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## Confounding the Rule of Law: Conflating Immigration, Nationality, and Asylum in the UK

Professor Devyani Prabhat's MacDermott Lecture on the Rule of Law and Immigration, Nationality, and Asylum, delivered at Queen's University Belfast on May 18, 2023.

### Abstract

In this MacDermott Annual Lecture, Professor Devyani Prabhat looks at current developments in immigration, nationality and asylum law and evaluates these in terms of the core ingredients of the rule of law. Specifically, the focus is on two aspects of the rule of law as elaborated on by Lord Bingham in his classic exposition on the rule of law (2011)<sup>1</sup>. First, Bingham asserts that, "Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion" is a fundamental requirement of the rule of law and, second, Bingham states that "the rule of law requires compliance by the state with its obligations in international law as in national law". The examples Professor Prabhat analyses in the lecture are that of the East African Asians who could not enter the UK with their British passports in the 1960s-70s, the Windrush generation and the hostile environment of immigration control, immigration control of EU nationals in the UK after Brexit, developments in cancellation of British Citizenship, and new legislation and proposals on asylum in the UK. Do these changes in the scope and application of the law comply with the rule of law in general and with the two specific principles on 'law not discretion' and 'international law compliance' in particular? While answering this question, Professor Prabhat explains how the different legal categories in immigration, nationality, and asylum are distinct but are often conflated or confused with each other. Executive discretion should be narrow for nationality and asylum matters to conform with international law whereas it can be wider for immigration so long as principles of fairness and non-discrimination are adhered to in each instance.

### Introduction

It is a huge honour to be speaking here in Queen's University Belfast on the 25th anniversary year of the Good Friday agreement. I want to thank you for inviting me to speak at such a special event. The legacy of Lord MacDermott after whom this annual lecture is named is of immense value. In 1957 Lord MacDermott gave the Hamlyn lecture on the topic 'Protection from power' on the importance of the rule of law and the protection of human rights from the abuse of power.<sup>2</sup> It therefore seems apt to talk about the rule of law in contemporary times as well. Today I talk about the rule of law specifically in the context of immigration, nationality, and asylum. These migration-linked topics are key areas for determining membership of a society and are critical for understanding a society's commitment to fairness and non-discrimination. Despite the breadth of subject matter, I have decided to keep all of immigration, nationality, and asylum in the mix for the talk today because all three are linked conceptually, and through past and contemporary developments and cases. The conflation of these areas gives rise to far reaching consequences for people's rights and for those who defend these rights and has grave implications for the rule of law.

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<sup>1</sup> Tom Bingham, *The Rule of Law*, Penguin Law, 2011.

<sup>2</sup> See Review by C of the speech: Protection from Power under English Law by Lord MacDermott, *The Modern Law Review*, Vol. 21, No. 5 (Sep., 1958), pp. 569-573.

## What is the Rule of Law?

The rule of law is a much-contested term, but its meaning has been deftly explained by Lord Bingham in his famous lecture at Cambridge University in 2006. The Cambridge lecture was later published as an article and then as a popular book on the rule of law.<sup>3</sup> "The core of the existing principle," Bingham argued, was "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts." Bingham identified eight central principles attached to the rule of law<sup>4</sup>:

- (1) The law must be accessible and so far as possible intelligible, clear and predictable.
- (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.\*
- (3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
- (4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
- (5) The law must afford adequate protection of fundamental human rights.
- (6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
- (7) The adjudicative procedures provided by the state should be fair.
- (8) The rule of law requires compliance by the state with its obligations in international law as in national law.\*

The rule of law also forms part of the Constitutional Reform Act 2005. Section 1 of the Constitutional Reform Act simply states that the "existing constitutional principle" of the rule of law and the Lord Chancellor's "existing constitutional role" are not "adversely affected" by the Act. Through this negative wording, the section confirms that the rule of law is indeed a constitutional principle.

Although several of Bingham's eight points are pertinent to our discussion, I have selected two (marked with asterisks by me) which are particularly applicable to examples of conflated migration-linked categories. These are the second and eighth principles about law not discretion for questions of legal right and liability and compliance with obligations in international law as in national law. I shall discuss these two at greater length. While immigration, asylum and nationality are linked matters, they do have differences in how they are legally conceptualised. Immigration is mostly about meeting conditions and the exercise of executive discretion on entry and stay conditions while nationality and asylum seeking are matters of assessing legal rights and obligations. Yet these are not so distinct in the UK in their operation. In many instances, the use of wide executive discretion, unchecked by judicial process, permeates nationality and asylum as well as immigration. In all three areas international law principles as part of domestic law have been affected or even deliberately excluded in recent political developments and legal changes.

