Chapter 5

The Displacement and Dispossession of Asylum Seekers: Recalibrating the Legal Perspective

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(1) Introduction

Asylum seekers have been rightly described as ‘among the most legally and socially disadvantaged people in western societies.’ Amongst migrants, and in a product of forced migration, asylum seekers are especially vulnerable to suffering from limited access to social housing. Immigration and social housing already sit on a precarious axis. Two recent contrasting media headlines on a 2009 report by the UK’s Equality and Human Rights Commission illustrate this aptly.

The report, entitled Social Housing Allocation and Immigrant Communities, was designed specifically to look at the facts behind “widespread media reports [which] suggest that migrants receive priority in the allocation of social housing, and in doing so displace non-migrants.” The report found quite clearly that less than two per cent of all social housing residents are people who have moved to the UK in the last five years and that nine out of ten people who live in social housing were born in the UK. Equipped with the report, Housing Minister John Healey attempted to counter claims that social housing favours immigrants at the expense of the indigenous population, stating that he wanted “to nail the myth” that certain groups were being left out in terms of housing allocation. [...] It is largely a problem of perception [...] The report shows there is a belief, a wrong belief, that there is a bias in the system.” The BSC covered the report and the minister’s comments under the headline, “Housing ‘not favouring migrants’.”

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Daily Mail took a rather different interpretation, carrying the headline ‘One in ten state-subsidised homes goes to an immigrant family’. In this example one idea of home has been set up in opposition to another, and a tension created between protecting (and defending) the indigenous population’s sense of home, on the one hand and making room – at both the state and housing levels – available to ‘others’ who may have been displaced and dispossessed from elsewhere on the other. Indeed, this has been regarded as a deliberate effect of the ‘demopolitics’ which constructs these images of ‘them’ and ‘us’ in an effort: “to contain citizenship, to uphold a certain statist conception of citizenship in the face of social forces that are tracing out other cultural and political possibilities [through]...the assertion of a right to settle as ‘illegal’ and ‘dangerous’.”

This chapter draws upon the recent emergence of ‘home’ as a subject of legal analysis, and particularly on the proposition that the occupied home is a distinct type of property, due to its central role in our lived experiences as humans, to reconsider the relationships between ‘housing’ and ‘home’ for human rights. There are obvious but implicit synergies across the three conceptual fields of shelter, housing and home as they inform human rights laws and norms. As Kenna has recently noted: “housing addresses the basic need for human shelter, but also facilitates the essential human requirement for a home.” This chapter seeks to make explicit these relationships in the context of asylum seekers, and considers

9 The legal concept of home has merged into a cross-disciplinary and inter-disciplinary ‘home’ scholarship, building on empirical studies and theoretical analyses of the lived experience of home, the meanings – which home represents for occupants, and the experience of losing one’s home, see generally L. Fox, Conceptualising Home: Theories, Laws and Policies (Hart Publishing, Oxford 2006) p. 9, especially ch. 4.

how a clearer articulation of this triad could usefully influence legal analysis and policy debates concerning asylum seekers and failed asylum seekers. Displaced from their state of origin, and easily displaced again from their precarious claim to housing in the UK, the ‘double displacement’ of asylum seekers highlights law and policy effectively coheres behaviour through the promise or denial of housing with little reference to human rights or notions of ‘home’. In exploring ‘double displacement’, two key features characterise our approach, both of which are drawn from an emphasis on the displaced or dispossessed human person who is the subject of the discussion. Firstly, we argue that the dominating or hegemonic discourse of legal and policy approaches to asylum seekers produces a minimalist ‘shelter’ approach to questions of housing and home for asylum seekers. This chapter seeks to consider how human rights approaches might create possibilities for developing new thinking on this subject from a person-centred and problem-solving perspective rooted in analysis of how the asylum seeker experiences the absence of ‘adequate housing’ and the absence of ‘home’.20

Secondly, and consequent on this approach, the paper considers the relationships between home, housing and human rights within the broader panoply of international and European human rights law. The importance of viewing housing within the broader framework of human rights – as a ‘gateway’ right – was emphasised by the UN Committee on Economic, Social and Cultural Rights when it re-visited that:

the right to housing is integrally linked to other human rights and to the fundamental principles upon which the [International Covenant on Economic, Social and Cultural Rights] is founded. Thus the inherent dignity of the human person from which the rights in the Covenant are said to derive requires that the term ‘housing’ be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons of access to income or access to economic resources.15

The Committee also noted that: ‘the indivisibility and interdependence of civil and political rights and economic, social and cultural rights [as] fundamental elements of international human rights law...has been repeatedly reaffirmed, most recently at

12 For further discussion of this approach, see Y. van der Horst, ‘Living in a Reception Centre: the Search for Home in an Institutional Setting’ (2004) 21 Housing, Theory and Society 36 at 37.
the World Conference on Human Rights in 1993. For example, without a secure base in housing in which the person can be based, the realization of civil and political rights—while perhaps theoretically available—is practically more difficult.

The chapter explores the importance of 'home' to human and, in turn, to human rights laws, both when 'housing' is available, in relation to the location and quality of accommodation provided to asylum seekers, and in relation to policies and practices that limit access to such accommodation, so that no shelter is provided. With regard to the latter, three case studies are undertaken to demonstrate that home and human rights thinking are absent from policies which exclude asylum seekers and failed asylum seekers from any claim to home, housing or shelter: the situation of people with a (medical) need for 'care and attention', into applying asylum seekers and failed asylum seekers themselves. We demonstrate that the policies enshrined in the relevant UK statutes, while arguably 'compliant' with international obligations, inadequately address the intrinsically needs of asylum seekers and failed asylum seekers, who must rely on the activism of individual judges to ameliorate their situation. Yet, without a statutory framework and a broader legal discourse that recognizes the importance of home to the human needs of asylum seekers, the extent to which judicial responses can temper the harsh consequences of exclusion from housing and home is necessarily limited. The final section of the chapter argues against a 'minimal compliance' approach to human rights as externally imposed international obligations, in favour of an arrangement that sees human rights norms as a platform on which to build domestic policy solutions.

(2) Home, Exile and Alienation: 'Double Displacement'

The central importance of notions of home, exile and alienation for the human experience has long been recognized in philosophical writing. We all exist in a relationship with place, whether positive or negative, whether with a meaningful place...
found...The idea (of a) the risk of having no proper or lasting place, no place to be or remain... This is the essence of our notion of "double displacement". Yet, the impact of double displacement is not reflected in the laws and policies which govern access to housing and hence for asylum seekers in the UK. The following sections demonstrate how the "double displacement" of asylum seekers is excluded from legal reasoning, whether in relation to legislative policies towards asylum seekers and failed asylum seekers, or in the judicial application of international human rights standards to their predicament. The purpose of this analysis is to highlight the disjuncture between human experiences of displacement and dispossession from home on the one hand, and the limitations of human rights law in formulating responses which value these experiences, on the other. Finally, we move on to consider alternative methods of framing "human rights" which might allow greater scope for recognising and responding to the double displacement of asylum seekers.

