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**ORGANISING FOR EXCLUSION?**  
MAKING SENSE OF ASYLUM POLICY IN THE REPUBLIC OF  
IRELAND AND THE UNITED KINGDOM

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**ORGANISING FOR EXCLUSION?**

**MAKING SENSE OF ASYLUM POLICY IN THE REPUBLIC OF IRELAND AND THE  
UNITED KINGDOM**

**by**

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'Organising for exclusion?' is dedicated to asylum seekers in Ireland and the UK, who continue to struggle in systems that are not designed to provide them with protection.

Sue Conlan  
August 2018

## **ORGANISING FOR EXCLUSION?**

### **MAKING SENSE OF ASYLUM POLICY IN THE REPUBLIC OF IRELAND AND THE UNITED KINGDOM**

#### **ABSTRACT**

‘Organising for exclusion?’ is a comparative study of the response of the Republic of Ireland and the United Kingdom to asylum seekers within the context of their relationship to each other and their membership of the European Union (EU). Through documents which cover the period from 1990 to June 2017, together with interviews with actors directly engaged in making or seeking to influence asylum policy in both states, this thesis challenges the view of the state as impotent, faced with waves of people seeking to cross its borders that the state is unable to control. It questions this narrative from the viewpoint of those responsible for the asylum policies in both states and argues that Ireland and the UK have achieved their objectives, by reducing the numbers of asylum seekers and, critically, the state’s obligations towards those in need of international protection. It argues that, in so doing, Irish and UK policy makers have created policy that has sidestepped the state’s legal and moral obligations to refugees, whilst presenting the image of being willing hosts to the ‘most vulnerable’.

‘Organising for exclusion?’ draws upon theories of immigration and refugees, of the state and state traditions and of regional governance in the form of the EU. It applies historical institutionalism and situated agency to the empirical material and uses sensemaking to identify the ways in which actors created or understood the framework set for them and the actions that this led to. The study focuses on the governance of asylum and the role of the state in the creation of the ‘asylum seeker’ as it is seen through the reflections and actions of those responsible for asylum policy.

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## **DEFINITIONS, ABBREVIATIONS AND ACRONYMS**

Asylum Seeker	A person who has made an application or been treated as a person who may require international protection and whose application has not been decided
Brexit	An abbreviation of 'British Exit' referring to the UK's withdrawal from the EU
<i>Bunreacht na hÉireann</i>	The Constitution of Ireland
Burden-sharing	A mechanism whereby EU member states agree to take a proportion of asylum seekers who have entered the EU in order to alleviate pressure on border states such as Greece and Italy
CEAS	Common European Asylum System, the legislative framework of the EU asylum system
CJEU	Court of Justice of the European Union
<i>Communautaire</i>	Supporting the principles of the European Union
CTA	Common Travel Area consisting of the UK, Republic of Ireland, Isle of Man and Channel Islands
<i>Dáil Éireann</i>	Lower House of the <i>Oireachtas</i>
EEC	European Economic Community
EU	European Union
Foreign Nationals	Nationals of any country other than EU citizens, sometimes used in place of 'Third Country nationals'
International Protection	Term used to cover both refugee status and other forms of temporary protective status such as Subsidiary Protection in EU member states (under the Qualification Directive)
IPA	International Protection Act 2015 (Ireland)
Ireland	The Republic of Ireland
JHA	Justice and Home Affairs, an area of responsibility within the EU, including asylum and immigration

MEP	Member of the European Parliament
Migrant	A person who has moved from their country of birth and is resident in another country, legally or illegally
NGO	Non-governmental organisation
<i>Oireachtas</i>	National Parliament of Ireland, consisting of the <i>Dáil</i> and the <i>Seanad</i>
Qualification Directive	A directive within CEAS, for identifying people who should be granted protection in an EU state as a refugee or person in need of subsidiary protection and the rights which attach to that status
RCD	Reception Conditions Directive, directive within CEAS, relating to the support, accommodation, detention and right to work of asylum seekers
Refugee	A person recognised under the Refugee Convention 1951 as outside their country of origin/habitual residence and who has been given protection in another state
Refugee Convention	Abbreviated title of 'The 1951 Convention relating to the status of refugees'
Resettled refugee	A person who is accepted as a refugee in a third country (by UNHCR) and then transferred for long term residence to another country
<i>Tánaiste</i>	Deputy Prime Minister in the Irish Government
<i>Taoiseach</i>	Prime Minister in the Irish Government
Third country nationals	Non-EU citizens
TD	<i>Teachta Dála</i> , translated as Deputy to the <i>Dáil</i> , elected member of the Lower House of the <i>Oireachtas</i>
UK	United Kingdom of Great Britain, Northern Ireland, Wales and Scotland
UNHCR	United Nations High Commissioner for Refugees, otherwise known as the UN Refugee Agency, responsible for the oversight of the application of the Refugee Convention

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Introduction

This thesis examines why, from the perspective of those engaged in asylum policy within Ireland and the United Kingdom (UK), the two states developed policy which is broadly similar to each other and seemingly at odds with their overall respective approaches to the EU. By doing so, the thesis highlights the consequences of these approaches for each state's obligations towards people in need of international protection. It demonstrates that, whilst Ireland was acutely conscious of UK asylum policy, the UK had little regard for its nearest neighbour, despite the UK depending upon Ireland to maintain immigration controls that were consistent with those in the UK.

On 1<sup>st</sup> January 1973, the Republic of Ireland (Ireland) and the United Kingdom (UK) became full members of the European Economic Community (EEC), the forerunner of the European Union (EU). On the same date, the UK introduced comprehensive immigration legislation that drew a line under the UK's relationship with Commonwealth countries, placing restrictions on those who had, through no choice of their own, been British subjects, and turning towards Europe instead (Dummett and Nicol, 1990).<sup>1</sup> For both states, the issue of asylum was not on the agenda at the time of EEC accession. Asylum did not become a serious political issue until the 1990s by which time the UK had developed a system of immigration control that was based primarily upon nationality and, with the exception of EU citizens and those that brought an economic benefit to the state, the principle of exclusion.

Ireland benefitted greatly from the structural support that it received as a member of the EEC/EU, enabling it to achieve a level of independence from the UK which had not previously been possible (Ferriter, 2004; FitzGerald, 2003). Despite its geographical location and its small size, it played an active part in the EU, becoming one of the first states to join a single currency.<sup>2</sup> Its *communautaire* approach to the EU was, however, undermined by its response to matters regarding Justice and Home Affairs (Laffan and O'Mahony, 2008, page 172). With that exception, Ireland's relationship to the EU stood in sharp contrast to that of its nearest neighbour, the UK, sometimes described as an 'awkward partner' in the EU (George, 1998).

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<sup>1</sup> On the eve of the UK joining the EEC, Citizenship of the UK and Colonies was redefined in a Government statement leaving those with only a connection to former colonies outside (Dummett and Nicol, 1990, page 227). The law was not changed until the British Nationality Act 1981.

<sup>2</sup> The Euro was adopted as the official currency of the European Monetary Union on 1 January 1999 and the currency became legal tender on 1 January 2002. Ireland was one of the first states to commence using the currency

Ireland experienced forced migration and an acute reduction in the size of its population as a result of famine and migration from which it has never recovered.<sup>3</sup> Unlike the UK, emigration was the order of the day (Quinn et al, 2008), not immigration. Despite these significant differences in its population, its active participation in the EEC/EU and the benefits it gained from EEC/EU membership, Ireland did not pursue an independent path from the UK when it came to asylum and other matters relating to Justice and Home Affairs (JHA) in the EU. Instead it developed an asylum system that has remarkable similarities to that of the UK. This was despite the fact that it oversaw the completion of key elements of the Common European Asylum System (CEAS) as part of its presidency of the European Council in 2004 and 2013<sup>4</sup>, measures from which it largely opted out.

Despite the strength of connection between these two states, there has only been one significant comparative study of the UK and Ireland. James (2011) undertook an in-depth study of the changes that occurred over a ten year period (1997-2007) in both Ireland and the UK under the leadership of the Prime Ministers of both countries, Bertie Ahern and Tony Blair. James examined the adaptation of national policy-making as a result of the demands and opportunities of EU membership. His observations provide an indication of the priorities for Ireland and the UK in their relationship with one another. Northern Ireland was a priority, leading to the Good Friday Agreement, itself the instigation of a revision in the Irish Constitution which led to a change in entitlement to Irish citizenship by birth on the island of Ireland (Mullally, 2007). Greater convergence is consistent with the parallel approach that both states have taken in relation to asylum and immigration after their negotiation of an 'opt-out' from the Amsterdam Treaty in 1999.

There has however been recognition of the peculiar relationship between Ireland and the UK and how it has changed over time. Not least amongst the commentators was Garret FitzGerald, former *Taoiseach* and by background an economist. Fitzgerald (2005) argued that the dependency of Ireland on the UK, despite independence in 1922, changed as a result of Ireland joining the EEC and that, in the fifty year period from independence until Ireland's membership of the EEC in 1973, there was an inequitable relationship between the two states. It was not political but economic independence, made possible by being a net beneficiary of EU funds until 2008, which brought parity in the relationship between Ireland and the UK. Membership of the EEC and its successor, the EU, was therefore critical for Ireland in that it started a process which reduced its dependency on the UK.

The British Council, in its series, *Britain and Ireland: Lives Entwined*, demonstrates the close proximity of the two states despite Ireland becoming an independent state. Its four volumes, dating from 2005 to 2012, include contributions from academics, politicians, civil

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<sup>3</sup> In 1841 the population was an estimated 8 million. In the census conducted in 2016, the population was less than 5 million.

<sup>4</sup> See chapter 4

servants, writers, journalists and others. The series commenced under the premierships of Bertie Ahern and Tony Blair which again may reinforce the view of James (2011) of a convergence of views and a tacit recognition of the unique relationship between the two states. One of the contributions to the first volume provided an insight into Ireland's relationship to the UK at that time. Mac Éinri (2005) relates a conversation that he had with a colleague in another government department in Dublin when he was seeking his own government's position on an EU directive. The response was "I'll get back to you – I'll just phone my opposite number in London" (Mac Éinri 2005. p.38).

These two states have been chosen because of the similarity in their approach to asylum seekers despite a number of differences that might have been expected to be more prominent in their effect. These include the creation of the Irish state out of opposition to domination by the UK; the existence of a written constitution in Ireland in contrast to the unwritten constitution in the UK; the more favourable approach in Ireland towards the EU in contrast to the UK's scepticism and, at times, hostility, the latter leading to the UK's decision to leave the EU during the period covered by this study.

It has been argued that the existence of a land border between the two states superseded all other considerations for the Irish state when it came to immigration (Costello, 2003; Quinn, 2009). As an extension of that, one of the main arguments in this thesis is that, for both states, protecting refugees was dependent upon the greater priority of controlling access to territory by non-EU citizens. In Ireland's case, its independence from the UK, as reflected in its Constitution, was itself secondary to maintaining freedom of movement between the two states, a position thrown into question in 2016 by the unilateral decision of the UK to leave the EU.

## 1.2 The contributions of this study

The principal contribution of this study is the focus on asylum policy from the perspective of those engaged in migration governance. Asylum policy engages actors in events on national, regional and international levels. In focusing on actors, this research provides a unique opportunity to examine how national priorities are managed by state actors alongside the state's obligations under international conventions and commitments as members of the EU.

The period that this study covers, from 1990 until June 2017, is relatively recent in the context of the existence of these two states. The era selected exemplifies a time when significant developments were taking place in both states and in the EU in the field of asylum from 1990 onwards. It examines the institutions of the UK and Ireland as they are understood, used or adapted by state actors and seen through the documentary evidence.

The contribution is also conceptual, developing an approach that focuses upon the organisation of asylum governance in both states and, by doing so, offers an actor-centred perspective that is sensitive to how individuals make sense of challenging issues and of their roles in the wider historical and institutional setting within which they operate.

The thesis also makes a methodological contribution, by applying concepts and frameworks commonly used in organisational studies but not typically used for migration studies. By doing so, the thesis identifies the scope for productive engagement between migration studies and other disciplines and approaches.

### 1.3 The research questions

This study was framed around the following questions: How has asylum policy in Ireland and the UK been influenced by the relationship between the two states and their membership of the EU? What explained the similarities and differences in the institutional response to asylum seekers in each state, particularly given their significantly different approaches to EU membership? What role have actors played within those institutions? How have actors understood and accounted for the actions that they have taken in response to people seeking asylum? How can this inform our understanding of state asylum policy making?

Before research commenced (and prior to the UK's decision to leave the EU), the following hypotheses were formulated:

- That asylum is not a strategic issue for Ireland and therefore that it has been willing to follow the UK's lead in this field.
- That the protection of the Common Travel Area (CTA) between the two states overrides any possibility that either state will adopt a more positive approach to EU asylum policy developments.
- That the UK is a greater beneficiary from their bilateral agreements on asylum policy than Ireland.

Whilst this study confirms those hypotheses to a significant extent, the simplicity of those statements must be examined in the context of a changing relationship over the period covered in this study.

Towards the end of the study, from mid-2015 onwards, Ireland provided operational and strategic support for EU measures during the 'migrant crisis' and, exceptionally, opted-in to an EU decision to relocate asylum seekers from Greece and Italy. This was in sharp contrast to previous decisions on EU asylum measures which Ireland did not take in favour of EU co-operation unless the UK had indicated an intention to do so. However, where asylum policy was concerned, Ireland followed the UK's lead and then adopted similar policy positions but

applied them to the peculiar situation in Ireland. The UK's decision to leave the EU has provided policy dilemmas for Ireland if it is to remain an EU state and retain its close relationship with the UK. Such matters were beyond the scope of this study although the potential implications of Brexit are examined.

#### 1.4 The state and the 'asylum seeker'

How can a study addressing asylum policy better inform our understanding of the state?

Asylum seekers are women, men and children who have entered the state and been registered in a national system that determines their status on the basis of international obligations. This study considers the way in which the state experiences asylum seekers. The main interest here is upon how policy makers make sense of and operate within the institutional environment and the pressures under which they operate. The experience of asylum seekers underlies and informs this thesis but this study is not concerned with the motives or experience of asylum seekers themselves. Instead it focuses upon the response of states to asylum seekers as demonstrated through the perspectives of those engaged in policy towards them.

The asylum seeker is almost absent from theories of immigration and refugees and, despite the prominence of the state in the lives of asylum seekers, the state and its institutions are not examined from the perspective of their impact on them. Similarly, theories around EU integration and governance do not include asylum seekers who are subsumed within the framework of migration.

An examination of the understanding of those engaged in asylum policy can reveal more about the state as an individual entity and also its bilateral relationships, and membership of a regional group of states and of the international community. It complements or contradicts studies on the outcomes of asylum policy. The particular focus of this study provides an insight into how a state manages its national priorities with its regional commitments and its international obligations.

States have introduced laws and reinforced borders with physical barriers that make it almost impossible for asylum seekers to arrive legally in an EU member state, particularly those such as the UK and Ireland on the western edge of the EU. However, if they get through these logistical and physical barriers, asylum seekers become the responsibility of and, more importantly, subject to various state institutions that co-operate at national and international levels. The term 'asylum seeker' has a very limited legal basis. The only definition in UK legislation is in relation to an outstanding application for asylum and their

eligibility for support and accommodation.<sup>5</sup> There are no definitions of an ‘asylum seeker’ in Irish legislation. It is essentially a social and political construction.

In contrast, the ‘refugee’ is clearly defined in international, EU and domestic law. It is the state, as a form of political organisation, which gives meaning to the ‘asylum seeker’. No one thinks of themselves as an asylum seeker or necessarily knows the term before they enter a country where they may be given that label. They are simply women, men and children hoping that they will find a better life than the one that they have left behind. It is, nevertheless, the term used throughout this thesis even though its use is problematic, not least because of the negative associations that go with it.

People seeking asylum in Ireland and the UK experience the state and its institutions unlike any other group of people, including other migrants and citizens. Asylum seekers have little or no autonomy but are instead constrained and controlled by state structures. If they fail to comply with the restrictions imposed upon them, they risk being refused entry or residence and returned to persecution or serious harm in their home country. At the same time, it is their compliance with those restrictions which also places them at risk of return to harm.

An asylum seeker can meet the apparatus of the state before they reach its borders, with border officers operating at points of departure from countries through which they pass *en route*. More often, an asylum seeker engages with the state (or organisations acting on its behalf) at points of contest or crisis. These include: on arrival at the ports of entry; in the criminal justice system on arrest after unlawful entry, overstaying or for alleged criminal activities; at points of application for asylum; in reception centres (including detention); on receipt of a rejection of their application, at the point of appeal or subsequent legal challenge in the courts if refused; and, finally, if all fails, on removal.

This study challenges the view of the state as impotent, faced with waves of people seeking to cross its borders. According to this position, asylum seekers impose themselves on the state, which is powerless to control their entry and residence. This perspective presents the state as the victim, doing its best to preserve itself and its people amidst circumstances broadly beyond its control. This study questions this ‘impotent state’ argument from the viewpoint of those responsible for the asylum policies of both states. It does so by examining the reflections of policy makers according to what they understood was happening, what they were aiming to achieve and the documentary evidence of what did in fact take place over the period covered in this study. The understanding of state actors demonstrates their explanation for the consistency of their actions with international obligations and commitments. The perspectives of policy makers are examined in the context of the documentary evidence of the outcomes of asylum policy in both states.

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<sup>5</sup> The first definition appeared in section 94 of the Immigration and Asylum Act 1999. This has since been repealed and replaced by section 18 of the Nationality, Immigration and Asylum Act 2002 which again only uses the phrase in relation to the accommodation and support of people who have applied for asylum.



## 1.5 The structure of the thesis

The thesis examines the literature relating to immigration, the state and the impact of EU membership before outlining the analysis and methodology which informed and guided the research. It reviews the institutional framework of the asylum systems in Ireland and the UK before looking in more detail at each state and then in synthesis, drawing upon the interviews conducted. Finally, it considers the findings of the research and the ways in which the analytical tools can be used in other research in the field of migration.

Chapter 2 draws upon existing theories of immigration and asylum, of the state and state traditions and of regional governance in the form of the EU. It locates the existing understanding of Ireland and the UK and their response to asylum seekers within them, identifying the ways in which they assist and the gaps that this study seeks to fill. For example, it identifies the attempts to understand a state response to refugees in the context of the demands of national interest in which law enforcement and security are prioritised. These theories together assist in teasing out the response of Ireland and the UK to asylum seekers and provide the framework for the research.

Chapter 3 outlines the analytical and methodological approach of this study, including the theoretical perspectives that underpin it. It discusses the specific techniques used to address the research questions as well as the methods used to address them. It outlines the factors that informed the research design, deals with the collection and analysis of data and analyses the strengths and weaknesses of documentation and interviews.

Chapter 4 provides an overview of the asylum systems in the UK and Ireland, setting out the connections between them and the context for the actors who engaged in the asylum systems at various points throughout the study. It draws upon the documentary evidence available, for example, in the form of political debates, government papers and Ministerial statements and analyses the evidence by drawing upon historical institutionalism and situated agency. One of the essential arguments within the chapter is the dominance of a UK emphasis on strict immigration control over both states, notwithstanding international obligations towards refugees.

Chapters 5 and 6 analyse the interviews conducted with actors in both states, highlighting the understanding of policy makers and those attempting to influence policy of the events in which they were engaged and their understanding of what they were seeking to achieve, particularly at points of crisis. It does so using the analytical tools provided by sensemaking. The UK moved from preventing entry to the UK itself to engaging in policies designed to exclude from the EU. Ireland concentrated on a developing and then consolidating its domestic asylum system whilst portraying a more humanitarian image on the EU and global stage.

Chapter 7 is a comparative analysis of the response of Ireland and the UK to asylum seekers through four themes: the Common Travel Area; the EU; institutions and actors; and Brexit. It draws upon interviews with actors who operated at an EU level who observed or interacted with state actors from both the UK and Ireland and the observations of state actors themselves about the relationship between the two states. In particular, it draws upon the theories examined in chapter 2. Both Ireland and the UK are viewed as having little regard to their commitment under the Refugee Convention.

Chapter 8 examines the findings of the research in the context of the theories of immigration, the state and European integration. It argues that state actors have worked within the frameworks and institutions of the state, accepting the limitations that are imposed upon them but also working to reinforce them. It demonstrates the wider applicability of the analytical tools of historical institutionalism, situated agency and sensemaking to other areas within the field of migration. Finally, it concludes that the state has been responsible for the creation of the 'asylum seeker' and has used the outcomes of its own asylum policies to justify even greater exclusion of people from international protection.

## **CHAPTER TWO**

### **LITERATURE REVIEW**

#### **2.1 Introduction**

Asylum seekers are not central to theories of the state and state governance, and do not feature in theories relating to Europeanisation (regional co-operation in and national responses to the EU). They also fall between the gaps in theories which address international obligations towards refugees and understandings of international migration. These theories are nevertheless the starting point for this thesis.

This chapter begins by looking at theories relating to immigration, the state and the EU. They are then brought together in order to demonstrate why these theories, not often thought of together, are actually relevant to this study, where the gaps appear and bring insights into the state's response to asylum seekers.

The structure of the chapter is as follows: Section 2 takes a detailed look at theories of immigration and, more importantly, theories relating to international obligations towards refugees. Section 3 examines theoretical perspectives of the state and the particular state traditions of Ireland and the UK. Section 4 deals with theories relating to Europeanisation, identifying the various ways in which EU states are considered to have responded to their regional obligations. Finally, in section 5, it demonstrates the benefit of combining these theories and identifies gaps in current knowledge that the study seeks to address.

The state and the operation of its institutions include both the recognisable state apparatus, such as the police or immigration service, its for-profit and not-for-profit agents and what March and Olsen (1984) define collectively as political structures, such as rules of behaviour, norms and physical arrangements. In addition, it includes bodies such as the European Commission and the Court of Justice of the EU (CJEU), to legal frameworks and obligations in the form of treaties, regulations and directives, to organisations for collaboration at an EU level in the form of Frontex (the EU Border Agency) and the European Asylum Support Office.

Ireland and the UK voluntarily signed up to international obligations towards refugees by signing the 1951 Refugee Convention<sup>6</sup> and thereby have a framework to inform their treatment of those claiming to be refugees. Both states are bound by international refugee law and engage with the office of the UN High Commissioner for Refugees, UNHCR, which oversees the operation of the Refugee Convention and Protocol. As EU members, these

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<sup>6</sup> Chapter 4 provides background information on both states' commitment to the Refugee Convention and its implementation in each state.

states took a position in relation to the Common European Asylum System (CEAS). Policy makers within states therefore have to engage with domestic politics in the context of regional and international obligations.<sup>7</sup> As will be seen in subsequent chapters, all of these commitments had to be understood and acted upon by individuals engaged in asylum policy who were dealing with competing demands and depended upon the timing of events as well as their ability to influence an outcome. For those reasons, the analytical tools of sensemaking, historical institutionalism and situated agency are used to analyse the data collected.<sup>8</sup>

## 2.2 Theories of immigration and asylum

Immigration is a highly contentious issue because it becomes a focus of attention when citizens are under pressure. Rather than look internally for the cause of problems, the 'outsider' is an easier target to blame. In the UK, for example, the inability of health services to respond to need because of underfunding becomes a reason to accuse politicians of allowing weak immigration controls under which people arguably enter the state to access free healthcare. Liberal democratic states can present themselves as under threat from people who cross their borders. Immigration controls are particularly focused on people who are forced to move and circumvent the law by crossing borders or remaining in a state without permission. Asylum seekers invariably come within this category, with few having the opportunity to enter a state through legal channels and only being able to remain, even for a temporary period, if they comply with strict conditions.

This study is concerned with those who apply for international protection on the grounds that they cannot return to their home country for fear of persecution or serious harm but who have not received that recognition by the state. One of the problems within the existing literature is the conflation of asylum with other forms of international migration and the difficulty of assuming that asylum is covered within the literature that deals with refugees. This problem is partly the result of refusing or failing to deal with mixed motives and reasons for movement across international borders (Crawley et al, 2017).

To regulate the problem of illegal entry or residence, states have created and use various forms of border control. These operate at the actual territorial borders of the state and within it. Geddes (2008) argues that there are three types of borders: territorial (at ports of entry), organisational (access to work and welfare) and conceptual (identity and belonging). Asylum seekers in the UK and Ireland experience all three forms of border

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<sup>7</sup> The implications of the decision of the UK to withdraw from the EU is considered at various points throughout this study but its obligations as a member of the Council of Europe and a signatory of the Refugee Convention are not affected by that decision.

<sup>8</sup> Chapter 3 examines the approach adopted and the role and relevance of sensemaking, historical institutionalism and structure and agency. Subsequent chapters then apply the approaches to the data collected

control: asylum seekers are demonstrably 'non-citizens'; they are less able to build the connections that would allow them to argue for inclusion in social membership (Carens, 2013) and to secure legal and community support for their claims and subsequent integration. These practices highlight the exclusion of asylum seekers from the 'Community of Value' alongside 'Failed Citizens' (Anderson, 2013).

Freeman (1995) identified three groups of states with different modes of immigration politics: English-speaking settler societies, European states that experienced mass immigration after the Second World War and European states that were previously sending states. Even with a Eurocentric approach, it is an analysis that, whilst useful in general terms, is partial and does not account for Ireland's response. As Quinn et al (2008) demonstrate, Ireland was a country of emigrants until the early 1990s, but, unlike EU member states such as Portugal and Spain, did not use the EU asylum framework as the basis for its asylum system, but 'borrowed' instead from the UK. In this instance, the Irish state's traditions and the strength of its connections to the UK, rather than its experience of immigration, appear to have determined its response to asylum seekers.

Hampshire (2013) argues that when contemporary liberal states meet 'the fact of immigration', there are four constitutive features of liberal statehood that shape their responses. These responses are: representative democracy, constitutionalism (the institutional architecture of a system of government, the basic rights of citizens and judicial review), capitalism and nationhood. He asserts that these pull in different directions, leading to either restriction or openness. The relevance to this study is how these constitutive features impact upon actors within governance systems.

Freeman (2006) argues that when asylum is the issue, then enforcement and securitisation dominate the debates and measures to deter people seeking asylum come to the fore, even at the expense of some business interests. That has not necessarily been the case in the UK where, for example, private security companies, such as G4S and Serco, have won lucrative contracts to run detention centres, provide accommodation for asylum seekers and also remove people from the UK. In Ireland, private companies hold the contracts to run, and in most cases, own the accommodation centres for asylum seekers. Hotel owners and even an equestrian company have derived huge profits in Ireland.<sup>9</sup> There are parallels with the use of public funds to finance private companies to run prison facilities. Hence, even at a time of severe restrictions on public funding, some business interests have profited from the strict controls aimed at asylum seekers.

The different features of liberal statehood identified by Hampshire (2013) can combine to produce the exclusion of asylum seekers from the state and from within communities. Whilst constitutionalism might curtail or mitigate the worst restrictions on entry or residence, such as judicial review of the fast-track detention of asylum seekers in the UK or

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<sup>9</sup> See, for example, section 1.6 of the 2009 report of the Free Legal Advice Centres, *One Size Doesn't Fit all*.

an amendment to legislation regarding child refugees in Calais (see Chapter 5), the dominant theme in the state response to asylum seekers is one of control over every facet of their lives at considerable public expense and private profit.

Castles (2004) argues that, in analysing why migration polices fail, the entry of asylum seekers, along with undocumented migrants, are forces which governments could not control. However, the issues that he raises are more relevant to labour migration, not to those fleeing or fearing to return to persecution or serious harm. Castles included asylum seekers within the overall ambit of immigration control systems and, as a result, negates the particular factors in play when refugees move across borders and require international protection. In addition, as will be seen in Chapters 5 and 6, which analyse the policies and practices adopted in both the UK and Ireland, the objectives of the policy were met, particularly in the numbers that were prevented from entering the two states. Those actors analysed the points at which asylum seekers were accessing their states and adapted their policies to control entry to the territory. In addition, they maintained or increased the level of control upon asylum seekers who gained entry.

So far, it has been claimed that themes in theories of immigration present the state as managing conflicting political, social and economic dynamics and that asylum seekers intensify some of the state's problem. A greater focus is required to examine the particular texts that make refugees and, more rarely asylum seekers, their exclusive focus. The following sections therefore examine the key literature about refugees and asylum seekers and indicate the ways in which these are relevant to this thesis.

Refugees are the one group within the field of international migration for whom there is an international framework. For Ireland and the UK, this is the 1951 Refugee Convention, as amended by the 1967 Protocol, which embodies the principles, rights and obligations of states towards refugees. In its initial manifestation, the Convention was limited in scope to events that occurred before 1951 and to refugees from Europe. Those limitations were withdrawn in 1967, opening up the protection afforded by the Convention to refugees from anywhere in the world and who were displaced at any time.

Article 1A of the Refugee Convention (as amended) defines a refugee as a person who:

*"...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself to the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such events, unwilling to return to it."*

The Refugee Convention refers only to refugees and not to asylum seekers. The term asylum seeker was unknown to the drafters of the Convention. The focus on individual determination of claims to refugee status changed after the end of the Cold War, involving a change of strategy when refugees were no longer fleeing Communist countries (Haddad, 2004, p. 139). The period after the Second World War was one in which the focus turned to the individual to whom human rights could be attributed.

The Refugee Convention itself does not contain a framework for dealing with people who arrive at the borders of a state and claim to be refugees other than in the general commitment not to return, or *refouler*, a refugee to the borders of a state where they would be persecuted and not to prosecute those that arrive illegally directly from the state where they fear persecution. However, when states such as the UK and Ireland incorporated the Convention into their domestic law in the 1990s, the term 'asylum seeker' was in popular and political use by then. Individual states framed the way in which refugee claims would be determined. It was national law and practice which, influenced by domestic political considerations, changed after the Cold War. Newspaper headlines such as 'bogus asylum seekers' influenced public perspectives and brought political pressure to introduce negative concepts such as 'manifestly unfounded' protection claims.<sup>10</sup>

Schuster (2003) reviews the history of asylum and critiques the conceptual frameworks, providing a comparative analysis of the asylum systems in the UK and Germany and argues that legislation dealing with asylum in the UK and constitutional changes in Germany are about protecting state sovereignty. The perceived protection of the state is central to the development of asylum systems in both Ireland and the UK. But 'the state' as a defined system with territorial borders can dominate and in so doing we can lose sight of the individual refugee. For example, Haddad (2004) argues that refugees exist as a result of the international state system and borders. She draws attention to the state-citizen-territory hierarchy, asserting that the refugee would not exist without the state system. However, the state system alone cannot explain the displacement of people across borders as refugees. Refugees are not all seeking protection from the state and its institutions although that might be the popular perception in Ireland and the UK and explain the general acceptance of Syrian nationals after 2015. It can also be a reason to undermine the rights of other refugees, such as members of the LGBT community in African states, who seek asylum as a result of personal identity and not necessarily because of political conflict.

Gibney (2004) addresses the response of liberal democracies to refugees and sets out the different approaches which follow from two theories: partialism and impartialism. Partialism, he argues, works with an ideal of states as distinct cultural communities

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<sup>10</sup> The term 'manifestly unfounded' refers to asylum claims that are deemed to have no merit at all. As will be seen in chapter 4, agreement arounds 'manifestly unfounded' asylum claims was reached amongst EU states before either the UK or Ireland had introduced a national legislative framework for asylum.

possessing a right to self-determination justifying priorities for citizens. A 'citizens first' policy, for example, the right of homeless Irish citizens above asylum seekers, is arguably partly responsible for the creation or maintenance of the system of Direct Provision in Ireland (see chapter 6). Gibney's second theory, impartialism, works with an ideal of states as cosmopolitan moral agents which argues for a policy that takes into account the interests of both citizens and refugees. The UK Prime Minister, David Cameron, was able to announce a policy change in 2015 to significantly increase the number of Syrian nationals to be settled in the UK as refugees which sat well with the British public in seeing a more humane response to the Syrian refugee crisis following the death of a three year old Syrian Kurdish boy, Alan Kurdi. Such events can be described as what would be referred to as a 'critical moment' in historical institutionalism, one of the analytical tools used in this study and introduced in chapter 3.

Impartialism does not assist if the government can argue that asylum seekers are not refugees but economic migrants, the dominant view in both Ireland and the UK. Instead, policies have been developed which have enhanced the status of the 'refugee', allowing greater denigration of the 'asylum seeker', one being the recipient of a benevolent state response and the other the subject of contempt. This is the position that developed in both states from 2015 onwards and which is most clearly seen in the UK's refusal to assist refugees who arrive in the EU and claim asylum, as set out in Chapter 5.

From the perspective of political theory, Boswell (2005) provides an analysis of the conflict between liberal universal theories (which argue for the protection of refugees) and national interest which tend to prioritise state citizenry. Like Gibney, Boswell also argues for a different approach which might bridge the disparity between two opposing positions, namely the moral obligation to assist refugees and self-interest. Some of the solutions Boswell proposes – protection in the regions of origin and internationally monitored repatriation – would either involve imposing obligations on or requiring cooperation of states in the areas around conflicts, which liberal democracies would not themselves entertain, or by forcing people back across borders against their will if they have sought asylum outside the region to which they were first displaced. Arguments as to how this could work have been set out by Betts and Collier (2017) in their support for 'special economic zones' in the countries which host the majority of refugees, arguments that have themselves received criticism (see, for example, Crawley, 2017; Webber, 2017).

EU asylum policies were the specific focus of a study by Zaun (2017) in which she argues that the stronger EU states, those in the Northern part of the continent, were able to impose their own highly regulated asylum systems on states with a less developed framework due to the strength of their position in the EU. However, Zaun's starting point is that EU asylum policies were in crisis. However, that requires an assumption that states did not anticipate or participate in the creation of the crisis in 2015 and that policy makers



chose a wrong path. As this study will demonstrate, that is not the position of policy makers in Ireland and the UK.

The contributions of Schuster, Haddad, Gibney, Boswell and Zaun, identify the conflict between the state and its obligations towards the refugee. While the literature identifies the tensions that exist and ways to resolve them when the person is accepted as a refugee, they do so without resolving the problem that states have themselves created by changing the refugee into an asylum seeker. In the UK it is a distinction that has become so prominent that even attempts to resettle asylum seekers with a 75% recognition rate as refugees under the EU's relocation scheme of 2015 was unacceptable to the UK government as will be seen in Chapter 5.

The following section highlights the difficulty in trying to locate the asylum seeker, the person applying for recognition as a refugee, within the existing literature.

There is no easy answer to the question of who is a refugee, unless the refugee remains in a country close to conflict and does not attempt to secure entry or residence in countries such as Ireland or the UK. States are quite prepared to talk of people as refugees whilst they remain in camps near their home country and even, contrary to international refugee law, when they are internally displaced. However, when refugees or those forced to move start the journey towards these so-called liberal democracies, then they transform into 'migrants' and states find ways to deny responsibility for them. Goodwin-Gill (2014) argues that refugees are the losers when co-operation between states, not least in the EU, moves control away from the national borders. We will return to this point as it relates to the way in which individual EU member states, not least those such as the UK and Ireland on the edge of the EU, have used the EU and co-operation with other EU members states to limit their responsibility for refugees. One example of this was the EU-Turkey Agreement in 2016.

The gap in the literature is asylum seekers, those who claim to be refugees but who require the recognition of the state in which they have arrived for that status to be afforded to them. As it stands, asylum seekers are seen as people to whom obligations are withheld by the state because they are situated outside the international system which provides them with protection. They are seen as migrants and therefore in tension with the right of a state to control who enters and remains within its territory and on what conditions without regard to international or regional conventions. The difficulty is dealing with a category of people whose status is itself undefined and dependent upon state institutions to provide the necessary stamp of approval. Theories of immigration and about refugees alone do not provide us with a sufficient basis to understand the state's response to asylum seekers. To assist, we need to turn to the literature regarding the nature of the state and its traditions for us to see how the state institutions are organised and the implications of that for asylum seekers. Both states developed highly centralised systems of control over asylum seekers, building upon existing state systems.

### 2.3 Theories of state and state traditions

This section addresses theories of the state as they are contained firstly in purely theoretical works and then as they are applied to the UK and Ireland. Those engaged in asylum policy do so within the context of the existing state structures, in existence well before asylum became an issue. The relationship between structure and agency, as outlined in chapter 3, is important in understanding the role that actors played in developing and maintaining asylum policy.

There is no clear understanding of the state within the literature and even the question as to whether the state can be studied is in dispute. There is also no agreement on what the state does, whether it is neutral and whether the changes that have taken place in recent years have redefined the state or people's experience of it. Richards and Smith (2002) argue that it is important to see the state as a fluid entity which contains a range of elements, some visible, some less tangible and others informal.

The state has been seen first and foremost as an exercise in legitimation and it has been proposed that we should abandon the state as a material body of study whilst continuing to take the idea of the state extremely seriously (Abrams, 1988). Abrams further argued that the only plausible alternative to taking the state for granted is to understand it as historically constructed. Abrams was prepared to accept the *state system* and the *state idea* and that the relationship of both to other forms of power should and can be central concerns of political analysis. It is Abrams' notion of state system in particular – a nexus of practice and institutional structure centred in government and more or less extensive, unified and dominant in any given society – that is perhaps more readily akin to the reality of the experience of an asylum seeker. Regardless of how the state manifests itself, for example, through a private security firm, an immigration officer in the civil service or an NGO, the asylum seeker has to deal with the system in its practical manifestation.

Bevir and Rhodes (2010) offer the theory of the stateless state, arguing that the state cannot be understood independently of people's beliefs and practices. In addition, that the idea of the state as a structure is only useful if it is unpacked into notions of tradition, dilemma, practice and unintended consequence. That is useful in that it allows us to see whether the full board and lodging accommodation of asylum seekers in Ireland, often in former hotels, is the result of a tradition or practice of institutionalising marginal groups, such as unmarried mothers, rather than a unique policy developed for refugees. Equally the UK's policy on asylum seekers' reception, which results in the homelessness and destitution of thousands of asylum seekers,<sup>11</sup> may also be seen as part of a wider tradition of failing to provide adequate or affordable housing to citizens on lower or no incomes.

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<sup>11</sup> See chapter 4, section 4.3.1

A further proposition about the state is that whilst an entity required three constituents to be a state – territory, people and government – it also required an additional characteristic – that of sovereignty – in order to play a full and active role in international relations (James, 1999). Indeed sovereignty is a key feature in the literature about immigration and the EU as it is considered to be threatened by immigration whilst also shared or pooled with the EU. Linked to sovereignty in an understanding of statehood is territoriality which, with its management, is seen as an essential or defining feature of states (Richards and Smith, 2002; Geddes and Taylor, 2013). Territoriality is key to understanding the desire of both the UK and Ireland to maintain and protect the shared border between them, although that has been called into question by the UK's decision to leave the EU.

In some texts, the state is a reference to the executive branch, in others to the executive and the legislature (Opeskin, 2012). Opeskin argues that a preferable conception would regard the state as the three branches of the executive, the legislature and the judiciary with the checks and balances that exist in every liberal democracy. However, those institutions are also evident in the EU, a multi-state system, which has its own branches similar to that of a state and to which EU member states contribute. It is not therefore sufficient to define the state by three branches alone. Territoriality distinguishes a state from the supranational entity of the EU.

Alternatively the answer may be found in the work of Sharma and Gupta (2006) who argue that new insights into the state could be obtained by thinking about states as cultural artefacts while simultaneously framing them within transnational dynamics. Sharma and Gupta argue that the concept of the nation-state has so thoroughly conjoined the state with the nation that it is almost impossible to think of one without the other. For them, anthropology enables us to see that states which are structurally similar might be profoundly different from one another in terms of the meanings that they have for their populations. If, however, the experience of asylum seekers in Ireland and the UK were the basis for an understanding of the state, then both states would barely be distinguishable from each other.

Theories of the state enable us to begin to identify the context and demands upon those engaged in asylum policy. However, it is the specific state traditions of the UK and Ireland that will give a clearer picture of the context in which policy makers operate. The following sections look firstly at state traditions in the UK, as the oldest of the two states, and then at Ireland, introducing the issue of governance and the implications for asylum policy.

### 2.3.1 The state traditions of the UK

The UK is a well-established liberal democracy that has gone through major changes, not least as a result of its membership of the EU and the fact that it is a four-nation state. In

order to understand the traditions that impact on people seeking asylum, it is useful first of all to understand the structure of the UK state and its major traditions. This section therefore examines the UK state in order to address the question of what is relevant to a study of a state response to asylum seekers.

The UK is first of all a multi-nation state. Since 1998, Northern Ireland, Wales and Scotland have all enjoyed some level of devolved government (Richards and Smith 2002). This has altered one of the fundamental principles of the British state which is parliamentary sovereignty or supremacy. Membership of the EU and voluntary participation in international human rights instruments have shaped sovereignty (Geddes 2013). However, devolution and governance do not undermine the fact that decisions on asylum are located at the centre of the Westminster Model emanating from the Palace of Westminster.

Britain has no written constitution but it is often seen as a flagship of liberal democracy with its separation of powers between the government, the legislature and the judiciary and with its concept of parliamentary sovereignty (Greenleaf, 1987). Greenleaf (1983) states that parliamentary sovereignty means that there is no question that cannot be determined by the Queen in parliament through legislation and that it has none of the hindrances of a written constitution. It is often referred to as the 'Westminster Model' and one with several characteristics including that Ministers are answerable to Parliament and civil servants are apolitical, described as a constitutional mythology by Richards and Smith (2002). Greenleaf (1983) also stated that there is a high concentration of legal power coupled with the absence of formal restraint in the use of that power. The emphasis of Greenleaf's work was to map the transition in Britain from libertarianism to collectivism. The state's response to asylum seekers is one of profound collectivism, with the asylum seeker completely dependent upon the state.

One of the more recent debates has been around the development of 'governance' as distinct from 'government'. Rhodes (1996) describes it as a change in the meaning of government, referring to a new process of governing, a changed condition or a new method by which society is governed. Rhodes includes privatisation, the loss of functions by central government to agencies and EU institutions and limits on the civil service by new public management all of which led him to coin the term a 'hollowed-out state'. The governance of migration has not, however, led to any variation in UK asylum policy which remains under the control of central government. As will be seen in chapter 5, the UK government not only retains full control of asylum policy but has sought to influence the direction of other EU states.

Bell and Hindmoor (2009) describe the government of governance, employing the term metagovernance. Their conceptual framework resonates with the reality of the asylum system in the UK. Bell and Hindmoor question the assertion of a loss of functions by

governments, arguing instead for a state-centric relational approach in which governments choose between different modes of governance, namely hierarchy, persuasion, markets, community engagement, and associative governance. That has particular relevance in the UK asylum field where the use of private companies from Serco and G4S to non-governmental organisations (NGOs) dealing with voluntary repatriation assists, rather than detracts from, control by central government.

Richards and Smith (2002) refer to a 'centreless society', stating that in governance there are many centres of power which link together a whole variety of state actors at local, regional and supranational level. Despite the emergence of governance, they nevertheless argue that power still remains concentrated with central government and conclude that Ministers and civil servants are still 'the guardians of the policy process' (p. 271), adapting to a changed environment with the shared goal to protect their own status and power. In order to achieve this, they have clung to the key characteristics of the Westminster Model including hierarchy, secrecy and elitism. In that model itself, Parliament is theoretically sovereign but their conclusion was that the reality is executive or cabinet sovereignty. That is borne out clearly where agreements were reached bilaterally by the UK with other EU states, such as France to close down camps in Sangatte and Calais, and by the UK and Ireland in the EU-Turkey Agreement. These had far-reaching implications for asylum seekers but did not apparently require any parliamentary approval. The existence of the EU has provided a basis to extend executive power away from national parliaments by, for example, using the European Council to reach agreements with other EU states to exclude refugees from entering the EU.<sup>12</sup>

The conclusion is that, even before considering the particular implications for asylum seekers, the UK state tradition is essentially one of policy made at the centre of government. This is despite the move towards the changing mode of governance that has been identified. The concentration of power has significant implications for a study of the state's response to a class of people who only have a right to be in the UK as result of international rather than national obligations. It sets the framework of the priorities for those engaged in asylum policy. As will be seen in chapter 5 on the UK, once the broad framework of an asylum system was created through legislation, many of the key developments took place with only limited participation, control or oversight from parliament or the judiciary. Chapter 5 demonstrates how policy makers understood interventions or interest by politicians or judges as matters to be a challenge to restore control to central government, not the checks and balances as an exercise in democracy.

The longevity of the UK and its long tumultuous history with Ireland shaped Ireland's institutions in parallel or indeed in opposition to the UK, not least in the form of a written constitution. However, as will be seen below, there are greater similarities than differences.

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<sup>12</sup> The EU-Turkey Agreement of March 2016 is one example of this and is dealt with in chapter 5.

It is in that context that, when it came to asylum, there is little to distinguish the response of each state to asylum seekers.

### 2.3.2 The state traditions of Ireland

Ireland is a state that has developed out of but also in close proximity to the UK. For Ireland, the EU gave it an opportunity to finally realise the benefits of economic independence from the UK (Ferriter, 2004; FitzGerald, 2003). This section will examine the nature of the Irish state as it developed as an independent state and how the state traditions of the UK have been utilised, adapted or rejected. This will enable us to assess the expectations and implications for the response of Ireland to asylum seekers.

Ireland, as a result of many years of British rule, modelled its state system on that of Britain (Marsh, 2010). It gained independence from Britain in 1922 at which point it became known as the 'Irish Free State' (FitzGerald, 2005), borne out of what FitzGerald describes as an anti-colonial war. Despite gaining independence, the institutions established by the Free State for ruling a newly independent country were based upon those of its former ruler, with Ireland gradually 'internalising' the British system (Kissane, 1995, p. 44). Marsh (2010) argues that the Constitution reflects one of the central tenets of classical liberal democratic theory, namely that the legislature makes laws and the executive carries them out and that law making procedure in Ireland is closely based, in letter and spirit, on the Westminster Model. However, he also states that the common view is that parliament is a 'glorified rubber stamp' for the government'. Ferriter (2004) states that those who came to control the politics of an independent Ireland did not suddenly become exponents of centralisation. Instead it was a feature of political culture prior to independence. Centralisation in Ireland had implications for asylum policy within the state, with central government seeking at times to impose obligations on regions in the form of the forced dispersal of asylum seekers with the attendant opposition that can accompany a lack of consultation and the absence of additional support for communities already under pressure. This can be seen in chapter 6.

Laffan and O'Mahony (2007) argue that the Irish system of government has been characterised as a variant of the Westminster Model with one important difference, namely a written constitution. Ireland has had a written Constitution since 1922 which, in theory at least, placed power in the hands of the people so that any significant changes were made by way of referenda. It also gave power to the higher Courts to review any legislation which Hogan (2012) describes as a radical break from British constitutional tradition with its doctrine of Parliamentary supremacy. There is, however, no evidence that either the use of referenda or this 'radical break' in the role of the courts has meant any radical difference in policy making and implementation in practice. As will be seen in chapter 6, there is little to

suggest that the higher courts have had any real influence over the Irish government's response to asylum seekers.<sup>13</sup>

Despite the apparent radical transformation of the Irish state as envisaged in the Constitution, the reality was somewhat different. Coakley (2010a) argued that, although the birth of a new Irish state marked a decisive shift in Irish political development, we should not ignore the extent to which its political institutions were built on its pre-1922 roots and that there was little change in much of administrative structure. Coakley (2010b) has also argued that the Constitution does not exist in a vacuum but is given substance by the political culture in which it operates, one which refers to fundamental, deeply held views on the state itself. These include the deeply held views of those who are engaged in asylum policy.

The existing literature on the Irish state informs us that, with some modifications, the state traditions are essentially the same as those of the UK. There is nothing in the practice of the state in Ireland which would suggest that it looked beyond the UK for its traditions except its appreciation of and approach to the EU. When it came to establishing institutions to respond to asylum seekers, there is clear evidence of the imprint of a UK system as will be seen in chapter 6.

Ireland and the UK negotiated a joint position in relation to the EU when JHA, including asylum, became areas of EU competency. The justification for this 'opt-out' was the CTA, including a shared land border between the Republic of Ireland and Northern Ireland, one of the four nations which form the UK. In addition to this special position regarding territory, is the arrangement whereby Irish and British citizens have rights, with a few exceptions, akin to citizens in each other's state (Ryan, 2001). These agreements were in place before either state became a member of the EU and informed their response to the role of the EU in matters relating to territory and immigration. However, in other policy areas, both have displayed quite different approaches to EU membership.

In the period examined in this study, there have been significant developments in the field of asylum at an EU level with the creation of CEAS. Therefore, given the different approaches of Ireland to the EU, including being one of the first states to adopt the Euro, there was the opportunity for Ireland to have been more open to CEAS. However, Ireland engaged less with CEAS than the UK. It is these apparent contradictions that were the impetus for this study. In order to understand why Ireland has apparently acted at odds with its more pro-EU stance in other fields, it is useful to examine the impact that European integration has on a member state and theories of Europeanisation in order to see what

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<sup>13</sup> Outside the period of this study, in February 2018, the Irish Supreme Court ruled that the complete ban on the asylum seekers' right to work was unconstitutional. This point is touched on in subsequent chapters.

assistance they can give in explaining the similarity in the UK and Irish responses to asylum seekers and, more importantly, the impact of these on asylum policy makers.

