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In October 2015 the world's media carried an image of a dead young boy lying face down on a beach in Greece. He had died in an effort to come to Europe.<sup>1</sup> The photograph sparked international outcry. Amongst the political responses to the development was that by the Scottish First Minister, Nicola Sturgeon, who declared "I pledge as first minister of this country that we stand ready to offer sanctuary to refugees that need our help".<sup>2</sup> The issue, the so-called 'migrant crisis'<sup>3</sup>, provides an existential challenge to the existing international and national regulations governing the movement of people. It does so simply on account of the unprecedented scale of the human dislocation in modern times. The United Nations High Commissioner for Refugees has stated that at the end of 2015 there were 65.3 million people displaced by conflict – a record high.<sup>4</sup> Between August 2015, and November 2015, there were a total of 530,265 asylum claims within the EU alone.<sup>5</sup> The scale of the crisis brings to the fore the fact that the existing international and national law putatively designed to address it are wholly inadequate. It also highlights the extent to which the Scottish Parliament and Government and, to a lesser extent, the UK Parliament and Government are legally constrained in the area. Sadly, though, it also evinces the reluctance of the UK Government to act in a way that could assist in ameliorating the crisis in a meaningful and material way.

## Definition, Classification and the Law

One of the most important initial legal issues arising from the migrant crisis is of definition and classification. This is because states, of course, control the entry of and stay of non-nationals into and within their territories. This is done through the law – internationally and nationally – operating to categorise those seeking entry and offering to certain persons leave to enter or remain within it. This is not to suggest that there is a consensus in definition and categorization. Indeed, the UN describes the lack of definitional clarity as a key source of inconsistency in international migration statistics.<sup>6</sup> That noted, the basic criteria customarily used to identify international migrants are citizenship, residence, time or duration of stay, purpose of stay and place of birth. Of these the 'purpose of stay' is key. Upon it turns the decision in UK law of which of three categories the person seeking entry the individual falls. The three are economic migrants, refugees and persons requiring humanitarian protection. This categorization is significant because it determines the nature and level of treatment afforded the person under the law.

## Economic Migrants

Economic migrants are persons who depart their country of origin or residence seeking to enter a country that may offer a better quality of living. The distinguishing factor between economic migrants and the other categories is that the decision to leave their country of origin entailed a choice. That choice is founded upon the considerable differential in levels of development and wealth between states. The factors attracting economic migrants (pull factors) include employment prospects, better healthcare, social security, access to basic amenities and social infrastructure. In the UK, non-EU economic migrants seeking to enter Scotland, England and Wales and Northern Ireland require an entry visa.<sup>7</sup> Certain

conditions are imposed if leave to enter is granted.<sup>8</sup> The Immigration Rules, which apply throughout the whole of the UK, operate a points-based system for economic migrants. The rules provide routes for economic migrants seeking leave to enter or remain in the UK as entrepreneurs, investors, highly skilled workers and skilled workers.<sup>9</sup> Applicants score points on attributes such as age, qualification, experience and salary and may be granted a visa to enter the UK for the purposes of work or to join family. These attributes must be met or maintained for visas to be granted or extended. This system applies to Scotland without exception. While the position in regard to economic migrants are relatively straight forward, the same cannot be said for refugees.

## Refugees

Refugees are distinguished from economic migrants by having left their country of origin or residence involuntarily. The UK rules applying to refugees are founded in international and EU law. Whilst 'refugee' literally signifies someone fleeing involuntarily for "refuge in a foreign country",<sup>10</sup> the legal definition goes further. The law was designed to apply to circumstances such as political upheaval, armed conflict and political persecution.

The leading instrument in the area is the United Nations Convention Relating to the Status of Refugees 1951 and its 1967 Protocol. There are 145 parties to it, with the UK becoming a party in 1954. The Convention, in article 1, defines a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or 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". Significantly, this definition fails to cover many of the persons now in transit, especially from Syria, because it fails to cover persons displaced through civil war or political unrest. It has been criticised for its limited scope and that it is today "... unworkable owing to the fact that contemporary population mobility has taken more complex shapes than ever before".<sup>11</sup> The narrowness of the Convention is largely explained by it being concluded in the aftermath of the Second World War and designed to address some of the problems then existing<sup>12</sup> – whilst respecting the ability of states to generally control immigration. The Convention finds a place in UK law through the Refugee or Person in Need of International Protection (Qualification) Regulations 2006<sup>13</sup> and the Immigration Rules. The 2006 regulations define a refugee as *inter alia* a "person who falls within Article 1(A) of the Geneva Convention...".<sup>14</sup> The precise test is found in Paragraph 334 of the Immigration Rules. Whilst the wording of the Immigration Rules is *prima facie* clear, the circumstances of refugees seeking entry are understandably not. For instance, a Syrian national who fled to escape the armed conflict will likely not meet the qualification criteria under the Immigration Rules nor qualify as an economic migrant. Note, though, that the UK Government has acted for Syrian nationals having valid limited leave to enter or remain in the UK.<sup>15</sup> It relaxed certain aspects of the Immigration Rules for Syrian nationals present in the UK before the start of the crisis and wishing to switch

their visa category. For all others caught up in the migrant crisis the only option under UK law is to seek leave to enter as someone in need of humanitarian protection.