(3) Asylum and Discretion in the UK

We now turn to an exploration of the very real predicaments of asylum seekers, as the paradigm of double displacement: displaced from their home state and dispossessed from "home in housing". Rather than responding to the adverse human consequences of displacement and dispossession, successive policies pursued by the UK government have actually heightened asylum seekers' vulnerability and sense of dislocation by adding conditions to and restrictions upon their right to, and ability to, access and participate in the labour market and to obtain social housing. Perverse amongst these policies is the attempt to use denial of housing as a means of coercing certain behaviours from (failed) asylum seekers. From the outset the paradigm embodied by these policies must be acknowledged; while these policies typically give very little weight to the human cost of asylum seekers' inability to re-establish "home", it is the internationally acknowledged human need for "home", and the deleterious effect of denying access to a meaningful home experience, that underpins their power to coerce.21 The following sections sketch the legal context of asylum seekers' home experiences, and show some potential legal solutions to their predicament based on European and international human rights law. Forthwith, we note that since these current approaches are rooted in the fairly blunt tools of existing law, and depend on a large extent on the activation of judicial intervention, the vision of "home" that they reveal is, at best, an attenuated vision that does little to ameliorate the risk of double displacement.

(4) Sketching the Legal Context: Asylum Seekers' Diminishing Rights to Housing

The UN Refugee Convention specifies some economic, social and cultural rights for persons recognised as refugees. However, whilst the person is still an asylum seeker awaiting the determination of their claim to be a refugee, the rights derived from the Refugee Convention generally do not apply.22 States may choose to assimilate welfare support and social housing for asylum seekers with the national population, to separate it entirely, or to hold asylum seekers in detention. The exclusion of asylum seekers from the Refugee Convention leaves them vulnerable to political needs at the domestic level, and may result in only the barest of provisions. Furthermore, even where domestic policies entitle asylum seekers to receive some shelter from the state, it is clear that merely providing a roof overhead does not suffice to satisfy even the most basic housing needs to enable a person to function in society. The provision of support to asylum seekers in the domestic law of the UK was described by the Joint Committee on Human Rights in 2007 as "a confusing mess".23 We pick up the story in the 1990s when, in a policy trajectory outwitting the transition from Conservative to Labour governments, the rights of asylum seekers to social security benefits were progressively extinguished. When combined with a general prohibition upon the right of asylum seekers to work, the vulnerability and exposure that this engendered was clear.24 Yet, a striking feature of the policies outlined below is that they rest at the premise that it is legitimate (indeed "normal")...

21 E.g. C. de Borda, "Home as a Place - Toward a Remodeled Understanding of the Place:World" (Universitas Press, Bloomsburg 1993), preface, xvi.

to the extent to which asylum seekers should "benefit" from social housing and other elements of the welfare state on political policy-making. The later stages of this chapter demonstrate the cost of failing to recognise the impact of these policies on asylum seekers' rights to housing and home as human rights.

In 1996 delegated legislation[28] attempted to remove the entitlement to social security benefits of asylum seekers who did not claim asylum at the point of entry into the UK. The role of judicial review in amending the plight of destitute asylum seekers was demonstrated when the Regulations were successfully challenged in Re: Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants.[29] In the conclusion of his judgment, Neill LJ noted that the Asylum and Immigration Appeals Act 1993 had provided "fuller rights" to asylum seekers than they had previously enjoyed, particularly in relation to appeals against negative decisions. However, the court went on to note that the Regulations would either render these fuller rights useless by encouraging potential refugees to leave the UK before concluding their appeals, or the Regulations trust:

unnecessarily contemplate or some life as destitute that no mind so calved person can tolerate. So basic is the human right here at issue that it cannot be necessary to consent to the European Convention on Human Rights to take note of their violation...[30]

In a powerful indictment of the impact of the regulations in practice, Neill LJ went on to claim that the regulations would hold it unlawful to alter the benefit regime so drastically as must inevitably be merely prejudicial, but on occasion disastrous, the statutory right of asylum seekers to claim welfare status...[31] (for my part regard the Regulations now in force... it is uncomprehending discrimination in effect that they must indeed be ultra vires...[32]

In upholding the asylum seekers' challenge to the Regulations, Neill LJ recognised the adverse human consequences of destitution, when he reasoned that:

Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either

period also applies where a hostile failed asylum seeker presents a fresh claim for asylum (so on the expiry of a further year, they would be able to apply for permission to work). 27 Social Security (Persons From Abroad) Misdirections Amendment Regulations 1996.


29 Ibid., 292 (Neill LJ).

30 Ibid., 293 (Neill LJ).

31 Ibid., 293 (Neill LJ).

32 The history of s 25 NAA 1948 is summarised in R. (on the application of Mc V) v. Slough BC [2008] 1 WLR 1808 (1) (Business H), discussed further below.


34 Asylum Support (Amendment) (No. 2) Regulations 2009; see http://www.bis.gov.uk/asylum/support/cashsupport/current/supportarrears (accessed 8 January 2010).

35 The criteria are set out in Regulation 3 of the Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2008.
3 NIAA 2002, they become ineligible either for NASS ‘hard case’ support or for local authority ‘destitution plus’ provision. Under section 9 of the Asylum and Immigration (Treatment of Claimants) Act 2004, even failed asylum seekers with children may have their support removed in this way.

The section 4 scheme, known as ‘hard case’ support, is designed for failed asylum seekers who are unable to leave the UK immediately due to reasons beyond their control. Unlike section 95 support, this does not result in cash payments, but consists of accommodation plus £35 per week in vouchers. Significantly, the use of vouchers rather than cash may exacerbate the stigmatisation of failed asylum seekers and also limits their choice as to where they purchase goods to meet their essential needs. Thus, the use of vouchers in this way compounds the lack of autonomy which renders accommodation for asylum seekers ‘unhomely’. However, as we shall see below, the section 4 regime is hugely problematic, not least of all because it is estimated that only four per cent of failed asylum seekers in the UK are in receipt of it, thus leaving the vast majority unsupported.

