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“Lifting the Wire”: Litigating for Migrants’ Rights in the UK

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PhD Law Studies

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September 2016

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature:.....

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Thank you very much to Marie, who started me out on this project, and to Elizabeth and James, who saw me through to its finish. You have all been unfailingly supportive throughout.

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UNIVERSITY OF SUSSEX

TOM SOUTHERDEN – PhD LAW STUDIES

TITLE: “LIFTING THE WIRE”: LITIGATING FOR MIGRANTS’ RIGHTS IN THE UK

SUMMARY:

This thesis focusses on litigation for migrants’ rights in the UK, and in particular litigation conducted by lawyers and activists motivated by the cause of promoting and protecting migrants’ rights. The thesis conceptualises this form of migrants’ rights activism as ‘cause litigation’. The thesis asks the question, what happens when immigration and migrants’ rights questions are litigated for political purposes in the UK? In answering this question the thesis shows that cause litigation has in some circumstances been able to develop some highly significant forms of rights-protecting systemic change. However, the thesis also shows that cause litigation is vulnerable to adverse Executive reactions. Executive conduct in the area of immigration and migrants’ rights is governed by an overarching imperative to exercise and be seen to be exercising control. Cause litigation presents direct challenges to this imperative. In response to these challenges the Executive has engaged in both evasion and an increasingly aggressive backlash against changes secured through cause litigation and the activity of cause litigation itself. This backlash has succeeded in undermining many of cause litigation’s achievements and has ultimately diminished the role of cause litigation and the rule of law in regulating immigration control in the UK. This is not to argue that the advancements obtained through cause litigation are irrelevant; those that survive, albeit in a reduced form, are non-negligible in the otherwise highly adverse context of the UK’s immigration politics. Cause litigation is, therefore, one of the few avenues open for migrants’ rights to be protected and advanced, even if it is in a compromised and vulnerable form. It is argued, though, that an activism technique that was a response to the political disadvantage migrants’ rights campaigners face, by securing practical change without mainstream political support, has ultimately not been able to escape from the UK’s adverse immigration politics.

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Chapter 1: Introduction

Introduction

This thesis examines the role that litigation plays in protecting migrants' rights in the UK. In particular, it focusses on the work of lawyers and other activists who, rather than simply operating with a traditional cab-rank approach, pursue a form of legal mobilisation in order to protect and promote the cause of migrants' rights. As this thesis will show, this politicised legal activism is at the heart of many of the most important developments in immigration law in the UK. At the same time, however, it has become increasingly controversial politically, with the successes it secures for migrants' rights running counter to governmental policy and the prevailing political consensus on the need for ever tighter immigration restrictions. The thesis therefore focusses on both the legal and policy changes that migrants' rights litigation in the UK has brought about and the wider relationship these changes have had with the development of the UK's immigration politics and government policy.

The thesis builds on previous studies of the influence of liberal norms, such as universal rights and the rule of law, in immigration policy,¹ and on studies of political litigation and 'legal mobilisation' in general and for migrants' rights in particular.² The thesis contrasts with these studies, though, in two ways. Firstly, it does not treat these liberal norms as a constant discursive force within the UK's immigration politics, but discusses the effects of their practical activation and mobilisation for a particular cause. Secondly, it argues that in addition to securing technical changes to procedure, politicised litigation has in some circumstances been able to develop some highly significant forms of rights-protecting systemic change. However, the thesis also shows that this litigation is vulnerable to adverse executive reactions, as a result of the obstructive role it plays against the executive's immigration policy imperatives. The title's quote comes from a leading migrants' rights litigator, interviewed for this research, who talked of 'lifting the wire' of immigration policy for migrants to come

¹ Joppke C, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 *World Politics* 266; Joppke C, *Immigration and the Nation State: the United States, Germany and Great Britain* (OUP 1999); Hampshire J, *The Politics of Immigration* (Polity 2013)

² Kavar L, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France* (CUP 2015); Sterett S, 'Caring about Individual Cases: Immigration Lawyering in Britain', in Sarat A & Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities*, (OUP 1998); Maiman R, 'Asylum Law Practice in the United Kingdom after the Human Rights Act', in Sarat A and Scheingold S (eds) *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice*, (Stanford University Press 2005)

through. She viewed her work as limited to making small and temporary gaps in an otherwise daunting immigration control edifice that would both remain in place and might well spring back closed. This thesis examines the extent to which this is the case.

This introductory chapter will start by setting the scene in which the thesis plays out, before discussing the background issues that motivated the study. It sets out the central question that the thesis will seek to answer and provides an outline of the key literature that has informed it. Finally, the chapter discusses the methodology that the study uses and then sets out an outline of how the thesis will progress.

Background: The Politics of Immigration and Migrants' Rights in the UK

In the summer of 2016, as this thesis was being finalised, the UK voted to leave the European Union. The single largest issue that drove the Leave vote appears to have been immigration.³ Since the expansion of the EU into Eastern Europe in 2004, immigration has been elevated to one of the major political issues of the day.⁴ In addition to these underlying concerns, from around 2014 onwards a major increase in disordered and deadly refugee migration into Europe occurred. The scale both of the numbers involved and the loss of life prompted increased media and political awareness of border camps at Calais and in Greece and Italy, as well as speculation that the refugees represented a terrorist or criminal threat.⁵ The repeated invocation by the Leave campaign of the need to 'take back control' appeared to tap into a sense of deep unease about a chaotic and threatening world.

These developments, though, fit part of a wider context that this thesis will chart. As will be shown, the post-War history of UK policy is largely of hostility towards immigration, particularly the immigration of Black and Asian populations from the 'New Commonwealth'.⁶ More recently the New Labour government sought to modify this restrictionist policy focus. This was done not least through its policy towards eastern European migration, along with

³ Goodwin M, 'Why Britain Backed Brexit' (The UK in a Changing Europe, 4 July 2016) <http://ukandeu.ac.uk/why-britain-backed-brexit%e2%80%8f/> accessed 22 September 2016

⁴ Bobby Duffy & Tom Frere-Smith, 'Perceptions and Reality: 10 things we should know about attitudes to immigration in the UK' (Ipsos MORI Social Research Institute, January 2014) <https://www.ipsos-mori.com/Assets/Docs/Publications/sri-perceptions-and-reality-immigration-report-summary-2013.pdf>

⁵ Daily Mirror, Jihadi terrorists could be hiding in Calais refugee camp ready to enter and attack Britain, (12 August 2016), <http://www.mirror.co.uk/news/uk-news/jihadi-terrorists-could-hiding-calais-8620074> accessed 22 September 2016

⁶ Spencer I, *British Immigration Policy since 1939: The Making of Multi-Racial Britain* (Routledge 1997)

other liberalisation of economic migration. Yet, this was also combined with continued and increasing hostility to irregular migration, particularly asylum seeking, against which New Labour promised to be 'as tough as old boots'.⁷

Following the collapse of the New Labour project, the Coalition government reinstituted an overtly restrictionist immigration agenda, announcing a top-line net-migration target considerably lower than such figures had been for many years and tailoring policy in an attempt to meet it.⁸ At the same time, it proclaimed the intention of making the UK a 'hostile environment' for irregular migrants,⁹ through imposing further immigration status-restrictions on basic needs and services. The UK, then, has experienced a long-term trend of demand for immigration restrictions from substantial majorities of the public and governmental ambitions to deliver on these demands. The few variations that there have been have tended to be in the intensity with which anti-immigration sentiment is felt by the majority of the public, and the particular targets and techniques for restrictionist measures chosen by the executive.

Throughout this period, though, an alternative force has existed within British politics, which will be the focus of this study. While majority opinion has remained steadfastly opposed to immigration, the combination of concern for racial equality and opposition to the variously draconian enforcement measures taken by the UK immigration authorities has led to migrants' rights becoming a key issue for the UK's human rights and social justice activists. Permanently embattled, these groups have sought to counter negative media representations of migration issues,¹⁰ influence governmental policy development¹¹ and intervene to prevent what they perceive as rights violations by the executive's immigration

⁷ Blunkett D, quoted in Don Flynn, 'Tough as old boots'? Asylum, immigration and the paradox of New Labour policy, IRP, November 2003, <http://www.swslim.org.uk/documents/themes/lt12-flynn.pdf> accessed 22 September 2016

⁸ Migration Observatory, Missing the Net Migration Target (27 November 2014) <http://www.migrationobservatory.ox.ac.uk/resources/commentaries/missing-the-net-migration-target/> accessed 22 September 2016

⁹ The Guardian, Immigration bill: Theresa May defends plans to create 'hostile environment' (10 October 2013), <http://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment> accessed 22 September 2016

¹⁰ Refugee Council, Top 20 Facts about Refugees and Asylum Seekers, (Undated) http://www.refugeecouncil.org.uk/latest/news/4735_top_20_facts_about_refugees_and_asylum_seekers accessed 22 September 2016

¹¹ Ritchie M HC Deb, 6 March 2012, c638W

administration.¹² Yet, while social attitudes on questions such as race have undoubtedly liberalised in the UK, migrants' rights activism has remained a distinctly minority activity. Despite their commitment, migrants' rights activists remain outgunned and possess few tools with which to exert influence. Immigration and migrants' rights controversies remain dominated by restrictionist rhetoric and policy development.

Motivations and Issues Behind the Study

This thesis focuses on one of the key ways by which immigration into the UK has persisted in the face of such concerted opposition. Scholars of migration have developed theories as to the structural reasons why liberal states continue to allow unwanted immigration to occur. The first wave of such discussion emphasised limits on the sovereignty of liberal states such as the UK, imposed by the increasingly globalised market place and liberal states' participation in international institutions.¹³ However, these views were challenged, most prominently, by Joppke, who while accepting that these issues were undoubtedly important, argued that of greater importance were aspects of what he termed 'self-limiting sovereignty'. As he puts it,

'The capacity of states to control immigration has not diminished but increased... But for domestic reasons, liberal states are kept from putting this capacity to use.'¹⁴

These domestic reasons he describes as the varyingly strong moral obligations felt by elites and the liberal state to immigrant populations and, most importantly for this study, the legal process whereby 'abstract commands of statutory and constitutional law' have been applied to immigration questions.¹⁵ More recently still, Hampshire has developed this argument out from the legal process specifically to a broader focus on 'liberal norms', of which regard for individual rights and the rule of law are key parts, as an important 'expansionist' force in liberal immigration policy.¹⁶

However, these studies have a tendency to take judicial interventions in immigration questions as an inevitable, natural phenomenon within liberal states. While to a certain

¹² Women for Refugee Women, Campaign, (Undated)<http://www.refugeewomen.co.uk/campaign/> accessed 22 September 2016

¹³ Sassen S *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996) chap 3

¹⁴ Joppke, *Liberal States* (n1) 270

¹⁵ Joppke, *Liberal States* (n1) 271

¹⁶ Hampshire (n1) 5

extent this may be true in so far as immigration and immigration control is regulated by law and therefore some form of litigation is likely to occur, this thesis will show that this perspective misses a crucial aspect of the picture. Judicial interventions only occur when cases are brought to them and judges' rulings reflect the issues and arguments that are presented to them. The nature of judges' interventions are therefore to a significant extent, although clearly not exclusively, contingent on the actors that bring those cases and the influences and frameworks that those actors operate within. As a result, it is important to understand more about that process and how it produces the particular judicial interventions that have occurred in immigration policy making and enforcement.

As will be discussed throughout this thesis, as a result of migrants' rights becoming a key issue for the UK's broader human rights, racial and social justice activism, immigration law in the UK and its related fields have over time developed a very significant politicised movement practicing within it. This movement, made up of both lawyers and a wider non-legal NGO sector, has seen legal practice as a key means of defending and promoting the cause of migrants' rights. The thesis will therefore address what the presence of this core of legal activists within the UK's immigration field has meant for judicial interventions into immigration enforcement and the development of immigration policy.

The author of this thesis has been professionally involved in this form of legal activism, both as a casework lawyer and latterly working for an international human rights NGO. However, the motivations behind this study began, five years ago, with concerns about the sustainability of a model of activism that appeared to be divorced from mainstream public politics. The self-conscious use of the legal process for the defence and promotion of migrants' rights appeared to be a political act that was seeking to conduct itself outside of the normal requirements of constituency building and mobilisation that democratic politics required. This in turn raised interesting constitutional questions about the relationship between law and politics in the UK.¹⁷ Most obviously, political objectives were being sought through means that skirted around public debate. This is a long-running point of contention in US politics regarding the 'liberal' rulings of the Supreme Court, which have been critiqued by conservative commentators as 'intellectual class values, which are far more egalitarian and

¹⁷ Loughlin M, *Sword & Scales: An Examination Of The Relationship Between Law And Politics* (Hart 2003); Bellamy R, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, 2007)

socially permissive... than those of the public at large and so cannot carry elections.’¹⁸ While it had not been expressed in quite these terms, this was a position that was starting to be expressed in UK political debate around the time that research began on this thesis.¹⁹

More interestingly, though, this legal activism was profiting from the constitutional convention that politics, in the sense of party politics and the wider discursive contest over power, would not encroach directly into legal matters. For this convention to hold in a society that lacks a written constitution the law, in the sense of legal process and the lawyers and judges that enact it, is required not to stray into territory regarded as being the exclusive purview of politicians and politics.²⁰ As Sarat and Scheingold have argued, failing to observe this requirement, by for example pursuing the cause of migrants’ rights through litigation, ‘puts at risk the political immunity of the legal profession and the legal process.’²¹ An erosion of ‘political immunity’ in this way carries with it a risk that the legal profession and the legal process become targets for the UK’s anti-immigration politics.

Much the same could be said regarding the relationship between legal processes and politics as for the nature of the UK’s debate on human rights more generally. As was noted above, migrants’ rights issues have been a major focus of the UK’s human rights campaigners. This has been as a result of issues, in addition to asylum, such as the widespread use of indefinite immigration detention,²² the immigration detention of children²³ and various migrants’ rights-affecting measures taken as part of the war on terror.²⁴ These actions demonstrated the UK state’s willingness to engage in practices against foreign nationals that it would not consider applying to its own citizens. As Benhabib has noted, ‘ultimately, citizenship was the prime guarantor for the protection of one’s human rights’.²⁵ As a result, while classical

¹⁸ Bork R, *The Tempting of America: The Political Seduction of the Law*, (Simon and Schuster, 1991) 337

¹⁹ Lord Dyson, What is wrong with human rights? (Hertfordshire University 3 November 2011) https://www.supremecourt.uk/docs/speech_111103.pdf accessed 22 September 2016

²⁰ Sumption J, ‘Judicial and Political Decision-Making: The Uncertain Boundary’ (the F.A. Mann Lecture 2011) <http://www.pem.cam.ac.uk/wp-content/uploads/2012/07/1C-Sumption-article.pdf> accessed 22 September 2016

²¹ Sarat and Scheingold, *The Worlds Cause Lawyers Make* (n2) 3

²² Wilsher D, *Immigration Detention: Law History Politics*, (CUP 2014)

²³ Fillmore E, ‘The Effects of Immigration Detention on the Health of Children and Families in the UK’ (2010) 34 *Adoption & Fostering* 88-91

²⁴ Jones K, ‘Deportations with assurances: addressing key criticisms’ (2008) 57 *ICLQ* 183 184; Jackson J, ‘Justice, security and the right to a fair trial: is the use of secret evidence ever fair?’ [2013] *PL* 720; Greer S, ‘Human rights and the struggle against terrorism in the United Kingdom’ (2008) 2 *EHRLR* 163

²⁵ Benhabib S, *Rights of Others* (CUP 2004) 68

interpretations of constitutional or fundamental human rights standards present them as being somehow 'existing independently of social recognition'²⁶ and therefore elevated above the ordinary cut and thrust of politics, migrants' rights have become one of the key battlegrounds in wider political discussion about the merits of the UK's adherence to international human rights norms and the extent to which such norms should be judicially enforceable.

Given this starting point, it might be thought that a suitable approach to this study would have been a critical investigation of whether or not such legal activism should be happening, or a critical analysis of the law's role in defending migrants' rights. However, this is not the approach that has been taken. While not entirely abandoning a critical approach, the study starts from the basis of accepting the reality of the regulation of immigration by a legal framework and that that framework inevitably produces litigation affecting migrants' rights issues. Taking the world as it is, the thesis also offers no comment on debates around the merits or otherwise of borders and immigration control per se. To this extent more radical critical scholars may consider that it falls within the genre of what El-Enany has critiqued as "'legal idolisers", who cling to protective laws, overlooking their exclusive function.'²⁷ However, rather than analysing whether or not migrants' rights activists *should* be pursuing immigration-related litigation when that litigation will be occurring regardless, with political and practical consequences for migrants' rights, the thesis focuses on the extent to which litigation does and can protect migrants' rights in the present circumstances and the related issue of the relationship such litigation has with the development of governmental immigration control policies. The thesis should therefore be understood as falling within the socio-legal scholarship of immigration and migrants' rights in the UK.

The Thesis' Focus

The present thesis draws on work from a number of different disciplines and lines of analytical enquiry. Scholarship on 'cause lawyering' has provided a route for moving from studies of law and politics as questions of constitutional or philosophical significance²⁸ into studies of legal

²⁶ Dembour M-B, *When Humans Become Migrants: Study Of The European Court Of Human Rights With An Inter-American Counterpoint* (OUP 2015) 3

²⁷ El-Enany N, 'On Pragmatism and Legal Idolatry: Fortress Europe and the Desertion of the European Refugee' (2015) 22 *International Journal on Minority and Group Rights* 7

²⁸ Loughlin(n17); Bellamy (n17)

work with political motivations as a practical enterprise. This has proved vital in setting the thesis' terms and formulating an understanding of the form of legal work being analysed. The 'cause lawyering' research project, led by Sarat and Scheingold²⁹ but taken on by others since then,³⁰ was primarily concerned with the daily business of working as a lawyer and

'the ways lawyers construct causes and causes supply lawyers with something to believe in, as well as ways commitment to a cause challenges conventional ideas of lawyer professionalism.'³¹

As such they provide a framework for approaching the question of how the motivations of the litigators matter in an analysis of the outcomes their work produces and the consequences of their actions. Yet these studies placed the lawyer themselves and their practice firmly at the centre of the analysis and focussed less on the cause they were seeking to support, other than for case-study purposes.

The related strand of 'legal mobilisation' scholarship has proved more useful in approaching the study as a focus on litigation as a tool for political activism. The early work in this body of literature, particularly that by Scheingold,³² Rosenberg,³³ Klarman³⁴ and Tushnet³⁵ encouraged a concentration on 'judicial impact'; the simple question of whether or not legal activists achieved what they set out to achieve through the courts, if not, why not, and in light of this, ultimately whether or not the 'turn to law' was a wise use of campaigning energy and activist resources. As Rosenberg put it, 'Under what conditions can courts produce political

²⁹ Sarat A & Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities*, (OUP 1998); Sarat A and Scheingold S, *Cause Lawyering and the State in a Global Era* (OUP 2001); Sarat A and Scheingold S, *Cause Lawyers and Social Movements* (Stanford University Press 2006); Sarat A and Scheingold S, *The Worlds Cause Lawyers Make: Structure And Agency In Legal Practice*, (Stanford University Press 2005); Scheingold S and Sarat A, *Something to Believe In: Politics, Professionalism, And Cause Lawyering* (Stanford University Press 2004)

³⁰ Marshall A-M & Crocker Hale D, 'Cause Lawyering' (2014) 10, *Annual Review of Law and Social Science* 301; Meili S, 'UK Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law' (2013) 54 *Boston College Law Review* 1123

³¹ Sarat A and Scheingold S, *Cause Lawyers and Social Movements* (n29) 1

³² Scheingold S, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd Ed University of Michigan Press 2004)

³³ Rosenberg G, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd Ed, University of Chicago Press 2008)

³⁴ Klarman M, *Brown v. Board of Education and the civil rights movement: abridged edition of From Jim Crow to civil rights: the Supreme Court and the struggle for racial equality* (Oxford University Press 2007)

³⁵ Tushnet M, 'Some Legacies of Brown v. Board Education' (2004) 90 *VLR* 1693

and social change? When does it make sense for individuals and groups pressing for [social] change to litigate?’³⁶

This approach has been subsequently moved away from as the sole concentration on legal and/or policy change as activist outcomes failed to take into account the myriad other socio-political influences that activist litigation can have. It was McCann that first led this move, in an overt challenge to Rosenberg.³⁷ Through a broader focus on ‘the constitutive role of legal rights both as a strategic resource and as a constraint on collective efforts to transform or ‘reconstitute’ relationships among social groups’³⁸ McCann sought ‘a more expansive, subtle and complex view of law’s role in political struggle than most studies focusing on reform-oriented litigation alone offer.’³⁹ In seeking this more expansive analysis he moved away from simple litigation outcomes to an analysis of the consequences for activist movements of their adoption and engagement with legal forms and processes. It is this activity he termed ‘legal mobilisation’.

This approach has most recently, and most importantly for the present thesis, been applied to immigration questions by Leila Kavar in her discussion of the ‘radiating effects’ of litigation on immigration in the US and France.⁴⁰ Kavar’s study is particularly important for the present thesis for two reasons. Firstly, it is one of very few detailed examinations specifically focussed on legal activism on immigration issues, albeit not in relation to the UK context.⁴¹ Secondly, it is important for its particular emphasis on the intersection between the activist tool being used (politically motivated litigation), the politico-legal context in which it is being used (in her case, the US and French judicial and political systems) and the politics of the activist issue in question (immigration policy and the rights of migrants). Political litigation operates in a sphere of mutually influential political, social and cultural factors which result in consequences that are very particular to their context. As Kavar herself demonstrates, the fact of the use of litigation by activists affects the politics of immigration policy in different

³⁶ Rosenberg, (n33) 4

³⁷ McCann M, *Rights at Work: Pay Equity Reform and The Politics of Legal Mobilization* (The University Of Chicago Press 1994)

³⁸ Ibid 7

³⁹ Ibid 9

⁴⁰ Kavar (n2) 153

⁴¹ For the UK specifically, book-length, Webber F, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto 2012); Morris L, *Asylum, Welfare And The Cosmopolitan Ideal: A Sociology Of Rights* (Routledge 2010); Chapters and journal articles include Sterett, (n2); Meili (n30)

ways in the US and France, as a result of the particular cultural histories and political settlements regarding judicial rights and courts' interventions into political decision making in the two countries. Yet, at the same time, the fact that it is immigration policy being litigated also has an influence on how the litigation is perceived and the radiating effects it produces; another activist issue would not be framed in quite the same way or carry with it precisely the same narrative baggage.

Kawar's interest in the 'radiating effects' of political litigation lead her to largely dispense with a concern for the outcomes of cases and the particular policy changes that they have or have not achieved. She refers to this as 'analytically decentering official case dispositions.'⁴² However, this is largely because she starts from a premise that in the particular field of immigration policy, litigation has little influence.⁴³ Yet, this is not the premise of the present thesis with regard to the particular context of the UK. The present thesis cannot entirely depart from the need to investigate the extent to which such litigation does have influence in the UK context and in particular, the extent to which migrants' rights activists have achieved their policy goals through litigation. Thus the more concrete, some might think prosaic, concerns of the earlier analysts of political litigation must also be tackled.

From Kawar, though, the present thesis draws a simple approach to the issue of political litigation for migrants' rights, which is capable of encompassing both the 'judicial impact' and the broader legal mobilisation perspectives. This is to ask, what happens when immigration and migrants' rights questions are litigated for political purposes in the UK? Put another way, what are the outcomes achieved and the consequences of migrants' rights litigation in the particular politico-legal context of the UK? When formulated in this way, the thesis will be able to take into account both the need to address the issue of policy change and the wider concerns of litigation's radiating effects.

It also allows for the present thesis to make its primary contribution to the literature on immigration law and policy and migrants' rights in the UK. As noted above, one of the lessons of the legal mobilisation scholarship is that the particularities of the context being studied are vital. As such, close attention to UK immigration and migrants' rights scholarship would be

⁴² Kawar (n2) 23

⁴³ Kawar (n2) 153

necessary in any case, to effectively analyse politicised litigation on the issue. However, this perspective can also be reversed. The thesis will be able to make a more substantial contribution to an understanding of migrants' rights and UK immigration policy development by showing how the fact of activist litigation as a force within the policy dynamic has influenced the development of this policy and its consequences for the human rights of migrants.

By seeking to answer the question of what happens when immigration policy and migrants' rights are litigated for political purposes in the UK, the thesis will use the tools and lessons provided by the cause lawyering and legal mobilisation scholars to expand and inform understanding of immigration policy development and migrants' human rights in the UK. In so doing, it may also be able to make a smaller contribution to the wider debate on the role of legalised human rights in UK politics by providing a detailed analysis of one of the key areas of contestation in that debate; the rights of migrants and the legal enforcement of those rights. How the thesis will go about investigating these issues will be the subject of the next section.

Methodology

In his discussion of socio-legal research, Bradshaw states that,

'First, socio-legal research considers the law and the process of law (law-making, legal procedure) beyond legal texts – i.e. socio-politico-economic considerations that surround and inform the enactment of laws, the operation of procedure, and the result of passage and enforcement of laws. Second in studying the context and result of law, socio-legal research moves beyond the academic, the judicial and the legislative office, chamber, library and committee room to gather data wherever appropriate to the problem.⁴⁴

This provides a relatively neat summary of the approach that will be taken in this research. As has been discussed above, this thesis will examine the legal and policy outcomes that politically-motivated litigation for migrants' rights produce for the operation of immigration control procedures, the development of immigration jurisprudence and the enforcement

⁴⁴ Bradshaw A, 'Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods', in Thomas P (ed), *Socio-Legal Studies* (Dartmouth 1997) 99

both of legislative and judge-made immigration law. It will also discuss the broader consequences of this litigation activism, in terms of its influence of the passage of legislation and on the wider public political debate around immigration and migrants' rights that informs and motivates that legislation. While making extensive reference to the relevant academic, legislative and judicial documents the research will necessarily take an empirical approach to these questions.

It will do so firstly through analysis of judgments in key migrants' rights cases brought through this form of legal activism. As will be discussed in chapters 4 and 5, the cases include both those taken as 'strategic litigation' by activist NGOs and judgments arising out of the day-to-day business of cause lawyering for individual migrants. The scope of the thesis does not allow for a complete sample of all such judgments; as is discussed in chapters 5 and 6 a key aspect of the migrants' rights litigation dynamic is the sheer weight of case law that it generates. Instead, cases were chosen for detailed discussion that exemplified or contributed to particular aspects of cause litigation's involvement in the development of the executive's immigration policy and procedure. Cases are discussed in legal terms but also in relation to the role the litigators played in bringing them about and executive responses to them. Rather than a pure focus on jurisprudential developments, then, case selection reflected the thesis' focus on the political and practical outcomes and consequences of the litigation. Legal change alone, though important, is only one element to be considered.

The second leading empirical element of the research is a combination of semi-structured interviews with practitioners of the kind of litigation under discussion and other related actors,⁴⁵ augmented by my own experiences in my professional life. 20 formal interviews were conducted with a range of actors in the sector. These included eight solicitors and barristers that take these cases, with a mix of lawyers working for charitable/not-for-profit enterprises and those working for private firms, nine senior NGO workers engaged in this work, two funding officers for institutional trusts that financially support this litigation, and an immigration judge and child-rights' barrister who has had many years' experience of hearing and representing migrants' rights cases. While it was not intended that these interview subjects were to be a statistically representative sample of the community of

⁴⁵ For discussion of semi-structured interview technique, Bryman A, *Social Research Methods*, 4th Edition, (OUP 2014) 470 - 482

migrants' rights activists that engage in litigation, they do present a reasonable cross section of experiences, relevant specialisms and approaches to the work.

The interviews lasted between one and two and a half hours, depending on the availability of the interviewee and the issues being discussed. Most were conducted in person, with one done over the phone. The interviews were semi-structured in form, using what Taylor and Bogdan have described as an 'interview guide'. As they explain,

The interview guide is not a structured schedule or protocol. Rather, it is a list of general areas to be covered with each informant. In the interview situation the researcher decides how to phrase questions and when to ask them. The interview guide serves solely to remind the interviewer to ask about certain things.⁴⁶

The reason for taking this approach, as opposed to a structured list of set questions, was that the interviews were intended to draw out the interviewees' own experiences and perceptions of their work, as well as the legal, institutional and political influences on their work. As such, the conversations were tailored to the particular individual and their role within the UK's migrants' rights sector. Questions were directed towards the practical realities of litigation, such as the influence of funding, professional responsibilities and procedural requirements; perceptions of political influence on their work, including in judicial decisions, policy development and sector priorities; and attitudes and expectations regarding the direction, influence and potential of the litigation that is being pursued for migrants' rights. Interviews were given on condition of anonymity, with quotations used in the thesis being ascribed to generic descriptive names to assist the reader.

Interviews were obtained through a combination of my own professional contacts and snowball sampling.⁴⁷ Bernard has described this technique as

'using key informants and/or documents you locate one or two people in a population. Then you ask those people to (1) list others in the population and (2) recommend someone from the list whom you might interview.'⁴⁸

⁴⁶ Taylor S & Bogdan R, *Introduction to Qualitative Research Methods: A Guidebook and Resource*, (John Wiley and Sons 1998) 105

⁴⁷ Bernard HR, *Social Research Methods: Qualitative and Quantitative Approaches* (Sage 2013) 168

⁴⁸ Ibid

He goes on to state that this technique is particularly suitable for interviewing people who 'are members of an elite group... and who don't care about your need for data.'⁴⁹ This is an apt description of the cause litigators who agreed to be interviewed for this study.

As noted above, I have worked in this sector for a number of years and this facilitated the process of getting interviewees. Making lists was not necessary, but recommendations were used to gain access to interview subjects with particular specialisms or experiences that I did not already have connections with. It also allowed me to follow up with interviewees to clarify issues outside of the formal interview setting and to discuss developments in the research and the issues it covers with a wider range of actors within the sector aside from the formal interview subjects. Working in the sector also enabled me to develop a clear picture of the structure of the sector, how the different actors fit within it and the extent to which they are able and willing to co-operate and coordinate with each other. It also allowed me to access web-based migrants' rights forums and real-world seminars where legal and policy developments were discussed and debated. These opportunities allowed me to monitor practical developments in a field that is fast moving, informed the questioning of interviewees and aided in the development the analysis that the thesis presents.

It was important to maintain an independent analytical approach to the issues, despite my direct involvement in the field. Many of the actors involved are strongly committed to the particular cause and/or are heavily embedded in an inherently adversarial relationship with the immigration control mechanisms of the state. This antagonism risks distorting perceptions or producing assumptions about third parties' motivations, particularly the immigration service and judges, which might not stand up to sustained scrutiny. As such it was important not to take all assertions and explanations provided by interviewees and contacts within the wider sector at face value. To this end I would keep regular notes on trends and common perceptions amongst the litigation actors in order to test them through empirical or theoretical analysis.

In addition to the leading elements of case law, interview data and professional contacts, the thesis also draws on archival research into parliamentary debates on relevant migrants' rights issues, publications and speeches by politicians on migrants' rights litigation, and media

⁴⁹ Ibid

coverage of these issues. It will also make use of official data sources when available and appropriate, such as quarterly immigration and courts and tribunal statistics, to document certain impacts of legislative or policy changes. These data sources will be used in combination with the other empirical sources to provide an explication of the UK's migrants' rights litigation sector and the policy and political outcomes and consequences that it produces.

Structure of the Thesis

The thesis is made up of five substantive chapters, which themselves can be understood as being grouped together into two sections. The first section, consisting of chapters 2 and 3, provides a more detailed discussion of the scholarly framework for the thesis' analysis and a contextual grounding in activist litigation for migrants' rights in the UK. From this starting point, the second section of chapters 4, 5 and 6 presents a detailed examination of the outcomes and consequences of this litigation, with each chapter taking an increasingly broad perspective on the issue. This is so as to synthesise the importance of practical legal and policy change as acknowledged by the first generation legal activism scholars with the focus on the wider consequences of such activism, what Kavar refers to as litigation's 'radiating effects'. As such, the second section moves from a discussion of the effectiveness of targeted strategic litigation, through a discussion of the impact of the much larger but more amorphous body of day-to-day cause litigation casework, to a discussion of the consequences of politicised litigation for migrants' rights for the rule of law's application to immigration policy and implementation in the UK.

Chapter Two begins with discussion of two key bodies of theoretical literature for the present study; the influences on liberal states' approaches to migration and constitutional debate around the rule of law and legalised rights charters in democracies. The chapter identifies some questions that this broader literature leaves unresolved and which a study of migrants' rights litigation in practice will need to address. From there it moves to discuss the various forms of politicised legal action that have been identified by scholars over the years and assesses the extent to which their frameworks of analysis apply to the particular context of migrants' rights litigation in the UK. From this the chapter proposes the term 'cause litigation' to encompass the particular form of legal activism the thesis deals with. The chapter then

goes on to consider the external elements that have been identified by political lawyering scholars to be the key influences and pressures the formation, the outcomes achieved and the consequences of political litigation. These are identified as constituting a broad three-point framework of the resources available to the movement, the legal framework and judicial context it operates in and the political opportunity structures it faces.

Chapter Three takes these three factors as a starting point and analyses how they play out in the context of cause litigation for migrants' rights in the UK. In so doing the chapter discusses the formation and current make-up of the UK's migrants' rights movement and the practitioners of cause litigation for migrants' rights in particular; the legal framework that is most commonly relevant to migrants' rights cases and the development of the UK judiciary's approach to implementing that framework; and the UK's public politics on immigration and how it has led to the predominant current discourse guiding both policy and administrative conduct, which the chapter identifies as the 'control imperative'. This imperative is shown to include both the location of dominant power over immigration decision making in the Executive and, perhaps more importantly, the need to overtly demonstrate possession of this dominant power. In so doing the chapter argues that while there are definite strengths within the cause litigation wing of the UK's migrant's rights movement, they are operating in a difficult environment. In particular, the power and reach of the 'control imperative' is identified as being the major obstacle to the UK's cause litigators for migrants' rights.

Chapter Four examines the outcomes of targeted strategic litigation as a means of promoting and protecting migrants' rights. This is litigation pursued with the deliberate aim of bringing about a change in a specific executive procedure or administrative practice of wider concern to the migrants' rights movement. It normally involves a combination of cause lawyers and migrants' rights NGOs. The chapter finds that while it can produce some positive changes, they tend to be limited to small technical adjustments in policy or practice. This is partly due to the relatively limited ambition of the cases that are taken. The chapter shows that migrants' rights strategic litigation in practice tends to amount to a means of resolving technical disputes between an interest group sector and an administration over practical issues which in other less politically contested areas might be capable of being resolved without such regular recourse to the courts. However, the chapter also shows that the

relatively limited returns for migrants' rights that strategic litigation produces come about as a result of the capacity and inclination of the Executive, inspired by the control imperative, to evade or absorb the implications of adverse judgments.

Chapter Five examines the outcomes that have resulted from the much larger but more amorphous body of day-to-day cause lawyering casework. The chapter shows that regularisation of irregular migrants has been the key activity of cause lawyers in this area. In particular it shows that through an incremental process, powerful and expansive forms of regularisation have been developed beyond and outside of accepted executive immigration policy in the fields of refugee status determination and Article 8 of the European Convention on Human Rights (ECHR), the right to respect for private and family life. Thus despite its lack of specific or targeted goals, day-to-day cause lawyering has produced more significant and durable systemic change than its more celebrated strategic counterpart. However, the chapter shows that these developments have again been met by an adverse reaction from the executive. In contrast to the more subtle tactics the executive used against the technical changes brought about by strategic litigation successes, these systemic changes have been met with overt and aggressive legislative and rhetorical backlash, facilitated by the legislature. The chapter concludes by discussing the effectiveness of the backlashes that have occurred and what is required for the systemic progress won through day to day cause lawyering to be revived.

Chapter Six discusses the consequences of cause litigation's presence in the UK's immigration policy dynamic and in particular its role as one of the primary obstacles to the control imperative in both its administrative and public political aspects. It focuses on the executive's response to this role, and shows that this has been to institute a backlash targeting the resources and the legal framework that helped develop and sustain cause litigation. The primary obstacle to this backlash has been the constitutional concern to protect the rule of law. While all sides in the dispute have agreed that the rule of law as a notion is unquestionable, the question has nevertheless arisen as to what form of it is appropriate for the UK and what role it should take in regulating immigration policy. The chapter argues that the Executive has been able to succeed in this backlash to the extent that it has because it was able to appeal to a resurgent strain of nationalism that has developed in the UK's political

discourse and unites concern about immigration with concern regarding economic and cultural precariousness. This underpins a turn against the 'thick' form of the rule of law and the kind of liberal universalism that cause litigation relies upon. The chapter concludes by discussing what remains of cause litigation following the backlash and its implications for the future. In particular it identifies possibilities for continuing intervention in the 'process' of immigration control, but limited influence on its 'outcomes'.

The findings of the previous chapters are then summarised in the concluding chapter 7, which seeks to answer the question of what happens when migrants' rights and immigration issues are litigated for political purposes in the UK. It argues that legal protections for migrants' rights and the broader role of liberal norms and the rule of law as impediments to restrictive immigration policy are not inevitable, but are the product of identifiable practical forces that result in certain cases being taken in certain ways by certain actors. This in turn means that certain rights and forms of migration benefit from such legal protection, which itself influences the direction in which the wider politics of immigration develops. In terms of practical protections for migrants' rights, cause litigation in the UK is capable of bringing about intermittent progress rather than simple defence. That said, while day-to-day cause litigation has produced significantly more systemic change than the more celebrated strategic litigation, both are vulnerable to the executive taking steps to retrench their gains and reassert itself; leaving diminished but still non-negligible advancements. By playing its role in obstructing the executive's immigration control policies, the chief consequence of cause litigation has been the ever increasing intensity of pressure on the executive to demonstrate control. Thus cause litigation inherently contributes to its own retrenchment and the broader strength of the control imperative that motivates the UK's immigration politics.

Section 1

Chapter 2: Litigation as Migrants' Rights Activism

Introduction

This chapter engages in more detail with some of the key literature referred to in the introduction. It will do so in order to layout the analytical framework by which the study proceeds and then to draw out from previous work the key factors that influence the outcomes and consequences migrants' rights litigation produces.

Firstly, the chapter examines elements from some broader theoretical literatures that intersect in the issue of political litigation for migrants' rights. In particular, studies of liberal states' relationships to migration and studies of rights and the due place of the courts in democratic decision-making. These broader studies provide a number of useful insights but also have shortcomings when applied to the questions this thesis addresses. These include how the role of liberal norms in forming state responses to migration might be affected by the deliberate co-option of those norms by activists, and how political and discursive representations of the UK's constitutional settlement may influence the practical legal and political responses to legal activism. Following this the section moves on to the various approaches that have been taken to analysing legal action as a form of activism. It will identify the scope of the study, relating it to the body of work on legal mobilisation, and will consider the extent to which existing frameworks of analysis apply to the particular context of migrants' rights litigation in the UK. As mentioned in chapter 1, the need for an alternative terminology, broader than the common focus on 'strategic litigation' but still narrower than overarching studies of 'legal mobilisation' is identified. Such an alternative is then proposed, with the concept of 'cause litigation'.

The second section of the chapter will then go on to consider the factors that can be seen from these works to be the key influences on political litigation and to set out how they relate to cause litigation for migrants' rights specifically. These are shown to be

- i) The resources available to the social movement

- ii) The legal framework and judicial environment in play in the issue
- iii) The political opportunity structures around the issue

Section 1: Frameworks for Understanding and Analysis

The first section of this chapter examines the broader contextual literatures that inform the thesis' understanding of the issues in play in the debate around political litigation for migrants' rights. It then looks at the key techniques and terminology that have been used in analysing legal activism of the kind this thesis focusses on.

Framework of Understanding

The numerous different aspects of social life that this issue touches on may be a partial reason for why it has proved so contentious in public political debate. This section will focus on two particularly important areas; the relationship that liberal states' such as the UK have with migration and constitutional questions of the role of law and the judiciary in liberal-democratic decision making. While each has been the subject of extensive study in their own right, the intention here is to discuss the key ideas and insights that this literature provides and how they interrelate with each other.

i) Limits on Migration Control in Liberal States

The migration scholarship of most relevance for the present thesis is the discussion of migration and migrants' relationship to liberal politics and liberal conceptions of statehood and citizenship. Litigation for migrants' rights relies, after all, on liberal principles of individual rights, constraints on government action, and the rule of law as the fundamental means of ordering a society.

In relation to migration and liberalism, numerous studies have focussed on migration as a primarily economic issue and a key element in the development of capitalist globalisation.¹ These debates initially sought to show that, through increased migration, the liberal state was losing yet another aspect of its traditional purpose and powers to the forces of globalisation. However, this view has been questioned by those who argue that migration in fact remains one of the few areas of state action in which liberal states in a globalised world are able to exercise considerable power. This power was directed towards attracting and facilitating certain forms of desirable migration and migrants (chiefly those deemed likely to provide economic advantage for the host state) and repelling and removing those deemed 'undesirable'. In fact, liberal states appeared increasingly prepared to engage in what could be described as thoroughly illiberal practices in the cause of keeping unwanted migrants at bay.² Ellermann, for example, has documented 'the progressive expansion of the socially coercive state in the advanced industrialized world',³ that is, a state which 'regulates individual behaviour in highly intrusive ways and, in the process, imposes severe personal costs on the regulated.'⁴ Deportation, she argues, 'constitutes a type of public policy that, although at the heart of statehood, places extraordinarily high demands on the liberal state.'⁵ The demands she is referring to are the paradoxical ones derived from competing notions of what it is to be a liberal state, including respect for the rule of law and the integrity of persons. These cannot be fully thrown off by liberal states and thus impede their ability to implement popular public policy in relation to immigration.

The leading scholar to raise this issue of immigration control as containing a paradox for liberal states has been Christian Joppke. In his seminal paper 'Why do liberal states accept unwanted immigration?' Joppke focussed on Cornelius, Martin and Hollifield's point that there is a 'gap between restrictionist policy goals and expansionist outcomes.'⁶ This 'gap'

¹ Hollifield J, 'The Emerging Migration State' (2004) 38 *International Migration Review* 885; Cornelius W and Tsude T, 'Controlling Immigration: The Limits of Government Intervention' in Cornelius W, Tsuda T, Martin P and Hollifield J, *Controlling Immigration: A Global Perspective* (Stanford University Press 2004) 3-51

² Guild E, Groenendijk K & Carrera S, *Illiberal Liberal States, Immigration, Citizenship and Integration in the EU* (Ashgate 2009); Gibney M, 'Asylum and the Expansion of Deportation in the United Kingdom' (2008) 43 *Government and Opposition* 146; Wilsher D, *Immigration Detention: Law History Politics*, (CUP 2014) 256

³ Ellerman A, *States Against Migrants: Deportation in Germany and the United States* (CUP 2009) 1

⁴ Ibid 3

⁵ Ibid 4

⁶ In this regard Joppke particularly cites Cornelius W, Martin P and Hollifield J (Eds), *Controlling Immigration: a Global Perspective* (Stanford University Press 1994) 3

might be explained by external globalising forces such as the expansion of international law and in particular 'the international human rights regime'. However, Joppke rejects these external causes as being 'inflated'. In their place he develops the notion of internal 'self-limited sovereignty' whereby liberal states, particularly European states that did not have a history of ethnically-based client politics as found in the USA, have developed 'legal constraints in combination with moral obligations toward historically particular immigrant populations.'⁷

An important aspect of Joppke's claim for the present thesis is that of these two principle factors, legal constraints appear to be the more powerful source of 'self-limited sovereignty'. His comparison of Germany and the UK makes this point by showing that a 'strong constitution celebrating human rights' in the German case, combined with 'a negative history', led to a very significant level of state tolerance of unwanted immigration. In contrast the UK, in the period Joppke was writing in, lacked anything of the kind; the Human Rights Act 1998 (HRA) was yet to come into force and as a result there was no equivalent in the UK's legal framework of the constitutional constraints that appeared in its German counterpart. Thus any residual sense of 'moral duty' towards Commonwealth immigrants found in Parliament could be overridden by populist anti-immigration measures.⁸ What is not clear from this, however, is precisely how legal limits play the role that they do. Joppke's primary interest appears to be in state policy making and the extent to which politicians take account of such legal/constitutional considerations in their own policy thinking. This process has been conceptualised in another context as 'governing like judges.'⁹ However this thesis is more concerned with instances in which Executive or legislative decision making either overrides these constitutional concerns or does not perceive there to be any, and activists prompt the legal system itself to act as a significantly limiting factor on intended policy outcomes.

Since his paper's publication, Joppke's notion has been built on and expanded. Most recently, Hampshire has shown that in fact the legal limits identified by Joppke as 'self-limited sovereignty' are only one aspect in the broader framework of influences on immigration

⁷ Joppke C, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 World Politics 266 292

⁸ Ibid 288

⁹ Stone Sweet A, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 204

policy in liberal democracies, the UK included. Hampshire argues that liberal democracies are inevitably and irretrievably caught in a 'paradox' of competing forces integral to their status as liberal states; the realities of representative democracy and the continuing power of notions of nationhood acting as conservative or restrictionist influences on immigration policy, while the forces of globalised capitalism and, as per Joppke, the liberal commitment to constitutionalism (particularly regard for individual rights and the rule of law) acting as expansionist influences.¹⁰

His study dedicates considerably more space to discussing the practical consequences of liberal constitutionalism for immigration policy outside of executive and legislative policy deliberation. For instance it highlights the commitment of liberal states to the UN Convention on the Status of Refugees¹¹ (the Refugee Convention) and the resultant necessity of operating an asylum system that accommodates migrants who might otherwise fall into the 'unwanted' category.¹² However, its central focus is on the existence and interrelationship between the four identified factors integral to a modern liberal state. As a result the study does not address the question of what effect the dedicated and deliberate use of legal constitutionalism as a bulwark against popular restrictionist policies, through activist litigation, may have on the preservation of the very liberal norms that this constitutionalism depends upon. As was noted in the previous chapter, an issue that this thesis will explore is whether these competing factors have outcomes not only for immigration policy, but also for each other, in that if legal constitutionalism is seen as being excessively influential, or hijacked for a particular purpose, it could produce a restrictionist-inspired backlash against it.

The work of Benhabib, building on Arendt's arguments regarding stateless people and the inherent vulnerability of rights,¹³ has shown that such a concern may be justified. They both show that even advanced liberal democracies can fail to afford 'the right to have rights' to individuals regarded as alien to their community. Benhabib argues that 'democratic rule has been based on various constitutive illusions such as the homogeneity of the people and

¹⁰ Hampshire J, *The Politics of Immigration* (Polity 2013) 5

¹¹ The 1951 UN Convention Relating to the Status of Refugees

¹² Hampshire (n10) 49

¹³ Arendt H, *The Origins of Totalitarianism* (Harcourt Brace & Co 1976) 268

territorial self-sufficiency' and that when confronted by 'challenges arising in interpreting "the rights of others"', there occurs, 'self-reflexive transformations on the part of the polity involved.'¹⁴ Thus, when compelled, through circumstance, to decide how far to encroach upon the rights of outsiders, societies develop and transform themselves in either universalist rights-respecting directions, or insular nationalist directions. Whether or not the transformations that occur are congenial to continued support for 'the rights of others' is therefore a crucial question. Benhabib's answer is to argue for the development of a form of liberal cosmopolitanism as the desirable end-point of such transformations, so as to ensure a Kantian 'cosmopolitan duty of hospitality' prevails.¹⁵ Somek has described something similar in his analysis of 'cosmopolitan constitutionalism', which requires a form of 'post-national citizenship' that at its logical end point,

'guarantees that any polity is as good as any other for anyone even though their law will be inevitably marked by the particularity of national traditions. Arguably, these conditions are satisfied by, first, a system of human rights protection... and, second, a strong protection against discrimination on the grounds of nationality.'¹⁶

Yet there is a clear risk that the democratic desire to maintain the 'constitutive illusion' of homogeneity, to borrow Benhabib's phrase for example, may undermine such cosmopolitan hopes. Liberal norms, and the legal limits that solidify them, may be vulnerable when they are seen to be propping up unpopular, 'unwanted' and outsider individuals, such as those that are the concern of this thesis.

The process by which this expansion and contraction of norms such as the rule of law takes place has been identified by Nash as that of 'cultural politics'. This notion starts from the premise that while at any given point a society may operate under a dominant set of what Benhabib would term 'constitutive illusions', rather than remaining static political culture can always be contested in the pursuit of particular interests and ideologies, and thus be open to change. In this understanding, political culture is made up of

¹⁴ Benhabib S, *Rights of Others* (CUP 2004) 171

¹⁵ Ibid 26

¹⁶ Somek A, *The Cosmopolitan Constitution* (Oxford 2014) 26

‘symbols that frame what issues, events or processes mean to social actors who are emotionally and intellectually invested in shared understandings of the world.’¹⁷

While a cohesive society will share a collection of symbols which play a major role in binding that society together, the meaning of those symbols and the relative weight to be attached to them will vary for different groups within a society. These rival interpretations will in turn compete, over time, for dominance in a society’s political culture, through representation in mass media, elite political discourse, activist rhetoric and mediated public opinion.¹⁸

A related argument about the notion of rights as a symbol that carry particular meaning, can be found in Scheingold’s discussion of the role that rights, and by extension the legal process that goes along with them, play in American political culture. Scheingold’s notion of the ‘myth of rights’ posits that rights are a ‘myth’ in American society in an anthropological sense; a story America tells itself which possesses a totemic quality that can be used for a variety of political ends.¹⁹ What Nash shows, though, is that this contested symbolism around the meaning of rights in America or elsewhere revolves around competing visions for the general social order. As Nash says,

‘Although social actors rarely if ever, imagine a fully formulated blueprint of a new society... in using or contesting symbols that are meaningful to them they are nevertheless engaged, more or less consciously, either in trying to bring one about or, just as likely, in defending what already exists.’²⁰

Thus in disputing the symbolic meaning of the notion of rights or the influence on a society of migration, competing cultural factions are in fact in a larger contest over what kind of society they wish to live in. Rights, for example, are for Nash inherently tied to notions of internationalism, universalism and cosmopolitanism. Yet they require nation states and

¹⁷ Nash K, *The Cultural Politics of Human Rights: Comparing the US and UK* (CUP 2009) 1

¹⁸ Ibid 7

¹⁹ Scheingold S, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd Ed University of Michigan Press 2004) p. X

²⁰ Nash, (n17) 2

domestic political and legal environments for them to be actualised. As Larking has commented on Nash in relation to rights law, 'internationally recognised human rights influence and are in turn influenced by domestic law, leading to a situation in which international and domestic law are mutually co-implicated and can no longer be neatly separated.'²¹ Like the transnational movement of people that Benhabib is concerned with, Nash and others such as Anderson²² have identified the inherently globalised human rights regime as essentially a cosmopolitan social project aimed at the promotion of the concept of societies owing duties to non-citizens. This is a particular 'blueprint for a society', but a contestable one which is likely to attract significant opposition.

In sum, the literature on liberal states' responses to migration indicates that they contain inherent tensions that pull policy-making in competing directions. However, this discussion is principally had at the level of political norms, including universalism and nationalism, rather than the mobilisation and enforcement of such norms through activist litigation or government reaction. At the same time, the related literature on the cultural politics of human rights and the difficulties of the 'rights of others' indicate that such activist litigation, whether it is intended or not, will symbolise and promote a particular contested vision of how such liberal societies should be structured; principally around cosmopolitan notions of universalism.

ii) Rights-Based Litigation in Democracies

The reliance on legalised 'liberal norms', in the tangible sense of a written rights charter or the more generalised sense of a respect for the rule of law when exercising the state's immigration control function requires there to be widespread agreement on the validity of such norms. There is therefore a need for a theoretical basis from which to approach the question of this legitimacy.

²¹ Larking E, 'Irregular Immigrants in Australia and the United States — Rights, Realities, and Political Mobilization' (2015) 15 JHR 189 199

²² Anderson B, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013)

As noted above, one of the key developments in the UK since Joppke's seminal essay has been the introduction of the HRA. As will be discussed in more detail in chapters 3 and 6, this was part of a set of substantial developments in the practical application of the rule of law both to immigration questions and the UK's wider governmental activities. In the UK context, discussion of the notion of the rule of law often begins with the work of AV Dicey.²³ Dicey identified three core principles that he claimed made up the rule of law as it existed in Britain;

- i) that only laws that have been properly and previously established and applied by properly constituted courts are enforceable;
- ii) that such laws apply to all regardless of social rank; and
- iii) that general constitutional principles such as rights are to be developed through judicial decisions rather than predetermined in constitutional documents.²⁴

His approach has come to be associated with the 'thin' form of the rule of law by theorists such as May and Tamanaha who have grouped subsequent analyses and possible alternatives or combinations of alternatives into 'thin' and 'thick' forms.²⁵ 'Thick' versions have tended to include issues of importance to politicised litigation strategies, such as judicial enforcement of human rights and a greater role for international law in domestic adjudication.²⁶ As will be discussed in greater detail in chapters 3 and 6, the expansion of the practical framework for cause litigation, including the HRA, can be thought of as a thickening of the rule of law in the UK. For present purposes it is enough to note that such a process has inevitably been contested in both scholarly and political debate.

In particular, the UK has been brought into the long running dispute over the merits and status of written bills of rights and the resultant power they tend to give to judicial decision makers.²⁷ A bill of rights such as the HRA is premised on the notion that there are some issues

²³ Dicey A, *An Introduction to The Study Of The Law Of The Constitution* (Macmillan 1979)

²⁴ Ibid 188

²⁵ May C, *The Rule of Law: The Common Sense of Global Politics* (Elgar 2014) 33-57, Tamanaha B, 'A Concise Guide to the Rule of Law' in Palombella G and Walker N (Eds) *Relocating the Rule of Law* (Hart 2009) 4

²⁶ Bingham T, *The Rule of Law* (Penguin 2011) 66

²⁷ Waldron J, *Law and Disagreement* (OUP 1999) 213; Dworkin R, *Taking Rights Seriously* (Harvard University Press 1978) 14-46;

which should be removed from ‘the ordinary cut and thrust of everyday politics’²⁸ and that pure majoritarian decision making leaves underrepresented groups (such as migrants) vulnerable to having even their basic rights being overridden.²⁹ However, opponents claim that reliance on judges to resolve disputes about which there is honest and reasonable disagreement undermines the respect for individual autonomy that democracy is built on,³⁰ and that in any case there is no particular reason to think that a panel of judges will be superior in any tangible sense at reaching a fair decision on a given subject than a chamber of elected representatives.³¹

Various attempts at developing a theoretically sound middle-ground between these two positions have been made, the most prominent of which has been Tushnet’s identification of ‘strong’ and ‘weak’ form judicial review.³² ‘Strong’ judicial review is capable of overriding legislation and is therefore vulnerable to the charge of anti-democratic illegitimacy. ‘Weak’ form review allows various means for the legislature to override the rights-decisions of the courts and thus, it is said, protects fundamental rights while preserving democratic accountability and legislative supremacy. The UK’s HRA is often held up as a paradigm example of this weak-form judicial review.³³ It was, after all, conceived as a compromise whereby a form of legal constitutionalism could be introduced into the UK system without fundamentally changing the primacy of Parliament and thus ultimately preserving the UK’s ‘political constitution’.³⁴

Rights would be protected firstly by the Act compelling Ministers to issue statements to Parliament confirming whether or not the legislation that they wished to pass was compatible with European Convention rights;³⁵ secondly by an instruction to courts that they were, as far

²⁸ Klug F A *Magna Carta for all Humanity: Homing in on Human Rights*, (Routledge 2015) 133

²⁹ Kavanagh A, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 347-348; Hunt M, Yowell P, Hooper H (Eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015) 24

³⁰ Waldron (n27), Bellamy R, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, 2007)

³¹ Vermeule A, *Law and the Limits of Reason*, (OUP 2012)

³² Tushnet M, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009)

³³ Kavanagh A, ‘What’s So Weak About ‘Weak-Form Review’? The Case of the UK Human Rights Act 1998’, *IJCL* (2015) 13, 1008

³⁴ Klug F, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (Penguin Books 2000)

³⁵ Human Rights Act 1998 s.19

as possible, to interpret any legislation in line with Convention rights;³⁶ and thirdly by making it unlawful for any public authority (including courts and tribunals) to act in a way that was incompatible with Convention rights.³⁷ At the same time, though, in circumstances where legislation could not be interpreted in line with Convention rights, the courts were denied a ‘strike down’ power, as available to the US Supreme Court. In its place, they were instead empowered to issue a ‘declaration of incompatibility’ intended to inform Parliament and the Executive that a legislative provision could not be squared with the requirements of the European Convention.³⁸ This relationship has been characterised and defended as promoting a ‘democratic dialogue’³⁹ between the judicial, legislative and executive branches of government which would promote the defence of rights but leave Parliament with the final say.⁴⁰

However, the argument has been made, particularly by Kavanagh but also by others,⁴¹ that there is little practical difference between supposedly ‘weak’ and ‘strong’ forms of review, that ‘weak’ form review is nothing of the kind.⁴² Conservative commentators object to what they see as ‘rights contagion’ undermining ‘British liberty’⁴³ and have claimed that ‘parliamentary committees such as the [Joint Committee on Human Rights] are more committed guardians of our human rights than are the appeal courts.’⁴⁴ Along similar lines there is a substantial body of work from the left which is of the view that progressive politics

³⁶ Ibid s.3

³⁷ Ibid s.6

³⁸ Ibid s.4 For Discussion, Kavanagh (n29); Young A, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2008)

³⁹ Hogg P and Bushell A, ‘The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)’ (1997) 35 *OHLJ* 75; Manfredi C and Kelly J, ‘Six Degrees of Dialogue: A Response to Hogg and Bushell’ (1999) 37 *OHLJ* 513; and Hogg P W & Thornton AA, ‘Reply to Six Degrees of Dialogue’ (1991) 37 *OHLJ* 529

⁴⁰ Young, (n38); Clayton R, ‘Judicial Deference and “Democratic Dialogue”: the Legitimacy of judicial intervention under the Human Rights Act 1998 [2004] PL 33; Hickman T R, ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’ [2005] PL 306; and Yap P-J, ‘Defending Dialogue’ [2012] PL 527

⁴¹ Morgan J ‘Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties’ and ‘Allan J ‘Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament’s Clear Intention and You Shake it All About—Doin’ the Sankey Hanky Panky ‘ in Campbell T, Ewing K & Tomkins A *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011)

⁴² Kavanagh, (n33); Gardbaum S, ‘What’s so weak about “weak-form review”? A reply to Aileen Kavanagh’ (2015) 13 *IJCL* 1040

⁴³ D Raab, *The Assault on Liberty: What Went Wrong With Rights* (Fourth Estate 2009) 123

⁴⁴ Tomkins A, ‘Parliament, Human Rights and Counter-Terrorism’, in Campbell T, Ewing K D & Tomkins A (eds), *The Legal Protection of Human Rights: Sceptical Essays* (2nd Edition, OUP 2011) 39

has more to fear from judicial review and interpretation, what Loughlin has termed 'a form of aristocratic rule',⁴⁵ than it does from elected MPs. Based on the works of Griffiths,⁴⁶ Ewing⁴⁷, and Bellamy,⁴⁸ contemporary political constitutionalism asserts that rights of the kind found in the ECHR, made more readily available to British claimants through the HRA, are really 'statements of a political conflict pretending to be a resolution of it'.⁴⁹

The present thesis will not seek to resolve these constitutional disputes. One of the key practical upshots of it for migrants' rights litigation is the ongoing dispute over whether or not the Human Rights Act should itself be abolished and replaced with a 'British Bill of Rights'.⁵⁰ This crucial debate will be discussed in more detail in Chapter 6, in particular regarding how migrants' rights litigation figures in that debate. For now, though, it appears that constitutional notions about 'the rule of law', the due role of courts, and the place of law and litigation in political decision making are subject to both evolution and fashion; with the identification of orthodoxies enabling the development of productive challenges to those orthodoxies. This creates a series of representations of the 'correct', traditional or historically validated interpretation of the UK's constitutional arrangements, that work to confer legitimacy on activities and outcomes that the favoured interpretation produces. For the present study these debates can be more fruitfully conceptualised as part of the competition of ideas seeking a dominant role in political consciousness along the lines identified by Nash above. In seeking to understand the consequences of litigating immigration policy on behalf of a political cause, the thesis will address how these theoretical representations of the UK's constitutional settlement influence the practical legal and political responses to such litigation.

iii) Conclusion

⁴⁵ Loughlin M, *Sword & Scales: An Examination Of The Relationship Between Law And Politics* (Hart 2003) 213

⁴⁶ Griffiths JAG 'The common law and the political constitution' (2001) 117 LQR 42

⁴⁷ Ewing K D, *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (OUP 2010)

⁴⁸ Bellamy (n30)

⁴⁹ Griffiths JAG, 'The Political Constitution' (1979) 42 MLR 14 14

⁵⁰ Greer S & Slove R, 'The Conservatives' proposals for a British Bill of Rights: mired in muddle, misconception and misrepresentation?' (2015) 4 EHRLR 372

The above debates around liberal states' relationship with migration and questions of rights and legitimacy of decision making in democratic societies contain important indicators of the broader issues that activists seeking political change through rights-based litigation in the UK face. Litigation for migrants' rights exists at the point where these higher order concerns meet; where the liberal notions of respect for rights and the rule of law as political concepts are put into effect through a testing of constitutional relationships between arms of the State. There are potential problems posed, though, by the co-option and aggressive promotion of liberal rights norms by the migrants' rights movement in the face of countervailing structural pressures. There are also real-world limits and opportunities presented by the discursive power of competing visions of the rule of law and the separation of powers in the UK.

Framework of Analysis

The theories discussed above provide a framework for understanding the issues that activists seeking to use the law to progress the cause of migrants' rights face. The practical realities of activist litigation have themselves been the subject of extensive analysis and theorisation in their own right. This second part of the section discusses how such analysis has been approached and from this discussion, identifies appropriate techniques and an appropriate terminology for the particular form of legal activism that this thesis focusses on.

i) Approaches to the Analysis

The study of the relationship between the law and social movements has developed a number of different approaches over the years. As was noted in the previous chapter, in contemporary scholarship it is most commonly associated with the term 'legal mobilisation'.⁵¹ The modern approach to this term began to be formulated by McCann, who specified that it involved 'activists with some measure of choice regarding both the general institutional sites and the

⁵¹ Zemans F, 'Legal Mobilization: The Neglected Role of the Law in the Political System' (1983) 77 *American Political Science Review* 690; McCann M, *Rights at Work: Pay Equity Reform and The Politics of Legal Mobilization* (The University Of Chicago Press 1994); Vanhala L, 'Disability Rights Activists in the Supreme Court of Canada: Legal Mobilization Theory and Accommodating Social Movements' (2009) 42 *Canadian Journal of Political Science* 981; and Cichowski R, *The European Court and Civil Society: Litigation, Mobilization and Governance* (CUP 2007)

particular substantive legal resources that might be mobilised to fight policy battles and advance movement goals.⁵² The approach therefore encompasses the work not just of the lawyers involved, but of wider activist groups. Most importantly, though, ‘legal mobilisation’ in this broad sense encompasses a legal activity that is much wider than simply engaging in litigation. As Vanhala has noted, it

‘can include many different types of strategies and tactics; such as raising rights consciousness among particular communities or the public, delivering public legal education or specialised legal education, lobbying for law reform or changes in the levels of access to justice, providing summary legal advice and referral services.’⁵³

Moreover, a legal mobilisation approach must take account of wider considerations than simply winning and losing in court.⁵⁴

This thesis cannot encompass all the facets of legal mobilisation that Vanhala identifies. However, the approach’s engagement with issues outside of the jurisprudence that activist litigation produces will be integral to this thesis’ interest in the wider consequences of politicised litigation. As McCann notes,

‘analysts should not ignore the potential for movement mobilisation of legal symbols, normative claims and procedures as powerful resources of counter-hegemonic action that are not necessarily dependent on judicial confirmation.’⁵⁵

Thus, while the present thesis comfortably falls within the broad meaning of legal mobilisation scholarship, analytical approaches more tailored to the specific issues that arise out of litigation, and litigation for migrants’ rights in particular, will also be needed.

