

*The exclusion of (failed) asylum seekers from housing and home: towards an  
oppositional discourse*

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**Abstract:**

The reality of human experience is that 'housing' – which usually connotes the practical provision of a roof over one's head – is experienced by users as 'home' - broadly described as housing *plus* the experiential elements of dwelling. Conversely, the condition of being without housing, commonly described as 'homelessness', is experienced not only as an absence of shelter but in the philosophical sense of 'ontological homelessness' and alienation from the conditions for well-being: the practical and psychological benefits that flow from having an opportunity to establish a home. For asylum seekers, these experiences are deliberately and explicitly excluded from official law and policy discourses. This article demonstrates how, in the case of asylum seekers, law and policy is propelled by an 'official discourse' based on the denial of housing and the avoidance of 'home' attachments, which effectively keeps the asylum seeker in a state of ontological homelessness and alienation. We reflect on how considerations of housing and home are excluded from policy debates and even legal analyses concerning asylum seekers, and consider how a new 'oppositional discourse' of housing and home – which allowed these considerations to be taken into account – might impact on the balancing exercise inherent to laws and policies concerning asylum seekers.

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## *The exclusion of (failed) asylum seekers from housing and home: towards an oppositional discourse*

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### Introduction

The reality of the human experience is that 'housing' – however it is defined and whether it is, as a question of fact, more or less satisfactory – is experienced by users as 'home'. While '*housing*' usually connotes the practical provision of a roof over one's head, '*home*' can be broadly described as housing *plus* the experiential elements of home – as a valued territory, as signifier and constituent of self- and social-identity, and as a social and cultural environment that is appropriate for the user's needs and way of life, for example, suitable for family life, and by providing an opportunity to participate in a community/society.<sup>1</sup> Consequently, the condition of being without housing, commonly described as 'homelessness' is experienced not only as the absence of shelter (houselessness) but as alienation, both in the philosophical sense of ontological homelessness<sup>2</sup> and alienation from the conditions for well-being (homelessness).<sup>3</sup> This article focuses on (failed) asylum seekers – that is, those who are awaiting determination of their claim for asylum and those whose claims have been refused but who have not yet left the UK - who we describe as 'doubly displaced', at the state level and, often, at the level of dwelling-place: displaced from their home state and dispossessed from their homes within that state, and prevented from re-establishing their sense of place in the host state, including – in light of their precarious claim on housing – being unable to secure the use of a dwelling which they can establish as a home. Starting from the (failed) asylum seeker's human experience of 'double displacement', we consider legal and policy responses to the housing of asylum seekers, to reflect on the exclusion of considerations of housing and home from policy debates and legal analyses concerning asylum seekers.

In doing so, we draw upon the recent emergence of 'home' as a subject of legal analysis,<sup>4</sup> and particularly on the proposition that the occupied home is a distinct type of property, based on its central role in our lived experiences as humans.<sup>5</sup> A key feature of our approach is our emphasis on the displaced or dispossessed human person who is the subject of the discussion. Our analysis is consciously shaped through the lens of the human experience of double displacement, rather than being framed by the current UK regulatory framework: that is, our analysis starts from the

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<sup>1</sup> On *home* as 'house + *x*' and the elements of the '*x* factor' interest, see L Fox, Conceptualising Home: Theories, Laws and Policies (Oxford, Hart Publishing, 2006), especially Chapter Four.

<sup>2</sup> Giddens described 'ontological security' as: "a person's fundamental sense of safety in the world and includes a basic trust of other people. Obtaining such trust becomes necessary in order for a person to maintain a sense of psychological well-being and avoid existential anxiety"; A Giddens, Modernity and self-identity: Self and society in the late modern age (Cambridge, Polity, 1991), 38–39.

<sup>3</sup> On the distinctions between 'houselessness' and 'homelessness' see P Somerville, "Homelessness and the Meaning of Home: Rooflessness or Rootlessness?" (1992) 16 International Journal of Urban and Regional Research 529.

<sup>4</sup> See, for example, Fox, op cit, n 1; DB Barros, "Home as a Legal Concept" (2006) 46 Santa Clara Law Review 255; M J Ballard, "Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy" (2006) 56 Syracuse Law Review 277.

<sup>5</sup> The legal concept of home is built on empirical studies and theoretical analyses of the lived experience of home, the meanings which home represents for occupiers, and the experience of losing one's home; see generally Fox, op cit n 1, especially Chapter Four.

person, rather than the law. Since the human experience of double displacement is not mitigated or exacerbated by legal changes in a person's immigration status our analysis considers both asylum seekers and failed asylum seekers (although we recognise that the underlying policy arguments about the provision of social housing may differ).<sup>6</sup>

This approach has roots in the epistemological tradition of social constructionism,<sup>7</sup> and particularly in the construction of social problems and policy narratives: "...on shifting sands of public rhetoric, coalition building, interest group lobbying and political expediency."<sup>8</sup> This perspective – which recognises the ‘implicitly and intentionally rhetorical’ process of defining housing problems for the purposes of policy debate – allows us to explore not only the material impact of exclusion from housing and home for (failed) asylum seekers, but the process by which the impact of this exclusion is in turn excluded from the policy process as not being a problem which should be acted upon. We start from a focus on the experiences of asylum seekers, and the (often deliberate) exclusion of these experiences from the policy process, and reflect on the implications this has for the ways in which issues concerning housing and home for asylum seekers are formulated, debated and critiqued in law and policy. Our critique posits that the development of law and policy in this context has been dominated by an ‘official discourse’ in respect of asylum seekers, which emphasises the government's objectives of reducing alleged ‘pull factors’, discouraging the formation of ‘home’ attachments or affiliative bonds in the UK, and incentivising voluntary return, as well as focusing asylum policy on the overarching objective of securing the UK's borders.

While decisions as to entry into the UK are properly recognised in international law as an expression of state sovereignty,<sup>9</sup> this state right is subject to, and must be balanced against, the individual right to seek refuge, which marks an exception to the state's absolute sovereignty in this regard.<sup>10</sup> Although the UN Refugee Convention provides the international legal definition of a refugee, it does not specify a process for determining who meets the definition.<sup>11</sup> It is in this determination of the scope and

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<sup>6</sup> See J Sweeney, “The Human Rights of Failed Asylum Seekers in the UK” (2008) Public Law 277

<sup>7</sup> See PL Berger & T Luckmann, The Social Construction of Reality: A Treatise in the Sociology of Knowledge (New York, Anchor Books, 1967); for discussion of the use of social constructionism in housing research, see K Jacobs, J Kemeny & T Manzi (eds), Social Constructionism in Housing Research (Aldershot, Ashgate, 2004).

<sup>8</sup> Jacobs et al, *id.*, p5.

<sup>9</sup> “One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it and to expel or deport from the State at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: E de Vattel, Law of Nations, book 1, s. 231; book 2, s.125.”; A-G for the Dominion of Canada v Cain [1906] AC 542 at 546 *per* Lord Atkinson.

<sup>10</sup> While state nationals have the right to enter the territory of the state, non-nationals have only limited rights of entry, established in international and domestic laws to varying degrees, for example, the right of an asylum seeker to seek refuge from a well-founded fear of persecution, under Article 14 of the Universal Declaration on Human Rights.

<sup>11</sup> The recognition of refugee status and the granting of asylum in the UK has traditionally been at the discretion of the executive, in the form of the Home Secretary, with a limited role for judicial oversight: see G Clayton, Textbook on Immigration and Asylum (2<sup>nd</sup> edn, Oxford, OUP, 2006); G Care, “The Judiciary, The State and The Refugee: The Evolution of Judicial Protection in Asylum – A UK Perspective” (2005) 28 Fordham International Law Journal 1421. In the exercise of this discretion,

extent of the state's discretion that domestic law and policy must weigh the balance between state rights and individual rights. This article argues that the power of official discourse – for example, in relation to national and individual security - threatens to obfuscate the nature and extent of the competing interests at stake. The problem, we argue, is two-fold. On the one hand, the weight attached to state rights in this context – particularly in light of heightened concerns with borders and national security following attacks on the World Trade Centre and other targets on 9/11 - threatens to overwhelm the human context of the individual right. This is exacerbated by the way in which asylum seekers have been framed in the popular media and on occasion by the judiciary<sup>12</sup> as 'cheats', 'illegals', 'so-called asylum seekers',<sup>13</sup> 'spongers' and 'social parasites' on the UK welfare state,<sup>14</sup> and potential terrorists,<sup>15</sup> in parliamentary debate as: "...people who may well be seriously involved in criminal activity such as drug dealing, people trafficking and so on."<sup>16</sup> and in legal discourse as not the responsibility of the state except in limited circumstances.<sup>17</sup> The combined effect of these phenomena is, we argue, that once we accept these two strands of 'official discourse', the human experience of the displaced or dispossessed person is

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the UK is subject to obligations under the 1951 UN Refugee Convention, as amended by the 1967 Protocol.

<sup>12</sup> See 'Foreign Spongers Scandal, by Judge', Daily Express, 29 July 2009, which reported Judge Ian Trigger as commenting, in the context of the criminal trial of a failed asylum seeker for drugs offences: "People like you, and there are literally hundreds and hundreds of thousands of people like you, come to these shores from foreign countries to avail themselves of the generous welfare benefits that exist here. In the past 10 years the national debt of this country has risen to extraordinary heights, largely because central Government has wasted billions and billions of pounds...Much of that has been wasted on welfare payments."; available online at <http://www.dailyexpress.co.uk/posts/view/117024/Foreign-spongers-scandal-by-Judge->

<sup>13</sup> For discussion of the negative portrayal of asylum seekers in media and political spaces, see AW Khan, "Countering Media Hegemony, Negative Representations, the 'Bad Citizen': Asylum seekers' battle for the hearts and minds of Scotland" *e-Sharp* Issue 11; available online at [http://www.gla.ac.uk/media/media\\_81285\\_en.pdf](http://www.gla.ac.uk/media/media_81285_en.pdf); A Bloch, "Refugee settlement in Britain: The impact of policy on participation" (2000) 12 *Journal of Ethics and Migration Studies* 367; M Bruter, "On what citizens mean by feeling 'European': Perceptions of news, symbols and borderless-ness" (2004) 30 *Journal of Ethnic and Migration Studies* 21; C Gifford, "National and post-national dimensions of citizenship education in the UK" (2004) 8 *Citizenship Studies* 145.