#### 2.4 Theories of Europeanisation

The EU has been a project about bringing states together in agreement with a view to avoiding the conflict that Europe has seen in the past. It is a form of regional governance and integration. The purpose of this section is to examine the different understandings of Europeanisation and asks whether and how they assist in evaluating the way in which those engaged in asylum policy within Ireland and the UK responded to attempts to co-ordinate a response to asylum seekers.

There is no single definition of Europeanisation. It has been variously described as the impact on individual member states and the comparative impact across member states (Bulmer and Burch 1998); the processes of construction, diffusion and institutionalisation, defined and consolidated in the making of EU decisions and incorporated into the logic of domestic discourse, identities, political structures and public policies (Radaelli 2000); and the emergence and development at a European level of distinct structures of governance (Green Cowles et al 2001).

Four possible co-ordination types have been identified in states' adaptation to EU membership (Kassim, 2003). These included an inter-governmental model which led states to pursue a comprehensive strategy, whilst more federally-inclined states opted for a more relaxed and selective approach. From the assessment of Geddes (2003) of the UK's approach, this would lead to the conclusion that the UK pursues a comprehensive strategy. By contrast, Laffan and O'Mahony's (2008) analysis of the Irish overall approach would place it in the more relaxed and selective strategy. James (2011) concluded that this was partly out of practical necessity for the Irish government and administration given its much smaller size and areas of interest. If Ireland has made rational choices to prioritise certain matters over others, then this may explain their lack of interest in asylum and immigration, making it more amenable to control by civil servants and the influence of the UK rather than by those with high political office. As will be seen in chapter 6, specific ministerial responsibility for asylum in Ireland was not in place until 2014 and policy makers were indeed learning from the UK. In addition, no Irish MEP, during the period of this study, sat on any committees which examined asylum and immigration.

One of the dominant arguments in discussions around Europeanisation is that of 'goodness of fit' which Green Cowles et al (2001) talk about as a way of assessing the impact of Europeanisation on a member state and the way in which adaptation takes place. Their argument is that the greater the misfit between existing national systems or policy, the



greater will be the impact of the change required as part of the price of membership of the EU. Laffan and O'Mahony (2008) argued that, notwithstanding Ireland's low level of development, there was a 'goodness of fit' between Ireland and the EU, far better than the UK (and indeed Denmark which also joined in 1973). However, Laffan and O'Mahony acknowledge that Ireland's lack of participation in JHA matters, which include immigration and asylum, is at odds with its *communautaire* approach, means that the 'goodness of fit' argument may not have any resonance if Ireland is examined through its response to asylum seekers.

Bulmer and Burch (2009) talk about the 'reception' of European integration in the UK and the 'projection' of British politics and policies at an EU level. In other words, a two-way process whereby a member state may use the EU and its institutions to bring about a common agenda which they perceive is in their national interest and which they may be better able to secure at an EU rather than a national level. That appears to have been the motive of the UK in deciding to participate in negotiations around the original Reception Conditions Directive (RCD), an element of CEAS, with the intention of influencing other member states to adopt a British position in relation to asylum seekers. Ireland, by contrast, opted-out despite the UK's participation. The reason for that is addressed in chapter 6. However, during the period covered by this study, neither the UK nor Ireland opted in to any of the recast directives and were therefore in line with one another once again but at even greater odds with the direction of the EU.<sup>14</sup> The exception, as will be seen in subsequent chapters, is the participation of both states in regulations which both identify the EU state which should take responsibility for an asylum seeker and the mechanism to make this happen.

Radaelli (2003) has argued that there are four responses by a member state to what is termed Europeanisation: inertia (a lack of change); absorption (adaptation); transformation; or retrenchment (domestic policies become less European than they were). These are useful concepts for analysing the response of Ireland and the UK to asylum developments at an EU level as well as the consequences that arose from them. These concepts enable us to ascertain whether the apparent similarity in response to asylum seekers in these two states is in fact dependent upon state traditions rather than either state's approach to EU integration. It also raises the question as to whether the rejection of an EU asylum system benefits both states equally. However, given that responses to Europeanisation can depend upon the issue being faced, there is not a 'one size fits all' answer on asylum. The different approaches adopted by Ireland and the UK to a new EU relocation system for asylum seekers in 2015 showed the ways in which Ireland can change

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<sup>14</sup> In November 2017, the Irish Government announced that Ireland would opt-in to the re-cast Reception Conditions Directive (2013). This was in response to a Supreme Court decision on the right to work under the Irish Constitution. This is referred to later on in this thesis.

its stance, arguably based upon a state's sense of identity and its place in a 'community of nations'.<sup>15</sup>

Europeanisation therefore exposes the differences and similarities between EU member states and the anomalies that can develop as a result of different approaches to what is intended to be a joint project of member states that have seen the value of co-operation at an EU level. For some, that co-operation, when it came to asylum seekers, was based upon a commitment to national sovereignty.

Guild argues, for example, that when the EU began to develop refugee protection, underlying it was the principal of territorial exclusion on the basis of national sovereignty (Guild, 2006). It has been possible to speak of an EU asylum and immigration *acquis* since the Treaty of Amsterdam in 1999 (Boswell and Geddes, 2011) from which the UK and Ireland negotiated an 'opt-out' (Costello, 2003). However, even prior to that, decisions had been taken which set the path for agreement at an EU level on asylum and immigration in advance of the Amsterdam Treaty (Geddes, 2008). Geddes refers to the establishment of an *ad hoc* group of high level officials which was brought together in 1986 during the British Presidency of the EU Council. This led first of all to the Dublin Convention 1990 (the forerunner of the Dublin II and Dublin III Regulations) and, in December 1992, to an agreement about 'manifestly unfounded' asylum claims. At this time, relationships in Europe were changing with the end of the Cold War and it was the beginning of a framework based upon exclusion and a denial of responsibility for refugees.

Following the Treaty of Amsterdam in 1999, the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) was established, which brought Interior Ministers together but, perhaps more importantly, established monthly meetings of officials (Boswell and Geddes, 2011). Favell (1998) identifies the particular involvement of officials and indeed the dominance of national state civil servants.

The literature about Europeanisation and the development of an EU asylum system demonstrate not simply the importance of territoriality and sovereignty but also the significant involvement from the outset of unelected officials. It raises the question about who was participating in discussions which involved consideration of state interests. In addition, Europeanisation exposes the limits of Ireland's commitment to the EU and potentially leaves it pursuing policies in tandem with a state which has a substantially different investment or interest in the EU. Ireland has been left isolated by the UK's unilateral decision to leave the EU.

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<sup>15</sup> The response of other EU states, not least Hungary, have also shown the weakness of the EU in seeking to impose obligations for refugees on member states

The following section brings theories of immigration, the state and EU integration together in order to demonstrate why these theories, when used together, help bring unique insights into the state's response to asylum seekers.

## 2.5 The theoretical framework and the research

Theories of immigration and asylum, the state and state traditions and of Europeanisation are all central to the research because Ireland and the UK have both experienced, like other EU states, a significant increase in the numbers seeking asylum since the early 1990s at a time when the EU was working towards greater harmonisation of asylum systems across the EU. This is despite the very different experiences that both states have had in relation to immigration and that the attempts at harmonisation of asylum governance occurred 40 years after both states became member states. It is also against the background of state traditions in both the UK and Ireland which have much in common, despite Ireland's independence. The intention is to demonstrate why all of these theories inform the collection of data and the choice of the approaches in sensemaking, historical institutionalism and structure and agency for the analysis, as outlined in chapter 3.

Whether the state is defined as the executive, the legislature and the judiciary (Opeskin, 2012), and whether or not the state is an idea (Abrams, 1998) or can only be understood as tradition, dilemma, practice and unintended consequence (Bevir and Rhodes, 2010), we need to conceive of the state within the framework provided by an examination of Europeanisation in which, for example, civil and public servants, that is the administrative elements of the state, arguably play a greater role in the implementation of the law and policy than those who make or interpret it. For example, the written guidelines of the UK Home Office, prepared not by politicians but by civil servants, which interpret the legislation and court judgments (including of the CJEU) can be seen as an exercise of state power that is beyond the direct control or detailed examination of the executive, the judiciary and the legislature. Similarly, in Ireland, the wide use of discretion by civil servants which leads to inconsistencies in the way that immigration control is administered, is an element of the state that receives little attention but which is extensive in its impact on the lives of those subject to immigration control, including asylum seekers. These traditions were in place before asylum became a key policy issue. Whether they determine the paths chosen by those engaged in asylum policy or provide the justification for decisions they take, is part of what this study seeks to examine using the tools available in sensemaking.

The move from 'government' to 'governance' (Rhodes, 1996) arguably makes no real difference to an asylum seeker. The fact that an asylum seeker is accommodated in the community or in an accommodation centre (Ireland) or detained (in the UK) by a private company, does not alter their experience of the state. It is actors within state institutions

that determine if and when they will be detained in the UK, and the type and location of accommodation that they will occupy, whilst their asylum application is being considered. It is, therefore, the decision of a situated agent that is crucial, not the operation which flows from that decision. In addition, an asylum seeker whose claim has failed and is facing forced removal from the state will not feel better or worse about the process of removal if it is affected by a private company on contract to the UK Home Office rather than a public official.

The theories of the state in the literature about the UK and Ireland are all central to the study in that they provide the framework for looking at how those states subsequently responded to both the EU and also to asylum seekers and their impact upon those engaged in asylum policy. Despite the variations in Ireland, which adapted the traditions that had previously been imposed upon it by the British, Ireland was not prevented from actively pursuing the benefits of EU membership. However, when an EU asylum framework was being formulated, Ireland prioritised the protection of its shared border with the UK above EU co-operation. The legacy of Ireland's struggle for independence from the UK had left a divided Ireland and a conflict which both states were actively working to resolve when asylum was a priority in the EU. The conflict in Northern Ireland, with ramifications for citizens in the Republic and in other parts of the UK, was a political priority for both states above the issue of foreign nationals seeking entry to each state. Therefore, policy makers at the level of officials were arguably able to exercise more influence over asylum given that Ministers were engaged in greater priorities.

Several important events had taken place in both states by the time that the EU began to address asylum, some of which may well indicate that Ireland would not have taken a different approach to asylum to the UK despite its more pro-EU stance. There is therefore a strong basis on which to assert that there was a path dependency which would strongly influence, if not direct, their respective positions in relation to CEAS. However, the literature also suggests that Ireland's real independence from the UK came with EU membership and therefore that membership was a critical juncture in its relationship with the UK (Laffan and O'Mahony, 2008).

When the opportunity came to engage fully with a developing EU framework on JHA, both states acted almost in parallel with each other. This was apparent from their negotiation of a protocol to Title IV of the Treaty of Amsterdam in 1999 by which they indicated that they would consider opting in to immigration and asylum measures if it was considered appropriate (Quinn, 2009). Costello (2003) argues that the 'opt-out' of the UK and Ireland had its origins in a particular British conception of border politics and a general reluctance in the UK to participate in European politics. With reference to Ireland, Costello states that the opt-out was attributed to the need to maintain the CTA. The existence of the CTA is, in itself, significant for this study not least because as Ryan (2001) demonstrates, its very

existence is due to the willingness of Irish officials, on the establishment of the Irish Free State in 1922, to participate in the UK system of immigration control. Quinn (2009) argues that Irish immigration policy is unusual in Europe because it is strongly influenced by the CTA, an influence that exceeds that of the European *acquis*. That has significant implications for asylum policy in Ireland post-Brexit. Geddes (2005) states that between 1999 and 2004 the UK opted in to all the asylum measures in contrast to only one in immigration. Similarly, Ireland opted in to all the measures in CEAS but very few of the directives in the immigration framework (Quinn et al 2008). Neither state opted in to the recast directives during the period of this study. This might be seen as retrenchment (Radaelli, 2003) by both states, particularly considering their earlier partial compliance.

The response of Ireland to CEAS has been more negative than that of the UK. Ireland chose not to opt-in to the Reception Conditions Directive when the UK did so and it was slow in implementing directives which dealt with asylum procedures and refugee determination. This is surprising because, from the early days of membership, Ireland was always the more enthusiastic member and has been known for its *communautaire* approach. In contrast to Ireland, which has been more comfortable with federalism, the UK has often preferred an inter-governmental approach (Geddes 2003).

Indeed, the theories of Europeanisation may suggest that Ireland's resistance to adaptation in the field of asylum has led to unforeseen consequences. For example, Ireland has in the past demonstrated what Radaelli (2003) has labelled inertia (a lack of change). This can be seen in its delay in transposing the Asylum Procedures Directive 2005, one of the elements of CEAS, well beyond the two years allowed under EU law. As a result it was referred by the European Commission to what was then the European Court of Justice (ECJ) resulting in new regulations being passed quickly in 2011, four years after they were due to be in force. In addition, although Ireland transposed the Qualification Directive within the required two years, it did so in a way that left it at odds with all the other EU member states by having two separate procedures – one for consideration of refugee claims and the other for subsidiary protection – with significant time lapses between them. The result was a judgment of the Court of Justice of the European Union (CJEU) against Ireland in May 2014 in which the CJEU said that it must be possible to submit both applications at the same time with the minimum of delay between consideration of both. The CJEU judgment<sup>16</sup> forced Ireland to bring in new laws which is evidence of Radaelli's assertion that inertia is unsustainable as a long term option. Ireland's reticence to introduce an asylum system consistent with an EU directive led to it being required eventually to change its procedures earlier than it would have done so of its own volition. It indicates that Europeanisation will have an impact even if a member state attempts to limit the consequences of membership.

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<sup>16</sup> Case C-604/12 H.N.

Hampshire (2013) refers to the fact that even in the EU, with the most developed supranational migration policy regime, states retain powers to regulate non-EU immigration and common immigration and asylum measures do not assist with admission to the territory. That is because member states, particularly the UK, have not been prepared to compromise on the integrity of their external borders and do not wish to pool or share sovereignty with the EU over immigration. However, one question is whether Ireland in particular has compromised its own sovereignty by placing the integrity of its border with the UK as the overriding factor when looking to meet its international obligations towards asylum seekers. As will be seen in chapter 4, an Irish Minister of Justice argued that the Irish citizens voted for this approach in a referendum.<sup>17</sup> However, the reality appears to be that members of the government, informed by civil servants, determine the national interest on such issues. The CTA likewise undermines the concept of territoriality which has been argued as a central feature of the state (Richards and Smith, 2002; Geddes and Taylor, 2013).

The point at which the theories of the state confront the EU and therefore the lack of participation in CEAS may arguably be around the central part played by civil servants at an EU level where much is debated and decided over asylum and immigration (Boswell and Geddes, 2011; Favell, 1998). Given the monopoly of advice, secrecy and elitism of the civil service referred to by Bevir and Rhodes (2006), Dummett and Nicol's view (1990), when they referred to the inability to discover the policies which lay behind UK immigration and nationality matters, was that immigration policy was not, in practice, democratically determined. The lack of political interest in asylum in Ireland is evidenced by the absence of any Ministerial post which prioritised asylum and immigration until 2014, providing a greater role for the civil service in Ireland at a national and EU level.

Theories of the state, immigration and the EU provided the framework to determine the methodology for the research and the appropriate analytical tools to assess the data. These are outlined in examined in detail in the next chapter.

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<sup>17</sup> Chapter 4, page 88

## **CHAPTER 3**

### **ANALYSIS AND METHODOLOGY**

#### **3.1 Introduction**

This study seeks to answer questions about the state's role in asylum policy focusing upon the perspectives of those with a direct interest in asylum policy set within the context of the archival material available. It therefore concerns the relationships between institutions of the state and how actors responsible for policy making within the state are influenced by the institutions and the structures within them. It examines the ways in which state actors 'makes sense' of the state's responsibility for asylum seekers, requiring key actors within the state to act not only in accordance with national but also international laws and institutional norms. It also examines the limitations on actors operating within institutions that are founded upon immigration controls designed to exclude foreign nationals.

This chapter outlines the methodological approach of this thesis and the theoretical perspectives that underpin it. Triangulation, the importance of evidence from more than one source, has been described as important together with the convergence of these multiple sources leading to the findings (Bryman, 2012; Yin, 2014). In this study, analysis of the data collected from documents, archival records and the interviews was done in conjunction with one another, rather than in isolation, and was essential to the findings and the eventual conclusions. This chapter identifies the challenges and opportunities presented by this approach and how these theoretical perspectives inform and shape it. It discusses the specific techniques used to address the research questions as well as asking how data collection strategies ensure that the research questions are addressed. It concludes with a reflection on the author's own position as a researcher and as a practitioner within the field.

The rest of this chapter sets out the study's objectives and the methods used to achieve these objectives in the context of theoretical perspectives, the methodological approach taken and the ways in which theory informed methodology throughout. Section 2 outlines the theoretical considerations which inform and underpin this study, theories relating to institutions, structure and agency and sensemaking. Section 3 outlines the factors that informed the research design. Section 4 deals with the collection of data, analysing the strengths and weaknesses of documentation and interviews. Section 5 provides the framework for the analysis of the data collected. Section 6 sets out the issues confronted in this study in relation to positionality and reflexivity. Finally Section 7 provides conclusions to the questions about the role of actors within the institutions that make and enforce asylum policy.

## 3.2 Theoretical perspectives

This section examines the starting point and its impact upon the research and the methods chosen. In addition, it lays out the theories around institutionalism, structure and agency and sensemaking with a view to answering the question as to how they can, together, add to an understanding of the state in its response to people seeking asylum.

### 3.2.1 The starting point

At the heart of this study are the institutions that are central to the system of asylum but, within that, are the explanations which actors give to their actions as they interpret the world around them and the impact this therefore has on and within those institutions (Parsons, 2010). It does not take the view, as positivists would, that the world is objective and separate to our understanding of it but instead that it is socially constructed and therefore that actors are not objective and value-free (Furlong and Marsh, 2010).

This research explores the views and perspectives of actors involved in asylum policy in Ireland and the UK, either as policy makers or as people attempting to influence policy (Gray, 2009). Twenty one interviews with those engaged in each state were conducted. Those interviews were supplemented by interviews with six actors who had or were based in Brussels and engaged at an EU level, either within an EU institution or in a policy role in an NGO.

The thesis does not seek to explain or describe their actions or the institutions in which they worked but focuses on the meaning of behaviour and an emphasis on the understanding of actors (Furlong and Marsh, 2010). This is therefore an anti-foundationalist position and in contrast to foundationalism which sees the world as objective, regardless of our understanding of it and positivism, which privileges explanation over understanding. This thesis seeks to understand the world of asylum policy makers as those actors interpreted it, an approach commonly called either interpretivist or constructivist. It was not therefore observing the world in which asylum policy makers work and report on it as a positivist would. Both ontological and epistemological assumptions have informed these methodological choices (Hay, 2007). By not taking the world as given, separate to our experience of it, the analysis focused on the interpretation that those engaged in asylum policy have given to their roles and gathered that data using semi-structured interviews.<sup>18</sup> This has been within the context of an examination of the documentary evidence highlighting the context within which those policy makers operated.

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<sup>18</sup> The interview schedule and questions are set out in Appendix 2. Information about the structuring of the questions and the relationship between actions and actors is set out below in section 3.4.2



To enable the making of choices about data collection and analysis, this study combines theories relating to institutionalism, structure and agency and sensemaking. The following section introduces each of these as distinct theoretical areas before outlining the relevance of each in greater detail in order to show their individual and collective bearing upon this study.

### 3.2.2 Institutionalism, structure and agency and sensemaking

This section introduces us to the term ‘institutions’ and examines how actors are shaped by the institutions and structures within which they work and how they make sense of their roles and responsibilities. To address these questions, it draws from theories relating to institutionalism, structure and agency and sensemaking.

Institutional theory is central to this study because of its core concern to explore the influence of institutions on politics and the ways in which they have a partly autonomous role in political life (March and Olsen, 1989, 2005). Hall and Taylor (1996) refer to two fundamental issues in institutional analysis: the relationship between institutions and behaviour and the process whereby institutions originate or change. In the asylum field, the relationships are both within the individual state institutions but also across state boundaries, making it more difficult to identify the origins or influences upon actors. It requires a method of examination that enables us to better interpret the decisions taken that led to the respective asylum systems in Ireland and the UK. In that context, new institutionalism and, in particular, historical institutionalism, has been instrumental in this study. It is evident in the dominance of strict immigration control over an asylum system in the UK and the ways in which Ireland took its cues from the UK, regardless of its different and relatively recent experience of asylum seekers.

Hall and Taylor (1996) identified three different strands of new institutionalism: rational choice institutionalism (RCI), historical institutionalism (HI) and sociological institutionalism (SI). They describe HI’s definition of institutions as ‘formal or informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy’ (p. 938). Whilst they identified the quite distinctive approaches of each, they argued for greater interaction or at least a better acquaintance with each other.

Institutions have an impact on the behaviour and choices of actors (Immergut, 1998) but can also be modified by actors (Barley and Tolbert, 1997). The extent to which institutions are modified, particularly at a time of heightened political crisis, such as the ‘migrant crisis’ in the EU in 2015, was an issue in this study. The relationship between institutional characteristics, political agency, preferences and change (March and Olsen, 2005) was also a feature. In the context of relatively new structures, formed over a period of less than 30 years in both the states in question, the influence of institutions within the state and their

adaptation in the field of asylum was relevant alongside institutions beyond the state, not least within the EU or other member states.

The thesis, by adopting an actor-centred focus, draws on theories relating to structure and agency, which, in turn, have a relationship with institutions (Hay and Wincott, 1998). Actors are not simply puppets of the institution but instead play a role alongside or within the institution (Hodgson, 2006). However, neither do they stand completely separate from institutions as they are shaped by the institutional environment in which they operate (Hay and Wincott, 1998). This, as it will be seen below, leaves little room for reliance upon rational choice institutionalism which, Hay and Wincott (1998) argue, 'replaces political subjects with calculating automatons' (p. 952). Structures, particularly in states that are well established like Ireland and the UK, are deeply embedded and thus less susceptible to the preferences or change of actors (March and Olsen, 2010).

This thesis draws, in particular, on 'situated agency' developed by Bevir and Rhodes (2010). Bevir and Rhodes argue that agents have capacity to adopt beliefs and actions but that it is always situated in a particular context and that agents use 'local reasoning', meaning that they use only the information that they possess even when the relevant information is at best not the full picture and at worst is false. As will be seen below with reference to sensemaking, it is not the accuracy of the information relied upon which matters, but instead its plausibility.

Finally, sensemaking allows us to assess how situated agents make sense of the environments within which they operate. This utilisation of theories of sensemaking is an innovation offered by this thesis because, whilst a less developed approach in relation to institutions, it provides powerful insight into how actors, within the UK and Irish asylum systems, make sense of events, processes, outcomes and factors that shape the politics of asylum (Weick et al, 2005; Weber and Glynn, 2006; Sandberg and Tsoukas, 2015).

### 3.2.2.1 Institutionalism

This section looks at the broad definitions of institutions and how they can open up an understanding of the role of agency and therefore of actors. In addition, it takes a closer look at new institutionalism with a particular emphasis on historical institutionalism.

The relationship between institutions and individual agents exists in some form in the various definitions of institutions (Hodgson, 2006). March and Olsen (2006) refer to rules and organised practices embedded in structures of meaning and resources and their relative resilience despite the changes, preferences and expectations of individuals. For March and Olsen, the will of political actors is less important than historical traditions and the values and preferences of actors develop within the political institutions. Scharpf (1997) includes social norms that actors will generally respect alongside formal legal rules and the machinery of the state in the concept of institutions. Hodgson (2006) defines institutions as

‘durable systems of established and embedded social rules that structure social interactions’ (p.13). Whilst institutions impose a form of consistency on human behaviour, they also depend upon the activities of individuals and also constrain and mould them (Hodgson, 2006). Hodgson therefore allows for a greater interaction between institution and behaviour than is suggested by the approach of March and Olsen (1984, 2006).

The institutions that form the asylum systems in Britain and Ireland as well as at EU level are relatively new and are still evolving. However, the institutions were created within well-established traditions which, particularly at a national level, were created over a much longer period of time. It is therefore useful to understand the role that new institutionalism, and particularly historical institutionalism, has played in this study. It should not be over-emphasised but taken in context. The ability of an actor to influence an institution will be dependent upon the position that they occupy within a given structure. Hence a Prime Minister’s ability to effect change within an institution will be greater than that of a lesser Minister or a civil servant. As will be seen in chapter 4, the UK Prime Minister Tony Blair played a significant part in shaping the UK’s response to an EU asylum system. But he did so by working within the overriding structure of an immigration control framework designed to deny entry and residence to non-EU nationals and particularly citizens of Britain’s former colonies with the exception of Ireland. In effect, he built upon the existing institutions.

Rhodes et al (2006) make the following distinctions between RCI, HI and SI: RCI sees institutions as a set of rules and incentives; HI sees them as continuities; and SI sees institutions as norms and cultures. There are nevertheless different ways of thinking within each approach as Shepsle (2006) demonstrates in relation to RCI, Sanders (2006) on HI and as Hall and Taylor (1996) clearly show with their comparative analysis of all three approaches and their role within political science.

In addressing the question as to how institutions affect the behaviour of individuals, Hall and Taylor (1996) distinguish between a ‘calculus’ and a ‘cultural’ approach. The former involves strategic calculations by individuals within the parameters set by the institutions; the latter emphasises the individual’s reliance on established patterns or routines in which institutions provide the templates for interpretation and action. Both of these approaches, Hall and Taylor argue, are used in HI where we also see the importance of ‘path dependence’ and ‘unintended consequences’, and are important in a study which seeks to interpret key historical developments over a period of time in states which have a different history of receiving asylum seekers.

Pierson (2004) argues that path dependence arguments offer an important tool for understanding political dynamics, emphasising the importance of when an event occurs in a sequence. For the purposes of this study, the fact that states such as the UK (and others

within the EU) had begun to discuss and agree elements of asylum policy ten years before Ireland began to operate its own defined system, arguably limited the options available to actors in Ireland. Ireland had little experience of immigration let alone asylum. As will be seen in chapter 6, when Ireland needed to put its own asylum system in place, it looked in particular to the UK and to other common law countries (including Australia). In addition, Ireland did not want to found wanting when its EU partners were embedding key principles, even if those principles were ones of exclusion. To that end, the Irish government gave a commitment to use the principle of 'manifestly unfounded' in deciding asylum claims in June 1990 before it had even developed its own asylum decision-making process. Therefore when Ireland drew up its own legislative framework for asylum six years later, Ministers argued that it was honour bound to include that provision.

Certainly, sequence was important when it came to CEAS with Ireland not determining its own position on opt-in until the UK had decided its own. As Hansen (2014) has said 'path dependence occurs when a decision limits the range of available options at subsequent points and, in so doing, encourages continuity in the form of a retention of the original choice' (p.270). However Pierson (2004) distinguishes between 'path dependence' and 'path determination', which allows for the possibility of change, albeit limited given the design of institutions to be change resistant. The extent to which that has occurred in Ireland and the UK and the role that actors have played is important, particularly in the context of consequences not intended by original actors. This is partly where sensemaking also plays an important part in this study. Sensemaking is examined in greater detail below but the issue of structure and agency is examined first, to demonstrate its relevance to this study.

### 3.2.2.2 Structure and Agency

This section looks at the role that actors play within institutions and how that is impacted by the structures within which they operate. It also addresses a particular aspect about agency, namely 'situated agency'.

As Furlong and Marsh (2010) have argued, social phenomena cannot be understood independently from people's interpretation of them. Therefore, the role of actors or agents is considered to be of equal importance to the structures within which they operate. Actors inform, influence, maintain, protect or defend those structures if they are seen as having value according to their position. Hay and Wincott (1998) have argued that the perceptions of actors are shaped by both the institutional context and existing policy paradigms and world views. Historical institutionalism, Hay and Wincott assert, must give proper attention to the role of ideas in shaping institutional trajectories. It is argued below that we can better understand how actors use ideas if we use the tools provided by sensemaking approaches.

Giddens (1984) places a high importance on the understanding that actors themselves place on the conditions of their actions and their reflexivity, which he argues are carried in practical consciousness. He describes action as 'a continuous process, a flow, in which the reflexive monitoring which the individual maintains is fundamental to the control of the body that actors ordinarily sustain throughout their day-to-day lives' (p. 9) and structure as both constraining and enabling. Reflexivity on the part of actors has also been stressed by Jessop (1996), albeit that he also argues that structures do not exist outside of action by specific actors.

Agents do not therefore exist simply to serve institutions but can also shape them. In some cases, agents shape it by responding to a crisis which threatens to destabilise the institution, for example when a legal challenge is made to a policy of detention for a significant number of asylum seekers. This was the case when the UK's fast-track detained system was challenged in the courts, as will be seen in chapter 5. However, agents are not completely separate from the institutions and they therefore operate in a particular context. Bevir and Rhodes (2010) have referred to this as 'situated agency', arguing that an acceptance of agency is an acknowledgement of the possibility that agents can transform the social background but are always situated in a particular context. Bevir and Rhodes make a very clear distinction between agents behaving rationally within external institutional settings and agents using what they refer to as 'local reasoning', reasoning that takes place against the background of a particular set of beliefs. Reasoning, for example, could include the view that strict limitation on the number of successful asylum claims is necessary in order to maintain public support for an asylum system. In the context of this study, the question then becomes how do actors make sense of their situation in order to even have the opportunity of influencing, shaping or maintaining institutions? That is where the tools of sensemaking provide added value in this study to which attention is now turned.

### 3.2.2.3 Sensemaking

Sensemaking is an approach that developed within the field of organisational studies and is not commonly used in political science. It is rarely used in migration studies where the emphasis is upon policy outcomes rather than seeking to understand how actors in these governance systems make sense of the issues and their roles and responsibilities.

It provides a framework and an approach that, when set within the context of new institutionalism (and particularly historical institutionalism) and structure and agency (and particularly situated agency), allows for an insight into how actors, working within a fast and relatively new phenomena such as asylum, understand the situations that they are asked to respond to and how they begin to act. It allows us to see how asylum policy makers explain their role and the decisions that they have made within the context of the institutions as we understand them from the documentary evidence available and over an extended period of

time. An example of its application in the field of migration governance can be seen in Geddes and Hadj-Abdou (2017). This section therefore sets out the particular approach provided by sensemaking and how it applies to the methods adopted in this study.

Sensemaking is an approach developed by Karl Weick. According to Weick (1993, p. 635), 'The basic idea of sensemaking is that reality is an ongoing accomplishment that emerges from efforts to create order and make retrospective sense of what occurs.' The ongoing nature of sensemaking means that it both precedes and follows decision making. Weick (1995) made an important distinction between interpretation and sensemaking, the latter involving authoring and creation as well as interpretation and discovery. It acts as an impetus for action. Weick identified sensemaking as a process that has seven properties. It is grounded in identity construction, retrospective, enactive of sensible environments, social, ongoing, focused on and by extracted cues and driven by plausibility rather than accuracy.

The key insight that can be taken forward for this study is that an actor-centred perspective can facilitate understanding of the development and maintenance of the institutions that constitute the asylum systems in Ireland and the UK. Scharpf (1997) refers to this as actor-centred institutionalism. Weick (1995) describes the central questions of how and why actors construct what they construct and with what effect. It provides the basis for an assessment of how actors interpret the challenges that they face and what they then create out of their understanding.

In the asylum field, it can mean making decisions in a complex and fast-moving environment, taking into account the views and decisions of others which may conflict or support the actions that they are taking. For example, this approach can be used to understand how a civil servant meets the demands of Ministers whilst also having to take into account legal challenges, parliamentary debates, developments at an EU level and a vast amount of information. In such an environment, as Weick (1995, p. 57) states, 'The strength of sensemaking as a perspective derives from the fact that it does not rely on accuracy and its model is not object perception. Instead, sensemaking is about plausibility, coherence, reasonableness, creation, intention and instrumentality'. To put it more succinctly, 'Accuracy is not the issue' (Weick 1995, p. 60).

In addition, the retrospective nature of sensemaking, in the context of the development of institutions over a period of years, is particularly useful in this study. Sensemaking commences with noticing and bracketing and leads to 'acting thoughtfully' (Weick et al, 2005). An actor's perspective of what is important and what that leads to, both at the time and with hindsight, was important in this study. In Ireland in 1999, a housing crisis led to the development of a hotel-style of full board and accommodation for asylum seekers with a complete ban on the right to work notwithstanding that Ireland was experiencing the 'Celtic

Tiger' years and was open to EU migration.<sup>19</sup> The policy of full board and accommodation had become so embedded that, regardless of a crisis in 2014, the maintenance of that system remained the preoccupation of policy makers. However, as Weick et al (2005) have argued, whilst institutions might trigger sensemaking, they have less influence over them subsequent to triggering, leading to unintended consequences that actors then need to make sense of in order to respond to them. That may assist in explaining the crisis that occurred in Ireland in 2014 when unrest in the accommodation centres for asylum seekers and a heightened focus on the asylum system was arguably an outcome of the institutionalised reception system. The very system designed to control asylum seekers was itself, for a limited period at least, out of the control of state actors. Their response was the establishment of a working group with a restricted remit and outside political participation, a particular focus of chapter 6.

Maitlis and Christianson (2014) define sensemaking (p. 67) as 'a process, prompted by violated expectations, that involves attending to and bracketing cues in the environment, creating intersubjective meaning through cycles of interpretation and action, and thereby enacting a more ordered environment from which further cues can be drawn.' For actors, not least civil servants accountable to Ministers, sensemaking therefore provides the mechanisms to come up with answers to the dilemmas posed by responsibilities towards refugees in the context of wider political pressures and state traditions.

Weber and Glynn (2006) build upon Weick's work to emphasise the importance of social and historical contexts within sensemaking. They do so by introducing three specific mechanisms – 'priming', 'editing' and 'triggering' of institutions – that all bring the wider social and historical contexts into sense-making processes. This enables development of a framework for locating the macro-level context, in which institutions reside, as well as the micro-level, at which sensemaking takes place. They argue that institutions prime sensemaking by providing social cues, edit it through feedback processes and trigger sensemaking by creating puzzles due to the contradictions, ambiguities and gaps inherent in institutions.

Sensemaking therefore provides a rich, if largely, unexplored basis in migration studies for bringing together the theories of institutions with structure and agency. It enables this study to explore both the particular location of decisions about asylum in specific organisational contexts while also enabling assessment of the impact of the wider social and historical setting as it affects the work of actors and their understanding of their roles. The questions used in interviews for this study were intended, for example, to elicit the actor's own choice of the situations in which they were engaged, the pressures and influences

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<sup>19</sup> The phrase 'Celtic Tiger' refers to the period 1997 to 2007 when the Irish economy was booming and Ireland became one of the richest countries in Europe

(internal or external to their organisation) upon them, the actor's understanding of them and the actions which they recommended or took.<sup>20</sup>

### 3.2.3 Summary

This section has outlined how three theoretical perspectives, when taken together, inform this study and the approach taken. Institutions lie at the heart of this study but are understood in the context of the key actors who work within them. Agents are not seen as unthinking automatons, but as acting within a particular context or situation with scope for local reasoning. In addition, it demonstrated that the use of sensemaking approaches can show how actors 'act thoughtfully' in relation to the challenges posed for them not only by asylum seekers but also by the wider organisational and institutional environment within which they operate. Thus, for example, there may be path dependencies, but this study is interested in how actors make sense of their situation as a way of then understanding why and how institutions can remain unchanged and how this then affects the way that states make sense of asylum-seeking migration. Put another way, it enables us to see how actors make sense of the wider social and historical setting within which they operate and how this then feeds into very specific sense-making processes within organisational settings in Ireland and the UK.

The remaining parts of this chapter outline the research design, data collection and analysis, together with reflections on the author's position as a practitioner in the field. It demonstrates the ways in which the theoretical perspectives have influenced the methodological decisions taken.

## 3.3 Research design

### 3.3.1 The choice of methodology

Before designing the research and determining the best method for the research, a review was undertaken of the literature on immigration and asylum, the state and state traditions as well as Europeanisation before approaching the specific issue of asylum in both states, in the context of their relationship and their EU membership (Bryman, 2012, p. 8). The literature review is set out in chapter 2. The decision was made to undertake a comparative analysis of two EU member states that engage closely with one another on matters relating to asylum despite their quite different approaches to wider issues within the EU. Ireland and the UK can be seen as 'most similar' cases while the examination of their individual asylum systems and the analysis of the views of policy makers about what they are trying to

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<sup>20</sup> The interview questions are set out in Appendix 2



achieve allows for the logic of comparison to be exploited (Sartori, 1991; Burnham et al, 2008).

The principal function of comparison in political science has been described as that of developing, testing and refining theories about causal relationships (Hopkin, 2010). It can also improve theory building (Bryman, 2012). In this particular study, the interest was in relationships between the two states and also the influence of the EU of which both were members independent of one another. A comparative analysis in this wider context can arguably tell us more than an analysis of policy and practice in one state alone.

The selection of cases for a comparative study is itself important as well as the object of the study (Geddes, 1990). Selection bias can affect a study's validity, but, limiting the study to two cases provides an opportunity to carry out in-depth research. The choice of Ireland and the UK is based on the similarities of their asylum systems within the context of their long historical connection, geographical proximity and shared land border, part of the Common Travel Area (CTA). These factors have influenced their response to the development of common asylum policies in the EU, of which they have both been members since 1973. In spite of very different immigration histories, Ireland and the UK have adopted an almost identical approach to the development of their asylum systems. The only exception was Ireland's decision not to opt-in to the original EU Reception Conditions Directive in 2003 because of its refusal to give asylum seekers the right to work.<sup>21</sup> However, that difference was ended when the UK chose not to opt-into the recast directive and can be explained by the UK attempting to upload its own ideas on to an EU stage. The study therefore raised the questions of how and why Ireland and the UK developed the asylum systems that they have today and how those asylum systems have been influenced by their relationship and their EU membership. It sought to address this through an examination of the role played by policy makers according to their own perspectives and reflections and not by a focus on the outcomes.

This led to a decision to use qualitative research methods which are particularly appropriate for this study as the emphasis is upon the ways in which actors interpret their social world (Bryman, 2012) and a focus upon a small number of cases, using intensive interviews with actors and deep analysis of historical material, albeit relatively recent, and a concern with a comprehensive account of some events (King et al, 1994). In addition, it allowed for the collection of distinctive information in depth from a relatively small number of cases (Burnham et al, 2008; Vromen, 2010). This included the collection of data about the development and nature of the key asylum institutions, the ways in which those institutions

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<sup>21</sup> The decision was made late in 2017 to propose that Ireland opts-in to the 2013 Reception Conditions Directive, a response to a Supreme Court decision that a complete prohibition on the right to work of asylum seekers was unconstitutional.  
[http://www.justice.ie/en/JELR/Pages/Access\\_To\\_Work\\_for\\_International\\_Protection\\_Applicants](http://www.justice.ie/en/JELR/Pages/Access_To_Work_for_International_Protection_Applicants) [last accessed 17.01.2018]

had been influenced by prior events and the role played by actors, including their own interpretation or reflections on key events that had occurred during their period of office.

The principal research question focused on the development of the respective asylum systems in the two states chosen, Ireland and the UK, and was based on the existing knowledge that both were very similar in content and intentions and that both states had adopted a similar response to the development of an EU asylum system. The principal research question was therefore: How has asylum policy in Ireland and the UK been influenced by the relationship between the two states and their membership of the EU?

Sub-questions were also developed looking at how actors understood and accounted for the actions that they have taken in response to people seeking asylum, the role of actors within institutions, explanations for the similarities and differences in the institutional response to asylum seekers in each state, particularly given the significantly different approaches to the EU. The principal question dominated the collection of data and the analysis but the sub-questions also helped to focus attention on the evidence that went to the heart of this study. This led to a conclusion that the Case Study Method was the most appropriate for this study and, in particular, that a holistic multiple case study was the most useful framework. The following section explains this method and the reasons for the choices made within it.

### 3.3.2 Case Study Method

The case study method provides a focus on a contemporary phenomenon within a real life context (Yin, 2014) and an intensive examination (Bryman, 2012). It allows for the examination over a period of time rather than at a given fixed point and which takes into account developments which take place during the period of study (Burnham et al, 2008). In addition, it provides a framework to assess empirical material from a variety of perspectives, taking into account the explanations given for key developments at the time in the context of demands imposed as a result of both internal and external pressures.

Yin (2014) defines the Case Study as a research method both by its scope and by its inquiry. In terms of scope, he argues that the method is useful where the boundaries between phenomenon and context are not clearly developed because they are not always distinguishable in real life situations. The inquiry relies upon multiple sources of evidence, benefitting from the prior development of theoretical propositions and the convergence of data.

Yin outlines four main types of case study design: a holistic single case study; an embedded single case study; a holistic multiple case study; and an embedded multiple case study. The reference to 'embedded' is to an in-depth study of one particular area of interest within the overall study. A holistic multiple case study was chosen for this study because it covers more than one case, with each state being treated as an individual case study before the

analysis is brought together in a single case. The period covered in this study, from 1990 until June 2017, enabled an opportunity to ascertain whether, for example, there was evidence of path dependency but also to trace sensemaking over a significant period during which the pressure from people seeking asylum had increased and in the context of an emerging EU asylum system.

The study in each state formed a separate case study in its own right (Gray, 2009) with a replication of the data collected and then analysed within each study, before cross-case conclusions were developed (Yin, 2014). Within each case study as well as the final analysis of the two together, the intention was to identify causal explanations or to explain the causal links between the facts observed and the inferences that can be drawn from them (King et al, 1994). Yin (2014) identifies four different applications of the Case Study method of which he states that the most important is to explain the presumed causal link in real-life interventions that are too complex for the survey or experimental strategies. That is why the case study method is particularly relevant to this study.

Yin (2014) identifies six sources of evidence which can be used in a case study: documents, interviews, archival records, direct observation, participant observation and physical artefacts. Of these six sources of evidence, three were of value in this study, namely documents, interviews and archival records. Direct observation, participant observation and physical artefacts offer no assistance in addressing the principal research question. Observation would also not address the key issues of structure and agency and sensemaking within the context of potentially multiple influences on actors or the reasons for the state responding at any given time to asylum seekers. Physical artefacts have no relevance to this study.

Key documents in the form of records held by the national parliaments and by bodies within the EU were primary sources. In addition, semi-structured interviews were conducted with people who had been involved at key stages either as policy makers or people seeking to influence asylum policy. The primary sources of data provide a rich source of information which allows for all of the key features to be examined, namely institutions, structure and agency, and sensemaking. It is the triangulation of data from different sources that gives confidence in the findings of the research.

For a comparative study of two states which are also members of the EU, it was necessary to not only identify key events but also the sequence in which they occurred. This was in order to get a better understanding of: (a) what institutions of the state were engaged; (b) how those institutions were affected by, participated in or sought to influence key events; and (c) the consequences for the state, their bilateral relationship with other states or on their relationships within the EU. This was done initially through the collection of data through documentation, followed by interviews which then led to the identification of additional documents. The 27 interviews conducted, 11 in the UK, 10 in Ireland and six with actors who worked in Brussels, were the primary source of data about the way in which

policy makers and influencers identified and interpreted the key events which enabled an analysis of the various elements within sensemaking. However, alongside the interviews, the data collected from the documents and archival materials themselves provided a source of evidence not only about the nature of institutions but the way in which institutionalism occurs. For example, it allowed for an examination of evidence of path dependency. The section below describes the collection of the various forms of data.

### 3.4 Data collection

Bryman (2012) describes the investigator as the main instrument of data collection as the matters that the researcher concentrates upon are products of their predilections leading to difficulties relating to replication. This reinforces the most important rule for all data collection which is to report how the data was collected and processed (King et al, 1994) and to maintain a chain of evidence (Yin, 2014). The intention in this section is to clearly set out how the data was collected, why and from which sources.

The first part of the data collection was in the form of documents and archival records that existed at both national and EU level. The second part was to conduct semi-structured interviews with some of those who had been or were still key participants at various stages in each state and at an EU level. These interviews themselves led to additional documentary evidence or a re-examination of documents if an interviewee's comments highlighted that a particular document, such as a White Paper, piece of legislation or report contained important information from their perspective. One of the values of the theory relating to structure and agency was to ensure that the relationship was properly interpreted.

There are some potential limitations arising from relying on documentation, archival records and interviews, which are now addressed in turn, firstly, documentation and archival records, including a description of the two types of documentary sources that are drawn upon, and secondly interviews.

Documents produced at the time of the event e.g. debate around a Bill, representations to a committee about developments at an EU level, answers to parliamentary questions and papers setting out a government's position, are indicative of the thinking at that time and cannot easily be dismissed by re-interpretation after the fact. Equally, those positions are set out in arguments recorded in the cut and thrust of parliamentary debate and therefore produced in a less controlled environment. This is in comparison to the production of a government paper or answer to a written question.

Interviews, however, shed a different light on debates, actions and decisions at the time that they were taken. The passage of time also has the benefit of allowing the interviewee to stand aside from the role that they occupied at the time and reflect on it in a more open

way than may have been possible if they had been talking about current events. This is particularly the case if they no longer have responsibility within that area of policy. Interviews also allow the interviewee to outline the role that they considered they played in relation to the representation of events in documents and whether, for example, they considered themselves bound by the structures within which they operated.

### 3.4.1 Documentation

A key issue is the identification and choice of documentation. Given the researcher's experience as a practitioner in the field in both states, various facts were known from the outset and therefore provided an early framework around which to identify documents. These included the existence of legislation which had been passed, starting in 1993 in the UK and in 1996 in Ireland. The debates around those pieces of legislation revealed not only the earlier attempts to legislate (1991 in the UK; 1994 in Ireland) but also the influence of agreements at an EU level which required a decision or implementation at a national level. These were therefore key starting points when looking at the documentation.

However, the systems in both states for the examination of developments at an EU level were not immediately clear from the documents. In addition, given the length of time that directives within the first phase of CEAS took to negotiate across so many member states, many of the documents at the European Council showed little difference or participation from Ireland or the UK. Furthermore, those documents which did show Irish or British interest would not represent the 'off the record' or bilateral or group discussions that would have taken place firstly, between officials of member states before formal Council meetings and, secondly, the unofficial discussions which occur outside of the formal recorded meetings. However, given the framework of key developments that was established from national and EU documents, the interviews supplement and enhance the explanatory power of data collected from documentary sources.

Another factor is the reliability of documentation, particularly those which it was known would automatically be in the public domain (as opposed to those obtained, for example, through freedom of information requests). To some degree, there is an element of choice as to what documents remain and are therefore available for consideration and the record itself may not provide information as to why it was retained. However, that problem can be addressed to a degree by using other means, in this study the interviews, to ascertain the general circumstances in which the documents were produced (King et al, 1994). In addition, those documents which arise within a politically contested space, such as parliamentary debate, are not the result of as much control as, for example, a government's position set out within a published paper.

An additional factor which can undermine the value of documentation relates to the production of documents with which officials were involved rather than politicians as they would not be identifiable. Indeed in public records relating to political discussions in both

states, the protocol of complimenting and certainly not criticising civil servants appears in both jurisdictions, therefore providing the appearance at least that civil servants are simply carrying out the will of politicians with no views or influence of their own. However, the public representation of opinions and decisions is useful in that they act as benchmarks against which to judge the views of officials who were prominent at that time and therefore they have value in that context, particularly when set alongside the interviews. For example, the Irish Minister of Foreign Affairs, speaking to a Refugee Bill in 1995, clearly identified decisions at an EU level on 'manifestly unfounded claims' which it was, in her view, important for Ireland to implement in domestic legislation.<sup>22</sup> These were matters that civil servants, rather than Ministers or other parliamentarians such as MEPs, were monitoring.

A further issue is the comparability of documentation which clearly differs between jurisdictions. This raises an issue as to the weight to be attached to a document when there is no direct comparison. For example, although both states have the ability to 'opt-in' to elements of the European asylum system, the Irish Constitution requires the government to obtain the consent of the *Oireachtas* before taking that step. No such requirement is present in the UK political system with its unwritten constitution. Arguably therefore, the record of parliamentary intervention in the UK is more cosmetic and less reliable as a view of the institution at that time than if there were consequences to their debates and decisions. However, the documentation in the UK at least gives the views of senior politicians at the time, for example on important legislative developments as well as issues arising at an EU level and these provided a basis on which to pursue enquiries by way of interview. UK Immigration Ministers would, for example, appear before various parliamentary committees or make statements in the Houses of Parliament about the UK's view of developments or participation in EU affairs.

