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Can only victims win? – how UK immigration law has moved from consideration of rights and entitlements to assertions of vulnerability.

Sheona York, Reader in Law and Kent law Clinic solicitor, University of Kent, 23 August 2018

Abstract

Looking at two prominent moments in UK immigration law, I assess how UK political changes have affected immigration law and practice.

In 1968, the newly-independent Kenya's 'Kenyanisation' policies had a catastrophic impact on those 'Kenyan Asians' who had elected to retain British passports rather than take Kenyan citizenship. As growing numbers fled to the UK, the Labour government rushed the Commonwealth Immigrants Act (CIA) 1968 through Parliament. This deprived the Kenyan Asians of the rights flowing from their citizenship. The debates in Parliament, in the media and in wider society confronted head on the UK's arguable breach of international law, and the political and practical difficulties of arguing for a multiracial society with equal rights for all, in circumstances in which many migrant communities faced poor housing, inadequate school provision and discrimination at work.

In contrast, the 2012 introduction of new Immigration Rules on family migration, considered in the House of Commons on 19 June 2012, had engendered little public debate beyond lawyers and NGOs. Virtually ignoring the underlying aim of reducing net migration to the 'tens of thousands', and the likely effect of the rule changes on ordinary families, the Commons debate concentrated on how judges' interpretations of art. 8 ECHR rights had prevented deportations of 'foreign national criminals', requiring a clear statement in the Rules of how art. 8 would be applied in future.

Since then, Home Office policy and practice and applicants' legal strategies and public campaigns have focused on vulnerability. Courts struggle over definitions of 'exceptional circumstances', 'unduly harsh' consequences, 'insurmountable obstacles' and the 'precarious' migrant, while campaigns focus on unfortunate individuals, children, trafficked and other abused victims. I suggest that this apolitical resort to assertions of vulnerability, analogous to Samuel Moyn's 'last utopia' of human rights,¹ is a blind alley, and that instead we need to start, or re-start,² a political debate about 'belonging' and migrants' rights and entitlements.

Introduction

The political contrast I wish to draw by looking at two specific parliamentary debates concerns two different subcategories of migration. The first subcategory consisted of 'citizens of the UK and Colonies' (CUKCs), defined by s4 British Nationality Act 1948 as 'any person born within the United Kingdom and Colonies'; and Commonwealth Citizens, being those who had been CUKCs until their respective Colony became independent. Neither of those groups had been caught by legislation directed against 'aliens' and therefore, until the Commonwealth Immigrants Acts 1962 and 1968, had the right to enter and remain freely in the UK. The second subcategory did not exist as such until after the passing of the Immigration Act 1971. Seen from the present day, that Act did two things: brought Commonwealth Citizens into the same new scheme of immigration control as 'aliens'; and

¹ Samuel Moyn *The Last Utopia: Human rights in history* Belknap Press 2010

² In part 5 I consider whether the Windrush debacle (which had not emerged at the time I wrote this abstract) is offering an opening for a broader less victim-centred politics of migration.

virtually put an end to further 'primary immigration', seen at that time as male heads of families coming to work, settle and bring their families. The 2012 'debate' concerns the 'new rules' to be applied to those families and to the application of art 8 in immigration generally.

The measures being debated nevertheless had commonalities. The first debate, on the Commonwealth Immigration Bill 1968, concerned the *termination of rights of citizenship and status akin to citizenship*, which had only recently become protected by international law. The second debate concerned *significant reduction in conditions of entitlement* for family members of British and settled migrants. I argue that although rights of citizenship differ significantly in content from a mere entitlement to apply for some kind of immigration status, they both have value, arise from statute and thus emanate from parliament. Bearing this in mind, it is notable that while the first debate directly addressed the legal, moral and political consequences of withdrawing rights of citizenship, the second debate barely if at all considered the impact of a significant reduction in conditions of entitlement of a large subcategory of migrants, or any resulting impact on society. Where 'rights' were referred to at all, these were the 'qualified rights' set out in art 8 ECHR. Nobody speaking in the debate raised the difference between these two types of 'rights'. Nobody appeared to understand that the inevitable consequence of making such changes would be some kind of race to the 'exceptional', depriving many ordinary families of the straightforward access to family unity and settlement in the UK which they had come to expect. This paper looks at the political background to the intervening changes in immigration law, seeking to shine a light on how this particular field of immigration law has ceased to concern itself with *conditions of entitlement* in favour of 'human rights', and the effect of this on discussions of immigration control generally.

In **part 1** I examine the parliamentary debate on the Commonwealth Immigrants Act (CIA) 1968, highlighting how MPs on both sides perceived the question of deprivation of citizenship rights as well as the hardship that would ensue. I briefly discuss the European Human Rights Commission's consideration of the East African Asians case against the UK in 1973.

In **part 2** I look at the 19 June 2012 'debate' on the proposed new family immigration rules. I define a difference between 'rights and entitlements' and 'human rights' and show that the debate lacked any principled discussion of rights and entitlements or analysis of the consequences of their loss. True that some MPs stated their opposition to some of the 'new rules'. However, the parliamentary motion was carried, and the opponents led no campaigns even against the most restrictive changes (such as the minimum income requirement for spouse entry, unaffordable by over half the working population).

In **Part 3**, to provide a political background to both debates, I look at how issues of race and immigration were approached as the first overseas Citizens of the UK and Colonies (CUKCs) and Commonwealth citizens arrived in the UK after the second world war. Then I look at the completely changed approach from the 80's onwards. What emerges from both periods is the unwillingness of Labour politicians and trade unions to engender a public political discussion on immigration, whether in relation to overall numbers or on how particular types of border control impact on the host society: but instead simply reacted to particular migrant flows judged to be a 'crisis'. During the post-second world war period, despite growing anti-immigrant feeling, it was broadly accepted that, once in the UK, immigrants have the same rights as residents. For Labour this meant that social problems judged to arise from immigration must be reducible to the practical matters of ensuring sufficient housing, school places and health care, while acts of racial discrimination should face legal

sanction. The 1968 debate, on a Bill brought in to respond to the ‘crisis’ facing the Kenyan Asians, showed that the political principles of universal democratic and legal rights were still powerful, but outside that debate Labour did not encourage discussion of any greater unease about how migrants change society, leaving such unease to fester. Then from the 80’s onwards the increasingly shrill and hostile anti-immigrant rhetoric of both subsequent Tory and Labour governments, responding to the ‘crisis’ of growing numbers of asylum-seekers (and the ‘foreign criminals’ issue), coincided with big increases in work migration and free movement of EU nationals enacted virtually behind the scenes, again leading to resentment: and even the resultant rise of UKIP did not trigger much political *debate*.³ I also note the wide gap in Labour politics between the public anti- asylum-seeker rhetoric, the lack of public debate on other immigration issues, and the transformation of many Labour activists’ politics on race through ‘institutional multiculturalism’ to the identity politics of today.

In **part 4**, to provide a legal background to the 2012 ‘debate’, I briefly review the ECtHR and UK jurisprudence on the application of art 8 ECHR in immigration cases. The ECtHR’s first analysis of art 8 in immigration matters, which accepted a Contracting State’s right to control immigration as a given, made it inevitable that the qualified rights conveyed by art 8 would always be limited by what the relevant Contracting State stated was its public interest: and thus an individual applicant would always be reduced to having to emphasise why their case was exceptional.⁴ I argue that this has led to the foregrounding of litigation and campaigns for such as children, trafficking victims, victims of domestic violence. In turn, this concentration on individuals and groups consciously identified as victims, and the increased legal reliance on art 8 ECHR, has enabled politicians, Home Office officials, judges, Legal Aid Agency officials, charitable funders, etc to overlook or give little importance to the situation of individuals and families with no particular claim to exceptionality. This, compounded with actual reduction in rights and entitlements for migrants, has contributed to a Home Office view that most if not all migrants reliant on art 8 ECHR for their claim to remain in the UK are just temporary migrants, who just need a little push to encourage them to leave the UK. The ‘little push’ has of course been the introduction of the ‘hostile environment’ policies in the Immigration Acts 2014 and 2016.⁵

In **part 5, postscript and conclusion**, I briefly review the ‘Windrush’ debacle and consider whether the political and social response to that, including a small emergence of public concern for ordinary migrants, will amount to more than a last gasp of the near-dead politics of solidarity.