<sup>14</sup> See for example two contrasting media headlines on a Report by the Equality and Human Rights Commission indicating that there is no evidence that people arriving in the UK jump the queue for social housing. Housing Minister John Healy claimed that he: "...wanted to 'nail the myth' that certain groups were losing out in terms of housing allocation. 'It is largely a problem of perception...The report shows there is a belief, a wrong belief, that there is a bias in the system.'"; reported by the BBC as "Housing 'not favouring migrants'", [http://news.bbc.co.uk/1/hi/uk\\_politics/8137408.stm](http://news.bbc.co.uk/1/hi/uk_politics/8137408.stm); and by the Daily Mail as "One in ten state-subsidised homes goes to an immigrant family"; <http://www.dailymail.co.uk/news/article-1198016/One-state-subsidised-homes-goes-immigrant-family.html?ITO=1490>

<sup>15</sup> D Leppard & J Ungood-Thomas 'Asylum seekers form quarter of terror suspects', The Sunday Times, 15 July 2007, available online at <http://www.timesonline.co.uk/tol/news/uk/crime/article2076120.ece>

<sup>16</sup> *Hansard*, HC col 328 (13 March 2007) (Mr Stewart Jackson MP); Still Human Still Here 'Parliamentary Briefing – March 2007 – Amendment to UK Borders Bill 2006' (2007) available at [http://www.refugeecouncil.org.uk/NR/rdonlyres/F3BB18A8-6238-420F-961C-48E83C6275B9/0/shsh\\_parliamentary\\_briefing.pdf](http://www.refugeecouncil.org.uk/NR/rdonlyres/F3BB18A8-6238-420F-961C-48E83C6275B9/0/shsh_parliamentary_briefing.pdf), p6; full text of the amendment, p10.

<sup>17</sup> Where a particular and distinct relationship of dependency exists between the state and vulnerable individuals who are subject to threats to their life or degrading living conditions; or where a 'direct and immediate link' exists between a particular type of state intervention and maintenance of the essential core elements of a meaningful private and family life; see C O'Connell, "A modest proposal: destitution, state responsibility and the European Convention on Human Rights" (2008) *European Human Rights Law Review* 583.

excluded as irrelevant. This is particularly significant in light of the position of asylum seekers as among the most marginalised, poor, and vulnerable people in our society.<sup>18</sup>

This article argues that these ‘official discourses’ imply discursive boundaries which inhibit the proper exercise of the balancing act that is required when weighing the state’s right to control its borders as a principle of state sovereignty against the asylum seeker’s right to seek refuge under international law.<sup>19</sup> By unpacking the human experience of displacement and dispossession for (failed) asylum seekers, we seek to resist these discursive boundaries, and rather to set up an ‘oppositional discourse’ which brings social science research knowledge to bear on the processes of evaluating law and policy. We argue that while the dominating discourse excludes questions of housing and home for asylum seekers, our alternative perspective is potentially transformative, in enabling analyses of law and policy concerning asylum seekers and their experiences of housing and home to move beyond the limitations imposed by current debates, not least by highlighting their exclusion as a social problem requiring policy attention. In doing so we seek to explore the possibilities for developing new thinking on this subject from a person-centred perspective, rooted in analysis of asylum seekers’ experiences of exclusion from the opportunity to establish housing and home.<sup>20</sup>

### **Home, exile and alienation: the human experience of displacement and dispossession**

The importance of ‘being at home in the world’ for the human condition, and the consequences of alienation from that sense of home, are common philosophical themes,<sup>21</sup> and underpin much political philosophy, from Hegel to Heidegger. For Hegel,<sup>22</sup> a core theme was the need for human beings to exist not only as rational individuals, but as part of the wider world around them, in ‘civil society’.<sup>23</sup> At the most basic level, it was recognised that everyone must exist in some relationship with place and with a meaningful connection to *home* – or, in the absence of such a meaningful connection, in a state of alienation.<sup>24</sup> Similarly, Heidegger<sup>25</sup> argued that

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<sup>18</sup> P Coelho, The Return of Asylum Seekers whose Applications have been Rejected in Europe (European Council on Refugees and Exiles, 2005), Executive Summary.

<sup>19</sup> On the power of official discourses, see F Burton & P Carlen, Official discourse: On discourse analysis, government publications, ideology and the state (London, Routledge and Kegan Paul, 1979).

<sup>20</sup> See H van der Horst, “Living in a Reception Centre: the Search for Home in an Institutional Setting” (2004) 21 Housing, Theory and Society 36, 37.

<sup>21</sup> See, for example, D Cooper, The Measure of Things (Oxford, OUP, 2002, 2008) for a philosophical account of what it might mean to ‘be at home in the world’. Levinas described the home as a precondition for existence, since: ‘[m]an abides in the world as having come from a private domain, from being at home with himself, to which at each moment he can retire.’; E Levinas, Totality and Infinity (The Hague, Martinus Nijhoff, 1969), 152.

<sup>22</sup> GWF Hegel, Elements of the Philosophy of Right (ed, AW Wood, transl, HB Nisbet), (Cambridge, Cambridge University Press, 1991).

<sup>23</sup> Indeed, the themes of ontological homelessness and alienation have been major themes for scholarly reflections on the human condition in modernity, particularly in the latter half of the twentieth-century.

<sup>24</sup> M Heidegger, Bauen, Wohnen, Denken (1951) [‘Building Dwelling Thinking’] and the 1951 lecture ...dichterisch wohnt der Mensch [‘...Poetically man dwells...’], translated by A Hofstadter, Poetry, Language, Thought (New York, Harper Colophon Books, 1971).

<sup>25</sup> M Heidegger, Sein und Zeit (1927); Being and Time, translated by J Macquarrie & E Robinson (Oxford, Blackwell Publishers Ltd, 1962).

people cannot 'be' without having some connection to a particular place.<sup>26</sup> Heidegger described 'dwelling' as encapsulating meanings including: '...to remain, to stay in a place...to be at peace, to be brought to peace, to remain at peace...preserved from harm and danger...safeguarded.'<sup>27</sup> The achievement of this state of peace and safety is not static but precarious, with Heidegger describing the 'real plight of dwelling' as the need for human beings to 'learn to dwell' in the world by 'ever search[ing] anew for the nature of dwelling'.<sup>28</sup>

The importance of dwelling as the basis for human existence is brought into sharp relief by experiences of exile, and the yearning for a place in which the exile can re-establish their sense of home in the world. The human instinct is to seek to recover a sense of home in the place one finds oneself, thus: "[b]eings surround themselves with the places where they find themselves, the way one wraps oneself up in a garment..."<sup>29</sup> Further, this is seen as a necessary step in maintaining their humanity, as: "[w]ithout places, beings would be only abstractions."<sup>30</sup> Malpas described humans as:

...the sort of thinking, remembering, experiencing creatures we are only in virtue of our active engagement in place...the possibility of mental life is necessarily tied to such engagement, and so to the places in which we are so engaged...when we come to give content to our concepts of ourselves and to the idea of our own self-identity, place and locality play a crucial role....<sup>31</sup>

Part of the danger of being an exile is the risk of losing one's place in the world without then recovering 'home' elsewhere. As Casey noted: "[n]ot only may the former place be lost but a new place in which to settle may not be found...[the exile faces] the risk of having no proper or lasting place, no place to be or remain."<sup>32</sup> It is to enable this recovery of home that Mircescu argued for the need to: "...recognise our sense of home as functional, effective, but ultimately constructed...lead[ing] to a much more elastic sense of self as it imaginatively journeys away from and in search of home."<sup>33</sup>

The case of asylum seekers demonstrates that when *home* - meaning the place, whether dwelling or homeland, where one belongs - is lost in one location, the human instinct is to seek to recover or re-create a new home elsewhere. Mircescu described exile as:

...an existential evolving triangle shaped on the axes of self, journey and home. In this sense...exile is the epitome of human condition as the three axes supply us with co-ordinates reflecting upon each other. Thus, our sense

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<sup>26</sup> "The way in which you are and I am, the manner in which we humans are on the earth, is Buan, dwelling. To be a human being means to be on the earth as a mortal. It means to dwell...man is insofar as he dwells." Building, Dwelling, Thinking, op cit, n 24, part I.

<sup>27</sup> Id.

<sup>28</sup> Id., part II.

<sup>29</sup> G Poulet, Proustian Space, (Baltimore, John Hopkins University Press, 1977), 26-27, quoted in JE Malpas, Place and Experience: A Philosophical Topography (Cambridge, Cambridge University Press, 1999), 176.

<sup>30</sup> Id.

<sup>31</sup> Malpas, op cit, n 29, 177.

<sup>32</sup> ES Casey, Getting Bank into Place – Toward a Renewed Understanding of the Place-World (Bloomington, Indiana University Press, 1993), preface, xii.

<sup>33</sup> M Mircescu, "The Language of Home" *eSharp*, Issue 7, p 3; available online at <http://www.sharp.arts.gla.ac.uk/issue7/Mircescu.pdf>

of self evolves, is not static. We are what we become...we can both return and arrive home.<sup>34</sup>

While the importance of place for asylum seekers has been recognised in sociological literature,<sup>35</sup> less attention has been paid to the deliberate and explicit policies which seek to *prevent* (failed) asylum seekers from developing a relationship with 'place' in the UK.<sup>36</sup> Yet, the concept of home as a relationship which can be created anew as well as one which can be restored underlines the UK's explicit policy of encouraging failed asylum seekers to return to their home states,<sup>37</sup> based on an official discourse of *return* (rather than re-settlement) as the route to *home* for failed asylum seekers.<sup>38</sup>

At the level of the homeland, much has been written about the impact of globalisation in de-stabilising traditional ideas of home, homeland and nation, from the emergence of new patterns of migration,<sup>39</sup> to a rise in insecurity and existential uncertainty in the aftermath of the 9/11 attacks.<sup>40</sup> Blunt and Dowling have indicated that:

Notions of home are central in these migrations. Movement may necessitate or be precipitated by a disruption to a sense of home, as people leave or in some cases flee one home for another. These international movements are also processes of establishing home, as senses of belonging and identity move over space and are created in new places.<sup>41</sup>

The disruption to the refugee's sense of belonging, giving rise to ontological insecurity and alienation, is 'multi-scalar'<sup>42</sup> – from disruptions to home or household to displacement from home city or nation. Across these scales, the impact of displacement and dispossession on the refugee is reflected in the view that the idea of 'homeland': "...invokes a longing and belonging and serves 'as a point (or set of points) of reference for individual social identity'."<sup>43</sup>

Forced migration has major impacts on home and identity, with displacement and dispossession having "profound and long-term implications"<sup>44</sup> on those who are separated from their homes and homelands. The 'double displacement' of asylum seekers constitutes a major interruption with fundamental human needs. Yet, the

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<sup>34</sup> *Id.*, 3-4.

