

# SPOUSE AND PARTNER IMMIGRATION TO THE UNITED KINGDOM

*History and Current Issues in British Immigration  
Policy*

By

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## The Study

This summary report is part of a study on spouse and partner immigration through the regulation of family reunification in Canada, the US, the UK, France and the Netherlands. The study covers the decade from 1995 to 2015, a period of more intense political and media scrutiny of immigration and more stringent immigration restrictions.

The project examines the following key issues:

- What underlies current concerns about spousal immigration through family reunification, and what effect do these concerns have on immigration policies?
- How can the apparent incompatibility between the rationale behind bureaucratic regulations be reconciled with the assessment of emotions (such as love) by government officers?

More specifically, this project is intended to provide a comparative empirical analysis and theoretical explanations of the subject. As the first transatlantic study of regulations governing immigration marriage, this investigation aims to:

- Summarize and analyze the legislation, policies and institutions developed by five nations to regulate spousal immigration through the family reunification process;
- Document and explain how Canada, the US, the UK, France, and the Netherlands view immigration marriage as a security issue requiring action;
- Analyze and compare the impact of institutional regulations and modifications respecting immigrant mobility, admission and access to citizenship. The effect of laws and policies in the above five countries on same-sex and queer couples is also examined;
- Explain how the fact that marriage has become a political and a security issue derails or reinforces the theorization of rights and citizenship in Western liberal democracies.

## Glossary

*British Consulate* – the office of the British representative in another state or territory

*Chief Constables* – Chiefs of British police

*Church of England/Wales* – the established church of England or Wales

*Commonwealth* – an association of the UK and her former colonies and dependencies

*Conservative Party* – centre-right political party, currently in power

*Equality Impact Assessment* – a process to ensure the non-discrimination of a policy

*European Convention on Human Rights* – international treaty to protect human rights

*European Court of Human Rights (ECtHR)* – supra-national court upholding the ECHR

*European Economic Area (EEA)* – single market comprised of EU and EFTA states

*European Free Trade Organisation (EFTA)* – free trade organisation and area between Iceland, Liechtenstein, Norway, and Switzerland

*European Union (EU)* – an economic and political union of 28 countries within Europe

*EU Commission* – the executive body of the EU

*EU Directive* – legal act of the EU, requiring implementing legislation in Member States

*Home Office* – a UK government department, oversees immigration control

*Home Secretary* – the government minister in charge of the Home Office

*House of Commons* – the lower elected house of the UK Parliament

*House of Lords* – the upper house of the UK Parliament

*Labour Party* – centre-left political party, currently in opposition

*Monarch* – the sovereign head of state, in the UK; the Queen

*New Labour* – how the Labour Party described itself when led by Tony Blair

*Orders in Council* – legislation made by the Privy Council in the name of the Queen

*Opposition* – the largest political party currently in opposition to the ruling party

*Privy Council* – body of formal advisors to the Queen, usually senior politicians

*Regulations* – secondary legislation usually made by Ministers under powers granted by statute

*Shadow Cabinet* – opposition MPs who form an alternative cabinet, scrutinising the performance and policy of their corresponding cabinet members

*Shadow Home Secretary* – the shadow cabinet MP corresponding to the Home Secretary

*High Commission* – the equivalent of an embassy in a Commonwealth country

*Whip* – MP who ensures that certain members attend and vote a certain way in Parliament

## Summary

This study seeks to consider how marriage migration to the UK has been regulated from 1900 to the present day, as well as analysing some of the contributory factors to and consequences of such regulation. Immigration in general often raises acute tensions across political boundaries and marriage migrants have raised particular socio-political issues which various administrations have attempted to address over the years. Issues of race, gender, culture and identity and different theorisations of the limits of state power in this area have all been instrumental in contributing to the regulation of marriage migration since the early 1900s.

In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, Jewish refugees fleeing persecution in Eastern Europe were considered a threat to British social identity and resources. Opponents of immigration began to agitate for regulation to control alien immigration. In 1905, the first Aliens Act was passed. This was the first structured attempt to control immigration and it included the first definition of an 'undesirable' immigrant and first reference to family members. The outbreak of war, first in 1914 and again in 1939 coloured public opinion against immigration further. The day after war was announced in 1914, the Aliens Restriction Act 1914, was hurriedly passed in just one day. Under powers established in the Act, all German males of a certain age could be interned in the UK and German women and children forcibly repatriated.

After the end of the Second World War, a greater number of Caribbean immigrants began to arrive in Britain than had ever done before and racial tensions grew in a climate of rationing, austerity and shortages. In 1948, following the redefinition of Canada's nationality laws in 1946 and the changing nature of the Commonwealth, Parliament passed the British Nationality Act in an attempt to clarify British subject status and reassert Britain's pre-eminent role within the Commonwealth. Commonwealth citizens were classified as British subjects under the Act, and as such, continued to have rights of entry to the United Kingdom. Over the years a growing number of Commonwealth citizens, principally non-whites, exercised their rights of entry. However, non-white immigrants were increasingly perceived as a social problem requiring greater control and the governments of the 1940s and '50s soon concluded that further restrictions were necessary.

In 1962, the Commonwealth Immigrants Act was the first legislative attempt to reduce Commonwealth immigration. The Act introduced controls on Citizens of the UK and Commonwealth who had not been born in the UK or had their passport issued by a British authority. This was a thinly veiled attempt to filter immigrants by race as the provisions mainly affected non-white Commonwealth citizens. However, the Act also made it 'impossible to continue the earlier pattern of rotating migration' (Sachdeva, 1993: 21). The consequence was that those migrants already in place settled and called for their families to join them. Within a very few years, limiting the entry of dependants therefore became the new target of immigration policies.

In the late 1960s, many East African Asians (many of whom had British citizenship but were not subject to the 1962 Act) began to arrive in Britain, fleeing *Africanisation* policies in East Africa. Fear began to grow in the UK over the number of refugees who might arrive. Once again, this fear begat hasty legislation and the Commonwealth Immigrants Act 1968 was passed in just three days. The Act limited the right of entry to Citizens of the UK and Commonwealth who had been, or whose parent or grandparent had been, born, adopted, registered or naturalised *in the UK*. This eliminated most East African Asians and it is estimated that 200,000 refugees were thus prevented from entering the UK.

In January 1969, further restrictions were placed on Commonwealth husbands. Husbands were only now to be admitted as dependants if 'presenting special features' and holding an entry certificate. These new measures were applied disproportionately against non-white husbands. The fear was that men were entering the UK for work, using marriage as a pretext. This is just one of the many ways in which women have been treated as second-class citizens in this arena. Wray identifies an emerging hierarchy of marriages in British immigration law, where distinctions were drawn between applicants along both racist and sexist lines (Wray, 2011). As Lord Hailsham remarked at the time, English immigration law is 'one of the least liberal and one of the most arbitrary systems of immigration law in the world' (HD Deb, 22 Jan 1969, col. 504).

On the 1<sup>st</sup> of January 1973 Britain joined the European Economic Community, the same day that the Immigration Act 1971 came into force. The Act repealed or consolidated the legislative changes in immigration over the preceding decades. It created two categories: 'patrials'; who had the right of abode in the UK and everyone else (including some citizens of the United Kingdom and Colonies) who were subject to immigration control. The Act dealt with both aliens and Commonwealth citizens together for the first time, creating a single system of control for non-patrials. The historic distinctions between categories of immigrants progressively diminished and the main difference now lay between EEC and non-EEC citizens.

In 1977, despite a short-lived relaxation on the restriction against sponsoring husbands from 1974, a new restriction was brought in which has arguably been one of the most controversial in British immigration history. Presented as addressing the concern to prevent abuse of the system, the primary purpose rule required migrant husbands to prove that the primary purpose of the marriage was *not* to gain admittance to the UK. The rule was applied to all female sponsors, including British citizen and settled women. In 1983, while a case challenging the legitimacy of the primary purpose rule was progressing through the European Court of Human Rights, a minor change was made to the rule to allow British *citizen* women to sponsor husbands. In 1985 when the decision in *Abdulaziz and others v UK* [1985] 7 EHRR 471 was issued, the court found only that the rule was discriminatory to women. Instead of abolishing the rule, the government responded by making the rule applicable to male sponsors as well.

In 1997, after 18 years of Conservative government, Tony Blair's Labour Party was elected to power, which heralded some changes in immigration policy. Labour was keen to attract only the highly skilled, highly educated migrants and nationality and race became secondary issues; the main determinant of a desirable migrant was their contribution to the economy. One of the new government's first acts was to abolish the primary purpose rule. However, the perception of ubiquitous abuse regained predominance and efforts to combat sham marriage began to move into the spotlight. For example, the Immigration and Asylum Act 1999 required marriage registrars with suspicions of a sham marriage to report the individuals to the Home Office. The Asylum and Immigrants (Treatment of Claimants, etc.) Act 2004 also prevented parties subject to immigration control from getting married without first securing a Certificate of Approval from the Secretary of State. This caused great hardship for many and was seen as a discriminatory and unjust policy, which in any case failed to distinguish between genuine and sham marriages. The compatibility of the scheme with human rights was successfully challenged both in the House of Lords and the ECtHR but it was not until 2011 that it was finally abandoned.

The judiciary also became increasingly involved in determining cases regarding article 8 of the European Convention on Human Rights, particularly surrounding the proportionality of government interference with immigrants' family life in the UK. The higher courts particularly began increasingly to criticise immigration policy as 'a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes' (*EB Kosovo v SSHD* [2008] UKHL 41). Their

decisions often ‘softened the harsh edges of government policy’ (Wray, 2013: 860). However, the ability of the courts to do so has since been diminished by the government’s increasing prescription of how article 8 ought to be interpreted and applied by the judiciary. The anticipated judgment of the Supreme Court in *R (MM (Lebanon)) v SSHD* is expected to throw some light on how the court intends to deal with the latest restrictions regarding article 8.

The Coalition/Conservative era which has followed has arguably been the most restrictive season of immigration regulation to date. This was driven by, among other factors, the Conservative Party’s own pledge to reduce immigration to the ‘tens of thousands’ (The Conservative Party, 2010). In 2010, a new language requirement was introduced requiring all partners applying for leave to enter or remain to prove they possessed A1 English language skills. In July 2012, this was followed by new requirements which have caused a great deal of hardship and been the subject of intense debate ever since. An income requirement was introduced requiring each sponsor to have a minimum income of £18,600, with greater amounts if children were also being sponsored. A Supreme Court judgment on the compatibility of this provision with human rights is currently awaited (*MM v SSHD and others*). The rule changes also increased the probationary period before spouses could apply for indefinite leave to remain from two to five years and attempted to reduce the ability of the courts to intervene in article 8 cases. In 2014, a new Immigration Act increased the powers available to investigate sham marriages and to remove migrants and their family members once their leave had expired. It also reduced appeal rights and reinforced in legislation the factors to which the government had stated the courts ought to have regard when dealing with article 8 cases. Another Immigration Act was passed in 2016. This included provisions to further limit appeal rights.

As we have seen, while in the past the distinctions between immigrants were based on whether or not they were ‘aliens’ or white or non-white Commonwealth citizens, today the main difference is between whether or not applicants are European Union citizens. The procedures for sponsors wishing to be joined by an EEA spouse or partner are considerably less restrictive. Meanwhile, procedures, rules and even fees remain an increasingly high barrier to cross for those who wish to be joined by a non-EEA partner. Shirley Williams, the Labour Shadow Home Secretary observed in the 1970s that:

Because of our long imperial heritage and because, perhaps, of the burden of history, our citizenship and immigration laws are now in an almost totally inextricable mess. It is high time we began to sort this mess out—began to get clear, obvious and easily enforceable rules. (HC Deb, 22 Nov 1972, col. 1355)

However, arguably, we are in much the same situation today. While in 1900 there was hostility to immigrants arriving from Eastern Europe, today, there remains opposition to immigrants arriving from Eastern Europe and elsewhere. No matter how well-disguised these objections to immigration, especially family migration, may be, one of the undeniable underlying factors remains a common fear or dislike of difference; whether racial, cultural, financial, political or any other real or imagined difference between the immigrant and oneself.

## Introduction

Our study begins at the turn of the 20th century. Since early in that century immigration to the UK has been the subject of increasing and increasingly complex regulation intended to control the arrival of ‘undesirables’. During this time, immigrants have often been perceived as being the source of social hostility between ethnic groups, of increased crime, disease and illegal employment as well as being considered to place an unfair burden on the social welfare system. Legislation intended to control and regulate immigration has often been seen to be pointedly targeting certain ethnic groups such as blacks and Asians, in response to a perceived threat to the ‘British’ identity.

The following report will examine the regulation of spousal (which is taken to include unmarried and same-sex partners where appropriate) migration to the UK in particular and its underlying political discourse. Spousal migration is amongst the largest sources of migration to the UK and is a category that often raises the most controversial questions.

After a historical review of spousal migration policy and legislation, the report will address current legal requirements for the reunification of spouses and issues relevant in this area today.

# 1- British Policies on Family Reunification

## A- 1900 – 1945 (The Aliens, Subjects and Citizens Era)<sup>1</sup>

During the late Victorian era, the issue of foreigners arriving in Britain was already being debated in the public arena (Dummett and Nicol, 1990: 98). From 1860-1900, large numbers of Jewish refugees fleeing persecution in Russia and Eastern Europe had begun to enter Britain (Dummett and Nicol, 1990: 98-100). The arrival of these refugees was seen as a social cost and a burden on the British system (Hayes, 2002: 30). Furthermore, the belief that Jewish people were biologically inferior had arisen in Germany in the late 19<sup>th</sup> century and it was not long before some Britons began to hold to this view as well (Dummett and Nicol, 1990: 98-99). Popular anti-Jewish prejudice led many to believe Jews to be ‘dirty, diseased, criminal and of poor physique’ (Dummett and Nicol, 1990: 100).

In the early 1900s, black, South Asian and Chinese seamen also began to arrive to work in ports such as London, Glasgow and Liverpool. Their presence was initially designed to be temporary and their employment contracts suggested they would return to their countries of origin, where many had left their families. However, a number began to settle permanently in the UK and to either start families there or call their families to join them. These men were considered a necessary labour force, rather than welcome permanent arrivals, such that, during the early 1900s, non-white seamen were occasionally forced to repatriate or be expelled (Bloch and Schuster, 2005: 494).

Nonetheless, at the time, opponents of immigration considered the Jewish refugees the foremost concern. Their arrival in large numbers and the perceived negative effects on housing and employment, which many argued they caused or exacerbated, meant opponents began to advocate for regulation to control alien immigration (Dummett and Nicol, 1990: 100-103; Wray, 2006: 308-309). Britain had long held a strong tradition of liberalism, and many Britons believed it was important to preserve its image as the standard-bearer of political and economic liberalism by maintaining a relatively open policy towards new arrivals (Garrard, 1971: 90-91; Cesarani, 1992). In a letter to the Times, the young Winston Churchill argued for the retention of ‘the old tolerant and generous practice of free entry and asylum to which this country has so long adhered and from which it has so greatly gained’ (The Times, 31 May 1904, p. 10, cited in Wray 2006: 304).

Nevertheless, many believed Jewish immigrants to be negatively associated with criminality and disease, housing and labour shortages, among other concerns (Dummett and Nicol, 1990: 100-103, Wray, 2006: 309). Several inquiries were tasked with investigating the matter, the latest of which was the Royal Commission on Alien Immigration in 1903. The Commission discovered that concerns regarding alien immigration were ‘largely ill-founded. Nevertheless it recommended controls.’ (Dummett and Nicol, 1990: 102). After some political delays and four failed attempts to introduce anti-alien legislation, in 1905 the first Aliens Act was passed (Garrard, 1971: 34-43; Wray, 2006: 310). The enactment of this legislation ‘confirmed in the public as well as the official mind the notion that the alien presence was problematic’ (Cesarani, 1992: 32).

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<sup>1</sup> See Dummett and Nicol, 1990.

## The Aliens Act 1905

The Aliens Act 1905 was the first structured attempt to control immigration into Britain. Under the Act, the first immigration officers were appointed to apply and enforce regulation at United Kingdom ports (s. 6). The Act allowed for immigrants to be screened on entry at designated ports by an immigration officer and a medical officer. Immigrants deemed to be 'undesirable' could be refused entry. The Act importantly included the first definition of an 'undesirable' immigrant (ss. 1(3), 3), which included those who were unable to support themselves and their dependants, were 'a lunatic or an idiot' or appeared likely to become a charge on the rates due to disease or infirmity, had been sentenced in a foreign country for certain crimes or had received an expulsion order. The need to support oneself *and one's dependants* is one of the first legal references to family migration, and in practice was one of the main reasons for refusals under the Act (Wray, 2006: 311). There was, however, an exception to this requirement for those who were considered refugees (s. 1(3)). The Act also allowed for the Secretary of State to issue rules for immigration officers to follow in carrying out their duties and powers (s. 2(2)). As we will see later, the use of rules made by the Secretary of State, rather than provisions under Acts made by Parliament allowed the government to retain 'informal control and flexibility' and meant 'many important questions were decided by circular or memorandum outside the formal legislative framework' (Wray, 2006: 312).

After the passing of the Act, a new government took power and while the new administration did not repeal the Act, there were 'a number of attempts to mitigate its effects' (Wray, 2006: 313). There was political ambivalence over the need for controls and how strictly they ought to be applied. While there was some evidence of a growing 'culture of exclusion', refusal rates were relatively low and powers of exclusion 'seem to have been exercised with restraint' (Wray, 2006: 314-315).

Although the 1905 Act was largely aimed at controlling male immigrants, and indeed men were sometimes unlawfully refused entry due to a fear of the effect of alien men on the labour market, the application of the Act also affected women through practices intended to verify their moral probity (Wray, 2006: 315). Unaccompanied women were often victims of discrimination, judged to be a threat to the moral foundations of British society. Furthermore, where there were couples whose marital status was unclear, it was the woman who tended to be denied entry, despite the fact that marriage was not a requirement for entry under the Act (Wray, 2006: 316).

Another theme was the corruption of moral values. Young women who came to get married were required to live elsewhere until they were actually married or to marry within a certain period. Unaccompanied women were routinely detained while the respectability of their connections was assessed, particularly if they were considered attractive. If a woman's relatives were considered insufficiently respectable, she was refused. (Wray, 2006: 315)

Immigrants suffering from minor and curable illnesses were sometimes also refused entry, without considering whether they would become a charge on the rates, as the Act stipulated (Wray, 2006: 316). This may be an early indication of the desire to filter immigrants considered less desirable by somewhat arbitrary or prejudiced bases. There was also an element of 'personal prejudice' in decision-making (Wray, 2006: 317). Immigration officers at times used their discretionary power to deny entry to immigrants who ought to have been permitted entry, especially those wrongfully denied despite being refugees. Yet there were also occasions when officers' discretionary powers were used to grant a somewhat unlikely admission.

While the emphasis in Jewish Chronicle reports was on unjustified refusals, whimsy or sentimentality occasionally resulted in an unexpectedly favourable decision. One officer said, after stretching a point to allow a young Polish woman to join her political activist fiancé, 'We must not spoil such a romance'. (Wray, 2006: 317)

The Aliens Act 1905, although not the first attempt to regulate immigration<sup>2</sup>, 'has always had symbolic importance as representing the modern onset of immigration control' (Wray, 2011: 303). It was 'the first attempt to establish a system of immigration control upon entry' as well as establishing a way to expel 'undesirables' (Wray, 2006: 302). Some have argued that the Act's effect was more symbolic than practical, arguing, 'these controls were not particularly stringent and few were deported or denied entry following its entry into force' (Schuster, 2003). Dummett and Nicol note: 'the Aliens Act was far from being a general control over entry; thousands of foreigners continued to arrive and settle without scrutiny' (Dummett and Nicol, 1990: 104). The Act itself allowed its controls to be avoided simply by travelling first- or second-class or in a smaller ship (s. 8) which, whatever the original aim of the provisions, 'created glaring loopholes which the organised criminal or determined alien could exploit' (Wray, 2006: 318). Wray argues the weak and arguably poorly drafted provisions allowed for a culture of unofficial and at times unlawful decision-making (Wray, 2006: 318).

However, others consider the Act to have been truly successful:

The utility of aliens legislation as a deterrent would become a cornerstone for future policy-making. In addition, the administrative machinery was invented, put in place and tested. Between 1906 and 1910, over 5,000 aliens were refused leave to land on grounds of means or illness. Over roughly the same period, nearly 400 'objectionable' aliens were expelled while hundreds of aliens convicted of crimes were deported annually. Whatever the criticisms of the working of the Act, from its proponents or opponents, these figures showed that it was operable and effective (Cesarani, 1992: 32).

Wray also notes that the Act served as a deterrent, at least to some, and provided a 'defence' against more extreme anti-alien measures during that time (Wray, 2006: 319). The Act also put in place a mechanism of control, which could be built upon in successive years both legislatively and politically (Dummett and Nicol, 1990: 104; Cesarani, 1996: 62). Furthermore, it demonstrates that even in these early years, relationships between partners came under scrutiny by the State and the concept of what made an 'undesirable' relationship or immigrant began to be determined by criteria laid down by the same.

### World War I and the 1914 Acts

Whatever the ambivalence during the early 1900s and 1910s towards control of aliens, the outbreak of war against Germany in 1914 tipped the balance of public and political opinion in favour of such action (Wray, 2006: 320). In addition to the anti-Semitic mindset of some in Britain during this period, further dislike and subsequent suspicion of immigrants, especially Germans, were fuelled by the outbreak of war.

Running alongside the alien-anarchist hysteria was the German alien/spy scare. Numerous books and articles peddled the fantasy that Britain was riddled with German spies in the guise of bankers, industrialists, barbers, waiters and humble clerks (Cesarani, 1992: 33).

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<sup>2</sup> See Stevens, 2004: 19-32 for earlier anti-alien measures.