The documentation was essential to set the framework for key developments, get a sense of its parameters and issues to be explored by way of interview, and also to see where a particular initiative started or how it progressed in either state or within the EU. It provided an opportunity to see where Europeanisation was at work, for example, by the way in which a state argued at an EU level for its national position to be adopted or used a development at an EU level, such as the necessity to transpose a directive, to argue for change at a national level.

The primary source documents considered in each state and at an EU level is summarised in the table below.

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<sup>22</sup> See chapter 6

Table 3.1: Sources of documentary and archival records

<b>EU</b>	<b>Ireland</b>	<b>UK</b>
Negotiations on elements of the Common European Asylum System	Debates in the Oireachtas on key legislative asylum and related immigration proposals or developments	Debates in the Houses of Parliament on key legislative asylum and related immigration proposals or developments
European Commission Green Papers	Debates at: the Joint Committee on Justice, Equality, Defence and Women's Rights; Joint European Affairs Committee; Public Accounts Committee	Debates at: Home Affairs Committee; European Scrutiny Committee (House of Commons); Select Committee on European Communities (House of Lords)
European Council Resolutions, reports on proposals, statements of Presidencies, General Secretariat	Statements of Government Priorities	Government Codes of Practice
European Commission Policy Plans	Government discussion documents	Government White Papers
European Commission communications to the European Parliament and European Council	Statements by Government Ministers including to the Dáil	Government reports to Parliament including Annual Reports on EU JHA matters
Position papers or statements submitted by either UK or Ireland to the European Commission	Annual Reports and strategy statements of independent bodies in the asylum application process	Report of the National Audit Office

Source: Author's assessment

These documents were initially read with the research questions and theoretical perspectives in mind and extracts selected and saved for further consideration. They were saved into the three categories above. After the initial reading of the documents, further examination was undertaken and sections of them were highlighted to allow for easier reference at a later date.

In addition, during the process of reading those documents, key events were noted in tabular form which was useful for a variety of reasons. Firstly, it provided a framework for the sequence of events. Secondly, it allowed for easier cross-reference to see, for example, the instigation of a proposal and the causal links or relationships including evidence of path

dependency or unintended consequence. Thirdly, it enabled the identification of key participants who could potentially be approached with a request for interview. Fourthly, it facilitated the process of pattern-matching logic, which Yin (2014) describes as one of five analytic techniques.

The tabular record developed from the initial reading was divided into three sections which aligned with the development of an EU framework around asylum. The first commenced with the Dublin and Schengen Implementing Conventions in 1990 until 1998; the second from 1999 with the coming into force of the Treaty of Amsterdam when asylum (and immigration) became EU competencies for the first time (and under which Ireland and the UK negotiated an 'opt-out') until the end of the first phase of the Common European Asylum System (CEAS) in 2006; and the third from 2007, with European Commission proposals for a revised CEAS, until June 2017. The three tables appear as Appendix 1 to this study.

After this initial and fairly extensive process was complete, and it appeared that further reading was not going to add to the data gathered, a preliminary analysis was undertaken to produce chapter 4, setting out the context for the remainder of the research. The focus then turned to interviews, discussed below, which led to further documents not identified during the preliminary desk research. Some of the interviewees highlighted documents that had not been fully appreciated prior to the interviews. This led to a review of the context chapter and a better understanding of the views being expressed by the interviewee.

### 3.4.2 Interviews

The data collected through the reading of documents and archival records was balanced by the other source of data collection, namely interviews with actors. Situated agency and sensemaking are central to understanding the issues and were addressed in equal measure: the examination of documents arguably provides a more unbiased presentation of the structure of those institutions; the interviews give an insight into the role that agency plays in the development and maintenance of those institutions and the ways in which key actors make sense of the situations in which they were involved, leading to reinforcement of or a change in the institution.

Interviews have been considered as less reliable forms of evidence in themselves for a variety of reasons. Key participants may not be available for interview and therefore those that participate may be a degree removed from the events in question. Even for those who were or are still key, recollection of events will be affected by the passage of time or by a different interpretation of events, not least with the value of hindsight but also as a result of knowledge of the consequences (not necessarily intended by them or their predecessors) of previous decisions such that they may wish to distance themselves from or re-interpret them. However, the interviews are not considered in isolation but alongside the documents against or in the context of which statements after the fact can be examined. In addition,



the interpretation that a participant gives to an event, which may be contradicted by documentary evidence, is an important source of information in itself when attempting to determine why and how policy decisions were made.

The interview questions<sup>23</sup> were intended to get an understanding of the environment in which the interviewee had or was working, the relationship between the institutions in which they engaged and their priorities, their understanding of the events in which they had been or were engaged and the actions which resulted.

The process of identification of an initial number of potential interviewees occurred during the first reading of the documentation. That was easier for politicians than it was for civil servants, the latter often remaining anonymous within documentation. Even if it was not possible to identify a post holder in the civil service by name at the time during a particular period, then it was at least possible to ascertain if the person who held the post would have been a participant at key stages. That was therefore a matter for enquiry with other interviewees. Almost two-thirds of potential interviewees were identified during the collection of data through the documentation to be able to start the process of approaching people for interview. It was considered that, to enable a proper assessment of sensemaking, the target was 30 interviews. It was necessary to have regard to the fact that the potential 'pool' of interviewees in Ireland was limited by virtue of the relatively few people engaged in asylum policy in a country which was much smaller than the UK. To have a real sense of comparison of the perspectives of policy makers, there was a need to have a balance, as far as possible, between interviewees who had similar roles in each state. In addition, the number chosen was based upon the knowledge that, in both Ireland and the UK, it would be possible to have access to a sufficient number of interviewees who had been involved in the earlier part of the period under study, when asylum was becoming a significant political issue, and the latter part when reviews and reforms were taking place.

In the end 27 interviews were conducted<sup>24</sup>: 11 from the UK (or related to the UK), 10 from Ireland and six with participants who were working or had worked at a pan-European level. The choice of participants to include, for example, politicians, civil servants, officials at the European Commission, arose from the central focus of the study which is the state and its institutions as they present on the face of the records themselves or as they are understood by those who administer them. The decision was therefore not to interview asylum seekers themselves, regardless of how the institutions are experienced by them. This is partly because the experience can vary over time and be influenced by the final outcome. However, a real issue was the fact that it was necessary to establish the response of the two states to people seeking asylum without regard to variations amongst asylum seekers. However, during the course of the interviews it was necessary to extend the invitations to

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<sup>23</sup> The questions that guided the interviews are set out in Appendix 2

<sup>24</sup> The dates that interviews took place, the position held and the location of the interviewees are set out in Appendix 2

interviews to those in NGOs who worked at a senior policy level. This was particularly due to the fact that an insufficient number of politicians or officials were responding to invitations and it was also considered useful to gather the views of those who were attempting to influence policy. Senior figures in NGOs also opened doors to politicians and civil servants.

The choice was to conduct semi-structured interviews with interviewees being fully informed of the outline of the study, the general framework for the interview, the recording of interviews and safeguards in place to protect anonymity both in the storage of interview material and in the use of material obtained during interview. In addition, given the author's professional role as the CEO of the Irish Refugee Council at the time of the initial interviews (until June 2016), and previous and subsequent role as an immigration lawyer in the UK, this longstanding interest in the issues (30 years) was disclosed at the time that an approach to potential interviewees was made.

A number of the interviews came about as a result of introductions or suggestions from other participants. It was particularly difficult to get politicians to agree to be interviewed in Ireland, which could be attributed to either the author's role at a policy level in Ireland or lack of interest. A number of senior civil servants declined to be interviewed because of the prominence of the role that the author had in the field in Ireland and therefore a level of sensitivity to the issue. Others agreed to participate for that reason so the author's position both opened and closed doors.

Interviewees were approached by letter or email which clearly identified the University of Sheffield and the PhD supervisor. The letters outlined the scope and purpose of the study and the general approach to be adopted within the interview. Having regard to the University's Code of Ethics, approval was obtained before data collection commenced. There was no issue about the vulnerability of interviewees because of the nature of the role of participants and substance of the interviews. Interviews took place at a venue of the interviewee's choosing.

The letter or emails sent to interviewees were intended to provide a framework for the interview sufficient to enable them to consider in advance their responses. Yin (2014) suggests that, when conducting interviews, the researcher should appear genuinely naïve about the topic. Whilst that is possible to some degree, particularly when seeking the views of an interviewee, it was not really possible for the author to present herself as a neutral observer of the process with no interest in the outcome. Indeed, detailed knowledge of the issues enhanced the interviews by being cognisant of key events and issues.

The decision was made to describe interviewees either as policy makers or policy influencers.<sup>25</sup> Policy makers included politicians (including politicians in opposition parties)

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<sup>25</sup> A more detailed description is given of each interviewee in Appendix 2 with the exception of Ireland in order to protect anonymity

and civil servants. Policy influencers included those with senior positions in NGOs and academics (including those who may have described their roles as more of an observer but whose work, for example, research, has a bearing on asylum policy). Some of those interviewed in the UK and Ireland had experience of working at an EU-level (including those whose main focus was at an EU level at the time of interview). Despite the more pro-EU stance in Ireland generally, very few had direct involvement at an EU level. This was in contrast to the UK where nearly 50% of those interviewed had experience of working at an EU-level. Despite this, policy influencers in Ireland were more conscious of developments at an EU-level than policy influencers in the UK.

Table 3.2: Role of interviewees (past or current at time of interview)

EU	UK	Ireland
2 Policy makers 4 Policy influencers	7 Policy makers* 4 Policy influencers	4 Policy makers** 6 Policy influencers

\* 5 had operated or were operating at an EU level

\*\* 1 had operated or was operating at an EU level

All of those interviewed, except one, showed no difficulty in participating and addressing the questions as clearly as they could. The exception was a civil servant who occupied a sensitive role in Brussels at the time who was very cautious in the answers given and indicated, at times, that they were not in a position to answer a question in any depth. One of those approached for interview (in February 2017) declined to be interviewed on the grounds that: *'I am sorry to confirm that UK civil servants are unable to take part in interviews or discuss specific cases, especially under the current circumstances.'*

The interviews were transcribed in full, including any periods of hesitation or repetition where they were recorded. In the main body of this thesis, interviewees are only identified by description, for example, policy maker or policy influencer, so as not to allow for their individual identification. This is particularly important in Ireland given the small pool of people for interview and therefore the greater possibility of identification if other terms were used.

### 3.5 Analysis

It is the triangulation that allows for cross-verification from various sources which are considered essential for the validity of this study (Bryman, 2012). The analysis started with the documentation and archival records as that informed the questions for the interviews, helped identify the interviewees and to frame the timeline and the correlation of key events. In addition, the documentation and archival records have a framework for analysing where elements of historical institutionalism such as path dependency may have appeared to have occurred. Further documents were gathered and analysed as a result of

identification through the interview process, and where those documents shed a different light on the areas of interest, the initial documentation was revisited to ascertain whether it had been misread or the choice had been too selective.

To begin the process of analysis, the key themes were first identified across the interviews conducted in or relating to the UK and Ireland. Having identified the 'story' that was evident in the themes, the approaches in sensemaking were used to build a picture of how individual actors understood the situation that they were relating and what action they took. The interviews with participants who operated in Brussels or at a pan-European level, were used in the comparative chapter (chapter 7) to add a balance to or comment upon those whose prime or sole focus was in or on behalf of their particular state. The EU interviews assisted in the analysis which brought together the concepts in institutionalism, structure and agency and sensemaking. The importance of the main research question cannot be overemphasised as it was key to ensuring that the analysis was on the impact of the relationship between the UK and Ireland and their membership of the EU. The chapters which follow indicate where causal inferences have been drawn from the data (King et al, 1994) but also provide alternative possibilities so that the reader can make their own assessment of the inferences drawn.

The role of the analysis is to craft the story, not assume that the facts speak for themselves (Yin, 2014). King et al (1994) refer to this as descriptive inference drawn from the summary of historical detail. In this study, the purpose was to identify, as far as possible, the causal links which explain the reasons for the asylum systems in Ireland and the UK. This was not for the purpose of understanding the asylum systems better, but to gain a better insight into or understanding of the state's response to asylum seekers.

What was required first of all was to 'craft' the individual story in each state. It was only when this was done that the two case studies were brought together to allow for conclusions to be drawn (Yin, 2014).

The principal research question was seeking to understand what influences were brought to bear on each state which helped to get a better understanding of the way in which the state works and, from that, a number of hypotheses were drafted before the research began. The study was looking for evidence of influences and to test the hypotheses. How the policy makers themselves understood the influences was itself important. Some of the inferences were more easily identifiable from the material but others were more nuanced and open to different interpretations. These are identified in the chapters which follow. The rules, routines, norms and identities of an institution were certainly units of analysis (March and Olsen, 2006), but the understanding and response of the actors themselves were central to this study.

The use of software for the analysis was considered but, with a relatively small number of interviews, it was possible to undertake the coding and therefore the analysis without the

use of software. In addition, the study involved complex situations across different jurisdictions over a lengthy period of time and which were developing even at the time that this research was done. It was therefore decided, not least based upon the author's considerable experience in the field already including routine work of analysing events as they occur, that there was no tool that could assist in the analysis.

### 3.6 Positionality and Reflexivity

As indicated above, immigration and asylum have been the author's area of exclusive professional practice for more than thirty years. At the time this study commenced, the position occupied was as the CEO of the Irish Refugee Council which meant a strong interest and involvement in seeking to influence asylum law, policy and practice in Ireland in a well-known and prominent position. Although most of the interviews were conducted after returning to the UK (and to legal practice in the field), it was considered important to disclose a long term professional interest in the area.

Regardless of this, the view was held that it is not possible for a researcher to stand outside of the area of study as if they are completely objective but that they are necessarily implicated in the construction of knowledge (Gray, 2009). Being conscious of the position held, the research questions were at the forefront during all stages.

The advantage to being an experienced practitioner in the field is that, whilst having a fairly extensive bank of knowledge at the outset, there was a genuine puzzle by the way in which Ireland conducted its asylum policy and indeed why officials in both countries sometimes acted in conflict with the evidence about the consequences of decisions. This led to an interest in getting a better understanding of Ireland's relationship to the UK, the impact of their EU membership and how policy makers interpreted the pressures upon them and their own decisions. Furthermore, having been engaged over a lengthy period of time in the UK, there was also an interest in better understanding how and why the institutions existed and again what and who influenced them. Whilst a professional interest as a practitioner in the field was relevant, the analysis was based upon the research conducted.

It was inevitable that, with interviews in Ireland, there was a degree of preconception based upon what the materials which formed part of the reading but also previous personal interaction with the individuals involved. To a lesser degree, this was also a factor when approaching interviewees in the UK given that legal practice in the field and an ongoing political interest in asylum issues. The professional experience working directly with and for asylum seekers provided a knowledge base of the impact that asylum policies and practices had on the lives of women, men and children in the respective asylum systems.

### 3.7 Conclusions

At the outset of this chapter, a number of questions were asked relating to the methodology adopted for this study. These related to the challenges and opportunities in the methodological approach taken, how the theoretical perspectives shaped that approach, the techniques chosen to address the research questions and about data collection, analysis and positionality.

This chapter has argued that the best way to understand the state's response to asylum seekers is by way of a comparative study of policy from the perspective of actors engaged in the policy process. This was done using a qualitative method and in particular the Case Study method, collecting data from three principal sources, documentation, archival records and interviews. The methodology was placed within the broader theoretical framework to demonstrate the ways in which they have guided the research throughout.

Whilst the structures in which actors operate inform and influence their response to asylum seekers, they have a degree of autonomy and can act according to their perceptions of the influences upon them. The use of interviews enabled key actors to reflect on their understanding of how they understood their role in the development of asylum policy in either Ireland or the UK. They have shown how they have been influenced by the institutions in which they either operated or existed externally but also how they influenced those institutions.

Despite the limitations that arguably come from limited sources, the value is in the depth of the research over a significant period of time and the benefit of reliance upon the research questions formulated at the outset which have therefore framed the whole process of data collection and analysis. The intention was to demonstrate that the four critical conditions related to the quality of the research design, construct validity, internal validity, external validity and reliability, have been satisfied (Bryman, 2012; Yin 2014).

The remaining chapters in this study bring the evidence and analysis together with the theoretical perspectives in order to address the principal question as to how asylum policy in the Republic of Ireland and the United Kingdom has been influenced by their relationship and their EU membership.

## CHAPTER 4

### THE INSTITUTIONAL FRAMEWORK

#### 4.1 Introduction

*“As I mentioned, one of the central objectives of our Presidency programme was to make progress on the measures which had an Amsterdam Treaty deadline of 1 May 2004. Two such measures, namely the asylum procedures directive and the asylum qualifications directive, had been the subject of discussion under successive Presidencies and were still outstanding at the beginning of our Presidency. The Irish officials set to work on a very structured basis to tease out the points of disagreement and negotiate a unanimous position thereon. I pay tribute to my officials for the wonderful work they did in that area. As a result we now have political agreement on the asylum procedures directive, which was achieved in May.”<sup>26</sup>*

Michael McDowell TD, Minister for Justice, 19 May 2004

*“Mr President, I am very pleased to be here today, representing the Irish Presidency of the Council, to mark this important stage in the completion of the second phase of the Common European Asylum System....[T]he new legislative framework further harmonises national asylum systems, the common standards are more protective and fully in line with the evolving case law of the Court of Justice and the European Court of Human Rights, and the new rules will enable Member States to operate efficient asylum systems capable of tackling abuse....An essential element to a credible and sustainable common European asylum system is that Member States build and maintain sufficient capacity in the national asylum systems.”<sup>27</sup>*

Lucinda Creighton TD, Minister of State for European Affairs, 11 June 2013

This chapter sets out the institutional context in which policy makers in both states were operating and provides the framework for analysing their own perceptions of that institutional context. It examines the systems in place at a national level which created the organisational approach to asylum when it became a more dominant issue at an EU level, limiting the ability of policy makers to subsequently alter the path that both states had set themselves upon. It outlines, from the documentary evidence, the priorities of each state, their relationship to each other and where they stood in relation to developments at an EU

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<sup>26</sup> Ministerial Presentation on the Justice and Home Affairs Council to the Joint Committee on Justice, Equality, Defence and Women’s Rights, 19 May 2004

<sup>27</sup> Speech to the European Parliament in Strasbourg on 11 June 2013

level. Based upon the documents examined before analysing the interviews with actors in chapters 5 and 6, it addresses the following questions: What was the institutional framework for actors engaged in asylum policy? What structures were in place which shaped actors' understanding of the situations in which they were required to act?

The argument that will be introduced is that the institutional framework was one in which both Ireland and the UK had in place structures that were so deeply embedded that they were less susceptible to change than newer EU states. Both states relied upon established patterns or routines as templates for interpretation and action by actors (Hall and Taylor, 1996, p. 939). This was regardless of the stated desire or belief of actors that they were acting in compliance with international obligations and regional commitments. To the contrary, both states developed asylum systems which effectively minimised their responsibility towards refugees, partly, at least, on the grounds of prioritising citizens (Gibney, 2004, p. 23).

The focus of this study is how key actors understood events in the area of asylum, the demands that arose whilst they were in office and how they acted within the context of an institutional framework that is national, regional and global. The institutional context in which those interviewed for this study operated is essential in order to understand how those institutions impacted on their behaviour and choices (Immergut, 1998) and how they, as agents, had a relationship with those institutions (Hay and Wincott, 1998). The actors interviewed for this study played a role within the institutions, they were not isolated from them (Hodgson, 2006). This chapter examines the institutional framework in existence throughout the period from 1990 and June 2017, during which EU states agreed that JHA, including immigration and asylum, would become areas of EU competency. Asylum would no longer be left solely to EU member states to determine law and policy but there would be EU systems addressing these issues. The UK was already an active participant in discussions at an EU level about asylum and immigration from 1986 onwards as shown by its participation in the *ad hoc* group of officials which began to meet at that time.<sup>28</sup>

Policy makers were conscious of, participating in and, on occasions, facilitating developments at an EU level. The path that the UK and Ireland would take within their own state systems was not determined by earlier decisions but there was a legacy arising from those decisions. That was particularly the case with Ireland.

Ireland oversaw the completion of key elements of both the first and second phase of CEAS on two occasions when it held the Presidency of the European Council, in 2004 and 2013. The public statements of Ministers acknowledged the importance of a common EU system. However, Irish Ministerial statements about the benefits of collaboration were in contrast, possibly in conflict, to the policy and legislative framework that they put in place in Ireland, preferring instead an asylum system that had many similarities to that of the UK. Ireland's

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<sup>28</sup> See Geddes (2008) on page 24



historical relationship with the UK and, in particular, the existence of a shared border, appeared to be the dominant institutional framework to which those engaged in asylum policy in Ireland had the closest regard. Statements about the benefit of the EU framework therefore have to be read in that context.

There are no such comparative statements about the EU asylum system from the UK, except those that distance the UK from and, at times, disparage it. The UK, unlike Ireland, did not at any time apparently feel the need or have the desire to facilitate an EU asylum system with the exception that it attempted to shape it. The UK approach to the EU was predominantly one of projection (Bulmer and Burch, 2009), seeking to shape an EU system that was similar to that in the UK.

To address the questions posed and show how the argument above is made, the chapter is structured as follows.

Section 2 outlines the approach of each state to asylum seekers and to the development of a European asylum system. Section 3 focuses on the UK asylum system. It examines the legislative framework established between 1993 and 2004, the additional administrative arrangements and agreements which supplemented the legislation, and the UK's attempts to frame the EU asylum system. Section 4 looks at Ireland's response to asylum-seekers, characterised by less legislative activity, the creation of an exclusively administrative system for the reception of asylum seekers and a decision making framework at odds with all other EU states. It examines how this was linked both to Ireland's relationship with the UK and with the EU. Section 5 outlines the significant similarities and differences in the Irish and UK's approaches to asylum seekers and sets the scene for the analysis of interviews conducted in both states. This chapter uses the analytical tools provided by historical institutionalism and structure and agency.

#### 4.2 The EU, Ireland and the UK

This section examines the overarching objectives of the UK and Irish governments in developing their asylum systems and their relationship to the development of an EU asylum system.

The parameters were clearly set by the politicians, providing a framework for interpretation and action by those involved in policy (Hall and Taylor, 1996). As will be seen below, there was a clear indication of continuities within the institutions which impacted upon policy makers (Rhodes et al, 2006).

Before asylum became a distinct area of EU governance (Green Cowles et al, 2001), EU member states had been negotiating agreements which created a negative framework

towards asylum seekers in which the UK was a key participant.<sup>29</sup> Since 1999, when the EU states began to build a common framework to deal with the entry, reception, status and applications of asylum seekers (Boswell and Geddes, 2011), Ireland and the UK adopted an independent approach to CEAS which was at variance with most other EU member states. They negotiated a special position in the Treaty of Amsterdam that gave them the option to sign up to immigration and asylum measures rather than being automatically bound by any new directives or regulations (Costello, 2003).<sup>30</sup> From the outset, therefore, the institutions which govern asylum in Ireland and the UK were developed outside of an EU framework. This offers an important insight into the way in which those engaged in asylum policy in Ireland and the UK viewed the EU asylum system and respond to it.

Official documents show that the UK looked to EU member states in continental Europe to achieve its objectives, with a clear preference for inter-governmental agreements (Kassim, 2003; Geddes, 2003). The purpose of the UK was to ensure that its own asylum systems were not undermined by EU membership and to influence the direction of EU asylum policy. Ireland's priority was to ensure that its border with the UK did not lead to its own asylum system being undermined by the movement of asylum seekers from or through the UK. Both states were alert to the implications of the exposure of their national borders to the movement of asylum seekers from neighbouring states. Both effectively looked eastwards. However, the UK had no apparent regard for the implications of its policies and decisions on Ireland.<sup>31</sup>

Another link between the two states was the underlying belief that the asylum system, created to protect state sovereignty (Schuster, 2003), was being defrauded by 'bogus' asylum seekers. The words 'genuine' and 'abuse' featured regularly in debates. Political statements were made about a commitment to help those 'genuinely' in need of protection (considered to be the minority) and a determination to refuse those who sought to 'abuse' the asylum system to avoid immigration control (the perceived majority). Both states sought to end the alleged abuse through a variety of measures. These ranged from legislation, administrative arrangements, political and public statements, opposition to legal challenges and, where the need arose, co-operation with other EU states.

Since 1993, the UK enacted five pieces of primary legislation around asylum seekers that were the framework for dealing with every aspect of the asylum system. Regulations and

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<sup>29</sup> These included the London Resolutions of December 1992 on 'manifestly unfounded claims', 'safe third countries' and 'countries of origin', all concluded during the UK Presidency of the European Council, June – December 1992.

<sup>30</sup> Protocol to Title IV of the Treaty of Amsterdam 1999 which was replaced by Title V of Part Three of the Treaty on the Functioning of the European Union 2007 extended to all matters relating to Justice and Home Affairs.

<sup>31</sup> That lack of consideration for the only EU state with which it shares a common border was thrown into sharp relief by the UK's decision to leave the EU. This is addressed in chapter 7.

immigration rules provided the finer details.<sup>32</sup> A review of the frequency and content of the legislation and regulations suggests frustration with the failure to curb alleged abuse of the system. This frustration influenced the development of administrative arrangements, not least with neighbouring states in continental Europe. These arrangements moved UK border controls further from the UK and shifted the governance of migration away from parliament, undermining the importance of parliamentary sovereignty.

In contrast, Ireland rarely legislated for asylum. It enacted its first principal piece of legislation in 1996<sup>33</sup>, replacing this with an Act passed in 2015.<sup>34</sup> Attempts to update legislation were made in 2008, partly to bring Ireland into line with the EU by transposing CEAS directives and establishing a 'single procedure'.<sup>35</sup> Parity was finally achieved in December 2015 with the passing of the International Protection Act 2015.<sup>36</sup> The Irish legislative framework focused on the decision-making process and the obligations of asylum seekers. It did so within a highly centralised system not uncommon in other areas of government and which was a feature of politics in Ireland well before independence (Ferriter, 2004). The legislation omitted any reference to asylum seekers' rights with the written constitution having limited applicability to non-citizens despite assertions (Hogan, 2012) that the constitution made Ireland distinct from the UK.

Ireland developed an administrative system in the form of the accommodation and support for asylum seekers, giving civil servants an almost unfettered ability to exert their own views of the state and its response to asylum seekers (Quinn and Hughes, 2005). The administrative support system largely safeguarded it from parliamentary oversight (Thornton, 2013) and any potential EU influence although, as will be seen in chapter 6, the courts and the constitution have been the basis of challenges, one of the features of a liberal state's response to non-citizens seeking entry or residence (Hampshire, 2013). The system of accommodation and support has been rolled out through private companies but this form of governance did not undermine central government control. Private business was simply the mechanism through which central government sought to act (Bell and Hindmoor, 2009).

Both states emphasised control rather than protection, focusing on the perceived interests of the state rather than the rights of individuals seeking protection. The protection of refugees is governed by international instruments and, without withdrawing from those

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<sup>32</sup> Legislation, statutory instruments and immigration rules are operationalised through guidance, drafted by civil servants, which contains the instructions for decision makers to follow, many of which are in the public domain. See <https://www.gov.uk/topic/immigration-operational-guidance/asylum-policy> [last accessed 27.8.2017]

<sup>33</sup> The Refugee Act 1996 did not come into force until November 2000 after amendment

<sup>34</sup> The International Protection Act 2015

<sup>35</sup> A single procedure allows for consideration of claims under the Refugee Convention and under the Qualification Directive to be considered in tandem, not sequentially as it was in Ireland from October 2006 until January 2017.

<sup>36</sup> The Act did not come into force for a further 12 months, on 31 December 2016. There was therefore almost a 20 year gap between legislation with a prime focus on asylum being passed in Ireland.

obligations, the only way to regain 'control' is to limit the impact of those obligations. Curtailing obligations has been one of the primary objectives of measures adopted in both states to deal with asylum seekers.<sup>37</sup>

From the outset, both states signed up to the Dublin Convention (with its greater benefits for member states furthest away from areas from which people sought refuge) but not to the Schengen Implementing Convention (based upon the principle of free movement without border restrictions). Although both signed up to the first tranche of CEAS<sup>38</sup>, they opted-out of the revised CEAS with the exception of the two regulations that dealt with enforcement.<sup>39</sup> The response of both Ireland and the UK to EU measures has therefore been to give precedence to the rights given to the state above the rights that infringe upon state control of asylum seekers.

Controlling or preventing the entry of asylum seekers took priority, alongside severely restricting the rights of those who did succeed in entering. To achieve this, the UK put in place a system that, when it appeared to be defective, was amended until it was as tight as possible. With that in place, it sought to influence other EU member states, either in the drafting of the various elements of CEAS<sup>40</sup> or in trying to move the question of asylum away from the EU itself.<sup>41</sup> Ireland set its sights on limiting movement from the UK. Ireland was slow to sign up to and then implement EU asylum measures. The exception for both states was their enthusiasm for measures in the EU asylum system which reduced their liability to consider asylum applications, returning asylum seekers instead to other EU states. The adaptation of an EU asylum system to the advantage of both states is arguably an example of the 'goodness of fit' arguments in Europeanisation (Green Cowles et al, 2001). However, as will be seen below, there were consequences for Ireland given the delay and manner in which they implemented measures that they had opted into.

The UK has a long history of implementing immigration controls which pre-date asylum policy by more than 40 years.<sup>42</sup> The UK also had a longer history of receiving and refusing asylum seekers and has been more proactive than Ireland in legislating to limit the so-called abuse of the asylum system. In effect, Ireland was content to follow the UK's lead, as Westminster sought to engage with and influence the development of an EU asylum system.

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<sup>37</sup> Even for EU member states, immigration is seen as a national prerogative

<sup>38</sup> The first phase of CEAS included: Reception Conditions Directive (UK only), Qualification Directive, the Asylum Procedures Directive, Dublin II Regulation and the Eurodac Regulation.

<sup>39</sup> The Dublin III and the Eurodac II Regulations.

<sup>40</sup> See the Sixteenth Report of Session 2012-13 - European Scrutiny Committee, Draft Directive laying down standards for the reception of asylum seekers (recast) which considered the UK's approach to the directive to maintain the UK's interests in the revised Dublin Regulation

<sup>41</sup> See the UK proposal for extraterritorial processing of asylum claims and regional protection zones considered in Communication from the Commission to the Council and the European Parliament: Towards more accessible, equitable and managed asylum systems, Brussels, 3.6.2003 COM (2003) 315 final

<sup>42</sup> See, for example, the British response to the need for labour in the after-math of the Second World War outlined in Conlan, S., (2017) *Brexit and the right to work in the UK*. Institute of Race Relations <http://www.irr.org.uk/news/brexit-and-the-right-to-work-in-the-uk/>

The following section looks firstly at developments at a national level and then at the UK response to and participation in the development of an EU system.

### 4.3 The UK asylum system

#### 4.3.1 The development of an asylum system in the UK

This section examines the use of legislation in establishing the UK asylum system and how other agreements and administrative arrangements supplemented the legislative framework. It establishes that the UK's approach to immigration, a significant political issue for more than thirty years before asylum came to the fore, set the framework in which those engaged in asylum policy were working. It identifies the role of path determination as well as path dependency given the established immigration control framework in the UK that created a legacy for asylum policy.

Despite the UK being a party to the Refugee Convention since 1954, the Convention did not become part of UK law until 1993. Before the Asylum and Immigration Appeals Act 1993, UK decision makers operated under immigration rules that indicated that account should be taken of the Convention (Macdonald and Webber, 2005). Decision makers also operated under immigration legislation which, with the exception of EU citizens, was designed to exclude rather than facilitate admission (Dummett and Nicol, 1990). Prior to a legislative framework, there was, for the majority of those who claimed asylum, an internal Home Office process leading to a decision with no right of appeal against refusal.<sup>43</sup> The incorporation of the Refugee Convention and the introduction of a right of appeal in the 1993 Act was therefore a step forward but it created a system that was unique to asylum seekers (Macdonald and Webber, 2005) and the right of appeal itself was curtailed by subsequent amendments.

The Acts which followed, in 1996, 1999, 2002 and 2004, aimed to plug a gap through which it was considered that those claiming asylum had been able to find a way. Some of the Acts were heralded as definitive, intended to solve the problem of abuse of the system. The 2004 Act, for example, included a section setting out the types of behaviour which damaged the credibility of the asylum claim before its substance was even considered.<sup>44</sup> Both Labour and Conservative parties demonstrated the same fundamental belief that the integrity of the asylum system was undermined by people who were not entitled to protection. At no point did the changes introduced indicate how the 'genuine' applicants for asylum were

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<sup>43</sup> The procedure involved the Home Office issuing a 'minded to refuse' letter, which gave an indication of an intention to refuse, and provided an opportunity to address the Home Office concerns. If that decision was maintained, there was no appeal for the majority of asylum seekers who could only challenge the refusal through the High Court, an expensive and lengthy procedure.

<sup>44</sup> These included: failure to produce a passport, claim asylum in a 'safe country' *en route* to the UK and making an asylum claim after receiving notification of an immigration decision.

able to be identified and their safety secured. The problem was always the abuse of the system, with the state portrayed as the victim.

*"It was found by the independent consultants who looked at the matter that the procedures are being abused, exploited and manipulated, so that the time limits cannot be adhered to."*<sup>45</sup>

*"The current system is complex, and the existing multiple rights of appeal delay the final resolution of cases. They enable those who have no legitimate basis to remain in the United Kingdom to manipulate the system and prolong their stay here. I am sure that hon. Members on both sides of the House have had long experience of the way in which people with no basis to remain in this country have been able to string out their stay, sometimes for years, by multiple and successive appeals."*<sup>46</sup>

Each successive piece of legislation added further barriers in the way of asylum seekers succeeding. Some sections of legislation also undermined the ability of those who claimed asylum to stay in the UK, not necessarily by seeking to physically remove them but by making it difficult for them to meet essential living expenses.<sup>47</sup> Legislation often contained powers to enable regulations to be brought in afterwards, with no debate or agreement from parliament, thereby denying the opportunity for scrutiny before they became operational.<sup>48</sup> There was, therefore, an absence of restraint on the use of power, including by unelected officials responsible for the operational decisions in asylum claims and support. Successive governments were accused of operating outside of parliamentary control.

*"I mentioned the Bill's 50 order-making powers. The Home Secretary criticised the 1996 legislation for being a "blank cheque Bill", and he said that it gave the Secretary of State wide and ill-defined powers to use in regulations. The same criticism can be made of this Bill."*<sup>49</sup>

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<sup>45</sup> Michael Howard, Conservative Home Secretary, Statement in the House of Commons, HC Deb 20 November 1995 vol 267 335-48

<sup>46</sup> Jack Straw, Labour Home Secretary, Order for Second Reading of the Immigration and Asylum Bill 1999, HC Deb 22 February 1999 vol 326 cc37-129

<sup>47</sup> The limited support for asylum seekers when their asylum application and appeals were concluded (even when further challenges follow or they could not leave the UK) was introduced in the 1999 Act. It was found to be unlawful by the High Court in *The Queen on the application of Refugee Action v. SSHD* [2014] EWHC 1033 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2014/1033.html>. Even for those still in the asylum process, the level of support has been harmful. See Refugee Action report, *Slipping through the cracks*, June 2017 <http://www.refugee-action.org.uk/wp-content/uploads/2017/06/Slipping-through-the-cracks-final4-A4-1.pdf>

<sup>48</sup> Orders passed by way of statutory instruments, for example adding a country to the designated list of safe countries, can only be challenged by way of a negative resolution procedure, in other words MPs 'praying against' a new measure within 40 days after it is laid before parliament.

<sup>49</sup> Sir Norman Fowler MP, Debate on the Second Reading of the Immigration and Asylum Bill 1999, HC Deb 22 February 1999 vol 326 cc37-129

The blank cheque powers were supplemented by rigid control over information to stifle analysis and debate. Parliament’s own committees found themselves working blindly. In 2003, the Home Affairs Select Committee produced a report to assist in consideration of the Asylum and Immigration (Treatment of Claimants, etc.) Bill 2003. However, it did so without having the text of the Bill itself.

*“In carrying out this scrutiny we have not had the benefit of a draft bill, nor—in common with other interested parties—were we given more than a few weeks’ notice of the proposals even in outline.... We are also surprised that two of the provisions in the Bill, those for a new criminal offence in relation to people trafficking and for electronic tagging of certain asylum seekers, were not mentioned in the announcement on 27 October. Whilst we appreciate the Government’s desire to legislate urgently on the measures in the Bill, we believe that it is unsatisfactory that a Bill has been introduced with insufficient advance information to enable proper consultation or prior parliamentary scrutiny of the principles involved.”<sup>50</sup>*

Introducing draft legislation without prior scrutiny by the opposition or opportunity for debate was evidence of the extensive nature of the state system, with practice and institutional structure centred in government (Abrams, 1988).

The Acts passed between 1993 and 2004 and the measures which they introduced are set out in the table below.

Table 4.1: UK Asylum legislation, 1993 - 2004

Year and Act	Key measures	Party in Government
<b>1993 Asylum and Immigration Appeals Act</b>	Introduced: 1. A right of appeal for all asylum seekers (to remove necessity of applications in the High Court); 2. Fingerprinting; 4. The principle of ‘safe third country’ <sup>51</sup> ; 5. Certification of ‘manifestly unfounded’ claims (limiting the right of appeal); 6. Increase in the fine under Carriers’ Liability Legislation <sup>52</sup>	Conservative

<sup>50</sup> First Report of the Home Affairs Committee Session 2003-2004, 16 December 2003, The Asylum and Immigration (Treatment of Claimants, etc.) Bill, HC 109

<sup>51</sup> Enabling the UK to decline full consideration of the asylum claim and return the asylum seeker instead to the third country

	<p>Withdrew:</p> <p>6. Access to some welfare benefits</p>	
<p><b>1996</b> <b>Asylum and Immigration Act</b></p>	<p>Introduced:</p> <ol style="list-style-type: none"> <li>1. A 'white list' of countries<sup>53</sup>;</li> </ol> <p>Withdrew:</p> <ol style="list-style-type: none"> <li>2. Access to subsistence benefits<sup>54</sup>;</li> <li>3. Eligibility to homeless persons' housing services from local authorities</li> </ol>	<p>Conservative</p>
<p><b>1999</b> <b>Immigration and Asylum Act</b></p>	<p>Introduced:</p> <ol style="list-style-type: none"> <li>1. A new scheme of support and dispersal run by the Home Office itself, separate to the benefits system, replacing cash payments with vouchers</li> <li>2. Increased the use of detention;</li> </ol> <p>Withdrew:</p> <ol style="list-style-type: none"> <li>3. Eligibility of all asylum seekers to welfare benefits</li> </ol>	<p>Labour</p>
<p><b>2002</b> <b>Nationality, Immigration and Asylum Act</b></p>	<p>Introduced:</p> <ol style="list-style-type: none"> <li>1. A requirement for support that the asylum claim be made "as soon as reasonably practicable";</li> <li>2. An Application Registration Card for identification;</li> <li>3. Proposals for accommodation</li> </ol>	<p>Labour</p>

<sup>52</sup> The Carriers' Liability Act 1987 introduced a fine for any carrier which brought a passenger to the UK who did not have the right of entry. The fine was originally £1000 per passenger, raised to £2000 under the 1993 Act.

<sup>53</sup> Countries from which it was deemed that there was no real basis for claiming asylum unless the asylum seeker could prove otherwise

<sup>54</sup> Unless the asylum seeker had claimed asylum on arrival at the port



	centres Withdrew: 4. The use of vouchers	
<b>2004 Asylum and Immigration (Treatment of Claimants etc.) Act</b>	Introduced: 1. Criteria which decision makers were to take into account as undermining credibility; 2. Criminal sanctions for those who entered using false documents or failed to co-operate with documentation procedures at end of the process; 3. Tagging as an alternative to detention; 4. A single appeal for all immigration and asylum decisions	Labour

Source: Author's assessment

Claims were made that the UK's asylum legislative framework had its origins in secret discussions within the EU. However, the evidence offered in this thesis suggests that such claims masked the reality that the UK government enacted measures to restrict the entry and rights of asylum seekers in pursuit of its own interests. It was not bound by the EU but using the EU where necessary to forward its own agenda. In other words, to use the language of Bulmer and Burch (2009), it was projecting its own policies on to an EU agenda. By the time that the first phase of CEAS was due for transposition into national law, the UK had in place a comprehensive asylum package which governed every aspect of claims for international protection. All that was therefore required was to 'slip in' the EU measures which, in any event, the UK government had, to a certain extent, helped mould. The UK therefore found it easy to adapt the EU mechanisms to its existing system (Radaelli, 2003).

The UK's foreign policy also had implications for asylum seekers who came from countries where the UK had engaged, directly or indirectly, in military action, sometimes under the rubric of 'regime change'. The connection between domestic and foreign policy may have become a greater focus of attention in the EU since the Arab Spring (Geddes and Hadj-Abdou, 2017), but it has not been a particular focus of attention at a national level. Decisions on asylum applications from Iraqi citizens provide an example of the link between domestic and foreign policy to the disadvantage of asylum seekers and refugees. Between 1997 and 2001, the average acceptance rate of Iraqi citizens claiming asylum in the UK was

44%.<sup>55</sup> By 2003, the year that the UK participated in the war in Iraq, the acceptance rate had fallen to 8%<sup>56</sup> (1% of whom were accepted as refugees<sup>57</sup>) and by 2004 it had fallen again to just 5%.<sup>58</sup> In other words, those fleeing conflicts that involved UK forces were considered less in need of protection if the UK had participated in military action against the existing regime.<sup>59</sup>

The focus on legislation and the parliamentary debate around it can also, however, have the effect of diverting attention away from administrative measures which, arguably, were beyond effective democratic control and oversight and were, instead, the preserve of a limited number of Ministers and senior civil servants. Administrative measures included inter-governmental agreements with other EU states, particularly France<sup>60</sup>, the expansion of the use of detention including the fast-tracking of asylum claims<sup>61</sup>, new models for the processing of asylum claims (see below), the use of private contractors to run detention centres<sup>62</sup> and the subsistence payments made to asylum seekers, including payment by card which limited their usefulness.<sup>63</sup> The extension of the methods of governance, including the use of private companies, extended the state system for asylum seekers, providing a new way of governing but without the diminution of central government power (Rhodes, 1996; Bell and Hindmoor, 2009). The impact of these measures on the ability of people to reach the UK and claim asylum was arguably much greater than legislation with the latter being used to limit the ability to achieve refugee status or humanitarian protection if an asylum claim was made in the UK.

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<sup>55</sup> Statistic taken from Sassoon, J. (2009). *The Iraqi Refugees: The New Crisis in the Middle East*, p.107

<sup>56</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/251055/6363.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251055/6363.pdf)

<sup>57</sup> In 2003, 6805 Iraqi asylum claims were determined by the Home Office of which just 70 were accepted as refugees. 2105 were given exceptional leave to remain and 45 were given discretionary leave. Statistics taken from *Control of Immigration: Statistics United Kingdom 2003* Cm. 6363

<sup>58</sup> Asylum Statistics United Kingdom 2004, 23 August 2005, Immigration Research and Statistics Service, Home Office

<sup>59</sup> The attempts by the UK Prime Minister, Tony Blair, to get EU agreements about returns to Afghanistan shortly after the US-led military intervention in that country is another example of foreign policy affecting asylum policy. The UK has not intervened in the war in Syria. If it had, it might not be providing an extensive resettlement programme for Syrian refugees.

<sup>60</sup> The significance of bilateral agreements can be seen in chapter 5 with a number of interviewees focusing upon the importance of such agreements to achieve the objective of limiting the number of asylum seekers who entered the UK

<sup>61</sup> Fast-tracking of asylum claims, for example, depending upon nationality, was introduced in 1996 but expanded to a fast-tracked detained system in 2000, placing asylum seekers into detention with a very restricted time frame to present their case, including any appeal. In a judgment given in July 2015, *Lord Chancellor v. Detention Action* [2015] EWCA Civ 840, the Court of Appeal dismissed the appeal of the Lord Chancellor against the judgment of Mr. Justice Nicol in the High Court, holding that the rules governing the fast track system did not strike the correct balance between speed and efficiency and fairness and justice but was too heavily weighted in favour of the former.

<sup>62</sup> The centres became known as Removal Centres with a view to them being consistent with EU law but given the length of time that some people are detained, the phrase 'detention centres' is more applicable

<sup>63</sup> See, for instance, Section 3 of the Seventh Report in Session 2013-2014 of the Home Affairs Select Committee, Asylum, 11 October 2013, HC 71

Table 4.2 New asylum applications submitted in the UK, 1996 - 2004

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004
No. of applications	29,642	35,502	46,014	71,158	80,315	71,027	84,132	49,407	33,960

Source: Migration Observatory

The number of people claiming asylum in the UK has never reached the level that it was in 2002 in the period studied.

The New Asylum Model (NAM), introduced in 2006, established a system whereby a Home Office caseworker was responsible for a claim from beginning to end (permission to stay or removal). NAM is an example of where controls operated internally after an asylum seeker has succeeded in gaining access to the territory. In a review of NAM, the National Audit Office (NAO) described its purpose in the following way:

*“The aim of the New Asylum Model is to achieve faster conclusions to cases, to recognise genuine refugees more quickly and to repatriate applicants refused asylum effectively. Realising this aim should reduce the cost of supporting applicants and deter others from making false claims. The model also aims to achieve better quality decisions that stand up to scrutiny, thereby reducing the number and cost of appeals.”<sup>64</sup>*

The NAO press release indicated that the NAO not only understood the primary intention of NAM but also reinforced the language of ‘unfounded’ and its connection to exclusion from the state.

*“Few removals of failed applicants are being achieved under the New Asylum Model, hampered by a lack of detention space and problems obtaining emergency travel documents. Throughout the second half of 2007, the gap between unfounded applications and removals increased. For the year as a whole, the Agency missed its ‘tipping point’ objective, which is to remove more failed asylum applicants than the number who make new unfounded applications. Unfounded applications exceeded removals by over 20 per cent.”<sup>65</sup>*

Although models to speed up the process of determining asylum claims were heralded as a means to reduce costs, that belief is brought into question when considered alongside the increased use and high cost of detention. In its Briefing on immigration detention in May

<sup>64</sup> National Audit Office, *THE HOME OFFICE Management of Asylum Applications by the UK Border Agency*, 23 January 2009

<sup>65</sup> <https://www.nao.org.uk/press-release/management-of-asylum-applications-by-the-uk-border-agency-2/> [last accessed 27.8.2019]

2017<sup>66</sup>, the Migration Observatory highlighted some key features of immigration detention including:

*“The UK immigration detention estate is one of the largest in Europe. From 2009 until the end of 2016, between 2,500 and 3,500 migrants have been in detention at any given time.*

*“The single most common category of immigration detainees is people who have sought asylum in the UK at some point.*

*“In late 2016 the estimated average cost of detention was £86 per day”<sup>67</sup>*

Even working on an average figure of 3000 men and women detained in 2016, the cost was more than £250,000 per day, payments made primarily to private companies which ran the ‘removal centres’.<sup>68</sup> This increased securitisation (Freeman, 2006) does not come cheap. Neither does it buy care. Alongside the financial costs are the unquantified human costs of detaining asylum seekers. The UN Special Rapporteur on violence against women was refused access to Yarl’s Wood Immigration Removal Centre by the Home Office in April 2014, a centre she wanted to visit as a result of receiving information about inappropriate sexual behaviour towards the women detained.<sup>69</sup> In an unannounced inspection of one centre by the HM Inspector of Prisons in November 2016, the Inspector found that incidents of self-harm had risen three-fold since the last inspection (March 2013) and that violence and anti-social behaviour had significantly increased.<sup>70</sup>

Survivors of torture, with clear evidence to support their claims, could be expected to stand a greater chance of succeeding in their asylum claims. However, the practice of individualised determination of asylum claims, rather than group determination, led to the rejection of expert evidence from medical professionals. In a report which examined 50 cases with medico-legal reports supporting claims of torture, there was clear evidence of Home Office caseworkers applying the wrong standard of proof in an apparent effort to justify refusing the application.<sup>71</sup> The view of a policy maker of that criticism was quite

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<sup>66</sup> Silverman, S.J. *Briefing: Immigration Detention in the UK* (5<sup>th</sup> revision), 2 May 2017

[http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Immigration\\_Detention-2.pdf](http://www.migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/Briefing-Immigration_Detention-2.pdf) [last accessed 27.8.2017]

<sup>67</sup> Ibid p. 2. The Home Office’s Annual Report and Accounts for 2015-2016 states that detention costs for the year ending 31 March 2016 were £125 million.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539638/HO\\_AR\\_16\\_gov.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539638/HO_AR_16_gov.pdf) [last accessed 27.8.2017]

<sup>68</sup> Nine centres are run by private companies, two are run by the Prison Service. For parents with children, the centres are known as ‘pre-departure accommodation’.

