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Why failed asylum seekers should have a conditional right to stay: an ethical guideline for policy debates

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Abstract

This article aims to reconcile the moral rights of failed asylum seekers with the integrity of the asylum system. Can the state grant failed asylum seekers a right to stay without undermining the core purpose of the refugee system? Can the state sometimes return those whose asylum claim has failed without violating their moral rights? The article argues that restricting the rights of asylum seekers and reducing the length of the asylum process raise ethical concerns and practical problems. It emphasizes that liberal states should charitably interpret the norms of international protection. It proposes to extend the right to stay on social membership grounds qualified by a good faith condition, and limit returns to those that have lodged their claim in bad faith. Engaging with the good/bad faith distinction the article aims to counteract a culture of suspicion towards asylum seekers by clarifying what it really means to launch a claim in bad faith and to realign its scope in a morally appropriate way.

Introduction

Asylum is a policy domain rife with conflicting claims about the causes of asylum-seeking migration, the feasibility of accommodating refugees, and above all the legitimacy of asylum claims. The 2015 migration crisis has exacerbated conflicting perspectives on asylum and has reinforced restrictive trends across Europe in the wake of intensive politicization. Political debates in the European Union (EU) have continued to shift towards greatly reducing the scope of asylum (Geddes et al., 2020), and asylum receiving states have devoted significant resources to reduce and deter (asylum seeking) migration (Eule et al., 2019). For instance, between November 2015 and December 2017 the Danish government introduced 67 restrictive changes in the Alien law in order to curb the arrivals of asylum seekers. Similarly, notwithstanding Merkel's "We can do this" announcement, the German government introduced a plethora of restrictive policy changes in the wake of 2015 (ibid., 43–44).

Moreover, irregular migration has become a greater public concern, and policies have shifted towards a more restrictive and punitive approach towards persons who reside, work or have entered the EU irregularly. Former policies of toleration and initiatives to regularize irregular migrants are now—with few exceptions for workers in key sectors

during the Covid-19 pandemic—deemed unpalatable across EU member states. These restrictive trends have culminated in a heightened ambition of EU states to return failed asylum seekers. An effective system for returns is seen as *the* key element of a well-functioning asylum system by EU leaders (see e.g. EC, 2023). Failed asylum seekers are persons who have made a claim for international protection but whose claim of protection has been rejected as an outcome of their asylum process, and who have thus become irregular migrants. Increase of returns is expected to decrease irregular migration, i.e., to deter non-genuine asylum-seeking migration in the future, and politically signal to voters the state's ability to control its borders (Geddes et al., 2020).

Given these exclusionary political developments, there is an increased need to focus on the question which moral obligations we have towards failed asylum seekers. Enforcing returns for all failed asylum seekers, especially after they have stayed a considerable time, violates their membership rights. At the same time, as often argued by policy makers legitimizing return orders, if failed asylum seekers are allowed to stay, and every asylum claim automatically turns into a right to stay, it puts the entire adjudication process into question.

This constitutes an ethical policy dilemma, by which we mean that in a particular policy context policy-makers are faced with hard choices between two competing moral demands (Bauböck et al., 2022). Here upholding the moral rights of asylum seekers is—from the perspective of the policy maker- in tension with safeguarding the integrity of the asylum system. Our aim in this article is to analyze this dilemma in-depth and clarify the nature of the tension, given that both the integrity of the asylum system and upholding (potential) refugees right to work and social rights are important ethical goals. Moreover, we aim to clear the debate from some misconceptions, develop a proposal to ease the tension and highlight some of its ethical and practical limitations.

We must add that a large part of the problem lies in the background conditions that result from past and present policies of host states. States have adopted deterrence measures and non-arrival tactics, they have securitized and externalized their border control, which together make it extremely hard, if not impossible, for asylum seekers to safely reach their territory and launch an asylum claim (Parekh, 2020). Moreover, the current border control regime offers very few legal pathways to immigration, and is especially prohibitive to poor, racialized "others", and those considered as low-skilled, which forces people to try to fit their case into the narrow legal framework of asylum. States thus have a responsibility to remove barriers and ensure safe passage for asylum seekers, as well as to open up more legal pathways for immigration. We take these to be important preventative measures by states, aiming to improve the background conditions, which could ease the pressure on the asylum system.

Until then, however we need to grapple with the hard dilemma here and now, and work out the ethically justifiable package of rights owed to failed asylum seekers, which are at the same time aligned with the integrity of the refugee protection system. We, therefore, bracket our cosmopolitan moral convictions that would otherwise lead us to rethink background problems of forced displacement (Parekh, 2020), such as the concept of refugee, (Schmalz, 2020, 23 ff.), the state's right to exclude, and the radically unequal global distribution of resources and power (e.g. Carens, 2013). Instead, we assume the existing institutional contours of the state system and the

refugee protection regime and address our argument to the ethically minded policy maker who understands the importance of both safeguarding individual moral rights and the fragile asylum system.

