REIMAGINING LAW AND JUSTICE

MIGRATING BORDERS AND CITIZENSHIP IN LAW

SCALES, LOCALES AND PRACTICES

Devyani Prabhat

UNIVERSITY OF LONDON PRESS

Migrating Borders and Citizenship in Law

Reimagining Law and Justice

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For my mother, Gouri Sen

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Preface

'The border is a beautiful piece of paper folded carelessly in half.'[1]

– Alberto Ríos, *The Border: A Double Sonnet*

The partition of India into India and Pakistan in 1946 created new borders. Borders divided communities and families. Borders were random lines drawn on paper which simply crossed over people overnight.[2] My grandmother, Charu, was a young woman in Bangladesh (then East Pakistan), when she found herself living amid raging communal violence between Hindus and Muslims. With a recently deceased husband, and with five little children to support, she decided to move to Kolkata (then Calcutta) in India to seek safety. Resourceful and brave, she brought up her children without any time or space for considering her own needs.

Fostered at times by distant relations, and often separated from their other siblings, Charu's daughters made their way in the world. Her elder daughter, Bela, became an adored educator, a head teacher at a school that served a large community. Her younger daughter, Gouri, became renowned in her Kolkata neighbourhood for going on hunger strike for her university place which Charu could not afford to fund. Eventually winning scholarships to complete her education, Gouri became a successful writer, with numerous books on the English Romantic poets to her credit. Yet both Bela and Gouri carried the burden of the child migrant's journey throughout their lives. Border crossing was not just the dangerous train ride they took to come to India from the newly created East Pakistan (Bangladesh); it was also social exclusion as newly impoverished children, with accents and manners from a different land, to be lost only with time and with considerable embarrassment.

Charu is now no longer alive to see that her grandchildren, Gouri's daughters, also migrated. But, unlike hers, theirs have been travels of choice and privilege. I am Gouri's younger daughter, who lived and worked in New York City before moving to the UK where, in time, I moved quite seamlessly from long-term migrant to British citizen without losing wanderlust.

Over three generations, migration has been both compulsion and choice created and constrained by borders. From Charu to her granddaughters, there has been a passage from empire to nation state and then again to new world orders. Global geopolitics and legal orders may have changed, yet despite new borders, many issues about migration and migrants endure across time. Perhaps this is because these

are fundamental questions about the human condition: what it means to exist on one planet while having different life experiences, whether structural constraints of inequality and barriers of domination will prevail, or resistance and cooperation will restructure in favour of equality, and whether free movement (which is natural in the animal kingdom and arguably also prevalent for generations of human ancestors) can ever be truly free again.

Such questions have a philosophical, and even mystical aura, but can be grounded firmly in law, legal texts and stories of law through the sociology of law and its history. A book about borders, subjecthood and citizenship is not about comparing the past and the present; it is about unearthing how empire and subjecthood are still part of the beating heart of state and citizenship today. This can be done by looking at law as a technology in the arsenal of both bordering and governance, whether states, international groupings or empires.

As Charu's peripatetic younger granddaughter, a sociologist and a lawyer trained in both the metropole and the periphery of the erstwhile British Empire, writing this book is for me a call to action. After all, both my mother's professional achievements and her sense of loss from forced childhood migration and displacement are a legacy of my own childhood. This book is for her, my beloved mother, Gouri Sen, who passed away while I was writing it. I am so glad she had read its draft preface. I shall love you, my Ma, forever.

Notes

1. All lines from the poem are reproduced with kind permission of the poet.

2. Borders crossing people rather than just people crossing borders is a popular reconceptualisation of how borders affect lives. The phrase 'the borders crossed us' was used to explain the effects of border changes in the US–Mexico context and changes in lives of Indigenous people in the US brought about by White settlement in North America. See, for example, J. D. Cisneros (2013) *The Border Crossed Us: Rhetorics of Borders,Citizenship, and Latina/o* Identity (Tuscaloosa: University of Alabama Press) and Eileen M. Luna-Firebaugh, 'The Border Crossed Us: Border Crossing Issues of the Indigenous Peoples of the Americas', *Wicazo Sa Review* 17, no. 1, Sovereignty and Governance, I (Spring, 2002): 159–81.

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I gratefully acknowledge the research leave time given to me by the University of Bristol, UK, so that ideas thought of, and taught, over the past decade could finally gel and connect on paper. My colleagues have helped support with suggestions for improvement and thoughtful feedback as well as nourishing conversation and exchange of ideas. Professor Carl Stychin, the series editor, and the University of London publishing team (especially Sandy Dutczak, Emma Gallon, Ciara Aaron, Julie Willis, Katharine Nelson and Joseph Runnacles) have been encouraging and gentle with deadlines and comments. Avery Anapol has been my dream engaged reader who has provided critical comments to drafts and made me think about how I write as well as what I write.

When my mum passed away during the writing, nothing seemed worthwhile anymore. My family has been with me in those dark times and grieved with me. My dog Jazz has been there beside me, listening to me think aloud through my arguments, wagging encouragingly at times and simply falling asleep at others. Many late nights or early mornings he has given me deeply disapproving looks for working at ungodly hours but then ungrudgingly done those same hours with me. This is a co-production, Jazz, though I know you prefer treats!

List of abbreviations

ASEAN	Association of Southeast Asian Nations
BAME	Black, Asian and Minority Ethnic
BNA	British Nationality Act
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CUKC	Citizen of the United Kingdom and Colonies
DACA	Deferred Action for Childhood Arrivals Program (in the US)
DREAM	Development, Relief, and Education for Alien Minors (in the US)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
ICE	Immigration Customs Enforcement (in the US)
JCWI	Joint Council for the Welfare of Immigrants
MIR	Minimum Income Requirement
NRPF	No Recourse to Public Funds
PRCBC	Project for the Registration of Children as British Citizens
SIAC	Special Immigration Appeals Commission
TFEU	Treaty of the Functioning of the European Union
UASC	Unaccompanied Asylum-Seeking Child
UKBA	United Kingdom Border Agency
UNCRC	United Nations Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees

UNHRC United Nations Human Rights Commission

VPRS Vulnerable Persons Resettlement Scheme

Introduction

'The border is a rusted hinge that does not bend.'

– Alberto Ríos, *The Border: A Double Sonnet*

The past is a foreign country, where the gaze of a living person is merely that of a tourist piecing together bits of information which they cannot wholly comprehend. The stories of my courageous grandmother, Charu Sengupta, my inspiring aunt, Bela Sengupta, and my indomitable mother, Gouri Sen, inform my understanding of self and history. They were all women who undertook journeys of migration. Yet, I am no exception to the difficulties of knowing how my family history truly unfolded in the backdrop of empire, the turbulence of political uprisings, and the birth of new nations. The pieces of the jigsaw do not always fit neatly to present a full picture.

For me, and for others like me, born in decolonised worlds, the colonialism of empires past has become a fading memory. At most, it is black and white, speeded-up footage of Gandhi walking at breakneck speed. It is stories heard (or handed down) from grandparents of riots and of fleeing burning houses; stories told and heard, accompanied by shivers of horror but not quite viscerally experienced because of generational change. Yet it is also a live topic. It is conversations about the value and morality of the dominance of English-language education to the cost of local languages in the diverse Global South. It is the bringing-down of statues of imperialists (sometimes even drowned in rivers) in English cities looking to break free from the heritage of slavers and slavery. It is the return of city names around the world to pre-colonial names: the unfamiliar name of Kolkata for the familiar name of Calcutta. It is the realisation that Calcutta's sister city Odessa from Soviet times was in Ukraine all along. It is many such things . . .

Decolonisation is a present-day buzzword too; decolonising the curriculum, the university, the media, and so the list goes on, with many

conversations at cross-purposes. In the days of ubiquitous decolonisation, it is no longer simply about direct imperial state power, but also thinking critically about how power persists in societal structures. Race, class, gender and intersectionality make these links explicit. Continued discrimination and inequality which are persistent amongst citizens of minority ethnicities (in effect, second-class citizenship) are rampant. The effects of racism and poverty are evident in the empirical data of economic deprivation in the Global South. Such patterns are also replicated within the geographical borders of the Global North, where Black and Brown populations remain largely poorer than others, and inequities persist across generations. Politics plays out through the bodies and life experiences of ethnic minorities, who are technically not migrants but still not quite whole citizens. Such structural inequalities make the effective exercise of citizenship rights nearly impossible even for those who have the status, while others remain excluded from the entry point itself.

I introduce this book with these broad contexts as these inform and shape the work of this book and drive its queries. The book views borders and citizenship through the long lens of history, as history seems to cast long shadows as well as repeat itself (in a disturbingly clichéd manner). The book is titled *Migrating Borders and Citizenship in Law: Scales, Locales, Themes and Practices* because borders are not fixed and immutable, and the role of the law is critical in their creation and diffusion. Borders move beyond being just physical boundaries between states and exist as everyday measures and practices which impact the daily lives of people. While Ayelet Shachar (2020) has written about the shifting border and revealed some key changes in which borders have moved from territorial to legal or technological conceptions, Josue Cisneros (2013) has captured the emotive dynamism of borders as 'the border crossed us' while writing about Latina/o identity. He writes about the US–Mexico border and its changing contours during the Mexican–American War of 1846–8, and subsequent legal and social movements that have reconfigured Mexican identities and American citizenship for Latina/o communities throughout history. Cisneros's book title, *The Border Crossed Us*, is derived from the popular activist chant, 'We didn't cross the border; the border crossed us!'. This context is true of other parts of the world where borders were often brutally or thoughtlessly redrawn by colonial powers or simply more powerful nations. As mentioned in the epigraph to the preface, the poet Alberto Ríos has written, 'The border is a beautiful piece of paper folded carelessly in half'. It is the careless and reckless division of territories by colonial powers, often for their own gain, that has led to millions of people losing their families, homes and lives. Yet for individuals, borders

remain deeply inflexible. Thus, Ríos's words in the epigraph to this introduction also ring true: 'The border is a rusted hinge that does not bend'.

Through bordering and borders this book focusses on those practices which have legal force and consequences for the lives of people who seek to live in a political system. Inconveniences, hurdles, hardships and barriers may seek to thwart many a human endeavour and may indeed be called 'borders', in the sense of delimiting access or hampering progress. But in this book, borders are sites of operation of power which can create legal hardship for people solely because they are, or are presumed to be, from elsewhere. The power is such that it can limit access to resources, keep agendas off the table, introduce new requirements, introduce new actors for carrying out state functions, and normalise or legitimise structural positions and hierarchies. While citizenship can be formal (legal status only) or substantive (legal status plus a panoply of ingredients of belonging, including political belonging), being a non-citizen can be a fragile and fraught experience. Bordering includes physical borders and the more insidious legal practices of creating foreigners as well as disentitling people from rights. The force of borders and bordering practices is in creating legal and material consequences, backed by governmental power of enforcement.

The book examines a variety of collective polities such as empire, nation state and free-movement regions to trace how law and borders intersect. It finds that the global and the local merge and clash, while the confluence of race, class and gender surface and resurface in waves of bordering and re-bordering. This book does not solely focus on the inclusion and exclusion binary, or other binaries such as the migrant alien and the citizen, the regular migrant versus the irregular, or the worker versus the welfare dependent. Rather, it deals with more diffuse concepts such as the generation or maintenance of foreignness; the everyday nature of migration and its control rather than the exceptionality of such control; and the complicated nature of migration control, which goes beyond nation-centredness. It seeks to explain better the mechanisms and practices of migration control.

In this book I trace the role of law as embodied in legal instruments and practices for identifying the underlying rationales for border control, such as security (war, national security, and law and order) and maintenance of the peace; regulating the labour market (both recruiting foreigners and preventing access to domestic labour markets for foreigners); protecting welfare provisions and resources (especially after domestic provisions for welfare have been institutionalised and consolidated); maintaining public health (especially in light of new or unfamiliar diseases); and above all, maintaining a distinctive sense of 'us' (who belong to a place and

community) versus 'them' (who do not). The manner in which borders are reshaped through focal points of operation (what I call 'migrating borders') is linked to these underlying rationales and their reconfigurations. Historicising border control also reveals that borders and citizenship operate through practices and mechanisms formed through the confluence of empire, nation state, global and local authorities, work and long-term membership in society.

In Part 1 of the book, 'Scales and locales of migrating borders', the first three chapters on empire, national bordering in the United Kingdom, and bordering the European Union are the locational and temporal scalar chapters for assessing which frames of migration control resonate over history and which emerge at specific junctures. Sitting in a research Tardis (a time machine, for those who are not fans of *Doctor Who*), we jump through different locations, but strangely, for time travel, somewhat chronologically, through empire, nation-state bordering and continental bordering. In each of these scales work, family and emergencies (such as health or security) are the critical themes of migration control. So, in Part 2, on the 'Themes and practices of migrating borders', the three chapters take each theme in turn in analysing the role of law. Accessing different scales of analysis (the ordered and bordered workplace, the intimate yet publicly scrutinised family unit, and the emergencies that spread out in time and space, becoming mundane and everyday), enables examination of the role of law in each key theme of migration control and assessment of whether there are any patterns identifiable in how law is used, and why it is used in such a manner, in each scale and context.

Why the focus on the role of law? The central argument of the book is that law has multiple roles in bordering, including in the resistance of some border practices. Law has a critical role in bordering access to rights and membership at various locales and scales (from the macro to the micro, spatially, and across eras, temporally) through specific mechanisms. For example, law creates categories of people. Depending on the categories, some people have better access to resources through their legal status, while others do not. Law may remove the need for frontal violence through its internal logic of process and order, while it justifies a different kind of powerplay, one which can wholly integrate with democratic legislative and judicial institutions. Alternatively (or perhaps synergistically), law may be critical for dismantling unfairness and injustice that is carried out solely in the name of foreignness (real or fictitious). From the point of view of scholarship, by focussing on bordering and the role of law, the book attempts to encompass traditional territorial understandings of borders with the newer work on acts that create barriers to movement, residence, rights and belonging.

Law's role against the key developments in migration control can be tested over time. In the British context, these co-relate to a continuum of changing geopolitical scenarios which reconfigure legal statuses. At various key stages in the evolution of the concept of citizenship, existing legal statuses have transformed. For example, in the context of the British Empire, the UK's membership of the EU, and modern-day Britain we can identify: the transformation of subjecthood to citizenship (at a time of empire), the emergence of citizenship linked to the Commonwealth (after the end of empire), the national citizenship plus EU rights model of citizenship (after the emergence of the EU), and the conditional citizenship of present times (linked to modern national security). Each of these stages plays a significant role in influencing contemporary immigration and nationality laws. The British Empire and the UK present the opportunity to study the empire, nation-state and continental bordering but comparative data on other jurisdictions also assist with analysis of trends and developments over time.

The law facilitates bordering through creating justifications for preventing movement of people or for enforcing limits on their entry or stay. Apart from providing authority through status, the law provides specific mechanisms for the enforcement of bordering. Analysis of these mechanisms such as documentation, detention, deportation and deprivation (cancellation of citizenship), as well as denial of dignity, reveals that bordering does not simply target and categorise people – it has racialised performative aspects. The law supports these aspects through an exceptional legal framework which suspends rights, the privileging of immigration powers as nation-state and executive privileges, and its confining of discretion, with individuals holding power as well as the removal of scrutiny from decision-making by those in power. The chapters of the book will illustrate these aspects of the role of law while highlighting how commonplace, unexceptional and mundane these are at the service of power and the powerful.

The book draws on primary and secondary material regarding several key events in law which have changed the migration legal landscape in recent times. It assesses statutory instruments, international conventions and case law, as well as accounts from the press on key events of migration control. It presents the connections between immigration and nationality as well as asylum through the lens of work and access to work (or benefits); family and blood-links; conduct; and race, class and gender. Greater economic productivity generally links up to longer-term secure status (including citizenship) whereas low-end work results only in short-term precarious status or becoming undocumented labour. Family connections and blood-links matter, but operate through the privileging of certain race, class and gender attributes. Conduct, as exemplified

in national security laws, has become a means of stratification even between citizens. Immigration control has extended to citizenship through national security laws, but instead of being exceptional, such control is normalised and consistent with past practices. Immigration control has become all-pervasive by involving the entire resident population, through legal duties to check and report on status at access points to resources such as housing, education and health. It is this normalisation that makes large-scale precarity for migrants, and even citizens, possible.

To develop the focus on migrating borders and the role of law, in the first chapter of this book the focus is on empire, as the transfer of wealth from colonies to the centre continues to influence current migration patterns. Who migrated during times of empire could reveal a lot about the framing of migration control at the time and whether such frames recur over time. The role of the law in extending jurisdiction of colonising nations, and justifying as well as maintaining their presence in colonised ones, is also intimately connected with migration and will form a part of this chapter. In Chapter 2 we move from colonial hostilities to the hostile environment for migration in the UK which is built on succeeding build-ups of restrictions on migration from erstwhile colonies, a sort of reverse decolonisation in the metropole of erstwhile empire. Perhaps the days of subjecthood are not just black and white but are still here in the lived moment of technicolour, multisensory, contemporary citizenship. Having covered empire and nation-state bordering, in Chapter 3 I turn to continental bordering with my gaze on the EU and the UK. This is an area fraught with tensions of human rights, citizenship rights and labour rights.

The first three chapters constitute Part 1, and because of their scalar approach to migration control these reveal the key frames of migration control and the practices which bring them to life. In Part 2 on 'Themes and practices', Chapter 4 on the workplace is on the first key frame of labour control in migration. Controlling who is actually in the workplace and who is sent out from it or kept invisible from it is a form of locational or microspatial bordering, so it reveals both long-term and emerging forms of bordering practices. Chapter 5 on the family is on the second key theme of controlling demographic characteristics. Controlling family migration and associated reproduction determines the future citizenry so it includes key practices of migration control. Chapter 6 focusses on the third key frame of migration control which is on emergency bordering (health and security). The recent Covid-19 global pandemic and post-9/11 security-themed bordering is an amalgamation of global and local bordering. The rich pickings of new practices (and those which persist from the past) in this chapter offer an opportunity to test how the most vulnerable are affected in times of crisis.

The broad sweep of the book necessarily means it picks and chooses, mindfully and strategically, which spatial and temporal scales to focus on. But no matter where it lands, it is a journey of following the displaced and the dispossessed. Why, and how, do they not gain entry to places where they can access safety or opportunities to better their lives, and if sometimes they do, how is that achieved? Why, and how, can people obtain both political and geographical belonging? And why, or how, does it remain so remarkably ethnicised globally? While it is not the place of an introduction to reveal the findings of the book, it will not be revealing much at this stage to say that the book finds that the rules of the game often change to prevent redistribution of global wealth in a manner commensurate with human movement and endeavours. Those displaced are the most adversely affected.

Migration is an epic story about the agency of human beings and their struggles against entrapment in structural inequalities. The narrative of 'floods' of people seeking to take over richer nations has a dissonant tone which distorts this story. Yet, demonising migration and migrants is now one of the most popular political ploys to garner votes in democratic nations. Understanding how this dehumanising narrative about migrants emerges and how it is politicised is critical for building a fairer and more just world. Assessing the role of the law in this is a project that is essential for challenging its misuse and releasing its potential for all of humanity rather than the powerful few.

As scholars, we ordinarily produce reasoned legal commentaries to each new development of powerplay against displaced individuals. We hide the emotions that are natural when seeing human beings fleeing war or persecution or struggling to save their children from drowning. Yet these emotions are of human connection. We can all understand how survival as an end goal can dehumanise people. So, even as we comment as legal scholars on the complicated provisions of law allowing detention, deportation or simply barring entry or penalising those who seek to save people from drowning in the oceans, we need to express sorrow, rage, empathy and understanding as well as hope. We should not just react but also seek to understand why and how we stand at the abyss that we do today. For if we stood in this very spot at the bottom in the past and emerged out of the darkness, perhaps we can rise once again as one human race with law and justice by our side. Although much remains to be done, community activism and legal challenges have prevented many unfair detentions and deportations. Law need not always be in the hands of the mighty. It is with this aspiration that the chapters unpack how bordering operates over time and space.

Part I

SCALES AND LOCALES OF MIGRATING BORDERS

Chapter 1

Bordering empire

'The border is where flint first met steel, starting a century of fires.'

– Alberto Ríos, *The Border: A Double Sonnet*

Introduction: bordering empire – migrating borders past and present

Modern-day bordering practices have their origins in past practices linked to colonial powers over people and their movement. Without the historical context of empires and power inequalities in the past, it is easy to think of migration as an aberration and as a modern-day challenge for rich countries that are increasingly unwilling to welcome people from less wealthy parts of the world. The persistence of the past in contemporary practices, mechanisms and institutions is palpable, and even with a quick examination it can become apparent that while immigration in contemporary times is mostly about nation-state control over who enters and who exits national borders, bordering practices pre-date the nation state. Drawing from Valverde's work on scale (both temporal and spatial) it is possible to ask the large questions about migration and borders which may not have been apparent in those spaces and times but now reveal patterns of movement and expropriation (Valverde 2015). By tracing the long arc of human movement prior to modern-day borders, the connections between colonial arrangements in empires and the creation of conditions that lead to migration and its control in today's world become visible. The heroic stories of many migrants who battled injustice in order to make new lives and contribute to their new societies also come to light under this scrutiny. To this effect, this book starts its analysis

from colonial arrangements which for centuries controlled migration for the economic benefit of colonising nations and forced human movement as well as constrained it.

An attempt to historicise is not easy. Often there is a collective amnesia in former colonial states about past atrocities carried out in colonised territories. What was considered ordinary for colonial states is now excused as having been 'a long time ago'. Even those people and institutions tasked with remembering the past fail to look too closely at some of these issues which have lasting consequences. For instance, Anderson (2021) writes how museums in the modern UK have no consistent approach to memorialising the impact of the British Empire, including its role in enslaving people. While the Black Lives Matter movement has been a catalyst for museums worldwide to change their practices, there has not been similar soul-searching across museums in the United Kingdom. There are a few exceptions, with Welsh museums notably stepping up to examine historical legacies of slavery. Yet all over England, Wales, Scotland and even Ireland (which was itself colonised), merchants, traders, shipowners and landowners have engaged in the activities of empire, profiting from the slave trade and other forms of colonial expropriation, and have generated enduring structural inequalities. Anderson asks of museums and cultural institutions, 'As institutions of public memory, are we willing to publicly acknowledge the historical crimes committed by the British empire, from which our nations' economies still benefit? Will we honour the promises many made last year to work to remove the structural inequalities minority groups face in museums?'

The ethical question raised by Anderson for museums is also relevant for legal scholars who examine how law operates to facilitate or deconstruct bordering practices. How do we approach nation-state borders in modern times when bordering practices precede nation-state sovereignty, and perhaps even the birth of democratic societies? How do we capture the inequities of colonial practices which have impoverished millions around the world and now, in new forms, obstruct their ability to move and search for better life conditions?

The role of empires

Throughout human history, regions and regional groupings under various forms of political divisions have tried to acquire and accumulate wealth for themselves through changing modes of economic production and trade while competing with others and protecting their own means of acquisition. One such mode of political operation has been through

empires, where the central power has controlled far-flung territories. During these times, different empires were often in competition with each other to gain competitive advantages in accessing resources of the regions they controlled (including access to labour as and when needed) and transferring wealth from colonies to the centre, and over time they created developmental advantages that continue into the modern day in terms of who industrialised first and became developed economies. Colonies mostly lagged behind, and owing to centuries of disadvantage, they remain part of the poorer areas of the globe post-decolonisation. Former colonies are the very same places from where economic migration is now selectively permitted.

Modern nation states are built on core shared values (even if imagined ones rather than those empirically established) and on some links to linguistic, ethnic or religious similarities. Sometimes there are complications regarding how a multiplicity of identities could be incorporated into a single, national identity. This was not always the case. Europe had been ravaged in the early seventeenth century by conflict between the Holy Roman Empire and states such as France and Sweden and their allies until the negotiations that led to the Peace of Westphalia, through treaties signed in 1648 (referred to collectively as the Peace or Treaty of Westphalia). The Peace of Westphalia recognised the full territorial sovereignty of the member states of the empire. They were empowered to draw up treaties with one another and with foreign powers. By this and other changes the princes of the empire became absolute sovereigns in their own dominions. Thus, the Westphalian treaty initiated the process of nationality coinciding with territory, and the principle of sovereignty over territory for nation states. Prior to this, empires had different practices of control. Some were not even considered empires or perceived as colonial centres because they could raise moral authority for their rule over different regions. Such claims could be ethnic and cultural similarities or developmental assistance – reasons often proffered by Moscow, for instance, for its control over the vast reaches of the Soviet Empire. Constituent regions of the Soviet Union may not have viewed themselves as colonies (until quite recently), even while scholars and reporters outside of these regions analysed them as the periphery of the erstwhile Soviet Empire for decades. Such dissonances and complexities make the study of empires challenging but also demonstrate the powerful role of law in the political processes of territory gain and administration.

Empires did not wholly pre-date nation states; at times they simply coexisted, or were the result of different states losing sovereignty. Empires straddled remote regions, and the locales of bordering contained populations of different races and ethnicities while retaining a power core.

Colonial authorities were not just engaged in displacing local people in positions of power worldwide, but were also fighting each other to gain control of the most lucrative regions of the world. They were to strategise flexibly and grapple with diverse situations while expanding territory and bringing more economically favourable opportunities within their grasp.

At the point of decline, empires in the past had created nation states, often with little insight of, or consideration for, the actual preferences of the local people they were governing. For example, after the World Wars of the twentieth century, re-alignment of global nation states took place and new countries emerged from decolonisation in many parts of Asia and Africa. European colonial powers drew up Africa's borders amongst themselves during the Berlin Conference (1884–5) with no consultation with the people they had colonised. In Central Asia, and in Eastern and Central Europe, Soviet vassal states continued for a long time afterwards as part of the Soviet Union. It is thus not surprising that the more recent literature on decolonisation and empires comes from the Central and Eastern European nations and their separation from the Soviet Union as well as renewed attempts by Russia to bring them back to the fold through invasions (for instance, Georgia, Chechnya, and Crimea and Donbas in Ukraine) (Krpan 2022).

In the 1940s to 1970s, new borders in Asia and Africa and other colonised parts of the world were created through brutal violence or generated legacies of violence which have lasted to the present day in many instances (for example: India–Pakistan, Israel–Palestine, UK–Ireland (over Northern Ireland), Eritrea–Ethiopia). Yet it is during this period of continued turmoil after the two World Wars that there was also the emergence of a supervening human rights framework which aimed to bring about some universal standards of living and being for all human beings irrespective of their origins or nation-state citizenship. Human rights standards being adopted globally indicated a new consideration of the rights of people across and within national borders.

As empires straddled vast territories, heterogeneity of values and beliefs was integral to the experience of empires even if some of these preferred or imposed homogeneity with dominant religious, linguistic and other cultural values emanating from the centre. While travel was difficult because of a lack of cheap and reliable mass transport, borders were not just potentially between regions. They were also about the natural boundaries of power and wealth which sought to preserve access over colonial resources for the metropole (at the cost of the colonies) or which served elites from colonised lands well. Elites could (mostly) travel freely to forge new connections and acquire new advantages. Later this free (yet constrained) movement of populations created new challenges for nation states.

This panoramic view of human history and politics reveals a changing yet constant view of migration and migration control in tumultuous political landscapes. Understanding empires, and the many roles of law in bordering, provides an insight into why nation states continue to retain almost unbounded discretion on who can enter, who can reside and work and bring their families, how people can naturalise or otherwise gain citizenship and hold multiple nationalities, and who can be expelled. While these processes are supported and facilitated by legal provisions, national sovereignty and democratic legitimacy (the will of the people of a nation), they provide the justification for regulations that create tremendous hardship for those who are on the outside of borders and bordering practices and who previously were forcibly part of the territory and within the sphere of the force of empires. Ironically, the very same expectations of national sovereignty and democratic will, which are now treated as a basis for erecting borders, were disapplied and suppressed for colonised peoples in the past in their own lands.

Yet not all empires were formed in the same manner or operated similarly. Some colonised contiguous lands while others, like Britain (being an island nation), competed for expansion further afield and on different continents. The manner of formation influenced operations. In general, empires of contiguous or nearby lands had more direct means of enforcement and focussed more on assimilation and direct control. Others who controlled territory located at distance did so often out of necessity as European powers competed with each other for land. Britain, with its island geography, strength in ship building and industry, and proficiency in naval operations for defence, spread its wings (or rather sails) further than most others.

The colonisers who went further afield were more likely to use presumptive legal rules (legal fictions which may not be true but are allowed to operate widely) and mechanisms (such as trading companies and the guarantees of subjecthood). Such colonies had more local participation in the enforcement of colonial authority which meant there were means of accommodating variations and generating consent to foreign rule often through the use of law. It would also be resource-intensive to create homogenised values over vastly disparate regions. Thus, empires with far-flung territories like the British Empire did not really aspire for sameness and there was no universal political participation guaranteed by being a member. By contrast, the Ottoman and Russian Empires, which had contiguous territories, tried to create internal sameness, often organising these according to a hierarchy of closeness to the dominant ethnic, linguistic, religious and cultural forms and practices. Thus, Khoury and Glebov (2017, 52) write about the Russian Empire that: 'It was the urgent

desire for uniformity rather than the social and political fact of diversity that had the potential to unravel in genocidal practices.'

The British Empire also sometimes emphasised the unity and sameness of the empire, although this was more the exception than the rule. This was the case during the two World Wars when the British Empire fought as one. The idea of sameness also manifested in lesser-known plans for joint activities such as participation in games and sports as a joint team. When British performance in the 1912 Olympics games was poor, the British Olympic Association planned to bring in a single British Empire Olympic team for 1916 (Llewellyn 2012). Plans for greater glory aside, laws in the British Empire were not uniform, with customary rules and religious laws finding place in more generic laws in a dual system that existed in colonised lands. Mostly the British Empire was considered an alliance of people who would share allegiance rather than in any manner being the same or similar. Therefore, British strategies on how to generate and retain colonies were considerably different from those of the Russians.

The complexities revealed in comparative studies of different empires are beneficial for understanding how bordering has evolved and why. For instance, scholars have found that there are links between the natures of empires, their dissolution process, the regimes of naturalisation and other means of acquisition of nationality that exist in the modern age. The British Empire attempted to maintain special relationships with former subjects after the British Empire became defunct. Yet similar parallels were not observed when the Soviet Union dissolved. Over time though, special considerations regarding who can have Russian passports (e.g. in Baltic areas) have emerged and Russia has been found to use forced passportisation as a means of creating a 'Russian' population in the Eastern Ukraine border regions which Russia has invaded, where people cannot access healthcare or education unless they hold Russian passports (Burkhardt et al. 2022).

For empires with non-contiguous, far-flung lands, with time it became expensive to extract resources, particularly as local rebellions became common. Migration would be inconsistently facilitated, compelled or even prevented depending on the needs of empires and specifically the economic needs of the cores of empires from the more distant lands. Although wider-reaching empires permitted greater migration, the majority of the poor were unable to travel, due to a lack of resources; in reality, the permissiveness of the laws did not lead to mass migrations, even if a small minority did travel in search of better lives for themselves.

In the British Empire, examples of movement of both the rich and the poor are found aplenty. Wealthy colonial subjects came to England

for better education and training. Some even settled long-term in England or other parts of the empire while others went back with competitive advantages to their home turf. People from British colonies were not barred from settling in Britain. However, the poor only found employment in the sectors unpopular with residents of the metropole. For example, working as ayahs (nannies) for low wages or working as seamen (lascars) on ships, where the working conditions were harsh, or serving in the British army, work which was fraught with danger. These jobs were seen to be in the imperial interest and were thus available as low-waged labour. At this point there was hardly any welfare provision for the poor (whether citizens or not), so these low-waged workers often found themselves in absolute penury once out of work. A similar situation existed for Algerians and other peoples colonised by the French in France.

In this book however the primary focus is on the British Empire, because first, it had a profound impact on the lives of diverse peoples with present-day legacies which are clearly identifiable around the world. Secondly, and arguably more importantly, because of its non-contiguous expansion it had to use law in many forms both during and after colonisation, resulting in many new legal mechanisms and practices, including a notion of imperial citizenship which is useful for this study of different bordering practices and the free movement of people. Further, after decolonisation we can trace the emergence of the UK as a new global power forging powerful alliances with the Commonwealth, a united Europe and the United States, all of which have had impacts on the political context of present-day bordering.

Durability of empires and the role of law

In the case of the British Empire, the very form of colonial authority and governance transformed over time. In the beginning, the British had developed colonies such as India as trading partners through companies set up for exploration and trade. The original colonisers started as independent merchants in the 1600s who then formed trading companies such as the East India Company and thereby had limited liability. These companies, such as the East India Company in India, operated under royal charters but were largely autonomous. On 31 December 1600 Queen Elizabeth I granted the East India Company a royal charter, 'The Governor and Company of Merchants of London Trading into the East Indies', and announced from the start it should be 'one body corporate

and politick', that is, a corporation. The new legal properties of companies were very handy as they could sue and be sued but not commit crimes. They did not have the problems of disloyalty or treacherousness like human beings. Though its first charter was experimental and limited to fifteen years, by 1607 the Crown agreed the Company could expect a 'perpetual succession'.

Initially, trading companies negotiated with the local rulers to just set up trading arrangements. Later, when their activities became truly profitable, they needed means of safeguarding their highly favourable business arrangements. Mixed with this was a paramount belief in European racial superiority. The early English East India Company laid the necessary, though perhaps not sufficient, conditions for its later transformation into a territorial empire (Stern 2011, 7). Lawrence James writes in *The Rise and Fall of the British Empire* (James 2002, 123) that the East India Company was purely a commercial enterprise which imported and exported goods from its factories in Bombay, Madras and Calcutta and was not involved in the internal politics of India. In practice, the Company was a hybrid corporation. This merchant–state hybridity refers to the private function of the Company as a joint-stock corporate established to trade and make profit for its shareholders, while simultaneously exercising public state governance as rulers of India. As the Company strived for profits, this was inherently contradictory to ruling a state of people. They raised private armies to fight against local rulers and acquire territory and then proceeded to become administrators and enforcers of foreign rules and laws in these vastly different places. Its increasing public role alienated both Indians and the British government as it faced increasing criticism regarding how it dealt with people.

By 1815 the Company owned the most powerful army in India and governed both directly and indirectly Bengal, much of the Upper Ganges basin, and extensive areas of eastern and southern India. Although there were several independent native princes in India, they all feared the power of the Company, and many sought its friendship and protection, but the Company's flexing muscles was a major issue. It was at this time that various initiatives were undertaken to set up British courts in India. These courts often pronounced on the idea of subjecthood and associated rights. Around the same time there was a transformation towards direct rule from England with the monarch taking over from the trading companies at the highest level. For all purposes, the Company operated as an agent for British imperialism, and its status continued to decline until the Company was replaced by direct British rule.

Eventually, the British government took over administration of many colonies. The empire both erased nations by taking over territories and

usurping established sovereigns. It was eventually forced to create new ones by drawing new borders and withdrawing from these territories. So, what did the law do to enable these social and political changes? As we shall see in this chapter, during colonial times the role of the law was primarily to underpin the structures of power which normalised the movement of Europeans as traders and rulers around the globe and which sanctioned the expropriation of resources from the East to the West. The law extended jurisdiction for colonial powers and ensured the supply of labour and raw materials for the heart of the empire from the early days of colonisation. The exact mechanisms varied, but were often rooted in a deep-seated hegemonic belief of racial superiority.

The breadth of the British Empire and its long durability over centuries raises questions as to how this empire was able to encompass different territories and what was the secret of its longevity. Naked powerplay and military might (guns, gunpowder and gunboats) would have necessarily played a huge part in acquiring new territory but would not explain its longevity. Creative legal mechanisms aided in the making of inroads into foreign territory and the taking over of their governance for considerable advantage. Legal transplantation from common law ideas drove perceptions of superiority of the British.

As mentioned earlier, a creative legal instrument was the idea of subjecthood. In the British Isles, the landmark *Calvin's Case* [1608], 77 ER 377 established that subjects were people who lived on any territory that came under the Crown. In 1608 English common law did not apply to Scotland and this became a contentious legal issue when James VI of Scotland succeeded to the English throne, leading to the unification of the Crowns of Scotland and England. *Calvin's Case* came to court at this time and raised the question of whether Calvin, a Scot, could hold land in England. This was possible if Scots were subjects of England as well as Scotland. If this were the case, English property law would apply to Calvin. The court decided that for a person to be a subject he had to be born in the 'King's dominion' and have parents who were 'under the actual obedience of the King' (Travers 2007). It was decided this was the case for Calvin after the unification of the Crowns. In effect, *Calvin's Case* connected subjecthood to territorial control and allegiance to the ruler.

While Calvin acquired property rights because of the holding of this case, the case did not always enhance individual rights. In the eighteenth and nineteenth centuries many colonial territories changed hands several times between imperial powers and it was possible for the Crown to claim allegiance and control over the newly acquired territories using the Calvin precedent (Everson 2003). This meant subjecthood, while initially about rights, also led to the justification for widespread colonisation.

Eventually, subjecthood became the key legal relationship between the British Crown and colonised people across the globe.

Subjecthood and borders: race, poverty and the unfree 'free' movement

While *Calvin's Case* laid out the bare elements of subjecthood, it is a complex concept which has gathered different dimensions over time. The legal content of subjecthood facilitated a veneer of formal, legal rights which tied the ruler to the ruled and the ruled to the ruler, even if they had never set eyes on each other and did not resemble each other. It also linked with allegiance and loyalty as a relationship between the sovereign and people. Muller writes how it provided a common bond between people of distant lands in times of empire (Muller 2017). The ruler was distant but was perceived as present in diverse lands through connections fostered by ceremonies and rituals to celebrate royal life events. In theory, subjecthood operated the same, whether the subject was located in England or India. But subjecthood also remained indeterminate in character with a wide range of inbuilt discretion regarding its substantive content. It could demand allegiance, become rights-linked or facilitate subjugation of people, depending on the situation. Thus Muller (2017, 13) writes, 'Subjecthood . . . was constantly shifting both in response to, and to accommodate, the vagaries of imperial rule.' The indeterminacy of subjecthood was compounded by the uncertainty about whom it applied to. Dummett and Nicol quote Sir Francis Piggott, who in 1907 wrote, 'there must be a multitude of persons who cannot say with certainty whether they are British subjects or not' (Dummett and Nicol 1990, 113). MacPhee and Poddar (2007, 78) write that imperial subjecthood meant that if a territory was annexed by the British all people living there automatically became British subjects. Theoretically this meant that they acquired the right to travel, as free movement was a corollary of subjecthood in empire. The availability of free movement of subjects over territory (even if such a right to free movement was rarely exercised) indicated that the sovereign had command over this territory which was accessible to the subjects. A twentieth-century judgment that re-confirmed this is that of Lord Diplock in *DPP v Bhagwan* [1972] AC 60 (72) where Diplock held that a British subject had the right by law to enter the UK without let or hindrance when and where he pleased and to remain in the UK as long as he liked. In practice, subjecthood in the service of empire was inherently unequal. This will be exemplified in the restrictions to free movement explored in the next section.

During days of empire there were significant differences in how the legal status of being a British subject in dominions or colonies and within England operated in practice. Subjecthood, and its portability across the vast breadth of the countries of the former British Empire and new Commonwealth nations, performs different functions. For example, Mamdani (1996) ably demonstrates the complex dimensions of subjecthood in late colonial Africa and the effects of these on contemporary Africa while Mongia (2018) shows how it works in the context of India and Indian migration throughout the empire.

The countries of the old Commonwealth (Canada, Australia, New Zealand) were also called 'dominions'. These are White settler colonies where local governance was usually autonomous. Locally elected representative governments were in charge in these places. In colonial territories, there were large non-European populations. The White residents were a small minority. These colonies became self-governing later than the dominions and became known as the new Commonwealth. India had an exceptional position within the British Empire as it was not considered a colony because the East India Company's rule came to an end in 1858, and the British Crown took direct control and appointed a government there. Yet India was often treated as a colony in terms of economic exploitation as well as a dominion when Britain needed political support on the world stage. For example, after the First World War, Indian representatives at the 1923 imperial conference were formally treated as equals of the representatives of the dominions for greater support from Indians. Thus, the British Empire is not a combination of similarly placed political entities but a grouping of differentially governed regions. It is not surprising then that the concept of subjecthood also differed within the empire. For instance, Indian British subjects were mockingly referenced as being of two kinds: victim Gentoos (Hindus) and conquering Moors (Muslims), with Gentoos waiting to be rescued from their subjugated state by the British (Sen 2002).

Subjecthood encountered different issues in settler societies than in colonies. In settler societies, the presence of Indigenous people was a factor that did not exist in colonies. While Indigenous people were part of subjecthood they were often denied citizenship of the emerging nations, a situation rectified only after many struggles for equality. Colonial oppression was thus replicated in settler societies in the dominions. In dominions, which primarily consisted of settler White populations, subjecthood was perceived as a direct relationship with the king through shared history and ethnicity. In time, as dominions carved out their own destinies, their views on closeness with the British monarch and state changed. There was no shared long-term association with White rulers

with whom the vast majority shared no ethnicity, therefore, being a subject was seen as being subordinate to foreigners. Between dominions and colonies, however, there was a clear hierarchy, and dominions considered themselves far superior in terms of wealth and culture.

Within Britain, the term 'British subject' stood for British people's own national identity as well as imperial supremacy. Subjecthood was considered an instrument of enlightened liberation rather than oppression. This rang true even at the time of the dissolution of empire. For instance, in 1948, Lord Chancellor William Allen Jowitt, 1st Earl Jowitt, speaking in a Parliamentary debate on the British Nationality Act 1948 said, 'I believe that we have managed to combine a sense of unity and a sense of individual freedom, now the link the bond which binds us together is of course primarily the fact that we are all proud to be subjects of his Majesty the King.'

Movement of people during empire

Colonial appropriation of Indigenous lands and peoples depended upon ideologies of European racial superiority as well as legal narratives that equate civilised life with English concepts of property. It was not only the English; many prominent Scots were also slave traders (Alibhai-Brown 2015, 71). In direct contrast to the idea of subjecthood, the British Empire participated in the forced movement of people, for example as slaves, for centuries. Slavery ensured a supply of free labour at the heart of empire. Human beings outside Europe were transported as property rather than as humans. They were traded as slaves or moved as indentured labour to provide for colonial needs (Bhandar 2018). Harris's article 'Whiteness as Property' (1993) demonstrates how whiteness becomes a value encoded into property law and social relations. Race-based chattel property captures the move from whiteness as status symbol to whiteness as an entitlement to social goods. The right to use and enjoy, the reputational value, the power to exclude, are all characteristics of whiteness shared by various forms of property. Bhandar writes about the racial regimes of property ownership that have evolved in settler societies in the context of colonialism. She examined settler colonialism in Canada, Australia, Israel and Palestine to demonstrate how modern property law contributed to the formation of racial subjects in secular colonies. Research on the participation of the British Empire in slave trading demonstrates the contribution of the slave trade to the British economy, including in the industrialisation of the economy.

Dummett and Nicol write that African slaves transported to the New World were for most purposes regarded as chattels – neither they

nor their children were counted as subjects nor were they even aliens (Dummett and Nicol 1990, 74). Citizenship by birth (*jus soli*) did not make a Black child a natural-born subject. Even when the slave trade was abolished in Britain, slaves could be still traded in the colonies. Many were in plantations in the Caribbean islands even as Lord Mansfield declared in England that slavery was not permitted, in the case of *Somerset v Stewart* [1772] 98 ER 499:

> The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

The court in this case decided that an enslaved person could not be forcibly removed from England and sent to Jamaica for sale. He was free in England.

Meanwhile, Indigenous people in America struggled over the crucial question of ownership of land. In the colonies of the New World, labour of every kind was in great demand. Voluntary migration and generous naturalisation laws were not enough to satisfy this demand. Hence, throughout the seventeenth and eighteenth centuries there was forced immigration from Britain to the Americas. After the wars in Ireland Cromwell sent thousands of Irish people to the West Indies as involuntary migrants. They worked on plantations in British colonies (Dummett and Nicol 1990, 71).

Once industrialisation eliminated the need for plantation labour, the empire was still displacing people from one part of the empire to another to serve as indentured labour, that is, where individuals are contracted for work without pay. The terms were usually unfair and created abysmal conditions for life and work. People were held compulsorily to the terms by third parties who owned these contracts and who deprived the poor migrant workers and their families of most of their earnings. Many researchers point out their conditions were nearly as unfree as those of slaves, with exploitation rife. Visram (1986, 9) writes that people of Indian origins were planted all over the Empire.

The Act of Abolition in 1833 banned slavery in the British Empire but India was a source of cheap labour for developing infrastructure around the empire such as railways, mines and plantations across Asia, the Caribbean islands, Pacific areas and Africa. Indian sailors worked for the British navy and Indian soldiers also served in the British army in

colonial wars. Economic migration by carers for children and families (ayahs) and seamen (lascars) did not always lift people out of penury. Ayahs who served on long sea voyages between India and England, taking care of British families and their young, had no work once they arrived in England and very little to support them and were often unable to secure a return voyage. Visram writes that they would care for the children, the baggage and the wives of the families during the long voyages but then would be discharged in England (Visram 1986, 29). Ayahs were treated as docile and 'child-like' and there was no reason to care for their needs as they gave no trouble. Some of them found temporary lodgings but these were usually overcrowded and expensive (such as a separate ayahs' home in London). Lascars and ayahs who became destitute would sometimes be brought to the notice of the India Office in the UK (Visram 1986, 25). For instance, in 1870 someone who was previously an officer in the Royal Navy was selling curry powder and doing occasional work for English families, but he was desperate to return to India. The India office held strictly to the view that according to law they were only responsible for individual lascars and therefore contributed £200 a year to the strangers' home for destitute seamen but they were not responsible for servants and other people who became destitute.

The 1820s legislation was however detrimental to the shipping industry, which suffered from an inability to hire lascars. Parliament was therefore forced in 1849 to revise the existing laws, and lascars, who were not treated as equal subjects, were redefined as British by statute for shipping purposes, enabling shipowners to hire labour more profitably. The shipping industry was in a growth phase at this time with the opening of the Suez Canal in 1869 and the introduction of steam navigation. This created a demand for labour in the engine rooms, such as firemen and trimmers needed to stoke the furnaces. European sailors did not want these jobs in tropical zones and so lascars were recruited to do the unwanted jobs for low wages. By 1914 some 51,000 lascars made up 17.5 per cent of the total number of seamen employed on British-registered ships. Visram writes that many passenger and cargo ships employed only lascars, who were hired not simply because they were cheap, but because they were good and efficient sailors. They did the most difficult jobs on ships, such as working in stiflingly hot coal-fired engine rooms for little pay (1986, 52–4). Yet despite lascars being highly skilled, by the 1820s discriminatory legislation restricted their numbers on British ships to protect jobs. Unlike ayahs, they were also considered a potential threat on British shores as they were identified as drunks and vagrants.

Dummett and Nicol (1990, 160) write that at the same time in the first half of the twentieth century the shipping industry worked jointly with

the British authorities to control entry by foreigners. Shipping companies also cooperated with the Board of Trade – the Ministry of Labour and the Home Office in practice – which laid the foundations of racially discriminatory controls over certain British subjects, namely seamen settled in or frequenting the major seaports. The 1905 Aliens Act required ships' masters to provide lists of immigrants subject to such controls – the shipping company committed an offence if such a person embarked without leave, and if an immigrant was admitted but expelled within six months the Home Secretary could recoup the cost of the return passage from the shipping company which had brought him or her to shore. Herein lie the origins of border control through placing the responsibility on companies that operate carrier services, such as present-day airlines.

While borders were internally porous in the British Empire, the barriers of resources and powerplay were significant. Though in theory all subjects were equal, in practice poorer subjects of empire were restricted in their options for movement and received virtually no support after moving. The elite acquired more resources, but others were moved/allowed only to move to meet the needs of empire, mainly labour requirements. Another group of people of Indian origin who travelled throughout the British Empire were soldiers in the British army spread far and wide across the empire. Gurkhas and Sikhs as well as others (mostly from hilly regions) fought for empire. Later in this chapter I will discuss the Sikhs and their transformation from loyal subjects to potential security threats. Many people from the Indian sub-continent continue to serve in the British forces today and yet, until recently, they had to contend with continued exclusions from the benefits of British citizenship. Visram writes that recruits for the Indian army came mainly from the tribes who lived in hilly regions of India, who were considered professional and loyal. Yet they mostly served at lower levels and were organised along caste or ethnic lines. Officers were entirely White Europeans, thereby maintaining the racial hierarchy of colonisation (Visram 1986, 114). The Indian army provided a huge number (2.5 million) of soldiers across the world, who fought in Burma, North Africa and Italy during the Second World War.

In terms of travel across borders from the colonies to the metropole, the British Empire had arguably very little requirement for borders within the empire, since mass travel was scarcely possible until the empire was nearly at its end. Migration control was not institutionalised formally into a set of documents and practices. Even passports were not formalised as means of authorised travel documents until the World Wars in the early to mid-twentieth century. MacPhee and Poddar (2007, 76) write that at the time of the East India Company prior to 1858 there was no real passport as such. The description of a British subject or English gentleman travelling

with his wife and servants on a document was sufficient to ensure travel virtually anywhere in the world. Britishness was thus not tied to having a national passport. This would change on 19 February 1858. At that point different countries discontinued the practice of issuing passports to each other's subjects, so the French government no longer issued passports to British subjects and vice versa. Prior to this point, it was only wealth that largely determined the ability to acquire passage on any means of travel, which was mostly via ships. As we have seen, at this point migration was neither exceptional nor a problem, but a necessary part of the exploitative substructure of colonialism. Migration was at the service of empire and people could move or were even forcibly moved in the service of empire. Later in this chapter I will look at how elites from the Indian sub-continent travelled to England for further education and training and acquired greater standing in their regional societies as a result. However, migration became a problem in the eyes of the British government when people in colonised lands started claiming equal rights as humans and could no longer be treated as property or as docile bodies. The extent to which this problem operated can be assessed by examining how the ordinary subject was stopped from exercising full free movement within empire.

The emergence of national borders

As already mentioned, dominions had greater control over their own destiny, and it is in this context of uneven understanding of subjecthood that dominions started regulating migration to their territories from other parts of the empire which were poorer and predominantly not White (mostly the colonies). Canada was one such dominion which received and welcomed huge numbers of European immigrants while simultaneously keeping out Asian migrants. Canada went on to reorganise its immigration and nationality legislation in a manner that excluded most Asian migrants, charging head taxes and placing quotas on their entry despite simultaneously recruiting European migrants in large numbers. National security, public health and employment control had merged to bring about the Canadian government's first attempt to restrict immigration from India through an Order in Council passed on 8 January 1908 that prohibited immigration of persons who 'in the opinion of the Minister of the Interior' did not 'come from the country of their birth or citizenship by a continuous journey and or through tickets purchased before leaving their country of their birth or nationality'. While supposedly neutral, in practice this continuous journey regulation applied only to ships that began their voyage in India, as

the great distance usually necessitated a stopover in Japan or Hawaii. Canada attempted to redefine who is truly Canadian from around 1910: Section 2 (a) of the Immigration Act of 1910 stated that for the purposes of the Act, 'Alien means a person who is not a British subject', but for immigration purposes, British subjects were divided into Canadian citizens and others, and only Canadian citizens possessed an unqualified right to enter and remain in Canada. A Canadian citizen was in turn defined as '(1) a person born in Canada who had not become an alien, (2) a British subject domiciled in Canada, or (3) a person naturalized in Canada not having lost domicile or become an alien'.

In 1914 in Hong Kong, an Indian Sikh businessman, Gurdit Singh Sandhu, decided to charter a ship for travellers from the Indian subcontinent to Canada. By starting from Hong Kong, the Indians would be able to come via a continuous journey to Canada and thereby comply with the formal requirements of the law. Gurdit Singh was aware that Canadian exclusion laws were preventing Punjabis from immigrating to Canada (Wallace 2015). Prior to this voyage, Gurdit Singh told press reporters. 'We are British citizens and we consider we have a right to visit any part of the Empire', thereby expressing his faith in British notions of fair play and justice. Yet the ship, the *Komagata Maru*, upon arrival in Canadian waters, was not allowed to dock in Vancouver (Berkeley Library 2020). Immigration officials were sent to meet it on small boats. There was violent opposition to the ship and its passengers from the Canadian public, with public meetings and protests organised on the shore. Meanwhile the passengers remained trapped on the ship over two very hot summer months and with little food and water.

Immigration officials ordered extensive medical examinations of the passengers and tried to put legal hurdles in their way. They were not able to contact their lawyer, J. Edward Bird. While other Sikhs in Canada were trying to support them by raising funds and setting up a Shore Committee, the passengers often could not contact anybody on the shore at all. The court challenge brought by the passengers failed because they were presented to the court as violent and disruptive on the ship. The full bench of the British Columbia Court of Appeal eventually delivered a unanimous judgment that under new orders-in-council it had no authority to interfere with the decisions of the Department of Immigration and Colonization. In its judgment, *Canada v Munshi Singh* [1914] B.C.J. No. 116, Judgment B.C. Court of Appeal, 6 July 1914, it said:

> Our fellow British subjects of the Asiatic race are of different racial instincts to those of the European race . . . In their own interest their proper place of residence is within the confines of their respective

> countries, not Canada where their customs are not in vogue and their adhesion to them here only gives rise to disturbances destructive to the well-being of society.

One quote that captures the reception of the ship is from Canadian Conservative MP H. H. Stevens in 1914:

> I challenge any man living to bring out a single instance in the whole history of the Indian nation to show that their civilization has done anything at all to uplift the other races of the world. I say their civilization is unproductive of good to the human race as a whole.[1]

It is clear that the British government was aware of this reception of Indian subjects. As far back as 1896 Joseph Chamberlain expressed his sympathies for racial exclusion in a conference:

> We quite sympathise with the determination of the white inhabitants of these colonies which are in comparatively close proximity to millions and hundreds of millions of Asiatics that there shall not be an influx of people alien in civilisation, alien in religion, alien in customs, whose influx, moreover, would most seriously interfere with the legitimate rights of the existing labour population. An immigration of that kind must, I quite understand, in the interests of the Colonies, be prevented at all hazards, and we shall not offer any opposition to the proposals intended with that object.[2]

Only 22 passengers out of the 376 passengers were permitted to disembark in Vancouver. Three weeks from losing this appeal, the ship was made to turn around (Bird 2014). Even the departure was a spectacle, with the navy called to escort the ship out and thousands of spectators watching and cheering from the harbour (Kazimi 2004).

Most of the *Komagata Maru* passengers were Punjabi Sikhs. Following their construction as a martial race by the British and their preferential recruitment in the imperial army from 1857 onwards, the Sikhs were forced to move between different parts of the British Empire, which produced a culture of mobility in Punjab. Sikhs from Punjab were preferred as fighters in the British army and were amongst the most well-travelled British subjects from the South Asian sub-continent (Roy 2016). The Sikhs began to perceive themselves as favoured British subjects and entitled to work and settle in any part of the empire and were, in fact, encouraged to do so through grants of lands, employment in ancillary services or setting up their own businesses in Shanghai, British Malaya, Hong Kong and East Africa. They were also circular migrants, because often after travels

across empire they would retire to their villages in Punjab. These porous borders that they crossed however started closing, as perceptions about Sikhs as loyal subjects changed in the early twentieth century (Talbot and Singh 2008), primarily because by this time the Sikh was regarded as a hostile subject because of violent anti-imperial groups set up by Sikhs in North America, such as the Gadr party. When the rest of the *Komagata Maru* passengers were forced to return to Budge Budge near Kolkata they were still considered threats, and they were shot at and detained. Many were under British surveillance because of suspected involvement in Indian independence.

The idea of the violent 'Asiatic' comes up in the *Komagata Maru* court documents in British Columbia, Canada. The racialised politics of exclusion of White Canada thus caused widespread ripples across empire. Settlers who had displaced Indigenous populations and controlled them had a fear of losing their land to others ethnically different from themselves. Public health was the other popular trope against migration from 'the tropics', as was the suitability of Asians for the cold climate of Canada. When the *Komagata Maru* came into Canadian waters, there was concern that 'Asiatics' would have diseases such as hookworms, which they would bring into Canada (Wallace 2013). There was also anxiety about jobs lost to migrants who would be willing to work in low-end jobs for less, such as in the mills of Canada, again a major reason for controlling migration in the contemporary world as well. It appears that border control a century ago was about overt racial concerns and ethnic purism manifested in concerns about economy, public health, infection and threats of violence.

What did this incident establish in terms of bordering and the role of law? Borders are not always physical or constant with clearly drawn lines of legality and illegality. The *Komagata Maru* and its 376 passengers were not 'foreign' by law but became undesirable and bordered in a manner that had not taken place until their arrival. Although as subjects of the British Empire they drew on the rule of law to challenge the redrawing of borderlines, they could not succeed in the face of national security, public health, anxiety about employment and economy, and basic racism.