<sup>69</sup> <https://www.theguardian.com/uk-news/2015/jan/03/yarls-wood-un-special-rapporteur-censure>

<sup>70</sup> HM Inspectorate of Prisons, *Report on an unannounced inspection of Morton Hall Immigration Removal Centre 21 – 25 November 2016*, January 2017 <https://www.justiceinspectors.gov.uk/hmiprison/wp-content/uploads/sites/4/2017/03/Morton-Hall-IRC-2016.pdf> [last accessed 27.8.2017]

<sup>71</sup> Freedom from Torture report, *Proving Torture: Demanding the impossible: Home Office mistreatment of expert medical evidence*. November 2016

different to an organisation providing support to survivors of torture, as will be seen in chapter 5, giving an insight into the criticism of a state actor of a report analysing evidence which does not concur with their view of the institution in which they operate.

The steps taken to control asylum seekers after entering the UK worked alongside the controls preventing arrival. These included carriers' liability<sup>72</sup>, the imposition of visas<sup>73</sup>, juxtaposed controls<sup>74</sup>, physical barriers<sup>75</sup> and agreements with other EU states.<sup>76</sup> The legislation passed between 1993 and 2004 provided the framework for a system that was intended to make it as difficult as possible for asylum seekers to succeed in securing their stay in the UK if they were able to gain entry. Other agreements and practices were used to deter and prevent entry to the UK and also to the EU and had the benefit of not requiring parliamentary approval. These measures were not simply outputs but also furthered the policy of exclusion, they were 'important inputs into the political process' (Pierson, 1993, p.595). Legislation, agreements and administrative practices derived from the same intent - to protect the UK from what was considered to be abuse of its immigration system.

Some of the measures introduced in the UK could not have been successful without agreement with other EU states. The remainder of this section therefore focuses upon the UK's role in the EU.

#### 4.3.2 The UK and the development of the EU asylum system

This section examines the UK's response to the development of an EU asylum system and how it used its membership of the EU to further its own asylum policies.

The Conservative Government proposed in 1991 that mechanisms to deal with 'unfounded claims' and 'safe first countries' should be introduced. This was two years before the UK parliament passed legislation incorporating the Refugee Convention. It led to debates in the European Council which resulted in the 'London Resolutions' of December 1992 on the same themes.<sup>77</sup> Even in advance of asylum becoming an area of EU competency in 1999, discussions and agreements were taking place at an EU level which were subsequently

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<sup>72</sup> First introduced in 1987, the fines were increased in the 1993 Act from £1000 to £2000 for each person brought to the UK without lawful authority. In the 1999 Act, additional forms of transport were included in the system.

<sup>73</sup> For example, the requirement that Zimbabwean nationals had to apply for visas before travelling to the UK at a time when more were facing human rights abuses and being forced to leave their country.

<https://www.theguardian.com/uk/2002/nov/08/zimbabwe.immigrationpolicy>

<sup>74</sup> Juxtaposed controls were introduced in 2003 and operated between the UK, France and Belgium (2004). See section 2 of the Home Affairs Select Committee, Seventh Report of Session 2016-17, HC24, 3 August 2016

<sup>75</sup> In December 2016, work was completed on a concrete wall around the port of Calais at a cost of £2.3m. <http://www.independent.co.uk/news/world/europe/calais-jungle-refugee-camp-wall-completed-emptied-two-months-cleared-a7472101.html> [last accessed 20.8.2017]

<sup>76</sup> For example, the EU-Turkey Agreement, March 2016

<sup>77</sup> The London Resolutions were themselves based upon a document of the UN High Commissioner for Refugees (UNHCR), *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, No. 30 (XXXIV) 1983, EXCOM Conclusions, 20 October 1983

incorporated into national laws and procedures (Geddes, 2008), part of the process of Europeanisation (Radaelli, 2000). During debates about asylum in July 1991, Roy Hattersley MP voiced concern that policy for the UK was being formulated in secret meetings away from parliamentary scrutiny:

*“So that we may examine these matters, may we have a general assurance about the procedures by which the changes in all the arrangements governing asylum and immigration are to be made? At the moment, thanks to the European Community, the Home Secretary meets his colleagues at two meetings—in Schengen and Trevi— which are described as private and which are in fact secret. Home Secretaries and Interior Ministers come to collective decisions for the entire Community and present those decisions, one by one, to their national Parliaments. Will the Home Secretary assure us that he will abandon that practice ... that he will report after his meetings with colleagues, and that he will enable the House to discuss his proposals before he agrees them with colleagues in Europe only to present them to the House on a take-it-or-leave-it basis?”<sup>78</sup>*

Despite concerns about secret EU deals, the UK’s approach to the EU was summed up by the Home Secretary, Kenneth Baker MP in November 1991.

*“I am wholly opposed to a transfer of competence to the European Community on matters of asylum and immigration. That is our negotiating position.”<sup>79</sup>*

The position of the UK towards the EU has remained the same throughout the negotiations after 1999. Sovereignty was in theory the preserve of the UK parliament even if it was shared with the EU (Geddes, 2013). However, there was no mechanism for the UK parliament to be consulted when the government decided to opt-in or to opt-out of EU asylum measures. Ministerial reports and documents regarding EU developments would be filed with various parliamentary committees which could scrutinise developments but the committees had no power of veto.<sup>80</sup> The absence of a written constitution in the UK (Greenleaf, 1987) enabled successive UK governments to make decisions without any effective parliamentary oversight. The only power available to parliament was to receive reports and comment on a decision taken but without any consequence for Ministers. It was not the EU that was taking control from parliament but the Westminster Model of government and their officials (Richards and Smith, 2002; Boswell and Geddes, 2011).

Reference is made to Ireland in relation to the joint ‘opt-out’ mechanism (Quinn, 2009). However, the close geographical proximity of Ireland and the UK including a shared border, their historical connection, the CTA and the frequency of travel between the two states, does not otherwise feature as a consideration in the UK’s policy framework. This is in stark

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<sup>78</sup> Debate on asylum in the House of Commons, HC Deb 02 July 1991 vol 194 cc165-78

<sup>79</sup> Debate on the Asylum Bill 1991 in the House of Commons, HC Deb 13 November 1991 vol 198 cc1082-181

<sup>80</sup> See, for example, statements of UK interviewees : UK3 (p. 99) and UK11 (p.104)

contrast to the deliberations in Ireland. Ireland, in effect, was incidental to what the UK was trying to achieve. That is not to say that Ireland was irrelevant, but that Ireland was not a definitive consideration when the UK positioned itself in relation to the EU.

In addition to not being bound by harmonising measures, the UK subsequently proposed a system for consideration of asylum claims outside of the EU, reducing the need for arrival in or travel through EU countries. The proposal for ‘better management’ of asylum by extraterritorial consideration of asylum claims or regional protection was contained in a letter from the UK Prime Minister, Tony Blair MP, and taken forward by the European Commission on behalf of the Council and the European Parliament.<sup>81</sup>

With a clear idea of the EU frame that he wanted in place, the Prime Minister, Tony Blair, had been steering the UK position, holding ‘over fifty meetings on the subject between 2001 and 2004’ (Anderson, 2013 p. 56).

*“We are trying to achieve proper standards, but it is important for countries to protect their own boundaries, and to protect themselves against illegal immigration--and, indeed, unlawful asylum. What is required is a balance. We want to establish proper standards in regard to the way in which people are treated and received, but we do not favour harmonisation. What we favour is the adoption of some common procedures, and the introduction of proper minimum standards; but, as a result of what we negotiated at Amsterdam, we retain integrity over our own borders.”<sup>82</sup>*

‘Unlawful asylum’ and ‘illegal immigration’ set the frame for the government’s negotiating position over an EU asylum system. Tony Blair was ideally situated to do this as he was the Prime Minister at a time when the UK was able to argue its own position in the EU and was entering into agreements with other EU states. His rationale was both to reduce numbers (through bilateral agreements) and also ensure that the UK asylum system was not undermined by a new EU framework. Tony Blair demonstrated the significance of a situated agent at a key point in time, working within the EU institutions and drawing upon the UK’s preferred option of inter-governmental co-operation (Hay and Wincott, 1998; Bevir and Rhodes, 2010).

UK foreign policy objectives also played a part in its domestic response to asylum seekers. In a statement to the House of Commons in June 2002, on conclusion of the Spanish Presidency of the European Council, Tony Blair, outlined progress on strengthening the EU’s borders. This included agreeing to ‘progress returns’ to Afghanistan.

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<sup>81</sup> Communication from the Commission to the Council and the European Parliament, Towards more accessible, equitable and managed asylum systems, 3 June 2003 COM(2003) 315 final

<sup>82</sup> Prime Minister, Tony Blair MP, speaking in the House of Commons after attending a Special European Council meeting in Tampere, Finland. HC Deb 19 October 1999, vol. 336 column 264. Tony Blair’s statements on asylum seekers, both before and after he became Prime Minister, were analysed by Bethany Maughan in a Refugee Studies Centre working paper, *Tony Blair’s Asylum Policies*, December 2010.

*“In a letter to [the Prime Minister of Spain] a month ago, I proposed that at Seville we should give a remit for action to strengthen the EU's borders, including Community funding; make progress on returns to Afghanistan now that normal government is being restored; and benchmark the performance of third countries and use our network of agreements to improve co-operation in handling migration issues.”<sup>83</sup>*

The UK saw itself as pursuing a different, sometimes superior, path to continental Europe:

*“We expect something more than the international ‘free for all’, the so called ‘asylum shopping’ throughout Europe, and the ‘it is not our problem’ attitude which is too often displayed. We therefore expect Europe and the developed nations across the world to respond through cooperation and reciprocation in a way that makes it possible for a nation like Britain to accept its responsibilities gladly, and to be able to manage them effectively.”<sup>84</sup>*

The EU attempts to develop a common asylum system highlighted the interest of the UK in enforcement and not protection. This was demonstrated in its determination to reinforce the Eurodac and Dublin mechanisms, which identified and provided for the transfer of responsibility of asylum seekers to another EU member state. They were not about conferring rights on individuals (Macdonald and Webber, 2005). The dominant theme of abuse, which characterised UK debates and legislation, carried over in its approach to the creation of an EU-wide system.

In preparing for the Tampere Council meeting in October 1999, the first dedicated to JHA, the Home Secretary, Jack Straw MP, compared its importance to the programme which led to the creation of the single market, a view with which the House of Lords Select Committee on the European Communities concurred.<sup>85</sup> The UK government set out its priorities in a Note submitted in preparation for the Council meeting in October 1999. The Note emphasised issues such as the ‘safe third country’ concept, manifestly unfounded claims, safe countries of origin and the Dublin Convention.

*“A review of the Dublin Convention is fully supported. The principles behind the Dublin Convention are right but the operation of the Convention requires improvement and any measures in that respect are to be welcomed. Any successor to the Dublin Convention will also need to consider all persons in need of international protection rather than limit itself to those meeting the narrower requirements of the 1951 Convention. Otherwise, as is increasingly happening, applicants will avoid the*

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<sup>83</sup> HC Deb 24 June 2002 vol 387 c611.

<sup>84</sup> David Blunkett MP, Home Secretary, Foreword to Secure Borders, Safe Haven: Integration with Diversity in Modern Britain, Home Office, Cm 5387, February 2002

<sup>85</sup> Nineteenth Report of the House of Lords Select Committee on European Communities, HL 101, published 27.7.99, para. 34



*Convention by claiming ECHR based protection, assuming that article 3 will prohibit their refoulement analogous to the asylum process.”<sup>86</sup>*

The interest of the UK in the Dublin Convention and its replacement regulations, combined with the Eurodac Regulation, was supported by the committees tasked with reviewing the UK’s participation within the EU and confirmed the UK’s overriding commitment to exclusion and not protection.<sup>87</sup>

*“The Minister informs us that the Government has decided not to opt into either of the draft Directives proposed by the Commission. The draft Procedures Directive would, he suggests, over-regulate the UK’s asylum system, making it difficult to use accelerated procedures for certain asylum claims and restricting the UK’s ability to require asylum seekers whose claims are considered to be clearly unfounded to exercise their right of appeal after they have left the UK.... We agree with the Minister’s interpretation of the scope of Article 4a of the UK’s opt-in Protocol and consider that the Government’s decision not to opt in should not prejudice continuing UK participation in the Dublin and Eurodac Regulations. In order to ensure that this remains the case, we think that the Government is right to seek to participate actively in the current negotiations and we welcome the Minister’s commitment to provide us with progress reports.”<sup>88</sup>*

The committee’s emphasis was clearly on reducing the ability of people claiming asylum to succeed and to challenge a negative decision. Whatever the agreement of the committee, all they were able to rely upon was ‘progress reports’ which would also have been the position had they disagreed with the decision to opt-out of new EU asylum procedures.

The EU was, however, a useful mechanism if it was active in restricting entry to the EU such as the EU-Turkey Agreement.<sup>89</sup> In a statement to Parliament after the UK agreed to the deal, the Prime Minister, David Cameron, made reference to refugees from within EU member states, a comment directed at the European Council’s decision of September 2015 to relocate asylum seekers from Greece and Italy<sup>90</sup>, a decision by which the UK, together

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<sup>86</sup> Pre-Tampere: NOTE from : United Kingdom Delegation to : Asylum Working Party 6 October 1999: Subject : Common Standards on Asylum Procedures Commission Working Document dated 3 March 1999

<sup>87</sup> At the time this thesis was being prepared, discussions were taking place for a Dublin IV Regulation with a compulsory ‘burden sharing’ mechanism due to the number of asylum seekers in border states such as Greece and Italy. Whilst the UK, despite the vote to leave the EU, indicated an interest in being able to return asylum seekers to other states, it did not wish to be bound by a quota system to take asylum seekers from within the EU, regardless of their nationality.

<sup>88</sup> European Scrutiny Committee, 12 October 2011. Similar positions can be seen in the Committee’s Sixteenth Report of Session 2012-13 and the record of the Committee for 25 June 2014.

<sup>89</sup> The European Council made its statement about the arrangement with Turkey on 18 March 2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> [last accessed 17.8.2017]

<sup>90</sup> The original European Council decision of 14 September 2015 was for 40,000 asylum seekers to be relocated from Greece and Italy. This was raised to 120,000 from Greece, Italy and Hungary on 22 September 2015.

with Ireland and Denmark, was not bound due to their 'opt-out'.<sup>91</sup> The relocation only extended to asylum seekers from three countries, Syria, Iraq<sup>92</sup> and Eritrea, nationalities which had a 75% acceptance rate as refugees in EU member states. It also came with financial support from the EU but there was no apparent interest in the UK in participating.<sup>93</sup>

As will be seen in chapter 5, the direction of UK asylum policy shifted from securing the UK's national borders to the external borders of the EU and even beyond the EU. The shift included changing from participation in the Italian-led Mare Nostrum search and rescue operation in the Mediterranean Sea<sup>94</sup>, to providing vessels for surveillance. The UK initially declined to participate in the EU Border Agency's Triton operation, despite its primary focus on 'border management'<sup>95</sup> on the grounds that such operations were a 'pull factor'.<sup>96</sup> That position changed in 2015 and had the support of parliament as expressed through the Home Affairs Select Committee:

*"The Government has supported both Frontex search and rescue operations in the Mediterranean and NATO operations aimed at disrupting migrant smuggling in the Aegean by deploying Royal Navy, Border Force and other vessels. We welcome these deployments although, given the low number of Border Force vessels in operation, it is important that this does not detract from their crucial role in policing the Channel.... Although the deployments to date have saved lives, it is clear that they are not yet achieving their primary task of deterring migrant flows and disrupting smuggling networks."*<sup>97</sup>

The UK consistently sought to undermine the right to apply for asylum and obtain protection in the UK and that approach framed its response to the development of an EU asylum system. It used its participation in negotiations to both reinforce its own positions and further its own objectives. That included encouraging debate in the EU about transferring asylum seekers away from the EU itself, reducing the possibility of secondary movement. At the same time, the UK 'opt-out' protected itself from any EU measures unless they assisted in fulfilling the primary objective of reducing the UK's responsibility for asylum seekers. It was essentially a case of wanting to have its cake and eat it. However, to

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<sup>91</sup> In contrast to the UK, Ireland chose to opt-in.

<sup>92</sup> Iraqi nationals were subsequently deemed ineligible for the scheme.

<sup>93</sup> The lack of interest in the scheme also extended to parliament as will be seen in chapter 5 which had no power to influence the decision about opting in or out due to the effective exclusion of parliament from decisions about EU Justice and Home Affairs matters.

<sup>94</sup> Mare Nostrum was set up after the death of 368 men, women and children off the coast of Lampedusa in October 2013.

<sup>95</sup> Frontex Press Release, September 2014 <http://frontex.europa.eu/news/frontex-launches-call-for-participation-of-the-eu-member-states-in-joint-operation-triton-b9nupQ> Triton became operational in November 2014.

<sup>96</sup> The impact of this position on policy makers can be seen in chapter 5.

<sup>97</sup> Paragraphs 85 and 86 of section 5, 'Protecting the EU's external and maritime borders', of House of Commons Home Affairs Select Committee, Seventh Report of Session 2016-17, HC24, 3 August 2016

give the appearance of commitment to obligations under the Refugee Convention, the UK has adopted a greater commitment to the resettlement of refugees from outside of the EU alongside support for refugees in the regions to which they were first displaced. As will be seen in chapter 5, the progression of policy along these lines is clearly seen through the views of those engaged more recently in asylum policy. It allows for the national interest in the preservation of immigration control and the borders of the UK to sit alongside a commitment to refugees (Gibney, 2004; Boswell, 2005). Unfortunately, it has been at the expense of asylum seekers.

Whilst the UK was actively creating its own form of exclusion, the only EU member state with which it shared a land border was establishing its own asylum system. The following section examines developments in Ireland.

#### 4.4 The Irish asylum system

##### 4.4.1 The development of an asylum system in Ireland

This section examines the asylum system in Ireland, how Ireland was influenced by the UK and responded to developments in the EU. It seeks to identify the particular developments in Ireland and their role in shaping or determining the possible options available to and the limitations upon those engaged in making or influencing asylum policy in Ireland.

Ireland, unlike the UK, did not have a highly developed immigration control framework prior to introducing legislation that specifically addressed asylum. In effect, it had a 'blank canvass' on to which it could have given effect to the Refugee Convention, which it signed in 1956. Ireland did, however, have the experience of receiving refugees beginning with Hungarians in 1956 who were accommodated in a former military barracks and whose movements were tightly controlled (Fanning, 2012).<sup>98</sup>

There is no evidence that Ireland sought to adopt an asylum system that was based upon the principles laid down in the preamble to its Constitution, in which it sought to:

*“... promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations”*

Unlike the UK, Ireland did not opt for frequent changes to its asylum system and neither did it legislate for the system that became known as Direct Provision. The *Oireachtas* has

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<sup>98</sup> The military barracks were at Knockalisheen in County Clare. The barracks subsequently became and remain a Direct Provision Centre owned by the Irish Government but run by a private company, Aramark, which also has contracts in US prisons. See, for example, <https://www.pbs.org/newshour/nation/prison-strike-protest-aramark> [last accessed 5.8.2018]

passed only two major pieces of legislation on asylum, the Refugee Act 1996 and the International Protection Act 2015 (which came fully into force on 1<sup>st</sup> January 2017). When the 1996 Act was passed, there were less than 500 asylum applications to be considered in Ireland (Quinn, 2009). At no time has any legislation contained a framework or even a reference to a system of support and accommodation for asylum.<sup>99</sup> An administrative framework for dealing with the applications of asylum seekers was in place until November 2000 despite the Refugee Act being passed in 1996 (Quinn et al, 2008). The non-legislative system was based upon letters sent to the UNHCR in London (Fraser, 2003; Quinn, 2009).

The first attempt to introduce legislation on asylum was in 1994. The purpose in doing so was set out by the Minister for Justice, Máire Geoghegan-Quinn TD.

*“My reason for updating the law on refugees is to make sure it removes the doubts people might have on the way we treat refugees and asylum seekers and to bring a transparency into the way we do our business. This is the reason for setting up a Refugee Applications Board which will be removed from the Department of Justice and will not be located or housed in it. It will have its own offices. Its staff will be totally independent of my Department and will be trained not by that Department but by the UNHCR.”<sup>100</sup>*

When legislation was finally passed in 1996, it did establish an independent body, in the form of the Office of the Refugee Applications Commissioner (ORAC), to deal with asylum applications. Almost 20 years later, in the International Protection Act 2015, ORAC was abolished and responsibility for asylum claims came directly under the control of the Department of Justice which dealt with all other aspects of immigration control, including entry to and removal from the territory of Ireland. ORAC’s abolition suggests that organisational change can occur despite the length of time that systems have been in place and even when legislation is required to give effect to that change. The implication is that the issue is political will and not, therefore, path dependency. Transfer of responsibilities to the Department of Justice was, however, consistent with an overriding policy objective of enforcement and exclusion. Therefore, the change that occurred was within the existing institutional framework.

Even at the early stages of Ireland’s legislative framework, there were concerns amongst some politicians about the potential influence of developments at an EU level.

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<sup>99</sup> The system became known as Direct Provision and was adapted from a UK model. It became a major focus of criticism as will be seen below. Chapter 6 examines the views of members of a working group which was tasked in October 2014 with recommending changes to the system.

<sup>100</sup> Debate at the Select Committee on Legislation and Security at the committee stage of the Refugee Bill, 5 October 1994. Responsibility for asylum decisions was transferred back to the Department of Justice in the International Protection Act 2015.

*“This morning we were privately briefed by Department officials on the dangers of the Dublin Convention being implemented before its ratification. Many Opposition Members and other members of the committee expressed fear about the democratic deficit in the area of asylum law and how the matter is progressing at EU level. Many developments occur behind closed doors between EU Ministers for Home Affairs and Justice and there is fear and suspicion that Parliaments in the European Union do not have enough input into the development of asylum law. Immigration policies and visa requirements lack a democratic input.”<sup>101</sup>*

The concerns expressed by some Irish politicians therefore echoed those in the UK, outlining the lack of information, knowledge and control over developments that were taking place within the EU. There was a wider perception of developments in the UK and their potential implications for Ireland’s own obligations under the Refugee Convention:

*“There has been wide speculation that the UK will publish a list of so-called “white countries” in which it is assumed that applicants for asylum are not at risk. According to Amnesty International, the countries concerned include Nigeria and Sri Lanka. For example, if a Nigerian national fleeing persecution in Nigeria sought asylum in the United Kingdom, because Nigeria is a “white list” country the UK would refuse consideration of the application. If the individual then sought asylum in Ireland, under the Dublin Convention the Irish authorities could send him back to the UK. As a result of the UK’s agreement with Nigeria, the applicant could then be returned to Nigeria. It is necessary to have an express provision in this Bill to ensure that nothing in the Bill or the Dublin Convention would authorise the transfer of an applicant for asylum to a Dublin Convention country from which there is reasonable cause to believe that he or she could be directly or indirectly returned to the country from which they fled.”<sup>102</sup>*

The response of Joan Burton TD, Minister for Foreign Affairs, was to assert the need for Ireland to co-operate and fall in line with other EU states, including over measures which undermined the ability of asylum seekers to progress their applications. In effect, the Minister was arguing that the path that Ireland needed to take was already determined for it, well before the state drew up its own asylum systems:

*“I am concerned at the suggestion that Ireland cannot trust its fellow EU member states to fulfil their obligations under the UN Convention. It is important that Ireland and its European partners play a full role in the affairs of the Union. We must, or are obliged to, operate in a climate of mutual trust and co-operation. The commitment [to include a provision on ‘manifestly unfounded claims’] was entered into on Ireland’s*

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<sup>101</sup> Liz O’Donnell TD, Ibid

<sup>102</sup> John O’Donoghue TD, Debate at the Committee stage of the Refugee Bill, 7 February 1996

*behalf during our last Presidency of the European Union by the then Minister for Justice, Deputy Burke, in June 1990.*<sup>103</sup>

In the year that the Refugee Act 1996 was passed, only a limited number of sections were brought into force. These included the section which gave effect to the Dublin Convention, although the Convention was still not operational for a further 12 months. In the same year, the Department of Justice also drew up guidelines for the reception of asylum seekers, proposing the co-operation of local health boards with the Irish Red Cross and Community Welfare Officers to ensure that the needs of asylum seekers, including unaccompanied children, were met.<sup>104</sup>

Despite the reception guidelines drawn up and the delay in implementing the full measures in the 1996 Act, Ireland did not legislate for reception conditions (Thornton, 2013). Neither did it sign up to the Reception Conditions Directive,<sup>105</sup> the only part of CEAS that it did not opt-into, and despite the UK choosing to do so. Its reasons for doing so are examined in more detail in chapter 6. As a result, it maintained a completely administrative system which continued to operate with minimum oversight, parliamentary, judicial or from any EU institution. Although it has been considered on several occasions at various committees<sup>106</sup>, by national and international bodies<sup>107</sup>, by the High Court<sup>108</sup>, and by a government working group<sup>109</sup>, it has remained largely unchanged since the introduction of the current system in April 2000.

The key Acts and the measures which they introduced are set out in the table below.

Table 4.3: Irish Asylum legislation, 1996 - 2015

<b>Year and Act</b>	<b>Key measures</b>	<b>Party in Government</b>
<b>1996 Refugee Act</b>	Introduced: 1. The right to apply for asylum	Fianna Fáil/Labour Party coalition

<sup>103</sup> Ibid. At that stage, responsibility for asylum seekers was dealt with by the Department of Foreign Affairs, not the Ministry for Justice.

<sup>104</sup> Eastern Health Board (1998), Homelessness, Housing Need and Asylum Seekers in Ireland

<sup>105</sup> After the period covered by this study, Ireland notified the European Commission that it wished to opt-into the Reception Conditions Directive 2013. It was in response to the Irish Supreme Court judgment about the right to work of asylum seekers. Since opting-in, Ireland has transposed the Directive into national law in the form of the European Communities (Reception Conditions) Regulations 2018.

<sup>106</sup> For example, the Joint Committee on Health and Children, 12 October 2010; Public Service Oversight Committee, 1 April 2015

<sup>107</sup> Irish Human Rights and Equality Commission, Policy Statement on Direct Provision, 10 December 2014; European Commission against Racism and Intolerance, 2011

<sup>108</sup> *CA and TA v. Minister for Justice and Equality* [2014] IEHC 532. The court ruled that ruled aspects of the 'House Rules' and the lack of any independent complaints mechanism were unlawful.

<sup>109</sup> The Working Group on the Protection Process, which commenced work in November 2014. See below and chapter 6.

	<ol style="list-style-type: none"> <li>2. Two independent bodies: the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal</li> <li>3. A right of appeal against refusal</li> <li>4. Rights of those recognised as refugees</li> </ol>	
<b>1999 Immigration Act</b>	<p>Introduced:</p> <ol style="list-style-type: none"> <li>1. Accelerated procedures for 'manifestly unfounded' claims<sup>110</sup></li> <li>2. The Refugee Appeals Tribunal</li> <li>3. Fingerprinting</li> </ol>	Fianna Fáil/Progressive Democrats coalition
<b>2000 Illegal Immigrants (Trafficking) Act</b>	<p>Introduced:</p> <ol style="list-style-type: none"> <li>1. Restrictions and special procedures on applications for Judicial Review</li> </ol>	Fianna Fáil/Progressive Democrats coalition
<b>2003 Immigration Act</b>	<p>Introduced:</p> <ol style="list-style-type: none"> <li>1. Criteria to be taken into account by decision-makers when determining credibility;</li> <li>2. A 'deemed withdrawn' procedure for applications;</li> <li>3. A 'safe country of origin' procedure leading to prioritisation;</li> <li>4. Carriers' Liability offences</li> </ol>	Fianna Fáil/Progressive Democrats coalition
<b>2007 2008</b>	<p>Proposed to:</p> <ol style="list-style-type: none"> <li>1. Transpose the</li> </ol>	Fianna Fáil/Progressive Democrats/Green Party

<sup>110</sup> The criteria were based on the London Resolutions of 1992

<b>2010 Immigration, Residence and Protection Bill<sup>111</sup></b>	Procedures Directive 2. Bring in a single procedure for protection claims 3. Replace the Refugee Appeals Tribunal with the Protection Review Tribunal	coalition
<b>2015 International Protection Act</b>	Introduced: 1. A new asylum decision making unit within the Department of Justice, the International Protection Office 2. A single procedure for deciding refugee and subsidiary protection claims 3. Increased powers to return people to the UK, regardless of any application for asylum they made on arrival in Ireland 4. The International Protection Review Tribunal (replacing the Refugee Appeals Tribunal) 5. Restricted rights to family reunification of refugees Abolished: 6. The independent office of the Office of the Refugee Applications Commissioner	Fine Gael/Labour Party coalition

Source: Author's assessment

The 2003 Act was first introduced as a Bill in February 2002 but did not come to the Committee stage until June 2003. By then, according to the Minister for Justice, legislation

<sup>111</sup> The Bills fell with the end of governments in 2007 and 2011. The IRP Bill was reintroduced in 2011 but withdrawn again.



was required as a matter of urgency, not least because of ‘obligations as a member state of the EU to bring in carrier liability legislation<sup>112</sup> (which had been in place in the UK since 1987). In introducing the debate at the Committee stage, the Minister, having published a 64-page explanatory memorandum just the day before, went on to explain the urgency:

*“This is urgent business from a number of perspectives, not simply because of the time we have arrived at in the Dáil year. The question of asylum seeking and its proper regulation is one which in certain contexts is a matter of life and death and in other contexts is a matter of serious consequence for the country and for people involved in the asylum process....This measure proposes to bring integrity to the process, to sort out as best we can the genuine asylum seeker from the non-genuine one. We need to make the system work and stop the abuse of the system which is taking place.”<sup>113</sup>*

The Minister was quite explicit in his disdain for asylum seekers:

*“[I]f someone does not turn up [for an interview] and gives no explanation, the person has another three days to give a reason - because the train was derailed or the taxi engine burnt out - bearing in mind that he or she is living in Ireland and that the main item in life is to get asylum status in Ireland.... People who do not show up, do not telephone to cancel an interview, leave the applications commissioner representative sitting in a room with an interpreter and a lawyer, with all the research having been done, and do not explain the reason they did not turn up will have their files shut at that stage. If they want to start the process again they can do so but they will not be able to wander down to the commissioner to say that their dog got lost or something like that.”<sup>114</sup>*

The path that was set in the early years of Ireland’s response to asylum seekers is a path that it has been on since, even when, looking back, for some policy makers it was a course which set Ireland in the wrong direction.<sup>115</sup> That suggests path dependence. It did not mean that Ireland was necessarily ‘locked-in’ to a course of action which could not be changed, but that changing course further down the line, even when a crisis presented itself, was a harder path to take (Pierson, 2000, p. 265).

Like the UK, the focus in the Irish parliament on those who succeeded in entering the asylum system in Ireland took attention away from the reduction in numbers of new asylum applications which followed a similar pattern to the UK.

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<sup>112</sup> Michael McDowell, Minister for Justice, Debate on the Immigration Bill 2002 at the Select Committee on Justice, Equality, Defence and Women’s Rights, 24 June 2003. Carrier liability made airlines, ferry and haulage companies, etc. liable for bringing anyone into the country without a legal right to enter.

<sup>113</sup> Ibid

<sup>114</sup> Ibid

<sup>115</sup> See quote from interview IR2 on page 121

Table 4.4 New asylum applications submitted in Ireland, 1996 - 2004

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004
No. of applications	1,179	3,883	4,626	7,724	10,938	10,325	11,634	7,900	4,766

Source: ORAC

The decrease in the number of new asylum applications, whilst evident, was not as significant as it was in the UK. Other measures were needed if Ireland was to limit its obligations under the Refugee Convention. This was achieved by reducing the ability to succeed on application and appeal.

Whilst there was generally a right of appeal against ORAC decisions to the Refugee Appeals Tribunal, there were two major hurdles which asylum seekers had to contend with. One hurdle was the prioritisation of a significant percentage of cases as allowed for in legislation and which significantly reduced the period of time for a decision on an asylum claim (Quinn, 2009). Prioritisation meant that the appeals were dealt with in a faster system and without a hearing. The decision to prioritise was based upon nationality through Ministerial Directives following a change to the Refugee Act 1996 introduced by the Immigration Act 2003.<sup>116</sup> Notwithstanding a reduction in the use of prioritisation, Ireland has consistently had one of the lowest rates for recognition of refugees amongst other EU states. In 2010, for example, only 1.1% of applications decided that year were accepted by ORAC.

The other hurdle which asylum seekers had to contend with was the negative response from the appeals tribunal. This was demonstrated most vividly in the allocation of a high number of cases to members of the Refugee Appeals Tribunal who had a record of dismissing appeals. It was an example of where a situated agent can have a profound effect on the outcome of individual asylum claims.

In November 2007, James Nicholson BL, one of the original appointees to the Refugee Appeals Tribunal, resigned his position as a Tribunal Member after criticism that he had an almost 100% record of rejecting appeals made by asylum seekers from negative ORAC decisions. Until that point, Mr. Nicholson had been allocated the highest number of appeals by the Chairman of the Tribunal, there being no system for a fair distribution of cases.

*“Prior to last year [2006], a high proportion of the cases allocated by the chairman of the tribunal to the 32-member board, which includes former government ministers, were given to Mr Nicholson.”<sup>117</sup>*

<sup>116</sup> In 2005, 40% of applications decided by ORAC were prioritised, with 32% of negative decisions subject to the accelerated appeals system (without an oral hearing). Statistics and information taken from ORAC Annual Reports.

<sup>117</sup> Reported in the Irish Independent, 4.3.2008 <http://www.independent.ie/sport/golf/lawyer-accused-of-bias-against-refugees-quits-appeal-tribunal-26427734.html> [last accessed 27.3.2017]

A number of asylum seekers had taken cases against Mr. Nicholson for allegations of bias given his record on asylum appeals. Their cases were settled out of court by the Refugee Appeals Tribunal (Joyce, 2009). The number of cases heard by him was recorded in a Supreme Court case<sup>118</sup> as being in the region of 900 to 1,000 cases in the years 2002 - 2004. In an earlier hearing of the appeal, a judge had stated that the agreed facts were as follows:

*"The [Tribunal Member] has not during the period from the 1st day of January 2002 to the 30th day of June 2004 set aside any recommendation of the Refugee Applications Commissioner and during that period he heard hundreds of Appeals"*

Mr. Nicholson was not the only Tribunal Member with a record of dismissing a very high proportion of asylum appeals. Another Tribunal Member, Sean Deegan, spoke publicly about his record in the Tribunal.

*"I would have dealt with, I'd say, about, probably, roughly in around 500 cases. I let in two people in six years. Two ladies, one from Moldova and one from Nigeria. The majority of the cases were not refugees, within the meaning of the statute, or within the meaning of the United Nation's declaration on refugees, that was quite obvious."*<sup>119</sup>

The problems in decision making in asylum cases were not limited to the Refugee Appeals Tribunal alone or to the earlier years of the Tribunal as evidenced in a judgment issued in 2014<sup>120</sup>:

*"As the judicial review relates solely to the Tribunal decision, the Court will say no more about the primary negative recommendation other than that the methods used and findings made by the Commissioner's Office failed the refugee assessment process abysmally.*

*"Every appellant has the right to expect a fresh hearing before a fair and impartial tribunal where his documents will be read, his appeal submissions considered, his evidence heard, the correct legal principles applied and an objective assessment made of the case. The system failed the applicant in this case.... when reviewing this quite extraordinary decision on the day of the hearing, the only conclusion which the Court could draw for the Tribunal's decision not to recommend that the applicant should be declared a refugee is that the Tribunal Member simply did not like the applicant."*

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<sup>118</sup> *Nyembo v. The Refugee Appeals Tribunal & anor* [2007] IESC 25. <http://www.independent.ie/irish-news/uturn-as-refugees-settle-bias-case-with-tribunal-26337810.html> [last accessed 27.3.2017]

<sup>119</sup> Recorded in an interview for the RTÉ Prime Time report, 2 July 2015

<sup>120</sup> *Harding-Clark J. in A.A.M.O (Sudan) v. Refugee Appeals Tribunal & anor.*, [2014] IEHC 49. The Irish Refugee Council analysed 86 asylum applications in 2012 and found a similar pattern of high refusals by particular Tribunal Members: Conlan et al (2012), *Difficult to Believe: the assessment of asylum claims in Ireland*, Irish Refugee Council <http://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/Difficult-to-Believe-The-assessment-of-asylum-claims-in-Ireland.pdf>

This demonstrates the ability of situated agents, working with the institutional framework of an assumption of a refusal of asylum claims, to give effect to the policy in a very direct way.

Although the split protection system in Ireland gave asylum seekers another opportunity to seek protection,<sup>121</sup> until November 2013 this was an application decided by the Department of Justice after a notice had been issued indicating that the Minister proposed to proceed with deportation. The subsidiary protection system was contained in the EU's Qualification Directive 2004 which Ireland not only opted into but had overseen to completion during its Presidency of the European Council in 2004. However, the split procedure meant that an application for subsidiary protection system could only be made when the asylum claim had been finally determined, including through the higher courts. The split system was maintained from October 2006 until January 2017.<sup>122</sup>

Ireland did not prioritise political responsibility for immigration and asylum until very late in its history of dealing with asylum seekers. Even with the appointment of a Minister, whose brief included asylum seekers, asylum did not reach the attention of the highest political office in Ireland, the Taoiseach.<sup>123</sup> It was only from July 2014 onwards that a Minister of State was appointed for the first time with any responsibility in the immigration field, including asylum, with overall responsibility remaining with the Minister for Justice (Joyce and Whelan, 2015).<sup>124</sup>

The first Minister of State oversaw two reviews of the protection system. The first review took the form of a working group, appointed in October 2014, with a particular remit to make proposals for the reform of Ireland's reception system, Direct Provision.<sup>125</sup> The second review was of the legislative framework and took the form of the International Protection Bill 2015. The 2015 Bill was put through the *Oireachtas* in just over four weeks.<sup>126</sup> Part of the pressure came from its introduction at the end of a five-year cycle in the life of the *Oireachtas*. The Act introduced a single procedure but it abolished the independent body

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<sup>121</sup> The split system allowed for consideration of an application for Subsidiary Protection, part of the EU asylum system, if the asylum seeker was not accepted as a refugee. In Ireland the two applications were considered separately, often years apart.

<sup>122</sup> The delay in bringing in a single procedure dates back to when Ireland transposed the Qualification Directive and introduced a split, rather than a single, procedure. It was introduced through the European Community (Eligibility for Protection) Regulations S.I. No. 518 of 2006. An amendment to the procedure was introduced in November 2013 following a challenge in the High Court (*MM v. DJELR and AG* [2013] IEHC 9) and following a referral to the CJEU.

<sup>123</sup> The Minister for Justice, Frances Fitzgerald TD, was also the *Tánaiste* from May 2016 until June 2017. In the UK, Tony Blair, Prime Minister from May 1997, took an active interest in asylum policy, both in the UK and the EU, from the outset of his premiership and particularly from 1999 onwards.

<sup>124</sup> The first appointment was Minister of State with responsibility for New Communities, Culture and Equality in July 2014 and the second, in May 2016, was Minister of State for Justice with special responsibility for Equality, Immigration and Integration. The post of Minister for Integration had been created in 2007 (Joyce, 2009).

<sup>125</sup> The Working Group presented its recommendations to the Minister for Justice and Minister of State in June 2015. It is a particular focus of chapter 6.

<sup>126</sup> It was introduced on 17 November 2015 and had its final reading on 18 December 2015

for deciding asylum claims at the first stage, placing decisions back within the Department of Justice. The Act also rolled back on the rights to family reunification of those who were recognised as refugees.<sup>127</sup> The majority of the Act, including the single procedure, did not come into force until 31 December 2016. The exception was a section dealing with people arriving from the UK, indicating the importance of the CTA to Ireland's asylum system (Costello, 2003; Quinn, 2009).<sup>128</sup>

The aim in establishing an asylum system in Ireland was to provide a framework for the processing of asylum applications and appeals separate to the Department of Justice. Legislation was intended to incorporate measures that had already been agreed either at an EU level, such as 'manifestly unfounded claims' and 'carriers' liability', measures approved before an EU system had been considered. The reception system remained a purely administrative system without a legislative framework, outside of oversight of the *Oireachtas*, except by way of debate, and deliberately outside of the EU directives that dealt with reception conditions. Ireland was aware of developments that were taking place within the EU but was slow to incorporate them with the exception of the enforcement measures such as the Dublin Convention. Its adaptation to an EU framework was therefore limited and with hesitation. This was based upon the view that the majority of asylum seekers were either not in need of asylum or should have claimed asylum before they arrived in Ireland.

The development of an asylum system in Ireland was parallel to the development of an EU asylum system, some of which, as outlined above, Ireland was responsible for seeing to fruition when it held the Presidency of the European Council. However, unlike other areas of EU co-operation, Ireland displayed elements of the UK's 'awkward partner' status in relation to the EU's asylum system. The exceptions were the negative measures of the Dublin and Eurodac Regulations and, eventually, the controlled measures in the EU relocation scheme.

The remainder of this section deals with Ireland's response to and participation in asylum developments within the EU.

#### 4.4.2 Ireland and the development of an EU asylum system

This section looks at the impact of Ireland's membership of the EU on its national asylum system and examines how its response to the EU has been influenced by its relationship

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<sup>127</sup> For only the second time in his Presidency, Michael D. Higgins called the Council of State together to give their views on whether he should refer the Bill to the Supreme Court for being contrary to the Constitution. The issues which he asked members of the Council to advise him on concerned the restricted rights to family reunification and the powers to refuse entry from the Common Travel Arrangement. He did not make the referral but the fact that he called the Council together was an indication of the level of his concern about the new legislation.

<sup>128</sup> Section 81 of the Act, dealing with people arriving from the CTA, came into force on 10 March 2016 under International Protection Act (Commencement) (No. 2) Order S.I. No. 133 of 2016

with the UK. It seeks to appreciate why, given Ireland's generally pro-EU stance, Ireland adopted a different approach in the field of asylum.

Ireland had, with the UK, negotiated an opt-out from any measures relating to asylum in the EU. According to the Minister of Justice in 1999, John O'Donoghue TD, the Irish electorate voted in favour of the opt-out because voters gave priority to the CTA. Hence when the UK government decided to opt-in to any measure, he argued that an Irish decision to follow suit was simply giving effect to the wishes of the Irish people. One such measure was the Eurodac Regulation.

*"A fundamental point which has to be made is in the Amsterdam Treaty Ireland opted out of measures such as this only because the United Kingdom did so. The people of Ireland who voted in the referendum to give effect to the Amsterdam Treaty clearly and unequivocally gave their consent to this approach. Moreover, the people also decided that the declaration attached to the Amsterdam Treaty is that Ireland will participate in these measures in this area to the maximum extent possible subject to the maintenance of the common travel area between Ireland and the United Kingdom. As I stated in my opening remarks, the United Kingdom has signalled its intention of adopting this measure and the motion before us today is in effect giving expression to the wishes of the Irish people as enunciated in the Amsterdam referendum."<sup>129</sup>*

The Minister's argument was a case of a liberal interpretation of a decision in a referendum in which the question put to the citizens was not quite as precise as the Minister later claimed. Nevertheless, it draws attention to the fact that decisions of the Irish government to opt-in to EU measures were guided by two considerations: firstly, whether the UK was proposing to opt-in, therefore paving the way for Ireland to consider doing so; secondly, whether the EU measure was one that Ireland wished to be bound by. The answer to the former was outside of Ireland's control. As subsequent chapters will show, there was little apparent consciousness amongst UK policy makers of the implications of their decisions on Ireland. The answer to the second question depended upon whether the measure related to rights of the state or those of asylum seekers. Like the UK, Ireland was keen to opt-in to the Dublin and Eurodac mechanisms but not those such as the original Reception Conditions Directive, containing with it the right to work (Thornton, 2013).

Although Irish politicians had expressed some concern about secret discussions at an EU level,<sup>130</sup> asylum and immigration were not areas of major interest for Ireland in the EU. Academics commissioned by an *Oireachtas* Sub-Committee on Ireland's Future in the European Union reported that 'Ireland was not to the fore in pressing for treaty or

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<sup>129</sup> John O'Donoghue, Minister for Justice, Debate in the Seanad on opting-in to the Eurodac Regulation, 13 October 1999

<sup>130</sup> For example, Liz O'Donnell TD at the Debate at the Select Committee on Legislation and Security on the Refugee Bill 1994, 5 October 1994

institutional change' with main lines of policy from the outset being the promotion and protection of the common agricultural policy, economic cohesion and social and environmental protection.<sup>131</sup>

A fundamental difference between the UK and Ireland over 'opt-in' decisions was that, following an amendment of its written Constitution, the Irish government could not opt-in to any measure without the consent of both Houses of the *Oireachtas*.<sup>132</sup> However, no agreement was needed if a government decided not to opt-in. So the decision not to opt-in to the Reception Conditions Directive was not debated or agreed by the *Oireachtas* and there are no public records to explain why and by whom the decision was made to remain outside of the original directive. This is in contrast to the public records which exist if the government recommends opting-in.

When it was decided to ask the *Oireachtas* to agree to opt-in to a measure limiting the rights of asylum seekers, the ability to return them to another state on 'safe country' grounds, the Government argued that it was on the grounds that the EU mechanism was tantamount to a train that was coming and Ireland just had to get on board. The enthusiasm of the Minister of Justice, Michael McDowell TD, only extended to measures that increased Ireland's ability to forego responsibility for asylum seekers.

*"The safe country of origin concept is recognised by the UK, Holland and Germany and will also be provided for in EU procedures and directives so it is not something public servants in the Department of Justice, Equality and Law Reform dreamed up one morning to make their lives easier. It is the future. It is arriving in Ireland and we must prepare for it."*<sup>133</sup>

By contrast, the same Minister of Justice stood firm against giving the right to work.

*"If I were to give the right to work to asylum seekers, I would massively increase the flow of people entering the country.... In the context of a common travel area with the United Kingdom, the results of allowing those seeking asylum to work could be mind boggling."*<sup>134</sup>

It appears clear that in the view of Michael McDowell TD, Ireland should not have had any obligations towards asylum seekers.

*"Some 90% of asylum applicants are found to be effectively economic migrants after they have gone through our process. Of the remaining 10%, the great majority are*

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<sup>131</sup> Barrett et al, *Ireland's future in Europe: Scenarios and Implications*, 12 November 2008

<sup>132</sup> Article 29.4.6 of the *Bunreacht na hÉireann*

<sup>133</sup> Committee stage of the debate on the Immigration Bill 2002, 25 June 2003

<sup>134</sup> Michael McDowell, Minister for Justice, Ministerial Presentation to the Joint Committee on Justice, Equality, Defence and Women's Rights, 11 March 2003

*people who have passed through Dublin Convention countries, but we were not in a position, for one reason or another, to oblige other member states to deal with them. The amount of people who come here from their country of origin, rather than via a Dublin Convention country, is infinitesimal.”<sup>135</sup>*

There was at least a clear understanding of Ireland’s enthusiasm for the Dublin Convention and the Eurodac Regulation as they allowed Ireland, on the western edge of the EU, to deny responsibility for asylum seekers who had come through another EU state.

If secondary movement from the UK in particular kept Ireland from signing the first Reception Conditions Directive, containing within it the right to work, the documents do not give an explanation for remaining outside the revised CEAS, lauded by its own Minister for Europe in June 2013. The reason appears to lie with the decision of the UK to ‘opt-out’ and therefore the impediment to Ireland acting alone. Certainly the statements made about the centrality of the CTA indicate the dominance of the relationship with the UK. On signing an agreement with the UK on 20 December 2011 to co-operate together over movement across the CTA, the Department of Justice announcement put asylum seekers at the heart of it:

*“Ireland and the UK today signed an historic agreement reinforcing their commitment to preserving the Common Travel Area (CTA) while further cracking down on illegal immigration and spurious asylum claims.”<sup>136</sup>*

Despite opting-in to the first tranche of CEAS (except the Reception Conditions Directive), Ireland failed to properly transpose the first set of directives<sup>137</sup>, implement them in a manner which was consistent with the principles of protection within them<sup>138</sup>, or make decisions in a timely manner. The transposition of the Asylum Procedures Directive, a central part of CEAS, did not take place until the European Commission made a referral to the European Court of Justice. The Commission gave the following reasons for the referral:

*“In the case of Ireland, to comply fully with the Directive, it still needs inter alia to implement requirements concerning the conduct of personal interviews, some guarantees for unaccompanied minors, the obligation to inform asylum applicants of delays in completing the procedure, and procedures for dealing with subsequent applications.”<sup>139</sup>*

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<sup>135</sup> Ibid

<sup>136</sup> <http://www.justice.ie/en/JELR/Pages/PR11000267> [last accessed 29.3.2017]

<sup>137</sup> Ireland was referred to the European Court of Justice by the European Commission for failure to transpose the Procedures Directive within the permitted two years

<sup>138</sup> The European Court of Justice, on a referral from the High Court of Ireland, ruled that Ireland must give applicants for subsidiary protection a ‘right to be heard’ in Case C-2 77/2012 MM v Minister for Justice and Law Reform (22 November 2012) which led to reform of the subsidiary protection procedure in Ireland

<sup>139</sup> Press release from the European Commission, 24 June 2010 [http://europa.eu/rapid/press-release\\_IP-10-808\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-808_en.htm?locale=en) [last accessed 24 March 2017]. Ireland responded by introducing new regulations to



Ireland's position in relation to co-operation on asylum at an EU level changed a little when migration became the top political issue in the EU in 2015, voluntarily opting-in to some measures, including relocation of asylum seekers from other EU states. The decision to opt-in was in stark contrast to the UK. Relocation allowed for the controlled entry of asylum seekers, chosen by Department of Justice officials.

