

# Racism in UK immigration law from the Commonwealth Immigrants Act 1962 to the present

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*“Discrimination on the ground of race, sex and religion are all now discredited, but discrimination on the ground of nationality is written into the laws of every land.”*

**Theodore Zeldin**

# What are immigration laws?

- Immigration laws restrict the entry and stay of non-citizens
- Intertwined with nationality law – which determines who is, and is not, a citizen

# Origins of British immigration law

- Controls on immigration first introduced in 1905
- Immigration controls only applied to “aliens”, not British subjects
- People born in the UK, and in British colonies abroad, were British subjects
- People born in British protectorates abroad had the separate status of “British protected persons”

# The British Nationality Act 1948

- Created two new statuses: “citizen of the United Kingdom and Colonies” (CUKC) and “Commonwealth citizen”
- People from the UK and its remaining colonies were CUKCs
- People from the “dominions” (Canada, Australia etc) were Commonwealth citizens but not CUKCs
- Both groups still had the right to live and work in the UK
- After WWII large numbers of people from the Commonwealth came to live and work in the UK – the “Windrush generation”

# The Commonwealth Immigrants Act 1962

- Introduced against a background of increasing racism and anti-immigration sentiment
- Imposed immigration controls on:
  - Commonwealth citizens who were not CUKCs
  - CUKCs who had a passport issued in a British colony rather than the UK

# The Commonwealth Immigrants Act 1968

- Introduced to prevent the immigration of East African Asians from Kenya and Uganda
- Imposed controls on all CUKCs unless they, or one of their parents or grandparents, was born, adopted or naturalised/registered as a citizen in the UK
- So CUKCs with recent UK ancestry (most of whom were white) remained free from controls – but CUKCs from British colonies abroad (most of whom were Black or Asian) were subject to controls
- Many East African Asians were left with no home at all

# The Government's racist motivations

*"It is sometimes argued... that we can take a less serious view of the scale of immigration and settlement in this country because it could be, and currently is being, more than offset by total emigration. This view overlooks the important point that emigration is largely by white persons from nearly every corner of the United Kingdom, while immigration and settlement are largely by coloured persons into a relatively small number of concentrated areas. The exchange thus aggravates rather than alleviates the problem."*

**-Labour Home Secretary James Callaghan**



# East African Asians v United Kingdom (1981) 3 EHRR 76

- The exclusion of the East African Asian CUKCs discriminated against them on the ground of their colour or race
- This constituted “degrading treatment” in the sense of Article 3 of the European Convention on Human Rights
- After the judgment, the Government sought to “remedy” the injustice by introducing the Special Quota Voucher scheme that allowed some CUKCs to settle in the UK based on an annual quota

# The Immigration Act 1971

- Created a single system of controls for aliens and Commonwealth citizens for the first time
- Still forms the basis of our immigration law today
- Introduced the concept of “patriality” – patrials had the right of abode in the UK and non-patrials did not
- Non-patrials required “leave to enter” and “leave to remain”

# Who had the right of abode?

(1) A person is under this Act to have the right of abode in the United Kingdom if—

(a) he is a citizen of the United Kingdom and Colonies who has that citizenship by his birth, adoption, naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the Islands; or

(b) he is a citizen of the United Kingdom and Colonies born to or legally adopted by a parent who had that citizenship at the time of the birth or adoption, and the parent either—

(i) then had that citizenship by his birth, adoption, naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the Islands; or

(ii) had been born to or legally adopted by a parent who at the time of that birth or adoption so had it; or

(c) he is a citizen of the United Kingdom and Colonies who has at any time been settled in the United Kingdom and Islands and had at that time (and while such a citizen) been ordinarily resident there for the last five years or more ; or

(d) he is a Commonwealth citizen born to or legally adopted by a parent who at the time of the birth or adoption had citizenship of the United Kingdom and Colonies by his birth in the United Kingdom or in any of the Islands.

(Section 2(1) of the Immigration Act 1971 as originally enacted)

# The racism of the Immigration Act 1971

- Replicated the racism of the 1968 Act – CUKCs with connections to the UK, Channel Islands and Isle of Man (mostly white) had the right of abode, while CUKCs solely connected to a British colony (mostly Black and Asian) did not
- Continued to violate the international law norm that citizens have the right to live in their own country
- Non-CUKC Commonwealth citizens only had the right of abode if they had a UK-born parent – again mostly benefiting white people
- Some CUKCs with the right of abode lost their CUKC status, and therefore their right of abode, when their home colony became independent

# The British Nationality Act 1981

- Replaced the status of CUKC with several types of British nationality
- CUKCs who were patrials became “British citizens”
- CUKCs who were non-patrials became either “British Overseas citizens” or “British Dependent Territories citizens”
- British citizens had an automatic right of abode in the UK, but the other categories did not
- Abolished birthright citizenship – birth in the UK no longer automatically made you a British citizen

# What can we learn from the history?

- Nationality is arbitrary – it's an accident of birth
- British immigration law is rooted in racism