(5) The Location and Quality of Asylum Accommodation: Shelter, Housing and Home

Even where asylum seekers are able to secure shelter from the state, for adequacy of provision in supporting housing and home has been a criticism. Two key issues have emerged in reports scrutinising the accommodation provided when an asylum seeker is ‘ineligible under the immigration system’, under section 95 of the Immigration and Asylum Act 1999: the location and the quality of the accommodation provided.

The emergence of these issues underscores the state’s perception of its role as providing ‘shelter’ rather than housing or home as they might be understood in the context of the ‘right to housing’ or the ‘right to respect for home’. Indeed, the approach of the UK to sheltering asylum seekers might deliberately undermine meanings of housing and home. For example, the issue of location is rooted in the policy of dispersal, which has come under criticism from the UK’s House of Commons Public Accounts Committee. The primary criterion in this process, which disperses asylum seekers around the UK, is the availability of accommodation, which the PAC has recognised can result in individuals becoming isolated.

This reflects Diken’s observation that refugee spaces (whether ‘open’ spaces, such as accommodation centres or reception centres, or closed spaces e.g. detention centres) are often deliberately located ‘outside cities, in suburbia or in rural areas, as a way of demonstrably peripheral sites’; away from amenities and facilities, and ‘characterised by a sterilised, non-functional enclosure’—contact with the outer world is physically minimised behind the fences, which yield no permission to touch the outer world resulting in the complete isolation of the refugee from public life.

The second, and perhaps most pressing issue is the quality of accommodation. The UK’s Joint Committee on Human Rights argued in its 2007 report on ‘The Treatment of Asylum Seekers’ that in some cases the quality and terms of accommodation provided to asylum seekers is so woeful as to constitute a failure to respect home and family life under Article 8 ECHR and the right to adequate housing under Article 11 ECHR, discussed further below. Nevertheless, the government maintains that it has agreed standards and contracts which ensure there is no breach of international obligations.

Against this background, and the likelihood that the asylum seeker already by virtue of their displacement from (and probably also displacement in) their home state, is experiencing a sense of powerlessness and depersonalisation...frequently mixed with an acute anxiety about their new circumstances and strong feelings of homelessness, the impact of further displacement in respect of asylum seekers’ provisions claim to housing (and by extension to re-establish home) is significant. Thus we are not just concerned with ‘homelessness’ in the sense of being without shelter, but with the argument that although asylum seekers may be provided with a roof over their heads, the evidentiary clearly indicates that the provision of shelter in this respect cannot necessarily be described as ‘housing’, and is likely to be inadequate and traumatic.

The distinction between being without shelter and being homeless was recognised by the UK in its definitions of homelessness as ‘a condition of detachment from

36 Schedule 3 also comprehensively excludes support under other non-asylum-seeker-specific welfare provisions.
41 Ibid.
42 These comments related specifically to accommodation provided under s 95 IAA 1999, discussed further below. See also Joint Committee on Human Rights, ‘The Treatment of Asylum Seekers’ HL (2006-2007) 81-1; HC (2006-2007) 604 [104], note that according to the High Court in R (Rashid & another) v Secretary of State for the Home Department (2004) EWHC Admin R21, in so far as ECHR reports express opinions on matters of law, they have only persuasive value; see generally J. Herbert, Parliament and the Human Rights Act: Can the ECHR Help Facilitate a Culture of Rights?’ (2006) 6 International Journal of Constitutional Law 38.
society characterised by the lack of affiliative bonds...that carries implications of belonging nowhere rather than having nowhere to sleep. As 'non-citizens', exiles, refugees and asylum seekers are already marked out as not belonging, and as subject to explicit policies which seek to ensure that they are not enabled in developing a sense of belonging, or coming to feel at home. The negative impacts of homelessness on individual well-being are well-established in research literature:

Coping without a home is a stressful, time-consuming occupation. Every single day, homeless people are faced with the task of securing food, shelter, and other necessities of life. Frequently they are obliged to negotiate complex bureaucratic systems, endure alienating and dehumanising service-delivery routines, and risk arrest or jail. They live with the physical and psychological consequences of poor diet, inadequate rest, and lack of health care."

The absence of home is also associated with alienation from the practical and psychological benefits (particularly in relation to ontological security and identity) that flow from having an opportunity to establish a home, for example, the potential to develop social, cultural or community capital in a particular location. While Bourdieu recognised the importance of durable networks for the acquisition of social capital, Putnam linked social capital to effective democracy, and for individual and community engagement in civil society.

45 UNCHS/Habitat, Strategies to Combat Homelessness (UN Centre for Human Settlements, Nairobi 2000), xiii.


47 Defined as: 'the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition' (P. Bourdieu, 'The Forms of Capital' in J Richardson (ed.) Handbook of Theory and Research for the Sociology of Education (Greenwood, New York 1986), 241-58, while sense of belonging and place attachment have not been central to the neo-Marxist theories of social capital, the role and relevance of place and social capital particularly among young people is emphasised by Scharfen-McDaniel, who argues that social capital must be grounded in the physical environment. See N.J. Scharfen-McDaniel, 'Conceptualizing Social Capital among Young People: Towards a New Theory' (2004) 14 Children, Youth and Environment 1-40 (available online at http://www.colorado.edu/journals/eye/14_1/articles/articlefull.htm, accessed 17 September 2010), the role of the 'sense of belonging' in social capital is also noted in D. Narayan and M.F. Cassidy, 'A Dimensional Approach to Measuring Social Capital: Development and Validation of a Social Capital Inventory' (2001) 49(2) Current Sociology 59-102.


50 See for example, F. Michelman, 'On Protecting the Poor through the Fourteenth Amendment' (1959-70) 83 Harvard Law Review 7.


53 Ibid.

54 Ibid.
asylum procedure is top priority...it is a disservice of temp-vaity, insecurity and authority...19

The home meanings most often missed by the residents of the reception centre in van der Horst's case study were autonomy (for example, the ability to choose what you eat and to prepare it) and the possibility to live your life in accordance with your cultural customs.58

It would therefore appear that there is a strong conceptual basis for arguing that 'housing as home' considerations—that is, considerations that go beyond concern with mere shelter—should be, be represented in legal and policy discourse on housing for asylum seekers. Yet, as the following sections will demonstrate, there remain considerable challenges to the development of legal strategies that can effectively represent the asylum seeker's interest in securing accommodation which can function as a home, against the state's expressed interest in avoiding the establishment of home attachments in the UK during the asylum process. These are brought to the fore in three case-studies in which the (failed) asylum seeker's limited rights to housing and home are challenged. Without mainstream acceptance of the importance of 'home' in legal and political discourse generally, = immigration and asylum law in particular, the extent to which asylum seekers in the UK 'enjoy' access to meaningful home has depended upon the judicial interpretation of domestic legislation that only indirectly addresses the idea of 'home'.