Can the state grant failed asylum seekers a right to stay without undermining the core purpose of the refugee system? If so, under what conditions? Can the state sometimes return those whose asylum claim has failed without violating their moral rights? If so, under what conditions? To set the stage, we outline the dilemma in the field of asylum in depth. Then we argue in two steps that failed asylum seekers should have a conditional right to stay. First, we discuss the rights we owe to asylum seekers during the asylum process to better understand the relevant moral grounds for their legitimate claims once their case has been rejected. Second, we elaborate our proposal for a conditional right to stay for failed asylum seekers. The moral argument for the right to stay builds on the idea that persons' geographical presence in a territory has normative significance of various kinds, captured by the umbrella term *social membership* (Bosniak, 2007, 2016; Carens, 2010, 2013). However, in order to take the second horn of our dilemma seriously, we qualify this pro tanto reason with a condition; namely that asylum seekers having launched their asylum claim in *good faith*. We argue that beyond social membership another normatively and politically significant factor is the normative attitude of asylum claimants towards the refugee system. If they made their asylum claim in good faith, i.e. through a reasonable interpretation of the legal norms and the existing international practice of refugee protection, they should have a right to stay. Instead, if their asylum claim is a clear case of bad faith, deliberately abusing the refugee system in order to access better opportunities in host countries, they may be subject to legitimate return. Bad faith would then morally override their pro tanto reasons of social membership.

We deliberately engage with the notions of good and bad faith as they are an integral part of the asylum procedure and are frequently referred to in political debates. It is important to note, however that we develop the distinction by taking a critical distance from its political rhetoric. By using the term and entertaining the possibility of 'bad faith' asylum seeking, our intention is not to echo this exclusionary political rhetoric. By contrast, we aim to show that what constitutes bad faith asylum seeking, appropriately understood, is much narrower than contemporary exclusionary rhetoric about 'ingenuine' asylum seeking tends to suggest. Our aim is to counteract such tendencies by clarifying what it really means to launch a claim in bad faith and to realign its scope in a morally appropriate way. In the final section of the paper we reflect on the practical difficulties of distinguishing good faith asylum claimants from bad faith ones, and the further ethical problems this raises. We argue that placing an emphasis on the normative attitudes of asylum seekers in the real world could lead to morally objectionable investigation techniques, could involve abuse of power by officials, and is likely to fall prey to explicit and implicit discrimination during the adjudications process. This should caution us to limit the practical use of the bad faith-standard to very clear-cut cases of abuse.

Our ultimate aim is to ease the tension between the liberal state's duty to respect the moral rights of failed asylum seekers and the state's duty to safeguard the core purpose of the refugee protection system. The dilemma so conceived is a moral theoretical one, characterized by a tension between moral entitlements that give rise to the right to

stay and the moral basis of the institution of refugee that sometimes requires a right to return.

Unravelling the dilemma

By subscribing to the Geneva Refugee Convention (GRC) of 1951, and its 1967 New York protocol, European states have recognized a duty to protect those suffering persecutions on grounds of race, religion, political opinion or social group. The right to protection includes the right to seek asylum. Other types of 'subsidiary protection' have also emerged for those who do not qualify for refugee status. The GRC as well as the European Convention on Human Rights (ECHR) prohibit the return of refugees or asylum-seekers to a country in which they are likely to be subjected to torture or to inhuman or degrading treatment or punishment *(non-refoulement principle*). The state's right to control borders and to exclude is limited by its duty to protect and adherence to its human rights commitments.

During the Cold War, asylum has not been a subject of political tensions, in part because refugees were dominantly perceived as European middle-class families fleeing from the communist regime, and numbers were relatively low (Mayblin, 2017). As numbers started to rise during the Fall of the Iron Curtain, and also non-European refugees started to arrive to Europe (ibid), European policy makers began to focus on potential abuse of the system. If rising asylum-seeking migration resulted from a misuse of the institution by migrants seeking access to better opportunities in their preferred destination states, as governments thought, then this is a domain where states could showcase their capacity to control borders. Governments had effectively isolated the one area where they could shape migration flows, given that national policies were unlikely to tackle conflict and persecution in countries of origin (Geddes et al., 2020).

From a government's perspective the first objective in the field of asylum has thus been to prevent and deter asylum seeking without warranted claims. Secondly, insofar as asylum seekers without a warranted claim nevertheless do arrive, states have focused on returning them once their claim has been rejected. However, this objective has partly been impeded by the lengthiness of asylum procedures. Even though the duration of asylum procedures varies greatly across EU countries (see e.g. ECRE, 2016), in all EU states a significant time can pass until a final decision is handed down. Although the duration of the asylum process can be somewhat shortened, there are limits to how speedy procedures can be. Especially the right of appeal is a fundamental moral and legal principle of the rule of law in a liberal democracy. It is during the appeals process that significant numbers receive asylum, or other forms of protection that were initially denied to them. The right to appeal however considerably prolongs the asylum process.

