The Immigration Act 1988

A discussion of its effects and implications

Chris Platt

Policy Paper in Ethnic Relations No.16

Centre for Research in Ethnic Relations
University of Warwick
Coventry CV4 7AL

May 1991

Contents

INTRODUCTION

In the House of Lords on the 4th March 1988 during the Immigration Bills second reading debate Lord McNair offered the following indictment of the legislation before him:

> It is another mean-minded, screw tightening, loophole closing concoction imbued with the implicit assumption that almost everybody who seeks to enter this demi-paradise of ours has some ulterior, sinister and very probably criminal motive and the sooner we get rid of him the better.
> (House of Lords 4th March col 389)

On the other hand the Government has characterised the Bill as being 'merely a technical measure' designed to promote 'harmonious community relations'. Mr Timothy Renton, a Home Office Minister, in the second reading debate in the Commons argued that,

> The Bill makes modest but sensible changes. Our immigration controls will remain effective and flexible. That is in the interests of all people in Britain, whatever their ethnic origins.
> (Commons 2r col 921)

That such diametrically opposed views cannot be reconciled is clear. What will be done is to show how the Bill is supported by a fundamentally racist and anti-refugee ideological structure of beliefs and assumptions. The Bill must also be located in the more general context of immigration policy and the implications of this Bill for the future development of not only British but European immigration control policies.

The dynamic behind the Conservative Party's attitude towards immigration policy can be identified in their 1987 Manifesto where it is argued that,

> Together we are building One Nation of free, prosperous and responsible families and people. A Conservative dream is at last becoming a reality.

In the context of this desired objective the 1988 Immigration Act can be seen to be developing the racist and restrictive tradition of immigration control that has been in place since 1962. This is achieved both through direct and crude attacks on rights apparently enshrined in the 1971 Immigration Act and through a simbiotic reconstruction of the concepts of prosperity and responsibility as further and expanded entry requirements.

The development of such 'means tested' aspects of immigration policy must not be seen as being independent of the general restrictive and racist operation of immigration control but rather as another method whereby entry can be refused to those who, other than for such restrictions could previously have been said to have an absolute right to enter the U.K.

This then is the context in which the actual effects that the passage of the Act has had on those seeking to enter this country and the important implications for the future development of immigration policy that derive from the changes made by the legislation will be discussed. Throughout this analysis it will be stressed that in many ways the significance of this legislation lies as much in what it paves the way for as in what it actually changes and that if future restrictive changes are to be defeated then an appreciation of the complex dynamic totality of immigration is vital.

CLAUSE ONE: THE REPEAL OF SECTION 1[5] OF IMMIGRATION ACT 1971

Clause 1 of the 1988 Immigration Act, 'The Termination of saving in respect of Commonwealth citizens settled before 1973' states that,

> 1. Section 1[5] of the Immigration Act 1971 is hereby repealed.

The section being repealed provided that as regards the operation of immigration control through the immigration rules,

> The rules shall be so framed that Commonwealth citizens settled in the United Kingdom at the coming into force of this Act and their wives and children are not, by virtue of anything in the rules, any less free to come into and go from the United Kingdom than if this Act had not been passed.

The purpose of s1[5] was then to provide Commonwealth citizens who were settled in the U.K. on the 1st January 1973 with the statutory assurance that they and their dependants would retain the immigration rights they held at that time. Thus, those protected by s1[5] have since enjoyed an absolute right to bring in their wives and children under the age of 16 free from the constraints exercised through the conditions set out within the immigration rules. For families there now include the primary purpose test, an 'intention of living permanently with the other', that the parties to a marriage have met, that there 'will be adequate accommodation for the parties and their dependants without recourse to public funds' and that they will be able to maintain themselves and their dependants without recourse to public funds. (H.C. 293) What then will be the effects of the repeal of s1[5]? The J.C.W.I. have stated that,

> Its abolition means that no British citizen and no Commonwealth citizen has an absolute right to live here with a foreign spouse: that right will be qualified by whatever tests are considered appropriate by the Government of the day.
> (JCWI Briefing Paper para 1.1)

The ending of the s1[5] protection will effect the Bangladeshi community most immediately as in 1986 over 70% of Bangladeshi wives and 90% of Bangladeshi children entering the U.K. did so under the provisions of s1[5]. (JCWI para 1.5)

Moreover, many members of the Bangladeshi community and any sponsor who is unemployed or in receipt of public funds as defined in s1[1] of the 1985 immigration rules changes, will find themselves unable to satisfy the conditions of the rules as set out above. High levels of poverty and unemployment will facilitate the use of 'recourse to public funds' refusals. It is therefore nonsensical to argue as T. Renton does that,

> The changes will affect people regardless of origin.

The structures of Immigration and Nationality law ensures that the effects of these restrictions will be focused on members of the black communities. As Mr Drabu of the UKIAS points out many of the most restrictive aspects of the immigration rules simply do not have any relevance for white people,

> the facts are clear that as far as black immigrants are concerned they are the only ones who now want their families united in this country. As far as whites are concerned they come into a different category, for example as an EEC citizen, they have a very special place in the immigration policy of this country. It does not apply to them.
> (Interview Transcript)

The realities of the world-wide inequalities in wealth make a mockery of any claim that suggests that the immigration rules will apply equally to all peoples. The fact that the Bangladeshi community will suffer most severely from the repeal of s1[5] is being compounded by the actions of councils such as Tower Hamlets. Their policy of evicting Bangladeshi families on the purported ground that in leaving accommodation in Bangladesh they have made themselves 'intentionally homeless' will make it extremely difficult for many families to enter the UK or even to continue to live in this country.

In this respect the Court of Appeal decision in R v Tower Hamlets L.B.C. Ex Parte Monaf, Ali and Miah (Times April 28 1988) offered only very limited protection. The Council were held to have been wrong to treat the Bangladeshis involved as being 'intentionally homeless' but only on the grounds that they had failed to discharge their duty under s60[5] of the Housing act 1985. This obligation is to consider the difference between,

> the prevailing housing conditions in the authority area and the pattern of life which would be a factor justifying a departure from the accommodation in Bangladesh which otherwise it would be reasonable to expect the person to occupy.
> (Times April 28 1988)

Subsequently, Tower Hamlets Council reviewed their actions in the light of this decision and were able, after an appropriate consideration of s60[5], to decide that they were within the law to continue with the evictions. This was despite the fact that the 'prevailing housing conditions' in Bangladesh consisted of 2 rooms accommodating 20 people and that as Mr Miah stated,

> There is no home and no work for them back in Bangladesh
> (Guardian June 7 1988)

It is therefore still open to councils to treat recent entrants to the U.K. as being 'intentionally homeless' due simply to the fact of their migration and to be within the law as long as the balancing exercise provided for by s60[5] is correctly considered. The repeal of s1[5] is then a direct encroachment upon the already limited legal acknowledgement of the concept of a right to family life as set out in Article 8 of the European Convention on Human Rights.

However, the actual effects of the repeal are likely to be mitigated in a number of circumstances. These cases will include all those who make applications prior to the Bill gaining its Royal assent, this represents a significant number as the JCWI estimate that there are around 9,000 people in the queue for entry in Bangladesh at the present time (JCWI Briefing para 1.5). In addition those who are British citizens by descent or who are women married to a British man before 1983 and thereby establishing a right of abode will be able to avoid the effects of the repeal. For those not within one of the above categories the consequences of the repeal will obviously be harsh.

These then are the direct effects of the repeal of s1[5] as far as people seeking entry to the UK are concerned. To assess the full significance of a clause such as this it is necessary to examine whether the aims of the introduction, as stated by the Government, will in fact be achieved by the legislation as it stands. In this instance they will not and this is because those stated aims are erroneous. The real reasons for the repeal have more to do with the desire to restrict, as far as possible, the number of black people entering the UK than with the establishment of a 'firm but fair' system of immigration control.

Furthermore, the implications of the repeal of s1[5] are significant in that it represents a potential breach of Article 8 of the European Convention on Human Rights. It is also important in the way in which it establishes an increasingly close link between immigration status and entitlement to welfare benefits, and

the way in which the use of repatriation as a method to achieve 'family unity' is brought onto the political agenda.

One of the prime arguments propounded by the Government in favour of the repeal of s1[5] was that,

> Following the Abdulaziz case at the European Court of Human Rights, the Government gave a commitment to end that element of sex discrimination.
> (D. Hurd 2r Commons col 790)

The Government is therefore presenting the repeal of s1[5] as being a direct result of the decision in the Abdulaziz case. This argument does not stand close inspection.

In the case of ABDULAZIZ, CABALES AND BALKANDALI v. UNITED KINGDOM (Series A. No.94 Application Nos 9214/80, 9473/81, 94781 28th May 1985) the question of whether the immigration rules in force at the time (HC 169), specifically paras 48 and 54 relating to the differential treatment of husbands and wives coming for settlement, and paras 41 and 44 dealing with fiances and fiancees, represented a breach of Article 14 of the European Convention on Human Rights (no discrimination on the grounds of sex, race, colour or language) by allowing men to bring women into the UK without having to satisfy the tests set out in para 54 that a man entering as a spouse would have had to have passed (these include the tests outlined above) before being allowed to enter to join a woman settled in the UK.

The Government argued that the main aim of the stricter treatment of husbands was the protection of the domestic labour market and that this aim meant that any discrimination under Article 14 was,

> objectively and reasonably justified and not disproportionate to the aims of the measures in question.
> (7 E.H.R.R. 471 p.496 para 57)

The Commission and the Court rejected this argument, concluding that there had been discrimination contrary to Article 14 and that the annual reduction in the number of husbands accepted due to this policy,

> was not of a size or importance to justify a difference of treatment on the ground of sex and the detrimental consequences thereof on the family life of the women concerned.
> (7 E.H.R.R. 471 p.500 para 77)

The clear implication of the decision is that husbands seeking settlement should be able to do so in a manner similar to that proscribed in para 48 for the entry of wives. The Statement of changes in the Immigration Rules 1985, seen as a direct response to the decision, did exactly the opposite by equalising the treatment of fiancees and fiances and husbands and wives at the more stringent level of the original paragraphs 41 and 54. Moreover the changes failed to deal with the question of discrimination on the grounds of sex both by providing an exception to the equal treatment in para 26 relating to the 'wives and children to whom paragraph 40 of HC169 applies', and by patently failing to deal with sex discrimination in other areas of the immigration law. For example, the discrimination in paragraphs 160-164 of HC169 as regards the,

> power to make a deportation order against the wife or children under 18 of a person ordered to be deported,

where a man would not be deported merely because his wife had been. Other examples of discrimination that will remain unaltered by the passage of the legislation include the provisions of para 25 which allow the spouse of a male

but not a female student to be given leave to enter for the authorised period of study and the procedure by which Special Vouchers will only be issued to the 'head of the household', invariably a man.

It is therefore quite clear that the Governments' arguments characterising the repeal of s1[5] as being an end to discrimination in immigration law are thoroughly misleading. The actions of the Government go completely against the spirit of the Abdulaziz judgement in that, as Stephen Sedley QC argues,

> levelling down is a fundamentally inappropriate way of securing equality of treatment in the field of human rights.
> (C.R.E. Opinion paper para 12 v and the Canadian case of Re Phillips and Lynch 1986 27 DLR (4th) in which the cure for the non availability of family benefit for single fathers was held to be the withdrawal of that payment from single mothers).

