Textbook on

Immigration and Asylum Law

Sixth edition

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Policy, politics, and the media

SUMMARY

This chapter is an introduction to some of the policy issues which shape immigration law. These issues are raised so that as they appear, embedded within the law throughout this book, they may be more easily recognized. The role of the media is discussed, because it is a powerful actor in moulding immigration and asylum policy, though in discussing the law, usually an invisible one. Some of the provisions which govern the treatment in the UK of asylum seekers are also covered here. These, too, have no other place in this book, not being an aspect of the law of entry, but they affect and are affected by the climate of policy on entry, and give rise to human rights issues. The institution and operation of the UK Border Agency is introduced as both a tool and an expression of policy.

2.1 Introduction – migration policy in a global context

In 2006, shortly after taking up his post as Home Secretary, John Reid pronounced that the immigration system was 'not fit for purpose'. His comment, dramatic, publicly given, and headline-catching, obscures the assumption behind it – that there is a recognized or agreed purpose for the immigration system. The Home Affairs Committee, in a measured introduction to the report of their inquiry into immigration control, posed the question: 'what is the purpose of the immigration system in the twenty-first century?' (Fifth Report of Session 2005–06 HC 775 para 5).

Before considering how this question is answered in policy and practice in the UK, we will take a step back to look through a wider lens. The study of migration is a vast field, engaging many disciplines including economics, politics, history, philosophy, international relations, as well as law. The main subject of this book is a tiny corner of that field: the national law which regulates entry to the UK. Though the policies implemented are national, the context for them is international. Evidence to the Home Affairs Committee was that:

> the great contradiction in migration today is that it is a global issue that people try to manage at a national level

and

> the root causes of migration are so powerful – it is about underdevelopment, disparities in demographic processes, in development, and in democracy – that to an extent . . . immigration control is treating the symptom rather than the cause. (para 7)

One of the key questions in the study of migration is 'What causes people to migrate?' Views that are held about this may in turn influence policy if policy makers seek to influence behaviour. Yash Ghai (1997) suggests that the market was historically, and remains, the key determinant of international movement. From the establishment of plantations and their demand for labour, the aspirations of employers fuelling illicit migration, and the balancing demand of the market for stability, labour mobility, and competition, these economic forces, he argues, predominate. Demetrios Papademetriou (2003) suggests that two drivers are particularly important in the present era: political, social, and cultural intolerance, which at the extreme turns into gross, group-based violations of human rights; and the systematic failure of governments to address multiple disadvantages faced by their populations. Papademetriou acknowledges that these phenomena are always present, and suggests additional factors influence the pattern of migration:

- a long-term political, social, and economic relationship between the country of origin and destination country;
- economic benefits of migration sufficient to motivate the destination country to organize structures to receive migrants;
- a mature and influential 'anchor' ethnic community in the destination state, who may welcome and facilitate new arrivals; and
- interest groups in the destination state who oppose the circumstances from which migrants are escaping, thus carving out a social space into which they can be welcomed, and political support for permissive migration policies.

It may be noted that of the two drivers which Papademetriou identifies as being particularly relevant at the present time, flight from human rights violations is one which would generate a need for international protection, perhaps a claim for refugee status. The failure of governments to address disadvantage might have that result, but might also generate what is often called economic migration. The trigger factors do not sit neatly in either category. While the law, particularly in Western countries (see discussion of EU policy in chapter 5), distinguishes sharply between economic migration and asylum-seeking, the actual causes of international movement are not necessarily so sharply distinguished. Sarah Taylor (2005:6) regards the attempt to make this distinction as problematic. She says that 'the explanation for most international migration is to be found in a combination of economic and non-economic factors'. She considers that Western governments' attempts to *control* 'irregular' migration by controlling borders are an attempt to do the impossible. She proposes cooperation with countries of origin to *manage* migration for the benefit of all concerned at the same time as the long-term work of tackling root causes – poverty, armed conflict, and human rights abuse.

This kind of approach, seeing the management of migration as requiring international cooperation, is reflected in the work of the Global Commission on Migration, convened to move 'beyond the political deadlock which had effectively paralysed international discussion on migration for more than a decade' (Grant 2006:13). The Commission proposed that migration should become 'an integral part of national, regional and global strategies for economic growth' (2005:2). Moving beyond the deadlock involved recognizing migration as a potential benefit for the host country, the country of origin, and the migrant themselves, and developing policies that enable all those benefits to flow freely. Their recommendations included measures to prevent the benefit to states of origin from being lost. For instance, a 'brain drain' should be replaced by a 'brain circulation', and taxation or appropriation of remittances – the

money that migrants send home – should be prevented. The money sent in remittances is 'second only to foreign direct investment in countries. In some countries remittances can be higher than official development assistance' (DFID 2007:13).

The Global Commission set an ambitious objective:

> Women, men and children should be able to realise their potential, meet their needs, exercise their human rights and fulfil their aspirations in their country of origin, and hence migrate out of choice rather than necessity. Those women and men who migrate and enter the global labour market should be able to do so in a safe and authorised manner, and because they and their skills are valued and needed by the states and societies that receive them. (2005:11)

These ideas echo a view put forward by the economist John Maynard Keynes, that migration is 'the oldest action against poverty', and recognized in the UK by the Department for International Development (DFID):

> migration and development are linked…The objectives of both fields are more likely to be achieved if migration and development policies begin to acknowledge the benefits and risks of migration for poor people and developing countries. (DFID 2007:8)

Interestingly, the UK government's 2008 consultation paper, *Earning the Right to Stay: A New Points Test for Citizenship*, contained a section headed 'Migration and International Development'. This section set out some ideas for encouraging circular migration in order to reduce the impact of a brain drain on developing countries. It suggested, for instance, developing codes of practice for different sectors, such as the one in force with the NHS whereby the UK reduces active recruitment from countries with vulnerable healthcare systems, or giving credits in the earned citizenship scheme for development work in a migrant's home country. This consultation was abandoned.

Immigration law attempts to influence the behaviour of migrants. Some would say this is an exercise which should not be undertaken. Jonathon Moses, for instance, argues that the globalization of labour is the necessary next step after the globalization of capital and trade. Some research suggests that the economic impact of an open border would be minimal, but that the difficulties which would be faced are the cultural ones of our capacity to live together.

Whatever is the case, the operation of laws is influential on migration in ways that are not fully understood. Economics, human rights, and regulatory laws are part of a complex web which interacts with the subjective reasons that people have for moving.

By way of example, there may be a trade-off between rights and the availability of opportunities for migrants to work. Martin Ruhs (2009) cites as extremes the Gulf States and Sweden. In 2005, migrants accounted for a relatively high percentage of the population in the Gulf States, ranging between 24.4 per cent in Oman and 78.3 per cent in Qatar. He describes labour migration in the Gulf States as an 'employer-led, large-scale guest worker programme', entailing minimal rights without opportunities for settlement. In Sweden, by contrast, labour migration is minimal; perhaps 400 people per year, but rights are comprehensive. He argues that this trade-off should be acknowledged, recognizing that the opportunity for migration has value and is conducive to human development, but also that a core minimum of rights should be identified.

The examples of the Gulf States and Sweden clearly show how governments attempt to influence behaviour through law, and the simple figures presented show that these attempts can have an impact, though from this brief information we cannot deduce

the whole effect. Papademetriou warns that: 'The attempt to manage…complex transnational processes through unilateral and single purpose policies will be of ever diminishing value.' He cites three escalating drivers of migration in the twenty-first century: exclusion of ethnic or religious groups, the deterioration of ecosystems, and flight from natural and human-made disasters. These are events for which border-oriented long-term policy responses are unlikely to be adequate. Papademetriou finds present policy constructs for dealing with migration dated and 'disturbingly binary'. Categories of 'sending and receiving' countries, 'permanent and temporary migrants' and 'economic migration and seeking refuge' are not, he suggests, an adequate foundation for policy.

As we look at the UK's law and policy, we can expect to see this tension between what we might call the old binary view and the awareness of a transnational reality. Yash Ghai observes that the law is contradictory as its underlying principles are confused. Although 'governments welcome economic flows – especially of finance and trade' they are more ambivalent on flows of people (Castles 2007:12).

There is unlikely to be a simple answer to the question which the Home Affairs Committee posed: the purpose of the immigration system. How the answer is currently seen in the UK may be partly indicated by where responsibility is located in government.

2.2 Institutional basis of immigration control – an overview

A number of parts of government have a significant role to play in migration policy: the Department for Business, Innovation and Skills in relation to overseas students and opportunities for workers; local authority social service departments in relation to children at risk; the police in relation to immigration offences; and so on. As a result of the Home Affairs Committee's recommendation, a Cabinet sub-committee was created to remedy 'the absence of any place within government with overall responsibility…for determining…migration strategy'. In so recommending, the Home Affairs Committee was drawing attention not to an absence of immigration control, which is a more limited activity, but to an absence of an overall migration strategy. Migration policy in the UK has tended to be strongly identified with immigration control – a more familiar phrase, and the title of this section. Publicly available documentation does not suggest that this sub-committee survived the 2010 General Election, and policy across government in relation to migration is now largely presented in terms of prevention. Bodies such as the Migration Advisory Committee make a contribution to migration strategy, but the attempt at a public demonstration of migration management has been largely abandoned in favour of immigration control.

