A Critical History of the Role of the Immigration Tribunal in Claims to Remain by Long Resident Non-Citizens

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Abstract

In this thesis, I engage in a detailed consideration of the history of the immigration tribunal and the different ways that disputes over immigration status have been conducted. I take an original approach by considering the immigration tribunal in the wider social and political context, as a public forum where arguments about what it means to belong in the UK are deployed, contested and crystallised in judicial discourse. I bring together deportation studies literature and critical human rights literature to a diachronic study of claims-making by long resident non-citizens in the immigration tribunal. I argue that a greater understanding of the development of the role of the courts in immigration decision making is necessary to understand recent legal developments. This involves an original analysis of previously unconsidered archive documents to develop a critical historical narrative, combined with an analysis of caselaw to illuminate the changing role of the tribunal in addressing claims to remain by long-resident non-citizens facing deportation.

This thesis shows how immigration tribunals have emerged at specific times in the 20th century and have often been introduced in parallel to restrictive legislation in order to create the impression that executive action is not arbitrary. I argue that the Home Office has in the past displayed an institutional antipathy to the judiciary in immigration decision-making, but at certain periods it has been expedient for the government to make use of immigration tribunals. The existence of the immigration tribunal has allowed the government to depoliticise controversial decisions by reframing moral/political decisions as legal decisions to be considered by neutral judges, channelling political opposition into the realm of law.

I also consider the tribunal as a space where the border is enacted. The tribunal provides a forum in which a long resident non-citizen and those supporting him can contest that person's official construction as someone who does not belong to a community in the UK. Yet whilst the tribunal provides this forum for alternative narratives to be put forward, I argue that by utilising the restrictive language and structure of the law, an immigration appeal can provide a space where such narratives are neutralised and ultimately subjugated to that of the state - effectively reframed as the logical outcome of a legal process.

Finally, this thesis considers the limits of human rights law in protecting the rights of long resident non-citizens and the need for renewed political debate on the wider consequences of reducing the security of non-citizens' residence.

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List of Abbreviations

AIT – Asylum and Immigration Tribunal

CAB – Cabinet Office

CIO – Chief Immigration Officer

CJEU – Court of Justice of the European Union

CUKC – Citizen of the UK and Colonies

DCA – Department for Constitutional Affairs

ECHR – European Convention of Human Rights

ECtHR – European Court of Human Rights

FCO – Foreign and Commonwealth Office

FO – Foreign Office

FTT – First Tier Tribunal

HO – Home Office

IAA – Immigration Appellate Authority

IAC - Immigration and Asylum Chamber

IAT – Immigration Appeal Tribunal

KCC – Kent County Council

LCO – Lord Chancellor's Office

LMA – London Metropolitan Archives

MOJ – Ministry of Justice

SSHD – Secretary of State for the Home Department

TNA – The National Archives

UT – Upper Tribunal

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Aliens Order 1920

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Aliens Restriction Acts 1919

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Asylum (Treatment of Claimant's) Act 2004

British Nationality Act (BNA) 1981

British Nationality (Proof of Paternity) Regulations 2006

Children's Act 1989

Extradition Act 1870

Commonwealth Immigrants Act 1962

Commonwealth Immigrants Act 1968

Crime and Courts Act 2013

Human Rights Act (HRA) 1998

Immigration Appeals Act (IAA) 1969

Immigration Act (IA) 1971

Immigration Act (IA) 1988

Immigration and Asylum Act (IAA) 1999

Immigration, Asylum and Nationality Act (IANA) 2006

Immigration Act (IA) 2014

Immigration Act (IA) 2016

Immigration Appeals (Procedure) Rules 1984 SI 2041/1984

Immigration (Restricted Right of Appeal against Deportation) (Exemption) (No. 2) Order 1988

Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012

Nationality, Immigration and Asylum Act (NIAA) 2002

National Assistance Act 1948

National Health Service Act 2006

National Health Service (Charges to Overseas Visitors) Regulations 2015

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Berrehab v Netherlands [1988] ECHR 14

Boultif v Switzerland [2001] ECHR 497

Chahal v United Kingdom [1996] ECHR 54

Dano [2014] EUECJ C-333/13

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Chapter 1: Introduction

In May 2018 it was widely reported that the 'Spiderman' of Paris would be granted French citizenship. Mamadou Gassama (MG), an undocumented Malian migrant residing in France at risk of deportation, was hailed by President Emmanuel Macron as a national hero when he rescued a young child dangling from the balcony of a fourth-floor Paris flat. He was promised documents allowing him to stay and a fast-track process to gain nationality. A government spokesman stated that *'This act of immense bravery, faithful to the values of solidarity of our republic, should open the door to him to our national community.'*[1] Also that month DW[2] was granted permission to remain in the UK following an appeal. A long-term lawful resident for more than 40 years since the age of four, DW faced deportation for a one-off serious crime. He was granted residence on the grounds that his human rights under Article 8 European Convention of Human Rights (ECHR) would be breached if he returned to Nigeria as the impact would breach his right to private life.

These stories exhibit different approaches to the question of membership of a community. MG was judged worthy of community membership, despite limited actual residence in France, based on a discretionary executive decision for a single act of bravery. The decision is political in the sense that it is open to approval or criticism by the electorate. Macron was responding to perceived public support for MG to remain. By contrast DW was deemed by the state to be unworthy of membership of the community, despite years of actual residence and social ties, based on a single act of criminality. Public support from his local community was of little relevance since the public interest was deemed to require his deportation. The government believed that the law, approved by a democratically elected Parliament, mandated his automatic deportation; his presence was not conducive to the public good. The decision was reversed by the judiciary, applying technical legal tests. This meant that were he to be removed he would be a 'victim' of human rights breaches. The ultimate decision on membership is a legal one and the judge is not directly accountable to the electorate.

[1] Kim Willsher, ''Spider-Man' of Paris to get French citizenship after child rescue', *The Guardian* (29 May 2018) www.theguardian.com/world/2018/may/28/spider-man-of-paris-to-get-french-citizenship-after-rescuing-child accessed 4th October 2020.

[2] A case study which the author has personal experience of.

This thesis is concerned with immigration decision-making; specifically, with discretionary decisions concerning whether a long resident non-citizen should be accepted for membership of a community. It asks how such decisions are made, what role is played by the immigration tribunal and in what ways this has shifted over time.

Many studies of immigration decision-making place the subject within the realm of administrative law, where immigration status is equated to something like a benefit which the state confers on an applicant. The Home Office and tribunal are studied as part of the administrative apparatus of the state faced with making large numbers of decisions and as such must balance the competing interests of fairness, efficiency and cost effectiveness.[3] In this thesis it is argued that the decision-making with which I am concerned is qualitatively different from other areas of administrative decision-making. Whilst a decision to grant someone entry clearance as a student may be similar in substance to an individual being awarded a discretionary benefit, decisions to deport or deny status to a long-term resident are fundamentally decisions about membership and belonging. Whilst they may not be the same as decisions to grant citizenship and thus full political membership, they are nevertheless decisions about membership of a social and economic community, which promises the prospect of full political membership at a later date. They touch on issues such as an individual's identity and sense of belonging. They are decisions that are not just about the individual, but also reflect the wider community of value[4] to which that individual aspires to belong. The legal discourse generated by such decisions can reveal how that community constructs the boundaries of membership and its sense of belonging.

Currently in the UK, criteria for entry and residence are established by detailed immigration rules produced by the executive with some limited parliamentary scrutiny.[5] A failure to continue to meet the rules will normally render someone liable to removal, yet there is always the possibility of discretion being exercised to allow an individual to remain. It is these discretionary decisions that this thesis focusses on.

[3] See Robert Thomas, *Administrative Justice and Asylum* Appeals (Oxford & Portland 2011); Michael Adler *Administrative Justice in Context* (Oxford 2010).

[4] Bridget Anderson, *Us and Them? The Dangerous politics of immigration* (OUP 2013).

[5] They are subject to the negative resolution procedure. A rejection within 40 days leads to an obligation on the Home Secretary to propose new rules but does not annul them (Immigration Act 1971, s3(2)). In practice, they are subject to change numerous times each year and have only ever been rejected by Parliament on two past occasions.

There are three different scenarios:

1. A person has not been formally accepted to membership of the community (e.g., they have entered illegally, or claimed asylum and were refused) but through delay or inaction by the state they have become integrated in the community – at what point should they (if ever) be accepted as a member?
2. A person has been accepted as a temporary lawful member of the community, but is now faced with removal[6] after becoming engaged in the life of a community – should their membership be revoked?
3. A person has been accepted as a permanent member of the community, but has now committed some offence against the community - should their membership be revoked?

Each scenario raises questions about how such decisions are made.

Firstly, which branch of government should be responsible for the final decision? Who takes ultimate responsibility for such decisions? Secondly, how much discretion should be given to the individual decision-maker? What factors should be taken into account as relevant? And thirdly, what involvement should be permitted from the wider community? At what level does such input matter – at the level of legislation, or at the level of implementation? This thesis explores how the answers to these questions have shifted over time, the reasons for this and the wider significance.

The intention of this research is to take a historical perspective, by focusing on the development of the immigration tribunals to explore the role of the judiciary and its interface with the community and politicians in how these decisions are taken.

[6] The reasons they are subject to removal may be due to a change in their individual circumstances which prevent them from meeting the mandated criteria for a renewal of leave (e.g., illness, loss of employment or failure to increase income, relationship breakdown or other unforeseen circumstances), due to a mistake in their application (either caused by the applicant or by the decision-maker) or due to an unexpected policy change, preventing them from obtaining further leave on the same basis that they entered.

Necessity of the Research

The genesis for this research emerged out of concern over the consequences of a series of changes to the appeal rights of non-citizens facing deportation or removal[7] from the United Kingdom. The Immigration Act 2014 removed most rights of appeal for those facing deportation or removal.[8] What is left is a right of appeal against a refusal of an asylum or human rights claim. At that time a further change restricted even this right of appeal from within the country to those who are classed as foreign national criminals, and the Immigration Act 2016 expanded this principle of 'deport first, appeal later' to all non-citizens who are refused leave to remain.[9] These changes follow amendments to the provision of legal aid which have removed legal aid in nearly all immigration cases,[10] making it in practice very difficult for an individual facing deportation to challenge that decision. The consequences are that in some cases individuals, born and raised in the UK, may be deported to a country where they have never lived. They have limited opportunity to present their case before an immigration judge prior to removal to argue that they 'belong' in the UK. Parallel to this, recent legislative developments have formalised in law the category of the 'precarious' migrant, whose claim to remain in the UK based on long residence should be accorded little weight by the tribunal.[11] Thus there has been a significant reduction in the rights of non-citizens resident in the UK and their ability to hold the state to account. Increasingly the law is being utilised to create new categories of precarious non-citizens who either face removal or remain in the UK, but are denied the ability to participate in society on equal terms with citizens. These changes raise a number of questions: Why was the immigration tribunal ever established? Why was it conceived that non-citizens deserved a forum in which to plead their

[7] It is important to note that in current UK law there are distinct powers of deportation (Immigration Act 1971, s3) used primarily against settled migrants where their presence is not conducive to the public good and administrative removal (Immigration and Asylum Act 1999, s10) used against those without leave to remain. Historically, deportation was the sole power used against settled migrants and those who overstayed their leave. These developments are discussed in the thesis.

[8] Immigration Act 2014 (IA 2014) pt2 ss15-19.

[9] Immigration Act 2016, s63. It was subsequently found to be operating unlawfully (see *R (Kiarie and Byndloss) v SSHD* [2017] UKSC 42) though the Home Office is attempting to introduce a process of video hearings from abroad (See *CJ (international video-link hearing: data protection) Jamaica* [2019] UKUT 00126 (IAC)).

[10] Legal Aid, Sentencing and Punishment of Offenders Act 2012.

[11] IA 2014, s19. See Richard Warren, 'Private Life in the Balance: Constructing the Precarious Migrant' (2016) 30(2) Journal of Immigration, Asylum and Nationality Law 124.

case for belonging in the UK before a judge? Why has its role now been so diminished? What are the social and political consequences of curtailing the ability of long resident non-citizens to access the tribunal?

Research Questions

In this thesis, I engage in a detailed consideration of the history of the appellate structures and the different ways that disputes over immigration status have been conducted. A key finding of the recent Windrush Lessons Learnt Review[12] was that there was within the Home Office an 'institutional amnesia' of the way in which the law had developed. By drawing on recently released archives this research aims to expose some of this forgotten history.

There are several key research questions which I intend to answer during the course of this research:

What can be learnt about the social and political role of immigration tribunals by investigating the history of claims by long resident non-citizens facing removal?

- **How and why did immigration tribunals emerge in the 20th century as a forum for the determination of immigration status?**
- **To what extent does a public immigration hearing allow individuals to put forward claims of 'belonging' in the UK?**
- **How has the articulation of such claims and the way in which they are decided changed over time?**
- **What role does human rights law play in this process?**

It is not my intention to provide solutions or policy recommendations for how immigration decisions *ought* to be taken. Other authors have attempted to set out normative frameworks and suggest reforms that would provide a more just approach to immigration adjudication.[13] Rather the main intention is to explore how such decisions have been taken, the role of the immigration tribunal and how this has changed over time. It is very much intended as a

[12] Wendy Williams, *Windrush Lessons Learnt Review* (HC93, 2020).

[13] See Stephen Legomsky, 'Restructuring Immigration Adjudication' (2010) 59 Duke Law Journal 1635 for a US example & Rowena Moffatt 'An Appeal to Principle: A Theory of Appeals and Review of Migration Status Decision Making in the United Kingdom (2017) PhD Thesis University of Oxford for a critique of the UK appeal system.

critique of existing structures and it is hoped that it will provoke further reflection and debate on current injustices and allow for future identification of avenues for change.

Contribution to Knowledge

This thesis takes an original approach by considering the immigration tribunal in the wider social and political context, as a public forum where arguments about what it means to belong in the UK are deployed, contested and crystallised in judicial discourse. I bring together deportation studies literature and critical human rights literature to a diachronic study of claims-making by long resident non-citizens in the immigration tribunal. It is therefore interdisciplinary, since I draw on wider anthropological, sociological and political studies literature to provide an academic backdrop against which to conduct a detailed study of this specific area of law. Some scholars have taken a critical ethnographic approach to deportation hearings; such studies have often been synchronic as they consider the law in a particular period.[14] In contrast this thesis considers the development of deportation law over time and the shifts in deportation decision-making. I argue that a greater understanding of the development of the role of the courts in immigration decision-making is necessary to understand the current changes. This involves an original analysis of previously unconsidered archive documents (including National Archive records from the Home Office, Lord Chancellor's Office and Cabinet Office), to develop a critical historical narrative. In particular, I consider the origins of the Immigration Appeals Act 1969 on which there has been very little academic comment. This is combined with an analysis of caselaw to illuminate the changing role of the tribunal in addressing claims to remain by long-resident non-citizens facing deportation. In particular, I consider critically the role that human rights law plays in this area of immigration decision-making. In doing so I address gaps in the existing literature and suggest further areas for academic research.

[14] E.g., Hasselberg Ines, *Enduring Uncertainty: Deportation, Punishment and Everyday Life* (Berghahn 2016).

Literature Review

The History of Immigration Adjudication

The focus of this thesis is on the historical development of the judicial processes of immigration adjudication and their relevance to discourses of belonging. This has been an understudied aspect of immigration law and policy. There is a significant amount of work exploring the history of UK immigration policy and some material considering the current procedures of the tribunal. Robert Thomas[15] views the immigration tribunal primarily as a case study of administrative justice. His work provides an evaluation of the success of the modern tribunal in fulfilling its expressed objectives. The Franks Committee Report of the Committee on Administrative Tribunals and Enquiries 1957 originally considered that a tribunal should be guided by judicial ideals of openness, fairness and impartiality. Thomas raises the question of whether this focus sidelined the importance of collective values such as efficiency and cost-effectiveness which should also be considered when evaluating the success of the functioning of an administrative tribunal.[16] Since tribunal adjudication has its historical roots in the development of the administrative state in the early 19th century there has been some ambiguity over whether it should be considered part of the administrative machinery of government or as an aspect of the judiciary. Tribunals were designed to be a more accessible alternative to the courts, providing a less formal way to resolve disputes between the citizen and the state. Thomas sees a tension between two competing normative models of how decision-making systems should operate - firstly a governmental model in which the tribunal is viewed as part of the decision-making process whose role is to secure the most effective implementation of policy and where cost effectiveness and efficiency are vital considerations. This is contrasted with a legal model in which the tribunal is viewed as part of the judiciary and each case requires fair, correct and independent treatment.[17] His study focuses specifically on asylum appeals and explores the reform of the tribunal system in the context of increased concerns over immigration and the late 1990s rise in asylum

[15] Thomas (n3).

[16] Rule 4 of the Asylum and Immigration Tribunal Procedure Rules 2005 (then in force) stated, '*The overriding objective of these Rules is to secure that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible'* (emphasis added).

[17] Thomas (n3) 472.

applicants. He does not address the wider issue of the changing access to judicial remedies for migrants facing deportation or frame it in the context of wider critical debates concerning the regulation of non-citizens.

Other scholars have investigated problematic aspects of immigration adjudication, often within the area of asylum hearings. Critical ethnographies in immigration tribunals have been carried out which focus on the narratives of asylum seekers. Sara Mckinnon[18] has considered how credibility is *performed* and assessed by decision-makers in the US courts. Anthony Good[19] explores the role of the expert in the tribunal, again focusing on asylum hearings. Whilst this work has examined the present-day workings of the tribunal, it has not considered it historically nor has it considered the courts as a place where the ideological work of policing the citizen - non-citizen border is performed.

Satvinder Juss[20] has analysed the UK's system of immigration adjudication drawing on theories of 'cultural jurisprudence' to critique decision-making in entry clearance cases. He analyses tribunal determinations in the 1970s and 1980s, questioning whether the tribunal is an independent judicial arbitrator free from policy considerations. His work does not focus on deportation. Stephen Legomsky[21] in a comparative study of UK and US immigration jurisprudence seeks to explain the tendency of both jurisdictions to issue conservative judgments which show great deference to the executive. This provides a detailed, if now outdated, overview of the development of caselaw concerning the rights of non-citizens, though his primary concern is the higher courts and judicial review. In contrast my aim is to focus on the tribunal in the development of deportation caselaw. Helena Wray[22] has explored the historic development of judicial decision-making in cases involving marriage migration. She observes that initially tribunal judges often adopted interpretations of the law that favoured restrictive immigration policies, and that they relied on similar beliefs and

[18] Sara McKinnon, 'Citizenship and the Performance of Credibility: Audiencing Gender-based Asylum Seekers in U.S. Immigration Courts' (2009) 29(3) Text and Performance Quarterly.

[19] Anthony Good, 'Anthropology and Expertise in the Asylum Courts' (2010) 23 Journal of Refugee Studies 109.

[20] Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet & Maxwell 1997).

[21] Stephen Legomsky, *Immigration and the Judiciary* (Clarendon Press 1987).

[22] Helena Wray H *Regulating Marriage Migration into the UK: A Stranger in the Home* (Ashgate 2011)

assumptions about immigration as were held within government and by administrators.[23] Post Human Rights Act, however, the higher judiciary began to develop Article 8 caselaw that challenged government supremacy in immigration control. Her study considers Article 8 family life removal caselaw involving non-citizens with settled spouses until 2010. Writing in 2011, she questioned whether this would mark a new era of more robust judicial oversight of immigration.[24] This thesis will be considering recent caselaw which suggests that, particularly in cases concerning Article 8 ECHR private life, this new era of judicial intervention has been short-lived.

Turning to the wider literature on the history of UK immigration; there are a number of studies on the development of immigration control in the UK[25] but I would argue that scholars of the history of immigration to the UK have given less attention to the role of the courts and tribunals and the development of immigration adjudication. Randall Hansen[26] explores the period when the UK shifted from being a nation open to all Commonwealth citizens to having a highly restricted immigration policy, drawing on government archives from the 1950s and 1960s. He examines the reasons why the UK government did not immediately restrict immigration despite growing public concern in the 1950s and anchors his explanation in the history of the British Empire and the decolonisation process. He argues that the UK's lack of a written constitution and comparatively weak judiciary makes it unique in having a relatively unrestrained hand when it comes to implementing restrictive immigration policy. Other Western states have found their efforts frustrated by legislative and judicial checks.[27] In his otherwise very detailed study of he makes only passing reference to the Immigration Appeals Act 1969 and does not focus at all on the development of the tribunal. James Hampshire[28]

[23] Ibid 78.

[24] Ibid 167.

[25] For example, Randall Hansen, *British Immigration Policy Since 1939: The Making of Multi-Racial Britain* (Routledge 2000). Ian Spencer, *British Immigration Policy Since 1939: The Making of Multi-racial Britain* (Routledge 1997); Zig Layton-Henry *The Politics of Immigration: Race and Race Relations in Postwar Britain* (Oxford 1992); Paul Foot, *Immigration and Race in British Politics* (Penguin 1965); Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (Cornell University Press 1997); Vaughan Bevan, *The Development of British Immigration Law* (Croom Helm 1986); Ann Dummett & Andrew Nicoll *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Northwestern University Press 1990).

[26] Hansen (n25).

[27] Ibid 242.

[28] James Hampshire, *Citizenship and Belonging* (Palgrave Macmillan 2005).

explores concepts of citizenship and belonging through archive research and addresses particularly the Commonwealth Immigrants Acts though again he does not consider the caselaw of the immigration courts.

Whilst several academics have considered the origins of the Commonwealth Immigrants Act 1962 and the Immigration Act 1971 there has been very little analysis of how the Immigration Appeals Act 1969 came to be introduced. No doubt this is because the 1969 Act was very quickly overshadowed by the 1971 Act which set the basis of modern immigration control. Yet it was the 1969 Act and the events leading up to it that introduced for the first time a system of immigration law with justiciable rights and a formal system of immigration appeals in which they could be enforced. The 1969 Act is key to understanding how immigration decision-making shifted from a matter of arbitrary executive power, to judicialisation. The reasons for this need to be explored to understand the forces that are now leading to a return to arbitrary executive power. Several academics have noted the lack of scholarship concerning the origins of the appeals system. Charles Blake[29] suggests it remains a mystery how the Wilson Committee on Immigration Appeals was established *'and will remain so until papers are released in due course'.* Juss writes *'Quite how and when the transmutation took place is an enigma which can only be fathomed when someone goes to the trouble of examining the relevant government papers on the matter'.*[30] This is therefore a significant gap which this thesis aims to fill.

Geoffrey Care[31] provides a historical outline of the establishment of the immigration tribunal. As an insider (a former judge) he can rely on personal insights and memories to record some of that history. The second part of his work focuses on the mechanics and workings of the tribunal. However, he rarely goes beyond a chronology of events to critically interrogate how and why rights of appeal developed and he does not seek to fit this history into any theoretical framework. He does not address recent developments such as the reduction in appeal rights and ability to access the tribunal which are of particular interest to me. In commenting on

[29] Charles Blake, 'Immigration Appeals - The Need for Reform' in Ann Dummett (ed) *Towards a Just Immigration Policy* (Civil Liberties Trust 1986).

[30] Satvinder Juss, *Immigration, Nationality and Citizenship* (Mansell 1994).

[31] Geoffrey Care, *Migrants and the Courts* (Ashgate 2013).

why there is a need for a tribunal, Care states democracy called for it,[32] but if that is so then we need greater consideration of how and why 'democracy' called for it, and why that call has weakened. This is a gap which this thesis addresses.

I consider the immigration tribunal in its wider social context, as a place where arguments about what it means to belong in the UK are played out. The tribunal and courts should be viewed as a site where the border is constructed and contested, with attention to the way in which the law constructs illegality or precarious non-citizenship status.[33] I therefore aim to draw on the literature that some have termed 'deportation studies'[34] in order to provide a critical perspective.

Deportation and Belonging

William Walters[35] views deportation as a disciplinary tactic and an instrument of population regulation, considering it a technique similar to other forms of expulsion such as exile and transportation. Drawing on Foucault, he argues that deportation has moved from a crude tool used to dispose of political enemies in the 18th century, to a technology regulating the quality and quantity of the population at the beginning of the 20th century. Deportation and the creation of 'deportability' is, thus, understood as an activity that is constitutive of citizenship.[36] As Matthew Gibney argues, deportation is both ineffective and essential; whilst the state is unable to deport all those who become deportable, *'every act of deportation might be seen as reaffirming the significance of the unconditional right of residence that citizenship provides'.*[37] It is utilised violently as well as symbolically and performatively to mark

[32] Ibid 15.

[33] See Nicholas De Genova & Natalie Peutz (eds) *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (2010, Duke University Press); Matthew Gibney, Bridget Anderson, and Emanuela Paoletti, 'Boundaries of Belonging: Deportation and the Constitution and Contestation of Citizenship' (2011) 15(5) Citizenship Studies 547; Luin Goldring & Patricia Landolt (eds) *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada.* (2013, University of Toronto).

[34] Susan Coutin, 'Deportation Studies: Origins, Themes and Directions' (2014) 41(4) Journal of Ethnic and Migration Studies 671.

[35] William Walters, 'Deportation, Exclusion and the International Police of Aliens' in De Genova (n29).

[36] Gibney (n33).

[37] Ibid 548.

the normative boundaries of the citizen. But the right to define who belongs to a community is often contested.[38] Even MPs who support strict immigration controls may find themselves supporting the rights of individual non-citizens to remain based on a belief that they belong to the community.[39] Often, rather than reaffirming a shared conception of citizenship, deportation may act to destabilise what it means to belong in the UK.

There have been a number of studies of anti-deportation campaigns, no borders activists and community movements such as *'No one is illegal'* that contest the dominant legal categories constructed by the state and put forward alternative narratives. Such campaigns frequently rely on presenting an individual claim to belonging based on a narrative of 'the good citizen' who is integrated with the local community.[40] Less attention has been placed on the courtroom and the legal process as a site where these categories are constructed,[41] and there has been little investigation into the historic development of immigration judicial discourse. For the tribunal could be seen as a place where the productive work of articulating and delineating the borders between citizen and non-citizen is actually accomplished, and where alternative narratives of belonging are assimilated and managed in a relatively controlled environment through the language of the law. Exploring these themes over time will provide a new perspective on these questions. This area of literature is discussed further in Chapter 2.

Critical Human Rights Literature

Finally, it is essential that the development of immigration adjudication, particularly since the 1970s, is understood in a further context. In those decades the ordered management and regulation of the non-citizen population has coincided with the emergence of a dominant neoliberal economic system; a system in which global migration plays an important role. Literature which addresses immigration controls within the framework of neoliberalism is

[38] Ibid 549.

[39] See Antje Ellermann, *States against migrants: deportation in Germany and the United States* (Cambridge University Press 2009).

[40] E.g., Beth Baker-Cristales, 'Mediated Resistance: The Construction of Neoliberal Citizenship in the Immigrant Rights Movement' (2009) 7(1) Latino Studies 60. See further discussion of this area of literature in Chapter 2.

[41] For one such study in the US see Susan Coutin, 'Suspension of Deportation Hearings and Measures of "Americanness"' (2003) 8(2) Journal of Latin American Anthropology 58.

critical here.[42] This is particularly relevant when considering New Labour's immigration policy and the introduction of the human rights appeal. One theme that emerges in this thesis is that of depoliticisation and the role that the immigration tribunal has come to play in shifting responsibility for controversial decisions from the arena of politics to the realm of law. In doing so I draw on academics who have considered depoliticisation as a neoliberal political strategy for managing conflicts and rationalising economic governance.[43]

At first glance the current highly regulated system of immigration control appears an anathema to the ideology of neoliberalism with its embrace of free markets and free labour. This has been described as the 'neoliberal paradox'[44] - states embrace the logic of neoliberal free market economic policies whilst attempting to maintain the boundaries and closure of the nation state. Yet the UK's current immigration system could be understood as 'roll-out neoliberalism', an emergent phase of active state-building and regulatory reform focused on the purposeful construction and consolidation of neoliberalised state forms, modes of governance, and regulatory relations.[45] Scholars have argued that immigration control has a role in producing a disciplined migrant work force, by creating a precarious and a dislocated sense of belonging.[46] Recent immigration judicial discourse has become imbued with the language of neoliberalism. This posits a neoliberal role for the migrant as a detached individual of precarious status where little weight is attached to any ties of belonging and community that have developed during their residence in the UK.[47] This is the ultimate flexible worker - brought in when work is available, removed from the jurisdiction when it is not.

[42] I use the term 'neoliberalism' to refer not just to the economic ideology characterised by strong private property rights, free markets and free trade but to an order of normative reason that seeks to extend a specific formulation of economic values and practices to every dimension of human life (Wendy Brown, *Undoing the Demos* (2015 Zone Books) 30).

[43] See Matthew Wood, Matthew Flinders, 'Rethinking depoliticisation: Beyond the governmental' (2014) 42(2) Policy and Politics 158; Peter Burnham, 'New Labour and the politics of depoliticisation' (2001) 3(2) British Journal of Politics and International Relations 128; Peter Burnham (2014) 'Depoliticisation, economic crisis and political management' (2014) 42 Policy & Politics 189.

[44] Monica Varsanyi, 'Rescaling the "Alien," Rescaling Personhood: Neoliberalism, Immigration, and the State' (2008) 98(4) Annals of the Association of American Geographers 879.

[45] Jamie Peck & Adam Tickell, 'Neoliberalising Space' (2002) *Antipode* 384.

[46] Monica Varsanyi & Nevins, J, 'Borderline Contradictions: Neoliberalism, Unauthorised Migration and Intensifying Immigration Policing' (2007) 12 Geopolitics 223.

[47] Here I am referring to recent developments surrounding family migration and the application of Article 8 of the ECHR where the government has through s19 of the IA 2014 attempted to direct judges in the way that such rights should be considered. See Richard Warren, 'Private Life in the Balance: Constructing the Precarious Migrant' (2016) 230(2) Journal of Immigration, Asylum and Nationality Law, 230(2) 124.

When considering rights to remain in the UK, the neoliberal migrant is defined in contrast to a narrowly conceived public interest that favours tough immigration control.[48] In this framework, alternative narratives of what it means to belong and play a role in a community are diminished. A further theme that emerges in this thesis is the development of the legal concept of 'precariousness' which increasingly is being applied by the courts through the medium of human rights law to restrict the ability of migrants to make claims of belonging in the UK.

This is one aspect of a wider critical concern over the role that human rights law plays in deportation appeals. The introduction of the Human Rights Act (HRA) 1998 in the UK coincided with the significant expansion and normalisation of deportation as a means of regulating the non-citizen population. This thesis will consider arguments by critical human rights scholars[49] who observe linkages between the rise of human rights discourse and neoliberalism. Whilst acknowledging the positive role that human rights movements have played, David Kennedy[50] outlines the dangers inherent in relying on human rights as an emancipatory project. One salient criticism is that a focus on individual legal solutions, can lead to a loss of focus on forms of collective political struggle. Individuals seek to claim rights from the state through legal means, rather than engaging in other forms of political activity which may be necessary to challenge deeper structural and economic injustices. It is argued that '*Human rights promises a legal vocabulary for achieving justice outside the clash of political interest'* and:

> *…promises that "law"-the machinery, the texts, the profession, the institution-can resolve conflicts and ambiguities in society by resolving those within its own materials, … on the basis of a process of "interpretation" that is different from, and more legitimate than, politics.*[51]

The judge is conceived as a neutral instrument of the law rather than as a political actor, obscuring the decision-making process. At present, given the lack of political solidarity with

[48] See Nationality, Immigration and Asylum Act 2002 (NIAA 2002) s117B.

[49] E.g., Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press 2018); Wendy Brown, '"The Most We Can Hope For …": Human Rights and the Politics of Fatalism' (2004) 103 South Atlantic Quarterly 451.

[50] David Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 Harv Hum Rts J 101.

[51] Ibid 116.

non-citizens in the UK and, in many cases, their lack of political rights, it is unsurprising that their defenders have often turned to legal solutions and the language of human rights. However, as Kennedy observes, viewing 'rights' as responsible for emancipation rather than people making political decisions can demobilise other actors and other vocabularies, and encourage reliance on enlightened, professional elites with 'knowledge' of rights and wrongs, alienating people from themselves and from the vocabulary of their own governance.[52]

Conor Gearty[53] also raises the concern that human rights as a political project can become captured by legalism. The concept of human rights represents a radical and transformative agenda and yet once codified in law, it relies on a largely conservative force – the law, judges and lawyers to carry out and enforce it.[54] He notes that once broad rights are entrenched in law there is a danger of a division arising between human rights in its legal form, and the political community from which those rights have come, and in which they must operate.[55] The custodianship of human rights has passed to judges and lawyers and it is their version which is enforced. Human rights become something that exists outside the political process, rather than something that is achieved and needs to be sustained through it. In spite of his concerns, writing in 2006 he was optimistic that the UK's approach in the Human Rights Act where judges can only issue declarations of incompatibility therefore maintaining the principle of parliamentary sovereignty would successfully allow for a dialogue between the political and legal spheres.

Wendy Brown[56] considers that whilst human rights activism may present itself as an anti-politics, solely focused on defending the powerless against power,[57] it needs to be critically examined as a political project. Furthermore, as human rights discourse has been increasingly embraced and incorporated into the legal structures of the state, it should be analysed as a mode of governance. For Brown, rights are not simply an attribute held by an individual but instead produce and regulate the subjects to whom they are assigned. They can

[52] Ibid 117.

[53] Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006).

[54] Ibid 12.

[55] Ibid 70.

[56] Brown (n49).

[57] Ibid 453.

simultaneously shield subjects from abuses whilst also becoming tactics in their disempowerment.[58]

This thesis will consider the problems inherent in immigration lawyers' increasing reliance on human rights from the early 2000s, a moment which coincided with a growing bipartisan political hostility to perceived 'illegal' migration and a decrease in the security of non-citizens' residence. It will analyse the role of judicial human rights' discourse in mediating the claims of belonging put forward by long residents and its construction of certain types of legal subject.

A further theme that will emerge is the role of the law in masking responsibility for controversial decisions. Kennedy's focus on the law of war considers how the juridification of warfare through the application of humanitarian laws can have the effect of transforming essentially political and moral decisions about whom to kill into 'judgments' masked in the seemingly technical and apolitical character of legal language.[59] This implies that an act occurred not as a result of an exercise of human freedom but as a result of *'the abstract operation of professional principles'.*[60] As such '*the human beings behind the decisions are allowed to hide behind professional rules and avoid the experience of responsibility'.*[61] Kennedy challenges those making such decisions *'to recapture the freedom and the responsibility of exercising discretion*'.[62] Drawing on these insights I argue that the framing of deportation decisions as a technical legal exercise decided by neutral judges applying an objective human rights law, rather than a truly wide exercise of discretion, may act to shield decision-makers from responsibility for making individually devastating life-changing decisions. Furthermore, by encouraging the careful application of legal tests and precedent to identify the exceptional cases that would breach human rights, the law provides reassurance that the majority of deportations are authorised and legitimate. This thesis will therefore take a critical approach when considering the role that human rights has played in the development of contemporary deportation appeals.

[58] Ibid 459.

[59] David Kennedy, *Of War and Law* (Princeton University Press 2006) 89.

[60] Ibid.

[61] Ibid 90.

[62] Ibid 103.

Thesis Argument and Structure

In this thesis I show how immigration tribunals have emerged at specific times in the 20th century and have often been introduced in parallel to restrictive legislation in order to create the impression that executive action is not arbitrary. The existence of a tribunal has always caused tension between the executive and judiciary. Drawing on archive records, I argue that the Home Office has in the past displayed an institutional antipathy to the judiciary in immigration decision-making, but at certain periods it has been expedient for the government to make use of immigration tribunals. The existence of the immigration tribunal has allowed the government to depoliticise[63] controversial decisions by reframing moral/political decisions as legal decisions to be considered by neutral judges, channelling political opposition into the realm of law.

Deportation[64] hearings in the UK are adversarial and conducted before one or more immigration judges. They provide an opportunity for the appellant, their family and supportive witnesses to give evidence before being cross-examined by a representative of the Home Office. They conclude with legal submissions from both sides. It has been argued that deportation is constitutive of citizenship where each act of exclusion can be seen as further strengthening the idea of the citizen who belongs to the national territory.[65] It has also been argued that the border is a space, not just for refusing entry but to clarify that the migrant is elected to be within that space and to perform a particular socio-economic role.[66] If that is the role of the border, then the institution of the tribunal extends the border deeper into the territory of the state. The immigration tribunal creates a forum where the scrutiny of the migrant can be publicly performed and a space where the border is enacted.

The law constructs an individual as a 'deportable' non-citizen. But the tribunal creates a space in which a long resident non-citizen and those supporting him can contest that person's

[63] I am using this term, not to indicate that the politics has been removed from the decision, but that the decision has been transferred to a less obviously politicised arena. See Flinders and Wood, 'Rethinking depoliticisation: beyond the governmental' (2014) 42(2) Policy & Politics 158.

[64] Technically these are now 'human rights appeals'. However, I will be considering the development of all appeals against deportation or removal of long resident non-citizens.

[65] Gibney (n33).

[66] Evan Smith & Marinella Marmo, 'The myth of sovereignty: British immigration control in policy and practice in the nineteen-seventies' (2014) 87(236) Historical Research 344.

official construction as someone who does not belong to a community in the UK. It provides a public forum where the competing discourses - that of the state and of the deportee and his community - are performed. There is the potential for this to problematise the boundary between citizen and non-citizen since deportation appeals raise difficult questions about what it means to be a citizen or to belong to a community in the UK. This is evident in the case of those born in the UK or resident from a very young age, but who nevertheless face deportation following a criminal conviction. Thus, the hearing can be understood as a public enactment of a wider contested discourse over the moral boundaries of 'belonging'. Yet whilst the tribunal provides this forum for alternative narratives to be put forward, I argue that by utilising the restrictive language and structure of the law, an immigration appeal can provide a space where such narratives are neutralised and ultimately subjugated to that of the state - effectively reframed as the logical outcome of a legal process.

This thesis comprises ten chapters:

Chapter 2 sets out key concepts. I develop a typology of immigration claims-making, identifying different ways that claims to resist removal are commonly articulated, based on belonging, compassion and rights. I consider the argument that claims based on belonging are ultimately moral and political claims as they require a decision-maker acting on behalf of the community to make a subjective assessment of whether a non-citizen should be accepted as a member of that community. Several academics criticise the fact that such claims often rely on approximating the economically productive neoliberal citizen and thus exclude those who may have very long residence but are unable to demonstrate they meet this ideal. Others therefore argue that such claims are better pursued as legal rights based simply on length of residence and derived from the ECHR Article 8 right to a private life.[67]

However, rights claims by non-citizens are inherently problematic. Since the passing of the Human Rights Act, claims to remain in the UK have largely been articulated through the language of Article 8 of the ECHR. This frames the argument in terms of an individual's right to private and family life, pitted against the wider public's right to control immigration or to deter and punish crime. My argument is that beneath the language of individual rights what

[67] Antje Ellerman, 'The Rule of Law and the Right to Stay: The Moral Claims of Undocumented Migrants' (2014) 42(3) Politics & Society 293.

continues to be at stake in these forums is whether the appellant is seen to 'belong' in the UK, but this is now mediated by convoluted legal tests. These claims do not necessarily avoid a subjective assessment of moral worth since the way Article 8 ECHR is considered ultimately involves a public interest assessment, which I will show in my thesis has become saturated with a neoliberal conception of an individual's value. My historical study of the development of deportation hearings explores the role that human rights law plays in mediating and individualising claims of belonging, framing them as technical legal claims made before impartial judges rather than the subject of moral/political decisions taken by politicians.

Chapter 2 then presents and develops my methodological framework and considers the role of the researcher and ethical concerns.

Chapter 3 begins the historical study by considering early tribunal structures; specifically, the Immigration Boards introduced by the Aliens Act 1905 and the short-lived and controversial Deportation Advisory Committee of the 1930s. Drawing on original archive research, I identify the reasons for establishing these tribunals, the tensions that resulted between the executive and the tribunals and the subsequent lessons which informed future governments. The Immigration Boards of the early 1900s were a compromise at a time when immigration restrictions were still politically controversial. The Deportation Advisory Committee was described by civil servants as a form of *'window dressing'*, designed primarily to placate liberal concerns and when it overstepped this role it was sidelined. Judges considering the individuals before them with a moral claim to belong were accused of thwarting immigration control. Both these appeal structures were subsequently perceived as failures by the Home Office and this led to executive resistance to any kind of tribunal or appeal system for the next 25 years, following the Second World War. This chapter establishes that lessons were learnt by the Home Office that they should resist judicial involvement in immigration decision-making and that judges should not have the ability to overrule discretionary decisions. It raises the following question: If the tribunal was an unwanted interference, what changed such that a tribunal became needed again in the 1960s?

Chapter 4 considers the origin of the contemporary immigration tribunal, seeking to understand why it was established despite institutional antipathy to a judicial element in immigration decision-making. This chapter again draws on original archive materials, filling gaps in the historical literature, to identify the pressures that led to the introduction of appeal

rights. In the 1960s there was a growing trend towards increasing the state's accountability in other areas of administrative decision-making, yet successive governments resisted the judicialisation of immigration controls for many years. The story is complex and many factors are relevant: continuing political pressure in Parliament in which MPs criticised the continued reliance on emergency wartime legislation; the expansion of judicial review in other areas of public law; the role of further integration with Europe and participation in the Council of Europe Convention on Establishment; and the role of a growing number of politically controversial immigration cases in calling into question the integrity of Ministers. I argue that ultimately it was the desire to introduce further restrictive legislation impacting on the rights of Commonwealth and colonial citizens,[68] by a Labour government with a weakened majority that led to the establishment of the Wilson Committee on Appeals as a compromise.

However, once established, a benefit that emerged was that the existence of an appeal tribunal enabled Ministers to deflect the increasing number of MPs' representations which were taking up more ministerial time. So, whilst in the 1950s it was being argued that discretionary decisions were of such a nature that they were matters for a Minister who should be answerable to Parliament but not to the courts, by the late 1960s it was seen by some as expedient to move these issues into the realm of law in order to depoliticise them. From here on judges were to be responsible for the decisions and Ministers could seek to defer accountability to the courts.

Chapter 5 considers the early operation of the modern appeals tribunal, drawing on archive material and caselaw to consider the role of the tribunal in deportation cases involving long resident non-citizens. Archive records show that the Home Office remained hostile to the role of judges and working groups were established to tighten up perceived loopholes sprung by the appeal system and to consider ways to reduce appeal rights. However, once introduced, there were now real political constraints on removing appeal rights at this time, and a number of ideas discussed by civil servants had to await changed political circumstances. Despite these concerns the caselaw demonstrates that tribunal judges in the 1970s and early 1980s often deferred to the government and were reluctant to overturn discretionary deportation decisions.

[68] Citizens of the UK and Colonies (CUKC) who were therefore British subjects.

This chapter also traces the parallel growing decline in the security of Commonwealth citizens' residence, though it is observed that in contrast to more recent developments, there was at least some genuine political debate in Parliament and opposition to reducing their sense of security. With increasing immigration enforcement in the 1980s the courts began to assert themselves in overturning deportation decisions. A turning point is the case of *Bakhtaur Singh*[69] in which the UK House of Lords accepted that judges could consider 'all relevant circumstances' when deciding whether to exercise their discretion to allow a deportation appeal. Prior to this, the court had consciously steered clear of making 'political decisions'. Those faced with removal (and their supporters) could be told that an independent right of appeal existed where all relevant circumstances would be considered, but in practice judges would defer strongly to the executive and decline to consider anything that was considered a matter of policy. Following this development, tribunal judges were able to make their own judgement as to whether a deportation should be carried out. The fact that the judge saw the appellant in person in a public hearing meant that lawyers' tactics was to *'bring the community into the courtroom'*[70] – to present a narrative of the non-citizen as belonging to their community and worthy of membership. At this point the tribunal arguably provided a public forum where narratives of belonging could be put forward. I argue here though that lawyers and judges were now jointly engaged in constructing a discourse about worthiness of belonging and much focus was on the economic role of the non-citizen. This development prompted a backlash from the government which began to restrict rights of appeal in such cases.

Chapter 6 traces the development and reforms of the tribunal in the 1990s and seeks to explain the apparent contradiction that new appeal rights for asylum seekers were introduced, whilst other appeal rights were taken away, as immigration enforcement became more pervasive. Despite previous opposition to the appeals system, by the early 1990s the tribunal was now seen by the government as an important part of the system of immigration control. It was accepted that there were political and international legal constraints to reducing appeal rights, but that the tribunal could be used in a way that facilitated government asylum policy. The intention was to use the tribunal as part of the administrative

[69] *Singh v IAT* [1986] UKHL 11.

[70] Frances Webber, *Borderline Justice* (Pluto Press 2012) 9.

machinery of state to process cases swiftly, and as a means to remove the oversight of the higher courts. It was also expedient in deflecting political representations from MPs and it is at this point that the government acted to prevent MPs from being able to automatically block deportations. The existence of a right of appeal justified this move. As political opposition to the government's attempts to decrease the security of non-citizens declined and as immigration enforcement powers increased, lawyers wishing to defend non-citizens facing removal increasingly turned to human rights law (even pre-Human Rights Act 1998) to provide a new source of legal protection.

Chapter 7 seeks to understand a further apparent contradiction. New Labour incorporated the ECHR into domestic law and provided specific human rights appeals in immigration law, whilst at the same time this period saw the introduction of increasingly punitive immigration laws and the beginnings of the dismantling of the existing appeals structure, leading today to a much more precarious legal position for non-citizens. I argue that New Labour's immigration policy was an attempt to resolve what has been termed the 'neoliberal paradox'[71] – how to balance a commitment to economic openness and a free labour market with growing populist demands for political closure. Labour attempted to pursue a relatively open approach to labour migration, framing it as a matter of economic management rather than a political issue (for example, by introducing the technocratic Migration Advisory Committee), whilst at the same time performatively demonstrating its commitment to political closure through increasingly visible enforcement operations and hostile political rhetoric against those who could be framed as unwanted migrants. In this context, the human rights appeal plays a role in depoliticising immigration decision-making by making decisions on whether individual non-citizens should remain ultimately a matter for the law in applying minimum standards of human rights. I draw on critical human rights literature and consider the introduction of the Human Rights Act in the context of a shift by those on the left to embrace an increased legal constitutionalism, following a period of Conservative dominance and in the wake of the abandonment of more traditional left-wing political ambitions for structural change.

[71] Varsanyi (n44).

A key development is 'automatic deportation'.[72] The UK Borders Act 2007 provided that where a person is sentenced to more than 12 months prison, the Home Secretary is bound in law to make a deportation order unless it would breach the ECHR. This pushes ultimate responsibility for deportation decisions onto the judges in interpreting the Convention and deflects blame from Ministers for unpopular outcomes. A decision on whether someone should be deported has been reframed from a discretionary political judgement to a legal question of whether it would breach human rights law. This chapter then considers recent attempts to reduce appeal rights and remove the scrutiny of the higher courts, culminating with the Immigration Act 2014 which means that in many deportation and removal cases the only ground of appeal is human rights.[73]

Chapter 8 explores the extent to which the tribunal provides a forum for long term residents facing removal to articulate a claim based on belonging, and how this is mediated by the nature of the human rights appeal. It first sets out how in the past 20 years there has been a decline in security of immigration status for non-citizens. This has happened under Labour, and Conservative/Coalition governments with little political opposition. This decline in security includes lengthened routes to settlement, increasingly complex rules and evidential requirements that can be difficult to comply with, increasing use of changes to rules with no transitional requirements for those already in the UK, increasingly unaffordable application fees, lower thresholds for deportation action against settled non-citizens, removal of appeal rights, removal of legal aid and increased opportunities for immigration status to be called into question (the 'hostile environment').[74]

As the political argument for security of status has been lost, increasingly supporters of non-citizens' rights have turned to the law. Article 8 ECHR private life has been relied on by lawyers as a means of challenging increasingly harsh decisions to remove long residents. This chapter then traces the Article 8 ECHR private life caselaw and shows how initially Article 8 was

[72] UK Borders Act 2007, s32.

[73] Prior to this, grounds of appeal had included the argument that the decision was contrary to the immigration rules, that a discretion under the rules should have been exercised differently and a general ground that the decision was not in accordance with the law. See Nationality, Immigration and Asylum Act 2002, former s84.

[74] Sheona York, 'The hostile environment. How Home Office immigration policies and practices create and perpetuate illegality', (2018) 32(4) Journal of Immigration, Asylum and Nationality Law 363; Melanie Griffiths & Colin Yeo, 'The UK's hostile environment: Deputising immigration control', (2021) Critical Social Policy 1.

applied restrictively in a way that seemed to narrow the focus of the deportation hearing and increased the deference to the executive as judges were conscious not to become involved in making political decisions. It thus reduced the ability of lawyers to *'bring the community into the courtroom'* and establish a claim based on belonging. The human rights appeal is centred on the individual being a 'victim of human rights breaches' and thus initially the tribunal was not interested in the wider impact of his removal on the community. Early caselaw specifically excluded any focus on the impact on third parties. By providing a minimal standard of protection, this framework effectively certifies that the general immigration system is human rights compliant and the judge's task is to search for the 'exceptional case' – a threshold where rights are breached. As the system of immigration control is slowly and continually tightened, resulting in harsher decisions affecting those with even longer residence, general decisions will continue to be upheld as human rights compliant in the majority of cases.

This approach was shifted by the higher courts' caselaw in 2008 and led to a period where judges again began to intervene in substituting their decisions. I describe how at this point it became possible in some cases for those facing removal to persuade a judge that they were morally worthy of belonging and that a wider range of issues should be considered. Just as in the 1980s, this led to a backlash from the government against the approach of the tribunal, and renewed attempts to restrict the discretion exercised by judges.

Chapter 9 continues this analysis of the caselaw by considering recent developments. It considers the current approach taken by the tribunal to the deportation/removal of those with long residence, following attempts by the government to reduce the discretion of tribunal judges by setting out public interest considerations to which judges must have regard. I first consider the legislative changes during this period. I argue that the political debate over the 2012 changes to the Immigration Rules and the IA 2014 was limited – much of it based on measures directed against foreign national criminals which no party could be seen to oppose. The human rights appeal is deployed as a minimal backstop with limited political discussion of the wider social consequences of the laws that are being approved.

I then analyse the caselaw. Article 8 ECHR currently operates to construct a certain type of legal subject. Firstly, the public interest in a non-citizen's removal has a neoliberal gloss applied to it through constructing the good migrant as someone whose social utility is measured in financial terms, placing them in opposition to the construction of the 'tax-payer',

who represents the public interest. This formalises the pre-existing tendency for judicial discourse to focus on the economic value of those facing removal. I then consider the interpretation of the terms 'precariousness' and 'social and cultural integration' and the role that these concepts play in mediating the claims of belonging by those resisting deportation. Judicial discourse can operate to naturalise the status of non-citizens as 'precarious', severely curtailing the ability of individuals to advance claims of belonging. The 'social and cultural integration' test has enabled judges to construct a particular ideal of the worthy citizen that those who wish to remain will often fall short of. Here 'belonging' is considered, yet the judges' conception of what it means to be integrated operates to exclude many of those who would need to make such a claim.

I conclude that whilst lawyers initially seized on Article 8 ECHR as a means of using the law to challenge executive decision-making and defend increasingly insecure non-citizen residents, it is evident that without political support for this project, reliance on human rights law is insufficient. Human rights law has proved to be compatible with an immigration system that has normalised deportation and institutionalised precariousness amongst long-term resident non-citizens. This is problematic for rights advocates.

Finally, Chapter 10 draws together the key arguments in this thesis. It outlines my conclusion on the origins and role of the tribunal as a site where legal discourse plays a productive role in articulating the normative boundary between citizen and outsider. It considers the political role of the tribunal and the question of who takes responsibility for immigration decision-making. It revisits the discussion on immigration claims-making and summarises my conclusions on the role that human rights law has played in this process.

This chapter also reflects on recent developments. The government has had to walk a fine line in providing controlled rights of appeal, which allow it to balance the advantages of channelling political and public opposition to controversial decisions into a controlled legal forum, with the disadvantages and risks of having judges interfere in matters of policy. The human rights appeal works for the government when it provides a forum for a non-citizen to have their day in court and to articulate their narrative of belonging, while simultaneously subjugating that narrative and upholding the immigration system in all but exceptional cases. At present the government has broadly succeeded in taming the tribunal through reducing the discretion of judges and limiting their ability to overturn discretionary decisions, whilst

maintaining the idea that there is a human rights appeal available. However, there is a risk for them that if the controlled legal forum for contesting the right to belong is removed completely, debates over what it means to belong in the UK will emerge in more political and disruptive ways.

The Windrush scandal provides evidence that when legal avenues were not available to obtain a meaningful remedy, individuals resorted to political methods – the media and lobbying MPs - to articulate claims to belong and achieve change. For a brief moment this re-politicised the question of the security of long resident non-citizens (and in some cases British citizens not recognised as such). This demonstrates the potential for reigniting political debate about the wider social consequences of how the UK treats long-resident non-citizens and their families. It also suggests that ultimately - *and counter-intuitively for a lawyer* – to improve the security of non-citizen residents, it is this wider political debate and opposition which is needed, rather than a reliance on human rights law.

Chapter 2: Theoretical Framework and Methodology

In this chapter I set out my key epistemological assumptions and present my methodology, which is a combination of historical analysis through archive research and caselaw analysis. In the process, I develop a typology of immigration claims-making which will be of assistance when analysing the development of caselaw. I also address methodological concerns about the role of the researcher in socio-legal research and research ethics.

Epistemology

This research is broadly located within a social constructionist epistemological framework,[1] recognising that the researcher is not independent of their object of study but plays a part in constituting it. Knowledge of reality is produced in a particular time and place and is shaped by social and political factors. In considering concepts such as nationality, citizenship and belonging it is necessary to reject an essentialist view and recognise that these concepts are constructed through discourse and social practices. Many of the concepts applied to migrants are legal constructs, and there is a danger of reifying these concepts so that individuals become defined with reference to their immigration status.[2] Academics have considered the way in which migrants become constructed through the law as 'illegal',[3] 'deportable'[4] and as 'refugees', or 'asylum seekers'.[5] Legal representations of social identities as fixed and coherent are often fictional. Nevertheless, they can have real and sometimes violent consequences and act to serve particular interests.[6] The approach of this thesis will be to recognise the role of language in constructing social reality and to take a critical approach when analysing judicial discourse. Socio-legal scholars have recognised the power of legal language to create epistemological frames which, whilst giving the appearance of neutrality,

[1] See Peter Berger & Thomas Luckman, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin 1966); Dave Elder-Vass*, The Reality of Social Construction* (Cambridge University Press 2012).

[2] See Liisa Malkki, 'From Refugee Studies to the National Order of Things' (1995) 24 Annual Review of Anthropology 495.

[3] Godfried Engbersen & Joanne van der Leun, 'The Social Construction of Illegality and Criminality' (2001) 9 European Journal on Criminal Policy and Research 51.

[4] Nicholas De Genova & Nathalie Peutz (eds), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (2010, Duke University Press).

[5] Nick Lynn & Susan Lea, ''A Phantom Menace and the New Apartheid': The Social Construction of Asylum-Seekers in the United Kingdom' (2003) 14(4) Discourse & Society 425.

[6] Elizabeth Mertz, 'A New Social Constructionism for Sociolegal Studies' (1994) 28(5) Law & Society Review 1245.

may act to constrain the discussion of wider social issues.[7] This is relevant when considering the way in which non-citizens' claims to remain are articulated before the courts and subsequently represented in judicial determinations.

Conscious of the use of terminology, I have throughout this thesis used the term 'non-citizen' to describe those long residents without British citizenship who are subject to immigration decision-making, in preference to the term 'migrant'. The reason for this is that the term 'migrant', frequently used by the authorities and courts, focuses attention on the act of movement as central to the identity of the subject being considered. However, many of the decisions I will be looking at concern those for whom their migration journey was years in the past, possibly in very early childhood, and whom have greater cause to call the UK 'home' than any other country. In some cases it is wholly inappropriate as they were born in the UK and have never left. Thus, the term 'migrant' is loaded in already implying that an individual is 'out of place'.

I make no attempt to define absolutely what is meant by a 'long resident', since whether an individual experiences a sense of belonging in the UK will vary based on a wide variety of factors, including their age and prior experiences. It should be noted though that in the 1960s, 5 years provided a benchmark of long residence as the period beyond which Commonwealth citizens should be immune from deportation.[8]

A Typology of Immigration Claims-Making

In order to understand the role of the tribunal in immigration decision-making, I will first set out a typology of immigration claims-making. It can be observed that there are three broad categories of claims-making by long resident non-citizens facing removal – 'claims based on belonging', 'claims based on compassion' and 'claims based on rights'. Whilst the first two of these are essentially political or moral claims, the third can be both a political claim in the

[7] Ibid.

[8] Commonwealth Immigrants Act 1962, s7(2).

sense of a call by campaigning groups for rights to be established and a legal claim in the sense of an individual claiming an existing entitlement in law.

a) Claims based on Belonging

By 'a claim based on belonging' I mean an appeal to the decision-maker that the non-citizen in some way shares the values or identity of the community in which they are currently residing, or otherwise experiences an intersubjective sense of home.[9] Such an appeal may be put forward in a variety of ways. An individual may present themselves as socially and culturally integrated, economically valuable or otherwise morally worthy of acceptance by the community. It is clear that an appeal to 'belonging' imposes upon a decision-maker the need to make an evaluative judgement, essentially a discretionary political or normative judgement about whether a person is worthy of membership.

The concept of belonging has often been considered by migration scholars in relation to citizenship. Citizenship is usually considered by the state to be an objective legal fact of significant consequence. Nevertheless, the wider concepts of citizenship and belonging can be taken to be discursively constructed. Citizenship is not a stable concept but has shifted over time. Christian Joppke[10] distinguishes between three aspects of modern citizenship: citizenship as status, which denotes formal state membership and the rules of access to it; citizenship as rights, which is about the formal capacities and immunities connected with such status. Finally, he considers citizenship as identity, which refers to the behavioural aspects of individuals acting and conceiving of themselves as members of a collectivity, classically the nation, or which refers to the normative conceptions of such behaviour imputed by the state. It is this aspect of citizenship that may be better described as 'belonging'.

Clearly it is possible that these aspects of citizenship may not be congruent. An individual may legally be a citizen but not identify with the wider nation state. The introduction of citizenship ceremonies in the UK can be seen as a conscious attempt by the state to address this issue by

[9] For example, in recent evidence before the Human Rights Select Committee inquiry the case was raised of a woman resident in the UK for 50 years, facing detention and removal without legal advice who had submitted a letter to the Home Office stating simply *'please help me, this is my home'.* Joint Committee of Human Rights, *Windrush generation detention, Sixth report* (HL160/HC1034, 2018).

[10] Christian Joppke, 'Transformation of Citizenship: Status, Rights, Identity' (2007) 11 Citizenship Studies 37.

giving more *meaning* to citizenship and linking legal citizenship to a subjective sense of belonging among new citizens. As the Home Secretary David Blunkett stated at the time:

> *The Government intends to make gaining British citizenship meaningful... The Government is concerned that those who become British citizens should play an active role, both economic and political in our society, and have* ***a sense of belonging*** *to a wider community*.[11]

Alternatively, an individual may not have the legal status aspect of citizenship but may have come to identify strongly with the country of their birth or long residence and so have developed a subjective sense of belonging. This sense of belonging may be intersubjective - shared within the wider community in which they reside.

There has been significant academic work on the concept of 'belonging'.[12] Paul Jones and Michal Krzyanowksi[13] argue that as an analytical concept, 'belonging' is preferable to a focus on identity, which is not the best way in which to conceptualise an individual's relationship to a collective. The concept of identity is too often used to describe collective identities which are taken to be stable and bounded and which necessarily exclude other identities. Belonging can be considered a process whereby an individual in some way feels a sense of association with a collective, but it is a fluid concept and individuals may have multiple attachments to different collectives, which may even appear contradictory. Identities are constructed through an individual's self-representations but also externally by the powerful 'other' such as institutional gatekeepers who set threshold criteria for entry (either formal such as with citizenship requirements or in less formal symbolic ways). As a result individuals can end up with a sense of belonging that does not fit with their collective identity. Whereas an identity is often defined in contrast to a clearly defined 'other', individuals may experience a sense of belonging with an 'other', while remaining outside the bounds of that group.[14] In the case of long resident non-citizens without legal status, the state through its actions may deny that

[11] Cited by Hanauer D, 'Non-place identity: Britain's response to migration in the age of supermodernity' in Gerard Delanty, Ruth Wodak, Paul Jones, (eds), *Identity, Belonging and Migration* (Liverpool University Press 2008) 198 (emphasis added).

[12] E.g., Nira Yuval-Davis, *The Politics of Belonging* (Sage 2011); Delanty et al. (n11).

[13] Paul Jones & Michal Kryzanowski, 'Identity, Belonging and Migration: Beyond Constructing Others' in Gerard Delanty et al. (n11).

[14] Ibid 45.

they belong to the national collective. Yet this denial of belonging is contested by those facing removal and their supporters. Those facing deportation may articulate their sense of belonging as being to their local town or community, as opposed to the wider national community which is denying them recognition.

For Joseph Carens, social membership or de facto belonging arises simply by the passage of time: *'Humans who have been raised in a society become members of that society and not recognising their social membership is cruel and unjust'.*[15] Social membership does not require legal permission; it simply arises and imposes an obligation on a state to consider the moral claim of an individual to now belong to a community. In his call for an amnesty for undocumented migrants, Carens places more weight on the passage of time than on the intensity of the migrant's social ties, reasoning that to establish a wider range of criteria by which to measure the concept of belonging would necessitate granting officials too much discretion *'in judging whether individuals have passed the threshold of belonging that should entitle them to stay'*.[16] Such decisions would inevitably be subjective and potentially discriminatory and so he is critical of the idea that an official could make a nuanced judgement about how deeply another individual belongs to a society. In reality though, even states that do provide for regularisation after a certain period of time, often allow wide discretion in deciding whether an individual is suitable for membership. Furthermore, as will be set out in subsequent chapters, UK caselaw has established a range of criteria which are considered by judges when evaluating such cases.

Academics have considered how undocumented migrants who act as 'social citizens' through their actions can make out a claim that they are de facto citizens whose integration should now be recognised through legal status.[17] Much of this work is ethnographic accounts from the United States focusing on claims-making via anti-deportation campaigns. Arguably there has been less focus on the way in which claims to belonging are articulated and mediated through the legal process. Susan Coutin[18] has examined suspension of deportation hearings

[15] Joseph Carens, The Case for Amnesty (2009) 34(3) Boston Review 7.

[16] Ibid.

[17] See, for example, Engin Isin & Greg Nielson, *Acts of Citizenship* (Zed 2008) who explore how those without status perform 'citizenship acts' in everyday social interactions.

[18] Susan Coutin, 'Suspension of Deportation Hearings and Measures of "Americanness"' (2003) 8(2) Journal of Latin American Anthropology 58.

in the United States for individuals applying for an amnesty based on seven years' residence, good moral character and facing extreme hardship if removed. She argues that undocumented migrants' lives were measured against the legal prototype of the proto-citizen and they were required to demonstrate acculturation to an Anglo-American identity. Hence, they and their lawyers attempted to structure their narratives to conform with that expectation. Heteronormative family values, a good work ethic and a complete break in their relationship with their country of origin were deemed significant. She argues that judges treated deviations from middle class Anglo culture as a lack of commitment to the nation and objectified 'culture' as an easily measured set of traits, such that individuals had to downplay their own bilingualism and biculturalism.[19]

Irene Bloemrad[20] considers the citizenship-like-claims-making of undocumented immigrant parents of US-born children. Informants described their view that citizenship was about economic behaviours, working, paying taxes, not using benefits, taking care of family members and raising children well and not breaking the law. [21] Caitlin Patler[22] in an analysis of 125 anti-deportation campaigns led by undocumented youth organisations in the United States considers the use of 'citizenship frames' to challenge deportations and build support for pro-immigrant legislation. Campaigns highlight social integration, deservingness, community ties, civic engagement, high achievement amongst students and the actual practice of citizenship in order to contest and blur the boundaries between citizen and non-citizen. She argues that, *'Citizenship frames emphasize subjective indicators of acculturation such as the feelings of membership present in an explicit identification with "American" culture and values'.*[23]

[19] Ibid 84.

[20] Irene Bloemraad, 'Theorising the power of citizenship as claims-making' (2018) 41(1) Journal of Ethnic and Migration Studies 4.

[21] See also Amalia Pallares, *Family Activism: Immigrant Struggles and the Politics of Non-Citizenship* (Rutgers University Press 2015); Victoria Quiroz Becerra, 'Performing Belonging in Public Space' (2014) 42(3) Politics and Society 331.

[22] Caitlin Patler, '"Citizens but for Papers:" Undocumented Youth Organizations, Anti-Deportation Campaigns, and the Reframing of Citizenship' (2018) 65(1) Social Problems 96.

[23] Ibid 100. See also Abrego, L (2011) 'Legal consciousness of undocumented Latinos: Fear and stigma in barriers to claims making for first and 1.5 generation immigrants' (2011) 45(2) Law and Society Review 337.

Shannon Gleeson[24] considers the way in which migrants' rights groups frequently frame appeals for greater migrant rights by highlighting the important contribution undocumented migrants make to the US economy, the exploitation they face in the black economy and the loss to the public of the taxes they would otherwise contribute. She cautions though, that framing a call for immigrant rights in economic terms risks relying on a narrow definition of economic worth. In countries such as the US where neoliberalism has become the dominate political ideology, market-based arguments of self-sufficiency, not having claimed welfare benefits and economic value have a strong appeal. But if economic productivity is conceived of as a legitimate basis for rights then those that lose out are the disabled, carers, the elderly and the unemployed.

Beth Baker-Cristales[25] also observes that in adopting a strategy that focuses on economic value, pro-immigrant groups are internalising a discourse of 'neoliberal citizenship'. In an analysis of migrant protests in Los Angeles she observes how in conforming to a dominant narrative of the self-disciplined entrepreneurial American citizen, rather than contesting an exclusionary model of citizenship, many protesters were effectively arguing for their inclusion in an exclusionary category. Natalie Deckard and Alison Heslin[26] argue that today individual successful market participation has become a condition for full inclusion for both citizens and non-citizens. In order to be accepted as fully belonging it is necessary to demonstrate a particular type of 'market citizenship'. Good 'market citizens' support families and provide for children without depending on any of the social rights of citizenship.[27] Charlotte O'Brien[28] has observed a similar development of 'market citizenship' in the EU, where citizens' rights of free movement are increasingly linked to participation in the formal market economy.