⁵² McCann, (n51) 9

⁵³ Vanhala L, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* (CUP 2011) 6

⁵⁴ Depoorter B, ‘The Upside Of Losing’ (2013) 113 CLR 817

⁵⁵ McCann, (n51) 12

As Harlow and Rawlings have shown, social and political movements, as well as individuals with their own political causes, have been applying 'pressure through law' in the UK for hundreds of years.⁵⁶ Yet, there has been little by way of in-depth analysis of the specific role litigation plays in migrants' rights politics in the UK. For example, there has been no book-length equivalent of Kavar's comparative study on the politics of litigating immigration policy in the US and France that focuses on the UK. This is not to say, though, that there have been no studies that dealt with migrants' rights and litigation issues in Western-European states, or looked at such litigation in the UK context specifically.

Dembour, for example, has taken a practical approach to the questions raised by Benhabib, discussed above, through her detailed focus on how the European Court of Human Rights (ECtHR) has dealt with migrants' rights and immigration matters. She has argued that, contrary to the claims of opponents of the ECtHR, the ECtHR has taken a predominantly state-centric view.⁵⁷ Similarly, Cornelisse has focussed on what aspects of immigration control, particularly immigration detention, demonstrate about the relationship between 'universal' rights and territoriality, and the limits, as she sees them, of internationalist human rights litigation to combat the rights abuses of migrants by sovereign states.⁵⁸ On the domestic front, Legomsky,⁵⁹ Morris⁶⁰ and Travers⁶¹ have all engaged with the UK's asylum and immigration system, and issues of how political considerations and legal decision making interact. However, their approach is either significantly time bound, primarily ethnographic in approach, or using an asylum or immigration context in order to make arguments related to broader theoretical issues related to globalised notions of rights. A further difficulty with these studies is that they provide little by way of a systematised approach to the study of litigation as a form of activism.

⁵⁶ Harlow C & Rawling R, *Pressure Through Law* (Routledge 1992)

⁵⁷ Dembour M-B, *When Humans Become Migrants: Study Of The European Court Of Human Rights With An Inter-American Counterpoint* (OUP 2015) 19

⁵⁸ Cornelisse G, 'Immigration Detention and the Territoriality of Universal Rights' in De Genova N & Peutz N, (Eds) *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press 2010)

⁵⁹ Legomsky S, *Immigration and the Judiciary: Law and Politics in Britain and America* (Clarendon Press, 1987)

⁶⁰ Morris L, *Asylum, Welfare And The Cosmopolitan Ideal: A Sociology Of Rights* (Routledge 2010)

⁶¹ Travers M, *The British immigration courts : a study of law and politics*, (Policy Press 1999)

A key issue for scholars either studying politicised legal action in general or particular instances of it is often to explain why a particular social movement⁶² uses litigation as a tool in its campaigning armoury. This question is often referred to as ‘the turn to litigation’. Political disadvantages, such as representing an unpopular or minority group, and resource availability are perhaps the most common and longest standing explanatory theories that appear.⁶³ Yet, while migrants’ rights campaigners certainly fall within the category of supporting an unpopular and/or marginalised group, many of the key issues this group faces are inherently legal in nature. A migrant’s life, at least until they have achieved settlement, is bound up in applications, administrative decisions, appeals and judicial reviews. As such it would be misleading to approach the question of litigation as if it were always a strategic choice for migrants’ rights activists, or something that can be ‘turned to’. Litigation will be occurring, whether or not it is conducted by activists or conceived of in activist terms.

A potentially more useful approach is the notion of ‘legal consciousness’. In relation to activist use of the law, its primary function has been to explore how law shapes not just human behaviour but also self-recognition, identity and ideals,⁶⁴ such as Vanhala’s discussion of how engaging in legal activism brought about changes in the self-identification of disabled people.⁶⁵ Outside of reflexive effects on activist communities, Kavar has made related findings regarding the ‘radiating effects’ of legal activism for migrants’ rights in France and the US,⁶⁶ and in particular the notion of legal activism affecting the terms of debate around immigration issues and the manner in which immigration policy is framed in societal and political discourse. As was noted in the introduction chapter, this thesis’ primary focus is the litigation itself, rather than, for example, notions of the self-identity of migrants and as such, Kavar’s approach to the issues of litigation’s radiating effects is more pertinent. A sole concentration on radiating effects, though, would be inappropriate for this thesis, as it would

⁶² Byrne P, *Social movements in Britain* (Routledge 2013); Della Porta D & Diani M, *Social movements: an introduction* (Wiley 2009)

⁶³ Cortner R, ‘Strategies and Tactics of Litigants in Constitutional Cases’ (1968) 17 *Journal of Public Law* 287; Zackin E, ‘Popular Constitutionalism’s Hard When You’re Not Very Popular: Why the ACLU turned to Courts’ (2008) 42 *L&SR* 367; Epp CR, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998)

⁶⁴ Fritsvold E D, ‘Under the Law: Legal Consciousness and Radical Environmental Activism’ (2009) 34 *Law & Social Inquiry* 799

⁶⁵ Vanhala (n53)

⁶⁶ Kavar L, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France* (CUP 2015)

require a turn away from the more tangible questions of the practical outcomes produced by litigation. Both perspectives will be accommodated in the thesis going forward.

An important perspective both for the practical outcomes achieved and the wider consequences of engaging in activist litigation for migrants' rights is the notion of legal opportunity structures (LOS). Building on the longer-standing idea of political opportunity structures, which will be discussed in greater detail below, LOS work emphasises the ways in which the systemic and procedural functioning of the legal system promotes certain sorts of cases, and therefore certain sorts of legal activism, and impedes others. Evans Case & Givens,⁶⁷ for example, have focussed on the rules of standing in different judicial contexts in the EU and how they produce certain types of case.⁶⁸ Andersen, in her work on LGBT rights in the US, relies heavily on an LOS framework.⁶⁹ Legal opportunity structures create certain types of participant, in the sense of the claimants, their representatives and their adversaries. These participants, or rather the idea of these participants, inevitably have social and cultural resonances that may be highly consequential for the practices of symbolisation discussed above in relation to Nash's work on cultural politics. Chapters 5 and 6 will discuss the relationship between the types of claimant the relevant legal opportunity structures create and the policy and political responses to migrants' rights litigation.

ii) Terminology of the Analysis

As previously noted, an extensive body of work has built up which addresses the core issues at the heart of the present study, but as Vanhala has pointed out, 'Academics, activists and legal actors conceptualise the use of legal action by social movements in a wide variety of ways.'⁷⁰ Vanhala herself uses the term 'strategic litigation', Kwar, meanwhile, uses the term 'legal activism' to discuss essentially the same activity.⁷¹ Others have referred to 'test case

⁶⁷ Evans Case R & Givens T E, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48 *Journal of Common Market Studies* 221; also, Wilson B M, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics' (2006) 39 *Comparative Political Studies* 325

⁶⁸ Also Andersen E A, *Out Of The Closets And Into The Courts: Legal Opportunity Structure And Gay Rights Litigation* (University of Michigan Press 2006) 5

⁶⁹ Ibid

⁷⁰ Vanhala (n53) 5

⁷¹ Kwar (n69) 19

strategy',⁷² 'public interest litigation',⁷³ or the 'law reform movement'.⁷⁴ The term most commonly used amongst UK practitioners is 'strategic litigation'. It is a tool that is of growing significance and its use both in practical terms and as terminology is being heavily promoted. Innovative funding bodies have been set up to encourage it,⁷⁵ training seminars are organised to spread awareness of its possibilities amongst campaigning NGOs⁷⁶ and legal charities have been formed with strategic litigation as a core element of their work.⁷⁷ Yet, even this relatively straightforward branch of political legal action does not benefit from a settled definition. Vanhala states that, 'when an organisation purposefully turns to the courts to pursue its goals, its action can be classified as strategic.'⁷⁸ The Strategic Legal Fund, which finances strategic litigation for migrants' rights, describes it as 'work where the impact is likely to go beyond an individual case and to result in changes to law, policy and practice that will benefit a wider group of people'⁷⁹ Smith, in investigating the response to the introduction of the HRA by legal NGOs in general, has used the formulation of a 'test case strategy' which he describes rather cyclically as, 'An agency or institution taking a test case strategy is deliberately seeking a strategic approach.'⁸⁰

Strategic litigation has attracted a large degree of interest from analysts who naturally view it as the primary means by which activists seek political change through litigation. It is the most overtly politicised and easily accessible form of litigation that external analysts can identify. Yet, as has already been noted, it is not only strategic litigation that has political consequences. This is a factor which is often missed or at least brushed over in studies that

⁷² Keck T, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights' (2009) 43 L&SR 151

⁷³ Cummings S, 'The Internationalization of Public Interest Law', (2008) 57 Duke Law Journal 891

⁷⁴ Mack K, 'Rethinking Civil Rights Lawyering and Politics in the Era before "Brown"' (2005) 115 The Yale Law Journal 256

⁷⁵ The Strategic Legal Fund, 'About the SLF' (The Strategic Legal Fund)

<http://www.strategiclegalfund.org.uk/about/> accessed 22nd May 2015

⁷⁶ Migrants' Law Project (MLP) 'Public Interest Litigation Training' (MLP) <http://themigrantslawproject.org/our-work/training/> accessed 14th May 2014

⁷⁷ Migrant and Refugee Children's Legal Unit (MiCLU) 'Home' (MiCLU) <http://miclu.org/> accessed 14th May 2014

⁷⁸ Vanhala (n53) 7

⁷⁹ The SLF (n75)

⁸⁰ Roger Smith, 'Experience in England and Wales: Test case strategies, public interest litigation, the Human Rights Act and legal NGOs' (Justice, May 2003) http://www.essex.ac.uk/armedcon/story_id/000696.pdf accessed 22 September 2016

focus primarily on strategic litigation,⁸¹ which tend to view it in isolation. To the extent that day to day litigation is mentioned it is dealt with as if it were a place holder, waiting for strategic opportunities to arise. This may be because in many contexts litigation is not such a daily event as it is in asylum and immigration matters. Indeed, it is in studies that most directly relate to immigration, particularly those by Sterett,⁸² Meili⁸³ and Webber,⁸⁴ that the most detailed exploration of the role of day-to-day litigation in the protection of rights can be found. As Sterett puts it, 'working for individual clients, independent of a concern for long-term rule change, is crucial'.⁸⁵

Non-strategic day-to-day litigation on individual cases can also be conceptualised as a form of activism.⁸⁶ Sarat and Scheingold have referred to it as an 'act of resistance... carried out on behalf of powerless groups'.⁸⁷ It can also be treated as politicised by the outside world. Moreover, non-strategic day-to-day litigation is also capable of producing the kind of legal change that strategic litigation strives for. This is particularly true in a heavily judicialised context such as immigration and migrants' rights, where litigation is a regular feature of migrants' interaction with the state.⁸⁸ Purely as a result of weight of numbers, the vast majority of case law must be developed in a non-strategic way. An alternative term is therefore needed that encompasses both strategic and non-strategic forms of litigation for migrants' rights.

⁸¹ Rosenberg G, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd Ed, University of Chicago Press 2008)

⁸² Sterett S, 'Caring about Individual Cases: Immigration Lawyering in Britain', in Sarat A & Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities*, (OUP 1998)

⁸³ Meili S, 'UK Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law' (2013) 54 Boston College Law Review 1123

⁸⁴ Webber F, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto 2012)

⁸⁵ Sterett (n82) 313

⁸⁶ Sterett (n82), Webber (n84), Maiman R, 'Asylum Law Practice in the United Kingdom after the Human Rights Act', in Sarat A and Scheingold S (eds) *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice*, (Stanford University Press 2005)

⁸⁷ Sarat and Scheingold, (n82) 18

⁸⁸ Robert Thomas, 'Immigration Judicial Reviews' (UK Constitutional Law Association, September 12, 2013) <http://ukconstitutionallaw.org/2013/09/12/robert-thomas-immigration-judicial-reviews/> accessed 22 September 2016

Sociologists and socio-legal scholars have for some time now focussed on the professional relationships and performance as a legal representative under the term ‘lawyering’.⁸⁹ Traditional ‘lawyering’ is generally thought of as based on a cab-rank approach to client selection and an ethical commitment to nothing more than the professional duties expected of a legal representative.⁹⁰ In contrast to this, scholars Sarat and Scheingold have pioneered the term ‘cause lawyering’.⁹¹ They and their contributors have identified cause lawyering as a distinct category on the basis of the motivations behind the practitioners’ work. Cause lawyers are, ‘lawyers who commit themselves and their legal skills to furthering a vision of “the good society” through ‘moral activism’.⁹² The work of such committed cause lawyers, though, is only part of the story. Activist litigation of this kind also involves campaigning NGOs, charities and other activist groups. They can act as claimants or intervenors in strategic cases, investigate issues, provide supporting evidence and act in supportive capacities for migrant claimants.⁹³

As such, an alternative term is necessary. The terms cause lawyering and strategic litigation will be combined to form the phrase ‘cause litigation’; meaning litigation that is motivated by a desire to support and promote the political cause of migrants’ rights. This terminology allows for a range of actors to be involved, both lawyers and non-legal campaign groups engaging in litigation and litigation support activities, unified by a shared participation in the movement and a political commitment to the ‘cause’ of migrants’ rights. While ‘cause litigation’ is a phrase that has appeared a small number of times within the literature, it usually goes undefined and is used without a detailed consideration of what legal and activist

⁸⁹ Boutcher S and Silver C, ‘Gender and Global Lawyering: Where are the Women?’ 2013 20 *Indiana Journal of Global Legal Studies* 1139; Ohlbaum E D, ‘Authentic Advocacy: Lawyering with Character’ (2013) 37 *American Journal of Trial Advocacy* 155

⁹⁰ A. Sarat & S. Scheingold (n82) 3

⁹¹ Sarat A & Scheingold S (eds), (n82); Sarat A and Scheingold S, *Cause Lawyering and the State in a Global Era* (OUP 2001); Sarat A and Scheingold S, *Cause Lawyers and Social Movements* (Stanford University Press 2006); Sarat A and; Scheingold S, *The Worlds Cause Lawyers Make: Structure And Agency In Legal Practice*, (Stanford University Press 2005)

⁹² Sarat and Scheingold (n82)

⁹³ Marseille A & Jans J ‘The Role of NGOs in Environmental Litigation against Public Authorities: Some Observations on Judicial Review and Access to Court in the Netherlands’ (2010) 22 *JEL* 373; Sundstrom L M, ‘Russian NGOs and the European Court of Human Rights: A Spectrum of Approaches to Litigation’ (2014) 36 *HRQ* 844

work is and is not included under the umbrella of the term.⁹⁴ The term's use in the present study should be understood as a product of various different elements of the scholarly work that has gone before it, combined with an appreciation of the practical realities that the migrants' rights cause in the UK operates with.

iii) Conclusion

This section has sought to provide an overview of the key literature that relates to both the broader theoretical issues that litigation for migrants' rights raises and the practical business of analysing such litigation as a form of activism. The broader studies raised a number of useful issues, in particular, how the role of liberal norms in forming state responses to migration might be affected by the deliberate co-option of those norms by activists; and how competing representations of the constitutional settlement, and indeed the notion of there being a 'settlement' in the sense of a defined and 'correct' position, may influence how legal activism is received both judicially and politically. The literature on analysis of legal activism showed that opportunity structures and a wider conception of legal consciousness that takes into account societal attitudes to rights litigation, will be important approaches. It also found that the terminology of 'cause litigation' was most appropriate for the present thesis.

Section 2: The Key Influences on Cause Litigation

The outcomes and consequences of cause litigation are likely to be highly influenced by relatively intricate relationships between social, cultural, political and legal factors in the UK. As McCann has put it, 'How law matters depends on the complex, often changing dynamics of context in which struggles occur.'⁹⁵ Indeed, as was discussed in the previous section, the

⁹⁴ Bloom A, 'Practice Style and Successful Legal Mobilization, Law And Contemporary Problems', (2008) 71 *Law And Contemporary Problems* 1; Carle S, 'Race, Class, and Legal Ethics in the Early NAACP (1910-1920)' (2002) 20 *Law and History Review* 97; Tamanaha B, 'A Holistic Vision of the Socio-Legal Terrain Law and Contemporary Problems' (2008) 71 *Law and Contemporary Problems* 89; Sang B, 'Tending towards greater eco-protection in Kenya: public interest environmental litigation and its prospects within the new constitutional order' (2013) 57 *Journal of African Law* 29

⁹⁵ McCann M, 'Law and Social Movements' in Sarat A, (ed) *The Blackwell Companion To Law and Society* (Blackwell 2004) 519

need to develop the term 'cause litigation' itself stemmed from the particular circumstances of migrants' rights litigation in the UK context.

It is possible to approach the general literature on constitutional debate, social movement activism and political litigation with this contextual specificity in mind. In doing so, insights into what are commonly found to be the key influences on political legal action can be discussed and those particularly pertinent to the UK can be identified. Three key themes emerge, which are discussed in turn in this section.

Three Key Themes

i) The Resources Available to the Movement

Scholars of social movements have for a long time focussed on the capacity of a given movement to mobilise resources, financial, human, intellectual etc, as a key determinant of their effectiveness.⁹⁶ This 'resource mobilisation theory' has subsequently been applied to the particular resources required for successful activism through law.⁹⁷ While this consideration is perhaps unsurprising, the literature does reveal a number of nuances to it that will be particularly important for a cause litigation approach.

The first is that cause litigation requires not only a high level of legal capacity but also for it to be relatively abundant and geographically widespread. Numerous studies have highlighted the need for expert legal representation for social movements and campaigning NGOs embarking on a legal strategy. Morag-Levine's study of conservationist NGOs turning to litigation⁹⁸ and Bouwen & McCown's examination of the strategies of interest groups in the European union⁹⁹ both point to the crucial role that access to such expertise has on the shape

⁹⁶ From McCarthy J & Zald M, 'Resource Mobilization and Social Movements: A Partial Theory' (1977) 82 American Journal of Sociology 1212; to Mccauley D, 'Europeanisation as Resource Empowerment for NGOs' (2008) 9 Perspectives on European Politics and Society 265; and Mccauley D, 'Protest, politics and produce: a resource account of anti-genetically modified organism activism' (2015) 20 Local Environment 34

⁹⁷ Most importantly, Epp (n63)

⁹⁸ Morag-Levine N, 'Partners No More: Relational Transformation and the Turn to Litigation in Two Conservationist Organizations' (2003) 37 L&SR 457

⁹⁹ Bouwen P and McCown M, 'Lobbying versus litigation: political and legal strategies of interest representation in the European Union' (2007) 14 Journal of European Public Policy 422

and direction of movement activities. In relation to the classic example of the NAACP in the US civil rights movement, Tushnet in particular has argued for the central importance of the organisation's access to 'extraordinarily talented lawyers' in the success of its litigation campaign.¹⁰⁰

However, these studies were principally focussed on the limited contexts of single organisations and/or exclusively strategic litigation approaches. Cause litigation, which as discussed above includes the daily representation of cases with no particular strategic merit, certainly has need of such expertise, but it must also try to make it available to as wide a proportion of the movement's constituency as possible. Epp points to the existence of a generation of dedicated lawyers as being a crucial element in his 'support structure' for a 'rights revolution'.¹⁰¹ Meanwhile, in relation to migrants' rights specifically, Webber describes expert legal representation as 'hugely important', pointing to a substantial difference in success between represented and unrepresented cases and the particular vulnerability of migrants to 'exploitation by profit driven firms and backstreet charlatans.'¹⁰²

This relationship between the movement at large and the lawyers that populate and work for it has also been shown to be potentially fraught with complications. Scholars have voiced concerns that a movement that becomes overpopulated or dominated by lawyers risks distorting its aims and disempowering and alienating its activists.¹⁰³ As Barclay and Fisher have pointed out,

'one of the difficulties with using legal strategies to define or achieve movement goals is that it requires social movements to adopt fixed goals over extended periods of time....Scholars have long noted and argued about the tension between cause lawyers pursuing planned litigation and the fundamental need of a social movement to set its own direction.'¹⁰⁴

¹⁰⁰ Tushnet M, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (University of North Carolina Press 2004) 33

¹⁰¹ Epp, (n63) 18

¹⁰² Webber (n84) 67-69

¹⁰³ Rosenberg (n81) 427; Marshall, A-M, 'Social Movement Strategies and Participatory Potential in Litigation', in Sarat A & Scheingold S *Cause Lawyers and Social Movements* (n91) 166

¹⁰⁴ Barclay S and Fisher S, 'Same Sex Marriage Litigation', in Sarat and Scheingold, (n94) 94

However, while these concerns are clearly of substantial significance for cause litigation activism, there is a limit to the remedial steps that can be taken. Cause litigation exists in a context where legal representation and litigation are necessary for individual clients with day-to-day needs distinct from the wider movement. Such a context is likely to lead to lawyers and legal concerns taking a dominant position within the movement as a whole. Yet this need not be an exclusively negative influence. As McCann has argued,

‘legal mobilisation does not inherently disempower or empower citizens... Legal relations, institutions and norms tend to be double-edged, at once upholding the larger infrastructure of the status quo while providing many opportunities for episodic challenges and transformations in that ruling order.’¹⁰⁵

What will matter most, then, is the capacity for the legal and non-legal aspects of the movement to work in a coordinated manner.

This coordination can involve activists in the wider movement contributing to the litigation that is being undertaken. Analysts of more sophisticated litigation strategies now regularly highlight the important role that activists peripheral to the strategic litigation itself can play in case identification, evidence gathering, claimant support and in the process of framing movement demands in terms most conducive to litigation. For example, McCann documents the practical support in terms of resources, evidence gathering and support of individuals whose litigation became leading test cases for pay equity provided by unions, feminist campaigners and civil liberties groups.¹⁰⁶ Litigation coordination of this kind is likely to have a significant influence both on case outcomes, the choice of cases taken, in strategic circumstances where choice is possible, and a migrant claimant’s capacity to navigate the litigation process relatively smoothly.

¹⁰⁵ McCann M, ‘Law and Social Movements’ in Sarat (n95) 519

¹⁰⁶ McCann, (n51) 116 - 124

Scholars, particularly sceptics of legal mobilisation approaches to activism such as Rosenberg, Klarman¹⁰⁷ and Tushnet,¹⁰⁸ have emphasised that it is at least extremely difficult (Rosenberg and Tushnet would argue impossible) for a litigation strategy to have positive outcomes for a particular client group without the extensive involvement of non-legal, non-litigation orientated activists engaged in influential public discourse and contestation. Litigation may be able to have a positive effect, but Rosenberg in particular argues that it is wrong to assume 'that courts can overcome political obstacles and produce change without mobilisation and participation.'¹⁰⁹ A positive effect for litigation may come where mobilisation and mass participation have contributed to movements in the political environment discussed above. Thus litigation would need to be coordinated to follow up on more mainstream activism to be sure of being positively influential. Without this coordination, these sceptics warn, litigation risks having substantively negative consequences through generating a powerful backlash against the decisions that are being made and the manner in which they are being taken.¹¹⁰

Given that cause litigation operates in and has influences on a public and political environment, it is likely to need to be part of a movement which as a whole is able to effectively respond to that environment. The thesis will therefore examine in chapter 3 how the UK's migrants' rights cause litigation sector is constituted. Then, across Section 2, the extent to which the UK's cause litigators are able to co-ordinate to deliver both their litigation-focussed activity and broader public engagement is explored. The focus of this analysis will be on the outcomes and consequences that such coordination, or lack thereof, produces.

ii) Legal and Judicial Context

A clear indication from the legal mobilisation literature is that the legal framework and the judicial context cause litigation operates within is a major influence on its outcomes and consequences. As was discussed above, these issues have in recent times often been

¹⁰⁷ Klarman M, *Brown v. Board of Education and the civil rights movement: abridged edition of From Jim Crow to civil rights: the Supreme Court and the struggle for racial equality* (Oxford University Press 2007)

¹⁰⁸ Tushnet M, 'Some Legacies of Brown v. Board Education' (2004) 90 VLR 1693

¹⁰⁹ Rosenberg (n81) 429

¹¹⁰ Klarman, (n107) 149 and Tushnet, (n108) 1708

approached in relation to the ‘legal opportunity structures’ (LOS) that exist in a given context. That framework is not used here partly to avoid confusion with the political opportunity structures discussed below, but also because as a portmanteau term it tends to cover areas that are being separated out in the present analysis. In particular, the rules relating to the funding of cases are here dealt with under the ‘resources’ issues discussed above, but have often come into consideration in LOS-based analysis.¹¹¹ An analytical division between resources, and what goes on in the courtroom, governed by the legal framework and judicial context they are working with, provides a clearer, if slightly overly neat, working distinction.

Turning to the legal framework of cause litigation first, much of it will be made up of legislation which sets out the State’s engagement with a particular group or issue being supported by activists. For migrants’ rights litigation this will be the various statutes dealing with immigration law and related matters, such as citizenship and the increasingly large range of social and economic regulations which contain an immigration element. The powers such legislation grants to the state, and the duties it imposes upon them, will to a very significant extent provide the circumstances and form the basis for the arguments that cause litigators go on to contest.¹¹²

However, it has been clear since the early days of legal mobilisation studies in the US that the presence or lack of underlying and fundamental constitutional rights that are amenable to litigation are of the greatest importance to cause litigators.¹¹³ This is most likely because unpopular and/or marginalised groups that require cause litigation support are unlikely to face a benign legislative environment.¹¹⁴ In contrast, as was noted above, the fact that US citizens have a Bill of Rights available to them that is legally enforceable is frequently cited as the fundamental basis for the development of a culture of legalised activism.¹¹⁵ Prior to the HRA’s introduction, comparative studies of the role of courts in US and UK politics or commentary on politicised lawyering in the UK would regularly cite the lack of a litigable rights

¹¹¹ Vanhala (n51) 531

¹¹² McCann (n51) re employment legislation 141-142; Vanhala (n53) 204 re disability legislation; Andersen (n68) re sodomy law 205

¹¹³ Zackin (n63) 368

¹¹⁴ Zackin (n63)

¹¹⁵ Rosenberg, (n81) 22

charter as an obstacle to the development of what this thesis is calling cause litigation.¹¹⁶ However, while the fact of there being a legalised rights charter to turn to may well be a major influence on activists' decisions to turn to litigation, the study of cause litigation engaged in here is specifically intended to relate to situations faced by those, such as migrants' rights activists, who have little or no effective choice. Of potentially greater influence, therefore, is the nature of the rights that these charters enshrine.

A key division in this regard is often identified as being between the classically liberal rights, often characterised as negative rights, provided in documents such as the US Constitution, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) on the one hand, and the more expansive social rights contained in more recent rights charters, most famously the post-Apartheid South African Constitution.¹¹⁷ The nature of these rights documents influences not only the judgments that are made possible by them, but also the nature of the debate regarding legitimacy and the place of judicial rights promotion in democratic societies. In societies which reserve their constitutional rights protection for civil and political rights there is an assumption of a more limited role of rights and legal action. Even writers who strongly support the notion of social and economic rights, such as Gearty, tend to regard them as fundamentally belonging to political argument and as having no place in law;

'The least effective way of securing social rights is via an over-concentration on the legal process, with the constitutionalisation of such rights being an especial disaster wherever it occurs.'¹¹⁸

In contrast, the more traditional and commonplace position regarding acceptable legal rights in the UK has perhaps been summed up best by Tomkins, who has stated that,

¹¹⁶ Epp (n63) 111 & Sterett (n82) 293

¹¹⁷ Waldron J, 'Socioeconomic Rights and Theories of Justice' (2011) 48 San Diego Law Review 773; Gorodzeisky A, 'Does the Type of Rights Matter? Comparison of Attitudes Toward the Allocation of Political Versus Social Rights to Labour Migrants in Israel' (2013) 29 European Sociological Review 630

¹¹⁸ Gearty C & Mantouvalou V, *Debating Social Rights* (Hart 2012) 1

‘Judicially enforceable substantive rights may be deemed compatible with political constitutionalism when they are narrowly defined and absolute... It is those *qualified* political claims that are elevated to the status of substantive rights that are problematic.’¹¹⁹

The rights that Tomkins regards as ‘qualified political claims’ particularly include Article 8, the right to respect for a private and family life. While this right derives from the ECHR and can be perceived as fitting within the classically negative rights position, it also contains sufficient ambiguity to be regarded by Tomkins, and many others as a political claim masquerading as a right. This point is vital for the present study as Article 8 plays a crucial role in migrants’ rights litigation.¹²⁰ As will be discussed at greater length in chapters 3 and 5, the fact that the current legal framework available to cause litigators in the UK includes rights such as Article 8, has had far reaching consequences for the migrants’ rights movement. The legal framework thus works not only to shape the nature of litigation that is able to take place, but also to condition the societal response to that litigation.

The literature also indicates that of equal importance to the outcomes produced by cause litigation is the judicial context of judges’ ability and willingness to intervene in executive decision making and their approach to doing so. Viewing the judicial context as an influence on cause litigation indicates that it must be considered as a variable, rather than a constant. Yet the traditional notion of a judge’s role, referred to by Segal and Spaeth as the ‘legal model’, is essentially centred around the idea that ‘decisions of a Court are based on the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, precedent, and a balancing of societal interests’.¹²¹ However, as was also noted above, critical analysts have long since recognised a gap between this ‘law on the books’ and law in reality. Legal process is not a machine for cases to be fed into for the ‘correct’ outcome to be reached. While Galanter long ago identified relative financial resources as a

¹¹⁹ Tomkins A, ‘The Role Of The Courts In The Political Constitution’ (2010) 60 UTLJ 4 4-5

¹²⁰ Dembour, (n57); also Thym D, ‘Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay?’ (2008) 57 ICLQ 87

¹²¹ Segal J, & Spaeth H, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993) 1

key determinant of legal disputes, noting that ‘the haves come out ahead’,¹²² others have problematised judges and the judiciary as key determinants themselves.

Some approaches to the critical reappraisal of the judicial role in litigation, such as that pursued by Segal and Spaeth, prioritise the personal politics of individual judges as key determinants.¹²³ Others, have tended to approach the question in terms of the judiciary as a class.¹²⁴ Whichever approach is emphasised, the problematisation of judges has served to show that the traditional ‘legal model’ cannot be relied upon. As Griffiths has argued, ‘judges must be judged by their policies, by which I mean their political attitudes, their views of where the public interest lies, as these affect their conclusions.’¹²⁵ It is arguable, though, that it is not only judges’ final determinations of cases that are affected by these issues, but also preliminary determinations such as whether or not to grant permission to proceed with judicial reviews and the manner in which they conduct hearings. For cause litigation, then, there are three points at which the judicial approach to the litigation is highly influential on the outcomes it can produce. They condition what kinds of cases get heard and what progress can be made by cause litigators. They will also condition the tactics used and the types of argument that cause litigators submit in the first place, through professional experience and received wisdom. They are therefore fundamental to the cause litigation enterprise.

The judicial approach to dealing with cause litigation, what Griffiths terms their ‘policies’, is largely governed by notions of ‘justiciability’. As McGoldrick points out, ‘an issue is considered to be justiciable in a particular forum if it is capable of being decided in that legal forum and it is considered appropriate to do so.’¹²⁶ As McGoldrick goes on to note, though,

‘Such a description has elements of circularity. If an issue is suitable for judicial determination it is said to be justiciable. If it is not so suitable it is said to be non-

¹²² Galanter M, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change.” (1974) 9 *L&SR* 95

¹²³ Segal J, & Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2012) 312

¹²⁴ Griffith JAG, *The Politics of the Judiciary*, (Fontana 1997); Ewing K D ‘The Bill of Rights Debate: Democracy or Juristocracy in Britain?’ in Ewing K D, Gearty C and Hepple B (Eds) *Human rights and labour law: essays for Paul O’Higgins* (Mansell 1994)

¹²⁵ Griffith (n46)

¹²⁶ McGoldrick D, ‘The Boundaries Of Justiciability’ (2010) 59 *ICLQ* 981 983

justiciable. However, conceptions of capability, fora and appropriateness may change over time.¹²⁷

It is arguable, though, that it is not merely over time that judgments of ‘appropriateness’ may change, but also between individual judges and particular circumstances.

Justiciability or ‘appropriateness’ decisions when dealing with cause litigation are often expressed in terms of what is ultimately law (and therefore within a judge’s remit) and what is politics (and therefore outside of such a remit). Granting or refusing permission for a case to proceed, or accepting or rejecting an argument during a hearing frequently involves a judge commenting on what they consider to be either ‘legal’ or ‘political’.¹²⁸ These determinations are a practical manifestation of the debate, discussed earlier in this chapter, regarding conceptions of the rule of law and in particular the separation of powers. Just as in constitutional debate there is no fixed meaning of the content and application of the rule of law, judges’ personal adherence to thick and thin varieties of it may vary. This is where the analytical division between the judiciary as a class and judges as individuals becomes crucial, as while the judiciary as a class may have a common adherence to the rule of law, individual judges may be inclined towards greater interventionism while others may be committed to preserving a more traditional separation of powers. These divisions are likely to play a crucial part in the outcomes of particular cause litigation efforts, and will be discussed throughout this thesis’ analysis of cases.

The approaches of individual judges in individual cause litigation cases to the justiciability of issues in dispute can also be aggregated to become trends that have the potential to produce broader consequences. A common view on such trends has been that UK judges have for many years operated a considerable degree of self-policing regarding contentious areas of social concern; whereby many areas were deemed to be outside, or largely outside, the ambit of judicial interference.¹²⁹ Immigration, historically, has been shown to be one such area.¹³⁰

¹²⁷ Ibid

¹²⁸ In a migrants’ rights context, Lord Sumption’s dissenting opinion in *Tigere, R (on the application of) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57

¹²⁹ Shapiro M ‘Judicial Delegation Doctrines: The US, Britain, and France’ (2002) 25 *West European Politics* 173

¹³⁰ Dembour (n57) Sterett (n82)

However, as will be discussed in chapter 3, analysts have noted that areas previously regarded as falling within the ‘political’ realm, and therefore generally outside the judicial purview, have in recent times begun to receive closer judicial scrutiny.¹³¹ In its examination of cause litigation cases, section 2 will discuss whether and in what ways there has been increased judicial intervention in migrants’ rights and immigration issues. Any such increase would have important implications for the outcomes possible from cause litigation, but may also bring with it political consequences if the separation of powers in immigration issues has been altered by the judiciary.

iii) Political Opportunity Structures

The third clear indication from across the studies is that while the legal and judicial frameworks will have a clear influence on outcomes for all litigators, cause litigation is particularly susceptible to the mediated public discourse, electoral politics and policy-making processes that pertain to the issue they are litigating. In contrast to the legal opportunity structures discussed above, studies of the political influences on social movement activism have often used the rubric of Political Opportunity Structures.¹³²

As Koopman’s et al note, ‘each form of collective action is understood as part of a larger political process and as being shaped by the opportunities and constraints offered by its political environment.’¹³³ However, they also identify a number of shortcomings in the traditional Political Opportunity Structure approach, including a bias towards institutional opportunities, such as the relative openness of policy processes, a tendency to over generalise outside of a particular context and a failure to grasp the notion of contentious politics as being fundamentally interactive and dynamic.¹³⁴ The present study adopts many of the same considerations. The interactive and dynamic nature of the issue is at the heart of this study’s

¹³¹ Kavanagh (n29) 211-233; Hickman T, *Public Law After the Human Rights Act* (Hart 2010) 130

¹³² Vráblíková K, ‘How Context Matters? Mobilization, Political Opportunity Structures, and Nonelectoral Political Participation in Old and New Democracies’ (2014) 47 *Comparative Political Studies* 203; Shawki N, ‘Political Opportunity Structures and the Outcomes of Transnational Campaigns: A Comparison of Two Transnational Advocacy Networks’ (2010) 35 *Peace & Change* 381

¹³³ Koopmans R, *Contested Citizenship: Immigration and Cultural Diversity In Europe* (University of Minnesota Press 2005)16

¹³⁴ Ibid 20-21

concern with the consequences of cause litigation on the wider politics of migration and rights in the UK. Contextual specificity has been a theme of this chapter and will be dealt with in detail in the chapter 3. Likewise the nature of policy development and implementation processes will be discussed in an appropriate context below and in the next chapter. Koopmans et al seek to correct these shortcomings in their approach to POS by encompassing both ‘institutional opportunities in the form of the chances of access and influence in the decision making process’¹³⁵ and the ‘discursive opportunities and constraints’, such as how an issue is framed and approached in political and media debate and public perception.¹³⁶ The same approach will therefore be applied here.

Turning to the ‘institutional opportunities’ first, the most obvious manner in which they are influential on cause litigation is in relation to the policy development and legislative processes. Here, the executive produces potentially rights-affecting migration policy which then form the basis of the litigation that follows. To some extent, the ability of a social movement to influence these processes will depend on the movements themselves; the capacities of their constituent entities, the ideologies and other motivations of the participants and the lobbying connections that the movement are able to cultivate. However, the institutional political opportunity structures that Koopmans et al discuss indicate that there are structural factors in a society’s constitutional and political arrangements that locate decision making and oversight responsibilities in different areas of the state and determine their powers relative to each other. This arrangement in turn dictates the relative openness of a policy process to outside influence, including attempts at influence from social movement campaigns. In discussing the particular context that migrants’ rights campaigners in the UK face, chapter 3 will therefore address the ministerial, administrative and legislative relationships that govern the UK’s immigration policy processes. This will be in order to discuss the manner in which the state is able to develop policy in response to cause litigation and the extent to which the migrants’ rights movement is able to influence that process.

It is not only in policy and legislative developments that institutional openness or closure and relative powers over decision making may influence the state’s response to cause litigation.

¹³⁵ Ibid 17

¹³⁶ Ibid19

This question of the institutional reaction also arises in the manner in which the executive's administrative arm responsible for the implementation of law in the particular policy area in question reacts to the cause litigation being pursued. Securing legal change through the courts is often intended to result in change in Executive behaviour towards the group or issue that activists are concerned with. However, the importance of administrative actors' attitudes to the litigation comes because, as Rosenberg points out, 'Court decisions, requiring people to act, are not self-executing'. Courts possess very little, if any, direct power to enforce the legal and social change that their judgments are said to bring about.¹³⁷ Instead, administrative agencies are created to enforce the law governing their policy area and in principle should do so regardless of the source of that law, whether it comes through parliamentary legislation, executive policy or, crucially for the cause litigation perspective, expansions in judicial interpretation. However, they are also creations of and form part of the executive arm of government and may in some circumstances become dominated by executive policy concerns over other sources of law. Thus, in circumstances where the litigation outcomes happen to coincide with the aims of an executive policy then it is entirely possible for that litigation to be enthusiastically implemented and enforced by the administration.¹³⁸ However, far more prevalent in the literature are instances in which administrative agencies have either outright refused to implement law change from the courts, or more commonly sought to circumvent it by interpreting rulings in a restrictive light and using them as a spur to new and varied forms of discriminatory or otherwise rights-damaging behaviour.¹³⁹

In relation to migrants' rights in the UK the primary administration responsible for implementation of immigration law, and thus cause litigation judgements, is the Home Office and its immigration service. The second section of the thesis will examine its responses to the cause litigation to assess the extent to which judgments are whole-heartedly implemented. In light of Koopmans et al's findings regarding the importance of discursive opportunity structures, though, this will not be the sole focus of the analysis. While the institutional

¹³⁷ Rosenberg, (n81) 15

¹³⁸ Ellis E, 'The Gender Recognition Bill' [2004] PL 467; and Young A. 'Is dialogue working under the Human Rights Act 1998?' [2011] PL 773

¹³⁹ Guiraudon V, 'European Courts and Foreigners' Rights: A Comparative Study of Norms Diffusion' *International Migration Review* (2000) 34 1088 1115; Abel R, 'Speaking law to power', in Sarat and Scheingold (n82) Cause Lawyering 86. See also Andersen (n68) and Klarman (n107)

opportunity structures may govern the capacity of the executive to devise and implement rights-affecting policy and empowers its administration to be the primary enforcer of cause litigation decisions, the discursive structures are also crucial to the executive's motivations and approach to these actions.

In some respects, discursive POS are influential on cause litigation both prior to and during litigation activity being undertaken. Firstly, the mediated and governmental discourse on an issue or particular social group will influence its uptake as a cause worth fighting for by politically engaged litigators. It is the engagement with the politics of an issue which distinguishes cause litigation from the traditional kind engaged in by most lawyers. As discussed above, cause litigation is to a significant extent a question of motivation, with 'belief in a cause and a desire to advance the goals of that cause' being 'the forces that drive cause lawyering actions.'¹⁴⁰ Discursive POS also have the capacity to overlap with the judicial context discussed above, in influencing judicial decisions on justiciability. Describing something as 'political' can function as a convenient explanation for judges to refuse to engage with issues they know to be contentious in wider political debate.¹⁴¹ As will be discussed in more detail in chapter 5, moreover, judges may be sensitive to developments in public debate regarding their own judgements and, despite their institutional insulation, may be influenced by related political pressure.

How an issue, such as immigration, is framed in mediated public discourse, though, is likely to be most directly influential on governmental responses to cause litigation successes. Writers such as Anderson,¹⁴² Somerville¹⁴³ and Zackin¹⁴⁴ have all identified factors such as media representation of an issue, public attitudes to that issue and the pressures of political party competition regarding that issue as likely to promote the development of rights-

¹⁴⁰ Hilbink T, 'You Know the Type: Categories of Cause Lawyering' (2004) 29 L&SE 657 659

¹⁴¹ Lord Sumption, 'The Limits of Law' (Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013) <https://www.supremecourt.uk/docs/speech-131120.pdf> accessed 22 September 2016

¹⁴² Bridgit Anderson, (n22) 45-46

¹⁴³ Somerville W, *Immigration Policy under New Labour* (Policy Press 2007) 119-139

¹⁴⁴ Zackin (n63) 368

damaging policies of concern to cause litigators. Hanson¹⁴⁵ and Tichenor¹⁴⁶ have also identified a tendency of administrators and policy makers in contested areas to rely on the direction of previous approaches as a defensive mechanism, known as path dependency. Thus there is a risk that rights damaging policies and practices may be adopted and then perpetuated by an executive under pressure from public discourse and unable or unwilling to challenge it. Moreover, the extent that the governmental wing of the executive exercises political control over the administrative exercise of policy and law implementation will also govern the possibility that discursive pressure influences administrative behaviour and decision making in response to cause litigation and migrants' rights claims. Chapters 4 and 5 will discuss the practical responses of the executive to various forms of cause litigation activity and the extent to which discursive POS drive those responses.

One further important point regarding discursive POS is that the framing in mediated public and governmental discourse of the cause the cause litigators are fighting for, in this case migrants' rights, will also impact on how judgments that are actually given on cause litigation cases are received and understood. If a particular cause is framed in heroic terms as righteous underdogs seeking justice then the activity of cause litigation in its name and the judicial outcomes it achieves are likely to be understood very differently to if a cause is framed in negative terms, as trivial, alien or threatening. This factor is particularly starkly revealed in discussion of the possible benefits to activist groups of losing cause litigation cases. Analysts such as Depoorter, have shown that where a cause is itself positively framed, legal failure can lead to upsurges in sympathy or support for what is perceived as a structurally unjust or unfair outcome, regardless of the legal correctness of the judicial decision in question.¹⁴⁷ As chapters 5 and 6 will discuss, though, where a cause is negatively framed, legal success may potentially bring with it a different set of risks if it promotes the interests of an unpopular group.

¹⁴⁵ Hansen R, 'Globalization, embedded realism, and path dependence: The other immigrants to Europe' (2002) 35 *Comparative Political Studies* 259

¹⁴⁶ Tichenor D J, *Dividing Lines: The Politics of Immigration Control in America* (Princeton University Press 2002)

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¹⁴⁷ Depoorter (n54)

It is therefore vital for an analysis of the outcomes and consequences of cause litigation that both the institutional and discursive opportunity structures around immigration and migrants' rights are understood, and this will be discussed fully in chapter 3.

Conclusion

This chapter has set out a number of points which will guide this thesis' analysis. The first is that in order to understand activist litigation's role in the UK's immigration politics the analysis must engage with some of the main arguments in the theoretical study of human migration and the discussion on liberal rights and the due place of law in democratic constitutions. Political theorists of migration and liberal states have shown that there are inherent contradictions within the liberal framework which are likely to render migration as permanently controversial and lacking in mainstream support. Migrants have been shown as likely to struggle to be afforded the same as, or even comparative rights to, 'native' members of a community, owing to the inherent reliance on membership and citizenship for rights protection. At the same time, constitutional rights theorists have debated the extent to which it is even appropriate for members of minorities to have access to legally enforceable rights over the majority. The framework in which these debates occur and the issues they throw up both point to likely obstacles in the way of substantial gains being made for migrants' rights through an approach that focusses on enforcing legal rights through litigation. They also indicate the terms in which much of the opposition to this form of activism is likely to be framed.

The second is that the research must be centred in the learning from the growing school of socio-legal scholars concerned with the relationship between litigation, lawyers, social movements and political change. This involves the intersection of a number of factors which could be worthy of extended study in their own right and as a result there is no settled theoretical or methodological approach that can be adopted wholesale for the present concerns. While an analytical approach modelled on the notion of legal mobilisation is relevant, it has also been shown to be too broad to be used alone in the present study. As a result, the hybrid notion of cause litigation has been developed which is able to take account

of numerous factors, including the technical legal work that goes into activist litigation and the role that both strategic and non-strategic litigation can play as forms of activism.

What has been kept from the legal mobilisation approach, however, is a major focus on the factors that surround the litigation, that influence its outcomes in a legal sense and its consequences in a political sense. Legal mobilisation is about significantly more than just the act of taking cases to court, and this is a lesson that will be reflected throughout this thesis. While court decisions are no doubt important for cause litigators, they are only one aspect of the role they play in the politics of migrants' rights in the UK. The literature connected to legal mobilisation and cause lawyering has shown that there are in fact three broad factors which influence what cause litigation for migrants' rights in the UK is able to produce. These are the financial, human and institutional resources available to the movement; the legal and judicial framework the litigators work with and the institutional and discursive political opportunity structures in which they operate and are a part of.

Having identified these three key features, the next chapter will discuss the specific context of cause litigation for migrants' rights in the UK and assess how these factors play out.

Chapter 3: Cause Litigation for Migrants' Rights in the UK Context

Introduction

*In the late 90s there was a voluntary sector compact with the Labour government. They couldn't agree one with the refugee field and the Home Office - they just couldn't agree one...that was about the level of mutual hostility and distrust around the then IND and the refugee charities and lawyers in that field.'*¹

Drawing from the studies discussed in the previous chapter, it has been possible to identify three broad factors which act as the crucial influences on cause litigation as a strategy for migrants' rights activism. These factors make it possible for cause litigation to function, provide its impetus and most importantly, shape the outcomes and consequences it produces. The factors identified were;

- i) the resources of the movement involved,
- ii) the judicial and legal framework in play in the issue,
- iii) the political opportunity structures the cause litigators operate within

Taking these as a starting point, this chapter will analyse how they play out in the context of cause litigation for migrants' rights in the UK.

The chapter will discuss the extent to which the factors function in a way that facilitates positive outcomes for the movement and the migrants' it seeks to support. It will also examine whether they contain problematic elements that are likely to limit the beneficial impacts of litigation for migrants' rights and potentially even provide fertile ground for the kind of backlash that litigation-strategy analysts have observed in other contexts.² It takes each of the three factors in turn and uses data gathered from activist and practitioner

¹ Funding Officer Interview, 15th April 2014

² Rosenberg G, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd Ed, University of Chicago Press 2008); Klarman M, *Brown v. Board of Education and the civil rights movement: abridged edition of From Jim Crow to civil rights: the Supreme Court and the struggle for racial equality* (Oxford University Press 2007); Andersen E A, *Out Of The Closets And Into The Courts: Legal Opportunity Structure And Gay Rights Litigation* (University of Michigan Press 2006)

interviews, policy papers, media reports and academic analysis to discuss their nature and how they relate to and influence migrants' rights litigation. In analysing the role of these factors in the UK context, the chapter will show that the picture is mixed. While there are some elements that indicate the potential for positive outcomes from litigation, these suffer from important limitations and are contrasted with some strongly adverse factors.

These circumstances, the chapter concludes, suggest that cause litigation may be limited in terms of the positive outcomes and consequences for migrants' rights that it can achieve and carries with it significant risks.

The UK's Migrants' Rights Activists

'We've ended up relying on lords and judges and I have to say for me at my age it feels very peculiar... At one point I remember thinking 'who is that old person standing up and arguing our brief?' and it was Robert Carr, who had been Home Secretary for the Tories. It must have been in the Sixties, because I remember that the Angry Brigade bombed his house. And I was thinking, "Oh dear, when I was younger we didn't think that was necessarily such a bad thing and now here we are".³

This statement from a veteran of the migrants' rights movement in the UK reflects both the origins of the cause and a key aspect of its current condition. The campaign for migrants' rights has its roots in the radicalism of the sixties and seventies and in particular its struggles for racial equality. Since that time, as this section will show, the movement has to a substantial degree (although not exclusively) moved away from mass participatory social struggles, and become simultaneously more legalised and institutionalised.

Inspired by the civil rights movement in the United States and responding to the first generation of post-War New Commonwealth immigration that brought large numbers of black and Asian people to settle in the UK, the liberal and radical left in the UK began to mobilise in opposition to the pervasive discrimination that marked the period.⁴ These

³ Migrants' Rights Consultant Interview 27th August 2013

⁴ Webber F, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto 2012) 6-7;

campaigns met with significant success in relation to domestic social and economic policy, particularly in the forms of the Race Relations Acts of 1965, '68 and '76 which set out to ban racial discrimination in the provision of housing, employment and services.⁵ However, as Spencer points out, during the same period the British state had developed a 'bi-partisan consensus that firm immigration control is the prerequisite of good race relations'.⁶

As Epp has put it 'By the mid-sixties the issue of immigration became increasingly politicised, as well as increasingly defined in racial terms.'⁷ As a result, while those motivated by racist sentiment saw immigration control as key to stopping 'the future growth of the immigrant-descended population',⁸ campaigners for racial equality equally saw the state's immigration policy and practices as a major battleground for their cause. In 1967 the Joint Council for the Welfare of Immigrants was set up to act as 'representatives of those communities which found themselves victims of a particular set of legal procedures... established not merely as a legal advice service, but as an anti-racist alliance.'⁹ In sympathy with this anti-discrimination movement was a related generation of 'radical lawyers'.¹⁰ The JCWI was joined in 1984 by the Immigration Law Practitioner's Association (ILPA), founded as a professional association for the nascent immigration legal profession with a mission 'to promote and improve advice and representation in immigration, asylum and nationality law.'¹¹ Such an association was badly needed in order to combat the widespread prejudice that immigration law was populated by 'bad lawyers arguing badly for dishonest clients.'¹² As York recalls the period,

⁵ Epp C R, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998) 113

⁶ Spencer S, 'The Impact of Immigration Policy On Race Relations', in Blackstone T, Parekh B & Sanders P, *Race Relations in Britain: A Developing Agenda* (Psychology Press 1998) 75

⁷ Epp, (n5) 113

⁸ Enoch Powell, 'Enoch Powell's 'Rivers of Blood' speech' (Conservative Association meeting in Birmingham on April 20 1968, The Telegraph, London, 06 Nov 2007) <http://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html> accessed 22 September 2016

⁹ Martin I 'Combining Casework and Strategy' in Cooper J and Dhavan R (Eds), *Public Interest Law* (OUP 1986) 262

¹⁰ Harlow C & Rawling R, *Pressure Through Law* (Routledge 1992) 3

¹¹ Immigration Law Practitioners Association, 'About ILPA' (ILPA) <http://www.ilpa.org.uk/pages/about-us.html> accessed 22 September 2016

¹² Sterett S, 'Caring about Individual Cases: Immigration Lawyering in Britain', in Sarat A & Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities*, (OUP 1998) 299

For immigration casework (there were few asylum cases until the late 1980's when the first war started in Somalia) preparation and representation at appeal was not covered by legal aid and relatively few migrants received formal representation from qualified solicitors.¹³

However, from the mid-1980s and onwards into the 1990s, while private cab-rank solicitors were rare in immigration and asylum cases,¹⁴ as Sterett has shown the sector developed into a small but growing group of dedicated cause litigators working in private practice and for NGOs like JCWI, the UKIAS and later the dedicated asylum legal charity Refugee Legal Centre (RLC).¹⁵ These cause litigators regularly pursued cases through such tribunal appeals as were available at the time and the Administrative division of the High Court.

The 1990s also saw a set of changes to progressive politics in the UK. A less radical and more institutional form of activism replaced much of the grass-roots activism that had previously occurred.¹⁶ Opponents of this development, such as Choudry and Kapoor, have critiqued it as 'the professionalisation of dissent.'¹⁷ However, the 1997 New Labour government sought to 'transform the [state's] relationship with this 'voluntary sector'¹⁸ by developing a contracted, professionalised civil society, termed a 'Third Sector', that would operate in the UK's political economy alongside the State and Business. Newman describes this approach as 'marking out terrain fundamentally different from both the economism [of Thatcherism] and the welfarist associations of Old Labour'.¹⁹ Re-framed as civil society organisations, activist and community groups were credited by Tony Blair with the ability to 'promote citizenship...and make a crucial contribution to our shared aim of a just and inclusive society'.²⁰

¹³ York S, 'The End of Legal Aid in Immigration - A Barrier To Access To Justice For Migrants And A Decline In The Rule Of Law' (2013) 27 JIANL 106, 124

¹⁴ Martin (n9) 265

¹⁵ Sterett (n12) 298

¹⁶ Hilton M, Crowson N J & McKay J (Eds), *NGOs in contemporary Britain: non-state actors in society and politics since 1945* (Palgrave Macmillan 2009); Whiteley P, *Political participation in Britain: the decline and revival of civic culture* (Palgrave Macmillan 2012);

¹⁷ Choudry A and Kapoor D, *NGOization: complicity, contradictions and prospects* (Zed Books 2013)

¹⁸ Williams F and Roseneil S, 'Public Values of Parenting and Partnering: Voluntary Organisations and Welfare Politics in New Labour's Britain' (2004) 11 Social Politics 181

¹⁹ Newman J, *Modernising Governance: New Labour, Policy and Society* (Sage, 2001) 144

²⁰ Blair, in Home Office 'Compact on Relations between Government and the Voluntary and Community Sector in England' (Home Office November 1998) available at http://www.compactvoice.org.uk/sites/default/files/compact_1998.pdf Accessed 31st August 2016 2

This process, of encouraging and rewarding the institutionalisation and professionalisation of activist and community groups through the provision of access, the prospect of influence and, in some circumstances, the allocation of funding had a significant effect on what began to be termed the migrants' rights 'sector'. The sector became constituted by a small number of relatively large national organisations, including the Refugee Council, Refugee Action, Migrant Helpline, The Refugee Legal Centre (RLC), the Immigration Advisory Service (IAS) Amnesty International UK, JCWI and The Medical Foundation for the Care of Victims of Torture, who variously combined membership, lobbying and other campaigning activity with government-contracted specialist service provision. As their names suggest, these larger organisations tended to be focussed on the specific questions of asylum seekers and refugees as during this period they represented the most overtly politicised and prominent forms of vulnerable migrant.

To these were added a much greater number of small local groups. They tended not to be quite so focussed in their target demographic, and also tended to involve voluntary or majority-voluntary staffing, were funded independently of government, and derived from an 'organic' development as a response to perceived need in their particular community.²¹ Writing at the turn of the millennium, Zetter and Pearl described them as

'providing, for example, rights and advice-based counselling or material assistance...usually established by groups and individuals who are not refugees or asylum-seekers, for example through local churches and welfare groups... most of which enjoy registered charitable status.'²²

These roles are still performed around the country by an extensive web of small-scale groups. Some of these groups derive from ethnic, religious or refugee community groups.²³ Others

²¹ Griffiths D, Sigona N and Zetter R, *Refugee Community Organisations and Dispersal: Networks, Resources and Social Capital*, (2005 Policy Press) 5

²² Zetter R & Pearl M, 'The Minority Within the Minority: Refugee Community-Based Organisations in the UK and the Impact of Restrictionism on Asylum Seekers' (2000) 26 JEMS 675

²³ Zimbabwe Association, 'Home' (Zimbabwe association) <http://zimbabweassociation.org.uk/> accessed 22 September 2016; British Tamils Forum, 'British Tamils Forum: Home' <http://tamilsforum.co.uk/> Accessed 31st August 2016

are based in religious conviction, with the Church of England and the Catholic Church being particularly prominent.²⁴ Still others, from GARAS in Gloucester,²⁵ to ASIRT in Birmingham²⁶ and RAMFEL in East London,²⁷ continue to be based on notions of political solidarity with migrants. Since the turn of the millennium, the twin policies of ‘disbursement’ of asylum seekers away from the south east and the expansion of the use of immigration detention have been particularly productive of community and activist groups of this kind. It is currently the case that every dispersal town in the UK has an asylum seeker support organisation and every detention centre has an independent visitors’ group.²⁸ These visitors groups are themselves represented by an umbrella organisation, the Association of Visitors to Immigration Detainees (AVID).²⁹

The majority of such small-scale groups do not have the capacity to act as legal representatives or to pursue legal challenges on behalf of migrants. Under Part V of the Immigration and Asylum Act 1999, immigration legal representation by such organisations is regulated by the Office of the Immigration Services Commissioner, and requires a relatively high level of institutional capacity including the passing of exams, ongoing training, adequate record keeping and data storage etc.³⁰ Such demands are sufficiently onerous to dissuade many groups from seeking to go down this path. Instead, organisations can flag up on-the-ground issues that they feel need addressing through litigation, provide the evidence to support cases that relate to issues such as social provision for vulnerable migrants or immigration service conduct and, crucially, find the migrants necessary to act as claimants in individual test cases. They tend, therefore, to work in collaboration with external lawyers for the benefit of individual clients, or be contacted by lawyers pursuing strategic or test

²⁴ The Notre Dame Refugee Centre, ‘Home’ (The Notre Dame Refugee Centre) <http://www.notredamerc.org.uk/> accessed 1 September 2016

²⁵ Gloucestershire Action for Refugees and Asylum Seekers, ‘Home’ (GARAS) <http://www.garas.org.uk/> accessed 22 September 2016

²⁶ Asylum Support and Immigration Resource team (ASIRT) ‘Home’ (ASIRT) <http://www.asirt.org.uk/> Accessed 31st August 2016

²⁷ Refugee and Migrant Forum of Essex and London, ‘Home’ (RAMFEL) <http://www.ramfel.org.uk/wordpress/> accessed 22 September 2016

²⁸ The Association of Visitors to Immigration Detainees (AVID), ‘Home’ (AVID) <http://www.aviddetention.org.uk/>, (Accessed 8th June 2014)

²⁹ Ibid

³⁰ Office of the Immigration Services Commissioner, ‘Regulations that immigration advisers must follow’ (OISC, 17 December 2008) <https://www.gov.uk/government/publications/regulations-that-immigration-advisers-must-follow--2/regulations-that-immigration-advisers-must-follow> Accessed 17 November 2014

litigation. They are therefore well placed to engage in the information sharing and collaboration necessary for them to constitute a major part of what Epp has described as a 'support structure' for legalised rights activism.³¹

The legal sector in the UK immigration and asylum system also developed significantly during the New Labour years. It is important to note, first of all, that the funding possibilities improved with the extension of civil legal aid to immigration and asylum appeals under the Access to Justice Act 1999. These changes effectively broadened the possibilities for making a career in politicised legal practice of various kinds, and in the asylum and immigration sector in particular.³² The introduction of the Human Rights Act (HRA), that will be discussed in more detail below, had the effect of providing a name and a collective legal identity for the previously amorphous collection of lawyers who identified their professional practice with political principle. As Berlins commented after the HRA was passed into law, barristers' chambers previously described as 'radical' are 'today described as human rights chambers'.³³

These chambers, of which Garden Court, Doughty Street and Matrix, are the leading examples in the field of migrants' rights cause litigation, are supported by a combination of solicitors working at private legal firms³⁴ and the national network of Law Centres; not for profit community law firms set up, according to Webber,

'by radical lawyers working with community activists to ensure the same access to justice for benefits claimants, social housing tenants, compulsorily detained mental patients, parents threatened with removal of their children, sacked workers and immigrants as had by wealthy corporations.'³⁵

For many years the RLC and IAS provided larger-scale national charitable provision of legal representation to migrants, but collapsed in 2010/11 for financial reasons that will be

³¹ Epp (n5) 18

³² Immigration and Welfare Barrister Interview, 9th April 2014; London Immigration Solicitor 1 Interview, 2nd April 2014

³³ Alex Hern, 'Who does early access to sensitive data really hurt?' (New Statesman, 18 June 2013) <http://www.newstatesman.com/node/134269> accessed 22 September 2016

³⁴ Such as Bindmans LLP, Birnberg Peirce and Partners; Wesley Gryk Solicitors and Wilsons Solicitors LLP

³⁵ Webber F, 'Borderline Justice' (2012) 54 2 Race & Class 39 39

discussed in more detail in chapter 6. In their place a number of smaller-scale independent migrants' rights focussed legal charities have subsequently been set up, largely staffed and run by ex-RLC or IAS lawyers, to either perform specialist legal work such as strategic litigation³⁶ or migrant children's cases,³⁷ or provide legal advice in areas of the country where there is a shortage of quality providers.³⁸ This disparate group of cause lawyers is nevertheless relatively highly integrated and capable of coordinated action, owing partly to its London-centric base and the active and widespread use of web-forums such as [Freemovement.org.uk](http://freemovement.org.uk)³⁹ and the coordinating function of the ILPA. Perhaps above all, legal tactics and developments are shared and discussed in the web-based Refugee Legal Group, or RLG. As one veteran migrants' rights barrister described it,

You know RLG? Look at that... All the time people posting and exchanging, it's amazing, just amazing. I don't think you could replicate that with a legal issue in the UK and probably anywhere in the EU. Maybe in the US, probably, but it is the most active legal bulletin board in the EU.⁴⁰

The UK's migrants' rights cause litigation movement therefore, is substantially constituted by three interlinked groups. The first is a large array of small scale community groups whose *raison d'être* is to respond to the practical consequences of specific government policies. The second is national charities that may conduct contracted service provision, although that particular role has been substantially curtailed recently,⁴¹ and also engage in lobbying and policy consultation as 'stakeholders'. Finally, the politicised cause-orientated legal sector which is independent of these NGOs, as well as independent of each other, but who remain relatively cohesive and co-ordinated through a shared commitment to 'the cause' of migrants' rights, which in turn maintains and encourages the use of practical co-ordination and information sharing tools. These three groups are also united in more or less conscious terms

³⁶ Migrants' Law Project (MLP) <http://themigrantslawproject.org/> accessed 14th May 2014

³⁷ Migrant and Refugee Children's Legal Unit (MiCLU) 'Home' (MiCLU) <http://miclu.org/> Accessed 14th May 2014

³⁸ Migrant Legal Project 'Home' (Migrant Legal Project) <http://migrantlegalproject.com/> Accessed 31 August 2016; Greater Manchester Immigration Aid Unit (GMIAU), 'Home' (GMIAU) <http://gmiau.org/> accessed 31 August 2016

³⁹ Free Movement, 'Home' (Free movement) <https://www.freemovement.org.uk/> accessed 22 September 2016

⁴⁰ Immigration and Welfare Barrister Interview, 9th April 2014

⁴¹ Refugee Action, 'The future of Assisted Voluntary Return' (Refugee Action, 27 July 2015) http://www.refugee-action.org.uk/assets/0001/2609/The_Future_of_AVR_briefing_27_July_2015.pdf accessed 22 September 2016

by a philosophical and political commitment to a rights-based cosmopolitanism. As was discussed in the previous chapter, this cosmopolitanism emphasises Benhabib's notion of the 'cosmopolitan duty of hospitality' to outsiders entering a community and, to various degrees, a universalist approach to rights and notions of justice.⁴²

The work of these groups has been transferred into a civil society model of activism, which largely seeks to play an 'insider' role in policy proceedings. Doing so allows for some degree of participation in the practical functioning and shaping of the systems, both judicial and administrative, that impact on migrants' rights.⁴³ However, this 'insider' model of activism has been adopted largely in place of broad-based membership-orientated public campaigning. While some of the national NGOs, such as Refugee Action and the Refugee Council present themselves as membership-based or grassroots organisations, they are not in a position to mobilise a substantial number of members or supporters amongst the general population. As a leading funder of charities in the movement put it,

'How many large member-led organisations are there? Virtually none... They certainly don't punch above their weight on broad based alliance building and coalitions and lots of members.'⁴⁴

Moreover, civil society insider status makes it difficult, both from a practical and relational standpoint to engage in the kind of radicalism that characterised the movement in previous generations. The approach, after all, depends to a significant extent on maintaining professional relations with state agencies. This is not to argue that the migrants' rights movement in the UK has lost all its radicalism. There continues to be a distinct strain of radical activism engaged with the issue, including from a no-borders perspective. Direct actions such

⁴² Benhabib S, *Rights of Others* (CUP 2004) 26

⁴³ Home Office, 'Asylum Policy Instructions: Medico-Legal Reports from the Helen Bamber Foundation and the Medical Foundation Medico-Legal Report Service' (13 July 2015), <https://www.gov.uk/government/publications/dealing-with-asylum-claims-involving-torture-or-serious-harm-allegations-process> accessed 24th September 2016; Home Office, 'National Referral Mechanism: guidance for child first responders Version 2', (21st March 2016), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510091/NRM_-_guidance_for_child_first_responders_v2.0_EXT.PDF accessed 24th September 2016

⁴⁴ Funding Officer Interview, 15th April 2014

as protesters super-gluing themselves to security vans to prevent forced removals,⁴⁵ or protesters surrounding and driving out immigration officers conducting immigration raids on ethnic-owned businesses⁴⁶ continue to occur. Most recently the UK wing of the Black Lives Matter movement and the feminist movement 'Women for Refugee Women' have adopted deportation and detention practices as one of their key targets for protest and civil disobedience.⁴⁷ However, such actions are rare, and formerly radical groups have begun to reconstitute themselves as more 'respectable' advice, research and advocacy platforms. The National Coalition of Anti-Deportation Campaigns, for example, has undergone a rebranding process and is now called 'Right To Remain'. Explaining this decision they stated,

Our work is increasingly around raising awareness of the legal processes, helping to make sure people understand the system, know their rights, and their options in the struggle to establish the right to remain.⁴⁸

This explanation is reflective the focus of activists on questions of law and policy rather than broad political principle. The term 'Right to Remain' itself represents a rhetorical engagement with the legal term 'leave to remain', the formal term for immigration status granted by the state.