The present authority to control immigration is given by Immigration Act 1971 s 4(1) to 'the Secretary of State'. Though the Act does not specify which Secretary of State this is, in long-standing policy and practice this has been the Home Secretary. In *Pearson v IAT* [1978] Imm AR 212, the Court of Appeal held that the Secretary of State, referred to throughout the immigration statute, must 'by reason of the subject matter' be the Home Secretary. We might note in passing that the Department of Health guidance which prohibited doctors who had qualified in another country from getting work in English hospitals – although it was the subject of a successful challenge in the

courts – was so in part precisely because another government department than the Home Office had unlawfully attempted to lay down an immigration measure (*R (on the application of BAPIO Action Ltd) v SSHD and Department of Health* [2008] UKHL 27; see chapter 9).

The immigration service, although answerable to the Home Secretary, was originally a distinct service. Immigration officers' powers concerned entry, and the Secretary of State's powers, exercised through Home Office civil servants (*Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560) were to deal with those already in the country by making decisions on further leave to remain or deportation (Immigration Act 1971 s 4). The distinction between the Secretary of State's powers and immigration officers' powers has diminished (Immigration and Asylum Act 1999 s 1) and is now of limited significance.

The 1971 Act did not deal with work permits, which remained the responsibility of the Secretary of State for Employment. Entry clearance officers remained answerable to the Foreign and Commonwealth Office. At the turn of this century, there were substantial changes. Chapter 1 has related how the Immigration and Asylum Act 1999 began to enlist more of society in immigration control, a process the present government is committed to intensify in its Immigration Bill 2013, and laid the foundations to export the UK's border, the detail of which is discussed in chapter 6. This policy of pervasive control was mirrored in institutional changes. In 2008, the Home Office and Foreign Office set up a joint unit to manage entry clearance. Following this, the Entry Clearance operation was rebranded 'UKVisas', and is now the overseas part of UK Visas and Immigration, a section in the Home Office. In June 2001, responsibility for work permit applications transferred from the Department of Education and Employment to the Home Office. It retained a separate identity as 'Work Permits UK' until 2008, with the creation of the UK Border Agency and the introduction of the points-based system. Now it is subsumed within UK Visas and Immigration in the Home Office. As immigration control was both extended beyond the UK's border and introduced into civil affairs, so the Home Office became the department with overall control.

2.2.1 Reviews and inquiries

From December 2005 to June 2006, the Home Affairs Select Committee of the House of Commons conducted a major inquiry into immigration control. During the period of that inquiry, there was a public outcry over the release of foreign national prisoners who had not been considered for deportation. An observer would be forgiven for thinking that this was due to 'weak laws' or possibly even the Human Rights Act. Neither of these was the case, and the problem was poor communication within the Home Office. The affair as treated in the media is discussed later in the chapter. It was in response to this that the incoming Home Secretary John Reid instituted a review, looking at strategic objectives, core processes, culture, and organization of the Immigration and Nationality Directorate (as it then was) (as stated to the Committee, HC 775 para 537).

The first published fruit of the review, issued shortly before the Home Affairs Committee reported, included an intention to 'make IND a more powerful agency, more clearly accountable to Parliament and the public'. The objectives were to:

- strengthen borders; use tougher checks abroad so that only those with permission can travel to the UK; monitor who leaves 'so that we can take action against those who break the rules';

- fast-track asylum decisions, removing those who fail, and integrating those who need protection;
- enforce compliance with immigration laws, 'removing the most harmful people first and denying the privileges of Britain to those here illegally'; and
- 'Boost Britain's economy by bringing the right skills here from around the world, and ensuring that this country is easy to visit legally' (*Fair, Effective, Transparent and Trusted*, July 2006).

These largely repeated the objectives of the five-year strategy launched in 2005. The agency was divided into regions in the interest of accountability and visibility. The message was that the immigration system was to be run in a way that ordinary people understood. Strategic direction was divided into management areas: asylum; borders; enforcement; human resources and organizational development; managed migration; and resource management; and the Director of UKVisas was given a seat on the board. An immigration casework review was undertaken to simplify and standardize information and knowledge management systems.

The Case Resolution Directorate was established to deal with the backlog of cases. The New Asylum Model was introduced for all asylum claims made after April 2007. It applied the principles associated with the reforms, of speed, simplicity, and accountability, by allocating an asylum case, after a screening interview, to a 'case owner' who then would see the case through to a conclusion.

Speed of decision-making became a highly prized quality in response to problems and injustice caused by delay. Already by this time, the prevailing governmental approach to a need to show achievement was to work to targets, mainly described in terms of numbers and time (e.g., 30,000 removals per year). The Home Affairs Committee identified the following problems with targets:

- Major political targets meant that other work may have been sidelined or even deliberately manipulated (para 57).
- For instance, prioritizing asylum claims and asylum removals had created backlog in other areas, and contributed to the foreign prisoner issue not being acted on more quickly.
- Targets were set for one part of a system without considering the effects elsewhere.
- This includes a problem with numerical targets *per se* in that, if a target of dealing with 90 per cent of claims in a certain time is met, 'what happens to the remaining 10% is irrelevant from the point of view of meeting targets' (para 583); so a target culture can also contribute to a black hole into which more difficult cases disappear because nobody can afford to spend the time on them.
- Targets on speed had a negative impact on quality.
- Targets might be met, but still have no impact on the underlying objective because they were the wrong targets. They might be set because they could be met rather than because they were designed to address a problem.

Despite these criticisms the culture of speed and targets intensified after the 2006 reviews, most strikingly exemplified by the publication of 'milestones'. Some effects of speedier initial decision-making in asylum cases are discussed in the section on the treatment of asylum seekers.

2.2.2 UKBA

In early 2007, the Home Secretary announced that the Home Office would be split into two. The focus of the new Home Office was to be terrorism, policing, security, and immigration. This allocation gave a clear signal about the way that immigration was perceived, and the direction that further institutional change would take. One of the effects was that the international protection nature of the work of dealing with asylum claims was even more invisible. Within the new enforcement-oriented Home Office, on 25 July 2007 the government announced the creation of a unified border force, called the UK Border Agency. This was an idea that as late as November 2006 had been described by the Minister for Immigration, Nationality and Citizenship as 'damaging, distracting and disruptive…' and 'rooted in a concept of a frontier that is long past'. (HC Debs 2 November 2006 col 182WH). UKBA came into being as a shadow agency in April 2008, incorporating immigration and visa work the border work of HM Revenue and Customs, and closer cooperation with the police Special Branch and with transport organizations, and regulators. Interestingly, the public launch did not come from the Home Secretary but from the Prime Minister in the Cabinet Office report *Security in a Global Hub* (2007). Migration in this vision was more a matter of border security than of foreign relations. The border as envisaged was not a 'purely geographical entity' (para 6). Much of the improved security that the document promised is delivered by 'exporting the border'. This is described in chapter 6, where we follow the various processes of border crossing. It relies on biometric data and cross-database checking at entry clearance posts, advance passenger information and juxtaposed controls in France and Belgium. *Security in a Global Hub* is an extensive document, describing a strategy of deterrence, intelligence sharing, and an integrated operation of policing and immigration control. Passengers are checked electronically against databases and watch lists, in advance through a visa application and again at the border.

On 1 March 2008, the first regulations took effect which created a duty to share information between immigration authorities, police, and revenue and customs in relation to a range of matters including 'passenger information' and 'notification of non-EEA arrivals on a ship or aircraft'. These were made under powers that already existed (Immigration, Asylum and Nationality Act 2006 (Duty to Share Information and Disclosure of Information for Security Purposes) Order 2008, SI 2008/539). The legislative foundation for closer cooperation between the three bodies was developed in the UK Borders Act 2007.

By April 2009, UKBA was fully established. The public face of UKBA was markedly security and enforcement oriented, inevitably if not only because immigration functions were institutionally combined with the work of crime prevention and raising revenue. Strategic objectives in UKBA's Business Plan April 2009–March 2012 were stated as articles of intent:

> We will protect our border and our national interests.
>
> We will tackle border and tax fraud, smuggling and immigration crime.
>
> We will implement fair and fast decisions.

It would be easy to lose sight of the purposes of immigration control as anything other than these. However, in its response to a report from the House of Lords Committee on Economic Affairs: 'The Economic Impact of Immigration' (session 2007–08 HL 82) the government said that the objectives of Britain's immigration system were threefold:

- To offer humanitarian protection to people requiring sanctuary and fleeing persecution;

- To welcome the loved ones of UK citizens and those with permission to be in the UK who want to be re-united with their families;
- To attract those with the skills who can make a positive contribution to the UK, through work and study.