More than a century later, on 18 May 2016, Canadian Prime Minister Justin Trudeau finally gave a formal 'full apology' for the *Komagata Maru* incident in the House of Commons. In modern Canada where multiculturalism is often celebrated, there have been many attempts to present this shameful episode in different lights and to 'own it' as a tragic event. Several plays have depicted the many angles and captured the pathos of early migration to Canada from the Indian sub-continent. Playwrights Sharon Pollock, Ajmer Rode, Sadhu Binning and Sukhwant Hundal have

all depicted the story of the *Komagata Maru* in Canada. In 2004, a documentary feature film, *Continuous Journey*, by Ali Kazimi brought to life the *Komagata Maru* incident from newly discovered rare film footage of the ship. The film received worldwide acclaim and finally there was recognition of the costs of transitioning out of the exploiter–exploited relationship of colonisation.

In the early days of the formation of Canada such incidents were not limited to Brown and Black men from the colonies. The first Indian woman to become a lawyer, Cornelia Sorabji, was stopped on her way to address a gathering in Toronto in 1931. The immigration official refused to let her enter on the grounds that she did not possess the necessary visa. When she said that she did not require such documentation as she was from British India and was thus equal to Canadians of the British Empire, the official reportedly replied that Canada was not part of the empire and even if Canada was part of the British Empire, he was still unwilling to let Sorabji enter (Banerjee 2010, 116; Sorabji 1934, 292). The reply captures the ambiguity about Canada's changing status within the Empire. By the early twentieth century, the term 'dominions of the British Empire' was informally used to refer to Canada, Newfoundland, Australia, New Zealand, the Irish Free State and South Africa.

In 1931, the Statute of Westminster was passed by the British parliament. It more formally conferred 'dominion' status on these six countries. It described them not as colonies, but as independent countries. They were equal to Britain, but 'united in free association [as] members of the British Commonwealth of nations'. So, at the time of Sorabji's arrival there would have been considerable confusion about how immigration control operated.

In practice, these borders did not exist only between colonies and dominions. Racialised British subjects (even the wealthy ones) could be barred from travel anywhere at will. For example, when Oudh (a Mughal province in Northern India which was a princely state) was annexed by the British in 1856, its king was deposed and the royal family became British subjects. The British foreign office however did not grant travel documents to the queen mother and her son when they wanted to travel to France as British subjects (MacPhee and Poddar 2007, 78).

Dummett and Nicol write that in Britain racial origin made no difference to subject status in law, but since poor subjects of any colour had no votes and fewer enforceable rights it was possible for the British government to operate outrageously racist schemes such as in 1786 for the compulsory settlement of Black Londoners on the coast of Sierra Leone in West Africa (1990, 79). Similarly, many poorer subjects, including babies born to unwed mothers and children, who were accused of minor offences

were transported to Australia and Canada from Britain (Kershaw 2009). In England other kinds of subjects came under the scope of immigration control in the 1900s. The Aliens Act of 1905 defined for the first time in British law the notion of the 'undesirable immigrant' as 'criminal aliens, the destitute, the ill or the infirm' who would place a burden on the early welfare systems, that is, on poor law institutions and the emerging health and welfare systems (Bashford and McAdam 2014). In Britain, the concern was to restrict the entry of destitute Jews fleeing repression in Russia and Eastern Europe (Bashford and McAdam 2014). The principle, though, was the beginnings of immigration systems that differentiated between the wanted and the unwanted. The 1905 Aliens Act made a seminal connection between immigration and welfare; in particular, the concept of 'recourse to public funds' was introduced so that migrants could not draw on social welfare reserved for the deserving 'British' (Miles and Cleary 1993). This restricted access to welfare to the 'deserving' and not those of undesirable conduct or circumstances.

These issues of movement, work, and lack of material welfare of subjects of the British Empire as well as the continuing legacy of unequal subjecthood raise questions about the value of British subjecthood both in the past and in the present. As we have seen, the fracture between subjects became apparent at this time as a division opened up between those White settler colonies where the British government granted a very large degree of autonomy to locally elected representative government and the colonial territories with large non-European populations, where White residents were a small minority concern regarding administration and commerce. The former type became what is now called the old Commonwealth, that is, Canada, Australia, New Zealand and, from 1902 to 1961, South Africa, and later became known as the new Commonwealth (Dummett and Nicol 1990, 115). Thus, the legal mechanism of subjecthood was not really the equivalent of citizenship, as it failed to create internally any sense of belonging to a single political unit. Similarly, in the context of the Ottoman and Russian Empires, Khoury and Glebov (2017, 52) write that 'no single narrative can account for the multiple ways in which citizenship and subjecthood were imagined, articulated, practiced, and claimed' at the time of empire. In many instances, the careful deployment of different kinds of political membership within the scope of political power could even prevent the recognition and articulation of colonial relationships. The Soviet project of jointly serving the purpose of socialism, whether as 'little Russians' (for example, used pejoratively for Ukrainians), Belarussians or Russians at the core of power, or as less advanced parts of the Soviet Republic (Kazakhstan and Tajikistan, for instance) which required 'development', concealed colonial expropriation

to a large extent. The exploitation continued until the dissolution of the USSR, and in some instances even for decades afterwards (Pirie 1996). Ukrainians arguably did not view themselves as colonised in the same manner as India or Kenya until the invasions and wars of the twenty-first century, when they started re-examining the Soviet-era political hierarchies within state-sponsored socialism. Rethinking events such as the human-made famine (known as the Holodomor) in Ukraine from 1932 to 1933 that killed millions of Ukrainians reveals the systemic manner in which people were deprived of livelihood (their farmlands), food and lives as well as cultural artefacts and language in the name of becoming part of the Soviet collectivisation of agriculture and homogeneous Soviet collective identity project (Mattingly 2020).

Learning from the experiences of the British Empire and the use of law in this context seems even more relevant now than ever before. Indeed, there are many generalisable lessons to be drawn from the British Empire for others such as the Soviet/Russian, French, Belgian or Dutch empires. For most of these European empires, while the empire was supra-national, the arrangements of empire accentuated the exclusionary characteristics of nation-state membership along racialised lines rather than facilitating robust supra-national rights. Those of White European ethnicity retained their citizenship privileges in rich metropoles no matter where they were located, while Asians and Africans who were colonised were often left with unilaterally assigned citizenships of their newly independent and impoverished countries (Manby 2023, 7). This is not surprising, as the colonial context was specifically designed as a political and economic system to provide competitive advantages at the core of empire while exploiting the colonised lands, so decolonisation carried over many relationships of exploitation inherent in imperialism through the new nationality arrangements.

The context of racialised and monetised unequal subjecthood continues to influence modern manifestations of nationality and immigration control. Take, for instance, the story of Ms Diane Elias, who in 2006 was litigating to be compensated by the British government [2006] 1 WLR 3213. She had been born a British subject. Ms Elias and her entire family had been held in a Japanese camp in Hong Kong because they were British subjects. After her liberation in 1945, Ms Elias lived sporadically in the UK and then permanently became a UK citizen in 1976. Ms Elias had been a British citizen for decades and had lived in the UK from the 1970s.

In November 2000 the government announced a £167m compensation scheme for British civilians interned by the Japanese during the Second World War with each receiving £10,000 as a 'debt of honour'. Several months after details of the scheme were published, the government

decreed that claimants should show a 'blood-link' with this country, disqualifying up to 2,400 whose forebears worked and lived in the Far East, often for the armed forces or the colonial administration.

Ms Elias was denied compensation under the scheme because it had introduced a requirement of blood-link to British national parents in order to qualify for the compensation. To be eligible for the non-statutory Far Eastern Prisoner of War Ex-gratia Compensation Scheme (2000), a former internee had to have been born in the UK or have a British parent or grandparent: Ms Elias was born in Hong Kong. Both of Ms Elias's parents were British subjects but were of Indian and Iranian origin. In short, as Ms Elias herself poignantly stated at the time of the case, she was British enough to be detained but not British enough to be compensated.

She sought judicial review on two grounds: the eligibility criteria entailed both direct and indirect racial discrimination in breach of s71 Race Relations Act 1976, which imposed on the Secretary of State the duty to have regard to the need to eliminate unlawful race discrimination in carrying out his functions. The Court of Appeal found that the discrimination was not directly racial; however, the eligibility criteria was indirectly racially discriminatory and disproportionate to its aim and thus unjustified. Mummery LJ held that the restriction of compensation for wartime internment to UK-born subjects or those with British parents or grandparents was racially discriminatory and disproportionate under the Race Relations Act 1976. He referred to s71 Race Relations Act: '"Although place of birth is not a racial ground, it may be prohibited as an indirect form of discrimination, subject to the defence of justification": [122]'.

We will revisit subjecthood again in the context of resistance to empire, movement of elites for education, and also restrictions placed on Commonwealth nationals in more recent times to further evaluate whether subjecthood had any emancipatory potential or simply was repressive in colonial times and fizzled out with time and changing political contexts.

Bordering empire: the hegemonic effect of the rule of law

So far, we have established the usefulness of subjecthood in expanding empire and also maintaining a veneer of rights. Later we will see that it could also be mobilised in resistance. But first we need to assess why British legal mechanisms gained currency in establishing long-term rule by empire. Subjecthood was only one legal institution and mechanism of control. There were many more at the service of empire for maintaining

newly drawn and redrawn borders. While the violent redrawing of borders in former colonised lands and the forced displacement of people in the affected lands is well documented, violence fails to explain the durability of the colonial arrangements across empire. Colonial arrangements rested on the infrastructure of law. As we have seen, there is a lot of difference between settled territory and colonised countries. Settler societies usually had some form of representative body and rejected any right to be taxed from the centre of empire. By contrast in colonised places law was used as well as violence to extract natural resources and exorbitant taxes (Darwin 2013, 233). Subsequent to partitions in various countries, nationality laws in those countries conferred citizenship on their people as per their constitutional arrangements. Yet this was only after centuries of exploitative rule.

It is perhaps impossible to explain how so few could have ruled over so many for so long without the real, as well as symbolic, and performative aspects of law. In the early days of empire and during its continuation, there was less concern about borders than there was about legitimising a rule that clearly was unfavourable in economic terms for those being ruled. Law had subtle and pivotal roles in defining and setting up the boundaries of empire throughout history, not just through the enforcement of geographical borders but also through its role in imperial domination. Local participation in British armed and police forces meant locals often maintained the day-to-day law and order and used violence against fellow subjects. The legitimacy of such violence was accepted or tolerated by the vast majority because it was bolstered by institutional arrangements with the trappings of legality, including mechanisms for challenging decisions and seeking justice. There was often a permanent sense of national security emergency across empire which further justified law and order interventions. The national security needs even justified banishment, such as through transportation to external penal colonies or offshore prisons, and the use of capital punishment on rebels. Entire peoples were declared criminal for more effective control. Indeed, entire penal regimes were coded and enacted to govern local populations through disciplining and punishment. Why such arrangements could be imposed is unfathomable without the moral expressiveness of law.

The superiority of British laws and processes throughout the empire as opposed to 'native' means of dispute resolution was fed by the colonial narrative of both racial and cultural superiority of White Europeans. Approaching British judges and lawyers or legally trained administrators who had claims to expertise in that system also contributed to those very same relations of superiority and inferiority. In the early days of institutionalisation of British justice overseas, courts where English law

was practised were considered superior to the law practised by 'natives'. English law was mostly written, and while oral advocacy was important there were copious written submissions and records kept which facilitated the enforcement of judgments. Local justice systems were often only oral in form with very few written records. As countries industrialised, people moved from villages of small communities governed through traditional and less distanced forms of authority to cities where they were strangers to neighbours. At that time written and recorded forms of adjudication became more popular and local populations started preferring courts with formalised justice systems. The distance between the core and the peripheries of empire contributed to this hegemonic rule, perhaps as much as military or technological advantages of the centre. The long-term hegemonic maintenance of colonial arrangements is reminiscent of Lukes's understanding of the third dimension of power, where some of the real interests of people can be hidden by its operation (Lukes 2021). Instead of action or inaction, the third dimension hides the arrangements of power despite its being in open view, because it creates certain legitimate conditions of operation in the eyes of those being dominated. Sometimes these interests may coincide with the real interests of elites in the colonies (such as in their business arrangements) but mostly these operate to legitimise extractive relationships. The British Empire was renowned for the import of its legal traditions and structures and the 'rule of law' throughout its territories. The purported neutrality of law reassured the ruled of fairness and equal treatment. Mostly this was untested, as subjects from different parts of the world did not have intersecting lives which prompted adjudication in a manner that needed them to be treated as equals in the same place and time. When, unusually, conflicts did arise, should there be unfairness, this was explained away through legal reasoning or as exceptional in the context of security needs. In India the representatives of the East India Company who ruled through imperial mandate often resented being brought before the British courts, which wealthy Indian traders and elites could afford and access. Yet through transportation and transplantation of English legal systems into colonised areas, it was possible to demonstrate superior moral values such as impartiality of the justice system and fairness as well as rule of law, all of which created a hegemonic impression of the overall fairness of British imperialism even when there were clear miscarriages of justice or political subjugation. Drawing on Fitzpatrick (1990), Merry writes that law was conceptualised as 'the gift we gave them' (Merry 2004).

Empire is not just about territorial conquest – it is also about cultural imperialism, about disparaging the values, social practices and religious beliefs of non-western people. In general, the non-European other was

and had to be saved from this disaster by colonisers (Darwin 2013, 5). Categorising and applying measures to bring civilising 'order' to native 'disorder' demonstrated administrative and organisational superiority. It is through these specific mechanisms that law had a hegemonic effect on local populations. Law became an ideological export throughout the British Empire and facilitated the domination of different populations around the globe. Merry (2004) writes that law was central to the 'civilizing mission' of imperialism, particularly British imperialism of the nineteenth and early twentieth centuries.

Empire: law as legitimacy and jurisdiction

The British administration was sensitive to popular perceptions of its rule: British justice was projected as superior in terms of efficiency and being impersonal in nature (Wilson 2016). There are instances where it indeed favoured locals, for example when the Calcutta Supreme Court was established by the British through the Regulating Act of 1773 (Alibhai-Brown 2015, 71). The court quickly showed itself to be a new and potentially highly destabilising force in Bengal politics. Whereas the old Mayor's Court had been staffed by men of local English influence, the judges of the Supreme Court were outsiders (some from Scotland, Wales and even Ireland). They were not necessarily well disposed towards the British in India. The East India Company's Indian subjects exploited new opportunities for legal redress, and the judges took an expansive view of their powers to hear cases involving Indian plaintiffs and defendants. The court's legal proceedings challenged the Company to justify the workings of its territorial government, especially its law courts (*adalats*), and rapidly exposed the gap between the rhetoric of regulated government, and the loosely coordinated network of powerholders sheltering under the Company's sovereignty. The Company, meanwhile, was forced to validate its administrative practices by a strident defence of 'Asiatic' customs, supposedly under attack from the alien invasions of the English judges (Travers 2007, 184). The Supreme Court was also used by the Company to sue its misbehaving servants, and for Company servants to sue Indian agents whom they accused of fraud. By the end of the nineteenth century, seven of the eight large Indian provinces were headed by Irishmen, while the chief justices of Bengal and Hong Kong were both Welshmen (Colley 2014, 120). Hence bonds with England and the Crown were that much weaker.

In order to access jurisdiction of British courts, applicants approaching the courts would raise issues of subjecthood to establish their connection to the courts. Many of them were involved in commercial

disputes. Thus, although subjecthood is often presented as the foundation of a relationship of allegiance and protection between the ruler and the ruled (Dummett and Nicol 1990, 142), for many people, it was an instrumental means to access courts and to be heard and recorded. Several cases exist on jurisdiction and subjecthood. People approached courts set up by the British rulers to be declared as 'subjects' so that they could seek the protection of the common law (Majumdar 2013). One example is *Killican v. Juggernauth Dutt* [1777] 1 Ind. D. 946, where jurisdiction of the court extended over all those born in Calcutta or residing in Calcutta.

One of the key byproducts of migration during times of empire was a strengthened legal transplantation of English common law around the world because legal education in England became a career necessity around the empire (Wilson 2016). The high status of English common law and British courts in India meant there was a professional demand for legal training in English law. In the beginning there was a monopoly of lawyers trained in England, and local elites, despite being educated in English, could not qualify to practise in the courts. Wealthy elites started sending their sons to England for training in the law. In the nineteenth century the first set of Asian, African, American and Caribbean Bar students were enrolled in the Inns of Court in London. The Inner Temple archivist Clare Rider (1998–2009) writes that the first Asian member of the Inner Temple was Aviet Agabeg from Calcutta, a student of St John's College, Cambridge, who was admitted on 11 June 1864 and called to the Bar in 1868 (Rider n.d.). The first Indian student to join and become qualified was Ganendra Mohan Tagore of the famous Tagore family, who was admitted in 1859 and called to the Bar on 11 June 1862. By 1885, 108 Indian barristers had been educated in England, encouraged by the Indian government, the Inns of Court and the Council of Legal Education, which granted concessions to Indian students to facilitate their training. Lincoln's Inn also recruited a number of students from further east in the nineteenth century. It still retains a special association with India and Hong Kong.

Alongside many male Indian barristers who studied in the UK, the first female Indian lawyer was Cornelia Sorabji (whose name has already been mentioned in this chapter). Sorabji was also the first woman to study law at Somerville College, and indeed at Oxford University, and the first woman to graduate from the University of Bombay. Along with her work as an advocate for individual women and children, she became an advocate of social reform, campaigning in particular for education for girls, for legal rights for women subject to segregation (*purdahnashins*),

for abolition of child marriage and for protection and support for widows (Banerjee 2010, 116).

In 1846, a Parliamentary Select Committee, and in 1854, a Royal Commission on the state of legal education both asked for more formalisation of training in England and Wales. Soon there were exams and also periods of training (Articles) and by 1909 there were eight law faculties in England and Wales. This meant academic and professional education/training were kept separate. The presence of a large number of Indian students led to a hub of student networks, for example, India House in London. However, there was no serious suggestion that Indians should play a part in imperial government until the 1830s, when the question was considered in the lead-up to the passing of the India Act of 1833. Foremost in the movement for native recruitment to the East Indian civil service were Sir Charles Trevelyan and Thomas Macaulay, who were serving in India at this time. While many amongst the British establishment feared that the education and employment of Indians would threaten the British Empire, Trevelyan and Macaulay argued the reverse, although appreciating that it would take some time to achieve true integration. Macaulay declared in a speech on the India bill in 1833:

> I feel that, for the good of India itself, the admission of natives to high office must be effected by slow degrees. But that, when the fullness of time is come, when the interest of India requires the change . . . to refuse to make that change lest we should endanger our power . . . is a doctrine of which I cannot think without indignation. (Rider n.d.)

Central to this development was the education of the Indigenous population. In arguing that this education should be in the English language and should follow the British tradition and syllabus, Macaulay wrote in his famous 'Minute of 2 February 1835 on Indian Education':

> In one point I fully agree with the gentlemen to whose general views I am opposed. I feel with them that it is impossible for us, with our limited means, to attempt to educate the body of the people. We must at present do our best to form a class who may be interpreters between us and the millions whom we govern; a class of persons, Indian in blood and colour, but English in taste, opinions, in morals and intellect. (Rider n.d.)

Although universities and colleges were subsequently established in a number of Indian towns and cities, the sons of the rich continued to be sent to England to receive a traditional education at the Indian civil service college at Haileybury, at the universities and at the Inns of Court.

The majority were to return to their native country to pursue a career in the Indian civil service and judiciary. It is significant that the first Indian to return from England to serve in the Indian civil service, in 1864, was Satyendranath Tagore, a relative of Ganendra Mohan Tagore, the first Indian to be called to the Bar in London. Training for the Bar had the added advantage of equipping students with advocacy skills and conferring status, prestige and potential wealth at home. In this manner, law was a multi-pronged tool of empire.

Banerjee writes that British education demonstrated to many educated Indians that humans are born free and equal, and this contradicted the position of British government that Indians were not yet ready for self-governance (Banerjee 2010, 11). Many of the leaders of the early independence movements had been trained as barristers in England. These included Gandhi, Nehru, Seretse Khama, the first president of Bechuanaland (modern Botswana) and Tunku Abdul Rahman, founder of modern Malaysia, all of whom had been educated at the Inner Temple. Gandhi was disbarred from the Inner Temple in 1922 for his conviction for sedition in a British Court. That did not bar Gandhi from becoming a household name worldwide (Banerjee 2010, 9). Other lawyers too struggled for liberty, equality, justice and truth and went on to bring down colonial structures in their homelands in the independence movements (Venkatesh 2019). Some British barristers too worked for local sovereignty, for example, Eardley Norton. They deployed the law in the resistance against imperialism.

Mobilisation of rights and subjecthood

The indeterminacy of subjecthood has led to its widespread use as a pragmatic policy linked to selective categorical operation in demographic control. Despite the production of legal elites who became steeped in the rule of law as part of their training, there was no impetus from the centre to decolonise. People could be subjects of the ruler, and access resources such as higher education, but still not become full citizens of empire. The training of lawyers did not compensate for the inherent inequality of status between the ruler and the ruled during empire.

Historian Mike Davis (2017) has discovered that there were at least thirty-four famines and other holocausts in India during colonisation. Indians suffered iniquitous high taxes and trade restrictions, and Indian artisans were persecuted. For instance, muslin, silk and cotton cloth weavers were unfairly restricted so that British mill-made cloth could be sold at high prices by the East India Company instead. Previously

rich provinces became poor because of unfair trade prices. Farmers were forced to grow cash crops such as indigo and as a result there was widespread starvation. Yet imperial monies continued to be spent on celebrating British rulers (such as in the Delhi Durbar in 1911 to celebrate the accession of George V) instead of providing relief for the starving millions. These atrocities largely went unnoticed in the metropole. As Gorman (2006, 12) writes, 'There are gaps between the Imperial Metropole and imperial periphery'.

Despite the oppression of colonisation worldwide, within Britain, imperialism was considered benevolent and beneficial for Britain as well as for the colonies (Gorman 2006, 4). Gorman writes that it was not just the Conservative party that supported the idea of a superior empire and imperialism, but also the Liberals, finding empire a source of support and intellectual sustenance. Educated and aristocratic elites were part of a small circle and were also politically active across parties. They saw the advantages of pro-imperial policies for Britain without sharing in the pain of those in the colonies. There were however different shades of imperial citizenship, for example, a more cosmopolitan imperial citizenship and a less cosmopolitan (and quite parochial) nationalist imperial citizenship which focussed more on being British in Britain (2006, 5).

Within Britain, imperial citizenship was conceived of as an extension of, rather than a replacement for, the identity of British-subject children. Here the rights attached and became about receiving the protection of the Crown and free movement in the empire whereas externally such rights were mostly symbolic and illusory for the vast majority. Gorman (2006, 9–10) writes that one could not really be a citizen of empire. Citizenship is technically a republican concept as it is horizontal in nature. Indeed, Greek city-states with a democratic body of polis were more likely to be precursors of citizenship as understood today with mutual obligations, rights and participatory aspects (2006, 13). The uneven legal content of subjecthood and its substantive content (if any) could perhaps give some rights to people to move and to mobilise for better conditions, but such rights were at the pleasure of the ruler. Being a subject was about becoming one through resistance and framing one's demands within the structural potentials and constraints of the system (Cederlöf 2017).

Whereas colonial rulers have used subjecthood pragmatically to enforce relationships of allegiance, colonial people have mobilised subjecthood as a category to agitate for rights as well. Both processes could take place simultaneously (for instance, see Newman 2011 and Merry 1991, who write about resisting using colonial ideology, procedures and systems). In order for subjecthood to attach to specific rights, it has to have been mobilised by movements or individuals who tested the limits

of its egalitarian scope. Otherwise, it meant there were no real gains. In North America, revolutionaries seeking independence reframed subjects as citizens who could control their own taxation and representation but often presented this as subjects holding rights within a constitutional democracy. The post-revolutionary generation defined individual rights exclusively in terms of the 'citizen' (Breen 1998).

Banerjee's work on post-colonial political claims of late Victorian Indian bourgeoisie explores their persistent deployment of the language of citizenship even when they remain legally dispossessed of its status (Banerjee 2010 as reviewed by Ho 2015). For example, politician Dadabhai Naoroji used subjecthood to challenge the exclusion of Indians from the commissioned ranks of the army in 1896. A decade later, judge and activist Syed Ameer Ali highlighted the empire's pledge of equal rights for all races and creeds, decrying the detainment of Indians seeking to enter Canada, a British dominion (Ranasinha et al. 2013, 22–3). Similarly, a prominent suffragist, Sophia Duleep Singh, daughter of the last king of the Sikhs, Duleep Singh, was of mixed heritage (with a German Ethiopian mother) and she was influential in English society. She was a goddaughter of Queen Victoria as well as being a princess (Ranasinha et al. 2013, 30–31). Her views were taken more seriously because of her status and appearance as a light-skinned elite Indian.

Majumdar (2013) also writes about other Indians who managed to climb the colonial hierarchies, such as those who remained in South Africa after completing their indentured periods and then established themselves slowly. Ex-indentured Indians were parents to the colonial-born professional Indians who were joined by 'free or passenger Indians', such as merchants and small traders. Colonised Indians in South Africa were called the 'coolie community' in a derogatory manner but they used this term to negotiate a new identity for themselves. Many of them became middle managers of the empire working for the British, yet when faced with challenges they mobilised their British subjecthood to seek rights using the language of the rights of subjects. Petitions written by Indians to the Natal colonial officers refer to themselves as deserving subjects who are different from other minorities. They also made frequent appeals to the sense of fairness of colonial authorities. Gandhi and his followers later used strategies of civil disobedience.

The 'loyal' or 'worthy' subject framing comes up while seeking rights in recent times as well. Gurkha soldiers in the UK were 'loyal' subjects who had fought for the British army, but many did not gain British citizenship. The Gurkhas wanted the law to be changed so that all Gurkhas who fought for the UK would gain the right of abode in the UK. They took their case to the High Court, and had the support of a number of celebrities, including

British actor Joanna Lumley whose father had served with Gurkhas. The campaign was about how much the Gurkhas had sacrificed for the country, and was eventually successful in 2008, when the High Court ruled in their favour. However, the government brought in rules which introduced new conditions rather than an automatic right to settle in the UK for all veterans. Veterans who had served for twenty years or more in the Gurkha brigade and had at least three years' continuous residence in the UK during or after their service could gain the right of abode, but these conditions greatly reduced who could be eligible out of all the Gurkha veterans. After much more campaigning by the Gurkhas the government subsequently announced that all Gurkha veterans who had served four years or more in the British army before 1997 would be allowed to settle in Britain, yet it had clearly tried to exclude through the implementation of restrictive conditions many who had made tremendous contributions to the country.

The end of free movement and the Commonwealth

The *Komagata Maru* story was only the beginning of the end of free movement around the empire. Canada passed its own citizenship act in 1946 and issued Canadian passports to include its own French-Canadian citizens (Fransman 2011). Canada's initiative in controlling its own immigration and naturalisation meant that each dominion could now determine criteria for entry and residence of its own citizens and regulate those from other parts of the empire. This challenged the common status of British subjecthood. The loyalty element of subjecthood acted as a rallying call for participation in the two World Wars across the empire. In the dying days of empire, subjecthood was challenged and discarded nationally in the former colonial spaces.

The rise of nationalism in the newly born free countries created an urge to monitor immigration from outsiders as an expression of state sovereignty. Countries like Australia and Canada perceived this reconfiguration as a liberation from British subjecthood. Discretion remained on racial qualifiers for admission as well as settlement, and rights did not automatically transfer from legal guarantees. This led to more barriers being set up against the entry and naturalisation of British subjects from elsewhere in the empire through racial qualifiers for entry and long-term residence. It was years before racial and ethnic qualifications for citizenship were eventually removed in these countries because of national, social and political movements to include minority and Indigenous persons into the fold of national citizenry (see for instance, Chesterman 2005).

Canada termed British subjects as Commonwealth citizens, so the British government introduced its own bill to include all Commonwealth citizens (people born throughout the Commonwealth) as British subjects. This was achieved through a legal sleight of hand: a shift in terminology from subject to citizen in the British Nationality Act 1948. To create equal status of subjects, the 1948 Act permitted former subjects of Commonwealth and colonies to freely enter and settle in the UK. The Act made it possible to naturalise as well as hold plural citizenships elsewhere without any limitation. It also recognised for the first time in statute law that people could become British by incorporation of territory (s.11) without being required to prove any allegiance as a basis for citizenship. Having to take an oath of allegiance to the monarch was part of the process of naturalisation (s.10(1)), however, so some people still had to demonstrate some sort of allegiance akin to subjecthood. Thus, the 1948 Act did not wholly abolish subjecthood and replace it with a uniform set of rights, but tried to create some broad-based citizenship.

At the point of breakdown of empire, and as more and more countries achieved independence, if those countries chose to join the Commonwealth their citizens remained British subjects. The 1948 British Nationality Act changed the focus from having allegiance to the king to just being a citizen of a country in the Commonwealth (Hansen 2000). Regarding the 1948 Act, Everson (2003, 77) writes: 'the natural universalism of subjecthood had been territorially qualified'. The 1948 Act had 'created a new geographical and territorial entity known as the UK and Colonies'. The British colonies would henceforth share a citizenship with the United Kingdom to be called Citizenship of the United Kingdom and Colonies. Under the British Nationality Act 1948, the concept of a British subject covered, in addition to citizens of the independent Commonwealth countries, 'Citizens of the United Kingdom and Colonies' and 'British subjects without citizenship'. 'British subjects without citizenship' were persons who could potentially become citizens of an emerging independent Commonwealth country on the coming into force of that country's citizenship law. If they did not acquire such citizenship they would, by default, then acquire Citizenship of the United Kingdom and Colonies (Dummett and Nicol 1990, 143). Later on, these recategorisations would create much upheaval in the lives of people settled for many years in the UK, mostly Caribbean people, who were collectively referred to as 'the Windrush generation' after the *Empire Windrush*, the ship which brought them to the UK in 1948, and who were wrongfully affected by new legal statuses created by law. This gave rise to what is now known as the Windrush scandal (or the Windrush deportations).

I shall return to these in Chapter 2 while examining internal and diffused bordering. But here in terms of the emergence of nation states and new borders, the story of end-of-empire re-bordering continues at its former outposts.

Re-bordering at the end of empire

Transition at the end of empire for newly independent countries to a commonwealth of nations was not automatic. They could opt whether to join or not. Some, like Myanmar (at that time named Burma), chose not to join the Commonwealth, so Burmese nationals did not retain British subjecthood. In contrast, those who joined the Commonwealth retained a right to enter, live and work in the United Kingdom, just as all subjects had done in the past. The 1948 Act retained this arrangement for Britain to maintain soft power over decolonised nations. The UK was 'first amongst equals' in the Commonwealth. Even in the dying days of empire the Labour government of 1945 to 1951 was determined to make the Commonwealth a dynamic new vehicle for British world influence (Darwin 2013, 355). This re-bordering of the British nation state which emerged at the end of empire helped maintain its global position in a changing world. Gorman writes that the Commonwealth for Britain was similar to the Roman model; it was to bind people together during times of peace (2006, 13).

This peace was however built on a foundation of bloodshed. Partitions of colonised countries like India were violent and led to forced migration as well as the loss of many lives. Independence in the case of British India occurred at relatively short notice in August 1947 but tying up the loose ends of empire stretched over years. When my grandmother, alone with her young children on a train, left Bangladesh, where people were being slaughtered, she had no certainty of her status or of a welcome in the newborn truncated India. All she knew was it was unsafe for her to remain in her natal village anymore because of the communal violence raging in her neighbourhood. Many people she knew had been killed and their houses burned down. She relied on the goodwill of new neighbours and old family connections in Kolkata (then Calcutta) who helped her find her feet. Her own education and cultural capital ensured her children did not grow up without education or slip into lifelong poverty. Yet she identified as a Bangladeshi Bengali all her life.

India and Pakistan both had to set out in statute who now belonged within their new borders. Britain likewise was forced to recalibrate its ideas about nationality and think afresh about the rights of its subjects

in view of the new sets of relationships that now linked colonies, old dominions and the 'mother country' within the Commonwealth. The reality was that many people of South Asian origin would qualify for UK Commonwealth citizenship (UKC), but the question was whether they would also come under Indian or Pakistani citizenship, as in that case they would not be eligible for UKC. There was anxiety about taking on Indians or Pakistanis in too large numbers within the UK and ideas of racial anxiety often were present in debates about the British Nationality Act itself, 'if we are not to be swamped by a flood of potential Indian citizens [should] they fail to register as Indians'. London's representatives in both Karachi and Delhi thus agreed on the need to 'exclude from citizenship of the United Kingdom and Colonies, persons of obvious connections with India and Pakistan by race and habitation, who do not automatically acquire citizenship of those countries on the date their respective Acts come into force'.[3] However, new bordering issues continue to plague these states with internal re-bordering a constant reality in these countries, for example, making undocumented people foreign in India in the 2020s (Ansari 2013, 296).

Race continues to play a critical role in global borders and bordering. For example, a law that has undermined Indian secularism is the Citizenship Amendment Act (CAA) which came into force in 2024 despite being passed by Parliament in 2019. Before the CAA, any foreign national seeking Indian citizenship through naturalisation needed to have spent eleven years in India to become eligible. India's citizenship law did not make religion a determinant of a person's eligibility for an Indian passport. All those seeking naturalisation had to show that they were in India legally and needed to wait for the same period – eleven years – to become eligible for citizenship. The CAA now offers a fast-track citizenship in five years to people belonging to persecuted minority religious groups (Hindus, Parsis, Sikhs, Buddhists, Jains and Christians who escaped to India from religious persecution) in Muslim-majority countries neighbouring India but not to any Muslims who might be persecuted as well. Muslim victims of religious persecution in Pakistan (like the Ahmadiyya), Afghanistan (the Hazara) or other neighbouring nations (such as the Rohingya in Myanmar), cannot benefit from this law. They will still need to wait for eleven years before they become eligible for Indian citizenship, and unlike Hindus, Parsis, Sikhs, Buddhists, Jains and Christians, Muslims seeking citizenship need valid documentation to justify their presence in India. Thus, the religious bordering seen at the time of empire continues to the present day in India. However, not everything has remained unchanged since the time of empire and indeed there is much change in migration control and enforcement. Shachar (2020) have

noted that borders are shifting. States have changed bordering practices both in location, outside of traditional state-geographical borders (for example through off-shoring asylum processing or treating those who physically arrive on their territory as 'not having arrived', as they have entered but not been legally admitted), and in time (by preventing their travel in the first place by checking documents at point of departure, or even before, rather than on arrival).

Some bordering practices are dispersed through technology as well as the de-centring of state functions and delegation to private parties and individuals who control access to resources necessary for human survival (employment, housing and healthcare, for instance). However, territorial physical borders still loom large in migration control, and present-day territorial borders are largely found between nation states. Free movement is possible within a nation state or across states, by agreement in regional zones such as the European Union (EU) but is often restricted to specific national origins such as those from member states of the EU. Nation states generally seek to host those who may be able to contribute and are 'deserving' of their place in society but reject others who may be a drain on resources or become 'threats' to host societies.

In this book, I argue that while the practices and mechanisms of bordering have shifted, dispersed and multiplied, as identified by Shachar and other scholars, the core justifications of migration control reverberate down the ages and are closely linked to ethnicity and the racial politics of colonial relations. Regulating foreigners and determining who is foreign (and should be treated as an outsider), has been the chief pre-occupation of borders but this objective has altered with time, location and changing histories, geographies and political formations. Bordering aims are not neatly conceived or ordered over time but emerge as recurrent patterns in bordering practices and the legal architecture of border control. As seen in this chapter, shifting borders are not just modern phenomena. To some extent borders have never been fixed points. Indeed, as we have seen during the expansion of empire there has been fluidity of movement as well as different kinds of restrictions, so shifting borders have old origins. The role of law has been to facilitate this expansion in a manner that gives it a veneer of legitimacy and to generate a belief that the rules and values of colonisers are somehow superior to those of the colonised people and essential for their long-term development. Only when law could be mobilised to expose its own double standards did decolonisation gain traction.

Conclusion

Nobel Prize-winning author Rabindranath Tagore's Bengali song 'Amra Sobai Raja' ('We are all Kings') proclaimed that all are kings in the kingdom of a King who gives respect to people and commands respect in return. That is the only reason people support the King. Written prior to India's independence from British rule, the song (translated from Bengali by Sumana Roy)[4] captures the desire of a nation to take charge of its own destiny and underlines the importance of democratic consent for governance:

> We are all kings in this kingdom of our King –
> Otherwise how else would we will to be with him?
> We do what we please
> our joy mingles in His
> We are no slaves to a despot's tyranny.
> Otherwise how else would we will to be with him?
> The King honors all
> receiving the same in return . . .

The song is a patriotic subversion of empire, yet the British Empire for a long time generated a sense of consent for empire within India which led to its durability. The role of law in colonial relations and bordering during empire is complex and subtle, with English legal education and training proving essential for maintaining colonial hegemony as well as inspiring and framing post-colonial arrangements.

Tethered to the legal promise of subjecthood was the idea of subjects being able to travel and settle throughout empire without hindrance, thereby signifying their equal status in the eyes of the King. Subjecthood had the function of extending territorial jurisdiction and creating legal domination over diverse people through these hegemonic characteristics. Yet, it unravelled precisely because it was not about equality but masking some of the most egregious exploitations of colonialism. Law did not just extend boundaries through legitimising brute force or even through the sleight of hand of subjecthood. It played an institutional role in imperial domination.

While subjecthood was carried around the world by British rulers through documents, laws and courts, it was never tested in a uniform or universal manner. Thus, experiences of being a subject varied widely. Hardly any mass travel had taken place for most of human history until the past century, so few British subjects chose to make use of their hypothetical rights by travelling to England. The few who did were at the extremes of social strata: either very poor or very wealthy. Poorer British subjects such as sailors and servants from India who travelled to England

were usually left impoverished by the India Office in England which was charged with their welfare (Saini 2018).

Historical data on subjecthood and citizenship reveal that law determines who is and who is not from a newly independent country, who remains a British subject and who does not. The backdrop of the World Wars and the resulting focus on loyalty and allegiance while incentivising cooperation from colonies and dominions in war efforts is of great significance. Cases such as the Elias case and the *Komagata Maru* case raise issues about the context of territory and jurisdiction of subjecthood and colonial power. As the British Empire grew during the eighteenth and nineteenth centuries there was an increase in the inflow of migrants from across the empire to England. Focussing on the British Empire, it appears it was in theory an area of free movement, but it also facilitated slavery and indentured labour in direct contrast to 'free' movement. This paradoxical situation was facilitated by racialised borders between colonies and dominions and its operation became clear during the breaking away from empire and rise of nationalism associated with decolonisation. Borders not only demarcated nations and territories but also transformed people into migrants. In general, borders were internally porous, but law extended jurisdiction for colonial powers and ensured a supply of labour at the core of empire.

Newly independent states had to reimagine their national character. For Canada, whiteness was part of a newly emerging national identity. Immigration control became a proxy for ethnicity control, as is evident from the efforts to curb the immigration from Brown and White areas of the globe to Canada. The Canadian context of settler colonialism is largely absent in the UK but both countries are linked by the history of empire and modern-day replication of the relations of empire. Maintaining majoritarian whiteness in ethnicity has been important in both contexts. Similarities in the negative tropes of immigration control such as public health (hookworms for *Komagata Maru* passengers and Covid-19 today), public order (Gadr party and violence for *Komagata Maru* passengers and terrorism now) and other such proxies of 'being a misfit' (regarding climate or culture, for instance) generate a lack of belonging to both nations in different ages. The politics of belonging is about the lack of ethnic fit in migrant populations in both countries. Whiteness of dominant populations was constructed and maintained by liberal legalism and was not overturned by the growth and proliferation of liberal rights in either country. Eventually migration control provides an ideal environment for the matching of different kinds of overt and structural discrimination.

From this chapter we can identify the major justifications for immigration control, such as labour needs and protection in an economy, public

order, national security, public health and control over the long-term ethnic makeup of countries. A variety of modern effects of colonisation persist in recent controversies, such as the controversy over the removal of statues of slave traders (for example, Colston in Bristol) or that of citizenship for Chagos islanders or descendants of people born in overseas territories (Dorling and Tomlinson 2019, 53). As we have seen, subjects were often blocked from exercising rights and indeed the internalised unequal relations of ethnicity persist beyond decolonisation. With time, decolonisation is far from complete and, indeed, the wrongful deportation of ethnic minority citizens (seen in the next chapter) takes decolonisation into reverse mode. It indicates a complete dissociation from those who came into contact with Britain through colonial links and were even sought out for economic reasons of the state, but with time came to be viewed as 'liabilities' for the majoritarian state.

Notes

1. Reported in 'Komagata Maru 100th anniversary: descendants surprised by stories'. https://www.cbc.ca/lite/story/1.2651437. Accessed 22 October 2025.

2. Speech to Colonial Conference of 1897, quoted in Rose et al. (1933, 41).

3. Ansari (2013), note 67: UKHC (Pakistan) to UKHC (India), 17 August 1951, FO 327/7089, UKNA.

4. The song lyrics are available in full at https://free219467.wordpress.com/2016/12/27/amra-shobai-raja-we-are-all-kings/. Accessed 22 October 2025.

Chapter 2

Empire into nation state: bringing home the colonial hostile environment

> 'The border is a belt that is too tight, holding things up but making it hard to breathe.'
>
> – Alberto Ríos, *The Border: A Double Sonnet*

Introduction

Moving through the scales of time and space, this chapter reaches the stage where empires have become less relevant than nation states as political entities for the purposes of bordering. Decolonisation of European colonies worldwide and the break-up of large conglomerates such as the Soviet Union in the twentieth century fundamentally altered how individuals related, and continue to relate, to different regions of the world. Past movements of people, and their journeys, together with the reshaping of legal instruments as well as techniques for border control continue to influence contemporary situations. For instance, today's multicultural Britain is shaped by the migration from erstwhile colonies and dominions. Former colonised subjects and their families (who joined them in the 1960s and 1970s) and their descendants, constitute the diverse population of contemporary Britain. In the previous chapter, we have seen the role of law in legitimising borders, whether through mechanisms of direct enforcement or through more disguised racialised discrimination operating widely throughout the empire. Colonial hostilities were usually carried out far from the metropole in states of permanent exception overseas. Law and order were heightened necessities in times of emergencies, but local

populations could turn hostile at any time and had to be repressed with swift action, thereby necessitating permanent states of exception.

From the early 2010s, the word 'hostile' has been closely associated with immigration control within the borders of the UK as part of 'the hostile environment' for immigration. It is this internal bordering which is the subject matter of this chapter. The descendants of former colonial subjects appear to once again face the wrath of the state machinery of law and order in a sort of reverse decolonisation where their continued presence in the metropole of erstwhile empire has become fraught with tensions of legitimacy of status.

What is this new situation of 'hostile' presence and how did it come into being? In 2018, press reports revealed that many Commonwealth citizens of Caribbean origin who had lived for decades in Britain were suddenly drawn into the nets of immigration control because of not having correct documentation for their immigration status (BBC News 2018). Having travelled to the UK from their countries of origin when the immigration laws did not require specific permission for Commonwealth nationals to travel to the UK, they were unable to present adequate documents when new document-checking requirements were introduced in the UK. Such law came into existence from 2014 onwards. Many predominantly Black British long-term residents lost their houses, jobs, employment and welfare benefits and could not access housing and healthcare. After the hostile environment legislation, some of the Windrush generation were detained and/or deported while others were refused re-entry to the UK when they tried to return from visits to family in the Caribbean. In the next chapter we shall see how there have been many more efforts to bring long-term European Economic Area (EEA) nationals living in the UK into the folds of British citizenship after Brexit than have ever been made for the mostly Black Caribbean population who had resided for decades in the UK. Many of the latter did not have any documentation to prove they were British. In some instances, their travel records had been destroyed by the Home Office or been lost because of the passage of time. Migration Observatory calculates that around 57,000 Commonwealth-born long-term residents have not formalised their status in the UK, of whom an estimated 15,000 are from Jamaica and 13,000 from India (Webber 2018). The effects of exclusion were generally unknown to the public. Awareness of the 'hostile environment' only became widespread when investigatory journalists found out that thousands of elderly British, mainly from the Caribbean, who came to the UK before 1973 as children with or to join parents, were finding themselves tracked and made irregular. This catastrophic situation for thousands of people was diminutively referred to as the 'Windrush scandal'.

The immense gravity of the situation can be sensed by zooming into the life of one affected person. Drawing from the prizewinning work of leading investigatory journalist Amelia Gentleman, reporting on the Windrush generations (Gentleman 2019) we can read of a Windrush-generation woman named Jocelyn. Her experience is illustrative of the agonising ordeals many faced and continue to face. Gentleman reports that Joycelyn arrived in London in 1963 at the age of four, travelling with her mother on a Grenadian passport as a British subject. She had lived all her life in the UK, studying and working in London. It was in 2009 that she lost her Grenadian passport. She had other problems with her documents such as minor discrepancies and could not obtain a new passport. She made many attempts to get the right paperwork in place but eventually she became unable to prove her status and was classified as 'illegally' residing in Britain at the age of fifty-five in 2014. She had many other records of her lifelong stay in the UK: medical files, school documents, bank statements and other such records of a life in the UK, but none of this was deemed sufficient. Consequently, she lost her employment. She was unable to find accommodation and became homeless.

She was given notice of deportation and was sent back to Grenada. She found it a wholly unfamiliar country as it had changed unrecognisably over time. She had no means to start a new life there after a lifetime in the UK. Only after the extent of the mistakes made by the Home Office in relation to the Windrush generation had become known to the public was Joycelyn sent a plane ticket in 2018 by the Home Office to return to the UK from Grenada. By then there was absolutely nothing left of her possessions in the UK. She depended on the charity of friends just to get furniture for her social housing accommodation. Gentleman reports that Joycelyn has not received any compensation for the appalling treatment she received, despite there now being in place a special government compensation scheme for the Windrush generation who were wrongfully affected.

Joycelyn's story is just one of the many life stories of those failed by the state. It exemplifies how subjecthood has cast a long shadow over citizenship rights in present-day Britain for racialised others (Tyler 2013). Isin (2015) writes that empires and nation states continue to co-exist in modern times. He states: 'it is rather difficult to describe modern history as an age of nation-states displacing if not replacing an age of empires as, arguably, not only is there an overlap between these two ages but also a mutual dependence between empires and nation-states, and by extension, between imperialism and nationalism' (Isin 2015, 254). The plight of the Windrush generation highlights this co-existence and how it renders the promise of equal citizenship illusory for many of Britain's ethnic

minority citizens. In this chapter, the focus is on how their status became suddenly precarious through the document-checking regime in the 2010s which ushered in internal bordering through law in Britain.

Chief legal architecture of hostile environment

The term 'hostile environment' was first used by former British Prime Minister Theresa May (when she was Home Secretary) in an interview with the *Telegraph* in May 2012 to describe a series of legislative and policy measures to make lives of irregular immigrants difficult. The idea was to motivate them to leave the UK of their own accord because of the adverse conditions (Kirkup and Winnett 2012). May identified the cause for overstaying by migrants as easy access to resources in the UK. She formulated a plan for restricting access as a means of reducing migration. This may have been an early approach but has now spawned internal bordering through a set of legal and policy measures which has expanded with time. It has now embraced a host of measures which can be implemented to monitor and restrict migration such as digital (biometric) borders, providing No Recourse to Public Funds (NRPF) for irregular migrants as well as for those with specific kinds of visas, regulation of the right to rent and employment checks which require proof of legal status, as well as plans to externalise asylum provision to locations outside of the UK. Indeed, the 'hostile environment' is now a catch-all term to include all measures that adversely affect migrants and extends beyond the initial focus on internal bordering (Worthing et al. 2021). It has been described as a 'sprawling web of immigration controls now embedded at the heart of the UK's public services and communities' (Liberty 2019, 7).

In 2023 Theresa May expressed regret for using the term 'hostile environment' in her memoir *The Abuse of Power* (Gentleman 2023). Yet May had not just used this term verbally. She also acted on it and implemented it during her tenure as Home Secretary on behalf of the government. She oversaw the enactment of a series of pieces of legislation (most notably the 2014 and 2016 Immigration Acts) that converted people legally present in the UK from the Caribbean Islands into 'illegally present'. As a central plank of the 'hostile environment', a variety of service providers were tasked with checking the immigration status of those accessing services (Liberty 2019). Private individuals and organisations were turned into deputised border guards, who were under a legal duty to refuse services and/or report any lack of immigration status to the Home Office (Walsh 2014). They would face potential sanctions, including imprisonment, if they did not participate. Data gathering and reporting duties of third

parties now include employers, bank employees, marriage registrars, the Driver and Vehicle Licensing Agency (DVLA) and landlords.

The core idea of the hostile environment was to stop irregular migrants from being able to access essentials for living, hence the focus on denying basic resources. Control of migration by involving private individuals such as landlords, employers and medical professionals (an intersection of immigration law, employment law, housing and medical law) thereby introduced new bordering practices which are not just at borders. The Immigration Acts 2014 and 2016 sought to monitor and deter irregular immigration but these have spillover effects on long-term residents as is evident in the precarity of the long-term resident Windrush generation (Bawdon 2019) as well as that of many EU nationals living in the UK after Brexit. Together with these two Immigration Acts, regulations and secondary legislation have also brought others working in health, education, policing and homelessness services, local authorities and charities as well as various regulators into the ambit of immigration enforcement.

The funding and ability of these services to continue to perform is often linked to their willingness and success in execution of their immigration functions. These new immigration functions bring into the microcosm of everyday life the presence of borders which are no longer now only the physical and territorial boundaries. However, these bordering functions are propped up by a wider climate of punitive immigration measures such as indefinite detention and forced deportation. Specific measures such as national health service charges have created barriers to healthcare for migrants. Bureaucratic changes (for example, placing immigration officials at police stations and local authorities) and data-sharing agreements between government departments, (for example, memorandums of understanding between the Home Office and Department for Health), have led to many deportations.

Increased deportations have also hit asylum seekers and post-Brexit EU nationals living in the UK. The increase in arrivals of asylum seekers in small boats making perilous journeys across the English Channel, many perishing on the way, is connected with the decreased access to legal routes for seeking asylum. Legal routes for asylum seeking have been curtailed to make Britain less attractive to foreigners. This is a huge shift in policy from the days when Commonwealth nationals were permitted to move freely to the UK under the 1948 British Nationality Act.

How can we reconcile these developments and the current situation in immigration and asylum control in the UK with the open doors policy of the 1948 British Nationality Act and plans for the diverse but closely bonded Commonwealth of Nations which emerged from the ashes of empire? Clearly there was a move away from those post-war plans with

borders migrating and changing contours in such a way as to render people, once welcomed, as foreign again. There are many threads that connect empire-age imperialist bordering to the present-day racialised bordering, and these can be followed to understand the links. In this chapter we will analyse the patterns of these developments linking empire, the legacy of empire and modern-day bordering.

From 'civis Britannicus sum' to 'civis nullius sum'?

When British dominion Canada passed its own citizenship act in 1946 and issued Canadian passports to include its own French-Canadian citizens, it was a truly revolutionary move away from a common British subjecthood (Fransman 2011). For an empire, citizenship linked to nationality is anathema because an empire, by definition, is transnational in nature and encompasses different kinds of political entities and territories. Canada's initiative in controlling its own immigration and naturalisation through national citizenship broke this mould and this had severe implications. Potentially it meant that every other British dominion could also break away from any common understanding of subjecthood. Each could determine criteria for entry and residence on its own terms and regulate subjects from other parts of the empire. This would fundamentally diminish the empire and challenge British supremacy at a time when Britain was weakened by the Second World War. To counter this threat, and firmly reestablish Britain's global place, the 1948 British Nationality Act expressly welcomed all Commonwealth nationals and people from former colonies who wanted to work or settle in Britain. It created the new status of 'citizen of the United Kingdom and Colonies' (CUKC) for people born or naturalised in either the United Kingdom or one of its colonies. Provision was also made in certain circumstances for citizenship to be acquired by descent from a CUKC, or by registration. The law was declaratory in nature, in the sense that it did not require any further action by individuals to take effect; it simply came into immediate effect through the statute.

Dummett and Nicol (1990) point out that even though there is no historical consistency about 'Britishness', the term has a strong political meaning and the distinction between British identity and the identities of other nations is taken for granted. Yet, the transformation of Britain from an empire to a nation state was accompanied by a crisis of identity (Doty 1996). The Commonwealth ideal envisioned a multiracial community cooperating on equal terms in political, economic and cultural matters. This ideal coincided with the professed ideology of '*civis Britannicus sum*'

that had legitimated Britain's imperial rule, the idea that being part of the British Empire would mean there was access to special advantages and guarantees. The Commonwealth had a grand vision of carrying on with that relationship through recognising preferential entry and residence for Commonwealth nationals. This gave post-war Britain a structural relative autonomy from other global powers including its own allies such as the US as well as the rest of Europe.

It was not just this *avant garde* political vision that led to the British Nationality Act (BNA) of 1948. The UK needed fresh blood to infuse in its drained economy and strong muscle to support and reinforce its depleted labour forces at that time. Posters were issued by the British government advertising for labour from across the Commonwealth to help rebuild Britain after the ravages of war (many such posters referred to Britain as the 'mother country'). Many of the Windrush generation arrived in response. As mentioned before, the Windrush scandal and the Windrush generation are named after the *Empire Windrush*, a ship that brought many passengers from the Caribbean Islands. The *Empire Windrush* passenger ship docked at Tilbury from Jamaica on 22 June 1948, bringing a set of migrants looking for a new future. Unlike the passengers of the *Komagata Maru*, they were able to disembark at their destination because they had been sought for working in sectors such as textiles and farm labour (Bawdon 2019). They expected a warm welcome from the mother country but upon arrival, most people found that the response from people in Britain to Black and Asian migrants was unfriendly and even hostile. They found it difficult to find housing and employment and frequently were targeted by racist violence.

Racism and hostility directed towards these newer members of British society became heightened with time (Phillips and Phillips 1998). Instead of being reassured about their safety, they found that many political leaders encouraged the hate and fed into the frenzy. A famous example is the speech by Member of Parliament Enoch Powell where he said, 'In this country in 15- or 20-years' time the black man will have the whip hand over the white man.' In what was often referred to as the 'rivers of blood' speech, Powell commented,

> We must be mad, literally mad, as a nation to be permitting the annual inflow of some 50,000 dependents, who are for the most part the material of the future growth of the immigrant descended population. It is like watching a nation busily engaged in heaping up its own funeral pyre.[1]

The speech illustrates the naked hatred of migrants which still has its echoes in modern migration discourse in Britain. Not surprisingly, an

anti-migration rhetoric soon prevailed in Parliamentary debates and new restrictive changes were proposed in immigration law with increasing restrictions on the rights of Commonwealth nationals.[2] These changes incrementally chipped away at rights to enter and reside rather than being an immediate about-turn from the 1948 Act.

A quick march of the law

The Commonwealth Immigrants Act 1962 introduced restrictions to entry for those whose passports had not been issued within the UK but instead had been issued by British colonial authorities overseas. In doing so it created an explicitly two-tier, racialised system of citizenship whereby all citizens outside of the UK and the colonies technically had the same legal status, but those who resided outside the UK found it nearly impossible to travel using their British passport. Through legal limits placed on the rights of Commonwealth citizens, the United Kingdom was withdrawing from the Commonwealth free-movement area from 1962 onwards, thereby affecting its citizens who resided outside the United Kingdom and whose parentage lay outside of the United Kingdom. Citizens of the United Kingdom and Colonies formally possessed the same legal status, but few had real residence rights. Citizens who resided in the United Kingdom, or whose parentage lay within the United Kingdom, did usually have a continued right of residence in the United Kingdom; they were mostly White. Thus, people who lacked residence rights were disproportionately non-White CUKCs. Just as free movement of subjects during the days of empire was also racially determined by their regions of origin, British citizenship was now of less value to non-White British people from overseas.