The UK's migrants' rights movement, then possesses many of the attributes that would suggest it is well placed to successfully engage in cause litigation. It has a substantial body of specialist and professionalised activist NGOs and access to experienced lawyers. These various groups are highly networked in with each other, capable of relatively coordinated action and relatively united in a philosophical commitment to rights-based cosmopolitanism.

⁴⁵ Crawley News, 'Protesters who stopped refugees from being deported from Gatwick Airport with help of superglue to face trial', (Crawley News, Crawley, May 17, 2015) <http://www.crawleynews.co.uk/Protesters-stopped-refugees-deported-Gatwick/story-26487512-detail/story.html> accessed 27 August 2016

⁴⁶ Colin Yeo, 'Southall Black Sisters confront UK Border Agency', (Freemovement, 2nd August 2013) <https://www.freemovement.org.uk/southall-black-sisters-confront-uk-border-agency/> accessed 27 August 2016

⁴⁷ Daily Telegraph, Black Lives Matter protests around the country: motorway route into Heathrow Airport blocked by activists lying on road, (5 August 2016) <http://www.telegraph.co.uk/news/2016/08/05/black-lives-matter-protest-blocks-heathrow-airport-traffic/> accessed 22 September 2016; Women for Refugee Women, <http://www.refugeewomen.co.uk/> accessed 26th September 2016

⁴⁸ Right to Remain, 'Right to Remain was formerly known as NCADC, the National Coalition of Anti-Deportation Campaigns' (Right to Remain) <http://righttoremain.org.uk/about/name.html> accessed 31st August 2016

However, national NGOs have very limited capacity to lobby and mobilise a grass-roots membership as a political force. As one interviewee engaged in this activity put it,

‘You run around trying to find judges and bishops and other members of the House of lords. And that's an indication of the weakness of popular movements in general’.⁴⁹

As was noted from the literature in chapter 2, coordination of legal and activist activity is important for the delivery of litigation that is effective in court, but the inability to situate the litigation within a wider influential constituency or influential programme of public activism is a significant weakness.

The Legal and Judicial Framework

‘Immigration is the most complicated area of British law because you’ve got basically a multi-dimensional intersection between statutes, regulations, rules, published policies, secret policies, actual practices, EU law, Human Rights Law and that’s just about whether or not you get to stay. And then you’ve got social welfare law, employment law, criminal law. You know. Tax isn’t complicated. Tax is bloody transparent.’⁵⁰

As might be guessed, this is the view of an immigration barrister, rather than a tax specialist. It provides a neat summary of the myriad ways in which the issue of immigration is dealt with in the UK’s legal framework. However, it was not ever thus. The UK’s legal framework in this area has evolved substantially over time, to a contemporary situation of ever-changing and ever more detailed legislation. This expansion has coincided with a development and expansion of the wider judicial context, by which is meant both the infrastructure of law (the courts and tribunals responsible for it) and the role and approach of judges to relevant public law questions. From significantly restricted beginnings the legal framework and judicial context now appear more promising to cause litigators.

⁴⁹ Migrants’ Rights Consultant Interview 27th August 2013

⁵⁰ Immigration and Welfare Barrister Interview, 9th April 2014

i) Legal Framework

As noted above, contemporary immigration law in the UK is vast and fast-changing. As a result it is not possible to do the full range of immigration law provisions justice here. Instead, the focus of this section will be on the broad development of the UK's legal framework around immigration and migrants' rights, with a focus on how this development has influenced cause litigation. More specific legislative and policy provisions relevant either to areas of particular concern to cause litigators or to the function of cause litigation itself will be dealt with directly across the analysis in section 2 of the thesis.

The 1971 Immigration Act formed the central basis of UK immigration law and procedure, and continues to do so to this day.⁵¹ Amongst many other reforms, it introduced a fundamental distinction between those that possessed the 'right of abode' (related to but distinct from citizenship) and all other would-be entrants who would be 'subject to immigration control'.⁵² The Act has often been cited as an example of the UK's definitive turn towards an extreme form of restrictionism.⁵³ However, by formalising an immigration system that functioned under the rule of law rather than executive mandate it started the process of greater judicial involvement in immigration matters and allowed for the development of cause lawyering for migrants' rights as an independent and self-conscious enterprise. The Act did so through the expansion of appeal rights to an independent judicial body,⁵⁴ lawful powers of detention and bail for immigration purposes,⁵⁵ the provision of funds to 'organisations helping persons with rights of appeal'⁵⁶ and perhaps most importantly, the formalisation of the 'immigration rules' as a published form of executive policy on immigration criteria that were both subject to parliamentary oversight and which could potentially be subject to judicial review.⁵⁷

⁵¹ MacDonald I, *MacDonald's Immigration Law and Practice* (9th Edition Butterworth's 2014)

⁵² Immigration Act 1971, s. 1(i) – (ii) This distinction has since been muddled by the UK's entry into the European Union. See Immigration Asylum Act 1999 s. 115(9)

⁵³ Hansen R, *Citizenship and Immigration in Postwar Britain: The Institutional Origins of a Multicultural Nation*, (OUP 2000) 16

⁵⁴ Immigration Act 1971, s.12-23. Immigration appeal rights had been introduced in the Immigration Appeals Act 1969 but had only just commenced when they were further expanded by the 1971 Act.

⁵⁵ Immigration Act 1971, Sch. 3, s. 2

⁵⁶ Immigration Act 1971, s.23

⁵⁷ Immigration Act 1971, s. 3 (ii). The notion of published immigration rules had first appeared in the 1969 Act, but they were at that point exclusively seen as ministerial policy.

Outside of the opportunities presented by the 1971 Act, there was little for the nascent cause litigation movement to turn to. The British Nationality Act 1981 introduced strict citizenship criteria which cut access to the 'right of abode',⁵⁸ and while the UK had been a founding signatory to the 1951 UN Convention on the Status of Refugees and its 1967 Protocol (the Refugee Convention), there were an effectively negligible number of asylum claims during this period.⁵⁹ However, the Convention became more relevant as in the mid-to-late 1980s this number began to substantially increase, from just under 4000 in 1988 to over 24,000 in 1992.⁶⁰ At this stage, as Care noted, 'The Convention was not directly enforceable in the United Kingdom, despite the United Kingdom's accession to the Refugee Convention'.⁶¹ Aspects of the Convention appeared in the Immigration Rules, but this did not provide asylum seekers with any justiciable rights. Crucially, 'illegal entrants' were not entitled to an in-country right of appeal against a refusal under the immigration rules. A claimant regarded as an illegal entrant was expected to return to their country, notwithstanding the alleged risk of persecution, to pursue an appeal.⁶²

Absent an effective appeals process those seeking protection under the Refugee Convention were forced to rely on traditional judicial review proceedings to seek injunctions against removal on non-refoulement grounds. However, the increasing numbers of claimants resulted in an increased judicial review burden on the High Court. A combination of pressure from the judiciary to resolve the swamping of the High Court with asylum claims, public campaigning from Amnesty International, and cause litigation in the form of the European Court of Human Rights case *Vilvarajah and Ors v UK*, in which a group of Sri Lankan asylum seekers argued that the lack of an in-country appeal right was contrary to Article 3 and 13 of the ECHR,⁶³ led to the UK government introducing the Asylum and Immigration Appeals Act

⁵⁸ British Nationality Act, parts I, II and III

⁵⁹ Neumayer E, *Asylum Recognition Rates in Western Europe: Their Determinants, Variation, And Lack Of Convergence*, [http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Article%20in%20Journal%20of%20Conflict%20Resolution%20\(Asylum\).pdf](http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Article%20in%20Journal%20of%20Conflict%20Resolution%20(Asylum).pdf) 46 accessed 22 September 2016

⁶⁰ Immigration statistics <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2015/asylum#data-tables> accessed 22 September 2016

⁶¹ Care G, 'The Judiciary, The State, And The Refugee: The Evolution Of Judicial Protection In Asylum – A UK Perspective' (2004) 28 FILJ 1421 1433

⁶² Ibid 1434

⁶³ The case was itself ultimately unsuccessful. See *Vilvarajah and Others v The United Kingdom* App no 13163/87 13164/87 13165/87 13447/87 13448/87 (ECtHR, 30 October 1991)

1993.⁶⁴ This was the first UK legislation dedicated to refugee law. Although restrictive in a number of respects, s.2 of the Act required that the immigration rules not to be contrary to the Refugee Convention, and section 8 and 9 introduced in-country appeal rights for the first time. These developments expanded a crucial area of migrants' rights litigation and, as will be discussed in later chapters, gave judges greater powers to reach facts and merits decisions independent of Executive decision making.

The next major shift would come following the General Election of 1997 and the enactment of legislation not overtly associated with immigration and nationality law at all; the Human Rights Act 1998. This would prove the single most important legislative change for the UK's cause litigators. The HRA brought the rights set out in the ECHR into domestic UK law for the first time. For migrants this meant that through s.6 of the HRA it would be unlawful for the immigration service and the tribunals to make decisions or take actions that were incompatible with a person's Convention rights when enforcing immigration control. As a result of the Strasbourg Court's development of Article 8 case law in particular, this opened the way for irregular migrants to resist removal and seek regularisation outside of the Executive's Immigration Rules, an issue that will be discussed in detail in chapter 5.⁶⁵ The interpretive and declaratory powers in sections 3 and 4 of the Act, as discussed in the previous chapter, were more fundamental still for cause litigators as they empowered judges to substantially change the effect of primary legislation and even to challenge, to an extent that is contested in the literature,⁶⁶ primary legislation for the first time.

Armed with these new powers, cause litigators brought cases of major significance for migrants' rights. Many of these cases will be discussed in detail in the chapters to come. For now it is enough to note that the HRA empowered courts and cause litigators to deal with a

⁶⁴ Randall C, 'An Asylum Policy for the UK', in Spencer S (Ed) *Strangers & Citizens: A Positive Approach to Migrants and Refugees* (Institute for Public Policy Research 1994) 222, Joppke C, *Immigration and the Nation State: the United States, Germany and Great Britain* (OUP 1999) 132

⁶⁵ Thym D, 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay?' (2008) 57 ICLQ 87

⁶⁶ Allan J 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You take Parliament's Clear Intention and You Shake it All About – Doin' the Sankey Hanky Panky'; and Morgan J 'Amateur Operatics: The Realisation of Parliamentary Protection of Civil Liberties' both in Campbell T, Ewing KD, Tomkins A, *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 108 and 428

number of issues that they had previously been reluctant or unable to address. For example, the *Belmarsh* case declared provisions in the Anti-Terrorism, Crime and Security Act 2001 that enabled the indefinite imprisonment without trial of foreign national terrorist suspects incompatible with Article 5 (the right to liberty and security of person) taken with 14 (the right of non-discrimination). This was a highly unusual move for the UK's courts who had a previous pre-HRA history of what Gearty has described as an 'appallingly deferential approach' to 'the exercise by the executive of the swingeing anti-terrorism powers'.⁶⁷ Likewise, the *Limbuela*⁶⁸ case, which will be discussed in the next chapter, was significant for its strong intervention into both immigration policy and government spending priorities, two other areas traditionally reserved to executive control. It was hailed as 'transforming human rights' through its 'recognition of positive duties [on the State] and of the role of human rights within the welfare arena.'⁶⁹

However, the HRA has not proved to be the solution to some of the major issues migrants' rights activists have been concerned about. It has, for example, provided no answer to the problem of indefinite immigration detention,⁷⁰ or to cases where a critically ill migrant will die through lack of medical treatment if removed to their home country.⁷¹ Thus it appears that while the judges have been equipped by the HRA to take a far more independent view on migrants' rights issues, there continue to be limits to how far they are willing to go, and thus to the opportunities presented to cause litigators. In acknowledgment of these limitations, in recent years cause litigators have begun to expand their repertoire with further regional and international sources of law.⁷² The hope here is to open up new approaches to old issues and to co-operate with the declared wish of the senior judiciary that arguments not be solely framed in HRA terms.⁷³

⁶⁷ Gearty C, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 Current Legal Problems 25

⁶⁸ *R (Adam) v. SSHD* [2005] UKHL 66

⁶⁹ Fredman S, 'Human rights transformed: positive duties and positive rights' [2006] PL 498

⁷⁰ *Lumba (WL) v SSHD* [2011] UKSC 12; *R (Das) v SSHD & Ors* [2014] EWCA Civ 45. For discussion of the issue, Johnston C 'Indefinite immigration detention: can it be justified?' (2009) 23 JIANL 351

⁷¹ *N v SSHD* [2005] UKHL 31; *N v The United Kingdom* App no 26565/05 (ECtHR, 27 May 2008)

⁷² Kavar notes a similar phenomenon occurring in the US; Kavar L, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France* (CUP 2015) 50

⁷³ Brenda Hale, 'UK Constitutionalism on the March?' (The Constitutional and Administrative Law Bar Association Conference 2014, London, 12 July 2014) <https://www.supremecourt.uk/docs/speech-140712.pdf> accessed 22 September 2016; David Neuberger, 'The role of judges in human rights jurisprudence: a comparison of the

A key area for the development of this work has been in the protection of victims of human trafficking. While such people had previously lodged claims for international protection based on risks on return to their home countries,⁷⁴ and continue to do so, in December 2008 the UK finally ratified the 2005 Council of Europe Convention on Trafficking in Human Beings, having previously been reluctant to do so for fear of the protections it offered acting as a ‘pull factor’ to ‘bogus’ claimants.⁷⁵ The Convention itself was not justiciable domestically, but was implemented from April 2009 through a ‘national referral mechanism’ (NRM). Under the NRM all suspected victims of trafficking were to be referred for a decision as to whether there were ‘reasonable grounds’ for thinking that the person was a victim of trafficking. An initial ‘reasonable grounds’ decision entitled the person to a ‘reflection period’ amounting to 45 days’ lawful status during which time a full ‘conclusive grounds’ decision would be made. This could in turn entitle the person to a renewable full year’s discretionary leave to remain on the proviso that the victim cooperate with any investigation and criminal proceedings.⁷⁶ While ‘reasonable’ and ‘conclusive grounds’ decisions are not in themselves appealable, cause litigators have pursued regular judicial reviews to contest deficiencies in the decision making. These have included issues around the role of expert evidence in trafficking determinations⁷⁷ and the question of ‘historic’ trafficking, when a person who had previously been trafficking is no longer under the control of their traffickers.⁷⁸

Outside of domestic law, the rights accorded by the EU Charter of Fundamental Rights⁷⁹ and the EU Qualification Directive⁸⁰ have been drawn on extensively, while the various iterations of the Dublin Convention which regulates which EU Member State has responsibility for processing an asylum claim has provoked a huge amount of ongoing litigation.⁸¹ The UN

Australian and UK experience’ (The Supreme Court of Victoria, Melbourne, 8 August 2014) <https://www.supremecourt.uk/docs/speech-140808.pdf> accessed 22 September 2016

⁷⁴ AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC)

⁷⁵ Harvey A, ‘Human trafficking - the road to ratification of the Council of Europe Convention Against Trafficking in Human Beings in the UK’ (2008) JIANL 22, 218

⁷⁶ Home Office, Victims of modern slavery – Competent Authority guidance Version 3.0 (21 March 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521763/Victims_of_modern_slavery_-_Competent_Authority_guidance_v3_0.pdf accessed 22 September 2016

⁷⁷ R (AB) v SSHD [2015] EWHC 1490 (Admin),

⁷⁸ R (Y) v SSHD [2012] EWHC 1075 (Admin)

⁷⁹ Abdul (section 55 - Article 24(3) Charter : Nigeria) [2016] UKUT 106 (IAC)

⁸⁰ MP (Sri Lanka) v SSHD [2016] UKSC 32

⁸¹ MSS v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011); Tarakhel v Switzerland App no 29217/12 (ECtHR, 4 November 2014); R (EM (Eritrea)), v SSHD [2014] UKSC 12; R (Hagos) v SSHD (Dublin returns

Convention on the Rights of the Child (UNCRC) has also begun to be applied to immigration cases in the UK as a result of Section 55 of the 2009 Borders, Citizenship and Immigration Act (BCIA) and the subsequent Supreme Court case of *ZH Tanzania*. As Bolton explains,

‘the UNCRC was signed by the UK but subject to various reservations, a number of which, including that providing for the non-application of the UNCRC to children subject to immigration control, were withdrawn in November 2008’.⁸²

Following the dropping of the reservation, Section 55 of the 2009 Act required that in discharging her immigration control functions, the Secretary of State must have ‘regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.’ As will again be discussed in greater detail in the next chapter, *ZH (Tanzania)* interpreted that provision in line with the UNCRC.⁸³

Despite a restrictive central line of immigration legislation, then, cause litigation was made possible by the legal formalisation of immigration control as part of this legislation and has since benefited from and contributed to the development of alternative sources of law. These alternative sources, most importantly the HRA, have made a crucial difference to the outcomes cause litigation is capable of.

ii) Judicial Context

As was alluded to above, one of the key outcomes of the legislative developments charted above has been the developments in the infrastructure of judicial engagement with immigration issues. The creation of tribunals engaged in merits appeals of immigration decisions independent of the executive, and their extension to asylum and other human rights and international protection claims, have been key influences on cause litigation becoming a significant force in immigration and migrants’ rights issues. They provide a venue for cause

– Malta) (IJR) [2015] UKUT 271 (IAC); R (ZAT and Others) v SSHD (Article 8 ECHR - Dublin Regulation - interface - proportionality) (IJR) [2016] UKUT 61 (IAC)

⁸² Bolton S, ‘Promoting the best interests of the child in UK asylum law and procedures’ (2012) 26 JIANL 232 235

⁸³ *ZH (Tanzania) v SSHD* [2011] UKSC 4 25

litigation arguments to be heard and require a staff of judges who, over time, have the potential to provide a counter-point to executive decision making and the cultures that inform it. For these developments to have a truly significant effect, though, the judges must be willing to approach immigration and migrants' rights issues in an independent and rigorous manner.

The UK legal system was for a long time regarded as being inhospitable to legal activism. Boon has called it 'a cold climate for cause lawyers'⁸⁴ and, writing in the mid-90s, Epp regarded it as "an especially inhospitable site" for what he described as a 'rights revolution'.⁸⁵ In seeking to explain this situation, Kavanagh has noted that 'belief in the value and importance of strong parliamentary government has been an important strand in British legal and political thought, which often goes hand in hand with scepticism about the desirability (and indeed, ability) of judges to enhance the protection of human rights and civil liberties.'⁸⁶ Constitutional notions of Parliamentary sovereignty, like the traditional notion of the rule of law, commonly derived from the writings of Dicey⁸⁷ produced a system of Parliamentary supremacy; what Young has described as the 'legal fact' that 'Parliament has no legal limits placed on its law-making power.'⁸⁸ This allowed an unabashed majority-rule principle to control legislative matters.⁸⁹ Bellamy has defended such an arrangement as offering 'a fair and impartial procedure that is unlikely to produce either irrational or tyrannical decisions.'⁹⁰ However, decisions that are not regarded as 'tyrannical' by the majority may still have seriously rights-damaging effects for unrepresented minorities, such as migrants.

The dominance of the parliamentary supremacist view, even amongst the judiciary itself, produced a distinctly limited conception of the due role of judicial review in the exercise of state power. Judicial review is itself a creation of the judges who, as mentioned in chapter 2, lacked, and continue to lack, any strike-down or in Tushnet's phrase 'hard review' power;

⁸⁴ Boon A, 'Cause Lawyers in a Cold Climate' in Sarat A and Scheingold S, *Cause Lawyering and the State in a Global Era* (OUP 2001) 143

⁸⁵ Epp (n5) 131

⁸⁶ Kavanagh A, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 3

⁸⁷ Dicey A, *An Introduction to The Study Of The Law Of The Constitution* (Macmillan 1979) 39

⁸⁸ Young A, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2008) 19

⁸⁹ For a non UK-centric discussion of the principle arguments here Waldron J, *Law and Disagreement* (OUP 1999) and Dworkin R, 'Rights as Trumps' in Kavanagh A and Oberdiek J (Eds), *Arguing About Law* (Routledge 2009)

⁹⁰ Bellamy R, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, 2007)

meaning that primary legislation was effectively immune from judicial review. While relatively more willing to examine executive conduct, other than reviewing the legality and procedural propriety of an executive action the courts actively constrained their examination of the 'reasonableness' of the executive following the famous *Wednesbury* judgment.⁹¹ Some, such as Gearty and Ewing, have argued that this in practice produced a strong predisposition towards favouring the Executive.⁹²

Over time, though, this highly conservative approach to the judicial function has expanded, with judges becoming increasingly interventionist in executive decision making that impinged on what the courts regarded as 'fundamental rights'. Judges developed increasingly demanding standards of judicial review of executive actions and policies. Lord Carnwath has recently summarised the history of these developments;

In 1987, Lord Bridge introduced the concept of "anxious scrutiny", implying a more intrusive review in cases involving the right to life or other basic rights. By 2000 the courts recognised the concept of a "sliding scale" of rationality review depending on the nature and gravity of the case. At the same time the Human Rights Act 1998 required judges to apply a test of "proportionality", derived from the European Court of Human Rights. There is now little to choose between the two principles. The actual decision in *Wednesbury* would be difficult to justify under the modern law, and its days as an authority may be numbered.⁹³

In relation to immigration specifically, the historic reluctance to intervene in Executive decision making was reputed to be particularly pronounced. Morris records that 'Judicial decision-making in the field of immigration and asylum has traditionally been driven by deference to policy priorities and shaped to a degree by conservatism and constraint.'⁹⁴ This approach even extended to the senior judiciary expressing a degree of distaste for dealing

⁹¹ Associated Provincial Picture Houses Ltd v *Wednesbury* Corporation [1947] EWCA Civ 1

⁹² Gearty C & Ewing K, *Freedom Under Thatcher*, 268

⁹³ Lord Carnwath, 'From Rationality to Proportionality in the Modern Law' (UCL-HKU conference 'Judicial review in a changing society' Hong Kong University, 14 April 2014) <https://www.supremecourt.uk/docs/speech-140414.pdf> accessed 22 September 2016

⁹⁴ Morris L, *Asylum, Welfare And The Cosmopolitan Ideal: A Sociology Of Rights* (Routledge 2010) 47

with immigration matters. Writing before the introduction of the HRA, Sterett makes the point that up to that point,

‘judges have argued that immigration cases do not belong in the general jurisdiction courts and would not be there if administrative adjudication were better.’⁹⁵

Only very occasionally would the UK’s senior courts of the 1970s and 80s produce rulings that presented a significant obstacle to the Executive’s exercise of immigration control functions. The high point was probably the case of *Khawaja v SSHD [1984]*, a case on the scope of judicial review of the exercising of the Secretary of State’s power to detain illegal entrants. Relying heavily on what was described by Lord Scarman as ‘the jealous care our law traditionally devotes to the protection of the liberty of those who are subject to its jurisdiction’ the House concluded that, as Wilsher has put it, ‘the Executive bore the burden of proving that an alien was an illegal entrant to the court’s satisfaction and to a high degree of probability.’⁹⁶ Other than this and a small number of asylum-related cases that will be discussed in chapter 5, though, the British judiciary was exceptionally deferential to executive decision making in immigration matters. Legomsky, who conducted an exhaustive comparative survey of immigration decisions in the UK and the US across the 1970s and 80s, concluded,

‘the selective deference displayed in immigration cases, resting as it does on judicially preferred values and policies, is arguably a classic example of judicial activism.’⁹⁷

Mirroring the wider developments in judicial approach described by Lord Carnwath above, judges’ involvement in immigration issues have also developed substantially over time. Webber, for example, now notes that ‘senior judges have shown more willingness to castigate Home Office conduct as a public disgrace, and law lords have condemned proposed legislation as an affront to the constitution.’⁹⁸ Her explanation for this rests largely on the make-up of the modern day judiciary, which includes a number of the previously radical lawyers of the 1970s and 80s.⁹⁹ However, while this is no doubt an important factor that will be referred to

⁹⁵ Sterett, (n12) 295-296

⁹⁶ Wilsher D, *Immigration Detention: Law History Politics*, (CUP 2014) 87

⁹⁷ Legomsky S, *Immigration and the Judiciary: Law and Politics in Britain and America* (Clarendon Press, 1987) 272

⁹⁸ Webber (n35) 39-54

⁹⁹ Webber (n4) 11

during chapters 4 and 5's analysis of cause litigation in practice, it must also be due to the changes in legislation that the judges were empowered to enforce and that cause litigators were able to develop, as discussed above.

Around the same period as the domestic courts began to take a more active approach in immigration matters, a parallel set of developments at the European level occurred which would prove hugely influential. Like the UK's domestic courts, the European Commission on Human Rights, subsequently transformed into the European Court of Human Rights (ECtHR) had initially been reluctant to engage with immigration policy and control issues.¹⁰⁰ The ECtHR first began to substantially overcome its previous reticence to engage with issues pertaining to immigration control in the 1985 case of *Abdulaziz, Cabales and Balkandali v UK*.¹⁰¹ This was a case that related to the rights of women to be joined in the UK by their foreign national husbands. While starting their deliberations with the finding that 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory',¹⁰² the judgment for the first time concluded that Article 8 rights to respect for Private and Family Life alone could potentially override a state's immigration control measures.¹⁰³ This would become an issue of fundamental importance to cause litigators, and will be discussed in depth in chapter 5.

Following this leap, though, the Strasbourg Court went on to produce what would become rulings of fundamental importance to cause litigators, particularly the triumvirate of *Soering v UK 1989*,¹⁰⁴ *Cruz Varas v Sweden 1991*¹⁰⁵ and *Chahal v UK 1996*¹⁰⁶ which prevented in absolute terms extradition, administrative removal and deportation of non-citizens to countries where they faced a real risk of torture and inhuman or degrading treatment or punishment (Article 3 ECHR). These rulings provided protection from removal and deportation of a wider range of migrants than were catered for by the Refugee Convention, particularly owing to their absolute nature which meant that the 'exclusion clauses' for very

¹⁰⁰ Dembour M-B, *When Humans Become Migrants: Study Of The European Court Of Human Rights With An Inter-American Counterpoint* (OUP 2015) 62

¹⁰¹ Ibid 96

¹⁰² *Abdulaziz, Cabales And Balkandali v United Kingdom* - 9214/80; 9473/81; 9474/81 [1985] ECHR 7 para 60.

¹⁰³ Dembour (n99) 96-130

¹⁰⁴ *Soering v. The United Kingdom* App no 14038/88 (ECtHR, 7 July 1989)

¹⁰⁵ *Cruz Varas and Others v Sweden*, App No 15576/89 (ECtHR 20 March 1991)

¹⁰⁶ *Chahal v United Kingdom*, App No 22414/93 (ECtHR, 15 November 1996)

serious international and domestic criminality that exist in the Refugee Convention did not apply.¹⁰⁷ However, the opportunity to use them for cause litigation during this period remained restricted, as they were not yet incorporated into domestic law and thus at best could only be raised as persuasive authority. Indeed, when the *Chahal* case was being heard in the UK Court of Appeal, the issues relating to Article 3 ECHR were dismissed by Staughton LJ as being either ‘unnecessary’ or ‘difficult’.¹⁰⁸

At both the domestic and European level, then, the judiciary has moved beyond a position of institutionalised reluctance to intervene in executive actions regarding immigration and migrants’ rights. There certainly remain limitations to their approach to immigration questions; one such example which would prove important in litigation that will be discussed more in the next chapter is a general reluctance to closely interrogate the working of immigration control procedures unless extensive evidence compels it. As one experienced cause litigation solicitor explained,

‘If you’ve got the SSHD saying ‘this is how it works’ [an immigration procedure], unless you’ve got a very clear picture that this is absolutely wrong you’re going to accept what the government says because you become a judge because you believe in the system’¹⁰⁹

Nevertheless, a more assertive judicial review in general has been coupled with specific doctrinal developments relating to migrants’ rights issues regarding the standard of review and the interpretation of ECHR rights. This has meant that, while always a struggle, cause litigation in recent times has operated in a relatively conducive judicial environment.

The judicial and legal framework for migrants’ rights in the UK has developed considerably. After years of structural limitations the judicial infrastructure has improved with the development of a professionalised and large scale Tribunal system. The broader legal

¹⁰⁷ Mackenzie A, “‘He heard the screams’: recent developments in the law of exclusion clauses’ (2014) 28 JIANL 265

¹⁰⁸ *Chahal v SSHD* [1995] 1 ALL ER 658

¹⁰⁹ London Immigration Solicitor 1 Interview, 2nd April 2014

framework has shifted in a significantly more promising direction for migrants' rights litigators. In turn and over time this has encouraged greater judicial engagement with migrants' rights issues. However, the current picture is not entirely positive for the litigators. As will be examined in more detail in chapter 4 and particularly chapter 5, judicial regard for the importance of immigration control and deference to the Executive on immigration issues remains significant. Nevertheless, it can be said that while the legal and judicial framework still has limitations for cause litigation, it is more promising than in previous periods.

The Political Opportunity Structures

*"The politics of this is so toxic that you know, a steady state seems not unattractive."*¹¹⁰

This view, expressed by a leading funder of migrants' rights campaigns, speaks to a sense of embattlement that is pervasive in the contemporary UK's migrants' rights movement. This section will examine the political opportunity structures (POS) which migrants' rights activism faces based on Koopmans' et al's approach to the POS, as discussed in chapter 2, which focuses on both the institutional and discursive structures in play. The section shows that the institutional structures locate predominant power over both immigration policy development and enforcement with the executive, with little institutional opposition. Legislative scrutiny of policy is diminished further by the discursive structures which compel both major parties to appear 'tough' on immigration. In this regard, the section shows that migration has been discursively characterised as causing a crisis and a threat. The section concludes by noting that the two POS elements are united in political and administrative imperative for the Executive, orientated around notions of 'control'.

i) Institutional Political Opportunity Structures

While in constitutional principle there are clear divisions between Government and the wider legislature, this section will demonstrate that in relation to immigration and migrants' rights

¹¹⁰ Funding Officer Interview, 15th April 2014

issues this division is far from clear cut, and in fact the Executive operates in a highly dominant position.

A set of institutional factors exist that constrain the level of access and influence activists can have to immigration policy making and implementation outside of the litigation process. Despite the creation of devolved assemblies outside of Westminster and repeated governmental pledges regarding greater localisation, the UK still operates a heavily centralised state.¹¹¹ The first past the post electoral system ensures that there is almost always a single party government, the 2010-2015 Coalition being a historic exception.¹¹² Moreover, party voting discipline within that single-party government is relatively strong.¹¹³ Senior Government ministers are invested with significant Executive powers and by virtue of being made up of the political leadership of the majority party, the Executive arm of the state has a great deal of personal and political authority over their colleagues in the legislature.¹¹⁴ While there is legislative oversight of new statutes from opposition parties, the capacity to intervene to amend rights-affecting legislation that the executive is committed to is distinctly limited. Moreover, much of the specifics of immigration control and rights-affecting policy is delivered through 'immigration rules', rather than primary legislation, which are subject to an even lesser form of Parliamentary oversight.¹¹⁵ While, as was noted above, the migrants' rights sector has a level of participatory and 'stakeholder' influence, what one interviewee involved in this work referred to as 'Parliamentary bill influencing and other forms of influencing of policy guidance, directive and regulatory frameworks',¹¹⁶ the effectiveness of this influence is limited to the extent that the Executive concedes.¹¹⁷

¹¹¹ Parry, R, 'The Civil Service and Intergovernmental Relations in the Post-devolution UK' (2012) 14 *The British Journal of Politics & International Relations*, 285

¹¹² Gay O, Schleiter P, Belu V, 'The Coalition and the Decline of Majoritarianism in the UK (2015) 86 *The Political Quarterly* 118

¹¹³ Bevan S, John P, Jennings W, 'Keeping party programmes on track: the transmission of the policy agendas of executive speeches to legislative outputs in the United Kingdom' (2011) 3 *European Political Science Review* 395 398

¹¹⁴ *Ibid* 400

¹¹⁵ They are subject to the 'negative resolution procedure'. Parliament, 'Negative Procedure', <http://www.parliament.uk/site-information/glossary/negative-procedure/> accessed 19 September 2016

¹¹⁶ Funding Officer Interview, 15th April 2014

¹¹⁷ Somerville W & Goodman S W, 'The Role of Networks in the Development of UK Migration Policy' (2010) 58 *Political Studies* 951

Moving from policy development issues to their enforcement, writing prior to the HRA and many of the major developments that this thesis discussed, Joppke argued that the UK's immigration-related,

'institutional arrangements entail a dualism of extreme legislative openness [Parliament being able to pass any law it likes] and executive closure, which, in the absence of a client machine, is detrimental to the interests of immigrants... Once a policy has been decided upon, there is executive closure in its implementation, with the Home Office firmly and uncontestedly in charge.'¹¹⁸

While this thesis will demonstrate it is no longer the case that the Home Office remains uncontestedly in charge, this description still fairly represents the institutional power relationships between the executive, its administrative agencies and the legislature.¹¹⁹ Jennings has also shown that government is 'able to intervene directly in bureaucratic activities through legislative, executive and administrative controls.'¹²⁰ This is not to argue that the executive, or the Home Office specifically, is a highly-efficient and well-oiled machine in terms of immigration policy implementation; as will be discussed in more detail below this is far from the case. However, it does mean that the Home Office is highly responsive to political demands in its activities and any failures in this regard are likely to be as a result of resource, capacity and competence issues rather than institutional resistance to delivering rights-affecting political demands.

Moreover, powers and responsibility regarding immigration related issues have been heavily centralised. There have been overt steps taken to exert greater direct Ministerial control over the department, with the then Home Secretary Theresa May stating that 'UKBA was given agency status in order to keep its work at an arm's length from Ministers. That was wrong.'¹²¹

¹¹⁸ Joppke C, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 World Politics 266 288-289

¹¹⁹ Consterdine E, 'One step forward, two steps back: Evaluating the institutions of British immigration policymaking' (Institute for Public Policy Research, 25 Apr 2013) <http://www.ippr.org/publications/one-step-forward-two-steps-back-evaluating-the-institutions-of-british-immigration-policymaking> accessed 31st August 2016

¹²⁰ Jennings, W, 'Bureaucratic Performance and Control in British Politics: Asylum Policy 1994–2007' (2010) British Journal of Politics and International Relations, 12, 539

¹²¹ BBC News, 'UK Border Agency 'not good enough' and being scrapped' (BBC News, London, 26 March 2013) <http://www.bbc.co.uk/news/uk-politics-21941395> accessed 22 September 2016

At the same time, while there has been much written in recent years regarding the phenomenon of 'internalising borders' bringing immigration issues into other areas of government policy,¹²² it remains the case that 'the Home Office holds a monopoly on immigration policymaking' within government.¹²³ The immigration service itself now has direct influence over the work of other departments of the State, particularly local authority housing and social service departments, through the provision (and therefore denial) of funding.¹²⁴ These arrangements have implications for migrants' rights, particularly children's rights, as enforcement priorities may supersede legal and ethical duties towards the child. For example, an interviewee specialising in cause litigation for the rights of migrant children claimed that,

The UK Border agency started to hold the purse strings for the local authorities who look after these kids. They've now been working together for so long they are convoluted...what was originally there to highlight the needs of these children and fund them and support them has now turned into a situation where these local authorities are now helping and supporting and working closely with the UKBA to think about ways of getting these children back to their countries of origin.¹²⁵

The institutional POS that confronts cause litigators is therefore highly problematic. A powerful executive is able to tightly control the extent of non-litigation influence that migrants' rights campaigners are able to exert, and legislative arrangements are structured so as to allow for very limited intervention in the institution of government policy. Ministerial authority can be directly influenced over the administration and enforcement of this policy, which ensures that the immigration administration is highly susceptible to political pressures and the wider discursive political opportunity structures of the immigration issue.

¹²² Anderson B, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013); Also Kesby A, 'Internal Borders and Immigration Control: New Prospects And Challenges' (2010) 2 EHRLR 176

¹²³ Consterdine (n118) accessed 22 September 2016

¹²⁴ UK Visas and Immigration, 'Funding to local authorities Financial year 2016/17 Home Office funding: Unaccompanied asylum seeking children (UASC)' (Version 2, UK Visas and Immigration, June 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426933/UASC_Funding_Instructions_2015-16.pdf accessed 22 September 2016; Nadine Finch, 'Always Migrants Sometimes Children' (CORAM Children's Legal Centre, August 2014) <http://www.childrenslegalcentre.com/userfiles/UK%20mapping%20report%20CONNECT.pdf> accessed 22 September 2016

¹²⁵ Children's Rights Solicitor Interview, 21st August 2013

ii) Discursive Political Opportunity Structures

Immigration, particularly black and Asian migration, has been consistently opposed by substantial majorities of the British public for many years. Opinion polling from the 1960s, 70s and 80s demonstrates a predominance of the view that immigration was too high regardless of its actual levels and an abiding concern that immigration would cause potential 'swamping' and bring with it an amorphous but alien and dangerous 'culture'.¹²⁶ These views were responded to and encouraged for electoral advantage by political parties, and by the 1980s and into the 1990s state policy was dedicated to Britain being an effectively 'zero-migration state'.¹²⁷ It was in this context, then, that the New Labour government of the late 1990s faced two major immigration challenges during its time in office. The first related to asylum and the second to economic migration from the new Eastern European member states of the EU.

Control of immigration during the early New Labour period of the late 1990s and early 2000s effectively meant gaining control of asylum, which rose to a historic peak of 84,000 individual claims in 2002 and was hugely controversial.¹²⁸ Asylum was characterised as a dishonest means of evading UK immigration control and in response New Labour introduced a range of external and internal obstacles to asylum claims in the belief that they were in a 'battle' to gain control of the system.¹²⁹ However, as Consterdine and Hampshire have shown, the second Labour government of 2001-2005 also instituted a policy of liberalising economic migration under the rubric of 'managed migration'.¹³⁰ Of greatest importance in this agenda

¹²⁶ Bobby Duffy & Tom Frere-Smith, 'Perceptions and Reality: 10 things we should know about attitudes to immigration in the UK' (Ipsos MORI Social Research Institute, January 2014) <https://www.ipsos-mori.com/Assets/Docs/Publications/sri-perceptions-and-reality-immigration-report-summary-2013.pdf> 4 Accessed 22 September 2016

¹²⁷ Joppke (n63) 100

¹²⁸ Home Office, 'Immigration statistics quarterly release' (Home Office, 25 August 2016) <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> accessed 22 September 2016

¹²⁹ Joshua Rozenberg, 'Judges prepare for battle with Blunkett' (The Telegraph, London, 27 Feb 2003) <http://www.telegraph.co.uk/news/uknews/1423210/Judges-prepare-for-battle-with-Blunkett.html>; The Guardian, 'Blunkett asylum law 'will face court battle'', 1 December 2003, <http://www.theguardian.com/politics/2003/dec/01/immigration.immigrationandpublicservices> Accessed 27 August 2016

¹³⁰ Consterdine E, Hampshire J, 'Immigration policy under New Labour: Exploring a critical juncture' (2014) 9 British Politics 275

was the decision not to impose ‘transitional controls’ on economic migration from Eastern Europe, at a time when only two other EU states had not imposed such controls.¹³¹ This resulted in a major increase in immigration. In the years immediately preceding the 2004 Accession, EU immigration averaged around 60,000 per year. In 2004 that number leapt to 130,000 and then rose to 198,000 by 2008.¹³²

This historically high level of immigration, the majority of it labour migration without being subject to labour-market controls, began to put the rhetoric of ‘managed migration’ under considerable strain. This strain was further exacerbated by the economic crash of 2007/8. Inward migration continued at high levels at a time when the previous economic justifications for permitting such immigration appeared to no longer apply.¹³³ This in turn showed up the executive’s lack of power to control and reduce it. Thus by the end of the New Labour period the twin waves of large-scale asylum seeking at the turn of the Millennium and large-scale labour migration from the EU Accession states of Eastern Europe created a growing representation of immigration as a chaotic and threatening force, which the UK government appeared to be powerless to resist and which above all, governmental authority was unable to even control. These concerns were heightened by the financial crash of 2007/8 and the subsequent economic stagnation and recessions of 2009 and 2012 which brought a growing sense of economic insecurity.

The effect of fifteen years of large scale and what appeared to be unmanaged immigration on British public attitudes has been stark. Dennison and Goodwin have stated that by the 2015 election immigration had become ‘one of the most salient issues in British politics’¹³⁴ and survey and polling analysis bears this out.

While the proportion of people indicating their opposition to immigration has always been relatively high, the strength of concern about the issue has never been higher. Immigration

¹³¹ Sweden and Ireland

¹³² Migration Observatory, Britain’s 70 Million Debate (University of Oxford September 2012) <http://www.migrationobservatory.ox.ac.uk/resources/reports/britains-70-million-debate/> accessed 22 September 2016

¹³³ Ibid

¹³⁴ Dennison J & Goodwin M, ‘Immigration, Issue Ownership and the Rise of UKIP’ (2015) 68 Parliamentary Affairs 168

became the issue most commonly identified as the single most important for the country in 2015.¹³⁵ Moreover, the scale of the issue is very substantially overestimated by the majority of the public, with the average guess for the percentage of the UK population being foreign born being 31%, when the actual figure is 13%.¹³⁶ The most mentioned group of migrants' in survey responses are refugees and asylum seekers, and the least are foreign students; the direct reverse of the reality that asylum seekers are currently the smallest intake group and foreign national students the largest. Thus, as IPSOS Mori have put it, 'we hugely overestimate the scale of the immigrant population, and our "imagined immigration" is focused on groups we are more negative about.'¹³⁷ The strength of public concern also appears to be distinct from other developed economies, with UK survey respondents indicating a higher level of agreement with the propositions that there is too much immigration and that immigration is a problem than any western European or North American state.¹³⁸

Mass-media reporting of immigration issues has also increasingly approached the issue in terms of crisis, threat and a loss of control. Media representation of immigration issues is particularly important in the UK context, as it has an unusually large and overtly politicised print media in comparison to other European states, the majority of which is politically orientated to the right of centre.¹³⁹ Despite declining sales industry-wide, the UK's print media is still relatively widely read and continues to be regarded as influential over the development of government policy in contentious areas, including immigration.¹⁴⁰ Some of the most significant parts of the industry regularly engage in actively campaigning against immigration. The Daily Mail and the Daily Express, the two middle-market right of centre newspapers, and the Sun, the UK's leading tabloid, who between them have a combined average daily

¹³⁵ Scott Blinder, 'Briefing: UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern' (3rd Edition, Migration Observatory, COMPAS, University of Oxford, 20th August 2015) <http://www.migrationobservatory.ox.ac.uk/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-concern> accessed 22 September 2016

¹³⁶ Duffy & Frere-Smith (n125) 5

¹³⁷ Duffy & Frere-Smith (n125) 6

¹³⁸ Blinder (n134)

¹³⁹ Curran J, Seaton J, *Power without Responsibility: Press, Broadcasting and the Internet in Britain*, (Routledge 2009)

¹⁴⁰ Bale T, 'More and More Restrictive—But Not Always Populist: Explaining Variation in the British Conservative Party's Stance on Immigration and Asylum' (2013) 21 *Journal of Contemporary European Studies* 25

readership of around 3.8 million,¹⁴¹ have been particularly active in pursuing overtly anti-immigration agendas.¹⁴²

Outside of this campaigning, scholarly studies of media discourse have consistently found a predominance of negative representation of immigration and migrants' rights issues, particularly framing those issues in terms of threat, security and peril. A 2006 study by Gross et al into broadcast media coverage of asylum issues found that

'the word asylum now connotes negativity and is still constantly embedded in a network of negative contexts... There is confusion too about the difference between criminal justice and human rights issues.'¹⁴³

Philo et al's media content analysis from 2011 identified eight key themes in the coverage provided by television and press news which included, 'Numbers and exaggeration', 'Burden on welfare and job market', 'Criminality, threat, deportation and human rights' and 'the need for 'immigration control'.¹⁴⁴ They go on to note that their press sample

'was largely characterised by the use of superlatives... We found 25 instances [out of 69 articles sampled] of pejorative language used to evoke 'natural disaster'... for instance 'an iceberg', 'swamped', 'soaring', 'waves' and 'flooding in'.¹⁴⁵

A similar study by Fox et al in 2012, this time focussing on newspaper reporting of A8 and A2 migration, found that 'reporting is not only anti-immigration, it is anti-immigrant.'¹⁴⁶ Lawlor's 2015 comparative study of media framing of immigration issues in the UK and Canada found

¹⁴¹ William Turvill 'National newspaper ABCs, June 2015: Most tabloids suffer double digit declines, Sun reclaims Sunday top-spot' (Press Gazette, London, July 10, 2015) <http://www.pressgazette.co.uk/national-newspaper-abcs-june-2015-most-tabloids-suffer-double-digit-declines-sun-reclaims-sunday-top> accessed 22 September 2016

¹⁴² Philo G, Briant E & Donald P, The role of the press in the war on asylum (2013) 55 Race & Class 28 29

¹⁴³ Bernhard Gross, Kerry Moore & Terry Threadgold, 'Broadcast News Coverage of Asylum April to October 2006: Caught Between Human Rights and Public Safety' (Cardiff School of Journalism, Media and Cultural Studies, 2007) <http://orca.cf.ac.uk/53007/1/BroadcastNewsCoverageofAsylum.pdf> Accessed 31st August 2016

¹⁴⁴ Philo G, Briant E & Donald P, *Bad News for Refugees* (Pluto Press 2013) 57

¹⁴⁵ Ibid 106 - 107

¹⁴⁶ Fox J, Morosanu L & Szilassy E, 'The Racialization of the New European Migration to the UK' (2012) 46 Sociology 680

that ‘threat of violence frames far outweigh [economic frames] in terms of sheer volume.... all papers use security frames in great numbers through the mid- to late 2000s’¹⁴⁷

These media ‘security frames’ have also appeared in government policy development and presentation. A number of analysts have noted that as part of the war on terror, immigration and asylum policy has become increasingly ‘securitised’.¹⁴⁸ In some instances, this has meant addressing asylum and immigration issues in policy as a threat to the physical security of the UK.¹⁴⁹ However, as Huysmans points out,

‘Even when not directly spoken off as a threat, asylum can be rendered as a security question by being institutionally and discursively integrated in policy frameworks that emphasizes policing and defence.’¹⁵⁰

Thus, while the media and public perception data discussed above reveal a dominant understanding of immigration and asylum questions as threatening and a source of peril and risk, state policy has reinforced this perception.

At the same time, politicians’ rhetoric and party competition has hardened on immigration and migrants’ rights issues. The Liberal Democrats, a party who went into the 2010 election proposing an amnesty for irregular migrants now state that, ‘Liberal Democrats believe Britain must be open for business and growth but closed to crooks and cheats.’¹⁵¹ The UK Independence Party, a radical populist right wing party began to appear to be a significant electoral force during the 2010 election¹⁵² and were a major threat to both the Labour and Conservative voting base. UKIP’s primary policy positions were opposition to the UK’s continued participation in the EU and in favour of a drastic cut in immigration figures,

¹⁴⁷ Lawlor A, (2015) ‘Local and National Accounts of Immigration Framing in a Cross-national Perspective’ (2015) 41 JEMS 918 930

¹⁴⁸ Givens TE, Freeman GP, Leal DL, *Immigration policy and security: U.S., European, and Commonwealth perspectives* (Routledge 2009); Huysmans J, *The politics of insecurity: fear, migration and asylum in the EU* (Routledge 2006)

¹⁴⁹ Huysmans J, Buonfino A, Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK (2008) 56 Political Studies 766

¹⁵⁰ Huysmans (n147) 3-4

¹⁵¹ Liberal Democrat Party, ‘Immigration’ (Liberal Democrat Party Undated) <http://www.libdems.org.uk/immigration> accessed 5 May 2016

¹⁵² Goodwin M and Ford R, *Revolt on the Right: Explaining Support for the Radical Right in Britain* (Routledge 2014)

effectively seeking to return the UK to its previous zero-migration position. Following their defeat in the 2010 election, partly as a result of the UKIP vote, the Labour party issued a public apology for its previous immigration policy¹⁵³ and underwent an internal review which emphasised the view that Britain's 'white working class' had been poorly served by the previous approach.¹⁵⁴ Meanwhile, Conservative politicians including Theresa May, with what would subsequently turn out to be a successful eye on party leadership ambitions, characterised immigration as an existential issue for British society, stating that,

‘reducing and controlling immigration is getting harder, but that’s no reason to give up. As our manifesto said, “we must work to control immigration and put Britain first.” We have to do this for the sake of our society.’¹⁵⁵

Yet, despite the institution of a ‘net migration target’ to reduce it ‘to the tens of thousands’,¹⁵⁶ and the institution of an overtly ‘hostile environment’ for irregular migrants,¹⁵⁷ net migration itself has risen ever further.¹⁵⁸ Government policies have thus targeted migrants’ rights without assuaging those sections of UK society that are concerned about immigration.

iii) The Political Opportunity Structures combine in the ‘Control Imperative’

Immigration, then, has not only been consistently opposed by large majorities of the population, but it has been increasingly discursively characterised in terms of a peril and threat. This discursive POS is combined with the strong institutional position of the executive

¹⁵³ Daily Telegraph Labour got it wrong on immigration, admits Miliband (17 January 2013) <http://www.telegraph.co.uk/news/politics/9808290/Labour-got-it-wrong-on-immigration-admits-Miliband.html> accessed 23 September 2016

¹⁵⁴ Cruddas J & Rutherford J, *One Nation: Labour’s Political Renewal* (London 2014), http://www.policyforum.labour.org.uk/uploads/editor/files/One_Nation_Labours_Political_Renewal.pdf accessed 28 September 2016

¹⁵⁵ Theresa May, ‘Theresa May speech in full’ (Politics.co.uk, 4 October 2011) <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full>, (Accessed 17th April 2013)

¹⁵⁶ Migration Observatory, ‘Missing the Net Migration Target’, <http://www.migrationobservatory.ox.ac.uk/resources/commentaries/missing-the-net-migration-target/> (Migration Observatory, COMPAS, University of Oxford, 27 November 2014) accessed 22 September 2016

¹⁵⁷ Partos R, ‘No Immigrants, No Evidence?: The Making of Conservative Party Immigration Policy’ (2014) 5, *Political Insight* 12

¹⁵⁸ Home Office, ‘Immigration statistics, October to December 2015’ (Home Office, 25 February 2016) <https://www.gov.uk/government/statistics/immigration-statistics-october-to-december-2015> accessed 22 September 2016

in legislative and policy terms and the susceptibility of immigration administration to political influence in the performance of its functions. As a result, the notions that frame Executive understanding of the demands it faces and that in turn motivate policy and practical responses are crucially important. While the notion of 'managed migration' is still relevant for understanding the strategic principle behind UK immigration policy, regarding the day-to-day reality of policy development and implementation in response to the pressures discussed above a more useful frame is the notion of a political and administrative imperative for 'control'.

The idea of the 'control' of immigration regularly appears in scholarly literature but is often subsumed into the term 'immigration control' as being a synonym for either cutting immigration or the broader notion of a state possessing an immigration policy.¹⁵⁹ More sophisticated analysts have identified that control in this context is more closely connected to policy *outcomes* than policy itself, and have argued that the extent to which states are able to *implement* policy is indicative of the extent to which a state is able to exercise immigration control.¹⁶⁰ Some of this theoretical discussion, however, risks neglecting the fact that the question of immigration policy is primarily an Executive concern. In this sense, a state does not have an immigration policy, a government does. Thus 'control' in the sense that will be focussed on in this thesis is less about cutting immigration necessarily, although clearly this is implied in much of the UK's immigration politics, but primarily an issue of the location of authority and responsibility within a state. It is focussed on who, in the individual and institutional sense, has the responsibility and power to do the developing and implement policy.

Clearly on a practical level control is imperative if the Executive's strategic policy of 'managed migration' is to be put into effect.¹⁶¹ Migration cannot be 'managed' if inflows and exits are out of control. The executive's immigration administration therefore operates from an

¹⁵⁹ Hansen R, *Citizenship and Immigration in Postwar Britain: The Institutional Origins of a Multicultural Nation*, (OUP 2000) 176; Somerville W, *Immigration Policy under New Labour* (Policy Press 2007) 12

¹⁶⁰ Also Ellerman A, *States Against Migrants: Deportation in Germany and the United States* (CUP 2009), and De Genova N & Peutz N, (Eds) *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press 2010)

¹⁶¹ Hampshire J, *The Politics of Immigration* (Polity 2013) 36

imperative that it monopolise, so far as is possible, decision making and enforcement powers within its area of responsibility. As was discussed above, institutional arrangements in the UK have allowed for this to happen internally within government, and so the only significant obstacles to this administrative control occurring are external, with the legal system and cause litigation being one of the most significant.

However, the notion of 'control' also regularly appears in the public pronouncements of politicians and, indeed, judicial rulings. The rhetoric of control serves Ministers in seeking to assuage public concern over the peril that migration is perceived as posing them; modern societies accept that threats and crises may not be entirely avoidable, but they can be 'controlled'. At the same time, the control imperative binds and limits the political opposition of the day for whom the need to appear like a viable government in-waiting requires the demonstration of commitment to control. This is perhaps the most important element of the imperative behind the notion of 'control'; to give the appearance of a strong and reliable Executive able to deal effectively with a formidable threat.

The control imperative therefore is made up of two aspects

- i) the administrative needs of the Home Office immigration service to monopolise authority in their field and to be able to enforce policy.
- ii) The political need for the executive to be seen to be in control by the electorate.

However, there have been permanent failures of control, including during the more liberal 'managed migration' period. Over the last decade the immigration service at the Home Office, in its various incarnations,¹⁶² has experienced intense political scrutiny over its perceived failure to gain control. The immigration service's reputation in this regard is so entrenched that the IPPR think tank was commissioned to conduct a study in 2013 into the question 'Why does the delivery of UK immigration policy seem to go so wrong, so often?' to which it concluded that 'the Home Office and the UKBA (in whatever form it is reconstituted) may never get it right' and that 'there does appear to be almost endemic ineptitude within the

¹⁶² The UK's immigration service in recent years has been restructured and renamed four times in nine years.

UK's immigration administration.¹⁶³ It has also been subject to extraordinary levels of criticism from its own Secretaries of State. It has been described as 'not fit for purpose' by the then Labour Home Secretary John Reid, and as possessing a 'closed, secretive and defensive culture'¹⁶⁴ by the then Conservative/Coalition Home Secretary Theresa May.

These attacks are examples of tactical decisions on the part of Ministers to front up to immigration control failings and thus engage in overt displays of the reassertion of control. A similar approach can be identified in the near-constant stream of immigration legislation that the New Labour government engaged in from 1999 to 2009, with the purpose of legislating often having more to do with being seen to be reasserting control than in introducing meaningful new control powers.¹⁶⁵ These steps are thus united in their purpose of giving the government of the day the appearance of control. They have occurred because the two aspects of the control imperative are interrelated. Gaps or failures in administrative control can undermine the executive's public appearance of control.

Likewise, though, the executive imperative to appear in control can increase pressure on the immigration service to conduct its business in an uncompromising manner; to constantly seek to maintain the control it is able to exercise, to intensify that control and if possible to expand it into areas that were previously out of reach. This can lead to changes in priorities for immigration service activities and is likely to shape immigration service responses to obstacles. Political pressures are therefore capable of directly influencing administrative conduct, with negative consequences for migrants' rights and cause litigation.

For example, much has been made over the years of the 'culture of disbelief' that pervades administrative decision making regarding asylum claims in particular.¹⁶⁶ However, this culture was not created in a vacuum and can ultimately be associated with the imperative for control. The decision to disbelieve asylum claims is best understood as a reassertion of control over a right, the entitlement to refugee recognition, that as will be discussed in more detail in

¹⁶³ Consterdine (n118) 15

¹⁶⁴ BBC News, 'UK Border Agency 'not good enough' and being scrapped' (BBC News, London, 26 March 2013) <http://www.bbc.co.uk/news/uk-politics-21941395> accessed 22 September 2016

¹⁶⁵ e.g. UK Borders Act 2007 which, as will be discussed in chapter 5, introduced 'automatic' deportation powers when the executive already had ample powers in this regard under the 1971 Act.

¹⁶⁶ Bohmer C & Shuman A, *Rejecting Refugees: Political Asylum in The 21st Century* (Routledge 2008) 127

chapter 5, presents a major challenge to the Executive's capacity to control immigration. At the same time, a number of extensive interview and observation-based research projects undertaken in the 2000s both on behalf of the Home Office¹⁶⁷ and by independent researchers¹⁶⁸ reported on the existence of a range of systemically unlawful practices,¹⁶⁹ and the prevalence of attitudes dominated by the need to 'control entry to the UK' rather than the application of law.¹⁷⁰ More recent reports have found that 'enforcement culture goes beyond areas where it might be appropriate (such as irregular immigration), and permeates the whole process of immigration policymaking'.¹⁷¹

The immigration service's own staff have occasionally expressed themselves in a way that indicates that pressure to demonstrate control over immigration can override duties to implement the spirit of law that protects migrants' rights. In 2010, substantial media attention was given to the testimony of an immigration service whistle-blower who reported that officers in her department that granted refugee status to claimants were awarded the 'grant monkey' – a soft toy monkey that had to sit on their desk as a 'mark of shame'.¹⁷² In 2014 the immigration service refused a Freedom of Information Act request for publication of Home Office training guidance to staff about the changes brought in by the 2014 Immigration Act on the basis that,

The withheld training documents contain lines to take, which could assist a foreign criminal's representatives in forming their arguments for appeal. If their appeals were

¹⁶⁷ Woodfield K et al (eds) 'Exploring the decision making of Immigration Officers: a research study examining non-EEA passenger stops and refusals at UK ports' (Home Office, January 2007) <http://www.statewatch.org/news/2007/jan/uk-ho-immig-decision-making-study.pdf> accessed 22 September 2016

¹⁶⁸ Weber L and Landman T 'Deciding to Detain: The Organisational Context for Decisions to Detain Asylum Seekers at UK Ports' (Criminal Justice, Borders and Citizenship Research Paper 2002) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520379 accessed 28 September 2016; Weber L Gelsthorpe L, *Deciding to Detain: How Decisions to Detain Asylum Seekers are Made at Ports of Entry* (University of Cambridge Institute of Criminology 2000) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520382 accessed 28 September 2016

¹⁶⁹ Ibid Weber & Gelsthorpe 2000 71 & 84; Woodfield et al (n166) accessed 22 September 2016

¹⁷⁰ Weber & Landman 2002, 5

¹⁷¹ Consterdine (n118) 8

¹⁷² The Guardian, 'UK Border Agency investigation finds cause for 'significant concern' (8 August 2010) <http://www.theguardian.com/uk/2010/aug/08/uk-border-agency-investigation-concerns> accessed 22 September 2016

successful, then we could be prevented from deporting foreign criminals in cases where it would be appropriate to do so.¹⁷³

More recently still, in the case of *Mohammed v SSHD [2016]* the continued unlawful detention of a Somali national with serious criminal convictions was justified by the Home Office on the grounds that,

‘If you are released from detention, our actions can [sic] lead to a negative view of the Home Office by the general public who may see the Department in failing in its duty to protect them from criminals.’¹⁷⁴

While these may be examples of unusual Home Office ineptitude in carrying out their control functions, they provide a window into the strength with which the control imperative is felt within the institution. They also mirror the experience of relations with the Home Office reported by interviewees. When questioned about the Executive’s conduct of litigation and responses to adverse court judgments, interviewees reported that in their experience;

‘It doesn't have any interest in changing and it has a vast interest in maintaining the status quo’;¹⁷⁵

‘The moment the ink is dry on a judgment, the Home Office is trying to get round it’;¹⁷⁶
and,

‘They’ve always been a law breaking department. Internally the culture is one that does not respect what they see as externally imposed laws or rules that they don’t agree with.’¹⁷⁷

¹⁷³ Home Office, ‘Freedom of Information request (our ref: 32533): internal review’, (12 November 2014) <https://www.whatdotheyknow.com/request/223785/response/594896/attach/3/32533%20Yeo%20IR%20response%202014%2011%2012.pdf> accessed 22 September 2016

¹⁷⁴ *R (Mohammed) v SSHD [2016] EWHC 447 (Admin)*

¹⁷⁵ Children’s Rights NGO Officer Interview, 28th August 2013

¹⁷⁶ Migrants’ Rights NGO Director 1 Interview, 8th April 2014

¹⁷⁷ Immigration and Welfare Barrister Interview, 9th April 2014

While these litigators are likely to regard their opponent as having an institutional inclination towards obstinacy and law-breaking, overall the evidence indicates that as an administrative institution the Home Office's immigration service is heavily dominated by an institutional imperative to assert 'control'.

The government of the day is under a strong imperative to demonstrate control, while its administration has both an institutional inclination and a strong political pressure to exert control over its policy field. Developing immigration law and policy through court judgments and cause litigation is likely to produce tension with this centralisation of 'control' within the executive. The effects of these tensions will be central to the issues examined in Section 2 of this thesis.

Conclusion

This chapter has demonstrated that, in the context of migrants' rights activism in the UK, the influences on cause litigation are a mixture of strengths and some major difficulties.

The UK's migrants' rights sector has developed significantly. Originally based in the anti-racism and radical lawyering tradition of the 1960s and 70s it has evolved into a substantially NGO-based civil society movement. The movement continues to benefit from access to high level legal expertise, relatively close coordination and cooperation and at least significant levels of connectivity. However, broader non-activist support, mass participation and the capacity to mobilise supporters into substantial voting blocks continue to elude it. As such, cause litigation tends to take place in political isolation. The legal developments in the last fifteen years, particularly the Human Rights Act but also developments in international law may have freed up some of the UK's ingrained judicial conservatism, particularly when it comes to immigration. This has been combined with institutional developments that have allowed for greater independent judicial engagement with immigration questions and provide a forum for cause litigators to do their work. However, the political opportunity structures cause litigators face are solidly negative. Public opinion on immigration in the UK has been strongly and consistently negative, and that hostility is increasing. Immigration (particularly but increasingly not exclusively, irregular immigration) has been problematised in public

discourse as a cause of crisis and threat. In response, institutional practices by the immigration administration and at the Ministerial level indicate the existence of an imperative to demonstrate control of immigration.