The day after war was declared against Germany, Parliament passed the Aliens Restriction Act 1914, rushing it through all its stages in just one day. It was a simple and short Act, without many substantive provisions but authorising Orders in Council to be made regarding the restriction of aliens, without the need for further scrutiny by Parliament. It therefore gave huge discretionary powers to the Home Secretary to make decisions regarding aliens without Parliamentary oversight. It created the power to enact Orders to control the movement of aliens and to oblige them to register with the police, as well as powers of internment and deportation (ss. 1(a)-(f)).

In September 1914, by Order pursuant to this Act, all German males aged 17 to 55 were ordered to be interned in camps across the UK (Dummett and Nicol, 1990: 107). German women and children were to be forcibly repatriated, unless exempted by tribunal (Cesarani, 1992: 35). Under the Naturalisation Act 1870, s. 10, British wives of German men automatically lost their British citizenship upon marriage and as such these women became subject to the controls under the Aliens Restriction Orders until November 1917 when Home Office guidance to police allowed British wives to apply for an exemption from the Orders if they could show the controls caused hardship and could prove their loyalty to Britain (Home Office to Chief Constables, 15 Nov 1917, National Archives, HO 45/10882/343995/7). These women, and to some extent their children, were also 'encouraged' to repatriate by the British state and suffered significant local hostility (Denness, 2014: 86-97).

A second Act was passed in 1914; the British Nationality and Status of Aliens Act. This Act formally defined the status of British subjects as anyone who was, or whose father was, 'born within His Majesty's dominions and allegiance' (s. 1). There were a few other instances in which British subject status could be conferred on a person; all others were considered 'aliens' under s. 27(1). The Act also provided new rules for naturalisation and set out the nationality status of British subject women who married aliens and vice versa. Under the Naturalisation Act 1870, British women married to foreign men were deemed to have acquired the nationality of their husband upon marriage (s. 10). However, in some cases, this had led to women becoming stateless if they had not in fact been granted nationality by their husband's country of origin. Under the British Nationality and Status of Aliens Act 1914, the provisions which led to a woman's loss of British nationality upon marriage were retained, but only where she had in fact acquired her husband's nationality (s. 10).

The 1914 Acts were aimed at restricting the arrival of aliens rather than British subjects, and during World War I and the following years there was increased movement of British subjects from abroad coming to Britain. These included, for example, demobilised colonial soldiers and workers employed in the war industry (Spencer, 2003: 7; Cesarani, 1992: 37).

### **The Inter-War Years**

Even after the war had ended, suspicion against those from Germany and Russia persisted, and the British Nationality and Status of Aliens Act 1914 was amended in 1918 and 1922, strengthening its provisions. The amended Acts increased the Home Secretary's powers to deport 'enemy' aliens and to deprive them of British citizenship where they had been naturalised. The Aliens Restriction Act 1914, meant initially as a wartime measure, was also amended in 1919 to continue and extend the emergency powers which had been used during the war (ss. 1-2) and to issue further restrictions on aliens. (ss. 3-8). The 1919 Act 'retained much of the wartime control over aliens. The Act was passed as a temporary measure but was renewed every year until 1971' (Bloch and Schuster, 2005: 494). Under the Aliens Order 1920, created under this amended Act,

tighter restrictions were introduced regarding the settlement of aliens who lacked sufficient means to support themselves. Immigration officers were given greater power to deal with illegal immigrants and greater powers of deportation were introduced. Furthermore, aliens looking for work were required to register with the police or face deportation.

The 1920s and '30s were marked by serious economic depression and this, together with the demobilization of thousands of men seeking employment and a shortage of housing, sparked racial tensions across Great Britain (Spencer, 2003: 10). Despite the imperial rhetoric of *civis Britannicus sum* (I am a British citizen),<sup>3</sup> which spoke of equal rights for all British subjects, the inter-war period was in fact marked by a desire to minimise the number of non-white immigrants entering Britain (Spencer, 2003: 8).

Officially, the Aliens Acts, as amended, did not apply to British subjects. This meant that Commonwealth citizens, who were British subjects and thus not aliens, found it much easier to move around the Commonwealth and faced far fewer restrictions and controls than aliens. This set in motion a pattern of Commonwealth immigration, which was to play an increasingly significant role in British history during the remainder of the 20<sup>th</sup> century (Sachdeva, 1993: 17). Nonetheless, in reality, many British subjects, especially non-white and married female subjects struggled to prove their British subject status so as not to come under the provisions affecting aliens<sup>4</sup>. Furthermore, controls began to be introduced not only at points of entry, but also at local administrations abroad. 'The British government caused various of its overseas agencies to restrict the issue of travel documents, and in particular to refuse to issue them to certain classes of persons that it wished to keep out' (Spencer, 2003: 12). Programs of repatriation for non-white colonial subjects were set up in an attempt to prevent their settlement. However, the social and financial cost of the schemes led to them being eventually abandoned (Spencer, 2003: 10).

Britain's immigration policies between the two World Wars reflect a certain anxiety flowing from its experience during the Great War. Even after the cessation of hostilities in 1918, the authorities preferred to govern using the executive measures utilised during the war, such as discretionary powers exercised through Orders in Council, government circulars or confidential letters from the Home Office to Chief Constables (Spencer, 2003: 8). 'Scrutiny by Parliament and the courts was minimal, while the role of the police and of intelligence services working under or with the War Office was greatly enlarged' (Dummett and Nicol, 1990: 112).

## World War II

As in the First World War, colonial soldiers from Asia and Africa were called upon to join the ranks as Britain entered World War II. It was 'the largest influx of black people there had ever been' in Britain (Dummett and Nicol, 1990: 169).

Suddenly, Asian and black British subjects were needed again for the purposes of imperial defence in time of war. War service or even temporary residence to help with the war effort was acceptable,

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<sup>3</sup> See Foreign Secretary Lord Palmerston's speech to the House of Commons, HC Deb, 25 Jun 1850, col. 380-444.

<sup>4</sup> For example, the Special Restriction (Coloured Alien Seamen) Order 1925 required alien seamen to register with the police and carry identification papers. However, this measure affected many British non-white seamen as many found it almost impossible to prove their British subject status, as sailors were not required to carry papers, and were rarely issued with them in any case (Cesarani, 1992: 39; Dummett and Nicol, 1990: 167-168).

even welcomed. Permanent residence was another matter; the official mind was always hostile to the settlement of people of colour in Britain (Spencer, 2003: 13).

The government was said to have taken the approach during the war of encouraging the racist and segregationist attitudes prevalent in the US towards the black American troops who were stationed in the UK (Dummett and Nicol, 1990: 170). Enemy aliens, including Germans, were again treated with hostility and from 1933 onwards, after the arrival of large numbers of Jewish refugees fleeing central Europe, Jews were once again subject to the same prejudices of the late nineteenth and early twentieth centuries (Cesarani, 1992: 41-44). The climate of suspicion surrounding certain categories of aliens was rekindled and perceived threats to national security provided an opportunity for the introduction of increasingly coercive and authoritarian legislation such as the Defence (General) Regulations 1939<sup>5</sup>.

Once again, ‘enemy’ aliens and their families, whether born aliens or not, came under increased suspicion. Some were initially ‘encouraged’ to repatriate and those who remained in Britain became subject to increasing controls in a climate of suspicion (Atkins, 2005). Unlike during the First World War, women were also interned under the Defence Regulations, first in prisons and later in specialised camps (Atkins, 2005). This included some British women married to ‘enemy’ aliens, based on ‘the assumption that women’s allegiance was subjective and derivative, a woman was assumed also to share her husband’s predisposition to disloyalty’ (Irving, 2016: 124). British women who had become aliens simply through marriage were not often interned, although there was evidence that they were treated with suspicion and some faced certain restrictions (Irving, 2016: 124-5).

## **B- 1945 – 1997 (The Commonwealth Era)**

### **The British Nationality Act 1948**

After the end of the Second World War, during the late 1940s, although many dominions such as Canada had already obtained independence, greater demand for independence arose among the British colonies. At the same time, a larger number of Caribbean immigrants began to come to Britain than had ever done so before. ‘There was little knowledge in the British public at large about the darker side of the Imperial record’ and instead calls for colonial independence were seen as disregard for ‘all that Britain had done for them’ (Dummett and Nicol, 1990: 171). Racist attitudes against the new arrivals grew in a climate of rationing, austerity and housing shortages in post-war Britain. At the same time, falling British birth rates and labour shortages meant immigrants were desperately needed (Dummett and Nicol, 1990: 171-177).

In 1946, Canada redefined its nationals as British subjects by virtue of having been granted this status by the Canadian government rather than by their allegiance to the Crown. This move was seen as ‘undermining the direct relationship of the Crown with its subjects’ and in light of the independence movements stirring in the colonies and demands by colonies who had gained independence for control over their nationality laws, Parliament passed the British Nationality Act 1948 to clarify British subject status in the Empire (Wray, 2011: 35). In retrospect, this may read as a relatively favourable piece of legislation, which allowed large numbers of immigrants to enter the country. However, its purpose at the time was rather ‘an attempt to reconstitute’ the idea

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<sup>5</sup> Regulation 18B provided for the internment of ‘hostile’ persons, which included many naturalised citizens of German, or other Axis nations’, descent.

of subject status by reasserting Britain's pre-eminent role within the Commonwealth (Wray, 2011: 35, see also Hansen 2000: 35,).

Under the Act, citizens of the United Kingdom and Colonies (CUKCs) and citizens of independent Commonwealth countries were all classified as British subjects. Although this theoretically allowed vast quantities of people to travel to the UK with their families (Abrahámová, 2007: 16), it was not anticipated at the time that this would happen (Wray, 2011: 35, 36). Paul argues that in fact the British Nationality Act 1948 was a political tool relying on the 'imagined political community of imperial "Britishness" to defend a practical policy – maintenance of the empire', especially in the face of a growing trend towards calls for independence among the colonies (Paul, 1997: 21-22). The Home Secretary, James Ede, stated during the debate '[i]t is true that we cannot admit all these backward peoples immediately into the full rights that British subjects in this country enjoy; but... we must give these people a feeling that on that homespun dignity of man we recognise them as fellow-citizens' (HC Deb 7 Jul 1948, col. 398). Thus the British Nationality Act 1948 was designed to show that within the Commonwealth 'everyone was a British subject but some subjects were more British than others' (Paul, 1997: 22).

The Act also reinstated women's right to retain their British nationality even after marrying an alien (s. 16) although it removed the right of alien women marrying British men to become British automatically; such women had to register to become citizens (s. 6). Under the British Nationality Act 1948, 'the transmission of citizenship, and thus subjecthood, continued to be confined to the male line. Thus the community of female Britishness continued to suggest dependence and inequality' (Paul, 1997: 24; BNA 1948, ss. 4-6, 12(5), 14-16, 23-24).

Where there were labour shortages the government was loath to fill them with the many non-white migrants from the Commonwealth who responded. Instead, the more racially acceptable European migrants, many of whom were refugees resulting from the war, were preferred (Wray 2011: 36). There was contradictory evidence regarding whether employers preferred non-white or alien workers to British and white workers (Dummett and Nicol, 1990: 163, 179). Certainly, some employers actively recruited Commonwealth workers despite government reluctance (Dummett and Nicol, 1990: 163). Over the years a growing number of Commonwealth citizens, principally non-whites, exercised their right of entry, coming as workers, visitors or students (Sachdeva, 1993: 18). However, there was both government and local hostility to increased immigration (Paul, 1997; Hansen, 2000; Wray, 2011: 35-37; Sachdeva, 1993: 18), and non-white migrants were increasingly perceived as a social problem requiring greater control (Abrahámová, 2007: 17). There were also growing concerns about the detrimental impact this form of migration could have on the English people (Carter, Harris and Joshi, 1987). According to a letter from eleven Labour MPs at the time: 'An influx of coloured people domiciled here is likely to impair the harmony, strength and cohesion of our public and social life and to cause discord and unhappiness among all concerned' (Carter, Harris and Joshi, 1987). Politically and legally, the UK government felt powerless to prevent the non-white Commonwealth immigration that followed and anti-Commonwealth migration feeling grew over time.

Critics accused the British Nationality Act 1948 of being too liberal to deal with this threat to social harmony (Sachdeva, 1993: 18). A Royal Commission was set up to consider further immigration measures and in 1949 recommended that any future immigrants be 'of good human stock and... not prevented by their religion or race from intermarrying with the host population' (Royal Commission on Population, 124). However, as legislative means were considered

unworkable,<sup>6</sup> there were attempts to solve the situation using administrative measures (Wray 2011: 37). It appears that ‘the Government had instituted, by 1952, a number of covert, and sometimes illegal, administrative measures’ (Carter, Harris and Joshi, 1987). For example, the British Travel Certificate, confirming that the holder was a British subject and providing a legal means of entry into the UK, was mainly issued for travel between the French and British colonies along the West African Coast. However, arrangements were made to omit any reference to British subject status from the document. This then prevented the holder entry to the UK (Carter, Harris and Joshi, 1987: 3).

In the Caribbean, ‘Governors were also asked to tamper with shipping lists and schedules to place migrant workers at the back of the queue; to cordon off ports to prevent passport holding stowaways from boarding ships; and to delay the issue of passports to migrants’ (Carter, Harris and Joshi, 1987: 3-4). Similar actions were introduced in Pakistan and India, where British officials recommended certain administrative barriers be raised (Wray, 2011: 37; Carter, Harris and Joshi, 1987: 3-4). Indian and Pakistani governments ‘proved extremely cooperative in this pursuit’ and ‘actively discouraged’ unskilled emigration and increased administrative hurdles (Paul, 1997: 152). Britain also made sure the reports that reached High Commissions abroad spoke of how difficult life was in Britain (Paul, 1997: 153).<sup>7</sup> This was done secretly, to avoid political embarrassment (CAB134/1466 Cabinet Committee on Colonial Immigrants, 6 Jun 1957) but these reports were sometimes published locally to discourage potential migrants (Paul, 1997: 152).<sup>8</sup> Nonetheless, these measures failed to prevent an increasing number of non-white British subjects from entering the UK (Carter, Harris and Joshi, 1987: 4). To the chagrin of British officials, once a British subject had succeeded in reaching Britain and could prove their British subject status, they had an ‘absolute right to admittance’ (Paul, 1997: 152).

Both the Labour and Conservative governments of the late 1940s and ‘50s were opposed to non-white immigration and public policy was moving steadily in the same direction. It was soon concluded that there was a need for more restrictive legislation and to justify such legislation a secret meeting of ministers gathered in 1954 to consider looking for evidence to demonstrate that non-white immigration was harmful to Britain (Carter, Harris and Joshi, 1987: 4, 7). Non-white migrants were widely believed to be the cause of social and economic problems, violence and crime, despite a lack of evidence that this was the case. A report was made to the Cabinet compiling answers to a questionnaire which had been circulated by the group using extremely loaded questions such as ‘Is it true that coloured people...are work shy?’ and ‘Is it true that they are poor workmen’. The report suggested that ‘coloured’ workers were ill-suited for work in Britain and more likely to become a burden on the state than other residents. ‘Coloured’ women were reported to be ‘slow mentally’ (Draft Report, 1953).

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<sup>6</sup> There were further British Nationality Acts passed in 1958, 1964 and 1965. However, they dealt mainly with particular colonies’ independence and their resulting nationality laws, such as in Rhodesia and Ghana and with rules regarding CUKC status in cases of statelessness.

<sup>7</sup> See CO1032/121 Colonial Office to Colonial Governors, 8 Aug 1956; CO1032/121 Sir Hugh Foot to A. H. Poynton, 15 Aug 1956; CO1032/122, Colonial Office to Sir Patrick Renison, 20 Nov 1956.

<sup>8</sup> See CO1032/119 Report of the Working Party on Coloured People Seeking Employment in the United Kingdom, 17 Dec 1953; CO1032/195 Indian High Commissioner to Commonwealth Relations Office, 10 ay 1958, Pakistan High Commissioner to Commonwealth Relations Office, 16 May 1958; DO35/10416 Recent Information about Coloured Immigrants.

## The Commonwealth Immigrants Act 1962

The events and anxieties of the preceding decade finally led to the passing of the Commonwealth Immigrants Act in 1962. This Act importantly was the first legislative attempt to control Commonwealth immigration, including by Citizens of the UK and Commonwealth, rather than merely alien immigration (Wray, 2011: 41). Under the Act, Citizens of the UK and Commonwealth who had not been born in the UK and whose passport was not issued by the British government were subject to entry restrictions (s. 1). This meant that those not born in the UK and whose passports had been issued by a colonial authority now came under the same conditions of entry as nationals of independent Commonwealth countries. British citizens by descent, who were overwhelmingly white and lived in former colonies such as Australia and Canada, had their passports issued by the High Commission in those countries, i.e. by the government, and were not subject to controls. The Commonwealth Immigrants Act 1962 therefore granted entry to most people who had been born in the UK or Ireland and those whose citizenship was through descent, who were often the descendants of white emigrants, while at the same time preventing the entry of Citizens of the UK and Commonwealth born in the UK's remaining colonies and who were mainly non-white (Wray, 2011: 38). All those subject to controls had to be in possession of a work voucher, be the wife or child under 16 of a UK resident, independently wealthy or a student. The Act also increased the time period necessary to qualify for citizenship from one year to five years for Commonwealth immigrants (s. 12(2)), making it the same as that required of alien immigrants.

The Act was a veiled attempt to filter immigrants by race and allowed for considerable administrative discretion. It was claimed by the Home Secretary, R. A. Butler, during debate that 'our experience of administering immigration up to date is that the freer we leave our immigration officers the better and more successful the administration, subject to the responsibility of the Secretary of State' (HC Deb, 16 Nov 1961, col. 687). In practice, this discretion allowed for covert racial discrimination (Dummett and Nicol, 1990: 183-4) as both public (Cmnd 1716) and secret instructions were issued to immigration officers to continue to allow white migrants to enter even if they did not fulfil the requirements (Wray, 2011: 37-38).

Even though the Act restricted the entry of many immigrants, priority was given to Commonwealth immigrant families (s. 2(2)). During the writing of the Bill, the rights of wives and children were considered 'so self-evident' that explicit provision was not made for them in the Bill but was planned to be made using instructions to immigration officers (Wray, 2011: 42). However, after avid debate their rights were laid down in statute so as to avoid the ambiguity that may occur if only under immigration instructions (see Wray, 2011: 42). Unmarried women living in 'permanent association' with a man were treated similarly to wives and usually allowed entry although they were still liable to deportation, whereas wives were not. These provisions, however, were not stipulated in the legislation but were found in the instructions issued to immigration officers. Wray points out that 'the permissive treatment of Commonwealth immigrant's families was not based primarily upon a commitment to family life; it was predicated on the close relationship between Commonwealth immigrants and the UK, while the presence of large numbers of unaccompanied males was seen as problematic for social reasons' (Wray, 2011: 42-3).

The Commonwealth Immigrants Act 1962 also made the assumption that men were the primary migrants. It was assumed that a woman would follow her husband. As the Minister in Committee on this Bill, Mr David Renton stated:

we have strong reasons for not treating husbands and wives in exactly the same way in the granting of unrestricted right of entry. In the Bill, as in our nationality law, we have assumed that the husband is the head of the family and that the wife acquires his domicile. (Deb, 6 Feb 1962, cols 330)

Nevertheless, in the instructions to immigration officers, husbands of resident wives were allowed unless he was a criminal, likely to need public funds or the wife did not wish him to join her (Cmnd 1716).

Alternative methods of redefining immigration rights, for example based on nationality, had been considered untenable (Hansen, 2000: 102-106) as the government did not want to prevent white migrants from former colonies from entering, nor did they want to allow non-white migrants from countries that were still colonies. Rather, the government sought to control entry by race without appearing to and so the Commonwealth Immigrants Act 1962 created 'controls that depended less on nationality than on racial difference, creating problems that remained unresolved for decades' (Wray, 2011: 38). As the Labour party leader, Hugh Gaitskell MP, in Opposition at the time, stated: 'It is a plain anti-Commonwealth Measure in theory and it is a plain anti-colour Measure in practice' (sic) (HC Deb 16 November 1961, col. 799).

Although the Act was much more restrictive than its predecessor, immigration from India and Pakistan initially increased due to the work voucher system and the numbers were further swelled by their families who followed. Although the number of work vouchers, and consequently immigrants later decreased again, the provisions in the 1962 Act meant an end to the pattern of circular migration where men came to the UK to work for a while before returning home again. Now, whether immigrant men had come to the UK before or after the 1962 Act, the removal of the ability to leave and leave open the possibility of a later return or replacement by another relative meant men were far more likely to call on their wives and children to join them in the UK. The subsequent presence of both immigrant men and their families and the inability for those families to leave and return at will has been said to have 'created a permanently resident population of Asians and Afro-Caribbeans by making it impossible to continue the earlier pattern of rotating migration' (Sachdeva, 1993: 21). Some therefore consider the 1962 Act the beginning of the shift towards family migration, rather than merely labour migration, as family reunification began in earnest as a consequence (Sachdeva, 1993: 21; Evans, 1983: 17). This was so much so that the waves of arriving dependants soon became a major source of debate (Wray, 2011: 44, Dummett and Nicol, 1990: 185). Although no British government had argued that there ought to be no right to family reunification at all, it had not initially been a big part of immigration in numbers or rhetoric. The attention now shifted to family immigration and new measures sought to maintain numbers as low as possible. Limiting the entry of dependants became the new target of immigration policies. Those opposed to immigration 'alluded to the "problem" of excessive New Commonwealth immigration' (Wray, 2011: 44). References were made to high birth rates, increased sexually transmitted disease, polygamy and 'inhumane and unsafe child care practices' (Wray, 2011: 44).