This brings us right to our ethical policy dilemma. On the one hand, states have a duty to uphold the moral rights of failed asylum seekers, which as we argue below, partially arise from the rights owed to them during the process and the necessary or likely lengthiness of a fair process. The moral argument for failed asylum seekers' right to stay takes as its starting point the idea that persons' geographical presence in a territory has normative significance of various kinds. The sheer length of their stay takes on a special moral significance at some point, the social ties they form matter; the variety of ways they make social contributions to the host society matters; and how person's identity is

more and more shaped by the host society also matters. These social facts give rise to a de facto membership whose normative significance is captured by the term *social membership* (Carens, 2010, 2013; Bosniak, 2016; Lim, 2014). Based on these joint moral reasons, we argue that failed asylum seekers who have spent significant enough time in the asylum adjudicating country acquire a pro tanto *social membership* based right to stay and obtain regular residency rights (Carens, 2010, 2013, 147), At the same time, if a destination country grants all failed asylum seekers the right to stay on social membership grounds the whole system of adjudication becomes pointless. Put differently, if those who would not otherwise have a right to stay obtain such a right as a corollary of the adjudication procedure's duration, the whole process is put ad absurdum. States would be seen as condoning the misuse of the asylum system by people who are not entitled to its protection. It might—as often argued by policy makers- also be seen as an "invitation" to circumvent the system, in the sense that people without a legitimate claim to asylum might be seen as encouraged to apply in the hopes of being allowed to stay after their claims are rejected. However, if governments try to process asylum claims rapidly in order to prevent the formation of any social membership ties, they may violate the rights of all asylum seekers to a fair process, including those with warranted claims. Fair process rights include the right to be heard, the right to legal assistance, as well as the right to an effective remedy. However, if asylum procedures uphold high moral standards and the rule of law, the procedures end up being long and complex, hence asylum seekers are likely to have established social ties, i.e. their return would violate the right to stay based on social membership. In short, the moral rights of failed asylum seekers are in tension with the integrity and sustainability of the refugee protection system.

We seek an ethical response to this policy dilemma in two steps. In the first step we discuss the rights of asylum seekers and policies during the asylum process, taking into consideration the potential that some claims may be unwarranted. In the second step we elaborate on the policies and normative responses after an unwarranted claim has been rejected.

Policy answers: restricting the rights of asylum seekers to deter ingenuine asylum-seeking

In order to prevent or deter non-genuine asylum-seeking migration, i.e. asylum claims made on unwarranted grounds, many governments restrict social and economic rights they view as incentivizing non-genuine asylum seeking. This concerns especially two entitlements, namely the right to work during the asylum process and access to welfare. Regulations differ across member states in that regard,[1] but most countries have made legislative changes in response to the refugee crisis following a more restrictive trend (see e.g. Fóti & Fromm, 2016, 15 ff.).

For example, Denmark severely reduced welfare benefits for non-EU nationals in 2015 (Agersnap et al., 2020). Denmark was not the only state to opt for such measures. Other governments including Germany have also restricted welfare as a preventive measure to

[1] The EU Reception Conditions Directive (article 15) requires signatory Member States to grant asylum-seekers the right to work within 9 months of applying for asylum. It, however, allows States to determine the conditions under which this right is conferred. The implementation of the RCD varies significantly in the EU member states(Costello and O'Cinnéide 2021, 8). Many member states including Austria, Germany, Hungary, and Greece established labour market tests which limit access to the labour market to certain positions that cannot be filled by nationals or EU citizens. Other states,such as Austria even limit the access in addition to certain sectors (ENAR 2016, 10).

reduce immigration (see ibid.; for a comparative perspective see Lafleur & Vintila, 2020). Before we proceed to moral reflections, let us first consider if such measures are justified under practical considerations.

Some studies (e.g. Schulzek, 2012; Thielemann, 2008) have provided evidence that asylum seekers are to some extent "pulled" by the welfare state. As concerns the effect of policies that have reduced welfare benefits for asylum seekers, recent research (Agersnap et al., 2020) shows effects of these welfare reductions on curbing inflows of asylum-seeking migrants.

Thus, whilst overall the evidence is scarce, there is some empirical indication that the generosity of a welfare package plays a role in incentivizing asylum-seeking migration. It is not clear, however, whether it incentivizes non-genuine asylum-seeking migration specifically, or whether it influences the country choice of asylum seekers. Are asylum seekers more likely to opt for countries with more generous access to welfare independently of whether they have an ingenuine or genuine asylum claim? If so, then cutting back on welfare could deflect asylum migrants to other countries, without reducing their overall flow. In Europe such policies would result in a race to the bottom and further undermine solidarity among EU states in sharing the burden of refugee protection. Such restrictions can be thus, detrimental to burden-sharing among states, a vital background condition for a well-functioning international refugee protection regime.

Concerning restrictions on labor market access, we can observe that overall employment bans on asylum applicants are persistent and widespread features of Western countries' asylum policies (Fasani et al., 2020). Despite this policy pattern there is, however, a lack of scientific evidence that the right to work acts as a pull-factor for asylum-seeking migration. A meta-analysis of studies from 1997 to 2016 (University of Warwick, 2016) has concluded that no research has found a long-term correlation between labor market access and destination choice. Moreover, as Marbach et al. (2018) demonstrate, banning the employment of asylum seekers for a considerable time period after arrival not only adversely affects the well-being of refugees but also imposes significant costs on the host country's economy. Fasani et al (2020) come to similar conclusions about the detrimental economic effect of employment bans for asylum seekers.