As a result it can be stated quite categorically that one effect of the repeal of sl1[5] will not be the removal of sexual discrimination in immigration law. Indeed the Governments' argument in court during the Abdulaziz case should be seen as a reaffirmation of the way in which,

> Assumptions about women being home makers, rather than breadwinners, and therefore less of a threat to the British labour market, are cynically used to minimize the number of black men entering Britain.
> (W.I.N.G. 'Worlds Apart' p.147)

By failing to deal with sexual discrimination the Government continues both to be able to condone and utilise it while simultaneously taking away the rights of other people seeking entry in the name of ending such discrimination.

Douglas Hurd also argued that the repeal of s1[5] was necessary as it,

> gives rise to anomalies and unacceptable results.
> (Commons 2r col 790)

This argument is constructed in such a way as to show that it is only the fact that two children, of the same parents, could be dealt with 'on a different basis', when they are married and seeking entry clearance for their spouse, that is unacceptable. Therefore by implication the problem is seen as being the fact that one spouse might get entry clearance due to the discrimination inherent in s1[5] rather than both being refused entry under a 'firm but fair' system of immigration control. The aim of removing anomalies is not achieved by the repeal of s1[5] as one consequence is that,

> many families will be split, with older children, born before their fathers became British, losing the right to come to Britain, while their mother and youngest siblings retain it.
> (JCWI Briefing Paper para 1.5)

Such a family split will be especially common in the Bangladeshi community, emphasising the way in which these changes will not effect people regardless of origin. In this context it is important to note that as far as the Government is concerned an 'unacceptable result' is one that allows the family members of a black British citizen to enter the country.

The practical effect of the repeal of s1[5] will be to cause hardship and suffering for many already divided families and not, as the Government argues, to remove anomalies and ensure equality of treatment. What then is the significance of the repeal of s1[5]? Part of the answer to this question can be provided by answering the question, what is the real reason for the repeal of s1[5]?

A combination of recent adverse court decisions and the increasing commercial availability of D.N.A. testing, that would, if introduced in a comprehensive manner mean the removal of the only barrier to entry for people covered by s1[5], that is the proof of a familial relationship, has forced the Government to act to retain strict control over the entry of black people into the UK. This has been done through the repeal of s1[5] which, through its wider application of the principle of living 'without recourse to public funds', and in the context of the relative poverty of many of those seeking entry, serves to make it increasingly difficult for many people to satisfy the requirements of the immigration rules.

Clause 1 serves its racist and restrictive purpose by severely curtailing previously available rights through the growth and development of the means testing of immigration status to ensure the entry of only 'prosperous and responsible families and people'. This is plainly acknowledged by T. Renton when he stated during the committee stage that,

> One of the Government's main aims in proposing the repeal of s1[5] is to strengthen our ability to prevent people coming into this country and then immediately becoming dependent on public funds.
> (Commons Committee Stage col 182)

This development of a corresponding relationship between immigration status and the entitlement to welfare benefits is further aided by the provisions of the Social Security Act 1988 which, as well as meaning that,

> The position of black and ethnic minority claimants will generally be worse after April 1988,
> (BRC April 1988. How the changes effect ethnic minorities p.5)

will, through the inclusion of a question on the Income Support Claim Form asking whether the claimant has been in the UK for less than 5 years and by providing for a further interview if the answer is yes, strengthen the relationship between the DHSS, the Immigration Service and the Police. (A set of relationships already well documented by P. Gordon in his 'Policing Immigration.')

The ominous nature of the implications of the political dynamic, illustrated by the developments outlined above, are revealed by the Conservative M.P. Ms T. Gorman. She links perceived abuses of the Welfare State to a call for the introduction of repatriation, as,

> there is no reason why these families should not be united in their country of origin. There is no reason why this country should accept into its welfare and pensions structure people who have spent most of their lives contributing their work effort to a different society.
> (Commons 2r col 844/845)

That those receiving the benefits of s1[5] have lived in the UK for at least a period of 15 years or, in many cases, since their birth and have, throughout that period, paid direct and indirect taxes, largely without claiming back entitlements such as child benefit, indicates the falsity of the Governments arguments. The repeal of s1[5] is designed to bring almost completely to an end the process of secondary migration. Moreover its implications are that the black communities are under threat from a Government who have consistently shown it to be their belief that being black means that a person cannot be properly British. This threat is beginning to manifest itself in the way in which an inability to support a family without recourse to public funds is being used as a bar to entry and in the way that the Government is turning arguments about a right to family unity upside down and using them in support of a system of

repatriation for those whose poverty precludes them, as a matter of policy, from being prosperous or responsible.

The only remaining hope for the opponents of clause one is that in legal terms the repeal could be potentially held to be unjustifiable. Stephen Sedley QC in an opinion on the Immigration Bill written for the C.R.E. argues that, following the House of Lords decision in RAINEY v GREATER GLASGOW HEALTH BOARD (1987 I.C.R. 129) what is required, to show the existence of justifiability as regards the existence of indirect discrimination, common to both the Sex Discrimination Act 1975 and the Race Relations Act 1976 is,

> proof that the measure is directed appropriately to a real need and is necessary to meet the need in spite of its discriminatory effect,
> (S. Sedley, QC, C.R.E. Opinion para 5 9th Feb 1988)

and that as regards the repeal of s1[5]

> Matched in the present context against the already heavy indirect discrimination produced by the act and Rules (against Bangladeshi families in particular) consistency with our existing legislation and jurisprudence must call for a stringent standard of justification of Clause 1.
> (Sedley, C.R.E. Opinion para 5)

That is a standard of proof that, following the comments of the E.C.H.R. in the Abdulaziz case dismissing the Government's claim that the sexual discrimination was justified in that it operated to protect the domestic labour market, the Government would find it very difficult to satisfy.

Furthermore the repeal of s1[5] will take from the Government the defence they have used against alleged violations of Article 8 of the European Convention which was simply that the British Government through s1[5] did have respect for the family life of its citizens. (X v UK 7048/75 1977 9 DR 42) Consequently,

> there is a real danger that to repeal s1[5] of the Immigration Act 1971 will both offend against fundamental principles of non-discrimination to which the UK and other Western nations expressly subscribe and place the United Kingdom at risk of breaching the European Convention on Human Rights.
> (S. Sedley, C.R.E. Opinion para 13)

The repeal of s1[5] is an attack on the concept of a family's right to unity in the UK. The disruption that the repeal will cause to the Bangladeshi community is not accidental. The Government's opposition to the entry of spouses and children was clearly illustrated by the way in which amendments to the Bill designed to protect family unity were rejected almost out of hand. An example of such an amendment was,

> Rules shall be so framed that no spouse or other family member seeking to join a person settled in the United Kingdom shall be subjected to more onerous requirements than those imposed on spouses and family members of nationals of E.E.C. states.
> (S. Randal Cttee Stage Commons col 786)

Clearly then it is black immigration that the Government continues to see as a problem and thus as the focus of immigration policy. Similarly, an amendment tabled in the Lords to protect the position of children of those effected by the repeal was summarily dismissed. The clarity of the Governments opposition to attempts to soothe the effects of clause one suggest that Sondhi is correct to argue that the basis of such treatment is that immigrants,

> were brought in as workers, not as human beings.

(R. Sondhi; The Divided Families of Bangladesh
and Pakistan; Racial Justice No 8 Winter 87/88)

The effect of the repeal of s1[5] will be felt at two levels. Initially by those losing their rights under s1[5] and secondly and more significantly for the future development of immigration law and practice, through excluding from the category of 'prosperous and responsible' citizens black and ethnic minority citizens, regardless of the fact that they may well have been born in the UK. This exclusion is then based on racism, legitimated through fears of the abuse of the welfare state and orchestrated through refusals based on a purported inability to support and maintain their families.

CLAUSE TWO: POLYGAMOUS WIVES

In common with the repeal of s1[5] the contents of Clause two serves both to restrict previously available rights and, through the restrictions it imposes on the operation of the right of abode and in the way support for this clause was articulated, has serious implications for the future direction and scope of immigration control.

This section, comprised of ten subsections, serves to prohibit,

> the entry of second or subsequent wives in polygamous marriages, who have the right of abode in the UK, if any other wife of that marriage has previously been admitted other than as a visitor.
> (JCWI Briefing Paper para 2)

This change was the least significant recommendation of the SCORRI Report on Immigration from the Indian Subcontinent (Select Committee Home affairs Session 19856. Immigration from the Indian Sub-Continent, 2r, PROC m/e App. Summary page xxxii No 22 para 71).

The basis for the recognition or non-recognition of the validity of polygamous marriages in English law can be found in s11[d] of the Matrimonial Causes ACt 1973 which provides that a marriage will be void on the grounds that,

> [d] in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage, domiciled in England or Wales.

Therefore the ability to contract a polygamous marriage is dependant upon the 'domicile' of the parties to the marriages (See HUSSAIN v HUSSAIN 1983 FAM 26 (1982) 3 All E.R. 369 CA). In practise this means that,

> If an immigrant husband is domiciled in any part of the United Kingdom a marriage which is polygamous will not be recognised in the United Kingdom. On the other hand if the husband is domiciled abroad in a country which permits polygamous marriage his second wife will qualify for admission and settlement to the United Kingdom under the spouses rule.
> (I. MacDonald Immigration Law and
> Practise 2nd Edition p.224)

Thus, through a form of negative pronouncement, it is clear that, in the above circumstances, a polygamous wife would be able to enter the UK in the exercise of her right of abode. This will not be so after the Immigration Act of 1988 takes effect. S 2[2] of the act provides that,

> [2] A woman to whom this section applies shall not be entitled to enter the United Kingdom in the exercise of the right of abode .... .

This restriction on the operation of the 'right of abode' contains inherently serious implications. Thee are due to the fact that as the right of abode is the right,

> to live in and come and go into and from, the United Kingdom without let or hindrance,
> (Immigration Act 1971)

it can only be exercised by the physical act of entering the UK. The changes introduced by clause 2 creates a class of women who will, on the one hand, have the right to reside in the UK but who, on the other, will be prevented from exercising that right. Once such an encroachment has been made it will be all the more difficult to prevent further restrictions on the entry of black people, especially dependants and women, into the UK because of the precedent set by clause 2 as regards the restriction of the operation of the right of abode.

The startling and revealing background to the effects and significance of this clause is that it deals, on average, with only 25 cases a year. This already small number is likely to diminish further as,

> Polygamous marriages never really numerous on the subcontinent in any event are no longer available for the Indian Hindu and the Sikh communities.
> (D. Pearl Immigration and Family Law p.39)

Furthermore the British Nationality Act 1981, by repealing the clause in the 1971 Immigration Act that gave the right of abode to all wives of British men, ensured that, in combination with the above fact, that clause 2 is focused on a,

> small and diminishing class of people.
> (ILPA Briefing Paper p.2)

Clause 2 therefore deals with a 'problem' that cannot, with any sense of reality, be said to exist.