### Conflating Asylum and Immigration: The Ukrainian Sponsorship Scheme

Immigration, nationality, and asylum are regulated largely by the same statutes. For example, the Nationality and Borders Act 2022 aims to "Make provision about nationality, asylum and immigration;" amongst other objectives. Asylum is a matter of right in international law. Article

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<sup>3</sup>Tom Bingham, (2007), *The Rule of Law*, *The Cambridge Law Journal*, 66(1), 67-85; Bingham, *Ibid* N. 2.

<sup>4</sup> Asterisks added by author for ease of reference to the principles in particular focus in this piece.

14 of the 1948 Universal Declaration of Human Rights states: “Everyone has the right to seek and enjoy in other countries asylum from persecution.” Yet it is increasingly resembling immigration in terms of being similarly subject to discretionary decision-making powers. For instance, Ukrainian families who come to the UK must apply for visas in advance, which is the immigration concept of seeking permission in advance of entry and not based on a universal international right to seek asylum. The Ukraine Sponsorship Scheme allows Ukrainian nationals and their family members to come to the UK, but they first need to arrange for a sponsor who can provide accommodation for a minimum of six months.<sup>5</sup> In this manner, what was essentially a matter of right has become conditional and dependent. Families and individuals are left at the mercy of sponsors. There are reports of predatory exploitation and people being rendered homeless at the end of the six-month period.<sup>6</sup> These developments demonstrate how a core principle of the rule of law about applying the law rather than the exercise of discretion (Bingham’s principle 2) is undermined and international law is not being implemented in national law (Bingham’s principle 8). The Ukrainian scheme is paradoxically presented as a shining example of how the UK can accommodate and welcome asylum seekers promptly and without delay as they would not have to seek asylum on arrival.<sup>7</sup> Despite its flaws, arguably, Ukrainian asylum seekers are better situated than other asylum seekers who cannot avail of any special schemes. I shall return to the situation of other asylum seekers later in this lecture.

### Conflating Nationality and Asylum: The East African Asians in 1960s-70s

The confusion in legal status is not just limited to asylum seekers and immigrants but also permeates nationality holding and asylum seeking. In the past this happened to British citizens who held British passports in Uganda and Kenya in the 1960s and 1970s. East African Asians who were coming to the UK to flee persecution there from newly formed authoritarian governments were denied entry into the UK (and often detained) despite being British passport holders. How did this happen? To understand why they could not enter readily with their passports we need to delve into the days of the British Empire.

Free movement of people was there in theory in times of Empire for British subjects but in practice it was not really an option for most people. Travel between colonies (mostly non-white, and not independent regions) and dominions (settled places which became independent or autonomous earlier) was usually restricted in practice.<sup>8</sup> Global politics was also shifting. British dominion Canada passed its own citizenship act in 1946 and issued Canadian passports to include its own French-Canadian citizens.<sup>9</sup> Canada’s initiative in controlling its immigration and naturalisation meant that each dominion could potentially break away from any common understanding of subjecthood for immigration purposes. Each could determine criteria for entry and residence on its own terms and regulate subjects from other parts of the Empire. This

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<sup>5</sup> <https://www.gov.uk/guidance/apply-for-a-visa-under-the-ukraine-sponsorship-scheme#overview>

<sup>6</sup> Homes for Ukraine: Housing scheme called danger to refugees - BBC News, 4<sup>th</sup> May 2022.

<sup>7</sup> Kathryn Cassidy, *Homes for Ukraine: One Year On*, UK in a Changing Europe, <https://ukandeu.ac.uk/homes-for-ukraine-one-year-on/>, last accessed 23<sup>rd</sup> Aug 2023.

<sup>8</sup> Randall Hansen, *Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation* (Oxford University Press, 2000). See also Devyani Prabhat, *Unequal citizenship and subjecthood: a rose by any other name ...?*, *Northern Ireland Law Quarterly*, Vol. 71 No. 2 (2020): Summer, 175-191.

<sup>9</sup> Laurie Fransman, *Fransman's British Nationality Law*, Bloomsbury Professional, 2011.

challenged British supremacy which was at the heart of Empire and was part of the British vision of the UK's place in the post-Wars world. To counter this threat, the 1948 British Nationality Act expressly welcomed all Commonwealth nationals and people from former colonies who wanted to work or settle in Britain. It created the new status of "citizen of the United Kingdom and Colonies" (CUKC) for people born or naturalised in either the United Kingdom or one of its colonies. Provision was also made in certain circumstances for citizenship to be acquired by descent from a CUKC, or by registration. The law was declaratory in nature in the sense that it did not require any further action by of the affected people to take effect.