The tension between cause litigation's strengths and the political opportunity structures it operates in, in particular the control imperative, is likely to have a strong influence on both the practical outcomes that it is able to achieve and the wider political consequences of the continued reliance on it for migrants' rights gains. Examining how this tension plays out in practice will be the focus of Section 2 of this thesis.

Section 2

Chapter 4: Strategic Litigation for Migrants' Rights

Introduction

*"There's no point negotiating with government when what they're doing is clearly illegal and we could force them to stop doing it."*¹

The tension between cause litigation's judicial expansionism and the Executive's need to exert control is most overtly displayed in the conduct of strategic litigation. As was discussed in chapter 2, this form of legal activism has been given many different definitions, but in this thesis is being taken to mean the deliberate seeking out of litigation opportunities by cause litigators in order to progress a campaign goal. As such, in general it involves a clearly defined target and relatively clearly observable outcomes. What these outcomes tend to be for strategic litigation for migrants' rights, and why they are as they are, will therefore be the subject of this chapter.

The chapter finds that there is a range of strategic litigation activity based on the movement resources dedicated to it and policy impact it is intended to achieve. The first section of the chapter examines what it argues constitutes the majority of strategic litigation undertaken by the UK migrants' rights movement, which is largely limited in scope to isolated technical issues of policy implementation or procedure, and discusses the practical outcomes these cases have achieved. The chapter then moves to examine an example where there has been commitment of greater resources and ambition; the recent litigation campaign against the detained fast track asylum system.

The chapter then goes on to apply the three-point framework of analysis set out in the previous chapters to the practice of strategic litigation, to investigate why strategic litigation for migrants' rights has taken the form that it has and why it tends to result in the outcomes it does. In doing so it argues that while the resources available to the movement and the judicial framework the movement operates in are receptive and enable regular courtroom success, they also tend to promote the kind of limited ambitions that the trend of strategic litigation represents. Most importantly, though, the chapter identifies the political opportunity structures the cause litigators operate in, and in particular the imperative of

¹ Migrants' Rights NGO Director 1 Interview, 8th April 2014

control that Chapter 3 showed motivated Executive responses to the immigration issue, as being the major obstacle to strategic litigation's outcomes.

The final section of the chapter then provides an assessment of strategic litigation's role in migrants' rights activism. It acknowledges that the picture is not exclusively one of disappointment for the cause litigators; different cases produce variable impacts and that persist for variable durations. Some of this variability can be put down to chance factors that are likely to be difficult to repeat, but the section argues that the extent of the Executive's motivation to undermine a ruling is ultimately the main determining factor in the extent of this variation.

Examining Strategic Litigation

I think there is a lot of dangers with just focusing on litigation without working on the public understanding. Even if you do have a successful outcome in court, if people don't understand that you're not going to affect public opinion and then the Government is likely to come back with something else.²

i) The study of strategic litigation

As this chapter will discuss in detail, strategic litigation is a key activity for the UK's cause litigation movement. Cause lawyers have seen migrants' rights as an important area in which to professionally exercise their political concerns and strategic litigation has become the most overt means of doing so. NGOs acting as claimants or third party interveners regularly appear in higher court proceedings. Institutional charitable funders actively promote strategic litigation's use³. It is therefore crucial for this thesis to analyse what outcomes this form of

² NGO Legal & Policy Officer Interview, 27th August 2013

³ The Strategic Legal Fund, 'About the SLF' (The Strategic Legal Fund) <http://www.strategiclegalfund.org.uk/about/> accessed 22nd May 2015

cause litigation has achieved and the influencing factors that have brought these outcomes about.

In attempting a similar analysis in relation to the US and France, Kavar argues that previous studies of strategic litigation on immigration issues from a range of different national contexts have emphasised 'the weak coercive power of legal rules in the migration policy domain.'⁴ Broader critiques of strategic litigation have also been made. Arguments from this perspective have tended to start with the claim that the impact of major litigation events have been greatly exaggerated. Tushnet has referred to this as the production of 'law office history' in which narrative and analysis stops at the judgment on the case and neglects the more ambiguous process of implementation. This, Tushnet argues, results in lawyers 'overestimating the importance of their activities'.⁵ Some analysts have gone further, however, and argued that while strategic litigation produces little by way of positive change for the causes it seeks to promote, it does have a tendency to produce a damaging backlash effect which may end up retarding progress that would otherwise have been achieved had litigation not intervened. As Rosenberg, pointing to examples related to gay marriage and civil rights in the US, argues 'those who rely on the courts absent significant public and political support will fail to achieve meaningful social change, and may set their cause back.'⁶

A unifying factor in the approach of most contributors to the debate around the efficacy of strategic litigation has been a focus on cases of major legal and political significance. Cases that overturn pre-existing doctrine, or can be shown to be at the beginning of a new doctrine, are afforded particular prominence. As Kavar says, 'to the extent that court-centred activity has been discussed by scholars in this area, analysis has centred on high-profile judicial decisions that extend the set of formal rights available to noncitizens.'⁷ However, as the next section will demonstrate, there are very few migrants' rights strategic cases that could be fairly considered 'high profile' in the UK. Such cases rarely achieve prominence in public debate and only a few have garnered substantial academic attention. This may partly be because the great majority of contemporary strategic litigation for migrants' rights in the UK

⁴ Kavar L, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France* (CUP 2015) 5

⁵ Tushnet M, *The Significance of Brown v. Board of Education* (1994) 80 VLR 173

⁶ Rosenberg G, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd Ed, University of Chicago Press 2008)

⁷ Kavar (n4) 3

has much smaller ambitions. Rather than attempting to bring about systemic change or challenge major aspects of policy, strategic litigation tends to be aimed at promoting or preventing particular conduct by the immigration service or altering technical aspects of Executive immigration administration. Strategic litigation thus effectively plays a regulatory role, by seeking to ensure that the practice of immigration control does not result in egregious rights violations.

ii) Strategic Litigation in Practice

The primary means by which strategic litigation is pursued by cause litigators is through a combination of cause lawyers and one or more of the myriad of NGOs and charities that make up the UK's migrants' rights movement and that were discussed in chapter 3. While there are some specialist strategic litigation organisations,⁸ for the most part the cause lawyers involved tend to be those doing cause litigation work on a day-to-day basis, which will be discussed in more detail in chapter 5, interspersed with the occasional strategic case. As one experienced litigator put it, 'I'm not a strategic lawyer, I've fallen into it by mistake.'⁹ Meanwhile, for the NGO's involved, strategic litigation obviously offers an opportunity to target specific policy priorities. An NGO officer working in this area explained, 'there's a real energy and commitment from senior managers for us to continue to do it. It's seen as being more tangible and finite in an area that I think sometimes people feel is too difficult.'¹⁰

Single-issue NGOs typically act as either interveners or in some instances claimants, often targeting a particular aspect of policy and procedure that they have identified as problematic from their daily work with their client groups. While their specific forms of participation will vary from case to case, they often include the provision of detailed witness statements documenting a repeated procedural failing on the part of the immigration administration, commissioning or engaging in published research on an issue which is subsequently submitted as evidence, compiling evidence of the experiences of their client group, and in some circumstances providing expert perspective on relevant issues, such as mental or physical health, tangential to immigration control law.¹¹ A large number of cases of this kind have

⁸ Migrants' Law Project (MLP) <http://themigrantslawproject.org/> (Accessed 14th May 2014) and the Public Law Project Public Law Project, <http://www.publiclawproject.org.uk/> accessed 20 September 2016

⁹ London Immigration Solicitor 2 Interview, 20th December 2015

¹⁰ NGO Legal & Policy Officer Interview, 27th August 2013

¹¹ Migrants' Rights NGO Director 1 Interview, 8th April 2014; NGO Legal Officer Interview, 29th April 2014; London Immigration Solicitor 1 Interview, 2nd April 2014, NGO Legal & Policy Officer Interview, 27th August 2013

taken place in recent years, and this section will set some of them out. This is to show the impact the mobilisation of resources by NGOs and their collaborative working with cause lawyers has had in practice, and to demonstrate the extent to which such cases have become a regular feature of the UK's migrants' rights movement activism.

Strategic cases frequently target particular aspects of Home Office policy which, it is argued, are in some sense irrational, are otherwise unlawful in public law terms or are contrary to European Convention on Human Rights (ECHR) standards. Here, NGO participants are often able to mobilise and dedicate research and monitoring resources to properly inform the court about the realities of how such policies play out in practice on a systemic basis. Three groups of strategic litigation cases involving direct NGO participation will be discussed below; cases regarding the specific application of technical Home Office policies, cases concerning migrants' access to the courts, and a third group regarding the interpretation of significant rights-affecting legislative provisions. The cases and the NGO involvement in them, will be outlined here, while their legal and policy outcomes will follow later in the chapter.

The first group, relating to technical Home Office policies, include a number of cases relating to immigration detention. In *Das v SSHD* [2014]¹² the mental health campaigning charity Mind and the specialist immigration detention NGO Medical Justice argued that the interpretation of the Home Office's policy on releasing immigration detainees on mental health grounds, which included a threshold of being so ill as to require in-patient hospital care, was inhumane and thus contrary to its objects and purpose.¹³ As a lawyer involved in the litigation explained,

'the focus of the intervention in that case was around what does it mean when we talk about serious mental illness? What does it mean to be satisfactorily managed? The interpretation that had been given... was an incredibly regressive approach.'¹⁴

Medical Justice, who regularly provide independent medical care and assessment to people in detention, were able to present evidence of the failures to provide effective mental healthcare in detention and the effect that this threshold had had on detainees, while Mind

¹² EWCA Civ 45, For discussion Marenah K, 'The Immigration Differential In The Treatment Of Mental Illness' (2015) 29 JIANL 41

¹³ R (Das) v SSHD & Ors [2014] EWCA Civ 45

¹⁴ NGO Legal Officer Interview, 29th April 2014

was able to present a broader perspective on the provision of mental health care and commonly accepted good practice outside of the immigration context.

*Lumba v SSHD [2011]*¹⁵ was a case concerning the immigration detention of foreign national offenders who had served their prison sentences and were awaiting deportation. It involved as interveners the immigration detention NGO Bail for Immigration Detainees (BID), giving evidence as an independent third party monitor of systemic Home Office conduct in relation to the operation of the power to detain. It was led by a large number of significant cause lawyers including Raza Hussain QC and Michael Fordham QC, who will both appear again in chapter 5 in relation to cause litigation on Article 8 ECHR, instructed by the specialist cause litigation charity the Public Law Project. In the case, the Supreme Court addressed a number of issues relating to legal principle, but specifically in relation to Home Office conduct it found that it was both unlawful in public law terms *and* constituted the tort of false imprisonment for the Home Office to operate a secret policy presumption in favour of detaining such people, while publishing a public policy that purported to operate a presumption *against* such detention. As Lord Collins summarised,

‘a deliberate decision was taken to continue an unlawful policy. As Lord Dyson says, caseworkers were directed to conceal the true reason for detention, namely the unpublished policy, and to give other reasons which appeared to conform with the published policy.’¹⁶

Aside from immigration detention, welfare support for asylum seekers has been targeted.¹⁷ *Refugee Action v SSHD [2014]*¹⁸ involved the refugee and asylum seeker support charity Refugee Action as a claimant, but also was conducted by a specialist strategic litigation organisation, the Migrants’ Law Project, who will appear later in this chapter in relation to the litigation against the Detained Fast Track asylum system.¹⁹ The case involved a judicial review of the Secretary of State’s decision to freeze the special welfare payments claimed by asylum

¹⁵ *Lumba (WL) v SSHD [2011]* UKSC 12, For discussion, Ruck Keene A, Dobson C, ‘At What Price Liberty? The Supreme Court Decision In *Lumba* And Compensation For False Imprisonment’ [2012] PL 628

¹⁶ *Lumba*, para 220

¹⁷ Also *Mulumba v First-tier Tribunal (Asylum Support) and SSHD*.

¹⁸ *R (Refugee Action) v The SSHD [2014]* EWHC 1033 (Admin) For discussion, Bales K, ‘The “essential living needs” of asylum seekers: lessons learned from *R (Refugee Action) v SSHD*’ (2015) 37 *Journal of Social Welfare and Family Law* 247

¹⁹ Migrants’ Law Project (MLP) <http://themigrantslawproject.org/> (Accessed 14th May 2014)

seekers who are otherwise prevented from working or claiming mainstream benefits. It turned on the duty under Regulation 10 of the Asylum Support Regulations 2000 to ensure that the 'essential living needs' of asylum seekers in these circumstances were met. Refugee Action was permitted to bring the claim by the court 'in the interests of all asylum seekers' on account of its charitable purposes being 'to support and work with refugee communities in order to facilitate the successful resettlement in the UK of refugees and asylum seekers'.²⁰ In practice the organisation was able to provide extensive evidence of what in reality constituted the 'essential living needs' of asylum seekers that had not up to that point been taken into account.

The second key area of strategic litigation activity has been in relation to cases that asked the courts to defend access to their own procedures. Here, NGO participants have worked to identify and support individual claimants with appropriate cases. Finding the right claimant can be crucial to a successful strategic challenge. For example, a lawyer involved in some of these cases pointed to *Gudanaviciene v Director of Legal Aid Casework & Or* [2014],²¹ which ruled that policy guidance issued to the Legal Aid Authority caseworkers on when to grant an exceptional entitlement to legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was not compatible with Article 8 in immigration cases.²² Here,

we had to look for someone who had a level of complexity to their case. If it's simple, they can do the application themselves, or an NGO can do it.²³

Local groups and NGOs therefore had to coordinate to identifying claimants whose cases were sufficiently complex to require legal assistance, but not so unusual that their circumstances could be distinguished away from the broader range of claimants or fall to be granted under policy as it stood at the time.

There will also be cases where an NGO substitutes themselves for an individual or group of claimants, when for systemic reasons individual claimants were not available or not

²⁰ (n18) para 2

²¹ R (Gudanaviciene & Ors), v The Director of Legal Aid Casework & Or [2014] EWCA Civ 1622. For discussion, Mountfield H, 'Judicial review and human rights: challenges to court fees and legal aid changes which limit or effectively exclude right of access to court' (2014) 19 Judicial Review 217; and Spurrier M and Janes L, 'Litigating to save legal aid' (2016) Legal Action 12.

²² Gudanaviciene (n21) para 74

²³ London Immigration Solicitor 2 Interview, 20th December 2015

appropriate. For example, *Medical Justice v SSHD [2011]*²⁴ successfully challenged a Home Office policy of removing irregular migrants' who were recognised as a suicide risk or had other serious mental health problems without any advance notice, on the grounds that it denied such people the opportunity to challenge the lawfulness of their removal. Here,

'it needed to be an NGO [claimant] because the whole argument was that to give somebody no notice of removal meant that you couldn't access court, so if you had an individual claimant who was accessing the court, well, you know...'²⁵

Likewise, in *The Public Law Project v Lord Chancellor [2016]*,²⁶ in which the specialist cause litigation NGO PLP obtained a ruling from the Supreme Court that a residence test for entitlement to legal aid barring access to anyone who had not been lawfully present in the UK for at least a year was ultra vires the powers granted under LASPO. Here, an NGO claimant was necessary as the Residence test was only a proposal at the stage the litigation was brought and so there were no individuals who had yet been effected by it.

To these cases, and a number of others, can be added a third class of case that are arguably more significant, both in terms of scale of ambition and impact achieved. In contrast to the above cases, rather than targeting a particular Executive policy, these cases focussed on the interpretation of statutes. They are the cases of *Limbuela & Ors [2004]*²⁷ and *ZH Tanzania [2011]*.²⁸ *Limbuela* represented a full-frontal attack on what was regarded at the time of its introduction as a key element of immigration control; the denial of housing and financial support to asylum seekers who failed to lodge their claims immediately upon arrival in the

²⁴ R (Medical Justice) v SSHD [2011] EWCA Civ 1710. For discussion, Ramage S & Everett K, 'Case Comment: Unlawful creation, publication and operation of Government policy without proper consultation or public information: R (on the application of Medical Justice) v Secretary of State for the Home Department' (2011) 201 Criminal Lawyer 1

²⁵ London Immigration Solicitor 1 Interview, 2nd April 2014

²⁶ R (The Public Law Project) v Lord Chancellor [2016] UKSC 39 For discussion, Fouzder M, 'Residence test in limbo after challenge upheld' (2016) 113 Law Society's Gazette 3.

²⁷ R (Adam) v. SSHD [2005] UKHL 66 There has been extensive discussion of many aspects and implications of the Limbuela judgment. For some examples, Morris L, *Asylum, Welfare And The Cosmopolitan Ideal: A Sociology Of Rights* (Routledge 2010); Sweeney J, 'The human rights of failed asylum seekers in the United Kingdom' [2008] PL 277; Fredman S, 'Human rights transformed: positive duties and positive rights' [2006] PL 498; Pillay A, 'Economic and social rights adjudication: developing principles of judicial restraint in South Africa and the United Kingdom' [2013] PL 599

²⁸ ZH (Tanzania) v SSHD [2011] UKSC 4. Likewise, this case has generated a great deal of academic analysis. Fortin J, 'Are children's best interests really best? ZH (Tanzania) (FC) v Secretary of State for the Home Department' (2011) 74 MLR 947; Bolton S, 'Promoting the best interests of the child in UK asylum law and procedures' (2012) 26 JIANL 232

country. S.55(1)(b) of the Nationality Immigration and Asylum Act (NIAA) 2002 required the Home Office not to provide accommodation to an asylum seeker if the 'Secretary of State is not satisfied that the claim was made as soon as reasonably practicable.' However, the cause litigators successfully asserted that this policy in its bare terms, enforcing homelessness in a context where asylum seekers were denied permission to work or access mainstream benefits and couldn't leave the country until their asylum claims had been decided, would in many circumstances meet the tests of inhuman and degrading treatment under Article 3 ECHR. This was done using evidence from Shelter regarding the realities of homelessness and the lack of alternative means of support for asylum seekers²⁹ while Liberty provided legal arguments on the Strasbourg case law on Article 3 of the ECHR.³⁰ As was noted in the previous chapter, the House of Lords ruled that the subsequent subsection s.55 (5)(a) of the 2002 NIAA, which stated that s.55(1) 'shall not prevent the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person's Convention rights' meant that at least a minimum of support had to be provided if the only alternative was street homelessness.

In contrast, *ZH Tanzania* was not a challenge to any particular aspect of immigration control policy. The case involved a mother with irregular status in the UK but two young British citizen children. The question was, then, how s.55 of the Borders, Citizenship and Immigration Act 2009 (BCIA), which placed a duty on the Secretary of State to safeguard and promote the welfare of children while discharging her immigration functions, was to be interpreted. The cause litigators' had two main priorities here. Firstly, to try to ensure that s.55 BCIA would have as robust and wide reaching influence as possible across the full range of immigration issues involving children.³¹ To this end they succeeded in focussing the interpretation of the duty to 'safeguard and promote the welfare of children' on article 3(1) of the UN Convention on the Rights of the Child (UNCRC) and its assertion that the 'best interests of the child' must be a 'primary consideration' in all actions concerning children. Secondly, to establish that children were to be treated as rights-baring individuals in immigration proceedings and not, as one cause litigator involved put it, as 'merely attachments to their parents.'³² This point

²⁹ *SSHD v Limbuela & Ors* [2004] EWCA Civ 540 paras 26-31

³⁰ *Ibid* para 87

³¹ Children's Rights Solicitor Interview, 21st August 2013

³² *Ibid*

was emphasised by Just for Kids Law taking the highly unusual step in immigration proceedings of representing the children's interests independently of their parents.

iii) The Results Achieved

While all of these instances of strategic litigation achieved success in court, this is not to claim that all strategic litigation succeeds. As one example in 2013, Mind and Freedom from Torture intervened unsuccessfully in the case of *SL v Westminster City Council* [2013]³³ to argue that migrants receiving outpatient mental health support should be considered as receiving 'care and attention' such as would entitle them to accommodation under the duties on local authorities contained in s. 21(1) of the 1948 National Assistance Act. More recently, strategic cases against the heightened financial requirements for family migration³⁴ and against the more stringent tests for 'adult dependent relative'³⁵ migration introduced in 2012 were brought by cause litigators including Richard Drabble QC, Manjit Gill QC, the Migrants' Law Project and JCWI. These cases were of potentially similar significance to *Limbuela*, targeting key aspects of current executive immigration policy, however, both have so far been rejected by the judges on grounds that the immigration rules are not unreasonable and are at least capable of being operated proportionately.³⁶

What is clear, though, is that strategic litigation is both regularly pursued and is regularly successful, at least initially. As was noted above, a major reason for this may well be the ability and willingness of the movement to marshal significant resources into making this happen. However, as Tushnet noted earlier in this chapter, judicial success can only be one part of the assessment. Given that, as was noted in chapters 2 and 3, there is not necessarily a straight correlation between a judicial ruling and the intended policy change being put into effect, it is necessary to understand what the practical outcomes of these judicial successes have in fact been.

Taking the examples given above, we can see that there is a range of practical outcomes that have occurred. Some cases have effectively produced no meaningful change despite their initial legal success. For instance, while *Lumba* compelled the Home Office to maintain a

³³ [2013] UKSC 27

³⁴ R (MM & Ors) v SSHD (Rev 1) [2014] EWCA Civ 985

³⁵ R (Britcits) v SSHD [2016] EWHC 956 (Admin)

³⁶ MM & Ors para 153; BritCits para 143. At the time of writing the appeal of MM & Ors to the Supreme Court has been heard, but no judgment given.

published policy presumption against detaining ex-foreign national offenders prior to their deportation, in practice such individuals continue to be routinely detained.³⁷ This has been achieved by asserting that, while a presumption of release exists, this can be outweighed by other factors particularly absconding risk and potential risk to the public. Ex-foreign national offenders are routinely viewed as high risks on both counts and thus detention is maintained.³⁸

Likewise, *Refugee Action [2014]* produced a detailed ruling that found ‘the information used by the Secretary of State to set the rate of asylum support was simply insufficient to reach a rational decision’, on the basis that the decision had failed to take into account the wide range of ‘essential living needs’ identified by the charity.³⁹ However, the Home Office response was to issue a new decision, formally taking these ‘essential living needs’ into account but calculating that no increase in payments was necessary. The new calculations found that all the major essential living needs identified in the judgment could in fact be accommodated within the rate as it had previously been set.⁴⁰ This litigation was criticised by one interviewee, an institutional funder of cause litigation, as ‘a good example of where strategic litigation may be a useful campaigning tool but in and of itself is overstated. It’s a positive ruling but the cost of the litigation through the various levels has been quite significant.’⁴¹

Similarly, following the *Das* decision on detention of the severely mentally ill, the Home Office’s formal policy was revised to take account of the ruling.⁴² However, subsequent independent reviews of detention practices have found that practical identification of the severely mentally ill and their subsequent release has not improved. The Shaw Review into the Welfare of Detainees in particular found that this procedure, known as Rule 35, ‘does not do what it was intended to do – that is, to protect vulnerable people who find themselves in

³⁷ Home Office, Enforcement Instructions and Guidance 55.1.2 Criminal Casework Cases, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/552478/EIG_55_detention_and_temporary_release_v21.pdf accessed 28 September 2016

³⁸ Migrants’ Rights NGO Director 1 Interview, 8th April 2014

³⁹ (n18) para 150

⁴⁰ Letter from James Brokenshire to the National Asylum Stakeholder Forum (11 August 2014) <http://www.nrpfnetwork.org.uk/Documents/Home%20Office%20letter%20asylum%20support%20August%202014.pdf> accessed 1 September 2016

⁴¹ Funding Officer Interview, 15th April 2014

⁴² Home Office, Enforcement Instructions and Guidance: Chapter 55 – Index (Home Office, 12 Jul 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470593/2015-10-23_Ch55_v19.pdf accessed 22 September 2016

detention.’⁴³ The reason given was that, ‘the Home Office does not trust the mechanisms it has created to support its own policy.’⁴⁴

Other cases have achieved some initial or longer term success, yet have subsequently met with significant difficulties. Medical Justice’s success in their challenge to no-notice removals, in *Medical Justice v SSHD [2011]*, was longer-lived in that all those facing removal were given 72 hours’ notice of any intended removal, the minimum the Court of Appeal considered necessary. However, in 2014 this principle was eroded by a new Home Office policy of notifying a person that they would be subject to removal proceedings but with no identified date or time, other than that it would occur in more than 72 hours from the date of the notice.⁴⁵

Gudanaviciene too produced a revision to the wording of formal policy. Previous instructions to legal aid decision makers were altered to make them less exclusionary, by removing references to a ‘very high threshold’ in Article 8 ECHR cases which were found to be inconsistent with the Strasbourg case law and therefore unlawful.⁴⁶ Cause litigators report that this has freed up the decision making to grant exceptional case funding from its previous position of near blanket exclusion. However, while this is undoubtedly a meaningful success, it does not resolve the fact that the requirement to go through the highly bureaucratic and time consuming ECF application process for legal aid funding continues to constitute a significant obstacle to Article 8 claims.

Of the cases discussed above, *Limbuela* and *ZH Tanzania* have had the most long-lasting and significant impact in policy and procedural terms. The immediate effect of the *Limbuela* ruling, was to effectively bring to an end the widespread use of section 55 NIAA to deny asylum seekers support. This policy had been a key point of principle for Ministers. As Morris reports, it was described by the then Home Secretary, David Blunkett, as ‘an important part of our

⁴³ Home Office, *Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw* (Cm 9186, 2016) para 12 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf accessed 22 September 2016

⁴⁴ Ibid para 4.118

⁴⁵ Home Office, ‘Detention Services Order 03/2014 Service of Removal Directions’ (Home Office, April 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510261/DSO_03-2014_Service_of_Removal_Directions.pdf accessed 31st August 2016

⁴⁶ (n21) paras 71-77 also *W v The United Kingdom* App no 9749/82 (ECtHR, 8 July 1987) and *Maaouia v France* App no 39652/98 (ECtHR, 5 October 2000)

asylum reform programme which is dealing with widespread abuse of the system.⁴⁷ *ZH Tanzania's* impact, as a result of the interpretive nature of the judgment and the sweeping nature of the section 55 BCIA provision, have been more wide-ranging still. This has included increasing the possibilities for regularisation of legal status under Article 8 for irregular families with children, strengthening procedural protections for unaccompanied children in the asylum system,⁴⁸ and enabling greater access to permanent settled status in the UK.⁴⁹

However, while these developments are clearly important and of considerably greater significance and duration than some of the other cases under discussion, their impact should not be overstated. For example, in relation *ZH Tanzania*, subsequent litigation efforts by the Home Office have succeeded in securing the 'clarification' that while a child's best interests must be a primary consideration, in deciding on regularisation decisions under Article 8 where the parents would otherwise be being removed, a child's best interests will ordinarily be to remain with their family and thus be removed alongside them.⁵⁰ Meanwhile, as was discussed above in relation to the *Refugee Action* case, since *Limbuela* the levels of financial assistance and standard of accommodation provided has been gradually eroded over time. The asylum support provisions of the 2016 Immigration Act, not yet brought into force at the time of writing, also appear likely to test the limits of what the *Limbuela* ruling will allow.

iv) Conclusion

All of these cases featured NGOs as either claimants or intervenors and all were pursued with a view to them forming part of a wider strategic goal. Interviewees from NGOs involved in some of these cases gave examples where they had taken the case on after recognising a systemic failing that their beneficiaries were consistently confronting,⁵¹ while others cited principles that their organisation had campaigned for for many years and were now concerned might be eroded by Home Office policy.⁵² Nevertheless, the majority of strategic litigation for migrants' rights tends to be limited both in the scale of its ambition and in the practical outcomes that it achieves. It is orientated around technical changes to procedure or

⁴⁷ Blunkett, quoted in Morris (n27) 53

⁴⁸ R (AN & FA (Children)) v SSHD [2012] EWCA Civ 1636

⁴⁹ SM & Anor v SSHD [2013] EWHC 1144 (Admin)

⁵⁰ This position has been expressed repeatedly in the case law, most recently in R (MA (Pakistan) & Ors) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705, para 40

⁵¹ Migrants' Rights NGO Director 2 Interview, 8th July 2014

⁵² NGO Legal Officer Interview, 29th April 2014

practice. Cause litigators report that for even these limited aims to be achieved, strategic cases require ongoing enforcement through attentive and repeated cause litigation on a non-strategic basis in individual cases.⁵³

Given this assessment, it is necessary to understand why this limited role for strategic litigation has come about. Of the three primary influential factors described in chapter 3, the legal and judicial framework and the political opportunity structures that the cause litigators operate under remain relatively constant in the period under discussion. This leaves a possible reason being the relatively small scale of the movement resources committed to them. The majority of these cases have tended to be isolated, either conceived by or arising out of the work of independent NGOs pursuing a discrete issue. It is notable, for example, that the most ambitious of the cases discussed above, *Limbuela*, was also the one that achieved the most substantial and durable outcomes for migrants' rights. To understand strategic litigation's full potential, the second section of this chapter will look at a scenario where the ambition of what was being targeted and the resources dedicated to it in terms of coordination and movement engagement was at its maximum.

The Detained Fast Track

*"It's the golden boy of the asylum system."*⁵⁴

Between 2013 and 2016 a coordinated and complex campaign of strategic litigation was undertaken by cause litigators, targeted at the Detained Fast Track (DFT) system for determining asylum claims. Rather than one-off litigation events, this involved a number of different judicial review challenges over an extended period, targeting different aspects of the system. A previous set of challenges, when the DFT system was first being developed, had failed. As will be shown, the more recent cause litigation effort represents one of the most ambitious and resource-intensive examples of strategic litigation in this area to date. As such it provides an opportunity to understand the extent to which greater commitment of resources, in the form of long term and coordinated activity between cause lawyers and the

⁵³ London Immigration Solicitor 1 Interview, 2nd April 2014; and Funding Officer 2 Interview, 28th February 2013

⁵⁴ Migrants' Rights NGO Director 1 Interview, 8th April 2014

wider NGO sector, can overcome the restrictions placed on strategic litigation by the other influencing factors.

i) The Origins of the DFT

As was discussed in chapter 3, for much of the 1990s and into the 2000s, the issue of asylum and refugee determination was at the forefront of the UK's immigration politics. Consecutive governments wrestled to institute an asylum processing system that could control and then cut the growing asylum intake, which by 2002 had reached record figures of 84,000. This agenda was embodied in the Detained Fast Track (DFT), the first iteration of which was introduced into the UK's asylum processing system in 2000.⁵⁵ Based at the Oakington Reception Centre, the 2000 fast track was designed to last no longer than seven days, during which time an asylum applicant would be held in immigration detention in order to facilitate a greatly accelerated asylum procedure. The central difference brought by the Oakington fast track system therefore, was that it used immigration detention for 'the administrative convenience' of the immigration service to process potentially viable claims.⁵⁶

From the start the fast track system was targeted by cause litigators for strategic litigation, in the House of Lords judgment in *Saadi v SSHD [2002]*⁵⁷ and then the ECtHR judgment in *Saadi v UK [2008]*.⁵⁸ However, these cases were ultimately unsuccessful, with both the House of Lords and a majority of the Grand Chamber of the European Court ruling that Article 5.1(f) ECHR allowed for 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country' and that, 'until a State has "authorised" entry to the country, any entry is "unauthorised"'.⁵⁹ As such the Oakington system was said to comply with ECHR standards, provided that it was 'closely connected to the purpose of preventing unauthorised entry of the person to the country' and that 'the place and conditions of detention should be appropriate'.⁶⁰ Wilsher has described these cases as serving both 'as a guide and a warning to the government in relation to future policies of detention on arrival.'⁶¹

⁵⁵ *Saadi v The United Kingdom* App no 13229/03 (ECtHR, 29 January 2008) para. 23

⁵⁶ *R (Saadi & Ors) v SSHD [2002]* UKHL 41 para 27

⁵⁷ *Ibid*

⁵⁸ (n55)

⁵⁹ (n56) para 35

⁶⁰ (n55) para 74

⁶¹ Wilsher D, *Immigration Detention: Law History Politics*, (CUP 2014) 93

However, the warnings were not heeded. In 2003 the Home Office announced a pilot 'detained fast track procedure' at Harmondsworth detention centre. The key development in the new DFT was the introduction of immigration detention during the appeal stage of an asylum claim as well as the initial claim stage, combined with a further speeding up of the system.⁶² Once again cause litigators challenged this development. The Refugee Legal Centre (RLC) decided to act as the claimant in a judicial review of the announcement of the pilot. In *R (Refugee Legal Centre) v SSHD* [2004], the argument moved from the use of detention, as in *Saadi*, to a greater focus on the determination procedure used during that detention. RLC argued that, 'the system was inherently unfair and therefore unlawful because the decision-making process was so compressed.'⁶³ However, despite some evident reluctance on the part of Sedley LJ, renowned as a former radical lawyer, the Court of Appeal again ultimately ruled that the DFT did not fall below the 'irreducible minimum of due process' necessary in asylum cases, and was therefore lawful.⁶⁴

Following the determination of *RLC* the Harmondsworth pilot was officially adopted as permanent policy and expanded to include women (at Yarl's Wood detention centre). The Oakington facility was closed down. The terminology of 'potential for a quick decision' was emphasised. In practice though, a 'quick decision' became synonymous with a refusal. Anonymous Home Office caseworkers, speaking to the LGBT campaign group Stonewall, stated that

'In fast-track there's pretty much an expectation that almost everyone will be refused. We don't put any old case into fast-track. We put ones which are removable and don't appear to have an asylum claim.'⁶⁵

The UN High Commissioner for Refugees (UNHCR) reported,

'Decisions made within the DFT often incorrectly apply and inaccurately engage with refugee law concepts and adopt an erroneous structural approach to asylum decision

⁶² Cwerner SB, 'Faster, Faster and Faster: The Time Politics of Asylum in the UK' (2004) 13 Time & Society 71

⁶³ *R (Detention Action) v SSHD* [2014] EWHC 2245 (Admin) para 34

⁶⁴ *R (Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1481

⁶⁵ Nathanael Miles, 'No Going Back: Lesbian And Gay People And The Asylum System' (Stonewall, 2010) https://www.stonewall.org.uk/sites/default/files/No_Going_Back__2010_.pdf accessed 22 September 2016

making. UNHCR is concerned that the speed of the DFT process may inhibit the ability of case owners to produce quality decisions.⁶⁶

The DFT averaged a 99% refusal rate since its 2005 roll-out.⁶⁷ In the subsequent litigation it was found that during that time the screening process used to decide whether or not a case was suitable for the DFT ‘did not seek or have the information necessary ... to decide whether a case was capable of quick decision or suitable for the DFT on a consistent basis.’⁶⁸ The range of cases that ended up in the DFT,

‘included cases previously thought of as inherently too complex for a quick decision: FGM, homosexuality, domestic violence from countries such as Pakistan, torture and rape.’⁶⁹

Having been rejected at every turn, strategic litigation ceased. Cause lawyers focussed on representing individual cases, with all efforts being directed towards getting their clients’ out of the DFT.⁷⁰ Migrants’ rights NGOs engaged in long term monitoring, research and lobbying in an attempt to bring the effects of the DFT system to wider media and political attention, but with little success.⁷¹ In particular, the voluntary detainee visitors group for the fast-track detention centres, the London Detainee Support Group, re-constituted itself as a campaign group under the name Detention Action. In 2011, Detention Action published detailed research noting, amongst other things, that the modern DFT was operating in a manner very different from that which had been validated by the Strasbourg Court in *Saadi* and was doing so in a policy climate that was radically different.⁷²

ii) A Return to Strategic Litigation

⁶⁶ UN High Commissioner for Refugees (UNHCR), Quality Initiative Project - Fifth Report to the Minister, March 2008, available at: <http://www.refworld.org/docid/56a9c7df4.html> accessed 1 September 2016 8.

⁶⁷ For Home Office figures provided in response to a Freedom of Information Act Request, Detention Action, ‘“Fast Track to Despair” report published’ (Detention Action, October 2nd 2011) <http://detentionaction.org.uk/fast-track-to-despair-report-published> Accessed 31st August 2016 12

⁶⁸ (n63) para 68

⁶⁹ (n63) para 68

⁷⁰ (n65) 23; Migrants’ Rights NGO Director 1 Interview, 8th April 2014; and London Immigration Solicitor 1 Interview, 2nd April 2014

⁷¹ Gauri van Gulik, ‘Fast-Track Unfairness: Detention and Denial of Women Asylum Seekers in the UK’ (Human Rights Watch, February 23 2010) <https://www.hrw.org/news/2010/02/23/uk-fast-track-asylum-system-fails-women> accessed 1 September 2016; Bail for Immigration Detainees ‘Detention under immigration powers in UK prisons: severe restrictions on access to justice’ (BID, 2013) <http://www.biduk.org/sites/default/files/2013-09-23%20BID%20Briefing%20Detainees%20in%20Prison%20%281%29.pdf> accessed 1 September 2016;

⁷² Detention Action (n67)

This central insight was taken up by cause litigators as the basis for renewed attempts to litigate the DFT.⁷³ In 2013 a strategic judicial review of the operation of the DFT was lodged, this time with Detention Action as the claimant. In *Detention Action v SSHD [2014]* the cause litigators argued that the DFT in its modern form fell below the standard set in *RLC*. In making these arguments the lawyers for Detention Action submitted evidence of failures at every stage of the DFT process, including in the length of detention, unsuitable claims not being identified, failure to remove identified unsuitable cases, failures in allocation of legal representation and failures at the appeal stage.⁷⁴ This litany of failures was said to demonstrate a system that was, in the language of *RLC*, so unfair as to be unlawful.

However, while the judge, Ouseley J, delivered a decision which largely accepted the criticisms of the DFT made by the cause litigators, he did not regard them as individually or cumulatively unlawful.⁷⁵ Only in relation to the specific failures to provide adequate legal representation did the challenge clearly succeed.⁷⁶ The ruling found that the small amount of time lawyers had with their clients meant that this safeguard was not functioning as it should. As Ouseley J, summarised, ‘it is the failings elsewhere which lead to the allocation of lawyers as the point at which something has to change.’⁷⁷ It was thus a relatively simple matter for the Home Office to introduce a new policy permitting greater time for duty solicitors to meet their clients before the substantive asylum process began.⁷⁸

Things did not end there, however. The new time-scales meant that claimants’ lawyers were better able to perform their proper representative functions. One consequence of this was a substantial increase in the number of referrals of potential victims of torture, sexual violence and other serious mistreatment to the therapeutic foundations Freedom from Torture and the Helen Bamber Foundation (HBF). In turn, these referrals led to victims of torture and/or human trafficking bringing further challenges to their detention in the DFT. They did so on the basis that the DFT operated with a systemic risk of unfairness in that it failed to identify those

⁷³ Migrants’ Rights NGO Director 1 Interview, 8th April 2014; and London Immigration Solicitor 1 Interview, 2nd April 2014

⁷⁴ (n63), para 68

⁷⁵ (n63) para 146

⁷⁶ (n63) para 196

⁷⁷ (n63) para 200

⁷⁸ Detention Action, ‘After the fast track: what next for the detention of asylum seekers?’ (Detention Action, 5 January 2016) <http://detentionaction.org.uk/after-the-fast-track-what-next-for-the-detention-of-asylum-seekers> accessed 20 September 2016

vulnerable or potentially vulnerable claimants the Ouseley judgment had found were unsuitable for a quick decision and therefore unsuitable for the DFT.

These challenges were grouped together, with the HBF providing detailed further evidence regarding their case load and some individual clients and the Immigration Law Practitioners' Association (ILPA) acting as a formal intervener.⁷⁹ In a coordinated action, Detention Action renewed their challenge to the functioning of the DFT, this time focussing on the Appeal stage of the asylum process and arguing that the DFT Tribunal procedure rules which allowed for specially speeded up appeals processes and for individuals to be detained for the duration of their asylum appeal were inherently unfair. Thus both entry into and appeal from the DFT process were being targeted at around the same time.

The Detention Action challenge was heard first and succeeded on all grounds. In *Detention Action v First Tier Tribunal (Immigration and Asylum Chamber) & Ors* [2015]⁸⁰ Nicol J ruled that the fast-track rules incorporated structural unfairness and put the Appellant at a serious procedural disadvantage.⁸¹ Following this, in early July 2015, the Secretary of State made a last minute concession to HBF, accepting that the DFT 'created an unacceptable risk of unfairness to vulnerable or potentially vulnerable individuals.' In his statement of reasons for the agreed concession Blake J stressed that the DFT had operated with an unacceptable risk of failure to identify vulnerable and potentially vulnerable individuals, including but not limited to those who might have been victims of torture, human trafficking, or who might have been suffering from mental disorder or other physical or mental impairment.⁸²

Following this series of defeats and faced with both the entry and appeals stages of the process being ruled unlawful, the Immigration Minister announced the complete suspension of the DFT while an 'urgent review of all the evidence about any possible unfairness in the

⁷⁹ JM & Ors v SSHD & First-Tier Tribunal (Immigration And Asylum Chamber) Consent Orders CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015, July 2015 <http://www.gardencourtchambers.co.uk/wp-content/uploads/2015/07/Helen-Bamber-Foundation-Order-Final.pdf> accessed 1 September 2016; JM & Ors v SSHD & First-Tier Tribunal (Immigration And Asylum Chamber) Statement of Reasons for CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015 July 2015 <http://www.gardencourtchambers.co.uk/wp-content/uploads/2015/07/Helen-Bamber-Foundation-statement-of-reasons.pdf> accessed 1 September 2016

⁸⁰ *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 For discussion, Briddick C, 'Detention Action v First-tier Tribunal (Immigration and Asylum Chamber) and Ors case note' 2015 JIANL 322

⁸¹ (n80) paras 57 & 58

⁸² Statement of Reasons (n79) para 48

DFT' was undergone and 'any shortcomings identified'.⁸³ The announcement made clear that the Government's intention to pursue appeals against the decision of Nicol J regarding DFT appeals vigorously. An expedited appeal was heard in July 2015 by the Court of Appeal, but was rejected. In the leading judgment, the Master of the Rolls found that,

In my view the time limits are so tight as to make it impossible for there to be a fair hearing of appeals in a significant number of cases. For the reasons that I have given, the safeguards on which the SSHD and the Lord Chancellor rely do not provide a sufficient answer. The system is therefore structurally unfair and unjust.⁸⁴

A subsequent application for permission to appeal to the Supreme Court by the Home Office was refused in November 2015.⁸⁵ The DFT remained suspended.

The Executive's last possibility for renewing the DFT relied on securing a revision of the procedure rules for appeals in the DFT that would take account of the Court of Appeal's judgment and still allow the DFT to function. However, in May 2016 the Procedure Rules Committee of the Immigration and Asylum Tribunal, made up of senior members of the UK's immigration judiciary, declined to make new Fast Track appeals rules.⁸⁶ Without procedure rules, appeals could not be heard while a person was in detention, which in turn undermined the Executive's control objective of processing and removing asylum claims as quickly as possible. As a result, the DFT was brought to an end.

This appeared to be a momentous event for the UK's migrants' rights movement and for cause litigation in particular. The DFT had become a central element of the Executive's immigration control efforts over this period and thus a major cross-Party governmental priority. The coincidence of the DFT's introduction and the decline in asylum numbers during the 2000s was seen by the Executive as evidence of its efficacy as a tool of control.⁸⁷ As Stefanelli has

⁸³ James Brokenshire, 'House of Commons: Written Statement (HCWS83)' (Home Office, 02 Jul 2015) <http://www.parliament.uk/documents/commons-vote-office/July%202015/2%20July/6-Home-Asylum.pdf> accessed 22 September 2016

⁸⁴ Lord Chancellor v Detention Action [2015] EWCA Civ 840 para 45

⁸⁵ Detention Action, 'The end of the track for the DFT' (Detention Action, November 12th, 2015) <http://detentionaction.org.uk/the-detained-fast-track-the-end-of-the-road> Accessed 31st August 2016

⁸⁶ Jerome Phelps 'The Fast Track is dead' (Open Democracy 50:50, 20 May 2016) <https://www.opendemocracy.net/5050/jerome-phelps/fast-track-is-dead> 22 September 2016

⁸⁷ Government immigration statistics reports include graphs showing the historic pattern of asylum numbers that are marked with what the Home Office considers key turning points in the downturn. The introduction of the DFT is one of them. Home Office, 'Immigration statistics quarterly release' (Home Office, 25 August 2016)

shown, preserving the DFT was cited by the government as one of its main reasons for refusing to opt in to the revised EU Asylum Procedures Directive.⁸⁸ Despite this governmental commitment to the DFT, it appeared that coordinated and concerted strategic litigation, well evidenced, backed up with long term research and campaigning material and targeted at specific weak points in the process, had brought down a structural element of the immigration control regime. Cause litigators described the result as something ‘to savour’,⁸⁹ and stated that ‘The gravity of this finding cannot be overstated.’⁹⁰ The litigators concerned were nominated for awards.⁹¹

iii) Outcomes

However, on the same day that the suspension of the DFT was announced the Home Office introduced an ‘interim instruction’ termed ‘Detained Asylum Casework’ (DAC).⁹²

Under this new policy, initial asylum claims would continue to be processed while claimants were held in immigration detention. The requirement for a case to be ‘suitable for a quick decision’ was removed. Instead the DAC process was intended for what were termed ‘enforcement cases’.⁹³ These are asylum claims that are made after a migrant is apprehended by immigration officers. They are regarded as inherently suspect by the Executive⁹⁴ and are considered likely to be certifiable as ‘clearly unfounded’ under s.94 of the 2002 NIA Act and thus deprived of an in-country right of appeal.⁹⁵ However, the same safeguards for detecting cases requiring further investigation and vulnerable claimants that were accepted as being defective in the DFT litigation were to operate in the new DAC system.

<https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> accessed 22 September 2016

⁸⁸ Stefanelli J, ‘Whose rule of law? An analysis of the UK’s decision not to opt-in to the EU asylum procedures and reception conditions Directives’ (2011) 60 ICLQ 1055

⁸⁹ Colin Yeo, ‘Detained fast track asylum process suspended’ (Free movement, 2 July 2015) <https://www.freemovement.org.uk/detained-fast-track-asylum-process-suspended/> accessed 22 September 2016

⁹⁰ Harvey A, ‘Detained fast-track suspended’ (2015) 29 JIANL 253

⁹¹ Law Society, ‘Law Society Excellence Awards 2016’ (Law Society) <http://www.lawsociety.org.uk/support-services/events-training/excellence-awards/> accessed 22 September 2016

⁹² Home Office, ‘Detention: interim instruction for cases in detention who have claimed asylum, and for entering cases who have claimed asylum into detention’ (Home Office, 1 August 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446421/Asylum_in_detention_-_interim_instruction_V2.pdf accessed 22 September 2016

⁹³ Hossain & Ors v SSHD (Rev 1) [2016] EWHC 1331 (Admin) para 35

⁹⁴ Ibid para 43

⁹⁵ Ibid para 17

Strategic litigation against the DAC was commenced, citing amongst other things reports from Freedom from Torture and HBF that high numbers of potential victims of torture and trafficking continued to be detained under the new DAC and arguing that the process should also be considered to be so unfair as to be unjust. However, on this occasion the cause litigators were not successful. The case of *Hossain & Ors v SSHD [2016]*⁹⁶ was heard by Cranston J, a former MP who had served as Solicitor General in the New Labour government that introduced the Oakington Fast Track. Cranston J accepted the necessity and validity of the DAC system, accepted the implication that enforcement cases were necessarily suspect and even went as far as to cast doubt on the integrity of medical practitioners who reported potential victims of torture amongst the detainees.⁹⁷ Crucially, and extraordinarily, proceedings in the case were halted by the judge halfway through at the Home Office' request, to allow it more time to submit over 800 pages of witness evidence from a range of senior officials. This evidence attested to the necessity of the DAC and asserted the invalidity of the claims that it dealt with. It was this evidence, which went untested owing to the restrictive rules on cross examination in judicial review,⁹⁸ combined with the judge's vocal reluctance to deal with a situation where 'a whole system of public administration is on trial',⁹⁹ that produced the result.¹⁰⁰ The decision has subsequently been approved by the Court of Appeal.¹⁰¹

The DAC is in essence a new form of detained asylum procedure and its use is expanding. Between 3 July 2015 and 31 January 2016, 1,413 cases were entered into the DAC.¹⁰² This new system represents a significant undermining of the DFT cause litigation's initial success. The level of long-term commitment, coordination, dedication of resources and ambition displayed by the cause litigators was able to secure a major defeat for a procedure which was considered to be a key element of the control imperative in immigration policy. However, it

⁹⁶ Ibid

⁹⁷ Ibid para 154

⁹⁸ R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs [2012] EWHC 2115 (Admin); also Honey R, 'Cross-examination in judicial review proceedings' (2012) 156 Solicitors Journal 21

⁹⁹ (n93) para 144

¹⁰⁰ An appeal against this decision was lodged, but permission was refused by LJs Beatson and Sales at the Court of Appeal. R (TH (Bangladesh) & Ors) v SSHD [2016] EWCA Civ 815

¹⁰¹ R (TH (Bangladesh) & Ors) v SSHD [2016] EWCA Civ 815 (10 August 2016)

¹⁰² (n93) para 102

appears that even with this heightened commitment the impact of strategic litigation can be absorbed and undermined. Why this is will be the subject of the next section.

Understanding Strategic Litigation's Outcomes

*Occasionally if we're lucky we get in a sharp kick to the shins, rather than cutting off below the knees. I don't think that happens. They go away and nurse their little wound and come back and kick you back much harder.*¹⁰³

Very few strategic litigation cases that succeed in court seek to challenge a structural element of the immigration control system in the way the DFT cases did. *Limbuela* could be said to have had an effect of this kind, imposing, as it did, a minimum standard or safety-net on the trend of policy developments in the period which emphasised the 'harnessing of the benefits system as a means to deter arrival'.¹⁰⁴ As a result *Limbuela* produced an angry reaction from Ministers. David Blunkett, Home Secretary at the time of the original High Court ruling, made headlines by announcing himself 'personally fed up with having to deal with a situation where Parliament debates issues and the judges then overturn them.'¹⁰⁵ This dynamic, of Executive criticism and delegitimisation of judicial decision making, is an important issue in its own right and will be returned to in chapters 5 and 6.

Understanding how the diminished outcomes that are often produced by strategic litigation come about requires a focus on elements of the three key influential factors discussed at length in chapters 2 and 3; the resources available and involved, the legal and judicial framework that applies and the political opportunity structures that cause litigators face. As will be seen, these factors interact to place unavoidable limits on the cases taken and the outcomes that are achieved that cannot completely be compensated for by cause litigators simply applying more resources.

i) The Resources Available to the Movement

¹⁰³ London Immigration Solicitor 1 Interview, 2nd April 2014

¹⁰⁴ Morris (n27) 46

¹⁰⁵ BBC News, 'Blunkett to fight asylum ruling' (BBC News, London, 20 February, 2003) <http://news.bbc.co.uk/1/hi/uk/2779343.stm> accessed 31st August 2016

The particular make-up of the UK's cause litigation sector tends to act as a limiting factor on the types of cases that are taken, while at the same time facilitating successful courtroom outcomes.

As the above has demonstrated, the majority of strategic litigation for migrants' rights in the UK is engaged in on an isolated basis, targeting a discrete aspect of administrative practice or technical interpretation of a published policy or statute. Even the more significant examples, such as *Limbuela*, were limited to a particular case and did not form part of a wider campaign. Only the DFT litigation could be said to have involved long-term coordinated activism. To a significant extent this limited ambition comes as a result of the fact that cause litigation is in general engaged in through a combination of independent cause lawyers representing claimants in coordination with a range of charities and NGOs. As Sarat and Scheingold say, 'causes and movements both invigorate and constrain lawyers.'¹⁰⁶

As will be discussed in the next section, the size of the groups involved is significantly influenced by the financial implications of going to court. For now, though, the important factor is that these civil society groups tend to be single-issue concerns, specialising on a particular human rights or medical issue or a particular subset of vulnerable migrants. The organisations in the cases discussed above, such as Detention Action, Refugee Action, Medical Justice, Freedom from Torture, the Children's Society and Shelter, would all fit this description. As a result, the particular expertise and policy focus of the NGOs engaging in strategic litigation as claimants or leading interveners will have a strong influence on what issues are targeted for litigation. Such groups' exposure to immigration policy, either through interacting with their client group or in a more institutionalised capacity as a service provider, will tend to be at the level of technical administrative implementation; the daily business of asylum support allocations, decisions to release or maintain migrant's detention or the handling of traumatised migrants' in immigration and asylum procedures.¹⁰⁷ This is the work for which they receive funding from charitable grant making bodies or supporters; orientated around the service delivery or gap-filling model of charities in contemporary liberal welfare

¹⁰⁶ Sarat A and Scheingold S, *Cause Lawyers and Social Movements* (Stanford University Press 2006) 2

¹⁰⁷ Wren K, 'Supporting Asylum Seekers and Refugees in Glasgow: The Role of Multi-agency Networks' (2007) 20 *Journal of Refugee Studies* 391

states.¹⁰⁸ It is also this work which provides them with the appearance of sufficient expertise to persuade a court to grant them standing to participate in a case.¹⁰⁹

The particular institutional competences and service provision model of the organisations that participate in strategic litigation is not solely a limiting factor. They also have the positive effect of enabling the delivery of high quality litigation. The challenges to the DFT, which involved a group of specialised single-issue organisations, Detention Action, Bail for Immigration Detainees, HBF and ILPA all targeting specific aspects of the system, demonstrates that well-informed groups able to dedicate limited but sufficient resources are able to contrast their on-the-ground experience with the Executive's characterisation of the realities of particular administrative decisions or policy programmes.¹¹⁰ This contributes to the regular successes of the cause litigators in strategic litigation described above; successes which in turn generate an incentive to continue with and further refine this strategic approach.¹¹¹

While the NGO-based model of strategic litigation may act to limit the range and scope of such challenges, it also helps to ensure that the litigation that is taken is well-prepared and strongly presented in court. NGO and cause litigator expertise alone, though, would not be sufficient to secure regular strategic litigation success. This also requires a relatively benevolent judicial environment.

ii) The Legal Framework and Judicial Approach

As was noted above, these resource issues overlap with the role of the judicial and legal framework in relation to the financial implications of entering the court system. While NGOs may regularly be able to secure their own legal representation on a pro-bono or conditional 'no win no fee' agreement,¹¹² NGO claimants face a significant financial risk from the costs liability of losing a judicial review claim against the Executive.

¹⁰⁸ Anheier H, 'Third Sector–Third Way: Comparative Perspectives and Policy Reflections', in Lewis J and Surender R (eds), *Welfare State Change – Towards a Third Way?* (OUP 2004)

¹⁰⁹ For a discussion of the importance of standing for NGOs in strategic litigation, Vanhala L, 'Legal Opportunity Structures and the Paradox of *Legal Mobilization* by the Environmental Movement in the UK' (2012) 46 L&SR 523; Hale M, 'Who Guards the Guardians?' 2014 3 Cambridge Journal of International and Comparative Law 100

¹¹⁰ Vanhala L, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* (CUP 2011) 212-240

¹¹¹ NGO Legal Officer Interview, 29th April 2014; Migrants' Rights NGO Director 2 Interview, 8th July 2014; NGO Legal & Policy Officer Interview, 27th August 2013

¹¹² London Immigration Solicitor 1 Interview, 2nd April 2014

This may mean that some organisations limit themselves to acting as third-party interveners in individual claimants' cases, as Shelter did in *Limbuela*, rather than pursuing cases directly. Another means of resolving this issue is to seek a Protective Costs Order from the court.¹¹³ The current law on PCOs will be discussed more in chapter 6, but for now it is enough to note that PCOs were originally a creation of the courts and an application involves convincing a judge that the issues raised are of general public importance, that the public interest requires that they be resolved and that, amongst other things, if the Order is not made then for financial reasons the applicant will probably discontinue the proceedings.¹¹⁴ The rules around PCOs to a large extent determine the type of NGO or charity that can bring a case directly. Given that the level of a PCO is determined based on what the judge considers the NGO could be reasonably expected to risk, established charities or NGOs with substantial financial resources are likely to have the level of a PCO set very high. This in turn makes it very difficult for a charity's trustees to justify putting such levels of income at risk for an uncertain legal outcome when it could be being spent on more immediate priorities and services.¹¹⁵ This effectively means that PCOs are far more likely to be attractive to smaller NGOs and charities with relatively limited financial resources.

Once cases make it into court, the attitude and approach of judges hearing strategic migrants' rights cases have also been crucial in rewarding strategic litigation efforts and in shaping the kinds of cases that are brought. As was discussed in chapter 3, the UK's judicial framework of immigration judges and senior civil judiciary have developed in their approach to immigration and migrants' rights issues.¹¹⁶ To an extent this reflects a generational shift amongst the judges, particularly the increasing presence of former radical lawyers and cause litigators on the bench. It is notable, for example, that at various stages of the DFT campaign, key cases were heard by Lord Justice Sedley and Justices Blake and Nicol, all of whom have a past history of involvement with cause lawyering of various kinds. Blake J was a former leading migrants' rights cause litigator involved in many of the key cases in the 1980s and 90s.¹¹⁷ Sedley LJ was

¹¹³ Clayton R, 'Public Interest Litigation, Costs And The Role Of Legal Aid' [2006] PL 429; Hale (n109)

¹¹⁴ R (Corner House Research) v Secretary of State for Trade & Industry [2005] EWCA Civ 192 para 141

¹¹⁵ NGO Legal Officer Interview, 29th April 2014

¹¹⁶ Morris (n27) 47

¹¹⁷ e.g. *Vilvarajah and Others v The United Kingdom* App no 13163/87 13164/87 13165/87 13447/87 13448/87 (ECtHR, 30 October 1991); *Chahal v United Kingdom*, App No 22414/93 (ECtHR, 15 November 1996); *D. v. United Kingdom*, App No 30240/96 (ECtHR, 02 May 1997)

a prominent radical lawyer, member of the Haldane Society and one-time member of the Communist Party.¹¹⁸ Nicol was a cause lawyer who, while practicing, had co-published 'Subjects, Citizens, Aliens and Others', a history of British citizenship and immigration law and policy. The book documented a history of ingrained administrative discrimination in immigration, arguing that,

'It is possible...even for functionaries to apply the law differently to different individuals or groups...through the functionaries' prejudices and practices.'¹¹⁹

However, while the presence of these justices might indicate an evolution that has reflected a wider trend in judicial review more generally, it does not mean that a radical reinvention of the traditional separation of powers in the UK has occurred. As Wray has noted, 'the courts are acutely conscious of their constitutional role'¹²⁰ and judges continue to demonstrate a commitment to policing the distinction between their role and what they regard as the proper territory of the Executive in relation to immigration policy questions.

As the cases discussed above demonstrate, this evolving approach has meant that where judges consider that they have a role to play, they are willing to engage in relatively intense review of Executive conduct and frequently find the immigration service or an aspect of Home Office policy wanting. In combination with the high quality of the litigation undertaken by the cause litigators, this leads to the repeated court room success of strategic litigation that this chapter has discussed. The issue, though, is in where the judiciary considers it should and shouldn't be operating, a point which, as was mentioned in chapter 2, is sometimes referred to as 'justiciability'.¹²¹ Judicial decisions on the justiciability of an issue are not fixed, but can be influenced by prevailing traditions, previous jurisprudence and judges' political awareness. As was seen in cases such as *Refugee Action*, such decisions depend to a large extent on what cases a judge can be persuaded to hear and rule on.¹²² The regulating of technical aspects of administrative policy appears to fall within what a sufficient number of judges regard as their

¹¹⁸ Berlins M, Dyer C, *The Law Machine* (Penguin 2000), 71

¹¹⁹ Dummett A, Nicol A, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Northwestern University Press 1990) p.16

¹²⁰ Wray H, 'Greater than the sum of their parts: UK Supreme Court decisions on family migration' [2013] PL 838

¹²¹ McGoldrick D, 'The Boundaries Of Justiciability' (2010) 59 ICLQ 981 983

¹²² Also R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57

proper role, and this has in turn influenced the tactical sense of experienced strategic litigators on how best to approach migrants' rights issues.¹²³

Beyond this, though, there appears to be a notable tendency for the courts to be willing to defend what they can be persuaded to perceive as their own territory. As has already been mentioned, the cases of *Medical Justice*, *Gudaviciene* and *Public Law Project* all centred around arguments on access to the courts and thus access to justice. *Gudaviciene* and *PLP* are all the more notable in this regard in that they involved questions of public expenditure, through the provision of legal aid, which have been traditionally thought of as firmly political questions outside of the courts' field of competence.¹²⁴ What appears to have provided the courts with sufficient justification to overcome this problem was the characterisation of the issue in terms of access to justice and the functioning of the court system, rather than welfare state principles.

The crucial role of framing migrants' rights issues in terms of justice is best displayed in the DFT cases themselves. Viewed from the perspective of the Executive, the DFT was a crucial procedural element in its immigration control policy. Immigration policy and control has been another area that was traditionally regarded by the courts as to be largely left up to the Executive. This was how the issues were interpreted in the initial unsuccessful litigation challenges of *Saadi* at the House of Lords and ECtHR. The determinations of the human rights arguments under Article 5 ECHR here were imbued with discussion of the policy issues and the perceived imperative, faced with the sharp increase in asylum numbers during the relevant period, for the Executive to exert control over the numbers coming in.¹²⁵ From this the courts determined that detention for 'administrative convenience' only was acceptable under Article 5, in so far as it was a proportionate response to a legitimate policy aim.

However, the DFT could also be understood (and was presented as such by the cause litigators) as an exercise in the application of law and procedure that was obliged to be

¹²³ Interviews London Immigration Solicitor 1 Interview, 2nd April 2014; Immigration Barrister/Judge Interview, 28th August 2013; Migrants' Rights NGO Director 1 Interview, 8th April 2014; Immigration and Welfare Barrister Interview, 9th April 2014

¹²⁴ Hoffman L, 'The COMBAR Lecture 2001: Separation of Powers' (2002) 7 *Judicial Review* 137; also Chamberlain M, 'Democracy and Deference In Resource Allocation Cases: A Riposte To Lord Hoffman' (2003) 8 *Judicial Review* 12

¹²⁵ (n56) para 47

conducted in a manner commensurate with wider standards of justice. The effect of the move from the immigration control perspective to the justice perspective was begun in RLC and can be seen in Sedley LJ's comments that,

The choice of an acceptable system is in the first instance a matter for the Executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-round of asylum applications. But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency'¹²⁶

While this assertion did not prove sufficient for the cause litigators to succeed in the RLC case, by the time of the renewed attack on the DFT this pointed the way towards fully framing the challenge in terms of legal procedure and ultimately notions of justice.

The original *Detention Action* challenge again lost on the Article 5 arguments before Mr Justice Ouseley, again for immigration policy reasons.¹²⁷ However, presenting the DFT as an issue of justice in the subsequent cases against the Lord Chancellor more readily appealed both to judges' expertise and their ingrained sense of judicial territory. Their expertise in the practical business of case management allowed them to appreciate what the time limits and realities of detention would mean both for an asylum seeker in the DFT and an immigration judge trying to hear their appeal. As the Master of the Rolls commented in response to the MoJ's argument that the appeals system could not be systemically unfair if there was a power for them to be adjourned,

'There is bound to be a reluctance to postpone or transfer an appeal on the day of the hearing when time has been allocated for the full hearing of the appeal and the parties and witnesses have come to give their evidence and advance their submissions... there will be a momentum in favour of proceeding with the hearing which it will be difficult for an appellant to stop.'¹²⁸

This was a rare admission by a senior judge that the realities of the judicial process sometimes overpower the pure pursuit of justice. Locating the DFT challenge in the issue of justice, combined with reiterating the accepted importance of the issues at hand and the depths to

¹²⁶ (n64) para 8 emphasis added

¹²⁷ (n63) para 74

¹²⁸ (n84) para 44

which the DFT had fallen, compelled the judges to overcome any reluctance they may have had regarding the justiciability of an immigration control issue of such significance.

