Written evidence submitted by Jonathan Thomas [EAP0024]

Written Evidence to Women & Equalities Committee

Thank you for the opportunity to take part in person at the first evidence session of the Committee's investigation into key Equalities aspects of the UK asylum system on Wednesday 26th January 2022. I am following up with a written submission on one specific area that was touched on in that evidence session; **Returns**.

The reason for this being that two comments I made at the evidence session bookended discussions on this topic, but, given the time available and the flow of questions, in between those two comments I did not have the opportunity to fill in any of the important detail on returns. As a result:

(1) my bookending comments may have seemed contradictory, and

(2) the Committee may have misapprehended my evidence on this issue.

I am therefore taking the opportunity to clarify this, and to provide that detail.

My bookending comments:

1. In the context of my evidence suggesting that the Nationality and Borders Bill of itself would unlikely reduce the level of irregular flows across the Channel, in the context of dealing with such flows I highlighted the importance of a high level of cooperation by the UK with other countries: "Actual deals, actual return agreements with other countries.", which level the UK might not be currently achieving.

2. In response to a question from the Chair at the end of the session: 'What evidence do any of you have that the Home Office is not actively pursuing return agreements with a wide number of countries?' I responded 'None'.

My evidence on Returns:

A realistic assessment of the significant challenges …

1. My first comment – on the importance of cooperation with other countries – was *not* meant to imply that:

    a. securing effective return agreements is easy, or

    b. the UK has not been trying to secure a number of such agreements for a significant period now, or

    c. other countries necessarily score any better than the UK in this respect; indeed all countries face the same challenge.

2. Securing return and readmission agreements at all is really hard. Securing such agreements that are effective in practice is even harder. And the UK is far from unique in finding this so. Why?

    a. Because countries from which migrants depart of course have their own interests and face domestic political pressures which generally mean they are frequently at best somewhat ambiguous, dissembling and half-hearted in their cooperation on immigration control matters. Those countries' interest in supporting migration opportunities for their citizens, which they may view as a quite natural phenomenon, a positive rite of passage associated with ambition and success, and those countries' relationship with their diaspora, as well as the potentially significant economic contribution made by remittances, can hardly be expected to make them naturally well-disposed to cooperate with efforts either to restrict emigration, or to subsequently accept forcible return of their citizens.

    b. Even where agreement is secured with such countries, the 'carrots' required to be offered to achieve that may themselves undermine the agreement's efficacy. Such agreements may therefore ultimately prove no better than neutral in terms of migration management. That is because it is a negotiation where promises of aid, trade *and greater legal entry possibilities* (often visa-free access) for the negotiating country's citizens often play a prominent part. One can immediately see the potential issue caused by granting greater access to another country's citizens, some of whom may then irregularly overstay, as a quid pro quo for securing some form of agreement on return.

    c. Even when such agreements for returns are concluded in good faith between countries, practical roadblocks can still frequently occur. Many migrants whom the UK might wish to return do not have identity papers. While the UK can provide them with a biometric identity document, there can be disputes over their identity and nationality. Receiving countries might not agree with the UK's determination as to who they are or that they are their citizens.

3. It is important to acknowledge that the concept of returns in the context of asylum claims is particularly fraught. Countries generating material asylum flows are the least likely to be in a position to implement organised returns programmes. And there is of course the added concern that, even where you have determined that the claimant is not a refugee, you might be wrong, and might be risking returning the claimant to a position of danger.

… does not mean that we should just accept the status quo …

Indeed, we need to recognise that things are not standing still, but in fact appear to be deteriorating. Numbers of migrant returns from the UK have fallen significantly. For all the talk on immigration control from successive UK governments over the last 15 years, official figures from the Home Office show that across this period both enforced and voluntary return numbers from the UK of irregular migrants currently stand at historic lows.

… and that there are not significant opportunities for improvement …

In this respect there are two quite separate areas where attention should be focused:

(1) Tactical investment: in agreements with *transit countries* to address concerted visible irregular migrant flows.