[24] Shannon Gleeson, ''They come here to work': an evaluation of the economic argument in favour of immigrant rights' (2015) 19(3) Citizenship Studies 400.

[25] Beth Baker-Cristales, 'Mediated Resistance: The Construction of Neoliberal Citizenship in the Immigrant Rights Movement' (2009) 7(1) Latino Studies 60.

[26] Natalie Deckard and Alison Heslin 'After post-national citizenship: Constructing the boundaries of inclusion in Neoliberal contexts' (2016) 10(4) Sociology Compass 294.

[27] Ibid 299.

[28] Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (2017, Hart). Here she critiques the development of CJEU caselaw such as *Dano* [2014] EUECJ C-333/13 and *Alimanovic* [2015] EUECJ C-67/14 which link enjoyment of full EU citizenship rights (non-discrimination and access to social welfare) to status as a worker, self-employed or self-sufficient person.

In the UK, Matthew Gibney (et al.) consider the way in which deportation is constitutive of citizenship, in that each act of deportation reaffirms the shared significance of citizenship and delineates the boundaries of membership.[29] The rise in deportation has come at a time when the UK has been attempting to *thicken* its conception of citizenship by instilling a subjective sense of belonging and 'British values' in those undergoing naturalisation.[30] Deportation is a performative act of exclusion for those who fail to become accepted as members. Yet Gibney notes the propensity for deportation to raise questions about how membership is conceptualised and who has the right to judge who belongs. Anti-deportation campaigns frequently present narratives of belonging for undocumented but otherwise law abiding, hard-working and socially integrated non-citizens where communities mobilise in order to contest the construction of an individual as someone undeserving of membership. In doing this, local people are asserting the right to play a role in judging who may belong to their community. Such campaigns may feed into the legal process of an immigration appeal, or they may be extra-legal, on behalf of individuals who have exhausted the legal process. However, that local understanding of belonging may exclude less popular individuals who are unable to elicit public support but nevertheless have valid legal claims to remain based on human rights.

Ines Hassleberg considers the reluctance of those defined as foreign national criminals to engage with anti-deportation campaigns given the difficulty in presenting a moral case to remain for those convicted of criminal offences.[31] Her ethnography of deportation considers the way in which foreign national criminals frame their arguments against deportation during appeal proceedings when appealing on Article 8 grounds. Instead of a claim based on belonging, she records a tendency to articulate the claim based on rights and on a sense of entitlement.[32] She observes that whilst deportation was often perceived by long resident migrants as a form of exile – banishing them from the home they had established in the UK - even in her interviews, as a result of their engagement with the appeals process, informants

[29] Matthew Gibney, Bridget Anderson, and Emanuela Paoletti, 'Boundaries of Belonging: Deportation and the Constitution and Contestation of Citizenship' (2011) 15(5) Citizenship Studies 547; See also, Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (2013, OUP). Anderson argues that modern states conceive of themselves as a 'community of value'. Those who wish to make a claim to belong to the community are expected to demonstrate their moral deservingness.

[30] See Hanauer (n11).

[31] Ines Hasselberg, 'Balancing Legitimacy, Exceptionality and Accountability: On Foreign National Offenders' Reluctance to Engage in Anti-deportation Campaigns in the UK' (2014) 41(4) Journal of Ethnic and Migration Studies 563.

[32] Ines Hasselberg, *Enduring uncertainty: Deportation, Punishment and Everyday Life* (Berghahn 2016) 150.

had internalised the language of human rights and appropriated a rule-oriented narrative when explaining why they should be allowed to remain.[33] She observes the role of lawyers in speaking for those facing deportation, and the frustration some informants experienced in being unable to speak to the judge as much as they wanted.[34] This is evidence that the legal process actively shapes and constrains the way in which claims are expressed. Her work is essentially a synchronic study considering recent deportees' experience of the appeal process. What needs to be considered though is how the role of the tribunal has shifted and the impact this has had on how claims to remain have been articulated over time. It is the aim of this thesis to place this issue in a historical perspective.

b) Claims based on Compassion

By 'a claim based on compassion' I mean that the individual puts forward an account of acute human suffering. They rely on evoking the pity or sympathy of the decision-maker who will exercise discretion. Such claims may be based on illness, on the difficulties likely to be faced on return or on other what could be termed humanitarian considerations, appealing to a shared humanity that transcends the imagined national community. Yet such claims often rely on an assessment of whether an individual is a 'deserving victim' and so may still incorporate an assessment of whether their actions and behaviour meet the normative boundary for community membership.

Miriam Ticktin[35] considers a so-called 'illness clause' that permits undocumented migrants to remain in France and argues that, given the level of discretion involved in such applications, claims on this basis rely on eliciting the compassion or pity of those making immigration decisions. Though framed as protection of an aspect of the right to private life, she argues that in France there has been a shift from appeals based on human rights to a focus on humanitarianism, where to obtain legal status, non-citizens need to frame themselves as objects of sympathy. She contrasts human rights institutions, grounded in law and constructed to further legal claims and accountability, with the discourse of humanitarianism,

[33] Ibid 72.

[34] Ibid 65.

[35] Miriam Ticktin, 'Where Ethics and Politics Meet: The Violence of Humanitarianism in France' (2006) 33(1) American Ethnologist.

premised on the ethical and moral imperative to bring relief to those who are suffering, and argues that humanitarianism has come to fill a gap created by the failure of rights discourses and practices.[36]

Sarah Lakhani[37] has considered the role of lawyers in framing legal claims for 'humanitarian' legal status by undocumented migrants who have been victims of crimes in the US. She observes how they *'elicit and script narratives of "clean" victimhood'* as well as positioning their clients as contributing members of society - effectively de facto citizens - who are deserving of legal status. It is questionable to what extent this is a claim based on a concept of a right to legal status, since the status in question is granted on a wholly discretionary basis - individuals must both qualify under rules and *deserve* the status - effectively such a claim is an appeal based both on belonging and on compassion.

Refugee claims whilst being claims based on a legal right to non-refoulement may also involve elements of a claim based on compassion. A number of legal tests such as whether the threshold of persecution has been met, or whether internal relocation is unreasonable, require a decision-maker to make a judgement based on the specific characteristics of the applicant. Despite the perceived objectivity of the law, there is clearly room here for a decision-maker to be influenced by a subjective assessment of whether the appellant is deserving of protection. Jessica Mayo[38] for example demonstrates how refugee narratives are shaped in the interaction between applicants and attorneys to conform to an expected narrative of the innocent victim of persecution, in order to paint them as understandable and sympathetic figures for the American audience which receives them. She notes that narratives operate not only on a logical level, but also on an emotional one, with the use of feelings seeming to be at odds to the traditional ideal of objective impartial justice.[39]

It should be noted that those relying on a claim based on compassion will often not be able to demonstrate any legal entitlement to remain, even under human rights or refugee law and

[36] Ibid 35.

[37] Sarah Lakhani, 'Producing Immigrant Victims' "Right" to Legal Status and the Management of Legal Uncertainty' (2013) 38(2) Law & Social Inquiry 442.

[38] Jessica Mayo, 'Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law (2012) 89(6) Washington University Law Review 1485.

[39] Ibid 1497-1522.

so ultimately require a discretionary political judgement to be made outside any legal framework. In the classic case of *N*,[40] concerning an individual with HIV who would not be able to access healthcare upon return, the House of Lords stated:

> *These brief statements of the problem encompass much human misery. No one can fail to be touched by the plight of the appellant and of others in a similar position. The prospect facing them if returned to their home country evokes a lasting sense of deep sadness.*[41]

However,

> *The strength of her claim under Article 3 does not depend upon the history, no matter how deserving or undeserving of our compassion, but upon her present situation and her immediate or very near future. ….. How are we to distinguish between the sad cases where we must harden our hearts and the even sadder cases where to do so would be inhumane?*[42]

The court ruled that Article 3 of the ECHR did not prevent a state returning such a person to a country where they would certainly die. In doing so they were conscious not to enlarge the scope of the convention right or to be seen to make a moral or political decision:

> *The function of a judge in a case of this kind, however, is not to issue decisions based on sympathy. Just as juries in criminal trials are directed that they must not allow their decisions to be influenced by feelings of revulsion or of sympathy, judges must examine the law in a way that suppresses emotion of all kinds. The position that they must adopt is an austere one. Some may say that it is hard hearted.*[43]

Here the court frames the legal role as objective and uninfluenced by their subjective feelings. Notably in this case the House of Lords was happy to defer responsibility for the harsh decision to other sources:

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[40] *N v SSHD* [2005] UKHL 31.

[41] Ibid [10] (Lord Nicholls).

[42] Ibid [59] (Baroness Hale).

[43] Ibid [21] (Lord Hope). It is interesting to note here that the emotion of revulsion which Lord Hope describes as being unjudicial, nevertheless plays a feature in deportation appeals. See discussion in Ch5, pp153-155.

> *We must not allow sympathy for the appellant to divert us from this task. It is **not for us** to search for a solution to her problem which is not to be found in the Strasbourg case law. It is for the Strasbourg court, **not for us**, to decide whether its case law is out of touch with modern conditions…We must take its case law as we find it, not as we would like it to be.*[44]
>
> *Whilst, for the reasons given, I would not regard the return of this appellant to Uganda as a violation of article 3, **it by no means follows that the Secretary of State is bound to deport her. Plainly he has the widest discretion in the matter...**I am not saying that the Secretary of State should now exercise his discretion in the appellant's favour, still less that a refusal to do so would be challengeable; only that the appellant's return would not inevitably follow from the failure of her appeal.*[45]

Thus, claims by non-citizens relying on such compassionate arguments are framed as necessarily involving a decision to be made which is seen as outside the legal arena of human rights law. In this case the judges have been clear that responsibility for exercising discretion in such cases ultimately lies with the executive.

c) Claims based on Rights

By 'a claim based on rights' I mean an appeal to the law that a person has a right to remain. Whilst this may simply be a political appeal by an individual or campaign group to a broad concept of human rights, i.e., for recognition based on a common humanity beyond the boundaries of the community, I am particularly interested here in claims often articulated by a lawyer specifically in legal terms. In contrast to a claim based on belonging, which relies on intersubjective recognition of membership of a community, on the face of it a claim based on rights is asking for recognition of an intrinsic property of the individual - a right that is thought to objectively exist in law. It is notable that in UK law, in order to bring proceedings under the Human Rights Act it is necessary for the claimant to be identified as a 'victim' of an unlawful breach of their human rights.[46]

[44] Ibid [25].

[45] Ibid [99] (Lord Brown) (emphasis added).

[46] Human Rights Act 1998, s7.

Claims based on rights have historically been more difficult for non-citizens to mount, given the entrenched presumption of state sovereignty and the corollary that non-citizens have no inherent right to enter or remain in a state of which they are not a national. Immigration status has been conceptualised as something which is inherently precarious and akin to a privilege which can be granted or not. Historically, claims by non-citizens based on a legitimate expectation to a status under domestic law have been very difficult to pursue.[47] It is therefore not surprising that advocates have turned to the concept of universal human rights in order to base claims to remain on a seemingly more substantive concept.

With the rise of a global human rights discourse, increasingly non-citizens' claims have been based on the belief that there is an inherent right to family or private life. Some have argued that given the limitations of claims made on the basis of a shared conception of belonging, appeals to international human rights standards offer more hope for securing the status of undocumented non-citizens.[48] By the late 1990s it was being argued that with the increased recognition of human rights norms we were entering an era of post-nationalism where increasingly rights are deterritorialised and attached to personhood rather than membership in a political community. National citizenship had been superseded by new forms of local or regional belonging and was losing its importance.[49] Daniel Thym[50] considers how the increase in human rights claims being put forward under Article 8 ECHR based on private life calls into question the conventional division between 'citizenship' with equal rights and 'alien status' without full protection of the law and is leading to a situation where long residence could amount to de facto citizenship.

There has been ample criticism of this post-nationalist argument, given that rights, even if described as human rights, are largely upheld or not by nation states.[51] Whilst the passing of the Human Rights Act may have heralded an internal shift of power from the executive to the

[47] I explore this further in the article 'Private Life in the Balance: Constructing the Precarious Migrant', Journal of Immigration, Asylum and Nationality Law, 230(2) 124-141.

[48] E.g., Antje Ellerman, 'The Rule of Law and the Right to Stay: The Moral Claims of Undocumented Migrants' (2014) 42(3) Politics & Society 293.

[49] See Saskia Sassen, *Losing Control. Sovereignty in an Age of Globalisation* (Columbia University Press 1996); Yasmin Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe* (University of Chicago Press 1994); David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (JHUP 1997).

[50] Daniel Thym, 'Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR' in Ruth Rubio-Marin (ed) Human Rights and Immigration (OUP 2014).

[51] E.g., Randall Hansen, 'The poverty of postnationalism' (2009) 38(1) Theory and Society 1.

judiciary, this does not mean that the UK has ultimately lost its ability to enforce immigration control. It is evident that in recent years the UK has attempted to shift power for immigration decision-making from the judiciary back to the executive, and, where that has not been politically possible, to curtail the discretion of the judiciary to freely interpret the ECHR.[52] Thus it remains questionable to what extent those without political membership in a community can ultimately rely on legally enforceable claims based on human rights. Catherine Dauvergne and Sarah Marsden[53] draw on Hannah Arendt's notion of citizenship as the 'right to have rights' to illustrate the problem with temporarily resident non-citizens seeking to make human rights-based claims, when at the point when they need to rely on human rights, they lack a meaningful way of enforcing them.

Antje Ellerman[54] has problematised the idea of relying on membership-based arguments for regularising undocumented migrants, in favour of claims based on rights. She notes that claims by non-citizens based on long residence and the passage of time, frequently rely on presenting them as having become socially and culturally integrated. Yet, as the lives of undocumented migrants are shaped by policies which aim at their social exclusion, it is often difficult for them to meet this expectation. This is particularly relevant in the UK where the present 'hostile environment' policies are specifically designed to prevent meaningful integration.[55] As a result cases are only compelling where immigrants succeed in approximating the 'ideal citizen' e.g., well integrated, financially self-sufficient and law-abiding. This can lead to the exclusion of migrants who, despite prolonged residence and often through no fault of their own, fail to conform to expected behaviours such as meeting rootedness and socialisation criteria.[56] Legal claims based on membership-based reasoning will inevitably involve a discretionary judgement rather than an establishment of a legal entitlement.

[52] Here I am referring to the Immigration Act 2014 and in particular s19 which directs judges in the approach to be taken to Article 8 claims – this will be discussed in Ch9.

[53] Catherine Dauvergne and Sarah Marsden, 'The Ideology of Temporary Labour Migration in the Post-Global Era' (2014) 18(2) Citizenship Studies 224.

[54] Ellerman (n48).

[55] See Reinhard Schweitzer, 'Integration against the state: Irregular migrant's agency between deportation and regularisation in the United Kingdom' (2017) 37(3) Politics 317.

[56] Ellerman (n48) 295.

Ellerman argues instead that the rule of law, as expressed in the principle of legal certainty, provides an alternative justification for the regularisation of resident undocumented migrants. She considers the argument that under Article 8 private life, migrants should have a right to be regularised based on length of residence alone. She derives from this that ideally there should be a statute of limitation on illegal entry, such that after a clearly defined amount of time (she suggests no more than five years) a non-citizen has a legal right to remain. For Ellerman, without such, the deportation of settled migrants constitutes an arbitrary act of state power.[57] If such an approach were adopted there would be no room for executive or judicial discretion, and the role of the wider public and their view of a migrant's suitability for membership would not be relevant at the decision-making stage.

A flaw in this approach, for those seeking to advance the protection of migrants, is that there is no logical reason why a state such as the UK would adopt five years as the period of limitation. Indeed, the UK in its current approach to Article 8 private life views 20 years as the necessary period for regularisation of status, combined with an assessment of suitability. It is also difficult to derive authority for this approach from the ECtHR, which has emphasised a range of factors that must be considered when Article 8 private life is being considered in a deportation context.[58]

Upon closer examination, a claim based on a human right to respect for private life under Article 8 of the ECHR is not that different from other claims based on belonging. Although framed as a legal claim based on universal personhood, given the qualified nature of the right it still requires a discretionary evaluative judgement to be made by a decision-maker. Article 8 frames the argument in terms of an individual's right to private and family life, pitted against the wider public interest in controlling immigration or deterring and punishing crime. But unless an assessment of private life could be reduced to a clearly worded rule - as Ellerman suggests - there will inevitably need to be an evaluative judgement. In assessing an individual's private life, the court considers the *'totality of social ties between settled migrants…and the community in which they are living*'.[59] This leads to comparing the '*solidity*

[57] Ibid 294.

[58] E.g., *Boultif v Switzerland* [2001] ECHR 497; *Uner v Netherlands* [2006] ECHR 873.

[59] *Uner v Netherlands* [2006] ECHR 873 [59].

of social and cultural ties with the host state to the country of destination'[60] and thus is effectively considering the *'degree of integration'*[61] displayed. 'Integration' is not a neutral concept and is laden with value judgements. Beneath the language of individual rights, what is at stake in these forums is still an assessment of whether the appellant is seen as worthy of belonging as a member of the community. Furthermore, as will be shown in the UK, the way in which the public interest is now conceptualised inevitably leads to a focus on the individual's economic value in the market economy.

In Article 8 appeals relying on private life, the tribunal can be seen as providing an opportunity for an individual to present themselves as someone who is well integrated and already a de facto member of the community. However, what needs to be considered here is the role that human rights law plays in mediating and individualising that claim, obscuring its nature as a moral and political claim to membership and framing it as a technical legal claim made before an impartial judge. For it is arguable that in utilising the restrictive language and structure of the law, an immigration tribunal provides a space where a non-citizen's narrative of belonging can be neutralised and ultimately subjugated to that of the state.

Claims-Making in the UK Immigration Tribunal

Having outlined a typology of ways in which claims to remain are made, this thesis will seek to explore the history of how such claims have been articulated in the UK tribunal, focusing specifically on the circumstances of those with long residence facing deportation.

There are 4 key phases to consider:

1) Pre-1969: Arbitrary executive powers and no judicial remedy available for 'aliens' facing removal, though there was limited use of deportation powers at this time. Arguments could be raised through representations to MPs who could then raise matters in Parliament or request the Secretary of State to exercise discretion. Until the Commonwealth Immigrants Act 1962 all Commonwealth citizens had the right of entry and thus could claim to belong in the UK. Even after, Commonwealth citizens were immune from deportation after 5 years' residence.

[60] Ibid [58].

[61] Ibid [56].

2) 1970-2000: The courts were able to review decisions made under the immigration rules and review the exercise of the Secretary of State's discretion within the rules when considering the removal of long resident non-citizens. Caselaw developed based on new immigration rules setting out relevant factors to be considered, and judges were able to exercise their own discretion when confronted by an individual facing deportation. Initially the courts tended to defer to the Secretary of State's view of the strong public interest in immigration control but over time the tribunal provided a place for individuals to put forward alternative narratives about why they should be accepted as a member of a community.
3) 2000-2012: Following the introduction of the HRA 1998, the courts were empowered to review decisions based on human rights grounds. Article 8 caselaw developed with the courts applying a proportionality test, preventing the removal of some long-term resident non-citizens based on the right to a private life. Individuals were increasingly able to challenge executive decisions, by invoking fundamental 'rights' not derived from the immigration rules. Yet initially the range of factors that judges could consider was narrowed when compared to earlier caselaw. In parallel, the use of deportation powers increased dramatically during this period and were increasingly applied to individuals with very long residence. The introduction of 'automatic deportation' in 2007 brought an increased reliance on Article 8 ECHR as the only available ground of appeal in many cases.
4) 2012-2020: Marked by attempts by the executive to curb access to the courts, removal of appeal rights and limitations on the ability for judges to review a decision-maker's discretion. The introduction of 'public interest considerations', to *guide* judges when assessing appeals, led to a reduced ability of judges to independently develop Article 8 caselaw.

In each phase I will explore the role of the courts in enabling non-citizens to articulate a claim to belong and to what extent this was a genuine challenge to executive control over immigration. In doing so the role of the Human Rights Act will be scrutinised, with focus placed on the shift from traditional deportation appeals in which judges could consider 'all relevant circumstances' to appeals conducted solely through the prism of Article 8 ECHR. Whilst initially appearing as a promising tool for those seeking to put forward a claim to remain, the

rise in use of Article 8 has coincided with increasingly strict immigration controls and a decrease in the long-term security of residence for non-citizens. It has also led to the increased juridification and legal complexity of immigration law and has arguably failed to provide non-citizens with greater security of residence. As will be shown, the story of the role of Article 8 ECHR in the immigration tribunal is by no means straight forward or linear but arguably Conor Gearty's concern about human rights becoming captured by legalism has been borne out.[62]

Research Methods

Archive Research

The historical chapters in this thesis are based on the analysis of archive records. My main sources were the National Archives at Kew Gardens and the London Metropolitan Archives as well as Kent County archives which provided some useful sources on the local Kent Immigration Boards which were established in the early 1900s. The records consulted focused on the establishment and disestablishment of previous immigration tribunals as well as those concerning the establishment and development of the present tribunal.

Paul Atkinson and Amanda Coffey[63] note that official documents can be considered as social facts, but they are not neutral, transparent reflections of organisational routines or decision-making processes. Rather, documents construct particular kinds of representations using literary conventions.[64] They advocate that when analysing documents, attention should be given to the form of the text (the genre, language, register and rhetoric used) and to the function, asking what kind of reality the document is creating and how it is doing it.[65] In analysing these documents it is also important to pay attention to what is not said and what is absent.

[62] Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press 2006) 70.

[63] Paul Atkinson & Amanda Coffey, 'Analysing documentary realities' in David Silverman (ed) *Qualitative Research 3rd Edition* (Sage 2011).

[64] Ibid 78-79.

[65] Ibid 81.

The records accessed in the National Archives included a number of key government sources – files from the Home Office, files from the Lord Chancellor's Office, files from the Cabinet Office (including cabinet minutes recording key decisions), files from the Foreign and Commonwealth Office and in some cases files from the Ministry of Labour and the Metropolitan Police. I used the National Archives database to search for key terms including 'deportation appeal', 'immigration appeal', 'deportation tribunal', 'immigration tribunal'. I was able to find significant material concerning the 1930s Deportation Advisory Committee including memorandums from the Committee and correspondence between the Home Office and the Metropolitan Police. I also searched for all available papers on the 1965 government white paper as well as the Immigration Appeals Act 1969, the Immigration Acts 1971 and 1988 and, where available, the aborted Asylum Appeals Act 1991 and the Asylum and Immigration Appeals Act 1993. Records for later acts were restricted at the time of the research. Having found key files through the database search, this often led to the need to work through a series of interlinked chronological files from a number of different departments. In this way the views of officials from different government departments could be compared and contrasted to note any disagreements or contradictions.

Some archive records had only been recently released including those for the Immigration Act 1988. On a number of occasions, it was necessary to request access to files which had been retained by government departments – this was particularly the case concerning records of the European Convention on Establishment. However, a number of files which approved promising from the title were still blocked for release, either because they contained personal information and so would not be released for 100 years, or for other unexplained reasons. The London Metropolitan archive contained significant material from the early 1900s and 1930s. Much of this required permission from the Board of Jewish Deputies in order to access it. This was obtained following an application to the board.

I also made significant use of Historic Hansard online to analyse the parliamentary records including, House of Commons and House of Lords debates from all the principal Immigration Acts, together with relevant records from parliamentary select committees. I worked systematically through the debates on all major immigration legislation including:

- The Aliens Act 1905

- Aliens Restriction Acts 1914 & 1919
- The Expiring Laws Continuance Acts from 1948 to 1971
- The Commonwealth Immigrants Act 1962
- The Commonwealth Immigrants Act 1968
- The Immigration Appeals Act 1969
- The Immigration Act 1971
- The Immigration Act 1988
- The Asylum and Immigration Appeals Act 1993
- The Special Immigration Appeals Commission Act 1997
- The Human Rights Act 1998
- The Immigration and Asylum Act 1999
- The Nationality, Immigration and Asylum Act 2002
- The Asylum (Treatment of Claimant's) Act 2004
- The Immigration, Asylum and Nationality Act 2006
- The UK Borders Act 2007
- The 2012 Immigration Rules debate
- The Crime and Courts Act 2013
- The Immigration Act 2014

This enabled me to develop a coherent understanding of how parliamentary discourse on immigration has shifted over the past 100 years. For the Acts from the 1998 onwards, I also read through the Public Bill Committee debates and where necessary any debates and reports by the Joint Committee of Human Rights. In addition to the legislative debates, key search terms were again used to identify additional parliamentary debates or important parliamentary questions on the topics of deportation and immigration appeals. For the more recent periods, where there are no readily available archive records (i.e., covering the 1991 Act onwards), I made use of grey literature[66] that is available on the internet or library, including historic party manifestos, government white (and green) papers, parliamentary

[66] Defined as publications that are not produced by commercial publishers. It includes research reports, working papers, white papers, and other reports produced by government departments.

briefings, and Home Office policy and consultation papers. I also made use of historic briefings from the Immigration Law Practitioner's Association.

My aim in accessing these resources was to develop a critical narrative of the emergence of immigration adjudication, that seeks to explain how and why at certain times a forum for deciding the status of non-citizens through oral hearings became desirable, whilst at other times access to a court has been curtailed. In doing so I intended to pay particular attention to the themes of belonging and precariousness, and how such ideas had been considered in the records.

Analysis of Caselaw

My intention was to analyse the development of UK caselaw in cases concerning long resident non-citizens being removed from the UK. I anticipated that a particularly interesting period would be that surrounding the introduction of the Human Rights Act 1998, when anti-deportation arguments moved from arguments concerning the immigration rules and use of executive discretion to human rights-based arguments focusing on the proportionality of removal.

Judicial determinations, especially those that function as precedents are authoritative statements of official state discourse which can have immediate, far reaching and long lasting effects.[67] Didi Herman argues that judges can act as nation-builders, engaging in strategies of estrangement and defining the boundaries of belonging.[68] However, judicial discourse could also be seen as representing the resolution of contested narratives between individuals and the state, or more significantly the managed subjugation of alternative discourses.

Marie-Benedicte Dembour[69] in her study of the jurisprudence of the ECtHR argues for an anthropological approach to the study of judicial determinations in an attempt to understand the conditions which make a particular pronouncement 'thinkable'. In doing so she views *'each decision as a piece of anthropological fieldwork - a conversation between different*

[67] Didi Herman, ''An Unfortunate Coincidence': Jews and Jewishness in Twentieth-century English Judicial Discourse' (2006) 33(2) Journal of Law and Society 281.

[68] Ibid.

[69] Marie-Benedicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter American Counterpoint* (Oxford University Press, 2015).

voices (some of them submerged) framed in a formal way'.[70] I sought to take a similar approach to the study of UK determinations.

Until the 1970s there is very little immigration caselaw, reflecting a reluctance by the courts to intervene in administrative decisions of the executive. This changed with the Immigration Appeals Act 1969, which for the first time gave non-citizens the ability to challenge an executive decision where it was not in accordance with newly published immigration rules, or where an executive discretion could have been exercised differently. I initially looked at the possibility of obtaining appeal determinations from the First-Tier Tribunal (Immigration and Asylum Chamber) and the equivalent tribunals prior to that, since it is at this level that a judge is engaged in finding the facts and setting out in detail the way in which the case is presented. However, data protection rules meant that it was not possible to obtain unreported cases. Many of the National Archive files which contain court determinations are blocked for 100 years. I was able to access the judicial notes of the Kent Immigration Boards established by the Aliens Act 1905, and whilst these proved interesting, they mostly concerned refusal of entry rather than deportation cases. I was able to access written notes from the Deportation Advisory Committee concerning cases that came before them as well as other archive records discussing the outcome of particularly controversial cases. I was also able to access a few more recent determinations that were available in the archives, although not enough to systematically analyse this level of appeal. This was a limitation to this approach and I therefore decided that my analysis of modern caselaw would have to be confined to an analysis of publicly reported caselaw from the Upper Tribunal (and the former Asylum and Immigration Tribunal (AIT) and Immigration Appeal Tribunal (IAT)) as well as the Court of Appeal and Supreme Court (and formerly the House of Lords).

There is a vast amount of caselaw covering removal and deportation decisions and therefore it was necessary to limit my area of enquiry. I elected to focus on cases involving the removal of long-term residents. In the period following the introduction of the Human Rights Act I chose to focus on those cases in which individuals raised claims primarily based on their right to a private life. This does mean that I have not discussed in detail the Article 8 caselaw where the claim is based primarily on family life. I confined my consideration to removal and

[70] Ibid 22.

deportation cases that are considered under UK immigration law.[71] I aimed to observe any shift in judicial language, with regards to how such claims are articulated and determined, focusing on key themes that emerge.

For the period between 1969 and 1999, I worked through early additions of Macdonald's Immigration Law,[72] a key text for immigration practitioners, in order to identify important tribunal and higher court cases that were influential in the way that lawyers presented the claims of those seeking to remain in the UK based on their established residence. Reading through these provided references to further caselaw which was then accessed. For the period from 2000-2020, all reported immigration tribunal judgments are available online. I therefore worked systematically through all reported determinations concerning long residence and Article 8 ECHR. I also read through all the Supreme Court and Court of Appeal cases that were cited in the tribunal as authority for the approach taken. In some cases, it was also necessary to draw on caselaw from the Administrative Court where the important precedent had been set in a judicial review case, rather than through a tribunal appeal. In doing so I hope to have developed an understanding of the way that the caselaw governing removal and deportation in these cases has shifted.

The Role of the Researcher: Legal Practitioner Turned Academic

In working on this thesis, I have been conscious of my role as a practising immigration lawyer as well as an academic and therefore something of an insider to my subject of study when considering the operation of human rights law. Much has been written on the complexities of adopting the dual role of an insider-outsider when conducting qualitative research, primarily as an issue that affects field research and ethnography, though arguably it is relevant to other types of qualitative research, given the role of the researcher in both data collection and analysis.[73] On the one hand, having direct experience can provide a greater level of awareness of the detail and complexity of the subject being studied. On the other hand, it is

[71] I note in Chapter 5 that since the 1980s the legal approach taken to the deportation of EU nationals and their family members under EU law has diverged significantly from the approach taken in UK law. To have attempted to analyse both in any detail would have been beyond the scope of this thesis.

[72] Ian Macdonald, *Immigration Law and Practice* (Butterworths Law 1983).

[73] See Sonya Dwyer & Jennifer Buckle, 'The Space Between: On Being an Insider-Outsider' (2009) IIQM 54; Ilse van Liempt & Veronika Bilger (eds) *The Ethics of Migration Research Methodology* (2009, Sussex Academic Press).

important to be aware of how one's own biases and preconceptions may be influencing what one is trying to understand. It is necessary therefore that my position as the author of the research is made explicit. It is inevitable that I have drawn upon and reflected upon my experience as a lawyer whose primary tool with which to assist clients has been human rights law and specifically Article 8 ECHR. In considering critically the role of human rights law, I am aware of numerous cases in which individuals' lives have been changed for the better by successfully relying on Article 8 ECHR. Yet over the past decade of intense involvement in arguing such cases, I have become increasingly aware that something has *gone wrong* with the role of this area of law in defending the rights of long resident migrants to remain in the country in which they feel at home. The complexity of the sometimes contradictory legal provisions; the hours devoted by lawyers and barristers to unravelling competing strands of caselaw from different levels of judicial authority in an attempt to elucidate some sense of inner logic and consistency within the pronouncements of the judges; the increasing number of legal tests with varying thresholds that need to be understood and fought over (an 'arguable case', 'reasonableness', 'unduly harsh', 'compelling circumstances', 'very compelling circumstances', 'unjustifiably harsh consequences', 'extra unduly harsh',[74] "exceptional'). It is as if lawyers and the judges are engaged in an elaborate intellectual dance, constructing a vast legal edifice on the head of a pin. Ultimately, this has come to obscure and mystify what is essentially a political issue – how do we define and adjudicate the boundaries of community membership?

Reflections on Limitations of Research

This thesis considers nearly 100 years of history and there are necessarily limitations to its scope. It is primarily based on archive work and caselaw analysis. I am aware that there are further research methods that could have been undertaken which would have provided alternative perspectives on the topic. Elite interviews with politicians, judges, lawyers and civil servants would have reinforced or perhaps challenged some of the central claims of this thesis. A comprehensive study of newspaper discourse and reporting of tribunal cases would also have added valuable material concerning the wider social role of the tribunal. An analysis of the archives of anti-deportation organisations and campaign groups (some of which were

[74] As suggested by Underhill LJ in *SSHD v JG (Jamaica)* [2019] EWCA Civ 982 [16].

identified in the archives during this research) would have shed further light on the interrelationship between political campaigns and legal claims-making and how this has changed over time. Such efforts have not been possible because of time limitations though these may provide avenues for future research.

It is also recognised that there are other theoretical frameworks that could be used within which to approach the subject matter. Whilst I have focused on the concept of belonging and the ability of individuals to put forward claims based on belonging, I have not analysed in detail the role that race plays and how this is constructed in judicial discourse within the tribunal caselaw. A number of academics have explicitly considered the role of race in immigration control.[75] This is a topic which could certainly be investigated further in relation to the role that race plays in how judges conceive of the concept of 'social and cultural integration', through comparing the deportation caselaw for different nationalities. Similarly, I have not considered the role of gender and whether this has an impact on how belonging is constructed through contrasting the caselaw involving long resident men and woman seeking to put forward claims of social integration. These are both areas which warrant further research and it is therefore anticipated that the material considered in this thesis could be evaluated further in the future by drawing on different theoretical perspectives.

Ethical Concerns

As this research primarily involved archive and caselaw analysis there were no major ethical concerns identified. Some archive materials identified belonged to the Board of Deputies of British Jews and access was formally requested and granted. It was not possible to secure access to individual case files which have a 100-year data protection restriction.

[75] See, for example, Nazilia Kibria, *Race and Immigration* (Polity 2013) for discussion in the context of the US, Luke de Noronha 'Deportation, racism and multi-status Britain: immigration control and the production of race in the present' (2019) 42(14) Ethnic and Racial Studies 2413 for a recent consideration of race and deportation and Shah P, *Refugees, Race and Asylum* (Cavendish 2000) for a discussion of the role of race in the asylum system.

Chapter 3: The Early Tribunals

> *In a free country the very essence of a system must be that there should be an appeal to somebody who can say whether these officers are doing what is just. If no appeal were possible, I have no great hesitation in saying that this would not be a desirable country to live in…*
>
> - *R v Justices of the County of London* [1893] 3 QB 476 at 492 (Bowen LJ).[1]

This chapter focuses on the tribunal structures that were introduced in the early 20th century prior to the introduction of the current system of immigration control. There are two examples which exhibit a number of commonalities in that they were both short lived and subsequently they were viewed by the civil service as administrative failures. Both were abandoned with the onset of a world war. This chapter is in two parts; the first focuses on the Immigration Boards introduced by the Aliens Act 1905. The second focuses on the Deportation Advisory Committee of the 1930s which was introduced on an extra-statutory basis. It draws on original archive research including Home Office and Metropolitan Police records from the National Archive, records of the Board of Jewish Deputies from the London Metropolitan archive and records of the Dover, Folkestone and Queenborough Immigration Boards held by Kent County Council Archives. The purpose of this chapter is to understand the origins of these tribunals and the reasons for their failure. In both cases the existence of an independent minded adjudicator was considered an unacceptable constraint on the arbitrary executive power which was necessary for effective immigration control. I will establish that lessons were learnt by the Home Office that they should resist judicial involvement in immigration decision-making and in particular that judges should not have the ability to overrule discretionary decisions. The tensions observed between the executive and the judiciary that emerge from the archive material I examined are a recurrent feature which can be identified in current debates concerning the rights of non-citizens.

[1] Cited in Ian Macdonald, *The New Immigration Law* (Butterworth & Co 1972).

Part 1: The Immigration Boards: 1906-1914

The Origin of the Aliens Act 1905

There has been significant academic work exploring the origins of the Aliens Act 1905, given that it marks a turning point in the history of UK immigration control.[2] Prior to the turn of the century under the Victorian era of laissez-faire economics, there was no systematic control of the entry and exit of 'aliens' into the UK.[3] Historically there had been periods when groups of aliens were subjected to collective expulsions or where restrictions on entry were placed on aliens with certain undesirable characteristics. Yet these controls were periodic, often brought in during times of approaching conflict and targeted at those viewed as politically undesirable.[4] From 1826 to 1905 no alien was expelled under specific immigration legislation.[5]

By the late 1800s, a number of Western states were establishing formal systems of immigration control. At the same time, the principle that the Crown as head of a sovereign state has the prerogative, without parliamentary authority, to exclude any alien was becoming consolidated in domestic law. In *Musgrove v Chun Teeong Toy* [1891] it was concluded that there was no authority for the proposition that an alien could establish a legal right to enter British territory. Prakash Shah observes that this case marks the reception into the common law of an evolving international law discourse. [6]

The impetus for the 1905 Act came from growing concern over the conditions in the East End of London, which were thought to be linked to a rise in Jewish immigration from Eastern

[2] See, for example, Bernard Gainer, *The Alien Invasion: The Origin of the Aliens Act of 1905* (Heinemann 1972); Alison Bashford & Jane McAdam, 'The right to asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law' (2014) 32(2) Law and History Review; Helena Wray, 'The Aliens Act 1905 and the Immigration Dilemma' (2006) 22 Journal of Law and Society 302; Ann Dummett & Andrew Nicoll *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Northwestern University Press 1990)*;* Thomas Roche, *The Key in the Lock* (John Murray 1969).

[3] Dummett & Nicoll (n2) 53. The term 'alien' referred to anyone who was not a subject of the King.

[4] For example, the Aliens Act of 1793, implemented during the period of the French Revolution, which was targeted at French republicans.

[5] Vaughan Bevan, *The Development of British Immigration Law* (Croom Helm 1986) 305. Extradition was possible under the Extradition Act 1870.

[6] Prakash Shah, *Refugees, Race and the Legal Concept of Asylum* (Cavendish 2000) 28-29.

Europe in the late 1800s - a time when Jews were facing increasing persecution. Familiar complaints were raised in the press of the day: the aliens were content to live in overcrowded accommodation which made more money for the landlords, but displaced native-born residents; the aliens lived in dirty unsanitary conditions and were linked to a rise in crime; the aliens lived in closed communities and were not integrating; the aliens undercut the wages of native-born tradesmen. In 1902 a Royal Commission was held to inquire into *'the character and extent of the evils which are related to the unrestricted immigration of aliens, especially in the metropolis'*[7] and to consider the measures that had been adopted for the control of immigration in other countries and British colonies. Their 1903 report formed the basis for the Aliens Act that followed. They concluded that it had not been proven that aliens were directly responsible for the displacement of labour but acknowledged that overcrowding was becoming a problem. A majority recommended that the government should introduce some restrictions – not on numbers, but on the class of immigrant who were admitted, especially those from Eastern Europe. Restrictions should be placed on where aliens were permitted to live, to prevent overcrowding and measures should be introduced to allow for the expulsion of '*alien criminals (and other objectionable characters)'*.[8] They considered that provisions would be made for appropriate legal proceedings before a court of summary jurisdiction.[9] However, the commission was split and two members of the commission, Kenelm Digby the Permanent Under-Secretary to the Home Office and Lord Rothschild, objected, arguing that such restrictions imposed via a test of money on arrival could act to unjustly refuse admission to hard working aliens who would in all likelihood go on to be very successful.[10]

The consensus among scholars is that the Act that emerged was a political compromise, and one which was, in the end, to satisfy neither restrictionists nor liberals. Whilst there was pressure for restrictions from some MPs and from growing anti-immigrant public opinion, there were also many MPs who were strongly opposed on ideological grounds and were concerned that restricting the free movement of labour would be a precursor to protectionism. This explains why controls were delayed for a number of years and why, when

[7] Report of the Royal Commission on Alien Immigration (Wyman and Sons 1903).

[8] Ibid 40 [267].

[9] Ibid 41 [4d].

[10] Ibid 52.

they finally arrived, they were limited. A series of unsuccessful Aliens Bills were proposed in 1890, 1894, 1897, 1898 and 1904.[11] The 1904 Bill failed to gain sufficient support and was withdrawn. One objection was the lack of any appeal procedure and a *'revolutionary'* power that allowed the executive *'without any regard to any law of evidence, which is the safeguard of our liberties, to refuse admission to alien immigrants and to expel them from this country.'*[12] The inclusion of an 'asylum clause'[13] protecting those facing political and religious persecution from being denied entry solely because of a lack of means, was seen as an essential compromise. The 1905 Bill also introduced the concept of an appeal to an Immigration Board, as a means of reassuring opposition MPs that this principle would be observed. Considerable debate was given to the procedural protections that would be in place for those refused leave, ensuring that they would be given a clear explanation of the grounds of refusal and be informed of the right of appeal.[14] There was still some concern about the proposed composition and qualifications of the tribunal and whether they would have the necessary expertise. The Home Secretary, Aretas Akers-Douglas supporting the bill, explained that a magistrate would sit on the board and that members of the Board of Deputies of British Jews should have a role. A significant number of MPs supported an amendment that there be an onward appeal from an Immigration Board to the Divisional Court of the King's Bench Division and if necessary, to higher courts, to supervise the various boards. This was rejected on the grounds that it would lead to significant delay and make the Act unworkable.[15] The question also arose of where the burden of proof should lie. A proposed amendment sought to place the burden on the immigration officer to prove to the Immigration Board that an immigrant was undesirable, on the grounds that a person should be considered innocent until proved guilty.[16] Despite considerable support, this was not successful, leaving the burden on the immigrant to prove a negative i.e., that they were not undesirable.

[11] Records of Ministry of Housing and Local Government TNA HLG 29/85.

[12] Herbert Asquith, Hansard HC vol 145 col 742 (02 May 1905).

[13] Aliens Act 1905, s1(3)(d).

[14] Hansard HC vol 148 col 806 (03 July 1905).

[15] Ibid cols 808-821 – Amendment defeated by 239 to 176.

[16] Ibid cols 794-801 – Amendment defeated by 210 to 161.

The Aliens Act 1905 in Practice

The eventual 1905 Act passed by the Conservatives fell to be implemented by a newly formed Liberal Government. It introduced a system of qualitative control rather than quantitative, which would have the effect of excluding the poor, sick and disabled from entrance to the UK, but not necessarily leading to any decrease in numbers. The Act introduced a power to prevent the landing of undesirable immigrants, although it only applied to those arriving on 'immigrant ships', defined as a ship which brings to the UK *'more than 20 alien steerage passengers'* – the lowest class on board the ship.[17] Those travelling in cabin class were exempted. The Act designated certain ports as immigration ports and appointed immigration officers, drawn from the existing customs officers, who were required to grant leave to enter and who could restrict entry to an immigrant *'who appears to him'* to be undesirable. Immigration Boards were established that were to consist of *'three ...fit persons having magisterial, business or administrative experience*' from a list approved by the Secretary of State.[18] In practice, board members included a variety of non-legally trained local persons. The Dover Board for example included six magistrates, the mayor, the harbour master, two shipping agents, and the chairman of the Dover Gas Company. Other immigration boards included among their members, individuals who described their qualifications as: a retired major general, builder's foreman, draper, builder, auctioneer, councillor/butcher, and several were described simply as *'gentlemen of independent means with time on their hands'*.[19] Six of the twenty-six London Board members were Jewish, and it was the stated intention that where possible a Jewish board member should always be present at a hearing.[20]

Upon arrival ships would be boarded by an immigration officer together with a medical officer to carry out inspections. First class passengers were able to leave without inspection. An alien could demonstrate that he was not undesirable by showing he had or was able to obtain the

[17] Aliens Act 1905, s8(2). Later reduced to 12 persons by ministerial order.

[18] Aliens Act 1905, s2(1).

[19] Lists of board members TNA HO45/10515/135080.

[20] Letter from clerk of London Board to Home Office 09/05/1908 TNA HO45/10515/135080.

means to decently support himself.[21] At commencement the test was whether the immigrant had £5 with £2 for each dependent. If in possession of this money, and not excluded for any other reason, the immigrant should be allowed to land.[22] If not further inquiries would be made into the immigrant's occupation, any proof of his trade, consideration of the state of the labour market, whether he had a job offer and good English. The immigration officer would then make his judgement. Those refused were given a notice setting out the grounds of refusal for why they were undesirable[23] and explaining that they had a right of appeal to an immigration board. [24]

Upon receipt of an appeal, immigration boards were summoned at a convenient place near the port. The immigrant would then be conditionally disembarked to attend the appeal which often took place the following day. Records show that hearings of the boards were not regular, and months could go by without a hearing.[25] The board often dealt with several immigrants who had arrived at the same time and made a single decision for all of them. A case would begin with a clerk reading the summary of grounds of refusal and the immigration officer presenting a summary of the reasons. Questions would then be asked by members of the board to the immigrants, and they would be asked to provide evidence of any money they owned and any other evidence of their intentions such as letters of invitation, addresses to any family members in the UK, references or proof of job offers. Family members could attend as witnesses and would be cross examined by the board. The board's decision would be reached after a short discussion and a formal notice would be issued, either upholding the immigration officer's decision or granting leave to land. If refused the immigrant should

[21] The use of the male pronoun throughout this section reflects the fact that this is the language that appears in the archive documents.

[22] In time the possession of £5 was not sufficient for an immigrant to be considered desirable. Minutes of the board indicate that immigration officers reported that immigrants were being given £5 from relatives or friends in order to get through inspection which they would then return. In September 1907 a family of Russian gypsies from Azerbaijan arrived with over £120. The Immigration Board felt unable to exclude them for want of means, but evidently considered them undesirable. Upon taking advice from the Home Secretary, they refused the appeal on the grounds that they lacked means to be used to support themselves and family 'decently'. Folkestone Immigration Board Minutes 1906-1913 KCC Archives Fo/JPm43.

[23] The refusal notice contained a checklist of reasons for the inspecting officer: 1) failed to show means, 2) lunatic or idiot, 3) suffering from a disease and likely to become a charge upon rates or detriment to the public, 4) sentenced in another country to an extradition crime, 5) an expulsion order has been made against him. KCC Archives DHB/L92.

[24] Home Office, 'The Aliens Act 1905 - Memorandum on the Proposed Administration of the Act' issued to Kent, 09/12/1905. KCC Archives DHB/L92.

[25] Folkestone Immigration Board Minutes 1906-1913 KCC Archives Fo/JPm4.

immediately be returned on the ship they entered. Typical cases included Russian tailors, French waiters and Italian ice cream sellers, refused entry due to a lack of confirmed employment.[26] Statistics show that between 1906 and 1913 there were 9,421 cases of migrants refused entry. Of these 51 per cent appealed and 38 per cent were allowed.[27] However, as anticipated by MPs prior to the passing of the Act, there were significant differences in outcomes between the various immigration boards. For example, only 5 per cent of those refused leave for want of means appealed in Dover, compared to 90 per cent of those refused in London. Between 1906 and 1913, 40 per cent of appeals in Grimsby succeeded, compared with 0% in Hull.[28]

The 1905 Act had an asylum clause which stated that leave should not be refused to an immigrant who 'proves' that he is seeking admission 'solely' to avoid persecution or punishment on religious or political grounds.[29] Bashford and Macadam argue that the codification of a 'right to asylum' at this time was highly unusual and therefore of great significance.[30] However, despite this right in theory it is questionable whether this was being applied. The minutes of the Folkestone Immigration Board reveal that between 1906 and 1913 only 1 case was ever recognised as a political refugee – a young man from Russia who it is stated had *'made himself obnoxious to the Russian government'.*[31] The records contain cases of Jews from Eastern Europe and Armenians from Turkey, yet in none is there any record of asylum being requested or considered by the board and many were refused for want of means. In March 1906, following concern over how the boards were functioning, the Home Secretary issued an order instructing the immigration officers and boards to give appellants the benefit of the doubt where they alleged that they were facing religious or political persecution. Critics argued that in doing so the Home Secretary had undermined the purpose

[26] Ibid.

[27] Report on the Committee on Immigration Appeals, (Cmnd 3387, 1967) Appendix 2, 73.

[28] Ibid.

[29] Aliens Act 1905, s1(3).

[30] Bashford & Macadam (n2) 311.

[31] Folkestone Immigration Board Minutes Minutes 1906-1913 KCC Archives Fo/JPm4.

of the legislation and paved the way for allowing in anyone who alleged persecution, yet it is not clear that this direction was followed by all the boards.[32]

At the same time the press were also admitted to the hearings.[33] A contemporary account by a journalist for the Jewish Chronicle is highly critical of the operation of the boards.[34] He describes a situation where the appellant found himself in an unequal contest, at the mercy of specific personalities on the board who had little appreciation for the rules and procedures of a court. He describes the immigration officer putting the case to the board before the appellant was present, the use of hearsay evidence of individuals who were not called to attend and the failure to inform the appellant's witnesses when the board was convening. Interpreter errors could lead to significant injustices and in some cases the board refused to adjourn to allow family witnesses to attend, so that the ship removing the rejected appellant could depart.[35] Wray in her study of the implementation of the Aliens Act documents numerous procedural irregularities reported in the Jewish Chronicle and argues that the weak legal framework created by the Act gave officials the power to create their own unofficial criteria for refusal.[36] The Immigration Boards cannot be considered as truly judicial institutions, in the sense that this would be understood today, as an independent adjudicating body operating within the judicial branch of government. The members were not legally qualified and until 1910, an alien was not permitted to have legal representation. Where any dispute arose over the status of an alien, the Secretary of State retained the ability to advise the board[37] and there was no right of appeal to a higher court. When legal representation was permitted in 1910, following representations from Jewish organisations, it was to be at the alien's expense and the boards did not need to permit representations from volunteers who were not legally qualified.[38] The Home Secretary directed the boards to ensure that this concession did not transform:

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[32] Myer Landa, *The Alien Problem and its Remedy* (P.S.King & Son 1911) 222-223.

[33] Rule 23A made on 20/03/06. Rules issued under the Aliens Act 1905 TNA HO45/10522/139441

[34] Landa (n32).

[35] Ibid 205.

[36] Wray (n2) 318.

[37] Aliens Act 1905, s8(4).

[38] Home Office memorandum concerning letter from Committee of Deputies of British Jews 1910. TNA HO45/10522/139441.

> *the proceedings before the board from an enquiry into the facts concerning an immigrant into something in the nature of a trial in which the immigration officer and the immigrant's counsel would be protagonists, and the immigration officer might lose that impartial and disinterested position which it is his strict duty to preserve.*[39]

The boards were instructed to protect the immigration officer from *'offensive attack and fortify him in the calm and dispassionate discharge of his duties'.*[40]

Immigration Board hearings were frequently reported in several regional newspapers, sometimes sympathetically. A short summary of the hearings would report the names and details of those rejected or accepted, together with the reasons and other notable details. The Sheffield Daily Telegraph of 22 February 1911 informed its readers that *'Romance entered into the proceedings of Grimsby Immigration Board when in order to obviate the hardship of parting lovers, the board arranged a wedding to take place'*. A *'bright looking intelligent Roumanian girl'* had been detained and classed as an undesirable for want of means, along with her two brothers. She was eventually allowed in on the condition that she marry her fiancé – a tailor's presser in Manchester - within a month, and in the meantime that she should reside in Grimsby in a house provided by the local Jewish Society. Her brothers were however refused entry.[41] The Yorkshire Evening Post of 15 May 1912 also reported on the *'romantic story'* of *'The Youth who cursed the Czar',* an 18-year-old Russian who was admitted by the Immigration Board after telling the remarkable story of how he insulted the tsar in front of a police officer and would rather commit suicide than return. On another occasion they described the *'pitiful scene'* of a family of '*fugitive Russian Jews'* who were found to be in a *'pitiably debilitated condition'.*[42] They describe the father grabbing the legs of the chair of the board and begging not to be sent back to torture and death in Russia, with observers of the scene visibly affected. The family were refused admission on grounds of ill health. These

[39] Letter from Home Office (Edward Troup) to the Immigration Boards, 07/06/10 introducing rule 4A concerning legal assistance. TNA HO45/10522/139441.

[40] Ibid.

[41] Immigration Board Reports, *Sheffield Daily Telegraph* (22 February 1911).

[42] Immigration Board Reports, *The Yorkshire Evening Post* (12th January 1907).

examples show that one consequence of the Immigration Boards was that for the first time decisions about whether an individual was considered desirable or undesirable to enter the UK became a matter of public discourse. The Immigration Board provided a public forum where the social drama of immigration control could be enacted. In doing so the enforcement of the UK's border was made visible and the public could be drawn into questions of what it meant to gain access to membership of the UK, and the consequences of non-admission.

Expulsion of Settled Migrants and Returning Residents

The Immigration Boards were primarily concerned with the admission of newly arrived aliens and did not deal with deportation cases which is the principal subject of this study. Yet the Aliens Act also provided for the Secretary of State to make expulsion orders on recommendation from a court where an alien had been sentenced for an offence carrying imprisonment or where a court certified that an alien had within 12 months of entering the UK been *'found wandering without ostensible means of subsistence, or been living under insanitary conditions due to overcrowding'.*[43] This was a limited power of deportation compared with the powers in force today, but it nevertheless provided for the first time a statutory mechanism to remove long term resident aliens regardless of their length of residence. The court would issue the recommendation as part of the sentence and so this could be appealed as part of any appeal in the criminal court system. Following a recommendation, the Home Secretary would have to decide whether to implement the decision but there was no further right to appeal. It is evident that the recommendation would usually be followed. In 1907, 314 cases needed a decision by the Home Secretary and orders were made in 306 cases. Only in eight of these was deportation not followed (four turned out to be British, two were very young with no previous convictions, one absconded and one died in prison). In the same year 16 cases were certified as liable to expulsion by court on destitution grounds.[44]

[43] Aliens Act 1905, ss3a & 3b.

[44] Home Office, Aliens Act 1905 - Statement with regard to the expulsion of aliens for the year 1907, 07/04/1906 Kent archives C/A3/7B/20.

Where it was alleged that an individual was an alien, the onus was on them to provide evidence to the contrary. The court was instructed that it must be satisfied that the person was an alien before recommending deportation, but it was left at the court's discretion as to their method of inquiry.[45] Critics argued that in using this power the court often recommended deportation of long resident aliens married to British partners without properly considering their domestic circumstances or making them aware that a deportation recommendation was being considered.[46] Landa reports of a case involving a man who had lived in the UK for 20 years without getting into any trouble being deported following a criminal conviction.[47]

Another situation in which settled residents became caught by the Act was when they returned to the UK following a short period away. In theory the Act could exclude any alien regardless of whether they had previously resided in the UK. The Folkestone Immigration Board records document a number of such cases.[48] One case in 1907 involved a 53-year-old Italian who claimed to have resided since he was 20 with his wife and children in London where he worked in a restaurant. He spoke fluent English and his children were born in England. He had left to visit his mother in Sicily and was returning now to family and work. The medical officer certified he was suffering acute trachoma, that could lead to blindness and that he would become a charge on the rates. The police verified that he had work and his wife and child were in London. He was granted leave to land on the condition he would immediately seek medical treatment. Others were not so fortunate. In 1908 a French man employed in England for 11 years, married to a British wife for seven years with British children, was refused leave to land for want of means and lack of employment.[49]

The Immigration Boards survived until the outbreak of the First World War, which led to a radical transformation of the state's power to exclude. These new powers would continue in

[45] Home Office guidance to courts on expulsion power s3(1a), December 1905 and Report by the Scottish Advocate Depute, Mr Cullen, KC as to certain questions under the Aliens Act 1905 TNA HO45/10330/134961.

[46] Letter from Board of Deputies of British Jews to Major Nathan MP, 11/11/29. LMA Acc/3121/E3/80/1.

[47] Landa (n32) 268.

[48] Folkestone Immigration Board Minutes 1906-1913 KCC Archives Fo/JPm43.

[49] Ibid.

a similar form until the late 1960s. Reviewing the workings of the Act in 1925, Sir Edward Troup, who had served as Permanent Under-Secretary of State between 1908-1922, considered that from an administrative point of view the Act was one of the worst ever passed, with the Immigration Boards making effective enforcement impossible. In his view the Home Office had struggled for nine years to prevent the Act being reduced to a farce,[50] though he does not elaborate in his memoirs on the nature of the problems. He concludes that *'It needed the outbreak of the great war to secure an effective (aliens) law'.*[51]

Part 2: The 1930s Aliens Deportation Advisory Committee

This section will explore the history of the short-lived Deportation Advisory Committee which sat between 29th February 1932 and 1939.[52] The archives reveal that from its inception the Committee came into conflict with individuals at the Home Office and Metropolitan Police who had a very different idea of the purpose and scope of the Committee. This led at first to the Committee's role being sidelined, and then to its eventual abandonment. It thus provides a good example of the tension between the executive and the judiciary that has become prevalent in the recent history of immigration law. As the Committee began to hear deportation appeals, its members came to consider themselves as occupying a semi-judicial role committed to certain principles of law: the requirement of evidence, a necessary burden of proof, the right of an accused to see the evidence against them. In contrast there is evidence that Ministers saw the Committee's role as principally serving a political purpose in providing the appearance of a legal process to allay concerns from certain groups about the arbitrary nature of immigration control, rather than acting as a true counterbalance to the freedom of executive action. It was thus always likely that these two visions would be irreconcilable.

[50] Edwin Troup, *The Home Office* (Hesperides 1925) 143.

[51] Ibid.

[52] Although the last referral to it was in 1936.

Background to the Deportation Advisory Committee

The Immigration Boards established by the 1905 Act were made obsolete by The Aliens Restriction Act 1914. The Act was rushed through Parliament as an emergency measure and gained Royal Assent on 5th August 2014, the day after Britain's declaration of war on Germany. It allowed for restrictions to be placed on aliens by Order in Council at *'any time when a state of war exists between His Majesty and any foreign power, or when it appears that an occasion of imminent national danger or great emergency has arisen'*.[53] This very short Act allowed for sweeping powers to be given to the Secretary of State, the detail of which would all be implemented by secondary legislation. If any question arose over whether an individual subject to the order was indeed an alien, the onus was on them to establish that they were not.[54]

When peace returned, following the First World War, the Aliens Restrictions (Amendment) Act 1919 provided for the alien restrictions to be extended year by year and introduced further restrictions on 'enemy aliens'.[55] The 1919 Act omitted the qualification that such orders could only occur in times of war or imminent national danger, though did provide for a weak form of parliamentary scrutiny, in that in peacetime the order must be laid before both houses for 21 days.[56] The Aliens Order 1920, issued under the Act, introduced the requirement that all aliens seeking employment should register with the police or risk facing deportation. Unlike the 1905 Act, the 1920 Order had no provision for granting asylum, and there was to be no recourse to an immigration board for those claiming to be refugees who were denied entry. An alien wanting to be employed now had to obtain a permit from the Ministry of Labour which must first be satisfied that the vacancy could not be filled by labour already in the country. Of most significance was that the 1920 Order introduced the ground where the Secretary of State could deport any alien where he considered that it was conducive to the public good.[57] This is a very broad concept and has remained the standard test for deportation ever since.

[53] Aliens Restriction Act 1914, s1(1).

[54] Ibid, s1(4).

[55] Aliens Restriction (Amendment) Act 1919, s9.

[56] Ibid, s1(2).

[57] Aliens Order 1920 Article 12(6).

At that time there was very little oversight of executive action. In the case of *Venicoff*[58] an attempt was made to challenge the ability of the Home Secretary to deport a non-citizen without any due process, via an application for habeas corpus. The applicant, a Russian who had been resident in the UK for over 30 years, was accused of living on the earnings of prostitution. He claimed that he had been unaware of the grounds on which he was being deported and believed that it was based on untrue allegations by his wife, who he was in the process of divorcing. The court held that there was no duty on the Secretary of State to hold an inquiry into an alien's deportation or provide an opportunity for them to be heard in order to rebut any allegations against them. Deportation decisions were to be made at the discretion of the executive and the court would not interfere. The principles decided by this case were not seriously questioned for several decades.[59] Absolute discretion remained with the Secretary of State in a system that was subsequently described as *'one of the least liberal and most arbitrary systems of immigration law in the world'.*[60]

Establishing the Deportation Advisory Committee

It is evident that the Board of Deputies of British Jews were influential in pushing for reform to the Aliens Order. They had established an Aliens Committee in 1905 to monitor the new law relating to non-citizens and to consider individual cases of hardship that arose. The board had limited staff to enter into lengthy correspondence with government, but it would refer individual cases to the 'Jews Temporary Shelter', a charity established to provide temporary accommodation, meals and assistance to Eastern European Jews arriving in London. In specific cases, they would write to the government. This intervention was not always welcomed. In 1908 the board wrote to the Home Secretary, concerned that a British boy named Marks, born to a Russian father, had been wrongly treated as Russian and deported to a country he had never lived in, after being considered to be of bad character. The Home Secretary responded by calling it an unfounded charge based only on a letter to the editor published in the Jewish Chronicle, accusing the Committee of having made no investigation

[58] *The King v Inspector of Leman Street Police Station, ex parte Venicoff* [1920] 3 KB72.

[59] Stephen Legomsky, *Immigration and the Judiciary* (Clarendon Press 1987) 39.

[60] Quintin Hogg MP, Hansard HC vol776 col 504 (22 January 1969).

into the case of the *'criminal Marks'* and complaining that letters such as this could serve no useful purpose and should be discontinued.[61] Whatever the truth of this case, the lack of any appeal procedure or explanation for why a decision had been reached was seen as a significant injustice.

It appears that the relationship between the Aliens Committee and the Home Office improved, with the Aliens Committee able to persuade the Secretary of State through representations not to make deportation orders in a number of compelling cases.[62] At the same time the Aliens Committee became more selective in the cases that it pursued making it a policy not to make representations in *'cases involving gross moral turpitude'*.[63]

As the years passed since the end of the First World War, there was growing disquiet amongst some MPs about the retention of wartime powers over aliens that were not subject to any judicial oversight. At that time the actual number of deportations was low by modern standards. In the seven years between 1923 and 1929, there were 352 cases which could be classed as arbitrary deportations (i.e., where there had been no court recommendation following a sentence).[64] However, a principle was at stake and MPs argued that the arbitrary powers of the executive were not consonant with British ideas of justice.

The Aliens Order 1920 had to be renewed every year as part of the annual Expiring Laws Continuance Act. Debates in the House of Commons provided an opportunity to consider the powers, but only to approve or reject the proposed renewal. There was no opportunity for Parliament to consider amendments to the existing legislation. Each year, following his election to MP for Mile End in 1923, Mr John Scurr, supported by others, began to table an annual amendment which would prevent the renewal of the Aliens Order. He objected in principle to the way in which a temporary wartime power was being repeatedly renewed, rather than permanent legislation being put forward and debated by Parliament:

> *If there is an adequate reason for legislation of this kind being placed permanently on the statute book, the Home Secretary ought to come down to the House with a*

[61] Letter from Home Secretary to Board of Deputies of British Jews, 03/07/08 LMA Acc/3121/B2/1/15.

[62] Minutes of Aliens Committee 13/12/28 LMA Acc/3121/E3/80/1.

[63] Ibid.

[64] Home Office Memorandum 05/08/30 TNA HO45/15171.

Measure based on his experience and face criticism of the House instead of relying on the Expiring Laws Bill to renew it from year to year... It is my intention on every occasion to resist the renewal of this Act until it is taken from the Statute Book.[65]

These amendments, supported by a significant number of MPs, were either withdrawn or defeated when put to a vote.[66]

Then in November 1929 a deputation from the Board of Jewish Deputies was received by Mr Clynes, the then Labour Home Secretary.[67] In preparation, the Board of Deputies attempted to rally the support of sympathetic MPs to attend the meeting with them.[68] The deputation, consisting of 11 Jewish representatives and five MPs met with Mr Clynes, his Permanent Under-Secretary Sir John Anderson and other Home Office officials.[69] Major Isidore Salmon, a Vice President of the board, introduced the deputation as representing the whole of Anglo-Jewry in the British Empire. A memorandum was submitted outlining four major changes which they hoped to bring about. Firstly, they raised the issue of refugees being refused entry and recommended that the Immigration Boards of 1905 be re-established to assess such cases. Mr Landau, a lawyer who had represented 400-500 appeals before the old Immigration Boards of which 72 per cent had been successful, argued that his experience showed that immigration officers at port often did not have sufficient evidence to make the correct decisions and the boards had been efficient and should be tried again. Concerning the deportation of settled residents, they stressed that there was a great constitutional principle at stake and it was not in accordance with British traditions of justice for an alien to be deported on the responsibility of one executive officer. They requested that there should be a judicial process enabling an alien to show cause why he should not be deported.[70]

The third issue raised concerned the difficulty of aliens naturalising and the fear that individuals may have been denied naturalisation based on unfounded rumours about their character with no opportunity to challenge this. It was proposed that an advisory tribunal on

[65] John Scurr MP, Hansard HC vol 198 col 2464 (29 July 1926).

[66] E.g., the amendment in 1926 was defeated by 211 votes to 96. Hansard HC vol 198 col 2327 (29 July 1926).

[67] Memorandum to incoming Home Secretary TNA HO45/14909.

[68] Correspondence between Board of Deputies and MPs, 24/10/29, 25/10/29, 29/10/29 LMA Acc/3121/E3/80/1.

[69] Note of proceedings at a deputation from the Board of Deputies of British Jews on 05/11/29 LMA Acc/3121/E3/80/1.

[70] Memorandum to Appeals Committee 16/06/66 TNA HO394/102.

the question of naturalisation be established, though the final decision would reside with the Secretary of State. Finally, the issue of aliens having to continue to register with the police was raised since this was a wartime power which should be abolished.

The board recorded that Mr Clynes appeared impressed with their arguments and would give full consideration to the proposals. After some months, Mr Clynes decided as a result to appoint an Advisory Committee to consider all cases in which it was proposed to make a deportation order under Article 12(6c) of the 1920 Order. This did not include cases where a court had recommended deportation or cases of individuals who had evaded immigration control by landing without leave and overstaying. This decision was announced in February 1930 to the Labour Party and to the Board of Jewish Deputies.[71]

It is evident that from the start there were reservations about the wisdom of loosening executive control over immigration, and Mr Clynes did not accept the majority of the board's proposals. It was never intended to relinquish control over the arrival of aliens. There would be no return to the Immigration Boards of the early 1900s and the Deportation Advisory Committee would solely deal with cases of settled residents. A senior civil servant advising the Home Secretary noted the advantages and disadvantages of the proposal and the importance that the executive must always retain the deciding voice:

> *The advantages are mainly of what perhaps I may call the "window dressing character". I cannot pretend that they will make the task inside the Home Office any easier or better in results. So far as the general interests of the country are concerned, I venture to think that the discretion of the Secretary of State unfettered by outside advice is probably the best…. work carried out in Soho by the police may have been hampered by a tribunal quite apart from the "disadvantages" of washing dirty linen in public.*[72]

Clynes in his response to the deputation explained that the right of asylum was not a right attaching to an alien but the right of a sovereign state to admit a refugee if it thinks fit. He assured them that applications by refugees would continue to receive sympathetic consideration but, given the economic circumstances, effective control must remain with the

[71] Correspondence between Board of Deputies and MPs LMA Acc/3121/E3/80/1.