Why then was the clause introduced? The basis for the creation of public and parliamentary alarm were the outrageous claims made by members of the Parliamentary Home Affairs Select Committee who initially claimed to have been told by senior immigration officials that 25% of Bangladeshi women seeking to enter the UK were second or subsequent wives. Even though the figures were revised to the level of 25 instances a year of such cases the damage had been done and the clause deemed necessary.

Throughout the debates the very existence of polygamous marriages was seen as being,

> contrary to the traditions of this country.
> (Lords, 2nd Reading 4th March 1988 col 266)

Such culturally supremacist arguments spilled over into overt racism when articulated by T. Renton who illustrates what he perceives to be the difference between British citizens and those who merely have some kind of right to enter the UK,

> If people want to have the advantage of coming to live in our civilised society I believe they should accept our standards.
> (Lords Cttee Stage 21 march '88 col 49)

The Government also argued on the basis of this cultural dichotomy that clause 2 helps the cause of community relations by restricting,

> The damage done to racial harmony which is potentially inflicted where some men are seen to be able to bring in more than one wife to live with them here...
> (Renton Commons Cttee Stage col 242)

The real aim of clause 2 is then to continue the process of ending once and for all the provisions made by the 1971 Immigration Act for the entry of dependants of people settled in the UK. This will almost exclusively affect families from the Indian subcontinent and this must be seen as a matter of deliberate policy planning and not simply as an unfortunate side effect of the legislation.

The practical effects of clause 2 are limited in as far as they will not apply to many situations, however the implications of its passage onto the statute books are significant. It creates a precedent for the restriction of the right in abode in any case where the 'implicit assumptions' about immigration to the UK identified by Lord McNair are clearly voiced and directed at a politically expedient group. Finally it also raises the question as to whether it is correct for the immigration law to be used in such a way as to circumvent the rights given by s11[d] of the Matrimonial Causes act 1973.

CLAUSE THREE: RIGHT OF ABODE AND BRITISH CITIZENS BY DESCENT

Clause three of the Immigration Act 1988 deals with the issue of the proof required to establish that a person has the right of abode in the UK. As with clause 2 the practical effects will be so limited as to render it unnecessary but it is significant in that it again takes what were previously seen as rights away from people. Furthermore, it reveals many of the prevalent assumptions abut immigration and indicates how the system of immigration control is structured around these racist assumptions and not the 'problems' with and the potential 'loopholes' in the immigration system that were identified by the Government as being the motivating force behind the changes being introduced.

The origins of clause three lie in the case of MOMOTAJ BEGUM (4280 UNREPORTED). This case turned on whether a person claiming to be a British citizen by descent (S2[1] British Nationality Act 1981) needed prior entry clearances or could make that claim to an immigration officer and, if refused, remain in the UK to exercise their right of appeal against that refusal under S13[1] of the 1971 Act. (The normal procedure provided for those without entry clearance would mean that they would not be able to appeal until they had left the UK and would not therefore be present at the hearing, severely limiting the value of the appeal itself). The legal question under consideration was, is a person claiming British citizenship by descent within S3(9), as set out in S3(9A), of the Immigration Act 1971 as amended by the British Nationality Act 1981, in which were prescribed all those who need 'proof of their right of abode by certificate of entitlement'.

The Immigration Appeal Tribunal held that, in law, there is no distinction to be made or provided for between people who are British citizens and those who claim to be British citizens arguing that,

> the Immigration Act 1971 s3(9A)[a] (as amended) defining those within s3(9) who require certificates of entitlement as proof of right of abode, must be taken to read, 'he is not nor claims to be a British citizen'.
> (Legal Action May 1986 p.57)

Therefore those claiming to be a British citizen, after the decision, did not require certificates of entitlement as proof of their right of abode. This was very important as it meant that those claiming the right of abode as a British citizen by descent could avail themselves of paragraph 90 (Rights of Appeal) of the Immigration Rules (HC 169 1983) and exercise the right of appeal under

s13[1] of the 1971 Act against the decision that such a person required leave to enter the UK. The result of the Begum decision was then to remove people claiming British citizenship by descent from the restrictions imposed by s3[9].

Following the decision a number of Bangladeshi families, frustrated by the delays in obtaining entry clearance, came to the UK and made such claims as the Begum case ratified. The Government immediately characterised the decision and its ensuing results as a 'loophole' through which people could avoid control and which was therefore open to 'exploitation' and, which as a matter of policy needed to be closed. T. Renton linked such ideas to a more general attack on the principle of appeal rights arguing that,

> As long as there is an unfettered right of appeal available in this country against the decision that a passenger claiming citizenship requires leave to enter, there will be those who seek to exploit the loophole.
> (Commons Cttee Stage col 325)

Not only is it factually incorrect to argue that there exists an 'unfettered' right of appeal for anyone seeking redress against the decision of an immigration officer but the way in which the Government has constructed these arguments illustrates their conception of the Immigration Appeals System as a route ideally suited for the use and abuse of those seeking to enter the UK illegally, and not as a system that provides only the barest minimum of protection for the majority of travellers against whom an incorrect decision could be made.

The effect of clause three is therefore to overturn the Begum decision. From the date at which the act comes into force people claiming citizenship by descent will have to have a certificate of entitlement without which the appeal against refusal of leave to enter cannot take place while that person is in the UK.

The introduction of this clause is quite simply unnecessary due to the imposition of visa requirements on citizens of Bangladesh, India and Pakistan in October 1986 and the introduction in 1987 of the Immigration (Carriers Liability) Act, the combined results of which have been that,

> very few people without documents showing clearly that they have a visa, or that they are British, have even been able to get on an aeroplane to come to the UK.
> (JCWI Briefing para 3.3)

As there is no practical function for this clause to perform the motives behind its introduction should be seen in the context of the policy of placing increasing emphasis on immigration controls in the country of departure as opposed to control at the port of entry. Clause 3 conforms to this policy objective by the way in which,

> It shifts a sizeable number of decisions regarding entitlements away from the immigration officer at the port to Entry Clearance Officers abroad.
> (Julian Fountain ILPA Internal Discussion Paper)

The result of a shift such as this is that the number of refusals of entry clearance will go up as will the delays and queues that have come to characterise the overseas entry clearance system and that serve as an unofficial but sanctioned method of restricting the number of black people who are able to come to the UK. Although the practical effects of the clause will be minimal what it does do is to, once again, encroach upon the already limited rights available to those seeking to enter the UK. This is achieved whilst ignoring the real problems that exist in countries such as Bangladesh as regards the administrative disaster that is the entry clearance system. (For examples of the way in which the system is operated in practise see 'But My Cows aren't

Coming to England' The Manchester Law CEntre 1986, and Divided Families by R. Sondhi. See bibliography).

The implication of the clause and of the attitude of the Government to it are that whenever a court decision goes against the Governments policy, then, to borrow a phrase from T. Renton, such blatant examples of 'judicial activism' will simply be overturned by legislation. Moreover, in their rejection of amendments seeking an exemption from clause 3 on the grounds of the existence of a causal link between administrative delays and cases such as that of Momotaj Begum the Government clearly shows that immigration policies are, in their view, enacted to keep people out and not to ensure firm or fair procedures and safeguards. This is clearly shown by T. Renton's horror at the prospect of an amendment that would facilitate the above exemption and in the way in which it was rejected on the grounds that,

> Amendment no 14 seeks to resolve the matter in favour of the applicant. That would be unacceptable.
> (Commons Cttee stage col 310)

From the point of view of the Government and its supporters an unacceptable result is one by which either a refugee or a black person are able to enter the UK.

The overall effect of the passage of this clause will be to emphasise the executive's control of not only immigration policy but of its administration and to further restrict the operation of the available judicial safeguards by increasing the extent of controls that operate before someone reaches this country. Without a doubt such developments will, if they remain unchallenged, have serious consequences as regards the construction of an increasingly politically repressive, restrictive and racist system of immigration control.

CLAUSE FOUR: MEMBERS OF DIPLOMATIC MISSIONS

Although in itself this clause and its effects are likely to be of limited importance as regards the wider operation of immigration policy in the UK, it can be seen as significant to the extent that it illustrates the nature of the assumptions on which the Bill as a whole is based.

The clause is said to be dealing with,

> an area of actual and potential abuse
> (Lords 12 April 1988 col 971 Earl Ferrers)

that exists because of exemptions from the operation of immigration control offered to members of diplomatic missions and their familials by s8[3] of the 1971 Act. Diplomatic missions are consequently characterised by the Government as being places of refuge for those seeking immigration control. Simultaneously the impression being given that all those attached to missions are actually or potentially in breech of UK immigration law. These ideologically constructed assumptions are thus given a factual status to which an appropriate Governmental response is needed.

On the basis of this perception of a potential and actual abuse of the provisions of s9[3], the existence of which is supported by little or no evidence, the Government is able to introduce restrictions on the rights of those forming part of diplomatic missions but who fall outside the legal definition of a 'diplomatic agent' (Diplomatic Privileges Act 1964). The changes are then a product of the assumptions and not the actual circumstances. This method of constructing situations and 'loopholes' that must be remedied and

closed is prevalent throughout this Bill and will be discussed more fully in the section on racism and the construction and passage of the act.

CLAUSE FIVE: RESTRICTED RIGHT OF APPEAL AGAINST DEPORTATION IN CASES OF BREACH OF LIMITED LEAVE

We have seen how the 1988 Immigration Act, through limiting the right of family unity by discriminating against polygamous marriages, that under certain circumstances will be recognised by matrimonial law, and by beginning to restrict appeal rights for those claiming British Citizenship by Descent, is eroding many of the safeguards offered by the 1971 Immigration Act. Clause 4 represents an even more significant challenge to the basic principles laid down in the report of the Wilson Committee on the basis of which the immigration appeals system was created in the Immigration (Appeals) Act 1969. Clause 4 will severely limit the availability and scope of appeals for all those in the UK without British citizenship, with only limited leave to remain and also for those seeking asylum or refugee status.

Clause 4 restricts the right of appeal against a deportation order made under either s3[5][a] or [c] of th 1971 Act. That is, a deportation order made for a breach of limited leave or against an individual as a family member of a person who has been deported, this only applies to 'non-patrial' women and children under the age of 18. (See para 160 of HC 169). An appeal against a s3[5] [a] or [c] order lies under s15[1] which states,

> s15[1] Subject to the provisions of this part of the Act a person may appeal to an adjudicator against- [a} A decision of the secretary of State to make a deportation order against him by virtue of s3[5].

This section in turn attracts the operation of the Immigration Rules (HC 169) part xii on deportation. The relevant sections as regards s3[5] [a] or [c] orders are; para 154 which sets out that,

> In considering whether deportation is the right course on the merits, the public interest will be balanced against any compassionate circumstances of the case;

Para 158 on deportation for breach of conditions or unauthorised stay which state that although,

> Deportation will normally be the proper course where the person has failed to comply with or has contravened a condition or has remained without authorisation. Full account is to be taken of all the relevant circumstances known to the Secretary of State including those listed n paragraph 156;

Paragraph 156 includes the consideration of,

> Compassionate circumstances.