These objectives attracted little attention in UKBA's business plan, but this should come as no surprise. These differences reflect the tensions indicated by Papademetrios and others, and they are no doubt also influenced by the media, which we discuss later. Nevertheless, UKBA marked a consciously different approach from its predecessor, the Borders and Immigration Agency, who stated their purpose as being to 'manage immigration in the interests of Britain's security, economic growth and social stability', in keeping with the tenor of the 2002 White Paper, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* Cm 5387. Management instead of control implies dealing with a resource, something that is inherently beneficial, and while setting rules and processes for how to handle the resource, getting the best out of it. The reversion to the language of control marks a more hard-nosed attitude to economic migration, and a more absolute approach to enforcement and border control.

The HASC remained intensely interested in the workings of UKBA and instituted a practice of requiring four-monthly reports on its performance. The resulting picture was not a happy one. In the words of the HASC, UKBA:

> continued to perform poorly in several areas, such as tackling the asylum and immigration backlog, and dealing with foreign national offenders when they are released from prison, and processing in-country visa renewals. (HASC, The Work of the UK Border Agency October to December 2012 Fourth Report of Session 2013–14 HC 486 para 3)

The HASC added that the Independent Chief Inspector of Borders and Immigration 'frequently reported' problems with the Agency 'as has the Parliamentary Ombudsman, who noted that almost two-thirds of complaints that had to be sent back to organisations in 2011–12 were about the Agency' (para 3).

In November 2011, following differences of understanding between ministers and senior UKBA officials about the scope of a pilot of risk-led border controls, the Home Secretary announced the creation of a Border Force, taking the border control function out of the UKBA. In 2012, in the words of the HASC, 'matters came to a head' when the ICIBI found that the HASC had 'consistently been supplied with misleading information about the immigration and asylum backlogs'. The Committee Report goes on:

> Mr Vine's oral evidence to us was remarkably consistent with Dr Reid's evidence to our predecessors six years previously – there was a lack of transparency and 'shockingly poor' customer service, and the Agency was divided into isolated 'silos'. (para 5)

The day after this report was published the Home Secretary announced that UKBA was to be abolished. The Agency status had created a 'closed, secretive and defensive culture'. The work of UKBA was divided into four new units in the Home Office:

(a) Border Force, a law enforcement command which carries out immigration and customs controls for people and goods entering the UK;

(b) UK Visas and Immigration: migration casework, visas, asylum casework, appeals, and business, growth and premium services;

(c) Immigration Enforcement: removals and detention, operational intelligence, foreign national offenders and immigration crime; and

(d) Operational Systems Transformation: responsible for modernizing technology; identity and data integrity; performance, assurance and compliance; business strategy; strategic risks and analysis; external engagement on growth; and joint working across the immigration system.

The HASC was surprised to note the immediate reassurance given by the Permanent Secretary: 'Most of us will still be doing the same job in the same place with the same colleagues for the same boss' (para 14). In its final report on UKBA, the HASC was sceptical about whether reorganization had or would have any impact on the effectiveness of its work (HASC, The Work of the UK Border Agency January to March Eighth Report of Session 2013–14 HC 616).

During the lifetime of UKBA there were major changes to the visa application process. Applications are now made online. Visa Application Centres (VACs) work with British diplomatic posts where decisions are made in a pattern of 'hub and spoke' working. For instance, the Madrid office decides applications made in Portugal as well as those made in Spain and Warsaw decides applications from non-EU nationals from 12 countries. The result is that typically an applicant completes an online visa application form, then attends a commercially run Visa Application Centre where they pay their fee (if not paid online), provide biometric data, and submit a paper copy of their application form. The VAC sends the documents to the hub which where ECOs make the decision.

2.3 A technological border

In 2003 work commenced on a programme aimed at delivering a new system of immigration control called e-borders. As described by the Chief Inspector of Borders and Immigration, this involved collecting Advance Passenger Information (API)

> for all scheduled inbound and outbound passengers, in advance of travel. The intention was to 'export the border' preventing passengers from travelling where they were considered a threat to the UK, while at the same time delivering a more efficient model of immigration control, targeting resources to risk and improving passenger clearance times through the immigration control. (ICIBI 2013 para 1)

E-borders rely on electronic recording, transfer, and checking of personal details becoming the paramount form of immigration control. UKBA aimed to create a comprehensive record of passenger movements which it considered will strengthen security by:

- identifying in advance passengers who are a potential risk;
- telling us who plans to cross our border;
- checking travellers against lists of people known to pose a threat; and
- enabling us to link a person's journeys in order to form a detailed travel history, so that we can provide background checks to other agencies and compile a profile of suspect passengers and their travel patterns and networks.

E-borders linked immigration control closely with security issues as expressed in the Prime Minister's 'Statement on Security' in Parliament on 25 July 2007:

> Our first line of defence against terrorism is overseas at other countries' ports and airports where people embark on journeys to our country, and from where embassies issue visas.

The requirement to provide biometric information for a visa application was the first step in the creation of e-borders. The Prime Minister goes on:

> The way forward is electronic screening of all passengers…at ports and airports…The Home Secretary will enhance the existing E-borders programme to incorporate all passenger information.
>
> The second line of defence is at our borders where biometrics…are already in use.

Since 30 November 2009, those people who arrive with biometric entry clearance have their fingerprints scanned on arrival to ensure that they match the prints of the person to whom entry clearance was issued.

British citizens also need to be able to travel in and out of the UK through electronic borders. The UK is moving towards embedding biometric details in the passports of British citizens, at the same time trying to ensure technological compatibility with new minimum security standards for European passports, including biometric fingerprint and facial data (Reg 2252/2004), although the Regulation is part of the Schengen *acquis* which does not apply to the UK.

Personal interviews are now used for first-time British passport applications, at which identity is confirmed through biographical details, facial features are scanned, and fingerprints taken. The information is recorded in a microchip which is read by an electronic reader at immigration control. The Identity Documents Act 2010 s 10 allows orders to be made compelling disclosure of information from other government departments for the purposes of issuing a passport.

For non-EEA nationals, the introduction of biometric residence permits (BRPs) plays a part in the e-borders project. The Immigration (Biometric Registration) Regulations 2008, SI 2008/3048 (as amended) require all applicants for leave to remain in the UK, and their dependants, to apply for a BRP. SI 2009/819 extends the requirement to those who are updating their passport or travel document and SI 2012/594 extends it to those to whom the Secretary of State decides to grant leave. Thus, at the point of grant or application, foreign nationals are brought into the electronic system. Details of leave granted are held on a chip in the BRP, and are therefore machine-readable and capable of being compared electronically with databases.

Data sharing with other countries is also at the heart of the e-borders scheme. Electronic collection and transmission of data has enabled the UK to enter into an agreement with the Five Countries Conference (FCC) nations: the USA, Canada, Australia, and New Zealand. Under a Protocol, the five countries are each able to check an agreed number (initially 3,000) per year of fingerprint sets in immigration cases against databases of the other FCC countries. The UK states it will use the Protocol primarily to check asylum cases where, e.g., the person cannot be identified or there is reason to believe the person may be known to another FCC country, and to check foreign nationals who have been convicted of criminal offences but are difficult to remove due to questions about identity and documentation. The UK, Australia, and New Zealand have opened a shared Visa Application Centre in Singapore.

The plan for e-borders also envisages a fast-track simple entry procedure for 'trusted travellers'. A Trusted Traveller Programme for regular travellers from the United States of America, Canada, Japan, Australia, or New Zealand is being piloted at some airports in place of a former voluntary iris recognition system.

The UK's e-borders system, if made fully effective in the way that the government envisaged, would be one of the most intensive in the world according to Statewatch. The target date for completion (now 2015) has been repeatedly deferred. E-borders is now included within a wider Border Systems Programme which has responsibility for all technological and information systems including the Warnings Index – a security log of people with significant criminal records, suspected terrorists, or others excluded from the UK (see chapter 6 for the effect of checks on entry).

2.4 Policy drivers

In the introduction to this chapter and in chapter 1 we noted that a number of political agendas typically have a major influence on migration policy. We now briefly identify some of the current drivers of UK policy.

2.4.1 Security

Security has been high on the government and public agenda since the attacks on the World Trade Center on 11 September 2001. The presence of terrorist networks in the UK, many of whose members were born abroad, brought allegations that the government did not know who was in the UK. Increasingly, immigration control became wrapped up with the anti-terrorism programme. Refugee law has been changed by the drive against terrorism, and the climate created by connecting the two has contributed towards the ease with which detention and criminalization have been visited upon asylum seekers. Chapters 13 and 14 of this book include a more detailed exploration of these matters.

Criticism of the immigration system was compounded on 26 July 2005 when, immediately after failed attempts at bombings in London, one of the suspects departed on Eurostar. This brought to public attention that there was no longer any monitoring of people leaving the country, as controls on departure had been abolished in the 1990s. The Prime Minister's statement on security on 5 August 2005 set out a number of anti-terror measures that would be taken, all of which have had a significant effect.