[72] Home Office Memorandum 05/08/30 TNA HO45/15171.

government. He explained that the increase in the number of aliens arriving meant that the size of the administrative machinery needed would be too difficult to manage and so immigration boards would not be in the public interest. He also rejected the idea of an advisory committee on naturalisation arguing that the 1914 legislation was clear that the Secretary of State should have absolute discretion over who became a citizen.[73]

Under the proposed scheme, the annual number of cases had been calculated to be about 20, by dividing the 352 cases of arbitrary deportation between the seven years 1923 to 1929 and subtracting the excluded cases. The Board of Deputies was concerned about the exclusion of cases recommended for deportation by a criminal court, as in their experience sentencing courts did not properly consider a man's length of residence and domestic circumstances before making a recommendation, but the Secretary of State refused to expand the Advisory Committee's remit.[74]

Mr Clynes invited Roland Vaughan Williams, the King County Recorder of Cardiff, to be the chairman of the new committee. Further members were chosen to include representatives from different sections of society. They consisted of Dr Ivy Williams, a doctor of law who had been a UK delegate to the Conference for the Codification of International Law at the Hague in 1930, Professor Laski – described as the leader of the Jewish community in Manchester (Chairman of the Manchester and Salford Council, Treasurer of the Board of Jewish Deputies and Chairman of the Board's Palestine Committee) – invited in order to represent the *'Jewish point of view'*, Professor Alfred Zimmern, Mr JJ Mallon, Warden of Toynbee Hall, to represent Labour interests and a businessman, Sir Alfred Davies CBE – Director of Glenbuedy Tinplate Works and Allerdale Coal Ltd, who it was thought would bring to the tribunal a point of view derived from his experience in the world of commerce and industry. From the start it was conceived that the tribunal's role would be advisory only and would not bind the Secretary of State in any decisions made.

However, before the tribunal could be formally appointed there was a general election in October 1931 which saw the formation of the National Government. Herbert Samuel, the

[73] Letter from the Secretary of State to the Board of Deputies of British Jews 26/02/30 LMA Acc/3121/E3/80/1. Referring to the British Nationality and Status of Aliens Act 1914.

[74] Letter to Secretary of State from the Board of Deputies on 29/04/30 and reply from Secretary of State of 29/05/30 LMA Acc/3121/E3/80/1.

Leader of the Liberal Party, became Home Secretary and was required to decide whether he now wished to proceed with the proposal and with the same committee members.[75] Apart from letters to the Board of Deputies and articles published in the Jewish Chronicle and the Times in March 1930 there had been no public statements promising to implement the proposal.[76] However, Samuel agreed to proceed with the tribunal and a formal announcement was made on 1 March 1932. The actual committee that was finally appointed consisted of Roland Williams as the Chairman, Dr Ivy Williams, Brigadier General Sir Wyndham Deedes, the former Chief Secretary to the Palestine government, Captain Oliver Lyttelton, J J Mallon, and Colonel F.D Samuel, Director of a banking firm, Treasurer of the Jewish Board of Guardians and Honorary Secretary of the Soup Kitchen for the Jewish Poor, who was appointed to be the Jewish representative.[77] A Home Office official was appointed as Secretary.

The Committee established its rules of procedure.[78] A quorum was set at three members. It was decided that the Home Office should refer all relevant cases to the Committee rather than expecting the prospective deportee to lodge an appeal since this would rule out any accusations of arbitrary action. The reference would be made before a deportation order was issued, unless the alien needed to be taken into immediately into custody, in which case the order would be made and the question for the Committee was whether the order should be enforced. When a case was referred to them, they gave the deportee seven days' notice and asked if they wished to make representations in writing. If they decided to hear the person, they would give seven days' notice informing them that they were entitled to be present and could be represented by counsel or a solicitor. The Committee could rely on any information available whether or not it would be admitted in a court of law. They could invite any government department which appeared to them to be interested to send a representative. They could allow or refuse any portion of the public to be present at the hearing. The

[75] Home Office memorandum 28/08/31 TNA HO45/14909.

[76] Memorandum of 03/09/31 TNA HO45/14909.

[77] Press cutting from the Times 02/03/32 LMA ACC/3121/E/03/130.

[78] Deportation Advisory Committee Proposed Rules of Procedure 19/03/32 TNA HO45/14909.

Committee requested that a verbatim note of proceedings should be made by a short-hand writer[79] and requested the employment of interpreters if necessary.[80]

The Committee began hearing cases in the Summer of 1932. Typically, hearings would open with a statement by a police officer against the alien. The alien or his representative were allowed to address the Committee, to cross examine police and call further evidence. Recommendation was then conveyed to the Home Secretary in the form of a memorandum from the Chairman.

During its existence the Committee oversaw 33 cases and recommended deportation in 19. In 14 it recommended against deportation and the Home Secretary accepted the recommendation in each case.[81]

Tensions Emerge between the Home Office and the Committee

The archives show that tensions between the Committee and the Home Office and Metropolitan police emerged early on as a result of a different conception of the role and purpose of the Committee. Unlike the Home Office decision-makers taking decisions on paper, Committee members came face to face with the human consequences of the administrative decisions.

One of first cases that the Committee encountered was that of William Winfield and William Urwin which was heard on 18th July 1932. The Chairman, Vaugham Williams, after consulting with the Committee submitted a lengthy memorandum on the case to Secretary of State.[82] These cases and several others involved residents who had been born in Britain, had left and naturalised in America and had subsequently returned as American citizens. At this time Britain did not allow dual citizenship and they therefore returned as aliens. They were permitted to enter as visitors without a time restriction to visit family members. In one case the person had been convicted of certain unspecified offences and fined, but the criminal

[79] Minutes of first meeting of Deportation Advisory Committee 17/03/32 TNA HO45/14909.

[80] Letter of Deportation Advisory Committee to Home Office 18/03/32 TNA HO45/14909.

[81] Memorandum to Appeals Committee 16/06/66 TNA HO394/102.

[82] Memorandum of Deportation Advisory Committee TNA HO45/14909.

court had not recommended deportation and so the Committee did not feel justified in advising deportation.

In the other cases the person had committed no offence, *'there was no suggestion that he was indigent or unable to support himself, or anything but a perfectly respectable member of society'.*[83] In the Committee's view they had not broken any condition imposed on them when they landed. The sole reason for the deportations appeared to be that they had entered into employment. The Committee found themselves unable to advise that it was conducive to the public good to deport an alien in such circumstances. The Committee's understanding of the term 'conducive to the public good' encompassed offenders and someone who was leading *'a vicious, intemperate or immoral life – in other words if he is an offender against the moral and social laws to which the ordinary citizen pays regard'* or if he was unable to support himself due to illness or became a burden on the public for other reasons. In all such cases there must be something personal to the alien which makes his presence detrimental to the public good.

> *But the presence of a man who is law abiding, orderly, well behaved and self-supporting is not in any way detrimental to the public good, nor does it become so because he engages in productive work which so far from being harmful is beneficial to the public. To deport a man in such circumstances is to deport him not by reason of anything personal to him but simply by reason of his being an alien; and in our opinion the order does not confer any power to deport a man, otherwise entirely unobjectionable* ***as a member of society****, just because he is an alien.*[84]

They considered the issue of economic reasons for removing foreigners but concluded that '*if it is thought desirable to forbid any foreigner whatever his skill from adding to the productive power of the country by working in it, that could be done by appropriate methods'*, but it cannot be said that it is conducive to the public good to deport a person who is working – *'if we advised so our advice would be legally erroneous'.*[85]

[83] Ibid.

[84] Ibid (emphasis added).

[85] Ibid.

The Home Office disagreed. In the opinion of those administering immigration control the returning residents had entered in order to visit family members and thus made statements that they had no intention to remain and to seek employment. If they had stated that they were coming to work, they would have been refused leave to land without a Ministry of Labour permit. They had therefore used deception to enter, had evaded immigration control, broken an implied condition of entry and so it was conducive to the public good to remove them.[86] However, the Committee unanimously recommended that they should not be deported and the recommendation was followed.

A further similarly problematic case was that of a 35-year-old Italian named Zerbino who claimed to have lived in the UK since the age of four, with his mother and father resident in Wales. On 9 March 1932 he was encountered arriving at Liverpool docks as a returning resident. He was admitted as a visitor with no formal time limit on his stay. He sought advice from the Italian embassy to remove his visitor condition and enable him to apply to work, but this was refused. The police brought his case to the attention of the Home Office stating that they had no grounds to prosecute him but that he was undesirable and was not leaving the UK. The Home Office were concerned that the Committee may have difficulty finding his deportation conducive to public good, especially as he had so far not broken any conditions attached to him.

After consideration, the Home Office decided to vary his conditions of leave such that his leave would shortly expire, and subsequently deport him without referral to the Committee, reasoning that his case would then not be one within the Committee's remit since he was now someone who had overstayed their temporary leave, rather than a permanent resident. The Italian embassy remonstrated that he had been resident since the age of four and was without knowledge of the Italian language. Reviewing the case, the Home Secretary noted that he is *'not too old at 35'* to acquire the language and that the decision could not be varied so as to make an exception, since this is the same rule that applied to naturalised British Americans returning to visit their families.[87]

[86] Internal memorandum to Secretary of State 07/07/32 TNA HO45/15171.

[87] Deportation case notes TNA HO45/15171.

Sir Russell Scott, the Permanent Under-Secretary at the Home Office wrote to Vaughan Williams a letter telling the Committee that they were wrong about these cases but that the question was now academic as these cases would not in future be referred to the Committee.[88] In future, clear conditions limiting leave and prohibiting employment would be imposed on such people when they arrived.

The End of the Committee

This was the first of a number of disagreements that emerged with the Committee, despite deportation being recommended in the majority of cases. Of the first 16 cases to be heard, nine had deportation upheld, four were recommended to not be deported, whilst three were still under consideration at the time of the review.[89]

By 1935 there was growing dissatisfaction amongst the Metropolitan police with how the Committee was operating. In November 1935, Normal Kendall, the Assistant Commissioner 'C' (Crime) at the London Metropolitan police lamented the *'pitiful position at the Home Office with regard to deportation orders*'.[90] He noted several cases in which the Metropolitan police had recommended deportation but been blocked by the deportation advisory Committee. In the case of Rosenschein – *'obviously a dangerous adventurer*', Vaughan Williams took the view that there *'was not at present sufficient information to make it likely that this person would be recommended for deportation'.*[91] In two other cases, Hatch and Isowitsky, who were fined in connection with an unregistered club, the police commissioner strongly recommended deportation to the Home Office but seven months later was informed by the Home Office that advice from Committee was against deportation.

Kendall complained:

> *The procedure before the Advisory Committee is difficult. The alien (who almost always is or has been a brothel keeper) has to conduct his case an experienced counsel, often*

[88] Letter from Sir Russel Scott to Vaughan Williams 03/11/32, TNA HO45/15171.

[89] Letter from Home Office to the Secretary of the Board of Deputies of British Jews 04/02/33 TNA HO45/15171.

[90] Confidential Memorandum 27/11/35 TNA MEPO 2/5056.

[91] Ibid.

Mr Walter Frampton; the police case is conducted by the Sgt or inspector in charge of the investigation.

This meant the police were forced to act as advocates against an experienced lawyer.

The whole point of nearly all these cases is that over-whelming suspicion of general murkiness of character and antecedents is present. The Committee rather conveys the general impression that everything alleged against an alien must be strictly proved and that they regard deportation from the country as serious as, if not more serious than a sentence of imprisonment.

We have formed the opinion that the advisory committee does not approach these cases from the point of view that the real point is whether the individual concerned, from his general reputation and history, is likely to be an asset to this country, but rather from the point of view of whether it will be unpleasant for him to return to his home.[92]

The turning point came with the 'Millington case'. Leonard Millington was an immigration officer who was convicted of accepting a bribe from a number of resident Italians working in the restaurant trade, in order to facilitate the illegal arrival of their brother-in-law, Luigi Costa. He was convicted under the Prevention of Corruption Act 1906 and sentenced to 12 months imprisonment at Wormwood Scrubs. Two of the Italians provided evidence for the prosecution and as such were not themselves prosecuted. The Home Secretary Sir John Simon decided that they should nevertheless be deported for the deterrent effect it would have on people who attempted to defeat the restrictions of entry for their relatives. The cases of Rossi, Cattini, Mortali and Borra came before the Committee on 4 December 1936.[93] A full report from the Home Office was forwarded to the Committee and a Chief Inspector Thompson provided evidence of the grounds on which they should be deported. The police wanted to rely on the statements made by the Italians for the prosecution as evidence that it was conducive to the public good to have them deported. The case was adjourned for consideration.

[92] Memorandum of Norman Kendall, Metropolitan Police 05/12/35 TNA MEPO 2/5056.

[93] Memorandum from T.B Thompson, Inspector of Police 06/12/35 TNA MEPO 2/5056.

Following the hearing the Metropolitan police were concerned that the Advisory Committee would not recommend deportation. *'If so the effect upon the alien population will be disastrous'* since *'men who had admitted conspiring to defeat our alien laws are to be allowed to stay'* unless the Secretary of State overruled the Committee. *'There is no doubt the case is being watched by the whole of Soho and Clerkenwell and that deportation orders were confidently expected'.*[94] The Assistant Commissioner Norman Kendall recorded that he would speak to Alexander Maxwell, a senior official at the Home Office[95] to try to persuade the Secretary of State to make deportation orders anyway regardless of the Advisory Committee's decision.

As expected, the Committee declined to recommend deportation against the Italians, reasoning that since they had been prosecution witnesses against the immigration officer, they should not be penalised for having incriminated themselves. They had previously been of good character and were unlikely to reoffend. The recommendation was accepted by the Home Secretary. This was the final straw for Kendall: *'The Advisory Committee recommended in their favour. I do not suppose we shall ever have a better case to show that the Advisory Committee should be abolished'.*[96]

Following discussions between the Metropolitan police and officials at the Home Office it was decided that changes needed to be made to how the Committee was operating. On 13 February 1936, Alexander Maxwell and Sir Ernest Holderness from the Home Office had a long talk with Vaughan Williams about the policy and procedure of the Advisory Committee. They observed that there was a difference of opinion over what the purpose of the Committee was:

> *He thinks if an alien has been allowed to settle down here, he ought not to be turned out of the country unless he has engaged in practices of a criminal character and is likely to continue to engage in such practices. The result is that he is always in these cases liable to take the view that the onus is on the Home Office to show why an alien*

[94] Memorandum of Norman Kendall 10/12/25 TNA MEPO.

[95] Alexander Maxwell became Permanent Under-Secretary of state at the Home Office in 1938 replacing Sir Russel Scott.

[96] Memorandum of Norman Kendall, Metropolitan Police 03/03/36 TNA MEPO 2/5056.

should be deported rather than on the alien to show why he should be given the privilege of continuing to stay here. [97]

They were concerned that:

His instincts as a lawyer are to require something approximating to legal proof of misconduct and to look with some suspicion on uncorroborated and untested police evidence… Mr Vaughan Williams is clearly inclined to give the alien the benefit of the doubt and to the reject the HO view that the onus is on the alien to show that he is a worthy person to whom the privilege of remaining in this country can properly be granted.[98]

They suggested to Vaughan Williams that the Committee *'might properly take for granted the salient facts alleged in the police reports'* without subjecting them to any independent scrutiny and *'merely ask the alien whether he had anything to say'.* Vaughan Williams apparently said this would not be *'practicable'.* He observed that it would be helpful if the Home Office could send a representative to attend to present a summary to the Committee as at present he had to act as judge and spokesman for the prosecution. They said that this was impossible as that would create the impression that the Committee was *'arbitrating between the Home Office and the alien'.*[99] Other problems were identified with the procedure that would continue to exist even if a more sympathetic chairman could be found. The aliens were seen to have the upper hand, since they were frequently represented by counsel who would *'naturally demand to know exactly what is alleged against their client and to cross examine the police'.* The police were considered not to be fit to undergo cross examination since the evidence against the alien was compiled from various reports from other police officers. There was a danger of the hearings turning into something approximating a trial.

The outcome was that the officials told Vaughan Williams that whilst *'they appreciated the help he had rendered to the Home Office in protecting successive Home Secretaries against criticisms of arbitrary and unfair action',* the practice and policy of his Committee was creating great difficulty. They stated that there had never been a public promise that the Home Office

[97] Memorandum of Alexander Maxwell, Under-Secretary at the Home Office 29/02/36 TNA HO213/239.

[98] Ibid.

[99] Ibid.

would refer every deportation case to the Committee, so in future it would not be used '*where we feel we have no need of its advice'.* There would remain a residue of cases where *'for one reason or another it was expedient to refer the case to the Committee'.* The Home Office officials record that Vaughan Williams *'would raise no objection to such a course and would be glad to be relieved of the responsibility'.* [100]

Following this, automatic referral was ended. In future the Home Office would only refer cases in which there was any doubt felt or where there was room for political controversy or a likelihood of serious protests. In such cases they would first write to the alien telling him that deportation was being considered and asking him whether he has anything to say before the deportation was carried out. If the answer did not create any substantial doubt, then it would be open for a deportation order to be made without a referral to the Committee.

This new procedure was communicated to Vaughan Williams in a letter from the police which suggested that, '*This would save the Committee a certain amount of trouble and I daresay be welcomed by the Committee'.*[101] Vaughan Williams accepted this position and stated that the Committee would have to see how the new procedure worked.[102] Even with the new procedure the police were still concerned that without a change of Chairman they would continue to encounter problems obtaining recommendations for deportation.[103]

In actual fact no cases were referred for the next three and a half years.[104] The fact that the Committee was no longer being used seems to have occurred with little public awareness or criticism. In October 1938 the Haldane Society, an organisation of socialist lawyers affiliated to the Labour Party held an enquiry into the law relating to Aliens. In their detailed outline of the state of the law they note critically that an alien could be expelled from the country by completely arbitrary decisions against which he had no right of appeal, and they recommended a right of appeal to a judge on the King's bench be established. They also recommended the introduction of immigration boards, comprised of Home Office officials, lawyers and representatives of refugee organisations to decide the cases of aliens arriving

[100] Ibid.

[101] Letter from Metropolitan Police to the Deportation Advisory Committee 30/07/36 TNA NO213/239.

[102] Letter from Vaughan Williams to A Maxwell 31/07/36 TNA HO 213/239

[103] Memorandum of Metropolitan police on new deportation referral procedure 14/07/36 TNA MEPO 2/50/56.

[104] Home Office Memorandum for the Immigration Appeals Committee 16/06/66 TNA HO394/102.

who claimed to be refugees. Yet curiously the report makes no reference to the existence of the Deportation Advisory Committee, which had not been formally dissolved.[105]

Further consideration was put off by the outbreak of the Second World War. Numerous 'enemy aliens' were interned without trial under wartime powers. By the time the war ended the Deportation Advisory Committee was no longer of relevance. A contemporary official stated, *'although no formal divorce took place between the Home Office and the Committee there was a de facto separation on ground of incompatibility of temper'.*[106] The powers derived from the 1919 Act were extended annually throughout the 1940s with no right of appeal against a decision by the Home Office. It was not until the 1950s that the issue of rights of appeal would again reach the political agenda. Reviewing the Deportation Committee 'experiment' in 1955 K.B Paice, the Under-Secretary of State for the Home Office described it as:

> *administratively a catastrophic failure… They completely inverted the emphasis by regarding an alien's presence here as a natural right of which he ought not to be deprived except on clear proof of some definite misconduct that was likely to be continued… No doubt a more judicious (i.e., unjudicial) choice of Committee might have mitigated some of the evils, but it is doubtful whether it could have been avoided… In short the very existence of such a committee or tribunal makes it virtually certain that a deportation order will not be made in many a case where it ought to be made simply because it will be recognised that the Committee will never support it.* [107]

Conclusion: Lessons Learned

This chapter has identified the social and political role that the early tribunal structures fulfilled. The Immigration Boards were introduced as a political compromise at a time when the imposition of immigration restrictions was controversial. However, from the start they were not independent judicial bodies but part of the administrative machinery of the Aliens

[105] Haldane Society: Report of Sub-Committee on the Law relating to Aliens (October 1938) LMA Acc 3121/E3/130/2. Correspondence between the Board of Deputies of British Jews and Colonel Samuel in 1939 also shows a lack of awareness of what happened to the Committee. Colonel Samuel a former member of the Committee stated that he believed one of the reasons it was abandoned was due to the expense.

[106] Home Office Memorandum for the Immigration Appeals Committee 16/06/66 TNA HO394/102.

[107] Briefing for Home Secretary by K.B Paice, the Under-Secretary of State for the Home Office 28/10/55 TNA HO 352/11.

Act. Attempts at providing full access to the courts for non-citizens were resisted. Given the relatively low numbers of people affected and the reasonably high success on appeal (at least at certain ports), it is tempting to see the Aliens Act as a token gesture, rather than a genuine attempt to limit immigration. The boards did, however, provide for the first time a public forum where a claim by a non-citizen to reside in the UK could be put forward, scrutinised and reported on to the public. The policing of the citizen/non-citizen border became a matter of wider public discourse. The criterion for membership was an assessment of 'desirability' based around a public demonstration of wealth, health and a lack of criminality. It is evident from the archive records and reported cases that those who could not meet such criteria would sometimes seek to use the hearing to put forward a claim based on compassion. Although in theory a right to asylum could be claimed, in practice the law was undeveloped and it is not clear that such claims were consistently considered by the various boards. Ultimately, with the onset of the First World War the boards were no longer politically necessary and could be dispensed with, given the new consensus on the need for strict border controls.

The Deportation Advisory Committee provided a public forum where the decisions of the Home Office, often based on police reports, were exposed to scrutiny. They also provided an opportunity for a long resident non-citizen to articulate a claim that, in spite of their past behaviour, they should still be considered to belong in the UK. What emerges from the records is that the government intent behind the Committee was never to have a truly independent judicial body that would act as a counterbalance to executive power. Rather it was hoped that it would serve a political purpose; a public relations exercise or *'window dressing',* in response to the pressure of specific interest groups and to assuage concerned liberal opinion about the existence of unconstrained executive powers over aliens. When the Committee exceeded this role, it became an unwanted interference.

There was a fundamental conceptual difference in approach. The police and Home Office officials took the view that an alien, no matter how long he had resided in the UK, could have no right or expectation that he could remain, and that the Committee should defer to their judgement. The starting point was that the alien's residence is precarious and needs to be justified. The objective fact of their alienage implies that they do not belong in the UK. In

contrast, the Committee viewed itself as adjudicating between the state and the individual standing before them who had become *a member of society.* Where an individual had lawfully settled, the Committee considered there was an evidential burden on the state to demonstrate they were unworthy of remaining a member.

To some extent, these nascent conflicts continue in current debates over deportation appeal rights. Given the lessons that the civil service learned from these *failed experiments*, it is unsurprising that post-war there was significant resistance to reintroducing a judicial element into immigration decision-making. The next chapter will consider how this resistance was overcome and explore the emergence of the modern system of immigration appeals.

Chapter 4: The Origin of the Modern Tribunal

> *I have just looked at that flimsy piece of paper, marked 5th August, 1914, the same tattered piece of paper which has been passed along the benches and which was printed in the first days of the First World War. It reeks of barbed wire and machine guns. Why can we not begin to tear it up, to take little corners off it every year, come to this House and produce a more agreeable, a more amenable, a more liberal and freer atmosphere for these people?*
>
> - Viscount Hinchingbrook MP in the House of Commons 1955.[1]
>
> *One law shall be to him that is home-born, and unto the stranger that sojourneth among you.*
>
> - Exodus 12:49 (quoted by Reginald Paget MP in the House of Commons 1958).[2]

This chapter concerns the period of immigration history between the end of the Second World War and the introduction of the Immigration Appeals Act 1969. This spans the Conservative governments between 1951 and 1964, and the Labour government of Harold Wilson between 1964 and 1970. It was a period during which the UK grappled with decolonisation, and its legacy as the former centre of an Empire. In 1948 the UK had no entry restrictions on British subjects (Citizens of the UK and Colonies (CUKC) and Commonwealth citizens)[3] a position which became politically unsustainable by the 1960s, as the number of new arrivals grew. This led to the introduction of the Commonwealth Immigrants Acts which would for the first time restrict the entry of British subjects. Academics concerned with UK immigration policy in this period have overwhelmingly concentrated on these developments and the seismic impact of this on British society and politics.[4] Much of the analysis has been of the way in which

[1] Hansard HC vol 546 col 1691 (24 November 1955) (Expiring Laws Continuance Bill Debate).

[2] Hansard HC vol 595 col 1337 (20 November 1958) (Expiring Laws Continuance Bill Debate).

[3] See British Nationality Act 1948, s1.

[4] E.g., Ian Spencer, *British Immigration Policy Since 1939: The Making of Multi-racial Britain* (Routledge 1997); Randall Hansen, *Citizenship and Immigration in Post War Britain* (Routledge 2000); Zig Layton-Henry *The Politics of Immigration: Race and Race Relations in Postwar Britain* (Oxford 1992); Paul Foot, *Immigration and Race in British Politics* (Penguin 1965); Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (Cornell University Press 1997).

decisions were taken to restrict migration, particularly from the New Commonwealth, without altering the basis of the UK's colonial citizenship. During the passing of the Commonwealth Immigrants Acts significant political questions were raised about how belonging to the UK was to be defined.[5] Academic debate has considered the extent to which notions of belonging were reconstructed in terms of a racial affiliation to the UK.[6]

In this chapter I initially concentrate on what may then have appeared as a less significant issue - the rights of aliens. In the immediate aftermath of the Second World War the UK government was committed to retaining absolute discretion over the control of alien immigration. By 1969 this commitment had faded and power ceded to immigration judges. Charles Blake notes that it remains a mystery how the Wilson Committee on Immigration Appeals was established *'and will remain so until papers are released in due course'*.[7] Satvinder Juss observes that it is unclear how and why the government shifted from a commitment to strengthen deportation controls to an enquiry into appeal rights.[8] This chapter draws on recently released archive material from the National Archives[9] to answer these questions. In doing so, I identify a number of factors that led to this major reform to the UK's system of immigration control. Firstly, there was growing political pressure in Parliament in which MPs criticised the continued reliance on emergency wartime legislation and a growing number of politically controversial immigration cases that led to the integrity of Ministers being questioned. Secondly, further integration with Europe and participation in the Council of Europe led to some compromises being made in relation to the rights of settled non-citizens. Yet, ultimately it was changes to the rights of British subjects that provided the impetus for reform. As restrictions were introduced on the entry of Commonwealth citizens,

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[5] See James Hampshire, *Citizenship and Belonging* (Palgrave 2005).

[6] See Hansen (n4) 10-16 considering this argument by Bob Carter, 'Immigration Policy and the Racialisation of Migrant Labour: The Construction of National Identities in the USA and Britain' (1966) 19(1) Journal of Ethnic and Racial Studies 135.

[7] Charles Blake, 'Immigration Appeals - The Need for Reform' in Dummett, A (1986) *Towards a Just Immigration Policy* (Civil Liberties Trust 1986) 177.

[8] *'Quite how and when the transmutation took place is an enigma which can only be fathomed when someone goes to the trouble of examining the relevant government papers on the matter',* Satvinder Juss, *Immigration, Nationality and Citizenship* (Mansell 1994) 128.

[9] In particular records from the Home Office, Lord Chancellor's Office, Foreign and Commonwealth Office, Treasury and Cabinet papers.

civil servants and the government initially resisted calls for an independent appeals process, drawing on past experience of the Immigration Boards and Deportation Advisory Committee. In this chapter I set out how that resistance was overcome and the consequences. I show that, despite these concerns about the executive losing absolute control over immigration decision-making, over time political benefits emerged from ceding power to the tribunal.

The 1950s: Attempts to Establish the Rule of Law

The post-war period saw the rapid expansion of the administrative state and with that the development of a range of tribunals. Concern about executive accountability in other areas of administrative decision-making and over the lack of cohesion in the emerging tribunal structures had led to the establishment of the Franks Committee on Administrative Tribunals and Enquiries. Its 1957 report[10] recommended that tribunals should be viewed as adjudicative, and a part of the judicial system, rather than as part of the administrative machinery of the state and should adhere to the principles of being fair, open and impartial. The 1960s would see significant developments in judicial review,[11] with pioneering judges developing new methods of judicial accountability.

The emergence of legal accountability in immigration law can be seen as one chapter in this broader context. Yet for many years, judicial supervision of immigration control was strongly resisted. Alien immigration continued to be dealt with under the Aliens Restriction Acts 1914 & 1919 under which more than 20 Aliens Orders had been issued. A common complaint was that the orders were inaccessible; most aliens would have little knowledge of the law they were subject to. There was no formal system of immigration rules and applications for the renewal of visas or for visitors to be allowed to stay to work were at the discretion of the Secretary of State. Immigration officers were provided with unpublished 'General Instructions', subject to regular revision.[12] A recommendation for deportation following a criminal offence could be challenged through the criminal appeals procedure, but there was

[10] Oliver Franks, *Report of the Committee on Administrative Tribunals and Enquiries* (Cmd 218, 1957).

[11] The case of *Ridge v Baldwin* [1964] AC40 extended the doctrine of natural justice into the area of administrative law, enabling the growth in applications for judicial review. See TT Arvind and Lindsay Stirton, 'The curious origins of judicial review' (2017) 133 Law Quarterly Review 91 for a discussion of the historical development of judicial review and the expansion of administrative law.

[12] Report of the Committee on Immigration Appeals, (Cmnd3387, 1967) 5.

no way to challenge a discretionary decision by the Secretary of State to make a deportation order. The orders provided for potentially indefinite detention pending deportation.

There were about 400-500,000 aliens living in the UK at this time.[13] The removal of people who breached their conditions of leave required the making of a deportation order. Between 1946 to 1950 the courts recommended deportation in 1,036 cases and 617 deportation orders were made.[14] In addition, 1,469 deportation orders were issued by the Home Secretary where there was no process before a court.[15]

The Aliens Restriction Acts were subject to some limited debate each year as part of the Expiring Laws Continuance Bill. As was the case in the 1920s, several MPs argued for repeal. In 1948 Mr Silverman MP for Nelson and Colne proposed an amendment at short notice to discontinue the Act. His argument was that very few people appreciated:

> *how absolute and uncontrolled the powers of the Home Secretary are under the Aliens Restriction (Amendment) Act, 1919. There is no parallel to it so far as I know in any country in the world outside the totalitarian and police States. It means absolute power—I will not say over life and death, but it is only just short of that—over liberty and movement without any appeal, inquiry or third-party judgment of any kind or any communication to the person concerned of what is alleged against him. They do not do these things in any other democratic country.*[16]

He compared the UK unfavourably to the United States where a person faced with deportation was informed of the charges against them and entitled to representation before a tribunal. In contrast in the UK there was no publication of cases of discretionary deportation nor decisions or reasons. He gave the example of a man who was working in the UK for many years who voluntarily returned home, only to find that his family were dead. Upon returning to his life in the UK he was refused entry. Silverman argued that refusing him the ability to resume his life in the UK *'was a decision which no tribunal dealing with cases in public could*

[13] A figure of 400,000 was given by Reginald Paget in Commons debate (Hansard HC Deb vol 484 col 1446 (22 February 1951)). In other debates of this period the number is sometimes given as 500,000. The exact figure was unknown.

[14] Hansard HC vol 484 col 1446 (22 February 1951).

[15] Ibid.

[16] Hansard HC vol 457 col 1143 (05 November 1948).

ever have arrived at'.[17] He proposed that if the government wanted to maintain such powers, they should pass a permanent Act which could be scrutinised by Parliament.

In response the Under-Secretary of State for the Home Department explained that experience had shown that it was difficult to get any workable system of control by tribunal and that there was no evidence of abuse of powers under the act.[18] A number of MPs who disagreed with the way that this temporary Act was being maintained on a permanent basis, felt compelled to vote against the amendment, otherwise the government would cease to have any control over immigration. The amendment was withdrawn.

The following year, 1949, a similar amendment was moved by Eric Fletcher MP for Islington East but was again withdrawn following limited debate. In 1952 during a significant debate on the issue, it was argued that it was difficult to conceive of wider police power over any human being than that given in the Aliens Restriction Act.[19] Here for the first time MPs questioned whether the powers were compatible with the recently signed Universal Declaration of Human Rights. Several argued against the power to deport long resident family members with family in the UK and raised the question of individuals subject to deportation orders who could not be deported and so were detained for a significant period. The precarious position of the alien in law and the consequences of this was recognised:

> *He knows that he has no security, and if he is fully acquainted with the Regulations and with the opportunities that exist under them for deporting him for any reason whatever, he is bound to have a feeling of insecurity.*[20]

Mr Wedgwood Benn proposed that there should be a committee to consider the operation of the aliens law;[21] again the amendment was withdrawn.

In 1953 a new Aliens Order was issued under the Aliens Restriction Act 1914 (as amended by the 1919 Act) which went some way towards placating critics. The numerous earlier orders were consolidated into a clearer framework and some of the more egregious wartime

[17] Ibid col 1148.

[18] Ibid col 1153.

[19] Reginald Paget, MP Northampton, Hansard HC vol 508 col 1287 (02 December 1952).

[20] John McKay, MP Wallsend, Hansard HC vol 508 col 1303 (02 December 1952).

[21] Wedgwood Benn, MP Bristol South East, Hansard HC vol 508 col 1297 (02 December 1952).

restrictions were abandoned. As an Order, it was not subject to detailed consideration in Parliament. A number of arguments were made by Ministers for the status quo; allowing the Home Secretary wide discretionary powers benefited the alien, since he would exercise these powers in a humane way. In contrast any attempt to formalise immigration rules that could be litigated was likely to lead to more unfavourable decisions being made since it would not be possible to set out in statute all the considerations that had to be taken into account.[22] The principal argument was that immigration decisions raised matters of policy for which the Secretary of State should be accountable to Parliament but not through challenge in the courts. It was preferable that any hard cases were raised by MPs, rather than being considered by a judge.[23]

Challenging the Aliens Restriction Act became an annual tradition throughout the 1950s.[24] In 1954 a controversial deportation case, described as one of the *'worst examples of illiberal action on the part of a Home Secretary to be found in the history of our country',*[25] added further ammunition to the critics of the existing immigration law. It concerned the case of Dr Joseph Cort, an American Doctor who had been living in the UK for three years. He had studied at Cambridge, completed his medical training at Yale and had a lectureship at Birmingham University. Whilst at Yale he had been a member of the communist party. It was accepted that whilst in the UK he was not politically active and there was no other objection to his character. He had received a letter from the American state department withdrawing his passport and ordering him to return to the US but providing no reason. It emerged that friends of his had been questioned as part of a congressional inquiry into communism in American universities and had lost their jobs. He refused to return and subsequently received call up papers to the military which he also failed to answer. He feared that on return he would be deprived of his nationality. He was then questioned by the British police on behalf of the Americans. The Home Office refused to grant him an extension of stay, giving him no opportunity to explain his circumstances. It was alleged in the Commons debate that the

[22] Hugh Lucas-Tooth, Joint Under-Secretary for the Home Department, Hansard HC vol 521 col 566 (26 November 1953).

[23] Ibid. See also Hugh Lucas-Tooth, Joint Under-Secretary for the Home Department, Hansard HC vol 532 col 508 (03 November 1954).

[24] These debates were pursued particularly by a group of Labour MP's Reginald Paget, MP for Northampton, Sydney Silverman MP, Nelson & Colne, Eric Fletcher MP Islington East, Francis Noel-Baker MP Swindon and Chuter Ede, MP for South Shields who had been a former Home Secretary.

[25] Mr Ede, MP South Shields, Hansard HC vol 546 col 1669 (24 November 1955). Case raised on 30/07/54 by Mr Benn.

Secretary of State mislead the House of Commons in stating that Dr Cort had refused to give a statement. It was suggested that in this case the Minister had used his discretion to refuse Dr Cort a renewal of his visa, seemingly on political grounds and contrary to normal policy. As a result, Dr Cort and his wife were forced to leave the UK to seek political asylum in Czechoslovakia. As Mr Benn put it *'… the apparatus of two modern States is turned on him to hound him out and hound him behind the Iron Curtain'.*[26]

By 1955 the pressure building in Parliament was being felt by the government and the case of Cort had led to *'justified accusations of arbitrary action'*.[27] The Home Secretary Gwilym Lloyd George, was advised that the lack of permanent immigration legislation was problematic but the best approach would be to stall it for *'as long as humanly possible*'.[28] However, a draft Bill could be prepared and ready since *'the present anomalous position is liable to break out at any time on an individual "cause célèbre" (e.g. the Cort case) quite apart from the annual hazard of the Expiring Laws continuance act'.*[29]

Throughout the 1950s and 1960s the debates on the Expiring Laws Continuance Bill were increasingly used by MPs to raise specific cases. In this period, it was rare for long resident non-citizens to face deportation. Most cases concerned decisions to refuse entry to prominent individuals on political grounds, for example peace campaigners. Some of these cases were reported unfavourably in the foreign media and it was argued this was damaging the UK's reputation internationally: '*Every time we blunder, as the Home Office blunders all too frequently, it counts against us in the eyes of the democratic world'.*[30]

A further *cause célèbre* came before Parliament in 1962 which highlighted the weakness of the courts in holding the executive to account. In the case of Dr Soblen,[31] the Secretary of

[26] Tony Benn MP, Hansard HC vol 531 cols 941-968 (30 July 1954*).*

[27] Briefing for Home Secretary by K.B Paice, the Under-Secretary of State for the Home Office 28/10/55 TNA HO 352/11.

[28] Memorandum to Home Secretary 21/06/55, Legislative programme of Parliament 1955/56, TNA HO 352/11.

[29] Ibid.

[30] Greenwood MP, Hansard HC vol 595 col 1421 (20 November 1958).

[31] Dr Soblen was a naturalised U.S citizen convicted of conspiracy to deliver sensitive information to the U.S.S.R. He was sentenced to life imprisonment but released on bail pending appeal and fled to Israel. Israel sent him back to the U.S. During a stopover in London he severely injured himself and was admitted to hospital in the UK. He was then refused political asylum and detained. He successfully applied for permission to enter Czechoslovakia, but the UK would not let him travel. The U.S requested his return. His case was raised by a number of concerned MPs. See, for example, Sydney Silverman MP, Hansard HC vol 668 cols 405-464 (28 November 1962).

State was accused of misusing deportation law to bypass the extradition process in order to return a man wanted by the United States who was seeking asylum. One of the grounds of challenge was that the deportation order had been issued without an opportunity for Dr Soblen's case to be heard. The judge endorsed the *Venicoff*[32] decision that an alien had no right to be heard before a deportation order was made.[33] It was not for the court to comment on a discretionary decision taken by the Secretary of State. Dr Soblen took an overdose of barbiturates and died shortly before he was to be deported to the United States.

During the 1950s, Home Office civil servants argued that whilst permanent legislation was in theory desirable, it was doubted whether Parliament would in peace time grant to the executive all the powers it required in *'a sufficiently arbitrary form'*[34] to secure effective alien control. It was feared that attempts to establish permanent legislation would be frustrated by the *'human rights brigade', 'abstract libertarians'* and *'conservative lawyers who wanted more control over the executive'.*[35] Sectional interests such as Jewish or émigré organisations would find their way into the Bill at committee stage and this would lead to a diminution of powers. Their advice was, *'It will be hard work stemming the tide of international liberalism as propagated by bodies such as the Council of Europe'.*[36]

Maintaining the present position was also problematic. The Home Office faced a growing number of difficult cases in which MPs sought to intervene. This led to protracted cases where deportation was suspended following an MP's phone call and opportunities were lost to pursue removal.[37] It was desirable to avoid being attacked annually on aliens legislation and to *'remove the ground for the reasonable criticism that we have no intention of ever giving up these powers'.*[38]

[32] *The King v Inspector of Leman Street Police Station, ex parte Venicoff [1920] 3 KB72*.

[33] *R v SSHD, ex parte Soblen* [1963] 1 QB 829.

[34] Memorandum to Home Secretary 23/06/55, Legislative programme of Parliament 1955/56, TNA HO 352/11.

[35] Briefing for Home Secretary (n27).

[36] Sir Frank Newsom minute 13/01/54, Legislative programme of Parliament 1955/56 TNA HO 352/11.

[37] Memorandum to Home Secretary 23/06/55, Legislative programme of Parliament 1955/56 TNA HO 352/11.

[38] Letter to Sir A Hutchinson from KBP (K B Paice of Princeton House) on analysis the 1954 debate on the Expiring Laws Continuance Bill TNA HO 352/11.

Some consideration was given to whether a deportation committee could be established. It would be limited to long residence cases and special care taken with selecting the chairman.[39] Ultimately though civil servants drew on the lessons of the 1930s' Deportation Advisory Committee to argue against it and it was decided that at the next debate on the expiring continuance laws no offer of a committee or tribunal should be made. The facts in deportation cases were not ones that the government would be willing to put before an advisory committee or court. After all, *'Those who assented to the Advisory committee in 1932 knew nothing of a world of Iron Curtains'.*[40]

The recommendation was that the Home Office:

> *should carry the burden of formulating and defending a policy for the control of aliens in circumstances in which it is constantly open to the accusation that it is acting arbitrarily,* ***in order to save the House of Commons and the British public from themselves***.[41]

In 1955 the Home Secretary decided against pursuing permanent legislation.[42] Sir Hugh Lucas-Tooth, the Under-Secretary of State, was instructed that even under very strong pressure in the debate on the Expiring Laws Continuance Bill, no promise should be given to provide safeguards against the exercise of arbitrary power by the executive.[43] The Home Secretary recognised that there may in the future be a case for creating a right of appeal against the deportation of aliens who were permanently resident for a long period of time. But *'there was no need to hurry about it – might best be left as a sop for the colonies when necessary'.*[44] It was recognised that in the near future, immigration of Commonwealth citizens may be limited, raising new questions about the rights of British subjects.

[39] Memorandum 28/10/55, Legislative programme of Parliament 1955/56 TNA HO 352/11.

[40] Briefing for Home Secretary by K.B Paice, Under-Secretary of State for the Home Office 28/10/55 TNA HO 352/11.

[41] Memorandum to Home Secretary 23/06/55, Legislative programme of Parliament 1955/56, TNA HO 352/11 (emphasis added).

[42] Minute of 16/08/55, Legislative programme of Parliament 1955/56 TNA HO 352/11.

[43] Minute of K.B Paice, Under-Secretary of State for the Home Office, 01/11/55 TNA HO352/11.

[44] Minute of 16/08/55, Legislative programme of Parliament 1955/56, TNA HO 352/11.

The European Convention on Establishment

The first attempt to provide aliens facing deportation with some semblance of due process came as a result of the UK reluctantly signing the European Convention on Establishment on 24 February 1956. Promoted by Italy, a net exporter of migrants, it was initially called the Council of Europe Convention on the Reciprocal Treatment of Nationals. Its aim was to harmonise and enhance the treatment of Council of Europe nationals living in another member states, including legal protections, ownership of property and economic activities – to some extent it was a forerunner of the EC treaties. Italy submitted a draft proposal in 1950 which was approved in May 1951 by the Council of Europe's Consultative Assembly. Whilst most member states approved the idea in principle, the UK government's hostility was evident.[45]

At a meeting to discuss the proposal, the Home Office representative made its firm opposition known. It was believed impossible to design a convention acceptable to all member states and that the UK *'would inevitably become involved with a clash over our entry and residence rules'*.[46] It was preferred to maintain bilateral agreements with other European states concerning the rights of their nationals. The UK's position was to discourage further examination of the draft proposal and avoid further meetings between member states. Instead, it was suggested by the Chairman of the Foreign Office Committee, F.G.K Gallagher, that they encourage the other member states to send detailed comments on the draft convention including alternative drafts. *'This would bring home the difficulties inherent in drafting such a convention and might serve to "kill it at birth"'*.[47]

Nevertheless, at a November 1951 meeting of Minister's advisers the majority of Council of Europe members set up a committee of experts to consider the proposed convention in detail. The UK attended in spite of Ministers' reservations, hoping to persuade the other member states of the futility of the undertaking, but it failed to derail the project.[48] All

[45] Council of Europe letter to member states 01/11/51 TNA LO2/676.

[46] Minute from Meeting of Foreign Office to discuss proposal 12/02/52 TNA LO2/676.

[47] Ibid.

[48] Foreign Office Minutes concerning Meeting of 'Committee of Experts', October 1952 & Report by the UK Representative to the Meeting of 'Committee of Experts' 30/10/52 TNA FO371/102541.

member states agreed that, in the interests of European co-operation it would be worthwhile to pursue the Convention, except for the United Kingdom.[49] For political reasons, the UK continued to attend the discussions. The Foreign Office considered that the UK *'would lose a considerable amount of goodwill if we alone of the Council of Europe powers, refused to join in'*[50] and a refusal to participate would *'call into question the sincerity of the UK's desire to be closely associated with all inter-governmental plans leading towards greater European unity'*.[51] The desire of the foreign office to create a *'favourable psychological atmosphere on the continent'*[52] prevailed over the Home Office's concerns about the domestic impact on aliens policy.[53]

Article 3 which set out certain procedural protections for member states' nationals facing expulsion was contentious. The UK was unable to accept an obligation requiring a person facing deportation to be told the reasons for it.[54] At first it appeared that they were in a minority of one, but when put to a vote four other member states supported the UK. Article 3 eventually stated that:

> *Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority.*

Ultimately, the UK agreed to ratify the convention and as a result it committed to modify its deportation procedures. However, officials were mindful of a desire to avoid a re-run of

[49] Council of Europe, Report of the Committee of Experts on the Draft Convention for the Reciprocal Treatment of Nationals, 21/10/52, [12-15] TNA FO371/102541.

[50] D.M.Day, Foreign Office Minute, 03/11/52 TNA FO371/102541.

[51] Ibid.

[52] In particular the UK was attempting to facilitate the ratification of the European Defence Community treaty and was concerned that France was reluctant to participate without the UK's clear commitment to Europe unity.

[53] Memorandum on Political Considerations affecting the United Kingdom attitude towards the draft convention for the Reciprocal Treatment of Nationals, D.M. Day, Foreign Office 05/12/52 TNA FO371/102541.

[54] Briefing dated 04/03/52 on Council of Europe meeting of Ministers' advisers of 26/02/52 TNA LO2/676.

Deportation Advisory Committee.[55] The Home Office proposed to allow alien nationals with more than two years' residence faced with deportation to make representations to the Chief Magistrate at Bow Street. Although the alien would have to be permitted representation if requested, there would be no legal aid[56] and it was not intended that the proceedings would take on the nature of a trial. The magistrate's role was advisory and the Secretary of State would not be bound by his opinion. This new policy was announced to Parliament in August 1956 and went some way towards placating critics of the Aliens Acts. However, it was made clear that this was an extra-statutory scheme which should in no sense be considered a 'right of appeal'.[57] The deportation orders would be made, and the magistrate's role was merely to advise on implementation. At this time deportation was on a small scale (around 100 cases per year including court recommended cases)[58] and a deportation order required the personal signature of the Home Secretary. By 1962 only 96 individuals had been permitted to make representations, and 50 did so. In 37 cases the magistrate concurred with the decision to deport and in all cases the Home Secretary followed the magistrate's opinion.[59] MPs objected to the lack of information on what considerations the Chief Magistrate took into account[60] and questioned whether the Secretary of State was using the grounds of national security to inappropriately deny an alien the ability to make representations.[61]

In November 1961 the day before the introduction of the Commonwealth Immigrants Bill it was conceded that theoretically it would be good to have permanent aliens legislation, but not immediately. Negotiations had started over UK entry to the EEC and so it would not be wise or practicable to draft permanent legislation.[62] This tactic was pursued until 1963, when

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[55] Letter from K.B.Paice of Home Office to G.E.A.Grey C.B.E, MC (Treasury) 25/07/56 TNA T221/452.

[56] *'In the somewhat unlikely event of the alien concerned being unable to afford to be represented there would after all be no great hardship, particularly under the informal arrangements you propose, if he had to plead his own cause'.* Letter from Treasury to Home Office 30/07/56 TNA T221/452.

[57] David Renton, Joint Under-Secretary of State for the Home Department, Hansard HC vol 595 col 1429 (20 November 1958).

[58] In 1958, 131 were deported and in 1959 the number was 86. In the first ten months of 1960 the number was 93. David Renton MP, Parliamentary Under-Secretary of State Hansard HC vol 630 cols 388-455 (16 November 1960).

[59] Henry Brooke, Home Secretary, Hansard HC vol 668 col 434 (28 November 1962).

[60] David Weitzmann MP, Stoke Newington and Hackney North, Hansard HC vol 630 cols 388-455 (16 November 1960).

[61] See for example the case of Mr Benson, deported without any opportunity to make representations, raised by Judith Hart MP, Hansard HC vol 698 col 36 (07 July 1964).

[62] David Renton, Under-Secretary of State, Hansard HC vol 649 cols 369-419 (15 November 1961).

talks concerning the UK's admission to the EEC ended following Charles de Gaulle's veto. The government then prevaricated; the Home Office was involved in an internal review of immigration control, and the current Parliament had a busy legislative schedule.[63] Reforms to aliens legislation were in fact pushed back by another 10 years until the UK joined the EEC.

The Commonwealth Immigration Acts and the Origins of Appeal Rights

It was the introduction of significant restrictions on British subjects (citizens of the Commonwealth) that finally led to the establishment of rights of appeal against immigration decisions, and the emergence of a formal framework of immigration law. Whilst the precarious position of aliens had been tolerated for many years, the imposition of immigration restrictions on Commonwealth citizens, made the situation unsustainable. The granting of appeal rights was a political compromise to facilitate the imposition of further restrictions proposed by the 1965 White Paper.

There has been a considerable amount written on the origins of the Commonwealth Immigration Act 1962.[64] For Hansen[65] the most interesting question is why it took so long for legislation to be introduced, given that public opinion was in favour of restrictions, particularly following the riots of 1958. Whilst many other Commonwealth countries had introduced immigration restrictions, the UK alone maintained the unrestricted right of entry to all British subjects. He locates an explanation in the conflicts within government which precluded a consensus for introducing restrictions. The Ministry of Labour's position hardened in the late 1950s, but some in the Commonwealth Relations Office remained ideologically opposed to measures which would erode the ideals of the Commonwealth.[66] Proposals for a Commonwealth Immigrants Act were therefore controversial. Informal means of control

[63] Ms Mervyn Pike, Parliamentary Under Secretary of State, Hansard HC vol 685 col 318 (27 November 1963).

[64] E.g., Spencer, Hansen, (n4).

[65] Hansen R, *Citizenship and Immigration in Post War Britain* (Routledge 2000).

[66] Ibid 80-100. It should be noted that a contrary argument is that successive UK governments actually cultivated anti-immigrant popular opinion in order to gain support for legislation to block 'coloured' migration. See Kathleen Paul, *Whitewashing Britain: Race and Citizenship in the Postwar Era* (Cornell University Press 1997).

through dialogue with colonial and Commonwealth governments were pursued in an attempt to reduce migration without resorting to a statute.[67]

By the late 1950s there were growing calls for restrictions against Commonwealth Immigration. In the wake of the 1958 Notting Hill and Nottingham riots, the MP Cyril Osborne called for the Home Secretary to deport all British subjects not born in the United Kingdom found guilty of crimes of violence. This was resisted on the basis that there was no evidence that colonial subjects were more responsible for crime than other British citizens. An MP supporting the government's position stated that the idea proposed was '*abhorrent to the majority of people in this country, it being the view of most civilised people that it should be the seriousness of the crime which determines the punishment and not the place of origin of the criminal'.*[68] Yet, there is evidence to suggest that by 1958 the public was becoming supportive of restrictive measures against Commonwealth immigrants and the Home Office instructed the Committee on Colonial Immigrants chaired by the Lord Chancellor to consider the desirability of introducing a statutory power to deport undesirable Commonwealth immigrants. Following the report, the government decided not to legislate on this particular issue and to wait until more general legislation became necessary.[69]

By 1961 the Conservative government had decided that statutory restrictions were now necessary. They introduced the Commonwealth Immigrants Bill to Parliament in November that year, describing it as a 'distasteful duty' carried out with great reluctance, and confirmed that the new controls would be carried out in a 'liberal spirit'.[70] Nevertheless, the Home Secretary advised the cabinet that no concessions would be made to provide rights of appeal and any attempts by the opposition would be resisted on grounds of principle and practicability.[71]

[67] Ibid 94-95. For example, attempts were made to restrict the provision of passports and to dissuade prospective migrants from making the journey.

[68] Anthony Greenwood MP, Hansard HC vol 585 col 566 (27 March 1958).

[69] Hansen (n4) 89-90.

[70] Lord Chancellor Viscount Kilmuir Hansard HL vol 238 col 13 (12 March 1962*).*

[71] Cabinet minutes of meeting of 24/11/61 TNA CAB130/180. A Home Office memorandum to the cabinet set out why previous appeals systems had proved undesirable.

Described in the headnote as 'An Act to make *temporary*[72] provision for controlling the immigration into the United Kingdom of Commonwealth citizens', the Act divided Citizens of the United Kingdom and Commonwealth (CUKC) into those who had UK issued passports and those who had passports issued by the colonies or a Commonwealth government. The latter would now be subject to immigration control. It distinguished between British subjects who 'belonged' to the UK and those who did not 'belong'. Home Office records show that the terms 'belongers' and 'non-belongers' were employed in deciding how controls would be implemented.[73] Unlike aliens, the Commonwealth Immigrants Act did set out clearly that Commonwealth immigrants had statutory rights not to be refused admission. If they were workers with labour vouchers, students, wives and children under 16 of a commonwealth citizen or self-sufficient people they could enter and were not subject to conditions on the length of their residence.[74] Yet the burden was on the migrant to *"satisfy an immigration officer"* of their intention and these rights could be overridden on medical or security grounds.[75] Critics have argued that in practice immigration officers had wide discretion to refuse.

The 1962 Act introduced a limited power of deportation for Commonwealth citizens following a court recommendation after conviction for an offence punishable by imprisonment.[76] This could be appealed through the criminal appeals system. There were exemptions for people connected with the United Kingdom by birth, parentage or marriage, and for those who had been resident for five years prior to conviction (five years was the length of residence after which a person could qualify for naturalisation).[77] A final decision on deportation was at the discretion of the Secretary of State. During the drafting of the Bill there was some debate over the length of time that a person must be resident in order to be immune from deportation. The Home Secretary, Rab Butler, noted that the argument for a time limit was because ***'an***

[72] Originally the restrictions on entry in Part 1 of the Bill were intended to apply for a period of 5 years, but on amendment this was reduced to 12 months so that the Act would have to be renewed via the Expiring Laws Continuance Bill in a similar manner to the Aliens Restrictions Acts. The deportation provisions contained in Part 2 of the Bill were however permanent.

[73] See the Lord Chancellor Viscount Kilmuir, Hansard HL vol 238 cols 1-23 (12 March 1962*),* TNA HO213/2331, TNA HO291/984 and discussion in James Hampshire, *Citizenship and Belonging* (Palgrave 2005).

[74] Commonwealth Immigrants Act 1962, s2.

[75] Ibid, s2(4).

[76] Ibid, s7.

[77] Ibid, s7(2).

immigrant who has resided here for a number of years ought to be regarded as "belonging" to the UK for all purposes'.[78] Whilst any alien no matter how long they had resided could be deported at the discretion of the Secretary of State, it was considered that since the Act was dealing with British subjects, it was desirable to give them greater security. The Home Secretary and Lord Chancellor agreed to five years as a limit beyond which there could be no risk of deportation.[79]

During the passage of the Bill through Parliament there was strong opposition to introducing restrictions on British subjects without a right of appeal, which would have an impact on relationships with other Commonwealth countries. Critics stated that this was departing from a long standing and cherished tradition of free movement for Commonwealth citizens and concern was raised about whether Commonwealth governments would respond by restricting the ability of those born in the UK to travel and work elsewhere in the Commonwealth. It was argued that the Act would be perceived as racist and cause emotional, economic and political damage to the delicate fabric of the Commonwealth. Some MPs were concerned that if and when the UK joined the Common Market, European nationals (aliens in law) would have preferential access to the UK above that of British subjects from the Commonwealth.[80]

At the Commons committee stage, opposition MPs attempted to introduce an amendment creating a Commonwealth Immigrants Appeal Tribunal which would hear appeals from those refused leave to enter and review the discretion of immigration officers making such judgements.[81] The arguments for an appeal in the case of British subjects who had enjoyed a right of free movement were stronger than those made on behalf of aliens, yet the amendment was defeated by 242 to 171. In the Lords several attempts were made to introduce an appeals tribunal, or an immigration board similar to that of the 1905 Aliens Act[82] and reference was made to the report of the Franks Committee[83] which had recommended

[78] Correspondence, Home Secretary to Lord Chancellor Viscount Kilmuir 20/10/61 TNA LCO2/6958 (emphasis added).

[79] Ibid, and correspondence, Lord Chancellor to Home Secretary 23/10/61 TNA LCO2/6958.

[80] See for example Gordon Walker, MP for Smethwick, Hansard HC vol 649 col 711 (16 November 1961).

[81] Mr Fletcher MP, Islington East Hansard HC vol 653 col 338 (06 February 1962). See also Hansard HC vol 654 cols 669-687 (22 February 1962).

[82] Lord Silkin, Hansard HC vol 654 cols 669-687 (22 February 1962).

[83] Franks (n10).

the expansion of rights of appeal to tribunals for citizens aggrieved by discretionary administrative decisions.

Home Office records show that the Secretary of State was well prepared to resist demands for a system of appeals.[84] Appeal rights would make immigration control unworkable unless *'a whole series of Ellis islands'* were built to detain appellants.[85] Instead any injustice could be addressed through MPs raising cases in the Commons or in representations. MPs were assured that immigration officers would act in a just way, only refusing admission after conferring with a senior officer.[86] Furthermore, it was considered undesirable for every aspect of the immigration officer's instructions, which were statements of policy, to be subjected to legal argument and for executive discretion to be reviewed by the courts.[87] Appellate machinery could not be reconciled with the responsibility of the Secretary of State to Parliament, and the Immigration Boards of 1905 made effective enforcement of the restrictions almost impossible since the immigration officers' 'justified decisions' were constantly overridden.[88] A further amendment to insist that the immigration officers' instructions be laid before Parliament as a statutory instrument was also resisted.

The 1965 Commonwealth Immigrants White Paper

It was Labour's attempt to introduce greater restrictions on Commonwealth nationals, in particular a discretionary power of deportation that finally led to the establishment of modern immigration appeals.

Having opposed the 1962 Commonwealth Immigrants Act as a matter of principle, Labour's 1964 manifesto committed them to retaining immigration controls on Commonwealth immigrants in an attempt to eliminate immigration as a major electoral issue. Labour also committed to legislate against racial discrimination and to give special help to local authorities

[84] It was however acknowledged that critics would rightly suggest that this position was *'contrary to the whole trend of modern attempts to provide effective remedies against potential mistakes and misconduct by public servants'*. Supplementary note on arguments against a right of appeal, 22/11/61 TNA HO344/9.

[85] Memorandum of Secretary of State, 22/11/61 TNA HO344/9.

[86] Letter of 23/03/62 Lord Chancellor Kilmuir to Lord Bishop of Liverpool TNA LCO2/6958.

[87] Hansard HL vol 238 cols 462-520 (20 March 1962).

[88] The Lord Chancellor, Viscount Kilmuir, Hansard HL vol 239 col 15 (02 April 1962).

where immigrants had settled.[89] Once in power the Labour government worked on new restrictions to reduce Commonwealth immigration. In November 1964 the government found itself defending the Aliens Acts and Commonwealth Immigrants Act against its own back benchers.[90] The Home Secretary, Frank Soskice, confirmed the government's intention to work towards permanent legislation and to consider the practicality of appeals but pleaded for time for this to happen and made no commitments.[91]

It was decided that existing restrictions on Commonwealth Immigrants were ineffective and that new powers were required to enforce time limits and conditions of entry for visitors and students. At a meeting in July 1965 the cabinet agreed a new power was needed to repatriate Commonwealth citizens who had overstayed or broken their conditions of entry without the need for a court recommendation.[92] It was intended that those who had been resident for more than six months would be able to submit representations to the Chief Magistrate at Bow Street in the same way as aliens.[93] This would be an extra-statutory scheme and not a legal right. The Home Secretary was cautioned that if it was put into a Bill, it would provide a *'field day for our libertarian critics'*[94] who would want to make it statutory for aliens too.

The government's proposals were set out in a White Paper published on 2 August 1965.[95] This was an example of what has been termed the Hattersley Equation[96] – an attempt to combine increasingly restrictive controls with a commitment to improved efforts at facilitating integration for existing resident migrants. The paper acknowledged that most of those who came to work would stay and raise their families and so should not be regarded as second-class citizens. A new National Committee for Commonwealth Immigrants was announced together with proposals for a Race Relations Bill.

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[89] Labour Party, 'The New Britain' (1964).

[90] Expiring Laws Continuance Bill debate Hansard HC vol 702 cols 229-331 (17 November 1964).

[91] Ibid cols 252-256.

[92] Home Office Minute 15/07/65 TNA HO344/79.

[93] The chief magistrate agreed in principle to take on this role. Correspondence between Robert Blundell (chief magistrate) 19/07/65 from CC Cunningham TNA HO344/79.

[94] Home Office Memorandum of 06/08/65 K.B.Paige TNA HO344/79.

[95] Home Office, Immigration from the Commonwealth (White Paper, Cmnd 2739, 1965).

[96] Shamit Saggar (cited in Will Somerville*, Immigration Under New Labour* (Policy Press 2007) 17-18). Roy Hattersley stated in Parliament, *'I believe that integration without limitation is impossible; equally, I believe that limitation without integration is indefensible'.* Hansard HC vol 721 col 359 (23 November 1965).

Following publication of the white paper the quota of labour vouchers was dramatically reduced with immediate effect and immigration officers were instructed to impose strict time limits on Commonwealth citizens entering as visitors or students. However, the power of discretionary deportation for British subjects who breached their conditions would require legislation and this would be controversial. Preparations were made for new primary legislation introducing a power of deportation in cases where a Commonwealth immigrant had obtained admission by fraud or false representation, remained in contravention of a condition of admission and in other cases where their presence was not conducive to the public good. At the same time the Home Secretary began considering a Royal Commission with very wide terms of reference covering immigration and emigration trends, government policy and the mechanisms of control, which might take three to four years to complete,[97] as a means to anticipate and placate the opposition to a new Commonwealth Immigration Bill. In the meantime, they would proceed with the new legislation but could reassure critics that the wider concerns were being addressed. With a slender majority of four in the House of Commons, it is likely that the government were concerned about the potential for a backbench rebellion from those in the party who had not accepted Labour's new approach to Commonwealth immigration.

Senior civil servants strongly advised the Home Secretary against a Royal Commission, warning that immigration policy involved technical issues which an independent committee was unlikely to be able to appropriately address. The findings of a commission could prove embarrassing and unwanted. They reiterated their warnings against weakening executive control over immigration.[98] Subsequently civil servants acquiesced to the Secretary of State's proposals but managed to persuade him to limit the terms of reference.[99]

At the same time, problems were emerging with the drafting of the Bill. The Home Secretary questioned whether the power to deport would be granted to him if a) in his opinion he thinks someone has breached their conditions, or if b) the immigrant has actually done so.[100] The

[97] Letter of Frank Soskice, Home Secretary, to Sir Charles Cunningham 17/10/65 TNA HO344/310.

[98] Letter of Sir Charles Cunningham, Permanent Under-Secretary of State with attached memorandum of Mr Gwynn to Home Secretary 15/10/65 TNA HO344/310.

[99] Minute of meeting of 19/10/65 between Home Secretary and Sir Charles Cunningham and Mr Gwynn of the Home Office TNA HO344/310.

[100] Memorandum 25/08/65 TNA HO344/79.

first was seen as preferable with the Home Secretary remarking that, *'I should have gone further and wished for a power to deport whenever I thought for whatever relevant reason this was in the public interest'.* [101] The concern was that if it was the former, pressure would increase for an advisory committee or a more statutory appeals scheme than what was proposed involving the chief magistrate. If it were the latter this could open up the possibility of challenge before the Courts – a *'sombre prospect',* although it was also considered that a series of successful court cases won by the government might have the positive outcome of allowing the public to better understand and approve of immigration controls taken against dishonest immigrants.[102]

In October 1965 Elwyn Jones, the Attorney General, raised his concerns about the new deportation powers.[103] They would lead to two classes of Commonwealth immigrant – those who were prosecuted and those dealt with by administrative action. The former would have an advantage since prosecution had to be established beyond reasonable doubt. The second group would not even be informed of the reasons for deportation and have no representation or hearing if they were thought to be in the UK for less than six months. This would be hard to defend. In these circumstances the Attorney General advised the Home Secretary to consider whether a non-binding advisory committee similar to the committee used during the war for enemy aliens could be introduced.

The Home Secretary was not convinced, drawing again on the lessons of the 1930s committee. He considered that '*all too often the court sees only the one would-be immigrant before it and cannot see how letting him remain can do the public interest any harm'.*[104] There was a danger that a new advisory committee would take this sort of attitude, whereas at present the use of limited representations to the chief magistrate did not frustrate Home Office policy.

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[101] Memorandum of Home Secretary 21/10/65 TNA HO344/79.

[102] *'My guess is in 9 times out of 10 it would be easy for us to show there was in fact fraud or a breach and we would in fact constantly win. Meanwhile considerable publicity would attach to such proceedings and the public would become increasingly aware of the kind of fraud and breach we have to deal with. Conversely dishonest immigrants would learn that going to court was not such a good thing after all. There would at the outset be a flurry of cases but it would gradually die out. Conversely our actions and administration would become understood and receive more and more public approval. If we don't have something like this the complaints will be endless'* Memorandum of Home Secretary 21/10/65 TNA HO344/79.

[103] Letter from Elwyn Jones, Attorney General to Home Secretary 20/10/65 TNA HO344/79.

[104] Unsent draft letter, Home Secretary to Elwyn Jones TNA HO344/79.