The decision to opt in to the relocation scheme introduced in 2015 came in response to the humanitarian crisis that occurred in 2015. In September 2015, the *Tánaiste* and Minister for Justice, Frances Fitzgerald TD, announced the establishment of the Irish Refugee Protection Programme. It included a commitment to relocate 2900 asylum seekers from Greece and Italy. In announcing the commitment, the *Tánaiste* focused on Ireland's international obligations and its place as an EU member state.

*"Ireland has always lived up to its international humanitarian obligations and we are fully committed to playing our part in addressing the Migration Crisis facing Europe.... Under the new Programme agreed today, Ireland will offer a welcome safe haven for families and children who have been forced to leave their homes due to war and conflict. We have consistently said that this humanitarian crisis is an EU issue that requires a coordinated EU response. We will work closely and collaboratively with our EU colleagues as part of this response."*<sup>140</sup>

From the adoption of the relocation scheme by the European Council in July 2015 until 9 June 2017, Ireland had relocated just 459 asylum seekers from Greece.<sup>141</sup> No asylum seekers had been relocated from Italy.

In the same spirit of co-operation with other EU member states, Ireland served on the Management Board of the European Asylum Support Office (EASO)<sup>142</sup> and played a small but important role in search and rescue (SAR) operations in the Mediterranean Sea.<sup>143</sup>

Ireland held the Presidency of the European Council on two crucial occasions when elements of CEAS were being finalised and yet Ireland's approach, despite enthusiastic statements about CEAS, was to remain outside the EU asylum framework where it gave rights to asylum seekers. Irish officials paid an active part in facilitating the finalisation of key EU asylum legislation but Irish politicians were not given the opportunity to decide if the state should opt-in. In addition, despite participating in discussions leading to a successful conclusion on the Qualification Directive and transposing it into Irish law by the required date of October 2006, Ireland did not commence using a single procedure until January

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avoid a judgment of the Court against the state. The European Communities (Asylum Procedures) Regulations S.I. No. 51 of 2011 came into force on 1 March 2011, more than five years after they were due to be in place

<sup>140</sup> Press release from the Department of Justice and Equality, 10 September 2015

<sup>141</sup> European Commission Factsheet on Relocation and Resettlement, 13 June 2017

<sup>142</sup> The Deputy Chair of the Management Board of EASO was, at the time this study concluded, Ireland's Chief International Protection Officer, who was previously the Refugee Applications Commissioner.

<sup>143</sup> Since 2015, Ireland had provided five naval vessels in SAR missions in the Mediterranean.

2017. Ireland presented an image of itself on an international stage which it did not stand up to when determining its own asylum policies.

The impact of Ireland's membership of the EU on its own national system has been minimal. Compared to its active participation in other EU measures, for example, monetary union, Ireland has at best been a reluctant participant in an EU asylum system, preferring to protect its domestic system from EU interference. Decisions on its participation in an EU asylum system have been dominated by considerations of the impact of any measures on movement from and its relationship with the UK (Costello, 2003). The change in emphasis in 2015 may have indicated a more positive approach to the EU on asylum. The decision to opt-in to relocation and resettlement did indicate a willingness to participate with other EU states at a time of crisis, unlike the UK. However, it was based upon the knowledge that Irish officials could determine who would be granted access to the state, at what point and under what conditions and therefore in a way which did not risk secondary movement from the UK to Ireland. The commitment to relocation and resettlement did not therefore signify any change of policy towards asylum seekers who made their own way to Ireland uninvited.

#### 4.5 Conclusions

This chapter set out to identify the institutional framework for those engaged in asylum policy in the UK and Ireland and the structures that were in place which shaped their understanding of the situations in which they were required to act. It examined how the asylum systems have been developed in both states, the influence of the relationship between the two states on the approach that they have taken towards asylum seekers and their response to obligations as EU members. This is the institutional framework in which policy makers and those seeking to influence asylum policy have been working, trying to make sense of the demands upon them and respond to them (Bevir and Rhodes, 2010).

The institutions in the UK and Ireland established to respond to asylum seekers were created in the context of two well-established parliamentary systems (Greenleaf, 1987; Marsh, 2010) which had themselves been adapting to participation in the regional governance of the EU for almost 20 years (Geddes, 2003; Laffan and O'Mahony, 2008). Those parliamentary systems were themselves impotent in controlling the decisions of the Irish and UK governments. This was due to the jointly negotiated 'opt-out' from matters relating to asylum (Boswell and Geddes, 2011; Quinn, 2009). The centralised systems of government, outlined in the respective state traditions in chapter 2 (Richards and Smith, 2002; Marsh, 2010), provided policy makers with the ability to negotiate, shape, form and even reject agreements both with other EU states and also with EU bodies themselves without the minimum oversight or involvement of elected officials. Either state could participate in the formation of an EU asylum system, as Ireland did on more than one

occasion when it held the Presidency of the EU Council, whilst refusing to accept the implications of the agreements for its own system.

Path dependence (Hall and Taylor, 1996) was evident in the formation of the Irish asylum system, coming, as it did, out of a well-established agreement between the UK and Ireland in the form of the CTA (Costello, 2003; Quinn, 2009). It was also a dependence that was influenced by its historical relationship with the UK, the latter more aware of continental Europe than Ireland. However, that is not to conclude that Ireland's adoption of a system that was similar to the UK was pre-determined. Instead, the Irish government's decision to both provide for an independent decision-making system in ORAC and then withdraw from it, demonstrates that it was in control of its own system.

The UK restricted the entry of asylum seekers and, if entry was achieved, reduced the chance of asylum seekers succeeding in their claims for international protection. The UK also used its connections with EU member states and institutions of the EU, particularly the European Council, to argue for the EU to reduce its responsibility for asylum seekers within the EU, with those in need of international protection being the losers. The UK government's decision in 2014 to bring Syrian refugees to the UK, and the Prime Minister's decision in 2015 to significantly increase their numbers, does not change that argument. That will be more clearly seen in chapter 5.

The UK was not content to limit the exclusion of asylum seekers from the UK alone. The UK government wanted other EU states to set in place a system that would have the same effect across the EU. All of this has been led at times from the highest political office in the UK government, the Prime Minister, and with actions that highlighted the myth of Ministers being accountable to Parliament (Richards and Smith, 2002). During the period of this study, the EU as a collective entity did not act on UK proposals, for example, to remove Afghan nationals or to provide for asylum determination outside of the EU itself, but it was moving in that direction. This will be examined in chapter 5.

Ireland benefited from action taken by the UK to limit entry to the UK thereby restricting the ability of asylum seekers to move within the Common Travel Area. This was despite the fact that Irish politicians and officials, as demonstrated in the quotes above, facilitated an EU asylum system. Ireland set in place systems that provided the minimum level of support and a separate system for asylum seekers. This will be more clearly seen in chapter 6. The decisions in 2015 to participate in the relocation of asylum seekers from within the EU are more to demonstrate Ireland's desire to be seen to co-operate in a humanitarian crisis rather than an overriding commitment to refugees.

The UK had greater regard to events in other larger EU states than it did to those in Ireland when it came to immigration. It was that pre-occupation that was a greater influence on the UK when the EU referendum was decided in June 2016. Ireland was not a consideration as is evident in the after-thought of the implications of Brexit on Ireland. When Ireland and

the UK negotiated an opt-out from JHA in 1999, they would not have envisaged that the commitment to the CTA would be compromised by the UK's withdrawal from the EU. The decision to jointly opt-out from EU developments in the areas of JHA was a critical juncture for both states in their relationship to the EU but with greater unintended consequences for Ireland than the UK. Given that the CTA had been in place for more than 50 years by then, it presumably seemed an institution that would not be undermined by the unilateral decision of one state. However, the UK state's ambivalence towards refugees and migrants and the movement of people from continental Europe, was greater than a commitment to a shared border with Ireland. Despite the strength of the connection between the two states and the agreement to maintain the CTA, the UK has threatened a well-established agreement with Ireland. The decision to withdraw from the EU with its impact upon the CTA demonstrates that significant change can occur despite the length of time that structures and institutions have been in place.

The approaches within the two states have been different but the effects have largely been the same. The various measures taken in both Ireland and the UK before a common EU system had been agreed meant that number of asylum applications has not since reached the peak of 2002. The EU asylum system was almost redundant before it was in place. The UK had opted for a national legislative framework supplemented by agreements and arrangements with other EU member states to enforce barriers to prevent entry to the UK. The legal changes included increasingly punitive measures for those who succeeded in gaining entry. The UK had particular regard to EU states in close proximity in continental Europe, particularly France, and those on the far borders of the EU, particularly Greece. Ireland legislated for an asylum determination system but left central parts of its asylum system to purely administrative arrangements. Ireland paid particular attention to its relationship with the UK, maintaining the CTA and effectively 'watching the UK's back' for its own benefit and did so in preference to participation in an EU asylum system.

The UK sought to influence the development of an EU asylum system, primarily to protect the national system that it had already established. Ireland facilitated the development of that system but stood apart from it, with the exception of elements of the first phase and the revised enforcement measures. Instead Ireland adopted a practice of opting-in only if the UK did so and it was considered to be in Ireland's national interests.<sup>144</sup> The exception was Ireland's participation in the relocation of asylum seekers from member states on the borders of the EU but that has had limited impact on the state given the small numbers actually taken.

Despite the UK's preference for legislation, requiring parliamentary approval, its decisions to opt-in or remain outside of the EU asylum system did not require parliamentary agreement.

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<sup>144</sup> Outside the period of this study, there was one further exception which was Ireland's decision to opt-in to the 2013 Reception Conditions Directive even though the UK had not done so. However, the UK had, by the time of Ireland's decision to opt-in, voted to leave the EU.

Indeed some of its more far reaching agreements with other states, including UK border controls on the territory of neighbouring states such as France, have not been subject to parliamentary approval. The governance of asylum-seeking migration, like the wider immigration system, does not lie in the democratic structures of the UK (Dummett and Nicol, 1990). The same position pertains in Ireland with a limited exception. Given Ireland's written constitution, any decision to opt-in has needed the consent of the *Oireachtas*. However, when a government has chosen to remain outside of any element of the EU asylum system, it has been beyond the sanction or support of elected officials. In addition, the fact that asylum has not reached the same level of political prominence in Ireland, has had the benefit of effectively keeping it under the radar with the consequence that decisions have been made with relatively little political or public scrutiny.

Situated agents have had the capacity to act with limited consequences but they have done so within the context of the structures and institutions of which they were a part, furthering the overriding intention in their respective asylum systems of exclusion from or within the borders of their states. Tony Blair not only oversaw the extension of controls over asylum seekers within the UK but also encouraged the removal, for example of Afghan asylum seekers, and attempted to influence EU policy in the direction of asylum determination outside of the territory of the EU. In Ireland, individual decision-makers exercised control over individual claims to ensure the denial of protection to asylum seekers over extended periods of time but did so within an overarching state view that asylum seekers in Ireland were not 'genuine refugees'.

The approach adopted by both states to the EU asylum system has followed an almost identical path, maintaining control over their own borders despite the development of an EU supranational system. Both signed up to the first phase of CEAS. The only difference was that Ireland did not opt-in to the Reception Conditions Directive. Both states opted-in to the revised Dublin and Eurodac Regulations. Differences emerged over the decisions taken by the European Council for the relocation of asylum seekers from Italy and Greece. Ireland opted-in but the UK refused to take any asylum seekers who had succeeded in entering the EU. In addition, Ireland was more proactive in participating in search and rescue in the Mediterranean with the UK focusing instead on surveillance and disrupting the people smuggling operations.

The structures and institutions of asylum in Ireland and the UK demonstrated a clear view that national interests were best served by limiting international obligations towards refugees. Such obligations were, for the UK, to be examined in the context of its rigid immigration system and, for Ireland, in the context of its relationship with the UK. This was therefore the institutional context for those engaged in asylum policy and the structures that were in place which shaped their understanding of the situations in which they were expected to act.

The ways in which these policies were brought into being, understood, reinforced or adapted in each state are examined in chapters 5 and 6 through the perspective of individual actors using the analytical tools provided by sensemaking.

## CHAPTER 5

### THE UK: EXTRAORDINARY COMPASSION OR MANAGED MIGRATION?

#### 5.1 Introduction

*“Mr Speaker, we are proposing that Britain should resettle up to 20,000 Syrian refugees over the rest of this Parliament. In doing so we will continue to show the world that this is a country of extraordinary compassion always standing up for our values and helping those in need.”*

Prime Minister, David Cameron MP, 7<sup>th</sup> September 2015<sup>145</sup>

This chapter examines the interviews conducted with actors who have been engaged in asylum policy in the UK and their understanding of the situations that they found themselves in, including the ‘migrant crisis’ in 2015. The interviews are analysed using the elements of sensemaking to identify actors understanding of and response to developments in the UK and the EU. It examines the commitment to Syrian refugees and its implications for those seeking asylum in the UK.

In September 2015, the Prime Minister, David Cameron, enunciated a view of the UK as a country that encapsulated a deep commitment to those in need of international protection. The language that the Prime Minister used in response to the crisis in Syria was in contrast to the institutional framework for dealing with those who made their way to the UK of their own volition, examined in the previous chapter. The commitment of the UK to Syrian refugees could be said to demonstrate the possibility that a policy can be interrupted, at least temporarily, if there is pressure to take into account public opinion.

For David Cameron himself, the commitment to Syrian refugees was an aberration, not a change in asylum policy. Within six months the Prime Minister made a statement to the House of Commons about the EU-Turkey Agreement regarding asylum seekers, including many Syrians, who were arriving in Greece from Turkey,<sup>146</sup> indicating that it was ‘business as usual’ in preventing the arrival of asylum seekers, not just into the UK, but also into the EU.

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<sup>145</sup> Statement to the House of Commons on refugees from Syria and counter-terrorism  
<https://www.gov.uk/government/speeches/syria-refugees-and-counter-terrorism-prime-ministers-statement>  
[last accessed 22.5.2017]

<sup>146</sup> The EU-Turkey Agreement of 18 March 2016 was a deal agreed by all 28 EU member states and Turkey to stop refugees from travelling to Greece across the Aegean Sea. Anyone arriving after 20 March 2016 was to be returned to Turkey unless they were accepted as refugees.

*“[T]he single biggest cause [of the migration crisis] has of course been the war in Syria and the brutality of the Asad [sic] regime. But we have also seen huge growth in people coming to Southern Europe from Afghanistan, Pakistan and North Africa, all facilitated by the rapid growth of criminal networks of people smugglers.... As part of this plan, the Council agreed to stop migrants from leaving Turkey in the first place to intercept those that do leave, while they are at sea, turning back their boats, and to return back to Turkey those that make it to Greece.”<sup>147</sup>*

The Prime Minister made it clear that UK operations already in place, in both the Aegean and Mediterranean Seas, would continue. Unlike the Government statement about UK operations in the Mediterranean in October 2014,<sup>148</sup> David Cameron did not say that these actions were in the interests of asylum seekers. Instead, he indicated that the aim was to move border controls as far away from the UK as possible. It was a statement in keeping with the development of immigration controls to prevent or deter asylum seekers from entering the EU and protect UK borders. Statements by the Prime Minister and the Home Secretary, Theresa May, did not create a hostile environment but were a continuation of asylum policy that had been in place for over 20 years.<sup>149</sup>

*“We have argued for a consistent and clear approach right from the start. Ending the conflict in Syria. Supporting the refugees in the region. Securing European borders. Taking refugees directly from the camps and the neighbouring countries but not from Europe. Cracking down on people smuggling gangs.”<sup>150</sup>*

The chapter focuses on both state and non-state actors engaged in asylum policy and how they interpreted the challenges that they faced, what they created out of them (Weick, 1995) and the implications of that for asylum policy in the UK. It does so using the approaches in sensemaking (Weick, 1993, 1995).

Section 2 summarises the positions of both Conservative and Labour governments, from the early 1990s through to 2004, when an increasing number of asylum seekers were arriving and which led to the development of an asylum system as a subsidiary of immigration control. It outlines how governments of both parties built upon an administrative framework and created a legislative environment particularly hostile towards asylum seekers that severely reduced the ability of people forced to leave their own countries to arrive and remain in the UK.

Sections 3 and 4 explore two themes at particular crisis points: firstly, the pressure of those attempting to enter the UK from Calais and, secondly, to enter the EU across the Aegean

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<sup>147</sup> <https://www.gov.uk/government/speeches/pm-commons-statement-on-european-council-meeting-on-migration-21-march-2016> [last accessed 17.8.2017]

<sup>148</sup> See page 105

<sup>149</sup> See chapter 4 for a more extensive overview of the UK's asylum policy from 1990 until June 2017

<sup>150</sup> Ibid



and Mediterranean Seas. These sections focus on the extension of UK immigration controls to keep asylum seekers out of the UK and of the EU. The measures adopted included bilateral and collective agreements with other EU member states.

Section 5 examines how the exclusion of asylum seekers from the UK and the EU was understood in the context of the commitments to provide a safe haven for refugees. It looks at how actors were able to portray the UK as a 'country of extraordinary compassion' even though asylum seekers were being denied entry and residence in the UK.

Section 6 identifies the UK's relationship with Ireland and understandings of the Common Travel Area and the impact of asylum policy upon public perceptions of asylum seekers.

Section 7 draws conclusions from this to show how the actions taken have led to the creation of the concepts of the 'deserving' and 'undeserving' refugee, bringing refugee protection under the rubric of 'managed migration' whilst undermining the right to claim asylum.

## 5.2 Creating the framework – the legacy of immigration enforcement

This section explores the opinions expressed by key actors who were central to the development of the asylum system in the UK. It sets out the framework that actors helped create, worked with or had to operate under.

*"Fear of persecution is no longer the dominant element for many asylum seekers. In only a small minority of cases in the United Kingdom are the applicants shown to have a "well-founded fear of persecution", as required by the terms of the 1951 United Nations convention on refugees.... The whole purpose of my proposals is to abate the flow of asylum seekers."*<sup>151</sup>

*"[W]e must recognise that the growth in asylum applications is in part linked to the fact that anyone who asks for asylum is allowed past the normal immigration controls at our ports."*<sup>152</sup>

For consecutive UK governments, asylum was simply part of immigration control, even though the rights of refugees were contained in the Refugee Convention to which the UK was a signatory. For the politicians, the increased number of asylum seekers was itself an abuse of the immigration system, threatening state sovereignty (Schuster, 2003). For

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<sup>151</sup> Kenneth Baker MP, Home Secretary, speaking in a debate on the Asylum and Immigration Bill 1991, HC Deb 02 July 1991 vol 194

<sup>152</sup> Kenneth Clarke MP, Home Secretary, speaking in a debate on the Second Reading of the Asylum and Immigration Appeals Bill 1992, HC Deb 02 November 1992 vol 213

example, in the Labour government's White Paper of July 1998, the Home Office premised its proposals for change on the following grounds:

*"There is no doubt that the asylum system is being abused by those seeking to migrate for purely economic reasons. Many claims are simply a tissue of lies. Some of these are made on advice from unscrupulous "advisers" simply as a means of evading control or prolonging a stay in the UK without good reasons."*<sup>153</sup>

Almost 20 years later, that same view still prevailed amongst policy makers.

*"I think part of the problem we find is that the people who we interview are coached. They are coached sometimes by legal advisers, they are coached more often by the traffickers in the camps and then they give us an account that they think we want to hear and it's difficult to hear that account time and time again without being a bit cynical."* (UK10)

This raises a question about the role of political institutions and the capacity or even desire of an actor to step aside and question a commonly held view, frequently expressed by the tabloid media.

The 1998 White Paper posited asylum seekers as economic migrants, seeking to enter or remain in the UK, but not people in need of international protection. Given that premise, the obligations under the Refugee Convention had to be accommodated within a system of strict immigration control. For those policy makers concerned with enhancing the rights of asylum seekers, it led to a framework that was harsh.

*"If you looked at the legislation for the period 1993, 1995, 1996, 1999, there was a constant theme. Every one was tougher than the one before and was distinctly unhelpful.... We were also getting an effect on government and Ministers with a constant denigration from parts of the national press: 'scroungers', 'economic migrants', 'to live on benefits'"* (UK3)

For such a policy maker, his ability to influence policy was limited by the limitations of the party political framework (Rhodes et al, 2006).

*"I was on the committees I wanted to be on. The Whips Office said will you disagree on chunks of the Bill? I said yes. They said alright, you can go on the committee but promise you won't vote against the government. This was the deal. I went on it, raised issues but didn't move amendments, because if I reneged on the deal I could say goodbye to being on committee."* (UK3)

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<sup>153</sup> Paragraph 1.14, headed Current Immigration Trends, in the White Paper, *Fairer, Faster and Firmer: A modern approach to immigration and asylum*, Cm 4018, July 1998

The depiction of asylum seekers as economic migrants was not the only framework used to further tighten the system. An attempt was made to re-focus the UK's response to asylum seekers in a White Paper published in February 2002<sup>154</sup>, framing the issues around national identity and a wider understanding of citizenship.

*“Confidence, security and trust make all the difference in enabling a safe haven to be offered to those coming to the UK. To enable integration to take place, and to value the diversity it brings, we need to be secure within our sense of belonging and identity and therefore to be able to reach out and to embrace those who come to the UK. Those who wish to work and to contribute to the UK, as well as those who seek to escape from persecution, will then receive the welcome they deserve.”<sup>155</sup>*

A sense of belonging and identity were not defined but there was an assumption of this being shared or common which is open to question: British people needed to be secure in their 'sense of belonging and identity' to welcome 'those who escape persecution'. In the section on asylum, the White Paper contained proposals to increase legal avenues for refugees to enter and remain in the UK. This went hand in hand with tight control of the movement and choices available to those whose arrival was not approved in advance. The White Paper maintained the view that the majority of asylum seekers were abusing the asylum system.

*“[W]e must ensure that the asylum system is returned to what it was always intended to be – a system for those who are in need of protection and for whom protection cannot be delivered through alternative means.... Over half of people who apply for asylum are currently found not to be in need of any form of international protection. It is this misuse of the asylum procedures that creates so many of the difficulties and costs in operating an effective system.”<sup>156</sup>*

The Home Office was working in the spotlight of a hostile populist media and was driven to greater hostility towards asylum seekers. If people seeking to enter the UK were portrayed primarily as 'illegal immigrants' by successive governments, which had also created the physical barriers, the views of the public were encouraged by the negative attitude from the politicians who were then on the receiving end of their own propaganda. It made for an unhealthy and difficult environment.

*“[T]he tirade of media abuse at the time was all about the numbers coming in as asylum seekers and the insecurity of the borders and the Sangatte camp. So we were trying to do the right thing in the context of a media storm really where every other night it was on the television, people breaking through the barbed wire, clinging to, under the train.” (UK1)*

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<sup>154</sup> *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, CM 5387, February 2002

<sup>155</sup> *Ibid.* From the Foreword by the Home Secretary, David Blunkett MP

<sup>156</sup> *Ibid* paragraph 16, page 13

The attempt by the policy makers to deal with the competing pressures towards greater exclusion was made worse by a failing operational system. This was the chaotic environment in which policy makers had to create some order to be able to act (Weick, 1995). The environment was not static or isolated, events had to be noticed and bracketed and acted upon in the context of much wider events, some well beyond the control of those responsible for UK policy (Weick et al, 2005).

*“[We had] a massive agenda of change at a time of enormous pressure because of world division and conflict and with administrative systems that were ineffective. And you wouldn’t want to be dealing with it in any of those circumstances. You wouldn’t want the conflict zones pressurising numbers and the smugglers, you wouldn’t want an incompetent administrative system, you wouldn’t want a febrile media and political environment and you wouldn’t have wanted the 11<sup>th</sup> September as a backcloth.” (UK1)*

This was the context in which CEAS was negotiated and in which the UK participated with a view to shaping the outcome.

*“Tony Blair had promised that he would cut by two-thirds the number of asylum seekers coming to the UK in, I can’t remember whether it was 2002, 2003, something like that. There had been a spike in the number of asylum applications. He promised that he would adjust this and the only way that he could adjust it was by common action with the other member states.” (UK7)*

The increase in the number of asylum seekers entering the UK triggered the demand to take action to stem the flow by co-operation with other EU member states. The UK’s participation in EU discussions about asylum was an exercise in trying to shape EU policy in a UK mould. There were no reasons for the UK to engage with an EU asylum system given the opt-out other than to protect its own systems. However, the UK was not alone in arguing for national priorities. This was a common approach to the development of an EU asylum and immigration system (Hampshire, 2013).

The White Paper of July 1998 set out the nature of the co-operation that the UK government was looking for from EU states and institutions. Reflecting on the UK Presidency of the European Council, the government set out its ongoing priorities:<sup>157</sup>

*“Another of the main priorities of our Presidency was to take forward work on developing a legal framework for a central database of fingerprints to support the operation of the Dublin Convention. The Eurodac Convention, when signed and ratified, will create a computerised central database which will allow the comparison of the fingerprints of asylum seekers across the EU. If a fingerprint match is found as a result of a comparison in the central Eurodac database, the Member States concerned will then enter into bilateral discussions under the terms of the Dublin Convention....*

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<sup>157</sup> The UK held the Presidency of the European Council from January to June 1998

*The Government accepts that such an extension of the scope of the Eurodac Convention should further enhance the operation of the Dublin provisions.”<sup>158</sup>*

The Amsterdam Treaty, signed in October 1997 and effective from May 1999, brought JHA into EU competency for the first time (Boswell and Geddes, 2011). On asylum, the agreement was to create CEAS with minimum standards applying across all member states.<sup>159</sup> The priorities for the UK’s engagement with the EU on asylum were immigration control and the ability to pass responsibility for asylum seekers to other EU states.

*“I think that when the first set of directives came into being, which of course was a Labour government and Labour opted in, that certainly the feeling we had at that point, and I think there were even some comments from Jack Straw that you know got reported on to us, was that Labour were, that the British government was interested in ensuring that, you know, that it really had an influence on this policy and that it wasn’t setting the bar too high.” (UK2)*

The UK parliament had little opportunity to influence the government’s approach to negotiations at an EU level, even when the EU Committee was engaged. Parliamentary sovereignty was side-lined.

*“If policies were emanating from the EU, they might be discussed at Westminster, not in the Commons but in the EU Committee. For example, if there was an EU directive or policy. But the UK had opt-outs. There was a small amount of discussion about what was happening in the EU. We were aware of attempts to achieve common standards for example on reception. These were discussed at the European Committee and then the Minister would say ‘we are not involved’ or ‘would take note of’.” (UK3)*

Despite the attempts by Tony Blair to encourage the EU to introduce extra-territorial consideration of asylum claims and start returns to Afghanistan as early as 2002,<sup>160</sup> the EU did not reach an agreement on returns with the Afghan government until October 2016. However, even before that agreement, the UK was reported to be amongst the EU member states that had taken part in forced returns to Afghanistan.<sup>161</sup> Cross-party consensus and the legal framework for exclusion and punishment were set in place, creating, as a policy influencer indicated, a lasting hostile environment for asylum seekers.

*“[W]hen the Labour government were very much at the forefront of creating, starting to put in place, the fundamentals and the foundations for what subsequently became the Coalition government, by their own admission, a hostile environment for migrants,*

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<sup>158</sup> Paragraphs 11.31 and 11.32 of the White Paper, *Fairer, Faster, Firmer*, July 1998

<sup>159</sup> The EU consisted of 15 member states at the time. The most significant enlargement of the EU came in May 2004 when 10 states became members by which time all the elements of CEAS were in place.

<sup>160</sup> See final paragraph, page 69

<sup>161</sup> <http://www.independent.co.uk/news/world/europe/afghanistan-police-beat-asylum-seekers-danish-officers-deportation-flight-kabul-refugee-returns-safe-a7739176.html> [last accessed 26.8.2017]

*they would argue that it was for migrants with no rights to reside in the UK or to be in the UK. We would argue that it was completely indiscriminate and that anybody who was caught up in that axis of suspicion, demonisation, denigration and the whole way that public policy has been influenced and overshadowed by that sense of ‘you mustn’t be soft on immigration’.” (UK5)*

One of the issues that this highlights is the difficulty of working within a frame in which asylum seekers are simply seen as a facet of international migration and who can be returned if they do not satisfy the requirements of who is desirable from an economic perspective.

A negative framework was created by both Conservative and Labour governments, with each building upon the other’s measures and justifications to establish an increasingly hostile environment for asylum seekers both in Britain and the wider EU. The negative framework came to the fore again in 2015 when international migration became a central focus of member states again and the UK sought to protect the system it had created by reinforcing barriers to enter the UK and the EU. The UK proposals for protecting the UK asylum system included working to keep people in the regions to which they were first displaced. Only a limited number of refugees were to be resettled in the UK. In shifting controls away from the UK, authority for decisions moved even further away from parliamentary scrutiny.

The hallmark of the political framework for asylum policy has been the prioritising of immigration enforcement above providing protection to those claiming asylum, built upon a belief that the majority of asylum seekers were abusing the system by the presentation of fraudulent claims. Given that, the following sections examine how policy makers made sense of the ‘migration crisis’<sup>162</sup> of 2015. One feature of this ‘crisis’ was the concern over the number of people illegally crossing EU borders.

*“[I]llegal migration into Europe rocketed from 2014 onwards, and the impact that it had on the environment in Europe, the panic, and I think panic is probably the right word actually, it completely changed the nature of the debate. The amount of time spent at a European level discussing migration and asylum issues, and it continues until this day.... So Calais, for instance, towards the end, was a real source of interest and so were things like the EU-Turkey deal, migrants drowning in the Mediterranean.”*  
(UK6)

The institutional framework for asylum policy was embedded in a mind-set of control and enforcement. This was the context created by and for actors who were required to respond

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<sup>162</sup> The phrase ‘migration crisis’ is significant in itself as the word ‘migration’, without qualification, implies voluntary movement. The UN Refugee Agency, UNHCR, highlighted that 90% of those arriving in Greece in 2015 were from refugee-producing countries. <https://www.economist.com/blogs/economist-explains/2015/09/economist-explains-4> [last accessed 1.9.2017]

to often fast-moving events and with competing demands, at a national, regional and international level. The following sections examine the ways in which actors understood this framework, the action that was taken and the impact that it had on future asylum policy. They are divided into three main themes which demonstrate the development of controls away from the UK: keeping asylum seekers out of the UK; keeping asylum seekers out of the EU; and turning protection into managed migration.

### 5.3 From Sangatte to Calais – keeping asylum seekers out of the UK

This section focuses upon the understanding of actors to events in 2015 when migration became the top political issue in the EU. It does so within the context of the actions taken in an earlier period of pressure upon politicians from those seeking to enter the UK.

*“The juxtaposed controls, there and at Brussels and at Paris Gare du Nord, were a remarkable achievement.... it completely shut down that route and although it didn’t stem entirely the tide of asylum seekers, they tended to be genuine asylum seekers from then on rather than economic migrants.” (UK1)*

After the introduction of juxtaposed controls in 2003,<sup>163</sup> the number of new asylum applications in the UK reduced by 60%.<sup>164</sup> The lessons learnt in 2002, about identifying the methods used by asylum seekers to gain entry to the UK and eliminating the route, were reinforced when numbers crossing illegally increased in 2015. By 2015, a camp at Calais, known as ‘The Jungle’, had attracted so much attention and concern that, like Sangatte, a decision was made to close it.<sup>165</sup> A retrospective view of the action taken concerning Sangatte would indicate that numbers reduced when the camp there was closed. Closing down the route from Calais could not have been achieved without the juxtaposed controls and agreements with France already being in place.

*“The greatest impetus for change has been that growing, the change in the European and the global environment. The fact that in 2010 we had something like 18000 asylum seekers and last year we had more like 40000, an increase in numbers into Europe and into the UK. And also a change in the percentage of those cases that arrived in the back of a lorry as opposed to those that entered on a visa or through some other route. So the greater percentage of asylum seekers over the last couple of years have been arriving via France compared to 2010.” (UK6)*

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<sup>163</sup> Juxtaposed controls meant UK border controls in France and French border controls in the UK

<sup>164</sup> The number of new asylum applications in 2004 was 33,960 compared to 84,132 in 2002. Source: Migration Observatory. The agreement with France, the *Le Touquet* Agreement, signed in February 2003 by President Chirac and Prime Minister Blair, allowed for UK immigration (and customs) controls in Calais and French controls in Dover.

<sup>165</sup> Given its unofficial and transitory nature, estimates varied about how many were present in the camp. One estimate put the number at 10,000 <https://www.theguardian.com/world/2017/apr/02/refugees-gather-calais-camp-unaccompanied-children> [last accessed 27.8.2017]

Policy makers went through a process of noticing the increase in numbers of those gathering in Calais and the methods they were using to enter the UK. They were asking ‘what’s the story?’ and moved to ‘now what?’ (Weick et al, 2005). The action was collaboration with the French authorities to close down ‘The Jungle’ in Calais. The numbers and methods of entry were the cues extracted from the environment at a time of crisis. The increase in people seeking asylum triggered the decision to close down the route of entry (Weick, 1995; Weber and Glynn, 2006). There was no apparent consideration of the particular identity (such as nationality), vulnerability (such as age) or strength of connections to the UK (such as family), just the numbers. The upward trend was enough to provoke joint action with the French even though the number of new asylum applications in the UK did not exceed 33,000 during this period.<sup>166</sup> It included expensive measures, the UK contributing £2.3 million to build a new wall around the port at Calais<sup>167</sup>, and drastic steps: the dismantling of the camp, dispersal of the occupants and an increased use of fines for carriers, such as haulage companies when ‘clandestines’ were found in lorries, even if they had not even left France.<sup>168</sup> One policy maker described the action taken in the following terms:

*“[T]he UK government put a lot of money into building a big fence in Calais.... And since around then the French have also kept up a heavy police presence around Calais and Coquelles, involving the gendarmerie, the riot police and the routine police ... and we would have given them some money to help them do that, we’ve seen the numbers entering clandestinely return to more normal levels I would say. They spiked in October ’15 and then they have returned to more regular levels since then. The other thing that has probably helped more recently is the move that we did to help the French break up the camp in Calais where there were 10,000 people sleeping in this makeshift refugee camp, the Jungle as it was called, and we helped the French. We particularly focused on the young people.” (UK10)*

The statement about the focus on young people should be set in the context of a court challenge<sup>169</sup> and an amendment to draft legislation,<sup>170</sup> both of which were contested by the government. The action reinforced the institutions that undermined the right to seek asylum and defended the system that, at best, tightly controlled their entry.

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<sup>166</sup> Numbers peaked in 2015 when 32,733 new asylum applications were filed, an increase from 21,843 in 2012. Source: Home Office, National Statistics for Asylum, 23.2.2017

<sup>167</sup> <http://www.independent.co.uk/news/world/europe/calais-jungle-refugee-camp-wall-completed-emptied-two-months-cleared-a7472101.html>. In January 2018, the UK agreed a payment to France of £44m. in order to keep prevent migrants from gathering at Calais in an attempt to enter the UK

<sup>168</sup> <http://www.cityam.com/221766/hauliers-facing-huge-fines-over-calais-migrants>

<sup>169</sup> The case concerned children with family in the UK: *The Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v. Secretary of State for the Home Department* [2016] UKUT 61 (IAC). The court ordered that the children should be admitted immediately.

<sup>170</sup> An amendment, known as the ‘Dubs Amendment’ was inserted as section 67 of the Immigration Act 2016 leading to a number of unaccompanied children being allowed to join relatives in the UK or taken into the care of local authorities <http://www.legislation.gov.uk/ukpga/2016/19/section/67/enacted>



For a policy influencer, the focus on arrivals from Calais dominated asylum policy at the time and achieved its objective, reinforcing the cycle of exclusion.

*“What’s really interesting is Calais, the way Calais became such a powerful issue, negatively, in UK policy and the extent to which policy was driven by ‘close down Calais’. To a large extent they have succeeded. Calais camp has gone away, they’ve strengthened the border controls in Calais, [it’s] had an effect of limiting the numbers who are coming over.” (UK5)*

The action taken in 2002 quickly and significantly reduced the number of asylum seekers arriving. Similar action was taken in 2015, but the reduction in numbers was relatively small. However, it allowed politicians to present evidence of a good job done at the time.<sup>171</sup>

Policy makers were unable to address matters in isolation or without considering the intentions and actions of others. Sensemaking does not take place in isolation (Weick, 1995) but requires an understanding of the approach that is taken by others who are an important part of the process. It was necessary for the UK government to work with other EU states and the governments of countries from or through which asylum seekers travelled. The actions in Calais built upon an existing bilateral relationship with the French authorities who had an interest themselves in reducing the attraction of Calais as a gathering point. French understanding of and interest in the situation met with that of the UK authorities and they were able to agree action, albeit that it involved challenges and compromises.

*“You get pushed into a position that you actually you didn’t start from. I’m pretty sure that the Immigration Bill, the passage of the Immigration Bill, and to an extent with Calais actually and the bilateral discussions with the French where you are, you have mutual interests, you are just trying to work out what the best way of resolving it is without sort of conceding too much ground.” (UK6)*

In effect, policy makers in different states were collaborating in order to reach a mutual understanding and act together to create a more ordered environment (Maitlis and Christianson, 2014, p.67).

A similar pattern occurred on the edge of the EU and UK policy makers were once more engaged.

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<sup>171</sup> The dismantling of the Calais camp interrupted but did not halt attempts to enter the UK from Calais <http://www.express.co.uk/news/world/812079/Calais-refugees-2017-Jungle-camp-migrant-crisis-France-UK-Europe> [last accessed 27.8.2017]

#### 5.4 From France to Greece – keeping asylum seekers out of the EU

Whilst the UK action with France was a bi-lateral agreement, the UK also benefitted indirectly from agreements within the EU including the EU-Turkey Agreement in March 2016, to which the UK was a signatory, reducing arrivals from Turkey to Greece.<sup>172</sup> This section highlights how actors used co-operation with other EU states and institutions to extend border controls even further away from the UK. It also demonstrates the extent to which central government and its officials operated with little democratic accountability.

As was seen in chapter 2, one of the descriptions of the UK is that it is a liberal democracy with the classic separation of powers between government (as the executive), parliament and the judiciary (Greenleaf, 1987). In the asylum field, parliamentarians were able to debate legislation brought before parliament between 1993 and 2004. However, parliamentary debate did not quite equate to parliamentary sovereignty although it enabled a level of participation in developing the framework of an asylum system. The involvement of UK elected representatives did not extend to developments at an EU level. Whilst there were distinct structures of governance within the EU (Green Cowles et al, 2001), these did not allow politicians in the UK parliament to engage in key decisions, evidence of the constitutional mythology about the accountability of Ministers (Richards and Smith, 2002). UK government co-operation with EU bodies and EU member states were the means by which this was extended well beyond the reach of parliament when it came to asylum.

The UK entered the EU-Turkey Agreement without any formal parliamentary approval being required and without there being a legal basis.<sup>173</sup> The agreement followed a pattern of bi-lateral agreements with France over Sangatte and Calais. As one opposition party policy maker indicated, elected representatives were way behind decisions that had implications for asylum seekers.

*“[R]ecently I was on one of these committees which was related to the EU-Turkey deal ... we were looking at Commission update Number 1 when in fact Number 4 had been published and here we were debating in a side room in the House of Commons these really pivotal European documents and it was a waste of time.” (UK11)*

The relationship between domestic and foreign policy in the field of migration is one that has begun to receive closer examination. This has included an extension of the remit on migration to EU Commissioners with responsibility beyond Home Affairs (Geddes and Hadj-

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<sup>172</sup> European Council, EU-Turkey Statement, 18 March 2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> In a statement issued on 28 February 2017, the General Court of the Union said that the European Council’s statement of 18 March 2016 contained inaccuracies regarding the authors of the EU-Turkey agreement.

<sup>173</sup> The Court of Justice of the European Union ruled that it had no jurisdiction to hear an appeal against the EU-Turkey Agreement <http://www.statewatch.org/news/2017/may/eu-council-ls-eu-turkey-appeal-9148-17.pdf>. That judgment was challenged <http://www.statewatch.org/news/2017/may/eu-cjeu-eu-turkey.htm> [last accessed 18.10.2017]

Abdou, 2017). Policy makers in the UK were, like their EU counterparts, beginning to make connections across government departments, referring at times to the objective of preventing entry to the UK and evidence of the social element of sensemaking.

*“I guess one of the biggest things that changed at a Whitehall level between 2010 and 2016 is the change in the relationship between the Foreign Office, Home Office and DFID.... I feel that the government as a whole has a coherent approach to migration by which I mean migration from start to finish, which is not just about keeping migrants out of the UK but it’s about trying to invest and protect in global systems that impact on migration flows.” (UK6)*

*“We are getting a little bit better at [getting the UK narrative straight] and sort of, in terms of, scripts and telling the UK story, and joining up a bit in terms of across HMG I think, Foreign Office, DFID, Home Office, Cabinet Office, maybe Treasury as well. There were maybe different approaches across. I think we are probably co-ordinating a lot better now.” (UK9)*

Alongside the EU-Turkey Agreement, the UK government also pulled back from search and rescue in the Mediterranean, explaining its decision based on a concern for ‘migrants’.<sup>174</sup> The government’s position was set out in a statement in the House of Lords in October 2014.

*“We do not support planned search and rescue operations in the Mediterranean. We believe that they create an unintended “pull factor”, encouraging more migrants to attempt the dangerous sea crossing and thereby leading to more tragic and unnecessary deaths. The Government believes the most effective way to prevent refugees and migrants attempting this dangerous crossing is to focus our attention on countries of origin and transit, as well as taking steps to fight the people smugglers who wilfully put lives at risk by packing migrants into unseaworthy boats.”<sup>175</sup>*

Its justification was built upon the claim that people were encouraged by people smugglers to take a risky journey, often in unsafe vessels, because they would be rescued. In reality it interfered with the right to seek asylum (Goodwin-Gill, 2011). This claim assumed that asylum seekers made their decisions fully cognisant of all the risks, the possibility of rescue

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<sup>174</sup> After the tragedy off Lampedusa in October 2013, the UK government took part in the Mare Nostrum search and rescue operation but when that came to an end, they eventually replaced a ship that had engaged in search and rescue with one which would undertake surveillance off the Libyan coast.

<sup>175</sup> Baroness Anelay’s written answer to question HL1977 from Lord Hylton in the House of Lords, 15 Oct 2014, Column WA41.

and of the EU's relocation scheme. These positions ran contrary to the available evidence<sup>176</sup> of the motivations of people who continued to cross the Mediterranean<sup>177</sup>.

*"[T]he UK government policy was not to encourage people to make very dangerous journeys over the Eastern or Central Mediterranean knowing that once they got into Greece or Italy or somewhere else, they then would be relocated around Europe."*  
(UK10)

The complex reasons that inform a decision by a person to cross international borders and the information available to them (Castles and Miller, 2009; De Haas, 2011) do not appear to feature in the minds of those engaged in asylum policy. The lack of attention to evidence about motivation for movement across borders supports the idea of the role of plausibility (Weick, 1995) in decision making, particularly if it can be argued that the policy is for the benefit of the person at whom it is aimed.

The UK also worked to prevent asylum seekers from even leaving their regions of origin to cross the Mediterranean through work with sending or transit countries.

*"[I]n 2016, it was very much working with France, improving border controls in Calais at the same time as reinvesting in efforts in the whole migration flow, seeking to influence migration flows in source countries, transit countries and sort of closer to home. So getting very involved in a new EU initiative which was the Khartoum Process<sup>178</sup>, the Valletta meetings<sup>179</sup>"* (UK6)

Both the EU-Turkey Agreement and participation in operations in the Mediterranean were understood to be for the same essential reason - restricting entry. The exception to this trend was in the area of refugee resettlement from outside of the EU which the following section addresses.

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<sup>176</sup> Research carried out as part of the MEDMIG project has identified complex reasons for people taking dangerous journeys across the Mediterranean <https://nandosigona.files.wordpress.com/2016/09/research-brief-03-boat-migration-across-the-central-mediterranean.pdf> [last accessed 2.6.2017]

<sup>177</sup> The numbers arriving in Italy in December 2016 were comparable to numbers arriving in December 2015 according to UNHCR [http://reliefweb.int/sites/reliefweb.int/files/resources/2016\\_12\\_UNHCRCountryUpdateItaly-December\\_2016\\_V8.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/2016_12_UNHCRCountryUpdateItaly-December_2016_V8.pdf) [last accessed 2.6.2017]

<sup>178</sup> The Khartoum Process is a collaboration between EU states and countries in the Horn of Africa to address migration issues <http://www.khartoumprocess.net/about/the-khartoum-process> [last accessed 27.5.2017]

<sup>179</sup> During the Maltese Presidency of the European Council in the latter half of 2015, an EU summit was held in Valletta to bring together EU and African states to discuss migration

## 5.5 From Syria to the UK – protection as managed migration

This section examines how actors understood the extension of the UK's refugee resettlement programme and how they were able to present that alongside differential treatment of those who were accepted as refugees through the asylum system.

*“The then Home Secretary, now the Prime Minister, made a speech to the Conservative Party Conference in October 2015 in which she set out a vision of what effectively was, it wasn't her language, a two-tier refugee protection system that would, I'd hesitate to say reward, I don't think that reward is the right word, but it would look after those that she described as 'the weak and the vulnerable', those that stayed in the region and didn't make journeys to Europe, and the system would not be so generous to those whom she dubbed 'the rich and the strong', people who made the journeys to Europe” (UK5)*

The attraction of resettlement of refugees for any government is clear: the state selects which refugees it will take to settle for the long term; it enables a better balance of family make-up and gender; there is no requirement to use the asylum process, as refugee status is determined in advance; and plans can be made for the arrival of those chosen and expected, including security checks. In other words, it is state-managed. In contrast, spontaneous arrivals of asylum seekers are unpredictable. They require huge resources to process individual claims, support and accommodate people, detain and remove from the state those who are not given permission to stay.

Resettlement enables policy makers to assert, as Theresa May MP did in October 2015, that the most vulnerable are being assisted. It is the key to understanding the attraction to policy makers. David Cameron's announcement in September 2015, which came without any warning to those who would be responsible for giving substance to it, resonated with the public mood in response to the death of Alan Kurdi, a three year old Syrian Kurdish boy who drowned in the Aegean Sea. A commitment to resettlement provided a framework for a policy maker to understand that asylum seekers should be refused protection for the sake of providing refuge to those in the greatest need.

*“[I]f you buy the analysis that there's a limit to how much our public sector can cope with, in terms of refugees, then the more of those who are clandestines or people who overstay visas, and then would turn out ... not to be valid refugees but to be economic migrants, then the less space there is in the system, in the country, to be able to take people who are genuinely refugees.” (UK10)*

All of this reinforced the implicit claim that Syrians and others who do not attempt to travel to the UK were the ‘most vulnerable’ and that the UK was abiding by its obligations towards refugees.<sup>180</sup>

The combination of the party conference speech by Theresa May and the announcement by David Cameron created a clear message to policy makers of what this would mean in practice. It was to come at a cost for asylum seekers, whose rights, even if accepted as refugees, are to be reduced. A policy maker understood the distinction in the following terms:

*“I think the framework there is to have a different period of leave. Rather than it being five years humanitarian protection [present practice for refugees regardless of how they entered], you would be given three years leave [if your asylum claim is successful].” (UK10)*

For someone attempting to influence policy, it had negative consequences:

*“[W]e are going to, over time, reward people who come in an orderly way through resettlement or have legitimate sur place claims ... and that we will diminish the offer to those who come spontaneously to an extent that it will affect their behaviour. I don’t think it is a sustainable, I see no evidence for that.” (UK5)*

These two actors, one a civil servant, the other the head of an NGO, operate within different frameworks: one works with the political statements and takes them to be consistent with a claim about the ‘most vulnerable’; the other works from evidence about the barriers placed in the way of refugees seeking lawful entry to states such as the UK. Their view of asylum policy is therefore the result of different understandings of the dynamics which influence or control movement across borders and, more importantly, what they are prepared to accept as a plausible basis for policy.

The image of the UK as a place of acceptance for those who are displaced as a result of conflict, ‘a country of extraordinary compassion’ according to the Prime Minister in September 2015, is sustained through a reconfiguration of the concept of asylum: providing places for resettlement whilst also extending barriers and controls on those who arrive or remain without permission. The control of asylum seekers is maintained within the wider immigration system.