Finally, I summarise how the separation of the politics of immigration control from the politics of race has led to a situation where, alongside passionate and even lacerating debates about ‘racism’, the rights and entitlements of thousands of migrants living and working and expecting to settle in the UK have been significantly eroded virtually without opposition, leaving only the ‘vulnerable’ to rely on art 8 ECHR, and an apolitical reliance on judges to make those decisions.

³ For discussion of this lack of debate, see for example *The Road to Somewhere: the populist revolt and the future of politics* David Goodhart, Hurst &Co, 2017

⁴ See later discussion of *When humans become migrants* Marie-Benedicte Dembour Oxford University Press, 2015

⁵ Theresa May interview 25 May 2012 <https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html>; Immigration Acts 2014 and 2016 measures on access to services.

Part 1 – the Parliamentary debates on the Commonwealth Immigrants Act 1968⁶

The crux of the Bill, and of the Act as passed, was the exclusion from the UK of overseas-born Citizens of the UK and Colonies (CUKCs), many of whom had no other citizenship. On 27 February 1968 Callaghan, then Home Secretary, opened the debate on the Bill:

We are about to discuss one of the greatest issues of our time, an issue which can tear us apart or unite us... the Government, Parliament, all parties in the country are fully committed to the development of a multi-racial society in Britain... a society in which there will be unity of purpose and common allegiance....⁷

...

There are at least 1 million persons living in various parts of the Commonwealth overseas who are ...potentially able to come to these islands free of control...

...

It would be irresponsible not to legislate on this vast issue of whether this country could afford in any circumstances to envisage the prospect of an invasion of a size which I have indicated, even though it is not likely.

He referred to the previous government's stated aims for the Commonwealth Immigrants Act (CIA) 1962, to exempt from immigration control those 'who in common parlance belong to the United Kingdom'. That Act had not worked, in that, in consequence of independence Acts passed in various Commonwealth countries, many UK passport holders had arrived in the UK who, in the view of many, did not 'in common parlance belong' in this country.

The entry of those still wishing to enter the UK was to be controlled by the issuing of vouchers, at a rate of some 1500 per year. Callaghan said:

The objective of the legislation is to control the flow of these people to the UK – that is, to form an orderly queue... the High Commissioners ... will best be able to assess priorities in terms of human needs'.

He concluded his opening speech by stating that it is 'essential that, after our immigrants arrive, they should be treated in every way as equal before the law...' and promised race relations legislation.

Quintin Hogg, shadow Home Secretary, replied. 'I view the idea of devaluing a British passport with the utmost abhorrence.' He referred to the debate on the British Nationality Act 1948, which created the Empire-wide citizenship of the UK and colonies. He noted that the idea then was that there would be a 'free trade in citizens' within the Commonwealth, and quoted Ernest Bevin:⁸ 'My idea of a foreign policy is to buy a ticket at Victoria Station and go where the hell I like'. Nobody, anywhere in the debate, noted that it was precisely that right, held by all Citizens of the UK and Colonies, which was being denied to the Kenyan Asians. Hogg's view was that it was the higher standard of living in the UK which 'will act as a magnet to which people will come because they are

⁶ I have selected extracts illustrating the main political points of view in the debate, citing the speakers

⁷ Hansard HC Deb 27 February 1968 vol 759 col 1241

⁸ General Secretary of the Transport & General Workers Union, Minister of Labour in the second world war cabinet, and foreign minister 1945-51

poor, because they are frightened, or because they are persecuted...’ and that this must be controlled because ‘this country is not manifestly under-populated and that we must try and control our own social problems’.

A major argument concerned citizenship rights. Sir Dingle Foot, Solicitor-General, said:

‘Are we to repudiate obligations simply because their fulfilment has become more onerous than at first contemplated? ... This is a most retrograde step in the sphere of international law... For the past 25 years one of the aims of governments ... has been to make private right a matter of international obligation... the Universal Declaration of Human Rights Art 15 assures the right to nationality... a British judge at the International Court, Sir Hersch Lauterpacht... said: “The individual has been transformed from an object of international compassion into a subject of international right”... In effect, we are creating a whole new class of stateless persons. We are transforming these British citizens into refugees, and the most pathetic kind of refugees, refugees with nowhere to go...’⁹

Andrew Faulds, Labour MP for Smethwick, said:

‘This new piece of legislation introduces an entirely new point... the abrogation of the right that recipients of British citizenship had always presumed to be their own... it is sad in a Socialist Government to witness another small death in the great traditions of British liberalism...’¹⁰

Other Labour MPs continued in the same vein:

‘The bill is white man’s treachery... How right these people in Kenya were to rush to the booking-office as rt. hon. gentlemen opposite spouted their race-ridden, race-laden theories... I was brought up to believe that the betterment of the individual and his family was the root premise of Socialism...’¹¹

‘This is a miserable measure, and certainly I shall not support it...If the Labour Party is to mirror the prejudices of [members] opposite, why should there be a Labour Party? All political parties exist to try to change society for the better...’¹²

A number of Labour MPs politically distressed by supporting the Bill discussed the tension between ensuring equal rights and a reasonable standard of living for those already in the UK and allowing entry to all those to be affected by the Bill.

‘It is often said ... that colour prejudice is a working-class vice. It has to be because these people come to working-class places. There is not much said when the immigrant is a labourer ... [or] when he is a bus conductor, and nobody else wants to do the job. Make him a bus inspector and what happens at Oxford?¹³ I have yet to see a coloured man as a shop steward, let alone a foreman ... a house near to where I live was up for sale, and the degree of apprehension in the neighbourhood had to be seen to be believed. The working-class

⁹ Sir Dingle Foot, Labour, Ipswich, QC and Solicitor-General

¹⁰ Andrew Faulds, Labour, Smethwick

¹¹ Peter Mahon, Labour, Preston, South

¹² Ben Whitaker, Labour, Hampstead

¹³ The writer, as a student, joined demonstrations in Oxford supporting the right of immigrant workers to be promoted to bus drivers and inspectors

*people ... see immigrants... as increased pressure on housing, schools and the health service, and additions to the unemployment figure of 600,000.*¹⁴

*'I appreciate the risk that I am running in supporting the Bill ... It means that I am saying that these people are different from us. I accept that that is the basis of the racist case...'*¹⁵

*'Both parties when in power misjudged the situation. In 1948,¹⁶ the present position was not conceived, and in 1958 it was not a problem. ...I agree with ... the Liberal Party that there should have been a more positive approach to the problem of immigration...'*¹⁷

David Steel¹⁸ noted that the numbers of CUKC arrivals from Kenya rapidly increased precisely because specific speeches (including by former Colonial Secretary Duncan Sandys proposing a private members bill to stop their entry)¹⁹ created serious alarm amongst Kenyan Asians that the assurances given them concerning their status as CUKCs was about to be withdrawn. Steel also linked the problems arising from the arrival of migrants to the lack of economic and social planning. *'Every piece of immigration legislation is negative – dealing with the problem by putting up another block' ... 'we have built up a series of disasters for ourselves which will not be solved by legislation against racial discrimination...'*

Andrew Faulds²⁰ said:

'I am relieved at the Government's intentions to... provide financial assistance for housing, welfare and education in areas such as mine in Smethwick... That is the most effective means of helping to solve a real problem...'

Renee Short,²¹ supporting him, noted: *'What help has been given so far... is just chicken feed...'*

The debate was closed by Home Office Minister David Ennals:²² *'The debate has not been on party divisions: thank heavens that it has not... the Bill is one that no one in this House would willingly have wanted to introduce. However the Bill is necessary...'* The House divided 372 to 62 and the Act came into force 3 days later.