At the time of independence of the East African countries in the 1960s, the nationality arrangements were such that most Asians became citizens of the newly independent country in which they were living but there were still many who held British passports and continued to do so. After the independence of Kenya, the Africanisation programme of the Kenyan authorities resulted in the persecution of the minority Asian community in Kenya. Large numbers of Asians with British passports began to migrate to the UK. Very soon there was virulent and vitriolic political opposition to the arrivals of Black and Asian people. A Member of Parliament Enoch Powell made a speech (popularly referred to as the 'rivers of blood' speech) which was about immigrants overcrowding Britain. The speech illustrates the naked hatred of migrants which unfortunately still has its echoes in modern migration discourse in Britain. Powell said, "We must be mad, literally mad, as a nation to be permitting the annual inflow of some 50,000 dependents, who are for the most part the material of the future growth of the immigrant descended population. It is like watching a nation busily engaged in heaping up its own funeral pyre." This hostility in open political discourse was also matched by the everyday experience of racism of Black and Asian people of finding housing or employment in the UK.

Unsurprisingly, the British government tightened controls over immigration. The 1962 Commonwealth Immigration Act rendered Commonwealth citizens subject to immigration controls for the first time; it ended the right of automatic entry for Commonwealth citizens. Thus, the status of subjecthood was now detached from any substantive rights such as a right to reside in the UK. Even if they were ordinarily resident, or had been, they were subject to a new system enabling deportation of those who had committed criminal offences. All these changes permitted enormous administrative discretion in determining who can enter and who can stay in the UK or who can continue to remain without being evicted. Crucially, the 1962 Act removed the right of entry of CUKCs whose passports had been issued by colonial authorities.

In 1968 the British government then passed another immigration act in just three days: the Commonwealth Immigrants' Act 1968.<sup>10</sup> The 1968 Act sought to prevent the re-entry of people from countries such as Uganda and Kenya. A citizen could henceforth only live and work in the UK if they, or at least one of their parents or grandparents, had been born, adopted, registered, or naturalised in the UK. The change in law now excluded most non-white people who were more likely to be born overseas or linked to UK through parents or grandparents born overseas. This rule excluded almost all the East African Asians who were at that time seeking entry to the UK. It did this without expressly adding race as a direct criterion for inclusion or exclusion and this made it difficult to challenge on grounds of discrimination in law.

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<sup>10</sup> Randall Hansen, "The Kenyan Asians, British Politics, and the Commonwealth Immigrants Act, 1968." *The Historical Journal*, vol. 42, no. 3 (1999), 809–834.

The situation in East Africa worsened in 1972 when General Amin ordered all Asians out of Uganda. Some 28,600 out of the 50,000 British passport holders in Uganda came to Britain. They were denied entry or detained in the UK and neighbouring countries. In the *East African Asians v United Kingdom* [1973] 3 EHRR 76 the court gave a decision about East African Asians and held that East African Asians who were British passport holders should not be deprived of their right of entry on racial grounds. Rather than assessing nationality rights, however, the court held that the UK had acted incompatibly with Article 3 (freedom from torture, inhuman and degrading treatment), Article 5 (right to liberty), Article 8 (the right to respect for private and family life) and Article 14 (prohibition on discrimination) of the European Convention on Human Rights.<sup>11</sup> The case is considered a landmark pronouncement on inhumane and degrading treatment. However, it is also arguably a failure to pinpoint how and why citizenship rights matter. It leaves us with an unanswered question: how did the right to enter the country of nationality, which is a fundamental property of citizenship, become detached, discretionary, and ultimately deniable?

### Conflating 'Irregular' Persons and Nationals: The Windrush Generation

There are other enduring confusions about nationality from times of decolonisation which have led to present-day problems. People arriving from the Caribbean Islands in the 1940s-60s had no requirement in law to register or to seek any sort of settlement status. Years later, the hostile environment legislations of immigration control with their requirements of document checking have resulted in the harassment, as well as detention and deportation of many who had arrived earlier. The Home Office has now apologised for many of these errors which resulted in loss of life and liberty.<sup>12</sup> Compensation has been awarded to some people although there are complaints about the slow rate of compensation payment and the bureaucracy surrounding the process.<sup>13</sup>

Like most of the other examples in this talk, the Windrush generation suffered (and continue to suffer) from dehumanisation and expulsion from membership in British society.<sup>14</sup> The vast amount of executive discretion in determining membership of society has rendered law an oppressive presence for many rather than serving as a protection of rights and a guarantor of fairness and non-discrimination.