There were several legislations brought into being to deal with the racism of the times. The Race Relations Acts of 1965, 1968 and 1976 are some examples of laws which highlighted racial discrimination in the realms of housing, education and employment (Brown 2018). The Race Relations Act 1965 was the first piece of legislation in the UK to address the prohibition of racial discrimination, but it was only limited to public places, where it made the promotion of hatred on the grounds of 'colour, race, or ethnic or national origins' an offence. The Race Relations Act banned discrimination in housing and employment. The Race Relations Act 1976 extended the definition of discrimination to include indirect discrimination. Individuals gained the ability to take discrimination complaints directly to civil courts or industrial tribunals. The Commission for Racial Equality was given responsibility to enforce legislation and conduct research to inform government policy on race relations. Scrutiny of the

police investigation of the murder of Black British teenager Stephen Lawrence in 1993 led to the publication of the Macpherson Report (1999) which concluded that 'institutional racism' was identified as existing within the Metropolitan Police. Following this report there was a new Race Relations (Amendment) Act 2000 which set out that public bodies, including the police as well as schools, could be held accountable for acts of racial discrimination. Other Acts and policies such as the Equality Act 2010 and the NHS Equality Delivery System (National Health Services England) have also now included public bodies within their purview. These developments indicate that there was awareness of the need to address racial tensions through legal intervention but that societal developments did not match up to these legal changes.

The arrival of East African Asians

In the backdrop of heightened racial tensions in the 60s and 70s, many displaced East African Asians who were British passport holders arrived in the UK. At the time of independence of the East African countries in the 1960s, the nationality arrangements were such that most Asians became citizens of the newly independent country in which they were living, but there were still many who held valued British passports as British subjects. Although they were using their British passports, they were also fleeing persecution from the dictatorial regimes of East Africa, and the rise of African nationalism there which had led to the persecution of minorities such as Asian-origin Ugandans and Kenyans (Hansen 1999). Seeking personal safety, they found that they could not enter and settle in the UK. The British government refused them entry or detained and deported many of them at the point of entry, stating that their passports were not intended to be used as travel documents. This begs the question as to what those passports were supposed to be used for.

In 1968, the British government passed an immigration act, the Commonwealth Immigrants' Act 1968, in just three days, to prevent the re-entry of people from countries such as Uganda and Kenya. The 1968 Act further restricted the right of entry of all Commonwealth citizens. A citizen could only live and work in the UK if they, or at least one of their parents or grandparents, had been born, adopted, registered or naturalised in the UK. This rule excluded almost all the East African Asians who were at that time seeking entry to the UK. It left some 200,000 Asians expelled from Kenya stateless after Britain refused them entry. In theory, they should have been able to claim the protection of the British state even as stateless individuals. However, rather than honour international

obligations under the 1951 Convention or their duties to British citizens, the British government chose to withdraw the right of entry and settlement from that group.

The idea of patriality

The Immigration Act of 1971 deepened the racialisation of immigration by creating an exclusionary aspect to British citizenship based on the concept of 'patrials' and 'non-patrials' (Goulbourne 1998). The Immigration Act 1971 created two categories: patrials, who have a special connection with the country, and non-patrials. Patriality depended on close connections (for instance, a grandparent or parent born in the UK). A patrial was generally (i) a CUKC who held that citizenship through birth, adoption, naturalisation or registration in the UK, or (ii) a CUKC who acquired citizenship outside the UK but who had lived in the UK for a continuous five-year period. These patrials held the right of abode in the UK; non-patrials did not. This meant millions of White Commonwealth citizens could, in theory, enter Britain under the patriality clause while almost all non-White Commonwealth citizens were excluded by 'racially defined categories' (Spencer 1997, 143). Commonwealth nationals whose parentage was also from outside the UK – mostly people of colour – had to acquire a work voucher to enter the UK or be admitted as a student or self-sufficient person (Yeo et al. 2019). They were still 'British subjects' under the BNA 1948, but that status was detached from any substantive rights. Even if they were ordinarily resident, or had been, they were subject to a new system enabling deportation of those who had committed criminal offences. The idea of patriality coincided with Britain's entry to the EEA. It ended the right of most CUKCs racialised as 'non-White' to enter Britain by distinguishing between patrial and non-patrial citizens. While patrial citizens (who were born in the British Isles or descended from a parent or grandparent who was registered as a citizen in the British Isles) had a 'right of abode' in the UK, non-patrial citizens (who could not trace their ancestry to the British Isles) no longer had this right. The immigration status of patriality therefore 'made whiteness the primary basis for belonging' (Schaap 2024) in Britain by removing the right of CUKCs racialised as 'non-White' to enter Britain while enabling the mobility of CUKCs racialised as 'White' from settler colonies. Taken together, these changes permitted enormous administrative discretion in determining who can enter and who can stay in the UK.

The 1971 Act completed the dissociation from the Commonwealth in immigration and nationality. It ended the preferential system of labour

vouchers and student entry for Commonwealth citizens. Meanwhile, the situation in East Africa worsened in 1972 when General Amin ordered all Asians out of Uganda. Some 28,600 out of the 50,000 British passport holders in Uganda came to Britain. They were denied entry or detained in the UK and neighbouring countries. The refusal of entry of several East African Asian British passport holders was challenged in the European Commission of Human Rights as reported in *East African Asians v. United Kingdom* [1973] 3 EHRR 76; 15 December 1973. From 1954 to the 1998 entry into force of Protocol 11 to the European Convention on Human Rights (hereafter ECHR) individuals did not have direct access to the European Court of Human Rights; they had to apply to the Commission in the first instance. It the Commission found the case to be well-founded it would launch a case in the court on the individual's behalf. Protocol 11 which came into force in 1998 abolished the Commission, enlarged the court and allowed individuals to take cases directly to it. But at the time of the East African Asians case, the European Commission found that the UK had participated in the inhumane and degrading treatment of the East African Asians in the form of racism and discrimination. In response, the UK government started a voucher system for each head of household (defined as a male member of household) who wanted to resettle in the country. Although clearly unfairly gendered in its approach, it relocated several people to Britain.

In the *East African Asians v United Kingdom* case [1973] 3 EHRR 76 the court gave a decision about East African Asians and held that those who were British passport holders should not be deprived of their right of entry on racial grounds. Rather than assessing nationality rights, however, the court held that the UK had acted incompatibly with Article 3 (freedom from torture, inhuman and degrading treatment), Article 5 (right to liberty), Article 8 (the right to respect for private and family life) and Article 14 (prohibition on discrimination) of the ECHR.[3] The case is considered a landmark pronouncement on inhumane and degrading treatment. However, it is also arguably a failure in pinpointing how and why citizenship rights matter. It leaves us with an unanswered question: how did the right to enter the country of nationality, which is a fundamental property of citizenship, become detached from citizenship holding? How is it now discretionary and deniable?

The BNA 1981 abolished the status of citizenship of the United Kingdom and Colonies. Together with the earlier Immigration Act 1971 the BNA 1981 brought preferential Commonwealth migration to a complete halt. The big question at this point was how Commonwealth citizens already present in the UK would be differentiated from those who would apply to enter in the future. Not only did Commonwealth nationals face legislative

restrictions on their entry, but they also had to start applying for visas to enter the UK during the 1980s. The introduction of visas in the 1980s was a response to outbreaks of conflict. The visa regime affected both asylum seekers and people seeking family reunification (Morris 1998). In 1985, for example, visa requirements were introduced for Sri Lankan nationals when there was an increase in the numbers of asylum applicants from Sri Lanka, thereby making it difficult for them to seek protection.

The 1981 Act also abolished citizenship through place of birth (or *jus soli*) and replaced it with citizenship through descent or *jus sanguinis*. This had the effect of excluding children born in Britain to Commonwealth migrants from immediate entitlement to citizenship. It further created three categories of British citizenship, two of which (that is, British Overseas Citizenship and Citizenship of British Dependant Territories) were not entitled to the right of abode. From 1983 onwards there were no more special connections in law for the UK for Commonwealth citizens. To become British, Commonwealth nationals had to naturalise like anyone else. Blood and ethnicity gained supremacy, as *jus soli* (birth citizenship), which had not depended on bloodlines, was abolished by the BNA 1981. The Immigration Act of 1988 ended the right to automatic entry of dependants of Commonwealth citizens who settled before 1973, marking the end of preferred immigration from Commonwealth countries. When the 1981 BNA came into effect on 1 January 1983 many people who were eligible to register as British citizens (having settled before 1973) did not do so. Some mistakenly assumed it was unnecessary since they believed themselves already to be British citizens or were deterred by the new bureaucratic process and steep fee imposed on applicants.

The mission creep of these legislations was both cumulative and insidious in nature. The 1948 Act had adopted a declaratory system in legislation which implied that all existing lawful residents could simply continue to exist as lawful residents without taking any additional action. The efficiency of the system rested on this uninterrupted right to stay but as residents were not required to take any further steps, many did not obtain any proof of their secure legal status. Although it may be argued that the BNA 1948 did not play a major role in attracting the 'Windrush generation' from the colonies and Commonwealth into the United Kingdom as it merely maintained the status quo of free movement from earlier times, it did advertise the availability of free movement. The manner in which the status quo shifted in subsequent years meant that the progeny of the Windrush entrants became treated as irregular residents (Phillips and Phillips 1998).

With the passage of time, it became impossible to readily ascertain who had legal residence as a citizen and who was a newer arrival. The

Home Office also lost records or simply did not maintain any for many who arrived from late 1940s onwards. However, this did not manifest as a pressing problem until the government introduced document checking from the early 2010s as part of Theresa May's plans. From the early 2010s a series of new laws designed to check the eligibility of people to hold basic rights in the UK, such as the rights to work, housing and healthcare, were introduced. Thus, whereas there was once a 'global vision' of Commonwealth citizenship so to speak under empire, that was slowly eroded in a series of laws, perpetuating the same exclusionary/othering practices etc (Alibhai-Brown 2015, 71, 141).

In the context of the British Empire, we have seen that free movement was a myth for many (Herzog 2012, 796). The subsequent way the Commonwealth story unfolded is a particularly British story, but it has also played out in other global stages resulting in the exclusion of people who once belonged. The hostile environment was all about paperwork. Categories such as 'undocumented citizen', 'denizen', 'stateless' and 'illegal migrant' are categories dependent on the bordering practice of having the correct paperwork in many parts of the world. Haney-Lopez (1996), Volpp (2001) and Aleinikoff (1990) have demonstrated that the formal restrictions of citizenship law in the United States came into existence in the nineteenth century. Gendered and racialised de facto barriers to full membership followed in the twentieth century. Broad-based immigration exclusion created a heightened sense of national borders as well as the state surveillance of those borders, which helped produce people who are called 'illegal aliens' (Ngai 1998). Just as apologies followed belatedly for the *Komagata Maru* incident and a compensation scheme was set up for the Windrush generation, there have been corrective steps taken through schemes that provide some amount of documentary citizenship to those with strong connections to the nation. For example, young children who came to the US as irregular residents were provided documentation to have legal rights in the US through the DACA (Deferred Action for Childhood Arrivals) programme from 2012 which gave the children (popularly called 'Dreamers') the temporary right to legally live, study and work in America instead of fearing deportation. They became eligible to apply for a driving licence, college enrolment and work permit. When Trump tried to end DACA the US Supreme Court blocked his bid in *Department of Homeland Security, et al. v. Regents of the University of California, et al.*, 591 U.S. 1 (2020). The battle over these rights is however far from over as new measures may come into existence in the future.

Document checking has rendered citizenship an exercise in ticking boxes and filling correct forms. Possessing the right paperwork has taken precedence over any other experiences of common values or long-term

presence. This is reminiscent of 'documentary citizenship' as a concept in more recently born countries such as India where it has become a mainstay of citizenship.

During the founding moment of present-day India, the most important event was the partition of India into Pakistan in the West (which included a part called East Pakistan to the East of India as well) and a remaining part still named India in 1947. Pakistan was a Muslim state whereas India adopted secularism as a basic tenet of its Constitution. Article 14 of the Indian Constitution says: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.' The religious distribution however made Muslims minorities in India and Hindus the majority population. Religious distribution differences forced the migration of millions of people across newly created borders, mostly Muslims moving to Pakistan and Hindus to India with much accompanying rioting and bloodshed. In 1975 new borders were created once again when Bangladesh which was East Pakistan became an independent nation. Despite its Muslim-majority population, it shares the same language (Bengali) with neighbouring West Bengal of India.

Those who crossed over from poorer Bangladesh to India through porous borders generally found a warm welcome in West Bengal, due in part to the shared linguistic Bengali identity. They could acquire new identity documents and start new lives in India. This was less true in another neighbouring Indian state, Assam, where ethnic Assamese people comprised a bare majority of the multi-ethnic state and the migrants, mainly Bengali Muslims, had crossed the border in past decades. The Indian government became keen to regulate migration into Assam. The first of many Indian government responses to Bengali Muslims in Assam took the form of the Immigrants (Expulsion from Assam) Act in 1950 (Dutta 2022). From the 1990s, Hindu nationalists intensified lobbying for the identification of Muslims in Assam as foreigners who had likely arrived illegally from Bangladesh (Hussain 2016) rather than having been historically present. In 2019, India listed 1.9 million people in Assam as illegal migrants from Bangladesh in a new National Register of Citizens (NRC) which aimed to identify and deport immigrants in India without valid papers by creating an official record of legal Indian citizens in a register (Ghoshal 2020). Therefore, holding the right paperwork has become even more critical as it is India's version of the hostile environment.

The production of 'illegality' and precarious citizenship, as seen in many other contexts, is entangled with complex legal enactments and arbitrary, anomalous and contradictory bureaucratic state practices (Tuckett 2015, 115). In other empires too this story of categorical exclusion of ethnic minority nationals has played out in former outposts. By 1975 France, like Britain,

had also instituted a tightly regulated, racially discriminatory immigration system that involved making distinctions about the desirability of particular nationality and racial groups as immigrants. Like the Commonwealth ideal which drew upon ideas of universality, French colonial philosophy was marked by the universalism of Enlightenment thinking. France and its colonies were meant to form an indissoluble unity. With the onset of immigration from its former colonies (especially Algeria), France also experienced outbreaks of racist, anti-immigrant violence (Doty 1996).

In both Britain and France, the immigration of non-White, non-European workers and their families, mostly uncontrolled in the beginning, eventually became severely restricted, repudiating the lofty ideals of the Commonwealth and universalism. Currently France, like Britain, continues to experience racial turmoil which is linked to the issue of immigration. France is engaged in re-writing its rules about acquisition of citizenship specifically in a way to cut ties of migration from former colonial or colony-linked territories. A recent example is the decision of France to curtail citizenship by birth from its overseas territory of Mayotte. Mayotte is an archipelago between Madagascar and the African mainland which is a French overseas territory that draws many migrants from neighbouring territories such as the Comoro islands. However, residence permits issued to foreigners in Mayotte are only valid for the islands and cannot be used to travel to mainland France so there is no immediate access to mainland France from Mayotte. Curbing *jus soli* is about forward planning: the idea is to prevent future access for generations born in Mayotte without blood-links to French nationals (Schofield 2024; Basilien-Gainche 2024). This is the reason that Trump has been seeking to end *jus soli* in the United States as well (Khan and Pinto 2025).

There appears then to be several common trends in countries which have empire-linked associations. Most notably, as citizenship regimes become more complex and exclusionary, the importance of evidencing a citizenship link grows. Perhaps this is the reason documentation has become important, and a lack of documentation has increased the precarity of many around the globe. In the next section we can see how new barriers can be created through paperwork (including digital documentation).

Document checking and precarity

Hostile environment legislation introduced the duty to check documents for individuals who had never before been through immigration control. The function of law in making bordering an everyday presence in the

lives of long-term residents becomes clear when the precise mechanisms of hostile environment migration-control legislation are examined. The hostile environment legislation achieves the control of irregular migration by involving private individuals such as landlords, employers and medical professionals and other such personnel who control access to resources, by placing a duty on them to verify immigration documentation for employees, tenants and patients. Through documentation checking and a duty to report, there is individualisation of migration control. Walsh (2014) explains this as deputisation of immigration duties which are placed on private individuals who control access to basic resources essential for everyday life. When people are unable to access basic resources, they are unlikely to exist in a society for long as irregular residents. They may be reported to immigration officials by their employers, landlords or healthcare professionals or they may choose to self-deport to avoid being forced into a difficult existence.

This inclusion of private parties is not just a recent hostile environment innovation. The state function of border control has involved other actors such as carriers (ships and later airlines) since the nineteenth century. The 1820 US Act Regulating Passenger Lists (s.4) required all captains of US-bound vessels to keep lists of their passengers. Similar duties have been in place in the UK on ships and on airlines with heavy penalties imposed for dereliction of duties (failure to check for appropriate documentation) by the Carriers Liability Act 1987. More recently, since 2004 the UK has involved carriers in collecting Advance Passenger Information (API) for both inbound and outbound air passengers. The Immigration Act 2014 obligates carriers and port operators to carry out embarkation checks. Such private carriers were directly involved in moving people across borders, whereas the new parties now brought in to enforce immigration rules have nothing to do with crossing borders or performing any function related to immigration. Modern measures are far more pervasive.

The government employs private actors now for visa and nationality services, providing security at border check posts, detention and deportation services. Indirect delegation also takes place when, say, private parties such as landlords further subcontract their functions (such as hiring agents to do document checking of tenants). In terms of private actors who are operating directly in the border-crossing space, there is even greater involvement of private actors and the creation of a secondary market of private immigration control after the hostile environment.

The Immigration Act 2014 introduced a new concept: the 'right to rent', which is actually about people who have a general lack of a right to rent. It made landlords responsible for checking the immigration

status of tenants. Checks at the workplace (explored at greater length in Chapter 4) were introduced in a rudimentary form from 1996 but were reformed further in 2006. The Home Office could now fine employers who were found to have employed a person without permission to work where the employer had not checked and kept a copy of documentary proof of immigration status. Employers became more cooperative in immigration enforcement for fear of the legal consequences of non-compliance. Chapter 4 will analyse more deeply the relationship between employers, workers and the state. Here I focus on landlords who also come under a legislative framework of document checking to understand how these mechanisms operate. They face civil penalties of up to £3,000 for each tenant whose immigration status does not allow them to rent.

Thus, the 2014 Immigration Act created a system of sanctions and penalties for landlords should they rent out to irregular migrants. The Immigration Act 2016 went further, criminalising landlords and housing agents for renting to someone when knowing, or having reasonable cause to believe, that they do not have the right to rent. Under the 2016 Act, 'renting property to a person knowing or having reasonable cause to believe that the person is disqualified' became a criminal offence for landlords and agents, and a system of accelerated eviction operates to remove tenants who do not have legal status. The scheme requires private landlords to check the immigration status of tenants and potential tenants. It makes knowingly leasing a property to a disqualified person a criminal offence, punishable by up to five years' imprisonment, an unlimited fine, or both.

The legal duty placed on landlords is onerous, and despite being provided guidebooks and simplified instructions (UK Visas and Immigration 2020), there are complex issues of law, interpretation and documentation that landlords must engage with in renting out property. These complexities undermine their ability to rent out fairly as they receive no training for performing their duties under the Act. Prospective tenants can present many different legal documents. While they were permitted to check scanned material during the Covid-19 pandemic, from 21 June 2021 landlords must either check the applicant's original documents or check their right to rent using an online portal.[4] Thus, although targeting irregular migrants, the arduous duty placed on landlords dis-incentivises their renting out to anyone whom they suspect to be 'non-British' and who are therefore less likely to have the required documentation legally mandated by the Act. The Joint Council for the Welfare of Immigrants (JCWI) has found that landlords avoid renting out to anyone who looks or sounds different or has a 'foreign' name to decrease any risk to themselves. According to their study, 42 per cent of landlords said that the right to

rent requirements had made them less likely to consider someone who does not have a British passport, and 27 per cent said they were reluctant to engage with those with foreign accents or names (JCWI 2017).

Prior to the pandemic, JCWI brought a case to the High Court to challenge the discrimination fostered by the 'right to rent' scheme. JCWI was supported by interventions from Liberty, the Equality and Human Rights Commission and the Residential Landlords Association (now part of the National Residential Landlords Association). The High Court judge, Martin Spencer J, decided the case in favour of JCWI, recording the 'disproportionately discriminatory effect' of the 'right to rent' on the grounds that the scheme was incompatible with Articles 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the ECHR ('the declaration of incompatibility'). He also declared that to roll out the scheme in devolved territories, without further evaluation of its efficacy and discriminatory impact, would be irrational and would constitute a breach of s. 149 Equality Act 2010 ('the declaration of irrationality').

The Secretary of State appealed the decision on six grounds but the most significant of these was that the legislation does not result in discrimination and the government was not responsible for any discrimination by landlords. If there were any discriminatory effects these were justified as a proportionate means of achieving a legitimate aim (of migration control). In the Court of Appeal, the judges looked closely at these grounds and the question of proportionality. The Court of Appeal reversed the decision of the High Court and found that there was an 'objective and reasonable justification' for the statutory provisions. The Court of Appeal set a very high bar in terms of what kind of adverse effects of the scheme (and what extent) would be required to find a statutory scheme discriminatory.

The judges drew on the standard set out in *Bank Mellat v HM Treasury* (No 2) [2013] UK SC 39. In the Bank Mellat case the court balanced the severity of the challenged measure in terms of its objectives and in that manner evaluated proportionality. According to the Court of Appeal in the JCWI case, the importance of supporting a coherent immigration system outweighed the adverse effects of the 'right to rent' scheme. In para 66 Hickinbottom LJ appeared to agree with the High Court that on the evidence,

> those who had a right to rent, but did not have British passports (or, particularly, had neither such passports nor ethnically-British attributes), were the subject of discrimination on the basis of their actual or perceived nationality; and that that discrimination was caused by the Scheme in the sense that, but for the Scheme, that level of such discrimination would not have occurred.

Yet, Hickinbottom LJ did not view the nature and level of discrimination as unacceptable. In terms of severity of the effects of the 'right to rent' scheme the court held that a minority of discriminating landlords, no matter how sizeable, could not satisfy the test of proportionality set out in *Bank Mellat* which has to be satisfied for a legislative provision to be declared as incompatible with human rights.

The Court of Appeal's decision exemplifies the highly deferential approach judges adopt to the executive and legislature on immigration as a matter of policy. It also shows how difficult it is to secure individual rights for ethnic minority citizens in a majoritarian Parliamentary democracy. By involving private individuals who control access to housing in the panoply of border control, the Home Office has become omnipresent in society and the discriminatory effects of pitting individuals against each other has become normalised as 'acceptable'. The limits of a liberal rights framework are exposed in this case as in past eras, when other means of bordering were tested, such as when British subjects from colonies were prevented from entering dominions based on race and ethnicity. It seems extraordinary that despite the centuries that have passed since then a certain amount of racism is considered acceptable in contemporary multicultural Britain.

The success of the scheme for employers and now for landlords has led to other private parties who control resources, such as access to healthcare, being brought under similar enforcement roles. Previously the NHS could only disclose patient information to third parties in connection with criminal investigations, but around the time of hostile environment policies, the Home Office also established data-sharing agreements with NHS Digital and the Department of Health and Social Care, allowing it to obtain confidential non-clinical personal information, such as addresses, relating to patients suspected of not having immigration status in the UK (Hiam, Steele and McKee 2018).

Sir Nick Partridge's report in June 2014, 'Review of Data Releases by the NHS Information Centre' (Partridge 2014)[5] found 7,766 responses to immigration tracing requests made between 1 April 2008 and 31 March 2013. Hence this is not a new hostile environment policy but one that has been ongoing for a long time. But the data requests increased by leaps and bounds in the hostile environment. In just three years from 2013 to 2016, looking only at the tracing requests approved, there were 12,672 responses (Travis 2017).[6]

In 2016 the processes became concrete policy.[7] This was through a formalised process that allows the NHS to pass individual demographic data, including a person's last known address, to the Home Office Immigration Enforcement Team (made public in January 2017 but active before then).

In 2017 NHS Digital and the Home Office signed a memorandum of understanding (MoU) to share information about patients for the purposes of immigration enforcement. Under this MoU, the Home Office made 8,127 requests for data in the first 11 months of 2016 alone, leading to 5,854 people being tracked by immigration teams.

Such uses of law and legal process to block access to legal rights are examples of the negative use of power, or what Lukes terms the first dimension of power (Lukes 2021). It is not a passive maintenance of the status quo. The first dimension of power is observable (such as the statistics on data requests) and it makes people act. Here, through forcing action on the NHS, the Home Office is able to proactively curtail the rights of people and create conditions of rightlessness.

Health bordering through documentation

Hostile environment instruments work within borders, as the unwanted people are already there, therefore the force of the law is felt at the points of checking documents and subsequently in any deportation proceedings, as well as in the daily lives of people. Although tenants can be vulnerable and employees too, several strong health policy reasons exist over and above vulnerability for delinking data sharing with the Home Office in the context of health provision. The GMC (General Medical Council) and NHS guidance on confidentiality makes it clear that patient information, including non-clinical information, should be disclosed to law enforcement authorities only in relation to serious crimes. When information about an immigration offence is required by authorities, a confidential health service is perceived as going against the public interest in immigration control.[8]

National AIDS Trust and Doctors of the World note that the GMC's own guidance on confidentiality explicitly highlights the potential deterrent effect of breaching confidentiality: 'Patients may avoid seeking medical help, or may under-report symptoms, if they think their personal information will be disclosed' (Whelan 2019). The data-sharing provisions did not pass the considerable public interest test required to breach the doctor–patient relationship and violated the patient's right to privacy under the Human Rights Act. A state's duties under the right to health therefore extends beyond its citizens to everyone within its territory, irrespective of migration status, and beyond policies and practices within the sphere of health to those that affect health (Muñiz 2019).

The application of immigration rules in health provision is likely to discriminate against non-British patients.[9] Migrants in an irregular situation may also fear being detained for deportation, particularly in countries where public officials have a duty to report on irregular migrants. In addition to ensuring access to healthcare without discrimination, strict walls should exist between healthcare personnel and law enforcement authorities. Those fundamental rights include the right to health.[10]

In the EU, the EU General Data Protection Regulation (GDPR) came into force on 25 May 2018 and set out clear rules on the processing of personal data that increase the rights of individual data subjects, with the aim of fostering greater transparency and accountability in the use of personal data. This law covers the requirement to safeguard immigration data and places data protection obligations on public service providers, certain authorities and private actors as well. The GDPR recognised prior violations of human rights in the context of the World Wars and sought to protect human beings based on rights already well recognised in human rights of the EU such as the EU Charter of Fundamental Rights (Articles 7 and 8) and the ECHR (Article 8) which are linked to privacy rights. While an exceptional need for data sharing can be demonstrated by governments, such exceptions are very narrowly drawn and must be specified in EU or national legislation (rather than administrative convenience). Even the exceptions must respect the fundamental rights and freedoms of individuals who would be affected by the exception, while being driven by the need to safeguard a specific and pressing social need (such as national security, the prevention, investigation, detection or prosecution of criminal offences or other important objectives of public interest). The exceptional need must be sufficiently clear and precise to be foreseeable for affected individuals, and necessary and proportionate in a democratic society. Immigration enforcement that does not prioritise access to essential services, such as healthcare, would be difficult to justify under these exceptional provisions (Vavoula 2020). Article 23 of the GDPR creates scope for 'restrictions' on those rights, that is, exemptions. Article 23(1) says what the grounds can be (national security, public interest grounds and so on); it also contains the test for what a valid (GDPR-compliant) exemption under national law looks like: a valid restriction is one that 'respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society'. Article 23(2) supplements that broad test with prescriptions about what the exemption created by domestic law needs to include, such as why data processing is required and what kind of data is being processed as well as what is being done to safeguard against unlawful access or abuse of such

data, amongst other considerations. Member states then go and implement those exemptions in national legislation.

The GDPR framework however does not apply wholly to the UK after Brexit as the UK introduced a specific exception for immigration control. The UK Data Protection Act (DPA) 2018 S. 4 A (Schedule 2) is about providing an exemption from some of people's data protection rights, if those rights were likely to prejudice the maintenance of effective immigration control, or the investigation or detection of activities which would undermine the maintenance of effective immigration control. This exemption is broad and could potentially include a variety of applications by the Secretary of State, but it is not available to others who share information with the Home Office on immigration matters, such as those with deputised immigration functions (employers, universities, doctors or even the police) (Crépeau and Hastie 2015).

The extent to which the Home Office can rely on this was evaluated in *R (Open Rights Group and the 3 million) v Secretary of State for the Home Department and Others* [2021] EWCA Civ 800. The Court of Appeal concluded that the 'immigration exemption' in Schedule 2 to the DPA 2018 is not compliant with the GDPR. In allowing the appeal, Warby LJ summarised the rationale for Article 23 as follows (para 50):

> . . . broad legal provisions, such as those that require a measure to be necessary and proportionate in pursuit of a legitimate aim, are insufficient to protect the individual against the risk of unlawful abrogation of fundamental rights. The legal framework will not provide the citizen with sufficient guarantees that any derogation will be strictly necessary and proportionate to the aim in view, unless the legislature has taken the time to direct its attention to the specific impacts which the derogation would have, to consider whether any tailored provisions are required and, if so, to lay them down with precision. This approach will tend to make the scope and operation of a derogation more transparent, improve the quality of decision-making, and facilitate review of its proportionality.

The question for the Court of Appeal was whether those tests for a GDPR-compliant domestic law exemption were met for the immigration exemption in paragraph 4 of Schedule 2 DPA 2018. It did not agree that there was compliance. It concluded (para 53):

> On my reading of Article 23 as a whole, it seems clear that the Immigration Exception is non-compliant. The Exemption itself contains nothing, specific or otherwise, about any of the matters listed in Article 23(2). Even assuming, without deciding, that it is

> permissible for the 'specific provisions' required by Article 23(2) to be contained in some separate legislative measure, there is no such measure.

The exemption was amended on 8 March 2024 in response to this decision. The amendments introduced the following safeguards to the exemption:

1. For the exemption to apply, the Home Secretary must apply the exemption on a case-by-case basis and make a separate decision about each right or each occasion on which they restrict a right.
2. They have to consider all the circumstances of the case, including any potential vulnerability of the person, and the impact it will have on their rights and freedoms and then carry out the balancing test – they must ensure that the risk to immigration control is substantial and outweighs the risk to the person's interests.
3. The use of the exemption has to be necessary and proportionate.
4. The Home Secretary has to record their decision to use the exemption and their reasons for using it, and inform the person of the decision, unless doing so would prejudice immigration matters.

This amendment has, as set out above, somewhat restricted the scope of application of the immigration exemption but nevertheless the UK is one of the few European countries to have such an exemption. In most European countries, with the exception of a few, such as Germany, there is no broad, statutory duty to inform the immigration authorities about service users. Even in Germany, where the duty to inform exists, education is exempted from this and there is also a 'don't ask, don't tell' policy in place for most other service providers (Schmitz-Berndt and Schiffner 2021). This means that the UK is very much an outlier in the data-sharing scenario.

Some aspects of health provision are specifically fragile where vulnerable populations are concerned. For example, reproductive and maternity care are areas of heightened vulnerability. Health inequalities in the reproductive space can deepen if provision of health services is linked to citizenship or migration status. While emergency care may still be accessible, maternity healthcare and other serious care needs may be missed. Apart from the other reasons, data sharing in maternity services is particularly problematic as the bodies of female migrants are often treated as sites for state control of reproduction and demographic control. This is a primary reason why many jurisdictions in the more economically prosperous countries have moved away from automatic citizenship being granted by birth (*jus soli*) to systems of gaining citizenship through

blood-links with existing citizens (*jus sanguinis*) to restrict migrant access to nationality by birth (Bhabha 2009). Terms like 'anchor baby' and 'drop and leave' babies are used to insinuate that migrants such as Latinas in the US breed babies to form the basis of a better life in the US. Racism is rife in reproductive services provided to migrant women (Chen 2011; Huang 2008). Indeed, the term 'anchor baby' has entered into common usage because of right-wing activists and is dispersed by mass media news outlets, mainly Newsmax and Fox News. It has then increased in prominence due to 'new media', such as medium-sized news outlets, also contributing to use of the term (Ignatow and Williams 2011).

The anti-terrorism rhetoric has also become linked to controlling the reproduction of migrant women. The confluence of race, gender and sexuality and how these are used to further anti-immigration rhetoric post-9/11 has reduced non-White female bodies to terrorist breeders. Immigration offences such as illegal entry are now comparable to terrorism offences. Even citizenship is targeted as a terrorist site of contention. The discourse of 'immigrants as terrorists' has been feminised in recent years and female bodies have become the targets of conservative/popular rhetoric. The term 'terror baby' has also been born (although is much less popular than 'anchor baby'), claiming that these babies are born in the US so that they can move in and out of the country freely while being trained as terrorists abroad. It is important to delink reproductive and maternity services for migrant women from dependence on immigration and nationality status to break free from such racialised deployment of law and legal discourse and to prevent its right-wing politicisation.

Resistance from civil society

Given the many strong public and human rights grounds for opposing data sharing in the health sector and specifically for migrant women in the reproductive care space, several challenges have been launched in this space, and more are likely should such measures continue to operate. Leading organisations such as Liberty and Migrants' Rights Network challenged the MoU on such grounds between NHS trusts and the Home Office, also involving the Department for Health and Social Care and NHS Digital, and were granted permission to argue their case in the High Court. Apart from the litigation there was targeted campaigning by Doctors of the World ('Free to Care' petition), National AIDS Trust and others. The Safe Surgeries Toolkit, Docs not Cops, and the 'Patients Not Passports' campaign, and Liberty's campaign for a firewall between Home Office and the NHS ('Care Don't Share', Bradley 2018), all focussed on stopping

data sharing between the NHS and the Home Office. The conjoined effect of the threat of a successful challenge in court as well as the strong campaigning by civil society actors led to some victories in preventing data sharing in the health sector. NHS Digital withdrew from the arrangement with the Home Office and the government agreed to limit data sharing to serious crime (Liberty 2018).

Medical professionals have opposed such migration-control duties being placed on them through campaigns ('Patients not Passports', for instance) and legal challenges. In the early days of the hostile environment policies, there was a data-sharing arrangement trialled at St George's hospital, Tooting, London. The NHS and the Home Office signed a MoU. The hospital was required to share data on the immigration status of patients in a controversial pilot project in the pre-natal department. Data sharing in the hospital led to deportations (Miles 2017). It was later challenged and withdrawn but it highlights the concerns of how such measures affect people who are vulnerable and need care.

Despite the victories mentioned above, the risk of health data falling into hands of immigration enforcement remains a real possibility. As digital databases expand and migrant communities become part of such databases or are unable to secure documents, it is important that their immigration status is not secretly shared with various agencies, including basic service providers, the police and the immigration services (Saunders 2023). Because irregular entry and stay are often criminalised, people who are without necessary documents face the risk that the use of services will expose them to immigration enforcement (including detention and deportation).

To ensure this does not happen, a data 'firewall' should always exist between service providers of all kinds. In the health sector, a 'firewall' would specifically delink the delivery of healthcare from the enforcement of immigration rules. While states may wish to pursue immigration objectives, they have a basic legal obligation to also protect human rights (Jolly and Lind 2021). Without such protection migrants with uncertain status will not call emergency services (for instance for a fire or traffic accident, or even report a crime committed against them). During the Covid-19 pandemic, many avoided even accessing health services for fear of being reported to immigration services, thereby indicating there needs to be active reassurance that delivery of basic services like healthcare is wholly delinked from immigration control. Some migrants worry about losing their informal sector jobs or the education services being accessed by their children should their lack of status become known to the authorities. In Chapter 5 I will return to healthcare access in terms of NHS charging.

Other requirements for checking documents and reporting also exist, such as in counter-terrorism schemes. Schemes such as Prevent, a British

statutory legal instrument which emerged in 2002 in the aftermath of 9/11, have brought universities within the bordering space. Prevent is pre-emptive in nature and targets activities, beliefs, behaviours, bodily movements, ideological positions and even emotions, which may not be criminal but may be indicative of intent. Prevent is another manifestation of border control. University personnel are drawn in to work with the police to control and monitor their students. In 2015 the Counter-Terrorism and Security Act imposed a legal duty on public bodies and their staff to carry out surveillance on the public. In 2024 the definition of extremism terrorism was widened to include 'promotion or advancement of ideology based on hatred, intolerance or violence or undermining or overturning the rights or freedoms of others, or of undermining democracy itself' (Mureithi 2024). These escalations meant the 'prevent' duty is ever expanding in scope and is now pervasive in the education space.

Individuals are not the only ones who become the eyes and ears of immigration enforcement because of their access to resources. There is a secondary level of immigration enforcement where these individuals hire agents to verify documents and meet their legal obligations. Privatisation is also more directly related to immigration control when private companies (such as G4S and Serco) are contracted-out immigration functions. The migration industrial complex has very dark overtones and reveals a lack of accountability. Private companies run detention centres for profit. They operate border services including deportation for profit. And they provide security services at physical borders.

Asylum privatisation and provision of resources

Private companies such as G4S and Serco which run prisons now lead on asylum provision. Apart from violence towards migrants (including rapes, death and injuries) which have taken place in spaces run by them, there is the use and exploitation of detained migrant labour to maximise profits. These companies hire detained migrants for nominal amounts to work in detention centres. They also provide temporary accommodation to asylum seekers which can be substandard.

A case concerning asylum accommodation provided by Serco came to the court and was decided in 2019. In this case, *Ali (Iraq) v Serco Ltd* [2019] CSIH 54, the court looked at whether it was unlawful for Serco to evict asylum seekers without first obtaining a court order, in terms of the Rent (Scotland) Act 1984. Serco provided temporary accommodation to asylum seekers in Glasgow. They provided this accommodation under the terms of section 95 of the Immigration and Asylum Act 1999 ('the

1999 Act'). Mrs Ali was living in such accommodation, but her asylum claim was rejected. The Home Secretary served a written notice to quit and soon after, Serco served an eviction notice on her and her husband. Thereafter, in July 2018, Serco began to implement the 'move on protocol' – a new policy of changing locks and evicting asylum seekers without any court process. This applied to asylum seekers, such as Ms Ali, whom Serco considered to have no continuing entitlement to be provided with accommodation. When Ms Ali challenged this, the court had to examine whether the eviction without a court order was unlawful in terms of the Rent (Scotland) Act 1984 because, among other things, it breached Article 3 and Article 8 rights under the ECHR. But first the court had to see if Serco could be classified as a 'public authority' under the Human Rights Act (HRA) 1998.

A 'public authority' is defined in section 6(3) of the HRA 1998 as 'any person certain of whose functions are functions of a public nature'. Here the decision was that Serco was essentially 'taking the place of central government in carrying out what in essence [was] a humanitarian function'. Serco was therefore 'exercising a function of a public nature' and should be classified as a 'public authority' under the HRA 1998 [para 32] (Casalicchio 2020). It is important to keep private companies within this public authority definition so that they cannot engage in exploiting vulnerable people. While the role of law in migration control is often one of categorisation and selective application of rights (for example, paying below minimum wage for work done by detainees) as well as the obfuscation of liability (when it is unclear who is acting in public authority), it can also sometimes ask for accountability and provide a framework for determining who is accountable. With the introduction of biometric borders and digital databases as well as decision-making algorithms, legal provisions will need to be even more carefully drafted to identify and attribute liability for wrongdoings (Lyon 2009). Who is accountable if mistakes are made? Would it be the digital coder, the policy maker or the enforcement team? These are the new questions that emerge out of technological advancement.

The legality of asylum seeking

While privatisation and use of technology bring unique challenges in asylum provision, in the UK there is an even greater challenge, in that the right to seek asylum itself is in jeopardy. There is no legal route for someone to claim asylum in the UK unless they are physically present in the UK, and there is no asylum visa to allow someone to enter in a

regular manner to access asylum. This curtailment of the right to seek asylum (which had been safeguarded in the post-war era by the 1951 UN Refugee Convention and the 1967 Protocol) is mainly prompted by channel crossings from France to England in small boats. The vessels on which crossings are made are not well-structured boats but are usually inflatable boats, dinghies or kayaks which are frail and unsuitable for a journey across the sea.

Many asylum seekers came from war-torn parts of the world to Europe from 2015 onwards. More than a million arrived by sea, as there were no safe routes over land (International Organization for Migration 2021). There are very few safe alternative routes for refugees to travel to the UK. A few resettlement routes do exist, such as the UK Resettlement Scheme, the Community Sponsorship and the Mandate Scheme which are available to people recognised as refugees by the United Nations High Commissioner for Refugees, but these are extremely restricted by nationality and number. Refugee family reunion visas and limited labour mobility schemes as well as nationality-based pathways (for instance, for Ukraine) exist but these are specific and do not meet the needs of most refugees (Gower and Sturge 2024). While tragic stories of people drowning in these dangerous crossings have been reported by the press, there are many calls for action in the media and in right-wing political rhetoric of stopping the 'invasions' of migrants. Yet it is overlooked by most that the war-torn areas from where the refugees have come were previously colonised lands; several were part of the British Empire. A report by the Refugee Council finds that three out of four people crossing the English Channel in small boats in 2023 are refugees who would be granted asylum if their claims were actually processed. Yet they fail to be considered genuine refugees when they are displaced due to ongoing conflicts which are playing out in the long shadows of history. Instead of offering shelter the UK and European countries have started closing asylum routes and are looking to offshore asylum seekers to less developed parts of the world in exchange for money. For instance, the EU has outsourced its migration problem to Turkey through the EU–Turkey deal of 2016. Germany and Italy have also been considering finding new safe third countries to accept asylum seekers as well. As these European countries seek to outsource/offshore to the Global South, the border has been shifted back from the point of entry of migrants in the Global North to their point of departure from the Global South.

Another wealthy nation, Australia, has attempted creative schemes of externalisation of asylum. It transfers asylum seekers to third countries that are deemed safe by Australia, mostly to offshore islands, such as Christmas Island, to detain and hold migrants. Australia uses

a creative 'deeming power' called the 'power of excision' that deems parts of Australian sovereign territory to be no longer included in Australia for migration purposes, thus making asylum seekers 'illegal' as they are deemed not to have arrived in Australia to seek asylum even when they have done so. This is a unique instance of migrating borders where the borders are truly themselves reconfigured through legal fiction (Mountz 2011).

The UK made a concerted effort to outsource migration in April 2022. Through a contract with Rwanda, the UK planned to deport some people seeking asylum in Britain to Rwanda without considering the merit of their claims at all in the UK. The UK did not make any provision for their return if they were later found to have a genuine case for asylum. In the meanwhile, the UK passed a new act to restrict access to asylum. This was the Nationality and Borders Act 2022 which aimed to prevent small boat crossings. This Act effectively made it an offence to arrive to seek asylum. The United Nations High Commissioner for Refugees (UNHCR) has said that some of its provisions are in breach of the Refugee Convention because it seeks to prevent people applying for asylum, shift responsibilities for refugee protection to other states and criminalise new arrivals (UNHCR 2021b). The Illegal Migration Act 2023 also states that all asylum seekers arriving irregularly (for example, in small boats) must be removed to a safe third country. At the heart of this Act is the idea that Rwanda is a safe third country, but it has been hard to convince the courts or human rights organisations and activists that it is indeed a safe third country.

The European Court of Human Rights stopped deportations to Rwanda in June 2022 (Dzehtsiarou 2022) and said that British courts needed to consider all human rights issues before starting deportations. A UK high court then decided in December 2022 that the Rwanda plan was lawful, but ten asylum seekers from Syria, Iraq, Iran, Vietnam, Sudan and Albania challenged the high court ruling, with the support of the charity Asylum Aid, in *AAA and Others v The Secretary of State for the Home Department* [2022] EWHC 3230 (Admin). Their claim was about whether Rwanda meets the legal threshold for being a safe country for asylum seekers. The Court of Appeal found that Rwanda was not safe and that asylum seekers risked being sent back to their home countries (where they could face persecution). The government appealed this decision and then the UK Supreme Court unanimously ruled that the government's plan to send asylum seekers to Rwanda was unlawful.

The Supreme Court found that asylum seekers sent to Rwanda may be at risk of refoulement – being sent back to a country where they may be persecuted, tortured or killed.[11] The courts cited extensive evidence from the UN refugee agency (UNHCR) that Rwanda does not respect the

principle of non-refoulement. The UNHCR's evidence questioned the ability of Rwandan authorities to fairly assess asylum claims. It also raised concerns about human rights violations by Rwandan authorities, including not respecting non-refoulement with other asylum seekers.

Lord Reed of the Supreme Court emphasised that there are obligations towards asylum seekers that go beyond the ECHR. The duty of non-refoulement is part of many other international conventions, and domestic law as well. In other words, exiting the ECHR (as has been proposed by some politicians) would not automatically make the Rwanda plan lawful or easier to implement.

Although the Labour Government (as of 2025) has abandoned the Rwanda plan, the Supreme Court's decision is not a barrier for the political viability of the Rwanda plan; indeed the Conservative government, which was the previous government, passed the Illegal Migration Act and the Safety of Rwanda (Asylum and Immigration) Act 2024 to designate Rwanda as safe so that asylum seekers could be sent there in future. While no-one has as yet been removed under the Rwanda deal other countries that are designated safe third countries could in future receive asylum seekers on behalf of the UK. Recent news reports state that the UK government is seeking to return failed asylum seekers to other countries, such as the Balkans.[12]

Another trend is to convert this core human right into discretionary political decisions which allow for governments to choose by creating special schemes for selected groups of asylum seekers. The UK has done this in earlier decades: accommodating the Chileans in the 1970s, the Vietnamese in the early 1980s and the Bosnians in the early 1990s (Sales 2002) without providing a generally applicable asylum right for all. In more recent times Ukrainian families who come to the UK must apply for visas in advance, which is the immigration concept of seeking permission in advance of entry and not based on a universal international right to seek asylum. The Ukraine Sponsorship Scheme allows Ukrainian nationals and their family members to come to the UK, but they first need to arrange for a sponsor who can provide accommodation for a minimum of six months (UK Visas and Immigration 2022). In this manner, what was essentially a matter of right has become conditional and dependent. Families and individuals are left at the mercy of sponsors. There are reports of predatory exploitation and people being rendered homeless at the end of the six-month period (Crawford and Smith 2022). At the time of writing, more family members are not permitted to join their displaced family in the UK as the Ukraine Family Scheme closed in February 2024. Those who were already granted permission under the Ukrainian Family Scheme can live, work and study in the UK and access public funds for up

to three years. However, those who intend to join a settled family member in the UK who can accommodate them may be eligible to apply under the Homes for Ukraine Sponsorship Scheme which is also available for Ukrainians to be hosted by non-family members. These different schemes are also confusing as they fluctuate with time with abundant unreliable information online about the schemes.

The Ukrainian visa system is paradoxically presented as a shining example of how the UK can accommodate and welcome asylum seekers promptly and without delay as they would not have to seek asylum on arrival (Cassidy 2023). Despite its flaws, arguably, Ukrainian asylum seekers, even if repackaged as visa holders, are better situated than other asylum seekers who cannot avail themselves of any special schemes. Similarly, following the beginning of the war in Syria, the UK government worked with UNHCR to resettle people as part of the Syrian Vulnerable Persons Resettlement Scheme (VPRS). The scheme offered safety to 20,000 refugees fleeing the Syrian crisis and ended in 2021. In 2015, the Home Office announced the scheme's breadth (or rather, limits): 20,000 Syrians by 2020. In 2017, the UK announced it was dropping the nationality requirement from the scheme to open it up to other refugees from the Middle East – mainly Libya. With 'Syrian' dropped from the title, the scheme has since been known as the VPRS. Refugees under the VPRS are granted five-year residence visas. These were initially humanitarian protection visas, but this was later changed to full refugee status. This latest scheme extends from a history of temporary, quota-based schemes adopted by the UK government. Following the crisis in Afghanistan in August 2021, the UK government formally opened the Afghan Citizens Resettlement Scheme (ACRS) in January 2022. The government has said that it will resettle more than 5,000 people in the first year and up to 20,000 over the coming years, but there is a large gap between promises and their implementation. All these schemes share the common features that these are nationality based, and time bound. It has been argued that temporary schemes for specific groups allowed successive governments to select those who are deserving of assistance rather than being universal and based on humanitarian and/or legal standards. This trend now appears to be a dominant one in asylum provision.

Such an approach negates the universal commitments of the Refugee Convention and is more in line with the approach of countries that did not sign up to the Refugee Convention at all, such as Asian countries like India. To unpack the Indian scenario is useful, especially as a test case of where the lack of Convention rights can lead in terms of asylum protection. The Foreigners Act of 1946 in India did not define who should be given refugee status so refugee status in India is predominantly politically

determined. Yet India was formed out of forced migration (Ananthachari 2001). The largest single mass migration in South Asia took place in 1947 when the partition of the Indian sub-continent took place, and in 1971 when Bangladesh became independent. Nearly seven million Bengali Hindus had crossed the border into West Bengal, Tripura and Assam to refugee camps built and sustained by the Indian government (Weiner 1993). At present certain refugee communities like Sri Lankan Tamils, Chakma and Tibetan refugees have received sufficient protection by the Indian state (Rajesh Babu and Pandiaraj 2022). On the other hand, refugee communities like Bangladeshi Muslims, Afghans, Burmese and many others who follow Islam have not received similar treatment.

In the recent past the Rohingya have consisted mainly of Burmese Muslims, bilingual Bengali- and Burmese-speaking people who are persecuted by the Burmese military (Sullivan and Sur 2023). They are effectively a stateless group who have fled Myanmar to continue to seek safety in India and Bangladesh. In India, they have not been offered asylum and have been treated as foreigners for deportation when they were detected through document checking or when they sought asylum. They have been arrested for violation of the Foreigners Act 1946 and the Passports (Entry into India) Act 1920 along with other legislation. Meanwhile, the Citizenship (Amendment) Act (CAA) 2019, in India, updates the existing Citizenship Act 1955, to provide Indian citizenship to minority communities fleeing persecution from neighbouring countries (Amnesty International 2024). It seeks to offer citizenship to Hindus, Parsis, Buddhists, Sikhs, Jains and Christians from Bangladesh, Afghanistan and Pakistan. The clear intention behind it is to grant citizenship to Hindus fleeing persecution in Muslim-majority countries neighbouring India but it has serious implications for both the Muslim immigrants as well as Muslims residing in India itself.

There is a cautionary tale for asylum rights and asylum seeking here from India which demonstrates how leaving asylum to political choices may have discriminatory and politicised effects. For asylum provision to address humanitarian needs, the countries who are signatories to the Refugee Conventions should avoid a similar route of political expediency. While there are many who fall through the cracks of the Refugee Convention, prior to the Convention there was no structured system for considering asylum claims (Kuipers 2021). For instance, when the Soviet Union denaturalised many of its emigrees, the League of Nations set up a committee under the famous polar explorer Fridtjof Nansen to deal with the situation of many who became stateless. Nansen designed a document for them to verify their identity and enable their travel through countries that recognised it. The document came to be known as the

'Nansen passport' (Gatrell 2017). Nansen had to convince each country to make this possible and achieved the extraordinary feat of some fifty-one countries recognising this passport by the end of the 1920s. Some 450,000 Nansen passports were issued in the 1920s. Nansen did not have the Refugee Convention to help him, and it took extraordinary negotiation and diplomacy to generate the political will for stateless and displaced people. It is important to remember that the intervening years have generated a ready framework of many human rights (both to prevent statelessness and confer refugee status) which nation states have agreed to. Preserving these conventions, at least as baselines for what protection displaced people should receive, is essential.

Blocking citizenship for refugees

Instead of providing enduring protection, the UK is moving towards increasing precarity. It has not just removed asylum pathways but also made it difficult for refugees to gain British citizenship. It used to be usual for those who had secured refugee status to naturalise as citizens over time. When refugees apply to become a British citizen, adults and children over the age of ten must meet a 'good character' requirement, which is set out in guidance. Generally, factors such as past criminal history, financial stability and breaches of immigration law have an impact on what the Home Office sees as 'good character'. Most issues (except serious criminal convictions) are disregarded after ten years, a rule that has been part of the guidance for some time. However, in February 2025, the government made changes to the 'good character' guidance for naturalisation (UK Government n.d., good character caseworker guidance). The changes say that people who entered the UK 'illegally' and/or arrived through dangerous routes will 'normally' be refused British citizenship. The Home Office defines 'illegal entry' as entering through any route in breach of immigration laws, for example in breach of a deportation order or through deception. A 'dangerous journey' includes, but is not limited to, travelling by small boat or being hidden in a lorry. It does not include arriving as a passenger on a commercial flight. This means, from 10 February 2025 (the date of the guidance), anyone who applies for citizenship who arrived in one of the above ways will normally be refused, no matter how long ago they arrived. This will have an impact on many refugees who gained status through an asylum claim in the UK, and people who are in the asylum system now. This change will make it harder for anyone who arrived in the UK through an irregular route to successfully apply for British citizenship.[13] It is hard to see how this barrier to

belonging as a permanent member of British society will prevent those who are fleeing war for reasons of safety from undertaking dangerous journeys. All it seems to achieve is a meanspirited exclusion of those who have successfully gained refugee status and remained for a long time in the UK to secure indefinite leave. It de-recognises their long-term links with this country and renders them vulnerable.[14]

Conclusion

The legacy of empire has not just left a trail of violence overseas. Continued British involvement in the post-war period in former colonies and dominions, especially throughout the Commonwealth, also created controversial internal bordering. The living progeny of former colonised people are ethnic minority citizens in modern United Kingdom. Whereas in the time of empire subjecthood was a legal fiction of equality, after the dissolution of empire, it was possible to refocus on the ethnic links very quickly to make citizenship illusory for ethnic minorities. Racialisation of citizenship has shaped the environment and the situation of the Windrush generation. In the past subjecthood was racialised based on ancestry: only those with grandparents/parents born in the British Isles could claim to have a special connection with the country, especially as the legal concepts of partiality and right of abode became prevalent in nationality and immigration legislation. There have been special visa pathways such as ancestry visas and youth mobility schemes for the old Commonwealth (former dominions) which are not available to the new Commonwealth. There are in the present not just these series of legislative changes eroding the rights of Commonwealth nations but many other ramifications which persist. Here law functions both for demographic reasons, through ethnicisation of nationality laws, and for symbolic reasons, for communicating the preferred values of a particular nation state. A primary shift is for blood-links to matter more in such scenarios with a likelihood of increasing inversely in relevance with the lessening importance of *jus soli*.

Tracing how citizenship becomes linked to ethnicity uncovers the role of the former colonial subject who becomes a Commonwealth national and then morphs into a long-term resident. It demonstrates the uncertain legal territory between subjecthood and citizenship. The East African Asians case shows how the re-bordering around Commonwealth nationals in Britain brought about by the changing status of Commonwealth nationals through different immigration and nationality legislation took place. Eventually, being rendered wholly foreign, Commonwealth residents with long-term residence suddenly found themselves trapped in new documentation

requirements imposed by hostile environment legislation and suddenly became categorically excluded. The role of law in this transformation is about making borders real and tangible, even within the nation-state boundaries, and often in continuation of empire-age practices of exploitation. The very construction of an idea of Britishness and proximity to Britishness is set out by law so that people continue to remain foreign within borders through the operation of law. The latest example of such exclusion is that of refugees in Britain who may be long-term residents and even hold permanent status with indefinite leave to remain, but still cannot become citizens.

Notes

1. '50 Years On: Rivers of Blood'. https://www.bbc.co.uk/programmes/b09z08w3. Accessed 20 October 2025.

2. For example, University of Warwick, Library Records Centre, 'The 1958 Riots'. https://warwick.ac.uk/services/library/mrc/studying/docs/racism/riots/. Accessed 8 October 2025.

3. The Immigration Act 1971 and the British Nationality Act 1981: The cross-linking of right of abode with being free of immigration control means citizenship is now a racialised notion (linked with ancestry and bloodlines). From 1983 no more special protection for Commonwealth citizens (they must naturalise like anyone else) and no more birth citizenship (BNA 1981).

4. The Home Office published guidance for private landlords on conducting right-to-rent checks during the Covid pandemic.

5. Prior to 2014, the NHS Information Centre (NHSIC), predecessor to NHS Digital, was already engaged in immigration tracing services (National AIDS Trust and Doctors of the World 2018).

6. MOU0002. https://committees.parliament.uk/writtenevidence/85587/html/. Accessed 20 October 2025.

7. MOU0002. https://committees.parliament.uk/writtenevidence/85587/html/. Accessed 20 October 2025.

8. 'NHS chiefs urged to stop giving patient data to immigration officials', *The Guardian*, 31 January 2018. https://www.theguardian.com/society/2018/jan/31/nhs-chiefs-stop-patient-data-immigration-officials. Accessed 8 October 2025.

9. Council of Europe, European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 16.

10. UN Committee on Economic, Social and Cultural Rights, Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights (13 March 2017).

11. *R (on the application of AAA and others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/Cross Respondent)*, UKSC/2023/0093.

12. 'Government considering sending failed asylum seekers to Balkans', Billy Kenber, BBC, 22 March 2025. https://www.bbc.co.uk/news/articles/cddyj8geo8po. Accessed 8 October 2025.