<sup>35</sup> See for example, N Spicer, "Places of Exclusion and Inclusion: Asylum-Seeker and Refugee Experiences of Neighbourhoods in the UK" (2008) 34 *Journal of Ethnic and Migration Studies* 491.

<sup>36</sup> We use the concept of 'place' in the sense of a space which has been invested with social meaning, see A Buttner & D Seamon (eds) *The Human Experience of Space and Place*, (New York, St. Martin's Press, 1980).

<sup>37</sup> See the UK Border Agency's policy on 'Voluntary Return', available online at <http://www.ukba.homeoffice.gov.uk/asylum/outcomes/unsuccessfulapplications/voluntaryreturn/>

<sup>38</sup> For example, in debates preceding the UK Borders Act 2007, the Home Office Minister described her agenda as: "...doing the right thing, which is working towards the departure from the UK of those who have no right to be here."; *Hansard*, HC col 330 (13 March 2007), (Joan Ryan MP); see also R Cholewinski, "Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Rights" (1998) 10 *International Journal of Refugee Law* 462; S York & N Fancott, "Enforced destitution: impediments to return and access section 4 'hard cases' support" (2008) 22 *Journal of Immigration Asylum and Nationality Law* 5.

<sup>39</sup> D Morley, *Home Territories: media, mobility and identity* (London, Routledge, 2000).

<sup>40</sup> C Kinnvall, "Globalisation and Religious Nationalism: Self, Identity, and the Search for Ontological Security" (2004) 25 *Political Psychology* 741.

<sup>41</sup> A Blunt & R Dowling, *Home* (London, Routledge, 2006), 2.

<sup>42</sup> *Id.*, 27.

<sup>43</sup> *Id.*, 160, quoting CJ Wickham, *Constructing Heimat in Post-War Germany: Longing and Belonging* (Lewiston, NY, The Edwin Mellen Press, 1999), 10.

<sup>44</sup> *Id.*, 196.

ability to recover or re-establish such roots is complicated for asylum seekers where there may not be a 'home' to return to. The destruction of home – 'domicide'<sup>45</sup> – is often manifest at two levels for asylum seekers, where both the home (dwelling house) and the homeland have come under attack. Thus, one analysis of Croatian refugees observed that:

It is not only their concepts of homeland that have been transformed, but also their homes in the most basic, physical sense. From sites of personal control, they were transformed into sites of danger and destruction...People were forced to leave their homes in response to threat, fears, military orders and violent attacks. Many homes literally ceased to exist.<sup>46</sup>

The persistence of the need for home after such experiences is captured by Brah in his description of a 'homing desire', which, in cases where there is no current prospect of resettlement or return – for example, for failed asylum seekers from 'unreturnable' countries<sup>47</sup> - can be understood as a human need to *make* a home (through resettlement), rather than by returning to a homeland.<sup>48</sup>

Yet, the concept of 'homeland' in the context of asylum seekers is a double-edged sword, as it has also been employed as a powerful rhetorical device to support post-9/11 security policies.<sup>49</sup> The new global 'domopolitics' evokes feelings about the sanctity of the home as dwelling place to support stronger measures in safeguarding the borders of the nation-state. This discourse uses the idea of: "...the home as hearth, a refuge or a sanctuary in a heartless world; the home as *our* place, where we belong naturally, and where, by definition, others do not";<sup>50</sup> as a justification for the priority afforded to security considerations, in debates which conflate concerns with borders, immigration and asylum. Thus, we have come to view:

...international order as a space of homes...[and] home as a place we must protect. We may invite guests into our home, but they come at our invitation; they don't stay indefinitely. Others are, by definition, uninvited. Illegal migrants and bogus refugees should be returned to 'their homes'.<sup>51</sup>

The positive qualities of *our* 'homeland as home' lend support to the argument that 'others' must be excluded from it: "Home is a place to be secured because its contents (our property) are valuable and envied by others."<sup>52</sup> This is also reflected in the emphasis in the UK debates on the alleged 'pull factors' that lead asylum seekers to select the UK as a host state. Yet, while the Home Office Minister (in debates

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<sup>45</sup> See JD Porteous & SE Smith Domicide: the Global Destruction of Home (Montreal, McGill-Queen's University Press, 2001); JD Porteous, "Domicide: The Destruction of Home" in D Benjamin (ed), The Home: Words, Interpretations, Meanings, Environments (Aldershot, Ashgate, 1995).

<sup>46</sup> M Povrzanovic Frykman, "Homeland lost and gained: Croatian diaspora and refugees in Sweden" in N Al-Ali & K Koser (eds) New Approaches to Migration? Transnational Communities and the Transformation of Home (London, Routledge, 2002), 118; S Carter, "The geopolitics of diaspora" (2005) 37 Area 54.

<sup>47</sup> In 2009, a report for the Joseph Rowntree Foundation, H Lewis, Still destitute: a worsening problem for refused asylum seekers (York, Joseph Rowntree Charitable Trust, 2009), reported that a situation of absolute desperation is developing among refused asylum seekers in Britain from four of the world's most troubled countries (Zimbabwe, Iran, Eritrea and Iraq) – described as 'unreturnable' - who are sleeping rough and eating from bins.

<sup>48</sup> A Brah, Cartographies of Diaspora: Contesting Identities (London, Routledge, 1996).

<sup>49</sup> For example, in the US, the formation of the 'Department of Homeland Security', with its role in securing the homeland borders.

<sup>50</sup> W Walters, "Secure borders, safe haven, domopolitics" (2004) 8 Citizenship Studies 237, 241.

<sup>51</sup> Id., 241.

<sup>52</sup> Id., 241.



preceding the UK Borders Act 2007) expressed concern that allowing ‘failed’ asylum seekers still in the UK access to support and accommodation until they left voluntarily or were removed: “...would provide a significant pull factor for asylum seekers...”,<sup>53</sup> research for Joseph Rowntree has found that there is: “...no simplistic relation between how well we treat asylum seekers and how many attempt to come here.”<sup>54</sup> Similarly, a Home Office research study in 2002 found that the respondent asylum seekers were not well informed about how they might be treated vis-à-vis welfare and housing after arriving in the UK, and none indicated that the UK was thought to offer more generous support than other destination countries.<sup>55</sup>

It is important to distinguish between the two separate issues of ‘pull factors’ on the one hand, and the question of returning failed asylum seekers on the other. It is widely recognised that ‘push factors’ – the reasons for leaving the home state - are a much stronger factor in forced migration than alleged ‘pull factors’ – the reasons asylum seekers may select a particular host state. For example, recent research which has indicated that refugees have little, if any, choice over which country they claim asylum in, and that few know what to expect before they arrive in the UK<sup>56</sup> supports the argument that domestic policy in respect of asylum seekers (for example policies relating to access to housing, social welfare or the right to work) will have little impact on the numbers of asylum seekers who come to the UK.<sup>57</sup> A separate issue is concerned with the decision of failed asylum seekers to remain and the success of policies encouraging voluntary return, but again, research has indicated that there is limited scope for government policies to influence this, as whether failed asylum seekers are likely to go home tends to be dependent on where they have come from<sup>58</sup> as even those who become destitute do not choose to return to certain ‘unreturnable’ home states. Both issues raise questions about the logic of policies which exclude (failed) asylum seekers from housing and home, not (primarily) as a matter of

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<sup>53</sup> *Hansard*, HC col 330 (13 March 2007), (Joan Ryan MP).

<sup>54</sup> Joseph Rowntree Charitable Trust, *Moving on from Destitution to Contribution* (York, Joseph Rowntree Charitable Trust, 2007), p8.

<sup>55</sup> V Robinson & J Segrott, *Understanding the decision-making of asylum seekers* (Home Office Research Study 243, Home Office Research, Development and Statistics Directorate, 2002), p50; rather, the priority for asylum seekers was to reach a place of safety; they have very little knowledge of the asylum procedures, benefit entitlements or availability of work in the host state: *id.*, Executive Summary, p vii. Böcker & Havinga’s 1998 study also found that asylum policies and reception procedures, for example, housing, were relatively unimportant in the decision to choose a particular destination country, with ties, for example colonial links, between the country of origin and country of refuge the most important factor, along with the varying physical and legal accessibility of different countries and chance events during the journey; A Böcker & T Havinga, *Asylum Migration to the European Union: Patterns of Origin and Destination*, (Luxembourg, Office for Official Publications of the European Communities, 1998); A Böcker & T Havinga, ‘Country of asylum by choice or by chance: asylum seekers in Belgium, the Netherlands and the UK’, (1999) 25 *Journal of Ethnic and Migration Studies* 43-61.

<sup>56</sup> “The concept of ‘choice’ can be understood only in the context of the circumstances under which individuals leave their countries of origin. The lives of the research participants are characterised by experiences of war, conflict and persecution. It is these ‘push’ factors that are decisive in the decision to migrate, rather than the ‘pull’ of any particular destination country.”; H Crawley, *Chance or choice? Understanding why asylum seekers come to the UK* (Refugee Council, 2010, available online at <http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/rchance.pdf>), p5.

<sup>57</sup> “Policies to remove social and economic opportunities for asylum seekers once they have entered a country of asylum have produced only limited effects on the number of applications, or no effect at all.”; *id.*, p4.

<sup>58</sup> See above, n 47.

allocating housing resource, but with a view to managing concerns about the volume of asylum seekers in the UK and associated fears regarding domestic security and control over borders.