When clause 4 becomes law it will exclude all these factors from the consideration of the appellate body if, under s[5][2], the person against whom the order was made has been in the UK for less than 7 years. (At the Commons committee stage an amendment was passed to exempt holidays abroad from being counted as curtailing the 7 year period). The appellate authority can therefore only consider whether,

> on the facts of his case there is in law no power to make the deportation order for the reasons stated in the notice of the decision.
> (1988 Act s5[1]

The Government amendment to s5[2] exempting holidays abroad from consideration as regards the 7 year rule was also said to allow an asylum seeker a very limited appeal based on the merits of the asylum application itself. However the position as regards this claim has yet to be clarified and the fact that a s5[2] also grants the Secretary of State the power to decide the classes of people who can or cannot have access to a full appeal would suggest that the position of asylum seekers will remain unconfirmed and thus very much at the mercy of the discretion of the Secretary of State. This is a far from satisfactory arrangement.

The consequences of the introduction of this clause for those in the positions outlined above are stark. As the UKIAS argue,

> By virtue of clause 4, once it has been accepted that an appellant is an overstayer and has been here less than seven years, the appellate authority will have to dismiss the appeal.
> (UKIAS Briefing Paper for MPs p.4)

Thus, in practical terms, the consequences for a large number of people will be devastating. All overstayers, whatever their reason for failing to comply with the restrictions of their limited leave will face the daunting prospect of being deported without a full hearing of the circumstances that led to the immigration offence.

The importance of these restrictions does, however, not only lie in the way in which it imposes limitations on the availability and scope of immigration appeals. Equal significance should also be attributed to the way in which this clause, by challenging principles and practises established by the 1969 Act, paves the way for perhaps even more radical changes in the not so distant future.

Throughout the debates on the Bill the Government clearly regarded the existence of the system of immigration appeals as being antithetical to the smooth running of immigration control in general. It is therefore unlikely that the reforms introduced by clause 4 will be the last challenge to the system established on the basis of the recommendation of the Wilson Committee (1967 Cmnd 3387) that,

> Given our recommendation in favour of an appeal against exclusions, the case for an appeal against deportation, which involves a much greater interference with a persons liberty, is correspondingly stronger.
> (Wilson Rept. p.30 para 93)

The restrictions to be implemented on the hearing of compassionate circumstances at deportation appeals for those who have been in the UK for less than the arbitrary period of 7 years, means that many people will be denied the opportunity to present their full circumstances to an appellate authority. They will therefore be liable to automatic deportation once it has been established that they have overstayed, for whatever reason, and that they do not satisfy the 7 year requirement. For these people the appeal will become, to all intents and purposes, meaningless. To deny a full hearing of the relevant facts and circumstances in an appeal is a gross infringement of the principles laid down in the Wilson Committee Report and should be seen as marking the beginning of a period that will be characterised by further concerted attacks on the rights of black people who wish to settle in the UK and not as an end in itself.

The mechanism the Government have utilised to threaten the continued existence of the appeals system is to erroneously portray the availability and generosity of the system as it stands in order to characterise the restrictions the Bill imposes as being legitimate and desirable. Such arguments are underlain by the very assumptions identified by Lord McNair and are best illustrated by the attitude of the Government towards asylum seekers and refugees.

The Governments' standard conception of the immigration appeals system is that it hampers the effective operation of control. T. Renton encapsulates their fundamental objections to the existence of the appeals system by arguing that,

> one of the problems about Britains treatment of immigration cases is that the superstructure of appeal upon appeal - the number of safeguards that we have given those who come here - to which we have added a Member of Parliaments representation, means that we arrive at a thicket within which the immigrant is well protected. He goes from one appeal to the next while the years drag on, at the end, after eight or nine years, it is almost inevitable that he will be given leave to remain in Britain.
> (Commons Reprt + 3r col 868 p.449)

Through the use of such arguments the two-tier appeals system is characterised as being a form of statutory loophole open to the abuse of those seeking, illegally, to enter the UK.

The consequence of the Government utilising these types of images is that they are thereby able to claim an automatic justification for the restrictive changes clause 4 implements. The Conservative MP Mr Hanley argued that,

> I cannot believe that clause 4 will do other than bring about the determination of a case much more quickly and fairly than at present.
> (Commons 2r col 80 p.415)

T. Renton also sought to justify the considerable restriction placed on the scope of the available appeal rights by arguing that,

> In many of the cases affected by clause 4, the appellant will already have had an opportunity to argue the compassionate circumstances of his case before an adjudicator when exercising his right of appeal against a refusal of extension to stay.
> (Commons 2r col 858 p.441. Clause 4 is now Clause 5)

Thus, as arguments relating to the consideration of compassionate circumstances have, according to T. Renton, previously been considered, it is not unreasonable to avoid the duplication of those same arguments in a deportation appeal. This is a false argument and totally and deliberately misleading.

The right of appeal against a refusal to vary leave to remain lies under s14[1] of the 1971 Act and paragraphs 95 and 97 of HC 169 that set out the general nature of that right of appeal and the general considerations relevant to such an appeal. Within these sections there is no express mention of a duty to consider the compassionate circumstances of the case in question, merely that,

> In deciding these matters account is to be taken of all the relevant facts.
> (HC 169 para 97)

That variation appeals are precluded from the full consideration of compassionate circumstances is clearly expressed in s19[2] of the 1971 Act. S19[2] confines the adjudicator to a review of,

> any determination of a question of fact on which the decision or action was based.

It is therefore incorrect to assert, as the Government have done, that the compassionate circumstances will have been taken into account in the making of the decision as the appeal is limited to the facts of the case and to whether, on those facts, the immigration rules were correctly applied.

That the Government are totally opposed to the establishment of a formal requirement for a consideration of compassionate circumstances at the variation appeal stage, and hence that their suggestions to the contrary, made throughout the debates on clause 5, were a deliberate attempt to mislead was made abundantly clear during the Committee Stage of the Commons. The action that revealed the Governments true position was the rejection of an amendment tabled by S. Randall MP designed to,

give appellate authorities powers that are outside the existing rules. This would enable the authorities, during variation of leave appeals, to take compassionate circumstances into account.
(Commons Cttee p.447 col 863)

The clearly expressed repugnance at such an amendment is based in the Governments' fundamental opposition to any form of an appeals system that would operate to facilitate the entry rather than the removal of black people and refugees seeking to enter the UK. For the Government, the immigration appeals system is in place to implement the spirit and letter of racist policies, within a legalised framework, and not to offer an impartial review of administrative decisions.

By offering such a misleading portrait of the appeals system it becomes possible for the Government through, policy initiatives, to begin to remove those aspects of the protections offered that fall outside their desired policy objectives, on an apparently legitimate basis. The real significance of these developments is that they will profoundly restrict the future scope and operation of the appeals system to the lasting detriment of the welfare of those who will be in the unfortunate situation of having to have recourse to whatever provisions are available. Furthermore, the Governments' image of the nature and workings of the appeals system is based not on fact but on politically motivated assumptions as to the nature of people seeking to settle in the UK. For example, the Governments' amendment to s5[2] was designed not to exempt asylum seekers from the effects of the introduction of the clause as was initially suggested but to,

ensure that the making of an asylum claim will bring no benefit other than a consideration of the claim by the appellate authorities.
(Commons Cttee col 484)

Government policy is therefore moving inexorably away from the position suggested in the European Convention on Human Rights which recognises the special position and needs of refugees and asylum seekers. This provides a violent contrast to the Governments' attitude in which any person claiming asylum who was forced to leave the country in which they had a fear of persecution by using, for example, forged papers, where in most cases there will have been no alternative, is characterised as being a 'bogus' applicant and who should therefore not be able to avail themselves of the right to an independent review of the full facts of their claim.

Clause 5 and the Governments' refusal to consider the establishment of an independent asylum tribunal serve to flatly deny the special nature of the situations of many of those who will be making asylum claims, a reality fully accepted by the Wilson Committee report in which it was argued that,

Special arrangements may be needed to expediate the hearing of appeals where the appellant is seeking asylum.
(Wilson Report p.66 para 19)

The amendment is based on the belief that characterises the totality of the Governments' attitude to appeals. That is quite simply that most applicants are liars and cheats whose desire to enter the UK is motivated only by a desire to reap the generous harvest provided by the Department of Health and Social Security. Within the Conservative Party this evokes a wave of heartfelt sympathy,

with the feelings of the citizens of this country who believe that people can arrive here and climb on to a raft of welfare benefits for which the indigenous population has already paid out of its earnings.
(Commons 2r col 843)

Through the construction of such images the racism of the Government, its supporters, and this legislation is shrouded in a cloak woven from threads relating to the 'genuine and legitimate' fears of the 'indigenous population' about abuses of the welfare state, housing shortages, hospital waiting lists and education.

As regards asylum seekers this attitude is constructed by arguing that without having ensured that asylum seekers do not have full appeal rights,

> the clause would unfairly advantage the asylum seeker over and above the extent justified by his circumstances. It would undermine the purpose of the clause by attracting bogus asylum applications which would be lodged solely to secure a full right of appeal.
> (Commons Cttee col 485/486

The crux of the Governments' argument is then, that the existence of a comprehensive appeals structure leads to an increase in the number of bogus or false applications, and that therefore, the policy should be to restrict the availability of appeals to ensure that only 'genuine' applications are attracted. Consequently amendments introduced to attempt to ensure that deportation appeals should consider the desirability of the ideal of family unity, that refugees should be granted full appeal rights and that compassionate circumstances should be heard at variation appeals were all rejected on the grounds that they would lead to an increase in the abuse of an already much abused system.

The factual base on which such arguments were constructed is, however, totally inaccurate. Recently there has been much pressure brought to bear on the Government to remedy the situation that arises under the operation of the immigration rules and legislation through which a person who has their initial asylum application refused will not be able to appeal until they have left the UK and returned, in most cases, to the country from which they were seeking relief. The practical implications of this policy are that an Iranian claiming asylum in the UK and who was refused would have to return to Iran to initiate an appeal against that refusal. The danger that such a person would be in as a result of this policy is obvious. This practise therefore serves only to render the nominal existence of the right of appeal meaningless as it is highly unlikely that the person involved would be at liberty to take up the rights that are purportedly available. During the debate on the report stage of the Bill T. Renton argued against the establishment of an automatic 'in country' right of appeal for asylum seekers stating that,

> Denmark introduced an in country appeal system no different from that pressed on us by the Opposition Members. Within a month, 3,000 people applied for asylum there.
> (commons Rept stage col 888)

He thereby implies that if an 'in country' right of appeal were established in the UK then there would be a veritable flood of predominantly bogus asylum applications. This attempt to make a causal connection between the rights available and the level of abuse of the system built on the basis of those rights was based on a deliberately misleading interpretation of the situation and circumstances that existed in Denmark.