- Extending grounds for deportation to include 'unacceptable behaviour' such as 'glorifying terrorism'. Following this, a policy was adopted of relying on such behaviour as evidence that deportation or exclusion met the statutory requirement that it was 'conducive to the public good' (see for instance *Naik v SSHD* chapter 6). At the same time, the new offence of encouraging terrorism was introduced in the Terrorism Act 2006. The UK Borders Act 2007 was an attempt to make deportation automatic for criminal offences. See chapter 15.
- Action on nationality law. This included reviewing the oath of allegiance and language testing, and expanding the grounds for depriving British citizens of their nationality (Immigration, Asylum and Nationality Act 2006 s 56). These matters are discussed in chapter 3.

- Implementation of the e-borders scheme.
- Measures to make it easier to prevent anyone with terrorist connections from obtaining refugee status (e.g., ss 54 and 55 of the Immigration, Asylum and Nationality Act 2006, discussed in chapter 13). Likelihood of causing harm was also a reason for prioritizing an asylum decision within the backlog dealt with by the Case Resolution Directorate.

Since these measures there have been regular interventions in legal procedure geared to restricting status or rights of appeal for people who are suspected of terrorist activities. For instance appeal rights against deportations based on national security were further restricted in the Crime and Courts Act 2013. In all of the developments of the e-borders security is one of the key drivers. Facilitating international exchange of information as among the FCC countries and in the EU is in large part a security measure. The latest measure is a last minute insertion by the Home Secretary into the Immigration Bill 2013 of a provision to deprive people of British nationality on the grounds that they have acted in a way that is seriously prejudicial to the UK's vital interests, even when such a measure would leave the person stateless.

The law barely deals with the question of what really is security. It is not confined to combating terrorism, however, as the deportation of serious criminals is also said to be in aid of public security. Security is usually concerned with a threat to the public or a section of the public. In *SSHD v Rehman* [2001] 3 WLR 877, the House of Lords said that the Secretary of State was the only proper judge of what was *in the interests of* national security (see chapter 15), but it was within their jurisdiction to decide that an action which threatened the security of another country was a matter of national security in the UK.

There is a great volume of writing on the effects of increased security measures on immigration and on asylum-seeking in the UK, in Europe, and worldwide. Much of it charts increased monitoring and controls and examines the risks of asylum claims being wrongly prevented or denied. While the rhetoric of governments often counterposes civil liberties and security, writers make the point that these can be on the same side. Related to this, some writers question the notion of 'security' as used in these debates. For instance, Nana Poku, Neil Renwick, and John Glenn argue that the idea of security which underlies the panoply of legal provisions is an outdated one tied to a national society, seen as military security and political and territorial integrity. They argue for replacing this with an idea of 'human security' (as opposed to 'state security') which values basic welfare of the population. This would entail taking into account that the pressures which cause migration often have their source outside the borders of a state, and that these may be events which fundamentally affect the security of a population, such as environmental degradation, economic deprivation, and conflict. They give examples of where such causes of insecurity have come from outside a state's borders: the 'speculative activities that resulted in the economic meltdown in South East Asia which led to the mass expulsion of "guest" workers from those states', and 'the sale of armaments to oppressive regimes'. They conclude that acknowledging this causal interdependence 'lies at the heart of sustainable common security'. This is an interesting counterpart to the House of Lords' identification of the security of one nation with the security of another – or of all.

2.4.2 Economic growth and economic migration

While there has been pressure on the UK government to close the border to entry for work, encapsulated in the slogan 'British jobs for British workers', the actual economic

impact of migration is complex, and very different in different sectors of the economy. The Migration Advisory Committee is an expert group which takes evidence from an extensive range of sources and has the job of advising the government on the need for, and to an extent the impact of, migrant workers, in particular on where there are shortages of skilled workers which could appropriately be filled by migration. Government decisions on controlling the opportunities to enter for work are based on advice from this body. For discussion of its work see chapter 9. Problems for government in relation to entry for work include attracting the people with the skills for which there is an unmet demand and tackling illegal working.

The Global Commission commends the practice of granting settlement to those who enter for work. Granting the right to stay often contributes to economic growth in the destination country and plays a role in meeting the needs of migrants. However, they also point out two disadvantages. One is that the public mood is not always welcoming, and may be less willing to accept long-term migrants. The other is that countries of origin stand to gain more if migrants return. Although it is difficult to devise programmes of temporary entry for work that protect migrant workers' rights, the Commission advises that this should be attempted as well as settlement routes. In such cases, workers' rights, including access to proper working conditions, information and to transfer employers, should be respected (2005:17–18).

These standards support the capacity of migration to alleviate poverty. If routes to work within the law are too restricted so that enterprising migrants are pushed into using illegal means, there is an overall loss (though not to the arguments of Ruhs earlier, which suggest that there may be an optimum balance). The individual migrant may suffer poor or dangerous living and working conditions, never be able to earn enough to pay off debts owed to smugglers or traffickers, let alone send home, and yet not be able to bring any of their troubles to the attention of the authorities because of their own illegal status. In the meantime, their country of origin may receive little or no benefit from their migration. The host country loses taxation, working conditions for other workers may be driven down, the immigration system is brought into disrepute, and migrants suffer from being associated with illegality. Where the rights of migrant workers are respected, their autonomy increases and they are able to leave abusive employers, send money home, return home when they are ready, or if they want to settle in the new country, are free to do so lawfully rather than 'disappearing' into the illegal economy (see Ryan MRN 2006).

In the UK, entry for work has been subject to intense scrutiny following the government's commitment to cut net immigration to tens of thousands. Students account for the largest group of immigrants (41 per cent of non-EEA visas in the year to September 2013), although the HASC argues that they should not be included in immigration figures unless and until they apply to stay after their studies, which the vast majority do not. Those coming for work accounted for 24 per cent in the same year. Human rights and domestic race relations are critically involved in family settlement, so this is difficult to control. Similarly, EEA nationals account for significant numbers of immigrants, but have a right to enter. In 2011 the government introduced a yearly 'cap' of 20,700 non-EEA workers who can enter for skilled work, and in December 2010 closed the general category for entry for highly skilled workers to all except 'those who have won international recognition in scientific and cultural fields, or who show exceptional promise', limited to 1,000 grants of entry clearance. There are now new Tier 1 routes for entrepreneurs; all these categories are discussed in detail in chapter 9.

The frequency with which categories of entry for work open and close demonstrates the attempts of the government to juggle responding to employers' demands for

flexibility in their work force, and appearing to meet political commitments to reduce immigration. The entry of non-EEA nationals for work – arguably the only group which could be numerically controlled – accounts for about one quarter of the net immigration figure or one tenth of the gross immigration figure (i.e., without off-setting emigration). The HASC observed that 'the proposed cap—unless it is set close to 100%—will have little significant impact on overall immigration levels' (para 31). The Migration Advisory Committee was unequivocal that the target could only be achieved by 'cutting net migration on study and family routes'. HASC advised the government 'not to treat the routes it can control too stringently in order to compensate for the routes it cannot control' (*Immigration Cap* First Report of Session 2010–11 HC 361 para 28). Employers' organizations opposed capping the numbers of intra-company transfers, which accounted for about 60 per cent of entries for skilled work. The HASC also advised against including intra-company transfers, while pointing out that without doing so there would be minimal impact on numbers, and intra-company transfers remain outside the cap.

2.4.3 Undocumented migrants and removal

A previous director of immigration enforcement and removals, when asked by the Home Affairs Committee how many illegal migrants there were in the UK, famously replied: 'I have not the faintest idea' (HC 775 para 74). The media seized upon this since effecting the timely and humane departure of those who have no right to be here has been an espoused political objective, and is often treated as a litmus test of the credibility of government's immigration policy. Thus, attempts to show that something is being done about this are another potent driver of immigration policy. However, there is much confusion and misinformation about who such people are, how many there are, and what harm their continued presence does, if any. The undocumented or 'irregular' population (thought to be around half a million) consists mainly of people who have overstayed their original leave, people who have entered clandestinely or on false documents without being detected, and people whose removal has been directed, but who have not left, such as asylum seekers whose claim has failed (see, e.g., JCWI 2006). There are also many migrants who are legitimately in the UK but who are in breach of their conditions of stay, for instance by working. Irregular migrants include those who have been trafficked. Often figures, known or guessed at, are used in debating these matters, it is generally unknown who is included. Describing such people as 'illegal' carries connotations of criminality that are often quite inappropriate. 'Illegal immigrant' – the term beloved of the media – has no precise meaning. To describe someone as an illegal immigrant who has worked in breach of their conditions of stay is equivalent to describing someone who has committed a speeding offence as an 'illegal driver'.

The circumstances of people with irregular status are more various than imagination can encompass. For instance, the history that led to the Court of Appeal case of *Bibi and others v SSHD* [2007] EWCA Civ 740 was that a man had entered the UK in the 1960s using documents that were not his, and obtained a British passport in that identity. He had worked in the UK ever since, and made regular trips home to Bangladesh. It was only after his death when the rights of his family were affected that his deception came to light. He had probably lived and worked and paid taxes with nothing apparently to distinguish his situation from that of another naturalized British citizen. This man's situation was very different from that of the cockle-pickers who died in Morecambe Bay, and others who live in hiding because their illegal status and their, in effect, debt bondage to their traffickers means that they have no option but to hide from the authorities.