(6) Case Study 1: Asylum Seekers in Need of 'Care and Attention'

To coincide with the introduction of the national system for asylum seekers, section 116 of the Immigration and Asylum Act 1999 attempted to remove their access to local authority support under section 21(1)(a) NAA 1948 by inserting a new section 21(1A). The new section 21(1A) NAA 1948 excludes the provision of section 116(1) support to persons subject to immigration control where their need for care and attention arises 'solely' because of destitution or the physical effects of destitution upon them. It was judicial activism, once again, which sought to ameliorate the impact of the legislation within R. v Wandsworth London Borough Council, Ex parte O and R v Leicester City Council, Ex parte Bhika, the Court of Appeal dammed the effort of the new section 21(1A) by indicating that virtually any infinity would mean that the need for care and attention was not 'solely' because of destitution. In an evocative passage, Simon Browns LJ said, 'If

55 Ibid, 41.
56 Rapoport mentioned, for example, the absence of man and women's spaces, and cultural norms on suitable relations between family members.
58 R. (on the application of Mo v Slough BC) [2008] 1 WLR 1808 [27].
59 Ibid.
60 Disappears in C. Sawyer and P. Tugn. 'Neither Here Nor There: Temporary Admission to the UK (2005) 17 ULJR Law 710
62 Ibid. 
63 R. (on the application of Mo v Slough BC) [2008] 1 WLR 1808.

there are to be immigrant beggars on our streets, then let them at least not be old, ill or disabled.60 Significantly, even failed asylum seekers may continue to benefit from section 21(1(A) support under this line of cases.61

In her judgment in R. (on the application of Mo v Slough Borough Council, discussed below, Baroness Hale stressed that, following the Wandsworth case, it had been expected by the senior judiciary that only those asylum seekers with the 'test of care needs which could only be met in specialised accommodation, and people who fell outside the asylum scheme altogether, would continue to fall under section 21(1A) NAA 1948 and thus be supported by local authorities, with others supported through the national system.62 But, highlighting again the tensions which have been evident between the judiciary — who are naturally faced with the human and personal stories of the people who are seeking housing through this route — and national policy-makers, she added, 'Thus was wrong. The Secretary of State was determined that the national scheme would indeed be a last resort. If support was available from the local authority, then it would not be provided through the national system, even where the mere provision of accommodation had met the asylum seeker's 'limited needs arising from destitution'.

This has created difficulties where particular local authorities, in places like Slough in the south-east of England, have come under pressure to provide support to (failed) asylum seekers in need of care and attention. At a political level, it is perhaps understandable that the local authorities resent footing the bill for asylum seekers since matters relating to immigration are quintessentially national government issue. However, the consequence has been a series of cases where local and national government have been in dispute as to who is responsible for providing accommodation support for particular asylum seekers,63 giving rise to what Sweeney has described as: 'an inverted and useless turf war between local and central government'.64

In the recent Slough65 case the House of Lords, citing Sweeney, has shifted some of the responsibility back on to national government by narrowing the scope of eligibility under the National Assistance Act 1948. In Slough the House of Lords examined the precedents of Mo and applied section 21(1A) support to failed asylum seekers who 'responsible for providing accommodation support for particular asylum seekers,65 giving rise to what Sweeney has described as: 'an inverted and useless turf war between local and central government'.64

58 Ibid, 2548.
60 R. (on the application of Mo v Slough BC) [2008] 1 WLR 1808 [27].
61 Ibid.
62 Disappears in C. Sawyer and P. Tugn. 'Neither Here Nor There: Temporary Admission to the UK (2005) 17 ULJR Law 710
64 Ibid.
The Idea of Home in Law

immediate need was for medication and a refrigerator in which to keep it. The House of Lords put forward a narrower reading of section 21(1)(a) NAA 1948 with the effect of upholding the local authority's decision to refuse accommodation. The court held that "the need for care and attention" required to trigger the duty to provide residential accommodation must mean something more than a mere need for "accommodation". The ordinary meaning of "care and attention" was "looking after", and as M did not need "looking after", the duty was not engaged. In Slough, the House of Lords thus cut back on the eligibility of asylum seekers to local authority housing, suggesting that, henceforth, "despite this cases in which the local government obligation to provide residential accommodation under section 21 of the NAA 1948 will be limited to those persons whose need does not arise solely from destitution but who also, in some sense, need "looking after". This is the immediate effect of the judgment: that local authorities are now within their rights to re-examine the circumstances of the person to whom they are providing accommodation under section 21(1)(a) and to give support to those who do not meet the stricter conditions set out in the Slough case to theory, asylum seekers now have, in their place, wider rights to support under the national system administered by NASS. The reality, however, is that these people will likely face administrative delays, complex applications, processes, and, ultimately, barriers in accessing housing which is not sufficient to function as home.

The House of Lords in Slough was silent on the potentially very serious implications of the judgment for "M" himself, but in the introduction to her leading judgment Baroness Hale noted that he had made an application to remain in the UK on the ground that he feared breaches of his Article 3 ECHR rights on being returned to Zimbabwe, he would be entitled hereafter to NASS accommodation irrespective of the outcome of the case (indeed the application). The wider impact of the judgment is that by restricting access to local authority support under the NAA 1948 to people who need "looking after", the House of Lords rendered more people eligible for national support by NASS. The judgment guts, as it were, the surprising restrictive approach to gaining access to accommodation theoretically provided at a national level. However, the judgment of the House of Lords, necessarily pinned to the facts and the legislation before it, could not address the central concern of this chapter: the importance of "home" as a central element of "being human" and, thus, of human rights law. Indeed this case easily was marked instead by its concern with the allocation of financial responsibility between branches of government and its inability to concerns about the particular vulnerability of asylum seekers, and others subject to immigration control, to double displacement.

63. [23] (Baroness Hale).
64. As Baroness Hale put it, M did not need looking after as, "[P]eople with the virus can now live normal lives for many years." [36] (Baroness Hale).
65. (1) Case Study 2: Late-applying Asylum Seekers

In 2002 primary legislation was passed that attempted to exclude late-applying asylum seekers from NASS accommodation and support. Section 5(3) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002) places the Home Secretary under a duty to exclude asylum seekers who do not make their application for asylum "as soon as reasonably practicable". However, a "safety net" under section 5(5) of the NIAA 2002 does "not prevent" the Home Secretary exercising a power to support late-applying asylum seekers to the extent necessary for the purpose of avoiding a breach of the European Convention on Human Rights, so preventing the Act from requiring the Home Secretary to act in such a way as to conflict with section 6(1) of the Human Rights Act (HRA) 1998. Yet, in what appears to be a spirit of minimal compliance, the Home Secretary has seemed at times reluctant to exercise this power, even in the face of considerable hardship.