13. In 2025 November the latest proposal from the Home Secretary is to require some migrants who may be in Britain under legal routes but relied on benefits for a certain period to have to wait twenty years before they can naturalise. https://www.bbc.co.uk/news/articles/c3w9wlney230. Accessed 20 November 2025

14. In November 2025 the UK government announced plans for 'earned settlement' which further lengthens the time period to twenty years for those who may have entered illegally or overstayed their visas. Oral statement to Parliament: 'A fairer pathway to settlement: The Home Secretary's statement setting out significant reforms to the UK's legal migration model'. Home Office and The Rt Hon Shabana Mahmood MP, 20 November 2025, https://www.gov.uk/government/speeches/a-fairer-pathway-to-settlement. Accessed 15 January 2026.

Chapter 3

Bordering a continent and a country: EU and the UK

'The border is the blood clot in the river's vein.'

– Alberto Ríos, *The Border: A Double Sonnet*

Introduction

Having covered the border dynamics of empire and commonwealth, this chapter focusses on continental bordering and the role of law. The scalar approach shifts the focus from empire to continent for two primary reasons: firstly, to analyse the dynamics and tensions between national and continental bordering and, second, to identify how supra-national citizenship can to some extent facilitate or, in the case of its loss, prohibit access to human and citizenship rights. Within continents or large regional blocks, borders can be reconfigured or erased to create zonal free-movement areas where there are no longer any border crossings. Normally, such areas have similar levels of economic development. The role of the law is to create categories of control within these regions. It determines who comes within the force of immigration control and who is exempt.

As seen in the previous chapter, the Windrush generation were targeted as a category by immigration control. Another category of residents in the UK excluded suddenly from secure status are EEA nationals through Brexit (2016 onwards). The Citizens' Rights Directive 2004/38/EC (also sometimes called the 'Free Movement Directive') sets out the conditions for the exercise of the right of free movement within the EU. Long-term

residents from the rest of Europe who could enter and stay in the UK without having to seek immigration permission under free-movement agreements within the EU could no longer do so freely after Brexit.

Many commentators and human rights activists point out that the Windrush generation were treated far worse than EU nationals in the UK during Brexit in terms of legal options to continue to reside in the UK (Escandell and Ceobanu 2024). Setting aside any comparisons about the extent of suffering of different groups of people, many EU nationals also struggled with the adverse consequences of Brexit.

One such example is that of Mr Melargo, a young Italian national who was detained in the UK. He had lived in the UK before Brexit and had made a late application to remain in the country using the Brexit EU settlement scheme set up for the millions of EU citizens living in the country before the UK withdrew from the bloc in 2021. He held a Home Office certificate explicitly stating he has a right to travel in and out of the country while officials were still processing his application to live and work in the country post-Brexit (O'Carroll 2024). Mr Melargo was a UK resident working in the UK. Yet he was separated from his Ukrainian partner and put on a plane to Venice by Border Force officials. This kind of deportation demonstrates the new-found precarity of many EU nationals in the UK. Thus, some EU nationals also experienced racialised exclusion in ways comparable to that of past exclusions of other nationals. Further, there are many racial minority citizens in EU nation states who had migrated to the UK and had then become vulnerable. Other third-country partners and family members also lost secure status because their EU national partner became displaced or precarious because of Brexit.

Above all, although EU nationals are usually depicted as high-end, professional and privileged migrants, they also include poorer migrants (many from Eastern Europe) who are seeking better life opportunities in other EU member states. It is wrong therefore to depict EU nationals as a single block of a completely different population group. When placed under immigration control, they have many similar vulnerabilities as other migrants.

The UK in the EU

In order to understand how continental re-bordering has affected EU nationals let us examine how it has materialised in the UK. Brexit is an instructive tale about bordering, de-bordering and re-bordering for other countries within the EU as well as other neighbouring states around the globe which have achieved varying degrees of economic integration

through sub-regional and regional economic and trade agreements. It is in these regions that free movement zones are more likely to flourish. The deeper the integration, the greater the likelihood of finding relatively liberal freedom of movement provisions between states. However, the integration of markets is not at similar levels worldwide. The lowest level of integration is characterised by the internal removal of trade barriers and is called a free trade area, for example, the North American Free Trade Agreement between Canada, the United States and Mexico (Suliman 2014). The next level would be a customs union, for example, the Caribbean Community. The third level is when both labour and capital can move, for example, the Southern Common Market in South America, or the Trans-Tasman Travel Arrangement between Australia and New Zealand (Lakos and Szabó 2025).

In some regions a few countries may be more advanced in integration than others. In Africa, some regional blocs have lifted (to a large extent) restrictions in cross-border movements, for example, the East African Community and the Economic Community of Western African States (Okolo 1985). In Asia, the free movement of labour, which is limited to skilled labour, is one of the core elements of the Association of Southeast Asian Nations (ASEAN) Economic Community's single market and production base. ASEAN allows practitioners in some professions to practise in other member states (Jurje and Lavenex 2015). The cross-border movement is usually of a temporary nature, and as it only relates to skilled labour it does not really take down borders for most people of the region. At the highest level there is an almost full economic union which then leads to integration beyond just movement. The EU is an example of such an arrangement. Similarly, the Nordic Passport Union allows citizens of the Nordic countries – Iceland, Denmark, Norway, Sweden and Finland – to travel and reside in another Nordic country without any travel documentation or specific documentation requirements. Since 25 March 2001, all five states have also been part of the Schengen Area. Most Schengen Area countries are part of the EU while all of the Nordic countries have strong links to the EU too, thereby creating a wider region of cooperation. Hence, internal borders have become largely collapsed within the EU. However, the integration of people and national politics at a level commensurate with the collapse of EU internal borders was not quite achieved within the EU, perhaps contributing to the exit of the UK. Migration played a significant part in this exit. We shall examine it in detail in this chapter to understand how it operates to include or exclude people.

We focus on bordering in Europe via the EU because arguably it has facilitated the highest level of integrated free movement across several nation states and also because Europe as a continent has had to reinvent

itself over time. It has had to project itself as a distinct and unique continent despite not being a geographically separate continent from Asia. Western Europe, particularly, has presented itself as the cradle of human enlightenment and the pinnacle of human culture and civilisation, a view consolidated throughout the globe because of the wealth and power acquired from colonialism. Santos and Boatcă (2022, 106) critique this 'archetypical continent' view of Europe, highlighting how this view gives privilege to Europe, Europeans and their descendants everywhere almost as a matter of right. Santos and Boatcă write that, 'The meta-geographical East-West division has also served as the most common and long-standing internal differentiation within Europe, periodically transferring geopolitical, economic, and cultural divides into an ahistorical distinction between Eastern and Western Europe. The European East thereby sanctions Western Europe's position as the norm' (Santos and Boatcă 2023, 141). They write that the European East partly acquires attributes of a larger 'Other' in being portrayed as Oriental or 'somehow Asian'. Historically, however, the concept of Europe has fluctuated depending not so much on geography as much as geopolitics and global power relations.

Global geopolitics was the reason for Britain to engage with European powers despite its own distinct island-nation position set apart from the rest of the continent (McCourt 2014). In the last chapter we saw how Britain maintained its position as a post-war global leader by brokering relations with former colonies which had become independent and encouraging free movement of people but then withdrawing from these arrangements as the internal political tides turned. Relationships between former coloniser and colonised proved sticky and not easily disentangled but Britain started looking for new partners, some of them fellow former colonisers themselves. The UK became active in European politics and made new economic alliances at a time of massive re-bordering within Europe.

In the post-war phase, several European borders have coalesced through reciprocal multi-lateral arrangements between nations in Europe. The Council of Europe (CoE) is an international organisation founded in the wake of the Second World War to uphold human rights, democracy and the rule of law in Europe. Founded in 1949, it now has forty-six members including the UK. In the 1950s, six core states – Belgium, France, Italy, Luxembourg, the Netherlands and West Germany – founded the EU's predecessor, the European Economic Community (EEC). The remaining states have acceded in subsequent enlargements. It is noteworthy that the founding states of the EEC are all former colonial powers or have benefitted from colonial arrangements (Hansen and Jonsson 2017). The EEC began with a core idea of free movement of people amongst member

states (Treaty of Rome). Nationals of EEC member states travelled freely between member states without requiring visas. However, they were still asked to produce their passports between borders, so internal bordering was not entirely abolished and largely coincided with national borders.

When the Schengen Convention was agreed in 1985, internal border checks were abolished, and a common visa policy was adopted. The Schengen Area encompasses most EU countries, except for Cyprus and Ireland. Bulgaria and Romania became the newest member states to join the Schengen Area, and as of 31 March 2024, any person crossing the internal air and sea borders is no longer subject to checks. Additionally, the non-EU states of Iceland, Norway, Switzerland and Liechtenstein have also joined the Schengen Area. The border-free Schengen Area guarantees free movement to EU citizens, along with non-EU nationals living in the EU or visiting the EU as tourists, as exchange students or for business purposes (anyone legally present in the EU). Free movement of persons enables every EU citizen to travel, work and live in an EU country without special formalities. When the EU was formed in 1993, similarly, the site of control shifted from national borders to the specific sites of document checking (Bigo and Guild 2005). Agreements such as these require member states to cede some amount of control over their own borders (Maas 2016).

Characteristics of EU citizenship

EU citizenship has a unique dynamic quite different from national citizenship. Any national of an EU member state is a citizen of the EU, but EU citizenship does not replace national citizenship. EU citizenship only adds some more legal rights to national citizenship. The rights attached to EU citizenship are such that they require respect from member states, hence indicating a willingness from nation states to give up exclusive national sovereignty over citizenship (Wallace 1999). This is a delicate balance, as holding EU citizenship depends on having a member-state nationality in the first place. While having national citizenship of an EU member state is vital, access is controlled almost exclusively by the member states.

As we have seen, by levelling the economic field between countries there can be a greater likelihood of free movement for individuals than when economic inequality is rampant. However, welfare provision may vary from state to state, leading to better economic support in some countries than in others. The EU cannot dictate changes to national standards. Not surprisingly, the largest differences between member states which

affect the exercise of uniform substantive citizenship rights across Europe are the means of acquiring or losing national citizenship as well as the kind of welfare systems and social safety nets across Europe. Hence there is a focus on harmonisation of various member-state standards on relevant laws and for closer cooperation on matters of nationality and social welfare (Threlfall 2003).

While harmonisation is attempted through negotiations and diplomacy, when disputes arise these go to the European Court of Justice (ECJ: the supreme court of the EU in matters of EU law). As a part of the Court of Justice of the European Union, the ECJ is tasked with interpreting EU law and ensuring its uniform application across all EU member states under Article 263 of the Treaty of the Functioning of the European Union (TFEU). The Court was established in 1952 and is based in Luxembourg. It is not possible to appeal against the decisions of national courts in the ECJ, but rather national courts refer questions of EU law to the ECJ. When such questions about naturalisation and denaturalisation of people in different member states reach the ECJ, it can review these using EU standards of proportionality review. Proportionality is a general principle of EU law, as laid out in Article 5(4) of the Treaty on European Union. It restricts authorities in the exercise of their powers by requiring them to strike a balance between the means used and the intended aim. It can also look into denial of welfare to a member-state national by another member state. However, it is ultimately for the national courts to apply the resulting interpretation to the facts of any given case.

Another forum of adjudication is the European Court of Human Rights (ECtHR). The ECJ is not institutionally related to the ECtHR, which is also known as the Strasbourg Court. Established in 1959, the ECtHR interprets the European Convention on Human Rights (ECHR). The court hears applications alleging that a contracting state has breached one or more of the human rights enumerated in the convention or its optional protocols to which a member state is a party. Aside from judgments, the court can also issue advisory opinions. Since all EU states are members of the CoE and so are parties of the Convention on Human Rights, all of these states also have case law from the ECtHR. Over time, incrementally both courts have created jurisprudence on EU citizenship and human rights although sometimes some issues may not be wholly aligned between both courts.

The legal challenges in courts and incremental changes via legal instruments have meant the dismantling of European internal borders since the creation of the EU. Initially the legal changes were about movement of goods and then it became about the free movement of workers (Schmidt 2012). It is well recognised that the ECJ managed to become an important actor for European integration. By establishing the direct effect

and supremacy of European law in the early 1960s, the ECJ constitutionalised the Treaty, granting European rights to individuals. The ECJ has been, and continues to be, a major force furthering European integration, and its case law on the fundamental freedoms laid out in the Charter of Fundamental Rights of the European Union. The Charter was declared in 2000 and came into force in December 2009 along with the Treaty of Lisbon. It brings together the most important personal freedoms and rights enjoyed by citizens of the EU into one legally binding document. It has been very important in this respect. There is widespread agreement among legal scholars on a convergence in the interpretation of the fundamental freedoms through the ECJ (Davies 2003; Tryfonidou 2016; Barnard 2010).

With the formation of the EEA and then the EU, Europe indeed became an area of free movement. But for whom? Softer monitoring for EEA nationals is the norm, but many scholars argue that the borders of Europe have further reified and blocked those from outside of Europe, and, with time, deprived many EU citizens of social rights in other member states (Mantu and Minderhoud 2023). Under EU laws, some third-country nationals could derive immigration status and also transmit the status to their children because countries permitted *jus soli* (birthright citizenship) and *jus sanguinis* (citizenship through blood-links). Yet there has been a move away from these permitted links which extend borders. For instance, in 1983 the UK moved from being solely a *jus soli* regime towards one mixed with blood-links. Being born in the UK does not automatically lead to British citizenship anymore. This makes it difficult for children of third-country nationals born in the UK to get British citizenship through birth in the UK unless they have a parent who is British or an EU national. Similarly, a prominent example of a birthright citizenship jurisdiction was Ireland, which until more recent times permitted *jus soli*. It changed this policy when faced with widening citizenship access for children of third-country nationals who were born in Ireland. Such children obtained birthright citizenship ties for themselves and legal rights for their third-country family members leading to a backlash against *jus soli* citizenship from existing citizens. The Chen case (Zhu and Chen, Judgment of 19 October 2004 [2004] Case C-200/02) is an example of the success of a third-country national mother to bring up an EU-born child as an EU citizen. The case is both about widening access and the backlash that followed the success. In this case a Chinese woman moved to Ireland to give birth. She gave birth to a baby girl named Catherine. As part of the Good Friday Agreement, a 1999 amendment to the Irish constitution specified that Irish citizenship was the 'birthright of every person born in the island of Ireland', including Northern Ireland. Though

the baby's Irish citizenship was never in question, UK authorities initially refused to extend a residence permit, and the case was referred to the European Court. The UK government submitted along with the Irish government that the action was inadmissible because the case fell outside the material scope of EU law. According to both governments, neither the child, Catherine, nor her mother, Mrs Chen, had crossed any border and could therefore not benefit from any citizenship rights. However, the ECJ in its judgment extended the protections of European law to a non-citizen parent of an EU citizen child even when they had not crossed borders between EU member states. The key factor here was that the child possessed the nationality of a member state different from the one where the family resided (that is, Irish citizenship) rather than crossing borders within the EU (Bigo and Guild 2005).

The Chen case thus gave some third-country nationals derived immigration status through their EU citizen children (White 2005). Many could also transmit EU citizenship to their children because some EU countries permitted *jus soli* (birthright citizenship) while others permitted a combination of modes of transmission via *jus sanguinis* (citizenship through blood-links). Yet the Chen case also contributed to the removal of unconditional *jus soli* in Ireland. Similar trends are observable across Europe: as third-country nationals started exercising derived rights to settle and give birth in European countries, several European countries moved away from *jus soli*. Birthright citizenship is much diminished now in Europe. Blood-links became the preferred way to transmit citizenship in many countries. The case itself was still undecided when the Irish government proposed the Twenty-Seventh Amendment of the Constitution of Ireland in March 2004 to remedy unconditional *jus soli*. The Irish Justice Minister called *jus soli* an 'abuse of citizenship' as it conferred on persons with no tangible link to the nation or the state a right of citizenship. The birth of an Irish child (the so-called 'anchor child') could enable non-nationals to circumvent the immigration and asylum systems. Eventually unconditional *jus soli* was abolished through the Twenty-Seventh Amendment of the Constitution of Ireland following the referendum.

The move away from birthright citizenship involved a departure from the traditional account of Irishness, which starts from birth (Maas 2016, 538). The question of citizenship by birth in Ireland first acquired prominence in recent years as a result of the Belfast Agreement of April 1998. This was an attempt at a political settlement for Northern Ireland and was agreed between the British and Irish governments and all but one of Northern Ireland's major political parties. One new development in the Agreement was the acceptance by Unionist parties that persons born in Northern Ireland should be entitled to opt for Irish citizenship.

The Agreement therefore recognised 'the birthright of all the people of Northern Ireland to identify themselves, and be accepted as Irish or British, or both, as they may so choose'. That statement was then the subject of a declaration by the two governments, in which they expressed their 'joint understanding' that the term 'the people of Northern Ireland' meant 'all persons born in Northern Ireland and having, at the time, of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence'. Northern Irish people can choose to be both Irish and British or exclusively Irish or exclusively British, but at birth they are attributed to be British until they decide to exercise a choice. On reaching the age of majority, they can renounce their British citizenship through an administrative process and become Irish or they can continue to be British. This is laid out in the British Nationality Act 1981, which states that a British citizen of full age and capacity may renounce their British citizenship and that, subject only to concerns about statelessness, the Secretary of State shall give effect to that renunciation. This is particularly problematic because of the serious identity-linked nationality issues in Northern Ireland.

The presumption of Britishness at birth was challenged by Emma DeSouza, who was born in Northern Ireland and was treated as presumptively British by the Home Office in De Souza (Good Friday Agreement: nationality) [2019] UKUT 355 (IAC). She was denied an EEA residence card for her US-born husband on that basis. She challenged the decision but lost before the Upper Tribunal. Eventually the dispute was settled out of court for the DeSouzas. The Upper Tribunal found in favour of the Home Office's position that the Belfast Agreement did not supersede the 1981 Act and therefore, Emma DeSouza was British despite her genuine belief that she was only Irish.

Making people citizens automatically through territorial birthright has normally been defended on the basis of administrative convenience. Since a birth is a publicly recorded event in many places (most have a central registry), citizenship through birthright provides the state with a reliable means to account for its population. Yet if birth citizenship is used to exclude outsiders it can lead to all sorts of inequalities and lead to the quick identification of unwanted 'foreigners' in the population mix. It also led to self-identification as foreign. For example, post-Brexit EU law rights attach solely from being Irish by birth in Northern Ireland. As EU law rights are often more generous for bringing in third-country national partners and deriving other benefits, those who would like to retain EU rights would have to undergo renunciation of their British citizenship by birth in Northern Ireland for pragmatic reasons. The numbers of these

renunciations in Northern Ireland have soared in recent times as Brexit has led to fears of loss of EU rights.

The effect of Chen on subsequent family law-related cases (such as Zambrano – *Ruiz Zambrano v Office national de l'emploi (ONEm)*, Case C-34/09) will be examined in Chapter 5 on the bordering of families. But for now, let it suffice to say that there is a clear move away from *jus soli* in the EU member states as well as in other countries of the world. Five EU countries award citizenship at birth on the basis of birth in the territory subject to certain conditions, but no country in the EU now provides unconditional *jus soli* (Erdilmen and Honohan 2020).

The political and popular reactions around birth citizenship in Ireland and Northern Ireland are reminiscent of other debates about 'anchor babies' and 'birth tourism', such as in another unconditional *jus soli* jurisdiction, the USA. US courts have answered questions about territorial birthright citizenship by referring to common law precedents. The Fourteenth Amendment to the US constitution established the *jus soli* principle as the principal means of conferring citizenship on children. The Amendment states: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside.' Passed after the conclusion of the Civil War, the main purpose of the Amendment was to guarantee the citizenship status of former Black slaves. However, the Fourteenth Amendment has also been interpreted to mean that all persons born on US territory shall be accorded US citizenship. This interpretation was affirmed in *United States v Wong Kim Ark*, 169 U.S. 649 (1898), when the US Supreme Court ruled that a child born in San Francisco to Chinese parents was indeed an American citizen, even though his parents were non-citizens because of the Chinese Exclusion Laws. With the Fourteenth Amendment, the US placed nativity/birth on its territory as the foundation for determining membership in the political community (King 2007). The equation of citizenship with territorial birth is an important principle that marks the distinctiveness of the American nation and the substantive quality of American citizenship. For example, champions of birthright citizenship usually defend the practice on the grounds that it allows for the vast majority of the American population to attain equal political status, thereby enabling democratic self-governance and individual self-determination. Various politicians and public commentators seek to deny birthright citizenship to children born in the United States to undocumented or temporary migrants (Nakamura and Foster-Frau 2025). There are also arguments that it is not fair to make citizenship compulsory as it is non-consensual when gained at birth. Schuck and Smith (1996) term this 'ascriptive' and consider this less valid than citizenship by consent.

In Chapter 1 we saw how in fact birthright status to subjecthood was useful for the advance of empire and the interests of empire, although recently there has been a rollback from birth citizenship for children of more recent arrivals. Consent is the basis of naturalisation but rarely do naturalised citizens get any extra credit or recognition for their consent in becoming a citizen. To the contrary, naturalised citizens are generally less secure in their citizenship status (see Chapter 6, for instance, on the cancellation of British citizenship).

Continental citizenship and rights

Another effect of hard borders for third-country nationals is the difficulty in obtaining asylum in Europe. Europe is referred to as 'fortress Europe' because of its stringent control over asylum seeking (Krotký 2023). Meanwhile, EU citizens have increasingly obtained better protection of their rights EU-wide and their EU citizenship has been consolidated at the continental level.

The overall pattern emerging in the past few decades is of how continental bordering and free movement are linked with the strengthening of EU citizenship rights. Through case law analysis it is possible to see that the rights of EU nationals living in the UK evolved over time. At first, rights only attached to those EU nationals who were working in the UK. Through judgments of the ECJ, EU nationals became more than just workers in the law and started acquiring rights as citizens of the EU. Over time, nation states have been compelled by EU law to give access to all EU citizens through their national welfare support and resources despite some member states expressing reluctance (Kostakopoulou 2020). However there has been an increased exclusion of third-country nationals. Through these developments in exclusion, it is possible to see how law and exclusion function to confer status, and preferred authority of status, within the continental context primarily through reciprocal arrangements, while excluding people who originate from outside the continent. Exit from these arrangements, such as during Brexit, or in the instance of Commonwealth nationals in Britain in the earlier decades means that foreignness is generated by law and becomes an accessible means of demographic control.

The exclusionary features in EU law appear to be linked to protection for labour markets and national welfare resources, which is where there is the greatest misalignment between EU and national citizenship. Eventually even the large role of law in exclusion within the EU was not considered by the British politicians and public as sufficient for

protecting British labour markets and welfare systems. EU immigration was a key factor for triggering the referendum process for Brexit (exit of the UK from the EU). Immigration became one of the tipping points for Brexit as the potential inclusion of Turkey in the EU and forward migration from EU member states in Eastern Europe to the UK became hotly debated topics (O'Brien 2016). Millions of EU nationals residing in the UK needed to regularise their status within a brief period; if they did not, they became foreign. In this manner, newly redrawn borders created foreigners through the constitutive operation of law.

From a migration perspective, Brexit was about successfully excluding others whether already present in the UK or aspiring to enter in the future. The constitutive registration system for ensuring that EU nationals could continue to live and work in the UK after Brexit was a different approach to membership from the declaratory system adopted earlier for the Windrush generation and other Commonwealth citizens in the UK. The legal arrangements in the two contexts thus provide an opportunity to comparatively assess how law operates for determining membership and the impacts of these approaches on whether people belong or become 'foreign'.

As we assess the bordering of the continent through law we need to ask first if it is possible at all to belong to a continent. While a sense of belonging can be engendered by, say cheap or free rail travel for youth and cultural festivals across this region bringing about a psychological sense of home across countries, the politics of belonging can be quite different if different states have different manners of managing migration. As discussed before, Europe, not being a distinct geographical region, has an identity built on the spoils of colonialism, and linked with colonialism a sense of cultural supremacy. Yet, it is also the cradle of formalised and institutionalised human rights such as equality. For a long time, nation-state membership has been considered essential for access to basic rights in law. Indeed, even access to human rights is mediated through citizenship in practice. Hannah Arendt called citizenship the 'right to have rights' (Benhabib 2004). Even the right to hold a nationality itself is a basic human right. For instance, Article 15 of the 1948 Universal Declaration of Human Rights states, 'Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.' Yet nation-state membership can be deeply politicised and ethnicised. It can demand allegiance to values that a globally mobile population may not subscribe to, such as loyalty to a single country.

EU citizenship is a way to transcend some of the narrowness of nation-state membership. As a last-minute addition to the Treaty of Maastricht, without significant political discussions (Aziz 2009, 291), EU citizenship

supplemented national citizenship, and the free movement of workers on the European level. All citizens of all member states automatically qualify. EU citizens may move and reside freely throughout the EU and may stand and vote in elections for municipalities and the European Parliament (Wind 2009, 254). Also relevant is Art. 12 (now Art. 16D) prohibiting discrimination on the ground of nationality. The core rights of EU citizenship are the freedom of EU citizens to live, work, study and access public resources anywhere within the common territory. States are reluctant to abdicate or transfer competence over the attribution of citizenship, because the competence to determine citizenship is the power to decide who is a member of the polity (Maas 2013; Weber 1964). The case can be made that citizens of the EU are essentially free from immigration control in moving around the territory of the member states. This is because of the range of rights that citizens of the EU have to travel, stay and reside, to/in other member states under EU law as a constitutional right flowing from their status as citizens. But, as already mentioned, it is not an autonomous concept. It is dependent on holding a member-state national citizenship (Art 9–12 of the Treaty on EU).[1] Declaration no. 2 to the Treaty states that, 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned'. EU citizenship may be supplementary to national citizenship, but does it provide any additional rights to EU nationals living in other member states?

EU citizenship: undermining or sharing nation-state sovereignty?

Another domain of nation-state regulation has been national elections. EU citizens have had uneven access to voting rights in various member states (Ziegler and Nowag 2023). In France, for example, the introduction of EU citizenship prompted several changes to the constitution to permit voting by EU citizens who were not citizens of France, and voting rights proved contentious. All EU citizens have the right to vote for and stand as a candidate in European Parliament elections in their country of origin, or, if they live in another EU country, they may choose to vote and stand there, under the same conditions as the nationals of that country. Under the Treaty for European Union and EU Charter of Fundamental Rights, EU citizens who live in another EU country also have the right to vote and stand as a candidate in local or municipal elections in the country they live in, again under the same conditions as the nationals of that country. Yet EU citizens are still excluded from taking part in national elections,

thereby again setting them apart as foreign despite holding continent-wide citizenship.

Since being or becoming a member-state national is crucial, a critical question is how does one become a citizen of one country while retaining links to other countries? The leading case on acquiring nationality is still the decision in the Nottebohm case delivered on 6 April 1955 in the International Court of Justice (Nottebohm Case (Second Phase) (*Liechtenstein v Guatemala*), ICJ Reports 1955). Mr Nottebohm, who was then a German national, had settled in Guatemala in 1905 and continued to reside there. In October 1939 – after the beginning of the Second World War – while on a visit to Europe, he obtained Liechtenstein nationality and returned to Guatemala in 1940, where he resumed his former business activities until his removal as a result of war measures in 1943 by Guatemala, as Guatemala had joined the US war effort. Lichtenstein was a neutral nation in the war. It decided to intervene on Nottebohm's behalf, but the ICJ decided that Mr Nottebohm's nationality of Lichtenstein was not based on any genuine prior link with Liechtenstein and the sole object of his naturalisation was to enable him to acquire the status of a neutral national in time of war. Since he maintained a domicile in Guatemala, the court held that he had not broken all bonds with his original nationality nor was he integrated into Liechtenstein society. For these reasons, Liechtenstein was not entitled to take up his case and put forward an international claim on his behalf against Guatemala. Liechtenstein nationality, having been acquired by naturalisation, could not have been considered dominant and effective. His request for indemnification of assets nationalised by Guatemala was rejected by the court.

The court emphasised that the grant of nationality was an act of national jurisdiction. But, at the same time, it held that the determination of nationality is not automatically effective internationally and that Nottebohm's new nationality was not 'ipso facto' binding on third-party states. Nationality was defined in the Nottebohm case by the ICJ as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'. Hence nationality has an emotive component which may be difficult to evidence.

This reasoning has been criticised for introducing a subjective test for genuine and effective nationality instead of highlighting objective factors which indicate connections with a country (such as length of residence or presence of family). An objective standard could more logically measure an individual's material connections to the country. Where people are employed or reside, and where they have family or financial assets can be determined through objective evidence and this could determine their dominant nationality far better than the affective elements set out in

Nottebohm. Instead of looking to objective, demonstrable facts, the court engages in a psychological evaluation of love, patriotism, interest in public life and so on, all of which are highly subjective, and depend on each individual judge's social and political opinions and tendencies.

Yet this affective or genuine connection approach is arguably still quite relevant and has even been part of other international law cases. For instance, the Inter-American Court of Human Rights, an international human rights court based in San José, Costa Rica, has decided that in Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), ILR, vol. 79, p. 284 'nationality can be deemed to be the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state'.

In the context of cancellation of citizenship, the presence or absence of another nationality becomes critical, and loyalty of the person being cancelled is also assessed. The psychological and emotional assessment for genuine connection resonates with a loyalty-allegiance-protection framing of citizenship and can be quite restrictive in terms of who belongs. Has EU citizenship transcended this mono-national framing and achieved any degree of real transnationalism? To some extent, it has done so, but the road to any understanding on continent-wide rights akin to national citizenship has been bumpy. Throughout the long evolution of EU citizenship, member states have not been willing to harmonise citizenship legislation or give primacy to the EU on this matter. The treaties specify that policies regarding the acquisition and loss of nationality remain the sole competence of the member states. Citizenship acquisition and loss are explicitly identified in the treaties as a matter of exclusive member-state competence.

A good example of this, which illustrates how the exclusion of British subjects through re-definitions and re-categorisations in British nationality laws excludes them from the EU as well, is the Kaur case decided by the ECJ [2001] EUECJ C-192/99 (20 February 2001). Born in Kenya in 1949 in a family of Asian origin, Ms Kaur became a Citizen of the United Kingdom and Colonies under the terms of the British Nationality Act 1948, but this status was not recognised under the Immigration Act 1971 as having a right of residence in the United Kingdom. The British Nationality Act 1981 conferred on Ms Kaur the status of a British Overseas Citizen, but as such, she had no right under national law to enter or remain in the United Kingdom. Following several temporary periods of residence in British territory, and while once again in the United Kingdom, in 1996 Ms Kaur re-applied for leave to remain as she already had done on several occasions since 1990, when she first entered the United Kingdom. This was denied, so she sought judicial review because she wished to remain

and find employment in the United Kingdom and periodically to travel to other EU member states. The court decided that Ms Kaur was not a citizen of the UK and was instead a citizen of a non-member country (Kenya) and therefore she had no eligibility for EU citizenship.

When joining the EEC, the United Kingdom attached a declaration to its 1972 Accession Treaty, updated in 1982 following revisions to its nationality legislation, specifying that British citizens, British subjects with the right of abode in the UK, and British Dependent Territories citizens with a connection to Gibraltar all qualified as UK citizens for the purposes of EEC law (United Kingdom 1983). It means others who were overseas nationals and who did not have the right to enter the UK (such as Ms Kaur) could not claim EU citizenship. This case recognises the UK's national sovereignty in redefining its own membership and even identifies this as customary international law in para 20.

> On the basis of that principle of customary international law, the United Kingdom has, in the light of its imperial and colonial past, defined several categories of British citizens whom it has recognised as having rights which differ according to the nature of the ties connecting them to the United Kingdom.

The ECJ specified in the Kaur case that this declaration was an 'instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty ratione personae', thus confirming the UK's authority to determine by itself who should be considered a British citizen for EU purposes. This meant Ms Kaur could not claim any links with the EU. Hence, those formerly linked (and displaced) by colonial powers could now be excluded both from nationality and from continental links. More generally, when national citizenship regimes become restrictive, they exclude people from EU citizenship as well, so that prior exclusions become even more hardened and durable. The case puts into place a double exclusion of overseas nationals from both subjecthood and then from the EC arrangement. However, the Kaur decision is not unexpected because of past case law of the ECJ. For example, the European Court had established in the case of *Micheletti and Others v Delegación del Gobierno en Cantabria* [1992] Case C-369/90 that, under international law, 'it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'.

In *Micheletti*, which is also about a third-country connection, the Court of Justice examined an issue of dual nationality, Italian and Argentinian, of Mr Micheletti, which came before the Spanish administrative authorities. Mr Micheletti applied for legal residency in Spain claiming that he was an Italian national, which was denied by the application of Spanish

law, which in cases of dual nationality is inclined to the nationality that coincides with the last habitual residence. Here his last residence was located in Argentina, so the Spanish administration considered that Mr Micheletti was not able to use EU law as a national of a member state. The ECJ found that Spain was not permitted to limit the application of community law in this manner especially if it constrained how another member state (Italy) recognised its own nationals. Mr Micheletti was recognised as Italian by Italy while being a dual national and residing in Argentina so that principle of dual nationality had to be respected by Spain as well.

Associated with the idea of multiple nationality holding is the core human rights principle of avoidance of statelessness. EU law prohibits statelessness. This became an important consideration where loss of citizenship is concerned. In another case where two member states were involved, the Rottmann case, *Rottmann v Freistaat Bayern*, Case C-135/08, a person had his member-state nationality revoked and this, in turn, deprived him of his citizenship of the EU. Mr Rottmann had acquired German nationality by naturalisation and had thus lost his Austrian nationality of origin. The German nationality was then revoked with retroactive effect on account of deception practised in that acquisition (fraud in the application process), thereby leaving Mr Rottmann stateless. The Court of Justice of the European Union (CJEU) declared that while

> . . . the Member States have the power to lay down the conditions for the acquisition and loss of nationality, . . . the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, . . . is amenable to judicial review carried out in the light of EU law.

In order to comply with EU law, the revocation of nationality should respect the principle of proportionality, and this principle applies to both the member state of naturalisation and the member state of the original nationality. In particular,

> it is necessary to consider the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.

Given Mr Rottman could not recover his Austrian nationality it was not possible to revoke his German nationality.

Another case, *Tjebbes and Others v Minister van Buitenlandse Zaken*, Case C-221/17 [2019], concerned a Dutch law providing for the automatic loss of nationality for Netherlands nationals who were resident outside the Netherlands (or any other member state of the EU) for ten years or more. The four applicants were Dutch citizens, by birth or naturalisation, who possessed also the nationality of a non-EU state (Canada, Switzerland and Iran) and had lost their Dutch nationality by operation of the law due to their residence abroad (and outside of the EU) for more than ten years. Three of the applicants, resident outside the Netherlands, lost their nationality by operation of the ten-year rule. The daughter of one of the first three applicants lost her Netherlands nationality by virtue of being a child of a Netherlands national denaturalised by operation of the ten-year rule. All four challenged a decision by the Minister refusing to issue new passports. Unlike Mr Rottmann, in this case the individuals had not become stateless upon the loss of the Dutch nationality, but they had lost the citizenship of the EU. Recalling *Rottmann*, the CJEU declared that while a member state retains the right to determine the conditions for the loss of its nationality,

> it is for the competent national authorities and the national courts to determine whether the loss of the nationality of the Member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of the person concerned and, if relevant, for that of the members of his or her family, from the point of view of EU law.

The CJEU further provided some guidance on how to grant consistency with the principle of proportionality in the case at stake: the national authorities and courts 'must be in a position to examine, as an ancillary issue, the consequences of the loss of that nationality and, where appropriate, to have the person concerned recover his or her nationality'. Such examination should be made on a case-by-case basis, with consideration given to the normal development of the family and professional life of the persons involved. The loss of citizenship must be consistent with the fundamental rights granted by the Charter of Fundamental Rights, and specifically with the right to respect for family life and to adequate consideration of the best interest of the child.

In *JY v Wiener Landesregierung* [2022] Case C-118/20, a similar assessment was carried out by the CJEU.[2] Ms JY, an Estonian national resident in Austria, had applied for Austrian nationality in 2008. After a few years,

in 2014 the competent Austrian authority assured JY that she would be granted Austrian nationality if she could prove, within two years, that she had relinquished her citizenship of Estonia, as provided by Paragraph 20 of the Austrian Law on Nationality. JY renounced her Estonian nationality and provided such confirmation in 2015, thus becoming stateless. In 2017, the newly competent Austrian authority revoked the decision issued in 2014 by the previously competent authority and rejected the application for nationality. This decision was justified by the fact that JY had committed, between 2014 and 2017, two serious administrative offences (failing to display a vehicle inspection disc and driving a motor vehicle while under the influence of alcohol) and eight administrative offences between 2007 and 2013. Thus, she no longer satisfied the conditions for grant of nationality. This decision was confirmed by the administrative court. On further appeal on a point of law, the Supreme Administrative Court of Austria took the view that such a situation did not fall within EU law since, unlike in *Rottmann* and *Tjebbes*, JY had already voluntarily lost her Estonian nationality and the citizenship of the Union when the 2017 Austrian revocation of the assurance was issued. Nevertheless, it asked the CJEU whether this case fell under EU law. The CJEU confirmed the right of member states to establish the national rules concerning the acquisition and loss of their nationality, including the legitimacy of the aim of avoiding multiple nationalities. The CJEU stated that both the host member state and the member state of the original nationality must comply with EU law:

> the Member State of origin should not adopt, on the basis of an assurance given by that other Member State that the person concerned will be granted the nationality of that State, a final decision concerning the deprivation of nationality without ensuring that that decision enters into force only once the new nationality has actually been acquired.

The decision to revoke the assurance previously given to that person as to the grant of nationality, that may have the effect of making the loss of the status of citizen of the Union permanent, can be made only on legitimate grounds and must respect the principle of proportionality. The court held that JY did not appear to represent 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or a threat to public security' in Austria that might justify the permanent loss of her status of citizen of the Union. The issue of conduct with her was about her driving record. She was imposed only minor fines, and even her driving licence was not withdrawn. In conclusion, the court stated that the principle of proportionality in such a case is not respected where the

decision to revoke the assurance to grant Austrian nationality is based on administrative traffic offences which give rise to a mere pecuniary penalty. As a consequence of this case the discretionary powers of member states in this area appear to be more contained within wider legal principles. These developments are therefore likely to nurture greater access to EU citizenship.

Continental 'welfare' bordering and borders in the borderless: free movement while keeping 'others' at bay

A prime area of contention for European law and national citizenship has been EU citizens' opportunities to claim social benefits in other member states. Nation states have found that their ability to regulate and restrict access to national welfare systems was greatly circumscribed after EU law safeguarded this right for EU citizens (Blauberger and Schmidt 2014). Directive 2004/38, which codifies European jurisprudence on free movement, states in its preamble, that 'Union citizenship is the fundamental status of nationals of the member states when they exercise their right of free movement' (European Parliament/Council 2004). EU law prohibits discrimination on the basis of member-state nationality with some limited exceptions yet nation states who are members of the EU are often unwilling to support foreigners. Thus, member states continue to exercise discretion in terms of welfare support for non-nationals.

When migration causes ethnic diversity there is very little popular support for universal welfare state programmes in most countries (Freeman 2009, 9). Social scientists hypothesise that this is because societies that are diverse usually have lower levels of social trust, and this leads them to spend less on social welfare and redistributive programmes (Freeman 2009, 2). Even within national boundaries centralised welfare means usually greater scrutiny of outsiders from different regions. For instance, under the 'Old Poor Law' of 1601 in England internal migrants moved from one jurisdiction to another when they crossed parochial boundaries (Feldman 2003). Later, central government took an enlarged and expanding part in welfare. As it did so, the entitlement to welfare of immigrants from overseas was scrutinised at a national level in a way that was analogous to the manner in which the status of internal migrants had previously been scrutinised at a parochial level.

In the twentieth century the situation changed, with central government increasingly contributing to old age pensions, health and unemployment insurance, and even to family allowances and to national assistance. Thus, the Aliens Act of 1905 linked external migration and

welfare (Bloch 2000; Miles and Cleary 1993). More recently, the term 'welfare chauvinism' has developed to describe policies enacting the notion that social assistance should be allocated on the basis of ethnicity or national citizenship. For example, many migrants have 'No Recourse to Public Funds' (NRPF), a set of rules originating in the Immigration and Asylum Act 1999 for excluding many non-UK nationals from welfare benefits. This means they may be ineligible for benefits like housing assistance, Universal Credit and other welfare payments (Dickson and Rosen 2020).

Welfare, and its relevance in reifying borders, means that people who work are glorified as productive and the work they do is valorised. Migrants who work are usually depicted as deserving and morally upright. Automatically there is a preference then for able-bodied, highly skilled workers who are likely to contribute to society without needing much support from the state in return. In the next chapter I examine this in the context of bordering of the workplace but here I look more closely at how migration and welfare have shaped both nation state and continental bordering.

EU citizenship, at least initially, was conceived of as an efficient means to facilitate access to national labour markets for the best suited workers from across Europe. Through a series of judgments of the European courts the rights became more linked to EU citizenship itself rather than to the holding of worker status. Directive 2004/38 is the main piece of secondary legislation setting the conditions for the exercise of the right to free movement for EU citizens and their family members, including the rules on equal treatment and social assistance. When introduced in 2004, the Directive was meant to bring clarity and to unify the rules applicable to mobile EU citizens irrespective of engagement in an economic activity. While the EU level creates transnational social rights and sets out the conditions of access to an EU host state's welfare system, the delivery of welfare takes place at the national and local levels, making national administrations and bureaucrats important actors in the governance of welfare. As Olsen states, free movement has 'made national borders less firm, but the boundaries of welfare states and social systems are still at work in contemporary Europe' (Olsen 2015, 99).

Economically inactive citizens can move and reside in another EU state if they have sufficient resources and comprehensive medical insurance. CJEU case law has assessed rights of economically inactive EU citizens by applying the principle of non-discrimination to the basis of nationality, from Article 18 of the TFEU. The legal category under which EU citizens exercise their right to free movement – worker, jobseeker, student or economically inactive – determines access to social rights in the

host state and leads to differential inclusion in the welfare state (Mantu and Minderhoud 2023). Thus, equal treatment works at its best and most generous where it is underpinned by the citizen's contribution to the 'market' but less so where the EU citizen is economically inactive and poor. There is significant discrimination against the least well-off EU citizens, those who are perceived to pose a threat to or constitute a burden on, the host member state. Such forms of discrimination against 'undesirable' migrants commonly occur in jurisdictions where different levels of government are responsible for social welfare provision (Maas 2013).

The issue of challenging discrimination on the grounds of nationality was successfully illustrated in the case of *Martínez Sala v Freistaat Bayern* [1998] Case C-85/96, where a Spanish woman who was living in Germany applied for a child-raising grant. She was refused on the grounds of nationality as she was not a German national and did not have a residence permit. She challenged this refusal, and the ECJ ruled that she was a Spanish national (and therefore an EU citizen) who lawfully resided in Germany. She was able to invoke Article 12 EC in conjunction with Article 18 EC. This case was later applied in *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] Case C-184/99, which concerned a claim for financial assistance from the Belgian social service. A French national who was a student in Belgium was turned down on the basis that he was not a Belgian national or a migrant worker, which was the requirement of Belgian legislation for accessing social welfare. The ECJ held that as he was a French national who was lawfully resident in Belgium, he was protected by Article 18 EC and allowed to call upon Article 12 EC to claim the financial assistance. This reinforced equal treatment for EU citizens who require financial help.

In *Collins v Secretary of State for Work and Pensions* [2004] Case C-138/02, an Irish-American dual national who claimed Job Seekers Allowance days after arriving in the UK was initially refused the allowance as habitual residence was required for this allowance. The ECJ held that as an EU citizen, he is entitled to equal treatment. A limitation can be placed on accessing benefits, but not if the person has a genuine link to the local labour market, which is the case for an EU member-state national seeking work. Effectively the ECJ held that a dual Irish-American national could rely upon EU law, thereby strengthening the rights of dual nationals. Similarly, in *Trojani v Centre public d'aide sociale de Bruxelles* [2004] Case C-456/02, a Salvation Army volunteer applied for the minimum subsistence allowance in Belgium. He was French, but went to Belgium in 2000, staying at a campsite and then a youth hostel in Brussels. He got board, lodging and pocket money for doing jobs for thirty hours a week, as part of a 'personal socio-occupational reintegration programme'. He was

denied this benefit from the Free Movement of Workers Regulation 1612/68 as he was not considered a 'worker'. However, the Court of Justice, Grand Chamber, held that Mr Trojani should be protected as a worker.

This line of cases took a restrictive turn with two cases, *Brey* (*Pensionsversicherungsanstalt v Peter Brey* [2013] Case C-140/12) and *Dano* (*Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] Case C-333/13), and now it became the requirement to be legally resident in a member state in line with EU law, that is, they must have sufficient resources in the first place in order to receive welfare subsequently after entry. In *Brey*, Peter Brey and his wife, both German nationals who moved to Austria in 2011, relied on an invalidity pension in Mr Brey's name. Mr Brey applied for a compensatory supplement for his pension and was subsequently excluded from that grant on account of the fact that he lacked sufficient resources to establish his residence in Austria. The CJEU asserted that national decision makers must assess 'the specific burden' that an award of benefits would put on the social assistance system, 'by reference to the personal circumstances characterising the individual situation of the person concerned'. Member states should not reject a claim for benefits without considering the individual's amount and regularity of income, the fact of any residence certificate, and the period over which the benefit is likely to be granted. However, the right of a host EU state to deny social assistance and to terminate the right to reside of an EU citizen who is not self-sufficient became equally central.

In *Dano*, Ms Dano and her son, both Romanian nationals, claimed an entitlement to unemployment benefits after being denied work by the jobcentre. At the time of the case, she was not seeking employment, had no training and had not worked in Germany or Romania before. She had lived in Germany since November 2010 at her sister's home. While deciding *Dano*, the court gave even greater deference to member-state interests than in *Brey*.

Welfare issues are even more complex when third-country family are involved. In this chapter, this is touched on briefly, but in the family chapter (Chapter 5) I shall look more closely at the bordering impact of the MM case, *MM (Lebanon) and Others (Appellants) v Secretary of State for the Home Department (Respondent)* [2017] UKSC 10, in which British citizens were attempting to bring into the UK their third-country national family members. In *MM*, the UK Supreme Court considered the appeals of five appellants with the right to live and work in the UK but married to third-country spouses without this right. The minimum income requirement (MIR) restricted cross-border relationships by denying family reunion. All the applicants were disadvantaged by the MIR. The Supreme Court decided that the Secretary of State could impose the MIR but would have

to specifically consider the best interests of children while assessing the effects of the Rules on a family as a primary consideration. After the MM case, the amended rules and guidance give effect to the decision regarding children's best interests. Indeed, the immigration rules now make express provision for these interests. However, the minimum income requirement is still in place and the current MIR has increased enormously in number since the decision.

The reluctance of nation states to include non-citizen family members is because of the perception that welfare is based on ideas of belonging through citizenship and paying into a common national pot (Jubany and Mayblin 2024). Belonging in a political sense tends to be connected to territorial residence in the nation state, to claims to nationality, and to the exclusion of others who have any legitimate claim to the collective pot (Anderson 2013). When people arrive in Europe from elsewhere today, there is a tendency to view these people as not deserving of benefit from European welfare states. While liberal laws and viewpoints may celebrate pluralism and multiculturalism, the harsh reality of colonial exploitation and that modern Europe has been diversified mainly by immigration from former colonial connections only in the last half century or so means there is a large gap in welfare harmonisation within the EU especially with respect to foreign nationals.

Bordering asylum

Bhambra (2022) has demonstrated through her research that Britain drained money from the colonies, and this paved the way for the current welfare state. Similarly, Achiume (2019) challenges the legal right of 'First World' states to exclude 'Third World' citizens, given Europe's colonial history. Asylum protection has also been weakened in the name of protecting the welfare state as asylum seekers and refugees are often portrayed in politics and media as illegitimate burdens on European welfare states. European states limit asylum seekers and refugees' access to the welfare state yet Europe's colonising in the past impoverished most of the world from which many asylum seekers move and should not be overlooked. Article 14 of the 1948 Universal Declaration of Human Rights boldly states: 'Everyone has the right to seek and enjoy in other countries asylum from persecution'. When Britain ratified the 1951 Geneva Convention on the Status of Refugees in 1954 it did so, as did all other signatories, on the basis that refugees were defined as Europeans displaced before 1951. This territorial restriction, which remained until 1967, was necessitated because Britain and the other colonial powers did not

view colonised subjects as being fully entitled to – or even ready for – human rights.

Scholars also point out that European countries do not host most asylum seekers. The vast majority of the world's refugees are hosted in countries neighbouring their countries of origin. The refusal to host asylum seekers has exposed the borders of the EU in the most apparent manner. Under the 1993 Treaty of Maastricht, previous intergovernmental cooperation on asylum was brought into the EU's institutional framework.[3] The EU developed an ambitious agenda to develop a continent-wide common policy on asylum, subsidiary protection and temporary protection for all non-EU nationals seeking international protection. The EU was bound by the Geneva Convention relating to the Status of Refugees of 28 July 1951 and the Protocol thereto of 31 January 1967, which meant that the principle of non-refoulement and all other principles regarding treatment of asylum seekers had to be fully observed. The Common European Asylum System (CEAS) first aimed to adopt the common minimum standards in the EU and then develop a short-term common procedure and a uniform status for those who are granted asylum to be valid throughout the EU in the longer term.[4]

Member states had to adhere to the same common minimum standards in connection with the reception of asylum seekers. The CEAS determined qualification criteria for international protection and the nature of the protection granted. It established procedures for granting and withdrawing refugee status. It went beyond minimum standards to develop a single asylum procedure comprising common guarantees and a uniform status for those granted protection. This was eventually established through the Treaty of Lisbon, which entered into force in December 2009 and created a common system comprising a uniform status and uniform procedures. The common system unifies grant and withdrawal of asylum, subsidiary protection and temporary protection. It also set in place criteria and mechanisms for determining which member state is responsible for considering an application, and standards concerning reception conditions. In July 2013 the Eurodac Regulation, the Dublin III Regulation, the Reception Conditions Directive and the Asylum Procedures Directive, were adopted.

In order to enforce border policies an EU agency, the European Border and Coast Guard Agency, commonly known as Frontex, was developed in coordination with the border and coastguards of member states. Initially, Frontex merely played a coordinating role to support member states. This changed over time and Frontex became a key means of bordering the EU. Indeed, the EU, through the asylum and migration control mechanisms mentioned above as well as the work done by Frontex, has become a key

player in migration control, often seeking to displace refugees to other countries and thereby earning the epithet 'fortress Europe'.

In 2015 there was the peak of a huge humanitarian crisis of displaced people seeking to reach Europe for safety. UNHCR reports that as of 7 December 2015, more than 911,000 refugees and migrants arrived in Europe. Some 3,550 lives had been lost during the journeys made by displaced people. This crisis was because of the conflicts and forced displacements from Syria, Afghanistan or Iraq and it continues to displace people to this day. Britain is a nation of islands which means very few out of those displaced actually reach it. Those who do are forced to arrive by unsafe routes over sea. In response to the displacements of people form the Middle East over 2015–2016, the European Commission reshaped Frontex to be a fully-fledged European Border and Coast Guard Agency with a massively enhanced budget and thousands of border guards to protect against asylum seekers (Vaughan-Williams 2008). Increasingly, Frontex is active in joint operations along EU external borders, including in the Mediterranean Sea and the Balkans, working closely with both EU and non-EU states. European and international nongovernmental groups, including Human Rights Watch, and media outlets have reported abuses by Frontex and officials from EU member states toward people arriving at EU borders. These include violent and illegal pushbacks where migrants are forced back over a border they have crossed without consideration of their asylum claims.

What we see in these incremental developments is that Frontex was not a one-time response to an urgent situation. It has grown to encompass bordering in normal peace times rather than being an agency that coordinates response at exceptional times (Vaughan-Williams 2008). In September 2020, the European Commission issued the New Pact on Migration and Asylum which proposes integrating the asylum procedure into overall migration management, linking it with pre-screening and return and thereby normalising the denial of asylum.

On the contrary, there have also been some international developments for improving conditions of asylum seekers. On a global level, in September 2016, the United Nations General Assembly unanimously adopted the New York Declaration for Refugees and Migrants, a landmark political declaration aimed at improving how the international community responds to large-scale movements of refugees and migrants and to protracted refugee situations. As a result, two global compacts were adopted in 2018, for refugees and for safe, orderly and regular migration (UNHCR 2016). The New York Declaration sets out a Comprehensive Refugee Response Framework, setting out specific actions needed to ease pressure on host countries, enhance refugee self-reliance, expand

access to third countries and improve conditions in countries of origin to enable refugees to return in safety and dignity. Based on these four key objectives, on 17 December 2018, the United Nations General Assembly affirmed the Global Compact on Refugees (Türk 2016).

At the UK national level however there has been little improvement and many new challenges for asylum seekers over the years. At present, asylum seekers arriving in the UK are without safe air or land routes. The phenomenon of people crossing the English Channel in small boats has led to many deaths from drowning but Migration Observatory reports that the vast majority of people who arrive are able to gain asylum as they have genuine claims. They write, 'the grant rate for people arriving in small boats to date has been higher than the average grant rate for asylum applications generally. In the year to 31 March 2024, 62 per cent (54,372) of all asylum decisions (87,501) were grants of refugee status or other permission to stay' (Walsh and Cuibus 2024). Yet there is a huge backlash against the asylum seekers who arrive in this manner even if they had no other options available for seeking safety. Their arrival in the UK is viewed as a security threat and their presence a drain on the country's resources.

Historically asylum seekers were forced to come in via the sea as there were no other safe routes for them, for example, the Huguenots, who were French Protestants in the sixteenth- and seventeenth-century French Catholic state arrived by boats in Britain and became refugees here (Cottret 1991). Jews who were escaping persecution in Russia and Eastern Europe by boat were the reason that the Aliens Act of 1905 came into being in the UK (Bashford and Gilchrist 2012). This Act targeted seafaring migrants on the basis of perceived penury, ill-health or likelihood to be become a public charge. During the Second World War, 250,000 Belgian refugees crossed the Channel 'crowding every floating thing that could possibly be put out to sea' (Bailkin 2018, 16).

The 1993 Asylum and Immigration Appeals Act became part of UK law as the first piece of primary legislation dealing specifically with asylum since the 1905 Aliens Act. The 1993 Act, while clarifying the right to seek asylum in international law imposed harsh new measures on asylum seekers and restricted their arrival (Macdonald 1993). Now, under section 40 of the Nationality and Borders Act 2022 (NABA), it is difficult for a person to arrive in the UK without a visa in order to claim asylum and they are no longer able to seek asylum from outside the country. From 28 July 2022 onwards, anybody who enters the UK (without a visa) and claims asylum will commit an offence of illegal entry which carries a maximum sentence of four years.

The Illegal Migration Act (IMA) was enforced on 20 July 2023 with the stated purpose of preventing and deterring 'unlawful migration, and

in particular migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control'. Many of the provisions of the IMA depend on agreements of the UK with safe third countries. At the EU level, the European Council and Türkiye reached an agreement in March 2016 aimed at reducing the flow of irregular migrants into Europe via Türkiye. One of the key initiatives presented in the New Pact on Migration and Asylum was the promotion of tailor-made and mutually beneficial partnerships with non-EU countries in the area of migration.

As we saw in the previous chapter, in April 2022 the UK had attempted to enter into an agreement with the Rwandan government to make arrangements to remove people seeking asylum who fulfilled the 'inadmissibility' definition (this means they had been present in or had a connection to a safe third country) to Rwanda as another 'safe third country' to have their asylum claim processed there instead. However, the Supreme Court found the Rwanda policy illegal on 15 November 2023, after over a year of litigation in the courts. The Supreme Court of the United Kingdom ruled that the Rwanda policy was unlawful, so no one has been sent to Rwanda. In future other such externalisation agreements may however come into place again. There may be further disputes about which countries are safe third countries. For example, in July 2023, the European Commission signed a Memorandum of Understanding with Tunisia and paid over 150 million euros to Tunisia (European Commission 2024). These developments raise new concerns about who will receive asylum in Europe, what is a safe third country and resources and national security.

This dilution of the right to asylum is complemented by special schemes that have increasingly started replacing the general right to seek asylum. Such schemes may appear to be quick and effective but become political decisions around special support for certain groups rather than being universal guarantees of rights. For example, when Russia invaded Ukraine in February 2022 and millions of Ukrainians were internally displaced, while millions sought refuge in other countries the UK government created a number of special schemes to support displaced Ukrainians (UNHCR 2025). However, these schemes depend on support from UK residents and organisations rather than being fully funded by the state. The first was the Ukraine Family Scheme which allowed immediate and extended family members of British nationals, people settled in the UK, and certain others resident here, to come to, or remain in the UK. It then opened a Homes for Ukraine Sponsorship Scheme which allows Ukrainian nationals and their immediate family members to apply for

permission to come to the UK if they have an approved sponsor. The UK sponsor does not need to have any family ties to the Ukrainian applicant but can offer them a home, such as a spare room or unoccupied residential self-contained unit. Another scheme is the Ukraine Permission Extension Scheme which allows Ukrainian nationals to extend their stay in the UK if they have a visa under the Homes for Ukraine or Ukraine Family schemes. Ukrainian nationals in the UK who have temporary visas, including work, study or visit visas, can apply to the Ukraine Extension Scheme. Any Ukrainian who held permission to stay in the UK on or between 18 March 2022 and 16 May 2023 is eligible to apply for three year's leave through the Ukraine Extension Scheme. But those who applied after this date can get only eighteen months' extension. These special schemes have tremendous positive impact on the lives of people displaced and provides them with opportunities to work and live, but none of these lead to long-term status or provide a route to settlement. Many Ukrainians in these schemes experience anxiety because of the short-term nature of the schemes and because of the complexity of the application process.