Ultimately, the government decided not to immediately pursue this part of the white paper by introducing a new Immigration Bill. They had, however, committed to introducing strengthened controls in the white paper and were aware that they would face criticism from the opposition if they backed down. It was also thought to be impossible for the government to seek another extension of the legislation under the Expiring Laws Continuance Bill unless it could also announce that an inquiry was being set up with a view to permanent legislation.[105] The Cabinet Home Affairs Committee eventually agreed on setting up a more limited expert inquiry into the mechanisms of control which would report sooner, avoiding the impression that a Royal Commission was being initiated to delay legislation.[106] Terms of reference were subsequently agreed: *'to consider what right of appeal or other remedy should be available to aliens and to Commonwealth citizens who are refused leave to land or required to leave the country'.*[107] This led to the creation of the Committee on Immigration Appeals established under the Chairmanship of Roy Wilson Q.C.

On 9 November 1965 the Prime Minister announced this climb down to the Commons. He explained that it would be complex to secure the right balance of treatment as between Commonwealth citizens and aliens, and to balance the need for a system of control answerable to Parliament with the need to ensure that the individual concerned has a fair opportunity to state his case. As a result, a committee would investigate the options and legislation would be brought in soon after. Unsurprisingly, accusations were made by Conservative MPs that the government were delaying legislating.[108] However, establishment of a special committee staved off a rebellion from Labour MPs at that year's Expiring Laws Continuance Bill debate, though the proposals in the white paper were fiercely attacked. By the time the Wilson Committee reported in August 1967, the Labour government had been returned to power with a far healthier majority of 96 in the 1966 elections.[109]

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[105] Letter to Prime Minister on proposed committee 03/11/65 TNA PREM 13/384.

[106] Minutes of Cabinet Home Affairs Committee meeting 29/10/65 TNA HO344/310.

[107] Home Office Minute by W Bohan 08/11/65 TNA HO344/79.

[108] See Peter Thorneycroft MP, Monmouth, & Henry Brooke MP, Hansard HC vol 721 cols 336-340 (23 November 1965). In the Lords' debate on the 1969 Act the delay in implementing the new deportation procedures was blamed on *'a revolt within the Parliamentary Labour Party against a thoroughly reasonable proposal',* Lord Brooke of Cumnor Hansard HL vol 300 col 1426 (27 March 1969).

[109] The immigration committee was mentioned in the 1966 election manifesto which pledged realistic, flexibly administered immigration controls. Labour Party Manifesto 1966: Time for Decision.

The Wilson Committee

The Committee first met on 17 March 1966. It comprised Sir Roy Wilson QC the Chairman who had served as President of the Industrial Court, Jeremy Hutchinson Q.C, Michael Montague, a businessman with connections to the Labour Party, Frank Milton, a magistrate and liberal politician, Sir William Murrie, a senior civil servant with links to the Home Office, Raymond Clarke, Secretary of the Yorkshire Council of Social Service and of the Yorkshire Working Group on Immigrants and Mr G F Smith, General Secretary of the Amalgamated Society of Woodworkers and Chairman of the T.U.C. Commonwealth Advisory Committee. The Committee Secretary was a Mr Bohan, a senior official in the Home Office.

The Committee set itself the task of reviewing the existing system of immigration control and considering the practicalities of any proposed appeal system. Records of the earlier immigration boards were studied to identify suitable lessons. They decided to take a wide range of evidence, not only from experts but from aliens' welfare organisations, to act as a safety valve for the feelings of resentment that many immigrant organisations experienced. The Secretary of State instructed the Committee that an early report was not needed, assuring them they would not be criticised at the next annual debate for not having produced the report.[110]

Towards the end of 1966 a consensus began to emerge that the Committee would recommend an appeal system drawing on aspects of the United States model, though questions remained over the status and independence of the judges, and the range of decisions that would be subject to an appeal.[111] In April 1967 a tentative list of recommendations were discussed with the Home Office with a final report being submitted to the Home Secretary in July that year. When it became apparent that the Committee was likely to recommend some form of appeal, the Home Office began preparing a potential appeal structure.[112] Concerns now shifted to the scope of an appeal. It was thought that an appeal system would only work if immigration decisions were founded on a set of propositions that were equally binding on the authority that takes the initial decision and the

[110] Minutes of 2nd meeting of Committee on Immigration Appeals 02/05/66 TNA HO394/135.

[111] Minutes of 8th meeting of Committee on Immigration Appeals 23/11/66 TNA HO394/135.

[112] Home Office outline of possible appeals system (IAC47) 19/01/67 TNA HO394/128.

appellate authority. The Secretary of State would retain absolute control over what general principles were applied, but it was also desirable that he retained a discretion to refuse undesirables outside these rules.[113]

Particular weight was given to the opinion of the Law Lord, Lord Devlin.[114] He noted that the fundamental issue the Committee had to consider was whether immigration control was to be a matter of administrative decision-making subject to some judicial control, or a matter for fresh judicial decision-making.[115] Ultimately, the Committee adopted the latter approach, recommending that decisions should be appealable both on the grounds that they were not taken in accordance with the law or with any applicable immigration rules and on the ground that a discretion exercised by the Secretary of State should have been exercised differently.[116] These decisions often involved compassionate factors which were most likely to give rise to controversy and a sense of grievance if they were not subjected to an impartial review.[117] Judges would therefore review the merits of immigration decisions.

In its report, the Committee praised the integrity of the immigration service and concluded that in general immigration control was being conducted fairly, with the great majority of cases correctly decided. Nevertheless, they accepted the criticism that *'it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal'.*[118] An appeal system was therefore necessary, to make it apparent to immigrants, their relatives and friends and the public that justice was being done. An appeal system would improve community relations by making the administration of immigration control more open to public scrutiny. This would bring immigration control in line with other areas of public law where tribunals had increasingly been introduced to resolve disputes:

[113] Memorandum of WJ Bohan 22/03/67 TNA HO394/128.

[114] Memorandum from Lord Devlin IAC39 TNA HO394/120.

[115] Record of Chairman's discussion with Lord Devlin and Professor Hamson 23/01/67 TNA HO394/120.

[116] These grounds became section 8 of the Immigration Appeals Act 1969. The review of decision-maker discretion did not include reviewing the refusal of an appellant's request to depart from an immigration rule (s8(2)).

[117] Home Office, Report of the Committee on Immigration Appeals (Cmnd3387, 1967) 48 [140].

[118] Ibid 28 [84].

> *The safeguards provided by such a procedure serve not only to check any possible abuse of executive power but also to give a private individual a sense of protection against oppression and injustice, and confidence in his dealing with the administration, which are themselves of great value. We believe that immigrants and their relatives and friends need the same kind of reassurance against their fears of arbitrary action on the part of the immigration service.*[119]

They recommended a system of appeals against decisions to exclude on entry, decisions to refuse a visa or entry clearance, decisions to deport, and against the refusal to vary conditions of entry. They proposed a two-tier structure with a central Immigration Appeal Tribunal (IAT) and subordinate judicial adjudicators at ports. The appellate authorities would be independent and supervised by the Council on Tribunals,[120] with tribunal members appointed by the Lord Chancellor and adjudicators appointed by the Home Office. Representation for both parties was desirable since hearings would be adversarial but *'proceedings should be informal as is consistent with preserving the general feel of a judicial hearing'.* An appeal to the IAT would require leave from the adjudicator. There would be no onward appeal, but the tribunal and adjudicators would be subject to judicial review.[121] Decisions of the appellate authority would be binding on the Home Office. The Committee recommended that appellants should be provided with free interpreting services, and that there should be no appeal fees. The Home Secretary's instructions to immigration officers should be published for both alien and Commonwealth immigration. If such a system was introduced it was anticipated that it might generate between 15-20,000 appeals annually.[122] They proposed that the power of courts to recommend deportation should be withdrawn, and that in future all deportation decisions should be taken on the initiative of the Secretary of State with the right of appeal to the tribunal. They accepted though that there may be political and national security cases where a right of appeal may not be possible.

They also recommended the creation of a new publicly funded organisation which would assist with non-citizens with advice and representation before the tribunal– this organisation

[119] Ibid 28 [85].

[120] Within the scope of the Tribunals and Inquiries Act 1958.

[121] At this time this was by way of the prerogative writs of certiorari, prohibition and mandamus.

[122] Home Office, Report of the Committee on Immigration Appeals (Cmnd3387, 1967) 33 [102].

became the UK Immigration Advisory Service which existed from 1970 until it went into administration in 2011. They considered that legal aid should be made available in deportation cases, since this involved serious matters of individual liberty and appellants in the criminal courts were currently entitled to legal aid.

The report was sent to the Home Secretary in July 1967. It is evident that senior civil servants were hostile to the recommendations.[123] Nevertheless, it was felt that it would be politically impossible for the government not to follow the recommendations; to do otherwise would create *'uproar in the Commonwealth'*.[124] Moreover, the present immigration system was imposing an increasing burden on Ministers. Since the 1962 Act was introduced, there had been a growing number of challenges in the High Court, made possible by the fact that the 1962 Act gave statutory rights of admission to Commonwealth immigrants which were not available to aliens. It was noted that in the past year there had been more challenges in the courts than during the whole previous history of immigration control.[125]

Such challenges were on limited grounds and the courts adopted a high degree of deference to the Secretary of State's decision. In the case of *K. (H) (an infant) [1967]*[126] a child who arrived at London airport to be reunited with his father, was refused entry as his age was disputed, despite him having access to evidence that supported his claim. On an application for habeas corpus and an order to quash the immigration officer's decision, the Lord Chief Justice held that whilst an immigration officer *'…was bound to act in accordance with the rules of natural justice, … he was not bound to hold any full-scale inquiry or to adopt judicial procedure'.* The application was refused and the child denied entry. In 1966 the individual right of petition was granted to the ECHR in Strasbourg and this case, the first of its kind was taken against the UK by the Campaign against Racial Discrimination. The lack of a right of appeal was raised. The case was settled by the UK avoiding a potentially damaging judgment.

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[123] *'This leaves me speechless. I will not record thoughts which might not look well in 30 years' time, but 1) the bigger crook you are the more protection you get...',* Letter from Mr Heddy, Foreign and Commonwealth Office 23/08/67. *'One's first reactions on reading the report tend to be emotional and to evoke antipathy to its recommendations'.* Letter to Mr B.H.Heddy from C.A.Jones, Home Office 15/09/67 TNA FCO50/85.

[124] Letter to Mr B.H.Heddy from C.A.Jones 15/09/67 TNA FCO50/85.

[125] Review of Public Expenditure: Immigration Appeals, T. Fitzgerald, January 1968 TNA HO344/320.

[126] *K. (H) (an infant)* [1967] 2 QB 61.

One argument put forward in reaching the settlement was the work of the Wilson inquiry.[127] In this context, a refusal to follow the Wilson recommendations could lead to *'a militant campaign of representations to MPs'* and further challenges to the ECHR.[128] Some consideration was given to whether appeal rights could be limited to Commonwealth immigrants[129] though this was dismissed as difficult to justify, particularly when the UK was negotiating accession to the EEC.

The decision to accept the proposals of the Wilson committee was announced to the Commons by Roy Jenkins in the November 1967 debate on the Expiring Laws Continuance Bill.[130] Significantly whilst the government would retain responsibility for setting policy the Secretary of State confirmed that he would *'no longer have the final word on the disposal of individual cases in the normal course'.*[131] Immigration decision-making would be ceded to a *'quasi-judicial'* appeal system that would *"measure up to present-day standards of administrative justice".*[132] The system would involve significant expense and lead to delays in decision-making but Jenkins argued that this would be a price worth paying. It was decided that cases involving national security issues would be referred to a special advisory panel of members of the Immigration Appeal Tribunal and any decision would be non-binding.[133]

Before the recommendations of the Wilson committee could be implemented, Parliament passed the Commonwealth Immigrants Act 1968. It cleared both houses in just three days at the end of February 1968, with the support of the opposition, as emergency legislation to deal with the increase in immigration from British passport holders from East Africa. There has been significant discussion of this period of British immigration history, often considered as a low point in the UK's dealings with its former empire.[134] Although attempts were made to

[127] In the final written settlement the government confirmed its intention to introduce the Immigration Appeals Bill. See *Alam and Khan v UK* App No 2991/66 (ECtHR, 17th December 1968).

[128] Review of Public Expenditure: Immigration Appeals, T. Fitzgerald, January 1968 TNA HO344/320.

[129] Cabinet minutes: Official Committee on Commonwealth Immigration, 12/10/67 TNA CAB134/2460.

[130] Roy Jenkins, Hansard HC vol 754 col 455 (15 November 1967).

[131] Ibid col 456.

[132] Ibid col 455.

[133] Immigration Appeals Act 1969, s9.

[134] See for example: Daniel Steel, *No Entry: The Background and Implications of the Commonwealth Immigrant Act 1968* (Hurst & Co 1969); Prakash Shah, *Refugees, Race and the Legal Concept of Asylum in Britain* (Cavendish 2000) 78-84. The

introduce appeals provisions by amendment,[135] the government maintained that legislation on appeals would take time to prepare and could not be done within the limited scope of this Bill. It was agreed to set up an extra-statutory system of ad hoc appeals for East Asian British passport holders, by sending two independent lawyers to Nairobi to consider these cases.[136]

The Immigration Appeals Act 1969

> *Hitherto entry into this country has been regarded purely as a privilege. Today the House has the courage to say that entry for an alien shall be a right….*[137]

The Immigration Appeals Bill was eventually introduced into Parliament in January 1969 and gained Royal Assent in May that year. It introduced the appeal system as a supplement to the existing systems of Commonwealth and alien immigration control, though it was stated that permanent legislation was being contemplated. At the same time Part 2 of the Bill introduced the controversial new deportation powers that had been set out in the 1965 white paper. The Act introduced appeals for Commonwealth immigrants in the primary legislation and then allowed for an Order to be issued under the Aliens Restriction Act 1914 which would make provision for appeals in cases involving aliens.[138]

It was passed with cross parliamentary support (although not without significant opposition from some MPs). In the parliamentary debates, it was noted by the Home Secretary, James Callaghan, that the introduction of an appeals regime would mark a loss of executive power, but an extension of the rule of law which *would 'give a new sense of security and protection to the individual'* and *'enhance the reputation of the country for justice and fair dealing.'*[139] However, another stated benefit was that the Home Secretary was receiving a *'continuing stream of correspondence from hon. Members, who whilst they may be against immigration in general, nevertheless always find an exceptional case in which I should have allowed*

Act imposed entry restrictions on CUKC who could not show a close connection to the UK – i.e. that they were born, adopted, naturalized or registered in the UK or that a parent or grandparent had been.

[135] See New Clause 3: Appeals in Hansard HC vol 759 cols 1671-1689 (28 February 1968).

[136] James Callaghan, Home Secretary Hansard HC vol 759 col 1253 (27 February 1968). By September 1968 there had only been 40 appeals which led to the government withdrawing the lawyers from Nairobi.

[137] Gordon Oakes MP, Hansard HC vol 776 col 508 (22 January 1969).

[138] Immigration Appeals Act 1969, s14 enabled The Aliens (Appeals) Order 1970 SI 151/1970 to set out the appeal rights for aliens.

[139] Hansard HC vol776 col 501 (22 January 1969).

someone in whom I have refused'.[140] Under the proposed system, '***the final responsibility in the generality of cases will no longer rest with me. Nor will hon. Members always be able to hold me answerable*** *if they think that a Commonwealth citizen or alien has been wrongly admitted or wrongly refused'.*[141]

Here then, we see an attempt to use the law to depoliticise the issue of immigration and to transfer questions over the status of migrants from the political sphere to the legal sphere. Concerns raised by a local community questioning and contesting the decision that a member of their community was considered not to belong, or controversial admission decisions could now be passed to the realm of the law, where neutral judges, assumed to be outside politics, would now be responsible for applying rules in a fair and impartial manner.

Flinders and Wood[142] argue that depoliticisation can be seen as a 'mode of statecraft' instituted by politicians to deflect blame and accountability from governments as decision-making is placed at 'one remove' from the centre. 'Governmental depoliticisation' involves the transfer of issues from the governmental sphere to the public sphere through the delegation of those issues by politicians to arm's-length bodies, judicial structures or technocratic rule-based systems that limit discretion.[143] Whilst decisions remain highly political, in the sense of their impact on individuals or society, they have been transferred to a less obviously politicised arena.[144] This theme of depoliticisation is one that will be returned to in subsequent chapters.

The most contentious issue raised by MPs was the transfer of discretionary powers from the executive to the judiciary and whether adjudicators who were not immigration officers would be best placed to make ultimately political discretionary decisions; decisions which would then be unaccountable to Parliament. Ronald Bell MP argued that what was called an advance of the rule of law, was actually the retreat of Parliament and political responsibility - the

[140] Hansard HC vol 776 col 489 (22 January 1969).

[141] Ibid col 490 (emphasis added).

[142] Matthew Flinders and Matthew Wood, 'Rethinking depoliticisation: beyond the governmental' (2014) 42(2) Policy & Politics 158.

[143]Ibid 165.

[144] Ibid 155.

replacement of political discretion with judicial discretion.[145] Despite these concerns, the Wilson Committee's recommendation on this point was accepted. The Home Secretary reiterated that he would retain ultimate control over the drafting of the immigration rules which would now be published.

The new system of immigration appeals partly came into force from 1 July 1970, shortly after a new Conservative government had taken power, with a manifesto pledge that there would be no further large scale permanent immigration.[146] Within months of the new appeals system taking effect, senior civil servants began discussing new legislation that would remove the right of appeal in some deportation cases.[147] The subsequent Immigration Act 1971 would set out a new consolidated framework of immigration control, and this Act has become regarded as the foundation of modern UK immigration law. However, the basic legal principle established in the 1969 Act, concerning immigration rules subject to a right of appeal, would remain at the core of it.

Conclusion: Immigration Control Becomes Subject to the Rule of Law

The introduction of the Immigration Appeals Act 1969 should be considered a milestone in the development of UK immigration law. Whilst it was quickly overshadowed by the much more far-reaching Immigration Act 1971 – of which there has been far more academic commentary[148] - it was the 1969 Act that marked a profound shift in the mechanism of immigration adjudication. For the first time an alien had justiciable rights – they could hold the Secretary of State to account against published immigration rules and could challenge discretionary decisions taken under those rules. Non-citizens faced with deportation became entitled to a public hearing in which they could make out a case that they should be allowed

[145] Hansard HC vol 776 col 532 (22 January 169). See also Lord Brooke of Cumnor who stated in the House of Lords Second Reading debate that the decision *'…will certainly lift a painful load of responsibility and unpopularity off the Home Secretary and other Home Office Ministers. I am not suggesting that this is why the Bill is being introduced; I know that it is not. I can recollect cases where my life as Home Secretary would have been easier if the ultimate responsibility for decision had been on some tribunal and not on me'.* Hansard HL vol 300 cols 1429-1431 (27 March 1969).

[146] Conservative Party, 'A Better Tomorrow' (1970).

[147] See extensive communications between Sir Kenneth Jones & T Fitzgerald September 1970 TNA HO394/61.

[148] See, for example, Callum Williams, 'Patriality, Work Permits and the European Economic Community: The Introduction of the 1971 Immigration Act', (2015) 29(5) Contemporary British History 508; Evan Smith & Marinella Marmo, 'The myth of sovereignty: British immigration control in policy and practice in the nineteen-seventies' (2014) 87(236) Historical Research 344.

to remain a part of the community of the UK. Complete control over immigration decision-making had shifted from the executive to the judiciary.

This chapter has set out the events that led to this transition. Senior civil servants in the Home Office were highly resistant to any reduction in the wide discretionary powers over non-citizens,[149] and this position was adopted by successive Home Secretaries from both parties. The growth of civil society groups supportive of migrant's rights, together with the interventions of liberal MPs led to growing political pressure on the government of the day. The fact that the UK's immigration laws were introduced as temporary emergency measures and contested on an annual basis provided a space for dissent.

A number of structural changes in the UK's relationship with the rest of the world, together with a series of specific events contributed to the concession of appeal rights. Firstly, the need to prioritise foreign policy in post-war Europe led to the UK reluctantly acceding to the Convention on Establishment which gave limited procedural rights to European aliens. Attempts to negotiate entry to the EEC increased the need to demonstrate that aliens were not subjected to arbitrary action, though at this stage these obligations were limited. The development of the right of petition to the ECtHR was a further international constraint. Ultimately, it was concerns over the UK's changing relationship with the Commonwealth, and a need to maintain the appearance of the fair treatment of British colonial subjects in an increasingly multicultural society, whilst reducing their actual rights, that finally led to this change in immigration control. Once the decision was taken to establish the Wilson Committee, the government was effectively committed to changing the basis on which immigration decisions were made.

Yet there were benefits for the government. As in the 1930s they provided a form of 'window dressing' at a time when politically controversial policy decisions were being made, and they provided a means of depoliticising difficult individual immigration decisions by deflecting criticism of government to the courts. This would subsequently become of greater

[149] This hostility in the Home Office to having its discretion challenged was evidently also felt more widely in the British civil service, which resisted attempts in other areas of administrative law to establish judicial tribunals. See archive research by TT Arvind and Lindsay Stirton, 'The curious origins of judicial review' (2017) 133 Law Quarterly Review 91.

importance to the government, provided that they could maintain sufficient control over the discretion exercised by the tribunal.

In the next chapter I will consider to what extent this new system of appeals actually provided a space for a long resident non-citizen faced with removal or deportation to make out a claim to belong in the UK.

Chapter 5: The Modern Appeals Tribunal 1970s-1980s

> *...when an alien approaching this country is refused leave to land, he has no right capable of being infringed in such a way as to enable him to come to this Court for the purpose of assistance.... In such a situation the alien's desire to land can be rejected for good reason or bad, for sensible reason or fanciful or for no reason at all.*[1]

This quote is from the judgment in a 1968 Court of Appeal case involving two 'aliens' who attempted to challenge the Home Secretary's arbitrary power to refuse an extension of leave to remain. It emphasises the precarious position of aliens prior to the 1969 Immigration Appeals Act (IAA). Widgery LJ drew on the analogy of a landlord who need not provide any explanation for refusing to extend a lease to a tenant. This posits the alien as a guest. The nation's immigration laws represent the exercise by the 'owners' of the national property of their collective right to use the property as they please.[2] A guest may be welcomed in, but he does not accrue tenancy rights. Following the introduction of the IAA 1969 and the decision to publish the immigration rules, non-citizens now had a tenancy agreement.

This chapter considers the early operation of the tribunal. It covers the period from 1970 until the mid-1980s spanning the Conservative Heath administration, Labour governments from 1974 until 1979 and the early Thatcher years. The first part draws on National Archive records[3] to show that the Home Office were initially hostile to the role of the adjudicators and working groups were established to consider ways to reduce the protections introduced by the 1969 Act. However, once introduced, there were now real political constraints on removing appeal rights and a number of ideas discussed by civil servants had to await changed political circumstances. I also trace the emerging decline in security of Commonwealth citizens' residence, though I observe that in contrast to recent developments, there was at least genuine political debate in Parliament.

[1] *Schmidt v SSHD* [1969] 1 WLR (Widgery LJ) 338.

[2] See Stephen Legomsky *Immigration and the Judiciary* (Clarendon Press 1987) 316 for discussion of the 'guest theory' and to what extent it explains the UK courts' traditional deference to the executive.

[3] Specifically, Home Office, Lord Chancellor's Office and Foreign and Commonwealth Office archive records.

The second part of this chapter will critically analyse the development of caselaw during this period focusing on deportation cases of long-term resident non-citizens. I examine the shifting role of the tribunal and the extent to which it provided a forum for considering claims of belonging. I argue that whilst there was initially strong deference to the executive, as immigration enforcement became more pervasive, long resident non-citizens were increasingly able to *'bring the community into the courtroom'* to put forward a claim of belonging.

Part 1: The Introduction of the Appeals System

The Immigration Appeal Tribunal (IAT) started operating on the 1 July 1970 for appeals against deportation, variations of conditions and refusal of entry clearance abroad. The government did not commence appeals for those refused entry on arrival but introduced an extra-statutory appeal for those who had already obtained entry clearance or a work permit prior to arrival.[4]

Initially immigration adjudicators were appointed by the Home Office, despite concerns raised in Parliament that this would affect their impartiality,[5] though they were not recruited from the immigration service. A list of the first intake shows that many had judicial experience in former British colonies in Africa, India and the Pacific.[6] Two working parties on appeals (one for the ports and one for in-country) were established to implement and monitor the new appeals system. The groups were headed by the former Secretary of the Wilson Committee, Mr Bohan, and consisted of representatives from different departments of the immigration service. Initially chief immigration officers (CIOs) were tasked with representing the Home Office. Records show that there was significant disquiet amongst the CIOs about how the appeals procedure was developing, with reports that they were facing tough questioning from adjudicators who were taking a more formal role that the Home Office had anticipated.[7] The

[4] This part of the Act was never brought into force since the Immigration Act 1971 removed in-country rights of appeal for anyone refused leave to enter unless they had already obtained entry clearance, a visa or work permit.

[5] See, for example, Dame Joan Vickers MP Hansard HC Deb 22 January 1969 vol 776 col 529. This was contrary to the recommendations of the 1957 Franks report which had emphasized the need for tribunals to have independence from the real or apparent influence of the administration.

[6] List of adjudicators TNA HO376/66. Geoffrey Care notes that many early judges were also drawn from the senior ranks of retired army or navy legal services. Geoffrey Care, *Migrants and the Courts* (Ashgate 2013) 35.

[7] Minute of the 21st meeting of the Port Appeals working party 04/08/70 TNA HO394/175.

difficulties raised are very similar to those raised in the 1930s when complaints were made about the Deportation Advisory Committee. CIOs felt they were not equipped to meet the legal standards required and feared that they would lose cases due to a lack of technical skill where the applicant was represented by a lawyer – *'the lawyer and the adjudicator talk the same language and the CIO was often out of his depth'.*[8] They had expected the appellant's lawyers to be *'people touting for custom at the port',* though some of them working for the UK Immigration Advisory Service (UKIAS) were *'quite formidable'.* Adjudicators were leaving it to the CIO to make the case for the Home Office rather than acting as an examining magistrate. As a result, CIOs needed much more awareness of legal rules of evidence and examination of witnesses. Over time it is evident that CIOs reported feeling out of their depth and losing morale.[9] They requested better training in law and public speaking though some felt that they would never be equipped for the role.[10] In time the Home Office would replace the CIOs with trained presenting officers.

Other problems arose over the need for keeping more formal records of immigration interviews since cases were being lost due to a lack of evidence.[11] As with the Deportation Advisory Committee, the adjudicators were not prepared to accept bare statements made by immigration officers without some evidence to back it up. One member of the working committee thought that the adjudicators must come to regard what was said in the Home Office explanatory statement as a completely truthful record of the events of the case and not question it.[12]

A consequence of the judicialisation of immigration control was that the exact wording of the immigration rules became subjected to an intense scrutiny in a way that had not been necessary before. Members of the appeal committee noted that sometimes the application of Home Office policy differed from what was formally stated in the rules, and clearly this could no longer be defended in a tribunal.[13] Decision-makers who previously had much more

[8] Ibid.

[9] *'Mr Hunter did not wish to give the impression that the presenting officers were seething with discontent'.* Minutes Appeals working party 29/09/70 TNA HO394/178.

[10] (n7).

[11] Minute of the 23rd meeting of the Port Appeals working party 15/09/70 TNA HO394/177.

[12] Mr Brown Minutes Appeals working party 09/11/70 TNA HO394/178.

[13] HG August Minutes Appeals working party 29/09/70 TNA HO394/178.

flexibility in refusing cases now had to think more carefully about how to justify decisions. Presenting officers were struggling to give and defend interpretations of the rules in court and so a Home Office interpretation of each rule was urgently required.[14]

After some time, a new combined working party on appeals and the immigration rules was established. Their official mandate was *'to remove obscurities and anomalies, to reduce the workload of the IND[15] and to reduce the scope for evasion of the control'.*[16] One task appears to have been to monitor tribunal decisions that went against the Home Office in order to identify areas where the immigration rules could be *tightened up* to prevent such appeals succeeding in the future. The fact that the immigration rules are not primary or even secondary legislation means that this kind of responsive micro-management is quite possible. From the minutes of this working group, one gets the impression they see their role as plugging leaks in the system of immigration control which have been sprung by the appeals system. Thus, from the start there appears to have been a defensive posture taken by the Home Office when faced with overturned decisions. Another purpose of the group appears to have been to consider ways in which appeal rights could be removed altogether. This will be discussed below.

The Immigration Act 1971

The change of Government in June 1970 led to a reappraisal of the appeal system even before it had fully commenced. Senior civil servants in the Home Office immediately began considering whether the newly introduced rights of appeal could be rolled back. The incoming Home Secretary, Reginald Maudling, was briefed on the new appeals procedure and how the Secretary of State had now lost the wide discretionary power to exclude or deport individuals based simply on suspicion.[17] In response he stated: *'Despite Enoch, I find this degree of liberalism disturbing'.*[18]

[14] Final meeting (25th) Appeals working party HQ 06/01/71 TNA HO394/178.

[15] Immigration and Nationality Directorate.

[16] Minutes of Working group on appeals and rules 1978 TNA HO394/219.

[17] Memorandum T Fitzgerald to Home Secretary 22/06/70 TNA HO394/61.

[18] Note from assistant private secretary of Reginald Maudling to Fitzgerald, Home Office 31/07/70 TNA HO394/61.

The Conservative's manifesto commitment was to introduce a new single system of control over all overseas immigration which would put an end to further large-scale permanent immigration.[19] The Home Office was immediately tasked with preparing an Immigration Bill to consolidate alien and Commonwealth immigration, and to introduce further restrictive measures on those from the Commonwealth including new powers of deportation. The new Home Secretary was content to continue with the appeals system in *'the ordinary run of decisions'* but instructed the Home Office to consider how rights of appeal could be removed in cases which turned on his judgement of what was in the public good.[20] Senior Home Office officials identified a number of difficulties. Politically it would be difficult to introduce further powers to deport Commonwealth citizens whilst at the same time removing the very recently established protections, particularly given the lack of evidence of how appeals were actually working. In any event, the UK's obligations under the European Convention on Establishment meant it would still be necessary to provide an avenue for representations for citizens of signatory states resident for more than two years. The final proposal,[21] approved by the Home Secretary was to remove deportation appeals in national security and public good cases, with any obligations under the Convention on Establishment being fulfilled in an extra-statutory manner by administrative action.[22] It was also decided that the remaining parts of the 1969 Act concerning appeals on entry would not be implemented as originally intended.

The new Immigration Bill was introduced to Parliament in February 1971.[23] It consolidated immigration law by removing the statutory rights of entry and family reunion of Commonwealth citizens. This was considered to be preferable to placing aliens' rights on a statutory footing, since there had been a growing number of High Court challenges since the 1962 Act was introduced.[24] Henceforth all rights of entry would be set out in the immigration

[19] 'A Better Tomorrow', Conservative Party manifesto 1970.

[20] *'I consider the Home Secretary should have an unfettered power subject only to his answerability to Parliament to exclude or expel any foreign national of or Commonwealth national where he has personally decided that this is conducive to the public good'.* Memorandum of Home Secretary TNA FCO50/355.

[21] Proposal to Home Secretary on appeals 18/09/70 Mr Waddell TNA HO394/61.

[22] Home Office officials noted that having introduced a statutory appeal, it may be very difficult to remove this and still maintain that the UK was complying with the Convention obligations (Letter to Sir Phillip Allen from Kenneth Jones 22/09/70 TNA HO394/61).

[23] First reading Immigration Bill 1971, Hansard HC vol 812 col 322 (23 February 1971).

[24] Memorandum of the Home Secretary 1970 TNA FCO50/355.

rules, and so would be within the power of the Secretary of State of the day to alter.[25] A key innovation was the creation of the concept of patriality[26] – a kind of quasi-citizenship, superimposed over the citizenships of Citizen of the UK and Colonies (CUKC) and Commonwealth British subjects. The effect was to provide a right of abode to several million Old Commonwealth citizens with an ancestral connection to the UK, whilst excluding most CUKC citizens not born in the UK and citizens of the New Commonwealth. Patriality would now be the legal basis for defining who belonged to the UK, rather than citizenship.

Much has been written about the significance of the 1971 Immigration Act, marking a point at which the UK turned away from the Commonwealth and towards a new trading relationship with the European Economic Community (EEC). The Act entered into force on 1 January 1973, the day the UK joined the EEC and permitted the free movement of labour into the UK. It is clear that there were delicate foreign policy concerns at stake in the forming of the legislation which would significantly weaken the immigration rights of Commonwealth citizens, whilst improving the rights of some aliens. It is beyond the purpose of this chapter to consider the complex discussions about the reasons for the Immigration Act 1971 and the creation of patriality, and these issues have been adequately dealt with in other works.[27]

Of greater interest for present purposes are the changes to deportation powers and the ability to gain a secure settlement status. New powers to deport on public interest grounds were introduced for both aliens and Commonwealth citizens, and the protection from deportation which came after five years' residence for a Commonwealth citizen was removed for those who arrived after the Act came into force.[28] Registration as a citizen after five years was no longer a right but was at the discretion of the Secretary of State and required knowledge of

[25] Immigration Act 1971, s3(2).

[26] Patrials were defined in the IA 1971, s2 as those with a right of abode. They included those born, adopted or naturalised in the UK (sub-s1a), CUKC citizens with a parent or grandparent who was born, adopted or naturalised in the UK (sub-s1b), CUKC citizens settled in the UK with 5 years' ordinary residence (sub-s1c), Commonwealth citizens with a parent who was born, adopted or naturalised in the UK (sub-s1d) as well as Commonwealth citizen women who were wives of the aforementioned (sub-s2).

[27] E.g., Hansen R, *Citizenship and Immigration in Post War Britain* (Routledge 2000); Callum Williams, 'Patriality, Work Permits and the European Economic Community: The Introduction of the 1971 Immigration Act' (2015) 29(5) Contemporary British History 508.

[28] IA 1971, s5.

English and demonstration of good character.[29] The voucher scheme for Commonwealth migrants was abolished and henceforth they would need work permits which would be issued for a 12-month period, with settlement possible after a continuous period of four years. There was some discussion on whether voting rights should be reformed so as to only be gained after permanent residence, but it was decided that this would be difficult to implement. As a result, Commonwealth citizens continued to have the right to vote and to stand for UK Parliament, though without the right to enter or security from deportation.[30]

The Government faced a difficult time defending some aspects of the Bill in Parliament and, now back in opposition, the Labour Party opposed the Bill.[31] There was concern with the idea that the legal basis for belonging should be tied to ancestral origin and so a racialised conception of belonging. Roy Hattersley argued that there was no clear reason to consider that:

> *a man whose grandfather emigrated from this country, whose parents were born and died abroad, and who wishes to come here for the first time is more belonging, has a greater stake in this country, that someone from the rest of the Commonwealth with no racial connection with this country, who has lived and worked here for, say, four and a half years, who has established a home here, who is bringing up his children here but who is still not patrial and cannot under this Bill be certain that he is patrial even when the five years are up.*[32]

Attempts were made to remove the ancestral clauses and to instead redefine UK citizenship:

> *I would suggest… that the real concept of belonging is the kind of feelings in the hearts and minds of those who wish to be regarded as citizens of this country… In those circumstances a person belongs to this country in a way which someone who is merely the child or grandchild of someone who was born in this country earlier in our history*

[29] IA 1971, Sch 1.

[30] Home Office paper on voting rights for Commonwealth Citizens 1970 TNA HO376/170.

[31] Zig Layton-Henry provides a number of suggestions for why Labour took a more principled position against further immigration controls once back in opposition, including a belief that the party's failure to effectively counter Enoch Powell's anti-immigration campaign had cost them the 1970 election. See Zig Layton-Henry, *The Politics of Immigration: Race and Race Relations in Postwar Britain* (Oxford 1992) 154-156.

[32] Roy Hattersley, Hansard HC Deb vol 813 col 152 (08 March 1971).

does not. This is a much nearer belonging than that which someone in the light of the birth of one of his ancestors claims.[33]

Although a clause which would have provided a right of abode to Commonwealth citizens with a grandparental connection to the UK was removed, the concept of patriality remained as the basis of belonging until the citizenship reforms of the 1980s.[34]

A significant line of criticism was that the new Bill reduced the security of Commonwealth citizens' residence and left them as second class citizens which would have negative effects on community relations.[35] The former Home Secretary, James Callaghan, argued that unlike alien immigration which was often temporary, Commonwealth immigration was by its nature migration for the purpose of settlement.[36] The new Act would, *'create a rootless and shiftless group of immigrants who will not be able to settle because they will not have surety and assurance of the basis on which they are here'.*[37] Callaghan highlighted the difference between *'aliens who have a home base and a home country to go back to'* and *'Commonwealth citizens who are also British subjects'.*[38]

When such a proposal had been suggested in the previous Parliament he had stated:

Do the Opposition seek to justify keeping a large body of Commonwealth immigrants, as opposed to a tiny number—in fact, keeping the whole body of Commonwealth immigrants—in a state of uncertainty and insecurity for four whole years with the object of getting rid of a tiny handful, of whom I already have power to get rid anyway and of whom I do get rid? Is that likely to help race relations and integration?[39]

...What I chiefly deprecate is the mood of uncertainty, and it may be of tension, which they could generate among Commonwealth immigrants in this country.[40]

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[33] Alex Lyon MP, Hansard HC vol 819 col 463 (16 June 1971) concerning proposed amendments.

[34] See James Hampshire, *Citizenship and Belonging* (Palgrave Macmillan 2005) for a detailed discussion of this issue.

[35] *'The prevailing theme is increased insecurity for immigrants, and this prevailing theme permeates the whole Bill'.* Baroness Gaitskill Hansard HL vol 320 cols 1014-1151 (24 June 1971).

[36] James Callaghan, Shadow Home Secretary, Hansard HC vol 813 col 69 (08 March 1971).

[37] Ibid col 70.

[38] Ibid col 72.

[39] James Callaghan, Hansard HC vol 773 col 445 Deb (13 November 1968).

[40] Ibid col 448.

In particular, tying a man to particular employment for 12 months with the threat of removal at the Secretary of State's discretion was considered to be *'intolerable and tyrannical'* and compared to indentured labour in the House of Lords.[41] The Chairman of the Race Relations Board advised the Home Secretary that the Bill would *'acutely increase the insecurity which coloured people living here already feel'.*[42] Macdonald in his comprehensive book on the Immigration Act 1971 argues that the Act marked the point that Commonwealth *'immigrants'* became *'migrants'*.[43]

This aspect of the Bill was strongly opposed. An amendment in the Lords tried to introduce a statutory protection to prevent Commonwealth immigrants from being deemed in breach of the conditions of their work permit due to illness or unemployment. This was resisted, though an assurance was given that such cases would be sympathetically dealt with; they would be given every opportunity to find other appropriate employment, and in the last resort they would have a right to appeal where ***'the appellate authorities will be able to form their own view of the compassionate circumstances'.***[44] Other amendments, that sought to include statutory rights for family members of British and Commonwealth citizens to enter the UK, were withdrawn after assurances were given that such 'rights' would be included in the immigration rules, which could be enforced in an appeal tribunal.[45] Attempts were made to obtain greater Parliamentary control over the rules through a number of amendments. The final position was that 'statements' of the rules would be laid before Parliament and subject to the negative resolution procedure – a weak form of scrutiny.[46]

There were also objections to the wide scope of the deportation provisions and the potential for long term settled migrants to face deportation simply for being the family member of a person liable for deportation: '*These may be boys and girls who if not born here will in all probability have had the whole of their education in this country, and be as much a part of our*

[41] Lord Brockway, Hansard HL vol 320 col 1038 (24 June 1971).

[42] Quoted by Roy Hattersley Hansard HC vol 813 col 148 (08 March 1971).

[43] Ian Macdonald, *The New Immigration Law* (Butterworths Law 1972) v54.

[44] Lord Aberdare, Minister of State, Hansard HL vol 322 col 713 (19 July 1971) (emphasis added).

[45] Lord Windlesham, Hansard HL vol 322 cols 1006-1009 (21 July 1971).

[46] See amendments put forward in Hansard HL vol 324 cols 313-414 *(*12 October 1971). Lord Gardiner, complaining about the state of the rules, stated: '*There is no other case that I know of in English law in which a Minister can make rules and regulations which have the force of law without submitting them to the ordinary Parliamentary approval'.*

community as is anyone with a white skin'.[47] Even Home Office civil servants had privately advised that leaving someone indefinitely liable to deportation could be undesirable from the point of view of integration into the community and put the UK out of line with other Commonwealth countries.[48]

During the passage of the Bill, the government pressed forward with the attempt to remove many of the existing appeal rights and took a strong line against the principal of the need for a right of appeal to a judicial body:

> *I do not think that anyone who is not a citizen of this country can be said to have a right to come and live here. If the Government refuse to let him come, and if the Government's decision is wrong, that is a matter for the British Parliament to decide in the interests of the British people.*[49]

A widely publicised problematic case involving the German student and political activist Rudi Dutschke was held as evidence that the system could not possibly function. After a five-day hearing, during which some of the evidence relied on was not available to the appellant, the special advisory panel found in favour of the Home Secretary in refusing him further leave for being undesirable on political grounds. A parliamentary debate followed, with the opposition arguing that the Home Secretary had used national security arguments to suppress political expression.[50] Members on both sides acknowledged that the procedure before the tribunal was not satisfactory for a court of law and had the appearance to the public of an unfair trial. The Home Secretary used this example to argue that, '*It is quite wrong to dress up as something to be decided by the court as a matter of law what is an act of policy by Government where the appeal should lie, not to a court, but to Parliament'.*[51]

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[47] James Callaghan, Shadow Home Secretary, Hansard HC vol 813 col 73 (08 March 1971).

[48] Fitzgerald Memorandum on draft proposals 1970 TNA HO376/169.

[49] Reginald Maudling, Home Secretary Hansard HC vol 813 col 52 (08 March 1971). Prior to the publication of the Bill Reginald Maudling had reluctantly decided that the advisory appeals system should continue *(*Reginald Maudling letter to Primeminister 28/01/71 TNA LCO2/8077). The Attorney General, Peter Rawlinson, disagreed arguing from his experience as counsel in the Dutschke case that a hybrid system could not be made to work (Letter to Home Secretary 29/01/71 TNA LCO2/8077). The Lord Chancellor, Quintin Hogg also argued against continuing the ' *"legal sham" process of arriving at an executive decision*' (Letter to Home Office from Lord Hailsham of St Marylebone 01/02/71 TNA LCO2/8077). The Primeminister overruled the Home Secretary and decided that these appeal rights should be abolished (Notes of cabinet meeting 10/02/71 TNA LCO2/8077).

[50] Hansard HC vol 809 cols 743-808 (19 January 1971).

[51] Reginald Maudling, Home Secretary Hansard HC vol 813 col 53 (08 March 1971).

Several concessions were eventually made at committee stage to allow the Bill to pass and importantly this attempt to remove all rights of appeal in 'non-conducive' deportation cases was dropped.[52] The final Act maintained the right of appeal direct to the tribunal, except in cases involving national security or other reasons of a political nature which would ultimately be a matter for the Home Secretary answerable to Parliament.[53]

With the introduction of the 1971 Act, the UK had finally moved beyond the reliance on wartime emergency legislation. Yet with the lack of statutory rights and the reliance on non-statutory immigration rules, successive Home Secretaries retained significant discretionary power over how immigration control would be exercised.

Early Attempts at Reform

Following the 1971 Act, the appeals structure remained unchanged for a number of years. Nevertheless, there was significant disquiet in the Home Office about its operation.[54] Of particular concern was that growing delays in the handling of appeals was providing an incentive for people to enter as visitors and then make unmeritorious appeals as a means of extending their stay. Those refused entry clearance overseas were also faced with long delays before they could be reunited with family. This appears to have been to a large extent caused by delay in the Home Office producing written explanatory statements of decisions for the appeal.[55] The problem of delay was raised in Parliament on several occasions and additional adjudicators were appointed to clear the growing backlog of cases.[56] The annual number of appeal cases was initially well within the estimate predicted by the Wilson Committee of 15-

[52] The Home Secretary announced on 06/05/71 that there would be a right of appeal against non-conducive deport decisions. On 20/05/71 he confirmed in standing committee during debate on clause 13 that he would adopt a reference to an advisory body in national security cases but not on a statutory footing. TNA BL2/1190 Council of Tribunal Papers on the 1971 Immigration Act.

[53] Immigration Act 1971, s15.

[54] *'The appeals system is being abused on the sub-continent and is weighing down our whole immigration control machinery'.* Letter from B3 Division to Mr Corben concerning Mr Lane's visit to the Indian Sub-continent 22/01/74 TNA HO394/168.

[55] Correspondence between civil servants 1974-1975 TNA HO394/170. Members of the Home Office working party on appeals had discussed the potential for arrears to build up in producing appeal statements which were calculated to take on average 1 hour 47 minutes to prepare and suggested that more staff would be needed from the start. This was not granted. Further Submission by staff side section on junior executive staffing requirements (APH18), January 1970. TNA HO394/174.

[56] See for example questions at Hansard HC vol 874 cc302 (24 May 1974), Hansard HC vol 877 cols 643-644 (18 July 1974), Hansard HC vol909 col 619 Deb (8th April 1976).

20,000. Arguably the Home Office had underestimated the resources that would be required to adequately manage the appeal system.

In 1974, confronted with growing delays, senior civil servants began considering whether a case could be made for removing rights of appeal and whether they could produce departmental evidence showing that the appeal system had proved much more elaborate and time consuming than was originally envisaged.[57] A number of problems were identified. The UK was now committed to giving some right of recourse to EEC nationals against adverse immigration decisions.[58] It was also recognised that *'the extent that we do away with the right of appeal we open the way to investigation by the Parliamentary Commissioner for Administration'* which was set up under the Parliamentary Commissioner Act 1967 to intervene in situations of alleged maladministration.[59] Removing appeal rights against deportation decisions would be likely to lead to more challenges in the High Court or the European Court of Human Rights (ECtHR), since now that the immigration rules had been published and considered to have the force of law in an immigration tribunal, attempts were also made to subject them to judicial review. It was also recognised that it may be politically difficult to justify removing appeal rights which had just been reaffirmed in the 1971 Act and that to do so would lead to Ministers receiving a lot more case representations from immigrant organisations and MPs.[60] Consideration was given to removing rights of appeal for those applying for entry clearance for temporary purposes and for those in the UK without permanent residence facing deportation.[61] There was also consideration of whether there was any way to get around the UK's international obligations.[62] This led to an alternative proposal which was to abolish the right of appeal against an extension of leave, leading to those refused either departing or being prosecuted and recommended for deportation by a

[57] Review of Immigration Appeal System, Letter from Fitzgerald to My Lyon, Home Office 23/01/74 TNA HO394/168.

[58] EEC Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health imposed an obligation on member states to not expel an EEC national before advice had been taken from a reviewing authority.

[59] (n57).

[60] Letter from Fitzgerald to Mr Lyon, Home Office 23/01/74 TNA HO394/168.

[61] Review of Immigration Appeal System, Second Letter from Fitzgerald to My Lyon, Home Office 24/01/74 TNA HO394/168.

[62] Pakenham Walsh to Fitzgerald 21/02/74 & Fitzgerald to Pakenham Walsh18/04/74 TNA HO394/168.

criminal court. It was thought that this would significantly reduce the Home Office work-load and avoid breaching international obligations.[63]

Once the 1974 general election was announced civil servants decided to gather evidence on whether the appeal system was impairing the system of immigration control[64] so that if the Conservatives were returned and decided to curtail appeal rights, they could present a feasible proposal. Fitzgerald, a senior civil servant at the Home Office, stated, *'If we have to do something, it can only be in the direction of restricting or curtailing existing rights of appeal'.*[65] Interestingly, no consideration appears to have been given to whether Ministers might consider providing better resources to allow the appellate system to function. Following the election of a Labour government, it was recognised that it was likely that plans for reforming the appeals system would have to be put on hold.[66]

What emerges from this correspondence between civil servants is that the appeals system is viewed as an impediment to the smooth running of their department. There is a concerted attempt to develop proposals which can be presented to the Minister reducing rights of appeal. However, there is a realisation that there were by then significant structural (political and legal) constraints that make returning to the days of complete discretionary executive powers difficult to achieve. These constraints are viewed in negative terms, as obstacles to try to work around. In this correspondence there is rarely any recognition that an appeal might actually have some value in correcting erroneous Home Office decisions and encouraging better practices. The existence of appeal rights has therefore been the subject of an institutional antipathy. This was the case in the early 1900s, the 1930s and from the very start of the contemporary appeals system. Arguably this was not helped by the fact that the Wilson Committee's principal argument for appeals was the need for the system to appear fair rather than any underlying criticism of the way in which immigration decisions were being made. Moffat[67] argues that one reason why the UK appeals system has been vulnerable to

[63] Fitzgerald to Cairncross 28/02/74 TNA HO394/168.

[64] Review of Immigration Appeal System, Letter from Fitzgerald to My Corben, Home Office 08/02/74 TNA HO394/168.

[65] Ibid.

[66] Letter from Fitzgerald to Cairncross 06/03/74 TNA HO394/168.

[67] Moffatt, R 'An Appeal to Principle: A Theory of Appeals and Review of Migration Status Decision Making in the United Kingdom (2017) PhD Thesis University of Oxford 263. The author cites Satvinder Juss, *Immigration, Nationality and Citizenship* (Mansell 1994) 125-9 for this observation.

erosion by successive governments is that there has never been a principled and coherent theory of why an appeal should exist as a right, leaving the government to consider rights of appeal as a policy matter. The Wilson Committee's focus on the presentational value of an appeals tribunal fuelled a perception that the appeals system had no real need to correct defective decisions and was really only a public relations exercise. Certainly, the archive records give an underlying sense that as non-citizens are conceived as having no positive right to live in the UK, those who succeed in an appeal are somehow evading immigration control, abetted by the tribunal.

During the late 1970s, under Labour, there was no substantial change to UK immigration law or rights of appeal. Randall Hansen describes Roy Jenkin's tenure as Home Secretary as a 'period of restrained liberalism'.[68] Labour made some minor reforms to ameliorate some of the harsher aspects of immigration policy, including an amnesty for those affected by the retrospective operation of the IA 1971, and introduced the Race Relations Act 1976, but they did not seek to repeal the Conservative's Immigration Act.[69] The major controversies of this period concerned the restrictive application of the immigration rules to family members of settled migrants and lengthy delays in processing applications. In April 1981 a Green Paper was finally produced by the Conservative government proposing a number of suggestions to *'rationalise substantive rights of appeal'*.[70] This stated that the appeals system was under great strain with an average delay of up to 14 months. During 1979, 18,000 new appeals were lodged and those pending rose from 11,700 to 16,350.[71] Charles Blake in a submission to the Council of Tribunals Legal Committee noted that at no point in the document did the word 'justice' feature.[72] In January 1985 the Home Secretary announced that they would not be making major amendments to rights of appeal as the delays had now reduced, though they would introduce new procedure rules.[73] In 1987 full administrative responsibility for the

[68] Hansen R, *Citizenship and Immigration in Post War Britain* (Routledge 2000) 25.

[69] Zig Layton-Henry, *The Politics of Immigration: Race and Race Relations in Postwar Britain* (Oxford 1992) 156-159.

[70] 'Rationalise' here appears to be a euphemism for 'remove'. Review of Appeals under the Immigration Act 1971: A discussion document TNA BL2/1971.

[71] Again, still within the Wilson Committee's prediction of between 15-20,000 per year.

[72] Council of Tribunals Legal Committee Note by the Secretary 03/07/81.

[73] Mr Brittain, Home Secretary, Hansard HC vol 70 col 560 (11 January 1985). Immigration Appeals (Procedure) Rules 1984 SI 2041/1984 were introduced later that month.

immigration appellate authorities was transferred from the Home Office to the Lord Chancellor, who would from then on appoint the adjudicators.[74]

Part 2: The Development of Caselaw on Deportation of Long-term Residents

A significant development following the IAA 1969 was that the instructions to immigration officers were made public, since these would be binding on immigration officers and on the tribunal. This led to the need to establish formal criteria to be considered by the Home Office when deportation decisions were made. Records show that civil servants in the Home Office were tasked with drafting a suitable deportation rule and there was some disagreement over the best way to frame it. A first draft[75] listed factors which should be taken into account in deportation cases taken on grounds of the public good:

- Age
- Length of residence in the UK
- Personal history, including character, conduct and employment record
- Domestic circumstances
- The nature of the offence of which the person was convicted
- Previous criminal record
- Compassionate circumstances
- Any representations received on the person's behalf

In cases that just involved a breach of immigration conditions:

> *Deportation will normally be the proper course where the person has persistently contravened or failed to comply with a condition or has remained without authorisation. But* ***full account is to be taken of all the relevant circumstances*** *(including those listed above) before a decision to make a deportation order.*

This was qualified with the statement that:

[74] Margaret Thatcher, Prime Minister, Hansard HC vol 112 col 266-7W (12 March 1987).

[75] Draft of new deportation rules, T. Fitzgerald 02/08/67 TNA HO 344/479.

> *In considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case. While each case will be considered in the light of the particular circumstances, the aim is an exercise of the power of deportation that is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects.*

No further guidance was given on how these competing factors should be weighed. Home Office officials were asked to comment on this proposal and an alternative was proposed which gave greater benefit of the doubt to Commonwealth citizens.[76] This was rejected[77] and the initial proposal became the deportation rules for the next 40 years.[78] Since the rules are subject to the negative resolution procedure, there was little parliamentary input into how decisions over deportation should be taken.

Given the permitted grounds of appeal, this meant that on an appeal a tribunal's role was to review whether the decision was in accordance with the immigration rule. The judge's role would first be to decide disputed facts - for example whether an individual had resided as long as claimed, or whether a relationship was genuine. Here the judge would have an advantage over the Secretary of State in that he could hear oral evidence from witnesses. Having ascertained the facts, the judge would then have to consider whether the discretion conferred by the rule and exercised by the original decision-maker should have been exercised differently. Effectively overall responsibility for deciding whether an individual should remain was ceded by the executive to the judiciary. In doing so the judge could entertain claims based on compassionate grounds, as well as claims based on an individual's presentation of a claim to belong in the UK.

Nevertheless, Legomsky[79] argues that throughout the 1970s and early 1980s the courts tended to show a strong deference to the Home Office, not seen in other areas of law.

[76] Letter by Mr Bohan to Fitzgerald 25/08/67 TNA HO 344/479.

[77] Fitzgerald letter to Mr Bohan and others 29/08/67 TNA HO 344/479.

[78] Immigration rule 364 in Immigration Rules HC395 (the contemporary version of the rules first introduced from 23 May 1994). After the introduction of administrative removal for overstayers (IAA 1999, s10) the same factors had to be considered in an identical rule when a decision-maker exercised discretion to remove (para 395C of Immigration Rules). On 20 July 2006 the deportation rule was replaced with a presumption in favour of deportation.

[79] Stephen Legomsky, *Immigration and the Judiciary* (Clarenden Press 1987).

Macdonald notes that in the first volume of published case reports issued by the IAT, 90 per cent were found in favour of the Home Office.[80] In the first edition of his textbook Immigration Law and Practice, published in 1983, Macdonald notes that at the level of the tribunal the public interest was taken to be primarily an interest in maintaining effective immigration control and so only the most catastrophic personal hardship would outweigh the perceived public interest in deporting overstayers. As such, other 'relevant circumstances' appeared to play no part in a deportation appeal.[81] So whilst individuals could seek to put forward claims based on compassion or claims based on belonging, a conservative tribunal judiciary[82] ensured that such cases would rarely succeed.

The early 1970s saw the growth of law centres as individuals committed to social justice increasingly turned to law to challenge the state. Increasingly specialist immigration practitioners, began to take test cases to the higher courts to push the boundaries of the law. By the 1980s, several leading cases had considered further the role of the adjudicator in exercising their discretion to review a deportation decision and, in particular, to what extent an adjudicator should make their own judgement as to whether a decision to deport was in the public interest. As with the 1930s deportation committee, there began to be some judges who when confronted by an otherwise well-integrated and law-abiding person who had overstayed, refused to always accept that the deportation of such a person was in the public interest.[83] Unlike the initial decision-maker for whom a deportation decision is a paper-based exercise, the adjudicator was confronted in person by the reality of an individual facing removal from a community within which they had established ties of belonging.

The first major case to address this which reached the UK House of Lords was the case of *Bakhtaur Singh*.[84] This concerned a Sikh musician/priest who had arrived in 1979 and

[80] Ian Macdonald, *The New Immigration Law* (Butterworths Law 1972) 5. His explanation is that the belief that historically immigration control was a matter for the crown prerogative, has overshadowed this area of law and meant that even once immigration control became encoded in statute, the courts have been reluctant to interfere with an executive decision to deport a non-citizen.

[81] Ian Macdonald, *Immigration Law and Practice* (Butterworths Law 1983) 338.

[82] Conversations with long standing immigration lawyers also support the argument that the composition of the initial tribunal judiciary, which consisted of a significant number of ex-colonial administrators, played a part in ensuring that for the first 10 years or so the tribunal adopted a deferential approach to Home Office decision-making. Geoffrey Care records that by the 1980s the 'old Colonialists' began to be replaced by a more diverse selection of adjudicators including an increasing number of academics. Geoffrey Care, *Migrants and the Courts* (Ashgate 2013) 35.

[83] See Ch3.

[84] *Singh v IAT* [1986] UKHL 11.

overstayed his work permit. At issue was whether the term 'all relevant circumstances' should include a consideration of the impact on third parties such as the Sikh community. The tribunal received significant testimony from a number of eminent witnesses who put forward the case that he was an important asset to their community, was greatly respected and should be allowed to remain. The adjudicator accepted that he was of great benefit to the Sikh community through his activities, including charitable work. However, the judge decided that it was beyond his jurisdiction to consider such matters, stating:

> *That his appeal produced so much support from those who turned out to be not a rabble, but rather, perhaps, in the main well-intentioned people though with strong feelings, and certainly prepared to listen to reason, maybe that is a factor.* ***Mercifully that aspect of the affair is not my concern*** (emphasis added).

Similarly, whilst concerns about the impact of deportation on the wider community were, *'a matter of importance to the Secretary of State in relation to the community at large and to community relations in particular.* ***That is one of his responsibilities, but is not one of mine'*** (emphasis added).

Here the tribunal has refused to take responsibility for what it considers to be a primarily political decision. The Court of Appeal was similarly of the view that the public interest could only be conceived of as the public interest in favour of deportation which then needed to balanced against compassionate factors. They went on to decide that:

> *We do not think that 'relevant circumstances' can be taken as extending to matters unrelated to the personal circumstances of the applicant and his family and persons intimately connected with him. To remove the ambit of the expression from a personal level to a public one is going too far.*

The case of *Darshan Singh Sohal* [1981][85] had grappled with similar concerns in which a Sikh priest had overstayed his leave and it was argued that deporting him would have a damaging effect on community relations with the Sikh community. In this case the tribunal heard a considerable amount of oral evidence from supporters of the appellant but ruled that such concerns were 'political matters' which were beyond its jurisdiction to consider. Such

[85] *R v IAT, ex parte Darshan Singh Sohal* [1981] Imm AR 20.

concerns could not form a part of the consideration of the public interest nor were they capable of being considered within the scope of 'compassionate factors' since they were not personal to the appellant.

This means that before the House of Lords decision in *Bakhtaur Singh*, the Secretary of State was able to make a deportation decision, argue that there was an independent appeal that would, according to the rules consider 'all relevant circumstances', effectively deferring responsibility for the final outcome to the judiciary and yet the tribunal could in turn say that 'political matters' such as the wider public interest in the decision were not a matter for a judge. The House of Lords judgment overturned this position. Whilst they could accept the argument that compassionate circumstances had to be particular to the individual, they considered that the term 'all relevant circumstances' had to be construed more widely. The Lords were presented by the claimant's lawyers with several examples where the public interest may be against deportation:

> *1. A person liable to deportation has been carrying on business in partnership. His deportation will ruin the partnership business.*
>
> *2. A person liable to deportation is an essential and irreplaceable worker for a company engaged in a successful export business. His deportation will seriously impair the business.*
>
> *3. A person liable to deportation is a social worker upon whom a particular local community has come to depend. His deportation will deprive the local community of his services which will be difficult to replace.*
>
> *4. A person liable to deportation is an indispensible member of a team engaged in scientific research of public importance. His deportation will put at risk the benefit which the public would enjoy if the research were successful.*[86]

It is noticeable that the first two of these examples focus on the individual as an economic actor in the formal economy. Thus, arguably the lawyers and court are jointly engaged here in constructing the figure of the economically active citizen-worker to which those aspiring to

[86] *Singh* (n84).

be allowed to remain should conform. Belonging is attested to by an individual demonstrating their economic value to the community.

The Secretary of State accepted that such matters may be relevant to whether deportation was appropriate, but maintained that such matters were for him alone, and did not fall within the jurisdiction of the appellate authorities. The Lords decided that the immigration rules could not be read in such a narrow way, and it would be contrary to general principles of legality for there to be some factors which the Secretary of State should be able to consider which were excluded from consideration by the courts. The Secretary of State asked the court rhetorically where the line was to be drawn once the appellate authorities were permitted to cross the boundary which separates personal and private considerations affecting the person liable to deportation from wider public and political considerations affecting society at large. The court declined to draw any precise boundary lines, stating only that the court would have jurisdiction to consider all *'matters relevant to the proper exercise of the statutory discretion'* and that relevance could only be determined in relation to the facts of a particular case. The weight to be given to any relevant matters was a matter for the adjudicator.[87]

As a result of this judgment, arguably the tribunal now provided a public forum where ideas about what it meant to be a member of a community could be played out and explored in judicial discourse. A potential overstayer, or someone facing deportation following a criminal offence could mobilise supporters and put forward a narrative that they should be accepted as a worthy member of the community and that there was less public interest in deporting them. Whilst the executive retained the ability to refuse individuals an extension of leave based on broad policy considerations, the right to appeal against deportation gave individuals the opportunity for an individualised trial in which their worthiness as members of the community could be scrutinised. The ultimate decision on whether such an individual was worthy of membership would be taken by an independent judge. Judicial discourse would therefore have a role to play in what factors were constructed as important to membership.

An awareness that the tribunal can be used as a space where community belonging can be performed evidently informs the strategies of lawyers. Frances Webber who was counsel for

[87] Ibid. The court did however caution in obiter remarks that little weight may be given where a person had established their stay whilst in breach of the immigration laws.

the appellant describes the practice of *'bringing the community into the courtroom'* in appropriate cases.[88] This happened in the case of Singh with the appellant organising a 100 strong picket of the court and many community leaders sitting in the public gallery. She argues that this is a valuable legal strategy – not only are judges aware that the quality of their decision will be widely scrutinised, but by bringing the reality of appellants' lives before a judge, the judge can see at first hand the community ties that an appellant is enmeshed in. The judge is therefore engaged in the decision in a way that a Home Office decision-maker is not. Arguably this is a potentially disruptive strategy which brings inherently political aspects of the case into the courtroom and forces the judge to confront the contestation over what it means to belong in the UK.

In subsequent cases certain key themes were put forward by representatives; economic value/work ethic, community engagement, integration, and the support of prominent individuals. An interesting case is one in which the appellant claimed to be a skilled goldsmith, who entered as a visitor but was refused an extension of leave.[89] The adjudicator heard evidence from 16 goldsmiths and business consultants and 42 letters of support, who endeavoured to make out the case that the appellant was a valuable asset to the community. The case was unsuccessful, but primarily as the judge was not convinced that the appellant was as skilled as he claimed to be, rather than rejecting the premise of the argument. In *Sigola*[90] the fact that the appellant was a nurse was held to be a matter of weight with the court considering that *'long term, humble service and the giving of a good deal of comfort to people at bedside level'* was relevant to whether deportation was appropriate.

Another notable case in the tribunal is that of *Muhummad Idrish*.[91] Here the court considered that it was '*contrary to common sense and the principles of immigration control to assume that the public interest in deportation applies equally regardless of the time or purpose of the overstay*'.[92] In this case the appellant was married to a British woman, though they subsequently separated and so he was faced with removal after six years' residence. He was

[88] Frances Webber, *Borderline Justice* (Pluto Press 2012) 9.

[89] *R v IAT, ex parte K K Dhunna [1992] Imm AR 457.*

[90] *R v IAT, ex parte Ida Sigola* [1984] (QBD 16 October 1984).

[91] *Muhummad Idrish v SSHD* [1985] Imm AR 155.

[92] Ibid.

a skilled social worker and on appeal the evidence in his case included 41 letters from Members of Parliament, three from Members of the House of Lords, 11 letters from clerics and religious organisations, three from social worker organisations, 14 from community and educational organisations and a number more. Numerous persons testified on his behalf that he was a skilled social worker who spoke a number of useful languages and several mass petitions were submitted with over 1000 signatures on one of them. The adjudicator refused the appeal by following *Bakhtaur Singh* in the Court of Appeal and declined to consider any of this material, seemingly relieved that he did not face the *'unenviable task'* of having to make such a controversial and life changing decision and effectively deferring responsibility to the executive.

On appeal the IAT were at this time still bound by the judgment in the Court of Appeal and so considered themselves unable to take into account the wider impact of his deportation on the community. Nevertheless, the tribunal found in his favour, and in doing so considered that in this specific case the public interest in deportation was not high. They considered it was an injustice not to grant him leave following the separation from his wife, noting his hard work in the local community and that, '*In our view this commitment provides a strong connection with the United Kingdom'.* In the case of *Leong*[93] the court allowed an appeal where an individual's deportation would have resulted in loss of employment for others settled in the UK. The case of *Pereira*[94] the tribunal gave guidance on how to evaluate the quality of petitions and letters received in deportation appeals.

Many of the prominent cases that came before the higher courts with significant popular support, involved individuals who had not actually been resident for that long, and who today would have very little chance of making out any claim to remain under current human rights legislation. The fact that there are not more early cases involving the attempted removal of those with longer term residence reflects the fact that at this time the Home Secretary was less likely to attempt to pursue the deportation of long resident non-citizens. The hardening approach to immigration control in recent years is discussed in Chapter 8.

[93] *Leong (5055)* – unreported case.

[94] *Pereira (3203)* [1984] unreported case.

Deportation Following a Criminal offence and the Emergence of the 'Doctrine of Revulsion'

I will consider separately how the tribunal initially dealt with the case of settled non-citizens facing deportation for having committed a criminal offence. Clearly such appellants are likely to have less ability to position themselves as worthy citizens, yet nevertheless those with strong ties to a local community may nevertheless be able to present a narrative of belonging to that community. A review of the early deportation caselaw reveals that there are a far smaller number of significant legal authorities in the higher courts than in recent years, the prominent authorities often concern very serious crimes and there are far fewer cases that concern the deportation of very long-term residents. This has changed significantly since the introduction of automatic deportation in 2007 for any non-citizen sentenced to over 12 months imprisonment.