In addition to moral concerns, which we discuss below, the question which rights package is granted to asylum seekers during the asylum process thus has practical policy implications. Moreover, there is an inherent paradox in the debate on welfare and work incentives for asylum seekers, if we consider that many governments keep asylum seekers dependent on welfare provisions because they deny them the right to work (Mayblin, 2014).

Policy answers: accelerating the asylum procedure

Another frequently explored policy option to deal with unwarranted claims is to filter them out at the start of the asylum process. In line with the EU Asylum Procedure Directive (2013/32/EU), many EU member states have introduced accelerated, priority or fast-track asylum procedures to address or prevent the overload of the asylum system by people with an unwarranted protection claim (and as well as accelerate the procedure for persons from certain countries with a high probability to have a valid claim); or the

fast screening at borders, as has been proposed in the EU Commission`s Proposal for a New Pact on Asylum and Migration (COM/2020/609).

The UN Refugee Agency (UNHCR) recommends using accelerated procedures for manifestly well-founded as well as manifestly unfounded protection claims. According to the UNHCR (2018, 5) manifestly well-founded claims refer to "asylum claims, which, on their face, clearly indicate that the individual meets the definition of a refugee under the 1951 Convention Relating to the Status of Refugees or subsidiary protection." Manifestly unfounded cases, by contrast, include asylum applications that have clearly no relation to the criteria of refugee status or subsidiary protection, and cases which are "clearly fraudulent or abusive". These cases should be distinguished from claims that are likely to be unsuccessful but are genuinely made, and from claims that simply have low recognition rates (ibid., 19).

EU member states apply a much more expansive approach regarding who can be categorized as having a manifestly unfounded claim, based on high past rejection rates -or manifestly well-founded claims based on high past acceptance rates. Through measures such as triaging, applicants are put into different 'tracks'. Persons who come from countries with previously low (or very high) protection rates would be typically put into accelerated or simplified procedures in contrast to other cases that would be adjudicated under the regular procedure (UNHCR, 2022). This approach can speed up the adjudication process, but their speediness and focus on *categories* of asylum seekers rather than individual cases could also undermine procedural guarantees, i.e. they potentially violate the rights of asylum seekers who are categorized based on previous low protection rates. In 2015, the UK High Court Judge called out fast track procedures for establishing institutionalized unfairness (Jakulevičienė, 2020). Whilst accelerating asylum procedures can be a way to ease the policy dilemma, we need to be cautious, as these procedures can undermine important rights that are owed to asylum seekers.

The moral duties of states during the asylum process

Our reflection on the moral duties of states towards asylum seekers starts from the idea of refugee protection as *membership repair*. The core idea is that refugeehood is a foreseeable system failure in the international state system that allocates individual rights protection to particular states. Refugeehood is conceived as the disruption of the political bond between the citizen and the state. It puts into question the legitimacy of the state system, which requires legitimacy repair. When a state fails, then the state system as a whole must assume joint responsibility and fairly allocate the burdens of protection to restore the legitimacy of the system as a whole (Carens, 2013; Owen, 2020; Shacknove, 1985; Song, 2019).

We think this ethical framework is the suitable one to adopt given the aim of the paper. Recall that our argument is addressed to ethically minded policy-makers who hold that states should have a right to control their borders, but understand that its scope is limited by international obligations assumed in state sovereignty. We therefore begin our ethical reasoning from the ethics of membership repair, which takes the broad institutional contours of the modern state system as given, and refugee protection to be one of its conditions of legitimacy. We develop a two-step moral argument: the first step argues for moral entitlements in the asylum adjudication phase; in the second step, we

derive the moral rights of failed asylum seekers from the rights and social conditions that obtain in the first phase.

What rights are owed to asylum seekers? In general refugees are owed some form of inclusion in a safe country where they can reorient their future and rebuild their lives. Their precise moral entitlements, however, depends on the kind of membership repair necessary to reinstitute their international political status. Depending on the reasons for their flight the specific way their political bond has been ruptured, Owen (2020) argues, this protection may take a temporary form or may require a permanent solution. "*Asylum refugees*" are fleeing from persecution by their own state. Their citizenship is being refuted and thus are in need of a new political bond, full permanent membership, i.e. citizenship in a new state. "*Sanctuary refugees*" instead, are fleeing from warzones and generalized disorder. The state has left them unprotected from severe harm and their citizenship should therefore be seen as ineffective. What is owed to them is sanctuary, a safe place that temporarily substitutes the protection of their essential rights of citizenship, until their country of origin is safe to return to (Owen, 2020).

Regarding the rights of asylum seekers, part of what causes the dilemma from the point of view of the host state is uncertainty of the outcome. During the adjudication phase we do not yet know if an asylum seeker will qualify for refugee status (asylum refugee), temporary protection (sanctuary refugee) or does not have a moral claim at all to international protection (failed asylum seeker). So what rights are owed to asylum seekers during the asylum process? We argue that asylum seekers' entitlements are morally on a par with sanctuary refugees in need of temporary, but robust protection. Sanctuary refugees require international protection until their country undergoes a positive regime change and is safe to return to, which renders their ground for protection void. Despite their time-limited presence in the territory, membership repair requires a rather robust set of social and economic rights, including the right to work, access to education and medical care. They might not need a new citizenship with a full package of political rights, but they do need to be able to experience themselves as effective social agents in their immediate environment (Owen, 2020).