There are 2 fundamental factual errors in Renton's argument as outlined above. The first is that the appeals system introduced by the Danish Aliens Act of the 8th June 1983 can in no way be said to be similar to the models proposed by organisations such as the British Refuge Council, Amnesty International, and Charter 87. Secondly the situation in Denmark as regards the type and number of applications was significantly different to that existing in the UK in that before the 1983 Act was revised in October 1987 there existed a situation

parallel to that experienced by West Germany as a consequence of the so called 'Berlin Gap'. It must therefore be concluded that there is no basis in fact for the fears the Government has attempted to arouse over potential and actual abuses of the immigration appeals system. Indeed, since the 1987 revision and the reaching of an agreement with the East German authorities the number of applications have fallen dramatically. Despite this change it would be dangerous to base any argument either for or against 'in country' appeals on numbers. Amnesty are correct to argue that,

> However inaccurate the figures quoted by Mr Renton, Amnesty International believes that the Government should be considering the needs of asylum seekers, not their numbers. It is our belief that the need to protect victims of state terror should take precedence over considerations of numbers or cost.
> (Amnesty International, sp British section. Asylum seekers in the UK: A Right of Appeal page 3)

Through such inaccurate portrayals of events and circumstances the Government attempts to legitimate the restrictions they wish to impose on the rights available to all potential entrants. In doing so they reveal their preoccupation with attempting to limit still further the numbers of black people and refugees who will be allowed to settle here and their fundamental political opposition to the very existence of the appeals structure as it presently stands.

For asylum seekers the effects of clause 4 will be severe as it is only at deportation appeals that the refusal to grant exceptional leave to remain (granted where a person does not fall fully within the definition of a person entitled to refugee status, para 34 of the immigration rules) can be challenged on grounds that include the relevant compassionate circumstances. The importance of this is that exceptional leave to remain is increasingly being granted rather than full refugee status in many cases. In 1986 2332 applicants were granted exceptional leave to remain while only 459 were granted refugee status. (UKAIS Refugee Unit. Briefing on the Immigration Bill). The effect of clause 4 will be to,

> destroy the possibility of asylum seekers having an independent review of the decision to refuse them exceptional leave to remain.
> (UKIAS Refugee Unit Briefing p.2)

The adverse effects of this clause for asylum seekers will be emphasised by the House of Lords decision in the case of SIVAKUMARAN (16 Dec 1987 Times, Independent, Guardian 17 Dec) which re-established the objective version of the 'well founded fear' requirement, for others by the restrictions on the availability and scope of judicial review imposed by the case of SWATTI (1986 1 All ER 717, 1986 Imm AR 88, 1986 1 WLR 477, 130 SOL JO 186 CA) and by the Appeal Courts decision in the case of VIRAJ MENDIS that the Home Secretary is entitled to take into account a letter from the Sri Lankan Government saying that he was free to return to the country without having to fear persecution and that the weight to be attached to such a letter is to be determined by the Home Secretary (CA June 17 1988 R v Home Secretary ex parte Mendis Guardian June 18th 1988). All the evidence would seem to indicate that the British Government is developing a refugee policy that expressly fails to take into account the special nature of the claim and that as a consequence of this equates their position to that of others seeking entry. In terms of the Governments' policy aims this ensures that the racism inherent in the legislation will have a direct impact on a group of people who to some extent would otherwise have been, to some extent, protected.

For all people facing deportation and having been in the UK for less than 7 years the introduction of clause 5 removes the possibility of the airing of compassionate circumstances in the hearing of their cases. This has been

achieved through the Governments' manipulation of assumptions and stereotypes and its construction on this fictional basis of an immigration policy that does not see the inclusion of a meaningful appeals system as being necessary or desirable.

The implication of clause 5 is that the Wilson Committee's report is no longer seen as being a valid base on which to operate an appeals structure. This clause and any future challenges to the 1969 Act should be contrasted vividly with the practise of the Immigration Appeal Tribunal to use the Court of appeal with itself as an appellant. The Wilson Report stated that,

> it is not our function to consider the desirability or otherwise of controlling immigration.
> (1967 Cmnd 3387 para 59)

This trend of the Tribunal would seem to fundamentally contradict such principles as,

> By going in appeal, the Tribunal may, with some justification, be seen as having a particular or special interest in getting a certain law or rule interpreted in a certain way. As an appellate body with judicial or

quasi-judicial functions, the Immigration Appeals Tribunal must be independent and impartial.
(UKIAS Annual Rept 1986-87 page 19)

The significance of clause 5 in this context is that these principles are clearly under threat.

The unfortunate implications of this clause are that it is not only the independence and impartiality of the appeals structures that are under threat but their continued existence and effective operation. As with other clauses of this Act the effects will be experienced most sharply by black families on whom the pressure due to delays and unreasonable refusals is to overstay rather than to continue to face separation. This clause fails to deal with any of the real problems that exist within the appeals system, for example the refusal of almost all adjudicators to make recommendations to the Home Office after an appeal has been refused in circumstances when deportation would not be the appropriate course to follow even where the adjudicator has the power to make such a recommendation.

CLAUSE SIX: OVERSTAYING A CONTINUING OFFENCE

By reversing the court decisions made in the cases of FURDE v SINGH and GRANT v BORG and thereby establishing that overstaying is a continuing criminal offence, clause 6 not only removes the protections previously offered by those decisions but significantly emphasises the role of the police and the criminal process in the overseeing of internal immigration controls. Through this reinforcement of the criminal nature of the offence of overstaying the clause will also serve to emphasise the restrictions that exist on the types of cases that can be heard by the Immigration Appeal Tribunal. This is so due to the fact that under both the 1969 Act and the 1971 Act no appeal lies against a deportation order so long as that order was made following the recommendation of a criminal court in which the individual involved was being prosecuted. The only appeal right that would exist in such a situation would be the general appeal against sentence and this would take place not as part of the immigration appeals system but as part of the criminal justice system thereby depriving the accused of the special though limited protections offered by the immigration appeals system. Clause 6 is then an indication of the fact that immigration policy follows a political dynamic and that at the present time that dynamic is moving in an increasingly restrictive direction.

Perhaps the most important consequence of this clause is the way in which it operates to circumvent the immigration appeals procedure. As the 1971 Act stands those who have overstayed for a period longer than 3 years cannot be prosecuted (s23 [3]), to this protection the decisions in GURDEV v SINGH in the Court of Appeal that overstaying was an offence that could only take place on one day (Singh [Gurdev] v The Queen WLR 23rd Nov 1973 QBD) and GRANT v BORG in the House of Lords which added the proviso that the actual act of overstaying could only take place on the day after the limited leave expired and only then if the person involved was aware that they were thereby overstaying (Grant v Borg 1982 HOL WLR 7th May 1982). S6[1] of the 1988 Bill provides that,

> [1a] A person commits an offence under subsection [1] [b][i] above on the day when he first knows that the time limited by his leave has expired and continues to commit it throughout any period during which he is in the United Kingdom thereafter.

The offence is therefore open ended and means that even those who escape the restrictions on appeal rights imposed by clause 5 by having been in the UK for more than 7 years can be prosecuted and through the criminal process denied a full hearing of all the issues relating to their deportation.

The passage of clause 6 could well have very serious consequences for asylum seekers who are recommended for deportation by a court in that previous assurances given by the Government, although not specifically withdrawn, have not been renewed in a statutory form. The assurances in question were given by the Government in 1986 to the European Commission for Human Rights in the case of MURGANDARAJAH KANDIA (No 9566/82) to the effect that where an asylum seeker was recommended for deportation by a court the Home Office would instigate the deportation proceedings under s3[5][a] and not s3[6]. Such proceedings would be taken under circumstances in which the person had been convicted of overstaying and recommended for deportation and where that person had submitted the asylum application before the deportation order was signed and had the application refused. The effect of this being that a full appeal under s15[1] would be allowed as opposed to attracting the restrictions operated by s6[5] which allows an appeal only against the conviction itself.

Clause 6 threatens these assurances in a number of ways. First of all, as has been pointed out in the analysis of clause 5, asylum seekers who have been in the country for less than 7 years will have their appeal limited to the consideration of their asylum claim. Secondly, as has been pointed out, these assurances have yet to be placed on any firmer footing and thirdly there has been no clarification from the Home Office as to the nature of the 'exceptional circumstances' in which a s3[5][a] procedure will not be initiated.

The combined implications of clauses 5 and 6 for the formulation of coherent appeals and refugee policies are far from satisfactory. The Government remains opposed to giving applicants any 'special treatment' despite the quite obvious special nature of the asylum applicants circumstances. The restrictions the Bill imposes could even go as far as to breach the UK's international obligations under the Universal Convention of Human Rights. That the Government are hostile to all refugee applications cannot be denied, the attempted legitimation of the governments stance through the articulation of notions of 'bogus' applications and an outright refusal to grant an automatic 'in country' right of appeal to all asylum seekers are clear indications that the UK's policy is equivalent to nothing more than a legal expression of a fortress mentality.

The basic force behind this clause is that overstaying is a criminal offence and deserves punishment. The manner in which these beliefs are expressed given the impression that overstaying is a criminal offence only slightly less repugnant than mass murder in fact it is only a very minor offence, trialable on a summary basis at a magistrates court and attracting a maximum penalty of 6 months imprisonment or a 500 pounds fine. It is therefore absurd that such a minor offence under immigration law should attract such a severe sanction as deportation through the criminal law.

The justification for this inbalance has been legitimated through the ideological construction of images of 'alien peoples' breaking 'our laws'. In the second reading debate in the commons it was argued that,

> Everyone who overstays is breaking the law and jumping the queue. (Commons 2r p.426 col 826)

This blanket criminalisation of all those defined as overstayers ignores the reality that many people overstay unintentionally and through no fault of their own. Furthermore it denies the way in which the immigration law itself serves to create overstayers, for example s8 of the schedule to the Act, by ending the policy of granting indefinite leave to remain where there was a fault in the notice granting or refusing a leave or in the cancelling of a leave, is likely to increase the number of people overstaying through misunderstanding or mistake.

Julian Fountain of the ILPA has argued that,

> To criminalise overstaying in this way invites the police to be more active in immigration matters.
> (ILPA Internal Briefing Paper para 28)

The work done by Paul Gordon in his book, 'Policing Immigration; Britains Internal Controls', graphically illustrates the effects of allowing the police to become involved in immigration matters. Indeed, it has been said that the police do not want these additional involvements in such sensitive areas. However, the Government argue that it is overstaying that is a threat to the establishment and maintenance of 'good race relations', in this country and not the existence of racism in the police force, both at a practical and a policy level, that manifests itself, for example, in the form of harassment and in a high level of unwillingness to investigate cases of racist violence. Consequentially the Government have responded to the criticisms aimed at clause 6 by characterising overstaying as a problem of 'law and order'. In contrast to the evidence presented by Gordon, to the experiences of many black people in the UK and even to the growing awareness within the police force that an increasingly active role in the implementation of internal immigration controls can only serve to increase tension, the Government maintain that as overstaying is a criminal offence the police must continue to be involved and, if in their view it is necessary, to have that role increased then there will be no problems as,

> The police appreciate that the enforcement of the immigration laws is a delicate task which must be approached with tact. The cause of good community relations will not, ... be helped if immigration offences are allowed to go undetected or unpunished. No police operation to check on overstayers or others in breach of our law takes place without good cause.
> (Commons Ctte col 655)

For the Government it is then a matter of deliberate policy planning that the police play an increasingly high profile role in the operation and implementation of the internal aspects of the UK immigration control system. This is of great significance as regards the future development of immigration policy in the UK. The tightening of internal immigration controls, through the involvement of the police force in this Act and through the increasing powers of the DHSS as regards their ability to check on claimants immigration status provided for in the 1988 Social Security Act, can only serve to increase the already significant tensions that exist between the British state and the black communities. The past history of the involvement of the police in using tactics such as trawling and the arbitrary checking of passports 'onspec' and the increasingly formalised equation of immigration and nationality status with Social security status suggest that the future will see the development of an increasingly restrictive and fundamentally racist system of internal immigration checks and controls. All the evidence points inexorably to the conclusion that as far as the Government is concerned, having ended primary immigration and through this Act severely curtailed the possibilities for the entry of family members or dependant, the focus of immigration policy is now black people who are already in the country.