### Settled Members of Society or Irregular Persons: EU nationals after Brexit

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<sup>11</sup> The Immigration Act 1971 and the British Nationality Act 1981: The cross-linking of right of abode with being free of immigration control means citizenship is now a racialised notion (linked with ancestry and bloodlines). From 1983 no more special protection for Commonwealth citizens (they must naturalise like anyone else) and no more birth citizenship (1981 BNA).

<sup>12</sup> Home Secretary apologises to members of Windrush generation, <https://www.gov.uk/government/news/home-secretary-apologises-to-members-of-windrush-generation>, 10<sup>th</sup> June 2019.

<sup>13</sup> Windrush Compensation Scheme Impact Assessment: <https://www.gov.uk/government/publications/windrush-compensation-scheme-impact-assessment> ; Home office, 6 February 2020.

<sup>14</sup> Windrush Lessons Learned Review: independent review by Wendy Williams, Home Office, <https://www.gov.uk/government/publications/windrush-lessons-learned-review> ( last updated 31 March 2020).



Another legacy of the document checking regime is the precarious legal status of EU nationals after Brexit. The EU Settlement Scheme (EUSS) is the mechanism through which EU, EEA and Swiss citizens and their family members resident in the UK prior to 31 December 2020 have been able to apply to secure their status and rights in the UK.<sup>15</sup> Pre-settled status, also known as Limited Leave to Remain, is a temporary form of stay in the UK. It is valid for five years. The pre-settled status of millions of EU nationals and their family members opened in August 2018 but is due to expire in the second half of 2023. This creates uncertainty about their future in the UK. The UK's position was that pre-settled status cannot generally be extended and is not upgraded automatically. Therefore, a subsequent application for settled status (officially called 'Indefinite Leave to Remain') had to be made before the expiry date of pre-settled status. However, this was only possible once the applicant had completed five years of continuous residence in the UK. Those who failed to make this application were at risk of losing their right to remain in the UK.

The Independent Monitoring Authority brought a judicial review proceeding against the Home Office in the High Court to challenge the requirement of a second application. The High Court ruled in December 2022<sup>16</sup> that applicants granted pre-settled status should not lose their rights of residence if they do not make another application for settled status. The court based its decision on article 13(4) of the Withdrawal Agreement which states that a right of residence can only be lost in very specific circumstances and could not just be lost through the expiry of a previously held status. The court held that settled status rights accrue automatically, without the need of a second application if the other conditions (such as the 5-year residence requirement) are satisfied. While the case was a victory for EU nationals, it illustrates how EU nationals have experienced categorical exclusion in a manner like commonwealth nationals. Like the earlier arrivals, EU nationals have also had to challenge the loss of their legal status in the courts.

These examples of exclusions and challenges in the past and in the present are not just only instances of unfairness, but also illustrate the underlying point that while distinct in legal conceptualisation, immigration, nationality, and asylum do not exist as separate spheres of operation of political power. The lines between those who belong and those who do not is being continually redrawn. Here in Belfast, we need to reflect on the special implications of these developments for Northern Ireland. For instance, in Northern Ireland, the Good Friday Agreement birthright provisions allow the people of Northern Ireland to identify and be accepted as Irish or British or both.<sup>17</sup> Northern Irish people can choose to be both Irish and British or exclusively Irish or exclusively British, but at birth they are attributed to be British until they decide to exercise a choice.<sup>18</sup> On reaching the age of majority, they can renounce their British citizenship through an administrative process and become Irish or they can continue to be

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<sup>15</sup> Details of the Scheme are available at <https://www.gov.uk/settled-status-eu-citizens-families>

<sup>16</sup> *Independent Monitoring Authority v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin).

<sup>17</sup> Good Friday (or Belfast) Agreement "*it is the birth right of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both*".

<sup>18</sup> The presumption of Britishness at birth was challenged by Emma DeSouza who was born in Northern Ireland and was treated as presumptively British by the Home Office. She was denied a EEA residence card for her US born husband on that basis. The dispute was settled in a different manner for the DeSouzas but before the Upper Tribunal they lost the case. The Upper Tribunal found in favour of the Home Office's position that the Belfast Agreement did not supersede the 1981 Act and therefore, Emma DeSouza was British despite her genuine belief that she was only Irish. See Upper Tribunal (Immigration and Asylum Chamber) in *De Souza (Good Friday Agreement: nationality)* [2019] UKUT 355 (IAC).

