The limits of control.

State control and the admission of refugee in Australia and Britain

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Abstract

Since the 1980s, industrialised countries have increasingly attempted to prevent the arrival to their territories of asylum seekers and refugees. Such policies have, however, generally proven ineffective and dangerous for refugees, as well as being politically highly charged. Despite the failings, popular support for less restrictive policies has not grown significantly, if at all.

This thesis adopts a historical institutionalist research design to investigate these issues. It examines the consequences of conflicts between policy-makers, the deficiencies of enforcement mechanisms, and increasing institutional complexity for the effectiveness and legitimacy of refugee admission policies. It does so through the lens of a comparative study of refugee admission in Britain and Australia from the end of the Second World War to the end of Tony Blair's and John Howard's Prime Ministerships in 2007. Although their immigration history is very different, Britain and Australia have, since the 2000s, developed preventive policies that have failed to achieve expected results. This has seldom been discussed, much less explained, in existing scholarship, which is why these two cases are the focus of this thesis.

The thesis shows that Australia and Britain present similar trajectories in regards to the evolution of discrepancies between policy objectives and outcomes in refugee admission. These discrepancies dramatically expanded from the 1980s, and have become increasingly complex during the 2000s. The thesis points to a clear correlation between increasing institutional complexity and decreasing policy effectiveness and legitimacy; in contrast, the significance of conflicts between policy-makers, and of the deficiencies of enforcement mechanisms, varies over time and across cases. This finding has significant implications for the identification of institutional settings conducive to more effective, legitimate and equitable refugee policies.

Certification

I acknowledge that I have submitted this doctoral thesis to the University of Leipzig as part of a co-tutelle agreement with Macquarie University.

Ethics approval required to conduct interviews has been obtained at Macquarie University (REF: HE26SEP2008-D06067) and the University of Leipzig.

I certify that the thesis is an original piece of research and that it has been written by me. Any help or assistance has been properly acknowledged.

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Acronyms

AAT	Administrative Appeals Tribunal
ABC	Australian Broadcasting Corporation
ACM	Australia Correctional Management
ADF	Australian Defence Forces
ANAO	Australian National Audit Office
ARC	Administrative Review Council
ASEAN	Association of Southeast Asian Nations
ASIO	Australian Security Intelligence Organisation
BIA	Border and Immigration Agency
BIR	Bureau of Immigration Research
CAAIP	Committee to Advise on Australia's Immigration Policies
CPA	Comprehensive Plan of Action for Indo-Chinese refugees
CUKC	Citizen of the United Kingdom and Colonies
DIAC	Department of Immigration and Citizenship
DIEA	Department of Immigration and Ethnic Affairs
DILGEA	Department of Immigration, Local Government and Ethnic Affairs
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DIMA	Department of Immigration and Multicultural Affairs
DORS	Determination of Refugee Status Committee
DP	Displaced Person
ECHR	European Convention on Human Rights

ECtHR	European Court of Human Rights
ELICOS	English Language Course for Overseas Students program
EU	European Union
EVW	European Volunteer Worker
HI	Historical Institutionalism
HRA	Human Rights Act
HRC	Human Rights Commission
HREOC	Human Rights and Equal Opportunity Commission
IAA	Immigration Appellate Authority
IAT	Immigration Appeals Tribunal
ICCPR	International Covenant on Civil and Political Rights
ICEM	Intergovernmental Committee on European Migration
IND	Immigration and Nationality Directorate
IOM	International Organization for Migration
IPPR	Institute for Public Policy Research
IRO	International Refugee Organization
IRT	Immigration Review Tribunal
JSCM	Joint Standing Committee on Migration
JSCMR	Joint Standing Committee on Migration Regulations
JCWI	Joint Council for the Welfare of Immigrants
NAO	National Audit Office
NASS	National Asylum Support Service
NPC	National Population Council

OPC	Offshore Processing Centre
RAR	Rural Australians for Refugees
RCOA	Refugee Council of Australia
RPP	Regional Protection Programme
RRT	Refugee Review Tribunal
RSRC	Refugee Status Review Committee
SHP	Special Humanitarian Program
SIEV	Suspected Illegal Entry Vessel
SLCAC	Senate Legal and Constitutional Affairs Committee
SLCLC	Senate Legal and Constitutional Legislation Committee
SLCRC	Senate Legal and Constitutional References Committee
SSCICMI	Senate Select Committee for an Inquiry into a Certain Maritime Incident
TPC	Transit Processing Centre
TPV	Temporary Protection Visa
UKBA	United Kingdom Border Agency
UNCLOS	United Nations Convention on the Law of the Seas
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Commission
UNRRA	United Nations Relief and Rehabilitation Administration

The only constant is change.

Heraclitus of Ephesus (Kirk and Raven, 1979: 197)

Introduction

Unpredictable refugee crises, unequal responses, and a paradox

'Unpredictability has become the name of the game.' With these words, addressing the current state of flux of the world order, High Commissioner for Refugees Antonio Guterres concluded his speech at this year's session of 'ExCom', the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR) on 3 October 2011 (Guterres, 2011: 14). This state of flux fuelled refugee crises that global governance mechanisms were unable to manage, Guterres had earlier argued. During a year in which the 1951 Convention relating to the Status of Refugees (hereafter the Refugee Convention) turned sixty, three major crises of forced displacement had occurred, in Cote d'Ivoire, Libya and Somalia. The High Commissioner thanked several developing nations for opening their borders to the sudden arrival of hundreds of thousands of refugees from these countries. Regardless of profound domestic change in the context of the Arab Spring, Tunisia and Egypt had sheltered refugees fleeing the civil war in Libya, and Yemen had welcomed Somalis escaping a drought aggravated by two decades of state disintegration. Liberia, a country still recovering from its own civil war, had hosted tens of thousands of Ivoirians who had fled their country's second civil war between the partisans of defeated President Laurent Gbagbo and of newly elected President Alassane Ouattara.

The response of wealthier countries to refugee outflows had been less generous notwithstanding the Western support given to the anti-Gaddafi rebellion in Libya and to President Ouattara in Cote d'Ivoire, and in spite of the humanitarian assistance given to Somalis affected by the drought. In the measured diplomatic tone suitable for an intergovernmental meeting, the High Commissioner mentioned that the arrival of 30,000 North African boat people to Italian and Maltese shores had triggered debates within the European Union (EU) over the reintroduction of intra-EU border controls, which had been

abolished by the Schengen agreement.[1] Guterres also noted that only a few hundred of the vulnerable refugees from Libya hosted in North African refugee camps had been admitted for resettlement by industrialised countries. In the face of these global inequities in the admission of refuges, the High Commissioner pleaded for a 'new deal in burden-sharing' in which industrialised countries would increase solidarity with the developing nations that hosted most of the world's uprooted people (Guterres, 2011: 6).

Achieving more global equity in the admission of refugees is urgently needed. More than 11 million forced migrants currently live outside the borders of their countries of origin, and the voluntary return of refugees to their countries of origin is at its lowest in twenty years (see UNHCR, 2011a: 18). Yet Guterres's new deal would constitute a rupture with the restrictive orientation that has for decades characterised the admission of refugees in industrialised countries. This new deal would also need to overcome the following paradox: The objectives of refugee admission policies in industrialised countries have become increasingly restrictive over the last three decades, even though restrictiveness has long proven to be not only harmful to refugees, but also *highly ineffective*.

Research purpose

This thesis attempts to understand and explain the above mentioned paradox on the basis of a comparative and longitudinal study of refugee admission in Britain and Australia between the Second World War and the end of Tony Blair's and John Howard's Prime Ministerships in 2007. While their immigration policies are highly dissimilar, Britain and Australia have long been considered to have little difficulty in managing inflows of refugees compared to other industrialised countries. As both countries are islands, the relative geographical isolation of Britain and Australian was said to be conducive to stringent border controls. The comparatively limited powers of the Australian and the British judiciary have been considered to facilitate the expulsion of 'unwanted non-citizens' (Layton-Henry, 1994; Joppke, 1999; Freeman and Birrell, 2001; Castles and Vasta, 2004). These features were thus believed to ensure congruence between restrictive policy objectives and outcomes in regards to the

[1] 'Without wanting to enter the European debate on migration and the future of the Schengen regime, it is important to recognize that Italy and Malta also received nearly 30,000 people who fled from Libya across the Mediterranean Sea.' (Guterres 2011: 12)

admission of refugees - and indeed the inflow of asylum seekers to Australia is amongst the lowest of all industrialised nations.[2] In both countries, however, the inability of governments to prevent the arrival by boat, plane and (in Britain) lorry of individuals seeking asylum, as well as the recognition of these individuals as refugees, has become a highly salient political issue since the 1990s.[3] This salience has fuelled the promotion by the Blair and the Howard governments of policies regarding the relocation of asylum procedures beyond their territorial borders, in 'offshore processing centres', as part of Australia's 'Pacific Solution' and in Britain's 'transit processing centres'. The latter were never established, and Australia's Pacific Solution has failed to prevent the relocation of refugees from 'offshore processing centres' to its territory (Betts, 2004; Taylor, 2005). Regardless, the Blair and the Howard governments continued to promote restrictiveness in the admission of refugees, and asylum remained a salient issue (Somerville, 2007; Stevens, 2007; Jupp, 2007).

Adopting a historical institutionalist research design, this thesis argues that the institutional trajectory of the admission of refugees in both countries since the Second World War is a critical contributor to the discrepancies between the objectives and outcomes of refugee admission observed in Britain and Australia in the last decades. This argument builds on existing comparative politics literature on immigration control, yet the thesis suggests an original, conceptually grounded explanation of discrepancies between policy objectives and outcomes, focusing on the complex evolution of interrelations between the agency of policy-makers and the public, the agency of forced migrants, and the institutional structure regulating refugee admission. The thesis's conceptual efforts aim to facilitate the identification of complementarities between its explanatory approach and explanations of discrepancies between policy objectives and outcomes made in other disciplines.

The next section of this introduction defines the topic of this thesis as 'refugee admission policies'. The extent of the discrepancies between the objectives and outcomes of refugee admission policies in industrialised countries is then briefly delineated, and is followed by a presentation of the explanatory contribution of this thesis's historical institutionalist approach. The penultimate section of this introduction justifies the selection of British and Australian refugee admission policies as cases with which to test the thesis's explanatory approach. The structure of the thesis is presented in the last section.

[2] See comparative statistics on the levels of asylum claims in industrialised countries, Australia and Britain between 1982 and 2007 in appendix 2.

[3] See comparative, longitudinal data on public opinion and immigration in Britain and Australia in appendix 3.

Labelling the admission of refugees

Although the admission of refugees has been a controversial issue in the global North for decades, the literature does not provide a commonly agreed-upon definition of this policy field. 'Asylum policies' is the notion most often used in literature investigating refugee admission in Europe (see for instance Joppke, 1999; Schuster, 2003a). This understandably reflects the significance of asylum procedures in the admission of refugees in European countries, yet is less adequate as a means to investigate refugee admission in countries such as Australia, where refugee resettlement - that is, the orderly and durable relocation of refugees from a first country of refuge to a third country - has historically been the dominant mode of refugee admission.[4] 'Refugee policy' is also an unsatisfactory label as it may include not only the admission, but also the settlement of refugees after they have been recognised as qualifying for humanitarian protection.[5]

This thesis thus suggests another label for its subject matter: refugee admission policy. 'Refugee admission policy' will be used to qualify the institutional framework which regulates the access of non-citizens to refugee status. In the British case, the label will also include the admission of refugees from the British Commonwealth possessing British citizenship yet with no right to enter Britain, an issue that will be discussed in chapter 3. Besides asylum procedures and refugee resettlement, 'refugee admission policy' will also include measures specifically adopted to ensure that individuals that are not considered as qualifying for refugee status in industrialised countries are discouraged from applying for asylum in these countries. An overview of these measures is given in the next section. Given the expansion of these policies over the last three decades, one may be tempted to use the label 'refugee rejection policy' instead of 'refugee admission policy'. Yet for the purpose of parsimony 'refugee admission' in the context of this thesis will be considered to have an inclusionary as well as an exclusionary dimension. 'Refugee admission policy' is thus a subfield of immigration control policies which have been defined by Hammar (1985: 7) - as 'the rules and procedures governing the selection and admission of aliens by states' - with one modification related to the above mentioned British episode: the definition also includes the

[4] See figure 3 comparing the significance of asylum and refugee resettlement in Britain and Australia between 1982 and 2007 in appendix 2.

[5] For a comprehensive presentation of the various aspects of asylum and refugee policy, see respectively Alink, Boin and t'Hart (2001) and van Selm (2005).

admission of refugees possessing the citizenship of their country of destination yet have no right to enter this country.

Discrepancies between the objectives and outcomes of refugee admission policies in industrialised countries since the 1980s: An overview

The objectives of refugee admission policies of industrialised countries have become increasingly restrictive since the early 1980s. On the one hand, the handful of Western states that had hitherto strongly been involved in resettlement operations gradually reduced their resettlement quotas and introduced more restrictive resettlement criteria (Shacknove, 1993; Frederiksson and Mougne, 1994; UNHCR, 2000). On the other hand, all industrialised countries progressively adopted a wide range of measures aiming to prevent the arrival and settlement of those considered to 'abuse' the right to claim asylum,[6] and to distort the principle of *non-refoulement*. The latter, at the core of the global refugee regime, states that no one shall be returned to a country in which he or she fears persecution.[7] A vast literature exists on the modalities of restrictiveness in refugee admission policies, especially in regards to asylum,[8] which is why this overview shall remain brief. It can be argued that restrictive policies encompass three levels of prevention: prevention of access to the territory of industrialised countries (territorial prevention); of access to refugee status (procedural prevention); and of access to socio-economic support during the time taken by an asylum procedure (socio-economic prevention). Territorial prevention encompasses measures such as visa requirements for the countries of origin of comparatively large groups of asylum-seekers, sanctions on carriers allowing the travel of improperly documented passengers, and investment in human and technological resources deployed to improve border controls.

[6] The universal right to claim asylum is stated in Article 14 of the Universal Declaration of Human Rights. There is however no 'right of asylum' in international law.

[7] According to Article 33 of the Refugee Convention, 'Prohibition of expulsion or return ("refoulement")' states in its first section that 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' Protection against expulsion also applies to refugees who arrive unlawful in a country and swiftly make themselves known to the country of refuge (Article 31 of the Convention). The expulsion of individuals fleeing persecution is also prohibited in the Convention against Torture and the European Convention on Human Rights.

[8] To mention significant comparative studies on the issue see, for instance, Miyamoto (1996), Zetter et al. (2003), Gibney (2004; 2005), Schuster (2005), Hatton (2009).

Procedural prevention applies to the introduction of increasingly expeditious asylum procedures, such as limitations on the right to appeal negative asylum decision, and the detention of asylum seekers entering a territory without permission. Finally, socio-economic prevention encompasses restrictions on welfare and housing support for asylum seekers as well as prohibition of the right to work. These measures have been adopted by all industrialised countries in various orders and combinations. Many preventive measures have involved a degree of supranational integration, especially in the European Union in which the restrictive 'harmonisation' of asylum policies has been pursued since the mid-1980s.[9] One of the central objectives of this harmonisation has been the prevention of multiple applications for asylum in various countries ('asylum-shopping').

Many scholars have argued that the proliferation of such preventive measures at the national as well as the European level allowed Western states to exclude those who were perceived as 'cheating the system' of humanitarian protection or even as threatening national (or European) identity (see for instance Weil, 1995; Huysmans, 2000, 2006; Bigo, 2002; Guild, 2003, 2006). Yet there is substantial evidence of a disjuncture between territorial, procedural and socio-economic prevention measures and the variation of the inflow of asylum seekers to industrialised countries. Zetter et al. (2003), in an analysis of asylum policies in five European countries between 1990 and 2000, note that the impact of specific restrictive measures on this inflow was impossible to isolate. In countries which had implemented restrictive measures early and in a coordinated fashion, such as Germany, there appeared to be a stronger correlation between the deployment of preventive measures and a decrease of asylum seekers' arrivals than in countries implementing preventive strategies later and in a less coordinated way, such as Italy. Hatton (2009), comparatively investigating the impact of such policies in 19 industrialised countries between 1987 and 2006, calculated that at best a third of the decline of asylum claims observed since the early 2000s can be attributed to restrictive entry control measures. Thielemann (2004, 2006) also conducted longitudinal, quantitative analyses of asylum policy in EU and OECD countries between the mid-1980s and the early 2000s. He adds that the international harmonisation of asylum policies has significantly reduced the ability of individual states to regulate the arrival of asylum-seekers, given that the replication of restrictive measures across states runs contrary to the attempt of states to be more restrictive than other potential destinations. Literature on the impact of restrictive refugee

[9] The literature on the Europeanisation of refugee admission is extensive; for a very recent assessment see Goudappel and Raulus (2011).

resettlement policies is more limited, yet scholars who have analysed Western responses to the refugee crises in the Balkans in the 1990s have argued that the delayed and timid provision of resettlement places for Bosnian refugees had been a key trigger to the 'asylum exodus' to Western Europe, an outcome that can hardly have been desired by policy-makers (Suhrke, 1998; van Selm, 2000).

The limited impact of preventive measures on inflows of asylum seekers does not mean that these measures are not harmful. A number of studies have shown that increases and decreases of claims, as well as the composition of the inflow of claimants, is correlated with the intensity and location of violent conflicts across the world (see for instance Schmeidl, 1997; Neumayer, 2005). Thus, indiscriminate restrictive measures harm individuals genuinely seeking protection from persecution. Migrant rights and refugee advocacy organisations, as well as scholars such as Grewcok (2009) and Weber (2010) have emphasised the deadliness of the arsenal of border control measures deployed to prevent unauthorised migration. According to Italian journalist Gabriele Del Grande (2010), at least 17,738 persons have died at European borders between 1988 and 2009, many of them individuals fleeing persecution in their country of origin. On the day of the 60th anniversary of the Refugee Convention, UNHCR High Commissioner Guterres therefore appealed to the emergence of 'protection-sensitive borders' (UNHCR, 2011b). Such borders have also been advocated by the British Refugee Council in recent years.[10] The widespread detention of unauthorised arrivals has also been particularly harmful to vulnerable forced migrants who have experienced arbitrary confinement and mistreatment (Mares 20002, Grewcock 2009).

Restrictive refugee admission policies are not only ineffective and dangerous–they have also increased the profitability of the organisation of clandestine migration routes to industrialised countries (Schloenhardt, 2001). Estimating the global gains of 'people-smugglers' is difficult, yet small-scale qualitative studies - such as Koser (2008) - give important insights on the matter, and especially show that 'smuggling can pay' for smugglers and smuggled migrants as the latter are often able to find work in their countries of destination. This appears to speak against the efficiency of socio-economic prevention measures, although Koser's findings should not be generalised without further evidence. Given the pressing need of refugees to flee persecution, it can be argued that they are a 'captive clientele' of 'people-smugglers', whose predecessors were called *passeurs* in another historical context (Brolan 2002).

[10] Interview with Helen Muggeridge, International Protection Policy Advisor, Refugee Council, London, 19.2.2009. See also Reynolds and Muggeridge (2008).

Finally, restrictive policies have not increased the confidence of public opinions in industrialised countries in the ability of their governments to control borders or to manage immigration. Comparative studies have long pointed at the development of strong anti-immigrant constituencies in Europe (Schain, Zolberg and Hossay 2002), and such movements sporadically find their voices in traditional countries of immigration (Newman 2002). The decline of asylum migration to industrialised countries over the last decade has failed to be correlated with a restoration of the legitimacy of governmental action, regardless of the widespread belief in many countries that refugees require special protection and should be treated with decency (Steiner, 2001; Kushner, 2003).

How a historical institutionalist approach can contribute to our understanding of such discrepancies

Three social sciences disciplines have suggested distinct explanations for the discrepancies between the objectives and outcomes of refugee admission policies: sociology, international relations and comparative politics. Rather than strictly competing with each other, existing explanations stress the significance of one particular type of constraint to the realisation of policy objectives. These explanations are reviewed in chapter 1, which is why they are only briefly evoked in this section, as a way to emphasise the contribution of this thesis's historical institutionalist approach to knowledge in the field.

Sociological literature has suggested that the social organisation of the migratory process constitutes the main constraint to the realisation of the control objectives of the state. Accordingly, transnational social bonds existing between refugees and migrants, the societies of their country of origin, and the societies of their countries of destination, have reduced the significance of territorial borders and proven uncontrollable by governments and immigration bureaucracies (Harris, 1995; Vertovec, 2004; Hess and Karakayalı, 2007). It is thus argued that the agency of refugees and migrants, and the social processes related to this agency, is too 'fluid' to be effectively regulated by rigid institutions of immigration control. While sociological literature is enlightening in regards to the significance of social networks for refugee mobility, the rigidity of state institutions is often rather assumed than empirically investigated, and this limits its explanatory value.

In contrast, international relations scholars have argued that the structure of the international system constitutes the main constraint to the control objectives of individual states in regards to the admission of refugees. Individuals facing political persecution, generalised conflict or starvation often have no choice but to flee to other countries regardless of the deployment of restrictive admission policies. Receiving countries unwilling to face sudden refugee inflows do have alternatives to closed borders, such as interventions in the countries of origin of refugees in order to prevent forced departure, and cooperation with other countries of destination to reduce variations in refugee arrival. Yet states often consider that these options generate greater costs than restrictive entry control, and are reluctant to cooperate towards a more equitable distribution of refugees as they fear that other states may not comply with their 'burden-sharing' commitments. It is further argued that the Refugee Convention had proven unable to address these difficulties because of its narrow focus on individual, political persecution and the lack of efficient enforcement mechanisms (Suhrke, 1998; Chimni, 2004). While the literature emphasises the significance of the diversity of state interests in the international system as a key contributor to the control difficulties of individual states, the dynamics of interest formation within these states is seldom addressed. Addressing these dynamics could thus potentially increase the explanatory power of international relations scholarship.

Comparative politics literature focuses on the elements that have been rather neglected in sociological and international relations literature, that is, the variety of domestic institutional structures of refugee admission and the various constellations of interests shaping the adoption of particular policies. A number of scholars have pointed at the significance of variations in liberal democratic values to explain variations in the restrictiveness of particular states (Joppke, 1999). Others have discussed the fragility of the regulatory framework of refugee admission policies in specific groups of counties (Alink, Boin and t'Hart, 2001). The flipside of the attention given to case-specific detail in comparative politics research is that the degree of generalisation in its suggested explanations of discrepancies between policy objectives and outcomes has been more limited than in sociological and international relations scholarship. This sets significant limits to the explanatory power of comparative politics approaches.

This thesis aims to improve the explanatory power of comparative politics research, and to increase opportunities for interdisciplinary dialogue over the causes of discrepancies between the objectives and outcomes of refugee admission policies in industrialised countries. It will

attempt to do so by 'importing' a research approach frequently used in comparative research, yet seldom applied to the investigation of refugee admission policies: historical institutionalism (HI).

HI is often portrayed as the stream of 'new' institutionalist research in which 'history matters', as HI scholars focus on policy developments over long periods of time. HI is also said to emphasise conflicts over the distribution of power in political systems (see for instance Hall and Taylor, 1996; Thelen, 1999). While these are doubtlessly core characteristics of the approach, this thesis is particularly interested in HI because it allows for the formulation of a set of general hypotheses which can explain discrepancies between the objectives and outcomes of refugee admission policies *and* address the contingency of the validity of its propositions (Streck and Thelen, 2005a; Mahoney and Thelen, 2010a). This is based on HI's most important assumption, namely that interrelations between political agency and institutional structure are open and thus evolve over time.

The research design of this thesis uses HI's core assumptions in regards to the openness of interrelations between political agency and structure, the centrality of power distribution in institutional settings, and the significance of institutional continuity and change over time to formulate a set of general hypotheses explaining deficits of policy effectiveness and deficits of policy legitimacy in refugee admission policies. In terms of methodology, the thesis uses a combination of instruments typical of qualitative comparative research (Lim 2006): secondary literature, and primary sources such as official documents, statistics, public opinion surveys, and more than forty interviews with policy actors and long-time observers of the development of refugee admission policies in Britain and Australia. Both this thesis's research design and its methodology are presented in more details in chapter 2.

Whither insularity: British and Australian refugee admission policies as test cases

This thesis applies the explanatory approach briefly presented above to British and Australian refugee admission policies between the end of the Second World War and the end of Tony Blair's and John Howard's Prime Ministership. As will be further developed in chapter 2, British and Australian refugee admission policies have been chosen as 'test cases' for the

following reasons. Firstly, these policies have never been compared in a book-length study, and existing comparative research remains limited. The comparative approach chosen thus constitutes a significant contribution to comparative literature.

Secondly, Britain and Australian immigration control policies present a challenging pattern of differences and similarities which perhaps help to explain why literature comparing both cases has hitherto been limited. While Australia is considered a traditional country of immigration, in which the arrival of settlers is a constitutive element of nation-building (Richards 2008), Britain has long been described as a 'would-be zero immigration country', in which immigration was perceived as worsening the population density of an overcrowded island (Layton-Henry 1994). These opposing immigration rationales have resulted in significant dissimilarities in the institutional organisation of immigration control in general and of refugee admission in particular. In addition, refugee inflows to Britain and Australian have long been highly dissimilar for geographical as well as historical reasons. During the 2000s, the immigration policy of both countries appeared to have converged. Under the 'New' Labour Prime Ministership of Tony Blair, Britain became more open to 'managed migration', (Somerville 2007) while the conservative Coalition government of John Howard emphasised more than ever the necessity for Australia to select suitable migrants only (Jupp 2007). There is one sector in which convergence has been more significant in the 2000s than in any other area of immigration control, and that is the area of investigation of this thesis. As mentioned in the first section of this introduction, both Britain and Australia have been comparatively more hostile than other industrialised countries to the unexpected increase in asylum claims that started in the 1980s, even though this increase has been more limited than in other industrialised countries.

The third justification of the comparison is that comprehensive explanations of discrepancies between the objectives and outcomes of Australian and British refugee admission policies have hitherto remained rare in comparative politics scholarship (including studies focusing on one of both cases). Explanatory literature has argued that both countries were better able than other states of the global North to control refugee admission; a significant amount of scholarship and official publications exist on the failures of British and Australian refugee admission policies since the 1990s, yet this literature tends to be more analytical than explanatory (see for instance Bem et al. 2007). Testing this thesis's research design in the context of British and Australian refugee admission policies has the potential to fuel more theoretical debates of the significance of both cases.

Thesis structure

The body of this thesis is structured in eight chapters, and a general conclusion follows. Chapter 1 reviews existing explanations of discrepancies between policy objectives and outcomes of refugee admission policies in sociology, international relations and comparative politics scholarship. Chapter 2 delineates the historical institutional approach developed in this thesis to explain such discrepancies, the choice of cases and the methodology adopted. The study of refugee admission policies in Britain and Australia is conducted in the six subsequent chapters.

Each case study is similarly structured in a series of three chapters. Each of these three chapters respectively focuses on: the post-war elaboration of refugee admission policies before asylum claims started to rise; policy responses to increases of asylum claims in the 1980s to mid-1990s under the Thatcher and Major government in Britain and the Hawke and Keating government in Australia; and strategies of institutional innovations pursued by the Howard government in Australia and the Blair government in Britain to prevent the arrival of asylum seekers. Not expanding the analysis beyond the end of Howard's and Blair's Prime Ministership could be considered detrimental to the thesis considering the significant developments of refugee admission policy that has since then occurred, especially in the Australian case, in which an unprecedented increase in boat people arrivals since 2009 has further increased the political salience of the issue (Koser 2010, Goot and Watson 2011). However, expanding the scope of the thesis would have required further extensive empirical analysis that would have gone beyond the resources available to conduct this project. I do however plan to apply this thesis's explanatory approach to developments that occurred between 2007 and 2011 in future research.

British refugee admission policies are investigated in chapters 3 to 5, and Australian refugee admission policies in chapters 6 to 8. The introduction of each of the six empirical chapters begins with a review of existing political science literature on refugee admission policies during the era investigated in the chapter of concern so as to emphasise the specific added value of the analysis to this literature. The value of the thesis's explanatory hypotheses is also tested in each chapter. The chapters' organisation aims to emphasise correlations between the thesis's explanatory hypotheses, which is why each chapter is organised chronologically. The

explanatory value of the hypotheses is summed up in the chapters' conclusions. The general conclusion summarises the findings, discusses their contribution to knowledge and suggests further research which could expand the conceptual and empirical scope of the thesis. Comparative data on the longitudinal evolution of refugee admission, on public opinion on immigration and asylum, and on the evolution of the regulatory framework of refugee admission are presented in appendixes 2 to 4.

1 The limits of state control in refugee admission policies: Literature review

1.1 Introduction

Prominent immigration scholars Alejandro Portes (1997: 817), a sociologist, and James Hollifield (2000: 137), a comparative politics scholar, have argued that explaining discrepancies between policy objectives and outcomes in immigration control policies was one of the key issues for research on the role of the state in immigration policies. Sociologists, international relations scholars and comparativists have suggested distinct, yet to an extent complementary, explanations of these discrepancies. Section 1.2 presents sociological approaches contending that immigrant and refugee agency constitutes the main constraint to the entry control objectives of states. In contrast, and more specifically addressing the area of refugee admission, international relations literature discussed in section 1.3 considers that unequal power distribution within the international system constitutes the main obstacle to the realisation of these objectives. As will be shown in section 1.4, comparative politics scholars argue that the values of liberal democratic states, as well as the organisational weaknesses of immigration control policies, are key elements leading to discrepancies between restrictive refugee admission objectives and policy outcomes in industrialised countries. Comparative politics scholarship has generally been more case-oriented than sociology and international relations literature. The conclusion will argue that a more general approach to constraints on state control from a comparative politics perspective would not only enhance the explanatory value of such perspective, but also facilitate interdisciplinary research on discrepancies between the objectives and outcomes of refugee admission policies.

1.2 Sociological approaches: Migrant agency and its social implications

Sociologists, as well as anthropologists, have argued that the ability of migrants to avoid restrictions on cross-border movement constitutes the main constraint to the realisation of state control over the admission of refugees and migrants. Migrant agency is said to thwart the

fixity of the political, legal but also economic regulation of international mobility. Stephen Castles (2004: 209-210) has highlighted the significance of migrant agency in the creation of social dynamics operating in relative independence from economic and political processes:

> [M]igrants are not just isolated individuals who react to market stimuli and bureaucratic rules, but social beings who seek to achieve better outcomes for themselves, their families and their communities through actively shaping the migratory process. Migratory movements, once started, become self-sustaining social processes.

A vibrant sociological literature has been published on the workings of transnational migrant networks (see especially Portes, 2003; Vertovec, 2004). However, research specifically focusing on networks amongst forced migrants, and investigating the impact of such networks on refugee admission policies, remains to date limited (see on this issue Crisp, 1999; Koser, 2010). In an influential small-scale qualitative study, Koser (1997: 597-600) has assessed to what extent the significance of various social networks impact on the choice of individual asylum seekers to seek refuge in specific countries of destination. Most asylum seekers interviewed in Koser's study said that their decision was influenced by the availability of a network of 'people smugglers' organising the journey. Only a few asylum seekers mentioned having been sponsored by friends, family or political organisations in their country of origin so as to be allowed to stay in the receiving country. Yet networks of family and friends were considered crucial to the financing of an unlawful journey to countries of destination.

Besides migrant-focused social networks, the arrival of migrants in receiving countries generates the expansion of what Castles and Miller (2003: 28) label the 'migration industry'. This includes businesses recruiting immigrants regardless of their right to stay in the country of destination, which is often the case in branches such as construction work and hospitality, as well as migration law professionals able to inform immigrants of their best options to stay in the country of destination (Harris, 1995). Yet in the field of refugee admission, welfare agencies providing support to asylum-seekers and refugees can also be counted as a significant element of this 'industry'. Tazreiter (2004), comparing Australian and German asylum policies in the 1990s, and Pickering et al. (2003), investigating asylum policies in New South Wales in the late 1990s and early 2000s, have shown that the decision by the Howard government to discontinue the provision of welfare benefits to allegedly 'non-genuine' asylum seekers and refugees have led charities and non-governmental organisations to 'step in' and to provide support to forced migrants. This has not only caused a diversion of

funding from other projects, as the government refused to provide specific funding to non-governmental welfare agencies to assist asylum seekers, but has also resulted in increased hostility amongst these agencies towards the government and an increase of solidarity with forced migrants.

In a critical review of his field of study, sociologist and migrant networks expert Michael Bommes (2002) has pointed at an inconsistency in the treatment of social agency in his discipline's literature. Whereas interactions between migrant agency and receiving societies are presented as 'fluid' social processes, interactions between migrant agency and state institutions regulating immigrant and refugee admission are portrayed as confrontations between a rigid political and legal structure and more flexible agents able to bypass and subvert control (for an exception see Jordan and Duevell, 2003). The issue has been recently addressed by the German interdisciplinary research project 'transit migration forschungsgruppe' (transit migration research group), in which the leading figures are sociologists and anthropologists. The group suggests a re-conceptualisation of institutions of immigration control as dynamic entities (Hess and Karakayalı, 2007; Tsianos, 2007) and as elements of a 'migration regime' interacting with migration agency. However, the transit migration research group focuses primarily on 'institutional dynamism' at the local and transnational level. National institutions of immigration control are left out of this re-conceptualisation of institutions as dynamic entities.[11]

1.3 International relations approaches: Global inequalities and lack of international cooperation

International relations and international law scholarship on refugee admission policy attribute discrepancies between policy objectives and outcomes to the limits of the global refugee regime and to the plurality of state interests within the international system. The centrepiece of the global refugee regime is the 1951 Refugee Convention. International law scholar Chimni (2004) has argued that the Convention was never meant to solve the problems of refugees in the global South and is in the direct continuation of past imperial policies of the global North. Chimni and others such as Zolberg, Suhrke and Aguayo (1989) and Duffield

[11] See a more extensive analysis of transit migration research group's innovative approach to migrant agency in Garnier (2008).

(2001) have contended that the Convention's definition of persecution is narrow and does not reflect the complexities of the causes of forced displacement, which include generalised violence and scarcity of natural resources. The narrow definition of refugee protection reflects an asymmetric global order in which rich countries benefit from the political instability and widespread poverty in the South. Thus, the global North has no interest in reforming the global refugee regime.

Suhrke (1998), while agreeing with this broad analysis, has insisted on the variations over time of the responses of Western states to refugee crises. She has compared two successful cases of 'refugee burden-sharing': the resettlement of Eastern European refugees after the Second World War and of Indo-Chinese refugees in the 1970s and 1980s, with the failure to coordinate international resettlement efforts towards refugees fleeing persecution in the Balkan in the mid-1990s. Successful burden-sharing in the two first cases is attributed to a common geopolitical interest amongst resettling countries, to relative flexibility as regards to the criteria used to select refugees for resettlement, and to public support to the measure in the countries participating to 'burden-sharing'. In contrast, the mass resettlement of refugees from ex-Yugoslavia in the mid-1990s failed because of the post-Cold War disappearance of a unifying geopolitical interest amongst the former Western bloc, lack of consensus over refugee selection criteria, and popular hostility towards refugees in the era of massive asylum to industrialised countries. The combination of these factors prevented organised resettlement, yet this only fuelled the disorganised and massive asylum migration of Balkan refugees to Western Europe, a development deeply unwelcome by countries of destination. Suhrke thus argues that the increase in asylum seekers' arrival to the West was the direct consequence of a lack of cooperation in refugee resettlement. She also insists on the role of past experiences in the unwillingness of Western countries to adopt flexible criteria in refugee resettlement. Although the resettlement of Indo-Chinese refugees was comparatively successful, sustained refugee arrival until the mid-to-late 1980s decreased the willingness of governments to be heavily involved in future 'burden-sharing 'operations (see also Shacknove, 1993; UNHCR, 1994).

Betts has expanded Suhrke's analysis to the prescription that organisations defending the interests of refugees - the UNHCR in the first place - should systematically persuade states of the existence of linkages between the refugee issue and other interests crucial to them, especially security, trade and immigration. '[C]ross-issue persuasion', he argues, is most efficient when 'an ideational, material or institutional relationship [exists] between the

refugee issue and other issue-areas' (Betts 2009: 179). The massive resettlement of Indo-Chinese refugees is considered successful because of Western countries were then committed to the preservation of regional security. Yet international consensus over the meaning of geopolitical security has declined since the end of the Cold War. This has in turn not only decreased the willingness of industrialised countries to coordinate resettlement efforts, as Suhrke mentioned, but has also made a reform of the global refugee regime that would account for the complexity of forced displacement impossible. Yet Betts insists on the significant role the UNHCR, and non-governmental refugee advocates can play as 'epistemic actors' (Betts 2009: 181) who identify cross-linkages between global issues and lobby states to address these cross-linkages.

International relations scholarship seldom addresses the 'root causes' of the political willingness, and unwillingness, of states to cooperate towards the provision of durable solutions to forced displacement. Domestic dynamics tend to be aggregated in the notion of 'state interest'. Addressing these dynamics however would be useful if one aims to evaluate which conditions are conducive, or not conductive, to an increase of international cooperation in regards to the admission of refugees.

1.4 Comparative politics approaches: Political and institutional constraints at the domestic level

In an edited volume comparing policies of immigration control in industrialised countries, Cornelius, Martin and Hollifield (1994: 3) have labelled the discrepancy between policy objectives and outcomes, characterising most of the cases analysed in the volume, the 'gap hypothesis'. The expression is widely used in comparative scholarship on immigration control policies (see for instance Hollifield, 2000; Cornelius et al., 2004; Lahav and Guiraudon, 2006). The literature can be divided in two main streams: one addressing the impact of liberal values on immigration admission objectives, the other being primarily concerned with organisational obstacles to congruence between policy objectives and outcomes.

1.4.1 Impact of liberal values

Investigating immigration policies in Western Europe and the US since the Second World War, Hollifield (1992) has argued that liberal democratic governments are constrained in their attempts to reduce immigration by the embeddedness of human rights in international institutions established after the war and by the seemingly inexorable expansion of global capitalism. Capitalist demand for migrant labour has led to high levels of immigration to industrialised countries. In Western Europe especially, labour immigration was originally meant to remain temporary. The settlement of 'guest-workers' has been opposed in many states by social and political forces considering that immigration is a threat to national identity. Yet the embeddedness of universal human rights in liberal democratic institutions, and their prevailing over more exclusionary reference categories such as citizenship, has facilitated the permanent stay of 'guest-workers'. The conflict between inclusionary structures and exclusionary agents within liberal democracies has been dubbed 'liberal paradox' by Hollified (1992; see also Hollifield, 2004).

Comparing the asylum policies of Germany, the US and Britain from 1945 to the 1990s, Joppke (1999a, 1999b) has specified Hollifield's argument by arguing that liberal constraints are primarily domestic, not international. The structural embeddedness of universal human rights, or, in the unique case of Germany until 1993[12], of a right of asylum in domestic constitutions, as well as court interventionism, explain the liberal character of policy outcomes in the US and Germany. Joppke argue that there is no such constitutional protection of human rights in Britain, and that the activism of the British judiciary is constrained by the principle of parliamentary sovereignty, according to which judicial decisions are subordinated to the willingness of parliament to comply.[13] Consequently, the gap between restrictive objectives and outcomes in asylum policies is considered greater in the US and Germany than in Britain.

In a comparison of Dutch, German and French asylum and family reunion policies between the 1970s and the late 1990s, Guiraudon has expanded Joppke's approach with a focus on the

[12] The right of asylum in Germany was severely constrained per constitutional reform in 1993, see Schuster (2003).

[13] Joppke's analysis of the British case ends in the mid-1990s; consequently, he does not discuss the impact of the adoption of Britain's Human Rights Act in 2000.

Europeanisation of immigration control. Neither the existence of universal human rights nor of domestic human rights are said to exhaustively account for the failure of restrictive immigration control policies in the European Union. The European judiciary constitutes a further layer of liberal constraints: the European Court of Human Rights (ECtHR) has since the 1970s overturned restrictive admission regulations in European states and consolidated the rights of non-citizens to enter and stay on their territory. Guiraudon identifies linkages between the national and the transnational level in the elaboration of judicial decisions, and points at the role of activists helping immigrants defend their right to enter and settle in the European countries (Guiraudon, 2000a).

The Europeanisation of immigration control however, does not mean that restrictive immigration policies outcomes cannot be achieved. Pressed by restrictive demands at the domestic level, European governments facing judicial and political pressure against their restrictive objectives from the 1980s gradually relocated the making of immigration policy to European institutions isolated from public scrutiny and expanded entry control beyond their borders. This 'venue-shopping' strategy, Guiraudon contends, allowed governments to escape domestic political contentions as regards to policy formulation and neutralised judicial oversight in regards to policy implementation (Guiraudon, 2000b: 261-266; see also Lahav and Guiraudon 2000).[14] Thus, in contrast to Hollifield and Joppke, Guiraudon insists on the ability of governments to avoid liberal constraints through institutional innovation in supranational venues. A similar argument has been made by Gibney (2003; 2005) in his comparative analysis of refugee policy since 1945 in Britain, the US, Germany, and Australia.

1.4.2 Organisational weaknesses

Several comparative politics scholars explain the inability of states to achieve their immigrant and refugee admission objectives as the consequence of enforcement difficulties related to organisational weaknesses within the 'immigration bureaucracy'. Investigating European asylum policies since the early 1980s, Alink, Boin and t'Hart (2001) have developed an engaging conceptual framework to address the field, that of recurring 'institutional crises'. The latter is defined as a state in which 'the institutional structure [of a policy sector]

[14] On Guiraudon's venue-shopping approach, see also Garnier (2010).

experiences a relatively strong decline and unusually low levels of legitimacy' (ibid: 298). This definition encompasses vulnerability-enhancing factors as well as catalysts of crises. Institutional crises can be caused by environmental change (variations in asylum seekers' arrival), by the enduring ignorance of organisational problems (conflicts between restrictive goals and practice) or by institutional rigidity, that is, the inability of institutions to cope with problems even when problems have been acknowledged.

The authors suggest two responses to 'institutional crises' with respectively two possible outcomes. A response encompassing many reforms, may result in a return of legitimacy within the policy sector if reforms are efficient, yet low reformist efficiency may trigger disillusion and the worsening of the crisis. A conservative response included only small changes may restore legitimacy if it had previously existed or, lead to policy stagnation if change brings no increase of policy efficiency (ibid: 300-302). For instance, the German constitutional reform of 1993 restricting access to asylum, which was followed by a decline of asylum inflow to Germany, is considered a reformist success restoring legitimacy. On the opposite, the incremental response of the Dutch government to a significant increase in asylum claims in the late 1990s is said to be both conservative and to lead to stagnation. The authors contend that as long as vulnerability-enhancing mechanisms do not disappear from a policy sector, the potential for institutional crises remains significant:

> In times of crisis, the institutionalized structure of the sector may come under severe pressure for change (…) [Yet a]s long as crisis decision-making remains within the domain of the sector, the institutional past will at least partially determine the boundaries of the future. (Alink, Boin and t'Hart 2001: 303)

Alink, Boin and t'Hart's 'institutional crisis' model is conceptually attractive because it identifies several factors leading to discrepancies between policy objectives and outcomes and points at the interrelations between these factors. The model also identifies a number of policy outcomes which could be replicated across a number of case studies. However, the main weakness of the model is its lack of clarity as regards to the boundaries of an 'institutional crisis'. Examples mentioned in the article lead to consider that asylum policies are in a permanent state of crisis, unwittingly limiting the explanatory value of the approach. In addition, the authors, who point at the role of the fragility of the 'asylum bureaucracy' in institutional crises, do not further address the issue in their empirical analysis.

In contrast, Antje Ellermann locates bureaucratic responsiveness in the field of immigrant admission at the core of her research. Ellermann (2006) focuses on political constraints to individual deportations of unlawful non-citizens in Germany. She shows that groups protesting against imminent deportations directly interfere with the tasks of frontline immigration bureaucrats implementing deportation policies. The publicisation of such cases impacts on public perception. Although the public is generally supportive of the deportation of unlawful non-citizens, protests against individual depotations can result in legitimation crises for governments accused of pursuing inhumane policies. Thus, how 'street-level bureaucrats' (Lipsky, 1980) the responses of local immigration officials to opposition to individual deportations is relevant to regional or national political authorities.

According to Ellermann, frontline bureaucrats and local authorities adopt various strategies in the face of the disruption of their administrative routine: conflict prevention, conflict containment and conflict resolution (Ellermann, 2006: 301-306). In the case of conflict prevention, bureaucrats attempt to avoid disruption through practices such as the rescheduling of deportations to hours unfriendly to social mobilisation, for instance the middle of the night. To achieve conflict containment, local authorities lobby higher authorities to centralise individual decision-making in individual deportation cases so as to insulate contestation from the actual decision-making process. Conflict resolution occurs when the immigration bureaucracy in charge of deportation innovates and pursues a policy of voluntary returns through financial incentives so as to avoid the political cost of deportation. Thus, Ellermann highlights the impact of changing public preferences over time (between the adoption of deportation regulations and effective deportation) and space (national versus local level) on policy outcomes. Yet she does not argue that local anti-deportation mobilisation automatically disrupts deportation practices and thus leads to policy failure. On the contrary, she points at the adaptiveness of immigration bureaucracies to social mobilisation. In most cases, non-citizens are eventually deported, or accept to return, to their countries of origin (ibid: 307).

In another study, Ellerman (2008) has focused on the implementation of re-admission agreements, that is, bilateral agreements between countries of reception and of origin of unlawful immigrants aiming to facilitate the return of the latter. She has argued that 'because migration control policies tend to be formulated unilaterally [by receiving states], many foreign governments have adopted obstructionist tactics that critically threaten policy implementation.' (Ellermann 2008: 170) Countries particularly dependent on the remittances of foreign nationals - often much higher than official development aid - have the least

incentives to participate in or implement re-admission agreements. Participation into such agreements can be obtained through the provision of concrete financial incentives, or through the threat of economic sanctions in the case of non-ratification, as is the case of the EU policy linking development aid with the participation into re-admission agreements. However, adopting an agreement and implementing it are not the same. At the implementation level, bilateral cooperation between immigration officials is crucial. Yet low-level bureaucratic cooperation can be in contradiction with a political preference for non-compliance if compliance is detrimental to the economic interests of the country of return.

Ellermann's research therefore addresses discrepancies between objectives and outcomes in immigration control policies as a dynamic process. At the domestic level, achieving policy objectives can be constrained by shifting public demands, as the impact of the anti-deportation movement has shown. Yet this challenge to restrictiveness may only be temporary, as bureaucrats respond to this constraint with restrictive institutional innovation. Ensuring the implementation of restrictions policy objectives beyond domestic borders is more complex. The example of re-admission agreements points at discrepancies between the objectives of governments on the one hand, and immigration bureaucracies on the other hand, in countries committed to re-admitting citizens expelled from other countries as unlawful immigrants. Such conflicts in turn hinder the implementation of re-admission agreements.

1.5 Conclusion

Reviewing the literature, this chapter has identified three types of explanations of the discrepancies between the objectives and outcomes of refugee admission policies. Sociological scholarship considers that the agency of migrants and refugees, and the social implications of this agency, to be a crucial obstacle to the implementation of entry control policies, yet seldom investigates the modalities of state responses to this agency. More specifically dealing with refugee admission policies, international relations approaches argue that the structure of the international system is both conducive to the production of refugee outflows, to the unwillingness of states to admit refugees, and to cooperation reducing the risks of refugee crises and the unpredictability in regards to the modalities of forced displacement. However, the domestic factors leading to such 'international anarchy' are

generally left unexplored. Comparative politics scholars addressing the discrepancies between immigration control objectives and their outcomes 'bring the state back' in the discussion. Comparative politics scholarship is more diverse in its explanations of these discrepancies than sociological and international relations approaches. Some scholars argue that the institutional entrenchment of liberal values in some industrialised countries has constituted the main obstacle to the implementation of restrictive policy objectives, although others have contended that this obstacle could be sidestepped if governments deploy restrictive entry control policies beyond the reach of liberal scrutiny. Others emphasise the detrimental impact of the plurality of interests within the field of refugee admission (within and beyond the borders of liberal democracies), the unpredictable character of refugee inflows, and enforcement weaknesses, on the ability of states to realise intended policy goals. Therefore, comparative scholarship provides state-centered explanatory elements of the 'limits of state control' that could be combined with sociological and international relations explanations, a complementariness that may expand interdisciplinary research into these limits. Yet the degree of generalisation of comparative politics explanations is generally inferior to that of the two other approaches, and this makes such complementariness uneasy. This thesis will attempt to develop an explanatory approach facilitating such complementariness by using a historical institutionalist research design.

2 Explaining unintended policy outcomes in refugee admission policies: A historical institutionalist approach

2.1 Introduction

The purpose of this chapter is twofold. Firstly, it aims to show that historical institutionalism (HI) provides conceptual and analytical instruments particularly useful to explain discrepancies between objectives and outcomes in refugee admission policies. Secondly, it explains the selection of Australian and British refugee admission policies as cases allowing assessment of the usefulness of a HI approach and presents the methodology used to investigate the cases.

Section 2.2 argues that the usefulness of HI relies on its open conception of interrelations between political agency and institutional structure, a conception that informs the two other core characteristics of the approach, that is, a focus on the crystallisation of power struggles within political system within institutions, and a strong preoccupation with institutional continuity and change over time. In Section 2.3, HI's core assumptions are combined with insights from the literature reviewed in the previous chapter to develop a framework of analysis guiding the investigation of discrepancies between policy objectives and outcomes in refugee admission policies. Section 2.4 explains why Australian and British refugee admission policies between the Second World War and 2007 have been chosen to test the explanatory value of this framework of analysis. Finally, section 2.5 presents the empirical methodology and outlines the structure of the case analysis.

2.2 Historical institutionalism: Core assumptions

Historical institutionalism shares with other 'new' institutionalist approaches, rational choice institutionalism and sociological institutionalism, a conception of institutions as dynamic structures interacting with human agency towards the production of patterned social

practice.[15] HI was first developed in the 1970s and 1980s by comparativists such as Peter Katzenstein, Peter Hall and Theda Skocpol. These scholars argued that addressing the impact of state institutions on the ability of political actors to implement their political objectives could explain variations of policy outcomes not addressed in pluralist or macro-structural theories of political behaviour.[16] This approach was for instance applied to the study of diverging responses to global economic crises in advanced capitalist economies, (Katzenstein, 1978; Weir and Skocpol, 1986; Hall, 1986), the transformation of social conflicts over time (Orren, 1974) and of the diverging outcomes of social revolution (Skocpol, 1979). More recent scholarship has applied HI's methods of inquiry to 'narrower' fields of inquiry such as specific policy sectors (see Katznelson, 1998; Pierson, 2006; Mahoney, 2010). As sections 2.2.1 to 2.2.3 will show, HI's empirical focus has resulted in its distinctiveness from rational choice and sociological institutionalism in regards to the nature of interrelations between political agency and institutional structure, to the significance of power struggles in institutional design, and to the significance of time in institutional development. The theorisation of these characteristics has been central in scholarship published over the last decade.

2.2.1 Open interrelations between political agency and institutional structure

HI scholars assume that institutions are settings of rules which *shape and are shaped by* political agency. To Steinmo and Thelen (1992: 10),

> [t]he institutions that are at the centre of historical institutionalist analyses… can shape and constrain political strategies in important ways, but they are themselves also the outcome (conscious or unintended) of deliberate political strategies, of political conflict, and of choice.

This constitutes a less agency-focused perspective on institutions than rational choice institutionalism and a more structure-focused perspective than sociological institutionalism. As Ikenberry (1994: 4) argues:

[15] See Steinmo and Thelen (1992), Ikenberry (1994), Hall and Taylor (1996), Bell (2002), and Immergut (2011)

[16] For an overview of the emergence of HI, see Thelen and Steinmo (1992: 3-7). Behaviouralism and macro-structuralism dominated US political science at the time (see also March and Olsen, 1984).

> Rational theories of institutions are too 'thin' – they are too much agency and not enough structure. They also do not put on the table what historical institutionalists argue lie at the heart of how institutions matter, namely the impact of institutional structures on the interests and goals of individuals and groups. Constructivist [i.e. sociological] theories, on the other hand, are too 'thick' - they do not allow for enough agency, and have problems explaining institutional change.

HI's open approach to the interrelations between agency and structure means that it is both a deductive and an inductive framework of analysis. It is deductive insofar as it identifies variables potentially significant in the explanation of policy outcomes; and it is inductive because the actual explanation of outcomes can only be made in the course of empirical analysis shedding light on the evolving configuration of relevant variables.

As mentioned in this chapters' introduction, HI's open approach to the interrelations between political agency and institutional structure is related to the empirical focus of HI scholars on institutional development over long periods of time, an aspect further discussed below. Yet recent HI scholarship, drawing on evolutionary theory, has gone further and argued that the approach also reflected human nature, which according to evolutionary biology is simultaneously cooperative and selfish, thus not primarily self-interested, as rational choice institutionalists argue (see Lewis and Steinmo, 2010).

2.2.2 Significance of power distribution

The second core characteristic of HI is its focus on institutions in relation to power distribution in political systems. HI literature focuses on institutions as the eventual 'crystallisation' of historical struggles for control over the distribution of power within society, be it at the level of the definition of constitutional rules after a revolution (Collier and Collier, 1991) or at of the seemingly smaller level of the skill formation regime in capitalist systems (Thelen, 2004). Struggles for power mean that groups of political actors will pursue different objectives in their attempt to establish a setting of rules. This may imply long bargaining processes over the delineation of an appropriate institutional setting if collective action is necessary to the adoption of said setting of rules. The result may be an 'institutional compromise' attempting to address conflicting policy demands within an institutional setting allowing for broad interpretation of the rules by the enforcing party, thus relocating conflicts

over power distribution from the level of rule-making to the interpretation of these rules at the enforcement level.

Besides, it is likely that a setting of rule will facilitate the realisation of the objectives of some agents (the 'institutional winners') and constrain the objectives of others (the 'institutional losers') (Thelen and Steinmo, 1992). HI assumes that it cannot be expected from 'institutional losers' to internalise disadvantaging rules and adapt their political expectations and behaviour to the existing setting of rules, as sociological institutionalist scholarhip would argue. The compliance of 'institutional losers' has to be ensured through efficient enforcement. The crucial role of the enforcement level in the study of institutional continuity and change has been emphasised in two recent volumes coordinated by Streeck and Thelen (2005b) and Mahoney and Thelen (2010b).

Rational choice and sociological approaches do not focus on power as much as HI does. Rational choice institutionalists consider that it is in the interest of benefit-maximising rational individuals to accept constraints on their strategic choice to improve collective outcomes.[17] Jenson and Merand (2010) note that the above mentioned focus on internalisation of rules by actors in sociological institutionalist literature emphasises the power of institutions, yet tends to obfuscate discussions of power struggles between actors.

2.2.3 Politics in time[18]

The last distinctive feature of HI amongst 'new' institutionalist literature is the study of institutional continuity and change over long periods of time. The issue is discussed at length in recent HI literature pursuing theorisation efforts. HI research has long emphasised the role of 'big' change for the development of institutional configurations structuring politics for decades, if not centuries (in this respect see especially Ertman, 1997). Episodes of sudden and dramatic change were contrasted with long phases of institutional stability. Doing so, HI

[17] Reviewing several decades of rational choice institutionalist literature, Moe (2006) argues that power distribution through institutions remained an under-researched issue in recent scholarship.

[18] *Politics in time* is the title of a collection of Paul Pierson's articles regarding methodological considerations when addressing the role of time in political processes (Pierson, 2004).

shared Krasner's (1984) approach to institutional continuity and rupture as a 'punctuated equilibrium' (see Thelen and Steinmo, 1992: 15). To Krasner,

> [a] basic analytic distinction must be made between periods of institutional creation and periods of institutional stasis. (…) New structures originate during periods of crisis. They may be imposed through conquest or be implanted by a particular fragment of the existing social structure. But once institutions are in place they can assume a life of their own, extracting societal resources, socializing individuals, and even alterting [sic] the basic nature of civil society itself. (…) Furthermore, once a critical choice has been made it cannot be taken back. (Krasner, 1984: 240)

Following this analysis, there are two distinct modes of interactions between political agency and institutional structure. On the one hand, periods of crises correspond to episodes of dramatic change in which political agency is able to refashion institutional structures. On the other hand, once new institutions are established, they constrain the cognitive preferences of actors, which tend to consider these institutions as more legitimate, but also less costly to operate than potential alternatives. In other words, once established, an institutional trajectory becomes path-dependent.

Subsequent HI literature has furthered the conceptualisation of institutional path dependence and of path-breaking institutional crises; one of the most influential scholars on the issue is Paul Pierson (see Pierson, 2000; 2004). Drawing first on rational choice literature, Pierson argues that increasing returns and positive feedback are the core dynamics generating path dependence. The repetition of an initial choice increases the significance of the initial decision, and this repetition diminishes the attractiveness of potential alternatives. Pierson states that path dependence through increasing returns is highly likely in political processes because of the following factors: '(1) the central role of collective action; (2) the high density of institutions; (3) the possibility for political authority for enhancing asymmetries of power; (4) its intrinsic complexity and opacity.' (Pierson, 2000: 256)

The centrality of collective action in politics implies that changing an established institutional trajectory translating collective action into the expected outcomes is costlier than institutional under-performance. The high density of institutions in the policy process implies that one change would affect all other institutions, and that adjustments would have to be made. 'Big' change of this type is costly, and thus creates an incentive for institutional inertia. Further, political authority has the ability to enforce rules disadvantaging others, therefore reducing

the effectiveness of protest. Finally, the complexity of politics implies that many participants to the political process do not exactly know how institutions work, and prefer institutional stability to the uncertainties of institutional change. In this context, path-breaking institutional crises are most likely to be generated by exogenous shocks or by a profound crisis of legitimacy of the existing institutions.

Such crises have often been labelled 'critical junctures' in HI literature, a label first used in this sense by Collier and Collier (1991) in a landmark comparative analysis of regime formation in Latin America. Capoccia and Kelemen (2007) however, argue that in contrast to the study of path dependence, 'critical juncture' is seldom properly defined in HI literature, and thus suggest their own definition:

> In institutional analysis critical junctures are characterized by a situation in which the structural (that is, economic, cultural, ideological, organizational) influences on political action are significantly relaxed for a relatively short period, with two main consequences: the range of plausible choices open to powerful political actors expands substantially and the consequences of their decisions for the outcome of interest are potentially much more momentous. Contingency, in other words, becomes paramount. (Capoccia and Kelemen, 2007: 343)

Both the brevity of a crisis and the role of powerful political actors able to decide on the development of an institutional trajectory are considered essential for a transformative episode to qualify as critical juncture. Institutional dismantlement is not the automatic consequence of this juncture. Old institutions can also be 're-equilibrated' to achieve different outcomes.[19]

Thelen (2004), Streeck and Thelen (2005a) and Mahoney and Thelen (2010a) consider that reducing the study of institutional continuity of change to the study of brief and agency-led institutional crises and long phases of path-dependent continuity constraining political agency narrows down the conceptual and analytical ambitions of historical institutionalism. The authors suggest complementing this binary approach to institutional development with a closer focus at institutional 'transformation without disruption' (Streck and Thelen, 2005a: 41), that is, 'small steps' of change over time eventually resulting in major institutional transformation. The following types of gradual institutional change are suggested:

[19] Capoccia and Kelemen consider that transformative institutional development over time is a process distinct from a critical juncture (ibid, 350-352).

displacement, layering, drift, and conversion (Streeck and Thelen, 2005: 18-30; Mahoney and Thelen, 2010: 15-18).[20]

Gradual institutional responses to exogenous and endogenous shocks do not necessarily result in an increase in institutional efficiency. Schickler (2001), in a study of the historical development of committee rules in the US Congress, argues that small-step, cumulative reformism over time not only has tremendous transformative implications, but also results in complex and 'disjointed' institutional settings. In disjointed institutional settings, multiple layers of rules contradict each other yet are each considered legitimate by distinct groups of actors. This, Schicker argues, has a detrimental impact on political agency. The growing complexity of the successively transformed institutional edifice constrains the translation of policy objectives into outcomes, yet the isolated legitimacy of its multiple parts reduces the likeliness of groundbreaking institutional change in the absence of a significant external shock. According to Schickler, uncoordinated, contained institutional change within a given regulatory framework can thus be highly inefficient yet legitimate enough to prevent groundbreaking institutional change.

HI's open conception of the interrelations between institutional structure and political agency is thus reflected in the approach of two other distinctive characteristics, that is, the significance of power struggles in institutional design and a preoccupation for the modalities of institutional continuity and change over time. Drawing on HI's three core assumptions, as well as last chapter's literature review, Section 2.3 elaborates a framework of analysis allowing the investigation of the interrelations between agency and structure in the production of discrepancies between policy objectives and outcomes in refugee admission policies.

[20]Institutional displacement means that political agents, faced with regulation problems not addressed by an existing setting of rules, add new rules to this setting, or re-activate old rules that have become obsolete, instead of dismantling the existing set of rules. Institutional layering is a limited form of displacement. Existing rules are not complemented with new rules; rather, existing rules are amended or revised. In contrast to displacement and layering, institutional drift results from the lack of adaptation of an institutional setting to unforeseen environmental change. Finally, institutional conversion occurs when existing rule settings are 'redirected to new goals, functions or purposes'. Conversion thus suggests 'institutional malleability', that is, the possibility for various interpretations of a setting of rules. The more an existing setting of rules allows for a plurality of interpretation, the greater the potential for institutional conversion. Streck and Thelen (2005a: 31) add a fifth mode of gradual change: institutional exhaustion. Yet Mahoney and Thelen (2010a) abandon the category because of its alleged lack of empirical relevance.

2.3 Applying HI's core assumption to this thesis's research question

2.3.1 Discrepancies between policy objectives and outcomes as 'unintended policy outcomes'

In order to explain discrepancies between objectives and outcomes in refugee admission policies, a specific definition of what is meant appears necessary. Insights from the literature discussed in the previous chapter are useful in this respect. Cornelius et al. (1994: 3) in their discussion of the gap between policy objectives and outcomes consider that intended policy outcomes are achieved when states are able to deliver the official objectives of immigration policy. Similarly, Ellermann (2008: 170) defines 'policy success' as 'the ability to implement central policy measures'. These definitions may appear minimalist, yet they stress an essential element of the assessment of the congruence between policy objectives and outcomes if one is to follow a historical institutionalist approach: contingency. Policy success or failure will thus not be evaluated in function of 'objective' criteria, but on the basis of criteria defined by agents involved in policy-making. In the field of refugee admission, this would translate in the admission of refugees following criteria defined at a specific moment in time as well as the non-recognition of refugees as asylum seekers (as well as the implications of this non-recognition, such as removal to the claimant's country of origin) following these specific criteria. Not achieving stated policy objectives would result in unintended policy outcomes.

Several authors have pointed at the limits of this effectiveness-based definition of policy success and failure. As Cornelius et al. (2004: 7) observe, the goals of immigration policy are not always clearly delineated. Freeman (1995; 2006) notes that the objectives of immigration policies in Western European countries have long remained vague compared to the policy objectives in Australia and other 'traditional countries of immigration'. According to Castles (2004: 207), lack of clarity in the definition of policy objectives is not necessarily a consequence of a lack of policy strategy. Castles distinguishes between 'ostensible' policy goals and 'hidden agendas'. The latter remain undeclared because 'politicians and officials may be reluctant to declare their true objectives, for fear of arousing opposition'. The existence of 'hidden agendas' makes it difficult to differentiate between intended and unintended outcomes. This is why Castles considers that the effectiveness or ineffectiveness of immigration control policies can only be evaluated in relative, not in absolute terms.

Castles' distinction between 'ostensible and 'hidden' policy agenda hints at another element that needs to be incorporated in the definition of thesis's object of study: the acceptance, or legitimacy of policy outcomes. Taking in account the legitimacy of policy outcomes is especially important as refugee admission policy is a highly salient field of immigration control. The research of Alink, Boin and t'Hart (2001) discussed in the previous chapter, has pointed at the significance of a decline of policy legitimacy in the unfolding of 'institutional crises' in the field of asylum. More broadly, Guiraudon (2000) alludes to the significance of legitimacy when she argues that European governments in the 1980s have found themselves constrained in their pursuit of restrictive control policies at the domestic level not only because of constitutional obstacles, but also of the anti-restrictive mobilisation of migrant rights groups. The failure to achieve restrictive outcomes has however been negatively perceived in public opinion. This conflict of legitimacies, Guiraudon argues, has played a significant role in the relocation of immigration controls beyond the boundaries of liberal democracies.

Assessing policy legitimacy is harder than assessing policy effectiveness. Polls measuring the evolution of support for specific immigration policies constitute an obvious indicator of such legitimacy. Experts in the field have, however, recommended caution as regards to their reliability; for instance, the wording of a poll question and exact timing have a significant impact on results (see Goot, 1999). In addition, several authors have pointed at the relevance for policy-makers of the 'organised public' as opposed to aggregate public opinion (see especially Freeman, 2006; Ellermann, 2008).

To sum up, the thesis will adopt the following working definition of unintended policy outcomes in refugee admission policies. The unintended character of policy outcomes is contingent to the definition of policy objectives at the time of implementation of these objectives. Unintended outcomes encompass a discrepancy between stated policy objectives and outcomes (lack of effectiveness) and a lack of acceptance of policy outcomes (lack of legitimacy). This definition implies that restrictive policy measures will not automatically be considered effective if they are followed by a decrease of unwanted migration; rather, there has to be evidence of a causal link between the adoption of restrictions and the decline. It also implies that there can be a disjuncture between policy effectiveness and policy legitimacy, for instance if a restrictive policy measure results in a decline of unwanted migration that is not perceived as a policy success by policy-makers and public opinion. Finally, the effectiveness and legitimacy (or the lack thereof) of policy outcomes are relative, not absolute. Measuring

either of these categories is submitted to significant limits as regards to the availability and reliability of empirical sources.

Drawing on the previous chapter and on HI's core characteristics, Section 2.3.2 formulates four hypotheses explaining unintended outcomes in refugee admission policies.

2.3.2 HI and unintended outcomes in refugee admission policies: Four hypotheses

Section 2.2 has argued that HI's core assumption is its open conception of the interrelations between political agency and institutional structure; this core assumption informs its approach to the role of power struggles in institutional design, to institutional continuity and change, but also to the contingency-related limits of explanatory research. In the following, HI's approach to power struggles and institutional continuity and change are converted into a set of general hypotheses estimating the likeliness of unintended policy outcomes. Each hypothesis is then applied to the study of unintended outcomes in refugee admission policies. The operationalisation of these hypotheses in the context of the case studies is presented in section 2.5.

- *Hypothesis 1: Unresolved conflicts amongst rule-makers ('advantaged agents') over the elaboration of an institutional setting results in the adoption of an institutional setting that makes concessions to all parties and is therefore not perceived as legitimate.* As section 2.2.2 has shown, power struggles between relatively equal parties during the establishment of a regulatory framework may result in the establishment of ambivalent 'institutional compromises'. This means that the adopted institutional setting cannot achieve legitimacy in the eyes of all rule-makers, as none of the rule-making parties is able to impose its view of power distribution onto the others parties, even if all parties gain more from the adoption of the institutional setting than if no institutional setting is adopted. *Application of hypothesis 1 to refugee admission policies:* It will be investigated to what extent conflicts amongst rule-makers (ruling parties, governments) result in the adoption of rules that include concessions to many parties, and thus fail to gain widespread legitimacy amongst policy-makers and the broader public.

- *Hypothesis 2: The effectiveness of a regulatory framework decreases when enforcement mechanisms are unable to translate policy objectives into outcomes.* This hypothesis is also based on insights from section 2.2.2. Especially newer HI literature has argued that weak enforcement mechanisms offered incentives for agents disadvantaged by specific rules not to comply with these rules, thus reinforcing the decline of regulatory effectiveness. *Application of hypothesis 2 to refugee admission policies*: The thesis will assess to what extent the inability of enforcement agents, especially immigration officials, to enforce the rules of refugee admission, have led to a decline of regulatory effectiveness, and if enforcement weakness has constituted an incentive for individuals to apply for asylum in order to remain in their country of arrival of residence.

- *Hypothesis 3: The accumulation of gradual transformations within a regulatory framework produces institutional complexity. The latter is detrimental to the effectiveness and legitimacy of this regulatory framework.* Drawing from Schickler (see section 2.2.3), the hypothesis assumes that cumulative institutional change is likely to result in a decrease rather than an increase in policy effectiveness and in a 'fragmentation' of policy legitimacy, as increasing institutional complexity means that rules can contradict each other. *Application of hypothesis three to refugee admission policies:* The research will assess to what extent the proliferation over time of rules codifying refugee admission is correlated with a decrease of regulatory effectiveness and legitimacy amongst policy-makers and the public.

- *Hypothesis 4: Policy outcomes cannot be satisfactorily explained by independent variables intervening in isolation to each other. Specific correlations between variables identified as significant have a higher explanatory value than these 'independent' chains of causation.* This hypothesis relates to section 2.2.1, which has argued that explanations of policy outcomes are highly contingent to correlations between variables only observable during the course of empirical research. *Application of hypothesis four to refugee admission policies*: The thesis will investigate to what extent the explanatory value of conflicts amongst rule-makers over policy formulation, of enforcement weaknesses, and of institutional complexity, varies over time and across cases.

2.4 Case selection

British and Australian refugee admission policies have been selected as cases studies to assess the usefulness of the HI approach in explaining unintended outcomes in refugee admission policies for the following reasons. Firstly, there is no book-length comparative and longitudinal study investigating the refugee admission policies of both countries, so that the comparison can increase our knowledge of the similarities and differences between both cases. Secondly, British and Australian immigration control policies have long been highly dissimilar. This diversity allows testing the explanatory value of the HI approach in two different contexts. Thirdly, whilst being dissimilar, both cases constitute 'deviant cases' (Lijphart, 1971; Seawright and Gerring, 2008) in explanatory literature on immigration control, as it is assumed that both countries are comparatively better able to control immigrations than other industrialised countries. The inability of British and Australian governments to achieve intended policy outcomes in the field of asylum over the last decades constitutes an explanatory challenge for this view and thus contributes to the ongoing conversation in comparative politics on the determinants of immigration control policies.

Britain and Australia have seldom been compared to each other in qualitative case study research on immigration control policies, and this is perhaps related to their dissimilar immigration histories.[21] Australia is often classified as an 'immigrant nation' (Castles and Vasta, 2004) or an 'English-speaking settler society' (Freeman, 1995). Since the Second World War, Australian governments have encouraged high levels of immigration and permanent immigrant settlement. Support of mass immigration was originally correlated with the highly discriminatory selection mechanisms of the White Australia policy. The latter aimed to ban the immigration of 'non-Whites', yet economic and international concerns led to

[21] Three studies systematically compare aspects of immigration policies in Australia and Britain, yet they do not focus on the explanation of policy outcomes. Money (1999) investigates the role of the spatial concentration of immigration in the formulation of immigration control policies in the 1960s and 1970s in Britain, Australia and France. Gibney (2004) inquires the role of universalist and particularist norms in Australian, British, German and US post-war asylum and refugee policies. With a narrower empirical focus, Afeef (2006) compares the dynamics leading to the promotion of the externalisation of asylum in Australia and Britain in the early 2000s. Cornelius et al. (2004) edited volume *Controlling immigration in a global world*, which addresses unintended outcomes in immigration control policies; including Australian and British immigration controls amongst its eleven case studies; in this context, Australia is compared with the US and Canada as 'traditional countries of immigration' and Britain with France, the Netherlands, Germany as 'reluctant countries of immigration' (see respectively Castles and Vasta, 2004; Layton-Henry, 2004). Beyond the field of immigration control, Baringhorst (2010) compares multiculturalism and immigrant integration in Britain and Australia.

a liberalisation of the immigration program and the progressive phasing out of the White Australia policy from the mid-1960s. Both the Australian Labor Party and the Liberal-National Coalition, which have alternated in governing the country until 2010,[22] have continuously supported comparatively high levels of immigration.[23] The corollaries of Australia's mode of openness to immigration have been an enduring concern for immigrant selection and the development of a specific immigration bureaucracy in charge of admission and settlement issues.[24]

By contrast, Britain has been qualified as a 'would-be zero immigration country' (Layton-Henry, 1994), and more recently as a 'reluctant country of immigration' (Somerville, 2009). From the 1950s, British authorities and the public became concerned with the potential migratory implications of the British Nationality Act 1948 which granted the indiscriminate right to enter and settle in Britain to all British subjects across the Empire.[25] A series of laws were adopted between the 1960s and the 1980s restricting the citizenship rights of Commonwealth nationals in order to limit post-colonial immigration.[26] In spite of low levels of immigration to Britain from the 1970s, leading to negative net migration as emigration remained high[27], the governments of Margaret Thatcher and John Major remained committed to restricting immigration (Joppke, 1999; Messina, 2001). This restrictive trajectory was interrupted in the early 2000s by Labour's political and institutional support to economic immigration as beneficial to Britain (Somerville, 2007a; Spencer, 2007; Balch, 2009). However, this objective rapidly became contentious and was never embraced by the Conservatives. The impact of the global financial crisis on Britain furthered a decline of political support for an increase of immigration to the UK (Somerville et al., 2009).

[22] The 2010 federal election has seen the formation, for the first time since 1941, of a minority Labor government supported by Green and independent parliamentarians.

[23] On Australia's immigration policies since the introduction of the White Australia policy in 1901 see especially Richards (2008); since 1972 and the end of the White Australia policy Jupp (2007).

[24] See Collins (1991); Cronin (1993); Jupp (1993; 2007); Freeman and Birrell (2001).

[25] On the interrelations between race and immigration control issues in Britain see Dummett and Nicol (1990), Cohen (1994), Layton-Henry (1994), Solomos (2003: 48-75).

[26] See especially the detailed historical study of the introduction of this legislation in Hansen (2000).

[27] See graph on the evolution of net migration between 1975 and 2008 in Somerville (2009), http://www.migrationinformation.org/charts/uk-jul09-fig1.cfm.

In spite of these highly dissimilar trajectories of immigration control policies, scholarship, with a few exceptions,[28] has been dominated by the view that the British and the Australian states were better able to achieve intended objectives of immigration control than other industrialised countries. In Australia's case, the literature insists on the isolated geographical position of the country, which has meant a limited exposure to unregulated immigration (Castles and Vasta, 2004: 144) and the weak constitutional protection of non-citizens facilitating refusal of entry and removal of unauthorised immigrants (Crock, 1998; Birrell, 2001: 544-545; Crock, Saul and Dastyari, 2006). It has also been argued that Australia's geopolitical situation as a 'regional hegemon' meant that the country was able to outsource immigration control measures onto its weaker neighbours in the Pacific (Taylor, 2005; Kneebone and Pickering, 2007; Metcalfe, 2010). 'Institutional closure' limiting the protection of the rights of aliens is equally emphasised in the British case (see Joppke, 1999; Geddes, 2003; Gibney, 2008). Although Britain is not considered a 'regional hegemon', the ability of successive British governments to 'pick and choose' the elements of EU immigration and asylum policies considered congruent with the British agenda of immigration control has been highlighted in scholarship on Britain and the EU (Geddes, 2005; Ette and Gerdes, 2007).

However, developments in British and Australian asylum policies over the last two decades have challenged the view that immigration control policies led to intended outcomes. As an extensive literature has shown, the increase in spontaneous arrival of asylum seekers to Britain from the early 1980s and to Australia from the late 1980s was highly unwelcome by governments and societies, as the arrivals were perceived as 'non-genuine asylum claimants'.[29] These increases were highly dissimilar in quantitative terms. By the late 1990s, Britain briefly became one of the main recipients of asylum migration amongst industrialised countries, whereas asylum migration to Australia remained (and remains) at comparatively low levels.[30] Regardless of this divergence, the relative rise of claims fuelled in both countries the adoption of an arsenal of measures aiming to prevent the arrival and settlement of allegedly 'non-genuine' asylum claimants, including sanctions on carriers transporting

[28] On the 'limits of control' in British immigration policies towards Commonwealth immigrants until the early 1980s see Hansen (2000), more generally Schain (2008); on immigration control challenges in Australia in the late 1980s and early 1990s Birrell (1993), and more generally Kabala (1993).

[29] On the unwelcome character of asylum migration in Australia, see especially Birrell (1993), Nicholls (1998), McMaster (2001), Mares (2001), McNevin (2007); in Britain see Joppke (1997; 1999), Squire (2009); on both cases Gibney (2004).

