they would be subject to a fair and efficient process, it did not deter them. It did not even deter them when they did not have a clear and efficient process, when they did not have a timeline and when they were in terrible conditions, because of the places they were fleeing from.

I guess that would require an evidence-based analysis of who it is that would be subject to this policy and what their motivations are for entering the UK in this manner. Looking at those people and their motivations is how you would get a sense of whether this would happen. If that is a route that you would like to pursue, the UNHCR has published quite extensive guidance on this. It has said that, as a matter of basic principle, signatories to the Refugee Convention should process people within their own territories. However, if they are to enter into arrangements where they transfer them elsewhere, there are a series of requirements that they set out, which is basically how you could do it in a way that is compliant with international law.

Some of those are what you have mentioned: access to fair and efficient procedures, and being treated in accordance with basic human rights standards. There would also have to be access to durable solutions and protection against refoulement. At least according to UNHCR guidance, if your question is one of principle, there is, in principle, a way that you could process someone in territory that is not your own in accordance with international law. It would just be a matter of whether that serves the deterrent effect, if that is your goal.

Q440 **Laura Farris:** That brings me on to my final question. With your background and experience, and having considered the Australia model in the depth that you have, if you were designing a system that you think would both be consistent with pragmatism and human rights and have a deterrent effect, what recommendations could you make to the UK Government?

Madeline Gleeson: That is an extraordinarily difficult question to answer in a short time, because these things are so complex. I would first be gathering data about the people who are coming to your country: who they are, what their motivations are, where they are coming from and whether they have family already in the UK.

Q441 **Laura Farris:** Assuming that data had been gathered already, it would be interesting to see if there were even one or two principles that you think have not been sufficiently explored in Australia, for example.

Madeline Gleeson: In Australia, I can say that we have not sufficiently explored the safe and legal pathways to protection. That is the biggest one. We are a resettlement country. We do resettle people, but one of the smallest areas that we resettle from is Asia. So, while there is obviously need across the entire world, I think that there could be a more targeted use of our resettlement programme. There can be a range of ways in which you identify people in need of protection before they need to go on long journeys and before they need to get on a boat. Identify those people, identify their protection needs, and then give them a pathway that is different.

There is a body of work developing in Australia looking at visa pathways and other opportunities to use migration pathways, student visas, family reunion, community sponsorship, and Canada has had some success in

that as well. There are many other ways that people can access protection, not just through traditional channels. If half of the effort that Australia had spent on offshore processing was put into looking at those and working out whether they work and strategising in that way, that would relieve some of the pressure points where there are larger numbers of people in need of protection in our region. Then it would be building up the capacity of other countries in our region to also increase their ability to support asylum seekers there.

Again, Australia is in a very different position because when most people flee their country and travel to Australia, they do not hit a Refugee Convention country on the way. What we are dealing with there geopolitically is that there is nowhere along the way where they could stop and get protection. It is very different from the UK.

Chair: Professor Klein?

Professor Klein: I do not have anything to add to Madeline's answer.

Q442 **Chair:** Can I just ask a few quick follow-up questions? Stuart McDonald asked earlier if there was any evidence of a deterrent impact from the overall policy, in particular the processing centres and so on. We heard Madeline Gleeson's response. Professor Klein, is there any evidence of the turn-back policy and the boat interventions policy having any kind of deterrent impact?

Professor Klein: We do know that the numbers have decreased over the years. In the statistics that have been released from the parliamentary office that has assembled that, there have been a smaller number of people arriving by boat. As Madeline has talked about, there have been stories that have come out. The fact that people knew that they would be turned back and that they could not stay did have some deterrent effect in that regard. It is not my particular area of expertise, but we know that the number of people who are now arriving by air—Covid aside—has been increasing significantly in the last couple of years. People are finding alternative ways, given Operation Sovereign Borders and the consequences that has had for transport by boat.

Q443 **Chair:** One of the questions I wanted to ask both of you more widely is about the reasons behind the increase that you had, initially up until 2013, in people arriving by boat and then the reduction after that. There is obviously a range of different factors involved. We have been hearing some evidence in the Channel that the reduction in the number of people trying to arrive by lorry, for example, has an impact on the approach that the different smuggler gangs were using. I am interested in what you think the reasons are both for the increase up until 2013 and then the reduction after 2013 in the number of people arriving by boat. I will start with Professor Klein.

Professor Klein: Operation Sovereign Borders began in late 2013, in December, so it was the point when that operation began. As Madeline has mentioned, the offshore processing had begun prior to that, but the numbers of boat arrivals increased. It was when Operation Sovereign

Borders began that we started seeing the decrease. What we saw was a mix of operations being undertaken. We do not have all the full details. We know that in some instances it was just vessels being turned back. They were being prevented one way or another from continuing on their journeys to Australia.

In some instances they were what was known as "assisted returns", so the vessel—perhaps in the context of a rescue—was provided with some assistance and facilitated in its return. We also had situations, as I think Madeline mentioned at one point, for example, of people arriving from Sri Lanka, where the Australian authorities would then enter into communications with Sri Lanka or India in order to be able to return people there. In some instances they were brought to Australia and flown back, or the vessels were taken back directly or on board Australian vessels at that time.

I do think we have to acknowledge that the physical activities of Operation Sovereign Borders absolutely decreased the number of boats coming, even though, as I have indicated, there are a range of concerns about how those policies were implemented and the consequences for the people concerned.

Certainly, I should also mention that Operation Sovereign Borders has had safety concerns for the Australian officials who have been involved in implementing this particular policy, because there were some reports in the media about the people who were on these particular vessels. They would sabotage their vessels at the point when they saw the Australian authorities. Fires were lit on these vessels to try to prevent them from being forcibly returned, which then triggered a rescue situation. There were concerns on some of these occasions for the safety and the security of the Australian personnel who were operating at the time. We do not have full details about that because of the security justification that is given for the lack of information around that.