Similarly, a special scheme for Hong Kong Nationals was created by the UK government a few years prior to the Ukrainian schemes. For ninety-nine years Hong Kong was a British colony and dependent territory before returning to Chinese sovereignty on 1 July 1997. Many Hong Kong residents possess a type of British Nationality Status known as British National (Overseas) (Benson 2025). From 31 January 2021, people with BN(O) status could apply for a Hong Kong British National (Overseas) visa to come and live and work in the UK for an initial period of thirty months which could be extended and lead to Settlement and British Citizenship. The BN(O) visa does not require a job offer, however, applicants must demonstrate that they have enough funds to support themselves independently in the UK for at least six months. Notably, there is also a NRPF condition attached to the visa. So, it is clear that this scheme also does not provide the kind of full support that asylum protection is supposed to provide.

Brexit and ramifications

Asylum, and how many asylum seekers will be welcomed, together with other issues of migration, were prominent in the lead up to the UK's exit from the EU (Brexit). The EU was considered a problem by many UK citizens because freedom of movement within the EU was seen as limiting the country's sovereignty. For the EU, place belonging has a dual (or multiple) component. Movement between EU countries triggers certain rights.

Such widening beyond nation-state bounds could be seen as a weakening of the national grip on citizenship and expansion beyond a single allegiance. It is also about greater 'European' belonging which can clash with values of patriotism. The national allegiance element clashed with the European in instances where simply highlighting the European has led to a backlash. Brexit is an instance where the national and supra-national citizenship modes have misaligned.

The national debate became steeped in nationalistic nostalgia with a preference for a more 'British' Britain. Many commentators link a hankering for empire with Britain's exit from the EU. Nobel laureate Abdulrazak Gurnah has said that the British Empire is 'still important in Britain' and may well have played a part in the Brexit vote (Knight 2022; see also Newbigin 2017). Once EU membership and rights expanded, Britain's continued membership of the EU became increasingly contested. New members and prospective members such as Turkey, were clearly redefining 'Europeanness' which was uncomfortable for many who saw being European as being Western European.

Some popular narratives are that asylum seekers have reconfigured nation-state demographics and failed to integrate while third-country nationals are taking advantage of more liberal EU laws for partners and family members. Hence EU citizenship has become simultaneously more threatening for national control over borders and threatened by the exercise of national sovereignty.

Brexit was framed as an opportunity for establishing the UK's own laws and being able to execute them, which gained 51.9 per cent of votes in the referendum of 23 June 2016, and eventually, the UK exited the EU after a transition period. As Scotland and Northern Ireland did not want to leave the EU, Brexit was viewed as an example of 'Little England' mentality (Doty 1996). Brexit categorically excluded EU nationals from a continued right to enter and reside in the UK except for those who availed themselves of a settlement process. Those who missed this process became irregular overnight. Yet, deciding who enters and who leaves the territory is fundamental to the exercise of sovereign power. The inability of the state to administer its borders successfully therefore 'creates a dilemma within the logic of governing' (Garland 1996). The UK government triggered Article 50 TEU on 29 March 2017, which makes clear that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements'. The UK eventually left the EU on 31 January 2020. This exit was considered by many to be the regaining of UK sovereignty from supra-national political control.

Following the end of the Brexit transition period, at the beginning of 2021, EU citizens living in the United Kingdom were moved under the

plethora of highly complex national immigration laws. More than three million people are now required to comply with immigration laws previously not applicable to them. They previously had free movement but now needed a visa and to meet salary and skills thresholds. Thus, Brexit is another example of migrating borders because overnight EU nationals living in the UK became foreign without moving anywhere or crossing borders themselves.

As we saw in the last chapter, in the 1960s and 1970s the UK government had decided to follow a declaratory route and to simply continue the lawful residence of existing residents by operation of primary legislation. There was no need for existing residents to apply for a new immigration status. Perhaps this was because new arrivals from the Commonwealth were being actively blocked. But it was anticipated that post Brexit there would be a need to distinguish between newly arrived EU nationals and those already UK residents, hence the EU residents who wanted to remain post Brexit had to register and gain proof of their legal status. The scheme to facilitate such proof was the EU Settlement Scheme (EUSS). EU, EEA and Swiss citizens and their family members resident in the UK prior to 31 December 2020 have had to apply to secure their status and rights in the UK through the EUSS which granted eligible individuals rights of legal residence depending on their length of residency in the UK.[5]

All EU, EEA and Swiss citizens and their family members living in the UK by 31 December 2020, had their rights guaranteed until 30 June 2021. After this date, only holders of certain status have the legal right to remain in the UK. While many Commonwealth nationals were later failed by the state in the Windrush 'scandal', EU nationals had a way to gain proof of status, but failure to apply would lead to them becoming unlawfully resident as soon as the application deadline expired. This would also have an impact on dependent children whose status relied on that of the parents (Griffiths and Yeo 2021). Many EU citizens who were entitled to apply may not have done so as they were vulnerable (for example, they could be elderly, lacking mental capacity, children in care or simply unaware). Concerns have also been raised over the perceived discrimination in the use of the algorithm-based automatic check mechanism and the inability of some of the applicants to use the Home Office app – which was initially available only for Android smartphones – because this excluded EU citizens who used other devices or who did not have a smartphone (Tomlinson 2020). These cracks in the system may appear unintended and purely bureaucratic or technological in nature but what these did were ensure that EU nationals now increasingly fall within the nets of the new hostile environment. The hostile environment of immigration policy makes life unbearable for those who are not able to prove

their legal status to reside in the UK. One of the means it adopts is to include private individuals such as employers and landlords to report on undocumented people (Liberty 2019). A total of 2.6 million EU citizens have lost their right to live and work in the UK automatically. Many were simply people who could not apply for settlement in time to protect their settlement rights by 30 June 2021 (Fernández-Reino and Sumption 2022). Similarly, post Brexit, vulnerable rough sleepers or poorer EU nationals who did not avail themselves of the EUSS in a timely manner suddenly became deportable overnight even if they had resided for a long time in the UK (Radziwinowiczówna and Lewis 2021). The new rules made rough sleeping grounds for refusal or cancellation of permission to be in the UK (Morgan and Dickson 2021).

There is some evidence that the UK frequently sought to deport EU citizens when they were covered by the safeguards provided by the Citizenship Directive (Ryan 2017). In 2016, the year of the Brexit referendum, there was a 26 per cent increase in the number of EU citizens deported from the UK in comparison to 2015.[6] The growth in the number of deportations has been attributed to the increasingly hostile environment targeting EU citizens in the UK, especially rough sleepers (Demars 2017).

The UK, even before Brexit, was negotiating its sovereignty from the EU by excluding its citizens and selecting for deportation the most vulnerable, such as people with low or no income and no access to housing (Radziwinowiczówna and Lewis 2021). EU citizens continued to be deported even during the Covid-19 national lockdowns in the UK. Deportations that happened during the pandemic were also selective, with an overrepresentation of citizens of poorer EU member states. Between April and June 2020 when Britain was hard hit by the first Covid wave, the only chartered deportation flights were headed for Europe, removing 188 EU citizens to Romania, Poland and Lithuania, as well as 97 to Albania (Radziwinowiczówna and Lewis 2023). The timing of these deportations was fundamental and demonstrated that the 'hostile environment' policy was undeterred by a serious global health crisis which otherwise limited travel (Walsh 2020). Guerrina and Masselot (2018) note that Brexit 'carries a substantial risk to the interests of traditionally marginal groups (including women) who have hitherto been covered by the EU legal framework'.

EU nationals post Brexit are in the same category as all other third-party nationals in terms of employment and welfare. The EU withdrawal framework makes it difficult to draw on EU law for challenges as EU law is no longer supreme in the UK. Not having the CJEU and EU Charter generates vagueness as to what actually is an existing right anymore despite

other UK domestic equalities legislation. There is a direct loss of the EU Charter of Fundamental Rights, although its general principles carry over into post-Brexit times through legislation and case law already in place as well as the general principles of common law. However, the EUSS scheme has been challenged through judicial review in UK courts. The Independent Monitoring Authority brought a judicial review proceeding against the Home Office in the High Court to challenge the requirement of a second application. Settled status is available to individuals who are able to demonstrate at least five years of continuous residence. Pre-settled status, also known as Limited Leave to Remain, is a temporary form of stay in the UK. It is valid for five years. The pre-settled status of millions of EU nationals and their family members opened in August 2018 but expired in the second half of 2023. This created uncertainty about their future in the UK. The UK's position was that pre-settled status could not be extended and is not upgraded automatically. Therefore, a subsequent application for settled status (officially called 'Indefinite Leave to Remain') had to be made before the expiry date of pre-settled status. However, this was only possible once the applicant had completed five years of continuous residence in the UK. Those who failed to make this application were at risk of losing their right to remain in the UK. The High Court ruled in December 2022, *Independent Monitoring Authority v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin) that applicants granted pre-settled status should not lose their rights of residence if they do not make another application for settled status. The court based its decision on Article 13(4) of the Withdrawal Agreement between the UK and the EU (2020), which states that a right of residence can only be lost in very specific circumstances and could not just be lost through the expiry of a previously held status. The court held that settled status rights accrue automatically, without the need of a second application if the other conditions (such as the five-year residence requirement) are satisfied. While the case was a victory for EU nationals, it illustrates how EU nationals have experienced categorical exclusion in a manner like commonwealth nationals. Like the earlier arrivals, EU nationals have also had to challenge the loss of their legal status in the courts.

In 2023 the ECJ dismissed three separate actions brought by three British citizens who were residing overseas in other member states of the EU for a long time but did not acquire any other EU nationality (Court of Justice of the European Union 2023). As a result of Brexit, they lost their EU citizenship rights, and they wanted the ECJ to recognise them as EU citizens despite Brexit. They argued that they had exercised their free movement to travel and reside in other EU states prior to Brexit and that this means their EU citizenship had already permanently attached to them. The ECJ

dismissed the actions and said that they had automatically lost their status as citizens of the EU after Brexit. The court noted that the decision to withdraw is for the concerned member state alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice. Accordingly, for the British citizens, the loss of the status of citizen of the EU, and consequently the loss of the rights attached to that status, was an automatic consequence of the sole sovereign decision taken by the United Kingdom to withdraw from the EU, and not of the withdrawal agreement or the Council's decision. This decision makes it clear that individuals deeply affected by the changing political and legal landscape of Brexit are re-bordered without any ability to change their own circumstances and no redress in the EU's court system anymore. Their mobility, residence and political rights are completely reconfigured without any input from them. Brexit, like Windrush, is an example where law channels power as it acts in its first dimension, evident in action, and proactively rolling back rights such as free movement (Lukes 2021).

Conclusion

The second half of the twentieth century witnessed the metamorphosis of Britain from a global, imperial power to a full member of the modern regional partnership that is the EU (Harfield 2007). Both supra-national memberships analysed in this book so far (empire and EU) closely resemble certain aspects of national citizenship which are exclusionary. In the case of empire, it was allegiance to an imperial power, while for EU citizenship it was loyalty to certain regional values which were deemed 'European' that excluded others who did not belong or remained at the fringes (mostly third-country nationals). Yet a narrative of EU solidarity and cultural belonging and genuine enjoyment of EU rights was also significantly at odds with other global arrangements of appropriation, such as colonial imperialism, and this narrative may have led to the eventual exit of the UK which missed its 'first amongst equals' position of earlier decades.

The situation of EU nationals in the UK during and after the Brexit process is especially instructive for assessing what kind of membership can support the rights of mobile populations who seek long-term status in their place of residence. The new immigration framework for EU nationals drawing on the same points-based system for work and similar visas as for non-EU foreigners who come to the UK revokes the special status of EEA nationals. Yet, this change is not abrupt, and the borders have been shifting for a while as exemplified through the heightened deportations of

EEA nationals who are out of work prior to Brexit and of Commonwealth nationals who could not produce proof of right to reside.

As the gap between the rights of citizens and those of non-citizen residents diminished through the rise of the universal human rights framework, the lasting significance or practical value of nation-state citizenship became more questionable. Yet holding such citizenship still plays a significant role in determining a person's life chances, and its value depends on the guarantees of the state to which one belongs. The promise of human rights is not yet that of an effective international leveller in terms of rights, therefore state membership remains a powerful determinant of who does or does not enjoy rights. It determines not only political powers, but where people can live and work and what other countries they can visit, live or work in. In most countries only citizens are guaranteed rights to vote and stand for election at the level of national politics, and they have greater security with respect to rights and benefits of other kinds. Where it is modified or softened at the edges (as has happened in free-movement areas) it is through the operation of a confluence of empire bordering, nation-state bordering and global bordering which operate in different situations to separate foreigners from those who really belong. Who is foreign varies from time to time and it can be those amongst us, those who seek to be one of us, those related to us or indeed those seeking shelter on our soil who are increasingly forsaken in contemporary times.

Notes

1. The Conference of the Representatives of the Governments of the Member States adopting the Treaty on European Union adopted Declaration No 2, which is annexed to the Final Act of the Treaty on European Union.

2. Stefania Bariatti, European Group for Private International Law. https://gedip-egpil.eu/fr/2022/a-new-cjeu-judgment-on-the-loss-of-the-nationality-of-a-member-state/.

3. Factsheets on the European Union, 'Migration and Asylum: A Challenge for Europe', 2018. https://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI(2017)600414_EN.pdf

4. Tampere Programme in October 1999. See Factsheets on the European Union, 'Asylum Policy, 2025. https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy#:~:text=With%20the%20adoption%20of%20the%20Tampere%20Programme%20in,valid%20throughout%20the%20EU%20in%20the%20longer%20term.

5. See UK government website, 'Apply to the EU Settlement Scheme', 2021. https://www.gov.uk/settled-status-eu-citizens-families.

6. Benjamin Kentish, 'Brexit: Deportations of EU Citizens Soar Since Referendum', 12 September 2017. https://www.independent.co.uk/news/uk/politics/brexit-latest-eu-citizens-deportations-rise-uk-home-office-referendum-a7935266.html.

Part II

THEMES AND PRACTICES OF MIGRATING BORDERS

Chapter 4

Bordering the workplace

> 'The border used to be an actual place, but now, it is the act of a thousand imaginations.'
>
> – Alberto Ríos, *The Border: A Double Sonnet*

Introduction

In Part 1 of this book, 'Scales and locales of migrating borders', the first three chapters on empire, national bordering in the United Kingdom and in the EU are the locational and temporal scalar chapters for assessing which frames of migration control resonate over history and which emerge at specific junctures. Through each of these scales, we find that work, family and emergencies (such as health or security) are the critical emergent themes in migration control. In Part 2, 'Themes and practices of migrating borders', the next three chapters take each theme in turn in analysing the role of law, and accessing different scales of analysis (the ordered and bordered workplace, the intimate yet publicly scrutinised family unit, and the emergencies that spread out in time and space becoming mundane and everyday). It is possible to detect identifiable patterns in how and why law is used in bordering practices and how these can be challenged through law as well. This chapter analyses the first theme on the workplace before the next two deal with families and emergencies.

The workplace is a critical site of bordering because work is a major driver for migration around the globe. In the UK work draws people from all around the globe. It is one of the major reasons for arrival in the UK, along with joining family members already in the UK and coming from

abroad to study in the UK. On average, from 2010 to 2019, 40 per cent of migrants moving to the UK for at least a year said that their main reason for moving was work (ONS 2020). Migration Observatory reports that almost half of the increase in non-EU immigration from 2019 to 2023 was because of workers (21 per cent) and their dependants (27 per cent) (Sumption, Walsh and Brindle 2024). Career driven, professionally mobile individuals tend to migrate for career purposes in their twenties, thirties and forties, which also corresponds to the prime age of reproduction (Roos 2013). Career-based international relocations in individuals' lives coincide with the timeframe for forming partnerships that are likely to lead to creating families. Some migrants come for education and then find employment and eventually form families. In this manner these long-term migration pathways are linked and interconnected.

Migration for work from poorer countries to richer ones is sought out by rich countries which need workers, especially in sectors where their own populations lack skills or are unwilling to take up employment. Yet there is widespread reluctance to treat migrant workers fairly. A widely prevalent political trope is that migrants take away local jobs or undercut local wages in highly developed economies. Paradoxically, out-of-work migrants are also equally reviled for being benefit scroungers, even if they have little or no access to public support and are blamed for draining the countries which have advanced welfare support resources. So, for every kind of work (the desirable and the undesirable) as well as a lack of work itself, migrants find themselves vilified by some members of host country populations, the press, politicians and sometimes by official government policies. Thus, migrant workers may have wings for migration but often cannot fly free of host country restrictions. In the words of one of Ukraine's foremost poets Lina Kostento in her poem 'Wings': 'A person it seems cannot fly. . . . But has wings. Yes – has wings! And those wings – not made of feather or fluff, But of truth, of virtue, and of trust.' The lack of wings for migrants once they reach their host countries is created out of a lack of trust in host countries. Their host countries also engage in protectionism for citizen workers.

Workplace bordering is complicated because it serves many different parties. It is not just between employers, the state and employees. Control of labour is multi-sited. It involves controlling movement at source (prior to departure through visa applications and checks), on arrival (checking for documents at borders) and continued monitoring through document checks at the workplace. Bordering tensions permeate from employers to employees themselves who can assume significant monitoring and reporting responsibilities at the workplace. Workplaces can also flout requirements to regulate migration status should this be profitable. One example of this is the gig economy which often hires 'illegal' workers.

Workplace bordering makes it challenging for migrants to obtain and retain work, an aspect which can be traced to the hostile environment legacy set out in Chapter 2. Should they be able to access work they may be exploited and paid less. They can then be blamed for driving down wages. As mentioned before, if they fail to obtain work and seek any kind of assistance, they can be labelled 'benefits scroungers' and 'fraudsters' who are welfare burdens. However, sometimes if they lack legal status or have short-term visa holder status, they do not have any entitlement to access welfare. In such situations, if they cannot find work, they are driven to desperate measures like working in the underground economy. This in turn can create more problems such as criminal exploitation and poor living conditions. Conditions of modern slavery and trafficking (which provide additional reasons for greater migration control) are thus the seamy underbellies of workplace bordering.

While concern about access to the labour market is tied to access, real or imagined, to welfare, most migrants spend the healthiest periods of their life working with no recourse to public funds. Arguably this contributes to the drawing away of the best workers at the peak of their productivity from their own economies of origin which are usually less developed – a phenomenon termed 'brain drain' when it takes place in the professional sphere. Many such workers (although not all) in their old age retire to other economies (including their economies of origin) and again draw on resources of other countries in their old age rather than in their countries of migration for work.

Work is not just about the economy and the marketplace. The labour market is viewed as one of the primary sites of integration for migrants who can learn about host country culture and acquire new knowledge, skills and professional developments as well as developing more contacts with fellow workers (Ager and Strang 2008, 170). Appropriate labour recruitment and facilitation, as well as elimination of some people from work, is one of the central functions of modern-day immigration bordering in advanced economies. Controlling who has access, and is actually in the workplace, and who is excluded, and sent out from it (or kept invisible from it), is a form of locational or micro-spatial bordering. In order to maximise the recruitment of productive workers who are desired and excluding those likely to be burdens on the national economy, there is immigration planning on which skills are to be prioritised. States, through immigration policies, have a considerable role in creating and shaping irregularity (Åhlberg and Granada 2022). By delineating which immigration routes are opened and for whom, the state creates spaces for both regular and irregular migration. This chapter therefore scrutinises the workplace and the impact on the workplace of various macro shifts

such as hostile environment policies, Brexit, the pandemic and changes in asylum policies, together with new and emerging technology, while looking at various categories of workers based on their structural vulnerability to exploitation.

Most migrants in the UK, with the notable exception of asylum seekers and irregular migrants, are permitted to engage in some form of employment. Workers can include a variety of people. They could be citizens who could face discrimination (especially if in less skilled occupations). They could be migrants with indefinite leave to remain (who are mostly so-called highly skilled migrants who can usually proceed to citizenship) or 'skilled' migrants on visas such as UK Tier 2 visa holders (discussed in greater detail further in this chapter) who can usually proceed to indefinite residence after a specified period of time. Workers could be other migrants whose temporary visa has a 'no recourse to public funds' (NRPF) condition attached (especially vulnerable are those tied to specific employers such as domestic workers or seasonal agricultural workers). They could be undocumented migrant workers or even failed asylum seekers who may be working in detention centres for nominal payment.

Even skilled workers are not immune from exploitation. They may remain in limbo for years while seeking long-term secure status. A key theme of this chapter is thus vulnerability, which is both exploited, and enhanced, by bordering practices. The state does not merely fail to redress exploitation but through taking the lead in bordering practices and collaborating with private companies and individuals in heightening these practices, it sometimes places people into structural positions where they can be readily exploited.

Exploitation can happen to anyone in the workforce. Workers can be directly exploited and abused by the owner-manager of a business or someone who works for the owner. But the owners and managers of a company might be unaware that an employee or middleman is exploiting people working for their business. Companies can be infiltrated by organised criminal gangs. In other situations, workers being exploited may work for a third-party organisation in the UK, or one which operates across international borders, and they are being sub-contracted to a legitimate business. People with vulnerabilities (whether that's down to their personal circumstances, their employment status, their language abilities or something else that isolates them from other people) are at enhanced risk of different kinds of abuse. People are exploited in many different ways in the workplace, including having wages deducted at source or wages being wrongly withheld, or having wages and paperwork being controlled by another person. Workers could have their liberty restricted. They could be kept in isolation and

subjected to psychological and physical abuse as well as violence and bullying. Sexual exploitation, domestic servitude and exploitation as part of the activities of organised criminal gangs are other kinds of modern slavery.

While all workers could be exploited, some are in less protected situations, so the range of likelihood of exploitation varies with their structural vulnerability. Migrant workers have additional vulnerabilities connected to their status as migrants. Many migrant workers have fled worse conditions or abuse elsewhere and thus do not consider their situation to be relatively worse even when they are being badly exploited. They may not be aware some of these are illegal for employers to do especially if these are more subtle kinds of abuse such as poor health and safety standards, for example, work without breaks and cramped and/or unsanitary accommodation. Even if they wish to complain about or report their employer, they may feel unable to do so out of discomfort or fear about their own legal status (they may be dependent on their employer or have irregular status) and ability to find alternative positions while retaining status.

In pre-war times there was little legal restriction on working in the UK, but this changed when wartime powers were extended after the Great War through the Aliens Restriction (Amendment) Act 1919. Migrants classed as 'aliens' were now required to seek permission from the British government for employment. These restrictions did not apply to British subjects and, later, when subjects were re-categorised as Citizens of the United Kingdom and Colonies (CUKC) they retained their right to work (as mentioned before in Chapter 2, this was through the British Nationality Act 1948, which had also protected their right to enter and reside). We have already seen how this demographic was later targeted with restrictions and eventually became part of the Windrush generation. The 'hostile environment' (recently rebranded by the government as the 'compliant environment') was a set of policies aimed at identifying and reducing the number of immigrants in the UK with no right to remain. It was introduced mainly through the Immigration Acts of 2014 and 2016, to restrict irregular migrants' ability to work and earn money, to rent and to access healthcare and welfare benefits. Those who control the resources such as employers and landlords are required to conduct immigration document checks and assist in immigration enforcement. Failure to do so could result in penalties and fines and/or criminal prosecution. Immigration status data is also shared with and between government departments. Use of such data can lead to detention and deportation if any government department is involved, and they share data with the Home Office.

In this chapter we will revisit document checking, which is connected to the workplace and which led to the mistreatment of the Windrush

generation. In Chapter 3 we observed the importance of worker status for EU nationals and how that progressed to a panoply of rights. A key feature of free movement rules that were in place until 2021 was that EU migrants could work in any job, whereas non-EU citizens on work visas would often have to meet skills-based selection criteria to be able to work. This has now changed because of the significant effects of Brexit on the workplace which brought all foreigners under similar restrictions. we will investigate how this also contributes to workplace bordering in this chapter.

The points-based system for work entry

Prior to 1913, work permits were not required for the employment of foreigners (Ng and Whalley 2005). Now it takes considerable time and effort to assemble the correct paperwork for employment. Migrants pay hefty fees and wait for years, needing both luck and persistence to get their requisite visa for work. There is usually little consideration for the needs of incoming migrants; the workplace is monitored for regulating access to the domestic labour market and ensuring the specific needs of the labour market are met for economic objectives.

Many advanced economies try to regulate labour flow through differential access for various categories of migrant labour (Salter 2006, 171). They adopt a points-based system (PBS) as a way of selecting labour migrants based on their characteristics, such as their educational qualifications, language proficiency, work experience and occupation. Points systems do not apply to all categories of migrants but only for workers. Family migrants, asylum seekers and students arrive through other processes. In 2008, the Labour government launched a PBS in the UK placing migrants into five tiers for purposes of visas, so as to secure better educated and skilled migrants who would not require welfare support. This act of categorisation of workers is a way of sorting out prospective applicants in a manner that simply keeps those not 'desired' in the population out of the country. Lukes's second dimension of power, which is more passive, is manifested here through keeping issues and agendas off the table (2021). Law maintains homogeneity through this categorisation by selecting for preferred characteristics such as workers with higher education from abroad. These foreign workers are unlikely to be poorer than general domestic educated and trained workers and are indeed likely to contribute far more.

In modern times, for most employers, where their worker comes from is likely to matter less than their ability to do their work. To provide them

with the necessary skilled workforce, work visas (for instance, US H-1B visa system) in the United States (Title 8, US Code) and the UK (highly skilled category) must generally be for graduate-level jobs only (for example, those normally requiring a bachelor's degree, such as engineers or doctors). Other countries such as Australia, New Zealand, Canada and Norway define 'skilled' as including many tradespeople and people with sub-degree vocational qualifications (such as plumbers or paramedics) for whom there is local demand. Canada, Australia and New Zealand are examples of established points systems and the UK too applied a similar system to only non-EU citizens prior to Brexit. After Brexit, EU nationals are also subject to the same mode of selection.

Labour selection based on desirability for the domestic market is the chief rationale in centralised government decision making and the setting of numbers for specific types of work. Employer feedback on industry needs can also be important. Eligibility criteria such as skills requirements or employer regulations are the most common way of shaping the nature and scale of migration. Many countries do not use points-based systems to select work migrants but instead rely on 'employer-driven' work-visa systems, while some of the governments using points systems have tried to increase the role of employers (for example, by prioritising migrants who have job offers). In wholly employer-driven systems, prospective migrants must have a job offer lined up with an employer who is willing to sponsor them prior to application. In the UK, employers are given considerable freedom to hire workers through visas and other mechanisms designed to match demand with supply of labour. Compared to the UK's employer-driven system, Australia's points system is more centrally planned as the government, rather than employers, plays the key role in deciding who should be admitted. There is also more scrutiny of migrants' personal characteristics, such as their age and qualifications, and not just the jobs they are likely to perform. Australia allows people to migrate without a job offer in place, although other countries with points tests, such as New Zealand, either require or prioritise job offers. In addition to conditions attached to the job, many work permit systems require the workers themselves to meet personal eligibility criteria. Common requirements include language proficiency, degree qualifications, age restrictions or nationality restrictions/quotas. The UK's current system categorises migrants based on skills (Kierans 2021). It is often unclear to applicants what kind of skill is preferred. There is no single definition of 'skilled'. Two common ways of defining the skill level of a job are the level of education that is required to perform it (for example, whether people doing the job generally require a post-secondary qualification or bachelor's degree) and the salary (for example, whether the salary is above a

chosen threshold (MAC 2013)). However, there may be some exceptions to the main skill requirements, for example in the case of occupations that are deemed to be in high demand or to have particular social and economic benefits that make them worth prioritising.

A primary objective is to select people who are likely to integrate successfully, particularly if they will become eligible to settle permanently. Thus, governments impose additional criteria such as language requirements as eligibility criteria. The very presence of a large number of irregularly entered workers who do not have the correct legal documents for work, however, indicates a mismatch between centrally determined systems of entry for workers and those who are actually required for work in a country. This is especially applicable in certain kinds of jobs for which there is no local supply of skills or simply no local interest because of low wages or poor progression. Yet, these are the very sectors that become the prime targets of immigration enforcement and experience maximum workplace bordering. In order to be secure, visas have increasingly become akin to property rights in terms of value (Casella and Cox 2018).

Enhanced immigration enforcement and lack of sufficient numbers of visas for lower-paid/lower-skilled jobs mean that irregularly hired employees are left at the mercy of exploitative employers. While many modern slavery provisions are supposed to assist with such situations, there is a rise in vulnerability of workers who do not have the correct documents because of hostile environment document-checking obligations. Hence workplace bordering facilitates both expropriation and exploitation of workers who come from poorer countries and seek opportunities to sustain themselves and their families and through this exploitation keeps costs of production/sale of goods and services lower for host country consumers of developed economies. It has thus become necessary to hold the correct visa to simply ward off exploitation. Even with visas, workers remain vulnerable, as these are easily withdrawn when the employer fires the worker. Once they lose employment with their sponsoring employer, the worker no longer has a right to reside and has to leave the country.

Visas are also difficult to obtain. For instance, for the US H-1B visa workers first need to obtain a job offer from an American employer. The employment position must be in a specialty occupation requiring certain levels of skills, expertise or a degree of some kind. Visas are allocated essentially by a lottery because the demand far outstrips the supply of these visas. H-1B visas are insufficient in number and thus become premium property for those who acquire them (Ng and Whalley 2005).

At the other extreme are visas which are nearly independent of residence requirements. For instance, digital nomad visa (DNV) programmes

grant individuals temporary residence in a country while working exclusively remotely (Casi, Mardan and Stage 2023). This kind of remote working became especially popular after the Covid-19 pandemic. Working abroad on a tourist visa is illegal so people who work in different countries via the internet technically need to have specific visas. However, more than forty countries have introduced digital nomad visas and relaxed residence requirements so that individuals can work remotely. Workers are disconnected from the jurisdiction where they are formally employed or where the people they serve reside. The DNV programmes permit individuals to choose their country of tax residence. This has especially facilitated mobility for freelancing tech entrepreneurs and those who work on social media content.

These kinds of flexible work visas show that with the necessary will it is possible to ease the path for workers to live and work across borders, but it appears to take place only rarely. Professionally mobile people such as tech-industry workers have some structural clout in the global economy because of their in-demand skills but most others cannot hope for such mobility.

Brexit and the labour market

A major source of migration for UK workplaces is from other EU countries. By 2020, an estimated 55 per cent of foreign-born workers who said that they had originally moved to the UK for work-related reasons were born in EU countries, which was largely the result of fifteen years of migration from EU countries following EU enlargement in 2004. EU workers could earlier avail themselves of free movement for more flexibility of travel and for staying for longer periods of time out of the UK if needed. They could also be out of work without losing the right to live and work in the UK. Brexit created a major change by removing the right to work associated with free movement for EU nationals and by introducing a work permit system for them identical to that which was already in place for other third-country nationals. EU nationals now have to depend on remaining employed for at least five years for continuous residence in order to apply for indefinite leave to remain (permanent settlement). They no longer have recourse to public funds.

Shortly before introducing its post-Brexit immigration system, the government said the aim of this policy would be to make the UK 'a magnet for the best and brightest' workers from around the world.[1] It added that 'there will be fewer lower-skilled migrants' and 'overall numbers will come down'. The opposite has happened, with net migration levels

nearly tripling from 219,000 in 2019 to a record 606,000 in 2022 (Sumption and Brindle 2024). Post Brexit, EU workers have been more likely to be working in low-wage jobs and less likely to be in high-skilled jobs than non-EU workers.

Post-Brexit changes to the UK immigration system have created new work visas because of labour market needs on a scale never previously experienced. A lot of the debate surrounding the new points-based immigration system has focussed on the Skilled Worker visa for foreign nationals with a job offer. This replaced the old Tier 2 (General) work permit. Unlike the Tier 2 visa, there is no maximum amount of time that can be spent in the UK on a Skilled Worker visa, provided the leave remains valid, and workers can change employers, so this improves conditions for workers. However, eligibility for a Skilled Worker visa still requires a job offer and English language ability. People can now be sponsored to work in medium-skilled rather than high-skilled jobs in many instances. Other significant changes include reducing the minimum salary requirement for a job offer, which can be as low as £20,480 per annum. The requirement to advertise jobs in the UK first has also been abolished and the annual quota on visas has also been removed. In the past, elementary care workers were not eligible for recruitment under the Health and Care Worker visa. This changed in February 2022 when immigration rules were relaxed for foreign care workers. The 'Health and Care Worker' visa is now essentially a sub-category of the Skilled Worker visa. It allows medical professionals to come to or stay in the UK to do an eligible job with the NHS, an NHS supplier or in adult social care. Indian nationals were by far the largest nationality for Skilled Worker visas in 2023, receiving around a third of visas to work both in the health sector and in all other industries. Overall, Indian citizens received 25 per cent of all main applicant work visas in 2023 (Sumption and Brindle 2024). The Covid pandemic had automatically led to a drop in non-EU labour migration. Total work visa grants fell by 40 per cent for main applicants in 2020 (Home Office 2023), and ONS analysis suggests that many people who received work visas did not take them up or left the UK early (ONS 2021). However non-EU work-related migration has grown strongly since 2021, following a pandemic-induced decline. Hence the trend now is towards cutting back numbers from these regions once again.

Indeed, at present there is a backlash against the legal migration that has taken place through the worker visa pathways in the UK with the Health and Care Worker visa route being specifically targeted for cuts (Brown 2025). A similar backlash is not there for other visa pathways. The nationality receiving the largest share of Youth Mobility visas (which is limited to people aged 18–31 from certain regions of the world) were

Australians.[2] There is no plan to roll these schemes back and the UK may even extend these to youth EU-wide in the future. Again, these differences in approach to the different migration pathways appears racialised in nature with migration from poorer, less white populations not preferred.

Naturalisation and belonging

Anderson writes that the fantasy citizen is a worker citizen (Anderson 2024, 2771). Fantasy citizenship is created through the 'right to work'. Some have it and some do not. The highly skilled worker is normally valued as a prospective citizen even if sometimes they too spend years on temporary visas (for instance in the US on H-1B visas). They are considered productive as well as responsible and suited for the needs of the host country. Citizenship by investment as well as through skill conversion into workplace productivity are examples of who is considered deserving of a place in society (Bassel et al. 2021). This fits in with the prevalent market logic. All the work pathways that potentially lead to permanent residence are for high-income roles in employment. Low-income workers do not usually have a means of acquiring long-term residence but remain reliant on continued domestic demand for their services. Long-term status is usually linked to a period of continued residence. For instance, all EU countries (except Ireland and Denmark) participate in the 2003 European Directive that requires them to grant long-term status to non-EU citizens after five years of residence. The UK also permits applications for indefinite leave to remain after five years of residence in the UK although recent proposals are to increase this to a much longer qualifying period (with ten years being considered).[3] Other countries give immediate settlement. For example, many skilled workers migrating to Australia receive permanent residence rights immediately on arrival. No such schemes exist for low-income workers whose work permit programmes are time limited. Low-income workers are expected to return home after the permitted period expires and are not allowed to apply for permanent settlement (Ruhs 2013). These programmes restrict other rights, such as the ability to bring family members. Pathways to naturalisation for wealthier migrants demonstrate that in present times economic criteria predominate at least in formal requirements for long-term membership rather than any other characteristics, but wealthier migrants also pay a premium for their new national memberships. They often lose out on tax benefits and other previous employment benefits as they migrate, but they are able to negotiate using their presumed productivity.

In the US the H-1B system is a dual intent visa. It provides for the temporary recruitment of workers but as it can also give people long-term

status. Foreign workers can use it to eventually naturalise (Jacobs 2022). Scholars find that there are severe inefficiencies in how the H1B system works as there is a long delay for these visas leading to a green card permanent status as well as these being limited in number (Jacobs 2022). The hurdles mean that foreign workers who become valuable to their US employers and who gain experience in the US are forced to return to their countries of origin. These outcomes also drive away future workers. Visa backlogs and waiting lists affect who will actually come to the US and remain there. Foreign students worry that there will be no jobs once they finish their studies (González 2021).

Most H1B visa migrants work in technology-related fields or the pharma sector. All of them have higher education degrees. The majority are from India, with Chinese nationals next in terms of number of applicants. Yet there are visa caps, so migrants from India and China have long waits in visa queues. Also, H-1B visa holders depend on having continued employment to proceed to green cards. In 2023 many H-1B holders in the US were laid off from their jobs with tech companies. The Canadian government created a special scheme to draw them to Canada instead. It stated,

> As of July 16, 2023, H-1B specialty occupation visa holders in the US, and their accompanying immediate family members, will be eligible to apply to come to Canada. Approved applicants will receive an open work permit of up to three years in duration, which means they will be able to work for almost any employer anywhere in Canada. Their spouses and dependants will also be eligible to apply for a temporary resident visa, with a work or study permit, as needed. (Wilson 2025)

The government statement continues: 'This will expand the opportunities available for skilled workers to continue to pursue their careers in the high-tech sector and contribute to economic growth and prosperity in North America.' There was massive demand for this scheme with full capacity reached within twenty-four hours. These kinds of schemes show that one country's difficulties in immigration systems can provide another with an opportunity to attract workers.

Wealthy migrants can directly obtain citizenship or residence by investment (*jus doni*) without bothering to enter the labour market and on a fast-track basis. Some provide residence-by-investment (RBI) programmes, also known as golden visas, while other countries such as Malta sell citizenship for the super wealthy. This practice has recently been considered as undermining EU citizenship by the Court of Justice of the European Union (ECJ). On 29 April 2025, the ECJ issued its ruling in

EC v Malta [2025] (Case C-181/23) and stated that Malta's investor citizenship framework is not compatible with EU law. The court was careful to respect the sovereignty of member states in the granting of nationality, but it asserted that this competence must be exercised consistently with the principles and values of the European Union as the national citizenship confers EU citizenship rights also to citizens. The court found that investor citizenship and sale of citizenship takes away from the substantive values of EU citizenship and are contrary to the objectives set out in Articles 20 TFEU and 4(3) TEU.

The UK also has a means of attracting high net worth individuals with investor visas (Tier 1 for investment of about £2 million in the UK economy). This is however an unusual process of becoming British. There are three main ways of becoming a UK citizen: automatic acquisition at birth, registration (usually for children) and naturalisation (usually for adults). Almost all migrant adults without a British parent will have to naturalise to become UK citizens. Adult migrants who apply for citizenship must usually have lived in the UK for at least five or six years[4] and must already have the permanent right to live in the UK (that is, ILR for non-EU citizens and permanent residence or settled status for EU citizens). Applicants must meet a language requirement and pass the 'Life in the UK' test, which is designed to evaluate their knowledge of UK institutions, history and culture.[5] Applicants must have 'good character', which includes paying taxes and not having a recent criminal record. They must also have been physically present in the UK for most of the previous years of required residency.

Scholars question the value of these various elements of requirements for naturalisation. The requirement of taking an oath in the citizenship ceremony has been particularly controversial as an oath of allegiance is not required for those who are citizens through other means. While providing a formal means of inclusion, the legal process of naturalisation also makes it clear that not all citizens are perceived as equal (Sredanovic 2022). Clearly naturalisation is seen as a process of curing people of their foreignness and serves to underline the need to prove themselves to be even better than citizens by birth: what scholars have termed a 'super citizen' (Badenhoop 2021, 579).

Migrants in the UK who are foreign nationals can acquire the right to live in the UK permanently without becoming citizens. Non-UK citizens who have permanent residence or settlement have extensive rights similar to those of UK citizens; for example, there are no restrictions on their right to work. Some settled migrants live their whole lives in the UK without becoming citizens. However, becoming a British citizen brings certain additional rights. In addition to voting, it is much harder for the

government to deport citizens, and citizenship cannot be lost as a result of long absences from the country. There are also some specific restrictions on the jobs certain non-UK citizens can do in the public sector (armed forces and civil services, for instance).

The most common ground for refusal of naturalisation is conduct. Good character is required of anyone over the age of ten seeking to register or naturalise. In recent times it has also been a key reason why people have lost their British citizenship (an aspect investigated in greater detail in Chapter 6). Conduct has also become a new issue for naturalisation of asylum seekers in the UK. The UK government has published recent guidance about naturalisation and conduct for asylum seekers which makes it almost impossible for people who arrive in the UK by dangerous journeys to become British citizens. A dangerous journey is one which could be via a small boat across the English Channel, but it could also be by means such as hiding in a vehicle. Previously refugees who had arrived by irregular routes would need to wait ten years before being considered for citizenship but now they are normally refused citizenship, regardless of the time that has passed from their arrival. This change will affect applications for British citizenship submitted on or after 10 February 2025, but the person could have come to the UK many years prior and they could already have indefinite leave to remain in the UK. The change has happened through case worker guidance when assessing if an applicant for citizenship is of 'good character'.[6] This is despite the UK being signatory to international law treaties, such as the 1951 UN Refugee Convention, which states that asylum seekers and refugees should not be penalised for illegal entry.

'Lower-skilled' workers and vulnerability

Studies show that while immigration policies have become more restrictive, immigration flows have continued to increase (Castles 2010; Clemens et al. 2018). In low-skilled jobs, (more appropriately referred to as low-paid jobs, because skill requirements from workers is actually quite high in these jobs), employers look for migrant workers to perform jobs which are not desired by local people. Sometimes these jobs are made available through legal pathways, as otherwise there would be more illegal employment. For low-paid jobs in the UK people can only avail themselves of a few immigration routes: the Overseas Domestic Worker visa, the Tier 5 Seasonal Worker visa for agricultural workers, and other limited temporary permits under Tier 5. These routes do not adequately respond to the continued demand for migrant workers in low-wage sectors like cleaning,

construction, hospitality and warehousing. The lack of safe and regular migration routes for low-paid work post-Brexit is a significant concern, as people are still likely to migrate for this type of work but will have to do so through irregular and often more dangerous channels.

The long-term consequence of low-paid immigration could be about difficulties in integration, competition with poor people in the UK in similar jobs and opening up legal pathways for exploitation because of low pay (Ruhs 2016). Yet not opening legal pathways for sectors where there is demand is likely to facilitate practices like forced labour and human trafficking. The Modern Slavery Act 2015 tries to ban such behaviour but there can be many situations which are not covered by it. An example of such vulnerability is in tied visas, for example, Overseas Domestic Worker visas. A person on the Overseas Domestic Worker visa is only allowed to work in the UK for six months and only as a domestic worker (cleaners, chauffeurs, cooks, those providing personal care for the employer and their family, nannies and others performing such jobs). They have to enter with an employer whose household they were already working in prior to coming to the UK (Anti-Slavery International et al. 2022). They cannot extend their visa even with the same employer.

Since 2016 Overseas Domestic Worker visa holders can theoretically change employer within the domestic work sector, but they cannot apply to renew their six-month visa, even if they have an offer of ongoing new employment. This makes the right to change employer meaningless in practice. It is not realistic to find a new job in a private household of a stranger in a foreign land with only a few months/days left on one's visa and no options to renew this. The visa also does not allow for access to public funds. Since 2016, safeguards have also been in place for migrant domestic workers as part of the visa application process, such as the requirement to be seen alone during the visa interview and that they should receive an information leaflet setting out their rights in the UK and who to contact should abuse occur. However, these safeguards are rarely applied or made use of. While there are mechanisms in place to identify and provide support to victims of trafficking and modern slavery in the UK, these only apply to migrant domestic workers whose treatment amounts to the legal definition of trafficking and modern slavery. In cases where migrant domestic workers have experienced violations of their labour rights, but which do not meet the threshold of trafficking or modern slavery, they are not in a position to access protection and assistance.

Employers have been shown to take advantage of these restrictions to impose abusive or exploitative conditions, knowing that migrant domestic workers are unlikely to leave or complain when that would mean losing

their work and with it their right to remain in the UK (Kalayaan 2019). It is therefore 'not only irregular migrants who are unable to challenge violations of labour laws and standards but also those working legally' (Anderson 2008, 202). Exploitation is defined in section 3 of the Modern Slavery Act 2015 as a form of abuse where someone is forced or coerced into doing things for the benefit of others. It includes slavery, servitude or forced/compulsory labour, sexual exploitation, bodily exploitation or being subjected to force, threats or deception to provide services or benefits to another person such as debt bondage, drug trafficking and financial exploitation.

Potential grounds for protection for workers is protection from discrimination under the Equality Act 2010 but this is not really available now for immigration status. The recent Supreme Court ruling in *Taiwo v Olaigbe* [2016] UKSC 31 confirmed that immigration status does not fall within the protected characteristic of nationality. Employees that are targeted in the workplace on the basis of their immigration status (or suspected immigration status) will not therefore be able to make any claim under the Equality Act 2010. In *Taiwo*, the Supreme Court unanimously dismissed the appeals about the mistreatment of persons because of their position as vulnerable migrant domestic workers. The workers in *Taiwo* were dependent on their employers for their continued employment and residence in the UK and claimed their ill treatment constituted race/nationality discrimination, contrary to the Equality Act 2010.

The appellant in the first appeal was a Nigerian national who came to the UK on a migrant domestic worker visa. The respondents were her employers. The appellant was seriously mistreated by the respondents and successfully brought claims in the employment tribunal for failure to pay the national minimum wage, for unlawful deductions from wages, for failure to provide rest periods and for a failure to give her written terms of employment. However, her claim for racial discrimination was unsuccessful. The appellant in the second appeal suffered similar experiences and was also a Nigerian worker in the UK on a domestic worker's visa. She successfully brought similar claims in the employment tribunal, but the Employment Appeal Tribunal overturned the employment tribunal's finding that there had been direct race discrimination.

Lady Hale gave the only substantive judgment and said that neither appellant had suffered race/nationality discrimination, because they suffered abuse as a result of their precarious immigration status, rather than their nationality. Race was a protected characteristic under the Equality Act 2010, s 13(1), and this included colour, nationality and ethnic origin. Nationality and immigration status could not be equated given

that non-British nationals may have a secure immigration status here and therefore not be vulnerable in the way that the appellants were.

Protected characteristics in the Equality Act and predecessor legislation aimed to protect specific groups who have historically been discriminated against and did so by interfering in other parties' rights to freedom of contract. Parliament could have opted to include immigration status in the list of protected characteristics but did not do so. The treatment of the appellants was attributable to the nature of their visa, which made them dependent on their employers for continued residence, rather than their nationality. The Supreme Court also found that there was no indirect discrimination because the vulnerability concerned the visas. Had the claimants been non-British nationals with the right to live and work in the UK they would not have experienced similar issues, so their being Nigerian had nothing to do with this exploitation. Lady Hale expressly refused to rule out the possibility of a successful claim for indirect discrimination in a case involving migrant workers, but one would have to carefully identify one that 'would have applied to all their employees, whether or not they had the particular immigration status of [the Claimants]'. Pre-2012 the Overseas Domestic Worker visa allowed domestic workers to change employer with the linked and required right to renew the visa but unfortunately as of now this pushes migrant workers into the hostile environment precarity where they are left at the mercy of the employer.

A technology-related development in low-paid work is that of the rise of the 'gig' economy (Obinna and Bacong 2024). While the gig economy could include off-line freelancing or sub-contracting for services, it includes the use of digital platforms which are used to match workers to those who need one-time or short-term services from them. There have been many legal disputes about whether such workers have any job-related protections, whether they can unionise or can go on strike since they have been categorised as freelancers rather than as employees (for example, the cases about Uber workers or Amazon) (Boewe and Schulten 2019; Halliday 2021). Immigration related precarity is even more prevalent in the gig economy where irregular working may be permitted and exploited to keep prices of services down.

As seen in the previous chapter, a key hostile environment policy is the offence of illegal working, introduced under the Immigration Act 2016. Being and working in the UK without authorisation was already prohibited under UK law, carrying the risk of deportation, but the Immigration Act 2016 made 'illegal working' a criminal offence in its own right, punishable by an unlimited fine, a six-month custodial sentence and the confiscation of any income earned during the relevant working period.

As a result of the offence, victims of exploitation are even more likely to go unidentified and unsupported. People would be unwilling to come forward as they could be punished themselves instead of the actual perpetrators of abuse being punished.

Who is an irregular worker?

Irregular status holders are not a homogeneous group of people. UK's exit from the European Union has resulted in an increase in the number of irregular migrants in the United Kingdom and this increase, when combined with measures that have progressively restricted the rights and entitlements of various immigration categories, creates an environment conducive to labour exploitation of more groups of people. Labour shortages may function as a 'pull factor', encouraging people working in sectors without regular routes to use alternatives, such as overstaying and diverse types of semi-compliance, including people working on visitors' visas or outside of the sector permitted by their visa. Finally, the concept of irregularity is further complicated by the fact that people can end up being treated as irregular despite this not being the case. As we have seen in Chapter 2, the most notable and well-known example of people wrongly being deemed irregular is, of course, the Windrush scandal. This major policy failure led to people who had arrived in the UK between 1948 and 1973 from the Caribbean and other parts of the Commonwealth, and who had the legal right to live and work in the UK, being denied access to services, wrongfully detained, threatened with deportation and, in at least 83 cases, wrongfully deported due to their inability to prove their right to reside in the UK (York 2018).

A less well-known example of people being wrongly treated as irregular are cases where authorities end up detaining victims of human trafficking who have the right to remain in the UK under the Modern Slavery Act 2015.[7] There are currently five primary international instruments that hold United Nations Member States accountable for meeting their obligations to prevent slavery and various forms of human exploitation which include the issues in the UK legislation: (1) The 1926 Slavery Convention; (2) The 1930 Forced Labour Convention; (3) The 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; (4) The 1966 International Covenant on Civil and Political Rights; and (5) The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. In keeping with these developments, the Modern

Slavery Act aims to identify victims, punish offenders and hold organisations accountable for exploitative practices. However, its effectiveness has been questioned by those who have examined the evidence of how it operates (Barkay et al. 2024; Mantouvalou 2018).

In the UK, the National Referral Mechanism (NRM) is the framework for the identification of potential victims of modern slavery. To be recognised as such and access support, potential victims must be referred to the NRM by a 'first responder', an organisation authorised to carry out an initial risk assessment and to refer cases to the NRM, for further assessment by a competent authority. First responders currently include local authorities, the UK Visas and Immigration, and several nongovernmental organisations, among others (Home Office and UK Visas and Immigration 2025). Just as with irregular working, victims with insecure immigration status are usually reluctant to come forward and report their abuse for fear of immigration action against themselves. Sometimes people who survive such slavery do not even know they have been enslaved or trafficked. A well-known example is the story of British Olympian and world champion athlete Mo Farah. Despite being a well-decorated and knighted athlete, Sir Mo Farah was not sure he would not face legal consequences for revealing that he had been brought into the UK from Somalia as a child by traffickers who made him work as a domestic servant in their household. Eventually he decided to make a documentary for the BBC telling the story of his life. This documentary has raised awareness of the vulnerability of trafficked children and how they are exploited.[8]

As mentioned above, the term 'modern slavery' loosely refers to severe forms of exploitation such as human trafficking and forced labour. The term became more firmly embedded in UK discourse with the passing of the Modern Slavery Act 2015 (Davies and Kachynska 2024). In the UK, modern slavery includes human trafficking, slavery, servitude and forced or compulsory labour. A person does not have to be moved to a different location in order to be considered a survivor of modern slavery – this is unlike trafficking, where movement is a key factor. Trafficking is one element that falls under the umbrella definition of modern slavery in the Council of Europe Convention on Action against Trafficking. Smuggling is not the same as trafficking. It is the covert and unlawful moving of someone across a border, but it could be at the request of the person being smuggled.

The legal framework governing the identification and protection of victims of trafficking/modern slavery in the UK is the Council of European Convention on Action against Trafficking (ECAT) and Article 4 ECHR (Gadd and Broad 2024). ECAT defines trafficking and imposes an array of obligations on states to prevent and combat trafficking, to protect the

human rights of victims and to promote international cooperation on action against trafficking. In *Rantsev v Cyprus and Russia* [2010] 51 EHRR 1, the Strasbourg Court concluded that trafficking within the meaning of Article 4(a) ECAT fell within the scope of Article 4. Article 4 prohibits slavery, servitude and forced labour. Article 4 ECHR imposes a number of positive obligations upon states, and those obligations 'must be construed in the light of [ECAT] . . . the Court is guided by [ECAT] and the manner in which it has been interpreted by GRETA' (*Chowdury v Greece* [2017] App No 21844/15 [§104]). The primary mechanism by which the UK complies with its obligations under ECAT is through the NRM (Gower 2023).

Yet, domestic legislation which ostensibly targets such crimes makes it harder for victims to seek help. For instance, in the UK the Nationality and Borders Act 2022 and the Illegal Migration Act 2023 both make it more difficult for victims of modern slavery to seek support, and for some to claim asylum (Haynes 2023). These Acts frame modern slavery as a criminal activity but there is little understanding of how immigration control is a primary driver motivating the state which then incentivises businesses to cooperate in this area to the detriment of human rights of victims. Part 5 of the Nationality and Borders Act 2022 addresses the provision of information relating to being a victim of modern slavery or human trafficking, compliance with slavery and trafficking information, the identification of potential victims, recovery periods, assistance and support, leave to remain for victims, and legal services (sections 58–59). Part 5 of the Nationality and Borders Act 2022 made changes to the Modern Slavery Act and related policy. They included raising the standards for making a decision on positive reasonable grounds. Another piece of legislation which acts as a barrier is the Illegal Immigration Act 2023. The central provision of the Illegal Immigration Act 2023 is section 2(1) which imposes upon the Secretary of State a general duty to remove a person from the UK when they engage in unlawful entry or absence of leave to remain. There are complications when the person has been a victim of modern slavery. The motivation behind these legal changes was to assist decision-makers in distinguishing between genuine and non-genuine accounts of modern slavery. New measures were also introduced to increase removals of Albanian nationals, even those identified as victims of modern slavery (Landman, Brewster and Thornton 2024). As in past years, with the Modern Slavery Act, these new measures increase scepticism about real concern for victims as they demonstrate a great interest in simply enforcing immigration control (Mantouvalou 2018).

These provisions appear to be a fairly obvious breach of the UK's obligations under ECAT and Article 4 ECHR. Indeed, the Secretary of State was unable to make a statement of compatibility under s. 19(1)(b)

HRA 1998, and s. 1(5) of the Act provides that the s. 3 HRA interpretative obligation does not apply. The government's view set out in the ECHR memorandum is as follows:

> The Government is satisfied that these provisions are capable of being applied compatibly with Article 4 ECHR. The Government has concluded that radical solutions are required to put a stop to the small boats crossing the Channel and the approach adopted in these provisions is therefore new and ambitious but taking such an approach means that the Home Secretary is therefore unable to make a statement under section 19(1)(a) of the 1999 Act.

The NRM is part of the UK Home Office which enforces control of immigration, crime and security. For a person to be supported they have to receive a positive conclusive-grounds decision on their case saying that they are indeed a victim of modern slavery. A person can continue to receive support via the NRM, however, their needs are assessed first through the process. So, after a positive conclusive-grounds decision, a person will only receive support for parts of their life where they have needs as a result of the modern slavery or trafficking they have experienced. After receiving a positive conclusive-grounds decision, a survivor who is not a UK citizen may make an immigration application to stay in the UK, but this is discretionary leave for temporary permission to stay in the UK.

Some people who apply may find that they are not considered eligible for this support at all because it is considered unlikely that they have experienced trafficking or modern slavery. This is called a negative conclusive-grounds decision. There can be a reconsideration application made if further information or evidence is to be submitted. The evidence that has to be produced must be 'objective' evidence of trafficking (January 2023: section 49 of the Statutory Guidance on Modern Slavery). The distrust regarding who is a victim is evident in this new requirement, as it makes it impossible for people to give a personal account of their own experience as evidence, as this is not considered objective evidence. This makes it even more difficult to obtain protection.