The hardships endured by the CUKCs stuck in Kenya following that Act are well-documented.²³ In 1973 the European Commission on Human Rights published its report on a series of cases cited as *East African Asians v UK*.²⁴ That Report considered whether, in passing the CIA 1968 and refusing admission to the Applicants, (25 CUKCs and 6 British protected persons) their rights under art 3 ECHR were breached. The Commission reviewed the House of Commons debate to discern whether

¹⁴ Charles Pannell, Labour, Leeds West (voted in favour)

¹⁵ Roland Moyle, Labour, Lewisham North

¹⁶ referring to the British Nationality Act 1948, which gave equal citizenship rights to all those born in the 'UK and Colonies'

¹⁷ Kenneth Lomas, Lab, Huddersfield West

¹⁸ David Steel, Liberal, Roxburgh, Selkirk and Peebles

¹⁹ Open letter from Iain Macleod MP to Duncan Sandys, The Spectator 23 February 1968

<http://archive.spectator.co.uk/article/23rd-february-1968/5/immigration>

²⁰ Andrew Faulds, Labour, Smethwick

²¹ Renee Short, Labour MP for Wolverhampton NE

²² David Ennals, Labour, Dover

²³ See for example *Whither Kenyan migrants?* Vincent Cable, Young Fabian pamphlet 18, July 1969, accessed 23/8/18 from the LSE digital library <https://digital.library.lse.ac.uk/objects/lse:tel582mib>

²⁴ *East African Asians v UK* [1973] ECHR 2

the Bill discriminated on racial grounds, and concluded that the 1968 Act, by subjecting to immigration control citizens of the UK and colonies in East Africa who were of Asian origin, discriminated against this group of people on grounds of their colour or race.

The Commission then decided that there had been no express undertaking that CUKCs of Asian descent would always be free to come to the UK, but 'did not think it necessary to determine' whether there had been any implied undertaking. It concluded that, although the hardships endured by the applicants resulted from actions of the Kenyan authorities, the UK's actions 'exposed the applicants to the possibility of it occurring', and thus the racial discrimination to which the applicants had been subjected amounted to degrading treatment in the sense of art 3. Thus the Commission ducked the issue of whether the CUKCs had been deprived of citizenship, limiting its findings to the discrimination issue.

Part 2 - 'this House [recognises] that art 8 ECHR is a qualified right and agrees that the conditions for migrants to enter the UK on the basis of their family and private life should be those contained in the Immigration Rules'²⁵

So moved Home Secretary Theresa May in the House of Commons on 19 June 2012. The Conservative's 2010 manifesto had announced the intention to reduce net migration to 'tens of thousands'. Damian Green, immigration minister in the Coalition government, announced to an audience of immigration law stakeholders²⁶ that each main category of non-visitor immigration (i.e., students, workers, family members, asylum-seekers) had been examined to see how numbers could be reduced. As well as tightening the requirements for each category, the government determined to reduce access to permanent residence (indefinite leave to remain) hitherto available for certain categories of workers and students, to cut access to public funds (welfare benefits, social housing), to limit the use of human rights claims by foreign national prisoners, overstayers, failed asylum-seekers and others with no leave to remain, and to restrict the impact of recent European Court judgments giving rights to non-EEA nationals. In relation to family migrants, long residents and those facing deportation, those policies were given legal expression in the 'new rules' laid before parliament on 13 June 2012.

Arguably, the very act of holding a debate proposing changes to the Immigration Rules showed a certain political nervousness. The Immigration Rules are statements of the Home Secretary's policy and become operative in law via the 'negative resolution procedure'.²⁷ Once signed by the Home Secretary the changes become law unless a motion – a prayer- is passed by the House within 40 sitting days. There was no procedural or legal need for the government to hold the debate; a point not lost on many MPs. Pete Wishart²⁸ stated '*all [the motion] seems to be is a statement of the bleeding obvious. We all know that article 8 is a qualified right, so why are we here today debating a nothing motion?*' John McDonnell²⁹ asked '*are we passing into law the rules that she published less*

²⁵ HC Deb 19 June 2012 col 760 et seq

²⁶ <https://www.gov.uk/government/speeches/immigration-damian-greens-speech-to-the-royal-commonwealth-society> accessed 28/7/18

²⁷ Immigration Act 1971 s3(2)

²⁸ Pete Wishart, SNP, Perth and North Perthshire

²⁹ John McDonnell, Labour, Hayes and Harlington (now shadow Chancellor of the Exchequer)

than a week ago?’ David Winnick³⁰ asked ‘Will Parliament have an opportunity to debate those changes?’ Theresa May repeated that ‘it is open to hon. Members to pray against the immigration rules if they wish to debate them. What we are agreeing [today] is that article 8 is qualified as set out in the immigration rules’.

That ‘debate’ therefore did not, and could not, substantively consider the proposed very significant curtailment in conditions of entitlements, not made up for by access to a ‘human right’. I define ‘conditions of entitlement’ as being the valuable, substantial attributes of a status capable of being applied for by a defined groups of applicants as defined by law, with clear procedures for considering applications, challenging refusals, etc. Such are often referred to as ‘rights’, as for example in social security law, access to social housing and state education: and in the immigration law field are in a similar legal category to rights of citizenship, in that their basis is statutory and thus ultimately emanating from parliament. It is clear that a ‘right’ deriving from art 8 ECHR (and indeed any other human right in the ECHR) is not the same type of right. This is nothing to do with art 8 being a qualified right. ‘Human rights’ are not ‘entitlements’: do not provide a legitimate expectation to applicants who meet a published set of requirements: and do not emanate from parliament in the way that entitlements do. What the government did in introducing the new family migration rules, and what the opposition permitted to happen, was very significantly to reduce the entitlements of family migrants. There was no parliamentary scrutiny of the changes.

Much of the ‘debate’ concerned ‘foreign criminals’, a numerically tiny category of migrants whose appeals against deportation have dominated the development of art 8 caselaw since the 2006 debacle.³¹ Theresa May stated:

... Nothing has done more to damage public confidence in the immigration system than when serious foreign criminals have used flimsy art 8 claims...’

‘...the exceptional circumstances will be far more limited than they have been up till now’.

‘...For too long the rights of foreign criminals have been placed above the rights of the British public... the British public’s right to protection from crime trumps a foreign criminal’s weak claim to family life...’

Yvette Cooper³² began her reply for the opposition confirming support for the changes respecting foreign criminals, emphasising that it was Labour which introduced the ‘automatic deportation’ provisions in 2007³³ and which had significantly increased deportation of foreign criminals. She mentioned the need for debate on *‘how the detail on the other aspects of the immigration rules, particularly on family ... will be scrutinised, and whether [the Home Secretary] is trying to bypass the normal scrutiny process.’*³⁴ However, she swiftly returned to the question of foreign criminals. And Jack Straw,³⁵ a Labour former Home Secretary, used his entire intervention to describe one

³⁰ David Winnick, Labour, Walsall North

³¹ A Labour Home Secretary was forced to resign in 2006 after it emerged that over 1000 ‘foreign criminals’ had been released on completion of their prison sentence without being considered for deportation.