Q444 **Chair:** Thank you. Madeline Gleeson?

Madeline Gleeson: I think Professor Klein has perfectly covered the second part of your question, which was explaining the decrease in numbers from 2013. I concur with her explanation.

The first part of your question was about the rise in numbers from about 2009 onwards. This is hotly contested and, because this is such a political issue in Australia and at that time it was such a hot political issue in Australia, there were all sorts of claims going back and forth, finger pointing and blame—that this policy or that policy was leading to the increase in boat arrivals. The short answer is that there is no evidence to support any of those claims. We do not yet have the full picture or understanding of why so many people were arriving by boat at that time.

We do know that if you look at how the trafficking and smuggling networks were operating in South East Asia at that time, they were operating incredibly efficiently and effectively at getting people through

the region, on to boats and down. Some explanation might come from what was going on in the world at that time, what might have been motivating people to leave their countries of origin at that time and why they might have been heading in this direction, or why they might have been moving on from transit countries.

Trying to reduce it to a simple set of push and pull factors is incredibly difficult and, no, that evidence does not exist. All we know is that, from 2009 onwards, we did see a dramatic increase in the number of people arriving by boat.

Q445 **Chair:** In terms of the reduction since, one of you said something about there being some increase in people arriving by aeroplane, and so on. Is there any evidence of people arriving by different routes or any other factors that might be influencing it? Are there any other policies that might have influenced the reduction that would be worth us being aware of?

Madeline Gleeson: There might be an argument for saying that one other policy, which we have not mentioned yet, was perhaps around that picture. That came in July of 2013, so it was a few months before Operation Sovereign Borders. That policy dramatically changed what was happening with the offshore processing. From August 2012 until July 2013, there was in place what was called the "no advantage" policy. This was not a policy that had any meaning that had been fleshed out yet. In rough terms it said that if you arrived by boat, you would not be processed or settled any quicker than if you had remained in, say, Malaysia. The idea was that you would not get any advantage from having come by boat as opposed to having stayed in the region and waited to be resettled.

That policy was highly criticised because there is no way to measure how long, if at all, resettlement from the region would take. Before the challenges of that were played out in July 2013, a new policy was introduced, which was that if you arrived by boat you would never be settled in Australia. This was a fundamental break from what we had had in 2001. In 2001, in the offshore processing at that time, the vast majority of those people who were found to be refugees were settled in Australia. Others were settled in New Zealand, and then there was a small number that went elsewhere. This policy meant that you would never be settled in Australia but there was no answer on where else you would go either.

There might have been some claim from the Government at the time that, instead of or in combination with the boat turn-backs, the statement that you would never be settled in Australia was accounting for the drop in boat numbers. Personally, I do not find this reason convincing, because people who come to Australia by boat are generally very well aware of these things once they get here, and this is a policy that could have been outwaited. This is not necessarily going to stop someone fleeing if they think, "Well, that will be their policy for a few years, but I will wait it out and then see what happens".

The other reason is that since then we have had the US resettlement deal. We have had 800-and-something people be resettled to the United States, and that has not seen a massive increase in the number of people arriving by boat. That policy has been chipped away at, in the sense that people have been resettled elsewhere and there still has not been any change in the boat numbers.

There is no hard evidence one way or another that this policy does more or less in terms of deterrence. All we know is that the main indicator that has led to a change has been the introduction of Operation Sovereign Borders.

Q446 **Chair:** How far is there evidence of this being driven, effectively, by criminal gangs who have a business model, and then changes to the business model? We have heard evidence around different gangs operating in the Channel using different routes, and what ends up being the easiest and the most profitable route for them. How far do you see that as being a factor in the Australian experience, Professor Klein?

Professor Klein: I don't have specific information about the changes in the criminal operation, so I cannot speak to that particular point.

Q447 **Chair:** Thank you. Madeline Gleeson?

Madeline Gleeson: I don't either. They exist, as they do all over the world. They facilitate smuggling and trafficking in some way, but I do not have specifics about the ebbs and flows in the organisational structure that I can speak to specifically.

Q448 **Chair:** Thank you. Madeline Gleeson, you referred to there being a £1 billion cost for 300 people for the most recent financial year. Are there any costs for the maritime operations? Is there any evidence of how much that costs, Professor Klein?

Madeline Gleeson: I will jump in quickly and clarify that that was $1 billion Australian, but it is still a very large amount of money.

Chair: Of course, yes.

Professor Klein: No, I do not have a dollar figure. I know that some costs related to Australia's turn-back policies have come up before our Senate estimates Committee, but I am not aware of the amount to be able to tell you; I am sorry.

Madeline Gleeson: That is an incredibly difficult one, I can say.

Q449 **Chair:** If you came across any figures and were able to let us know, that would be wonderful. In terms of the overall cost that you referred to, Ms Gleeson, that $1 billion was for the most recent financial year. What was the cost at its peak?

Madeline Gleeson: That is taken as an average cost, year on year, of about that much, but I can provide further specifics to the Committee if that would assist. In terms of the boat issue for the previous question, it is incredibly difficult to get answers on that because of the secrecy and

the refusal to answer any real questions about what is going on. As a result, it becomes difficult to get information about the costs, but I can get information to the Committee about the costs of offshore processing.

Chair: That would be fantastic. Thank you. It would be very useful to have a sense of the cost over time and for different years, depending on the number of people involved.

Thank you very much for your time, particularly so late, and thank you for your patience. We have kept you late into the night. We very much appreciate your time, and we are very grateful for the evidence that you have both given us today. Thank you very much.