These ideas became progressively more entrenched so that by the time a Labour government returned to power in 1964, further immigration control seemed a necessary solution to these presumed problems (Wray, 2011: 45). While many politicians remained committed to the reunification of Commonwealth families, there were others who argued vehemently for stricter controls. As Wray documents, '[t]he way out of the impasse... was to crystallize discontent around the undeserving case of the fraudulent applicant' (Wray, 2011: 45). Advocates of further controls had raised the abuse argument in earlier periods, and were particularly concerned with the seeming abuse of the dependants' provisions, especially 'the apparent ease with which the admission of polygamous or common law wives could be abused' (Wray, 2011: 45). In February

1965, Home Secretary Frank Soskice reported ‘there is evidence that under the existing control evasion on a considerable scale is taking place’ and announced that further instructions would be given to immigration officers to ‘examine with greater thoroughness than hitherto has been thought necessary the identity and the validity of the claims of persons who seek entry’ (HC Deb, 4 Feb 1965, cols. 1284-5).

Under these new instructions, dependants’ claims were to be more closely scrutinized and statistics began to be kept on the number of spousal migrants entering, as well as their country of origin (Wray, 2011: 45). The numbers that were documented led some to believe that abuse was happening on a large scale although there was little concrete evidence of this (Wray, 2011: 46). The need to prevent abuse soon became one of the foremost aims in immigration policy and discourse. Britain also attempted to persuade Commonwealth countries to introduce their own curbs on emigration. This strategy was considered a failure and instead a variety of restrictions were recommended in a government White Paper, including immigrant health checks, a compulsory register of dependants and the requirement of entry certificates (Cmnd 2739, Aug 1965).

### **The Commonwealth Immigrants Act 1968**

Anti-immigration sentiment, especially against immigrant dependants continued to grow as politicians felt the number of those arriving was reaching disturbing levels. In the late 1960s, many Asians settled in East Africa, principally in Kenya, Uganda, Malawi and Tanzania, feared or suffered discrimination under the *Africanisation* policies introduced in these countries in the mid-1960s. Anticipating this possibility, special arrangement in the Independence Treaties of Kenya, Uganda, Malawi and Zanzibar (later to become part of Tanzania) had allowed many East African Asians to retain their UK citizenship after independence. As British, rather than Commonwealth citizens, whose passports were issued by the High Commission in their independent Commonwealth country, they were not subject to the Commonwealth Immigrants Act 1962 and many began to arrive in Britain. However, fear over the number of Asian-East Africans who might arrive added to the anti-immigration sentiment already prevalent. Conservative MPs such as Cyril Osborne and Enoch Powell began overt and, at times, extreme campaigning for stricter controls (Sachdeva, 1993: 23).

As a response to these pressures, and in part to placate public pressure (Sachdeva, 1993: 24), the Commonwealth Immigrants Act 1968 was passed in just three days. Evans notes how the Bill was passed ‘in an atmosphere of emergency and with a willingness to surrender liberal and humanitarian decencies generally associated only with the gravest national crises’ (Evans, 1983: 18). The Act limited the right of entry to those Citizens of the UK and Commonwealth who had been, or whose parent or grandparent had been, born, adopted, registered or naturalised *in the UK* (s. 1). As a result, East African Asians who had claimed UK citizenship through registration at a UK High Commission, which had previously been enough, but could not satisfy the ancestral link, were no longer entitled to admittance to the UK. Around the same time a quota system, initially set at 1,500 per year, was also put in place to limit their entry. The Home Secretary, James Callaghan admitted that approximately 200,000 East African Asians were to be affected by the Act (HC Deb, 27 Feb 1968, col. 1246). Immigration instructions were also formulated in 1968 to curtail the rights of certain children over 16 and men between the ages of 60-65 to enter as dependants for fear that they were not genuine dependants, but disguised workers (Wray, 2011: 48; Sachdeva, 1993: 24). The Act and subsequent immigration instructions were further attempts to distinguish between applicants on racial grounds without appearing to, by making the distinction between those with ancestral links to the UK and those with greater links to former or

existing colonies. It was believed that the Act would constitute an end to the ‘by now thoroughly unwelcome primary immigration from the Commonwealth’ (Sachdeva, 1993: 24).

### Restrictions on Commonwealth Husbands

The importance and prevalence of family reunification now took centre stage. Even from politicians who did not want any further primary migrants, there was an understanding that allowing those already here to be joined by their family was an important right (HC Deb, 7 Nov 1968, col. 1048), although Wray notes that this feeling generally only extended to the wives and children under 16 of resident Commonwealth men (Wray, 2011: 48). Not surprisingly therefore, ‘the first moves were against husbands, whose acceptance had always been more conditional than that of wives’ (Wray, 2011: 48). In January 1969, Home Secretary James Callaghan announced new restrictions on Commonwealth husbands after it was discovered that the number who had been entering under a ‘concession’ had risen ‘steeply’ to 1,676 in 1968 (HC Deb, 30 Jan 1969, col. 367). The admission of husbands as dependants was to be limited to those ‘presenting special features’ and holding an entry certificate. Furthermore, men already living temporarily in the UK for other purposes would not be allowed to remain following a marriage, except in ‘exceptional’ circumstances. In practice, these new measures were applied discriminatorily against non-white husbands (see Dummett and Nicol, 1990: 206-7; Bhabha and Shutter, 1994: 57-59). Only 6 South Asian husbands were admitted in 1973 and 400 Ugandan Asian husbands were refused entry despite being rendered stateless as a result of expulsion from Uganda (Wray, 2011: 49). The fear was that men were entering the UK for work, using marriage as a pretext: ‘Marriages in which a husband sought to join his wife rather than the conventional reverse pattern lacked credibility and legitimacy’ (Wray, 2011: 49).

Furthermore, while there had historically been some official opinion that the marriage of white British women to non-white immigrants was ‘undesirable’ (Dummett and Nicol, 1990: 165), white British or settled women found it much easier to argue that they could not be expected to live abroad with their non-white husbands than non-white British or settled women did (see Wray, 2011: 77-8).<sup>9</sup> There was also some evidence that those who had adopted the cultural norms of Britain were more likely to be allowed to live in the UK and bring in a spouse (Unreported cases, see Wray, 2011: 77-8).

### The Immigration (Appeals) Act 1969

Stricter regulation inevitably led to instances of discrimination and hardship. The Immigration (Appeals) Act 1969 attempted to deal with that by establishing a comprehensive structure of appeals against decisions by the Secretary of State.<sup>10</sup> While the 1905 Act, which had led to the implementation of immigration boards at designated ports of entry, had touched on this, this had been repealed by the 1914 Act. The 1969 Act established a system of adjudicators and an Immigration Appeal Tribunal for those affected by the Commonwealth Immigrants Acts with the

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<sup>9</sup> *Ahmet* 27 Jun 1972, Imm AR TH/3018/71 (24); *Constantinides* 21 Jun 1973, Imm AR 30 TH/3043/72 (160); *Papadopoulos* [1974] Imm AR 46. See *Sadhu Singh*, where a British-born woman of Indian descent was told there was no barrier to her moving to India to be with her husband as ‘there would be no differences in race or religion’ (19 Mar 1973, Imm AR 67 TH/581/72 (126), at p. 70).

<sup>10</sup> Most of the provisions of this Act did not come into force until 1973, with the commencement of the Immigration Act 1971.

possibility of extension to aliens.<sup>11</sup> The Act also granted greater powers to deport immigrants who had been resident in the UK for less than five years (s. 16). This power was reportedly used both as a means of enforcing immigration regulation and to excluding those considered socially undesirable (Clayton, 2012).

However, the Act also gave immigration officers the power to refuse all dependants who did not hold an entry certificate (s. 20) and such dependants had no right to be present at an appeal (Immigration Act 1971, s. 13(3)). This meant that while the Act appeared to grant greater powers of appeal, the chances of winning an appeal were also greatly reduced because instead of appealing against a decision to refuse entry once the individual reached Britain, where family and lawyers could assist, appeals were now often conducted against decisions taken at British administrative posts abroad, where no such help may have been available and where the applicant was often absent from the procedure (Dummett and Nicol, 1990: 207, 210).

The insistence on entry certificates was another part of UK immigration history that was introduced with mixed motives and undoubtedly led to hardship and discrimination for some (Juss, 1997: 44-45; Wray, 2011: 49-50). It was argued that the use of entry certificates prevented large numbers of applicants travelling to the UK only to be told they were not eligible for entry. There was also a desire to prevent the hardship (and bad publicity) that was caused when applicants, including several vulnerable people, were detained in adverse conditions pending removal after arriving without an entry certificate (Wray, 2011: 49-50). Instead, immigrants would be dealt with and increasingly filtered in their country of origin under the entry clearance system. This measure built on 'another recurring theme in immigration legislation', the 'desire to conceal rather than prevent the harsh treatment of immigrants and their family members' (Wray, 2011: 50-51).

### **The Immigration Act 1971**

The Immigration Act 1971 repealed or consolidated many of the legislative changes of the earlier decades. It created two categories, 'patrials' (a term used until repealed by the British Nationality Act 1981), who had the right of abode in the UK and everyone else, including some Citizens of the United Kingdom and Colonies, who were subject to immigration controls. For the first time, the Act dealt with both aliens and Commonwealth citizens together, creating a single system of control for aliens and the CUKCs and Commonwealth citizens who had been affected by the Commonwealth Immigrants Acts of 1962 and 1968. This greatly consolidated the controls contained in the 1962 and 1968 Acts and reified the two previously implicit categories of those who had the right of abode and those who did not into 'patrials' and others. From 1973, the distinctions between Commonwealth citizens and aliens progressively diminished. The main distinction between immigrants now lay between European Economic Community and non-European Economic Community citizens.<sup>12</sup>

The Act also formalised the Secretary of State's instructions to immigration officers, which had been instituted under the Aliens Act 1905, s. 2(2). Under the Aliens Act however, such

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<sup>11</sup> The Aliens (Appeals) Order 1970 extended the system to aliens, but most of its provisions also did not come into force until the Immigration Act 1971 came into force.

<sup>12</sup> The Act had come into force on the 1st of January 1973; the same date Britain joined the European Economic Community (EEC). Under Community law, EEC citizens enjoyed freedom of movement within the Community, which effectively created a class of migrants with a 'new and privileged position in British immigration law' (Sachdeva, 1993: 27).

instructions had been issued voluntarily and did not have a formal status; they were applied using administrative discretion. Under the Immigration Act 1971, such instructions were required to be made by the Secretary of State and took on a much more formal status, including some Parliamentary scrutiny by means of a negative resolution process. They were now to be called Immigration Rules, and became the primary way in which the entry and stay of persons not having the right of abode under the Act were to be regulated (s. 1(4)). The Rules were also a way to codify, clarify and convey the content of the existing instructions given to immigration officers, not all of which had previously been published, although supplementary instructions and guidance (not inconsistent with the rules) were still permitted to be given to immigration officers without the requirement of laying them before Parliament (IA 1971, Sch. 2, 1(3)).<sup>13</sup> Orders in Council, made under the Aliens Acts, had been issued by the Privy Council and approved personally by the monarch but they had only applied to aliens, whereas the new Immigration Rules would apply to both aliens and Commonwealth citizens. The Immigration Rules are written by the Home Secretary and are laid before Parliament for 40 days, without the need to pass through the same Parliamentary debate and scrutiny as an Act of Parliament.<sup>14</sup> As Lord Hope, Deputy President, explained in *R (on the application of Alvi) v SSHD* [2012] UKSC 33, Judgment at [54]:

Questions as to where the line was to be drawn with regard to the content of the rules were for the Secretary of State to determine as matters of policy. What Parliament was insisting on was that she should lay her cards on the table so that the rules that she proposed to apply, and any changes that were made to them, would be open to scrutiny.

Therefore, while in some ways the Rules were a step towards greater transparency and accountability in rule-making in regards to immigration, they also became more commonly and openly used as the primary means by which immigration was regulated and could be amended much more quickly and easily than legislation and without the same Parliamentary oversight. Immigration officers' discretionary power gave greater scope for administrative discrimination, even while official statements emphasised the non-discriminatory nature of British immigration law. For instance, during debate the Home Secretary, Robert Carr declared: 'It is enormously important to reassure the immigrants already here that they will suffer no loss of status under the Bill, that in this country there will be no first or second class citizens' (HC Deb, 8 Mar 1971, col. 43). However, the Immigration Rules now became the foremost way in which immigration policy was implemented and they were repeatedly formulated to further restrict the entry of non-white dependants (Evans 1983: 400-407; Sondhi 1987: 14; Sachdeva 1993: 32). The Shadow Home Secretary, Shirley Williams argued vehemently against the first Immigration Rules, claiming they were a 'strange vehicle by which to make a fundamental change in the whole basis of British immigration law' (HC Deb, 22 Nov 1972, col. 1344). She entreated the Home Secretary to withdraw and re-write them, arguing that 'in places the rules are so offensive to natural justice, to decent human treatment, and to the long tradition of links between this country and the Commonwealth' (col. 1343). Mrs Williams also argued that the Rules unfairly discriminated

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<sup>13</sup> See the more recent judgment in *R (on the application of Alvi) v SSHD* [2012] UKSC 33 where the Supreme Court found it was unlawful to refuse an application on the basis of requirements not included in the Immigration Rules and the subsequent change in practice such that 'everything which is in the nature of a rule', which includes 'any requirement which, if not satisfied, will lead to an application for leave to enter or to remain being refused' must be incorporated in the Immigration Rules (*R (Alvi) v SSHD* [2012] UKSC 33, [41], [57]).

<sup>14</sup> The Immigration Rules are subject to a negative resolution process, where either House may object to the rules in a general way and the Home Secretary is then obliged to re-write them and re-lay them within another 40 days (Immigration Act 1971, s. 1(4), 3(2)). This power is very rarely used.

between men and women and that it was ‘time that the House woke up to the fact that men and women increasingly expect to be treated equally’ (col. 1353).

Nonetheless, overt gender discrimination was maintained in the rules for some time. The statutory rights of Commonwealth men already settled in the UK to be joined by their wives and children were preserved in s. 1(5) of the Act but not the position of those who would come later. All other Commonwealth citizens and their dependants were to be regulated by the Immigration Rules. The first set of rules set out various extra conditions for these immigrants. This included provisions, some of which had previously been applied, such as refusal of recourse to public funds and maintenance and accommodation requirements (HC 79, 80, 81, 82, 25 January 1973). Wives, fiancées and ‘women living in permanent association’ with Commonwealth citizens were to be admitted, providing these requirements were met, but husbands and fiancés of female Commonwealth citizens were not, unless ‘special considerations’ were present (HC 79; HC 81). ‘Special considerations’ often included a finding that certain women could not be expected to live in their husband’s home country and there was also an exception for those whose grandparent was born in the UK (HC 81). As Wray documents, these ‘exceptions would have principally benefitted white women’ (Wray, 2011: 51). Wray also identifies an emerging hierarchy of acceptable marriages, which was now ‘more clearly linked to race’ and was facilitated by both the law and immigration officers’ discretion in distinguishing between applicants (Wray, 2011: 51). The effect was to draw distinctions between would-be immigrants on both racist and sexist lines.

White British men could count on being able to bring spouses more or less as they chose. Black and Asian men settled in the UK had, formally speaking, the same rights but were increasingly subject to discrimination... A woman who married a white male of British descent may have been able to take advantage of the rules on patriality. In other cases, she could claim that she should not suffer the hardship of living in an alien environment, a claim which women of New Commonwealth origin found far harder to make (Wray, 2011: 51-52).

Behind this stance was the belief that New Commonwealth immigration was ‘qualitatively different from other immigration and... undesirable’ (Wray, 2011: 53).

### **Lifting the Ban on Commonwealth Husbands**

The Immigration Rules that had begun under the 1971 Act were added to and amended in the years that followed. Some of the earliest changes came in 1974 when the long-standing discrimination preventing women from sponsoring a Commonwealth husband was abolished. At the time there was both solidarity for the position of women and their ‘inalienable right’ to marry foreign men (HC Deb, 21 Jun 1974, col. 929) and concern that if the government were ‘to admit husbands on the same basis as wives this would undoubtedly lead to a substantial and continuing new wave of male immigration, particularly from the Indian subcontinent’ (HC Deb, 28 Mar 1974, col. 794-5; see Wray, 2011: 52-3). Wray found that, overall, reform of the rule was considered ‘desirable’ providing it resulted in only small numbers of husbands being admitted (Wray, 2011: 53). Consequently, the ban on sponsoring husbands was lifted in 1974 and despite the fears of a rush of applications, the number of Commonwealth husbands and fiancés who arrived between 1974 and 1976 only rose from 500 to around 1,800 (Evans 1983: 133).

### **The Race Relations Acts 1965, 1968 and 1976**

The accrual of numbers of immigrants and their descendants in the UK, from all over the world sparked greater social anxiety and discrimination along racial lines. While immigration regulation was becoming more restrictive and indirectly, yet intentionally, racially-biased, there

was also a move to prevent racial discrimination within the UK. In 1965 the first Race Relations Act had been passed, although its measures were very limited, mainly dealing with discrimination in public buildings. Amendments to the Act in 1968 improved upon the 1965 Act only slightly. The Race Relations Act 1976 was, in contrast, passed with a view to dealing with discrimination in areas such as employment and housing. The Commission for Racial Equality (CRE) was also created to monitor race relations and help enforce the Act.

Some have argued that race relations legislation was used to appease politicians who were uneasy with the racist tone that non-white immigration rhetoric produced in policy and legislation (Dummett and Nicol, 1990: 193). Hansen called the Race Relations Act 1976 ‘the second pillar of Britain’s fair but firm immigration regime’ (Hansen, 2000: 228). Certainly the need for racial harmony was used to justify more restrictive immigration policies (see Wray, 2011: 58). Dummett and Nicol observed that ‘[i]t had become psychologically impossible for both sides to think of ‘immigration’ in any sense, or any context, except as a verbal convention for referring to the race situation in Britain’ (Dummett and Nicol, 1990: 213).

### **The Introduction of the Primary Purpose Rule**

The next major change in British immigration law was the insertion of the so-called ‘Primary Purpose Rule’ into the Immigration Rules in 1977. This ‘sordid episode in immigration history’ (Bevan, 1986: 254) is one of the most controversial components of historic immigration control. Although the ban on Commonwealth husbands had been lifted in 1974, by 1977 there was already pressure to restrict this route again. The supposed connection between Commonwealth husbands/fiancés and fraud led to a political move to prevent the entry of husbands and would-be husbands of primarily Asian women in the UK, especially those contracting arranged marriages. Alexander Lyon MP described this at the time as a ‘panicked’ response based on ‘racial hostility’ and argued that there was no evidence of abuse ‘on the scale that would justify the kind of rules that are being introduced’ (HC Deb, 24 May 1977, cols. 1336-1338). Nonetheless, ‘reliance on the assumed ubiquity of abuse was dominant’ (Wray, 2011: 69) and in March 1977 the Immigration Rules were amended to refuse entry to husbands and fiancés of women in Britain (including British citizen and settled women) where:

the officer to whom the application is made has reason to believe that the proposed marriage would be one of convenience entered into primarily to obtain admission here with no intention that the parties should live together permanently as husband and wife (HC 238, para 47).

The application of the rule, firstly only to female sponsors and secondly not only to women who were temporary migrants but to long-term settled migrants and importantly British citizens severely discriminated against women and was an unprecedented move against the rights of British citizens. However, since, at this time, the rule stipulated that there must be a suspicion that it was a marriage of convenience *and* that the parties did not intend to live together, Wray found that ‘the new rule had only a limited impact at that stage’ (Wray, 2011: 57). Nonetheless, the rule was a clear example of the implicit gender and race discrimination inherent in the immigration system at the time. While husbands of white women were often permitted entry through administrative measures, as mentioned above, husbands of non-white women, especially those of Asian descent, were treated with suspicion. The ‘primary purpose rule’ meant that ‘arranged marriages sponsored by a woman returned to their lowly place in the hierarchy [of marriages]’ (Wray, 2011: 57).

Once again, there were government statements at the time suggesting that such measures were necessary to promote racial harmony.<sup>15</sup> However, in fact policies such as this exacerbated racial hostilities as many immigrants felt a sense of official exclusion and a rejection of the validity of their personal lives and cultural practices (Wray, 2013: 643). Unfortunately, Sachdeva notes that policy makers discovered too late that ‘strict immigration control of dependents cannot possibly be seen as conducive to good race relations’ (sic) as resentment often arose both among immigrants and the ‘host’ community as a result (Sachdeva, 1993:22).

Following the election of a Conservative government in 1979, led by Margaret Thatcher, who had stated in a televised debate a year earlier; ‘people are really rather afraid that this country might be rather swamped by people with a different culture’,<sup>16</sup> further amendments were made to the primary purpose rule. It was decided to separate the primary purpose test from the intention to live together but also to add a requirement that the parties had met, which was later interpreted to mean had met purposefully and in adulthood (see Clayton, 2014: 271-272). This was intended to reduce the number of fiancé(e)s entering for arranged marriages as well as proxy marriages, despite the fact that it was clear that such marriages were not necessarily fraudulent marriages. As Alex Lyon, the Labour MP, argued regarding the rule change:

That is not intended to hit a marriage of convenience, which is met by other rules; it is intended to hit the genuine arranged marriage of Asian girls, whether or not they were born in this country. In doing that, the right hon. Gentleman introduces a racialist difference between one British citizen and another. (HC Deb, 14 Nov 1979, col. 1336).

The Home Secretary, William Whitelaw suggested that such a change in the rules would hopefully enable otherwise repressed Asian women to ‘make their own choice’ of spouse (HC Deb, 14 Nov 1979, col. 1340). It was believed by those on both sides of the political spectrum that after a generation or so, the desire of Asian migrants to make arranged marriages with those from outside the UK would wane and be replaced by more ‘British’ marriage practices (Wray, 2011: 61-62). As the Home Secretary responded to Mr Lyon: ‘in the future it will increasingly be the practice that Asian girls in this country will wish to marry Asian boys in this country. I should have thought that that was a position that we should encourage.’ (HC Deb, 14 Nov 1979, col. 1336).