Nevertheless, the rhetoric of ‘pull factors’ linked to the UK welfare state remains powerful in justifying the policies adopted by the government, with the concept of home used to legitimise a particular political approach towards asylum seekers appealing to our concern to safeguard for ourselves the welfare provision which we view as valuable and likely to be envied by others. An example of this is the commonly held (and frequently emphasised in the popular media)<sup>59</sup> misconception that migrants - including forced migrants such as asylum seekers - are at the front of the queue for social housing allocation,<sup>60</sup> with the perceived risk that their presence displaces the indigenous beneficiaries of social housing.<sup>61</sup> The issues of immigration and social housing sit on a precarious and sensitive political axis, in which one idea of home has been set up in opposition to another, with tensions between protecting (and defending) the indigenous population’s sense of home, and allowing *home* – both homeland and housing – to be available to ‘others’ who have been displaced and dispossessed from elsewhere. Kaplan has described a similar phenomenon in the US as: “...the notion of the homeland itself contribut[ing] to making the life of immigrants terribly insecure.”<sup>62</sup>

This can be regarded as a deliberate consequence of the domopolitics which constructs images of ‘them and us’ in an effort: “...to contain citizenship...in the face of social forces that are tracing out other cultural and political possibilities [such as]...the assertion of a right to settle as ‘illegal’ and ‘dangerous’.”<sup>63</sup> Kinnvall has suggested that: “...it is difficult to ignore how concerns about the economic, cultural, and social threats posed by refugees and other immigrants have tended to make their way into security considerations in both Western and non-Western societies...as state rights are pitted against individual rights.”<sup>64</sup> Similarly, where laws and policies governing asylum balance state sovereignty against the asylum seeker’s individual rights, the danger is that debates which have at their centre the issue of state security and the protection of the homeland for citizens risk losing all sense of balancing competing interests.

### **Shelter, housing and home**

Against the likelihood that the asylum seeker will already have experienced: “...a sense of powerlessness and dependence...frequently mixed with an acute anxiety about their new circumstances and strong feelings of homelessness”;<sup>65</sup> the impact of their precarious claims to housing and home is significant. In the discussion that

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<sup>59</sup> Above, n 13.

<sup>60</sup> J Rutter & M Latorre, Social Housing Allocation and Immigrant Communities (Equality and Human Rights Commission, Research Report 4, online at [http://www.equalityhumanrights.com/uploaded\\_files/ehrc\\_report\\_-\\_social\\_housing\\_allocation\\_and\\_immigrant\\_communities.pdf](http://www.equalityhumanrights.com/uploaded_files/ehrc_report_-_social_housing_allocation_and_immigrant_communities.pdf)

<sup>61</sup> Shelter, Policy: Discussion paper – No Place Like Home? (London, Shelter, 2008).

<sup>62</sup> A Kaplan, ‘Homeland insecurities: reflections on language and space’ (2003) 85 *Radical History Review* 82, 87.

<sup>63</sup> Walters, op cit, n 50, 256.

<sup>64</sup> Kinnvall, op cit, n 40, 744.

<sup>65</sup> Id., 747.

follows we consider various circumstances in which asylum seekers may, at different stages of the process (while waiting for their claim to be considered, or after their claim has been refused), face ‘homelessness’ in the sense of being without shelter,<sup>66</sup> as well as those cases in which asylum seekers may be provided with a roof over their heads but remain ‘homeless’ in the sense that the evidence clearly indicates that the nature of the shelter provided does not satisfy the criteria of ‘housing’, and is not likely to be conducive to feelings of ‘home’.<sup>67</sup>

The distinction between being without shelter and being homeless was recognised by the UN in its definition of homelessness as: “a condition of detachment from society characterised by the lack of affiliative bonds...carr[ying] implications of belonging nowhere rather than having nowhere to sleep.”<sup>68</sup> As ‘non-citizens’, asylum seekers are already marked out as not belonging, not ‘at home’. Furthermore, official discourse explicitly ties a range of policy goals to the objective of preventing asylum seekers from forming affiliative bonds in the UK – from rapid processing of applications,<sup>69</sup> and the imposition of tight restrictions upon the right to work,<sup>70</sup> to the removal of support for failed asylum seekers with children, which Lord Bassam (for the government) argued was not intended to force destitution, but to: “...influence behaviour so that people co-operate and to incentivise voluntary return before removal is enforced.”<sup>71</sup> This is arguably reinforced by the state’s wish to prevent asylum seekers from establishing a home, family and private life of the sort that might attract protection under Article 8 of the European Convention on Human Rights,<sup>72</sup> with the subtext that if asylum seekers are prevented from establishing such links they cannot then claim to have suffered an interference under Article 8 when their removal from the UK is ordered.

The UN Refugee Convention specifies some economic, social and cultural rights for persons recognised as refugees. However, whilst the person is still an asylum seeker awaiting the determination of their claim to be a refugee, the rights derived from the Refugee Convention generally do not apply.<sup>73</sup> States may choose to assimilate

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<sup>66</sup> More literally, ‘houselessness’.

<sup>67</sup> Report of the Joint Committee on Human Rights, ‘The Treatment of Asylum Seekers’, HL (2006-07) 81-I; HC (2006-07) 60-I CHR, para. 104.

<sup>68</sup> UNCHS/Habitat, Strategies to Combat Homelessness (UN Centre for Human Settlements, Nairobi, 2000), xiii.

<sup>69</sup> Fairer, faster and firmer – A modern approach to immigration and asylum, Cm 4018, (London, TSO, 1998). The rapid processing of applications is also a central goal of the ‘New Asylum Model’, Controlling our borders: Making migration work for Britain - five-year strategy for asylum and immigration, [www.archive2.official-documents.co.uk/document/cm64/6472/6472.pdf](http://www.archive2.official-documents.co.uk/document/cm64/6472/6472.pdf); see also Home Office Press Release 18th January 2006 ‘New Asylum Model: Swifter decisions – Faster removals’, <http://press.homeoffice.gov.uk/press-releases/new-asylum-model-swifter-decisio>.

<sup>70</sup> After one year asylum seekers may apply for permission to work (but not to become self-employed or to engage in a business or professional activity), so long as they can demonstrate that they are not responsible for the delay in processing their application for asylum; Immigration Rule 360; Rule 360A adds that any permission to work will expire when a claim is ‘fully determined’, thus excluding failed asylum seekers from working.

<sup>71</sup> *Hansard*, HL, col 287 (July 12, 2007) (Lord Bassam).

<sup>72</sup> See *R (on the application of Shahid) v Secretary of State for the Home Department* [2004] EWHC 2550, where the theoretical possibility of an asylum seeker relying on Article 8 as a reason for remaining was accepted by the court.

<sup>73</sup> See *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants and ex parte B* [1996] 4 All ER 385 (CA); [1997] 1 WLR 275 (Simon Brown LJ at 292 noting that ‘no obligation arises under Art 24 [Refugee Convention] until asylum seekers are

welfare support and social housing for asylum seekers with the national population, to separate it entirely, or to hold asylum seekers in detention. Yet, even where asylum seekers receive shelter in the sense of a roof over their heads, for example, in an accommodation centre, or in temporary accommodation such as a ‘bed and breakfast’, the nature and quality of the accommodation may be such as to call into question whether this amounts to ‘housing’ as defined by the UN Committee on Economic, Social and Cultural Rights: that is, as including “...adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities...”<sup>74</sup> Merely providing a roof overhead does not suffice to satisfy even the most basic housing needs to enable a person to function in society, and it is evident that this is not likely (and deliberately so) to satisfy the human need for ‘home’.

The degree of overlap between the components of ‘adequate housing’ and the meanings of home for occupiers (family, privacy, security, control, continuity, self-expression and personal identity)<sup>75</sup> are striking when considering the availability of ‘adequate housing’ and ‘sense of home’ for asylum seekers. Studies of home meanings and ontological security have emphasised the importance of permanence,<sup>76</sup> rootedness<sup>77</sup> and continuity<sup>78</sup> in providing a feeling of security at home.<sup>79</sup> Where the experiences of asylum seekers living in temporary accommodation do not correspond to these normative ideas of home they can be described as ‘unhomely’.<sup>80</sup> On the one hand, we recognise that people can (and human nature suggests that they will seek to) create home wherever they find themselves, however, the transitory nature of asylum seeker status (in respect of both the host state and in relation to their housing) is already associated with uncertainty and insecurity, which in turn will tend to undermine the extent to which ‘home-making’ is likely to be successful;<sup>81</sup> the asylum seeker is thus to some extent excluded from home meanings by their transient status,

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recognized as refugees. [...] Not for one moment would I suggest that prior to that time their rights are remotely the same’); Cholewinski, *op cit*, n 38, 477; R Cholewinski, “Economic and Social Rights of Refugees and Asylum Seekers in Europe” (2000) 14 *Georgetown Immigration Law Journal* 709, 711; C Sawyer & P Turpin, “Neither Here Nor There: Temporary Admission to the UK” (2005) 17 *International Journal of Refugee Law* 688, 688.

<sup>74</sup> See UN Committee on Economic, Social and Cultural Rights, General Comment 4, ‘*The right to adequate housing (Art.11 (1))* : . 13/12/91. CESCR General comment 4’; available online at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument)

<sup>75</sup> Fox, *op cit*, n 1, Chapter Four.

<sup>76</sup> A Dupuis & DC Thorns, “Home, Home ownership and the search for ontological security” (1998) 48 *Sociological Review* 24.

<sup>77</sup> The physical feeling of being anchored in a place; see SG Smith, “The Essential Qualities of a Home” [1994] *Journal of Environmental Psychology* 31, 32.

<sup>78</sup> “[H]aving a place to return to, where one feel a sense of belonging, also engenders feelings of continuity, stability and permanence”; *id.*

<sup>79</sup> A Rapoport, “A Critical Look at the Concept ‘Home’”, in Benjamin, *op cit*, n 44; R Sebba & A Churchman, “The Uniqueness of Home” (1986) 3 *Architecture and Behaviour* 7.

<sup>80</sup> Blunt & Dowling, *op cit*, n 41, 26.