The strengthening of judicial willingness to engage in review of the Executive overall, then, has been a key contributor to strategic migrants' rights litigation. The regular court wins come as a result and are a major element in the perpetuation of the strategic litigation approach. However, most important has been the judicial approach to these strategic litigation cases, which has tended to reward those cases that either focus on relatively straightforward questions of interpretation or administrative procedure or on questions of justice and the administration of the courts. This in turn encourages the taking of cases that fit, or can be made to fit, this paradigm and constrains cause litigators from successfully venturing into alternative, more expansive terrain.

iii) The Political Opportunity Structures

Political opportunity structures are the most important influencing factor from the point of view of the practical outcomes, both positive and negative, that strategic litigation brings about. This is because of the particularly disadvantageous POS the migrants' rights movement faces.

Strategic litigation would be understood by many analysts to be a natural response to migrants' rights activists' political disadvantage in terms of public opinion and the lack of mass-movement support for its agenda.¹²⁹ Strategic litigation in this context is an attempt to secure policy change without the need for mass participation, and litigation on the kind of technical issues chiefly discussed above is one of the main means by which the migrants' rights movement seeks to influence the conduct of the immigration administration. However, the principles it achieves are developed through legal argument and judicial decision rather than consensual negotiation and subsequent administrative ownership.

As such, much of it can be usefully conceptualised as a form of lobbying, or 'stakeholder engagement', by other means. Strategic litigation of this kind either takes the place of, or in some instances follows on from failed, negotiations with the Executive which in other contexts might reasonably be expected to be resolvable without recourse to the courts. One

¹²⁹ Bouwen P and McCown M, 'Lobbying versus litigation: political and legal strategies of interest representation in the European Union' (2007) 14 *Journal of European Public Policy* 422; Zackin E, 'Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU turned to Courts' (2008) 42 *L&SR* 367

interviewee whose organisation had ended up pursuing strategic litigation explained this decision as,

‘a failure of advocacy and politics, absolutely... We spent two years really working on an advocacy basis ... working with Home Office officials... And we just got nowhere. We got absolutely nowhere.’¹³⁰

However, the Executive response to adverse rulings is frequently to evade or minimise the effect of judgments secured through strategic litigation. This approach in turn is likely to prompt further litigation from the cause litigators following up to seek enforcement of the letter and spirit of judgments that they secure. As a funder of strategic litigation explained, ‘if the practice doesn’t change, you still need the [individual] cases to keep pushing away’.¹³¹ This dynamic results in the use of strategic litigation as a form of compulsory negotiation. In this negotiation, an Executive which is either unwilling or unable to accommodate the demands of the migrants’ rights movement is compelled to institute technical changes, and then modify those changes, as a result of the court process. Thus the outcomes strategic litigation achieves are almost always partial and often temporary.

This situation poses a great difficulty for strategic litigation. As Rosenberg identified, ‘the placing of the power to enforce court decisions in the Executive branch leaves courts practically powerless to ensure that their decisions are supported by elected and administrative officials.’¹³² Strategic litigation appears to rely for its enforcement on an Executive arm that is under extreme pressure and is dominated by a policy imperative of control that is in permanent tension with the principle of enacting migrants’ rights-protecting court judgments. The act of compelling the Executive to participate and publicly imposing decisions on migrants’ rights issues on it undermines not only the Executive’s attempts to exert control but, crucially, undermines the ability to give the public appearance of exerting control. In this context, it is understandable why ‘imposed’ changes might be resisted.

The reality of this tension can be seen in the regularity with which the UK’s courts have ruled in very strong terms against the Home Office, not just for unlawful actions but for conduct that lacks respect and regard for judicial oversight and the courts. In particular, courts have

¹³⁰ Migrants’ Rights NGO Director 2 Interview, 8th July 2014

¹³¹ Funding Officer 2 Interview, 28th February 2013

¹³² Rosenberg (n6) 16

made repeated findings of failings to abide by either published Home Office policy or judicial case law,¹³³ the unlawful use of secret unpublished policies¹³⁴ and the displacement of politically unpalatable but legally necessary decisions onto the Courts.¹³⁵ Immigration officers have even been found to have submitted ‘false and misleading’ evidence to the courts¹³⁶ and to have ‘deliberately concealed important evidence and lied on oath.’¹³⁷

This does not mean to say that the Executive routinely ignores judgments that conflict with its priorities; adherence to the notion of the rule of law appears to be strong enough in the UK administrative system that such overt illegality is relatively rare, although not unheard of.¹³⁸ However, what it does mean is that the administration has available to it a variety of techniques to minimise, evade or manipulate judicial rulings that conflict with the underlying immigration policy frame of exerting and being seen to exert control. In another context Conant has referred to this approach as ‘contained compliance’.¹³⁹

In the administrative responses to the courtroom success of migrant rights strategic litigation discussed above, numerous instances of this ‘contained compliance’ were identified. Some, such as *Lumba* and *Refugee Action* resulted in the same policy that had been declared unlawful being pursued by a relatively seamless transition to different, lawful, means. Others, such as *Gudanaviciene* and the Article 8 implications of *ZH Tanzania*, had the full implications of their rulings diminished or absorbed through further litigation or policy interpretation. Others still, such as *Medical Justice* and *Mahmood*, achieved a measure of substantive change but were diminished or undermined through the development of entirely new policies. It seems likely that the DFT challenge will join this part of the spectrum. The introduction of the DAC system shows signs of impacting on comparatively similar numbers of asylum claimants, and with similar failings in terms of filtering out the particularly vulnerable claimants amongst

¹³³ Two recent examples; *Home Office v VS* [2015] EWCA Civ 1142; *MM & GY & TY v SSHD* [2015] EWHC 3513 (Admin)

¹³⁴ (n15)

¹³⁵ *MA (Nigeria) v SSHD* [2009] EWCA Civ 1229; also *R (Mohammed) v SSHD* [2016] EWHC 447 (Admin)

¹³⁶ *R (Sino) v SSHD* [2011] EWHC 2249 (Admin) para 16(i)

¹³⁷ Ntege [2014] unreported. Judges remarks reported in BBC News, ‘Probe of three immigration officers in ‘sham vicar case’’ (BBC News, London, 4 December 2014) <http://www.bbc.co.uk/news/uk-england-london-30329896> accessed 22 September 2016

¹³⁸ Daily Telegraph, Theresa May accused of unacceptable and regrettable behaviour by judge, (Telegraph, 20 June 2012)

<http://www.telegraph.co.uk/news/uknews/immigration/9345345/Theresa-May-accused-of-unacceptable-and-regrettable-behaviour-by-judge.html> accessed 22 September 2016

¹³⁹ Conant L, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002) 207

them. However, it nevertheless is effectively restricted to those cases that do not attract an appeal and may, as a result, prove easier to be extricated from for those claimants with viable refugee claims. Time will tell.

What this indicates is that notwithstanding the skill with which strategic litigation is brought by cause litigators, and the courts' frequent willingness to look favourably on such cases, strategic litigation is only one forum in which migrants' rights issues are decided. This forum operates within a much larger and more influential arena, the political opportunity structures, which, ironically, strategic litigation is intended to avoid. It is clear from the control imperative-inspired contained compliance of the Executive, however, that the POS cannot be avoided and continues to dictate the extent to which migrants' benefit from the strategic efforts of the cause litigators.

Strategic Litigation's Impact on Policy Affecting Migrants' Rights

*'Of all the government departments the Home Office is the one who is most casual about losing court cases, they do all the time.'*¹⁴⁰

These factors in combination, then, have produced the current form of the majority of migrants' rights strategic litigation. The limited ambition and scope, its technical nature and dedication to securing practical administrative and policy changes can best be understood as replacing the kind of negotiation that 'stakeholder' groups in other sectors might reasonably expect to be able to successfully carry out with the Executive outside of the courtroom. Cause litigators and the Executive are thus engaged in a semi-perpetual process of involuntary negotiation, conducted largely away from public understanding or engagement, with the judiciary empowered to compel a reluctant Executive to concede to the migrants' rights movement's requests.

This reluctance on the part of the Executive is the key determining issue in the extent to which strategic litigation is capable of producing substantive migrants' rights outcomes. As the replacement of the DFT with the DAC showed, it is not enough to raise the level of ambition and long-term coordination and activism amongst the cause litigators. Court room success is

¹⁴⁰ Migrants' Rights NGO Director 2 Interview, 8th July 2014

regularly followed by leading cases being undermined through the ‘contained compliance’ of the enforcement process. In turn this requires further follow up litigation by cause litigators at the individual case level to try to ensure that the headline wins that are secured and enforced as far as possible. Such a process is inherently unreliable. That said, it is relatively rare for a strategic litigation success to be rendered completely irrelevant through the evasion tactics of the Executive. Some successes are secured for a period of time, or are enacted in a partial way. Such marginal gains are not negligible in a context where, as a result of the control imperative, the Executive would not otherwise have conceded them.

Yet, while the Executive’s inclination to evade strategic litigation outcomes is ultimately the determining factor in the extent to which such litigation achieves positive outcomes for migrants’ rights, it is also the case that different types of case require different levels of political effort on the Executive’s part for this evasion to be successful. It appears that some challenges, particularly those that focus on a procedural issue, can be evaded relatively simply through adjustments in immigration officer practice. The cases of *Lumba* and *Das* are examples of this. Others, including those that involve challenges to immigration rules or formal published policy, can likewise be responded to without significant public or parliamentary comment. The cases of *Refugee Action* and *Medical Justice* met this fate. Ultimately, despite the scale of the work involved, this is also what occurred to the DFT litigation. While it is true that a parliamentary announcement was necessary for the original suspension of the DFT, the introduction of the DAC has received no such oversight or criticism.

What appears to be most durable are those strategic litigation successes that involve interpretation of primary statutes. The case of *Limbuela* and *ZH Tanzania* have been subject to some efforts on the part of the Executive to diminish their impact. However, the core of their findings regarding the meaning of Section 55 BCIA or Article 3’s relationship to homelessness and social provision have remained, as doing away with them completely would require the passing of legislation to repeal Section 55 (5) BCIA and replace it with legislation specifically incompatible with Convention rights. This would require the relevant Minister to make a statement under section 19 (1)(b) HRA that ‘although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill’. Up to this point the Executive has not felt sufficiently motivated to take these steps, satisfied perhaps with the diminishment of these ruling’s implications it has been able to

achieve. Such significant steps may well seem beyond it at the moment, and so the underlying outcomes of these particular cases may be more secure than their non-legislative counterparts.

However, as the demands of the control imperative continue it is also clear that demand for further restrictive measures will rise while the political costs of instituting ever more substantial measures will lower. The 2016 Immigration Act comes close, by terminating the support arrangements for asylum seekers, including asylum seekers with children, that were being defended in *Limbuela*, albeit replacing them with a greatly reduced alternative.¹⁴¹ This was achieved with little opposition in Parliament, although at the time of writing it has yet to be brought into force.¹⁴² Even securing legislative interpretations may not guarantee that migrants' rights progress will be secured through strategic litigation in the future.

Conclusion

Strategic litigation has been shown to be a major element of cause litigation activism for migrants' rights in the UK. Its regular successes in court no doubt provide important morale boosts for a permanently embattled movement.¹⁴³ More importantly, it can produce practical changes to immigration service conduct and procedure that are non-negligible from a migrants' rights perspective, particularly given that the control imperative militates against the Executive conceding these changes through more voluntary negotiation. However, these cases have been shown to often be limited in scope and ambition and the practical changes they achieve to be fleeting and compromised.

While there are other factors, to do with the resources available to the movement and the judicial framework they are operating under that produce this limited role, it is the response of the Executive to strategic litigation which is ultimately determinative of it. Strategic litigation does not benefit from the support of a politically significant mainstream constituency and nor is it part of a major mass movement, two factors which were discussed

¹⁴¹ Immigration Act 2016 s. 66 and Sch. 11

¹⁴² Colin Yeo, 'Which sections of the Immigration Act 2016 are in force with what effect?' (Free Movement, 14 July 2016) <https://www.freemovement.org.uk/sections-immigration-act-2016-force-effect/> accessed 22 September 2016

¹⁴³ London Immigration Solicitor 1 Interview, 2nd April 2014; Migrants' Rights NGO Director 1 Interview, 8th April 2014; Migrants' Rights NGO Director 2 Interview, 8th July 2014; NGO Legal & Policy Officer Interview, 27th August 2013

in chapter 2 as being crucial to positive implementation of judgements by the executive. This chapter has shown that the control imperative identified in chapter 3 results in a consistent pattern of evasion and absorption of court decisions that contradict Executive policy intentions. This pattern appears to only be limited by the level of motivation the Executive feels to obstruct the implementation of a strategic litigation case, in combination with the political effort required of the Executive to achieve that obstruction. Some strategic litigation wins appear more insulated than others from retrenchment, but all are potentially vulnerable to a sufficiently motivated Executive.

Given the broadly unreceptive political environment that the movement operates in, cause litigation's primary defence against such 'contained compliance' is to pursue further litigation. This form of enforcement of strategic litigation wins requires a vibrant and active non-strategic cause litigation sector, and the role played by this cause litigation in individual cases will be the subject of the next chapter. As was noted in this chapter, however, this process renders litigation as a process of compulsory negotiation, whereby policy or procedural change is imposed on a largely unwilling administration that then resists it to the extent that further court hearings permit.

In the face of the ever increasing pressure on the Executive to demonstrate control in relation to immigration, the tension caused by strategic litigation risks incentivising the Executive to turn to ever more major and draconian reform and brings cause litigation itself to the forefront of immigration controversy. This chapter has already discussed one manifestation of this tension, in the ministerial response to the *Limbuela* judgment. This is an issue which will need to be considered further in the next two chapters.

Chapter 5: Day-to-Day Cause Lawyering for Migrants' Rights

Introduction

*'We're talking about quite political individuals who've chosen to be lawyers because they want to make a difference and they are making a difference to individuals'*¹

This chapter will study the day-to-day work of cause litigators for migrants' rights, pursuing the same broad goals of defending and progressing migrants' rights, but doing so by representing migrant clients on an individual basis. What Sarat and Scheingold have referred to as 'acts of resistance when carried out on behalf of powerless groups.'² As chapter 4 showed, strategic and day-to-day cause litigation cannot be entirely separated. Strategic litigation relies on the day-to-day litigation for its enforcement. Many of the actors involved are the same, with cause lawyers in particular pursuing day-to-day litigation for their clients while occasionally becoming involved in a strategic challenge. Also, possible strategic challenges are frequently identified and developed through day-to-day casework.³ However, a distinction can be made between strategic litigation, which deliberately targets a distinct executive policy or persistent practice, and the day-to-day business of representing individual clients and seeking to secure their rights through litigation.

The structure of this chapter varies slightly from the previous chapter, in that the role of the three key influencing factors on cause litigation permeate through the analysis, rather than being discussed individually. This is because, as will be argued, the interrelationship between the resources available to the movement, the legal and judicial framework it operates in and the political opportunity structures it confronts is crucial to the policy and political developments that the chapter charts. It shows that through the weight of cases being pursued by cause lawyers who are compelled to operate at the edges of the immigration law envelope, the legal framework around migrants' rights has been substantially developed. In particular, routes for the regularisation of irregular migrants have been developed outside of

¹ Immigration and Welfare Barrister Interview, 9th April 2014

² Sarat A & Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities*, (OUP 1998) 18

³ London Immigration Solicitor 2 Interview, 20th December 2015

and to a greater extent than executive control-orientated policy would otherwise have permitted.

The chapter looks at two examples of systemic change in the legal framework brought about through day-to-day cause litigation. These are the developments in the UK's refugee status determination system under the 1951 UN Convention Relating to the Status of Refugees (the Refugee Convention) and the system of claims based on Article 8 of the European Convention on Human Rights (ECHR), the right to private and family life. Both of these can be understood as primarily acting as routes to regularisation for irregular migrants. The chapter argues that without strategically targeting defined end-goals, day-to-day cause litigation has expanded refugee protections significantly beyond the executive's policy tolerance, while regularisation through Article 8 was effectively developed in the courts into a parallel regularisation system independent of executive policy.

However, the chapter then shows that these systemic advancements in the legal framework made through day-to-day cause lawyering are themselves vulnerable to the executive's responses. In contrast to the standard responses to strategic litigation discussed previously, this chapter shows that the political opportunity structure of the control imperative has at times compelled the executive to engage in a much more overt backlash. The latter part of the chapter goes on to discuss the effect that these backlashes have had, why they have been engaged in and what prospects there might be for the protections to survive and be revitalised.

The chapter begins by further discussing the nature of day-to-day cause litigation, and what it has achieved.

The Role of Day-to-day Cause Lawyering

“Because the politics is so toxic and the debate goes in one direction, defence and obstructionism is a highly effective tool because the debate isn’t there to be had.”⁴

i) Day-to-Day Cause Lawyering: The Resources of Expertise and Commitment

Cause litigation’s human resources of legal expertise and institutional resources of NGO capacity and coordination are as highly influential in day-to-day litigation as in strategic litigation, but martialled in a different way. In contrast to the strategic litigation discussed in the previous chapter, rather than acting as formal claimants or interveners, NGOs may provide expert supporting evidence, either on medical matters such as evidence of torture,⁵ or background research evidence on relevant human rights conditions in countries of origin.⁶ They may also provide social, emotional and practical assistance to the migrants themselves while they are going through the process. This leaves the bulk of the casework in the hands of cause lawyers alone. As was discussed in chapter 2, cause lawyers are to be distinguished from ‘cab-rank’ lawyers and have been variously defined as ‘lawyers who commit themselves and their legal skills to furthering a vision of “the good society” through ‘moral activism’;⁷ as ‘lawyers who consciously seek social or political goals while simultaneously pursuing the interests of their individual clients’;⁸ and as lawyers who, ‘have something to believe in and bring their beliefs to bear in their work lives.’⁹

Chapter 3 discussed the nature of the UK’s immigration sector in detail, and set out the fact that it is populated by a combination of both traditional ‘cab-rank’ lawyers and cause lawyers. Although it is not possible to provide comparative data with other countries, it is a notable

⁴ Funding Officer Interview, 15th April 2014

⁵ Helen Bamber Foundation ‘Legal Protection’ (Helen Bamber Foundation) <http://www.helenbamber.org/how-we-work/hub-protection-work/> accessed 22 September 2016; and Freedom from Torture, ‘Make A Referral’ (Freedom from Torture) <https://www.freedomfromtorture.org/make-a-referral/5175> accessed 1 September 2016

⁶ Amnesty International, ‘Our work on refugee and migrant rights’ (Amnesty International) <https://www.amnesty.org.uk/refugee-asylum-seeker-migrant-human-rights> Accessed 27 August 2016; Freedom from torture, ‘Sri Lanka - Out Of The Silence’ (Freedom from torture, May 2011) https://www.freedomfromtorture.org/feature/out_of_the_silence/5979 accessed 27th August 2016

⁷ Sarat A & Scheingold S (n2) 3

⁸ Meili S, ‘UK Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law’ (2013) 54 Boston College Law Review 1123 1128

⁹ Sarat A and Scheingold S, *The Worlds Cause Lawyers Make: Structure And Agency In Legal Practice*, (Stanford University Press 2005) 1

feature of the UK's immigration sector that cause lawyers have historically made up a significant proportion of it. In addition to their numerical significance, cause lawyers have also been highly influential in how the sector and how the legal framework it operates in has developed. Cause litigators routinely push at the edges of the law, rather than taking the law as it is. Meili, for example, notes 'a legal strategy long practiced by cause lawyers in litigation: pushing the boundaries of precedent to establish revised standards.'¹⁰ Or, as Underhill LJ has put it in less complimentary terms, seeking 'to exploit even the faintest ambiguity'¹¹ in the relevant legal framework.

Where Meili slightly overstates the case, though, is the implication that the primary intent of cause lawyers in their daily work is to establish revised standards. Cause lawyers interviewed for this thesis were clear that while their overarching motivations were certainly to defend and promote migrants' rights, their immediate priority was always the interests of their client. As one interviewee put it,

'you can't use them for your ends and not look after their interests. There's probably times when people have got a really good point but they've not been able to run it because then it's not [in their client's interests]'.¹²

It is perhaps better, then, to understand the work as pushing the boundaries of precedent for the advantage of their client and the cause.

This inclination to seek to expand the legal framework beyond what executive policy would voluntarily allow for the benefit of their clients and the wider cause partly derives from cause litigation's motivating ethos. However, it is also a consequence of related practical factors around the development of the legal framework and funding structures. This interrelationship will be discussed in more detail below. For now, though, it is enough to note that this interrelationship has also meant that cause lawyers have come to dominate particular areas of immigration work in comparison to their cab-rank colleagues. While the work of cause

¹⁰ Meili (n8) 1143

¹¹ *Singh v The SSHD* [2015] EWCA Civ 74 para 66

¹² London Immigration Solicitor 2 Interview, 20th December 2015

lawyering throws up a large number of ancillary issues, cause lawyers' most significant role has been in the active development and expansion of the legal framework of regularisation for migrants with no lawful status, or those facing having it stripped from them.

The first area which will be discussed, where this role has been most pronounced, is in refugee recognition and protection. As Meili notes, in this area cause lawyers, 'keep pushing the boundaries of domestic resistance, confident—or at least hopeful—that they will eventually experience breakthroughs'.¹³

ii) Developing the Legal Framework of Refugee Regularisation

As chapters 3 and 4 have already discussed, asylum has been a major issue within UK immigration politics for the last thirty years and a priority area for the migrants' rights movement. As a result, the legal framework of refugee status determination has been one of the most significant areas of day-to-day work for cause litigators. While traditional cab-rank lawyers have been involved in the asylum field since the expansion of legal aid in the later 1990s, as was noted in chapter 3 it is an area that has been traditionally dominated by cause lawyers. This is partly a result of financial resource considerations, but was also due to the inherently politicised nature of this work, which appealed to radical, activist and human rights lawyers. As a veteran cause litigator explained,

'I found most of my spare time was on politics and I found it very attractive because I spent a lot of time working with political exiles and here I was helping them stay in the country.'¹⁴

Given this political and moral context, asylum seeking and refugee status is often viewed as distinct from other forms of migration and legal immigration processes. However, as it exists in the UK it is in effect a legal framework whereby irregular or otherwise precarious migrants seek to regularise their status. They do this through asserting that they face a risk of persecution on return to their home countries, under Article 1A(2) of the Refugee

¹³ Meili (n8) 1147

¹⁴ Immigration and Welfare Barrister Interview, 9th April 2014

Convention.¹⁵ While the state has more or less willingly signed up and remained bound by the requirements of the Refugee Convention, introducing a legal framework through legislation implementing many of its key obligations,¹⁶ day-to-day cause litigation has been at the forefront of expanding its regularisation function.

In the early days of cause litigation it did so by contributing to the development of asylum as a viable means for relatively mass migration. As was mentioned above, in the mid-to-late 1980s, the 'early days' of large-scale asylum seeking in the UK, the lack of funding, infrastructure and professional prestige meant that what asylum litigation that there was was almost exclusively carried out by cause litigators.¹⁷ During that period a series of Tamil asylum cases gained significant political attention¹⁸ and brought about important legal developments. One of them, *Sivakumaran v SSHD [1987]*,¹⁹ began as an ordinary day-to-day case but ended up being taken to the House of Lords by solicitor David Burgess, regarded with near legendary status in the cause litigation sector²⁰ and a group of barristers including Louis Blom-Cooper QC, one of the founders of Doughty Street Chambers and also one of the founders of Amnesty International. It was opposed for the government by John Laws, later to become Lord Justice Laws, who as First Treasury counsel led for the government in a number of crucial migrants' rights cases during this period.

The case dealt with how the stipulation in Refugee Convention 1A (2) that a refugee claimant's fear of persecution on return had to be 'well-founded' was to be interpreted. The case began as an ultimately unsuccessful attempt to argue that a 'well-founded fear' meant 'on the basis of objective facts, [a claimant's] fear was reasonable and plausible' instead of the more rigorous position of the Secretary of State, that the test was solely an objective one to be based on the known facts of the relevant circumstances in the home country at the time.

¹⁵ UN Refugee Convention Art 33

¹⁶ As discussed in chapter 2 this would be regarded as an act of 'self-limited sovereignty' Joppke C, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 World Politics 266

¹⁷ York S, 'The End of Legal Aid in Immigration - A Barrier To Access To Justice For Migrants And A Decline In The Rule Of Law' (2013) 27 JIANL 106 124

¹⁸ Joppke C, *Immigration and the Nation State: the United States, Germany and Great Britain* (OUP 1999) 130

¹⁹ R (Sivakumuran) v SSHD [1987] UKHL 1

²⁰ Webber F, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto 2012) 19; Also, Frances Webber, 'David Burgess – An Appreciation' (IRR, 4th November 2010) <http://www.irr.org.uk/news/david-burgess-an-appreciation/> accessed 22 September 2016

However, in losing this argument the cause litigators nevertheless succeeded in convincing the Lords that while the objective test of risk on return might be applied, the standard of proof of that risk ought to be set at the low level of ‘a reasonable degree of likelihood’ rather than the ordinary civil standard.²¹ This argument was arrived at on the basis of reference to domestic authority regarding extraditions under Fugitive Offenders Act 1967, where the Lords’ previous acknowledged that a lower standard of proof than ‘more likely than not’ was appropriate in circumstances where ‘the relative gravity of the consequences’ of getting the decision wrong were very serious.²²

Obtaining judicial recognition of the ‘gravity’ of the decisions in question, which in asylum can potentially include life and death, was in itself a crucial success for the cause litigators in a context where, as Joppke has shown, there was already significant political debate around the ‘bogus’ nature of most asylum claims.²³ In fact, the judgment was an early example of the important strain in judicial reasoning regarding refugee status discussed in the previous chapter where the courts have instituted a robust legal framework by formally recognising the important and fundamental nature of the issues at risk in asylum cases, often in the face of political discourse of the time. Of more immediate practical importance, though, were the procedural implications of this determination. Without this interpretation the Refugee Convention could not have become a means of providing international protection on a large scale, other than to prominent figures. This is because, as Sweeney points out, most ‘applicants will tend to have little in the way of documentary evidence, and a lot will depend on what they say and how they say it.’²⁴ Only a lower standard of proof could accommodate such limited evidence of risk that a person would face persecution on return to their home countries and still allow claims on a reasonably regular basis.

Thomas has also shown that around the same period day-to-day cause litigation contributed to the practical infrastructure of the asylum legal framework, through the development of the first in-country appeal rights for refused asylum seekers at the immigration tribunal, in the

²¹ (n19) 994f

²² (n19) 994h

²³ Joppke (n18) 130

²⁴ Sweeney J, ‘Credibility, proof and refugee law’ (2009) 21 *International Journal of Refugee Law* 700

ECtHR case of *Vilvarajah v UK*,²⁵ discussed in chapter 3.²⁶ The Immigration and Asylum Tribunal's independent asylum decision making in practice removes from the Executive the monopoly on determining whether or not a person should be recognised as a refugee. From a policy perspective this point has become more pressing from the early 2000s onwards with the Tribunal's own pioneering jurisprudential development, 'country guidance' (CG) cases.²⁷ These are asylum determinations which give the Upper Tribunal's general assessment of the relevant human rights conditions in a country of origin and related general categories of person likely to be entitled to international protection.²⁸ They were developed to counter the repeated complaints of both cause litigators and the judiciary that 'the outcomes of decisions on asylum claims differ widely irrespective of their essential similarity'.²⁹ CG cases' findings bind Tribunal judges when determining individual asylum claims unless compelling counter evidence of a change of circumstances is presented. CG cases have thus become important for cause litigators, as by bringing to bear the collective research resources of the NGO sector and the experience of the cause lawyers they provide an opportunity to directly influence how the UK's refugee policy is developed, away from the Executive and through the Tribunal.³⁰

Country guidance is not the only means by which through their work in individual cases, cause litigators have been able to provide regularisation opportunities outside of the intended policies of the Executive. Cause litigators have been able to push at the edges of the Refugee Convention itself to enable it to provide migrants a broader basis through which to secure legal status in the UK. An important area for this work has been the application of the 'membership of a particular social group' (PSG) criterion in Article 1 A(2) of the Refugee

²⁵ *Vilvarajah and Others v The United Kingdom* App no 13163/87 13164/87 13165/87 13447/87 13448/87 (ECtHR, 30 October 1991)

²⁶ Thomas R, 'The Impact of Judicial Review on Asylum' [2003] PL 479 488

²⁷ Blake N, 'Luxembourg, Strasbourg and the national court: the emergence of a country guidance system for refugee and human rights protection' (2013) 25 *International Journal of Refugee Law* 349

²⁸ Recent CG cases include assessments of the risks posed to Christians in China QH (Christians - risk) (China) CG [2014] UKUT 86 (IAC); gay men in India MD (same-sex oriented males: risk) India CG [2014] UKUT 65 (IAC); and failed asylum seekers on return to Sri Lanka GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319.

²⁹ Thomas R, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) 20 *International Journal of Refugee Law* 489 489

³⁰ London Immigration Solicitor 1 Interview, 2nd April 2014, Human Rights NGO Officer Interview, 8th July 2014 and London Immigration Solicitor 2 Interview, 20th December 2015

Convention. This clause has been characterised as ‘the Convention ground with the least clarity’³¹ in comparison to its counterparts such as political opinion or religious belief. As Chaudhry notes,

‘As a result of its ambiguity, the courts have grappled to delimit the boundaries... This has led to an unstructured legal framework in which the courts have been vested with a wide discretion in the application of the Convention.’³²

This level of discretion available to the courts has provided a fertile environment for the non-strategic work of cause litigators, particularly in the period of mass asylum seeking from the late 1990s onwards. The case of *Shah and Islam* [1999],³³ which found that in some circumstances, including the particular circumstances of Pakistan, women could be considered as a social group for the purposes of the Convention, has been hailed as ‘paving the way for a 21st century expansion of PSG in all categories’.³⁴ Kelly has identified the categories of gender, sexuality and family as being particularly key themes around which the PSG criteria has been developed.³⁵

Shah & Islam itself was focussed on gender issues, in circumstances where two married Pakistani women had been abandoned by their husbands and the evidence indicated that they would be at risk of being perceived as having engaged in immoral activity.³⁶ Its reasoning opened up the possibility for claims based on extreme gender discrimination where societal and or legal regimes result in potentially persecutory treatment of women and girls. These have included Afghanistan³⁷ and Sudan.³⁸ It has also facilitated claims that relate to gender-

³¹ United Nations High Commission for Refugees (UNHCR), ‘Guidelines On International Protection: “Membership Of A Particular Social Group” Within The Context Of Article 1A(2) Of The 1951 Convention and/or Its 1967 Protocol Relating To The Status Of Refugees’ (UNHCR, 7 May 2002) <http://www.unhcr.org/publ/PUBL/3d58de2da.pdf> accessed 22 September 2016

³² Chaudhry M, ‘Particular social groups post Fornah’ 2007 21 JIANL 137

³³ *Islam v. SSHD Immigration Appeal Tribunal and Another, Ex Parte Shah*, R v. [1999] UKHL 20

³⁴ Kelly B, ‘What is a ‘particular social group’? A review of the development of the Refugee Convention in England’ 2010 JIANL 9 12

³⁵ Ibid 9

³⁶ (n33) para 2

³⁷ NS (Social Group, Women, Forced marriage) Afghanistan CG [2004] UKIAT 00328

³⁸ FM (FGM) Sudan CG [2007] UKAIT 00060

based abusive practices, such as risk of FGM,³⁹ domestic violence⁴⁰ and trafficking for the purposes of sexual exploitation.⁴¹ Meanwhile, regarding family issues, PSG has been developed to apply to the family members of individuals who themselves are subject to adverse attention. Family members of individuals arrested and disappeared by the Iranian regime,⁴² members of families caught up in blood feuds⁴³ and Chinese families violating the state one-child policy⁴⁴ have all benefited from these rulings. The leading sexuality case *HJ (Iran) & HT (Cameroon) [2010]*,⁴⁵ found in favour of the cause litigators' argument that not only did a person's homosexuality place them in a PSG for the purposes of the Convention but that the executive's longstanding defence against such claims that a person could be expected to return to their country of origin and live 'discretely' was illegitimate.⁴⁶ Instead, cause litigators argued, a person who would live 'discretely' out of fear of persecutory consequences was entitled to refugee protection as they would not be able to 'live freely and openly', which was considered a fundamental right that the Convention was intended to protect.⁴⁷ These particular social group arguments have been described as 'a comprehensive defeat' for the government.⁴⁸

The line of argument in *HJ & HT* has also subsequently been applied to more expansive interpretations of Convention grounds other than PSG. Cases involving religious belief, such as those brought by Ahmadis who face extreme forms of legal and societal discrimination in a number of Islamic countries, have applied the same test of whether or not a person would suppress their religious faith and practice out of fear of persecutory reprisals.⁴⁹ Cause litigators have also been able to apply the 'freely and openly' rubric to questions of political opinion. In the case of *RT Zimbabwe [2012]* it was ruled that a person who did not hold a political opinion (in this case, strong support for the ruling Zanu-PF regime) should not be

³⁹ *SSHD v. K [2006] UKHL 46*

⁴⁰ *KA and Others (domestic violence risk on return) Pakistan CG [2010] UKUT 216 (IAC)*

⁴¹ *AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC)*

⁴² (n39)

⁴³ *EH (blood feuds) Albania CG [2012] UKUT 348 (IAC)*

⁴⁴ *Liu v SSHD [2005] EWCA Civ 249*

⁴⁵ *HJ (Iran) v SSHD (Rev 1) [2010] UKSC 31*

⁴⁶ *Ibid* para 35 (b)

⁴⁷ *Ibid* para 65

⁴⁸ Kelly B, 'Law Lords v New Labour: did the highest court frustrate the Government's attempts to control immigration' (2011) 25 *JIANL* 146 152

⁴⁹ *MN and others (Ahmadis - country conditions - risk) Pakistan CG [2012] UKUT 389 (IAC)*

expected to fabricate an opinion in order to avoid persecution; essentially that the person should be able to live ‘freely and openly’ in their political neutrality.⁵⁰ More recently still, the case of *MSM (Somalia) [2016]* found that an investigative journalist (a dangerous occupation in Somalia) could not be expected to change his profession in order to avoid persecution.⁵¹

None of these groups would have been awarded a route to leave to remain through mainstream policy channels. These cause litigation efforts effectively expanded the legal framework of regularisation presented by a refugee status determination system that the executive had chosen to implement, and took them beyond what executive policy would otherwise have allowed.

iii) Creating the Legal Framework of Article 8 Regularisation

“So, what sort of leave have you got here? Well none, so the starting point is you've got no entitlements. We then cut a human rights swathe through that to look at what everyone is entitled to.”⁵²

As was noted in chapter 2, the fact that the current legal framework available to cause litigators in the UK includes human rights such as Article 8 has had far reaching consequences for the migrants’ rights movement. Article 8 ECHR has been used by cause litigators on an individual case-basis to ‘cut a human rights swathe’ through a number of barriers to social entitlements for migrants, including access to education,⁵³ healthcare⁵⁴ and housing.⁵⁵ However, Article 8’s primary role since the introduction of the Human Rights Act 1998 (HRA) has been as a means of status regularisation. In contrast to the previous section, where cause litigation in refugee status determination was discussed as expanding and developing a legal framework of regularisation the executive put in place, this section will discuss how Article 8

⁵⁰ *RT (Zimbabwe) & Ors v SSHD [2012] UKSC 38*

⁵¹ *SSHD v MSM (Somalia) & Anor [2016] EWCA Civ 715*

⁵² Immigration NGO Legal Director Interview, 12th September 2013

⁵³ *R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57*

⁵⁴ *Akhalu (health claim: ECHR Article 8) Nigeria [2013] UKUT 400 (IAC)*

⁵⁵ *Birmingham City Council v Clue [2010] EWCA Civ 460*

ECHR has been used as a tool that effectively, although without being strategically intended, created an independent legal framework of regularisation.

Article 8 proved vital to cause litigators pursuing the individual interests of their clients partly because in most circumstances the other rights protected by the European Convention were not available to them as a result of the ‘foreign cases’ test. The test was extensively discussed in the House of Lords case of *Ullah v SSHD [2004]*⁵⁶, where the question arose of,

‘Whether any article of the ECHR other than Article 3 could be engaged in relation to a removal of an individual from the UK where the anticipated treatment in the receiving state will be in breach of the requirements of the Convention, but such treatment does not meet the minimum requirements of article 3 of the Convention.’⁵⁷

The test was summarised by the House of Lords as meaning that only a real risk of a ‘flagrant breach of the very essence of the right’ in the receiving state would cause a Convention state to be in breach of its duties under the Convention.⁵⁸ *Ullah* as a case also developed important principles regarding the correct interpretation of the s.2 HRA duty on courts to take into account ‘Strasbourg case law that will be returned to in chapter 6. A migrant, though, is able to develop a family life or a settled private life in their host society and thus in many circumstances the ‘foreign cases’ test did not apply. As was mentioned in chapter 3, since *Abdulaziz, Cabales and Balkandali* in 1985 the ECtHR recognised that a state’s exercising of its otherwise lawful immigration control policy raises the prospect of a migrants’ Article 8 rights being violated directly by the host state.’⁵⁹

By the turn of the millennium and the dawn of the HRA regime the ECtHR had begun to loosen what Dembour has shown to be its ‘relative closure... to the predicament of migrants’.⁶⁰ In *Bensaid v UK* 2001 and then *Slivenko et al v Latvia* 2003, the Strasbourg Court began the

⁵⁶ R (Ullah) v Special Adjudicator [2004] UKHL 26

⁵⁷ Ibid, para 1

⁵⁸ Ibid para 50

⁵⁹ *Abdulaziz, Cabales And Balkandali v United Kingdom* - 9214/80; 9473/81; 9474/81 [1985] ECHR 7

⁶⁰ Dembour M-B, *When Humans Become Migrants: Study Of The European Court Of Human Rights With An Inter-American Counterpoint* (OUP 2015) 97

process of considering situations in which not only family life, but private life and ‘the network of personal, social and economic relations that make up the private life of every human being’⁶¹ were in issue. As a result, in principle at least, irregular living in a Convention state could be regularised simply by virtue of the inevitable consequences of the passage of time. In a further departure again from the Court’s traditional reluctance to impede states’ immigration control powers, the cases of *Boultif v Switzerland* (2001), *Uner v the Netherlands* (2006) and *Maslov v Austria* (2008) set the terms under which the Court would countenance the prevention of the deportation of a foreign national offender on Article 8 grounds.⁶²

These cases empowered the courts to act as effective arbiters of regularisation, by calling on them to make a judgment regarding the proportionality of an individual’s removal from a country. In the interests of consistency, the Court developed its own framework of factors to decide whether a proposed deportation ‘was necessary in a democratic society and proportionate to the legitimate aim pursued.’⁶³ These included, for example, consideration of ‘the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled’⁶⁴ and stipulations that ‘for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion.’⁶⁵ In producing these criteria, though, it effectively formed the criteria for regularisation outside of, and developed independently of, Executive policy choices; what Thym has referred to as ‘general criteria guiding the application of the European Convention to immigration cases’.⁶⁶

These developments at Strasbourg, and similar development relating to other non-absolute rights, had a significant effect in UK domestic law and procedure, through s.2 of the HRA’s requirement that rights be interpreted by taking into account Strasbourg case law. As Kavanagh has noted, ‘Some commentators have described the acceptance into UK law of the

⁶¹ *Slivenko v. Latvia* App no 48321/99 (ECtHR, 9 October 2003)

⁶² *Dembour*, M-B, (n60) 181 -185

⁶³ *Uner v Netherlands* App no 46410/99 (ECtHR, 18 October 2006) paras 57-60

⁶⁴ *Ibid* para 58

⁶⁵ *Maslov v Austria* App no 1638/03 (ECtHR, 23 June 2008) para 75 For further discussion of the effect of these cases, *Dembour*, (n60) 81-185

⁶⁶ Thym D, ‘Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay?’ (2008) 57 ICLQ 87 87

doctrine of proportionality as one of the most profound changes brought about by the HRA.⁶⁷ In *Razgar* [2004], the House of Lords set out its own Article 8 framework, by posing five questions regarding whether the removal from the UK of a migrant would breach Article 8, the most important and contentious of which was the last; whether the interference with the Article 8 rights of a migrant caused by their removal from the country would be proportionate to the legitimate public end sought to be achieved.⁶⁸ However, Lord Bingham's reference in *Razgar* to his expectation that only 'a small minority of exceptional cases' would succeed on Article 8 led to further dispute. As Kelly explains, 'the concept of 'exceptionality'... gained currency as the *ratio* of the *Razgar* judgment, rather than as a prediction of success rates.'⁶⁹ In an effort to curtail the influence of Article 8, the Executive argued that the immigration rules could be taken to be the measure of what constituted proportionality in all but exceptional cases and that 'an immigration judge was confined to considering whether the government's decision was within the lawful range of responses to the facts'⁷⁰ Thus, Article 8 would have no role independent of government policy other than to introduce the equivalent of a traditional judicial review. As one cause litigator summarised it, 'the Secretary of State decides and everything else is *Wednesbury*.'⁷¹

These issues were finally resolved in the case of *Huang* [2007] where the cause litigators were again led by Nicholas Blake, who will be remembered from the DFT litigation in chapter 4.⁷² In *Huang* it was decided that the proportionality assessment in Article 8 required a framework of testing whether the impugned measure was derived from a legitimate objective, was rationally connected to that objective, whether the measure was no more than necessary to achieve the legitimate objective in question, and, most contentiously, whether it 'struck a fair balance between the rights of the individual and the interests of the community.'⁷³ This question of the court reaching an independent view on what constituted 'striking a fair

⁶⁷ Kavanagh A, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 8

⁶⁸ *R (Razgar) v. SSHD* [2004] UKHL 27

⁶⁹ Kelly (n48) 156

⁷⁰ Ockelton M, 'Article 8 ECHR, the UK and Strasbourg: Compliance, Cooperation or Clash?' in Ziegler K, Wicks E and Hodson L, *The UK and European Human Rights: A Strained Relationship?* (Hart, 2015) 216, also *Edore v SSHD* [2003] EWCA Civ 716

⁷¹ Immigration Barrister Interview, 20th December 2015

⁷² On *Huang's* impact on immigration law, Kelly (n48); Wray H, 'Greater than the sum of their parts: UK Supreme Court decisions on family migration' [2013] PL 838 840; Farbey J, 'Standing in the Home Secretary's shoes? The function of the Tribunal in human rights cases' (2013) 27 JIANL 331

⁷³ *Huang & Ors v SSHD* [2005] EWCA Civ 105 para 19

balance’ became the crux of the controversy that was to follow. Controversial because, as Laws LJ subsequently stated, there was, ‘real difficulty in distinguishing this from a political question to be decided by the elected arm of government’.⁷⁴ In effect at immigration tribunal level it produced an independent merits appeal under Article 8,⁷⁵ but through judicial decision making rather than primary legislation.

Along with *Huang* [2007], the cases of *EB Kosovo* [2008] and *Chikwamba* [2008] pursued this direction with a clear statement of the tribunals and courts being capable and appropriate decision makers able to come to their own independent view, distinct from the Executive’s immigration service, on immigration applications invoking Article 8. As Farbey has put it, ‘The Tribunal takes decisions for itself as part of the overall immigration decision-making process.’⁷⁶ In *Huang* the House of Lords stated that the task of judges in Article 8 cases,

“is not a secondary, reviewing, function... The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it.”⁷⁷

In *EB Kosovo*, a case brought through the Immigration Advisory Service, Lord Bingham called for judges to engage in a ‘broad and informed judgment... not constrained by a series of prescriptive rules’.⁷⁸ *Chikwamba*, which followed shortly afterwards, put this principled power into practice. As part of their administration of immigration control, the immigration service operated a long standing policy of requiring migrants with family life cases to leave the country and apply under the normal visa process to come back in again in order to regularise their status. Yet in *Chikwamba* leading cause litigation counsel Mike Fordham QC, who would also later reappear in this account having become a part-time High Court Judge, instructed by Birmingham migrants’ rights solicitors The Rights Partnership,⁷⁹ argued that such a policy was disproportionate.⁸⁰ The House of Lords decision that it was likely to be

⁷⁴ *Miranda v SSHD & Ors* [2014] EWHC 255 (Admin) para 40

⁷⁵ (n73), para 13

⁷⁶ Farbey (n70) 335

⁷⁷ (n73) Para 11

⁷⁸ *EB (Kosovo) v SSHD* [2008] UKHL 41 para 21

⁷⁹ TRP Solicitors, ‘TRP Solicitors’ (TRP Solicitors) <http://www.trpsolicitors.co.uk/> accessed 22 September 2016

⁸⁰ *Chikwamba v SSHD* [2008] UKHL 40.

disproportionate in almost all family cases was reached notwithstanding the state's accepted interest in maintaining an orderly and effective immigration control regime.⁸¹ While this may appear to be a small and technical change, it can be seen as the final element in which the Courts, as a result of the arguments of cause litigators, effectively created their own parallel regularisation system.⁸²

As a result of these cause litigation cases and the judicial approach that had been taken to them, the courts now had a series of unusual powers. These were the power to decide on family and individual migration cases independent from government policy and to create frameworks and criteria for assessing such cases based on a notion of proportionality. In this way the Article 8 framework had been developed independently of government immigration policy and effectively imposed on Home Office practice through cause litigation. What is more, the development of immigration policy by government now had to take account of Article 8 regularisation. By virtue of section 6 of the HRA, the immigration service as a public body had a duty of its own to process applications raising Article 8 and apply Article 8 regularisation case law in its decision making. Up until the start of the controversy that will be discussed below, Article 8 claims were formally processed by the Home Office as an 'Outside of the Rules' application, emphasising that Article 8 was not catered for directly by executive policy. More importantly still, at the higher level of migration policy development, the notion of irregular migrants accruing Article 8 rights to regularisation over time became a factor in the design of wider immigration and asylum processes and policy.⁸³

Thus cause litigators, through the opportunities presented by the weight of their daily caseload and the ability to marshal the resources of legal expertise and NGO support to identify and promote key issues, had brought about systemic change in the UK's immigration legal framework. The senior judiciary of the time had taken an approach to these cases which regarded them as falling well within its understanding of its role in the post-HRA environment.

⁸¹ Ibid para 4

⁸² For rival assessments of these developments, Wray, (n72) 83 and Campbell D, 'Catgate and the challenge to Parliamentary Sovereignty in Immigration Law', [2015] PL 426

⁸³ e.g. 'The legacy system'. Sweeney J, 'The human rights of failed asylum seekers in the United Kingdom' [2008] PL 277; and Hintjens H, 'Nowhere to run: Iraqi asylum seekers in the UK' (2012) 54 Race & Class 88

This in turn introduced a system of regularisation parallel to the Executive's intended immigration control policy.

iv) Why Regularisation? The intersection of the legal framework and resources

To understand day-to-day cause litigation's role within the UK's immigration policy dynamic, it is important to understand why it has this prominent role in developing the legal framework of regularisation for irregular and vulnerable migrants. As was noted earlier in this chapter, the reasons involve an overlapping of the cause litigators' ethos and political commitments, the developing nature of the legal framework that they operate within and the structural influence of funding on the types of work that is done.

Migrants' rights cause lawyers' motivations centre around the prevention of human rights violations against migrants and advocacy on behalf of vulnerable migrants, or migrants who would otherwise be ensnared in the legal process but excluded from it. Clearly, not all migrants would fall within these categories, and certain classes of migrant are more vulnerable to human rights violations from both the state and private actors than others. A long term priority for cause lawyers has been to represent a client base that cannot afford mainstream private representation.⁸⁴ As was discussed in chapter 3, this has meant that in practice most day-to-day cause litigation has been funded through legal aid, however financial eligibility requirements for such aid are strict, meaning that in practice it is limited to those either on no, or very low, wages.⁸⁵ As state immigration law and executive policy has developed to be based around the economic value of the migrants' concerned, it has become increasingly exclusionary of cause lawyers' client base. As a result, the limitations on the financial resources available to cause lawyers have worked in conflict with the legal framework of the immigration rules that they work within. Put simply, if a client is eligible for legal aid they are likely to be ineligible for most of the mainstream immigration rules

⁸⁴ Webber (n20) 6

⁸⁵ Legal Aid Agency, 'Controlled Work: Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2015 v1' (Legal Aid Agency, April 2015) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420970/laa-determine-controlled-work-mediation.pdf accessed 22 September 2016

categories.⁸⁶ This results in requiring an ever more 'creative' approach to securing lawful status for their clients that does not rely on these mainstream visa categories.

Moreover, the desire to prevent violations of migrants' human rights has in its own right led to the regularisation of migrants with no lawful status or those facing having it stripped from them becoming a top priority for cause litigators. This is because irregular status carries with it the most pronounced risks of rights violations. Benhabib has described how, 'the loss of citizenship rights... was politically tantamount to the loss of human rights altogether.'⁸⁷ Lawful immigration status carries with it various degrees of approximation of the citizenship rights Benhabib is discussing, with permanent settlement, for example, carrying with it greater degrees of rights protection than a time-limited or tied status which continue to produce vulnerabilities to exploitation and abuse.⁸⁸ Irregular status represents the gravest risk to migrants' rights. The increasing encroachment of 'internal border controls' seeks to exclude irregular migrants from basic needs like housing and healthcare.⁸⁹ Meanwhile, the threat of removal from the country carries with it the related elements of state force, such as arrest and immigration detention, that are frequently exercised in unlawful and rights violating ways.⁹⁰ At the same time, these state policies and practices create powerful tools for exploitation by predatory elements of a host society. The political and moral imperative for cause lawyers is, therefore, to help prevent these risks from occurring. However, this has led to cause lawyers being compelled to push at the edges of the law in their active pursuit and expansion of regularisation opportunities as, by definition, irregular migrants' tend to be excluded from mainstream immigration policy and status criteria.

This combination of factors have together led to the particularly significant role of cause lawyering in developing regularisation opportunities that this chapter focusses on. However,

⁸⁶ The maximum monthly disposable income for a legal aid claimant in an immigration/asylum matter is £733 per month, or £8796 per annum. In comparison, the minimum income threshold for a spousal visa is £18,700 per annum. Legal Aid Agency, 'Controlled Work: Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2015 v1' (Legal Aid Agency, April 2015) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420970/laa-determine-controlled-work-mediation.pdf accessed 22 September 2016.

⁸⁷ Benhabib S, *Rights of Others* (CUP 2004) 50

⁸⁸ Mantouvalou V, "'Am I Free Now?' Overseas Domestic Workers in Slavery' (2015) 42 *Journal of Law and Society* 329

⁸⁹ Webber (n20) 149-162

⁹⁰ Costello C, 'Immigration detention: the grounds beneath our feet' (2015) *Current Legal Problems* 1

in doing so, day-to-day cause litigation has produced a permanent tension with the control imperative within broader immigration policy making. The regularisation of irregular and vulnerable migrants outside of executive policy intentions both impacts on the administrative delivery of control by the immigration service and undermines the executive's capacity to publicly demonstrate control.

The Regularisation Frameworks Meet the Control Imperative

Administrative justice alongside human rights law has been the two key constraints on the executive in terms of how it would like to develop immigration policy in a much harsher way.⁹¹

Like strategic litigation, day-to-day cause litigation is engaged in in isolation, without the political cover provided by a significant political constituency or mass movement activism. As was discussed in chapter 2, this constitutes a significant vulnerability for the changes it has brought about and this section will demonstrate that despite being developed judicially, they have not been able to circumnavigate politics.

This section will discuss the executive's reactions to the developments in both asylum and Article 8 regularisation. In doing so it will primarily focus on Article 8. As has already been discussed, asylum has been one of the major issues in debates around immigration policy and migrants' rights for many years and human rights debates in the UK more generally. As a result, it has also received an enormous amount of scholarly attention and analysis from a domestic, comparative and theoretical perspective.⁹² In contrast, though, the role played by Article 8 both in the UK's immigration and migrants' rights debates has been relatively understudied.⁹³ As such, the executive's rhetorical, policy and legislative responses to the asylum

⁹¹ Funding Officer Interview, 15th April 2014

⁹² Gibney M, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (CUP 2008) Lawrance B & Ruffer G, *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (Cambridge University Press 2014); Bohmer C & Shuman A, *Rejecting Refugees: Political Asylum in The 21st Century* (Routledge 2008), Stevens D, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004) Friedman E & Klein R, *Reluctant Refuge: The Story Of Asylum In Britain* (British Library Publishing Division 2008)

⁹³ For some examples, Kelly (n48); Wray (n72); Farbey (n72); Thym (n66)

crisis of the late 1990s and early 2000s, and cause litigation's role within it, will be briefly outlined first before a more detailed analysis of political developments around Article 8 is set out.

i) Asylum

By the turn of the millennium the executive's imposition of 'carrier sanctions' and visa restrictions were proving insufficient to stem the arrival of large numbers of asylum seekers. The UK's immigration debate was heavily focussed around asylum and the executive's failures in demonstrating control. The developments in refugee protections won through non-strategic cause litigation, including the in-country appeal rights system and the low standard of proof that cases were assessed by, were identified as one of the main obstacles to the control agenda. As Tony Blair claimed in his autobiography,

The combination of the courts, with their liberal instinct; the European Convention on Human Rights, with its absolutist attitude to the prospect of returning someone to an unsafe community; and the UN Convention of Refugees, *[sic]* with its context firmly that of 1930s Germany, *[sic]* meant that, in practice, once someone got into Britain, and claimed asylum, it was the Devil's own job to return them.⁹⁴

The government response to this perceived problem operated at both the rhetorical and the legislative levels. As was discussed in chapter 4, Labour government ministers repeatedly denounced judges,⁹⁵ seeking to delegitimise decisions that were seen as undermining government policy and go so far as to claim that as a result of the judiciary's asylum decisions 'democracy itself is under threat'.⁹⁶ As Thomas commented at the time, 'The Home Office could not have antagonised the judiciary more if it had tried',⁹⁷ while as Kelly has later

⁹⁴ Blair T, *A Journey* (Random House 2010) 205

⁹⁵ Blunkett D, *The Blunkett Tapes: My life in the bear pit* (Bloomsbury 2006) 607

⁹⁶ Daily Mail, Judges can threaten democracy - Blunkett (2001), <http://www.dailymail.co.uk/news/article-164666/Judges-threaten-democracy--Blunkett.html>, accessed 22 September 2016

⁹⁷ Joshua Rozenberg, 'Judges prepare for battle with Blunkett' (The Telegraph, London, 27 Feb 2003) <http://www.telegraph.co.uk/news/uknews/1423210/Judges-prepare-for-battle-with-Blunkett.html> accessed 22 September 2016

claimed, 'At times, the government willingly fostered the suggestion that its attempts at [immigration] reform were frustrated by the courts.'⁹⁸

In tandem with the fostering of this belief, the New Labour administration introduced a series of measures designed to curtail the courts' and cause litigators' ability to influence this branch of immigration policy. The DFT, discussed at length in Chapter 4, can be understood as one aspect of this approach. A further structural change was the reform of the Tribunal system made under s.26 of the Asylum and Immigration (Treatment of Claimants) Act 2004 (AI(TCA)), from a two tier Immigration Appellate Authority (IAA) made up of Immigration Adjudicators and the Immigration Appeal Tribunal (IAT), to a single-tier Asylum and Immigration Tribunal. This was intended to reduce the number of appeal possibilities and thus speed up the decision-making and removal process for failed claimants. This structure was, however, again reformed in s.3 of the Tribunal, Courts and Enforcement Act 2007 to reintroduce a two tier system of First Tier and Upper tribunals.

These structural measures should be seen alongside interpretative measures such as the s.94 powers in the 2002 Act to declare cases as 'clearly unfounded' and thus remove in-country appeal rights⁹⁹ and s.8 of AI(TCA) which mandated that certain behaviours common amongst asylum seekers (such as not claiming asylum at a port of entry) should be regarded as damaging to their credibility.¹⁰⁰ Most aggressively of all, during the passage of the 2004 Act the government seriously canvassed the possibility of removing all immigration cases from judicial review proceedings entirely; a proposal that was ultimately not introduced following outcry in the House of Lords.¹⁰¹ When faced with significant pressure to demonstrate control, then, one of the New Labour government's key strategies was to target the frameworks that facilitated cause litigation to function.

ii) Article 8

⁹⁸ Kelly (n48) 147

⁹⁹ Thomas R 'Asylum appeals overhauled again' [2003] PL 260

¹⁰⁰ Ensor J, Shah A & Grillo M, 'Simple myths and complex realities - seeking truth in the face of section 8' (2006) 20 JIANL 95

¹⁰¹ Thomas R, 'After the ouster: review and reconsideration in a single tier tribunal' [2006] PL 674 674

While the development of Article 8 through non-strategic cause litigation was certainly not welcomed by the New Labour administration in its early phases, neither did it immediately result in sustained public controversy. This would change, however, following the ‘failed deportation scandal’ of 2006 and the Labour government’s response to it.¹⁰² This scandal arose when in April 2006 the Home Office revealed that between 1999 and March 2006 over 1000 foreign national offenders had been released from prison at the end of their sentences without being considered for deportation. This revelation prompted the resignation of the then Home Secretary, Charles Clarke and his replacement with John Reid who upon taking office pronounced that the UK’s immigration service was ‘not fit for purpose’.¹⁰³

Nothing seemed to demonstrate the lack of control quite as powerfully as the notion of foreign criminals remaining in the UK following their sentence. In the search for an ever illusive sense of ‘control’, as Dembour says, ‘the deportation of non-citizens convicted of crime has now become the expected norm in political debate, with the main parties vying for the speed at which and the quantities in which this can be achieved.’¹⁰⁴ To this end the government’s legislative response to this crisis was to introduce the UK Borders Act of 2007. It introduced ‘automatic’ deportation for all non-EEA nationals who were sentenced to one year or more in prison.¹⁰⁵ However, the ‘automatic deportation’ provisions of s.32 of the 2007 Act were modified by s.33, which introduced exceptions. While some were technical, relating to questions of age at the time of conviction or extradition matters, the two most contentious were where deportation would breach a person's Convention rights, or the UK's obligations under the Refugee Convention.

In practice, as a result of the Refugee Convention’s exclusion clauses for serious crime¹⁰⁶ and the limited number of migrants’ eligible to make out a substantive risk of Article 3 ECHR mistreatment in their home countries, the only viable appeal option was often Article 8. Thus, as a result of government legislation, Article 8 became the main obstacle to government policy over a highly controversial area; the deportation of foreign national offenders. Figures

¹⁰² Shah R ‘The FNP Saga’ (2007) 21 JIANL 27

¹⁰³ Kelly (n48) 157

¹⁰⁴ Dembour, (n60) 174

¹⁰⁵ UK Borders Act 2007, s.32

¹⁰⁶ UN Refugee Convention Article 1(f)

quoted in Parliament via a freedom of information request showed that by 2012, Article 8 accounted for 89% of all successful FNO appeals against deportation.¹⁰⁷ As one interviewee put it, ““You ended up with a law that said basically we’re going to deport everybody unless it breaches Article 8. And then you’re surprised that every case gets decided on Article 8 grounds?””¹⁰⁸ This brought cause litigators’ and the judiciary’s role as external impediments to the Executive’s control efforts to the forefront of the immigration debate. Given the strength of feeling around the issues and the increasingly intense imperative to demonstrate control felt by the executive, this placed Article 8 regularisation in a precarious position.

As was shown in the earlier section of this chapter, the executive’s attempts to limit the application of Article 8 to dealing with aberrant decisions and extraordinary factual circumstances, by insisting in the courts that only those cases that were ‘exceptional’ should succeed, largely failed. Rather than ‘exceptionality’ *EB (Kosovo)* [2008] confirmed that the basis on which Article 8 cases should be dealt with was the cause litigators’ formulation of the ‘reasonableness’ of any proposed removal.¹⁰⁹ This much lower test of ‘reasonableness’ was later reiterated even more expressly by Sedley LJ in the Court of Appeal in *VW Uganda* [2009] which rejected the necessity of showing ‘insurmountable obstacles’ to any return.¹¹⁰ When it came to power, though, the 2010 Coalition government took on Article 8 more directly. In doing so it faced two key constraints. The first was the Liberal Democrats’ commitment to the ECHR and retention of the HRA.¹¹¹ Without repeal of the HRA, s. 2 ensured that the jurisprudence of the Strasbourg Court on Article 8 would remain a key issue in the UK’s domestic immigration proceedings. The second was that there was no lawful basis for the UK to derogate from Article 8 ECHR solely in immigration cases.¹¹² Indeed, at the height of the Article 8 controversy that was to come, a serious move was made by Conservative backbenchers to withdraw Article 8 from all immigration cases. This step was rebutted by the

¹⁰⁷ Raab D. HC Deb 22 Oct 2013, Vol 569, Col 244

¹⁰⁸ Immigration and Welfare Barrister Interview, 9th April 2014

¹⁰⁹ (n78) para 18

¹¹⁰ *VW (Uganda) v SSHD* [2009] EWCA Civ 5 para 19

¹¹¹ Liberal Democrat Voice, ‘Lamb and Farron launch Liberal Democrat Campaign to save the Human Rights Act’ (25th May 2015) <http://www.libdemvoice.org/lamb-and-farron-launch-liberal-democrat-campaign-to-save-the-human-rights-act-46094.html> accessed 20 September 2016

¹¹² Re law of derogations, O’Boyle M, ‘Emergency government and derogation under the ECHR’ (2016) 4 EHRLR 331

Home Secretary solely on the grounds of its illegality under international law, despite her expressing strong support for the principle behind the proposal.¹¹³

Reforms to Article 8 as it was applied domestically in the UK did nonetheless form a key part of the Coalition agenda to create a 'hostile environment' for irregular migrants.¹¹⁴ In pursuing this agenda the Coalition took a similar twin approach as that which New Labour had used when responding to the asylum crisis of the early 2000s. On one hand, substantial changes to the legal framework around how Article 8 was to be applied by Tribunals and courts were introduced, while on the other the government waged a high profile public campaign to denounce judges and lawyers.

This started with changes to the immigration rules. These amendments, referred to cause litigators as the 'New Rules',¹¹⁵ in essence sought to end the process by which immigration judges assessed the proportionality of a foreign national's removal on a case-by-case basis. Instead, Theresa May stated that 'there will generally be no need for a separate assessment of Article 8 beyond the requirements set out in the "immigration rules". Compliance with the "immigration rules" will mean compliance with Article 8, other than in truly exceptional circumstances'¹¹⁶ and 'the way we are approaching it...means that the exceptional circumstances will be far more limited than they have been up to now.'¹¹⁷ The rules themselves also attempted to reintroduce the insurmountable obstacles test that had been rejected in *EB Kosovo* and *VW Uganda*.¹¹⁸ In combination, then, the New Rules were intended to reverse the most significant developments in the Article 8 case law and revert to a state by which practical government policy on immigration, as expressed by the immigration rules, would be presumed to be axiomatic with what would be proportional under Article 8.