British.<sup>19</sup> However, post-Brexit EU law rights now would attach from being Irish. EU law rights are often more generous for bringing in third country national partners and deriving other benefits which means those who would like to retain EU rights would have to undergo renunciation of their British citizenship for pragmatic reasons. The numbers of these renunciations in Northern Ireland have soared in recent times.<sup>20</sup> Apart from the administrative inconvenience to people, this is problematic because of the serious identity linked nationality issues in Northern Ireland.

### Conflating Nationals and Foreigners: Cancellation of Citizenship

The way citizenship is attributed at birth in Northern Ireland also resonates with one of the core issues in citizenship stripping. At the time that a person faces the cancellation of their British citizenship they must be holding an alternate nationality so that they are not rendered stateless (S.40 of BNA 1981). Quite often the issue is unclear whether there is another surviving citizenship, but through their past connections with other countries or their heritage or ancestry, they may be attributed an alternate nationality. It is then possible to strip a person of British citizenship as they would not become stateless. This scenario plays out in the *Shamima Begum* case.<sup>21</sup> Begum left the UK as a 15-year-old British schoolgirl for Syria in 2015. She was found in a camp in Syria some years ago. The Home Secretary removed her British citizenship soon, thereafter, arguing that she would not be left stateless as she was eligible for Bangladeshi citizenship through her ancestry. This eligibility is derived from a Bangladeshi statute for nationality which has nothing to do with British nationality laws or with Begum's own actions in acquiring any other nationality. This was despite Bangladesh asserting that Begum is not their citizen and would be put on trial with death penalty as an option for terrorism should she ever enter Bangladesh.<sup>22</sup>

After protracted litigation surrounding several preliminary issues, Begum lost her appeal against cancellation at the Special Immigration Appeals Commission's (SIAC)<sup>23</sup>. Yet the court found "credible suspicion" that Begum had been trafficked for the purpose of sexual

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<sup>19</sup> Section 12 of the BNA 1981: A British citizen of full age and capacity may renounce their British citizenship and that, subject only to concerns about statelessness, the Secretary of State shall give effect to that renunciation.

<sup>20</sup> Luke Butterfly, Irish Times, UK immigration law prompted many to renounce British citizenship in Northern Ireland, November 14, 2022, <https://www.irishtimes.com/ireland/social-affairs/2022/11/14/uk-immigration-law-prompting-many-to-renounce-british-citizenship-in-northern-ireland/#:~:text=Hundreds%20of%20people%20from%20Northern,people%20living%20in%20the%20North.>

<sup>21</sup> *Shamima Begum v Secretary of State for the Home Department*, SIAC date of judgment 22<sup>nd</sup> February 2023, <https://www.judiciary.uk/wp-content/uploads/2023/02/Shamima-Begum-OPEN-Judgment.pdf>

<sup>22</sup> Mattha Busby, Shamima Begum would face death penalty in Bangladesh, says minister, 4<sup>th</sup> May 2019, <https://www.theguardian.com/uk-news/2019/may/04/shamima-begum-would-face-death-penalty-in-bangladesh-says-minister>

<sup>23</sup> In Begum's case, the preliminary issues were about the alternate nationality and about whether she could be permitted to enter the UK to be present in her appeals proceedings. Begum was stripped of her citizenship while outside the country and thus first sought permission to enter to be present at her appeal. This permission was denied by the Home Secretary, and she litigated the impact of this decision on her ability to instruct her lawyers and participate in her trial, arguing that it violated her fair trial rights. She lost that round of litigation in 2022 when it went up all the way to the Supreme Court. Only after that the case returned to the SIAC for hearing on the substantive grounds.



exploitation, as her lawyers had argued. It also found that there were “arguable breaches of duty” by state authorities in having allowed her to make the journey to Syria. In its decision, the SIAC states that the case is “about fundamental principles, rights and obligations”. It also says that “the rule of law is non-negotiable”. But ultimately, it upholds the cancellation order.

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

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

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

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

A wider implication of Begum's case is that anyone with any other national connection is now at greater risk of losing their British citizenship and becoming effectively stateless. The situation singles out naturalized citizens and other second-generation migrants born as British in terms of their holding a less secure citizenship status in the country. The SIAC noted in its decision that "...many right-thinking people in this country's Muslim communities (and beyond) feel that they are being treated as second-class citizens, and/or that their welcome is somehow contingent. The Commission has received a considerable body of evidence on that topic, and it raises important issues. It is not an answer to that concern to say that the Secretary of State has paid regard at a general level to inter-community relations or was given advice that the deprivation of Ms Begum was strongly supported by a majority of public opinion [para 397]." It then says that it has seen closed evidence that such an issue has been duly considered by the Home Secretary [para 398]. These contradictions cannot be explained to the public without transparency in proceedings.