Asylum seekers who are waiting for their claims to be adjudicated can belong to any category. We argue that asylum seekers should be conceived as morally on a par with sanctuary refugees, who are owed temporary but robust protection. The point is that they might or might not have a valid claim, but we do not yet know. The default moral attitude of a liberal state is to err on the side of caution. Giving asylum seekers what they might or might not be entitled to is morally preferable over not giving them what they might or might not be entitled to. Thus, all asylum seekers as if sanctuary refugees for the time period they are waiting for their claims to be adjudicated, i.e. until proven otherwise.

Treating all asylum seekers morally on a par with temporary refugees in need of sanctuary has the following implications for their moral entitlements. They are owed a safe space where they can reimagine a future, begin to rebuild their lives and experience themselves as social agents, even if this imagined future has a short-term horizon. This includes basic security, mobility, as well as certain social and economic rights, such as genuine opportunities for access to education as well as to the labour market. Local political rights are also thought to be necessary for the exercise of social agency

(Aleinikoff & Zamore, 2019, 71; Owen, 2020, 78). Given that the temporal horizon of these guarantees is tied to the length of the adjudication process, the social and economic rights involved may be subject to time restrictions. The right to work, for example, can be realized through a temporary work visa, which may be discontinued, renewed or requalified as permanent depending on the outcome of the asylum process.

Despite the fact that this moral entitlement to social and economic protection is also enshrined in regional and domestic law, restrictive state policies routinely violate asylum seekers' right to work and access to welfare (Aleinikoff & Zamore, 2019, 5). Apart from the practical consideration we discussed above, states that restrict the right to work or right to welfare of asylum seekers, in the hope of deterring non-genuine claimants, do not merely deny an unwarranted benefit to the non-genuine claimants. They violate the rights of genuine refugees, who are owed such a robust protection from the beginning. We think this is a serious violation of the state's duty of international protection, an important moral condition of legitimate statehood, that cannot be justified by the need to preclude freeriding. In the next section we outline a more just solution to the state's dilemma between respecting rights and restoring the integrity of the refugee protection system.

Failed asylum seekers' *conditional right to stay*

If a person does not have a warranted claim he/she becomes an irregular migrant. Returning failed asylum seekers, however, is often politically and practically infeasible for a number of reasons, including the refusal of states of origin and transit of readmission (Geddes et al., 2020). In 2021 EU Member States issued 342,100 return orders, and returned only 82,700 people to non-EU countries (Eurostat, 2022). Given that non-voluntary returns currently lack a checks and balance system that would control state's use of this instrument, it should be carried out with great caution and subject to a number of ethical constraints. On the one hand, it matters morally where failed asylum seekers return to: the home state should not only be safe but also have the capacity to reintegrate them (Owen, 2020, 82). On the other hand, it matters morally what they have to *leave behind*: they may have "valid [moral] reasons for not returning—reasons that go beyond a well-founded fear of harm [as enshrined in the non-refoulment principle]" (Aleinikoff & Zamore, 2019, 67).

We argue that in most cases, returning failed asylum seekers is not only practically impossible; it is also morally objectionable. We have argued above that during the asylum process all applicants are owed a robust package of protections, including economic and social rights. Those asylum seekers who are rejected after a fair procedure, no longer have a valid ground for international protection, and could, in principle, be legitimately returned to their allegedly safe home. However, the temporary rights of protection they enjoyed in the asylum-seeking phase for a relatively long period of time generates new moral grounds for a potential right to stay in the state of asylum, which we now turn to.

Our moral case for failed asylum seekers' right to stay rests on the idea that persons' geographical presence in a territory over a period of time has normative significance of various kinds (Bosniak, 2007). During a lengthy asylum process, when states honor their moral entitlement, asylum seekers can put down roots and form social ties; they can make social contributions to the host society in a variety of ways; moreover their identity

is more and more shaped by the host society. These social facts together constitute de facto membership in the host society, captured by the term *social membership* (Carens, 2010, 2013; Bosniak, 2007, 2016; Lim, 2014).

The idea of social membership involves different moral grounds for recognition and inclusion in the host state (Bosniak, 2016; Lim, 2014). The first has to do with social relationships that develop over time and the severity of the harm to those relationship in the case of non-voluntary return. Asylum seekers who have developed significant personal ties with citizens or long-term residents of a host state should not be returned (Carens, 2013; Owen, 2020). A fabric of social ties constituting de facto membership should receive legal recognition by granting them a right to stay. Which relationships count as significant and how long should they last is contested, but the principle should suffice here for our ethical policy guidance. Second, if the right to work and other forms of social and cultural integration are granted during the asylum process, asylum seekers should be seen as valuable contributors to goods and services in the host economy and society. Both the state and the asylum seeker is invested in the mutually beneficial tie they have created over time generate reasons of reciprocity (Brock, 2021; Carens, 2010). Third, the longer the duration of the asylum process the more the person's life-plan is embedded in the material and symbolic aspects of the host society (Lim, 2014). This is especially true in the case of minors who often do not know any other language or social environment than the one in the host-society (Carens, 2010, 11).