<sup>81</sup> For example, in a study of young homeless adults living in shelter accommodation in London, it was noted that while the occupiers sought to create a sense of home and belonging where they were located, and in some sense this could be successful, where the facilities provided by the shelter were such as to offer them security, independence and freedom, and a sense of family, that at the same time: “...this was also an unhomely home because this sense of belonging was always invaded by a sense that this home was neither permanent nor did it accord with their ideal of home.”; P Kellett & J Moore, “Routes to home: homelessness and home-making in contrasting societies” (2003) 27 *Habitat International* 123, 133.

even when that transience becomes long-term. This is exacerbated when the housing environment is ‘unhomely’. For example, Diken described refugee spaces (whether ‘open’ spaces, such as accommodation centres, reception centres, or closed spaces such as detention centres) as ‘non-places’;<sup>82</sup> refugee spaces are often deliberately located (for example as part of the UK’s strategy of dispersal):<sup>83</sup> “...outside cities, in suburbia or in rural areas, as a rule in demonstrably peripheral sites...”;<sup>84</sup> away from amenities and facilities, and in Diken’s study were found to be:

...characterised by a sterilised, mono-functional enclosure: contact with the outer world is physically minimised behind the fences, which yield no permission to touch the outer world resulting in the complete isolation of the refugee from public life.<sup>85</sup>

The need for displaced persons to re-establish some sense of home for their mental and physical wellbeing was emphasised in van der Horst’s Dutch study of asylum seekers living in reception centres, which found that, while policy discourse tended to focus on efficiency, functionality and the provision of shelter, when discussing their lives in the centre the residents used home discourses to describe their experiences, including their frustration at not having ‘even the most basic attributes of home’.<sup>86</sup>

While we would not dispute that efficiency, functionality and shelter are important policy values, so too is the ‘home’ perspective, which: “...is hardly represented in the dominant discourse.” This is perhaps not surprising if the policy question is the systemic issue of what to ‘do’ with asylum seekers.<sup>87</sup>

Talk about the right to a home is very marginal when the people involved are not legal residents, as is the case with asylum seekers. The centres are hardly aimed at providing a home. The concern is with giving a shelter and making the procedure run smoothly. Functionality within the aims of the asylum procedure is top priority...it is a discourse of temporality, insecurity and authority...<sup>88</sup>

The home meanings most often missed by residents were autonomy (for example, the ability to choose what you eat, and to prepare it) and the freedom to live in accordance with cultural customs.<sup>89</sup> Furthermore, the Dutch study found that:

...officials make no real effort to make the institutions homelike. Rather, homelike attachments to the centres are discouraged. An institutional

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<sup>82</sup> Diken uses Augé’s terminology: M Augé, Non-places: Introduction to an Anthropology of Supermodernity (London, Verso, 1995); B Diken, “From Refugee Camps to Gated Communities: Biopolitics and the End of the City” (2004) 8 Citizenship Studies 83, 91.

<sup>83</sup> The policy of dispersal was implemented under the Immigration and Asylum Act 1999, and has been heavily criticised: C Boswell, Spreading the Costs of Asylum Seekers: A Critical Analyses of Dispersal Policies in Germany and the UK (Royal Institute of International Affairs, 2001), <http://www.researchasylum.org.uk/?lid=141>; P Hynes, The Compulsory Dispersal of Asylum Seekers and Processes of Social Exclusion in England (Summary of Findings, Middlesex University, 2006), [http://www.mdx.ac.uk/HSSc/research/centres/sprc/docs/Summary\\_of\\_Findings.pdf](http://www.mdx.ac.uk/HSSc/research/centres/sprc/docs/Summary_of_Findings.pdf); A Anie, N Daniel, C Tah, A Petruckevitch, An exploration of factors affecting the Successful dispersal of asylum seekers (RDS Online report 50/05, Home Office, 2005), <http://www.homeoffice.gov.uk/rds/pdfs05/rdsolr5005.pdf>.

<sup>84</sup> Diken, op cit, n 82, 91.

<sup>85</sup> Id.

<sup>86</sup> van der Horst, op cit n 20.

<sup>87</sup> Id.

<sup>88</sup> Id. 41.

<sup>89</sup> For example, the absence of men and women’s spaces, and cultural norms on suitable relations between family members.

discourse produces the quality standards and suppresses home associated standards...The centres are measured against the standards of cost and efficiency. Food, hygiene and sleep are the three main criteria.<sup>90</sup>

Conversely, from the asylum seeker's perspective: "[f]unctionality and efficiency, as stressed in the policy, are terms hardly used by the respondents. Bed, bath and bread, considered sufficient in the opinion of the policymakers, is clearly not sufficient to them."<sup>91</sup> Residents tended to respond in two ways to this absence of home: some residents attempted to adapt their lives in the centre to make it more 'homely'; however, "...[i]n other situations...the lack of a 'home' caused mental and physical suffering."<sup>92</sup>

These characteristics are also evident in the UK discourse, with its emphasis on efficiency, functionality and the policy goals of 'containing' asylum seekers, keeping them out of the workforce, and encouraging return when applications for asylum have failed. For example, in 2002 the Government identified criteria by which a trial of accommodation centres would be assessed as including improvements in the asylum process, for example: closer contact between asylum seekers and the relevant authorities; reduced decision times by tighter management of the interview and decision-making process; fewer opportunities for illegal working during the application process; minimal opportunities for financial or housing fraud; reduction in community tensions; and facilitating integration for those granted a status in the UK and voluntary return packages for those who are refused;<sup>93</sup> with a focus on costs and processing times.<sup>94</sup> While these criteria are obviously important from the government perspective, and a quick positive decision is advantageous for the asylum seeker, the dominance of bureaucratic functionality to the exclusion of the 'home' experiences while living in accommodation centres has negative implications for asylum seekers while awaiting determination of their claims.

## Failed Asylum Seekers

Recent studies have also emphasised the negative impact of experiences of (lack of) home for failed asylum seekers who are denied access to housing and home. A series of interviews with rejected asylum seekers carried out by Amnesty International in 2006: "...revealed lives on the margins of society, abject poverty and individual struggles to survive with whatever help could be found, with health problems and degrees of psychological distress directly related to this painful limbo existence."<sup>95</sup> The human costs of destitution for rejected asylum seekers included depression and other mental health problems, and they were described as having been "stripped of their dignity" and having "given up hope of ever living normal lives."<sup>96</sup> Through this lens, it can be seen that while maintaining an environment in which refused asylum seekers remain *not at home* is designated as a positive outcome within the boundaries of the dominant discourse, such approaches have adverse human consequences. Yet,

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<sup>90</sup> *Op cit*, n 20, 45.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, Cm 5387 (London, TSO, 2002), para 4.39.

<sup>94</sup> *Id.*, para 4.40.

<sup>95</sup> Amnesty International, *Down and Out in London: The Road to Destitution for Rejected Asylum Seekers*, (London, Amnesty International UK, 2006), 14.

<sup>96</sup> *Id.*; see pp15-17 for accounts of these impacts in the voices of refused asylum seekers.

these human consequences are largely excluded from legal decision-making in England and Wales.

Asylum-seekers have been described as: “...among the most legally and socially disadvantaged people in western societies.”<sup>97</sup> In addition, successive policies pursued by UK governments have heightened asylum seekers’ vulnerability and sense of dislocation by adding conditions to and restrictions upon their right to, and ability to, access and participate in the labour market and to obtain social housing, with the combined effect of rendering many asylum seekers destitute.<sup>98</sup> This was highlighted in a series of research studies for the Rowntree Trust,<sup>99</sup> the most recent of which found that over a third of failed asylum seekers in Leeds had been destitute for over a year. The Rowntree reports also refuted the government’s claim that no asylum seekers need to be destitute, finding that substantial numbers were destitute because of inadequate administration.<sup>100</sup> Yet still, for most purposes asylum seekers remain totally excluded from employment,<sup>101</sup> from the safety net against homelessness offered to UK and EU nationals,<sup>102</sup> and from the minimum benefits that anyone else in the UK might expect,<sup>103</sup> thus curtailing their access to all the key provisions that for others prevent destitution.

These policies can be justified in the official discourse – to diminish alleged ‘pull factors’, or because (failed) asylum seekers are ‘undeserving’ or worse, likely to be criminal – and when these considerations are used to frame the debate, the impact of the policies on the human experience of the asylum seeker is marginalised, even rendered irrelevant. The exclusion of asylum seekers from housing and home is not defined as a problem, but is a ‘non-problem’, and so does not require a solution through the policy agenda. However, reviewing the widespread destitution of failed asylum seekers through the ‘oppositional discourse’ of the human experience of displacement and dispossession casts into sharp relief the competing individual interest that should be weighed against the dominant interests of the state in these circumstances: the interest in establishing home through housing.

Yet, conversely, government policies as given effect through law have sought to use the *denial* of housing as a means of coercing certain types of behaviour from asylum seekers. For example, section 55 of the Nationality, Immigration and Asylum Act 2002 provided that asylum seekers who did not apply for asylum “as soon as reasonably practicable” on arrival in the UK could be denied accommodation otherwise available to asylum seekers, with the expectation that the (threat of) denial of accommodation would induce more rapidly filed applications. Likewise, and

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<sup>97</sup> S Castles & A Davidson, Citizenship and Migration: Globalisation and the politics of belonging (London, Macmillan, 2000), 73.

<sup>98</sup> Above, n 70; Cholewinski, op cit, n 38; O’Cinneade, op cit, n 17.

<sup>99</sup> See K Adie, J Baggini, C Griffiths, B Kilgallon, S Warsi, Moving on: From Destitution to Contribution (York, Joseph Rowntree Charitable Trust, 2007); D Brown, Not Moving On: Still Destitute in Leeds (York, Joseph Rowntree Charitable Trust, 2008); H Lewis, Still Destitute: A Worsening Problem for Refused Asylum Seekers (York, Joseph Rowntree Charitable Trust, 2009).

<sup>100</sup> Not Moving On, id.

<sup>101</sup> Above, n 70.

<sup>102</sup> Under the Housing Act 1996, s186, asylum seekers are not considered homeless if they have any accommodation, ‘however temporary’ available to them.

<sup>103</sup> Since the enactment of the Asylum and Immigration Act 1996, adult asylum seekers have been excluded from the mainstream benefits system in the UK; discussed further below.

despite Government protestations to the contrary, it remains the case that the law continues to condone the destitution of failed asylum seekers, with the (threat of) denial of accommodation intended to support the policy of return by encouraging asylum seekers to leave the UK. These policies reveal a paradox: while they typically give little weight to the asylum seeker's interest in re-establishing 'home', it is the universally acknowledged human need for 'home', and the deleterious effects of denying access to a meaningful home experience, that underpins their power to coerce.