Attribution of nationality, such as in the Begum case, is simply a mechanism of avoiding creating statelessness in the eyes of the law, while people are still left stateless in reality as they have no effective nationality. In terms of citizenship stripping because people who might have an alternate nationality are more likely to be vulnerable to this measure, which is usually connected with national security, but can be for a range of different conduct also has specific relevance for places where people may have multiple nationality, such as in Northern Ireland. The situation has now taken a worse turn because an amendment to Section 40 of British Nationality Act 1981 has now made it possible to render naturalised citizens stateless while cancelling their citizenship. Now an order to deprive a person of their British citizenship can be made by the Home Secretary, if s/he is satisfied that:

- it would be conducive to the public good to deprive the person of their British citizenship status and to do so would not render them stateless; or
- the person obtained their citizenship status through naturalisation, and it would be conducive to the public good to deprive them of their status because they have engaged in conduct "seriously prejudicial" to the UK's vital interests, and the Home Secretary has reasonable grounds to believe that they could acquire another nationality.

So international law to a large extent is not taken seriously in this area, and there is only lip service to the idea of statelessness. Instead, what we see is a view of citizenship as most protected for a mono national British by birth whereas everyone else can be stripped for a wide variety of conduct. This creation of various tiers of citizenship is the creation of second-class citizenship.<sup>24</sup> Ngai while studying the treatment of East Asians in the US writes that when ethnic minority citizens continue to remain aliens over generations, they can be called alien citizens.<sup>25</sup> Ngai's work was in the context of migrants acquiring citizenship rights but for cancellation the focus shifts to treating citizens as problems. The idea appears to be to simply prevent re-entry and the restrictions act to banish people. Apart from the punitive effect of banishment there is the symbolic effect of such laws which seem to make some citizenship- holding of lesser value than others and to foster an idea of lingering foreignness.

To summarise, the wide discretion with the Home Secretary for cancellation cases is compounded by the avoidance of international law duties such as preventing trafficking,

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<sup>24</sup> Linda Bosniak, "Varieties of citizenship." *Fordham L. Rev.* 75 (2006): 2449.

<sup>25</sup> Mae M Ngai, "American orientalism." *Reviews in American History* 28.3 (2000): 408-415.

avoiding statelessness, and providing a fair trial. All of these undermine the rule of law particularly Bingham's principles 2 and 8 of the rule of law.

### Conflating Asylum Seekers and 'Irregular' persons: Illegal Migration Act 2023

Now, as promised at the beginning of the lecture, let us return to the topic of asylum and the rule of law. We have already seen that there is a need for prior permission to enter such as with a visa for Ukrainians or to arrive through a safe and legal route as set out in the Illegal Migration Act 2023. These are not requirements which can be imposed on asylum seekers in international law. A requirement of prior permission increases the risk of unsafe conditions for asylum seekers. Wide discretion with executive authorities in decision-making violate international law principles about the right to seek asylum.

Prior to its becoming law, the UNHCR said the Illegal Immigration Bill (as it then was) would clearly breach the Refugee Convention, stating: "The effect of the bill (in this form) would be to deny protection to many asylum-seekers in need of safety and protection, and even deny them the opportunity to put forward their case"<sup>26</sup>. While Ukrainian asylum seekers have specific schemes, other asylum seekers are provided very few means (if any) of entry into the UK. There has been particular focus on the Home Secretary's admission in March 2023 that the Illegal Migration Bill (as it then was) may conflict with requirements of the European Convention on Human Rights. On the first page of the published law, the Home Secretary said she was "unable to make a statement" that its bill's provisions are "compatible with the Convention rights"; a highly unusual situation for a country ostensibly governed under the rule of law.

Meanwhile the government is looking to outsource asylum control to other 'safe' third countries. Certain asylum seekers would not be allowed to enter the UK at all if asylum seeking is offshore. The plan is to send these asylum seekers to countries like Rwanda instead. At present no such transfers have taken place because of legal challenges however the observable trend is very clear: just as we see the emergence of tiers of citizens, we can also see tiers of asylum seekers who are treated differently from each other.

