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History and sources of immigration law

SUMMARY

This chapter divides into two parts. The first gives a brief history of immigration law in the UK, focusing on key legislative developments and noting the themes which arise in that history. The second part introduces the reader to the sources of immigration law, including the immigration rules and concessions.

1.1 Introduction

One of the reasons for having at least a passing acquaintance with the history is that themes repeat themselves over time, and it is possible to gain a greater perspective and understanding when we know that the current trend is not new. Particular kinds of legal provisions are created, abolished, and then recreated. For instance, sanctions on airlines for carrying passengers who do not carry full documents were introduced in the latter part of the twentieth century by the Immigration (Carriers Liability) Act 1987, but in 1905 the Aliens Act had provided for fines to be levied on carriers of unauthorised passengers.

Bevan identified nine themes in UK immigration policy: lack of planning, the Commonwealth, the importance of the European Community, international law, bipartisan policy, concern for civil liberties, race relations, the question of assimilation or diversity and the use of language (1986:22–28). These themes are still visible and important in the twenty-first century, though the balance has changed since 1986. We would now need to add the preoccupation with deterring false asylum claims and terrorism. Each of these will emerge to varying degrees in the course of this book. In enabling us to see that the issues of today are not new, a historical perspective creates the possibility of learning from history.

1.1.1 Attitudes to immigration

Every history of immigration shows that in Britain each new group of arrivals has been regarded with suspicion and hostility. Allegations against Jews at the turn of the twentieth century, West Indians in the 1950s, people from the Asian subcontinent in the 1960s, and in the 1990s, and at the turn of the twenty-first century, against asylum seekers, are all remarkably similar: 'every mass immigrant group was liable to be pronounced unconventional, unclean, unprincipled and generally unwelcome'

(Jones in Juss 1993:71). To this we can add that they are accused of being inveterate liars and scrounging from, or alternatively taking the jobs of, native British people, sometimes even the last two at the same time.

A linked phenomenon is the assertion that the issue is not one of race but of numbers. This is strongly correlated with a political objective of assimilation rather than diversity. If an immigrant group gains sufficient strength in numbers it is thought that it will have more capacity to retain an identity distinct from that of the host population. Interestingly, while denying that the control of entry is to do with race, it is generally said that it is to do with race relations. Politicians often justify a curb on immigration by saying that it is good for race relations. The basis for this is the numbers idea again, and the goal of assimilation. Immigrant groups are thought to be assimilable in small numbers (see for instance the report of Political and Economic Planning discussed in Dummett and Nicol 1990:174). In larger numbers they are said to generate resentment in the host population. Established immigrant groups have also sometimes supported this line of argument though others have opposed any form of immigration controls. Examples of the latter are the action of Jewish trade unions in the nineteenth century and the Indian, West Indian and Pakistani Workers' Association in the twentieth century, (see Cohen, Humphries and Mynott 2002).

The link between immigration and race relations was enshrined in government in the former Home Affairs Select Committee on Race Relations and Immigration. Just by way of example, this Committee's report of 1990 asserted that 'the effectiveness and fairness of immigration controls affect both the maintenance of good race relations at home and Britain's standing in the world'. The European Court of Human Rights did not accept this argument for the maintenance of immigration rules that discriminated against women (*Abdulaziz, Cabales and Balkandali* (1985) 7 EHRR 471). The Commission did not accept that the restriction on the entry of husbands was justifiable on the grounds advanced by the government, which included the protection of employment opportunities for the indigenous population and the maintenance of 'public tranquillity'. The numbers involved were so small that the effect on the employment situation was insignificant, and no link had been demonstrated between excluding such men and 'good race relations'. The effect could equally be the reverse, in that although the rules addressed the fears of some members of the population, they could create resentment in others, particularly the immigrant population which would regard the rules as unfair (para 77). The Court endorsed the Commission's view (para 81).

Protection of race relations is often advanced as a reason for government policy. However, Lester and Bindman say that this thinking is an expression of 'the ambivalence of public policies. One face confronts the stranger at the gate; the other is turned towards the stranger within' (1972:13–14). Roy Hattersley discovered that he was wrong to make the connection between race relations and immigration:

Good community relations are not encouraged by the promotion of the idea that the entry of one more black immigrant into this country will be so damaging to the national interest that husbands must be separated from their wives, children denied the chance to look after their aged parents and sisters prevented from attending their brothers' weddings. It is measures like the Asylum and Immigration Bill – and the attendant speeches – which create the impression that we cannot 'afford to let them in'. And if we cannot afford to let them in, then those of them who are already here must be...doing harm. (*The Guardian* 26 February 1996)

1.2 History of immigration law

In studying immigration we are focusing on movement *into* a country, in this case the UK. However, this is only one small part of a worldwide movement of peoples which has gone on since time immemorial. Until at least around 1994 (Home Affairs Committee, Fifth Report 2005–06, para 8), Britain was a country of net emigration; in other words, more people left the UK than entered it. Many of the people who have come to the UK have been from areas with a long history of migration, and in paying attention to their arrival in the UK we are only selecting a tiny portion of history.

A complex body of statute and case law governing entry into the UK is a twentieth century phenomenon. Before this there was not a developed body of law, but there were numerous provisions controlling the movement of aliens. Aliens are defined as people who do not owe allegiance to the Crown; in other words they are not citizens of the UK nor of any territory in the control of the UK. Sometimes sweeping measures have been employed; for example, in 1290 Edward I, following an increasing campaign of hatred against Jews, expelled all Jews from England. Some of those expelled would have been aliens, and some British subjects. The latter, according to Magna Carta, had a right to remain in the kingdom and travel freely in and out; the royal decree was illegal as well as immoral, but there was no remedy.

Measures controlling the movement of aliens were often connected with hostilities with other countries. In the sixteenth century, when England was at war with Spain, Ireland gave assistance to the Spaniards, and Ireland and England were in continual conflict. There were by this time a significant number of Irish people resident in England. As Dummett and Nicol comment, regardless of the individual views or affiliations of these people, Queen Elizabeth I issued a proclamation that ‘no manner of person born in the realm of Ireland... shall remain in the realm’ (1990:45). The Irish were either expelled from England or imprisoned. Again in 1793, a statute was passed to control the entry of aliens, this time directed towards travellers from France; following the French Revolution it was feared they might stir up similar fervour in England. While some echoes of these earlier practices may be detected in modern law, by and large the immigration law of the last 100 years is a very different creature from the Royal Proclamations of Edward and Elizabeth.

The beginning of modern-day immigration control can be traced to the persecution of Jews in Eastern Europe at the end of the nineteenth century. From being an envied and romanticized minority as they had been in the nineteenth century, Jews once again became a target of violence and hostility. Many took refuge in Western Europe, including England. However, such movements of hatred are not generally confined within national boundaries, and the new arrivals found themselves also the subject of a campaign in Britain. They were concentrated in areas of poor housing and working conditions, and popular prejudice could regard them as having created these conditions rather than suffering from them alongside other workers. Here is an instance of the characteristics identified by Jones and many other writers as linked with immigrants. As mentioned earlier, both in former times and later in the twentieth century, immigrants are associated with overcrowded housing, disease, crime, and either taking jobs and keeping down wages, or refusing to work and taking up welfare provision.

A campaign against alien workers followed, and the government responded by setting up a Royal Commission to investigate the effect of immigrant workers upon housing and employment conditions and upon public health and morals, the allegations being that they were unclean and spread disease and crime.

The conclusion of the Royal Commission was that there was no threat to the jobs and working conditions of British workers, and immigrants did not create poverty, disease, and crime. There was a slightly higher rate of crime among some alien groups, though Dummett and Nicol suggest that 'the figures were crude and took no account of social class' (1990:101), and immigrants were living in overcrowded housing. The balance of the report was not obviously in favour of immigration control; nevertheless, the Royal Commission recommended control. The result was the Aliens Act 1905, the first major piece of modern immigration legislation. This Act marked the inception of the immigration service and the appeals system. It set up an inspectorate which operated at ports of entry to the UK. It was called the Aliens Inspectorate and its officers (the first immigration officers) had the power to refuse entry to aliens who were considered 'undesirable'. Undesirability was defined as lacking in the means to support oneself and dependants, and lacking in the capacity to acquire such means; mentally ill; likely through ill health to become dependent on the public welfare system or to endanger the health of others; or as having been previously expelled or convicted abroad of an extraditable nonpolitical crime. As a result of successful argument in Parliament, those opposed to controls on aliens had managed to limit the inspectorate's powers to those who travelled on the cheapest tickets (steerage class) on immigrant ships, which were defined as those carrying more than twenty aliens. These categories bear a striking similarity to the requirements for entry in modern-day immigration rules. Under present rules, all categories of entrant are required to show that they will not be reliant on public funds, long-term entrants are required to undergo a medical examination (HC 395 para 36) and the commission of criminal offences may give grounds for deportation (Immigration Act 1971 s 3(5)(a)). Note also that the standards in the Act do not clearly correspond to the findings of the Royal Commission; instead they compromise between averting real problems which had been identified and pandering to fears which had been shown to be unfounded. The overall effect is somewhat mitigated by the arguments in Parliament of those concerned with civil liberties. Here we see a reflection of Bevan's themes of lack of planning and bipartisan policy, the latter meaning that political parties would tend to take opposing positions on immigration (though it would also be true to say that it is an issue which does not always split on party lines). The combination of these two factors led to legislation with a confused purpose.

The Act also marked the beginning of an appeals system, by providing for Immigration Appeals Boards. They were set up in every major port of entry and immigrants refused leave to enter had a right of appeal to them.

As we have seen in relation to earlier conflicts with France and Spain, war has been used to impose severe restrictions upon foreigners. During the First World War, the Aliens Restriction Act 1914 s 1 gave the Secretary of State a great deal of power to regulate the entry, stay, and deportation of aliens, and even to pass regulations 'on any other matters which appear necessary or expedient with a view to the safety of the realm'. The Aliens Restrictions (Amendment) Act 1919 extended these wartime powers to apply at any time, subject to a yearly review. This was the pattern also with Prevention of Terrorism Acts, introduced in 1974 as an emergency measure subject to

annual review, but culminating in a permanent Terrorism Act in 2000. The effects of the 1919 Act were far reaching. Not only did the wide powers given to the Secretary of State for wartime now also apply in peacetime, the Act also set the pattern, as Bevan describes, for the legal structure of immigration control. The legislation, like many modern statutes, was skeletal in form, having few substantive provisions but giving wide powers to the Secretary of State to make rules.

The 1919 Act was followed by the Aliens Order of 1920, which laid out the more detailed control of aliens and initiated today's system of work permits. Both passports and work permits grew out of wartime controls, as before 1914 it was possible to travel between a number of countries without a passport.