It would therefore be extremely naive for those opposed to the Governments policies to be complacent and argue that forced repatriation could not yet become a political reality. To argue in this manner ignores the dynamic to which policies are formulated, developed and implemented. In the context of this Act it must therefore be stressed how, in eroding certain aspects of the 1971 Act, the dynamic has moved on with the parameters of future policy developments being set largely by the political agenda laid out during the passage of this Act.

CLAUSE SEVEN: PERSONS EXERCISING COMMUNITY RIGHTS AND NATIONALS OF MEMBER STATES

Clause 7 provides that,

7[1] A person shall not under the principle Act require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable community right or of any provision made under section 2[2] of the European Communities act 1972.

The Government have stated that this clause, which means that EEC citizens will not be required to obtain leave to enter the UK from an immigration officer, is necessary to conform to Community law and the Treaty of Rome. At this level and in the context of the desirability of European unity there can be little criticism or argument over this clause. The Labour Party, in its general opposition to the Bill, adopted a position similar to this as regards the effects of this clause arguing that,

It is not controversial and is broadly acceptable to the opposition. (Commons Cttee Stage col 668)

Such positions, however, fail to appreciate the fundamental importance of these changes counterpointing, as they do, the differential treatment of black people and EEC citizens, especially in the light of the effects of the repeal of s1[5]. Moreover, by failing to pose the questions that should consequentially be raised as to the probable nature and development of European immigration policy after 1992, the opposition has moulded itself feet of clay by remaining within a solidly static frame of analysis. The consequence of the self imposition of such a restriction is that, in all likelihood, opposition to the probable racism of any such European immigration policy will fail. A dynamic understanding of racism and immigration policy is vital if the mistakes of the past 26 years are not to be further compounded.

Clause 7 contrasts violently with clause 1 in that it gives very significant rights to a very significant number of people, (over 200 million EEC citizens), while clause 1 completely erases a significant package of rights and protections from a numerically very insignificant group of people. Clearly then, when T. Renton in the Lords argued that,

The truth is that we are a very heavily populated country and to the extent that we become more populated our problems of unemployment, housing, and education become more acute.
(Lords 4th March col 383)

He is only thinking of the potential impact of black migration as being in any way problematical, and not the large numbers of EEC citizens who will be able to come to this country almost without restriction. The numbers and resources game is therefore very selective in its relevance and application. In short, the benefits that clause 7 bestows on EEC citizens are the products of racism and racist immigration policies and not of any tendency towards creating an expansive rather than a restrictive system of control.

This extension of rights does not however mean that British citizens will have the right to be joined by their foreign spouses and families as EEC citizens will have. (See Part VI paras 66-72 of the 1985 Immigration Rules). Practice and policy throughout the European Communities is that the Immigration law of a member state will apply to a national of that country as a citizen of that country and not as an EEC citizen. This does not apply if, for example, a British citizen is resident in another member state as in such circumstances the full range of rights accruing to an EEC citizen would then apply to the British

citizen. The benefits of being an EEC citizen do not therefore materialise until that person has left the country of which they are a citizen. The absurdity of such arrangements is best illustrated as an example of the kind of situation that can and does arise from the operation of the practices outlined above.

The problems encountered by a British citizen in attempting to bring to this country a spouse who is not British are manifold. In some cases the problems erected by the immigration laws are insurmountable and in such circumstances British citizens have been forced to sell their house and give up everything that they have in the UK in order to move to an EEC country to live, and where they will be able to take advantage of the rights to family unity accorded to EEC citizens. Once the spouse has joined them the couple will have to wait until the non EEC spouse has been able to qualify for the citizenship of that country before being able to return to the UK without hindrance. These situations will not be remedied by the passage of clause 7 of this Bill.

The expansion of rights to EEC citizens provided for by this clause serves only to highlight the inequalities of treatment inherent within the UK immigration law and strikingly emphasised by the repeal of s1[5] of the 1971 Act provided for by clause 1 of this Bill. Indeed attempts to reconcile the position of British and EEC citizens as regards the right to be joined in the UK by a spouse and family were rejected on the grounds that,

> to try and equate our obligations under the Treaty of Rome with our immigration control over people coming to our country from all over the world is trying to equate two things which are totally different.
> (Earl Ferrers Lords 12 April col 1022_

The conclusion that must be drawn from such arguments is that the Government divides the world and characterises those seeking to settle in the UK along bipartite lines. First of all there are the predominantly white Europeans and commonwealth citizens who are relatively wealthy, who are therefore 'prosperous and responsible' and who will therefore, on the basis of their wealth and colour, be eligible for settlement in the UK. The second group contains all those who, because they are black and relatively poor, are, and as a matter of public policy should be, precluded from entering this country.

Clause 7 emphasises the very strong racist element in immigration policy and practise in the UK. The proposals for the introduction of a European computer read passport and the formal ending of barriers between the member state in 1992 must stand as warnings to those opposed to the racism of the current immigration control system to be vigilant as to the future and to understand the dynamic upon which both policy and racism operate in this field. If the warnings clearly indicated within this legislation are not heeded then, what is at the moment, the potential for the development of a unified racist European immigration policy will swiftly become reality.

CLAUSE EIGHT: EXAMINATION OF PASSENGERS PRIOR TO ARRIVAL

This clause was introduced at the report stage of the Bill's passage through the Commons thereby avoiding a full discussion of its possible effects during the Committee stage. T. Renton argued that,

> The intention of the new clause is to remove any legal impediment to the operation of pre-clearance arrangements.
> (Rept stage Commons p.439 col 847)

Pre-clearance has become an increasingly important tenant of immigration control policy in the years since the instigation of an entry clearance system formed

part of the Wilson Committee's Report in 1967. This entry clearance system has been substantially augmented in recent years through the strict introduction of visa controls on those from the Indian sub-continent and Africa as well as the Immigration (Carriers Liability) Act of 1987. That this clause has been introduced is a clear indication that the Governments policy is to continue to shift the focus of control on entry away from the point of entry into the UK and towards the point of departure of the people involved.

Although this clause merely provides for pre-clearance facilities to be requested and paid for by airline companies there are many fundamental objections that should be voiced as regards such moves, the effects of which are likely to lead to increasing difficulties for those seeking to enter the UK, for example, from what have been characterised by the immigration authorities as 'pressure to emigrate countries'.

It would be a great mistake to view pre-clearance as simply a mechanism by which the smooth running of an airlines boarding and landing procedures can be facilitated. To a certain extent this may well be so on runs such as those between New York and London but not on the majority of flights to and from other destinations around the world. Since the passage of the Immigration (Carriers Liability) Act 1987 it has become increasingly important for airlines to be able to control and check those attempting to board a flight to the UK and so be able to avoid the financial penalties that the Act provided for in the case of a passenger arriving in the UK, by air, without the correct documentation or clearance. In this light it is clear that in many situations an airline's request for pre-clearance will not be born out of an altruistic desire to provide a better service for passengers but rather out of financial expediency. It must be recognised that there can be a dual purpose to the operation of pre-clearance, on the New York flights it may well be intended to offer customers a better service but for those flying from Khaka or Karachi it would be designed and implemented to further augment the restrictive operation of immigration control.

T. Renton cannot therefore speak of pre-clearance existing as a single unitary and non-discriminatory procedure by arguing that,

> such pre-clearance, if requested by the airlines could be carried out as well as Delhi, Dhaka and Islamabad, as it has been at Kennedy Airport.
> (Commons Rept 16 Feb col 848)

Because there are, in the light of the twin paradines of prosperity and responsibility, two distinct spheres of operation for any system of pre-clearance that will be introduced.

There seems little to suggest that the procedures outlined in clause 8 will serve nay purpose other than to add to the misery already caused by way in which the entry clearance system functions at the present time in countries such as India, Bangladesh and Pakistan. These procedures themselves are failing to work in the way envisaged by the Wilson Committee, rather they have been utilised,

> as a tap to regulate the entry of people who are actually entitled to come here.
> (Interview transcript, Mr Drabu of the UKIAS)

Pre-clearance in this context is clearly a back door method of restricting the movements of people who may well have a demonstrable right to enter the UK. It is also very clear that this restrictive operation of pre-clearance will be specifically targeted against black people as it has been shown how in the 'numbers game', adopted by the Government in order to legitimate the nature and form of their immigration policy, it is only the number of black people who enter the UK that is characterised as being problematical.

The effect of the implementation of this clause will be the creation of a 3 tier hierarchical immigration system in which the base will be represented by those visa regulated systems in operation in most African and Asian countries which, after the final passage of this Bill, will be augmented by the restrictive and racist system of pre-clearance that this clause provides for. The middle level of the system will be composed of the non visa regimes that exist for the white citizens of the remainder of the non communist world while at the peak will be an expansive pre-clearance system reserved for the super-privileged citizens of countries such as the United States of America. A headline in the Guardian newspaper neatly sums up the true nature of the system that the introduction of this clause helps to create by stating that,

> Renton clears way for paid queue jumping.
> (Guardian Wed Feb 17 1988 p.6)

While the Government continues to manipulate the construction of images of black people 'jumping the queue' and uses these constructs to provide the impetus for placing further restrictions on the ability of black people to satisfy increasingly stringent entry requirements, the introduction of this clause, without a full and proper debate, indicates that it is not with the existence of 'queue jumping' per see that they are concerned but rather with the kind of people who should be entitled to indulge in the legally sanctioned avoidance of administrative delays.

Pre-clearance is then only of advantage to the wealthy and is thoroughly undesirable from the point of view of the vast majority of black people seeking to enter the UK. It is, however, desirable from the point of view of the Government as it will mean that,

> the problems are happening a long way away and therefore are getting less attention from the public in general and the media.
> (Interview Sue Shutter JCWI)

As well as augmenting the panoply of back door immigration controls an immigration policy structured around pre-clearance seems, as do clauses 5 and 6, to circumvent the established appeals procedures. During interviews representatives of the JCWI also argued that an increased focus on control at the point of departure will lead to an increae in the rate of refusals of entry clearance and a corresponding diminution in the remedies available to the individuals refused, emphasising that pre-clearance is essentially restrictive as opposed to felicitous in nature.