An example of the judiciary forcing the use of the safety net can be seen in the case of "A". "Limbuela and Tieu" where an applicant had been excluded from access to support by virtue of section 5(3), and the power under section 5(5) had not been exercised by the Home Secretary. The facts presented to the House of Lords indicated that the applicant had experienced real hardship, including sleeping rough, and the House of Lords went on to hold that the Home Secretary's failure to exercise section 5(5) of the NIAA 2002 amounted to a violation of his right to freedom from inhuman and degrading treatment under Article 3 ECHR. The House of Lords found that because the statutory framework combined the exclusion from support with a prohibition on work, it was a positive act by the state against asylum seekers.

It was therefore caused by Article 3's prohibition upon inflicting inhuman and degrading treatment, rather than the right to respect for home, family and private life as protected by Article 8 ECHR. As well as providing the reason and basis for the judgment, the judgment went on to say that it is "clear that the applicant, who is female, severely disabled and pregnant, was in breach of section 3 ECHR. The reason for that is that she has never been in contact with the system and would face a significant risk of a violation of her right to protection of health and human dignity if she were to be returned to the country from which she has fled."
There are, however, a number of possible arguments that might be raised against the orthodoxy. For example, Sweeney has argued that the causal link between the statutory framework and the destitution of failed asylum seekers is not broken by their refusal to leave the UK; rather, he argues, the government remains "directly responsible", so that Article 3 ECHR is "engaged, and the power under paragraph 3, Schedule 3 NIAA 2002 should be exercised in favour of destitute failed asylum seekers." This argument was based on the observation that the successful applicants in Adam, Limbula and Tseta had "chosen" not to apply for asylum as soon as reasonably practicable, and so the "choice" exercised by failed asylum seekers should not be regarded as a complete barrier to the engagement of the state's direct responsibility.

It is also arguable that human rights law imposes some duty on the state to protect individuals from their upwane or illegitimate choices. For example in Çiga v Turkey the European Court of Human Rights associated the protective duty owed to a suicidal or self-harming detainee under Article 2 ECHR. The court held that if the state were aware that a detainee posed a "real and immediate risk" of suicide, it would be under a positive obligation to do all that could reasonably be expected to prevent that risk from materializing. The detainee's "apparent choice" to inflict harm upon their own person does not displace the state's responsibility to attempt to prevent the harm. A further set of arguments that might be made relates to the weakness of the section 4 scheme, described by the Joint Committee on Human Rights as "inhumane and inefficient", and the government's acquiescence to the fact of mass homelessness amongst failed asylum seekers. As noted above, the Independent Asylum Commission found that in 2007 less than four per cent of failed asylum seekers who were still in the UK received support under the section 4 scheme (9,365 out of 283,500 people). Thus it would seem indisputable that the legislative framework leaves large numbers of people destitute, and that the government must be aware of this. Furthermore, the European Court of Human Rights judgment in Chahal v UK, recently reaffirmed in Akhmedov v Turkey, makes it clear that suffering of the type covered by Article 3 ECHR can never be justified on welfare policy grounds, such as "the prohibition of torture and of inhuman or degrading treatment or punishment."

71 Ibid.
73 Ibid. [6]. The European Court found that in this case the Respondent State had in fact fulfilled its duty.
74 Ibid. [83] or see Akgåbo v Turkey [2005] ECHR 932 [44] (only available in French). Twarhiti v Turkey [2000] ECHR 612 [70] (assistedly available in French).
punishment is absolute, irrespective of the victim’s conduct. In the light of this principle, it is reasonable to assert that if the statutory framework leads to the fact of mass destitution amongst failed asylum seekers, the observation that such destitution may pursue the policy of determent unmeritorious applicaaaa from ever seeking to come to the UK is irrelevant.

The UK government has strongly refuted the JCHR’s finding that the government has indeed been practising a deliberate policy of ‘destruction’ of asylum seekers and failed asylum seekers. However, in apparent contradiction of this the Court of Appeal has recently stated that the objective of the exclusions contained in Schedule 3 of the NIAA 2002 can be ‘readily inferred’ from its context:

It is to discourage from coming to, remaining in and consuming the resources of the United Kingdom of certain classes of person who can reasonably be expected to look to other countries for their livelihood.

The ‘discouraging’ effects of Schedule 3 is rooted in the threat of street homelessness: that having arrived in the UK, asylum seeker will not (unless until) an application for asylum has successfully been processed be allowed an opportunity to establish a home in this country, either in the sense of an adopted homeland in the sense of obtaining housing as home. As we have seen, in some cases this goes beyond questions of adequacy of housing and home, to the basic denial of shelter.

In such cases it is helpful to bear in mind that in Adam, Limbuela and Teneza, Lord Brown noted that an intention to cause street homelessness could ‘readily be characterised’ as involving ‘degrading treatment’ and would be enough to engage the direct responsibility of the state. Thus if the government can be taken to know about the mass destitution of failed asylum seekers, resulting from the poor administration of, and tough eligibility criteria for, section 4 support, then

80 Saad v Italy (2009) 49 EHRR 30 [127]. The question was whether expulsion of a terrorism suspect to a state where he might suffer torture, inhuman or degrading treatment was justifiable. The full quotation is, ‘As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct (see Chahal v UK (1997) 23 EHRR 413, § 79), the nature of the offence alleged to be committed by the applicant is therefore irrelevant for the purposes of Article 3 [...]’.


85 Ibid. [101] (Lord Brown).

it would seem that the government is directly responsible for the deliberately ‘discouraging’ conditions resulting from the ensuing denial of housing rights amounting to inhuman and degrading treatment. This opens up the possibility for a significant advance under Article 3 in respect of asylum seekers and failed asylum seekers facing street homelessness, particularly since, following Chahal, if the statutory framework gives rise to degradative amounting to inhuman and degrading treatment, it cannot be justified or balanced against other policy aims.