The Second World War had a very significant effect upon patterns of immigration to the UK. War was declared at a time when the Commonwealth was a strong bond which held together a number of nations in allegiance to the monarch of the UK. The UK was regarded by many as the 'mother country'. The fact that British and Commonwealth soldiers were fighting alongside one another contributed to the development of the idea of family, a sense of partnership, and belonging. Additionally, some Commonwealth service people had contributed to the war effort by doing essential work in the UK and so developed real familiarity with Britain. The media talked in terms of loyalty and gratitude to other Commonwealth citizens. This sense of belonging was not a thought-out policy based on a concept of rights enforceable by individuals, but more of a pleasing sentiment which was not expected to have any legal effect.

The reality of post-war entry to the UK was somewhat different. Spencer (1997) describes the deliberations of an interdepartmental working party set up in 1948, and also the later work of a committee of the Ministry of Labour, to consider where there were labour shortages and whether citizens from Commonwealth countries could or should be recruited to make up any shortfall. Writers differ as to the extent of any labour shortage and of recruitment policies aimed at remedying such shortage. The main focus was on the West Indies, and the question of whether workers should be recruited from there. Spencer reports negative conclusions as far as the recruitment of West Indians was concerned; they were not considered suitable workers or acceptable to the unions in the UK. Spencer also reports a refusal by the unions to co-operate with a recruitment scheme, and a preference by the government committees for workers from the continent of Europe. The reasons for this preference were that European workers would be easier to integrate and easier to return when no longer needed. The latter is in part because European workers would not have any claim as British subjects whereas Caribbean workers would. That Europeans would be regarded as easier to integrate could be surprising in view of the fact that English would be a native language for Caribbean workers though not for any European. However, Spencer's analysis of the Cabinet papers of the time, now released under the 30-year rule, strongly suggests that colour was at the root of the government's objection to West Indian workers. An analysis of Cabinet papers of the following few years relating to attempts to restrain immigration in the early 1950s reveals the same concerns (Carter, Harris, and Joshi 1987).

All the authors mentioned above, whose work is based on Cabinet papers, recount obstructive practices that were instituted in the Caribbean, West Africa, India, and Pakistan, making it more difficult for citizens of those countries to travel to Britain despite their being Commonwealth citizens. Examples of tactics employed were the delay in issuing passports and the omission of the reference to British subject status on travel documents, even though the holder was entitled to such a reference.

The passage of the British Nationality Act in 1948 did not affect right of entry into the UK; it dealt with nationality rather than immigration. However, it did so in a rather theoretical sense, being more a matter of labelling than of delivering enforceable rights. Indeed it was not within the contemplation of those who produced this legislation that the millions of Commonwealth citizens and citizens of the UK and Colonies would attempt to use their theoretical right to enter the UK. This Act will be considered in more detail in the chapter on nationality. In terms of this brief history, it both expressed the rather theoretical and symbolic idea that legislators had of the meaning of British subject status, and began the division between citizens of independent Commonwealth countries and other British subjects, which laid the foundation for the later development of immigration control.

Despite the disincentives mentioned above, immigration into Britain continued. There were opportunities for work, and these were attractive. By far the largest number of entrants was from Ireland and the countries known as the Old Commonwealth, i.e. Australia, Canada, and New Zealand. Immigration from the Caribbean was also rising, though not keeping pace with Ireland and the old Commonwealth. Until the release of the Cabinet papers relating to the 1950s, it was widely believed that there was a disproportionate rise in that period of immigration from the Caribbean and of social problems associated with this immigration. The popular account also entailed that the government was dedicated to retaining the rights of British subjects from the Caribbean to enter the UK, but then as social problems escalated, reluctantly they were forced to legislate in the form of the Commonwealth Immigrants Act 1962 to restrict the right of some Commonwealth citizens. Political speeches of the time focused on the familiar theme of numbers. A certain number of immigrants, it was asserted, could be assimilated – in other words absorbed – into the majority culture in Britain without noticeable impact or making demands. Beyond that number they became unassimilable. The studies mentioned above suggest a contrary view, namely that in working parties established specifically to consider the role of ‘coloured’ workers, the link of immigrants with social problems was not proven, and immigrants from the West Indies were far outnumbered by those from Ireland and the old Commonwealth. The initiative to control black immigration seemed to come, not from the identification of a social problem, but from an independent agenda within the Home Office and Cabinet Office. The government moved to impose a quota system on immigrants from the West Indies. However, official descriptions of them became more favourable after arrivals increased from India and Pakistan. Those who were formerly lazy were now industrious and English-speaking, and it was the South Asians who were ‘unassimilable’. The British government succeeded in obtaining co-operation from West Indian, Indian and Pakistani governments to restrain migration, and Paul comments:

The range of administrative methods used by territories of origin and the United Kingdom to prevent colonial migration was so extensive that one might suggest that those migrants who did succeed in obtaining a passport, completing an English language interview, bearing up to scrutiny and accepting the propaganda at its true value were indeed hardy souls. (1997:153)

After years of political debate and manoeuvring the Commonwealth Immigrants Act was finally passed in 1962. The significance of the Act was immense. For the first time there was a restriction on the rights of certain Commonwealth citizens to come to the UK.

The Act distinguished between Commonwealth citizens based on parentage. Those who were born in the UK or Ireland or who held a passport issued by the government of those countries would not be subject to immigration control; others would. The immigration control consisted of conditions that a Commonwealth citizen would have to satisfy to gain entry. Whether these conditions were satisfied was to be determined by an immigration officer who was given a wide measure of discretion.

One of the peculiar features of British immigration law, to which we shall return time and again, is the heavy reliance on formerly unpublished instructions, guidelines, and concessions. These less formal sources in practice determine the outcome of applications. In the course of the implementation of the Commonwealth Immigrants Act 1962, it was made clear by internal guidance that the discretion given to immigration officers to refuse entry on the basis that requirements were not met, would not be applied in practice to immigrants from Canada, Australia, or New Zealand. The system of control that was established therefore discriminated at two levels against black would-be entrants. Initially, the terms of the Act itself, while neutral on their face as regards race or colour, were based on a requirement of birth in the UK or possession of a passport issued by the UK government, both of which would be satisfied more often in practice by white people. At the second level of internal instructions, the discrimination was closer to being explicit. As with the Jews in the thirteenth century, though more subtly, the distinction was made on the basis of ethnicity, not nationality.

For the Commonwealth citizens subject to immigration control, a three-tier system of work vouchers was instituted. Dummett and Nicol comment that this founded a bureaucratic system for processing immigration rather than a method of controlling it. The actual effect of the Commonwealth Immigrants Act was very different from the government's intention. There was a substantial rise in immigration from the Indian sub-continent in particular around the time of the 1962 Act. The Act has often been presented as the response to this increased immigration, but as Spencer (1997) and Bevan (1986) recount, it is more likely to have caused it. Spencer suggests four ways in which the Commonwealth Immigrants Act actually encouraged immigration, as follows.

First, the build-up to the legislation had taken years. The proposal to restrict immigration was therefore known long in advance and during the years 1960–62 this created a rush to 'beat the ban'.

Second, prior to the 1962 Act, those who had come from the Indian subcontinent to Britain were mainly men who had come for a temporary period to work, and to send money back to their families. Often this was in a tradition in their original locality, and they came to Britain because at that time there was a good chance of employment particularly in the textile industry in the north. These men's travels were therefore not immigration as it is sometimes understood 40 years later, i.e. they had not come to settle. The 1962 Act made it less likely that men retiring from this role could be replaced by younger relatives as the work voucher system would not have favoured their entry. The tendency of the Act therefore was to encourage those men to apply for leave to remain in the UK.

Following on from the last point, the Act permitted unification of families, and so for the men who had come as sojourners, the provisions of the Act combined to make remaining in the UK and being joined by their families the more viable option. It might be said (though Spencer does not make this point) that the Act encouraged and established the growth of an immigrant population modelled on British assumptions

of working and family life, rather than an understanding of what migration meant to those who were doing it.

Spencer's final point is made also by Dummett and Nicol (1990): that the Act established a regime that regulated and therefore to a degree allowed people to enter the UK, namely the system of entry control and work vouchers.

The 1962 Act was formative in that it laid the foundation of the distinction between entry as a right and entry subject to the fulfilment of conditions, and did so by using the criterion of connection with the UK. The particular history of this Act reminds us not to take at face value assertions of cause and effect in relation to legislation; it also introduces the role of internal guidance in the operation of immigration law.

The history of the Commonwealth Immigrants Act 1968 is discussed by many writers including Shah, P. (2000), Bevan (1986), and Dummett and Nicol (1990). It provides a stark illustration of the difference between immigration policy based on loyalty to those whom the Empire and then the Commonwealth gave the status of British subject, and immigration policy based on fear of admission of numbers of non-white people. The key events were the independence of, first, Kenya and, later, Uganda and Tanzania. Each of these countries at independence had an established minority population which had come from the Indian sub-continent, some of whom had been introduced into East Africa by Britain which, as colonial power, had employed them on construction projects. Many had left India before its independence and before the creation of Pakistan, and their only citizenship was that of the UK and Colonies. The East African countries, on attaining independence, pursued a policy of Africanization that required residents to demonstrate their allegiance to the new state. Many Asians either did not fulfil the conditions for acquiring the new citizenship or did not register within the time limit, preferring to wait and see how their fortunes were likely to go in the new regime before committing themselves. Some may have been reluctant to lose their British connection. For many of those who did not acquire the new citizenship, serious consequences ensued. They lost their employment or their livelihood, and sought to use whatever protection their citizenship of the UK and Colonies could offer them. Their passports had been issued by the British High Commission and, therefore, under the 1962 Act they were not subject to immigration control. They had, as British subjects, right of entry into the UK. Inflated figures of likely entrants were quoted in the media, and the Commonwealth Immigrants Act 1968 was rushed through Parliament. The new Act provided that British subjects would be free from immigration control only if they, or at least one of their parents or grandparents, had been born, adopted, registered, or naturalized in the UK. The issue of a passport by a British High Commission thus ceased to be a qualification for entry free of control. For those subject to control, another voucher system was introduced. This one was based on tight quotas, reflecting the government's contention that numbers were the problem.

The story of the East African Asians illustrates how a British government was prepared to mix together issues of nationality and immigration. This is one of the themes identified by Bevan. While the East African Asians retained their CUKC (citizen of the UK and Colonies) status, it was in effect worthless as it no longer conferred a right of entry to their country of nationality.