[30] See the comparison of the evolution of asylum claims in Australia and Britain in the last two decades in appendix 2.

undocumented passengers, the detention of undocumented asylum seekers, multiple restrictions on the rights of claimants during asylum procedures, agreements with countries of origin to re-admit 'failed' asylum seekers, and active promotion of restrictive asylum policies in regional and global fora. Whereas these measures and strategies were equally adopted by other industrialised countries confronted with the global rise of asylum migration, Britain and Australia went a step further with the promotion of the 'extra-territorialisation' of asylum procedures to other countries. Most significantly, the Howard government implemented the so-called Pacific Solution in September 2001, which included the processing of asylum claims made by individuals intercepted on unauthorised boats in 'offshore processing centres' (Taylor 2005). A year and a half later, in February 2003, Tony Blair promoted the establishment of 'transit processing centres' for asylum claimants beyond the borders of the EU (Betts 2004). In both cases, this arsenal of measures was progressively extended as previously implemented restrictive measures appeared unable to restrict asylum migration as much as governments intended to, and the political salience of asylum rose in both countries from the late 1990s. The number of new asylum claims markedly declined in Australia and the Britain in the early 2000s. In Britain however, the backlog of accumulated asylum claims declined only very slowly, and the Blair government was unable to achieve its numerical targets in regards to the removal of claimants not granted protection[31] In Australia, the decline of new asylum claims lasted until the end of the period analysed in this thesis, yet rose again from 2007 (Koser 2010). Refugee admission remained a controversial issue in both countries' public debates.[32]

Britain's and Australia's similar trajectories in regards to asylum policies cannot be explained by the above mentioned literature arguing that both countries were comparatively successful in achieving intended objectives of immigration control. The comparative analysis thus aims to show that a HI approach can both offer an original, conceptually grounded, explanation to unintended policy outcomes in refugee admission policies, and expand our knowledge of the British and the Australian cases.

[31] See chapter 5.

[32] See the evolution of public opinion on immigration and asylum see appendix 3 and Goot and Watson (2011).

2.5 Methodology and outline of the case analysis

In the tradition of qualitative comparative studies (see Lim, 2006; Gerring, 2007), the empirical inquiry is based on a broad range of sources. Document analysis is combined with qualitative interviews in the field of asylum and refugee policies. Analysed documents include secondary literature on immigration control in general and refugee admission policies in particular; parliamentary debates[33]; statistics on refugee and asylum numbers[34]; polls assessing the significance of asylum and immigration as issues of concern amongst the electorate; legislation regulating the admission of refugees; and policy reports on refugee admission by the immigration bureaucracy, international and non-governmental organisations. In addition, interviews were conducted between 2007 and 2009 in Canberra, Sydney, Melbourne, London, and Geneva with 42 policy actors and long-time observers of the field, including Australian and British parliamentarians, journalists, refugee advocates, lawyers, representatives from the national administrations in charge of the admission of refugees, representatives of the UNHCR and the International Organization for Migration (IOM) in both countries and at the headquarters in Geneva, and academics.[35] These interviews had an exploratory function in the data-gathering process and were conceived as assessments of policy changes under the Blair and the Howard governments by significant policy actors.[36] However, the discussions were also revelatory in regards to other aspects, especially the enduring preferences, in both countries, for discretion-based, rather than legislation-based, refugee admission.

The following sources were used to assess the evolution of the significance of unintended policy outcomes over time. Congruence between stated policy objectives and outcomes (policy effectiveness) was assessed on the basis of available parliamentarian, bureaucratic and non-governmental sources, as well as secondary literature using archival material, defining

[33] Parliamentary debates were respectively retrieved from the electronic database of the Parliament of Australi's Hansard (http://www.aph.gov.au/hansard/intro.htm) and Hansard data base of Millbank Systems, which is operated by the British Parliamentary Services (http://hansard.millbanksystems.com/).

[34] Main sources of statistics were statistical bulletins and further reports by the British Home Office, Australia's Department of Immigration, the UNHCR, the British Refugee Council and the Refugee Council of Australia.

[35] See appendix 1 for the list of interview partners.

[36] On methodological considerations in interviews with policy actors, see Meuser and Nagel (2005).

policy objectives and reporting policy outcomes. To evaluate the degree of acceptance of policy formulation and of policy outcomes (policy legitimacy) in public opinion, secondary sources on opinion polls as well as concerns expressed in the media were used in combination with polls released by survey bodies for more recent years. Conducting primary research for the entire period of investigation would have gone beyond the scope of the investigation. The variation of legitimacy amongst policy-makers was assessed on the basis of secondary literature retracing policy development, and using archival or interview material for this purpose, media reports on policy-makers' views, as well as the above mentioned personal interviews with policy actors and observers.

The three variables, at the core of the thesis's explanatory hypotheses. that is, conflicts over policy formulation amongst policy-makers, ability to enforce the rules (and the lack thereof), and institutional complexity, were investigated as follows.

1) Conflicts over policy formulation: the analysis used sources publicly available (including secondary sources using archival material) and details gathered from interviews as regards to the debates within parties in power, or, to a lesser extent because of the lack of sources, within immigration bureaucracies, on the merits of debated legislation and regulations.

2) Ability to enforce regulations: sources on the resources available to the refugee admission bureaucracy to ensure the compliance of prospective refugees to existing regulations. Financial resources were not considered to be a sufficient indicator of such ability, as availability of material resources does not automatically translate into bureaucratic efficiency. Thus a number of other criteria were taken in account, such as the number of staff available to process claims and the level of knowledge of staff about asylum procedures. To find such information, reports produced by governmental or non-governmental organisations assessing policy effectiveness, such as Britain's and Australia's audit offices and parliamentary committees on immigration, were analysed. Interviews with policy actors involved in policy implementation, such as the UNHCR's Quality Initiative in the British case[37], and a number of immigration lawyers in both countries, were particularly insightful.

[37] See chapter 5.

3) Regulatory complexity: A sequential analysis of the transformation over time of the institutional setting, with a particular attention for the introduction, disappearance and reintroduction of various regulatory measures as well as the degree of coherence between successive reforms was conducted.[38] While primary legislation is publicly available, the transformation of secondary legislation and of less formal discretionary procedures was more difficult to assess due to limited sources. Valuable information was found in historical studies retracing policy development on the basis of ministerial archives, statements by MPs and Lords or Senators familiar with the inner workings of the immigration bureaucracy, as well as policy reports by non-governmental organisations on the state of refugee resettlement policies and of the asylum procedure.

As mentioned in the introduction, each case study is structured in a series of three chapters. Chapters 3 to 5 investigate the British case, chapters 6 to 8 the Australian case. The introductory chapter of each case study investigates the development of refugee admission policies from the mid-1940s until the end of the Prime Ministerships of James Callaghan in Britain (1979) and Malcolm Fraser in Australia (1983). During this period, both countries resettled comparatively large numbers of refugees, and, the numbers of asylum claims remained very limited. The case studies' middle chapters focus on refugee admission under the Conservative government of Margaret Thatcher (1979-1990) and John Major (1990-1997) in Britain, and the Labor governments of Bob Hawke (1983-1991) and Paul Keating (1991-1996) in Australia. In both cases, asylum claims significantly increased over the period and the framework of refugee admission was profoundly transformed from a discretion-based to a legislation-based institutional setting. The final chapter of the case studies compares refugee admission policies under Tony Blair's Labour government in Britain (1997-2007) and John Howard's Liberal/National Coalition in Australia (1996-2007). The period was characterised in both cases by constant restrictive institutional innovation in refugee admission policies. This responded in Britain to an unprecedented increase in asylum claims and in Australia to an unprecedented arrival of unauthorised boat people claiming asylum. In both cases, these increases peaked in the early 2000s and were followed by a steady decline of asylum claims/boat people arrival until the end of the period of investigation.

[38] See appendix for a synthetic presentation of the evolution of the regulatory framework between 1945 and 2007 in both countries.

The introduction of each of the six chapters starts with a review of existing political science literature on refugee admission policies during the era investigated in the chapter of concern. This allows identifying areas that has hitherto not been analysed in details in the literature and pointing at the specific contribution of thesis to knowledge on the cases. Each chapter is organised chronologically so as to emphasis the correlations of the explanatory hypotheses presented in section 2.3.2. The ability of the hypotheses to explain developments in each chapter is evaluated in the chapters' conclusions.

Case study 1 – British refugee admission policies

3 Post-war refugee admission: The slow demise of a dual institutional setting

3.1 Introduction

The introductory chapter of the British case study investigates and attempts to explain unintended policy outcomes in British refugee admission between the end of the Second World War and 1979. Comparative politics literature analysing British immigration control during this period has primarily focused on policies towards non-European immigrants and refugees from the British Commonwealth. Until the late 1990s, the literature emphasised the ability of successive British governments to restrict 'Commonwealth immigration', the originally derogatory euphemism often used in reference to immigration from former British colonies in Africa, South Asia and the Caribbean. Layton-Henry (1992; 1994; 2004), Freeman (1995) and Joppke (1998b; 1999) have pointed at the distinctive restrictiveness of British immigration politics and policies towards Commonwealth immigrants. Whereas Layton-Henry has argued that deep-seated racism was a key contributor to such restrictiveness, Freeman and Joppke have pointed at institutional mechanisms enabling the translate exclusionary political discourse into exclusionary policies .The regulation of Commonwealth immigration in the context of British citizenship legislation, and the absence of constitutional limits to the powers of the British Parliament to modify the definition of British citizenship, constitute the two institutional pillars of this restrictiveness.[39] The absence of such institutional safeguards' is considered crucial in the ability of British governments in the late 1960s and early 1970s to restrict as much as possible the arrival of 'East African Asian' refugees fleeing persecution in Kenya and Uganda, although Britain eventually admitted several thousand East African Asians as immigrants and resettled 28,000 Ugandan Asian refugees.

[39] A similar argument is made in legal scholarship addressing the historical development of British immigration law and policy; see especially Dummett and Nicol (1990), Shah (2000).

Scholarship published in the 2000s has questioned such convergence between restrictive politics and policies. Hansen (2000) and Schain (2008) have pointed at the slow transformation of British citizenship law, which granted the right to Commonwealth subjects to immigrate and settle in Britain, in the 1960s and early 1970s, despite widespread hostility to Commonwealth immigration from the mid-1950s. The slowness of this institutional transformation is attributed to the long-standing legitimacy of an imperial conception of citizenship amongst the British political elite.

The emphasis on the regulation of Commonwealth immigration in political science literature means that the admission of refugees from outside the Commonwealth, whose arrival was regulated by the rules of admission of aliens, has been less investigated in the discipline. Historical scholarship (Kay and Miles, 1988; Miles and Kay, 1992) has however shown that post-war British governments resettled comparatively large numbers of European refugees from Eastern Europe as temporary, then permanent additions to the domestic workforce, and that this measure was overall considered efficient and legitimate. Geographer Vaughan Robinson has highlighted the lack of enthusiasm and preparedness of British governments towards the resettlement of non-European alien refugees in the 1970s (see Robinson and Hale, 1989; Robinson, 2003).

Informed by these insights, the chapter will compare the admission of alien refugees with that of refugees from the British Commonwealth, and assess the value of this thesis's hypotheses explaining untended policy outcomes. This means investigating the correlations between, on the one hand, the level of conflicts over policy formulation, the strength of enforcement mechanisms, and the complexity of the institutional framework of refugee admission, and on the other hand policy effectiveness and policy legitimacy. This is done in the context of a chapter structure that reflects the existence of two distinct modes of regulation of refugee admission. Section 3.2 assesses the modalities of admission of alien refugees, and section 3.3 focuses on the admission of refugees from the British Commonwealth. Section 3.2 also incorporates an analysis of Britain's role during the drafting of the Refugee Convention. This allows assessing Britain's priorities in the elaboration of the treaty as well as the impact of Britain's position on the wording of the Convention. The chapter conclusion gives a synthetic account of the hypotheses' explanatory value.

3.2 Admission of alien refugees

This introductory section briefly shows that between the late 18th and the early 20th centuries, British refugee admission policies evolved from being a liberal regime exempting alien refugees from usual entry control mechanisms to a regime ensuring that entry of both immigrants and refugees was only allowed on a discretionary basis.

The Act for Establishing Regulations Respecting Aliens, adopted in 1798, recommended to ensure that 'persons … really seek[ing] refugee and asylum from oppression and tyranny' be granted refuge or asylum in Britain (Bevan, 1986: 59-60; Stevens, 2004: 21). Three decades later, the Aliens Act 1826 repealed the right to expel foreigners. Concerned with political refugees, the Extradition Act 1870 prohibited the forcible return to their country of origin of political offenders who had fled to the UK (Stevens, 2004: 30-31). Porter (1979) argues that Britain's *laissez-faire* towards refugees during the 19th century was primarily due to the country's interest in the refugees' professional skills and wealth, rather than to humanitarian principles.

In the late 19th century, a significant increase in immigration to Britain in a context of economic difficulties led to domestic demands for more stringent immigration control and to the eventual adoption of the Aliens Act 1905. The 1905 Act granted immigration officers the discretion to refuse aliens admission in case prospective immigrants could not support themselves in Britain. Yet the Act exempted aliens fleeing persecution from expulsion and provided a right to appeal against refusal of entry at Immigration Boards (Bevan, 1986: 73; Schain, 2008: 128; Stevens 2004: 40). This remnant of political liberalism did not survive the outbreak of the First World War. The Aliens Restriction Act 1914, adopted a week after the British declaration of war, granted the Home Office the right to arrest, detain, expel, and deport any alien (Schain, 2008: 128). This means that legislative exemptions from immigration control for aliens fleeing persecution asnd seeking refuge in Britain disappeared from primary legislation (Shah, 2000: 43). Instead of being eventually repealed, wartime measures adopted to restrict the arrival of foreigners expanded after the war. The Aliens Restrictions (Amendment) Act 1919 officially dismantled Immigration Boards, which had practically ceased functioning since 1914 (Dummett and Nicol, 1990: 151-152). The admission of alien refugees remained largely a matter of administrative discretion until the slow expansion of a right of appeal against refusal of entry that started in the late 1960s. As

section 3.2.1 will show, the British authorities were keen to see the regulation of the admission of refugees through unfettered administrative discretion endorsed in the Refugee Convention.

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3.2.1 Defending discretion-based refugee admission during the drafting of the Refugee Convention

The study of the *travaux preparatoires* of the Refugee Convention reveals that the British authorities, who had a significant influence over the drafting of the treaty as a victor of the Second World War, strongly advocated administrative discretion as the most appropriate mode of refugee admission during the drafting of the Convention (Weis, 1995; and see Noiriel, 2006: 144-147). A British delegation participated in both the Committee on Refugee and Stateless Persons established in 1949 to draft the Refugee Convention,[40] and in the Conference of Plenipotentiaries finalising the treaty (Weiss, 1995: 2).[41] During the elaboration of Article 1 of the Convention defining the meaning of refugee, the British representative in the drafting committee supported the adoption of a broad definition of this term. The French and United States representatives supported a narrower definition. As Noiriel notes, the respective positions of the three states may at first sight appear as a paradox. France's openness to refugees in the first half of the twentieth century stood in opposition to British and American restrictiveness towards refugees since the end of the 19th century. However, as the Convention was drafted, France and the US hosted large numbers of refugees. Both countries were thus hostile to a Convention definition that would potentially result in the expansion of the refugee influx to their territory (Noiriel 2006: 145-6). Britain did not host comparable numbers of refugees at the time and appeared less concerned with the potential implications of the adoption of a broad definition of a refugee. This can be attributed to the fact that the treaty would only becoming binding in Britain if it was not only ratified but

[40] Other members of the *ad hoc* Committee on Refugee and Stateless Persons were representatives of Belgium, Brazil, Canada, China, Denmark, France, Israel, Poland, Turkey, the USSR, the US, and Venezuela (UNHCR/Weis, 1995: 2).

[41] Other countries represented at the conference were Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Federal Republic of Germany, Greece, the Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland (the Swiss delegation also represented Liechtenstein), Turkey, the US, Venezuela, and Yugoslavia. The governments of Cuba and Iran were represented by observers (Weis, 1995: 12).

also incorporated in domestic law, so that the practical consequences of the adoption of a broad definition would remain limited until such incorporation (Harvey, 2000: 25).

The final version of Article 1 was a compromise between the French/American and the British position – even though the US never became a party to the Convention.[42] Part A of the article gave a broad definition of the refugee, although the definition only applied to 'events occurring before 1 January 1951'.[43] Part B of the article stipulated that states party to the Convention could choose how to interpret the meaning of 'events occurring before 1 January 1951' and apply it either to events occurring in Europe only, or in Europe and elsewhere. This provision was eventually repealed in the 1967 Protocol relating to the Status of Refugees removing the geographical and temporal limitations of the Refugee Convention.

It could be argued that Britain's defence of a broad refugee definition meant that the country supported inclusive refugee admission policies, notwithstanding the fact that the Convention would not automatically apply to British refugee admission policies, as has been mentioned earlier. Yet the position of the British delegation on other articles shows that Britain also supported the use of discretionary procedures for explicitly restrictive purposes. For instance the British representative expressed the following reservations regarding Article 9, which exempts refugees from restrictions imposed onto the rights of foreign nationals for national security reasons:

> The UK representative said that, while he had no instructions from his Government on the matter, he felt sure it would be sympathetic to the provisions of Article 25 [the draft version of Article 9]. It might, nevertheless, have some difficulty in accepting them, because of overriding considerations of national security. He recalled the critical days of May and June 1940, when the UK had found itself in a most hazardous position; any of the refugees within its borders might have been fifth columnists, masquerading as refugees, and it could not afford to take chances with them. It was not impossible that such a situation might be reproduced in the future. (Weis, 1995: 49)

[42] The US ratified the 1967 Protocol to the Refugee Convention in 1968.

[43] According to the Refugee Convention Article 1, Part A(2) the treaty definition of a refugee "shall apply to any person who... a result of events occurring before 1 January 1951 and owing to wellfounded 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 of 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 fear, is unwilling to return to it." At the time, the treaty definition also applied to individuals who had been considered refugees under a number of previous international arrangements (Article 1 Part A (1)).

The British position was criticised by the US representative, who argued that reservations were not necessary as 'none of the provisions' of the Convention 'would apply unless the refugees were genuine' (Weis, 1995: 63). The final version of Article 9 was a compromise between the US and the British positions as it authorised the imposition of restrictions 'pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.' (UNHCR, 2010: 18)

In the discussion of the definition of the principle of *non-refoulement* (Article 33), the British representative argued that the Convention should allow states parties to return refugees to countries in which they feared persecution in exceptional cases and to transfer these refugees to third countries in which they did not fear persecution (Weis, 1995: 325). The final version of Article 33 did not endorse the removal of refugees to what would be today called 'safe third countries', yet it included exemptions from the principle of *non-refoulement* in case the refugee had committed 'particularly serious crimes' (UNHCR, 2010: 30).[44]

The analysis of the *travaux preparatoires* shows that the British discretionary approach to refugee admission was not necessarily equivalent with restrictiveness. Rather, discretion was advocated as offering flexibility in regards to individual decisions over the admission of refugees. Regardless of the merits of discretion-based refugee admission, Britain's regulatory approach conflicted with the approach of other influential countries during the drafting. This in turn resulted in the production of a treaty that can be qualified as an ambivalent 'institutional compromise'. Many Convention articles allowed for a broad margin of interpretation; the 'correct' interpretation of the Refugee Convention remains a hotly disputed issue until today, as will be illustrated in subsequent chapters in regards to the British and the Australian case.

The Churchill government ratified the Refugee Convention in 1954, yet the treaty was not incorporated into British statutory legislation until the adoption of the Asylum and Immigration (Appeals) Act 1993. Without this incorporation, the Convention was not binding, and thus the treaty had a limited practical impact on domestic policies. Section 3.2.2 and 3.2.3 focus on asylum and refugee resettlement procedures in this context.

[44] See footnote 7 for the wording of Article 33.

3.2.2 Asylum procedure: Primacy of discretion and moderate institutional change

During the period analysed in this chapter, British asylum procedures were barely formalised and asylum was only very rarely granted. Asylum decisions were at the discretion of the Home Office's Immigration and Nationality Directorate (IND), and no dedicated asylum bureaucracy was established within he IND before the 1980s. On request, parliamentarians could ask the Home Secretary to reconsider negative asylum decisions. This provision was not defined in legislation, yet progressively became an established custom.[45] In the last instance, asylum seekers refused entry, similarly to other immigrants, could seek judicial review of Home Office decisions. As for any case of judicial review, courts could be requested to assess whether the Home Office decision had been irrational, illegal or procedurally inappropriate, yet the merits of the asylum case were not addressed (Harvey, 2000: 224-232). There is no comprehensive study of asylum in Britain between the 1950s and the 1970s, yet according to existing literature, national security considerations were determinant in decisions to grant political asylum or refugee status, which were two separate categories until 1983 (see Kaye and Charlton, 1990).

In the 1960s, pressure for the introduction of a right of appeal in immigration matters increased following the introduction of the Commonwealth Immigrants Act 1962, which will be discussed in Section 3.3.1. This pressure eventually had an impact on the asylum procedure. A report on immigration appeals commissioned by the House of Commons was released in 1967 (Hepple, 1969; Stevens, 2004; 81-82). The report triggered the adoption of the Immigration Appeals Act 1969. The Act granted a right of appeal to both Commonwealth and alien immigrants. The procedure was further formalised in the Immigration Act 1971. Home Office decisions were now to be reviewed by an adjudicator (an immigration judge). In case of refusal of the adjudicator's decision, the latter was reviewed by the Immigration Appellate Authority (IAA). Adjudicators and IAA members were appointed by the Lord Chancellor, and thus independent from the Home Office. There was no separate asylum procedure for people seeking protection in Britain. In addition, individuals who had attempted to enter Britain unlawfully had no right to appeal against a Home Office decision from within

[45] See the presentation of the evolution of this custom by Home Secretary Douglas Hurd in a parliamentary debate dedicated to the issue, HC Deb 26 March 1986, vol. 94, cc952-953.

the British territory. Appeals against refusal of entry were only allowed after the appellants had returned to their country of habitual residence (the legal term for this procedure is 'non-suspensive right of appeal'). As the Immigration Appeals Bill 1969was debated in parliament, Home Secretary James Callaghan stressed that individuals fleeing persecution were in practice granted the right to stay until the hearing of their appeal as a matter of administrative discretion.[46] Callaghan welcomed the introduction of a right of appeal as a contribution to the expansion of the rule of law:

> Under the proposed system, the final responsibility in the generality of [immigration] cases will no longer rest with me. If an immigrant wishes to dispute a decision, his proper remedy under the [Immigration Appeals] Bill will be to exercise his right of appeal under the system which the Bill lays down. (…) For myself and the junior ministers, and perhaps for Hon. Members, it may mean a lightening of the burden which we carry, but certainly the Bill marks an important extension of the rule of law in this country. It will be of benefit to immigrants and also, in a sense, to the Home Office, because it will require it to make manifest the grounds on which decisions are taken about immigration control. (House of Commons debates, 22 January 1969, Hansard vol. 776, col. 490)

At first, legislative change did not result in asylum-related contentions between the Home Office and the IAA. In 1977, it was estimated that the success rate of appeals lodged by asylum seekers was 0%, compared to a 10 to 15% success rate for appeal made by visitors or students. This means that Home Office decisions in asylum cases were in practice never overturned at the appeal stage (Stevens, 2004: 82).

A limited right of appeal accessible to asylum claimants was thus introduced following demands for an appeal right for immigrants especially in family reunion cases, not following demands related to asylum claimants. Domestic demands for the introduction of checks and balances to the discretionary powers of the immigration bureaucracy in asylum cases were overall limited.[47] It can be argued that the lack of domestic demands to reforms was related to the low levels of asylum claims in Britain until the late 1970s. There is no publicly available

[46]'I must emphasise, however, that seamen and stowaways will be allowed to remain here for the hearing of their appeals whenever this is practicable. In particular, I give an assurance that a seaman or stowaway who appears to be making a bona fide claim to political asylum will not be removed until his appeal has been disposed of.' Home Secretary James Callaghan, HC Deb 22 January 1969, Hansard vol. 776 c496.

[47] One exception is the Soblen case in 1962. Robert Soblen, a German Trotskyist and a spy for the Soviets in the US after the war, was refused political asylum in 1962 in Britain after he had tried to escape a conviction for treason in the US. Asylum was refused, and Solben ended his life in his prison cell. This stirred significant political controversies in Britain at the time, yet the case had no long-standing institutional impact (Thornberry, 1963; Stevens, 2004: 73-75).

official record of asylum claims made in Britain before 1979, when the Home Office started to release annual statistics on the issue. The Office recorded a total of asylum claims for 1979 at 1,563, a year in which 525 applicants were granted asylum.[48] Statistics were released in response to repeated demands for disclosure by parliamentarians concerned with an increase in claims. It is thus safe to assume that levels of claims were lower than the 1979 figure over the previous decades. However, the UNHCR had earlier attempted to convince the British authorities to incorporate the Refugee Convention in domestic law (Macdonald, 1983: 242). As a result of correspondence between the UN refugee agency and the Home Office, the first Immigration Rules publicly released by the Home Office in 1960 referred to the need to take in account 'relevant international agreements to which the United Kingdom is a party' in entry decisions. The Refugee Convention however, was not explicitly referred to. The next reference to the Refugee Convention in legislation was in a footnote of the Immigration Rules 1973 (Stevens, 2004: 78). This footnote remained the last significant institutional change related to the incorporation of the definition of the refugee in domestic law until the adoption of the Asylum and Immigration (Appeals) Act 1993 twenty years later. In practice, the Refugee Convention only played a role in cases of expulsions of individuals claiming asylum when all other reasons to appeal an expulsion decision had been exhausted.

This section has shown that asylum between the 1940s and the 1970s was characterised by low-level conflicts over policy formulation and moderate institutional change that did not challenge the ability of the Home Office to enforce its decisions, as the numbers of asylum claims remained small and access to appeal against a Home Office decision severely restricted. It is difficult to affirm with certainty that successive British governments achieved intended policy objectives. Available material shows that these objectives were not clearly stated in policy, although evidence of cases seems to suggest that preserving national security was more important than humanitarian concerns. Policy outcomes however appear to have been considered legitimate in the absence of significant political and public controversies.

As the next section will show, low levels of political conflicts also characterised the resettlement of Eastern European refugees, yet the resettlement of alien refugees became more controversial in the 1970s. The arrival of East African Asian refugees from former British colonies to Britain in the late 1960s and early 1970s is discussed separately in section 3.3.2.

[48] Home Secretary David Waddington, HC Deb 05 July 1985 vol. 82 c281W.

3.2.3 The sinuous politics of refugee resettlement

To compensate for scarcity of labour during the post-war reconstruction period, the British authorities, similarly to their Australian counterparts and other Western states, resettled large numbers of Eastern European Displaced Persons (DPs) from refugee camps in Germany and Austria. Between 1946 and 1949, more than 90,000 nationals from various Eastern European countries came to the UK as part of the European Volunteer Workers (EVW) scheme.[49] Both the Labour government of Clement Atlee and the Conservative opposition in parliament supported the arrival of the DPs (Kay and Miles, 1988: 216), yet there were bureaucratic dissentions as to the modalities of resettlement. The departments managing labour supply—that is, primarily, the Ministry of Labour and the Ministry of Health concerned with the recruitment of additional doctors and nurses—advocated the arrival of DPs most suitable to the branches in which scarcity of labour existed. Young, single women were selected to work as nurses, and young single men as coalminers. Selection officers in refugee camps were tasked to facilitate the arrival of DPs considered able to 'blend in' in the British population, especially Baltic nationals. Baltic nationals were portrayed as well-educated and hard-workers, Ukrainians and Yugoslavs as racially inferior and poorly trained, while Jewish refugees were not even eligible for the EVW scheme (Miles and Kay, 1992: 23). The Foreign Office argued for larger resettlement targets than the Ministries of Health and Labour as it wanted to rapidly clear out refugee camps in the British Zone of Occupation; the camps were considered a financial burden. In addition, the Foreign Office was critical of refugee selection as advocated by the Ministries of Labour and Health. To the Office, such selection overlooked that refugees left behind in camps faced a dire future as they were doomed to return to countries marked by the destructions of the Second World War. In contrast, the Home Office was hostile to the large-scale resettlement of DPs, as it considered that the arrivals were a potential source of public disorder. It supported the forcible repatriation of resettled refugees who were found to have committed offences (Miles and Kay, 1988: 218-219).

[49] See table by nationalities in Miles and Kay (1988: 217). Britain also allowed the permanent stay of Polish and Ukrainian soldiers who had fought with the allies during the war and were unable to return to their countries of origin.

The Home Office's concerns were ultimately overridden by enduring demands for foreign labour and mounting protest against British restrictiveness at the domestic and international level. British employers advocated the arrival of additional workers regardless of their cultural background. The Ministry of Labour considered that the threat of deportation was economically inefficient as it negatively affected the productivity of the DPs worried that they might one day be deported. International organisations such as the International Refugee Organization (IRO) also criticised the harshness of Britain's resettlement policy and DPs themselves protested against the temporariness and the precariousness of their working conditions (Miles and Kay 1988: 228). Increasing openness to DP resettlement led to a relaxation of selection criteria used by British selection officers dispatched in refugee camps.

Britain's involvement in the resettlement of Hungarian refugees fleeing the Soviet repression of the Hungarian revolution in October-November 1956 did not emphasise domestic needs for additional labour. Anthony Eden's government (Conservative) responded quickly to the plea of the UNHCR and the Intergovernmental Committee for European Migration (ICEM) to admit refugees who had *en masse* crossed the border to Austria.[50] The government originally planned to accept 2,500 Hungarians,[51] however, the British population was sympathetic to the arrivals, and many made generous contributions to fundraising organised to support the refugees. The refugee intake soon exceeded 2,500 (Stevens, 2004: 72).

In contrast to the DPs, the Hungarian refugees were admitted in Britain without preliminary screening in camps, and allowed from the start to stay permanently. Some MPs feared the presence of Communist agents amongst them, and this risk was acknowledged by Home Secretary Lloyd George. Yet George opposed the screening, arguing for the necessity to help the Hungarian refugees as quickly as possible.[52] The Eden government closely cooperated with the voluntary sector to facilitate the provision of temporary accommodation and

[50] By the end of November 1956 more than 110,000 Hungarians had arrived in Austria, and the UNHCR office in Vienna considered that the usual resettlement eligibility procedures were impossible to carry out in these conditions (UNHCR, 2000: 29; 32).

[51] 'Her Majesty's Government have decided to authorise the admission of 2,500 Hungarian refugees to this country and have discussed with the British Council for Aid to Refugees (which represents the principal voluntary organisations concerned with refugees entering the United Kingdom) arrangements for organising the reception and care of the refugees in this country and placing them in suitable employment wherever this is possible. Her Majesty's Government have also agreed, subject to the approval of Parliament, to provide a grant of up to £10,000 to meet approved administrative expenses incurred by the Council in connection with this scheme, which is being put into effect forthwith.' Foreign Secretary Douglas Dodds Parker, HC Deb 9 November 1956 vol. 560 c6W.

[52] Home Secretary Lloyd George, House of Commons debate, 13 December 1956, Hansard vol. 562, col. 610.

language support for the refugees, and with employers and trade unions to facilitate labour market integration.[53] From early November 1956, the British government was involved in international efforts aiming to facilitate the coordinated resettlement of Hungarian refugees, many of whom expressed the wish to be resettled in the US, Australia or Canada. The British government offered financial support to the Canadian and Australian authorities to facilitate the travel of large numbers of refugees eventually resettled to the two Commonwealth countries. Between 1956 and 1959, 20,990 Hungarian refugees were permanently resettled in the UK, which became the third largest country of resettlement behind the US (40,650) and Canada (27,280) (UNHCR, 2006b: 10). Discretionary decision-making in regards to the admission of Hungarian refugees facilitated swift refugee resettlement in a context of unambiguous political objectives which contrasted with the dithering of the EVW program less than a decade earlier.

Yet Britain's international leadership in the resettlement of the Hungarian refugees was to remain an isolated case. British governments were more reluctant than many other Western countries to admit Chileans fleeing the overthrow of the Allende regime in the early 1970s, and Southern Vietnamese following the fall of Saigon in 1975. In political discourse, Harold Wilson's Labour government showed more sympathy to the cause of the Chilean refugees than Edward Heath's Conservative government. Yet both Labour and the Conservatives were equally restrictive in practice. 3,000 Chileans were resettled between 1974 and 1979 in the UK, far less than the number of Chileans resettled in the US and Australia during this period (Robinson, 2003: 113-115). Candidates for resettlement in Britain had to show evidence of family connections in Britain and were submitted to extensive security clearance involving cooperation between the British authorities and the US secret service (Kaye and Charlton, 1990). The Wilson government channelled funding to the UNHCR to help the agency resettle Chilean refugees in other countries.[54]

Britain's original involvement in the resolution of the Indo-Chinese refugee crisis was similarly modest. Between 1975 and 1979, the country's main activity in this respect was the rescue of boat people in distress in the South China Sea by British ships. The Callaghan

[53] 'Over 1,000 employers have notified one or more vacancies for Hungarian refugees. Up to 8th December some 500 refugees had been placed by my officers in employment with suitable accommodation. Approval of employment has been given in other cases where the refugees have secured work through friends or relatives.' Minister of Labour Iain Macleod, HC Deb 13 December 1956 vol. 562 c594W.

[54] See the exchange between MP Neil Kinnock and Minister of Overseas Development Judith Hart, HC Deb 8 November 1974 vol. 880, cc 267-8W.

government also supported the activities of the UNHCR and voluntary agencies in South-East Asian countries hosting most of the boat people fleeing Vietnam.[55] No more than a few hundred Indo-Chinese were resettled to Britain over this period (Robinson and Hale, 1989: 1). Section 3.3 will discuss elements contributing to the decline of enthusiasm of the British government for refugee resettlement between the 1950s and the 1970s.

Between the 1940s and the 1970s, the willingness of successive British governments to resettlement alien refugees fluctuated significantly, and many voices had their say in the decision-making process. Planning the post-war resettlement of European DPs caused conflicts between the departments involved in this planning, however scarcity of labour resulted in the temporary marginalisation of the Home Office, the main advocate of highly restrictive admission policies. The Home Office however became more supportive of the arrival of Hungarian refugees who were€ considered 'geopolitical allies'. By the early 1970s however, the British authorities were again reluctant to resettle alien refugees, and preferred providing financial assistance to the provision of humanitarian protection beyond British borders. Institutionally however, refugee policy was simpler than refugee politics, as the admission of individual refugee was at the entire discretion of the Home Office. British immigration officials were dispatched to select refugees for resettlement in the countries to which these refugees had fled. Refugees who were refused resettlement had no opportunity to appeal against this refusal. However it cannot be argued that policy outcomes strictly matched policy objectives, as these policy objectives especially in the case of the post-war DPs and the Hungarians, were defined and redefined over short periods of time. Notwithstanding the limits to policy effectiveness as defined in this thesis, their legitimacy was not seriously challenged in political or public debates.

As mentioned in the introduction, the admission of non-European refugees from the British Commonwealth caused far more controversies than the admission of 'alien' European refugees. Section 3.3 investigates the modalities and factors of these controversies.

[55] See Home Secretary Merlyn Rees, HC Deb 8 December 1978 vol. 859 c817W. The next chapter addresses the involvement of the Thatcher government in the Indo-Chinese refugee crisis.

3.3 Admission of non-European refugees from the British Commonwealth

3.3.1 Discrepancy between restrictive politics and ambivalent regulatory framework

British admission policies towards non-European refugees from the Commonwealth, especially towards Eastern Africans of Indian origin fleeing persecution in Kenya and Uganda in the late 1960s and early 1970s, were embedded in the regulation of entry and settlement of Commonwealth citizens. The following paragraphs thus discuss the general policy framework before turning more specifically to refugee admission.

In 1948, the British Nationality Act introduced the status of 'citizen of the United Kingdom and colonies' (CUKC). All CUKCs, but also all citizens from British dominions, were British subjects who had the right to enter and settle in Britain.[56] The 1948 Act had been adopted because the British political elite were faced with the unilateral adoption by dominions (Canada, followed by Australia) of citizenship legislation and wished to entrench the freedom of movement of British settlers scattered across the world in statutory legislation (Hansen, 2000: 37-45). Yet the adoption of the Act would prove to have unforeseen consequences.

After the Second World War, the Atlee government had briefly supported the arrival of immigrants from British colonies to compensate for expand the domestic workforce. Yet the resettlement of Eastern European refugees discussed above was soon preferred to the arrival of Commonwealth immigrants. Regardless, significant numbers of Commonwealth nationals put into practice their right to settle in Britain, guaranteed in the British Nationality Act 1948, from the early 1950s. Their arrival was encouraged by employers as labour was still scarce in many sectors, yet the public and the press rapidly became hostile to the increasing presence of non-European immigrants (Joppke, 1999: 106-107). From the mid-1950s, the Eden and the MacMillan governments promoted a range of restrictive practices aimed at decreasing the incentives for Commonwealth immigrants to move to the UK, such as negative publicity as

[56] Article 1 of the British Nationality Act 1948 stated that '[e]very person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section [that is, Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon] is a citizen of that country shall by virtue of that citizenship have the status of a British subject.'

regards to employment and housing conditions in Britain, the introduction of prohibitive immigration fees, and bureaucratic hassles such as delays in the release of passports necessary for travel (Schain, 2008: 124-127). Commonwealth governments became increasingly hostile to such practices. For instance, in 1960, the Indian Supreme Court decided that the withholding of Indian passports by British authorities was illegal, causing bilateral tensions between the British and the Indian governments (Hansen, 2000: 96-97). 'Low-intensity' and piecemeal immigration control triggered an unintended increase in Commonwealth immigration to Britain. Prospective immigrants expected that 'hard' legislation restricting their right of entry in Britain would soon follow 'soft' disincentives (Dummett and Nicol, 1990: 182-183). Until the early 1960s, restrictions on the arrival of Commonwealth immigrants were thus relatively ineffective.[57] Riots in London and Nottingham between residents and recent Caribbean immigrants reinforced the political salience of Commonwealth immigration (Hansen, 2000: 81-87). The failure of restrictive measures to deliver expected outcomes fuelled demands for the introduction of entry restrictions per legislation within the Conservative Party. However, many others within the party, as well as the Labour party in opposition, were reluctant to adopt a radical transformation of the British citizenship regime. This resulted in the adoption of the first Commonwealth Immigrant Act in April 1962, a highly ambivalent piece of legislation.

The Commonwealth Immigrant Act 1962 introduced a hierarchy of rights of entry and settlement for British subjects which clearly discriminated against non-European Commonwealth immigrants, and increased bureaucratic discretion towards the latter. British subjects whose British passport had been issued under the authority of colonial governments, that is, the majority of Commonwealth citizens from Africa, Asia and the Caribbean, were submitted to immigration quotas. In addition, they had to be promised a job offer, possess skills considered useful to Britain, or be in possession of an employment voucher to be entitled to settle in the UK. The Act also introduced a power to deport Commonwealth citizens who had committed offences 'punishable with imprisonment' if deportation was recommended by the judiciary. Discretionary powers were expanded through other aspects of the Commonwealth Immigrant Act 1962. Regardless of the immigration quota, the Ministry

[57]' By the end of 1959, there were approximately 126,000 West Indians living in Britain who had arrived since the end of the war (…) What distinguished the migrants in this period [the 1950s] from pre-war entrants from the Caribbean and south Asia was that most of them settled inland to do working-class jobs. Pre-war immigrants from these countries, except in ports, had mainly been professionals or students.' (Dummett and Nicol, 1990: 170-172)

of Labour had the discretion to refuse to grant an employment voucher (Hepple, 1969: 318-319). Notwithstanding these restrictive measures, the Act did not restrict secondary immigration through family reunion; did not sanction clandestine entry in Britain; and did not create institutional mechanisms enforcing the departure of students or visitors from the Commonwealth overstaying their visa (Hansen, 2000: 136-137). This complex regulatory structure did not lead to the intended decrease of Commonwealth immigration (Hansen 2000: 136-137).

The lack of the effectiveness of the Commonwealth Immigrants Act 1962 contributed to a shift in Labour's attitude as regards Commonwealth immigration. Labour had originally opposed the 1962 Act, eventually giving their parliamentary support on the condition that the Act was annually submitted to a renewed vote. Thus, as it came to power in 1964, Harold Wilson's Labour government could have voted against the renewal of the Act. Yet it did not do so, and the 1962 Act continued to be renewed over the following years. The counterpart of this endorsement of entry restrictions was a commitment to the adoption of some anti-discriminatory measures within Britain, a commitment resulting in the Race Relations Act adopted in 1965.[58] The Conservatives soon endorsed these anti-discrimination measures. As the next section will show, bipartisanship in regards to the need for 'tough entry controls' as the counterpart of official support to 'racial harmony' made it politically easier to adopt restrictive immigration control legislation, yet this did not result in an increase of the legitimacy of the regulation of Commonwealth immigration.

3.3.2 Eastern African refugee crises and the gradual 'alienisation' of Commonwealth nationals

Britain's response to the 'Kenyan Asian' refugee crisis in the late 1960s was as much shaped by bipartisan support for strict immigration control as it was by the convoluted character of the Commonwealth Immigrants Act 1962. In the mid-1960s, Jomo Kenyatta's government introduced 'Africanisation' measures towards British subjects living in Kenya. In particular,

[58] Wilson's Home Secretary Frank Soskice argued that the British government found it appropriate to give institutional support to racial harmony if it could be ensured that entry of Commonwealth immigration was strictly controlled (Hansen, 2000:137).

the latter had to become Kenyan citizens and to renounce to their British citizenship if they didn't want to be deprived of the right to own a business in Kenya. The long-established community of 'Kenyan Asians', British subjects of Indian origin, were most detrimentally affected by the measures as they played a key role in Kenya's economuy. Alongside other 'East African Asians' living in Uganda, Tanganyika and Zanzibar (the future Tanzania), the 'Kenyan Asians' had not been affected by the above mentioned settlement restrictions towards Commonwealth immigrants. The immigrations restrictions of the Commonwealth Immigrants Act 1962 applied to individuals whose passports had been released by the governments of (former) British colonies, yet most East African Asians possessed passports that had been released by the British government. In addition to this legal specificity, the East African Asians had been given a guarantee by British authorities that they would keep the right to settle in Britain in case of difficulties in newly independent African countries (Hansen, 2000: 160). For this reason, many chose to flee to Britain as Africanisation policies became increasingly discriminatory. By late 1967, 13,600 Kenyan Asians had arrived in Britain, in a context of expanding hostility towards Commonwealth immigration. Bilateral negotiations were conducted with the Kenyan government to foster a decrease of departures, yet Kenyatta refused to cooperate.

The failure of this strategy led to a further step towards the dismantlement of post-imperial nationality law. At the initiative of Home Secretary Callaghan, the Commonwealth Immigrant Act 1968 was rushed through parliament in February of that year. The Act furthered the development of a hierarchisation of citizenship rights which had begun with the Commonwealth Immigrant Act 1962. Freedom of entry and settlement in the UK was now reserved to British citizens holding a passport issued by the British government and demonstrating a 'quality connection', that is, immediate family connection, with Britain. The Act effectively deprived most Kenyan Asians of their entitlement to settle in Britain. A small immigration quota for British passport holders from East Africa (1,500 annually) was introduced as a meagre replacement (Hansen, 2000: 160-162). Regardless of widespread popular hostility to the arrival of African refugees in early 1968, the adoption of the second Commonwealth Immigrant Act generated heated debates in parliament. The bill almost failed to gain a majority in the House of Lords. Many parliamentarians could not fathom that the British government was breaking its promise to help subjects of the Crown facing difficulties in their country of residence. Yet the government argued that the Kenyan Asians belonged to Kenya's economic elite and were thus only mildly affected by governmental sanctions,

whereas Britain struggled with economic difficulties and could not afford an increase in immigration. The government's position was popular. According to a Gallup-NOP poll conducted during parliamentary debates, the adoption of the bill was supported by 69% of respondents. Support for the bill was higher than average amongst the working-class, that is, traditional Labour supporters (Hansen, 2000: 155). Three days before the Commonwealth Immigrants Bill 1968 was adopted, anti-immigration and maverick Conservative MP Enoch Powell advocated the repatriation of Commonwealth immigrants living in the UK to their countries of origin. Another poll revealed that 82% of the respondents shared Powell's view (Bristow, 1976).

The Immigration Act 1971 further endorsed the 'alienisation' of Commonwealth nationals. The Act was the first in British post-war immigration legislation to regulate conjointly the immigration of aliens and that of Commonwealth citizens. The 1971 Act introduced the concept of 'patriality' which built upon the provision of the 1968 Commonwealth Immigrant Act requiring from British subjects 'family connections' with the UK to be entitled to settle in the country, an entitlement referred to in the Act as the 'right of abode' (Hansen, 2000: 200). The 'alienisation' of Commonwealth immigrants was not entirely achieved as a further refugee crisis occurred in Eastern Africa. On 3 August 1972, Uganda's president Idi Amin announced the expulsion of all Asian residents holding a British passport, to be effective by November 1972. According to Loescher 55,000 'Ugandan Asians' refusing to renounce their British subjecthood were then threatened by the expulsion. Thousands 'Ugandan Asians' who had intended to adopt Ugandan citizenship were left stateless by the Amin government and forced to move to impoverished rural areas (Loescher, 2001: 66). Idi Amin considered Britain responsible for the admission of the Ugandan Asians as the British Crown had historically supported the settlement of Indian merchants in East Africa (Kuepper, Lackey and Swinerton, 1975). As had been the case with the Kenyan Asians and regardless of the 1968 and 1971 restricting settlement in Britain, many British parliamentarians shared the view that Britain had a special responsibility towards the Ugandan Asians, and so did foreign governments.[59] This led the Wilson government to organise an emergency resettlement operation for the Ugandan Asians in spite of enduring popular hostility towards the arrival of African refugees.

[59] During the first House of Common debates following Idi Amin's announcement of the massive expulsion of Ugandan Asians, MP Richard responded to Foreign Secretary Douglas-Home presenting the events: 'The United Kingdom has a special responsibility for these people since many of them altered their position upon the word of successive British Governments and such difficulties as they now face, whatever else should be said about them, are certainly not of their making.' HC Deb 7 August 1972 vol. 842, c160.

Britain's resettlement involvement was accompanied by governmental attempts to involve as many other countries as possible in resettlement efforts, yet the success of this campaign was limited. Canada resettled between 6,000 and 7,000 Ugandan Asian refugees, three-quarters of whom had been citizens of Indian origin who had been deprived of their citizenship by the Ugandan government and were thus stateless. According to Pereira, Adams and Bristow (1979), Canada's resettlement was highly selective and reflected its general immigrant admission criteria in regards to required levels of education and working experience. The US resettled approximately 1,000 stateless refugees as a matter of urgency. India admitted a contingent of refugees who renounced their British citizenship, and Sweden, the Netherlands, and Norway admitted a few hundred refugees permanently. In contrast, 28,000 Ugandan Asians with British passport were resettled in the UK (Loecher, 2001: 167).

The Ugandan Asians, who clearly fled persecution and were admitted for this reason in Britain, were not granted refugee status. The Home Office argued that this status cound not be granted to British citizens regardless of the fact that the category of British nationality relevant to the Ugandan Asians did not include the right to settle in Britain anymore following the adoption of the Commonwealth Immigrants Act 1968. Ugandan Asians who attempted to be recognised as refugees in other European countries failed, as the courts of these countries considered that they were British citizens and thus should remain in Britain regardless of the precariousness of their status in this country. Schuster (2003: 138) has thus argued that the Ugandan Asian refugees were the first 'refugees in orbit' being refused admission by several governments arguing that protection was available elsewhere. The asylum procedure applied to aliens was eventually expanded to Commonwealth immigrants in 1979. This step marked the end of the 'alienisation' of refugees from the former British Empire.

3.4 Conclusion

This introductory chapter to the British case study has identified two modes of regulation of refugee admission to Britain between the end of the Second World War and the 1970s, one regulating the admission of alien refugees and the other the admission of refugees from the British Commonwealth. The former was embedded in the regulation of the admission of aliens in Britain, yet included elements that only applied to forced migrants, especially the asylum procedure and refugee resettlement operations. Yet there was no specific unit within

the Home Office which dealt with asylum claims, and refugee resettlement remained an *ad hoc*, discretionary instrument responding to specific refugee crises. Asylum however was a more sophisticated procedure than resettlement. In the first decades after the Second World War, the asylum procedure encompassed a single discretionary decision by the Home Office, which could be informally re-assessed by a parliamentarian representing the case requesting the Home Secretary to do so, or be subjected to judicial review, which did not address the merits of the case. In the late 1960s, a right of appeal at an administrative tribunal, limited to claimants who had lawfully entered Britain previous to their asylum claim, was introduced between the first instance decision by the Home Office and judicial review. However, the Refugee Convention was not incorporated into domestic law and had no regulatory impact until the end of the 1970s. Notably, Britain defended a discretionary approach to the determination of asylum claims as the most appropriate admission method during the drafting of the Refugee Convention. This position had significant influence over key articles of the treaty, which allowed a broad margin of interpretation. The implications of this influence are explored in the next chapters.

In contrast, the admission of Commonwealth nationals seeking refuge in Britain occurred until the adoption of the Commonwealth Immigrants Act 1968 within the context of existing regulations on Commonwealth immigration; these were themselves subordinated to British nationality law. The arrival of Ugandan Asians fleeing persecution to Britain during the 1970s can be qualified as highly informal in regulatory terms. The resettlement operation organised in 1972 was entirely *ad hoc*. Individuals seeking protection over the following years were refused asylum as it was argued that they could not apply for it as British citizens; only a few individuals were granted residence in Britain on a discretionary basis. It was only in 1979 that this state of 'non-admission through non-regulation' ended, and the regime of refugee admission for aliens became the single refugee admission regime in Britain.

During the three decades of regulatory dualism, each refugee admission regime presented a distinct configuration of policy effectiveness and policy legitimacy, and thus a distinct configuration of 'unintended policy outcomes' following the definition of this concept introduced in the previous chapter. The legitimacy of the admission of alien refugees was contested as the resettlement of Eastern European refugees started in the 1940s and then rapidly increased; policy legitimacy increased further towards Hungarian refugees in the 1950s to become again contested in the 1970s towards Chilean and Vietnamese refugees. Significantly, this pattern does not mirror the evolution of policy effectiveness. The objectives

of policy towards Eastern European DPs and Hungarian refugees were defined and redefined as policy unfolded, whereas there were less significant policy variations towards Chilean and Vietnamese refugees regardless of divergences of policy rhetoric between major parties. In contrast, the legitimacy of the admission of both Kenyan Asians and Ugandan Asians was highly contested, as many parliamentarians, and public opinion according to surveys, wished more restrictive policies while a few denounced a breach of commitment towards the East African Asians adopted before the independence of the British colonies. Yet if one looks at the stated regulatory framework, that is, the Commonwealth Immigrant Act 1968 and the more *ad hoc* measures towards Ugandan Asians in the 1970s, then the objective to restrict arrival as much as possible was largely achieved.

It was argued in the previous chapter that controversies between policy-makers in regards to the elaboration of the institutional setting of refugee admission would lead to a decrease of legitimacy of policies regulating refugee admission (hypothesis 1); that the weakness of enforcement mechanisms would reduce policy effectiveness (hypothesis 2); and that increasing institutional complexity would reduce both policy effectiveness and policy legitimacy (hypothesis 3). Does the analysis conducted in this chapter confirm the explanatory value of these hypotheses?

In the case of the admission of alien refugees, it has been shown that struggles between bureaucracies involved in the resettlement of DPs impacted on the legitimacy of the operation and led to a rapid evolution of policy objectives. In contrast, governmental cohesion in regards to the arrival of Hungarian refugees enabled a swift increase in resettlement places which was welcome at the international level. In the case of Vietnamese and Chilean refugees, public differences of opinion between parties resulted in contested legitimacy yet masked continuity between a Conservative and a Labour government over the implementation of restrictive admission policies. Variations of power struggles are thus correlated with variations of policy legitimacy, and the first hypothesis thus appears indeed to have some explanatory power. The second hypothesis appears irrelevant for the period of investigations, as the level of asylum claims remained low. The explanatory value of the third hypothesis is harder to assess. The complexity of resettlement can be considered to have decreased over time, since the Home Office, which was marginalised in the resettlement of European DPs in the 1940s, became in the following decades the sole organiser of refugee admission.[60] This

[60] This is not the case of the settlement of refugees, in which voluntary organisations were highly involved.

decrease of complexity is not correlated with a straightforward amelioration of policy legitimacy or effectiveness. The complexity of the asylum procedure however increased over time, with the addition of a layer of appeal in the early 1970s. Yet this had no impact on policy effectiveness, as there were no disputes between the organisations involved in decision-making. The legitimacy of asylum appeared unaffected as the issue was barely ever publicly controversial. Overall, the only variable to show a significant explanatory value over the period is variations of power struggles between decision-makers.

In the case of Commonwealth refugees, the role of variables can only be assessed in the context of the East African Asian crisis. It has been observed that conflicts over policy formulation were intense and in the line of conflicts over the regulation of Commonwealth immigration since the 1950s. This level of conflict was correlated with low policy legitimacy, thus confirming the first hypothesis. Contrary to the case of alien refugees, the second hypothesis can be tested in the case of the Ugandan Asians attempting to claim asylum in the 1970s: the non-regulation of asylum efficiently prevented such claims in practice. Entry was only allowed on an entirely discretionary basis, and the Ugandan Asians had no avenue to circumvent the decisions of the immigration bureaucracy. This seems to confirm the second hypothesis. Finally, it can be argued that the third hypothesis has some explanatory value if one applies it in reverse (a reduction of institutional complexity leads to an increase in policy legitimacy and effectiveness). Institutional complexity declined, as the regulation of admission via convoluted statutory legislation over British citizenship was replaced during the 1970s by *ad hoc* administrative discretion. This facilitated congruence between stated objectives and policy outcomes, yet did not increase policy legitimacy.

The next two chapters assess the evolution of this explanatory configuration can as the rise of asylum claims became the predominant focus of refugee admission policies under the Thatcher and Major governments.

4 Refugee admission policies under the Thatcher and Major governments: Rise of asylum claims, contested policy objectives and increasing institutional complexity

4.1 Introduction

The previous chapter has argued that only the first of this thesis's three hypotheses attempting to explain unintended outcomes in refugee admission policies, that is, the detrimental impact of conflicts over the elaboration of the rules of refugee admission on the legitimacy of refugee admission, appeared to be confirmed. In contrast, no clear-cut correlation could be established between enforcement ability and policy effectiveness, and between institutional complexity on the one hand, and policy effectiveness and legitimacy on the other hand. This chapter investigates to what extent this explanatory configuration evolves in the context of British refugee admission policies under the Conservative governments of Margaret Thatcher (1979-1990) and John Major (1990-1997). The period was characterised by a steady rise of asylum claims that accelerated from the mid-1980s. In the context of this increase, the regulatory regime of asylum considerably expanded and became entrenched in statutory law, while refugee resettlement lost its relevance as an instrument of refugee admission.

Comparative politics scholarship on British asylum and refugee policies under the Thatcher and Major government agrees on two significant observations. On the one hand, the rise of asylum claims in Britain was inferior to simultaneous increases of claims in other Western European countries. On the other hand, popular and political hostility towards asylum seekers was more virulent than elsewhere (Jopkke, 1998a, 1999; Steiner, 2000; Schuster, 2003a). Yet diverging interpretations are made of the ability of the Conservatives to translate restrictive politics into restrictive policies. To Joppke, Britain was more successful in this respect than the US and Germany because of close ties between immigration and refugee policy, enduring effectiveness of administrative discretion and limits to judicial intervention. Kaye (1992; 1994) and Pirouet (2001), who focus exclusively on the British case, acknowledge the restrictive rhetoric of the Thatcher and Major governments, yet show that British refugee and human rights organisations had some influence on policy, for instance through their consistent support for the introduction of a statutory right of appeal for all asylum seekers. Schuster (2003a) contends that the Asylum and Immigration (Appeals) Act adopted in 1993 reflected

this influence. Although the Act was predominantly restrictive, it introduced a right of appeal against negative asylum decisions and incorporated the Refugee Convention's definition of a refugee into domestic law (see also Schuster and Solomos, 2001). In contrast, Schuster argues, the second piece of statutory legislation on asylum adopted three years after the first, the Immigration and Asylum Act 1996, was exclusively restrictive, showing that NGO influence on the policy agenda of the Conservatives was short-lived.

There is thus a significant body of scholarship assessing the impact of conflicts over policy formulation on policy developments. In contrast, literature on the impact of the dramatic increase in asylum claims on the ability to enforce policy, and on the implications of the institutional transformation of the refugee admission, is less extensive. Beyond analysing the value of the thesis's explanatory hypotheses, the chapter thus intends to contribute to the case-specific literature by addressing the role of the last two factors. For this purpose, the chapter uses sources on enforcement seldom used in the literature, especially parliamentary debates on refugee admission and policy evaluation reports released by voluntary agencies.

The chapter is structured as follows. Section 4.2 presents the rise of asylum claims under the Thatcher and Major governments, and section 4.3 briefly addresses immigration-related contentions under the Conservatives in order to contextualise refugee admission within the field of immigration control. Sections 4.4 and 4.5 respectively contrast the significance of conflicts over policy formulation, of enforcement ability and of the pattern of institutional development for the legitimacy and effectiveness of refugee admission before and after the debates leading to the adoption of statutory legislation on asylum in 1993. The conclusion sums up the development of the institutional setting of refugee admission over the period and assesses the value of this thesis's explanatory framework in the context of this chapter.

4.2 Rise of asylum claims

An unprecedented rise of asylum claims occurred in Western Europe during the 1980s and early 1990s. Between 1985 and 1991, annual applications for asylum climbed from 28,900 to 46,545 in France; 73,000 to 256,112 in the Federal Republic of Germany; and 15,000 to 41,629 in Switzerland (BRC, 1992: 24-25). The rise also affected Britain, although it was not as significant as in neighbouring countries. Numbers of claims fluctuated between 1,563 in

1979 and 3,998 in 1988, then decupled within three years and reached a peak in 1991 at 44, 840.[61] Until the mid-1990s, annual levels of asylum claims lodged in Britain remained higher than in the previous decade, and reached 37,000 in 1996 (UNHCR, 2002: 113). The majority of asylum seekers did not claim asylum at airports or seaports on arrival in Britain. Most had previously lived in the country as students or visitors and claimed asylum at or after the expiration of their visa. [62]

Asylum claims made in Britain, and more broadly in industrialised countries, represented a very limited amount of the global numbers of forced migrants, which rose from almost 8.9 million in 1980 to more than 18.3 million in 1992 (UNHCR, 2000: 308). Most asylum applicants originated from countries affected by political upheavals and civil wars. The number of claims by Iranian asylum seekers increased in the early 1980s after Ayatollah Khomeini had overthrown the Shah in Iran; and so did the number of Polish claims following the introduction of martial law in Poland. Numbers of Sri Lankan asylum seekers rose in the mid-1980s as the conflict between the Singhalese government and the Tamil separatists intensified in Sri Lanka. Similarly, increasing numbers of Kurds from Turkey claimed asylum in Britain and Western Europe as the confrontation between the Turkish government and the pro-independence Kurdish Workers Party (PKK) became more violent. Civil war in several African countries, especially Zaire, Nigeria and Angola, and the breakdown of Yugoslavia led to a sharp increase in claims from Africa and the Balkans until 1996.[63] Regardless of the correlation between conflicts and the rise of demand for protection by specific nationalities, the increase in asylum claims was vocally denounced by the Thatcher and the Major governments as well as the popular media.

4.3 Popular and political restrictiveness

As an opposition leader, future Prime Minister Margaret Thatcher declared during the campaign for the 1979 general election that Britain was being ‘swamped with different cultures’ and that it would be foolish to ‘ignore people’s worries’ in dealing with the issue

[61] See detailed statistics on annual numbers of asylum claims in appendix 2, table 3.

[62] 1989 was the only year in which the numbers of asylum claims made at British ports of entry outnumbered in-country asylum claims until the early 1990s (see BRC, 1992: 10).

[63] See detail of applicants per country of origin in BRC (1992: 11-12) and Schuster (2003: 158-159).

(Thatcher, 1978). The Conservatives won the general election with the largest swing since 1945 and quickly adopted measures aiming to further restrict the arrival of Commonwealth immigrants. At the time, the salience of immigration in public opinion surveys was significantly higher than in the mid-1970s.[64] In its first two years in power, the Conservative majority severely restricted access to family reunion through marriage and adopted the British Nationality Act 1981, which constituted the last legislative step towards the 'alienisation' of Commonwealth nationals analysed in the previous chapter. The British Nationality Act restricted the right to enter and settle in Britain (the right to abode) to British citizens born in Britain of at least one British parent and to legal residents in Britain. The Act was more a symbolic than a profound institutional change, as major changes had previously occurred with the adoption of the Immigration Act 1971 (see Schain, 2008: 134-137). Family reunification was further restricted with the adoption of the Immigration Act 1988.

Restrictive legislation targeting Commonwealth immigration was congruent with an increase in affirmed immigrant hostility amongst the Conservative political elite. Asked if they would support the voluntary repatriation of Commonwealth immigrants, 38% of Conservative MPs agreed in 1969; 42% in 1982; and a staggering 70% in 1992 (Messina, 1998: 56). Beyond the elite level, hostility to Commonwealth immigration was a factor of party cohesion for the Tories. A survey of Conservative party members in 1992 showed that a majority of respondents 'strongly agreed' on only one issue: support to more restrictive immigration control. Immigrant repatriation was supported by 32% of the surveyed party members – the strongest support for a single issue in the survey.[65] Messina (2001: 77) has argued that political hostility to immigrants was intentionally promoted by the Conservative political elite to broaden its support base. Anti-immigrant discourse could neutralise the electoral appeal of the xenophobic British National Party and broaden popular support for the Conservatives amongst the white working-class, who never embraced the Tories' neoliberal economic

[64] See the evolution of 'immigration as an important issue' in IPSOS-MORI surveys in appendix 3, figure 7.

[65] Paul Whiteley et al. (1994) *True blue: The politics of conservative party membership*, Oxford: Oxford University Press, pp. 252-257, quoted in Messina (2001: 273).

policies.[66] Indeed public opinion polls show that the expansion of restrictiveness was congruent with a decline in the salience of immigration from the early 1980s.[67]

Political restrictiveness towards immigrants expanded to asylum seekers from the 1980s. Studying the parliamentary debates on the introduction of the Carrier Liability Act 1987[68] and the Asylum and Immigration (Appeals) Act 1993, Steiner (2000) has shown that Conservative MPs were staunchly opposed to the arrival of asylum seekers as 'bogus claimants' aiming to enter the UK as economic immigrants while repeatedly insisting on the country's allegiance to the principle of asylum. The historical record of Britain as a haven for people fleeing persecution was repeatedly emphasised in debates in order to justify restrictiveness towards these alleged 'bogus claimants'. This insistence of Britain's tradition of generosity ignored the self-interested motives that had led to the provision of protection in earlier decades, which has been presented in the previous chapter.

4.4 Contentions over the admission of refugees until the late 1980s

4.4.1 Don't mention the asylum bureaucracy

The immigration bureaucracy processing asylum claims was rapidly overwhelmed with the increase in claims presented in section 4.2. A specialised unit processing asylum claims was established within the Home Office's Immigration and Nationality Directorate (IND) in 1981 (Kaye and Charlton, 1990), yet the provision of resources to this unit did not match the steady increase in asylum claims in the second half of the 1980s. According to Home Secretary Peter Lloyd, IND staff dealing with asylum claims increased from 39 in 1984 to 100 in December 1990.[69] Yet the number of asylum claims increased from 2,905 in 1984 to 22,005 in 1990 (BRC, 1992: 10). Thus, the amount of claims per asylum caseworker more than doubled

[66]'[I]t is abundant from the historical record that the politics of friends and enemies was a rational political strategy. It was rational because at no point during its conception or implementation were the central tenants of the neoliberal project embraced by a majority of the British public. As a result, populist issues, such as immigration control, were added to the neoliberal project mix in order to make it more palatable to the white working class.' (Messina, 2001: 277).

[67] See appendix 3 figure 7.

[68] See section 4.4.3.

[69] HC Deb 12 December 1990 vol. 182 cc402-3W.

during this period.[70] Because of resource constraints, processing time and consequently the backlog of unprocessed asylum claims increased. In 1986, the average processing time already exceeded a year, and the IND pledged to reduce it to six months (BRC, 1986: 6). This objective could not be met both because of the more than tenfold increase in claims from 3,998 in 1986 to 44,840 in 1991, but also because of a decrease of 'productivity' in the processing of cases. Between 1986 and 1991, the number of annual decisions in asylum cases decreased from 6,965 to 4,685 (BRC, 1992: 9). In 1991, the backlog of claims waiting for a primary decision by IND staff had grown to approximately 70,000 (BRC 1992: 10).

Long procedural delays caused by an increase in asylum claims constituted an incentive for immigrants wishing to extend their say in Britain at the expiration of their visa to apply for asylum. Yet procedural delays were also detrimental to people who had fled persecution and spent years in legal limbo before knowing if their stay in Britain could be permanent; this negatively impacted on their well-being and social integration. Besides the issue of delay, enforcement ability was also limited by the lack of contacts between asylum claimants and the authorities during the processing of asylum claims. This reduced the ability of the immigration bureaucracy to locate asylum seekers refused entry and who should have been ordered to leave Britain. In addition, very little data on asylum seekers, but also on recognised refugees, was systematically generated by the Home Office and disseminated to governmental and non-governmental organisations in charge of settlement. The latter had thus no in-depth knowledge of the socio-economic composition and needs of the population of asylum seekers and refugees at the local level it was supposed to assist. This detrimentally affected contacts between refugees and refugee community organisations, and between refugee organisations and the Home Office (Robinson, 1998).[71]

The existence of a steadily expanding backlog of asylum claims in a context of political hostility to claimants led to a transformation of refugee protection in Britain. Whilst the proportion of asylum claimants granted refugee status and thus permanent protection in Britain significantly declined from 59% in 1982 to 9% in 1991, an increasing proportion of

[70] Home Secretary Lloyd considered that approximately eight staff within the asylum unit were not directly dealing with asylum claims at the time, and that this number had been relatively constant over the previous years. On the basis of this estimation and of the annual asylum statistics mentioned earlier, the ratio of claims per caseworker evolved from 93 in 1984 to 239 in 1990.

[71] Robinson (1998: 151-152) argues that the lack of data contrasts with the comparatively detailed data available on ethnic minorities, based on detailed questions in the decennial census, where no such data was generated on refugees and asylum seekers.

claimants were granted Exceptional Leave to Remain (ELR), that is, temporary protection. The period of validity of ELR status was at the discretion of the Home Secretary. The proportion of asylum claimants granted ELR increased from 11.8% in 1982 to 63% in 1990. Because of the provision of ELR, overall refusal of protection declined from 30 % in 1982 to less than 10% in 1989 (UNHCR 2002: 113).[72] Given the political climate at the time, it can be argued that the expansion of ELR was less a compassionate measure than a pragmatic move allowing for a visible reduction of asylum claims that was not correlated with the grant of permanent protection, and did not require to locate and deport thousands of asylum seekers refused permanent protection.

Whereas the financial and human resources of the asylum bureaucracy thus remained limited for years, the Thatcher government and the Conservative parliamentary majority adopted a range of other measures aiming to prevent the arrival and settlement of alleged 'bogus claimants'.

The first of these preventive measures was the imposition of visa requirements for Sri Lankan nationals in 1985. A visa requirement for nationals of a former British colony had never been adopted before. The measure followed a significant increase, in Britain and elsewhere in Western Europe, of asylum claims lodged by Tamils fleeing ethnic persecution in their country of origin. Home Secretary Leon Brittan argued that a visa requirement was necessary since most Tamils who claimed asylum in Britain were not found to meet the refugee definition of the UN Refugee Convention and could find protection closer to home, amongst the Tamil community in India.[73] Right-wing Conservative MPs advocated a ban on further Tamil immigration as well as the repatriation of the Tamils that arrived to Britain.[74] Visa requirements for Sri Lankan nationals were followed by visa requirements towards all major countries of origin of asylum seekers: Turkey in 1989, Uganda in 1991, Yugoslavia in 1992, Sierra Leone and Cote d'Ivoire in 1994 (Stevens, 2004: 93).

[72] See the annual evolution of the grant of protection in appendix 2, table 6.

[73] HC Deb 03 June 1985 vol. 80 cc52-4.

[74] 'Does my right Hon. and learned friend accept that many of my constituents are concerned that any Tamils hav'e been allowed into the country at all? Many people in my constituency and, I am sure, up and down the land feel that this country has done enough. Enough is enough. We have our own problems across the board, from unemployment to social services. When will the first Tamils be sent back, because the Government of Sri Lanka have clearly said that there is no threat to their existence in that country?' MP Terry Dicks, HC Deb 03 June 1985 vol. 80 c55.

The Carrier Liability Act 1987 was also adopted to prevent the arrival of allegedly 'bogus' asylum seekers. The Act introduced a fine on carriers allowing improperly documented aliens to travel to Britain and was passed in parliament a month after the arrival of a group of Tamil asylum seekers with fraught passports at Heathrow airport in February 1987.[75] Carrier sanctions were accompanied with the announcement of more restrictive asylum procedures, such as restrictions on the provision of government-funded legal advice considered by the Home Secretary to fuel illegal entry and stay.[76] Labour opposed the Carrier Liability Act as a hasty, disproportionately restrictive and counter-productive policy response.[77] Labour parliamentarians argued that fining carriers, alongside visa requirements would lead to an increase in 'immigration racket', the expression then in use to qualify what is today called 'people smuggling'.[78]

The Thatcher government's strong support to European intergovernmental coordination on asylum was also part of this preference for preventive policies over an increase in resources within the domestic asylum bureaucracy. British officials actively participated in the Trevi group. The group has been created in 1975 as a forum for European Home Affair Ministers to address the transnational dimension of terrorism and trafficking, yet increasingly focused on cross-border immigration as several European countries were preparing the abolition of intra-European frontiers in the context of the Schengen agreement. Despite having no intention of joining the Schengen area and remaining attached to national border control, the British Conservatives were a driving force on European discussions of the prevention of asylum migration. An intergovernmental Ad Hoc Group on Immigration was established during the

[75] The episode is more specifically analysed in section 4.4.2 and 4.4.3.

[76] 'For the future, however, we need to change our procedures to ensure that we are properly protected against immigration rackets which take advantage of our generous procedures. In particular, we must not allow procedures which were intended originally as safeguards to become the vehicle by which those who have no entitlement to come here, whether as refugees or in whatever other capacity, achieve their ends.' Home Secretary Douglas Hurd, HC Deb 03 March 1987 vol. 111 c732.

[77] MP Gerald Kaufman (Labour): 'The fact is that a problem has arisen that the Government have found themselves unable to cope with without panic legislation. If that problem exists, the Home Secretary would be better advised to consider carefully how to deal with it rather than rushing through the House of Commons legislation which he may well repent.' HC Deb 3 March 1987 vol. 111 col 734.

[78] MP Michael Meadowcroft (Liberal) commented on Douglas Hurd's statement: 'Is the Home Secretary aware that every Hon. Member despises and condemns the actions of racketeers? However, the more that the Government place restrictions on immigration, such as visas, the more they force refugees into the hands of racketeers. Is it not wholly unreal to put the restrictions on the airlines and shipping companies? How else are people to get out of countries? Are they supposed to come in rowing boats?' HC Deb, 3 March 1987, vol. 111 col. 735.

British presidency of the European Community in 1986 (Kaye and Charlton, 1990; Geddes, 2005: 733).

The unwillingness of the Thatcher government to increase resources within the asylum bureaucracy was correlated with a further decline of refugee resettlement, although the Conservatives at first appeared more open to the resettlement of Vietnamese refugees than the Callaghan government. Increase in forced departure from Vietnam in 1979 resulted in an increase of boat people's departure to South-East Asian countries, which already had difficulties to cope with the large population of Vietnamese refugees hosted in refugee camps.[79] Most concerning for the Thatcher government was the situation in the then British colony of Hong Kong. After having agreed to resettle 1,500 Vietnamese hosted in Hong Kong camps to Britain, Prime Minister Thatcher, alongside with other governments,[80] supported the organisation of an international conference aiming to increase international resettlement efforts. The conference took place in Geneva in July 1979. Britain agreed to resettle a further 10,000 Vietnamese refugees, a modest target in comparison to other Western countries (Robinson and Hale, 1989: 1; and see comparative statistics in Viviani, 1984: 50).[81] This resettlement experience, in contrast to Australia's experience with the resettlement of Vietnamese refugees analysed in Chapter 6, did not result in the establishment of a permanent refugee program. After 1981, Britain's resettlement intake remained marginal regardless of repeated demands to increase the intake by voluntary organisations (see for instance BRC, 1984).[82]

4.4.2 Increasing opposition to governmental restrictiveness

The previous chapter has mentioned that MPs and Lords, as a matter of custom, could be required by immigrants and asylum claimants refused entry at British borders—or required to leave Britain after a period of stay—to represent their case with the Home Secretary. This provision was particularly significant for individuals refused entry at the border, who had no

[79] For more details on the Indo-Chinese refugee crisis see chapter 6, section 6.4.3.

[80] See Chapter 6 Section 6.4.3.4.

[81] Between 1975 and 1981, the UK resettled 15,572 Indo-Chinese refugees; Australia resettled 60,103; Canada 79,908; France 79,684; the Federal Republic of Germany 19,566; and the US 468,463 (Viviani, 1984: 50).

[82] During the 1980s, a few hundred Ugandan Asian and Vietnamese refugees continued to be resettled to Britain, mostly on grounds of family reunion; for annual resettlement statistics from 1982 see appendix 2, table 5.

right to appeal against an IND decision from within the British borders. Parliamentary representation on behalf of immigrants and asylum seekers rose significantly in the first half of the 1980s. According to Home Secretary Douglas Hurd, representations in case of entry refusal at the border rose from an average of 1,000 between 1980 and 1982 to 5,700 in 1985. After-entry representations sharply increased as well (9,000 to 15,000 in 1985). [83] Parliamentary representation gave MPs and Lords first-hand experience with flawed asylum decisions. These were not only denounced in the context in direct exchanges between parliamentarians and the Home Office, but also, increasingly, in the parliamentary arena.[84] Faced with parliamentarian criticism, Home Secretary Hurd conceded minor procedural reforms in 1983-1984, such as informing asylum seekers of the availability of subsidised legal aid. [85] However Hurd attempted to corset parliamentary representation through the introduction of guidelines restricting individual representation to cases occurring in the constituency of parliamentarians wishing to represent these cases.[86] This would have meant to dramatically increase the volume of immigrant representation for parliamentarians in Southern constituencies in which major airports and seaports were located.[87]

Parliamentarians involved in case representation often had strong links with refugee organisations, whose opposition to restrictive politics and policy increased in the early 1980s. The British Refugee Council (BRC) was created in 1981 as the umbrella organisation for voluntary agencies involved in the refugee field. Several MPs and Lords were members of BRC committees and voiced the concerns of refugee organisations in the parliamentary arena. The BRC was one of two 'established' voluntary organisations cooperating with the IND in refugee and asylum matters. The other was the UK Immigration and Advisory Service

[83] HC Deb 26 March 1986 vol. 94 cc953-954.

[84] For instance, Lord Clement McNair, son of the first president of the European Court of Human Rights, argued in December 1983: 'The Committee of Ministers of the Council of Europe recommended in 1981 that: "The applicant shall receive the necessary guidance as to procedures to be followed and shall be informed of his rights. He shall enjoy the guarantees necessary for presenting his case to the authorities concerned and have the right to be heard … as well as the possibility to communicate freely with the office of the UNHCR and to approach a voluntary agency working for refugees." In practice, it seems to be largely a matter of luck. Those interviewed by the immigration service at Lunar House, Croydon, fare relatively well. There are very few complaints. But for many asylum seekers, their first and inevitably alarming confrontation with British authority is an immigration officer at the port of entry. Here, I am afraid, there is quite a lot of evidence that some immigration officers are lacking in training, in linguistic back-up, in knowledge of the sort of conditions that produce refugees or even, in some cases, in common courtesy.' HL Deb, 7 December 1983 vol. 445 cc. 1132-1133.

[85] See Home Secretary Leon Brittan, HC Deb 17 July 1984 vol. 64 cc85-6W.

[86] HC Deb 26 March 1986 vol. 94 c953.

[87] See statistics cited by MP Gerald Kaufman during the debate, HC Deb 26 March 1986 vol. 94 c959 and MP Jeremy Corbyn, HC Deb 26 March 1986 vol. 94 c1002.

(UKIAS), which provided partially publicly funded legal aid to asylum seekers. Already in 1980, UKIAS denounced the long delays experienced by asylum claimants waiting for IND decisions as well as the time spent in detention by some unlawful claimants (Pirouet, 2001: 20). In the following years, the BRC unsuccessfully advocated for an increase in refugee resettlement and of assistance given to refugees after arrival to Britain (BRC, 1984).

Episodes in which the government sought to 'flex its discretionary muscles' to prevent the arrival of allegedly 'bogus claimants' played a role of catalyst for the mobilisation of refugee organisations against what was perceived as administrative arbitrariness. Section 4.4.3 focuses on the most transformative of these episodes, the adoption of the Carrier Liability Act 1987 mentioned in the previous section.