¹¹³ Dominic Raab MP & Rt Hon Theresa May MP HC Deb 30 Jan 2014, Volume 574, Col 1062 – 1102

¹¹⁴ Schatzberger E, 'The Immigration Act 2014: 'Not on the list you're not coming in; landlords forced to discriminate'' (2015) 79 *The Conveyancer and Property Lawyer* 395

¹¹⁵ Colin Yeo, 'Controversial Human Rights Rules Rejected' (Freemovement, 3 October 2012) <http://www.freemovement.org.uk/controversial-new-immigration-rules-rejected/> Accessed 13th August 2014

¹¹⁶ May, Theresa, HC Deb 19 June 2012, Vol 546, Col 762

¹¹⁷ Ibid Col 768

¹¹⁸ Immigration Rules, Appendix FM at [Ex.1. (b)]; 276ADE (1) (iii); 276ADE (1) (iv)

However, these moves quickly devolved into a dispute about the actual legal force of immigration rules within the UK's immigration system. The House of Lords in *Odelola* [2009] had previously stated that

‘The status of the immigration rules is rather unusual. They are not subordinate legislation but detailed statements by a minister of the Crown as to how the Crown proposes to exercise its executive power to control immigration.’¹¹⁹

As such, immigration rules are not legislation, but ‘executive statements of policy’ and, as was argued in *Izuazu* [2013], one of the first major cause litigation cases on the issue, ‘policy is subject to law, not *vice versa*’.¹²⁰ The crux of this argument was that under Sections 6 and 2 of the Human Rights Act, the immigration service and Tribunal had to interpret Article 8 in light of the Strasbourg case law, as well as being bound by the normal rules of precedent in relation to the domestic case law on Article 8 issues. Immigration rules therefore, regardless of their political importance, couldn’t override precedent and primary legislation. As the now Blake J, who will be remembered from his role in *Huang*, above, and the DFT litigation discussed in chapter 4 and who heard *Izuazu*, commented on *Huang* and *EB Kosovo*, ‘Whilst it is open to Parliament to change the law by primary legislation, unless and until it does so these decisions are binding on the Upper Tribunal and will be followed by it.’¹²¹

In the first wave of major cases seeking to define the courts’ interpretation of the New Rules, the Upper Tribunal and the Court of Appeal essentially accepted these arguments, stating that the New Rules provided ‘a complete code’ for Article 8 but only in so far as the ‘exceptional circumstances’ get-out clause within them enabled an assessment of the proportionality of a person’s removal in light of the relevant case law.¹²² This decision was made by the Court of Appeal in *MF Nigeria* [2013], a case brought by the private cause litigation firm Wilsons LLP and argued by Raza Hussain QC, who had previously been junior counsel in *Huang*. Importantly, though, the judges in *MF Nigeria* referred to the High Court

¹¹⁹ *Odelola v SSHD* [2009] UKHL 25 para 6

¹²⁰ *Izuazu* (Article 8 – new rules) *Nigeria* [2013] UKUT 45 (IAC) Appendix B [15]

¹²¹ *Ibid* para 59

¹²² *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 paras 44-45. For more discussion of *MF Nigeria*, Seddon D, ‘Case Comment: *MF (Nigeria) v Secretary of State for the Home Department*’ (2013) 27 JIANL 350

decision of Sales J in *Nagre*, made around the same period, which raised what would turn out to be the most important aspect of the developing Article 8 jurisprudence, the question of an ‘exceptionality test’. The Court of Appeal approved Sales J’s summary of the Strasbourg case law on this point, albeit following it with the assertion that no such test was being applied other than that for a case to succeed outside of the circumstances considered by the rules ‘something very compelling (which would be “exceptional”) is required’.¹²³ As such the dispute over whether or not proportionality should be assessed by immigration decision makers inside the rules or outside was ‘one of form rather than substance’ as ‘either way the result should be the same.’¹²⁴ This decision was greeted as a success by the cause litigators involved, as it seemed they had essentially stopped the attempts to undermine the protections for Article 8 that they had developed through the case law up to this point.¹²⁵ However, as will be seen below, the decision that the New Rules were in and of themselves lawful and therefore continued to apply would prove crucial as the case law developed further.

This policy backlash to Article 8 was accompanied by a simultaneous rhetorical backlash from the government. In the build-up to the introduction of the New Rules this included making serious and often spurious claims about the damaging and dangerous impact of Article 8 as it was then operating. At the Conservative Party Conference of 2011 Theresa May announced that her focus would be on ‘foreign nationals who, in all sanity, should have no right to be here’.¹²⁶ In particular, May targeted what she described as ‘the misinterpretation of Article 8 of the ECHR... as an almost absolute right’ by the UK’s courts, despite the UK courts doing no such thing. Elements of the press supportive of the hostile environment agenda began publishing attacks on named immigration judges, including publishing paparazzi-style photographs of judges leaving their homes.¹²⁷ The introduction of the rules were preceded

¹²³ (n122) para 42

¹²⁴ (n122) para 45

¹²⁵ Omar Shibli, ‘Form not substance’: Deport rules do not change the law (Free movement, 22 October 2013) <https://www.freemovement.org.uk/form-not-substance-deport-rules-do-not-change-the-law/> accessed 22 September 2016

¹²⁶ May, Theresa, (2011), “Speech to the Conservative Party Conference 2011”, Politics.co.uk, <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full>, Accessed 22 September 2016

¹²⁷ David Barrett, and Josie Ensor, ‘Judges who allow foreign criminals to stay in Britain’ (The Telegraph, London, 16 Jun 2012) <http://www.telegraph.co.uk/news/uknews/immigration/9335689/Judges-who-allow-foreign-criminals-to-stay-in-Britain.html> accessed 22 September 2016

by the staging of a parliamentary debate over the introduction of the changes to the rules that was not required by parliamentary procedure,¹²⁸ expressly to 'send a message' to the judiciary.¹²⁹ The subsequent push back from the courts was then followed by aggressively worded media briefings denouncing judges and cause lawyers for choosing to 'ignore Parliament' and 'drive a coach and horses through our immigration system.'¹³⁰ When these moves did not produce the immediately desired response, the Executive redoubled its denunciations of judicial meddling in democratic border control, accusing judges and cause litigators of 'subverting democracy'¹³¹ and announcing that legislative restrictions to Article 8 were necessary in order to stop the judges and cause litigators from causing "more victims of violent crimes committed by foreigners in this country".¹³²

The executive proceeded to introduce a series of Article 8 related clauses through the 2014 Immigration Act. These attempted to set out the government's position on what the 'public interest' in criminal deportation¹³³ and normal Article 8 regularisation cases¹³⁴ would be. This was an attempt to weight the balancing act that immigration decision makers engage in when assessing proportionality under Article 8 in favour of removal. Thus the Act included stipulations as to what Courts and Tribunals' must 'have regard to'¹³⁵ when dealing with an Article 8 case.¹³⁶ It also stated that little weight should be given to a private or family life with a partner established while a person was in the UK unlawfully,¹³⁷ and that little weight should be given to any private life established during a time when a person's immigration status in the UK was "precarious".¹³⁸ In relation to cases of criminal deportation, these restrictions also applied but additional measures were introduced which heavily favoured deportation.¹³⁹ The

¹²⁸ Changes to the Immigration Rules are normally subject to the negative resolution procedure.

¹²⁹ Theresa May, HC Deb 19 June 2012, Vol 546, Cols 778

¹³⁰ May (n126)

¹³¹ Press Association, 'Theresa May attacks judges over deportation rules' The Guardian (London, 17 February 2013) <http://www.theguardian.com/politics/2013/feb/17/theresa-may-attacks-judges-deportation> accessed 22nd May 2016

¹³² Ibid

¹³³ Immigration Act 2014 s. 117(B) & 117(C)

¹³⁴ Immigration Act 2014 s.117(B)

¹³⁵ Immigration Act 2014, s. 117(a)(2)

¹³⁶ This included whether or not a person seeking to enter or remain in the UK could speak English and whether or not such a person was be 'financially independent'.

¹³⁷ Immigration Act 2014 s.117B(4)

¹³⁸ Immigration Act 2014 s.117B(5)

¹³⁹ immigration act 2014 s.117C (6)

Parliamentary Joint Committee on Human Rights commented at the time that these steps were "a significant, and possibly unprecedented trespass by the legislature into the judicial function".¹⁴⁰ However the Labour Party, at the time the official Opposition, supported the moves the government proposed to make, and even attempted to hint at support for the backbench amendment mentioned above.¹⁴¹ Thus, ample Parliamentary support was available for the retrenchment to take place.

The changes to the Immigration Rules and the provisions of the 2014 Act were also met with alarm by cause litigators.¹⁴² They were couched in terms of setting out the government's position on what the 'public interest' element of the balancing exercise required, but in effect sought to monopolise the determination of what the public interest was and the relative weight that should be attached to it. Moreover, they spilled over into mandating how judges should exercise their deliberative functions, by stipulating how much weight judges should attach to certain other issues.¹⁴³ This ran contrary to Lord Bingham's assertion in *Huang* that it would be wrong to afford 'deference' to the Secretary of State on these matters except in so far as she was able to access special sources of knowledge and advice, as they were ultimately the 'performance of the ordinary judicial task of weighing up the competing considerations on each side.'¹⁴⁴

Thus, once again, faced with significant political demand for control, the tools of cause litigation were targeted by the executive. As a result of the political opportunity structures of institutionally limited Parliamentary opposition and in particular the control imperative influencing both the government and official Opposition, these rights-restricting measures were straightforwardly instituted. The question would then arise as to what impact they would have in practice.

Outcomes for Cause Litigation's Regularisation Frameworks

¹⁴⁰ *Joint Committee on Human Rights, Legislative Scrutiny: Immigration Bill (Second Report) (2014), para.109*

¹⁴¹ Hanson D, HC Deb 30 Jan 2014 Vol 574 Col 1060

¹⁴² Colin Yeo, 'The New Rules' (Free movement, 9 July 2012) <https://www.freemovement.org.uk/the-new-rules/> accessed 22 September 2016

¹⁴³ Immigration Act 2014, para 117B (4) and (5)

¹⁴⁴ (n73) para 16, also Lord Wilson in *Quila v SSHD*

*I think we were all a bit stupid really. We all thought that Theresa May would never get away with those rules, but the Court of Appeal has adopted them.*¹⁴⁵

i) The Impact of the Reassertion of Control

The overarching intention of this set of reforms was to reduce the impact of Article 8 in immigration cases and thus to reassert control over this area of immigration policy. Despite the initial resistance of the courts described above, this has been effectively achieved.

In practice, this was achieved firstly by immigration service initial decision makers failing to meaningfully apply the requirements set out in *Nagre* and *MF Nigeria* that cases must be considered in line with the criteria set out in the rules and then an overall assessment of proportionality made in line with the wider Article 8 case law. As York notes, 'Following these changes, Home Office decisions on applications covered by the new rules gave no or cursory consideration of Art 8 factors.'¹⁴⁶ The Tribunals were then put in the position of being the only forum in which proportionality under Article 8 is meaningfully discussed. Furthermore, the Home Office developed an unwritten policy of applying for permission to appeal to the Upper Tribunal against any First Tier Tribunal decisions that sided with the appellant in Article 8 cases, regardless of the legal merits of the decision.¹⁴⁷ This further increased the pressure on judges at first instance. A cause litigation barrister specialising in Article 8 cases reported at the time that, 'Tribunal Judges are totally affected by the fact that all their cases get appealed, and the general feeling that they are now targets themselves.'¹⁴⁸ This particular tactic eventually caused an outcry from the President of the Tribunal.¹⁴⁹

Moreover, during and following this period prior to the primary legislation of the 2014 Act coming into force, a second wave of cases began to be decided that appeared to take an

¹⁴⁵ Immigration Barrister Interview, 20th December 2015

¹⁴⁶ York S, 'Immigration Control and The Place of Article 8 In The UK Courts - An Update' (2015) 29 JIANL 289

¹⁴⁷ Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC)

¹⁴⁸ Immigration Barrister Interview, 20th December 2015

¹⁴⁹ (n147)

importantly different line to the cases that had gone before. Cases such as *Gulshan*¹⁵⁰ and *Haleemudeen*¹⁵¹ invoked the new rules not as possessing legal force that overrode the force of case law, as this was widely agreed to be impossible, but as providing a contextual force in which to conduct Article 8 assessments. They essentially created a pre and post-New Rules reality regarding the role of Article 8 in immigration cases, in which the force of the Secretary of State's political views regarding immigration control, as expressed through the New Rules, were to be given significantly more weight than had previously been the case. This position was endorsed by the High Court in *Nagre*¹⁵² and then by the Court of Appeal in *SS Congo* [2015] in which it was found that it was important to accord,

proper weight to the judgment of the Secretary of State, as expressed in the rules, regarding what is needed to meet the public interest which is in issue¹⁵³

Moreover, following the introduction of the 2014 Act this argument from the Secretary of State and Parliament's assessment of the public interest has been adopted even more forcefully by the courts. The Court of Appeal cases of *AJ (Angola) and AJ (Gambia)*,¹⁵⁴ *MA (Somalia)*,¹⁵⁵ *Singh*¹⁵⁶ and most recently *CT Vietnam*¹⁵⁷ all called on Tribunal judges to either 'take into account Convention rights through the lens of the New Rules' or to afford 'great weight' to the public interest identified by Parliament in the 2014 Act.

Most importantly, the decision in *SS Congo* melded the discussion of the weight to be attached to the expression of public interest found in the New Rules and the 2014 Act with whether or not a test of 'exceptionality' should be applied. In doing so it found that, in light of the *Huang* judgment that the Court of Appeal remained bound by, 'it cannot be maintained as a general proposition that [leave to remain] or [leave to enter] outside the Immigration Rules should only be granted in exceptional cases' but then went on to rule that 'in certain specific contexts, a proper application of Article 8 may itself make it clear that the legal test

¹⁵⁰ *Gulshan* (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC)

¹⁵¹ *Haleemudeen v SSHD* [2014] EWCA Civ 558

¹⁵² *R (Nagre) v SSHD* [2013] EWHC 720 (Admin)

¹⁵³ *SSHD v SS (Congo) & Ors* [2015] EWCA Civ 387

¹⁵⁴ *SSHD v AJ (Angola)* [2014] EWCA Civ 1636

¹⁵⁵ *SSHD v MA (Somalia)* [2015] EWCA Civ 48.

¹⁵⁶ (n11)

¹⁵⁷ *SSHD v CT (Vietnam)* [2016] EWCA Civ 488

for grant of LTR or LTE outside the Rules should indeed be a test of exceptionality.’¹⁵⁸ This is justified by the argument that,

‘It is only if the normal balance of interests relevant to the general area in question is such as to require particularly great weight to be given to the public interest. ... (as in the precarious cases considered in *Nagre* and the foreign national criminal cases considered in *MF (Nigeria)*) that a strict test of exceptionality will apply.’¹⁵⁹

This judgment appears to both confirm the reintroduction on an exceptionality test, as was the Executive’s intention to begin with, and to have limited, to an extent, its application. However, the implications of the rule depend to a great extent on the meaning of the word ‘precarious’, given that it leaves open the prospect of an exceptionality test being lawfully applied in such cases. On this point, the Upper Tribunal in *AM (S 117B) Malawi* has interpreted Section 117B of the 2014 Act, which deals with the term ‘precarious’ in extremely broad terms, so that it is now interpreted as meaning any form of immigration status short of citizenship or indefinite leave to remain.¹⁶⁰ As one cause litigator stated in a case comment,

“It is difficult to conceive of a less favourable interpretation...In short, any form of limited leave will amount to a precarious immigration status.’¹⁶¹

Another argued that ‘this is an extraordinary decision, arguably even *per incuriam*.’¹⁶² The legislation gave no indication of what was meant by ‘precariousness’, and other less stringent definitions were available to it. The Tribunal’s embrace of the notion that precariousness extends beyond irregularity and into any condition in which a person lacks citizenship or permanent status means that, as the cause litigator quoted above went on to state,

¹⁵⁸ (152) para 29

¹⁵⁹ (n152) para 31

¹⁶⁰ ‘AM (S.117B) [2015] UKUT 260 (IAC) para 32

¹⁶¹ Bijan Hoshi, ‘Precarious immigration status defined (Free movement, 28 May 2015)

<https://www.freemovement.org.uk/precarious-immigration-status-defined/> accessed 22 September 2016

¹⁶² York (n146) 299

on the Tribunal's interpretation, it is difficult to conceive of a situation where an individual seeking to rely on Article 8 ECHR would have an immigration status that was not precarious.¹⁶³

The day before this thesis was submitted to the printers, the Court of Appeal released judgment in *Rhuppiah [2016]* which dealt with this issue of precariousness.¹⁶⁴ Another judgment by Sales LJ, it confirmed that most forms of limited leave to remain would constitute 'precariousness' for the purposes of Article 8. To succeed in these circumstances, a non-criminal person relying on private life would require an exceptional case that showed 'compelling circumstances'.¹⁶⁵ However it stopped short of the Home Office's full submission, following the above logic in *AM[s117B]* that anything short of ILR would constitute precariousness, although it reserved judgment on this point and did not define what would constitute an unprecarious but nevertheless non-permanent immigration status.¹⁶⁶

The legal barriers that have been erected, through the imposition of exceptional, compelling and 'very compelling' circumstances tests and the application of precariousness to what in effect is anyone who might conceivably need to rely on Article 8, mean that it is now little more than a sweeper of aberrant cases and extraordinary circumstances. Article 8 has thus been reduced back to providing a form of minimal core protections for migrants' rights, rather than the more expansive vehicle for regularisation independent of Executive policy that had resulted from the long-term day-to-day work of the cause litigators. As a leading Article 8 cause litigator put it, 'we're back in the pre-*Huang* days.'¹⁶⁷

ii) Prospects for Revitalising Regularisation

Fundamentally for cause litigation, this retrenchment represents the undermining of Article 8 as legal framework of regularisation independent of Executive policy. Cause litigation,

¹⁶³ Hoshi (n161)

¹⁶⁴ *Ruppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803

¹⁶⁵ *Ibid* para 54

¹⁶⁶ *Ibid* para 44

¹⁶⁷ Immigration Barrister Interview, 20th December 2015

therefore, has not been able to break away from the restrictiveness of Executive immigration policy and decision making, governed as it is by the control imperative.

Some may doubt, though, whether this is likely to be a permanent state of affairs. While the current period is one in which the executive has checked the role of the judiciary when it comes to Article 8, but it may be that cause litigation may be able to bring about a revitalisation of Article 8's independent regularisation function at some point in the future. The developments around refugee status determination might indicate that at least in principle this might be possible. As was demonstrated above, the executive engaged in a similar pattern of behaviour in response to cause litigation's success in expanding the legal framework of an independent refugee status determination system. The control imperative required that anti-cause litigation legislation be introduced and Labour government ministers also repeatedly denounced judges, claiming that as a result the judiciary posed a threat to democracy and even that their decisions would produce physical threats to the British public.¹⁶⁸ It seems, then, that the Executive of any political stripe is inclined to launch public and legislative attacks against cause litigation and the judicial and legal framework for it when the political need to publicly demonstrate control requires it.

However, despite the grave concern of commentators at the time, very few of the government's attempts to curtail the courts' role in refugee determination in the early 2000s produced a fundamental undermining of the cause litigation role.¹⁶⁹ Looking back on this period, Meili makes the point that, 'despite the desperate measures taken by the government to curb the influx of asylum-seekers, cause lawyers representing asylum-seekers were not completely frustrated in their attempts to provide protection for their clients.'¹⁷⁰ Specifically, certification of cases as manifestly unfounded has meant that cause litigators pursue judicial review of the certificate rather than a straightforward merits appeal;¹⁷¹ far from ideal, but not

¹⁶⁸ The Guardian, 'Clarke confronts judges on terror law' (The Guardian, London, 7 September 2005) <https://www.theguardian.com/uk/2005/sep/07/terrorism.immigrationpolicy> accessed 22 September 2016; The Telegraph, 'Terror suspects win Lords appeal against detention' (The Telegraph, London, 16 Dec 2004) <http://www.telegraph.co.uk/news/1479156/Terror-suspects-win-Lords-appeal-against-detention.html> accessed 22 September 2016

¹⁶⁹ For examples, Bohmer & Shuman (n92) Schuster L, *The Use And Abuse Of Political Asylum In Britain And Germany* (Routledge 2003)

¹⁷⁰ Meili (n8) 1147

¹⁷¹ R (Husan) v SSHD [2005] EWHC 189 (Admin)

a removal of cause litigation's role. Likewise, the DFT, as was discussed in chapter 4, was undoubtedly a major issue of concern for cause litigators and devolved into a system that reduced the judicial function to the point where it was so unfair as to be unlawful. Yet by virtue of its physical and institutional limitations connected to detention, it was always isolated from the mainstream system and never dealt with more than 10% of claimants.¹⁷²

Most importantly, when it came to interpreting the Section 8 AI(TCA) provisions on asylum seeker credibility, the judiciary were willing and able to resist the legislative and rhetorical pressure on them to systematically downgrade the standard of their decision making. Having 'been instrumental in overseeing the application of asylum law', as O'Sullivan put it, judges were able to rely on their longstanding jurisprudence, mentioned earlier regarding judicial recognition of the gravity of the issues in asylum cases, that they must be subject to the 'most anxious scrutiny' by the court.¹⁷³ In *JT Cameroon [2008]*, the Court of Appeal went as far as to use Section 3 of the HRA to read the word 'potentially' into AI(TCA) s.8 (1)'s instruction that,

'In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as [potentially] damaging the claimant's credibility, of any behaviour to which this section applies.'¹⁷⁴

This effectively moved the prescribed behaviour from a position of automatically warranting a rejection of the credibility of a claimant, as was intended by the government of the time, to one where 'It is no more than a reminder to fact-finding tribunals that conduct coming within the categories stated in section 8 shall be taken into account in assessing credibility.'¹⁷⁵ The result of this judgment has been that Section 8 has become a largely ineffectual at the appeal stage of the asylum decision making process.¹⁷⁶ The judicial resistance shown in its approach to preserving the independence of its deliberative functions, has meant that, broadly

¹⁷² Detention Action v SSHD [2014], para 71

¹⁷³ O'Sullivan M in Kneebone S, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (CUP 2009) 244

¹⁷⁴ *JT (Cameroon) v. Secretary of State for the Home Department*, [2008] EWCA Civ 878 para 20

¹⁷⁵ *Ibid* para 21

¹⁷⁶ Webber (n20) 43

speaking, the independent judicial role in refugee status determination survived these attacks.

Having clung on, cause litigation was able to re-emerge once the asylum and refugee issue began to lose its political prominence, the intensity of the imperative for control diminished and the executive's attacks subsided. As was described earlier in this chapter, the protections afforded to asylum claimants were able to be developed to become relatively expansive in relation to a wide range of particular nationalities and social groups through cause litigation in the Tribunal system. Yet during this period the Executive's response to these developments has been considerably more muted. When claimant numbers declined substantially the need for overt public displays of control had dissipated. Quietly, the refugee recognition rate has risen to the around the highest it has ever been in the modern era of mass asylum seeking.¹⁷⁷ Having been put under considerable pressure during the early 2000s, then, cause litigation on the Refugee Convention has been able to re-emerge as a major means of protecting the rights of vulnerable migrants through regularisation.

This is not to claim that the Executive has been converted to a commitment to refugee protection, far from it. However, in place of aggressive legislative and policy responses, Home Office responses to the more recent advancements in refugee protection through day-to-day litigation have been broadly comparable with that described in the previous chapter regarding its response to strategic litigation. The enforcement of judgments expanding refugee protections and the institutional adoption of their meaning has become a key contested area as a result of the administrative imperative for control.¹⁷⁸ As one interviewee put it,

¹⁷⁷ Home Office, 'Immigration statistics quarterly release' (Home Office, 25 August 2016) <https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> accessed 22 September 2016

¹⁷⁸ R (Apata) v The SSHD [2015] EWHC 888 (Admin); SSHD v MN and KY (Scotland) [2014] UKSC 30 For discussion, Craig S, 'The use of language analysis in asylum decision-making in the UK - a discussion' (2012) JIANL 255; Warren R and York S 'How children become "failed asylum-seekers": reflections on the experiences of young unaccompanied asylum seekers in Kent from 2006 to 2013, and how "corrective remedies" have failed them' (2014) 28 JIANL 123; also, The Mirror, 'Does the Home Office think you're gay?' (The Mirror, London, 6 March 2015) <http://www.mirror.co.uk/news/ampp3d/home-office-think-youre-gay-5280895> accessed 27 August 2016

‘Every time you protect a particular group, the tortured, the trafficked, the child, entry to that group is policed harder. It’s members of that group that suffer the policing.’¹⁷⁹

While the executive’s attitude to this form of regularisation outside of its control may not have changed, then, it had ceased to be the most pressing issue during the relevant period and a satisfactory level of control for the immigration administration could be achieved in less aggressive ways. A more aggressive form of executive response only became necessary when the systemic changes brought about through refugee and article 8 related litigation began to impact on the second element of the control imperative; the need for the executive to be seen to be exercising control. The systemic changes in regularisation opportunities were the result of many individual decisions on immigration status that could not themselves be evaded, as each decision required a single concrete response from the executive; the granting of legal status to each individual. The executive’s only option in such circumstances was therefore to address the whole framework under which these individual decisions were made.

It appears, then, that absent public pressure, the executive’s attention can move away from an issue, allowing it the chance to be revitalised through long-term cause litigation work. What this depends on, though, is the judicial approach to political pressure, and particularly its willingness to resist significant political pressure during the peak of the backlash, by defending the courts’ and judiciary’s role in the decision making on that issue. When it comes to the judicial approach to Article 8, however, very little of this kind of willingness has been evident. It is true that throughout the earlier stages of the development of the Article 8 New Rules jurisprudence there were some notable rulings which sought to maintain the full legal framework of Article 8 as a tool for regularising and thus protecting migrants’ rights. The rulings in *Izuazu*, *MF Nigeria*, *MM (Lebanon)*¹⁸⁰ and *Ganesabalan*,¹⁸¹ for example, all either sought to keep open the independent role of the tribunal in Article 8 development or to rein back in some of the more restrictionist implications of other judgments. As with some of the key DFT cases discussed in the previous chapter, these were often from judges who had

¹⁷⁹ Immigration NGO Legal Director Interview, 12th September 2013

¹⁸⁰ R (MM) v SSHD [2013] EWHC 1900 (Admin);

¹⁸¹ R (Ganesabalan), v SSHD [2014] EWHC 2712 (Admin)

previous involvement with cause litigation. In particular Blake J, who has already been discussed repeatedly, and Fordham J have both been prominent in defending the Article 8 jurisprudence and have a cause litigation background. Fordham, as was noted above, had argued the appellant's case in *Chikwamba*, lead for the claimants in the pivotal DFT case of *RLC v SSHD 2004* and more recently in the Public Law Projects judicial review of the legal aid residence test.¹⁸²

However, these attempts have been largely superseded by a contemporary judicial approach which has adopted the Executive's analysis of the issues and have facilitated Article 8's retrenchment. Contrary to the senior courts' approach around the time of *Huang* and *EB Kosovo*, many amongst the immigration judiciary and the senior civil judiciary had been at best ambivalent about Article 8's role in immigration and some had been openly hostile to it. Chapter 4 noted that strategic litigation was most successful when judges could be persuaded that the issue at hand fell within their territory, and that in particular notions of justice were involved. In these day-to-day cases, though, for many judges it seems that Article 8 is neither regarded as an issue of justice, nor even to properly fall within their territory.

As one extreme example, an anonymous immigration judge recently published an article in the Mail on Sunday newspaper stating that Article 8 was 'the last resort of the rascal in my opinion.'¹⁸³ Of perhaps greater significance, the Vice President of the Immigration and Asylum Chamber, Ockleton J, has called for *Huang* to be reversed and argued that regarding Article 8 more generally, 'It might even be doubtful whether it is proper for judges to make such decisions.'¹⁸⁴ This perspective echoes the view of Laws LJ, mentioned above, that Article 8 judgments were in danger of spilling over into the 'political' function of the executive. Sales J, now elevated to Sales LJ, has led this Court of Appeal's attempts to ensure that executive control would once again predominate over independent tribunal adjudication, particularly through the reintroduction of an exceptionality test in *Nagre*, *SS Congo* and *Agyarko* and most

¹⁸² R (The Public Law Project) v Lord Chancellor [2016] UKSC 39

¹⁸³ Anonymous 'Asylum Judge', 'The true lunacy of our broken asylum system: Judge who rejects most claims despairs at how only a tiny few actually leave Britain' (Daily Mail, London, 21 August 2016) <http://www.dailymail.co.uk/debate/article-3751122/The-true-lunacy-broken-asylum-Judge-rejects-claims-despairs-tiny-actually-leave-Britain.html> accessed 22 September 2016

¹⁸⁴ Ockelton M, 'Article 8 ECHR, the UK and Strasbourg: Compliance, Cooperation or Clash?' in Ziegler K, Wicks E and Hodson L, *The UK and European Human Rights: A Strained Relationship?* (Hart, 2015) 218

recently dealing with the precariousness arguments in *Ruppiah*. In the mirror image of Blake and Fordham, Sales, like Laws LJ before him, is a former First Treasury Council, who unsuccessfully argued the Government's case in *EB Kosovo*. This has caused significant disquiet amongst cause litigators, one of whom argued that 'I think it's really alarming that those people who have been at the heart of Government Article 8 legal representation are now creating our law on Article 8.'¹⁸⁵

The prospects for a revitalised Article 8 do not, then, look good. The dominant judicial approach of the current Court of Appeal and Tribunal has been to adopt what could be described as the 'lens of the rules' view, in which the general tenor of restriction and Executive control that the rules and legislation represented was willingly applied as a guide to all further judicial reasoning on the issues that these developments raised. For cause litigators, as one of them put it, 'you desperately hope that the Supreme Court will come out with something good.'¹⁸⁶ Time will tell, but it will require a considerable turnaround on the part of the Supreme Court for this retrenchment of the legal framework of regularisation to be reversed. At the time of writing, two key Supreme Court judgments have so far been delivered, in *Makhoulf*¹⁸⁷ and *Hesham Ali*¹⁸⁸, and while *Hesham Ali* in particular provides some counterbalance to the direction of travel the Court of Appeal has taken Article 8, there is little sign of the turnaround that would be required.¹⁸⁹

Conclusion

This chapter has demonstrated that the day-to-day work of cause litigation has been hugely influential on the development of the modern immigration system. As a result of the filtering effects of the financial resources and wider immigration legal framework the cause lawyers

¹⁸⁵ Immigration Barrister Interview, 20th December 2015

¹⁸⁶ Ibid

¹⁸⁷ *Makhoulf v SSHD* [2016] UKSC 59

¹⁸⁸ *Hesham Ali v SSHD* [2016] UKSC 60

¹⁸⁹ Both cases dealt with the Article 8 immigration rules changes, rather than the statutory provisions of the 2014 Act, and are therefore of only limited application. However, *Hesham Ali* considers the question of the weight to be attached to the immigration rules and emphasises that while they are relevant and an important consideration other factors must also be considered that are not catered for by the rules. While this may not sound hugely significant, for cause litigators it is a useful counterbalance to the 'lens of the rules' jurisprudence that has gone before.

operate with, combined with the underlying political ethos of the lawyers' cause itself, the development of regularisation opportunities outside of the intentions of the Executive has become its most important function. These developments have in particular occurred in relation to the Refugee Convention and Article 8 of the ECHR. However, these developments operate in direct confrontation with the imperative to exercise and demonstrate control which motivates Executive policy.

The clash with the control imperative has prompted a backlash from the Executive which targeted the legal frameworks of regularisation that resulted from this long-term day-to-day cause lawyering. This being said, while both the Refugee Convention and Article 8 have experienced backlashes at points where the political controversy surrounding them was most acute, efforts by the Executive to curtail their influence have always stopped short of removing their protections altogether. What remains after these backlashes are essentially a limited set of core protections. For cause litigation the positive sign from this is that, as the chapter showed, provided that the infrastructure of cause litigation, such as the HRA, sufficient financial and human resources, and a relatively supportive judiciary remain in place, these protections can potentially be built on, as occurred in the refugee convention case.

However, a further risk arises from this process. As this chapter noted, while the executive will take the least onerous action that is sufficient to meet its need to reassert control, this need is relative to the intensity of public demand for control and the related strength of the imperative to overtly demonstrate control. As such, a systemic role that cannot be simply evaded, as was seen in chapter 4, or in circumstances in which evasion and absorption are no longer satisfactory to meet control demand, produces an aggressive and ambitious executive backlash. This chapter has discussed examples where this backlash has targeted the outcomes of cause litigation. The next chapter will discuss the consequences of cause litigation's systemic role in the UK's immigration policy dynamic overall.

Chapter 6: The Clash with Control and the Consequences for Cause Litigation

Introduction

*'I think the sector is just bowled over by what's happening to it.'*¹

The studies of cause litigation's constituent parts in chapters 4 and 5, have shown that strategic litigation for migrants' rights has been frequently undermined and non-strategic day-to-day cause lawyering has been met by an aggressive public backlash by the Executive. These problematic legal and policy outcomes for cause litigation have come as a result of the political opportunity structures that the cause litigators face. The control imperative that the executive operates under provides its motivation to respond in this way, while the dominance over immigration issues that the executive enjoys within the UK's constitutional arrangements has facilitated their implementation.

However, taken together, chapters 4 and 5 also showed that despite these limitations, cause litigation as a whole has acted as one of the primary obstacles to the control imperative. It has impeded the administrative business of executive policy implementation and, crucially, impeded the executive's ability to be seen to be exercising control. This chapter assesses cause litigation as a whole and the consequences of its obstructive role in the UK's immigration policy dynamic. It examines what Kwarl would describe as the 'radiating effects' of cause litigation.² The chapter shows that cause litigation's increasing conflict with the political opportunity structures that frame the UK's immigration politics has in recent years resulted in both a practical and rhetorical backlash from the Executive against cause litigation itself, rather than simply the outcomes it produces. The practical backlash involved a series of policies which sought to undermine cause litigation by diminishing the resources and legal framework that sustain it. The chapter shows, though, that the primary constraint on this backlash has been politicians', both in government and in the wider legislature, concern to be seen to respect and protect the rule of law. Yet, the chapter shows that the framework of justification adopted by the executive for its backlash has allowed them to implement

¹ Funding Officer 2 Interview, 28th February 2013

² Kwarl L, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France* (CUP 2015) 153

changes that have seriously weakened, although crucially not destroyed, the rule of law in immigration control.

The main body of the chapter sets out what in practice has been done to undermine the capacity of cause litigation to function as effectively as it has up to now. It then discusses how this was achieved by the Executive. The section shows that the executive has attempted to justify its backlash against the resources and legal framework of cause litigation through a rhetorical turn against the model of the rule of law that allowed cause litigation to flourish, and a reassertion of a more overtly nationalist 'traditional' conception of the rule of law's role in immigration issues. It has done this by identifying cause litigation with notions of liberal universalism and social cosmopolitanism which were then blamed for the wider social and economic threats that, as was discussed in chapter 3, have led to the heightened concern over immigration. The chapter concludes by discussing the extent to which this backlash has been effective and what this means for the role of cause litigation in defending and promoting migrants' rights in the UK.

Given its importance to the subsequent debate, though, the chapter will commence by building on some of the analysis in chapter 3 regarding the development of the rule of law and cause litigation as it came to exist in the UK.

The Thickening of the Rule of Law: The Role of Resources and Legal Framework

*'When I started doing this stuff the government's rhetorical position was very clear; commitment to the rule of law, commitment to the ECHR, commitment to upholding EU law.'*³

The rule of law as a notion has been described as 'an essentially contested concept' within political discourse and legal theory.⁴ Outside of the academy it has proved itself to be a highly malleable concept, that develops in equal measure through practical usage and political

³ Immigration and Welfare Barrister Interview, 9th April 2014

⁴ Waldron J, 'Is The Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137

rhetoric. The frequency with which it is uncritically invoked as a universal good suggests that it may have become, as Shklar has put it, 'just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.'⁵ However, regardless of its merits, as will be demonstrated throughout this chapter, it can be used as a rhetorical tool to discredit opposition. As Bellamy has noted,

'When Judges criticise legislatures and governments they typically do so in the name of the Rule of Law. Unfortunately, politicians do the same when they attack judicial activism.'⁶

Scholarly attempts at its definition have varied substantially over time. As was discussed in chapter 2, in the UK context discussion of the notion often begins with the work of AV Dicey, whose 19th Century study of the UK's constitutional arrangements has become canonical.⁷ Dicey's three maxims regarding the production of law, its universal application and an opposition to constitutional rights statutes, discussed in chapter 2, have come to be associated with 'thin' forms of the rule of law, to borrow Tamanaha's typology,⁸ which emphasise the application of the law to all actors in a given polity, the rejection of arbitrariness and the limits on government's coercive powers over individuals. As the FA Hayek argued,

'stripped of all technicalities [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand.'⁹

However, others, such as Harden and Lewis, have criticised what they argue is 'Dicey's conflation of nineteenth-century constitutional arrangements and *the* rule of law.'¹⁰ As they go on to state, if this conflation

⁵ Shklar J, 'Political Theory And The Rule Of Law' In Hutchinson A & Monahan P (Eds) *The Rule Of Law: Ideal Or Ideology* (Carswell 1987) 1

⁶ Bellamy R, *The Rule of Law and The Separation Of Powers* (Ashgate 2005) xi

⁷ Dicey A, *An Introduction to The Study Of The Law Of The Constitution* (Macmillan 1945)

⁸ Tamanaha B, 'A Concise Guide to the Rule of Law' in Palombella G and Walker N (Eds) *Relocating the Rule of Law* (Hart 2009) 4

⁹ Hayek F A, *The Road to Serfdom* (2nd Ed. Routledge 2001) 54

¹⁰ Harden I & Lewis N, *The Noble Lie: The British Constitution And The Rule Of Law* (Hutchinson 1988) 4, emphasis in the original

‘becomes *as description*, the ruling paradigm for discussing constitutionality and the rule of law, it can only work in opposition to an effective analysis of contemporary constitutional conditions’.¹¹

Attempts to engage with these ‘contemporary constitutional conditions’ have tended to introduce ‘thicker’ conceptions of the rule of law, which include notions such as protection of human rights as defined in international rights documents such as the UDHR, the ECHR and the ICCPR.¹² As Lord Bingham has said,

‘It is, I think, possible to identify the rights and freedoms which, in the UK and developed Western or Westernised countries elsewhere, are seen as fundamental, and the rule of law requires that those rights should be protected.’¹³

Bingham declared himself an adherent of a ‘thick’ rule of law.¹⁴ This ‘thick’ rule of law position is intended to be reflective of contemporary legal and political practices, whereby western states that subscribe to the rule of law, including the UK, almost universally operate forms of legalised rights charters, and courts are actively involved in adjudicating on disputes between the state and individuals over ‘fundamental rights’. In this sense, the ‘thick’ rule of law is an example of the malleability of the concept of the rule of law in response to predominant practical usage and the facilitative legal framework that it benefits from.

As was discussed in chapter 3, New Labour instituted the development of what could be thought of a thicker form of the rule of law through expanding the legal framework and resources available to cause litigators, most overtly through the introduction of the Human Rights Act 1998. This was accompanied by the Data Protection Act 1998 and followed by the Access to Justice Act 1999, the Freedom of Information Act 2000 and the Race Relations Amendment Act 2000. The Acts greatly expanded the rights-based claims individuals were

¹¹ Ibid

¹² Bingham T, *The Rule of Law* (Penguin 2011) 66- 67

¹³ Ibid 68

¹⁴ Ibid 67

able to make on the State, while simultaneously constraining state action and placing a variety of duties regarding standards of treatment and disclosure of information on state agencies. Backing these rights and duties up would be a greater role for litigation, where disputes over them would be resolved independently of government, by the judicial system. Commenting on these developments at what would turn about to be near the end of New Labour's time in power, Gearty summed the position up by stating that 'in recent years the power of ... the state generally has been regulated by statute in ways that simply did not exist in years gone by.'¹⁵

These changes, particularly the Access to Justice Act which realigned and expanded legal aid spending in civil law, were partially instituted as part of New Labour's 'social exclusion agenda'.¹⁶ As York notes,

The newly-constituted Legal Services Commission found itself, as part of the Access to Justice Act 1999, the instigator of a trendy relaunch of legal aid: the Community Legal Advice Service. This was to be an area-based provision, based on a scientific assessment of unmet client need in every area of social welfare law, in every part of the country. This arose out of, and its development was paralleled by, extensive, well-resourced government-backed research which showed how 'justiciable problems' contribute to and exacerbate 'social exclusion'.¹⁷

Issues such as poverty, educational underachievement and housing vulnerability were identified as often resulting from failures in the enforcement of legal rights. This line of thinking invited greater judicial involvement in questions of social provision and greater intervention in various levels of executive decision making in these areas.

¹⁵ Gearty, quoted in Ewing K D, *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (OUP 2010) 7

¹⁶ Sommerlad, H, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' (2004) 31 *Journal of Law and Society* 350

¹⁷ York S, 'The End of Legal Aid in Immigration - A Barrier To Access To Justice For Migrants And A Decline In The Rule Of Law' (2013) 27 *JIANL* 106 128

At the same time, the broader package of legislative changes formed part of a programme of constitutional reform which was central to the first term New Labour government's self-identity as a 'modernising' force. As Klug puts it, 'Constitutional reform as a package had become one of the badges of New Labour; a set of measures to signal that it still had a distinct radical programme'.¹⁸ The modernity that New Labour in its first term sought to bring about was imbued with the 'third way' principles of its wider policy programme.¹⁹ Built on an electoral base of newly affluent, socially liberal and increasingly cosmopolitan voters,²⁰ and significantly influenced by liberal and left-leaning lawyers,²¹ New Labour's constitutional reform programme was intended to be both empowering of citizens against a state which under the period of long Conservative rule had become viewed as authoritarian and reactionary,²² while at the same time promoting a form of individualism which would avoid the centralising, statist tendencies of the old British left.²³

New Labour were not alone in looking to expand and enrich the traditional role of the rule of law in the UK. As discussed in chapter 3, these reforms were met with open arms by a growing and increasingly prominent sector of the legal profession, human rights lawyers, who gained a more prominent place in media and popular consciousness during the period.²⁴ As has been discussed throughout this thesis, judges also developed a wider willingness to engage in more searching judicial review of ministerial and executive actions than was previously the case.²⁵ For example, the developments in case law of measures such as protective costs orders involved the courts recognising the role of judicial review for ventilating 'issues of general

¹⁸ Klug F, *A Magna Carta for all Humanity: Homing in on Human Rights*, (Routledge 2015) 246

¹⁹ Giddens A, *The Third Way: The Renewal of Social Democracy* (Blackwell 1998); and Plant R, Beech M & Hickson K, *The Struggle for Labour's Soul: Understanding Labour's Political Thought Since 1945* (Routledge 2004)

²⁰ Heath AF, Jowell RM, Curtice JK, *The Rise of New Labour: Party Policies and Voter Choices* (OUP 2001) 122

²¹ For relationship between New Labour and lawyers Klug F, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (Penguin Books 2000) 158- 163

²² Erdos D, 'Charter 88 and the Constitutional Reform Movement: A Retrospective', [2009] Parliamentary affairs 538 538

²³ Klug, (n18) 246

²⁴ Maiman R, 'Asylum Law Practice in the United Kingdom after the Human Rights Act', in Sarat A and Scheingold S (eds) *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice*, (Stanford University Press 2005)

²⁵ Kavanagh A, *Constitutional Review under the UK Human Rights Act* (CUP 2009); Hickman T, *Public Law After the Human Rights Act* (Hart 2010); and Tomkins A, 'National security and the role of the court: a changed landscape?' (2010), 126, LQR 543, For a critical perspective on these developments, Ewing K, 'The Futility of the Human Rights Act' [2004] PL 829 For a response, Kavanagh A, 'Judging The Judges Under The Human Rights Act: Deference, Disillusionment And The 'War On Terror'' [2009] PL 287

public importance'²⁶ and consciously taking on a duty to facilitate this to ensure that such cases were heard.²⁷ These developments occurred around the same time as the charity and NGO sector, which drew much of its approach and staff-base from a similar left-liberal, rights-focused milieu as New Labour,²⁸ began to develop its role from the provision of goods and services to rights-based public campaigning organisations, openly discussing the economic and political causes of the issues they were working on.²⁹

There was a concentrated period, then, around New Labour's first term in office, when legislative changes coincided with wider social and political developments to expand the rule of law in the UK into a thicker form and encourage the greater use of litigation for social purposes. As the next section will show, though, a gradual waning of Executive tolerance eventually transformed into a full-scale backlash against cause litigation.

Thinning down the Rule of Law in Immigration

*Aggregate funding into the field is probably... around £15-18m a year; that's all funders including Big Lottery. So, you know, there's a bigger cut in legal aid per year than that.*³⁰

As this section will show, this waning of enthusiasm on the part of the Labour government began as a result of the control imperative, and was augmented in the Coalition and Conservative eras by the austerity agenda of both governments, and the Conservative's particular ideological concerns regarding legalised rights charters. These concerns overlapped with the control imperative to produce a concerted policy backlash aimed at reducing the resources available to cause litigators and rolling back the advancements in the legal and judicial framework that facilitated it.

²⁶ R (Corner House Research) v Secretary of State for Trade & Industry [2005] EWCA Civ 192 para 46

²⁷ Ibid para 71 (1) (ii) and (v)

²⁸ Buchanan T, 'Human Rights Campaigns in Modern Britain' in Hilton M, Crowson N J & McKay J (Eds), *NGOs in contemporary Britain: non-state actors in society and politics since 1945* (Palgrave Macmillan 2009) 122 – 124; also Hilton M, *The politics of expertise: how NGOs shaped modern Britain* (OUP 2013)

²⁹ Hilton M, Crowson N J & McKay J (Eds), *NGOs in contemporary Britain: non-state actors in society and politics since 1945* (Palgrave Macmillan 2009) 39; also Nash K, *The Cultural Politics of Human Rights: Comparing the US and UK* (CUP 2009) 137

³⁰ Funding Officer Interview, 15th April 2014

i) New Labour Backtracks on Cause Litigation and the Thick Rule of Law

As was mentioned in chapter 3, the Labour Government began a process of reducing the commitment to a human rights framework in British government policy and political life as a result of the War on Terror.³¹ However, while this affected a number of areas, including foreign policy and the conduct of the security services,³² many of the major human rights controversies of the 2000s regarding terrorists should be understood to be migrants' rights issues in another form. Controversy has largely revolved around what actions the state can and can't take against foreign national terrorists by way of deportation and detention, including the use of indefinite, trial-less internment,³³ the use of secret evidence³⁴ and the deportation of terrorist suspects to states that practice torture.³⁵ One of the major drivers for the control imperative in immigration policy has been the threat of terrorism that certain forms of migrant are perceived to pose. However, as has already been noted in chapter 5, the later Labour governments had also begun to institute a number of policies that sought to diminish the effectiveness of cause litigation in migrants' rights and immigration matters in connection to more mundane issues than national security.

As was noted during chapter 3's discussion of the legal framework of migrants' rights cause litigation, New Labour's time in office contained a near continuous process of immigration legislation.³⁶ A significant aspect of this process was the introduction, particularly in relation to asylum, of measures directed towards the curtailment of the power of courts to affect immigration decision making and to limit migrants' access to them. These legislative steps targeted the legal framework cause litigators relied on and were discussed at length in chapter 5.³⁷ These attacks on the legal framework were combined with a systemic change to

³¹ Gearty C, *Can Human Rights Survive?* (CUP 2006) 99

³² *Belhaj & Anor v Straw & Ors* [2014] EWCA Civ 1394

³³ *A & Ors v. SSHD* [2004] UKHL 56

³⁴ Jackson J, 'Justice, security and the right to a fair trial: is the use of secret evidence ever fair?' [2013] PL 720

³⁵ Kavanagh A, (n25) 'Judging The Judges'; Tomkins A, (n25); Michaelsen C, 'The renaissance of non-refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights' (2012) 61 ICLQ 750

³⁶ Depending on how it is counted, New Labour passed between eight and twelve Acts of Parliament relating to immigration issues during their 13 years in power. Mulvey G, 'Immigration Under New Labour: Policy and Effects' (2011) 37 JEMS 1477

³⁷ Immigration, Asylum and Nationality Act of 2002 s. 94; Asylum and Immigration (Treatment of Claimants) Act 2004 s. 8

the funding regime of legal aid. In 2007 the traditional hourly rate mode of payment for legal work was replaced by a 'fixed fee' model termed the Graduated Fee Scheme (GFS).³⁸ As the cause litigation charity Asylum Aid have said,

'Ten hours spent working closely with an asylum seeker receives the same funding as a single hour's work – with the result that less detailed work results in larger profits.'³⁹

This scheme was particularly damaging to the long-term non-strategic cause litigation discussed in chapter 5 and, as will be discussed again below, ultimately led to the closure of the two major national cause litigation legal charities doing this work, the Refugee Legal Centre and the Immigration Advisory Service, who failed to adapt to the new business model even prior to the subsequent implementation of the legal aid cuts in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) that will be discussed below.⁴⁰

While the majority of these measures required legislative approval in one form or another, the reality of large majorities and party discipline under the Labour government allowed for a strong executive to implement them with little tangible opposition. The House of Lords, less subject to executive control and containing a large number of retired judges and senior lawyers, proved the only substantial legislative obstacle during this period.⁴¹ Thus, as would become a theme throughout the period of backlash, the dominance of the executive in the UK's institutional political opportunity structures facilitated these retrenchments of the rule of law's influence in immigration control. These steps also indicate that a direction of travel had begun long before Labour was removed from office.

ii) Coalition & Conservative Governments Expand the Backlash

³⁸ Constitutional Affairs Committee, Implementation of the Carter Review of Legal Aid (HC 2006-07 223-II)

³⁹ Asylum Aid, 'Asylum Aid policy briefing Legal Aid'(Asylum Aid, February 2013) <http://www.asylumaid.org.uk/wp-content/uploads/2013/02/LegalAidBriefing.pdf> accessed 22 September 2016

⁴⁰ York, (n17) 112

⁴¹ Migrants' Rights Consultant Interview 27th August 2013; Immigration NGO Legal Director Interview, 12th September 2013

The change of government in 2010 heralded the beginning of a concerted executive attack on cause litigation. Thomas has recently argued that,

‘It is generally recognised that access to justice has been severely limited, but ... immigration may have sustained some of the severest restrictions’.⁴²

In particular, and once again, these actions targeted both the resources available to cause litigators and the legal framework that they operated in, and were facilitated by limited opposition in Parliament. This time, though, they did so in a considerably more far reaching and damaging ways.

Some steps taken were connected to a combination of immigration and wider austerity policy priorities. For example, very substantial increases in application fees for regularisation, citizenship naturalisation and appeals against decisions at the tribunal were introduced.⁴³ Under the rubric of austerity, the Home Office was instructed by the Treasury that the immigration system had to become ‘self-funding’;⁴⁴ in the sense that the costs of processing and determining immigration applications and implementing decisions taken (including enforced removals) would have to be met by migrants themselves. However, this demand could be mobilised by the Home Office as part of the control agenda. It chose to impose the subsequent cost increases almost exclusively on family migration, settlement, naturalisation and appeals against Home Office decisions; business immigration under the points based system being left largely untouched.⁴⁵ This meant that applications in ‘unwanted’ migration categories, to borrow Joppke’s phrase, now operate at a considerable profit margin. As one

⁴² Thomas R, ‘Immigration and Access to Justice: A Critical Analysis of Recent Restrictions’ in Palmer E, Guinchard A, Cornford T & Marique Y (Eds.) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016) 105

⁴³ UK Visas and Immigration, ‘New immigration and nationality fees for 2016 to 2017’ (UK Visas and Immigration, 11 January 2016) <https://www.gov.uk/government/news/new-immigration-and-nationality-fees-for-2016-to-2017> accessed 22 September 2016

⁴⁴ Home Office and HM Treasury, ‘Home Office’s settlement at the Spending Review 2015’ (Home Office and HM Treasury, 25 November 2015) <https://www.gov.uk/government/news/home-offices-settlement-at-the-spending-review-2015> accessed 22 September 2016

⁴⁵ (n43)

example, the cost to the Home Office of processing an application for a child to register as a British Citizen is £272,⁴⁶ but the application fee has been raised to £936.⁴⁷

In addition to bringing in revenue under the austerity system, the size of these fees may act as an unavoidable obstacle to irregular and otherwise vulnerable migrants accessing their legal entitlements. As one cause litigator commented following the announcement, ‘The choices made by Ministers as to where the highest fees should fall are telling. High fees have a deterrent effect and are simply unaffordable for some families.’⁴⁸ In 2016 the government also announced its intention to raise appeal fees for the tribunal by over 500%, but eventually backed down following universal opposition in a consultation exercise and unusually significant parliamentary pressure.⁴⁹ The imposition of very high fees of this kind is ordinarily subject to little if any parliamentary scrutiny, being done through regulations laid before parliament under the negative resolution procedure, and as a result are another example of the institutional strength of the executive in implementing control-imperative inspired measures. The government have said that it is reviewing the fee increase and will return with fresh proposals.

Financial decisions as tools of the control imperative were also demonstrated in the Coalition reforms to legal aid. These reforms were crucial as, as has been discussed throughout this thesis, the funding regime and the rules around it has a major influence on the manner and extent to which cause litigation is conducted. As one institutional litigation funder noted,

⁴⁶ Home Office, Impact Assessment for the Immigration and Nationality (Fees) Order 2016 <http://www.legislation.gov.uk/uksi/2016/177/impacts/2016/33> accessed 28th September 2016

⁴⁷ (n43)

⁴⁸ Colin Yeo, ‘Massive increase in family immigration fees for 2016-17’ (Free movement, 2 March 2016) <https://www.freemovement.org.uk/massive-increase-in-family-immigration-fees-for-2016-17/> accessed 22 September 2016

⁴⁹ Ministry of Justice, Tribunal Fees: The Government Response to the consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber) (Ministry of Justice September 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553387/proposals-imm-asylum-chamber-consultation-response.pdf accessed 20 September 2016; Daily Telegraph, Government U-turns on 500 per cent increase on immigration tribunal fees, (25 November 2016) <http://www.telegraph.co.uk/news/2016/11/25/government-u-turns-500-per-cent-increase-immigration-tribunal/> (accessed 12 February 2017)

‘the changes to legal aid contracting over not just the last year but over the last five years is extremely relevant to how casework is developed. It’s clearly the single biggest driver for how certain firms do their work or how any firm does their work, but also who is in the field and who isn’t and how particular work is done.’⁵⁰

The austerity regime introduced under the Coalition provided the justification for a major restructuring and curtailment of legal aid spending, far more drastic than the introduction of the GFS had been previously. The legal aid framework under the Access to Justice Act 1999 was replaced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). This reduced legal aid funding across many areas of civil law that impact on both migrants’ and citizens’ rights, including housing, education and employment⁵¹ and has been characterised as ‘an enormous assault on the availability of publicly funded legal services.’⁵² However, immigration cases, including the kinds of Article 8 cases discussed in chapter 5, were removed from legal aid entitlement altogether, despite their crucial importance.⁵³ What remained for migrants’ rights cause litigators was legal aid for asylum cases, trafficking cases, a small subset of cases relating to domestic violence, judicial review and immigration bail cases.⁵⁴ These cuts were then followed up in the ‘transforming legal aid’ regulations of 2013 which cut legal aid payments further by removing the 35% ‘uplift’ previously paid for work at the Upper Tribunal level.⁵⁵ As Thomas has summarised, ‘the upshot was a radical reduction in immigration legal aid.’⁵⁶

While what was left continued in principle to cover a significant amount of cause litigation work, in combination with the cuts under the GFS scheme LASPO further damaged the mixed-economy model that many legal practitioners in this field relied upon. Up to this point, the

⁵⁰ Funding Officer Interview, 15th April 2014

⁵¹ LASPO 2012, Sch 1

⁵² Armstrong N, ‘LASPO, Immigration and Maaouia v United Kingdom’ (2013) 18 Judicial Review 177 177

⁵³ Ministry of Justice, ‘Scope’ (Ministry of Justice, Updated: Friday, 11 January 2013) <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/legal-aid/newslatest-updates/legal-aid-reform/scope> accessed 22 September 2016

⁵⁴ York (n17) 107

⁵⁵ Ministry of Justice ‘Transforming legal aid: delivering a more credible and efficient system: Consultation Paper CP14/2013’ (Ministry of Justice, 9 April 2013) https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf accessed 22 September 2016

⁵⁶ Thomas, (n42) 115

more difficult and time consuming Article 8 regularisation or asylum cases had been cross-subsidised by the more relatively straightforward immigration cases.⁵⁷ This approach had been encouraged by the Legal Services Commission, the administrative agency responsible for legal aid funding at the time, which referred to it as ‘a “swings and roundabouts” business model’, which ‘relied on balancing simple cases against complex ones’.⁵⁸ Following LASPO and the withdrawal of immigration from legal aid in its entirety this would no longer be possible.

It should also be remembered that, as was mentioned in chapter 4, in 2013 the intention to introduce a residence test for eligibility for what remained of legal aid was announced, which would have effectively excluded all irregular migrants and all newly arrived lawful migrants from entitlement to civil legal aid (other than asylum claimants). The statutory instrument required for this move was subject to judicial review by cause litigators who, after losing before Laws LJ in the Court of Appeal on all grounds, succeeded in obtaining a decision from the Supreme Court that it was unlawful as being ultra vires the powers given by LASPO.⁵⁹ The Court expressly gave no opinion on the underlying discrimination and access to justice issues at the heart of the Residence test proposals, issues which the Court of Appeal had found acceptable, and so the prospect of primary legislation to introduce a residence test remains open.⁶⁰

In the same way as financial issues under austerity coincided with the immigration control imperative, ingrained Conservative party scepticism towards constitutionalism and a thicker rule of law⁶¹ was allied with concerns about control to bring in a number of restrictions to Judicial Review proceedings. While they had a wider impact, cause litigation for migrants’ rights was particularly vulnerable to them and, as will be discussed below, they were publicly justified in control imperative terms. Firstly, the Coalition attempted to restrict the role that NGOs and other interveners could play in judicial review proceedings, discussed at length in

⁵⁷ York (n17) 131

⁵⁸ York (n17) 131

⁵⁹ R (The Public Law Project) v Lord Chancellor [2016] UKSC 39; and Public Law Project v The Lord Chancellor [2015] EWCA Civ 1193

⁶⁰ R (The Public Law Project) v Lord Chancellor [2016] UKSC 39 para 39

⁶¹ Munce P, ‘The Conservative Party and Constitutional Reform: Revisiting the Conservative Dilemma through Cameron’s Bill of Rights’ (2014) 67 Parliamentary Affairs 80

chapter 4, by increasing the financial obstacles to them doing so.⁶² Sections 85 and 87 of the Criminal Justice and Courts Act 2015 required third parties supporting claimants to provide much more detailed disclosure of their financial records than was previously the case and, more onerously, created for interveners a potential liability for any costs accrued by the defendant (typically the Home Office) arising from their intervention.

Of potentially the greatest risk to strategic cause litigation were measures designed to reduce the financial viability of judicial review challenges. Section 88 of the CJA barred the application of PCOs to the pre-permission stage of judicial review.⁶³ As was also discussed in chapter 4, fear of liability for government costs if the case is unsuccessful is a major obstacle to NGO participation in strategic litigation cases. PCOs were created in order to diminish this fear. However, as Hickman and Jaffey have noted,

‘Defendants and interested parties not infrequently run up massive pre-permission bills... We have seen cases where such cases pre-permission costs have comfortably exceeded £30,000. The risk of unknown and potentially substantial pre-permission costs is a risk that those who would otherwise qualify for costs protection cannot possibly take.’⁶⁴

Mirroring this move, the Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 also limited legal aid payments to those cases where permission to proceed was ultimately granted or the Secretary of State withdrew the challenged decision. Thus all work in preparation for a judicial review around individual or a group of individual’s cases would be done at the financial risk of the lawyers concerned, as payment would depend on the result achieved.⁶⁵ This was a highly significant step for cause litigation as aside from the strategic cases, judicial review plays a particularly prominent role in day-to-day immigration and

⁶² Ministry of Justice, Judicial Review – proposals for further reform: the Government response, (MoJ February 2014) <https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response.pdf> para 35 accessed 22 September 2016

⁶³ Criminal Justice and Courts Act 2015 s. 88 (3)

⁶⁴ Ben Jaffey and Tom Hickman, ‘Loading the Dice in Judicial Review: The Criminal Justice and Courts Bill 2014’ (UK Constitutional Law Association, 6th February 2014) <https://ukconstitutionallaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/> accessed 22 September 2016

⁶⁵ The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015 s.2(3)

asylum matters. Statistics released in 2013 at the height of the backlash against the expanded Rule of Law showed 77% of the total judicial reviews lodged were immigration and asylum related.⁶⁶ Such a preponderance of migrants' rights cases had attracted the ire of the immigration service and the wider Executive. As Robert Thomas has commented, 'epithets such as "lacking substance", "without merit", and "vexatious" have repeatedly been employed by the Home Office to characterise immigration judicial reviews.'⁶⁷

Using this weight of 'vexatious' claims as justification the Coalition also, through section 84 of the CJCA,⁶⁸ compelled judges to refuse permission for judicial review in circumstances where the conduct of the public authority was unlawful, but it is considered that had the public authority behaved lawfully the outcome would have been 'highly likely' to have been the same. Thus judicial review's capacity to act as a means for securing damages, censure and thus discipline public bodies were further reduced.

The most contentious aspect of this drive to curtail the legal framework for cause litigation and diminish the influence of the rule of law in immigration, though, has been the ongoing drive to repeal the Human Rights Act. This was a manifesto pledge of the Conservatives in the 2010 election but was blocked by the Liberal Democrats once the Coalition had formed.⁶⁹ Nevertheless, sections of Conservative government, most prominently Theresa May the then Home Secretary and now Prime Minister and Chris Grayling the then Justice Secretary, continued to agitate for its repeal and towards the end of the Parliament, in November 2014, a Conservative party paper was published which set out concrete proposals.⁷⁰ Amongst many other aspects of concern to cause litigators, this document contained provisions that would

⁶⁶ Ministry of Justice, 'Judicial and Court Statistics 2011' (Ministry of Justice, 28 June 2012) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf accessed 22 September 2016

⁶⁷ Robert Thomas, 'Immigration Judicial Reviews' (UK Constitutional Law Association, September 12, 2013) <http://ukconstitutionallaw.org/2013/09/12/robert-thomas-immigration-judicial-reviews/> accessed 22 September 2016

⁶⁸ Amending the Senior Courts Act 1981 s.31; Criminal Justice and Courts Act 2015 s. 84(1)

⁶⁹ Munce P, 'Profoundly Un-Conservative? David Cameron and the UK Bill of Rights Debate', (2012) 83 The Political Quarterly 60; McQuigg R J A, 'The Human Rights Act 1998 - Future Prospects' (2014) 35 Statute Law Review 120 121

⁷⁰ The Conservative Party, 'Protecting Human Rights in The UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws' (The Conservative Party, 3rd October 2014) http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf accessed 31st August 2016

have likely led to the UK having to withdraw or be expelled from the ECtHR and contained specific curtailment of the roles of articles 3 and 8 ECHR in immigration policy and procedure.⁷¹ On achieving a majority in the 2015 general election, the new Conservative government announced the intention to progress the repeal of the HRA within its first hundred days in office.⁷² However since that announcement the timetable continued to slip, as a series of obstacles created more difficulties than it appears were bargained for when the pledge was made.⁷³ The difficulties the current government have had in delivering what was a clear and long-standing manifesto commitment are an important issue which will be discussed in more detail later in this chapter. For now it is enough to note that since the coming into power of the Coalition government of 2010, the prospect of revocation of the HRA has been hanging over cause litigators and since 2015 has become a viable possibility.

While these general steps were of particular importance to cause litigation, a number of specifically anti-cause litigation steps were also pursued. Chapter 5 has already demonstrated that substantial steps were taken to curtail the influence of Article 8 ECHR in judicial decision making. However, in addition to these moves, s.15 of the Immigration Act 2014 withdrew a wide range of appeal rights in their entirety, leaving only appeals on the grounds that removal would breach the United Kingdom's obligations under the Refugee Convention and/or the 2004 EU Qualification Directive, or be unlawful under the HRA.

Moreover, s.17(3) of the Act gave the Secretary of State the power to issue a certificate in cases where an individual has sought to make a human rights appeal against a deportation order (as was previously discussed in chapter 5, effectively the only ground of appeal open to most deportees) which would compel them to pursue their appeal from outside the country. This has been referred to as a 'deport first, appeal second'⁷⁴ provision. Cause litigators report that while the power to certificate such cases is permissive rather than mandatory,

⁷¹ Ibid

⁷² Tim Ross, 'David Cameron: My plan for the Tories' first 100 days in power' (Telegraph, London, 26 Apr 2015) <http://www.telegraph.co.uk/news/general-election-2015/11563550/David-Cameron-My-plan-for-the-Tories-first-100-days-in-power.html> accessed 22 September 2016

⁷³ Gearty C, *On Fantasy Island: Britain, Europe and Human Rights*, (OUP 2016) 187

⁷⁴ Home Office, 'Deport first, appeal later' measures start to bite' (Home Office, 6 January 2015) <https://www.gov.uk/government/news/deport-first-appeal-later-measures-start-to-bite> accessed 22 September 2016

immigration service caseworkers effectively apply it in every available case.⁷⁵ In addition, the recent Immigration Act 2016 contains provisions to extend this power to *all* human rights appeals where the Secretary of State considers that the person would not face a real risk of serious irreversible harm.⁷⁶

In combination with the legal aid provisions discussed above, and even without the potential reintroduction of a residence test, these moves mean that migrants seeking to regularise their status face a concerted range of obstacles to them doing so. Firstly, they will be compelled to rely on human rights arguments in their appeals (as all other arguments have been withdrawn from them) and in effect for most people this will mean reliance on Article 8. Secondly, consideration of Article 8 has been significantly undermined through the legislative and rules changes discussed in chapter 5. Thirdly, in any case such a person is highly likely to go unrepresented, given the lack of legal aid funding for such cases; and fourthly, in deportation cases at the present time, and shortly all other immigration cases, appeals arising from such applications will likely be conducted with the claimant already in their country of origin rather than the courtroom. The likely scenario will therefore be a ‘highly adversarial’⁷⁷ Tribunal hearing before an Immigration Judge where the Immigration Service is represented and the Appellant is neither represented nor present.