The issue of colour (which was the terminology then used, and which was quite accurate) continued to dominate public debate about immigration. When the Immigration Act 1971 was passed, the racial definition of those with rights of entry and those without was complete. While the Immigration and Asylum Act 1999 and Nationality,

Immigration and Asylum Act 2002 have made substantial changes to the immigration process and the rights of immigrants, the 1971 Act remains the source of Home Office and immigration officers' powers to make decisions on entry, stay, and deportation. Its significance in terms of the history we are now tracing is its division of the world into patrials and non-patrials. Previously, UK law had divided the world into British subjects and aliens. This was the fundamental category which determined whether a person had right of entry into the UK. Legislation then, as we have seen, restricted the rights of some British subjects to the extent that these rights became practically worthless. The Immigration Act 1971 gave right of abode in the UK to those it defined as 'patrials'. These were:

- (i) citizens of the UK and Colonies who had that citizenship by birth, adoption, naturalization, or registration in the UK;
- (ii) citizens of the UK and Colonies whose parent or grandparent had that citizenship by those same means at the time of the birth of the person in question;
- (iii) citizens of the UK and Colonies with five years' ordinary residence in the UK;
- (iv) Commonwealth citizens whose parent was born or adopted in the UK before their birth;
- (v) Commonwealth citizens married to a patrial man.

Commonwealth citizens who had been settled in the UK for five years when the Act came into force (1 January 1973) also had the right to register and thus possibly the right of abode. More detail is given of these provisions in chapter 2. Others, including British citizens without the necessary tie of parentage, would be subject to immigration controls. Apart from the five-year residence qualification, the right to live in the UK and to enter free from immigration control was determined by birth or parentage, not by nationality. The British Nationality Act 1981 carried this classification into British nationality law, and it is still the case that there are some, though a dwindling number, of British nationals who do not have a right of entry to the UK.

On the same day that the Immigration Act 1971 came into force, the UK entered the European Community. One of the cornerstones upon which the EC is built is freedom of movement, not only of goods but also of workers and their families. Despite this timing, the Immigration Act made no reference to European membership or the principle of freedom of movement. It continues to be the case up to the present that UK immigration law has developed quite separately from European law on freedom of movement (*R v IAT and Surinder Singh ex p SSHD* [1992] Imm AR 565) and that, at the same time that immigration restrictions were confirmed for Commonwealth citizens with a traditional allegiance to Britain, a new category of privilege was created for European nationals. The free movement rights of EU nationals are now implemented in UK law by the Immigration (European Economic Area) Regulations 2006, SI 2006/1003.

Primary immigration, that is of people coming to establish a life on their own rather than to join family members, virtually ceased with the Acts of 1968 and 1971; nevertheless in the 1980s the general trend in immigration provisions remained towards increasing restriction. Attention switched from primary immigration to family settlement, and more demanding rules for the entry of spouses were introduced. These raised such a political storm that, most unusually, there was a debate in Parliament concerning new immigration rules (see discussion in chapter 9).

On the whole, however, toward the end of the twentieth century, immigration policy (as distinct from asylum) did not play such a prominent part in the political life of the UK as it did previously. The Labour government's abolition of the infamous primary purpose rule in 1997 was a reversal of one of the most punitive provisions on family settlement (again see chapter 9) and the reduced tension around immigration and increased awareness of rights made this possible. The increasingly restrictive nature of immigration law did not arise from concerns about immigration as such, but from concerns about increased asylum claims. The rapid growth of a visa regime, now affecting travellers from potentially any country in the world, is an example of this (see chapter 7). The Immigration and Asylum Act 1999 made significant inroads into the rights of appeal of those alleged to be in breach of immigration law, but this was to address the backlog of cases at the Home Office and to expedite the removal of unsuccessful asylum seekers. The backlog, rather than issues of entry and entitlement, became the immigration scandal of the late 1990s in its own right.

The other major development in immigration law in the last 20 years has been the introduction of internal controls. This entails the devolution to housing officers, benefits officers, employers, registrars of births, marriages, and deaths, and airline officials of decisions concerning immigration status. These decisions then determine entitlement to a civil benefit such as housing or employment. Juss dates the introduction of these provisions from the first report of the Select Committee on Race Relations and Immigration in 1978. The effect has been to exclude from social benefits those people who have, or who may have, or who may be thought to have, a questionable immigration status. These provisions are predicated on the idea that there is a negative impact on Britain's housing and welfare system from immigrants who have deceived their way into the system – an idea we have seen at work earlier in the twentieth century.

Both the development of internal controls and the reduction of appeal rights ride on the back of the issue which has attracted public attention in the 1990s – that of asylum. The bulk of the case law reported in the Immigration Appeal Reports for some years concerned asylum rather than immigration issues. There was an escalation of legislation principally aimed at controlling asylum seekers: the Asylum and Immigration Appeals Act 1993, Asylum and Immigration Act 1996, Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002, the bizarrely named Asylum and Immigration (Treatment of Claimants etc) Act 2004, and the Immigration, Asylum and Nationality Act 2006. However, although the target group is different, the themes are recognizable.

The 1993 Act introduced an appeal right for asylum seekers, but also the concept of a claim 'without foundation' (Sch 2 para 5). Again, this is based on the idea of a potential entrant as dishonest. Claims so certified would attract only limited appeal rights, the government's avowed intention being to speed through the system claims which could be identified at an early stage as unmeritorious. This provision is based not only on the idea of the deceptive applicant but also on addressing the backlog. Juss gives a stinging account of the origins of the 1993 Act in which he suggests that the problem of the backlog was self-inflicted, resulting from a recruitment freeze in the Immigration and Nationality Department (IND). Opportunities for applicants to manipulate the system arose as a result of increasing delays, and these manipulations in turn extended the delays. His account may be borne out by the fact that the backlogs were effectively tackled in the year 2000 by recruiting extra personnel in IND.

Delay and cheating the system, and the relationship between the two, became the political issues of the 1990s. The alleged cheating was both at the point of entry (the concept of the 'bogus' asylum seeker) and after entry (the concept of the 'scrounger'). These ideas underlie further provisions in the Asylum and Immigration Act 1996 such as, for instance, the creation of a new offence of obtaining leave to remain by deception (s 4). The kinds of claims that would be subjected to restricted appeal rights (known then as the short procedure) were extended to include those from a designated country of origin. Designation, according to the promoting minister in Parliament, would be on the basis that there had been a high number of applications and a high number of refusals from that particular country and that there was, in general, no serious risk of persecution in that country (HC Col 703 (11 December 1995)). This provision has a similar basis to the 'without foundation' provision, that of expediting applications on the basis that they may be identified without full examination as being unmeritorious. Similar provisions followed in the 1999 Act ('manifestly unfounded') and in the 2002 Act ('clearly unfounded'). The list of designated countries became known as the White List. It was abandoned after a successful challenge, in *R v SSHD ex p Javed and Ali* [2001] Imm AR 529, to the inclusion of Pakistan because of known widespread discrimination against women and against Ahmadis, which had been accepted in the higher courts in the UK (*Shah and Islam v IAT and SSHD* [1999] Imm AR 283 and *Ahmed (Iftikhar) v Secretary of State for the Home Department* [2000] INLR 1). Where sectors of society could be said to be at risk, it could not be reasonable to say there was, in general, no serious risk of persecution. A new 'white list' was produced in the 2002 Act and has been extended by ministerial orders.

Section 2 of the 1996 Act also introduced a power to remove asylum seekers before their appeal is heard (a 'non-suspensive appeal') if they had travelled through a country which can be regarded as a 'safe third country'. These provisions, as mentioned earlier, arose from concern in Europe about asylum seekers being 'bounced around' Europe, i.e. shuttled from one country to another, each one declining to hear their asylum application but finding a reason to return them to another member state. The UK was a signatory to the Dublin Convention, the treaty by which EC countries sought to find a way of determining which state should hear an asylum application. However, as international law, this treaty was not binding in the UK directly in tribunals. It has now been superseded by a regulation, discussed in chapter 12.

Other provisions of the 1996 Act continued the dual themes of deception and internal controls. More criminal offences were devised, targeting the racketeering of those who arrange entry to the UK for gain (s 5), and more internal controls were set up, including recruiting employers into the system of detection of residents with potentially irregular immigration status (ss 8 and 9).

The history of immigration law is full of examples of legislation swiftly introduced to reverse higher court decisions. Section 11 of the 1996 Act was one such example. The Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996, SI 1996/30, had removed benefits from almost everyone who was subject to immigration control. The regulations were declared *ultra vires* by Simon Brown LJ because they were beyond the tolerance level of a 'civilised nation'. 'Something so uncompromisingly draconian can only be achieved by primary legislation' (*R v Secretary of State for Social Security ex p JCWI* [1997] 1 WLR 275). As Macdonald puts it: 'The government duly obliged, enacting the condemned regulation as section 11 of the 1996 Act'(2001:9).

The Immigration and Asylum Act 1999 continued the trend by, according to Statewatch, 'hugely increasing surveillance, monitoring and compulsion.' Registrars of births, marriages, and deaths were brought into the internal control system (s 24). Penalties for carrying passengers without full documentation increased once again, being extended to include trains, buses, and coaches to cover entry via the Channel Tunnel (Part II of the Act). There were also provisions for penalizing private car and lorry drivers who carried clandestine entrants. Material support for asylum seekers was converted into a voucher system and a dispersal system which would distribute asylum seekers around the country (Part VI). Appeal rights were further curtailed, both for asylum seekers and other deportees (Part IV). Limited appeal rights for family visitors were reinstated. The 1990s had seen a massive increase of asylum seekers detained in detention centres and prisons. One of the anomalous features of immigration detention generally, including that of asylum seekers, is that it is not subject to any form of supervision by the courts, and there is no presumption of a right to bail, as there is when someone is charged with a criminal offence. In the 1999 Act the government took the opportunity, partially, to address this issue by introducing a routine bail hearing (Part III). However, these provisions were never implemented, and were repealed by the Nationality, Immigration and Asylum Act 2002. The 1999 Act contained the first statutory presumptions of the safety of a third country to which an asylum seeker could be returned. This appeared to be a government reaction to having the Secretary of State's certificates of safety issued under the 1996 Act regularly struck down by the courts. In the Immigration and Asylum Act 1999, s 11, the certificates in relation to European countries were made immune to judicial review by a statutory presumption that such countries were deemed safe. This proved unassailable (*R (Thangasara) v SSHD* [2002] UKHL 36).

The 1999 Act was proclaimed as a radical overhaul of the immigration and asylum system. It expressed the political agenda of its day – suspicion that there is a large volume of unmeritorious asylum claims; the cost of welfare benefits obtained by people who made such claims; the progressive extension of internal controls; the problem of backlog and delay in the system both before dealing with claims and before removal from the country of those who did not succeed; and the shifting of blame to the morally more acceptable targets of 'racketeers' rather than the obviously vulnerable asylum seekers. There was another influence at the time of debates on the 1999 Act, namely, the Human Rights Act 1998 (HRA), which had received Royal Assent but was not yet in force. The 1999 Act removed some rights to have an appeal heard in the UK. The counterbalance was to provide an in-country appeal on human rights grounds. The 1999 Act provided the first statutory right of appeal against immigration decisions on human rights grounds (s 65, now in the Nationality, Immigration and Asylum Act 2002 s 84). Further discussion of the implications of the introduction of the HRA is reserved for chapter 4.