### Humanitarian Protection

'Persons granted humanitarian protection' is a category of persons introduced into UK law in 2003. Its present form is based upon articles 15-19 of the Qualification Directive 2006. Humanitarian protection is subsidiary protection a state can offer complementary and additional to that under the Refugee Convention. The Refugee Council terms it as a form of immigration status granted by the Home Office to a person who it decides has a need for protection but who does not meet the criteria for refugee status.<sup>16</sup> These persons are unable to satisfy the requirements for entry as economic migrants and do not fall within the definition of a refugee. It is granted to persons not recognized as refugees but with a well-founded fear of prosecution or real risk of serious harm for a non-Convention reason.<sup>17</sup> The Immigration Rules contain the tests that must be met before humanitarian protection is granted, in paragraph 339C. It defines such an individual as a person showing substantial grounds for believing that, if he returned to the country of his origin he would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country. Serious harm includes "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict". This category, therefore, goes some way in addressing the difficulties attendant to the limited scope of the definition of a refugee.<sup>18</sup> It does not, however, cover persons displaced by civil war or societal collapse – as in Syria, Iraq and Libya. Further the existence of the rules is one thing, their application is another. As of 26 May 2016, 1854 Syrians had been granted humanitarian protection – a relatively low number in light of the magnitude of the crisis in Syria.<sup>19</sup>

### The UK Position and Scottish Approach

There are limitations and constraints upon the ability of Scotland, and indeed the UK, to act in addressing the migrant crisis. These are found in the terms of the devolution settlement, the nature of international and EU refugee law, and, particularly in the case of the UK, the political reluctance to act. The ability of the Scottish Government and Parliament to act in response to the migrant crisis is limited by a number of factors. The first and most significant is found in the terms of the devolution settlement. Paragraph B6 to Schedule 5 of the Scotland Act 1998 provides as reserved matters "Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents". Scotland cannot, therefore, admit economic migrants, refugees or someone in need of humanitarian protection – or indeed anyone at all – of its own accord. As a constituent nation within the UK, Scotland does not have

authority over its borders. It is the UK Government and Parliament which have the competence to control the entry of persons into the whole of the country. Operationally, UK Visas and Immigration (UKVI) is the agency that applies the UK's immigration, refugee and humanitarian policies through, in part, applying the Immigration Rules. This position can lead to frustration where the Scottish Government desires to take a different approach from that of the UK. For example, the First Minister, Nicola Sturgeon, demanded action from the UK Government in response to the migrant crisis and has pledged to "take in a fair share of those who arrive in the UK looking for refuge".<sup>20</sup> Indeed, humanitarian concerns, demographic considerations and the nature of the Scottish economy may well support a different approach being taken north of the border.<sup>21</sup> Further reserved powers having relevance to the migrant crisis are foreign affairs and international relations. Scotland cannot, for instance, act individually or jointly in an attempt to address the civil war in Syria in order to tackle the factors causing people to flee the country.

A second limitation upon Scotland and the UK is found in the nature of international refugee law itself, including the EU's rules. As seen above the international regulation in the area is a post-World War Two construct and designed to address a specific and a relatively narrow range of circumstances. These being individuals having a well-founded fear of being persecuted for certain specified reasons and because of that fear are unable or unwilling to seek protection in that country. The definition of a person in need of humanitarian protection in UK and EU law goes some way further. Whilst certain individuals caught up in the crisis will fall within the definitions found within the Refugee Convention and the humanitarian protection rules a great many others will not. Clearly both schemes do not directly and fully address the migrant crisis, they were simply not designed to do such a thing.

A third constraint on Scotland's ability to act and assist in addressing the migrant crisis is the UK's general reluctance to act in a material and meaningful way. Indeed, the Scottish National Party has criticized the UK Government for taking in a very small number of people compared to other EU countries such as France and Germany. The SNP's Westminster leader Angus Robertson stated in September 2015 that it was appalling that only 216 refugees had been "given sanctuary" under the Vulnerable Persons Relocation Scheme at that point.<sup>22</sup> The entry of persons into the UK has, of course, been a very hot political topic – it being perhaps the most emotive issue in the EU referendum debate. In light of the concerns over immigration held by a sizable proportion of the electorate – most strongly in England – the approach taken UK-wide is explicable. That noted, concerns existing in the south east and midlands of England arguably do not exist in Scotland – as strongly in any event. Differences in humanitarian outlook, demographic pressures and economic needs appear to all favour increased migration to Scotland.