When interviewed, an experienced cause litigation barrister described this scenario as one in which ‘the Secretary of State has a free run at the appeal’,⁷⁸ but it is a scenario that has been challenged by cause litigators and found by the Court of Appeal in *Kiarie [2015]* to be lawful in the generality of cases.⁷⁹ Despite the judicial approach documented in chapter 4 of tending to defend their territory against encroachment from the executive when issues of justice are concerned, when asked to deal with this scenario of foreign national offenders relying on Article 8 to appeal a deportation order, the justices went out of their way to characterise the practical business of an out of country appeal in a manner that did not reflect cause litigators’

⁷⁵ RLG; Immigration Barrister Interview, 20th December 2015

⁷⁶ Immigration Act 2016, s.63

⁷⁷ Thomas, (n42) 118

⁷⁸ Immigration Barrister Interview, 20th December 2015

⁷⁹ R (Kiarie) v The SSHD [2015] EWCA Civ 1020 para 71

experience⁸⁰ and placed huge reliance on the effectiveness of ‘the specialist immigration judges within the tribunal system’ to act as a backstop for any problems that might arise.⁸¹

iii) Conclusion

In response to cause litigation’s role in the UK’s immigration politics, then, a series of restrictive measures have been introduced directed at the resources and legal framework that cause litigation relies on. To understand the full consequences for cause litigation and its role in protecting and defending migrants’ rights in the UK’s immigration politics of this backlash, it is necessary to first analyse how this backlash was delivered, as this will help explain the nature, if any, of the constraints that the executive was operating under.

How the Rule of Law in Immigration was diminished: Liberal Universalism and the Control Imperative

‘Human rights has become a code word for foreigners interfering in our legal affairs.’⁸²

This section will show that this backlash was intended to appeal to a core of factors, including the politics of austerity and anti-Europeanism, which had coalesced into a reassertion of a nationalist, sovereignty-based political framework around immigration. The expansion of the rule of law into a thicker, internationalist and universal rights-based framework, which cause litigation depends on, was associated with a wider project of liberal economics and social cosmopolitanism which were collectively treated as being responsible for the threats and peril which, as was discussed in chapter three, dominate the UK’s immigration discursive opportunity structures. They were contrasted by the executive with a more traditional ‘thin’ notion of the rule of law, which had applied during the prolonged period of executive dominance of immigration and ‘zero-migration’ policies of the second half of the 20th Century. A thinner rule of law would undermine cause litigation, facilitate the control imperative and was thus treated as the only legitimate form for the UK context.

⁸⁰ Ibid para 66

⁸¹ Ibid para 65

⁸² Migrants’ Rights Consultant Interview 27th August 2013

i) Obstacles to the Backlash

Before examining the executive's rhetorical strategy in detail two important factors should be noted. The first is to reiterate the point, discussed in chapters 2 and 3, that politicised litigation in other contexts has been shown to be vulnerable to backlash when it is engaged in in isolation from mainstream activism and a viable public engagement with significant political purchase. Chapters 3, 4 and 5 have shown that cause litigation for migrants' rights in the UK does largely suffer from this handicap. This lack of a significant mainstream constituency in support of migrants' rights leads to the second key point to note. This is that the control-orientated backlash that was instituted was able to proceed with little or no Parliamentary opposition. As was discussed in chapter 5, the curtailment of access to Article 8 was supported by the Labour party with the only formal criticisms being that the steps taken did not go far enough. The withdrawal of appeal rights were opposed by the Labour party in the Commons but passed easily with the support of the Liberal Democrats, the junior partner in the Coalition.⁸³ Regarding the legal aid cuts, Thomas has commented that,

‘a notable feature of LASPO was the almost total lack of Parliamentary opposition... the withdrawal of immigration legal aid was barely mentioned in the Commons... An amendment to retain immigration within scope was defeated in the Lords.’⁸⁴

It is indicative, though, that the curtailment of access to Judicial Review was met with some opposition in the House of Lords. The duty on the court to compel interveners to pay the government's costs, as described above in relation to what was to become section 87 of the CJA, was watered down to only apply in more limited circumstances.⁸⁵ Even more significantly, the most successful act of opposition to the backlash came from the judges. Stronger restrictions on the rules of standing in judicial review, which would have drastically curtailed NGO's ability to bring strategic litigation, had been initially proposed by the

⁸³ HC Deb 30 Jan 2014 Vol 574 Col 1109

⁸⁴ Thomas (n42) 116

⁸⁵ Criminal Justice and Court Act 2015 s. 87

executive⁸⁶ but were opposed by the judiciary in an unusually strongly worded public submission to the consultation on the Bill. This was done through reliance on the rule of law, with the judges stating, amongst other things, that,

‘Any consideration of a new test of standing must address head-on the effect this may have on the rule of law. The consultation paper fails to do so.’⁸⁷

Following this intervention the proposal was dropped from the bill. With regard to the specifically immigration-orientated restrictions, despite not ultimately being pushed to a vote, the curtailment of immigration appeal rights received the strongest of what little parliamentary opposition there was, and this was done again in rule of law terms. Opposition MPs pushing for the retention of appeal rights cited the Wilson Committee’s 1967 report on administrative justice, which stated that it was

“fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man’s whole future should be vested in officers of the executive, from whose findings there is no appeal.”⁸⁸

What parliamentary opposition to the backlash there was was couched in rule of law terms, with the more overt the clash the stronger the resistance. The executive therefore had to construct an approach that would meet the imperative for a reassertion of control in immigration by undermining cause litigation, while at the same time being seen to preserve an acceptable conception of the rule of law.

ii) The Forces in Immigration Policy: Universalism versus Nationalism

As was discussed in detail in chapter 2, analysts of liberal states’ responses to immigration have raised various explanations for the competing influences that govern the policy

⁸⁶ Ministry of Justice, Judicial Review – proposals for further reform: the Government response, (MoJ February 2014) <https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response.pdf> accessed 22 September 2016

⁸⁷ The Judiciary of England and Wales, ‘Response of the senior judiciary to the Ministry of Justice’s consultation entitled ‘Judicial Review: Proposals for Further Reform’’ (The Judiciary of England and Wales, November 1, 2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf> accessed 22 September 2016

⁸⁸ Mactaggart F, HC Deb 22 October 2013, Vol 569, Col 188

approaches adopted.⁸⁹ Joppke in particular has addressed the UK directly, and writing in the late 1990s found a state that, 'has displayed an exceptionally strong hand in immigration policy.'⁹⁰ Joppke argued that the UK, 'stands out as the Western world's foremost 'would-be zero immigration country' displaying an exceptionally strong and unrelenting hand in bringing immigration down to the 'inescapable minimum'.⁹¹ This strength, Joppke argued, derived from a political consensus on immigration rooted in race-based nationalism. In the UK case, Joppke identified a situation in which a nationalist frame of executive conduct and governmental policy was in competition almost solely with universalist legal norms that this thesis has shown cause litigation relies on, and that it was consistently winning out in that contest. As a result, immigration policy could be conducted on the basis that, 'immigration is considered a non-recurrent, historically unique event whose consequences are not yet fully mastered, and which is unlikely to be repeated in the future.'⁹²

Hampshire's more recent analysis of this field came to some similar conclusions regarding the importance of liberal universalism as a counterweight to the dominance of nationalist policy framing, albeit based on general norms of which specific legal rules are an important but still only a constituent part.⁹³ For Hampshire, these factors are more expressly balanced against each other, theoretically in a permanent and irresolvable competition, in contrast to Joppke's approach of assuming a nationalist framework and then applying a (on his argument very weak) legal universalist counterweight.

Yet, however the relationship between these two forces is specifically conceptualised, around the time of Joppke's publication a set of both legal and wider policy changes were being instituted that would run counter to his assessment. Immigration policy would in a number of respects be opened up and legal universalism would be expanded through the thickening of the rule of law. This was itself part of a project combining liberal economics, social cosmopolitanism and a universalist rights framework. It is this thickening that was then taken

⁸⁹ Joppke C, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 *World Politics* 266; Hampshire J, *The Politics of Immigration* (Polity 2013); Cornelius W, Martin P and Hollifield J (Eds), *Controlling Immigration: a Global Perspective* (Stanford University Press 1994) 3-51

⁹⁰ Joppke C, *Immigration and the Nation State: the United States, Germany and Great Britain* (OUP 1999) 137

⁹¹ *Ibid* 100

⁹² *Ibid* 9

⁹³ Hampshire J, *The Politics of Immigration* (Polity 2013)

up and activated by the cause litigators. This could be thought of as an experiment, then, in introducing a universalist framework to the UK's immigration politics. These changes have come to be particularly associated with the New Labour government. This is ultimately because of the effect they had on New Labour's political philosophy and its economic policies while in government.

As was discussed earlier in this chapter and in chapter 3, New Labour's philosophy and economic policies were centred around notions of 'modernisation' which sought to differentiate themselves from previous Labour administrations through adherence to neoliberal economics.⁹⁴ Employment 'flexibility' was encouraged,⁹⁵ making, as Anderson has noted, certain rights more contingent on economic performance than citizenship or belonging to the national "us".⁹⁶ At the same time, low and high skilled migration was encouraged, particularly through the decision not to impose transitional controls on A8 migrants from eastern Europe.⁹⁷ These reforms are frequently characterised solely in terms of New Labour's neo-liberalism and adoption of neoliberal globalisation.⁹⁸ Yet, they must also be understood in social cosmopolitan terms. Economic liberalisation was combined with a rejection of race-based nationalism of the previous Conservative administration. In this sense they sought to appeal to 'the middle-class, socially liberal and Southern voters' who occupied crucial marginal constituencies, while banking on the continued support of Labour's electoral base in the rapidly de-industrialised North, Wales and Scotland. As Consterdine and Hampshire have noted,

'economistic reasoning was reinforced by a secondary aspect of the Third Way, its cosmopolitan pluralism, which was part of New Labour's wider project of fostering a

⁹⁴ Goodwin M and Ford R, *Revolt on the Right: Explaining Support for the Radical Right in Britain* (Routledge 2014) 109

⁹⁵ Davies P and Freedland M, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (OUP 2007) 11; McCann D, *Regulating Flexible Work* (OUP 2008) 173

⁹⁶ Anderson B, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013) 71

⁹⁷ Consterdine E and Hampshire J 'Immigration Policy Under New Labour: Exploring A Critical Juncture' (2014) 9 *British Politics* 275 283

⁹⁸ Flynn D, 'New borders, new management: The dilemmas of modern immigration policies' (2005) 28 *Ethnic and Racial Studies* 463 469; Mulvey G, 'Immigration Under New Labour: Policy and Effects' (2011) 37 *JEMS* 1477 1483

progressive interpretation of British identity based on ideas of tolerance, openness and internationalism.’⁹⁹

In this sense, the decision to allow greater migration from the new EU member states formed part of a wider policy of closer engagement with the European project, in contrast to the highly contentious relationship the previous Conservative administration had developed with the EU.¹⁰⁰

To this socially cosmopolitan pro-Europeanism and the liberalisation of economic and migration policy can be added the rights-based universalist reforms of the Human Rights Act and the expansion of legal aid which as was shown in chapters 3, 4 and 5, began to take their effect in the same period. While the New Labour project could not generally be described as universalist, particularly in relation to their approach to immigration, the inherently universalist principles of the human rights framework proved expedient for a political project intent on pursuing a centre-left programme while appealing to voters across social, racial and class divides.¹⁰¹ Although these reforms were couched in the relatively nationalistic communitarian terms of ‘bringing rights home’ and as part of the ‘social exclusion’ agenda, they were nevertheless truly universalist in effect. They allowed access to the courts and greater legally enforceable rights for migrants than had ever previously been the case.

iii) The Resurgence of Nationalism and the Demand for Control

However, as chapter 3 recorded, these policies were introduced against a historic policy and discursive backdrop heavily informed by a nationalist frame, with significant hostility to immigration amongst large sections of the British electorate and no significant history of commitment to rights-based, judicialised politics. The collapse brought about by the Banking crisis of 2007-8 spurred a resurgence in nationalist and anti-migration sentiment.¹⁰² This was

⁹⁹ Consterdine and Hampshire (n97) 285

¹⁰⁰ Consterdine and Hampshire (n97) 275

¹⁰¹ Klug (n18) 246

¹⁰² Bobby Duffy & Tom Frere-Smith, ‘Perceptions and Reality: 10 things we should know about attitudes to immigration in the UK’ (Ipsos MORI Social Research Institute, January 2014) <https://www.ipsos-mori.com/Assets/Docs/Publications/sri-perceptions-and-reality-immigration-report-summary-2013.pdf> accessed 22 September 2016

particularly the case amongst working class, traditional Labour, voters for many of whom the universalist liberalisation and cosmopolitanisation of British economic and social life had not brought the benefits that the Labour government had claimed the country would enjoy.¹⁰³ While the middle-class socially liberal and southern voters that had become synonymous with New Labour, including, as was noted above, a legal profession and human rights lawyers, had obtained security despite, and in some cases because of, the rejection of traditional nationalism, as Goodwin and Ford noted, many traditional working class voters,

‘saw the influx of ‘foreigners’ as threatening their jobs, wages, identity, the cohesion of their local communities, and the nation at large.’¹⁰⁴

This talk of security and of threats is, of course, at the heart of the political imperative for the demonstration of control that has been discussed throughout this thesis. The coincidence of policies that were perceived by large portions of the electorate to have increased economic and social precariousness had led to an identification of this policy programme as being largely responsible for the threats that needed to be controlled, and a failure of the executive to perform its proper function of providing this security.

While New Labour’s pro-economic migration position derived from a combination of economic priorities and social cosmopolitanism, towards the end of their time in power this growing resurgence of nationalist influence on policy was already being recognised. Gordon Brown famously declared himself in favour of ‘British jobs for British Workers’, a phrase borrowed directly from the far-right nativist rhetoric of the BNP.¹⁰⁵ A line of policy thinking began to gain traction, led by figures such as Maurice Glasman and John Cruddas and known as Blue Labour, which emphasised a more rooted, community-based, socially traditional and ultimately nationalist policy perspective over the individualism and itinerancy identified in the migration state and legalised rights model that had previously been pursued.¹⁰⁶ Thus by the

¹⁰³ Anderson B, ‘Migration, Immigration Controls and the Fashioning of Precarious Workers’ (2010) *Work, Employment and Society* 300

¹⁰⁴ Goodwin and Ford (n94) 109

¹⁰⁵ Anderson (n96) 57

¹⁰⁶ Glasman M, Rutherford J, Stears M, White S (Eds) *The Labour Tradition and the Politics of Paradox*, (The Oxford London Seminars, in association with the Christian Socialist Movement, Compass, The Fabian Society, Progress and Soundings Journal 2011) Davis R, *Tangled up in Blue: Blue Labour and the Struggle for Labour’s Soul*

time of the arrival of the Coalition government with a guiding agenda of austerity, a distinct turn against the economic liberalism, social cosmopolitanism and rights-based universalism of the previous era had been identified by all the main parties.

This is not to claim that reversion to a nationalist frame was a universal or even hegemonic view amongst the UK population. However, it is to argue that a significant nationalist tendency had developed within UK society and, equally importantly, that it had considerable electoral significance.

iv) Targeting Cause Litigation's Universalism

In justifying the Coalition and Conservative backlash, elements of cause litigation that were broadly accurate, its ideology and the social make up and predominant political inclinations of cause litigators, were equated with New Labour's project of liberal reform and social cosmopolitanism, and then held collectively to be the archetype of both what was wrong with the previous regime and, crucially, why the electorate's demands for control were not being met. As will be seen, this rhetorical backlash in particular sought to impose a division of legitimacy between the rule of law model of 'modernising', rights-based, universalist cause litigation, based in what was characterised as the discredited previous regime, and the traditional and national, and therefore legitimate, model of the rule of law that favoured a minimalist role for the judiciary in immigration policy and control matters. All sides in the dispute around cause litigation presented themselves as in favour of the rule of law and as a result it became a malleable symbol of unquestionable social good. The contest then became focussed on what considerations fell inside and outside of its parameters.

At one level this involved questioning the legitimacy of the practical functions of the rule of law in the immigration context. The exercise of lawfully granted appeal rights and access to judicial review were characterised as 'abusing the system'. The then Home Secretary, Theresa May, announced to Parliament that, 'By limiting the grounds for appeal to four—only those

(Ruskin Publishing 2011); Sage D, 'A challenge to liberalism? The communitarianism of the Big Society and Blue Labour' (2012) 32 Critical Social Policy 365

that engage fundamental rights—we will cut that abuse’,¹⁰⁷ having previously claimed to the Conservative party conference that the appeal system,

‘is like a never-ending game of snakes and ladders, with almost 70,000 appeals heard every year. The winners are foreign criminals and immigration lawyers – while the losers are the victims of these crimes and the public.’¹⁰⁸

The emphasis on ‘fundamental rights’ indicates another aspect of this process, whereby a rhetorical division was created between what were considered to be ‘real rights’ and ‘abusive’¹⁰⁹ or ‘so-called rights’.¹¹⁰ To this end David Cameron claimed that ‘the good name of ‘human rights’ has sometimes become distorted and devalued. It falls to us in this generation to restore the reputation of those rights.’¹¹¹ Article 8 ECHR rights have been particularly vulnerable to this technique. In the run up to the 2015 election, for example, David Cameron promised that ‘We will extend our new policy of deport first, appeal later to cover all immigration appeals where a so-called right to family life is invoked.’¹¹²

These ‘so-called’ rights were then directly identified with the previous regime, through the repeated identification of ‘New Labour’s Human Rights Act’, as being responsible for blocking the executive’s control efforts. This was a trope routinely used in conservative media outlets,¹¹³ while Grayling, for example, asserted,

¹⁰⁷ May, T HC Deb 22 October 2013, Vol 569, Col 158

¹⁰⁸ Colin Yeo, ‘Theresa May unveils Tory immigration plans’ (Free movement, 1 October 2013) <https://www.freemovement.org.uk/theresa-may-unveils-tory-immigration-plans/> accessed 22 September 2016

¹⁰⁹ Michael Wilkinson, ‘Theresa May’s ‘chilling and bitter’ measures to send illegal migrants home’ (The Telegraph, London, 06 Oct 2015) <http://www.telegraph.co.uk/news/politics/conservative/11913723/david-cameron-conservative-conference-2015-live.html> accessed 22 September 2016

¹¹⁰ Home Office, ‘Immigration Act 2016 Factsheet – Appeals (Sections 63-65)’ (Home Office, July 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537244/Immigration_Act_-_Part_4_-_Appeals.pdf accessed 22 September 2016

¹¹¹ Christopher Hope, ‘Good name’ of human rights has become ‘distorted and devalued’, says David Cameron’ (The Telegraph, London, 15 Jun 2015) <http://www.telegraph.co.uk/news/politics/david-cameron/11674006/Good-name-of-human-rights-has-become-distorted-and-devalued-says-David-Cameron.html>

¹¹² David Cameron, ‘JCB Staffordshire: Prime Minister’s speech’ (Prime Minister’s Office, 10 Downing Street, 28 November 2014) <https://www.gov.uk/government/speeches/jcb-staffordshire-prime-ministers-speech> accessed 22 September 2016

¹¹³ Patrick Hennessy, ‘Britain challenges power of human rights court’ (The Telegraph, London, 21 Jan 2012) <http://www.telegraph.co.uk/news/politics/david-cameron/9030375/Britain-challenges-power-of-human-rights-court.html> accessed 22 September 2016

‘We will repeal Labour’s Human Rights Act. In its place we will be bringing forward a British Bill of Rights and Responsibilities. Because we believe the two go firmly together. It’s not good enough to announce ‘I know my rights’ if you aren’t prepared to accept that you have responsibilities to society and your fellow citizens as well.’¹¹⁴

In this way, rights-based migrants’ appeals were conflated with New Labour, rendering both contrary to British traditions, spurious and responsible for society’s current problems.

Following this, the point was driven home through invoking a notion of lawyers as having profiteered off the lack of control in immigration. May’s comment, above, regarding ‘lawyers and foreign criminals’ being the only people that benefitted from the appeals system was one such instance, while others included the then Lord Chancellor Grayling’s complaint about ‘lawyers who make money out of creating opportunities to attack government, Parliament and the decisions they make’¹¹⁵ and the Justice Minister Dominic Raab’s reference to human rights laws as ‘an industry or bandwagon for lawyers.’¹¹⁶ It is here that a notion that a class of moneyed social cosmopolitans have directly benefitted from instituting the threats that ‘the public’ and ‘ordinary people’ suffer from was developed. In some instances, this was taken to the point of conflating ‘New Labour’ and cause litigators, through an assumed alliance of common interests, with Grayling publishing the complaint that,

The professional campaigners of Britain are growing in number, taking over charities, dominating BBC programmes and swarming around Westminster... There is a steady flow of people taking up such jobs from the world of politics – former advisers and politicians joining the ranks of these serial campaigners... The traffic also goes in the opposite direction, with campaigners lining up to try to become Labour MPs... One essential part

¹¹⁴ Chris Grayling ‘We must seize power from Euro judges and return the phrase Human Rights to what it really should be - a symbol of the fight against oppression and brutality’ (Daily Mail, London, 3 October 2014 (Updated 22 December 2014)) <http://www.dailymail.co.uk/news/article-2778786/We-seize-power-Euro-judges-return-phrase-Human-Rights-really-symbol-fight-against-oppression-brutality.html> accessed 22 September 2016

¹¹⁵ Chris Grayling, ‘Chris Grayling: We must stop the legal aid abusers tarnishing Britain’s justice system’ (The Telegraph, London, 20 Apr 2014) <http://www.telegraph.co.uk/news/uknews/law-and-order/10777503/Chris-Grayling-We-must-stop-the-legal-aid-abusers-tarnishing-Britains-justice-system.html> accessed 22 September 2016

¹¹⁶ Raab, D HC Deb 09 May 2016, Vol 609, Col 516

of the campaigner's armoury is the judicial review, through which it is possible for them to challenge decisions of government and public bodies in the courts.¹¹⁷

These directly politicised attacks also merged with an appeal to the need to revert to an older, 'traditional', political culture with regard to legalised rights and immigration control. In doing so, the present, discussed as chaotic and threatening, was contrasted with an idealised past of properly functioning institutions and effective immigration control. In particular, legitimacy for the role of the rule of law was linked directly to the extent to which it could be associated with a particular political tradition; the tradition of minimal state intrusion and the protection of property rights and civil liberties. Raab, as Justice Minister, was most overt about this principle when repeatedly invoking,

'this country's liberal tradition of freedom and its approach to human rights, which is founded in Magna Carta and in the thinking of great British philosophers from John Locke and John Stuart Mill through to Isaiah Berlin.'¹¹⁸

However similar, less theoretically literate, points were made by Cameron, who invoked the importance of rights 'rooted in our values'.¹¹⁹ This critique included direct attacks on cause litigators, as mentioned above, but also encompassed judges, who were accused of 'activism' and of actively undermining the rule of law¹²⁰ when their judgments and the rights they applied could be construed as falling outside of the boundaries of this tradition.

This traditionalist rhetorical backlash against cause litigation's universalism and social cosmopolitanism was further imbued with a heavy emphasis on nationalism. The most overt example of this being the proposal to replace the Human Rights Act with 'a British Bill of

¹¹⁷ Chris Grayling 'The judicial review system is not a promotional tool for countless Left-wing campaigners' (Daily Mail, London, 6 September 2013 (Updated 11 September 2013)): <http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html> accessed 22 September 2016

¹¹⁸ Raab, D HC Deb 09 May 2016, Vol 609, Col 513

¹¹⁹ Mark Elliott, 'David Cameron promises a "British Bill of Rights". And what, exactly, does that mean?' (Public Law for Everyone, October 1, 2014) <https://publiclawforeveryone.com/2014/10/01/david-cameron-promises-a-british-bill-of-rights-and-what-exactly-does-that-mean/> accessed 22 September 2016

¹²⁰ Policy Exchange, 'Judicial Power Project' (Policy Exchange) <http://policyexchange.org.uk/judicial-power-project/item/judicial-power-project> Accessed 31st August 2016

Rights’.¹²¹ The nationalisation of the rights involved in cause litigation indicates a conscious attempt to paint the rights available through the Human Rights Act as foreign, or specifically European, and as therefore distinct from the legitimate tradition of the rule of law in the UK. David Cameron emphasised this nationalisation when stating that ‘this country will have a new *British* Bill of Rights to be passed in *our Parliament*, rooted in our values.’¹²²

The migrants’ rights cause litigation case of *Ullah*, discussed in Chapter 5, played a crucial role here, as a result of the principle that Lord Bingham enunciated in it regarding British courts’ duties under section 2 of the HRA to ‘take into account’ the Strasbourg caselaw. Bingham’s interpretation of what ‘take into account’ required was that ‘courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court’ and that ‘The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.’¹²³ This strong adherence to Strasbourg authority has proved highly controversial amongst academic¹²⁴ and judicial commentators¹²⁵ while in political debate, particularly during the backlash period, it was reduced to the notion of a ‘threat to British democracy by the human rights bandwagon’¹²⁶ and British courts being subservient to ‘foreign judges’. During the backlash foreign migrants’ and ‘foreign’ judges, then, were associated together as joint threats to the nationalist model of control being promoted. At the time of writing the future of this British Bill of Rights continues to be up in the air.¹²⁷ Nevertheless, its totemic presence in Conservative discourse during this period

¹²¹ Munce (n61) & (n69)

¹²² Elliott (n119)

¹²³ R (Ullah) v Special Adjudicator [2004] UKHL 26, para 20

¹²⁴ Kavanagh, (n25) *Constitutional Review* 153-155; Andenas M & Borge E, ‘Is the Ullah principle wrong?’ (2012) 128 LQR 319

¹²⁵ Lord Justice Laws, Hamlyn Lectures: Lecture III: The Common Law And Europe, (Judiciary of England and Wales, 27 November 2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf> accessed 22 September 2016; Lord Judge - Constitutional Change: Unfinished Business, (UCL Constitution Unit, 18 December 2013) <http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/181213> accessed 22 September 2016

¹²⁶ Dominic Raab, quoted in Daily Telegraph, ‘Strasbourg not superior to British courts’ says former senior judge’ (Telegraph, 4 December 2013) <http://www.telegraph.co.uk/news/uknews/law-and-order/10495899/Strasbourg-not-superior-to-British-courts-says-former-senior-judge.html> accessed 22 September 2016

¹²⁷ James Tapsfield, ‘Theresa May is ‘set to shelve’ David Cameron’s flagship plan for a British Bill of Rights’ (Daily Mail, London 10 August 2016 (Updated 10 August 2016)) <http://www.dailymail.co.uk/news/article-3732902/Theresa-set-shelve-David-Cameron-s-flagship-plan-British-Bill-Rights.html> accessed 22 September 2016

served as a catch-all response to the various interconnecting strands of concern discussed in this section.

As the same time as instituting a backlash that would diminish the capacity of the rule of law to function as a check against executive power through cause litigation, though, the executive needed to continue to express commitment to principles of the rule of law and of human rights, which were assessed to be indispensable. David Cameron repeatedly invoked the rule of law as a key part of his campaign to promote 'British values', describing it as, 'as British as the Union Flag, as football, as fish and chips.'¹²⁸ Theresa May did similarly, describing, 'our shared values, such as democracy, the rule of law, individual liberty and mutual respect.'¹²⁹ Lord Chancellor Grayling was most overt of all on this point when defending the judicial review provisions in the Commons,

As Lord Chancellor I take my responsibility to uphold the rule of law very seriously, but I do not believe that the way in which it has evolved in relation to the current use of judicial review is consistent with or necessary to uphold the rule of law.¹³⁰

The solution that was reached was described by one interviewee for this thesis as 'a permanent war with the human rights defenders.'¹³¹ However, it can perhaps be better explained as a project of cultural politics which, in Nash's sense as was discussed in chapter 2, involves 'challenges to power relations'¹³² in which 'accepted norms and meanings are challenged and new articulations of interests and identities instituted in their place.'¹³³ This process can involve the contestation over notions of legitimacy, and involves processes of 'symbolisation' in which concepts and foundational myths within a political society, such as 'the rule of law' or 'human rights',¹³⁴ and indeed social groups such as 'ordinary people', the 'British public' and even 'lawyers', can be ascribed a meaning the definition of which is

¹²⁸ David Cameron, 'British values: article by David Cameron' (Prime Minister's Office, 10 Downing Street, 15 June 2014) <https://www.gov.uk/government/news/british-values-article-by-david-cameron> accessed 22 September 2016

¹²⁹ May, T HC Deb 10 June 2013, Volume 564, Col 20

¹³⁰ Grayling, C HC Deb 01 December 2014, Vol 589, Col 70

¹³¹ Immigration and Welfare Barrister Interview, 9th April 2014

¹³² Nash K, 'The 'Cultural Turn' in Social Theory: Towards a Theory of Cultural Politics' 2001 35 Sociology 77 85

¹³³ Ibid 87

¹³⁴ Nash K, *The Cultural Politics of Human Rights: Comparing the US and UK* (CUP 2009) 1-2

contestable and contested through rhetoric, including around the nature and extent of any notions of legitimacy that might be attached to them.

v) Conclusion

In the present case, the executive's rhetoric was focussed on demarcating a legitimate definition of the rule of law and notions of rights and their role in immigration control. This definition was based around a claimed national tradition of classical liberalism. At the same time, this legitimacy was contrasted with a class of 'lawyers' and a wider 'human rights industry' symbolised as essentially trivial, rootless and profiteering off an illegitimate and failed New Labour experiment in cosmopolitan reform to the rule of law and to wider British society. This was an experiment that was ultimately held responsible for the threats and sense of peril that sat at the heart of the public imperative for control of migration. Thus, it was through appealing to and appeasing the public element of the political opportunity structure that cause litigators confront, the control imperative, that the executive was able to secure the roll back of the resources and legal framework that sustain cause litigation.

The Consequences for Cause Litigation as a Tool for Protecting Migrants' Rights

*"I do think it's a problem that we end up so dependent on litigation because we are so unable to win the argument."*¹³⁵

The backlash targeted cause litigation by seeking to undermine its resources, primarily in the sense of finance through the legal aid system, and the legal and judicial framework that sustains it. It made the pursuit of judicial review and strategic litigation as set out in chapter 4 more difficult, more risky and less effective while at the same time diminishing day-to-day cause lawyering through curtailing appeal rights and, as was set out in chapter five, reducing the influence of Article 8. While the previous section has clearly set out that this was the intent, the extent to which it has been effective must be examined. Despite the compelling nature of the control imperative's demand for action to be taken in this way, the previous section also noted that the executive did not have an entirely free hand in this area. How the

¹³⁵ Migrants' Rights NGO Director 1 Interview, 8th April 2014

constraints that existed impacted on the practical effects and the broader consequences of the backlash will explain much about where cause litigation has been left and what the future may hold for its role in defending and promoting migrants' rights.

Taking the practical effects first, it is perhaps too early to get a defined picture of the extent of the backlash's impact, although research efforts are being made to chart this.¹³⁶ That said, the most overt and fundamental issue has been the reduction in legal aid availability. The cuts to financial resources led to reductions in the availability of the other key resource for cause litigation; committed cause lawyers able to engage in long-term representation work. As has already been noted, the early days of the coalition government saw the collapse of the two leading national cause litigation charities, the RLC and the IAS. While this happened prior to LASPO coming into effect, their collapse was precipitated by the announcement that immigration would be removed from legal aid scope.¹³⁷ Their demise was followed by the closure of one of the leading cause litigation barristers chambers, Took's Chambers, in 2013 citing 'devastating legal aid cuts',¹³⁸ and over the course of three years following the coming into force of the LASPO cuts, 11 law centres closed down.¹³⁹ This has left only 44 law centres across the country, of which 20 are in Greater London.¹⁴⁰ As one funder of cause litigation noted, "I think the sector's in shock and everybody's head are down."¹⁴¹

Law centres and private cause litigation firms are also reported as having to 'turn people away who they would have previously been able to help' while the Law Centres Network state that, 'On average, centres are taking on only one in four of the cases they would have conducted

¹³⁶ Natalie Byrom, 'The State of the Sector: The impact of cuts to civil legal aid on practitioners and their clients' (The Centre for Human Rights in Practice, University of Warwick in association with Illegals April 2013) https://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/spendingcuts/153064_statesector_report-final.pdf accessed 22 September 2016; also, The Low Commission on the Future of Advice and Legal Support, <http://www.lowcommission.org.uk/> accessed 27 September 2016

¹³⁷ BBC News, 'Immigration Advisory Service goes into administration' (BBC News, London, 11 July 2011) <http://www.bbc.co.uk/news/uk-14105065> accessed 22 September 2016

¹³⁸ Sam Marsden 'Michael Mansfield QC's chambers to close over 'devastating' legal aid changes' (The Telegraph, London, 23 Sep 2013) <http://www.telegraph.co.uk/news/uknews/law-and-order/10328955/Michael-Mansfield-QCs-chambers-to-close-over-devastating-legal-aid-changes.html> accessed 22 September 2016

¹³⁹ Jon Robins 'We will have a law centre owned and run by the people for the people' (The Justice Gap, June 24, 2016) <http://thejusticegap.com/2016/06/will-law-centre-owned-run-people-people/> Accessed 31st August 2016

¹⁴⁰ Law Centres Network, 'Law Centres' (Law Centres Network) <http://www.lawcentres.org.uk/about-law-centres/law-centres-on-google-maps/alphabetically> accessed 22 September 2016

¹⁴¹ Funding Officer 2 Interview, 28th February 2013

in the past' across all areas of law.¹⁴² This has been put down to a combination of the removal of classes of case, particularly non-asylum regularisation cases, from legal aid provision all together and the withdrawal of appeal rights. The lack of alternative sources of income for not-for-profit organisations such as law centres and the mixed-economy business models of private cause litigation firms have meant it has not been possible to maintain the levels of cause litigation casework at previous levels.¹⁴³ Some cause litigators have predicted that the removal of appeal rights and their replacement with 'administrative review' will simply generate significantly more judicial reviews of poor administrative review decisions.¹⁴⁴ It is too early to tell definitively whether or not this has occurred, but recent figures show an increase in immigration-related judicial reviews from just over 13,000 in 2013, to over 20,000 in 2015/16.¹⁴⁵ Even if a permanent increase in judicial review did occur, it is unlikely that it would fully compensate for the loss of appeal rights, both in quantities of cases and in practical outcomes, as such reviews would not ordinarily be empowered to reach decisions on the underlying merits of the case. Moreover, as has already been discussed in this and the previous chapter, cause litigators report that the 'deport first appeal later' provisions, in combination with the roll-back of article 8 protections, have rendered what appeals that remain extremely difficult to win.

Turning to the broader implications for cause litigation's future, interviewees repeatedly expressed serious concern about the impact of the specific measures that have been introduced and also the implications of the manner in which this was done. An NGO officer,

¹⁴² Catherine Baksi, 'Law centres: Picking up the pieces' (The Law Society gazette, 1 September 2014) <http://www.lawgazette.co.uk/analysis/features/law-centres-picking-up-the-pieces/5042728.fullarticle> accessed 22 September 2016

¹⁴³ The early days of these developments were discussed in interview with Funding Officer 2 Interview, 28th February 2013; Funding Officer Interview, 15th April 2014

¹⁴⁴ Colin Yeo, 'Full immigration appeals ended: Immigration Act 2014 brought into force' (Free movement, 2 March 2015) <https://www.freemovement.org.uk/full-immigration-appeals-ended-immigration-act-2014-brought-into-force/> accessed 22 September 2016

¹⁴⁵ Ministry of Justice, 'Civil Justice Statistics Quarterly, England and Wales (Incorporating The Royal Courts of Justice 2015) January to March 2016' (Ministry of Justice, 2 June 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527018/civil-justice-statistics-january-march-2016.pdf accessed 22 September 2016 and Ministry of Justice, 'Tribunals and Gender Recognition Certificate Statistics Quarterly January to March 2016 and annual statistics 2015/16' (Ministry of Justice, 9 June 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/528233/tribunals-commentary.pdf accessed 22 September 2016

for example, noted that her organisation was concerned that they would need a more effective communication strategy around their cause litigation work as,

‘there’s a really negative attitude towards lawyers and barristers and so [the case causes] might get caught up in those issues and the focus I think taken away from what [the cases] actually mean for claimants.’¹⁴⁶

Another officer at a different NGO expressed concern that,

I think you’re going to see a reduced pool of specialist public lawyers which will result in more in less good quality claims being brought and that will ultimately have a knock on effect on the organisations that those lawyers work with.¹⁴⁷

Clearly, then, the sector itself has worries for the future of cause litigation. It should be noted, though, that such concerns and lamenting declines in funding and capacity are something of a recurring theme across the scholarship on lawyering for migrants’ rights in the UK.¹⁴⁸ It appears that at any given time a state of crisis and embattlement has existed yet, as this thesis has set out, cause litigation has survived and developed over time. In its various forms it appears to be durable, and the backlash that has been instigated need not be terminal.

This is because, as was demonstrated in the previous section, cause litigation is insulated from backlash, to an extent, by its association with the notion of the rule of law, a norm of apparently universal legitimacy and importance in the UK’s political system, although far from universally accepted definition. The few successful parliamentary obstacles to the restrictive legislation, for example in relation to judicial review, did so on the basis of defending the oversight role of the executive by the courts within the rule of law framework.¹⁴⁹ Moreover, the attempts to justify the backlash, and particularly to repeal the Human Rights Act, were

¹⁴⁶ NGO Legal & Policy Officer Interview, 27th August 2013

¹⁴⁷ NGO Legal Officer Interview, 29th April 2014

¹⁴⁸ Martin I ‘Combining Casework and Strategy: The Joint Council for the Welfare of Immigrants’ in Cooper J and Dhavan R (Eds), *Public Interest Law* (Blackwell 1987) 265; Francis Webber, *Borderline Justice*; York (n17) 66-67;

¹⁴⁹ HL Deb 27 October 2014, Vol 756, Col 989

presented in terms of preserving human rights¹⁵⁰ and did not go as far as simple repeal of the HRA, suggesting instead that a replacement bill of rights would be put in place, albeit one that appeared likely to be significantly weighted against migrants' rights claims.¹⁵¹ For the future of cause litigation these concessions may not look promising, but are significant. They would seem to indicate a fundamental change in the minimum standards expected of a functioning rule of law in the UK.

Demand for a legalised rights charter and a relatively significant capacity for public interest litigation could not be entirely surmounted by an appeal to a traditional, nationalist, rule of law discourse around liberties, responsibilities and parliamentary sovereignty. Public interest litigation, including the kind of NGO-based strategic litigation discussed in chapter 4, was defended strongly in the House of Lords, where the constitutional role of the judiciary as a check on executive power was discussed at length and taken to include such strategic cases.¹⁵² With regards to the role of legalised rights charters, despite the backlash they in principle maintained a relatively strong level of support. Polling data has shown that only 11% of adults regarded repeal of the HRA as a governmental priority, while when asked which of the enumerated ECHR rights should not be protected under a replacement British Bill of Rights, the only issue to receive double-figure support was a ban on the death penalty.¹⁵³ This would appear to indicate that there remains substantial support for the notion of legalised rights and even the formulation of rights as they currently exist in the ECHR and brought into UK law through the HRA.

A further crucial factor has been the insulation of the HRA by the devolution arrangements which gave the Scottish and Northern Ireland governments a more significant, albeit contested, say in any reforms than would normally be the case for Westminster legislation.¹⁵⁴ In this regard it is notable that a commission of inquiry set up under the Coalition Government

¹⁵⁰ The Conservative Party, 'Protecting Human Rights in The UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws' (The Conservative Party, 3rd October 2014) http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf accessed 31st August 2016

¹⁵¹ Ibid 6

¹⁵² Lord Pannick HL Deb 27 October 2014, Vol 756, Col 992

¹⁵³ COMRES 'Amnesty International Human Rights Poll' (COMRES 8 November 2015) <http://www.comres.co.uk/polls/amnesty-international-human-rights-poll/> accessed 27 August 2016

¹⁵⁴ Greer S & Slowe R, 'The Conservatives' proposals for a British Bill of Rights: mired in muddle, misconception and misrepresentation?' (2015) 4 EHRLR 372 381

to examine public demand and ideas around repeal of the HRA and replacement with the 'British Bill of Rights' found a marked geographical and cultural division within the UK. As the majority report (in favour of HRA repeal) noted,

“the meetings that we had, particularly in Scotland and Wales, produced in general very little support for a UK Bill of Rights. Calls for a UK Bill of Rights were generally perceived to be emanating from England only and there was little if any criticism of the European Court of Human Rights or of the Convention.”¹⁵⁵

The appeal of the kind of anti-cosmopolitan nationalism that has been used to justify repeal of the HRA although electorally powerful, was limited in its reach to those who felt particularly threatened by the cosmopolitan globalism of the previous regime. An alternative form of nationalism and diminished concerns regarding control amongst the Scottish electorate in particular were used by the SNP since the 2015 election to characterise the nationalist justification for repeal of the HRA as a form of English parochialism, and the issue as a whole was used as a point of principle around which to differentiate themselves from the Westminster Conservative government.¹⁵⁶ The UK's recent Brexit vote, as mentioned in the introduction chapter to this thesis, appears to have added to these difficulties and further complicated the government's position, although it remains committed to HRA repeal.¹⁵⁷ Whether the defence of the HRA is ultimately successful or whether it is still replaced by a BBoR will be of major importance for how the future of cause litigation will develop. A BBoR appears highly likely to offer fewer possibilities than the HRA has done up to this point. Yet, this insulating effect of contemporary understandings of what a modern rule of law requires seems likely to allow at least some forms of cause litigation for migrants' rights relying on legalised rights charters to continue.

¹⁵⁵ Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Volume 1 December 2012) <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>, para 43 accessed 22 September 2016

¹⁵⁶ Kate Devlin 'SNP hit out at British Bill of Rights plan' (Sunday Herald, Glasgow, 15 May 2016) http://www.heraldsotland.com/news/14494257.SNP_hit_out_at_British_Bill_of_Rights_plan/ accessed 22 September 2016

¹⁵⁷ The Journal of the Law Society of Scotland, 'Truss lists Human Rights Act reform as "third priority"', (7 September 2016) http://www.journalonline.co.uk/News/1022209.aspx#.V-rNw_ArLIU accessed 27 September 2016

In this sense it appears that the backlash has left the elements of cause litigation that deal with what could be described as the process of immigration control in a relatively functional state. The continued availability of judicial review, and the maintenance of legal aid funding for this work, albeit on a more limited basis means that aspects of immigration control procedure such as use of immigration detention and the treatment of migrants during processing, determination and removal procedures can still be the subject of cause litigation. In addition, the defence of the rules of standing mean that this 'process' work may continue to be possible on both a strategic and non-strategic basis. As chapter 4 demonstrated, this work is not insignificant, it secures some practical and procedural changes that would not otherwise have been granted by the immigration service and the executive. However, these changes are diminished through executive absorption and evasion of judgments.

Strategic litigation is also to a significant extent reliant on the continued work of non-strategic day to day cause lawyering, the long term capacity and quality of which has been placed under considerable strain by the backlash. The point where this strain has been particularly felt is in relation to individual casework, particularly regularisation as was seen in chapter 5 but also the broader fundamental issue of the granting and refusing of legal status in the UK. In contrast to the process aspects discussed above, this could be viewed as the outcomes of immigration control. The roll back of appeal rights, both in terms of their straightforward removal and in their undermining through out-of-country appeal certification, occurred in conjunction with the diminishment of Article 8 that was discussed in the previous chapter. To these moves must be added the major increases in appeal fees that at the time of writing are due to come into effect. In combination, this package of measures represents a major roll back of the function of the independent tribunal system.

This is a system that, as was discussed in chapter 3, was first instituted in the 1971 Act, subsequently expanded to include asylum cases in the 1993 Act and which had, over time, developed into a significant and assertive independent source of entitlement to remain in the UK. As this thesis has documented, having access to an effective alternative source of status determination has been crucial in allowing cause litigation to become as influential a force as it has been. This is particularly the case given chapters 3 and 4's findings regarding the institutionalised problems of the immigration service's attitude to applying rights protecting

court judgments in the absence of active oversight. The undermining of the tribunal system represents a major realignment of the power to determine lawful presence in the UK, away from independent determination and towards a reassertion of executive control.

When surveying the state of cause lawyering for migrants' rights in the UK prior to the introduction of the Human Rights Act, Sterett argued that cause lawyers were effectively limited to disputes over process and as such had a limited effect on the policy environment in which their cause operated.¹⁵⁸ This thesis has demonstrated that since that time substantial developments have taken place which meant that Sterett's description was no longer accurate. While not as stark as Sterett's findings, the present backlash appears to be taking things back towards that state of affairs. Going forwards, the process of immigration control remains disputable, but its outcomes are to be firmly controlled by the executive.

Conclusion

Despite all its limitations, cause litigation has acted as one of the few major obstacles to the executive fulfilling the requirements of the control imperative. Failings in control as a result of cause litigation's obstruction have further increased the pressure on the executive to reassert control. The sense of immigration as a crisis has escalated as it has appeared more and more to be uncontrollable. This is effectively a feedback effect, whereby the more obstructive of control cause litigation is, the greater the imperative for control becomes.

In response to this role, the executive has launched a backlash targeting the resources and legal framework that have sustained cause litigation. Cause litigation's universalism and in particular its reliance on a thicker notion of the rule of law was used against it. Its liberal universalism was construed as trivial, anti-democratic, undermining of the traditional, and therefore legitimate, rule of law and even as responsible for the threats and precariousness that permeates contemporary discourse around immigration and inspires the public pressure for control. Cause litigation and its practitioners were identified as symbolic of an at-best foolish and at-worst dangerous experimental era in British political culture and the history of

¹⁵⁸ Sterett S, 'Caring about Individual Cases: Immigration Lawyering in Britain', Sarat A & Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (OUP 1998) 305

immigration policy, when universalist rights-based individualism was promoted and the role of law's function within the immigration control system was expanded. This thicker notion of the role of the rule of law was to be replaced with what was characterised as a nationalist tradition based around liberty and responsibility, with minimal judicial interference in the executive's exercising of its democratically authorised immigration control functions.

Rather than Joppke and Hampshire's notions of nationalist and universalist frames in permanent tension with each other, then, this chapter and the thesis as a whole has demonstrated a process whereby an experiment in aggressive promotion and activation of those universalist liberal norms through cause litigation produced a period in which they were to a significant extent elevated above their nationalist competitors. The result has been a counter-mobilisation and aggressive reassertion of the nationalist frame, leaving it in the ascendancy over universalism and the rule of law in immigration. The result has been a series of measures which have substantially reduced the scope of cause litigation's capacity itself to act as a protective force for migrants' rights within the UK's immigration control procedures. In particular, there has been a major realignment of powers to grant and refuse lawful status in the UK – the path away from other risks to migrants' rights – from the immigration judiciary and the cause litigators, back to the executive. However, the limits placed on the backlash's reach have indicated that the malleable nature of the rule of law as a norm now requires the availability of some form of legalised rights charter and the capacity for public interest and strategic litigation cases to be brought. The insulation provided by the residual respect for this conception of the rule of law within the UK's constitutional framework has meant that cause litigation is likely to survive the backlash, albeit in a reduced form focussing on processes of immigration control rather than substantive outcomes.

Chapter 7: Conclusion

This thesis has examined what happens when immigration and migrants' rights questions are litigated for political purposes by migrants' rights activists in the UK. The thesis' key findings and their implications both for migrants' rights and for cause litigation itself will be discussed in this concluding chapter.

The thesis sought to make a contribution to the understanding of immigration policy, politics and migrants' rights in the UK firstly by rooting its analysis in the practical realities of politicised litigation and the policy responses of the executive. As such it has attempted to provide a clearer, more current and more analytical picture of the actors involved in the UK's contemporary migrants' rights debate than has otherwise been available in the scholarly literature. As will be discussed below, this has produced findings regarding the strengths and limits of the capacities of migrants' rights cause litigators along with a characterisation of executive practice centred on institutional and political imperative rather than broader strategic or theoretical considerations. At the same time, it has sought to show how broader debates from constitutional and political theory perspectives play out in practice, through the activation and mobilisation of liberal norms such as the rule of law to defend and progress a political project which runs contrary to the general drift of democratically established policy. In doing so it has shown that while, perhaps counterintuitively, systemic change may be possible through this method, this process also produces negative consequences that have put the rule of law to the test, particularly as it applies to immigration questions. Conversely, while this period of severe pressure on the contemporary notion of the rule of law in the UK has weakened and diminished it in many respects, this process has also revealed some apparently durable and potentially permanent core aspects from which cause litigation can seek insulation and hope for the future.

There have been numerous discussions about the role that rights and the courts play in immigration policy and politics both in the UK and on a more theoretical level regarding liberal states generally.¹ These studies have a tendency to take judicial interventions in immigration

¹ Joppke C, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 *World Politics* 266; Joppke C, *Immigration and the Nation State: the United States, Germany and Great Britain* (OUP 1999); Hampshire J, *The Politics of Immigration* (Polity 2013)

questions as inevitable and are more concerned with either the specifics of the rulings or the constitutional or political implications of their existence. However this thesis has found that this perspective misses a crucial aspect of the picture. Human Rights and related universalist norms such as the rule of law are not a disconnected and a-contextual force that exist within a political society independent of the actors involved. They exist in practical implementation, whether that be in political adherence by executive policy makers and implementers or, as was discussed in this thesis, through contentious and active enforcement by litigation. Likewise, litigation and judicial interventions in immigration questions are not themselves inevitable or constant forces that can be understood as uniform factors in liberal states' migrants' rights and immigration politics. Judicial interventions only occur when cases are brought to them and judges' rulings reflect the issues and arguments that are presented to them. This thesis has shown that certain types of case are taken, on behalf of certain types of migrant and by certain types of litigator. The nature of judges' interventions are therefore to a significant extent, although clearly not exclusively, influenced by the actors that bring those cases and the influences and frameworks that those actors operate within.

The thesis demonstrated a three-fold framework of influences on cause litigation for migrants' rights in the UK, of which the two most crucial for influencing the types of cases that end up before the judges were the resources available to the movement and the legal framework that governs immigration and migrants' rights in the UK. As the thesis has shown, financial resources and legal framework have both facilitated cause litigation's development and directed it towards focussing on irregular migrants and technical strategic challenges against Home Office procedure. At the same time, the human resources available to cause litigation are made up of what Sarat and Scheingold would define as 'cause lawyers',² legal professionals working in a politically motivated fashion, and non-legal NGO and charity staff and volunteers. As was discussed in chapter 3, this is a crucial and distinctive element of the UK's migrants' rights movement, where activists dedicated to a common cause of migrants' rights have tended to professionalise in either formally constituted NGOs or through the provision of legal services, and this professionalisation has been combined with a relatively

² Sarat A & Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities*, (OUP 1998)

high degree of coordination and cooperation. Between them they constitute a well-functioning 'support structure',³ in Epp's phrase, for cause litigation to be pursued.

These cause litigators are seeking to pursue their political and ethical project, the promotion and defence of migrants' rights, through the courts. Some of this work is engaged in purely on the basis of a desire to apply professional skill and training to a political or moral position.⁴ For others it is a more expressly calculated move to seek alternative ways of promoting a deeply unpopular cause without having to depend on traditional forms of political support. Critics of cause litigation in the UK, such as Tomkins⁵ and Morgan,⁶ have frequently expressed variations on the view that litigation for political purposes is a means of seeking policy change by evading democratic politics. However, this study has strongly demonstrated that cause litigation for migrants' rights does not and cannot evade such politics. This finding raises important questions for cause litigators, who by politicising the theoretically a-political practice of client legal representation remove the 'political immunity'⁷ that the practice traditionally enjoys.

In relation to this point, the third influencing factor on cause litigation's outcomes and consequences that the thesis identified was the UK's political opportunity structures in immigration policy. These govern both the manner in which the outcomes of cause litigation are received and responded to by the executive, and frame the approach the executive ultimately takes to cause litigation and cause litigators themselves. The UK's immigration POS is made up of both institutional and discursive aspects. Chapter 3 showed that the institutional power relationships between the executive, its administrative agencies and the legislature is heavily dominated by the executive.⁸ It was also shown, as Jennings noted, that

³ Epp C R, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998) 18/

⁴ Hilbink T, 'You Know the Type: Categories of Cause Lawyering' (2004) 29 *Law and Social Enquiry: Journal of the American Bar Foundation* 657

⁵ Tomkins A, 'The Role Of The Courts In The Political Constitution' (2010) 60 *University Of Toronto Law Journal* 4

⁶ Morgan J 'Amateur Operatics: The Realization of Parliamentary Protection of Civil Liberties' in Campbell T, Ewing K & Tomkins A *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 452

⁷ Sarat A and Scheingold S, *The Worlds Cause Lawyers Make: Structure And Agency In Legal Practice*, (Stanford University Press 2005) 3

⁸ Consterdine E, 'One step forward, two steps back: Evaluating the institutions of British immigration policymaking' (Institute for Public Policy Research, 25 Apr 2013) <http://www.ippr.org/publications/one-step-forward-two-steps-back-evaluating-the-institutions-of-british-immigration-policymaking> accessed 31st August 2016

this strong centralisation of governmental power subject to only limited opposition within parliament means that government is 'able to intervene directly in bureaucratic activities through legislative, executive and administrative controls.'⁹ These institutional factors give the executive significant capacity to deliver rights-affecting measures.

Most importantly, though, the thesis has shown that the public discursive element of the POS is dominated by what has been termed 'the control imperative'. The control imperative is made up of the immigration administration's need to monopolise decision making authority in their field and the political need for the executive to be seen to be in control by the electorate. These aspects are obviously interrelated. Gaps or failures in administrative delivery can undermine the executive's appearance of control. Likewise the executive need to appear in control can increase pressure on the immigration service to conduct its business in an uncompromising manner and can lead to changes in priorities for immigration service activities. However, control in this sense is less about a specific immigration policy, or even about cutting immigration to the UK necessarily. It is about the location and monopolisation of decision making and implementation authority over immigration issues in the executive. This imperative conditions the executive's response to the advancements and protections for migrants' rights secured through both strategic and day to day litigation, encouraging the evasion and absorption of judgments where they can be isolated, or a more aggressive and overt backlash against the framework that produces such judgments when necessary. Moreover, the need to be seen to be in control has ultimately produced an ostentatious reassertion of executive authority over cause litigators themselves, in a backlash targeted at their capacity to pursue their activities.

This systemic backlash has resulted from the executive's need to respond to the permanent failures of control that have occurred, both during the UK's relatively liberalised 'managed migration' period and subsequently during the more recent period of overt hostility to inward migration, and irregular migration in particular. While there are a number of factors that have brought these about, including the setting of unrealistic political targets and under-resourced implementation, this thesis has demonstrated that cause litigation has been key. Contrary to

⁹ Jennings, W, 'Bureaucratic Performance and Control in British Politics: Asylum Policy 1994–2007' (2010) 12 *British Journal of Politics and International Relations* 539 540

some previous studies of activist litigation on immigration issues,¹⁰ this thesis has found that in some circumstances cause litigation is capable of bringing about systemic change in defence of migrants' rights. However, what constitutes systemic change for the better for migrants' when secured through cause litigation simultaneously constitutes an unacceptable encroachment into its role for the control imperative-dominated executive.

Notable in this issue is the relative importance of the two constitutive elements of cause litigation. Strategic litigation, discussed in chapter 4, as it is most commonly practiced in the UK context has tended to have a regulating influence over the technical implementation of immigration control procedures and processes. In this sense, as a result of the regularity of the litigation being pursued and its specific policy focus, strategic litigation in effect functions as another means of negotiation or 'stake holder engagement' between the migrants' rights sector and the immigration administration, only one that includes an element of compulsion. More significantly, though, the cumulative weight of day to day cause litigation, politicised as 'acts of resistance' as discussed in chapter 5, over time resulted in highly significant change through the development and creation of routes to regularisation. This finding is often unacknowledged, even within the sector itself, and is perhaps counter-intuitive given the considerable prominence strategic litigation has, both within the sector and within academic studies of legal mobilisation. However, the long-term impact of day to day cause litigation has produced significantly more systemic change than its more overtly political strategic litigation counterpart.

These outcomes taken together produce cause litigation's role in obstructing and overtly undermining the executive's efforts to fulfil the control imperative. As time and these failures by the executive have gone on, they have combined with and reinforced wider economic, security and cultural concerns about precariousness to greatly increase the intensity of the public demand for control. This has in turn required greater displays of the exercise of control by the executive to meet this demand. Such exercises are facilitated by the fact that cause litigation is engaged in largely in political isolation, without the support of a wider electorally significant constituency or an influential protest movement. Chapter 5 documented steps

¹⁰ Kavar L, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France* (CUP 2015); Sterett S, 'Caring about Individual Cases: Immigration Lawyering in Britain', in Sarat A & Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities*, (OUP 1998)

taken to significantly retrench the developments in the law of regularisation that day to day cause litigation has brought about. This was done not just at the level of technical rules changes, but as part of an overt public strategy of aggressive engagement with cause litigators and immigration judges.

However, this process has ultimately led to the executive feeling sufficient pressure to take actions against cause litigation itself, and there being insufficient parliamentary opposition to prevent it. The heyday of managed migration saw human migration as an inevitable consequence of contemporary globalised capitalism, and something of potentially significant benefit to host societies in primarily economic, but also cultural terms, provided it was 'managed' correctly. There is now a greater scepticism about this perspective, with a resurgence of a nationalist frame to the UK's immigration policy development embodied by the view that control is an urgent first order priority which must be established, as the system had become 'out of control'. Cause litigation, and the cause litigators that do it, have been caught up in a more general process of a turn against liberal universalism and social cosmopolitanism in British political life, which have been identified as the underlying cause of the 'precariousness, instability, lack of protection, insecurity and social and economic vulnerability'¹¹ from which the demands for control stem and the reason for why control has not been effectively implemented.¹²

As a result a backlash against cause litigation was implemented which has seriously diminished cause litigation's capacity to function in the way that it had been previously.¹³ Financial resources, appeal rights, access to Tribunals and the effectiveness of judicial review have all been targeted. An ongoing threat exists against the Human Rights Act itself, which has survived up to now thanks to constitutional difficulties regarding Scotland and Northern Ireland, with the recent Brexit vote adding a further complication. These elements that cause litigation had relied on were all constituent parts of a 'thicker' conception of the rule of law than had traditionally been applied to British politics, society and executive conduct. Yet this

¹¹ Anderson B, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013) 81

¹² Goodwin M and Ford R, *Revolt on the Right: Explaining Support for the Radical Right in Britain* (Routledge 2014)

¹³ Thomas R, 'Immigration and Access to Justice: A Critical Analysis of Recent Restrictions' in Palmer E, Guinchard A, Cornford T & Marique Y (Eds.) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016)

thesis has shown that this thick rule of law has been put through a severe test as a result of the control imperative, and has come out reduced, 'thinner', as a result.

Of greatest concern to cause litigators is that, as was discussed in chapter 6, the application of the rule of law to the executive's exercising of its immigration control powers has been particularly affected. Executive policy appears to be increasingly directed towards the rolling back of independent sources of status determination, primarily the Immigration Tribunal. This in turn is part of a centralisation of control over the outcomes of immigration processes, the issue of whether or not a person is granted lawful status in the UK, in the immigration administration. Another overt manifestation of this direction of travel occurred during the recent, at the time of writing, debate around whether or not the UK should adopt an 'Australian style points based system' for its post-Brexit immigration regime. This proposition was rejected out of hand by the government on the basis that

"a points based system would give foreign nationals the right to come to Britain if they meet certain criteria: an immigration system that works for Britain would ensure that the right to decide who come to the country resides with the government.'¹⁴

From the perspective of the rule of law this statement is incoherent, in that any alternative immigration rules would be accompanied by a public law duty of fairness to apply the published policy and grant immigration status to people who met them, an issue that was itself discussed in chapter 4 in relation to the *Lumba* case. However, it does demonstrate another small example of the wider trend this thesis has documented. In pursuit of control the executive is seeking not only monopolisation of decision making authority, but also to remove the notion of migrants' baring rights, as migrants, that the state has a duty to meet and to diminish the role of the rule of law in regulating grants or refusals of status. One of the themes of this thesis has been the gradual introduction and enforcement of the rule of law into the executive's immigration control regime over many years, which cause litigators have both contributed to and benefited from. The recent backlash, though, appears designed to move things back towards migrants' lawful status in the UK depending on executive fiat.

¹⁴ The Guardian, No 10 rules out points-based immigration system for Britain (5 September 2016) <https://www.theguardian.com/uk-news/2016/sep/05/no-10-theresa-may-rules-out-points-based-immigration-system-for-britain-brexit> accessed 22 September 2016

This concern is born out by chapter 6's finding that of the two branches of cause litigation, the effects of this backlash have been most immediately felt in the day to day cause litigation, rather than in strategic work. It is the day to day litigation that is most straightforwardly directed towards securing a person's legal status in the UK, from which protection from other rights violations and abuses derives. Strategic litigation, in contrast, has tended to focus on regulating the processes and procedures the immigration service uses while making their determinations. Another important finding of the thesis has been that the survival of aspects of the migrants' rights protection regime depend to a large extent on how closely associated they are with the commonly accepted standard of the rule of law in the contemporary UK. It is for this reason that in delivering the backlash against cause litigation the executive sought to revise and reinterpret the meaning of the rule of law, rather than repudiate it entirely.

The control-inspired backlash has put the thicker rule of law to the test, but what has survived this test reveals something important for cause litigators and constitutional debate in the UK. The attacks on the thicker version of the rule of law that cause litigation embodies and relies upon could not be taken as far as might have been considered desirable or necessary from a control imperative perspective, because doing so would have fallen outside of contemporary perceptions of a legitimate reinterpretation of the rule of law. Relatively assertive judicial review and the powers and capacity to pursue public interest litigation were both supported by elites who regarded them as fundamental to the rule of law. In historical terms, as this thesis has discussed, these are relatively modern developments that now appear to be entrenched. Strategic litigation, which particularly depends on these aspects, was therefore insulated from the worst of the backlash in a way that its day-to-day counterpart was not. Notwithstanding some resistance, particularly the popular support for some form of legalised rights charter that again, the, backlash's test of the thick rule of law revealed, there has been far greater willingness to concede to the executive its control over migrants' status rights.

Finally, much of this thesis, and indeed this concluding chapter, has given a negative response to the central question of what happens when migrants' rights are litigated in the UK. It would be possible to understand this thesis' findings as showing a fairly unrelenting pattern of executive obstruction of cause litigators efforts, of political attacks against them and ultimately legislative and policy retrenchment of the advances they have secured. However, there is positivity from a migrants' rights perspective to be found amidst the gloom. The thesis

has shown that in terms of practical protections for migrants' rights, cause litigation is capable of bringing about not only simple defence, but actually intermittent progress. While this progress has been attacked and retrenched, it has rarely been done away with entirely. In assessing cause litigation it is crucial not to consider its role in isolation, but also to acknowledge the weakness of migrants' rights protections outside of the legal arena. With this in mind, cause litigation has brought about practical changes both at a technical procedural level and at a structural level that are non-negligible, even after the executive has implemented its control-inspired responses, and which would not have occurred otherwise. Things are unequivocally better for migrants in the UK as a result of cause litigation's presence in the UK's immigration policy dynamic than if the alternative were the case.