1.2.1 Twenty-first century

Four immigration statutes have been passed already in this century, in an atmosphere of 'gathering storm in relations between the executive and judicial branches in the national constitution' (Rawlings 2005:380). There have also been three terrorism statutes, one of which (Prevention of Terrorism Act 2005) consists entirely of the most severe statutory curtailment of civil liberties seen in Great Britain since wartime

internment. This came into existence to replace earlier even more restrictive measures applied to foreign nationals through a misuse of immigration powers (Anti-terrorism, Crime and Security Act 2001, Part IV).

Two major cases in the House of Lords arising from the same issue were heard by chambers of nine and seven Lords respectively, indicating the constitutional importance of the matters addressed, and reasserting the place of the judiciary as protectors of fundamental constitutional values. *A and others v SSHD* [2004] UKHL 56 concerned the direct challenge to the detentions under the Anti-terrorism, Crime and Security Act 2001, and *A v SSHD* [2005] UKHL 71 the question of whether evidence which could have been obtained by torture could be used in cases before the Special Immigration Appeals Commission.

At the same time as the 2004 judgment, the government was proposing to stop all immigration and asylum issues from being heard by the courts, whether on appeal or review, by means of a far-reaching ouster clause in the Asylum and Immigration (Treatment of Claimants, etc) Bill 2003 (AITOC). Such a move was unprecedented. Rawlings refers to it as part of a 'revenge package' from a government frustrated that the judiciary continued to develop and maintain the rights of asylum seekers in the face of government attempts to restrict them (2005:378).

At the time of the passing of the 1999 Act it was widely predicted there would be another immigration statute within three years, and so it turned out (see for this point and generally McKee). The Nationality, Immigration and Asylum Act 2002 was preceded by a White Paper: *Secure Borders, Safe Haven; Integration with Diversity in Modern Britain* (Cm 5387). The publication of the White Paper was announced by Home Secretary David Blunkett in the following terms:

The White Paper takes forward our agenda by offering an holistic and comprehensive approach to nationality, managed immigration, and asylum that recognises the interrelationship of each element in the system. No longer will we treat asylum seekers in isolation or fail to recognise that there must be alternative routes to entry into this country. (HC col 1028 7 February 2002)

The Act deals with changes to nationality law, the provision of accommodation centres for asylum seekers, restrictions on the asylum support system, the provision of removal centres and expansion of powers of detention and removal, extension and amendment of the carriers' liability scheme, and the introduction of further criminal offences. At least as much as the 1999 Act, this Act was dominated by objectives concerning the asylum system.

McKee refers to 'divergent and contradictory goals', specifically:

- to keep asylum seekers out, but to provide a welcome for genuine refugees;
- to integrate refugees and ethnic minorities into mainstream British culture, but to celebrate cultural diversity;
- to include a raft of authoritarian and repressive measures under the same anodyne umbrella of 'modernisation' as liberal measures to allow economic migration and facilitate easier travel. (2002:181)

Within the broad purposes identified by McKee, the Act and the White Paper have a number of underlying policy themes which may be characterized as:

1. developing an all-pervasive control system for asylum-seekers;
2. a controlled development of the possibility of entry for work;

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3. the creation of a class of people without rights or status;
4. development of extra-territorial immigration control;
5. combating terrorism; and
6. the strengthening of executive power.

Taking each of these in turn: the all-pervasive control system is an attempt to repair the damaged credibility of the asylum system, an issue discussed more fully in the next chapter. Accommodation and removal centres were elements in this development. Restrictions on welfare support which made it conditional on reporting or residence also tightened the level of continuous control that the government is able to exercise over asylum seekers. Increased powers of detention and removal served the same purpose.

The second policy underlying the 2002 White Paper was a cautious encouragement of economic migration. This was the first evidence for decades that immigration policy might be directed towards encouragement of entry, and received a general welcome. Shah, R. (2002:315), for instance, saw this as evidence of 'a new dynamism' in the Home Office. However, this apparent shift in policy was not reflected in the 2002 Act. Extensions of various schemes permitting entry of workers were implemented by concessions and developments in administrative practice which, in some cases, resulted in changes to the immigration rules. The retention of government control over entry into the UK is presaged in the White Paper, para 12: 'We have taken steps to ensure that people with the skills and talents *we need* are able to come to the UK on a sensible and managed basis' (emphasis added). The retention of control and the words emphasized lend support to the argument of Cohen that such proposals represent nothing new; rather, they replicate a historical tendency to manipulate overseas labour, 'labour which can be turned on and off like a tap' (2002). Bevan made the same comment in relation to earlier provisions (1986:278). Scepticism it seems was warranted. A further White Paper in 2005 announced a tiered system of managed migration that aims to bring entry for work and study into a more routinized, bureaucratized system, dominated by immigration control. But this is to anticipate. The growth of a class of people without rights or status is evident in a number of disparate developments, and three provisions of the 2002 Act in particular are part of that development. Section 4 substantially extended the power of the Secretary of State to deprive a person of their British nationality. In the case of people who acquired their British nationality by naturalization or registration, there is no requirement to have regard to whether doing so will leave them stateless. In the case of others, although they may not strictly speaking be left stateless, as the Joint Parliamentary Committee on Human Rights pointed out:

deprivation of British citizenship would entail loss of British diplomatic protection; loss of status; loss of the ability to participate in the democratic process in the United Kingdom; and serious damage to reputation and dignity. The Home Office argument assumes that the real threat to human rights would derive from any subsequent decisions taken as part of the immigration control process. In that process, there would usually be adequate opportunity to ensure that effect is given to Convention rights, and that other rights are given appropriate weight. However, we are concerned about the wider implications of loss of British citizenship. (Parliamentary Joint Committee on Human Rights Session 2001–02 Seventeenth Report para 26)

While recognizing that there is no right to a nationality, the Committee was concerned about the consequences of statelessness, and that if the other country refused a passport, the alternative nationality would be 'an empty shell' (para 26). The Committee's report reveals that the civic limbo in which persons would find themselves was not

recognized by the Home Office. The dangers of being left in a condition of no status or rights were sadly demonstrated after the case of *Ahmed v Austria* 24 EHRR 62. The European Court of Human Rights decided that the applicant could not be removed from the country as this would breach his human rights. However, the Austrian government did not issue him with a residence permit, and eventually, without any support or security, Mr Ahmed took his own life.

Section 76 of the 2002 Act enables the Secretary of State to revoke a person's indefinite leave to remain if the person 'is liable to deportation but cannot be deported for legal reasons'. The legal reasons which would prevent deportation are likely to be that the person would face a serious violation of their human rights in their country of origin and no other country is willing to accept them. Without indefinite leave to remain, a person may neither work nor claim benefits. They are without status and without means.

The 2002 Bill was amended in the House of Lords so that citizenship by birth (though not by application) could only be removed in reliance on acts committed after s 4 came into force (1 April 2003). However, indefinite leave to remain may be revoked in reliance on anything done before s 76 came into force (10 February 2003) and leave granted before that date may be revoked, giving the section retrospective effect.

Finally, s 67(2) in combination with its interpretation in *R v SSHD ex p Khadir (Appellant)* [2005] UKHL 39 means that a person who is granted temporary admission – a status without rights – may remain in that position for years, even though there is no possibility of being removed (see chapter 15). The status of temporary admission, on which many asylum seekers remain for years, is a bar to rights of many kinds. The government has maintained that people on temporary admission are not 'lawfully present' for the purpose of social security rules and housing rules. Arguments on this and other issues have even led to the legal fiction that people temporarily admitted are not present at all, let alone lawfully. This has been scotched in *Szoma v Secretary of State for the Department of Work and Pensions* [2005] UKHL 64, in which their Lordships held that the appellant was lawfully present. As a consequence, he was one of a small minority of those on temporary admission who are able to claim income support.

The concern with undocumented migrants both throughout Europe and further afield is marked by this paradox. Ever-increasing control measures are developed alongside measures to exclude some people from the system altogether. The Criminal Justice and Immigration Bill contains a further power of this kind, discussed below.

The development of extra-territorial immigration control is strongly signalled in the 2002 White Paper but barely appears in the Act. Most measures taken for this purpose are administrative arrangements whose statutory support appears elsewhere (e.g. the Channel Tunnel Act 1987). They include the posting of immigration officers abroad as airline liaison officers, and alongside their counterparts at European ports. They are aimed at deterring asylum claims and in policy terms are important. To these measures could be added the extension and amendment of provisions relating to the liability of carriers (lorry drivers, rail companies, and so on) for clandestine entrants hidden in their vehicles. These developments constitute a significant change in the nature of immigration control, and are discussed fully in chapter 7.

Combating terrorism is a thread which runs throughout legislation and government policy much more strongly since 11 September 2001. The Anti-terrorism, Crime and Security Act 2001 contains significant provisions affecting refugee claims, discussed in chapter 14, but the connection with prevention of terrorism is not explicit

in the Immigration Acts. There are not, for instance, sections headed 'terrorism'. Nevertheless, in the 2002 Act, the strengthened and extended border controls, the new offences created, and the intensive monitoring of asylum seekers all have security as a background theme and objective (see McKee and Shah, R. 2002). A radical interpretive provision in the 2006 Act (discussed in chapter 14) has the same objective, as did the proposals to work the Prime Minister's 2005 set of 'unacceptable behaviours' into immigration and nationality law (see chapters 3 and 16). This trend is the 'Secure Borders' aspect of the 2002 White Paper's title. More directly, as discussed in chapter 14, s 72 enables members of organizations proscribed under the Terrorism Act 2000 to be excluded from refugee status. For a discussion of the effect of the 2001 Act on immigration and asylum see Blake and Hussain, *Immigration, Asylum and Human Rights* (2003, Chapter 7).

The welfare support provisions of the 2002 Act were among its most contentious provisions. Despite research suggesting that welfare policies are not an effective deterrent (Home Office Research Study 243, 2003), the government was dedicated to a path of reducing welfare provision. As welfare support is not covered as a subject in its own right in this book, the main issues will be outlined here. The crucial provision in the 2002 Act was s 55 which provided that the Secretary of State has no obligation to provide welfare support (money or accommodation) where a claim for asylum has not been made 'as soon as reasonably practicable' unless this is necessary to avoid a breach of the claimant's human rights. Challenges to denial of benefit multiplied in the High Court. In the first year of the Act judges made over 800 emergency orders for the payment of interim benefit (Sedley LJ annual Legal Action Group lecture November 2003). After people were refused support even when they claimed asylum on the day of their arrival in the UK, the case of *R (on the application of Q) v SSHD* [2003] EWCA Civ 364 considered the meaning of s 55. The Court of Appeal accepted that the asylum seeker's circumstances should be taken into account in determining what was 'as soon as reasonably practicable' and this could include advice given by someone arranging their passage. In January 2004 the government was obliged to introduce fairer procedures and a three-day period to allow people to find their way to relevant government offices (Macdonald and Webber 2005:868).