The provision of support to asylum seekers in the UK has been described by the parliamentary Joint Committee on Human Rights as 'a confusing mess'.<sup>104</sup> By the 1990s, the rights of asylum seekers to social security benefits were being progressively extinguished, and when combined with a general prohibition on the right of asylum seekers to work, the vulnerability and exposure that this engendered in respect of housing and home was clear.<sup>105</sup> This, in turn, has emphasised the power of the dominant discourse, which has sought to minimise the state's obligations towards asylum seekers in respect of housing and home, not only deflecting attention from their human experiences but also allowing their living conditions at the most basic level to be determined according to the political agenda.<sup>106</sup>

The withdrawal of housing rights for asylum seekers set the scene for the progressive erosion of the state's welfare obligations towards asylum seekers by limiting the duty owed by local authorities under Part III of the Housing Act 1985 where the applicant was a homeless asylum seeker. For example, section (4) of the Asylum and Immigration Appeals Act 1993<sup>107</sup> provided that asylum seekers were ineligible for housing assistance if they had any accommodation in the UK, however temporary; furthermore, where an asylum seeker was eligible for housing, "any need of his for accommodation shall be regarded as temporary only."<sup>108</sup> There is some evidence that the courts were prepared to extend this duty as far as the legislation permitted. In R v Kensington & Chelsea ex parte Irina Korneva<sup>109</sup> the Court of Appeal – in a judgment expressed in the language of statutory construction - held that this temporary housing should still be 'suitable' in terms of the condition of the property.<sup>110</sup> "There is, however...no distinction drawn between the discharge of duty towards eligible asylum-seekers with no accommodation and other homeless persons."<sup>111</sup> While accepting that the 'right to housing' safety net had been reduced by Parliament, the court did not accept the invitation to further encroach on the duty owed to asylum

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<sup>104</sup> Op cit, n 67, 110.

<sup>105</sup> Above n 70.

<sup>106</sup> In Westminster City Council v National Asylum Support Service [2002] UKHL 38 Lord Hoffman observed that: "There was a time when the welfare state did not look at your passport or ask why you were here...immigration status was a matter between you and the Home Office, not the concern of the social security system. As immigration became a political issue, this changed...Voters became concerned that the welfare state should not be a honey pot which attracted the wretched of the earth. They acknowledged a social duty to fellow citizens in need but not a duty on the same scale to the world at large."; paras 19-20. In addition, the use of asylum seekers as a political tool is outlined in A Bloch & L Schuster, 'Asylum and welfare: contemporary debates' (2002) 22 Critical Social Policy 393.

<sup>107</sup> Later, section 186(1) of the Housing Act 1996.

<sup>108</sup> Asylum and Immigration Appeals Act 1993, section 4(3).

<sup>109</sup> [1996] EWCA Civ 1114.

<sup>110</sup> In this case the flat allocated to the applicant and her son suffered from damp.

<sup>111</sup> Id., 710-11.



seekers by local authorities, and, significantly, were explicit in equating the position of asylum seekers entitled to temporary housing with citizens who fell into the same category.

Meanwhile, in 1996, the Social Security (Persons from Abroad) Miscellaneous Amendment Regulations were passed to remove the entitlement to social security benefits of asylum seekers who did not claim asylum at the point of entry into the UK (with the use of delegated legislation perhaps indicating a desire to avoid the controversy that might be engendered by open debate and scrutiny in the public forum of the Houses of Parliament). These Regulations were successfully challenged in R v Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants,<sup>112</sup> when Brown LJ noted that the Regulations would either encourage potential refugees to leave the UK before concluding their appeals or, would: "...necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it."<sup>113</sup> In upholding the asylum seekers' challenge to the legislation, Brown LJ reasoned that:

Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution. Primary legislation alone could in my judgment achieve that sorry state of affairs.<sup>114</sup>

Indeed, this comment proved to be prophetic, and the Asylum and Immigration Act 1996 was enacted to more securely achieve the aims of the impugned Regulations.

With limited rights to housing and no entitlement to social security asylum seekers faced with destitution began to assert rights under the residual safety net of the UK's welfare state provided by the National Assistance Act 1948.<sup>115</sup> Of course, the residual safety-net of the 1948 Act could only ever be partial and inadequate, since it was not designed to support housing or provide homes - in contrast to the homelessness provisions in the Housing Acts, from which asylum seekers had been excluded. In R v Hammersmith and Fulham London Borough Council, Ex parte M<sup>116</sup> the Court of Appeal held that asylum seekers who were sleeping rough and going without food were covered by section 21(1)(a) of the NAA 1948, which imposes upon every local council a duty to provide residential accommodation "for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them." One of the most significant consequences of this decision was that it transferred primary responsibility for housing many asylum seekers on to local authorities. The incoming Labour government responded with the White Paper 'Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum',<sup>117</sup> followed by the Immigration and Asylum Act 1999, which created an alternative to the residual safety net of the 1948 Act in the form of a separate national system administered by the new National Asylum Support Service (NASS).

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<sup>112</sup> [1997] 1 WLR 275.

<sup>113</sup> *Id.*, 293, *per* Brown LJ.

<sup>114</sup> *Id.*

<sup>115</sup> The history of s21 NAA 1948 is summarised at para 7 *et seq* of Baroness Hale's leading judgment in R (on the application of M) (FC) v Slough Borough Council, discussed below.

<sup>116</sup> (1997) 30 HLR 10

<sup>117</sup> *Op cit.*, n 69.

The shift to the national system in the 1999 Act prompted the removal of the limited right to (temporary) housing from local authorities.<sup>118</sup> In its place, under section 95, NASS support may be provided to asylum seekers ‘who appear to the Secretary of State to be destitute or to be likely to become destitute’. Under section 4, the Secretary of State may also provide support through NASS to destitute failed asylum seekers, subject to strict criteria such as demonstrating, with evidence, that there is no safe route of return or that they have a physical or medical impediment to travelling (such as the latter stages of pregnancy).<sup>119</sup> The notable consequences of separating the welfare support of asylum seekers from other people in the UK included the sense of ‘otherness’ that it brought, as well as undermining the expectation that asylum seekers should be treated comparably to equally vulnerable nationals. For example, the level of cash support that a single asylum seeker aged 25 or over is entitled to is calculated at 70 per cent of the income support level for non-asylum seeking adults.<sup>120</sup>

The human experience of asylum seekers is further obscured by the way that legal discourse has been dominated not by the rights of the applicants, but by the division of financial responsibilities between national and local government. One of the quirks of the NASS system is that if the asylum seeker was eligible for local authority support under the NAA 1948, then they would not be ‘destitute’ and so would not qualify for NASS accommodation. Foreseeing this eventuality, the 1999 Act had attempted to curtail access to local authority support by inserting a new section 21(1A) into the NAA, excluding the provision of local authority support to persons subject to immigration control where their need for care and attention arises ‘solely’ because of destitution or the physical effects of destitution upon them. Cases concerning access to local authority support under section 21(1)(a) NAA 1948 thus became known as ‘destitution plus’ cases, but in R v Wandsworth London Borough Council, Ex parte O and R v Leicester City Council, Ex parte Bhikha,<sup>121</sup> the Court of Appeal again applied an expansive interpretation, dampening the effect of the new section 21(1A) by indicating that virtually any infirmity would mean that the need for care and attention was not ‘solely’ because of destitution: “If there are to be immigrant beggars on our streets, then let them at least not be old, ill or disabled.”<sup>122</sup>

This has created difficulties where particular local authorities, especially in South East England, have come under pressure to provide support to asylum seekers in need of care and attention.<sup>123</sup> Crucially, since the obligation stems from welfare and not immigration law, the local authority may owe duties to *failed* asylum seekers in need of care and attention as well as those awaiting asylum decisions.<sup>124</sup> At a political level, it is perhaps understandable that local authorities resent footing the bill since immigration is seen as a quintessentially national government issue. However, the

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<sup>118</sup> Immigration and Asylum Act 1999, section 117(5), which repealed section 186 of the Housing Act 1996.

<sup>119</sup> The criteria are set out in Regulation 3 of the Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005. Section 4 support is discussed further below.

<sup>120</sup> JCHR, op cit n 67, para. 71; from 5th October 2009, £35.13 per week for all single asylum seekers aged 18 or over. The figure is fixed by the Asylum Support (Amendment) (No. 2) Regulations 2009.

<sup>121</sup> [2000] 1 WLR 2539.

<sup>122</sup> Id., 2548.

<sup>123</sup> See Fairer, Faster and Firmer, op cit, n 69, at para 8.14.

<sup>124</sup> See Sweeney, op cit, n 6, 284; the local authority duty to failed asylum seekers is terminated where the individual does not comply with removal directions: section 54 and schedule 3 Nationality Immigration and Asylum Act 2002.

consequence has been a series of cases where local and national government have disputed who is responsible for providing accommodation support for particular asylum seekers,<sup>125</sup> giving rise to what Sweeney has described as: "...an inverted and unseemly turf war between local and central government."<sup>126</sup>

In R (on the application of M) (FC) v Slough Borough Council,<sup>127</sup> Baroness Hale revealed that the senior judiciary had not foreseen this turn of events,<sup>128</sup> but noted that the policy aims of the 1999 scheme included: "...the deterrent effect of making the claimants' situation 'less eligible'."<sup>129</sup> In a re-assertion of the 'deserving' asylum seeker as victim (rather than rights-bearer or contributor), the decision in Slough<sup>130</sup> suggests that 'destitution plus' cases will now be limited to those persons whose need does not arise solely from destitution but who also need 'looking after'.<sup>131</sup> This has opened a gateway for local authorities to re-examine the circumstances of the persons to whom they are providing accommodation under section 21(1)(a) NAA 1948 and to cease support for those who do not meet the stricter conditions set out in Slough. In theory, (failed) asylum seekers consequently excluded from local authority support and at risk of destitution can now seek support under the national system administered by NASS. However, in reality, they are likely to face administrative delays, complex application processes, and, ultimately, barriers in accessing housing which is capable of functioning as *home*.