It is important to note that even though social membership involves a variety of moral grounds that support failed asylum seekers' claim to stay, it should not be operationalized as a checklist for border control authorities. Investigating actual social membership on a case-by-case basis would involve a level of intrusion liberal societies should not accept (Carens, 2010). Moreover, in reality states often actively prevent the social integration of asylum seekers, through detention, remote housing, restricting the right to work etc. precisely to block their potential social membership claims. Against such background conditions and state failure to honor entitlements, the state's verdict of de facto integration lacks moral significance. Instead, social membership should be operationalized by a proxy using only the length of time spent on the territory. Failed asylum seekers who have been present long enough are entitled to stay. Based on wide-spread immigration practice five years could be a general guideline for states. Political communities, however, should be free to adopt a lower threshold and use a more generous proxy of social membership for the right to stay.

The social membership argument was first developed as a case of amnesty for irregular immigrants who have de facto built a life if the host society (Carens, 2010). There the social membership reasons are thought to supersede the original moral wrong of irregular border crossing (Bosniak, 2016). We think that a similar case can be made for asylum seekers, whose case has failed due to the narrow legal scope of asylum and its complex and often inconsistent application by states. A failed asylum seeker's case with no valid legal ground for refugee protection, could be seen as a case of irregular entry from a narrow legal point of view. The fact that they originally did not have a legally valid ground to enter, however, does not mean they do not have a strong enough moral ground to stay. The changing circumstances of de facto social membership, and the moral costs involved in rupture, warrant their claim to legal recognition. Some states do actually

recognize this type of social membership ground of the right to stay (see our discussion below on the *humanitarian right to remain*).

One might object here that in such a way states would condone the misuse of the asylum system by people who are not entitled to its protection. Persons making clearly unwarranted asylum applications, wrongfully entering the asylum system thereby accumulate moral claims to stay indefinitely in a society they had no right to enter in the first place. We agree that an automatic transformation of the right to claim asylum into a right to stay could be problematic; it goes to the heart of our ethical policy dilemma. However, returning all is both morally problematic and practically infeasible. To carefully address this objection and to take seriously the second horn of our dilemma, i.e. the integrity of the asylum system, we draw a moral distinction between failed asylum claims that are originally launched in *good faith* vs. clear cases of asylum claims launched in *bad faith*. We argue that social membership is necessary but not sufficient. It must be complemented by a good faith asylum claim to ground the right to stay.

To properly understand the category of a failed asylum-claim originally launched in *good faith* we need to provide some background to the murkiness and complexity of the context of launching an asylum claim. Firstly, asylum seekers are fleeing serious often protracted harms or threats, experience severe deprivations and undergo human traumas. A decision to flee involves complex deliberation based on multiple factors, beyond targeted persecution. Secondly, the legal texts can be read more narrowly or broadly, and regional conventions diverge on the valid grounds of international protection. The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, for example, uses a more expansive definition including persons fleeing civil war and generalized violence. As Aleinikoff and Zamore (2019) argue, "Whatever the meaning given to the Convention's [GRC] definition of refugee, it is plain that international practice, supported by domestic and international norms, extends protection well beyond it." (Aleinikoff & Zamore, 2019, 90). There is, then, a significant interpretative grey zone between the legal text and the international practice of protection, where persons fleeing a variety of serious threats could reasonably and genuinely believe that their case for asylum is well founded. We argue that in such cases of good faith interpretation of the legal and political practice of refugee protection, failed asylum seekers should be granted the right to stay. In other words, liberal states should extend the right to stay to those failed asylum seekers whose claims fall short of a strict legal interpretation of refugeehood but may be seen as a good faith interpretation of the existing legal norms and broader institutional practice of refugeehood.

This de-facto widening of the definition of the legitimate reasons of non-return is already implemented in practice in the EU through the legal instrument of 'subsidiary protection.' Subsidiary protection, derived from the non-refoulment principle, is granted to a third country national or stateless person who does not qualify as a refugee, but for whom there is sufficient ground to believe that if returned to her country of origin or former habitual residence, she would face a real risk of suffering serious harm, and that she is unable, or owing to such risk, unwilling, to avail himself or herself of the protection of that country (Directive 2011/95/EU). Put simply, states recognize that asylum claimants who do not qualify for refugee status under the GRC (no nexus to a Convention ground) sometimes cannot be sent back because of threats to life or freedom.

Some EU member states have also introduced through national legislation a so-called *humanitarian right to remain* as a form of protection and residence right. In the EU countries where it does exist, the degree of integration into the local society can serve as a strong ground for granting the right to stay. In Austria, for instance, if an asylum seeker is denied refugee status and subsidiary protection, the degree of social integration is taken into consideration in order to determine whether a humanitarian right to remain can be granted. In the decision process, the authorities are asked to consider the length of stay in the country, family ties, and residence permits of family members, employment, social ties with locals and associations, knowledge of the local language, participation in social activities, criminal record, and chances of well-being in the country of origin. Humanitarian right to remain is a relevant form of protection from return. For example, in 2021 in Austria, 3,130 received a legal status of a humanitarian residence right (BMI, 2021, 28). But in order to prevent that such integration conditions kick in states use such accelerated procedures as we discussed above, as well as differential inclusion measures to prevent successful integration of those asylum seekers who are less likely to obtain refugee status. For instance, Germany does not grant language courses to asylum seekers from countries with recognition rates below fifty percent (Will, 2018). Both the pre-categorization of cases based on a country-level proxy and the stratification of rights during the asylum-seeking phase can be problematic from a moral point of view.