³² Yvette Cooper, Labour, Normanton, Pontefract and Castleford

³³ UK Borders Act 2007 ss 32, 33

³⁴ HC Deb 19 June 2012 col 776

³⁵ Jack Straw, Labour, Blackburn,

particular case in which a foreign criminal won an appeal on the basis of family life in which *'in my judgement, he formed a relationship solely in order to evade immigration control...'*³⁶

A few Members noted that 'immigration is being raised constantly on the doorstep, in our mail boxes, in the pub' and urged that 'it is not racist to discuss immigration... [because] if we do not, fascist organisations will step into the void we have created by not discussing these issues.'³⁷

Some Members criticised the role of the ECHR. Continuing the concern about foreign criminals, Dominic Raab³⁸ argued that the ECHR *'was never intended to have any extra-territorial application at all. It was certainly not intended to fetter deportation in any way... in 1996³⁹ it was decided that governments could not deport ... if there was a substantial risk of torture... we see new fetters on deportation... Abu Qatada's deportation was barred ...because he might not get a fair trial in Jordan This is a dangerous precedent...'* Raab however blamed the UK judiciary for the *'400 foreign criminals a year [who] defeat deportation orders on art 8 grounds'*, including a man who murdered a constituent of his. He referred to another case of *'an individual who raped his partner and then claimed a relationship with that partner as part of the family life he relied on...'*⁴⁰ He then criticised the previous government's 'automatic deportation' provisions for including a human rights exception *'fatally weakening our power to deport.'*

The main speech highlighting the attack on family migrants' entitlements was not from Labour but from the Scottish National Party member Pete Wishart.⁴¹ Wishart deplored the proposed minimum income requirement and the 'purgatory' of longer probationary periods for spouses. However even he concentrated on the *'Conservative assault on article 8 ... The right to a family life... is about the people whom we see in our constituencies every day... who are separated from their families because of the inflexible rules and their rigid application by the UKBA'*. His interventions were almost universally criticised, and the debate rapidly returned to the issue of foreign criminals. Jeremy Corbyn,⁴² then a backbench MP, attempted again to draw attention to the wider issues dealt with in the 'new rules', describing them as likely to have a *'devastating effect on the family life of those who have migrated here, work hard, drive our trains, clean our floors and help our industries to get along'*. But even he retreated to considering the effects on children and families of the deported foreign criminal.⁴³

Chris Bryant,⁴⁴ closing for the Labour opposition, clarified that *'we are supporting the motion today on the understanding that it applies solely to the operation of article 8 in relation to the deportation of foreign criminals'*. The Immigration Minister Damian Green however made it clear that *all* the changes were to take into account proportionality under article 8 *within the rules*, so that, in any category, only 'genuinely exceptional cases' will merit discretion outside the rules.

³⁶ HC Deb 19 June 2012 col 780

³⁷ Kris Hopkins, Conservative, Keighley

³⁸ Dominic Raab, Conservative, Esher and Walton, currently Minister for Exiting the EU

³⁹ Ibid, referring to *Chahal v. United Kingdom* (23 EHRR 413)

⁴⁰ Ibid, col 787

⁴¹ Pete Wishart [n24] col 790

⁴² Jeremy Corbyn, Labour, Islington North, currently Leader of the Labour Party

⁴³ HC Deb 19 June 2012 col 802

⁴⁴ Chris Bryant, Labour, Rhondda

There was no vote on the motion. The rules came into force on 9 July 2012. Broadly, successful family visa applications fell by around 20% up to 2014, but by early 2018 appear to have reached previous levels,⁴⁵ showing that the changes did not achieve even family migration's 'share' of the stated aim of 'reducing net migration to the tens of thousands'. However the significant hardship caused to families⁴⁶ has not provoked much public response. This will be discussed in part 5 below.

Part 3 – Politics and immigration in the UK since the 1950's

A. Background

There has been no modern state which has operated open borders. Nor has there ever been any significant political movement in any modern state which has argued for open borders, whether on the basis of the equal moral worth of individual human beings or otherwise. Even the major nations largely built from immigration, such as the USA and Australia, always wielded controls on entry. The high point of progressive internationalism may have been the Communist Manifesto's 1851 call '*workers of the world unite*', or maybe the Second International's call in 1914 for an international socialist conference to end the First World War. But even those calls, which lacked support and failed, proposed solidarity between workers from different nation-states, and did not propose or argue for any general rights of people to move freely around the world. Moreover, the UK trade union movement argued in support of the Aliens Act 1905, the UK's first formal immigration controls in the modern era. There was not even clear support for political asylum, as trade unionists were seen in 1905 to oppose even the entry of refugees in the form of Jewish migrants fleeing pogroms in pre-revolutionary Russia, and (and there was opposition during the 30's to the entry of Jewish refugees from Nazi Germany). Until the Immigration Act 1971 the entry and remaining of 'aliens' in the UK was strictly controlled by Orders introduced under the Aliens Restrictions (Amendment) Act 1919. However, it was generally accepted that the small numbers who had arrived should be treated equally along with existing residents, and not until the post-second world war period was there any significant anti-immigrant feeling. The moral and political questions raised by immigration were little theorised about.

B. the 50's and 60's: "they've stopped talking about it in the clubs"

In his social and political history of Britain Peter Hennessy⁴⁷ touches briefly on Gellner's view⁴⁸ on the nation-state and nationalism's importance as a political glue in an industrialised society, and on Perkin's definition of a 'viable class society'.⁴⁹ He shows how both Conservatives and Labour were disconcerted at the effects of the arrival of the first West Indian migrants in 1948 – as disturbers of what Gellner refers to as the 'old and well-established self-image'⁵⁰ of a 'tight little' nationalist unity,

⁴⁵ Immigration statistics <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-march-2018-data-tables>

⁴⁶ See for example the reports and evidence considered in the Supreme Court and previous hearing in *MM (Lebanon) [2017] UKSC 10* (concerning the minimum income requirement); and also *All you need is love and £18,000* Ala Sirriyeh, *Critical Social Policy* 35(2); *Family Friendly? The impact on children of the Family Migration Rules: a review of the financial requirements* Childrens Commissioner, August 2015; *The devastating impact on the 2012 family immigration rules* Sonel Mehta of Britcits, from a talk given to ILPA 21/2/16

⁴⁷ *Having it so good – Britain in the 50's* Peter Hennessy 2006 Penguin Allen Lane

⁴⁸ *Nations and Nationalism* Ernest Gellner 1983 Blackwell, 63

⁴⁹ *The origins of modern English Society* Harold Perkin, Routledge 2002

⁵⁰ Gellner n4, 69

forged during the war, which encompassed every citizen of the Empire. The archives show secret discussions during the Attlee and Churchill governments about controlling Commonwealth immigration, and show that until the 60's such discussions foundered on the economic need for migrant labour and the determination not to control immigration from the old white Dominions (Canada, Australia etc). He also reports from the archives Lord Salisbury's view that the Welfare State was a pull-factor, and quotes from Macmillan's diary that "PM thinks 'keep Britain white' is a good slogan!"⁵¹

David Widgery, in his book *The Left in Britain 1956-1968*,⁵² sums up the period by noting that '*immigration from the West Indies reached a peak in 1958-60 and for Asians in 1963-4, almost precisely in time with the jobs available*'. He continued succinctly: '*the appetite for labour was keen enough to bring women workers and immigrants into the workforce from their sinks and villages*'.

As part of a 1966 survey of race relations in Britain, Radin⁵³ notes how the 1958 Notting Hill and Nottingham riots led to the first official Trades Union Congress (TUC) response. The TUC made clear its opposition to all forms of discrimination. But for several years no formal response was made to grass-roots requests for guidance and suggestions about what to do in their own communities. The introduction of measures to curtail immigration in the Commonwealth Immigrants Bill in 1961 was criticised as 'though not a racial measure in form...its operation is bound to weigh against Commonwealth citizens who are coloured'. The TUC position was firmly that:

'...the most serious social problems facing immigrants to Britain were those which had faced working people for many years and caused hardship to substantial sections of the British public as a whole ... immigrants could best serve their own interests by taking part on an equal footing with other members of the trade union movement which represented their day to day interests as workers, and, through branches and trades councils, provided a means of expression in local and national life'.

It could be argued that this showed a solidarity of class between white and 'coloured' workers, but if so it was very partial, ignoring the controls on entry of wives and children, additional barriers to housing for immigrant families, and not formally confronting racist and prejudiced attitudes amongst the white workforce.

Several national unions and many senior Labour figures formally opposed the CIA 1962, but after the bruising election campaign of 1964 felt forced to make a sharp change in official party policy. A White Paper⁵⁴ proposed further restrictions on entry of Commonwealth citizens, plus conditions limiting lengths of stay and easier deportation procedures, while proposing separate legislation to outlaw race discrimination. There was no wide public debate on these measures, and, despite the significant restrictions and loss of rights proposed, the parliamentary debates on this are notable for speeches on both sides congratulating themselves and each other for taking race and immigration 'out of politics'.

⁵¹ Hennessy (n3 p224).