### Conflating the Procedures of the Rule of Law with Obstructions and the Defenders of the Rule of Law with Obstructionists

It appears there is contravention of principles of international law in core areas of law relating to migrants (including those who are citizens but have connections with other countries) and migration. A further hurdle in many instances is that people cannot challenge these laws or decisions through effective means as due process in courts is compromised. As we have seen one of the most important courts for immigration matters is the SIAC. This court was initially set up in 1997 mainly as a forum where foreigners could appeal against deportation orders.<sup>27</sup> Later, it took over other national security cases, such as detention of those who could not be deported and cancellation of citizenship. In its early years after formation, the legal community criticised the SIAC's use of secret evidence and proceedings which were closed to the public.

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<sup>26</sup> <https://www.unhcr.org/uk/uk-immigration-and-asylum-plans-some-questions-answered-by-unhcr.html>

<sup>27</sup> Bureau of Investigative Journalism, 24.10.12, The Special Immigration Appeals Commission (SIAC) explained, <https://www.thebureauinvestigates.com/stories/2012-10-24/the-special-immigration-appeals-commission-siac-explained>

Many lawyers who served as special advocates at the SIAC resigned in protest because they were unhappy with how it operated.

Since then, its procedures have been fine-tuned (for example, those who appeal to it must be given the gist of the evidence against them). Its remit has also been expanded to include more immigration and nationality issues. It is not unusual for the SIAC to disagree with the home secretary on human rights issues. For instance, in a 2010 case, Appeal no: SC/77/80/81/82/83/09, the court decided that the UK could not deport several suspected terrorists to Pakistan, as they faced a real threat of torture there<sup>28</sup>. This was despite the UK receiving diplomatic assurances from Pakistan that they would not be subjected to torture.

In recent years however it appears that the tide has turned on the evaluation of human rights issues in the SIAC. Higher courts have been steering the SIAC away from reconsidering the secretary of state's assessment of the country's national security needs using its own lens. One example is a 2021 case *Secretary of State for the Home Department and P3*, [2021] EWCA Civ 1642, where a person was deprived of their citizenship and then denied entry to the UK by the home secretary. The SIAC overturned the home secretary's decision, so the home secretary appealed. The Court of Appeal sided with the home secretary, ruling that the specialist court could not substitute its own evaluation of the interests of national security. This is also close to the Supreme Court's view as well in an earlier round of Begum's case (2021] UKSC 7. Here too the Supreme Court said that on a deprivation appeal, the SIAC is not entitled to re-evaluate the home secretary's discretion by using its own standards of review. In the absence of proper judicial oversight, it is nearly impossible to correct for (or even know of) any mistake or potential misuse of executive power.

Undermining the lawyers who have taken on cases in immigration, nationality and asylum has become a common occurrence in recent times. Their lives have at times been in grave danger. A man visited the offices of Duncan Lewis Solicitors in Harrow armed with a large knife and threatened to kill a member of staff because he blamed lawyers at the firm for preventing the removal of immigrants from the UK.<sup>29</sup> Just days earlier the then home secretary, Priti Patel, had claimed activist lawyers were frustrating the removal of refused asylum seekers from the UK. Current home secretary Suella Braverman also wrote to Tory party members claiming "an activist blob of left-wing lawyers, civil servants and the Labour party" had opposed legislative attempts to curb small-boat crossings in the Channel.<sup>30</sup> In a similar vein in March 2023 Prime Minister Rishi Sunak said "lefty lawyers" were thwarting efforts to crack down on illegal migration. The Bar Council and the Law Society have made representations to the Prime Minister to stop making statements that place lawyers at risk.<sup>31</sup> Such sentiments could serve to

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<sup>28</sup> Decision dated 18<sup>th</sup> May 2010 available at [Microsoft Word - Open Judgment 1.doc \(tribunals.gov.uk\)](#); last accessed 21<sup>st</sup> August 2023.

<sup>29</sup> <https://www.theguardian.com/uk-news/2020/oct/23/man-faces-terror-charge-over-alleged-attack-at-immigration-law-firm>

<sup>30</sup> <https://www.ft.com/content/246232b7-2f83-4698-a2bd-368e396913fe>

<sup>31</sup> Bar Council and Law Society warn that Prime Minister's attacks on immigration lawyers are misleading and dangerous, 14 June 2022, Electronic Immigration Network, <https://www.ein.org.uk/news/bar-council-and-law-society-warn-prime-ministers-attacks-immigration-lawyers-are-misleading#:~:text=The%20Bar%20Council%20and%20the%20Law%20Society%20called%20on%20the,for%20simply%20doing%20their%20jobs.>

endanger professionals who work in this sector especially lawyers seeking to defend the rule of law.