Evidence given to the Home Affairs Committee in 2006 suggested that by far the largest number among undocumented migrants are people who have at some point been lawfully resident, and may still be so. A number of NGOs take the same view:

> Anecdotal evidence suggests that pressures exist with the experiences of migration which buffet against plans and intentions to remain lawfully and which convert a minority of migrants into rule breakers and overstayers. Many of these pressures are financial, involving the discovery that recovery of the cost of the original investment in migration (visa fees, student fees, travel costs, legal advice and other facilitation, etc) is not as easily recoverable from the meagre wages available to migrants as had been thought. In other instances migrants will come under pressure from family abroad to remain to take full advantage of earnings opportunities which can be remitted abroad. In these cases migrants may be tempted to work more hours than permitted or overstay their leave in order to claim to the benefits of migration. (MRN 2007)

The weight of evidence and opinion is that action needs to be taken on many different fronts to tackle this problem, but that some regularization of existing irregular migrants and the protection of migrant workers' rights are important elements. Enforcement by removal is not the only strategy. Ruhs and Anderson (2007) point out some non-compliance is tolerated by all concerned. For instance, how does the law evaluate a request by a student's employer that she works a couple of extra hours so that she exceeds the permitted hours that week? These compromises, they suggest, need to be understood.

Even when a removal decision has been made and directions issued to carry it out, carrying this into effect is not a simple matter. The obstacles to removal are real, and not always understood by critics. As JCWI reports:

> Removal of failed asylum seekers may be impeded for a variety of practical reasons, such as a lack of travel documents, a lack of co-operation from the authorities of the country of origin in issuing such documents, or because there are no safe routes of return, or simply because that country is unsafe to return to. (2006:17)

These obstacles to removal are discussed in chapter 16. In addition to these reasons, Phuong discusses a range of other practical factors. Airlines may be reluctant to take on scheduled flights of people who are being removed against their will:

> Each person to be removed from the UK is subject to a risk assessment in order to determine his suitability for escorted or unescorted removal via commercial air services . . . In any case, the International Air Transport Association . . . has decided that the number of persons to be removed should be limited to one escorted and three unescorted on each flight. (2005:124)

Additionally, many passengers do not like to see people forced onto a plane and 'may take their business to another airline' (2005:125). In Germany, under pressure from the public, Lufthansa decided it would not carry passengers who were resisting deportation (2005:125). Because of the limited flights to removal destinations and the growing reluctance of commercial airlines, governments including the UK now charter planes to countries to which there are high numbers of returnees, and there are regular charter flights returning people to Afghanistan, Pakistan, Jamaica, and Nigeria. Charter flights have also been used for returns to Iraq and Sri Lanka. Clearly this is an expensive method, as planes with a capacity of hundreds of passengers may only carry a few dozen

returnees at any one time (2005:125), although flights to, e.g., Afghanistan have been known to carry as many as 90 passengers. Related to this, the Home Office identify 'reserves' for each flight. This means that extra people are given removal directions, and may be taken to the airport, but will only board if others do not fly because of last minute injunctions or other reasons. Those not flying are returned to detention. This practice has been criticized by HMIP.

The Home Affairs Committee noted that, despite the tone of much public debate, public opinion is another factor which explains the low number of removals relative to government targets and the numbers of those who are liable in law to removal (para 418). (See also the section on media.) Phuong notes that, although public opinion may be in favour of removals in the abstract, when it comes to people being removed by force, and sometimes even injured or killed in the attempt, especially if they know them personally or they 'seem likeable (especially if they are well educated and have small children) they can become quite opposed to a particular forced removal' (2005:126).

In almost any government statement of immigration policy objectives in recent years, 'increase removals' has appeared as a key item. The practical reality is that it is a hard and unpleasant business for all involved and often unfeasible. Phuong concludes that one should also ask 'why are there so many people to be removed in the first place?' She, too, speculates that limited routes to legal migration may be part of the reason, and that opening up economic migration could assist. The Global Commission on International Migration recommends: 'States should address the conditions that promote irregular migration by providing additional opportunities for regular migration and by taking action against employers who engage migrants with irregular status.' The Commission also recommends 'dialogue and cooperation among states' (2005:36). Other commentators, too, consider that action on illegal working would alleviate the problems of undocumented migrants. Ryan (2006) explains that giving migrants the same basic workers' rights as other employees could solve some of the problems of exploitation not only directly but also indirectly, and help resolve immigration irregularity at the same time.

The conduct of removals is also a cause for concern. This is discussed in chapter 16 along with legal controls over the removal process.

2.5 Control within the borders

The concern with controlling and being seen to control the presence and numbers of irregular migrants has become a major preoccupation in government policy. This reached a new extreme in 2013 with the creation of the 'Hostile Environment Working Group'. The aim was to make the UK a hostile environment for the undefined population of unwanted immigrants. Following Liberal Democrat objections, the group was renamed the Inter-ministerial Group on Migrants' Access to Benefits and Public Services. The avowed purpose was pursued by considering initiatives such as asking the Department of Education to check children's immigration status as part of a school admission process and requiring landlords to check prospective tenants' immigration status, letting only to those with verifiable permission to reside in the UK. The second proposal, though not the first, made it into the Immigration Bill 2013, many of whose provisions are directed to the same purpose (see chapter 1). Others include making access to bank accounts and driving licences dependent on immigration status. The Bill

also proposes to give the Secretary of State the power to investigate marriages where one party is a non-EEA national. This is an active investigation power over and above the duty of marriage registrars to report if they are suspicious.

In the light of the proposals in the Immigration Bill, predictions look likely to come true that biometric residence permits would become the required proof for access to public goods and services. The requirement to apply for a BRP at the same time as making an immigration application first came into effect on 25 November 2008 for extensions of leave for students, spouses, civil, and unmarried partners. Further groups of migrants were added and since 1 December 2012 all applicants for visas for more than six months or for leave to remain in the UK must obtain a biometric residence permit. They are also issued as a matter of routine to all who are granted indefinite leave to remain or refugee status.

There is no obligation to carry the BRP, but it may be used to gain access to public services, education, or employment. This generates potential for discrimination if cards *become* a requirement where access to the benefit in question does not in fact depend on immigration status, or where the BRP is not well understood. Bennon reported a speech of the former Home Secretary to the effect that BRPs were to be used to 'refine and upscale a project already in hand – the enforced destitution of irregular migrants such as failed asylum applicants and visa overstayers so as to encourage them to return to their sending countries' (2007:328). The policy of enforced destitution is considered further in the next section.

The use of BRPs to access health care is in keeping with the government's programme of attempting to end access to the National Health Service for groups of foreign nationals. The Immigration Bill proposes that most migrants will pay a health services levy, and that access will be denied to refused asylum seekers. Critics have argued that there is a point beyond which health services cannot be curtailed without impact on the service as well as the life and health of the individual. For instance vulnerable pregnant women refused ante-natal care may have a health crisis resulting in an emergency hospital admission which could have been prevented.

In 2011 UKBA conducted an online survey of BRP users, inquiring into their experiences of the ease or otherwise of use, and any problems of discrimination or obstruction. While some problems with the use of the card were indicated, on the whole results were evenly balanced between those who found the card convenient and those who found it inconvenient. Among the respondents, there was no significant impact based on immigration status, race, or gender. Sixty-four per cent of the respondents were male, and 81 per cent were between 21 and 44 years old (*Securing our Border: Controlling Migration – Biometric Residence Permit Surveys 2011 Summary Analysis* December 2011).

This book does not cover access to welfare benefits and public services, but in the light of the imminent changes which may come with the Immigration Bill, and the current policy of hostility, the following points are made as a short context to those changes. Most people subject to immigration control do not have access to public housing. Presently there is no bar to their renting privately. Most migrants granted leave to enter the UK are granted that leave on condition of having no recourse to public funds. The benefits rules which prohibit access to most welfare benefits for most non-EEA migrants therefore to a great extent mirror the immigration conditions. There are many complex exceptions, but the point here is that the broad prohibition on access to welfare benefits or public housing already applies not only to irregular migrants but also to lawful ones. Access to the National Health Service depends on immigration status. All school age children are entitled to attend school, but access to higher education is

in practice limited by whether the student is treated as eligible to pay home or overseas fees. Students on discretionary leave are charged as overseas students.

The integration policy behind recent legal changes and proposals is marked by a tendency to harmonize to a conception of British life that is based on a particular conception of the majority culture. Tests of English language ability are now required for most categories of entry except visitors and the very rich. The 'life in the UK' test, initially a condition of obtaining British citizenship, is now required for all applicants for indefinite leave to remain.