⁵² *The Left in Britain 1856-1968* Penguin Books 1976, page 14

⁵³ *Coloured Workers and British Trade Unions* Beryl Radin, *Race* vol 8, 1966, Institute of Race Relations [*Race* was later renamed *Race and Class*]

⁵⁴ *Immigration from the Commonwealth* 1965 (draft available online at <http://filestore.nationalarchives.gov.uk/pdfs/small/cab-129-122-c-109.pdf>)

On behalf of the extraparliamentary Left, David Widgery apologises that his book *'reflects the pre-1968 Left's complete lack of interest in the particular situations of woman and immigrants'*. After the particularly stormy election campaigns in 1964 which focused on immigration, a 1966 article in the academic journal *Race*⁵⁵ opened by saying:

'The issue of coloured immigration cannot be shown to have had any significant impact at the 1966 general election...the Bradford Labour Party two generations ago could have been relied on for some spirited idealism typical of the ILP [Independent Labour Party]. Today the party is more likely to adopt more solid 'practical' policies'. After the publication of the (Labour) 1965 White Paper they decided not to make any public statement. [The most important thing for the Party was that] they've stopped talking about it in the clubs'.

The writers described one Labour candidate's view of the White Paper as *'morally disturbing but politically appropriate'*. The Conservatives (in Bradford) had continued to talk about immigration, but, when faced with Labour asking: *'who let all these people in?'* they fell silent.

Widgery says that under Wilson, [Labour] *'was able to proceed along a programme at least as right-wing as Gaitskell's but untroubled by the traditional Left's objections. The party's quite explicit retreat from its internationalist neo-principles on immigration policy went unmarked'*.⁵⁶

What became semi-formal Labour Party immigration policy during the 60's was more or less enacted by the later Conservative government in the Immigration Act 1971. In 1966 Cedric Thornberry, lecturer in law at the London School of Economics, declared⁵⁷ that Labour's 1965 White Paper measures had broken new ground for Commonwealth citizens, removing essential legal rights and effectively reducing them to the status of (undesirable) aliens. However his 1964 Fabian pamphlet *The stranger at the gate*,⁵⁸ edited from a report adopted by the Society of Labour Lawyers, had proposed a structure of immigration control very like that later enacted in the Immigration Act 1971. And that Act precisely reduced the position of both Commonwealth citizens and aliens to 'undesirables', albeit with published criteria for entry and a right of appeal. He makes no critique of any reasons put forward for imposing immigration control, nor provides any economic or political analysis of the underlying motivations for migration, or causes of racism and discrimination in the host country. He concludes: *'Noone suggests that the pattern of wholly unrestricted entry and unqualified asylum of before 1905 should be resurrected'*.⁵⁹

C. 1979-2010 –'bogus asylum-seekers', 'foreign criminals' – and unrestricted immigration?

Immigration as a 'crisis' political issue reemerged in the 80's, in the face of an exponential increase in asylum claims from insignificant numbers in the 80's to over 97,000 claims⁶⁰ in 2001. Government discourse, both Tory and then Labour, paid lip-service to 'genuine asylum-seekers' but concentrated entirely on how to restrict arrivals and how to restrict their rights once here. The 90's saw major immigration legislation, in 1996⁶¹ excluding asylum-seekers from receiving mainstream social

⁵⁵ *Colour and the 1966 general election*, Deakin et al, *Race* vol 8

⁵⁶ Widgery n1 p 199

⁵⁷ *Note on the legal position of commonwealth immigrants* Cedric Thornberry, *Race*, vol 7 1966

⁵⁸ *The stranger at the gate* Cedric Thornberry, Fabian research series 243, August 1964

⁵⁹ *ibid*, p25

⁶⁰ Including dependants

⁶¹ Asylum and Immigration Act 1966

assistance benefits and public housing, and in 1999⁶² setting up an entirely separate welfare and housing system for asylum claimants, in a policy later described as 'destitution by design'.⁶³ Legislation in 2002⁶⁴ enforced a distinction in welfare terms between those who claimed asylum on arrival and those who claimed after passing immigration control.⁶⁵ In 2004,⁶⁶ as well as introducing new immigration offences and determining how asylum-seekers' credibility should be regarded, the appellate system was reorganised again, making 3 times in 10 years, each time in the hope of reducing the numbers of asylum appeals.

Despite these frontal attacks on asylum-seekers' rights from both Tory and Labour governments, there was little coherent *political* opposition. First, there was a shift towards legal campaigning. The introduction of legal aid along with the other welfare reforms in 1948 had gradually led to the growth of new types of lawyer, working in new types of legal practice, consciously aiming to take up legal problems in a strategic way in order to achieve or defend people's rights to housing, benefits, jobs, and, gradually, immigration rights. The introduction of the Human Rights Act in 1998 and the extension of legal aid to immigration tribunal representation in 1999 intensified these trends. So we saw a move away from the more political anti-deportation and anti-racist campaigns of the 80's,⁶⁷ which attempted to make links between lack of opposition to racial discrimination in society and the essentially racial basis of immigration control, and wider economic issues. Instead, campaigns supporting individuals against deportation became more focused on the individual's links with the community and any special needs, rather than on rights and entitlements or economic solidarity. And the major opposition to curtailment of asylum-seekers' rights was based on large-scale legal actions.⁶⁸

Secondly, broader issues of race and racial discrimination in British society have become unhooked from issues of economic and social class, and concentrated more on identity and recognition. The germ of this may have been in the 50's and 60's support for legal sanctions against racial discrimination, alongside a failure to confront the lack of housing, school places, jobs and health provision in those areas where the arrivals of growing numbers of immigrants had exacerbated already serious local issues, allowing prejudice to turn into actual opposition to immigration. Instead of campaigning about and remedying those shortages, during the 80's and increasingly under Labour from the late 90's, especially Labour-run local authorities became the spearheads of race equality campaigns, leading to a particular political conception of multiculturalism which has led to the 'identity politics' of today. Kenan Malik, writer, lecturer and broadcaster, summarises the process:⁶⁹

⁶² Immigration and Asylum Act 1999

⁶³ *Destitution by Design* was the title of a report published by Ken Livingstone's London Mayoral office in 2004, arguing that the government was using destitution as a tool by which to deter asylum-seekers from coming to the UK

⁶⁴ Nationality, Immigration and Asylum Act 2002

⁶⁵ Both the 1996 Act and the 2002 Act gave rise to streams of High Court injunctions, the 1996 ones leading to the setting up of NASS and the provision of support and accommodation to asylum-seekers in 'dispersal areas' and in 2002 eventually to the case of *Limbuella*, arguably the high point of legal activism. [*Adam, Limbuella & Tesema v SSHD*, [2005] UKHL 66]

⁶⁶ Asylum and Immigration (Treatment of Claimants) Act 2004

⁶⁷ For example Viraj Mendis, https://en.wikipedia.org/wiki/Viraj_Mendis and Josephine Yirenyi, who obtained the formal support of both LB Ealing and LB Hammersmith & Fulham Councils for her campaign, as well as a number of local trade union branches.

⁶⁸ See n62 above

⁶⁹ *What is wrong with multiculturalism – part 1* from a 2012 lecture published on Pandaemonium <https://kenanmalik.com/2012/06/04/what-is-wrong-with-multiculturalism-part-1/>

...[Multiculturalism] has, in recent years, come to have two meanings that are all too rarely distinguished. The first is what I call the lived experience of diversity. The second is multiculturalism as a political process, the aim of which is to manage that diversity. The experience of living in a society that is less insular, more vibrant and more cosmopolitan is something to welcome and cherish. It is a case for cultural diversity, mass immigration, open borders and open minds.

As a political process, however, multiculturalism means something very different. It describes a set of policies, the aim of which is to manage and institutionalize diversity by putting people into ethnic and cultural boxes, defining individual needs and rights by virtue of the boxes into which people are put, and using those boxes to shape public policy. It is a case, not for open borders and minds, but for the policing of borders, whether physical, cultural or imaginative.

The conflation of lived experience and political policy has proved highly invidious. On the one hand, it has allowed many on the right – and not just on the right – to blame mass immigration for the failures of social policy and to turn minorities into the problem. On the other hand, it has forced many traditional liberals and radicals to abandon classical notions of liberty, such as an attachment to free speech, in the name of defending diversity. That is why it is critical to separate these two notions of multiculturalism, to defend diversity as lived experience – and all that goes with it, such as mass immigration and cultural openness – but to oppose multiculturalism as a political process.