4.4.3 The adoption of the Carrier Liability Act as a catalyst for organised contestation

In February 1987, a group of 64 Tamils arrived at Heathrow airport and claimed asylum. Immigration staff soon noticed that they had used false travel documents to reach Britain. The claimants were summarily interviewed at the airport without access to legal aid and were denied asylum. As the claimants had no access to a right of appeal, refusal of asylum was to be quickly followed by removal from Britain. The head of the BRC, alongside parliamentarians, lobbied Home Secretary Hurd to use its prerogative of ministerial intervention and to defer deportation so as to allow claimants access to a fair asylum procedure. Hurd refused to intervene. To counter the expediency of the Home Office, solicitors sought leave to judicial review. The latter was granted in the proverbial last minute, as the Tamils physically resisted being forced to board a plane leaving Britain. Faced with a court decision potentially condemning the abuse of his discretionary power, Hurd eventually granted access to representation and legal aid.[88] This concession however was followed a few weeks later by the adoption of the Carrier Liability Act 1987 as well as further measures restricting access to subsidised legal aid and parliamentarian representations for people claiming asylum at British borders.

[88] During the proceedings, the Tamils were detained on a discarded ferry and went on hunger strike. Voluntary agencies campaigned against their detention and the BRC directly intervened to negotiate the end of the strike. See the chronology of the events in BRC (1987: 11-12).

The bureaucratic expediency surrounding the introduction of the Carrier Liability Act 1987 fuelled a profound transformation of the landscape of refugee organisations. The Joint Council of Welfare on Immigrants (JCWI), which had until then primarily assisted Commonwealth immigrants, and Amnesty International, which had addressed the rights of forced migrants in the broader context of human rights advocacy, started to focus more specifically on asylum seekers. Grassroots refugee organisations also became more vocal, yet opposed the 'reformist cooperation' of more established refugee organisations with the Home Office (Kaye, 1992: 53). The introduction of the Act also led the voluntary sector to focus its reformist demands on the introduction of a statutory right of appeal for all asylum seekers (Pirouet, 2001: 39).

The Heathrow episode also played a role as regards to the strategies and venues of contestation. On the one hand, refugee organisations now directly sought the support of the Labour party for their reformist demands. Until the mid-1980s, asylum had been a marginal issue for the Labour party, which was more preoccupied with the integration of ethnic minorities than with asylum and refugee issues (Messina, 2001: 279-283). Londoner backbencher MP Jeremy Corbyn, who entered parliament in 1983, was one of the few Labour MPs to show a consistent interest for the issue of refugee admission.[89] Apart from Corbyn, refugee organisations obtained the support, from the late 1980s, of Labour MPs vocally opposed to Conservative immigration and integration policies, especially newly elected MPs from ethnic minorities (Kaye, 1994: 152). On the other hand, solicitors systematically sought judicial review for cases of 'failed asylum seekers' refused entry at the border and threatened with expedite removal. Judicial reviews taken in this context redefined both the role of the courts and the significance of the Refugee Convention in asylum cases.

The Bugdaycay and Sivakumaran decisions were particularly significant in this respect. The Buddaycay case dealt with an asylum seeker who had been deported to his country of origin without a thorough assessment of the persecution risk in this country. The Lords of Appeals, in February 1987, found that this lack of assessment was in breach of the principle of *non-refoulement* (Article 33 of the Refugee Convention). More broadly, the Lords recommended the 'most anxious scrutiny' of decisions potentially breaching the fundamental rights of a person (Rawlings, 2005: 390-391). The relevance of the Refugee Convention was reiterated in the decision on the Sivakumaran case in 1988. The case dealt with the interpretation of the

[89] Corbyn's reformism is further discussed Section 4.5.1.

standard of proof necessary to demonstrate a 'well-founded fear of persecution' so as to be eligible for refugee status according to Article 1 of the Refugee Convention. The Court of Appeals decided that the Home Office had been in breach of the Convention as its definition of a 'well-founded fear of persecution' had been too narrow. In a further instance of judicial review, the Lords of Appeal disagreed with the Court of Appeals and returned to a narrower definition of fear of persecution. Yet the Lords went further than the Court of Appeals as regards to the significance of the Refugee Convention. In their decision, they argued that '[t]he United Kingdom having acceded to the Refugee Convention and Protocol, their provisions have for all practical purpose being incorporated into United Kingdom law.'[90] Even in the absence of primary legislation incorporating the Refugee Convention in British domestic law, the courts thus considered that asylum decisions were bound to the scrupulous respect of the Convention as Britain had ratified the treaty.

Section 4.5 focuses on the transposition of political and institutional contentions to the parliamentary arena, as statutory legislation on asylum was adopted in response to an acceleration in the increase in asylum claims.

4.5 Transposing contentions to the legislative level: Conservative asylum legislation in the 1990s

4.5.1 Drafting the Asylum and Immigration (Appeals) Act 1993: Conflicting reform agendas

From 1988 to 1991, the number of asylum claims made in Britain more than decupled within three years and reached 44,840 in 1991. In Britain and elsewhere in Western Europe, immigration officials feared an incontrollable tide of asylum claims from Eastern Europe following the end of the Cold War and increasingly pressed for coordinated preventive action at the European level (Robinson, 1996). The British asylum bureaucracy was more than ever faced with processing difficulties. The increasing salience of asylum fuelled opposite demands for the introduction of asylum-specific legislation. The elaboration of the Asylum

[90] Quoted in Stevens (2004: 78).

and Immigration (Appeals) Act 1993 marked a peak in the confrontation of opposed policy agendas on asylum.

In May 1991, a group of Labour backbenchers with first-hand experience in the representation of asylum cases, headed by Jeremy Corbyn, introduced a bill on asylum to the House of Commons. Corbyn's Asylum Seekers and Refugee Bill proposed the establishment of an independent refugee agency assessing asylum claims; the provision of a right of appeal for all asylum seekers, to be heard by an independent refugee review board; and the adoption of a charter of rights for asylum seekers and refugees stating Britain's responsibility towards humanitarian arrivals. The bill also suggested amending the Carrier Liability Act 1987 considered to penalise asylum seekers attempting to flee persecution.[91] The bill had been prepared with the assistance of voluntary agencies, especially the BRC and JCWI. Corbyn and his supporters were certainly aware that their attempt at a 'march through the institutions' had only a faint chance of success. As draft legislation introduced by a small group of MPs, Corbyn's bill needed the approval of a majority of MPs to become proper draft legislation before a date for parliamentary debates was set. Even if the bill was to reach the stage of proper parliamentary debate, the Conservative majority in the House of Commons was highly unlikely to adopt it. Still, a majority of MPs supported the proper introduction of the bill to the lower house. The vote allowing the bill to be debated in parliament was tumultuous, and this reflected the level of contention generated by immigration and asylum issue in the parliamentary arena in the early 1990s. According to the Hansard debate transcript in the House of Commons, several Labour MPs accused Conservative members of racism, and the latter requested in turn a formal apology.[92] Yet Corbyn's Asylum and Refugee Bill was never to be discussed again in parliament. Its introduction was deferred several times and eventually abandoned, showing the limits of Labour's commitment to a reformist agenda reflecting the demands of refugee advocates.

The government's Asylum Bill was introduced in parliament six months after Corbyn's bill, in November 1991.[93] The government's bill was predominantly restrictive and orientated towards the prevention of 'bogus claimants'. For instance, it doubled fines on carriers

[91] HC Deb 08 May 1991 vol. 190 cc745-7.

[92] The comments were triggered by the presentation by Conservative MP Gerald Howarth of the bill as 'Labour's Trojan horse by means of which they want to effect a policy of uncontrolled immigration, trading on the good will of the British people to accommodate those who have found affliction and oppression abroad', HC Deb 08 May 1991 vol. 190 c749. For the transcript of the protests see HC Deb 08 May 1991 vol. 190 cc750-52.

[93] See HC Deb 13 November 1991, cc1082-181.

transporting undocumented immigrants, restricted access to state-funded legal aid and housing assistance, and introduced compulsory fingerprinting to better account for the mobility of asylum seekers. Yet besides these restrictive elements, the bill also introduced the possibility for all asylum seekers to seek an appeal against a negative decision. This was an amelioration of status for asylum claimants hitherto deprived of an avenue of appeal, yet the right to seek appeal was still inferior to a proper right of appeal (Stevens, 2004: 164-165). Joppke (1999: 133) argues that the introduction of this right to seek appeal was taken to pre-empt the European Court of Human Rights (ECtHR) denouncement of the absence of a right of appeal for asylum claimants as in breach of the European Convention of Human Rights (ECHR).[94]

Regardless of the inclusion of an opportunity to appeal against asylum decisions, the predominantly restrictive nature of the Asylum Bill was strongly opposed within and beyond parliament. Refugee organisations attempted to mobilise the British public against the bill, for instance through letter-writing campaigns (see Schuster, 2003a: 169-170). The UNHCR and law associations equally denounced it (Stevens, 2004: 165). A complaint was lodged against the racist character of the planned suppression of publicly funded legal assistance at the Commission for Racial Equality.[95] Within parliament, the bill was opposed by all Labour MPs as well as the other opposition parties in the House of Commons; crossbench opposition was significant in the House of Lords. [96]

Labour's unanimous hostility to the bill did not mean that all MPs shared the same view. Whereas shadow Home Secretary Roy Hattersley affirmed the commitment of Labour to deter 'bogus claimants',[97] leftist MPs such as future Secretary for International Development Clare Short stressed that resources constraints imposed on the asylum bureaucracy left refugees in a legal limbo and increased the likeliness that 'bogus organisers of fraudulent claims' take

[94] Britain, as a member of the Council of Europe, became a party to the ECHR in 1950, yet only ratified the option protocol allowing for individuals in Britain to petition the ECtHR after exhaustion of all domestic avenues of appeals in 1966. The expected court decision was the last step of a process which had started in 1987, as a solicitor appealed against the lack of provision of a right of appeal for a Sri Lankan asylum seeker. It was expected that the court would decide that the UK was in breach of Article 13 of the ECHR stating that legal remedies to administrative arbitrariness had to be available. Against the odds, the ECHR did not condemn Britain.

[95] See MP Max Madden, HC Deb 13 November 1991 vol. 198 cc1082.

[96] See the second reading of the Asylum Bill at the House of Lords, HL Deb 10 February 1992, vol. 535 cc457-530.

[97] HC Deb 13 November 1991 vol. 198 c1094.

advantage of the situation.[98] Regardless of the diversity of views within Labour, cohesive opposition to the bill meant a lengthy process of amendment through parliamentary committee. Eventually, the government was forced to abandon its plan to pass the bill before the April 1992 general election.

The Conservatives were returned to power, albeit with a reduced parliamentary majority.[99] The Major government was committed to a quick adoption of the Asylum Bill. A revised version of the bill was reintroduced to parliament in October 1992. The new draft legislation appeared to make more concessions to reformist demands than the original draft. Endorsing the judicial doctrine developed in 1987 and presented in Section 4.4.3, the Asylum Bill 1992 incorporated the refugee definition of the UN Refugee Convention into British law. It also included a proper statutory right of appeal for all asylum claimants. Yet these apparent concessions to the progressive agenda were not unqualified. The appeal procedure distinguished between a fast-track procedure for applicants originating from countries considered 'safe', and therefore were considered to have no good cause to apply for asylum[100]; and the usual procedure for allegedly 'genuine' applicants from 'unsafe' countries. Additionally, the bill removed the right to appeal against refusal of entry of other categories of entrants, that is, students and visitors. The objective of this measure was to restrict the arrival of another type of 'bogus' entrant: individuals attempting to deceive immigration control through lengthy appeal procedures. Beyond these aspects, the new Asylum and Immigration (Appeals) Bill expanded the 1991 Asylum Bill's emphasis on the prevention of arrival and settlement of asylum claimants, for instance with the introduction of an authorisation to detain asylum seekers refused entry and awaiting deportation. Following the regulatory pattern developed since the early 1980s, the bill did not contain measures addressing the enduring lack of financial and human resources within the asylum bureaucracy.

As had been the case with debates on the previous bill, the Labour frontbench endorsed the need for toughness towards alleged 'bogus claimants'.[101] In contrast, backbencher Corbyn

[98] Ibid, c1081.

[99] The Conservative Party lost 40 seats, yet kept a majority of 336 MPs, while Labour gained 42 seats (271 MPs).

[100] The claimant then had only two days to lodge an appeal against refusal of entry, and the decision of the special adjudicator was final. In contrast, the standard appeal procedure allowed ten days to lodge an appeal, and the special adjudicator had 42 days to decide after an appeal was lodged (Stevens, 2004: 169).

[101] 'No one on the Opposition Benches condones bogus applications for asylum: everyone condemns them. However, weeding out false claims should not be at the expense of prejudicing genuine claims, and that is our fear about the Bill.' HC Deb 2 November 1992 vol. 213 c36.

emphasised the suffering of refugees across the world and saw in the bill an element of a Europe-wide 'racist agenda'.[102] Outside parliament, voluntary organisations criticised the Immigration Rules, that is, secondary legislation codifying the implementation of the bill were denounced as more explicitly hostile to asylum claimants than the bill itself. According to Amnesty International:

> [W]e consider the draft Immigration Rules to be broadly inconsistent with internationally-recognised standards for the examination and determination of asylum applications, such as those set out in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. Whereas these standards require asylum applications to be examined and determined 'in a spirit of justice and understanding', the draft Rules [in which the appeal procedure were delineated] give the impression of having been devised to facilitate the refusal of applications.[103]

Parliamentary and non-governmental criticisms had less impact on the draft legislation than had been the case before the 1992 general election. The Asylum and Immigration (Appeals) Act was eventually adopted with no major amendments in July 1993.[104]

For more than two years, the drafting of Britain's first Asylum Act had witnessed conflicts and negotiations between opposite visions of regulatory reforms. It cannot be said that the resulting Act was a compromise between equals since the Conservatives controlled parliament. Rather, intra-party criticism of the bill's restrictiveness, especially in the House of Lords, and the development of a judicial doctrine *de facto* considering the Refugee Convention as legally binding, meant that core elements of the refugee organisations' reformist agenda were incorporated into the legislation. The resulting Asylum and Immigration (Appeals) Act 1993 was thus an ambivalent piece of legislation simultaneously incorporating restrictive and progressive policy objectives. As the next section will show, Britain's first Asylum Act was not here to stay.

[102] HC Deb 2 November 1992 vol. 213 c64-65.

[103] Quoted by shadow Home Secretary Tony Blair, HC Deb 2 November 1992 vol. 213 c38.

[104] See the original Asylum and Immigration (Appeals) Act 1993 at http://www.legislation.gov.uk/ukpga/1993/23/contents/enacted and the summary of the most significant provisions in Stevens (2004: 165-169).

4.5.2 Institutional ambivalence, rise of claims and rise of conflicts

The adoption of the Asylum Act 1993 was followed by a rash increase in asylum claims from 28,000 in 1993 to 55,000 in 1995 (UNHCR, 2002: 113).[105] The legislation thus failed to achieve its most significant objective in the eyes of the Conservatives. The inclusion of a statutory right of appeal and the incorporation of the Refugee Convention also failed to achieve more procedural fairness for applicants. Research published by the non-governmental legal assistance organisation Asylum Aid in April 1995 revealed the development of a 'culture of disbelief' within the IND's asylum bureaucracy.[106] For instance, asylum caseworkers routinely refused to believe that applicants had been tortured, arguing that applicants injured themselves and did so deliberately for the purpose of claiming asylum. Documentary evidence of persecution provided in support to the applicants' claims was countered with the argument that areas of freedom from persecution existed in the applicant's country of origin, so that flight beyond borders was not considered necessary to escape persecution. This 'culture of disbelief' led to an increase in the rate of refusal of asylum in the first instance. Most claimants refused asylum on the basis of such justifications appealed against IND decisions at the Immigration Appeals Authority. In turn, the backlog of asylum cases shifted from the IND's asylum bureaucracy to the appeal stage (see Asylum Aid, 1995). Asylum Aid included in its report a list of practical recommendations to the IND aiming to increase the fairness and effectiveness of decision-making in asylum. These included the development of better training in international human rights and refugee law for asylum caseworkers and the expansion of quality control through decisions monitoring. As Asylum Aid itself mentioned in the report, the IND rejected both the findings and the recommendations of the study, arguing that it offered a biased, non-representative view of its work (ibid.).

The Major government showed no immediate interest in further reforms. A year later however, the Home Office commissioned a wide-ranging transformation of the computerisation of asylum files, a reform that was set to increase processing effectiveness

[105] Whilst the war in Bosnia led to a significant increase of claims by Balkan nationals, Commonwealth nationals (especially Nigerians, Indians, Pakistanis, and Sri Lankans) were strongly represented in the statistics (UNHCR, 2001: 119; Schuster, 2003a: 158). See appendix 2, table 4 for the details of the increase of asylum claims per year.

[106] Asylum Aid's research was based on the study of letters of refusal communicated by 'failed' asylum claimants, and did not involve the participation of the IND.

without affecting the methods used by case workers (see Public Account Committee, 2000). This reform would prove a difficult legacy for the Labour government, as the next chapter will show. The government showed more enthusiasm for the demands of right-wing Conservative backbenchers and popular newspapers such as the *Sun*, the *Daily Mail* and the *Daily Mirror* to increase restrictiveness towards asylum seekers portrayed not only as 'bogus claimants' but also as 'cheats' of the social security system (Kaye, 1999: 29-30). The Conservative elite had an opportunistic electoral interest in being responsive to such demands. Research commissioned by the Conservative Party and conducted on Conservative supporters in mid-1994 showed that potential Conservative voters had strong right-wing views on immigration and crime. It was thus argued that restrictive legislation over these issues would be a winning issue at the next general election (Kaye, 1999: 27).

Regardless of a decline of asylum claims in 1994-1995, the government announced new restrictive legislation on asylum in October 1995. The Immigration and Asylum Bill 1995 endorsed the notions of 'safe third country' as well as 'safe country of origin' as defined in the European Union's Dublin Convention. Accordingly, a country could be declared 'safe' by the Home Secretary if there was 'no serious risk of persecution'; a designation that shifted the burden of proof to demonstrate that the country was unsafe to the applicant. The government used the incorporation of the Refugee Convention in domestic law in the 1993 Asylum Act to announce the expansion of the fast-track appeal procedure for applicants whose asylum claim was considered to meet neither the Refugee Convention definition of well-founded fear of persecution nor that of fear of torture in the definition of the ECHR (Stevens, 2004: 172). For the first time, restrictive measures affected not only the legal but also the social status of asylum seekers. Most significantly, the new Immigration and Asylum Bill included the exclusion of asylum seekers from welfare benefits and sanctions on employers hiring unlawful immigrants such as 'failed' asylum seekers. At the annual conference of the Conservative Party, the Conservatives enthusiastically supported the restriction of welfare benefits, yet small business owners were worried by the introduction of employer sanctions (Kaye, 1999: 32).

The exclusion of asylum seekers from welfare benefits was however denounced by a spectrum of organisations and individuals that was far larger than that of voluntary organisations assisting asylum seekers and refugees. The broader welfare sector, churches, prominent lawyers, and doctors denounced the welfare benefit cuts in the media but also in more than two hundred submissions made to the Social Security Advisory Committee which

had been tasked by the government to review the measure. The Commission for Racial Equality condemned the measure as racist, as the asylum seekers excluded from welfare benefits were non-White in their majority. The UNHCR publicly expressed its concern with the bill, breaching with the intergovernmental organisation's usual restraint in domestic policy debates. In the face of such opposition, the Social Security Advisory Committee recommended not to adopt the reform (Kaye, 1999: 32).

In contrast with the cohesive nature of extra-parliamentary protest against the 1995 asylum bill, divisions within the Labour party had further increased since the adoption of the 1993 Act. Tony Blair, who had become Labour leader in 1994, was mindful of the potential impact of radical opposition to the bill on the 1997 general election. The Labour frontbench firmly supported restrictiveness towards 'bogus claimants' while disagreeing with the Conservatives' tactics. More vocal opposition came from the backbenchers already committed to the rights and welfare of asylum seekers as well as parliamentarians known for their anti-racism advocacy, such as Diane Abbott (Schuster, 2003a: 170-172).

The Major government was keen to avoid a repetition of the lengthy parliamentary debates which had characterised the original discussion of the first Asylum Bill in 1991-1992. It thus attempted to impose restrictions on welfare benefits through secondary legislation, which did not require plenary debates. This tactic backfired. The Joint Council for the Welfare of Immigrants attacked the legality of the strategy in court. The Court of Appeal argued that exclusion from welfare support was legally allowed, although it described the measure as 'uncivilised' and 'inhuman'. However, the procedure of introduction of the measure through secondary legislation was judged illegal (Kaye, 1999: 34). The provision was subsequently reintroduced as a late-stage amendment of the Asylum and Immigration Bill. This led to a once-in-a-decade legislative 'ping-pong' between the House of Commons and the House of Lords, as the latter repeatedly tried to 'amend the amendment' to mitigate its exclusionary character.[107] Yet the Lords' amendment was eventually defeated as the government mobilised backbenchers to secure its defeat in the upper house.

The Asylum and Immigration Act 1996 entered into force in late July 1996. In contrast to the 1993 Asylum Act, which was *less* restrictive than the original draft introduced to parliament

[107] Lord McIntosh of Haringey (Labour) stated as he reintroduced the amendment: 'What the Government are doing, at the very best, is a crude attempt to cut down on the number of applications by starving people out—that is what it comes to—without regard to the justice of those applications and without regard to the likelihood of them succeeding.' HL Deb 22 July 1996 vol. 574 c1184.

in 1991, the Asylum and Immigration Act 1996 was *more* restrictive than the bill introduced to parliament in October 1995. In spite of expanding protests, the Conservative majority had used all 'parliamentary weapons' available to ensure the adoption of its restrictive program. Yet this did not prevent the Joint Council for the Welfare of Immigrants to, again, challenge the legislation in the courts. This time, JCWI argued that the exclusion of asylum seekers from welfare benefits was itself illegal. The Court of Appeals endorsed this view in November 1996. It argued that local authorities had a duty under the 1948 National Assistance Act to provide welfare to otherwise destitute people. Several municipalities appealed against the High Court decision, yet they lost the appeal in February 1997 (Kaye, 1999: 36-37).

Section 4.5 has shown that the acceleration of the increase in asylum claims between 1988 and 1991 fuelled an acceleration of the transformation of the regulatory regime of refugee admission into an asylum regime. This acceleration also triggered an expansion of contestations from within the policy sector to the broader parliamentary arena. Between 1991 and 1993, conflicts between the progressive and the restrictive reform agendas on asylum reached a climax with the introduction of two draft bills on asylum encapsulating opposite policy visions. After two years of intense parliamentary negotiations, the Asylum and Immigration (Appeals) Act adopted in 1993 integrated progressive as well as restrictive elements not yet on an equal footing. Besides a series of restrictive measures, a statutory right of appeal was introduced for all asylum seekers, yet a distinction was made between the procedural entitlements of claimants from 'safe' and 'unsafe' countries of origin. This differentiation entrenched in statutory legislation a political discourse denouncing most asylum seekers as 'bogus claimants'. What the 1993 Act did not introduce were statutory reforms of the asylum bureaucracy, which was more than ever unable to deal with the amount of claims. Overall, the Asylum and Immigration (Appeals) Act 1993 can thus be qualified as an ambivalent 'asymmetric institutional compromise' integrating a few progressive and many restrictive reforms while neglecting bureaucratic reforms.

This compromise was neither able to prevent a further increase in asylum claims nor to increase the fairness of the asylum procedure. Only months after the adoption of the 1993 Act, the government considered the adoption of more restrictive legislation so as to please its electoral basis. The voluntary sector denounced a perceptible increase in the restrictiveness of the immigration bureaucracy. Increased restrictiveness was not only highly detrimental to refugees whose credibility was routinely dismissed, but also to procedural effectiveness, as

most ‘failed’ asylum claimants made use of their right of appeal against bureaucratic asylum decisions at the Immigration Appeals Authority. In this context, the drafting of new statutory legislation caused even more intense political conflicts than the adoption of the previous Act three years earlier. Yet the Labour frontbench showed support to the objective of the Conservatives to ‘bogus claimants’ and the Major government used a range of parliamentary strategies to ensure that the adopted legislation, the Immigration and Asylum Act 1996, was as restrictive as possible. The government also took advantage of the incorporation of the Refugee Convention in the previous Act to further reduce the procedural entitlements of categories of asylum seekers who were not considered to strictly meet the criteria of fear of persecution defined in the Convention. The attempt to introduce measures aiming to penalise asylum seekers not only legally, but also socially backfired. Courts ruled against the exclusion of asylum seekers from welfare provision, a momentous decision that shifted responsibility of care from the national to the municipal level. Small business employers, a traditional clientele of the Conservative party, showed no enthusiasm for the introduction of sanctions on businesses employing ‘failed’ asylum seekers and other improperly documented immigrants. The Major government thus left a refugee admission regime in shambles to its successor.

4.6 Conclusion

The second chapter of the British case study has identified a profound transformation of Britain’s refugee admission regime between 1979 and 1997. Refugee resettlement, whose legitimacy was challenged since the early 1970s, all but disappeared in the early 1980s. In contrast, the regulation of asylum went through a process of considerable transformation apart from the asylum bureaucracy itself. The latter only experienced minor institutional change and was neglected both financially and in terms of human resources. The regime also became increasingly restrictive, including numerous measures aiming to prevent the arrival of ‘bogus claimants’ but also reducing the social and legal rights of asylum seekers living in Britain. The transformation of the asylum regime reflected the responsiveness of both major parties to a range of actors willing to influence an increasingly salient asylum agenda, especially voluntary organisations and the tabloids on the restrictive side. However, the permeability of both the Conservative and the Labour party to such demands greatly varied over time as both parties encompassed a variety of positions. Party heterogeneity became particularly visible as

Labour backbencher Corbyn introduced his progressive draft Asylum Bill during the House of Lords debates of the 1993 and 1996 Asylum Acts.

It can doubtlessly be argued that unintended policy outcomes, which have been defined as a lack of policy effectiveness and legitimacy, became more significant than in the previous chapter under Thatcher's and Major's Prime Ministerships. Yet the evolution of legitimacy and effectiveness was neither clearly correlated nor similar. The decline of effectiveness was dramatic and appears as relatively linear, as the immigration bureaucracy was increasingly overwhelmed by the steady and accelerating increase in asylum claims. Legitimacy decline was more complex. On the one hand, the legitimacy of existing asylum policies was increasingly contested by agents within the policy field, then by Labour within the parliamentary arena. Yet Conservative asylum policies remained highly legitimate amongst its electorate. The Conservatives successfully presented the failure to achieve stated restrictive policy objectives as related to the agency of immigrants determined to circumvent the rules, not as the consequence of bureaucratic inefficiency generating incentives for such circumvention whilst penalising refugees. Doing so, the Conservatives built on a restrictive political rhetoric deployed towards Commonwealth immigrants since the 1950s which had proved increasingly convincing at grassroots levels. The Labour frontbench was not insensitive to the electoral traction of demonstrative hostility towards allegedly bogus asylum claimants, and its presentation of the issue converged towards the Conservative position in the years preceding the 1997 general election. In addition to this complexity, it can be argued that policy legitimacy did not evolve in a linear way. As a study of the events surrounding the adoption of the Carrier Liability Act 1987 has shown, specific policy episodes themselves relatively irrelevant in terms of policy effectiveness had a dramatic and long-lasting impact on policy legitimacy. In the mentioned episode, the illegitimacy of the Home Office's relentless quest for policy expediency amongst refugee and human rights organisations played the role of catalyst in the reorganisation of both the field of refugee organisations and of the policy demands of these organisations.

In this context, what is the explanatory value of this thesis's hypotheses on the causes of unintended outcomes? How did the development of conflicts over policy formulation, of enforcement ability and institutional complexity contribute to this dramatic decline of policy effectiveness and fragmentation of policy legitimacy?

The explanatory value of the first hypothesis is less straightforward than in the previous chapter. On the one hand, power struggles between policy actors from the mid-1980s eventually resulted in the production of the Asylum and Immigration (Appeals) Act 1993 which had been qualified above as an 'asymmetric institutional compromise' which proved illegitimate in the eyes of all parties involved, and this speaks for the value of the hypothesis. On the other hand, even more intense struggles during the drafting of the 1996 Act did not result in such compromise because of divisions within Labour and of the array of parliamentary and regulatory instruments available to the Conservatives to adopt their policy agenda; the adopted regulatory framework was considered legitimate within the party. This finding points to the importance of the structuration of conflicts between policy-makers and at the evolution of their relative power. The second hypothesis on the detrimental impact of the increasing volatility of asylum claims on enforcement ability, and thus on policy effectiveness, appears easy to confirm. As the numbers of asylum claims rose, it became increasingly difficult for the asylum bureaucracy to ensure fair and efficient processing of claims. However, the hypothesis needs to be qualified. Enduring resource scarcity within the asylum bureaucracy itself weakened enforcement ability and in turn increased the agency of claimants whose arrival was portrayed as the core problem of asylum policies by the Thatcher and the Major governments. Finally, the third hypothesis on the correlation between increasing institutional complexity and decreasing policy effectiveness also appears to be confirmed. On the one hand, the increasingly complex nature of the asylum procedure did not result in an effectiveness increase. For instance, the expedited introduction of preventive measures resulted in increased activism by refugee organisations to ensure that all legal and judicial avenues were exhausted before an asylum seeker could be removed. This activism played a significant role in the evolution of the role of the courts, which transformed the legal basis of an asylum claim in Britain by *de facto* incorporating the Refugee Convention in municipal law, and in the expansion of the right of appeal. Both elements contributed to an increase in the quantity of appeals against decisions made by the asylum bureaucracy, and to a slowing down of claim processing.

The final chapter of the British case study investigates to what extent this explanatory configuration is further transformed in the context of refugee admission policies under Tony Blair's Labour government, as asylum gained unprecedented political salience.

5 Refugee admission policies under Tony Blair: Peak and decline of asylum claims, political opportunism and permanent reformism

5.1 Introduction

Assessing refugee admission policies under the Thatcher and Major governments, the previous chapter has argued that the detrimental impact of limited enforcement and institutional complexity on policy effectiveness and legitimacy was clearer than the impact of conflicts over policy formulation. This chapter investigates the transformation of this configuration of variables in the context of refugee admission policies under Tony Blair's Prime Ministership (1997-2007). Under Blair, the level of asylum claims reached a peak by 2003 before steadily declining. The continuing increase in claims fuelled a further acceleration of institutional innovation that did not stop after asylum claims had started to decline. Under Blair's Prime Ministership, the Home Office released two White Papers and a five-year strategy on immigration and asylum (Refugee Council, 1998; Bloch, 2000; Squire, 2005; Sales, 2005; Hampshire, 2009).[108] Four comprehensive Acts on immigration and asylum were adopted (see Stevens, 2004; Rawlings, 2005; Billings, 2006; Ward, 2006), which is more legislation than in any other area of social policy (Somerville et al., 2009).[109] The Blair government also intensified British efforts to influence the European agenda on immigration and asylum (Geddes, 2005; Ette and Gerdes, 2007; Spencer, 2007). Yet this 'institutional activism' was not correlated with a restoration of policy legitimacy, which has been described as fragmented as the Conservatives left power. According to MORI-IPSOS public opinion polls, the political salience of immigration steadily increased between 1997 and 2007; in Eurobarometer surveys, immigration was considered one of the two most important issues of concern facing Britain in all polls conducted between July 2003 and July 2007 (Eurobarometer, various years).[110]

[108] The White Papers were *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum* (Home Office, 1998) and *Secure Borders, Safe Haven - Integration with Diversity in Modern Britain* (Home Office, 2002). They were followed by the five-year strategy for asylum and immigration *Controlling our Borders – Making Migration Work for Britain* (Home Office, 2005).

[109] These major immigration and asylum Acts were the Immigration and Asylum Act 1999; the Nationality, Immigration and Asylum Act 2002; the Asylum and Immigration (Treatment of Claimants) Act 2004; and the Immigration, Asylum and Nationality Act 2006.

[110] See appendix 2, figure 8 and figure 9.

The permanent reformism and political salience of asylum policies have been the subject of an already extensive political science literature. Most scholars argue that asylum policies became more restrictive and exclusionary under Blair. Asylum seekers and other immigrants considered undesirable by the government and the media were 'securitised', that is, portrayed as potential social and economic threats to the national polity (see especially Hampshire, 2009; Sales, 2005; Squire, 2009; Mulvey, 2010). Critical literature contends that the 'securitisation' of asylum seekers occurred in response to a sense of loss of national-territorial identity as Britain became markedly more globalised and Europeanised (Squire, 2009). Adopting a policy analysis approach, Somerville (2007: 191) also argues that 'the media, public attitudes and electoral calculation' dominated policy input. Statham and Geddes's (2006) study of networks in asylum policy-making confirms these influences and add the asylum bureaucracy as a significant agenda-setter. The study also highlights the marginal role of voluntary agencies as regards to policy input. In contrast to Statham and Geddes, who extrapolate their findings to the entire field of immigration policy, several authors insist on the asylum-bound character of this agenda-setting configuration. Flynn (2003, 2005), Balch (2009) and Somerville (2010) argue that think tanks and business organisations played a crucial role in the emergence of Labour's pro-active economic immigration policy, which was a profound rupture with decades of restrictiveness

Several studies address more specifically the lack of effectiveness and legitimacy of asylum policies under Blair. Somerville (2007) and Spencer (2007) point at the discrepancy between the relentless attempts by the Blair government to be 'seen to be doing something' by the media and the public and unprecedented bureaucratic inefficiency, a discrepancy that detrimentally affected policy legitimacy. Spencer adds that Tony Blair's strong interventionism in the field had rather a disruptive than a positive impact. She argues that this interventionism led to the formulation of unachievable promises, to conflicts with his Home Secretaries and to a reinforcement of long-standing bureaucratic inertia. Thus, the detrimental impact of limited enforcement ability and of conflicts over policy formulation has been explored in the literature. In contrast, institutional complexity within the asylum field—as opposed to the increasing complexity of immigration policy in general, see Somerville (2007)—has yet to be systematically assessed. The systematic investigation of institutional innovation will thus constitute the pillar of this chapter's structure. Sections 5.2, 5.3 and 5.4 will each discuss the development, adoption and implementation of Labour's successive agendas on asylum. For the most part, these agendas were delineated in the White Papers

Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum (Home Office, 1998) and *Secure Borders, Safe Haven - Integration with Diversity in Modern Britain* (Home Office, 2002), and in the five-year strategy for asylum and immigration *Controlling our Borders – Making Migration Work for Britain* (Home Office, 2005). This chronology will address the potential overlaps and contradictions between distinct phases of institutional innovation, a pattern resulting in institutional complexity. The analysis of institutional complexity greatly benefited from insights gained in interviews with immigration bureaucrats, lawyers, a *Guardian* journalist and a Labour MP who had experienced and observed the development of Labour's asylum policy since its inception, as well as with a member of the UNHCR unit who became involved in the unprecedented monitoring of the activities of the asylum bureaucracy in the mid-2000s. Focusing on the modalities of institutional innovation from planning to implementation will also allow the analysis of correlations between institutional complexities, conflicts between policy makers and enforcement ability. The chapter conclusion summarises the evolution of Britain's refugee admission regime under Blair's leadership and returns to the assessment of the value of this thesis's explanatory model.

5.2 Labour's inaugural reform agenda: Fairness and efficiency in asylum procedures

5.2.1 Agenda elaboration: Reformism and inertia

The general election of May 1997 resulted in a landslide for 'New Labour', a party determined to modernise Britain.[111] The party's electoral manifesto, released in 1996, argued that better protection of individual rights, insistence on individual responsibility as well as on meritocracy and efficiency would facilitate Britain's integration in the global economy. Participative policy-making and bureaucratic rationalisation were set to help achieve this aim.[112] Immigration and asylum had been relatively marginal issues during the 1996-1997 campaign (Schuster, 2003a: 165). The party's electoral manifesto promised to overcome procedural inefficiency and to increase fairness towards asylum and immigration applicants

[111] The Labour Party won with an unprecedented majority of 418 seats (out of 659) in the House of Commons.

[112] See New Labour's electoral manifesto (Labour Party, 1996), Hay (1999) and Finlayson (2003).

(Labour Party, 1996), yet many Labour members and parliamentarians were acutely aware of a legacy of institutional mismanagement in immigration and asylum policies. As the last chapter has shown, Labour MPs had in opposition accumulated first-hand experience with bureaucratic failure in the context of ministerial representations in immigration and asylum cases. Contacts between MPs and refugee organisations had been close, and Labour backbenchers had in 1991 proposed a bill advocating a radical reform of asylum and refugee policies. Yet Tony Blair and Home Secretary Jack Straw were wary of reforms which would appear too liberal to those who had in the past supported the restrictive immigration policies of the Conservatives (Kaye, 1999). Rather than engaging in early policy change, the new government commissioned a comprehensive review of immigration and asylum policies. More than a year lapsed before the Blair government released its reform agenda. In the meantime, policy was made in the framework developed under the Conservatives. Labour also endorsed the budgetary limits defined by the Major government for its first two years in power.[113]

After having cooperated with the Labour party during the first half of the 1990s, refugee and human rights organisations were determined to influence the agenda of the party now in power. In July 1997, the Immigration Law Practitioners' Association (ILPA), and Justice and the Asylum Rights Campaign jointly published a reform agenda advocating a profound transformation of the asylum system so as to achieve more fairness. Increasing the quality of administrative decisions was a central element of this agenda (Pirouet, 2001: 155). NGO mobilisation had little influence over Labour's first policy steps in the field of immigrant and refugee admission. For instance, during the summer of 1997, the Blair government introduced restrictions on the right of asylum seekers to appeal against entry refusal following an influx of Roma from Central Europe to Britain. The influx occurred in the context of a continuing increase in asylum claims from 41,500 in 1997 to almost 58,500 in 1998.[114]

The gap between the Labour party and NGOs widened with the publication of the White Paper *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum* in July 1998. *Fairer, Faster and Firmer* introduced a 'covenant' delineating reciprocal obligations between the government and asylum seekers.[115] The government committed itself to an

[113] Interview with Labour MP Neil Gerrard, London, 5 .2.2009.

[114] See appendix 2, table 3.

[115] Home Office, 1998, Chapter 8(6).

acceleration of the asylum procedure and to the scrupulous respect of the rights of genuine applicants. In return, asylum seekers were required to 'tell the truth about their circumstances; obey the law; keep in regular contact with the authorities.'[116] These reciprocal obligations were set to ensure a fair and efficient processing of asylum cases.

The White Paper's 'fairness commitment' included the adoption of the Human Rights Act (HRA), tabled for late 1998. The HRA fully incorporated the European Convention of Human Rights into British domestic law and was presented as 'a major defence against arbitrary or unreasonable behaviour by public authorities.'[117] The White Paper planned the introduction of a right of appeal against breaches of the ECHR in primary asylum decisions as well as the meticulous application of the Refugee Convention and other international human rights treaties to which Britain was a party.[118] The last 'fairness' element was the abolition of the 'white list' of 'safe countries of origin' introduced in the Asylum and Immigration Act 1996. The measure was considered unfavourable to individual claimants from allegedly 'safe' countries. Significantly, *Fairer, Faster and Firmer* did not suggest measures to embed this fairness commitment within the asylum bureaucracy. Labour ignored the recommendations of refugee organisations such as an improvement of the training of asylum caseworkers in refugee and human rights law.

The White Paper's 'efficiency commitment' appeared to 'modernise' existing asylum policies rather than to depart from the priorities of the Conservatives. *Fairer, Faster and Firmer* argued that the introduction by the Conservatives of the computerisation of asylum and immigration files shortly before the 1997 election, as well as a vaguely defined reorganisation of asylum and immigration casework, would lead to a substantial and rapid decline of the backlog of asylum claims accumulated over the years. Another 'efficiency' element was the grant of indefinite leave to remain in Britain to asylum applicants who had been waiting for an initial status decision on their claim for more than five years, which amounted to 20,000 or so cases.[119] The White Paper also announced the establishment of the National Asylum Support Service (NASS). NASS was to relocate the provision of welfare to asylum seekers

[116] Ibid., chapter 8(5).

[117] Home Office, 1998: Chapter 2(5).

[118] These were the Convention Against Torture and the International Covenant for Civil and Political Rights. Home Office, 1998: Chapter 8(1).

[119] Ibid, Chapter 8(28).

from the municipal to the national level[120] and to increase control over welfare delivery through dispersal and the introduction of welfare vouchers. Asylum seekers were to be compulsorily dispersed to boroughs where accommodation was available so as to improve use of accommodation capacity. The introduction of cashless welfare vouchers instead of monetary payments was presented as limiting welfare fraud.[121] Finally, the White Paper maintained the option to detain undocumented and 'failed' asylum seekers.[122]

Beyond asylum-related measures, *Fairer, Faster and Firmer* devoted much space to the presentation of an 'integrated approach' to immigration control, a reform presented as a modernisation initiative.[123] The vision of unified and presumably coherent architecture of immigration control was a novelty, yet it built on control mechanisms already in place. This architecture included: the deployment at airports of airline liaison officers assisting carriers in the detection of passengers with false documents; the increased use of information technology for identification purposes at territorial borders; further commitment to detain undocumented arrivals during the examination of their entry claim, including asylum seekers; and the increased removal of asylum claimants refused entry in Britain.[124] This expansion of control was considered necessary to deter the arrival and reduce the settlement of non-genuine asylum applicants, which diverted resources away from the processing of genuine claimants and reduced the public legitimacy of asylum policies.

In line with Labour's modernisation rhetoric, *Fairer, Faster and Firmer* assumed that bureaucratic rationalisation, technological improvement and the expansion of asylum seekers' human rights entitlements would result in a fairer and more efficient asylum procedure. The White Paper's more restrictive elements had the potential to reassure voters who had hitherto supported the Conservatives restrictiveness.

Fairer, faster and firmer was not the only venue in which Labour developed its inaugural reform agenda. The EU arena played an increasing role for British immigration and asylum policies. Similarly to developments at the domestic level, Labour's arrival to power

[120] As mentioned in the previous chapter, responsibility for the welfare of asylum seekers had been transferred from the national to the municipal level in late 1996 after a court had decided that the exclusion of asylum seekers from welfare provision, foreseen by the 1996 Immigration and Asylum Act, was unlawful.

[121] Home office (1998), chapter 8(21).

[122] Ibid, chapter 12.

[123] Seven out of the thirteen chapters of the White Paper deal primarily with immigration control, whereas only one chapter is devoted to asylum.

[124] See ibid, Chapters 5 to 7.

constituted less a rupture with the Conservative trajectory than a change of tone. Labour's assertiveness towards the EU had increased during the opposition years, yet the party frontbench had no intention of embracing supranationalism (Geddes, 2003; Bulmer, 2008). Labour's 1996 electoral manifesto announced an increased participation in EU initiatives with the objective to strengthen Britain's sovereignty (Labour, 1996). This assertive and self-interested approach to European cooperation was congruent with Labour's above mentioned understanding of globalisation as inevitable yet immensely beneficial to Britain if well-managed. Ludlow (1998) notes that the British EU presidency from January to July 1998 reflected Labour's change of tone. Blair, in contrast to Thatcher and Major, appeared to take the EU seriously, and so did his ministerial team. The Blair government was ready to participate to the acceleration of the *communautarisation* of policies within the EU as long as it appeared congruent with British policy objectives. In this perspective, it successfully negotiated an 'opt-out' clause from Title IV of the EU Treaty of Amsterdam, which incorporated the Schengen Agreements and more broadly asylum, immigration, visa issues and judicial cooperation to the competences of the European Union from 1 January 1999. The opt-out meant that British governments would in the future have the liberty to select the common EU initiatives in the fields of border control, immigration and asylum they wished to join (Ette and Gerdes, 2007: 97).

5.2.2 Agenda adoption: The limits of participatory policy-making

In line with Labour's consultative approach to policy-making, *Fairer, Faster and Firmer* had been released in July 1998 as a proposal open to comments. The reactions of refugee organisations were cautious at best. They welcomed the expansion of avenues of appeal for asylum claimants, yet deplored the reorganisation of welfare support and the absence of a sustainable strategy to reduce the backlog of asylum claims (see for instance Amnesty International, 1998; Refugee Council, 1998). The concerns of refugee organisations had no major impact on the drafting of the Immigration and Asylum Bill aiming to implement the White Paper. The bill was tabled in parliament in February 1999.

The Immigration and Asylum Bill 1999 included almost all preventive measures adopted by the Conservatives and largely focused on the re-organisation of immigration control. For instance, the right to detain undocumented asylum claimants as well as appeal restriction on

'manifestly unfounded' asylum claims were maintained. The bill introduced penalties on the assistance to illegal entry, increased the search powers of immigration officers, and reorganised welfare and housing support for asylum seekers. The 'fairness commitment' of Labour's inaugural agenda was reflected in a few measures, especially the introduction of a right to appeal against a breach of the ECHR[125] and the abolition of the 'white list' of safe countries of origin. Reforms aiming to increase bureaucratic effectiveness, such as the computerisation of case files, had either already been adopted or were implemented through extra-legislative provisions.

The primarily restrictive nature of the Immigration and Asylum Bill was not seriously challenged before it became legislation. Labour's first asylum bill was submitted to a parliamentary Special Standing Committee which could amend the bill on the basis of submissions made by interested parties, and many individuals and organisations did submit progressive proposals. Yet, following an established practice, the appointed members were loyal supporters of the government.[126] Unsurprisingly, although the committee deliberated for months, only very few non-governmental amendments were adopted. For instance, on the recommendation of the Legal Aid Board, government-funded legal aid for representations at the appeal stage was included in the legislation (Pirouet, 2001: 156-157). The Immigration and Asylum Act 1999 was eventually adopted in November of that year. Whilst the Asylum and Immigration Act 1993 had enclosed 16 sections, and the Asylum and Immigration Act 1996 13 sections, the Immigration and Asylum Bill was considerably more comprehensive and encompassed 170 sections. Despite its length, details on the implementation of many measures were left to secondary legislation, which was still being enacted years after the publication of the Act (Stevens, 2004: 176).

5.2.3 Agenda implementation: Inherited and new difficulties

The delay in the implementation of Labour's first agenda, the legacy of bureaucratic failure inherited from the Conservatives, but also Labour's own implementation difficulties, thwarted Labour's fairness and efficiency commitments.

[125] The Human Rights Act itself, which incorporated the ECHR into British domestic law, had been adopted in 1998 and entered into force in 2000.

[126] Interview with Labour MP Neil Gerrard (see footnote 112).

The computerisation of immigration and asylum case files experienced major technical problems, leading to a period of quasi-standstill in case processing (Public Account Select Committee, 2000). Anticipating efficiency gains, the IND had laid off caseworkers considered not only redundant but also not skilled enough to make appropriate asylum decisions. Self-imposed budgetary discipline meant it was impossible to organise the emergency hiring of sufficient and more qualified staff. In the words of then Labour backbencher Neil Gerrard:

> [The Home Office] didn't have enough resources during the 1990s, and in 1996-1997 the Tory government bought this all-singing all-dancing computer system from Siemens that was going to solve all the casework problems. On the back of that they produced a budget for 1997 which got rid of a lot of staff because the computer system was going to solve all of the problems. But it never worked. We inherited that in 1997 and Gordon Brown, then Chancellor, said that we were going to stick with the Tory budget for two years, and they were in a mess. I remember speaking to the Minister in 1997 and saying 'what on earth are you doing, getting rid of staff at the Home Office when you have this backlog of cases' and he said 'you know, we've got to do it….they aren't the right calibre of staff to make decisions.' I said 'Train them then, do something you can do', and in the end he said 'Look, Gordon said we have to stick with the Tory budget for two years and I haven't got any money, they've got to go.' So they got rid of staff on the back of having this brand new computer system, the system never worked and after a couple of years the backlog had doubled.[127]

Contributing to this backlog was the continuing expansion of asylum migration. Numbers of new asylum claims reached 91,200 in 1999 and remained above this figure until 2002, reaching a peak that year at 103,080.[128] Britain, for the first time, became the main country of destination of asylum seekers worldwide (Home Office, 2008: 26). The rise of asylum applications was congruent with a global increase in forced displacement, and many applicants originated from war-torn regions, especially Kosovo in the late 1990s, and Afghanistan and Iraq in the early 2000s. The Blair government participated in international efforts towards a resolution of the refugee crisis in the Balkans. Financial and logistical assistance was provided to Macedonia, which hosted hundreds of thousands of refugees in emergency shelters, and a few thousand Kosovo refugees were temporarily resettled to Britain (van Selm, 2000). Britain's involvement in the Kosovo crisis started as the Immigration and Asylum Bill 1999 was debated in parliament. Home Secretary Jack Straw argued during the

[127] Interview with Labour MP Neil Gerrard (see footnote 112). On the basis of an interview with former Immigration Minister (a junior portfolio within the Home Office) Barbara Roche, who, Spencer (2007: 344) notes that '[w]hen Barbara Roche took over as Immigration Minister in July 1999, she was told there were only fifty case-workers trained to handle asylum cases, in a year when there were 71,000 applications.'

[128] See annex 2, table 3.

parliamentary debates that asylum and refugee resettlement were entirely distinct issues; indeed resettlement was not addressed in the Immigration and Asylum Act 1999.[129] Yet the resettlement of Kosovo refugees was to have an impact on subsequent reforms of Britain's refugee admission regime, as will be shown in Section 5.3.

As a result of bureaucratic failure and of the increase in asylum migration, the backlog of asylum cases awaiting a first instance decision rose sharply from 51,800 in 1997 to an all-time maximum of 125,100 in 1999. It then started to decline, reaching 94,500 in 2000 (Watson and Danzelman, 1998: 11; Home Office, 2008: 26). Many more claimants were waiting for a final decision on their cases at the appeal stage: new applications for appeal against an asylum decision in creased from 6,615 in 1999 to 46,190 in 2000 (Rawlings 2005: 394). The adoption of the Immigration and Asylum Act 1999 was thus followed by the highest ever backlog of asylum claims.

The government's 'efficiency commitment' was also challenged by the fraught implementation of the reform of welfare and housing support for asylum seekers. This was related to the above mentioned lack of detailed planning in primary legislation, but also to the lack of knowledge gathered by the immigration bureaucracy on asylum seekers and refugee communities, which has been mentioned in the previous chapter. Asylum seekers were predominantly dispersed to disadvantaged boroughs where public housing was available regardless of the lack of familiarity of the locals with asylum migration (Stevens, 2004: 191). Dispersal to disadvantaged communities fuelled xenophobic resentment at the local level (Squire, 2009: 116-144). The implementation of cashless welfare support (the voucher system) had been equally poorly planned – the Home Office's review of both schemes stated that the '[o]peration of the national asylum support scheme [had] proved less straightforward than expected' (Home Office, 2001). Refugee organisations reluctantly enlisted as partners in voucher management criticised the blurring between their established role to assist asylum seekers and their new function as service provider for the state. Vouchers were also denounced as a highly discriminatory measure which allowed for the immediate identification of asylum seekers in daily encounters (Pirouet, 2001: 158).

[129] See Home Secretary Jack Straw, HC Deb 05 May 1999 vol. 330 cc948. See also appendix 2, table 5, that shows that no refugees were permanently resettled to Britain between 1997 and 2004, whereas a few dozen had still been resettled to the UK in the last years of the Major government.

Whilst Labour appeared unable to achieve its 'efficiency commitment', it distanced itself from the implications of its 'fairness commitment'. For instance, the party frontbench condemned judicial decisions liberally interpreting refugee and human rights law. Most significant were the Shah and Islam cases in March 1999. Court decisions over these cases broadened the British interpretation of Article 1 of the Refugee Convention by recognising non-state actors as agents of persecution, an aspect that remained implicit in the Convention.[130] This reinterpretation of the Convention fuelled a significant increase in the granting of refugee status in the following months (Pirouet, 2001: 79). Home Secretary Straw denounced the decisions during the EU Tampere Summit in October 1999, arguing that they increased Britain's 'attractiveness' for asylum seekers within the EU as not all national courts allowed individuals to qualify for refugee status because they feared persecution by non-state actors (Bunyan, 2003).

Finally, a series of incidents related to the entry of asylum seekers to the British territory contributed to challenging Labour's credentials in the provision of an integrated architecture of immigration control. The most critical entry-related issue was the 'Sangatte crisis' at the French-British border. From 1999, Kosovo Albanians, and later Afghan nationals who were hosted in a reception centre near the northern French town of Sangatte repeatedly attempted to reach Britain through the Channel tunnel. These attempted passages began to be widely reported in the British media from mid-1999, coverage being particularly extensive and alarmist in the summer of 2001 (Schuster, 2003b). Two other border control-related issues significantly affected the perception of asylum policies. In February 2000, Afghani nationals high jacked a plane leaving Afghanistan that landed at Stansted airport. The high jackers and most hostages claimed asylum in Britain. Many of the high jackers were subsequently detained on the basis of anti-terrorism legislation, yet the fact that they were allowed to claim asylum sparked a scandal in the tabloids. Asylum and terrorism became interconnected issues in media discourse, an interconnection that would become more frequent in the context of terrorist attacks of 11 September, 2001 in the US (see Refugee Council 2003, ICAR, 2006, Clements 2007). A few months later, in late June 2000, the bodies of 58 Chinese nationals were discovered in a lorry in Dover. It was assumed that the clandestine passengers had planned to work illegally while claiming asylum and had died of asphyxiation on their way to

[130] In these cases, the House of Lords ruled in March 1999 that divorced Muslim Pakistani women who feared retributions by their former husbands constituted a 'particular social group' of refugees as defined in the Refugee Convention.

Britain. The Dover tragedy pointed to the vulnerability of undocumented migrants attempting to cross increasingly fortified borders, but also highlighted the attractiveness of Britain's labour market for these undocumented migrants.

Implementation failure, combined with the continuing influx of new asylum seekers, was more than ever fiercely denounced in the British popular press. This led the Asylum Rights Campaign, a network of refugee advocates, to complain against the *Sun* and the *Daily Mail*'s hostile reporting to the Press Complaints Commission. The Commission eventually rejected the complaint, yet criticised the atmosphere of fear propagated by the coverage (Pirouet, 2001: 2). The resurgent right-wing British National Party took advantage of the hostility to the arrival of dispersed asylum seekers in impoverished boroughs. The BNP eventually won several seats at local elections in 2002 and 2003. The Conservative frontbench, who had adopted a low profile on asylum after the 1997 general election, denounced Labour's implementation difficulties as the party's own 'asylum shambles'.[131] In contrast to political and public hostility towards asylum seekers, Kosovo refugees temporarily resettled in Britain were perceived as genuinely in need of humanitarian protection. Local authorities showed a willingness to organise emergency housing for the refugees and charities successfully raised funds to assist the arrivals (Bloch, 1999; Gibney, 1999).

While asylum was not a dominant issue during the general election campaign of 2001, it was one of the few issues on which the Conservatives were considered better able to govern than Tony Blair's government, according to public opinion polls (Clarke et al., 2004). Unsurprisingly, in a context of strong economic growth and declining unemployment, Labour was returned to power, losing only six seats. Regardless of this sweeping electoral victory, public and political pressure in the field of refugee admission was crucial for the evolution of Labour's asylum agenda in the first half of the 2000s.

Section 5.2 has identified a progressive decline of distinctiveness between Labour and Conservative asylum policies throughout the process of elaboration, adoption and implementation of Labour's first reform agenda on asylum policies. As it came to power, Labour appeared determined to be in rupture with the Conservatives in its first policy agenda. Yet this agenda became increasingly restrictive and thus close to the Conservatives during a phase of elaboration that lasted two years. Originally, the policy shift from the Thatcher and the Major governments was to be organisational, as policy would now be defined in

[131] See for instance shadow Home Secretary Anne Widdecombe, HC Deb 01 February 2001 vol. 362 cc471-477.

consultation with significant actors in the policy field, be encapsulated in a clear policy strategy, and reach out to the neglected immigration bureaucracy. The policy shift was also to be ideological, as Labour aimed to go beyond the crude restrictiveness of Conservative policies to combine fairness and efficiency. Refugee and human rights organisations, which had since the 1980s become significant agenda-setters for Labour, supported this policy shift. Yet Labour took its time in releasing its first strategy document. The White Paper *Fairer, Faster and Firmer* remained below the expectations of the non-governmental sector as it endorsed the Conservatives' rhetoric of a necessary fight against 'bogus claimants'. Yet the document did commit to an increase in fairness and effectiveness in asylum procedures. This commitment was translated in a number of measures such as the suppression of the 'white list' of safe countries of origin and the strengthening of appeal rights for asylum claimants. Yet the adoption of the Immigration and Asylum Act 1999 also narrowed the ideological and organisational gap with the Conservatives. During the drafting debates, the government showed very little openness to progressive amendments made by the voluntary sector, and the resulting Act was predominantly restrictive. The gap between the Conservatives and Labour further narrowed at the implementation level, not only did the Conservative policy legacy put constraints on Labour's ability to restore policy effectiveness, it was also hampered by a delayed adoption of Labour's policy agenda in a context of rising numbers of asylum claims. Numerous dramatic episodes related to border controls such as the 'Sangatte crisis' gave Labour's enforcement difficulties a high degree of visibility that the failure within the bureaucracy processing asylum claims did not have. It is in this context that Labour's second reformist agenda on the regulation of refugee admission emerged.

5.3 Second reform agenda: Restrictive institutional innovation in international context

5.3.1 Agenda-setting: Labour's competing visions

Between 2000 and 2005, reformism reached a climax in refugee admission policies and in immigration control policies more broadly as Labour developed its 'managed migration' agenda. The development of this agenda saw a pluralisation of agenda-setting dynamics. Whereas the advocacy of incentives for selected economic immigration by organisations

representing businesses and lawyers' associations had an impact on policy, the policy agenda in the field of refugee admission was mainly set by three Labour frontbenchers: Jack Straw, Home Secretary until June 2001, David Blunkett, Straw's successor as the head of the Home Office until December 2004, and Prime Minister Tony Blair. All shared the view that more needed to be done to appease popular concern over the 'asylum crisis', yet each also promoted specific, and not always compatible, institutional innovations.

5.3.1.1 Jack Straw's vision

The first version of Labour's second reform agenda on asylum policies was developed by Jack Straw in 2000-2001, and communicated in a *Guardian* article published in early June 2000; during an EU summit on the emerging Common European Asylum System in Lisbon in late June 2000; and during a speech at the Institute for Public Policy Research (IPPR), a think tank close to Labour, in February 2001 (resp. Travis, 2000; Straw, 2000; Straw, 2001). Straw argued that the obligation of states party to the UN Refugee Convention to process all asylum claims made on their territory was obsolete in an era of massive non-genuine asylum migration driven by the affordability of air travel and the professionalisation of people smuggling. The Home Secretary suggested the following reforms to modernise the global refugee regime.[132] To avoid 'asylum-shopping' by individuals submitting multiple asylum claims in various countries, joint efforts by the EU (if not the international community) were needed to protect asylum procedures from non-genuine refugees. Coordinated deterrent measures promoted by Straw included the joint adoption of a list of 'safe countries' from which asylum claims would be impossible. Straw argued that a joint list would be fairer than a unilateral white list of 'safe countries', such as the one introduced by the Conservatives and abolished by Labour, as it would be agreed internationally (Travis, 2000). The Home Secretary also advocated including a common fast-track asylum procedure for 'manifestly unfounded' asylum claims in the EU directives on common standards in asylum policies (Straw, 2000: 134-135). Enthusiastic about Britain's involvement of the refugee crisis in Kosovo, Straw showed an initial interest for the establishment of a refugee resettlement

[132] In the *Guardian* article in question, Travis (2000) noted that Straw, in private, drew a comparison between his role in the reform of the Refugee Convention and his participation in the redrawing of the Labour party constitution's former 'clause four' advocating the nationalisation of industry, an essential element of the 'modernisation' of Labour in the mid-1990s.

program, yet rapidly made clear that resettlement would only become a policy option once the efficient prevention of unfounded asylum claims had been achieved (Straw, 2001). Other legacies from the Britain's participation in the resolution of the refugee crisis in Kosovo crisis were Straw's advocacy of an increase in financial and logistical assistance to states receiving major refugee influxes, and more broadly, his support to a 'root cause approach' addressing 'the underlying causes of migration' through the development of stronger linkages between development, migration and foreign policy (Straw, 2000: 138).

Labour's 2001 electoral manifesto was strongly influenced by Straw's reformist approach. It stressed Labour's commitment to avoid the misuse of asylum as an opportunity for economic immigration; pledged to achieve the annual removal of 30,000 non-genuine asylum seekers from Britain by 2003-04; promoted the harmonisation of the interpretation of the Refugee Convention within the EU; and announced increased assistance to regions experiencing refugee crises (Labour Party, 2001). Human rights and refugee organisations, but also organisations closer to Labour, were more sceptical. For instance, the IPPR, the Labour-leaning research institute where Straw had presented his reform agenda in February 2001, criticised the disproportionate emphasis on the prevention of bogus claimants. Individual Labour politicians, such as Claude Moraes, then Labour Member of the European Parliament and former director of the Joint Council for the Welfare of Immigrants, also criticised Straw's proposals (BBC, 2001).

Straw became Foreign Secretary in June 2001, and thus never oversaw the implementation of his reform agenda. New Home Secretary David Blunkett did set in motion some of Straw's reformist impulses, yet his own agenda on immigration policies was overall less asylum-focused than that of his predecessor.

5.3.1.2 David Blunkett's vision

Before becoming Home Secretary, David Blunkett had been State Secretary for Education and Employment since Labour came to power in May 1997. The admission of skilled overseas workers and overseas students had belonged to his portfolio, and demand for student visas by universities, and business visas by employers had then strongly increased. In response, Blunkett had overseen a reform simplifying the admission of overseas workers and

students. In a context of expanding labour shortages, he was keen to pursue a similarly pro-immigration agenda in his new position as Home Secretary (Flynn, 2003: 6-7). Blunkett's approach was shared by the Junior Minister for Immigration at the Home Office, Barbara Roche, who had advocated an increase in legal economic immigration to Britain since autumn 2000 (Ashley, 2000; Balch, 2009: 618-623). Her view had never been publicly endorsed by Home Secretary Jack Straw. With little involvement of the Home Office (Spencer, 2007: 351), Blunkett and a close advisor drafted Labour's second White Paper dealing with the Home Office portfolio, *Secure Borders, Safe Haven – Integration with Diversity in Modern Britain*.

Released in February 2002, *Secure Borders, Safe Haven* coined the concept of 'managed migration'. On the one hand, the arrival and integration to Britain of immigrants considered beneficial to the country's economy and society was to be encouraged. On the other hand, 'disorderly' immigration was portrayed as undermining the social fabric necessary to support high levels of immigration and increased social diversity. Non-genuine asylum seekers and migrants seeking to work without permission were perceived as the most concerning forms of disorderly immigration (see Blunkett's foreword in Home Office, 2002: 4-6).

The White Paper did not reintroduce the 'covenant' made in the 1998 White Paper *Fairer, Faster and Firmer*, which had implied reciprocal commitments of fairness and efficiency between the government and asylum seekers. It argued that 'non-genuine' asylum seekers had breached the covenant offered by the government by continuing to apply for asylum, leading to its premature ending (Home Office, 2002: 13-14). The right to appeal against a breach of the Human Rights Act, which had been at the core of the government's original 'fairness commitment', was now perceived as a strategic weapon for failed asylum seekers attempting to delay their removal (ibid: 61). In response to this perceived abuse, the White Paper announced tightened appeal rules for 'manifestly unfounded' claims as well as measures further restricting the mobility of claimants during the asylum procedure: biometric registration cards, 'seamless' provision of mandatory accommodation from arrival to decision, and increase in detention capacities (ibid: 53-61). *Secure Borders, Safe Haven* remained committed to Labour's 2001 electoral manifesto to remove up to 30,000 failed asylum seekers annually (ibid: 65).[133]

[133] Beyond measures directly associated with the entry of asylum seekers, the White Paper planned to expand the broader prevention of undocumented migration through an expansion of the architecture of controls within and

Blunkett was more supportive of refugee resettlement than Straw. *Secure Borders, Safe Haven* announced the creation of a domestic quota-based refugee resettlement program, to be operated in cooperation with the UNHCR and voluntary agencies following the model of established resettlement countries (ibid: 52-53). The social integration of refugees, yet not of asylum seekers, was to be facilitated by assistance to training and employment search (ibid: 70-74). Legal immigration avenues for economic immigrants using the asylum route a measure never foreseen by Straw, were also envisaged so as to facilitate the legal entry of low-skilled immigrants, who were in high demand on the labour market regardless of their legal status (ibid: 12-13).

Finally, the White Paper was less 'internationalist' than Straw. Whilst Britain's active participation in the UNHCR's Global Consultations on International Protection was emphasised (Home Office, 2002: 48), Straw's explicit demand for a reform of the Convention was not repeated. In addition, it was argued that Britain could not wait for a European solution in the face of the challenges faced at the domestic level; hence the need for more policy autonomy at the domestic level. Yet the White Paper remained committed to the harmonisation of EU asylum policies, including a reform of the Dublin Convention which would better ensure that the claims of asylum seekers were effectively processed in the first EU member state they reached (ibid: 49). Considering Britain's geographical location at the EU's north-western periphery, the reform was set to lead to a decrease of claims made on British territory, as many claimants transited through other countries before arriving in the UK.

In contrast to Straw, Blunkett oversaw the adoption and implementation of many aspects of his agenda, and this is discussed in Sections 5.3.2 and 5.3.3. Yet Tony Blair's interventionism in the asylum field limited Blunkett's ambitions as an agenda-setter.

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beyond the British territory. Measures tackling people-smuggling and people-trafficking in countries of origin and of transit of undocumented migrants were at the core of this expansion (Home Office, 2002: 75-98).

5.3.1.3 Tony Blair's interventionism

From the beginning of the 'Sangatte crisis' at the French-British border in mid-2002[134], Tony Blair became increasingly involved in the definition of the policy agenda on asylum (Flynn, 2003: 11). The Prime Minister requested weekly updates of the statistics on new asylum claims. Without informing the Home Office of his intentions, Blair announced in a TV interview in early February 2003 that the number of new asylum claims made in Britain would be halved within six months. In a private conversation with Blair, Blunkett denounced the target as unachievable in such a short period of time (Spencer, 2007: 345). Following Blair's announcement, a series of Cabinet documents announcing dramatic reforms aimed at preventing the arrival of asylum seekers to the British territory and the EU were leaked to the press.[135] These reforms had not been foreseen by Blunkett, and had thus not been mentioned in the 2002 White Paper. According to a personal interview with a UNHCR official, the proposals had been drafted by a consultant with no experience in refugee policies and tasked by Cabinet with the release of a proposal leading to a radical decrease of asylum claims to Britain.[136] In terms of content, the reforms were closer to Straw's agenda than to *Secure Borders, Safe Haven*. To restrict the arrival to EU territory to only the most vulnerable asylum seekers, the Cabinet documents envisaged the creation of 'regional protection areas', for refugees in their regions of origin. The first leaked Cabinet document was more radical than later versions and also included preventative military interventions in countries of origin so as to stem refugee flows.

These proposals were personally promoted by Blair both at the domestic and the EU level. In a letter to the Greek EU Presidency in early March 2003, the British Prime Minister promoted the creation of 'transit processing centres' for asylum seekers beyond the EU borders to replace the processing of claims in EU countries. The originally envisaged location of the transit processing centres was an island leased from Croatia.[137] The British plans were closely followed by UNHCR High Commissioner Ruud Lubbers' own vision of a reform of the

[134] The Sangatte camp was eventually closed in December 2002 after a French-British agreement (see Schuster, 2003b for a detailed analysis of the 'Sangatte crisis').

[135] See the detailed analysis of the evolution of these proposals in Noll (2003).

[136] Interview in Geneva, 3.4.2008. The interview gave no evidence that the plan had been directly inspired by Australia's Pacific Solution (see Chapter 8), and no further conclusive evidence was found on the matter. Such influence however is not implausible given the amount of global press coverage on Australia's scheme.

[137] Ibid.

global refugee regime, which he released in London after a meeting with Blair.[138] Blair's and Lubbers' plans were discussed at the European Council in Brussels in late March 2003, and the European Commission tasked to produce a communication on the 'managed entry' of forced migrants to the EU (Noll, 2003: 304-206). The discussion of the British proposals at the EU level is discussed in Section 5.3.2.

The fact that Blair's agenda-setting interventions frequently occurred on TV and in the popular press itself generated more media attention to his agenda than to the proposals made by his Home Secretaries. The latter at first chose arenas susceptible to attracting the attention of the political and administrative elite, but less that of the broader British public. This does not mean that Straw and Blunkett shied away from the popular press, yet when they did engage, their proposals were not the type of sensational news Blair generated. According to Spencer (2007: 346), Blair's restrictive interventionism also had an impact on bureaucratic agenda-setting. It ensured Cabinet support to restrictive proposals such as the expansion of restrictions on the right of appeal, a measure also supported by Straw and Blunkett, yet less popular amongst other Cabinet members, such as the Lord Chancellor.

The following section assesses which of these multiple policy proposals eventually became policy.

5.3.2 Adopting the reform agenda: Selective regulatory activism

The adoption of Labour's second reform agenda resulted in significant regulatory change at the domestic and the EU level. Two comprehensive pieces of British legislation on asylum and immigration were adopted within two years, the Nationality, Immigration and Asylum Act 2002 (164 sections) and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (50 sections).[139] The focus of the 2002 and 2004 Asylum Acts were measures further reducing the legal and social entitlements of asylum seekers. These included the building of large accommodation centres to better control the whereabouts of claimants during the asylum procedure; a more restrictive detention regime for 'manifestly unfounded' claimants; the

[138] For an analysis of the UNHCR reform plans see Betts (2004). See also next paragraph.

[139] For a detailed analysis of the legislation see Stevens (2004: 196-213) on the 2002 Act, Ward (2006: 12-14) on the 2004 Act; and especially Rawlings (2005) on the numerous strategies of the executive aiming to curtail judicial review in asylum cases in the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

reductions of avenues of appeal against refusal of entry; the reduction of access to judicial review; and restrictions of welfare support for specific categories of asylum seekers. The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 streamlined the appeal procedure by replacing the Immigration Appellate Authority, which had proceeded to a two-tier appeal procedure, with the Immigration Appeals Tribunal, in which there was only one level of re-examination of negative immigration and asylum decisions. Secondary legislation reintroduced a national list of safe countries of origin, which had been first introduced by the Conservatives and later abolished by Labour, notwithstanding Straw's advocacy of international coordination as regards to the introduction of such a list.

European initiatives, which had been at the core of Straw's and Blair's reformist impulses, were barely significant in legislation. For instance, international cooperation, including the establishment of a resettlement program, was addressed in only one section (s.59) of the 2002 bill. The details of the resettlement program, Gateway, were defined in secondary legislation. From 2004, up to 500 refugees, depending on the availability of adequate refugees were annually resettled in Britain.[140] David Blunkett's 'managed migration' agenda was also invisible at the legislative level. The overhaul of entry permits which facilitated immigration to Britain was an administrative measure and thus was said to not require statutory legislation.

The debates of draft legislation revealed the heterogeneity of Labour's agenda not only in the field of refugee admission, but also as regards to the broader development of a 'culture of rights' in Britain, which had been one of the party's objective as it came to power in 1997. Most significantly, the parliamentary Joint Committee on Human Rights (JCHR) monitoring the application of the Human Rights Act published damning reports on both the 2002 and 2004 immigration and asylum bills (see Ward, 2006: 11, 14); however the reports failed to restore a more liberal policy agenda (Rawlings 2005: 401). Crossbench opposition in the House of Lords delayed the adoption of legislation, yet more progressive amendments introduced by the upper house were rejected by the House of Commons. Again, the detail of many measures was left to secondary legislation (Stevens, 2004: 195-196).

At the EU level, the first half of the 2000s can be considered the climax of what Geddes (2005: 724) has characterised as Britain's 'conditional and differential' involvement in the

[140] Protection need according to the 1951 Convention and lack of integration in first countries of refuge constitute the main selection criteria. Vulnerability criteria such as age and health condition are given special considerations. Potential candidates for resettlement were referred by the UNHCR to the IND, which conducts its own selection mission so as to meet the resettlement candidates (ICMC, 2009: Part II, 11-14, Part III, 45-50).

elaboration of joint EU immigration and asylum policies.[141] The UK participated in all asylum directives and most measures preventing irregular migration between 1999 and 2004.[142] According to Ette and Gerdes (2007: 99-101), only minor changes in domestic law were necessary to accommodate EU legislation. In contrast, the Blair government opted out of a directive extending the rights of non-EU nationals, a measure which would have required more significant domestic change (ibid: 98). Still it is important to note that the adoption by Britain of the EU directives on asylum embedded in EU law minimum standards in regards to the reception of asylum-seekers, the processing of their claims and the requirements to be met to be granted protection. This made it impossible for the UK to adopt national legislation lowering these standards (Kaunert 2009: 151). In the continuity of previous governments, the Blair government maintained its objection to a participation in the Schengen area of joint border controls, even though Britain was heavily involved in practical cooperation in the field such as joint patrols at Britain's borders (French-British joint border controls established in the aftermath of the Sangatte crisis) and in schemes aiming to reduce the entry of irregular migrants in the EU via the Mediterranean, in Turkey, and the Balkans (Geddes, 2005: 734-735; Squire, 2009: 93-115).

The adoption of initiatives aiming to drastically restrict the arrival of asylum seekers to the British, and the EU territory was less successful. Noll (2003) offers a detailed analysis of the 'charm offensive' deployed by Tony Blair in the lead-up to the European Council of Thessaloniki in June 2003 to convince fellow EU heads of state of the need to endorse his vision of humanitarian protection beyond EU borders. Whereas regional protection did not meet significant opposition, several EU governments rejected transit processing centres, especially Germany. Blair reportedly anticipated the rebuttal of this plan at the Thessaloniki summit and distanced himself from the proposal without informing the British EU delegation (Travis, 2003b). The idea was not further pursued at the EU level. A Home Office official argued in a personal interview that the difficulties to find a third country eager to host a centre

[141] Especially from the European Council of Seville in 2002, the Europeanisation of immigration and asylum policies took restrictive accents in contrast to the more positive vision of common asylum and immigration policies elaborated at the European Council of Tampere in 1999. On the 'race to the bottom' in the elaboration of common asylum standards in the EU see especially Costello (2005).

[142] The asylum-related measures are the EURODAC regulation establishing an EU-wide database allowing to identify asylum seekers; the Temporary Protection Directive establishing minimum standards on the provision of humanitarian protection in case of mass influx; the Reception Conditions Directive defining minimum standards on the conditions of reception of asylum seekers Directive; the Dublin II Directive determining member states' jurisdiction to determine asylum claims; the Qualification Directive setting out minimum standards to qualify as refugee or humanitarian case; and the Asylum Procedure Directive laying out minimum standards as regards to the determination of asylum claims.

in which asylum seekers were compulsorily removed from the EU before the processing of their claims, as well as the opposition of the European Commission were key to this development.[143] The Council endorsed the development of regional protection programs enhancing protection in regions of origin, yet these were to remain a very marginal aspect of EU asylum and refugee policies.[144]

The study of the adoption of Labour's second reform agenda in refugee admission policies reveals the following. The further degradation of asylum seekers' legal and social status, which aimed to decrease Britain's appeal to allegedly non-genuine claimants and was equally supported by Straw, Blunkett and Blair, was far more emphasised in statutory legislation than any other reform. Straw's insistence on a necessary harmonisation of policies at the EU level was also successfully translated into policy, as Britain became heavily involved in the restrictive Europeanisation of EU asylum and immigration control policies. Blair's interventionism was less successful in this respect, although this does not mean that the idea to open transit processing centres for asylum seekers beyond EU borders was abandoned at the Home Office.[145] Blunkett's reform agenda was the most neglected in statutory legislation. This may explain why the former Home Secretary expressed in a personal interview to Spencer (2007: 434) that he felt 'grossly misinterpreted by the liberal left' denouncing his focus on restrictive border controls. Given that it was buried in bureaucratic documents and secondary legislation, the progressive side of his reform agenda may have been perceived as entirely subordinated to restrictive policies.

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[143] 'My personal view is that it would be very difficult to find [a third country in which to open a processing centre]. Australia, from their point of view, I think they have already stopped doing that [the Pacific Solution, see Chapter 8] because the government changed but under the Howard government, they were in a particularly advantageous position because they have lots of small poverty-stricken Pacific islands nearby, on which they can put people, whereas we don't. I mean in the EU, we have got Eastern Europe, we've got Africa and neither of them would be particularly happy to have his country used as a dumping ground… I mean for refugees. I can't see that happening. It might do, but you would need an agreement and the Commission would never buy it. And even if the Commission did buy it, the European Parliament would need to buy into it and I can't see that happening. And then somebody would need to agree to build a transit centre relatively close to the EU.' Interview with David Saville, EU Asylum Policy Team, UK Border Agency, London, 2.2.2009.

[144] As defined by the European Commission in 2005, regional protection programs (RPPs) were to combine support to protection in regions of origin of refugees and resettlement of particularly vulnerable refugees from these regions to EU member-states (CEC, 2005). After significant delays, pilot RPPs were launched in Tanzania, Ukraine, Moldova and Belarus in 2007 as part of the external dimension of EU asylum policies. Resettlement selection missions were jointly conducted by the UK and Ireland in Tanzania in 2008. The European Commission has since argued that the resettlement component of RPPs remains 'underdeveloped' (CEC, 2009: 10).