In search of a better answer, our proposal for a conditional right to stay combines two rationales: By resting the moral case for the right to stay on social membership grounds, it acknowledges the moral force of the humanitarian protection policy. By requiring good faith, it condemns deliberate abuse of the system and avoids that every asylum claim automatically turns into a residency right over time. The good faith conditionality also taps into the moral rationale of subsidiary protection. It acknowledges that many rejections have to do with the overly narrow interpretation of refugee protection and that the category's scope is widening in practice. A person with a valid reason for non-return should have a right to stay in the country where her asylum claim has been rejected.

Good faith and bad faith asylum seeking

We have argued that failed asylum seekers should have a right to stay based on social membership reasons and provided that they have launched their asylum claims in good faith. In this section we elaborate the good faith vs. bad faith distinction and explain why a persons' *normative attitude* to the refugee system matters for the second horn of the dilemma.

The principle of good faith is a fundamental principle of international law, which has gained a special contemporary significance in international treaty law. It requires parties to act with honesty, loyalty and reasonableness towards each other in the implementation of international treaties, such as the GRC. While the principle of good faith as a legal obligation to the host state, does not explicitly apply to individual asylum seekers, it is still implicitly enshrined in asylum practice. The UNHCR places an emphasis on the truthfulness of asylum seekers and on cooperatively assisting the host state officials in establishing the truth (Uçaryılmaz, 2020, 54–56).

Good faith asylum seekers are those whose claims fall short of the narrow legal interpretation of the existing criteria (of the GRC), but may be seen as a good faith interpretation of the broader institutional practice of refugeehood. The concept of refugee protection as an international practice (Aleinikoff & Zamore, 2019; 90), beyond the GRC and its legal discursive practice, includes regional and domestic norms and practices, as well as organizations such as the UNHCR. There are asylum claims that fall outside of the strict legal definition of who is a refugee according to GRC, but may result as plausible, when applying a broader institutional scope of interpretation. A good faith example would be a refugee who has left her country of usual residence fearing persecution as s/he has suffered severe discrimination qua her/his social group membership in the LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer) community, to the point that life became intolerable at home. Since discrimination does not equal targeted persecution by the state, during the process the claim of this asylum seeker might be rejected, but on our account, she would count as a good faith asylum seeker.

Subsidiary protection is morally underpinned by the idea that there is a wider scope for international protection than the GRC; there are other valid reasons of non-return related to the country of origin. The humanitarian right to stay, instead is morally underpinned by reasons of social membership; i.e. valid reasons of nonreturn that obtain in the host country. We think that a possible way to address the dilemma and to avoid the abuse of the humanitarian practice is by combining the two moral rationales. Liberal states must take seriously the social membership grounds of the right to remain and grant it to all failed asylum seekers who have entered the asylum system with a good faith claim. However, in order to safeguard the integrity of the refugee system states should be able to signal that intentional abuse of the system is too weighty wrong to be tolerated. Even though all asylum seekers have gained extra moral grounds to stay over time, we argue that not every failed asylum seeker should enjoy the right to stay.

Clear cases of *bad faith* failed asylum seekers ought to be treated differently, in light of the policy dilemma we are faced with. Bad faith asylum claims are clear cases of deliberate abuse of the refugee protection system in order to cross borders to advance non-protection related interests. They do not have urgent reasons to leave their home country; still, they try to take advantage of the refugee system to advance non-protection related interests. The person applies for asylum in the knowledge that she does not qualify as refugee and after realizing that she does not qualify aims to construct reasons so that she cannot be sent back, e.g. trough religious conversion in the reception state solely for the sake of remaining in the country.

It deprives genuine refugees from resources and opportunities, and it undermines the institutional purpose at its core. Given that they do not fear threat in the country of origin and given the weight of the harms and wrongs caused by abusing the system, these reasons of return outweigh their otherwise legitimate reasons of social membership to stay.

It is important to emphasize that singling out bad faith failed asylum seekers for return and respecting the right to stay of good faith failed asylum seekers is not without moral costs and runs into several difficulties in practice. In the remaining part of this section we consider some pressing objections.

First, distinguishing good from bad faith might be impossible to establish or morally problematic to investigate. For reasons of practical difficulty, the bad faith category should be limited to clear-cut cases, similar to the UNHCR's categorization of manifestly unfounded cases, that have clearly no relation to the criteria of refugee status or subsidiary protection. However, in some cases, even if establishing bad faith were possible, doing so may itself be morally objectionable. In cases of sexual orientation, for example, we might have to accommodate bad faith asylum seekers for liberal moral reasons. Detecting the untruthfulness of such claims would violate the right to define one's own sexual orientation by subjective rather than objective criteria.