...

Throughout the Sixties and Seventies, four big issues dominated the struggle for political equality: opposition to discriminatory immigration controls; the struggle against workplace discrimination; the fight against racist attacks; and, most explosively, the issue of police brutality.... Local authorities in inner city areas pioneered a new strategy of making black and Asian communities feel part of British society by organising consultations, drawing up equal opportunity policies, establishing race relations units and dispensing millions of pounds in grants to minority organisations. At the heart of the strategy was a redefinition of racism. Racism now meant not simply the denial of equal rights but the denial of the right to be different.

This has affected wider politics in three ways. First, 'minority groups' are represented as fixed cultural entities all holding the same opinions, and treated as unable and unwilling to change their own views of themselves. And thus, because political multiculturalism requires respect for their differences, even 'harmful cultural practices'⁷⁰ can be criticised from outside only with difficulty. Secondly, it is often argued that others not part of a given group cannot ever (whether by study, enquiry or by political discussion) fully understand the subjective experience of being in that group, and so cannot ever truly campaign for political change for people in that group. Whereas the reality of migrant experience is that their culture and their individual ambitions are changed by living in the host country, integrating whether by work, marriage or friendship into a new more mixed society and identifying only partially or not at all with 'their' minority. Moreover, many individuals have moved along a trajectory of political integration, for example having arrived as refugees and becoming involved in community activity on behalf of refugees, then joining a mainstream political

⁷⁰ As female genital mutilation, forced marriage etc are euphemistically termed

party and standing for election to represent an entire local community with similar *political* ideas, not as “the Muslim candidate” or even “the ethnic minority candidate”.

However with the advent of identity politics those possibilities of solidarity of class, workplace, estate or community, aiming to achieve any material improvement in rights, entitlements or living standards, are rendered more difficult, as political discussion has to overcome barriers of acute distrust and real fear of ‘causing offence’.

Extraordinarily, this process, so corrosive of progressive and universalist politics, has taken place while successive Tory, Labour, Coalition and Tory governments nationally were instituting anti-immigrant policies *aimed at those already in the UK, many with legitimate expectations of being able to remain permanently*. For example, Labour moved from its 1998 White Paper⁷¹ broadly supporting integration to the virtually opposite policies of lengthy probationary periods for settlement and a proposal for ‘earned citizenship’ as well as the ‘automatic deportation’ of foreign criminals. The Coalition and Tory government’s aim to ‘reduce net migration to the tens of thousands’ has led to the introduction of ‘hostile environment’ policies, designed to root out ‘illegal migrants’ but in fact affecting large cohorts of legal migrants with expectations of settlement.⁷² Until very recently, this has taken place virtually without political debate, on the assumption that public opinion is firmly anti-immigrant.⁷³ Only the recent ‘Windrush’ debacle, discussed below, has shown politicians that public opinion may have shifted.

A subsequent Conservative complaint is that Labour 1997-2010 had, contrary to popular understanding, encouraged unrestricted immigration. The Daily Telegraph, Migration Watch and the Daily Mail⁷⁴ all reported (in 2009) the revelations of a former Labour adviser. He referred to an unpublished version of a Barbara Roche speech: *“Earlier drafts I saw also included a driving political purpose: that mass immigration was the way that the Government was going to make the UK truly multicultural. I remember coming away from some discussions with the clear sense that the policy was intended – even if this wasn’t its main purpose – to rub the Right’s nose in diversity and render their arguments out of date.”* The Daily Express refers to a book⁷⁵ making ‘shocking claims’ that Tony Blair led ‘a massive conspiracy to flood the country with millions of migrants’. (The Observer’s reviewer commented: ‘... So secret that immigration was on the front page of the newspapers most weeks’.)⁷⁶

Certainly, work-based immigration was permitted to expand and foreign students were encouraged, especially after the introduction of the points-based system in 2007. And no limits were imposed on free movement of nationals of the 8 new EU accession countries in 2004, and many more arrived

⁷¹ *Fairer, Firmer, Faster* Cm 4018 <https://www.gov.uk/government/publications/fairer-faster-and-firmer-a-modern-approach-to-immigration-and-asylum>

⁷² See n5

⁷³ It is often argued that the rise of UKIP and the Brexit vote show that public opinion is indeed firmly anti-immigrant. It is the author’s view that such is the *result* of the lack of debate of the issues.

⁷⁴ Daily Telegraph 23/10/2009 <https://www.telegraph.co.uk/news/uknews/law-and-order/6418456/Labour-wanted-mass-immigration-to-make-UK-more-multicultural-says-former-adviser.html> Daily Express 27/2/2016 <https://www.express.co.uk/news/uk/648008/Tony-Blair-Labour-immigration-asylum-seekers-UK-Brexit-EU-referendum> Migration Watch (undated) <https://www.migrationwatchuk.org/press-article/83> ; all accessed 1/8/18

⁷⁵ *Broken Vows: Tony Blair – the tragedy of power* Tom Bower, 2016

⁷⁶ <https://www.theguardian.com/books/2016/mar/13/broken-vows-tony-blair-tragedy-power-review-tom-bower>

than had been anticipated. But certainly from Home Secretary David Blunkett's 2002 White Paper *Secure Borders, Safe Haven*⁷⁷, the headline narrative, policies and laws introduced by the Labour government, as with the Conservative government before it, were directed at the protection of UK society and the UK welfare system from 'bogus' asylum-seekers, 'illegal' migrants and 'foreign criminals', and emphasised the need for existing migrants to show 'loyalty' and 'earn' their right to stay.

Part 5 – the legal background to why 'only victims can win'

A – 1960s - 2010

The first family migration cases heard by the European Commission on Human Rights came from UK applicants in 1966. The applicants' lawyers argued that once a migrant was settled in a host country, his family were entitled to choose to live together in that country. Against this the UK government put the now-familiar argument that a State had complete sovereignty over entry of aliens, and that a refusal to let a family member join a settled person did not even engage art 8. The Commission gave 3 reasons for dismissing the applications. First, the Convention did not refer to immigration at all, and migrants' rights emerge in the Convention only indirectly. Secondly, it was the aliens' choices to emigrate and divide their families. Thirdly, a defendant State does not have to explain or justify how it understands the country's best interests in relation to migration policy.

In 1980, 3 applicants⁷⁸ applied to the ECtHR to challenge the gender bias in the 1980 Immigration Rules. The case formally sets the boundaries for family migration:

Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. [67]

(As in the *East African Asians* case the court was prepared to rule on the discrimination issue, and decided that it was unlawful to make it more difficult for husbands to join settled wives than for migrant men to join their spouses).

Dembour⁷⁹ argues that this position was not inevitable. The Commission could have made a free-standing analysis of what the terms of article 8 might mean *for migrants*. However, in the *ABC* case the ECtHR put the interests of the State before those of the applicant families. In Dembour's view, this necessarily relegates Convention rights to applying only in exceptional cases, since State sovereignty is accepted to be the default position. Since then, art 8 litigation has consisted of haggling over what counts as an exception. Further, victory in an individual case does not necessarily force a State to change its policy since each case has individually to be determined as exceptional. The task facing human rights lawyers, and the fate of their clients, became to show why their circumstances are exceptional: and gradually the accumulated facts of decided cases⁸⁰ built up into a

⁷⁷ *Secure Borders, Safe Haven* Cm 5387, February 2002

⁷⁸ *Abdulaziz, Cabales and Balkandali*. 9214/80, 9473/81, 9474/80

⁷⁹ See n4

⁸⁰ *Sen v. the Netherlands*, 31465/96 § 31; *Tuquabo-Tekle & ors v The Netherlands*, 60665/00, 1 March 2006; *Sezen v Netherlands* [2006] 43 EHRR 30; *Mokhrani v France* (2203) 40 EHRR 123 para 33; *Gül v. Switzerland*, 23218/94, Council

set of guidelines on what family and private life *mean* in relation to art 8 ECHR. In the UK, *Mahmood*⁸¹ introduced the requirement that for an art 8 claim to succeed there need to be 'insurmountable obstacles' to the family's living together in the migrant's country; and a settled partner's knowledge of the 'precarious' status of a migrant partner weakened the family's case. After that, the UK courts' application of art 8 rights took a slightly more liberal position than the ECtHR, considering 'reasonableness' rather than 'insurmountable obstacles', and deciding that it would be rare to require a UK-born spouse to accompany a partner to live abroad.⁸²