The argument in favour of resettlement depends upon the acceptance that people who arrive illegally and claim asylum do not need protection as refugees. The plausibility of that

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<sup>180</sup> The scheme itself was called the ‘Syrian Vulnerable Persons Resettlement Programme’ and was initially set up under the Coalition government in January 2014. It was extended by David Cameron to include a far greater number. The Centre for Social Justice actually coined the phrase ‘extra vulnerable’. <http://www.centreforsocialjustice.org.uk/core/wp-content/uploads/2017/02/The-Syrian-Refugee-Crisis-Final-002.pdf> [last accessed 28.8.2017]

position is easier to appreciate if you accept the basic premise – that those who arrive or remain illegally in the UK and make asylum claims are not refugees but people determined to abuse immigration control. The fact of their method of entry or attempt to resist enforcement action is enough to justify that belief. These institutions have become so embedded over a period of time that state actors work with the internal logic and the actions which follow (March and Olsen, 2006). An alternative view is that these actors, as situated agents, use ‘local reasoning’ in the context of a particular set of beliefs (Bevir and Rhodes, 2010).

This chapter commenced with a review of the asylum framework established in the earlier part of the period covered in this study, from early 1990s until 2004. It then examined the move away from asylum policy within the UK itself to the policies developed in and towards Europe and its borders. The following section returns to the relationship between the political and public debate and the ongoing response to asylum seekers in the UK.

## 5.6 The end of the right to claim asylum?

This section turns attention to the UK asylum system, the impact of the media and public focus on asylum and the ways in which actors were not simply identifying the story but also beginning to create the story of asylum in the UK going forward. An element of that was that, despite the shared land border with Ireland, consideration of the implications of UK policy developments and political decision for Ireland were not part of the equation.

Alongside the pressures of illegal entry from countries such as France, policy makers have also been influenced by UK media coverage and its impact on public opinion.

*“The whole of the asylum debate is so negative. It permeates the public consciousness.... There was a survey a year or 18 months ago which looked at immigration and people were asked ‘do you think there is too much/too little’ and then a list of individuals e.g. qualified nurses and doctors, students and the last one was asylum seekers. When asked about individual category examples only one of which was negative and that was asylum seekers. This has come from 20 odd years of politicians and the press.” (UK3)*

Public opinion can change the demands upon policy makers contending with numerous pressures that leave very little time to even develop policy. Within that, they are required to come up with a response that meets political demands.

*“[T]he mood and the environment changes and when that does your policy approach changes, when Ministers want a policy response change and they may become more conservative, more risk averse. We saw that at the end of last year. Or they may feel like they have to do something really quite radical to be on the right side of the*

*argument. .... [T]he main frustration probably for me was that in a role that was supposed to be about policy development, I probably spent no more than 20% of my time doing policy development. The rest of the time was reacting to debates or litigation or something else. It was just dealing with daily flurry of pressures.... Time was devoted to dealing with the interest in the subject rather than developing any real policy solutions.” (UK6)*

In the absence of time for reflection and consultation, this policy maker suggests that policy is developed more or less chaotically. In such circumstances, external challenges, such as political debate or litigation, are seen as distractions rather than contributions to policy development. This environment includes the view that those who arrive spontaneously are by definition not in the greatest need.

*“I think that the UK government’s impetus for change is to try and move away from a situation where we are dealing with people who claim asylum just because they have managed to get to the UK.... this is about differentiating between asylum seekers who we bring in and resettle, so we bring them in from the camps around Syria, for example, or potentially we can start bringing them in from some of the countries in Africa that are really in trouble at the moment.” (UK10)*

Asylum seekers rarely have the opportunity to use legal channels to enter the UK, but illegal immigration undermines a system of managed migration. The use of illegal means of travel (for example in the back of a lorry) involves an inability on the part of a state to properly identify and monitor those who are arriving. In a crisis, particularly one where security is an issue, it is difficult to differentiate between those who require protection and those who pose a risk. Politicians are sensitive to criticism and public pressure and are more risk averse when they fear accusations of not being in control of the situation.

Security issues have increased since the initial frame for asylum policy was set. Regardless of the lack of evidence that asylum seekers have increased the security risk, it suits the assertion that their entry must be tightly controlled.

*“I think that greatest impetus to change at the moment is certainly what is happening to Syria and the way in which that links, for some people, to questions about security. You know that, there’s no doubt that there are some groups that are interested in breathing life into that particular connection.” (UK2)*

*“What I think will drive policy in this country or Brexit is the general shift across Europe to a more isolationist, more nationalistic political agenda, less solidarity, things thrown up around Turkey, the Italians starting to [use] detention, the Hungarians taking a much tougher line on all migrants entering ‘our territory unless we say so’, that seems to me to have a much bigger impact given where we are geographically. It’s difficult to get to the UK at the best of times.” (UK5)*



In addition, asylum seekers have become so submerged within the language of migration that they are not seen as a distinct group to whom the UK state has obligations under international conventions.

*“I feel that the government as a whole has a coherent approach to migration, by which I mean migration from start to finish, which is not just about keeping migrants out of the UK but it’s about trying to invest and protect in global systems that impact on migration flows.” (UK6)*

Part of that move away from a focus on asylum seekers led to a desire to have discussions on the UK’s agenda on EU migration but with little impact.

*“So I guess where [other EU member states] have gone through a lot of the pain when we had the extremely busy period in between summer 2015 and April 2016 where a lot of legislation was taken through, I suppose the frustration was, you know, we wanted to talk about other things, we had a renegotiation we wanted to talk about, we then had the referendum and we wanted to talk about our migration priorities, or what we saw as priorities but unfortunately ... the conversations were elsewhere.” (UK9)*

For that policy maker, asylum policy had been addressed and it was now time to address EU nationals and their rights to enter and remain in the UK. It is beyond the scope of this study, but the impact of a negative policy framework may well be the forerunner for the treatment of EU nationals.

For someone seeking to influence policy towards asylum seekers who reached the UK, the negative view of asylum applications carried over to the decision-making process. Decisions were seen as an integral and effective part of the process of keeping down the acceptance rate.

*“[O]ne of the key findings from [a report] was how the standard of proof in asylum claims ... that standard of proof should be low, the actual bar for that is constantly increasing so there’s a constant need for asylum caseworkers to heighten that level of proof. So, it is almost getting to criminal levels, going beyond reasonable doubt. You need to be able to prove that this happened to you whereas legally that’s not the position that they should take.” (UK8)*

Policy influencers found that, even at the initial stages of an asylum claim, the system was focused on return rather than supporting claims.

*“I also sent [a short film for women claiming asylum] to the Home Office. I had anticipated that they would want to show it at the Asylum Screening Unit, because that is where women are before they are interviewed and I had understood that there are screens there, so they would have the technology. And when I asked them, when I contacted the Asylum Screening Unit, they said those screens are used for the*

*voluntary return film. I was very shocked by that, I must admit.... the irony of showing a film about voluntary return when you could be showing a film about, for women, about their rights.” (UK4)*

The fact that the number of asylum seekers accepted as refugees was kept low fed the argument that the ‘real refugees’ are those who do not make the journey. However, refugees might also be presented as a pressure on already over-stretched public services.

*“I think that an influence on asylum policy could come indirectly through this focus on public services and access to public services. There is obviously a big debate ... about immigration checks and healthcare and other ways. Legislation has been brought in in the last several Immigration Acts which really generates a huge hostile environment, narrowing any of the sort of entitlements that people have and one of that’s around healthcare and increasing ... So that’s another trend which I think is then indirectly, even though that is about all immigration, it puts the pressure on the asylum system.” (UK8)*

Asylum policy in the UK is driven by the principles of keeping asylum seekers out of the UK and, if they arrive, to monitor and refuse refugee status to the majority. The logical extension of that, for those who are accepted as refugees after arrival, is to make a distinction between them and those that the UK selects for resettlement. It has led to the UK assisting those states on the borders of the EU with the processing of asylum claims and the maintenance of their borders. It has always been dominated by an inter-governmental approach to the EU (Geddes, 2003; Kassim, 2003). Beyond that, the policy has moved, within the wider migration framework, to working in and with countries beyond the EU.

With few exceptions, none of this has been with regard to the implications for Ireland or led to any significant revision of the UK’s relationship with Ireland. As will be seen in chapter 6, this is in contrast to the development of asylum policy in Ireland which, as a minimum, has had regard to UK policy and, at its height, has been built upon asylum policy in the UK. In contrast, the UK has entered into agreements with other states, particularly within the EU, to achieve its objectives. The focus has been on states in continental Europe. The relationship with the Republic of Ireland has been marginal.

*“With Ireland in terms of trying to ensure that, for their sakes as well as ours, they didn’t become a backdoor gateway. I’m mixing metaphors but a back door which would have then undermined the peace process and what has been talked about since Brexit, the idea of border controls in one form or another which we were very keen to avoid. So there were discussions and actually I think Ireland played it very well because they played it very low key. They didn’t make themselves a target.” (UK1)*

Given that the majority of asylum seekers were travelling from countries other than Ireland, arrivals from other EU states were more pressing for policy makers.

*“I’m far more concerned about our relationship with France and Belgium and the Netherlands potentially and it’s that direction that clandestine illegal migrants tend to come from, rather than Ireland.” (UK6)*

And when entry from the Republic of Ireland has been an issue, it has been in the context of the perceived benefits to the UK.

*“I think we have done quite a lot of work with the Irish already in terms of types of information, sharing information [about] borders, helping to ensure that our border systems are similar, so that we can have some confidence that the people coming into Ireland are not people who necessarily pose a threat to the UK.” (UK10)*

It is a view that resonated with the co-operation of Irish officials with UK border controls when Ireland became an independent state (Ryan, 2001). That is not to suggest that there is not a mutually beneficial relationship between the two states, more that the UK does not need to look to Ireland to achieve its primary objectives of preventing illegal entry. The UK-Ireland ‘opt-out’ from JHA was for the main purpose of controlling entry into the CTA (Costello, 2003). Border controls between the two states do exist, but they have been limited and targeted.<sup>181</sup>

According to the understanding and actions of policy makers, the UK fulfils its obligations towards refugees by assisting those the policy makers deem to be the most vulnerable. The ways in which they have made sense of the story is to assert that those who travel to the UK unaided are not in need of protection. It leads to a conclusion that, even when asylum seekers are accepted as refugees, the type and level of support they should receive should be less than those provided to resettled refugees.<sup>182</sup> The direction of policy is towards the ending of the right to claim asylum.

## 5.6 Conclusions

The chapter focused on actors engaged in asylum policy in the UK and how they understood the challenges that they faced, the actions that this led to and the implications of that for the future direction of asylum policy in the UK.

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<sup>181</sup> The Borders, Citizenship and Immigration Act 2009 introduced border controls between the Republic of Ireland and the UK (but not between the Republic and Northern Ireland). In an impact assessment dated 15 January 2009, when the Bill was going through parliament, one of the benefits of such controls was identified as “Reduction in imported asylum cases and abuse of immigration system.” [http://www.legislation.gov.uk/ukia/2009/20/pdfs/ukia\\_20090020\\_en.pdf](http://www.legislation.gov.uk/ukia/2009/20/pdfs/ukia_20090020_en.pdf) [last accessed 7.8.2017]. Ireland introduced similar controls at the same time.

<sup>182</sup> The Refugee Council undertook a survey in April and May 2017 of refugees who had been through the asylum process, finding high levels of destitution and homelessness [https://www.refugeecouncil.org.uk/assets/0004/1546/Refugees\\_without\\_refuge\\_September\\_2017.pdf](https://www.refugeecouncil.org.uk/assets/0004/1546/Refugees_without_refuge_September_2017.pdf) [last accessed 18.10.2017]

Policy makers consistently built their policies on the basis of asylum seekers being 'undeserving' *per se* and later embedded that in the idea of the 'deserving' refugee. The frame that was set for policy makers was one that put asylum seekers into a category of a wider immigration system in which they were seen as abusing that system by their unlawful entry and the presentation of fraudulent claims. Preventing and punishing abuse have been the consistent themes behind asylum policies. The story that had been created of the asylum seeker who arrives uninvited as the 'undeserving', then created the opportunity to craft a new story around the Syrian refugee 'crisis'. The large-displacement of Syrians from 2011 onwards, and their movement towards and across the EU in 2015, presented an opportunity to consolidate the idea that those arriving of their own volition were not the 'real refugees'. In other words, policy makers entertained sympathy for Syrian refugees outside of the EU but denied it to asylum seekers, whatever their nationality. Syrians arriving through Calais did not fit the image of the 'most vulnerable'. Resettlement effectively enabled the UK's obligations towards refugees to be subjected to the wider perspective that obligations under the Refugee Convention should also be part of 'managed migration'.

Policy makers understood that asylum seekers should be deterred and, in some cases, actively prevented from entering the UK and acted accordingly. It was evidence that the preferences of state actors had been developed within the political institutions (March and Olsen, 2006). For those asylum seekers who managed to arrive in the UK, policy makers put in place levels of control that covered almost every aspect of their lives. These controls were flexible and adaptable to changing conditions. When a legislative framework was put in place, it was amended every few years when it did not seem to be working. However, whilst agreement of a majority in parliament was needed to pass legislation, agreements were being reached and action taken that did not require parliamentary approval. What was learnt early on was that the effective control of entry was based on the identification of the methods and routes of entry and actions to block them. This required negotiations and agreements with other states and led to the joint action with France over the camp at Sangatte, the *Le Touquet* Agreement and the subsequent collaboration with the French over the 'Jungle' camp and arrivals from Calais. It was also extended to other EU states not least in the form of the EU-Turkey Agreement.

The EU was a means to achieve the surveillance and controls that were needed, not least over enforcement measures such as the Dublin and the Eurodac Regulations, but also in the Mediterranean and Aegean Seas. Generally, EU influence upon UK asylum policy has been minimal. The UK has retained its distinctiveness and independence. The exceptions were the necessary collaborations with other EU states or with an EU-wide policy to further UK objectives, such as the Dublin Regulation which determines which state is responsible for an asylum claim.

*“[W]e would only be negotiating hard if they are measures that we are likely to opt-into, which recently has not been so in the asylum area. It’s been Dublin and Eurodac that we have been very keen to carry on playing in.” (UK6)*

The policies put into place in the earlier period were reinforced when the number of asylum seekers began to rise again in 2015. Policy makers built upon the lessons learnt in the early 2000s, when arrivals from France were at a height, and developed new areas of co-operation that extended the UK’s interest in border controls to the borders of the EU. New forms of co-operation also included participation in discussions with countries that are sending or transit countries to reduce asylum seekers’ access to the EU.<sup>183</sup>

UK asylum policy has been extended from a primary focus on providing protection to asylum seekers who arrive illegally to the management of refugees through resettlement. Obligations under international conventions have therefore been subjected to the commitment to maintain strict immigration control and, in particular, to prevent illegal entry to the UK.

*“[Rewarding resettled refugees is] a classic case of political rhetoric then having to be given practical expression in policy terms. And it stumbles because it’s based on the idea of ‘good refugee/bad refugee’, ‘deserving/undeserving’. None of us would accept that those distinctions have any meaning or substance. So then trying to build policy on the back of it makes it even more difficult.” (UK5)*

The UK’s response to asylum seekers demonstrates the continuities that there have been in the institutions that have been created. It has led to a redefining of international obligations to suit national priorities with the result that the right to seek asylum has been undermined. Actors in the UK have worked within those institutions and not only accepted the framework, but have maintained and developed the institutions so that they can adapt to organise for the exclusion of asylum seekers not just from the UK, but from the borders of the EU itself.

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<sup>183</sup> Given that discussions are focused on the EU and its neighbouring states, the UK’s decision to withdraw from the EU may mean that UK policy makers are less able to influence the direction of any agreements under negotiation.

## CHAPTER 6

### IRELAND: INTERNATIONAL PROTECTION OR MARGINALISATION?

#### 6.1 Introduction

*“Ireland has also played an important role in moving the international debate on migration and displacement forward, notably through our role as co-facilitator in discussions at the United Nations.... The migrant crisis has challenged us all at a humanitarian and at a structural level. This has led to the most significant period of reform and response by Government in the past fifteen years.”*

*Tánaiste and Minister for Justice, Frances Fitzgerald TD, 1<sup>st</sup> February 2017<sup>184</sup>*

This chapter focuses on both state and non-state actors engaged in asylum policy in Ireland and how they understood the challenges that they faced and the actions that this led to. The interviews are analysed using the elements of sensemaking to look at the development and maintenance of reception facilities for asylum seekers in Ireland, the most dominant element of Irish asylum policy. In particular, it examines the response of those engaged in asylum policy to a crisis in 2014 in the reception system in the context of the government’s response to the ‘migrant crisis’ which came to public attention in the EU in 2015.

In September 2015, Ireland joined other EU states in agreeing to opt-in to a relocation and resettlement programme for asylum seekers and refugees. Ireland’s commitment was to take ‘4,000 persons in need of international protection’.<sup>185</sup> In the same month, the Irish government established the Irish Refugee Protection Programme to facilitate the arrival of Syrian asylum seekers and refugees. Twelve months later, Ireland co-facilitated, with Jordan, the UN Summit for Refugees and Migrants which took place in New York. In the period of one year, therefore, Ireland positioned itself on the international stage as a partner in the humanitarian crisis which had come to the fore in 2015. In the same year, a working group presented its recommendations to the Irish Government for the reform of

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<sup>184</sup> Speech to Irish Human Rights and Equality Commission’s Seminar on Ireland’s Response to the Global Refugee and Migration Crisis: From International Protection to National Integration <http://www.justice.ie/en/JELR/Pages/SP17000028> [last accessed 1.9.2017]

<sup>185</sup> Statement by the *Tánaiste* on the Migration Crisis Following an Emergency Meeting of Justice and Home Affairs Ministers, 22 September 2015 <http://www.justice.ie/en/JELR/Pages/PR15000483> [last accessed 1.9.2017]. 2900 were to be asylum seekers from Italy and Greece and 1100 refugees from outside of the EU.

the protection system and the *Oireachtas* passed the International Protection Act 2015, the first reform of asylum legislation in almost 20 years.<sup>186</sup>

The focus of this chapter is upon the interviews conducted with those engaged in asylum policy in Ireland. It examines their perception of the events in which they were engaged and how they understood and made sense of them and the action that they took as a result. It highlights the legacy of earlier policy decisions and the limitations on actors as a result of the institutional framework which they were operating within.

The structure of this chapter is as follows.

Section 2 reviews the early political response to asylum seekers arriving in Ireland, establishing the relationship between Irish asylum policy and developments in the EU and the UK and the frame for those engaged in the development of asylum policy.

Section 3 examines how the increase in the number of asylum seekers in the late 1990s and early 2000s influenced the thinking of policy makers leading to the establishment of the reception system in Ireland known as Direct Provision. Section 4 looks briefly at the events which followed on from that system, leading to a crisis in the summer of 2014 and how the Ministers framed the terms of reference of a Working Group to respond to it.

Section 5 examines in detail the Working Group on the Protection Process and the events which followed the publication of its report in June 2015. It focuses upon the identity of actors within the non-state organisations which engaged in the Working Group, their failed expectations and the actions which followed. It highlights the imbalance of power in a project limited to recommendations and where decisions and actions take place after the project is finished.

Section 6 concludes with an assessment of the role that actors played in the response of the Irish state to people seeking asylum and what that says about Ireland's asylum policy.

## 6.2 Creating the framework: see no evil, hear no evil

This section reviews the framework of asylum policy in Ireland, identifying the initial sources of policy and influences upon those actors engaged at an early stage in developing an asylum system. It highlights the necessity, when attempting to understand events that are novel, such as the unexpected rise in people seeking asylum, of determining action within the context of existing commitments and state traditions.

Ireland held the Presidency of the European Council in the first six months of 1990 when two key Conventions affecting the movement of people across internal EU borders were

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<sup>186</sup> A more complete account of Ireland's asylum system is set out in chapter 4, including the legislative and administrative frameworks

passed.<sup>187</sup> At that time, asylum seekers were not high on the political agenda in Ireland itself.<sup>188</sup> Prior to Ireland passing its first legislation in 1996, agreements between EU member states, including the UK, were setting a framework which would influence asylum policy in Ireland.

One of the agreements on asylum in the EU related to the concept of ‘manifestly unfounded’ asylum claims.<sup>189</sup> In proposing measures in the Refugee Bill 1995,<sup>190</sup> the Minister of State for Foreign Affairs, Joan Burton TD, referred to agreements reached between EU states:

*“Manifestly unfounded applications cause significant problems for many countries. They are a matter of concern to the UNHCR because they cause delay and difficulties with genuine applicants.... European Union Ministers also passed a resolution on the subject in 1992.<sup>191</sup> There is general agreement that manifestly unfounded applications act to the detriment of genuine applications and can have the effect of either slowing down the system enormously or, in some cases, almost making it unworkable.”<sup>192</sup>*

The early frame for policy makers in Ireland drew a distinction between ‘genuine’ refugees and those who presented unfounded claims. This distinction was reinforced in 1998 when the Minister for Justice, Equality and Law Reform, John O’Donoghue<sup>193</sup> TD, opposed a Private Member’s Bill to regularise the status of asylum seekers saying:

*“It is a source of puzzlement to many people that at a time when there are no conflicts taking place near our borders of the kind that usually generate refugee movement, when we have no colonial links with countries in which political turmoil is taking place and when the number of claims for refugee status is declining in other European states, the Irish rate shows a major increase.... It serves nobody's interests, least of all those of refugees, to pretend that everybody who applies for refugee status is a person who is fleeing persecution. The reality, in line with the international experience, is that*

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<sup>187</sup> The Dublin Convention and the Schengen Implementing Convention

<sup>188</sup> Asylum applications were below 500 per year before 1996.

<sup>189</sup> The concept of ‘manifestly unfounded’ is based upon an assumption that there are no obvious grounds for the person claiming asylum to be in need of international protection.

<sup>190</sup> Debate in the Justice Committee in the Oireachtas,,February 1996,

<sup>191</sup> Three Resolutions were passed in London when the UK held the Presidency of the Council: on manifestly unfounded claims, safe third countries and countries of origin.

<sup>192</sup> Select Committee on Legislation and Security Debate on section 12 of the Refugee Bill 1995, 7 February 1996

<sup>193</sup> Following his departure from politics, John O’Donoghue qualified as a barrister and subsequently joined a panel of lawyers at ORAC responsible for interviewing asylum seekers and making recommendations on their claims for international protection. See <http://www.independent.ie/irish-news/politics/exjustice-minister-behind-direct-provision-system-to-interview-refugees-31544033.html> [last accessed 27.3.2017]



*at most about 10 per cent of applicants will, following examination of their claims, be found to be refugees.”<sup>194</sup>*

The view of the ‘genuine’ and the ‘bogus’ asylum seekers coming from the government was particularly based upon the experience of other countries. This was the period in which asylum policy in Ireland began to take on a greater significance as one policy maker acknowledged:

*“Comprehensive development of asylum policy really only started incrementally about 1999 and has continued since then. There have been some rational approaches from abroad, some planning.” (IR1)*

By 1999, the number of asylum seekers arriving in Ireland had risen more than six-fold from 1996<sup>195</sup> and that required action to respond to their immediate physical needs, presenting a real challenge to policy makers. The dominant feature of the crisis was understood to be the need for accommodation. That was a set of events from which the outcome was uncertain (Maitlis and Christianson, 2014) and the cue acted as an impetus for action (Weick, 1995).

*“We went from a situation in Ireland where people applying for asylum went from less than 100 a year. Now I can’t say when that was but certainly it would have been quite small, to a figure of around 10,000.... I suppose, to be honest, I like everyone else fell into the focus of, you know, getting accommodation, fix people up, because you know, there is no point when you have about 10,000 people a year coming in, sitting at the harbour spouting philosophy. They want a bed and they want accommodation and they become the issues.” (IR2)*

In theory at least, the decision of state actors that the priority was a need for accommodation should have been set within Ireland’s international obligations as a signatory to the Refugee Convention and as an EU member state. However, those commitments had to be balanced with national priorities of which ‘managing the numbers’ was central, minimising commitment to international obligations as will be seen below with reference to the Reception Conditions Directive.

*“There were two influences: assuring that we adhered to international legal obligations, from both a domestic and international perspective; and numbers. Numbers were monitored particularly from 2000 until 2004 when numbers were*

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<sup>194</sup> Private Members’ Bill – Asylum Seekers (Regularisation of Status) (No. 2) Bill 1998, Second Stage, Dáil Éireann Debate, Vol. 488 No. 4 10 March 1998

<sup>195</sup> The number of new asylum applications between 1996 and 2004 are set in Table 4.4 in chapter 4

huge.<sup>196</sup> *Apart from adherence to international obligations, the aim was to ensure that policies were developed to manage the numbers.*" (IR1)

Framing the situation around numbers has dominated the action that has been taken by policy makers from the outset, not only in attempting to prevent more asylum seekers arriving but also to control their numbers once they had arrived.

*"With numbers, it wasn't simply a question about those coming in but also ensuring that the relevant agencies were resourced in their statutory roles, ORAC and RAT, and reducing the backlog. The main role was to keep the backlog down, it was 10,000 in 2000, and the timetable for processing had to be reduced. There was a proactive strategy to do the above, a framework."* (IR1)

Policy makers had particular regard to policy developments in the UK.

*"I was reading all the literature, all the international research, best practice, House of Commons Select Committees, Public Accounts Committee. They had very good reports. Comptroller and Auditor General. I would always read. I would understand the challenging environment and try to understand.... I had to do international research and get the variety of the best options.... The key influence was the UK because of the Common Travel Area and how it was responding to challenges at the time: increase in numbers led to substantial legislation. In 2000 there were substantial initiatives, 'reform' of their policies"* [IR1]

Alongside the UK, there was a consciousness of the development of an EU asylum system.

*"There was massive dovetailing [with CEAS]. There was unanimity in the Council for the first phase. All key directives were going through with the exception of Reception.... All of the domestic changes in the Immigration Act 2003 which amended the Refugee Act 1996, all of the key issues in that were also contained in the Asylum Procedures Directive in particular.<sup>197</sup> So working groups had to ensure parallelism between EU law and national law"* (IR1)

The dovetailing or parallelism with CEAS was not as evident to a policy influencer who framed the issue in a different way, suggesting that, despite its pro-EU response in other areas (Laffan and O'Mahony, 2008), it was not amenable to accommodating the EU when it came to asylum.

*"What they actually did in practice was they put into legislation a lot of the more harsher and more negative aspects, elements of the directives without putting in the*

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<sup>196</sup> In 2000, the number of new applications was 10938. After reaching a peak of 11634 in 2002, new applications has reduced to 4766 in 2004 and therefore returned to the numbers seeking asylum in 1998

<sup>197</sup> The Immigration Act 2003 introduced changes which included exclusion from refugee status, fingerprinting, actions which were considered to undermine credibility and the prioritising of asylum applications ('fast-tracking').

*counter-balancing measures within the directives. So they kind of cherry-picked basically”<sup>198</sup> (IR9)*

Those engaged in the development of asylum policy in Ireland extracted cues within the framework which was set for them by the politicians in power at the time. It led to policy makers proposing options for consideration by those with political oversight which they had deduced were in keeping with the established parameters (Furlong and Marsh, 2010). It put Ireland on a path that it has not diverted from since, despite being one of the wealthiest EU states for a period of more than ten years.<sup>199</sup>

*“You know, I suppose one thing that you learn going through, especially going through a place like the Department of Justice, is that if you start on the wrong foot, then you are going to stay there. And it’s very, very difficult, it’s very difficult to persuade people sometimes, you know, that this is not the right way to do it and that there should be a different way. It just doesn’t get heard.” (IR2)*

The initial identification of asylum seekers as a cause for concern did not come from Ireland’s own experience of asylum seekers but from the experience of other EU member states, not least of which was the UK. It was in a negative framework from the outset, built upon an assumption that the majority of asylum seekers were not in fact refugees. The influence of policy developments in the UK was particularly evident in the decisions that were taken when it came to establishing a reception system for Ireland.

### 6.3 Establishing a reception system in Ireland

This section sets out what cues policy makers in Ireland took from events in the UK and what impact that had on the decision to establish a reception system<sup>200</sup> for asylum seekers under the auspices of the Department of Justice.

In the early stages of development of asylum policy in Ireland, policy makers ruled out particular courses of action. According to one policy maker, there were certain values that were important and this ruled out detention.

*“We didn’t want camps, we didn’t want that sort of thing and we didn’t have a policy, we always shunned a policy of a kind of incarceration, you know what I mean, prior to asylum just put them in some place and lock them up, that was never the policy, that*

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<sup>198</sup> The website of the Irish Naturalisation and Immigration Service, part of the Department of Justice, contains the following statement as the only references under ‘Asylum policy’, all of which are enforcement measures: “A summary list of policies concerned with the delivery of asylum services in Ireland: Deportation Orders, Dublin II Regulation Orders, Removal Orders and Voluntary Returns. Detention” [last accessed 23.3.2017]

<sup>199</sup> The ‘Celtic Tiger’ years from mid-1990s until 2008

<sup>200</sup> The term ‘reception system’ is a misnomer given the impact that it has had on asylum seekers, but it is used in this thesis as a common term for the element of accommodation and support for those claiming asylum

*just wasn't on in Ireland either at an official level or a political level. That was seen always as 'no, we can't do that'. So that's how we got into the business of hotels and that's how the policy of dispersal arose." (IR2)*

A decision was made to opt for collective living with full costs being borne by the state and with little autonomy for asylum seekers themselves. Initial responsibility for accommodating asylum seekers fell to the agencies dealing with the homeless but that was transferred to the Department of Justice which established a form of institutionalised living when the numbers rose significantly.

One explanation for the choice of a form of institutionalisation was past Irish state practice, that of the marginalisation of groups whose identity or behaviour was considered offensive. That practice was later directed against asylum seekers (Ferriter, 2004).

*"Ireland's almost instinctive reaction to dealing with problem populations has been institutionalisation.... It's how we did, in effect, the state or private elements who had massive state support, how they dealt with problematic populations always." (IR4)*

That actor's view is based upon previous policy decisions towards sectors of the Irish population but also the public response to asylum seekers. The systems and structures for social interactions with 'problematic communities' were already in place.

*"We had a debate on the Magdalen Laundries, a heartfelt apology and I think a very genuine apology from the Taoiseach. Then when you say, we are not saying that Direct Provision is the Magdalen Laundries, however similar institutionalised forces are at work here yet not been able to draw on the equivalent. With the Magdalen Laundries and the Mother and Baby Homes, these are fallen women. With Direct Provision, these people are coming over here, wouldn't have it as sweet in their own countries, feck 'em." (IR4)*

In reaching decisions about what course of action to follow, policy makers had to take into account public perception of asylum seekers, illustrating the competing pressures in the crisis and the social element of sensemaking (Weick, 1995) and the context in which policy makers work (Weber and Glynn, 2006).

*"[A]s time went by what became quite a substantial challenge, it was local attitudes, the attitudes of the population.... So through all that then we got into this whole mess of Direct Provision, because there would have been resistance to the idea that people should, the population would have the view that these people are getting everything." (IR2)*

Policy makers were faced with an immediate need for accommodation but resistance to the idea that asylum seekers were being favoured above or treated equal to Irish citizens. The

perception of favouritism was resisted both by some of the Irish population and by those officials responsible for providing the resources from the state.

*“If you are a policy maker and you go to the Department of Finance and you are looking for money, well they say why haven’t you been here about people we have here in this town who are hungry, and genuinely hungry, and who are not all on drugs and who are elderly, and who are definitely not on drugs or drink, what have you been doing about that? And the answer is sometimes precious little, you know. And that was always a difficult question to deal with and if you are dealing with Ministers and policy makers there is this kind of attitude, ‘look after our own first’.” (IR2)*

The number of people claiming asylum was a crisis which the services available could not respond to adequately within the existing system. The options available to policy makers were determined by the availability of resources and the hostility to the idea of public money being used to support asylum seekers. Account had to be taken of the competing views and demands of colleagues responsible for public finances and of the public. The fact that asylum seekers were not themselves receiving any significant amount of public money did not counter the belief of some that they were being supported disproportionately. It was enough that it appeared to be the case for policy makers to be sensitive to the possibility of political backlash. There were steps forwards and backwards as policy makers responded, for example, to local opposition.<sup>201</sup>

The motivation for the decision to set up the system of Direct Provision was influenced by what was both being said and done in the UK.

*“Departmental officials kept coming on to how the United Kingdom had dealt with the issue of welfare rights for asylum seekers. So the creation of Direct Provision was in fact based on a UK pilot study or a pilot Direct Provision with bed and board and limited financial support which ended in about 2002 in the United Kingdom but just continued and was seen as a core part of the policy.” (IR4)*

In the view of this policy influencer, the policy decisions were impacted by a fear that Ireland would be a magnet for asylum seekers if it did not establish a system which took asylum seekers out of the social welfare net.<sup>202</sup> Policy makers were being prospective about the possible implications of action or inaction. The need for accommodation – a roof over

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<sup>201</sup> The debate before the Public Accounts Committee of the Oireachtas in December 2003 illustrates the various obstacles that the Department of Justice was dealing with over a period of time when attempting to establish accommodation centres for asylum seekers. It was a debate on the [2002 Annual Report of the Comptroller and Auditor General and Appropriation Accounts - Chapter 4.1 Provision of Accommodation for Asylum Seekers](#)

<sup>202</sup> The National Asylum Support Service (NASS) in the Home Office became operational in April 2000. In the same month, the Department of Justice’s Directorate for Asylum Support Services (DASS), established in November 1999, set up the Direct Provision system. DASS was subsequently replaced by the Reception and Integration Agency

the head of asylum seekers – required attention. However the particular form that the action took came from a motivation to limit the ‘attraction’ of Ireland for asylum seekers.

The reference to the practice in the UK was an early indication of the awareness of the direction of the UK’s asylum policy and the implications for Ireland. One of the results of developments in the UK was the decision that, despite the lack of expertise in dealing with social welfare and housing, the Department of Justice would have responsibility for accommodating asylum seekers, as the Secretary General outlined to the Public Accounts Committee in December 2003<sup>203</sup>:

*“The Department of Justice, Equality and Law Reform was of the view that other Departments had more expertise in the area of providing accommodation, welfare supports and health care etc., because it did not have a background of working in these areas.... the Government decided that the Department of Justice, Equality and Law Reform should take the lead role. The justice ministries in other jurisdictions had the same experience. For example, the Home Office in the UK was given the task, and the same has happened in other EU member states.”*

The UK had already taken the decision to limit the payment of social welfare to asylum seekers. The impact of these developments was noted in the only comparative study to date on the rights of asylum seekers in both the UK and Ireland (Thornton, 2013):

*“With increasing ministerial unease around the numbers of asylum seekers and in response to a white paper on immigration policy in the UK, John O’ Donoghue T.D., Minister for Justice and Equality, felt that the proposals contained in the UK’s white paper on immigration were of ‘particular significance’.<sup>204</sup> With proposed changes to the UK system of asylum support, fears were expressed of increased asylum flows towards Ireland. Minister O’ Donoghue said that the 80,000 asylum seekers in the UK would be ‘well aware’ of the more generous welfare entitlements in Ireland once the UK moved to a non-cash based reception system.<sup>205</sup> The Minister noted that when the UK had changed its welfare policies towards asylum seekers in 1996, this had resulted in a decrease in the number of refugee claimants in the UK and a large increase in asylee numbers in Ireland.<sup>206</sup> Minister O’Donoghue stated that “every immigration service in Europe” was telling him that Ireland’s welfare provision was acting as a magnet in drawing asylum seekers.<sup>207</sup>”*

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<sup>203</sup> 2002 Annual Report of the Comptroller and Auditor General and Appropriation Accounts - Chapter 4.1 Provision of Accommodation for Asylum Seekers

<sup>204</sup> Press and Information Office, DJELR, “Direct Provisions of support for asylum seekers”, 6 September 1998.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> Ministerial letter, J. O’Donoghue, DJELR to D. Ahern, DSCFA, 07 August 1998, on the welfare system and asylum seekers.

The political imperative to reduce the alleged attractiveness of Ireland to asylum seekers still needed to meet the need for accommodation. The need was met by the availability of a type of accommodation, namely hotels, and, when faced with local resistance, hotels in remote places.

*“There were people, spaces in other parts of the country, underused hotels.... In fact some towns that were on the radar we never got into because the resistance was too .., we couldn’t put people in there. And that then meant that some of the accommodation we would have sourced wouldn’t have been ideal, it would have been off centre which wasn’t ideal for the people concerned given that they were coming from a totally different culture themselves. ” (IR2)*

The decision to provide full board and accommodation went hand in hand with the determined view that asylum seekers would not, under any circumstances, be allowed to work.<sup>208</sup> It was based upon the view that granting the right to work increased the number of asylum seekers in Ireland.

*“Numbers hugely influenced by not opting in to the Reception directive. The work issue was the issue. There was evidence from 1999 when the government granted certain applicants employment, there were substantial numbers. There was a definite link between giving access to work and asylum flows.” (IR1)*

An increase in the number of asylum seekers arriving in Ireland coincided with the introduction of a right to work. The fact that there were increases in other EU states which already had the right to work did not affect the conclusion that it was the right to work which led to the increase in Ireland. It was sufficient that the explanation for the increase was plausible, not that it was accurate. In the context of the right to work, the situation of the UK was again influential because of the existence of the CTA and an open border between Northern Ireland and the Republic (Quinn, 2009).

*“When the restriction on the right to work was introduced, the United Kingdom had a more severe restriction on the right to work in around the Asylum and Immigration Act 1999, so they didn’t want to be seen, in their words, as an easy target, for people to say ‘oh we may have to go to Ireland because of the possibility to work’ whereas in the UK they had closed off that possibility for a short enough period of time.” (IR4)*

By contrast, given that Ireland had not opted-in to the Reception Conditions Directive, which included a right to work, the EU was impotent in the face of Ireland’s refusal to grant

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<sup>208</sup> On 30 May 2017, the Supreme Court of Ireland ruled that having an outright prohibition on asylum seekers’ right to work was unconstitutional, giving the government six months to respond and determine how to comply with the constitutional right to seek employment. *NHV v Minister for Justice and Equality and Ors.* [2017] IESC 35. The government subsequently proposed to opt into the Reception Conditions Directive 2013 which provides for the right to work after nine months but allows conditions to be put on the type of work that an asylum seeker can take

the right to work and the nature of the reception system in place.<sup>209</sup> Ireland demonstrated that it could step aside from its more federally-inclined position towards the EU, possibly out of practical necessity given its other priorities (Barrett et al, 2008).

*“We had addressed a letter to Ireland, I can’t remember now, it might have been a year or year and a half ago, raising some concerns about the Direct Provision system .... we addressed it because we wanted the Irish government to be aware that we were watching them and were aware of the Irish issues. But knowing at the same time that we didn’t have the tools to operate legally against them because Ireland hasn’t opted in to the Reception Procedures Directive, so we would be on shaky ground to take a legal case against Ireland.” (EU1)*

The particular type of reception system that was chosen by the state came firstly from a standpoint that the detention of asylum seekers was not acceptable and therefore that an alternative form of ‘reception’ had to be found. However, it was also based upon a view that the majority of asylum seekers were not in need of international protection. Decisions and actions were influenced both by developments in the UK and the response of some Irish citizens to the perceived benefits that asylum seekers were receiving. The challenges which policy makers were dealing with had to be assessed within the context of competing and sometimes contradictory demands from both inside and outside of the state. Having determined what was not acceptable, decisions were made based upon state traditions. The action that this led to – the establishment of Direct Provision – followed a pattern of accommodation for particular groups of Irish citizens away from communities. The action satisfied the political imperative that Ireland should not act in a way that would seem to attract asylum seekers.

Direct Provision partly arose from a decision of the UK to take asylum seekers out of the mainstream social welfare system which Ireland followed. It was also partly due to a decision to maintain a prohibition on employment which was sustained even when new legislation was passed.<sup>210</sup> By contrast, there was no evidence that Ireland’s membership of the EU influenced any decision or action in relation to the accommodation and support of asylum seekers, not least because of the political decision not to opt-in to the Reception Conditions Directive.

In reflecting upon the reception system, one actor involved in attempting to influence policy observed:

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<sup>209</sup> The UK had opted-in to the original RCD and had a limited right to work for asylum seekers

<sup>210</sup> The International Protection Act 2015, the first comprehensive review of refugee law in Ireland since the Refugee Act 1996, maintained the complete prohibition on the right to work when it was passed in December 2015.



*“I think the way the system is constructed, there is nothing here about integration whatsoever. It’s about isolation.”* <sup>211</sup>(IR10)

Despite the reduction in the number of asylum seekers arriving in Ireland, the number remaining in the state remained high.<sup>212</sup> It was an unintended consequence and at best and led to a crisis that is outlined below.

#### 6.4 The making of a crisis

The number of asylum seekers remaining in the state remained disproportionately high compared to the drop in numbers arriving. This section examines how the asylum system that had been established led to a crisis in 2014 to which the politicians were forced to respond.

*“There are an estimated 7,937<sup>213</sup> people in the system, of whom 55% (4,350) have been in the system for over five years. 21% of the total are children”*<sup>214</sup>

Part of the reason for asylum seekers being in Direct Provision for so long was due to a two-tiered protection system for dealing with protection claims in Ireland.<sup>215</sup> Rather than passing legislation to combine consideration of the two protection applications in one procedure – for refugee status and Subsidiary Protection - Ireland chose to separate them.<sup>216</sup> In addition, the number of applications that were refused at the first stage and even on appeal, led some to either challenge those decisions in the High Court or make another application. Whilst applications were considered, they were accommodated in the system of Direct Provision if they had no other means of support.<sup>217</sup> Delays were therefore

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<sup>211</sup> There was an opportunity to include asylum seekers when an inter-departmental review of integration strategy was undertaken overseen by the Department of Justice. In the strategy that was published, asylum seekers were again omitted. ‘The Migrant Integration Strategy: a blueprint for the future’ was published by the Department of Justice and Equality in February 2017

<sup>212</sup> In 2013, only 946 new asylum applications were submitted. By contrast, there were 5047 asylum seekers (including family members) resident in Direct Provision accommodation.

<sup>213</sup> Not all asylum seekers lived in Direct Provision hence the number that is higher than those in the centres

<sup>214</sup> Working Group to Report to Government on Improvements to the Protection Process, Including Direct Provision and Supports to Asylum Seekers, Final Report, June 2015, paragraph 3.7

<sup>215</sup> This followed the introduction of an EU status known as Subsidiary Protection in October 2006. The split system was criticised by a High Court Judge in *MM v. DJELR and AG* [2013] IEHC 9. A single application and appeals procedure was brought into force on 1 January 2017 on the enactment of the International Protection Act 2015. At the outset, the new decision making body within the Department of Justice, the International Protection Office, had a backlog of 3000 applications to process and consider.

<sup>216</sup> Subsidiary Protection, an EU status, was first introduced in October 2006. It remained a separate application in Ireland until implementation of the International Protection Act 2015 which came into force in January 2017.

<sup>217</sup> Even when they at the end of that process, some remained in the accommodation centres either because they could not obtain separate accommodation after getting permission to stay or no enforcement action was taken against them

built into the system, not uncommon in immigration systems. The high refusal rate<sup>218</sup> led those attempting to influence policy to be very critical of Ireland's record.

*"Ireland's acceptance rate averages about 3% and how that is one of the lowest in Europe. So that in itself is contradictory to this common system and also indicative of the fact that there is such reticence to accept the Convention, to apply the Convention."* (IR6)

*"But there was always that policy standpoint, we are here to deter and there was never that balance of protection and deterrence. It was always a misnomer to call it a protection policy."* (IR5)

In the summer of 2014, there was unprecedented attention on the failures of the Irish asylum system, in the form of a week-long exposé in The Irish Times in August 2014<sup>219</sup>, a series of reports on RTÉ Radio 1<sup>220</sup>, an ongoing challenge in the High Court to the system of Direct Provision<sup>221</sup> and spontaneous protests at six Direct Provision centres across the country over August and September 2014.<sup>222</sup> The importance placed on those events varied amongst those interviewed.

*"[The] Irish Times Lives in Limbo piece was in essence the reason for the setting up of the Working Group on the protection system and Direct Provision."* (IR4)

*"I think it reached a tipping point and I do think that summer of discontent did, you know, I think it brought a focus at a time and... I don't think that people were messing that time. In my time, I have seen people over time get angrier and angrier and it wasn't like anything we had been on the ground all the time. I'd got locked in a room where people were rowing and shouting. They stopped us in an inter-agency meeting. They had reached the point."* (IR7)

*"It was only once that public perception began to change, once there was that summer of discontent, that something then needed to be done."* (IR5)

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<sup>218</sup> In 2010, only 1.1% of applications decided that year were accepted by ORAC. In 2016, 8.5% of applications decided by ORAC were accepted. Statistics are taken from the ORAC website.

<sup>219</sup> Lives in Limbo: Life inside Ireland's direct provision system for asylum seekers, August 2014  
<http://www.irishtimes.com/news/lives-in-limbo>

<sup>220</sup> The series was produced by Brian O'Connell over a number of weeks on Today with Sean O'Rourke  
<http://www.rte.ie/radio1/today-with-sean-o-rourke/programmes/2014/0728/633522-today-with-sean-o-rourke-monday-28-july-2014/?clipid=1639112>

<sup>221</sup> CA and TA (a minor) v. Minister for Justice and Equality and ors. [2014] IEHC 532  
<http://www.courts.ie/Judgments.nsf/0/9816BD5E4D1003F780257DB00040BA1D> Judgment was handed down on 14<sup>th</sup> November 2014, after the Working Group commenced its work, but the case was being argued before the court at the time that the decision was taken to organise the Working Group

<sup>222</sup> The protests took place in different locations across the state but, for example, included one at a centre in Waterford <http://www.irishtimes.com/news/social-affairs/160-asylum-seekers-protest-at-waterford-direct-provision-centre-1.1955913>

It led to a decision by the Ministers to establish a Working Group to look at the system and propose recommendations for reform.<sup>223</sup> The Working Group first met in November 2014 and completed its work with the publication of a report containing its recommendations to government on 30 June 2015. The framework for the focus of the Working Group was set by the Ministers and restricted the Working Group to making recommendations to government.<sup>224</sup> The Working Group, according to its Chair, a former High Court judge, did not apparently need to examine the evidence or seek an explanation for the excessive length of time that asylum seekers were waiting for a final outcome on their application to remain in Ireland.

*“The inability of the State’s determination procedures to deliver final decisions in a timely manner has resulted in many applicants continuing to live in Direct Provision centres for periods far longer than originally intended and experiencing the problems that inevitably arise in such circumstances. It was evident to the Working Group from the outset that the “length of time” issue was the single most important issue to be addressed.”<sup>225</sup>*

The Chair’s view was that there was no deliberate intent to keep asylum seekers in limbo. It was, in his view, simply an inadvertent result of the system. In effect, the Chair of the Working Group, a key person in the process, constructed a view of the crisis which then limited the possible outcomes of any change in policy that the Working Group might propose. Two participants who were attempting to influence policy had a different perspective of underlying problems in the asylum system.

*“[O]ur protection policy was not working. It was completely dysfunctional.... There was the fact that it was a sequential system, the fact that we had a really high refusal rate in Ireland on applications, it was the fact the applicants felt that they weren’t believed and I think also when you are interacting with officials in the Department you can see that the culture is quite alarming and very, very negative.” (IR9)*

*“[The culture of disbelief] was never something that you could actually tackle head on because it was just part of it. And if you tried to name it, it was pooh poohed, no, no, absolutely not, because they couldn’t be seen to be in agreement about it.” (IR5)*

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<sup>223</sup> The author was herself a member of the Working Group on behalf of the Irish Refugee Council (IRC) from November 2014 until her resignation in March 2015 when the IRC decided to withdraw its participation from the Working Group on the grounds that it did not believe that the Government was serious about reform of the asylum process. The IRC press statement is contained here:

<https://www.irishrefugeecouncil.ie/news/irish-refugee-council-resigns-from-government-working-group-to-reform-the-protection-process/3890>

<sup>224</sup> Although consultative forums existed in the UK with participation from representatives of NGOs, there was no equivalent working group in the UK which could have led to a comparative analysis between the two states

<sup>225</sup> From the Foreword to the Working Group report by its Chairperson, Dr. Bryan McMahon

Despite holding these competing views, members of the Working Group worked together to produce recommendations with which they all concurred. The reasons for that and the results are examined in more detail below.

## 6.5 The Working Group on the Protection Process

This section examines how members of the Working Group understood what they were seeking to achieve whilst they participated in it and how they responded to it after the report had been submitted to the Government. It identifies how actors attempted to inform, influence, maintain, protect or defend the Working Group and the violated expectations that followed.