The government still pursued to the House of Lords the question of whether actual or imminent destitution would amount to a breach of Article 3 – the right to be free of inhuman or degrading treatment. The House of Lords found that it did (*R v SSHD ex p Adam, Limbuela and Tesema* [2005] UKHL 66; see further in chapter 4). Despite the inroads which court decisions at all levels have made into the operation of s 55 the Parliamentary Joint Committee on Human Rights reiterated their concern that

the levels of homelessness and destitution which reliable evidence indicates have in practice resulted from section 55 are very likely to breach both the obligation of progressive realisation of rights under Articles 9 and 11 International Covenant on Economic Social and Cultural Rights (since they represent a regression in the protection of these rights for asylum seekers), and the obligation to ensure minimal levels of the Covenant rights to the individuals affected by section 55. (JCHR Session 2005–06 Eighth Report HL paper 104 HC 850 para 121)

Welfare support continued to be a major preoccupation in the 2004 Act. The proposal in the consultation letter which preceded the Act which provoked the most opposition was that welfare support and accommodation should be withdrawn from failed asylum seekers with families. The 1999 Act had already withdrawn support from asylum seekers whose claim had failed, but it was not thought appropriate then to inflict

destitution on children. In 2003 the government had a different solution – take the children into care. Section 9 enables support to be withdrawn once a claim has failed and appeals are exhausted in a case where the Secretary of State certifies that the claimant ‘has failed without reasonable excuse to take reasonable steps to leave the UK voluntarily’ (s 9 of the 2004 Act, inserting para 7A into Sch 3 of the 2002 Act). Section 10 drew almost as much criticism as it enables the Secretary of State to make regulations making continuation of accommodation for a failed asylum seeker dependent upon performing community service.

The Parliamentary Joint Committee on Human Rights noted that an asylum seeker ‘who has exhausted their rights of appeal, cannot return to their country for reasons beyond their control and who has no other means of support is in an analogous position to a UK citizen or any other person in the UK who is entitled to emergency state assistance to prevent destitution’ (Fourteenth Report 2003–04 HL 130/HC 828 para 18). An obligation to perform community service as a condition of receiving emergency social assistance was not, as claimed by the government ‘a normal civic obligation’. On the contrary, it was ‘without precedent or even analogy’ (para 15). There was a significant risk of breach of Article 4(2) ECHR through forced or compulsory labour (para 16). Singling out asylum seekers would breach Article 14 as it was unjustifiably discriminatory (para 21), and a withdrawal of support if someone did not perform the labour could breach Article 3 by subjecting them to inhuman and degrading treatment (para 24).

In the event, s 10 has proved impossible to implement as no community organizations could be found who were willing to provide the community service in question. The YMCA, which considered it, was persuaded to change its mind.

A similar fate may be in store for s 9. The operation of s 9 was piloted in late 2005 in East London, Manchester and West Yorkshire. Organizations representing social workers lobbied against it as their members balked at taking asylum seekers’ children into care when this would not be in the children’s best interests. The Joint Committee on Human Rights considered that it would be difficult to implement s 9 without breaches of Articles 3 and 8 (Session 2003–04 Fifth Report HL Paper 35 HC 304 para 45). Reports of children’s charities and refugee organizations concluded that the pilot of s 9 had caused enormous distress and destitution. Many families’ support had been wrongly ended when they still had the possibility of appeals. Families were considered to be at low risk of absconding, but some did disappear when faced with the prospect of parents being separated from children (Refugee Action and Refugee Council 2006).

The Immigration, Asylum and Nationality Act 2006 contains a provision enabling the Secretary of State by order to repeal s 9. The intention was that the minister would be able to do this once the pilot study was over (HL Debs 7 Feb 2006 cols 587–8). No government report of the pilot has yet been produced, and the government is still reserving its position (Joint Committee on Human Rights, Tenth Report 2006–07, para 94). The opposition of unions, professions and civil society to the implementation of ss 9 and 10 may have neutralized these provisions.

The Bill that preceded the AITOC Act 2004 contained a clause which would have prevented all higher courts from hearing any immigration or asylum case whether by way of appeal or review. The decisions that would be affected were all those which came before the Asylum and Immigration Tribunal. These might be, for instance, refusal of a visa for a married partner to enter the UK, or a determination of free movement rights under European Union law. The government’s stated reason was to streamline the appeals process and end unmeritorious appeals, but the measure contained no means

of separating the meritorious from the unmeritorious, and that decision is precisely the one the courts can make. In addition to the plain injustice to foreign nationals the development of international refugee law would be denied the contribution of the British House of Lords.

There was unanimous opposition from the legal establishment. The Law Society, Bar Council, Joint Parliamentary Committee on Human Rights and senior judiciary including two former Lord Chancellors agreed the ouster clause violated the rule of law. Matrix Chambers published an opinion quoting Lord Denning: 'If tribunals were at liberty to exceed their jurisdiction without any check by courts the rule of law would be at an end' (*ex p Gilmore* [1957] 1 QB 574 at 586). The government was forced to concede, and on introducing the Bill for its second reading in the House of Lords the Lord Chancellor Lord Falconer accepted that the ouster clause could not stand (HL Debs 15 March 2004 col 51).

The Bill contained other reforms of the appeals system which, after reformulation, gained acceptance in Parliament. The principal one was collapsing the former two-tier system of immigration appeals into one. This and the other features of the new system are discussed in chapter 8.

The 2004 Act added a number of enforcement powers. It is a fairly short miscellany of mainly punitive or enforcement measures, the Bill being referred to by Lord Lester as 'mean spirited and reactionary'. (2004:263) It received Royal Assent on 22 July 2004.

In February 2005 the White Paper entitled *Controlling our Borders: Making migration work for Britain* (Cm 6472) was announced as a 'five-year strategy for asylum and immigration'. The Immigration, Asylum and Nationality Act 2006 was said to provide the legislative base for implementing the proposals, but includes fresh initiatives not raised in the White Paper; it is apparent that the White Paper is not a five-year plan in any comprehensive sense. Much of its content referred to changes that had already been agreed or made. New proposals included:

- the introduction of a points system encompassed in four tiers for all migration for work or study, privileging the most skilled and ending settlement rights for the low skilled;
- detaining more failed asylum seekers;
- giving recognized refugees only temporary leave (five years);
- abolishing appeals against work and study immigration decisions;
- increasing use of new technology and intelligence co-ordination at borders, and re-introducing exit monitoring.

Most of these did not require legislation, and the majority of the 2006 Act provisions concern tightening enforcement powers, whether through immigration officers' powers or sanctions on employers.

The most radical and far-reaching proposals of *Controlling our Borders* were those to end appeal rights and to institute a comprehensive points system for work and study. The points-based system was modelled on that of other countries, for instance Australia, in which a certain number of points are required to gain entry, and these are gained for qualifications and other characteristics such as age, available money, and so on. Once published the points-based system consisted of five tiers to encompass all routes to entry for work and study. The vision promoted by the government was of a routinized system, with applications beginning with an online self-assessment form

for the applicant to check whether they would qualify for entry. As each tier comes into effect, appeal rights for that tier will be removed (BIA Highly Skilled Migrants under the Points Based System: Statement of Intent 2007). All applications to enter for work will be made at overseas posts instead of through the current specialized system at Work Permits (UK) (see chapter 11). There will be no appeal against refusal for entry clearance for any purpose except family-related applications. The first stage of implementation, for highly skilled people, is due to start in March 2008. The five-tier system is discussed in chapter 11.

The right of appeal for visitors was removed by the 1993 Act, but s 4 of the 2006 Act is a far more radical step. It removes the right of appeal against refusal of entry clearance in all but specified visitor and dependant cases. Those who will retain the right of appeal are not defined in the statute but will be by regulations and will include family visitors. The new system will encompass students and all those who apply under the rules for reasons such as religious ministry, self-employment, or working holidays. The change is potentially enormous. There was advance warning of this in relation to students and work permit holders in the five-year strategy document, and a swell of opposition ensued, including from University Vice Chancellors and Principals (letter from Universities UK to Financial Times, Tuesday, 5 July 2005) but to no avail.

The government regards appeal rights as less important in the future because of the claimed quality of the new points system. In its briefing to the House of Lords Committee Stage of the Bill, ILPA quoted the then Shadow Home Secretary Rt. Hon. Tony Blair, MP, during the passage of the Asylum and Immigration Appeals Act 1993:

When a right of appeal is removed, what is removed is a valuable and necessary constraint on those who exercise original jurisdiction. That is true not merely of immigration officers but of anybody. The immigration officer who knows that his decision may be subject to appeal is likely to be a good deal more circumspect, careful and even handed than the officer who knows that his power of decision is absolute. That is simply, I fear, a matter of human nature, quite apart from anything else. (Commons Hansard, vol 213, col 43, 2.11.92)

The five-tier system extends the policy of end-to-end monitoring to all who enter for work and study. A key feature of the system is 'compliance checking': this involves checking with sponsors that migrants are here and are doing what their terms of entry permitted them to do, and checking on whether people have left the UK at the end of their permitted period of stay. Educational institutions will become sponsors of overseas students, and employers of their employees.

In the meantime, entry for work became less welcome after all. Romanian and Bulgarian workers are given more limited rights to work than A8 nationals, and the terms of entry for medical graduates and highly skilled workers were dramatically restricted during 2006 (see chapters 2 and 11). Families once again came under the government spotlight, as a certificate of approval scheme was introduced for marriages of foreign nationals (see chapter 9), and proposals issued to raise the age for marriage once again and introduce language testing for spouses.

The 2006 Act, in addition to removing rights of appeal as mentioned above, develops the provisions for information exchange between carriers and immigration control personnel, including a power for the Secretary of State or an immigration officer to compel disclosure to them of passenger lists. This is an element in the development of 'exporting the border', as introduced in the 2002 White Paper. The Act's other miscellaneous provisions are enforcement oriented, including a provision which makes it far easier to exclude people charged with terrorist-related offences from the protection of

the Refugee Convention (s 54). As discussed above, the 2002 Act made it possible for the first time for people to lose British nationality acquired by birth or parentage. The 2006 Act made the grounds for this substantially easier, equating them with the grounds for deportation – simply that the deprivation of nationality was ‘conducive to the public good’ (s 56).