### **Administrative Practices**

Although wives and children under 16 of Commonwealth men had a statutory right to enter the UK under the Commonwealth Immigrants Act 1962, there was increasing evidence during this time that suspect administrative practices were being used in order to restrict the number of successful would-be immigrants. These were indicative of the assumption of abuse of the immigration system and the climate of intimidation that pervaded the era. For example delay, hostile interviews and inappropriate medical examinations were used to intimidate and attempt to prevent certain applicants from entering Britain.

Delay was found to have been a deliberate Home Office tactic, which was described by the Home Affairs Committee in 1990 as both ‘intolerable’ and ‘indefensible’ (Home Affairs Committee, 1990; Fransman, 2011: 707). Delays of anywhere between one and four years, just

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<sup>15</sup> See for example comments of the Prime Minister James Callaghan, HC Deb, 31 Jan 1978, col. 241 and comments of Home Secretary Merlyn Rees, HC Deb, 6 Apr 1978, col. 648.

<sup>16</sup> Granada Television Interview, 30 Jan 1978, <http://www.margaretthatcher.org/document/103485>.

for initial processing, were reported across many different administrative centres and these were suggested to be deliberate (Wray, 2011: 108).

Interviews were also conducted in highly adverse conditions, with applicants travelling great distances, often with small children in extreme heat and without adequate amenities available. Interpreters were at times found to be incompetent, and on occasion 'rude, aggressive or even corrupt' (Wray, 2011: 114). Appeals based on these grounds were often dismissed (Runnymede Trust 1977: 14-17 and Sondhi 1987: 22-3, both cited in Wray, 2011: 115). Unaccompanied women and children faced difficulties in interviews, some women and children being exposed to threats and aggressive behaviour by the interviewer and despite there being policy against interviewing children under 14, the practice continued (Wray, 2011: 115).

Inappropriate medical examinations and procedures were also carried out on women and children. X-rays were frequently used to establish the age of applicants, despite this being an inaccurate science. Some women were refused entry after x-rays 'proved' them to be younger than they had stated, even though this may be easily attributable to the inaccuracies of such estimates and the effect of malnutrition and poverty on growth (see Wray, 2011: 119-20). X-rays were also reported to have been carried out by unqualified staff and were even performed on pregnant women, despite a prohibition in the UK against x-raying women during pregnancy, other than for medical necessity, due to the harmful effects of x-rays on the unborn child (Wray, 2011: 120). It was not until 1982 that the policy on x-raying was changed (Commission for Racial Equality, 1985: 40, cited in Wray, 2011: 120).

In 1979, it came to light that single women were also being subjected to intrusive medical examinations, designed to determine their virginity. The implied argument was that it could thereby be ascertained whether applicants coming to the UK ostensibly for marriage were in fact already married. Despite government assertions that the tests had only been carried out in a tiny minority of cases, evidence soon emerged that they had in fact been used frequently, over several years and often without appropriate consent (Wray, 2011: 121-122). The Home Secretary Merlyn Rees declined to discipline the parties involved or order an inquiry, stating merely that he had 'made it clear' that such tests should not be requested in the future (HC Deb, 9 Feb 1979, col. 312-313W).

These administrative practices were among a slew of techniques which together acted to reduce the number of applicants who would successfully gain immigration status. They demonstrate the lengths to which certain policymakers and officials were willing to go to achieve this aim and the difficulties which would-be immigrants faced during the process.

### **The British Nationality Act 1981**

The British Nationality Act 1981 (BNA 1981) abolished the category of Citizen of the United Kingdom and Colonies. It was replaced by a new hierarchy of citizens; first, there were to be British citizens, who had the right of abode in the UK. This group comprised those Citizens of the UK and Commonwealth who had been 'patrials' under the Immigration Act 1971 (which was amended accordingly). Commonwealth citizens who were patrials also had the right of abode in the UK and so retained their previous rights but it was no longer open to further Commonwealth citizens. Second, Citizens of the UK and Commonwealth connected with existing dependencies were to be citizens of British Dependent Territories, who had no right of abode in the UK. Third, remaining Citizens of the UK and Commonwealth were to be British Overseas Citizens, who had no automatic right of abode in the UK either. Many of these citizens were former Citizens of the

UK and Commonwealth such as the East African Asians, who had been affected by the Commonwealth Immigrants Act 1968; people of Indian or Chinese origin in countries such as Malaysia or people of British descent removed by more than two generations from Britain (see Dummett and Nicol, 1990: 243). There were also a few groups without citizenship of any Commonwealth country who were to remain British subjects and a smaller number of British Protected Persons in Brunei.

Importantly, the Act also partially abolished the historic *ius soli* rights to citizenship (see Sawyer and Wray, 2014). Children could no longer become citizens merely by being born on British soil, but only where one of their parents was a British citizen or was 'settled' in the UK. This change excluded the children of temporary or illegal immigrants from British citizenship and meant that citizenship became more linked to race than ever before. It also made the determination of citizenship much harder as it was no longer clearly linked to place of birth but depended on more complex criteria.

The Act also removed the distinction between genders in parentage. Now whether an individual's mother *or* father was a British citizen, he would have the right to British citizenship (ss. 1-3), whereas previously only fathers could transmit citizenship and only to their legitimate or legitimated children (BNA 1948, s. 23, 32(2)). This had excluded both those whose mother *only* was a British citizen and illegitimate children of British fathers. However, the new provisions also removed the ability for wives of British citizens to register as British citizens automatically; such a person would instead have to follow the requirements for naturalisation, although under more lenient provisions than others.

The BNA 1981 overturned the principle that those born in Britain were automatically British and transformed or confirmed that the idea of 'Britishness' was not an automatic right but an earned and often racially- and culturally-dependant right. Rumours that non-white citizens in Britain were also to have their citizenship taken away circulated in a climate of fear (Dummett and Nicol, 1990: 245). The Act was seen as a 'reinforcement of effective racial discrimination' although the government 'denied indignantly that the scheme was discriminatory' (Dummett and Nicol, 1990: 245) and has never accepted the assertion that British nationality law was racist (Department of Constitutional Affairs, 2004: 208). As Sawyer and Wray explain:

decisions about whom to accept and whom to reject were made on the basis of race... this was not openly acknowledged but achieved indirectly through immigration measures that cut across rather than complemented nationality laws and which then informed new hierarchical nationality laws which awarded unwanted citizens a nationality that did not fulfil a basic functional criterion, i.e. access to the territory. This was exacerbated by the loss of *ius solis* for some of those born on the territory. (Sawyer and Wray, 2014: 10)

While the general constitutional model is that a coherent structure of nationality law is the foundation on which immigration law should be constructed, instead nationality legislation was often fashioned to address the immigration needs of the moment. As the Labour Shadow Home Secretary admitted in 1972, '[b]ecause of our long imperial heritage and because, perhaps, of the burden of history, our citizenship and immigration laws are now in an almost totally inextricable mess (HC Deb, 22 Nov 1972, col. 1355). Nationality law, and especially the BNA 1981, was 'perceived only in terms of restricting immigration', and provided merely '*ad hoc* solutions to temporary political problems' (Dummett and Nicol, 1990: 241).

## The Development of the Primary Purpose Rule

However, by the early 1980s, the use of the primary purpose rule to prevent the entry of greater numbers of predominantly non-white immigrant men was attracting negative attention. In an ‘increasingly hostile administrative climate’ the rule was used to deny many hopeful applicants entry during this period and ‘there was little effort to deny the racist underpinning of the controls’ (Wray, 2011: 62). At the time, the primary purpose rule only applied to husbands and male fiancés seeking to join their wives, as did other conditions such as the requirement to have met and to intend to live together. From 1974, as detailed above, women had been allowed to sponsor husbands from the Commonwealth, however, when the primary purpose rule was later introduced, prohibiting husbands who could not fulfil this requirement, this effectively constituted a partial reinstatement of the ban on husbands. Therefore, in 1980, in a move designed to protect the concerns of mainly white British women, a slight change was made to the primary purpose rule which allowed British *citizen* women *born in the UK and with one parent born in the UK* to sponsor husbands (HC 394). This introduced a ‘two-tier citizenship’ (Sachdeva, 1993: 66) and was clearly designed to attempt to allow white British women to sponsor husbands while still preventing most non-white women from doing so.

In May 1982, a case was brought at the European Court of Human Rights, a supra-national court ruling on alleged violations of the European Convention on Human Rights. Here, three women whose applications by their husbands had been refused because of the stricter rules for female sponsors (including the citizenship condition), arguing they breached articles 8 and 14 European Court of Human Rights (right to respect for family life and freedom from discrimination in the enjoyment of Convention rights). While the case was pending, some further minor changes were made to the rule in 1983. These allowed all British citizen women to sponsor husbands, regardless of where they had been born. However, they also shifted the burden of proof from the Home Office to the applicant so that it was for the applicant to prove that the primary purpose of their marriage was *not* immigration (HC 169, para 54). Settled women remained unable to sponsor husbands, unlike their male counterparts.

In 1985, the final decision was issued<sup>17</sup>. The response of British ministers was not to amend the rule so that the more stringent requirements would no longer be applied to husbands and fiancés, but to extend them so that they applied equally to wives and fiancées as well. The rule, in regards to spouses, now read:

- An entry clearance will be refused unless the entry clearance officer is satisfied:
- (a) that the marriage was not entered into primarily to obtain admission to the United Kingdom; and
  - (b) that each of the parties has the intention of living permanently with the other as his or her spouse; and
  - (c) that the parties to the marriage have met; and
  - (d) that there will be adequate accommodation for the parties and their dependants without recourse to public funds in accommodation of their own or which they occupy themselves; and

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<sup>17</sup> *Abdulaziz, Cabales and Balkandali v UK* [1985] 7 EHRR 471. The court found only that the rules were discriminatory because they infringed upon gender equality.

- (e) that the parties will be able to maintain themselves and their dependants adequately without recourse to public funds (HC 503, para 46).

Over the following years the application of this rule became the subject of intense judicial debate. One of the main contentious issues was the requirement for parties to prove that the main purpose of the marriage was not immigration to the UK. This often proved extremely difficult for parties in an arranged marriage to adequately convey to immigration officers and later the courts. The ‘genius’ of this aspect of the rule meant that ‘[i]t was immaterial how many other motives might be present; unless the applicant could demonstrate that one of these was the primary motive, the application failed’ (Wray, 2011: 88-9). The presence of any sort of deception in an application, even many years previously, also at times meant the application failed under the primary purpose rule, even where the relationship itself was accepted as genuine. Wray argues that instances of deception which did not have a bearing on the relationship itself or the purpose for which the relationship was entered into ‘should have had only limited relevance as there are many possible reasons for deception’ (Wray, 2011: 94)<sup>18</sup>.

Female sponsors found it especially difficult to successfully overcome the primary purpose rule due to the prevailing assumptions regarding gender roles among people from the Indian Subcontinent. Women who lacked a certain appearance of personal agency were often considered not to have the right to determine her place of residence after a marriage while those appearing to possess agency could be considered to so culturally uncommon as to lack legitimacy<sup>19</sup>. A woman’s physical appearance and manner as well as her intelligence and ability to communicate were also weighed and (unfairly) played a role in the decision-making. In a comparison of cases, Wray found that those women who were young, attractive, intelligent, according to the decision-maker, were more likely to receive a favourable result (Wray, 2011: 100).

As such, the application of the rule revealed that ‘[i]t was assumed that immigrants were motivated overwhelmingly by an urgent desire to come to the UK... and every action and decision was viewed through that prism’ (Wray, 2011: 102). Therefore, ‘[r]efusals were often based upon discrepancies in the answers given by the parties to intrusive and detailed questioning, defective documentation and minor deviations from a stereotyped view of customary practice’ (Wray, 2006b: 306). Indeed, Alexander Lyon MP protested during the initial debate of the rule in 1977: ‘But the rules also allow an immigration officer to ask any questions he likes... He does not have to show any just cause... He may simply dislike the people involved.’ (HC Deb, 24 May 1977, col. 1338). There was a growing assumption that ‘a single dominant motive for a marriage could be identified and that this motive would often, at least for some types of applicant, be immigration’ (Wray, 2011: 101). There was also an evident unbalanced policy position focusing on the position of the applicant over the legitimate desires of the sponsor, despite the fact that the sponsor was a British citizen or settled resident with resulting rights (Wray, 2011: 101, Sachdeva, 1993: 144).

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<sup>18</sup> For example, in the cases of *R v IAT, ex parte Syed Akhtar Hussain* [1989] Imm AR 382 and *R v IAT, ex parte Girishkumar Somabhai Patel* [1990] Imm AR 153 the applicants were refused under the primary purpose rule. This was due to them making false declarations as to when they first met their fiancées (likely because they thought that the true account would in some way disqualify them under the rule) despite the fact that the genuineness of their subsequent marriages was not itself in question.

<sup>19</sup> In the case of *Sumeina Masood v IAT* [1992] Imm AR 69, a woman who appeared to have the ‘whip hand’ and was reluctant to live outside the UK after her marriage, was considered to lack the intention to live together and thus the application failed.

In 1986, the rules were amended to prevent the entry of spouses who were under 16 (HC 306) and again in 1990 stipulating that *both* spouses be over 16 (HC 251) and that only one wife in a polygamous marriage could enter (HC 555, para 3). These changes were claimed to be for the protection of vulnerable women but were also seen as a discouragement to young and arranged marriages and a rejection of the cultural practices of certain groups (Wray, 2011: 67).

### The Immigration Act 1988

The Immigration Act 1988 sought to ‘curb certain perceived abuses’ of immigration law and was seen as further ‘cultural interference’ (Sachdeva, 1993: 39). The Act removed the statutory protection resident men from the Commonwealth had enjoyed under the Immigration Act 1971, s. 1(5) to bring in their wives and children under 16 (s. 1). This was claimed to be ‘the trade-off for permitting the entry of husbands’ under the changes to the Primary Purpose Rule in 1985 (Wray, 2011: 66) notwithstanding that these changes had been made as a result of the European Court of Human Rights’ decision in *Abdulaziz et al.* The removal of the statutory right under the 1971 Act meant that now *no* British citizen had a right to be joined by his or her dependants (Dummett and Nicol, 1990: 253-4). It also meant that these families now had to satisfy the more stringent requirements under the Immigration Rules, which had not previously applied to them<sup>20</sup>.

The Act was described by the Home Secretary, Douglas Hurd, as making ‘sensible and limited changes to ensure that our immigration law is flexible, effective and strong enough’ (HC Deb, 16 Nov 1987, col. 788). The Minister of State for the Home Office also maintained: ‘None of our proposals is racist. The Bill seeks better race relations’ (HC Deb, 16 Nov 1987, col. 849). However, others have argued that such comments were in fact vastly deceiving (Blake and Scannell, 1988: 2). Lord Clement McNair, Scottish Liberal Democrat deputy whip in the House of Lords at the time, described it scathingly as ‘another mean-minded, screw-tightening, loophole-closing concoction imbued with the implicit assumption that almost everybody who seeks to enter this demiparadise of ours has some ulterior, sinister and very probably criminal motive and the sooner we get rid of him the better’ (HL Deb, 4 Mar 1988, col. 389). And Mr Roy Hattersley, MP for Sparkbrook, an area heavily populated by immigrant families, argued: ‘It benefits virtually no one...Worst of all, it prejudices good community relations’ (HC Deb, 16 Nov 1987, col. 789).

### Abolition of the Primary Purpose Rule

In 1992, following the case of Surinder Singh (Case C-370/90, *R v Immigration Appeal Tribunal ex p. Home Secretary* [1992] ECR I-4265) and other domestic case law (see Wray, 2011: 73-103), unpublished guidance was issued to Immigration Officers to allow certain exceptions to the Primary Purpose Rule. Where it was considered that the marriage was genuine and subsisting and the parties had been married for at least five years or had a child with the right of abode in the UK, the incoming spouse could be granted entry (HC Deb, 30 Jun 1992, col. 523). This had the result of effectively imposing an unofficial waiting period upon many genuinely married couples who were separated for up to five years until this exception could apply (Menski, 1994: 118).

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<sup>20</sup> The Act also prevented the entry of a wife in a polygamous marriage where there was already another wife in the UK and greatly reduced the ability to challenge deportation orders.

It was not until the election of a Labour government in 1997 that the rule was finally abolished (HC 26). The Labour Party manifesto had promised to end the ‘arbitrary and unfair results’, which they acknowledged often occurred under the primary purpose rule (Labour Party Manifesto, 1997). Whatever the policy goals behind this decision, it was also a political move, designed to garner support for their party on a highly controversial issue without affecting immigration numbers a great deal. When asked about the rationale for the abolition, the new Under-Secretary of the Home Office, Lord Mostyn replied that it was ‘very doubtful that this inherently ineffective and unfair rule has worked to filter out those who sought to cheat the system. This question is not therefore about numbers, but about fairness’ (HC Deb, 7 Jun 1997, col. 219W). Once again, we can see that the emphasis was on perceived abuse of the system. In the next section we shall consider what policies the New Labour government enacted to replace this rule and what implications they had for spousal migrants.

## C- 1997 – 2010 (The Era of New Labour)

### Emphasis on Economic Immigration

It has been argued that ‘between 1962 and 1997, despite some occasional deviations, the general direction of policy was consistent’; the aim was to limit non-white immigration (Wray, 2011: 139). With the election of Tony Blair’s Labour government after 18 years of Conservative rule, the direction of policy took a sharp turn. While policy changes may not have been ‘immediately evident’, they were ‘precipitated by the change in government and they rendered the former terms of analysis outmoded’ (Wray, 2011: 139). Labour was prepared to acknowledge the advantages of immigration and rather than merely attempting to restrict it, they sought to regulate it. Labour shortages and an ageing population meant certain professions wanted to recruit from abroad and economic migration increased more than 300% over this period (Wray, 2011: 140).

It became clear that the government was keen to encourage highly skilled, highly educated migrants while ‘unskilled’ migrants were not welcome. In a 2005 Home Office Report *‘Controlling our borders: Making migration work for Britain’*, Tony Blair stated that such policies would ‘ensure Britain continues to benefit from people from abroad who work hard and add to our prosperity... Those who want to settle permanently in the UK will have to show they bring long-term benefits to our country.’ (Cmnd 6472). Such rhetoric fuelled the idea of ‘l’immigrant parfait’ or ‘the perfect immigrant’ (Haince, 2014) as juxtaposed with the ‘undesirable’ migrant, which was being interpreted more and more widely.

The Highly Skilled Migrant Programme provided work permits for skilled workers, even where the applicant did not have a specific job offer. This, along with a few other schemes, anticipated the Points-Based System, established in 2008 and upon which much of the current immigration system is built today even if the points element has entirely disappeared. Those entering under lower skilled categories were expected to return home after a given period of time and such schemes did not lead to settlement. Foreign students were also welcomed, paying much higher fees than UK or European students, yet their stay in the UK also could not lead to settlement. They were initially permitted to extend their stay in the UK for up to two years in order to find a graduate job. However, this policy was eventually restricted so that students without job offers were obliged to leave immediately after graduating.

This division between skilled and unskilled migration was subject to pressure however, including from spousal migrants. Since spouses were not required to have certain skills or

educational attainment, Wray argues that marriage migration ‘had the potential to derail the government’s control over the quality of entrants’ (Wray, 2011: 141).

Furthermore, the number of asylum seekers and irregular migrants increased dramatically between 1997 and 2009 (see Wray, 2011: 142) and administrative issues, among other problems, in the immigration system meant huge delays in their processing. Meanwhile, the expansion of the EU with its free-movement rights meant the entry of more workers, who could not be tested for their skill levels, and their family members. Public opinion became more hostile to immigration and the government response was to further restrict migration where they could. Asylum cases were dealt with more cursorily, irregular or short-term migrant ‘switching’ (moving immigrant categories) was disallowed and appeal rights reduced. The Points-Based System was introduced in 2008 for most migrants other than dependants and asylum claimants. Spouses came increasingly under scrutiny. The goal in particular was to reduce unskilled and irregular migration. By the end of the Labour period, ‘[t]he increasingly harsh rhetoric and regulatory overload reflected the growing predominance of this goal so that it sometimes trumped even economic benefit’ (Wray, 2011: 143).

### Emphasis on Racial Equality

Furthermore, Labour took a new approach to race equality. Although the new government continued the previous approach of enacting both external immigration control and internal race equality measures, they also ‘strove, at least to a limited degree, to import considerations of equality and fairness into immigration control’ (Wray, 2011: 144). Labour’s electoral support came in part from immigrants and the British children of former immigrants and it was felt that taking their concerns seriously was ‘both a principled and strategic position’ (Wray, 2011: 144).

The Race Relations (Amendment) Act 2000 (now replaced by the Equality Act 2010) amended the 1976 Act by prohibiting racial discrimination by all public authorities, which included the immigration authorities and the Home Office<sup>21</sup>. However, immigration functions which were carried out or authorised by Ministers of the Crown were exempt from this requirement (s. 19D, as amended), as were legislative acts and judicial decisions (s. 19C). This importantly meant that decisions of the Home Secretary became ‘almost impossible’ to successfully challenge on the basis of apparent racial discrimination due to the use of ministerial discretion, ‘the complexity of the rules’ and ‘practical and resource obstacles’ (Wray, 2011: 145).

It has been argued that during this period race became a secondary issue; the main determinant of a desirable migrant was based on economic factors and what the migrant could *give* to Britain (Flynn 2005: 484, Sales 2005: 458; Wray, 2011: 145). ‘Nonetheless’, Wray maintains, ‘given global inequalities, many divisions were still perpetuated along ethnic, national or racial lines’ (Wray, 2011: 145).

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<sup>21</sup> The Act was in part a response to the brutal racially-motivated murder of a black teenager, Stephen Lawrence, in London and the subsequent failure of the police to properly investigate the murder. An inquiry was held into the events, which found evidence of entrenched racial bias in the police (MacPherson Inquiry, Cmnd 4262-I).