These issues have been recognised in several reports scrutinising the accommodation provided when an asylum seeker is eligible under NASS. The two key issues which have emerged, location and quality, reflect the discussion in the previous section concerning the experiences of asylum seekers in 'un-homely' accommodation. The issue of location is rooted in the policy of dispersal,<sup>132</sup> which has come under criticism from the UK's House of Commons Public Accounts Committee (PAC). The primary criterion in the dispersal process is the availability of accommodation, which the PAC has recognised: "...can result in individuals becoming isolated."<sup>133</sup> In addition, the 2007 Joint Committee on Human Rights Report on the Treatment of Asylum Seekers found evidence that the quality of NASS accommodation is unsatisfactory and falls short of what is required under the Article 8 ECHR right to respect for home, family and private life.<sup>134</sup> While the PAC report suggests that there

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<sup>125</sup> Discussed in Sawyer & Turpin, op cit, n 73, 710 *et seq*

<sup>126</sup> Sweeney, op cit, n 6, 285.

<sup>127</sup> [2008] UKHL 52.

<sup>128</sup> "We had assumed that the new national asylum support scheme would provide for destitute asylum seekers even if they were especially vulnerable, if the care and attention they needed could be provided for them in the accommodation provided by the new scheme."; id., para 27.

<sup>129</sup> Id., para 22.

<sup>130</sup> The Slough case concerned the case of 'M', an HIV positive Zimbabwean 'overstayer' (i.e. someone who had stayed beyond the amount of time permitted on their visa), whose immediate need for medication and a refrigerator in which to keep it the NHS could already provide.

<sup>131</sup> The use of 'looking after' echoes the post-war construction of the asylum seeker as a victim rather than a rights-bearer, or someone who contributes to the welfare system by participating in the labour market and paying taxes; see Bloch & Schuster, op cit, n 106, 397-8.

<sup>132</sup> Above, n 83.

<sup>133</sup> House of Commons Public Accounts Committee, 'Management of Asylum Applications: Twenty-eighth Report of Session 2008-09', HC 325 (2009), p6

<sup>134</sup> JCHR report, op cit n 67, para 102; the Government maintains that it 'has agreed standards and contracts' which ensure there is no breach of international obligations; Joint Committee on Human

may be some scope for ‘housing as home’ considerations – that is, considerations that go beyond concern with mere shelter - to be represented in policy discourse on housing for asylum seekers, at a judicial level these issues have been obscured by the debate concerning the obligations of local authorities vis-à-vis central government. In addition, there remain considerable challenges to the development of legal strategies that can effectively represent the asylum seeker’s interest in securing accommodation which can function as a home, against the state’s expressed interest in avoiding the establishment of home attachments in the UK during the asylum process.

The decision in R v Secretary of State for the Home Department, ex parte Adam, Limbuela and Tesema<sup>135</sup> suggested that, even in the face of concerns regarding the costs imposed on local authorities in respect of NAA support for asylum seekers, and the explicit aim of reserving NASS support as a ‘last resort’, the House of Lords could recognise the human impact where asylum seekers were excluded from housing and home. This case concerned section 55(1) of the Nationality, Immigration and Asylum Act 2002 (NIAA), which places the Home Secretary under a duty to exclude from the national scheme asylum seekers who do not make their application for asylum ‘as soon as reasonably practicable’, thus reinforcing the legislative policy to restrict access to the nationally administered system. Nevertheless, a ‘safety net’ under section 55(5) NIAA does ‘not prevent’ the Home Secretary exercising a power to support to the extent necessary for the purpose of avoiding a breach of the European Convention on Human Rights, so preventing the Act from requiring the Home Secretary to act in such a way as to conflict with section 6(1) of the Human Rights Act 1998.<sup>136</sup>

Each applicant had been excluded from access to support by virtue of section 55(1), but the power under section 55(5) was not exercised. The facts presented to the House of Lords indicated that the applicants had experienced considerable hardship, including sleeping rough, and the House of Lords went on to hold that the Home Secretary’s failure to exercise the power under section 55(5) NIAA 2002 amounted to a violation of their right to freedom from inhuman or degrading treatment under Article 3 ECHR,<sup>137</sup> with the court paying particular attention to the attempt to use the threat of destitution to coerce asylum seekers to apply promptly for asylum. It is significant that this case was adjudicated on the basis of Article 3 ECHR, often considered the only ‘absolute’ right in the Convention.<sup>138</sup> At one level this provides a welcome recognition that homelessness and destitution strike at the heart of what it means to be human, potentially constituting one of the most serious forms of human

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Rights, ‘Government Response to the Committee’s Tenth Report of this Session: The Treatment of Asylum Seekers’, (2006-07) HL Paper 134; (2006-07) HC 790, para. 9.

<sup>135</sup> [2005] UKHL 66.

<sup>136</sup> s6(1) HRA 1998 renders it unlawful for a public authority to act in a way that is incompatible with a Convention right.

<sup>137</sup> Notwithstanding the general principle that the state is not responsible for the destitution of asylum seekers, the House of Lords held that by creating a statutory framework that combined a prohibition upon working with exclusion from support by the state the UK Government was ‘directly responsible’ for their suffering; above, n 17.

<sup>138</sup> M Addo and N Grief, “Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?” (1998) 9 European Journal of International Law 510; J Callewaert, “Is there a margin of appreciation in the application of Articles 2, 3 and 4 of the Convention?” (1998) 19 Human Rights Law Journal 6; S Palmer, “A Wrong Turning: Article 3 and Proportionality” (2006) 65 Cambridge Law Journal 438.

rights violation recognised by the ECHR. However, as well as reserving protection only to those cases with the most extreme adverse facts, the reliance on Article 3 in this context also emphasised (by their absence) the contingent nature of the right to respect for home under Article 8, as well as the unenforceability of the right to adequate housing in the International Covenant on Economic, Social and Cultural Rights.<sup>139</sup>

There remains some dispute as to whether the UK government is in fact following a policy of using (the threat of) forced destitution as a means of coercing failed asylum seekers to return to their home state. At the end of the asylum process, a failed asylum seeker may be ‘removed’ from the UK, however it is recognised that making a successful forced removal is challenging,<sup>140</sup> with the most recent report of the PAC observing that since its previous report removals of failed asylum seekers have actually decreased.<sup>141</sup> Successful return is highly dependent on the failed asylum seeker’s willingness to make a ‘voluntary’ departure from the UK, and restricting entitlements to social assistance including housing has become a standard means of encouraging departure.<sup>142</sup>

A destitute failed asylum seeker has two potential avenues of support as a matter of UK law.<sup>143</sup> If removal directions have not been made, or the failed asylum seeker is complying with such directions,<sup>144</sup> and they are in the UK not in breach of the immigration laws,<sup>145</sup> then they may benefit from section 21 NAA 1948 ‘destitution plus’ support in the same way as an asylum seeker, so long as they meet the ‘needs looking after’ criteria outlined in Slough. Secondly, where the ‘destitution plus’ criteria are not met, a destitute failed asylum seeker may apply for NASS ‘hard case’ support under section 4 of the IAA 1999. Unlike NASS support, section 4 support does not result in cash payments, but consists of self-catering accommodation plus £35 per week in vouchers. Significantly, the use of vouchers rather than cash may further exacerbate the stigmatisation of failed asylum seekers, limiting their choice as to where they purchase goods to meet their essential needs<sup>146</sup> and so compounding the lack of autonomy which renders this type of accommodation ‘unhomely’.<sup>147</sup>

Most importantly for the reality of the human experience of failed asylum seekers, if a failed asylum seeker does not comply with removal directions then they become ineligible either for NASS ‘hard case’ support or for local authority ‘destitution plus’ provision,<sup>148</sup> so excluding them from all access to rights that for others prevent destitution. It is assumed that the stark choice between destitution and ‘voluntary’

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<sup>139</sup> See J Sweeney & L Fox O’Mahony, “The Displacement and Dispossession of Asylum Seekers: Recalibrating the Legal Perspective” in L Fox O’Mahony & J Sweeney (eds), The Idea of Home in Law: Displacement and Dispossession (Abingdon, Ashgate, 2010).

<sup>140</sup> Op cit, n 116.

<sup>141</sup> Id.

<sup>142</sup> Note the statements of Lord Bassam regarding the means to ‘incentivise return’, above, text to n 71.

<sup>143</sup> C Lewis, “Asylum Support Brief - Part Three: Failed Asylum Seekers” (2006) 156 New Law Journal 1246; JCHR, op cit, n 67, para 67 *et seq*.

<sup>144</sup> NIAA 2002, Schedule 3, para 6(1).

<sup>145</sup> Id, para 7.

<sup>146</sup> JCHR op cit, n 67, para 110.

<sup>147</sup> Above, nn 75-86.

<sup>148</sup> IAA 1999, s 54 and NIAA 2002 Schedule 3, which also excludes support under other welfare provisions.

return will encourage people whose application for asylum has been rejected, and yet who still refuse to return ‘home’, to leave the UK. Yet a report by the Independent Asylum Commission in 2008 showed that less than 4% of failed asylum seekers still in the UK receive support under the section 4 scheme.<sup>149</sup> Unless they qualify for local authority support, the remainder remain in the UK without the right to work and, without any recourse to public support, reliant on charitable and voluntary organisations.<sup>150</sup>

A crucial question is whether, given that the failed asylum seeker has the option of returning ‘voluntarily’ to their state of origin, the state is responsible if they become destitute. If the UK is responsible, then following *Adam*, *Limbuela* and *Tesema* this would appear to be an infringement of Article 3 ECHR. Indeed, the exclusion from support of failed asylum seekers who do not comply with removal orders<sup>151</sup> can be suspended under paragraph 3 of Schedule 3 NIAA 2002 in order to avoid a violation of the ECHR or EU law. However, the orthodoxy is that the ‘choice’ of the asylum seeker to remain in the UK severs the government’s responsibility for the destitution so that no violation of the ECHR arises and the safeguard is not triggered.<sup>152</sup> In all of these cases, the impact of exclusion from housing and home on failed asylum seekers has not been a feature of the policy debates, leading Lord Sandwich to suggest that: “[o]nce a person is to be removed from the UK, it seems that our famous sense of decency and much-advertised belief in human dignity are removed at the same time.”<sup>153</sup>

## Conclusions

The deliberate and explicit exclusion of asylum seekers from the opportunity to establish home through adequate housing in the UK pursues a clear and identifiable agenda: to reduce alleged ‘pull factors’, to discourage the formation of ‘home’ attachments in the UK and to incentivise return, as well as focusing asylum policy on considerations of security, efficiency and the desire to clamp down on allegedly fraudulent or false claims of asylum. However, this article argues that the dominant focus on these considerations has also excluded consideration of the human needs of asylum seekers, who are denied the opportunity to establish housing and home while waiting for their claim to be determined or after a claim has been refused, leading to what we have termed ‘double displacement’. While it is proper that legal and policy decisions concerning the treatment of asylum seekers be determined by balancing the interests of the state against the individual, we argue that the power of the dominant discourse has excluded any sense of balancing individual interests, including the need for housing and home. The impact of government rhetoric in this context has been recognised in recent years. For example, in a House of Lords debate on Immigration and Asylum in 2005, Lord Sandwich claimed that:

...asylum seekers are again becoming the cannon fodder of an election campaign. In some ways, Labour and Tory thinking in another place has

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<sup>149</sup> 9,365 out of 283,500 people; Independent Asylum Commission, Second report of conclusions and recommendations, safe return (London, Independent Asylum Commission, 2008) (<http://www.independentasylumcommission.org.uk/>), 31.