Continuing the control theme, *Controlling our Borders* introduced a ‘new asylum model’ (NAM), an administrative system designed to streamline applications and make greater use of detention. Two induction centres are already in place. The accommodation centres proposed in the 2002 Act did not prove viable, and this is another attempt to process as many asylum claims as possible while keeping the claimant in some form of detention or controlled accommodation. The NAM is in place for all new asylum decisions from March 2007 onwards. Its workings are discussed further in chapter 12. In tandem with the NAM, in July 2006 the Home Office announced that there was a ‘legacy’ of 450,000 cases that were outstanding and would not come within the NAM, and they undertook to clear this backlog within five years. A directorate has been set up within the Home Office to be proactive in achieving this. A case will be considered to have been concluded when the individual has left the UK or been granted leave to remain.

In parallel with the passage of the 2006 Act through Parliament the Home Affairs Committee was conducting an inquiry into immigration control. A number of the current reforms may be traced to their report. Perhaps their main message was that the immigration system was stuck in the era of seeing itself, and being seen, as concerned with preventing entry. The focus now needed to be different. Two aspects were important: facilitation of legitimate travel; and control of immigration after arrival in the country. When people’s leave to remain expired, the government should be aware of that and able to act on it.

Also in 2006 the Home Office instituted a root and branch review of the immigration system, following the disclosure that foreign prisoners had been released without being considered for deportation. Although this was the trigger for the review, in fact it resulted in a programme of far-reaching reforms which is still ongoing. The major ones are discussed in the next chapter. An independent inspectorate has been set up, replacing some of the existing monitor roles. Most of the reforms did not need primary legislation, but the UK Borders Act 2007 was enacted to deal with some that did, and to introduce a scheme of biometric identity documents for foreign nationals.

Sections 5 to 15 provide that any non-EEA national in the UK, whether lawfully resident or not, may be required to apply for a ‘biometric immigration document’. This means any kind of document recording external physical characteristics including in particular fingerprints, features of the iris and digital photographs which may be scanned by facial recognition technology. Exactly who *is* required to apply for these documents is to be specified by the Secretary of State in regulations. The Secretary of State therefore has the power to determine whether these provisions apply to people with settled status, and could for instance require applications by people who are in the UK on a work permit, or as students, or applying for asylum. This is a precursor to the government’s plan to introduce identity cards for all, for which the statutory framework was laid down in the Identity Cards Act 2006.

Section 19 removes the right to introduce new documentary evidence at appeals against a refusal to vary leave under the points-based system. This seems to be related to the Home Affairs Committee’s point that an appeal was not the place to be considering documents that should have been submitted at the outset.

The 2007 Act introduces automatic deportation for those who have committed certain criminal offences (ss 32–39). Although the Home Affairs Committee endorsed this idea for ‘serious criminals’, it may be doubted whether all those caught by this provision could really be described as such (see chapter 16 for discussion). A further provision in the Criminal Justice and Immigration Bill 2007 removes all status from people who cannot be deported for legal reasons. This is to prevent the government from being obliged to give a protective status to people who have been convicted of a criminal offence, but cannot be returned to their home country because of feared human rights abuses. They will not be removed, but will be able to be kept in the UK without any right to claim any social benefits or to work. Despite this, the Bill also provides for powers to restrict their residence and work, and for electronic tagging. It seems that this is some steps short of the house arrest introduced under the Prevention of Terrorism Act’s control orders, but more oppressive than mere temporary admission. It is another example of the government legislating to overturn a decision of the courts, this time the decision in the Afghan hijackers’ case, discussed in chapters 2 and 8.

The 2006 Act gave increased powers of arrest to immigration officers. The 2007 Act gave them increased powers of detention. The 2006 Act created a duty for immigration, revenue and customs officers to share information. These steps contribute to the creation of the unified border force, announced by the Prime Minister in July 2007. This is a major new development in immigration control. Collaboration now seems to be the new direction, not only in the creation of a unified border force but also in the development of in-country immigration control. It is marked by an intensification of the engagement of many other governmental and non-governmental bodies in the business of ‘migration management’. It looks as though, by the end of 2008, immigration control will be an intelligence-led, bureaucratic process, which might impact upon a foreign national in the UK at any point in life, and which will be experienced also outside the UK as a technologically dominated bureaucracy.

1.3 Sources of immigration law

There is no doubt that immigration control is an exercise of executive power; that is, it is exercised by the executive arm of government, in this case principally by the Home Secretary, Home Office civil servants, immigration officers, and entry clearance officers. Less clear are the source and limits of that power. Immigration law is, in a sense, all about the exercise of executive power and the limits upon it. A characteristic that will be encountered over and over again in the study of immigration law is the retention of discretion, which of course is less amenable to control than the application of specific rules. The discretionary nature of immigration law is at the root of much of the criticism that has been directed at it. While challenges to decisions and initiatives towards accountability and openness seek to put limits on the power of the executive, in other ways the scope to use discretion is continually reasserted. In order to ascertain the extent to which decisions can be challenged, it is necessary to consider the source of the power which is exercised. A purely statutory power is subject to public law constraints and the exercise of appeal rights; something with a more nebulous origin may be harder to control. So we will begin with that question – where does it come from?

1.3.1 Prerogative origins?

The right of nation states to control the entry and expulsion of foreign nationals is often said to be an essential aspect of sovereignty, which some regard as exercised under the prerogative (e.g. Glossop 2007). The prerogative was originally the power of the crown. The Bill of Rights 1689 decreed that the prerogative could not be extended any further and that statute could supersede the prerogative. From this time on, the prerogative had a residual character (see, for instance, Loveland, *Constitutional Law; Administrative Law and Human Rights: A Critical Introduction* 2003). In the present day, relevant prerogatives, if any, are at the disposal of the government, which now holds the authority of the crown for most purposes. There are personal prerogatives of the monarch such as dispensing certain honours, but we are not concerned with these.

The present extent of the prerogative has been a matter of argument even in quite recent times. In *R v Secretary of State ex p Northumbria Police Authority* [1989] QB 26, the Court of Appeal found that there was a prerogative to keep the peace even though it had not been written down anywhere. However, Vincenzi argues that there are specific recognized areas of prerogative power, not an amorphous pool which could be used for purposes convenient to the government (1992:300). Following *CCSU v Minister for the Civil Service* [1985] AC 374 (the GCHQ case) in which the House of Lords decided that the exercise of the prerogative was reviewable, a number of prerogative powers have been considered, and the reviewability of each decided as a separate question (see, e.g. *R v Secretary of State for Foreign and Commonwealth Affairs ex p Everett* [1989] QB 811 CA, *R v SSHD ex p Bentley* [1993] 4 All ER 442). This seems to support Vincenzi's argument. Indeed this approach seems to flow from Lord Diplock's list in the GCHQ case of potentially non-reviewable prerogative powers, and the question was not resolved in *ex p Northumbria Police Authority*.

Those prerogative powers which have been identified include matters such as the conduct of foreign affairs, the power to conduct the internal affairs of the civil service, and the issue of passports (Vincenzi, *Crown Powers, Subjects and Citizens* (1998)). It would be a brave person now who suggested that there was a major prerogative power left undiscovered, and in the area of immigration control it is reasonable to assume that whatever prerogative power exists is known about. Chapter 4 of Vincenzi's book explores the relationship between the prerogative and immigration control, and reference should be made to that for a full account. All the authorities agree that there is a prerogative power to deal with aliens, but there is disagreement over the extent of that power.

Immigration control in the UK is now largely governed by statute and immigration rules made pursuant to the statutory duty to do so (Immigration Act 1971 s 3(2)). The Immigration Act 1971, however, expressly reserves a prerogative power in mysterious terms: 'This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of her prerogative' (s 33(5)). In its reference only to aliens, the subsection conforms with the established view that the prerogative does not apply to those who owe allegiance to the Crown, that is, British and Commonwealth citizens (*DPP v Bhagwan* [1972] AC 60 and *R v IAT ex p Secretary of State for the Home Department* [1990] 3 All ER 652). However, what power over aliens does the section reserve? The whole Act and all subsequent immigration statutes, deal with those who are subject to immigration control. If there was a prerogative of immigration control, this would, as a normal rule, be in abeyance to the extent of the statutory

power (*AG v de Keyser's Royal Hotel Ltd* [1920] AC 508). It would be both superseded and impaired. Section 33(5) is not thought to displace this rule. Immigration control is exercised pursuant to the statute and rules as indeed the rule of law requires. It is not empowered by a mysterious source which somehow lurks behind the rules. Vincenzi suggests that the only non-contentious prerogative in relation to aliens is to imprison enemy aliens, that is, nationals of those countries with whom the UK is at war. Macdonald in his 5th edition (2001:708) suggested there was a power to deport, and as we have seen, Edward and Elizabeth I behaved as though they thought so. However, this was in relation to aliens regarded as enemies, not those regarded as friends. In the 6th edition Macdonald has revised his views (2005:3) and, following the work of Shah and Vincenzi, adopts the view that there was no distinction in common law between the rights of subjects and friendly aliens. The first appearance of a reservation of a prerogative power was in the Aliens Restriction Act 1914, which, at a time of war, can be taken to have been referring to enemy aliens.

There is undoubtedly a power to make immigration decisions outside the immigration rules, but this can more simply derive from the powers in the statute to give or refuse leave to enter or remain (the Immigration Act 1971 ss 3A, 3B and 4), and there is no need to employ the prerogative as an explanation (Macdonald 1995:41). Glidewell LJ in *R v Secretary of State for the Home Department ex p Rajinder Kaur* [1987] Imm AR 278 took the view that this power to make decisions outside the rules is derived from the prerogative. However that case concerned a Commonwealth citizen, and Glidewell LJ cannot have been right in this. Vincenzi argues that immigration control cannot be a prerogative power because the concept of immigration control is a modern one, originating in the Aliens Act 1905. The prerogative, as we have seen, could not be extended after 1689.

If immigration control is seen as a 'prerogative power clothed in statute', its amenability to regulation is that much less. If it is seen as a purely statutory power, it must be exercised in accordance with the power granted by that statute and in accordance with principles of statutory interpretation, and not otherwise. Evans notes:

The reluctance of the courts to challenge the Executive's exercise of statutory powers on matters touching national security may also have been influenced by the Crown's claim that the exclusion and expulsion of aliens were within its prerogative, the scope of which was never definitely established, but which still maintains a shadowy existence alongside immigration control. (1983:422–3)

The conclusion here is that it is unlikely that the prerogative is the source of immigration control, but there has been a tendency in the courts and executive to treat it as though it was. This has enabled them to call upon a supposed reserve of undefined power to supplement explicit provisions.