Another route is asylum for victims of modern slavery. The NRM route is separate from the asylum process. An NRM application and asylum claim can be submitted at the same time. In *R (KTT) v Secretary of State for the Home Department* [2021] EWHC 2722 (Admin), the High Court held that Home Office guidance was unlawful as it did not provide for a grant of leave to remain, where a person had a pending asylum claim that was based on a fear of re-trafficking. It was held that the ordinary meaning of Article 14 is that a confirmed victim of modern slavery who

is also seeking asylum must be granted leave to remain, as their stay in the UK is necessary due to their personal situation (that is, the need to pursue their asylum claim). The Court of Appeal concurred with this holding. The legal position after *KTT* is therefore that a person who is a confirmed victim of modern slavery and who had a pending claim for asylum that was based on a fear of re-trafficking was entitled to a grant of discretionary leave. New guidance from 16 March 2023 now provides for discretionary leave to be granted in line with *KTT* to those who had a positive conclusive-grounds decision made before 30 January 2023 and who had an outstanding asylum claim based 'in a material part' on the risk of re-trafficking.

In other countries too there are efforts to prevent and recompense for modern-day exploitative relations. In 2000, the US Congress passed the Trafficking Victims Protection Act (TVPA), which was 'the first comprehensive federal law designed to protect victims of sex and labor trafficking, prosecute traffickers, and prevent human trafficking in the United States and abroad' (Leach 2022). The TVPA set some 'minimum standards' for the elimination of human trafficking. The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking. For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that imposed for grave crimes, such as forcible sexual assault. There are measures to implement human rights through business as well. The California Transparency in Supply Chains Act of 2010, for instance, is one of those that places a duty on businesses to report (McGaughey et al. 2022). It is similar to the French 'duty of vigilance' law of 2017 which requires corporations to declare modern slavery practices, if any. The Australian Modern Slavery Act 2018 (Cth) also has such provisions. In the UK, too, businesses must report in their annual statements the steps taken to ensure modern slavery is not taking place. Statements are to be published on the company's website (if they have one). However, the measure lacks teeth, as the only penalty is that the Secretary of State can bring a civil proceeding for an injunction. The French law places greater accountability, including positive obligations on businesses to act. Australia's approach, as in the UK, is to emphasise criminal action against offenders and corporate responsibility (Barnes, Naser and Aston 2023). All of these jurisdictions fail to wholly take account of the human rights of the victims of these offences and consider them in the context of their vulnerable migration status.

Bordering asylum seeking through work

As we have seen, victims of modern slavery may often have asylum claims. Yet asylum seekers are blocked from working in the UK. EU law requires member states to grant asylum seekers access to their labour market after they have been waiting for nine months for a decision on their claim. Members can apply more favourable provisions and/or grant access to the labour market subject to conditions. The UK imposes some of the strongest restrictions on the right to work for asylum seekers compared to other European nations. In the UK permission to work can be granted only in limited circumstances. People who have claimed asylum in the UK can apply for permission to work if they have been waiting twelve months for a decision, and if they are not considered responsible for the delay in their asylum claim. This restrictive provision can be further restricted, because even if permission is granted, the person will only be allowed to accept jobs on the shortage occupation list, which includes only a narrow range of jobs. By contrast, other developed countries have more generous provisions. Canada allows asylum seekers to work immediately, whilst in the USA they are eligible to work after six months.

Without the right to work, most people seeking asylum must rely on help from the UK government while they are waiting for the outcome of their application. The National Institute of Economic and Social Research finds that there is strong evidence to provide asylum seekers the right to work. It has published a paper on the economic and social impacts of lifting work restrictions on people seeking asylum and found that 'allowing people seeking asylum the right to work would increase tax revenue by £1.3 billion, reduce government expenditure by £6.7 billion, increase GDP by £1.6 billion, and improve the wellbeing of those individuals' (Aleynikova and Mosley 2023). Asylum support starts from the day of the screening and gives people somewhere to live and a small allowance for necessities. In the next chapter there is an assessment of the extent to which this is actually adequate for asylum seekers, but here it is important to note that this support should simply be for a fleeting time while a decision is being taken, rather than extend for a prolonged period of incapacitation. As mentioned, waiting for the opportunity to work forces people to be reliant on government help. This spreads discontent among British citizens towards dependants who have come from abroad. Paradoxically, denying self-help work opportunities and delaying asylum processes affects asylum seekers and their public image rather than negatively affecting that of the state.

Until mid-2002, asylum seekers could apply for permission to work if they had been waiting six months for an initial decision on their asylum claim.

The government removed that concession, saying it was necessary to distinguish asylum from economic migration and that giving people the right to work after six months incentivised economic migration in the shape of asylum seeking. A right to apply for permission to work after twelve months was introduced in 2005 to comply with the EU law of the time. The government restricted work rights further to the shortage occupation list in 2010.

It is important to note that such restrictions have been imposed and maintained by successive governments of different political hues who have all maintained that they want to prevent economic migration through this pathway. Yet it prevents people from having a dignified existence in the UK while awaiting their asylum decisions. On the issue of human dignity in the context of asylum seeking, a clear legal standard has been set in a leading case, *R v Secretary of State for the Home Department ex parte Adam, Limbuela, Tesema* [2005] UKHL 66 (in short, the *Limbuela* case). In *Limbuela*, three asylum seekers whose claims for asylum were deemed not to have been made as soon as is reasonably practicable following their arrival in the UK were each refused support under s55(1) of the Nationality Immigration and Asylum Act 2002. Each was successful in their application for judicial review in the Administrative Court, which was later upheld by the Court of Appeal. The Secretary of State appealed to the House of Lords but lost the appeal.

S.95 of the Immigration and Asylum Act 1999 authorised the Secretary of State to provide or arrange support for asylum seekers (and their dependants) who appeared to be destitute or likely to become so within a prescribed period, but s55(1) of the Nationality Immigration and Asylum Act states that the claim has to be made as soon as is reasonably practicable after arrival in the UK; s55(5)(a) enabled the Secretary of State to exercise powers to provide support to protect Convention (ECHR rights).

The test for whether an applicant was destitute was set out in s95 of the Immigration and Asylum Act 1999 and covered circumstances in which a person did not have adequate accommodation or could not meet essential living needs. Although the applicants had been forced to sleep rough on the street and had limited access to food and washing facilities whilst awaiting their asylum applications the Secretary of State did not provide them any support before an ultimate state of inhuman or degrading treatment was reached. The decision by the Secretary of State to not support someone who would otherwise qualify for support under s95 of the 1999 Act because he was, or was likely to become, destitute, was wrong and the court noted that asylum seekers in this position were prohibited from employment. Where the inhuman or degrading treatment or punishment resulted from acts or omissions for which the state was solely responsible, there was an absolute obligation to refrain from such conduct.

The court held that there was no doubt that the threshold might be crossed if a late applicant for asylum with no means and no alternative source of support, unable to support themselves, was, by the deliberate action of the state, denied shelter, food or the most basic necessities of life. In the *Limbuela* case there was sufficient evidence to justify the conclusion that due to their treatment by the Secretary of State, there was an imminent prospect that they would suffer inhuman or degrading treatment. The court noted that asylum seekers were prevented from working while their application was being processed and concluded that a failure to provide support would therefore expose the claimants to the risk of being homeless or without access to adequate food, creating an Article 3 ECHR violation.

In the next chapter, in the context of families and housing for asylum seekers, I will return to this standard (*Limbuela* standard) as it is unclear now with new developments in standards of asylum housing, and general care and support for asylum seekers, if even this low threshold of inhuman and degrading treatment is being met. Here in the context of work restrictions, we can see how denying adequate support further compounds vulnerability of asylum seekers who (as noted in *Limbuela*) have no other means to support themselves.

Civil society actors call for the 'right to work' for asylum seekers in the UK. For example, Lift the Ban, a coalition of 240 charities, businesses and trades unions which seeks to overturn the government's ban on asylum seekers working, states: 'It takes the toughest toll on people seeking asylum, but the UK economy also misses out on tax revenue and much-needed specialists' (Refugee Action 2022). Paradoxically, people held in immigration detention who are supposed to be facing imminent deportation are permitted to work, albeit for an extremely low rate of pay (Mantouvalou 2020). They are given work roles within their detention centres and paid nominal amounts. Detainees are only paid £1 an hour, and a maximum of £30 a week (for a maximum of 30 hours a week, as Detention Services Order 01/2013 provides) for cleaning, cooking and other such roles in the centre (Home Office 2025b). This low rate of pay was challenged in *R (on the application of Shola Badmus, GW, Okwudili Chinze and Granville Millington v The Secretary of State for the Home Department*) in the Court of Appeal. The appellants were subject to immigration detention and undertook paid activities while detained in Brook House. They worked as cleaners and cleaning supervisors, barbers and welfare 'buddies' (organising legal advice surgeries, Home Office interviews for other detainees, and supporting those faced with problems), and were paid £1 an hour for their work.

For comparison purposes, there is the National Minimum Wage Act in the UK, under which there is a minimum wage set for those over 25 years old. Section 59 of the Immigration, Asylum and Nationality Act

2006 excludes immigration detainees from minimum wage legislation. Detention Services Order 01/2013, in turn, provides that detainees should be paid £1 per hour for 'routine work' (cleaning, for instance), and £1.25 per hour for 'specified projects' (painting, for instance).

Immigration removal centres are often run by private companies who seek to maximise their profits. These companies 'offer the opportunity' for detainees to perform essential work for maintenance within the centres and pay them £1 per hour. With this small amount detainees cannot even afford items from the centre's vending machines. However, the Court of Appeal held that this low rate of pay is not exploitative and did not violate human dignity. The human rights arguments were also dismissed (a violation of Article 14 of the ECHR, which prohibits discrimination), in conjunction with Article 4 (prohibition of slavery, servitude, forced and compulsory labour), Article 8 (right to private life), and Article 1 of Protocol 1 (the right to property). The contractors running these centres are profiting from the work of those detained as they are getting work done for amounts well below normal costs.

The case is subject to appeal to the Supreme Court, and possibly the ECtHR if domestic remedies are exhausted. It is to be hoped that the human rights arguments will be reconsidered, and that it will be recognised that detainees' treatment both falls within the ambit of Articles 4, 8 and Article 1 of Protocol 1, and violates the Convention when taken together with the prohibition of discrimination (Mantouvalou 2020).

This exploitation of people in detention centres is linked to the wider issue of a lack of accountability when privatisation takes the place of migration control. There are numerous instances of serious abuses (rapes, use of disproportionate force and even deaths) in these centres as well as during the deportation process. While such abuses of power can happen in the hands of state agents, private operators are profit-incentivised and further removed from accountability than direct public service state authorities. Yet by privatising, the government is able to escape direct liability when things go wrong and this turns migration control into a business.

Eyes everywhere: private parties checking status and technology

Migration control, from when it commenced, was a core state action conducted by governments. Yet checking people's status and tracking who is living in a society has now become everyone's legal duty. This is part of a hostile environment immigration strategy which involves employers,

landlords and others who have reporting duties as private individuals. Yet perhaps there is a longer track record. The co-opting of private parties goes back at least to 1793 when ship captains had to supply data about new arrivals and exits. The Registration of Aliens Act 1793 (UK), obliged ship captains to report numbers, names and occupations of foreign passengers to local port authorities upon arrival. There was a fine applicable if the captain omitted any passenger. Similarly, air carriers are also required to check documents (1944 Chicago Convention on International Civil Aviation). Within a few decades (in the late 1980s) there were sanctions placed on airlines for not checking documents properly. This was mainly because of asylum seekers who were arriving in Western Europe and the UK in the 1980s. Airlines were also drawn into the immigration detention business because they needed to report and hold passengers without documents. Hence detention centres were set up initially quite near airports (for example, Harmondsworth).

More recent developments have broadened the duty to report so that it is not limited to borders. There are companies that specialise in immigration detention. For example, detention involves private companies such as Serco and G4S running facilities which are prison-like in appearance and format, where people are sent once they are found or presumed to be present in society without regular status. So, specific sites of bordering have been extended. Private companies then run these centres for profit and exploit those who are detained in these spaces by giving them work on site for nominal amounts far below minimum wage (as mentioned above).

Immigration checks for the purposes of employment were introduced in a rudimentary form from 1996. The 1996 law was further reformed in 2006. The Home Office could now fine employers who were found to have employed a person without permission to work where the employer had not checked and kept a copy of documentary proof of immigration status. Employers became more cooperative in immigration enforcement for fear of the legal consequences of non-compliance. The success of this scheme has led to other private parties who control resources such as access to housing and healthcare being involved in similar enforcement roles. The different instruments of hostile environment enforcement are: primary legislation (the Immigration Acts 2014 and 2016), secondary legislation (for example to regulations governing National Health Service charges), bureaucratic changes (such as the embedding of immigration officials at police stations and in local authorities) and data sharing agreements between government departments (such as memorandums of understanding between the Home Office and Department for Education and the Department for Health).

Under the Immigration Act 2016 the enforcement powers of immigration officers were further strengthened to target 'illegal working', and

the circumstances in which an employer can be found guilty of employing 'illegal' workers have been broadened. It is now a criminal offence to 'employ another person knowing, or where an employer has reasonable cause to believe, that the worker is disqualified from employment by reason of their immigration status'. Whereas the prior offence required actual knowledge of illegal working, liability now arises where the employer has a 'reasonable cause to believe' that the worker is disqualified, a much lower threshold. Section 35(4) of the Immigration Act 2016 also increases the criminal penalty for employing persons without the right to work under section 21(4) of the Immigration, Asylum and Nationality Act 2006 from a maximum of three to five years' imprisonment alongside a fine, or both (Bales 2017). Further, wages paid to such workers can be seized as proceeds of crime. Speaking in the House of Commons on 13 June 2016, the Minister for Immigration, James Brokenshire, said: 'The Government are committed to tackling illegal working. The Immigration Act 2016 makes illegal working a criminal offence in its own right, which ensures that wages paid to illegal migrants can be seized as the proceeds of crime, and assets may be confiscated on conviction.'

In tandem with the criminal offence, and irrespective of employers' reasonable cause to believe, 'civil penalties' may also be imposed upon employers employing those without the right to work. The civil penalty consists of either a £15,000 or £20,000 fine per worker depending on whether it is a repeat offence, issued by way of notice. This differs from a criminal charge as civil penalties can be issued by Immigration Enforcement without having to bring the matter before a court, or prove that the employer knew, or had reasonable cause to believe, that the individual had no right to work. Where employers are found to be employing workers without the right to work, the civil penalty can be reduced if the employer agrees to cooperate with Home Office officials. A £5,000 discount, for example, will be made where employers report 'suspected illegal workers' and a further £5,000 will be granted where there is evidence of 'active cooperation'. This means most employers will find it prudent to check immigration documents and/or if they fail to discover an irregular status at first, later cooperate to mitigate the fines. These actions can be a 'statutory excuse', where an employer can show that they carried out the correct 'right to work' checks or took suitable cooperative action (for example, section 15(3) of the Immigration, Asylum and Nationality Act 2006). This includes the re-checking of the worker's status where they do not have a long-term right to work in the UK. Such checks also eliminate the *mens rea* requirement (the requirement of a specific intent or knowledge of wrongdoing) for the criminal offence as the employer can demonstrate that they reasonably believed the individual had a right

to work. Similarly, we have already seen in Chapter 2 how landlords are also drawn in through right-to-rent checks by the same Act. Not surprisingly, private companies which provide secondary document-checking services are also now flourishing. The chief advantage of spreading out state services in this manner, apart from having eyes everywhere, is that the financial burden is also shifted to private parties like employers and landlords. It is also hard to pin liability on the government under these schemes, which in effect diffuses both the control of and accountability for migration. In the workplace, technology can replace the need for state control, for example, 'E-Verify', a biometric system that identifies those eligible to work legally in the United States has taken over much of the bordering function (Goldstein and Alonso-Bejarano 2024).

The widespread use of technology has assisted both the internalisation and the externalisation of borders (Huysmans 2014). Internalisation is prominent in empowering detection within borders, but externalisation is also facilitated through electronic checks, offshore holding and contracting out to external agencies for keeping people offshore. Security concerns have led to the use of modern technology and companies have invested a lot of money in research and development. As a result, private companies now have facial recognition, drones and data-mining technologies for use in border control, and all of these are continuously being improved. Technological advancements can make border control more 'efficient' in terms of needing fewer people to administer border control, but it is less 'accurate' and more error prone, thereby creating more unfairness and injustice (Boswell and Besse 2023, 396).

Using automatic software for applications for entry and even automating decisions on applications can speed up backlogs but this dehumanises people, as it does not take into consideration that lives may be at stake when they cross borders or that critical opportunities may be lost. Errors can be undetectable. Affected parties become unable to effectively challenge the use of these devices and their algorithms because of a lack of records or available data. Even the bodies and physical movements of asylum seekers can be analysed to detect signs of lying or to trace accents and match to purported countries of origin, thereby bringing bordering to the physical level of monitoring (Naranjo and Molnar 2020).

The university as a workplace site of bordering and production of future workers

Another site of bordering is the provision of education in universities. Education is the link between the production of future workers as well as

the site where family migration may take place if dependants of students join them from elsewhere in the world. Globally, the UK is the world's second largest destination for international students, behind only the United States: about 12.5 per cent of all international students worldwide come to the UK for their studies (Universities UK International 2017). A massive boom in international student numbers has been driven, to a considerable degree, by the marketisation of UK international higher education. With the introduction of the Tier 4 regime in 2008 came the PBS, which led to a fundamental change in the relationship between the state, individual universities and international students in the UK. All international students coming to the UK had to have a Tier 4 visa, and in order to obtain such a visa, they had to be sponsored by an educational institution that had a state-granted Tier 4 sponsor licence. Yet visas for students and their family members are highly contentious and numerous restrictions have to be navigated in the sector. For example, in 2012 the 'post-study work' route was closed so that students would not be able to automatically proceed from study to work as they could in the past. They would have to find an employer willing to sponsor them for a skilled work visa or needed to qualify for another type of work visa, for example as an entrepreneur. A rebranded post-study work visa known as the Graduate Scheme was introduced in 2021 where students could continue to work with employers without needing specific sponsorship. The driving force behind this new visa scheme was to attract talent from the university sector for the UK workforce.

In 2023 it was announced that students would not be able to bring foreign family members to the UK during their studies on dependent family visas unless they were in research masters or doctoral programmes. This came into effect from 1 January 2024, and is likely to deter some applicants who would rather have brought their family members here.

Similarly, past difficulties for universities have included ensuring students have adequate language competence and that they show regular attendance in their studies. A major scandal erupted regarding the London Metropolitan University when the UK Border Agency claimed that in 'more than a quarter' of the sample of international students that it audited at London Metropolitan, 'students did not have permission to stay in the country, a "significant proportion" did not have sufficient English and there was no proof that half of those sampled were turning up to lectures', and then revoked the university's licence as an international sponsor (Meikle 2012).

The revocation of London Metropolitan's licence meant that over 2,500 international students then at the university suddenly no longer had valid student visas – even though the overwhelming majority of them

had done absolutely nothing wrong – and these students were given sixty days by the UK Border Agency to find another university in the UK in which to enrol or they would be required to leave the country (Garner and Rawlinson 2012). Eventually, London Metropolitan University was able to appeal successfully against the UK Border Agency ruling and win its sponsorship licence back; only 153 out of the more than 2,500 international students at the university had their right to study in the UK taken away because of visa violations (Richardson 2013). However, this was a cautionary tale for other university sponsors, many of whom rely on international students to survive in the tight financial situation caused by a lack of adequate public funding.

Under the Tier 4 regime, universities have also become responsible, for the first time, for the immigration status of the international students studying on their campuses. As Geoffrey Alderman (2016) notes, the Home Office became, for the first time, a major regulator of higher education in the UK. Its annual monitoring and audits of Tier 4 sponsors, as well as its option to cancel the Tier 4 sponsor licences that give educational institutions the right to admit international students, provided the Home Office with extensive power over policy and practice throughout the higher education sector. Previously, the visa status of international students in the UK had been determined entirely between the individual student and the state, but under Tier 4, a 'quid pro quo' arrangement has been set up in which universities, in return for being awarded the privilege of being able to admit international students, are also given the responsibility of helping 'to prevent the [immigration] system from being abused' (Home Office 2025a). This means, effectively, that 'the university . . . becomes an extension of the state border agency', 'the classroom becomes a border site, university staff become border agents' and a 'two tier student identity' is constructed, as universities become legally liable for monitoring and regulating the physical presence and behaviour of international students in a way that they are not liable for regarding home students (Jenkins 2014, 265–7).

As the classroom becomes a border site, university staff become border agents, enforcing approved behaviours on students. The student body becomes divided, as these behaviours apply to only part of it, creating a two-tier student identity. Structurally, control is transferred from educational to administrative staff, who implement and regulate the monitoring and surveillance systems that the United Kingdom Border Agency (UKBA) requires. A new requirement is made of teachers and course leaders, who must now nominate 'contact points'. This contact must be recorded by teaching staff on behalf of administrative staff, who must manage such records on behalf of the UKBA. This entails a further ceding of power within

the university from educational to administrative functions, another set of non-educational requirements which must be complied with by teaching staff. Continuing to provide education is in the interests of educational institutions but the objectives of such UKBA schemes mean that staff roles involve elements of surveillance of the student community.

Conclusion

While examining changing borders at the levels of empire (the British Empire), continent (the EU) and nation state (the UK), the control of labour migration as a key objective of migration control has emerged repeatedly as a recurrent motivation. This chapter has therefore drawn the research gaze to the workplace. It reveals that work is a Catch-22 area for most migrants. If migrants obtain work, they are vilified for taking away local jobs from local people and if they struggle to find work, they are equally reviled for being potential benefit scroungers (even if they have little or no access to public support). While concern about access to the labour market is often tied to access to welfare, most migrants spend the healthiest periods of their lives working with no recourse to public funds. Arguably this contributes to drawing the best workers away from their own economies of origin, which are usually less developed ones. Many such workers (although not all) retire when older to other economies (including the ones they originally left) and draw on the national resources of their countries of origin in their old age rather than their countries of migration. Why then should they be projected as drains on the economies of their host country and their work undervalued and restricted by a multitude of means? On the other hand, why should migrants constantly have to strive to be seen as more deserving of work and receiving asylum than others in the population?

The workplace (and its extension into other sites of bordering such as universities) is not just about employment, labour relations and people's needs. It is also an area of immigration control. Even the most qualified migrant workers spend many years living with temporary status. While technology helps some migrants transcend borders (for example, digital nomads), others are trapped in the most extractive labour practices brought about by technology such as digital monitoring and tracking of workers.

While regulating access to the labour market as per the demands of the market and the economy, as well as the demands and privileges of business and employers, is a function of the law, this is not the whole picture. The law creates conditions where those who do not have the

proper documentation cannot function and have to be reported or self-deport. The law creates conditions of precarity (especially when it is cited strategically, applied in diffuse ways and especially in conjunction with technology and corporate money), but it is also key (as we have seen in the Supreme Court regarding deportation to Rwanda) in resisting unfair, harsh and discriminatory bordering practices.

Providing safe routes for refugees means offering protection and ways of reaching the UK so that they do not have to resort to dangerous journeys; this is key to ensuring that the post-war consensus on asylum as a human right does not collapse. Enabling the right to work for asylum seekers will also be crucial to achieving a more inclusive economy and supporting stronger integration outcomes in the long run. As an influential member of the UN and a signatory to the Refugee Convention, the UK should share responsibility for protecting refugees globally. According to Bosniak (2007), we need to rethink territoriality and territorial presence, given that borders now even pre-empt arrivals. Sanctuary movements and anti-racism alliances are often based on the idea that if people are already here and become longer-term residents, they will become one of us and not remain foreign, and should therefore be treated fairly, but if borders pre-empt entry, then there is no opportunity to create those bonds of humanity at all.

Similarly, hostile environment policies seek to uproot people before they can become one of us through their long-term presence. In the case of not rescuing migrants at sea or denying them arrival rights, their humanity is simply eroded. In the next chapter it will become apparent that even the sanctuary of the private family space is often denied to migrants. There needs to be an understanding of historical and contemporary resource-hoarding by the more powerful nations at the expense of human rights, and basic human rights need to be upheld more strongly than ever before in resisting such practices.

Notes

1. 'Get Brexit Done: Unleash Britain's Potential'. The Conservative and Unionist Party Manifesto 2019. https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf. Accessed 20 October 2025.

2. 'Youth Mobility Scheme Visa'. https://www.gov.uk/youth-mobility. Accessed 23 October 2025.

3. HM Government Immigration White Paper May 2025. 'Restoring Control over the Immigration System'. https://assets.publishing.service.gov.uk/media/6821f334ced319d02c906103/restoring-control-over-the-immigration-system-web-optimised.pdf. Accessed 20 October 2025.

4. News agencies report that the period of naturalisation for becoming British is likely to become ten years, after a public consultation. This is another example of the tightening of rules that creates greater internal bordering and precarity for long-term foreign residents. See Zeffman and Morton (2025).

5. For a critique of the British citizenship process see Brooks (2016) and Prabhat (2018).

6. UK Visas and Immigration Guidance, 13 February 2025. 'Good Character Requirement (accessible)'. https://www.gov.uk/government/publications/good-character-nationality-policy-guidance/good-character-requirement-accessible. Accessed 20 October 2025.

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8. *The Real Mo Farah*. Directed by Leo Burley for BBC One. Atomized Studios, 2022.

Chapter 5

Bordering families

> 'The border says *stop* to the wind, but the wind speaks another language, and keeps going.'
>
> – Alberto Ríos, *The Border: A Double Sonnet*

Introduction

Moving from education to work to family is a common migration development process as well as a normal life stage for most people. For millions, joining family members is a major motivation for migration. Outside of asylum seeking and irregular entry, as already mentioned in the previous chapter, only highly paid immigrants (educated or skilled) have the right to bring in family members at the time of their arrival or after a specific period. Lower-paid (or so called lower-skilled) migrants cannot usually bring in family members. Thus, controlling the family space is a means of separating productive and non-productive long-term residents. As we have seen in the previous chapter, the worker and their work are ordinarily treated as distinct from other human aspects, such as the need to be with their loved ones. Migration usually remains temporary if families cannot join the primary migrant. Workers are likely to return to their families after their work contribution unless they make new associations in the locus of their work. The ordered and bordered workplace is thus a critical unit of migration control which spills over into family life. The family unit is also a zone of control as it is the potential site of the production of future citizenry. Controlling family migration (or any of the earlier stages) and any associated reproduction means that future citizenry is not of migrant descent and does

not expand through migrant family reproduction. In that sense, migration control is largely about demographic control.

The bordering of families and their treatment reveals much about societies and their sense of who belongs. Some family members may be accepted as close family (for example, children and parents), whereas others are considered too distant in relationship (for example, uncles, aunts or cousins), or some may be close but are excluded as they may be considered likely to take up national resources (for example, aged parents). Although families are often constituted solely of adults, the presence of children offers additional critical evidence in law as to the formation of a specific family unit. Children also migrate on their own from conflict-ridden areas. The manner in which children who migrate are treated gives great insight into host societies and their attitudes towards human rights. Migrants as children have the maximum potential to socialise and become new citizens quite rapidly. For children, their innocence as well as their evolving capacities and potential for future contributions places them outside of the usual calculations of deservingness. A state approach that excludes foreign-born children or reduces access to citizenship for children born to migrants on host territory therefore demonstrates a deep-rooted unwillingness to accept 'others' as part of the nation state. For instance, in 2018 the Trump administration started a zero-tolerance policy for irregular entries of migrant families. Many families moved because of instability of the economy and politics in that region (Peri and Zaiour 2023; US Department of Justice 2018). Parents travelling with their children from these conflict areas were criminally prosecuted and separated from their children. This was the first time a 'zero-tolerance' policy resulted in immediate separation of parents travelling with children. Children were kept in horrible conditions, including cage-like enclosures (Stumpf 2023). Nearly 3,000 children were separated from their parents until 20 June 2018, when Trump signed an executive order halting family separation because of public outrage over the conditions of the separated children (Human Rights Watch 2018). Some of the children were separated for years, and despite official discontinuation of the practice of family separation, reports state that unofficially the practice of detaining children separately continues (Human Rights Watch 2019a, 2019b).

Asylum-seeking children unaccompanied by family members in the UK are often housed in unsafe accommodation such as hotels, with adults not related to them. The Independent Chief Inspector of Borders and Immigration has reported that children's voices are often not heard concerning their welfare (Neal 2023). Hundreds of children go missing, as criminals abduct them from these hotels.[1] The emotional well-being of

children as well as their physical safety can be compromised in myriad ways. This can even be in the guise of access to play areas or activities that children engage in while in bordered areas such as asylum centres. One specific instance illustrates how traumatic these activities can be. Some children awaiting asylum were asked by adults in charge to play a game to guess who would be in foster care next (Kleiderman 2024). This was a cruel game which preyed on children's anxieties about their future. The uncertainty about legal status even leads young people to take their own lives (Mental Health Foundation 2024). Yet children should be automatically protected and supported by the law, even in the face of regulations against illegal entry or residence in sovereign states.

The family is carefully controlled as a border zone despite being the most private of spaces. Dehumanising treatment of children and issues of family separation may appear to operate at a micro-level and behind private walls, but in reality the migrant child and family are laboratories for bordering practices. As we have seen in previous chapters, bordering practices are rooted in policies of empire, continental bordering, as well as national immigration law. This chapter therefore enters into the microcosm of human life in its most private sphere and examines bordering through law within the confines of the home and in the family space. While primary migration remains largely the domain of male workers, restricting family members who migrate has a greater impact on women and their ability to move. The gendered dimension is however not limited to women and is not limited to non-citizens. Even citizens have restrictions on their right to bring in foreign family members, and this is where the class dimension becomes most apparent, as only high-earning citizens are able to bring in foreign family members. The racial aspects of bordering families become less visible when mixed with other motivations. Yet it is apparent when one examines policies such as ancestry visas for White Australians (a visa that is available to citizens from Commonwealth countries, such as Australia, who have a UK-born grandparent, so these are more likely to be White Australians) or virginity testing for South Asian women seeking to join their partners in the UK (examined below).

Anxiety about the migrant family

The migrant family that brings foreign family members into the fold of a nation state via its citizen status comes under heightened immigration scrutiny. As noted, this is particularly gendered as regards the control of women and their relationships. Controlling the sexuality of women and

their reproductive powers is usually adopted as key to demographic control. For example, by the Naturalisation Act of 1870 a British woman who married an alien became an alien and lost all rights and privileges of British nationality (Baldwin 2014). Yet foreign women marrying British men became part of British citizenry. This duality captured in law treats women as simply extensions of the personhoods of their husbands. Similarly, the 1914 British Nationality and Status of Aliens (BNSA) Act stated that 'the wife of a British subject shall be deemed to be a British subject, and the wife of an alien shall be deemed to be an alien'. Foreign men were seen as threats or competition for British labour, so they were not granted British nationality by marriage. Foreign brides automatically gained their British husband's nationality. Many colonial subject women would become British in this manner.

This approach was consistent with the political logic of the day: women did not have separate votes, as their interests were supposed to be aligned with (and identical to) their male relations (fathers or husbands). Women did not get drafted for service in the armed forces. They had no manifestation of citizenship separate from their male relations. This continued in regard to family relations until 1948. Until then, British women marrying a foreigner automatically lost their citizenship. It is only after 1948 that women in the United Kingdom were finally granted the right to their own nationality regardless of their marital status. However, where once the concerns were focussed on relationships between White female British subjects and racialised men in the colonies, by the mid-twentieth century the focus had shifted to men from the 'new Commonwealth' migrating to the UK. Qualms about migration were gendered and racialised, with family migration policies built upon the suspicion that men (especially from sub-Saharan Africa and the Indian sub-continent) immigrating as husbands were economic migrants or security threats in disguise (Wray 2011).

A prominent case in point is that of *Abdulaziz, Cabales and Balkandali v the United Kingdom*, 15/1983/71/107-109, Council of Europe: European Court of Human Rights, 24 April 1985, where three lawfully and permanently settled residents of the UK challenged the government's refusal to permit their husbands to join or remain with them on the basis of the 1980 immigration rules in force at the time. The rules applied stricter conditions for the granting of permission for husbands to join their wives than vice versa. These conditions did not apply to the wives of male permanent residents. The court found that Article 8 encompassed the right to establish one's home in the state of one's lawful residence, and that being forced to either move abroad or be separated from one's spouse was inconsistent with this principle. On this basis the applicants claimed that, as a result of unjustified differences of treatment in securing the right to

respect for their family life, based on sex, race and, in the case of Mrs Balkandali, birth, they had been victims of a violation of Article 14 of the ECHR, taken in conjunction with Article 8 of the ECHR.

The applicants claimed there was no objective and reasonable justification for the difference in treatment. The government's claims ignored the modern role of women and the fact that men may be self-employed and create rather than seek jobs, as in the case of Mr Balkandali. The male foreign partners were considered a likely threat to public order through presumptions of masculinity and lack of access to the labour market. The court agreed that Article 14 taken together with Article 8 ECHR had been violated by reason of discrimination against each of the applicants on the ground of sex. Yet the case demonstrates how immigration laws and rules commonly presume male migrants will either become job seekers or, in the alternative, breach the social order because of violent behaviour. In this manner gender stereotyping continues unless expressly challenged.

Culture of disbelief: virginity testing

These gendered perceptions nestle within the wider frames of immigration control often based on cultural presumptions. For instance, suspicion regarding the validity of South Asian spousal relationships led to virginity testing of South Asian women to determine whether or not they were married (a matter presumed to be co-related for South Asian women) (Parekh and Datta 2023). Under the Immigration Act 1971, women joining their fiancés in the UK who were to be married within three months of entering did not have to get visas; however, wives joining their husbands would have to wait for long periods in order to get certificates for entry as spouses. The UK government started suspecting that women were claiming to be unmarried to avoid waiting for this process. In order to determine if the women were actually married or not there was virginity testing of women suspected to be wives. The idea was that if they were not virgins, they were wives, thereby presuming no South Asian woman ever engaged in pre-marital sex. The practice of virginity testing was not acknowledged by the UK government but was reported first in 1979 by *The Guardian*. It highlighted the story of a thirty-five-year-old teacher, 'Mrs K', who had to undergo virginity testing after arriving at Heathrow.[2] She had asserted that she was unmarried and had come to meet her fiancé, who was a British resident of Indian descent, but this had not been believed and the immigration officer suspected she was married. The concept of virginity is a social construct and not something that can be medically proved in confirming status, yet Mrs K was referred for virginity testing

by the immigration officer. Mrs K had asked for a female doctor and a gown, but neither was provided. Her examination was conducted by a male doctor, and she had to disrobe completely without a gown. Prior to the test she was given a consent form to sign, and she signed it for fear of being deported. The incident created outrage once it became public and led to the Home Office asking all immigration officers not to test for sexual relations or childbirth for any immigration purposes. While India approached the United Nations Human Rights Commission (UNHRC) in Geneva and argued that this was a case of racial discrimination against Indians, it was eventually resolved through bilateral discussions rather than any findings or determinations (Whitehead 2023). The UK government sent a letter of regret to the High Commission of India assuring them that this practice would never recur but there was no formal acknowledgement about the extent of this practice and how many had been affected. Ultimately the issue just dissipated as a mere concern, but it left behind a clear track record of how women are treated in a specific racialised manner for immigration purposes. This distrust of intimate family relations of migrants is also expressed in other ways, such as the manner in which migrants' marriages are viewed with suspicion and closely scrutinised for fraudulent behaviour.

Culture of disbelief: sham marriages and non-marriages

Virginity testing concerned the purpose of a visit rather than questioning the validity of a relationship, but the culture of disbelief penetrates deeper with the questioning of the genuineness of migrants' relationships. Charsley and Benson (2012) write that post-colonial South Asians in Britain are frequently suspected of having 'arranged', 'forced' and 'sham' marriages. These views inform the present-day UK family migration visa which came into being in 2012 and has a focus on evidence of a 'genuine' and 'subsisting' relationship as the basis for an applicant to secure a visa alongside concerns of integration such as meeting language requirements and financial viability to reduce the risk of welfare dependence. The 'genuineness' of the relationship can be evidenced with marriage or civil partnership certificates, letters written by friends/family, pictures and videos, (auto)biographical narratives and portfolios of a couple's life together, alongside the evidence of biological children (if any), joint utility bills, proofs of residence together or other such evidence of a joint life.

'Genuineness' can be viewed in juxtaposition to the kind of relationships which result in sham marriages (or marriages of convenience) and

sham civil partnerships. In these relationships the marriage or civil partnership is only entered into for avoiding immigration control. Since 1999, Sections 24 and 24A of the Immigration and Asylum Act 1999 (consolidated by the 2014 Immigration Act) place a duty on registration officials across the UK to report suspected sham marriages and civil partnerships to the Home Office. Immigration officials also work in close cooperation with the police (since Operation Nexus in 2012) and are often based in police stations. There are concerns about how the police can effectively support communities if immigration monitoring is part of their work portfolio.

The genuineness of South Asian marriages is specifically questioned in the instance of arranged marriages which are assumed to be forced marriages. There are also concerns that marriages not performed according to Christian rites are disbelieved by officers and treated as non-marriages (that is, not legally performed as per the Marriage Act 1949 in England and Wales or not meeting requirements for being recognised as legally binding in the jurisdictions where performed, if outside of England and Wales). Naqvi (2023) has demonstrated that non-marriage is applied in ways that target minoritised couples' and communities' marriage practices. Non-marriages can be a catch-all category for all kinds of suspect intimate relationships, for example, sham marriages can be considered non-marriages (*A Local Authority v SY*, [2013] EWHC 3485, para. 50) and forced marriages can also be declared as non-marriages (*B v I (Forced Marriage)*, 2009).[3]

The requirement of evidence of genuineness of a subsisting relationship for a family visa purpose is arduous, as it means that couples must keep proving the nature of their relationship for the entire duration of the visa. Naturalisation is a long period (often five to ten years) and the visa normally lasts 2.5 years each time it is extended, so it is a prolonged period of proving a relationship through state-recognised metrics (such as joint economic, residential and/or child-rearing responsibilities). Relationship breakdowns can be directly reported to the Home Office through an online reporting tool but fear of the implications of this on permission to stay in the country can create additional pressures to continue in broken relationships. While partners in abusive relationships with settled migrants/citizens in the UK can apply for indefinite leave to remain based on the abuse, there are still concerns that people may stay in abusive relationships for fear of losing the right to stay in the country.[4] This can be for a number of reasons, such as lacking evidence of the domestic abuse, or they travelled to their home country to seek support and now cannot re-enter, or that they are not fully able to separate from their partner despite the abuse.

Same-sex couples also have similar requirements but, in their case, there are additional presumptions of non-genuineness. The additional bars for same-sex relationships in migration control are seen in asylum

proceedings where asylum seekers have to evidence how they are affected because of their sexual orientation and that their relationships are genuine. This genuineness is one which has to conform with the perceptions of decision makers on what a same-sex relationship should be and how much it is a cause for fear for applicants in the foreign country concerned. The applicants need to show that they need international protection on the basis of their sexual orientation and/or gender identity and need to show that they have a 'well-founded fear of being persecuted for reasons of [. . .] membership of a particular social group' (1951 Geneva Convention Relating to the Status of Refugees). Women and lesbians and gay men can form a 'particular social group' (*Shah and Islam v Secretary of State for the Home Department*, House of Lords, 2 A.C. 629, 1999 (HL)).

This means that claimants need to prove that they belong to the particular social groups of lesbian/bisexual/gay/transgender/intersex people. They are mostly disbelieved, and their claims refused. In the past, applicants were asked for deeply private and intimate information but in *A (C - 148/13), B (C - 149/13), and C (C - 150/13) v Staatssecretaris van Veiligheid en Justitie*, Grand Chamber, Judgment, 2 December 2014 (Court of Justice of EU), the Court of Justice of the EU held that, 'questions concerning details of the sexual practices of the applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof.

In the UK in July 2010 the Supreme Court (in *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31) found that such information also cannot be requested and that asylum seekers cannot be asked to hide their sexual orientation (for reasonable tolerance) and live in such oppressive conditions in their home countries. HJ and HT were homosexual men, from Iran and Cameroon respectively, and in both Iran and Cameroon it is a criminal offence punishable by, inter alia, imprisonment and, in the case of Iran, by the death penalty, for consenting adults to engage in homosexual acts. Yet the Court of Appeal agreed with the Home Office that there was reasonable tolerance (reasonable tolerability test) for homosexuality so long as it was hidden. The Supreme Court allowed the appeal by the asylum seekers holding that the 'reasonable tolerability' test applied by the Court of Appeal is contrary to human rights.

There are still many hurdles for same-sex families and asylum seekers. The culture of disbelief is far from wholly overcome but at least these cases have addressed the most egregious violations of human dignity relating to sexuality as a basis for asylum seeking. Asylum overall however is still an area where the basic humanity of asylum seekers is assaulted because of a lack of fair processes and adequate support. I shall return to this theme in the next chapter.

Culture of control: the minimum income requirements

There are restrictions placed on foreign family members in the context of resettlement. For example, with limited exceptions for students in research intensive degrees, international students cannot bring their dependent family members to join them in the UK (2024).[5] Similarly, workers on the care-worker visa are not allowed to bring in their dependents to the UK (Sumption and Brindle 2024). Present-day language requirements are also barriers for many partners who may be from non-English speaking jurisdictions.

Financial requirements have been added for family members who may be permitted entry. For example, citizens have to meet financial conditions in order to bring in their foreign family. In a new requirement introduced in July 2012 for the family visa, the family unit has to demonstrate financial independence from the state welfare pot through meeting certain minimum income requirements (MIR). The rule introduced a requirement for the UK sponsor to earn a minimum gross income of £18,600, even more if children were also involved. This has prevented many British citizens from being able to settle with their partners in the UK. The MIR is not just about being able to adequately maintain one's family but is a specific figure which must be met. It has both gendered and racialised effects, as many people who work part-time are women, who often bear the bulk of childcare responsibilities or are minority British citizens in lower-paid jobs (or an intersectionality of both). People who are self-employed or still in education or training may not be able to show they have such resources, especially if they have to show they have this amount as steady savings over time. Indeed, this amount in 2012 was higher than the annual minimum income for many people (about 20–25 per cent of UK citizens) so it is not clear why it was set as a requirement for those with foreign family members, especially as there is no recourse to public funds for family visa holders. However, the MIR has ostensibly been set in order to prevent welfare dependence

The 2012 Rules have been challenged under Article 8 of the ECHR in the recent case of *MM (Lebanon) and Others (Appellants) v Secretary of State for the Home Department (Respondent)* [2017] UKSC 10. As the minimum income requirement restricted cross-border relationships by denying family reunion, all five appellants in the *MM* case were not permitted to bring their spouses to the UK because they did not meet the MIR. The Supreme Court decided in the case that the Secretary of State could impose the MIR but would have to specifically consider the best interests of children while assessing the effects of the Rules. Thus, following the case there are new amended rules and guidance stating that decision makers must take

into account, as a primary consideration, the best interests of any relevant child. Despite this change, the basic premise behind MIR is still valid and the amount itself continues to rise. In 2024, the amount had been raised to £29,000 (on 11 April 2024) and it is set to rise again to £38,700 in 2025.

It is not just partners and children who are affected by the restrictions placed on foreign family members and their long-term residence in the UK. Income restrictions are also placed on the migration of aged foreign-resident parents. Applicants have to show they have enough money to support their elderly relatives without relying on public funds for at least five years from the date the relative entered the UK as a dependant adult. The family does not just have financial limitations; applicants also have to show that their parents require personal services-based care that cannot be substituted for by non-family members or that they cannot adequately obtain such care in their home countries through suitable hiring of paid services. Only if this further condition is met can a British citizen apply for their overseas-resident adult dependent relative on a family visa which can lead to indefinite leave to remain in the long term. These conditions are applied in a manner that excludes most elderly visitors, as is evident from the very low rate of success for this visa. Applicants are often unable to provide the kind of detailed evidence of the need for care and the inability to obtain such care in the applicant's home country (freemovement n.d.). Naturalised citizens who have parents in foreign countries are greatly affected by these measures and continue to retain foreignness in the UK through the operation of the law.

By preventing the entry of family members who are not economically active and may require some support the law supports a passive exercise of power. The rights of these family members are simply kept off the agenda as they are unable to enter and seek support. This is the second dimension of power as per Lukes (2021), which manifests through inaction and keeping agendas off the table for discussion and deliberation. The incapability of migrants to care for immediate family members is a silent pain endured by many.

Bordering through denying humanity

As already mentioned, the mission creep of the British immigration regime into asylum provision has shaped migrant vulnerability. The right to seek asylum has been eroded through various measures, such as not allowing people to seek asylum beyond first port of entry into Europe, not allowing family reunification, age assessment of child migrants, denial of the right to work, very little economic support for

asylum seekers, together with poor-quality housing and health support which makes their lives difficult. Asylum seekers, who are mostly racialised minorities, are unable to rejoin family members beyond immediate family. Even children who live all their lives in a country can find themselves left without citizenship. It is no longer simply a matter of being an insider or an outsider. Through these restrictive approaches to foreigners with close and intimate links to citizens, borders are reified in private domains. A state of foreignness persists for many, hand in hand with long-term presence, citizenship and the bordering of citizenship.

In the previous chapter we have already discussed the situation of asylum seekers in terms of lack of safe routes, lack of work and treatment as exploited workers in detention. In this chapter, we return to other ways asylum seekers are bordered. As discussed previously, there has been a proliferation of laws intended to make the attaining of asylum and the lives of all those seeking it in the United Kingdom more uncomfortable both in terms of entry and in the area of welfare entitlements. Yet the *Limbuela* case (cited in Chapter 4) established that asylum seekers have a right to dignity. Does that standard persist? In this chapter we examine the issue of dignity through the lens of asylum seekers with families. As we have seen, asylum seekers have no general right to work in the UK. Does this change with the presence of children in the family?

Section 55 of the Borders, Citizenship and Immigration Act 2009

The UK government previously maintained a reservation to the United Nations Convention on the Rights of the Child (UNCRC) with respect to children subject to immigration control. This meant that the Convention applied to other children in the UK but not to foreign national children when regarding matters of immigration control. However, as of November 2008 this reservation no longer applies. Section 55 of the Borders, Citizenship and Immigration Act 2009 contains a mandatory duty on the Home Office and others making immigration decisions to safeguard and promote the welfare of children in the UK as they carry out their functions. The scope of the duty is broad, meaning that any immigration decision taken within the UK should include a consideration of this duty.

A relevant case for gauging this point is *R (Cardona) v Secretary of State for the Home Department* [2021] EWHC 2656 (Admin). Mr Cardona, the claimant, was a citizen of Honduras who arrived in the UK on 20 September 2018 with his wife and their daughter, who was then aged twenty-one months, and they claimed asylum. At the time of the hearing

date on 27 July 2021, Linden J observed that nearly three years later, that application had yet to be determined, although the court was told that an outcome was expected by 21 September 2021, absent special circumstances. In 2020, Mr Cardona received permission to work, pending the determination of his application for asylum. However, in line with paragraph 360A of the Immigration Rules, that permission was limited to employment in jobs on the Shortage Occupations List (SOL). Mr Cardona did not possess the skills or qualifications which would enable him to take up one of the occupations on the SOL. However, there were other jobs available in the area where he and his family were living, which local employers would be willing to offer him, that he would like to take up in order to help him support his family. Mr Cardona was not permitted to take up such employment for compassionate reasons, despite the duty placed on the Secretary of State to consider children's welfare in s55 of the Borders, Citizenship and Immigration Act 2009. Hence, Mr Cardona challenged the permission to work and volunteer for asylum seekers of 22 May 2019 (Version 8), as it affected children. He argued that the decision did not give sufficient reasons and/or address the particular considerations of his case and that this was irrational. The court agreed that the wording of Version 8 was indeed defective as it related to children. The presence of children could therefore make a difference, even without a general right to work for asylum seekers. Yet family reunification is a severely restricted right in the UK. Immediate family members include only a partner and children under eighteen, or over eighteen in exceptional circumstances, so others cannot seek reunification. The Home Office guidance states that other dependent relatives such as sisters, brothers, parents, grandparents, uncles and aunts are excluded from the Refugee Family Reunion route. However, the Immigration Rules state that if an applicant does not satisfy the requirements for a partner or child under the Rules, the Home Office decision maker must consider whether there are exceptional circumstances which would make a refusal of the application a breach of Article 8 ECHR. The Home Office guidance further states that the Home Office decision makers must consider whether there are any compelling compassionate grounds which would warrant a grant of leave outside the Immigration Rules.

Unaccompanied children who come to the UK and seek to join their extended families are often unable to do so despite this guidance and Article 8 ECHR. While special consideration for children may be written into the law (for example, through s55 of the Borders, Citizenship and Immigration Act 2009), these often fall short of the required measures for children. Child asylum seekers who arrive unaccompanied by adults often find their best interests are not considered. Legal assessment of

their needs and their welfare fall short of the other priorities of the hostile migration and refugee policies (Crawley 2006; Bhabha and Schmidt 2008) as well as austerity measures. Yet, local authorities have duties to support all children 'in need' in their area (Part III of the Children Act 1989). The UK Home Office definition of an Unaccompanied Asylum-Seeking Child (UASC) is a person under eighteen, who is applying for asylum in his or her own right and is separated from both parents and not being cared for by an adult who in law or by custom has responsibility to do so. They are considered children first and asylum seekers later. Yet often the children are disbelieved, and their age is assessed through challenging processes. As soon as they turn eighteen the Home Office often seeks to reassess their situation and/or deport them. This is very much in line with the treatment meted out to asylum seekers in general.

Many unaccompanied children are subjected to age assessment if they do not bring evidence of their age. Age assessment involves social workers gathering information from a range of sources. Social workers should use all relevant information, multi-disciplinary expertise and other techniques in the age assessment process.

The difference between a child being assessed as a child or being wrongly assessed as an adult can be the difference between their being able to remain in the UK or facing detention and removal. It is very easy to wrongly assess a child to be an adult, as the assessment process is just two Home Office members of staff assessing age by looking at a person and judging by their appearance and demeanour whether they think that the individual could be a child. The leading case is *R (B) v Merton* [2003] EWHC 1689 (Admin). The applicant claimed to be seventeen years old. He had no documentation to support his claimed age. He was interviewed by a social worker with the assistance of an interpreter on the phone. The social worker from the local authority, the London Borough of Merton, decided that he was over eighteen. He applied for judicial review of that decision. The court provided guidance on the lawful assessment of age in the event of disputes between the local authority and a UASC. The court found that there was no onus of proof on the applicant to establish their age. Social Services should not simply adopt a decision made by the Home Office but should make its own decision. If this involves an interview then certain safeguards should be followed, such as explaining the purpose of the interview to the young person, providing an interpreter in person, taking notes of the interview, bearing in mind cultural and background differences, providing an opportunity to address or answer any point that the decision maker was making against the applicant, and providing adequate reasons (even if not elaborate reasons). In this case the court decided that the decision that the applicant was not a child was unlawful.

Since this case, all UK age assessments have to be 'Merton compliant' in order to be lawful. Yet young people on the verge of turning eighteen receive no support and fear detention and deportation. Many of them risk being trafficked, re-trafficked or exploited in the underground economy where they remain hidden in fear of deportation. Adolescents who have some adult features, such as increased facial hair, are subjected to greater scrutiny. Racialisation is inherent to the process of age assessment with Brown and Black young people who lack documents often deemed adults. The Nationality and Borders Act 2022 introduced the concept of 'scientific methods' of age assessment. An individual's refusal to participate in a 'scientific method' of age assessment will lead to that individual being viewed by the Home Office as being aged eighteen years or over and therefore able to be deported to a 'safe country'. Biological methods are invasive and can be especially traumatic for those young people who have already fled conflict (British Association of Social Workers 2023).

If a young person is found to be an adult on arrival, they are assigned a date of birth making them over eighteen and they are dispersed in adult accommodation and treated as adults from that point onwards, but if they are found to be below eighteen they get special consideration as children. Even accompanied children can be highly vulnerable. The separation of young children from their adults became commonplace in the US southern borders because of the criminal prosecution of adults who crossed the border without permission. As mentioned earlier, in 2018, the Trump administration brought in a 'zero tolerance' policy for illegal immigration which meant that all those who crossed the border without prior permission could be prosecuted, including those who wanted to seek asylum. Any accompanying children were separated from these adults and placed in care arrangements without family members, including hundreds who were even infants and toddlers under the age of five (Southern Poverty Law Center 2022). Separation in this manner is deeply distressing for the whole family and particularly damaging to children, who suffer long-term consequences for their relationships, mental health, legal cases and finances.

Children held together with their families in detention centres are rarely cared for, with inadequate opportunities to study and play. Individuals can be detained far from their families, transferred between detention centres without notice, or released and re-detained. Visits are hindered by travel costs, distance and child-unfriendly accommodation. Detainees and their families are particularly harmed by lengthy and repeated detention, as well as uncertainty borne from the absence of a timeframe or limit to their detention. Separation may continue even after people are released, due to the allocation of distant housing, electronic tagging or

reporting conditions, absence of funds for travel and long-term damage to relationships and mental health brought about by uncertainty and emotional distress.

Even if not in detention, in the UK many families are housed in abysmal conditions while male detainees are often selected for housing in a variety of unsuitable accommodations. As we have seen in previous chapters, off-shoring has become the chosen way forward for dealing with asylum claims, mainly to bring down expenses, but another way to reduce costs has been to use hotels, former prisons or ex-military sites for housing asylum seekers. The conditions there are poor, including low-quality food and an inability to access healthcare or legal advice. Barracks and barges (for example, the *Bibby Stockholm* as late as January 2025) when used are spaces where asylum seekers feel confined and are unable to meet anyone else. Severe mental health issues are commonplace in these conditions, as are the outbreaks of infectious disease.

Children's rights: citizenship

Despite the many challenges for foreign family members and asylum seekers the presence of children brings different considerations for their welfare. Yet foreign children, or children of foreigners, often struggle to gain regular status even if they are long-term residents. One barrier for children is the cost of acquiring citizenship. In the UK, a change in law brought about by the British Nationality Act 1981 removed automatic birthright citizenship for children born in the UK (that is, *jus soli* citizenship). Before 1983, anyone born in the UK automatically acquired British citizenship. After the Act came into force, those born in the UK were only considered British citizens if at least one of their parents were either a British citizen themselves or 'settled' in the UK at the time of the child's birth. While children connected through blood-links in this manner retained eligibility through descent for British citizenship, for others the process is through naturalisation when they are adults or through registration when they are below eighteen.

In the UK, the registration fee is over £1,000 for children who otherwise have full eligibility for British citizenship. This amount is more than it costs to process registration applications, but the Home Office justifies the fees on the grounds that the income generated can be used to cross-subsidise other immigration activities. The Home Office also asserts that British citizenship is a valuable asset for those who obtain it, so the charge is justified. An applicant, O, challenged the fees with the assistance of the organisation PRCBC (Project for the Registration of Children as British

Citizens) in court as her family could not afford the fees: *R (on the application of The Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* UKSC/2021/0063. O was a child holding Nigerian citizenship, who was born in the UK in 2007 and has lived in the UK ever since. On this basis, O would be entitled to register as a British citizen under section 1(4) of the British Nationality Act 1981, but for her family's inability to afford the registration fee, set at £1,012. The case went to the UK Supreme Court, which looked into the fees to ascertain whether these act as a barrier for citizenship.

The case raised two key questions for the Supreme Court: (1) whether the fees constituted an unlawful infringement of a *common law constitutional right* of access to (the rights conferred by) British citizenship and (2) whether the fees nullified a *statutory right* to become a British citizen and were thus *ultra vires*. The court decided that the right to citizenship was 'important' and the attendant rights 'significant' (para 5). However, the court held that the case was 'not concerned with common law rights which have been recognised as fundamental or constitutional' (para 33). British citizenship was a statutory right and thus was dependent on the statutory provisions.

This case demonstrates how having an uncodified constitutional structure complicates the determination of fundamental rights and this means statutory rights are not that sacrosanct. The Supreme Court ultimately found the fee regime to be lawful, as the 'statutory rights to British citizenship' under the 1981 Act (para 47) were framed as being no more than 'a statutory procedure for registration by which a person can acquire British citizenship [. . .] subject to conditions specified by Parliament' (para 43). Those conditions expressly include the payment of a fee, the level of which is to be set by the Secretary of State (pursuant to Section 68 of the Immigration Act 2014), with no statutory requirement to have regard to their affordability. The fees regime was thus found to be lawful.

The decision to charge children more than the actual costs for processing their applications is an example of the commodification of citizenship rights. The PRCBC decision has the impact of placing a high financial barrier on children's citizenship even when they are British in every sense but for the legal document. Essentially it creates an economic profit for the government from over-pricing British citizenship for children and it also devalues citizenship as an administrative procedure or a commodity that can be sold at a premium to those who already belong. Why should children's rights be restricted in this manner? The reasons given of administrative budgets and value of citizenship are unlikely to be the only ones for pricing children out. When children become citizens, they gain more security of status, but it provides a way

in for their foreign family members who can then remain with them or join them. In the US where birth citizenship exists, children can be perceived as 'anchor babies' for foreign families. Huang writes in her article, 'Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies' that the higher birth rates in the USA from 2006 were associated with the increased number of immigrants (Huang 2008). This then created hostility towards migrant women who were accused of producing 'anchor babies'.