As mentioned in chapter 1, the growth of internal immigration controls has entailed the increasing recruitment of public officials and private citizens into the business of immigration control. To mention a few: marriage registrars, local authority housing officers, lorry drivers, employers, and universities. The residence test proposed for eligibility for legal aid would involve solicitors checking their clients' immigration status, and the Immigration Bill 2013 extends the net much further (see chapter 1 and earlier in this chapter). There is another dimension of this development of pervasive immigration control which needs mention to give a picture of migration control in today's Britain and that is the privatization of government activities. The contracting out of Home Office housing for asylum seekers is mentioned later. In addition to that, the 'business process management and outsourcing solutions' company Capita obtained a contract to 'find and remove more than 150,000 migrants who have overstayed their visas' (BBC news: *Capita gets contract to find 150,000 illegal immigrants* 18 September 2012). Capita sent texts to thousands of people but it was not disclosed how they obtained the mobile numbers or on what basis recipients were selected. As a consequence those who received texts telling them to leave the UK included British citizens who had lived lawfully in the UK for over 30 years and who had never given the Home Office their mobile phone number. An immigration adviser received letters for 31 of his clients demanding that they go back to India.

They were IT specialists who had been on short-term contracts providing services to a UK company. The letters (like the texts) stated: 'You no longer have the right to remain in the United Kingdom' and 'you must make immediate arrangements to leave the United Kingdom and provide proof you have done so'. They had all left Britain in 2008, and the Home Office had been advised of this. (BBC news: *Capita tells departed migrants to leave the UK* 4 January 2013)

Clearly these actions, like the Go Home campaign discussed later, are part of creating the 'hostile environment' and are part of a growing haze over the distinction between the activities of various 'outsourcing' companies and the actions of the Home Office.

2.5.1 Treatment of asylum seekers

This section concerns the conditions of support for asylum seekers during their time in the UK.

The Tenth Report of the Parliamentary Joint Committee on Human Rights in Session 2006–07, *The Treatment of Asylum Seekers*, was an important public document, saying:

12. The treatment of asylum seekers is important for the men, women and children seeking asylum in the UK. But it is also important for those of us who are not asylum seekers. This is because the UK's approach to migration – and its treatment of asylum seekers in particular – says something about the society we live in and the kind of country we want to be. The human rights principles and values of democratic societies must guide the country's behaviour towards asylum seekers and its relationships with other countries from which asylum seekers originate.

Asylum seekers who have no other means of material support are entitled to a basic level of assistance and accommodation while their claim is being considered (Immigration and Asylum Act 1999 s 95). The financial support for a single adult is approximately 51 per cent of the income support rate for a person over 25. This can be refused if they do not claim asylum as soon as reasonably practicable after their arrival (Nationality, Immigration and Asylum Act 2002 s 55). As discussed in chapter 1, the application and interpretation of this section left hundreds (at least) of asylum seekers destitute. Following the *Limbuela* judgment, discussed in chapter 1, people with an outstanding asylum claim or appeal should no longer be denied support where they are destitute. In the JCHR enquiry, witnesses including from the Home Office confirmed that s 55 of the 2002 Act was still being used to deny support to people who had somewhere to sleep but no food. Also, anyone who took more than three days after arrival to claim might well not receive support. However, the difficulties of finding one's way to an unknown location in an unknown country, perhaps not speaking the language, and without the information that this journey was necessary and how to do it, were minimized or overlooked (para 78). The Committee concluded that the continued application of s 55 did not comply with the *Limbuela* judgment, that there were clear breaches of Article 3 ECHR, and that s 55 ought to be repealed. It was not.

Where an asylum claim has failed and appeals are exhausted, entitlement to support under s 95 ends. A refused asylum seeker may be able to claim support under s 4 of the 1999 Act if they are taking all reasonable steps to go home, or the Secretary of State accepts that they are physically not able to leave, either because of illness or there is no viable route of return, or failure to support would entail a breach of their human rights, or they have children who would otherwise require local authority support. These conditions do not apply to the majority of refused asylum seekers. Section 4 support consists of accommodation and a card (Azure card) credited with £35 per week. Asylum seekers are not permitted to work, though see *ZO Somalia* discussed later in this chapter.

The JCHR criticized frequent moves of asylum seekers who were on asylum support, interrupting children's schooling and causing other hardship, the use of vouchers to buy food and toiletries – once abandoned by the government as too degrading and inefficient but now revived in the form of the Azure card – and the poor housing provided as the only option, sometimes overcrowded with collapsing ceilings. With the prohibition on doing paid work, there was no escape from the degrading conditions. The Committee concluded:

> The treatment of asylum seekers in a number of cases reaches the Article 3 threshold of inhuman and degrading treatment. This applies at all stages of the asylum process.

The HASC 2013 Inquiry into Asylum also reported on housing conditions for asylum seekers following contracting out the provision of accommodation to multinational companies. There were problems with poor standards in housing, lack of housing, and slowness in responding to complaints. Although some problems were remedied by individuals at a local level, at the systemic level it appeared that some at least of the contractors were unable to deliver what they had promised.

Funding for English classes for asylum seekers has also been intermittently stopped and started. The Refugee Council commented:

> The removal of automatic ESOL and FE funding for asylum seekers is a major blow toward their ability to function and communicate effectively during the time when their claim is being considered… English language brings greater self-sufficiency which, amongst other benefits, means less reliance on support services. It also allows people to make connections

with the local community that they would not have otherwise. We are particularly concerned that these changes further disempower people who have already undergone significant loss. (ESOL and Further Education Funding Changes 2007/08 announced by the Learning and Skills Council. Briefing November 2007)

The HASC in 2013 recommended that English provision be restored to its former level, as for those obtaining leave to remain as refugees, lack of English language provision is a bar to integration.

2.5.1.1 Destitution

While life on s 4 support is virtual destitution, most refused asylum seekers do not qualify for s 4, and are entirely destitute. In 2006 an independent group of people began to investigate the asylum system in depth. This became the Independent Asylum Commission, which reported in 2008 on whether the asylum system was 'fit for purpose yet'. The foreword to their final report said:

We lose control over the movements of the asylum seeker at exactly the point – after refusal – that the incentive for the asylum seeker to maintain contact disappears. And we lose moral authority by using destitution to 'encourage' refused asylum seekers to return home 'voluntarily'.

Their recommendations included that 'robust independent research should be undertaken into the reasons why different categories of refused asylum seeker do not return home voluntarily, and the results should inform any future project to increase take-up of voluntary return'. Certainly many would say that their first asylum decision was badly made and the appeal system was unable to right that right (see chapter 11 for some reasons as to why that might be and for coverage of the asylum application process). Destitution at this stage is not an accident. The JCHR said:

We have been persuaded by the evidence that the government has indeed been practising a deliberate policy of destitution of this highly vulnerable group. We believe that the deliberate use of inhumane treatment is unacceptable.

Since then there have been numerous reports on destitution, all of which confirm that the largest groups of destitute asylum seekers come from countries where there is severe conflict and human rights abuses. For instance research by the Joseph Rowntree Trust revealed that the largest groups of destitute refused asylum seekers were from Eritrea (25 per cent), Sudan (14 per cent), and Iran (12 per cent). This may in part be an indicator of the very real obstacles to return even when an individual asylum claim has failed. A refused asylum seeker may still be in fear of what would happen to them on return. This overriding fear may make the thought of return intolerable. In addition, there are obstacles to return which have been considered earlier and are also examined in chapter 16.

For such a person, fast progress through the asylum system may mean that they are plunged more rapidly into destitution or, one of the few options for survival, illegal working. Other options are charities, begging, sleeping rough or staying with friends. For a fuller account of survival strategies see Crawley, Hemmings, and Price, 2011. For the government, meeting targets of fast processing may mean an increase in the number of people who have no regular status but cannot be removed, a phenomenon which causes them much political embarrassment, an increase in illegal

working which they are pledged to reduce, or an increase in destitution for which they are also criticized.

2.5.1.2 The right to work

EC Reception Directive 2003/9 Article 11(2) requires that if an asylum decision has not been taken within one year through no fault of the applicant, the Member State must 'decide the conditions for granting access to the labour market for the applicant'.

Key Case

***ZO (Somalia) and MM (Burma) v SSHD* [2010] UKSC 36**

The Supreme Court held that Article 11(2) of the Directive also applied to fresh claims for asylum, so that if a person whose first claim had failed later found further evidence and was able to make a fresh claim, that would trigger the start of a further 12-month period after which permission to work could be sought. Many asylum seekers do make fresh claims. The government's common practice was to decide that further representations did not amount to a fresh claim and then refuse that claim on the same day. The representations might be waiting for years for a decision as to whether they met the requirements (see chapter 11) to be treated as a fresh claim, but during that time the Home Office would not treat time as running for the purposes of permission to work. The Court said that to interpret the rules in that way deprived the right to apply for permission to work of all utility.

The judgment of the Court of Appeal was to the same effect as that of the Supreme Court, but was never implemented. Once the Supreme Court judgment was given, UKBA introduced a policy that the only work for which asylum seekers could be considered was that in the list of shortage occupations. The Home Affairs Select Committee in its 2013 Inquiry into Asylum compared the UK with other European countries which allow the right to work after shorter periods and with less onerous conditions.