### 6.5.1 The scope of the review

The remit of the Working Group, despite the reference to the ‘protection process’, was on the Direct Provision system. It had the potential to lead to some changes in asylum policy, albeit within terms of reference that limited its scope. The terms of reference were as follows:

*“Having regard to the rights accorded to refugees under the 1951 Geneva Convention Relating to the Status of Refugees and bearing in mind the Government’s commitment to legislate to reduce the waiting period for protection applicants through the introduction of a single application procedure, to recommend to the Government what improvements should be made to the State’s existing Direct Provision and protection process and to the various supports provided for protection applicants; and specifically to indicate what actions could be taken in the short and longer term which are directed towards:*

- 1. improving existing arrangements in the processing of protection applications;*
- 2. showing greater respect for the dignity of persons in the system and improving their quality of life by enhancing the support and services currently available;*

*ensuring at the same time that, in light of recognised budgetary realities, the overall cost of the protection system to the taxpayer is reduced or remains within or close to current levels and that the existing border controls and immigration procedures are not compromised.”*

It brought together civil servants, as representatives of their departments, with individuals and representatives of organisations engaged in attempting to influence asylum policy. It was referred to in passing by one of the state actors interviewed for this study.

*“[T]here has been no published research by the Department of Justice except the Working Group report. This was the first assessment from all angles.” (IR1)*

Despite the statement about ‘assessment from all angles’, the remit of the Working Group was primarily limited to the Direct Provision system. It was, nevertheless, a unique exercise in Ireland in attempting a review of a government system which was still in operation. There are, therefore, questions about why, given this opportunity, the system of Direct Provision remained largely unchanged, even after the Department of Justice had allegedly implemented a large number of its 173 recommendations.<sup>226</sup> The political will for change was not evident despite the pressure for change in 2014.

The Working Group provided an opportunity to examine the restrictions imposed on actors within a defined project and the impact that this has on their ability to respond on its completion.

The construction of identity is considered essential as it shapes how events are interpreted and the action that follows (Weick et al, 2005). It is therefore examined below, before looking in more detail at the Working Group and its aftermath.

#### 6.5.2 Constructing identity

Non-state actors on the Working Group outlined their own approach to working with state representatives.

*“[O]n the policy side we would certainly try and engage with the authorities to understand how things are working, to try and identify gaps, to try to bring things to their attention, to try to work constructively with people in the sector to try to identify solutions to the problems, things like that.” (IR3)*

*“We had a very, kind of, strategic decision quite early on which was to try and collaborate with the state as much as we could and to build those relationships as much as we could.” (IR5)*

Words such as ‘engage with the authorities’, ‘work constructively’ and ‘collaborate’ defined the approach of the organisations themselves and acted to distinguish them from others whom they considered adopted a different approach. A collaborative approach would impact on the nature of their participation with state actors in the Working Group, possibly

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<sup>226</sup> By the end of the period covered by this study, June 2017, the Department of Justice had not concluded its final consideration of the recommendations of the Working Group. Their final report (of three) was published in July 2017 [http://www.justice.ie/en/JELR/3rd\\_WG\\_Progress\\_Report\\_-\\_July\\_2017.pdf/Files/3rd\\_WG\\_Progress\\_Report\\_-\\_July\\_2017.pdf](http://www.justice.ie/en/JELR/3rd_WG_Progress_Report_-_July_2017.pdf/Files/3rd_WG_Progress_Report_-_July_2017.pdf). One of the NGO members of the Working Group who set up ‘Time to Act’ (see p. 134) published an analysis of the implementation of the recommendations in December 2017 in which they concluded that, out of 173 recommendations in the Working Group report, only 12% could be verified as having been implemented <http://www.nascireland.org/wp-content/uploads/2017/12/Nasc-Working-Group-Report-Dec-2017.pdf> [last accessed 31 July 2018]. A comment by an interviewee on an interim report of the Department of Justice on the Working Group recommendations can be found on page 137.

involving a voluntary constraint on expectations given that other participants might not share their values.

*“I suppose our model of work ... starts with the lived experience....So you are hoping that the voice of people who you are working with and for, informs your work” (IR7)*

The ‘lived experience’ of asylum seekers would also act as a frame of meaning, informing their priorities and the significance which they would attach to developments as they occur.

*“When you talk about people on the margins, you talk about specific people with names and faces. So I always try to have that. If we were talking about Deportation Orders, it was a specific person, it wasn’t a made up amalgam. It was someone in [name of centre] who I was working with, whom I knew, I knew their kids. So that was the sort of person that I had in mind often when I was going into bat. That’s not something, I can’t go back and say to that person that I haven’t represented their interests to the best of my ability” (IR7)*

The context for some of the non-state actor participants were the international conventions and the European directives which informed their work and their aims for asylum policy in Ireland.

*“[T]he focus was ... very much around the UN Conventions ... and the international instruments that really guided what we really wanted as a response ... as well as European asylum policy, things like the Reception Conditions Directive, things like that. So we very much based our standpoint on those, how those things were guiding us.” (IR5)*

*“[The] wider external, I suppose in the EU context, in a sense it’s where we would look to.... And I suppose all the thinking goes as NGOs working in the area is kind of like an advocacy tool, just saying you need to sign up the Receptions Directive, you need to sign up the Qualification Directive, the recasts.” (IR9)*

Having a clear understanding of their approach provided the framework for expectations of participation in the Working Group. It also led to violated expectations (Maitlis and Christianson, 2014) and to action.

### 6.5.3 Simulated equality

The Working Group provided an opportunity to reflect on the ways in which individuals, coming together with a clearly defined set of goals, attempted to form a collective vision of what asylum policy could become in Ireland. The fact that it was only non-state actors interviewed for this study who spoke about it is perhaps indicative of the significance for them in contrast to the state actors. However, it also demonstrated the limitations of agreement given the wider political framework and the fact that people around the table represented very different, and at times deeply entrenched, views of asylum seekers.

The expectation of non-state actors on the Working Group were that the collective decision making which the Working Group had engaged in would lead to action. With a few exceptions, that proved not to be the case. There was a sudden realisation that 'the story' they had been led to believe or allowed themselves to create, was without substance. In addition, that if they wanted their participation to have meaning, then they would need to create meaning out of their violated expectations.

*"I went into that process with the hope that it wasn't [a vehicle to take the heat out of the situation] and I think if I hadn't gone in with that hope, I wouldn't have been able to stay in that process. But, I think the moment I sat down at the launch and the Minister sat down and said "food for thought" ... that's when the penny dropped and I knew that, okay she has just manoeuvred the situation out of public view and just invalidated all of the work that we had done and nothing is going to change" (IR5)*

*"Suddenly, even the Minister who was supportive, you could actually even see it on the day that the report was launched, completely different.... So suddenly this is "food for thought", do you know what I mean.... So where there had been: this is unacceptable; this is something we can't stand over; we've put a group together; there was unanimity; it was signed off, somehow in a couple of months everything changed" (IR7)*

The environment of the Working Group gave an apparent reassurance that it was a partnership in which all voices carried equal weight and, more importantly, that agreement on the recommendations meant that they would be acted upon. The Working Group report was the start of the government's consideration of the proposals and decisions as to what action, if any, would follow. The recommendations in the report were not a 'programme for government' and non-state actors were no longer around the table to participate in decisions about implementation.<sup>227</sup> That task rested principally with the Department of Justice.

It was the same sense of identity that non-state actors held which was also the cue for violated expectations for them and their organisations. For some this was the motivation for action in an attempt to salvage key recommendations that they had fought for and which would therefore justify their participation in the Working Group.

*"I felt that we had got an agreement [on the Working Group] and I felt after all the work we had put in, it was probably the first time that I took it a bit personally.... And more, I was really frustrated that something which really made sense and for which all of the evidence had been provided for, and the process had been engaged with.... I*

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<sup>227</sup> One of the individual members of the Working Group wrote an article for publication highlighting some of the potential benefits of the model: Smyth, C. (2016): 'Chronicle of a Reform Process: the Irish Working Group on Protection'. *Journal of Refugee Studies*, 29 (3):388-410. The article was written before publication of the Working Group report (June 2015) and therefore before there was any chance to assess its usefulness as a model for replication.

*thought we were going to get nothing.... And I was, I was genuinely fearful that people would end up with nothing but also that people would be really angry and that there would be a lot of trouble, and I could understand it.” (IR7)*

The violated expectations experienced by some of the non-state actors led to their own action. They joined together to make a collective statement through a joint website, *timetoact.ie*. It was an attempt to force the government to do precisely that - act upon key recommendations in the report. They also met with the Ministers in an attempt to push home their key objectives. The website no longer exists as it was taken down when it appeared clear that it was not going to have the broad impact that it was aimed to achieve.<sup>228</sup>

The Working Group of necessity required compromise. It gave an illusion of equality as one policy influencer described it.

*“When you look at the wider systematic issues, I think that the Working Group process that went on for nine months odd, that was quite an intense time in terms of activity. It brought together a large number of people in the sector to work together in a wider context than people often have the opportunity to do. And also there was the availability of information as a result of that process that isn’t always available or at least not always available at one time in the same place.” (IR3)*

For those members whose framework included the experience of asylum seekers themselves<sup>229</sup>, it meant limiting that awareness and commitment to an agreement to achieve some form of amnesty for those in the system for more than five years.

The Working Group and its report were a very specific response to the crisis in the summer of 2014. Members of the Working Group agreed to rule out any focus on the reasons for asylum seekers remaining in the system for so long. Consideration of fundamental issues was therefore absent. The Working Group looked at the ‘here and now’ and declined to ask why asylum seekers were spending years in the system, including the particular role of individual situated agents who were able to exercise such influence over decisions. Members of the Working Group accepted the plausibility of the statement made at the

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<sup>228</sup> The essential element of [www.timetoact.ie](http://www.timetoact.ie) can be seen on the website of one of the NGOs which was represented on the Working Group <http://www.nascireland.org/latest-news/joint-statement-government-advised-time-to-act-is-now/> [last accessed 21.7.2017]

<sup>229</sup> The Working Group report contained a summary of the views expressed by asylum seekers who had taken part in consultations across the country. Those views were summarised in just three pages of a 257 page report which filtered the comments of asylum seekers to suit the main focus of the Working Group, namely the length of time spent in the system without explanation for that situation. The Irish Refugee Council carried out an evaluation of those comments [http://www.irishrefugeecouncil.ie/wp-content/uploads/2015/10/What-asylum-seekers-told-the-Working-Group-about-the-length-of-time-and-the-decision-making-system\\_Oct2015.pdf](http://www.irishrefugeecouncil.ie/wp-content/uploads/2015/10/What-asylum-seekers-told-the-Working-Group-about-the-length-of-time-and-the-decision-making-system_Oct2015.pdf) [last accessed 29.3.2017]



outset by the Chair of the Working Group that they did not need to examine the reasons that asylum seekers spent so long in the system.

Compromises were made in order to reach agreement.

*“[T]here was a point where people agreed in principle that the state with all its resources, without trying to assign blame, either to the state mechanisms or to the applicant themselves, so not getting into that where there isn’t an agreement, to say, with all of the resources including those at the state’s disposal, it is unacceptable that people should be more than five years.” (IR7)*

In addition, some members had not factored in the necessity that the Ministers would have their own views on the recommendations and their own priorities. They had overlooked that consideration by politicians would commence from the presentation of the report and its recommendations. From the retrospective observation of one participant, the Ministers had to reach a political decision based on an increasingly security-sensitive situation.

*“This is where the context changed. The big thing is that there were those in Tunisia, do you remember there was an Irish couple killed, there was a terrorist attack. There were huge numbers starting to arrive in Europe and it was before death of Alan Kurdi. So there was a lot of fear about the numbers that were starting to come across Europe. So the famous ‘pull factor’ obviously started to influence the say, while obviously people were saying that we really need to be responding to it, they were all terrified that they would end up with loads of people.” (IR7)*

The report did lead to one of the main recommendations in the report – to grant leave to remain to those who had been in the system for more than five years – being acted upon, leading to 2000 people being given leave to remain in the state. However, it was implemented in a way which meant that the state institutions determined how it would be carried out. The way in which it was implemented led non-state actors to reflect on their complicity in the dysfunctionality of the system.

*“[I]t makes me feel very uncomfortable, you know, and very often as an organisation, so say for example, when you look at the DP5 scheme, people who were in the system for five years, the fact that, okay it was positive, that was really positive, but still there was no public announcement. It was, people were expected to hear about it magically or it was up to NGOs to go around, to try and find the people, to say ‘this is happening’. There was no structure put on it. We were put in a position where we were perpetuating this underhand, informal process.... It was the worse kept secret. It was an informal scheme, Ministers were talking about it as an informal scheme but nobody knew the real guidelines to it.... you found yourself caught up in this because we knew that this was the only way to get a substantial number of people from,*

*moved out of Direct Provision, given a residency permission and brought back into the community.” (IR9)*

One of the key recommendations, to grant leave to remain to asylum seekers who had been in the system for five years or more, was certainly taking.<sup>230</sup> Organisations that had argued for it were effectively bound to encourage people to take advantage of it. Once an actor was engaged within their own individual organisation, rather than in the Working Group, the limitation of the power they possessed was easier to acknowledge. It has been said that ‘Enactment is premised on the idea that people play a key role in creating the environment in which they found themselves’ (Maitlis and Christianson, 2014, p. 84). Having agreed to participate in the Working Group and reached a collective agreement over an informal ‘amnesty’, participants who wanted to see that made effective were effectively bound to deliver it. However, it came at a cost to their own organisation’s integrity.

Perhaps understandably therefore, some of those interviewed had a different view of the Working Group compared to those who had participated in it.

*“[The Working Group] is hugely important but it’s completely overrated, I think. Maybe a smokescreen isn’t the right word, a red herring or whatever the word is.” (IR6)*

*“I would have believed that the Working Group was a Trojan horse from day one. I think it was there to deliver a certain result.” (IR10)*

When the Working Group came together it did so on the understanding that members would work collectively in an effort to reach a consensus. Co-operation and compromise was based upon the belief that agreement on recommendations would lead to implementation. People with different agendas came together with the inevitable sense of a limitation on their own individual agency. Only state actors in the Working Group had a part to play in the action or inaction that followed.

Circumstances changed after the report was submitted and it appeared that the politicians were rolling back on their commitment to reform, if indeed that was genuine. As will be seen from statements from the Minister for Justice in 2015 about the ‘migration crisis’, government attention turned to the ‘real refugees’ from Syria and away from the allegedly bogus ones at home to whom an invitation had not been extended. This led to a situation of a violation of expectations on the part of some members of the group which acted as a spur to action on their part and the implementation of one the Working Group’s recommendations. One policy influencer described the Department of Justice claims to implementation of recommendations to be exaggerated:

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<sup>230</sup> The recommendation that led to this action was not about reform of the asylum system; it was about reducing the backlog of cases that were stuck in the system.

*"[Department of Justice officials] wrote a report later where it was a tick box exercise, that the implementation had been this and that. And then announced it to us so we hadn't seen it and they were pulling a fast one, that 'we are doing some stuff'. So then this is a time that you say, do we go out all guns blazing or do you say you've had your moment, we are going to have to play a slightly longer game even though you are frustrated and saying, do you know, we are going to have a chance to revisit this but that's a work of fiction." (IR7)*

The Working Group was brought together by Ministers in the Department of Justice after events in the summer of 2014. It was a response to an unintended consequence of the failure of the asylum system to function effectively, however that might be interpreted.

For a number of reasons, the Working Group was not going to achieve the outcomes some members expected.

Firstly, the framing of the focus for the Working Group was not set by its members but by those who would receive the report and by the person appointed to chair the working group. The report was to be in the form of recommendations and not a programme of work to be carried out. A decision about implementation of the recommendations was not an agreed part of the project. That task, or the decisions which led to action, belonged to the Ministers and their officials. That was the traditional way in which government operated (Marsh, 2010) and there was no reason to think that this Working Group would break with a tradition of central government control.

Secondly, the time for the Ministers to reflect upon and determine action was on presentation of the report. Consideration of 'what's the story' started for them at that point and only they could determine what action, if any, would follow. The Ministers would take into account factors which had not been prescient at the time that the Working Group deliberated. In addition, the Working Group had agreed that the report would not address 'the story' of the treatment of asylum seekers.

Thirdly, contributions may have been equal whilst the Working Group existed but that ended when the Working Group concluded its work by signing off on the recommendations.

The Working Group formally concluded its work on the publication of its report. The violation of expectations, felt severely by some of the non-state actors on the Working Group, led to their own action. Its impact was, however, determined by the willingness and ability of the non-state actors to publicise a recommendation and to assist people to engage with an unwritten policy.

Members of the Working Group worked with a plausible but unsubstantiated explanation that asylum seekers were in the asylum system for lengthy periods of time because the system was not working efficiently. The lack of attention to the ways in which asylum seekers were in the system for so long led to a report with recommendations that did not

address some fundamental problems in the Irish asylum system. The system was still predicated on a view that most asylum seekers did not need international protection. In some senses, the report enhanced the opportunity for the Irish government to solidify the system of Direct Provision whilst also creating the impression that the Irish Refugee Protection Programme, established the same year that the Working Group report was published, was a new system which focused on 'genuine refugees'. The distinction was felt very keenly by asylum seekers who had laboured in the asylum system for many years. The Working Group reinforced the view of Maitlis and Christianson (2014, p. 91) that 'when deterrents to sensemaking exist in the form of deeply embedded practices, sticky prior accounts, or top team attention that is focused on alternative issues, organizations struggle to engage a deep and lasting change process'.

## 6.6 Conclusions

This chapter focused upon actors engaged in asylum policy in Ireland, both state and non-state, and how they understood the events that were taking place, what actions they took as a result and what that says about Ireland's asylum policy.

Policy makers understood that they were to deliver an asylum system which viewed asylum seekers with scepticism given the political narrative that most were not refugees. They were also set the task of ensuring that Ireland did not 'attract' asylum seekers. However, state actors had to deal with the reality of the situation as they found it: in the initial period, this was to provide for the accommodation and support of asylum seekers within the context of what was acceptable. With competing demands and pressures, and an overarching imperative to ensure that Ireland did not become a magnet for asylum seekers, the system of Direct Provision came into being. Once on that path, policy makers have not wavered from it. Even with a crisis in the summer of 2014, the response was to ask for recommendations for reform of the asylum system but within the context of what already existed and without examining the reasons behind that crisis. There is nothing in the interviews which suggests that policy makers were questioning the overarching framework of control above protection.

Non-state actors in the Working Group accepted the limitations set by the policy makers and, in doing so, had to work within the frame set for the policy makers. Nothing was to be recommended which would encourage the 'undeserving'. Asylum seekers who obtained permission to stay in Ireland on the basis of a recommendation to clear the backlog had to forego any claim to be a refugee in order to be given the lesser status of leave to remain.

Irish politicians and officials looked at events in other EU states which had been dealing with asylum seekers over a greater period of time. Policy makers took note of the lessons learnt elsewhere and the action which followed. They then adapted these on the basis of a sense

of identity that shunned detention but which was accommodating of isolation and a form of institutionalism. Direct Provision resonated with Ireland's response to its own citizens whose conduct or identity were considered outside of what was acceptable.

Enactment, the influence between action and environment (Maitlis and Christianson, 2014), led to the development of the system that became known as Direct Provision, coupled with a lengthy, sequential and sceptical system for deciding protection claims, led eventually to a combination of social, political and legal events in the summer of 2014 which could not be contained by ignoring them. In other words, the earlier set of actions, arising from the response to the first crisis, led eventually to the second crisis.

The decision to establish a Working Group to make recommendations for reform took the sting out of the crisis in 2014. It came at the expense of reforming the asylum system in Ireland which took a step backwards in the 2015 Act by extending co-operation with the UK over the Common Travel Area. By contrast, the relocation and resettlement programme of the EU in the latter half of 2015 gave Ireland an opportunity to demonstrate its commitment to co-operation with other EU states. However, international commitments have not been matched by an improvement in the treatment of asylum seekers in Ireland.

## CHAPTER 7

### THE U.K. AND IRELAND: INTERNATIONAL IDENTITIES AND DOMESTIC POLICIES

#### 7.1 Introduction

*"I believe there are three fundamental principles that we now need to establish at the heart of a new approach to managing migration that is in the interests of all those involved.... First, we must help ensure that refugees claim asylum in the first safe country they reach.... Second, we need to improve the ways we distinguish between refugees fleeing persecution and economic migrants.... Third, we need a better overall approach to managing economic migration which recognises that all countries have the right to control their borders - and that we must all commit to accepting the return of our own nationals when they have no right to remain elsewhere."*

Theresa May MP, UK Prime Minister, 19 September 2016

*"Indeed, we in Ireland understand from our own experience the forces that can push people to leave their homes for an uncertain future. During the 1960s, the population of my country was less than half what it had been in the early 1840s due to mass emigration that began in response to famine and continued virtually unabated for over a century because of poverty and lack of opportunity.... Right now, the burden of hosting refugees is disproportionately borne by developing countries. A more equitable sharing of responsibilities is urgently needed.... Ireland stands ready to play its part in addressing this crisis."*

Frances Fitzgerald TD, Irish *Tánaiste* and Minister for Justice, 19 September 2016

This chapter provides a comparative analysis of the response of Ireland and the UK to asylum seekers through four themes: the Common Travel Area; the European Union; institutions and actors; and, finally, Brexit. These themes are examined through the perspective of actors involved in asylum policy throughout this study, 1990 to June 2017. The views expressed by actors within Ireland and the UK are complemented by the perspectives of those who worked at an EU level and using the tools available through sensemaking. Historical institutionalism is used to examine the legacies of the asylum policies adopted by both states, particularly in relation to the implications for their relationship to each other and to the EU. The chapter also draws upon the theories outlined in chapter 2, particularly regarding state traditions and Europeanisation.

A number of arguments will be developed in this chapter. Firstly, that the historical relationship between Ireland and the UK, and particularly the existence of the CTA, led Irish policy makers to base their response to asylum seekers upon the UK state's immigration framework of exclusion. In that context, decisions were heavily influenced by the timing and circumstances in which Ireland became a country of 'immigration' and the institutions already in place and state traditions within each state when asylum became a key political issue. Secondly, that lessons 'learnt' in the UK, even if they were not applicable to Ireland, led to both states adopting the UK's 'awkward partner' approach when the EU began to develop an EU-wide asylum system, protecting their institutions from the external interference of the EU and resisting adaptation to an EU asylum model. Thirdly, the argument will be advanced that institutional structures limited the options for state actors who have acted in ways that have reinforced the institutions that governed asylum in both states.

In principle, asylum policy makers in Ireland and the UK have regard to external commitments, in the form of international and EU obligations. State actors may view these as compatible with domestic politics or a hindrance to the furtherance of national priorities. The statements made at the UN Summit on Refugees and Migrants in September 2016 by the UK Prime Minister and Irish *Tánaiste* illustrate the very different presentations of the UK and Ireland in response to the 'migrant crisis' in 2015. The statements could not be in greater contrast for two states that co-operated on matters relating to asylum.

The UN General Assembly met in September 2016 for a Summit on Refugees and Migrants. It led to the New York Declaration<sup>231</sup> in which countries around the world made a number of commitments, the first of which was to 'Protect the human rights of all refugees and migrants, regardless of status'. The statement of the UK Prime Minister indicated that the priority was to keep refugees in the countries closer to conflict and persecution and return those that did not remain in those regions. The Irish *Tánaiste* and Minister for Justice spoke about Ireland's willingness, based upon its own history of forced migration, to play a part in taking refugees from other parts of the world. Despite the difference in public presentation, this chapter argues that both states have adopted very similar asylum governance systems which have undermined the ability of asylum seekers to obtain protection as refugees in both the UK and Ireland.

This chapter is structured as follows: Section 2 examines the historical relationship between Ireland and the UK in the form of the CTA. It identifies the implications of the CTA for the development of the asylum system in Ireland.

Section 3 examines the joint approach of both states to the development of an EU asylum system, identifying the UK's attempts to project their asylum policies onto other EU states and the action taken in the Ireland to resist adaptation to an EU system. For both states,

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<sup>231</sup> <http://refugeesmigrants.un.org/declaration> [last accessed 21.10.2017]

their interest in the enforcement measures of the EU asylum system highlighted their overriding interest in maintaining limited responsibilities for asylum seekers. The section also examines the different approach taken by both states to developments in the EU in 2015, locating the difference in the construction of state identities.

Section 4 looks specifically at the part played by state actors in the development and maintenance of asylum policies, reinforcing the institutions which are built around the principle of exclusion. It argues that state actors established and then reinforced the dominant narrative that asylum seekers were not in need of protection.

Section 5 speculates about the implications of Brexit, both for the relationship between the two states but also the potential inability of the UK to engage in the EU enforcement measures which have featured prominently in their asylum policies.

Section 6 concludes by reiterating that both states have collaborated to develop asylum policies which are built upon strict immigration controls within a UK-framework, excluding interference from the EU and with actors predominantly working within the institutions, reinforcing the principal aim of the control of borders: territorial, organisational and conceptual (Geddes, 2008).

## 7.2 The Common Travel Area – the ties that bind?

This section outlines the influence of the CTA on policy makers in Ireland that led them to act to form an asylum system with the same hallmarks as that of the UK. It also demonstrates the absence of any real awareness of Ireland by UK policy makers. Finally it also looks at the historical significance of the CTA to both states and why those ties have been threatened by the UK's decision to leave the EU.

*“[UK policy makers] were always interested in learning. They had more numbers of course but they were always interested in what we were doing because of the Common Travel Area. But they had THINKERS<sup>232</sup>” (IR1)*

Irish policy makers were aware of the value of their co-operation with the UK because of the CTA, the existence of which has been central to the development of asylum policy in Ireland (Costello, 2003; Quinn, 2009) and which has been in place since the creation of an independent Ireland in 1922. Ryan (2001) argued that, from the outset, Irish officials agreed to participate in a UK immigration control system and both agreed that they would enforce each other's 'conditions of landing for aliens' (p. 856).

This thesis shows the role that the agreements over the CTA have played and, more significantly, the ways in which Irish policy makers took their cues from the situation in the

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<sup>232</sup> Emphasis by the interviewee who spelt the word and said that it was in capitals



UK. Irish policy makers were not relying on, and were not necessarily able to draw upon, their own experience which was still limited at the time that an asylum system was being constructed in the early to mid-1990s. They were, however, able to draw upon their own experience of dealing with 'problematic communities' and the institutions which were put in place to accommodate them. The reliance on the UK's response to asylum seekers led Irish state actors to adopt policies in Ireland which placed similar restrictions on asylum seekers to those already in place in the UK. It was done in the perceived interest of the Irish state. In other words, Irish policy makers enacted a sensible environment with benefit to both Ireland and, indirectly, to the UK. UK policy makers did not need to concern themselves with the movement of people across the border with Ireland but could, instead, focus on continental Europe.

Irish politicians were keen not to be found wanting in the eyes of their own voters when steps were taken in the UK to reduce the rights of asylum seekers. They did not wish Ireland to be seen as a more attractive option than the UK, hence the withdrawal of the right to social welfare and the prohibition on the right to work. In addition, Ireland adopted the UK practice of one government department being responsible for every facet of the lives of asylum seekers, regardless of its lack of expertise in areas such as housing and financial support. The UK transferred responsibility for asylum seekers' accommodation and support to the Home Office; Ireland transferred control to the Department of Justice (Fanning, 2011). The ways in which these transfers were done demonstrated two different state traditions: the UK legislated for the reception of asylum seekers; Ireland put in place an administrative system. The respective models, therefore, say something about each state which is separate to the issue of asylum. Neither can be described as 'hollowed out' (Rhodes, 1996) given the all-pervasive nature of both state's response to asylum seekers. However, although those traditions provided a framework for responding to asylum seekers, the tendency for the UK to legislate and for Ireland to adopt an administrative system did not determine the nature of the asylum systems that were developed around them. The motivation came from the existence of the CTA built upon the historical relationship between the two states.

The importance of the CTA to both states' asylum and immigration systems was illustrated by an agreement in December 2011 to share visa data. The Irish Minister for Justice, Alan Shatter TD, stressed that both countries shared 'a common interest in protecting and enhancing' the CTA. It was an indication that, when it came to the movement of people across state boundaries, policy was partly determined by the impact on the CTA. The agreement was further enhanced in the IPA 2015 which negated the right to claim asylum to those who had lived in the UK for at least a year. As will be seen below, the UK government also spoke of protection in relation to the CTA, but it was subject to an overriding commitment to protect its immigration controls.

The CTA was the means by which the UK and Ireland were able to resist any interference by the EU in matters relating to JHA by their negotiation of an opt-out under the Treaty of Amsterdam. The response of both states to the EU is examined in greater detail below but the argument here is that the CTA appeared to have such prominence that it supports the view that path dependence was central to the decisions taken by both states on asylum and immigration. However, there was one critical juncture, the UK decision to leave the EU. This suggests that the historical agreements over the CTA may have been more of a path determination (Pierson, 2004) for the UK, a part of which was the means to an end to resist EU interference over border controls. The UK was not locked-in to the CTA but it was to immigration controls, even if that affected the UK's 'special relationship' with Ireland.

In a speech outlining the UK's priorities for leaving the EU, delivered on 17 January 2017, the Prime Minister, Theresa May, spoke of the importance of the CTA:

*"We cannot forget that, as we leave, the United Kingdom will share a land border with the EU, and maintaining that Common Travel Area with the Republic of Ireland will be an important priority for the UK in the talks ahead... [T]he family ties and bonds of affection that unite our 2 countries mean that there will always be a special relationship between us."*<sup>233</sup>

The priority of the CTA came with a proviso:

*"[W]e will work to deliver a practical solution that allows the maintenance of the Common Travel Area with the Republic, while protecting the integrity of the United Kingdom's immigration system."*<sup>234</sup>

One implication of 'working together' may mean the Irish authorities agreeing to enforce UK immigration controls as they did in 1922 (Ryan, 2001). The sequence of events demonstrated the priorities. The UK's vote to leave the EU came first; the implications for the UK's relationship with Ireland, and the difficulties created for Ireland as a result, came second. Even before Brexit, the ability of asylum seekers to move within the CTA has been limited. The expectation is that the controls will become even tighter.

*"[E]ven to date most of the asylum seekers I've been meeting have found it very difficult to travel, to get off the island of Ireland because of the physical nature of the island. Obviously there are going to be a number who do. I think, you know, there may be a certain amount who will get to Belfast but I think it's going to be more*

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<sup>233</sup> The government's negotiating objectives for exiting the EU: PM speech, 17 January 2017  
<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> [last accessed 6.9.2017]

<sup>234</sup> Ibid

*difficult for them to do that. And I think you are going to see the United Kingdom, as it's called, actually clamping down and closing borders more. So it's going to be even more difficult for everybody"* (IR10)

In an interview conducted for this study on the relationship between Ireland and the UK, one UK policy maker forgot Ireland's existence.

*"Why, when the European border is not the extremity of the UK, should France, who now will have the extremity of the Western European Union border, have an agreement with a non-European Union country to stop people going to that non-European country?"* (UK3)

It was a reference to the *Le Touquet* Agreement and the importance to the UK of the arrival of asylum seekers from Northern France. However, it is Ireland, not France, that will 'have the extremity of the Western European border' and a land border with the UK. Whether it is possible to maintain the CTA after Brexit remains to be seen.

The movement of people across international borders requires policy makers to have regard to the events and actions in neighbouring countries, real or assumed, from which they extract cues. The presence of a shared border between Ireland and the UK, the historical relationship, the similarity in state systems and the UK's prior experience with asylum and immigration, led Irish policy makers to draw upon the thinking and also the action taken in the UK.

The existence of the CTA, with its' open border between the two states, provided a particular problem for the Republic, given the ease with which asylum seekers could enter across their land border with Northern Ireland. The UK was also concerned to ensure that all of its borders were secure given its well-established immigration control framework well before immigration became an issue for Ireland. Any concerns which UK governments may have had were assuaged by the ways in which Ireland approached asylum, seeing it also as a part of a wider model of immigration enforcement, not as the means by which to determine responsibilities arising under international or EU law.

The CTA was the basis for both states projecting a dismissive approach towards the development of solidarity between EU member states through a European asylum system. It was the foundation of decisions by Irish policy makers over asylum and immigration (Costello, 2003). The CTA had far less significance for the UK. Ireland nevertheless now has a system built on that of the UK and that will have its own significance for those engaged in asylum policy going forward who will have to meet international and EU obligations whilst sharing a land border with a non-EU country. There are unforeseen and unintended consequences from being tied so closely to a state that prioritised its demand for 'national sovereignty' over its shared interests with Ireland and its EU and international obligations.

### 7.3 Ireland, the UK and the EU – a sensitive issue

This section examines the relationship between asylum policy in Ireland and the UK in the context of their membership of the EU, focusing upon the construction of identity as it is demonstrated through each state's response to the EU.

*"[A]sylum policy, which was based in international law rather than EU law, there were all kinds of objections put in the way of the attempt to try and co-ordinate policy and create common standards for the EU, not least the British I would say. The British were always wary of the Amsterdam Treaty because they did say that they didn't want the EU institutions meddling in legal migration. They were slightly more open on common standards for asylum but still not very positive I would say."* (EU3)

The choice of Ireland as co-facilitator of the UN Summit for Refugees and Migrants in September 2016 was an indication that Ireland was viewed as an honest broker on an international stage. In addition, as will be seen from the statements in the introduction to chapter 4, Ireland played its part in enabling key parts of two different phases of CEAS to be finalised. Ireland also took the step, in contrast to the UK, of opting-in to the relocation and resettlement programme agreed by the European Council in July 2015. These actions portrayed a view of Ireland which was more consistent with the way it has been seen in other policy areas (Laffan and O'Mahony, 2008; James, 2011). The views of some of those interviewed in the UK and in Brussels confirmed the different approach by Ireland to the EU.

*"I'm more aware of [Ireland] in terms of, at the operational level ... [it] tended to be as positive as possible within the European system despite what the British government might have been doing."* (UK2)

*"Ireland, especially since the bailout programme, the financial crisis, doesn't want to be seen politically as a state which is just taking things from other states in the EU. They want to be seen as a solidaric member that also helps out in crisis situations. They don't want to be seen as not playing their part in what is seen in the end to be solidarity with Greece and Italy in a crisis situation."* (EU1)

The same could be said for Ireland's participation in search and rescue in the Mediterranean, providing vessels to save lives whilst the UK provided surveillance boats.

This thesis, however, focuses upon policy rather than upon operational matters and in relation to asylum policy and the EU, the evidence points to the UK leading the way and Ireland being content to follow, subject only to showing even greater inertia (Radaelli, 2003). This inertia was demonstrated when it came to signing up for a directive that would

have granted asylum seekers the right to work. Ireland persisted in remaining outside of the Reception Conditions Directive.<sup>235</sup>

Amongst those interviewed in Ireland for this study, only one had experience of dealing with asylum policy at an EU level. This compared to five amongst UK policy makers interviewed. Of the six EU interviewees, only two had any knowledge of or engagement with policy makers in Ireland. By contrast, all of them had dealt with or were aware of UK policy makers. Whilst there was a consciousness of developments and key directives in the EU asylum system by those interviewed in Ireland, this related to its potential applicability or adaptation in Ireland, not to engagement with EU asylum policy. It was, therefore, more of a case of 'taking from' rather than 'giving to' or seeking to influence or shape EU asylum policy. The focus of the interviews with those involved in asylum policy in Ireland was on domestic issues, most notably the Direct Provision system, not the wider asylum system or developments in the EU.

In addition, of the 11 MEPs who represent constituencies in Ireland in the European Parliament, none of them have had any engagement with asylum policy in the EU. No Irish MEP sat on any committees which dealt with JHA and therefore the interest in influencing asylum policy was arguably absent. In contrast, UK MEPs were active in chairing and participating in key committees,<sup>236</sup> acting as Rapporteurs on EU asylum measures<sup>237</sup> and UK MPs were involved in debating EU asylum and refugee policy in the UK parliament.<sup>238</sup> Irish TDs were very engaged with attempts to change Irish asylum legislation, but there was no real evidence of engagement with EU asylum policy. Ireland's intransigence in failing to operationalise the EU asylum framework in Ireland led to Ministers railroading TDs to agree to passing measures with little time to debate or object.<sup>239</sup> The exception was Ireland's determination to resist changes that might weaken its own ability to control the numbers crossing from the UK.

*"The right to work itself, this is one of the most shocking things about the Irish asylum system because it's the only country in Europe that doesn't allow asylum seekers access to the labour market and that combined with these long delays, it's really quite inhumane."* (EU1)

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<sup>235</sup> After the period covered by this study, the Irish government notified the European Commission of its desire to sign the RCD. However, the draft scheme allowing asylum seekers to work contains conditions which make the 'right to work' almost meaningless

<sup>236</sup> Claude Moraes, a UK Labour MEP, is Chair of the European Parliament's Civil Liberties, Justice and Home Affairs Committee (LIBE)

<sup>237</sup> Jean Lambert, a UK Green Party MEP, was Shadow Rapporteur on a number of reports relating to elements of CEAS

<sup>238</sup> The European Committee debated 'Schengen and EU-Turkey co-operation on migration' in March 2017

<sup>239</sup> See chapter 4, page 85

Although some Ministers of Justice showed an interest in EU asylum matters and took part in discussions with other EU member states, it was particularly after it became the top political issue in the EU in 2015. By contrast, senior UK Ministers, including the Prime Minister, were active in attempting to shape EU asylum policy from the start of it becoming an area of EU competency.

The differences in approach to the EU are the result of various factors. Firstly, Ireland did not have the same level of interest in asylum and immigration compared to the UK. Ireland's priorities lay in seeking peace in Northern Ireland and with issues such as agriculture (James, 2011) which therefore affected its capacity to engage with a matter that was not high on the domestic political agenda.

Secondly, unlike the UK, dealing with asylum seekers was a relatively new phenomenon in Ireland and, as Irish policy makers acknowledged, they did not have the expertise and were just beginning to frame their domestic policies. Even 20 years after Ireland itself had been engaging in asylum policy, it still has limited capacity to get involved at an EU level on asylum. A request for a contact to interview in the Ireland's Permanent Representation office in Brussels for this study in February 2017, led to the following response:

*"There is no one in the rep who deals with asylum. An official if requested will channel our views on matters to the relevant meetings but all such views are sourced through us. Otherwise my own small team directly engage at an EU level."*<sup>240</sup>

Thirdly, Ireland had not been a colonising nation and did not engage in foreign policy matters like the UK. Instead it had been ruled firstly by England and then by Britain. As indicated, it was Ireland's membership of the EU that enabled the state to escape its legacy of economic dependence on the UK (Ferriter, 2004; Laffan and O'Mahony, 2008; FitzGerald, 2005). By contrast the UK, as is shown in chapter 5, was very much engaged in seeking to shape EU asylum policy and to prevent it from impacting on its own policy priorities.

*"When it comes to external dimensions, I am thinking about the foreign policy of migration, migration partnerships, return policies, countries like the UK and North Western European states are on the same page, Germany, Netherlands, Belgium, these countries. But they differ enormously when it comes to something like relocation for example, which the UK has refused to participate in and those other countries see it as a central part of solidarity."* (EU2)

All of these combined to put asylum policy down the agenda in Ireland. However, the CTA was always a priority and therefore preserving that meant being an apparently willing partner in the joint agreement with the UK to negotiate an opt-out from JHA matters under

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<sup>240</sup> Email from Head of Asylum Policy, Department of Justice, to author, 16 February 2017

the Treaty of Amsterdam. Deference to the UK led to the policy decision outlined in chapter 6, namely that Ireland would only consider opting-in to EU asylum measures if the UK did.<sup>241</sup> UK participation paved the way for Ireland to have the option (Quinn, 2009). The exception to this has been Ireland's decision to opt-in to the EU's relocation and resettlement programme even though the UK remained outside the relocation scheme. It is therefore useful to examine why that difference has occurred. This is before returning to the issue of identity construction and why that matters when looking at institutional or organisational identity and the impact of that identity upon those engaged in asylum policy.

The relocation and resettlement programme adopted by the European Council in 2015 was passed by a qualified majority.<sup>242</sup> It was binding upon all EU member states except the UK, Ireland and Denmark (which also has an opt-out of JHA matters in the EU). Ireland chose to opt-in, as confirmed by the European Commission in March 2016:

*"The Commission has today confirmed the full participation of Ireland in the EU relocation scheme. In line with its 'opt in' under the Lisbon Treaty, Ireland notified the Commission on 6 October of its wish to participate in both Council Decisions on relocation and to relocate applicants for international protection from Italy and Greece."*

The programme came to an end in September 2017. Ireland had committed to taking 2900 asylum seekers from within the EU. As indicated in chapter 6, only 459 had been transferred from Greece by June 2017. All of those would have been citizens of Syria or Eritrea, vetted and chosen in advance and their arrival planned. Relocation also came with a payment of €6000 for each asylum seeker. Ireland's commitment was, therefore, to engage in a managed transfer of asylum seekers, many of whom were expected to be accepted as refugees, on a relatively small scale compared to the numbers in Greece and Italy. The risks therefore were minimal but it allowed Ireland to show solidarity with other EU member states.

The overarching theme in both Ireland's and the UK's response to the EU system is their engagement with the enforcement measures in the form of the Eurodac and Dublin Regulations, respectively identifying responsibility for asylum seekers and transferring them to other EU states where possible. For both states, it was a selective approach to European integration.

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<sup>241</sup> Despite the UK's opt-in to the RCD, Ireland remained outside of the RCD until it opted-in to the recast directive in 2018.

<sup>242</sup> Hungary and Slovakia voted against compulsory relocation of asylum seekers. Their challenge to the scheme was dismissed by the European Court of Justice in September 2017. Hungary went further and challenged the heart of CEAS itself by placing all asylum seekers into detention. Its act led to the European Commission giving formal notice of infringement proceedings against Hungary in May 2017. The UK is not the only 'awkward partner' when it comes to EU asylum policy.

The UK approach to an EU asylum system has left its policy makers with very little room for negotiation. The inter-governmental, as opposed to a federally-inclined, approach to the EU has led other EU member states to resist the UK's attempts at a debate on its terms.

*"It's more of a sense that the UK takes the bits it likes and left the rest to Europe. While the rest of Europe is dealing with large numbers of asylum seekers, the UK is navel gazing about free movement with not particularly high levels of goodwill."* (EU2)

What does this say about a national identity construction and why is that relevant to this thesis?

The external presentations of these two states are very different to each other when participation in joint EU projects on asylum seekers and refugees are concerned: Ireland at best displays signs of solidarity with other states, particularly within the EU; at worst Ireland is neutral. The UK at best makes no attempt to show solidarity and at worst it shows contempt. This is not a reference in either case to the conduct of individuals towards other individuals but a state response to other states and, in particular to migration, demonstrated in the position adopted by individual state representatives in their interaction with others but also the comments of others engaged in debates around the UK's membership of the EU. It is not, however, an individual identity but a state identity and one which has been writ large in the UK's decision to leave the EU. What must be borne in mind, in this context, is that immigration control and therefore asylum policy, remains the prerogative of Westminster and therefore of a predominantly English political class.

Why does this matter in the context of this thesis? It matters because state identity is part of the frame that informs and directs how state actors make sense of the events in which they are engaged as individuals and the cues that they extract or exclude (Fiss and Hirsch, 2005). State identity also informs what actors consider to be plausible, who else will be given credence or disregarded as part of the social element of sensemaking and what action they will engage in (Weick, 1995; Weick et al, 2005). And it is a cycle that reinforces itself. Actors engage in policy within the context of state institutions and their ability to inform, influence, uphold or reinforce policy is dependent upon the seniority of their role, the level of political interest in the issue, the nature of the crisis and whether that is contained within their own state. However, they are also shaped by the institutional environment in which they operate (Hay and Wincott, 1998, p. 956). All of those factors were evident during the period covered by this study. The following section deals specifically with actors within the context of the particular institutions in each state.

#### 7.4 Institutions, actors and accountability

This section firstly compares the institutions that have been developed to respond to asylum seekers in both states and the effect of the differences or similarities of their



approaches. It examines the impact of institutions on actors and how they were shaped by them. In addition, it looks at actors roles within institutions and the ways in which actors may have modified institutions.

The constitutional arrangements in Ireland and the UK are notably different. The Irish Constitution requires the government to obtain the consent of both Houses in the *Oireachtas* if it wants to sign up to any measure in the JHA framework of the EU (Quinn et al, 2008). There is no such requirement if the decision is taken by an Irish government to remain outside of any measure. Hence the decision not to opt-in to the RCD, one of only two states not to opt-in to the original directive<sup>243</sup> (the other being Denmark<sup>244</sup>), was never put to elected politicians (Joyce and Quinn, 2014). In the UK, the decisions to opt-in or remain outside of any JHA matter do not require any parliamentary approval and neither is there any sanction for the decisions taken by the government.

Despite the differences, the evidence is that both states chose to adopt the same approach to the EU asylum system, governed firstly by the UK's insistence that the EU would not alter its own national framework and, secondly, by the desire of both states to maintain an open border between them. The open border did not even extend to refugees let alone those who were classed as asylum seekers.<sup>245</sup>

There were also marked differences in the use of legislation and, by contrast, the use of administrative procedures. The regularity with which the UK legislated to govern asylum was matched by the infrequency in Ireland. In the UK, there were five pieces of legislation within a nine year period from 1993 until 2004, all of which made significant changes to the handling of all matters relating to asylum seekers (Macdonald and Webber, 2005). Legislation not only prescribed the decision-making processes but also the support and accommodation of asylum seekers. Secondary legislation, in the form of statutory instruments, immigration rules and, for those responsible for decisions on asylum claims, published operational guidance, was also part of the policy and operational framework in the UK.

In Ireland, whilst parts of immigration legislation dealt with asylum, there have been only two substantive Acts dealing with asylum with almost 20 years between them. Neither addressed the reception system which remained a purely administrative system (Thornton, 2013; Joyce and Quinn, 2014) and there are no published guidelines for decision makers.

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<sup>243</sup> The original RCD was passed in 2003. The recast directive, to which Ireland has indicated an intention to opt-in, was passed in 2013

<sup>244</sup> Although Denmark did not opt-in to the Reception Conditions Directive, which gives asylum seekers the right to work after nine months, it passed legislation giving asylum seekers the right to work after six months under certain conditions: Madsen, P.K. (2016) Labour market integration of asylum seekers and refugees: Denmark. European Commission

<sup>245</sup> Those recognised as refugees in both states cannot travel freely between Ireland and the UK but require a visa.

The highly prescribed UK framework did not signify a transparent, politically accountable system. Many of the more significant agreements and measures, including the *Le Touquet* Agreement with France and the EU-Turkey Agreement between EU member states, were not passed by parliament. Nevertheless, the legislative framework was the foundation for pushing for a more restrictive agenda through collaboration with other EU states.

Asylum was highly politicised in the UK although, from 2004 onwards, it became less of a focus and gave way to attention on the arrival of EU nationals from Eastern Europe (Boswell and Geddes, 2011). By then, the essential framework was in place and undermining responsibility for asylum seekers in the UK moved to the denial of entry to the territory of the EU (Webber, 2012). The UK also had a popular press that was fixated upon asylum and immigration. By contrast in Ireland, asylum rarely became a top political issue although it was portrayed as a crisis in the late 1990s (Fanning, 2011). Subsequently asylum was less of a focus and fell off the political agenda in Ireland. Its absence from a political agenda was no less a political act than maintaining an active interest at the highest political level. In Ireland, it meant a system where asylum seekers were in limbo for years until their treatment became a tipping point that required attention. The crisis in Ireland in 2014 was an unintended consequence of a system that kept people highly dependent upon the state, often isolated from wider society and with little autonomy. However, being people not packages, their warehousing did not make for sustainable communities.

The highly politicised nature of asylum in the UK was demonstrated by the interest of Prime Ministers, not least Tony Blair (Anderson, 2013, p. 56) and Theresa May. Successive UK governments, satisfied that the domestic system was working as intended, turned attention to the EU and particularly worked with member states, rather than EU institutions, to further the policies of exclusion. After the initial focus on asylum seekers in the late 1990s and early 2000s, asylum largely became a parochial issue in Ireland, at least until the events in the EU in 2015. The 'crisis' then provided an opportunity to step up to the plate and create a programme which distinguished, in political rhetoric, between the 'most vulnerable' and asylum seekers already in the state. A humanitarian crisis matched political convenience and very little changed in Ireland's asylum institutions. A government working group, focused on reform of the existing asylum system, was side-lined by a government programme taking refugees from outside of the state. The UK's higher level focus on asylum also allowed the Prime Minister of the day, David Cameron, to match the public mood by announcing an increase in the number of Syrian refugees that would be allowed into the UK. However, it was entirely in keeping with and reinforced the view that asylum seekers were not worthy of protection, only those refugees whose arrival could be managed.

This raises the issue of structure and agency and the importance of the relationship between the two (Hay and Wincott, 1998; p. 953). The nature and level of a crisis increases the political stakes and makes it more likely that senior politicians take control of policy,

despite their lack of understanding. It also increases the possibility that the balance between acting and thinking which is central to sensemaking (Colville et al, 2012) is disrupted by the demand for action.