The recent High Court decision in R. on the Application of N v Coventry City Council has, unfortunately, confirmed that the courts have not yet adopted this reasoning, but appear to be continuing to pursue a ‘minimal compliance’ approach to their ECHR obligations in respect of housing asylum seekers. Mr Gurnham QC (sitting as a deputy High Court judge) examined whether the Coventry City Council’s cessation of section 21(a)(a) NAA 1948 support to an HIV-positive failed asylum seeker suffering from tuberculosis, TB meningitis, syphilis and cognitive disturbance would trigger the human rights safeguard of paragraph 3 Schedule 3 of the iNAA 2002. The judgment found that the cessation of local authority support would not be a breach of the ECHR:

because it would be open to the claimant to return to his home country of South Africa. If he chooses to stay in the United Kingdom, the degradation he may suffer as a consequence of that decision, not the cessation of Coventry’s support,

The Article 3 argument is an important element of the overall approach to questions of shelter, housing and home for asylum seekers. It is a potentially powerful argument since, as the decision in Chahal has indicated, as an absolute right it is not subject to qualification, so that the court cannot justify an interference with Article 3 rights based on the balance of the individual’s right against other policy aims. On the other hand, the Article 3 right is inherently limited in that it is likely to apply only in the most extreme cases of destitution, where a failed asylum seeker is facing street homelessness. As such, it goes to lack of shelter, rather than questions of the adequacy of housing or the home experience. In addition, as the discussion in this section has demonstrated, to date the UK courts have adopted a minimal compliance approach which undermines the applicability of Article 3 even in cases of extreme destitution.

Nevertheless, and despite having not yet been taken on board by the judiciary, the Article 3 approach outlined here offers the strongest compliance or legal enforcement based argument in this context. The following sections show that while the International Covenant on Economic Social and Cultural Rights

86 In prohibiting work, denying support, and failing to arrange genuinely voluntary discharge or facilitate efficient forced removal. 87 [2008] UKHC 2786 (Admin).

88 Ibid. [51]
(I'CESCR) sets out a right to housing, and Article 3 of the European Convention on Human Rights contains the right to respect for home; the legal frameworks for the enforcement of these rights are structurally weaker than Article 3 so far as any compliance-based approach is concerned.

(9) The I'CESCR Argument: the Right to Housing

The right to housing in international law has its origins in Article 25(1) of the 1948 Universal Declaration of Human Rights. The 1966 International Covenant on Economic, Social, and Cultural Rights (I'CESCR) is now the most significant international human rights law applicable in this field. Under Article 2(1) I'CESCR States Parties agree to guarantee the rights contained within without discrimination on, amongst other grounds, ‘national and social origin’. Thus, under this Covenant, states must guarantee the rights of non-nationals such as refugees and asylum seekers. Article 11 of the I'CESCR requires that states recognize:

the right of everyone to adequate standards of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

This article is included within the rights owed to ‘aliens generally’ under Article 21 of the 1951 UN Refugee Convention, and has been used to ensure that refugee accommodation is, for example, habitable and not unreasonably remote.98

The weakness of housing rights for refugees and asylum seekers derives from the I'CESCR text within the nature of the obligation that the Covenant places upon states. The notion of economic, social and cultural rights is controversial in some quarters because they may be understood as insufficiently precise in scope and requiring an unrealistic amount of state expenditure.99 In the light of this, under Article 2(1) I'CESCR States Parties undertake ‘to take steps…to the maximum of its available resources…with a view to achieving progressively the full realisation of the rights recognized’.100

The UN Committee on Economic, Social and Cultural Rights has expressed its view of the obligations arising under the Covenant in its ‘General Comment No. 3: The Nature of States Parties Obligations’.101 It has argued that under Article 2(1) I'CESCR States Parties are under an immediate duty to take steps to secure the

rights contained in the Covenant,102 unless they can demonstrate that they do not have the resources to comply with even a ‘minimum core obligation’.103 Moreover, in carrying out any actions relative to the right to housing, states are bound by the overarching principle of non-discrimination.104

It has discussed the issue of housing specifically in its ‘General Comment No. 4: The Right to Adequate Housing’, which has taken a broad interpretation of Article 11 I'CESCR so that it encompasses not merely the provision of shelter, but ‘the right to live somewhere in security, peace and dignity’.105 The content of the right to housing, in respect of both practical issues such as location and quality, and in relation to the human need to establish a home, has been extensively formulated by Kemen,106 who has emphasized the inter-relationships between shelter, housing and home.

In addition to its inherent value, it has also been recognized that the ‘right to housing’ under I'CESCR has instrumental value, since it facilitates the protection of other rights. As the discussion in the opening section of this chapter has highlighted, the UN Committee on Economic, Social and Cultural Rights has emphasized the importance of viewing housing within the broader framework of human rights, as ‘intimately linked to other human rights’,107 and as indivisible and interdependent with civil and political rights.108 The potential for adopting a legal strategy which relates the right to housing - with all the barriers to enforcement as a positive obligation that economic, social and cultural rights carry - to civil and political rights - inherently more enforceable as ‘absolute rights’ - must lie in the argument that housing and housing can function as a gateway to civil and political rights.

This proposition can be viewed as echoing Hegel's arguments in Elements of the Philosophy of Rights,109 where the institution of private property was justified on the basis that it provided a gateway to the property owner's engagement in civil society.110 In fact, Hegel claimed that the function of private property as a...
of establishing personhood took precedence over the function of private property as a means of satisfying a person’s material needs, since property was fundamental to the existence of the person: thus, Hegel asserted that “[n]ot until he has property does the person exist as Person.”102 For Hegel, the essential basis of property for the existence of the person was derived from the function of private property as a medium through which individuals could exhibit their will. The approach is also reflected in Radin’s theory of ‘property for personhood’, which postulated that ‘the right to property is a right for personal growth and development — to be a person — an individual needs some control over resources in the external environment.’103 A crucial further step for Hegelian philosophy, however, was the idea that people needed to be made secure in their control over parcels of the material world in order to be capable of developing as persons within the wider material and social world, and so as a function within civil society. Thus:

That all human beings should have their livelihood to meet their needs, on the one hand, a moral wind; and where it is exercised in this indiscriminate manner, it is indeed well intentioned, but like everything else is merely well intentioned, it has no effect being. On the other hand, a livelihood is something other than position and belongs to another sphere, that of civil society.104

While Hegel was primarily concerned with property ownership, the analogy to the opportunity to establish housing as one home, so enabling the asylum seeker to acquire some degree of control over their environment in a context in which they have been stripped of autonomy and has been disrupted is not difficult to make.