In the 1970s recommendations for deportations were subject to the consideration of the criminal courts. It was held that a recommendation was not part of the punishment for an offence but a subsequent matter which could be appealed against alone without including an appeal against the sentence.[95] The lead case that set down guidelines concerning how the power to recommend deportation should be exercised by criminal courts was *Nazari*,[96] which clarified earlier seemingly conflicting judgments of the courts.[97] The court held that the sentencing court should hold a full inquiry into a case before any order recommending deportation was made, and that judges should invite counsel to address them on the possibility of a recommendation for deportation being made. Firstly, the court must consider whether the accused's continued presence in the United Kingdom was a *detriment* and this would depend on the seriousness of the offence. The criminal court was not interested in the conditions a defendant would face on return - that was a matter for the Secretary of State, but it must consider the impact an order would have on third parties *'who are not before the court and who are innocent persons. This Court and all other courts would have no wish to*

[95] See *R v Edgehill* [1963] 1 QB 593.

[96] *R v Nazari* [1980] 1 WLR 1366.

[97] See *R v Caird* [1970] 54 Cr App R 499 for the previous leading judgment.

break up families or impose hardship on innocent people'.[98] It is notable that this latter statement was made as a simple and seemingly common sense statement with very little reasoning given to it, and it is clearly at odds with the contemporary approach applying Article 8 ECHR where the courts are now very prepared to break up families and impose hardship on innocent people in the name of immigration control.[99] On this basis, the appeal of a man with a string of convictions including aggravated burglary and actual bodily harm, was spared deportation on the grounds of the impact it would have on his wife and two children. Whilst this case gave guidelines to the Courts in their consideration of making deportation recommendations, it did not give guidance to the Secretary of State on how he should exercise his discretion.

The court further stated that when making a recommendation all the criminal court is doing is providing an opinion of whether it is to the '*detriment of the country*' that the accused should remain there, yet the willingness to consider the wider impact on third parties of an individual's deportation does suggest an expansive approach to considering what is in the public interest. The issue of *'detriment to the country'* was considered further in *Serry.*[100] An Egyptian national, resident for five years, with a pregnant wife, had been recommended for deportation following a first shop-lifting offence. The primary reason of the sentencing court was that he and his partner *'had been living on the backs of the tax-payers for years without doing any work at all'* and he was therefore a detriment to the UK. The Court of Appeal, following *Nazari* were not prepared to equate a need for social welfare with criminality and rejected this approach swiftly and in the strongest terms:

> *It is quite obvious to us that Lord Justice Lawton did not have that sort of detriment in mind, if indeed it can properly be called a detriment at all… We cannot say too strongly that the fact that a defendant has been living on social security is not a factor which should be taken into account in deciding whether to make a recommendation for deportation.*[101]

[98] Ibid.

[99] See Ch 8 and discussion of the case of *Carmona v R.* [2006] EWCA Crim 508 which shows how the introduction of the HRA actually led to this position hardening.

[100] *R v Serry* [1980] EWCA Crim J1028-1.

[101] Ibid.

Again, such an approach is contrary to how a contemporary assessment is made under Article 8 ECHR where the public interest is aligned with the interests of 'the tax-payer'.[102]

In the case of *Santillo*,[103] the Court of Appeal stated that the mere existence of previous criminal convictions is not of itself a basis for making a recommendation. Whilst this case concerned EC law which places stricter limits on the deportation of EC nationals,[104] remarks suggested that it had wider application:

> *This is not only the law in accordance with article 3 of the Council Directive.* ***It is also only common sense and fairness. No one can reasonably recommend the deportation of a foreigner solely because he has a criminal record.*** *If he is, or will upon release from prison be, completely rehabilitated, he is a threat to no one.* (emphasis added).

Once again as with the case of *Serry*, the judges appealed to a feeling of *common sense* that no one would consider deporting a foreigner who posed no further threat to society. Yet such common sense was not to last, and the tribunal began to take a very different approach. In Florent[105] the Court of Appeal upheld a tribunal decision that concluded that some offences were so serious that they justified deportation even if there were no previous offences and no great likelihood of the individual re-offending. In each case what mattered was the specific factual circumstances of the offence. Here the appellant had been involved in a particularly violent knife assault on his wife, described in quite graphic detail, committed at a time he was suffering from a psychiatric disorder. The criminal court had not recommended deportation, and the appellant maintained contact with his two children.

This case is perhaps where we see the emergence of what could be termed the *'doctrine of revulsion'* – the idea that some crimes are seen as such an affront to society, that they alone justify expelling a non-citizen member from the community, regardless of other ties of belonging, compassionate circumstances or the fact that the individual is assessed as a low

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[102] See NIAA 2002, s117B(3) discussed further in Ch9.

[103] *R v SSHD, ex parte Santillo* [1981] QB 778.

[104] Today the comparable Article 27 of the Citizenship Directive EC/2004/38 states that for deportation to be a proportionate response there must exist a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.

[105] *R v IAT, ex parte Florent* [1985] Imm AR 141.

risk of reoffending.[106] On the facts the court still considered the appellant to be a risk, but the suggestion put forward by the judges and apparently conceded by counsel for the appellant, was that for some crimes, even if there is no future risk to the public, past conduct alone justifies deportation.[107] As a result a significant gap opened up between the treatment of EC nationals (per *Santillo*) governed by EC directives, and non-EC citizens, in the matter of deportation.[108] The principle that a serious offence was itself a sufficient basis for deportation, was derived primarily from the case of Florent, with the court using the lack of previous argument on this point to justify their decision.[109] There is little wider reasoning to explain why the *common sense* position expressed in *Santillo* had been rejected. The principle was consolidated in the case of *Goremsandu.*[110] Counsel for the appellant argued that there had to be some discernible public interest served by the deportation beyond the public interest in the deterrence of others. The court held that it was open to the Secretary of State to decide that some offences were so serious and so repugnant to the generally accepted standards of morality that *'the continued presence of the offender after his release from prison is offensive to the public if it can be avoided'*. This was irrespective of a propensity to commit further offences of a similar character. This particular case concerned a long resident Zimbabwean national who received a five-year sentence after being convicted of incest. As with *Florent*, on the facts, the court were not convinced that he posed no further risk. Nevertheless, the ratio goes wider and could be applied in cases where an offender is considered completely rehabilitated.

What emerges from these cases is that it is not just the nature of the crime, but the wider public response to it that should be considered. Cases which aroused *'public revulsion',* are

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[106] The term *'public revulsion'* is used explicitly in subsequent caselaw – see *N (Kenya) v SSHD* [2004] EWCA Civ 1094 and *OH (Serbia) v SSHD* [2008] EWCA Civ 694 discussed in Ch8, 220-222. This earlier caselaw is where the concept emerges.

[107] See also: *Hukam Said v IAT* [1989] Imm AR 372 CA. A man resident for 7 years with indefinite leave with a wife and two children was made subject of a deportation order following a 5-year sentence for supply of class A drugs. The Court of Appeal did not even make reference to *Santillo* and no consideration was given to the question of the risk of reoffending. In *Martinez-Tobon v IAT* [1988] EWCA Civ J0212-11 a man resident for 11 years with his wife and children was successfully deported following a 4-year conviction for importing drugs.

[108] In the case of *Sheikh-Mohammad Nasser Al-Sabah v IAT*, [1992] Imm AR 223 it was subsequently confirmed that the immigration rules expressly allowed for different treatment of non-EC citizens.

[109] The court stated: *'If there were merit in Mr Pannick's … argument it would be surprising enough that neither experienced counsel nor this court appreciated it in Florent. All the more surprising that the argument failed to surface in the two further appeals'.*

[110] *Goremsandu v SSHD* [1996] Imm AR 250.

the kind where a propensity to reoffend is not relevant to the question of deportation. A sense of outrage at a non-citizen infringing the moral boundaries of the community should take precedence over an expert analysis of the future risk a person poses when deciding whether they should still belong to that community. This was considered necessary to maintain public confidence in the treatment of non-citizens.[111] Deportation thus serves an essentially symbolic purpose of reinforcing the importance of citizenship, and the tribunal provides a forum in which the moral boundary can be reaffirmed. What is not clear is how a judge is expected to evaluate *'public revulsion'*, other than by deferring to the Secretary of State's awareness of hostile media reports against persons of foreign nationality who commit certain crimes. Such an approach appears to be a means of drawing on wider public discourse concerning whether such a person is entitled to belong to the wider community into the legal process when making a decision. In doing so the court has framed the judicial role in a very different way to the approach they took in *N*[112] in which it was stated, '*Just as juries in criminal trials are directed that they must not allow their decisions to be influenced by feelings of revulsion or of sympathy, judges must examine the law in a way that suppresses emotion of all kinds'.* The concept of 'public revulsion' has continued to be an important factor in deportation caselaw.[113]

Conclusion: The Early Caselaw

This chapter has considered how the tribunal began to operate in practice. It has shown that the Home Office was institutionally resistant to the role of judges and from the start sought ways to reduce appeal rights. The Conservative government in the 1970s continued to make arguments for why it was wrong in principle for deportation decisions to be decided by the courts. However, having introduced appeals, there were now real political constraints on removing them. Despite these concerns, the early caselaw shows that the first intake of tribunal adjudicators in the 1970s and early 1980s adopted a position of deference to the Home Office and were reluctant to overturn discretionary decisions to make deportation

[111] Wilson LJ in *OH (Serbia) v SSHD* [2008] EWCA Civ 694.

[112] *N v SSHD* [2005] UKHL 31 (discussed in Chapter 2).

[113] In the case of *Hesham Ali* [2016] UKSC 60 Lord Wilson expressed doubts over his 'emotive' choice of language in earlier cases, whilst not resiling from his focus on the need to instill public confidence in the treatment of foreigners who commit crimes. He stated, '*the very fact of public concern about an area of the law, subjective though that is, can in my view add to a court's objective analysis of where the public interest lies'* [70].

orders. By the mid-1980s, as the government expanded the use of immigration enforcement, the courts began to assert themselves. Tribunal judges began to be able to exercise their own discretion to prevent deportations and some adopted a more interventionist approach, reminiscent of the approach taken by the Deportation Advisory Committee of the 1930s. Here all relevant factors could be taken into account, allowing judges to venture into areas of public policy by deciding how such factors should be weighed. It became possible for individuals faced with deportation to advance a claim that they were established members of the community in order to persuade a sympathetic judge that they were a 'worthy citizen' but for the citizenship and therefore deserving of continuing membership. Strong support from supporting witnesses and community members testifying before the tribunal to the public value of the appellant could be persuasive in permitting a judge to overturn a deportation decision by concluding that it was not in the public interest. It is evident that perceived economic value was an important aspect of this which was put forward by claimants, but there was the possibility for considering the wider social impact of the denial of membership to an individual.

This chapter also traced the developing decline in security of Commonwealth citizens' residence, through the introduction of the IA 1971, though notably there was at least strong political debate over the desirability of such an approach. There was strong opposition from the Labour front bench over the wider social consequences of decreasing the security of Commonwealth citizens. This will be contrasted with more recent developments in Chapters 7-9. It will be argued that since the 1990s there has been a lack of meaningful political opposition to laws which reduce non-citizens' security of residence and a tendency to defer to human rights law as a minimum backstop of protection, rather than make a political case for the importance of security of residence. Chapter 6 first considers the changes to the role of the tribunal brought about by the development of new rights of appeal on asylum grounds.

Chapter 6: Expanding and Contracting Appeal Rights: The Appeals Tribunal 1980-1999

> *A new right of appeal in asylum cases is an essential ingredient of any attempt to streamline the determination system and to increase the proportion of applicants who are not allowed to settle in this country.*
>
> - Letter from David Mellor, Chief Secretary to the Treasury, 1991).[1]

This chapter discusses a series of reforms that occurred in the 1980s and early 1990s to try to understand the seemingly contradictory process by which, on the one hand, new rights of appeal were granted to those arriving unlawfully and claiming asylum on the basis of the UN Refugee Convention 1951, whilst on the other hand, rights of appeal of those facing deportation for overstaying lawful leave were restricted. Despite previous opposition to the appeals system, by the early 1990s the tribunal had become an important part of the system of immigration control. The government had now accepted that there were political and international legal constraints to reducing appeal rights, but that the tribunal could be used carefully in a way that facilitates government asylum policy. Provided that sufficient control could be retained over its operation, the tribunal could provide a means to placate critics of increasingly strict immigration controls, deflect political representations from MPs, ward off the intervention of the higher courts and so facilitate immigration enforcement.

I then consider how as immigration appeal rights were restricted, lawyers began to turn to international human rights law (even pre-Human Rights Act 1998) as a potential source of protection to non-citizens facing deportation. As will be seen in Chapter 7, this turn to human rights law occurred at the same time as there was a collapse in significant political opposition in Parliament to decreasing the security of non-citizens.

Immigration Control in the 1980s

By 1980 primary immigration from the Commonwealth had significantly reduced. The Conservatives nevertheless included in their 1979 manifesto a pledge for firm immigration

[1] Letter from David Mellor, Chief Secretary to the Treasury to Home Office 01/05/91 TNA HO394/966.

controls.[2] There is evidence that during this period, the way in which the immigration rules were enforced and the way in which discretion was exercised became hardened in favour of refusal.[3] Such concerns were supported in a report by the Commission for Racial Equality[4] which was highly critical of the way immigration control was being conducted. There was evidence of an increasing crackdown on those who had breached their conditions of leave. Between 1974 and 1989 the number of deportation decisions taken by the Home Office rose from 911 to 3,214 per year.[5] In 1994 deportation action was initiated in 5,770 cases.[6] This is the period during which what had been a seldom used power in the 1960s, began to become normalised. Following the introduction of the Immigration Act 1988, Ministers delegated authority for issuing deportation decisions to immigration enforcement officers, rather than senior Home Office officials. This led to considerable concern that migrants and even British citizens were becoming subject to removal action without full consideration of their circumstances.[7] Whilst this became the subject of litigation the practice was eventually held to be lawful by the House of Lords.[8]

Another important legal development in this period was the British Nationality Act 1981 which fundamentally restructured UK citizenship law. This finally replaced Citizenship of the UK and Colonies, and the concept of patriality, with a modern conception of British citizenship

[2] Conservative Party, '*General Election Party Manifesto 1979*' (April 1979) www.conservativemanifesto.com/1979/1979-conservative-manifesto.shtml accessed on 04/10/20. The pledges included a reduction in access to permanent settlement, restrictions on the family members permitted to enter the UK and firm action against 'illegal immigrants'.

[3] Roy Hattersley MP alleged that the Home Secretary was responsible for *'a general hardening of attitude in the immigration service which has come about either as a result of direct ministerial instruction or because the policies and attitudes of the Conservative leadership have indirectly permeated down through the Home Office'*, Hansard HC vol 26 cols 633-704 (28 June 1982*).* See Satvinder Juss, *Discretion and Deviation in the Administration of Immigration Control* (Sweet & Maxwell 1997), for his discussion on how a 'discrepancy system' was increasingly being used to refuse applications for entry clearance.

[4] Commission for Racial Equality, *Immigration Control Procedures: report of a formal investigation,* (1985). The Home Office tried to prevent the investigation from being conducted by arguing that it was outside the CRE's remit but lost in the case of *Home Office v CRE* [1982] QB 38. Upon publication the government did not support its conclusions.

[5] Home Office Control of Immigration Statistics (Cmnd 9544, 1984) & Home Office Control of Immigration Statistics (Cm1124, 1989). Macdonald cites statistics that show that in the second half of 1988 following the introduction of the Immigration Act 1988 the number of notices of intention to deport almost doubled, increasing from 609 to 1142. Ian Macdonald, *Immigration Law and Practice 3rd edition* (Butterworths Law 1993) 370.

[6] Home Office, Control of Immigration Statistics: United Kingdom (Cm6363, 2003).

[7] See 'Briton was deported illegally from the UK' (The Independent 29/04/89). Press cutting TNA HO394/864. This reported the case of a 25-year-old British citizen, born in London to Nigerian parents who was deported within 24 hours of being arrested for a driving offence after he gave a false name.

[8] See *R v IAT, ex parte Alexander and ex parte Oladehinde* [1990] 2 WLR 1195. See Home Office '*Response to judgment*' TNA HO394/889.

that was aligned with the right of abode. This has been discussed extensively elsewhere.[9] A significant change was the removal of an automatic right to citizenship for children born in the United Kingdom. Henceforth children would only belong to the UK if they were born to a British or settled parent.[10] The government maintained that it was desirable to prevent visitors, students and illegal entrants with little connection to the UK from giving birth to British children and this would bring the UK into line with other European states which did not have a *ius soli* principle of citizenship acquisition. Although children born in the UK could register as British once their parent became settled or after 10 years of residence prior to the age of 18, it is from this point that the phenomenon of 'precarious citizens'[11] emerges – young people born in the UK, growing up unaware of their lack of legal status until such point as they are required to obtain a passport or otherwise demonstrate their eligibility for a public service.[12] During the passage of the Bill, objections were raised that this would increase the insecurity felt by non-citizen residents; in particular there was concern over what would become of a child born British to settled parents where years later the Home Office decided that the parent should in fact be deemed an 'illegal entrant'.[13] Thus during this period we see a continuing decrease in the security of the residence of non-citizens, but still some political opposition in Parliament. Labour in the early 1980s, under the leadership of Michael Foot, adopted a more radical approach to immigration reform and its 1983 manifesto included a

[9] See, for example, Charles Blake*, 'Citizenship, Law and the State: The British Nationality Act 1981'* (1982) 45(2) Modern Law Review.

[10] Parent did not then include an unmarried father. The British Nationality (Proof of Paternity) Regulations 2006 went some way towards amending this anomaly but the legacy of this was not fully corrected until the Immigration Act 2014, s65.

[11] Migrant Children's Legal Unit, *Precarious Citizenship: Unseen, Settled and Alone* (2016).

[12] This sometimes occurs in cases where a child is taken into care and the local authority fails to inquire into their immigration status, or where a child's parents do not register them as British. Such children may well identify as British and yet find themselves vulnerable to deportation to a country they have not lived in. Since it is now increasingly difficult to gain a settled status, today an increasing number of children are born to non-settled parents and so not automatically British. It is estimated that there are at least 120,000 children in this position. Nando Sigona and Vanessa Hughes, *No Way Out, No Way In: Irregular migrant children and families in the UK* (Compas, Oxford 2012). A more recent report estimates 215,000 children, and 117,000 young people, Andy Jolly et al., *London's children and young people who are not British citizens: A profile* (Greater London Authority 2020).

[13] See, for example, John Tilley MP *'If the nationality of a child is not fixed at registration, many children will grow up not knowing their nationality. Some may not realise that they are stateless until it is too late for them to do anything about it*', Hansard HC vol 997 col 1027 (28 January 1981).*'The definition of "settled" in the Bill is complicated and is not, I think, secure. It will give rise to many uncertainties and personal problems'* Baroness Vickers Hansard HL vol 421 cols 875-956 (22 June 1981). In hindsight these observations appear very prescient.

commitment to repeal the IA 1971 and BNA 1981, and replace them with a non-discriminatory citizenship law which would restore *ius soli.*[14]

Restricting Deportation Appeals: A Response to 'Judicial Activism'

The Immigration Act 1988 introduced by the Conservative government was described as a Bill to *'repair loopholes'* caused by *'judicial activism'* in that it reversed the effects of a number of higher court decisions.[15] The most significant in terms of appeal rights was removing the ability of those facing deportation on the basis of having breached conditions from appealing on the merits of the case unless they could show they were last granted leave to enter over seven years ago.[16] For those who could not show this arbitrary seven year period of residence, judges would no longer have the ability to consider compassionate circumstances and exercise their own discretion. Thus the sorts of appellants whose cases succeeded in the wake of the *Bakhtaur Singh* judgment, discussed in Chapter 5, would no longer have the opportunity to *'bring the community into the court room'.*[17] This would retain the illusion of a right of appeal, but the tribunal would be excluded from the consideration of the merits.[18] Critics argued that this would render such appeals 'absolutely meaningless' for people who within seven years may have settled, married and had British children[19] and fundamentally undermined the principles established by the 1969 Act.[20] In promoting the legislation the government began the familiar characterisation of the appeals system as a form of statutory loophole open to the abuse of those seeking to enter the UK illegally, which was hampering

[14] Labour Party, The New Hope for Britain, Manifesto 1983 http://labour-party.org.uk/manifestos/1983/1983-labour-manifesto.shtml accessed on 04/10/20. These pledges were notably absent in the 1987 manifesto, and there was no mention of immigration in the 1992 manifesto.

[15] Hansard HC vol 122 col 790 (16 November 1987), Roy Hattersley MP referring to an article in the Guardian 13/11/87, 13 by Tim Renton, the Minister of State for the Home Office promoting the Immigration Bill.

[16] Immigration Act 1988, s5. For those who could not show 7 years' residence, their appeal right was restricted to whether on the facts there was in law no power to make the deportation order.

[17] Clearly the consequences of the Singh case were discussed at a high level within the Home Office. A national archives file labelled 'Interpretation of public interest in the Immigration Rules: implications of the Bakhtaur Singh judgment' TNA HO 394/778 remains closed until 01/01/2067.

[18] In *R v SSHD, ex parte Malhi* [1990] it was also held that the limited jurisdiction prevented a tribunal judge from considering other public law arguments such as fairness and natural justice. Tribunal judges were not required to investigate the decision-making process; only whether on the facts of the case there was in law a power to make the deportation order.

[19] John Cartwright MP Woolwich, Hansard HC vol 122 col 810 (16 November 1987).

[20] Chris Platt, *The Immigration Act 1988: A Discussion of its Effects and Implications: Policy Paper 16 (*Centre for Research in Ethnic Relations, University of Warwick 1991).

effective immigration control.[21] At Committee stage the Minister promoting the Bill gave the impression that adjudicators would be able to make recommendations to the Home Office about whether to exercise discretion on compassionate grounds in any earlier appeals against the refusal of an extension of leave. However, it was shown that this was not a practice followed by adjudicators and an amendment to ensure that it would be was resisted.[22]

The archives reveal that civil servants had been asked to review after-entry enforcement procedures with a view to speeding up removal of those who had overstayed their leave.[23] This led to several meetings during which officials decided which rights of appeal could be removed, and which proposals might survive parliamentary debate.[24] Initially civil servants considered whether a new power of administrative removal could be created for those who had overstayed, without an appeal right. Significant work was also given to whether a new concept of 'unlawful presence' could be devised that would treat overstayers in the same category as those who arrived unlawfully and prevent them from appealing.[25] Ultimately they decided it would be simpler to qualify the existing deportation power with restricted appeal rights; this was viewed as better presentationally, since it could be sold to Parliament as tightening up procedures rather than taking a wholly new power.[26] It is evident that Home Office officials expected that their aim of removing appeal rights would encounter significant political opposition and so should be introduced gradually and carefully framed:

> *…in so far as worthwhile schemes of unlawful presence involve extending administrative deportation, so then will they encounter hostility in Parliament and resistance outside to effective implementation. This causes me to reflect how far we are not already pressing hard against the margins of enforceable acceptability*.[27]

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[21] Ibid 16-17. In debate the Minister for the Home Office stated *'We have a superstructure of appeals in this country which has little parallel in other Western countries. That superstructure is such that, through using the system, people are often able to abuse it and to stay for much longer in this* country than is justified'. Mr Renton, Hansard HC vol 129 cols 1207-1208 (17 March 1988).

[22] See debates at Hansard HC vol 127 cols 863-874 (16 February 1988) & Hansard HL vol 495 cols 113-162 (22 March 1988). Subsequently in the case of *Gilegao v SSHD [1989]* Imm AR 174 the tribunal held that it had no power to issue directions to adjudicators on the circumstances in which they should make a recommendation to the Home Office.

[23] Letter by T C Platt, Home Office to Ackland and Fittall, July 1987 TNA HO394/817.

[24] Notes of Home Office Meetings of January 1987 and 04/05/87 TNA HO394/817.

[25] Correspondence between Home Office officials TNA HO394/817.

[26] Letter J G Daly B3 Division to Mr Platt Immigration Bill: After Entry Enforcement 29/09/87 TNA HO394/816.

[27] RM Morris to Mr Hyde Letter further to discussion on unlawful presence 27/04/87 TNA HO 394/835.

Though the more dramatic removal of appeal rights were at this time rejected, the concept of the administrative removal of overstayers was eventually introduced over 10 years later as section 10 of the Immigration and Asylum Act 1999 under a Labour government. The concept of 'unlawful presence' (person unlawfully in the UK) was also eventually introduced in the Immigration Act 2014 which also removed most rights of appeal.[28] This is evidence that more recently introduced policies reducing appeal rights had in fact been under discussion amongst civil servants for many years, waiting for an opportunity when they would be politically viable, due to a decline in political opposition to reducing the security of non-citizen's residence.

Deportation appeals by overstayers were described as, by their nature difficult to resolve and taking up much of the time of the appellate authorities. It was anticipated that the proposed changes would restrict 70 per cent of the appeals by those deported under IA 1971, s3(5)a. Officially the government's position was that it *'does not believe that in a period of less than seven years' residence any compassionate factors that might be presented against the decision to make a deportation order can be of sufficient strength to be compelling'.*[29] However, it is evident that the reason for choosing seven years was not based on any real principle. Ministers supporting the Bill were briefed that there was no *'magic formula'* for why seven years should be the period before which the full right of appeal was to be activated.[30] At first it was considered that five years would be an appropriate cut off[31] since this was the length of lawful residence necessary to acquire citizenship and had previously been the length of time after which Commonwealth citizens became immune from deportation and regarded as belonging in the UK.[32] However, the *'tactics of (the bill's) presentation'* was considered to be very important. It would be better to go for a longer period so that if there was strong pressure from Parliament on this matter, it could be reduced to five years as a concession that might allow it to pass.[33] Clearly there was not sufficient parliamentary pressure as the seven years exclusion became law.

[28] IA 2014, s1.

[29] Speaking note for committee stage TNA HO394/816.

[30] Clause 4: Supplementary Briefing: Lines to take at likely questions raised in Parliament. TNA HO394/816.

[31] Letter by T C Platt, Home Office to Ackland and Fittall, July 1987 TNA HO394/817.

[32] See Ch4, 112-113.

[33] (n30).

The final Act provided for those who were legally resident less than seven years to appeal against deportation on the grounds that their removal would breach the UK's obligations under the Refugee Convention.[34] This was needed to reflect a government concession made before the European Commission of Human Rights in the case of *Kandiah*[35] that overstayers facing deportation who raised asylum grounds would have a right of appeal that would satisfy Articles 3 and 13 of the ECHR. At this time though, it was not considered that a right of appeal was required in cases that might engage Article 8 ECHR based on family ties. A Commons amendment tried to allow for a further exception for cases where the person facing deportation had a settled child, spouse or parent. The government argued it was impossible to isolate one compassionate factor from general considerations and this would undermine the aims of the exclusion.[36] The amendment was defeated.

The Role of MPs' Representations

Despite the appeals process, increasingly MPs would raise in Parliament examples of hard cases who for technical reasons were denied a right of appeal. A typical example is the case of Parveen Kahn who was permitted to enter the country to marry a man who had always believed that he was in the UK legally, having entered at the age of 13. They had two British children. It later emerged that her husband was in the country illegally and the whole family were faced with removal. This was despite the fact that her husband would have qualified for an amnesty if he had been aware of his situation.[37] Increasingly MPs' representations were made on behalf of constituents who had family members visiting who had been refused entry on arrival in the UK but who had no in-country right of appeal. An MP would intervene to prevent immediate removal, enabling a person to be granted temporary admission whilst the representations were being considered. In October 1985 the Home Secretary reported that

[34] Implemented by the means of the Immigration (Restricted Right of Appeal against Deportation) (Exemption) (No. 2) Order 1988 SI1203 issued under section 5(2) of the Act.

[35] Application No *9586/82 Kandiah* was declared inadmissible by the Commission after the UK gave an assurance *'in such cases that no overstayer who claimed asylum would be removed without a chance of having a decision to refuse asylum reviewed by an independent tribunal'.* The UK maintained its opposition to granting an in-country right of appeal to illegal entrants refused asylum, though this became the subject of later proceedings before the Commission.

[36] Briefing Note on Amendment for Committee Stage 4\3\22(28) TNA HO394/816.

[37] See description by Gerald Kaufman MP, Hansard HC vol 55 col 659 (05 March 1984). For examples of other difficult cases raised by MPs see *Kassamali* Hansard HC vol 951 cols 156-168 (06 June 1978); *Talash Khan* Hansard HC vol 961 cols 992-1000 (26 January 1979); *Luczak* Hansard HL vol 433 cols 821-843 (20 July 1982); *Rasheida* Hansard HC vol 50 cols 573-578 (08 December 1983); *Stancu Papusoiu* Hansard HL vol 440 col 1523 (29 March 1983).

he was now receiving MPs' representations at a rate of 200 a week in relation to port cases where there was no appeal and that this was thwarting immigration control.[38] In such cases temporary admission was being granted to further investigate the issues raised. In 1986, 18,000 immigration representations were received.[39] These included deportation cases which had been through the appeal process. Rather than this being evidence of a hardening of immigration control,[40] it was argued that this showed that a number of MPs[41] were now 'misusing their right' to make representations on individual cases. The solution adopted was to issue new guidelines that limited the ability of MPs to prevent removals through making representations.[42] In the debate in which MPs supported a motion *taking note* of this change, opposition MPs were placated with the fact that there existed an independent appeals system.[43] In cases with a right of appeal the Minister would no longer stop removal in order to review a case again unless there was compelling new evidence. Critics argued that MPs and thus Parliament had a constitutionally important right to be able to call to account the executive through the Minister, and the Minister was binding his own hands by refusing to review a case.[44] The answer was that the independent tribunal was now fulfilling that role.

The 1990s and the Introduction of Asylum Appeals

During the 1990s the political debate shifted from a concern over the immigration of Commonwealth family members to new concerns over the rising number of allegedly 'bogus' asylum applicants, leading to the Asylum and Immigration Appeals Act 1993. The Act introduced a new right of appeal on the grounds that removal would be contrary to the UK's obligations under the Refugee Convention, including for those who had entered the country illegally who at present had no entitlement to appeal.[45] However, it was in the context of an

[38] Douglas Hurd, Hansard HC Deb vol 84 cols 825-839 (29 October 1985).

[39] Tim Renton, Minister of State Hansard HC vol 140 col 521 (10 November 1988).

[40] Statistics show that the number of people refused entry increased from 10,871 in 1976 to 23,110 in 1986. Home Office, Control of Immigration Statistics: United Kingdom (Cm166, 1986).

[41] 23 MPs were singled out as examples of the 'problem we are facing'. These included Gerald Kaufman, Jeremy Corbyn and Claire Short.

[42] Hansard HC vol 140 cols 518-44 (10 November 1988).

[43] Tim Renton, Minister of State (n42) cols 520-522.

[44] Robert MacLennan MP (n42) cols 530-531.

[45] Asylum and Immigration Appeals Act 1993, s8.

Act that was primarily about restricting the rights of asylum seekers.[46] It is worth considering how the new appeal right came about, given that Ministers had been fiercely against extending any right of appeal to those who had entered illegally, drawing lessons from other countries in Western Europe such as Germany and Denmark which they claimed were now overwhelmed with asylum applications as a result of appeal rights providing an incentive for asylum claimants.[47] This right of appeal had long been called for;[48] the Select Committee on Race Relations and Immigration had recommended in 1985 that an independent right of appeal should be introduced for those claiming asylum who were classed as illegal entrants. The government had not accepted this but since 1983 they had adopted a procedure of referring asylum claimants to the UK Immigration Advisory Service (UKIAS) who could provide assistance and make representations to the Home Office prior to removal. This practice ended following a significant increase in asylum claimants in 1987.[49] During the passage of the Immigration Act 1988, Ministers resisted calls for introducing a general right of appeal on asylum grounds. After much criticism, an increase in judicial review cases[50] and challenges to Strasbourg,[51] the government finally accepted the need for a right of appeal. Randall[52] argues that the increasing recourse to judicial review and the consequential procedural obligations placed on the Home Office, together with an increasing number of applications, was leading to a breakdown in the processing of asylum claims. The concession of a limited appeal would speed up the resolution of such cases without litigation in the High Court. The original Asylum Bill 1991 proposed that rather than a right of appeal there would merely be a right to seek

[46] Other measures in the Bill included mandatory fingerprinting, restrictions on accessing certain housing support and new powers to curtail existing leave once an asylum claim had been made. New immigration rules were also introduced setting out 'credibility' criteria which could lead to the refusal of asylum claims as a result of certain behaviours.

[47] See Hansard HC vol 127 cols 874-888 (16 February 1988).

[48] E.g., Proposals for Reform, European Council for Refugees and Exiles (ECRE) (October 1990) & 'Towards a credible asylum process', Amnesty International (May 1992).

[49] See Douglas Hurd MP, Secretary of State for the Home Department, Hansard HC vol 111 cols 732-743 (03 March 1987).

[50] The late 1980s saw the first major asylum judicial review cases decided before the House of Lords. In 1981 there were 157 immigration judicial review applications. By 1986 this had more than doubled to 516. Maurice Sunkin, 'What is Happening to Applications for Judicial Review' (1987) 50 MLR 432 [443].

[51] See *Vilvarajah & Ors v UK* [1991] ECHR 47. This case came about as the result of the government returning to Sri Lanka the appellants in *Sivakumaran* prior to a right of appeal. A number of them were subsequently tortured, won an appeal from overseas and had to be brought back at government expense. The final judgment from the ECtHR did not accept the appellant's argument that a suspensive right of appeal before a tribunal was necessary to avoid a breach of the ECHR, since there existed the possibility of judicial review. Nevertheless, by this time the government had committed to introduce a right of appeal.

[52] Chris Randall, 'An Asylum Policy for the UK', in Sarah Spencer (ed.*) Strangers and Citizens: A Positive Approach to Migrants and Refugees* (1994, IPPR) 221-222.

leave to appeal to an adjudicator which could be refused without an oral hearing. Shah argues that this was an attempt to deal with a backlog of claims by rejecting them *en masse* while attempting to frustrate access to the higher courts.[53] Thus asylum appeals were primarily proposed in order to create a new fast-track system that was administratively convenient. It is in this period that the tribunal appeal system had become accepted by the government as an expedient part of the administrative apparatus of immigration control. This conforms to Thomas' governmental model which views the tribunal as part of the decision-making process of government rather than a part of the judiciary.[54] In such a model the tribunal's role is to secure the most effective implementation of policy, and cost effectiveness and efficiency are vital considerations.

Recently released documents provide further insight into the development of the Immigration and Asylum Appeals Act 1993 and the reasons why the Home Office finally conceded new rights of appeal. It is evident that the government genuinely thought that the European court would find against them in the *Sivakumaran/Vilvarajah*[55] case and were surprised when the decision accepted that judicial review provided an adequate remedy to satisfy ECHR Articles 3 and 13. The original 1991 Asylum Bill was drawn up with an expectation that they would lose. Nevertheless, by this stage it had been accepted that a system of asylum appeals was necessary as a means of *warding off* judicial review and in order to create a more efficient administrative system for processing asylum claims which would ultimately lead to more removals. This policy is summarised in a letter from David Mellor, Treasury concerning funding for asylum appeals:

> *We have already accepted advice from official working group that a new right of appeal in asylum cases is an essential ingredient of any* ***attempt to streamline the determination system and to increase the proportion of applicants who are not allowed to settle in this country****.*[56]

[53] Prakash Shah, *Refugees, Race and Asylum* (Cavendish 2000) 170.

[54] Robert Thomas, *Administrative Justice and Asylum Appeals* (Oxford & Portland 2011) Chapter 2.

[55] (n51).

[56] Letter from David Mellor, Chief Secretary to the Treasury to Home Office 01/05/91 TNA HO394/966 (emphasis added).

Randall and Shah's arguments are therefore supported by these papers. However, the 'concession' of asylum appeal rights cannot be disassociated from wider proposed reforms to the immigration appeal system. In 1990 a review of the appeals system was suggested by the foreign secretary, Douglas Hurd, with the aim of limiting the scope of the appeals system in a Bill to be introduced in the following Parliament.[57] Responding to concerns raised by the Lord Chancellor about the growing backlog of appeals, his proposed solution was to abolish the right of appeal for visitors.[58] At a similar time an interdepartmental working group had been set up to focus on the 'problem of asylum', which considered strategies of deterrence and ways of increasing the refusal rate to at least 30 per cent.[59] Essentially policy was being devised to reduce the number of immigration appeals whilst developing a more efficient and restrictive asylum process. The working group concluded that abolishing visitors' appeal rights would enable the appeal system, which had a backlog of 31,000 cases, to continue without the need for more resources.[60] However, they noted that the resource argument was the only positive argument for abolishing these appeals, which were after all out of country appeals. The arguments against were that abolishing appeals would remove one of the government's '*main planks of defence'* in the face of criticism over how it was operating immigration control. This would lead to alternative avenues of redress being sought such as MPs and the ECHR, and ethnic minorities would resent it as unjust and unfair.[61] It was acknowledged that the existence of rights of appeal had been used in order to justify reducing MPs rights to intervene in particular cases and that with 18.5 per cent of appeals succeeding they may well be accused of creating injustice:

> *Our immigration appeals structure is certainly generous by international standards. But that itself is not an argument against it, provided it serves a useful purpose. The system did in fact serve a very useful purpose in enabling us to stop the "MP's representations" abuse that had grown to epic proportions in the mid-1980s. So far as we can judge, abolition of the appeal right would be bound to bring back the "MPs*

[57] Letter from Foreign Secretary to IND officials 23/07/90 TNA HO394/966.

[58] '*I believe that a more radical solution is required (to the backlogs). Our objective should be to abolish appeal rights for intending visitors',* Douglas Hurd to Lord Chancellor 06/07/90 TNA HO394/966

[59] See Interdepartmental asylum review papers TNA HO394/993.

[60] Conclusions of working party; letter from T C Platt to Ms Spencer 04/01/91 TNA HO394/966.

[61] Ibid.

representations quagmire". It would almost certainly also generate an increase in judicial review, which might lead to the same kind of trouble that we currently have with asylum cases.[62]

These concerns were discussed with the Home Secretary, Kenneth Baker. It was recorded that*: 'He had sharp memories of being obliged in his former constituency to intervene…. A number of government MPs had found themselves in a similar position and had been relieved when the "stop" had finally been abolished'.* He expressed the view that he would wish to avoid their return.[63]

At this point then, the appeals tribunal had come to serve a useful purpose in deflecting political challenges to immigration control, into the legal system. There was a presentational difficulty in abolishing appeal rights since this could *'undermine the operation of the current MPs guidelines, under which Ministers* ***use the existence of rights of appeal to justify refusing to intervene****'*.[64] Careful thought would have to be given regarding how to avoid calls for reintroducing MPs rights to stop removals.[65]

In 1991 the Home Secretary presented a paper to the Home and Social Affairs committee on the possibilities of introducing a 'balanced package' of changes, removing general appeal rights for visitors (about 7500 a year), cases which were mandatory refusals under the immigration rules (about 1000 a year), and out of country appeals for those refused at port (about 1000 a year) and illegal entrants (about 100 a year), whilst at the same time introducing appeal rights for those who claimed asylum.[66] This led to a number of disagreements amongst Ministers. It was decided to try to remove the suggested appeal rights, but considered politically difficult so close to an election, so a proposal was put in place for a short Asylum Bill, with a view to a more detailed Immigration Bill in the following Parliament. This created concerns over where the extra resources would come from for the asylum appeals if no immigration appeal rights were abolished. An attempt was made to

[62] Draft Letter from AJ Langdon to Mr Walters 16/01/91, Home Office TNA HO394/966.

[63] Letter from Morris concerning discussions with Home Secretary 31/01/91 TNA HO394/966.

[64] Home Office paper Contents of New Asylum Bill INB(691) 08/07/91 TNA HO394/966 (emphasis added).

[65] (n60).

[66] Home Office proposal for Home and Social Affairs committee 01/02/91 TNA HO394/966.

introduce a short Asylum Bill in 1991 but progress stalled and was then interrupted by the 1992 general election.

The eventual Immigration and Asylum Appeals Act 1993 resurrected the abolition of immigration appeals for visitors, short term students and where there was a mandatory refusal under an immigration rules.[67] It was promoted as a provision to make the appeals system more efficient.[68] It provided for special adjudicators who would hear appeals from those facing removal who had claimed asylum (excluding national security cases). The onward right of appeal was restricted in cases considered to be unfounded. As expected, removal of appeal rights was opposed, with MPs arguing that it would have a detrimental impact on race relations, if the family members of British citizens and settled migrants were arbitrarily refused permission to visit with no right of appeal.[69] Petitions and protests were organised against this clause of the bill. A recently elected, Tony Blair stated:

> *It is a novel, bizarre and misguided principle of the legal system that if the exercise of legal rights is causing administrative inconvenience, the solution is to remove the right. No doubt that might satisfy bureaucrats and Government administrators in many areas, but it can hardly be a justification for removing rights...*[70]

He argued the result would be an increase in judicial review applications and MPs representations.[71] Evidence was presented that a significant number of such appeals were successful.[72] The government eventually conceded that an obligation would be imposed on the Home Secretary to monitor the impact of this clause by having an independent monitor produce an annual report for Parliament.[73]

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[67] Asylum and Immigration Appeals Act 1993, s10.

[68] Earl Ferrers, Hansard HL vol 541 col 1147 (26 January 1993).

[69] See Hansard HC vol 216 cols 701-726 (11 January 1993).

[70] Tony Blair, Hansard HC vol 213 col 43 (02 November 1992).

[71] It is ironic that only a number of years later his own government were to escalate the progressive removal of appeal rights.

[72] A figure of 1,700 appeals allowed out of 8,000 cases was given. Hansard HL vol 541 col 1177 (26 January 1993).

[73] Sub-section 3AA. The monitor's effectiveness was criticised. It was subsequently described as a *'blind neutered poodle with its vocal chords cut out'* by Mr Boateng MP, Hansard, HC vol226 col 73 (07 June 1993).

The 1993 Act also provided for the right to appeal (with leave) to the Court of Appeal on a point of law.[74] This was aimed at providing a manageable alternative to the increasing number of applications for judicial review against the decisions of the IAT. The stated ambition was to resolve most new asylum claims within three months,[75] and unfounded cases within a week to 10 days. When this did not happen and the numbers of new arrivals continued to increase, with significant backlogs of asylum appeals[76] the first of many attempts at reform occurred with the introduction of the Asylum and Immigration Act 1996. This Act was primarily concerned with increasing the ability of adjudicators to fast track asylum appeals that were alleged to be unfounded.[77] A particularly controversial aspect was the removal of housing and income support from those who were initially refused asylum by the Home Office, leading to accusations that this was an attempt to thwart the right of appeal by reducing appellants to destitution, thus making it impossible to exercise.[78] The decision to terminate housing and support prior to the appeal suggests a belief that a meaningful appeal was unnecessary to correct incorrect decisions.

From this period onwards throughout the 1990s and early-2000s, asylum came to dominate the work of the appeals tribunal and the issue of non-asylum deportation appeals was a less prominent concern.

The influence of the ECHR pre-Human Rights Act

In the late 1970s and early 1980s, even prior to the incorporation of the ECHR into UK law, attempts were made by legal practitioners to seek to rely on the ECHR as a source of rights in domestic courts for non-citizens. It is worth considering how this development occurred. After

[74] Asylum and Immigration Appeals Act 1993, s9.

[75] Kenneth Baker, Hansard HC vol 198 col 1093 (13 November 1991).

[76] In November 1995 the average delay in processing an appeal was said to be 19 months. Jack Straw MP, Hansard HC vol267 col 339 (20 November 1995).

[77] The 1996 Act saw the introduction of the 'white list' of 'safe countries' and a system of certification that would prevent onward appeals from an adjudicator to the IAT, together with the introduction of non-suspensive appeals for those who had passed through safe third countries.

[78] The removal of support had first been accomplished through amendments in early 1996 to the Social Security Regulations 1987. These were ruled ultra vires in the case of *JCWI V DHSS* [1996] EWCA Civ 1293 in which Simon Brown LJ stated that the regulations would render appeal rights nugatory and would lead for some asylum seekers to *'a life so destitute that to my mind no civilised nation can tolerate it'.* The AIA 1996, s9-11 introduced a ban on housing and benefits into primary legislation which eventually led to further litigation, forcing local authorities to provide for the destitute under the National Assistance Act 1948 and the Children's Act 1989, before a new system of asylum accommodation and support was finally introduced in the Immigration and Asylum Act 1999.

the UK permitted the individual right of petition in 1966, non-citizens were quite quickly assisted to take cases directly to Strasbourg. Many were ruled inadmissible[79] and it was some years before the court held that Article 8 could be engaged by non-citizens claiming a right to residence based on family life.[80]

Given the historic position of non-citizens lacking any vested right to a legal status in UK law[81] combined with their lack of political representation, it is understandable why the concept of human rights – rights available beyond the limits of citizenship – would be seized on by progressive lawyers seeking to assist their clients. As the domestic law hardened and previous legal avenues were closed, it is evident that greater recourse was made to the discourse of human rights. Following the 1988 restrictions on merits appeals, deportation appellants with less than seven years' residence in relationships or with children were now forced to seek the assistance of an MP to make representations to the Secretary of State or use judicial review to challenge a deportation decision.[82] Unlike the tribunal, the court on review would not hear oral evidence, would not exercise its own discretion in place of the Secretary of State and was confined to public law arguments, such as whether the decision was unreasonable on Wednesbury grounds. Provided all relevant factors had been considered, the decision would normally stand. In the case of *Asiedu*[83] the court was very reluctant to intervene in a judicial review of a discretionary decision responding to representations from an MP, noting that a Minister was not required to act like an appellate body in relation to a decision of an immigration officer. A promising line of attack for applicants' representatives pursuing judicial review in such cases was to challenge whether, when exercising discretion to make a deportation decision, the Home Office had applied their correct internal policies.[84] Through

[79] See *Alam and Khan v UK* 2991/66 (ECtHR, 17th December 1968) for a case that was admitted but settled. For detailed discussion see Marie-Benedicte Dembour, *When Humans Become Migrants* (Oxford University Press, 2015) 96-129.

[80] See *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] ECHR 7. Again discussed in detail in Dembour (n79).

[81] Higher court case law has consistently held those making applications under the immigration rules do not have a vested right to be granted that which they have applied for. There is therefore no presumption against retrospectivity resulting from amendments to the immigration rules. See *Odelola v SSHD* [2009] UKHL 25 [29]-[59] Lord Brown concerning retrospective changes affecting an applicant for leave & *Abidoye v SSHD* [2020] EWCA Civ 1425 concerning retrospective application of deportation rule changes.

[82] E.g., the applicant in *Hlomodor v SSHD* [1993] Imm AR 534, a married overstayer lodged an appeal against his deportation decision, but failed to attend the tribunal – presumably as he had no arguable legal grounds. He then made representations via an MP and sought judicial review against implementation of the deportation order.

[83] *Asiedu v SSHD* [1988] Imm AR 186.

[84] E.g., *Balwant Singh v SSHD* [1997] Imm AR 331.

this, increasingly appellants also began to argue that this must include a policy to comply with the ECHR.

The courts initially resisted the idea that an international treaty not incorporated into domestic law was a relevant consideration to be taken into account when determining a deportation appeal, reasoning that it was not for the courts to incorporate the ECHR into UK law through the backdoor.[85] In the case of *Chundawara*[86] the court held there was no obligation to consider Article 8 ECHR when considering the impact of deportation on an individual's family life. *Brind*[87] confirmed that the ECHR could not be relied on in the UK as a source of rights, and that the doctrine of proportionality which applied when considering interferences in qualified rights could not be followed by UK courts.

Denning LJ held in the Court of Appeal that:

> *The Convention is drafted in a style very different from the way to which we are used to in legislation. It contains wide general statements of principle. They are apt to lead to much difficulty in application: because they give rise to much uncertainty. They are not the sort of thing which we can easily digest. Article 8 is an example. It is so wide as to be incapable of practical application.*[88]

It was established that immigration officers could not be expected to know or apply the principles of the ECHR when making decisions.

In spite of this, even prior to the introduction of the Human Rights Act, with the growing number of petitions to Strasbourg, the ECHR had begun to exert an increasing influence on UK immigration policy making, as demonstrated by the government's response to the *Vilvarajah* and *Abdulaziz*[89] judgments. It also influenced the way that appellants' lawyers began to frame their arguments. Murray Hunt[90] argues that by the early 1990s there emerged in the UK courts a common law human rights jurisdiction as ECHR provisions began to

[85] See *R v SSHD, ex parte Brind* [1991] 1 AC 696, (Lord Ackner).

[86] Chundawadra v IAT [1988] Imm AR1.

[87] *R v SSHD, ex parte Brind* [1991] UKHL J0207-1

[88] *R v CIO, Heathrow Airport, ex parte Salamat Bibi* [1976] 3 All ER 843.

[89] (n80).

[90] Murray Hunt, *Using Human Rights Law in the English courts* (Hart Publishing 1997).

feedback into domestic law, an example being the development of the requirement of 'anxious scrutiny' in Wednesbury judicial review where fundamental rights are at issue.[91] In the 1993 case of *Hlomodor*[92] the Secretary of State conceded that the recently decided ECHR case of *Berrehab,*[93] which set out guidance applicable when considering the deportation of long-term resident non-citizens, was relevant when he was exercising discretion. He subsequently operated an unpublished internal policy, which was later revealed and subjected to considerable litigation. This applied in cases of overstayers who were married to those with a settled status and was said to be an attempt to conform with the UK's obligations under Article 8 of the ECHR.[94] This policy stated that decisions of the ECHR had *'demonstrated that, however unmeritorious the applicant's immigration history, the court is strongly disposed to find a breach of Article 8 where the effect of an immigration decision is to separate an applicant from his/her spouse or child…'.*[95] Therefore in cases not involving criminal offences, if a marriage or common law partnership pre-dated enforcement action and had lasted two years or more or in other cases where the settled spouse had lived in the UK from an early age or it was otherwise unreasonable to expect them to leave, deportation action should not proceed.[96] This policy also explained that in cases involving separated parents, where removal of one would result in deprivation of frequent and regular access currently enjoyed by either parent, removal action should not be pursued in non-criminal cases.[97] The Home Office also began to operate a further policy concession to normally not remove families with children who had been resident for a continuous period of seven years.[98]

Whilst this was general policy guidance rather than binding law, the tribunal on appeal could consider a failure by the Home Office to apply a policy without providing adequate reasons. In a judicial review, as long as the policy was considered, the court would often defer to the

[91] As per *Bugdaycay v SSHD* [1987] HL AC 514.

[92] (n82).

[93] *Berrehab v Netherlands* [1988] ECHR 14.

[94] Macdonald I & Blake N, *Immigration Law and Practice 3rd edition (*Butterworths Law 1993) 504 [15.52].

[95] Policy DP/2/93 cited in *Iye v SSHD* [1994] Imm AR 63.

[96] Policy cited in case of R v *SSHD, ex parte Benjamin Yaw Amankwah* [1994] Imm AR 240.

[97] Policy quoted in *Gangadeen v SSHD* [1997] EWCA Civ J1121-24.

[98] Policy DP5/96.

Secretary of State as to the outcome unless the decision was irrational.[99] But in a case where the Secretary of State purported to have considered the application of ECHR Article 8 and specifically stated there was no breach, it was held on judicial review that an approach which did not ask the correct questions when considering Article 8, as illustrated in the case of *Berrehab*, would be unlawful.[100] In this way the jurisprudence of the ECtHR crept into UK domestic law.

Finally, it is of note that the case of *B v SSHD* [2000][101] also confirmed that when EU law was being considered, the ECHR (at this time unincorporated) was of relevance given that the EC treaties were to be interpreted in accordance with fundamental human rights. In this case, involving an Italian national resident for 35 years convicted of serious sexual offences, the court acknowledged that they would have been unlikely to interfere with the Home Secretary's decision on traditional public law grounds of lawfulness of rationality, but when considering the principle of proportionality the court felt it had to allow the appeal. The court stated:

> *…there is one further factor of real weight: he has lived in this country since he was a small boy—**it is his home…***[35]. *What in my judgment renders deportation a disproportionate response to this appellant's offending, serious as it is, and to his propensity to offend such as it may now be, is the fact that it will take him from the country in which he has grown up, has lived his whole adult life and has such social relationships as he possesses…. **What is proposed in the present case, although in law deportation, is in substance more akin to exile.** As such it is in my judgment so severe as to be disproportionate to this man's particular offending, serious as it was, and to his propensities* [37] (emphasis added).

What this development demonstrates is that as appeals on the merits were restricted by a government publicly committed to strengthening immigration controls, even prior to incorporation into domestic law, the concept of human rights was seized on by lawyers as a potential tool to strengthen the arguments that could be made to prevent deportation. The

[99] See *R v SSHD ex parte Ozminnos;* Gangadeen (n97); *Ahmed and Patel v SSHD* [1998] INLR 570.

[100] *Zighem v SSHD* [1996] Imm AR 194.

[101] *B v SSHD* [2000] 2 CMLR 1086.

introduction of the Human Rights Act 1998 would formalise access to legal arguments that were already being pursued and recognised in Home Office policy concessions.

Conclusion: The Shifting Role of the Tribunal

In Chapters 5 and 6 I have shown how from the start civil servants and politicians responsible for immigration control have had a complex and difficult relationship with the Immigration Appeal Tribunal. Initially it was seen as an impediment to the efficient running of the immigration system, yet over time it was accepted that it could be an instrumental part of immigration control, provided that its role was circumscribed.

This chapter has explained why a new right of appeal was brought in for asylum seekers as other appeal rights were curtailed. By the early 1990s the tribunal was now seen by the government as an important part of the system of immigration control. It was accepted that there are political and international legal constraints to reducing appeal rights, but that the tribunal could be used in a way that facilitates government asylum policy. The intention was to use the tribunal as part of the administrative machinery of state to process cases swiftly, and as a means to remove the oversight of the higher courts. The existence of a right of appeal also enabled Ministers to deflect political representations from MPs and justified reducing their ability to influence immigration decision-making. However, it is clear from the archives that at no time was a principled belief in the importance of appeal rights established within the Home Office. Neither was a clear justification established or widely accepted for why the judiciary were better placed than executive officers in making discretionary decisions under the immigration rules on whether a long resident non-citizen should be allowed to remain.

These chapters have also considered the early development of caselaw concerning the deportation of long resident non-citizens. Chapter 5 set out how, after an initially deferential approach, the Tribunal began to play a more significant role in overturning deportation decisions. No doubt this was a catalyst for the restrictions on merits appeal rights introduced by the Immigration Act 1988. These limited a judge's ability to exercise discretion in cases where an appellant had been resident less than seven years, returning responsibility for such decisions to the executive but with a token right of appeal. At the same time, the existence of appeal rights justified an argument that Ministers need no longer review a case based on an MPs' representations.

This chapter has also set out how, as earlier remedies were restricted and as immigration enforcement powers increased, lawyers wishing to defend non-citizens facing removal began to turn to human rights law (even pre-Human Rights Act 1998) to provide a new source of legal protection. Chapters 7 to 9 will now consider the introduction of human rights appeals. It will be shown that whilst human rights law initially promised a new toolkit for non-citizens, assisted by lawyers to challenge removal, the juridification and increased legal complexity of human rights law has ultimately failed to prevent the increased precariousness of their residence.

Chapter 7: Immigration Appeals and the Human Rights Act 2000-Present

> *…the time is over-ripe to domesticate what are or should be British civil rights and liberties and to bring them home to British courts in a way that ensures effective access to justice.*
>
> - Lord Lester of Herne Hill, 1997.[1]

During the past 20 years the immigration tribunal has been subject to significant reforms, dismantling the structure that was instituted following the Wilson Committee report. Much of this occurred under a Labour government, under the guise of tackling a crisis in the asylum determination system. By 1999, more than 26,000 appeals were outstanding,[2] and the backlog of undecided asylum claims was said to be approaching 100,000.[3] These backlogs led to the introduction of increasingly punitive immigration laws and the gradual erosion of the original appeals structure, paradoxically at the same time as the Human Rights Act 1998 provided significant new arguments for non-citizens faced with deportation. This chapter will outline the legal developments of this period in an attempt to make sense of this seemingly contradictory approach. I will set out a history of the five major rounds of reforms in which the tribunal legislation and architecture were substantially redesigned. It begins with a short consideration of Labour immigration policy to set out the political and economic context in which these reforms occurred. I consider how Labour attempted to balance economic openness to lawful migration with political closure against unlawful migration. It endeavoured to depoliticise the issue of lawful immigration by subordinating it to economic policy, such that key decisions on policy could be framed as matters of technical economic management rather than political choices. The introduction of human rights appeals in the tribunal as a minimum backstop of protection can be understood as consistent with this approach, allowing the government to present itself as adopting a strict approach to illegal immigration whilst reassuring liberal critics. I will focus particularly on the introduction of

[1] Lord Lester of Herne Hill, vol 577 cols 1725-1758 Hansard HL (05 February 1997). Introduction of Human Rights Bill into the Lords.

[2] Minister of State for Immigration Mike Obrien, Hansard HC vol 316 col 622W (23 July 1998).

[3] Hansard HL vol 606 cols 862-870 (02 November 1999).

'automatic deportation' as a mechanism to insulate the executive from political responsibility for controversial decisions.

This chapter ends with a consideration of the most recent changes under the Coalition Government which have removed most rights of appeal established in 1969. Remaining appeal rights are now limited to human rights or protection grounds, with reduced scope for the consideration of claims based on belonging.

Labour's Approach to Immigration

Somerville argues that New Labour fundamentally changed the UK's approach to immigration, with its commitment to economic migration marking a decisive break with the bipartisan settlement of the 1970s and 1980s which had sought to limit further primary migration.[4] His study considers the global and structural forces that contributed to this shift. Under the label of 'managed migration' the Labour government sought to reframe labour migration as an economic rather than a political issue, emphasising that the UK was in global competition for 'the brightest and best'. A significant development was the establishment of the Migration Advisory Committee (MAC), a nominally independent expert body that would provide advice to government on the economic impacts of migration and on skill shortages in the UK economy. Somerville observes the potential role of the MAC in taking the *'political heat out the debate'*,[5] with the government able to use it as a mechanism to justify policy decisions. The development of Labour's points-based system represented a new transparent scheme for work-based migration which could be responsive to changing economic conditions.[6] Furthermore, Labour provided for immediate free movement for the A8 countries[7] which joined the EU in 2004, justifying it primarily by reference to the economic benefits that would flow from increased labour mobility.

At the same time Labour developed an entrenched commitment to reduce the number of new asylum applications and expedite the asylum and removals process, with an openly

[4] Will Somerville, *Immigration under New Labour* (Policy Press 2007).

[5] Ibid 35.

[6] See Home Office, 'Controlling our borders: Making migration work for Britain: Five Year Strategy for Asylum and Immigration' (Cm6472, 2005).

[7] Accession 8 (Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia).

expressed hostility to so-called bogus asylum seekers or other irregular migrants 'jumping the queue' and a readiness to link unauthorised migration to post-9-11 security concerns. In the late 2000s, the 'foreign national criminal' would join these figures as targets for restrictive interventions.

It is tempting to locate the shift in labour migration policy within Labour's broader adoption of neoliberal economic policies. Fairclough, in his analysis, of New Labour discourse, documents the way that New Labour framed the role of government as that of managing seemingly inevitable global changes resulting from the forces of globalisation, rather than making active political choices.[8] Burnham has argued that a defining feature of New Labour's approach to government was depoliticisation which he defines as *'the process of placing at one remove the political character of decision-making in order to: off-load responsibility for the consequences of unpopular government policies'.*[9] He focuses on their broader approach to economic policy, the so-called 'third way' in which traditional economic policy debates have been replaced by a form of technocratic managerialism emphasising the constraints imposed by 'global capital'.[10] He observes a shift from 'discretion based' or political management of the economy to 'rules based' or depoliticised management, where governments are content to accept externally imposed rules limiting their room for manoeuvre.

This approach can also be seen in Labour's attempt to reduce the debate over the political desirability of new labour migration to a matter of economic policy, where the costs and benefits of changes in migration levels can be viewed primarily in terms of changes to GDP and the government's role is to draw on expert advice and adapt migration policy in a way that responds effectively to external economic forces. The points-based system was specifically an attempt to introduce a highly technical rules-based system that would eliminate the need for decision-makers' discretion.

[8] See Norman Fairclough, *New Labour, New language* (Routledge 2000). Somerville observes that the Home Office 2002 White Paper which set out a new approach to immigration dedicated a significant section to 'the challenges of globalisation'.

[9] Peter Burnham, 'New Labour and the politics of depoliticisation' (2001) 3(2) British Journal of Politics and International Relations 128.

[10] Ibid 129.

Despite this approach to labour migration, immigration has remained a contested political issue. Varsanyi has described a 'neoliberal paradox'[11] where states embrace the logic of neoliberal free market economic policies which should imply an openness to the free movement of labour, whilst still attempting to maintain the boundaries and closure of the nation state, in response to popular political concerns. The way that Labour attempted to address this contradiction was by pursuing a relatively open economic approach to labour migration whilst performatively demonstrating its commitment to political closure through increasingly visible enforcement operations, with published statistics on detention and removals and hostile political rhetoric against those who could be framed as unwanted migrants. In doing so it contributed to the development of the narrative that a good migrant worthy of community membership should be first and foremost conceptualised in economic terms.

The Human Rights Act 1998 and The Special Immigration Appeals Commission (SIAC) Act

One of the first major pieces of legislation of the New Labour government was the Human Rights Act. It is worth asking why New Labour, which would subsequently prove to have strong authoritarian tendencies particularly when it came to immigration control, decided to incorporate the ECHR into domestic law. It is arguable that human rights legislation can also play a role in depoliticisation since there is the potential for essentially political and moral questions to be reconceptualised as legal or technical matters. For example, difficult political decisions concerning whether a long-term resident should remain in the UK can be reframed as objective legal decisions taken by independent expert judges applying human rights law.

Academics have increasingly highlighted links between the emergence of international human rights law and neoliberalism. Moyn[12] argues that the modern framework of human rights as an ideological project emerged with the collapse of other utopian political projects. Whilst historians have tended to see human rights developing logically from the post-Second World War settlement, spurred on by a determination to prevent a repeat of the wartime

[11] Monica Varsanyi, 'Rescaling the "Alien," Rescaling Personhood: Neoliberalism, Immigration, and the State' (2008) 98(4) Annals of the Association of American Geographers 879.

[12] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press 2018).

atrocities, Moyn argues that modern human rights emerged in the late 1970s. It is the loss of faith in other left-wing collective political projects, which had been pursued during the early Cold War years, that enabled the concept of human rights to become embraced as a new utopian ideology. He sees, with the founding of NGOs such as Amnesty international, an attempt to frame human rights as a non-partisan project beyond politics as a replacement for failed political utopias. If this is right, then it is not surprising that the adoption of human rights laws has coincided with the hegemony of neoliberalism, which also seeks to frame the management of the economy as something that is beyond politics. Essentially, the individual focus of human rights, seeking to provide a minimum standard of *individual* protection for primarily political and civil rights, but without a broader focus on collective challenges to economic inequality, has proved to be compatible with the rise of neoliberal economic structures. The failures of structural modes of thinking and more activist political struggles to retain widespread appeal, has created a void which has been filled by human rights.[13] This framework may go some way towards explaining why an increasingly authoritarian yet neoliberal immigration system has coincided with the formalisation of human rights appeals as a limited method of accountability. As will be shown, over the last 20 years there has been a lack of any significant parliamentary opposition to make a principled political case for why non-citizens should have security of residence. Relying on a minimal backstop of externally imposed human rights constraints provides reassurance to liberal critics of immigration decision-making. Simultaneously it allows politicians to promote strict immigration enforcement and to deflect political responsibility, when criticised by those favouring such policies for a failure to implement them in a particular case. This is an issue which will be explored further in Chapters 8 and 9 when seeking to understand the role of the Human Rights Act in current immigration decision-making.

In 1966 it was a Labour government that accepted the individual right of petition to Strasbourg. Macdonald argues that such a move had previously been strongly resisted, due to concerns that complaints would be lodged by colonial subjects.[14] It was only in the dying

[13] Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2015) 77 Law and Contemporary Problems 147.

[14] Ian Macdonald and Frances Webber*, Immigration Law and Practice 5th edition* (Butterworths Law 2005) 256 citing Hansard House of Commons debates. See also Brian Simpson (2004*) Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2004).

days of empire, as the majority of overseas territories had gained independence, that the UK felt able to concede the individual right of petition. Klug argues that that the campaign for a UK Bill of Rights was kick-started by the Commonwealth Immigrants Act 1968, which led to a revival of interest in the idea, as people feared the impact the Act would have on British citizens.[15] She makes the case that those on the political left had initially been reluctant to support a Bill of Rights that would cede more power to an elite educated judiciary, believed to be prone to conservative judgments. A discussion document had been produced by the Labour Party in 1976 and various attempts had been made by some MPs to introduce Private Members' Bills on the subject but none were successful.[16] A House of Lords Select Committee considered the issue in 1978 and the Conservative government of 1979 stated it was committed to holding all party discussions on a Bill of Rights, though once in power the Conservatives did not pursue it.[17]

There is a long tradition of scepticism of legal constitutionalism within the left, amongst those who believe that social justice and economic change should be brought about primarily through legislation rather than litigation.[18] However, declining confidence in the political apparatus of the nation state to effect enduring social reform, has led some on the left to resort to the law as a substitute for politics.[19] Klug argues that it was in the late 1980s, faced with the continued Conservative domination of Parliament, that the left began to see a Bill of Rights as a means to hold the government to account, with judges increasingly being seen as providing much needed opposition to an over-strong executive government.[20] She documents how a consensus for constitutional reform emerged with the formation of Charter 88, which drew together civil liberty groups, academics, judges, lawyers and even celebrities. Before this, civil liberty struggles in the UK had been conducted primarily within the common law tradition rather than embracing the international human rights movement, but this began

[15] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights.* (Penguin Books 2000) 152.

[16] Ibid 154.

[17] Ibid 156.

[18] See John Griffith, 'The political constitution' (1979) 42(1) Modern Law Review for a classic left argument against a UK Bill of Rights and legal constitutionalism.

[19] Chris Bickerton, 'The Left's Journey from Politics to Law' (2017) in Ekins, R & Gee, G, *Judicial Power and the Left*. (Policy Exchange 2017).