*“When this became an issue that was dealt with at head of state level, and a certain amount of political panic was infused into the whole situation, much of the more sophisticated and knowledgeable thinking was shut out of the room. The discussion went from ‘how do we manage this? how do we think about reform of the system?’, whatever ideas, good or bad, were involved in that, to ‘we need to stop the flow, how do we do that?’” (EU2)*

Tony Blair’s engagement was an attempt to shape the direction of an EU system, arguing at an early stage for asylum seekers to be dealt with outside of the EU. It was evidence of one actor using his position of power, as the UK’s most senior politician, to advocate for policies that had not even been debated, let alone agreed in parliament. Neither did these ideas appear in any government statement or paper, despite the intensity of the focus on asylum in the UK at that time, reinforcing the argument that the government was not accountable to parliament (Richards and Smith, 2002).

The ‘crisis’ in 2015 in the EU provides an opportunity to examine the ways in which actors understood the situation and what action they took. In 2015, migration became the highest political issue in the EU and, as one senior civil servant in the UK described the response, there was ‘panic’. However, it created possibilities that were not there before the crisis.

*“In 2010 if you wanted to do something on asylum, I think we would have struggled because they weren’t that interested, whereas in 2016, everyone was interested and it was important. It changes and the resources will be found to make it happen. So much I think is dependent upon the environment, on the context in which policy is being created or defended. In 2010 and 2016 things were completely different.” (UK6)*

It also meant that policy makers who were not responsible for making the political judgments found themselves outside of the frame of reference which would inform the understanding and action in a time of crisis.

*“I remember one of the more senior people in 2015 saying ‘we need to keep talking about this because we all know that if this ever gets to a point where it’s just the leaders of our countries that are coming to a room to decide these things, then all bets are off’. And that’s actually what happened.... They were factored out of the equation when it became a political issue, once the numbers rose and everything and once the system collapsed basically, when CEAS wasn’t followed anymore.” (EU6)*

Despite the policy direction set by Ministers in Ireland, the ability of officials to influence policy was greater due to the lack of interest at the highest political level. However, they still understood and operated within the political parameters set within the institutional

framework. The civil servants understood that their remit was to deliver a system that met with Ministerial approval or provided the options, not to make the decisions.

*“The UK has published research for example on key pull factors and how they maintain processing. Canada was more influential than Australia. And I was interested in the law. I always looked at them because they were common law countries.... My role has been proposing as a civil servant but also responsibility to look at international best practice. We were not cocooned. I attended a lot from EU and international meetings, networking, picking up policy ideas. There was policy transfer.... My role was very much to recommend policy, implement, research and understand, based on international issues.... I had to understand what the Minister might want. I never said anything that would be rejected.” (IR1)*

State actors in Ireland were learning from the UK, other EU member states and countries with similar legal systems. UK state actors were good at sharing their experience, advocating the UK’s positions, but there was little indication of how their contribution sat with the direction of policy discussions at the time or that they had anything to learn.

*“[W]e are trying to influence others but they are possibly not that receptive at the moment in terms of the other debates that are going on on the Common European Asylum System. So everyone is worrying about how they fulfil their obligations under the burden-sharing influx. Obviously, in terms of our asylum policies internally, that hasn’t changed.” (UK9)*

*“The UK representative ... was very engaged, one of the most active participants. And that actually surprised me. He presented a position that may not have been agreed to by most people in the room but he advocated that position repeatedly and strongly throughout the process.... It was more of presenting the UK position which wasn’t necessarily constructive in the conversation that was taking place.” (EU6)*

In the UK, particularly given its length of experience in the field, a target was to share its expertise and project its policy amongst other states, at an inter-governmental or EU level, to adopt policies that furthered the UK agenda on immigration control.

Internally, in the UK, state actors understood that their role was to maintain or, if necessary, restore control. The emphasis was upon delivering according to the government’s agenda but with more latitude to influence developments in the absence of a political crisis. Policy makers have not always been able to control the narrative, but challenges have been met with the intention of restoring control to the government and its officials.

*“There were a number of significant challenges, some of which we won, some of which we lost. One which we lost was on the detained fast-track asylum process.... That had a very profound impact on our approach to the whole asylum system and required a great deal of investment, not all of which we could control actually, to review and try*

*to recreate an ability to detain certain types of cases in the interests of maintaining effective immigration control but also ensuring that we were not detaining people that we shouldn't.” (UK6)*

Within the structures established in both states, the ability of an actor to influence asylum policy depended upon whether they had any accountability and, if so, to whom. In both states, the patterns seemed the same: civil servants did not seek to undermine or change the direction of the policy framework set for them by Ministers to whom they were accountable. In Ireland, however, they actively sought ideas from other states, both within and outside of the EU. Those ideas then formed part of their enactment of a sensible environment (Weick, 1995, p. 30). Irish policy makers then presented policy proposals to Ministers which, in their view, would be acceptable. Given the lack of any sustained political interest in Ireland in asylum policy, what was put in place had the hallmarks of a negative immigration control gathered by civil servants from other EU states, not least from the UK. In the UK, there was no evidence that civil servants either attempted to or had the opportunity to influence asylum policy. Instead UK civil servants reinforced it when there were challenges in the courts and parliamentary debates and advocated for it in the EU. Senior politicians in the UK, with no accountability to parliament, were the only ones who were able to act according to their own priorities and with little accountability within the established structures and institutions of the state.

Given the strength of relationship between Ireland and the UK, built upon the CTA, the following section deals with the potential implications provided by the UK's decision to leave the EU.

#### 7.5 Brexit – breaking up is hard to do

*“One of the things that irritates me most, and probably does others, about the Brexit debate is the misinformation about the role of member states in the European Council. These things are not imposed in Brussels. They are proposed in Brussels and debated between the member states... There's no uniform response. It's not member states against the Council or member states for the Council. It's different member states acting in their own capacity and bringing their own point of view forward.”(EU3)*

In 1973, when Ireland and the UK became members of the EEC, they made separate applications as independent states but the success of Ireland's application was dependent upon the UK's application being successful (Tonra, 2017). In 1997, Ireland and the UK jointly negotiated a special position in the EU when a decision was made that matters relating to JHA, which included asylum, would become areas of EU competence (Costello, 2003). In 2016, the UK voted to leave the EU. The decision did not take into account the implications

for the Republic of Ireland and, even though a majority in Northern Ireland voted to remain<sup>246</sup>, the decision to leave also applies to Northern Ireland. The Republic will therefore have a land border with a non-EU state by 30 March 2019.

There are a number of potential implications for both the UK and Ireland in the event of Brexit, the circumstances of which were still under negotiation when this thesis was finalised. The implications particularly concern the UK's ability to influence or enter into any agreements with other EU states when they act collectively in the Council, including the enforcement mechanisms of the Dublin and Eurodac Regulations; the possibility that bilateral agreements, particularly with France, may not be maintained to the same extent; the isolation of Ireland from other EU states when it can no longer rely upon its partnership with the UK; the substantial difficulty in maintaining an open border between the Republic of Ireland and Northern Ireland and therefore the threat to the CTA and the agreements which go with it.

In March 2016 the UK joined other EU member states in entering into an agreement with Turkey to deter the arrival of asylum seekers into Greece and take back those who arrived after 20 March 2016 unless they were accepted as refugees. The UK was a willing participant in a measure agreed by the Heads of State in the European Council which restricted the ability of refugees to claim asylum in the EU. The first implication of Brexit for the UK is that it will not be able to enter into an agreement over asylum with all EU states collectively, known as the EU27, although it may be able to reach individual agreements.

In addition, the UK will not be able to enjoy the benefits of the Dublin and Eurodac Regulations unless it is able to use participation in them, possibly as part of a *quid pro quo* for co-operation over sharing intelligence for security purposes.

For the UK, its ability to influence any new regulation is weakened primarily by its decision to leave the EU and its lack of co-operation even before that, given the reluctance that it has shown in participating in other measures.

*"[I]t really wasn't the case that anyone was worried about asylum and immigration, with respect to the relationship with the EU because the UK participates in so little of it. The only place where it does have relevance is really Dublin because there is no goodwill that the UK can draw on in terms of pure asylum co-operation." (EU2)*

The proposed Dublin IV Regulation may contain a compulsory burden-sharing mechanism which the UK will not wish to be bound by. If the UK is not part of the Dublin system, then further measures will be needed if Ireland wishes to transfer asylum seekers back to the UK. That has implications for the legality of such action, given that Ireland will remain an EU member state, subject to the jurisdiction of the Court of Justice of the European Union and the obligations in the Charter of Fundamental Rights.

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<sup>246</sup> The vote in favour of remaining was 56% compared to 44% for leaving

For Ireland as well, the absence of the UK from negotiations in the EU over future asylum measures may weaken its ability to argue for its own particular position. Having only partially engaged with the first phase of CEAS, and in the absence of staff in the Ireland Representation office in Brussels dealing with asylum, it could find itself left out on a limb in a very fast-moving political environment.

*“The last 12 months has been a constant crisis situation ... migration policy has become the biggest priority for this Commission ... it has been non-stop both in terms of dealing with the crisis from an operational perspective in Greece and Italy to a lesser extent, but also in terms of the policy response, the need to revise the whole of our legislation, as well as other policy initiatives such as the need to revise our whole legislation last September.” (EU1)*

Another issue for the UK is the *Le Touquet* Agreement with France which pre-dates any EU asylum system and is not part of it. The UK Prime Minister and French President agreed continued co-operation over Calais in January 2018.<sup>247</sup> The agreements with France and Belgium, the juxtaposed controls, can remain in force as separate bilateral agreements. However, like Ireland and the CTA, it will mean EU member states entering into or maintaining an agreement with a non-EU state and that has implications for non-EU state officials operating on EU territory and the jurisdiction over disagreements.

For Ireland and the UK, the implications for the CTA are the greatest issue. Whatever statements have been made by UK politicians, not least the Prime Minister, Theresa May, there were no clear proposals about how to manage the border between the Republic and Northern Ireland.

Beyond the direct implications for Ireland and the UK over the CTA, there are the wider issues raised by the EU Referendum in the UK, in particular the use of immigration, and asylum as part of that, as an attack on much more fundamental issues.

*“In terms of the UK, the referendum itself has allowed some people to express quite xenophobic [tone] ‘it’s time for you to go home, we voted for you to leave’. Some people thought they were voting for some people to leave rather than voting for the UK to leave the EU. And that creates the atmosphere where it’s more difficult to make the argument in favour of being more welcoming and open towards asylum seekers and refugees.” (EU4)*

The UK’s decision to leave the EU was taken without political leaders and advocates for leaving or remaining having any apparent regard for the implications for Northern Ireland, part of the UK, or the Republic of Ireland, part of the CTA. National sovereignty, the authority of a state to govern itself, was the hallmark of the leave campaign, built principally

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<sup>247</sup> <https://www.theguardian.com/world/2018/jan/17/may-and-macron-to-sign-new-calais-border-treaty> [last accessed 21.1.2018]

upon arguments about controlling immigration. It was a campaign, and a decision, that failed to have regard to the fact that the UK is a multi-nation state and that the interests of countries which form the UK are not necessarily the same as the perceived interests of England. The centralised nature of asylum governance in the UK, with power resting with Westminster, undermines the changes that have taken place in the UK since 1998. In addition, the collaboration that is required across state borders to control immigration was a matter that was absent from the arguments in support of Brexit. The decision to leave will have implications for asylum policy in both states but, as yet, it is not possible to identify what they will be. The wider implications of the focus on immigration in the campaign also remain to be seen.

*"[I]t's becoming, as in the UK as well, probably not about migration, certainly when you look at it factually, it shouldn't be about migration, but migration is like this stalking horse for everything else and now that that's happening in other countries as well. People are picking that as a convenient issue on which to deal with other things. And that's a huge impact. And I would argue that, historically, someone will be able to trace that directly back to what happened in the UK and how it was raised." (EU6)*

## 7.6 Conclusions

With the exception of the heads of the UK government and the Ministers for Justice in Ireland, policy makers have not only acted within the frame set for them, they have reinforced the institutions which undermine obligations under international law, working with the idea of asylum as managed migration. State actors accepted the political narrative that the challenges which they faced were challenges to the concept of asylum by migrants abusing the systems designed to protect refugees. The actions which had been taken from the outset, in the form of their respective asylum systems, were built upon to create a framework where only those who are brought into Ireland or the UK can expect to enjoy the protection of the Refugee Convention.

Asylum governance in both states is a legacy of UK strict immigration control which is aimed at preventing foreign nationals having access to, and residence in, their territories. International and EU obligations, under the Refugee Convention and CEAS, are secondary to the overarching emphasis on immigration enforcement. The CTA, whilst providing for freedom of movement for nationals of the two states, was the reason that both states projected a dismissive approach towards the development of an EU asylum system. The CTA was not, however, the basis of the UK's rejection of solidarity between member states when relocation was agreed in 2015. At that point, the CTA was not a consideration and of no value to the UK's desire to prevent entry from other EU states. Neither did the CTA feature as a factor when the vote to leave the EU was taken. Immigration control took precedence over an agreement that had been in place for almost 100 years and despite the



consequences of Brexit for Ireland, North and South. Ireland was not part of the frame during the campaign and at the time of the decision to leave.

To achieve the border controls which the UK wanted to preserve and which Ireland was content to support, both states negotiated an opt-out from JHA matters when they became areas of EU competence in the late 1990s. The decision to opt-in was made consistently through three versions of the Dublin Regulation and two versions of the Eurodac Regulation, measures designed to not only identify the EU member state responsible for asylum seekers but also with a mechanism to transfer them back to that state. By contrast, Ireland and the UK only signed up to the first version of CEAS and Ireland persistently declined to opt-in to a measure which would give asylum seekers the right to work, leaving it out of sync with every other EU member state, including the UK.<sup>248</sup> That position was consistently based upon a plausible, if untested, view that it would make Ireland an attractive option.<sup>249</sup>

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<sup>248</sup> Ireland opted-in to the Reception Conditions Directive 2013 after the period of this study and introduced regulations to implement the Directive in the form of the European Communities (Reception Conditions) Regulations 2018.

<sup>249</sup> The right to work introduced has been criticised as being ineffective for a variety of reasons: <https://www.irishtimes.com/opinion/asylum-seekers-right-to-work-remains-a-fantasy-1.3577346> [last accessed 29.7.2018]. The nature of the reception system in Ireland undermines the right to work even when granted.

## **CHAPTER 8**

### **ASYLUM POLICY IN PERSPECTIVE**

#### **8.1 Introduction**

This thesis identifies, analyses and compares the response of the Irish and UK states to issues raised by the presence of asylum seekers between 1990 and June 2017. This was a pivotal period in the development of asylum policy in both states and in the EU. It shows how politicians and officials dealt with the competing demands of domestic priorities, regional commitments and international obligations. It highlights how these actors gave priority to domestic politics at the expense of refugees whilst claiming to protect the 'most vulnerable'.

Primary and secondary data were collected to address five research questions:

- How has asylum policy in Ireland and the UK been influenced by the relationship between the two states and their membership of the EU?
- What explained the similarities and differences in the institutional response to asylum seekers in each state, particularly given their significantly different approaches to EU membership?
- What role have actors played within those institutions?
- How have actors understood and accounted for the actions that they have taken in response to people seeking asylum?
- How can this inform our understanding of state asylum policy making?

In terms of theory, the thesis draws on the literature around immigration, the state and the EU and tools offered by historical institutionalism, structure and agency and sensemaking to generate, contextualise and analyse the data. This multi-angled approach allows for better triangulation of the 'actor-centred' evidence. The evidence shows how those making and influencing asylum policy were affected by their 'working environment' and the impact of their actions on the institutions in which they operated. Both primary and secondary data indicate that those engaged in asylum governance saw their task as the exclusion of foreign nationals from and within the state territory. This led them to undermine their commitments to international obligations by establishing and maintaining a system that reduced the opportunities for protection to those seeking asylum.

## 8.2 The findings

### 8.2.1 Institutions

The findings show that the Westminster Model of government holds sway in both states. This reinforces the arguments about hierarchy, secrecy and elitism of Ministers and Civil Servants as ‘the guardians of the policy process’ (Richards and Smith, 2002, p. 271). The evidence indicates that the well-established parliamentary systems in both states are undermined by the actions taken by central government in the field of asylum governance.

For example, in the UK, some of the major developments in asylum policy have been brought about by negotiation and agreement by or on behalf of central government with other EU states. These have included the *Le Touquet* Agreement and collaborations with France over ‘The Jungle’ in Calais, together with the EU-Turkey Agreement between the Heads of Member States in the European Council. The exceptions are the preliminary legislative basis for asylum decision-making and reception conditions in the UK, created principally between 1993 and 2004.

In Ireland, central government pursued an administrative asylum governance system over the reception of asylum seekers without giving the *Oireachtas* the opportunity to decide whether that was consistent with international or EU obligations. Direct Provision was established in April 2000, but during the period of this study, which concluded in June 2017, the *Oireachtas* was not given the opportunity to vote on Ireland signing up to the Reception Conditions Directive.<sup>250</sup> Central government’s facilitation of EU asylum measures, in 2004 and 2013, did not extend to allowing its own elected politicians to determine if Ireland should participate in them. The exceptions were when the UK took part in elements of the EU asylum system and then Ireland’s central government would propose Ireland’s participation and, therefore, give parliamentarians the possibility to endorse the government’s decision to opt-in to EU measures.

The findings also confirm the influence of state traditions on the responses to the presence of asylum seekers. For both states, the principal aims of asylum policy were to limit the entry of asylum seekers to their territory in the first instance, to limit the ability of those who do enter to integrate into local communities and to limit the opportunity to obtain refugee status. However, these aims have different origins. For the UK, the state was committed to immigration enforcement before asylum was an area of concern. This commitment motivated the extension of immigration controls to foreign nationals who seek international protection.<sup>251</sup> For Ireland, the centrality of the CTA and its previous practice of excluding even its own citizens from full participation in society, led to an asylum system

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<sup>250</sup> A motion for Ireland to opt-in to the Reception Conditions Directive 2013 was put to the *Oireachtas* on 23 January 2018, part of the government’s response to a Supreme Court decision on the right to work of asylum seekers

<sup>251</sup> Control over the movement of people even with the state was a tradition before migration across international borders became prominent (Anderson, 2013, chapter 1)

focused on the protection of what policy makers consider to be the best interests of the Irish state. Both states have overridden commitments to international obligations and 'outsourced' immigration controls. Successive governments have used private businesses to receive, detain and remove asylum seekers. These illustrate Bell and Hindmoor's (2009) observations around the state's use of different forms of governance to continue to exercise control.

The states' efforts to limit the entry of asylum seekers to their territories, and control their access to social protection and refugee status, have succeeded both because and in spite of the EU. Ireland and the UK used the Dublin and Eurodac systems to deny responsibility for asylum seekers and used the opt-out from directives that gave rights or provided some protection to asylum seekers, such as the Reception Conditions Directive. The 'rights' of the state, as perceived by policy makers (Coakley, 2010b), took precedence over people's rights.

There was no 'goodness of fit' (Green Cowles et al, 2001) in the Europeanisation of the UK and Irish asylum systems. The evidence shows that the state systems were capable of adaptation. However, where asylum was concerned, there was no political will to 'fit' an EU-style of asylum governance into a national framework. This was despite the EU's usefulness in cross-EU regulations that allowed the UK and Ireland to deny their legal responsibilities under international conventions.

The UK tried to 'fit' the EU into a UK-style of exclusion or at least to move it in that direction. It promoted the view that the UK's form of asylum governance was 'superior' and did so with a colonial attitude. An unintended consequence of this attitude towards the EU is the UK's exit from it. Earlier policy decisions created tracks for successive governments to run on. Ireland was willing to get on board when the movement of people across their shared border was concerned. The irony is that the shared border, which both states have been keen to protect from asylum seekers, has created a crisis between them as a result of Brexit.

The UK's exit from the EU also has repercussions for Ireland's relationship with the EU, not least in Justice and Home Affairs. Ireland will navigate its own position in relation to such matters and will not be able to monitor and potentially mirror the UK's responses. It will have to follow EU law with implications for its relationship with the UK.

The UK's policy commitment to systems for the exclusion of foreign nationals undermined its relationships with other EU states. For Ireland, the CTA mattered more than states in continental Europe, which were more distant geographically, regardless of Ireland's otherwise *communautaire* approach to the EU. Whilst Ireland's role on the international stage has been co-operative and inclusive (where the UK was defiant and exclusive), its treatment of asylum seekers at and within its borders differs from a stated commitment to sharing obligations for refugees. Domestically, Ireland distinguishes between asylum seekers and refugees and that distinction is manifest in the discrimination against asylum

seekers. In sum, Ireland's international presentation does not match its asylum policy or its internal conduct towards asylum seekers.

### 8.2.2 Actors

The interviews for this study confirm that the values and preferences of actors develop within the political institutions (March and Olsen, 2006). State actors in both states viewed these institutions, in Weick's phrase, as carving a necessary order from chaos (Weick, 1993). For them, international obligations and agreements within the EU were secondary to the perceived interests of the state and a rigid system of immigration control. Their aim was to extend state control over people who have no political influence and to do so through relations with individual states (and resist the interference of EU institutions). For example, when border crossings were a concern, state actors in Ireland looked to the UK for policy and agreement and the UK sought agreements with France and Belgium to locate its controls on their territory.

The interviews show actors working within the limitations presented to them. In 2014, when Ireland experienced a crisis in its management of the system of Direct Provision, actors chose to accept restrictions on proposals for reform for government consideration. In effect, the institutions and processes of control were so embedded that actors continued to work according to their logic (March and Olsen, 2006). There was a refusal to examine any historical reasons for asylum seekers being left in limbo for so long without a final outcome on their applications to remain in the state. In the UK, the groundless declaration that people seeking asylum do not need protection was combined with the discrediting of EU attempts at 'burden sharing'. It led to politicians talking about 'real refugees' and their greater commitment to resettlement in a manner consistent with 'managed migration'. It enabled policy makers to propose that those who enter through a resettlement route should receive more favourable treatment than asylum seekers who make their own way to the UK.

Asylum policy engaged actors in events on national, regional and international levels. Policy makers in Ireland and the UK were necessarily cognisant of and responsive to the movement of people across the borders of neighbouring states. The evidence shows that, whilst they were conscious of their responsibilities as EU members and signatories to the Refugee Convention, they acted in a way that ensured that asylum policy was not in crisis. If the state actors' perspective is accepted, then asylum policies have succeeded. Their short-term aims were achieved, not least in the flow of people into their respective states being significantly reduced, in 2002 and again in 2015.

From 2015 onwards, the policies adopted favoured those whose entry could be 'managed'. For the UK, this meant those recognised as refugees who had not even tried to enter the EU. For Ireland, it meant refugees from outside the EU and those considered to be refugees (by their nationality) who had been held in Greece or Italy. This supports liberal universal

theories where the moral obligation to assist refugees meets the self-interest of the state (Boswell, 2005) by allowing for the controlled entry of refugees.

The evidence from the state actors suggests the need to combine theories of the state with theories about immigration to understand the actions of the British and Irish governments. This is because of their distinction between refugees and asylum seekers, which means that the latter only exist when they enter the state or, for Ireland at least, when they enter the borders of the EU. The states created the category of asylum seeker to deny the legal rights to people seeking asylum. It later enabled them to portray themselves as responding to a refugee 'crisis' through the process of resettlement.

### 8.2.3 The original hypotheses

This study was premised upon hypotheses around the relationship between the UK and Irish asylum systems and the impact their relationship has had on asylum governance in both states. These were:

- That asylum was not a strategic issue for Ireland and therefore that it has been willing to follow the UK's lead in this field.
- That the protection of the Common Travel Area between the two states overrides any possibility that either state will adopt a more positive approach to EU asylum policy developments.
- That the UK is a greater beneficiary from their bilateral agreements on asylum policy than Ireland.

This section evaluates each of these in the light of the findings.

Irish policy makers did follow the UK's lead on asylum to the extent that they drew upon the experience and thinking in the UK on asylum when the number of asylum seekers in Ireland began to require a concerted response. The UK's expertise did not stop Ireland from considering the experiences of other states, but the UK was the most dominant. Irish policy makers believed that asylum seekers would move from or through the UK to Ireland if the Irish asylum system treated them better than in the UK.

Notwithstanding the developments from 2015 onwards in relation to Ireland's opt-in to the relocation and resettlement programme adopted by the European Council, asylum was not and is not a strategic issue for Ireland. The development of the Irish Refugee Protection Programme, designed to implement the relocation of asylum seekers from within the EU and the resettlement of refugees from outside of the EU, has not led to an improvement in the treatment of asylum seekers. The Irish government's response to the crisis in the Direct Provision system in 2014 showed that there was no real attempt to improve the system for those who make their own way to claim asylum. The only real change arising from the Working Group report was an 'amnesty' which dealt with the legacy of a failed process by granting leave to remain to many who had been in the system for more than five years.

However, the asylum system was left intact, including the Direct Provision system, which continues to warehouse asylum seekers in institutionalised accommodation.

What is also telling about the Irish view of asylum is its lack of engagement in asylum policy issues in the EU. This is evidenced by no Irish MEP having sat on any committee or engaged in a debate about the EU asylum system and that there is no one from the Asylum Policy Unit of the Department of Justice based in Brussels. This indicates that asylum is secondary to other areas, even within JHA, despite the movement of refugees into and across the EU still being a high priority in the EU.

The CTA is of such prominence in the mind of policy makers that it will continue to be central to any decision of Ireland in relation to an EU asylum system. However, it is now complicated by the decision of the UK to leave the EU. Had the UK decided to remain within the EU, then the indications from policy makers in the UK are that the UK would continue to use the enforcement measures of CEAS, the Dublin and Eurodac Regulations, but would remain outside of the other elements of CEAS. Ireland may, through its decision on relocation and resettlement in 2015, be at the stage of taking an independent view and approach to CEAS. The decision to opt-in to the 2013 Reception Conditions Directive may also indicate an independent view of CEAS regardless of the approach of the UK. However, the decision to opt-in is more likely a matter relating to its own constitutional affairs than the adoption of a more positive view of CEAS.<sup>252</sup>

It is not possible to conclude, on the basis of this study, that the UK is a greater beneficiary than Ireland of any bilateral agreements between them. The level of information sharing and nature of the co-operation between the two states is not clear from the evidence gathered. The statements made by Ministers in December 2011<sup>253</sup> suggest that Ireland benefits from any agreements between them. However, the statements from actors in the UK also indicate that the UK works on the assumption that its border with Ireland is secure as a result of Irish immigration controls. In addition, the changes introduced in the IPA 2015 give Ireland the opportunity to return people to the UK even if they claim asylum in Ireland. Therefore, Ireland appears to benefit from its arrangements with the UK but, as stated above, it is a matter that requires research to understand the relationship better, particularly after Brexit when Ireland, an EU state, will have a shared border with a non-EU state.

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<sup>252</sup> The decision to opt-in follows the Irish Supreme Court finding that a complete ban on the right to work for asylum seekers was unconstitutional. The Court gave the government an opportunity for the legislature to decide how to respond before final judgment was given.

<sup>253</sup> See pages 86 and 143

### 8.3 The wider applicability of the analytical tools

This study drew on ideas from historical institutionalism, structure and agency and sensemaking to make sense of the data. These ideas allowed for the analysis of UK, Irish and EU institutions over time, their impact on actors at key stages in the respective political systems, those actors' roles in those institutions and how they understood national, regional and international events.

This analytical framework can be applied to other areas of international migration studies: research with people who cross borders and become asylum seekers; situations involving cross border interests that impact upon migration; and the long-term implications for 'integration' arising from immigration and asylum policies and practices.

#### 8.3.1 Applications for asylum

Decisions on asylum claims are often based upon speculation, assumptions and stereotypes. There is routinely little understanding of the events, some historical, that lead to asylum claims when asylum seekers are universally seen as people seeking to circumvent immigration control. This leads to asylum decision-making being approached on the basis of scepticism, lack of trust and ignorance, all of which increase the possibility that fundamental reasons for protection are not taken into account.<sup>254</sup> Such exclusionary practices threaten people's lives and welfare.

This study uses concepts from historical institutionalism to consider evidence of path dependency, unintended consequences, critical moments and critical junctures. It draws on observations from debates around structure and agency to examine the impact of individual actors and from sensemaking to explore those actors' perspectives and understandings. These concepts can also be applied to studies with asylum seekers.

Judgments about the need to leave a home country and the sequence of events which precede and follow such decisions are often in the context of a legacy that it is important to understand. It should form part of the assessment of risk when deciding if it is safe to return at some later point. For example, a young man who gets into a relationship with a young woman in his community contrary to their cultural norms, can face reprisals from her family especially if her father has a political role and connections. By itself, his claim appears to be a private matter and unrelated to the international system designed to protect refugees from persecution. However, placed within the context of a regional

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<sup>254</sup> Research in both the UK and Ireland has shown that refusals are formulaic and fail people claiming asylum. For example, 'Unsustainable: the quality of initial decision-making in women's asylum claims' (Asylum Aid, 2011); 'Difficult to Believe: the assessment of asylum claims in Ireland' (Irish Refugee Council, 2012) and 'Proving Torture: Demanding the impossible: Home Office mistreatment of expert medical evidence' (Freedom from Torture, 2016).



political system (Kurdish) that has developed out of a struggle for independence and autonomy from central government (in Baghdad, Iraq), together with critical moments of international intervention in his country which has its own legacy (the invasion of Iraq and the subsequent presence of ISIS), then the need for protection takes on a different meaning. The ability of a situated agent, the young woman's father, to act with impunity and the young man's inability to relocate in his country, may mean that a personal feud has created a crisis for the young man which the authorities in his country will have little interest in averting and almost no ability to provide protection. Research that identifies the historical context of political and personal power is important for a proper application of the international obligations towards refugees.

Similarly, a woman who has taken a hazardous journey across several countries, will have been forced to make decisions at various crisis points which will invariably have unintended consequences for her welfare. Her assessment of 'what's the story?' must be followed shortly after by 'what now?' and then repeated on a regular basis. She will have understood and acted within the limitations which some of the actors involved in this study have put in place. The complexity of her decisions and the actions that she took can be analysed using the tools available in sensemaking. Stories will also reveal the role of situated agents at various points *en route*. How she understood the events that she was caught up in and the actions that she took are crucial in understanding her ability and willingness to give an account to people she has never met before, some of whom will determine her immediate support and her future protection.

### 8.3.2 Wider cross-border interests

One of the issues identified in this study was the lack of any significant political interest by Irish politicians in the development of a national and regional asylum system. One of the historical reasons for that was the more immediate and pressing issue of Northern Ireland. The Good Friday Agreement in 1998 followed a referendum which redefined Irish citizenship as an entitlement for anyone born on the island of Ireland. It also led to a change in the Irish Constitution which took away the right to Irish Citizenship by birth in Ireland and made automatic acquisition of Irish citizenship dependent upon at least one parent being Irish.<sup>255</sup> An agreement reached in an attempt to bring peace to one country, constitutionally part of the UK but geographically part of the island of Ireland, had significant implications for people of foreign origin who entered Ireland. This has had particular significance for asylum seekers, with time spent in the asylum system not counting towards 'lawful residence'.<sup>256</sup>

Research into the period which led up to the Good Friday Agreement, the change in Irish nationality law and the ways in which these events were understood by the actors involved

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<sup>255</sup> This was the 27<sup>th</sup> amendment to *Bunreacht na hÉirean*. The restriction on entitlement to Irish citizenship was brought in under the Irish Nationality and Citizenship Act 2004 (Mullally, 2007)

<sup>256</sup> A child born in Ireland to a parent who had legally resided for four years before their birth is Irish by birth. Asylum seekers are not considered to be legally resident.

would benefit from an application of the combined tools provided by historical institutionalism, situated agency and sensemaking. Arguably, the extension of a right to citizenship as part of a peace process was not done with the intention of excluding people of foreign birth but that was a consequence. The UK's exit from the EU, the result of anti-migrant sentiment, will itself have implications for the citizens of both states.<sup>257</sup> The cyclical pattern of decisions for citizens having consequences for migrants and vice versa would benefit from closer examination and might help to demonstrate the inter-connected nature of people in crisis situations.

### 8.3.3 Immigration and integration

The link between immigration and integration are often the focal points of popular debate in the UK with accusations that 'newer' communities, particularly those who are Muslim, are not adapting to the country in which they live.<sup>258</sup> These are cities in the UK where immigration has occurred to some of the poorest areas. Ireland has a much more recent history of immigration but there are already legacies from the asylum system which are leading to potential flashpoints within communities there. There are lessons not only for the here-and-now of integration policy but also reasons for changing the immigration and asylum systems which lead to the creation of isolated communities in the first place.

Although not an issue concerned with international protection, immigration to some of these parts of the UK has been as a result of forced displacement. For example, the building of the Mangla Dam in Azad Kashmir in Pakistan led to immigration to the UK, particularly cities like Bradford, in the 1960s,<sup>259</sup> and its extension years later led to further displacement. The consequences of that for the long term sense of displacement and inability to return have implications for integration in the countries in which people have settled. The historical links between Pakistan and the UK as a legacy of colonialism, combined with decisions to displace citizens who were able to relocate by migration to the UK, arguably left its own legacy of marginalisation and one which has implications for identity and integration.

The 'immigration debate' may not be as overt in Ireland as it is in the UK but it has its proponents who use immigration as a political platform.<sup>260</sup> Towns like Balbriggan in North County Dublin are less than 10 km away from Direct Provision centres like Mosney, the largest accommodation centre for asylum seekers. As a result, children from Mosney have

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<sup>257</sup> On the possible implications for Irish citizens in the UK, see for example <https://www.theguardian.com/politics/2016/oct/19/law-may-be-needed-preserve-rights-irish-uk-after-brex>

<sup>258</sup> See, for example, a new UK government initiative announced in March 2018 to pilot integration measures in cities or towns with a strong Muslim population <https://inews.co.uk/news/politics/bradford-racial-ethnic-integration-segregation/>

<sup>259</sup> See Javed Bashir, The Myth of Return, 24 January 2006 [http://www.lancashiretelegraph.co.uk/news/6236312.The\\_myth\\_of\\_return/](http://www.lancashiretelegraph.co.uk/news/6236312.The_myth_of_return/)

<sup>260</sup> See, for example, <https://www.independent.ie/regionals/fingal/independent/news/balbriggan-pushed-to-the-edge-claims-candidate-sharkey-35526609.html>

often gone to school in Balbriggan and, years later, when their parents get permission to stay in Ireland, it is not unusual for former asylum seekers to settle in the town. Whether the tensions in Balbriggan are as real as some political candidates portray is a matter of debate. However, the legacy of accommodating asylum seekers for many years in centres where they were dependent upon the state, through private companies, to provide transport to schools, is an issue that would benefit from research using the toolkit of historical institutionalism, situated agency and sensemaking in combination.

Historical institutionalism, with its notions, for example, of path dependency, critical moments and unintended consequences, provides a foundation for the examination of the ways in which situated agents, at national and local level, have influenced decisions about integration. Hall and Taylor (1996) introduced the ideas of a 'calculus' and 'cultural' approach in historical institutionalism. Research that is 'actor-centred' would help to identify if, in decisions around immigration and integration, strategic calculations were made by individuals within the parameters set by the institutions or individuals relied on established patterns or routines as the templates for interpretation and action. Research on the organisation of communities would also benefit from the insights provided by an application of the various elements of sensemaking, not least identity.

#### 8.4 Conclusions

Asylum governance in states such as Ireland and the UK is a small part of the state's responsibility to people within its territory. The obligations are greater if people are physically present, hence the determination to refuse entry if at all possible. Unlike immigration, which can affect citizens (for example, a British or Irish citizen married to a foreign national), asylum policy is about the treatment of people who are not citizens. It is arguably a unique group who can and have been subjected to systems that would normally be considered unacceptable if the people on the receiving end were or included citizens.

The asylum seeker is a challenge to the state because the state has defined what is lawful and then placed barriers - legal, physical and societal - to prevent legal entry and undermine the possibility of securing legal residence. It is a cynical *fait accompli*. It is not the conduct of asylum seekers that decides policy or practice; their conduct is the outcome of the systems that have been put in place, not the precursor for them. However, it is the conduct of asylum seekers that becomes the justification for the measures which the state has already adopted. It is within a framework of exclusion, illegality and unlawfulness that decisions are made about whether to recognise asylum seekers as refugees. On the basis of the statements made by policy makers in interviews, statements, documents and debates, asylum seekers in Ireland and the UK are invariably pre-determined to fail in their bid for protection in these two states, regardless of both states having obligations under the Refugee Convention.

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## Appendix 1: Asylum Developments, EU, UK and Ireland, 1990 – June 2017

<b>Year</b>	<b>EU</b>	<b>UK</b>	<b>Ireland</b>
1990	Irish Presidency (January-June); Dublin Convention (June); Schengen Implementing Convention (June)	[At start of the period, the UK was using an administrative system for consideration of asylum claims – replaced in 1993 by legislation]	[At start of the period, Ireland was using an administrative system for consideration of asylum claims – replaced in 2000 by legislation passed in 1996 but subsequently amended]
1991	Hague Council: included discussion on 'manifestly unfounded' or 'abusive' claims	First Asylum Bill: Proposed 1. To raise Carriers' Liability fine to £2000; 2. Accelerated procedures for 'unfounded claims'; 3. Fingerprinting (Bill lapsed with Parliament)	
1992	Maastricht Treaty: created Third Pillar of Justice and Home Affairs (JHA); UK Presidency (July – December); London Resolutions (1 December) on 1. Manifestly unfounded claims 2. Safe third countries 3. Countries of origin		
1993		Asylum and Immigration Act: 1. Right of appeal for all AS; 2. Fingerprinting; 3. Reduced access to some welfare benefits; 4. Safe third country; 5. Certification of manifestly unfounded claims; 6. Administrative measures for dealing with Unaccompanied	

		Minors	
1994			First Refugee Bill
1995	Schengen Convention in force; Resolution on 'minimum guarantees';		
1996	Irish Presidency (July – December); Joint Position on Harmonized application of the term 'refugee' (March)	Asylum and Immigration Act: 'White list' of countries introduced; 'In-country' applicants no longer eligible for subsistence benefits; AS not eligible for non-contributory benefits; AS not eligible under local authority homeless obligations	Refugee Act (not fully implemented until 2000 except Dublin Convention provisions and definition of a 'refugee'): 1. Created a legislative basis for the right to claim asylum and two independent bodies to recommend/review decisions on asylum claims 2. Prohibition on employment; 3. Incorporated Dublin Convention Immigration controls introduced for non-EEA nationals travelling from the UK;
1997	Dublin Convention in force		New Administrative asylum measures introduced (replacing admin measures introduced in 1985); Intro of 'fast track' for 'manifestly unfounded' claims
1998	UK Presidency (January – June): strengthened application of Joint Position on harmonized application of the term 'refugee'	British-Irish Agreement; White Paper: Fairer, Faster, Firmer; Human Rights Act (in force Oct. 2000)	British-Irish Agreement
1999	Tampere Programme: - Agreement to establish a Common European Asylum System (CEAS) – first	Immigration and Asylum Act: Bill considered by a Special Standing Committee;	Immigration Act amending Refugee Act; Administrative scheme for reception of asylum seekers agreed;

	phase 1999-2005; Treaty of Amsterdam inc. Protocol to Title IV (UK and Irish 'opt-out'). Led to creation of Strategic Committee on Integration, Frontiers and Asylum (SCIFA)	Created a completely new system for the support of asylum seekers administered by the Home Office separate to the benefits system	Directorate for Asylum Support Services (DASS) established
2000	Hague Programme: agreement to establish minimum standards in a Common European Asylum System (CEAS);	National Asylum Support Service (NASS) operational effective from 3 April 2000	New support arrangement for asylum seekers came into force from 10 April 2000 (excluding them from welfare payments); Illegal Immigrants (Trafficking) Act: Introduced restrictive time limits for JRs in asylum and immigration; Refugee Act fully operational
2001			Reception and Integration Agency (RIA) replaced DASS
2002	Eurodac Regulation approved; European Union Network for asylum practitioners (EURASIL) established; European Council, Seville: UK proposed a 3-point plan: 1. Encourage poorer countries to co-operate in measures to reduce the flow; 2. Agree common standards to allow for quicker returns (inc to Afghanistan); 3. Strengthen the EU's border and use EU money for that purpose. UK began participation in the European	Nationality, Immigration and Asylum Act 2002: • Prohibited an in-country right of appeal for claims certified as clearly unfounded. • Introduced a list of 'safe countries' which denied applicants from those countries the right of an in-country appeal. UK began participation in the European Migration Network (EMN)	Immigration Act: 1. Carriers' Liability; 2. Safe third country; 3. Factors which undermine credibility of asylum claims Ireland began participation in the European Migration Network (EMN)

	Migration Network (EMN)		
2003	Reception Conditions Directive (RCD) adopted; Dublin II Regulation adopted; Eurodac Regulation became operational	UK opts-in to RCD and Dublin II	Ireland choose not to opt-in to RCD but opts-in to Dublin II; Immigration Act 2003: Introduced a Ministerial Order for the prioritisation of asylum claims; European Convention on Human Rights Act
2004	Irish Presidency (January – June); QD published (April); Frontex Regulation (October); General Directors of Immigration Services Conference (GDISC) initiated (by the Dutch)	UK opts-in to QD Asylum and Immigration (Treatment of Claimants etc.) Act: revised the appeal structure to limit the right of appeal	Ireland opts-in to QD Referendum on Irish Citizenship by birth: revoked citizenship by birth in Ireland
2005	UK Presidency (July – December); Asylum Procedures Directive (APD) published (1 December)		Discussion document on Immigration and Residence in Ireland; Irish Naturalisation and Immigration Service (INIS) established
2006		Immigration, Asylum and Nationality Act 2006: provided right of appeal for people whose refugee status was not extended on review or was revoked	
2007	European Commission Green Paper on the future of CEAS: proposed revising CEAS to establish common standards across the EU; the establishment of an Asylum Support Office; and a 'corrective'		



	burden sharing mechanism to complement the Dublin system		
2008	European Commission Policy Plan on Asylum: proposed second phase for CEAS (to be completed by end of 2012); Proposals for re-cast RCD	UK 'opted-out' of recast RCD (contd. to be bound by original)	Immigration, Residence and Protection (IRP) Bill published (withdrawn in 2010): proposed a 'single protection procedure'
2009	Lisbon Treaty came into effect; Proposals for recast APD and QD	Act; UK held Presidency of GDISC (until early 2011); UK 'opted-out' of recast APD and QD	Language analysis for Somali applicants introduced; Ireland 'opted-out' of recast APD (had not yet transposed the original directive) and QD
2010	European Asylum Support Office (EASO Regulation) agreed; Stockholm Programme		IRP Bill 2010 published (fell with end of government in January 2011)
2011	Draft Re-cast RCD published	Agreement between UK and Ireland over CTA; UK decides not to opt-in to recast RCD but participated in negotiations to protect Dublin III Regulation decisions	Agreement between UK and Ireland over CTA; IRP Bill re-introduced in March 2011 (subsequently withdrawn)
2012	Commission proposal on EU-wide permanent relocation scheme and joint processing of asylum applications	UK welcomes second but not first proposal from the Commission; Opts-out of the recast APD but opts-in to recast Eurodac Regulation	
2013	Irish Presidency (January – July); Final recast Directives of CEAS agreed		
2014	DG Home Affairs becomes DG Migration and Home Affairs	British-Irish Visa Scheme; New agreement over data sharing	British-Irish Visa Scheme; New agreement over data sharing
2015	European Council Relocation and Resettlement Scheme		International Protection Act

<b>2016</b>	EU-Turkey Agreement	UK Referendum on EU membership	IPA section on returns across CTA in force
<b>2017</b>			IPA Single Procedure in force

Source: Author's assessment

## **APPENDIX 2: INTERVIEW SCHEDULE, QUESTIONS AND DESCRIPTION OF PARTICIPANTS**

27 interviews were conducted between 25 April 2016 and 24 April 2017. With the exception of one interview, they were audio recorded. All interviews were transcribed by the author.

The questions that were used to guide the interviews are as follows:

1. What role(s) have you held in relation to policy towards asylum seekers?
2. What/who has influenced you in that role?
3. What has been the greatest impetus to change in/maintain asylum policy during the period that you have been/were in your position?
4. What is/have been the biggest obstacles which have prevented/frustrated you in the implementation or development of asylum policy?
5. How has the external environment impacted upon the work that you have been responsible for?
6. What is/has been the relationship between the development of asylum policies at a national level and other EU states?
7. What is/has been the relationship between the development of asylum policies at a national level and those within the EU?
8. Can you give an example of an action or initiative which you have been involved in which has led to a substantive change and how has this happened?
9. How effective do you consider that you have been in influencing a national asylum policy in Ireland/UK or at an EU level?

With the exception of the first two interviews in Ireland, conducted prior to 23 June 2016, the following question was added in the light of the result in the UK referendum on EU membership:

10. What do you think are the possible implications of Brexit for asylum policy in UK/Ireland?

Interviewees are referred to in the body of the thesis as either 'policy maker' or 'policy influencer' which are used in this study to mean someone involved or interested in asylum policy, at some point during the period covered in the study, 1990 until June 2017. These general terms were used in order to avoid the risk of identification in Ireland where the pool

of people for interview, in a relatively specialised field and small population, was much greater than the UK. The terms were used to mean the following:

Policy maker: a politician or civil servant

Policy influencer: a person in an international organisation, a non-governmental organisation or an academic.

Those interviewed are identified by country or by reference to involvement at an EU level. In terms of the categories above, they are as follows:

Policy Maker	Policy influencer
IR1	IR3
IR2	IR4
IR8	IR5
IR10	IR6
	IR7
	IR9
UK1	UK4
UK2	UK5
UK3	UK7
UK6	UK8
UK9	
UK10	
UK11	
EU1	EU2
EU3	EU4
	EU5
	EU6

The interview dates and locations of the interviewees are given below together with a description of the post held by the interviewee at the time that they were reflecting upon in the interview. It should be noted that the location of and post held by Irish interviewees are not listed (except location as Republic of Ireland (ROI) only to avoid identification which is otherwise possible given the small number of people involved in asylum policy in a relatively small country

Participant	Date of interview	Location of interviewee	Post held
UK1	20.07.2016	London	Politician

<b>UK2</b>	<b>16.09.2016</b>	<b>London</b>	<b>Politician</b>
<b>UK3</b>	<b>01.09.2016</b>	<b>London</b>	<b>Politician</b>
<b>UK4</b>	<b>18.01.2017</b>	<b>London</b>	<b>NGO</b>
<b>UK5</b>	<b>18.01.2017</b>	<b>London</b>	<b>NGO</b>
<b>UK6</b>	<b>30.01.2017</b>	<b>Brussels</b>	<b>Official</b>
<b>UK7</b>	<b>01.02.2017</b>	<b>London</b>	<b>Academic</b>
<b>UK8</b>	<b>03.02.2017</b>	<b>London</b>	<b>NGO</b>
<b>UK9</b>	<b>20.03.2017</b>	<b>Brussels</b>	<b>Official</b>
<b>UK10</b>	<b>14.02.2017</b>	<b>London</b>	<b>Official</b>
<b>UK11</b>	<b>24.04.2017</b>	<b>London</b>	<b>Politician</b>
<b>IR1</b>	<b>25.04.2016</b>	<b>ROI</b>	
<b>IR2</b>	<b>27.05.2016</b>	<b>ROI</b>	
<b>IR3</b>	<b>16.08.2016</b>	<b>ROI</b>	
<b>IR4</b>	<b>12.01.2017</b>	<b>ROI</b>	
<b>IR5</b>	<b>11.01.2017</b>	<b>ROI</b>	
<b>IR6</b>	<b>11.01.2017</b>	<b>ROI</b>	
<b>IR7</b>	<b>11.01.2017</b>	<b>ROI</b>	
<b>IR8</b>	<b>16.08.2016</b>	<b>ROI</b>	
<b>IR9</b>	<b>12.01.2018</b>	<b>ROI</b>	
<b>IR10</b>	<b>12.01.2018</b>	<b>ROI</b>	
<b>EU1</b>	<b>12.10.2016</b>	<b>Brussels</b>	<b>Official</b>
<b>EU2</b>	<b>29.03.2017</b>	<b>Brussels</b>	<b>NGO</b>
<b>EU3</b>	<b>13.02.2017</b>	<b>Brussels</b>	<b>Official</b>
<b>EU4</b>	<b>03.03.2017</b>	<b>Edinburgh</b>	<b>IGO* Consultant</b>
<b>EU5</b>	<b>25.01.2017</b>	<b>Berlin</b>	<b>NGO</b>
<b>EU6</b>	<b>20.01.2017</b>	<b>Brussels</b>	<b>NGO</b>

\*Intergovernmental organisation