(2) Strategic investment: in the UK's *assisted voluntary return* programme

1. Transit Country Agreements: the opportunity for control with soul

Given the practical difficulties of returning asylum claimants swiftly to their home country, it might seem more practical and less challenging to seek to remove them instead to a country through which they have transited on the way to the UK. Yet, while on the face of it the challenges of convincing a home country to take back someone whom you are claiming to be their citizen may look quite different from the challenges of convincing a transit country to take them instead, in some respects removing irregular migrants to a transit country may appear no less challenging.

Indeed, the track record seems to demonstrate this. One of the world's few transit return agreement regimes is the European Union's 'Dublin Regime', an agreement between EU states to allocate responsibility between themselves for hearing an asylum claim in circumstances where the asylum seeker has passed through/into more than one of those states. It is not just a returns, but also a redistribution, regime, designed to allow asylum claimants to travel on to countries where they have close family ties – which is why the UK took in claimants under the regime while it was in the EU – as well as to transfer claimants back to transit countries should they have no such ties. But what may seem a sensible approach on paper has never functioned in practice at any real scale, anywhere in the EU.

The UK's particular experience of the Dublin regime while in the EU was that rather than a returns super-highway it was a rather quiet back street, with annually only hundreds of asylum claimants moving under it to/from the UK in either direction. For the last five years of the UK's participation in the Dublin regime, the UK agreed to the transfer in to the UK of over twice as many claimants as it managed to get agreement of other EU states to transfer out (even though the UK made far greater numbers of transfer out requests than it received transfer in requests). In terms specifically of the Channel crossings, in 2020 the UK returned just 25 people *to* France under Dublin rules despite the arrival of over 8,500 migrants across the Channel. And it transferred in eight times as many *from* France.

Yet it would be wrong to conclude that tactical return agreements, forged amidst a surge in irregular migrant flows through a particular route, cannot have an effect on those flows – see for instance the effect of the EU-Turkey deal of 2016. And it is worth remembering what is at stake in seeking such agreements. For it is only cooperation on returns and redistribution of migrants that can truly break the people smuggling model and save lives, by addressing the high risks and potentially fatal consequences of those migrants entrusting their lives to people smugglers.

If we stop to think what a properly functioning, as opposed to dysfunctional, asylum regime might look like today on an international level, if we were to start again from scratch, it might look something like the regime of protection, determination and allocation suggested by one of the world's foremost authorities on the history and legal interpretation of the UN Refugee Convention, Professor James Hathaway[1]. Under his proposal, asylum seekers could cross any border to claim protection as now, but that country where they claimed protection would simply be their entry point into the international refugee determination and allocation process, not necessarily the country where, even if they were assessed as being a refugee, they would be allowed to remain and rebuild their lives.

Instead there would be an allocation mechanism to fairly distribute refugees across countries. Less refugees would then put themselves lives at risk of perishing on the journey. And it would be a much fairer system for the poorer countries that currently host 85% of the world's refugees. Crucially it would also be the one fool proof way of making redundant the services of international criminal smuggling networks; who would pay to be smuggled to a particular country when wherever they arrived had no bearing on which country they would be allocated to.

But we are not starting an international asylum system from scratch, and there seems low likelihood of states agreeing on such a fair system. Yet some of the positive attributes of such a system could still be achieved on the bilateral level, and by doing so can thwart people smugglers, save lives, but could also result in the UK taking in *more, not less,* refugees.

Such a system could be applied to the irregular flows across the Channel. To stand any chance of success it requires political goodwill, fair dealing, and for both sides – the UK and France – to accept and understand not just what they could gain from the arrangement, but that the other side has to gain something too. Any agreement must therefore solve a problem at *both* ends, and strike public opinion in both countries as fair and desirable.