[20] Klug (n15) 158.

to shift in the early 1990s as the National Council for Civil Liberties (renamed Liberty) began to situate itself more squarely within the broader human rights movement.[21] Whilst significant figures in the Labour Party still objected in principle to empowering judges through a Bill of Rights, this shifted with the emergence of New Labour, and Klug argues that several key figures including the Home Secretary Jack Straw and Lord Chancellor, Lord Irvine, were instrumental in ensuring that incorporation of the ECHR became a reality.[22]

When the Human Rights Bill was introduced there was limited discussion in Parliament about the impact that the ECHR would have on UK immigration law. The white paper, *'Rights Brought Home*',[23] issued at the same time as the Bill was published, noted that the duty to comply with human rights obligations will apply to immigration officers,[24] but otherwise had nothing to say about the potential impact that the incorporation of the ECHR would have on UK immigration control. Despite this being a convention concerned with 'human' rights the emphasis in the white paper was firmly on 'British' rights with little suggestion that the same rights could also be applied to non-citizens as a means to ameliorate some of the more repressive aspects of UK immigration control. It was stated in the second reading debate that:

> *Bringing these rights home will mean that the **British people** will be able to argue for their rights in the **British courts**, without inordinate delay and cost…There will be another benefit: **British judges** will be enabled to make a distinctively **British contribution** to the development of the jurisprudence of human rights across Europe.*[25]

During the parliamentary debates, general constitutional concerns were raised about the shift of power to the judiciary and the potential for politicisation of the judiciary, who would end up making political judgments that Parliament should be taking.[26] The MP, Mr Humphrey Malins, who was involved in the founding of the Immigration Advisory Service, raised some concerns in the Commons debate on the second reading debate about the potential for

[21] Ibid 158-163.

[22] Ibid.

[23] Home Office, *Rights Brought Home: The Human Rights Bill,* (Cm3782, 1997).

[24] Ibid 9.

[25] See Jack Straw Hansard HC Deb vol 306 col 768 (16 February 1998) (emphasis added). Throughout the debates there were frequent references to 'our citizens' having to go to great expense to obtain justice in Strasbourg.

[26] Brian Mawhinney MP, Hansard HC vol 306 cols 767-793 (16 February 1998).

Articles 3 and 8 to be raised in immigration hearings.[27] But at this time there does not appear to be a widespread sentiment in Parliament that giving human rights to non-citizens was going to significantly interfere with UK immigration control.[28] The government confirmed that it was its intention that convention rights could be relied on in asylum appeals, but there was little discussion of this beyond the role of Article 3 in asylum. With regards to Article 8, far more time was devoted to concerns with how the right to a private life might impact on the freedom of the press than to the impact it would have on immigration law.[29]

Shortly before the Human Rights Bill was introduced, Parliament was asked to pass the 1997 Special Immigration Appeals Commission (SIAC) Bill specifically to address cases such as *Chahal,*[30] in which the ECtHR had found the UK in breach of Articles 3 and 13 for seeking to return a suspected terrorist to India. Ever since the case of Rudi Dutsckhe,[31] the so called 'three wise men' advisory panel to decide national security appeals had been heavily criticised. Since then, other politically charged national security cases[32] had attracted significant controversy. The SIAC Bill was introduced as a direct response to the *Chahal* judgment where the European court found that the non-binding advisory appeal process was not an effective remedy against a deportation decision. SIAC established a new appeals commission, which would comprise a panel including a member who had held high judicial office, to hear deportation appeals in cases where national security issues were at stake. The decision of the commission would be binding. Procedure rules would provide that in some circumstances classified material would not be disclosed to the appellant. The Act passed very quickly through both Houses with cross-party support, with the Conservatives confirming their commitment to the ECHR and that they had already been intending to pass legislation

[27] *'I take another example relating to article 8. China's respect for family life consists of limiting each family to one child. Will economic migrants no longer be returnable to China? We must be very cautious and look ahead. I predict that most of the claims that will be made under the convention will be challenges to deportation'... 'We will face very real problems further down the road if we incorporate the convention into our law'.* Hansard HC vol 306 col 811 (16 February 1998).

[28] In the subsequent SIAC debates some MPs raised the issue of how family life would be interpreted by judges in an immigration context. See, for example, Lord Wilberforce, Hansard HL vol 582 cols 1227-1312 (03 November 1997).

[29] E.g., Hansard HL vol 582 cols 1227-1312 (03 November 1997).

[30] *Chahal v. United Kingdom* (23 EHRR 413).

[31] See discussion in Ch 5, 138.

[32] *R v SSHD, ex parte Hosenball* CA 1977; *Agee v United Kingdom* (1976) 7 DR 164.

in response to the *Chahal* judgment.[33] Compared with the parliamentary debates surrounding the 1971 Act there was far less concern raised about the principle of the executive losing ultimate responsibility for politicised national security decisions. In fact, it had long been acknowledged in private by the Home Office that it was only a matter of time before UK law on this issue was found to be inconsistent with the ECHR and that cases such as *Chahal* were likely to become more common in the future.[34] As far back as 1991, during preparation of the Asylum Bill, consideration had been given to changing the way such cases were handled and proposals had been made for proper judicial oversight to prevent the return of those who would face a real risk of torture. It is evident from archive records that the security services did not want control of their ability to remove terrorists who claim asylum to be passed into the hands of the immigration appellate authorities.[35] But civil servants recognised that there would be political difficulties, whatever decision was made:

> *On the other hand, we must recognise the political realities of returning someone to a country where he faced persecution – even if we described him as a risk to national security – would be very difficult.* ***It might be easier to have the choice taken away from us by the appellate authority****.*[36]

Here there is an explicit recognition that the tribunal may play a useful role in removing responsibility from the executive for difficult political decisions by shifting it to the judiciary. Conservative Ministers were long aware that the UK was in breach of its international obligations. Indeed, the Lord Chancellor, Lord McKay raised concerns privately with the Home Secretary in 1991 about the existing legal position:

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[33] See Baroness Blatch, Hansard HL vol 580 col 737 (05 June 1997) & Clappison MP, Hansard HC vol 299 col 1053 (30 October 1997).

[34] Minute to Foreign Secretary from Home Secretary 27/08/91 TNA HO394/963. He recognised that domestic law was in conflict with the UK's international obligations and stated that *'Politically it will be very unattractive to have large numbers of people imprisoned for long periods of time whilst Strasbourg proceedings drag out'.* Minute of Douglas Hurd Foreign Secretary *'I agree that our present arrangements conflict with the 1951 Refugee Convention and the ECHR'* TNA HO394/963.

[35] Home Office discussion paper 14/04/91 TNA HO394/963.

[36] Asylum Bill: Appeals and Conducive Cases Revised Paper, Asylum Division 13/08/91 N C Sanderson, Asylum Division 13/08/91. Further Revised Draft 16/08/91 TNA HO394/963 (emphasis added).

> *It seems to me that once it is acknowledged that our domestic law is in conflict with our international obligations it is incumbent upon us to take steps to rectify that situation. I really do not think that any other position is tenable.*[37]

In the end the Conservative government made no changes, deciding instead to await the outcome of the *Sivakumaran*[38] case which was then pending in Strasbourg.

Round 1: The First Major Reforms

The Immigration and Asylum Act 1999 was the first of a number of far-reaching reforms of the immigration appeals system that rewrote the appeals provisions in the 1971 Act. In July 1998 the government published its first major white paper on immigration policy*, 'Firmer, Faster, Fairer'*, together with a consultation paper, *'Review of Appeals'*[39] which was said to reflect the conclusions of a comprehensive inter-departmental review completed in April 1998. This examination of the appeals system occurred in a very different political context to that of the Wilson committee when the focus was on Commonwealth citizens. The focus of this and subsequent parliamentary debates was on the perceived crisis in the asylum system, given that asylum appeals had come to dominate the tribunal's work. Far less consideration was given by MPs in Parliament to the consequences that reforms to the appeal system would have in future on other non-asylum-seeking migrants who may in the future face removal.

By summer 1998, according to government figures, applications lodged before the 1993 Act came into force were estimated to be taking on average 58 months to reach an initial decision, while those lodged since were taking an average of 14 months.[40] Asylum appeals were taking an average of 12.5 months before being heard by an adjudicator.[41] A further concern was the growing number of judicial reviews which were being heard in the High Court concerning the

[37] Letter Lord Mackay, the Lord Chancellor to Kenneth Baker, Home Secretary re: Letter of 27/08/91 TNA HO394/963.

[38] *R v SSHD, ex parte Sivakumaran* [1987] UKHL 1, Heard before ECtHR as *Vilvarajah & Ors v UK* [1991] ECHR 47.

[39] Home Office and Lord Chancellor's Office, *Review of Appeals: Consultation Paper* (1998) TNA BL2/3180.

[40] Mike O'Brien, Hansard HC vol 316 cols 379-80W (20 July 1998).

[41] Mike O'Brien, Hansard HC vol 317 cols 28-30W (27 July 1998).

refusal by the IAT to grant permission to appeal.[42] There was a general consensus among Parliamentarians that the current system was unsustainable.

The strategy promised *'a radical overhaul of the system of immigration and asylum appeals'*[43] and was promoted in the House of Commons as *'the most fundamental reform of immigration and asylum law for decades'.*[44] The white paper makes frequent references to the need for efficiency in order to deter unmeritorious cases who benefited from delays in the processing of claims.[45] The appeals consultation paper sought views on how to 'streamline' the appeals system and whether a single-tier appeals system should be introduced. The paper also considered creating a presumption that appeals would be heard on paper since the current procedures of calling witnesses and hearing representatives was *'time-consuming and expensive'.*[46]

The language is typical of New Labour – highly managerial in style, with significant sections focused on the detailed costs of running a system of appeals and the financial savings to be gained. Whilst the paper acknowledges that the UK must now act in conformity with international obligations, there is very little recognition of the importance of appeals in correcting defective decisions. Compared to the original Wilson committee report there is little focus on the need for the process to appear fair or on the potential impact on the wider community. The consultation paper devotes 12 pages to setting out the costs and savings of a reformed appeal system but does not even provide details of the success rates on appeal or evidence of the type of cases where incorrect decisions were being overturned, such that a respondent to the paper would be able to evaluate the benefits of an appeal. At the time of publication approximately 30 per cent of asylum appeals were being allowed.[47]

At the heart of the proposed Act there appears to be a contradiction in its approach to migrants' rights. The Act brought in a new swifter power of administrative removal, which

[42] (n39) 7 [5.4]. Government figures show that the number of applications had risen from 359 in 1988 to 1748 by 1996 (Annex F).

[43] Home Office, *Fairer, Faster and Firmer - a modern approach to immigration and asylum* (Cm 4016, 1998) 5.

[44] Jack Straw introducing the Bill in the House of Commons second reading Hansard HC vol 326 col 37 (22 February 1999).

[45] (n43) 3.

[46] (n39) 8 [5.11].

[47] Figure quoted in Lords debate by the Lord Bishop of Oxford, Hansard HL vol 636 col 1105 (24 June 2002).

could be used against overstayers and those considered to have breached their conditions of leave, in place of the existing deportation provisions.[48] They would have no in-country right of appeal and so the practical effect was to now deny a right of appeal against removal to even those who had been in the country for more than seven years. The government promised that all relevant factors would be considered by immigration officers, but there would be no independent review by the appellate authorities. This was estimated to lead to a decrease of up to 4,600 deportation appeals a year and would *'…present savings to the appeal system plus an increase in the speed of the process which would contribute to the reduction of social benefit costs'.*[49] It will be recalled that this was a measure which had been under the consideration of civil servants since the early 1990s but had not been attempted during the previous Conservative government out to concern that it would be difficult to get through Parliament.[50] Now under a Labour government with a large majority it was brought forward with very little opposition.

At the same time a new right of appeal was granted where an individual alleged a breach under the Human Rights Act.[51] The new removal power and human rights appeal were designed to come into force at the same time as the Human Rights Act on 2 October 2000. From this point onwards, those facing deportation and removal, even those with less than seven years' residence, would be able to appeal not just on the basis of the immigration rules (which could be changed at the pleasure of the Secretary of State) but on the grounds that they had a human right to private and family life. Somerville observes the *'tidal quality'* of rights under Labour with the majority of policy and legislation restricting rights but with some advances in the form of a strengthened connection between migration and the concept of human rights.[52] His work, which is otherwise a detailed discussion of New Labour's immigration policy, does not seek to explore the reasons behind these seemingly contradictory impulses, or address the shifting role of the courts in immigration disputes. The consequences of these developments will be explored subsequently.

[48] IAA 1999, s10.

[49] (n39) 5 [4.4].

[50] Ch6, 161-162.

[51] IAA 1999, s65.

[52] Will Somerville, *Immigration under New Labour.* (Policy Press 2007) 59.

Round 2: The Appeals Legislation is Rewritten for a Second Time

The 1999 Act was the first of a series of Acts that redesigned the appeals process, incrementally narrowing and limiting the scope of appeals. By 2001 adjudicators were dealing with approximately 55,000 appeals each year and this was to increase to over 100,000 by 2003 (the majority of which were asylum), far in excess of the number originally envisaged by the Wilson committee.[53] By 2000 there was also growing government concern with the number of immigration judicial reviews lodged each year, which by then made up over half the caseload of the Administrative Court.[54] From the government's perspective the vast majority of these were meritless, and simply a delaying tactic to enable an individual to create facts on the ground which would then make it unreasonable to remove them. In contrast, critics could argue that the rise in judicial review coincided with an increasingly dysfunctional Home Office department, making an increasing number of harsh and often legally-defective life-changing decisions based on a proliferation of restrictive immigration legislation. Furthermore, the Home Office's lack of legal conscientiousness in applying binding case law or implementing decisions of lower tribunals leaves judicial review the only remedy for individuals to enforce a clear entitlement.[55] Therefore, the government made parallel attempts to exclude the jurisdiction of the higher courts.

The Nationality, Immigration and Asylum Act (NIAA) 2002 again fundamentally rewrote the appeals provisions of the 1999 Act. This Act was introduced in the context of continuous criticism from the media and the opposition that the changes introduced by the 1999 Act had done little to reduce the number of asylum seekers arriving each year. The development of asylum and immigration law in this period needs to be understood, not only in light of the perceived 'crisis of asylum' but also in the context of post-9-11 concerns about border security. Throughout 2002 the government was involved in litigation in the Special

[53] House of Commons Library, *Research Paper 05/52: The Immigration Asylum and Nationality Bill 2005* (30th June 2005) 14.

[54] By 2000 there were 2,151 immigration/asylum judicial reviews lodged out of a total of 4,238 judicial reviews. Ministry of Justice, *Civil justice statistics quarterly, July – September 2017* https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-july-to-september-2017 accessed 04/10/20.

[55] Robert Thomas disputes the argument that most judicial reviews lack merit, finding that when one takes into account the large number of cases in which the Home Office concedes before and after a grant of permission, there is little difference between the average success rates in immigration and other types of judicial review cases. 'Mapping immigration judicial review litigation: an empirical legal analysis' (2014) 16. https://www.research.manchester.ac.uk/portal/files/48220230/POST-PEER-REVIEW-NON-PUBLISHERS.PDF accessed 04/10/20.

Immigration Appeals Commission surrounding the indefinite detention of foreign national terror suspects, found unlawful in the Belmarsh case,[56] and these concerns had certainly hardened the approach taken to migrants who had breached immigration laws.

As with the 1999 Act, the NIAA 2002 was based around deterring asylum claimants. The white paper, '*Secure Borders, Safe Haven Integration with Diversity in Modern Britain',*[57] set out the vision for a reformed appeal system, recognising that the legislation needed to be restructured to *'Streamline our appeals system to cut down delay and remove barriers to removal'.*[58] Despite the 1999 appeals system only having commenced in 2000, in promoting the new Act Blunkett stated: *'At the moment the system is virtually unworkable... The whole system is riddled with delay, prevarication, and, in some cases, deliberate disruption of the appeals process'*.[59] The 2002 Act rewrote and simplified the appeals provisions. It was now possible for anyone to appeal against a decision to remove or deport them on a number of grounds,[60] but in administrative removal cases the appeal would only be possible from within the UK if it engaged human rights, the Refugee Convention or EU law and was not certified as clearly unfounded. The 2002 Act has remained the basis of the modern appeals legislation, despite being significantly amended since this time.

It is in this period that there is a growing tension between successive Home Secretaries in support of increasingly authoritarian immigration policies and the judiciary. It may appear ironic that this antagonism becomes particularly apparent under a Labour government, which had just empowered the judiciary by passing the Human Rights Act, but this is arguably evidence that an increased legal constitutionalism allows politicians to respond to demands of the electorate by passing populist legislation and shifting blame for state inaction to the judiciary. The government is able to position itself as acting on behalf of the people, in a battle against unelected judges. A noticeable example is David Blunkett's response to the judgment

[56] *A and others v SSHD* [2004] UKHL 56.

[57] Home Office, *Secure Borders, Safe Haven Integration with Diversity in Modern Britain* (Cm 5387, 2002).

[58] Ibid 108.

[59] David Blunkett, Hansard HC vol 384 col 355 (24 April 2002).

[60] NIAA 2002, s84. At this time the basic grounds – not in accordance with the immigration rules (84a), not in accordance with the law (84e), and that discretion should have been exercised differently (84f) were retained but it was made clear that this only covered the exercise of a discretion *conferred by* the rules and so the tribunal could not review a general discretionary decision taken outside the rules. The grounds also included arguments under the Race Relations Act 1976 (84b), Human Rights Act 1998 (84c), EU law (rights under the Community Treaties) (84d), and Refugee Convention (84g).

in a series of cases involving asylum support[61] when he gave a number of interviews attacking the judge in question. This led to a debate in the Lords proposed by members who were concerned by tabloid articles in which the Home Secretary was said to be engaged in a 'war on the judges'.[62] This tension was to escalate further during the passage of the 2004 Act through Parliament and has become a recurring feature of recent political discourse surrounding immigration, where successive Home Secretaries have adopted a policy of blaming judges for the outcomes of immigration appeals.[63]

Round 3: The Tribunal Architecture is Redesigned (Nearly Precipitating a Constitutional Crisis)

In May 2003, only a few months after the 2002 Act came into force, the Government announced their intention to introduce further legislation.[64] In December that year, just months after a new statutory review system had come into effect, the Asylum (Treatment of Claimants) Bill was placed before Parliament. It proposed replacing the two-tier structure of adjudicators and the Immigration Appeal Tribunal (IAT) with the single-tier Asylum and Immigration Tribunal (AIT) where single legally qualified immigration judges would hear appeals. The intention was to limit onward rights of appeal and more significantly to prevent judicial review of immigration decisions. This reform was undertaken at a time when the government had recently committed itself to the wholesale reform of the entire administrative tribunal structures. In 2000, Sir Andrew Leggatt had been appointed by the Lord Chancellor to undertake a review of the various tribunals that then existed, to ensure that they constituted a coherent structure for the delivery of administrative justice and that

[61] In the case of *Limbuela v SSHD* [2005] UKHL 66 Mr Justice Collins allowed judicial reviews by a number of asylum seekers who were being made destitute under section 55 of the 2002 Act which allowed the Home Secretary to deny support to those who were alleged not to have claimed asylum as soon as reasonably practicable. The section included a specific exception where an individual's ECHR rights would be breached, but when the court found that this exception should apply and that Parliament couldn't have intended to render so many people destitute, the Home Secretary argued publicly that the judges were overturning the will of Parliament. See Sheona York (2017) *The Law of Common Humanity: revisiting Limbuela in the 'Hostile Environment'.* Journal of Immigration, Asylum and Nationality Law, 31 (4) 308-329 for further discussion of this case.

[62] Hansard HL vol 648 cols 876-916 (21 May 2003) Debate on Judiciary, Legislature and Executive. See Lord Lester of Herne Hill col 893.

[63] E.g., Theresa May, 'It's MY job to deport foreigners who commit serious crime - and I'll fight any judge who stands in my way, says Home Secretary', Mail on Sunday, 16/03/13 <www.dailymail.co.uk/debate/article-2279828/Its-MY-job-deport-foreigners-commit-crime--Ill-fight-judge-stands-way-says-Home-Secretary.html> accessed 04/10/20.

[64] See Hansard HC vol 407 col 274W (18 June 2003).

decision-making procedures met the requirements of the European Convention on Human Rights for independence and impartiality. He proposed that there should be a more unified and independent two-tiered system of tribunals.[65] He noted that immigration and asylum appeal hearings were formal and adversarial and, in light of the serious consequences of the decisions, he strongly supported appellants being granted publicly funded representation.[66] He recommended a First-Tier Tribunal where a judge would be assisted by expert lay members, if appropriate, to decide all questions of fact, together with an Upper Tribunal where a single judge would then be confined to considering points of law. Following his report, the Department for Constitutional Affairs published a white paper[67] which proposed to establish a unified tribunal service under the Department of Constitutional Affairs and so independent of any sponsoring government department. Recommendations included a focus on ensuring better feedback so that the quality of initial decision-making was improved and that those aggrieved by administrative decisions were able to access clear advice prior to any appeal. The general structure was to be a two-tiered system as recommended. But the paper explained that immigration appeals were an exception since the AIT had been created to *'reduce the impact of the abuse of the two-tier system in asylum cases'*[68] where the large number of appeals was *'fuelled more by the intention of many appellants to postpone as long as possible removal from the United Kingdom by using every procedural means at their disposal, rather than by the quality of decisions by adjudicators'*.[69]

At this time there was a reasonably high success rate before the IAT with a third of cases being granted permission to appeal, and the Immigration Law Practitioners Association reported that in 2002, 61 per cent of those heard were either allowed or remitted for a fresh hearing because of an error of law.[70] As initially proposed clause 10 ('the ouster clause') of the Bill would have prevented any judicial scrutiny of decisions of the AIT and allow only a reference

[65] Andrew Leggatt, *Tribunals for Users: One System, One Service: Report on the Review of Tribunals* (DCA 2001).

[66] Ibid, pt2.

[67] DCA, 'Transforming Public Services: Complaints, Redress and Tribunal' (Cm 6243, 2004).

[68] Ibid 41 [7.18].

[69] Ibid 24 [5.12].

[70] Immigration Law Practitioners Association (ILPA), *Briefing for Second Reading 17 December 2003 Asylum and Immigration (Treatment of Claimants, etc) Bill 2003 Clause 10.*

by the President to the Court of Appeal for an 'opinion'. Unsurprisingly, there was significant criticism nearly leading to a constitutional crisis since the executive was trying to remove the judiciary from their constitutional role in providing scrutiny of executive action. The Immigration Law Practitioners Association described it as: *'most extreme example ever drafted of a 'modern' Government's attempt to curtail the right of access to the courts'*[71] and argued that, *'In the new single tier Tribunal, there is no room for jurisprudence or precedent, there is only…The President. … It is difficult to see how someone who believes in the rule of law could accept this appointment'.*[72]

The Joint Select Committee on Human Rights stated:

> *Ousting the review jurisdiction of the High Court over the executive is a direct challenge to a central element of the rule of law, which includes a principle that people should have access to the ordinary courts to test the legality of decisions of inferior tribunals.*[73]

They noted that even at the height of the Second World War when the UK was facing a threat of imminent invasion, judicial review was preserved against the use of emergency powers of detention without trial, yet the government was proposing that this was now necessary to deal with immigration appeals.[74] Faced with the potential consequence of a situation where the senior judiciary would be forced to confront the issue of whether Parliament is, in the 21st century, supremely sovereign, the Government backed down and the ouster clause was withdrawn at the second Lords reading.[75] What emerged from the 2004 Act was the single tier Asylum and Immigration Tribunal (AIT) but with a complex process for internal reconsideration of errors of law with oversight from the High Court. Alongside these reforms were significant changes to the provision of legal aid, ultimately making it more difficult for individuals to access legal advice in order to take legal action. The 1999 Act had initially increased the availability of legal aid, leading to a massive expansion of the number of

[71] ILPA, *Clause 10 Briefing,* March 2004.

[72] ILPA, *Briefing for Second Reading,* March 2004.

[73] Joint Committee on Human Rights, 'Fifth Report' (HL5/HC304 2003-2004), [57].

[74] Ibid [61].

[75] Hansard HL vol 659 cols 49-124 (15 March 2004).

immigration law practitioners. Yet by 2004, legal aid was capped to a limited number of hours of advice, no representation at asylum interview, and funding for further appeals required a grant of permission. As a result an increasing number of specialist firms stopped carrying out publicly funded immigration and asylum work.[76] The reformed appeal system came in for numerous criticisms with some suggesting that it was more cumbersome than the original two tier system, with a lack of consistency over what actually happened at the reconsideration stage.[77] The AIT would survive until 2010 when it was subsumed back into a unified two tier tribunal structure, as had been proposed in the Leggatt report back in 2001.[78]

The Focus Shifts to Immigration Appeals

The previous waves of reforms were carried out within the context of a perceived crisis of asylum and aimed specifically at the asylum appeals procedure. By 2005 the number of new asylum applications had fallen to 25,712, the lowest since 2002,[79] and the government turned its attention on the remaining rights of appeal possessed by those who were not asylum seekers,[80] proposing to remove the ability to appeal against most immigration decisions.[81] This would mean that lawfully resident workers, students, spouses would not be able to appeal if a subsequent application for further leave or indefinite leave to remain was refused and would become unlawfully resident upon refusal of further leave. This idea as a means of curtailing appeal rights had been discussed by civil servants as far back as 1974 but not pursued, as it was acknowledged that the effect would be to criminalise otherwise lawful migrants.[82] Arguably the successive rounds of legislation focusing on 'abusive' asylum

[76] This topic has been discussed at greater length by other authors. See Sheona York (2013) *The end of legal aid in immigration: A barrier to access to justice for migrants and a decline in the rule of law* (2013) 27(2) Journal of Immigration, Asylum and Nationality Law 97 & Jo Wilding, *Droughts and Deserts* (University of Brighton 2018).

[77] Robert Thomas, 'After the ouster clause: review and reconsideration in a single tier tribunal' (2006) Public Law 674.

[78] Leggatt (n65).

[79] Home Office, Immigration Statistics, Year ending December 2018 table as1. www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2018 accessed 04/10/20.

[80] In the 2005 Labour Manifesto a commitment had been made to abolish all appeal rights for non-family immigration cases. Labour Party, 'Britain Forward not Backwards' (2005) 52.

[81] This included appeals against entry clearance decisions (except in family cases which would be dealt with on papers only), refusals of leave to enter at port and all decisions refusing further leave or curtailing leave (except where previous leave was granted as a refugee).

[82] Letter, Fitzgerald to Cairncross 28/02/74 TNA HO394/168.

applicants had created an environment where MPs were now receptive to the removal of non-asylum appeal rights.

These proposals became the basis of the Immigration, Asylum and Nationality Act (IANA) 2006. According to the Home Office Command Paper which preceded the Bill, it was decided to remove these appeal rights *'because the issues raised are less important'*[83] and appeal rights should be focused on asylum and family cases that raise fundamental issues.[84] The clause removing in-country appeal rights faced opposition and Labour, recently re-elected with a reduced majority, backed down. But these plans remained a Home Office policy which would be brought forward again in another form in the Immigration Act 2014. The removal of rights of appeal in entry clearance appeals passed, in spite of critical reports from the Independent Monitor for entry clearance applications on the quality of decision-making, and the fact that, in 2005, 53 per cent of appeals against refusals of entry clearance were allowed.[85] Throughout the parliamentary debates there appears to have been little awareness or discussion of the original reasons why an appeal system was established in the 1960s.

Removing Government Discretion: The 'Foreign Prisoners Scandal'

Shortly after the IANA 2006 was granted Royal Assent in March 2006, the government was faced with the fall out of what became known in the media as the Foreign Prisoners Scandal.[86] In April it emerged that a number of foreign national prisoners had been released from prison following completion of their sentences without their cases being referred to the Home Office for consideration of deportation. This led to severe criticism of the Home Secretary, Charles Clarke, particularly in the tabloid press, and later to his removal from office. Whilst this was essentially a failure of administration which could have been addressed by appropriately using existing powers, the solution proposed was further legislation. The immigration rules were swiftly changed, removing the duty to consider all relevant circumstances including

[83] Home Office, *Controlling our borders: Making migration work for Britain, Five year strategy for asylum and immigration* (Cm 6472, 2005) [33].

[84] Charles Clarke, Hansard HC vol 436 col 193 (5 Jul 2005).

[85] House of Commons Library (n53).

[86] E.g., Alan Travis, 'Foreign prisoners scandal deepens as Reid revises figures'. The Guardian (16th May 2006). www.theguardian.com/uk/2006/may/16/ukcrime.prisonsandprobation accessed 04/10/20.

compassionate circumstances and introducing a presumption that deportation would occur, absent exceptional circumstances.[87] Then the UK Borders Act 2007 introduced 'automatic deportation': this provided that a deportation order must be made in respect of any non-citizen who had been sentenced to over 12 months in prison or to an offence specified by order.[88] In practice this could not be automatic, given the need to consider human rights and protection issues. Essentially what automatic deportation did was remove the ability of the Secretary of State to exercise discretion in any particular compelling case once a foreign national, regardless of his length of residence or family ties to the UK, met the criteria for automatic deportation. In such cases deportation was *deemed* to be conducive to the public good and a deportation order must be made, without the need to consider the immigration rules, unless one of a number of specific exceptions applied, the most important being where a breach of the ECHR or Refugee Convention would occur. An automatic deportation order could only be appealed on the grounds that an exception applied, which meant that the tribunal was also prevented from exercising its own discretion in compelling cases. The appeal could be certified as clearly unfounded preventing it from taking place until after the appellant had been deported.[89]

Effectively Ministers had been relieved of the responsibility for making potentially controversial decisions. Ultimate responsibility has been placed onto tribunal judges who, in cases involving long term resident non-citizens could now only allow an appeal within the scope of Article 8 of the European Convention of Human Rights. Home Office caseworkers could be instructed to serve deportation orders in the majority of cases and let the tribunal deal with those where a breach of human rights would occur.[90] Then, in the cases where the executive was overturned, the tribunal judges, and human rights law could be blamed for preventing the deportation of foreign criminals. During the parliamentary debates, the existence of the Human Rights Act was deployed as a minimal backstop of a civilised society, thus obviating the need for a wider political debate on where the boundaries of membership

[87] Immigration Rule 364; Statement of changes to the Immigration Rules: HC1337, 20 July 2006.

[88] UK Borders Act 2007, s32.

[89] NIAA 2002, s94.

[90] Statistics on the number of cases in which automatic deportation is not pursued by the Home Office prior to an appeal were requested through a Freedom of Information request. The information was denied on the basis of cost, implying that such information is not readily accessible.

should lie and what factors should be taken into account when deciding whether a long resident non-citizen should be expelled.

The Act received cross-party support and passed easily through Parliament. Whilst a few MPs were concerned about the scope of the new deportation powers, others argued that the deportation provisions were being weakened by the human rights exceptions and a number called for the Human Rights Act to be abolished, or replaced with a British Bill of Rights that would secure rights primarily for British citizens.[91] Once again the Bill was framed in the context of dealing with illegal immigration and the abuse of the asylum system, rather than acknowledging its impact on long term settled non-citizens. The Immigration Minister presented the purpose of the Bill as to *'strengthen our UK borders and our fight against illegal immigration, however it manifests itself'.*[92] Yet the proposed changes would have an impact on any non-citizen, including those born in the UK or legally resident for decades. Although this was acknowledged by MPs at various points, the impact on the wider settled non-citizen population was not a significant focus of discussion. There was little political debate over the underlying principle of whether it was right to deport very long resident non-citizens and the potential wider impact that could have on ethnic minority communities. Evidently the general opinion on the use of deportation as a sanction had shifted significantly from where it was in the 1960s when many members were concerned that once settled for over five years Commonwealth citizens should be secure from the threat of deportation. The example of Sachai Makao was raised in the Commons Second Reading as a case in which Ministers would no longer have a discretion to intervene in.[93] He was a Thai national who had been a settled resident in the Shetland Islands since his childhood and faced deportation following a prison sentence for a crime he committed in the aftermath of his stepfather's death. After a delay of four years, he was faced with removal, yet gained strong support from members of his local community, who organised protests, petitions and attended his appeal as witnesses arguing that he belonged in the UK. A large number of MPs supported an early day motion in his

[91] Green MP, Hansard HC vol 460 col 258 (9 May 2007).

[92] The Minister for Immigration, Citizenship and Nationality (Mr. Liam Byrne), Public Bill Committee First Hearing, 27/02/07. When discussing the automatic deportation provisions, one Conservative MP stated: '*We are talking about people who have come to this country seeking asylum, broken the law of this country and been convicted of indictable offences. Why should the British taxpayer pay for these people at all? Why are they not simply sent straight back?'* (Roger Gale MP, Hansard HC vol 456 col 604 (05 February 2007).

[93] Paul Rowen MP, Hansard HC vol 456 col 661 (05 February 2007).

favour. His case was allowed on appeal under the immigration rules. This case highlights the role of political pressure feeding into the legal process, enabling a judge to find that his deportation was not conducive to the public good. Yet under the proposed legislation, Ministers and judges would effectively be immunised from such political pressure and the decision on whether he should remain would be solely a matter of human rights law – an external constraint imposed on the decision-maker - rather than a political choice.

Ellerman[94] has observed how in practice states often face difficulties implementing coercive immigration restrictions. At the legislative stage, legislators will approve tough legislation in the belief that they have a mandate from their electorate for such policies which will be applied to a caricature 'illegal migrant'. Yet at the implementation stage, when the reality of the law as applied to individual human beings becomes apparent, politicians find themselves intervening on behalf of deserving constituents to prevent deportations, contrary to the laws they have previously supported. It is worth noting that her study pays little attention to the role of the judiciary in immigration decision-making, and particularly its role in taking away the pressure on, and indeed the ability of, MPs to intervene in individual cases. The UK Borders Act can be seen as an attempt to neutralise this possibility. By removing executive discretion and permitting only limited exemptions, the legislature is insulating the decision-making process from political interventions. Once the conditions are met for deportation it is a matter for the law – and ultimately for judges - to consider whether a human rights exemption applies. Here again is an example of depoliticisation through transferring controversial decision-making to the legal arena of human rights law.

Following the introduction of the Act, deportation decisions were regularly made against individuals with very long residence, after relatively minor offences, and so it is unsurprising that the number of successful deportation appeals on human rights grounds began to increase.[95] The role of the tribunal in these appeals will be considered further in Chapters 8 and 9.

[94] Antje Ellermann, *States Against Migrants: Deportation in Germany and the United States* (CUP 2009).

[95] The percentage of deportation appeals allowed rose from 24% in the year 2007/08 to 37% in 2013/14 when the Immigration Act 2014 was introduced. Ministry of Justice, *Tribunals and gender recognition certificate statistics quarterly: October to December 2018:* Mina Table FIA_3. www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2019 accessed 04/10/20.

Round 4: The Tribunal is brought into the Unified Tribunal Structure

In August 2008, yet another government consultation was published based on yet another appeals working group composed of the Home Office and judiciary, which proposed a further series of reforms to the tribunal.[96] The consultation paper described the AIT as a success which had significantly increased the efficiency of the appeals process. Nevertheless, it was stated that the High Court remained overburdened with reconsidering decisions of the AIT and so it was now proposed to move to a two-tiered system, as had originally been proposed by the Leggatt review. Effectively the hope was that the newly created Upper Tribunal, being a superior court of record, would come to replace the High Court completely in reviewing first tier decisions, and not be subject to further judicial review to the High Court.

In February 2010 a ministerial order[97] issued under The Tribunals, Courts and Enforcement Act 2007 abolished the AIT and transferred its functions to Immigration and Asylum Chambers within the unified First-Tier and Upper Tribunals. By 2013 the majority of judicial review cases on matters concerning immigration were also heard by the Upper Tribunal in place of the High Court.[98] By this time the number of claims had risen exponentially from 2,151 in 2000 to 13,340 in 2013.[99] It is reasonable to assume that the progressive erosion of appeal rights accounts significantly for this increase.

Round 5: Conservative Policy and The Immigration Act 2014

In 2010 the Conservative-Liberal Democrat Coalition government came to power in the UK. Whilst the Coalition government's programme involved trade-offs from both parties, in terms of immigration policy, it is evident that Conservative policy dominated, with Theresa May appointed Home Secretary.[100] On the face of it, Conservative immigration policy marked a break with Labour's approach to migration. Whilst Labour had continued a restrictive

[96] UK Borders Agency, *Consultation: Immigration Appeals Fair Decisions; Faster Justice* (21 August 2008).

[97] The Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 SI 2010/21.

[98] Crime and Courts Act 2013, s22.

[99] Ministry of Justice (n54).

[100] Notably Liberal Democrat manifesto commitments to allow a route to citizenship for those unlawfully resident for 10 years, to incorporate the UNCRC into domestic law and to allow asylum seekers to work were abandoned. Liberal Democrats, Manifesto 2010 (2010) 75-77 www.markpack.org.uk/files/2015/01/Liberal-Democrat-manifesto-2010.pdf accessed 04/10/20.

approach towards the treatment of asylum seekers, its more open policy towards economic migration saw net migration rise from 48,000 in 1997 to 256,000 in 2010, at a time when the economy was mostly growing.[101]

Conservative policy, developed in the aftermath of the 2008 recession, was driven by a manifesto commitment to reduce net migration to the tens of thousands, a policy which as of 2020 has yet to be achieved and which is hamstrung by the demands of business not to reduce access to certain skilled labour. Instead, emphasis was placed on reducing family migration (actually the smallest of the three major categories of migrant) and on performatively targeting unlawful migration. However, Conservative policy concerning appeal rights can be seen as the continuation of a long-term trend pursued by previous governments, with renewed attempts to reduce appeal rights which Labour had tried and failed in 2006 to curtail. By 2013 the number of appeals to the tribunal had fallen significantly since the early 2000s though there was a high success rate in all categories of appeal.[102] This reduction meant that appeals were being dealt with in an average of 12 weeks.[103]

The 2014 Immigration Act was the most significant change to rights of appeal since 1969. It removed all rights of appeal against existing immigration decisions[104] and created a simplified power of removal with no right of appeal for anyone without leave to remain, thus consolidating the treatment of overstayers and those who have never been granted leave.[105] Such a concept had been suggested by civil servants as far back as the 1980s, but had at that time been dismissed as too difficult to get through Parliament.[106] For non-EU nationals it is now only possible to appeal against a decision to refuse a protection claim, a human rights claim[107] or a decision to revoke protection status. Those refused further leave in certain other categories are entitled to an internal administrative review to consider whether a

[101] Oxford Migration Observatory, 'Net Migration to the UK' https://migrationobservatory.ox.ac.uk/resources/briefings/long-term-international-migration-flows-to-and-from-the-uk/ accessed 04/10/20.

[102] The figures for allowed appeals in 2013/2014 were Managed Migration: 49%; Entry Clearance: 47%; Family Visit: 43%; Deportation: 37% representing more than 27,000 individual decisions allowed. Ministry of Justice (n95).

[103] Home Office, *Immigration Bill Factsheet: Appeals (clauses 11-13)* 3.

[104] IA 2014, s15 replacing NIAA 2002, s82.

[105] IA 2014, s1.

[106] See Ch 6, 161-162.

[107] Applications based on family life are taken as implicit human rights claims.

'caseworking error' has occurred, and can still challenge a decision by judicial review, but do not have an appeal that fully considers the merits of the application.[108]

Once again, the appeal system was characterised as being subject to abuse, manipulation and deliberate delay. In promoting the Act, Theresa May presented the appeals system, which then allowed appeals against a variety of separate immigration decisions, as providing *'17 different opportunities for immigration lawyers to cash in and for immigrants who should not be here to delay their deportation or removal'*,[109] implying that anyone making use of the appeal system was in some way abusing it. The government argued that *'the immigration appeals system has become a never-ending game of snakes and ladders'* which was not fair to applicants due to the delays and costs.[110] In future, appeals would only exist where a case touched on a fundamental right. Even here though, it was argued that there was no legal requirement for an in-country appeal, unless there would be a risk of serious irreversible harm resulting from removal pending the appeal.[111] Non-suspensive appeals would therefore be introduced for human rights claims made by those liable to deportation unless this test was met. The Immigration Act 2016 expanded this so-called 'deport first, appeal later' to potentially any removal case though at the time of writing this practice has been curtailed following the Supreme Court judgment in *Kiarie and Byndloss*.[112]

In justifying this reduction in appeal rights, the Home Office policy impact assessment focused primarily on financial savings and anticipated that there would be 39,500 fewer appeals each year, a reduction of 58 per cent from 2012.[113] It specifically stated that it would not consider the impact on the migrant whose right of appeal is removed, relying on a Migration Advisory Committee recommendation that such assessments should concentrate on the welfare of the

[108] The effectiveness of administrative review has been subject to significant criticism. Independent Chief Inspector of Borders and Immigration, *An inspection of the Administrative Review processes introduced following the 2014 Immigration Act* (2016).

[109] Theresa May, Hansard HC vol 569 col 158 (22 Oct 2013).

[110] Home Office, *Immigration Bill Factsheet: Appeals* (clauses 11-13) 1.

[111] Home Office, *Impact Assessment of Reforming Immigration Appeal Rights,* 15/07/13. This became s94B of the NIAA 2002 introduced by IA 2014, s17.

[112] *Kiarie and Byndloss v SSHD* [2017] UKSC 42.

[113] Home Office (n111) 2.

'resident' population rather than that of the population plus migrants.[114] The MAC deliberately did not define what constituted a 'resident', stating that this would be for the government to decide, though they assumed that 'resident' refers to whichever group of individuals' welfare the Government wishes to maximise when it develops migration policy.[115] The government defined resident as UK nationals or those who are 'formally settled' (i.e., with indefinite leave to remain).[116] This decision, taken without wider public discussion, inevitably excludes thousands of individuals who have been factually resident for many years or even from birth with strong ties within the community. Such people are still categorised as 'migrants' whose welfare does not need to be considered. Unlike the Wilson committee report, the 2013 impact assessment gave no consideration to the benefits of appeal rights on community relations[117] or on the settled family members of those now denied an appeal right.

The Coalition went further than Labour's previous attempts at reducing appeal rights by acting to curtail judicial discretion. The Act significantly narrowed the available grounds of appeal.[118] This means that, for the first time since the 1969 Appeals Act, a judge can no longer allow an appeal on the ground that the decision is not in accordance with the immigration rules, general principles of public law or more importantly on the ground that the judge would have exercised discretion differently. The judge must also not allow 'new matters' to be considered on appeal without consent from the Home Office.[119] This marks a real shift in power and responsibility over immigration decision-making back to the executive, whilst retaining an appeal in theory for the most controversial decisions. For those whose claim to remain is based on long residence and integration in the community, a judge will only be able to overturn a decision where he finds a breach of Article 8 of the ECHR. In this exercise the judge's discretion is also limited further by statutory considerations that judges must 'have

[114] Migration Advisory Committee, 'Analysis of the Impacts of Migration' (2012) 97 [6.2]. The remit was to, *'research the labour market, social and public service impacts of non-EEA migration; and to advise on the use of such evidence in cost-benefit analyses of migration policy decisions'* 7 [1].

[115] Ibid 97 [6.3]. They recommended that the government should explicitly address who constitutes a 'resident' when conducting a migration policy impact assessment.

[116] (n111) 5.

[117] Other than a reference to the costs to business of having to re-hire replacement workers.

[118]IA 2014, s15(4) replacing NIA 2002, s84. The only grounds of appeal now available are that the decision would breach the Refugee Convention, the UK's obligations under the EU Qualification Directive to those who qualify for humanitarian protection or on that the decision is contrary to the HRA 1998, s6.

[119] IA 2014, s15(5) replacing NIAA 2002, s85.

regard to' when deciding an Article 8 claim on appeal.[120] This will be explored more fully in Chapter 9.

Conclusion: The Decline of Appeal Rights

In 2000 the introduction of the Human Rights Act appeared to offer new opportunities for resident non-citizens to hold the state to account. Yet by the end of 2020 the system of immigration appeals established by the 1969 Act has been largely dismantled. This chapter has set out how this occurred.

With increased levels of migration, the appeals system had necessarily grown beyond what had been envisaged in the 1960s. Yet the archive records considered in the previous chapters show there had from the start been at the Home Office an institutional antipathy to the role of the tribunal, and a desire amongst senior civil servants to reduce appeal rights. The focus on the 'crisis of asylum' in the late 1990s enabled the immigration appeals system to be successfully characterised as a mechanism to circumvent immigration controls rather than a safeguard against executive power, even though there were high appeal success rates. However, it is also evident that what animated the authors of the Wilson committee report and those who passed the 1969 Act - a concern with the appearance of justice being done - could no longer command such widespread political support in Parliament. With Labour now competing with the Conservatives to demonstrate its commitment to controlling unwanted immigration, whilst adopting a broadly neoliberal approach to economic policy, political opposition to policies decreasing the security of non-citizens had significantly declined.

Given the highly politicised nature of immigration, successive UK governments have been faced with a series of dilemmas. First the 'neoliberal paradox'[121] – how to balance a commitment to open neoliberal economic policies with a populist desire for political closure. Labour sought to manage that by framing 'good' legal managed migration primarily in economic terms, whilst simultaneously performing an aggressive posture on irregular asylum migration to satisfy the need for political closure. Arguably the Conservative government was

[120] IA 2014, s19.

[121] Varsanyi (n11) 879.

unable to maintain that balance - the result being Brexit and the decision to opt for political closure at the expense of economic openness.

A second dilemma is that identified by Ellermann - how to satisfy the public appetite for restrictive legislation and increased political closure whilst at the same time avoiding the political difficulties that arise when MPs are faced with the consequences of the legislation affecting individual long-term residents who are members of actual communities with strong ties of belonging. As identified by Gibney et al[122] when it comes to actually implementing immigration policy, the question of who should be permitted to belong and who is involved in making that decision often becomes contested. Arguably the tribunal and the Human Rights Act have played a role in managing that dilemma. They have enabled decision-makers to implement that restrictive legislation but retain the appearance that there is a fair legal process and that the UK remains committed to international human rights standards. The government has therefore been able to displace political accountability for controversial decisions through reliance on judges applying the minimum standards of the Human Rights Act to make the binding legal decision. A political decision on whether a long-term resident should be considered worthy of membership can be reframed as an objective legal decision on whether their human rights would be breached.

At present in non-criminal cases the executive still retains an ultimate discretion to grant leave, notwithstanding the fact that a tribunal has determined that removal will not breach an individual's human rights. However, the fact that a legal decision has been made that a person's human rights will not be breached provides a compelling justification for the government not to act further in their favour, despite any demands to the contrary. In automatic deportation cases the government has been relieved of that difficulty; legislation has removed the discretion of the executive to permit such people to remain, pushing responsibility for preventing deportation onto the tribunal.

This chapter completes the historical account of the development of the appeals tribunal which seeks to explore how and why immigration tribunals emerged as a forum for the determination of immigration status. What now needs to be considered is the role of the

[122]Matthew, Gibney, Bridget Anderson and Emanuela Paoletti, 'Boundaries of Belonging: Deportation and the Constitution and Contestation of Citizenship', (2011) 15(5) Citizenship Studies 547.

tribunal in providing a controlled legal forum for considering the claims to remain by long resident non-citizens, and importantly, the role played by human rights law.

Chapter 8: The Rise of Human Rights Appeals – The Decline of Secure Residence: 2000-2020

> *As we celebrate the 70th anniversary of the Universal Declaration of Human Rights, the United Kingdom remains committed to the promotion and protection of the human rights of all people around the world.*
>
> - UK National Statement on the Promotion and Protection of Human Rights by Ambassador Karen Pierce at the UN General Assembly Third Committee, 29/10/18.

This chapter, together with Chapter 9, considers the past two decades and examines the development of Article 8 caselaw in the context of a period where the security of non-citizens' residence was being progressively eroded. In the first part I will set out the argument that, despite the introduction of the HRA 1998, there has been a decline in the security of residence for long resident non-citizens, leading to more cases of long resident non-citizens having to argue their claim to remain before the tribunal. In the second part I will consider the role of human rights appeals in determining such cases. I argue that initially the reliance on Article 8 heralded a restrictive turn in the development of deportation and removal caselaw. However, subsequent progressive developments provided increased opportunities for long residents to put forward claims based on belonging under the ambit of the right to private life. Once again, as seen in the 1930s and 1980s, as immigration enforcement hardens, there are judges who are prepared to exercise their own discretion to allow deportation appeals by those who have established strong ties with the community. This discussion will be concluded by Chapter 9 which focuses on the counterreaction from the executive and considers the contemporary approach to claims by long residents.

Part 1: The Decline of Secure Residence and the Changing Nature of Immigration Enforcement

There are three important developments to note that have an impact on the nature of cases that now reach the immigration tribunal:

1) The Increase in Insecure Lawful Residence Status

In Chapter 5, I discussed the decline in security of Commonwealth citizens' residence.[1] Historically, once admitted in search of work, Commonwealth citizens had an automatic right to settlement. This distinguished the UK from other European states which had relied on temporary *Gastarbeiter* schemes to fill post-war labour shortages. Yet in recent years it has become increasingly difficult to gain a secure status as the UK has sought to reconceive labour migration as a temporary and reversible phenomenon. The IA 1971 led to newly arrived Commonwealth migrants having to pass through probationary periods of temporary leave before obtaining settlement, creating more situations where they could end up overstaying. The BNA 1981 made it possible for children to be born and raised in the UK for many years, without being British or even having leave to remain.[2] The IA 1988 removed a guarantee provided by the IA 1971 that the immigration rules would be framed in such a way that settled Commonwealth citizens, their wives and children would not lose any of the rights they had when the 1971 Act was passed.[3]

In recent years, routes to settlement have been lengthened or withdrawn entirely for workers, spouses and others who arrive on limited leave.[4] Opportunities to legally switch from one immigration category to another have been removed in many cases.[5] This direction of travel was pursued by the Labour government until 2010 and accentuated under the Coalition government. In February 2012 the Immigration Minister, Damien Green, announced

[1] See Ch5, 132-139.

[2] See Ch6, 158-159.

[3] IA 1988, s1 repealed IA 1971, s1(5).

[4] E.g., since 9 July 2012 those who enter the UK as spouses must now wait at least five years before applying for settlement, and in some case 10 years' residence in 4 sections of 2.5 years. Formerly those on spouse routes had a probationary period of 12 months (later increased to 2 years) prior to settlement, or in some cases could gain settlement immediately if they had been living together overseas. A financial requirement and an English language test must be met on entry and every 2.5 years when an extension of leave is requested. The financial requirement, subject of litigation in the case of *MM & Ors v SSHD* [2014] EWCA Civ 985 has been observed to be such that 45% of applicants would be unable to sponsor a foreign national spouse. Should they fail to meet these conditions at each application, they may find themselves being removed from the UK (Immigration Rules: Appendix FM). Since 2005 refugees have also been granted 5 years' temporary leave rather than immediate settled status, with the possibility of it being revoked prior to settlement (Immigration Rule 339R).

[5] A ban on those on short-term visas switching onto the spouse route was implemented in 2002. Until April 2006 many of those entering the UK as workers, had a viable route to settlement after 4 years. Students were able to extend their leave on post-study work visas and subsequently acquire settlement. For those on work routes, settlement has now been restricted, including for skilled workers who may be forced to leave the UK after a period of six years or more unless they are earning a specified salary.

that settlement would be restricted for skilled workers, stating: *'Settlement in the UK is a privilege. We are sweeping aside the idea that everyone who comes here to work can settle, and instead reserving this important right only for the brightest and best'.*[6] Increasingly non-citizens can find themselves resident for many years building up significant ties to the community but unable to obtain a secure status. Unexpected but relatively common life events (loss of employment, failure to obtain a pay increase, illness or relationship breakdown), or unforeseen policy changes can make it impossible to apply for an extension of leave. Significantly increased application fees and an uncompromising approach to small mistakes in an application have further made it difficult for individuals to retain a lawful status.[7] Once there is a break in continuity, even those with years of previously lawful residence need to start again on a further 10-year-route to settlement. The UK has made it easy for non-citizens to lose their immigration status but difficult to regularise.[8] Furthermore, as discussed in Chapter 7, automatic deportation has decreased further the security of those with settled status, increasing the number of very long-term residents potentially facing removal. As a result, the cases that come before the tribunal will inevitably involve more compelling facts than those in previous decades.

2) The Changing Nature of Immigration Enforcement

Whilst non-citizens classed as aliens have theoretically always had limited rights, in Chapter 6 I noted that the growing use of detention and deportation has made that a practical reality.[9] Since the 2000s there has been an expansion in the use of immigration detention. In 2000 the detention estate could hold 475 people. By 2014, there were 11 long-term detention centres

[6] Home Office Press Release, 'Automatic settlement for unskilled workers to end' (29 February 2012) www.gov.uk/government/news/automatic-settlement-for-unskilled-workers-to-end#:~:text=Migrant%20workers%20coming%20to%20the,time%20they%20have%20spent%20here.&text=Temporary%20leave%20will%20be%20capped,temporary%20work%20routes%20being%20abused accessed 04/10/20.

[7] As of October 2020, a family of 4 relying on human rights to gain settlement over 10 years will face fees of £48,271.20 (this figure includes the health surcharge but not the additional fees to submit the application via outsourced service providers). Home Office, Immigration and Nationality Fees: 6 April 2020. https://www.gov.uk/government/publications/visa-regulations-revised-table/home-office-immigration-and-nationality-fees-6-april-2020 accessed 04/10/20. Whilst fee waivers can be obtained in cases engaging human rights, this can be a difficult process and does not cover the final settlement application. Thus, some long resident non-citizens may be unable to ever acquire a secure settled status.

[8] Goldring and Luling have referred to this in the context of Canada as amounting to a game of 'chutes and ladders' whereby migrants with precarious immigration statuses struggle to navigate a path to a secure status. Goldring L & Landolt P (eds), *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada.* (2013, University of Toronto Press).

[9] Ch 6, 157-158.

with a capacity of over 3,800.[10] In 2015 a peak of 32,447 individuals were detained during the year.[11] The past two decades has also been marked by a shift in approach to immigration enforcement which relies less on policing the external border and more on attempts to construct and police an internal border. This technique relies on the effective privatisation of immigration control, with the state seeking to co-opt civil society to enforce immigration checks. In recent years the government has used the term 'the hostile environment'[12] to describe the series of measures which seek to make it untenable for those without immigration status to remain in the UK. The origin of these measures can be traced to the late 1980s and the Immigration Acts of the early 1990s with attempts to prevent access to benefits and employment. The Asylum and Immigration Act (AIA) 1996 introduced employment checks to prevent illegal working and prevented anyone subject to immigration control from accessing housing, child benefit and income support, though certain individuals such as refugees were exempted.[13] Non-citizens would now need to prove that they were entitled to such support, contributing to the hardening of the boundaries between citizens and non-citizens in their day-to-day interactions. The Immigration Acts 2014 and 2016 built on this, such that there are now status checks when individuals apply for work, welfare benefits, healthcare,[14] private rented housing,[15] bank accounts,[16] driving licences,[17] or give notice to marry,[18] together with an increase in data sharing between government departments. There are now more opportunities for those with very long residence to have their status called into question (as demonstrated by the so-called Windrush scandal, in which large numbers of long-term lawful residents became subject to immigration enforcement action). However,

[10] Amnesty International UK, *A matter of routine: The use of immigration detention in the UK* (2017) 16.

[11] Home Office, Immigration statistics, Year Ending March 2019, 24/05/19 <www.gov.uk/government/statistics/immigration-statistics-year-ending-march-2019> accessed 04/10/20.

[12] Sheona York, 'The Hostile Environment. How Home Office immigration policies and practices create and perpetuate illegality', (2018) 32(4) Journal of Immigration, Asylum and Nationality Law 363.

[13] AIA 1996, s8—11. Section 8 on employment checks has since been replaced by the Immigration, Asylum and Nationality Act 2006, ss15-26.

[14] National Health Service Act 2006, s175 & The National Health Service (Charges to Overseas Visitors) Regulations 2015 (as amended).

[15] IA 2014, s21.

[16] IA 2014, s40 & IA 2016, s45.

[17] IA 2014, s46.

[18] IA 2014, pt4.

counterintuitively there has been a decrease in the number of individuals being forcibly removed.[19] A stated aim of the hostile environment policies is to compel individuals to seek voluntary return, rather than relying on the need for forced removal. Yet statistics also show that the number of voluntary returns has been in decline since a peak in 2015.[20] The UK government has faced criticism for the failure to monitor the effectiveness of the hostile environment measures.[21] A combination of insecure lawful migrants losing their status, with poor immigration enforcement, is likely to lead to an increase in the resident population of undocumented migrants.

3) An Increase in the Resident Population of Undocumented Migrants

Since the early 1990s net migration has increased significantly from 37,000 in the period 1991 to 1995 to an annual average of 266,000 in the period 2014 to 2019.[22] What this figure does not capture is the number of people who have entered unlawfully or remained in the UK without a lawful status. Prior to 1993, it was government policy to grant what was known as Exceptional Leave to Remain (ELR) quite liberally in cases where individuals were refused asylum. This was a temporary status but would normally lead to settlement after a number of years. This policy was reconsidered during the passage through Parliament of the Asylum and Immigration Appeals Act 1993. Kenneth Clark explained that ELR had often been granted in cases where the individual did not qualify for asylum, but, following delays in the processing of their claims, it was now felt unreasonable to remove them.[23] In some years 60 per cent of those refused asylum had been granted ELR and the government believed this was encouraging individuals to make spurious asylum claims. What this explanation conceals is that ELR was being granted in many cases where removal was simply not possible due to the practical difficulties in removing individuals, often to active warzones or where countries of origin would refuse to accept them back. Granting ELR was therefore a practical way to avoid

[19] Enforced removal numbers fell from 21,425 in 2004 to 7,313 in 2018. Home Office (n11).

[20] Statistics show that whilst voluntary returns increased significantly from 3,566 in 2004 to 29,768 in 2015, they had dropped 17,197 by 2018, calling into doubt the success of the 'hostile environment' measures. Home Office (n11).

[21] See, for example, David Bolt, Chief Inspector of Borders and Immigration, 'An inspection of the 'hostile environment' measures relating to driving licences and bank accounts' (October 2016).

[22] House of Commons Library, *Briefing Paper: Migration Statistics,* (3 June 2019) 8 [2.1] https://commonslibrary.parliament.uk/research-briefings/sn06077/ accessed 04/10/20.

[23] Kenneth Clarke, Home Secretary, Hansard HC vol 213 col 27 (02 November 1992).

a situation where individuals would end up becoming long term resident but with no legal immigration status. Civil servants who reviewed this policy cautioned that whilst reducing the use of ELR would on paper boost the government's refusal of asylum rate, there was a *'considerable danger'* of it '*contributing to the growth of a criminalised underclass as seen in Paris and Brussels'.*[24] The policy was revised to grant ELR in fewer circumstances, but until the early 2000s country specific ELR policies remained in place for certain countries on humanitarian grounds where removal was likely to be difficult.[25] These were later withdrawn[26] and ELR was subsequently replaced by grants of Humanitarian Protection and Discretionary Leave (DL) which are granted in far more limited circumstances. As a result, increasing numbers have been refused asylum but not removed and so end up remaining in the UK in a situation of 'limbo'.[27] It is therefore likely that the number of cases of undocumented long residents reaching the tribunal seeking to make claims to remain will have increased since this time. Furthermore, several concessionary policies refraining from enforcement action where a person had established family life in the UK were withdrawn in 2008. The reason given was that these were no longer required since such circumstances were now covered by Article 8 ECHR.[28] In hindsight these concessionary policies were more generous than the present application of Article 8 by the courts.

It is of course difficult to know the current population of undocumented migrants but credible estimates have suggested between 417-863,000.[29] One study from 2012 suggested there may

[24] Home Office Briefing Paper considering UK's obligations under international law 04/06/91 TNA HO394/996. This paper also considered the active review after 4 years of those with refugee leave but noted the great political difficulties that would result in trying to carry out enforced removals of former refugees who had become part of the community with jobs and children at local schools.

[25] E.g., large numbers of Afghans and Iraqis that were refused asylum were granted ELR under country specific policies which recognised that return to Taliban controlled Afghanistan or Saddam controlled Iraq was unfeasible.

[26] See *R (S) v SSHD* [2007] EWCA Civ 546 case for discussion on the withdrawal of such policies and how it led to "conspicuous unfairness" in a number of cases.

[27] Caselaw has consistently held it will not breach Article 8 to deny leave to a person whom it is impossible to remove in the foreseeable future unless there is no reason to believe that that situation may change. See *RA (Iraq) v SSHD* [2019] EWCA Civ 850.

[28] E.g., the concession for children resident for more than 7 years (DP5/96) was withdrawn without notice on 9 December 2008. See *R (Munir & Ors) V SSHD* [2012] UKSC 32 [13].

[29] Gordon et al, *Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK* (Greater London Authority 2009). See also Andy Jolly et al., *London's children and young people who are not British citizens: A profile* (Greater London Authority 2020) which estimates 674,000 undocumented individuals in the UK.

be 120,000 children resident without legal status, half of whom were born in the UK.[30] Despite unofficial amnesties[31] that have at times attempted to address the situation of large numbers of unresolved cases, the government's current approach is to rely on the 'hostile environment' strategies described above to force undocumented non-citizens to take voluntary return. As such there is still no resolution to the 'deportation gap'.[32] Routes to lawful regularisation have been made more difficult. In 1985 it was government policy that, *'Continuous unlawful residence in the United Kingdom amounting to 10 or more years is considered a prima facie reason for allowing a person to remain'.*[33] By 1987 this policy position had hardened and 14 years' unlawful residence became the benchmark where indefinite leave to remain should normally be granted absent countervailing factors.[34] Currently, at least 20 years' residence is required as well as meeting stricter 'suitability' requirements relating to past conduct in order to embark on a 10 year precarious route to settlement.[35]

To conclude, successive governments have hardened the UK's approach to immigration enforcement, and the willingness of the executive to deport long residents has increased, such that the cases now coming before the tribunal have more extreme facts than those in preceding eras. My review of Article 8 caselaw shows that in the early 2000s the reported cases often concern refused asylum seekers residing in the UK for several years relying on family or private life to found a claim to remain. By the late 2010s, reported Article 8 cases regularly concern those resident for decades facing deportation or removal after failing to maintain a lawful status. It is therefore clear that the position of those with long residence is less secure than it was two decades ago.

[30] Nando Sigona & Vanessa Hughes *No Way Out, No Way In: Irregular migrant children and families in the UK.* (Compass, University of Oxford 2012).

[31] E.g., The 450,000 'Legacy cases' considered between 2007-2011 – Not an amnesty according to the Home Office, but an *'operational programme'.* See *SH (Iran) & Anor v SSHD* [2014] EWCA Civ 1469 [35].

[32] I.e., the gap between the number of people refused permission to stay and those who actually leave. Matthew Gibney, 'Asylum and the Expansion of Deportation in the United Kingdom' (2008) 43(2) Government and Opposition 146.

[33] David Waddington, Minister of State at Home Office, Hansard HC vol 87 col 692 (29 November 1985). This policy was based on a requirement of the Convention on Establishment relating to long residence of nationals of signatory states, but was applied more widely.

[34] Letter from Tim Renton to Neil Thorne MP, 08/10/87 cited in Immigration Law and Practice, Macdonald and Blake [1991], 378 fn18.

[35] Immigration rule 276ADE introduced by Statement of Changes to the Immigration Rules, 13 June 2012 (HC194), which entered into force on 9 July 2012.

Part 2: The Rise of Human Rights Appeals

Following the introduction of the Human Rights Act 1998 and the Immigration Act 1999, non-citizens faced with removal had a new remedy available to them. The tribunal now had the authority to consider Article 8 of the ECHR – the right to respect for family and private life. Claims that had previously been pursued on the basis that discretion within the rules should be exercised differently could now be formally articulated through the prism of human rights law.

The past 20 years can be broken down into several distinct periods:

1) A restrictive period following the introduction of the Human Rights Act 1998 from 2000-2007;
2) A liberalising period between 2007-2012 following a series of House of Lords judgments;
3) The period from 2012-Present dominated by executive attempts to reverse perceived judicial activism.

This section will consider the first two periods whilst Chapter 9 will address the current approach taken by the tribunal to claims to remain by long residents facing removal or deportation.

2000-2007: A Restrictive Start: The Development of Article 8 caselaw

With the arrival of the Human Rights Act, lawyers were optimistic that this offered a genuine opportunity to increase the legal protections available for non-citizens facing removal, and that the European Court could act as a restraining influence on the UK government. Macdonald and Webber, writing in 2005, noted a progressive development in the Strasbourg Court's judgments with less emphasis placed on the state's right to control immigration and more weight being given to the rights of individuals to have their family and private life respected[36] and that this was yet to be appreciated by the UK courts. Whilst for many years the ECtHR declared inadmissible complaints from non-citizens facing expulsion, by the 1990s and early 2000s the court was developing caselaw on the deportation of long resident, second

[36] Ian Macdonald and Frances Webber, *Immigration Law and Practice 6th edition* (Butterworths Law 2005) 426 [8.82].

generation migrants or quasi-nationals. However, Marie-Benedicte Dembour[37] is critical of the development of the ECtHR caselaw. She argues that Strasbourg has from the start put the interests of state sovereignty first with the rights of migrants occasionally being recognised as an exception to the general rule that a state is entitled to expel a non-citizen. This amounts to what she terms the 'Strasbourg reversal' – qualifying state sovereignty with human rights obligations rather than the other way round. One should therefore be wary of expecting the ECHR to provide rights for aliens against their host state.

Whilst Article 8 has primarily been argued in the context of cases involving family separation, the wide scope given to the concept of private life[38] which includes the *'totality of social ties between settled migrants…and the community in which they are living'*[39] has enabled those with long residence to argue they have an inherent right to remain based on their established private life; a claim that is stronger if that private life was established lawfully. Yet it is evident that in the Strasbourg caselaw there has been disagreement within the court on how to address the cases of long residents being expelled by member states. Initially there was some support for the idea that those born in a member state or resident from childhood should not be subject to expulsion, and indeed a number of European states do not deport so-called second generation migrants.[40] In the case of *Beljoudi,*[41] Judge Martens considered that mere nationality should not constitute justification for expelling someone from his 'own country' – an effective recognition that ties of belonging are more important than the legal fiction of nationality. However, Grand Chamber caselaw has subsequently established that there is no legal prohibition of expulsion against any non-citizen or 'settled migrant'.[42] Attempts to provide guidance to member states applying Article 8 in expulsion cases have produced the so-called *Boultif* criteria– factors which should be taken into account when making a decision on the proportionality of a removal.[43] These factors are very similar to the deportation

[37] Marie-Benedicte Dembour, *When Humans Become Migrants* (Oxford *University Press, 2015).* See also Marie-Benedicte Dembour, 'Human Rights Law and National Sovereignty in Collusion: The Plight of Quasi-Nationals at Strasbourg' (2003) 21 Neth Q Hum Rts 63.

[38] See *Niemietz v Germany* [1992] ECHR 80 [29].

[39] *Uner v Netherlands* [2006] ECHR 873 [59].

[40] Ibid [39].

[41] *Beldjoudi v France* [1992] ECHR 42 [2].