#### Conflating Ethnicity, Racialisation, Allegiance and Membership: Some Final Words

We have come to new crossroads now 25 years from the Good Friday agreement. With Brexit, and with other developments, immigration and nationality and asylum laws act as litmus tests for how seriously, the rule of law is taken in a society. These laws are about membership in a society; who is an insider who is an outsider. These may signify hospitality to others or hostility toward them. Disregard for international law in these scenarios may be interpreted as a lack of due regard for others in the world. Many commentators have said recent hostility toward the EU is a resurgence of nostalgia for the continuation of Empire, but hostile environment developments have also affected members of the former Empire.<sup>32</sup> Perhaps there are pragmatic advantages in the continuation of relationships of exploitation, but such exploitation should never be justifiable in the name of law.

Relationships of exclusion are not just legacies of the past. There are also significant differences from how the state power would expand previously in terms of colonisation and how it operates now. In the past, colonisation involved the expansion of jurisdiction of state through the bodies of subjects. In the famous Calvin case (1608) 77 ER 377 the Scottish born subject was within the jurisdiction of the English King and could access estates in England. As a Scot, he could not legally own English land. Yet through the concept that allegiance was tied to the person of the king, rather than to the kingdom itself or its laws Calvin's Case established that a child born in Scotland, after the Union of the Crowns under King James VI and I in 1603, was considered under the common law to be an English subject and entitled to the benefits of English law. But now with developments, such as in cancellation of citizenship, there is a rollback of jurisdiction from the bodies of citizens. Citizens can be simply disowned and exiled. Such exile is usually linked to the concept of allegiance. For instance, in *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064. Arden, LJ, said para 51 of the judgment, “In the present case, the appellant has over a significant period of time fundamentally and seriously broken the obligations which apply to him as a citizen and put at risk the lives of others whom the Crown is bound to protect. I do not consider that it would be sensibly argued that this is not a situation in which the state is justified in seeking to be relieved of any further obligation to protect the appellant.”

It is hard to assess the objectives or efficacy of counter-terrorism measures such as cancellation of citizenship as very few hard facts are known. Perhaps the modern state is looking for a quick fix pragmatic remedy to counterterrorism. Perhaps jurisdiction change could be because of the growth of human rights in the interim years from colonisation and the wars to the present day, and now there is a pushback by the nation states to emerge stronger. Overturning these human rights frameworks which act as constraints over state action can be a show of nation state power.

These are obviously broad issues we cannot resolve here in a single lecture, but categorical exclusion of foreigners present in our midst is often an indicator of rising national fervour and a return to ethnicised and racialised notions of national belonging. With hostile environment legislation it has now become the duty of individuals who have access to resources such as

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<sup>32</sup> Brexit has been driven by nostalgia for a lost empire, lost prominence of commonwealth and Britain's global position in it according to many scholars.

Nobel laureate Abdulrazak Gurna has said that the British empire is “still important in Britain” and may well have played a part in the Brexit vote. Afa Hirsch writes in her book *Brit(ish)*, (2018:270) that, ‘the ghosts of the British Empire are everywhere in modern Britain, and nowhere more so than in the dream of Brexit’.

housing (landlords), health care (medical services staff), and employment (employers) to monitor the immigration status of others. Indeed, finding who is the ‘other’ has become the duty for all of us. As poet Alberto Rios has written “The border used to be an actual place, but now, it is the act of a thousand imaginations.”<sup>33</sup> This is all the more reason that we need to reflect on the principles of the rule of law, and why these should provide a structural framework of how we evaluate legal developments today. The principles apply irrespective of what specific views we hold on the various issues of migration that I have spoken about today.

### Conclusion

It has been a pleasure to speak to you and to return to Belfast and to QUB where I gathered empirical data for my PhD several years back. That research led to my first book *Unleashing the Force of Law*<sup>34</sup>, which eventually won the Peter Birks prize from the Society of Legal Scholars, UK, and Ireland. I owe a debt to this community and have a personal connection and by inviting me to your midst for this conversation today you made me welcome once again. The core message of this lecture is that the grave implications for the rule of law intensify when different legal categories in immigration, nationality, and asylum are collapsed into one. These ought to be considered legally distinct but politics often conflates these and renders every legal status entirely precarious. Executive discretion should be narrowly tailored for nationality and asylum matters to conform with international law whereas it can be wider in scope for immigration so long as principles of fairness and non-discrimination are adhered to in each instance. Only then can there be conformity with the basic principles of the rule of law.

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<sup>33</sup> *The Border: A Double Sonnet by Alberto Rios*

<sup>34</sup> Devyani Prabhat, *Unleashing the Force of Law: Legal Mobilization, National Security, and Basic Freedoms*, Palgrave, 2016.