[145] '... if we are talking about setting up transit centres outside the EU to which asylum seekers can go and have their claims considered (being allocated to an EU country if their claim succeeds), then that is still something we would want the EU to look at.' Additional comment made by David Saville in the personal interview mentioned in footnote 143.

5.3.3 Implementing the agenda: Decreasing asylum claims and increasing contentions

The adoption and implementation of Labour's second raft of reforms was congruent with a steady decline of asylum claims. The annual level of new claims reached an all-time high in 2002 at 103,080 then declined to 60,050 in 2003 and 40,620 in 2004, and continued to fall in the following years.[146] Tony Blair's promise to halve the numbers of new asylum claims by September 2003, which Home Secretary Blunkett had criticised as unrealistic, became reality (Travis, 2003a). The backlog of cases awaiting an initial decision by the IND also continued to steadily decline from 42,200 in 2001 to 9,700 in 2004 (Home Office, 2008: 26). One could thus argue that Labour was able to achieve the core objective of its second reform agenda, that is, restricting the arrival and settlement of asylum seekers perceived as non-genuine. This congruence between stated objectives and outcomes differed from the implementation of Labour's first reform agenda. Yet it is important to note that the decline of asylum claims was not limited to Britain. In 2004, the level of asylum claims in industrialised countries was the lowest since 1988 (UNHCR, 2005a: 3). More concerning for the government, other stated objectives were not achieved and unexpected regulatory challenges emerged, while the enduring inefficiency of the asylum bureaucracy was the target of unprecedented opposition.

Ironically, hostility to asylum seekers hindered the implementation of control measures. Most significantly, rural communities were hostile to the establishment of accommodation centres for asylum seekers (Sales, 2005: 454). Numerous press articles were published on local campaigns against the centres and the Conservatives vocally denounced the project. As a result of this pressure, the accommodation centres were never built. From 2003, public concerns over asylum migration expanded to other categories of migrants, jeopardising the relative lack of political and public controversies on the pro-immigration dimension of the government's 'managed migration' agenda. The decision allowing nationals from Eastern European countries joining the EU in 2004 (the A8 countries) to freely settle and work in Britain from 1 May 2004 ahead of most EU member-states was welcome by the business community. Yet broader public opinion was sceptical and the Conservatives were overtly hostile to the measure. This decision was followed by a sharp rise of immigration from Eastern Europe. 1.3 million nationals from A8 countries (Poland, the Czech Republic,

[146] See appendix 2, table 3.

Slovakia, Hungary, Slovenia, Estonia, Latvia, and Lithuania) were registered to arrive to work in Britain between 2004 and 2009 (Somerville et al., 2009).[147]

The arrival of Eastern European immigrants occurred as Britons had an inflated perception of the numbers of asylum seekers in their country, and reinforced the popular expression of a fear of being 'invaded'. In 2002, a MORI poll revealed that a majority of respondents estimated that Britain was hosting 23% of the world's refugees and asylum seekers, more than ten times the correct figure of less than 2% (Kushner, 2003: 262, footnote 16). Whereas surveys in 2001 showed that a minority of respondents considered asylum to be one of the most significant issues facing Britain, asylum was considered in 2003 'a serious problem' by a majority in a *Populus* poll – while most respondents still considered that 'it is right that Britain should continue to let in people seeking asylum if their claim is genuine' (Riddell, 2003). In all consecutive semi-annual Eurobarometer polls released between July 2003 and July 2005, immigration was considered one of the two most important issues facing the country in Britain. The salience of the issue was exceptional compared to other EU member-states. The percentage of Britons most concerned about immigration peaked at 41% in July 2004. In this series of polls, a majority of Britons also consistently preferred national immigration and asylum policies to EU joint decision-making, whereas the population of most EU member-states preferred joint EU decision-making in the field (Eurobarometer, various years).[148] Whereas public concern appeared unaffected by the decrease of asylum claims, a continuing lack of consideration for institutional neglect within the asylum bureaucracy led to enhanced mobilisation, at both the domestic and the international level, for reforms within the asylum bureaucracy.

The House of Commons Home Affairs Committee conducted three consecutive inquiries on asylum policies in 2003-2004, including one on the rationale and processing of asylum applications (Home Affairs, Committee 2004). This report was followed in June 2004 by a National Audit Office (NAO) report reviewing the speed and quality of asylum decisions

[147] There was no registration of return, yet it was estimated that half of the A8 arrivals had left by 2009 (Somerville et al., 2009). This unprecedented rise was due to two major factors. Firstly, Britain was one of the only EU member-states to open its labour market to immigration from new EU member states in Eastern Europe from 2004, whereas most other countries had imposed transitional regulations restricting this access; East-West EU labour immigration was thus first concentrated on a small number of destinations. Secondly, it was estimated that a large community of Eastern European immigrants were already working in the UK without authorisation before 2004. The official liberalisation of the British labour market meant a massive regularisation of their situation. This appeared in immigration statistics, as A8 nationals wishing to work legally had to sign up in a Worker Registration Scheme (ibid; Ruhs and Anderson, 2010).

[148] See appendix 3, figure 9.

taken since 1999. The NAO inquiry included comprehensive scrutiny of the procedures through observations and interviews at the IND, case file analysis and an estimation of the cost of individual processing (see NAO, 2004: 51-53). Subsequently, the House of Commons Select Committee on Public Account ran an inquiry on the same issue, whose results were released in January 2005 (Public Account Committee, 2005). The UNHCR also played a crucial role in this mobilisation. In October 2003, UNHCR High Commissioner Ruud Lubbers, visiting London, suggested to Home Secretary David Blunkett that the UN agency work with the Home Office to increase the quality of domestic asylum procedures.[149] Lubbers argued that efficiency and fairness in asylum procedures were the corollary of the pursuit by Britain and other Western countries of their efforts to make the global refugee regime immune to non-genuine asylum claimants (see Betts, 2004). Further consultations between the UNHCR and the Home Office ensued, resulting in the agreement of the Home Office to have a UNHCR mission monitor decision-making by asylum caseworkers and suggest improvements. The UNHCR Quality Initiative project started its supervisory mission in March 2004. For the first time, the Home Office had agreed to external quality monitoring of asylum decisions taken by IND caseworkers. It had also agreed to the public release of the UNHCR's findings. The UNHCR Quality Initiative proceeded with its monitoring of case decisions in 2004 and released its report in early 2005 (UNHCR, 2005b).

The findings and recommendations of the Home Affairs Committee, NAO and the UNHCR Quality Initiative Project overlapped on a number of crucial issues and integrated many of the reform demands formulated over the years by refugee organisations, whose influence over Labour's asylum agenda had continuously decreased since the party had come to power in 1997.[150] It was observed that asylum caseworkers were under pressure to deliver decisions as quickly as possible, yet were poorly trained to assess the circumstances of asylum seekers and the relevant human right framework of asylum decisions. Time pressure and poor training increased the risk of erroneous asylum decisions likely to be overturned on appeal, and thus of long and costly asylum procedures. In response, the Home Affairs Committee, the NAO and the UNHCR recommended better training of caseworkers, investment in the 'country of origin' database used by caseworkers to assess the credibility of claimants, and the provision of legal advice as early as possible to asylum seekers. These recommendations were

[149] Interview with Alexandra McDowall, UNHCR Legal Officer, Quality Initiative Project, 12.2.2009.

[150] See in this respect the submission made by refugee organisations to the above mentioned inquiry of the House of Commons Home Affairs Committee on asylum applications, http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmhaff/218/218we41.htm.

considered to be both fair to applicants and to reduce the costs associated with the poor quality of primary asylum decisions.

Section 5.3 has shown that Labour's second reform agenda on refugee admission policies became markedly more restrictive and in part contradicted its first reform agenda. This second reform agenda was also increasingly diverse as Straw, Blunkett and Blair set distinct policy priorities. This diversification of the agenda explains why the 2002 White Paper *Secure Borders, Safe Haven* was less central in policy formulation than the 1998 White Paper *Fairer, Faster and Firmer* had been. The profusion of policy objectives in the asylum field as well as Blair's personal interventions in support to restrictiveness on TV and in the tabloids overshadowed, in public perception, the emergence of a pro-active policy agenda towards other categories of immigrants as well as towards refugees considered genuine with the establishment of a small refugee resettlement stream. Labour condemned itself to deliver on bold policy promises not only at the domestic but also at the EU level. Although the Blair government presented the significant and steady decline of asylum claims that occurred from 2003 as the results of its policies, this was not enough to contain public concerns as many other untenable promises were not implemented, in part because they were opposed by sections of society. The Conservatives were only too eager to insist on Labour's numerous 'policy blunders' and demanded more radical restrictiveness. One aspect that the Labour frontbench had continued to neglect amidst its reformist frenzy was the dire state of the asylum bureaucracy. This not only attracted the attention of domestic institutions monitoring asylum policies but also of the UNHCR. The UN agency strategically appealed to the British government to accompany its efforts for global leadership towards a reform of refugee policies preventing the arrival of non-genuine claimants with domestic reforms facilitating the integration of genuine refugees through fairer and more efficient processing of asylum claims. Labour's third reform agenda emerged amongst these contradictory pressures for policy change.

5.4 Third reform agenda: Administrative reforms in preventive context

5.4.1 Agenda formation: Addressing conflicting reform demands

The configuration of actors setting Labour's reform agenda in the field of refugee admission between the mid-2000s and Blair's stepping down as Prime Minister in June 2007 differed from the actors who had set the previous reform agenda. Whilst Tony Blair's influence remained strong, that of his Home Secretaries was not as marked as under Straw and Blunkett. The role of governmental actors outside of the Home Office, refugee and human rights organisations and the UNHCR advocating bureaucratic reforms, but also the interfering role of the Conservatives, increased notably. Similarly to the previous agenda, a number of announced measures stood in direct contradiction to initiatives adopted only a few years earlier.

Tony Blair announced a re-orientation of asylum and immigration policy at the annual Labour Party conference in September 2004. The Prime Minister mentioned that the removal of failed asylum seekers would be amongst Labour's priorities if it were to be returned to office at the 2005 general election. By the end of 2005, Blair argued, the monthly removal of 'failed' of asylum seekers would exceed the numbers of new asylum applications so as to 'restore faith in a system that we know has been abused' (Blair, 2004). This became known as the 'tipping point target' (Somerville, 2007: 65). This target was at the core of Labour's new strategy document (not labelled a White Paper) on immigration and asylum, *Controlling our Borders: Making Immigration Work for Britain* (Home Office, 2005). Mirroring Labour's electoral manifesto for the 2005 general election (Labour Party, 2005), *Controlling our Borders* mapped out policy priorities for the next five years and reflected the above mentioned diversity of influences on policy formulation.

In order to achieve Tony Blair's 'tipping point' target, the strategy document, prefaced by Blair and introduced by new Home Secretary Charles Clarke,[151] announced a raft of restrictive measures towards asylum seekers in continuity with previous restrictive reforms. These included a further increase in detention capacities for 'manifestly unfounded' claimants, electronic tagging of immigration detainees, and pro-active action towards

[151] David Blunkett resigned as Home Secretary in December 2004 in the context of allegations of misuse of his position to accelerate the granting of a visa. His public image had previously been weakened by a 'paternity scandal' to which the visa case was related.

countries of origin to ensure the re-admission of nationals refused asylum in Britain (Home Office, 2005: 30). The five-year strategy also renewed its commitment to the expansion of an archipelago of 'integrated border controls' originally presented in Labour's 1998 White Paper.

Controlling our Borders's insistence on the need to restrict immigration impacted on reforms adopted in the context of Labour's second reform agenda. The refugee resettlement program, one of Blunkett's initiatives, was barely mentioned and not even referred to as refugee resettlement (ibid: 18). *Controlling our Borders* also repealed the grant of permanent residence to refugees in Britain, replaced it with a five-year temporary visa at the end of which protection need would be re-assessed. The temporisation of refugee status stood in direct contradiction to the measures facilitating the integration of refugees announced in the 2002 White Paper. More broadly, legal immigration was no more considered a positive contribution to Britain's social diversity and economy; only its economic benefits were mentioned. The report announced the creation of a new, point-based entry system differentiating between streams of migrants in function of their skills to 'only allow into Britain the people and skills our economy needs' (Tony Blair in Home Office, 2005: 6), and the expansion of efforts to 'crack down' immigration abuse.

Controlling our Borders also devoted much less space to the global and European dimension of preventive cooperation on asylum and refugee issues than *Secure Borders, Safe Haven*. This can be interpreted as a response to public hostility to the Europeanisation of immigration, but also as a consequence of the timing of the release of the document, released as the campaign for the 2005 general election was starting. The electoral manifesto of the Conservatives, published a few weeks before the publication of *Controlling our Borders*, advocated the processing of all asylum claims overseas and the quota-based arrival of refugees, the generalisation of detention of undocumented asylum seekers, a withdrawal from the Refugee Convention to avoid the obligation to assess all asylum claims as well as a reduction of economic immigration, considered 'out of control' through the imposition of a quota system (Conservative Party, 2005; BBC 2005). The radically restrictive character of the Conservatives' proposals was a concern for the government, given that the Tories and not Labour were perceived as the party best able to handle the issue of immigration and asylum according to pre-election surveys (Whiteley et al., 2005: 11).

Yet *Controlling our Borders* also reflected the influence of demands for reforms in the asylum bureaucracy. A reorganisation of the processing of claims by the IND was introduced: the New Asylum Model (NAM). NAM included several of the reforms demands discussed in Section 5.3.3: enhanced training for asylum caseworkers and quality control over case decision; reform of the processing of cases to enhance 'case ownership', as a single caseworker would take asylum cases from the initial claim to case resolution; and agreement to allow the UNHCR Quality Initiative Project to continue monitoring the quality of asylum decisions (Ward, 2006: 15-16; Refugee Council, 2007). Yet other aspects of NAM fitted with the core objective of Labour's third reform agenda to facilitate the removal of failed claimants. Most significantly, NAM introduced a classification of claimants in distinct streams to allow for the 'tailor-made' processing of different profiles of asylum seekers. The classification in stream determined for instance the entitlement of access to legal aid and the speed with which a case would be processed (Home Office, 2005: 35-36).

NAM was the first substantial reform to address difficulties within the asylum bureaucracy since asylum claims had started to rise in the early 1980s. Yet while the reform included elements recommended by institutions advocating a more progressive asylum policy, the government ensured that NAM would also contribute to its 'tipping point' removal target. This was even more blatant in the rhetoric used to present the scheme in *Controlling our Borders*. The strategy document argued that the absolute reduction of asylum claims achieved over the previous years through numerous preventive measures now provided the 'space' to reform the asylum system itself (Home Office, 2005: 35). Ensuring closer contact between case owners and asylum seekers was presented as a measure of 'tight management' of both detained and non-detained asylum seekers reducing the incentives to abscond in the community. The acceleration of the procedure was said to help achieve the swifter removal of 'failed' applicants, while the potential benefits of an acceleration of the procedure for refugees were not mentioned. More broadly, the contribution of NAM to an increase in the quality of procedures benefiting genuine asylum claims was only mentioned in passing (ibid: 8; 10; 36).

The government's continuing focus on the prevention of asylum migration as well as its increasing emphasis on the prevention of irregular migration, were reflected in its supranational agenda. Interrelations between migration, foreign policy, and development issues were discussed at the British-organised G8 summit of Gleneagles in July 2005. Joint action preventing irregular migration was one of the core aspects of the immigration and

asylum agenda of the British presidency of the EU between July and December 2005. In these areas, Britain emphasised the need for 'practical cooperation', that is, intergovernmental cooperation between EU member-states with similar priorities (CEU, 2005). In contrast, the government appeared decreasingly inclined to engage in the harmonisation of asylum policies. According to interviews with Home Office and UNHCR staff, this was due to the perception that Britain was more committed than other member-states in implementing existing EU directives and regulations, and considered that further harmonisations steps were not in Britain's interest.[152]

As Section 5.4.2 will show, institutional reforms within the asylum bureaucracy remained marginalised during the process of reform adoption regardless of its increased visibility in terms of agenda-setting.

5.4.2 Agenda adoption: Impact of the London bombings

In contrast to Labour's first and second reform agenda, the party's third reform agenda was released during a general election campaign. Labour won the 2005 general election well ahead of the Conservatives yet lost 47 seats, while its voting share was the lowest ever recorded for a winning party. Many commentators believed that widespread hostility to Blair's staunch support of the war in Iraq in 2003 had outweighed Labour's strong economic record, and was also largely responsible for a significant increase in voting share for the Liberal Democrats (see for instance BBC, 2005b).[153] Despite his personal role in Labour's electoral decline, Tony Blair announced that he would not stand down as Prime Minister. A handover to Chancellor of the Exchequer Gordon Brown over the next four years was considered highly likely – and eventually occurred in late June 2007. In his victory speech, Blair mentioned that reforming immigration and asylum policies was one of his priorities (Blair, 2005).

[152] Interviews with Alexandra McDowall (see footnote 149); David Saville (see footnote 143); Christopher Prince, Director of International Policy, International Group, United Kingdom Border Agency, 20.2.2009.

[153] Barbara Roche, the Immigration Minister who had, with Home Secretary David Blunkett, been key in the introduction of a pro-active immigration policy in Britain, lost the seat she had held since 1992; she had shown strong support to Blair's decision to engage in the war in Iraq.

Many asylum-related measures were adopted without change in statutory legislation, most significantly the introduction of the New Asylum Model. The latter started to be implemented by the Home Office in May 2005 (Refugee Council, 2007). As with previous reforms adopted through administrative change, this ensured limited visibility in political and public debates. Statutory legislation aimed at implementing most of the *Controlling our Borders* agenda, the Immigration, Nationality and Asylum Bill 2006, was introduced only a few weeks after the election. Mirroring the strategy document and in contrast to the four previous immigration and asylum bills introduced under the Blair government, most of the bill dealt with immigration, and less specifically with asylum issues. The bill restricted the right of all immigrant categories to appeal against entry refusal from within Britain, with the exception of asylum seekers and refugees at the end of their five-years residence visa; increased penalties on illegal employment; and introduced new measures aiming to enhance control over entry and departure of non-citizens such as visa fingerprinting.[154] As the bill was debated, many parliamentarians across party boundaries and in both houses were highly critical of the reduction of rights of appeal for overseas students, workers and family members,[155] some pointing to the blatant contradiction between Labour's earlier objective to increase the level of student immigration to Britain and the drastic reduction of the their appeal rights.[156]

The shape of the legislative debate was affected by a dramatic event occurring two days after the second reading of the bill in the House of Commons: the 7 July 2005 terrorist attacks in London. Although none of the bombers had been asylum seekers or refugees, the Home Office introduced an amendment giving a wide interpretation of the Refugee Convention's exclusion clause in British law (clause 52 of the bill). This meant that people accused of involvement in activities related to terrorism as defined in British law would be barred from access to refugee status. A wide range of organisations, including the House of Lords, the parliamentary Joint Committee on Human Rights, the UNHCR, refugee and human rights organisations, but also the Association of Chief Police Officers denounced the clause as a distortion of the intended interpretation of the Convention provision and as unnecessary given the existence of a comprehensive legislative framework dealing with national security threats (Liberty, 2006; Refugee Council, 2006: 7; Ward, 2006: 18; JCHR, 2006: 56-58). Yet the

[154] See Home Secretary Charles Clarke, HC Deb 05 July 2005 vol. 436 cc188-194.

[155] See ibid, cc191-192.

[156] See for instance Lord Dholakia, HL Deb 6 Dec 2005 vol. 676 c525-526.

amendment was not removed from the legislation. The Immigration, Asylum and Nationality Act 2006 was eventually adopted in March of that year.

Increasing concerns with immigration-related issues rather than with asylum permeated the adoption of Labour's third reform agenda.

5.4.3 Agenda implementation: Muddled results, shifting contentions

According to Eurobarometer surveys released between July 2005 and July 2007, immigration remained one of the two most concerning issues amongst Britons, the other main issue of concern being either crime or terrorism (Eurobarometer, various years).[157] This occurred despite the continuation of the decline of asylum claims between May 2005 and Blair's resignation in June 2007: 30,840 new asylum applications were made in 2005; 28,320 in 2006; and 28,300 in 2007.[158] Beyond this decline, the government failed to deliver the 'tipping point' promise first made by Blair in September 2004. The monthly numbers of failed asylum claimants removed from Britain continued to be inferior to the numbers of claimants denied asylum.[159] In contrast, bureaucratic reforms within the asylum bureaucracy undeniably led to change. The implementation of the New Asylum Model was followed by significant if not revolutionary bureaucratic change. First evaluation reports considered that NAM had led to significant change in asylum casework. A NAO evaluation observed that the numbers of asylum caseworkers at the IND had significantly increased. The level of on-the-job training had improved and case ownership increased the incentive for rapid case resolution (NAO, 2009: 5). In an interview, a member of the UNHCR Quality Initiative considered that these improvements had led to an increase in the quality of the asylum procedure, including better interview techniques and a better use of information on the country of origin of the applicants.[160] She also considered that the Quality Initiative's continuing monitoring of asylum decisions had led to an increased acceptance of external

[157] Only in the poll conducted a few months after the 2005 London bombing was immigration relegated to third issue of concern after crime and terrorism. See appendix 3, figure 9.

[158] See appendix 2, table 3.

[159] 24,730 claimants were refused asylum or other forms of protection in 2005. 17, 050 in 2006 and 16,755 in 2007; respectively 13,730, 16,330 and 12,705 'failed' claimants were removed from Britain or left the country voluntarily over these years (Home Office 2008: 26).

[160] Interview with Alexandra McDowall (see footnote 149).

scrutiny by IND staff. Yet much remained to be achieved. The NAO evaluation observed a notable acceleration of claim processing, yet the level of staffing was not flexible enough to cope with fluctuations in the numbers of asylum claims (NAO, 2009: 8). In addition, more than 20% of appeals against negative decisions at the Immigration Appeals Tribunal overturned the IND decision, showing that the IND's 'culture of disbelief' had not been swept away by the reforms (NAO, 2009: 5).[161] Further, the accumulated legacy of bureaucratic inefficiency continued to burden the IND. In July 2006, the Home Office revealed that the number of unresolved asylum cases, or 'legacy claims', was estimated at 400,000 to 450,000 files (Public Account Committee, 2009).

The scale of regulatory difficulties was even greater in other areas of immigration policy, and these had a profound transformative impact on the management of immigration in Britain. Irregular migration became a major concern as it was officially estimated to have reached 430,000 individuals in 2005. A London School of Economics Study released in 2007 gave a higher evaluation at 618,000 (Somerville et al., 2009). The extent of illegal stay revealed that bureaucratic inefficiency as regards to entry control went far beyond asylum. The 'foreign prisoners' affair[162] was another high-profile revelation of bureaucratic failure. The incident caused the dismissal of Home Secretary Charles Clarke and his replacement by hitherto Defence Secretary John Reid. Reid was committed to large-scale bureaucratic reforms and commissioned a review of the operations of the IND. Public pressure and the review eventually triggered the establishment of an on-purpose agency in charge of immigration and border controls separate from the Home Office - the Border and Immigration Agency (BIA) - in April 2007 (Spencer, 2007: 357-358).[163] The effects of this encompassing reform are outside of the scope of this thesis, as it was adopted two months before Tony Blair left Downing Street.

[161] See also appendix 2, table 6, which shows the evolution of the proportion of negative decisions in asylum cases overturned by the Immigration Appeals Tribunal.

[162] In August 2006, it was revealed that more than a thousand foreign nationals detained in Britain had since 1999 been released in Britain without consideration for removal because of a lack of communication between the prison service and the IND. Home Secretary Clarke waited several weeks to inform the Cabinet that there were serious criminals now at large amongst the released. This caused Clarke's sacking as well as an increased focus on the arrest and effective detention of foreign criminals. As places in immigration detention remained scarce, this meant that there was less space available for failed asylum seekers set to be removed, thus increasingly the likeliness of absconding and contributing to the government's inability to achieve its 'tipping point target' (BBC, 2006; NAO, 2009: 8; 32-33).

[163] In April 2008, the BIA was merged with the agency in charge of visa release, UKvisa, and the revenue and customs agency, HM Revenue and Customs, to form the UK Border Agency (UKBA).

Labour's third reform agenda under Tony Blair's Prime Ministership lasted only two years, yet this short period of time witnessed the most comprehensive transformation of the asylum bureaucracy to occur since the Second World War, as well as a general reorganisation of immigration policy in 2007 whose scale had not been foreseen as Labour released its five-year strategy document *Controlling our Borders* in 2005. Whereas agenda-setting in the previous reform phase had been dominated by Labour frontbenchers, it was now far more diverse. Both the demands for bureaucratic reforms made by the domestic voluntary sector, the UNHCR as well as parliamentarians monitoring Home Affairs and the advocacy of the Conservatives for even more restrictiveness were reflected in this agenda. Whereas responsiveness to Conservative demands may have been due to the formulation of Labour's third reform agenda during the campaign for the 2005 general election, it can be argued that the role of the UNHCR as an embedded observer and 'constructive commentator' of decision-making practices within the IND asylum unit constituted a catalyst for bureaucratic reforms, which were not opposed by the government.[164] These reforms occurred as immigration, more than asylum, became an increasingly salient issue in public opinion. A significant factor of this salience was the fallout of an unprepared openness to immigration from the European Union. This was an indication of the limited expertise of the Home Office as regards to international migratory flows beyond its focus on the prevention of asylum claims from the global South. The first credible estimations of the extent of irregular migration pointed at the managing, and planning, inefficiency of the British immigration bureaucracy far beyond the area of asylum.

5.5 Conclusion

The analysis of Labour's three consecutive reform agendas in the field of refugee admission reveals the following. Under the Blair government, the ideological underpinnings of refugee admission policies never entirely broke with the framework established by the Conservatives.

[164] Asked if the monitoring activities of the UNHCR had constituted the impulse for the Home Office to introduce the New Asylum Model, Alexandra McDowall from the UNHCR Quality Initiative responded as follows: '... it is a good question. I think that would be a question of perception. I suppose we could take credit for the introduction of certain elements of NAM but it probably was in discussions already. Knowing how the Home Office works, they wouldn't accept an external suggestion wholeheartedly. And in any event, there would have been some rumblings internally already. Having said that, during the time before the introduction of NAM, there was no other independent monitor of quality, like UNHCR, whilst post-NAM they have the Quality Initiative and the Quality Audit Team, the Home Office's own team, to make these kinds of suggestions, before NAM it was just us. But there has to be also the political willingness to overhaul the system which was the case.'

Similarly to the Tories, 'New' Labour considered that the majority of individuals seeking asylum in Britain aimed for improved economic and social status rather than protection from persecution. As had been the case under the Thatcher and Major governments, the continuous increase in asylum claims until 2003 fostered intense institutional innovation, a trend that did not stop as asylum claims steadily declined between 2003 and 2007. Many institutional innovations were the direct continuation of Conservative policies, such as the expansion of restrictions on the social and legal entitlements of asylum seekers through restricted right of appeal against negative decisions by the asylum bureaucracy and tight control over welfare and housing provision. The promotion of measures preventing the arrival of claimants considered non-genuine was also a continuation of Conservative policies, although the Blair government more strongly insisted on the international and European dimension of these measures than its predecessors.

However, Labour's agendas also featured significant innovations. In contrast to the Conservatives' scant definition of policy objectives, there was a profusion of policy objectives clearly stated in three consecutive strategy documents complemented with numerous policy interventions by consecutive Home Secretaries and Blair himself. Furthermore, the Blair government devised mechanisms aiming to facilitate the arrival and settlement of refugees considered genuine, especially refugee resettlement. The creation of a resettlement program followed Home Secretary Straw's assessment that the temporary resettlement of Kosovo refugees had been a positive experience and was integrated by Straw's successor David Blunkett into his broader migration management agenda in the early 2000s, only to be marginalised as public hostility grew towards what was perceived uncontrolled immigration. The fate of the resettlement program is representative of other progressive measures introduced by Labour, as commitment to their implementation was fleeting and subordinated to overall policy restrictiveness. The introduction of a long-awaited reform of the asylum bureaucracy in 2005 departed from this path as it partly followed the recommendation of the UNHCR and a range of domestic actors and was here to stay; yet Blair and Home Secretary Clarke were wary to portray the measure as compatible with, and subordinated to, the established restrictive agenda.

Between 1997 and 2007, policy effectiveness and legitimacy in the field of asylum appeared to follow opposite trends, although these trends were not linear. Labour was first confronted with a major crisis of policy effectiveness which resulted from accumulated bureaucratic inertia under the Conservatives, continuing increase in asylum claims and the delayed

implementation of its own policy agenda. From the early 2000s onwards however, Labour was better able to reach a number of stated policy outcomes as asylum claims decreased (a worldwide trend), avenues of appeal against IND decisions were severely restricted and bureaucratic reforms eventually improved, to a limited extent, the quality of decision-making. It is important to note that the reduction of the accumulated backlog of asylum claims that had gone beyond the level of first instance decision, and which reached 450,000 claims in 2006, was not amongst Labour's priorities[165] and can thus be considered outside the scope of the definition of policy effectiveness used here, which focused on the congruence between stated policy objectives and outcomes. It is also important to note that Labour by far did not achieve all of its numerous policy objectives. This contributed to a weakened policy legitimacy, which, overall, dramatically declined under Blair. The previous chapter has mentioned that the Conservative electorate had been supportive of the Tories' restrictiveness; this was less the case of many individuals and organisations which had perceived Labour as the champion of the rights of immigrants and refugees before the party came to power. In addition, a series of episodes in the late 1990s and early 2000s such as the 'Sangatte crisis' were portrayed by the Conservatives and the tabloids as symbolic of Labour's lack of ability to manage the immigration portfolio. The government was unable to provide any other answer than to reassert that it was committed to reducing the abuse of the British asylum system and to be tougher on border controls. The decline of asylum claims did not lead to a restoration of faith in Labour's ability to achieve its policy objectives, as this decline was congruent with increasing difficulties with the management of immigration. If anything, these difficulties further challenged the credibility of Labour's commitment to manage migration.

How can this divergence between policy legitimacy and effectiveness in Labour's refugee admission policies be explained by this thesis's hypotheses?

It has been shown that over three consecutive waves of reformism, various constellations of conflicts between policy-makers contributed to the production of a complex regulatory framework negatively impacting policy legitimacy. First, Labour failed to enshrine in statutory legislation its commitment to fairness and efficiency towards asylum seekers in legislation reflecting its first reformist agenda. This attracted the hostility of the progressive backbench and the voluntary sector. During the second reformist phase, Labour's agenda was unambiguously restrictive so as to respond to public concerns. Yet the various visions

[165] This was in confirmed by Alexandra McDowall from the UNHCR Quality Initiative during the personal interview mentioned in footnote 149.

developed by Straw, Blunkett and Blair worked against policy cohesion and offered a broadside for the Conservatives, who relentlessly attacked Labour's 'broken promises' and were perceived as more competent as regards to the management of the immigration portfolio. Conflicts over policy-making were most diversified in the third reformist phase, in which Conservative and progressive reformist pressures found their way into Labour's agenda. It is difficult to say if policy legitimacy further declined. The reform of the asylum bureaucracy appeared to slightly increase policy legitimacy in the eyes of reformist organisations, yet Labour's management of broader immigration issues was denounced by the Conservatives and proved an enduring concern to the public.

Asylum seekers and other immigrants disadvantaged by increasingly restrictive admission rules and aiming to enter Britain continued to not comply with these rules when enforcement was deficient. The public focused on the most visible enforcement difficulties at Britain's borders, such as the Dover tragedy in 2000 and the 'Sangatte crisis' in 2002; yet the weakest link of the enforcement chain until the end of the period of investigation was the labour market. Scarcity of labour due to the economic prosperity that characterised most of Blair's decade in power, weak enforcement of employer sanctions, but also—and perhaps more significantly than weak employer sanctions—limited opportunities for immigration candidates from the global South to come to work to Britain legally although they were welcome as a cheap workforce constituted incentives for immigration candidates to try their luck through the asylum route. Combined with decades of deficient processing of asylum claims, enforcement limitations had led in the mid-2000s to the accumulation of almost half a million unresolved asylum claims, and this was still less than the estimated number of irregular immigrants living in Britain. Yet the more 'visible' measures had been at the core of Labour's restrictive policy agenda, as they were indeed correlated with a steady decline of asylum claims and the enhancing of border controls. It is in this respect that policy effectiveness was to an extent achieved according to the definition used in this thesis.

Finally, institutional complexity, explored in most details in this chapter so as to address a gap identified in the literature, contributed to a decline of both policy effectiveness and policy legitimacy. In terms of effectiveness, Labour found itself unable to implement or even to adopt, all the reforms that were promoted by diverse frontbenchers at various points in time. This necessarily widened the gap between stated policy objectives and outcomes. The multiplication of policy objectives also resulted in the mobilisation of increasingly diverse constituencies, be it rural areas opposed to the building of large accommodation centres for

asylum seekers 'in their backyard', poor municipalities opposed to the dispersal of asylum seekers, and refugee organisations opposed to the reduction of the legal and social entitlements of asylum seekers. This not only led to an overall decline of policy legitimacy but also to its increasing fragmentation.

As in the previous chapter, the explanatory value of each hypothesis is thus significant, yet one can observe an evolution in the relevance of variables. The variable that appeared to gain most relevance in comparison to the Thatcher and Major eras is institutional complexity. The very public, increasingly complex and frequent—if partial—redefinition of policy objectives, and the multiplication of 'broken promises', constituted a trademark of Blair's Prime Ministership; while the Conservatives had only deviated from an increasingly restrictive adoption of the first Asylum and Immigration Act in 1993. In other words, the role of the institutional structure becomes relatively more significant than the agency of policy-makers and of asylum seekers for the production of unintended outcomes. This finding differs from scholarship arguing that Tony Blair's exclusionary rhetoric was the defining feature of 'New' Labour asylum policies (Mulvey, 2010). Yet it corroborates assessments made in studies such as Somerville (2007) and Spencer (2007) on the correlation between permanent policy restructuring and policy failure in asylum policies. This chapter contributes to this body of literature insofar as it points at the historical embeddedness of institutional dynamics at the core of this failed institutional complexity, especially bureaucratic inefficiency and the discrepancy between a political rhetoric highly responsive to public restrictiveness and the lack of coherence of institutional change. As has been shown in the first chapter, both aspects were characteristic of admission policies towards refugees from the Commonwealth. However, qualifying the complexity of institutional developments in the field of asylum of path-dependent—a term used by Hansen (2000) to describe the convoluted character of institutional development of admission policies towards Commonwealth immigrations—appears to lack nuances. Schickler's (2001) notion of 'disjointed' institutional development introduced in the second chapter, which applies to small-step, cumulative reforms over time which may contradict each other yet are considered legitimate by distinct groups of actors and thus reduce the likeliness of ground breaking institutional change, seems more adequate.

The next three chapters focus on this thesis' second case study and investigate the modalities of unintended outcomes in Australian refugee admission policies since the Second World War.

Case study 2 – Australian refugee admission policies

6 Refugee admission policies until the early 1980s: Selective openness

6.1 Introduction

The inaugural chapter of the Australian case study investigates and attempt to explain unintended outcome sin Australia's refugee admission policies between the end of the Second World War and the end of Malcolm Fraser's Prime Ministership in 1983. Over more than four decades, asylum was seldom requested and even more rarely granted, yet Australia was amongst the few nations to resettle comparatively large numbers of refugees from the start to the end of this period. Political science and historical scholarship has emphasised the ability of Australian governments to achieve their policy objectives as well as the diversity of these objectives in the context of the White Australia policy as well as after the policy's demise.

According to Kunz (1988) and Richards (2008: 166-203), the resettlement of more than 180,000 European Displaced Persons between 1947 and 1954 to Australia was driven by demographic nation-building and economic imperatives. Palfreeman (1967), Markus (1983), Neumann (2004: 42-51, 65-78) and King (2005) have evidenced the primacy of racial considerations in policies restricting the arrival of Jewish refugees in the 1940s and of non-European refugees until the gradual end of the White Australia policy from the mid-1960s. Cox (1979), Price (1981) and Viviani (1984) have argued that the admission of Indo-Chinese refugees from the mid-1970s was shaped by geopolitical considerations, although humanitarian concerns played a more significant role than in previous decades. These scholars emphasise overall high degree of bipartisan consensus between Labor and the coalition between the Liberal Party and the Country Party (renamed the National Party in 1982) in the pursuit of these objectives. Conflicts between Labor and the Liberal/Country Party coalition did occur, for instance over the treatment of wartime Asian refugees in the last years of the Chifley government (King, 2005) and the resettlement of Indo-Chinese refugees under the Whitlam government (Viviani, 1984, yet they remained episodic. The limited impact of a sceptical, or even hostile, public opinion on policy objectives such as the post-war

resettlement of Eastern European DPs or the increase in Indo-Chinese resettlement in the late 1970s is also emphasised in the literature (Goot, 1999; Bruer and Power, 1993).

The ability of several governments from the centre-right as well as the centre-left to achieve policy objectives in evolving international contexts and in the face of cautious domestic public opinion suggests that refugee policy demonstrated a high degree of responsiveness to changing circumstances as well as a significant degree of autonomy from public pressure. On the basis of the thesis's framework of analysis, this chapter aims to make a twofold contribution to the literature. It first discusses to what extent the apparent responsiveness and autonomy of refugee policy are equivalent with the concepts of policy effectiveness and legitimacy used to assess the intended character of policy outcomes. Secondly, the chapter assesses the value of the thesis's explanatory hypotheses, which at first sight appears limited given that refugee admission policy appears as comparatively effective during this period.

The structure of the chapter reflects the significance of the White Australia policy and of its legacy for the organisation of these four decades of refugee admission. Section 6.2 argues that the responsiveness of refugee admission policy to changing circumstances had its roots in the discretion-based immigrant admission mechanisms that originally constituted the core institutional framework of the White Australia policy. Sections 6.3 and 6.4 respectively focus on the admission of European and non-European refugees and show how successive post-war Australian governments were able use the organisational flexibility allowed by discretion-based admission mechanisms to refine and achieve various policy objectives. To conclude, Section 6.5 retraces the evolution of policy effectiveness and legitimacy over the period of investigation and addresses the value of this thesis's explanatory framework.

6.2 White Australia policy: Inclusion and exclusion through administrative discretion

From the mid-1850s, the Australian colonies developed policies aiming to restrict the settlement of non-Europeans. The core rationales for these restrictions were fear of economic competition and racial prejudice (Hawkins, 1991; Cronin, 1993; Dutton, 2002). As the Australian Commonwealth (that is, the Australian federal state) was established in 1901, the power to make immigration law was transferred from the colonies to the Parliament of the Commonwealth. The adoption of federal rules prohibiting the long-term settlement of non-

Europeans was one of the very first issues debated by the new Commonwealth Parliament. As Cooney (1995: 12) observes:

> [t]he parliamentary debates during the passage of the [Immigration Restriction] Act [1901] reflect virtually unanimous support for the White Australia Policy. The controversy in Parliament was thus not over whom to exclude but how to exclude.

Many parliamentarians supported legislation explicitly prohibiting the settlement of non-European immigrants. However, Britain was opposed to Australia's exclusionary legislation as it jeopardised good relations with non-European parts of the British Empire, especially India. In addition, the Barton government itself was keen to maintain good relations with non-European regional powers, especially Japan (Cooney, 1995: 13-14).

The legislation eventually adopted by the Australian Parliament, the Immigration Restriction Act 1901, transferred the power to determine the suitability for settlement of individual immigrants to immigration officers. The Act stipulated that anyone who failed a dictation test in a European language prescribed by the immigration officer in charge could be refused settlement in Australia.[166] With overwhelming majority, the Senate opposed a motion requiring that the European language used in the test be known by the prospective immigrant (Immigration Reform Group, 1962: 13). Entry decisions could be appealed against only in a limited number of cases and only by immigrants who had previously been allowed to enter Australia. Prospective immigrants contesting decisions made before arrival or at the border had no right of appeal.[167] The Immigration Restrictions Act 1901 did not exempt refugees from the dictation test. Refugees admitted in Australia over the following decades, such as a few thousand White Russians and anti-fascist Italians in the 1920s and 1930s, were thus admitted as 'suitable immigrants' (Neumann, 2004: 15). More specific measures were adopted in response to the flight of Jewish refugees from Nazi persecution. In August 1938,

[166] The 1901 Act defined a number of statutory exceptions from the dictation test, amongst them persons who could prove that they had previously lived in Australia, members of the British Army or Navy, as well as persons granted a 'certificate of exemption' from the test, whose release and validity was entirely at the discretion of the minister (see Immigration Restrictions Act 1901 3(h) and Palfreeman, 1967: 109-111).Three more specific Acts aiming to restrict the arrival or settlement of non-Europeans were adopted in the first half of the 20th century: the Pacific Islands Labourers Acts 1901 and 1906, as well as the Wartime Refugees Removal Act. The latter is discussed in section 6.4.1.

[167] In 1932, a requirement of landing permit, to be granted before arrival to Australia, was introduced in the 1901 Act. The amendment, adopted in a context of economic recession reducing the need for labour immigration, aimed to allow for restrictions on European immigration, as it was considered that the dictation test could not be used for this purpose. In 1940, the Act was further amended to impose statutory conditions on the grant of a landing permit, such as the possession of landing money (Palfreeman, 1967: 100).

Australia House in London received more than 500 immigration applications by German Jews fleeing Nazi persecution (Markus, 1983: 18). However, neither the Lyons government nor the Australian population welcomed a significant rise of Jewish immigration to Australia, which amounted to 500 arrivals in 1937. International pressures led the government in June 1938 to allow for the arrival of 15,000 Jews fleeing persecution in Europe over the following three years (ibid: 21-22).[168]

Section 6.3 investigates the role of discretionary practices of refugee admission towards European refugees until the late 1960s. As in the first chapter of the British case study, this section incorporates an analysis of Australia's position during the drafting of the Refugee Convention so as to assess Australia's priorities during the treaty's elaboration and the country's influence over the wording of the Convention.

6.3 Admission of European refugees

6.3.1 Post-war refugee resettlement: Achieving economic and nation-building objectives

Between 1947 and 1954, more than 180,000 European DPs were resettled in Australia (Kunz, 1988: xvii). The large-scale admission of European DPs was part of the country's post-war strategy of sustained population growth. Concerns over Australia's rate of population increase had emerged in the 1930s. One of the most prominent advocates in parliament of a substantial immigration increase was then Labor backbencher Arthur Calwell. Calwell's profile rapidly rose within the Labor Party and he became Minister of Information during the Second World War. Australia's geopolitical and demographic vulnerability became a critical concern to the authorities under the wartime Curtin government. Calwell was nominated Minister of Immigration by Prime Minister Chifley in 1945 and an on-purpose Department of Immigration was established the same year (Kunz, 1988: 15). In his first ministerial statement as Immigration Minister, Calwell announced that his objective was a target of 2% population growth *per annum*, including 1% through immigration. This meant 70,000 immigrants a year at the time.[169] British settlement had traditionally been encouraged, yet Calwell was aware

[168] The quota was slightly expanded in 1939 (Neumann, 2004: 20).

[169] Arthur Calwell, House of Representatives debates, 2 August 1945 (no column reference).

that British immigration would not suffice to meet his growth target. He thus promoted the carefully managed arrival of settlers from continental Europe.

Refugees were not Australia's European settlers of choice. The Chifley government was originally reluctant to participate in post-war resettlement efforts, as popular hostility towards Jewish refugees arriving in the country before and immediately after the war had been widespread. In 1946-47, the government had allowed the arrival of a few thousand Jews from Central Europe sponsored by family members. Whilst no governmental assistance was offered to facilitate their settlement, most Jewish refugees had no difficulties settling in their country of refuge (Kunz, 1988: 8-9). Regardless of their successful integration, Jewish arrivals were unwelcome. Opinion polls conducted by academics and government officials before *and* after the Second World War revealed widespread racial prejudice towards Jews. In early 1947, restrictions were imposed on the maximum numbers of Jewish passengers allowed to board ships *en route* to Australia. Similar restrictions were introduced on aircrafts in 1948. The criteria were bluntly defined in terms of race, not religion. Australian Jewish organisations vehemently yet unsuccessfully protested against the measure (Markus, 1983: 26-28). Fear of an increase in Jewish immigration led the Chifley government to refuse a request of the United Nations Relief and Rehabilitation Administration (UNRRA) to resettle 30,000 DPs in early 1947 (Neumann, 2004: 29).

The attitude of the Australian government changed a few months later. Immigration Minister Calwell was sent to Europe in June 1947 to assess under what conditions Australia could achieve the set demographic targets. Australia had a few weeks before become a member of the International Refugee Organisation (IRO), which coordinated resettlement from European camps with the UNRRA, yet Chifley had given no guarantees to the two international relief agencies of an involvement in resettlement activities beyond financial support. Acknowledging Australia's population growth targets, the IRO informed Calwell that many DPs in refugee camps met Calwell's 'suitability' standards. The IRO even made ships available to facilitate the departure of the DPs for Australia, a welcome offer as there was a limited availability of large ships which could be used for civilian purposes a few years after the end of the war. This convinced Calwell and Chifley to participate in the IRO's mass resettlement scheme (Kunz, 1988: 35). Australia officially agreed to resettle a contingent of 12,000 DPs and to practice no discrimination on the basis of race or religion. In practice however,

> '[Australian] selection teams received secret instructions that only Baltic (read "Nordic" or "Aryan") persons would be selected for resettlement, and government publicity [for the program in Australia] stressed the desirable 'racial characteristics' of the migrant' (Markus, 1983: 29).

Surveys conducted amongst the Australian population in August 1947 revealed that 23% of respondents supported the arrival of DPs to Australia, while 19% were against it. A majority of respondents (54%) did not know the meaning of 'displaced person'. When more specifically asked if they favoured the arrival of '12,000 displaced persons a year, if the refugee organisations could supply the ships', 48% of the surveyed persons answered in the negative (Markus, 1985: 19). In this context, Calwell considered that the 'first impression' of the DPs on Australians would be crucial to the viability the resettlement program; the first DPs to leave for Australia were thus subjected to a stringent selection process. Australian immigration officers dispatched to European refugee camps were required to prioritise the selection of Nordic-looking, healthy, 'able-bodied', highly skilled, and politically moderate males under 40 years of age. As it started however, the selection process was highly informal and reflected the lack of experience of the Department of Immigration with such an operation. Australian selection officers stationed in camps later recounted a lack of training,[170] the absence of clear selection principles[171] and disagreements between staff on the ground and the immigration bureaucracy in Canberra on the resettlement of specific individuals.[172]

In contrast to the British case, the selection rationale of the immigration bureaucracy was not seriously challenged by other ministries or by employers. This was related to the omnipresence of the Department of Immigration in the organisation of resettlement. The Australian authorities required that the DPs enter two-year work contracts giving full

[170] According to Mort Barwick, selection officer in Cologne, Germany, in 1949: 'We had practically no briefing. There was practically nothing known regarding the post in Germany ' (quoted in Martin, 1989: 16). Selection officer Peter Edwards, stationed in Germany six years later (1955), has similar memories of the lack of training before his selection mission: 'There was no briefing. None at all. The reason was not because the department did not want to give any briefing, it was simply that there was no expertise. There were very few officers who returned to Australia who had any experience.'(Martin, 1989: 25)

[171] 'There were no specific instructions as to what type of person we should take. I think it had been agreed… that all countries had a responsibility to try and resettle displaced persons and provided they were of reasonable standard and in your opinion could assimilate into your community…if you were satisfied, select them.' (Mort Barwick, quoted in Martin, 1989: 17)

[172] For instance, selection officer Barwick recalls having attempted to refuse a person with a Nazi background, yet his decision was overturned by Canberra 'but because these people had relatives or some associations with Australia, Canberra decided that they should be accepted.' (Martin, 1989: 19) From late 1948, as the authorities were faced with a limited supply of prospective male settlers of working age with no families, the men/women ratio became more equal than earlier planned (Kunz, 1988: 46-47).

responsibility to the Australian government for work placement. The DPs had an obligation to remain at least one year in their allocated employment. The Commonwealth also provided for reception and accommodation on arrival.[173] 'Blanket' work contracts facilitated the recruitment of large groups of refugees without having to precisely evaluate domestic labour need. However, such contracts also led to frequent mismatches between the qualifications of the refugees and their allocated jobs. Whereas the DPs' level of education was high by Australian standards, most were employed on arrival as workmen and labourers. According to Kunz (1988: 143), the Department of Immigration became rapidly aware of such mismatches, yet it had no intent of reforming the work contract scheme. Inflexible, government-led job allocation fulfilled another purpose: it restricted job competition between DPs and the domestic workforce, thus respecting trade union demands. In addition, the DPs' contribution to the Australian economy was widely publicised by the Department of Immigration. This 'public relations offensive' contributed to the acceptance by the Australian population of a sharp increase in DPs resettlement far beyond the original annual target of 12,000.[174] Calwell also used geopolitical arguments to justify the increase, presenting the decision of the Truman administration to increase DP resettlement to the US as worthy of emulation in Australia (Kunz, 1988: 36).

The resettlement of the DPs is an example of the flexibility as well as the policy autonomy allowed by discretionary refugee admission practices entirely controlled by the Department of Immigration. Departmental control ensured the subordination of the demands of other actors interested in the arrival of the DPs to its own policy objectives and that the discrepancy between official selection objectives and selection practice in refugee camps remained shielded from the public. The resettled DPs themselves could have attempted to denounce such practices. Yet they were both, in the late 1940s and early 1950s, socially isolated from the Australian population which rather tolerated than embraced their arrival, and busy making the most of the socio-economic opportunities offered by their country of adoption (Kunz,

[173] Australia and New Zealand were the only countries participating to the DP Mass Resettlement Scheme in which the state took such a significant role in job allocation.

[174] According to Kunz (1988: 43) quoting unpublished Department of Immigration statistics, arrival of DPs to Australia under the Mass Resettlement Scheme occurred as follows: 840 in 1947, 9,953 in 1948, 75,486 in 1949, 70,212 in 1950, 11,708 in 1951, 2,055 in 1952, 441 in 1953, and 5 in 1954. Main nationalities of resettled DPs were Polish (63,394), Latvian (19, 421) and Ukrainian (14,464). Increase of departure to Australia was also due to the increased availability of immigrant ships bound to Australia and to US policy towards the DPs.

1988; Richards, 2008: 166-203).[175] As section 6.3.3 will show, the Department of Immigration eventually recognised the flaws of its selection practices and these evolved towards further groups of resettled refugees. Yet this did not mean that discretion-based admission of refugees lost its appeal. As the next section will show, the practice was fiercely defended by the Australian representative during the drafting of the Refugee Convention.

6.3.2 Adopting the Refugee Convention: Australia's position and treaty outcomes

Australia played a significant role in the establishment of the United Nations. Chifley's Minister for External Affairs H.V. Evatt led the Australian delegation at the 1945 San Francisco conference which drafted the UN Charter, and was elected President of the UN General Assembly in 1948. The Chifley government was one of the first to sign the Universal Declaration of Human Rights in 1948 (Charlesworth, 2006: 49). Yet Australia did not become a member of the *ad hoc* committee drafting the Refugee Convention. This may have been due to the limited significance of Australia in the post-war international system in contrast to Britain, which was a committee member, but it was perhaps also due to the Menzies government's lack of enthusiasm for the Convention. The draft Convention produced by the drafting committee did not further encourage Australia to increase its involvement in the preparation of the treaty. Neumann (2004: 81-83) shows that Department of Immigration Secretary Tasman Heyes had four objectives to the draft Convention. Firstly, the universal nature of the refugee definition used in Article 1 was considered incompatible with the White Australia policy:

> …acceptance by Australia of a convention which provided that [non-European refugees] should not be discriminated against and should not be subjected to any penalty for illegal entry, would be a direct negation of the immigration policy followed by the Australian government since Federation. (Tasman Heyes, May 1950, quoted in Neumann, 2004: 82)

[175] Kunz (1988), who conducted many interviews with DPs a few decades after their arrival, noted that many bore no grudge with the fact that they had had to work in low-skilled jobs on arrival despite their high level of qualifications and the discrimination they encountered amongst Australians, as this had not stopped them climbing the socioeconomic ladder in the following decades. Yet he also noted that some, especially DPs who had been older and less skilled as they were resettled resented the way they had been treated and never felt at home in their country of adoption.

Secondly, Heyes did not agree with the non-discrimination of refugees in their country of residence. The provision stood in opposition to the compulsory two-year work contract for refugees presented in the last section. Thirdly, he rejected the grant of exemption from penalties for refugees entering a country unlawfully, considering that the measure was only relevant to European countries, where refugees would cross territorial borders to escape persecution. In contrast, Australia was surrounded by an ocean and this made such a scenario impossible. Finally, Heyes disagreed with the exemption of refugees from restrictions applied to aliens for matters of national security, as this was considered to limit the department's discretion to deport aliens. Because of these reservations, Australia opposed the organisation of the Conference of Plenipotentiaries discussing the final draft of the Refugee Convention in 1951. As the conference took place, the Menzies government feared diplomatic embarrassment because of its discordant position (Neumann, 2004: 83).[176]

The *travaux preparatoires* to the Refugee Convention (Weis, 1995) show that the Australian representative defended Heyes's position during the Conference of Plenipotentiaries. The Australian representative rejected preferential treatment for refugees compared to other foreigners as regards to emission of identity and travel documents,[177] and opposed exemptions from exceptional national security measures[178], expulsion[179] and non-discrimination as regards to the right to work.[180] Further reservations were made in regards to governmental cooperation with UN institutions monitoring the implementation of the Convention.[181] As the *travaux preparatoires* and Noiriel (2006: 144-147) reveal, the stance of the Menzies government was congruent with the position of the French and the US governments as regards the rejection of a broad refugee definition, and with the British position on the rejection of refugee-specific exemptions. It could thus be argued that the alignment of Australian demands with the restrictive demands of more influential states resulted in the integration of these restrictive demands in the Convention.

[176] See the list of participants to the *ad hoc* committee and the Conference of Plenipotentiaries in footnotes 39 and 40

[177] Article 28, UNHCR/Weis (1995: 247-249; 254).

[178] Articles 8 and 9, ibid: 67-68.

[179] Article 32, ibid: 305; 316.

[180] Articles 2, 3 and 17; ibid: 37; 40; 144.

[181] Article 35, ibid: 357.

In contrast with the US, which never ratified the 1951 Refugee Convention, the Menzies government ratified the treaty in 1954; the Convention was thus not considered incompatible with domestic priorities.[182] The timing of treaty ratification, as well as Australia's legal structure limited the treaty's impact. On the one hand, the large-scale resettlement of European DPs had by 1951 become a trickle, thus limiting the need to consider the practical implications of the treaty.[183] On the other hand, as in the British case, the Convention, as an international treaty did not become legally binding before it was incorporated in domestic legislation, and the first, fleeing reference to Australia's international obligation towards refugee in immigration legislation would not be made before 1981.[184]

6.3.3 Admission of Hungarian and Czech refugees: Influence of the Refugee Convention?

Australia's involvement in the resettlement of Hungarian refugees fleeing the Soviet repression of the Budapest uprising was very similar to the involvement of Britain. Three days after the UNHCR and Austria, the county to which the refugees fled, had appealed for the assistance of the international community, Prime Minister Robert Menzies announced that Australia would admit 3,000 Hungarian refugees in 1956-57. This target was increased to 10,000 within weeks and further expanded over the following months (York 2003). Admission criteria were less selective than had been the case for post-war DPs. On 8 November 1956, Immigration Minister Townley stressed the need for 'an immediate and positive contribution towards helping these unfortunate victims of aggression.' Townley argued that humanitarian as well as labour market considerations would play a role in resettlement, a stance that contrasted with Calwell's straightforward utilitarianism in the case of the post-war DPs.[185] In contrast to the latter, the Hungarian refugees were not hosted in camps and were not required to enter compulsory work contracts. The resettlement operation

[182] The ratification included a reservation on Article 32 prohibiting the expulsion of refugees legally residing on the territory of state parties (Neumann, 2004: 85).

[183] Between 1951/1952 and 1954/1955, Australia resettled hundreds to a few thousand refugees per annum, a large decreased compared to resettlement since 1947 (RCOA, undated).

[184] See section 6.4.3.5.

[185] Athol Townley, House of Representatives Debates, 8 November 1956, col.2142.

was barely mentioned in parliamentary debates after November 1956, indicating that the issue did not raise political contentions.

One could argue that Australia's ratification of the Refugee Convention had an impact on the organisation of the resettlement of the Hungarian refugees. Selection criteria were more humanitarian than had been the case of the post-war DPs. The operation respected the principle of non-discriminatory access to the labour market, which had been one of Australia's main points of contention over the draft Convention. In addition, the refugees were portrayed in the political and public sphere as victims of political persecution, a representation in line with the Convention's refugee definition.

Yet this does not mean that the Australian authorities considered the Convention to be legally binding. Other factors had a more direct impact on the evolution of resettlement between the late 1940s and the mid-1950s. As mentioned in the British case study, the mere size of the refugee outflow from Hungary to Austria meant that a stringent selection procedure was even more difficult to implement than had been the case in post-war refugee camps. Further, Australia's demonstration of solidarity towards the Hungarians was congruent with a low point in the bilateral relations between Australia and the Soviet Union, which was unrelated to the Budapest uprising. In 1954, Moscow had severed its diplomatic relations with Canberra following the 'Petrov Affair'.[186] Finally, at the domestic level, the Hungarian refugees were met with more sympathy and less wariness that the DPs had been. The Department of Immigration had learned that accommodating refugees in camps and restricting initial choice on the labour market had been detrimental rather than beneficial to the DPs' social and economic integration in the short-term (Kunz, 1988: 194-196). Finally, the arrival of Eastern Europeans was no longer the challenging novelty it had been for Australians in the late 1940s.

The role of the Refugee Convention was equally limited in the case of Eastern European athletes requesting political asylum during the 1956 Melbourne Olympic Games, which took place only a few weeks after the Soviet intervention in Hungary. The government was

[186] The defection of Vladimir Petrov, an employee of the Soviet Embassy in Canberra who had been recruited as a spy for the Australian secret services, was highly publicised by the Menzies government a few weeks before the 1954 federal election. Soviet agents attempted to forcibly return his wife, whom Petrov had not informed of his spying activities, back to Russia. The picture of a distressed Petrova forced to board a Soviet plane in Sydney became an iconic image of the Cold War in Australia, yet Petrova was removed from the plane in Darwin and was granted refugee status in Australia and alongside her husband granted defector status (Neumann, 2004: 52-53). Opposition leader H.V. Evatt denounced the exploitation of the affair as an electoral asset by Menzies, although poll figures revealed that support for Menzies' Liberal/Country coalition was on the rise prior to the incident (Manne, 2002).

expecting a number of demands for political asylum by Eastern European delegations and set up an interdepartmental committee tasked with the examination of the claims. Minister of External Affairs officials presented the grant of asylum as a prerogative of the Australian state, not a requirement of international law. Eventually, less than twenty members of the Soviet and Eastern European delegations were granted permanent residence in Australia, not 'political asylum' as this category was since the 'Petrov Affair' reserved to individuals with 'intelligence value' (Neumann, 2004: 56-59).

The resettlement of Czechoslovakian refugees fleeing the Soviet invasion in 1968 featured many similarities with the resettlement of the Hungarians, although outflow from Czechoslovakia was not as sudden, so that the resettlement operation was not characterised by a comparable sense of urgency. At the time of the invasion, more than 80,000 Czechoslovaks were abroad in Australia and other Western countries, and the latter extended the visa conditions of Czechoslovakian visitors or relaxed permanent immigration criteria (Loescher, 2001: 178). Between 1968 and 1970, 5,536 Czechoslovakian refugees were admitted for permanent residence in Australia (ibid: 158). The existing Czech-Australian community actively advocated the permanent admission of Czechoslovaks unwilling to return to their country of origin, and offered to assist the Department of Immigration in its integration efforts (Cigler, 1986: 156-160). Similarly to the Hungarians, most Czechoslovak refugees were skilled professionals. This further facilitated their economic and social integration (Loescher, 2001: 178; Cigler, 1986: 165).

Section 6.3 has shown that between the late 1940s and the late 1960s, the stated objectives of refugee admission—that is, mostly, refugee resettlement—evolved significantly. The translation of evolving policy objectives into accepted policy outcomes was facilitated by the absence of political conflict over these objectives and by discretionary admission practices, which did not require formal amendment when policy objectives evolved, as statutory legislation would have. This evolution was a response to the transformation of the international environment and of domestic political priorities. It was also informed by implementation difficulties encountered in earlier resettlement operations, as the comparison between the resettlement of the DPs and the Hungarians has illustrated. The Menzies government defended the flexibility of discretionary admission practices during the negotiation of the Refugee Convention and its approach found its way into the treaty insofar as key articles related to refugee admission allowed for a wide margin of interpretation. It has been argued that the alignment of Australia's position on that of geopolitically more relevant

countries, especially Britain in this case, had contributed to such outcomes. Yet the primacy of administrative discretion was even greater in Australia than in post-war British refugee admission policies towards European refugees discussed in Chapter 3. In the case of refugee resettlement, this can be attributed to the dominance in the policy field of the Department of Immigration. No comparable, self-contained entity regulating immigration existed in Britain, where immigration was not a national priority, as was the case in Australia. The Department of Immigration appeared autonomous from the policy demands of other actors keen to influence policy objectives and had greater control over the information reaching the Australian public over policy practices (which is not to say that it was insensitive to public opinion). In the case of asylum (and of the drafting of the Refugee Convention), other bureaucracies, especially the Department of External Affairs, appeared at least as significant as the Department of Immigration. Yet the influence of discretionary practices was still more significant than in Britain, as individuals applying for political asylum in Australia had no access to a formal right of appeal, a procedure introduced in Britain in the late 1960s for immigrants and asylum-seekers who had earlier entered the country legally and claimed against a refusal to extent their stay. The next section investigates if the regulatory flexibility and autonomy allowed by the discretion-based admission of European refugees also apply to the admission of non-European refugees.

6.4 Admission of non-European refugees

Section 6.4 compares policies elaborated in response to the failed removal of wartime refugees in 1949; to the demands for humanitarian protection by West Papuan refugees in the 1960s, and to the Indo-Chinese refugee crisis between 1975 and 1983. It shows that each of these episodes involved discretion-based institutional innovations that would prove momentous in later years. Australia's response to the Indo-Chinese refugee crisis is dealt with in most detail, as it allows an assessment of the factors leading to the creation of the country's humanitarian program based on a permanent refugee resettlement intake.

6.4.1 Failed removal of wartime Asian refugees and expansion of administrative discretion

As mentioned in section 6.3.1, political and public openness to post-war European refugee resettlement did not extend to Jewish refugees, whose admission had been restricted through confidential quota agreements with shipping and aircraft companies. Less confidential was Arthur Calwell's decision to ensure the departure of Asian refugees temporarily resettled in Australia during the Second World War. During the war, 6,000 Chinese refugees had been granted certificates of exemption from the dictation test in European language. These exemptions officially allowed the refugees to stay in Australia regardless of the White Australia policy. 800 of these wartime refugees were still living in Australia in 1949 (King, 2005: 48). No mechanism was foreseen in the Immigration Restrictions Act 1901 to terminate certificates of exemptions and expel the wartime refugees. To overcome what he considered an intolerable regulatory loophole, Immigration Minister Calwell tabled in 1949 the Wartime Refugees Removal Bill in parliament. The bill amended the Immigration Restrictions Act to provide a statutory basis for the deportation of the Asian refugees. Support of the legislation by a Labor parliamentary majority was secured within two weeks. The wartime refugees were arrested and detained pending deportation. Several challenged the legality of the Wartime Refugees Removal Act 1949 at the High Court, arguing that the Act was overstepping the constitutional prerogatives of parliament. Yet the court upheld the validity of the Act (Palfreeman, 1967: 103). The Liberal opposition, led by Robert Menzies, as well as the media, attacked the 'inhumanity' of Calwell's restrictiveness, arguing that the wartime refugees were socially and economically well-integrated.[187]

The Liberals, who won the December 1949 federal election, never implemented the Wartime Refugees Removal Act.[188] Yet the contentions which had led to its adoption, alongside the controversial removal of non-European settlers married to Europeans constituted a catalyst for legislative reform and for the eventual replacement of the Immigration Restrictions Act 1901 by legislation that increased the discretionary power of the immigration bureaucracy over the admission and settlement of non-citizens. A decade after the wartime refugees controversies, the Commonwealth Parliament adopted the Migration Act 1958. The Act abolished the

[187] King (2005) argues that the wartime refugees also fought to stay in Australia because they had little to return to, as their livelihood had been destroyed during the war.

[188] Wartime refugees with 'good record' were allowed to stay in Australia. However, the legislation was not repealed by the Menzies government and remained on the statute books (Palfreeman, 1967: 20-22).

dictation test and related certificates of exemption from the test, and therefore increased the discretion of immigration officers to admit or refuse entry. Section 6(1) and 6(2) codifying entry read as follows:

> (1) An immigrant who, not being the holder of an entry permit that is in force, enters Australia thereupon becomes a prohibited immigrant.
>
> (2) An officer may, in accordance with this section and at the request or with the consent of an immigrant, grant to the immigrant an entry permit. (Quoted in Palfreeman, 1967: 108-109)

Sections 6(1) and 6(2) constituted the sole statutory basis for the regulation of immigration until 1981. Immigrant admission was however regulated through other instruments, such as bilateral agreements with European countries of origin of immigrants (Hawkins, 1991: 35). In the context of such agreements, immigration officers had significant leeway in the interpretation of 'prohibited immigrants' as defined in section 6(1) of the Migration Act 1958, and this allowed the gradual acceptance of immigration from a greater range of European countries, which eventually included Greece and Turkey, a far cry from what Calwell had considered 'suitable' European settlers in the late 1940s (Palfreeman, 1967: 122-123).

Conflicts over the permanent admission of non-European refugees had thus fuelled the overall expansion of discretionary practices of entry control. This eventually facilitated the gradual demise of the White Australia policy, a development doubtlessly unforeseen as the Migration Act 1958 was adopted. As Sections 6.4.2 and 6.4.3 will show, Australia's involvement in the resolution of refugee crises in its region led to other significant regulatory innovations before and after the official demise of the White Australia policy.

6.4.2 West Papuan refugees: Foreign policy concerns and reluctance to grant protection

Since the end of World War I, Australia had under various statuses administered the Territory of Papua and New Guinea.[189] In 1962, the control of the West Papuan province, which

[189] Whereas former German New Guinea became a territory administered by Australia under a League of Nations mandate from 1920 until Japanese occupation in 1941, Papua became an external territory of the Australian Commonwealth. After the war, New Guinea and Papua were united as the Territory of Papua and New Guinea placed under the trusteeship of the United Nations.

bordered Papua and New Guinea, was transferred from the Netherlands to Indonesia. Anticipating the province's self-governance, the Dutch authorities had supported the development of local West Papuan elites, yet Indonesia's Sukarno government had no intention of granting the province administrative autonomy. The Australian authorities dreaded a potential influx of independence-seeking West Papuans into Papua and New Guinea, as this movement of population had the potential to jeopardise bilateral relations with Indonesia; to undermine the stability of a future self-governing Papua New Guinea; and to attract critical public scrutiny at the domestic level. The latter was in particular related to the sympathy shown for the West Papuans by former soldiers of Australia's Papuan battalions during the Second World War who had fought the Japanese military alongside Papua's local population (Neumann, 2004: 72-74).

The Menzies government attempted to restrict the settlement of West Papuans in Papua to a few hundred individuals who had been demonstrably politically active and were considered clearly in danger of persecution by the Indonesian authorities. It also objected to the involvement of the UNHCR in the matter (Neumann, 2006). Hundreds of West Papuans deemed 'non-political' were returned to Indonesia. However, the border between West Papua and the Territory of Papua and New Guinea crossed a thick rainforest, and the locals had better knowledge of this forest than the enforcers; this made it difficult to ensure that all 'non-political' West Papuans were effectively returned.

Even more concerning for the Australian government was the arrival by boat of a small group of West Papuans claiming political asylum to the Australian Torres Strait Islands in 1969. Keen to avoid publicity on the issue, the Department of Immigration attempted to convince the arrivals that their asylum claims would be processed by the Australian authorities if they returned to Papua and New Guinea. The West Papuans agreed to return to Papua; yet instead of being granted asylum there, they were eventually returned to their province of origin (Neumann, 2004: 78).[190]

Australia's treatment of Papuan refugees in the 1960s resulted from conflicts between the White Australia policy's ideological objectives and the diversification of domestic public opinion and foreign policy concerns towards its immediate region. The response to West

[190] According to Neumann (2004: 91) the situation in Papua New Guinea also contributed to the delay of the ratification by Australia of the 1967 Protocol to the Refugee Convention removing the geographical and temporal limitations of the treaty, which the country only ratified in December 1973, almost simultaneously with Papua's access to self-government.

Papuans sailing to Australia eerily reminds of policies adopted decades later to prevent asylum-seekers the processing of asylum claims on Australian territory, most notably the Pacific Solution. West Papuan forced migration would remain a delicate issue in Australia's refugee admission policies until the mid-2000s, as will be further investigated in chapter 8.

Australia's policy response to the West Papuans was the last significant episode in the history of refugee admission to occur before the demise of the White Australia policy. Section 6.4.3 focuses on the first major episode of refugee admission to occur in the aftermath of this demise: Australia's response to the Indo-Chinese refugee crisis.

6.4.3 Australia's response to the Indo-Chinese refugee crisis: From resettlement reluctance to the creation of Australia's humanitarian program

In contemporary discussions of Australia's refugee policy, the country's response to the Indo-Chinese refugee crisis is often presented as an unprecedented humanitarian effort enabled by Malvolm Fraser's brinkmanship. The former Prime Minister is credited with the ability to have overcome adverse circumstances, such as the very recent ending of the White Australia policy, a reluctant public opinion, and a period of slow economic growth detrimental to an expansion of immigration so as to enable a generous response to the plight of the refugees.[191] In line with scholars such as Viviani (1984) and Suhrke (1998), the following will nuance this view by showing that Fraser's leadership was as much institutional as it was political, and that it benefited from a comparatively favourable domestic and international policy environment. These favourable circumstances contribute to the explanation of why refugee resettlement became an institutionalised, legitimate alternative to the provision of humanitarian protection in Australia, whereas this was not the case in Britain. Australia's response to the Indo-Chinese refugee crisis however began under the Whitlam government, and this hesitant start is discussed in section 6.4.3.1.

[191] This view was for instance adopted in the praised SBS documentary *Immigration Nation* retracing the history of Australia's immigration policy (for an analysis of the documentary see Garnier and Kretzschmar, 2011).

6.4.3.1 End of the White Australia policy and 'non-intervention' in Vietnam

From the late 1960s, successive opinion polls revealed a shift in Australian public opinion on immigrant admission. Whereas a majority had hitherto been hostile to the permanent settlement of non-Europeans, an increasing amount of respondents supported the admission of an increasingly large intake of non-Europeans (Goot, 1984: 51; 53). The trend reached a peak under Gough Whitlam's Prime Ministership (Labor, December 1972-November 1975).

The gradual shift of public opinion constituted an auspicious context to the end of the White Australia policy. The first institutional step of the process was made in 1966 as the Holt government (Liberal/Country Coalition) allowed the permanent settlement of selected non-Europeans. The decision of the Whitlam government in early 1973 to grant access to Australian citizenship to all individuals who had lived in the country for at least three years was the last step of this process.[192] Significantly, the official ending of the White Australia policy was congruent with a significant reduction of the county's annual immigration intake, which declined from almost 133,000 in 1972-73 to less than 90,000 in 1974-75 and less than 53,000 in 1975-76 (RCOA, undated) in a context of increasing unemployment (Jupp, 2007: 37).

Both the demise of the White Australia policy and the unprecedented decline of the immigration intake were fundamental challenges to the *modus operandi* of the Department of Immigration. Considered by Whitlam to be unable to cope with dramatic change, the department was abolished in 1974 and its functions redistributed to various departments, from Foreign Affairs to the Department of Labour (Bruer and Power, 1993: 111-112). Yet if Whitlam's act of 'creative destruction' was in part motivated by the will to allow for the emergence of new ideas on immigration policy in a new institutional setting, this did not mean that he advocated the massive arrival of Indo-Chinese refugees as the crisis in Vietnam started to unfold in 1975. Whitlam's reluctance to admit Indo-Chinese refugees reflected geopolitical and electoral considerations. The Labor government observed a policy of neutrality, not of opposition, towards the North Vietnamese government, and Whitlam considered that Southern Vietnamese fleeing the country after the fall of Saigon in 1975 were staunch anti-communists who may offer support to the Liberal/National Coalition rather than

[192] On the gradual demise of the White Australia policy see Palfreeman (1967), Harris (1993), Dutton (2002), Richard (2007: 234-260).

the Labor Party.[193] Thus, the Australian Prime Minister, in contrast to the Nixon administration, did not support a significant engagement of Australia in the resettlement of Southern Vietnamese refugees after the fall of Saigon in April 1975.

Whitlam's position was criticised by the Liberal/Country Party opposition led by Malcolm Fraser, which controlled the Senate from 1974, and by the Department of Foreign Affairs. It also divided the media, sections of the Australian public, and members of the Labor Party (Viviani, 1984: 60-61).[194] To increase his policy autonomy, Whitlam created a specific taskforce on Indo-Chinese refugees headed by his private secretary Michael Delaney (Viviani, 1984: 293). Between April and August 1975, just over 1,000 Indo-Chinese refugees with relatives in Australia were allowed to settle in Australia, whereas the US had by the end of April 1975 evacuated 131,000 refugees (Viviani, 1984: 43; 64). Ironically, the scale of the US resettlement effort constituted a favourable environment to Whitlam's reluctance to resettle Indo-Chinese refuges. In late 1975, refugee outflows declined, so that the issue of an increase in Australia's resettlement efforts became a less pressing issue.

6.4.3.2 Shifting dynamics of institutional innovation

Whitlam's Prime Ministership ended with his highly controversial dismissal by Governor-General John Kerr. Whitlam would be remembered for his commitment to a more multicultural, humanist and internationalist Australia; this commitment is obvious in the ratification of numerous international treaties under his Prime Ministership (Kirby, 2010), if not in his policy towards Indo-Chinese refugees. It can be argued that Fraser shared many of Whitlam's aspirations, as he built on the ratification of aforementioned treaties to entrench these aspirations at the core of Australia's institutions. Furthermore, Fraser was less opposed to the resettlement of Indo-Chinese refugees. The following paragraphs show that this openness was related to many factors.

As he came to power, Fraser re-established the Department of Immigration as the Department of Immigration and Ethnic Affairs (DIEA) (Jupp, 2007: 38; Bruer and Power, 1993: 116). The

[193] See for instance Whitlam's answers to repeated questions by Coalition MPs on the government's course of action of Vietnam in House of Representative debates, 8 April 1975, and more broadly SSCFAD (1976: 31-32).

[194] A poll conducted in May 1975 revealed that a narrow majority (54%) of the surveyed persons considered that Vietnamese refugees should be allowed to come to Australia (Viviani, 1984: 63).

DIEA again took charge of refugee policy in consultation with the Department of Foreign Affairs, whilst general policy objectives were defined at Cabinet level. The re-creation of a dedicated immigration bureaucracy restored 'lines of communications for interest groups in the community' which had been disrupted by the abolition of the department (Viviani, 1984: 66). The first significant institutional transformation to occur was the entrenchment of multiculturalism within the objectives and structure of the department. In addition, specialised organisations pursuing a multicultural agenda, such as the Australian Institute of Multicultural Affairs were established (Jupp, 2007: 82-88; Hawkins, 1991: 119-122). The commissioning of a review of functions and operations of the department would prove rich of institutional consequences in the longer term; the review findings are discussed in the next chapter.

Beyond the field of immigration, the Fraser government aimed to increase the accountability of the public service through 'new administrative law' and accompanying institutions (Bruer and Power, 1993: 115). The latter are worth mentioning, as they would prove, after a few years, to have a tremendous impact on immigration and refugee policy, as will be shown in Chapter 7. This reformism encompassed the establishment of the Administrative Appeals Tribunal (AAT) (1975), the Federal Court (1976), the Commonwealth Ombudsman (1976), the Administrative Review Council (ARC) (1976) and the Human Rights Commission (HRC) (1981). The Administrative Decisions and Judicial Review Act 1977, which became operational in 1980, simplified judicial review to both the Federal and the High Court, and the Freedom of Information Act 1982 facilitated access by members of the public to their individual administrative files. Whereas access to administrative review by the AAT was limited to Australian citizens and permanent residents, all other administrative review and judicial review avenues were open to temporary entrants.[195] Until the reforms, the only avenue of contestation open to individuals disagreeing with decisions taken by immigration officials was to appeal to the discretionary intervention of the Immigration Minister. Demands for ministerial intervention had tremendously increased over time, to reach 15,000 in 1977-78 (Hawkins, 1991: 122).

Fraser's reformist impetus had two important consequences for specific innovations in the field of refugee admission. Firstly, the return of refugee policy to the redesigned Department of Immigration meant the restoration of a more consultative approach to agenda-setting and policy-making. Secondly, the introduction of accountability standards over administrative

[195] In accordance with the principles of judicial review, the Federal Court and the High Court do not assess the merits of the case but the procedural correctness of the decision.

decisions introduced a layer of institutional complexity into the decision-making process which would prove, after a few years, institutionally and politically difficult to manage.