## Emphasis on Non-Legislative Measures

The Immigration Rules had become the primary way in which immigration was regulated and changes to the Rules became more and more frequent (Wray, 2011: 142). Therefore, while certain key statutes were enacted during this time, ‘legislative debates may be less revealing than in the past’ (Wray, 2011: 155). ‘As always in British immigration law, it is essential to consider also the prevailing policy and actual practice, rather than just the officially stated law’ (Sachdeva 1993: 32).

Judicial interpretation also began to play a more influential role in this area. The government’s use of rules and policy to control immigration meant that rules and the decisions they produced could be scrutinised under the Human Rights Act 1998 in ways that could not be applied to primary legislation. As we shall see, at notable times the judiciary found certain aspects of policy to be incompatible with human rights.

## After ‘Primary Purpose’

The abolition of the Primary Purpose Rule was one of the first actions of the Labour government in relation to immigration (HC 26). It ‘enabled the government to establish radical credentials on a matter of high symbolic importance which, however, would make only a relatively small difference to immigration totals’ (Wray, 2011: 156). The responsible Home Office minister made the argument for abolition on various grounds:

‘it is arbitrary, unfair and ineffective and has penalised genuine marriages, divided families and unnecessarily increased the administrative burden on the immigration system. The rule has also placed British citizens resident here at a disadvantage compared with other EU nationals resident in Britain.’ (HC Deb, 5 Jun 1997, col. 218-9W)

Even anti-immigration proponents largely did not support this ‘illogical, ineffectual and outmoded’ rule (Wray: 2011 157). Instead, rhetoric and policy was turning to countering the sham marriage. In 1999, the Immigration and Asylum Act was passed, which defined a sham marriage as one entered into ‘for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules’ (s. 24(5)). Marriage registrars who had suspicions that a marriage was a sham were required to report the parties to the Home Office under section 24(3).<sup>22</sup> The Act also provided that parties to a marriage had to give at least 15 days notice of their intention to marry and had to give such notice by personally attending the registry office (ss. 160-163). Those marrying in the Churches of England and Wales were exempt.

Some argued at the time that the Act marked a return to the values in place before 1997 (see Stevens 2001: 420). For example, Diane Abbott MP argued that the new provisions were merely the ‘domestication of the primary purpose rule...which has more to do with responding to scares in the tabloid press than to a thoughtful and considered approach to immigration control’ (Diane Abbott, Standing Committee, 20 Apr 1999).

Others argued that despite Labour’s rhetoric on anti-discrimination, they ‘regarded control of this route of immigration as important, even at the cost of potential discrimination’ (Wray, 2011: 158). There was still widespread and entrenched fear of abuse of the immigration system. A

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<sup>22</sup> There were further requirements to report suspicious marriages under the Reporting of Suspicious Marriages and Registration of Marriages (Miscellaneous Amendments) Regulations 2000.

government White Paper *Secure Borders, Safe Havens*, complained of disturbing levels of switching (moving immigrant categories) (Cmnd 5387: 101). The paper recommended a ban on switching into the spousal category, which was implemented in 2002 (HC 164). This was considered necessary to help prevent sham marriages, despite the fact that there was little evidence to support this claim (Wray, 2011: 159). The ban required applicants wishing to switch to leave the country and re-apply to enter as a spouse. They would potentially be living in volatile areas or facing personal danger, especially where the applicant had initially entered the UK in order to claim asylum. Those whose applications for family reunification were subsequently denied might find it impossible to return. The applicant may have spent many years in the UK and developed a genuine relationship with a UK citizen or resident yet 'they were sacrificed to the government's need to establish its authority in the immigration and, particularly, the asylum arena' (Wray, 2011: 160).

In 2004, another Act was passed, containing measures which ostensibly aimed to combat sham marriages; the Asylum and Immigration (Treatment of Claimants, etc.) Act. The number of reported suspicious marriages had risen from 756 in 2001 to 2,712 in 2003 and these figures (whether they represented increased fraud or increased suspicion) were used to justify the new policy (HC Deb, 15 Jun 2004, col. 681). Under the Immigration and Asylum Act 1999 parties were already required to give notice of their marriage to a registrar in order to be granted permission to marry. However, the 2004 Act now prevented a registrar from accepting such notice where at least one of the parties was subject to immigration control, without certain further requirements also being fulfilled (s. 19). Any party subject to immigration control had to satisfy the registrar that he or she had entry clearance granted expressly for the purpose of marrying in the UK, written permission from the Secretary of State to marry or fell within a class of persons given such permission by the Secretary of State (s. 19(3)).

Practically, this meant that such persons had to obtain, at considerable cost, a Certificate of Approval to marry in the UK (ss. 19-25). Those without leave, with short-term leave or whose leave was about to expire were refused a certificate. In most cases, those refused had to leave the UK and re-apply from outside. Once again, marriages in the Churches of England and Wales were exempt.

It was not clear how necessary these new measures were. Certainly, the number of reported suspicious marriages was increasing. However, Wray argues that these were blanket measures which were based on immigration status rather than the genuineness or otherwise of the relationship, that further measures for detecting sham marriages were not necessary as registrars were already reporting any which seemed suspicious and the new measures did not close any previously undetected loopholes (Wray, 2011: 163-164). By the first half of 2004, when the Bill was under debate, 2,251 'suspicious' marriages had been reported by registrars under the s. 24 IAA 1999 duty, yet only 37 people were subsequently prosecuted for immigration fraud (HL Deb, 15 Jun 2004, col. 686). Indeed, Lord Avebury objected:

We acknowledge that there are sham marriages and that measures need to be taken against them, but we object to the Government's pernicious habit of introducing major amendments at the eleventh hour to deal with problems that could well have been foreseen at an earlier stage, allowing for proper consultation with the agencies concerned... I am sure that... a better solution could have been developed, avoiding the possibility of European Court of Human Rights breaches, and of interference with legitimate marriages (HL Deb, 15 Jun 2004, col. 688).

The Act caused great hardship for many and was seen as a discriminatory and unjust policy, which failed to properly distinguish between genuine and sham marriages. Consequently, the Act

was successfully challenged several times in the courts on human rights grounds<sup>23</sup>. However, the government did not heed these victories for some time and it was not until 2011 that the scheme was finally abandoned.<sup>24</sup> One possible motivation for the new Act, suggested in the Court of Appeal *Baiai* hearing (*SSHD v Baiai and others* [2007] EWCA Civ 478) at [13], was the ability to avoid article 8 claims under the Human Rights Act 1988 by preventing the formation of family life. We will now look at article 8 claims in more detail.

### Article 8 ECHR in the domestic courts

The Human Rights Act 1998 made enforceable the rights under the European Convention on Human Rights against public authorities in the UK. After the Human Rights Act was implemented in 2000, the judiciary became heavily involved in establishing the application of article 8 ECHR in domestic immigration cases, particularly the proportionality of government interference with immigrants' family life in the UK<sup>25</sup>.

One major area in which this began to happen was in challenging removal orders. The Immigration and Asylum Act 1999, s. 10 extended powers of removal to those who had overstayed their leave, breached a condition of their leave or obtained leave by deception<sup>26</sup>. After the 2002 ban on switching (HC 164), this power was often applied to married or co-habiting parties whose leave had expired. Previously, affected parties had only been able to rely on Home Office discretion and later certain policies relating to this.<sup>27</sup> With the advent of the Human Rights Act 1998 (and exclusively after the abolition of policy DP3/96) article 8 began to be used in case law to challenge removal orders or the refusal of re-entry to a removed party. Article 8 allowed parties to challenge these decisions using a more comprehensive argument than under the previous policies; respect for family life. In the case of *R (on the application of Razgar) v SSHD* [2004] UKHL 27, Lord Bingham established a five-stage test for the application of article 8 to removal cases, at [17]:

- (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
- (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

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<sup>23</sup> Notably in the case of *Baiai*, where the House of Lords (the predecessor of the Supreme Court) ruled against the scheme in 2008 (*R (On the application of Baiai and others) v SSHD* [2008] UKHL 53). It was also challenged in the European Court of Human Rights in the case of *O'Donoghue and others v The United Kingdom*, app. no. 34848/07 [2010]; (2011) 53 EHRR 1, which stated that the Certificate of Approval scheme did not assist in making a determination as to the genuineness of a marriage, was applied to all with insufficient leave to remain regardless of their intention towards the marriage and was prohibitively expensive.

<sup>24</sup> Under the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011.

<sup>25</sup> Article 8 prohibits interference by a public authority with an individual's respect for private and family life.

<sup>26</sup> Under the Immigration Act 1971, s. 33 and Sch. 2, ss. 8-11 power had been given to immigration officials to remove illegal immigrants and those refused entry from the UK. Removal was distinguished from deportation by the fact that deportees could not apply to re-enter until the deportation order was lifted or had elapsed, whereas those removed could re-apply immediately from outside to regularise their stay, or crucially to re-join a spouse.

<sup>27</sup> Previous policy had recommended that removal not be used where the parties were already married or in a relationship similar to marriage, or where the spouse had been resident in the UK for a long period or had children from a previous relationship in the UK, among other factors (DP2/93). A later policy was more restrictive (DP3/96).

- (3) If so, is such interference in accordance with the law?
- (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
- (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

Questions 1 to 4 are usually easily answered and cases tend to bear on the answer to question 5; proportionality. Relevant factors included the immigration status of the parties on marriage and the possibility of living elsewhere. It is well-established that article 8 does not give parties a right to choose their country of residence.

For some years even after the passing of the Human Rights Act 1998, the courts were hesitant to override decisions of the government in removal cases and were unsure of the extent to which article 8 should be permitted to be applied by the courts<sup>28</sup>. However, in 2005 in the case of *Huang and others v SSHD* [2005] EWCA Civ 105, Laws LJ (the same judge who had presided in *Mahmood*) held that it was for the courts to decide in *exceptional* cases whether the decision was correct on the grounds of proportionality. In 2007, this finding was upheld in the House of Lords, with the distinction that cases need not be exceptional for the court to make their own finding as to proportionality (*Huang (FC) v SSHD* [2007] UKHL 11).

Article 8 was also used to challenge the requirement to leave the country and reapply for admission as a spouse rather than switching in country<sup>29</sup>.

The House of Lords also criticised immigration control as ‘a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes’, reducing, Brown LJ argued, ‘the weight otherwise to be accorded to’ it (*EB Kososvo v SSHD* [2008] UKHL 41, at [16]). The decisions of the Home Office were shown at times to be acts of ‘bureaucratic inhumanity rather than a necessary discipline to preserve the integrity of immigration control’ (Wray, 2011: 200). In contrast, the appellate courts ‘self-policed’ the limits of their authority and by their judgments ‘softened the harsh edges of government policy’ (Wray, 2013: 860). Their decisions ‘more fully recognised migrants’ humanity’ (Wray, 2011: 200) and highlighted the importance of the role of the courts in applying article 8 to family reunification by recognizing the importance of applicants’ family ties and questioning the ‘claims of government’ which operated against them (Wray, 2013: 860).

The position of parties seeking to apply article 8 to their cases has moved on considerably since these early decisions. It is arguably far less optimistic today due to the government’s increasing restrictions and due to the lower courts’ diluting effect on some of the more generous earlier positive decisions of the appellate courts. It is now very rare, particularly after the 2012 and 2014 policy changes discussed below, that the rationale found in *Chikwamba* or *EB (Kosovo)*

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<sup>28</sup> See *R v SSHD ex parte Mahmood* [2000] EWCA Civ 315 and subsequent cases applying *Mahmood*.

<sup>29</sup> In the case of *Chikwamba v SSHD* [2008] UKHL 40, a failed asylum seeker, who had married in the UK, was required to return to Zimbabwe to reapply even though she had a young child and would be forced to make the difficult choice of taking the child with her to a volatile country or being separated from her daughter and husband for months. Scott LJ held that such Kafkaesque policies should not be allowed in the UK and that it was the role of the courts to prevent them from taking root (at [4]). It was further held that the application of article 8 meant that it would rarely be proportionate to require parties to leave and apply from abroad, especially where there were children involved (at [44]).

can be used to further a migrant's claim. To some degree the position will be unclear until the anticipated judgment of the Supreme Court in the joined cases *R (on the application of MM (Lebanon)) v SSHD and SS (Congo) and others v SSHD*<sup>30</sup>.

In 2012, the government reacted to the higher courts' reticence to follow a more hard-line approach to this issue by inserting new provisions in the Immigration Rules to indicate how the government wished article 8 to be interpreted (HC 194, 2012, paras 109-115). However, there was 'little indication' that these changes affected how the courts applied article 8 (see Wray, 2013: 857-8) and in 2014 Parliament enacted legislation which sought to more clearly limit the power of the courts to make their own decisions regarding the application of article 8 by codifying what the courts ought and ought not to take into consideration (Immigration Act 2014, s. 19). This will be considered in greater detail below.

### Raising the Minimum Age Requirements

Another way in which immigration regulation attempted to control spousal migration was by raising the minimum ages for sponsorship and entry of a spouse<sup>31</sup>. Each time, the argument was made that raising the minimum age would help prevent forced marriages, despite evidence to the contrary (see Migration and Law Network, Dec 2007; Southall Black Sisters, 2006, Samad and Eade, 2002.). This final measure increased the minimum age for international marriages above the age for marriages by two parties resident in the UK and as the Migration and Law Network commented in their response to the government proposal: 'If there are valid reasons to increase the minimum age for marriage, they apply to all marriages, not just international marriages' (Migration and Law Network, 2007).

In 2009, a case was brought to challenge the minimum age requirement of 21 years which demonstrated the discriminatory nature of the requirement<sup>32</sup>. The application was denied at first instance, where it was held that the minimum age requirement was a necessary provision aimed at preventing forced marriages. It was also held that any interference with the parties' article 8 rights was proportionate and in any case it was not unreasonable to expect the British wife to join her husband in Chile (*Quila and another v SSHD* [2009] EWHC 3189 (Admin)).

However, that decision was overturned at the Court of Appeal a year later, where it was held 'the rule cannot lawfully be applied to the present appellants or, by parity of reasoning, to others like them' ([2010] EWCA Civ 1482, at [4]). At this stage the case had been joined to another involving an arranged marriage however the court said they could find no reason to distinguish the two cases (at [80]). The Court of Appeal judgment was confirmed in the Supreme

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<sup>30</sup> For the Court of Appeal judgments see [2014] EWCA Civ 985 and [2015] EWCA Civ 387. These cases will seek to answer the question of whether certain requirements in the Immigration Rules, especially the minimum income requirement under the 2012 changes to the Immigration Rules (discussed below) are compatible with article 8 considerations. In both cases the lower court or tribunal found the requirements did breach the parties article 8 rights but these decisions were overturned by the Court of Appeal. The decision of the Supreme Court is currently awaited.

<sup>31</sup> In 1986 the minimum age for the entry of spouses had been set at 16 (HC 306) and in 1990, this had been extended to resident spouses as well (HC 251). In 2003, the minimum age for sponsorship was raised to 18 (HC 538) and the same for entry in 2004 (HC 164). The minimum age for both sponsorship and entry was raised again to 21 in 2008 (HC 1113).

<sup>32</sup> The case involved a couple who had married at ages 17 and 18 respectively shortly before the minimum age requirement was raised to 21 for both sponsors and applicants and consequently the applicant was refused permission to live in the UK with his British wife.

Court in 2011, with a dissenting judgment by Brown LJ. There, Wilson LJ held that the rule was an infringement of the parties' article 8 rights. He acknowledged that the rule was 'rationally connected to the objective of deterring forced marriages' yet held that the Secretary of State had failed to show that it 'strikes a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages. On any view it is a sledgehammer but she has not attempted to identify the size of the nut' ([2011] UKSC 45, at [58]). He went on to say that he could not see how the rule could be applied without infringing article 8 rights (at [59]).

The government eventually responded by reducing the minimum age requirement to 18 in November 2011 (HC 1622). The Minister for Immigration, Damian Green, stressed while announcing the change that '[t]here is no place in British society for the practice of forced marriage... That is why the Prime Minister has announced that the government will criminalise the breach of Forced Marriage Civil Protection Orders and that there will be a consultation on making forcing someone to marry an offence in its own right' (HC Deb, 7 Nov 2011, col. 7WS). The continuing emphasis on forced marriage as a rationale for stricter immigration regulation will be discussed in a later section.

### **Immigration Regulation 1997-2010**

So, what defined immigration regulation in the period 1997-2010? As we have seen, Labour's administration took a different principled approach to immigration and immigrants. The era was marked by a growing acceptance of racial difference where '[f]avour was now based less on race or skin colour and more on conformity to cultural and legal norms and, arguably, on considerations of social class' (Wray, 2011: 172). Whereas, in the beginning of the 20<sup>th</sup> Century, race and colour had provided clear demarcations of who belonged and should be permitted entry and residence, in the later part of the century, acceding to modern cultural norms provided a new rubric for these decisions.

Certain measures were introduced specifically to counter past abuses. An exemption from the required period of probationary leave was permitted in October 1998 for spouses who had suffered domestic violence before fulfilling the number of years of residence required to qualify for indefinite leave to remain (HC 395, para 289A-C, as amended by Cmnd 4065).<sup>33</sup> Spouses who had lived together overseas for a number of years were given immediate indefinite leave to remain and the requirements for unmarried partners to enter were relaxed (Concession Outside the Immigration Rules for Unmarried Partners, 13 Oct 1997). Unmarried and same-sex partners were included officially in the Immigration Rules from October 2000 (Cm 4851) and civil partners in December 2005 (HC 582) respectively. These measures, coupled with the disapproval of arranged, forced and polygamous marriages, suggest 'the emerging contours of an acceptable 'modern' applicant' (Wray, 2011: 159). 'Race and gender still featured, although more implicitly than before, but married status and a heterosexual relationship were no longer central, providing an implicit contrast with less 'modern' forms of family life such as the arranged marriage' (Wray, 2011: 172-173).

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<sup>33</sup> This had operated as a concession before inclusion in the Rules. It did not apply to fiancé(e)s or where the sponsor had limited leave to remain.

## D- 2010 – 2015 (The Coalition/Conservative Era)

### A New Climate

The Coalition Era brought a new administration and consequently a change in the political climate surrounding immigration law and policy. The new government, led by a Conservative Prime Minister and a new Home Secretary, Conservative MP Theresa May instigated a new program of immigration reforms, which led the UK into arguably the most restrictive season of immigration regulation to date. The Conservative Party election manifesto had included a pledge to reduce net migration to the ‘tens of thousands’ (The Conservative Party, 2010: 21). This was reiterated by the Home Secretary in her first speech on immigration policy in the role. She also emphasised the desire to attract more of the ‘brightest and best’ while reducing numbers overall (5 Nov 2010, Policy Exchange). Immediately some things began to change, however the biggest policy changes came in July 2012.

### Language requirement

In November 2010, a new language requirement was introduced<sup>34</sup>. The new provisions required all partners applying for entry clearance or leave to remain to prove that they had ‘A1’ English language skills (speaking and listening), according to the Common European Framework of Reference. This was to be proven by taking a test at an approved test centre at their own cost before their application to enter the UK would be approved (Cm 7944). There were three notable exceptions; those who came from a list of countries which the UK considered to be majority English-speaking countries, those who had completed a Bachelor’s Degree or equivalent in the English language and a third exception for those with ‘exceptional compassionate circumstances’ (Cm 7944, para 281(ii)). ‘Exceptional compassionate circumstances’ remains undefined but was taken to include those who were resident in countries without an approved test centre. This ground was removed as an automatic exception from the Guidance on 24 July 2014. Since then parties are expected to travel to another country to take the test unless they can show that it is not ‘practicable or reasonable’ for them to do so (Immigration Rules, Appendix FM 1.21, s. 7, November 2015).

The Home Secretary argued this measure was necessary to ‘help promote integration, remove cultural barriers and protect public services’ (Press Release, 9 Jun 2010). However, the measure was also heavily criticised as being racially discriminatory and for disproportionately affecting certain groups of people who would find it difficult to access or afford adequate language tuition or testing facilities in their own country (see Opinion by Matrix Chambers for Liberty, 21 September 2010). An Equality Impact Assessment carried out by the government before implementation of the policy acknowledged ‘the possibility that the reforms, or the way in which we operate them, might have unintended consequences in terms of disproportionate impact on particular groups’ but added ‘[w]e do consider that any impact is outweighed by the benefits of the policy’ (July 2009, p. 13).

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<sup>34</sup> There had been language requirements for those wishing to naturalise since November 2005 (British Nationality (General) (Amendment) Regulations 2005) and for those applying for indefinite leave to remain from April 2007 (HC 398). There was also a pre-entry language requirement for those seeking indefinite entry as a partner. However, under those rules, those not able to show ‘sufficient knowledge of the English language’ were still to be admitted for up to 27 months, during which time they were expected to gain ‘sufficient knowledge’ (HC 398, paras 281(i)(b)(ii); 287(a)(vi)).

Shortly after the adoption of the 2010 rules, the courts examined whether the language requirement was unlawful under articles 8 and 12 of ECHR and found that the new language requirement was a proportionate interference with article 8 rights<sup>35</sup>. However, the Supreme Court in 2015 found that although the rule itself was proportionate, there were insufficient exceptions to the rule in the Guidance<sup>36</sup>. A final decision on the guidance is therefore currently pending.

## The changes of July 2012

A consultation paper was released in July 2011, setting out the government's proposals to make several changes to the immigration system, especially in the area of family migration. The Home Secretary stated these were with the aim of 'stopping abuse, promoting integration and reducing the burden on the taxpayer' (Home Office, 2011: 3). On 9 July 2012, many of these proposals were introduced, bringing in some of the most dramatic changes to the Immigration Rules in the last century. Some of the most significant changes included the introduction of a minimum income requirement, an increased probationary period before indefinite leave could be granted, stricter tests of 'genuineness' regarding sham marriages and a new approach to determining article 8 cases (Cm 8423; HC 194).