2.5.1.3 The future of asylum support

A powerful case was made in the HASC inquiry for the abolition of s 4 support and this is under consideration.

Overall, there is now a large body of reports by NGOs and parliamentary Committees who have followed in the footsteps of the Independent Asylum Commission and made many detailed and practical recommendations to achieve a more effective and humane asylum support system. However, it is clear that there is not the political will for this to inform policy-making.

2.6 Media

The final subject in this chapter is the media. They have been present, though without mention, in much of what has gone before. Policy is presented and framed in the way it is because the government expects that the media will publicize what they have said. Without the news media, many of the policy statements we have been discussing might not be made at all. Lord Woolf described the relationship between the media and the

judiciary as one of a common interest, and a need to be independent of one another while also recognizing that each has some power to uphold the other's independence. The media and judiciary each act as a check on the power of government, particularly when that government has a large majority and can become 'impatient of interference and criticism' (2003). When there is tension in the relationship between the judiciary and executive, the media is an interested party.

Constitutional Reform Act 2005 s 3 affirms convention by requiring ministers to uphold the independence of the judiciary. The House of Lords Constitution Committee explained that this does not mean that ministers may not comment on individual cases. They may, but they should say that they disagree with the decision and that they will appeal if that is the case, and not imply that there is something wrong with the judge for making that decision (2006–07 Sixth Report para 40).

This convention has been infringed in immigration and asylum cases in recent years. In a number of cases, the judge has come under personal attack. Even more than this, ministers have implied that there is something unconstitutional and anti-democratic in the judges upholding the rights of asylum seekers and migrants. Remarkably, in relation to *R (on the application of Q and M) v SSHD* [2003] 2 All ER 905, the then Home Secretary David Blunkett said that he would not put up with judges interfering with the democratic process in this way. The case was one of statutory interpretation, using the Human Rights Act to interpret the Nationality, Immigration and Asylum Act 2002. Commenting on Mr Blunkett's response, Geoffrey Bindman in *The Independent* newspaper in February 2003 pointed out that it is the constitutional task of the judiciary to interpret legislation, and in a democracy, judicial review is the essential constitutional check by the judiciary of the executive.

A personal attack on the judge was combined with misinformation in the case of *R (on the application of S and others) v SSHD* [2002] EWCA Civ 1157, in which the government apparently used the media to publish a distorted account of a court case, with damaging results for the courts, the Human Rights Act and the appellants. This case was serious enough that, in combination with two other incidents, it prompted an enquiry by the JCHR.

Briefly, this was the case of nine people who had hijacked a plane as a desperate measure to leave Afghanistan. They were members of a group opposed to the government, and were in fear for various reasons, including that one member of their group had been tortured, killed, and then delivered to their door. After an eight-day hearing by a specially convened Tribunal, their claims for asylum were turned down because of the crime they had committed by hijacking the plane, but it was held that they should have temporary protection because of their fears of human rights abuses. This would entail a grant of discretionary leave. They were convicted of the hijacking and served prison sentences, though later cleared by the Court of Appeal because the jury had been misdirected on the question of duress.

The government accepted before the Tribunal that the appellants did not present any security risk to the UK, but refused to accept the ruling of the Tribunal. They did not challenge it, but just failed to implement it. They kept the appellants on temporary admission, even though there was no basis in law for this. Discretionary leave, although temporary, would entitle them to work or claim benefits, neither of which they could do on temporary admission.

As the hijack itself was such a high-profile event, the media would be interested in the fate of the appellants, so anticipation of press coverage must have been in the government's mind in the conduct of this case. The question was whether the government was willing to take the lead in explaining to the public that the hijackers had paid the penalty

in law for their criminal actions, what they had suffered, why they needed protection, and to take credit for Britain upholding its proud tradition of giving sanctuary, albeit temporary. Unfortunately, they did nothing, leaving the appellants in limbo for 18 months.

When the case eventually came to the High Court, and Sullivan J ordered that the Secretary of State act lawfully and grant discretionary leave, the government appealed to the Court of Appeal. The High Court judgment was castigated in the press and by the Prime Minister as 'an abuse of common sense'. The response of the Prime Minister and Home Secretary implied that the High Court had only just decided that the claimants could not return for human rights reasons and that they were amazed and outraged by this, rather than acknowledging that the human rights decision had been made 18 months earlier and was no surprise. Their response also implied that these people had hijacked a plane and got off scot-free. Crucially, the Home Secretary commented in the press:

> When decisions are taken which appear inexplicable or bizarre to the general public, it only reinforces the perception that the system is not working to protect or in favour of the vast majority of ordinary decent hard-working citizens in this country.

The media did not apparently notice that the 'ordinary decent hard-working citizens of this country' were not in any way adversely affected by the decision, but were being invoked in support of the indignation of the Home Secretary and Prime Minister. Over the next few days, they picked up the case as a call to repeal the Human Rights Act. The Daily Telegraph contrasted the 'hijack at gunpoint' with the right to stay. There was no mention of the basis for the appellants' fear, nor the abuse of power by the Home Secretary. The press coverage painted the claimants as the villains of the piece, and the Home Secretary as amazed and outraged. Eventually the Court of Appeal applauded Sullivan J's judgment as 'impeccable'.

At the special inquiry by the Parliamentary Joint Human Rights Committee, the Lord Chancellor was asked whether he regarded Sullivan J's judgment as 'impeccable' or 'inexplicable and bizarre'. His response sets out a fairly standard piece of legal reasoning which implicitly endorses that it was 'impeccable'.

Comment has not all been in one direction. As discussed in chapter 1, in recent years, there has sometimes been a high level of tension between the executive and judicial branches of government. One indication of this was that senior judiciary broke their time-honoured tradition of not commenting on government policy. The battle over the proposed ouster clause in the AITOC Bill brought out the senior and retired judiciary in powerful opposition, not only in Parliament but also outside it. Lord Woolf's trenchant criticism in his Squire Centenary lecture marked a new point in executive/judicial relations. Lord Steyn was prepared to count himself out of hearing the challenge to the British government's role in detention in Guantanamo Bay, which he described as a 'legal black hole' (2004:256), in order to be free to warn publicly against an 'unprincipled and exorbitant executive response' (*The Independent* 26 November 2003).

The use of the media in relation to *S* was a low watermark. However, the release of foreign prisoners reported in 2006 was, if anything, a lower point. In this case, neither the judiciary nor the Human Rights Act had any part to play. Journalism revealed a failing in government, and the government then blamed the judiciary and the Human Rights Act. The story is best told in the words of the JCHR report:

> 22. When it came to light that a substantial number of foreign prisoners had been released at the end of their sentences without being considered for deportation, some of whom had re-offended, the then Home Secretary, Rt Hon Charles Clarke MP announced plans, in a

statement to the House of Commons on 3 May 2006, to change the system governing deportation of foreign prisoners.

23. The new Home Secretary, Dr Reid, said in a newspaper article on 7 May: 'the vast majority of decent, law-abiding people…believe that it is wrong if court judgments put the human rights of foreign prisoners ahead of the safety of UK citizens. They believe that the Government and their wishes are often thwarted by the courts. They want the deportation for foreign nationals [sic] to be considered early in their sentence, and are aware that this was overruled by the courts' (*News of the World*).

The cause of the prisoners not being considered for deportation was actually a failure of communication between different parts of the Home Office, and nothing at all to do with the Human Rights Act. This was admitted by the government in evidence given to the JCHR enquiry. This admission of course gained almost no press coverage by comparison with the outcry over the release of the prisoners, which was full of misinformation of all kinds. After the assertion by the Home Secretary that the Human Rights Act was to blame, the Prime Minister followed up in Parliament with a speech referring to the government's plans to change the law on deportation, and said that the vast majority of people 'would be deported, irrespective of any claim that they have that the country they are returning to may not be safe' (HC Debs 17 May 2006 col 990). The implication was not only that the Human Rights Act was to blame but also that the government had the power to legislate to override fundamental rights. The press coverage also implied that the prisoners *would* have been deported if they had been considered, but deportation is a discretion to be exercised on the merits of the individual case. There were said to be 1,000 prisoners freed without consideration of their cases, but the fact that this total was accumulated over seven years was lost from public view.

A serious result of the media outcry was that the government was under pressure to find and deport as many of the freed prisoners as they could. This meant that recently released foreign nationals, even if they would not normally be deported on the facts of their case, were at higher risk. One such case was that of Sakchai Makao, a popular young Thai man who had lived in Shetland most of his life. After one crime that was out of character, he served an eight-month prison sentence, but was welcomed back to Shetland. He was re-arrested for deportation in the aftermath of the foreign prisoners issue, but the islanders felt he had been picked up as a 'soft target', and they campaigned for him to stay. The Tribunal agreed he should.

Not only foreign nationals were at risk in this operation. Some of the alleged foreign national prisoners turned out to be British. It seemed that prisoners' nationality was not routinely checked (see Shah, R. 2007).