This is not easy, but it is possible, because both sides have a common interest in:

1. Saving lives
2. Restoring control across over the UK/France border
3. Reducing the pressures on Calais and the surrounding areas
4. Ending criminal smuggling networks
5. Reducing irregular migration both in France and the UK
6. Showing that cooperative migration control can work
7. Providing safe and legal routes for those seeking asylum.

Importantly it could also be put in place while maintaining adherence to human rights protections and the Refugee Convention. How then might this work?

The *only* way to end migrant boat crossings across the Channel safely, humanely, legally, and completely is to remove the incentive for trying, through the *(almost) immediate return* of *(almost) everyone* irregularly crossing the Channel. This would mean effecting rapid assessments of those arriving to ascertain whether they have valid human rights claims to remain in the UK, and immediately transferring back the remainder to France. And at the same time it would mean the UK taking in numbers of refugees already in France, including those with family connections to the UK. This should stem the flows, as those without strong human rights claims would understand there was no point risking the dangerous onward journey to the UK. Less people would die trying, and more refugees could be safely admitted to the UK (including from France as well as resettlement from the UNHCR system).

2. Assisted Voluntary Returns (AVR): can bypass the logistical issues with forced returns and achieve better reintegration outcomes and lower re-migration rates

In the context of returns of asylum seekers, while swift forced returns to their countries of origin may be unrealistic and potentially expose migrants to risk of being returned to danger, UNHCR data over time shows that, on average, even about a quarter of refugees have been able to return to their home country after no more than five years abroad. So in this context, a key focus in terms of returns of failed asylum seekers to their home countries should be less on immediate return, but

rather on how to keep facilitating the return home of those who want to do so over time, which may be over a number of years.

I produced a report on this topic for the SMF two years ago, analysing the evidence and proposing ways that the UK's AVR programme could be reformed. Or, rather, rebooted, leveraging off what the AVR programme in the UK had been previously when IOM and then Refugee Action had day-to-day responsibility for it, prior to the Home Office taking back control of the programme in 2016.[2] And while trust in, and numbers through, the UK AVR regime continue to suffer, the broader evidence continues to suggest that, if done right and targeted at the right individuals and the right situations, assisted return programmes can be beneficial to both returning and receiving states and to the migrant themselves[3].

Our SMF report concluded that a rebooted AVR programme could:

1. make better use of public money,
2. command greater public trust and confidence,
3. while gaining the trust of irregular migrants and protecting their rights,
4. drive more productive cooperation and partnerships across government departments and civil society, and
5. achieve more sustainable returns through working with the grain of more migrants' motivations and aspirations to return.

Unlike the state-state readmission and return agreements required to process forced returns, AVR primarily requires agreement between people, not states. And, if handled fairly and sensitively, with engagement from some supportive organisations in the refugee sector, as was the case in the UK not so long ago, AVR can help the return of longer term failed asylum seekers who have exhausted their rights and have no meaningful form of support in this country, but also lack the impetus, resources and ability to return without advice and assistance. What is more, the very existence of an AVR programme which required the Home Office and the refugee rights sector to work together could provide powerful opportunities for co-operation that would not otherwise arise, which is crucial to better address one of the most complex challenges of the asylum system in a way in which no single institution, nor even single side of the debate, can do on its own.

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ENDNOTES

[1] James C Hathaway, 'The Global Cop-Out on Refugees' (2018) 30(4), International Journal of Refugee Law, 591 https://academic.oup.com/ijrl/article/30/4/591/5310192.

[2] Jonathan Thomas, 'Between a rock and a hard place: AVR 2.0: the case for rebooting Assisted Voluntary Return in the UK's immigration control regime' (Social Market Foundation, 2 December 2019) https://www.smf.co.uk/wp-content/uploads/2019/12/Between-a-rock-and-a-hard-place.pdf.

[3] Talitha Dubow and Katie Kuschminder, 'EU Exit regimes in Practice: Sustainable Return and Reintegration' (ADMiGOV, 2021) https://admigov.eu/upload/Deliverable_24_Return_and_Reintegration_Dubow_Kuschminder.pdf.