### a) *Minimum income requirement*

Perhaps the most significant change was the introduction of a minimum income threshold. Before the 2012 changes, parties were required only to be able to maintain themselves and any dependants adequately without recourse to any additional public funds. The 2012 changes made it a requirement that every person wishing to sponsor a spouse must have a minimum income of at least £18,600. This rose to £22,400 if the incoming spouse was bringing a non-citizen child and a further £2,400 for each additional sponsored child. Only the income of the UK-based spouse could be taken into account; the prospective income of the incoming spouse could not be considered. Furthermore, savings could only be used to supplement a shortfall in minimum income where sponsors had over £16,000 in savings. Previously, the prospective earnings of the incoming spouse could be counted towards the maintenance requirement as could support from third parties, such as parents or other friends and relatives. However, these sources of income were now to be discounted.

The new measure came under intense opposition from migrant rights organisations, who observed that the amount, even for a couple without children was significantly higher than the income arising from full-time employment on the minimum wage. According to research by the Migration Observatory, 47 percent of employed British citizens in 2012 and 41 percent in 2015 (due to wage inflation over time) were ineligible to sponsor a spouse under the new rule (Migration Observatory, 2012 and 2016). Women were especially affected by the rule, as were younger people, non-white workers, those less educated and those living outside London where wages were generally lower. The measure was also criticised for discriminating against British citizens, whose spouses were under far more restrictive immigration conditions than EEA citizens' spouses, who were not subject to the Immigration Rules but could take advantage of the more accommodating position under EU law. Despite government claims that this measure seeks

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<sup>35</sup> *R (on the application of Chapti and others) v SSHD* [2011] EWHC 3370 (Admin); ([2013] EWCA Civ 322),

<sup>36</sup> *R (on the application of Bibi) and another v SSHD* [2015] UKSC 68. Rather unusually, the court requested further submissions from the parties as to whether a finding of incompatibility should be made where the fulfilment of the requirement would be impractical.

to reduce reliance on benefits and increase integration, the evidence reveals that it has in many cases had the opposite effect as without their partners many would-be sponsors are forced to receive benefits to cover the reduction of income and lack of childcare and feel alienated from British society as a result of the impact of the measure (Wray, Kofman, Grant and Peel, 2015).

In July 2013, a case was brought at the High Court to challenge the minimum income requirement, and particularly its impact on children who were separated from parents as a result. The High Court ruled that although the measure was proportionate, its application in most cases would not be. The Court of Appeal however, in 2014, found that the measure was lawful and questions of proportionality would have to be decided on a case-by-case basis. The Supreme Court heard the appeal in February 2016 and their judgment is currently pending<sup>37</sup>.

#### *b) Increased probationary period*

In July 2012 the probationary period before spouses could apply for indefinite leave to remain was also increased from two to five years<sup>38</sup>. The government argued this new measure would reduce the number of welfare claims or rather increase the time before people became eligible for welfare and would enable the removal of more spouses whose marriages broke down in the early years of marriage. The exception for victims of domestic violence still applied. In addition, the provision granting immediate settlement to spouses who had lived overseas together for four years or more was removed. This was originally included as an exception to the probationary period required of other married couples because it was understood that such a marriage was not likely to be fraudulent nor likely to break down within a short time of residence in the UK. The removal of the right was however argued on the basis of an entirely different rationale; that it was ‘unfair that a migrant partner who may never have been to the UK or made any tax or National Insurance contribution should get immediate settlement and full access to the welfare system’ (Home Office, 2012: 27).

#### *c) Changes to the interpretation of Article 8*

As mentioned previously, the government also chose this opportunity to insert new provisions in the Immigration Rules regarding how they wished article 8 to be interpreted in family migration cases (HC 194, 2012, paras 109-115). There were no substantial new provisions other than to say that in considering applications for family migration, the current Immigration Rules ‘reflect[] how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK...’ (HC 194, para 115, GEN 1.1). The Home Secretary Theresa May also shortly afterwards brought the issue to debate in Parliament putting forward a motion that Parliament agree that ‘the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be those contained in the Immigration Rules’ (HC Deb, 19 Jun 2012, col. 760). She argued:

a migrant seeking to come to the UK to join a partner must meet the criteria set out in the rules or a visa will be refused and there will be no separate article 8 claim. The immigration rules will no longer be a mere starting point, with leave granted outside the rules or appeals allowed under article 8 for those who do not meet them. The rules will instead take into account article 8, relevant case

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<sup>37</sup> *MM v SSHD and others* [2013] EWHC 1900 (Admin); ([2014] EWCA Civ 985). MM was a PhD student who earned less than the minimum income level. Two other couples’ cases were joined to this case where they also did not earn the minimum income level and wished to sponsor non-EEA partners.

<sup>38</sup> This had already been increased from one to two years in 2002 by the Nationality, Immigration and Asylum Act.

law and appropriate evidence and they will be proposed by the Executive and approved by the legislature (col. 763).

This move was quite clearly aimed at attempting to prevent the courts from taking their own view on the proportionality of any interference with article 8 rights in particular cases, as members of the Home Office repeatedly stated during the debate (cols. 760-824). The Minister of State for Immigration, Damien Green asserted; ‘We are having an “active debate in Parliament” on immigration rules’, as the court had requested in Huang ([2007] UKHL 11, at [17]). However, there were many who argued that such a motion could never reflect the full breadth and depth of the debate that was needed on the Immigration Rules in their totality. Perhaps unsurprisingly therefore, there was ‘little indication’ that these changes to the Immigration Rules affected how the courts continued to apply article 8 (see Wray, 2013: 857-8). It was not until Parliament made express changes in statute on the matter in 2014 that the courts were forced to change their approach (see Immigration Act 2014, s. 19).

### **The Immigration Act 2014**

The Immigration Act 2014 enacted several new schemes regarding persons without proper leave to remain in the UK. Importantly, it increased powers to investigate suspected sham marriages and the powers to remove migrants without proper leave to remain and their family members. It limited appeal rights to only those on refusal of a human rights claim (in the context of family migration). This meant that refusal of other applications, such as a removal decision, would not give rise to a right of appeal. The Act also limited the rights of irregular migrants to access various services, such as health, housing and banking. It also set out in statute specific ‘public interest’ considerations, which courts *must* have regard to when determining article 8 claims in removal and deportation cases.

In relation to sham marriages, the Act substituted the definition of a sham marriage under the Immigration and Asylum Act 1999, s. 24 to one where:

- (a) either, or both, of the parties to the marriage is not a relevant national,
- (b) there is no genuine relationship between the parties to the marriage, and
- (c) either, or both, of the parties to the marriage enter into the marriage for one or more of these purposes—
  - (i) avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules;
  - (ii) enabling a party to the marriage to obtain a right conferred by that law or those rules to reside in the United Kingdom (IA 2014, s. 55, in force from 1 March 2015).

Under the Act, the notice period which couples were required to give at a registry office prior to getting married was increased from 15 to 28 days. Also parties marrying a non-EEA citizen in the Churches of England and Wales were required to complete civil preliminaries first and give the same such notice (IA 2014, ss. 48-62). The Act also introduced a referral and investigation scheme where registrars were required to refer to the Secretary of State any marriages involving a non-EEA citizen without a valid immigration status in the UK or whose status was limited (IA 2014, s. 48-62). British and EEA citizens were exempt from the referral scheme, as were non-EEA citizens with a right of permanent residence in the UK under EU

regulations, those exempt from immigration control or with settled status or those with a valid marriage visitor or fiancé visa (IA 2014, s. 49). Where the Secretary of State decides to investigate the marriage, the notice period is extended to 70 days while the Home Office investigates.

The Home Office also issued instructions to Immigration officials, in Appendix FM 2.0 *Genuine and Subsisting Relationship*, which states ‘Consideration of whether a relationship is genuine and subsisting is not a checklist or tick-box exercise’ (para 3.0). However, it then goes on to list several factors which it states ‘will inform casework decisions’ (para 2.1). Factors which may indicate a non-genuine relationship include being unable to communicate in a shared language, being unable to recount accurate personal details about the other and how they met, having had very few or no guests at the wedding and having ‘a lack of appropriate contribution to the responsibilities of the marriage’ (para 3.2). Factors which may indicate a genuine relationship include four factors which would very rarely apply where the parties were in an arranged marriage or for any reason would choose not to co-habit until after marriage, such as a long-term relationship, a history of cohabitation, having children together and having shared financial responsibilities (para 3.1). There are only two factors which are more likely, but by no means guaranteed, to be present where certain cultural practices would usually preclude pre-marital cohabitation.

There are that the UK-based partner has visited the other in their home country and that they have made definite plans concerning the practicalities of living together in the UK (para 3.1).

As may be expected, enforcement operations taken where a Home Office investigation leads officers to believe that the marriage is or may be a sham are extremely disrupting to the lives of the couple and, ‘[f]or reasons that can only be imagined’, often occur at the wedding ceremony itself (Yeo, 2014c). A guidance document was released in August 2015 called *Criminal Investigation: Sham Marriage* which set out the Home Office approach to investigating sham marriages and the offences which parties could be charged with. Colin Yeo, a barrister and founder of *FreeMovement*, the popular immigration law blog noted with concern the lack in the document of anything ‘urging caution... with regards to false denunciations or on the need to respect the parties to genuine marriages or on the need for a high degree of proof before such allegations are made’ (Yeo, 2015b).

In relation to article 8 claims, the Act sought to more clearly control the power of the courts to make their own decisions regarding the application of article 8 by codifying what the courts ought and ought not to take into consideration in such cases. As stated above, section 19 amended the Nationality, Immigration and Asylum Act 2002 (NIAA, 2002) to include a new Part 5A which now states that where a court is considering an article 8 claim, they *must* have regard to certain ‘public interest’ considerations, which are laid out in statute. These considerations are formulated as statements of truth despite the fact that many of the assertions within them are highly contested. They include: that it is ‘in the interests of the economic well-being of the UK’ that people who seek to enter or remain in the UK are able to speak English, because such people are ‘less of a burden on taxpayers’ and ‘better able to integrate into society’ (NIAA 2002, s. 117B(2)) and that ‘little weight’ should be given to a private life, or a relationship established by a person while they are in the UK unlawfully or their immigration status is precarious (s. 117B(4)-(5)). Statements such as this, especially when embedded in the law, again reveal the assumption of abuse that policy-makers appear to have regarding many family migrants.

## Criminalisation of Forced Marriage

The Forced Marriage Unit had been created in 2005 to implement the government's forced marriage policy both in the UK and through British Consulates abroad. However, at that time, there was no criminal offence of forcing someone to be married or any similar offence. In 2011, the government conducted a consultation on forced marriage, with a view to determining whether it should be made a criminal offence (Gay, 2015: 1). Following the consultation it was announced in June 2012 that the government planned to make forced marriage a criminal offence (Prime Minister's Office, 2012). Forced marriage is seen not only as a human rights issue, but also at times an immigration issue. A British citizen may be forced to marry someone mainly to enable their admission to the UK and as one civil servant found, will then be 'forced to sponsor their overseas spouse' (Jenkinson, 2015), although Samad and Eade had previously found that '[t]he number of cases where immigration was the sole factor... was negligible' (Samad and Eade, 2002: 58-9).

In 2014, under Part 10 of the Anti-Social Behaviour, Crime and Policing Act, it was made a criminal offence to breach a Forced Marriage Protection Order (s. 120), which had been in place since November 2008 under the Forced Marriage (Civil Protection) Act 2007 and to take part in forcing someone to be married (ss. 121-2). However, the civil Forced Marriage Protection Orders still remained. However, despite the enactment of new powers concerning forced marriage, at the date of writing, there has only been one successful prosecution of a forced marriage offence (Unreported, 10 June 2015; Crown Prosecution Service, 2015). Evidential difficulties, some of which are 'victim-based', was cited as one of the most common reasons for discontinuation of a prosecution or investigation (Family Law Week, 2016). There is also a fear of causing cultural offence, as well as the victims' own reluctance to bring a prosecution against family members for reasons of fear, shame or loyalty. Victims also have the option to alternatively seek a civil remedy using the Forced Marriage Protection Orders, saving their relatives from criminal prosecution, which many find preferable for various reasons.

## The 'Surinder Singh' Route

Within the EU, EU law enjoys primacy over national laws. The UK does not generally challenge this principle, although there have been some exceptions in practice. In line with EU free movement rules, EU citizens have the right under EU law to move to another Member State to work, study or reside as a self-sufficient citizen. They also consequently have the right to return to their original country. Those returning to their original country are therefore considered still to be exercising their rights under EU law and can take advantage of the of the much more generous provisions in EU law regarding free movement and family members so that therules also apply to their spouses, even those who are not themselves EU nationals. Therefore, EEA partners of British or settled persons and non-EEA partners of EEA residents in the UK can be subject to much more open requirements for immigration to the UK than other spouses provided there has been an effective exercise of rights. In 1992, a case was brought at the Court of Justice of the European Union (CJEU) and the court held that a person exercising their right of free movement within the EU was entitled to utilise EU law rather than the law of their own Member State regarding bringing in their family members<sup>39</sup>. The judgment stated: 'A spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in another Member State' (at I-4296).

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<sup>39</sup> *R v IAT and Surinder Singh, ex parte SSHD*, [1992] ECR I-4265, C-370/90.

In many Member States, EU law is more accommodating than States' own immigration regulations, and consequently, this was a somewhat commonly used provision throughout Europe, particularly between countries with adjoining land borders. Following the 2012 changes to UK immigration law, there was even greater motivation for British nationals to use 'the Surinder Singh route' in order to have their family members join them in the UK. There was, on occasion, 'anecdotal evidence' of British citizens who exercised their right of free movement to another EU country for a very short period of time in order to trigger their eligibility for the Surinder Singh route (Gower, 2015: 11). In order to combat this, in December 2013 the government amended the regulations incorporating Directive 2004/38 into UK law to state that a person must have moved 'the centre of [their] life' to another EU country in order to qualify for the Surinder Singh route<sup>40</sup>. The legitimacy of such a change to the Directive is certainly questionable at the very least. A letter dated 7 August 2014 from the EU Commission states the apparent incompatibility of the change with EU law.<sup>41</sup>

However, since then a second case on this matter was brought at the CJEU, *O and B v The Netherlands*, C-456/12 in March 2014. The judgment made no mention of the case of *Surinder Singh*, yet it has been argued that it 'completely re-writes the legal basis of the earlier case and sets out important and binding new guidance' (Yeo, 2014). The court held that to be eligible to use EU law for one's non-EEA family members, residence in another Member State must be 'genuine residence'. This was defined to mean residence of at least 3 months, under Article 7 of the Directive, that visits only on weekends and holidays did not qualify, and that during such residence family life had to be 'created or strengthened' (paras. 51-59). Furthermore, they outlined that abuse of the route, where there is no genuine exercise of rights, was not permitted. However, they also stressed that the route applied not only to employed and self-employed workers, but to the self-sufficient and students as well. This the UK had consistently denied and in June 2013 the European Commission initiated infringement proceedings against the UK for their 'failure to transpose EU law... correctly' in this regard<sup>42</sup>. This dispute remains ongoing (EU Commission, 2012).

The judgment also stated clearly that the conditions for granting a derived right of residence on a British citizen's family members following such a move, 'should not, in principle, be more strict than those provided for by Directive 2004/38' (at para 50). Nonetheless, the UK government still maintains that the 'centre of life' test is compatible with this latest judgment. However, many consider it an ultra vires amendment to the Directive and believe it is likely to be found incompatible with the Directive by the CJEU in due course (Yeo, 2014; Wray and Hunter, 2014).

Upon a British exit from the EU, the Surinder Singh route will not necessarily be closed; the terms will depend on the deal reached with the EU and the model or degree of co-operation with the EU that the UK chooses to adopt. However, if, as currently seems likely, free movement is severely curtailed after Brexit, the route is likely to disappear.

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<sup>40</sup> Immigration (European Economic Area) (Amendment) (No.2) Regulations 2013, s. 5. This is taken to include the length of residence, the location and the degree of integration into that Member State.

<sup>41</sup> Letter dated 7 Aug 2014 from the EU Commission, <http://www.freemovement.org.uk/wp-content/uploads/2014/08/EU-Commission-letter-anon.pdf>.

<sup>42</sup> Ibid.

## EEA Residence Cards and the Immigration (EEA) Regulations 2015

Similarly, prior to April 2015, non-EEA spouses of UK citizens holding an EU residence card were still required by UK immigration guidance to apply for an EEA family permit to enter the UK. This was also in contravention with the Directive 2004/38. Theoretically, under UK law, non-EEA family members have the right to enter the UK to join or accompany their EU family members. However in practice it was found that carriers were interpreting the guidance given to them by the Home Office to mean that they should refuse to accept passengers without proof of their entitlement to enter the UK (Sibley, Fenelon and Mole, 2012: 20; Yeo; 2015). In March 2015, the CJEU held in *McCarthy and others v SSHD* C-202/13 that Member States were required to recognise an EU residence card without also demanding further visa requirements. In this case, the regulations transposing the Directive into UK law were amended to recognise the decision in the *McCarthy* judgment (Immigration (EEA) (Amendment) Regulations 2015).

## The Immigration Act 2016

The most recent major addition to immigration legislation is the Immigration Act 2016, which received Royal Assent on 12 May 2016. The Act makes several changes to immigration regulation in the UK. The main way in which the Act affects marriage migrants is through the removal of certain in-country appeal rights. The 2014 Immigration Act already limited the right of in-country appeals to those relating to a human rights or refugee claim. The 2016 Act removes the right to in-country appeals for any human rights claims (Immigration Act 2016, ss. 63-65 which amends the NIAA 2002, s. 94B). This importantly means that all appeals on the basis of article 8 will now only be able to be brought from outside the UK. The applicant has no right to be present at the appeal unless this will cause 'a breach of human rights' or 'a real risk of serious irreversible harm' (Nationality, Immigration and Asylum Act 2002, s. 94B, inserted by the Immigration Act 2014). This exception is presently defined very narrowly (see Home Office, 2016). It is well-known that out-of-country appeals seriously diminish the ability of the applicant to achieve a fair outcome as well as greatly disrupting family life in the process.

The Act also introduces some judicial oversight for immigration detention and limits the time permitted for detaining pregnant women to 72 hours in most cases (Sch. 10 and s. 60). It remains to be seen how these new provisions will affect marriage migrants.

## **2- Current Procedures for Family Reunification**

The changes in July 2012 and beyond remain in place with only minor changes and apply to applications by non-EEA partners today. As we have already discussed, the main distinction lies between the non-EEA and EEA partners of citizens or settled residents.

### **A – Non-EEA Partners**

For non-EEA partners, all applications made on or after 9 July 2012 must comply with Appendix FM of the Immigration Rules. This states that for entry clearance as a partner the applicant must apply from outside the UK and may not be admitted if the exclusion of the applicant is deemed conducive to the public good, including if the applicant has previous convictions in foreign countries of certain gravity (s. S-EC). If the applicant owes debts to the National Health Service in the UK of over £1000 or has failed to pay litigation costs to the Home Office they will also not be admitted. Otherwise the requirements for entry are much as has been discussed above: the sponsor must be a British citizen or settled person, both sponsor and spouse must be over 18, the relationship must be genuine and subsisting and they must intend to live together permanently in the UK. They must also satisfy the minimum income requirement and language requirement in place since July 2012 as discussed above. If the applicant meets these requirements they may be granted entry for up to 33 months, or if as a fiancé(e) for up to 6 months.

The following flowcharts illustrate a straightforward application process for spouse or partner applications whether applying from outside or within the UK (UK Visas and Immigration, 2015).