1.3.1.1 *A modern equivalent?*

It is perhaps less likely now that inexplicable discretion will be attributed to the prerogative (though see chapter 11 for a theory of work permits), but there is a tendency to see behind immigration control, not the prerogative, but two other principles: sovereignty and the judgment of the executive. The first is explanatory and the second is justificatory.

Sovereignty in dealing with foreign nationals is curtailed by treaties to which the state is a party such as, in the UK's case, the European Convention on Human Rights and the 1951 UN Convention Relating to Refugees. In the age of internationalism, globalization,

the development of international human rights norms, and an international criminal court, the nation state can no longer be properly regarded as the ultimate legal authority. It is well recognized that national legal authority must now be tempered by regard for international law, and that international regulation is a fact of life.

Ironically, it is through the Human Rights Act 1998, bringing the rights of the European Convention into UK law, that the idea of sovereignty seems to be making something of a comeback. In immigration cases in the ECHR, the court routinely begins its reasoning with the statement that states have the right, as a recognized principle of international law, and subject to their treaty obligations, to control the entry of non-nationals (see *Abdulaziz Cabales and Balkandali* (1985) 7 EHRR 471 para 67). This statement has an understandable place in the judgment of an international court, but has been transposed into the UK courts' and tribunals' reasoning in human rights cases. It is not inaccurate, but is unnecessary in the national context, where the task of the decision-maker is to apply and interpret law which is already made by the sovereign law-maker (Parliament) or is of a lesser status (immigration rules) or is case law which arises or can be argued to have a place in the jurisdiction. Sovereignty, if it arises at all, is being exercised, not challenged, and the reiteration of it in national courts has an effect similar to that noted by Evans in relation to the prerogative. This was demonstrated in *R v SSHD ex p Saadi, Maged, Osman and Mohammed* [2002] 1 WLR 3131, HL, in which the principle of sovereignty prevailed over human rights (see chapter 15). As Dauvergne comments, 'Migration law is transformed into the new last bastion of sovereignty' (2004:588), and correspondingly, sovereignty is invoked to buttress the state's right to control migration. A number of writers now argue that the territorial notion of sovereignty is also breaking down (e.g. Thomas and Kostakopoulou, Dauvergne), and that sovereignty is now exercised over people and information more than over territory. The shift in the UK's border control strategy could be argued to demonstrate just that.

Deference to the judgment of the executive no longer has the hold on case law that it had in the early days of the Human Rights Act, but is still sometimes asserted or implicit. The basic idea is that immigration control is a matter within the remit of the executive, so the judiciary should be reluctant to interfere with their judgment. This argument gained in importance as the courts and tribunals began to explore the application of qualified rights under the Human Rights Act, which require the decision-maker to judge the proportionality of the harm done to the individual against the public interest served. For instance, to remove someone from the country who is in breach of immigration law serves certain public interests but interferes with the individual's right to respect for their family and private life. This judgment involves the courts and tribunals in judging the merits of the case, and deference to the executive was argued to restrain the judiciary in this new role. This issue is discussed further in chapter 8. Current authority is that the idea of deference has been overused, and that it is not really a proper constitutional principle at all (*Huang and Kashmiri v SSHD* [2007] UKHL 11). The judiciary are competent to decide whether in a particular case they should give special weight to the Secretary of State's judgment or not. The existence, extent, and nature of this principle has been a subject of extensive debate in academic writing and judicial decisions. To argue for deference is not the same thing as to argue for a prerogative power, but the effect may be similar in that, in both instances, it is posited that there is an area of exercise of judgment which is somehow the special preserve of the government. For instance, in the case of indefinite detentions of foreign nationals the Court of Appeal deferred to the judgment of the executive that discrimination on

grounds of nationality was necessary for security reasons (*A v SSHD* [2002] EWCA Civ 1502). In the House of Lords, Lord Bingham in particular set out the UK's obligations under international treaties as an important part of the reasons why this deference was not warranted (*A v SSHD* [2004] UKHL 56).

The prerogative is not a source to which there can be fresh recourse, whatever view is taken of its earlier extent. The search for a deeper principle continues, however, and part of the present debate is a re-examination of the rule of law (see e.g. Dauvergne; Harvey C. 2005; Poole; Bingham 2007 for a range of views).

1.3.2 Statutory origins

For the avoidance of doubt, the present-day legal source of the power of immigration control is statutory. The main statutes are the Immigration Act 1971, the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Act 2002, the Asylum and Immigration (Treatment of Claimants etc) Act 2004, and the Immigration, Asylum and Nationality Act 2006, supplemented by the UK Borders Act 2007. All of these have been discussed above.

The fundamental legal authority for the power to control immigration is found in the Immigration Act 1971 s 4(1), which says:

The power under this Act to give or refuse leave to enter the United Kingdom shall be exercised by immigration officers, and the power to give leave to remain in the United Kingdom, or to vary any leave under section 3(3)(a) (whether as regards duration or conditions), shall be exercised by the Secretary of State.

Perhaps surprisingly, the statutes contain none of the specific provisions which govern whether a person may gain entry to the UK or leave to remain, although they do contain the basic grounds upon which they may be required to leave. The requirements to be met to gain entry or leave to remain are contained mainly in the immigration rules.

Immigration Act 1971, s 1(4) contains the only requirement as to their content, which is also the only statutory provision for content of entry requirements. They must

include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules ...) persons coming for the purpose of taking employment, or for the purposes of study, or as visitors, or as dependants of persons lawfully in or entering the UK.

Section 3(2) provides that this

shall not be taken to require uniform provision to be made by the rules as regards admission of persons for a purpose or in a capacity specified in section 1(4) (and in particular, for this as well as other purposes of this Act, account may be taken of citizenship or nationality).

The rules are now voluminous and run into several hundreds. (Numbering stops at 395 but this is not indicative as many are divided into sub-rules: A to K and so on.) They were last consolidated in 1994, and are frequently amended in major or minor respects. The rules govern almost all immigration cases and also have an impact on asylum cases. They therefore contain the practical substance of immigration law.

1.3.3 Immigration rules

On reading the rules it is apparent that they are the language of the administrator rather than the lawyer. They are practical and descriptive, stating what action should be taken in given sets of circumstances. This being the case, they should not be treated

as a legal text in the English tradition, namely as language which has been created with great precision and therefore must be interpreted strictly. The accepted approach (*Alexander v IAT* [1982] 2 All ER 766) to interpretation is:

These Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument. They must be construed sensibly according to the natural meaning of the language which is employed (para 11).

The rules have become more specific over the years. They have also become more and more comprehensive, as matters formerly dealt with by concessions and policies are absorbed into the rules. However, the Home Affairs Committee has called for their redrafting and consolidation 'to provide a clear, comprehensive and realistic framework for decisions'. The Committee considered that they fall short of this currently, as they 'present a list of issues to be addressed rather than a list of criteria which you might or might not meet'. They also include a number of what might be called 'subjective' tests of intentionality (Fifth Report 2005–06).

The Committee also recognized that the rules will also require an exercise of judgment and, even if redrafted, it is unlikely that they could be applied mechanically. As they currently stand there is considerable scope for judgment as to whether specified criteria are met, for instance whether maintenance for a spouse is adequate and the couple intend to live together as husband and wife. This is not a discretion in a pure sense, but it is a matter on which an entry clearance officer and an applicant could disagree. Consider, by way of comparison, an application for a welfare benefit. If the claimant's income is less than the applicable amount, the benefit must be paid. There might be a question about whether all assets have been disclosed, but on a given set of figures there is no judgment to be made: the claimant has an entitlement. In the event of being turned down for entry clearance, applicants cannot point to the rules and say 'you are wrong – I am entitled to entry clearance'; they can only argue about the strength of their evidence and the conclusions to be drawn from it.

This predictability or otherwise of decisions based on the rules will become even more significant under the new points-based system. The Home Affairs Committee report casts doubt on whether it will ever be possible to apply the rules in the routinized way upon which the government relies as a guarantee of the quality that would justify removing rights of appeal. The status of the immigration rules has been a subject of much legal argument. For most purposes there is no doubt that they are not subordinate legislation. They are made by the minister pursuant to a statutory duty to do so, and are subject to the negative resolution procedure in Parliament. In these respects they resemble delegated legislation. However, s 3(2) describes them as 'rules...to be followed in the administration of this Act', and this is how they have been regarded in case law. *Pearson v IAT* [1978] Imm AR 212 remains the authority that the Rules are not delegated legislation or rules of law, but rules of practice for the guidance of those who administer the Act. Despite this, the rules have a status well beyond that of normal administrative guidelines. *Pearson* also found that the rules, while not rules of law, have the force of law. Previous statutes provided that an adjudicator 'must allow an appeal if he considers that the decision or action against which the appeal is brought was not in accordance with the law or any immigration rules applicable to the case' (Immigration Act 1971 s 19 and Immigration and Asylum Act 1999 Sch 4 para 21). The current equivalent provision is differently phrased. The appeal must be allowed if the decision 'is not in accordance with the law (including immigration rules)' (Nationality, Immigration

and Asylum Act 2002 s 86(3)(a)). This seems to represent a shift towards recognizing the rules as a form of law. In either form of words the immigration rules are treated by statute as though they have binding force. In ascertaining what is the law relating to a given situation, for instance, to discover whether an aged mother will be permitted to join her daughter in the UK, the first place to look is the rules. They provide the basic content of legal entitlement, even if they are not themselves of a legal character.

The rules are made by the minister, subject to the negative resolution procedure. They are therefore subject only to very limited parliamentary scrutiny, and if Parliament wants to reject them it must reject the rules as a whole: there is no provision for amendment. This has happened on very few occasions, the most notable perhaps being in December 1982 (HC col 355 15 December 1982) when the Labour Party opposition succeeded in defeating the Conservative government's proposed new marriage rules. These would have introduced a burden on the applicant to show that the marriage was genuine (later introduced anyway) and a two-year probationary period (defeated on that occasion but introduced on 1 April 2003 without parliamentary debate). In *Huang and Kashmiri v SSHD* [2007] UKHL 11 the House of Lords rejected an argument that the negative resolution procedure meant that the immigration rules were the product of democratic debate and compromise. The immigration rules are 'not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented' (para 17). This latter point was a rare, perhaps unique, instance of the judiciary noting that those most affected by the immigration rules have no say in their content.