None of this was to do with the Human Rights Act or, in fact, the state of the law at all, but it was nevertheless a platform upon which the government could launch its idea of 'automatic' deportation for serious offences. In chapter 15, we discuss how automatic this actually is. Although the UK Borders Act 2007 has created a strong presumption in a wide range of criminal cases, even the strongest presumption cannot displace human rights, as the JCHR noted. Government representatives before the Committee were forced to agree. Nevertheless, human rights of migrants have continued to be a target, and as discussed in chapters 7, 8, 17, and elsewhere, the government has continued to legislate to try to exclude human rights particularly of those with criminal convictions. The real issues have at times been obscured by remarks probably designed for the media but not necessarily true, for instance the Home Secretary's famous complaint that a particular appellant had been protected from deportation because he owned a cat (BBC news: *Theresa May under fire over deportation cat claim* 4 October 2011). This was of course

not so, and the judiciary, who were implicitly trivialized by this false account, entered the media arena with the Royal Courts of Justice issuing a statement that the cat 'had nothing to do with' the deportation being overturned.

The foreign national prisoners issue also provoked a published letter from the Prime Minister to the Home Secretary, in which he alleged that British courts overruled the government in a way that was inconsistent with other EU countries' interpretation of the ECHR. A parliamentary question and inquiries by the JCHR were unable to unearth any such case, but if they had, the implication that this would be somehow illegal, unethical or unconstitutional is simply wrong. The suggestion was withdrawn before the JCHR, but again without media attention.

Sometimes, of course, the press itself misrepresents the law, and has also done this in a way that inaccurately disparages the Human Rights Act. An instance of this was press coverage of the case of Learco Chindamo, the young man who killed Philip Lawrence. A teenager killing a respected head teacher generated particularly strong feeling, and once again the Human Rights Act was wrongly credited with the fact that the Asylum and Immigration Tribunal held that he could not be deported. Chindamo, as an EU national, could only be deported 'on imperative grounds of public policy', which would not apply in this case where he was agreed not to present a future risk. Undeterred by facts, the *Daily Mail* and other newspapers reported that the Human Rights Act was the reason for the ruling which it described as 'profoundly stupid and amoral' (21 August 2007). The Shadow Home Secretary was apparently also taken in, saying that the case demonstrated 'a stark demonstration of the clumsy incompetence of this Government's human rights legislation'. In fact, it was an EC Directive which bound the Tribunal.

The concern in cases of this kind, and one reason that *S* and the foreign prisoners issue warranted investigation by the JCHR, was that such inaccurate reporting, and particularly when led by government, undermines attempts to build a human rights culture. It feeds racism, though this was not discussed by the JCHR, as the implication of the Home Secretary's remark, not voiced openly by him but quickly picked up on by newspapers such as the Daily Mail, is that human rights are delivered to failed asylum seekers in preference to long-term residents. There was no foundation for this in the cases in question.

The role and power of the press in creating a climate around asylum has been researched in a number of studies. This, too, is not new. Greenslade for the Institute of Public Policy Research shows that press reports have encouraged ill-feeling against migrants since the early part of the twentieth century, including anti-Jewish material in the newspapers of the late 1940s and press coverage of street fighting in Notting Hill in the 1950s, inaccurately reported as 'race riots'. The study shows how 'newspapers, either by exaggerating race disputes or covering them in such a way as to suggest that migrants were the cause of trouble, helped to set the political agenda which led to immigration legislation' (2005:17). A similar story may be told about disturbances in Brixton in 1981, also inaccurately dubbed 'race riots'. Greenslade gives examples of misinformation in newspapers which directly resulted in violence. For instance, the misleading claim that 'luxury pads' were being prepared for asylum seekers resulted in homes being broken into and damaged before refugees had moved in.

In October 2003, the Press Complaints Commission issued a brief guidance note to editors about terminology. It explained, for instance, that an asylum seeker is 'someone currently seeking refugee status or humanitarian protection'. Consequently 'there can be no such thing in law as an "illegal asylum seeker" '. This guidance on terminology, while welcome, only scratched the surface. The JCHR recommended the PCC go further and provide practical guidance on professional practice of

journalists in reporting matters of legitimate public interest, while not encroaching on free speech (para 366).

A study for the Information Centre about Asylum and Refugees in the UK (ICAR) assessed the impact of media and political images of refugees and asylum seekers on community relations in London (ICAR Media Image, Community Impact 2004). This report uses a range of methods and is a theoretically grounded study. It was inconclusive about the link between unbalanced press reporting and violence against asylum seekers. It did find under-reporting of violence against asylum seekers and refugees, and the frequent use of emotive language and inaccurate information. The writers noted that 'local papers were more likely than national ones to interpret their role as providing a balanced picture on issues that affect local people' (2004:98). This finding was repeated in a later study by ICAR of the effect of the Press Complaints Commission Guidelines (ICAR 2007).

The 2007 ICAR research found that the most inaccurate reporting was in the daily newspapers with the top six circulation figures. The study found most political reporting to be 'tired, repetitive and unquestioning'.

This is endorsed by Philo, Briant, and Donald (2013), whose extensive study of media treatment of refugees finds

- Persistent and overwhelmingly hostile coverage of refugees and asylum in the national media
- Confusion in news accounts between refugees, asylum seekers, and other migrants
- Relative absence of the voices of refugees or those who represent them
- Adverse consequences for the stability of existing communities
- Consequences for refugees, particularly in compounding their isolation and stigma.

The book documents many kinds of abuse, including those found by earlier researchers: false adverse portrayal of migrants and refugees, and false presentation of the impact of the law, in particular the Human Rights Act. It demonstrates how the construction of questions by journalists contributes to an adverse climate by defining problems and asking how politicians have solved them. The book also covers a new and significant form of use of the media – advertising by the immigration authorities. There is discussion of television programmes such as *UK Border Force*, a series funded by the government to portray what an interviewee for the authors' research described as 'a simple good and bad vision of the world'. While the funding for the programme was handed back because of controversy, there was a larger budget which UKBA spent on sponsoring TV coverage.

Finally, the government resorted to an extraordinary use of media in the 'Go Home' campaign. A van travelling around London bore the slogan:

> In the UK illegally? Go home or face arrest. Text HOME to 78070 for free advice, and help with travel documents. We can help you return home voluntarily without fear of arrest or detention.

The exercise was considered ill-judged. The HASC thought that there would be a 'more effective and less menacing' way to deliver this message. Likewise it advised the Home Office to reconsider its use of twitter feeds – also used as advertising for government policy but potentially misleading.

There is enormous power attributed in the immigration and asylum field to an invisible factor called 'public opinion'. There is now a range of initiatives by NGOs and by

individuals and community groups to tackle 'public opinion' directly by the provision of direct information about and contact with refugees and asylum seekers and their human experience. See, for instance, the Refugee Awareness Project originating in Refugee Action, in which local people and refugees talk and work together, and the City of Sanctuary movement, an initiative to build a climate of welcome and hospitality. These and other initiatives working directly on this form of 'climate change' illustrate that public opinion and the question of accurate and inaccurate information is a major driver in the field of asylum policy.

As government solutions to an ill-defined problem proliferate, so do the solutions of civil society, migrants themselves, activists, and people at various levels of organization. The London-based Strangers into Citizens campaign commissioned a telephone poll of 1,004 British adults in April 2007. Of these, 66 per cent believed that undocumented migrants who have been in the UK for more than four years and pay taxes should be allowed to stay and not called 'illegal'; and 67 per cent believed that asylum seekers should be allowed to work (Strangers into Citizens press release 24 April 2007). A coalition now numbering over 60 organizations formed a campaign called 'Still Human Still Here' which aims to end the destitution of refused asylum seekers.

An important role played by the media in immigration and asylum issues is in investigative journalism. Journalists have revealed many human stories and uncovered malpractice in government, for instance when a chief immigration officer was alleged to have pressurized an 18-year-old asylum seeker for sex in return for asylum status (Observer 21 May 2006). Sometimes also press reports from their country of origin may be an important source of evidence for asylum seekers. It is difficult to establish their claim outside their country, but they may be able to obtain newspaper reports through contacts or online, or occasionally witness statements from investigative journalists (for instance in *BK (DRC)* [2007] UKAIT 00098).

Some of the major human rights violations occurring in connection with migration have been uncovered by investigative journalists, for instance, the Joseph Rowntree Foundation note in their report on contemporary slavery a 'formidable body of work by investigative journalists' (2008: 24) which has uncovered stories of trafficking adults and children for sex and other forms of forced labour, and abuse. John Pilger's film, *Stealing a Nation*, brought the little-known story of the Chagos Islanders (see chapter 3) to the attention of the general public when it was shown on ITV.

2.7 Conclusion

This chapter just touches on some of the issues surrounding the making of legal policy. This is the edge of a very large field. Some other policy issues are addressed throughout this book as they arise.

QUESTIONS

1 Under what conditions is it possible to make immigration policy in a way that is truly democratically accountable? Is this desirable?

2 What elements would you like to see in a code of practice for the media on reporting on immigration and asylum issues?

For guidance on answering questions, visit www.oxfordtextbooks.co.uk/orc/clayton6e/.

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