Sections 6.4.3.3 to 6.4.3.5 investigate more specifically Australia's response to the Indo-Chinese refugee crisis under the Fraser government.

6.4.3.3 Australia's first boat people[196] and the ambivalent formalisation of the country's humanitarian program

Forced departure from Vietnam, which had significantly decreased in the second half of 1975, started to increase again in 1976. More forced departures from Vietnam meant more arrivals to first countries of asylum in South-East Asia, especially in Thailand and Malaysia, whose governments were increasingly reluctant to host more arrivals.[197] In this context, the first Vietnamese 'boat people' landed on Australian shores in April 1976. Further boats followed over the next months (DIEA, 1977: 5-6). As the first Indo-Chinese arrived, no formal refugee status determination mechanism was in place in Australia. The *ad hoc* committee created to assess the asylum claims of Eastern European athletes during the Melbourne Olympics, mentioned in Section 6.3.3, had long disappeared. Instead of establishing a new assessment mechanism to process the arrivals, the boat people were simply granted permanent residence.

The continuing arrival of boats to Australia's shores became a polarising issue in domestic debates by late 1976, while countries in the region and the UNHCR repeatedly urged the Australian government to become more involved in the resolution of the refugee crisis. The Senate Standing Committee on Foreign Affairs and Defence released a highly critical report on the response of the Whitlam government to the Indo-Chinese refugee crisis in December 1976. The report attacked the reluctance of the Labor government to respond to the crisis; the lack of considerations for differences between refugees and immigrants in resettlement planning; the disregard by the immigration bureaucracy—which at the time had been deprived

[196] The Indo-Chinese refugees were of course not Australia's first 'boat people' if one interprets this term literally. The country being an island for thousands of years, it has been discovered and rediscovered by people arriving by boat, and this long before the momentous arrival of the first European boat people in 1788. Yet the term, not only in Australia but also at the international level became widely used in the context of the Indo-Chinese refugee crisis, and is used in this sense throughout the case study.

[197] See the evolution of arrival in first countries of asylum in South-East Asia in Viviani (1984: 39; 41; 44) and UNHCR (2000: 98).

of its department—for the Vietnamese large family structure;[198] and the lack of institutional preparedness to the arrival of Indo-Chinese refugees in spite of a need for assistance as most had only a limited knowledge of the English language, a limited level of formal education and more broadly no experience with Western society (SSCFAD, 1976).

Immigration Minister Michael MacKellar addressed these concerns in a major parliamentary statement defining Australia's humanitarian policy on 24 May 1977.[199] MacKellar presented the formalisation of Australia's refugee policy as reflecting international obligations and respecting the primacy of governmental discretion in the admission of individual refugees. The Immigration Minister insisted on the government's preference for skilled refugees as well as refugees with family members already living in Australia. This did not mean that the MacLKellar advocated insulation in policy-making. On the contrary, he announced a consultative approach to policy formulation and implementation, including stronger relations with the UNHCR, the ICEM and domestic voluntary agencies involved in refugee settlement. The Immigration Minister also announced the creation of an interdepartmental committee assessing the asylum claims of 'people such as those who enter Australia illegally - for example, deserting seamen - or who become prohibited immigrants - for example, by the expiry of temporary permits'.[200] The UNHCR was to be associated with the deliberations of this committee. As Viviani (1984: 72-73) argues, regardless of the establishment of a humanitarian stream as a distinct component of Australia's immigration program, MacKellar's statement 'raised more questions than it answered'. The Immigration Minister did not make any specific commitment to the level and composition of future refugee intakes and did not specify the criteria of reference to assess Australia's resettlement capacity.

This uncertainty may have encouraged South-Eastern Asian countries to re-direct the continuing flow of boat arrivals to further shores, which in turn resulted in an increase in boat arrivals in Australia. Whereas 204 Indo-Chinese boat people landed on Australian shores between July 1976 and June 1977, 1,437 arrived between July 1977 and June 1978 (DIEA, 1977: 15; DIEA 1978: 6). Labor MPs repeatedly accused the government of favouritism

[198] This disregard had led to which led to the separation of many Indo-Chinese families, as family reunion measures were based on a nuclear conception of the family.

[199] Michael MacKellar, House of Representatives Debates, 24 May 1977, pp.1714-1716.

[200] Michael MacKellar, House of Representatives Debates, 24 May 1977, p.1715.

towards refugees from Vietnam as opposed to Latin American refugees.[201] Policy change followed the electoral victory of the Coalition in December 1977, as individual Coalition MPs started to label the boat people as 'queue-jumpers'.[202] The government repeatedly stressed that boat people were not illegal immigrants.[203] A committee assessing asylum claims, the interdepartmental Determination of Refugee Status committee (DORS) was established in March 1978. Decision-making in DORS was entirely controlled by the immigration bureaucracy, although the UNHCR had a consultative function. There was no right of appeal against a DORS decision, yet the committee could re-assess individual asylum claims in the light of additional information not available at the time of the claim (see DIEA, 1978: 6; Hawkins, 1991: 190-191).[204] An *ad hoc* increase in Australia's resettlement quota by 2,000 additional places for refugees from Thai and Malaysian camps was also announced (Viviani, 1984: 80).

These efforts barely affected the continuing outflow of refugees from Vietnam, which dramatically increased from mid-1978. Increased repression against the Chinese minority in Vietnam and Vietnam's invasion of Khmer rouge-led Kampuchea in December 1978 led to a quadrupling of the monthly refugee outflow. 232,400 boat people, predominantly ethnic

[201] See for instance Labor's answer to MacKellar's policy statement MP Uruquart Innes, House of Representatives Debates, 24 May 1977, p. 1716; Labor Senator Tony Mulvihill, Senate Debates, 24 May 1977, 1265-1266.

[202] See for instance the intervention of National MP Tom McVeigh, House of Representative Debates, 14 March 1978, p. 691: 'I wish to make my position crystal clear as regards those whom we term the boat refugees from Vietnam. I believe we have reached an intolerable situation when 29 boat loads of people, numbering 1,097 in all, can in effect jump the queue and come to Australia in preference to people who have to go through the formalities and wait for entry to Australia. We must have another look at the situation. (…).' McVeigh's criticism went beyond the refugee issue: he was also opposed to an expansion of the immigration intake to Australia, especially if this immigration was non British: 'Suffice it to say, there is no way in the world that the Australian population will reach the 20 million mark by the turn of the century.'

[203] '[L]et me make one thing absolutely clear: The people who have made trips to Australia in small boats are not illegal immigrants. They have made unauthorised trips to Australia but as soon as they arrive they are processed in the normal way and are given valid entry permits, so they are not illegal immigrants. There is a real distinction between those unauthorised arrivals and people within the community who do not hold valid entry permits', Michael MacKellar, House of Representatives Debate, 26 May 1978, p. 2591. DIEA's annual report for 1977/1978 (DIEA, 1978: 28) was equally assertive, although it acknowledged the challenge posed by the arrivals: 'The "boatpeople" have captured headlines, yet the total of unauthorised arrivals of less than 1650 people in 45 boats since 1975 represents only about one-fortieth of the people who are illegally in Australia (…) The boat people are not illegal entrants. True, persons proposing to enter Australia are required to secure a visa overseas (…) The boat people do not have visas. But on arrival they are interviewed and assessed, and their health is checked. They are usually given qualified entry permits for temporary residence while their claims for permanent residence are assessed in detail. If a person on a boat proves not to be a refugee, he or she may be deported. This has happened on one instance. The arrival of these small boats is nonetheless of enormous concern to the Department. There is no denying that in its implication the unscheduled, uninvited boats challenge the adequacy of the Migration Act and the resources available to police it.'

[204] 563 individuals seeking protection were granted refugee status and permanent residence through DORS until June 1979 (DIEA, 1979: 14)

Chinese, landed in Singapore, Malaysia, Indonesia, the Philippines, Thailand, and Hong Kong between mid-1978 and 1979 (Viviani, 1984: 80). This did not lead to a shift of the Australian publics' attitude towards boat people. In June 1978, a poll revealed that 57% of respondents would not allow boat people arriving on Australian shores to stay in the country (Viviani, 1984: 84).

This constellation of international and domestic pressure constituted incentives for the Fraser government to promote cooperative protection arrangements at the international level that would convince first countries of asylum in South-East Asia not to tow back boats at sea, thus decreasing the likeliness of boat arrival to Australia.

6.4.3.4 Geopolitics of burden-sharing and institutional entrenchment of refugee resettlement

The Fraser government engaged in bilateral arrangements with first countries of asylum before a further increase in Indo-Chinese arrival in South-East Asia led to more comprehensive and multilateral agreements. In July 1978, with US diplomatic support, Australia reached a 'boat-holding' arrangement with Indonesia. The Sukarno government accepted hosting more boat people; in return, Australia promised to increase its resettlement intake to 9,000 in 1978-79.[205] The Fraser government also requested the UNHCR increase its involvement in the processing of boat people arriving to first countries of asylum and bound to be resettled in third countries (DIEA, 1978: 28). Australia's boat-holding agreement was arguably successful, as boat people arrival to Australia declined to 351 between July 1978 and June 1979 (DIEA, 1979: 13).[206] Yet unprecedented boat arrival to South-East Asia in April-

[205] According to a former selection officer in Malaysia, Australian immigration staff used less official methods than the boat-holding arrangement with Indonesia to prevent the departure of boat people to Australia: 'I was sent off to Malaysia with virtually my terms of reference to stop these boats coming to Australia. (…) If a boat was unseaworthy the Malaysians were very sympathetic and they'd allow them to land and go to a camp but if the boat was seaworthy, they'd say, "On your way. We've got enough." Some of our fellows would take the police inspector or the sergeant of policy away and divert his attention and a couple of hours later the boat has sunk. How did it sink? Well, we knew how it'd sunk because boys had pulled the plug out or bore a hole in it but it left the Malaysian authorities scratching their heads on many occasions as how these boats had suddenly sunk. I hate to think how the Malaysian authorities would have reacted if they had known.' (Then selection officer Greg Humphries, quoted in Martin, 1988: 107)

[206] Additionally, on the suspicion that the Vietnamese was encouraging the departure of individuals it considered undesirable, Australia suspended its development aid to Vietnam in January 1979, for the first time using 'aid as a foreign policy lever' (Viviani, 1984: 90).

May 1979 led to a joint warning by ASEAN countries Indonesia, Malaysia, the Philippines, Singapore, and Thailand that their hospitality to boat people was about to come to an end (UNHCR, 2000: 83-83). This prompted the organisation of multilateral meetings in Geneva aiming to better coordinate international protection efforts and to collectively increase pressure on the Vietnamese to restrain from forcing people to leave the country by boat.

Vietnam's commitment to stop forcing departures was obtained at a major international conference on Indo-Chinese refugees in Geneva in July 1979. The US, Australia, Britain and other resettlement countries pledged to accept categories of Vietnamese wishing to leave the country through Orderly Departures Programs. Whereas UN Secretary General Kurt Waldheim praised Vietnam's decision, voluntary agencies as well as churches feared that people may be forced to remain in Vietnam (Viviani, 1984: 106; Stein, 1979: 722-723). In addition, first countries of asylum accepted to temporarily host the refugees on their territory as Western countries pledged to offer 260,000 resettlement places in return. Australia expanded its 1979-1980 resettlement target from 10,500 to 14,000 after having supported France's view that a country's resettlement effort should be measured in terms of *per capita* involvement; Australia was comparatively generous by this standard.[207] Boat arrivals to ASEAN countries and Australia indeed dropped sharply in the following months (Stein, 1979). The UNHCR would continue to be responsible for the processing of boat people arriving to first countries of asylum and bound to be resettled elsewhere.

International burden-sharing efforts constituted a favourable environment for the institutional entrenchment of refugee resettlement in the institutional setting regulating the arrival of refugees to Australia. Whereas Australia's humanitarian program had been set up in 1977 without addressing the issue of intake planning, resettlement was planned annually from the early 1980s. The resettlement program comprised several streams. The largest one was open to refugees meeting the criteria of the Refugee Convention and two smaller streams, the Special Humanitarian Program (SHP) and the individual Special Humanitarian entry (also known as the Global SHP), were open to refugees who did not meet the persecution definition of the Refugee Convention, such as victims of human rights abuses who had yet to leave their countries of origin (York, 2003). SHP and Global SHP resettlement required sponsorship by

[207] 'Australia endorses the French contention that refugees could be resettled in proportion of at least one per 1000 population. By June 1980, Australia will have directly accepted Indochinese refugees in ratio of one to 390 of our population.' Michael MacKellar, Speech to UN conference on Indochinese refugees (MacKellar, 1979: 170).

individuals or voluntary agencies, thus limiting public costs (Price, 1981: 104-105).[208] Intake planning facilitated coordination with voluntary agencies over the post-arrival integration of resettled refugees. Para-governmental institutions were created to advise the Department of Immigration on the composition of the resettlement intake and to monitor Australia's refugee policy, such as the Australian Refugee Advisory Council (York, 2003).[209] Coordination efforts were commended in a report by the Senate Foreign Affairs and Defence Committee evaluating Australia's response to the Indo-Chinese crisis since its 1976 report (SSCFAD, 1982).[210]

By the early 1980s and in the context of an evolving response to the Indo-Chinese refugee crisis, refugee resettlement had become a highly legitimate alternative to asylum. Indo-Chinese refugee resettlement had also been more humanitarian than had been the case of any previous groups of refugees since the Second World War. This evolution had been allowed by relatively favourable domestic and international circumstances. At the domestic level, the ideational and institutional commitment to multiculturalism resulted in a greater acceptance of the diversity of immigrants coming to Australia and of collaborative efforts facilitating socio-economic integration. This meant a more open, but also more planned approach to refugee admission than had previously been the case, and thus a redefinition rather than an abolition of refugee selection. At the international level, the scale, the long-lasting character, and the geopolitical significance of the refugee outflow from Vietnam had constituted a favourable environment for collaboration between Western countries of resettlement, South-East Asian countries of first asylum as well as Vietnam itself. This window of opportunity lasted long enough to establish refugee resettlement as the main mode of refugee admission in the post-White Australia context. However, both domestic and international circumstances remained highly volatile, as Section 6.4.3.5 will show.

[208] See the annual evolution of Australia's resettlement intake by streams between 1977/78 and 2006/07 in appendix 3, table 6 and figure 8.

[209] The Refugee Advisory Council, alongside other advising bodies on immigration policies, was replaced by the Australian Council on Population and Ethnic Affairs in 1981 (York, 2003).

[210] As in 1976, the Coalition had no majority in the Senate, so that the report's satisfaction with Australia's resettlement program appeared consensual amongst parliamentarians. Another indication of the Department of Immigration's responsiveness to earlier criticisms is the reproduction, in the 1983 Senate report, of the reformist demands made by the Senate in 1976 with the Department's extensive and self-critical answers to these demands (see SSCFAD, 1982: 36-54).

6.4.3.5 Refugee resettlement in context

Whereas boat people arrival to Australia's shores came to a standstill in the early 1980s, Australia's resettlement intake since the establishment of the country's humanitarian program reached an all-time record in 1981-82. 21,921 refugees, most of them Indo-Chinese, were resettled in Australia that year.[211] This occurred in a difficult economic climate, in which both the resettlement intake and the general immigration intake attracted increasing public hostility.[212] In this context, the Fraser government became increasingly critical of the refugee selection methods applied by the UNHCR in South-Asian refugee camps. In a major parliamentary statement on refugee policy in March 1982, Immigration Minister Ian Macphee argued that:

> [d]uring my visit last year I reached the conclusion… that a proportion of people now leaving their homelands were doing so to seek a better way of life rather than to escape some form of persecution. In other words their motivation is the same as over one million others who apply annually to migrate to Australia. To accept them as refugees would in effect condone queue-jumping as migrants. In all of this, the Government's primary concern is to maintain the humanitarian focus and integrity of Australia's obligations accepted by our commitment to the United Nations Convention on Refugees. (Ian McPhee, House of Representatives debates, 16 March 1982, p. 991)

In response, the Australia government no longer recognised the refugee processing procedure used by UNHCR staff, and sent Australian immigration staff to South-Asian refugee camps to individually screen refugees requesting resettlement in Australia.

Following Macphee's policy statement, guidelines for the determination and processing of refugees were released in 1982. The guidelines' resettlement priorities were the size and nature of a particular refugee problem; resettlement urgency; validity of the claim for refugee status or consideration within the Special Humanitarian Program; views and policies of the UNHCR, countries of first refuge and other resettlement countries; existence of ethnic communities in Australia likely to facilitate sponsorship and other post-arrival support; and

[211] See appendix 3, table 8.

[212] Price (1981: 107) observes that '[i]t is very largely the unemployment position [of the refugees] which troubles many Australians and from time to time their unease comes through in the media, wall slogans and political debate. Many wish to eliminate the whole refugee program until Australian citizens have more work, and this will unquestionably be an issue at the forthcoming federal election.' For scholarly exchanges at the time on the desirable level of immigration in Australia see the contributions in Birrell et al. (1979).

Australia's regional and other national interests (York, 2003). The reform was followed by a sharp quantitative decrease of Indo-Chinese refugee resettlement, although Vietnamese nationals remained the most significant group of refugees to be resettled in Australia for several years.

Besides the introduction of more stringent selection criteria, the Fraser government increasingly stressed the need to prevent refugee outflows and to facilitate refugee resettlement in countries culturally similar to 'refugee-producing' states. The report of the Senate Foreign Affairs and Defence Committee on Australia's involvement in the Indo-Chinese refugee crisis, mentioned earlier, noted that international law should more accurately reflect this preventive dimension:

> The shortcomings in existing international law relating to refugees are being demonstrated to Australia by the Indochinese problem. It is imperative that Australia continues to participate effectively in international attempts to develop realistic and comprehensive laws to contain and minimise the impact of massive refugee flows. (SSCFAD, 1982: xiii)

In this perspective, Australian representatives at the 1981 UNHCR Executive Committee plenary meeting initiated the concept of temporary refuge as 'the practice whereby refugees are admitted temporarily into a country of first arrival, pending the provision of a durable solution'(DIEA, 1982: 59). According to the Department of Immigration, the UNHCR Executive Committee unanimously endorsed the initiative (ibid.). At the regional level, the government was engaged in negotiations with Vietnam and South-Eastern Asian nations to reduce primary and secondary refugee outflows.[213]

The reforms occurred as Australia was experiencing the increasing 'overstay' by temporary migrants, constituting a regulatory challenge for an immigration bureaucracy focused on entry and exit control at the border, not on after-entry controls (Cronin, 1993: 83-84). The scale of the problem led the government to proceed to two waves of widely publicised amnesties for 'overstayers' in 1976 and 1980 (Hawkins, 1991: 203-204). Access to permanent residence was also restricted through codification in statutory legislation. An amendment adopted in 1980 introduced a new section in the Migration Act (Section 6A) limiting access to permanent residence to the following categories of temporary entrants: family members of Australian citizens; holders of temporary residence permits with work rights; and persons granted

[213] Ian Macphee, House of Representatives debates, 16 March 1982, p. 991

asylum, refugee status or demonstrating 'strong compassionate or humanitarian grounds' to remain in Australia (Birrell, 1992: 26-27). The amendment entered into forced in 1981. It constituted the first ever mention of refuge or asylum in Australian statutory legislation, although it was only relevant to temporary entrants and 'overstayers' willing to stay in Australia. The fact that this definition left much room for interpretation (there was no specification to the meaning of 'strong compassionate or humanitarian grounds' in Section 6(A)) would prove momentous over the following years, as the next chapter will show.

Section 6.4 has shown that similarly to policies towards European refugees, the objectives of admission policies towards non-European refugees varied significantly between 1949 and the early 1980s. Nonetheless, the level of conflicts generated by these policy objectives was higher than towards European refugees. Calwell's attempt to ensure the departure from Australia of wartime refugees of Asian origin in 1949 was motivated by his strict adhesion to the ideology of the White Australia policy. This adhesion was shared by Labor parliamentarians who supported the Wartime Refugee Removal Act, yet was perceived as inflexible and harsh by Menzies' Liberal opposition. Once in power, Menzies never applied the Act. Yet in the early 1960s, the Menzies government restricted as much as possible the grant of asylum to West Papuans. The ideological framework of the White Australia policy still played a role in this restrictiveness, yet concerns over the disruptive role of the issue for bilateral relations between Australia and Indonesia were also relevant. Whitlam's reluctance to resettle Indo-Chinese refugees was motivated by geopolitical and electoral concerns. Different geopolitical concerns as well as humanitarian considerations[214] motivated Fraser's support to refugee resettlement and the involvement of his government in collaborative efforts at the international level to resolve the crisis. The Labor frontbench endorsed this policy course, yet it caused divisions within both the Coalition and Labor. Public opinion also became increasingly hostile to Indo-Chinese arrival to Australia.

In contrast to the British experience towards Commonwealth immigrants, such controversies did not result in the political and public denunciation of alleged policy failure in regards to entry control. It can be argued that this was related, on the one hand, to a favourable international environment insofar as Australia was never faced with the admission of a large group of refugees susceptible to seriously challenging refugee admission objectives. On the other hand, successive governments were able to develop institutional innovations which

[214] Electoral concerns may have also played a role for Fraser's support to the resettlement of Indo-Chinese refugees, yet I found no evidence that this was the case.

increased policy autonomy, especially the expansion of discretionary practices of entry with the eventual adoption of the Migration Act 1958 and the formalisation of a refugee resettlement program in the late 1970s. Innovations that departed from discretionary practices were also established, especially institutions monitoring the accountability of administrative decision-making and the introduction in statutory law of a humanitarian status. These institutions had no practical impact until the end of Fraser's Prime Ministership, yet this would not last.

6.5 Conclusion

In contrast to post-war British refugee admission policies, Australian refugee admission policies between the end of the Second World War and 1980 (the year in which refugee and humanitarian statuses were for the first time mentioned in legislation) involved only one central mechanism of admission: administrative discretion. The mechanism, which was equally central in the admission of immigrants, found its origin in the institutional design adopted to implement the White Australia policy. Geopolitical considerations had constrained Australia to rely on discretionary practices instead of the preferred option, statutory legislation to exclude non-Europeans from permanent settlement to Australia. Far from being a regulatory constraint in practice, dictionary entry control soon allowed successive governments to translate evolving policy objectives into practice towards both European and non-European refugees, during and after the end of the White Australia policy. The regulation of entry was controlled by a contained bureaucracy, the Department of Immigration, except under the Whitlam government as it was temporarily abolished. This abolition allowed for ideological change and bureaucratic openness to multiculturalism, yet it also caused a temporary disruption of the accumulation of knowledge by the immigration bureaucracy. The Fraser government re-established the department, which from the late 1970s operated in the most diversified policy environment of the post-White Australia era. The significance of this diversification for refugee admission policies will be further investigated in the next two chapters.

The analysis conducted in this chapter confirms the argument suggested in the literature that Australia's refugee admission policies, until the country's response to the Indo-Chinese refugee crisis, were able to adapt to an evolving environment and featured a high level of

bureaucratic autonomy. Yet this did not entirely translate into high levels of policy effectiveness and policy legitimacy as defined in this thesis, that is, congruence between stated policy objectives and outcomes, and legitimacy of policy outcomes. On the one hand, in all cases of resettlement but especially that of the DPs and of the Indo-Chinese refugees, practical difficulties and bureaucratic inexperience constrained the selection of the refugees according to the original priorities of the government. This in turn resulted in a redefinition of policy priorities. On the other hand, opinion polls since the end of the Second World War showed that the Australian population was never supportive of the arrival of large groups of refugees. However, bipartisan support ensured the *post hoc* legitimation of these objectives in political discourse. The latter proved effective, or at least remained largely uncontested until the 1970s, as a degradation of the economic climate led to more vocal public hostility to high levels of immigration. Public hostility started to impact on refugee admission policy in the early 1980s, and would remain significant in the following decade, as the next chapter will show.

Can this thesis's hypotheses explaining unintended outcomes in refugee admission policies account for these evolutions of policy legitimacy and effectiveness?

The thesis's first hypothesis on the impact of conflicts in regards to policy formulation on policy legitimacy is only partially confirmed. Regardless of the level of bipartisan disputes, which was temporarily significant towards wartime refugees and Indo-Chinese refugees, the use of discretionary practices to admit refugees was never challenged by the major parties. This speaks against a significant correlation between political conflicts and policy legitimacy. Independent from the evolution of the regulatory framework, a correlation however exists between the level of partisan disputes and legitimacy of policy outcomes. This means that refugee admission policy was, as it was elaborated, considered legitimate by the major parties. Calwell's position on wartime refugees and Whitlam's reluctance to resettle Indo-Chinese refugees constitute two exceptions to this immediate legitimacy. However, this decline of legitimacy did not last, as bipartisanship was restored following institutional innovations compatible with the primacy of administrative discretion. In the case of the wartime refugees, this innovation was the eventual removal of the dictation test and the expansion of administrative discretion; in the case of Indo-Chinese refugees, the formalisation of refugee resettlement enabling the planned arrival of refugees to Australia. There is thus a correlation between low levels of conflict over policy-making and legitimacy of policy outcomes for the major parties. Yet this did not translate in the legitimacy of these outcomes amongst the

Australian population, which remained consistently cautious towards the arrival of large groups of refugees. Hence the hypothesis is only partly confirmed.

The second hypothesis on the correlation between weak enforcement ability and lack of policy effectiveness is, as in the British case, not really relevant for this period. It could be argued that the arrival of Indo-Chinese boat people constituted a minor enforcement challenge triggering a major institutional reform, that is, the formalisation of refugee resettlement. The Fraser government certainly adopted the reform as it was keen to avoid enforcement difficulties in the future, yet it was also keen to avoid immediate public controversies over refugee policy caused by the arrival of a few boat people.

The third hypothesis pointing to a correlation between an increasing complexity of the institutional setting and decreasing policy legitimacy and effectiveness appears as hard to confirm as the first hypothesis. At first sight, it does seem that the extent of discretionary practices of refugee admission, thus a simple institutional setting at least until 1980, indeed ensured a high level of policy legitimacy, at least amongst policy-makers, and facilitated the adjustment of the objectives of refugee admission to both the evolution of the political environment and to policy practice on the ground. However, within the boundaries of administrative discretion, this institutional setting became increasingly complex, as it eventually included the creation of a formal committee assessing asylum claims as well as the formalisation of a refugee resettlement program. In addition, the introduction of a statutory provision on refugee and humanitarian status in the Migration Act in 1980 was in rupture with administrative discretion. These reforms appeared to increase policy legitimacy amongst policy-makers and had no apparent impact on public legitimacy, and these findings are not congruent with the explanatory hypothesis.

The next two chapters investigates how this explanatory configuration evolves as Australia was faced with its limited rise of asylum claims, first under the Hawke and Keating governments, then under the Howard government.

7 Refugee admission under the Hawke and Keating governments: Whom to select and how?

7.1 Introduction

The previous chapter argued that this thesis's explanatory hypotheses had a limited value in regards to the development of Australia's refugee admission policies between the Second World War and the end of Malcolm Fraser's Prime Ministership, although it was shown that policy effectiveness and legitimacy were far from absolute during this period. The second chapter of the Australian case study investigates the evolution of this explanatory configuration in the context of refugee admission policies under the Labor governments of Bob Hawke (1983-1991) and Paul Keating (1990-1996). The second chapter of the Australian case study investigates Australian refugee admission policies under the Labor governments of Bob Hawke (1983-1991) and Paul Keating (1991-1996). Australia's immigration policy during this period is often referred to as controversial, problematic, or in a 'state of crisis'. The discrepancy between the increasingly diverse socioeconomic and ethnic composition of the immigration intake on the one hand, and increasing public hostility to this composition, especially the level of Asian immigration on the other hand, constitutes one side of this purported crisis. The other side of the crisis is the complex and incremental transformation, between 1989 and 1994, of the regulation of immigration control from a discretion-based to a legislation-based model (Hardcastle and Parkin, 1990: 315; Birrell, 1992: 23; Cronin, 1993: 91-96; Crock, 1996: 280). Refugee admission policy was a core area of the 'crisis'. Firstly, the era experienced an increasingly contentious expansion of the grant of asylum and asylum-like status. Secondly, boat people arrival, which had stalled since 1982, resumed in 1989 and was again accompanied with intense political and public controversies.[215] In contrast to the late 1970s and early 1980s, refugee resettlement was not correlated with an interruption of boat people arrival.

Political sciences scholarship offers competing explanations of the discrepancy between the evolution of the immigration intake and public attitudes. Birrell (1984) and Ozdowski (1985) argue that 'ethnic activism' by non-Anglo-Saxon migrant communities significantly

[215] See annual statistics on the arrival of boat people to Australia since 1982 in appendix 2,table 7 and figure 5.

influenced the policy priorities of the Hawke government in its early years in power. In contrast, Jupp (1993) argues that the influence of the 'ethnic lobby' over the major parties has often been overestimated, even by this 'lobby' itself. Hardcastle and Parkin (1990: 324; 328-329) and Bruer and Power (1993: 120) observe that the impact of migrant activism has varied during Hawke's Prime Ministership, yet attest the role of this influence on a number of ministerial and bureaucratic replacements.[216] To Betts (1993; 1999), ethnic politics were less significant to Labor's immigration policy-making than the pro-immigration advocacy of an elitist 'new class' of idealist (and wealthy) refugee defenders, but also of business sectors reliant on a sustained immigration inflow (the 'growth lobby'). Labor is also said to have neglected the scepticism towards the immigration intake of the broader—and according to Betts, more legitimate—Australian public. McAllister (1993) agrees with Betts on a disjuncture of attitudes between the political elite and the public on immigration. Yet he emphasises the enduring significance of bipartisanship and of the immigration bureaucracy in the determination of policy during the 1980s and early 1990s. Kabala (1993: 13-16) and Bruer and Power (1993: 118-123) however argue that the agenda-setting role of the Department of Immigration declined in an increasingly pluralist policy environment.

The declining autonomy of the immigration bureaucracy is at the core of explanations of the other side of the 'immigration crisis', the hesitant transformation of the regulatory framework of immigration control. Ozdowski (1985) and Hawkins (1991) argue that the Hawke government and the department belatedly addressed the limits of the discretionary-based system of entry control in the face of increasing demand for immigration and of the existence of avenues offered to prospective immigrants to contest refusal of entry. Birrell (1992) and Cronin (1993) reverse the perspective and argue that 'judicial activism' expanded as the courts, which reinterpreted the rules of entry control, made it possible for migrants to contest executive decision-making.

[216] Between March 1983 and March 1996, the Immigration portfolio was successively held by seven Commonwealth Ministers: Steward West (March 1983-December 1984), Chris Hurford (December 1984-February 1987), Mick Young (February 1987-March 1988), Clyde Holding (March-September 1988), Robert Ray (September 1988-April 1990), Gerry Hand (April 1990-March 1993, remaining Immigration Minister as Paul Keating became Prime Minister in December 1991), Nick Bolkus (March 1993-March 1996). According to Hardcastle and Parkin (1990: 324; 328-329), 'ethnic politics' were crucial in the replacement of Immigration Minister Chris Hurford by Michael Young in 1987; Bruer and Power (1993: 120) in contrast insist on their role in the replacement of Robert Ray by Gerry Hand as Immigration Minister and of Ron Browne by Chris Conybeare, former staffer at the Department of the Prime Minister and Cabinet as Secretary of the Department of Immigration, in April 1990.

This thesis's explanatory hypotheses thus appear to have some value: conflicts over policy formulation, enforcement difficulties as well as institutional complexity appear to have detrimentally affected policy effectiveness and legitimacy. However, the framework has not been systematically tested, and none of the political sciences studies mentioned here has yet to specifically address the 'immigration crisis' in the context of refugee admission policies. This chapter thus offers a conceptual as well as an empirical contribution to the literature.

The analysis will be structured as follows. Section 7.2 presents the evolution of refugee admission during the period of investigation and points at the increase in asylum claims and of demands for humanitarian protection. Section 7.3 focuses on mounting political and policy contentions until the end of the 1980s, as the legitimacy of refugee resettlement was challenged. Section 7.4 shows that the impact of the 1989 reform of immigration control on refugee admission policies remained limited, although the reform was concomitant with an unprecedented increase in asylum claims. Refugee admission policies were more affected by reforms adopted from 1992 and analysed in section 7.5. The conclusion gives a summary account of the transformation of refugee admission under the Hawke and Keating governments and assesses to what extent the explanatory configuration presented at the end of the last chapter evolves during this period.

7.2 Refugee admission between 1983 and 1996: Asylum increase, resettlement fluctuation

Similarly to Britain and other Western countries, Australia experienced a significant, albeit comparatively limited, increase in asylum and asylum-like claims from the 1980s. No boat people arrived on Australia's shores between 1982 and November 1989. Boat people arrivals between 1989 and 1995 were predominantly Cambodian, Vietnamese and Chinese nationals.[217] Yet even after 1989, boat people's requests for humanitarian protection in Australia did not constitute the bulk of asylum claims. An average of 200 people arrived unauthorised per boat and claimed asylum between 1989 and 1996. The peak year was 1994-95 with approximately 1,000 boat arrivals. In contrast, the total number of claims for refugee status increased from 3,370 in 1989-90, 13,954 in 1990-91, and 9,793 in 1991-92 (Philips and

[217] See chronology of boat arrival and nationalities between 1989 and 1993 in JSCM (1994: 17-18)

Spinks, 2011; DIEA, 1995: 42).[218] For reasons discussed in Section 7.4, Chinese nationals were strongly represented in these statistics with 7,405 claims in 1990 and 9,377 in 1991 (ibid: 38; 40). A relative decrease of claims followed until 1994, yet numbers increased again to 9,800 in 1995-96 (UNHCR, 2000: 321). In addition, the number of individuals claiming permanent residence in Australia on the basis of humanitarian or compassionate grounds increased sharply. The total number of applications for residence lodged from within Australia climbed from 8,000 in 1979 to 35,000 in 1989-90. Amongst this category, approximately 10% claimed residence on compassionate or humanitarian grounds in 1982, 30% in 1988-89 and 50% in 1989-90 (JSCM, 1992: 96-97). At the end of the 1980s, there were more demands for humanitarian protection than for refugee status; in both the case of refugee and of humanitarian claims, most were made by temporary entrants who had entered Australia legally, not by boat people.

Whereas the increase in asylum claims contributed to the quasi-demise of refugee resettlement in the British case, resettlement remained the dominant mode of refugee admission in Australia.[219] Total resettlement of Convention refugees and of humanitarian cases (SHP and Global SHP, see previous chapter Section 6.4.3.4) declined from 17,054 in 1982-83 to 9,147 in 1991-92 to increase again in 1995-96 to 15,052. The proportion of Convention refugees resettled in Australia declined markedly until 1989-90 while the SHP intake increased, to then respectively fluctuate in the opposite direction until 1993-94.[220] Indo-Chinese nationals constituted 95.3% of the intake in 1983, this proportion diminishing to 45.6% in 1987, yet increasing temporarily again in 1989-90 with the arrival of a contingent of Indo-Chinese refugees as part of the Comprehensive Plan of Action for Indo-Chinese refugees (CPA) (NPC, 1991: 128-9).[221] Even if the intake of Indo-Chinese refugees remained the largest group resettled under the Hawke and Keating governments, the intake from the Middle East (especially Lebanon), Eastern Europe and Latin and Central America increased significantly. Australia also started to resettle small caseloads of African refugees in 1984 (York, 2003).

[218] See also the comparison between annual numbers of boat people arrivals and of asylum claims in appendix 2, table 7 and figure 5.

[219] See the comparison between grant of asylum and refugee resettlement in appendix 2, figure 3 and table 5.

[220] See the comparison of the evolution of refugee resettlement by stream in appendix 2, figure 6 and table 8.

[221] As will be argued in Section 7.3, Indo-Chinese individuals who could have qualified for resettlement until 1982, as more stringent selection criteria for resettlement were introduced (see previous chapter), constituted a significant proportion of the family reunion stream in the 1980s and 1990s.

The fluctuations of the refugee intake did not follow the evolution of the general intake of permanent immigration. The latter increased strongly between 1983-84 and 198889 from 68,820 to 145,316, then declined continuously to 69,968 in 1993-94 and increased again by almost 30,000 over the two following financial years (RCOA, undated).

Section 7.3 assesses the impact of political conflicts and regulatory difficulties on refugee admission policies until the late 1980s.

7.3 Political and institutional instability until the late 1980s

7.3.1 Political and popular contentions over policy objectives

As mentioned in the introduction, contentions over the level of Asian immigration to Australia dominated political and public debates on immigration during the 1980s. As this section will show, Indo-Chinese refugee resettlement was a significant element of these contentions in the first half of the 1980s.

Shortly after the Hawke government came to power, the Liberal/National Coalition started to denounce the level of Asian immigration to Australia as too high and discriminating against skilled European migrants, and criticised the inclusion of Latin American refugees in the resettlement intake as 'socialist'.[222] In response, Immigration Minister Steward West argued in March 1984 that the relative increase in immigration from Asia was a legacy of the Fraser government's resettlement policy, which the Hawke government had now endorsed. West presented refugee resettlement w as only one element of comprehensive efforts to solve the Indo-Chinese refugee crisis. Besides resettlement, Australia took a leading role in the elaboration of alternatives to resettlement, and continued the bilateral orderly departures agreement that had been agreed with Vietnam agreed under the Fraser government. This orderly departure agreement led to an increase in Indo-Chinese family reunion to Australia.[223] Therefore according to West, there was 'no evidence of an Asianisation of the [immigration]

[222] See Coalition immigration spokesman Alan Hodgman, House of Representative debates, 14 September 1983, p.759ff.

[223] Ibid, p. 642.

program' as the Hawke governments' refugee policy was in the continuation of the policy of the previous government. [224]

West's mention of an alleged Asianisation of Australia, even if it was to refute its existence, proved momentous. Ten days later, on 17 March 1984, historian Geoffrey Blainey in a famous speech at the Warrnambool Rotary club, attested such Asianisation and appealed to 'restore control' over the country's destiny. Blainey's words were widely denounced in quality newspapers such as the Melbourne-based *Age* and the *Sydney Morning Herald* (Betts, 1999: 256-267). Betts claims that Blainey's speech responded to the concerns of many Australians at the time (ibid.). However, polls investigating the level of satisfaction with the government's immigration program showed a notable increase of popular concern *after*, not before, Blainey's speech. This sequencing points at Blainey's role as a 'political entrepreneur' able to organise public opinion rather than indicating a marked increase of public concern before his Warrnambool intervention (Goot, 1985).

Regardless of this sequencing, the shift in public opinion was correlated with reforms in regards to the immigrants and refugee intake. The planned immigration intake for 1984-85 included a significant increase in skilled immigration. In contrast, the planned humanitarian intake decreased. Immigration Minister West reiterated the government's preference for alternative options to the resettlement of Indo-Chinese refugees and Prime Minister Hawke pointed at the 'irony' of an accusation of Asianisation as Asian immigration was decreasing.[225] The modification of the intake composition was emphatically welcomed by the Coalition's immigration spokesman Alan Hodgman, who presented it as a return to a bipartisan approach to immigration policy.[226] Parliamentary controversies over immigration remained limited over the following years, in which new Immigration Minister Chris Hurford advocated an economy-focused immigration policy not always popular with ethnic minority organisations (Hardcastle and Parkin, 1990: 320-321).

Indo-Chinese refugee resettlement had thus been at the centre of early controversies over the level of Asian immigration to Australia. The salience of resettlement in the early years of the

[224] House of Representatives debates, 7 March 1984, p. 643.

[225] 'There is some irony in the fact that now, when the absolute number of Indo-Chinese refugees-and indeed the total number of Asians-coming into Australia is dropping , we find ourselves being subjected to criticism from some quarters for allegedly contributing to the "Asianisation" of Australia.' Bob Hawke, House of Representative debates, 10 May 1984, p. 2231.

[226] See House of Representative debates, 30 May 1984, p. 2459ff.

Hawke government contributed to a shift of the Indo-Chinese intake towards the family reunion stream, which in turn became the stream at the centre of political contention, whereas the political and public legitimacy of refugee resettlement appeared durably restored.This is illustrated in the Committee to Advise on Australia's Immigration Policies' (CAAIP) report *Immigration: A Commitment to Australia*. The 'FitzGerald report' nicknamed after the chair of the CAAIP, constituted the most significant review of immigration policy in a decade and a half. Whereas the FitzGerald report recommended a restructuring of immigration intake based on a decrease of family reunion and an increase in skilled immigration, its recommendation on the level of refugee resettlement was close to the existing level, that is, about 10% of the annual intake (CAAIP, 1988: 83). Refugee resettlement was equally absent from the controversies surrounding the derogatory remarks of opposition leader John Howard on the level of Asian immigration in August 1988.[227] Howard's comments were vocally denounced by Prime Minister Hawke and in the 'quality press', and were highly controversial amongst his own party, eventually contributing to the temporary demise of Howard as opposition leader (Hardcastle and Parkin, 1990: 325). Different polls given different accounts of public opinion. A Newspoll survey conducted in August 1988 showed that 77% of respondents totally or partially agreed with Howard's statement, yet another survey by AGB: McNair conducted a few months later showed that only 45% supported a decrease of Asian immigration to Australia (Goot 1999: 55). During 1988, the broader salience of immigration had however increased. A Morgan poll surveying spontaneous responses in regards to 'the three important things that the government should do something about' showed an increase of mention of 'immigration/migrants' between February and September 1988 (from 11% to 18%) compared to similar surveys conducted earlier, in which the mention had stalled at 6% (ibid: 45).

As the next section will show, discretion-based immigration control, and especially the admission of individuals claiming asylum and humanitarian protection, had become increasingly difficult over the course of the 1980s. This was well-documented in reports

[227] In an interview on 1 August 1988, Howard argued that Asian migration 'should be slowed down a little'. The remark caused uproar at parliament and in the quality newspapers. Hawke accused Howard of 'cynical opportunism' putting in jeopardy the relations between Australia and its Asian neighbours, especially in economic terms, and tabled a parliamentary resolution condemning racism. Many members of the Liberal Party – albeit not immigration spokesman Minister Alan Cadman – disagreed with Howard. Several prominent Liberal parliamentarians crossed the floor to support Hawke's resolution, amongst them former Immigration minister Ian Macphee and future Immigration Minister Philip Ruddock. Former Immigration minister Michael MacKellar, the architect of Australia's humanitarian program, abstained (Jupp, 2007: 128). Howard remained unapologetic, accusing the government of 'gravelling and apologising to Asia' (Collins, 1991: 305).

released by various review committees and institutions from the late 1970s to the end of the decade.

7.3.2 Institutional challenges to discretionary decision-making

Three processes, which had started before the Hawke government came to power, resulted in pressure for a transformation of the regulation of immigration control. Firstly, discretion-based entry control appeared increasingly unable to deal with a general increase in immigration demand, especially demand by temporary arrivals to stay permanently in Australia. Secondly, there were increasing conflicts between the Department of Immigration and the courts over the meaning of the legislation that enabled to grant permanent residence in response to this demand. Thirdly, the difficulties of discretionary decision-making were repeatedly criticised by institutions monitoring the implementation of public policies. The admission of refugee and humanitarian entrant played a prominent role in the three processes.

The increasing problem of overstay has been presented in the last chapter, section 6.4.3.5. In order to restrict access to permanent residence, the Fraser government had in 1980 amended the Migration Act 1958) to specify which categories of temporary entrants could apply for permanent residence and prohibited applications by individuals who had overstayed their visa and people who had entered Australia unlawfully. However, temporary entrants who could attest compassionate or humanitarian grounds for admission, even if they were 'unauthorised entrants', could still apply for permanent residence. As has been mentioned in section 7.2, the number of people who applied for the category increased until the late 1980s to approximately 15,000 applicants.

In case their application to stay in Australia was refused by the Department of Immigration, applicants for permanent residence had, since the institutional reforms set up under the Fraser government presented in section 6.4.3.2, access to judicial review. The High Court and the Federal Court were increasingly requested to review immigration decisions. Between 1986 and 1992, 'in all but two years… immigration constituted the largest single source of review work for the Federal Court' (Crock, 1996: 275). Judicial review decisions profoundly transformed the regulation of refugee and humanitarian admission. In the Kioa case (1985), the High Court argued that unlawful immigrants in Australia had a right to procedural fairness

before a deportation order could be taken (Cooney, 1995: 17). The Federal Court decided in the Tang and the McPhee cases (respectively 1985 and 1988) that unlawful non-citizens had the right to apply for permanent residence on humanitarian and compassionate grounds. The Federal Court also quashed a number of restrictions on the meaning of humanitarian and compassionate as 'irrelevant considerations' (Dahlan and Damouni cases, 1989) while the High Court deemed restrictions on the definition of a refugee as 'unreasonable' in the Chan Yi Kin case (1989) (Crock, 1996: 276-280). Court decisions criticising the misconstruction, and especially the 'unreasonableness', of administrative decisions, were deeply and personally resented by the immigration bureaucracy, including the Immigration Minister (Crock, 1996: 282-283). It has been argued that the expansion of the meaning of humanitarian and compassionate grounds by the courts constituted in itself an incentive for 'visa overstayers' to apply for permanent residence on humanitarian grounds, and to request judicial review in case of refusal (Birrell 1992).

From the late 1970s, various institutions released reports pointing at such difficulties and advocating comprehensive regulatory reforms. Until the release of the FitzGerald report in 1988, reform proposals were only followed by minor changes. The first internal review of departmental decision-making, conducted by the Joint Management Review and released in July 1978, noted the 'excessive discretionary features' of the Migration Act 1958. The discretionary intervention of the Immigration Minister was requested in a barely manageable number of cases. Lack of clear policy directions resulted in relaxed policy enforcement; with individual immigration officers appearing more willing to change immigration status on request than to refuse entry or to enforce deportation cases (Hawkins, 1991: 122-125). The Administrative Review Council and the Human Rights Commission made similar assessments of the detrimental impact on immigration control, as well as on applicants, of the lack of a clear policy codification, in two reports respectively released in 1985 and 1986.[228] The Human Rights Commission also criticised discriminatory treatment of undocumented immigrants of non-European origin[229] and discrimination as regards to the selection of non-

228 The Human Rights Commission received 140 written submissions and heard 120 witnesses during the conduct of its inquiry into the Migration Act, showing a significant level of public interest for the inquiry (Ozdowski, 1985: 541-542).

[229] Far more undocumented immigrants from Asia and the Pacific were placed in immigration detention than British undocumented immigrants in relation to their proportion of the total of apprehended undocumented immigrants (Ozdowski, 1985: 552).

European refugees for resettlement (Ozdowski, 1985: 552)[230] as potentially in breach of the International Covenant on Civil and Political Rights (ICCPR). Deprivation of liberty in immigration detention, interference with privacy and arbitrary expulsion constituted further potential breaches of the ICCPR (Cooney, 1995: 19; 22 117). Both the ARC and the HRC reviews recommended the specification of immigrant selection criteria in statutory law and the setting up of more coherent mechanisms to review administrative decisions on immigrant status (Cooney, 1995: 18-24). As had been the case earlier with the Joint Management Review, only limited change followed the ARC and HRC reviews.

Many criticisms made since the late 1970s were reiterated in the FitzGerald report released in 1988 and mentioned in section 7.3.1. The CAAIP considered the discretionary power of the Department of Immigration, and of the Minister of Immigration, too broad; statutory immigration legislation too limited; and non-statutory regulations incomprehensible and discriminatory. Yet the CAAIP report also took a further reformist step. It suggested a model migration bill, designed to replace the Migration Act 1958 (CAAIP, 1988: 111-118; Cooney, 1995: 25). The model bill entailed a detailed codification of visa classes in statutory legislation to be monitored by parliament, in contrast to the decision-making guidelines until then in use by the department. To preserve flexibility in the application of the new entry regulations, the minister would keep the discretionary power to intervene in 'hard cases', for instance if the refusal of a visa was to be unjust or unfair. The CAAIP's model migration bill provided for a review of decision-making internal to the department as well as a right of review at the Administrative Appeals Tribunal. A separate, discretion-based review mechanism for refugee admission cases was foreseen with the appointment of an independent Refugee Commissioner.[231]

The FitzGerald report attracted far more public awareness than previous reports advising to reform the admission of immigrants and refugees. What attracted most attention was the discussion of widespread concerns amongst Australian society towards multiculturalism,

[230] 'It was suggested that profiles of national groups used in the selection process for refugees from Indochina were not properly researched and that they were discriminated against certain racial groups by presenting a sliding scale of settlement acceptability on national grounds, with the Vietnamese seen as most suitable.' (Ozdowski, 1985: 553)

[231] The main distinction between the recommendations of the HRC and the ARC and the CAAIP's proposed reform was to leave out policy principles from the model bill, an unexpected omission given the significance of debates on immigration policy objectives during the 1980s (Cooney, 1995: 25-26).

whereas the report's proposals for a reform of immigration decision-making were largely overlooked. Nonetheless, and in contrast to earlier critical reports on immigration policy, the government responded to the report recommendations with a momentous reform of immigration control.

7.4 First wave of regulatory reforms and ensuing challenges

7.4.1 The Migration Legislation Amendment Act 1989

Senator Robert Ray, who replaced Clyde Holding as Immigration Minister in September 1988, delivered the government's official response to the FitzGerald report to the Senate on 8 December 1988.[232] His response started with the presentation of new principles guiding immigration policy which reflected the report's recommendation to taken concerns over citizenship and multiculturalism seriously.[233] The minister's announcement of the planned immigration intake for the following year did not follow the recommendations to significantly increase the intake of skilled migration and reduce family reunion, yet the planned refugee intake remained close, if slightly inferior, to the committee's recommendations. Finally, the minister announced a transformation of immigration decision-making from a discretion-based to a legislative-based regulatory framework that would depart from the report's recommendations, as the latter were judged as impracticable for the immigration bureaucracy. Rather than replacing the Migration Act 1958 with a new Migration Act, a comprehensive amendment to the existing Migration Act was announced.

The Migration Legislation Amendment Bill 1989 was tabled at the Senate on 5 April 1989.[234] The Amendment Bill introduced a detailed codification of the categories of persons allowed to enter Australia as well as the conditions of their entry. This stood in rupture to the

[232] Senate debates, 8 December 1988, pp. 3753-3781. The following paragraphs reflect the Minister's response to the CAAIP report.

[233] These principles emphasised the government's prerogative to ensure that the right to enter Australia was reserved to Australian citizens and non-citizens holding a valid visa; the government's commitment to a non-discriminatory policy; the value of Australian citizenship; the need for immigrants to respect the 'institutions and principles… basic to Australian society'; and the reciprocal commitment of the government to facilitate equal participation in Australian society.

[234] Senate debates, 5 April 1989, pp.9 22-927.

discretion-based entry control model that had existed since the establishment of the Australian Commonwealth in 1901 (Cronin, 1993: 91-96). The Migration Legislation Amendment Bill 1989 not only introduced this legislative classification of visa types, but also altered existing statutory legislation. The bill restricted eligibility for residence on humanitarian and compassionate grounds in order to prevent judicial intervention against decisions taken by the Department of Immigration (JSCMR, 1992: 99). The access to judicial review of unauthorised entrants applying for a visa and refused entry in Australia was repealed altogether. If the bill aimed to restrict judicial review in immigration cases, it created an administrative tribunal, the Migration Review Tribunal (MRT), at which non-citizens could appeal against the refusal of a visa. Yet this decision excluded individuals applying for a refugee and a humanitarian visa, to whom the avenue of contestation against a refusal of entry by the Department of Immigration remained judicial review only. Finally, the transformation of the institutional setting of immigration control from a discretion-based into a legislation-based included severe restrictions on the ability of the Immigration Minister to interpret legislation, a measure that the FitzGerald report had not recommended, as it considered that some administrative flexibility would still benefit the new system.

Notwithstanding the comprehensive character of the Migration Legislation Amendment Bill 1989, immigration regulations, that is, secondary legislation codifying the detail of the application of the Act remained at the draft stage as the bill was published. Immigration Minister Ray considered that a further 18 months were necessary until completion of the draft, meaning that the regulations could not enter into force before the end of 1990. Yet the entry into force of the Migration Legislation Amendment Act 1989 was accelerated to December 1989 to occur before the March 1990 federal election.

The parliamentary committee created to monitor the implementation of the reform, the Joint Select Committee on Migration Regulations (JSCMR) denounced this step as a severe blow to effective implementation. The JSCMR also argued that the 1989 reform had gone to the extreme opposite of the previous regulatory system. Administrative discretion had been almost entirely removed from entry regulations, which were now exclusively based on legislation. Since the immigration bureaucracy had no more discretion in legislative interpretation, legislation would now have to be amended each time a regulatory ambivalence occurred in practice (JSCMR, 1990: 2-4). As the next section will show, the immigration bureaucracy was soon confronted with major regulatory ambivalences in the field of refugee admission.

7.4.2 Tiananmen and the rise of asylum claims

Following the repression of Chinese democratic protests at Tiananmen Square in early June 1989, Prime Minister Hawke announced that Chinese nationals visiting or studying in Australia at the time of the events would be granted visa extensions until January 1991. No Chinese national would be deported as long as the situation remained unclear in their country of origin.[235] The Department of Immigration estimated that 21,000 Chinese nationals resided in Australia at the time. Most had arrived as overseas students in the past few years, especially as part of the English Language Course for Overseas Students program (ELICOS).[236] This development was due on the one hand to the relaxation of *bona fide* checks for ELICOS applicants in 1986, and on the other hand to the relaxation by the Chinese government of exit visa conditions. Many ELICOS students did not leave Australia as their temporary visa expired. In May 1989, the overstay rate of overseas students was estimated at 23.3% overall and at 40% amongst Chinese students (JSCMR, 1992: 183).

Originally, the Tiananmen-related visa extensions only applied to Chinese nationals who were legally in Australia as of 20 June 1989. However, the measure was progressively extended both in time beyond its original end date of December 1991 and to Chinese nationals unlawfully in Australia as the Tiananmen events occurred. Before the 1989 reform, these extensions would have taken the form of a discretionary decision by the minister. Following the entry into force of the Migration Legislation Amendment Act 1989, the changes occurred through the successive introduction of new visa categories in statutory legislation.[237] These permanent changes created uncertainty for Chinese nationals already in Australia who applied for a residence status that almost disappeared after a few months. The changes also

[235] 'In six years of government I have never witnessed such a tragedy as we have seen in China in recent days.' Prime Minister Bob Hawke, House of Representative debates, 15 June 1989, p. 3523f.

[236] Between 1986-87 and 1989-90, the numbers of overseas students in Australia rose from 31,545 to 82,066. The proportion of Chinese nationals amongst overseas students rose from 6% in 1986-87 to 27% in 1989-90 (JSCMR, 1992: 183).

[237] In February 1990, access to permanent residence was opened to Chinese nationals legally in Australia as of 20 June 1989, and temporary residence permits for unauthorised Chinese immigrants in the country by this date were extended. In June 1990, a specific four-year residence permit was introduced for which all Chinese nationals living in Australia by 20 June 1989 could apply. Individuals who had applied for permanent residence after the February 1990 reform were strongly advised to reconsider their application and apply for this new status, as applications for four-year residence permits would be granted priority processing over the applications for permanent residence (JSCMR, 1992: 186-190).

constituted an incentive for further Chinese nationals to come to Australia as the reform gave the impression that gaining permanent residence had been facilitated. This perception was strong amongst ELICOS students who arrived in Australia in the months after the Tiananmen events. Many newcomers attempted to stay in Australia at the expiration of their visa by applying for humanitarian and/or refugee status (JSCMR, 1992: 190). In July 1990, and in the face of such demands, the option to apply for permanent residence on humanitarian grounds was repealed altogether, yet reinstated six months later only as a temporary residence permit. 'Visa overstayers' could apply for such permits until July 1991 only. After this option had disappeared, a large number of 'overstayers' applied for asylum between July and December 1991. By then, a backlog of 23,000 applications for asylum or for humanitarian status had been accumulated (JSCMR, 1992: 40-41). The rush of applications constituted a catalyst for the transformation of the asylum procedure, which had yet to be affected by the 1989 reform of the regulation of immigration control.

7.4.3 Delayed and limited transformation of the asylum procedure

Since 1978, asylum claims were assessed by the interdepartmental Determination of Refugee Status committee, which had been established in response to the arrival of Indo-Chinese boat people to Australia's shores, as the previous chapter has mentioned. The DORS committee was consultative and advised the Immigration Minister, who decided asylum cases. The committee did not meet the applicant personally, and there was no right of appeal against the minister's decision at an administrative tribunal, yet asylum claimants had access to judicial review.[238] Refugee advocacy groups had long been critical of the absence of direct contact between the asylum claimant and the DORS committee and the fact that its membership did not include representatives from civil society or from the UNHCR. These issues became critical following the 'rush' of applications for refugee status mentioned in section 7.4.2. The sharp rise of applications led to long delays until asylum decisions were taken, and to

[238]The procedure started with an interview of the claimant by a DORS officer. The officer communicated the interview transcript to the DORS committee composed exclusively of representatives from the Departments of Immigration, Foreign Affairs and Trade, and Prime Minister and Cabinet; these representatives were untrained in refugee law. The DORS committee neither met the applicant, nor took a final decision. Rather, it made a decision recommendation to the minister. Applicants were informed of this recommendation and could comment negative applications, these comments being forwarded to the Committee re-assessing its original recommendation and then informing the minister (JSCMR, 1992: 116).

increased demand for judicial review in case of refusal of asylum status. In response, the DORS committee was replaced by the Refugee Status Review Committee (RSRC) in December 1990.

The RSRC included a representative of Refugee Council of Australia (RCOA).the umbrella organisation of Australian voluntary agencies in the refugee sector.[239] Yet similarly to the DORS procedure, asylum claimants had no direct contact with the RSRC; the role of the committee remained advisory, and the asylum procedure did not include a right to appeal the refusal of a humanitarian or refugee visa at an administrative tribunal. Still, the establishment of the RSRC was at first welcome by the UNHCR and refugee advocacy groups (JSCMR, 1992: 136). However, the new system neither led to an acceleration of decision-making, nor did it prevent an increase in requests for judicial review. The increase of demand for judicial review added to the workload of courts which had not been designed to be the decision-making instance of last resort in refugee cases. The increased immigration-related workload of the courts caused some *Schadenfreude* amongst bureaucrats (and some commentators). These argued that courts were responsible for their increased workload, since they had broadened the meaning of refugee and humanitarian status that had enabled this increased demand for judicial review (see especially Birrell, 1992 and the bureaucrats' opinions reported by Crock, 1996). The inefficiency of the RSRC triggered yet another reform with the creation of an administrative tribunal specifically dealing with asylum claims, the Refugee Review Tribunal (RRT). The establishment of the RRT is discussed in section 7.5.

A last momentous aspect of this rich period of transformation must be mentioned: the renewed arrival of Indo-Chinese boat people to Australia's shore, which resumed in November 1989 after seven years of interruption. As section 7.4.4 will show, the resurgence of boat people arrivals was predictable considering the regional context, yet it was highly unwelcome by the Australian government.

[239] To decrease the minister's decision-making burden, a senior staff member of the Department of Immigration could take a final decision in asylum cases. In case of a negative decision, the minister had the discretion to grant humanitarian status. Measures were also taken to increase procedural efficiency. At the interview stage, immigration officers were required to identify cases requiring 'fast tracking'; the UNHCR's role as an advisor was formalised; inquiries were to be made in other countries so as to check that the claimant had not applied for asylum elsewhere; and a time limit of 21 days for the applicant and the UNHCR to comment on this primary decision was introduced (JSCMR, 1992: 119).

7.4.4 Resurgence of boat people arrival: Illegitimacy and unlawfulness

Not only had boat people stopped arriving to Australia's shores between the early and the late 1980s; following the adoption of the 'burden-sharing' agreement between Vietnam South-Eastern Asian nations receiving boat people and resettlement countries in Geneva in 1979,[240] refugee outflow from Vietnam had dramatically declined. Yet boat people arrival to Vietnam's neighbouring countries in South-East Asia started to rise again from 1986. This was due to the slow pace of the Orderly Departures Programs for migrants from Vietnam to resettling states; to enduring conflicts causing forced displacement in countries neighbouring Vietnam, especially Cambodia and Laos; and to the recognition by the UNHCR of all boat people landing on the shores of South-East Asian nations as refugees. The latter created an incentive for some Vietnamese nationals to leave the country by boat in the hope of being recognised as refugee and automatically resettled in Western countries (Davies, 2008: 193-194). Having hosted tens of thousands of refugees awaiting resettlement for a decade, Thailand, Indonesia, Malaysia and Hong Kong were highly critical of the indiscriminate refugee assessment by the UN agency and unwilling to continue hosting a resurging influx of boat people. As boat people arrival to their shores accelerated in 1988 and early 1989, Indonesia, Thailand and Malaysia started to push back boats at sea. Many boat people reached Hong Kong as an alternative destination, prompting the Hong Kong authorities to start detaining the newcomers. The threat of a renewed 'boat people crisis' fuelled a resurgence of multilateral meetings on the issue. Eventually, the Comprehensive Plan of Action for Indo-Chinese refugees (CPA), a new, more formal 'burden-sharing' agreement than the agreement adopted in Geneva in 1979, was adopted at a UNHCR-led international conference again organised in Geneva, the city hosting the headquarters of the UNHCR, on 15 June 1989.

The CPA aimed to reduce the incentive for individuals willing to leave Vietnam to depart by boat to South-Eastern Asian countries in the hope of being recognised as refugees. Boat people arriving to Vietnam's neighbouring states after a cut-off date would no longer be automatically recognised as refugees, yet they would not be towed back at sea. The CPA stated that the refugee claims of boat people who arrived after the cut-off date was to be individually assessed by the UNHCR, so that no boat people would be arbitrarily returned to Vietnam. Individuals assessed as refugees by the UNHCR would be resettled in third

[240] See chapter 6 section 6.4.3.4.

countries and boat people refused refugee status would be repatriated to Vietnam. The CPA was to be in place until 1996 (Robinson, 2004: 320). The agreement applied only to Vietnamese and Laotian nationals, not to Cambodians seeking refuge from the civil war in their country of origin in Thailand. The latter were considered 'displaced persons', and not refugees. Repatriation rather than resettlement was prioritised in their case (Davies, 2008: 192).

In line with Australia's decade-long advocacy of multilateral burden-sharing agreements for Indo-Chinese refugees, the Hawke government was involved in preparatory talks in the lead-up to the 1989 Geneva summit and Australia became a member of the CPA's Steering Committee. By June 1990, 7,000 Vietnamese nationals had received a resettlement visa for Australia as part of the Special Humanitarian Program. A further 8,000 were accepted under the family reunion or skilled migration streams (DILGEA, 1990: 46). In parallel, Australian Foreign Minister Gareth Evans played a significant role in the drafting of the Cambodian peace settlement between 1989 and 1991. The Hawke government supported the repatriation, supervised by the UNHCR, of Cambodians to their countries of origin (DILGEA, 1992: 88).

As had been the case of earlier multilateral agreements, it can be argued that Australia's involvement in the CPA and, perhaps to a lesser extent, in the Cambodian peace settlement, aimed to reduce boat people's arrival to Australian shores by contributing to the provision of alternative 'durable solutions' for forced migrants. This however did not prevent the arrival of boat people to Australia's shores. 18 boats carrying 735 persons, mostly Chinese, Vietnamese and Cambodian nationals, landed on Australian shores between November 1989 and January 1994 (JSCM, 1994: 2; 17-18). The post-1989 arrival of boat people became controversial for several reasons. Firstly, refugee resettlement, and voluntary repatriation, in the case of the Cambodians, were perceived as the legitimate avenues of protection from persecution, especially because the Hawke government was involved at the time in the international efforts to provide durable solutions to South-East Asian refugee crises. Secondly, the asylum claims of boat people were untimely as the regulation of refugee admission was already unable to cope with the protection claims made by Chinese nationals, as mentioned in section 7.4.3. Boat people also constituted a regulatory challenge of their own. Whereas most post-Tiananmen Chinese asylum seekers arrived legally in Australia and subsequently claimed asylum at the expiration of their student visa, boat people were unlawful arrivals. As such, the legislation foresaw their detention at the border until they were granted a valid entry permit. In practice, those who arrived in 1989-90 were left in legal limbo, and in detention, for up to

two years. Coalition MPs accused the government of favouritism towards Chinese nationals who claimed asylum, and refugee advocates pleaded to show more compassion towards the boat people.[241]

Regardless, a detention facility dedicated to the detention of boat people was opened at the former mining station of Port Hedland, Western Australia, in August 1991.The Port Hedland detention centre was the first of a series of remote immigration detention centres established to hold 'immigration offenders'. The Department of Immigration argued that the establishment of a detention centre on the remote site of Port Hedland was appropriate since most boats people arrived through that region. The department also contended that the operational costs of the Port Hedland detention centre were lower than the Sydney immigration detention complex of Villawood, so that there was no justification to transfer the detainees to a metropolitan detention centre at taxpayers' expense (JSCMR, 1992: 171). Yet the lack of interpreters and of specific services for asylum seekers in Port Hedland was denounced by refugee advocacy groups.[242]

Detained boat people, and lawyers who defended their cases, attempted to challenge the legality of immigration detention through requests for judicial review. They argued that immigration detention was unreasonable since it punished individuals who had committed no crime. Both the government and the opposition were however hostile to the intervention of the judiciary in the matter. On 5 May 1992, two days before boat people challenging the legality of their detention was set to be heard at the Federal Court, both Labor and the Liberal/National Coalition supported the adoption of an amendment to the Migration Act that specifically required the detainment of 'designated persons' whose attributes were clearly those of the detained boat people, although the boat people were not mentioned in the legislation (Crock, 1996: 283-284). The adoption of this amendment pre-empted a decision by the Federal Court over the legality of boat people's detention. Six months later, the High Court upheld the constitutional legality of immigration detention under the legislative regime created on 5 May 1992, yet questioned the legality of immigration detention preceding this date. The High Court decision triggered compensation claims by boat people for wrongful

[241] See for instance the exchange between Senator Tambling and Senator Bolkus, Questions without Notice, Senate debate, 11 March 1991, p. 1547.

[242] As Port Hedland was opened, legal advice for asylum seekers received public funding. However, recruitment of competent lawyers accepting to be sent to remote Port Hedland on short notice was difficult (JSCMR, 1992: 174).

detention before the 5 May 1992. The government announced at the time that it was ready to develop the appropriate legislative arsenal preventing such claims (Crock, 1996: 283-284).

At the time of this 'judicial battle', the general salience of immigration had significantly increased amongst Australians. In the Morgan survey asking respondents to name spontaneously 'the three most important things the government should be doing something about' 12% of respondents named 'immigration' or 'migrants' in September 1991, yet this figure climbed to 18% in February 1992.[243] Yet the figure decreased over the following months to reach 13% in June 1992 (Goot 1999: 46), and is important to mention that the most often quoted issue, 'reduce unemployment' was named by 74% of respondents. In 1991-1992, surveys asking if there were 'too many immigrants' in Australia also showed unprecedented level of support for this statement (above 70%, when the figure had seldom been above 65% in the past. (ibid: 39). According to the evidence available, no specific survey on boat people was conducted during this period. Yet a Saulwick survey conducted in October 1993, a year and a half after legalisation of the mandatory detention for 'designated persons' showed that 44% wished that they would be 'sent back straight where they came from' and 46% 'assessed with all other migrant applicants, and held in custody in the meantime.' Only 7% considered that they should directly be allowed to stay in Australia (ibid: 58).[244] It can thus be argued that the government's policy was more legitimate than that of refugee advocates; still, a large proportion of Australians apparently supported even more restrictive policies towards boat people.

Between 1989 and 1992, the post-Tiananmen demands for protection by Chinese nationals and the resurgent arrival of Indo-Chinese boat people revealed a range of critical issues that the 1989 reform of the regulatory framework of immigrant admission prove unable to resolve. Firstly, although the decision of Prime Minister Hawke to grant protection to the Chinese had been lauded at it occurred, its migratory implications were rapidly denounced. This showed the difficulty to coordinate foreign policy and domestic policy objectives as Asian immigration to Australia had been a politically sensitive issue since the beginning of the 1980s. Secondly, Hawke's decision constituted a premature test of the responsiveness of the newly established legislation-based framework regulating immigrant and refugee admission to changing circumstances. Thirdly, it became soon clear that the 1989 reform did not result

[243] See appendix 3, figure 8 for a contextualization of the increase in longitudinal data.

[244] See also appendix 3, figure 11.

in a decline of requests for judicial review, even though this had been one of the main motives for the introduction of a legislation-based system of entry control. Finally, the renewed arrival of boat people to Australia's shores reignited debates on 'queue-jumping' and on the need for border controls which had preceded the expansion of resettlement for Indo-Chinese refugees in the late 1970s. It is in this context of multiple contentions that regulatory reforms more specific to the admission of refugees than the 1989 reform were adopted.

7.5 Second wave of reforms: Limited impact and increasing contentions

7.5.1 Adoption of the reforms and increased salience of boat people arrival

The 'reform of the 1989 reform', the Migration Reform Bill 1992, was introduced in parliament by Immigration Minister Gerry Hand in early November 1992.[245] Hand, who had been Immigration Minister since April 1990, had been maintained in his functions by Paul Keating, who had become Prime Minister after winning a leadership ballot against Bob Hawke in December 1991.[246] Hand argued that the implementation of the CAAIP recommendations, beyond the comprehensive legislative reform introduced in 1989, required the codification in statutory legislation of additional, border control focused measures restricting the rights and the mobility of unlawful non-citizens. The reform, Hand argued, was in Australia's national interest.[247] The Liberal/National Coalition supported the adoption of

[245] House of Representative debates, 4 November 1992, p. 2620ff.

[246] Keating himself, who was a fervent supporter of good relations between Australia and its Asian neighbours, and a passionate advocate of reconciliation with Indigenous people at the domestic level, showed far less interest in immigration matters than his two predecessors Malcolm Fraser and Bob Hawke. A search in Parliament's Hansard database leads to 8 matches for the combination 'Paul Keating' as speaker and 'immigration' as keyword during the period covered by Keating's Prime Ministership; no Prime Ministerial statements or interventions during question time by Keating appear on the issue. In contrast, a similar search for Malcolm Fraser and Bob Hawke leads respectively to 25 and 42 matches, amongst them specific interventions during question time and dedicated immigration-related statements.

[247] 'In 1989 my predecessor, Senator Robert Ray, took a major step towards legislative implementation of the recommendations of the CAAIP report. In spite of the 1989 reforms, a major issue confronting the Government is border control. (...) A primary objective of the Migration Act is to regulate, in the national interest, the entry and presence in Australia of persons who are not Australian citizens. The Government views it as essential that all provisions and policies under the Act be interpreted in a way which furthers this objective. An objects provision will be inserted in the Act to remind the community, the administrators and the courts of this intention.' House of Representative debates, 4 November 1992, p. 2620ff.

the reform, yet pilloried the inability of the Keating government to restore effective control over immigration policy.[248]

The Migration Reform Act 1992 introduced a regime of mandatory detention for all 'unlawful non-citizens' (this was a new label introduced in the Act) until their immigration status had been determined. Yet the Act continued to distinguish within this category between unauthorised arrivals and people who arrived legally and then overstayed their visa. The Immigration Minister had the discretion to release 'overstayers' from detention if they satisfied health and safety requirements. In contrast, individuals arriving in Australia unlawfully were to remain in detention until either deportation or regularisation of their status. The Migration Reform Bill 1992 also announced the creation of the Refugee Review Tribunal (RRT), a proper administrative tribunal at which asylum claimants could appeal against negative decisions over their cases. However, the reform restricted judicial in immigration cases by removing immigration decisions from the reach of the Administrative Decisions and Judicial Review Act 1977. A number of traditional grounds for review at the Federal Court, especially breach of natural justice, unreasonableness and irrelevant considerations were excluded from the new review regime. Only 'technical' reasons such as error of law and failure to follow prescribed procedures remained reviewable.[249] The reform however did not affect the constitutional prerogative of the High Court to serve as a judicial review instance of last resort (JSCMR, 1992: 126-128; Crock, 1996: 270-272).[250]

Only a few days before the debate over the adoption of the Migration Reform Bill 1992, more than a hundred Chinese boat people had landed on Christmas Island, an Australian island hundreds of kilometres off Western Australia. This constituted the largest boat people contingent since the resumption of arrival in late 1989 (see JSCMR, 1994: 18) and it occurred weeks before the High Court was set to hand down a decision on the constitutional legality of mandatory detention for unlawful non-citizens. The Department of Immigration was faced with considerable media interest in boat people at the time. Between June 1992 and June 1993, the department received more than 1,000 media inquiries in the issue (DIEA, 1993: 8).

[248] Coalition immigration spokesman Minister Philip Ruddock mastered this rhetoric of conditional support to the government, which allowed the Coalition to denounce Labor's immigration and refugee policy while endorsing the legislation when its support was required. Ruddock's rhetoric regulatory brought Immigration Minister Hand into a rage; see for instance Ruddock's response to the Migration Reform Bill 1992, House of Representatives debates, 11 November 1992, p. 3142f.

[249] See the complete list of grounds for judicial review in immigration cases in Crock (1996: 272).

[250] In addition, the period of time during which judicial review could be requested at either the Federal or the High Court was reduced to 28 days.

Numerous petitions requesting the release of boat people in the community were brought to parliament. Polls conducted at the time showed a high level of opposition to the then immigration intake, to an increase in Asian immigration to Australia, and to the release of the boat people in the community as immigrants (Goot, 1999a: 39; 45; 47; 57). Importantly however, immigration was not considered one of the most important electoral issues faced by the country (ibid: 53).

The entry into force of the Migration Reform Act 1992 was delayed until 1 September 1994. Only the Refugee Review Tribunal was established in July 1993. Between late 1992 and September 1994, further reforms came to complement the Migration Reform Act, such as the introduction of a limit on the financial compensations that the Australian state would grant to individuals who had been wrongfully kept in immigration detention to one dollar a day (Crock, 1996: 269).

7.5.2 Implementation of the 1992 reforms and detention-related contentions

The Migration Reform Act 1992 entered into force as Australia faced an unprecedented increase of boat people arrival. More than 1,000 boat people landed on Australian shores between July 1994 and June 1995, and they were all placed in immigration detention (DIEA, 1995: 42). The alleged vulnerability and loss of integrity of Australia's borders were repeatedly denounced in parliamentary debates, especially by anti-immigration mavericks on the fringe of both major parties.[251]

The increase in arrivals strained the Department of Immigration's ability to expedite the processing of asylum claims made by immigration detainees. Notwithstanding the assertion that the detainees' asylum requests were fast-tracked, procedures lasted months, if not years. Therefore, the number of asylum seekers at the Port Hedland immigration detention centre increased sharply. In response, a second remote immigration detention centre was opened at the disaffected military base of Curtin, Western Australia in April 1995 (DIEA, 1995: 42). As of June 1995, more than 800 people were detained at Port Hedland, Curtin and in the more

[251] Here is an example of the type of rhetoric that developed during this period: 'There is no doubt than any lessening of the integrity of Australia's immigration policy puts in jeopardy the surveillance of northern Australia. If the end result …is to encourage more asylum seekers to come to Australia, which puts in jeopardy the surveillance of northern Australia… would tie the hands of the Customs Services and the navy.' Peter Dodd (Labor), House of Representative debates, 11 October 1994, p. 1644f.

urban and long-established immigration detention centres of Villawood (Sydney) and Maribyrnong (Melbourne). More than one hundred detainees attempted to escape at the time. Rooftop protests and hunger strikes were organised by detained asylum seekers refused refugee status appealing against entry refusal at the RRT, and if refused entry at that level, requested judicial review of their cases. This further increased the asylum-related workload of the court notwithstanding the establishment of the RRT, which had been created in the hope that request for judicial review would decrease.[252] Still, the Department of Immigration won most cases of judicial review.[253] Yet this did nothing to reduce political and public controversies related to boat people. Further restrictive innovations were developed to increase the expeditiousness of the asylum procedure.

Department of Immigration officials started to use practices of deceit towards detained boat people aiming to limit their opportunities to engage Australia's protection obligations. In December 1994, the department started to systematically interview boat people on arrival so as to assess if they planned to claim asylum. If a demand for protection in Australia was not explicitly requested, the arrivals were rapidly removed (ANAO 1998: 67-68; 72). At the Port Hedland detention centre, guards started to systematically deny access to lawyers and to the Human Rights and Equal Opportunity Commission (HREOC) to detainees who had not explicitly requested that they wished such contact. HREOC sued the department for such practice, and won its case at the Federal Court. In response, the government planned to introduce legislation to give a statutory basis to the behaviour of the prison guards and thus prohibit contact between HREOC and detainees who had not requested legal advice. The federal election occurred before the amendment was adopted.

A last restrictive innovation, which targeted all asylum seekers in and outside of detention, was introduced by the Keating government: the entrenchment of a restrictive interpretation of the Refugee Convention in domestic legislation.

[252] This phenomenon was unparalleled in immigration cases. Requests for judicial review decreased following the establishment of the Migration Review Tribunal in 1989 and especially after the adoption of restrictions on the grounds of review in the Migration Reform Act 1992 (Crock 1996: 288).