The possibility of applying Hegel’s comments concerning property ownership more broadly is recognised by Ryan when he noted that:

the point of these being property rights is to be seen in a variety of ways in which people and/or themselves and their purposes in the world. There is no suggestion that each and every person or can or should have certain sorts of property in order to be as a person in the world. No particular property rights seem essential — though rights certainly are.105


Thus, in Radin’s terminology, ‘object-relations’ is identified as ‘the first step on the road to autonomy that will develop the individual in the context of the family and the state.’106 This development, in turn, can be seen as a necessary precursor to the individual’s ability to exercise civil and political rights, so enabling the position of the right to housing as a gateway right to civil and political rights to be disentangled. This is also reflected in the proposition that ‘[i]f not being able to call any place “home” is implicitly considered to be a handicap for being a complete human being.’107 The consequence of various legal frameworks which exclude asylum seekers from rights to secure shelter, housing and home, can thus be seen to have consequences beyond housing per se, which spill over into exclusion from civil and political life, as the refugee is not simply excluded from the law in an indifferent manner but rather abandoned by it.108

(10) Article 8, ECHR: The Right to Respect for Home

The idea of an enforceable ‘right to respect for home’ is similarly not one which sits easily within English law. Historically, references to respect for home have tended to revolve around the idea of privacy at home, and particularly with the extent to which the state can lawfully impinge upon a citizen’s private dwelling.109 While Article 8(1) of the European Convention on Human Rights states that ‘Everyone shall have the right to respect for his private and family life, his home and his correspondence’, the reference to ‘respect for home’ in this paragraph is clearly embedded in the overall context of Article 8. For example, in London Borough of Harrow v Qazi,110 the first landmark decision of the House of Lords on the right to respect for home, Lord Hope noted that: ‘[n]otwithstanding human rights instruments recognise the right to privacy. That is the concept which underlies Article 8 of the Convention.’111 Thus, the reference in Article 8 to the right to respect for family life, for home and for correspondence are often viewed conjunctively, as aspects of the right to private life,112 and the right to respect for

109 Enick v Caravan (1765) 9 St Tr 1030; Malins v Commissioner of Police for the Metropolis No. 2 (1979) Ch 544.
110 [2009] UKHL 43.
111 Ibid. 149.
112 Van Dijk and van Hoof have noted that: ‘[t]he collection or designating the rights involved in Article 8, the “right to privacy” is often used nowadays;’ van Dijk and G.H.J. van Hoof, Theory and Practice of the European Convention on Human Rights (3rd edn Kluwer, The Hague 1998) 409 [8.1].
The Displacement and Dispossession of Asylum Seekers

In a series of recent cases, the House of Lords has sought to set the bar for minimal compliance with Article 8 in relation to UK nationals so that it would not be necessary to consider whether any interference was justified where the occupier had no contractual or proprietary right to occupy its accommodation or any such interference could be presumed to be justified where Parliament had already struck a balance between the competing interests. More recently, in Doherty v Birmingham City Council, the House of Lords allowed for the possibility of some review of the process by which a local authority made a decision to evict, although the procedural nature of this review is emphasised by the decision to allow this through a (non-lawyer) judicial review process, rather than a 'proportionality review', such as was expected by the European Court of Human Rights in discussing the right to respect for home in C综合整治 v UK and McCall v UK.

Thus, while the decision in Doherty has extended the applicability of Article 8 to eviction cases by allowing for a judicial review process which can scrutinise the reasons behind the local authority’s decision to evict, the applicability of this article to asylum seekers is limited to a key extent. Firstly, as a qualified right, any assertion of the rights to respect for home is subject to balance against competing policy aims with which, in the case of failed asylum seekers, have been very clearly articulated in the shape of the policy of return. However, beyond that, it is also significant that as a qualified right, the accommodation, the state is entitled in considering claims under Article 8 to make a distinction between citizens and non-citizens, so that the weakly enforceable rights available to UK citizens against eviction can be denied to asylum seekers.

(11) Conclusion: Human Rights as Policy Goals, not Legal 'Minima'

The manipulation of (failed) asylum seekers’ vulnerable grasp on ‘home’ connections has led to explore the quality and location of asylum accommodation, and policies aimed at restricting access to such accommodation and support as they have been mediated through the lens of legal interpretation. However, the existing legal tools for giving effect to house interests are weak, and often ineffective, and it is therefore a bare, atomised vision of home that is glimpsed through the lens.

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113 For example, work to develop more robust criminal and civil responses to domestic violence within the home to England had to overcome the additional challenges associated with policing offences with the privacy of the home; see for example S.M. Edwards, Policing Domestic Violence: Women, the Law and the State (Sage, London 1989).


115 The Commission held that the right to an adequate standard of living and the right to enable accommodation were not in principle among the rights and freedoms guaranteed by the Convention. See, for example, A.H. Robertson et al., Privacy and Human Rights (Manchester University Press, Manchester 1973) [79].


117 London Borough of Harrow v Quil [2003] UKHL 43; London Borough of Lambeth v Kay; Leeds City Council v Price (Kay v Price) [2006] UKHL 10; and Doherty v Birmingham City Council (2008) UKHL 57.

118 London Borough of Harrow v Quil [2003] UKHL 43.

119 London Borough of Lambeth v Kay; Leeds City Council v Price (Kay v Price) [2006] UKHL 10.

120 Doherty v Birmingham City Council (2008) UKHL 57.

121 Application No 66746; judgment, 27 May 2004.

122 Application No 19950/04; judgment, 13 May 2008.
right to housing is inherently weak as a socio-economic right, and the English courts have applied a restrictive interpretation to the (qualified) right to respect for home in Article 8 ECHR. Even the protection afforded by Article 3 ECHR in the Limmwala case hinged upon applicants being able to show that they and their situation exposed them to an 'imminent prospect' of inhuman and degrading conditions, 123 which is a delicate and fearful state and, thus, assistance at this stage comes too late and too infrequently to constitute a reliable legal recourse. Yet, despite the apparent weaknesses of arguments that rely on the enforcement of strict legal rights under human rights law to secure housing and home for asylum seekers, we would argue that the notion of home as a core element of being human, and of human rights, can still help us to rethink our understanding of 'failed' asylum seekers' destitution, and to support legislative interventions that are not dependent on the generosity of sympathetic and activist judges to mitigate its worst effects.

There is some evidence that an approach to asylum seekers that recognises the importance of home is realistic. For example, the obsession with failed or late applying asylum seekers' 'choice' to be homeless is not mirrored within domestic housing policy. Part 7 of the Housing Act 1996 recognises a category of person who is 'intentionally homeless' but also 'in priority need', and who must be provided temporary accommodation for such a period as would give them a reasonable opportunity to find accommodation for themselves. For this category of person, it would seem that at a policy level (i.e. rather than by compulsion from Article 3 ECHR) it has been deemed appropriate that local authorities must provide support, notwithstanding the 'choice' of the applicant.