A further serious implication of clause 8 relates to the way in which the power to refuse entry clearance is to be handled and by whom. Sue Conlan of the JCWI argued that by granting an immigration officer the indirect power to ensure, that in effect, entry clearance could be withheld by granting such an officer the ability to give an immigration stamp which would be deemed to constitute leave to enter the UK, even thought he officer does not actually have the power to refuse clearance, sets a dangerous precedent. By giving the immigration officers the power to recommend to an airline that a certain person cannot be assured of entry into the UK and that it would therefore be prudent not to allow that person to board the plane, if a fine under the provisions of the Immigration (Carriers Liability) Act is to be avoided, the Government is once again circumventing the checks and controls that should serve to protect the interests of those attempting to enter the UK. As Sue Conlan argues, the result of this will be that,

> You will therefore have a decision that is not even made by an immigration officer but that is made by an airline and is open to challenge by nobody.
> (Interview Sue Conlan JCWI)

Clause 8 is thoroughly dishonest, under the guise of making things easier for airlines and their passengers, the Government has again encroached considerably on the rights of individuals to a fair consideration of their application to come to the UK. A policy based on such a model of pre-clearance is a purely restrictive policy and that this policy is fundamentally racist is clear from the ground, defined by the imposition of visa regimes, on which it is built. Furthermore, the clause fails to address the real problems that exist within the entry clearance system as set up following the recommendations of the Wilson Committee. They are, the underfunding, the bureaucracy and the well documented racism of the entry clearance officers and their practices. It is these areas and issue that need urgent consideration and attention from the Government and not the supposed 'problem' of the length of the queues at Heathrow.

CLAUSE NINE: CHARGES

Clause 9 states that,

> The Secretary of State may with the consent of the Treasury make regulations prescribing fees to be paid, at such times as may be prescribed, in connection with any application for indefinite leave to remain in the United Kingdom or the grant of such leave; and no such leave shall be granted unless any fee payable in connection with the grant of that leave has been paid.

When the Conservative goal of 'building one Nation of free, prosperous and responsible families and people' is considered in the context of charging a fee of approximately œ50 for the granting of indefinite leave to remain it becomes quite clear that, for the Government, the ability to pay for the exercise of a legal right is of considerably greater importance than the exercise and existence of that right itself. This provision is therefore thoroughly compatible with the moves the bill makes towards implementing an increasingly means tested immigration system.

Douglas Hurd justified the charges in the following manner,

> we already charge for visas, entry clearance and citizenship. It is also right that we should be able to charge for the grant of settlement, on the usual basis of recovering the costs of considering the application for settlement. (Commons 2r p.410 col 793)

What the Government are unable to do is to justify the charges when, as Hurd stated, charges will have been made at the other stages of entry procedure and especially when it is accepted that settlement, subject to qualification, is a statutory right under the 1971 Immigration Act.

The effects of the introduction of charges such as this are significant both in terms of the practical effects that they will have on families seeking entry to the UK and in terms of the future policy implications of such moves. The JCWI believe that the effects of clause 9 will represent,

a significant barrier to poorer, especially large families seeking reunion in Britain.
(JCWI Briefing Paper)

In the context of the Bill as a whole this must be seen as the prime objective of this as well as the other clauses. It is a nonsense for the Government to attempt to argue as they have done that the Bill is intended to ensure both,

better customer service and tighter immigration control.
(Commons 2r col 790)

in a context of overt racism and restriction that defines such objectives as being mutually exclusive. The question to be asked is that posed by Mr Drabu of the UKIAS,

If there are charges is the Government prepared to provide a service which is efficient and which is consistent with the amount of money they are asking people to pay?
(Drabu Interview Transcript)

The answer, from a general consideration of this Bill, is that the Government is not prepared to offer such a service. The legislation does nothing to improve procedures or to reduce the length of the queues of people waiting for entry clearance in the Indian sub-continent. It does nothing to ensure the employment of more numerous and better trained immigration officials and is therefore only of benefit to those who are white and relatively wealthy. This is a deliberate move which when set in the context of the Government's policy objectives can be seen to be acting to facilitate the professed aim of encouraging only 'prosperous and responsible' people to settle in the UK. In short moves towards the extension of charges for almost the whole range of immigration services should be seen as nothing more than the creation of further methods by which black people can be prevented either from entering or remaining in the UK. That these negative effects will primarily have relevance for black consumers of the immigration service is beyond all doubt and is clearly shown by the contrasting treatment being offered to rich white passengers under the provisions of clause 8.

There was an initial fear that the operation of this clause would mean that those on a limited leave who were unable to afford to pay the œ50 fee would thereby become overstayers and therefore liable to having deportation proceedings initiated against them. This fear was resolved in the Lords but in such a way that shows the fallacy of claims that the Bill affects 'people regardless of origin'. The clarification offered in the Lords was that if an applicant was unable to meet the costs of settlement then rather than initiating deportation proceedings or a prosecution of that person as an overstayer, the limited leave would simply be extended, theoretically until such a times as the fee could be met. This is however a far from perfect solution to a problem that will only exist because of the introduction of the charge provided for by this clause as anomalous and discriminatory situations will continue to arise.

For example, if a person came to the UK as a visitor and during the stay married a British citizen that persons immigration status would have changed but, if after the appropriate time required to qualify for settlement, that person could not afford the œ50 fee then they would retain the original visitors status and so attract the restrictions on employment and access to benefits that follow from such a status. The result being that such a person would continue to have significant problems in raising enough money to gain the recognition of a status to which they are undoubtedly entitled. In such situations therefore,

Extending limited leave is actually going to be very meaningless.
(Interview Sue Conlan JCWI)

The Government's ideological equation of financial status with responsibility and therefore entitlement to settle in the UK is given clear expression in clause 9. There can be no doubt that the basis of such developments is racism. Given the grotesque inequalities in the distribution of wealth throughout the world and within individual nations is it obvious that black people will suffer disproportionately from the imposition of the financial prerequisites this Bill enshrines as determinants of immigration status and entry entitlement. There can therefore by no doubt that the real aim of the introduction of charges for the grant of indefinite leave to remain is to preclude many black people from being able to settle on a permanent basis in the UK.

SCHEDULES: minor amendments

Although grouped under the heading of 'minor amendments' the changes introduced under this section of the Bill are of great importance. Taken together they represent an increase in the arbitrary powers of immigration officers and a corresponding reduction in the rights of those who are seeking to enter the UK. A brief summary of the most important sections follows.

Limitation and conditions on leave to be applicable also to subsequent leave granted after absence within period of earlier leave.

Courts had held that if an individual passport had been endorsed 'given leave to enter, section 3[3]b' without any qualifying restrictions then a passenger was to be deemed to have been given indefinite leave to enter the UK as no conditions on the stay had been imposed. Paragraph 1 of the schedule to the Act means that from the date on which the Act comes into force passengers given the 3[3]b endorsement without qualification will only be able to stay in the UK for the length of time specified in the original limited leave.

Similar changes are introduced by paragraph 8 of the schedule which relates to,

> Leave in default of notice giving or refusing leave or cancelling refusal.

Paragraph 8[1] of the 1988 Act amends para 6[1] of schedule 2 of the act of 1971 which provides that if the notice of refusal of leave to enter or of refusal of leave is not given to the applicant within 12 hours, (amended to 24 hours by para 7 of the schedule to this Act), then the applicant,

> Shall (if not patrial) be deemed to have been given indefinite leave to enter the United Kingdom.

The amendment means that rather than indefinite leave to enter the UK the immigration officer shall grant,

> Leave to enter the United Kingdom for a period of six months subject to a condition prohibiting his taking employment.
> (Para 8[1] schedules to the 1988 Act)

Sub-section 2 of paragraph 8 introduces an even harsher restriction on the rights of those whose passport stamp is illegible. By amending paragraph 6[3] of schedule 2 of the 1971 Act, (This sets out how, even though a passenger has been given a notice refusing leave to enter the UK, that notice can be cancelled by a notice given in writing by an immigration officer and that at the same time the officer can give limited leave to enter. However, if such a notice granting the limited leave is not given, and it has been the practice that illegible stamps come into this category of cases, then the notice cancelling the refusal,

> shall be deemed to be a notice giving him indefinite leave to enter.)

the Government have decided that a person whose passport is endorsed with an illegible stamp will, in the future, be granted only three months leave to remain.

The JCWI argue that this change,

> could be very damaging; many people who travel frequently are often given a six month stamp. They will have no reason to know that a stamp which they cannot read, but which they know to be identical with one they have received many times before, actually means something different and could therefore inadvertently become over-stayers.
> (JCWI Briefing paper para 8.1)

The Government are then attempting to deal with a symptom of the failings of the immigration control system and not with the deep rooted causes of those problems that visibly manifest themselves. Rather than attempting to ensure that mistakes do not occur they have chosen to penalise still further those who the errors most directly affect. The consequences of these changes will be to further thicken the fog of misunderstanding and maladministration that pervades the immigration services and, in direct terms, they will also mean that the pressure to overstay will be made all the greater. This in turn will generate tensions that are created primarily by the actions and attitudes of immigration officers and the system they operate and that can only be increased by the introduction of clause 6 that makes overstaying a continuing offence. The act as a whole will therefore serve only to increase such tensions.

Paragraph 3. Deportation Order to Terminate Appeal Pending in Respect of Limited Leave

This clause especially in the light of the effects of clause 5, should be seen as part of the general attack the Act as a whole serves to mount on the continued existence of an immigration appeals system as established by the proposals of the Wilson Committee.

Paragraph 6. Power to Detain Passports etc.

Paragraph 6 of the schedule states that,

> An immigration officer may detain any passport or other document produced pursuant to sub-paragraphs [2][a] above until the person concerned is given leave to enter the United Kingdom or is about to depart or be removed following refusal of leave.

Such a right, at present, does and has not existed although it is not unknown for various documents to be detained by immigration officials. Therefore this paragraph operates to attempt to confer retroactive legality on the past actions of immigration officers that previously had no basis in law and to emphasise the contrast between the diminution of the rights of passengers and the sanctioned increase in the already draconian powers of immigration officers.

The consequence of legalising the detention of passports will be to allow immigration officials to detain documents whenever they feel that there is a possibility that they may be forgeries whether or not that suspicion has any basis in fact. This is another example of an instance in which the Government would argue that the law is 'colour blind' to its apparent legal objectivity. However, such an argument ignores once again the subjective involvement of racist immigration officers and the general nature and objectives of immigration control policies. The reality of this paragraph is, as the ILPA point out, that,

> it only takes a couple of out of control immigration officers and peoples lives can be seriously messed about with no redress in law; the power is personal to the immigration officer, so complaining to the Minister will not necessarily be effective.
> (ILPA Internal Briefing Paper)

As with many of the changes introduced by this Act it is of vital importance that this paragraph is not viewed in purely administrative terms, rather that all such developments should be located in their political and ideological contexts. Detaining passports is a thoroughly intimidating practise the ultimate aim of which is to form part of a package of procedures designed to prevent or dissuade people from attempting to enter the UK, whatever the validity of that application may be.

Paragraph 10. Restrictions on Work in Case of Persons Temporarily Admitted

Under the provisions of this paragraph all people who are in the UK on a form of temporary admission or who are without status, being subject to an appeal after a deportation order has been signed, and presumably after the coming into force of this Act, those who cannot afford to pay the fee for the granting of unlimited leave to remain, will be subject to a prohibition on employment. What will this mean in practical terms is best illustrated by a consideration of the position of asylum seekers.