Figure 1 – Apply to Join Family Living Permanently in the UK

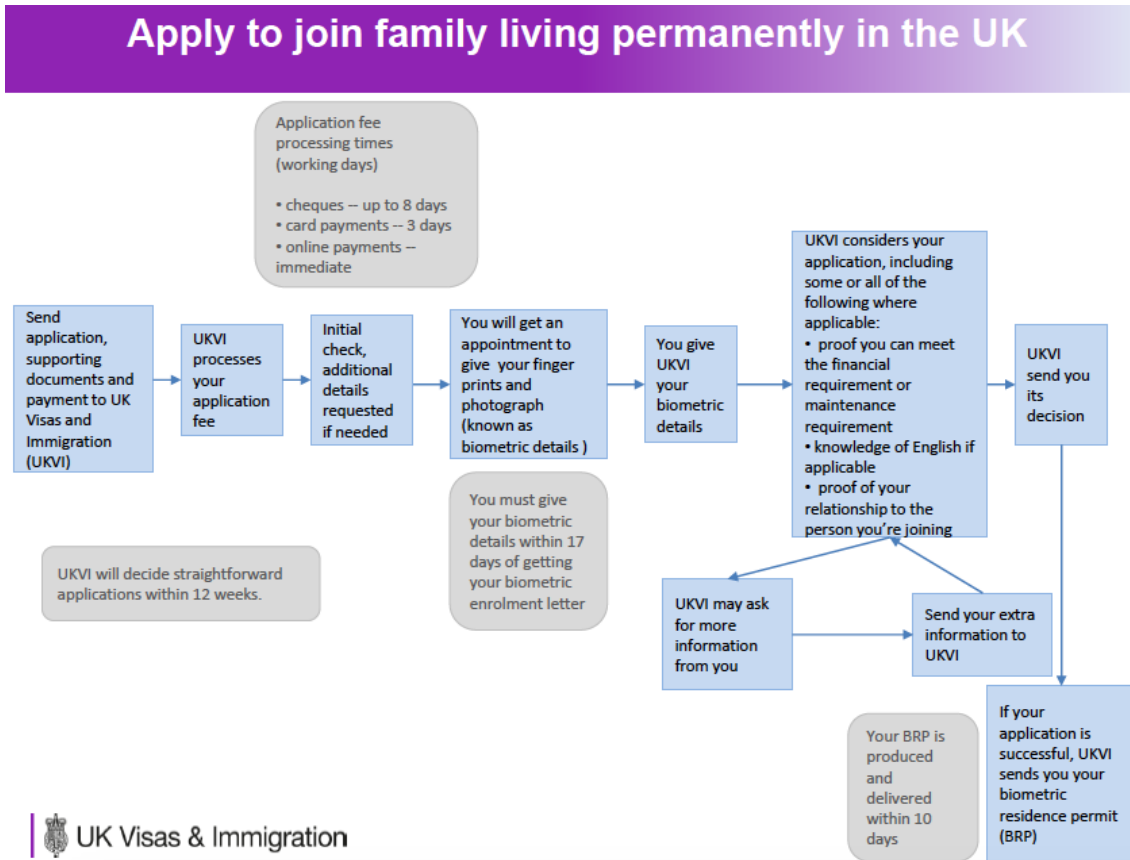
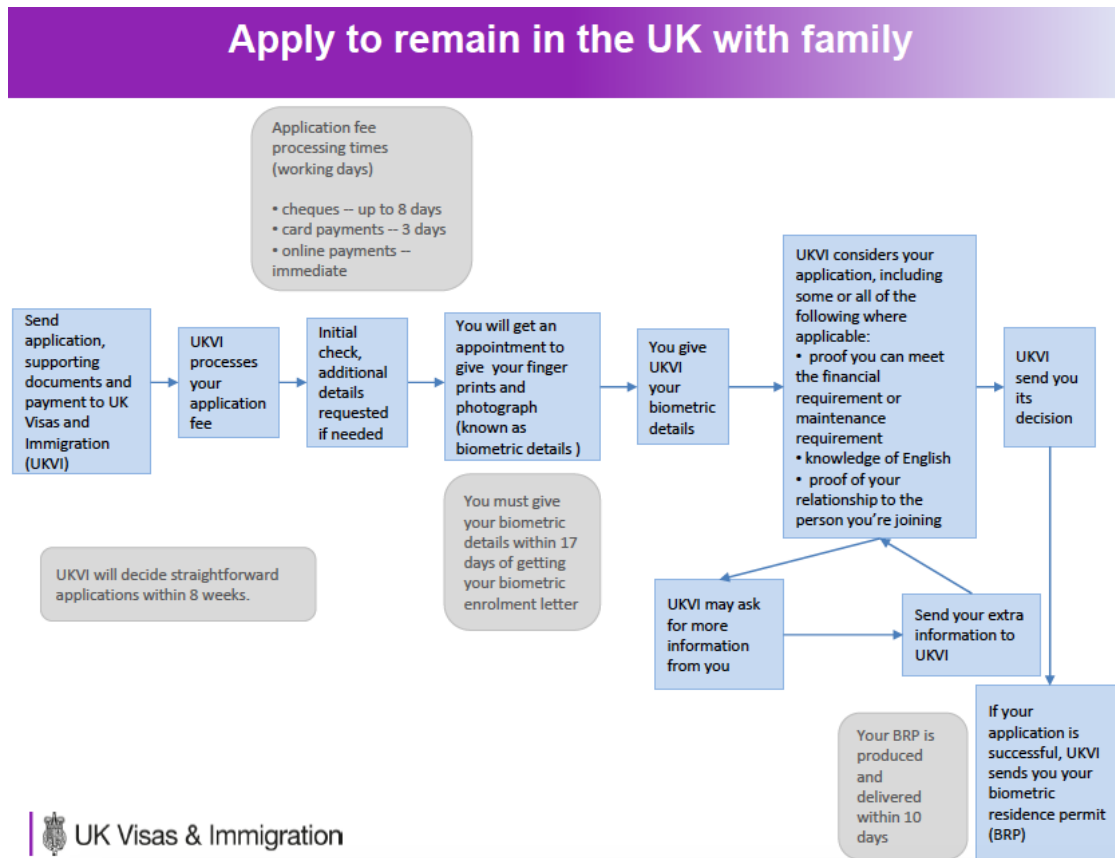


Figure 2 – Apply to Remain in the UK with Family



Once an application has been successful, leave will be granted for 2.5 years, at which point all the conditions must be met again (with only the advantage that the applicant's earnings can count towards meeting the income threshold). After five years an application may be made for indefinite leave to remain.

When the application for indefinite leave is made, the applicant and sponsor must both be in the UK and not deemed unsuitable on the same grounds as before. The applicant must have demonstrated 'sufficient knowledge' of English language and life in the UK by being from a list of English-speaking countries, possessing a Bachelor's degree or higher taught in English or having passed an English language test at a minimum level of B1 according to the CEFR. In order to satisfy the knowledge of life in the UK test, the applicant must have passed the Life in the UK test. There is an exception from both of these requirements where the applicant is over 65 or unable to satisfy them due to a mental or physical condition rendering the requirement unreasonable. The applicant is also able to satisfy the requirements where they have lived in the UK for at least 15 years and have passed a speaking and listening test at level A2 or ESOL level 2 and can provide evidence that the applicant has 'made efforts to learn English but does not yet have sufficient knowledge of the English language to pass a qualification at B1 CEFR' (Appendix KoLL, s. 3.2). If the applicant still cannot satisfy these two requirements they may be granted further limited leave to remain for up to 30 months. There is an exception where the applicant has a 'genuine and subsisting' parental relationship with a child who is under 18 and is a British citizen or who has lived in the UK for the preceding 7 years and where it would not be reasonable to expect the child to leave the UK. The exception for victims of domestic violence still applies.

Fees under the Immigration Rules are extremely high, and have consistently been among the very highest across Europe (Wray, Agoston and Hutton, 2014). From 18 March 2016, new fees were issued. The cost of a spousal visa is now £1,195 and £1,875 for a settlement application (Home Office Immigration and Nationality Charges, 2016). Since April 2015, applicants must also pay an Immigration Health Surcharge, which is currently £600 on application and a further £500 when renewing a visa. Fees for appeals are £80 without a hearing and £140 with a hearing (The First-Tier Tribunal (Immigration and Asylum Chamber) Fees Order, 2011, s. 3). However, parties' own legal costs may well exceed these amounts in addition. By way of an example, the typical costs involved for a partner joining a British citizen on the five-year route to settlement are set out in the following table (taken from Wray, Kofman, Grant and Peel, 2015: 73, updated by authors).

Table 1 – Costs on Application

<b>Application/process</b>	<b>When paid</b>	<b>Cost</b>
English language tuition and pre-entry test (A1 speaking and listening)	Before application	Variable
Medical examination plus TB test for some countries	Before application	Variable
Application	On application	£1,195
Health surcharge	On application	£600
Further leave to remain	2.5 years after entry	£811
Health surcharge	2.5 years after entry	£500
English language tuition and test (B1)	Before applying for indefinite leave to remain (after 5 years)	Variable
Life in the UK test	Before applying for indefinite leave to remain (after 5 years)	Each attempt costs £50; guide costs £12.99
Application for indefinite leave to remain	After five years	£1,875
<b>Total</b>	<b>After five years</b>	<b>£5,043.99 plus costs of language courses, language tests, legal fees, translation of documents and medical examinations</b>

## B - EEA Partners

Under Directive 2004/38, under article 2(2), Member States must allow the entry and residence of the spouses and registered partners (as well as other relatives) of Union citizens who are exercising their rights under the Directive to live, study or work in another Member State. Under art. 3(2), Member States of the EU must facilitate the entry and residence of the partners of EU citizens with whom they have 'a duly attested durable relationship'. By separate arrangement, the same rights apply to the partners of nationals of the European Economic Area (Norway, Iceland, Liechtenstein) and Switzerland. These obligations are incorporated into UK law by the Immigration (EEA) Regulations 2006 (as amended). It is clear that, compared to the position for partners of British or settled persons the position for partners of EU citizens in the UK is much

more accommodating. Spouses of British citizens who have exercised their rights under the Directive in another Member State must also be admitted to the UK, as provided in the cases of *Surinder Singh* and *O and B* discussed above.

It is not compulsory for applicants to have an EEA Family Permit (obtained on first application) or Residence Card (granted by another EEA state if the couple have already lived there), but in practice partners may be denied entry without proof of their entitlement to residence and it is therefore advisable that partners apply for one before attempting to enter the UK. Applicants must be the partner of an employed or self-employed person, or of a self-sufficient person or student. Those whose partners are not workers must also have comprehensive sickness insurance (other than their possible entitlement to NHS treatment). There are no other income requirements for EEA partners or their sponsors, no accommodation, language or age requirements. After five years residence under the Directive, the partner may obtain permanent residence.

EEA family permits, usually required on entry, are free and the fee for Residence and Permanent Residence Cards is £65. The contrast with the position under the Immigration Rules is evident and the government has started to examine applications made under the EU rules more closely, rejecting those where, in its view, the conditions have not been met (although this may be contested).

### 3- Current Issues

In recent years, discourse has focused on the effect of immigration on resources, national security concerns and the need to prevent abuse of the immigration system, among other issues. This has manifested in regulation such as the 2010 and 2012 changes, which increased requirements for spousal migrants and sponsors, greater public and political disquiet about the bearing of article 8 on ‘undeserving’ applicants and greater debate surrounding the merits or otherwise of a British exit from the EU. A few of the principal issues of contemporary debate are briefly examined below.

#### 2010 and 2012 Changes

One of the most controversial steps taken in immigration regulation in more recent times was undoubtedly the introduction of the minimum income requirement in 2012. This highly contested measure has been criticised by migrant rights groups on many grounds. In particular, it is criticised for separating families, being unfairly calculated, for disproportionately affecting some groups more than others and for failing to achieve its stated aim:

to ensure family migrants are supported at a reasonable level that ensures they do not become a burden on the taxpayer and allows sufficient participation in everyday life to facilitate integration (Home Office, 2011: 7-8).

The Migration Observatory have also criticised the current system for failing to take into account the incoming spouse’s future earnings and the support of third parties. They also argue that the way in which the income level was calculated raises problems as it does not account for each variable in the cost/benefit calculation of the sponsor to the state (Migration Observatory, 2016: 5-10). These, and other concerns, especially regarding the welfare of children who are separated from a parent due to the requirement (Wray et al, 2015) have plagued the income requirement since its introduction.

*MM v SSHD*, a long-standing case seeking to challenge the requirement, has been progressing through the courts since 2013. The High Court judgment in 2013 found that the application of the income requirement would breach art 8 ECHR (the right to respect for family life) in most cases ([2013] EWHC 1900 (Admin)). This was reversed by the Court of Appeal ([2014] EWCA Civ 985). During the year between the High Court and Court of Appeal decisions, around 4,000 cases which would have been refused under the income requirement were put on hold with no possibility of being resolved because the government did not want to implement the High Court judgment despite its binding force. It was not until July 2014, when the outcome of the decision in the Court of Appeal gave the government the answer they needed, that the stayed cases were refused outright (UK Visas and Immigration, 2014). The case was appealed to the Supreme Court and was heard in February 2016. Their judgment is currently pending and is eagerly anticipated, especially given the seriousness of the imposition of the requirement on families.

## Article 8

Another issue fiercely debated in recent times has been what some see as the grossly unjust effect of article 8 on the position of foreign criminals. Public opinion, often inaccurately, criticises the current system for being unable to remove terrorists, murderers and the like, all because of trivial article 8 concerns as seemingly demonstrated by the ‘Catgate’ scandal. In a speech to the Conservative Party on 4 October 2011, the Home Secretary Theresa May misleadingly stated that a man in the UK illegally was unable to be removed due to article 8 considerations because he owned a pet cat (*Anon (Bolivia) v SSHD* [2008] IA/14578/2008). In reality the case hinged on other considerations, but disingenuous statements such as this have only fuelled disquiet on this issue.

As detailed above, the government has consistently attempted to constrain what they see as the courts’ overly generous application of article 8. While Migration Watch, the right-wing immigration think tank, argued that in the drafting of the latest of such provisions in the 2014 Immigration Act ‘[c]are has been taken not to contradict in any way the rights conferred by Article 8’ (Mitchell, 2014), others maintain that the changes are an unusual (potential) interference in the independence of the courts and tread dangerously close to an attempt to displace the separation of powers (Yeo, 2014b). Yeo argues, ‘[i]t is only in immigration law that politicians have sought directly to influence the thinking of judges’ where ‘judges are instructed that there is less public interest in removing wealthy English speakers than poor Urdu speakers’ (Yeo, 2014b). Furthermore, this, along with the recent curtailing of the rights of the last remaining in-country appeals in the Immigration Acts 2014 and 2016, as detailed above, will further limit the ability of parties to receive full consideration of their claims.

## EU Free Movement and Brexit

Hostility, not only towards immigrants from Europe, but also against all immigrants, has grown with the expansion of the EU so much so that rhetoric regarding the rights of immigrants especially from newer Member States impacts upon all marriage migrants and played a big part in the Brexit debate. Much of the debate focussed on the potential to reduce immigration. Popular ridicule of the lunacy of courts protecting the human rights of terrorists and the false association between the European Convention on Human Rights and the European Union further clouded the debate making a clear, much-needed discussion less tenable.

While David Cameron secured a ‘new deal’ in February 2016 with the European Union ahead of the EU referendum, hoping to avoid a positive vote to leave the EU, the terms of this are now largely irrelevant. Following the vote for Brexit, the future of UK immigration law and policy post-Brexit remains extremely unclear. Prime Minister Theresa May hopes to trigger Article 50 of the TFEU in March 2017 and thus begin the negotiating process. She has repeatedly stated that her government wishes to both restrict the free movement of EU workers (and thus spouses) while maintaining access to the EU single market. However, this is something that EU leaders have so far been adamant cannot and may not be uncoupled.

The director of the Migration Observatory, Madeleine Sumption, among others, has argued that whether or not the UK becomes a member of the EEA after leaving the EU (as Iceland, Liechtenstein and Norway are) will be key. Members of the EEA have access to the EU single market and reciprocally have agreed to the free movement of people. Sumption believes that if the UK does not join the EEA, immigration would decrease after a Brexit whereas

membership of the EEA would likely not lead to a significant decrease, if any. If, on the other hand Britain negotiates a stand-alone deal with the EU, the terms could be different again.

Many Leave campaigners have argued for the implementation of an ‘Australian-style’ points based system, rewarding skills and expertise (and usually financial stability) with simpler immigration access to the country and operating across all nationalities, rather than prioritising EU citizens. It is likely that any move away from the current model would seek to redress the balance between the rights of UK sponsors and those of EU sponsors living in the UK. This would likely mean that all spousal migrants would be assessed under the same rules of entry and residence, rather than the current two-tier system and these are likely to resemble the more onerous domestic rules.

However, until a deal is worked out between the EU and the UK, the long-term effects on law and policy of spousal migration to the UK remain uncertain.



## ANNEX 1 - Summary of relevant regulation between 1900 and 1945

Legal Authorities	Summary	Analysis
<b>Aliens Act 1905</b>	<p>First structured attempt to control immigration.</p> <p>First immigration officers were appointed.</p> <p>Allowed for immigrants to be screened on entry.</p> <p>Immigrants deemed 'undesirable' could be refused entry.</p> <p>First definition of an undesirable immigrant: - those unable to support themselves and their dependants, those who were a 'lunatic or an idiot' or appeared likely to become a charge on the rates due to disease or infirmity, those who had been sentenced in a foreign court for certain crimes or had received an expulsion order.</p> <p>Exceptions for those considered refugees.</p> <p>Controls only applied to those travelling 'steerage' or third class and in ships over a certain size.</p>	<p>It 'confirmed in the public as well as the official mind the notion that the alien presence was problematic' (Cesarani, 1992: 32).</p> <p>Reference to dependants was one of the first legal references to family migration and in practice was one of the main reasons for refusal under the Act (Wray, 2006: 311).</p> <p>Served as a deterrent to some and provided a defence against more stringent anti-immigration measures (Wray, 2006: 319).</p> <p>Demonstrated that the state scrutinised relationships between partners and determined what made them 'undesirable' from an early stage.</p>
<b>Aliens Restriction Act 1914</b>	<p>Passed the day after war was declared, in just one day.</p> <p>Simple and short Act, without many provisions but allowing Orders in Council to be made without the need for further scrutiny by Parliament.</p> <p>Orders could be made to control the movement of aliens and require them to register with the police as well as powers of internment and deportation.</p> <p>All German males aged 17-55 were ordered to be interned in September 1914 under such an</p>	<p>Gave huge discretionary powers to the Home Secretary to make Orders.</p>

	Order. Many German women and children were forcibly repatriated.	
	British wives of German men who had lost their British citizenship upon marriage were also subject to the Aliens Restriction Orders until November 1917 when Home Office guidance allowed for exemptions to 'loyal' women where the controls caused 'hardship' (Home Office to Chief Constables, 15 Nov 1917, National Archives, HO 45/10882/343995/7).	
<b>British Nationality and Status of Aliens Act 1914</b>	Defined British subjects as anyone who was, or whose father was, born within His Majesty's dominions and allegiance, as well as a few other instances.  All others were considered aliens.  New rules for naturalisation and for women who married aliens and vice versa.	Aimed at restricting the arrival of aliens rather than British subjects.  Clarified British subject status.  Slightly improved women's nationality rights upon marriage to an alien.
<b>Status of Aliens (Amendment) Acts 1918 and 1922</b>	Increased the Home Secretary's powers to deport 'enemy' aliens and to deprive them of British citizenship where they had naturalised.	
<b>Aliens Restriction (Amendment) Act 1919 and its enabled Orders</b>	Amended to continue and extend the emergency powers used during the war. Issued further restrictions on aliens.  Tighter restrictions regarding the settlement of aliens lacking sufficient means to support themselves.	Extreme wartime measures used.
<b>Aliens Order 1920</b>	Immigration officers given greater power to deal with illegal immigrants and further powers of deportation.  Required alien seamen to register with the police and carry identification papers.	
<b>Special Restriction (Coloured Alien</b>		Affected many non-alien seamen who found it almost impossible to prove their British subject status.

**Seamen) Order  
1925**

**Defence  
(General)  
Regulations 1939**

Regulation 18B provided for the internment of 'hostile' persons, often people of German descent.

Extreme wartime measures were introduced.

Women were also interned, unlike in the First World War.

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## ANNEX 2 - Summary of relevant regulation between 1948 and 1976

Legal Authorities	Summary	Analysis
<b>British Nationality Act 1948</b>	<p>Clarified British subject status across the British Empire.</p> <p>Citizens of the UK and colonies (CUKCs) and citizens of independent Commonwealth countries were all classified as British subjects.</p> <p>Reinstated women's right to retain their British nationality upon marriage to an alien. Removed the right of alien women marrying British men to become British automatically.</p>	<p>In response to Canada's redefinition of its nationals as British subjects by virtue of grant by the Canadian government, Britain acted to reaffirm British subject status as conferred by allegiance to the crown.</p> <p>Critics later accused the Act of being too liberal to deal with the growing threat to social harmony perceived as being caused by immigration.</p>
<b>Commonwealth Immigrants Act 1962</b>	<p>British subjects, included CUKCs who had not been born in the UK or had their passport issued by the British government were subject to entry restrictions.</p> <p>All those subject to control had to be in possession of a work voucher, be the wife or child under 16 of a UK resident, be independently wealthy or a student.</p> <p>Increased the time necessary to qualify for citizenship from one year to five years, making it the same as required of alien immigrants.</p>	<p>First legislative attempt to control Commonwealth immigration, including CUKCs.</p> <p>Meant the same conditions of entry applied to some CUKCs as applied to nationals of independent Commonwealth countries (although citizens of 'white' Commonwealth countries received more favourable treatment via instructions to immigration officers).</p> <p>The gap between aliens and Commonwealth citizens (and some CUKCs) began to shrink.</p> <p>Veiled attempt to filter immigrants by race.</p> <p>Meant an end to the pattern of circular migration and family migration began in earnest.</p>
<b>Commonwealth Immigrants Act 1968</b>	<p>Passed in just three days to prevent admission of East African Asians who were CUKCs and were not subject to controls under CIA 1962 and who were now fleeing to the UK as a consequence of 'Africanisation' policies.</p>	<p>Clearly predicated by racial concerns. Very limited quota system also put in place for these CUKCs.</p>

	<p>Limited the right of entry to CUKCs who had been, or whose parent or grandparent had been born, adopted, registered or naturalised in the UK.</p> <p>Those who could no longer satisfy this ancestral link were no longer entitled to admittance.</p>	
<p><b>Immigration (Appeals) Act 1969</b></p>	<p>Established a comprehensive structure of appeals.</p> <p>Established a system of adjudicators and an Immigration Appeal Tribunal for those affected by the CIAs.</p> <p>Granted greater powers to deport immigrants resident in the UK for less than five years.</p> <p>All dependants who did not hold an entry certificate could be refused entry and had no right to be present at an appeal.</p>	<p>Therefore appeared to grant greater powers of appeal while at the same time making it harder to win an appeal as it was harder to be present at an appeal.</p>
<p><b>Immigration Act 1971</b></p>	<p>Repealed or consolidated many of the legislative changes of the earlier decades.</p> <p>Created a limited and mainly white category of ‘patrials’, who had the right of abode and everyone else, including CUKCs and aliens, who were subject to immigration restrictions.</p> <p>Dealt with both aliens and Commonwealth citizens together for the first time.</p> <p>Statutory rights of Commonwealth men already settled in the UK to be joined by their wives and children under 16 were preserved.</p> <p>All aliens, CUKCs and Commonwealth citizens and their dependants, other than patrials were to be dealt with under the Immigration Rules.</p>	<p>This Act remains the cornerstone of British immigration policy. The first Act to deal with aliens and Commonwealth citizens together.</p> <p>Main distinction therefore now lay between EEC and non-EEC citizens who had a ‘new and privileged position in British immigration law’ (Sachdeva, 1993: 27).</p> <p>Immigration rules were formalised and became the main way in which immigration was regulated. In some ways they were a step forwards in transparency and accountability but still much less so than if using legislation alone to regulate immigration.</p>