A second set of examples that demonstrate how respect for 'home' might influence the legislative process can be seen in recent debates about the treatment of failed asylum seekers. During the parliamentary debates on the UK Borders Act 2007, to which reference was made briefly above, an alliance of refugee organisations lobbied in favour of an amendment which would have allowed failed asylum seekers access to support and accommodation until they left the UK or were removed. The amendment was opposed by both the government and the opposition, and it was rejected. 124 A striking feature of the debates was that the issue of human rights, let alone the importance of 'home' to being human, was largely absent from the discussions. 125

Similar legislative suggestions have, however, been put forward in relation to the proposals of the European Commission for reforms to the Common European Asylum System, and in relation to which the connection to human rights has been more explicit (although, as we shall see, the UK Home Office remains rather sceptical). The European Union is in the process of reforming its Common European Asylum System. In European parlance, issues such the housing rights of asylum seekers would be termed as involving their 'material reception conditions'. One of the key legislative proposals is to recast the current Reception Directive, 126 the legal instrument that specifies minimum levels of treatment for people claiming asylum in the EU.

The thinking of the UK Home Office under the outgoing Labour government was indicated in the form of an Explanatory Memorandum dated 23 December 2008, and signed by Phil Woolas, then Minister of State for Borders and Immigration. 127 The general theme of the memorandum is that many of the proposals reflect existing practice in the UK, and are therefore not necessary. This applies, for example, to the proposal to unify the procedure for considering 'pure' asylum claims and claims for subsidiary protection (e.g. fears of more general human rights abuses failing short of the refuge definition) in a single process, which the UK already does. 128 It also applies to proposals to enhance protection for disabled people 129 and people with special needs, 130 and to improve standards of living for asylum seekers. 131 The Home Office has, however, expressed concern over the proposal to allow asylum seekers to gain access to the labour market after they have been in the UK for six months. 132

The approach to human rights is, however, rather telling. In an early section of memorandum headed 'legal and procedural issues' the memorandum presents an assessment of the comparability of the European Commission proposals with human rights norms, and concludes that the proposals respect fundamental rights. 133 En route to this conclusion the memorandum notes that the European Commission proposals state that to ensure higher and more equal standards of reception will have 'an overall strong positive impact from a fundamental rights point of view'. 134 The memorandum, however, continues by stating that, '[W]e [the Home Office] believe that these proposals would grant entitlements that go substantially beyond the minimally guaranteed by these rights'. 135

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125 Ibid., 280.
127 Explanatory Memorandum on file with the authors.
128 Ibid., [4].
129 Ibid., [15-17].
130 Ibid., [23-27].
131 Ibid., [21-22].
132 Ibid., [18-20].
133 Ibid., [3].
134 Ibid., [1].
135 Ibid., emphasis added.
When this general approach is coupled with the previously noted concerns about improving the standard of living for asylum seekers and their access to the labour market, it would seem to have led to the ascendance of human rights thinking as a mobilising force for responding to double displacement on the part of the Home Office. The treatment of human rights in the memorandum implies, as the heading also suggests, that human rights law constrains a legal and procedural hurdle to be overcome, rather than human rights norms acting as a goal or aspiration to be progressively realised. Yet this is not the only way to view the role of human rights thinking in the legislative process. Indeed the Committee of the Regions of the European Union issued its own formal Opinion on Commission Proposals, which adopted a human rights-oriented approach and went further in its attempt to avoid double displacement, with proposals on failed asylum seekers that can be described as particularly humane.

The Committee of the Regions was established in 1994, following the Maastricht Treaty of 1992, to give a voice to sub-national bodies in the European legislative process. It is by no means equal in its influence to the so-called "institutional triangle" of the European Commission, Council and Parliament, but its views are sought on topics that concern its membership. It is presently comprised of 344 members, who are all local councillors across the 27 member states of the EU. Since local authorities are closely involved in the reception of asylum seekers and the integration of refugees, the Opinion of the Committee of Regions is particularly significant in this context. At its 8th Plenary Session on 7 October 2009, the Committee of the Regions voted to adopt its Opinion on the CRAs reforms. In it, the Committee broadly welcomed the Commission's proposals, including those relating to access to the labour market, but then, taking inspiration from Article 3 ECHR, proposed an amendment to the recent Reception Directive that would greatly enhance the situation of failed asylum seekers. The proposal merits quotation in full:

Article 20(6). Member States shall not withdraw or reduce material reception conditions for refused applicants for international protection until plans for their removal or voluntary return are in place.

Article 20(7). For the duration, or the threat of it, shall never be used in order to coerce refused applicants to return to their State of origin.


137 Committee of the Regions (EU), "Opinion of the Committee of the Regions on The Future of the Common European Asylum System (I)" (Oppinion/CEA (09) 90), final 5-7 October 2009. James A. Sweeney noted in an expert advisory to the Committee of the Regions during this process.

138 The Committee noted that access after six months is a controversial proposal for some member states, but that it could benefit both the asylum seekers and the member state: ibid. [58].

139 The rationale is explained in the 8th accompanying the proposal amendment.

by particular societies. Thus, the idea of the right to housing as home, which has been seen to emerge strongly with experiential evidence relating to asylum seekers, can be seen to have considerable critical potential. Human rights norms can help incite political willingness to act responsibly in contentious areas such as the relationship between immigration and social housing.

To achieve this potential, however, the discourse on 'home' must shift from a focus on the judicial enforceability of existing human rights norms via the circumscription devised above, to the applicability of human rights norms in the formulation of legislative solutions to the needs of asylum seekers, who are at risk of double displacement. Human rights, including home rights, should not be seen as legal minimas, but rather as policy goals that legislation should seek to achieve.

Chapter 6
Can International Housing Rights Based on Public International Law Really Impact on Contemporary Housing Systems?
Padraig Kenna

(1) Introduction

The concept of home advances a new basis for evaluating housing rights, emphasizing their human and personal benefits. Housing rights address, at a national, regional, and global level, displacement and dispossession, as well as access to home for all. These rights are forcing a new discourse and jurisprudence across the world, largely based on public international law instruments. However, the legal liberal approach and framework of such housing rights discourse needs to engage with housing systems at the micro, meso and macro levels. There is a particular and urgent challenge in addressing the structural and institutional elements of housing systems, such as housing finance, infrastructure, ownership and exchange of housing and regulation of housing systems and sub-systems. Ultimately, this could ensure that the contemporary revival of global housing finance regulation can incorporate a housing rights perspective.

(2) The Concept of Home

The concept of home is widely viewed as central to housing and housing rights—a critical element of the basic physiological needs of food, clothing, and shelter, established by Maslow, and its contemporary societies often relating to the safety, love/belonging, esteem and self-realization needs. Housing and home are connected to health, child development, poverty and opportunity in general. The emotional and symbolic significance of housing and home relate to the sense

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