Even though the rules are subject only to a limited parliamentary scrutiny they are subject to challenge by way of judicial review. The duty to make the rules is derived from statute, and so the minister cannot achieve by the rules anything which is outside the powers given in the Act. The rules are therefore in theory subject to challenge on the grounds of illegality, irrationality, and procedural impropriety (following Lord Diplock's classification in *CCSU v Minister for the Civil Service* [1985] AC 374). Unsuccessful attempts have been made to challenge the rules on the basis that they fetter discretion, this being an aspect of illegality (*R v Secretary of State for the Home Department ex p Rajinder Kaur* [1987] Imm AR 278). For the purpose of a challenge for irrationality, the rules are treated like by-laws, and so may only be struck down if they are 'impartial or unequal in their operation as between classes; manifestly unjust; made in bad faith; or involving such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable persons' (*Kruse v Johnson* [1898] 2 QB 91). This has succeeded on one occasion, when the rule on admission of family dependants was challenged for its requirement that the elderly dependent relative, in order to gain entry, must be living at a standard substantially below that in their country. This discriminated against applicants in poor countries, for whom even a small amount of financial help would lift their standard of living above a low level for their country (*R v IAT ex p Manshoora Begum* [1986] Imm AR 385).

The rules are now also subject to challenge on a further ground of illegality, namely that the minister in making them has acted unlawfully under s 6 HRA as the rules breach Convention rights. On and after 2 October 2000 there has been a trend towards removing discrimination from the rules, presumably to avoid such challenges. The rules are also subject to directly applicable EC law, and in *The Queen on the application of Ezgi Payir* [2005] EWHC 1426 (Admin) the High Court made a declaration that rr 92–94 were unlawful insofar as they purported to exclude the right to an extension of stay for a Turkish au pair, contrary to Article 6 of Decision 1/80 of the Council of the

Association between the EU and Turkey. This outcome was upheld on a preliminary reference to the ECJ (Case C-294/06).

Although for most purposes the rules are not regarded as subordinate legislation, they may be for the purposes of the Human Rights Act. The Act defines subordinate legislation in s 21(1) as including 'rules...made under primary legislation'. It appears that this includes the immigration rules, and so the interpretive duty in HRA s 3 will apply. Even without this, those who implement the rules are public authorities under s 6 and their actions must be in accordance with the Convention. In effect, immigration rules must be applied in a way that upholds Convention rights; the only relevance of their being subordinate legislation would be if to uphold rights requires a strained construction of the rules. Section 3 would require this of subordinate legislation, but s 6 may not require it of a public body. Ultimately, as discussed above, if the rule conflicts with rights and cannot be interpreted by whatever means so as to deliver the rights, it may be struck down as being made in breach of s 6.

The judgment in *Huang* referred to above confirmed that not only are they not the fruit of democratic debate, the immigration rules also do not already embody human rights standards. The consideration of a human rights claim begins once an applicant has failed under the rules. Human rights standards are additional to the rules, which, as previously discussed, are simply guidance in the administration of the powers to grant and refuse leave to enter or remain.

1.3.4 Policies and concessions

Internal government instructions are highly influential in the implementation of immigration law as they guide immigration officers and Home Office officials in their response to individual cases. These may be of a formal or informal kind. Mention has already been made of the exclusion of black passport holders from the UK by means of internal government instructions which accompanied the Commonwealth Immigrants Act 1962. These, of course, were not the kind of instructions to which the public would have access. The secrecy which was a hallmark of immigration law has changed in recent years, and the body of internal instructions is now disclosed on the Home Office website. Internal instructions as they now exist may be divided into three kinds.

First, there are policy documents which give guidance on the exercise of a discretion. An example is DP3/96, a policy document which sets out situations when it will and will not be appropriate to exercise powers of removal and deportation in relation to people who have families in the UK. It is not comprehensive but it is far more detailed than the statute. The criteria for immigration detention are found entirely in guidance documents of this kind, disclosed on the IND website in the Operational Enforcement Manual.

Second, there is guidance on the application of the immigration rules. There is a comprehensive code of guidance on the application of the immigration rules known as the Immigration Directorate Instructions (IDIs). There is another for dealing with asylum claims, the Asylum Policy Instructions (APIs), which include summaries of the relevant law, and Nationality Instructions (NIs) which give similar guidance for dealing with nationality applications. Also published are notices given at intervals: Asylum Policy Updates, and Asylum Process Guidance. Frequent reference is made to relevant instructions throughout this book. They are a practical guide to how discretion is exercised.

Third, there are various kinds of concessions. One of the features of immigration law is the extent of provision which has been contained in discretionary practices outside the rules. Although the rules have become more and more comprehensive, they still do not cover every eventuality. In relation to some situations commonly encountered, there is standard practice which is known as a concession. Some concessions have been established for many years but never integrated into the immigration rules. An example of this was the grant of indefinite leave to remain to a person who attains refugee status. This had the appearance of established rule, as it was invariable practice for some years, but when practice was changed in August 2005, this could be done simply by an announcement. Such announcements may be given for instance by notice on the IND website, in Parliament, by letter to interested organizations.

Some concessions are announced in Parliament and devised in terms as detailed as an immigration rule. Examples here have been a concession for entry of unmarried partners, which was announced in Parliament on 10 October 1997 and a concession for spouses subject to domestic violence to obtain indefinite leave to remain, announced in Parliament on 16 June 1999. In these cases the concessions had the appearance of trial rules. They were both amended by later statements in Parliament, following representations about how they operated in practice (17 June 1999 and 26 November 2002 respectively), and incorporated into the immigration rules. The first of these two provisions raises issues of equality of treatment between married and unmarried and between heterosexual and homosexual couples. Strong and conflicting opinions are held about these questions, and it appears that the government was seeking a politically viable rule by experiment in order to achieve some level of equality by 2 October 2000 when the Human Rights Act came into force, though it has since been amended more than once. The trend is for concessions to be incorporated into the rules, and there is a long-term project to incorporate all concessions into a set of consolidated rules.

There are also temporary concessions directed towards periods of upheaval or emergency. An example of such a concession was the Home Office decision in July 1999 temporarily to suspend the return to the Republic of Congo of asylum seekers whose applications had been rejected, because of the civil war. Concessions may also be given in the form of procedural waivers where hardship would arise if strict procedure were insisted upon. For example, following the Humanitarian Evacuation Programme from Kosovo, Kosovan families in Britain were required to travel to Croydon for an asylum screening interview. This involved whole families, who were surviving on minimal resources, paying fares for transport and travelling perhaps with ill family members or small children. In June 2000 the Home Office decided that it would be sufficient for only the principal applicant to attend the asylum screening interview providing certain conditions were met.

What all these forms of guidance have in common is that if an individual comes within their terms they can expect to be treated in accordance with the policy. This may be enforced, depending on circumstances, either by appeal or judicial review, and these forms of redress are discussed in chapter 8. *R v SSHD ex p Amankwah* [1994] Imm AR 240 was the first case which held that if the policy was undisclosed, but its existence was known, then a decision which did not take the policy properly into account was unreasonable and unfair. The existence of a policy on marriage and deportation had become known by accident, having been referred to in a Home Office letter in a previous case.

Since then, policies have been gradually disclosed. At first, selected documents were sent to practitioner organizations. Now the majority of internal instructions of

substance are available on the Home Office website. Much of the substantive detail is contained in annexes to IDIs, APIs and NIs, but the majority of these too are disclosed. In 2003 the government took the further step of putting on the website parts of the Operational Enforcement Manual which deals with detention and removal.

Now it is clear that the Home Office should apply the policy in a relevant case even if the individual is unaware of it (*SSHD v the Queen on the application of Rashid* [2005] EWCA Civ 744).

There may still be a question as to which version of a policy applies in a particular case. While policies and instructions are increasingly disclosed, there is also a growing tendency to no longer disclose their date. In *R (on the application of I and O) v SSHD* [2005] EWHC 1025 (Admin) the Home Office was unable to provide the exact date when a policy came into effect, though Owen J accepted an assurance that there was no material difference from the earlier policy (para 21).

Individual exceptions may be made, and as Macdonald describes (1995: 44–5), may become established concessions as the compassionate circumstances which led to their first being recognized are replicated in other cases. An established concession is a stronger basis from which to argue, as is apparent from the above, but if there is no such concession available it is possible to argue that the particular circumstances of the case warrant more lenient treatment than the rules seem to provide. Both the Home Office and immigration officers do on occasion agree to act more leniently than the rules provide. The source of this power has been discussed above, and is the Immigration Act 1971, not the prerogative.

1.3.5 Tribunal decisions

A specialist source of law in the immigration and asylum field is the body of case law emanating from what is now the Asylum and Immigration Tribunal (AIT). The structure of the tribunal and grounds of appeal to it are discussed more fully in chapter 8. Here we simply consider tribunal decisions as a source of law.

Recent studies by Buck (2006) and Thomas (2005) examine the unique phenomenon of the AIT and its case law. The early idea of tribunals, as fact-finding bodies which were somehow closer to the people and the facts than the courts could be, is a misleading picture of the AIT. Its characteristics are described by Thomas as: high volume; fact-based; compulsory (in that claimants have little alternative); no compromise is possible; serving public interest; not bound by usual rules of evidence; and an exceptionally high rate of challenge.

Buck notes that the intention of tribunal case law was that it would not be binding in the way that the decisions of higher courts are. Wade and Forsyth say that the tribunal's duty is to reach the 'right decision in the circumstances of the moment' (p 931). However, like other tribunals, the AIT has devised its own system of precedent and authority. There is a starring system, whereby the President may decide to designate certain tribunal decisions binding on certain issues. Although they are fact-finding tribunals, their decisions are often intricate works of legal reasoning, and sometimes run to scores of pages. Buck notes that, like courts, they apply 'concrete legal rules to facts' (p 464). Their decisions are not all reported, and there is now a practice direction which prevents unreported cases from being cited in tribunals except in defined circumstances. There is a system of factual precedents called country guidance cases, discussed in chapter 12.

Tribunal decisions may be accessed on the AIT website (www.ait.gov.uk) and by searching on www.bailii.org or the membership database of www.ein.org.uk.

1.4 Conclusion

Whether the focus of attention is the Jews in the nineteenth century, West Indians in the 1960s, East African Asians in the 1970s, or more recently asylum seekers, immigration legislation is passed with a target group in mind. The political agenda of the day moulds the law in a very direct way. The current targets probably fall into two: the illegally resident population, and terrorists. The first is a diverse group of people not abroad, but present in the UK, and mainly unaccounted for. The same could perhaps be said of the second group. The result is a concentration on security and the dissemination of points of immigration control through many aspects of life. Another key present aim, to regularize entry for work, can be met in the course of this.

QUESTIONS

- 1 What further themes can you identify arising from the history and development of immigration law? Are these the same as the ones identified by Bevan in 1986?
- 2 Are there any other mechanisms of democratic accountability that could or should be introduced into the process of dealing with immigration? Is it a matter for the government or the people?
- 3 Given the use and origin of the immigration rules, it appears that the Secretary of State both makes and implements much of immigration law. Is this a problem?

For guidance on answering questions, visit www.oxfordtextbooks.co.uk/orc/clayton3e.



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