# Forms of protection

- Asylum
- Humanitarian protection
- European Convention on Human Rights

# What is a refugee?

*"...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."*

- Refugee Convention 1951



# What does an asylum-seeker need to prove in order to establish that they are a refugee?

- That they have a well-founded fear of being persecuted in their home country
- That the persecution is because of their race, religion, nationality, membership of a particular social group or political opinion
- That their home country's authorities wouldn't adequately protect them against the persecution
- That they couldn't avoid the persecution by relocating to another part of their home country, or that it wouldn't be reasonable to expect them to do so
- Some people are excluded from refugee status for various reasons (including past crimes)

# What doesn't the Refugee Convention do? (1)

- It doesn't provide a safe and legal route to reach a safe country – you have to already be in the UK in order to claim asylum
- Most refugees have no choice but to leave their country through irregular means
- Many refugees have good reasons for not claiming asylum in a "safe" third country – such as street-homelessness and destitution, state/police racism, or family ties to the UK

# What doesn't the Refugee Convention do? (2)

- It doesn't protect everyone who needs protection
- It only protects people with a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion
- Doesn't necessarily protect people who are at risk from indiscriminate violence in a war zone
- Doesn't necessarily protect people from destitution, hunger or lack of medical care

# Humanitarian protection

- Complementary to refugee status, and protects some people who are not refugees
- Called “subsidiary protection” in EU law
- Protects people who are at risk of serious harm, such as the death penalty or torture
- Protects people who are at risk from indiscriminate violence – although the threshold is very high
- Some people are excluded because of past crimes

# Article 3 of the European Convention on Human Rights

- Prohibits torture and inhuman or degrading treatment or punishment
- Protects people who are at risk of e.g. torture on return, but are excluded from asylum and humanitarian protection because of criminal offending
- Also protects some people who are at risk of serious suffering and death due to lack of medical care – but only in very narrow circumstances

# Article 3 and “medical” cases (1)

- *D v United Kingdom* (1997) 24 EHRR 423 – Article 3 prohibited removal of critically ill HIV sufferer to St Kitts where he would die an early/degrading death with no care, support or accommodation
- *N v Secretary of State for the Home Department* [2005] UKHL 31 – Article 3 did not prohibit removal of HIV sufferer to Uganda where she would be likely to die early due to lack of antiretroviral drugs; *D* was confined to “deathbed cases”
- *Nupheld* in Strasbourg
- *GS and EO v Secretary of State for the Home Department* [2015] EWCA Civ 40 – Article 3 did not prohibit removal of people with kidney failure who would die quickly after removal from lack of medical care

# Article 3 and “medical” cases (2)

- *Paposhvili v Belgium* [2017] Imm AR 867 effectively departed from *N*
- Article 3 can prohibit removal of a seriously ill person where *“substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.”*
- Adopted by UK Supreme Court in *AM (Zimbabwe)* [2020] UKSC 17

# Asylum and credibility

- Many people are disbelieved by the Home Office and/or judges because of “inconsistencies”
- But evidence shows that human memory for information such as dates, sequences, durations and proper names is poor, and that true accounts are just as inconsistent as false ones
- Many asylum-seekers suffer from PTSD and depression, which are known to impair memory
- Judges and officials are bad at assessing credibility
- Many “failed” asylum-seekers have been wrongly refused



# Article 8 of the European Convention on Human Rights

- Protects the right to private and family life
- But it is a “qualified” right that can be limited in the public interest

# How immigration law tears families apart (1)

- The “financial requirement” of £18,600 for British citizens and settled persons wanting to bring their partners to the UK tears many families apart
- It was largely upheld in *MM (Lebanon)* [2017] UKSC 10 but exceptions must be made in some cases

# How immigration law tears families apart (2)

- UK Borders Act 2007 – non-citizens are automatically considered for deportation if they receive a 12+ month sentence
- This is the case even if they have lived in the UK since early childhood – there are even cases of the Home Office seeking to deport people born in the UK
- Immigration Act 2014 – introduced the new sections 117A-D of the Nationality, Immigration and Asylum Act 2002 which attempted to codify judges' consideration of Article 8 in immigration cases
- The threshold for resisting deportation on Article 8 grounds is now very high

# Do the arguments for immigration control stack up? (1)

- The resources argument – would Britain be overwhelmed if it opened its borders to unlimited immigration?
- But rapid mass migration is already happening in countries that are much poorer than the UK and much less equipped to deal with it – so we are simply sending the problem elsewhere
- This argument is a kind of NIMBYism

# Do the arguments for immigration control stack up? (2)

- **Should non-citizens who commit serious crimes be deported for “abusing the hospitality” of the UK?**
- **Nationality is arbitrary – it is an accident of birth**
- **Non-citizens are punished twice for a crime where British citizens would be punished once – and deportation is often a much harsher punishment than prison**
- **Many people who are deported have lived in the UK since early childhood and have little or no memory of their home countries**

**Questions**