The present situation is that while awaiting a decision on an asylum application a person will be placed on temporary admission and will not be the subject to any limitations on being able to take employment. The serious financial implications of paragraph 10 arise due to the length of time that the determination can take and during which the applicant will be unable to work. The British Refugee Council state that although the average waiting time for a decision on the asylum issue is 13 months, many asylum seekers are forced to wait for over 2 years for a decision to be reached. This is a considerable and financially debilitating time during which to be prevented from earning money on which to live.

This paragraph penalises those on temporary admission for the failings in the administration of the immigration control system. What should be done to ensure a 'better customer service' is to reduce the delays that give such changes their dramatic effects and not to penalise for those delays for which they are in no way responsible. Paragraph 10 is therefore a further example of the Government attempting to make it as difficult as possible for people to enter or settle in the UK if they are poor, black or victims of persecution.

CONCLUSION

When on the 25th April 1988 the Daily Express carried a front page headline proclaiming the,

> Scandal of Back Door Immigration,

over a story which, with little or no substantiation, claimed that,

> Tens of thousands of illegal immigrants are sneaking into Britain each year despite tough rules controlling entry,

they are not merely providing a knee jerk response to the passage of the 1988 Immigration Act but are reflecting the way in which immigration and the control of that immigration remain firmly at the forefront of the agenda of political debate and public consumption. The unfortunate truth that must be accepted following the passage of an Act that is so blatantly racist and the nature and tone of the parliamentary debates relating to that passage is that it is the far right, since 1979 operating within the Conservative Party, who have firmly seized the initiative as regards the setting of that agenda. This is at least partly due to the acquiescence and abdication of responsibility that has taken place in the name of opposition by the Labour Party. This Act illustrates the dynamic development of this agenda and indicates that, however bad the situation may be for black people in the UK or attempting to enter the UK at the present time, the situation is only ever likely to get worse if the mistakes of the past are not learnt from.

The Conservative Government has constructed its arguments in favour of an immigration control system, the primary purpose of which is to prevent the entry of black people, in a structured and deliberate manner. This construction begins with a purported concern as to the state of 'community relations', it

then develops by linking this to a concern over immigration and its effects and finally, building on these issues, which have formed the basis of the debates over immigration since the passage of the 1962 Commonwealth Immigrants Act, expands to a consideration not only of the aims of future policy initiatives but also of the status and continued presence of black people in the UK.

The Governments purported and often stated position is that controlling immigration is essential for the maintenance of good 'community relations'. Their position is however more complex than the simple expression of such beliefs would seem to indicate. The image of 'community relations' presented is used as a negative force through the application of which further restrictions on the immigration of black people can be implemented. For example, the government argued that it can be,

> no service to community relations for families to come here if they are homeless or destitute,
> (Commons 2r col 791)

thereby seeking a justification for the increased means testing of immigration status. For the Government then, the interests of 'community relations' are, essentially, those of racism. Community relations only exist in circumstances in which black people, by their presence, create them. Therefore, without black people there would be no 'community relations' and consequentially no scope for the development of 'bad community relations'. Immigration controls that in practise and design, only restrict the entry of black people are therefore characterised as being,

> a condition of harmony in our cities.
> (Commons 2r col 794)

Having established this political and ideological base the governments arguments in favour of stricter legislation are focussed on the number of immigrants who arrive each year and the politically and ideologically perceived effects that follow from their arrival. In doing so the government sought to deflect criticisms of the act by widening the context of their political aims. T. Renton expressed this move in the House of Lords by stating,

> As I said, 47,000 people came here in 1986. That is more than the average size of a parliamentary constituency ..... It is too many. Therefore it is not a question of whether this Bill goes too far. The question is whether it goes far enough to stem this still very considerable flow.
> (Lords 4th March '88 col 385)

Aside from the fact that in making this statement Renton fails to distinguish between the Governments willingness to allow white immigration, illustrated by the introduction of class 7, and their abhorrence of black immigration, there can be no doubt that it is not immigration per see that is being seen as a problem. Only black immigration, that in the above quotation is seen as representing a threat to the established political order, in the Government's eyes needs to be controlled.

Simultaneously this political threat is seen to be compounded by the purportedly large numbers of illegal entrants to the extent that the presence of black people in the Uk is regarded as representing a threat to the continued existence of the 'British way of life'. In such a way the immigration control system is characterised as being lax and thus allows for the development of the construction of arguments that link perceived abuses of the system to the previously spectoral incarnation of forced repatriation. Taking for granted the assumption that wholesale evasions of control are commonplace it is argued that,

These leaks deeply concern many of the indigenous people of this country who are worried that, in some areas, their society is being fundamentally changed by the culture of a people from far away.
(Commons 2r col 842)

It is through this construction of inherent conflict between 'indigenous' and 'non-indigenous' peoples that the potential nature of future policy developments cam be identified.

Phizacklea and Miles have argued that,

We regard the period since 1971 as a period characterised by a drift towards 'repatriation' because the 'fears' which have been referred to to justify government policy have been shown not to be satisfied solely by strict control over 'coloured' immigration.
(Phizacklea and Miles, White Mans country p.114)

I would argue that there can be no doubt that the 1988 Immigration Act serves to sharpen the focus of such developments. That this is so was expressed clearly by T. Renton when he argued that there was now a need to,

start to deal with the excessive numbers of immigrants already here.
(Commons 2r col 817)

The more or less abject failure of the campaign against this Act shows how important it is for those fighting racism at all levels to regain the initiative. If this is not done then the future will continue to look bleak. As long as the very idea of repatriation, in whatever form, remains an acceptable item on the political agenda then there is much work to be done.

The final strand that completes the Government's web of deceit and deception is the parallel process of undermining the position and status of black people settled or born in the UK. An example of this process is Norman Tebbitt's recent speech to the South Africa Club in which he clearly illustrates that the government conceptually and politically distinguish between those who are British and white and those who, at the moment, merely have some right to claim the 'benefits' of being a British citizen.

There could just be a touch of hypocrisy on the part of those who talk of the white South African tribes as outsiders as though they had arrived at Cape Town yesterday when they themselves have barely had the time to complete the journey from Heathrow to Hounslow West before claiming British rights.
(Guardian 21 April 1988)

The simple conclusion to be drawn from the practical effects of the Act and from the ideological forces that provide its dynamic is that it is not only the right or ability of black people to enter the UK that is under continued threat but their physical presence in the UK, regardless of a claim to citizenship.

References

Amnesty: Journal of British Section of Amnesty International, No. 31 Feb/March 1988, p.14 UK Rates of return, J. Shaw; p.20 Europes Fortress Mentality, P. Rudge

- ''Exiled' Asylum Seekers in the U.K.'

- Correspondence Between Amnesty and T. Renton on Refugees - Dec '87 - March '88

British Refugee Council: Refugee Advisers Handbook, January 1988 Edition

British Refugee Council: 'Settling for a Future, Proposals for a British Policy on Refugees', 1987

British Refugee Council: Asylum Seekers in the U.K.: Essential Statistics, C. Nettleton nad A. Simcock, September 1987

Conservative Party: 1987 Manifesto, Immigration and Race Relations, p.59, Conservative Party 1987

Charter '87: A Charter for Refugees, The Governments Position on Charter 87, 13 February 1988

Mactaggat, Misrahi and Rahman, 'A Race to exclusion' Marxism Today, January 1988, p.20

Duffy, B.J. The Immigration Rules, Discussion of 1983 Changes: Public Law, Summer 1983, p.220.

Dummett, A. (ed.) 'Towards a Just Immigration Policy' Cobden Trust 1981

Freeman and Spencer: 'Immigration Control, Black Workers and the Economy' British Journal of Law & Society, Vol. 6, No.1 1979, p.53

Home Affairs Select Committee, Third Report, Home Affairs Session 1984/5. Refugees and asylum, 3r Vol. IR and Proc. Vol II M/E and App.

Home Affairs Select Committee, Second report, Home Affairs Session 85/86. Immigration from the Indian Sub-Continent, 2r Proc M/E App.

I.L.P.A.: J. Fountain - Internal Discussion Paper, unpublished Staff Seminar Paper

I.L.P.A.: Parliamentary Briefing Papers Nos 1 & 2

Immigration Law Practitioners Association: Basic Immigration Law Training Pack, 19 April 1988

Joint Council for the Welfare of Immigrants: Briefing Paper on 1988 Immigration Bill

J.C.W.I.: Bulletin Vol. 3, No.4, November 1987 'Bangladeshi's Intentionally Homeless'

Juss, S.S.: Justice denied: Family Unity Cases, New Law Journal, January 29, 1988, p.67

Lal, S. and A. Wilson "But My Cows aren't going to England", 'A study in how families are divided'. Manchester Law Centre, 1986

Layton-Henry, Zig 'The State and New Commonwealth Immigration: 1951-56' New Community Vol. XIV, No. 1/2 Autumn 1987

Lever-Tracy, L.: "Immigrant Workers and Post-war Capitalism", Politics and Society Vol. 12, No.2,1983

Macdonald, I.A., #Immigration Law and Practice in the United Kingdom' Second edition, London: Butterworths 1987

Marrington, D. 'From Primary Right to Secondary Privilege: An Essay in British Immigration Law', New Community Vol.XIV, No.1/2 Autumn 1987, CRE 1987

Miles, R. and A. Phizacklea 'White Mans Country', Pluto Press, 1987

Nicol, A. 'Illegal Entry After Zamir', New Law Journal, October 7th 1982

Nikolinakis, M. 'Notes Towards a General Theory of Migration in Late Capitalism', Race and Class Vol. 17, No.1, Summer 1975

Owers, Anne 'Families Divided: Immigraion Control and FAmily Life' Board for Social Responsibility, Church of England 1984

Owers, Anne 'Kurds New Colour Bar', New Society, 27 Nov. 1987, pp.20-21

Pearl, D. 'Family Law and the Immigrant Communities', Bristol Family Law Guide and Practice Series 1986

Pearl, D. 'South Asian Immigrant Communities and English Family Law: 1971-87', New Community, Vol. XIV, No.1/2 Autumn 1987, p.161

Peppard, N. 'The Age of Innocence: Race relations Before 1965' New Community Vol. XIV, No. 1/2 Autumn 1987

Sedley, S. Q.C. 'In the Matter of the Immigration Bill 1987. Opinion for the C.R.E. (Paper), (Unpublished??)

Somraj, UK's Immigration Laws - Are they fair?' Labour Research November 1987, p.15

Sondhi, R. 'Divided Families: British Immigration Control in the Indian Sub-Continent', Runnymede Trust 1987

'The Monday Club' Monday News June/July 1983. Story claiming '47% of immigrants favour repatration'

U.K.I.A.S. Refugee Unit, 'Briefing on Immigration Bill' B. Stoyle, 22 feb 1988

U.K.I.A.S. Annual report 1986-7

U.K.I.A.S. 'Immigration Bill, Background Information for Members of Parliament', 12 Nov. 1987

Women, Immigration and Nationality Group 'World Apart', Pluto Press, 1985