However, until the Coalition government's measures, relatively few applicants needed recourse to art 8 ECHR. Not just family migrants but also many workers and students had clear paths to extending stay and even settling in the UK, with long-standing requirements both affordable and relatively simple to understand (such as 'able to maintain themselves without recourse to public funds'). Application fees were moderate. Both specific Home Office policies and a widely applied general discretion were exercisable for people who did not meet the rules, such as 'unlawful' migrants with long residence in the UK or married to British citizens. The Immigration Rules required that evaluation of such cases included considering links with the community and other positive attributes. The Coalition and subsequent Tory Governments' removal of many rights and grounds of appeal, withdrawal of legal aid from immigration cases along with actual cuts in rights and entitlements for wide categories of migrant left not just family migrants but others abruptly cut off from their potential future in the UK, unless they could bring themselves into the 'new rules' characterisation of 'exceptional'.

B - The 2010 elections, the Coalition government and Theresa May as Home Secretary

As we saw in **Part 2 above** the 2012 'new rules' significantly restricted the conditions of entitlement for family members to enter and settle in the UK, and sought to curtail access to art 8. The new Appendix FM of the Rules starts:⁸³

'... [This route] reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others'

At first sight, the rule changes may have looked like an improvement. Previously, those unlawfully present and seeking regularisation had recourse to policy statements and discretion, but had no right of appeal against refusal. In contrast, the 'new rules' provided a clearly-defined 'route to settlement' even for 'unlawful' applicants, and an in-country right of appeal against refusal.

However, those improvements came at a significant price. First, the 'routes to settlement', coupled with the removal of access to public funds except for truly exceptional applications, and the frankly

of Europe: European Commission on Human Rights, 10 October 1994; *Berrehab v The Netherlands* (1988) 11 EHRR 322; *Moustaquim v Belgium* (1991) 13 E.H.R.R. 82; *Beldjoudi v France* (1992) 14 EHRR 801

⁸¹ *Mahmood* [2000] EWCA Civ 315

⁸² *Razgar* [2004] UKHL 27, *Beoku-Betts* [2008] UKHL 39, *VW (Uganda)* [2009] EWCA Civ 5, *AB (Jamaica)* [2007] EWCA Civ 1302, *AB (Jamaica)* [2007] EWCA Civ 1302

⁸³ Immigration Rules Appendix FM para GEN 1.1

shocking increases in application fees since 2012,⁸⁴ has created a large underclass of migrant and ‘mixed’ families existing in what the Tribunal has defined as ‘precarious’ immigration status,⁸⁵ lasting many years with receding hope of being eligible for, or affording the fees for, indefinite leave, let alone citizenship. Many migrants with meritorious applications remain or become unlawfully present because they cannot afford the fees. Arguably, it is government policy which is ‘creating illegality’, driving people to have to rely on art 8 ECHR.

This very reliance on art 8 ECHR has led to intense litigation. The caselaw has not just agonised over whether an appellant meets the new requirements of ‘exceptional circumstances’, ‘insurmountable obstacles’, ‘undue’ hardship’, ‘significant obstacles to integration’, etc. The Home Office argued that, in whole classes of cases, art 8 did not even apply. Eventually a series of Upper Tribunal decisions during 2013, almost all concerning deportation appeal for ‘foreign criminals’ with family in the UK,⁸⁶ held that the Rules do not deal with every aspect art 8 rights: the Home Office must still consider each person’s art 8 rights individually, and the Home Office must continue to follow the previous decisions of the UK courts. Then it took until the 2017 Supreme Court decision in *MM (Lebanon)*,⁸⁷ some five years after the ‘new rules’ were introduced, to deal with the fact that the structure of the ‘new rules’ excluded those applying from outside the UK from any formal discretion in the rules themselves.⁸⁸ On the main issue the Supreme Court decided that the minimum income requirements were not incompatible with art 8 ECHR (because discretion was always theoretically available), but the Guidance on considering exceptional circumstances was inadequate. The rules were then amended to introduce a 2-tier analysis of exceptionality:⁸⁹

...where there are **exceptional circumstances** which could render refusal of entry clearance or leave to remain a breach of Article 8 of the European Convention on Human Rights, because such refusal could result in **unjustifiably harsh consequences for the applicant, their partner or a relevant child**; then [an applicant can put forward evidence of 3rd party support (e.g. financial help from their family)].

In another significant shift to the need for exceptionality, a separate formal requirement to consider a person’s age, length of residence in the UK, family, work and other associations with the UK, as well as character, domestic and compassionate circumstances, before making a removal decision (Para 395C of the Immigration Rules), was replaced by a new para 353B, setting out ‘exceptional circumstances’ which would be taken into account when considering a person’s ‘further submissions’, limited to ‘character, conduct and associations including any criminal record...’ and ‘compliance with any previous conditions...’ The 2014 case of *Oludoye*⁹⁰ stated:

⁸⁴ Kent Law Clinic evidence 12/7/18 to the ICIBI on Home Office approach to charging for services – pdf is available

⁸⁵ *AM (S 117B) Malawi* [2015] UKUT 0260 (IAC); *Deelah and others (section 117B - ambit)* [2015] UKUT 00515 (IAC); [Rhuppiah v Secretary of State for the Home Department \[2016\] EWCA Civ 803](#)

⁸⁶ *MF Nigeria* [2013] EWCA Civ 1192 (‘complete code’); *Nagre*, [2013] EWHC 720 (Admin) (a further threshold to meet?); *SS (Congo) & Ors* [2015] EWCA Civ 387 (exceptional; compelling)

⁸⁷ *MM (Lebanon) & Ors, R(on the applications of) v Secretary of State and another* [2017] UKSC 10

⁸⁸ The entry clearance rules in Appendix FM did not, until *MM* was decided, contain any provision for discretion, whether analogous to para EX.1 available for in-country applications, or at all.

⁸⁹ Immigration Rules Appendix FM GEN 3.1(1)

⁹⁰ *Oludoyi & Ors, R (oao) v Secretary of State for the Home Department (Article 8 – MM (Lebanon) and Nagre)* (IJR) [2014] UKUT 539 (IAC), para 43

the notion that a good immigration history on the part of an individual somehow reduces (at all or to any significant extent) the weight that would ordinarily attach to the state's interests in immigration control [is misconceived] ...

The tribunal stated that Ms Oludoyi's being a nurse, which was a 'shortage occupation' in immigration terms, did not count as an 'exceptional' circumstance. In other words, only victims could win.

A similar change took place in the rules concerning deportation. Para 364 of the Rules had for many years required a similar list of 'factors' to be considered before making a decision to deport. The case of *N (Kenya)*⁹¹ held that even after the introduction of the automatic deportation provisions in the Borders Act 2007, '*In substance, the Article 8 proportionality question and the paragraph 364 balance are the same*'. However, the 2012 rule changes on deportation deleted all the positive factors previously contained in para 364, and require that the outcome for family members would be 'unduly harsh', or that there would be 'very significant obstacles to integration' in the destination country. And if those requirements are not satisfied, *the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above [those set out in the rules]*. And just as a good and useful life can no longer assist a non-criminal family life applicant, rehabilitation is no help to a foreign criminal. In *Danso*,⁹² the Court of Appeal said '*rehabilitation of the kind exhibited by the appellant in this case is not uncommon and cannot in my view contribute greatly to the existence of the very compelling circumstances required to outweigh the public interest in deportation*'.