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## Conclusion

The ability of the Scottish Government and Parliament to act in response to the migrant crisis is very limited. The devolution settlement, the terms of international law and EU law in the area and the UK Government's policy on immigration all conspire to tie their hands and restrict the entry of persons to Scotland. These limitations exist irrespective of the intentions of the Scottish Government to do more to address the migrant crisis. Whilst the flow of people into Europe may have reduced due to the agreement between the EU and Turkey the underlying causes of the migrant crisis have not been addressed. Ultimately, the solution to the problem requires a return to a degree of normalcy in the states from which the migrants originate. Until that time, however, Scotland is at the mercy of the UK Government in being able to act in a more positive and significant manner.

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1. See BBC News <[www.bbc.co.uk/news/world-europe-34133210](http://www.bbc.co.uk/news/world-europe-34133210)>.
2. On 3 September 2015, cited at <[www.bbc.co.uk/news/uk-scotland-scotland-politics-34140195](http://www.bbc.co.uk/news/uk-scotland-scotland-politics-34140195)>.
3. Ascribing a word or term to the situation is no simple matter. 'Refugees', 'migrants', 'emigrants', 'displaced persons' etcetera connote different things and carry distinct meanings legally and popularly.
4. <[www.unhcr.org/uk/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html](http://www.unhcr.org/uk/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html)>.
5. BBC News <[www.bbc.co.uk/news/world-europe-34131911](http://www.bbc.co.uk/news/world-europe-34131911)>.
6. United Nations, *International Migration Report 2002*, page 10. Available at; <[www.un.org/esa/population/publications/ittmig2002/2002ITTMIGTEXT22-11.pdf](http://www.un.org/esa/population/publications/ittmig2002/2002ITTMIGTEXT22-11.pdf)>.
7. Paragraph 7 of the Immigration Rules. Available at; <[www.gov.uk/guidance/immigration-rules/immigration-rules-part-1-leave-to-enter-or-stay-in-the-uk](http://www.gov.uk/guidance/immigration-rules/immigration-rules-part-1-leave-to-enter-or-stay-in-the-uk)>.
8. These conditions include employment restrictions, non-access to public funds, registration with the Police and restriction on studying in the UK.
9. Immigration Rules part 6A, supra note 7.
10. *Bloomsbury Concise English Dictionary* (2nd edn, A & C Black London)
11. Akm Ahsan Ullah, *Refugee Politics in the Middle East and North Africa. Human Rights, Safety and Identity* (Palgrave Macmillan 2014) p 106.
12. See generally Clayton, G. *Textbook on Immigration and Asylum Law* (6th edn, OUP 2014).
13. Hereinafter referred to as the 'Qualification Directive'.
14. Regulation 2 of the Qualification Directive.
15. Written Ministerial Statement; *Renewal of Immigration Concession for Syrian Nationals*. Available at; <[www.gov.uk/government/speeches/renewal-of-immigration-concession-for-syrian-nationals](http://www.gov.uk/government/speeches/renewal-of-immigration-concession-for-syrian-nationals)>. Note also the Syrian Vulnerable Person Resettlement Programme, mentioned below.
16. Cited at <[www.refugeecouncil.org.uk/glossary#H](http://www.refugeecouncil.org.uk/glossary#H)>.
17. See <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257431/huma-prot.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257431/huma-prot.pdf)>.
18. A specific form of humanitarian protection is that under the Syrian Vulnerable Persons Relocation Scheme. Introduced in 2014 it applies to certain categories of Syrian nationals including victims of sexual violence and the elderly, see <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06805>>.
19. <[www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/may2016](http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/may2016)>.
20. *The Scotsman* cited at <[www.scotsman.com/news/politics/top-stories/nicola-sturgeon-demands-uk-action-on-refugee-crisis-1-3894130#axzz3pDdVRuyF](http://www.scotsman.com/news/politics/top-stories/nicola-sturgeon-demands-uk-action-on-refugee-crisis-1-3894130#axzz3pDdVRuyF)>.
21. The Scottish Government acts to encourage economic migrants and has in the past managed to persuade the UK Government to extend student visas for a period to allow post study work. In regard to the former see <[www.talentscotland.com/move](http://www.talentscotland.com/move)>.
22. BBC News; <[www.bbc.co.uk/news/uk-34171148](http://www.bbc.co.uk/news/uk-34171148)>.