[253] The rate of judicial review cases won by the Department of Immigration increased from 63% in 1991-1992 to 84% in 1995-1996 (DIEA, 1996: 14).

7.5.3 Narrowing down Australia's protection obligations

Until the mid-1990s, controversies between the executive and the judiciary in the field of refugee admission has mostly involved clashing interpretation of domestic legislation codifying humanitarian status, as has been illustrated in section 7.3.2. 'Interpretation battles' in regards to the Refugee Convention became prominent in the mid-1990s in two distinct contexts: the criteria qualifying for the recognition as a refugee (thus on the definition of a refugee), and the meaning of protection from persecution.

The debate on the meaning of the Refugee Convention's definition of a refugee stemmed from the decision of a Federal Court judge, Ronald Sackville, in December 1994 to grant asylum in Australia to a Chinese couple expecting a second child. Because of China's one-child policy, Justice Sackville considered that the parents could be considered to belong to a 'particular social group' having a well-founded fear of persecution if they were threatened with mistreatment in their country of origin, and thus be recognised as refugees according to the Convention (Crock, 1996: 284). The government appealed Sackville's decision at the Full Federal Court. A potentially negative decision by the court was pre-empted with the introduction of an amendment to the Migration Act narrowing down the scope of the definition of a refugee in domestic legislation. The amendment stipulated that the fertility policy of another country was no reason to be qualified as members of a 'particular social group' requiring refugee status according to the Refugee Convention. The amendment was submitted to an inquiry of the Senate's Legal and Constitutional Legislation Committee, and the inquiry received many submissions hostile to the amendment, most prominently by former High Court Judge and then HREOC President Ronald Wilson. The amendment's defenders were equally mobilised. In a press release, Labor Senator Jim McKiernan argued that its non-adoption would motivate a considerable number of Chinese nationals to come to Australia by boat to apply for asylum, this in turn forcing Australia to adopt a policy of maritime interdiction to prevent the arrival of these boats.[254]

In June 1995, the Full Federal Court quashed Sackville's decision. As a consequence, the Chinese couple was removed to China and the woman allegedly forced to terminate the pregnancy. Since the Full Federal Court had upheld the government's decision, the

[254] See the discussion of McKiernan's press release, which in hindsight can be seen as a prototype of some elements of the Pacific Solution introduced by the Howard government in 2001, in House of Representatives debates, 8 March 1995, p. 1804f.

amendment was considered unnecessary and was never put to parliamentary vote. The Full Federal Court's decision was adopted two months after a momentous High Court case on the interpretation of treaties in Australian law. In April 1995, the High Court had decided in the *Teoh* case that Australia's ratification of international treaties generated a 'legitimate expectation' that these treaties would be applied. This finding was vehemently rejected by the Keating government, resulting in a hostile joint press release by Foreign Minister Gareth Evans and Attorney General Michel Lavarch (Patapan, 2000).

If the Australian Parliament did not adopt the 'fertility amendment', it did narrow down the meaning of the Refugee Convention's definition of protection from persecution in domestic legislation. This occurred after the arrival to Australia of boat people who had previously been denied protection elsewhere (in Indonesia) in the context of the Comprehensive Plan of Action for Indo-Chinese refugees discussed in Section 7.4.4. In response, the government in September 1994 introduced an amendment to the Migration Act acknowledging the validity in Australian law of the determination of refugee status by the UNHCR in CPA-participating countries. This meant that Australian authorities prohibited individuals refused refugee status in the context of the CPA to apply for asylum on Australian territory. Further, the amendment provided for the recognition of third countries as safe if Australia was satisfied that they respected the principle of *non-refoulement*. Refugees hosted by 'safe third countries' would have no right to apply for asylum in Australia. Senator Crowley, who represented Immigration Minister Nick Bolkus[255] during the amendment's second reading debate justified the measure as necessary to prevent 'forum-shopping', that is, repeated asylum claims in various countries.[256] The recognition of China as a 'safe third country' in January 1995 caused controversies.[257] The measure had responded to the arrival to Australian shores of Sino-Vietnamese boat people who had earlier been resettled from Vietnam to China in the context of the CPA. The Senate's Legal and Constitutional Legislation Committee recommended adopting the amendment recognising China as a 'safe third country' only if a 'safeguard mechanism' was in place allowing for the minister to examine asylum claims considered genuine. The Independent, the Green and the Democrat Senators denounced the amendment as misusing the 'safe third country' concept, which had been designed in Europe to ensure that no multiple asylum claims would be made in relatively similar democracies,

[255] Nick Bolkus had succeeded Gerry Hand as the head of the Department of Immigration in February 1993.

[256] House of Representatives debates, 8 March 1995, p. 1804f.

[257] See Senate debates, 8 February 1995, p. 698ff.

whereas human rights abuse in China were well-known. In addition, the three Senators criticised the adoption by the Australian and the Chinese governments of a bilateral memorandum of understanding on the matter instead of a proper treaty that would require parliamentary scrutiny. Yet the amemdment was eventually adopted with bipartisan support.

Section 7.5 has shown that the 'reform of the reform' of immigration control more profoundly affected the regulation of refugee admission than the 'real' reform of immigration control in 1989. The second wave of reforms included not only the Migration Reform Act 1992 but also a flurry of additional amendments, court decisions favourable to the government, and administrative measures detrimental to boat people seeking asylum. The most significant changes were the introduction of a right of appeal for asylum seekers at administrative tribunals; the reduction of grounds of judicial review (which also applied to immigration cases); the multiplication of amendments ensuring that the detention of 'unlawful non-citizens' regardless of their asylum claim was legal, as it was administrative and not punitive detention; and the creation of the concept of 'safe third country' in the Australian context. Almost all these measures enjoyed bipartisan support as they were suggested, although the Coalition did not miss an occasion to denounce the alleged chaos that immigration and border control policies had become under Labor. Political debates on refugee admission focused almost exclusively on the few hundreds of boat people boat people who arrived to Australia's shores each year. Other asylum seekers, who constituted the majority of claimants, as well as refugee resettlement, were never mentioned in the debates. Anti-boat people restrictiveness was not ineffective from the perspective of the government. Whereas there had been 953 boat arrivals in 1994, this figure declined to 237 in 1995 (Philips and Spinks, 2011). Most boat people who arrived in Australia in the mid-1990s no longer spent long years in detention, as had been the case of the arrivals between 1989 and 1992. Most claimants who did not immediately request asylum, or who were found to benefit from protection in a 'safe third country', were removed from Australia. The rate of claimants granted asylum after judicial review also declined. The anti-boat people measures were denounced by various organisations and individuals including minor party parliamentarians, refugee advocacy groups, lawyers, prominent judges, and the HREOC. Yet as the Keating government was challenged in the polls by the John Howard led Coalition, refugee admission policies and more generally immigration were thus far from a dominant concern amongst the electorate. In a *Morgan* surveys asking to name spontaneously 'the three most important things the government should do something about' between mid-1992 and 1996, immigration was only mentioned

by 5% to 13% of respondents in contrast to unemployment (which over the period was mentioned as 'the most important thing' by the largest proportion of respondents), economy and finance or social welfare.[258]

7.6 Conclusion

Under the Hawke and Keating governments, Australia's refugee admission regime experienced profound regulatory change. This evolution to a large extent had its roots in reforms adopted under Malcolm Fraser's Prime Ministership. Most significant in this respect were, firstly, the unintended expansion of the use of the humanitarian status, created in 1980, to access permanent residence in Australia. This led to battles between the executive and the judiciary over the interpretation of this status and played a large part in further regulatory difficulties encountered as Chinese nationals applying to stay in Australia after the Tiananmen events. Secondly, the marginalisation of asylum, which was the flipside of the expansion of resettlement in the late 1970s, meant that the system was not prepared to deal with the significant increase in claims that occurred from 1989. The fact that no right of appeal was created for asylum claimants in the context of the 1989 reform, whereas a right of appeal was created for immigrants, increased the numbers of requests for judicial reviews and worsened the relations between the judiciary and the executive over asylum cases.

Other changes resulted from reforms that emerged as Labor was in power, especially the progressive expansion of mandatory detention for all unlawful non-citizens, including unauthorised asylum seekers. In contrast to these reforms, the refugee resettlement program created in the late 1970s did not experience any major regulatory transformations until 1996; the institutional stability of refugee resettlement would not last forever, as the next chapter will show. These findings are congruent with more general explanations, in the literature on immigration control during this period, on the significance of the assertiveness of the judiciary as well as the damaging role of delays in implementing reforms. The chapter adds to these findings the significance of both the historical embeddedness of some areas critical for institutional change (humanitarian status in particular) and of self-generated problems under the Labor governments (mandatory detention for unlawful arrivals).

[258] See appendix 3, figure 10.

Refugee admission policies were not only an arena of battles between branches of the government, but also of political battles that took place between the major parties as well as under the cover of bipartisanship. Conflicts over the level of Asian immigration, including resettlement openly riddled the major parties until the mid-1980s to then decline, except for John Howard's public opposition to Asian immigration in 1988. Howard's position cost him – temporarily – the leadership of his party. Open opposition to Asian migration became the domain of the political fringes in the following years. In contrast, the regulation of entry control by Labor was repeatedly and vocally denounced by the Coalition without challenging bipartisanship in the approval of reforms; this doubtlessly contributed to foster the impression in political and public debates that the sector was 'in crisis'. Yet immigration, until the end of the period, did not became a core area of concern for the Australian public compared to issues such as unemployment. This finding contributes to the literature as it shows that in the field of refugee admission, the determinants of policy-making appear to be party dynamics as well as institutional dynamics, whereas the 'ethnic lobby' had less impact on policy formulation. The role of the public is difficult to assess, as hostility to immigration continued to endure, yet the topic remained benign in electoral terms compared to issues such as the economy.

To return to the thesis's central question, what is undeniable is that both policy effectiveness and policy legitimacy declined during this period. The management of demands for humanitarian status was the area marked by the greatest deficit of policy effectiveness, followed by the management of asylum claims made by Chinese nationals after the Tiananmen events. The management of boat people's asylum claims was far less efficient than in the previous period. Yet the objective of the Hawke and Keating government from 1989 was to entirely prevent boat people arrival and this proved impossible to achieve. It can be argued that any boat people arrival, already by 1992, was considered illegitimate both by the government and the opposition. In contrast, the legitimacy of refugee resettlement remained significant after having declined in the early 1980s, as its composition was overtly challenged by the Coalition. Polls do not point at a continuous decrease of policy legitimacy amongst the public; attitudes towards immigration actually improved in the mid-1990s.

How do the thesis's hypotheses explain this expansion of unintended policy outcomes?

The impact of conflicts over policy formulation on policy legitimacy is ambivalent. The Coalition and the Labor Party did not fight over alternative visions of refugee admission, as was the case in Britain as the first statutory legislation on asylum was planned. Conflicts came

far more from within the policy field, and there was bipartisan consensus that the Department of Immigration was right and the judiciary was wrong. Yet the Coalition's repeated attacks on the adopted regulatory framework, regardless of its support to the adoption of the reforms, doubtlessly contributed to a legitimacy decline.

The explanatory value of the second hypothesis, that is, the detrimental impact of weak enforcement mechanisms on policy effectiveness, is clearer. The 'overstay' of many temporary immigrants, and their attempts to legalise their status by claiming humanitarian status on the basis of the interpretation by the court of existing status, weakened the ability of the immigration bureaucracy to enforce the rules. Also, the fact that the courts allowed many to stay created an incentive for others not to comply, thus furthering enforcement difficulties. The other major enforcement difficulty of this period was created by the sudden increase in claims for refugee status by Chinese nationals in 1991, impacting on an unprepared asylum system. Lastly, the enforcement difficulties created by a few hundred boat people determined to exhaust all avenues of appeal before risking being sent back to their country of origin were considerable relative to the size of the group.

Finally, the explanatory value of the third hypothesis on the correlation between an increase of institutional complexity and a decline of policy legitimacy and effectiveness is also confirmed. Not unlike developments the development of refugee admission in Britain under Tony Blair, the multiplication of policy objectives (in this case not only restrictive but also progressive with the extent of stay on compassionate grounds for Chinese nationals), and the adoption of multiple and partially contradictory regulatory changes to achieve these objectives backfired. On the one hand, not all these objectives could be achieved; while on the other hand, the Hawke and the Keating governments were attacked by parliament for not being able to deliver on their promises.

In comparison to the previous chapter, the explanatory configuration of unintended policy outcomes has thus evolved. The explanatory value of policy conflicts remains limited, and that of enforcement difficulties remains high, yet the role of institutional complexity has significantly increased. The last chapter of this case study assesses to what extent this explanatory configuration further evolved under John Howard's Coalition government, as the salience of Australia's refugee admission policies became a global issue.

8 Refugee admission policies under John Howard: Opportunistic restrictiveness and global institutional activism

8.1 Introduction

It has been argued in chapter 7 that variations in enforcement ability as well as institutional complexity constituted the key explanatory variables of the decline of policy effectiveness and legitimacy under the governments of Bob Hawke and Paul Keating. This chapter investigates the evolution of this explanatory configuration under the Prime Ministership of John Howard (1996-2007). Similarly to British asylum and refugee policies under Tony Blair, refugee admission policies under John Howard's successive Liberal/National Coalition governments (1996-2007) have already been the topic of extensive political science scholarship.[259] Beyond the discipline, a large body of literature, either scholarly[260] or written for a broader audience[261] has been published on the topic over the last decade. The flurry of non-academic publications reflects the significance of contentious debates on asylum in the Australian public sphere in the early 21st century. Asylum became a major political issue as boat people arrival to Australia's shores rose sharply in 1999-2000. The Howard government was determined to prevent the settlement in Australia of these alleged 'queue-jumpers'. Policies translating this anti-boat people agenda into institutional practice, especially temporary protection visas, the relocation of asylum procedures in third countries in the context of the 'Pacific Solution', harsh treatment in immigration detention centres, and

[259] See Nicholls (1998); Kukathas and Maley (1998); McMaster (2001); Maley (2001; 2003; 2004); Goot (2000); McAllister (2003); Devetak (2004); Gelber and MacDonald (2006); Goot and Watson (2007; 2011); McNevin (2007); Rodd (2007); and Pietsch and Marotta (2009).

[260] Amongst academic publications, legal studies (refugee law and criminology) have been particularly prolific, see especially Taylor (2005); Pickering (2004); Kneebone (2006); Crock, Saul and Penovic and Dastyiari (2006); Dastyiari (2007); Kneebone and Pickering (2007); Grewcok (2009); Inder (2010).

[261] See for instance the accounts of high-profile human rights lawyer Julian Burnside (2007a; 2007b); refugee advocate Pamela Curr (2007); Jesuit and human rights activist Frank Brennan (2003); and former ALP President and Western Australian Premier Carmen Lawrence (2006; 2007). Andrew Bartlett, former Democrat Senator (now affiliated with the Greens) and member of all significant parliamentary inquiries in asylum-related matters (see next footnotes) held a very active blog on the matter from 2004 (see http://andrewbartlett.com/).

expedite removal of failed asylum seekers, have been scrutinised in details by NGOs,[262] journalists,[263] academics[264] and various public agencies.[265]

Political science literature often argues that asylum policies under Howard were highly restrictive within and beyond Australia's borders, and that this included the demonization of boat people presented as a threat to the country's security. The hostile portrayal of boat people not only involved the government but also the media and the immigration bureaucracy.[266] A number of authors highlight the nefarious contribution of xenophobe and populist Pauline Hanson and of her party One Nation to asylum politics and policies in the late 1990s.[267] A significant body of critical literature contends that the Coalition's conceived boat people as 'threatening others' who ought to be banished from the body politic through exceptional discourses and practices. Such discourses and practices are said to foster the cementation of an exclusionary and hierarchical territorial and social order helping the powerful to remain in power.[268] Rewording this claim using this thesis's analytical framework, critical scholarship thus argues that the Coalition's anti-boat people agenda was highly efficient and highly legitimate amongst Australia's political elite and society.

Whilst acknowledging the punitive character of the Coalition's asylum policies, several authors have pointed to their limits. Analyses of public opinion surveys have highlighted a correlation, in the mid-2000s, between a notable decrease of support for restrictive policies

[262] See Amnesty International (1998; 2005) on mandatory detention; Human Rights Watch (2002) on temporary protection visas; Edmund Rice Centre (2004; 2006) on the expedite removal of failed asylum seekers; and Oxfam (2002a; 2002b; Bem et al. 2007); and Metcalfe (2010) on the Pacific Solution.

[263] See Mares (2002) on mandatory detention in Australia; Marr and Wilkinson (2003) and Gordon (2005) on the Pacific Solution.

[264] See Tazreiter (2004) on the impact of temporary protection visas; Corlett (2005) and ERC (2004; 2006) on the tragic consequences of the expedite return of failed asylum seekers to their countries of origin.

[265] Between 1996 and 2007 critical reports on the management of boat people have been released by the Australian National Audit Office (ANAO), the Human Rights and Equally Opportunities Commission (HREOC), the Senate Standing Legal and Constitutional References/Constitutional Affairs Committee (SSLCRC/SSLCAC), the Joint Standing Committee on Migration (JSCM) and the Commonwealth Ombudsman (see especially ANAO, 1998; 2004; HREOC, 1998; SSLCRC, 1999; SSLCAC, 2006a; 2006b; JSCM 2000). Beyond these inquiries conducted as part of the 'usual business' of the institutions in question, extraordinary inquiries have investigated particular incidents, such as the 'Children Overboard' affair and the sinking of the 'SIEV-X' causing the drowning of more than 350 boat people (SSCICMI, 2002a), the wrongful detention of Australian resident Cornelia Rau (Palmer, 2005) and the wrongful deportation of Australian citizen Vivian Solon (Commonwealth Ombudsman, 2005).

[266] See especially McMaster (2001); Mares (2002); Devetak (2004); Pickering (2005); Tazreiter (2004); Gelber and McDonald (2006); Every (2008).

[267] Kukathas and Maley (1998); Jupp (2007: 120-136).

[268] Davidson (2003); Perera (2002); Hovell (2003); Pickering (2005); Rajaram and Grundy-Warr (2004); Grewcock (2009).

and increased support for lawful immigration on the one hand and a decline of unemployment to record lows on the other hand.[269] Research in various disciplines indicates that increased political and policy restrictiveness offset the expansion of a nationwide vibrant refugee advocacy movement at the domestic level[270] and caused the tarnishing of Australia's reputation at the international level.[271]

Scholarship appears thus divided in its assessment of both policy effectiveness and policy legitimacy. The level of conflicts in the political sphere (which is assumed to be low in critical scholarship yet significant in the rest of the literature) appears as the main explanatory factor of policy legitimacy. The contribution of the institutional setting of refugee admission, both in terms of enforcement ability and of complexity, to policy effectiveness and legitimacy (or to the lack thereof) has been less investigated than the contribution of political conflicts. The explanatory framework suggested in this thesis can thus contribute to scholarship insofar as it systematically analyses correlations between political conflicts, enforcement ability and institutional structure, and points at historical continuities and ruptures in the role of these variables.

This chapter will highlight elements of continuity and change in the refugee admission policies of the Howard government. Its structure is thus similar to the structure of chapter 5 on refugee admission policies under Blair's Prime Ministership. Although the Coalition's refugee admission policies were not based on a succession of strategy documents, as was the case of immigration and refugee policy in Britain under Blair, three distinct periods in policy-making can be identified: a period of transitory reforms between 1996 and 1998 focusing on the expansion of executive control over admission and on cost effectiveness; the barely constrained pursuit of an anti-boat people agenda between 1998 and 2004; and the emergence of an opposition to this anti-boat people agenda between 2004 and 2007. Each of the three periods is assessed in sections 8.2 to 8.4, and each section is divided between the formation of the policy agenda, its adoption and implementation. As in the previous chapters, the chapter conclusion (section 8.5) sums up the evolution of the refugee admission regime during the period of investiguation, assesses the explanatory value of the thesis's hypotheses and compares the explanatory configuration of this chapter with that of the previous chapters.

[269] McNevin (2007); Pietsch and Marrotta (2009); and especially Goot and Watson (2011).

[270] See Coombs (2004); Gosden (2006); Mares (2007).

[271] Zifcak (2003); Charlesworth et al. (2006).

8.2 First reformist phase: Governmental control and cost effectiveness

8.2.1 Inaugural agenda-setting

The results of the March 1996 federal election are crucial to understanding refugee admission policies under John Howard's first government. The Liberal/National Coalition won a sweeping majority of House of Representatives seats, yet remained reliant on other parties in the Senate.[272] Howard, who had defended the role of the Senate as the guardian of the balance of power under the Hawke and Keating governments, now denounced the upper house as obstructionist when it blocked Coalition legislation. To attempt to gain a majority at the Senate, Howard could have provoked a double dissolution of both houses.[273] He did not choose this option, partly because of fears of 'leakage' of Coalition votes to the far right. The voting share of right-wing parties had significantly expanded at the 1996 election (Evans, 2000: 26-27; 31). The most influential figure of the Australian far-right was Pauline Hanson. The former small business owner had been disendorsed as a Liberal Party candidate during the 1996 election campaign because of her inflammatory rhetoric against Asian immigration and alleged 'special rights' for Indigenous people. Campaigning to become an Independent member of the House of Representative, Hanson won the seat of Oxley, a working-class electorate and hitherto one of Labor's safest seats in Queensland, with an unprecedented swing against the Labor Party. In April 1997, Hanson established her own party, Pauline Hanson's One Nation. One Nation went on to win more than 20% of the vote at the Queensland state election in June 1998. It became the most successful third party at a state or territory election in Australian history.[274]

[272] The Liberal and the National Party won 94 out of 148 seats in the House of Representatives, gaining 29 seats while the Labor Party lost 31 seats to maintain 49 MPs in the lower house, see http://www.aec.gov.au/elections/federal_elections/1996/index.htm.

[273] According to S. 57 of the Australian Constitution, the Governor-General, on advice of the Prime Minister, can order dissolution of both the House of Representatives and the Senate after the latter has twice rejected a bill approved by the former.

[274] The role of the right-wing vote at the 1996 federal election went beyond Pauline Hanson's appeal to lower-class Queenslanders. A former far-right Liberal MP, Western Australian Paul Filing, re-entered the House of Representatives as an Independent. So did Graeme Campbell, the Western Australian maverick who had been disendorsed by the Labor Party because of his anti-Asian diatribes. Campbell also established his own xenophobic party, Australia First Party. The latter never became as popular as Pauline Hanson's One Nation (Boyle, 1997).

Neither Howard nor his Immigration Minister Philip Ruddock supported Hanson's openly xenophobic stance. Yet Howard had in the past pleaded for a reduction of Asian immigration to Australia, as the previous chapter has mentioned. In contrast Ruddock, who had considerable experience in the immigration portfolio as the long-standing immigration spokesman of the Coalition, had been one of the few Liberal MPs to support Bob Hawke's parliamentary motion condemning racism in the aftermath of Howard's derogatory comments on Asian immigration in 1988.[275] Notwithstanding their past differences, Howard and Ruddock were both anxious to regain the support of Liberal voters who had preferred One Nation at the 1996 federal election. They argued that the concerns of Pauline Hanson's supporters were legitimate and defended Hanson's right to express her opinions, which they were careful not to label as racist (Newman, 1998; Jupp, 2007: 53; 135-136). Immigration Minister Ruddock relativised Hanson's opinion as one of the many voices challenging the prerogative of the government to determine the country's immigration policies, alongside the courts, ethnic minority representatives and international bodies such as the UN.[276] The rejection of 'judicial activism' in immigration control policies had been a bipartisan concern since the 1980s, yet open criticism to the 'ethnic lobby' and the UN, but also their discursive association with the noxious influence of Pauline Hanson, were in rupture with Labor's political discourse.

Ensuring the government's primacy in decisions over entry control was the first core element of the government's inaugural agenda on immigrant and refugee admission policy. Access to judicial review was considered the greatest institutional hurdle in this respect. Ruddock considered that the reforms introduced by Labor between 1989 and 1994 to reduce the interpretive power of the courts had been inefficient. Testimony to their failure was the continuing rise of requests for judicial review in immigration and refugee cases. The Immigration Minister was thus determined to introduce a so-called privative clause in statutory legislation which would prohibit access to judicial review in immigration cases.[277]

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[275] See chapter 7, section 7.3.1.

[276] For instance, in a speech at the National Press Club on the Coalition's reforms in immigration policies on 18 March 1998, Ruddock argued: 'So the question is not how do we *stop* migration, but how do we *manage* it to gain the best outcomes for Australia. "The response of the government of Australia, of this government, is that we should determine the answer to that question. It is *the government*, not some sectional interests, or loud intolerant individual voices, or ill-defined international interests, or, might I say, the courts that determines who shall and shall not enter this country, and on what terms. This is the defining feature of Australia's migration program. It is not that we shouldn't have one.' (italic in original, Ruddock, 1998)

[277] See for instance Ruddock, House of Representatives debates, 3 September 1997, p. 7614ff.

Reducing the costs of the immigration program was the second core element of the Howard government's inaugural agenda. Over the previous years, the Coalition had repeatedly denounced Labor's policies as wasteful. To specifically reduce the costs of refugee admission, Ruddock supported an increase of planning certainty in the delineation of the humanitarian intake. In line with reforms affecting the entire public service, Ruddock also promoted profound structural reforms within the immigration bureaucracy aiming to increase effectiveness, which followed what has been labelled in the literature as New Public Management (NPM) practices.[278]

Finally, the Howard government came to power as the Comprehensive Plan of Action for Indo-Chinese refugees ended. This marked the conclusion of twenty years of international efforts to resolve the Indo-Chinese refugee crisis through the provision of mutually acknowledged status determination procedures and orderly migration channels. In line with both the strengthening of the government's prerogatives and cost reduction, the Coalition was committed to intergovernmental efforts reducing the likeliness of unauthorised migration to Australia (DIMA, 1997: 47ff).

The ability of the Coalition to convert its policy agenda into regulatory reforms is assessed in Section 8.2.2.

8.2.2 Agenda adoption: Legislative and non-legislative change

The Coalition had no difficulties adopting measures which did not require parliamentary approval, such as the restructure of the refugee intake according to its cost effectiveness agenda. The Coalition's first planned refugee intake remained close to the level of humanitarian places offered under the Keating government. It consisted of 12,000 offshore places for refugees and humanitarian entrants and 2,000 onshore places for people claiming asylum or humanitarian status from within Australia (Ruddock, 1996). However, a number of measures reflected the Coalition's prioritisation of cost effectiveness. In case grants of asylum

[278] NPM aimed to introduce management practices usual in the private sector in the public service. This encompassed the replacement of permanent position by fixed-term contracts for senior executives; an increase of planning autonomy for governmental agencies; a strengthened focus on achieving planned outcomes; and the principle of contestability, that is, to ensure the provision of services by the state was more efficient than through the market (see Halligan, 1999; Keating, 2004).

exceeded the target of 2,000, this would result in a reduction of the number of offshore humanitarian visas granted through the Special Assistance Category, a component of Australia's humanitarian program dedicated to forced migrants who did not qualify for refugee status. Ruddock argued the measure consolidated the planning certainty of settlement services (ibid.). Further changes to admission procedures reflected the primacy of cost reduction. The relatives of refugees granted a protection visa were now to be included in the annual humanitarian intake. Presenting the measure to parliament, Ruddock argued that this step followed international standards. Yet it was denounced by Labor as reducing the effective intake of refugees by 30%.[279] However, Labor had no opportunity to oppose the measure in parliament since it did not constitute a statutory change requiring legislative approval.

Bureaucratic reform was another area in which parliamentary approval was not required. In contrast to the delayed and limited application of New Administrative Law reforms to the immigration portfolio initiated under Malcolm Fraser's Prime Ministership, which has been discussed in the previous chapter, the application of New Public Management methods to the immigration bureaucracy all but lagged behind other areas of the public sector. As he came to power, John Howard replaced the Secretary of the Department of Immigration, Chris Conybeare, with veteran public servant Helen Williams. Williams had previously spent many years at the Department of Education (Malone, 2006). In February 1998, Williams was replaced by Bill Farmer, who had made his career at the Department of Foreign and Trade, and remained Secretary until 2005 (DFAT, undated).

The flexibility of the appointments of senior executives such as Departmental Secretaries has been criticised in the literature on public administration as reinforcing the politicisation of the public service (see for instance Weller, 2002). However, NPM-influenced measures within the Department of Immigration had the potential to limit *impromptu* political interferences in the regulation of immigration. Firstly, the reorganisation of the department's missions in a detailed set of targets for each of its branches against which to measure the department's annual performances reduced the margin of manoeuvre for *ad hoc* change in response to rapidly evolving political priorities.[280] Such target-setting also had the potential to increase

[279] See House of Representatives debates, 13 December 1996, p. 8639f.

[280] From 1996-97, the Department of Immigration's annual reports were structured in function of these targets. It is however important to note that both the scope of targets to achieve and the meaning of each target was significantly modified each year. It could be argued that these frequent changes reflected shifting political priorities.

the department's accountability, since expected outcomes were clearly stated. Secondly, the autonomy of the Department of Immigration was reinforced through the adoption of purchaser-provider arrangements with the Department of Finance. According to these arrangements, the Department of Immigration provided a service to the Department of Finance at an annually renewable set price. Therefore the Department of Immigration had a keen interest in ensuring that services it purchased from external providers respected the financial framework agreed with the Department of Finance (Tucker, 2008: 162-163). The increase of departmental insulation from political scrutiny through NPM practices would however contribute to the expansion of a management crisis within the Department over the following years.

Purchaser-provider agreements were to play a crucial role within a further NPM-related reform: the privatisation of immigration detention centres. Following a disagreement with the hitherto public sector company managing detention over the costs of guarding immigration detainees, the Department of Immigration put the provision of services in immigration detention centres to tender in late 1997 (ANAO, 1998: 40-41). In February 1998, Australasian Correctional Management (ACM)[281], a company specialised in prison management, became the department's detention service provider. According to the General Agreement adopted by DIMA and ACM, the original objective of the privatisation was to 'deliver quality detention services with ongoing cost reduction' (ANAO, 2004: 13). The contract between the Department of Immigration and ACM did not specify the procedures to follow in case the service provider was not able to meet this objective. Yet ACM was to be financially penalised if it did not achieve its compliance targets (ibid: 12-14). ACM was thus encouraged to deliver a desirable compliance outcome. Yet the company was not bound to addressing the singularity of immigration detention, that is, being an administrative measure and not a punitive regime, a singularity entrenched in legislation and reaffirmed in several court decisions confirming the legality of the measure. The implications of this agreement for the relations between the department and the successive companies managing the detention centres will be investigated throughout the chapter.

Another measure that did not require specific parliamentary approval and would impact on refugee admission policy was the dismantlement of institutions advising the government and the Department of Immigration on immigration policy, notably, the Bureau of Immigration

[281] ACM was the operational company of Australasian Correctional Services Pty Ltd, which became the GEO Group Australia in January 2004 (ANAO 2004: 11).

Research. Established under the Hawke government, the BIR had conducted high-quality research on immigrants and immigration policies in relative independence from the department. The dismantlement of BIR perhaps increased the ideological coherence of the immigration bureaucracy yet also abolished a significant avenue of relatively non-bureaucratic knowledge production in the field (Jupp, 2007: 57-58).

A last area of measure that did not require a vote in parliament was international cooperation. The government organised in Canberra in November 1996 an international conference on forced displacement and irregular migration in the Asia-Pacific. The meeting was the first step towards the establishment of the Asia-Pacific Consultations on refugees, displaced persons and migrants (APC), the first regional, intergovernmental forum devoted to the issue.[282] In addition, Australian immigration officials actively participated to the Manila regional conference on human trafficking in 1996 (DIMA, 1997: 90f).

The Coalition was thus able to adopt a vast array of reforms without requiring parliamentary approval. Despite having no majority in the Senate, it was equally determined to ensure the adoption of reforms necessitating legislative change. Traditional bipartisanship over the primacy of the executive and parliament over entry control facilitated this endeavour. This is best illustrated in the case of the 'HREOC amendment'. The Keating government had planned to introduce this amendment to the Migration Act before the 1996 federal election, as mentioned in the previous chapter section 7.5.2. A few weeks after the election, the Howard government introduced to parliament a similar amendment limiting the prerogatives of the HREOC to visit unauthorised arrivals in detention centres. To accelerate the amendment's adoption, the government requested the Senate to bypass usual parliamentary procedures and allow for a debate on the bill in the lower and the upper house during the same parliamentary sitting. Labor Senators, as opposed to the Greens and the Democrats, supported this infringement to parliamentary procedures.[283] To prevent the adoption of the bill, the HREOC however pledged to respect the intent of the legislator and to refrain from contacting immigration detainees without preliminary request. The Coalition supported the measure and the 'HREOC Bill' was withdrawn.

[282] See http://www.apcprocess.net/.

[283] See Senate debates, 27 June 1996, p. 2350ff and 28 June 1996, p. 1240f. The procedure had been adopted in the early 1990s in response to the huge amount of bills submitted to the Senate on the last days of a given sitting period, effectively reducing time for debates.

Labor did not support all reforms as fervently as it had supported the 'HREOC Bill'. For instance, in September 1997, Labor Senators, after negotiations, agreed to support a reform package including the reduction of asylum seekers' work rights,[284] the reduction of time to submit an appeal against an adverse departmental decision, and the introduction of a fee of 1,000 dollars on the submission of appeal against an adverse departmental decision at the Refugee Review Tribunal.[285] Former Immigration Minister Nick Bolkus argued that this highly restrictive agenda would never have been supported by Howard's Liberal predecessor Malcolm Fraser. Bolkus justified his party's qualified support to the measures as a constructive contribution to policy-making.[286]

Labor drew a line regarding the adoption of a privative clause removing judicial review in immigration cases. The Coalition first attempted to ensure the adoption of the clause as part of the reform package mentioned in the last paragraph. Yet Labor insisted that it would only approve the package without the clause. The privative clause was reintroduced to parliament as a stand-alone amendment in late September 1997. Labor's Immigration spokesman Martin Ferguson denounced the privative clause as a 'dishonour [to] the nation', a weakening of the right of appeal, a bypassing of the checks and balances entrenched in Australian society and a source of conflicts between the High Court and the government.[287] Coalition MPs and Ruddock dismissed this position as disingenuous since Labor itself had acknowledged that the impositions on constraints to judicial review between 1989 and 1994 had failed to reduce the role of the courts in immigration cases.[288] Labor's attempt to portray the amendment as a concession to One Nation was also denounced as hypocritical in this respect.[289] Because of the Coalition's majority in the House of Representatives, the lower house adopted the amendment, yet it was rejected in the Senate.

The Coalition was thus able to ensure the adoption of a far-reaching reform agenda in the field of refugee admission notwithstanding its lack of majority in the Senate. However, it was

[284] Access to the labour market was to be prohibited for individuals who claimed asylum within 14 days of entering Australia. Immigration Minister Ruddock argued that the measure was necessary as many applicants purposefully claimed asylum regardless of their low prospects of being recognised as refugees because they could stay in the country and work while their claim was being processed.

[285] Senate debates, 3 September 1997, p. 6073ff. Asylum seekers successfully appealing a decision at the RRT were subsequently reimbursed.

[286] Senate debates, 1 September 1997, p. 6077.

[287] See House of Representatives debates, 24 September 1997, pp. 8277ff.

[288] See especially Petro Georgiou, ibid. p. 8295ff.

[289] Ibid.

unable to ensure the adoption of one of the core elements of its agenda, the privative clause. Section 8.2.3 assesses how this agenda was implemented.

8.2.3 Agenda implementation: Increase in asylum claims, increasing departmental insulation

The Coalition's inaugural agenda was adopted as asylum claims increased significantly from 5,803 in the financial year of 1995-96 to 10,267 in 1996-97 (DIMA, 1997: 88), 8,101 in 1997-98 (DIMA, 1998: 99) and 8,257 in 1998-99 (DIMA, 1999: 85).[290] Most claims were submitted by people who had entered Australia legally and subsequently applied for asylum. In contrast, the number of unauthorised boat arrivals in general and of unauthorised boat arrivals claiming asylum remained at a few hundred in 1996-97 and 1997-98, whereas the number of people arriving to Australia unlawfully by plane steadily increased to more than 2,100 in 1998-99 (ibid: 67). The government attributed the decline of boat arrivals to the effectiveness of the 'safe third country' agreement with China mentioned in the previous chapter (DIMA, 1997: 100).[291] Yet the agreement did not prevent a resurgence of boat people arrivals from China in 1998-99. This was attributed to an increase of people-smuggling activities in the province of origin of the arrivals (DIMA, 1999: 67). Asylum seekers who had arrived legally in Australia were not required to be detained, in contrast to unauthorised boat and air arrivals. Still, the increase in unlawful arrivals by plane, but also the increasing efforts of the immigration bureaucracy to locate 'visa overstayers' (see for instance DIMA, 1998: 10) meant that the population of immigration detention centres increased. Yet most detainees did not spend long periods of time in detention, as 'overstayers' were generally quickly removed from Australia.

Although the number of asylum claims increased, the department was able to reduce the backlog of asylum cases from 9,055 to 5,672 cases between July 1996 and June 1997 (DIMA, 1997: 49). However, this temporarily led to an increase in grants of asylum above the limit set at 2,000 cases a year. This meant that fewer refugees from the Specific Assistance Category

[290] See also the comparative evolution of asylum claims in Britain and Australia in appendix 2, figure 2 and table 4.

[291] See Section 7.5.3.

were granted a protection visa allowing them to be resettled in Australia during that year.[292] Although the department had the opportunity to quickly notice that setting a target for the grant of asylum was impracticable, the target remained, and it remained constant at 2,000 over the following years. Fortunately for the government, the number of new asylum claims declined until 1998-99. This contributed to keeping the level of new grant of asylum below its target of 2,000 visas.

Yet the government could not prevent an increase of appeals against refusal of asylum. Almost all claimants denied asylum by the immigration bureaucracy appealed at the Refugee Review Tribunal. The Australian National Audit Office (ANAO), in a report on the management of boat people, noted that refusal of asylum in the cases of boat people claiming asylum was more often overturned by the RRT (that is, the claimant was granted asylum) than in other type of asylum cases. The ANAO enjoined the department to investigate this rate, which was all but cost-effective as an appeal at the RRT was more expensive than the original asylum decision by the Department of Immigration.[293] The department remained evasive in its response to ANAO and did not agree to investigate the matter further (ANAO, 1998: 91-92).[294] A significant proportion of asylum claimants who lost their appeal at the RRT continued to request judicial review. By 1998-99, the number of immigration cases of judicial review had increased to more than a thousand (DIMA, 1999: 119). More than half of these cases were asylum cases, a considerable proportion if one considers that several million people applied for a visa to Australia each year and had access to appeal procedures.

The department appeared even more reluctant to address critical issues as regards to immigration detention than it was as regards to the high level of appeal against asylum decisions. The above mentioned ANAO report on the management of boat people recommended that the department strengthen its monitoring role to prevent enduring disturbances in detention centres and amend the contract between the Department of

[292] On this decline see also appendix 2, figure 6 and table 8.

[293] More broadly, the ANAO report evidenced the disproportionate cost of the management of boat people since 1989: 'Boat people represent less than 0.01 % of all arrivals in Australia (…) Total Commonwealth expenditure on the management of boat people represents the equivalent of about 8% of DIMA's budget. DIMA's actual expenditure on the management of boat people is approximately 6% of its budget, as some agencies involved in the management of boat people pay their own costs.' (ANAO, 1998: xii)

[294] 'In percentage terms, 13% of boat people applicants were granted protection visas at primary determination, whereas 26% of review cases were granted protection visas. The ANAO is not aware of another administrative decision-making system where the approval rate is higher at administrative review than at the primary level.'(ANAO, 1998: 90)

Immigration and its detention service provider to allow for more accountability (ANAO, 1998: 26-39). The department, which at the time of publication of the ANAO report was entering negotiation with its new, private detention service provider, ACM, agreed to take in account these recommendations. Yet they were not implemented. The contract between the department and ACM remained vague (see ANAO, 2004).

The treatment of detainees in immigration detention also alarmed domestic and international institutions monitoring the respect of human rights. In April 1997, the United Nations Human Rights Commission (UNHRC) considered that the detention for more than four years of a Cambodian asylum claimant had been in breach of Article 9 of the ICCPR prohibiting arbitrary detention.[295] A year later, HREOC released a detailed report on the treatment of detained boat people which included visits in immigration detention. Similarly to the UNHRC, HREOC argued that long periods of immigration detention breached international human rights law, and made a number of recommendations on the management of detention centre and the care of detainees not unlike the above mentioned ANAO report (HREOC, 1998: i-xx). Observing that the UNHRC decision was not legally binding, the government rejected the views of the UNHRC and the HREOC that mandatory detention breached international law (see DIMA, 1998: 48). Immigration Minister Ruddock however affirmed to take the HREOC recommendations on the care of detainees 'very seriously' (Ruddock and Williams, 1997; Ruddock, 1999).

As it came to power in 1996, the Coalition thus adopted a wide-ranging reform agenda in the immigration field which primarily aimed to increase executive and parliamentary control over refugee admission and to increase cost effectiveness. The rationale of this agenda was the restoration of the allegedly challenged integrity and legitimacy of Australia's immigration policy, evidenced not only in the rise of One Nation but also, the government argued, courts, the 'ethnic lobby' and the UN. Labor, whose approval was critical for legislative reforms as the Coalition did not control the Senate, had no say on the adoption of many reforms transforming the immigration bureaucracy. Yet it supported, sometimes enthusiastically, sometimes reluctantly, many measures requiring its parliamentary approval. Labor's only categorical opposition was on the adoption of a privative clause further restricting access of

[295] Australia's ratification of the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) in 1991 meant that individuals had the right to complain about their treatment at the United Nations Human Rights Commission (UNHRC) after exhaustion of domestic remedies. Following the ratification, several immigration detainees had made such complaint.

immigrants to judicial review, and this opposition was vocally denounced by the Coalition as incoherent given Labor's record in this respect.

The reforms affected many aspects of refugee admission, from the structure of the humanitarian intake (which became more rigid) via the modalities of the decision-making procedure (which aimed to restrict the avenues of appeal open to prospective entrants) to the management of detention for unauthorised arrivals (which was privatised and set to become more effective). The Department of Immigration showed responsiveness to governmental demands and swiftly implemented the reforms. Yet neither the government nor the department were willing to implement policy recommendations of other agencies, even as the recommendations they made were compatible with the government's reformist agenda. The next section will show that insulation from external scrutiny was crucial in the government's response to a sharp increase in boat arrival in 1999-2000.

8.3 Second reformist phase: Anti-boat people agenda

8.3.1 Emergence and development of the agenda

The Coalition was returned to power at the October 1998 federal election. Yet its majority in the House of Representatives was slightly reduced and it was still two seats away from a majority in the Senate. The far-right vote was at its peak at the federal level. Pauline Hanson's One Nation reached a record mobilisation, gaining more than a million votes in the Senate.[296] In spite of the Coalition's rather modest victory, Prime Minister Howard considered his government's 'mandate' to have been strengthened.[297] Howard's determination to implement this 'mandate' was perceptible in the field of refugee admission, in which the government was confronted with an unprecedented increase in boat people's arrival to Australian shores.

Whereas 200 boat people had arrived in Australia in 1998, 3,722 landed on the country's northern shores in 1999, and 2,939 in 2000 (York, 2003). This led to an increase of population

[296] See http://www.aec.gov.au/Elections/federal_elections/1998/index.htm. Pauline Hanson herself lost her seat of Oxley following an electoral redistribution, yet a One Nation Senate candidate, Len Harris became a member of the upper house after having successfully challenged the eligibility of the incumbent in September 1999.

[297] The core issue of the election was the adoption of the Goods and Services Tax, which had been unpopular before the election and was opposed by Labor (Evans, 2000: 28).

in immigration detention centres from 2,716 detainees in 1997-98, to 3,574 in 1998-99 and 8,205 in 2000-01 (DIAC, 2008). Curtin immigration detention centre, which had been closed as boat people's arrival had declined over the previous years, was reopened. Two further remote detention centres were established at Woomera (South Australia) in late 1999 and Baxter (South Australia) in late 2002.

For the first time, most arrivals did not originate from South-East Asia. Many boat people arriving from late 1999 were Iraqi and Afghani asylum seekers respectively fleeing Saddam Hussein's dictatorship and the fundamentalist Taliban. As their status of unlawful non-citizens required them to be detained according to the Migration Act, the proportion of detained asylum seekers increased (Phillips and Spinks, 2011). Afghans, Iranians and Iraqis were the main nationalities held in detention between 2000 and 2002. At the time, Australia hosted increasingly large numbers of Afghan refugees (UNHCR, 2004: 221). In addition, before this increase, a high proportion of Afghan and Iraqi asylum claimants (which constituted a small proportion of the total number of claims) had been granted asylum (see DIMA 1998: 65; DIMA 1999: 85). This made it difficult for the government to argue that the asylum claims of the newly arrived Afghani and Iraqi boat people were not genuine.

These developments led to a shift in governmental and departmental rhetoric. The newcomers were not considered non-genuine refugees; however, it was argued that they should have claimed asylum elsewhere, closer to their countries of origin. They only came to Australia because they could afford to pay people smugglers to seek better migration outcomes, which most refugees across the world did not have the opportunity to do, according to official rhetoric. In addition, the arrivals were considered to have 'jumped the queue' of humanitarian places primarily available through the refugee resettlement channel, Australia being 'one of the most generous countries in the world' in terms of provision of resettlement *per capita*.[298] In the face of the rapid and sharp rise of boat people arrival from late 1998, urgent action was required to prevent the arrival of the boat people to Australia's territory. Failing to prevent entry would send a sign to people-smugglers as well as prospective boat people that Australia was a soft touch. In addition, international action was needed to ensure that the meaning of

[298] For instance, Immigration Minister Ruddock argued in late 1999 that the arriving boat people 'are often people – unlike those we have seen before who have not been able to sustain asylum claims – notwithstanding our generosity in relation to Iraqis and Afghans in accommodating them through the regular refugee program, who have been living in security and safety for a number of years in third countries, and are now seeking to get to the front of the queue for asylum places in Australia.' (Immigration Minister Ruddock, House of Representative Hansard, 13 October 1999: 11475)

Refugee Convention was not distorted by 'sectional interests', and that the UNHCR better assist states in protecting the most vulnerable refugees and combating people-smuggling (Ruddock, 2000a).

The government's rhetorical shift was more a matter of nuance than a radical rupture with the past. As the first chapter of the study has shown, expressions such as 'queue-jumpers' had been used since the late 1970s in public discourse, and by immigration ministers at least since 1982.[299] The reference to Australia as 'the most generous country in the world' in terms of *per capita* resettlement had also emerged in the context of Indo-Chinese resettlement. Frank hostility towards boat people had been a feature of the rhetoric of both Labor and the Liberal/National Coalition since the early 1990s. The Coalition's perhaps greatest rupture with previous governments was the discrepancy between its preventive rhetoric and lack of involvement in international efforts facilitating the coordinated resettlement of Middle Eastern forced migrants, whereas both the Fraser and the Hawke governments had actively fostered the orderly arrival of Indo-Chinese refugees to Australia via resettlement in the context of international agreements.

Anti-boat people rhetoric was at its most drastic as the MV *Tampa* arrived in Australian waters in late August 2001. The *Tampa*, a Norwegian freighter, carried more than 400 asylum seekers, mostly Afghans and Iraqis, rescued from an unseaworthy boat in Indonesian waters. Howard was determined not to allow the passengers to disembark on the Australian mainland. The Prime Minister argued that Australia had no obligation under international law to accept the *Tampa* passengers since the ship had been on its way to Indonesia as it made an emergency rescue call. In numerous interviews, the Prime Minister reminded everyone that Australia was one of the most generous countries in the world in terms of intake of refugees *per capita,* and thus would not allow criticism of its actions towards the *Tampa*. The scheme that was to be created on the basis of this view was soon to be nicknamed the 'Pacific Solution'. The details of post-*Tam*pa institutional change are assessed in Section 8.3.2; the following paragraph concentrates on the techniques used by the government to set its agenda in political and public discourse at the national and international level.

After a week of stand-off, Howard and Ruddock jointly announced on 1 September 2001 that the *Tampa* passengers would be brought to third countries and that the Navy would reinforce its surveillance patrols in international waters. Over the following weeks and in the context of

[299] See the excerpt of a parliamentary statement by Immigration Minister Macphee in Chapter 6, Section 6.4.3.4.

a looming federal election, the rhetoric became more aggressive. In early October Howard and senior Cabinet ministers wrongly accused the boat people of throwing their children overboard in order to provoke rescue. Australian Defence Force (ADF) representatives quickly attempted to point out to the Prime Minister that this was untrue, and that Navy officers had never informed their superiors of this happening. Yet this would only be revealed after the 2001 federal election. The tragic sinking of the 'SIEV-X',[300] leading to the death of several hundreds of people who intended to claim asylum in Australia, attracted compassionate words from the government. Yet it led to no immediate inquiry on the fact that despite intense maritime surveillance, the SIEV-X rescue calls had been reported by the Navy, as was revealed a year later in a parliamentary inquiry (SSCICMI, 2002a).

The government's anti-boat people agenda proved popular in the electorate. Several polls conducted between August 2001 and the federal election in November 2001 showed that between 68% and 77% of respondents considered that the government should not accept refugees arriving by boat; rather the boats should be turned back. When respondents were more specifically asked whether the government should allow none, some, or all asylum seekers in Australia, the percentage of respondents considering that the government should allow none increased from 50% in August-September to 56% in October 2001 (Goot and Watson, 2011: 36-39). It is important to observe that this did not constitute a dramatic shift of opinion in the matter. As has been emphasised especially in the first chapter, no poll ever showed that Australians enthusiastically supported the arrival of boat people to their shores. The government's agenda was however denounced by prominent public figures before the federal election in November 2001, including high-profile Liberals such as former Prime Minister Malcolm Fraser and former Immigration Minister Ian Macphee, as lacking compassion, dangerously playing the 'race card' and manipulating public opinion (ABC, 2001b). Regardless of this opposition, the Coalition not only won the election but significantly increased its voting share while Labor's share declined. One Nation's voting share declined to about half its 1998 electoral result, the right-wing party being outnumbered by both the Greens and the Democrats.[301] The significance of the minor parties' votes in the Senate meant that yet again the Coalition was unable to win a majority in the upper house.

[300] 'SIEV' stands for 'Suspected Illegal Entry Vessel', as unauthorised boats susceptible to enter Australian waters were officially referred to.

[301] http://www.aec.gov.au/Elections/federal_elections/2001/index.htm

The role of the '*Tampa* effect' in the Coalition victory at the 2001 federal election has been debated in the literature. Most scholars consider that the affair, combined with the fallout of the 9/11 terrorist attacks in the United States, was a determinant in the Coalition success (see McAllister, 2003). In contrast, Goot and Watson (2007: 267-268), on the basis of a detailed analysis of the Australian Election Study, have argued that the state of the economy remained the election-making issue, and thus do not consider that the Pacific Solution had a 'game-changing' impact on the 2001 election. The latter interpretation is congruent with polls conducted in the previous decade showing that immigration was never amongst the most pressing concerns of the Australian public.

Agenda-setting dissensions within the Coalition frontbench were more limited than dissensions within Tony Blair's Labour frontbench as Britain was confronted with record levels of asylum claims in the early 2000s. The only case of public divergence on refugee admission within the Coalition frontbench was not related to the prevention of boat people but to the granting of temporary resettlement to Kosovo refugees in 1999. In early April 1999, the UNHCR asked the Australian government to participate in the emergency resettlement of Kosovo refugees fleeing ethnic cleaning by the Serbian army. Immigration Minister Ruddock opposed Australia's engagement, arguing that Australia was too far from Kosovo to be an appropriate temporary destination for the refugees (Head, 1999).[302] Prime Minister Howard disregarded Ruddock's view. The day after Ruddock had publicly opposed Australia's engagement in temporary resettlement, the Prime Minister announced - jointly with the Immigration Minister - that his government, keen to participate in international humanitarian efforts, would resettle 4,000 Kosovo refugees as a strictly temporary measure. The temporary resettlement of the Kosovars was presented as an extraordinary measure and as Australia's contribution to humanitarian 'burden-sharing' in line with the country's proud record in responding to forced displacement. Ruddock fully endorsed Howard's decision and no divergences of opinion between the Immigration Minister and the Prime Minister were perceptible until Amanda Vanstone replaced Ruddock as Immigration Minister in October 2003. Although Vanstone had a more ebullient style than the meticulous Ruddock, her views were consistently in line with those of the Prime Minister.

[302] This stance was in line with Ruddock's long-standing opposition to the grant of temporary residence to humanitarian entrants. As the last chapter has shown, Ruddock had been critical of the practice in the case of the post-Tiananmen Chinese refugees.

Beyond this convergence of views between the Prime Minister, Ruddock and later Vanstone, the Department of Immigration deployed unprecedented efforts to promote the anti-boat people agenda at the domestic, regional and international level. Ruddock travelled extensively to countries of origin and of transit of unauthorised arrivals in South-East Asia and the Middle East to strengthen bilateral cooperation preventing illegal departures and ensuring the return of individuals refused entry in Australia. The most sustained cooperation was with countries in Australia's region, especially with Indonesia. Beyond bilateral cooperation, Ruddock played an active role in multilateral fora and in international organisations on refugee and immigration control policies. Ruddock chaired or participated in: a joint meeting of the Asian-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC); and the Intergovernmental Consultations on Asylum Migration and Refugees in Sydney in April 2001, Australian being IGC chair that year (DIMIA, 2001: 29); a Four Countries Conference on immigration (with the US, Canada and the UK) in April 2002 in Sydney; and, jointly with Indonesian representatives, to the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime held in Bali in February 2002 that institutionalised the so-called Bali Process, Australia being a member of the Process Steering Committee (DIMIA, 2002:4). The minister also chaired the Australian delegation at annual UNHCR Executive Committee meetings, a practice considered unusual in the field,[303] and supported the Australian candidate for the post of the IOM's Deputy Director General in February 1999, which he did not win (DIMA, 1999: 83).

Towards the wider public, the department not only promoted the anti-boat people agenda in numerous ministerial press releases but also in a large variety of public relations material released by the department directly responding to claims criticising the government's agenda. Here are two telling examples of this intense agenda-setting. Under the heading 'border protection', the department made available on its website 'factsheets' directly responding to a document released by the respected social justice organisation Edmund Rice Centre (ERC) debunking myths on asylum seekers, such as them being illegal 'queue-jumpers'. The department's 'factsheets' in response stressed that the ERC was wrong. A similar counter-offensive was launched in response to an advance copy of a critical field report of the UN Working Group on Arbitrary Detention following a visit to Australian immigration detention centres in May-June 2002. The department publicly released its hostile response to this report

[303] Interview with Paul Power and Carolina Gottardo, respectively CEO and National Policy Director of the Refugee Council of Australia 12.7.2007.

under the same 'border protection' website headline.[304] Ruddock even directly intervened in the academic sphere, publishing articles and being interviewed in well-known Australian law and immigration policy journals (Ruddock, 2000b; 2001).

The next section investigates the modalities of the adoption of the Coalition's anti-boat people agenda.

8.3.2 Agenda adoption: reducing Australia's legal and territorial protection space

The implementation of the Coalition's anti-boat people agenda required significant regulatory change. As in the previous reform periods, change occurred through measures which did not require parliamentary approval, such as bureaucratic reforms and international agreements, and through the adoption of new statutory legislation. Sections 8.3.2.1 and 8.3.2.2 focus on the adoption of this period's most significant reforms, the establishment of a temporary protection regime and of a new 'border protection regime' aimed at preventing boat people arrival. The sections closely follow the chronology of the adoption of the reforms, as this illustrates the ability of the government to use the speed of events in its favour.

8.3.2.1 Temporary protection regime: Legislative expansionism

Howard's above mentioned announcement that Kosovo refugees would be granted strictly temporary humanitarian visas in early April 1999 was entrenched in statutory legislation three weeks later. A One Nation executive quickly claimed that temporary resettlement was a 'direct application' of the right-wing party's program on immigration, which the Coalition had earlier denounced as 'inhumane' and 'discriminatory' (Head, 1999). The Migration Legislation Amendment (Temporary Safe Haven Visas) Act 1999 did not specifically apply to the Kosovo refugees. It provided for the creation of temporary visa classes in specified circumstances. Regardless of its potentially wide-ranging implications, the amendment was unanimously endorsed in parliament. MPs and Senators from all major and minor parties

[304] See the archived portal at http://pandora.nla.gov.au/pan/31543/20040430-0000/www.minister.immi.gov.au/borders/index.htm.

stated that their vote showed support to Australia's involvement in the international resolution of the humanitarian crisis in the Balkan.[305]

The flexibility of the amendment was illustrated a few months later as the Safe Haven status was granted to 1,500 East Timorese refugees. The latter had been evacuated from Dili as Australian-led peacekeeping UN troops intervened in East Timor to protect the population against Indonesian attacks following a referendum supporting East Timor's independence.[306] Three weeks after the arrival of the East Timorese, in mid-October 1999, the government used the wide-ranging regulatory possibilities allowed by the Temporary Safe Haven Visa Act to introduce, per secondary legislation, three-year temporary protection visas for unauthorised asylum seekers granted protection in Australia. In contrast to usual permanent protection visas, temporary protection visas (TPVs) entailed very limited access to welfare support and no right to apply for reunion with family members. The measure was explicitly adopted to deter further boat people from Iraq and Afghanistan considered to have had the opportunity to seek protection elsewhere and to have come to Australia 'uninvited'.[307]

To deflect the claim that the TPVs were the creature of One Nation, Immigration Minister Ruddock stressed that temporary protection had been used by earlier governments. Indeed, as has been mentioned in the last chapter, the Hawke government had introduced four-year temporary protection visas as refugee claims made by Chinese nationals soared in 1990. What the Immigration Minister did not mention was his strong opposition to Labor's measure at the time. The Democrats criticised TPVs as discriminatory towards genuine refugees and sought to invalidate the measure through the adoption of a motion of disallowance.[308] Yet the motion was not supported by Labor. Labor Senators argued that although they were appalled at the government's political manoeuvres, TPVs were a necessity as 'queue-jumping' shouldn't be allowed. In addition, Labor parliamentarians said they were able to mitigate the detrimental effects of the visa through the introduction of 'safeguards' in the legislation: at the expiration of their visa, the situation of TPV refugees would be reconsidered to see if humanitarian protection in Australia was still necessary. Such safeguards were considered to bring the

[305] See for instance Democrat Senator Andrew Bartlett, Senate debates, 29 April 1999, p. 4553ff.

[306] See House of Representatives debates, 29 September 1999, p. 10911.

[307] See Philip Ruddock, House of Representative debates, 13 October 1999, p. 11474 and 20 October 1999, p. 11981.

[308] Senator Andrew Bartlett, Senate debates, 24 November 1999, p. 10599.

TPVs in conformity with international law requirements and to differentiate them from One Nation's own temporary protection proposals.[309]

Many voluntary organisations and scholars have argued that the TPV regime was in breach of Article 31 of the Refugee Convention (see for instance Crock, Saul and Dastyiari 2006: 138). Article 31 states that refugees who enter a country unlawfully should not be discriminated against if they contact the authorities of the country of arrival without delay. As mentioned in the first chapter of this case study, the Menzies government had been opposed to the adoption of this article during the drafting of the Refugee Convention, arguing that the article had been written for European countries, where refugees crossed territorial borders to flee persecution. The interpretation of the article by the Howard government showed not only that it shared Menzies' view, but also that it was able to follow this view in practice notwithstanding the existence of the Refugee Convention. This occurred as use was made of the significant margin of interpretation allowed by the wording of Article 31 for its purposes regardless of its usual understanding not only by immigration lawyers and the UNHCR, but also many other states party to the Convention.

8.3.2.2 A 'new comprehensive border protection regime': Interrelations between bureaucratic and legislative change

8.3.2.2.1 Pre-*Tampa* policies

The establishment of a 'new comprehensive border protection regime' (SSCICMI, 2002a: 3) preventing the arrival and settlement of boat people, occurred through considerable institutional and legislative change. In this process, the organisational role of the Department of Prime Minister and Cabinet overshadowed the Department of Immigration. As the arrival of boat people to Australia's shores accelerated in April 1999, Prime Minister Howard ordered the establishment of a Coastal Surveillance Task Force aiming to define a strategy strengthening Australia's ability to 'detect and deter unauthorised arrivals' whether they arrived by boat or by plane. The Task Force released a comprehensive list of recommendations in June 1999, all of which were adopted by the government. The key

[309] Senator Jim McKiernan, Senate debates, 24 November 1999, p. 10610ff; Senator Chris Schacht, Senate debates 25 November 1999, p. 10643

measures included an increase in financial resources to overseas immigration staff aiming to precent the departure to Australia of non-citizens who did not possess a valid visa; the strengthening of cooperation between agencies involved in maritime 'border protection', and between agencies gathering intelligence on irregular movement; and increasing penalties on people-smuggling activities. In total, the government committed 124 million AUD to the detection and prevention of unauthorised arrival to Australia (ANAO, 2002: 77-79).

Measures requiring changes in statutory legislation were introduced to parliament in September 1999 as the Border Protection Legislation Amendment Bill 1999. The Act made numerous amendments to the Migration Act 1958, the Customs Act 1901, and the Fisheries Management Act 1901. This Act allowed Australian immigration officers to board, search and destroy foreign ships not only within Australian territorial waters but also, in particular cases, in international waters. Extra-territorial intervention was considered compatible with the UN Convention on the Law of the Seas (UNCLOS) preventing sovereign intervention on foreign ships in international waters by making 'full use' of exceptions in the UNCLOS allowing boarding a ship that would constitute a threat to national security (Grimm 1999). As in the above mentioned case of Article 31 of the Refugee Convention, the government thus used for its purposes the margin of interpretation opened by the wording of the treaty, regardless of what was regarded as the commonly accepted interpretation of the UNCLOS at the time (see Inder, 2010). Labor supported the legislation as necessary to 'protect the system from people queue-jumping when they are being promoted by people smugglers.'[310] In rupture with their usual disapproval of government legislation on refugee admission, the Democrats also supported the adoption of the Border Protection Legislation Amendment Bill, arguing that the bill did not merely target refugees, but all boats potentially threatening Australia's interests.[311] One Nation equally endorsed the amendment.[312] Parliamentary unanimity on this Act contrasted to the renewed opposition of Labor and the minor parties to the adoption of a privative clause prohibiting judicial review in immigration cases, which once again was reintroduced to parliament in parallel to the border protection amendment.[313] Resources dedicated to the prevention of unauthorised arrivals were again increased in May 2000, and further measures were taken to reinforce inter-agency cooperation on the matter in Australia

[310] Senator Chris Schacht, Senate debates, 25 November 1999, p. 10643.

[311] Senator Andrew Bartlett, ibid, p. 10651.

[312] See Senator Len Harris, ibid, p. 10647.

[313] See Con Sciacca, House of Representatives debates, 28 June 1999, p. 7597.

as well as cooperation with countries of origin and transit of unauthorised arrivals (ANAO, 2002: 78-79).

8.3.2.2.2 Post-*Tampa* policies: the Pacific Solution and more

The policy agenda adopted after the '*Tampa* affair' in 2001 did not constitute by itself a 'regime' change. Rather, institutional dynamics that had developed over the previous years, such as the dominant role of Prime Minister and Cabinet in organisational development and an 'innovative' interpretation of international law, were reinforced. Governmental action taken towards the *Tampa* was managed by the People Smuggling Taskforce (PST), an interdepartmental coordination unit closely associated with the Department of Prime Minister and Cabinet (SSCIMI, 2002: 7-8). After the resolution of the Tampa affair, the PST continued to coordinate action towards SIEVs until December 2001.

On 29 August 2001, as the *Tampa* entered Australia's territorial waters, the government introduced the Border Protection Bill 2001 in parliament. The bill aimed to authorise the Australian authorities to remove any ship from Australian territorial waters, and thus went far beyond the interpretation of the UNCLOS made in the Border Protection Legislation Amendment Act 1999. The government's decision to remove a ship from Australian waters was to be non-renewable by the judiciary. Individuals on the ship in question would be prohibited from claiming asylum in Australia (Hancock 2001). Opposition Senators voted against the bill as its provisions dealt with far more than the arrival of the *Tampa* and were devoid of any judicial oversight.[314] The bill was thus defeated in the Senate. Notwithstanding the Senate's decision, the government was at the time negotiating with several nations in the Pacific the admission and processing of the *Tampa* passengers (Oxfam, 2002: 20-21) Prime Minister Howard announced on 1 September 2001 that the government had obtained the agreement of Nauru to process asylum seekers amongst the *Tampa* passengers and of New Zealand to resettle those assessed as refugees. Papua New Guinea agreed to the transhipment of the *Tampa* passengers through Port Moresby on 2 September, and to hold a second offshore processing centre similar to that on Nauru on 10 October 2001 (SSCMI, 2002: 3;

[314] See Senate debates, 29 August 2001, p. 26969ff.

292). The *Tampa* passengers were transferred onto an Australian Navy ship bound to Nauru on 3 September.

Over the course of these few days, Howard misled the Australian public by wrongly suggesting that the offshore processing scheme had the support of the UNHCR, and that the *Tampa* passengers agreed to be sent to Nauru (Marr and Wilkinson, 2003: 162-164). In addition, the government ordered the Navy on 3 September 2001 to initiate Operation Relex. The maritime operation aimed to prevent the entry into Australian waters of SIEVs[315] through interception by the Australian Navy. Interception was followed by either escorted return to Indonesian waters or, if the boat was deemed unseaworthy, by rescue and transfer of the boat passengers to Australia's excised territory Christmas Island, and eventually to offshore processing centres on Nauru and Manus Island. None of these measures had been coordinated with Indonesia, from which the unauthorised boats departed to Australia. As the offshore processing regime was elaborated, Indonesia's President Megawati Sukarnoputri repeatedly refused to speak directly to John Howard (Marr and Wilkinson, 2003: 74-76).

The pursuit of offshore processing without pre-existing legal basis was challenged at the Federal Court. Within a few days, Justice Tony North ordered the return of the *Tampa* asylum seekers to Australia. Yet the judgment was appealed by the government at the Full Federal Court. On 18 September 2001, the Full Federal Court acknowledged that the executive had, on the basis of the Migration Act 1958, the 'prerogative power' to prevent the entry of unlawful non-citizens into Australia's territory. Before the court's decision, the UNHCR had suggested an alternative scheme to the 'Pacific Solution' (UNHCR, 2001a) and welcomed North's decision (UNHCR, 2001b). Yet the UN agency later acknowledged that this decision had been overturned and agreed to start processing the *Tampa* asylum seekers on Nauru from 24 September 2001 (UNHCR, 2001c).[316]

The Howard government had thus managed to take advantage of its geopolitical dominance in the Pacific and of the primacy of domestic law *vis-à-vis* international law to initiate its new border protection regime. The wide-ranging legislative package entrenching this regime in domestic law encompassed six bills.[317] The legislative package retrospectively endorsed the

[315] See footnote 299.

[316] The UNHCR however was not prepared to process further asylum seekers intercepted by the Australian Navy, see also next subsection.

[317] The package included a new version of the previously rejected Border Protection Bill, the Border Protection Bill (Validation of Enforcement Power) Bill 2001; the Migration Amendment (Excision from Migration Zone)

post-*Tampa* anti-boat people agenda. This included the designation of a large proportion of Australia's territorial waters (the territorial sea surrounding the northern half of the Australian continent) as 'excised' from the country's migration zone. Unauthorised non-citizens intercepted in the 'excision zone' were labelled 'offshore entry persons'. 'Offshore entry persons' had no right to claim asylum in Australia and were required to be taken to 'declared countries' or to remain in detention in the excised zone. Declared countries had to fulfil the 'safe third country' criteria first used in legislation under the Keating government (see section 7.5.3): the Australian government had to be satisfied that declared countries respected the principle of *non-refoulement*. The asylum procedure foreseen in declared countries was entirely at the discretion of the Department of Immigration. Asylum claims had no right of appeal to the Refugee Review Tribunal. The legislative package entailed further restrictive measures. Most significantly, the privative clause restricting access to judicial review by the High Court in immigration cases was finally adopted, and the scope of the definition of a 'refugee' in Australian law was further reduced.[318] The package was supported by Coalition and Labor parliamentarians in the House of Representative on 19 and 20 September 2001 and in the Senate a week later. The Democrat, Green and Independent Senators rejected the measures.

As they had done earlier towards initiatives such as the TPVs, Labor parliamentarians were critical of the expedite character of the adoption of the reforms yet mentioned that the level of unauthorised arrivals made the reforms necessary.[319] Over the following years, Labor indeed opposed measures building on the post-*Tampa* legislative package, especially the expansion of the excision from the migration zone which reduced access to asylum procedures on the Australian mainland. The Howard government first attempted to expand the excision through the introduction of migration regulations expanding the meaning of the original excision bill. The regulations were repeatedly disallowed in the Senate. A bill entrenching the expansion of excision zone in primary legislation was then introduced in parliament, and was twice rejected

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Bill 2001; the Migration Amendment (Excision from the Migration Zone) (Consequential Provisions) Bill 2001; the Migration Legislation Amendment Bill (n.1) 2001; Migration Legislation Amendment Bill (n.6) 2001; and the Migration Legislation Amendment (Judicial Review) Bill 1998 (2001).

[318] See overview in SSCICMI (2002a: 5-6). According to Senator Bartlett, the UNHCR in a submission raised the risk that the new Section 91 R of the Migration Act redefining the meaning of a refugee in Australian law would exclude Convention refugees from being granted asylum and put them at risk of *refoulement*, see Senate debates, 24 September 2001, p. 27693f.

[319] See Con Sciacca, House of Representatives debates, 19 September 2001, p. 30954f; Senator Jim McKiernan, Senate debates, 24 September 1001, p. 27697f.

by the Senate in 2002 and 2003.[320] Notwithstanding this setback, the adoption of the Coalition's boat people agenda from 1999 to 2004 was expeditious and entailed the conversion of extraordinary measures adopted 'on the run' into a 'comprehensive new border protection regime.' Sequential analysis revealed a pattern of closely intertwined non-legislative and legislative reforms brought forward by a variety of events. This new *fait accompli* tactic, in which non-legislative reforms preceded statutory change, resulted in a profound transformation of the management of boat people. Yet other factors enabled the use of such tactics in the first place. At the domestic level, the absence of constitutional safeguards as regards to the rights of non-citizens widened the range of restrictive options that the government could adopt. The international political environment was also conducive of such expeditiousness. Australia was far more powerful than the poverty-stricken Pacific states which agreed to participate in deterrent schemes in exchange for financial assistance. The 9/11 terrorist attacks in the US led to an increased acceptance of tough border control policies in public opinion. Finally, the ambivalence of the Refugee Convention, which did not prohibit the processing of asylum seekers in third countries, meant that the 'spirit' of the treaty could easily be bypassed by determined governments without breaching the 'letter' of the treaty. Similarly, the government used to its advantage the margin of interpretation allowed by the wording of the UNCLOS.

As Section 8.3.3 will show, the implementation of the anti boat-people agenda resulted in unintended outcomes which jeopardised the sustainability of the reforms.

8.3.3 Policy implementation: The limits of deterrence

The implementation of the Coalition's anti-boat people agenda was followed by an immediate decline of boat people arriving on Australia's shores. Whereas six unauthorised boats carrying 1,212 persons arrived to the Australian mainland in August 2001, one boat with 65 persons on board arrived in September 2001, then none until the arrival of one boat in July 2003. Two others unauthorised boats followed in November 2003 and March 2004. In the first months following the beginning of Operation Relex, the decline in boat arrival to Australia's shores was accompanied with an increase in maritime interceptions of SIEVs by the Australian

[320] See the detailed chronology of the events in Coombs (2005).

Navy. Between August and December 2001 sixteen SIEVs carrying 2,372 passengers, were either sent back to Indonesia or granted landing in Australia's excised territories; more than 1,600 asylum seekers were sent to Nauru and PNG and had their claims processed there (DIMIA, undated; Oxfam, 2002b: 10). A marked decline in boat interception occurred from December 2002. Only one boat was escorted to Australia's excised territories and one returned to Indonesia until June 2004 (DIMIA, undated). The government praised this decline as a demonstration of the effectiveness of its policy strategy (see for instance Ruddock, 2002).

The decline of boat people arrival was correlated with a more gradual decline of asylum claims made in Australia. The number of claims peaked in 2000-01 at 14,672 and then steadily declined to 6,299 in 2002-03 (DIMA, 2004: 66). This was the lowest asylum figure since 1992, yet it remained far higher than the number of unauthorised boat people annually intercepted en route to Australia or in Australian waters. Overall figures on asylum claims however barely featured in political debates and were only scantily addressed in annual departmental reports. This suggests that the 'asylum issue' had under the Howard government almost exclusively become a 'boat people issue' in public and political discourse, and that success in the prevention of boat people was presented as an effective asylum policy.

Yet several instruments introduced to restrict the arrival and settlement of unauthorised boat people seeking asylum did not work as intended. Temporary protection visas, which excluded family reunion, constituted a pernicious incentive for family members left behind to attempt to be reunited with their relatives granted asylum in Australia. The number of women and children *en route* to Australia by boat to claim asylum increased after the introduction of the TPVs (Gordon, 2005: 34-35). The intent of the TPVs to deter unauthorised asylum claims through restrictions on access to welfare services also backfired. While agencies usually assisting refugees had to limit their assistance to TPV refugees to avoid contravening government regulations and thus losing their funding, state governments and additional voluntary agencies shifted resources towards the assistance of TPV holders despite having no dedicated line of funding to do so (Pickering, Gard and Richardson, 2003). Finally, the TPVs did not in practice remain temporary. Most TPV holders were granted further protection at the expiration of their visas, as their protection need was still considered to justify their stay in Australia as refugees. Yet the temporariness of their original residence status left them in uncertainty as regards to their future and jeopardised successful socio-economic integration in Australia.

Operation Relex, the maritime interdiction operation which started in September 2001, also had unintended outcomes. Navy officials noted that prior to Operation Relex, passengers of intercepted boats welcomed their rescue knowing that they would be transferred to Australia. The prospect of being either returned to Indonesia or transferred to third countries led to a decrease of cooperation amongst passengers, now prepared to create situations triggering rescue at sea. This included sabotaging the engine of their boats, jumping overboard, or more violent behaviour towards Navy staff (SSCICMI, 2002a: 29-30). Violence against Navy officers increased after the mission of Operation Relex had been modified to restrict rescue at sea to cases of absolute last resort, that is, when SIEVs were 'marginally seaworthy' and the boat passengers already in concrete danger of drowning (SSCICMI, 2002a: 81). The desperate behaviour of boat people, which was denounced as ruthless by the Australian government, was the very consequence of its policies. Yet it never went as far as to lead parents to throw their children overboard, as the government had argued in October 2001 (see Section 8.3.1). The implementation of Operation Relex also led to tensions between the Indonesian government and the Australian authorities in regards to the prevention of boat departures. The Indonesian authorities did not welcome Australia's unilateral boat interdiction policy. Bilateral cooperation between the Indonesian and the Australian police forces aiming to prevent boat departures from Indonesia was unilaterally interrupted between September 2001 and June 2002 (SSCICMI, 2002a: 10).[321] Indonesia's lack of cooperation explains a temporary increase in boat interception by the Australian Navy in September-October 2001 (DIMIA, undated).

The 'outsourcing' of asylum seekers did not prove as expeditious as expected. Firstly, the UNHCR, which had agreed to process the asylum claims of the *Tampa* passengers, declined to do so in the case of claims of further arrivals to Australia's offshore processing centres, so that the Australian government had to send domestic immigration staff to process the claims. Secondly, most of the asylum seekers sent to Nauru and PNG were granted refugee status. Their cause had mobilised prominent lawyers - whom the government tried to prevent visiting the offshore processing centre of Nauru.[322] The 'offshore' asylum seekers also benefited from

[321] Ironically, this followed an official visit by Prime Minister Howard to Indonesia in August 2001, during which he and Indonesia's President Megawati Sukarnoputri jointly released a communication on the renewal of the Australia-Indonesia relationship in the areas of people-smuggling and trafficking (Ricklefs, 2004: 279).

[322] Prominent refugee lawyer Julian Burnside for instance was first denied a visa to visit Nauru. He was then granted a visa, yet the plane on which he travelled to Nauru was denied landing. Interview with Julian Burnside, Melbourne, 26.7.2007.

a High Court decision in February 2003 to invalidate the privative clause restricting judicial review in immigration cases as in breach of section 75 of the Australian Constitution defining the powers of the High Court. This led to the grant of refugee status to many claimants, whom the department, in charge of the original procedure, had first denied refugee status. In addition, many boat people refused refugee status in the first instance refused to return to Afghanistan and Iraq despite the offer by the Australian government of 'repatriation packages' as they feared persecution upon return (Gordon, 2005). Thirdly, most 'offshore entry persons' granted refugee status were resettled in Australia. Except for New Zealand, no country agreed to resettle more than a handful of refugees from Nauru or Manus Island, resulting in Australia resettling almost 58% of the caseload (Bem et al., 2007: 55). Finally, the government's prioritisation of the Pacific Solution led to the neglect of other significant issues in its Pacific region at the time of the *Tampa* arrival. For instance, Australia's Foreign Minister did not attend the signing of the Bougainville Peace Agreement in Papua New Guinea, otherwise considered to contribute to regional stability, which was a key element of Australia's foreign policy in the region (Oxfam, 2002: 18). Several Pacific Island governments as well as the Pacific Island Forum, the main multilateral organisations including Australia and its Pacific neighbours, condemned the policy. So did the Nauruan opposition and later the island's new government, civil society organisations and churches across the region (ibid: 22-24; Gordon, 2005).