A further change introduced via the Immigration Act 2014 turned the 'screw' of requiring exceptionality still further. Section 117B Nationality, Immigration and Asylum Act 2002 now sets out **public interest considerations applicable in all cases** relying on art 8. In particular, primary legislation now states that:

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

The Upper Tribunal has since interpreted the definition of 'precarious' in s117B as encompassing any migrant who does not have settled status (ILR) or British citizenship.⁹³ These decisions arguably prevent the application of art 8 in precisely those cases which need it.⁹⁴

In its 2011 consultation paper on proposed cuts to legal aid for immigration applicants⁹⁵ the Ministry of Justice asserted that migrants seeking to enter or remain in the UK for non-protection reasons were exercising a choice and thus did not merit public expenditure on legal aid for them. Representations before and during the parliamentary debates concentrated on specific categories of vulnerable people, such as children, those experiencing domestic violence, victims of trafficking: and

⁹¹ *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094, para 54

⁹² *Danso v SSHD* [2015] EWCA Civ 596 [20]

⁹³ *AM (S 117B) Malawi, Rhuppiah* fn82 (*Rhuppiah* is due to be heard in the Supreme Court)

⁹⁴ *Private life in the balance: constructing the precarious migrant* Richard Warren, *Journal of Immigration, Asylum and nationality law* vol 30 no 2, 2016. The Court of Appeal in *Rhuppiah* opened the door to revisiting this, and the Supreme Court will consider it this year

⁹⁵ *Proposals for the reform of legal aid in England and Wales* MOJ November 2010

the eventual legislation⁹⁶ included some very limited exceptions.⁹⁷ In fact for a large proportion of non-asylum migrants, the true 'clients' are the (ordinary, non-exceptional) British or settled families of those applicants,⁹⁸ for whom the 'choice' to go and live in the migrant's country of origin involves the loss of their whole lives in the UK, including work, accommodation, loss of their children's access to education and the chance to grow up in the UK: and thus 'unreasonable' as found by previous UK court decisions. Some may have imagined that considering those families' art 8 rights would take account of those issues. However we have seen above that the interpretation of art 8 enshrined in the 2012 'new rules' covering family and private life rules and deportation of 'foreign criminals', was both far more restrictive and far more complicated.⁹⁹ This has left 'ordinary families' not just without legal recourse but without champions, as campaigns, charitable grants, research projects as well as individual tribunal and court judgments have concentrated on specific categories of vulnerable applicants.

Part 5 – postscript on Windrush and conclusion

I believe that the extracts I have presented from 2 important parliamentary debates on UK immigration control measures expose big differences between the way the major political parties approached immigration issues in the 2 different political circumstances over 40 years apart. In relation to the 1968 debate I have provided some short accounts and references intended to open a window into how immigration and race issues were approached in trade unions, local politics and in wider society at that time, so as to provide context for the main parties' political positions in the passage of the Commonwealth Immigrants Act 1968. I then briefly touched on immigration issues as they arose from the 80's onwards, in a very different political context. I have described how, during a long period of unvarying hostility from the main parties directed against asylum-seekers, illegal migrants etc, political discourse on race moved completely away from traditional left-wing economic and social analyses into a more subjective concern with self-definition. I argue that these political trends have left little room in which to build solidarity between crucial groups all with claims to 'belong': between British citizens and settled migrants, those on long and precarious routes to settlement, and those defined as 'unlawful' but waiting for an application to be dealt with or simply unable to leave. (Many individual families contain people in all these categories). I believe it is those political trends which have left the field open both to narrow campaigns 'against migrants' and to major government attacks on migrants' rights and entitlements with no effective opposition.

I then set out the story of how the legal interpretation of human rights in immigration has led in the realm of family and private life to an interpretation that the state's right to control immigration and to determine what is in the public interest is unvarying. This inevitably leaves the rights of each individual relying on family and private life having to be justified as exceptions to that principle. A series of ECtHR describing the types of family situations which may attract the protection of art 8

⁹⁶ Legal Aid, Sentencing and Punishment of Offenders (LASPO) 2012

⁹⁷ Victims of trafficking, victims of domestic violence (only under certain circumstances), unlawful detention, and judicial review (with exceptions): to which list, after 6 years, unaccompanied children have just (12/7/18) been added - <http://strategiclegalfund.org.uk/news/government-forced-into-a-u-turn-on-legal-aid-for-unaccompanied-migrant-children.php> accessed 30/7/18

⁹⁸ As the writer argued in the Immigration Advisory Service submissions to that consultation

⁹⁹ See York, Sheona (2015) *Immigration Control and the Place of Article 8 in the UK Courts - an update*. Journal of Immigration, Asylum and Nationality Law, 29 (3). pp. 289-307. ISSN 1746-7632

then provided some guidance to national courts. I have shown how the slightly more liberal interpretation by the UK courts (against a background of virtual obsession with the need to deport foreign criminals) led to the Coalition government's determination to curtail recourse to art 8. I showed how the parliamentary discussion of the 'new rules' took place in a procedural cul-de-sac, but more importantly that by 2012 there was very little courage in the mainstream parties to discuss immigration except by restating the need to reduce numbers, deport foreign criminals and remove illegals. The main opponent to the 'new rules' in the 2012 debate was a Scottish Nationalist, and virtually his only supporters were – Jeremy Corbyn and John McDonnell. None of them prayed against the 'new rules'. I show how, in the legal arena, the retreat to the 'exceptional' has continued, to the point that it requires a medical or social work report to show that splitting a family would have an 'unduly harsh' effect on a child: and in a thankfully unreported Tribunal case, a judge decided that a person who was dying did not have 'very significant obstacles' to his reintegration into his home country.

Can only victims win? Are we reduced to this? Earlier this year, the 'Windrush' debacle broke into the news. Many thousands of migrants who had entered the UK in the 50's and 60's by right, whether as CUKCs or Commonwealth citizens who acquired the right of permanent settlement, and who had needed no documents to prove this, had begun to be trapped by the various 'hostile environment' measures in the Immigration Acts 2014 and 16, and in particular the need to show extensive original documentation to prove immigration status and other rights. Many have lost jobs, homes and faced deportation or refusal of health treatment. Facing significant public pressure, the government has introduced special measures to assist those affected. On 21 August 18 people thought to have been wrongfully deported received a formal apology.¹⁰⁰

For the first time in many years, the effects of immigration policy faced the public scrutiny of ordinary people. It became clear that ordinary people, like them and including them, faced loss of jobs, accommodation, right to medical treatment, etc, because of government policy and Home Office bureaucratic incompetence. Sajid Javid, the new Conservative Home Secretary, whose parents had emigrated to the UK from Pakistan in the Sixties, said that upon learning about the treatment of the post-war Windrush migrants: 'I thought that could be my mum ... my dad ... my uncle ... it could be me.'¹⁰¹ He rapidly disowned the 'hostile environment' (preferring to speak of a 'compliant environment') and halted some of the 'hostile environment' measures, explicitly in fear of wrongly depriving yet more 'Windrush' people of their rights. The 'Windrush' saga has been accompanied by a major series of articles in the Guardian covering that and other aspects of current immigration laws, such as the lengthy 'routes to settlement', the high application fees and the great difficulties of keeping families together and bringing up children as 'precarious' migrants. Some of these issues have been responded to – there is now to be a formal inspection into the Home Office fee charging policy.¹⁰² Thus there have been very brief glimpses of a world in which politicians could not simply rely on a presumed general public hostility to migrants. However at the time of writing, it is impossible to say whether any life can be breathed into the politics of solidarity, so as to achieve any significant change in UK immigration policy.

¹⁰⁰ <https://www.bbc.co.uk/news/uk-45258866> .

¹⁰¹ Daily Telegraph [and everywhere else] 29/4/18

¹⁰² <https://www.gov.uk/government/news/work-in-progress>

What are the wider implications of all this? Home Secretary Theresa May stated in 2012 that those 'new rules' represented taking back control of migration decisions from the judiciary. However, the legal interpretation of those rules has left only a diminishing space available to 'the vulnerable'. In my view, the collapse of solidarity in wider politics has thus led to an abdication to the judiciary of *political* responsibility for determining who could enter or stay in the UK. Not just that 'only victims can win' but it is the judges who decide.

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