	The Secretary of State's instructions to immigration officers were formalised under the Act. Now to be called Immigration Rules and established as the main way in which immigration was to be regulated.	
<b>1974 Immigration Rule Changes</b>	<p>Ban on Commonwealth husbands and fiancés was lifted.</p> <p>Women could now sponsor Commonwealth men on the same basis as men could sponsor Commonwealth women.</p>	A step forwards in gender equality although many remained hostile to the idea of more foreign men coming to Britain and concerned that primary immigration would therefore never cease.
<b>Race Relations Acts 1965, 1968 and 1976</b>	<p>Racial tensions were common and a need to regulate against discrimination was seen as important.</p> <p>1965 Act – limited effect, mainly dealt with discrimination in public buildings.</p> <p>1976 Act – more far-reaching, dealt with discrimination in employment and housing.</p>	<p>Some have argued race relations legislation was merely to appease politicians unhappy with the racist tone produced by anti-non-white immigration legislation.</p> <p>Others have argued the need for racial harmony was used to justify more restrictive immigration policies.</p>

### ANNEX 3 - Summary of relevant regulation between 1977 and 1997

Legal Authorities	Summary	Analysis
<p><b>Primary Purpose Rule introduced 1977</b></p>	<p>Husbands and fiancés of all women in Britain could be refused entry where an immigration officer believed the proposed marriage would be ‘one of convenience entered into primarily to obtain admission here with no intention that the parties should live together permanently as husband and wife’ (HC 238, para 47).</p> <p>Based on the supposed connection between Commonwealth husbands/fiancés and fraud.</p> <p>Husbands of white women were often admitted through administrative measures.</p> <p>In 1979 – the tests for primary purpose and intention to live together were divided into separate requirements and a requirement that the parties had met was added.</p>	<p>Very controversial episode in immigration history.</p> <p>Arguably based on a desire to reduce the number of non-white men entering the country, especially through arranged marriages.</p> <p>Discriminatory in many ways, but especially in that it was mainly applied to female sponsors.</p> <p>Government statements suggested the rule was necessary to promote racial harmony and prevent women being forced into unwanted marriages but in fact it exacerbated racial hostilities and there was no evidence of a link between this measure and forced marriages.</p>

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<b>British Nationality Act 1981</b>	<p>Abolished the category of CUKCs and replaced it with a new hierarchy of citizens:</p> <p>British Citizens – with the right of abode in the UK. Included ‘patrials’ but no other Commonwealth citizens unless already resident in the UK.</p> <p>All other categories did not convey the right of abode in the UK.</p> <p>British Dependent Territories’ Citizens – CUKCs connected with existing dependencies.</p> <p>British Overseas Citizens – such as the East African Asians and many other ethnic minority groups living in other countries or people of British decent removed by more than two generations.</p> <p>British Subjects – those who did not have citizenship of any Commonwealth country.</p> <p>British Protected Persons – those who were citizens of British Protectorates.</p> <p>Also partially abolished the <i>ius soli</i> rights to citizenship. Now based more on parentage than place of birth.</p> <p>Removed the ability for wives of British citizens to register as British citizens, would instead have to naturalise.</p>	<p>Vastly restricted the right of abode in the UK to a select category of people.</p> <p>The partial abolition of <i>ius soli</i> rights to citizenship excluded the children of temporary or illegal migrants from citizenship. Meant that citizenship became more linked to race and ideas of integration.</p> <p>The Act removed the distinction between genders in parentage. Now both mothers and fathers could convey citizenship to their legitimate and illegitimate children.</p> <p>Was perceived as nationality legislation crafted to provide ‘<i>ad hoc</i> solutions to temporary political problems’ (Dummett and Nicol, 1990: 241).</p>
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<p><b>The Development of the Primary Purpose Rule 1980-1990</b></p>	<p>1980 – British citizen women born in the UK with a parent born in the UK could sponsor husbands.</p> <p>1983 – All British <i>citizen</i> women could sponsor husbands. But the burden of proof is shifted to the applicant. Settled women still cannot sponsor husbands.</p> <p>1985 – after the decision in <i>Abdulaziz, Cabales and Balkandali v UK</i> [1985] 7 EHRR 471, which found the rule was discriminatory towards women, the rule was applied equally to male sponsors as well and the burden of proof fell on the applicant. However, as most wives and children still had a statutory right to enter, they were primarily subject to administrative measures, such as hostile interviews, delays and medical examinations (including virginity testing for fiancées).</p> <p>Shifting of the burden of proof and the hostile administrative practices used as times meant that it became very difficult for parties to successfully prove their marriage was <i>not</i> primarily for immigration purposes.</p>	<p>The rule was attracting negative attention and was increasingly seen as discriminatory towards women and British citizens and later towards those in arranged marriages and especially non-white partners.</p> <p>‘It was assumed that immigrants were motivated overwhelmingly by an urgent desire to come to the UK... and every action and decision was viewed through that prism’ (Wray, 2011: 102).</p> <p>There was an evident unbalanced policy position focusing on the position of the applicant over the legitimate desires of the sponsor, despite the fact that the sponsor was a British citizen or settled resident with resulting rights.</p>
<p><b>Raising of the minimum age</b></p>	<p>1986 – spouses under 16 were refused entry</p> <p>1990 – both spouses had to be over 16 and only one wife in a polygamous marriage could enter.</p>	<p>Changes to the age limits were claimed to be for the protection of women but were also seen as a rejection of certain cultural practices and disproportionately affecting certain groups.</p>
<p><b>Immigration Act 1988</b></p>	<p>Removed the statutory protection to bring in their dependants that resident Commonwealth men had had under the Immigration Act 1971. Meant these families now had to satisfy the more stringent requirements under the Immigration Rules.</p> <p>Prevented the entry of a polygamous</p>	<p>Sought to ‘curb certain perceived abuses’ of immigration law and was seen as further ‘cultural interference’ (Sachdeva, 1993: 39).</p> <p>Described as as ‘another mean-minded, screw-tightening, loophole-closing concoction imbued with the implicit assumption that almost everybody who seeks to enter this</p>

	wife where there was already a wife in the UK.  Greatly reduced the ability to challenge deportation orders.	demiparadise of ours has some ulterior, sinister and very probably criminal motive and the sooner we get rid of him the better' (Lord Clement McNair, HL Deb, 4 Mar 1988, col. 389).  Roy Hattersley MP argued: 'It benefits virtually no one... Worst of all, it prejudices good community relations' (HC Deb, 16 Nov 1987, col. 789).
<b>Changes to Primary Purpose Rule 1992</b>	Following the <i>Surinder Singh</i> case and other domestic case law, unpublished guidance was issued to allow an exception to the primary purpose rule where the marriage was genuine and subsisting and the parties had been married for at least five years or had a child with the right of abode in the UK.	This had the result of imposing an unofficial waiting period of five years upon couples unless they had a British citizen child.
<b>Abolition of Primary Purpose Rule 1997</b>	The Labour Party had promised in their manifesto to abolish the rule.  It was abolished soon after the new government was elected.	It 'enabled the government to establish radical credentials on a matter of high symbolic importance which, however, would make only a relatively small difference to immigration totals' (Wray, 2011: 156).

## ANNEX 4 - Summary of relevant regulation between 1997 and 2010

Legal Authorities	Summary	Analysis
<b>Abolition of Primary Purpose Rule 1997</b>	<p>The Labour Party had promised in their manifesto to abolish the rule.</p> <p>It was abolished soon after the new government was elected.</p>	<p>It ‘enabled the government to establish radical credentials on a matter of high symbolic importance which, however, would make only a relatively small difference to immigration totals’ (Wray, 2011: 156).</p>
<b>Immigration and Asylum Act 1999</b>	<p>Defined a sham marriage as one entered into ‘for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules’ (s. 24(5)).</p> <p>Marriage registrars who had suspicions of a sham marriage were required to report the parties to the Home Office.</p> <p>Parties to a marriage had to personally attend a registry office to give at least 15 days notice of their intention to marry.</p> <p>Those marrying in the churches of England and Wales were exempt.</p>	<p>Some argued the Act marked a return to more repressive values (Stevens, 2001: 420):</p> <p>E.g. Diane Abbott MP: merely the ‘domestication of the primary purpose rule’ (Standing Committee, 20 Apr 1999).</p>
<b>Immigration Rule changes 2002</b>	<p>Switching in-country into the spousal category from another immigration category was banned (HC 164).</p>	<p>Considered necessary to help prevent sham marriages, despite a lack of evidence to support this claim.</p> <p>Those required to leave the country faced family separation and often personal danger or hardship, especially where they had originally entered the country to claim asylum.</p>
<b>Asylum and Immigration (Treatment of Claimants, etc.) Act 2004</b>	<p>Registrars were prevented from accepting notice of intention to marry where either party was subject to immigration control without further requirements also being fulfilled.</p> <p>Such parties had to satisfy the registrar that they had been granted</p>	<p>A rise in the number of reported suspicious marriages was used to justify this policy, although it was not clear whether this was the result of increased suspicious marriages, increased suspicion or increased reporting.</p> <p>Some argued that new measures</p>

	<p>entry clearance expressly for the purpose of marrying in the UK, or have written permission from the Secretary of State to marry or fall within a class of persons given such permission.</p> <p>Such persons practically had to obtain at great expense a Certificate of Approval to marry from the Secretary of State. Those without any or much remaining leave were refused a certificate.</p>	<p>went far beyond detecting sham marriages and the need for further measures was doubtful as suspicious marriages were already being reported (Wray, 2011: 163-4).</p> <p>Caused great hardship for many and was seen as discriminatory and unjust and failed to distinguish between genuine and sham marriages.</p>
<p><b>Abolition of the Certificate of Approval Scheme</b></p>	<p>The scheme under the Treatment of Claimants Act 2004 was successfully challenged in the courts several times in the cases of <i>Baijai</i>, reaching the House of Lords in 2008 ([2008] UKHL 53) and <i>O'Donoghue v UK</i> (2011) EHRR 1 in the ECtHR.</p> <p>Minor changes were made to decrease the cost of the certificates.</p> <p>The government did not respond until 2011 when the scheme was finally abandoned.</p>	<p>This Act did much to aggravate relations between immigrants and policy-makers and many believed it revealed the government to be unsympathetic to the needs of spousal migrants.</p>
<p><b>Article 8 ECHR Claims – Prohibits unlawful interference by a public authority with an individual's respect to private and family life.</b></p>	<p>After the Human Rights Act 1998 made the ECHR rights enforceable against public authorities in the UK, article 8 began to be relied upon in removal cases.</p> <p>The test established in <i>R (Razgar) v SSHD</i> [2004] UKHL 27 usually hinged on the proportionality of an interference with article 8 rights. Revelant factors included the immigration status of the parties and the possibility of living elsewhere together.</p> <p>Originally the courts were unsure of their remit in applying article 8 and hesitant to overturn decisions of the government in removal cases.</p>	<p>The decisions of the Home Office were shown at times to be acts of 'bureaucratic inhumanity rather than a necessary discipline to preserve the integrity of immigration control' (Wray, 2011: 200).</p> <p>The appellate courts 'self-policed' the limits of their authority and by their judgments 'softened the harsh edges of government policy' (Wray, 2013: 860).</p>

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*Huang and others v SSHD* [2007] UKHL 11 – case need not be exceptional for the court to make their own finding on proportionality (earlier the CA had decided they could overturn decisions in *exceptional cases* ([2005] EWCA Civ 105).

*Chikwamba v SSHD* [2008] UKHL 40 – it would rarely be proportionate to require parties to leave and apply from abroad, especially where there were children involved.

*EB (Kosovo) v SSHD* [2008] UKHL 41 – when delay is due to ‘a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes’, this may affect the proportionality of expulsion.

But the position has moved on since those cases and is arguably far less optimistic today. To some degree the position will be unclear until the judgment of the Supreme Court is released in the joined cases *R (MM (Lebanon)) v SSHD* and *SS (Congo) and others v SSHD*.

**Changes Relating to Article 8**

New provisions were inserted in the Immigration Rules in 2012 to indicate how the government wished article 8 to be interpreted (HC 194).

There was little indication these changes affected how the courts applied article 8.

In the Immigration Act 2014, s. 19 provisions were included in statute as to how the courts ought to apply article 8 in removal and deportation cases.

These changes, first in the Immigration Rules and then in statute show an attempt to control the judiciary and again reveal the assumption of abuse that policy-makers appear to have made regarding many immigrants.

**Changes to the Immigration Rules regarding the minimum age**

2003 – minimum age for sponsorship raised to 18 (HC 538).

Each time the argument was made that raising the minimum age would help prevent forced marriage, despite absence of supporting evidence.

	<p>2004 – minimum age for both sponsorship and entry raised to 18 (HC 164).</p> <p>2008 – minimum age for both raised to 21 (HC 1113).</p> <p>2009 – the case of <i>Quila and another v SSHD</i> was brought to challenge the minimum age requirement of 21 years. This was successfully challenged in the Court of Appeal and then the Supreme Court in 2011 ([2011] UKSC 45), which held that the rule failed to strike ‘a fair balance’ between the parties’ article 8 rights and the interest in preventing forced marriages.</p> <p>2011 – the government responded by reducing the minimum age requirement for both parties to 18.</p>	<p>Raising the minimum age to 21 was the most controversial, as this was higher than the age for marriage within the UK.</p> <p>Continuing emphasis on forced marriage as a rationale for stricter immigration regulation. Especially affects parties from the Indian subcontinent where earlier marriages are more consistent with cultural norms.</p>
<b>Race Relations (Amendment) Act 2000</b>	<p>In part a response to the murder of a black teenager and the subsequent failure of the police to properly investigate it.</p> <p>Amended the 1976 Act by prohibiting racial discrimination by all public authorities, including the Home Office and immigration authorities.</p> <p>However, immigration functions carried out by Ministers were exempt, as were legislative and judicial decisions.</p>	<p>In practice, decisions of the Home Secretary were ‘almost impossible’ to successfully challenge in relation to racial discrimination (Wray, 2011: 145).</p> <p>It has been argued that during this period race became a secondary issue; desirability of immigrants was based far more on economic and cultural factors.</p> <p>‘Nonetheless...many divisions were still perpetuated along ethnic, national or racial lines’ (Wray, 2011: 145).</p>
<b>Other Changes to the Immigration Rules</b>	<p>Partners suffering domestic violence, which resulted in the breakdown of their relationship before they qualified for indefinite leave to remain could be granted that earlier (HC 395, para 298A-C).</p> <p>Spouses who had lived together overseas for a number of years were given indefinite leave to remain earlier.</p>	<p>These changes suggest ‘the emerging contours of an acceptable ‘modern’ applicant’ (Wray, 2011: 159).</p> <p>Cultural norms in the UK were changing but did not encompass other cultural norms such as polygamy and child marriage.</p> <p>‘Race and gender still featured, although more implicitly than</p>

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The requirements for unmarried partners to enter were relaxed administratively in 1997 and were included officially in the immigration rules with the same rights as spouses in 2000 (Cm 4851).

Same-sex and civil partners were included in the immigration rules with the same rights in 2005 (HC 582).

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before, but married status and a heterosexual relationship were no longer central, providing an implicit contrast with less 'modern' forms of family life such as the arranged marriage' (Wray, 2011: 172-173).

## ANNEX 5 - Summary of relevant regulation between 2010 and 2015

Legal Authorities	Summary	Analysis
<p><b>Language requirement November 2010</b></p> <p><i>R (Chapti and Bibi) v SSHD</i> [2011] EWHC 3370 (Admin); ([2013] EWCA Civ 322; [2015] UKSC 68</p>	<p>All partners applying for entry clearance or leave to remain to pass test of A1 English skills before entry.</p> <p>Exception for those from English-speaking countries, with a degree in English or with ‘exceptional compassionate circumstances’ (Cm 7944).</p> <p>Originally those with no test centre were exempt but now expected to travel to another country to take the test unless not ‘practicable or reasonable’ (Appendix FM 1.21, s. 7).</p> <p>Challenged the language requirement. High Court and Court of Appeal found the requirement was proportionate.</p> <p>However, the Supreme Court held there were insufficient exceptions to the rule and requested further submissions from the parties. Case currently pending.</p>	<p>Home Secretary argued it was necessary to ‘help promote integration, remove cultural barriers and protect public services’.</p> <p>However, also criticised as being racially motivated and disproportionately affecting certain groups.</p>
<p><b>Minimum income requirement July 2012</b></p>	<p>Every person wishing to sponsor a spouse must have a minimum income of £18,600 or £22,400 with one sponsored child plus another £2,400 for each further sponsored child.</p> <p>Only the sponsor’s income is considered. Previously applicant’s prospective income and third party support could also be considered.</p>	<p>Arguably, one of the most significant changes in the last century.</p> <p>Home Secretary argued necessary for ‘stopping abuse, promoting integration and reducing the burden on the taxpayer’.</p> <p>First time a threshold had been set, previously were just required to maintain themselves and any dependants without recourse to public funds.</p> <p>The amount is more than a full-time employed worker on British minimum wage would earn.</p>

		Disproportionately affects women, young people and non-Londoners.
	Challenged the minimum income requirement.	A very important case which will reveal how the Supreme Court intends to deal with article 8 claims post Immigration Act 2014.
<b><i>MM v SSHD and others</i> [2013] EWHC 1900 (Admin); [2014] EWCA Civ 985</b>	High Court held the measure was proportionate but its application would often not be.  Court of Appeal held the proportionality would have to be decided on a case-by-case basis.  Supreme Court judgment pending.	
<b>Increased probationary period July 2012</b>	Probationary period increased from 2 to 5 years before parties can apply for indefinite leave to remain.  Exception for domestic violence victims remained.  Exception to grant immediate settlement to those who had lived together overseas for over four years was removed.	Government argued this would reduce the number of welfare claims and enable the removal of spouses whose marriage broke down before that period.
<b>Changes to the interpretation of Article 8 in the Immigration Rules July 2012</b>	Home Secretary inserted new provisions stating the Immigration Rules reflected how the balance ought to be struck in article 8 claims.	This move was clearly aimed at preventing the courts from making their own judgment on proportionality in article 8 cases.  Had limited effect on judges' application of article 8.
<b>The Immigration Act 2014</b>	Increased powers to investigate sham marriages. New sham marriage definition. Notice period for marriage increased from 15 to 28 days and could be increased to 70 days where the Home Office wished to carry out an investigation (ss. 48-62).  Increased investigatory powers regarding sham marriages.  In-country appeal rights limited to those on refusal of human rights	Greater emphasis on fraud and sham marriage. No indication of Home Office recognising the disruption and potential abuse involved in an enforcement operation.  No longer a right to appeal a removal decision in country.  Parliament seeking to control the courts. Reveal the assumption of abuse which many policy-makers have regarding marriage migrants.

	claims and refugee claims.	
	Codified list of what the courts <i>must</i> have regard to when applying article 8 (s. 19).	
<b>Anti-Social Behaviour, Crime and Policing Act 2014</b>	Forced marriage and breaching a Forced Marriage Protection Order made criminal offences (ss. 120-22).  Civil FMPOs remain.	Only one successful prosecution to date (unreported, 10 June 2015).  Perhaps due to evidential difficulties, fear of cultural offence, victim's own reluctance due to fear, shame or loyalty. Also the ability to choose civil remedies instead.
<b>The 'Surinder Singh' Route</b>  <i>R v IAT and Surinder Singh, ex parte SSHD, [1992] ECR I-4265, C-370/90; O and B v The Netherlands, C-456/12 (2014)</i>	CJEU had previously held (in 1992) that family members of EU citizens returning to their state of nationality after exercising their free movement rights were governed by EU law rather than the immigration laws of their partner's Member State.  The UK later amended the Immigration (EEA) Regulations 2013, s. 5 to say this would only apply where the sponsor had moved 'the centre of their life' to another Member State.  CJEU released a new judgment in 2014 stating use of 'Surinder Singh' route must be after 'genuine residence' in another Member State.  Defined as: Over 3 months, not including weekends and holidays only, not if route abused and during residence family life must be 'created or strengthened' (paras. 51-59).  Also held that it applied not just to workers but the self-sufficient and students, which the UK denied.	The legitimacy of the UK amendment to the Regulations transposing the Directive 2004/38 is certainly questionable if not illegal.  The EC had already commenced infringement proceedings in June 2013 under art. 258 TFEU for the narrow way in which the UK was applying EU law on free movement in the Immigration (EEA) Regulations 2013.  This clearly shows the UK's interpretation of the <i>Surinder Singh</i> principle is incorrect. However, the UK maintains its 'centre of life' test is compatible with the judgment.

**EEA Residence Cards and the Immigration (EEA) Regulations 2015**

EU law allows those with EEA Residence Cards to reside in another Member State with their family without further requirements being imposed. The UK denied this.

Another instance of potential contravention of Directive 2004/38, however in this case the UK accepted the CJEU's ruling.

***McCarthy and others v SSHD C-202/13***

In this case the CJEU confirmed the policy that EEA Residence Cards were sufficient. Subsequently the UK amended the Immigration (EEA) Regulations 2015 to reflect this.

**Immigration Act 2016**

New Immigration Act.

Removes all immigration appeals from this country, which makes it much harder for the applicant to achieve a fair outcome and greatly disrupts family life in the process.

Main provisions relevant to marriage migrants are the removal of in-country appeal rights for human rights appeals; the only in-country appeal remaining after the Immigration Act 2014.

The exception is currently defined very narrowly (Home Office, 2016).

Exception where this would cause 'a breach of human rights' or 'a real risk of serious irreversible harm' (clauses 31-33).

It remains to be seen how these new provisions will affect marriage migrants.

Also introduces some judicial oversight for immigration detention and limits detention of pregnant women to 72 hours in most cases (Sch. 10 and s. 60).



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