The Pacific Solution had been implemented as overcrowding and disturbances in immigration detention centres reached a climax. If the government had hoped that offshore processing would deter so many applicants as to resolve these problems, this expectation was not met. Not only did the government open further immigration detention centres after the implementation of the Pacific Solution; the mismanagement of immigration detention remained systemic despite the ending, in 2003-04, of the purchaser-provider agreement between the Department of Immigration and the Department of Finance mentioned in section 8.2.3. The agreement had significantly contributed to an increase of financial pressure on the department and external service providers to meet compliance targets such as detention and removal of unauthorised arrivals (Halligan and Tucker, 2008: 13). This obsession with targets meant that detention was in any case the preferred option of the successive companies managing detention centres over the release of detainees in the community. It also fostered a highly punitive culture. Cases of detainee abuse, as well as insensitiveness to abuse of detainees by other detainees, were routinely reported to observers. Desperate actions such as

mass hunger strikes, lip-stitching and wrist-slashing proliferated. Several mass escapes occurred, often with the support of refugee activists (Mares 2002). The department and the government remained unmoved by the accumulation of critical reports, even when these reports had been commissioned by the department itself, such as the Flood Report in 2000. A minor concession was the creation of the Immigration Detention Advisory Group (IDAG), which could visit any detention centre and advise the government on potential reforms; these recommendations however remained purely consultative. Also, the management of immigration detention centres was eventually transferred to the company Group 4 Falck in February 2004, yet the new contract between DIMIA and its service provider did not require a significantly expanding the monitoring of the welfare and human rights of detainees (ANAO, 2004).

The situation was different in the offshore processing centres (OPCs) on Nauru and Manus Island (Papua New Guinea). The International Organization for Migration had agreed to manage the centres by guaranteeing that they were not detention facilities, as Nauruan or Papuan legislation did not allow the detainment of unlawful non-citizens whose only crime was to have attempted to enter another country illegally. The IOM, which had a long experience in the provision of immigration services to both states and individual immigrants, was not driven by the punitive culture permeating the prison-building companies providing services in the Australian immigration detention centres. Still, the conditions in which boat people were hosted on Nauru and Manus Island in 2001-02 were appalling, not only according to external observers[323] but also to an IOM officer who managed one of the OPCs.[324] Over time, the living conditions in the OPCs became more humane, and asylum seekers were granted the right to leave the centres during the day. This however did not mitigate the isolation to which asylum seekers were confined. Most suffered from depression or other serious forms of mental illnesses (see Gordon, 2005; Metcalfe, 2010).

The harsh treatment of intercepted boat people within and beyond borders fuelled domestic opposition. The Labor frontbench's 'qualified support' to Coalition policies was highly controversial amongst the ranks of the party. Thousands of Labor members took part in rallies denouncing the party's stance during the 2001 electoral campaign. This protest resulted in the

[323] Interview with Democrat Senator Andrew Bartlett, Canberra, 19.6.2007; interview with *The Age* journalist Michael Gordon, Melbourne, 26.7.2007.

[324] Interview with Steve Hamilton, Chief of Pacific Operations, International Organization for Migration, Canberra 22.6.2007.

creation of the Labor for Refugees group in December 2001 (Rintoul, 2009). Internal divisions became more prominent as the party frontbench reiterated its restrictive stance towards unauthorised arrivals claiming asylum after the 2001 federal election. The approach adopted by new Labor leader Simon Crean and immigration spokeswoman (and future Prime Minister) Julia Gillard on asylum seekers and refugees in December 2002 (Crean and Gillard, 2002) caused the prominent resignation of outspoken Carmen Lawrence, a former Western Australian Premier, from Crean's frontbench (ABC, 2002).

The critical stance of a number of Labor Senators permeated the report of the Senate Select Committee on the 'Children Overboard' affair, the drowning of the SIEV-X and the establishment of the Pacific Solution (SSCICMI, 2002a). The report, released in October 2002, was fiercely denounced by Coalition Senators (SSCICMI, 2002b). Increasing support for a more compassionate stance towards asylum seekers within the Labor Party was also manifest in the election of Carmen Lawrence as National President of the party.[325] Yet the division of the Labor Party over asylum and refugee policy continued under the leadership of Mark Latham, who succeeded Simon Crean as Labor leader in December 2003. The Labor Party platform on asylum adopted at the January 2004 National Conference remained close to the policy of the Coalition. It endorsed mandatory detention for unauthorised asylum seekers and a 'tough' approach to border protection. This platform was not approved by several Labor frontbenchers.[326]

By that time, the domestic refugee advocacy movement experienced an unprecedented mobilisation. Advocacy in regional Australia, in which several detention centres were located, became particularly significant from 2000-01. The network Rural Australia for Refugees (RAR), which was created in Bowral, a rural town of New South Wales, in the aftermath of the Tampa incident, involved more than 5,000 people across Australia in late 2002.[327] More

[325] Interview with Carmen Lawrence, Canberra, 13.6.2007. Lawrence was the first ALP president to be chosen by party members and not the party's leading instances, in November 2003.Ironically, this grassroots-oriented reform had been introduced by party leader Simon Crean, who supported the anti-boat people agenda, see ABC (2003).

[326] Caucus member Lindsay Tanner argued that his part had adopted a 'racist' refugee policy. Party President Lawrence expressed her disappointment yet argued that dissent was at least alive within her party, whereas Liberals opposing the course of the Coalition frontbench remained 'mute' (ABC 2004).

[327] RAR's policy objectives were to '[r]eceive all asylum seekers in accordance with our obligations under the UN Convention on Refugees which Australia signed in 1954", to release all detained asylum seekers, abolish TPV, close detention centres, and expand the Australian refugee resettlement quota.' (RAR ten point plan, http://www.ruralaustraliansforrefugees.org.au) To RAR founding member Ann Coombs, 'Rural Australians for Refugees was borne out of frustration. It began after the Tampa stand-off, when we were told that 85% of

broadly, public support for the Coalition's anti-boat people agenda declined between 2002 and 2004. According to the above mentioned Newspoll survey series, 48% of respondents agreed to admit 'some' or 'all' boat people seeking asylum in August-September 2002 and 63% in August 2004 (Goot and Watson, 2011: 39).

John Howard's two 'middle mandates' from 1998 to 2004 were thus marked by the formation, adoption and implementation of an extensive anti-boat people agenda. Other categories of asylum seekers were almost absent from this agenda. Refugee resettlement declined during this period because of the *de facto* cap on the number of refugee places available in Australia introduced by the Coalition in earlier years,[328] yet this was attributed by Immigration Minister Ruddock and others to boat people 'jumping the queue' of available humanitarian places. Preventing the further decline of resettlement was thus one of the justifications used to legitimise the anti-boat people agenda.

The political rationale of this agenda was highly exclusionary and it featured tremendous institutional innovativeness to prevent the arrival and settlement in Australia of a few thousand boat people, most of whom were from the Middle East. This innovativeness was pursued both within and beyond Australia's borders. It involved the legal 'shrinking' of the Australian territory for immigration purposes and the expansion of the bureaucratic territory of its immigration and border control apparatus. This transformation of Australia's territory and regulatory space was to ensure not only that boat people did not arrive in Australia, but also that their asylum claims were still processed to avoid a conflict with the letter of the Refugee Convention. Both of these innovations involved intense domestic legislative and bureaucratic reforms as well as a creative reinterpretation of international refugee and maritime law for executive purposes. These innovations were promoted as the future of the global refugee regime in every possible arena, including: talk-back radio shows reaching the electorate of the proverbial 'marginal seats' (constituencies in which the difference of voting intentions between the Coalition and Labor was narrow); the Department of Immigration's website (one just need clicking 'border protection', then 'factsheets', then 'myths on asylum seekers' on the archived department's website to be immersed in this advocacy); and the immigration bureaucracies of foreign governments in the context of numerous regional and international meetings on forced migration and people-smuggling.

Australians were behind the government. (…) Confronted with abuse of power, individual action seems futile. But it is exactly at such moments that it is imperative.' (Coombs, 2004: 126)

[328] See statistics on the evolution of refugee resettlement in appendix 2, figure 6 and table 8.

The approval of the Labor Party was necessary for the numerous measures requiring change in statutory legislation. It has been argued in the literature that a key contributor to bipartisan as well as public support to such measures was a deep-seated fear of invasion by malignant 'others', a fear borne out of the repressed knowledge that the ancestors of many European Australians had themselves been such invaders.[329] The analysis made in this chapter does not confirm this claim yet qualifies it as follows. First, there is evidence that this fear was volatile and not all-encompassing. Within the political sphere, there was significant opposition to the government's anti-boat people agenda amongst Labor and the minor parties. Public opinion polls show that support to the anti-boat people agenda significantly declined after 2002. Secondly, the Howard government was highly skilled in what can be qualified as 'opportunistic regulatory engineering'. It used its institutional prerogatives, its geopolitical status and its ability to interpret international law to ensure the incremental adoption of the agenda, which thus built on already pre-existing regulations (as well as in Australia's historical dominance of the Pacific). This is why the process can be qualified as 'engineering', which involves incremental innovation to build on existing knowledge and practices, rather than, say, the work of a 'maleficent genius' fundamentally transforming Australia's refugee admission regime for the worst.

Would Machiavelli have been proud of the Coalition's application of his principle that the end justifies the means? Not really, if one looks at 'the end'. The Coalition's anti-boat people agenda was perhaps effective in preventing the arrival of 'suspected illegal entry vessels' to Australia's shores. Yet the popularity of the policy quickly declined with the emergence of an increasingly organised opposition, and many of Howard's stated objectives were not achieved. Most significantly, most of the boat people sent to offshore processing centres eventually settled in Australia as refugees. The third section assesses the impact of these developments during Howard's last mandate as Australia's Prime Minister.

[329] See especially Burke (2008), Lawrence (2006; 2007). In the personal interview mentioned in footnote 325, Carmen Lawrence insisted on the role of this 'fear of the other' in the high level of public support for the Coalition's anti-boat people agenda; so did then Democrat Senator Andrew Bartlett (see footnote 323), journalist Peter Mares (interview in Sydney, 23.7.2007), and then President of the Refugee Council of Australia David Bitel (interview in Sydney, 27.6.2007 and 5.7.2007).

8.4 Third reformist phase: Reluctant and limited reformism

8.4.1 Stability of the governmental agenda

In October 2004, the Liberal/National Coalition won its fourth consecutive federal election. The Coalition majority in the House of Representatives was slightly reduced, yet the government won enough votes in the Senate to ensure a majority of two seats which was to become effective when half of the upper house was renewed in July 2005. The 2004 election also halted the increase in voting shares for minor parties observed in the previous federal elections. The One Nation vote continued to decline. The Democrat vote collapsed following internal party feuds. The Green vote, while expanding, did not grow as much as the party and many observers had expected.[330]

The Liberal/National majority in both houses allowed the Coalition to adopt legislation without needing to ensure the support of other parties. In the field of refugee admission, the results of the October 2004 federal election may have been interpreted by the Howard government as an endorsement of the Coalition's preventive agenda. Indeed the government's anti-boat people agenda appeared here to stay. Refugee resettlement however did not increase beyond targets first set in 1996 despite a marked decrease of asylum claims in Australia and a significant expansion of the other streams of the country's immigration intake between 2004 and 2007.[331]

The stability of the government's anti-boat people agenda is evidenced by the following measures. The establishment of the Coalition's majority in both houses in July 2005 was quickly followed by the adoption of an amendment expanding the excision from the migration zone. As has been mentioned in Section 8.3.2.2, Labor and the minor parties had repeatedly opposed this expansion. In November 2005, the Migration Legislation Reform Act 2005 re-introduced the privative clause restricting judicial review by the High Court in immigration cases without breaching Section 75 defining the powers of the court. In mid-2006, the Coalition attempted a further expansion of the excision zone to the entire Australian mainland with the tabling of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006.

[330] See http://results.aec.gov.au/12246/default.htm.

[331] See appendix 2, figure 6 and table 8.

The adoption of the amendment would have prevented all unauthorised boat people from applying for a visa in Australia and all intercepted boat people would eventually have been sent to offshore processing centres in third countries. The introduction of the 'DUA Bill' followed the decision to grant protection in Australia to a group of West Papuans who had fled Indonesian persecution by boat to far north Queensland. This decision caused the ire of the Indonesian government, which withdrew its ambassador in Australia a day after the grant of protection to the West Papuans (ABC, 2006a). In April 2007, in the aftermath of the arrival of 83 Sri Lankan asylum seekers to Nauru, the government announced a 'swap deal' with the US. This would ensure that those assessed as refugees on Nauru would be resettled in the US while Australia accepted to resettle Caribbean refugees intercepted at seas before they could reach the US shores (RCOA, 2007a). The swap deal was directly in line with Howard's 2001 electoral slogan according to which intercepted boat people would never set a foot on Australia's shores.

Regardless of the Coalition's majority, neither the DUA Bill nor the 'refugee swap' were implemented. However, the government reluctantly proceeded with reforms of the immigration detention regime which had long been supported by refugee advocates. At first sight, the existence of constraints on the further expansion of the government's restrictive agenda in refugee admission under the last Howard government is puzzling. From July 2005, the Coalition had a majority in both Houses of Parliament. The limited character of constitutional, judicial, international and now parliamentary constraints on policy adoption could have given the government free rein to implement its agenda regardless of the decline of public support mentioned in the previous section. Yet this was not the case. A few weeks after having gained this parliamentary majority, the Coalition government reluctantly passed legislation softening the mandatory detention regime on Australia's mainland. A year later, the government withdrew the above mentioned DUA Bill from parliament as a number of Coalition Senators had announced they would 'cross the floor' to vote with the opposition on the bill. In addition, Labor MPs and Senators more systematically opposed Coalition legislation on refugee admission than in earlier years. The next section addresses in more details the influence on policy of actors opposing the government's anti-boat people agenda.

8.4.2 Emergence of an alternative policy agenda

The organised opposition to the government's priorities achieved the following: a softening of the mandatory detention regime for unlawful non-citizens; the prevention of the adoption of the DUA Bill; and significant reforms within the Department of Immigration. This agenda is detailed in the three sections below.

8.4.2.1 Softening the mandatory detention regime for unauthorised arrivals

The advocates of reforms in refugee admission policy were far more visible during the 2004 election campaign than they had been during the 2001 campaign. Many of their reform demands, such as the end of mandatory detention for unauthorised arrivals, were integrated into the Greens' electoral platform (see for instance Mathews, 2004). The modalities of refugee settlement impacted on the significance of the refugee advocacy movement in regional Australia. As of late 2004, more than 2,000 refugees resettled from offshore processing centres and released from onshore detention on TPVs had settled in regional towns. Many took jobs in low-skilled sectors affected by labour scarcity, such as abattoirs. Local employers and other members of the community petitioned their local MPs for an end of the TPV regime. This advocacy was critical to the announcement by Immigration Minister Amanda Vanstone in September 2004 that TPV holders would be able to apply for permanent residence at the expiration of their visas (Coombs, 2004; Gordon, 2005).

The revelation in late January 2005 that mentally ill Australian resident, Cornelia Rau, had spent ten months undiscovered in the immigration detention centre of Baxter constituted a further catalyst of mobilisation against the government's agenda. Rau was not an asylum seeker, yet her case prompted the first high-profile public expression of dissent with the governmental course on refugee admission by a Coalition parliamentarian, the Liberal MP Petro Georgiou. Georgiou was then a backbencher, yet he had played a key role in the Liberal Party in the 1970s and early 1980s as advisor to Prime Minister Malcolm Fraser and Opposition leader Andrew Peacock and in the setting up of Australia's multicultural policies as the Director of the Institute of Multicultural Affairs (Jupp, 2007: 73; 83).

In February 2005, Georgiou urged the government to reform its policy of mandatory detention for unauthorised arrivals and to grant permanent residence to all TPV holders. He argued that the 'crisis' which had justified the measures, that is, a sharp increase in boat people arrival, had ceased.[332] The public and political outcry following the revelation of the Rau case also prompted the Department of Immigration to order an inquiry into the circumstances of Rau's detention. Conducted by former AFP Commissioner Mick Palmer, the inquiry revealed details of the dysfunctional nature of immigration detention and the systematic mistreatment of detainees. The terms of reference of the inquiry were soon extended to the case of the wrongful removal of Australian citizen Vivian Solon. The Solon case became in turn the topic of a specific investigation led by former Victoria police commissioner Neil Comrie (Palmer, 2005; Commonwealth Ombudsman, 2005). Alarmed by the findings, the Commonwealth Ombudsman's office launched inquiries into more than two hundred other cases of wrongful immigration detention (see for instance Commonwealth Ombudsman, 2006).

The government as well as the Department of Immigration deeply regretted the report's findings.[333] Yet no reforms of the detention regime were tabled in parliament. In this context, Petro Georgiou, with the support of three other Liberal backbenchers, Bruce Baird, Judi Moylan and Russell Broadbent, announced in June 2005 that he would table a private member's bill[334] amending the Migration Act 1958 to introduce statutory limits to the use of mandatory detention, especially in the case of women and children. Prime Minister Howard opposed the imitative, yet in the face of a 'backbench rebellion' threatening the Coalition's cohesion, Howard saw no other option than to integrate the backbenchers' demands into a government bill, the Migration Amendment (Detention Arrangement) Bill 2005. National MP John Forrest, representing the regional constituency of Mallee (Victoria), unexpectedly rose to support the bill at Parliament. Forrest argued that immigration issues constituted the highest workload of his office as his constituents demanded the arrival of more immigrant workers to compensate for labour scarcity.[335] Labor MPs were divided between those openly supporting

[332] House of Representatives debates, 9 February 2005, p. 159.

[333] See Senate estimates, 25 May 2005.

[334] A private member's bill means that the bill in question is introduced by one or several individual parliamentarians, whereas most bills (in Australia and other parliamentary democracies) are generally introduced by governments.

[335] 'All of the industry bodies along the Murray Valley constantly remind me and the member for Farrer [Leader of the Nationals Tim Fischer] that the single most important issue is access to labour. So we as a region are a natural attraction for the people whom we are discussing tonight.' John Forrest, House of Representatives debates, 21 June 2005, p. 94.

the dissent of the Liberal backbenchers and others denouncing their disingenuous silence over the previous years.[336]

8.4.2.2 Preventing the prohibition of boat people's asylum claims

The introduction of the Designated Unauthorised Amendment Bill in parliament in April 2006, less than a year after the softening of the mandatory detention regime, was perceived by the 'Liberal rebels', the voluntary sector and the quality media as a breach with the new—if reluctantly established—reformist consensus (see for instance Manne, 2006). The then degree of cohesion and organisation of the refugee advocacy movement was demonstrated by the amount of initiative taken in the few months separating the first and the second reading of the Designated Unauthorised Amendment Bill in parliament. During that period, the Senate's Legal and Constitutional Legislation Committee conducted an inquiry into the provisions of the DUA Bill. The Committee called to make submissions to the inquiry within ten days, and received almost 140 submissions by refugee advocacy groups, individual activists, as well as the UNHCR and government agencies.[337] Except for the Department of Immigration, not one submission advocated the adoption of the bill. The submission by the UNHCR regional office was uncharacteristically openly critical of the legislation.[338] The Edmund Rice Centre, which had in 2004 released an alarming report on the dangerous return of failed asylum seekers to their countries of origin, advanced the publication of a follow-up report to coincide with the Senate inquiry.[339] This report focused primarily on failed asylum seekers sent back from Nauru's offshore processing centre to Afghanistan, and established that several returnees had been killed after their removal (ERC, 2006).

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[336] Compare for instance the statements of enthusiast Tanya Pilbersek and critical Julia Irwin, House of Representatives debates, ibid, p.94.

[337] See the submissions on the Senate's website, http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/migration_unauthorised_arrivals/submissions/sublist.htm.

[338] In a personal interview, the refugee coordinator of Amnesty International Australia considered this submission to be as critical as Amnesty's own submission. Interview with Graham Thom, Refugee Coordinator, Amnesty International, Sydney, 9.7.2007.

[339] The report release had not been planned to directly influence the domestic debate but to impact on the Australian government in an international context, as the ERC had planned to release it at the annual meeting of the UNHCR Executive Committee in Geneva as it had done with the 2004 report. Interview with Anna Samson, campaign officer, A Just Australia, formerly at the Edmund Rice Centre, Sydney, 8.7.2007.

The intensity of the opposition to the bill, and the evidence submitted to the Senate inquiry in support to this opposition, led the Senate committee to unanimously recommend the withdrawal of the legislation (SLCLC, 2006b).[340] As the committee report was tabled in parliament, a poll revealed that a large majority of respondents opposed the introduction of the legislation as detrimental to Australia's bilateral relations with Indonesia (ABC, 2006b). Immigration Minister Amanda Vanstone had previously acknowledged in an interview that 'foreign policy considerations' had played a role in the drafting of the DUA Bill (ABC, 2006c). This contradicted the established official rhetoric on Australia's immigration control policies stressing the prerogative of the Australian government to decide who enters the country.

Notwithstanding the opposition, the bill was tabled for a second reading at the House of Representatives in August 2006. Not unaware of public opinion, many Labor MPs presented the bill as an infringement on the national interest, arguing that it abolished Australia's borders[341] and that it had been dictated by the agenda of the Indonesians. Yet several also quoted the above mentioned ERC report on the removal of failed asylum seekers to justify their opposition. Most crucially, the Liberal backbenchers who had supported Petro Georgiou's private member's bill softening immigration detention opposed the DUA Bill. Georgiou emphatically declared the DUA Bill as the 'worst piece of legislation [he] had seen in Parliament'.[342] The 'backbench rebels' either 'crossed the floor' or abstained, yet the Coalition majority was sufficient for the adoption of the bill in the lower house. However, a few Coalition Senators had announced their opposition to the legislation in the upper house, and this jeopardised the Senate's approval as the Coalition could only rely on its majority of two seats. Liberal Senator Judith Troeth, the most prominent potential dissenter, later considered that her opposition to the bill was primarily due to her 'revulsion' towards the consequences of the bill for asylum seekers. Yet she argued that 'about 10%' of her decision to oppose the legislation was motivated by patriotic concerns. She also noted that her constituents had been very supportive of her decision, which she considered to reflect the

[340] The high level of cooperation between majority and opposition Senators during the inquiry was confirmed in a personal interview with Labor Senator Patricia Crossin, Deputy Chair of the Senate Legal and Constitutional Affairs Committee during the 2006 inquiry, in Canberra on 14.6.2007.

[341] Leader of the Opposition Kim Beazley, House of Representatives debates, ibid. p. 29f.

[342] House of Representatives debates, 9 August 2006, p. 42. Georgiou reiterated this assessment during a personal interview in his Melbourne office on 25.7.2007.

position of 'almost a majority' of people in the community.[343] Faced with the eventuality of a Coalition-driven defeat of the DUA Bill in the Senate, Howard withdrew the legislation from parliament. The introduction of the 'refugee swap' between Australia and the US mentioned in Section 8.4.1 was not debated in parliament. The deal was denounced by the refugee advocates as well as the opposition parties.[344]

8.4.2.3 Transforming the culture of the Department of Immigration

The extent of administrative failure brought to light by the Palmer inquiry into the detention of Cornelia Rau led to calls, in May 2005, by refugee advocates and the Labor Party, for the establishment of a Royal Commission into the treatment of asylum seekers, refugees and immigration detainees since the introduction of mandatory detention (see Project SafeCom, 2005). The government opposed this demand yet 'set out a very broad [reformist] approach for the department to achieve in a very short time frame' (Proust, 2008: 25). The hitherto Secretary of the Department of Immigration, Bill Farmer, was appointed ambassador to Indonesia a few days before the public release of the Palmer report. Farmer was replaced by Andrew Metcalfe. Metcalfe was no unknown quantity to the Department of Immigration, at which had worked for decades, yet he had left a few years before the scandals occurred (Malone, 2006). Metcalfe and the department were given three months to develop a strategy implementing the recommendations made in the Palmer report to effect cultural change. The deadline ensured that the release of this strategy coincided with the release of annual budget estimates and a further highly critical report investigating the wrongful deportation of an Australian citizen (Proust, 2008: 25). It also allowed for the inclusion of the implementation strategy in the department's annual report for 2004-05, which already appeared to pave the way for the 'post-Palmer era' (see Metcalfe, 2005: 2-3). The 'cultural change strategy', which Metcalfe presented as a comprehensive response to the Palmer report, aimed to transform the department into 'a more open and accountable organisation that deals reasonably and fairly with clients and has staff that are well trained and supported' (Metcalfe 2005, 2).

[343] Interview with Judith Troeth, Senator for Victoria, former minister of the Howard government, Melbourne, 25.7.2007.

[344] See for instance RCOA (2007).

Section 8.4.3 evaluates the impact of the alternative policy agenda, the softening of mandatory detention, the non-adoption of the DUA Bill and the 'cultural change' at the Department of Immigration on refugee admission policies until the end of the Howard government in 2007.

8.4.3 Achievements and limits of the alternative policy agenda

The evaluation of the impact of the alternative policy agenda until the end of John Howard's Prime Ministership is based on personal interviews with actors in the policy field conducted in mid-2007, thus a few weeks before the 2007 federal election and the end of this thesis's period of investigation; on an independent evaluation commissioned by the department and conducted in 2008 (Proust, 2008); and on HREOC's evaluation of change in immigration detention centres (HREOC, 2007).

Proust (2008, 5) notes that the Department of Immigration had within three years been implemented most of the recommendations of the Palmer report. This included an increase of staff training and accountability and, more specifically related to this thesis's topic, the processing of asylum claims of detained asylum seekers within 90 days. In a personal interview, the reform of the detention regime was mentioned by staff from the department's Onshore Protection Branch—which oversees the determination of asylum claims made in Australia—as the measure that had the most impact on their work.[345] It is not insignificant to note that contrary to the other departmental measures that followed the implementation of the Palmer reform, the three-month detention limit was entrenched in statutory legislation and was thus a measure on which the government could expect to be held accountable by monitoring agencies and the Labor Party as soon as legislation was implemented. Regardless of this reform, HREOC noted that the amelioration of the living conditions in detention centres remained uneven; change was particularly slow in the immigration detention centre of Villawood (HREOC, 2007).

On the basis of interviews with senior staff of agencies working with the department, Proust notes that relations between these agencies and the department appeared to have improved,

[345] Interview with Beth Powell, Director of Protection Policy, and Alan Hutchinson, Director of Management and Protection Program, Department of Immigration and Citizenship Canberra, 19.6.2007.

although opinions varied in regards to the extent of change already achieved (Proust 2008, 7). In this thesis's interviews specifically addressing refugee admission policies, a former department employee, parliamentarians, and voluntary agencies staff all noted that the department had become more responsive to external scrutiny.[346] A policy advisor of the Greens considered that refugee activists had played a key role in this evolution. Mobilisation had become efficient enough to 'know whom to call' quickly in case of an alleged 'departmental bungle'. The department had become more sensitive to refugee issues because of a heightened sense of 'self-preservation' in the face of intense public scrutiny rather than because of a genuine increase of concern for human rights issues.[347] The CEO of the Refugee Council of Australia also argued that policy implementation in the field of asylum had undeniably changed notwithstanding the enduring restrictiveness of official rhetoric on asylum.[348] What he and a former President of the RCOA stressed however, was that in the field of refugee resettlement, and in contrast to asylum, relations between their organisations and the department had been consistently harmonious and productive over the years.[349] In contrast to these positive assessments, a representative of the NGO A Just Australia considered that institutional change had remained superficial.[350] Democrat Senator Andrew Bartlett noted that the department's 'culture of control' in the field would only really change if the legislation changed – and legislative change had remained very limited.[351]

Indeed, apart from the above mentioned softening of the mandatory detention regime for unauthorised arrivals, the defenders of an alternative policy agenda merely prevented the expansion of the Coalition's anti-boat people agenda, which had itself built upon numerous restrictive measures adopted over the preceding decades. Reform advocates had also failed to foster legislative reformism within the Labor Party. The party's electoral platform for the

[346] Interview with Tom Davis, lecturer in social and public policy, University of Melbourne staff at the Department of Immigration's Onshore Protection Branch during the 1990s, Melbourne, 27.7.2007; Democrat Senator Andrew Bartlett (see footnote 322); Labor Senator Patricia Crossin, Canberra, 14.6.2007; Paul Power and Carolina Gottardo, Refugee Council of Australia (see footnote 302). Gottardo, who had previously worked in the refugee sector in the UK and had recently moved to Australia at the time of the interview, noted that the Department of Immigration was far more open to external scrutiny than the Home Office, which Power commented by saying that this openness was fairly recent and related to the events in 2005.

[347] Interview with Max Phillips, immigration advisor of Kerry Nettle, Senator for New South Wales, the Greens, Sydney, 22.8.2007.

[348] Interview with Paul Power, Refugee Council of Australia (footnote 303).

[349] Interview with David Bitel (see footnote 329).

[350] Interview with Anna Samson (see footnote 340).

[351] Interview with Andrew Bartlett (see footnote 323).

2007 federal election promised to repeal offshore processing in the context of the Pacific Solution—which had been dormant for several years—and to abolish temporary protection visas for asylum seekers granted refuge in Australia – a practice practically discontinued since 2005. Yet Labor was committed to maintaining the legislative framework of both measures, that is, the excision from the emigration zone and the safe haven provision in the Migration Act 1958, as well as the principle of mandatory detention for unauthorised arrivals.

The victory of Kevin Rudd's Labor Party in November 2007 was cautiously welcomed by the voluntary sector (see Project SafeCom 2007, RCOA 2007b). Four years and a further increase in boat people arrival later, many Australians are appalled at Labor's proposals to prevent the arrival of boat people to Australia (and thus deliver the promise made by Coalition leader Tony Abbott to 'stop the boats') through its 'Malaysian Solution' proposed in May 2011 (Hartcher 2011). Yet the proposal of the Gillard government to relocate the processing of boat people to Malaysia as part of its 'Malaysian Solution' is entirely consistent with the existing legislative framework, and this reminds us of the significance of the institutional structure of policies beyond the political rhetoric. The High Court's decision to declare this part of the Malaysian Solution as 'unlawful' in August 2011 (Needham 2011) stresses another important dimension of refugee admission policies that this thesis has evidenced: the interpretation of an existing legislative framework is itself a motor of regulatory innovation. Since the mid-1990s, interpretations of the Refugee Convention by successive governments have systematically narrowed down the meaning of a treaty created to protect forced migrants. The Australian High Court has now reversed this dynamic to give a broader interpretation of a legislative amendment adopted to contain their arrival. At the time of writing, the institutional implications of this decision remain to be seen.

8.5 Conclusion

Under the Prime Ministership of John Howard, the key issue of concern in Australia's refugee admission policies was the sudden arrival of a few thousand boat people between 1999 and 2001, an arrival that abruptly stopped by 2002. Whereas asylum seekers in the British case were mostly considered to be economic immigrants with no need to claim protection, Australia's boat people under Howard were portrayed as 'undeserving refugees' who should have sought protection closer to their (mostly Middle Eastern) countries of origin. The

Howard government became intensely engaged in institutional innovation aiming to prevent the arrival of these boat people through maritime interdiction and the relocation of the processing of asylum claims beyond Australia's borders. The intensity of 'extra-territorial' institutional innovation increased after the government had appeared unable and unwilling to address systemic problems in domestic immigration detention centres. Yet Australia's 'new comprehensive border protection regime' built on a preventive regulatory framework that had already considerably expanded under the Hawke and Keating governments, and was supported by an anti-boat people rhetoric reaching back to the end of Malcolm Fraser's Prime Ministership.

As in the case of refugee admission policies under Tony Blair, it can be argued that the effectiveness and legitimacy of refugee admission policies under Howard followed somewhat opposite trends. Policy effectiveness was challenged by an overall increase in asylum claims in the late 1990s followed by an increase in claims made by boat people between 1999 and 2001. Restrictive governmental action was correlated with a decrease of claims and of boat people arrival from mid-2002. However, many promises made by the Howard government, most prominently that none of the *Tampa* boat people would ever set a foot on Australian soil, were not kept. There were thus many discrepancies between stated policy objectives and outcomes. These discrepancies contributed to weakening policy legitimacy both amongst policy-makers and the public. This overall opposition between increasing effectiveness and decreasing legitimacy does not corroborate the critical analyses mentioned in the chapter's introduction, which argued that the Coalition's asylum policies were characterised by an increase in effectiveness and legitimacy. This chapter's findings rather builds on the literature pointing at the limits of restrictiveness, yet insists on the precarious character of the achievements of the opponents of the anti-boat people agenda because of the historical embeddedness of this restrictiveness in Australia's immigration legislation.

How do these thesis's explanatory hypotheses explain this configuration of policy effectiveness and legitimacy?

Conflicts between the major parties played a significant role in the production of a complex regulatory framework. There was less bipartisan agreement than in previous periods over the righteousness of the primacy of executive and parliamentary power on the one hand, and the fraught nature of the involvement of the judiciary in asylum policies on the other hand. Labor repeatedly opposed the adoption of measures restricting judicial review or added to measures

introduced by the Coalition's 'judicial safeguards'. It can be argued that the perception by the Coalition that its powers were restricted by Labor's opposition played a role in its elaboration of the Pacific Solution. The latter originally escaped the oversight of the Australian judiciary before the High Court declared the deprivation of judicial review unlawful. Yet the impact of political conflicts should not be overestimated. The Coalition, without the need of parliamentary approval adopted many reforms which would prove even more detrimental to policy legitimacy, such as the privatisation of immigration detention centres and the introduction of allegedly cost-effective methods of governance within the Department of Immigration. Thus the first explanatory hypothesis is confirmed to an extent.

The second hypothesis on detrimental impact of non-compliance on enforcement and thus policy effectiveness is also confirmed to an extent. The rebellion of detained asylum seekers against conditions in immigration detention centres made the centres difficult to manage, and this was part of the impetus for the creation of the Pacific Solution. However, the detainees rebelled not only against detention but also against the modalities of enforcement itself, which was far from functioning as the government had planned; thus enforcement ability was affected by systemic problems regardless of the agency of asylum seekers. Besides, the appeals of boat people and asylum seekers against decisions in asylum cases, and the fact that many won their cases also worked against policy effectiveness.

The third hypothesis attesting a correlation between institutional complexity and a decline of effectiveness and legitimacy is easier to corroborate than the two other hypotheses. Most significantly, the privatisation of immigration detention centres and the establishment of a 'new comprehensive border protection regime' led to many unintended outcomes. The Department of Immigration had no effective oversight of the management of detention centres, and this contributed to the extent of mistreatment which caused uproar in the mid-2000s. The complexity of the management of the Pacific Solution delivered outcomes that were not as restrictive as intended, since the governments and organisations involved in the operation had some autonomy not only ideologically but also practically from the restrictive rationale of the Coalition.

This chapter thus features yet another explanatory configuration of unintended policy outcomes than the previous one. The impact of conflicts over policy formulation on policy legitimacy is more significant than under Hawke and Keating, while the impact of non-

compliance on enforcement difficulties does not appear to increase greatly, and the impact of institutional complexity appears as much relevant as in the previous period.

This evolution of the configuration of variables explaining unintended outcomes in Australian refugee admission policies has also been observed in the British case. The significance of this finding will be assessed in the thesis' general conclusion.

Conclusion

Elaborating this thesis's research objective

The elaboration of this thesis's research objectives was a slow process that started a few years ago and evolved significantly since that time. Refugee admission policies in Australia and Britain were originally selected as case studies because both countries, which had never been compared in regards to this policy area in a book-length study, appeared as the 'vanguard' of a profound transformation of asylum policy in Western democracies from the early 2000s. The main feature of this 'vanguard' role was Australia and Britain's almost simultaneous pursuit of the 'extra-territorialisation' of asylum, notwithstanding their widely different histories in regards to immigration and refugee policy. The 'extra-territorialisation' of asylum was meant to reduce the political liability constituted by the increased arrival of unauthorised asylum claimants per boat to Australia and per lorry and plane to Britain. These unauthorised asylum seekers were denounced by the governments of John Howard and Tony Blair as abusing the generosity of both states towards individuals fleeing persecution. The Australian version of the 'extra-territorialisation' of asylum was the development of the so-called Pacific Solution in September 2001. The Pacific Solution aimed to prevent the arrival of unauthorised boat people to Australia's shores while providing for mechanisms that assessed boat people's asylum claims in 'offshore processing centres', far away from the Australian territory. A year and a half after the beginning of the Pacific Solution, Tony Blair proposed to relocate the processing of asylum claims in EU member-states beyond the borders of the EU in so-called 'transit processing centres'. Blair and his Home Secretary Jack Straw also suggested increasing financial and logistical support to regions hosting the most refugees in the world in the framework of 'regional protection areas'. The Howard and the Blair government vocally promoted their extra-territorialisation strategies as constitutive of a reform of the UN Refugee Convention, removing the obligation of signatory states to individually assess the protection needs of all asylum applicants regardless of the genuineness of their need for protection.

The 'extra-territorialisation' of asylum, as well as other restrictive measures such as the systematic detention of unauthorised asylum claimants, were denounced as threats to the right to claim asylum by refugee advocates and many scholars (Taylor, 2005; Kneebone and Pickering, 2007; Noll, 2003; Hyndman and Mountz, 2008). Critical literature in various

disciplines has argued that asylum seekers have become the very real scapegoats of concerted efforts by governments to create the illusion that the sovereign state is still mighty and powerful (see especially Soguk, 1999, 2007; Bigo 2002, 2007). Both the Howard and the Blair governments were said to pursue such strategies to convince their domestic constituencies that processes of neoliberal globalisation, which they enthusiastically embraced, had not hollowed out state capacity to control borders, notwithstanding a fragmentation of political, social and economic governance (Schuster, 2005, McNevin 2005, Squire 2009). These arguments were considered by the author of this thesis as an inspiring basis for a systematic comparative investigation of Britain and Australia as the 'vanguard of extra-territorialisation'.

Yet further investigation led to the elaboration of another perspective on these recent developments. This perspective shares the above mentioned concerns over a reduction of the 'protection space' and does not disagree with critical scholarship, yet it constitutes a distinct contribution to the debate on the implications of such policies. The reconsideration of the thesis's approach started with the following observations. Australian and British 'extra-territorialisation' strategies failed to deliver on many of the objectives they set out to achieve. Most significantly, the majority of boat people sent to Australia's offshore processing centres were granted refugee status, and the majority of these refugees were resettled in Australia (Bem et al, 2007). The Pacific Solution progressively lost its popular appeal and was eventually discarded under the Prime Ministership of Howard's successor, Kevin Rudd. Blair's transit processing centres were never opened; EU-supported regional protection areas for refugees have yet to go beyond the pilot stage in Europe (Stevens 2007, ICMC, 2009: Part II, 7-10). Notwithstanding these shortcomings, the development of 'extra-territorialisation' strategies was congruent with a significant decline of the arrival of asylum seekers to Britain and Australia. The Howard and the Blair governments justified these strategies on the basis of this decline regardless of the shortcomings of these policies and the simultaneous decline of asylum claims in countries which had not been part of the vanguard of extra-territorialisation.[352] Other actors also seem to be convinced that extra-territorialisation strategies were worthwhile preventive instruments regardless of their flaws. In Britain, the Conservatives supported the outsourcing of asylum claims to isolated islands during the 2005 campaign for the general election (Conservative Party, 2005). According to personal interviews conducted in 2009, outsourcing the processing of claims beyond EU borders

[352] See appendix 2, figure 1 and table 3.

remained an attractive option within the British immigration bureaucracy. In Australia, a resurgent increase in boat people arrivals since 2009 has led the Coalition to demand the return of the Pacific Solution (Narushima, 2010; Murphy and Grattan, 2011). This led to the following questions: how can this singular configuration of discrepancies between policy objectives and outcomes be explained? And is this configuration new and contingent to contemporary globalisation processes, or has it characterised past policies aiming to control the admission of refugees? Researching literature on British and Australian asylum policies before the early 2000s, it became apparent that these dynamics were indeed a recurrent feature of refugee admission policies in both countries. This resulted in an investigation of scholarship suggesting explanations of discrepancies between policy objectives and outcomes in immigration control policies.

Reviewing the literature, it was observed that three disciplines suggested distinct explanations for these discrepancies. Sociological scholarship argued that migrant agency constituted the primary constraint to the realisation of policy objectives (agency-based explanation) (see especially Castles, 2004; Tsianos, 2007). In contrast, international relations literature argued that uneven distribution of power within the international system was the primary reason for discrepancies between the policy objectives of individual states and outcomes (structure-based explanation) (Suhrke, 1998; Chimi, 2005; Betts, 2009). Comparative politics, the body of scholarship closest to the type of investigation conducted in this thesis in terms of methodology, primarily located constraints to entry control objectives within the organisation and values of liberal democracies (resp. Alink, Boin and t'Hart, 2001; Ellermann, 2006, 2008; and Hollifield, 1992; Joppke, 1999; Guiraudon, 2000). Yet the degree of generalisation in the interrelations between social or political agency and institutional structure in the production of these constraints was more limited in comparative politics scholarship than the degree of generalisation in regards to interrelations between agency and structure in sociological and international relations scholarship. This set significant limits to the explanatory usefulness of comparative politics approaches. This finding led to a redefinition of the thesis's central research objective. The thesis would not only attempt to explain what constrained the realisation of policy objectives in British and Australian refugee admission policies, but also to formulate a conceptually grounded comparative research design explicitly addressing interrelations between political agency and structure in the production of these constraints.

Summary of the research approach

Drawing on the various definitions of discrepancies between policy objectives and outcomes found in the above mentioned literature, these discrepancies were labelled 'unintended policy outcomes' and defined as a deficit of policy effectiveness (lack of congruence between stated policy objectives and outcomes) and of policy legitimacy (lack of support for the policy amongst policy-makers and the broader public). A historical institutionalist approach (HI) was then used to elaborate a research design aiming to explain deficits in policy effectiveness and legitimacy. HI was used to this purpose because of its central assumption, namely that interrelations between political agency and institutional structure (defined as a setting of rules supposed to regulate the behaviour of agents) are open and can lead to a large variety of policy outcomes. Drawing on this central assumption, HI scholarship focuses on institutional structures as crystallisations of power struggles open to many conflicts, and on the modalities of institutional continuity and change (Thelen and Steinmo, 1992; Hall and Taylor, 1996; Thelen, 1999). Newer HI literature, which has reinforced the conceptual ambitions of earlier HI research, insists on the significance of the enforcement level in accounts of the reality of power distribution in political systems. Weak enforcement structures provide incentives for agents disadvantaged by power distribution, as defined by rules entrenched in institutional settings, not to comply with these rules. Newer HI scholarship also highlights the multiple modalities of institutional change. Accordingly, change can be dramatic and path-breaking- as authors discussing path-dependency and critical junctures have argued (Pierson 2000, Capoccia and Kelemen 2007) -as much as it can be cumulative and transformative over time (Streeck and Thelen, 2005a; Mahoney and Thelen, 2010a). Cumulative, sprawling institutional change can result in the production of a highly complex institutional structure in which rules conflict with one other. These conflicts mean that the institutional structure is unable to achieve more than small-target policy objectives, and this limited effectiveness in turn limits the legitimacy of the adopted policies (Schickler 2001).

Drawing on HI's core features, the following four general explanatory hypotheses were elaborated and applied to refugee admission policies.

The first hypothesis assumed that conflicts between 'advantaged agents' in defining the rules of a given policy area would negatively impact on the legitimacy of the eventually adopted rules. In the context of this research, this meant investigating if conflict-laden elaboration of administrative regulations and legislation codifying the admission of refugees subsequently diminished the legitimacy of this legislation amongst 'rule-setters' and the broader public.

The second hypothesis assumed that a weakened enforcement framework would encourage the non-compliance of 'disadvantaged agents', in turn reducing policy effectiveness. In the field of refugee admission policies, it was assumed that 'disadvantaged agents' with an incentive to not comply with the rules of admission were asylum claimants. It would be investigated to what extent sudden increases of asylum claims slowed the processing of asylum claims, this weakness by itself being an incentive for individuals wishing to remain in a country to apply for asylum since an asylum claim, according to the principle of *non-refoulement*, would prevent deportation.

The third hypothesis assumed that institutional complexity would reduce overall policy effectiveness and legitimacy. Applied to refugee admission policies, this meant investigating whether the cumulative transformation of rules regulating refugee admission over time had resulted in conflicts between these rules, impeding the realisation of policy objectives and reducing the legitimacy of refugee admission policies amongst policy-makers and the public.

The fourth hypothesis reflected HI's insistence on the variations in the explanatory values of variables over time, and thus on the contingent character of HI's explanatory ambitions. This meant that the research would not identify stable explanatory correlations between the three aforementioned hypotheses and the evolution of policy effectiveness and legitimacy. Rather, the findings would point at the evolution of patterns of correlations between explanatory variables over time.

The remaining sections of this conclusion summarise the thesis's findings and suggest how its research agenda could be further expanded.

Summary of the findings

Evolving unintended policy outcomes

This thesis has first highlighted the *enduring significance of unintended policy outcomes* in British and Australian refugee admission policies since the Second World War, as well as *the extent of variations over time of the modalities of these unintended outcomes*. In this respect, both cases are very similar; however, the modalities of evolution of unintended policy outcomes have often differed.

Chapter 3 and Chapter 6 have shown that refugee admission policy in Britain and Australia between 1945 and the late 1970s/early 1980s was characterised by frequent transformations of policy objectives. These transformations responded to practical constraints to the realisation of planned objectives. For instance, both the Attlee and the Chifley governments originally promoted highly restrictive resettlement criteria in regards to post-war European Displaced Persons they wished to resettle in Australia and Britain. The implementation of these highly restrictive criteria would have severely limited the numbers of refugees potentially qualifying for resettlement. This limitation was problematic as the rationale for post-war resettlement was to expand the Australian and British workforce. Originally planned selection criteria were also difficult to implement, as selection officers sent to refugee camps in Central Europe were unfamiliar with their environment, yet had to perform their task as fast as possible given workforce demand and the wishes of international organisations to close down the camps without delays. These constraints led both the British and the Australian governments to revisit their selection objectives. A similar responsiveness was observed in the context of other significant resettlement operations during the period of investigation, especially that of Indo-Chinese refugees to Australia. Thus policy effectiveness, according to the definition of this thesis- i.e. congruence between stated objectives and outcomes -was not as extensive as has frequently been argued in the literature.

Policy legitimacy during this period was also far from absolute; yet the modalities of this legitimacy differed in Britain and Australia. Policy legitimacy in Australia was characterised by a disjuncture between public and political support. Opinion polls show that Australians never embraced the arrival of large groups of refugees to Australia. Refugee admission

policies however enjoyed bipartisan consensus over the entire period, with two significant exceptions: the post-war treatment of Asian refugees temporarily resettled in Australia during the Second World War, and Gough Whitlam's reluctance to resettle Indo-Chinese refugees to Australia. 'Habitual bipartisanship' created a discourse of political acceptance of refugee admission policies, notwithstanding the frequent redefinition of policy objectives. In contrast, the legitimacy of British refugee admission policies was characterised by a marked division between policies towards Commonwealth refugees (the East African Asian refugees of the late 1960s and early 1970s) and 'alien' refugees from Europe, Chile and Indo-China. Policies towards Commonwealth refugees were far less legitimate amongst major parties and the public than policies towards 'alien' refugees.

Chapter 4 and Chapter 7 showed that unintended policy outcomes under the Thatcher and Major government in Britain, and the Hawke and Keating governments in Australia, which both faced significant increases in asylum claims, became dramatically more significant than in the previous period of investigation. In Britain, notwithstanding their commitment to preventing the arrival of 'bogus asylum claimants', the Thatcher and Major governments appeared unable to stop the increase in asylum claims and to improve the efficiency of the asylum bureaucracy. Notwithstanding their limited effectiveness, restrictive asylum policies remained popular amongst the Conservatives and the British public. Yet these policies were increasingly contested by individuals and organisations defending the rights of refugees from the early 1980s and by Labour from the early 1990s. In Australia, the Hawke government directly contributed to an unprecedented increase in asylum claims with its decision to grant sanctuary to Chinese nationals living in Australia at the time of the Tiananmen events. Both the Hawke and the Keating governments were unable to prevent 'overstayers' (individuals remaining in Australia at the expiration of their visa) claiming and being granted humanitarian protection (until the possibility of claiming humanitarian protection was repealed altogether in 1991), and unauthorised boat people claiming asylum (regardless of the imposition of mandatory detention for unauthorised non-citizens in 1992). Constraints to policy effectiveness led to a decline of policy legitimacy in terms of an increase in tensions over the objectives of refugee policies between Labor and the Liberal/National Coalition. While this decline of legitimacy did not prevent Coalition support for Labor legislation, it did cause a decline of political and popular acceptance of Australia's involvement in refugee admission operations, especially in relation to resettlement.

Finally, Chapter 5 and Chapter 8 showed that refugee admission policies under the Howard governments in Australia and the Blair government in Britain both featured opposite trends in regards to policy effectiveness and legitimacy. This points at a further dramatic transformation, if not a clear expansion, of unintended policy outcomes during the third period of investigation undertaken in this thesis. In Britain, the Blair government remained committed to preventing the arrival of non-genuine asylum claimants, although what was meant with this notion considerably evolved over time. As 'New' Labour came to power, non-genuineness was defined more narrowly in policy than had been the case under the Conservatives. In other words, original asylum policies under Blair were more progressive than had been the case with policies under the Thatcher and Major government, and this reflected the influence of Labour over the refugee movement in the early 1990s. However, this influence rapidly declined as asylum claims in Britain continued to increase in the first years of the Blair government. In turn, the restrictiveness of asylum policies again expanded considerably from 1999, and the Blair government became part of the 'vanguard' of the extra-territorialisation of asylum. While they were the most symbolic element of this extra-territorialisation, 'transit processing centres' failed to be implemented, and asylum claims markedly declined from the early 2000s. In Australia, the Howard government's restrictive refugee admission policies were a direct continuation of those implemented by the Keating government. The plethora of restrictive measures adopted in response to an unprecedented increase in boat people arrivals, especially Australia's effective role as a 'vanguard of extra-territorialisation' in the context of the Pacific Solution, were correlated with a dramatic decline of asylum claims.

In both countries, increasing policy effectiveness did not lead to a clear restoration of policy legitimacy. Under Blair, immigration became one of the two most worrying issues in public opinions, and both public opinion and the Conservatives appeared to support even more restrictive policies than the Labour government. The salience of immigration was in part due to the hostility of Britons, and of the Conservatives, to Labour's failed attempt to 'manage migration', a dramatic change of policy rationale which had occurred without dramatic change to the institutional framework of immigration control and settlement policies. In Australia, a rupture of bipartisanship occurred in the early 2000s, as Labor refused to support the further expansion of Howard's anti-boat people agenda after the implementation of the Pacific Solution. Opposition to Howard's course subsequently grew within the ranks of the Coalition and constrained the government to abandon the adoption of the 'extra-

territorialisation' of asylum and to reform the regime of mandatory detention for unauthorised non-citizens. Hostility to boat people declined in public opinion in the mid-2000s yet never disappeared. This enduring hostility can in part be attributed to the popular legitimacy of Australia's refugee resettlement program, a legitimacy cleverly mobilised by the Howard government in its repeated attempts to discredit boat people claiming asylum by labelling them 'queue jumpers'.

Table 1 on the next page offers a comparative overview of these variations of unintended outcomes over time. The next subsection assesses to what extent this thesis's explanatory hypotheses indeed explained these variations.

Evolving explanatory configurations

As the following paragraphs will show, the *configurations of variables explaining unintended outcomes varies strongly over time*, *and the explanatory value of the variables itself varies*. Explanatory outcomes are, at best, mixed in regards to post-war refugee admission policies up until the late 1970s/early 1980s. The first explanatory hypothesis of this thesis is partly confirmed in the British case, but not confirmed in the Australian case. In the latter, no clear correlation is apparent between conflict-laden ambivalent institutional design on the one hand and a decrease of policy legitimacy on the other hand. In the British case, conflicts of interest over the regulation of the admission of refugees from the Commonwealth led to the elaboration of admission mechanisms which satisfied neither the partisans of restrictiveness nor the supporters of a more liberal regime in regards to the admission of Commonwealth nationals, and this correlation is congruent with the first explanatory hypothesis. Conflicts over the admission of European Displaced Persons after the war and over the admission of Chilean and Vietnamese refugees did lead to political tensions, yet these tensions were not related to the institutional setting regulating refugee admission.

Table 1: Evolution of unintended outcomes in British and Australian refugee admission policies

Variations in unintended outcomes over time						
	British refugee admission policies			Australian refugee admission policies		
	Policy legitimacy amongst policy-makers and the public	Policy efficiency (match between stated objectives and outcomes)	Unintended outcomes (lack of policy legitimacy and efficiency)	Policy legitimacy amongst policy-makers and the public	Policy efficiency (match between stated objectives and outcomes)	Unintended outcomes (lack of policy legitimacy and efficiency)
First period of investigation: before significant rise of asylum claims	Overall decline over the period, retrospective legitimacy but no return to higher levels of legitimacy after decline; legitimacy amongst public lowest on refugees from the Cth	High on the surface (multiple adjustments of objective as feedback from difficulties on the ground)	Moderate (less control than often assumed in the lit)	High amongst major parties, retrospective legitimation and sporadic declines and return to higher levels; limited legitimacy amongst public	High on the surface (multiple adjustments of objective as feedback from difficulties on the ground)	Moderate (less control than often assumed in the lit)
Second period of investigation: steady rise of asylum claims	Legitimacy of restrictiveness amongst the Conservatives government and voters, increasing challenge by refugee organizations of action and non actions, results to conflict in parlem arena in the early 1990s	Sharp decline as successive border control measures, then intro of statutory legislation fail to stop increase of claim and to improve procedure	Dramatic expansion	Decline amongst policy makers but maintenance of bipartisanship, limited legitimacy amongst the public with sporadic declines, no evidence in polls of steady decline	Decline during the 1980s as greater access to permanent residence on humanitarian grounds, then complex management of increase of protection demand by post-Tien An Men Chinese nationals then by boat people	Expansion
Third period of investigation: rise then fall of asylum claims	Sharp decline amongst policy-makers (between Labour, the Conservatives and refugee organizations and within Labour) and the public, asylum and immigration become amongst main issues of concern from the early	Further decline as asylum-seekers intake continues to increase and no procedural amelioration, then increase as decline of claims from early 2000s	Complex as efficiency and legitimacy go in opposite directions	Legitimacy amongst Coalition yet unstable amongst Labour until early 2000s, selective bipartisanship; visible decline amongst Coalition from 2005 as initiatives are blocked by backbenchers; expansion	Decline as regards to arrivals in the late 1990s-early 2000s as unprecedented arrival of boat people, yet efficient increase after implementation of Pacific Solution; enduring policy inefficiency in domestic	Complex as efficiency and legitimacy go in opposite directions

The division, in the Australian case, between the high legitimacy of refugee admission amongst policy-makers, and the low legitimacy of these policies amongst the public from the Second World War up until the 1970s, cannot be explained by the first explanatory hypothesis.

The explanatory value of the second hypothesis is also limited for this period of investigation. In both countries, the ability of the immigration bureaucracy to enforce the rules of refugee admission was not severely challenged, most significantly because asylum claims remained rare.

Finally, some elements confirm the value of the third hypothesis regarding the detrimental impact of institutional complexity on policy effectiveness and legitimacy; yet again other elements disconfirm this hypothesis. In Australia, the framework of reference regulating the entry of refugees was until the mid-1970s very simple: administrative discretion was entirely controlled by the Department of Immigration. This environment was drastically transformed under Whitlam's Prime Ministership as the Department of Immigration was abolished and the admission of Indo-Chinese refuges was managed from the Prime Minister's office, and there is evidence that this transformation was neither efficient nor considered legitimate at the time. In contrast, the introduction by the Fraser government of definitions of a refugee and of entry on humanitarian grounds in statutory law doubtlessly made the regulatory framework more complex. Yet this increase in complexity was considered entirely legitimate amongst policy-makers as it aimed to prevent the 'abuse' of administrative discretion by 'overstayers' determined to stay in Australia. In Britain, the regulation of refugee admission was divided until the late 1960s between a statutory framework regulating the entry of British subjects and a discretionary framework regulating the entry of aliens. The simplification of the system through the progressive 'alienisation' of British citizens from the Commonwealth was politically highly salient, yet the outcome of this institutional simplification was perceived as highly legitimate by policy-makers and the public. It could be argued that this correlation between a decline of institutional complexity and an increase in policy effectiveness and legitimacy confirms 'in reverse' the value of the third explanatory hypothesis.

This thesis's hypotheses are more useful for explaining the expansion of unintended outcomes in British and Australian refugee admission policies during the 1980s to mid-1990s than they are for explaining the configuration of 'moderate unintended outcomes' during the previous decades. In the British case, the third hypothesis was found to have the highest explanatory

value. The increasing role of the judiciary in refugee admission policies often prevented the implementation of the Thatcher and Major governments' goal to expedite the deportation of 'bogus asylum claimants'. Such policy ineffectiveness caused increasing partisan divisions between the Conservatives and Labour and thus a decrease of policy legitimacy. The legitimacy of Conservative refugee admission policies amongst organisations working with refugees was also negatively impacted by the introduction of measures aiming to prevent the arrival of asylum seekers to Britain, such as visa requirements and carrier sanctions. The decline of legitimacy led to progressive mobilisation in favour of the introduction of a right for asylum claimants to appeal against negative asylum decisions at administrative tribunals. The eventual introduction of this right of appeal in legislation further increased the degree of complexity of the asylum procedure, and its implementation was rapidly contested by the Conservatives as too lenient, and by refugee advocates as dysfunctional. Thus, increasing institutional complexity evidently led to a decline of policy effectiveness and legitimacy. The value of the second hypothesis is also clearer. The system of individual decision-making in asylum cases was indeed 'overwhelmed' by the steady increase in asylum claims from the early 1980s. Chronic lack of resources channelled to the immigration bureaucracy meant that enforcement remained weak throughout the period of investigation, and this weakness created an incentive for individuals to apply for asylum if they wished to remain in Britain for several years. Finally, the value of the first explanatory hypothesis is clear as regards to the introduction of the Asylum and Immigration (Appeals) Act 1993. Britain's first piece of primary legislation on asylum was the production of conflicts between opposite reformist views. The resulting Act has been qualified as an 'asymmetric institutional compromise' combining contradictory (progressive and restrictive) policy objectives; neither its progressive nor its restrictive objectives were achieved, and the Act thus lost its legitimacy for both the progressive refugee advocates and the Conservatives. Yet the first explanatory hypotheses cannot explain the adoption of the unequivocally restrictive Asylum and Immigration Act 1996 after even more intense conflicts between the progressive and the restrictive sides of the debate.

The Australian case features a similar explanatory configuration: the value of the third and second explanatory hypotheses increased and the explanatory value of the first hypothesis remained limited. As in the British case, the expanding role of the judiciary in decisions over the admission of immigrants meant that the executive was increasingly unable to prevent the settlement of 'overstayers' applying for and gaining humanitarian status, and later to prevent

asylum claims by boat people. The gradual transformation of refugee admission from a discretion-based to a legislative-based institutional setting between 1989 and 1994 also significantly increased the complexity of the regulatory framework, as regulations were constantly adopted, amended and repealed. Fraught transformation led to a decrease of both policy effectiveness and legitimacy. Hawke's decision to allow Chinese nationals to stay after the Tiananmen repression in 1989 constituted a major enforcement challenge for the immigration bureaucracy. As in the British case, enforcement difficulties constituted an incentive for 'overstayers' to apply for asylum regardless of their need for protection. This confirms the explanatory value of the second hypothesis. Finally, the first hypothesis is partly confirmed. On the one hand, conflicts between the major parties over the alleged 'Asianisation' of Australia contributed to a reduction of the availability of refugee resettlement places, as resettlement was at the time of the debate (in the mid- to late-1980s) dominated by Indo-Chinese arrivals, as well as Australia's renewed involvement in international resettlement efforts with its participation in the Comprehensive Plan of Action for Indo-Chinese refugees (CPA). Yet bipartisan consensus over the significance of refugee resettlement returned in the late 1980s, and resettlement again expanded in the context of the CPA. Further, both major parties were convinced that restrictive measures were needed to prevent the settlement of boat people in Australia.

The value of the explanatory hypotheses as applied to refugee admission policies under the Howard and Blair governments evolves yet again. In the British case, the first hypothesis is clearly confirmed. Conflicts within the Labour party, between Labour and the Conservatives, and between Labour and progressive reformists at the domestic and the international level, contributed to the production of a highly ambivalent regulatory framework that could never achieve the flurry of policy objectives adopted by Labour. The second hypothesis is also useful to explain the further decline of policy effectiveness in the late 1990s, as asylum claims in Britain reached a peak and the immigration bureaucracy was further destabilised by the failed introduction of a new computer system as well as a freeze on financial resources. The hypothesis is less able to address the increasing effectiveness of the immigration bureaucracy as asylum claims decreased markedly from the early 2000s and significant administrative reforms were introduced in the mid-2000s. The third hypothesis is, however, valid throughout the entire period. The institutional framework of refugee admission became significantly more complex, but also more discontinuous, under Tony Blair's Prime Ministership. For instance, restrictive measures adopted under the Conservatives were repealed, then reinstated (the

'white list' of safe countries of origin), and others adopted, then repealed (various appeals against negative asylum decisions by the immigration bureaucracy). This negatively impacted on policy effectiveness and was denounced from all sides as 'policy chaos'.

In the Australian case, the value of the first explanatory hypothesis is limited in regards to institutional developments as the Howard government came to power. Both major parties considered until the early 2000s the expansion of restrictiveness towards unauthorised asylum seekers as highly legitimate (a view endorsed in public opinion) regardless of its complexity and limited effectiveness, and this is not congruent with the assumptions of the first hypothesis. Yet early on Labor opposed the expansion of restrictions upon the judiciary's right to review immigration cases, and this indirectly contributed to the continuing existence of conflicts over the interpretation of existing legislation until the early 2000s. After the implementation of the Pacific Solution, Labor's opposition, as well as the mobilisation of progressive reformists within Australia's blossoming refugee advocacy movement, became more significant; tensions within the Coalition became visible as the Coalition gained the power to make legislation without having to rely on other parties. As a consequence of these tensions, the government was prevented from expanding its restrictive legislative agenda further and had to soften the mandatory detention regime for unauthorised immigrants – a progressive reform adopted on top of decades of accumulated, and never repealed, restrictive legislation. The first hypothesis is thus partially confirmed. This is also the case with the second hypothesis. The unprecedented increase in asylum claims in the late 1990s weakened enforcement mechanisms, and perhaps, for a brief period of time, constituted an incentive for asylum claimants to try their luck and come to Australia by boat. Yet the adoption of the Coalition's anti-boat people agenda was correlated with a dramatic decline of boat people arrivals, and this proved the strength of the enforcement of maritime interdiction. Asylum claims declined more generally, thus indicating an increasingly effective enforcement of entry and post-entry controls on the Australian mainland. The third hypothesis is more clearly confirmed than the other two. Institutional complexity under Howard increased tremendously. This included the ineffective privatisation of immigration detention centres, but also the transfer of the management of the Pacific Solution's 'offshore processing centres' to an international organisation whose priorities did not coincide with the priorities of the Howard government. Finally, and as mentioned earlier, the judiciary continued to contribute to the complexity of asylum decision-making, at least until the adoption of restrictive legislation considered compatible with the separation of powers by the Coalition in 2005. This

complexity not only contributed to a reduction of policy effectiveness, but also of policy legitimacy amongst the above mentioned progressive reformists and Labor, and also amongst public agencies monitoring policy implementation such as the Australian National Audit Office.

Table 2 on the next page summarises the explanatory value of this thesis's approach, and emphasises interrelations between agency and structure within each hypothesis. The table helps illustrate the following patterns. Firstly, it shows that the explanatory value of the approach varies significantly. Whereas none of the explanatory hypotheses can satisfactorily explain the configuration of unintended outcomes in refugee admission policies before asylum claims started to rise in the 1980s, this value is more significant for the two subsequent periods of investigation. However, the value of the explanatory hypotheses does not unambiguously 'increase with time'. The hypotheses appear confirmed for two of three variables in both cases in the second period of investigation, but only for one of them in the Australian case in the third period of investigation. This is related to a second significant pattern revealed in the table. Although unintended outcomes in British and Australian refugee admission policies evolve similarly (at first moderate, then dramatically expanding and then similarly complex), the similarity of this evolution is not explained by similar explanatory configurations. In the first period of investigation, explanatory variables are similarly unable in both cases to explain the modalities of unintended policy outcomes, yet this does not mean that the 'missing pieces' of the explanatory puzzle are the same in both cases. The final pattern revealed by the comparative table is that in both cases, the explanatory value of institutional complexity (and thus the clearly structure-oriented variable) is the only one to clearly increase over time. In both cases, increasing institutional complexity is clearly correlated with a decrease of policy effectiveness and legitimacy, whereas the value of the agency-related variables is more volatile both in the case of 'advantaged agents' (policy-makers and the public) and 'disadvantaged agents' (asylum seekers).

The significance of the thesis's findings and of the patterns presented above are discussed in the remaining sections of this conclusion.

Table 2: Value of this thesis's explanatory hypotheses

	Is the explanatory value of the hypotheses confirmed?							
	British case				Australian case			
	Hypothesis 1	Hypothesis 2:	Hypothesis 3:		Hypothesis 1	Hypothesis 2:	Hypothesis 3:	
	Conflicts amongst policy makers ('advantaged agents') over policy formulation produce an ambivalent institutional structure, which causes a reduction of policy legitimacy	A weak enforcement structure creates incentives for asylum seekers ('disadvantaged agents') not to comply with the existing framework of refugee admission, hence reducing policy effectiveness	The development of a complex institutional structure over time reduces policy legitimacy and policy effectiveness		Conflicts amongst policy makers ('advantaged agents') over policy formulation produce an ambivalent institutional structure, which causes a reduction of policy legitimacy	A weak enforcement structure creates incentives for asylum seekers ('disadvantaged agents') not to comply with the existing framework of refugee admission, hence reducing policy effectiveness	The development of a complex institutional structure over time reduces policy legitimacy and policy effectiveness	
First period of investigation: 1945-late 1970s/early 1980s	Yes	Partly	Partly		Partly	Partly	Partly	
Second period of investigation: Thatcher and Major governments (UK), Hawke and Keating governments (Australia)	Partly	Yes	Yes		Partly	Yes	Yes	
Third period of investigation: Blair government (UK), Howard government (Australia)	Yes	Partly	Yes		Partly	Partly	Yes	

Contribution of this thesis to scholarship and suggestions for further research

Case-specific discussion

Firstly, the comparison conducted in this thesis has illustrated that the ability of successive British and Australian governments to control immigration was not as significant as is often argued in the literature. In regards to the first four decades of refugee admission policies after the Second World War, the thesis has shown that Australian governments from Chifley to Fraser were better able to respond to discrepancies between policy objectives and outcomes by adjusting policy objectives than subsequent governments. This ability was attributed to a high level of bipartisan support for policy objectives, which led to consensual policy outcomes regardless of 'failure' during the policy process, and to the insulation of the immigration bureaucracy. Bureaucratic insulation ensured that not many policy actors, and certainly not the broader public, were aware of the difficulties experienced by the immigration bureaucracy in achieving originally planned policy objectives. In the British case, the thesis has added evidence to existing literature (Hansen 2000, Schain 2008) concerning the existence of policy dualism towards 'alien refugees' on the one hand and refugees from the Commonwealth on the other hand by insisting on the greater ability of British governments to achieve policy objectives in regards to the admission of European, Chilean and Indo-Chinese refugees than to 'East African Asian' refugees. It has also shown that notwithstanding this policy dualism, the Home Office's immigration bureaucracy was not as insulated as Australia's post-war Department of Immigration, as other bureaucracies competed with the Home Office over the direction and modalities of refugee admission policy.

In regards to the period from the 1980s to the mid-1990s, the thesis has pointed at similarities which have yet to be identified in the literature. A significant body of scholarship has pointed at a significant decline of policy legitimacy and effectiveness during this period in the Australian case; however this decline has yet to be as clearly evidenced for British refugee admission policies under the Thatcher and Major governments, especially in regards to policy dynamics during the 1980s. Bureaucratic inertia during this period, which significantly contributed to a considerable expansion of the grant of asylum, stood in sharp contrast to a high level of restrictiveness in political discourse. The comparative analysis has also

highlighted the significance, in both countries, of conflicts over the meaning of the Refugee Convention at two distinct levels during this as well as the subsequent period of investigation. Firstly, in both countries, judicial review (systematically pursued by the defenders of the rights of asylum claimants) 'engineered' over time the obligations of the Australian and British state to consider the Refugee Convention as a binding treaty. This resulted in the incorporation of parts of the Convention in domestic law. Secondly, fierce 'interpretive battles' have been conducted over the wording of the Refugee Convention since the mid-1980s. Court decisions have expanded the meaning of concepts at the core of the Convention, most significantly 'refugee', 'protection' and persecution'. While these 'progressive' decisions have been comparatively rare in both cases, they have had a tremendous impact on individual decision-making by setting precedents and leading to an increase of recognition of asylum seekers as refugees. In response, British and Australian governments have attempted to restrict access to judicial review and have pursued the adoption in domestic law of increasingly restrictive definitions of key concepts of refugee law. This has not prevented the occurrence of 'interpretive battles' during but also beyond the period of investigation, as is currently observed in Australia.[353] Ironically, as has been evidenced in Chapter 3 and Chapter 5, these 'interpretive battles' have their origin in the long negotiations, to which both the Atlee and the Chifley governments actively participated, between the drafters of the Refugee Convention, negotiations eventually resulting in the adoption of a very ambivalent treaty.

The comparative analysis of policies under the Blair and Howard government has also done more than illustrate the 'vanguard role' of both countries in regards to the extra-territorialisation of asylum. The comparison has shown that notwithstanding their practical limits, extra-territorialisation strategies pursued in the early 2000s were congruent with a decrease of asylum claims in both countries. It has been argued that the failure of the Blair and the Howard government to restore policy legitimacy in spite of increasing congruence between policy objectives and outcomes was related to the increasing complexity of the regulatory framework of the refugee admission. This level of complexity was qualified, following Schickler (2001), as 'disjointed institutional development', producing over time a

[353] As mentioned in Chapter 8, the Australian High Court has in August 2011 deemed the 'Malaysian Solution' to be in breach of the definition of 'effective protection' in 'safe countries' in the Migration Act. Ironically, this definition had been adopted in the context of the Pacific Solution and considered highly restrictive at the time. This has led *Sydney Morning Herald* columnist Richard Ackland to acerbically label former Immigration Minister Philip Ruddock, generally identified with the most restrictive aspects of Australia's refugee admission policy, a temporary 'human rights hero' (Ackland, 2011).

highly complex and partly incoherent refugee admission structure unable to ensure that all stated policy objectives are achieved, in turn jeopardising policy legitimacy.

While this thesis significantly contributes to the analysis of the evolution of the policy effectiveness and legitimacy of refugee admission in Britain and Australia since the Second World War, it cannot be argued that it convincingly explains all the stages of this evolution. The explanatory hypotheses have been found to only partially explain the modalities of unintended policy outcomes before asylum claims started to rise in both countries during the 1980s. The methodology used to analyse the variables certainly contributed to the explanatory limits of the research design. Archival research, including a thorough analysis of media reports on refugee policy during this period, as well as, so far as this is still possible, interviews with policy actors and observers of 'early' policy developments, could certainly sharpen the explanatory focus of further research on this period. In addition, the choice of variables has neglected a number of explanatory aspects of policy outcomes mentioned in the literature, especially racial prejudice. The latter has only been addressed in the thesis insofar as it directly resulted in institutional dynamics as in the case of the White Australia policy, and in policy towards Commonwealth refugees in Britain. Yet further integration of this variable into the analysis (for instance in regards to the evaluation of policy legitimacy) would perhaps increase the explanatory value of the approach; this would mean a more substantial analysis of data on public opinion. A more systematic analysis of the role of party dynamics and of the structure and agency of the media may also be of great benefit.

The value of this thesis's explanatory hypotheses is higher for refugee admission policy from the 1980s than for the previous period of investigation, so the project can still be considered a significant contribution to case-related explanatory scholarship. Yet this does not mean that the 'explanatory puzzle' is complete. Explanatory factors found to be missing from the explanatory configuration of the previous period, that is racial prejudices, the broader role of public opinion, the agency and structure of the media[354] and party dynamics may still be relevant to more contemporary policy developments. Therefore, the explanatory value of the approach developed here would benefit from an expansion to several additional variables, especially 'immaterial' variables (such as racial prejudice) whose impact on the institutional

[354] Senior *Guardian* journalist Malcolm Dean (2011) has most recently argued that the British modern media undermined democracy, one of his case studies begin asylum policy.

structure is harder to assess than the variables investigated in this thesis. This would, however, require significant methodological changes.

Finally, the investigation has shown that unintended policy outcomes converged over time, although this convergence is explained by distinct configurations of variables. This finding leads us to ask whether such convergence applies for the entire field of immigration control policies or is specific to the subfield of refugee admission policies. This question can only be answered through further comparative research on other subfields of immigration control policy in Britain and Australia, such as labour and family immigration. Future research in this respect could benefit from the insight of policy transfer literature (see for instance Dolowitz 1997, Stone 2001) and focus more closely on exchanges between Britain and Australia through intergovernmental organisations and meetings such as the IGC and the Five Countries Conference. The discovery of a convergence of unintended policy outcomes across the entire field of immigration control would challenge typologies of immigration control that point at distinct structures of immigration control in Australia as a traditional country of immigration and in Britain as a long-standing 'immigration policy laggard' (see for instance Freeman, 1995; Cornelius and Tsuda, 2004). If further comparative research, however, showed that policy convergences are sector-specific and limited to refugee admission policies, then this would contribute to literature pointing at a functional differentiation of policy dynamics between areas of immigration control policies and show that this sectoral convergence is not a recent phenomenon (see contributions in Betts, 2011; Garnier, forthcoming).

Conceptual discussion

Beyond its contribution to case-related literature, the thesis offers a few insights of a more conceptual nature that may be useful for interdisciplinary research aiming to explain discrepancies between policy objectives and outcomes in immigration control policies, as well as more broadly for research interested in the evolution of such discrepancies in other policy fields.

Firstly, the suggested definition of discrepancies between policy objectives and outcomes as 'unintended policy outcomes' encompassing deficits of policy effectiveness and legitimacy has proven a useful tool for comparative qualitative research. It can be argued that this

definition is applicable to the investigation of the same issue in other countries, thus generating more comparative data, but also to the investigation of similar issues in other policy fields in Britain, Australia or other countries. Yet one should be mindful of the definition's limits. In particular, the suggested definition of 'unintended policy outcomes' is highly qualitative and lacks precision. Such qualitative definition is useful in the context of comparative research across a number of countries and over time; a comparative study involving many cases may require the conversion of qualitative assessments into numerical values so as to obtain a more specific ranking of the outcomes. Charles Ragin's application of Boolean algebra to comparative qualitative research (Ragin 2008) may be highly useful in this context.

Secondly, and most significantly in regards to the thesis's central research question, the approach developed in this thesis allows a comparative politics approach to explain unintended outcomes in immigration control policies in terms of interrelations between political agency and institutional structure. This is especially the case for policy developments since the late 1970s/early 1980s. Both in the Australian and the British case, the dramatic decline of policy effectiveness and legitimacy (i.e. the expansion of unintended policy outcomes) in the 1980s and early 1990s was explained by agency- and structure-related factors. On the one hand, a weak institutional structure at the enforcement level created incentives for 'disadvantaged agents' (asylum seekers) not to comply with these rules. On the other hand, sprawling institutional complexity made it difficult for 'advantaged agents' (policy-makers) to ensure that all policy outcomes were achieved. In contrast, the complexity of policy outcomes under Blair and Howard (declining policy legitimacy, increasing policy effectiveness) shows that increasing enforcement capabilities related to a decline of asylum claims from the early 2000s, reducing the opportunities for 'disadvantaged agents' to not comply with the rules of admission. Yet in both cases, the continuing expansion of institutional complexity meant that notwithstanding the strengthening of enforcement mechanisms, the architecture of control has become so complex that it made it even more difficult for 'advantaged agents' than in previous periods to achieve policy effectiveness and legitimacy. In the British case, conflicts amongst 'advantaged agents' over policy objectives also clearly contribute to understandings of the decline of policy legitimacy during this period.

These findings lead to a conceptual conversation with sociological approaches to unintended outcomes in immigration control policies, which argue that migrant agency constitutes the primary constraint to the control objectives of the state. The findings point at conditions

particularly conducive to the subversion of state control by migrant agency. On the basis of this thesis's findings, this occurs not only when enforcement mechanisms are weak, but also when the institutional structure of immigration control becomes so complex as to provide 'built-in', if unintended, 'regulatory loopholes'.