<sup>150</sup> See *Down and Out in London*, *op cit*, n 95, 6.

<sup>151</sup> By section 54 IAA 1999 and Schedule 3 NIAA 2002.

<sup>152</sup> The orthodoxy is challenged in Sweeney, *op cit*, n 6.

<sup>153</sup> *Hansard*, HL, col 1247 (23 February 2005), (Earl of Sandwich).

converged into a more aggressive stance.... The Government's new strategy has been greeted with dismay by those who work with asylum seekers. Its robust language—of crackdowns and rooting out abuse—amounts to an obvious manifesto.<sup>154</sup>

In the same debate, Baroness Neuberger added: "I am appalled by the tone of the debate coming from both the Conservatives and the Government."<sup>155</sup> while the Lord Bishop of Leicester expressed concern for: "...the most vulnerable in our towns and cities whose lives, freedoms and rights are most likely to be subtly undermined by the tone of our immigration debates."<sup>156</sup>

The position of asylum seekers as amongst the most marginalised, vulnerable and poor people in our society also provides a powerful reminder of the power of rhetoric in constructing a class of people who are 'them' not 'us', and the implications of such abstractions for law and policy discourse. In a seminal article focusing on the rhetoric of poverty,<sup>157</sup> Thomas Ross demonstrated how the way in which we talk and argue about poverty reveals what we believe about ourselves and others, with the rhetorical separation of 'the poor' as different, deviant, morally weak, making more coherent the physical separation of the poor from the affluent in society. Ross argued that this rhetoric is achieved, in part, through the separation and stigmatisation of people in poverty using rhetorical themes of difference and deviance, and also through the premise that we are helpless to change the 'harsh realities' of society, thus placing the 'problem' of poverty beyond judicial power or jurisdiction.<sup>158</sup> It is this rhetoric, Ross argued, that enables us to distinguish groups of people as 'them' and 'us', and "to make *their* suffering intellectually coherent."<sup>159</sup>

The parallel between the rhetoric of poverty and the dominant discourse towards asylum seekers in the UK is highlighted by Ross' observation that:

Historically, we have often encouraged...change on the part of the poor by making the conditions of poverty so appalling that we imagine poor people will do whatever it takes to avoid them. We are disappointed when so many poor people seem to insist on not mending their ways and, to our surprise, seem willing to go on living in the horrific conditions of poverty. This disappointment feeds the argument of helplessness. If poor people are unwilling to change their behavior and values in response to the strongest of incentives, the horror of life in poverty, what else can we do?<sup>160</sup>

This analysis echoes the official policy of 'encouraging' failed asylum seekers to leave the UK through denying them the opportunity to establish a secure base for housing and home. If failed asylum seekers will not leave, even when denied access to the opportunity to establish home, what else can we do? Furthermore, just as the poor are conceptually separated into 'deserving' and 'undeserving' poor, so too asylum seekers are identified as 'genuine' (and so successful in their claims) or 'fraudulent' (and so refused asylum). 'Undeserving' asylum seekers are, furthermore,

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<sup>154</sup> *Id.*, col 1246.

<sup>155</sup> *Hansard*, HL, col 1223 (23 February 2005), (Baroness Neuberger).

<sup>156</sup> *Hansard*, HL, col 1228 (23 February 2005), (The Lord Bishop of Leicester).

<sup>157</sup> T Ross, "The Rhetoric of Poverty: Their Immorality, Our Helplessness" (1991) 79 *Georgetown Law Review* 1499.

<sup>158</sup> *Id.*, 1502, 1509.

<sup>159</sup> *Id.*, 1508, emphasis added.

<sup>160</sup> *Id.*, 1510.

denied the means (through the denial of the right to work) to join the ‘deserving’ members of society.<sup>161</sup> Meanwhile, the human experiences of (absence of) housing and home for (undeserving) asylum seekers – the reasoning goes – are not our responsibility or our concern. Added to this, the dominant policy rhetoric, with its power base in the need to secure *our* home borders, easily overshadows the human impact of this exclusion.

It has often been said that the measure of a society is in how it treats its most vulnerable members. This article argues that the discourse surrounding asylum seekers and their access to housing and home must begin to allow scope within the framework of debate for a more humanistic perspective, which recognises the vulnerability of (failed) asylum seekers, and the impact of exclusion from housing and home on their wellbeing. While we are not necessarily advocating a major u-turn in policies concerning jobs and welfare, we do argue that there is a need for a greater measure of fairness and balance in the ways in which we debate issues of housing and home, so that we treat asylum seekers as people rather than excluding consideration of their human experiences. This is particularly apt in light of evidence suggesting that government concerns regarding alleged ‘pull factors’ are unfounded:<sup>162</sup> there is no need to treat people in such a non-human way. Even allowing that there may be cases in which asylum seekers commit crimes, or make fraudulent claims, this does not make them so ‘different’ from the indigenous population. Ross captured this point in his description of the rhetoric of poverty as both revealing and obscuring: on the one hand, a reality of criminal and immoral behaviour is revealed, but this simply demonstrates that: “[t]he rich are not the only ones who defraud the government and abuse their children.”;<sup>163</sup> while, on the other hand, the rhetoric obscures those aspects of the lives of asylum seekers that mirror our own lives: that we all suffer when our access to a secure base for housing and home is rendered precarious.

The rhetoric makes it easy for the legal methodology to simply accept the status quo and to say that we can’t change the world. In the case of asylum seekers’ access to housing and home, viewing the issue through a lens which excludes the human context of experiences of lack of home or ‘un-homeliness’ from the dominant discourse enables decisions to be reached in accordance with the overarching interests of the state, with the primary area of legal debate focusing around which is less responsible for the limited provision available, between local authorities and the centrally funded NASS. This article problematises these issues by identifying an oppositional discourse which recognises the reality of asylum seekers’ experiences of (the absence of) housing and home, so demonstrating the need to add an important human dimension to legal and policy discourses concerning access to support, forced destitution and the opportunity to establish ‘home’. We argue that this oppositional discourse should be brought to bear when addressing fundamental questions underpinning the balance struck between the state’s interests in relation to asylum seekers and the individual right to seek refuge.

Since policies are rooted in the recognition of problems, the first step in this process must be to re-define the exclusion of such people from housing and home as a

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<sup>161</sup> R Sales, ‘The deserving and the undeserving? Refugees, asylum seekers and welfare in Britain’ (2002) 22 *Critical Social Policy* 456.

<sup>162</sup> Above, nn 53-58 and associated text.

<sup>163</sup> Ross, above n 157, 1541.



problem requiring a solution.<sup>164</sup> If social problems are understood as a process of competitive claims-making,<sup>165</sup> the oppositional discourse would seek to counter the official discourse which has to date been promulgated by the media and politicians and which has constructed the presence of asylum seekers as the problem, and excluded consideration of their needs for housing and home.<sup>166</sup> Jacobs et al have identified three conditions which are necessary for housing problems to be recognised as problems and acted upon: (1) a convincing narrative must be developed; (2) a coalition of support must be constructed; and (3) the coalition of support must ensure that institutional measures are implemented.<sup>167</sup> We would argue that the lens of housing and home provides a framework within which to develop a convincing narrative opposing the exclusion of asylum seekers - which we recognise as not just about the allocation of housing and welfare resource but giving effect to a political agenda regarding immigration and asylum policy which is preoccupied with control.<sup>168</sup> By providing this alternative lens, we would seek to develop a coalition of support in favour of reconstructing the normative questions around the rights to housing and home for asylum seekers.

An example of this approach in practice, and its power to influence institutional measures, can be seen in the amendments to the proposed Common European Asylum System put forward by the EU's Committee of the Regions,<sup>169</sup> including the proposition that: "Forced destitution, or the threat of it, shall never be used in order to coerce refused applicants to return to their state of origin."<sup>170</sup> The emergence of an oppositional discourse provides opportunities to lobby for developments in the way that we understand the norms that underpin human rights, for example, the right to housing, to respect for home or even to freedom from inhuman and degrading treatment. It is also important to remember that these: "human rights norms can help inculcate political willingness to act responsibly in contentious areas such as the relationship between immigration and social housing";<sup>171</sup> and so potentially counter-balance the official discourse in influencing legislative developments to move beyond minimal compliance with international standards, and to re-think the balance struck by policies that exclude asylum seekers from housing and home.

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<sup>164</sup> See W Parsons, Public Policy: An Introduction to the Theory and Practice of Policy Analysis (Cheltenham, Edward Elgar, 1999).

<sup>165</sup> K Jacobs, J Kemeny & T Manzi, 'Power, discursive space and institutional practices in the construction of housing problems' (2003) 18 Housing Studies 429, 430.

<sup>166</sup> Jacobs et al describe the construction of social problems, including the image of: "...asylum seekers as culpable groups who are subverting allocation waiting lists."; id., 431, as: "...draw[ing] heavily upon negative stereotyping and rhetorical strategies that undermine the status of certain marginalised social groups while privileging others."; id., 430.

<sup>167</sup> Id.

<sup>168</sup> See Sales, op cit, n 161.

<sup>169</sup> To which Dr Sweeney is an expert adviser.

<sup>170</sup> Article 20(7); see further, Sweeney & Fox O'Mahony, op cit, n 139.

<sup>171</sup> Sweeney & Fox O'Mahony, id.