The term 'anchor baby' has entered common usage now because of its use by right-wing activists and media (Ignatow and Williams 2011). It refers to children of migrants/people with short-term presence who become citizens (generally through *jus soli*) and then confer potential citizenship benefits to their migrant families, presenting this as a problem for society. Yet the pejorative nature of the term is uncalled for when children are accessing the constitutional rights guaranteed by the American constitution with no decision making on their own part. In this manner the confluence of race, gender and sexuality creates a gendered racism for controlling who is really 'American' (Chen 2011). The children and women are presented as national security threats, environmental threats and economic drains simply by their presence. Not surprisingly, border detention areas then become similar in nature to prison cells for holding terrorism suspects, and even very young children can be detained in such cells. Even the term 'terror baby' can be found to refer to birthright citizen children born to non-citizens (Lugo-Lugo and Bloodsworth-Lugo 2014).

While it is not couched in similar terms in the UK, regulating access to citizenship for children (just as it is about controlling the sexuality of women) is also about regulating long-term demographic changes. It starts with controlling the reproductive capacities of women (especially of women who are not White) and continues with restricting the rights of children. In the UK context such regulation is intertwined with EU law.

In Chapter 3 we analysed the Chen case on *jus soli* citizenship and derived rights for family members. Here we return to the Chen scenario in the context of child rights. The Chen case was extended by the Zambrano case, which granted third-country national parents the right of residence and work. Mr Ruiz Zambrano, the father, was a Colombian national staying illegally in Belgium together with his two Belgian children who had never left that EU member state. Article 20 TFEU conferred the status of Citizen of the Union on the children. Mr Ruiz Zambrano sought to reside as the parent of EU nationals and obtain a work permit to which, as an illegal immigrant, he was not entitled under Belgian law. The ECJ ruled

that the Zambrano parents could rely on the Treaty provisions on EU citizenship to obtain a derivative right of residence as the father of EU national children. The parents were given these rights as their expulsion would take EU citizenship away from their children born in Belgium. This case was a purely internal situation with no EU cross-border movement of the people involved in the case. After stressing that 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States', the ECJ ruled, in the key passage of the judgment, that 'Article 20 TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. For this point, the ECJ drew on *Rottmann*, an earlier case on deprivation of citizenship.

As mentioned before, *Rottmann* was a case about loss of citizenship owing to fraud committed by the citizenship applicant in the application process. While being the subject of judicial investigations in Austria, Rottmann, an Austrian national, moved to Germany in 1995. Two years later, Austria issued an arrest warrant against him. In February 1999, he acquired German nationality by naturalisation, triggering the loss of his Austrian nationality. However, in August 1999, Austria informed Germany of the arrest warrant issued against Rottmann. Taking the view that by withholding that information Rottmann had obtained German nationality by deception, Germany revoked that nationality and, since the original nationality did not revive, Rottmann became stateless. In the key passage of the judgment (para. 42), the ECJ held that

> [i]t is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of [EU] law.

It appears that citizenship of the EU is more important for the ECJ than free movement. This is the foundation for the Zambrano decision but soon the court changed track from Zambrano in subsequent cases. The 'genuine enjoyment' protection did not apply to adults being separated from their spouses (*McCarthy v Secretary of State for the Home Department*, Case C-434/09), or to adults separated from their parents (*Ymeraga and others v Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-87/12 [2013]), nor to children separated from only one of their parents, whilst the other was able to remain with them (*Dereci and others v*

Bundesministerium für Inneres, Case C-256/11). The exceptional nature of Zambrano is thus because of the presence of children in the family.

This is also true in the British immigration situation when UK courts have looked at Article 8 of the ECHR, the right to respect of one's private and family life. For example, the *ZH* case [*ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4] focusses on the best interests of a child. Article 3(1) of the UNCRC provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. The best interests principle can be seen as the guiding principle of the entire Convention; it is an umbrella provision prescribing the approach to be taken in all actions concerning children. The Convention does not offer a precise definition of best interests, or an explicit list of factors relevant to best interests. A child's best interests are likely to change depending on the situation. However, the UNCRC does state that 'best interests', broadly speaking, refer to a child's general well-being, which takes into consideration a wide range of factors. These factors include the views of the child, the need for a safe environment, family and close relationships, and development and identity needs. Some laws, for example the Children Act 1989, and the Borders, Citizenship and Immigration Act 2009, make explicit reference to the best interests of children and therefore require decision makers, tribunals and courts to consider this when reaching decisions.

The UK Supreme Court considered the best interests of the child in a mother's appeal to the Supreme Court against her removal from the United Kingdom. The main issue was the weight to be given to the best interests of children who are affected by a decision to remove or deport one or both of their parents from the UK. In the Supreme Court decision, Lady Hale held that the best interests of a child must be considered first before going on to consider whether other factors might act as differing considerations – such as the need to maintain immigration control or the parent's poor immigration history. She further observed that the 'spirit if not the precise language' of Article 3(1) had been translated into English law. In para. 44 she writes:

> The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible.

Given the clear steer in the judgment as to the primacy of the principle of best interests of the child, the question of whether it is reasonable to expect someone to relocate could only be of second tier importance.

Brexit has created complex issues for children in families who have lived a long time in the UK but have EU connections (Sigona 2019; Welsh 2023). Confusion has arisen around the British government's own understanding of its citizenship laws, following a judgment by the UK's High Court in *Antoine Lucas Roehrig, R (on the application of) v Secretary of State for the Home Department* [2023] EWHC 31 (Admin). For seventeen years, the Home Office deemed EU nationals exercising free movement rights in the UK to be settled and their UK-born children, thus, British. But on 2 October 2000, the Home Office changed the rules. In order to be deemed 'settled', EU nationals now had to apply for and be granted indefinite leave to remain. The problem is that many EU nationals did not apply for indefinite leave to remain, simply because they did not need it to enter and reside in the UK. Take, for instance, Antoine Lucas Roehrig, who was born on 20 October 2000, in the UK. His mother is a French national who had lived and worked in the UK under EU law for the five years before he was born. Roehrig claimed he acquired British citizenship at birth by virtue of section 1(1)(b) of the British Nationality Act 1981 because his mother was settled in the UK at the time he was born. The Home Office disputed that his mother met the Act's criteria for being settled and refused his application for a British passport. On being challenged, the High Court agreed with the Home Office (20 January 2023, in the case of *Roehrig v Secretary of State*). On an appeal, this was confirmed by the Court of Appeal in *(Roehrig) v Secretary of State for the Home Department* [2024] EWCA Civ 240. The Supreme Court refused permission to appeal the order. It is unclear how this decision conforms with the best interests of the children as they are left without citizenship. Mere technicalities of the operative date of the law deprives them of their secure status despite their years of presence in this country. They spent their formative years in the UK but are now foreign forever.

Education for children

Not all rights depend on citizenship. Education should be a universal right for children, but in reality, it is not always available to all children. There are gaps in the rights of foreign children who continue to reside in the UK. While the *ZH* case hammers home the importance of best interests consideration, what is the impact of children's legal status on specific rights? In this section I shall look at education before moving to

healthcare in the next section (in conjunction with access to healthcare for adults as well).

Since 2008, British universities and private schools have had to carry out immigration checks under the Points Based System. If an unaccompanied child enters on a visa, they can only study in the independent school which is their licensed sponsor of their visa. There is a comprehensive set of responsibilities of state-funded schools and their admission authorities (Department for Education 2014a). The admission authorities for state-funded schools (maintained schools and academy schools) must not check the immigration or nationality status of foreign national children as a pre-condition for admission and they must not refuse to admit a child on the basis of their nationality or immigration status nor remove them from the roll on this basis. Schools must not ask to see passports or other immigration information as a condition of admission (this would be a breach of paragraphs 1.9(a) and 2.8 of the school admissions code) (Department for Education 2014b).

In June 2015, the Department for Education (DfE) and the Home Office quietly signed a Memorandum of Understanding under which the DfE was to share the personal details of 1,500 school children a month in order to help identify immigration offenders (Gayle 2016). The data would be drawn from school censuses and include pupils' names and addresses, and school and attendance records. In September 2016, new regulations came into force adding nationality, country of birth, and proficiency in speaking, reading and writing in English to the data collected in school censuses and collated in the national pupil database. The collection was a compromise won by the DfE to curb stricter proposals from Theresa May. The then Home Secretary wanted teachers to carry out immigration checks and schools to 'deprioritise' places for the children of illegal immigrants. The data collection was challenged by the campaign group Against Borders for Children and the human rights charity Liberty when people became aware of it. New guidance on the school census confirms that pupil nationality and country of birth data is 'no longer required by the department and, as such, it is removed from the school census collection from autumn 2018 onwards' (Department for Education 2019, 12). Schools 'must no longer request this information from parents, or retain the data within their system, for purpose of transmitting to the department via the school census', the guidance states. Now it is the responsibility of parents to check if their child is eligible to study.

In the US the Family Educational Rights and Privacy Act (FERPA) protects the data of undocumented children by making it unlawful to share their immigration status with non-school personnel, which means undocumented status is not reported to immigration officials by schools.

Organisations like Immigration Customs Enforcement (ICE) cannot gain access to school data, so children feel sheltered in school especially as per a Supreme Court case *Plyler v. Doe* 457 U.S. 202 (1982), which held that immigration status has no place in the context of K-12 education. *Plyler*, issued by the Supreme Court in 1982, held that undocumented immigrant students have a right to public education without any distinctions to be drawn based on their immigration status. *Plyler*'s holding that immigration status has no place in the school context created not just a legal rule, but a school culture that views assimilation as the primary goal of schools vis-à-vis immigrant students. Assimilation arguments are closely linked to the 'innocence' of children. The innocence of children is also a key factor in seeking their protection. Even for adults there is the use of vulnerability and deserving/undeserving migrants as frames for rights, especially in asylum seeking. Should citizenship and long-term residence rights be granted as a reward for good behaviour or based on factual social membership?

Plyler stated that undocumented children cannot be discriminated against by schools. Yet with time, many undocumented children drop out of school, and few make it to higher education. Most of them have arrived at a very young age and suffer from severe well-being concerns and worries about their families. They need to make efforts to regularise their status. There is no clear path for permanent US residence, with options like sponsorship by a relative potentially taking decades to process. However, some young people (popularly referred to as 'Dreamers') have obtained protection under the Development, Relief, and Education for Alien Minors Act (DREAM Act) (Rabin 2023). The DREAM Act provided legal status and a pathway to US citizenship for those that met a stringent set of criteria. Although the DREAM Act was first introduced in 2001, it has never been approved by Congress. Legislative reform and the implementation of administrative reform was attempted by President Obama in the form of the Deferred Action for Childhood Arrivals Program (DACA), an executive branch memorandum signed by President Obama in 2012. DACA granted persons who arrived in the US as minors without authorisation a renewable residence permit and travel documents, as well as eligibility for work permits without giving them access to permanent residence and thus eventually to naturalisation (Gonzales, Terriquez and Ruszczyk 2014). Yet it prevented their deportation, so it gave them a right to remain in the US.

DACA was upheld unchanged until its rescission in 2017 by the Department of Homeland Security (DHS) under the Trump administration. The fragility of DACA was due to its being an executive branch memorandum and not legislation by Congress. DACA's rescission was eventually challenged in the Supreme Court of the United States. DACA

was restored after the challenge, but many children fell through the gaps in between. Attempts to pass the DREAM Act occurred once again at the end of 2022 but these were unsuccessful. Meanwhile DACA still continues to be a fragile right, as it has not been approved by Congress and continues to be challenged in the courts time and again. This aggravates the situation of immigrant children arriving from 2017 onwards who cannot experience schools as a place of refuge because of the renewed crackdown on illegal entry and pursuit of undocumented populations.

The university as a site of national security bordering

As mentioned in the previous chapter, the university too has become a site of bordering. A particularly acute situation of bordering is when universities have to report behaviours of students to authorities. In 2003, the UK government established the Counterterrorism Strategy (CONTEST) comprised of four 'Ps': Protect, Prepare, Pursue and Prevent (Abbas, Awan and Marsden 2023). The overall aim is to reduce the threat of terrorism in the UK, while the objective of the 'Prevent' pillar is to diminish the threat of home-grown terrorism by calling upon individuals in public-facing roles to report anyone they suspect of being vulnerable to radicalisation and terrorism. The remit of the Prevent pillar was extended by the 2015 Counterterrorism and Security Act. Since then, university staff have been incorporated into the strategy by the Prevent Duty Guidance (2015) that was legally imposed on them by section 26(1) of the Counterterrorism and Security Act. The Guidance and the Act together outline that higher education institutions must attempt to prevent individuals from being drawn into violent extremism, legally obliging them to report any individuals that they suspect of being vulnerable to radicalisation.

Prevent concentrates on the threat posed by 'home-grown' terrorists, including those who arrived in the UK as migrants. It imposes a legal duty on universities requiring them, in conducting their functions, to identify and report students who might be seen as 'vulnerable' to radicalisation (Choudhury 2017). Since its introduction in 2015, this duty has been subject to increasing empirical research in the education sector. Findings demonstrate the securitisation of higher education and 'policing' of Muslim students (Zempi and Tripli 2022). Prevent hampers freedom of speech, threatens student activism and forces Muslim students to hide their Muslim identity to avoid being labelled as 'radical' or 'vulnerable' to terrorism. Since its introduction in 2015, the duty has been subject to increasing empirical research in a variety of settings, including healthcare and education.

Prevent is another manifestation of border control, as the university is drawn into collaborating with the police to control and monitor students intellectually and practically at the level of action, speech, thought and appearance. Read in tandem with other criminalisation efforts and creation of pre-crime spaces (such as creating criminal liabilities for employers and cancellation of citizenship, which is examined in Chapter 6), we are left with an overwhelming impression of compulsory cooperation in criminal law enforcement through Prevent and this is especially disturbing in the sphere of education where free thought and free speech are important principles of debate and discourse.

The fact that Prevent legislation has made it a statutory duty for schools and universities to prevent terrorism means that staff have become agents of the state and thus utilised as tools for 'surveillance' within universities (Arshad-Ayaz and Naseem 2017). In this context, universities are presented as 'inherently radical spaces' and Muslim students 'at risk of radicalisation as a result of inhabiting this location' (Brown and Saeed 2015, 1955).

Right to access healthcare for children and their families

Although schools remain relatively safe spaces for migrant children, healthcare access can be challenging for those children without legal status. In the UK, while people without legal immigration status can access emergency care, families are reluctant to seek healthcare because they fear exposure to immigration authorities.

As we have seen in previous chapters, healthcare restrictions are nested in other hostile environment issues such as a rise in immigration raids, indefinite detention, restricted access to the housing rental market, driving licences and bank accounts, as well as potential family separation. Charging regulations are specific barriers to healthcare, and compound other issues for migrants such as lack of information, lack of support and language barriers. By scapegoating migrants as 'health tourists' who abuse 'our NHS', the government is able to draw attention away from a decision to restrict NHS funding (Tilford 2015). For instance, in the financial year 2015/16, the NHS as a whole reported an overspend of £2.5 billion in today's prices, against a budget of £128.9 billion, hence showing a significant deficit in its budget (Gainsbury 2023). Yet, instead of discussing more funds the government launched a consultation on 'migrant contribution to healthcare' stating, 'The next step in cross-government plans to make it more difficult for illegal migrants to live in

the UK unlawfully, and to ensure legal migrants make a fair contribution to our key public services, has been launched today' (Home Office 2013).

Following this there was a new programme. The Visitor and Migrant Cost Recovery Programme 2014–16 set out a series of measures designed to more readily identify and charge those not eligible for free NHS care. In 2014, the Immigration Act changed the definition of 'ordinarily resident', increasing the number of people not eligible for free NHS care, by effectively excluding anyone without indefinite leave to remain. The 2015 NHS charging regulations then followed, introducing the Immigration Health Surcharge and raising the amount an NHS Trust could charge ineligible patients to 150 per cent of the cost price. With charging mechanisms established and teams of Overseas Visitor Managers strengthened, the next step was to introduce upfront charging of non-eligible patients for all non-urgent care. A patient's eligibility for free NHS care came to be checked more regularly from 2017 (Department of Health 2017).

Once in the UK, those migrants and visitors who have not paid the Immigration Health Surcharge may be chargeable for NHS care. There is little knowledge among the general public as to charging regulations and the exemptions that threaten migrant health. One area where this becomes apparent is in maternal healthcare services. Pregnant women both seeking and refused asylum tend to avoid seeking antenatal care because of their fear of being charged. In some cases, this was also linked to fears about their data being shared with the Home Office, which could lead to their deportation (as mentioned in Chapter 2). Children may be also kept from receiving care because of anxiety about family separation and fear of deportation if detected.

The hostile environment has encroached on a number of values central to the function of the National Health Service in the UK. Patient data-sharing undermines the need for access to healthcare in an atmosphere of trust. Healthcare access, transparency of healthcare operations and patient safety may all be compromised if the immigration exemption in the Data Protection Act is used for accessing and sharing healthcare information and linked immigration data. With the revelation of the mistreatment of the Windrush generation, such concerns have been realised as people who are in fact British citizens are refused healthcare because they cannot prove their status. The narrative of 'deservingness' has trumped universal access to healthcare (Sales 2002). With digital technology being increasingly used in immigration control it will soon be possible to have all immigration decisions automatically determined by artificial intelligence (automated decision trees being employed and facial technology used for recognition and monitoring access at borders). This can mean no appeals for those whose cases have been erroneously

considered and no recourse to any special considerations for those in desperate need of assistance. Such apparent injustice needs to be countered at the earliest possible stage: stopping data sharing would be the step that would prevent erroneous decisions having catastrophic consequences for people. A feeling of trust that everyone can access care without negative repercussions needs to be engendered and is essential for both individual and community health (PICUM 2020). If private parties are collecting immigration data, they need to be similarly informed that immigration data is personal data collected only for a specific purpose, which should not be processed for any unrelated reason.

In the UK children without status face great uncertainty over access to services and future employment, and anxiety about deportation. Not only can this impact on their mental health, but upfront charging for health services may prevent access to care (Papageorgiou et al. 2020; Johnson 2018). In the UK non-residents have had to pay NHS charges since 1977, but in practice this was rarely enforced. In 2015, The National Health Service (Charges to Overseas Visitors) Regulations introduced new treatment fees (often required in advance) as well as routine immigration checks on patients by hospital and community health service staff. In England the details of patients with unpaid NHS debts above £500 are referred to the Home Office after two months, which can lead to an immigration or asylum application being denied.

In the US, children cannot enrol in insurance coverage under the Affordable Care Act (ACA) which means they have very little ability to get treatment. Five states (California, Illinois, Massachusetts, New York and Washington), plus Washington D.C., extend healthcare services to undocumented children but in other states children have little access. The border experience impacts children's mental well-being and not having access to care makes them especially vulnerable. For example, the 'Zero Tolerance' policy enacted by the Trump administration, which meant all irregular border-crossers were prosecuted, resulted in families (including children) being detained at the US–Mexico border. Some were even placed in cages. Children grow up having to keep their legal status hidden, creating strain on their lives (Hernandez 2023).

Those affected by immigration control often need healthcare because of the impact of immigration measures yet the very same system holds them back from obtaining treatment. The narrative of 'deservingness' has again come into play across both sides of the political divide with a person's record as a citizen (paying taxes, not having a criminal record and doing voluntary service) becoming a factor in political debates about whether or not people should receive treatment (Gentleman 2018). The moral position, that healthcare is a human right, is undermined by

justifications for exclusion which ignore the structural determinants of health. Justifications for exclusion then expand into deciding who actually deserves publicly funded healthcare. This is very similar to the arguments about restricting welfare access, which also hinge on ideas of deservingness. For example, the Home Office initiated a policy that it would seek a second medical opinion in respect of vulnerable people in immigration detention when they have already submitted an 'external' medical report – produced by Medical Justice or another independent medical professional – as to their vulnerability to harm in immigration detention. This then delays any treatment that could be available for those detained. In a judgment handed down on 12 January 2024, *Medical Justice, R (On the Application Of) v Secretary of State for the Home Department* [2024] EWHC 38 (Admin), the High Court allowed a judicial review brought by Medical Justice to this policy so that there was no further harm to vulnerable people.

Another case where mental health was given importance by the court is the case of *HA (Nigeria)* [2012] EWHC 979 (Admin). The court held that HA should not have been detained due to his mental health. He was transferred between hospital and detention centres several times and this worsened his situation. His treatment and the conditions in which he was held were found to amount to a breach of Article 3 of the European Convention on Human Rights, which prohibits inhumane and degrading treatment. The relevant detention policy – which had been changed to allow people with mental illness to be detained if they could satisfactorily be managed in detention – was also found to be unlawful. The Home Office appealed but later withdrew its appeal.

Similarly, the use of force on immigration detainees in hospital, *FGP v Serco & SSHD* [2012] EWHC 1904 (Admin), was also successfully challenged. In the case of *EH, R (on the application of) v Secretary of State for the Home Department* [2012] EWHC 2569 (Admin)), EH, a Rwandan genocide survivor, was unlawfully detained for three months because the Secretary of State did not give due consideration to their serious mental illness. EH was granted leave to remain for a further three years. The Secretary of State for the Home Department agreed to pay EH damages in the sum of £35,000.

Mental and physical health both matter when people are detained for a long duration. In *BA, R (on the application of) v Secretary of State for the Home Department* [2011] EWHC 2748 (Admin) (26 October 2011), BA had been detained in Harmondsworth IRC (Immigration Removal Centre) for 156 days. By this stage, it was and had been clear for some time that detention was having a serious effect on BA's mental and physical health. The judge decided that a point had been reached where the negative effect of

detention on BA's health, coupled with the fact that this effect was likely to postpone any decision on his asylum claim, meant that detention had ceased to be for a reasonable period. After that period continued detention turns into false imprisonment and BA had to be released and given damages for false imprisonment.

Access to children's health services in detention

Returning to the specific context of children, the agony of detained children is palpable. In *R (on the application of Reetha Suppiah and Others) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin), the High Court judge ruled that two asylum seekers and their children were unlawfully detained at Yarl's Wood immigration centre. The children, along with their parents, were removed from their home and taken to the prison by UK Border Agency officials. They were kept in confinement for thirteen days and suffered from diarrhoea and vomiting. However, after their release the children continued to suffer from reoccurring nightmares. The parents sought a declaration that the government policy on detaining minors at the centre was so defective that it could not be efficiently conducted. The grounds for challenge alleged Articles 3, 5 and 8 of the European Convention (right to life, fair trial and family life) had been breached.

In 2011 (at the time of this case) there were nearly one thousand children detained in immigration removal centres who were members of families identified for forced removal from the UK. They were held subject to detention indefinitely under administrative orders, without time limit and without judicial oversight. On average, children spent almost sixteen days in detention; in some instances, however, detention lasted for as long as sixty-one days. There are many instances where children are detained but then released again because removal, for whatever reason, cannot take place. The children are supposed to be provided with education and leisure activities while they are detained with their families, but their situation becomes hugely vulnerable whilst in detention.

Preserving children's rights and keeping families together

There is very little legal advice in immigration law that is accessible and affordable for most migrants. Given the vulnerabilities in this sector and the need to protect young children, pregnant women and those

potentially in abusive relationships, there has to be access to legal advice for all affected (Yasenov et al. 2020). It is possible to create sanctuary zones for populations seeking asylum or those without full immigration status, such as sanctuary cities or even institutions like universities where data sharing could be refused. However, there could still be demands made in the national interest under the immigration exemption in the Data Protection Act, which permits the sharing of data, such as an interest in immigration control (Bauböck and Mourão Permoser 2023).

Given the enormously detrimental effects of immigration measures, particularly on health, there are some effective ways of ensuring access to healthcare services is not affected by the new data-sharing and charging measures. One option is to create a firewall between health provision and immigration. One firewall mechanism is to simply implement a 'don't ask – don't tell' policy, so that information from healthcare professionals does not reach immigration law enforcement (Carens 2013, 130–47). By simply not sharing personal data it is possible to keep people safe from deportation (Lasch et al. 2018). While this resists bordering, it also supports the wider population from communicable diseases and public health crises and allows medical staff to prioritise medical issues. In terms of education, too, it is clearly important to have a firewall between education and immigration services. Any child should be able to engage in education particularly at a young age without fearing that the adults responsible for them in school will report on them. If undocumented children do not receive a proper education, their only options in life may be to engage in criminal activities or be part of other exploited sectors, a situation that also adversely affects wider society. Yet firewalls are a limited protection and one that is not very effective if legal duties to share data are imposed on providers.

If there is instead a sanctuary zone, through the carving out of safe spaces at subnational levels by agents that act independently of, or in resistance to, national governments, then people are better protected. Setting up a sanctuary zone is a complicated affair and requires coordinated resistance by a number of organisations, including NGOs, municipal/urban local authorities and community groups. It can involve initiatives such as declaring universities or even cities as sanctuary zones where immigration duties will not apply. Governments of sanctuary cities or regions can use their territorial autonomy to prevent deportations (Bazurli and de Graauw 2023). Even individuals and institutions in civil society, such as churches, who give shelter to undocumented migrants, can be part of a sanctuary movement. While this is an inclusive measure and provides better protection in some ways than creating firewalls, it is limited to specific zones or periods in a person's life and is contingent on ongoing mobilisation around them.

Perhaps the best way to protect people, and especially young people, who may not have all their legal documents, is to regularise their status through providing special mechanisms of inclusion. Clear pathways for migrants to regularise their status would reduce the number of residents with a precarious status in the first place and reduce any repercussions from possible data-sharing of their immigration status. There is a need for national governments to ensure that any restrictions on access to services and welfare support are proportionate and that there are clearer pathways for those with an irregular status to regularise their position. No one should be without status forever (Van Hout et al. 2024). Many countries have some pathway towards regularising after a certain number of years of residence during which people have to demonstrate they did not acquire a criminal record. Individuals may be given amnesties to prevent overwhelming immigration resources in negative state functions, such as prevention of irregular immigration, and instead provide support to those living long-term in the country. Young people could have their age counted in their favour in such schemes as they are more likely to possess social membership. Providing regularisation prevents the development of underground economies which depend on irregular labour. Using legal criteria to regularise migrants' status strengthens the rule of law as it enhances predictability (Song and Bloemraad 2022). After a certain period of association with a country people may become full members of society in a process akin to rehabilitation after a statute of limitations for criminal offenders. Only regularisation can provide people with full protection against future bordering practices.

Conclusion

As we have seen in this chapter, although amplified by hostile environment monitoring in the UK, and the global political distrust of migrants and asylum seekers, the historical context for distrusting and monitoring migrant family units is linked to colonial relationships of expropriation. Children usually form the core of families, so family bordering practices affect them when the adults in their families are targeted or when they are themselves denied fair treatment. They are the future of humanity, yet the treatment of children in terms of the right to a family, access to healthcare and education, which are basic rights, is patchy at best and extremely cruel at worst. Their treatment demonstrates both the extreme human costs of bordering as well as the potential of the law to act as a shelter when mobilised in a protective manner. Despite special welfare duties towards children, they

are not given full access to basic rights and are often left in distress. Their situation as asylum seekers is especially precarious.

Through immigration measures the private space of family life becomes open to public intervention for demographic control. By regulating families, states are regulating zones of love and care. When this regulation lacks compassion it demonstrates a stark disregard for humanity and the emotions that make us human. The stories of families pulled apart by immigration control are heartrending and these need to be disseminated widely so that people can understand how borders operate. The humanity of asylum seekers should be apparent to all but needs reiterating again and again in the climate of politics of hate around displaced people. The law appears to strip them of basic dignity by invading their most intimate relationships. Yet, this chapter also demonstrates that the role of law in challenging state power can be immense. It is possible to develop creative means of challenge and resistance, especially through coordinated efforts. Professionals, charities and voluntary organisations have to work closely together on several fronts, such as educating different stakeholders on what the legal provisions on charging or data sharing or child welfare actually are. Is this possible at all times or is it suspended during times of emergencies? That is a query for the next chapter.

Notes

1. See EPCAT and UCL report, 'Behind Closed Doors', which states there were 440 missing episodes reported among the 5,400 unaccompanied children housed from July 2021 to June 2023, see p. 7. https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=b6fe36f8-4e04-4d3a-81bc-990633b7067c. Accessed 20 October 2025. See also Parliament Written Questions and Answers: https://questions-statements.parliament.uk/written-questions/detail/2022-10-11/61091. Accessed 20 October 2025.

2. It is interesting that the teacher is always referred to as Mrs K in the documents and in the press despite it being a matter of contention whether she was married or not.

3. *B v I (Forced Marriage)*, https://www.4pb.com/case-detail/b-v-i-forced-marriage/. Accessed 20 October 2025.

4. UK Visas and Immigration, 'Indefinite Leave to Remain or Enter (Domestic Violence or Abuse)'. https://www.gov.uk/indefinite-leave-to-remain-domestic-violence-abuse/eligibility. Accessed 20 October 2025.

5. UK Government Note on Student visa: https://www.gov.uk/student-visa/family-members. Accessed 20 October 2025.

Chapter 6

Bordering globally: emergencies of health and security

> 'The border, the word *border*, sounds like *order*, but in this place they do not rhyme.'
>
> – Alberto Ríos, *The Border: A Double Sonnet*

Introduction

As we have seen in the preceding chapters, law operates on different scales, in different locales and with different functions, often in a manner that disadvantages minority populations and people from other countries. Law has been essential for the raising of additional borders during crises. In recent times it has led to global shifts in who can cross national, or even local, spatial borders because of the Covid-19 pandemic as well as numerous counter-terrorism threats. Unlike work or family migration, national security or public health emergencies are supposed to be exceptional in nature but are likely to become normalised with time. When urgent action is rushed through legislative processes and power is concentrated in the executive, the details of how those who are marginalised can be affected is often overlooked. Their situations are often purposefully aggravated by state action. The laws which derive from emergency powers tend to last far longer than the initial impetus of their origin and development (Scheppele 2003).

In times of emergency, governments usually attempt to regulate the movements and activities of people differently, depending on their legal status as citizens or non-citizens. During most emergencies, foreigners

come under heightened scrutiny and restrictions. States gain greater powers over individuals' nationality, especially in the context of removal of nationality or keeping non-nationals (and sometimes even nationals) outside nation-state borders (Blackbourn, De Londras and Morgan 2019). This means that while control over family and work migration may be both inclusive or exclusive in nature, emergency rules are wholly exclusionary and may even render citizens foreign. National security-related conduct has led to citizens being stripped of their citizenship. During public health crises, in order to contain possible infections picked up overseas, nationals have been prevented at times from returning to their home countries.

Both pandemic and national security emergency bordering are burning contemporary issues. Detention, deportation and dilution of citizenship rights (via travel restrictions or cancellation of citizenship) form features of the criminalisation of immigration ('crimmigration') in both instances (Stumpf 2013, 59). The first part of the chapter examines public health and the pandemic in the framework of emergency bordering before moving on to the second part which scrutinises national security and cancellation of citizenship. Both parts demonstrate how these measures have greater impact on those who are already vulnerable and marginalised and how emergency-era re-bordering reinforces inequalities in society for prolonged durations.

The pandemic and public health borders

The UK had several new legal instruments to cope with the Covid pandemic. Most were introduced as emergency provisions and then took on more durable forms as the pandemic progressed. In the UK, from the perspective of immigration control, the timing of the arrival of Covid was particularly volatile as it coincided with the transition period of Brexit (the UK's exit from the European Union) which continued until the end of 2020 (31 December 2020). As analysed in Chapter 3, Brexit has created upheaval in the lives of many EU nationals who were residing in the UK and of British nationals living in other EU countries. In particular, the change in legal status for those affected by Brexit, from EEA nationals abroad in EU countries to third-country nationals, while the pandemic was in full swing in 2020 was a severe burden for many (Atkinson 2022). In the year ending June 2020, 260,000 EU nationals departed, while in the year ending June 2021, 190,000 EU nationals left the UK (Office for National Statistics 2022). Many left in the immediate aftermath of the first lockdown while others were stuck in limbo, through both pandemic measures and Brexit-related changes in law.

By the time Covid came to the UK it had already ravaged other countries such as Italy, and the emergency nature of the situation was apparent here. Legal action was swift in response. On 11 March 2020, the World Health Organization declared that there was a global Covid outbreak (World Health Organization 2020). On 19 March 2020 the UK government introduced emergency legislation which was given Royal Assent on 25 March as the Coronavirus Act 2020. The accompanying regulations were made under the Public Health (Control of Disease) Act 1984. The Secretary of State decided to use emergency powers to make the regulations. Full information was not available about how these regulations would operate until much later (House of Lords 2021). The regulations were not first approved by a resolution of each House of Parliament, as per the normal democratic process.

These rules impacted extensively on a range of rights under the ECHR. Lockdowns affected Article 2.1 of Protocol 4 (freedom of movement) as well as Article 8 (respect for private and family life), as the regulations made it impossible for people to visit even close relatives unless they shared the same household group (termed a bubble). Covid rules also engaged Article 11 (freedom of assembly and of association) because assemblies were banned and association between people who were not members of the same household or bubble was restricted (Joint Committee on Human Rights 2021). As schools and educational institutions were impacted, this in turn affected Article 1 of Protocol 1 (right to education). In terms of religious beliefs and practices, Article 9 (freedom of thought, conscience, and religion) was affected as Covid halted religious services and led to the closing of religious centres and places of worship. The right to marry (Article 12) was affected, as both religious and civil weddings were suspended.

A challenge to the UK's lockdown policies was brought by businessman Simon Dolan, who brought a judicial review. Dolan submitted that the regulations imposed sweeping restrictions on civil liberties and were unlawful on three grounds. Firstly, he argued the government had no power under the Public Health (Control of Disease) Act 1984; secondly, that the regulations were unlawful applying ordinary public law principles; thirdly, he said that they violated a number of Convention rights guaranteed in domestic law under the Human Rights Act 1998 such as Articles 5 (right to liberty), 8 (right to autonomy and respect for privacy and family life), 9 (right to religious freedoms and the implied right to worship), 11 (right to assembly) and 14 (right to enjoy Convention freedoms without discrimination: women, for example, were disproportionately affected by domestic violence, which more than doubled during the lockdown). The measures also breached Articles 1 (right not to be deprived of

property including business interests) and Article 2 of Protocol 1 (right to education) of the ECHR and Fundamental Freedoms.

The court refused Dolan permission to apply for judicial review, but the Court of Appeal granted permission to appeal relating to the 1984 Act. The Court of Appeal dismissed the case *R (on the application of Dolan and others) v Secretary of State for Health and Social Care and Another* [2020] EWCA Civ 1605 on the primary reasoning that the pandemic was a fast-moving situation, and the government was acting on expert advice in an exceptional situation (para 38). Dolan had submitted that this restriction amounted to a curfew or house arrest. The court's response (para 92) was that there was no deprivation of liberty within the meaning of Article 5 ECHR and the criteria set out by the Strasbourg court. The court's rationale was based on the express exceptions to Regulation 6(1) as well as the overriding exception of having a reasonable excuse.

Developments in the UK were also emblematic of global developments. Globally, the pandemic introduced sub-national bordering through quarantine zones, and it did so on an unprecedented scale. Pandemic measures created different tiers of legal status, with differential treatment for the vaccinated and not-yet vaccinated, or those fully boosted with an adequate number of shots and those who were not, age-related categories such as older at-risk people and young children without vaccines, and exemption categories based on health or belief-based reasons. Public health has been a rationale for consolidating borders and preventing entry of travellers for a long time. Safeguarding public health was a popular reason used against migration from 'the tropics', as was the suitability of Asians for the cold climate of Canada. When the *Komagata Maru* came into Canadian waters, there was concern that 'Asiatics' would have diseases such as hookworms, which they would bring into Canada (Wallace 2013). The NHS routinely screens for tuberculosis for UK visa applications from certain parts of the world for people who plan to stay in the UK for longer than six months.[1] Women who require TB (tuberculosis) tests are not exempt even when pregnant. Instead, they can choose an X-ray with an extra shield to protect them and their unborn child in the second and third trimesters or a sputum test (phlegm coughed up from their lungs). If they choose a sputum test there may be an extra fee, and they could wait up to eight weeks for results. Their only other option is to wait until after delivery. These measures appear extreme, as they are just screening tests and not actually about those who are symptomatic, but it may be argued that these are essential to prevent the spread of TB from high-risk areas. Historically the spread of TB in Europe and North America was linked to migration from other parts of the world.

It is likely that bordering has also been ineffective in preventing the spread of past epidemics (Wood et al. 2007; Thompson 2005). Borders did not contain smallpox outbreaks, plague epidemics, the 1918 influenza pandemic and other more recent infectious disease outbreaks and epidemics such as HIV/AIDS, SARS and Ebola (Dionne and Turkmen 2020). Borders made to contain people affected many and created discrimination against those already structurally disadvantaged. Dionne and Turkmen (2020) write that the patterns of violence and discrimination evident during the spread of Covid are similar to the othering of and blame against marginalised groups in the past.

During the Covid pandemic, which began in late 2019, leaders around the world restricted non-essential travel to varying degrees, some sealing off their borders entirely, to help curb the spread of the virus by regulating both entry and exit of people. This was in line with other measures to prevent the spread of the virus from person to person contact such as school closures, workplace closures, cancellation of public events, restrictions on public gatherings, closures of public transport, stay-at-home requirements, public information campaigns, contact tracing, restrictions on internal movements and international travel controls including border closures, partial travel restrictions, entry or exit screening and quarantine of travellers. Face coverings and taking vaccines were at first optional in many places but soon many governments made these mandatory. For public transport and travel it became compulsory to have records of vaccination (popularly known as 'covid passports'). Entry/exit screening (for example, temperature measurement, health questionnaire, thermography, laboratory tests and/or follow-up quarantine or tracking) was implemented at airports, ports, land borders and train stations. Quarantine/isolation of travellers from affected regions (at borders, at designated institutions or at home) was also important as a protective measure. These measures were augmented with technology (such as digital tracking and e-borders). The Covid legal framework was confusing for ordinary people who were unclear at times about what was a legal requirement or obligation and what was just public health advice.

Travel restrictions (that is, varying levels of travel reductions) between countries and between regions and large cities within countries) as well as travel bans (suspension of flights, ground crossing, ship itineraries, refusal of entry or travel and visa suspension/denial) between countries, and between regions and large cities within countries, were commonplace during the pandemic. Restrictions later changed into travel 'bubbles' and corridors between some countries which were considered to have similar levels of infection, and which negotiated safe travel within their regions.

The measures attempted to identify outsiders who were seen as potential agents for the spread of disease. But migrant populations with family elsewhere were struck especially hard as they were unable to travel to their loved ones and often felt additional anxiety about the well-being of their relatives and friends elsewhere, especially in parts of the world with less access to vaccines. There was also an inability to attend funerals and be with family and friends when they were ill or dying in foreign countries. It has been argued by scholars that these borders were not effective and prevented close cooperation between nations on disease control (Grépin et al. 2023). The UK Home Office reports that, 'There were an estimated 30.2 million passenger arrivals in 2021 (including returning UK residents), around a quarter (23%) less than the previous year, due to the travel restrictions imposed as a result of the COVID-19 pandemic' (Home Office 2022). There were concessions made by the UK Home Office for foreigners who could not leave the UK before the expiry of their visas as well as for indefinite leave holders, and other visa holders who could not return to the UK because of pandemic restrictions.

While borders became reified as countries started closing them to prevent the spread of Covid, applications for new nationalities started increasing. A select few rich people started moving to countries with lower levels of infection using multiple nationality as a means to gain entry. The super-wealthy even chartered planes. Popular 'pandemic passports' or permanent residency programmes were offered by Australia, Antigua, St Kitts and Nevis, Tuvalu, Vanuatu, Austria, Switzerland, Portugal, Cyprus, Malta and Montenegro (Arlidge 2020). All offered nationality or permanent residency in return for a direct donation to the national treasury or investments in local property or businesses. It could cost as little as $100,000 per family member in the Caribbean, rising through €1 million to €2 million ($1.1 million to $2.2 million) in Malta and Cyprus, to €7 million ($7.6 million) in Austria.

The UK was not considered a safe haven as it had a rising number of Covid cases during the pandemic and therefore its investment residency was not as popular. Australia and Austria were both popular destinations for the wealthy because of their superior health services as well as containment of Covid. Yet even in these countries there were restrictions placed on people, which reinforced borders and led to exclusions. In the next two sections I will look at the specific exclusions of citizens and foreigners in the context of Australia, which, despite being a preferred Covid destination for the super-rich, had one of the strictest Covid bordering regimes. It also shares the features of selective immigration in common with other developed countries. Australia has restrictive policies which affect asylum seekers, including being one of the first countries to

introduce offshore processing of asylum seekers. In fact, Australia was one of the first countries to exclude its own citizens during the Covid pandemic, thereby demonstrating how pre-existing hard borders become further reified in times of emergencies.

Exclusion of citizens: *Newman v Minister for Health and Aged Care*

With a rise in the use of technology, the role of law became more invisible and the spectacle of violence in law-enforcement receded. Previously visible at the geographical borders, enforcement is displaced to points of departure or offshore to other territories to pre-empt travel. While the increased use of technology and documentation may make the experience of crossing borders more restrictive and bureaucratic in nature, it is experienced in a more hidden and insidious manner than public physical violence.

The overt exclusion of citizens is an unusual feature of emergency bordering which persists even after the immediate threat subsides. One example during the pandemic was the exclusion by Australia in 2021 of all travellers from India, including citizens of Australia (Simic and Rubenstein 2023). Anyone, including citizens, who attempted to return could be imprisoned for up to five years and be fined $50,000. Ostensibly neutral, and applicable to all, this restriction affected mainly Australians of Indian origin (the second biggest group residing in Australia after British-origin residents). The only exceptions were repatriation flights which still left thousands of Australian citizens in India, unable to return. Even those who could travel to Australia had to quarantine for fourteen days in a hotel but there were caps on international arrivals. Australia had one of the strictest pandemic regimes, but many other countries also restricted travel from India because it was greatly affected the second time that Covid became widespread (the so-called 'second wave' of the pandemic in 2021).

Australia has a number of legal structural preconditions which rendered its measures particularly harsh and difficult to challenge. First, it does not have an enumerated set of constitutionally guaranteed rights for citizens and, secondly, it has a federal structure which permits states and the Commonwealth (federal government) to regulate pandemic-related health/travel measures. The federal powers to regulate pandemic travel were guided by s477 of the Biosecurity Act 2015 which gave wide powers of discretion to the executive. Travel regulations also regulated outward travel by citizens and residents to ensure the quarantine system was not

overwhelmed on the return of travellers from countries where the infection was intense and widespread (so-called hotspots). Yet these measures created hardship for those needing to return home or travel for urgent reasons. A key case which underlined this exclusion through re-bordering was *Newman v Minister for Health and Aged Care* [2021] FCA 517. Gary Newman was a seventy-three-year-old Australian citizen who had been in India since March 2020. Despite many efforts to return to Australia, he had been unable to do so, due to a scarcity of flights and cancellations. At the time that the travel ban was imposed, he was still actively looking for options to return to Australia but was barred from re-entry.

Newman challenged his exclusion with two main arguments. The first was 'proportionality': that the ban was invalid because the Minister had failed to comply with the criteria in s477(4) of the Biosecurity Act 2015. The second was based on the 'principle of legality': that even if the ban was valid, it did not extend to Australian citizens, as citizens had a fundamental right to re-enter Australia. However, by the time the case was heard the ban was lifted and the large constitutional questions remained unanswered. Hence, the federal court decision eventually did not provide much guidance on the issue of citizenship rights or the use of executive discretion in *Newman* but on dismissing his grounds for challenge. Indeed, the Australian courts have not had much input in assessing the pandemic-era powers of the Australian government (Walpole and Isdale 2021). Similarly, courts throughout the world have exercised immense legislative and executive discretion when assessing the proportionality of Covid restrictions. The Australian situation is perhaps a more extreme one but one in tune with other nations.

Exclusion of foreigners: Djokovic and discretion

Australia, like many other countries, was also harsh towards foreigners during the pandemic, but demonstrated perhaps the harshest levels when the most stringent measures of exclusion were put in place. While the Newman case is about citizens, the dispute over the vaccine exemption and entry of tennis star Novak Djokovic during the 2022 Australian Open is a prime example of how foreigners, even elite celebrity ones, were adversely and deeply affected by pandemic regulations. The wide discretion on exclusion exercised by executive officials meant that despite all the resources at his disposal, Djokovic was still deported for not being vaccinated against Covid and/or not having a valid exemption from requiring the vaccine (Ignovska 2022).

In 2022, the Australian Open required players to be vaccinated before participation but also devised a means of exempting those who had 'natural immunity'. Tennis Australia granted Djokovic, then defending champion and world number one tennis player, an exemption from being vaccinated because he claimed he had already tested positive for Covid and recovered, thereby having natural immunity from the disease. However, Djokovic's exemption was widely disbelieved, because the timing of when he had claimed to be ill had not matched when he had been seen publicly attending events. Upon arrival in Australia, Djokovic's visa was cancelled at the airport and he was taken into immigration detention at Melbourne's Park Hotel for several days and faced imminent deportation. The same hotel was also being used to hold asylum seekers and refugees; some had been in this hotel for years. Many had even been infected with Covid while living there. The holding of Djokovic in this manner and in such a location generated some publicity on how asylum seekers are detained in Australia and there was even some critical coverage of how Australia offshores migrants by sending them to Nauru and Papua New Guinea, to detain any asylum seekers who arrived by boat in Australia. Unlike Djokovic they have little to no resources for challenging their detention and many had spent years confined to the detention sites. In addition, their plight did not hold as much media attention as Djokovic's clearly transient and extraordinary situation.

Djokovic, despite having all possible resources at his disposal, faced an uphill task in his appeal. He had to demonstrate that there was no rational basis for a cancellation decision, but the broad discretion from section 116(e) of the Act allowed the Minister to cancel a person's visa if their presence 'might be' a risk to 'the health, safety or good order of the Australian community' and hence covered broad grounds for exclusion (Daly 2022). Djokovic won this appeal despite the high bar, because the minister for home affairs conceded that Border Force was unreasonable when it proceeded with cancelling Djokovic's visa without allowing him time to contact Tennis Australia or his lawyers. The cancellation decision was quashed by the judge and hence the visa Djokovic held became valid again. This victory was short-lived however as the decision to cancel Djokovic's visa was taken once again by another minister. The immigration minister used his personal powers (so-called 'God Powers') under s133C(3) of the Migration Act to re-cancel the visa (Pillai 2022). This time the reasoning was that Djokovic's not having been vaccinated could inspire people to become anti-vaccine. In rejecting Djokovic's appeal against the cancellation, the full bench of the federal court expressly said its decision did not reflect 'the merits or wisdom of the decision' but only

whether it was so irrational as to be unlawful. Eventually Australia's federal court upheld the cancellation of Djokovic's visa, *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] 397 ALR 1, and he was deported. Djokovic was unable to appeal this decision successfully as it was hard to establish this was unreasonable at a time when the vaccination drive was at its peak.

At least Djokovic obtained some reason for the decision to cancel his visa, which is more than many others who lose immigration appeals are able to do. As an island nation Australia has used wide latitude in executive discretion for protecting borders and usually ministers do not give reasoned decisions for cancellation of visas. Therefore Djokovic did make some progress in this aspect and was able to expose some of the capriciousness of the system in his high-profile challenge.

As already mentioned, Djokovic's situation also brought into focus the situation of asylum seekers who were detained during the pandemic or even denied entry. While states have the sovereign right to regulate the entry of non-nationals, the right to seek asylum and the prohibition of returns to situations of danger are central tenets of international law. This also prohibits countries from rejecting asylum seekers at borders. The United Nations High Commissioner for Refugees (UNHCR) has repeatedly warned that measures that deny asylum seekers entry at borders are not only contrary to international law but are also not necessary to address public health risks where cooperation is more important than xenophobic isolationist policies.

Safeguarding the rights of refugees while also protecting public health, for example through testing and quarantine, and other reasonable and proportionate measures, can prevent illnesses and deaths during a pandemic, yet at the height of the emergency, nearly 100 countries initially restricted access to asylum seekers. Some states used the pandemic as a purported justification to introduce restrictive measures detrimental to the rights of refugees. Many such measures continue to be in place after the pandemic abated. In some cases, restrictive practices adopted at the height of the pandemic for public health reasons have been retained or reinforced as security measures. An example of this is Title 42 in the US which was a Covid public health restriction affecting migrants at the US–Mexico border. It expired on 11 May 2023, when the public health emergency for Covid was lifted (Carnegie Corporation 2023).

Title 42 was a public health order originally enacted under the Trump administration, which allowed US authorities to expel migrants quickly back to Mexico or, in rare cases, to their countries of origin. The Biden administration tried to lift Title 42 in spring 2022, arguing that it was no longer needed as a public health measure, had become ineffective

as a deterrence tool and violated the right to apply for asylum. A court stayed the administration's decision, based on a lawsuit filed by several Republican attorneys general, and Title 42 remained in effect for an additional year. The end of Title 42 meant a return to Title 8, which allows migrants to apply for asylum but also leads to formal deportations to country of origin for those who do not qualify, and the possibility of criminal prosecution for a second entry during a five-year period.

The Biden administration published new restrictive rules after the pandemic that required migrants to seek asylum by making an appointment at a port of entry through an online app and create a presumption of ineligibility for asylum for those who try to cross between ports of entry. It is now possible to quickly assess at the border if someone is eligible for asylum and turn away those who are not (Santana, Long and Spagat 2023). While this is a harsh set of rules, the Biden administration tried to expand some legal pathways for certain nationalities, including employment-based visas for Central Americans. A sponsorship programme for Cubans, Haitians, Nicaraguans and Venezuelans has been created as well as for Ukrainians (Castañeda and Hoeppner 2022). In many ways this is a similar approach to the special schemes in the UK which rely on visas for displaced people from Ukraine and Hong Kong for lack of a generalised legal path to asylum for most asylum seekers (see Chapters 4 and 5).

Proportionality and Covid: disproportionate effect on minority populations

The moral panic towards immigration control continued throughout the pandemic as it had for a very long time prior. Protecting public health and national security have both been part of the intent of statutes regulation asylum, immigration and nationality (Prabhat 2019). Anti-migrant policies and processes created an environment conducive to the spread of Covid, especially in migrant communities, and undermined public health efforts to contain the pandemic (Fotheringham and Boswell 2022). Migrants and ethnic minority communities are often not discrete from one another; they can be interchangeable categories or have specific life situations that differentiate them as people. While there are many migrants who are not racial or ethnic minorities, most ethnic minorities in Britain have some connection to migration whether directly or indirectly through family members and diasporic connections. Policy makers should consider their specific situations as a whole but often they overlook the intersectionality of their varied structural positions and the lived experiences of people (Mamluk and Jones 2020).

The strongest link between migration and the pandemic in the UK is arguably not about the movement of people during the pandemic, but that the NHS in the UK is heavily dependent on migrant labour. Frontline staff in the NHS comprise a high proportion of ethnic minority and foreign nationals; 14.6 per cent of NHS workers are of another nationality but many more will be British ethnic minorities who experience some similar patterns of discrimination and inequality (Baker 2023). The British Medical Association reported that in the early days of the pandemic, 94 per cent of clinicians who died due to the virus were from a BAME (Black, Asian and minority ethnic) background. In April 2021, a team at the University of Nottingham found that Black healthcare workers treating hospitalised patients during the first wave of the pandemic were more likely to have had Covid infections than their White counterparts, even if other factors like age, sex, socioeconomic background and job role were accounted for, so there was a disproportionate effect on minority ethnicity healthcare workers (Valdes et al. 2021).

While the language on Covid illness and deaths has often been about pre-existing health conditions, health does not exist in isolation from other social determinants. The Office of National Statistics figures published on 7 May 2020 revealed Black people were four times more likely to die from the virus than White people. Bangladeshi and Pakistani males were 1.8 times more likely to die from Covid than White males. These differential life statistics can perhaps be explained by pre-existing social inequalities which have been exacerbated by the hostile environment policies and austerity measures. There are several factors that affect migrant health: policies such as No Recourse to Public Funds for irregular migrants and for those with visas, right to-rent and work checks which require proof of legal status, NHS data sharing with the Home Office on immigration status of patients and NHS charging policies for foreigners, as well as poor asylum accommodation, and continued use of detention and deportation powers (JCWI 2022). The NHS clarified that vaccinations were not dependent on having an NHS number or having legal status as a migrant in the UK and were free for all. It also stated that Covid testing and treatment were free of charge for all, but follow-up treatment for any secondary or co-existing health issues would be chargeable (UK Health Security Agency 2021). These measures did not wholly support the most vulnerable during the pandemic and created uncertainty about availability of treatment. Public health and migrant rights groups warned this message did not cut through deep-rooted fears of the NHS instilled by nearly a decade of hostile environment policies in healthcare, and the 'majority' of undocumented migrants were unlikely to come forward and

avail themselves of treatment, thereby increasing risks to their own personal health as well as to public health.

The UNHCR in 2021 reported that the pandemic increased unemployment and poverty in marginalised communities (UNHCR 2021a). Covid death rates were much higher for minority ethnicities for a variety of reason (Downes et al. 2021). Minority ethnicity and migrant populations bore disproportionate burdens of the effects of the pandemic with the least resources, in most instances, to protect themselves and to seek treatment and recover. For example, according to Shahid, nearly 50 per cent of Muslims are born outside the UK and are therefore disproportionately impacted by immigration policies which create a barrier to accessing healthcare due to surcharges or fear of deportation (Shahid 2020).

Detention

The pandemic severely affected populations in detention (Ferstman 2024). In the UK, the power to detain individuals was created by the Immigration Act 1971 as well as the Nationality Immigration and Asylum Act 2002. In the past there were no permanent detention centres in the UK. In 1973, British Airways' predecessor, the British Overseas Airways Corporation, was perceived as struggling with efforts to detain undocumented migrants and a facility near its corporate headquarters in Harmondsworth was constructed. This has since been expanded and was followed by a series of conversions of former prison facilities or Air Force bases. Facilities are largely managed by subsidiaries of four major security companies: G4S (Group 4 Securicor), Geo, Mitie and Serco (Corporate Watch 2018). In recent times, controversial new modes of accommodation have been introduced, such as numerous hotels and a barge (the *Bibby Stockholm*).

The plight of people in detention can be understood through Giorgio Agamben's (1998) formulations of the state of exception, the camp and 'bare life'. For him, the Nazi camp is about holding 'bare life' (which is only a biological conception of life rather than of human flourishing). Current detention centres for migrants such as Yarl's Wood are reminiscent of this reduction to bare life. People have been tortured, raped and rendered psychologically battered in these places and have even ended their own lives in sheer desperation. Medical Justice reports that at least thirty-five people have died in immigration detention between 2000 and 2015. In 2022, Manston Processing Centre was found to have 'catastrophic overcrowding' and 'grotesque treatment' by the UK Chief Inspector of Borders and Immigration. Manston is a former military base in Kent. It opened

as a processing centre in February 2022 for arrivals to the UK in small boats as a short-term holding facility for newly arrived migrants and asylum seekers. A man died of a communicable infection there in 2022. In 2023 the *Bibby Stockholm* barge was used to house people awaiting the outcome of their asylum applications. An asylum seeker committed suicide on it and there was an acute sense of despair amongst others housed there (Taylor and Syal 2023).

The UK has three times more individuals in immigration detention compared to other European Union member states. In addition, unlike most European countries, the UK has not legislated a statutory upper time limit on the period that an individual can be held in immigration detention (Green 2019). Yet detention is not supposed to be within a lawless black hole. The principles that govern detention and detention conditions are set out by a leading case – *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB) – and are known as the Hardial Singh principles. In this case the judge decided that the power to detain migrants under the Immigration Act 1971 is subject to limitations imposed by the common law and include the following safeguards: (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal. These principles have often been reiterated and confirmed by British courts.

During the pandemic, detainee numbers had reduced from around 32,000 in 2015 but were still high. Around 24,500 people entered immigration detention in the UK in 2021 according to a Migration Observatory report (Griffiths and Walsh 2024). There were heightened concerns about detention in the UK during the pandemic because of the risk of infection in detained populations. Detention Action (a charity) lodged legal proceedings against the Secretary of State for the Home Department (SSHD) [2020] EWHC 732 (Admin) in which they submitted an urgent interim relief application to order the release of 736 detainees whose removal was not imminent because of the global pandemic and travel restrictions around the world. They were being held in overcrowded, poorly ventilated and unclean conditions where Covid can easily flourish. The court considered the Hardial Singh principles. Although these principles are protective of the rights of potential detainees, Detention Action lost its case as the court did not think the principles were violated by the State during the pandemic and as a result detention could continue

during the pandemic. However, the Home Office decided to review all detention cases after this judgment.