The thesis's findings can also be discussed from the perspective of international relations approaches arguing that lack of cooperation between states, and thus the anarchic structure of the international system, is the main constraint to the ability of states to control immigration. It has been shown that the domestic configuration most conducive to international cooperation, which in the investigation proves to be Australia's involvement in international efforts to resolve the Indo-Chinese refugee crisis, is a combination of high policy legitimacy amongst 'advantaged agents' (policy-makers); of relatively effective enforcement mechanism reducing incentives for 'disadvantaged agents' to not comply with the rules (in that case boat people deciding to wait for resettlement instead of sailing further to Australia); and of institutional simplicity (which allowed for a high degree of policy responsiveness). Given the sprawling institutional complexity, or 'disjointed institutional development', in refugee admission policies since the early 1980s, it is unlikely that such domestic configuration may reappear soon. Yet the approach developed in this thesis could be applied to other cases of successful 'burden-sharing' operations in order to establish if other domestic configurations, perhaps more applicable to the contemporary state of refugee admission, facilitate engagement in international cooperation aiming to solve refugee crises. In this respect, the study should not only focus on industrialised countries, but also on emerging countries which have successfully implemented cooperative schemes (for an overview of these schemes see Betts 2009).

The explanatory approach developed in this thesis thus works towards 'levelling the conceptual playing field' between, on the one hand, sociological and international relations approaches, in which conceptualisation and generalisation efforts are explicit and significant, and comparative politics research, in which these efforts have hitherto been less significant. However, and to continue the metaphor, the 'conceptual field' of explanatory research on the unintended policy outcomes of immigration control policies remains far from even. This thesis's explanatory approach is considerably less parsimonious than sociological and international relations approaches: its explanatory ambitions are limited by its insistence on the historical context in which its explanatory configurations are valid. The upside of such complexity is that it has the potential to complement more parsimonious approaches with

explanatory nuances. The downside of the approach, however, is that its prescriptive ambitions are naturally limited by its attachment to the significance of the historical context. This could also be qualified as a conceptual inability to predict the future, a feat theoretically less impossible in the case of sociological and international relations approaches discussed in this thesis, in which the historical context is considered less central to the approaches' explanatory value.[355] It is thus difficult to formulate specific policy recommendations on the basis of the approach given that tomorrow's problems will not be the problems of the past.

However, this downside suggests a very important finding for policy-making: the irrepressibility of change. The irrepressibility of change points at the need to accept mistakes as an integral part of a process of permanent adjustment of policy objectives and to acknowledge that uncertainty is constitutive to policy-making, or, in other words, that uncertainty is constitutive to the policy process. In an era of 'migration management', which finely classifies immigrants and refugees along specific streams and categories (see the contributions in Geiger and Pecoud 2010), requesting tolerance for 'policy failure' appears counter-intuitive. Yet such tolerance played a key role in the legitimisation of the admission of large groups of refugees, notwithstanding public hostility at the time of the arrival of these refugees, until the 1980s in Britain and Australia. A policy agenda building on the findings of this thesis would thus investigate how to integrate unpredictability into contemporary, institutionally sophisticated policy making. This agenda may constitute a normative and organisational shift away from the certainties of 'modernity', yet it appears worth a thought considering the destructive implications for refugees of policies giving the illusion that the world is based on certitudes.

[355] On the strictly explanatory and not predictive nature of historical institutionalist research see Steinmo (2010).

Appendix 1: List of interviews

Interviews in Sydney, Canberra and Melbourne

Carmen Lawrence, MP and former Premier of Western Australia and former president of the Australian Labor Party, Canberra, 13.6.2007.

Patricia Crossin, Senator for the Northern Territory, Australian Labor Party, Canberra, 14.6.2007.

Cameron Rashleigh, Senior Protection Officer, UNHCR, Canberra, 15.6.2007.

William Maley, academic, Australian National University, Canberra, 18.6.2007.

Astri Suhrke, academic, former UNHCR staff, Canberra, 18.6.2007.

Tony Burke, MP, at the time shadow Minister for Immigration (after the 2007 election Minister for Agriculture and for Population Policies), Australian Labor Party, Canberra, 18.6.2007.

Andrew Bartlett, Senator for Queensland, the Democrats, Canberra, 19.6.2007.

Beth Powell, Director of Protection Policy, Department of Immigration and Citizenship, Canberra, 19.6.2007.

Alan Hutchinson, Director of Management and Protection Program, Department of Immigration and Citizenship, Canberra, 19.6.2007.

Ian McAllister, academic, Australian National University, Canberra, 21.6.2007.

Steve Hamilton, Chief of Pacific Operations, International Migration Organisation, Canberra 22.6.2007.

David Bitel, lawyer and former president of the Refugee Council of Australia, Sydney, 27.6.2007 and 5.7.2007.

Anna Samson, campaign officer, A Just Australia, Sydney, 8.7.2007.

Paul Power, CEO, Refugee Council of Australia, Sydney, 12.7.2007.

Carolina Gottardo, National Policy Director, Refugee Council of Australia, Sydney, 12.7.2007.

Susan Kneebone, academic, Monash University, Melbourne, 20.7.2007.

Peter Mares, journalist, Melbourne, 23.7.2007.

Savitri Taylor, academic, La Trobe University, Melbourne, 25.7.2007.

Petro Georgiou, MP, Liberal Party, former director of the Australian Institute for Multicultural Affairs, Melbourne, 25.7.2007.

Judith Troeth, Senator for Victoria, former minister of the Howard government, Melbourne, 25.7.2007.

Michael Gordon, journalist, Melbourne, 26.7.2007.

Klaus Neumann, academic, Swinburne University, Melbourne, 26.7.2007.

Julian Burnside, lawyer, Melbourne, 26.7.2007.

Tom Davis, academic, formerly employed at the Onshore Protection Branch, Department of Immigration, Melbourne, 27.7.2007.

Max Phillips, immigration advisor of Kerry Nettle, Senator for New South Wales, the Greens, Sydney, 22.8.2007.

Nic McLellan, journalist and activist, Sydney, 25.8.2007.

Interviews in Geneva

Richard Danziger, 2001-2003 head mission in Indonesia, IOM, now head of Counter-Trafficking Division, IOM, 2.4.2008.

Jef Crisp, Head of Evaluation and Policy Analysis, UNHCR, 3.4.2008.

Larry Bottinick, senior legal adviser, Regional Bureau Asia Pacific, UNHCR, 8.4.2008.

Michelle Klein-Solomon, director, Migration Policy, Research and Communication, IOM, 7.4.2008.

Gevais Appave, consultant, former Director of Migration Policy, Research and Communication, IOM, 7.4.2008.

Anja Klug, senior legal officer, Protection Operation and Legal Assistance Section International Protection Division, UNHCR, 10.4.2008.

Interviews in London

Don Flynn, director, Migrant Rights Network, 26.1.2009.

Christopher Prince, Director of International Policy, International Group, United Kingdom Border Agency, 20.1 2009.

Alan Travis, Home Affairs Editor, the Guardian, 30.01.2009.

David Saville, EU Asylum Policy Team, UK Border Agency, 2.2.2009.

Neil Gerrard, MP, Labour Party, 5.2.2009.

Keith Best, chief executive, Immigration Advisory Service, 10.2.2009.

Chris Huhne, MP, Liberal Democrats and Home Affairs Spokesman, with the participation of Shona Kerr, Parliamentary Researcher, 10.2.2009.

Alexandra McDowall, UNHCR Legal Officer, Quality Initiative Project, 12.2.2009.

Helen Muggeridge, International Protection Policy Advisor, Refugee Council, 19.2.2009.

Appendix 2: Statistics on refugee admission in Britain and Australia

Data on asylum statistics are presented as figures and tables. The figures allow for an easy identification of trends over time as well as similarities and differences between Australian and British refugee admission policies. The tables allow for closer analysis.

Asylum claims in industrialised countries, Australia and Britain, 1982-2007

Sources: UNHCR (2002: 113), UNHCR annual statistical yearbooks, statistical annexes, 2003-2007.

Figure 1: Asylum claims in idustrialised countries, Australia and Britain, 1982-2007

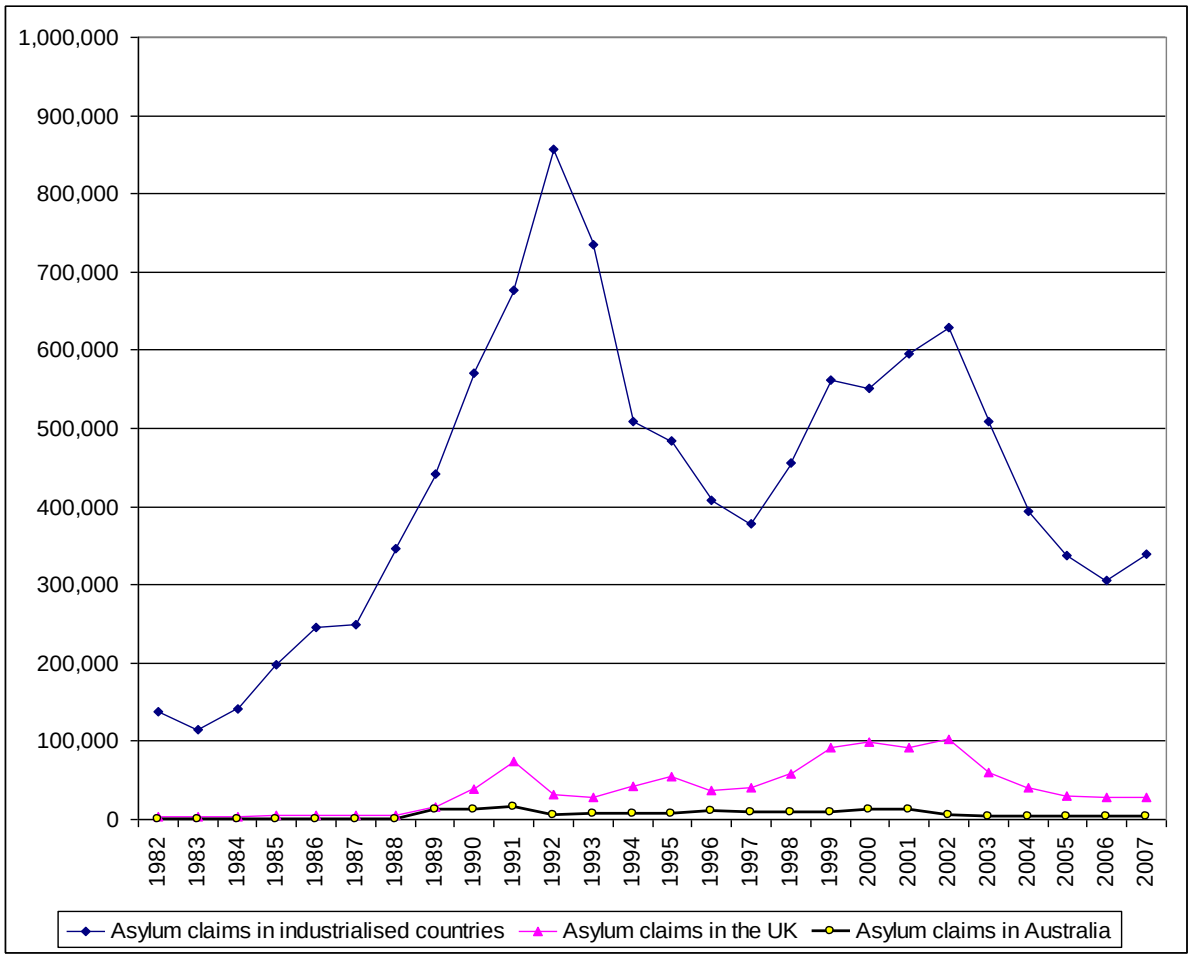

Table 3: Asylum claims in idustrialised countries, Australia and Britain, 1982-2007

	Asylum claims in industrialised countries	Asylum claims in Britain	Asylum claims in Australia
1982	137,257	4,223	170
1983	114,415	4,296	183
1984	141,274	4,171	167
1985	197,901	6,156	315
1986	246,150	5,714	488
1987	249,582	5,863	439
1988	346,907	5,739	500
1989	441,188	16,775	12,620
1990	571,129	38,195	12,130
1991	677,331	73,400	16,740
1992	857,589	32,300	6,050
1993	734,393	28,000	7,200
1994	509,157	42,200	6,260
1995	484,292	55,000	7,630
1996	408,936	37,000	9,760
1997	377,839	41,500	9,310
1998	456,477	58,487	8,160
1999	561,387	91,200	9,450
2000	551,468	98,900	13,070
2001	595,653	92,000	12,370
2002	628,660	103,080	5,860
2003	508,060	60,050	4,300
2004	394,550	40,620	3,200
2005	338,130	30,841	3,200
2006	306,330	28,320	3,720
2007	338,350	28,300	3,980

Figure 1 and table 3 show that increases and decreases of asylum claims in Britain and Australia have generally been congruent with increases and decreases of asylum claims elsewhere in industrialised countries between 1982 and 2007, a finding that relativises the effectiveness of particular policies implemented by individual states.

Asylum claims and grant of asylum in Britain and Australia, 1982-2007, first instance decisions

Sources: NPC (1991: 124); UNHCR (2002: 113); UNHCR annual statistical yearbooks, statistical annexes, 2003-2007.

Figure 2: Asylum claims and grant of asylum in Britain and Australia (first instance), 1982-2007

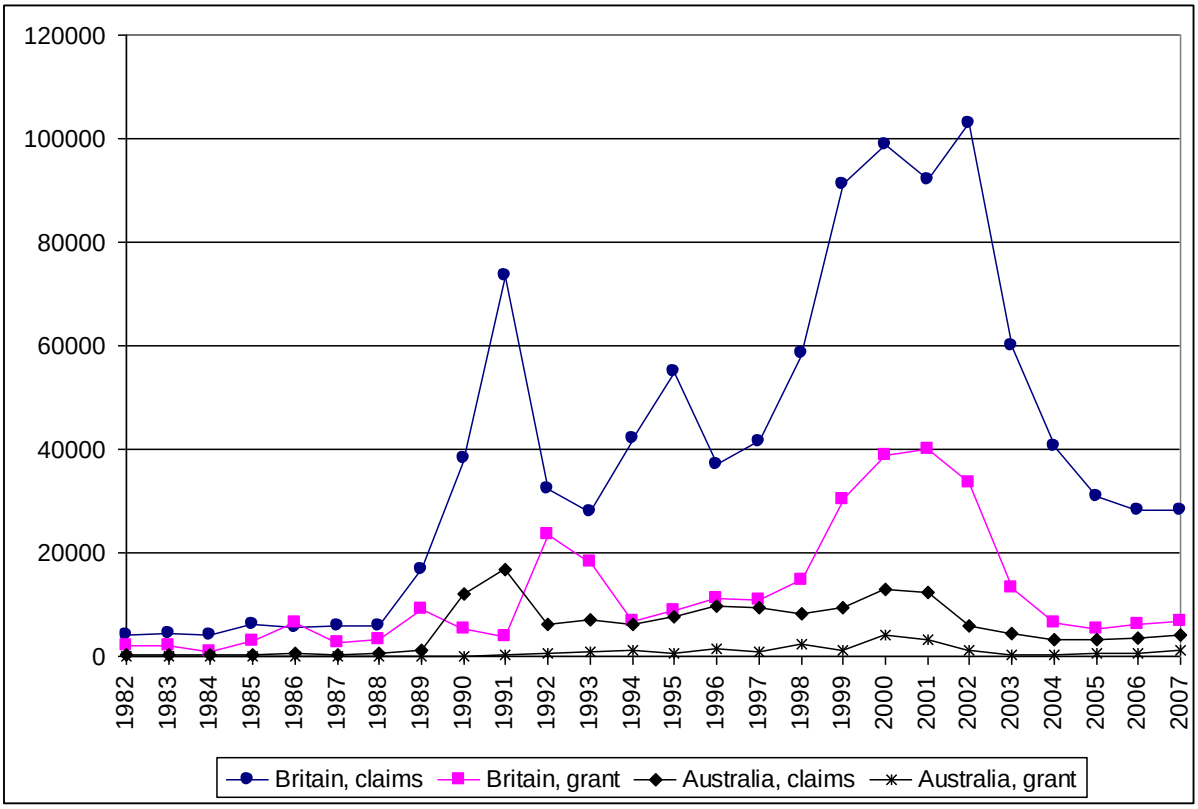

Table 4: Asylum claims and grant of asylum in Britain and Australia (first instance), 1982-2007

	Britain, claims	Britain, grants	Australia, claims	Australia, grants
1982	4,223	2,038	170	35
1983	4,296	2,124	183	33
1984	4,171	991	167	57
1985	6,156	3,071	315	65
1986	5,714	6,429	488	67
1987	5,863	2,693	439	109
1988	5,739	3,264	564	97
1989	16,775	9,175	1,262	80
1990	38,195	5,200	12,128	91
1991	73,400	3,750	16,743	189
1992	32,300	23,580	6,054	614
1993	28,000	18,340	7,198	992
1994	42,200	6,840	6,264	1,031
1995	55,000	8,960	7,632	681
1996	37,000	11,170	9,758	1,380
1997	41,500	10,950	9,312	1,009
1998	58,487	14,700	8,156	2,492
1999	91,200	30,240	9,451	1,211
2000	98,900	38,834	13,065	4,050
2001	92,000	39,990	12,366	3,364
2002	103,080	33,460	5,863	1,234
2003	60,050	13,180	4,295	261
2004	40,625	6,353	3,201	346
2005	30,840	5,427	3,204	577
2006	28,320	6,240	3,515	697
2007	28,300	6,805	3,980	1,212

‘First instance decision’ (‘grant’ in figure 2 and table 4) stands for the decision taken by the ‘asylum bureaucracy’ of each country, that is, the asylum units of the Immigration and Nationality Directorate in Britain and the units responsible for the grant of asylum within Australia’s Department of Immigration. In Britain, grants of asylum include refugee status and humanitarian status. There are no annual statistics on Australia’s humanitarian status, which existed in statutory law between 1980 and 1991 and played a crucial role in the transformation of refugee admission policies during this period (see Chapter 7). According to the available statistics (JSMCR 1992: 96-97), 17,500 applications for humanitarian status were made in 1989/1990, the highest level on record. Australian asylum statistics between 1985 and 1988 are based on data for financial years (1985/1986 to 1988/1989) as no yearly data from January to December is available for this period (data available in NPC (1991: 124) appear not to have been reported to the UNHCR, which provides for comparable data over years from January to December). Thus figure 2 and table 4 are not entirely accurate for the years in question.

Refugee resettlement and grant of asylum in Britain and Australia, 1982-2007

Sources: NPC (1991: 124), UNHCR (2002: 113; 143), UNHCR statistical yearbook, statistical annexes, 2003-2007.

Figure 3: Refugee resettlement and grant of asylum in Britain and Australia, 1982-2007

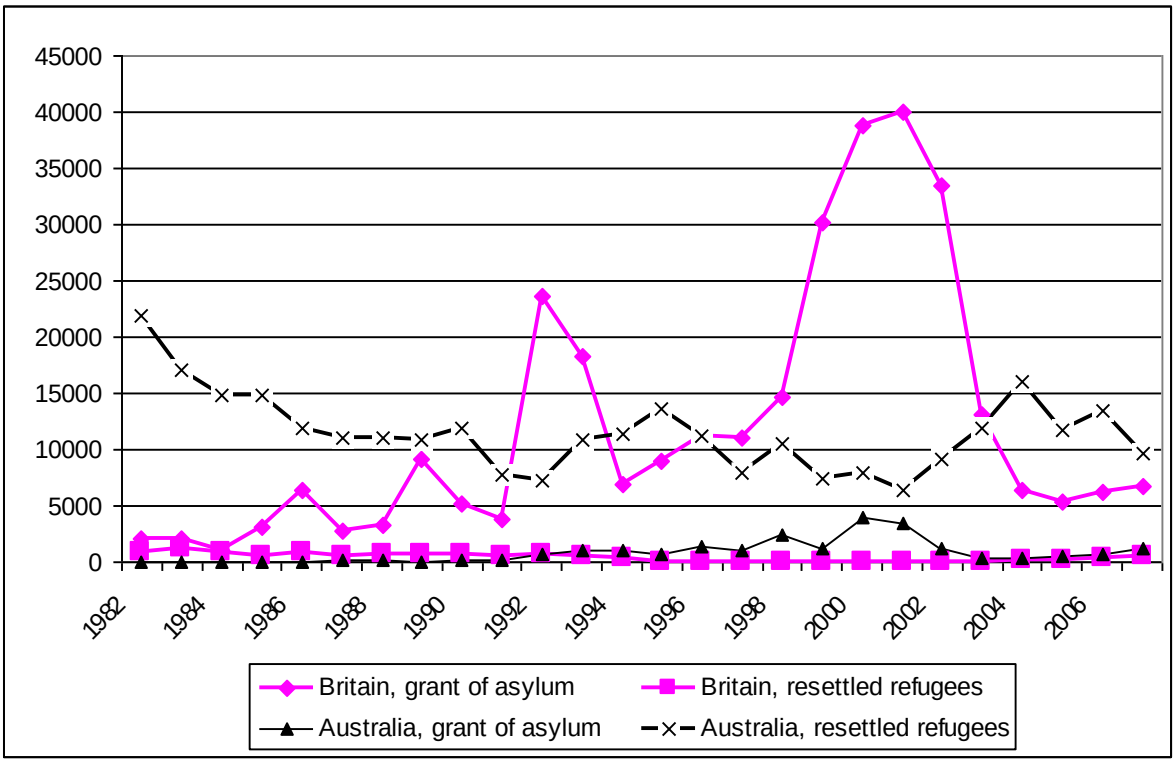

Table 5: Refugee resettlement and grant of asylum in Britain and Australia, 1982-2007

	Britain, grant of asylum	Britain, resettled refugees	Australia, grant of asylum	Australia, resettled refugees
1982	2,038	807	35	21,917
1983	2,124	1,222	33	17,054
1984	991	803	57	14,769
1985	3,071	529	65	14,850
1986	6,429	833	67	11,840
1987	2,693	435	109	11,101
1988	3,264	715	97	11,076
1989	9,175	723	80	10,887
1990	5,200	650	91	11,948
1991	3,750	490	189	7,745
1992	23,580	620	614	7,157
1993	18,340	510	992	10,939
1994	6,840	260	1,031	11,350
1995	8,960	70	681	13,632
1996	11,170	20	1,380	11,253
1997	10,950	0	1,009	7,955
1998	14,700	0	2,492	10,457
1999	30,240	0	1,211	7,467
2000	38,834	0	4,050	7,878
2001	39,990	0	3,364	6,454
2002	33,460	0	1,234	9,172
2003	13,180	0	261	11,855
2004	6,353	150	346	15,967
2005	5,427	175	577	11,654
2006	6,240	378	697	13,429
2007	6,805	515	1,212	9,628

Figure 3 and table 5 show the respective dominance of refugee resettlement as the primary mode of admission in Australia and of asylum claims in Britain.

Percentage of asylum claimants granted refugee status in Britain and Australia, first instance decisions and decisions after administrative review, 1982-2007

Sources: NPC (1991: 124); UNHCR (2002: 113; 143), UNHCR statistical yearbook, statistical annexes, 2003-2007.

Figure 4: Percentage of asylum claimants granted refugee status in Britain and Australia, 1982-2007

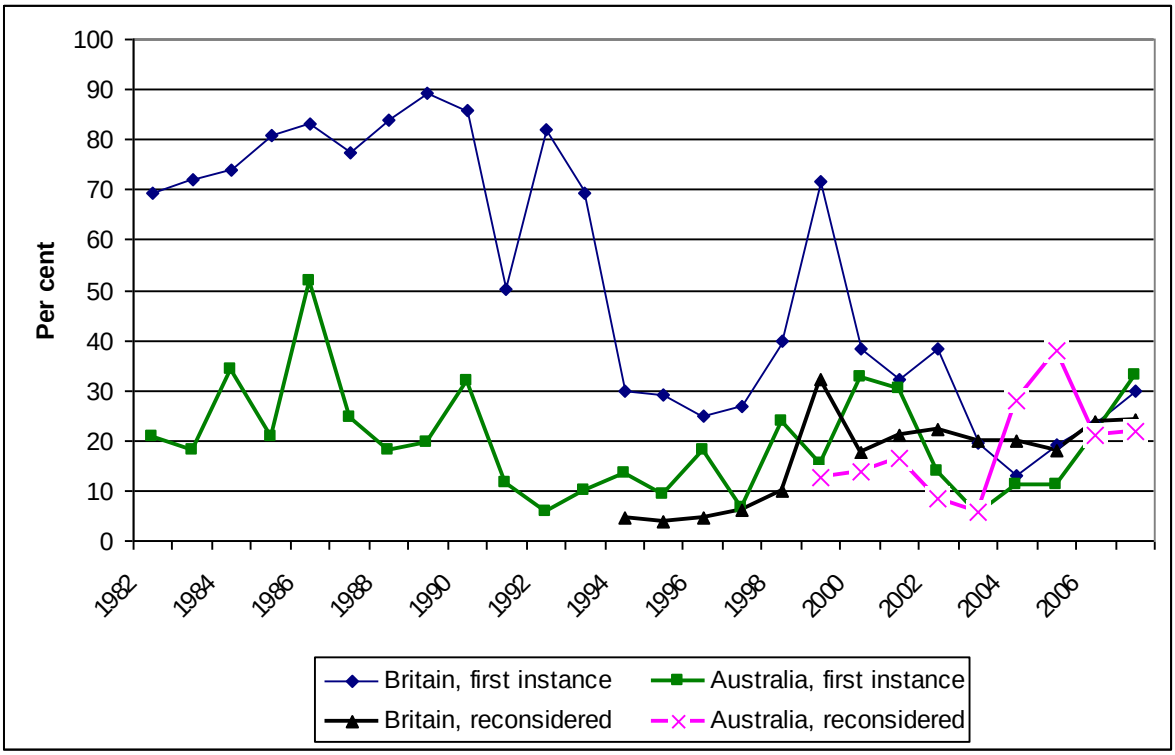

Table 6: Percentage of asylum claimants granted refugee status in Britain and Australia, 1982-2007

	Britain, first instance	Australia, first instance	Britain, reconsidered	Australia, reconsidered
1982	69.3	20.6	Not applicable	Not applicable
1983	72	18	Not applicable	Not applicable
1984	74.1	34.1	Not applicable	Not applicable
1985	80.8	20.6	Not applicable	Not applicable
1986	83	51.6	Not applicable	Not applicable
1987	77.4	24.6	Not applicable	Not applicable
1988	84	18.1	Not applicable	Not applicable
1989	89.3	19.5	Not applicable	Not applicable
1990	85.9	31.8	Not applicable	Not applicable
1991	50.3	11.4	Not applicable	Not applicable
1992	82.1	5.8	Not applicable	Not applicable
1993	69.2	9.9	Not available	Not applicable
1994	29.9	13.3	4.6	Not available
1995	29.2	9.1	4	Not available
1996	24.8	18.1	4.6	Not available
1997	27	6.6	6.1	Not available
1998	40	23.8	10	Not available
1999	71.7	15.5	32.2	12.8
2000	38.2	32.6	17.7	13.8
2001	32	30.4	21.2	16.5
2002	38.2	13.7	22.1	8.4
2003	19.5	5.2	20.1	5.8
2004	13	11	20	28
2005	19	11	18	38
2006	23.2	21.6	23.6	21
2007	29.7	33.1	24	21.7

‘First instance decisions’ (‘first instance’ in figure 3 and table 3) stands for the decision taken by the asylum units of the Immigration and Nationality Directorate in Britain and the units responsible for the grant of asylum within Australia’s Department of Immigration ‘Administrative review decisions’ (‘reconsidered’ in figure 4 and table 6) means decisions taken by administrative tribunals, the Immigration Appellate Authority in Britain (AAT) and the Refugee Review Tribunal in Australia (RRT), in favour of asylum claimants. The AAT and RRT re-examine, on request, decisions taken by ‘asylum bureaucracies’ not to grant protection. These tribunals have existed since 1993 in Britain and 1994 in Australia. Especially in the British case, the data points at the discrepancy between the very high level of positive first instance decisions in the mid-1990s and restrictive governmental rhetoric. From the mid-1990s in both countries, the decline in positive first instance decisions was accompanied by high levels of positive decision at the administrative stage.

Asylum claims and boat people arrivals in Australia, 1982-2007

Sources: NPC (1991: 124); UNHCR (2002: 113); UNHCR annual statistical yearbooks, statistical annexes, 2003-2007; Philips and Spinks (2011).

Figure 5: Asylum claims and boat people arrival in Australia, 1982-2007

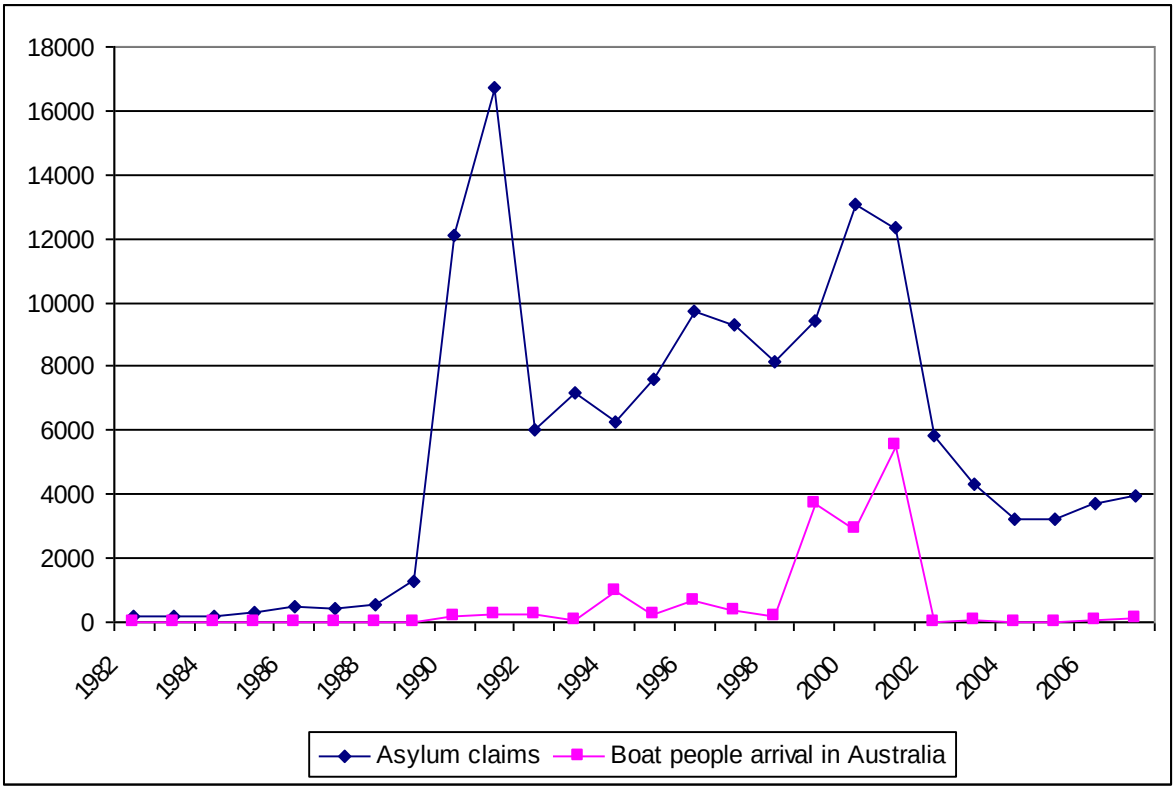

Table 7: Asylum claims and boat people arrival in Australia, 1982-2007

	Asylum claims	Boat people arrival in Australia
1982	170	0
1983	183	0
1984	167	0
1985	315	0
1986	488	0
1987	439	0
1988	564	0
1989	1,262	26
1990	12,130	198
1991	16,740	214
1992	6,050	216
1993	7,200	81
1994	6,260	953
1995	7,630	237
1996	9,760	660
1997	9,310	339
1998	8,160	200
1999	9,450	3,721
2000	13,070	2,939
2001	12,370	5,516
2002	5,860	1
2003	4,300	53
2004	3,200	15
2005	3,200	11
2006	3,720	60
2007	3,980	148

As for figure 4 and table 6, Australian asylum statistics between 1985 and 1988 in figure 5 and table 7 are based on data for financial years (1985/1986 to 1988/1989) since yearly data from January to December is not available. The data show that the number of asylum claims made by boat people has constantly been significantly inferior to the total number of asylum claims made in Australia in spite of their prominence in public and political debates.

Refugee resettlement by categories in Australia, 1977/78-2007/08

Source: RCOA (undated)

Figure 6: Refugee resettlement by resettlement stream in Australia, 1977/78-2007/08

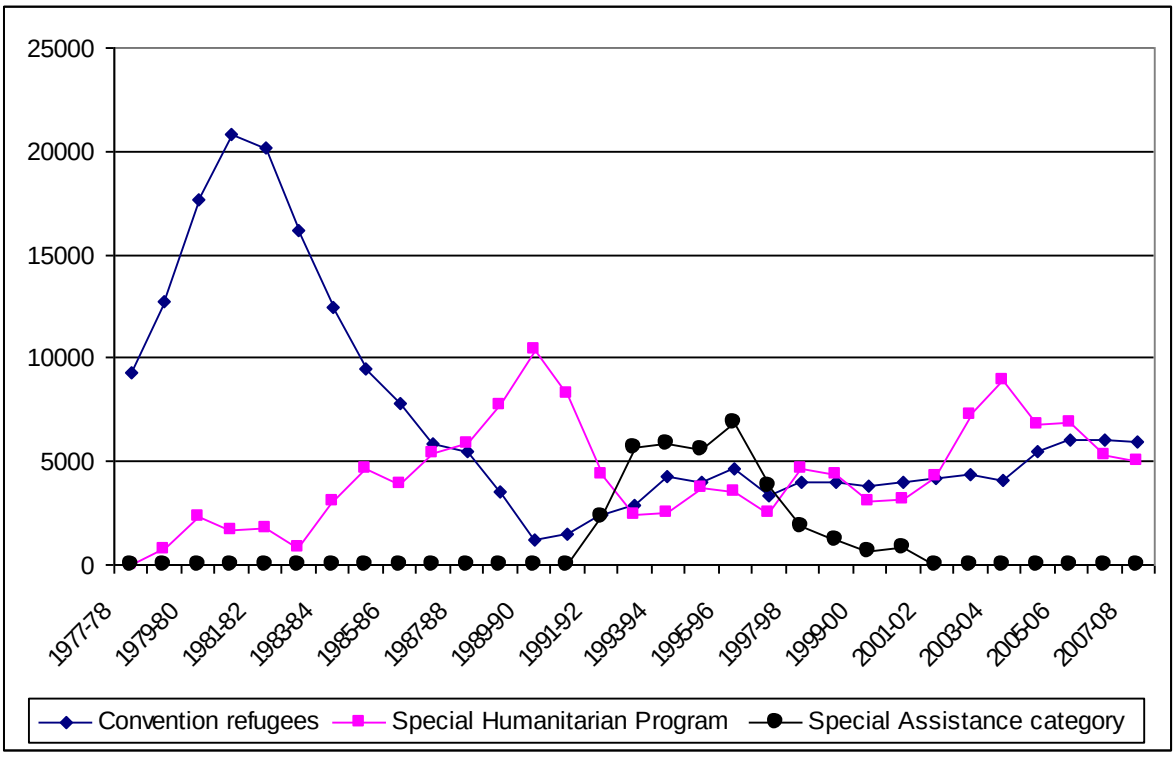

Table 8: Refugee resettlement by resettlement stream in Australia, 1977/78-2007/08

	Convention refugees	Special Humanitarian Program	Special Assistance category (1991-2002)
1977-78	9,326	0	0
1978-79	12,750	700	0
1979-80	17,677	2,277	0
1980-81	20,795	1,675	0
1981-82	20,195	1,722	0
1982-83	16,193	861	0
1983-84	12,426	3,059	0
1984-85	9,520	4,687	0
1985-86	7,832	3,868	0
1986-87	5,857	5,434	0
1987-88	5,514	5,878	0
1988-89	3,574	7,735	0
1989-90	1,238	10,451	0
1990-91	1,497	8,287	0
1991-92	2,424	4,360	2,363
1992-93	2,893	2,392	5,657
1993-94	4,315	2,524	5,840
1994-95	3,992	3,675	5,545
1995-96	4,643	3,499	6,910
1996-97	3,334	2,470	3,848
1997-98	4,010	4,636	1,821
1998-99	3,988	4,348	1,190
1999-00	3,802	3,051	649
2000-01	3,997	3,116	879
2001-02	4,160	4,258	40
2002-03	4,376	7,280	0
2003-04	4,134	8,927	0
2004-05	5,511	6,755	0
2005-06	6,022	6,836	0
2006-07	6,003	5,275	0
2007-08	5,962	5,026	0

Figure 6 and table 8 present the evolution of the categories of refugees resettled to Australia since the establishment of the country's humanitarian programme during the Indo-Chinese refugee crisis In this case, data for financial years available on the website of the Refugee Council of Australia was used instead of UNHCR data, as the latter is only available since 1982. The data show that refugees resettled on the basis of the 1951 Refugee Convention have only exceptionally constituted the main resettlement category. One of the main claims of the Howard government in abolishing the Special Assistance Category was to refocus Australia's humanitarian program on 'Convention Refugees', yet this has not occurred in practice. It is important to reiterate here that a 'humanitarian category' adopting a broader definition of persecution than the Refugee Convention is not open to individuals claiming asylum in Australia.

Appendix 3: Evolution of public opinion on immigration in Britain and Australia

Appendix 3 does not feature figures or tables directly comparing British and Australian public opinion on refugee admission. Although the data selected here have been chosen because of their similarities, the questions asked in public opinion surveys were not identical, and are not available for the same periods of time.

Immigration as an important issue in Britain, 1974-2007

Source: IPSOS-MORI (1988, 1997, 2009)

Figure 7: Percentage of respondents considering that immigration is the most important issue facing Britain, 1974-2007

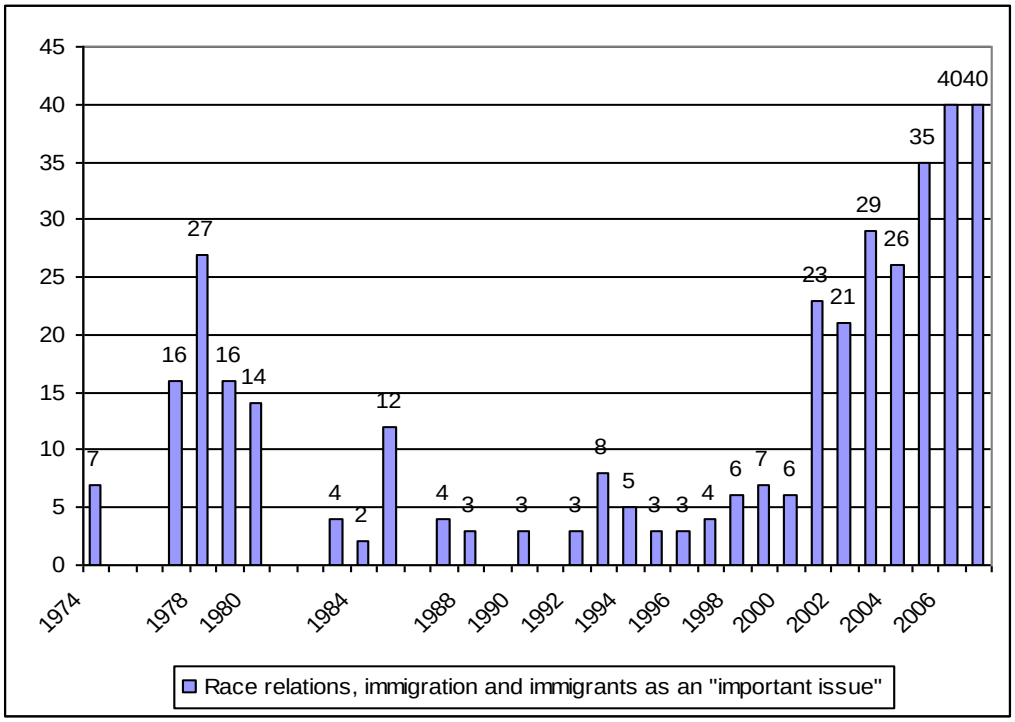

Figure 7 presents the percentage of respondents who said ‘immigration’, ‘race’ or ‘immigrants’ when asked ‘What would you say is the most important issue facing Britain today?’ and ‘What do you see as other important issues facing Britain today?’ in IPSOS-MORI polls. Some data are not available, which is why a few bars are missing. For most years, data are available monthly. For the purpose of comparison figure 7 compares answers given in September of any given year, except in 1977 (November), 1978 (August), 1980 (April), 1987 (August), 1988 (October), 2006 (October) and 2007 (June, in this case to show the importance of immigration as an issue as Tony Blair stepped down as Britain’s Prime Minister).

Immigration as an important issue under Labour, 1997-2007 – monthly data

Source: IPSOS-MORI (2009)

Figure 8: Percentage of respondents considering that immigration is the most important issue facing Britain, monthly data, May 1997-June 2007

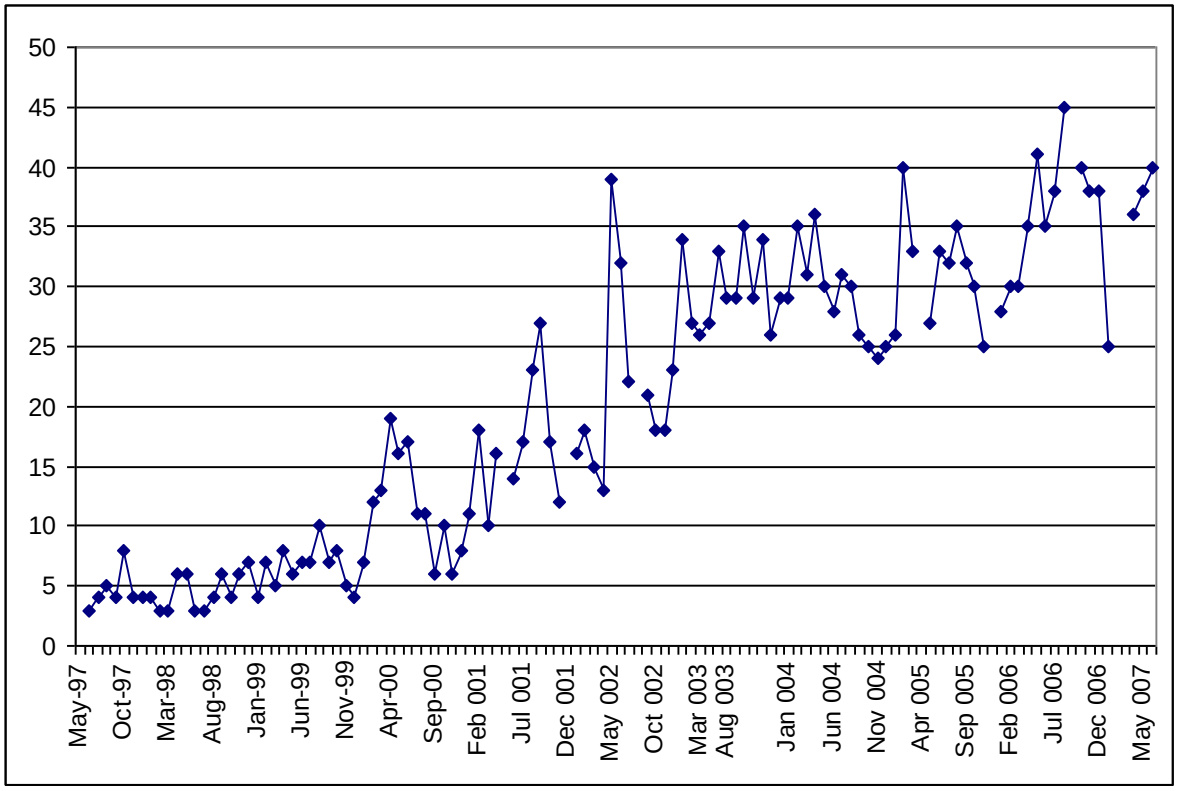

Figure 8 compiles available monthly data in IPSOS-MORI polls between May 1997 and June 2007 on the same questions presented in figure 6. It thus presents the percentage of respondents who said 'immigration', 'race' or 'immigrants' when asked 'What would you say is the most important issue facing Britain today?' and 'What do you see as other important issues facing Britain today?' Figure 8 shows that public opinion on race and immigration was highly volatile under Tony Blair's Prime Ministership. Yet as in figure 6 it is impossible to argue with the certainty that asylum was the most salient of all the issues related to immigration/race during the period under investigation.

Immigration as an important issue in Britain and the EU, 2003-2007

Source: Eurobarometer (various years)

Figure 9: Percentage of respondents considering immigration as one of of the two most important issues facing their country, Britain and EU average, 2003-2007

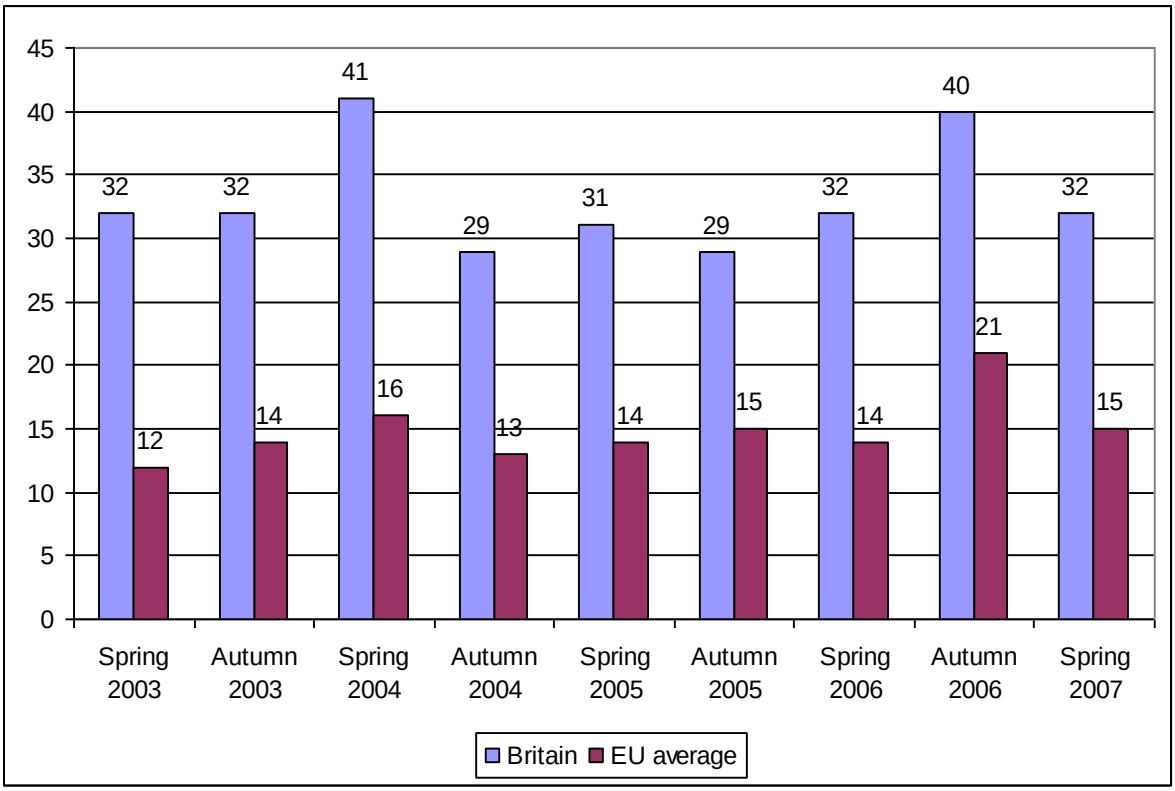

Figure 9 presents the percentage of respondents answering 'immigration' as 'one of the two most important issues facing our county' in successive biennial Eurobarometer polls. The figure shows that immigration was a far greater concern in Britain than in most EU countries in the early 2000s and until the end of Tony Blair's Prime Ministership.

Immigration as an important issue in Australia, 1982-2006

Sources: Goot (1999: 45-46), Roy Morgan Research (2000; 2011)

Figure 10: Percentage of respondents considering that immigration is one of the three most important things the government should do something about, Australia, 1982-1999

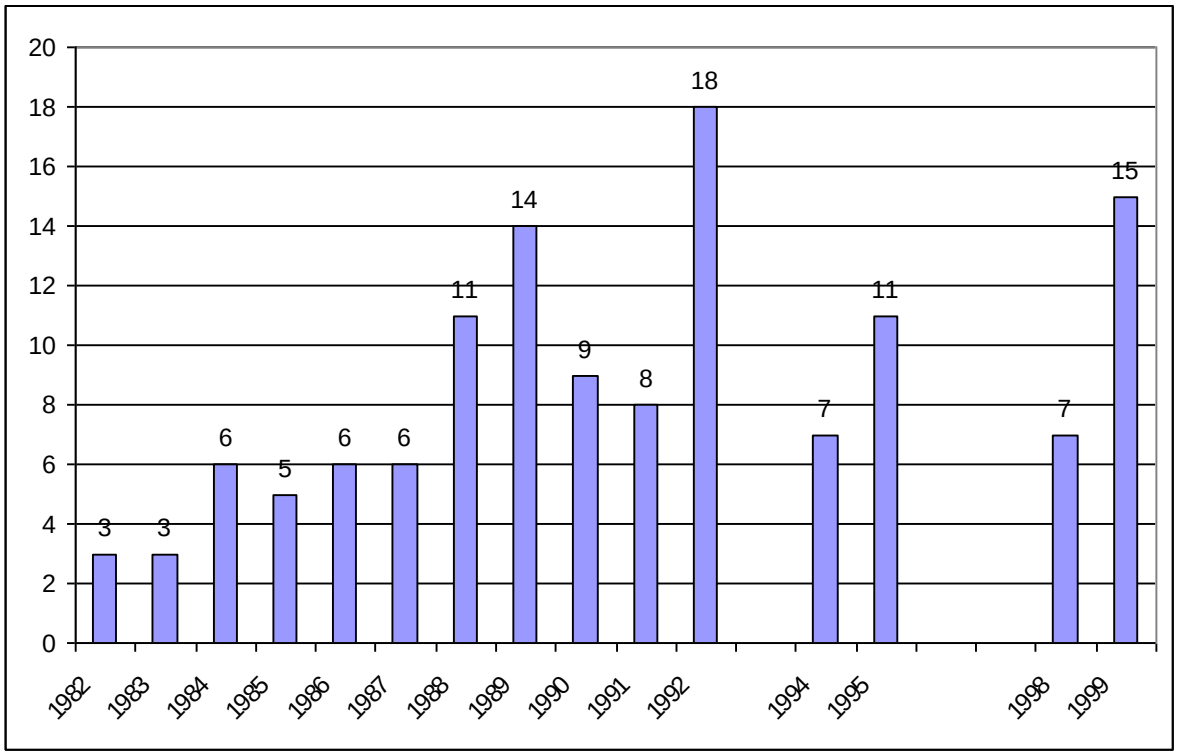

Figure 10 presents the percentage of respondents spontaneously answering 'immigration' to the question 'What are the three most important things the government should be doing something about?' in Roy Morgan Research polls. For all years the poll was taken in February except in 1994 (July), 1998 (April) and 1999 (November). This question was no longer asked in Morgan surveys after November 1999. Since 2005, Morgan polls have sporadically asked what is the 'most important issue facing Australia'. The percentage of respondents who mentioned either immigration or asylum/refugees was at 2% in November 2005 and 7% in April 2006 (Roy Morgan Research 2011). Figure 10 and these additional data show that immigration has over the last decades been a less salient issue in Australia than in Britain, and that this salience has not featured a linear increase.

Australia: Should boat people be sent back? 1979-2004

Source: Goot (1999: 57-58), Goot and Watson (2011: 39)

Figure 11: Percentage of respondents considering that boat people should be sent back, Australia, 1979-2004

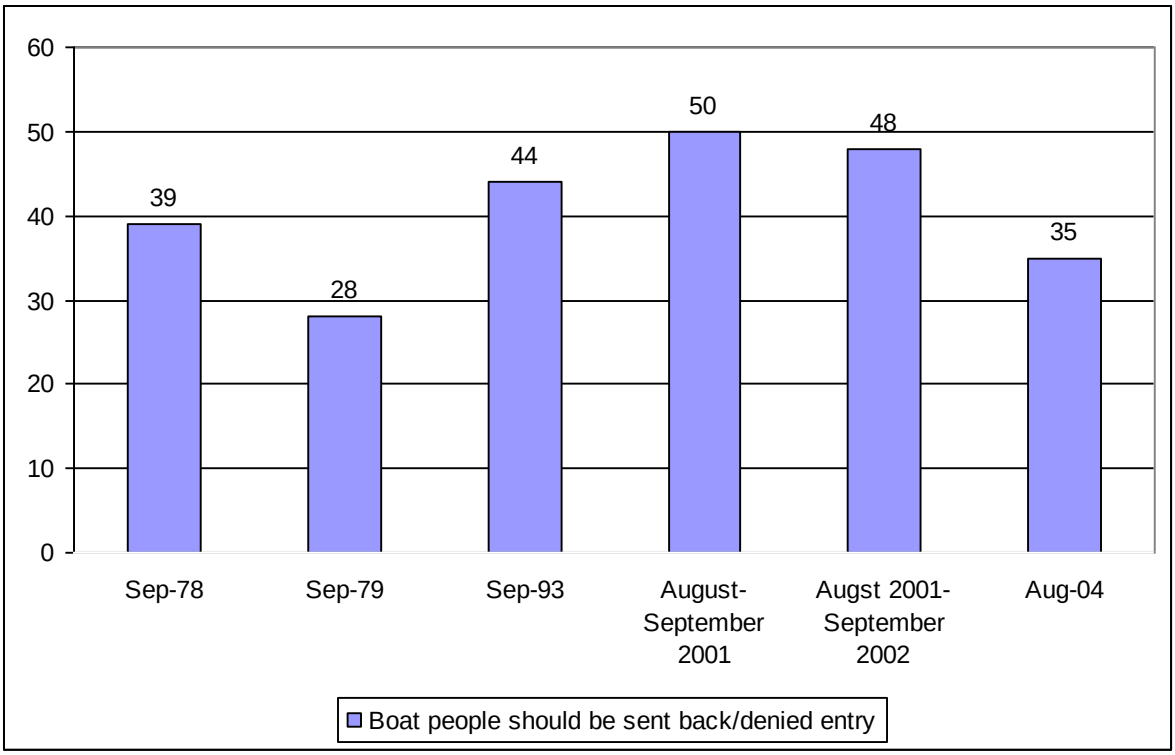

Figure11 shows the percentage of respondents stating that boat people should be sent back in various polls taken as the issue was politically salient. The data were selected on the basis of the similarities of the questions asked (see next page). In the case of the Indo-Chinese crisis, the data shows that people's support for the immediate deportation of boat people declined as boat people arrivals decreased because of the provision of an alternative (and orderly) venue of refugee admission (refugee resettlement). A comparable decline of support is notable in the early 2000s as boat people arrivals to Australia declined after the implementation of the Pacific Solution.

Detail of questions/further responses

September 1978: McNair Anderson poll, answer to the question: 'What should the Federal government do about refugees who come by boat without special permits, and land at places like Darwin; take a lenient view and allow them to settle here [29% agreed], or take a hard line and send them back [39% agreed], or make special efforts to get some other countries to take them [27% agreed].'

September 1979: McNair Anders poll, answer to the question: 'What should the Federal Government do about refugees who come by boat from Vietnam without special permits, and land at places like Darwin: take a lenient view and allow them to stay here [27% agreed], or take a hard line and send them straight back [28% agreed], or make special efforts to get some other country to take them [39% agreed].'

September 1993: Saulwick poll, answer to the question: 'You may know that some people have travelled to Australia from Asia in small boats and have applied to stay as migrants. Do you think people who attempt to become migrants in this way should be: sent straight back where they came from, despite what they say may happen to them [44% agreed]; assessed with all other migrant applicants, and held in custody in the meantime [46% agreed]; or allowed to stay as migrants in Australia [7% agreed].'

August-September 2001, August September-2002 and August 2004: Newspoll surveys, answer to the question: 'Thinking now about asylum seekers or refugees trying to enter Australia illegally. Which one of the following are you personally most in favour of with regards to boats carrying asylum seekers entering Australia? turn back all boats carrying asylum seekers; allow some boats to enter Australia depending on the circumstances; allow all boats carrying asylum-seekers to enter Australia?' The graph shows the answer for 'turn back all boats carrying asylum seekers'. The proportion of people advocating to 'allow all boats to enter Australia depending on the circumstances' increased from 9% in August-September 2001 to 14% in August 2004; that of people advocating to 'allow some' increased from 38% to 47% over the same period.

Appendix 4: Regulatory framework of refugee admission policies

Britain: chronology, 1946-2007

1946-1949	90,000 European Displaced Persons are resettled to Britain, without any amendment to entry control legislation.
1948	British Nationality Act. British subjects become British citizens, all 'citizens of the United Kingdom and colonies' have the right to enter and settle in Britain.
1954	Ratification of the Refugee Convention.
1956-1959	Resettlement of almost 21,000 Hungarian refugees, without any amendment to entry control legislation.
1960	First reference in British immigration rules of the need to take into account 'relevant international agreements'.
1962	Commonwealth Immigrant Act 1962. British citizens whose passports have been issued under the authority of colonial governments are deprived of their right to enter and settle in Britain.
1966	Ratification of the First Optional Protocol of the European Convention of Human Rights. Individuals residing in Britain can complain against the government for a breach of the ECHR after exhaustion of domestic avenues of appeal.
1968	Commonwealth Immigrant Act 1968. Restricts the right to enter and settle in the UK to British citizens holding a passport issued by the British government and demonstrating an immediate family connection with Britain. Aims to prevent the arrival and settlement of 'East African Asians'.
1969	Immigration Appeals Act 1969. Immigrants refused entry or stay can appeal against a Home office decision at the Immigration and Appeal Acts. Appeals do not apply to immigrants prevented entry at the border.
1971	Immigration Act 1971. Marks the end of 'legislative dualism' in regards to the entry of aliens and of nationals from the British Commonwealth.
1972	28,000 'Ugandan Asians' are resettled in Britain, without further amendment of the statutory framework of entry control.
1973	Secondary legislation (the Immigration Rules) mentions the Refugee Convention for the first time.
From 1973	Resettlement of a few thousands of Chilean and Indo-Chinese refugees, without any amendment to entry control legislation

July 1979	Geneva Conference on Indo-Chinese refugees. Prime Minister Thatcher strongly supports international 'burden-sharing' yet Britain admits comparatively small numbers of Indo-Chinese nationals over the next decade. No amendment to entry control legislation.
1981	Creation of an Asylum Unit at the Home Office's Immigration and Nationality Directorate.
1984	Home Secretary Leon Brittan attempts to restrict the representation of asylum seekers refused entry at the border by parliamentarians; this representation is not a right but an established parliamentarian custom.
1985	First visa requirements for a Commonwealth country, Sri Lanka, following an increase of asylum claims from this country. The measure is followed by the periodic introduction of visa requirements on nationals from main countries of origin of asylum seekers.
February 1987	The Lords of Appeals recommend 'most anxious scrutiny' of administrative decisions potentially breaching the fundamental rights of a claimant (Bugdaycay case).
March 1987	Carrier Liability Act. Penalties on carriers allowing for the travel to Britain of improperly documented passengers. Follows a stand-off between the government and refugee advocates over the attempted removal without access to judicial review of improperly documented Sri Lankan nationals.
1988	The Lords of Appeals argue that 't]he United Kingdom having acceded to the Refugee Convention and Protocol, their provisions have for all practical purpose being incorporated into United Kingdom law.' (Sivakumaran case)
May 1991	Labour backbencher Jeremy Corbyn introduces the Asylum Seekers and Refugee Bill. The bill, amongst other measures, incorporates the Refugee Convention into domestic legislation, plans the creation of an independent body assessing asylum claims, and grants a right of appeal for all asylum seekers. The bill is never granted a proper parliamentary debate.
November 1991	The government introduces the Asylum Bill. The bill increases penalties on carriers, increases identification requirements for asylum seekers and somewhat expands access to appeals. The bill lapses before the 1992 election.
July 1993	The Asylum and Immigration (Appeals) Act 1993 is granted royal assent. It incorporates the restrictive measures introduced in the Asylum Bill 1991, as well as a right of appeal for all asylum seekers (with a 'fast-track' procedure for claims 'without foundations') and article 1 of the Refugee Convention. The Act entails no measure affecting first instance decision-making by the IND's 'asylum bureaucracy'.
Mid-1996	Failed introduction of the computerisation of asylum files at the IND.
July 1996	The Asylum and Immigration Act 1996 is granted royal assent. The Act restricts the right of appeal of asylum seekers from 'safe countries' designated by the government, and is soon nicknamed the 'white list'. Many other restrictive measures are introduced, in particular the right to withdraw housing accommodation and welfare provision from asylum seekers.
November 1996	The Court of Appeals rules that the deprivation of welfare provision to asylum-seekers is unlawful.

July 1998	Release of the White Paper *Fairer Faster, and Firmer*. The White Paper announces a 'reciprocal covenant' on fairness and efficiency between the government and asylum seekers, the removal of the 'white list', a right of appeal against first instance asylum decisions for breaches of human rights, and the 'modernisation' of border controls, housing and welfare provision for asylum seekers.
1 January 1999	Entry into force of the Amsterdam Treaty, Britain opts out of Title IV regulating border control, immigration, asylum and visas and has thus the option to opt in individual directives.
1999-2004	Adoption of all EU directives on asylum and irregular migration; Britain opts out of a directive strengthening the rights of non-EU nationals.
March 1999	British courts decide that non-state actors can be considered as 'agents of persecution'; this leads to a broader interpretation of the Refugee Convention in Britain ahead of other EU states (Shah and Islam cases).
November 1999	The Immigration and Asylum Act 1999 is granted royal assent. It encloses the above mentioned measures announced in the White Paper, and does not incorporate reforms affecting the asylum bureaucracy.
1999	Britain resettles approx. 4,000 refugees from Kosovo, with no further transformation of the legislative framework of refugee admission.
1 January 2000	Entry into force of the Human Rights Act, which incorporates the European Convention of Human Rights in domestic law. Yet the judiciary does not have the prerogative to repeal legislation considered in breach of the Act.
1999-2002	'Sangatte crisis.' Unauthorised immigrants stranded in Northern France attempt to enter Britain through the Channel tunnel. The French and British government adopt a bilateral agreement on joint border controls in December 2002.
June 2000	Home Secretary Jack Straw evokes a revision of the Refugee Convention imposing restrictions on the right to claim asylum. This would be based on an agreement at the international level upon a list of 'safe countries'.
2001	Labour's manifesto for the 2001 general election commits to removing 30,000 'failed' asylum seekers annually.
February 2002	Release of the White Paper *Secure Borders, Safe Haven* introducing the concept of 'managed migration' strongly advocated by Home Secretary David Blunkett. The White Paper announces many new restrictions, especially on asylum seekers' right of appeal, especially on the right to appeal against breaches of human rights and on the mobility of asylum seekers. It also foresees the expansion of legal avenues of immigration to Britain, including the creation of a permanent refugee resettlement program, and a reform to the accommodation and housing scheme introduced in 1999.
November 2002	The Nationality, Immigration and Asylum Act 2002 is granted royal assent. It incorporates the above mentioned measures and reintroduces Britain's 'white list' of 'safe countries'. Applicants from safe countries have no right to appeal against a negative asylum decision from within the British territory. Refugee resettlement and more generally Blunkett's 'managed migration' approach are only cursorily mentioned.

February 2003	Prime Minister Blair announces on TV that the number of asylum claims will be halved within six months.
March 2003	Blair suggests the establishment of 'transit processing centres' for asylum claimants at the periphery of the EU as well as 'regional protection areas' for refugees in their regions of origin.
June 2003	European Council of Thessaloniki. Facing opposition by several EU governments, Blair abandons his TPC proposal. In contrast, the creation of EU-funded regional protection programs is endorsed by the Council.
March 2004	The UNHCR's Quality Initiative starts monitoring IND decision-making in asylum cases.
March 2004	Establishment of Britain's refugee resettlement program, Gateway, which is only cursorily mentioned in the Nationality, Immigration and Asylum Act 2002.
July 2004	Immigration and Asylum (Treatment of Claimants) Act which further reduces asylum seekers' right of appeal against IND decisions (replacement of the two-tier appeal system in the context of the Immigration Appellate Authority with a one-tier appeal procedure in the context of the Immigration Appeals Tribunal.
September 2004	At the annual Labour conference, Blair announces that by the end of 2005, the monthly removal of 'failed' of asylum seekers will exceed the numbers of new asylum applications ('tipping point' target).
February 2005	Release of the five-year strategy on immigration and asylum *Controlling our Borders.* It announces a temporarisation of visas granted to refugees (five-year limit), stricter rules for entry on immigration, but also a reform of the asylum procedure. Refugee resettlement is not mentioned.
May 2005	Introduction of the New Asylum Model, a reform of asylum decision-making by the IND. The reform incorporates recommendations made by the UN Quality Initiative as well as domestic institutions such as the Home Affairs Committee.
March 2006	The Immigration, Asylum and Nationality Act 2006 is granted royal assent. Besides the measures mentioned in Controlling our Borders, it narrows down the interpretation of the Refugee Convention with the expansion of the 'exclusion clause' (cases in which a person can be excluded from refugee status).
1 April 2007	Abolition of the Immigration and Nationality Directorate and creation of the Border and Immigration Agency, itself replaced by the UK Border Agency in April 2008.

Australia: chronology, 1945-2007

13 July 1945	Establishment of the Department of Immigration.
1947-1954	180,000 European Displaced Persons are resettled to Australia, without any amendment to the Immigration Restriction Act 1901, the legislative framework of entry control.
1947	Imposition of quotas on carriers travelling to Australia in regards to the number of Jewish passengers allowed. The measure is confidential and taken outside statutory legislation.
1949	Wartime Refugees Removal Act aiming to prevent the permanent settlement in Australia of Asian refugees who have found refuge in Australia during the Second World War. The Act is never implemented.
1954	Ratification of the Refugee Convention.
1956-1957	Admission of 30,000 Hungarian refugees; no amendment to entry control legislation.
1958	Migration Act 1958. Abolition of the dictation test and related certifications of exemptions; increases the discretionary power over entry control of the immigration bureaucracy.
1968-1970	Admission of more than 5,500 Czech refugees; no amendment to entry control legislation.
1969	The Department of Immigration refuses to process the asylum claims of West Papuans sailing to the Northern Territory. Promise to process the claims on the then Australian territory of Papuan and New Guinea. The claimants are eventually returned to West Papua.
1973	Official demise of the White Australia Policy; ratification of the 1967 protocol of the Refugee Convention.
1974	Abolition of the Department of Immigration by the Whitlam government.
1975	Policy-making towards Indo-Chinese refugees is relocated to a Prime Ministerial taskforce.
1976	Re-establishment of the Department of Immigration as the Department of Immigration and Ethnic Affairs (DIEA).
1976-1981	The Fraser government adopts a series of reforms aiming to increase the fairness and accountability of administrative decisions. Establishment of the Federal Court, the Commonwealth Ombudsman, the Human Rights Commission and the Administrative Review Council; adoption of the Administrative Decisions (Judicial Review) Act 1977.
1976 and 1980	Amnesties for immigrants who have overstayed their visas.
April 1976	Indo-Chinese boat people land in Darwin for the first time.
May 1977	Statement by Immigration Minister MacKellar on Australia's humanitarian policy.

March 1978	Creation of the Determination of Refugee Status committee (DORS) to assist the Minister in asylum decision-making.
July 1978	'Boat-holding' agreement with Indonesia to help prevent the arrival of further boat people to Australia.
July 1979	Geneva conference on Indo-Chinese refugees, international 'burden-sharing' agreement. Arrival of boat people to ASEAN countries and Australia drops sharply over the following months.
1980	Migration Amendment Act (n.2) 1980. Introduction of Section 6(A) in the Migration Act 1958, which restricts access to permanent residence to a few categories of temporary entrants. Amongst the categories eligible to stay are 'refugees' and persons 'showing strong compassionate or humanitarian grounds.' First mention of 'refugee' in Australian primary legislation.
1981	The Fraser government promotes the concept of 'temporary refugee' at the UNHCR's annual Executive Committee meeting. Beginning of the Special Humanitarian Program.
1982	Reform of Australia's selection of Indo-Chinese refugees for resettlement. Previously, the government had relied on referrals by the UNHCR. In the face of perceived abuse by refugees, Australian selection teams are sent to refugee camps to conduct their own individual assessments. Following the reform, the annual level of resettlement to Australia drops sharply.
March 1984	Geoffrey Blainey denounces the 'Asianisation' of Australia.
1985	The High Court decides that unlawful entrants have a right to procedural fairness, and thus the right to apply for judicial review against a negative entry decision by the Department of Immigration (Kioa case). The Federal Court decides that unlawful entrants have the right to apply for permanent residence on humanitarian or compassionate grounds (Tan case). The Administrative Review Council and the Human Rights Commission recommend to reform immigration-policy-making so as to enhance policy clarity.
1987	The Department of Immigration is renamed the Department of Immigration, Local Government and Ethnic Affairs (DILGEA).
May 1988	Report of the Committee to Advise on Australia's Immigration Policies, *Immigration, a Commitment to Australia* ('Fitzgerald report'). The report recommends a level of refugee resettlement close to the existing level as well as the swifter rejection of applicants refused entry to Australia (suppression of access to judicial review).
August 1988	Opposition leader John Howard supports a decrease of Asian immigration to Australia.
1989-1991	Significant involvement of Foreign Minister Gareth Evans in the Peace Settlement in Cambodia.
June 1989-1991	In early June, Prime Minister Hawke decides that Chinese nationals living in Australia as the Tiananmen events occur have the right to extend their stay. The decision is followed by multiple changes to the residence status of Chinese nationals allowed to stay in

	Australia, including the short-term introduction of temporary refugee visas.
June 1989	Beginning of the Comprehensive Plan of Action for Indo-Chinese Refugees (CPA).
September 1989	The High Court broadens the interpretation of the Refugee Convention in domestic law (expansion of the meaning of 'particular social group', Chan Yee Kin case).
November 1989	After six years of interruption, unauthorised boat people (from Cambodia) land on Australian shores.
December 1989	Migration Legislation Amendment Act 1989. The Amendment codifies categories of entrants in statutory law and removes the discretionary power of the Immigration Minister. A right of appeal against negative entry decision is introduced for prospective immigrants, but not for asylum-seekers.
December 1990	Establishment of the Refugee Status Review Committee.
July 1991	Access to permanent residence on humanitarian or compassionate grounds is repealed from the Migration Act. This is followed by a sharp increase in asylum claims in the second half of 1991.
August 1991	Opening of Port Hedland Immigration Detention Centre.
5 May 1992	Amendment of the Migration Act to require the detention of 'designated persons'. The decision is made two days before the Federal Court was expected to invalidate the existing legislative basis for immigration detention (Lim case).
1993	The Department of Immigration is renamed the Department of Immigration and Ethnic Affairs (DIEA).
1 July 1993	Grant of a formal right of appeal against negative asylum decisions and establishment of the Refugee Review Tribunal.
September 1994	Entry into force of the Migration Reform Act 1992. The Act restricts access to judicial review for immigration cases by removing immigration from the reach of the Administrative Decisions (Judicial Review) Act 1977. Migration decisions can only be 'overturned' in case of an error in law. Other traditional grounds of review such as natural justice and unreasonableness do not apply anymore to immigration cases.
September 1994	Migration Laws Amendment Bill (n.4) 1994. Asylum decisions adopted in countries participating in the CPA, or 'prescribed countries', are recognised as valid in Australian law. China is recognised as a 'prescribed country' in January 1995.
December 1994 – June 1995	The Federal Court expands the interpretation of the Refugee Convention in Australian law by considering that China's one-child policy can result in fear of persecution. In response the Keating government presents an amendment to the Migration Act excluding the fertility policy from the grounds leading to fear of persecution (Migration Legislation Amendment Bill n.4 1995). The Full Federal Court reverses the Federal Court decision and the bill is allowed to lapse.

April 1995	*Teoh* decision by the High Court: Australia's ratification of an international treaty generated a 'legitimate expectation' that the treaty is legally binding. (In 1997 and 1999, the Howard government attempts to nullify this decision; the Administrative Decisions (Effect on International Instruments) is never adopted.)
April 1995	Opening of Curtin immigration detention centre.
March 1996	End of the Comprehensive Plan of Action for Indo-Chinese Refugees.
April 1996	Introduction of the 'HREOC amendment' aiming to prohibit contact between the Human Rights and Equal Opportunity Commission and immigration detainees who do not request its assistance (Migration Legislation Amendment Bill n.2 1996). HREOC states that it will comply with the government's demand and that no legislative reform is necessary. The bill lapses.
1996	The number of refugee visas granted to individuals claiming asylum in Australia ('onshore refugees') is limited to 2,000. A grant of 'onshore visas' in excess to the limit results in a corresponding decrease of visas granted to a specific category of resettled refugees ('offshore refugees').
September 1997	Introduction of a provisional fee of 1,000 dollars for asylum seekers appealing against a negative decision at the Refugee Review Tribunal. Labor opposes the adoption of a privative clause restricting judicial review by the High Court in immigration cases. The introduction of a privative clause is again opposed twice over the following years.
February 1998	Privatisation of immigration detention centres.
April –October 1999	Adoption of the Temporary Safe Haven Act as the legislative framework allowing for the temporary resettlement of Kosovo refugees. The Act is expanded to East Timor refugees in September 1999 and constitutes the basis for the introduction of temporary protection visas for unauthorised arrivals granted refugee status in Australia in October 1999.
1999-2000	Unprecedented increase in boat people to Australia's shores.
September 1999	Border Protection Legislation Amendment Act 1999. The amendment expands Australia's interpretation of the UN Convention on the Law of the Seas so as to allow for the boarding of foreign ships in international waters, and narrows Australia's interpretation of its protection obligation under the Refugee Convention. Asylum claims who have transited through a 'safe country' for a period of more than seven days must apply for asylum in this country before applying for asylum in Australia.
November 1999	Opening of the Woomera immigration detention centre.
August 2001	Arrival of the *Tampa* in Australian waters; establishment of the People-Smuggling Task Force which liaises closely with the Department of Prime Minister and Cabinet.
September 2001	1 and 10 September: bilateral memoranda of understanding between Australia, Nauru and Papua New Guinea on the hosting of 'offshore processing centres' for asylum seekers. 3 September: Beginning of maritime interdiction operation Operation Relex. 18 September: The Full Federal Court declares that the government has the 'prerogative power' to prevent the entry of unlawful non-citizens into Australia's territory.

September 2001	19-20 September: The House of Representatives and the Senate adopt the post-*Tampa* legislative package. It introduces an excision in Australia's migration zone and requests the processing in 'declared countries' of asylum claims made in the 'excision zone'. 'Offshore asylum claimants' have no right of appeal to the Refugee Review Tribunal. More generally, the package introduces a privative clause restricting access to judicial review by the High Court and narrows down the interpretation of the Refugee Convention in domestic law (restrictive definition of persecution)
September 2001-July 2003	No boat people arrive to the shores of the Australian mainland.
2002	Opening of Baxter immigration detention centres, closing of Curtin immigration detention centre.
2002-2003	Labor opposes the expansion of the excision from the migration zone.
February 2003	The High Court declares the privative clause restricting judicial review in immigration cases anti-constitutional (case Plaintiff S57/2002 v the Commonwealth of Australia).
April 2003	Woomera immigration detention centre is closed.
2004	Migration Amendment (Judicial Review) Bill 2004.Attempts to re-introduce a privative clause compatible with art. 75. The bill lapses before the 2004 federal election.
September 2004	Immigration Minister Vanstone announces that Temporary Protection Visa holders will be allowed to apply for permanent residence at the expiration of their visa.
June-July 2005	After the revelations of the wrongful detention and deportation of Australian residents and citizens, Liberal backbencher Petro Georgiou announces he will introduce a private member's bill softening the immigration detention. His proposal is converted into the government-supported Migration Amendment (Detention Arrangements) Act 2005.
July-Nov 2005	Migration Litigation Reform Act 2005, very similar to the Migration Amendment (Judicial Review) Bill 2004, introduces restrictions on judicial review of immigration cases by the High Court compatible with the Australian constitution. Expansion of the migration zone through secondary legislation (amendment to the Migration Regulations).
April-August 2006	Migration Amendment (Designated Unauthorised Bill) 2006. Aims to further expand the migration zone; follows the recognition as refugees of West Papuan asylum seekers who had sailed to the Northern Territory. Several Coalition parliamentarians announce they will oppose the bill, which is eventually withdrawn.
April 2007	The government announces a 'refugee swap' between Australia and the US. The measure is never implemented.
August 2007	Baxter immigration detention centre is closed.

Appendix 5 removed from Open Access version as it may contain sensitive/confidential content.

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