[42] (n39) [55].

[43] *Boultif v Switzerland* [2001] ECHR 497 [48].

immigration rule, used by the UK for decades.[44] Dembour argues that despite these guidelines a study of the Strasbourg caselaw reveals an inconsistency in their application, and often a lack of clear reasoning making deportation caselaw akin to a lottery.[45] Importantly though, in the case of *Maslov,*[46] involving the deportation of a man resident in Austria since the age of six with a long history of serious offences, the Grand Chamber ruled that where there has been long residence since childhood, the private life claim will often succeed unless there are *'very serious reasons...to justify expulsion'.* In doing so they emphasised the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin.[47]

The impact of Article 8 in UK law has had a convoluted history, and it is questionable whether it has significantly enhanced the position of non-citizens. Initially the UK courts accepted the argument that the Home Office should be given a wide margin of discretion when considering whether an immigration decision breached Article 8. The early cases of *Mahmood*,[48] *Samaroo*,[49] and *Edore*[50] relied on the principle that where a difficult judgement has to be made between competing interests the judiciary should defer on democratic grounds to the elected government, particularly in matters involving social, economic or political factors.[51] In *Mahmood*, which set out guiding principles on Article 8 claims made by overstayers with family relationships, it was held that although they must give anxious scrutiny to decisions involving human rights, the courts should only overrule the Home Secretary to find a breach of Article 8 where the Home Secretary's judgement on proportionality was unreasonable. Removing an overstayer who had established family with a British partner and children would often be a proportionate outcome, particularly if the relationship was established in knowledge of the appellant's precarious immigration status and there were no

[44] See Ch 5, 143-144.

[45] Dembour (n37) 179.

[46] *Maslov v Austria* [2008] ECHR 546.

[47] Ibid [100].

[48] *R (Mahmood) v SSHD* [2000] EWCA Civ 315.

[49] *R (Samarooo) v SSHD* [2001] EWCA Civ 1139.

[50] *Edore v SSHD* [2003] EWCA Civ 716 which concerned the removal of a woman with two children by a British man.

[51] See Lord Hope in *R v DPP, ex parte Kebeline and Others* [1999] UKHL 43.

'insurmountable obstacles' to family life existing in the country of return. In *Samaroo,* a case involving deportation of a long resident convicted of a drugs offence, the court held that in cases involving convicted criminals, the Home Secretary would have a significant margin of discretion in deciding the balance to be struck between the public interest in deportation and individual rights.[52] Macdonald and Webber described this in 2005 as a neo-Wednesbury approach and argued that as a result of this approach, '*Routine decisions to deport…which used to be the bread and butter of adjudicators were treated as matters of policy, requiring a large margin of executive discretion to be accorded to the Secretary of State'.*[53]

It was only with the case of *Razgar*[54] that it was firmly established that an appeal tribunal has an obligation to fully consider the merits of an Article 8 claim and make its own independent decision on proportionality. Yet even after this case, judgments of the tribunal failed to apply this logic.[55] Subsequently, the Court of Appeal in *Huang*[56] disavowed the application of a Wednesbury test and yet still arrived at a position where refusing a claim to remain which did not meet the immigration rules would only be disproportionate if it was 'truly exceptional'. The Court held that the immigration rules issued by the executive and approved by Parliament generally struck an appropriate balance between an immigrant's rights and the assumed public interest in strong immigration control, and so would generally dispose of proportionality issues arising under Article 8.[57] In the Court of Appeal therefore, *Huang* established a 'test of exceptionality' in Article 8 cases. It is notable that Baroness Hale in *Razgar* suggested that Article 8 would be of limited scope:

> *…this is a field in which harsh decisions sometimes have to be made. People have to be returned to situations which we would find appalling. The United Kingdom is not required to keep people here who have no right to be here unless to expel them would*

[52] Ibid [36].

[53] Macdonald (n36) 363.

[54] *Razgar, R (on the Application of) v SSHD* [2004] UKHL 27.

[55] E.g., *FZ (Article 8) Serbia and Montenegro* [2004] UKIAT 00204 & *DM (Proportionality – Article 8) Croatia* * [2004] UKIAT 00024. A review of all early reported IAT decisions shows that the significant majority of appeals by the SSHD against a favourable adjudicator's decision were allowed.

[56] *Huang and Others v SSHD* [2005] EWCA Civ 105 which addressed the test established in the tribunal case of *DM* (n49).

[57] Ibid [60]. This was a questionable assumption to make given the nature of the immigration rules, and the fact that many of them had remained unrevised for many years.

> *be a breach of its international obligations. It does the cause of human rights no favours to stretch those obligations further than they can properly go.*[58]

Here responsibility for 'harsh decisions' is not placed with the decision-maker but is the inevitable consequence of the correct and impartial operation of the law. At this time then, the application of human rights law appeared to have added little to the existing deportation arguments since an Article 8 evaluation involved a more restrictive framework than the consideration of 'all relevant circumstances' under the deportation/removal immigration rules. In assessing 'all relevant circumstances' judges were obliged to consider all the factors that might affect the public interest in removal in a positive or negative way and this did not involve deferring to the view of the Secretary of State or applying a 'margin of discretion'. As such there was room for the views of the public by way of petitions, statements of support etc. to be considered.

As Macdonald and Webber wrote in 2005:

> *The contrast with human rights law under Article 8(2) is often quite stark. There, the need for immigration control and the policies embodied in the legislation and rules is often cast uncritically into the scales as the constitutionally unassailable work of the elected government, which the courts can only peer at timidly from under the long skirts of deference, citing the need for constitutional propriety...*[59]

Removal: Private Life Cases

One of the first tribunal guidance cases to consider Article 8 claims based primarily on private life involved a family from Kosovo who had been refused asylum and were facing removal after five years in the UK.[60] The representatives for the appellants went to considerable lengths to set out their links to the local community, and the impact their loss would have, including an extensive bundle of references and reports. The judge noted that:

[58] (n54) [65].

[59] Macdonald (n36) 1037.

[60] *AR (Article 8, Mahmood, Private life)* [2002] UKIAT 7378

The documentary evidence indicates that they have made considerable efforts to integrate and establish themselves in the community. They appear to have impressed a considerable number of people, including the Member of Parliament for Barking.[61]

Nevertheless, the court used the principle in *Mahmood* that there were no insurmountable obstacles to them continuing their family life to swiftly reject the appeal, without further consideration of the Strasbourg caselaw on private life or analysis of the concept of the public interest. The contrast in approach to the case of *Bakhtaur Singh*[62] is striking.

A further case involved an applicant who had spent nine years in the UK from the age of nine with three adult siblings. Her representative argued that her work in the UK as a teacher meant that there was a wider community interest in her remaining in the UK. The tribunal did not accept that such matters could lower the strong weight to be placed on the public interest in immigration control. It confirmed that whilst the state interest in immigration control is not immutably fixed, '*it is only in very limited circumstances that the interests of the state and wider community in the maintenance of effective immigration control will not carry a heavy weight'.*[63]

In reviewing the tribunal Article 8 caselaw between 2000 and 2007 a pattern emerges in which the tribunal acts as a gatekeeper, applying legal principles to overturn adjudicators who have proved too sympathetic when faced by appellants and their supporters who have put forward a case for why they are well integrated members of society and thus morally worthy of membership in the UK.[64] Tribunal guidance addressing how judges should consider cases involving private life was clear that, *'Sympathy for and admiration of an individual do not as such enhance or otherwise affect that person's rights under article 8'.*[65] That case involved an applicant who arrived as a child asylum seeker, with a significant disability and who had

[61] Ibid [9].

[62] *Singh v IAT* [1986] UKHL 11, discussed in Ch5, 145-150.

[63] PO *(interests of the state –Article 8) Nigeria* [2006] UKAIT 00087, headnote

[64] E.g., *KM (Article 8 - Family Life) Albania* [2004] UKIAT 00079; *BR (Article 8 - Proportionality - Delay - Shala) Serbia & Montenegro* [2004] UKIAT 00078; In *KS (Length of Stay – Proportionality) Sri Lanka* [2004] UKIAT 00245 *'It follows that, although we have considerable sympathy for the claimant, the Adjudicator was wrong and we allow the Secretary of State's appeal'; MW (Deportation – Jamaica -conducive to the public good) Jamaica* [2004] UKIAT 00171. See also *JN (Uganda) v SSHD* [2007] EWCA Civ 802 - a woman resident for over 12 years with supporting references, work record and community engagement who was successful at the first instance but overturned by the tribunal as not exceptional.

[65] *MG (Assessing interference with private life) Serbia and Montenegro* [2005] UKAIT 00113.

presented himself as well integrated, hard-working and embarking on a career to teach adults with learning difficulties at a local college. He was described in references as being *'a valuable member of his department, hardworking, honest and having a natural empathy with the students he teaches'.*[66] The adjudicator who had seen the applicant and witnesses give evidence before him praised his *'personal and moral'* response to the adversity he faced, noted in particular that he had worked hard to improve himself and found that he provided a significant contribution to his local community. It is evident that the adjudicator had decided that the appellant passed the normative threshold for being accepted as belonging in the UK. However, on appeal the tribunal characterises a human rights appeal as a matter of applying the law strictly and dispassionately, and finds that the decision to allow his appeal was not one that was reasonably open to the adjudicator: '*Stripped of the subjective veneer which the Adjudicator chose to put upon it, there is plainly nothing remotely exceptional about the appellant's private life'.*[67] It was not for judges *to 'impose our own views as to what sort of job, course of study or voluntary activity is of sufficient benefit to the nation'.*[68]

Another way in which Article 8 initially provided for a narrower appeal was in the insistence that the court was only interested in the rights of the appellant and that the rights of third parties could only be taken into account to the extent that they impacted on the appellant's rights.[69] Thus the decision-maker's focus is framed as being on the individual 'victim' of a human rights breach, rather than viewing the decision in its wider social context, whereby the deportation of the appellant necessarily has a wider impact on many other members of society. After all, *'The purpose of Article 8 is not to preserve the benefits felt by third parties attributable to the appellant's presence in the United Kingdom but to protect the appellant's*

[66] Ibid [12].

[67] Ibid [31].

[68] Ibid [30]. However, it is worth noting that in *GS (Article 8 – public interest not a fixity) Serbia and Montenegro* [2005] UKAIT 00121 in which lengthy delay in the asylum process had led to the orphaned child appellant becoming an *'integrated alien within the United Kingdom with few if any remaining ties to his country of origin',* the tribunal accepted an adjudicator characterising it as an exceptional case. The appellant had presented evidence of positive work and studies in the UK and the tribunal accepted that as a result of the delay *'the respondent acquiesced in the appellant, at a particularly vulnerable and formative period of his life, developing close ties with foster parents which he has maintained. The effect of delay in his case was to encourage him to integrate with the wider community*' [14].

[69] See *KO (Article 8, Deportation, Kehinde)* [2002] UKIAT 6038 & *AC (Deportation, Article 8, Appellant) Turkey* [2004] UKIAT 00122 paras 17-24. It was suggested that other affected parties would be forced to bring proceedings in the High Court under HRA 1998, s7 if they could establish themselves as 'victims' of a human rights breach.

own private and family life'.[70] In that case the adjudicator was confronted by an appellant with lengthy residence, a taxpayer who ran a business employing 16 people and could not see how it would be proportionate to remove the appellant leading to their unemployment. The tribunal overturned this on the basis that the loss of employment of others in the UK was not a matter of relevance for an adjudicator and the impact on the wider interests of the community was a matter for the Secretary of State's discretion. They cautioned adjudicators that the *'purpose of Article 8 is not to reward virtue'*[71] since it would be unjust if judges were to qualitatively assess the worthiness of an applicant's occupation, *'so that nurses in the NHS are viewed more favourably than a typist in a private company'.*[72]

There was held to be nothing exceptional about a case in which an Afghan asylum seeker would be returning to his country where he had no home, work on family despite the fact he had strong supporting references from an NHS trust who were relying on him for his work for them. In allowing the appeal the adjudicator had recognised that he had built up private life in the UK over a substantial period of time, and his work was '*of considerable benefit to the (mostly) public authorities for whom he works'.*[73] The Court of Appeal upheld the tribunal in reversing the decision, stating that:

> *when considering the right to respect for private life granted by Article 8, it will not normally be a substantial factor to consider the contribution which is being made to the community. … one must start with a consideration of what it is that is being protected and it* ***is a right of an applicant and not an assessment of how valuable the applicant's remaining within the United Kingdom is to the community.***[74]

It can be seen that the framing of the appeal as concerned with a victim of a breach of human rights created a framework that was thought to prevent adjudicators from a more holistic, though arguably subjective, assessment of whether the individual before them should remain a member of UK society.

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[70] *SO (Article 8 – impact on third parties) Nigeria* UKAIT 00135, headnote.

[71] Ibid [15].

[72] Ibid.

[73] *MA (Afghanistan) v SSHD* [2006] EWCA Civ 1440 [5].

[74] Ibid [23] (emphasis added).

Criminal Deportation Cases

A similar approach can be seen in cases involving the deportation of long-term residents, only here there is an even stronger deference to the executive. Arguably the introduction of the Human Rights Act facilitated a restrictive turn in the deportation caselaw, both in the tribunal and criminal courts. The case of *N Kenya*[75] considered both the traditional ground of appeal – that discretion should have been exercised differently within the rules - and an Article 8 human rights claim. It concerned an individual with long residence and strong family life who had been convicted of serious offences. It was held that in substance, the Article 8 proportionality question and the paragraph 364 balance are the same, so the Article 8 claim could be subsumed within the scope of the deportation appeal. Whilst accepting that the adjudicator's role went beyond a mere review function the court reiterated the principle that in cases involving serious criminal offences, a judge must defer to the Home Secretary's expertise in judging how effective a deterrent is a policy of deporting foreign nationals. In this case the tribunal had attached too much weight to the appellant's low risk of reoffending and failed to consider *'the public policy need to deter and to express society's revulsion at the seriousness of the criminality'*.[76] In this case the *'doctrine of revulsion'* was now applied as a self-evident statement without reference to earlier caselaw. Other factors that might feed in to the public interest in a positive way - a public interest in the principle of rehabilitation, or a public interest in promoting stable families - are notably absent from consideration. By equating the traditional approach to deportation with the Article 8 approach, the scope of the tribunal judge's discretion has been diminished.[77] With the introduction of the HRA, the margin of appreciation that Strasbourg grants to member states when implementing the ECHR, was equated with the concept of a margin of discretion to be accorded to the executive by the judiciary. This then became a concept to apply in all deportation appeals regardless of whether they were primarily argued on human rights grounds or under the former rules.

[75] *N (Kenya) v SSHD* [2004] EWCA Civ 1094.

[76] Ibid [64].

[77] There was a strong dissenting judgment from LJ Sedley who considered that the judgment was reasonably open to the judge given the scope of his discretion and should not have been interfered with unless it was perverse.

In another revealing case,[78] the appellant had fled Kosovo and arrived in the UK as a 16-year-old, was living with his parents and siblings and suffered from PTSD. He had been with a friend when they were attacked by some other youths but had responded by running after one of them and stabbing them. He received a two-year sentence. The tribunal which considered his case allowed his deportation appeal:

> *At the moment the appellant has done everything that he can to rehabilitate himself in society and to provide for his family. He has sought employment; he voluntarily worked for the church before he could get employment, and he is regarded within his home community as a stable and remorseful person. There is a very impressive wealth of support given to him by those who know him and his family, and it is impossible to ignore the strength of the local community's opinions of him.*
>
> *He has not committed any further criminal offence since this time and has done his best to rehabilitate himself in society. We accept that the crime is a one-off offence, caused by a particular incident when his friend was beaten in front of his eyes in broad daylight, which triggered off the trauma associated with PTSD…*[79]

Wilson LJ in the court of appeal reviewing the decision also said:

> *In my heart I would wish to propose that this appeal be allowed. The efforts of the appellant to rehabilitate himself and to make himself a useful member of our society are, in the light of his childhood experiences, almost heroic.* ***But my work in the court is supposed to be ruled not by my heart but by my head.***[80]

In this case there is clear recognition that the applicant has demonstrated his worth in society, the court has been impressed by the presentation of his claim to membership in the UK, not-withstanding his offence. Nevertheless, his appeal was dismissed since the judge had erred in his approach: '*There was no reference to the significance of a deportation order as a deterrent. There was no reference to its role as an expression of* ***public revulsion*** *or in the building of*

[78] *OH (Serbia) v SSHD* [2008] EWCA Civ 694.

[79] Ibid [11].

[80] Ibid [16] (emphasis added).

public confidence'.[81] Thus, Wilson LJ is deferring responsibility for the decision to supposed objective legal principles of human rights law.

The introduction of the HRA also led to the criminal courts giving less attention to an offender's domestic circumstances when deciding whether to issue a recommendation for deportation. In the case of *Carmona*[82] the Court of Appeal revised the guidance in *Nazari,*[83] by drawing on the more restrictive caselaw from the Administrative court. They considered that the statement in *Nazari* that, '"*This Court and all other Courts would have no wish to break up families or impose hardship on innocent people" was not intended and has not been understood literally',*[84] though if that were the case one wonders why the court had in fact made that statement. The court decided that since the coming into force of the HRA 1998, the prescription in *Nazari* that sentencing judges should have regard to the effect of deportation on the offender's family should be taken as a requirement to consider the Article 8 rights of his family. But since the criminal court was ill-equipped to undertake a full investigation into the offender's situation in the country of origin if deported, there was now no need for a sentencing court to consider the Convention rights of an offender at all or the wider impact of his deportation on other parties when deciding to recommend deportation.[85] This could be left to the Secretary of State and the immigration tribunal on any appeal.

So, at this point, despite the introduction of an appeal based on Article 8 ECHR, the government had succeeded in maintaining executive control of immigration decision-making and, in fact, it had led to the higher courts adopting a more deferential approach. An appeal existed where an individual facing removal could raise their human rights. This provided a public forum to channel representations, petitions and concerns about the removal of individuals from the UK and allowed the government to assert that cases were subject to an independent legal process. However, in practice only very rarely would the court overturn a decision on Article 8 grounds and once dismissed it could be asserted that the decision was just and met international human rights standards.

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[81] Ibid [16] (emphasis added).

[82] Carmona v R [2006] EWCA Crim 508.

[83] [1980] 1 WLR 1366.

[84] (n82) [10].

[85] Ibid [15-22]. See also *DA (Colombia) v SSHD* [2009] EWCA Civ 682.

2007-2012: A Crack appears - Progressive Developments in Article 8 Caselaw

Between 2007 and 2012 a series of progressive judgments by the House of Lords/Supreme Court expanded the role of the tribunal in making decisions relating to Article 8, mainly in relation to family life. The first of these was *Huang*[86] which confirmed the Court of Appeal's decision that the tribunal must make its own decision on proportionality, explicitly rejecting earlier authorities. However, the House of Lords went further in rejecting the idea that Article 8 claims would only succeed in exceptional cases. The Lords stated that there could be no assumption that the immigration rules, which are not the product of active debate in Parliament, correctly reflect the balance between private rights and the public interest.[87] Instead *'an applicant's failure to qualify under the Rules is for present purposes the point at which to begin, not end, consideration of the claim under article 8'.*[88]

In contrast to the lower courts the House of Lords emphasised the importance of the Strasbourg case law *'in illuminating the **core value** which article 8 exists to protect',* with the Lords stating:

> *Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives.*[89]

This was a prelude to three House of Lords judgments[90] overturning restrictive Court of Appeal decisions which significantly shifted the tribunal's approach to Article 8 claims, arguably bringing the approach more in line with that of the Strasbourg Court's more recent decisions.[91] These recognised that the impact of a decision on all relevant family members must be taken into account in an appeal to the tribunal on human rights grounds, rather than

[86] *Huang v SSHD* [2007] UKHL 11.

[87] Ibid [16].

[88] Ibid [6].

[89] Ibid [18] (emphasis added).

[90] *Chikwamba v SSHD* [2008] UKHL 40; *Beoku-Betts v SSHD* [2008] UKHL39; *EB (Kosovo) v SSHD* [2008] UKHL 41.

[91] Ian Macdonald & Ronan Toal, *Immigration Law and Practice 8th edition* (Butterworths Law 2012) [8.91]

just a focus on the rights of the appellant.[92] The focus was now on whether removal of a partner or parent would be reasonable when taking into account all the circumstances, rather than on a search for insurmountable obstacles to family life.[93] Subsequent Supreme Court caselaw,[94] and a number of important Court of Appeal decisions[95] also drew on the unincorporated UN Convention on the Rights of the Child (UNCRC) and emphasised the importance of considering the best interests of any children affected by an immigration decision.

In hindsight this period marked a highpoint for those supporting migrants in relying on the courts to provide protection against executive immigration decisions. Whilst this more liberal approach primarily focused on the right to family life, arguments based on private life were increasingly made by those with established residence facing removal or deportation.

Removal: Private Life Cases

There are several different scenarios in which individuals have sought to rely on Article 8 private life to resist a decision to remove them:

Those with lawful leave subject to 'near-miss' immigration decisions

During this period the immigration rules provided for indefinite leave to be obtained after 10 years' continuous lawful residence subject to a consideration of general desirability. One area where Article 8 began to be increasingly argued by lawyers remained in situations where individuals had established themselves over a number of years' lawful residence but then found themselves unable to meet a requirement of the increasingly complex points-based system, often by a seemingly insignificant margin, or due to the fact that the requirement had changed at short notice preventing them from continuing their employment or studies.

This led to a series of reported cases, often by those who had arrived as students or workers in which individuals sought to present themselves as having a well-established private life in

[92] '*It ... risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others...'* Baroness Hale. *Beoku-Betts* (n90) [4].

[93] Lord Bingham *EB Kosovo* (n90) [12].

[94] *ZH (Tanzania) v SSHD* [2011] UKSC 4.

[95] E.g., *VW (Uganda) v SSHD* [2009] EWCA Civ 5; *MA (Pakistan) v SSHD* [2009] EWCA Civ 953.

the UK which had been interrupted by overly bureaucratic decision-making. Caselaw has established that for those with limited leave there is no common law legitimate expectation of further leave even where the immigration rules suddenly change at short notice, unless there was a clear and ambiguous promise devoid of relevant qualification,[96] which the Home Office is now careful not to give. Yet arguments were made that those with established residence, had an underlying right to respect for private life under Article 8 ECHR, which should not be taken away by a sudden unforeseen change of government policy. So a student who was not able to complete a course due to a sudden change in the rules had her appeal allowed on the basis of her established private life.[97] The tribunal provided guidance that, *'social ties and relationships (depending upon their duration and richness) formed during periods of study or work are capable of constituting 'private life' for the purposes of Art 8'*[98] and *'when determining the issue of proportionality in such cases, it will always be important to evaluate the extent of the individual's social ties and relationships in the UK'.*[99] This raised the possibility that individuals could succeed in founding a case to remain based on a lawfully established private life, even when they could no longer meet the strict immigration rules.

In one revealing case[100] a judge turned to Article 8 private life to allow an appeal out of despair at the lack of discretion in the immigration rules which had created an immigration system which now lacked common sense and humanity and was leading to what he perceived to be obvious injustices:

> *The injustice in this case arises from Rules in which any opportunity for discretion has been removed. This kind of situation cries out for somebody to take a sensible and commonsense approach, looking at the overall aim of the Rule in question. …. however, any opportunity to exercise discretion has been removed at all stages of the system.…Only in very rare cases where an MP intervenes and the matter reaches a very high level is there some chance of discretion being exercised in a situation like this. In*

[96] *Mehmood (legitimate expectation*) [2014] UKUT 00469 (IAC).

[97] *CDS (PBS: "available": Article 8) Brazil* [2010] UKUT 00305 (IAC). See also *OA (Nigeria) v SSHD* [2008] EWCA Civ 82 for a similar situation.

[98] *MM (Tier 1 PSW; Art 8; "private life") Zimbabwe* [2009] UKAIT 00037, headnote 1.

[99] Ibid, headnote 3.

[100] *BN (Article 8 – Post Study Work) Kenya* [2010] UKUT 162 (IAC) [3].

addition I have no power to introduce a discretionary element in the decision under the Immigration Rules, where there is none. For a number of years recommendations by Immigration Judges, where appeals have been dismissed, have not been followed as a matter of policy. Dismissing the appeal under the Immigration Rules with a recommendation that discretion should be exercised to depart from the Rules in this particular case would therefore be unlikely to make any difference.

….What is needed in any decision-making process is for a person to be able to exercise discretion in a sensible way in the application of any set of rules to the facts of individual cases. If the initial decision-maker is not allowed to do it, neither is the Judge at appeal, neither is a decision-maker looking at the judge's recommendation, and neither is a decision-maker looking at a further application, then the only room for common sense to return is through a few very senior civil servants or Ministers, or a High Court Judge. Most people cannot hope to get their cases considered at this level, and much unfairness will result in individual cases.

25. It is for these reasons that I have decided, after not a little hesitation to turn to Article 8 as the only way out of this dilemma, and the only way to produce a fair and humane result. …The issue here is that all applicants have the right to be treated as people, and any decision-making must retain a certain amount of common sense, humanity, and flexibility in order to recognise that those affected by the decisions made are human beings, and have the right to be respected as such.

This case is very reminiscent of the way that judges in the 1930s Deportation Advisory Committee were prepared to overturn executive decisions, based on its perception of unfairness. It is a rare recognition of the futility of the immigration appeal process. In the present case, the Upper Tribunal overturned the adjudicator's approach holding that it was not the role of the judge to use human rights law in order to make up for the loss of judicial discretion and the inflexible nature of the immigration system. This line of caselaw was ultimately considered by the Supreme Court in 2013[101] which concluded that Article 8 is not

[101] *Patel and Others v SSHD* [2013] UKSC 72 [57].

a general dispensing power to compensate for a lack of judicial discretion in appeals that narrowly missed an immigration rule.

Unlawfully resident long residence cases

During this period the immigration rules permitted those with 14 years' unlawful residence to apply for indefinite leave to remain, subject to a general discretionary assessment of the desirability of granting leave, taking into account the list of factors contained in the former deportation rule.[102] Those who fell short of this may nevertheless try to persuade a tribunal to grant them leave based on Article 8 private life. Appellants are therefore required to put forward their account of unlawful residence, providing evidence of the continuity of residence and material going toward their worthiness for what is effectively a form of amnesty.

A number of cases considered by the tribunal in this period concerned the Article 8 rights of those with less than 14 years' residence who arrived as asylum seekers, sometimes as asylum seeking children, but did not receive a final refusal until many years after their arrival due to systemic problems with the asylum process, during which time they had established strong ties in their community. As observed above, many of the early cases reported by the Upper Tribunal were dismissed, often overturning an adjudicator who had proved too sympathetic to the circumstances of the appellant. The issue was considered by the House of Lords in the case of *EB Kosovo*[103] which looked specifically at the relevance of government delay in a case where an unaccompanied minor from Kosovo had become integrated into the community, whilst waiting for a decision on his asylum claim. Had he received a prompt decision he would have qualified for leave enabling him to apply for further leave with his partner, but instead he lost out. Lord Bingham held that delay was relevant for a number of reasons. Firstly, the passage of time strengthens a private or family life; secondly, it weakens the argument that less weight should be given to the family and private life of individuals with a precarious legal status (in this case temporary admission):

> *An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time… A relationship so entered into may well be imbued with a*

[102] Rule 276A-D brought in from 1 April 2003 (formerly this had been a policy concession). See Ch 5, 143 for the list of deportation factors.

[103] *EB (Kosovo) v SSHD* [2008] UKHL 41.

> *sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.* [104]

Here there is a recognition that over time, an individual's sense of precariousness naturally decreases as they become more integrated into the place they are living. This leaves open the possibility that in cases of long residence brought about by delay, an individual may succeed in establishing that their removal would now be disproportionate.

In several cases appellants also sought to 'bring the community into the court' in order to make out a claim that they are worthy of remaining. The Court of Appeal[105] reviewed the question of whether a person's value to their local community is relevant when considering an Article 8 appeal. Representatives for the appellants sought to rely on the pre-HRA case of *Bakhtaur Singh* concerning the wider exercise of discretion under the deportation rules. The Secretary of State sought to counter this by arguing that the rights conferred on individuals under the European Convention are not a reward for good behaviour or for their contribution to society but are intrinsic, and so a person should not get less protection for his human rights because he is of less value to the community.[106] Relying on the recent Supreme Court cases and Strasbourg authority, the court accepted that the Article 8 assessment required a broad range of factors to be considered and therefore in principle there was no reason why value to the local community should be excluded. The public interest in removal may be reduced if the local community would lose a person of value, though the court added that it expected this would only make a difference in relatively few instances where the positive contribution to this country was very significant. In this case the court carefully distinguishes the issue it is deciding from previous Court of Appeal authorities though it is arguable it in fact departs from them to enlarge the ambit of what can be taken into account by judges when considering claims based on private life. In the lead judgment Sir David Keene stated that he would be

[104] Ibid [15].

[105] *UE (Nigeria) v SSHD* [2010] EWCA Civ 975.

[106] Ibid [11].

surprised if the Article 8 assessment is a narrower exercise than what was formerly required as a discretionary exercise (although that is exactly what cases until then had established). Richards LJ in his shorter concurring judgment is more cautious, accepting that the Article 8 assessment is a narrower, *'more specific and targeted exercise'* than an assessment under the old deportation rules. Therefore, for him *'contribution to the community is not a freestanding or stand-alone factor to be put into the Article 8 balance…'*.[107] This is of importance as subsequently his approach has been preferred.[108]

However, what is not explored in any detail here is the concept of *'value to a community'* and how this is to be evaluated. There is no further discussion whether this is conceived of in primarily economic terms, or whether other ways in which a local community benefits from an individual's presence are to be taken into account. Thus by 2012 there was a certain amount of uncertainty in the caselaw, though it left some room for appellants with established residence to bring the community into the courtroom in order to seek to convince a sympathetic judge that they had become well integrated and were of 'value' to a community. In cases where individuals had been subject to government delays, or substantially met the 'spirit' of the rules, these factors could be relevant to the weight to be given to their removal. The author is aware of numerous unreported cases during this period in which a young adult who arrived as a child, was able with the support of his local community (school friends, foster carer, past teachers, community workers) to persuade a sympathetic judge to allow an appeal on Article 8 private life grounds.

Criminal Deportation Cases

The period from 2007 saw the introduction of automatic deportation and thus the tribunal needing to deal with individuals with many years' residence becoming subject to deportation. A review of the key caselaw shows that the more liberal family life Article 8 cases had less impact in deportation cases where there was still a strong degree of deference to the executive, particularly now that the legislature had mandated that deportation is in the public interest for those with a 12-month sentence. However, it is evident that as more cases of

[107] See also *RU (Sri Lanka) v SSHD* [2008] EWCA Civ 753.

[108] See *Thakrar (Cart JR; Art 8: value to community)* [2018] UKUT 00336 discussed in Ch9, 251.

individuals with very long residence and strong ties became referred for automatic deportation, the number of successful appeals increased. In 2007/08 there were 402 deportation appeals determined with a success rate of 24 per cent. By 2013/14 there were 1,797 determined with a success rate of 37 per cent.[109] This was later to be used by the government as evidence that judges were taking an overly liberal approach to the application of Article 8 ECHR. It is questionable though whether this period actually saw the development of a more liberal approach in deportation appeals. It is arguable that the increase in allowed appeals reflects the fact that, following the introduction of automatic deportation, judges were applying the existing approach to more extreme facts. It is clear though that the caselaw was more liberal than that of recent years.

In *RG*[110] the tribunal held that when considering the Article 8 rights of someone lawfully resident who was subject to automatic deportation there was no need to find that a case was *'"exceptional" or belongs to "a small minority"',* which was effectively an acknowledgement that it was entirely appropriate for many appeals to succeed if the executive was now pursuing deportation in any case involving a 12-month sentence. The tribunal attempted to apply the learning from the ECtHR case of *Maslov*[111] in a number of appeals concerning those with very long residence from an early age. In the case of *Masih*[112] the tribunal attempted to provide a single authority summarising the approach that should be taken in deportation cases. It involved a 24-year-old man who arrived in the UK as a 10-year-old and had committed serious offences at the age of 21 leading to a 50-month prison sentence. Even though he had been considered to pose a high risk of reoffending, the First-Tier Tribunal acknowledged his progress in prison and allowed the appeal drawing on the principle in *Maslov* that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the country, very serious reasons are required to justify expulsion. The Upper Tribunal held that the decision was open to the panel. Similarly, HK[113] concerned

[109] Ministry of Justice, Tribunal Statistics Quarterly: Jan to March 2019; Main Tables FIA3, Published 13 June 2019 https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2019. Accessed 04/10/20.

[110] *RG (Automatic deport – Section 33(2)(a) exception) Nepal* [2010] UKUT 273 (IAC) [41].

[111] (n46).

[112] *Masih (deportation – public interest – basic principles) Pakistan* [2012] UKUT 00046 (IAC)

[113] *SSHD v HK (Turkey)* [2010] EWCA Civ 583.

a 22-year-old of Turkish origin who arrived in the UK aged six and remained living with his family. He faced deportation following a two-year sentence after taking part in a revenge attack on a person he believed had murdered his friend. His appeal was allowed and upheld by the Court of Appeal who following the case of Maslov noted that, *'Fifteen years spent here as an adult are not the same as fifteen years spent here as a child. The difference between the two may amount to the difference between enforced return and exile'.*[114]

MK[115] came to the UK at the age of three and faced deportation at the age of 26, following a four-year sentence for drugs offences. In this case the tribunal was unimpressed with the appellant's achievements in the UK and not convinced that he would not reoffend but concluded that his length of time in the UK and lack of connections with Gambia meant the appeal should succeed.[116]

BK[117] arrived as a visitor aged 10 and had spent the majority of his life in the UK with no leave to remain. He had suffered a history of domestic violence and childhood bullying and at the age of 16 committed a series of drug-related offences, described by the sentencing judge as *'…unbelievably dreadful, wicked behaviour…'.*[118] A panel of the former Asylum and Immigration Tribunal (AIT) took note of previous authority concerning the need to show public revulsion towards the treatment of 'foreign criminals', but stated:

> *…although he is a foreign criminal within section 32 of the 2007 Act* ***we do not consider that any reasonable person, viewing the facts of his case objectively,*** *when considering the needs identified in N (Kenya) to deter foreign criminals from committing serious crimes and to build confidence that foreign nationals who have committed serious crimes are dealt with with appropriate severity****, would realistically consider Mr Kofi to be a foreign criminal (in broad terms, using those words in their everyday usage, as opposed to the statutory definition).*** *For all practical purposes,*

[114] Ibid [35] per Sedley LJ.

[115] *MK (deportation – foreign criminal – public interest) Gambia* [2010] UKUT 281 (IAC).

[116] See also *RG (Automatic deport – Section 33(2)(a) exception) Nepal* [2010] UKUT 273 (IAC); *KD (Ivory Coast) v SSHD* [2009] EWCA Civ 934 for similar cases of successful deportation appeals involving private life.

[117] *BK (Deportation – s 33 "exception" UKBA 2007 – public interest) Ghana* [2010] UKUT 328 (IAC).

[118] Ibid [5].

> *we conclude Mr Kofi is more properly categorised, and* ***would be seen by all reasonable minded persons considering those needs, as a homegrown criminal.***[119]

Therefore, they gave less weight to the need to show society's revulsion to him as a foreign criminal. The decision was upheld in the UT by a panel led by Sedley LJ on the basis that the AIT panel was entitled to reach this conclusion. The interesting aspect of this case is that the AIT uses quite strong language to downplay the focus on the appellant's nominal 'foreignness' and instead focuses more on the reality of his life growing up in the UK.[120] The state's narrative is that the appellant is objectively 'foreign' and hence deportable. However, having heard the appellant give evidence, the AIT view him as someone who, despite his criminality, essentially belongs in the UK. The appellant has been able to use the space provided by the tribunal to obtain from the tribunal judges an intersubjective recognition of his sense of belonging in the UK. It will be seen in Chapter 9 that there has subsequently been a hardening of approach which emphasises the 'foreignness' of those subject to automatic deportation even after years of residence from a young age.

In these cases, the tribunal can also be seen as trying to assess the individual's moral character through taking into account the views of sentencing judges and probation officers on the individual's progress in rehabilitation and propensity to reoffend. In the case of BK, *'They also noted that the sentencing judge had been satisfied that there was another side to the Respondent other than that shown by the offences, and that he was a young man "with good in him"'.*[121] Therefore, appellants are able to try to put forward a narrative of themselves as well-integrated, reformed characters with a future in the UK, through obtaining the evidence of supporting witnesses, references from probation or prison officers, probation reports and other evidence of achievements. Judges in turn are involved in assessing whether there is the possibility of redemption or whether an individual has irreparably broken their ties of membership and therefore deserves what effectively amounts to exile from their community.

[119] Ibid [14] (emphasis added).

[120] This reference to 'reasonable minded persons' is reminiscent of the judges in the criminal courts in the 1980s who adopted a 'common sense' approach to the question of deportation (See discussion Ch 5, 151-153).

[121] Ibid [21].

The case of Bah[122] is an example of someone who was unable to achieve this despite his 18 years' residence from the age of seven. In this case the tribunal considered that the very serious reasons to expel him:

> *…range from his educational failure, long term unemployment, association with criminals, criminal convictions, proximity to shootings, the exposure of his family to gang culture and its implications, contempt for United Kingdom criminal and immigration law and a clear statement of refusal to accept any form of assistance that might in any way improve his private and family life.*[123]

So, by 2012, whilst judges were bound to respect the strong public interest in deportation of those defined as 'foreign criminals', there are a number of examples of judges refusing to respect the executive's judgement when faced by the potential deportation of individuals with very long residence, argued on the basis of Article 8 private life. In such cases judges were willing and able to exercise their own discretion in weighing the competing factors when reaching a decision on whether the appellant passed the moral boundary for continued belonging to the community.

Conclusion: Article 8: *'A legal tool to redesign national immigration law'*?

This chapter has shown how the rise of human rights appeals has coincided with a period during which non-citizens' security of residence has been reduced. As both main parties have claimed a democratic mandate to pursue restrictive immigration legislation, lawyers supporting migrants have increasingly turned to and relied on the quasi-constitutional protection of the Human Rights Act to protect non-citizens when the political process has failed to do so. Claims to remain have been pursued through the prism of Article 8.

Initially Article 8 was applied restrictively in a way that seemed to narrow the focus of the deportation hearing and increased the deference to the executive as judges were conscious not to become involved in making political decisions. It thus reduced the ability of lawyers to 'bring the community into the courtroom' and establish a claim based on belonging. Early

[122] *Bah (EO (Turkey) – liability to deport)* [2012] UKUT 00196(IAC).

[123] Ibid [84].

caselaw effectively certified that the general immigration system was human rights compliant and that Article 8 would only be breached in an 'exceptional case'.

However, this approach was to shift and in cases involving established family life, a series of expansive judgments began to allow more individuals to overturn decisions to remove. Whilst in general the tribunal maintained a reluctance to accede to human rights arguments based on private life, even here some cracks emerged such that individuals could seek to put forward a claim that they were well-integrated and of value to the community, and at the same time seek to argue that where there had been a delay in handling their claim to remain, less weight should be attached to the public interest in their removal. In deportation cases, when faced by individuals who had grown up in the UK and been convicted of relatively minor crimes, judges increasingly refused to accept that their offending necessitated their exile. By now it was being plausibly argued that there was an emerging human right to security of residence in a country where one does not possess nationality, including regularisation of unlawful status.[124] Article 8 had provided *'immigration lawyers and national courts with a legal tool to redesign national immigration law'*.[125]

The next chapter will consider the subsequent backlash from the UK government against this perceived judicial activism, which sought to restore the pre-existing position.

[124] Daniel Thym, 'Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR' in Ruth Rubio-Marin (ed) *Human Rights and Immigration* (OUP, 2014).

[125] Ibid 129.

Chapter 9: Taming the Tribunal: Human Rights Appeals in the Tribunal: 2012-2019

> *If judicial restraint is not properly maintained in this area, there is a danger that the public's perception of human rights law will be adversely affected.*[1]
>
> - Upper Tribunal (Immigration and Asylum Chamber) President Mr Justice Lane.

This chapter considers the contemporary approach taken by the tribunal to appeals by those with long residence facing removal or deportation. It starts by considering recent legislation which directs the approach to be taken by tribunal judges to claims to remain based on human rights. I argue that the political debate over the 2012 changes and the IA 2014 Act was limited and an opportunity missed to consider the wider social consequences of the current approach to deportation. It then considers recent caselaw, focusing on the interpretation of two concepts that are applied when considering such claims – 'precariousness' and 'social and cultural integration'. I consider the role these concepts play in mediating the claims of belonging by those resisting deportation. Judicial discourse can operate to naturalise the status of non-citizens as 'precarious', severely curtailing the ability of individuals to advance claims of belonging. The social and cultural integration test has allowed judges to construct a particular ideal of the worthy citizen which many of those who wish to remain cannot reach.

I conclude that whilst lawyers initially seized on Article 8 ECHR as a means of using the law to defend increasingly insecure non-citizen residents, human rights law has proved to be compatible with an immigration system that has normalised deportation and institutionalised precariousness.

The 2012 Immigration Rules: A Response to 'Judicial Activism'

In 2012, as the government introduced a strict minimum income requirement for those sponsoring non-citizen family members, it also attempted to incorporate its interpretation of Article 8 ECHR into the immigration rules. The government claimed that Article 8 was being interpreted inconsistently by the courts and *'driving a coach and horses through our*

[1] Tribunal President Mr Justice Lane, *Thakrar (Cart JR; Art 8: value to community)* [2018] UKUT 00336 (IAC) [115].

immigration system'.[2] Theresa May claimed in a speech to her party conference that Article 8 was being perverted and that judges did not understand it was a qualified right, giving the example of a judge who had allowed an appeal from *'an illegal immigrant who had a pet cat'*.[3] This was in a context in which tribunal judges were already being named and shamed in the press for allowing deportation appeals of foreign national offenders.[4] A more justified criticism is that the wide discretion available to tribunal judges was resulting in unpredictable and inconsistent outcomes.[5] Ultimately this move was a backlash by the executive against perceived judicial activism and expansive judgments such as *EB Kosovo*[6] and *Huang*.[7] In *Huang* the Lords had said that the immigration rules could not be assumed to be compliant with the ECHR, particularly since they were not subject to active parliamentary debate. Therefore '*…an applicant's failure to qualify under the Rules is for present purposes the point at which to begin, not end, consideration of the claim under article 8'*.[8] The government claimed that the new rules were a direct response and would remove the need for judges to assess proportionality on a case by case basis.[9] This backlash is similar to government's response in the 1980s to perceived judicial activism when it passed the Immigration Act 1988 which limited judicial discretion to allow appeals by overstayers.

The 2012 rules purported to set out Parliament's position on where the balance should be struck between the right to respect for private and family life and the public interest in safeguarding the economic well-being of the UK by controlling immigration.[10] At the same time it was said that they would fully reflect the factors which can weigh for or against an

[2] Speech to conference, 04/10/11. Available at http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full, accessed 04/10/20.

[3] Ibid. This was of course untrue, as the Justice Secretary Kenneth Clarke subsequently acknowledged. The solicitor involved in the case reported that the appeal was actually conceded by the Home Office on the basis that they had incorrectly applied their own policy and any reference to the couple's pet cat was incidental.

[4] See 'End the Human Rights Farce' campaign, The Sunday Telegraph https://www.telegraph.co.uk/comment/telegraph-view/10022146/Rights-that-make-a-mockery-ofourcourts.html accessed 04/10/20.

[5] See Home Office, Immigration Rules on Family and Private Life (HC 194) Grounds of Compatibility with Article 8 of the European Convention on Human Rights: Statement by the Home Office (June 2012) [11].

[6] *EB (Kosovo) v SSHD* [2008] UKHL 41.

[7] *Huang v SSHD* [2007] UKHL 11.

[8] Ibid [6].

[9] Home Office, Statement of Intent: Family Migration (June 2012).

[10] Ibid [33].

Article 8 claim.[11] The rules pose some obvious difficulties. Firstly they introduce separate rules for private and family life which runs counter to the established holistic approach which considers all aspects of private and family life of all affected parties.[12] Secondly they introduce bright-line rules, contrary to the dicta of Lord Bingham in *EB Kosovo* that there can be no substitute for a careful and informed evaluation by a judge of all the facts in a particular case.[13] For example, the rule on private life requires a person over 18 to have accumulated 20 years' residence in order to be granted leave, with no room for considering other compelling and case specific aspects of private life. Thirdly, by introducing legal tests which had been disavowed by earlier domestic caselaw, the rules appeared to be an attempt to overrule this caselaw in favour of a more restrictive interpretation.

The government introduced a motion in Parliament, recognising Article 8 as a qualified right and endorsing the Article 8 rules, in the hope that by obtaining positive approval the rules would gain democratic legitimacy.[14] Importantly, there was not a full debate on the content of the rules and several MPs were critical of the manner in which the motion was proposed.[15] The Home Secretary framed the exercise as a request from the judiciary that Parliament should make its views clear. This debate would provide clear guidance: in future the judge's role would be to review the proportionality of the Article 8 rules, rather than considering proportionality in each individual case.[16] Many on the opposition benches supported the government including the former Home Secretary Jack Straw.[17] The shadow Home Secretary even suggested that primary legislation should be enacted to override caselaw and that Labour would assist.[18] Much of the debate focused on Article 8 being used by foreign criminals, a group that MPs are reluctant to defend, with examples demonstrating that the judiciary were out-of-step with public opinion.[19] The Home Secretary stated that if the

[11] Ibid [7].

[12] As per *Beoku-Betts v SSHD* [2008] UKHL39.

[13] (n6) [13].

[14] Hansard HC vol 546 cols 760-824 (19 June 2012).

[15] E.g., John McDonnell and Peter Wishart on the appropriateness of this process, where many MPs admitted they had not even read the immigration rules in question.

[16] Home Secretary Theresa May (n14) col 762-3.

[17] Jack Straw MP (n14) col 762.

[18] Yvette Cooper MP, Hansard HC vol 546 col 50 (11 June 2012).

[19] Chris Byant MP (n14) col 815.

opposition believed *'that fewer foreign criminals should be allowed to stay in this country on the basis of article 8, she should support the motion and give a clear message to the courts'.*[20] The increased success rate of deportation appeals[21] on Article 8 grounds was provided as evidence of the tribunal taking an increasingly liberal approach, though this was more likely to have been the result of the Home Office attempting to deport in more extreme cases, where prior to the introduction of automatic deportation, discretion would have been exercised against deportation. Chris Bryant subsequently stated for Labour, *'I want to make it absolutely clear 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',*[22] which was not the case. There was little discussion of the consequences for non-citizens who were not criminals.[23] Those who have overstayed their leave or been refused further leave, even if incorrectly, were easily assimilated with foreign criminals as rule breaking individuals.

There was little analysis of the statement that *'where a foreign national receives a 12-month sentence, deportation would normally be proportionate'* and whether this was appropriate for non-citizens born or raised in the UK. The tone had shifted from the 2007 debates about automatic deportation where there was a general acknowledgment that there would be cases of long-term residents where deportation was inappropriate.[24] The motion was passed without a vote.

The Courts Respond: The First Wave of Caselaw

Since the rules are not primary legislation and not subject to amendment in Parliament, this could only have a limited legal effect and it is unsurprising that the courts would not accede to the initial Home Office argument that the executive's immigration rules now completely encapsulated Article 8. The tribunal's first response to the 2012 rules set out that that the

[20] Theresa May (n14) col 776.

[21] The number of successful deportation appeals rose from 24% in 2007/08 to 33% in 2011/12.

[22] Chris Byant MP (n14) col 819.

[23] Peter Wishart ((n14) cols 789-793) was one of very few MPs to draw attention to the fact that behind the tabloid headlines, were cases of 'normal British families' relying on Article 8 to preserve their family life.

[24] Theresa May's response to the question of whether it would be proportionate to deport a man resident for 60 years from childhood following a 12-month sentence on the basis that he was 'foreign' was that he shouldn't have committed a crime. Hansard HC vol 546 col 50 (11 June 2012).

courts must now consider two stages[25] – first apply the rules, and if an individual did not qualify under the rules, they must go outside the rules and consider proportionality, drawing on existing Article 8 caselaw. A series of early reported cases by the new tribunal President Blake were critical of the government's approach, explicitly rejecting attempts to introduce tests that appeared to contravene established caselaw.[26] The Court of Appeal modified this approach slightly, deciding that a two-stage approach was necessary where the rules prevented full consideration of Article 8 caselaw, but where the rules included a general clause that allowed for exceptional circumstances to be considered this was sufficient to allow for a consideration of proportionality within the rules. It also cautioned that greater respect should be given to the immigration rules as a statement of the government's position on proportionality.[27] The government began to concede in the higher courts that the rules could not overrule existing caselaw.[28] Caselaw on Article 8 proliferated as judges struggled to apply it, resulting in successful challenges by both appellants and respondents and an excessively convoluted approach.[29] In these appeals, what was ultimately at stake was whether an individual should be permitted to remain part of the community they had been living in, but now they were subject to increasingly complex and convoluted legal tests. This escalation in complexity coincided with the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in April 2013 removing legal aid for most Article 8 appeals.

Finally, a series of Supreme Court decisions[30] concluded that the rules were an acceptable way of attempting to incorporate Article 8 and of demonstrating the executive's view of

[25] *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC). MF could not succeed under either the private life or family life rules, but when considered all aspects in accordance with the caselaw the tribunal found in his favour.

[26] In particular *Izuazu (Article 8 – new rules)* [2013] UKUT 00045 (IAC) in which it was stated: *'Parliament has not altered the legal duty of the judge determining appeals to decide on proportionality for himself or herself. There can be no presumption that the Rules will normally be conclusive of the Article 8 assessment or that a fact-sensitive inquiry is normally not needed. The more the new Rules restrict otherwise relevant and weighty considerations from being taken into account, the less regard will be had to them in the assessment of proportionality [3]'.* See also *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 00060 (IAC) which involved a man who had been resident in the UK for 21 years since the age of 6. Blake ruled that the tribunal had failed to consider the case ECtHR case of *Maslov* and the importance of the appellant's private life.

[27] *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192.

[28] Ibid [34-39].

[29] For a period of time, following the case of *Gulshan (Article 8 – new Rules – correct approach)* [2013] UKUT 00640 (IAC) there was an interim legal test of 'arguably good grounds', necessary in order to get to stage 2 of the Article 8 consideration. It was subsequently disavowed, but the author has experience of numerous cases caught up in lengthy litigation as a result.

[30] *R (MM(Lebanon) & Ors) v SSHD* [2017] UKSC 10; *R (Agyarko and Ikuga) v SSHD* [2017] UKSC 11 and *Hesham Ali (Iraq) v SSHD* [2016] UKSC 60.

where the public interest lay[31] but tribunals would still need to go beyond them and consider the proportionality of removal, applying the necessary caselaw where there were compelling factors that the rules did not take into account. In the meantime, dissatisfied with the tribunal's initial response the government had brought in primary legislation to address their concerns over Article 8.

The Government Responds: The 2014 Public Interest Statutory Considerations and the Second Wave of Caselaw

The Article 8 statutory considerations introduced by the 2014 Act were a direct challenge to the perceived failure of the courts to respect 'democratically approved' immigration rules. In February 2013, the Home Secretary denounced the judges' approach.[32] She argued against the '*abuse of Article 8'* stating that:

> *Some judges have still chosen to ignore the will of Parliament and go on putting the law on the side of foreign criminals instead of the public. I am sending a very clear message to those judges: Parliament wants a law on the people's side, the public want a law on the people's side, and this Government will put the law on the people's side once and for all.*[33]

The primary legislation, enacted as an amendment to the Nationality Immigration and Asylum Act 2002, sets out factors that judges must 'have regard to' when considering the public interest in removal. Section 117B applies to all cases, whilst section 117C applies where a person is defined as a 'foreign criminal'. The statutory considerations gave the legislature for the first time a proper chance to decide how UK deportation law should be applied, where the boundaries of membership should lie and to approve the government's desire to shift power back from the judiciary to the executive. Yet the parliamentary debates reveal that there was a limited understanding of the exact consequences of attempts to qualify the approach taken by judges to the application of an ECHR right.

[31] Though with a strong dissenting judgment from Lord Kerr in *Hesham Ali.*

[32] Theresa May, 'It's MY job to deport foreigners who commit serious crime - and I'll fight any judge who stands in my way, says Home Secretary', Mail on Sunday, 16/03/13. www.dailymail.co.uk/debate/article-2279828/Its-MY-job-deport-foreigners-commit-crime--Ill-fight-judge-stands-way-says-Home-Secretary.html accessed 04/10/20.

[33] Theresa May Hansard HC vol 569 col 162 (22 Oct 2013).

Firstly, there was limited opposition to the Bill - the Liberal Democrats were then in coalition with the Conservatives and Labour did not oppose the Bill. The shadow Home Secretary Yvette Cooper criticised the Bill for not going far enough, arguing that stronger controls were needed.[34] Since no party wanted to be portrayed as soft on foreign criminals, it is unsurprising there was little discussion over the morality or wider social consequences of deporting individuals resident since birth or early childhood.[35] Similarly both parties agreed on the need to combat the presence of 'illegal immigrants' without reflecting that they as lawmakers are ultimately responsible for setting the parameters that create and perpetuate illegality. Opposition was largely confined to Caroline Lucas, the SNP and backbenchers – just 18 MPs opposing the first reading,[36] 16 opposing the third reading and the opposition abstaining.[37]

Secondly, the Bill had a truncated timetable with only a few MPs objecting to the limited opportunity to scrutinise provisions, including numerous late government amendments.[38] There was a lack of concern for the detail of the Article 8 changes. One point is the concept of 'precariousness', which, once attached to a migrant, mandates a court to give little weight to their private life. It is by no means clear that MPs understood that the term 'precarious' could be applied to individuals with decades of lawful residence in the UK and those on lawful routes to settlement. The Home Office explanatory notes,[39] accompanying the Bill did not discuss in detail the likely impact of the Article 8 changes. A Home Office memorandum on the European Convention of Human Rights argued for consistency with Strasbourg caselaw and noted that short-term lawful status would be considered precarious.[40] Reviewing the proposed legislation, the Joint Committee of Human Rights were *'uneasy about a statutory provision which purports to tell courts and tribunals that "little weight" should be given to a*

[34] Yvette Cooper Hansard HC vol 569 col 168 (22 Oct 2013).

[35] Labour's Shadow Minister of State for the Home Department questioned *'whether there are further measures that we could jointly take to tackle the curse of foreign criminals not being deported'.* David Hanson MP, Hansard HC vol 574 col 1062 (30 Jan 2014).

[36] Hansard HC vol 569 col 257 (22 Oct 2013).

[37] Hansard HC vol 574 col 1130 (30 Jan 2014).

[38] See Chris Bryant Hansard HC vol 574 col 1017 (30 Jan 2014) & Caroline Lucas MP col 1024.

[39] Immigration Act 2014: Explanatory Notes http://www.legislation.gov.uk/ukpga/2014/22/notes/contents accessed 04/10/20.

[40] Home Office Immigration Bill, European Convention of Human Rights, Memorandum (October 2013) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249270/Immigration_Bill_-_ECHR_memo.pdf accessed 04/10/20.

particular consideration in such a judicial balancing exercise' ,[41] but they did not consider the ambit of the term precarious. In the Commons public committee scrutiny of the bill, no attention was given to its meaning.[42] The appellant in *MF*[43] was described as having a precarious status, yet he had never had a lawful status, so this was not a good example of the wider application of this concept which was eventually determined to include all lawfully resident migrants not yet granted indefinite leave to remain.

In the Lords debates there was more thoughtful consideration of how individuals become defined as illegal, and attention focused on whether the deportation tests were compatible with the consideration of a child's best interests.[44] The lack of definition of the term precarious was raised, and it was described by the government as covering those temporarily in the country to work or study. However, it was suggested that as it was difficult to define in legislation, the courts would define it in accordance with Strasbourg caselaw.[45] 'Social and cultural integration' was also problematised by Lord Pannick who questioned how this concept was to be interpreted:

> *Can the Minister assist the Committee on what this concept means? Does the Muslim man living in Birmingham whose social and cultural life is in the Muslim community, and does the Jewish woman living in Hendon in the Jewish community, satisfy this criterion? Are they socially and culturally integrated in the United Kingdom?* [46]

He received no answer and this was not debated further. No consideration was given to the wording of this test in the House of Commons debates, or the way in which it might be construed.

Ultimately the public interest considerations were passed unamended and an opportunity was missed for more comprehensive debate over where the boundaries of membership and

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[41] Joint Committee on Human Rights, Eighth Report Legislative Scrutiny: Immigration Bill (HL102/HC935, 2013) 4. It was described as *'a significant trespass by the legislature into the judicial function'* which *'…*may be unprecedented' 22.

[42] See HC Public Bill Committee 6th Sitting, 05/11/13 https://publications.parliament.uk/pa/cm201314/cmpublic/immigration/131105/pm/131105s01.htm accessed 04/10/20.

[43] (n27).

[44] Lord Pannick, Hansard HL vol 752 col 1349 (5 Mar 2014). He noted presciently that the undefined term precarious *'will give lawyers many hours of gainful employment'.*

[45] Lord Wallace of Tankerness Hansard HL vol 752 col 1398 (5 Mar 2014).

[46] Lord Pannick (n44) col 1394.

exclusion should be set, and what would be the wider social and political consequences of the UK's treatment of long-term resident non-citizens as illegal or precarious. This is in stark contrast to the debates surrounding the Immigration Act 1971, where there was strong opposition to the idea that a newly arrived Commonwealth migrant would have even 12 months of uncertainty before acquiring a secure legal status.[47] It was argued that the new legal criteria would lead to greater clarity and consistency,[48] and yet the inclusion of concepts such as 'precarious' and 'social and cultural integration' do not provide an obviously objective way for judges to evaluate individual cases without the need for further interpretation. The result has been a second wave of proliferation in Article 8 caselaw. As questions regarding the interpretation of the 2012 changes reached the Supreme Court in 2016, the 2014 legal developments were already being litigated in the Court of Appeal, reaching the Supreme Court in 2018. The law on Article 8 now involves a number of competing and not always consistent sources of law – the immigration rules (statements of the executive), statutory considerations (legislative) and caselaw informed by the ECtHR (judicial). How these are to be applied has been subject to conflicting interpretation. Between 2012 and 2019 there were six Supreme Court cases, 68 Upper Tribunal reported decisions providing guidance to the First-Tier Tribunal (FTT) as well as tens of relevant Court of Appeal and High Court decisions. The result has been to increase the number of legal thresholds that may apply depending on the nature of the claim – 'exceptional circumstances', 'compelling circumstances', 'very compelling circumstances', 'unduly harsh', 'extra unduly harsh',[49] 'unjustifiably harsh consequences' and 'reasonableness'.

The remainder of this section will consider particular elements relating to those seeking to remain in the UK on the basis of their long residence.

[47] See Chapter 5, 135-138.

[48] Mark Harper, Immigration Minister defending the clause (n41) col 215.

[49] Underhill LJ in *SSHD v JG (Jamaica)* [2019] EWCA Civ 982 [16].

Removal: Private Life Cases

For those not subject to criminal deportation who have resided in the UK for a significant period of time, the starting point is the immigration rules which provide for an Article 8 claim to be accepted where a person has been resident for seven years if under 18 (subject to a further assessment of the reasonableness of their removal), in excess of half their life if under 25, or 20 years if over 25. A further category covers those over 18 where there would be *'very significant obstacles to their integration'* into the country to which they would have to go if required to leave the UK. On the face of it all that is needed is 20 years' strict residence – thus removing the need for a more subjective evaluation. Yet all of these are subject to a 'suitability assessment' – an assessment of the character of the individual to ascertain whether they are worthy of membership. Suitability is focused on reasons to exclude someone.[50] What is not encompassed in the rules is any assessment of their integration or positive contribution to the UK. Rather than encouraging decision-makers to engage in a positive evaluation of their sense of belonging and acceptance into the community, the focus on *'very significant obstacles to integration',* places an emphasis on the suffering they would face *in another country* as a 'victim' of human rights breaches. However, in order to establish the difficulties of reintegration it is likely they will seek to put forward a case that they are now well integrated in the UK as a comparator. In the case of a child who has been in the UK for seven years, a reasonableness test is applied which will necessarily import a consideration of the child's integration when evaluating the impact on them of returning to their country of nationality.

If an individual does not meet the rules, where there are compelling features not recognised in the rules, the court must consider Article 8 outside the rules, applying appropriate caselaw. Here more subjective matters may be factored in but judges must have regard to the statutory considerations which include a reaffirmation that, *'The maintenance of effective immigration controls is in the public interest'*[51] and a statement that it is in the public interest that persons

[50] This includes things such as minor criminal convictions, previous use of deception, incurring NHS or litigation debts as well as a general assessment of conduct, associations, or other reasons that may make it undesirable to allow them to remain in the UK (See Immigration Rules Appendix FM Section S-LTR 1.1-2.2. and S-LTR.3.1-4.5).

[51] NIAA 2002, s117(1).

who seek to remain in the United Kingdom are able to speak English[52] and are financially independent,[53] because such persons *'are less of a burden on taxpayers and are better able to integrate into society'.* The need for a non-citizen to be an independent economic actor is now in primary legislation, reinforcing the perception that a migrant's value to the UK should be primarily conceived of in economic terms. Whilst the lack of financial independence is to be taken against an applicant, financial independence does not count in the applicant's favour.[54] Furthermore, the non-citizen is constructed in opposition to the 'tax-payer', despite the fact that most will also be tax-payers. The contributions that carers make and other non-monetary contributions that non-citizens make to UK society are not explicitly considered as relevant to the public interest question. Thus, the legislation adds a neoliberal gloss to Article 8 ECHR. An individual's financial means becomes a key factor in whether their right to a private and family life is respected. This resonates which the development of the concept of 'market citizenship' where one's ability to participate in the market economy becomes linked to full entitlement to rights.[55] This is a very different approach to that taken by the courts in 1980 to the question of financial independence.[56] That those with more money are better able to integrate was accepted as self-evident in the case of *MM,*[57] yet a causative link between wealth and integration has not been demonstrated.[58]

Even more significant is the application of 'precariousness' to the assessment of private life claims.

'Precariousness'

For those who seek to argue their case outside the rules, judges are to give little weight to their private life if their legal status is 'unlawful' or 'precarious'. This will include people resident for decades, who cannot meet the suitability requirements, or people who have

[52] Ibid, s117(2)

[53] Ibid, s117B(3)

[54] *Rhuppiah v SSHD* [2018] UKSC 58 at [57].

[55] See discussion in Ch2, 48-49.

[56] See *R v Serry* [1980] EWCA Crim J1028-1 discussed in Ch5, 139-140.

[57] *R (MM (Lebanon) & Ors) v SSHD* [2017] UKSC 10.

[58] Helena Wray, 'The MM Case and the public interest: how did the Government make its case?' (2017) 31(3) J.I.A.N.L 227.

resided for less than 20 years, who cannot meet the *'very significant obstacles to integration'* requirement.

The tribunal initially adopted the suggestion of the Home Office that anyone who had legal status but was not yet settled (i.e., possessing indefinite leave) should be regarded as precarious, regardless of the length of time they had been resident or that they were on a viable route to settlement. This approach was at odds with the comments of Lord Bingham in the case of *EB Kosovo* discussed in Chapter 8, which acknowledged that over time, if no removal action is taken, an individual's sense of their precariousness should decrease. I have argued elsewhere that this does not accord with the Strasbourg jurisprudence, which has never equated 'settled migrants' with those granted a particular form of permanent residence.[59] The ECtHR typically uses the term 'precarious' for those with no leave, or with a pending asylum application. Whilst there was some debate in the Court of Appeal over whether the Home Office's approach was consistent with Article 8,[60] and clearly some Supreme Court judges who favoured the alternative approach,[61] the Supreme Court eventually rejected my arguments[62] and agreed with the tribunal's interpretation. I argue this was in part due to a desire to reduce the complexity of current caselaw, and avoid requiring the lower courts to take a more nuanced approach to the concept of precariousness.[63] Nevertheless, the Supreme Court accepted that exceptionally a court may have to read down the little weight requirement to allow for an Article 8 compliant outcome, though the court provided little guidance on when such an exception may be reached.

The consequences are that anyone with limited leave to remain, even with decades of residence, is considered to have a precarious legal status - which means little weight being accorded to their private life. The case of *Rhuppiah* involved a woman with more than 15 years' lawful residence at the date of first refusal of her leave, who was providing essential care for a man with significant health problems. Whilst she was eventually granted leave,

[59] Richard Warren, 'Private Life in the Balance: Constructing the Precarious Migrant' (2016) 30(2) Journal of Immigration, Asylum and Nationality Law 124.

[60] *Rhuppiah v SSHD* [2016] EWCA Civ 803.

[61] See comments by Lord Kerr in *Hesham Ali* [99-100] and Lady Hale in *Agyarko* in open court.

[62] *Rhuppiah v SSHD* [2018] UKSC 58 [24].

[63] Richard Warren, 'Supreme Court decides that the UK is a Precarious Home for Migrants: A Critical look at the case of Rhuppiah', (2019) 33(1) Journal of Immigration, Asylum and Nationality Law 27-35.

having acquired 20 years' residence during the course of legal proceedings, the Supreme Court notes that her residence will continue to be precarious for the next 10 years, and declined to say whether her appeal should have succeeded, since this had become academic.

Another stark example of the impact of precariousness is *Miah.*[64] This involved a young man from Bangladesh, sold into slavery at the age of eight, trafficked to the UK at the age of 13, placed into foster care and granted leave to remain for six years. Post-18 his further leave was refused. The tribunal accepted that he had no ties with any family or friends in Bangladesh and would be returning to a difficult situation, though not one which would amount to 'very significant obstacles to integration', so he could not be granted leave under the immigration rules. The tribunal President then considered the proportionality of removal outside the rules and noted that:

> *…the private life of a child is of a qualitatively different nature from that of an adult. Quite apart from the fact that a moderate period of residence is likely to be of greater impact, influence and temporal significance in a relatively short life, it is less likely that a child will be aware of, much less responsible for, his immigration status [22]*

However:

> *While the impact of sections 117B (1)-(5) on children will appear harsh and unfair to many, this is the unavoidable consequence of the legislative choice which Parliament has made.[24]*

His status was precarious. Little weight was given to his private life and the appeal dismissed. Notably, the judge was keen to attribute responsibility for the harsh outcome to Parliament.