In Australia indefinite detention was also permitted for decades. In 2004 the highest court of the land, the Australian High Court, upheld the constitutional validity of indefinite immigration detention of a stateless man in the case of *Al-Kateb v Godwin* [2004] 219 CLR 562. In 2023 the High Court reversed this position and ruled in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, that indefinite detention was unlawful and unconstitutional in immigration detention. Since NZYQ the government can no longer detain people if there is no real prospect that it will become practicable to remove them from Australia in the reasonably foreseeable future (ss189 (1) and 196 (1) of the Migration Act). It is crucial for the UK also to reconsider its position on indefinite detention and follow in Australia's footsteps.

Control of conduct: bordering through deportation

Deportation is often a choice made for foreign nationals who are found guilty of crimes, as well as people who are present without immigration permission. Section 32(5) of the UK Borders Act 2007 mandates that, unless certain circumstances apply, the Home Secretary must make a deportation order against a 'foreign criminal', defined in the Act as a person who has been convicted of an offence and sentenced to twelve months' imprisonment as a result. The right of states to deport non-citizens on their territory in a lawful manner is typically seen as a power that flows from the state's right to control immigration. The reason that indefinite detention should not be permissible in law is because immigration detention is meant to take place only for the specific purpose of imminent deportation. In the UK 'deportation' can refer to a range of practices that go under different terms, including 'removal' (a term for an administrative order to leave the state, which typically carries no appeal rights) and judicial deportation as well as self-deportation (Webber 2018). Deportation enables the state to remove those who have entered illegally, those whose permission to reside has elapsed or been withdrawn and those who are legally resident but who are breaching conditions of entry (Ruhs and Anderson 2010). Deportation must be enforced by states through the threat of actual coercion. Deportation reinforces ideals of who belongs and who does not.

Challenges to deportation are usually made on the basis of Article 8 ECHR on the right to family and private life. The landmark case of *R (Razgar) v SSHD* [2004] UKHL 27 sets out the standards of deportation.

In Razgar, the claimant was an Iraqi asylum seeker who had already sought asylum in Germany but claimed that his return to Germany would adversely affect his mental health. The case sets out that the relevant Article 8 challenge questions are:

- 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?
- If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- If so, is such interference in accordance with the law?
- 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?
- If so, is such interference proportionate to the legitimate public end sought to be achieved?

A case where these questions were raised was that of Mr Jimmy Mubenga, who died during his removal to Angola on a British Airways commercial flight from Heathrow to Luanda in October 2010 (Hemmings 2011). He was being removed by a private security company's civilian staff. Following the death, three G4S 'escorts' were arrested and questioned by the police (Webber 2014). The prosecution case was that, handcuffed behind his back and with his head pushed down for over half an hour, Mr Mubenga was held in a position which impeded his breathing. The guards denied pushing him down, and claimed that he put himself into that position, bent over in his seat. Yet other passengers heard him calling out in distress, crying for help, saying 'I can't breathe'. The guards denied hearing any such cries. Three eminent medical specialists agreed at the inquest that the cause of death was cardio-respiratory failure caused by restraint. Despite the evidence, all three G4S guards were acquitted of the manslaughter charge, and Mr Mubenga's death was not proved to be unlawful killing.

This case demonstrates the extreme use of coercive state power in deportation (Anderson et al. 2011). Citizens are not supposed to be subject to such power but in the case of the Windrush generation, many who had the right to remain in Britain were wrongly deported. Several of them had lived for decades in the UK (Williams 2020). Using such power against them made their presence in the country conditional and their membership precarious. Similarly, EU citizens have been deported in increasing numbers since Brexit referendum. The year of the Brexit referendum saw

a 26 per cent increase in the number of EU citizens deported from the UK in comparison to 2015 (Migration Observatory 2025). The growth in the number of deportations has been attributed to the increasingly hostile environment targeting EU citizens in the UK (Radziwinowiczówna 2020), especially rough sleepers (Demars 2017). Deportations that happened during the pandemic were also selective, with an overrepresentation of citizens of poorer EU member states. Between April and June 2020 when Britain was hard-hit by the first Covid wave, the only chartered deportation flights headed for Europe, removing 188 EU citizens to Romania, Poland and Lithuania, as well as 97 Albanians (Radziwinowiczówna and Lewis 2021). The timing of these deportations was fundamental and demonstrated that the 'hostile environment' policy was undeterred by a serious global health crisis limiting travel.

Protesting against deportations has resulted in arrests and prosecutions of protestors. The 'Stansted 15' were one such group of protestors who were eventually found not guilty, however their case is an example of another kind of control over migration: that of preventing solidarity or support for irregular migrants. The Stansted 15 tried to stop an aircraft being used to deport people to Africa. The jet they surrounded in March 2017 had been chartered by the Home Office to transport people from UK detention centres for repatriation to Nigeria, Ghana and Sierra Leone. They cut through the perimeter fence and locked themselves together around a Boeing 767 jet. They were convicted of the intentional disruption of services at an aerodrome under the Aviation and Maritime Security Act (AMSA) 1990. The Lord Chief Justice said they 'should not have been prosecuted for the extremely serious offence'. In February 2019, three were given suspended jail sentences, and the other twelve were handed community orders. The actions against the protestors are part of the rise of criminalisation of migrant solidarity in most of Europe. In 2022, 102 human rights defenders faced criminal or administrative proceedings in the EU for acts of solidarity with migrants (PICUM 2023). People have been criminalised for their actions, including offering assistance with an asylum application, saving people in need out at sea or in boats and providing transport, food or shelter to migrants.

National security bordering measures: cancellation of citizenship

The legal frameworks and challenges in the Covid pandemic reveal an emerging theme of exclusion from this analysis of pandemic-era bordering and some of its persistent forms. Multiple nationality holders,

minority citizens and others with connections with other shores (such as asylum seekers and stateless people) were all disproportionately affected by the pandemic. Those who were already precariously placed in society were affected more than others. Perhaps this is not just limited to health-related emergency laws, as it seems to be a wider characteristic shared by different emergency laws. Another area of durable emergency framing is in national security where specific groups (mostly of minority ethnicity and religious affiliations) are often disproportionately affected.

As we have seen in asylum bordering, countries such as Australia and the UK have been 'offshoring' their borders and relying on technology to monitor individuals as well as pre-empt travel, based on who would be unwelcome if they posed a threat to national interests. During the pandemic, sub-national bordering became commonplace, but for national security national borders are of central importance. For the purposes of studying national bordering in the global context, I will zoom in on the specific idea of the external dimension of citizenship which involves legal recognition (both internally by one's own country and externally by other countries). While deportation is supposed to affect only foreigners, the Windrush and Brexit examples demonstrate how insider/outsider statuses are often unclear. Citizens can also be expelled from membership and this can be seen through another use of the law: the law allowing the cancellation of citizenship.

On the world stage, citizenship enables members of a country to have secure access to the external world, for example by being able to apply for a travel document and travel permission through their nation state or through diplomatic protection of their country while situated outside of it. It also provides a right to enter from outside of a country and the right to reside without being subject to immigration control in a country. Affecting these core legal rights effectively excludes people from national borders. So far in previous chapters we have seen that the focus of behavioural control for deportation is mainly on foreigners who are excluded from national borders if they are considered a threat to law and order or national security. Reasons relating to conduct can however bring citizens into the counter-terrorism net and they can be rendered foreign if their citizenship is stripped. The mechanism of cancellation of citizenship (also known as citizenship deprivation or revocation of citizenship) is increasingly being used globally to prevent re-entry of 'problematic' citizens for purposes of counter-terrorism. The manner in which the legislative provisions for cancellation of citizenship are structured results in placing ethnic minority citizens at greater risk of loss of citizenship. Studying cancellation of citizenship is important as it illustrates the numerous functions of law in bordering.

The right to nationality is well protected in international law. Article 15 of the Universal Declaration of Human Rights 1948 sets out, 'Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'. Similarly, the International Covenant on Civil and Political Rights sets out in Art. 24(3) that: 'Every child has the right to acquire a nationality'. Any state can determine under its own law who are its nationals but there are some limits on this power. One such limit is that of not making someone stateless through loss of citizenship, so as to ensure that there can be support from responsible governments to the people connected to their countries. Stateless people do not have recourse to support from any government and are especially vulnerable.

Generally, this limit applies at the point of withdrawal of citizenship. Another limit on nationality is placed at the point of acquiring citizenship, as states have some constraints on how they grant nationality. Other countries may refuse to recognise a nationality in international law if it is not based on a 'genuine' connection. Both of these constraints (statelessness and genuineness) have greater implications for multiple nationality holders. Both constraints (statelessness and genuineness) are conceptually linked as well. In order to decide on the extent of application of each constraint, the meaning of nationality, and how it is attached, is often evaluated by decision makers.

In the UK, the stripping of citizenship is permitted by an Act of Parliament (British Nationality Act 1981 section 40); any challenges to cancellation provisions are difficult because of Parliamentary Sovereignty (the constitutional principle that Parliament is the supreme legal authority in the UK which can create or end any law) and the discretion given by statute to the Secretary of State in recognition of executive expertise/competence in the field of national security. One possibility is however to challenge the use of discretion which is used to render a person stateless. Using this as a basis, three leading cases on citizenship cancellation are *Al Jedda* (Application no. 27021/08), *Pham* (erstwhile *B2*; *Pham v Home Secretary* [2015] UKSC 19) and *Begum* (Preliminary Issue: Substantive; [2020] UKSIAC SC_163_2019). The facts of these cases show a similar pattern, that of a British citizen losing their citizenship while outside the UK. In all three cases the presence of another nationality is critical for avoiding statelessness. In these kinds of cases UK courts often adopt a conflict of laws framework in order to assess the presence or absence of another nationality. Presence of another nationality would remove the risk of statelessness.

Under the 1981 Act, the Home Secretary could deprive a person of citizenship if they were satisfied that this would be conducive to the public

good (s40 (2)), but not if they assessed it likely that the order would make the person affected stateless (s40 (4)). There are now new elements in this power. Previously, birth citizens could not have their citizenship taken away, but the reach of this power increased after the attacks of 11 September 2001 on the Twin Towers of the World Trade Center in New York City (referred to as 9/11). After 9/11, the Nationality, Immigration and Asylum Act 2002 rendered birth citizens subject to cancellation of citizenship powers for the first time in the UK. However, no one could be rendered stateless through cancellation for conduct at this point.

From 2015, this scenario changed in response to the number of cases where naturalised citizens stripped of British citizenship claimed they had no other surviving citizenship and would therefore be stateless if they lost their British citizenship. An amendment to the British Nationality Act 1981 changed the legal situation and enabled the government to render any naturalised citizen stateless while depriving them of their citizenship. The new subsections to Section 40 of the British Nationality Act (4A) permits cancellation for naturalised persons even at risk of statelessness, so it follows in s40 (4) that the Secretary of State may not make an order under subsection (2) if they are satisfied that the order would make a person stateless and says:

> F3(4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if –
>
> (a) the citizenship status results from the person's naturalisation,
>
> (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
>
> (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

Thus, the Home Secretary can now deprive British citizens of their citizenship in a few different scenarios: (1) it would be 'conducive to the public good' to deprive the person of their citizenship and to do so would not leave them stateless; (2) the Home Secretary is satisfied that citizenship was acquired through naturalisation and obtained fraudulently or by false representation; or (3) on 'conducive' grounds where citizenship was acquired through naturalisation and the Home Secretary has reasonable

grounds to believe they could acquire another nationality. The Secretary of State can use these powers for all naturalised citizens, irrespective of issues of statelessness if the conduct in question is 'not conducive to the public good' and is 'prejudicial to the vital interests of the country'. All they need is a reasonable belief that another nationality may be acquired.

Why was there a change to specifically target naturalised citizens and render them stateless? A stateless person is defined in Article 1(1) of the 1954 Convention on Statelessness as 'a person who is not considered as a national by any State under the operation of its law'. The 1954 Convention, which is binding on the UK, also establishes minimum standards of treatment for stateless people in respect of a number of rights including, but not limited to, the right to education, employment and housing. A subsequent convention, the 1961 Convention, aims to prevent statelessness and reduce it over time. It requires that states establish safeguards in their nationality laws to prevent statelessness at birth and later in life.

Naturalised citizens are more likely than citizens by birth to have some other nationality and thus would be less likely to be rendered stateless, but it can be argued that in that case, there is no necessity for specifically mentioning in the legislation that naturalised citizens can be cancelled even at risk of statelessness.

The House of Lords debates on the amendment proposed that the Secretary of State should have reasonable grounds to believe the deprived persons could acquire another nationality so that people would not be rendered stateless without any safeguards in place. Adding a higher standard of conduct ('seriously prejudicial to the vital interests') was also considered an important means of constraining widespread statelessness (Hansard HL Deb 17 March 2014). Yet, under section 10 of the new Nationality and Borders Act 2022, the government is now allowed to strip people of citizenship without giving them notice to appeal against the measure, thereby diluting the earlier protections as people may remain unaware of their loss of nationality while outside the country (Prabhat 2021b). In this manner cancellation powers have morphed into targeted instruments of bordering effective especially against naturalised citizens and multiple nationality holders. These citizens who have links with other countries are also more likely to be of minority ethnicity.

The legal scene shifted once again when British-born Shamima Begum was stripped of her citizenship in 2019. Begum left the UK at the age of fifteen with two school friends to travel to Syria. She married an ISIL (Islamic State of Iraq and the Levant) fighter and had three children, who all died as infants. She was detained in the Al-Roj camp run by the Syrian Democratic Forces, where conditions are very poor, and is still in Syria at the time of writing. Begum wishes to return to the UK but in February 2019 the

Secretary of State deprived her of British citizenship due to considerations of national security and refused her leave to enter the UK to challenge that decision. The Home Secretary removed Begum's British citizenship, arguing that she was eligible for Bangladeshi nationality through her parents and would therefore not be rendered stateless, but this particular proceeding is not about the issue of statelessness but about whether she could enter the UK to challenge the decision to cancel her citizenship.

Begum sought leave to enter the UK so that she could pursue an appeal against this decision, but her application for leave to enter was refused. Begum challenged both the decision to deprive her of citizenship and the decision to refuse her leave to enter the UK. The Special Immigration Appeals Commission found that, as Ms Begum remains detained by the Syrian Democratic Forces in a camp, she cannot give effective instructions or take any meaningful part in her appeal. This means that her appeal cannot be fair and effective. The Court of Appeal agreed, holding that Begum should be granted leave to enter the UK so that she could pursue her appeal. The Secretary of State appealed to the Supreme Court.

In the *Begum* case, [2021] UKSC 7, the main right at stake before the Supreme Court was the right to a fair trial, as Begum was unable to enter the country to participate in the proceedings before the Special Immigration Appeals Commission (SIAC). Her lawyers submitted that they were unable to contact her and take instructions from her from the camps in war-torn Syria. The Supreme Court refused to let her return. It said that fair trial is subject to public safety. The Supreme Court stayed Begum's appeal indefinitely and observed that 'if a vital public interest – in this case, the safety of the public – makes it impossible for a case to be fairly heard, then the courts cannot ordinarily hear it'. Applying this to Begum's situation, the court suggested that

> [t]he appropriate response to the problem in the present case is for the appeal to be stayed until Ms Begum is in a position to play an effective part in it without the safety of the public being compromised. That is not a perfect solution, as it is not known how long it may be before that is possible. But there is no perfect solution to a dilemma of the present kind.

The court did not focus on the nature and extent to which this right was engaged in the case and eventually decided the case on applicable standards of review (Aolain 2020; Prabhat 2023; 2021a). In the coversheet to the judgment, there is a note on which point 3 is:

> The steps taken on behalf of the Secretary of State and Her Majesty's Government to facilitate Ms Begum's involvement in the deprivation

> appeal, as described in the Witness Statements of Lauren Cooper dated 12 October 2020 and 5 November 2020, shall be confidential and no party or other person shall publish or disclose the same.

Given that confidentiality, in the interests of national security, permeates each aspect which could potentially relate to the issue of fair trial, there is only limited information about future possibilities (such as steps that may have been taken or will be taken by the government). Meanwhile there were reports that a Canadian spy aided in trafficking Begum and several others to Syria, thereby raising issues of state complicity in her situation (Baker 2022).

The Home Secretary removed Begum's British citizenship, arguing that she was eligible for Bangladeshi nationality through her parents and would therefore not be rendered stateless. Nationality acquisitions of this kind are termed 'dormant citizenships' by scholars (for example, Jedlicki and Lamarche 2020). The SIAC agreed with the Secretary of State and held that Shamima Begum is a citizen of Bangladesh and so would not be made stateless by being stripped of her British citizenship (*Begum v Secretary of State for the Home Department* [2020] All ER (D) 43; 7 February 2020). Yet, on 20 February 2019, Bangladesh issued a statement saying Begum did not have Bangladeshi nationality and would not be allowed into Bangladesh (Addley and Ahmed 2019). In May 2019, Bangladesh stated it would seek the death penalty for Begum if she ever visited Bangladesh because of her connection with terrorism.

Once again, whether a cancellation measure survives a court challenge largely depends on the text and interpretation of foreign nationality law, in this case Bangladeshi nationality provisions and case law. The Bangladeshi Citizenship Act 1951 grants individuals born outside Bangladesh a right to claim citizenship if at least one parent is a Bangladeshi citizen at the time of their birth. This approach is suspiciously like forced nationalisation as it leaves nothing to individual choice. The provision goes on to say that dual nationality is not permitted, so someone with another citizenship 'ceases to be a citizen of Bangladesh' if they are over twenty-one. By now Begum was over twenty-one years of age but she had been stripped of British nationality. Irrespective of a technical residual citizenship, the fact that Bangladesh says she has no claim to Bangladeshi citizenship means that she is now effectively stateless (Gjevori 2019). The Shamima Begum case is as much about the precarity of citizenship as it is about expulsion from the national community.

After protracted litigation surrounding several preliminary issues, Begum lost her appeal against cancellation at the SIAC. In Begum's

case, the preliminary issues were about the alternative nationality and about whether she could be permitted to enter the UK to be present at her appeals proceedings. Begum was stripped of her citizenship while outside the country and thus initially sought permission to enter to be present at her appeal. This permission was denied by the Home Secretary, and she litigated the impact of this decision on her ability to instruct her lawyers and participate in her trial, arguing that it violated her fair trial rights. She lost that round of litigation in 2022 when it went all the way to the Supreme Court. Only after that was the case returned to the SIAC for hearing on the substantive grounds. Yet the court found 'credible suspicion' that Begum had been trafficked for the purpose of sexual exploitation, as her lawyers had argued. It also found that there were 'arguable breaches of duty' by state authorities in having allowed her to make the journey to Syria. In its decision, the SIAC stated that the case was 'about fundamental principles, rights and obligations'. It also said that 'the rule of law is non-negotiable'. But ultimately, it upheld the cancellation order. This decision has survived all domestic proceedings although Begum's lawyers are bringing it to the European Court of Human Rights for further challenges.

The Begum case and other cancellation cases take place within an opaque setting where national security trumps most other concerns. Cancellation of citizenship is easily done in the UK by a simple executive order (Home Secretary's order). In the UK ministers are given decision-making authority based on their collective responsibility to Parliament. They are presumed to have superior knowledge and expertise. The Home Secretary appears to have a nearly unlimited degree of discretion in cancellation cases, even when human rights are at stake. There is no judicial oversight at the point of cancellation. The Home Secretary assesses what is a threat to national security and then decides whether to cancel citizenship or not.

Affected individuals do not receive an opportunity to make representations prior to the decision being made. Indeed, at times, the person affected does not even have to be notified of the order. Moreover, challenging a deprivation order is difficult. Appeals are only possible after the order comes into effect, at which point cancellation will have already taken effect. Most people are outside the country when their citizenship is cancelled and are therefore unable to attend any legal challenges to the cancellation. Even when a person does appeal, their appeal is heard in a special court (the aforementioned SIAC). The SIAC holds closed proceedings when required in the interests of national security and gives closed judgments where national security-related material is involved. Special advocates provide legal support to appellants, but they only share the

gist of the case with their clients and cannot take instructions once they have had access to any sensitive material.

Apart from these hurdles for appellants, the judges ordinarily only apply a very light-touch standard of review in national security cases. However, section 6 of the Human Rights Act 1998 requires courts and tribunals to act compatibly with the rights found in the ECHR. As a result, when rights are at stake, courts usually apply the more searching proportionality analysis while reviewing ministerial discretion. They are supposed to examine whether rights were considered and attributed the appropriate weight by the decision maker. An example of how this operates is seen in immigration law where a person may challenge their deportation from the UK based on their right to a private and family life (Article 8 of the ECHR, for example: House of Lords in *Huang* [2007] UKHL 11 on Article 8 and proportionality). Courts try to determine through proportionality analysis whether individual rights are sufficiently protected.

While proportionality analysis is about the balance of factors, in the context of Begum's appeal (and others like it), it ought to be possible for courts to engage in a deeper analysis of the Home Secretary's decision making should the court have been so minded. Appellate courts (such as the SIAC) are not confined by the relatively narrow standards of review of decision making that ordinarily apply in judicial review proceedings. Instead, they can undertake what is called a 'full merits review' of a case. While this does not empower them to simply substitute their own views for those of the decision maker, they should examine how the rights components as well as other relevant information formed a part of the original decision. Considering this, the SIAC's reluctance to narrow down the Home Secretary's ministerial discretion in Begum's case, despite serious concerns about statelessness, issues of fair trial or trafficking issues, is surprising and raises concerns.

A wider implication of Begum's case is that anyone with any other national connection is now at greater risk of losing their British citizenship and becoming effectively stateless. The situation singles out naturalised citizens and other second-generation migrants born as British in terms of their holding a less secure citizenship status in the country. The SIAC noted in its decision that

> many right-thinking people in this country's Muslim communities (and beyond) feel that they are being treated as second-class citizens, and/or that their welcome is somehow contingent. The Commission has received a considerable body of evidence on that topic, and it raises important issues. It is not an answer to that concern to say that the Secretary of State has paid regard at a general

> level to inter-community relations or was given advice that the deprivation of Ms Begum was strongly supported by a majority of public opinion [para 397].

It then says that it has seen closed evidence that such an issue has been duly considered by the Home Secretary [para 398]. These contradictions cannot be explained to the public without transparency in proceedings.

Attribution of nationality, such as in the Begum case, is simply a mechanism of avoiding the creation of statelessness in the eyes of the law, while people are left stateless without any effective nationality.

An immediate implication of the Begum case is that for many, an appeal from outside the country is inaccessible. There are also many symbolic elements of cancellation, especially in Begum's deprivation (Gjevori 2019). As mentioned before, the situation worsened in 2022, as the Borders Act 2022 has now removed the requirement to provide notice of deprivation. People are even less likely to be able to challenge cancellation of their British citizenship while overseas when they are unaware of the decision to deprive them. There are also severe consequences of loss of citizenship for individuals. For instance, some British nationals were stripped of citizenship and then killed by drone attacks (Woods and Ross 2013). The lack of transparency about citizenship stripping means there is very little data on how many people are actually losing their citizenship for national security or other reasons of conduct and how many for fraud.

The situation raises concerns for migrants who naturalised to citizen ship and other second-generation migrants born as British. In many instances migrants may not even be aware of any eligibility they may have to their parents' countries of origin. Some South Asian countries have provided increased access to their national citizenships to descendants of their overseas nationals in order to facilitate greater links with their diaspora. Diasporic citizenship introduces a layering of citizenship rights. Sending countries/countries of origin may restrict political rights, inheritance and property rights but they usually leave open the right to return and reside (International Organization for Migration 2013). For example, dual citizens or people possessing Overseas Citizenship of India have no voting rights in Indian elections and the main benefit of holding overseas citizenship is increased travelling rights. The diaspora is a source of remittances and return migration or continued business links, so such changes incentivise continued investment in the Global South. Unlike in India, in the Philippines there are more extensive rights for the diaspora residing abroad such as voting rights, especially in recognition of their importance to the economy. The north–south differences in diasporic citizenship are also apparent. While the north, when accepting

multiple nationality, has devised comprehensive rules, similar initiatives for Global South diaspora have not always been received well in economically powerful countries. In the past, European countries such as Ireland have maintained nationality links with their diaspora but now there is a rollback from such links with poorer countries (as noted in the chapter on the European Union and the rollback of Irish citizenship). Changes in nationality measures to enhance links with parental countries of origin in the Global South now place British ethnic minority nationals at higher risk of losing their British citizenship.

Cancellation and new frontiers for multiple nationality holders

Citizenship stripping demonstrates how there is a resurgence of national scrutiny over multiple nationality holders and the creation of aliens out of citizens. According to Jurgen Habermas (1996), globalisation 'signifies transgression, the removal of boundaries and thus, a danger for the nation state which almost neurotically watches its borders'. Part of this process of being a global citizen has been the capacity to hold multiple nationalities. However, it does not necessarily indicate any decline in state sovereignty, as states have to recognise this capacity and multiple nationality holding. Britain has been very open to the retention of multiple nationalities by its citizens yet allegiance which was associated with kings and queens has now emerged as critical to nation-state belonging in law, both in cases of naturalisation and in cancellation of citizenship. Cancellation cases appear to illustrate a decreasing tolerance of multiple nationality holding (albeit in the guise of protecting against statelessness) and a further de-recognition of minority ethnicity/racialised citizens.

Questions of nationality are normally within the competence of national tribunals, and further national law determines whether nationality attaches or is lost. Dual nationality may cause practical problems which cannot be resolved if the two states adopt a strictly national attitude in the matter. The confusion from the application of multiple nationality principles and rules which increased with increasing migration and rights of nationality in different nation states led to the drafting and adoption of the 1930 Hague Convention, which sets out a multilateral approach to multiple nationality. The Hague Convention allows non-recognition so far as the rules are inconsistent with 'international convention, international custom' or 'principles of law generally recognized with regard to nationality'. Nationality cannot be forced on an unwilling individual, but the convention does not cover the kind of situations of loss of citizenship

for multiple nationality holders. There is also a 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality.

The idea of predominant nationality is of great importance in resolving this problem. In a hierarchy of the two nationalities of the claimant, the ranking nationality would be the principal or dominant nationality and the next in rank would be the other nationality, seen as the subsidiary nationality. A new legal concept, namely, that of effective and dominant nationality has emerged as a solution in international law but if this is only about emotive elements of citizenship it can become arbitrary in nature (Kannof 2011). Given formal legal requirements for naturalisation, it is also unlikely there are any emotive requirements for acquisition of citizenship in the UK (such as having to demonstrate patriotic fervour or allegiance in deeds and words). A determination which is being made at the point of cancellation where a person has already held a citizenship with all its connections for long, cannot be only about emotive aspects. Indeed, it is unclear why greater loyalty (or lack of disloyalty) is expected from naturalised citizens or multiple nationality holders.

The process of cancellation facilitates the further shoring up of the nation state's borders, as jurisdiction is removed from the bodies of former citizens who are effectively expelled from the borders in direct contrast to assuming jurisdiction, as in the Calvin case on subjecthood discussed in Chapter 1. Apart from keeping people outside the country, cancellation powers make expressive statements about who does not belong. As Bosniak writes, racial subordination has distorted formally egalitarian polities to create 'second-class citizens' who enjoy status of citizenship but who are nevertheless denied the enjoyment of citizenship rights or 'equal citizenship' (Bosniak 2000, 465). Through cancellation, certain – usually non-White – populations are managed outside the borders. The symbolic effects of cancelling citizenship have created a class of permanent 'alien citizens' or 'second class citizens' who now remain subject to additional border controls. By being considered potentially 'problematic', such citizens are rejected from full inclusion into membership.

International law prohibits statelessness but there is a greater risk for dual nationals of deprivation as they are not rendered stateless through cancellation of their British citizenship. As different kinds of citizens are affected in different ways through citizenship stripping, and specifically because it affects people with migration connections (in other words, mostly ethnic minorities), it is likely to violate the principles of non-discrimination and equality. This may appear to be an accidental effect of stripping rather than its intention, but it violates the basic principles of equality amongst all in a nation's citizenry. The European

Convention on Nationality has explicitly provided for non-discrimination between nationals, including between nationals by birth and those who acquired nationality subsequently, but the UK has not signed up to this framework, thereby again dragging its feet on human rights that are accepted in neighbouring countries. International law to a large extent is not taken seriously in this area, and there is only lip service paid to the idea of statelessness. Instead, what we see is a view of citizenship as most protected for a mono-national British citizen by birth, whereas everyone else can be stripped of it for a wide variety of conducts. This creation of various tiers of citizenship results in a second-class citizenship (Bosniak 2006). Ngai, while studying the treatment of East Asians in the US, writes that when ethnic minority citizens continue to remain aliens over generations, they can be called alien citizens (Ngai 2000). Ngai's work was in the context of migrants acquiring citizenship rights, but as regards cancellation the focus shifts to treating citizens as problems. The idea appears to be simply to prevent re-entry, and the restrictions act to banish people. Apart from the punitive effect of banishment, there is also the symbolic effect of such laws, which make some citizenship-holdings of lesser value than others and foster an idea of lingering foreignness.

Based on facts that are known so far, the Begum case is particularly challenging in the context of citizenship cancellation because Begum was born in the UK and had done nothing to acquire another citizenship herself. She merely had an eligibility which she had acquired through her ancestral heritage. This eligibility has been granted by a country which was cultivating relations with its diaspora. Begum could not have avoided this eligibility as it operated automatically through Bangladeshi nationality laws. This is an issue that has come up in other contexts of nationality laws when children of naturalised parents automatically acquire derivative secondary citizenships or eligibility for citizenships of their parental countries of origin. It can also come about if the state of origin refuses to recognise expatriation or derivative acquisition for their nationals, or grants one without requiring surrender of other nationalities. For example, Israel extends citizenship to foreign nationals of Jewish origin without requiring them to surrender their previous nationality. Many countries provide 'external citizenships' (Dumbrava 2014) or 'compensatory citizenships' (Harpaz 2018) to the descendants of their citizens, often to correct historical disassociations between people of similar ethnic origins. People may return through these links to their countries of ethnic origin or diasporic links in what has been called 'ethnic return migration' (Tsuda 2009; Kulu 2000) or 'diasporic return' (Olsson and King 2014; Mueller 2022). This can be driven by nostalgia and may or may not have merely a symbolic effect. For instance, these can be very contentious

in regions like the former Yugoslavia or in regions of the former Soviet Union as identity projects, but mostly it may simply be a choice made by individuals to reconnect with ancestral 'homelands' (Waterbury 2014). Although this has been termed 'kin-state politics' (Waterbury 2020), that pursuit of opportunities through diasporic links is the choice of an individual rather than being one that is unilaterally imposed on them as a punishment by another state.

The nationalistic politics in these types of projects are often about neighbouring countries competing for member citizens. Taken to its extreme, such projects can become about forcing nationals of other states to accept a foreign nationality – a measure that can be about forcibly occupying a territory and enforcing an identity on its inhabitants. An example of this was when Russia occupied Crimea and made Russian citizenship automatically applicable. It became mandatory for people living there to hold Russian passports to access healthcare, housing or other necessities (Hinnant et al. 2024). In recent times, people in occupied territories in Ukraine have been similarly forced to accept Russian citizenship and even to swear oaths of allegiance. They even had to undertake to fight for Russia. Yet such measures are in direct violation of the Geneva Convention on Civilians, 1949, Article 45, which states, 'It is *forbidden to compel* the inhabitants of occupied territory *to swear allegiance to the hostile Power*'. Some of these measures taken by Russia have been presented as welfare measures for the benefit of Ukrainian children, for example, by fast-tracking children's citizenship if their parents are detained or if they are orphans because of the invasion. Almost 20,000 Ukrainian children have disappeared into Russia or Russian-held territories, according to the Ukrainian government, where they are given passports and adopted as Russian citizens (Burkhardt 2023). Clearly this is an extreme example of forced nationality acquisition, different from the equally extreme situation of citizenship cancellation, which forms part of the political arsenal of state power play. Yet these measures are also taken when an emergency such as war, invasion or national security threat is ongoing or imminent.

For a well-rounded picture on how nationality operates it is important to acknowledge that nationality is not just a state prerogative over an individual, but also comes with concomitant duties and responsibilities which can be imposed on the state. Cancellation appears to be a measure that absolves a nation state of its duties towards citizens, but this raises the question of who bears responsibility for these people? Provision of diplomatic protection to nationals who are in need in foreign territories is a state responsibility (Foreign, Commonwealth and Development Office 2022). Under international law the UK and other nation states can grant

diplomatic protection to their citizens if it is shown that another country has committed an intentionally wrongful act against them. In such situations, if a dual/multiple nationality holder is involved, the main enquiry becomes who is the nation state responsible. The challenging scenario is where a dual national brings a claim against one of their states in their other state of nationality. Article 4 of the 1930 Hague Convention declares that 'a State may not give diplomatic protection to one of its nationals against a state whose nationality that person possesses'. In other words, an individual traditionally cannot invoke the protection of one of their states against the other. In its 2006 Articles on Diplomatic Protection, the International Law Commission adopted a more flexible rule, which relied on a test of predominant nationality; Article 7 provides that:

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

In recent times, the UK Government decided to exercise diplomatic protection over Nazanin Zaghari-Ratcliffe, a dual UK-Iranian national imprisoned in Iran (and one of a number of people who have been in such a position over the past few years). Zaghari-Ratcliffe was subject to human rights abuses, such as denial of fair trial and being tortured. All diplomatic remedies had been exhausted. It was then decided that Zaghari-Ratcliffe, although a dual national, was predominantly British (Foreign, Commonwealth and Development Office 2019). Zaghari-Ratcliffe was in imprisoned in Iran from 2016, and she was eventually released only in 2022 and flown back to the UK to be reunited with her family (Farrer 2022). Her situation serves as a cautionary tale on the challenges of multiple nationality as well as the scope and limits of diplomatic protection. The suspicion with which multiple nationality holders are perceived (despite often being inadvertent nationality holders) is based on the same concerns about loyalty and allegiance as underlining the cancellation cases examined in this chapter. Perhaps there is concern about political loyalties and patriotism when there may be multiple allegiances.

Targeting multiple nationality holders for cancellation is regressive in a world where the number of people holding at least two citizenships is constantly increasing, because of increasing mobility and different nationality regimes across countries. Despite the prevalence of assessment of foreign nationality in cancellation cases, and the wider reach of cancellation powers over citizens with dual/multiple nationality, the UK has one of the least restrictive regimes in terms of permitting as many

other nationalities as anyone desires. Upon acquiring other nationalities, one does not lose British nationality (Hansen 2002, 179). The Home Office does not assist other countries in enforcing prevention of double nationality (182). Historically this liberal stance to multiple nationality holding was linked to a soft power strategy for British nationality: it was considered beneficial for British nationality to remain with people even if they subsequently obtained other ones (186).

The phenomenon of dual citizenship has spread across geographic and demographic borders to become a normal status for millions of individuals and a legislative practice in approximately half the countries of the world. Several global developments and individual state changes have impacted on this trend. Regional differences in this development indicate that Asian countries have been more hesitant to allow dual citizenship than European and American countries. Despite a previously hostile stance on dual citizenship, it is clear that there has been a major shift in global attitudes toward it and that more and more countries are allowing their citizens to hold dual citizenship.

By contrast, in the 1980s very few countries allowed dual citizenship. In the past, citizenship generally coincided with an individual's national centre of gravity (practical and affective), precisely because mobility across nations was limited and the individual had to choose sole primary residence. While some states have now changed their legislation in order to accommodate citizens abroad, others have changed their legislation in order to incorporate migrants as citizens in their country of residence in order to facilitate integration and political participation. These different aims of allowing dual citizenship can be categorised as an 'emigrant' or an 'immigrant' approach to legislation change. These terms are in no way exclusive and do not illustrate the specific paths taken to allow dual citizenship by different states. Many poorer countries strengthen diasporic connections to ensure remittances from abroad can boost their economy. Apart from the refusal to recognise expatriation by states, dual nationality may also take place at birth if there is both nationality by birth on territory (*jus soli*) and through blood-links (*jus sanguinis*) (De Padua 1985). To avoid the problem of children of citizens born abroad becoming aliens in the country of their parents' nationality, some amount of link through descendance was added to the mix.

Multiple nationality holders may have varying degrees of foreignness (based on external bonds) which may make them less integrated in homogeneous communities. Even with inadvertent nationality holding, people may be disqualified from public office. In a key Australian case, *Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon* (commonly referred to as the 'Citizenship Seven

case'), the Australian High Court decided that a dual citizen, irrespective of whether they knew about their citizenship status, will be disqualified from Parliament unless they are irremediably prevented by foreign law from renouncing the foreign citizenship and have taken all steps that are reasonably required to renounce that foreign citizenship (Crock 2017).

Citizenship laws often combine ethnic, cultural or civic elements, but in practice tend to incline towards one or another (Honohan 2007). Birthright citizenship entered the common law tradition with Calvin's Case (1608), 77 ER 377, which invoked the concept of 'ligeance' to legitimise the bonding of subjects to monarchs from birth (King 2007). Yet in more recent times, *jus soli* citizenship had been pejoratively described as accidental citizenship, for example, citizenship of individuals who were born on US territory to non-citizen parents (Nyers 2009). Nyers looks at the case of Yaser Esam Hamdi who was born in the US and was captured in Afghanistan in 2001 and designated an 'illegal enemy combatant' by the Bush administration. He was a birthright citizen but was detained for almost three years without charge. The United States government claimed that he was fighting with the Taliban against the US, and he was eventually released on the condition that he renounce his US citizenship and commit to travel prohibitions and other conditions. He was deported to Saudi Arabia, where he had been raised. Nyers points out that the discourse of 'accidental citizenship' was used for stripping Hamdi of his citizenship because an accidental citizen can be a risky one. In the past American citizens of Japanese descent were interned similarly as 'accidental' and enemy citizens. As mentioned in Chapter 5 on the family, such citizens are also called 'anchor babies', and their parents 'birthing tourists', because they are seen as expedient means to access the benefits of American citizenship while not really 'deserving it'.

Irrespective of these criticisms of *jus soli*, people can now gain and maintain multiple nationalities. Does this make citizenship less emotive and more instrumental? Spiro argues about the importance of location and shared space (birth or naturalisation) in creating identity in citizenship regimes and adds that dual citizenship creates a slow but sure move away from nation-state membership (Spiro 2008). Perhaps easy access to citizenship devalues formal citizenship because it makes it easy to acquire citizenship without emotional stirrings. This takes away from patriotism, a fundamental concept in the global order of states. But the difference in power equation between nation states and individuals is so great, that while people may be permitted to make these choices about their state affiliations, nation states should not be permitted to arbitrarily dissociate from individual citizens. With cancellation, this is the trend that threatens individual liberties and human rights.

Conclusion

This chapter on law and emergency frameworks demonstrates how re-bordering has taken place both between, and within, nation states and regions during the global Covid pandemic and in the interests of national security. The already wide executive discretion on who enters national borders becomes even wider when a health or security emergency prevails. It is also clear that those who are already vulnerable are the ones most affected by new measures that curtail entry and movement. Taking a long view of developments in times of emergencies, it becomes evident that legal exceptionalism on the basis of public health and national security has been a recurrent theme in migration control, and not just a modern manifestation.

Law centralises discretion in times of extended emergencies, and it is difficult to identify the parameters and limitations of that discretion. It becomes protected from most legal scrutiny by others such as courts. Although proportionality can be a check on the discretionary powers of the executive in times of emergencies, states are given considerable constitutional latitude in the face of immediate crisis. The pre-emptive nature of bordering, in such circumstances, is to prevent movement and journeys, in the first place through the use of technology. If such movement still takes place, the law provides scope for further detention and deportation from national territories. This can operate to exclude both foreigners and citizens.

Offshored or externalised borders produce new categories and distinctions such as between citizens and migrants, and between different categories of migrants (refugees, economic migrants, expats) and their corresponding forms of mobility and immobility. The pandemic and citizenship-stripping in their own unique ways signal the decline of cosmopolitanism, because they both affected people with multiple loci in their lives more than they did the non-migrant populations. The pandemic also reveals how pre-existing inequalities are reified during times of emergencies. The use of technologies such as Covid passes, which formed part of the biometric database and were used at local, regional, national and global levels, indicates that law and technology will likely become further intertwined, thereby relocating borders from border checkpoints to people's persons and nearby physical entities, or even no longer requiring the involvement of other immigration personnel in monitoring them.

When the border is an automatic and integrated entity, migrants do not need to actually move borders, and the violence of borders is internalised. Although othering occurs during both emergencies and 'normal'

times, emergency bordering creates additional layers of 'foreignness' due to the nature of these threats crossing borders. Governments acquire new functions which range from the conferring or withdrawing of status, creating exceptional legal frameworks which suspend rights, the privileging of immigration powers as nation-state and executive privileges, and the confining of discretion with individuals holding power, as well as the removal of scrutiny from decision making by those in power.

Cancellation cases are increasingly used to prevent re-entry of 'problematic' citizens for purposes of counter-terrorism. The manner in which the legislative provisions for cancellation of citizenship are structured results in placing ethnic minority citizens at greater risk of loss of citizenship. As seen in previous chapters, the history of legislative changes to free movement of erstwhile Commonwealth citizens from the 1960s onwards as well as the juxtaposition of 'hostile environment' legislation and Brexit rules, already creates a process of continued colonisation over internal ethnic minority populations. The worsening inequalities of the pandemic resulted in hardened exclusions. Racialised effects could haunt future law regimes, especially should more pandemic variants or infections come back. Cancellation operates in normalised exceptionalism and absolves nation states of the responsibility for their citizens, ushering in a new way of migration control.

Far from being the archetypical post-national global movers and shakers, many multiple nationality holders have been adversely affected by conflicts of national jurisdictions and laws. These manifest in various ways, not least in their not being able to obtain diplomatic protection in certain countries and, in the case of citizenship cancellation, in their losing primary nationality. Yet, many dual nationals are either inadvertent nationality holders or wish to maintain connections of meaningful kinds to more than one country because of their life situations. In either instance, making their rights conditional comes across as a penalty imposed on some for retaining connections that transcend borders. When diasporas of the Global South, who have already experienced colonisation in the past, become subject to these new restrictions, global power inequalities are perpetuated inter-generationally through this new pattern of bordering.

While on the surface nationality appears to lose much of its relevance in a global world, the framework of 'exceptionalism' in national security has further extended state powers of immigration control to spill over into nationality. Cancellation takes place against a backdrop of normalised emergencies, and the law transforms citizens into foreigners, often without any right of appeal or any notice of the cancellation. Arbitrary distinctions are made between birth citizens (a mix of where people are

born and how their parents link to being British) and naturalised citizens (migrants who are long-term residents and undertake the legal process to become citizens). Thus, the wide discretion exercised by the Home Secretary over cancellation cases enables the state to avoid international law duties, such as preventing trafficking, avoiding statelessness and providing a fair trial.

Counter-terrorism measures operate to create differentiated border controls, which are not so much about the location of people but which specific set of people these are and their likely affiliations. In this sense, the case of national security and its logic is different because it probes deeper into people's conduct, and even their ideas and speech, to potentially exclude them through movable border controls. The two kinds of bordering are different in terms of national security, focussing more closely on conduct and leaving people permanently outside of borders (in some instances) while pandemic-era bordering was linked more closely to time and location. Yet the two are connected, because pandemic bordering becomes security linked at times, particularly towards the end of the pandemic.

As seen in the previous chapters, even the right to seek asylum has been eroded through various measures, such as blocking arrivals of those seeking asylum and through the denial of basic human rights and humanity. Yet all is not bleak in terms of the role of the law in these situations. Law is also used to challenge state action as being disproportionate in response to the threats. What renders most of these challenges ineffective, however, is the wide discretion given to the executive in most jurisdictions whenever an emergency framing of the law is adopted. In order to make legal scrutiny more efficacious, judicial oversight of these measures should be preserved and there should be more accountability as regards the measures that are adopted, including the provision of better data and evidence to endorse the necessity of certain steps.

Notes

1. UK Visas and Immigration (n.d.) Tuberculosis tests for visa applicants. https://www.gov.uk/tb-test-visa. Accessed 22 October 2025.

Conclusion

> 'The border is mighty, but even the parting of the seas created a path, not a barrier.'
>
> – Alberto Ríos, *The Border: A Double Sonnet*

This book, *Migrating Borders and Citizenship in Law: Scales, Locales, Themes and Practices*, argues that law has multiple dimensions and mechanisms for breathing life into borders. These roles operate at different locales and scales (from worldwide to the continent, or to the family or workplace) as well as through different mechanisms (such as preventing entry, withholding access to resources or deportation). Writing this book has been a layered, intellectual and deeply personal experience, filled with thoughts of my grandmother's and my mother's migration journeys in days of empire, and mine in terms of nation-state citizenship. Ours are stories in common with many who start out as foreigners in new places. In law, foreignness is shed with time. But foreigners and residents are not binary categories and instead exist in varying legal statuses at different points of time. In terms of constitutive rules of membership, law ascertains in the first place who crosses borders and who does not, and who remains foreign despite being within national borders. Through processes of naturalisation or free movement residence, law can reduce degrees of foreignness and create a sense of legal membership and belonging, at least for some.

As noted before, Ayelet Shachar in her book *The Shifting Border* (2020) has discussed how borders have become less territorial as they have become movable. They are no longer at fixed geographical points, due to the application of law and technology to enforce borders extraterritorially, as well as to apply them even to internal populations. Her work ably demonstrates that such a shift has taken place and, the chapters of this book present much evidence in support of the movement of borders, even

when people do not cross them. Indeed, that is why this book is titled *Migrating Borders*, to underline its focus on the dynamism of borders, rather than just on the mobility of people. However, borders have never actually been simple fixed geographical points, as can be seen during the expansion of empire as well as its contraction, and the post-war developments in immigration law in the UK and in Europe.

Applying Mariana Valverde's approach to temporal and spatial scales in sociolegal studies (Valvedere 2015), this book has selected different time periods and geopolitical entities for assessing the role of law in borders and bordering. The advantage of applying this approach is that one can expose some of the reasoning given over space and time for migration control. The primary reasons for deciding who is part of a collective project (whether nation state or continental grouping or empire), and who is not, are about workforce requirements, demographic reproduction and security of the collective enterprise (whether health or national security). This book has revealed numerous instances where this framing of the requirements of migration control repeats itself over time and across different scales of geography.

As we have seen regarding empire (Chapter 1), emergence of the nation state (Chapter 2) and transcontinental re-bordering (Chapter 3), the functions of law in bordering vary from conferring or withdrawing status, creating exceptional legal frameworks which suspend rights, the privileging of immigration powers as nation state and executive privileges, and the confining of discretion, with individuals holding power. Laws may also remove scrutiny over decision making by those in power. Conversely, law can also be used to set up free movement regions, as well as to provide rights and safeguard liberties. When bordering takes place through law, there are some justifications which consolidate the more repressive elements in law and supress its emancipatory aspects. These justifications are economic welfare, controlling access to the labour market, regulation of conduct for national security, public health and demographic control, which permeate different periods of time. The manifestations of these frames of immigration control are at the workplace, in families and everywhere in society through emergency framing which becomes commonplace in nature.

In Chapter 1 on empire, Lukes's (2023) work on power and his discussion on the third dimension of power provides an analytical explanation for the role of law in creating a sense of legitimacy. Law facilitated domination through a veneer of legality, even when furthering illegitimate ends such as colonial expropriation across empire. Lukes's third dimension of power reveals how power can create and maintain the hegemony of colonialism. In this instance it achieves this through the export of

common law and setting up of courts and legal training in colonial outposts as well as the use of the English language. It was not all about brainwashing or hoodwinking people; often these choices coincided with the short-term real interests of colonised people, especially with those of the local elites. It is also possible to observe the other two dimensions of power operating in how law functions in bordering. Law sometimes keeps agendas and issues off the table (this is the second dimension of power which manifests through inaction), for example by simply excluding certain categories from rights or maintaining homogeneity in immigration rights through preferred characteristics (such as desirable workers as seen in Chapter 4 or of family members who will not be economic liabilities as seen in Chapter 5). It is also present in its first dimension, evident in action, as it can proactively roll back free movement or externalise borders through agreements (for example, the Windrush generation in Chapter 2 or Brexit in Chapter 3). In emergencies it contains or excludes people through overt acts (Chapter 6). Through each chapter in this book, we can see the close correspondence of law, bordering and the various dimensions of power (evident in action and inaction, as well as more insidious manners of legitimation).

In every chapter of this book, it is evident from the analysis that, hand in hand with law and law enforcement, borders create foreigners and differentiate them from residents. During times of empire, exploitation of people elsewhere for the betterment of colonisers in powerful countries was a given, in terms of the power inequities between colonisers and colonised peoples. It was normal to monitor family lives (including codifying personal laws of different religious and ethnic groups in colonial lands), confining people to particular work or industries (for example, forcing farmers to grow cash crops or not allowing lawyers to practise in courts without certain qualifications from England), or normalising emergency use of police and military powers in domestic law and order situations in order to retain colonies. People were moved across empire or deployed and incentivised to work in priority areas for the empire (for example, slavery, indentured labour and armed forces). It took time and strategic use of resources as well as changes in global political circumstances to disentangle the unequal relationships of empire.

With the advent of human rights and the rise of nation-state equality across the globe, there was a period when many human beings could exercise free movement and acquired the ability to access resources and contribute to global economies worldwide. This period coincided with the advent of mass travel. With more people travelling from poorer parts of the world, soon borders became widely prevalent and harder to cross. Modern times thus replicate and repeat many structural inequalities,

particularly those seen in formerly colonised spaces. However, the monitoring of populations, mostly racialised ones, now happens on national soil at the core of former empires rather than overseas in colonial outposts. Migration as an individual choice is streamlined towards national interests of wealthier nations and discouraged or violently stopped when considered to be against popular will or national interests. Richer countries (which had previously become wealthy through colonising the source countries of modern migration) could now pick and choose the 'desirable' migrants while blocking out others who might be risks to their economies or their security or were just 'too different' in their eyes. While borders and bordering practices were present in the past, they have now become ever less exceptional in nature. Now they not only demarcate nations and territories, but also transform long-term resident people, including citizens, into foreigners or migrants without a right of presence by invading homes, workplaces and neighbourhoods.

Throughout, the focus of the book is on the law and how it operates to categorise and demarcate eligibility and access to resources. The implication is that courts, legislators and the public should not just derive unquestioning authority from the law but be open to understanding the political, historical and economic imperatives behind the law, at the same time being more cognisant of race, class and gender in this area of law. The law has always had a central and multidimensional role to play in bordering. The central idea of creating different categories of human beings who have different rights is based on sorting out who is actually worthy of being a full member of the society located in that particular time and place from who is deemed unworthy of full membership. This is the central project of migration control.

Law has at least three broad dimensions in which it operates for this purpose. First, it lays down the expectations of state power in terms of rules and legislation so these can be implemented, sometimes to the detriment of the individuals affected. Second, it legitimises domination over those who do not benefit from the rules, often from a neutral or even an overtly beneficent perspective (such as exporting the rule of law for greater justice) while actually having disadvantageous effects on those lacking formal and/or substantive membership. Finally, it can be mobilised, in often unexpected ways, by those seeking to challenge bordering practices. This third dimension of the role of law has become more prominent with the rise of human rights instruments but is now threatened by rising nationalism and rollbacks in commitments to universal human rights.

We can follow these patterns in the exclusionary frames of immigration control: national security, law and order, productivity needs and welfare

access. Health and demographic preferences linked to race and gender have been present ever since it has been possible to exclude others, but these frames become more discretionary and delinked from rights or procedural safeguards (including those of review) with time. The workplace and the family have become spaces where the intersections between the national, continental and remnants of empire are racialised and gendered to sort people into categories.

The growth in unreviewed and enlarged discretionary executive powers of exclusion seems particularly out of step with the human rights frameworks to which most nations have signed up. There are few checks if executive discretion is exercised in discriminatory or arbitrary manners. If these powers are exercised against specific kinds of citizens (for example, racialised citizens or long-term residents) there is a real danger that the idea of equal citizenship and fairness within nation states could be subverted. Unlike empires, nation states usually have charters (whether constitutional, legislative or simply by tradition) of inclusion and equality for their citizens over and above, or in addition to, human rights. If these arrangements are undermined there would be widespread deportations of marginalised citizens as well as the likelihood of the creation of a permanent underclass of less-valued citizens or residents who are only viewed instrumentally as being useful for the common good. Such citizens would not be able to partake of the full benefits of citizenship or residence. Emergency powers, and their widespread as well as long-term use, make these enduring inequalities heightened and pernicious.

The spread of populist, anti-migrant and anti-migration rhetoric has become pervasive, with populist political parties which oppose immigration and asylum increasing their vote share across most of Europe and North America. Riots that target racialised minorities in the UK and bring to the brink of power anti-immigration parties such as in France and in the Netherlands demonstrate how immigration has become a lightning rod for hate rhetoric. Resurgence of nationalism is also exemplified by Brexit and the connected immigration law changes. In 2025, Trump (at the time of writing this conclusion) has deported migrants who are 'undocumented' and revoked the legal status of many migrants who held secure status.

The categorical exclusion of foreigners present in our midst is often an indicator of rising national fervour and a return to ethnicised and racialised notions of national belonging. With 'hostile environment' legislation in the UK, it has now become the duty of individuals who control access to resources such as housing (landlords), healthcare (medical services staff) and employment (employers) to monitor the immigration status of others. Indeed, finding who is the 'other' has become a duty

for all of us. What are the implications of such developments? Are we to live in a continued dystopia of borders everywhere as law and technology serve the rise in ethnonationalism globally? Are we at the end of an era of human rights where the tools to check discrimination no longer exist, except in national promises which fluctuate with politics?

Perhaps there are pragmatic advantages for one party in the continuation of relationships of exploitation, but such exploitation should never be justifiable in the name of law. For example, perhaps the modern state is looking for a quick-fix pragmatic remedy to counter terrorism, but this should be checked against the standards of the rule of law. The grave implications for the rule of law intensify when different legal categories in immigration, nationality and asylum are collapsed into one. This ought to be considered as legally distinct, but politics often conflates these and renders every legal status entirely precarious. Executive discretion should be narrowly tailored for nationality and asylum matters to conform with international law, whereas it can be wider in scope for immigration so long as principles of fairness and non-discrimination are adhered to in each instance. Only then can there be conformity with the basic principles of the rule of law.

With increasing migration and a rise in naturalisation as well as dual/multiple nationalities, there should be the delinking of national citizenship from any kind of ethnic preferences in the host population, but as immigration control is normally linked to national origins, national membership continues to remain closely associated with ethnicity. State sovereignty makes it difficult to challenge on what basis newcomers are treated differently, and the barriers which are placed on them. At the same time, there are expectations of contribution and assessment of deservingness placed on individuals.

A modern nation state does not need token spaces of multiculturalism, but real recognition of plurality, which is a part of shared history, and diverse groups of people should be stakeholders in its future. Integration is usually about common language and understanding of the majority culture, but it should be much deeper in terms of mutual respect and support.

Integration (just like the decision to migrate) is normally depicted as an individual choice, but local communities can play a huge role in proactively welcoming those who migrate and providing them with supportive conditions to integrate. Cities and city authorities, for instance, can certainly act to oppose national politics that are anti-migrant, since cities host most migrant populations and draw on migrant work forces. Some cities have embraced their titles of global cities or joined the movement to become 'cities of sanctuary' for asylum seekers. Can these models be replicated on national scales (or even continental ones) to create truly

global nations or nations of sanctuary? Or will the rhetoric of becoming Starmer's 'island of strangers' keep echoing Powell's ill-chosen 'rivers of blood' invectives (Walker 2025; Burke 2025).

Only time will tell, but for now the hope captured in the words of renowned poet Rabindranath Tagore provides a suitable substitute. Tagore won a Nobel prize for literature in 1913 while India was still a British colony, for his poems written in Bengali. He became a leading inspiration in India's independence struggle and turned down a British knighthood in protest against imperial violence. In this poem, 'Gitanjali 35' from Gitanjali (Song Offerings), he beseeches the supernatural powers for a new future for his country, but it is equally a plea for all of humanity. Let nation states rise above being realms of prejudice.

Where the mind is without fear and the head is held high;
Where knowledge is free;
Where the world has not been broken up into fragments by narrow domestic walls;
Where words come out from the depth of truth;
Where tireless striving stretches its arms towards perfection;
Where the clear stream of reason has not lost its way into the dreary desert sand of dead habit;
Where the mind is led forward by thee into ever-widening thought and action
Into that heaven of freedom, my Father, let my country awake.[1]

Notes

1. Rabindranath Tagore, *Gitanjali (Song Offerings), A Collection of Prose Translations Made by the Author from the Original Bengali*, intro. by W. B. Yeats (London: Macmillan, 1913). Public domain.

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