Second, migrants might be applying in what they presume is good faith, because they lack precise knowledge about the laws of the host country for example. We think that insufficient or imprecise knowledge cases are to be expected given the complexity of the international legal regime, and the complex realities people are fleeing from. These cases, on our view, fall within the interpretative grey zone that gave rise to the category of good faith interpretation in the first place. What is its precise scope and how far should it extend will be subject to reasonable ethical and political disagreement. Clear-cut bad faith cases in turn in principle could be filtered out at the initial stage of asylum processes. But as we have discussed above, such screening must be in full compliance with the rights of asylum seekers, and must not compromise the individual right of asylum nor procedural guarantees.

A third objection could be that such a proposal would shift the attention of asylum agencies from protection towards investigating good faith/bad faith claims.[2] Instead, we argue that when asylum agencies focus on singling out a limited number of clear-cut bad faith cases, it could plausibly increase the scope of protection for two reasons. The positive signaling effect of a well-functioning institution can garner public support for the asylum system, which, in turn, could strengthen its protection capacity. Moreover it could counter the exclusionary rhetoric in the field of asylum by showing what exactly constitutes bad-faith asylum seeking and what does not, and that its scope is much narrower than commonly assumed.

A fourth and related objection is that this differentiation might open up the possibility for abuse by state authorities and further strengthen a culture of suspicion towards asylum seekers. This could be the case in countries where politically driven state authorities aim to reject as many asylum applications as possible and discourage all asylum-seekers from placing a claim, whether legitimate or not, or refuse to grant protection from refoulement. The state, however, has an obligation to pursue refugee protection in good faith as well. The principle of good faith is a fundamental principle of international law that applies to all states. This implies that, states have the obligation to safeguard the well-being of refugees, refrain from discriminatory treatment, to act honestly and truthfully in investigating and adjudicating cases, and last but not least, to show reasonableness in evaluating each case by its own merit (Uçaryılmaz, 2020). Because of the ever more growing tendency of states to reject and deter asylum claims, scholarly engagement with what counts as a good or bad faith interpretation of asylum aims is needed to counteract abuse fueled by prejudice and suspicion towards asylum seekers. First,

[2] We would like to thank an anonymous reviewer for asking us to address this point.

by drawing attention to the complex normative environment and systemic constraints under which asylum claimants operate; second, by making a moral case for the right to stay for the many failed asylum seekers that are now irregular and thus treated with suspicion; third, by limiting the use of bad faith or 'abusive' asylum seeking to its morally appropriate use.

Finally, one might object that tying the right to stay to 'good faith' asylum-seeking legitimizes those immigration policies that tie asylum to deservingness or 'good behavior'. It is, however important to see that good faith is not a judgment about personal character, or everyday adherence to social norms or cultural expectations, which we agree are morally impermissible in an adjudication process. Instead 'good faith' pertains to the interpretation of reasons of refugee protection, and expresses respect for the moral rationale of the asylum system. We have argued that in the complex reality of flight and protection, liberal states should charitably interpret the norms of international protection.

Finally, whilst the integrity of the refugee system is a legitimate moral concern, we want to emphasize that states should be alert not to create more harm by returning failed asylum seekers, e.g. by separating families, than what is potentially caused by granting them a right to stay.

Conclusion

This contribution addressed the policy dilemma of how to reconcile the moral rights of failed asylum seekers with the objective to maintain the integrity of the existing asylum system. We have argued that policy approaches that aim to deter unwarranted asylum seekers and reduce the case overload of the asylum system in EU member states raise both practical and ethical problems. The practical concern is that both the restriction of rights (most notably curtailing the right to work and access to welfare), as well as the expedition of asylum procedures have a limited potential to disincentive unwarranted asylum-seeking migration. In ethical terms the way these policies are currently set up undermine the rights of all asylum seekers.

Restricting the rights of asylum seekers during the asylum process would imply the moral cost of depriving legitimate asylum seekers from what is legally and morally owed to them. Assessments at initial stages of the asylum process can be a potential solution to the challenge of unwarranted claims, but they would need to focus on the individual right to asylum and avoid morally arbitrary differentiation and exclusion. We have argued that a morally more just way of dealing with the political challenge is to apply differential treatment to the different normative attitudes of asylum seekers towards the refugee system. Asylum seekers who make a genuine claim in good faith should have a social membership based right to remain in the host country, respecting the moral claims of asylum seekers accumulated during the asylum process. Clear-cut cases made in bad faith may, instead, be legitimately returned. Return of bad faith failed asylum seekers is a morally appropriate response to address the policy dilemma at hand, i.e. aiming to reconcile the integrity of asylum system with the rights of asylum seekers from a statist institutional perspective. This is not to deny that most asylum-seeking migrants from the Global South are morally entitled to admission into affluent societies, on other grounds. So, what looks like a bad faith asylum claim from a restricted institutional

perspective of a nation state, may well be an attempt to claim legitimate moral entitlements from a global justice perspective.

Abbreviations

ECHR	European Convention on Human Rights
EU	European Union
GRC	Geneva Refugee Convention
LGBTQ	Lesbian, Gay, Bisexual, Transgender, Queer
OAU	Organization of African Unity
UNHCR	United Nations High Commissioner for Refugees

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