In justifying an expansive approach, the Upper Tribunal considered it was adopting an *'unsophisticated, unpretentious'* dictionary definition of the term *'precarious'* equating it with *'unstable', 'fragile'* or being *'bereft of guarantees and security'.*[65] For them this describes the objective situation of a non-citizen granted temporary leave to remain, even if resident for many years. Whilst that may be the reality for non-citizens in the UK, the notion that there is

[64] *Miah (section 117B NIAA 2002 – children*) [2016] UKUT 00131(IAC).

[65] *Deelah and others (section 117B - ambit)* [2015] UKUT 00515 (IAC) [32].

at the heart of precariousness a power relationship has been lost in this discussion; rather precariousness is seen as natural due to the uncertainties of an unforeseeable future – e.g., will relationships endure, will earnings continue at the same level or will the immigration rules change so as to preclude a further grant of leave. The judges do not acknowledge the significant sociological literature that has developed concerning the concept of 'precariousness' as an academic term.[66]

Migration may involve many uncertainties, but by no means is it a natural consequence of migrating that an individual becomes particularly precarious. Indeed, the 'homes' that migrants have left may be sources of insecurity and migration may provide the foundations of a more secure home through employment opportunities or family reunion. After many years' residence (sometimes since birth) an individual may have developed a strong subjective sense of home and stability. States could, if they chose, operate on the basis that once accepted for legal admission as a worker or family member, a non-citizen is entitled to a secure residence. The fact that some individuals are instead vulnerable to the loss of immigration status, social exclusion, incarceration and forcible removal is a consequence of the way the law operates to categorise them as precarious non-citizens. It is exactly that precariousness that it is argued Article 8 should protect individuals from after many years of residence. Instead 'precariousness' has been reified as an attribute which can be applied to them within the framework of human rights law, to delegitimise a claim to belong.[67]

Isabell Lorey (following Judith Butler) draws a conceptual distinction between existential social precariousness and 'precarity' as a relationship of inequality. Because life is exposed to an existential vulnerability, the idea that one could be entirely legally protected is a fantasy.[68] However, what needs to be understood is the way in which the law is applied to institute precarity for certain groups of people and the purpose that this serves. Increasingly the state utilises precarity as an instrument of governing. 'Precariousness' is a legal device that curtails the ability of individuals to advance Article 8 private life claims outside of the 20-year rule.

[66] See, for example, Guy Standing, *The Precariat: The New Dangerous Class*. (2011, Bloomsbury Academic); Pierre Bourdieu, 'Precariousness is everywhere nowadays' in Pierre Bourdieu, *Contre-Feux (Acts of Resistance)* (1998, Polity)

[67] Richard Warren, 'The UK as a Precarious Home' in Helen Carr, Caroline Hunter & Brendan Edgworth (eds), *Law and the Precarious Home: Socio-legal perspectives on the Home in Insecure Times* (Bloomsbury 2018).

[68] Isabel Lorey, *State of Insecurity: Government of the Precarious* (Verso 2015) 20.

This means there is now limited room for those with a precarious status to *'bring the community into the court*' to persuade a judge that they are worthy of remaining due to their value to the community.

Dr Forman was a 69-year-old US citizen and specialist music therapy, resident in Scotland for seven years before being refused leave to remain. His appeal was allowed by the First-Tier Tribunal on the basis of his private life.[69] The case was given positive media coverage including in papers that often call for tough enforcement of immigration rules.[70] It was reported that the FTT judge told him he had an exceptionally strong case and that he had too many supporters to be accommodated by the tribunal.[71] On appeal, the approach of the Upper Tribunal is revealing. It goes to great lengths to establish how ímpressed it is with the appellant:

> *The nature, quality and quantity of the support for Dr Forman's application to the Secretary of State can only attract a mixture of admiration and envy. His application was supported by written testimonials from a total of 63 friends, professional and academic colleagues, studies and supporters. Dr Forman is clearly a rather special person* [4].

They even state that:

> *If this were a merits appeal, there could only be one outcome, bearing in mind the various considerations and observations rehearsed in [3] - [5] above: Dr Forman would be a resounding winner. However, we have a significantly different duty and task, namely that of deciding whether the decision of the FtT is undermined by material error of law* [6].

They find that Dr Forman's precarious status meant that the little weight should be given to his private life in the UK. The tribunal again made clear that responsibility for the ultimate

[69] *Forman (ss 117A-C considerations)* [2015] UKUT 00412 (IAC).

[70] David Scott, 'Pink Floyd star fights deportation threat to music teacher', *The Daily Express* www.express.co.uk/news/uk/526261/Pink-Floyd-Gilmour-fights-deportation-of-music-teacher-Steve-Forman accessed 04/10/20.

[71] ´Katherine Sutherland, 'Legendary musician wins deportation battle', Deadline News http://www.deadlinenews.co.uk/2015/01/08/legendary-musician-wins-deportation-battle/ accessed 04/10/20.

decision was with the legislature. Dr Forman continued his legal battle up to the Court of Session. In 2018 the Home Office settled his case and granted him indefinite leave to remain. It appears this was ultimately a political rather than legal decision, as a result of the continued campaign in his support.

Despite recent legal developments, lawyers have continued to try to rely on the principles derived from *Bakhtaur Singh*[72] and *UE Nigeria*[73] to argue that an individual's value to the community is a relevant consideration. The case of Lama[74] is illuminating as it appears to represent a contrivance by the tribunal to avoid the strictures of the new legislation. It concerned a 26-year-old Nepalese student who had lost his leave to remain but had become a full-time carer for Mr R, a disabled actor of significant renown, who had made a significant contribution to the arts and acted as an inspiration for other disabled actors. The appeal was accompanied by petitions and significant support from friends and professional colleagues. The court accepted that the removal of the appellant and the loss of the care he provided would end Mr R's acting career. The determination reads as a clever attempt to navigate a path to allowing the appeal. Whilst little weight must be given to the private life of the appellant, the judge conceives of a scale of little weight and places the appellant at the upper end of the 'little weight scale'. He then uses the principle from *UE Nigeria* to weigh the *'[loss of] value to the community in the United Kingdom …. loss of public benefit'* and *'whilst this does not tilt the balance in the Appellant's favour, it is one of the building blocks in the proportionality balancing exercise'.*[75]

The judge concludes:

> *… that the special, unique and compelling features of the relationship and arrangements under scrutiny combine to outweigh the public interest. This is my evaluative assessment in this highly unusual and intensely fact sensitive cases.*[76]

[72] *Singh v IAT* [1986] UKHL 11.

[73] *UE (Nigeria) v SSHD* [2010] EWCA Civ 975.

[74] *Lama (video recorded evidence -weight – Art 8 ECHR)* [2017] UKUT 00016 (IAC).

[75] Ibid [42].

[76] Ibid [46].

Whilst the decision reads as a sensible and compassionate one, it seems difficult to reconcile with similar decisions in which judges sublimate feelings of compassion for the appellant to the structure of the law, and indeed it is questionable whether the judge's analysis of 'the scales of little weight' can survive *Rhuppiah* in the Supreme Court. In *Thakrar*[77] the current President of the tribunal is implicitly critical of the approach taken by his predecessor in *Lama.* The tribunal considered the cases of *Bakhtaur Singh* and *UE Nigeria* and provided lengthy guidance on the weight to be given to an appellant's value to the community. Importantly the judge prefers LJ Richards comments in *UE* that an Article 8 appeal is of narrower focus, especially since First-Tier Tribunal judges are no longer empowered by Parliament to decide how a discretionary policy expressed in the Immigration Rules should be exercised in a particular case.[78] He doubts whether the examples given in *Bakhtaur Singh* are now relevant. Judges should not be subjectively deciding who is of more value to the community since this should be left to executive policy. However, rather than rule that such matters are outside the scope altogether, the judge goes on to effectively introduce a test of exceptionality when assessing whether the positive contribution that an individual makes to the UK is relevant to an Article 8 assessment.

> *a judge must be satisfied that the contribution is* ***very significant*** *[112]…One touchstone for determining this is to ask whether the removal of the person concerned would lead to* ***an irreplaceable loss to the community of the United Kingdom or to a significant element of it.***[79]

The tribunal has retained the possibility that they may allow an appeal due to an individual's contribution and value to the community, whilst making it highly improbable that most individuals would succeed. By taking a more cautious and deferential approach, the tribunal has pulled back from a role that could bring it into conflict again with the government. Indeed, the President cautions First-Tier judges that, *'If judicial restraint is not properly maintained in this area, there is a danger that the public's perception of human rights law will be adversely*

[77] *Thakrar (Cart JR; Art 8: value to community)* [2018] UKUT 00336.

[78] Ibid [109].

[79] Ibid [114] (emphasis added).

affected'.[80] Thus, as of 2020, it is arguable that the government has succeeded in limiting the discretion of judges and the nature of arguments that can be successfully advanced.

Criminal Deportation cases

The concept of the 'foreign criminal' found in s117D of the Immigration Act 2014 takes two suspect traits 'foreignness' and 'criminality' and combines them to create a legal subject. Foreignness is based on the legally objective concept of not being British, which in the case of those with long residence may not accord with the individual's own subjective experience or sense of belonging. Criminality is based on a single sentence of 12 months imprisonment, or an assessment that the person's offence caused serious harm, or that they are a persistent offender. Once an individual becomes classified as such, this designation is immutable - the law will treat them as a 'foreign criminal' indefinitely. Criminal offences are never spent for the purposes of immigration control.[81] Furthermore, the public interest considerations deem deportation to be in the public interest for a person who becomes so defined.[82] Even if they succeed in a deportation appeal and thus can't be deported, the public interest still requires their deportation if possible, at a later date.[83]

In the case of *SS*[84] the Court of Appeal recognised the political/moral nature of a deportation decision and considered that by legislating in 2007 that the deportation of a foreign criminal is conducive to the public good Parliament was according great weight to this principle. The executive should now be accorded a wide margin of discretion in making deportation decisions.[85] Although acknowledging there is no formal test of exceptionality, *'…the scales are heavily weighted in favour of deportation and something very compelling (which will be exceptional) is required to outweigh the public interest in removal'.*[86]

[80] Ibid [115].

[81] Legal Aid ,Sentencing and Punishment of Offenders Act 2012, s140.

[82] NIAA 2002, s117C(1)

[83] Immigration rule 399C.

[84] *SS (Nigeria) v SSHD* [2013] EWCA Civ 550.

[85] Ibid [36-55].

[86] *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 [42].

The 2014 legislation introduced a series of legal tests to be considered by tribunals when deciding claims to remain under Article 8 ECHR. The subsequent history has involved convoluted attempts by the courts to reconcile the strict rules-based approach mandated by Parliament and the executive with the more open ended and holistic approach required by the jurisprudence of the ECtHR. The Supreme Court, despite a strong dissenting judgment from Lord Kerr has upheld the lawfulness of this approach,[87] whilst ensuring that an Article 8 proportionality assessment must still take place within the ambit of 'very compelling circumstances'. In deportation cases where an individual has served a sentence of more than 12 months but less than four years, separate considerations exist for family and private life. Those relying on family life need to show that the impact of their removal on a qualifying partner[88] or qualifying child[89] would be 'unduly harsh'. Although the proposed deportee is the appellant, the focus here is on the partner and child as 'victims' of the human rights breach. The personal impact on the appellant themselves is irrelevant, which appears counter-intuitive given that it is the foreign national's rights that are supposed to be at stake. This test has been interpreted by the Supreme Court as a very high threshold to meet.[90]

My focus here is on the private life test which requires that the person must have been lawfully resident in the UK for most of their life, socially and culturally integrated in the UK and would face very significant obstacles to their integration into the country to which they would be deported.[91] If they have been sentenced to over four years there must be very compelling circumstances over and above this.

[87] *Hesham Ali* considered the 2012 rules. *KO (Nigeria) & Ors v SSHD* [2018] UKSC 53 considered the statutory deportation regime.

[88] British or settled, NIAA 2002, s117D(1)

[89] British or having 7 years' continuous residence, NIAA 2002, s117D(1)

[90] It is the search for an impact on a child which is not just harsh, but excessively harsh (equated with 'excessive cruelty'). In the case of *KO (Nigeria)* the Supreme Court held that unduly harsh involved *'a degree of harshness going beyond what would necessarily be involved for any… child of a foreign criminal facing deportation'.* The judges manage to rationalise such a test as consistent with the UK's obligations to '*promote and safeguard the welfare of children'.* Though see also *HA (Iraq) v SSHD [2020] EWCA Civ 1176* [39]-[58] in which the Court of Appeal purports to clarify these comments by Lord Carnwath, but arguably reinterprets them in a manner that lowers this high threshold.

[91] Immigration rule 399A.

‘Social and cultural integration in the UK’ and ‘Very significant obstacles to integration in country of origin’

The first test requires the individual to present themselves to the court as socially integrated and to minimise any ties that they may have had with their country of origin. Individuals are generally expected to set out detailed narrative statements, discussing their life in the UK ideally supported by documentary evidence. Typically, such statements will narrate the individual’s own subjective sense of identity, experience of being brought up in the UK, knowledge of and links with their country of origin and explore their past behaviour in order to account for how and why they ended up offending. They would ideally be supported by family and friends who can testify to the individual’s participation within their community. Here the tribunal provides a forum in which they can perform their integration and seek recognition from the judge of their experience of belonging in the UK. It requires the judge to make a subjective assessment of whether the ‘integration test’ has been met, which appears at first sight to undermine the intention of the rules to reduce the need for discretion. Little consideration was given to the wording of this test in Parliament and it is interesting to see how the courts have applied it.

The concept of integration is highly contested, and there is significant academic literature exploring it. Some have tried to quantify and measure the process of social integration.[92] Indeed the Home Office has published one such framework, drawing on work by academics in order to identify factors relevant to encouraging the successful integration of migrants.[93] Others have criticised the assumptions inherent in the concept of integration.[94] Schinkel argues that measuring immigrant integration is a neo-colonial practice. Integration is misconceived as a property of individuals, rather than being seen as a property of a social whole. Migrants are perceived as being more or less integrated according to objective

[92] E.g., Marta Kindler, *Social networks, social capital and migrant integration at local level European literature review* Iris Working Paper SERIES No 6 (2015 University of Birmingham); Sarah Spencer, Katherine Charsley, ‘Conceptualising integration: a framework for empirical research, taking marriage migration as a case study’ (2016) 4 Comparative Migration Studies 18.

[93] Home Office, *Indicators of Integration framework, third edition* (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835573/home-office-indicators-of-integration-framework-2019-horr109.pdf accessed 04/10/20.

[94] E.g., Willem Schinkel, *Imagined Societies. A Critique of Immigrant Integration in Western Europe* (Cambridge University Press, 2017).

measurements. Thus ‘*‘integration’ becomes a decidedly un-social and non-relational concept, which posits a static object (‘society’) over against individuals whose being signifies a certain degree of ‘integration’ as an individual-level trait’.*[95] This resonates with the neoliberalisation of migration and citizenship policies where a failure to integrate is an individual’s responsibility.

This research and commentary has eluded the tribunal which has sought to develop its own commonsense understanding of the term. In *Bossade*[96] the tribunal gave guidance on the ‘integration test’ recognising that: ‘*the term integration imports a qualitative test……one is not simply looking at how long a person has spent in the UK…’.* It concluded simply that prisoners are not socially integrated and therefore during the time a person is in prison such a person cannot as a general rule demonstrate integration.[97] In that case the appellant had been in the UK lawfully since 1991 when he was four. His mother, sister and half-brother were naturalised as British citizens and he did not start offending until he was around 16. His evidence was that he identified with British culture and had no memories of his time in the DRC (Congo). The tribunal accepted that he had shown an awareness of his behaviour and was attempting to reform but concluded that the nature of his anti-social offending including a 42-month sentence for robbery meant that he could not be considered socially integrated. The argument that the court could not require (social and cultural) integrative behaviour to be free of criminality because the provision was predicated on someone being a foreign criminal to begin with was rejected. It was accepted that there would be significant obstacles to his reintegration into the DRC - he did not speak Lingala, he had no experience of living there and had no family there - but this could not be categorised as ‘very significant’. This sets a very high threshold for anyone facing deportation as a result of a prison sentence.

In taking this approach, the tribunal understands integration within a normative framework, whereby integration must be into a specific understanding of UK culture and society. It is not enough to be functionally integrated into the social and cultural milieu that an individual has been residing in for the majority of their life or to show that one experiences a sense of

[95] Willem Schinkel, ‘Against ‘immigrant integration’: for an end to neocolonial knowledge production’, (2018) 6 Comparative Migration Studies 31.

[96] *Bossade (ss.117A-D-interrelationship with Rules)* [2015] UKUT 00415 (IAC).

[97] Ibid [25].

belonging in their immediate surroundings and to compare that with the situation they would face on return. Instead, the individual must be seen to integrate into a particular set of social and cultural values. This is made more explicit in subsequent cases in the Court of Appeal. TB[98] had been in the UK since 1990 when he was nine years old and had indefinite leave to remain. The rest of his family had British citizenship. He had a history of minor offending since the age of 13, with no sentences above 12 months, but faced deportation as a persistent offender. He spoke English with all his siblings and friends, had only ever lived with his parents in the UK, had visited Turkey only once since arriving in the UK and only had a grandmother in Turkey. The FTT accepted that he regarded himself as British, having grown up in Tottenham, which he regarded as a rough part of London where he had mixed with the wrong people. He had not committed an offence since 2013 and his evidence of remorse was accepted by the tribunal. Several witnesses testified that he had changed, was close to his family and did not associate with former friends. The tribunal allowed his appeal and accepted he met the exception for deportation. The judge who observed him during his appeal accepted that he presented as a 'native' North Londoner, had spent his schooling and formative years in the UK since the age of nine and that English was his normal language of social intercourse. It is evident that he had passed the threshold for being considered as belonging in the UK, in spite of his offences. In particular the tribunal considered:

> *I take the view that in considering integration into the life of the UK, it is necessary to take into account that life as it is genuinely and honestly lived on the ground. That means not putting out of account aspects of life in the UK which we might regard as unfortunate and unpleasant. Gang culture is sadly a part of life for many young people in this country and the fact that the appellant appears to have involved himself in that culture is, in my judgment, an example of his integration into life in the UK.*

The judge concluded that:

> *Expecting a person such as this appellant to travel alone to live in what is, essentially, a foreign country after a life and childhood growing up and living in this country, would*

[98] *Binbuga (Turkey) v SSHD* [2019] EWCA Civ 551.

> *amount to exile rather than return and would represent a very serious obstacle to his integration into that country.*[99]

The higher courts rejected this approach holding that despite approximately 20 years' residence he could not be described as socially or culturally integrated into the UK. For the Upper Tribunal:

> *I simply cannot accept that being a member of a gang in North London can possibly be considered to be an example of social and cultural integration.* ***There must be imported into the term 'social and cultural integration' the norms of British society****. Indeed, I consider that being a member of a gang is the antithesis of being socially and culturally integrated in the UK.*[100]

The appellant's criminality therefore broke his social and cultural integration into British society. What is not explored by the judge in any detail is what, in a country as diverse as the UK, *'the norms of British society'* are and how such a concept it to be evaluated. In these cases the judges are engaged in reifying an abstraction – British society and culture into which an individual must be seen to be integrated. Rather than recognising that there are a multiplicity of ways to define and understand British society and culture, the judges seek to establish an objective construction against which to measure an appellant's integration. Various controversial attempts to define British values have been put forward before by the government.[101] The government has sought to codify an approach to integration drawing on a list of supposedly objective criteria by which integration can be measured.[102] However, these are not drawn upon in this judgment. It is difficult to see what criteria the judges are using in order to conceive of this idea of British society and culture other than with reference to the judge's own experience in his particular region of the UK.[103] The complexities are left undefined in this judgment.

[99] Ibid [66].

[100] Ibid [51].

[101] E.g., DFED, Promoting fundamental British values as part of SMSC in schools, November 2014.

[102] Home Office (n93).

[103] It is worth asking whether if the judge was transplanted to a North London housing estate, he would feel socially and culturally integrated into his immediate surroundings.

The Court of Appeal upheld the decision of the UT clarifying that:

> *…social integration refers to the extent to which a foreign criminal has become incorporated within the lawful social structure of the UK…. Similarly, cultural integration refers to the acceptance and assumption by the foreign criminal of the culture of the UK, its core values, ideas, customs and social behaviour. This includes acceptance of the principle of the rule of law.*[104]

This nevertheless still leaves the UK's core values, ideas, customs and social behaviour undefined. The judges appear to believe that these are self-evident, yet given the current division in the country caused by the Brexit referendum, in which even the UK's system of representative democracy and 'the rule of law' is being openly challenged, these concepts are at best contested.

The court also stated that it was not helpful to use the concept of 'home-grown criminal' to assess whether he was socially and cultural integrated, and is dismissive of an earlier line of caselaw.[105] It relied on a case which had objected to the use of the term, where the appellant had arrived in the UK at age 16.[106] The fact that a nine-year-old child had through no fault of their own spent their formative years growing up in in a particularly rough part of British society and culture, was not considered relevant. This again fits within a neoliberal framework where an individual's failure to integrate is their responsibility and cannot be attributed to wider structural factors. Compared with earlier caselaw[107] it is no longer accepted that *'all reasonable people'* would regard someone raised in the UK as not being in any realistic sense a 'foreign' criminal. There has been a hardening of the boundary between citizens and non-citizens raised in the UK.

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[104] *Binbuga* (n98) [51].

[105] See discussion at Ch8, 216-217.

[106] *LW (Jamaica) v SSHD* [2016] EWCA Civ 369 involved a man lawfully resident in the UK for over 40 years, with a wife of 20 years, 2 British children and 2 stepchildren. He served a 6 years sentence for drugs offences. The First-Tier Tribunal, upheld by the Upper Tribunal found that '*it would be exceptional to deport a 56-year-old person who has been resident in the United Kingdom for approximately forty years, who has strong family ties in the United Kingdom, no family or ties to Jamaica and who is, in effect, a 'home-grown offender"'.* The decision was overturned by the Court of Appeal, rejecting his description as being a 'home grow' criminal.

[107] *BK (Deportation – s 33 "exception" UKBA 2007 – public interest) Ghana* [2010] UKUT 328 (IAC) [14].

The Upper Tribunal proceeded to swiftly deny the appellant's asserted subjective identify as belonging in Tottenham, in favour of the presumed objective fact of nationality: '*The reality is that this is a Turkish man who speaks Turkish and has at least one relative in Turkey. He is fit and there appears nothing to stop him building his life in Turkey'.*[108] The courts are ultimately reasserting the importance of legal citizenship – the only safeguard against deportability - and using the appellant's nominal nationality as an indicator against his integration. The conclusion is that his removal will not breach his human rights. In doing so the appellant's narrative of belonging has been subsumed beneath a state narrative of exclusion.

Another example is *AM,*[109] who entered the UK aged 12 as a refugee from Somalia and subsequently acquired ILR. He had resided in the UK for 30 years. He had a series of convictions as a result of alcohol addiction, culminating in a two-year sentence for robbery. His refugee status was revoked and the court concluded that he was not socially or culturally integrated in the UK, despite having spent 31 years of his life in the UK, during which time he attended secondary school, worked, married and had three daughters. They considered that whilst he may have been integrated in the past, *'by the time he had left prison, he was no longer socially and culturally integrated in the UK'*[110] since he had lost contact with his family and was now homeless and jobless.

In CL[111] the court takes a more nuanced approach to this issue, though without disavowing previous authorities. CL was a 27-year-old Nigerian national who arrived in the UK at the age of one, suffered abuse from his mother and was taken into care at age 15. The UT had accepted he identified as 'black British' and had been socially and culturally integrated, but concluded that short periods of detention in a Young Offenders' Institution had broken his integration. They also found that although he had never returned to Nigeria and had no family there, *'it has not been suggested that his mother brought him up ignorant of Nigerian customs and traditions'.*[112] There would not be very significant obstacle to his integration.

[108] *Binbuga* (n98) [73].

[109] *AM (Somalia) v SSHD* [2019] EWCA Civ 774.

[110] Ibid [72].

[111] *CI (Nigeria) v SSHD* [2019] EWCA Civ 2027.

[112] Ibid [84].

For the Court of Appeal social identity *'is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging'.*[113] They did not accept that mere offending and imprisonment alone will inevitably break social and cultural integration. It was necessary to consider the actual impact on an individual's relationships and affiliations. Here, *'the extent of CL's alienation from British society was not at all comparable to that of the appellant in the case of AM'.*[114] The court also did not accept that sufficient reasons had been given concerning integration into Nigeria and the appeal was remitted for a further hearing.

In the case of *Akinyemi,*[115] the appellant was born in the UK in 1983 shortly after the law changed preventing the acquisition of British citizenship by birth. He had never lived anywhere else and believed himself to be British. He had in fact been entitled to register as British. His long history of significant offending ended in deportation action being pursued when it emerged that he had no lawful immigration status. The Upper Tribunal dismissed his appeal, noting that although he spoke English *'the evidence of his integration into society was, having regard to his history of offending, mixed; and that he had never been financially independent'.*[116] Although he had never been to Nigeria he was *'of Nigerian ethnicity'*[117] and there would not be very significant obstacles to his integration there. The judge found that little weight had to be given to his private life since his immigration status was unlawful. The Court of Appeal allowed the appellant's appeal and remitted it for reconsideration, principally on the ground that the Upper Tribunal was wrong to state he was unlawfully present.[118] The UT proceeded to dismiss the appeal again leading to a further Court of Appeal determination which again remitted it to the UT due to an inadequate consideration of the strength of the

[113] Ibid [58].

[114] Ibid [81].

[115] *Akinyemi v SSHD* [2017] EWCA Civ 236.

[116] Ibid [28].

[117] Ibid [32]. The reference here to ethnicity suggests that race is a factor in the judge's reasoning, and that his ethnicity is viewed as anchoring him to his true 'home'. One wonders if the appellant had been white with Australian parents if he would have been described as being of 'Australian ethnicity'.

[118] He did not have leave to remain, but having never entered unlawfully he could not be said to have an unlawful status.

public interest in deporting a man born in the UK.[119] They did not suggest that the appeal would necessarily succeed.

What is evident from these cases is that the concept of integration when applied to whether there are very significant obstacles to reintegration abroad is conceptualised very differently from the concept of integration into the UK. The Home Office argues that the test is a stringent one; not having lived in the country of return, not speaking the language, not having any employment prospects and not having any family to return to would not amount to very significant obstacles.[120] The leading case is Kamara[121] which has held that:

> *The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life[14].*

This assessment will include a consideration of the particular characteristics of the person being returned such as their educational background and abilities.[122] It is noticeable that integration into a country of return, unlike integration into the UK, does not require a positive moral identification with the national values of that country. Rather it relies on a concept of functional integration requiring an individual to be able to *'operate on a day-to-day basis'.* It therefore appears far easier to establish that an individual could integrate into a country they may hardly have lived in, than it is to establish that they are presently integrated into the UK.[123]

A final issue of interest is the question of whether successful rehabilitation is a factor of relevance when considering the private life of a long resident. In his dissenting judgment in

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[119] *Akinyemi v SSHD* [2019] EWCA Civ 2098.

[120] Home Office, Criminality: Article 8 ECHR cases v8.0, 13 May 2019, 33-36.

[121] *SSHD v Kamara* [2016] EWCA Civ 813.

[122] *AS (Iran) v SSHD* [2017] EWCA Civ 1284. This case concerned a 21-year-old who arrived in the UK aged 9 and faced deportation following a 3-year sentence in a youth offender's institution for offences committed when aged 17. An appeal is currently pending before the Supreme Court in order to allow for further interpretation of this legal test.

[123] In *CI (Nigeria)* [71] the court confirmed that this is the case.

the lead Supreme Court case,[124] Lord Kerr emphasised that the public interest is multi-faceted:

> *…there is a public interest in families being kept together, in the welfare of children being given primacy, in valuing a person who makes a special contribution to their community, and in encouraging and respecting the rehabilitation of offenders. These factors all play a role in the construction of a strong and cohesive society.*[125]

He considered that the risk of re-offending is of predominant importance, since if an individual is unlikely to commit crime, it is difficult to justify his expulsion on the ground that it is preventing crime and disorder.[126] This approach has been consistently rejected in favour of the view that deportation of foreigners who commit crimes is important in itself. Lord Wilson revisited the comments he had made about the role of deportation in expressing 'public revulsion'. Whilst accepting that this language was too emotive, he maintained that deportation of criminals still served the important purpose of maintaining public confidence in the treatment of foreigners.[127] As such, whilst a failure to rehabilitate may be relevant to whether an individual is socially integrated, rehabilitation is of little positive relevance to their human rights appeal. The Upper Tribunal has provided guidance that, '*Rehabilitation will not ordinarily bear material weight in favour of a foreign criminal...'.*[128] This is a very different approach to the approach taken historically in the cases discussed in Chapter 6, and to the approach taken by the ECtHR.

Conclusion: The Current Approach

The changes to the structure of Article 8 appeals have created a complex legal framework in which tribunal judges must operate when considering claims to remain by non-citizens facing

[124] *Hesham Ali* (n30)

[125] Ibid [169].

[126] Ibid [96].

[127] Ibid [70] *'Judges must be sensitive to the public concern in the UK about the facility for a foreign criminal's rights under article 8 to preclude his deportation….the very fact of public concern about an area of the law, subjective though that is, can in my view add to a court's objective analysis of where the public interest lies'.*

[128] *RA (s.117C: "unduly harsh"; offence: seriousness)* Iraq [2019] UKUT 00123 (IAC) headnote 4. However, on appeal as *HA (Iraq) v SSHD [2020] EWCA Civ 1176* the court clarified that whilst rehabilitation is not of positive weight to an appellant, it may reduce the extent of the public interest in deportation if an offender is a lower risk to the public, though this would rarely be of great weight [130-149].

removal. Rather than an approach where judges have broad discretion to consider all relevant circumstances, judges are now directed towards an Article 8 framework involving a series of discrete legal tests. Non-citizens can be variously constructed by the law as 'precarious', 'socially excluded', 'foreign' and 'a burden on the tax-payer' – a legal reality that may well not accord with their lived experience.

Article 8 ECHR which appeared to immigration lawyers in the 1980s as a potentially liberating right that could hold the state to account, now proves able to coexist with an increasingly illiberal deportation regime and an immigration system that institutionalises the precarious status of non-citizens, denying them security of residence for decades after they first arrived. Whilst there was a brief expansive moment in the development of Article 8 caselaw concerning family life, the recent direction of the higher courts has been to largely adopt a deferential approach to the executive and Parliament. They have tamed the tribunal, curtailing the judicial freedom of any overly sympathetic First-Tier Tribunal judges, to avoid the tension with the government that has been a historic feature of deportation law. Whilst human rights appeals do still succeed in the tribunal these are more likely to be cases involving family life that are incorrectly refused under the immigration rules, rather than deportation cases.

The UK has succeeded in creating a framework where the executive can make decisions to exclude non-citizens, yet there is a seemingly independent right of appeal on 'human rights' grounds to an international legal order to assuage critics of such decisions including sympathetic MPs who may otherwise seek to intervene. Individuals with very long residence can effectively be forcibly transported from the country they have been lawfully resident in for decades, leaving British children to grow up in a single parent family as an additional punishment over and above what their national peers would face and critics can be reassured that the courts have ruled that their human rights have not been breached. The rhetoric of human rights has sanitised the violence inherent in the act of deportation.

The human rights appeal provides a forum in which individuals can have their day in court. It provides an opportunity for them to put forward their claim to belong and to contest the decision to treat them as a someone who should be excluded. Those facing removal due to lack of legal residence can seek to mobilise supporters from their local community in order to put forward their moral worthiness of membership. Those facing deportation who have

resided in the UK since childhood can seek to present themselves as quasi-citizens. Whilst 'exceptional' cases may succeed, the structure of the law now often enables such narratives to be subsumed beneath that of the state. Indeed the 'right' that they must rely on contains the mechanisms to defeat their claim. The legal concept of precariousness devalues the ties of belonging acquired by lawfully resident migrants. The social integration test acts to prevent many of those defined as foreign national criminals from establishing that they belong in the UK, whilst reinforcing the importance of the legal fiction of nationality. Even where judges of the First-Tier Tribunal, confronted by an individual appellant's narrative, feel compelled to allow an appeal, it is evident from the number of reported higher court decisions overturning such cases, that the structure of the law will often not permit them to succeed.[129]

Hasselberg noted the propensity of those facing deportation to internalise the discourse of human rights and articulate their opposition to their removal through this language, rather than drawing on the language of belonging.[130] Arguably this is the nature of the legal process which works to constrain the way in which individuals seek to articulate a claim to remain. It takes an individual's narrative of their subjective experience of living and working in a community, translates it through the prism of human rights law in order to create specific legal subjects to be dealt with by the law; the 'precarious migrant', the 'unintegrated migrant', the 'foreign national criminal' the 'burden on the taxpayer'. The outputs are human rights compliant deportations and removals.

[129] Whilst deportation cases do still succeed, practitioners have observed that tribunal judges who decide to allow a deportation appeal now 'face a formidable challenge' in justifying that stance in a written determination, with the UT often acting as a gatekeeper to overturn such decisions. Nick Nason, 'Blocking deportation: seven tips for an appeal-proof tribunal judgment' (28/01/19) https://www-freemovement-org-uk.chain.kent.ac.uk/appeal-proof-deportation-judgment/ accessed 05/10/20.

[130] Ines Hasselberg, *Enduring uncertainty: Deportation, Punishment and Everyday Life* (Berghahn 2016) 72.

Chapter 10: Conclusion – 'Rights' or 'Belonging'?

In this thesis I have considered the wider social and political role of the immigration tribunal through investigating the claims made by long resident non-citizens. I have carried out original archive research in order to explore the historical origins and development of the immigration tribunals. This is an area where there has been little academic research and I have therefore addressed a number of gaps in existing work on immigration history, including by identifying the motivations behind the Immigration Appeals Act 1969. I have also considered the historical development of deportation caselaw concerning long resident non-citizens and explored the changes in how such cases have been considered by the courts. In doing so, I have drawn on deportation studies and critical human rights literature to consider the wider social role of the tribunal and I have made an original contribution to this literature.

This chapter draws together the key themes and insights that have emerged from this study, and provides my answers to the primary research questions.

I have set out three core arguments under the following headings:

- **The political role of the tribunal**
- **Immigration claims-making by long residents**
- **Security of residence and the shift from politics to law**

The Political Role of the Tribunal

A principal argument of my thesis is that the tribunal serves an important political purpose. The tribunal is not merely a means of holding the executive to account and correcting defective decision-making, although it can and does do that. Rather it can also play an active role in facilitating strict immigration policies through reducing and deflecting political opposition.

The archive records reveal that the Home Office has historically viewed the tribunal with hostility, as an impediment to the smooth running of immigration control. Well into the 1970s there was in the Home Office an institutional antipathy to the judicialisation of immigration control, and an evident desire for unconstrained executive powers. Yet despite this, over time it has come to serve a useful political role in depoliticising difficult immigration decisions and

relieving Ministers from political responsibility. This has resulted in a complex and sometimes strained relationship, where the executive has relied on the existence of the tribunal yet sought to maximise control over the way in which judges determine appeals.

My thesis explains how and why immigration tribunals emerged in the 20th century as a forum for the determination of immigration status. The 1905 Immigration Boards were introduced as a political compromise necessary when introducing the first systematic aliens legislation at a time when the need for such controls was still a controversial issue.[1] In Chapter 3 it was established that they were not truly judicial institutions. Members of the boards were not legally trained and they lacked the supervision of the higher courts. It is evident from contemporary accounts that their operation was viewed as problematic by both liberals and those demanding stricter controls. With changed political circumstances – the outbreak of WW1 leading to a wider acceptance of the need for strict immigration controls - the boards could be dispensed with and there was, for a time, a political consensus that immigration decision-making should be a matter for the executive.[2]

The Deportation Advisory Committee was established in the 1930s in response to growing disquiet over the existence of these arbitrary wartime powers and particularly due to concerns raised by Jewish community groups. From the start its primary advantage for the Home Office was its '*window dressing character*'[3] – the fact that its existence could ward off political opposition to the use of arbitrary powers. Even then the Committee was only advisory and advice from civil servants was that the executive should retain absolute discretion over matters concerning immigration. When the Committee began asserting itself in advising against deportation, it was sidelined and ultimately abandoned.[4] Again, changed political circumstances – this time the Second World War – meant that its loss was unopposed.

In Chapter 4 I showed how these proto-tribunals were treated as *'failed experiments'* which exerted a lasting impact on the Home Office and led to institutional resistance to involving a

[1] Ch3, 70.

[2] Ch3, 80.

[3] Ch 3, 84.

[4] Ch 3, 94.

judicial element in immigration decision-making, even to the point that this issue exerted an impact on the UK's willingness to participate in the Council of Europe Convention on Establishment. This resistance continued throughout the 1940s and 1950s with Home Office civil servants concluding that they had a responsibility to retain strict controls over immigration and that resisting political pressure for reform was necessary *'to save the House of Commons and the British public from themselves'.*[5] Nevertheless it was recognised that this position was unlikely to be sustainable in the long-term.

By the late 1960s new political arguments were being made for why immigration decision-making should be subjected to independent oversight. In Chapter 4 I set out in detail the complex circumstances that led to the creation of the Wilson Committee and ultimately the Immigration Appeals Act 1969. The archives show that such a move was fiercely resisted by civil servants in the Home Office.[6] Primarily it was seen as politically necessary to address the controversy of bringing in further restrictive deportation laws affecting Commonwealth Citizens at a time when there was already significant political criticism of how such individuals were being treated under the Commonwealth Immigrants Act 1962. Importantly though, a key motivation behind the Wilson committee's recommendation for an appeals' tribunal was in order to provide the appearance (and hence reassurance) that justice was being done, rather than an acceptance that there was anything fundamentally wrong with the integrity of immigration decision-making.[7]

In Chapter 5 I showed that as soon as the tribunal began to operate it was viewed with hostility by the Home Office and attempts were made to reduce its role, despite the fact that the early caselaw shows a strong tendency to defer to the executive in deportation matters. But by the 1960s there began to emerge another positive argument for why the executive should be relieved of the responsibility for deciding such cases. There had been a series of controversial decisions which had been subjected to unfavourable media and parliamentary criticism. Furthermore, the Home Secretary complained of receiving a *'continuing stream of correspondence'* from MPs, who whilst generally supporting immigration control, were

[5] Ch4, 106.

[6] Ch 4, 100-118.

[7] Ch 4, 120; Ch5, 141-142.

requesting the review of particularly compelling cases.[8] The introduction of the tribunal allowed such controversies to be deflected from the political sphere to the legal sphere. Whilst this was not the primary motivation at the time, I showed in Chapter 6 that it was subsequently to become of greater importance.

The most contentious issue was giving judges the ability to overrule executive decision-makers' exercise of discretion. In parliamentary debates in the 1960s there was principled opposition to this with the argument made that what was being sold as an advance of the rule of law, was actually the retreat of Parliament and political responsibility.[9] It was said to be wrong for questions of policy to be dressed up as something to be decided by the court as a matter of law[10] and that Ministers (and hence Parliament) should retain ultimate responsibility for controversial discretionary decisions. Yet this was to shift and by the early 1990s both political parties recognised that the tribunal has come to serve a useful political purpose, so long as the executive could retain sufficient control over the procedure. In Chapter 6 I discussed how asylum appeals in the tribunal were viewed as an essential ingredient in streamlining the asylum process with a view to facilitating more removals and restricting access to the higher courts.[11] In the 1980s the government removed the ability of MPs to stop deportation flights through representations. At the time they were placated by the existence of an independent right of appeal. Subsequently, when discussing the abolition of appeal rights, a noted obstacle was the danger of a return to receiving MPs' representations which was perceived as undesirable.[12] Thus a new consensus accepted that shifting responsibility away from politicians and to tribunal judges was desirable. The SIAC Act in 1997 passed with a cross party consensus and, compared to the parliamentary debates surrounding the 1971 Act, there was far less concern about the principle of the executive losing ultimate responsibility for politicised national security decisions. Indeed, civil servants

[8] Ch 4, 124-125.

[9] Ch4, 125-126.

[10] Ch5, 138.

[11] Ch 6, 166.

[12] Ch6, 167-168.

also now recognised the advantages of having responsibility for such decisions taken away from them.[13]

In Chapter 7 I considered how by the late 1990s the Labour government sought to depoliticise the issue of immigration by framing labour migration primarily as a matter of economic policy on which it would receive advice from the Migration Advisory Committee. I also considered the role of human rights in providing a minimum legal backstop, sufficient to assuage critics that decisions would be subject to appeal, sufficient to deflect representations from MPs and their constituents, whilst providing a limited ability for judges to overturn discretionary decisions. Indeed Article 8 appeals initially appeared to limit the scope of a judge's discretion when compared with prior caselaw.[14]

With the advent of automatic deportation, the government found a mechanism to remove executive discretion and direct political accountability for decisions involving foreign national criminals which had generated political controversy, whilst placing responsibility onto judges applying the ECHR. Parliament decided to remove executive discretion to consider all relevant circumstances. Deportation would be the appropriate decision unless the law (in most cases human rights law) prevented it, and it would therefore often fall to judges to take responsibility for the decision to deprive someone of their established home by upholding the deportation order or, perhaps more controversially, by allowing a foreign national criminal to remain. Liberals and those attempting to intervene in individual deserving cases could be reassured that there still existed an independent right of appeal to the courts, whilst Ministers could claim they were statutorily barred from exercising their own discretion. Furthermore, judges could then be blamed for controversial outcomes.

In Chapter 7 I noted Ellerman's[15] argument that whilst states are often able to pass strict deportation legislation to be applied to a caricature 'illegal migrant', at the implementation stage, when the reality of the law is applied to individual human beings, the state may find it lacks what she terms 'coercive capacity'. This arises from interventions from politicians seeking to prevent the deportation of a deserving constituent supported by the local

[13] Ch7, 185.

[14] Ch8, 212-216.

[15] Antje Ellermann, *States Against Migrants: Deportation in Germany and the United States* (CUP 2009).

community, contrary to the very laws they may have previously supported. The variation in states' capacity to successfully implement coercive deportation policies can be determined by the degree to which their administrative agencies are 'politically insulated'.[16] Her study focused on legislative-executive relations and paid little attention to the role of the judiciary in immigration decision-making. This thesis fills a gap by identifying the role that the tribunal can play in *strengthening* the state's coercive capacity by relieving pressure on MPs to intervene, and providing reassurance that decisions to deport are compatible with human rights legislation. Thus, despite the fact that the tribunal can and does overturn immigration decisions, it simultaneously legitimises increasingly harsh deportation policies. As deportation and removal policies have become harsher and affected more long-term residents, the aim of successive governments has been to maintain a position which limits the ability of the tribunal to overturn more than a minority of deportation decisions.

In Chapter 8 I observed that following the introduction of human rights appeals, in many cases tribunal judges initially deferred to the executive's deportation decision. However, following some expansive judgments from the higher courts and the increasing use of deportation powers against people with very long residence, an increasing number of deportation appeals were successful. This was evidently problematic for the government, though as noted above this could be framed politically, as judges thwarting the will of Parliament through the misuse of human rights laws. The legal developments of 2012 and 2014, discussed in Chapter 9, were a response to this and an attempt to restore a more compliant tribunal that would apply Article 8 ECHR in a limited way. The public interest considerations were an attempt to restrict the judges' exercise of independent discretion and encourage deference to the initial decision. By removing all rights of appeal other than human rights appeals and by removing legal aid, a nominal right of appeal remains, but is of limited efficacy for those challenging deportation decisions. Nevertheless, controversial decisions can be upheld as demonstrating compliance with international human rights standards.

It can therefore be observed that, since the beginning of modern immigration control, the executive has had a difficult relationship with the judiciary. There has been a desire to retain as much executive control over immigration decision-making as possible, whilst mitigating the

[16] Antje Ellermann, 'Coercive Capacity and The Politics of Implementation: Deportation in Germany and the United States' (2005) 38 Comp Pol Stud 1219.

political difficulties associated with this (i.e., the criticisms of acting unjustly or of making controversial decisions). Government strategy has been to balance the need for a tribunal to take responsibility for controversial immigration decisions, without permitting individual judges too much autonomy such that they stray into matters of policy. It can be seen that there are several occasions where this has occurred: in the 1930s when the Deportation Advisory Committee's fundamental approach to its role clashed with the role it had been assigned; in the late 1980s when an expansive interpretation of 'all relevant circumstances' led to judges having wider discretion over the merits of deportation decisions; in the late 2000s when in response to increasingly harsh decisions, individual judges began to overturn removal and deportation decisions. On each occasion the executive has sought to restore a more compliant tribunal as well as reducing the scrutiny of the higher courts.[17] As of 2020 it can be said that the government has broadly succeeded in taming the tribunal and ensuring that appeals by long residents facing removal or deportation can succeed only in limited circumstances.

Deferring Individual Responsibility

A further theme running through this thesis has been the question of individual responsibility for immigration decision-making and the extent to which those making controversial and emotionally difficult decisions are able to deflect their sense of responsibility for a decision which may ultimately result in the application of physical force to separate an individual from their home and family. At various times in the archives and caselaw I have identified individuals either wishing to defer responsibility or denying that they in fact have it.[18]

As set out above, the judicialisation of immigration control allows Ministers to defer responsibility for the ultimate outcome of controversial decisions to judges. By the 1960s as immigration decision-making became increasingly controversial, Ministers specifically stated the benefits of allowing judges to make these decisions. However, within the caselaw there are numerous examples of individual judges, when confronted with difficult decisions, attempting themselves to shift responsibility either to the executive or to Parliament or in

[17] See reforms discussed in Ch 7.

[18] See discussion of *N*, Ch2, 53-54; Political debates Ch4, 124-126; archives Ch7, 185; Caselaw discussed in Ch5, 145-150 (the *Bakhtaur Singh* case), Ch8, 215-216, 221-222 & Ch 9, 247-250.

some cases simply to the concept of 'the law' which is perceived to require harsh decisions to be made. There are frequent statements by judges wishing they could allow a compelling claim based on a sense that an individual has established a claim to belong in the UK but deferring to the law to dismiss the appeal.

The advent of automatic deportation, discussed above, can be seen as the government deliberately abdicating responsibility for deciding whether a foreign national convicted of a crime should be deported. Though it can be argued that Parliament were responsible for exercising a democratic mandate to pass strict deportation laws and in the IA 2014 MPs set down strict criteria over when deportation would be appropriate, I argued in Chapter 9 that in doing so they deferred to human rights law as a minimum backstop with limited debate or understanding of how key terms such as 'social and cultural integration', 'precariousness' and 'unduly harsh' would be interpreted. It therefore deferred responsibility for the consequences in individual cases to the courts. Judges in turn would in some cases then defer responsibility to the strictures of the law mandated by Parliament.[19]

In Chapter 1 I identified Kennedy's concerns with the way that those who make life and death decisions may seek to hide behind the law in order to *'avoid the experience of responsibility'.* He challenges those making such decisions *'to recapture the freedom and the responsibility of exercising discretion'.*[20] It is possible that both executive decision-makers and judicial decision-makers justify the harsh outcomes of their decisions by denying to themselves that they have any discretion to act differently. This theme, which emerged during the course of my study, could be explored through further research specifically designed to address the question of individual responsibility.

Immigration Claims-making by Long Residents

The second principal argument from my thesis concerns the role that the tribunal plays in providing a controlled legal remedy which structures the claims-making of long residents facing deportation. I argued that, as authoritative statements of official state discourse,

[19] E.g., *Miah* Ch9, 247.

[20] David Kennedy, *Of War and Law* (Princeton University Press 2006) 103.

judicial determinations can play an important role in defining the boundaries of belonging.[21] Whilst individuals may still succeed in deportation appeals, judicial discourse plays a role in subjugating contested narratives of belonging and normalising the deportation of non-citizens as compatible with human rights in a liberal democracy.

In my thesis I asked the following sub-questions:

- To what extent does a public immigration hearing allow individuals to put forward claims of 'belonging' in the UK?
- How has the articulation of such claims and the way in which they are decided changed over time?
- What role does human rights law play in this process?

In my introductory chapter I observed that it has been argued that the border is a space, not just for refusing entry but to clarify that the migrant is elected to be within that space and to perform a particular socio-economic role.[22] It is my argument that the institution of the tribunal extends the border deeper into the territory of the state and creates a forum where the scrutiny of the migrant can be publicly performed and a space where the border is enacted. It has widely been acknowledged that border enforcement has a performative aspect to it;[23] the visible drama of immigration detention and deportation, and its reporting in the media acts as an assertion that the state is sovereign and the bond that exists between members is being reinforced by the symbolic purge of outsiders. Indeed, Wendy Brown argues that it is precisely as actual sovereignty has waned that the visibility of borders and increased performativity of immigration enforcement have become more necessary to reassure an insecure population of the illusion of sovereignty.[24]

The tribunal is a public forum where the border can be performed; where claims about belonging can be put forward and contested and where judicial discourse plays a role in

[21] Ch2, 63 referring to Didi Herman, ' 'An Unfortunate Coincidence': Jews and Jewishness in Twentieth-century English Judicial Discourse' (2006) 33(2) Journal of Law and Society 281.

[22] Evan Smith & Marinella Marmo, 'The myth of sovereignty: British immigration control in policy and practice in the nineteen-seventies' (2014) 87(236) Historical Research 344.

[23] E.g., Christopher Bertram, 'Citizenship, semi-citizenship and the hostile environment: the performativity of bordering practices' in Devyani Praphat (ed) *Citizenship in Times of Turmoil?* (Elgar 2019).

[24] Wendy Brown, *Walled States, Waning Sovereignty* (2017, Zone Books).

reinforcing the normative boundary of membership. In an appeal against removal or deportation a long resident non-citizen is brought before the law; subjects themselves to the scrutiny of the law and attempts to put forward a narrative setting out why they should be accepted for membership of the community. The state has the opportunity to set out a narrative that they should be excluded. Once this space has been provided, the non-citizen has a chance to contest their construction as foreign and non-belonging. They have the opportunity to 'bring the community into the courtroom' – to draw on others who share a belief that they should be regarded as belonging - that they have passed the normative threshold to secure their acceptance into the local community. To that extent the tribunal could be seen as providing a subversive space where there is room to destabilise established state narratives. For example, a non-citizen resident since childhood may seek to destabilise the narrative that by lacking British citizenship they are objectively 'foreign' or that in having committed a previous offence they are irrevocably 'a criminal'. It is therefore of key interest how the law structures and restricts such claims and frequently dictates the outcome, leading to a situation where subversive narratives can be subsumed within a judicial determination which presents their deportation and removal as a logical 'human-rights compliant' outcome. This thesis has analysed how this has changed over time through a detailed examination of the evolution of deportation caselaw.

In Chapter 2 I set out an argument that claims to remain by non-citizens can be one of three types – claims based on belonging, claims based on compassion or claims based on rights. This thesis has been primarily interested in the relationship between claims based on belonging and those based on rights. Claims based on belonging are fundamentally political claims which may be articulated by anti-deportation campaigns, but may also be harnessed by lawyers seeking to 'bring the community into the courtroom' in an attempt to obtain an intersubjective recognition from the judge. As many academics have identified there is a tendency for claims based on belonging to be framed around an approximation of the morally worthy citizen – i.e., a good citizen but for the legal citizenship.[25] As neoliberal ideology has permeated most aspects of everyday life, claims based on belonging have frequently been pursued around a neoliberal conception of the productive worker-citizen. As others have

[25] Ch 2, 47-49.

noted this can be problematic for those whose claims to belong do not involve participation in the formal market (for example, carers, the disabled etc..).[26]

However, I also identified in Chapter 2 that claims based on rights are inherently problematic for non-citizens, given the entrenched presumption of state sovereignty and the starting position that no non-citizen can found a positive right to enter a state of which they are not a member. In the UK those who meet the immigration rules may claim they have a 'right' to remain which has not been recognised, but here the ease with which the rules can be changed, sometimes with retrospective effect, limits the extent to which that can be described as a meaningful right or legitimate expectation.

It makes little sense to speak of a 'right to belong' that can be protected in law. Belonging is not something which is capable of being granted as a right. Instead belonging is a process; something that is subjectively experienced, negotiated and often contested. Whether someone can establish that they belong requires a subjective feeling of identification to their home combined with recognition from others that that person has passed their, often unconscious, criteria of membership. Different local communities may well have different criteria and may well contest the official state sanctioned criteria (for example, strict compliance with the immigration rules). But that community often does not have the authority to grant formal recognition of belonging (i.e., permission to remain). That prerogative belongs to the state.

In recent years, lawyers have embraced Article 8 ECHR – the right to private life - as a potential way to anchor a positive right to remain for those with long residence who may well have an established subjective sense of belonging. It is argued that recognition must be given to the totality of social ties that a person has established in the territory that has become their home, such that it would be unjust to deprive them of that. Yet I identified that the qualified nature of this right means that its application to individual cases will always prove challenging. Ultimately, decision-makers have to make subjective judgments as to whether an individual has established a right to private life and this inevitably leads back to an evaluation of a moral claim to belong, albeit now framed as an application of human rights law. A danger is that framing this as an impartial and objective legal exercise, obscures what is ultimately at stake;

[26] Ch2, 49, 56.

that someone is responsible for making a discretionary decision about whether an individual remains a member of the community in which they are residing.

My study has identified the shifting way in which claims have been put forward in the tribunal and the way in which the law has either accepted or constrained attempts to articulate claims based on belonging. Analysis of the early tribunals is hampered by the lack of availability of judicial judgments. However, in Chapter 3 I observed that in the 1900s, the Immigration Boards were engaged in a qualitative assessment of the desirability of a non-citizen's entry and residence. For the first time, immigration decision-making became a matter of public discourse, with the social drama of immigration control reported in local newspapers. Whether a person was desirable or undesirable was framed primarily around a conception of economic value as a member of the UK, as well as a concern with the subject's physical and mental health.

In the 1930s, members of the Deportation Advisory Committee were confronted by claims of belonging from long residents facing deportation. What is revealed is a fundamental difference in approach between judges and the executive. There was a tendency by the Committee to view those with lengthy residence as pre-existing members of a community and require positive evidence of why that membership should be deprived, rather than deferring to the principle that, as non-citizens facing exclusion, they needed to establish a positive case to remain. This was irreconcilable with the approach taken by the Home Office.[27]

In the contemporary tribunal it is evident that there have been times when individuals have been able to more successfully advance claims based on belonging. In Chapter 5 I considered how in the 1980s, where adjudicators in deportation hearings had the discretion to consider 'all relevant circumstances', there was space to bring the community into the courtroom and seek to persuade a sympathetic judge that an individual had established a claim to belong. Whilst restrictive interpretations by the IAT and Court of Appeal initially limited the impact of this tactic, the House of Lords judgment in *Bakhtaur Singh* opened up this possibility. Thereafter we see lawyers and judges engaged in considering a variety of scenarios where an individual has a well-established home within the UK. Again though, it is primarily economic

[27] Ch3, 87-95.

aspects that are highlighted as claimants sought to approximate the ideal of the good worker-citizen.[28]

In Chapter 8 I considered how the introduction of human rights appeals initially led to a narrowing of this approach. Claims based on a long resident non-citizen having established a claim to belonging in the UK now need to be articulated on the basis that an individual has a human right to a private life, which is subjected to a disproportionate interference. This initially led to a number of differences; firstly an exclusion of third party interests in place of a focus on the rights of the individual victim; secondly strong deference to the assumed public interest in strict immigration control; thirdly a focus on exceptionality in order for a claimant's case to succeed.[29] By the late 2000s further expansive higher court judgments again opened up the possibility of claims based on belonging being advanced under the auspices of Article 8 private life,[30] though the caselaw remained contested.

Finally, we have the modern Article 8 regime with its series of convoluted legal tests introduced by the 2012 immigration rule changes and augmented by statute from the IA 2014. This attempted to reduce decision-maker discretion by setting out strict rules to be met in order to establish a right to private life; in non-criminal cases, 20 years' residence, half one's life if under 25, or seven years if under 18 combined with an assessment of the reasonableness of removal. Yet it is simply not possible to reduce an Article 8 assessment to a legal rule. The reasonableness test necessarily imports a consideration of the child's integration and sense of belonging in the UK compared to where they would be returning to. The suitability criteria involve a wide range of factors that could lead a decision-maker to conclude an individual is not worthy of membership.[31]

For those who can't meet those rules there is to be an assessment of whether the person faces very significant obstacles to integration in the country they are going to. This is primarily focused on the negative consequences faced by the 'victim' of a human rights breach – rather than on a positive evaluation of their sense of belonging and acceptance into the community

[28] Ch5, 147-150.

[29] Ch8, 212-219.

[30] Ch 8, 223-233.

[31] See Ch9, 244.

they are currently residing. Yet as the rules are not primary legislation, even beyond the rules there is still scope for considering other compelling factors recognised in the Article 8 ECHR caselaw, albeit now through the prism of the statutory public interest considerations.[32] This openly links the right to a private life with a neoliberal conception of the financially independent market citizen. In Chapter 9 I identified the consequences of the judicial interpretation of the terms 'precarious' and 'social and cultural integration'. The concept of precariousness is a legal mechanism that undermines the ability of claimants with long residence and an insecure immigration status to make out a claim to belong unless they strictly meet the immigration rules. It operates to devalue the ties of belonging and community that have been established by requiring judges to give them little weight. However, caselaw retains the possibility that in some unspecified exceptional cases an individual with a precarious status may still seek to persuade a judge to take into account their private life and other aspects of their claim to be of value to the community.[33] The tribunal still therefore provides a controlled legal forum for such claims to be channelled, but with an expectation that in the majority of cases, the law dictates that they should not succeed.

In contrast, in criminal cases the concept of 'social and cultural integration' specifically requires the judge to grapple with a subjective assessment of an individual's claim to belong. In doing so the court has had the opportunity to articulate in judicial discourse what it means to belong as a member of the UK and draw the boundaries that define a failed 'unintegrated' citizen. Rather than interpreting the concept as a practical test of functional integration it has infused the concept with an assessment of 'British values', though without developing a detailed articulation of what those values consist of. There are also suggestions in the caselaw that nominal nationality and ethnicity must always anchor an individual to their true 'home' and thus count against an individual, even one who was born and raised in the UK.[34]

A key conclusion is that whilst the tribunal provides a forum in which claims to belong can be articulated, it also provides a space where a claimant's subjective experience of belonging can be subsumed beneath that of the state; where nominal nationality (foreignness) is reified by

[32] NIAA 2002, s119B.

[33] See cases of *Rhuppiah* and *Thakrar* discussed in Ch9, 245-252.

[34] Ch9, 258-261.

the law as a defining trait which takes precedence over an individual's lived experience. The resulting determination distils these contested narratives into a judgment and justifies the individual's deportation as compliant with international human rights standards.

Security of Residence and the Shift from Politics to Law

My final argument concerns the way in which attempts to maintain the security of residence for non-citizens have shifted from political to legal methods. In the UK, reliance on human rights law to protect the residence rights of non-citizens has been unable to compensate for a lack of strong political opposition.

For many years, there was little in the way of legal accountability in immigration law, with the starting point being the unfettered right of the sovereign state to exclude non-citizens. In the 1900s it was political pressure and concern over the security of non-citizens that led to the establishment of the Immigration Boards, against the judgement of Home Office civil servants. In the 1930s it was political pressure in Parliament and by community groups which led to the Deportation Advisory Committee. In the 1960s it was again ultimately political concern over the declining security of Commonwealth citizens which led to the establishment of an appeals tribunal.

This thesis has documented the contradiction that as legal methods of accountability have increased there has also been a decline in security of non-citizens' residence. Whilst those defined as aliens were always in theory precarious in law, it is only with the more recent systematic use of detention and deportation powers and the introduction of a pervasive internal border that that position has become a practical reality. In contrast Commonwealth Citizens who prior to 1962 had an unrestricted right of residence have seen a continuous erosion of those rights. The theme of precariousness is one that runs through this thesis. In Chapter 8 I documented a number of features of the modern system of immigration control which have led to the creation of increasingly precarious non-citizens on lengthy and insecure routes to settlement, and who face a continual risk of losing their status. This decline in security has resulted from a lack of formal political opposition in Parliament, apparent particularly from the late-1990s onwards where both main parties have had little regard for the wider social impact of reducing the ability of non-citizens to acquire a secure immigration status. If one considers the debates in the 1960s and 1970s, there was an evident concern

about the dangers of creating an underclass of insecure workers with limited rights.[35] Even as late as 1991 there was still some concern in the Home Office about the wider social consequences of creating an underclass of residents without an immigration status.[36] But by the late 1990s and early 2000s it had become established that in a modern globalised world, the UK will rely on temporary and disposable guest workers with little political debate about the wider social consequences and sustainability of such policies, or of the reasons why large numbers of non-citizens subsequently become overstayers. Despite frequent stated concerns about a lack of migrant integration, recent government reports on this topic do not consider the role of immigration law in facilitating or constraining the development of a secure sense of home amongst non-citizens.[37] By defining residents for the purposes of migration policy impact assessments as those who are formally settled, policy decisions specifically exclude the consideration of the welfare of many long-term residents.[38] The designation of such people as 'precarious' in law, is an example of the government overtly utilising precarity as a mechanism to regulate the lives of non-citizens. These decisions have been taken with very little public discussion of the wider societal consequences or desirability of this approach.

At the same time, this decline in formal political opposition has coincided with the expansion of legal means of seeking to hold the executive to account. Immigration legal aid and judicial review grew significantly in the 1990s. In Chapter 7 I documented the way in which lawyers seized on human rights law in the late 1970s and 1980s as a potential tool to improve the security of residence of those facing deportation. I considered as well the arguments for why sections of the left had embraced the law as a substitute for political activism. I also sought to understand the apparent contradiction that the Labour government introduced the Human Rights Act 1998 at the same time as a hardening approach to immigration control.

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[35] Ch4, 112-113; Ch5, 135-137.

[36] Ch 8, 210.

[37] E.g., Louise Casey, *The Casey Review: A review into opportunity and integration* (2016); Department for Communities and Local Government, *Creating the conditions for integration* (2012). The latter report argued that creating an integrated society is *'central to long term action to counter extremism',* yet specifically denied the role of law in facilitating integration. The final report of the All Party Parliamentary Group on Social Integration, *Integration not Demonisation* (2018), does acknowledge the difficulties of encouraging integration amongst non-citizens who are conceived of as being temporary migrants. It notes the reality that, of those granted settlement in 2015, 50% had entered the UK on a visa without the potential to lead to settlement and yet had subsequently been able to settle [60]. It does not, however, address the impact of the legal concept of 'precariousness'.

[38] Ch7, 201-202.

A major conclusion is that the reliance on human rights law, whilst having notably successful outcomes in individual cases, has not been sufficient to halt the wider deterioration in security of non-citizens' residence. A rhetorical commitment to human rights has managed to co-exist with policies that create a permanently precarious resident non-citizen population. This provides a compelling case study to illustrate the arguments by critical human rights scholars that human rights as an ideology, in seeking to provide a minimum standard of protection for primarily political and civil rights, but without a broader focus on challenging economic inequality, has proved to be compatible with the rise of neoliberal economic structures.

The question is whether the failure of the law to establish such security, will eventually lead to a re-politicisation of the issue?[39] Or whether the lack of political support for the rights of non-citizens is now such, that remaining appeal rights could now be removed without prompting a political backlash?

The example of the response to the Windrush scandal - the logical consequence of decades of changes chipping away at non-citizens' security of residence - suggests it may be the former. The Windrush cases involved a variety of different legal scenarios, but many will have had indefinite leave to remain or a right of abode granted by law at a time when it was not necessary to have documentary evidence. When confronted by the UK's privatised internal border (or hostile environment), many were unable to provide evidence of status and faced an insurmountable burden of proof to establish their lawful status. Most of these individuals will have lacked any appeal right, and will also have struggled to obtain legal assistance for judicial review due to the removal of legal aid for immigration law in 2013. Lacking a legal remedy, they turned to political methods – contacting journalists or making representations to MPs. It was only when a critical mass of cases was publicised that the scandal erupted, for a brief moment bringing into sharp public focus the question of how the UK treats long resident non-citizens. The stories of those affected were primarily articulated on the basis

[39] Immigration of course remains a highly political issue, but until comparatively recently the wider social consequences of large numbers of long-term residents with a precarious status have not been made salient.

that they had a moral claim to belong in the UK, rather than on the basis of a claim to respect for human rights.[40]

As a practicing lawyer, I am aware that at present it is harder to win very compelling human rights claims, which a decade ago would have succeeded, in a climate where the legal route is now beset with obstacles. Increasingly clients may need to seek political solutions – contacting MPs, sympathetic journalists, or campaign groups - to raise the politics of their case and highlight the limits of the legal process.

The Windrush scandal provides evidence that as law fails to provide solutions perceived as just to those affected by immigration decisions there is the potential for a turn back to politics and the possibility to open up a wider public debate about the social consequences arising from how the UK treats non-citizens. There is a fine line between providing highly controlled legal remedies and creating a system in which individuals no longer have confidence. If the legal system no longer offers a meaningful remedy, individuals are forced to return to political methods to address their grievances. It is hypothesised that proposed future attempts to further limit access to the court may have this affect. This is an area that is ripe for future research on the intersection of political and legal claims.

Final Reflections on Limitations of Research and Possible Future Research

In my methodology, I explained that given the wide historical scope, it was necessary to limit the research methods undertaken.[41] There were other research methods that could have been pursued which would have complemented the archive and caselaw analysis, including elite interviews, a study of news discourse reporting deportation cases and further analysis of anti-deportation campaign archives. This thesis was focused primarily on the situation of non-citizens with long residence facing removal or deportation, who are only one of the categories of case dealt with by the tribunal. The subject of asylum was only discussed in as much as it was relevant to understanding the impetus for the reforms of the 1990s, yet that is a major part of the work of the tribunal. Considering critically the historical role of the

[40] E.g., see example referred to in Ch 1, of a woman resident in the UK for 50 years, facing detention and removal without legal advice who had submitted a letter to the Home Office stating simply, *'please help me, this is my home'.* Joint Committee of Human Rights, *Windrush generation detention, Sixth report* (HL160/HC1034, 2018).

[41] Ch2, 66-67.

tribunal in the asylum process would therefore also be a valid area of research. However, whilst this thesis is necessarily based on limited materials and perspectives and therefore may only provide a partial account, it has made a number of original contributions to the study of immigration law and provides further avenues of research.

As stated in the introduction, it was not the intention of this thesis to provide recommendations for a more just approach to immigration decision-making. Rather the purpose was to critically analyse the current approach and in doing so expose some of the hidden history to help us understand how we came to be in this position. What has become clear though is the need to recognise the limits of the legal process and the importance of renewed political debate on the wider social consequences of the UK's current treatment of long resident non-citizens. The question that needs to be confronted remains: Where individuals have become well established in the UK and put forward a claim to belong to a local community, how should decisions about accepting or revoking membership be taken and by whom?

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