The backlash that this thesis has charted has eroded many of the advancements that cause litigation created and leaves it in a diminished and vulnerable position. The UK's Brexit vote, the full implications of which at the time of writing have not yet become clear, does not bode well for the future of the cosmopolitan, rights-based, pro-migrant framework that cause litigation depends upon and is a manifestation of. Nevertheless, despite this diminished role and the further threats it faces, some core activities have remained. Cause litigation appears likely to continue to 'lift the wire' of immigration control 'a little bit at a time'.¹⁵

¹⁵ London Immigration Solicitor 1 Interview, 2nd April 2014

Bibliography

Alex Hern, 'Who does early access to sensitive data really hurt?' (New Statesman, 18 June 2013) <http://www.newstatesman.com/node/134269> accessed 22 September 2016

Amnesty International, 'Our work on refugee and migrant rights' (Amnesty International) <https://www.amnesty.org.uk/refugee-asylum-seeker-migrant-human-rights> Accessed 27 August 2016;

Andenas M & Bjorge E, 'Is the Ullah principle wrong?' (2012) 128 LQR 319

Andersen E A, *Out of The Closets and Into The Courts: Legal Opportunity Structure And Gay Rights Litigation* (University of Michigan Press 2006)

Anderson B, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) *Work, Employment and Society* 300

Anderson B, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP 2013)

Anheier H, 'Third Sector–Third Way: Comparative Perspectives and Policy Reflections', in Lewis J and Surrender R (eds), *Welfare State Change – Towards a Third Way?* (OUP 2004)

Anonymous 'Asylum Judge', 'The true lunacy of our broken asylum system: Judge who rejects most claims despairs at how only a tiny few actually leave Britain' (Daily Mail, London, 21 August 2016) <http://www.dailymail.co.uk/debate/article-3751122/The-true-lunacy-broken-asylum-Judge-rejects-claims-despairs-tiny-actually-leave-Britain.html> accessed 22 September 2016

Arendt H, *The Origins of Totalitarianism* (Harcourt Brace & Co 1976)

Armstrong N, 'LASPO, Immigration and Maaouia v United Kingdom' (2013) 18 *Judicial Review* 177

Asylum Aid, 'Asylum Aid policy briefing Legal Aid' (Asylum Aid, February 2013) <http://www.asylumaid.org.uk/wp-content/uploads/2013/02/LegalAidBriefing.pdf> accessed 22 September 2016

Asylum Support and Immigration Resource team (ASIRT) 'Home' (ASIRT) <http://www.asirt.org.uk/> Accessed 31st August 2016

Bail for Immigration Detainees 'Detention under immigration powers in UK prisons: severe restrictions on access to justice' (BID, 2013) <http://www.biduk.org/sites/default/files/2013-09--23%20BID%20Briefing%20Detainees%20in%20Prison%20%281%29.pdf> accessed 1 September 2016;

Bale T, 'More and More Restrictive—But Not Always Populist: Explaining Variation in the British Conservative Party's Stance on Immigration and Asylum' (2013) 21 *Journal of Contemporary European Studies* 25

Bales K, 'The "essential living needs" of asylum seekers: lessons learned from R (Refugee Action) v SSHD' (2015) 37 *Journal of Social Welfare and Family Law* 247

BBC News, 'Blunkett to fight asylum ruling' (BBC News, London, 20 February, 2003) <http://news.bbc.co.uk/1/hi/uk/2779343.stm> Accessed 31st August 2016

BBC News, 'Immigration Advisory Service goes into administration' (BBC News, London, 11 July 2011) <http://www.bbc.co.uk/news/uk-14105065> accessed 22 September 2016

BBC News, 'UK Border Agency 'not good enough' and being scrapped' (BBC News, London, 26 March 2013) <http://www.bbc.co.uk/news/uk-politics-21941395> accessed 22 September 2016

Bellamy R, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP, 2007)

Bellamy R, *The Rule of Law and The Separation Of Powers* (Ashgate 2005)

Ben Jaffey and Tom Hickman, 'Loading the Dice in Judicial Review: The Criminal Justice and Courts Bill 2014' (UK Constitutional Law Association, 6th February 2014) <https://ukconstitutionallaw.org/2014/02/06/ben-jaffey-and-tom-hickman-loading-the-dice-in-judicial-review-the-criminal-justice-and-courts-bill-2014/> accessed 22 September 2016

Benhabib S, *Rights of Others* (CUP 2004)

Berlins M, Dyer C, *The Law Machine* (Penguin 2000)

Bernard HR, *Social Research Methods: Qualitative and Quantitative Approaches* (Sage 2013)

Bernhard Gross, Kerry Moore & Terry Threadgold, 'Broadcast News Coverage of Asylum April to October 2006: Caught Between Human Rights and Public Safety' (Cardiff School of Journalism, Media and Cultural Studies, 2007) <http://orca.cf.ac.uk/53007/1/BroadcastNewsCoverageofAsylum.pdf> Accessed 31st August 2016

Bevan S, John P, Jennings W, 'Keeping party programmes on track: the transmission of the policy agendas of executive speeches to legislative outputs in the United Kingdom' (2011) 3 *European Political Science Review* 395

Bijan Hoshi, 'Precarious immigration status defined (Free movement, 28 May 2015) <https://www.freemovement.org.uk/precarious-immigration-status-defined/> accessed 22 September 2016

Bingham T, *The Rule of Law* (Penguin 2011)

Blair T, *A Journey* (Random House 2010)

Blair T, in Home Office 'Compact on Relations between Government and the Voluntary and Community Sector in England' (Home Office November 1998),
http://www.compactvoice.org.uk/sites/default/files/compact_1998.pdf Accessed 31st August 2016

Blake N, 'Luxembourg, Strasbourg and the national court: the emergence of a country guidance system for refugee and human rights protection' (2013) 25 *International Journal of Refugee Law* 349

Bloom A, 'Practice Style and Successful Legal Mobilization, Law And Contemporary Problems', (2008) 71 *Law And Contemporary Problems* 1

Blunkett D, quoted in Don Flynn, 'Tough as old boots'? Asylum, immigration and the paradox of New Labour policy, IRP, November 2003,
<http://www.swslim.org.uk/documents/themes/lt12-flynn.pdf> accessed 22 September 2016

Blunkett D, *The Blunkett Tapes: My life in the bear pit* (Bloomsbury 2006)

Bobby Duffy & Tom Frere-Smith, 'Perceptions and Reality: 10 things we should know about attitudes to immigration in the UK' (Ipsos MORI Social Research Institute, January 2014)
<https://www.ipsos-mori.com/Assets/Docs/Publications/sri-perceptions-and-reality-immigration-report-summary-2013.pdf> accessed 28th September 2016

Bohmer C & Shuman A, *Rejecting Refugees: Political Asylum in The 21st Century* (Routledge 2008)

Bolton S, 'Promoting the best interests of the child in UK asylum law and procedures' (2012) 26 *JIANL* 232

Bork R, *The Tempting of America: The Political Seduction of the Law*, (Simon and Schuster, 1991)

Boutcher S and Silver C, 'Gender and Global Lawyering: Where are the Women?' 2013 20 *Indiana Journal of Global Legal Studies* 1139

Bouwen P and McCown M, 'Lobbying versus litigation: political and legal strategies of interest representation in the European Union' (2007) 14 *Journal of European Public Policy* 422

Bradshaw A, 'Sense and Sensibility: Debates and Developments in Socio-Legal Research Methods', in Thomas P (ed), *Socio-Legal Studies* (Dartmouth 1997)

Brenda Hale, 'UK Constitutionalism on the March?' (The Constitutional and Administrative Law Bar Association Conference 2014, London, 12 July 2014)
<https://www.supremecourt.uk/docs/speech-140712.pdf> accessed 22 September 2016;

Briddick C, 'Detention Action v First-tier Tribunal (Immigration and Asylum Chamber) and Ors case note' 2015 JIANL 322

British Tamils Forum, 'British Tamils Forum: Home' <http://tamilsforum.co.uk/> Accessed 31st August 2016

Bryman A, *Social Research Methods, 4th Edition*, (OUP 2014)

Buchanan T, 'Human Rights Campaigns in Modern Britain' in Hilton M, Crowson N J & McKay J (Eds), *NGOs in contemporary Britain: non-state actors in society and politics since 1945* (Palgrave Macmillan 2009)

Byrne P, *Social movements in Britain* (Routledge 2013); Della Porta D & Diani M, *Social movements: an introduction* (Wiley 2009)

Campbell D, 'Catgate and the challenge to Parliamentary Sovereignty in Immigration Law', [2015] PL 426

Campbell T, Ewing KD, Tomkins A, *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011)

- Allan J 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You take Parliament's Clear Intention and You Shake it All About – Doin' the Sankey Hanky Panky'
- Morgan J 'Amateur Operatics: The Realisation of Parliamentary Protection of Civil Liberties'
- Tomkins A, 'Parliament, Human Rights and Counter-Terrorism'

Care G, 'The Judiciary, The State, And The Refugee: The Evolution Of Judicial Protection In Asylum – A UK Perspective' (2004) 28 FILJ 1421

Carle S, 'Race, Class, and Legal Ethics in the Early NAACP (1910-1920)' (2002) 20 Law and History Review 97

Catherine Baksi, 'Law centres: Picking up the pieces' (The Law Society gazette, 1 September 2014) <http://www.lawgazette.co.uk/analysis/features/law-centres-picking-up-the-pieces/5042728.fullarticle> accessed 22 September 2016

Chamberlain M, 'Democracy and Deference In Resource Allocation Cases: A Riposte To Lord Hoffman' (2003) 8 Judicial Review 12

Chaudhry M, 'Particular social groups post Fornah' 2007 21 JIANL 137

Choudry A and Kapoor D, *NGOization: complicity, contradictions and prospects* (Zed Books 2013)

Chris Grayling 'The judicial review system is not a promotional tool for countless Left-wing campaigners' (Daily Mail, London, 6 September 2013 (Updated 11 September 2013))
<http://www.dailymail.co.uk/news/article-2413135/CHRIS-GRAYLING-Judicial-review-promotional-tool-Left-wing-campaigners.html> accessed 22 September 2016

Chris Grayling 'We must seize power from Euro judges and return the phrase Human Rights to what it really should be - a symbol of the fight against oppression and brutality' (Daily Mail, London, 3 October 2014 (Updated 22 December 2014))
<http://www.dailymail.co.uk/news/article-2778786/We-seize-power-Euro-judges-return-phrase-Human-Rights-really-symbol-fight-against-oppression-brutality.html> accessed 22 September 2016

Chris Grayling, 'Chris Grayling: We must stop the legal aid abusers tarnishing Britain's justice system' (The Telegraph, London, 20 Apr 2014)
<http://www.telegraph.co.uk/news/uknews/law-and-order/10777503/Chris-Grayling-We-must-stop-the-legal-aid-abusers-tarnishing-Britains-justice-system.html> accessed 22 September 2016

Christopher Hope, 'Good name' of human rights has become 'distorted and devalued', says David Cameron' (The Telegraph, London, 15 Jun 2015)
<http://www.telegraph.co.uk/news/politics/david-cameron/11674006/Good-name-of-human-rights-has-become-distorted-and-devalued-says-David-Cameron.html> accessed 28th September 2016

Cichowski R, *The European Court and Civil Society: Litigation, Mobilization and Governance* (CUP 2007)

Clayton R, 'Judicial Deference and "Democratic Dialogue": the Legitimacy of judicial intervention under the Human Rights Act 1998 [2004] PL 33

Clayton R, 'Public Interest Litigation, Costs And The Role Of Legal Aid' [2006] PL 429

Colin Yeo, 'Controversial Human Rights Rules Rejected' (Freemovement, 3 October 2012)
<http://www.freemovement.org.uk/controversial-new-immigration-rules-rejected/> Accessed 13th August 2014

Colin Yeo, 'Detained fast track asylum process suspended' (Free movement, 2 July 2015)
<https://www.freemovement.org.uk/detained-fast-track-asylum-process-suspended/> accessed 22 September 2016

Colin Yeo, 'Full immigration appeals ended: Immigration Act 2014 brought into force' (Free movement, 2 March 2015) <https://www.freemovement.org.uk/full-immigration-appeals-ended-immigration-act-2014-brought-into-force/> accessed 22 September 2016

Colin Yeo, 'Massive increase in family immigration fees for 2016-17' (Free movement, 2 March 2016) <https://www.freemovement.org.uk/massive-increase-in-family-immigration-fees-for-2016-17/> accessed 22 September 2016

Colin Yeo, 'Southall Black Sisters confront UK Border Agency', (Freemovement, 2nd August 2013) <https://www.freemovement.org.uk/southall-black-sisters-confront-uk-border-agency/> accessed 27 August 2016

Colin Yeo, 'The New Rules' (Free movement, 9 July 2012) <https://www.freemovement.org.uk/the-new-rules/> accessed 22 September 2016

Colin Yeo, 'Theresa May unveils Tory immigration plans' (Freemovement, 1 October 2013) <https://www.freemovement.org.uk/theresa-may-unveils-tory-immigration-plans/> accessed 22 September 2016

Colin Yeo, 'Which sections of the Immigration Act 2016 are in force with what effect?' (Free Movement, 14 July 2016) <https://www.freemovement.org.uk/sections-immigration-act-2016-force-effect/> accessed 22 September 2016

Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (Volume 1 December 2012) <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>, accessed 22 September 2016

COMRES 'Amnesty International Human Rights Poll' (COMRES 8 November 2015) <http://www.comres.co.uk/polls/amnesty-international-human-rights-poll/> accessed 27 August 2016

Conant L, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002)

Consterdine E and Hampshire J '*Immigration Policy Under New Labour: Exploring A Critical Juncture*' (2014) 9 *British Politics* 275

Consterdine E, 'One step forward, two steps back: Evaluating the institutions of British immigration policymaking' (Institute for Public Policy Research, 25 Apr 2013) <http://www.ippr.org/publications/one-step-forward-two-steps-back-evaluating-the-institutions-of-british-immigration-policymaking> accessed 31st August 2016

Constitutional Affairs Committee, *Implementation of the Carter Review of Legal Aid* (HC 2006-07 223-II)

Cornelius W and Tsude T, 'Controlling Immigration: The Limits of Government Intervention' in Cornelius W, Tsuda T, Martin P and Hollifield J, *Controlling Immigration: A Global Perspective* (Stanford University Press 2004)

Cortner R, 'Strategies and Tactics of Litigants in Constitutional Cases' (1968) 17 *Journal of Public Law* 287

Costello C, 'Immigration detention: the grounds beneath our feet' (2015) *Current Legal Problems* 1

Craig S, 'The use of language analysis in asylum decision-making in the UK - a discussion' (2012) *JIANL* 255

Crawley News, 'Protesters who stopped refugees from being deported from Gatwick Airport with help of superglue to face trial', (Crawley News, Crawley, May 17, 2015)
<http://www.crawleynews.co.uk/Protesters-stopped-refugees-deported-Gatwick/story-26487512-detail/story.html> accessed 27 August 2016

Cruddas J & Rutherford J, *One Nation: Labour's Political Renewal* (London 2014),
http://www.policyforum.labour.org.uk/uploads/editor/files/One_Nation_Labours_Political_Renewal.pdf accessed 28 September 2016

Cummings S, 'The Internationalization of Public Interest Law', (2008) 57 *Duke Law Journal* 891

Curran J, Seaton J, *Power without Responsibility: Press, Broadcasting and the Internet in Britain*, (Routledge 2009)

Cwerner SB, 'Faster, Faster and Faster: The Time Politics of Asylum in the UK' (2004) 13 *Time & Society* 71

D Raab, *The Assault on Liberty: What Went Wrong With Rights* (Fourth Estate 2009)

Daily Mail, Judges can threaten democracy – Blunkett (2001),
<http://www.dailymail.co.uk/news/article-164666/Judges-threaten-democracy--Blunkett.html>, accessed 22 September 2016

Daily Mirror, Jihadi terrorists could be hiding in Calais refugee camp ready to enter and attack Britain, (12 August 2016), <http://www.mirror.co.uk/news/uk-news/jihadi-terrorists-could-hiding-calais-8620074> accessed 22 September 2016

Daily Telegraph, Labour got it wrong on immigration, admits Miliband (17 January 2013)
<http://www.telegraph.co.uk/news/politics/9808290/Labour-got-it-wrong-on-immigration-admits-Miliband.html> accessed 23 September 2016

Daily Telegraph, Black Lives Matter protests around the country: motorway route into Heathrow Airport blocked by activists lying on road, (5 August 2016)
<http://www.telegraph.co.uk/news/2016/08/05/black-lives-matter-protest-blocks-heathrow-airport-traffic/> accessed 22 September 2016;

Daily Telegraph, Government U-turns on 500 per cent increase on immigration tribunal fees, (25 November 2016)

<http://www.telegraph.co.uk/news/2016/11/25/government-u-turns-500-per-cent-increase-immigration-tribunal/> (accessed 12 February 2017)

Daily Telegraph, Theresa May accused of unacceptable and regrettable behaviour by judge, (Telegraph, 20 June 2012)

<http://www.telegraph.co.uk/news/uknews/immigration/9345345/Theresa-May-accused-of-unacceptable-and-regrettable-behaviour-by-judge.html> accessed 22 September 2016

David Barrett, and Josie Ensor, 'Judges who allow foreign criminals to stay in Britain' (The Telegraph, London, 16 Jun 2012)

<http://www.telegraph.co.uk/news/uknews/immigration/9335689/Judges-who-allow-foreign-criminals-to-stay-in-Britain.html> accessed 22 September 2016

David Cameron, 'British values: article by David Cameron' (Prime Minister's Office, 10 Downing Street, 15 June 2014) <https://www.gov.uk/government/news/british-values-article-by-david-cameron> accessed 22 September 2016

David Cameron, 'JCB Staffordshire: Prime Minister's speech' (Prime Minister's Office, 10 Downing Street, 28 November 2014) <https://www.gov.uk/government/speeches/jcb-staffordshire-prime-ministers-speech> accessed 22 September 2016

David Neuberger, 'The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience' (The Supreme Court of Victoria, Melbourne, 8 August 2014) <https://www.supremecourt.uk/docs/speech-140808.pdf> accessed 22 September 2016

Davies P and Freedland M, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (OUP 2007)

Davis R, *Tangled up in Blue: Blue Labour and the Struggle for Labour's Soul* (Ruskin Publishing 2011)

De Genova N & Peutz N, (Eds) *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press 2010)

- Cornelisse G, 'Immigration Detention and the Territoriality of Universal Rights'

Dembour M-B, *When Humans Become Migrants: Study Of The European Court Of Human Rights With An Inter-American Counterpoint* (OUP 2015)

Dennison J & Goodwin M, 'Immigration, Issue Ownership and the Rise of UKIP' (2015) 68 Parliamentary Affairs 168

Depoorter B, 'The Upside Of Losing' (2013) 113 CLR 817

Detention Action, “‘Fast Track to Despair’ report published’ (Detention Action, October 2nd 2011) <http://detentionaction.org.uk/fast-track-to-despair-report-published> accessed 31st August 2016

Detention Action, ‘After the fast track: what next for the detention of asylum seekers?’ (Detention Action, 5 January 2016) <http://detentionaction.org.uk/after-the-fast-track-what-next-for-the-detention-of-asylum-seekers> accessed 20 September 2016

Detention Action, ‘The end of the track for the DFT’ (Detention Action, November 12th, 2015) <http://detentionaction.org.uk/the-detained-fast-track-the-end-of-the-road> accessed 31st August 2016

Dicey A, *An Introduction to The Study Of The Law Of The Constitution* (Macmillan 1979)

Dominic Raab, quoted in Daily Telegraph, ‘Strasbourg not superior to British courts’ says former senior judge’ (Telegraph, 4 December 2013) <http://www.telegraph.co.uk/news/uknews/law-and-order/10495899/Strasbourg-not-superior-to-British-courts-says-former-senior-judge.html> accessed 22 September 2016

Dummett A, Nicol A, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Northwestern University Press 1990)

Dworkin R, ‘Rights as Trumps’ in Kavanagh A and Oberdiek J (Eds), *Arguing About Law* (Routledge 2009)

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1978)

El-Enany N, ‘On Pragmatism and Legal Idolatry: Fortress Europe and the Desertion of the European Refugee’ (2015) 22 International Journal on Minority and Group Rights 7

Ellerman A, *States Against Migrants: Deportation in Germany and the United States* (CUP 2009)

Ellis E, ‘The Gender Recognition Bill’ [2004] PL 467

Enoch Powell, ‘Enoch Powell's 'Rivers of Blood' speech’ (Conservative Association meeting in Birmingham on April 20 1968, The Telegraph, London, 06 Nov 2007) <http://www.telegraph.co.uk/comment/3643823/Enoch-Powells-Rivers-of-Blood-speech.html> accessed 22 September 2016

Ensor J, Shah A & Grillo M, ‘Simple myths and complex realities - seeking truth in the face of section 8’ (2006) 20 JIANL 95

Epp C R, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998)

Erdos D, 'Charter 88 and the Constitutional Reform Movement: A Retrospective', [2009] *Parliamentary affairs* 538

Evans Case R & Givens T E, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive' (2010) 48 *Journal of Common Market Studies* 221

Ewing K D 'The Bill of Rights Debate: Democracy or Juristocracy in Britain?' in Ewing K D, Gearty C and Hepple B (Eds) *Human rights and labour law: essays for Paul O'Higgins* (Mansell 1994)

Ewing K D, *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (OUP 2010)

Ewing K, 'The Futility of the Human Rights Act' [2004] PL 829

Farbey J, 'Standing in the Home Secretary's shoes? The function of the Tribunal in human rights cases' (2013) 27 JIANL 331

Fillmore E, 'The Effects of Immigration Detention on the Health of Children and Families in the UK' (2010) 34 *Adoption & Fostering*

Flynn D, 'New borders, new management: The dilemmas of modern immigration policies' (2005) 28 *Ethnic and Racial Studies* 463

Fortin J, 'Are children's best interests really best? ZH (Tanzania) (FC) v Secretary of State for the Home Department' (2011) 74 MLR 947

Fouzder M, 'Residence test in limbo after challenge upheld' (2016) 113 *Law Society's Gazette* 3.

Fox J, Morosanu L & Szilassy E, 'The Racialization of the New European Migration to the UK' (2012) 46 *Sociology* 680

Frances Webber, 'David Burgess – An Appreciation' (IRR, 4th November 2010) <http://www.irr.org.uk/news/david-burgess-an-appreciation/> accessed 22 September 2016

Fredman S, 'Human rights transformed: positive duties and positive rights' [2006] PL 498

Free Movement, 'Home' (Free Movement) <https://www.freemovement.org.uk/> accessed 22 September 2016

Freedom from Torture, 'Make A Referral' (Freedom from Torture) <https://www.freedomfromtorture.org/make-a-referral/5175> accessed 1 September 2016

Freedom from Torture, 'Sri Lanka - Out Of The Silence' (Freedom from torture, May 2011)
https://www.freedomfromtorture.org/feature/out_of_the_silence/5979 accessed 27^t
August 2016

Friedman E & Klein R, *Reluctant Refuge: The Story Of Asylum In Britain* (British Library
Publishing Division 2008)

Fritsvold E D, 'Under the Law: Legal Consciousness and Radical Environmental Activism'
(2009) 34 *Law & Social Inquiry* 799

Galanter M, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal
Change." (1974) 9 *L&SR* 95

Gardbaum S, 'What's so weak about "weak-form review"? A reply to Aileen Kavanagh'
(2015) 13 *IJCL* 1040

Gauri van Gulik, 'Fast-Track Unfairness: Detention and Denial of Women Asylum Seekers
in the UK' (Human Rights Watch, February 23 2010)
<https://www.hrw.org/news/2010/02/23/uk-fast-track-asylum-system-fails-women> accessed
1 September 2016

Gay O, Schleiter P, Belu V, 'The Coalition and the Decline of Majoritarianism in the UK (2015)
86 *The Political Quarterly* 118

Gearty C & Mantouvalou V, *Debating Social Rights* (Hart 2012)

Gearty C, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or
Indispensable?' (2005) 58 *Current Legal Problems* 25

Gearty C, *Can Human Rights Survive?* (CUP 2006)

Gearty C, *On Fantasy Island: Britain, Europe and Human Rights*, (OUP 2016)

Gibney M, 'Asylum and the Expansion of Deportation in the United Kingdom' (2008) 43
Government and Opposition 146

Gibney M, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to
Refugees* (CUP 2008)

Giddens A, *The Third Way: The Renewal of Social Democracy* (Blackwell 1998)

Givens TE, Freeman GP, Leal DL, *Immigration policy and security: U.S., European, and
Commonwealth perspectives* (Routledge 2009)

Glasman M, Rutherford J, Stears M, White S (Eds) *The Labour Tradition and the Politics of
Paradox*, (The Oxford London Seminars, in association with the Christian Socialist
Movement, Compass, The Fabian Society, Progress and Soundings Journal 2011)

Gloucestershire Action for Refugees and Asylum Seekers, 'Home' (GARAS)
<http://www.garas.org.uk/> accessed 22 September 2016

Goodwin M and Ford R, *Revolt on the Right: Explaining Support for the Radical Right in Britain* (Routledge 2014)

Goodwin M, 'Why Britain Backed Brexit' (The UK in a Changing Europe, 4 July 2016)
<http://ukandeu.ac.uk/why-britain-backed-brexite2%80%8f/> accessed 22 September 2016

Gorodzeisky A, 'Does the Type of Rights Matter? Comparison of Attitudes Toward the Allocation of Political Versus Social Rights to Labour Migrants in Israel' (2013) 29 *European Sociological Review* 630

Grayling, C HC Deb 01 December 2014, Vol 589, Col 70

Greater Manchester Immigration Aid Unit (GMIAU), 'Home' (GMIAU) <http://gmiau.org/> accessed 31 August 2016

Greer S & Slowe R, 'The Conservatives' proposals for a British Bill of Rights: mired in muddle, misconception and misrepresentation?' (2015) 4 *EHRLR* 372

Greer S, 'Human rights and the struggle against terrorism in the United Kingdom' (2008) 2 *EHRLR* 163

Griffith JAG 'The common law and the political constitution' (2001) 117 *LQR* 42

Griffith JAG, 'The Political Constitution' (1979) 42 *MLR* 14

Griffith JAG, *The Politics of the Judiciary*, (Fontana 1997)

Griffiths D, Sigona N and Zetter R, *Refugee Community Organisations and Dispersal: Networks, Resources and Social Capital*, (2005 Policy Press)

Guild E, Groenendijk K & Carrera S, *Illiberal Liberal States, Immigration, Citizenship and Integration in the EU* (Ashgate 2009)

Guiraudon V, 'European Courts and Foreigners' Rights: A Comparative Study of Norms Diffusion' (2000) 34 *International Migration Review* 1088

Hale M, 'Who Guards the Guardians?' 2014 3 *Cambridge Journal of International and Comparative Law* 100

Hampshire J, *The Politics of Immigration* (Polity 2013)

Hansen R, 'Globalization, embedded realism, and path dependence: The other immigrants to Europe' (2002) 35 *Comparative Political Studies* 259

Hansen R, *Citizenship and Immigration in Postwar Britain: The Institutional Origins of a Multicultural Nation*, (OUP 2000)

Hanson D, HC Deb 30 Jan 2014 Vol 574 Col 1060

Harden I & Lewis N, *The Noble Lie: The British Constitution And The Rule Of Law* (Hutchinson 1988)

Harlow C & Rawling R, *Pressure Through Law* (Routledge 1992)

Harvey A, 'Detained fast-track suspended' (2015) 29 JIANL 253

Harvey A, 'Human trafficking - the road to ratification of the Council of Europe Convention Against Trafficking in Human Beings in the UK' (2008) JIANL 22

Hayek F A, *The Road to Serfdom* (2nd Ed. Routledge 2001)

HC Deb 30 Jan 2014 Vol 574 Col 1109

Heath AF, Jowell RM, Curtice JK, *The Rise of New Labour: Party Policies and Voter Choices* (OUP 2001)

Helen Bamber Foundation 'Legal Protection' (Helen Bamber Foundation)
<http://www.helenbamber.org/how-we-work/hub-protection-work/> accessed 22 September 2016

Hickman T R, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998' [2005] PL 306

Hickman T, *Public Law After the Human Rights Act* (Hart 2010)

Hilbink T, 'You Know the Type: Categories of Cause Lawyering' (2004) 29 L&SE 657

Hilton M, *The politics of expertise: how NGOs shaped modern Britain* (OUP 2013)

Hilton M, Crowson N J & McKay J (Eds), *NGOs in contemporary Britain: non-state actors in society and politics since 1945* (Palgrave Macmillan 2009)

Hintjens H, 'Nowhere to run: Iraqi asylum seekers in the UK' (2012) 54 Race & Class 88
HL Deb 27 October 2014, Vol 756, Col 989

Hoffman L, 'The COMBAR Lecture 2001: Separation of Powers' (2002) 7 Judicial Review 137

Hogg P and Bushell A, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn 't Such a Bad Thing after All)' (1997) 35 OHLJ 75

Hogg P W & Thornton AA, 'Reply to Six Degrees of Dialogue' (1991) 37 *OHLJ* 529

Hollifield J, 'The Emerging Migration State' (2004) 38 *International Migration Review* 885

Home Office and HM Treasury, 'Home Office's settlement at the Spending Review 2015' (Home Office and HM Treasury, 25 November 2015)
<https://www.gov.uk/government/news/home-offices-settlement-at-the-spending-review-2015> accessed 22 September 2016

Home Office, 'Asylum Policy Instructions: Medico-Legal Reports from the Helen Bamber Foundation and the Medical Foundation Medico-Legal Report Service' (13 July 2015),
<https://www.gov.uk/government/publications/dealing-with-asylum-claims-involving-torture-or-serious-harm-allegations-process> accessed 24th September 2016

Home Office, 'Deport first, appeal later' measures start to bite' (Home Office, 6 January 2015) <https://www.gov.uk/government/news/deport-first-appeal-later-measures-start-to-bite> accessed 22 September 2016

Home Office, 'Detention Services Order 03/2014 Service of Removal Directions' (Home Office, April 2014)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510261/D_SO_03-2014_Service_of_Removal_Directions.pdf accessed 31st August 2016

Home Office, 'Detention: interim instruction for cases in detention who have claimed asylum, and for entering cases who have claimed asylum into detention' (Home Office, 1 August 2016)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446421/Asylum_in_detention_-_interim_Instruction_V2.pdf accessed 22 September 2016

Home Office, 'Freedom of Information request (our ref: 32533): internal review', (12 November 2014)
<https://www.whatdotheyknow.com/request/223785/response/594896/attach/3/32533%20Yeo%20IR%20response%202014%2011%2012.pdf> accessed 22 September 2016

Home Office, 'Immigration Act 2016 Factsheet – Appeals (Sections 63-65)' (Home Office, July 2016)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537244/Immigration_Act_-_Part_4_-_Appeals.pdf accessed 22 September 2016
Home Office, 'Immigration statistics quarterly release' (Home Office, 25 August 2016)
<https://www.gov.uk/government/collections/immigration-statistics-quarterly-release> accessed 22 September 2016

Home Office, 'Impact Assessment for the Immigration and Nationality (Fees) Order 2016'
<http://www.legislation.gov.uk/ukxi/2016/177/impacts/2016/33> accessed 28th September 2016

Home Office, 'National Referral Mechanism: guidance for child first responders Version 2', (21st March 2016),
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510091/NRM_-_guidance_for_child_first_responders_v2.0_EXT.PDF accessed 24th September 2016

Home Office, Enforcement Instructions and Guidance 55.1.2 Criminal Casework Cases,
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/552478/EG_55_detention_and_temporary_release_v21.pdf accessed 28 September 2016

Home Office, Enforcement Instructions and Guidance: Chapter 55 – Index (Home Office, 12 Jul 2016)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470593/2015-10-23_Ch55_v19.pdf accessed 22 September 2016

Home Office, *Review into the Welfare in Detention of Vulnerable Persons: A report to the Home Office by Stephen Shaw* (Cm 9186, 2016)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/2532_Shaw_Review_Accessible.pdf accessed 22 September 2016

Home Office, Victims of modern slavery – Competent Authority guidance Version 3.0 (21 March 2016)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521763/Victims_of_modern_slavery_-_Competent_Authority_guidance_v3_0.pdf accessed 22 September 2016

Honey R, 'Cross-examination in judicial review proceedings' (2012) 156 Solicitors Journal 21

Hunt M, Yowell P, Hooper H (Eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart 2015)

Huysmans J, Buonfino A, *Politics of Exception and Unease: Immigration, Asylum and Terrorism in Parliamentary Debates in the UK* (2008) 56 Political Studies 766

Huysmans J, *The politics of insecurity: fear, migration and asylum in the EU* (Routledge 2006)
Immigration Law Practitioners Association, 'About ILPA' (ILPA)
<http://www.ilpa.org.uk/pages/about-us.html> accessed 22 September 2016

Jackson J, 'Justice, security and the right to a fair trial: is the use of secret evidence ever fair?' [2013] PL 720

James Brokenshire to the National Asylum Stakeholder Forum (11 August 2014)
<http://www.nrpfnetwork.org.uk/Documents/Home%20Office%20letter%20asylum%20support%20August%202014.pdf> accessed 1 September 2016

James Brokenshire, 'House of Commons: Written Statement (HCWS83)' (Home Office, 02 Jul 2015) <http://www.parliament.uk/documents/commons-vote-office/July%202015/2%20July/6-Home-Asylum.pdf> accessed 22 September 2016

James Tapsfield, 'Theresa May is 'set to shelve' David Cameron's flagship plan for a British Bill of Rights' (Daily Mail, London 10 August 2016 (Updated 10 August 2016)) <http://www.dailymail.co.uk/news/article-3732902/Theresa-set-shelve-David-Cameron-s-flagship-plan-British-Bill-Rights.html> accessed 22 September 2016

Jennings, W, 'Bureaucratic Performance and Control in British Politics: Asylum Policy 1994–2007' (2010) 12 *British Journal of Politics and International Relations* 539

Jerome Phelps 'The Fast Track is dead' (Open Democracy 50:50, 20 May 2016) <https://www.opendemocracy.net/5050/jerome-phelps/fast-track-is-dead> accessed 22 September 2016

Johnston C 'Indefinite immigration detention: can it be justified?' (2009) 23 *JIANL* 351
Joint Committee on Human Rights, Legislative Scrutiny: Immigration Bill (Second Report) (2014)

Jon Robins 'We will have a law centre owned and run by the people for the people' (The Justice Gap, June 24, 2016) <http://thejusticegap.com/2016/06/will-law-centre-owned-run-people-people/> accessed 31st August 2016

Jones K, 'Deportations with assurances: addressing key criticisms' (2008) 57 *ICLQ* 183

Joppke C, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 *World Politics* 266

Joppke C, *Immigration and the Nation State: the United States, Germany and Great Britain* (OUP 1999)

Joshua Rozenberg, 'Judges prepare for battle with Blunkett' (The Telegraph, London, 27 Feb 2003) <http://www.telegraph.co.uk/news/uknews/1423210/Judges-prepare-for-battle-with-Blunkett.html> accessed 22 September 2016

Kate Devlin 'SNP hit out at British Bill of Rights plan' (Sunday Herald, Glasgow, 15 May 2016) http://www.heraldscotland.com/news/14494257.SNP_hit_out_at_British_Bill_of_Rights_plan/ accessed 22 September 2016

Kavanagh A, 'Judging The Judges Under the Human Rights Act: Deference, Disillusionment And The 'War On Terror'' [2009] *PL* 287

Kavanagh A, 'What's So Weak About 'Weak-Form Review'? The Case of the UK Human Rights Act 1998', (2015) 13 *IJCL* 1008

Kavanagh A, *Constitutional Review under the UK Human Rights Act* (CUP 2009)

Kawar L, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France* (CUP 2015)

- Keck T, 'Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights' (2009) 43 L&SR 151
- Kelly B, 'Law Lords v New Labour: did the highest court frustrate the Government's attempts to control immigration' (2011) 25 JIANL 146
- Kelly B, 'What is a 'particular social group'? A review of the development of the Refugee Convention in England' (2010) 9 JIANL 12
- Kesby A, 'Internal Borders and Immigration Control: New Prospects And Challenges' (2010) 2 EHRLR 176
- Klarman M, *Brown v. Board of Education and the civil rights movement: abridged edition of From Jim Crow to civil rights: the Supreme Court and the struggle for racial equality* (Oxford University Press 2007)
- Klug F, *A Magna Carta for all Humanity: Homing in on Human Rights*, (Routledge 2015)
- Klug F, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (Penguin Books 2000)
- Koopmans R, *Contested Citizenship: Immigration and Cultural Diversity In Europe* (University of Minnesota Press 2005)
- Larking E, 'Irregular Immigrants in Australia and the United States — Rights, Realities, and Political Mobilization' (2015) 15 JHR 189
- Law Centres Network, 'Law Centres' (Law Centres Network)
<http://www.lawcentres.org.uk/about-law-centres/law-centres-on-google-maps/alphabetically> accessed 22 September 2016
- Law Society, 'Law Society Excellence Awards 2016' (Law Society)
<http://www.lawsociety.org.uk/support-services/events-training/excellence-awards/> accessed 22 September 2016
- Lawlor A, (2015) 'Local and National Accounts of Immigration Framing in a Cross-national Perspective' (2015) 41 JEMS 918
- Lawrance B & Ruffer G, *Adjudicating Refugee and Asylum Status: The Role of Witness, Expertise, and Testimony* (Cambridge University Press 2014)
- Legal Aid Agency, 'Controlled Work: Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2015 v1' (Legal Aid Agency, April 2015)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420970/l-aa-determine-controlled-work-mediation.pdf accessed 22 September 2016
- Legomsky S, *Immigration and the Judiciary: Law and Politics in Britain and America* (Clarendon Press, 1987)

Liberal Democrat Party, 'Immigration' (Liberal Democrat Party Undated)
<http://www.libdems.org.uk/immigration> accessed 5 May 2016

Liberal Democrat Voice, 'Lamb and Farron launch Liberal Democrat Campaign to save the Human Rights Act' (25th May 2015) <http://www.libdemvoice.org/lamb-and-farron-launch-liberal-democrat-campaign-to-save-the-human-rights-act-46094.html> accessed 20 September 2016

Lord Carnwath, 'From Rationality to Proportionality in the Modern Law' (UCL-HKU conference 'Judicial review in a changing society' Hong Kong University, 14 April 2014) <https://www.supremecourt.uk/docs/speech-140414.pdf> accessed 22 September 2016

Lord Dyson, What is wrong with human rights? (Hertfordshire University 3 November 2011) https://www.supremecourt.uk/docs/speech_111103.pdf accessed 22 September 2016

Lord Judge - Constitutional Change: Unfinished Business, (UCL Constitution Unit, 18 December 2013) <http://www.ucl.ac.uk/constitution-unit/constitution-unit-news/181213> accessed 22 September 2016

Lord Justice Laws, Hamlyn Lectures: Lecture III: The Common Law And Europe, (Judiciary of England and Wales, 27 November 2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf> accessed 22 September 2016

Lord Pannick HL Deb 27 October 2014, Vol 756, Col 992

Lord Sumption, 'The Limits of Law' (Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013) <https://www.supremecourt.uk/docs/speech-131120.pdf> accessed 22 September 2016

Loughlin M, *Sword & Scales: An Examination Of The Relationship Between Law And Politics* (Hart 2003)

MacDonald I, *MacDonald's Immigration Law and Practice* (9th Edition Butterworth's 2014)

Mack K, 'Rethinking Civil Rights Lawyering and Politics in the Era before "Brown"' (2005) 115 *The Yale Law Journal* 256

Mackenzie A, "'He heard the screams": recent developments in the law of exclusion clauses' (2014) 28 *JIANL* 265

Mactaggart F, HC Deb 22 October 2013, Vol 569, Col 188

Manfredi C and Kelly J, 'Six Degrees of Dialogue: A Response to Hogg and Bushell' (1999) 37 *OHJ* 513

Mantouvalou V, "'Am I Free Now?" Overseas Domestic Workers in Slavery' (2015) 42 *Journal of Law and Society* 329

Marenah K, 'The Immigration Differential In The Treatment Of Mental Illness' (2015) 29 *JIANL* 41

Mark Elliott, 'David Cameron promises a "British Bill of Rights". And what, exactly, does that mean?' (Public Law for Everyone, October 1, 2014)
<https://publiclawforeveryone.com/2014/10/01/david-cameron-promises-a-british-bill-of-rights-and-what-exactly-does-that-mean/> accessed 22 September 2016

Marseille A & Jans J 'The Role of NGOs in Environmental Litigation against Public Authorities: Some Observations on Judicial Review and Access to Court in the Netherlands' (2010) 22 JEL 373

Marshall A-M & Crocker Hale D, 'Cause Lawyering' (2014) 10, Annual Review of Law and Social Science 301

Martin I 'Combining Casework and Strategy: The Joint Council for the Welfare of Immigrants' in Cooper J and Dhavan R (Eds), *Public Interest Law* (Blackwell 1978)

May C, *The Rule of Law: The Common Sense of Global Politics* (Elgar 2014)

May T, HC Deb 10 June 2013, Volume 564, Col 20

May T, HC Deb 19 June 2012, Vol 546, Cols 778

May T, HC Deb 22 October 2013, Vol 569, Col 158

May T, Theresa, HC Deb 19 June 2012, Vol 546, Col 762

McCann D, *Regulating Flexible Work* (OUP 2008)

McCann M, 'Law and Social Movements' in Sarat A, (ed) *The Blackwell Companion To Law and Society* (Blackwell 2004)

McCann M, *Rights at Work: Pay Equity Reform and The Politics of Legal Mobilization* (The University Of Chicago Press 1994)

McCarthy J & Zald M, 'Resource Mobilization and Social Movements: A Partial Theory' (1977) 82 American Journal of Sociology 1212

McCauley D, 'Europeanisation as Resource Empowerment for NGOs' (2008) 9 Perspectives on European Politics and Society 265

McCauley D, 'Protest, politics and produce: a resource account of anti-genetically modified organism activism' (2015) 20 Local Environment 34

McGoldrick D, 'The Boundaries Of Justiciability' (2010) 59 ICLQ 981

McQuigg R J A, 'The Human Rights Act 1998 - Future Prospects' (2014) 35 Statute Law Review 120

Meili S, 'UK Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law' (2013) 54 Boston College Law Review 1123

Michael Wilkinson, 'Theresa May's 'chilling and bitter' measures to send illegal migrants home' (The Telegraph, London, 06 Oct 2015)
<http://www.telegraph.co.uk/news/politics/conservative/11913723/david-cameron-conservative-conference-2015-live.html> accessed 22 September 2016

Michaelsen C, 'The renaissance of non-refoulement? The Othman (Abu Qatada) decision of the European Court of Human Rights' (2012) 61 ICLQ 750

Migrant and Refugee Children's Legal Unit (MiCLU) 'Home' (MiCLU) <http://miclu.org/> accessed 14th May 2014

Migrant Legal Project 'Home' (Migrant Legal Project) <http://migrantlegalproject.com/> accessed 31 August 2016

Migrants' Law Project (MLP) 'Public Interest Litigation Training' (MLP)
<http://themigrantslawproject.org/our-work/training/> accessed 14th May 2014

Migrants' Law Project (MLP) <http://themigrantslawproject.org/> accessed 14th May 2014

Migration Observatory, 'Missing the Net Migration Target',
<http://www.migrationobservatory.ox.ac.uk/resources/commentaries/missing-the-net-migration-target/> (Migration Observatory, COMPAS, University of Oxford, 27 November 2014) accessed 22 September 2016

Migration Observatory, Britain's 70 Million Debate (University of Oxford September 2012)
<http://www.migrationobservatory.ox.ac.uk/resources/reports/britains-70-million-debate/> accessed 22 September 2016

Ministry of Justice 'Transforming legal aid: delivering a more credible and efficient system: Consultation Paper CP14/2013' (Ministry of Justice, 9 April 2013)
https://consult.justice.gov.uk/digital-communications/transforming-legal-aid/supporting_documents/transforminglegalaid.pdf accessed 22 September 2016

Ministry of Justice, 'Civil Justice Statistics Quarterly, England and Wales (Incorporating The Royal Courts of Justice 2015) January to March 2016' (Ministry of Justice, 2 June 2016)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527018/civil-justice-statistics-january-march-2016.pdf accessed 22 September 2016 and

Ministry of Justice, 'Judicial and Court Statistics 2011' (Ministry of Justice, 28 June 2012)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf accessed 22 September 2016

Ministry of Justice, 'Scope' (Ministry of Justice, Updated: Friday, 11 January 2013)
<http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/legal-aid/newlatest-updates/legal-aid-reform/scope> accessed 22 September 2016

Ministry of Justice, 'Tribunals and Gender Recognition Certificate Statistics Quarterly January to March 2016 and annual statistics 2015/16' (Ministry of Justice, 9 June 2016)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/528233/tribunals-commentary.pdf accessed 22 September 2016

Ministry of Justice, Judicial Review – proposals for further reform: the Government response, (MoJ February 2014) <https://consult.justice.gov.uk/digital-communications/judicial-review/results/judicial-review---proposals-for-further-reform-government-response.pdf> accessed 22 September 2016

Ministry of Justice, Tribunal Fees: The Government Response to the consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber) (Ministry of Justice September 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553387/proposals-imm-asylum-chamber-consultation-response.pdf accessed 20 September 2016

Morag-Levine N, 'Partners No More: Relational Transformation and the Turn to Litigation in Two Conservationist Organizations' (2003) 37 L&SR 457

Morris L, *Asylum, Welfare and The Cosmopolitan Ideal: A Sociology Of Rights* (Routledge 2010)

Mountfield H, 'Judicial review and human rights: challenges to court fees and legal aid changes which limit or effectively exclude right of access to court' (2014) 19 Judicial Review 217

Mulvey G, 'Immigration Under New Labour: Policy and Effects' (2011) 37 JEMS 1477

Munce P, 'Profoundly Un-Conservative? David Cameron and the UK Bill of Rights Debate', (2012) 83 The Political Quarterly 60

Munce P, 'The Conservative Party and Constitutional Reform: Revisiting the Conservative Dilemma through Cameron's Bill of Rights' (2014) 67 Parliamentary Affairs 80

Nadine Finch, 'Always Migrants Sometimes Children' (CORAM Children's Legal Centre, August 2014) <http://www.childrenslegalcentre.com/userfiles/UK%20mapping%20report%20CONNECT.pdf> accessed 22 September 2016

Nash K, 'The 'Cultural Turn' in Social Theory: Towards a Theory of Cultural Politics' 2001 35 Sociology 77

Nash K, *The Cultural Politics of Human Rights: Comparing the US and UK* (CUP 2009) 1

Natalie Byrom, 'The State of the Sector: The impact of cuts to civil legal aid on practitioners and their clients' (The Centre for Human Rights in Practice, University of Warwick in association with Illegal April 2013) https://www2.warwick.ac.uk/fac/soc/law/research/centres/chrp/spendingcuts/153064_statussector_report-final.pdf accessed 22 September 2016

Nathanael Miles, 'No Going Back: Lesbian and Gay People And The Asylum System' (Stonewall, 2010)
https://www.stonewall.org.uk/sites/default/files/No_Going_Back__2010_.pdf accessed 22 September 2016

Neumayer E, Asylum Recognition Rates in Western Europe: Their Determinants, Variation, And Lack Of Convergence,
[http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Article%20in%20Journal%20of%20Conflict%20Resolution%20\(Asylum\).pdf](http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Article%20in%20Journal%20of%20Conflict%20Resolution%20(Asylum).pdf) accessed 22 September 2016

Newman J, *Modernising Governance: New Labour, Policy and Society* (Sage, 2001)

O'Boyle M, 'Emergency government and derogation under the ECHR' (2016) 4 EHRLR 331

O'Sullivan M in Kneebone S, *Refugees, Asylum Seekers and the Rule of Law: Comparative Perspectives* (CUP 2009)

Ockelton M, 'Article 8 ECHR, the UK and Strasbourg: Compliance, Cooperation or Clash?' in Ziegler K, Wicks E and Hodson L, *The UK and European Human Rights: A Strained Relationship?* (Hart, 2015)

Office of the Immigration Services Commissioner, 'Regulations that immigration advisers must follow' (OISC, 17 December 2008)
<https://www.gov.uk/government/publications/regulations-that-immigration-advisers-must-follow--2/regulations-that-immigration-advisers-must-follow> Accessed 17 November 2014

Ohlbaum E D, 'Authentic Advocacy: Lawyering with Character' (2013) 37 American Journal of Trial Advocacy 155

Omar Shibli, 'Form not substance': Deport rules do not change the law (Free movement, 22 October 2013) <https://www.freemovement.org.uk/form-not-substance-deport-rules-do-not-change-the-law/> accessed 22 September 2016

Parliament, 'Negative Procedure', <http://www.parliament.uk/site-information/glossary/negative-procedure/> accessed 19 September 2016

Parry, R, 'The Civil Service and Intergovernmental Relations in the Post-devolution UK' (2012) 14 The British Journal of Politics & International Relations 285

Partos R, 'No Immigrants, No Evidence?: The Making of Conservative Party Immigration Policy' (2014) 5 Political Insight 12

Patrick Hennessy, 'Britain challenges power of human rights court' (The Telegraph, London, 21 Jan 2012) <http://www.telegraph.co.uk/news/politics/david-cameron/9030375/Britain-challenges-power-of-human-rights-court.html> accessed 22 September 2016

Philo G, Briant E & Donald P, *Bad News for Refugees* (Pluto Press 2013)

Philo G, Briant E & Donald P, *The role of the press in the war on asylum* (2013) 55 *Race & Class* 28

Pillay A, 'Economic and social rights adjudication: developing principles of judicial restraint in South Africa and the United Kingdom' [2013] *PL* 599

Plant R, Beech M & Hickson K, *The Struggle for Labour's Soul: Understanding Labour's Political Thought Since 1945* (Routledge 2004)

Policy Exchange, 'Judicial Power Project' (Policy Exchange)
<http://policyexchange.org.uk/judicial-power-project/item/judicial-power-project> accessed 31st August 2016

Press Association, 'Theresa May attacks judges over deportation rules' *The Guardian* (London, 17 February 2013) <http://www.theguardian.com/politics/2013/feb/17/theresa-may-attacks-judges-deportation> accessed 22nd May 2016

Public Law Project (Public Law Project), <http://www.publiclawproject.org.uk/> accessed 20 September 2016

Raab D & May T, *HC Deb* 30 Jan 2014, Volume 574, Col 1062 – 1102

Raab D. *HC Deb* 22 Oct 2013, Vol 569, Col 244

Raab, D *HC Deb* 09 May 2016, Vol 609, Col 516

Ramage S & Everett K, 'Case Comment: Unlawful creation, publication and operation of Government policy without proper consultation or public information: R (on the application of Medical Justice) v Secretary of State for the Home Department' (2011) 201 *Criminal Lawyer* 1

Randall C, 'An Asylum Policy for the UK', in Spencer S (Ed) *Strangers & Citizens: A Positive Approach to Migrants and Refugees* (Institute for Public Policy Research 1994)

Refugee Action, 'The future of Assisted Voluntary Return' (Refugee Action, 27 July 2015)
http://www.refugee-action.org.uk/assets/0001/2609/The_Future_of_AVR_briefing_27_July_2015.pdf accessed 22 September 2016

Refugee and Migrant Forum of Essex and London, 'Home' (RAMFEL)
<http://www.ramfel.org.uk/wordpress/> accessed 22 September 2016

Refugee Council, *Top 20 Facts about Refugees and Asylum Seekers*, (Undated)
http://www.refugeecouncil.org.uk/latest/news/4735_top_20_facts_about_refugees_and_asylum_seekers accessed 22 September 2016

Right to Remain, 'Right to Remain was formerly known as NCADC, the National Coalition of Anti-Deportation Campaigns' (Right to Remain)
<http://righttoremain.org.uk/about/name.html> accessed 31st August 2016

Ritchie M HC Deb, 6 March 2012, c638W

Robert Thomas, 'Immigration Judicial Reviews' (UK Constitutional Law Association, September 12, 2013) <http://ukconstitutionallaw.org/2013/09/12/robert-thomas-immigration-judicial-reviews/> accessed 22 September 2016

Roger Smith, 'Experience in England and Wales: Test case strategies, public interest litigation, the Human Rights Act and legal NGOs' (Justice, May 2003) http://www.essex.ac.uk/armedcon/story_id/000696.pdf accessed 22 September 2016

Rosenberg G, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd Ed, University of Chicago Press 2008)

Ruck Keene A, Dobson C, 'At What Price Liberty? The Supreme Court Decision In Lumba And Compensation For False Imprisonment' [2012] PL 628

Sage D, 'A challenge to liberalism? The communitarianism of the Big Society and Blue Labour' (2012) 32 Critical Social Policy 365

Sam Marsden 'Michael Mansfield QC's chambers to close over 'devastating' legal aid changes' (The Telegraph, London, 23 Sep 2013) <http://www.telegraph.co.uk/news/uknews/law-and-order/10328955/Michael-Mansfield-QCs-chambers-to-close-over-devastating-legal-aid-changes.html> accessed 22 September 2016

Sang B, 'Tending towards greater eco-protection in Kenya: public interest environmental litigation and its prospects within the new constitutional order' (2013) 57 Journal of African Law 29

Sarat A & Scheingold S (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities*, (OUP 1998)

- Abel, R 'Speaking Law to Power: Occasions for Cause Lawyering'
- Sterett S, 'Caring about Individual Cases: Immigration Lawyering in Britain',

Sarat A and Scheingold S, *Cause Lawyering and the State in a Global Era* (OUP 2001)

- Boon A, 'Cause Lawyers in a Cold Climate'

Sarat A and Scheingold S, *Cause Lawyers and Social Movements* (Stanford University Press 2006)

- Barclay S and Fisher S, 'Same Sex Marriage Litigation'
- Marshall, A-M, 'Social Movement Strategies and Participatory Potential in Litigation'

Sarat A and Scheingold S, *The Worlds Cause Lawyers Make: Structure And Agency In Legal Practice*, (Stanford University Press 2005)

- Maiman R, 'Asylum Law Practice in the United Kingdom after the Human Rights Act'

Sassen S *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996)

Schatzberger E, 'The Immigration Act 2014: 'Not on the list you're not coming in; landlords forced to discriminate'' (2015) 79 *The Conveyancer and Property Lawyer* 395

Scheingold S and Sarat A, *Something to Believe In: Politics, Professionalism, And Cause Lawyering* (Stanford University Press 2004)

Scheingold S, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2nd Ed University of Michigan Press 2004)

Schuster L, *The Use And Abuse Of Political Asylum In Britain And Germany* (Routledge 2003)

Scott Blinder, 'Briefing: UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern' (3rd Edition, Migration Observatory, COMPAS, University of Oxford, 20th August 2015) <http://www.migrationobservatory.ox.ac.uk/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-concern> accessed 22 September 2016

Seddon D, 'Case Comment: MF (Nigeria) v Secretary of State for the Home Department' (2013) 27 *JIANL* 350

Segal J, & Spaeth H, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993)

Segal J, & Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2012)

Shah R 'The FNP Saga' (2007) 21 *JIANL* 27

Shapiro M 'Judicial Delegation Doctrines: The US, Britain, and France' (2002) 25 *West European Politics* 173

Shawki N, 'Political Opportunity Structures and the Outcomes of Transnational Campaigns: A Comparison of Two Transnational Advocacy Networks' (2010) 35 *Peace & Change* 381

Shklar J, 'Political Theory And The Rule Of Law' In Hutchinson A & Monahan P (Eds) *The Rule Of Law: Ideal Or Ideology* (Carswell 1987)

Somek A, *The Cosmopolitan Constitution* (Oxford 2014)

Somerville W & Goodman S W, 'The Role of Networks in the Development of UK Migration Policy' (2010) 58 *Political Studies* 951

Somerville W, *Immigration Policy under New Labour* (Policy Press 2007)

Sommerlad, H, 'Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid' (2004) 31 *Journal of Law and Society* 350

- Spencer I, *British Immigration Policy since 1939: The Making of Multi-Racial Britain* (Routledge 1997)
- Spencer S, 'The Impact of Immigration Policy On Race Relations', in Blackstone T, Parekh B & Sanders P, *Race Relations in Britain: A Developing Agenda* (Psychology Press 1998)
- Spurrier M and Janes L, 'Litigating to save legal aid' (2016) *Legal Action* 12
- Stefanelli J, 'Whose rule of law? An analysis of the UK's decision not to opt-in to the EU asylum procedures and reception conditions Directives' (2011) 60 *ICLQ* 1055
- Stevens D, *UK Asylum Law and Policy: Historical and Contemporary Perspectives* (Sweet & Maxwell 2004)
- Stone Sweet A, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000)
- Sumption J, 'Judicial and Political Decision-Making: The Uncertain Boundary' (the F.A. Mann Lecture 2011) <http://www.pem.cam.ac.uk/wp-content/uploads/2012/07/1C-Sumption-article.pdf> accessed 22 September 2016
- Sundstrom L M, 'Russian NGOs and the European Court of Human Rights: A Spectrum of Approaches to Litigation' (2014) 36 *HRQ* 844
- Sweeney J, 'Credibility, proof and refugee law' (2009) 21 *International Journal of Refugee Law* 700
- Sweeney J, 'The human rights of failed asylum seekers in the United Kingdom' [2008] *PL* 277
- Tamanaha B, 'A Concise Guide to the Rule of Law' in Palombella G and Walker N (Eds) *Relocating the Rule of Law* (Hart 2009)
- Tamanaha B, 'A Holistic Vision of the Socio-Legal Terrain Law and Contemporary Problems' (2008) 71 *Law and Contemporary Problems* 89
- Taylor S & Bogdan R, *Introduction to Qualitative Research Methods: A Guidebook and Resource*, (John Wiley and Sons 1998)
- The Association of Visitors to Immigration Detainees (AVID), 'Home' (AVID) <http://www.aviddetention.org.uk/>, accessed 8th June 2014
- The Conservative Party, 'Protecting Human Rights in The UK: The Conservatives' Proposals For Changing Britain's Human Rights Laws' (The Conservative Party, 3rd October 2014) http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/03_10_14_humanrights.pdf accessed 31st August 2016
- The Guardian, 'Blunkett asylum law 'will face court battle'', 1 December 2003, <http://www.theguardian.com/politics/2003/dec/01/immigration.immigrationandpublicservices> accessed 27 August 2016

The Guardian, 'Clarke confronts judges on terror law' (The Guardian, London, 7 September 2005) <https://www.theguardian.com/uk/2005/sep/07/terrorism.immigrationpolicy> accessed 22 September 2016

The Guardian, 'UK Border Agency investigation finds cause for 'significant concern' (8 August 2010) <http://www.theguardian.com/uk/2010/aug/08/uk-border-agency-investigation-concerns> accessed 22 September 2016

The Guardian, Immigration bill: Theresa May defends plans to create 'hostile environment' (10 October 2013), <http://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment> accessed 22 September 2016

The Guardian, No 10 rules out points-based immigration system for Britain (5 September 2016) <https://www.theguardian.com/uk-news/2016/sep/05/no-10-theresa-may-rules-out-points-based-immigration-system-for-britain-brexit> accessed 22 September 2016

The Journal of the Law Society of Scotland, 'Truss lists Human Rights Act reform as "third priority"', (7 September 2016) http://www.journalonline.co.uk/News/1022209.aspx#.V-rNw_ArLIU accessed 27 September 2016

The Judiciary of England and Wales, 'Response of the senior judiciary to the Ministry of Justice's consultation entitled 'Judicial Review: Proposals for Further Reform'' (The Judiciary of England and Wales, November 1, 2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/jr-phaseii-public-consultation-judicial-response.pdf> accessed 22 September 2016

The Low Commission, 'The Future of Advice and Legal Support', <http://www.lowcommission.org.uk/> accessed 27 September 2016

The Mirror, 'Does the Home Office think you're gay?' (The Mirror, London, 6 March 2015) <http://www.mirror.co.uk/news/ampp3d/home-office-think-youre-gay-5280895> accessed 27 August 2016

The Notre Dame Refugee Centre, 'Home' (The Notre Dame Refugee Centre) <http://www.notredamerc.org.uk/> accessed 1 September 2016

The Strategic Legal Fund, 'About the SLF' (The Strategic Legal Fund) <http://www.strategiclegalfund.org.uk/about/> accessed 22nd May 2015

The Telegraph, 'Terror suspects win Lords appeal against detention' (The Telegraph, London, 16 Dec 2004) <http://www.telegraph.co.uk/news/1479156/Terror-suspects-win-Lords-appeal-against-detention.html> accessed 22 September 2016

Theresa May (2011), "Speech to the Conservative Party Conference 2011", *Politics.co.uk*, <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full>, accessed 22 September 2016

- Theresa May, 'Theresa May speech in full' (Politics.co.uk, 4 October 2011) <http://www.politics.co.uk/comment-analysis/2011/10/04/theresa-may-speech-in-full>, accessed 17th April 2013
- Thomas R 'Asylum appeals overhauled again' [2003] PL 260
- Thomas R, 'After the ouster: review and reconsideration in a single tier tribunal' [2006] PL 674
- Thomas R, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) 20 International Journal of Refugee Law 489
- Thomas R, 'Immigration and Access to Justice: A Critical Analysis of Recent Restrictions' in Palmer E, Guinchard A, Cornford T & Marique Y (Eds.) *Access to Justice: Beyond the Policies and Politics of Austerity* (Hart 2016)
- Thym D, 'Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay?' (2008) 57 ICLQ 87
- Tichenor D J, *Dividing Lines: The Politics of Immigration Control in America* (Princeton University Press 2002)
- Tim Ross, 'David Cameron: My plan for the Tories' first 100 days in power' (Telegraph, London, 26 Apr 2015) <http://www.telegraph.co.uk/news/general-election-2015/11563550/David-Cameron-My-plan-for-the-Tories-first-100-days-in-power.html> accessed 22 September 2016
- Tomkins A, 'National security and the role of the court: a changed landscape?' (2010), 126, LQR 543
- Tomkins A, 'The Role Of The Courts In The Political Constitution' (2010) 60 UTLJ 4
- Travers M, *The British immigration courts : a study of law and politics*, (Policy Press 1999)
- TRP Solicitors, 'TRP Solicitors' (TRP Solicitors) <http://www.trpsolicitors.co.uk/> accessed 22 September 2016
- Tushnet M, 'Some Legacies of Brown v. Board Education' (2004) 90 VLR 1693
- Tushnet M, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (University of North Carolina Press 2004)
- Tushnet M, The Significance of Brown v. Board of Education (1994) 80 VLR 173
- Tushnet M, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009)
- UK Visas and Immigration, 'Funding to local authorities Financial year 2016/17 Home Office funding: Unaccompanied asylum seeking children (UASC)' (Version 2, UK Visas and Immigration, June 2016)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426933/ASC_Funding_Instructions_2015-16.pdf accessed 22 September 2016

UK Visas and Immigration, 'New immigration and nationality fees for 2016 to 2017' (UK Visas and Immigration, 11 January 2016) <https://www.gov.uk/government/news/new-immigration-and-nationality-fees-for-2016-to-2017> accessed 22 September 2016

UN High Commissioner for Refugees (UNHCR), Quality Initiative Project - Fifth Report to the Minister, March 2008, available at: <http://www.refworld.org/docid/56a9c7df4.html> accessed 1 September 2016

United Nations High Commission for Refugees (UNHCR), 'Guidelines On International Protection: "Membership Of A Particular Social Group" Within The Context Of Article 1A(2) Of The 1951 Convention and/or Its 1967 Protocol Relating To The Status Of Refugees' (UNHCR, 7 May 2002) <http://www.unhcr.org/publ/PUBL/3d58de2da.pdf> accessed 22 September 2016

Vanhala L, 'Disability Rights Activists in the Supreme Court of Canada: Legal Mobilization Theory and Accommodating Social Movements' (2009) 42 Canadian Journal of Political Science 981

Vanhala L, '*Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK*' (2012) 46 L&SR 523

Vanhala L, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* (CUP 2011)

Vermeule A, *Law and the Limits of Reason*, (OUP 2012)

Vráblíková K, 'How Context Matters? Mobilization, Political Opportunity Structures, and Nonelectoral Political Participation in Old and New Democracies' (2014) 47 Comparative Political Studies 203

Waldron J, 'Is The Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137

Waldron J, *Law and Disagreement* (OUP 1999)

Waldron J, 'Socioeconomic Rights and Theories of Justice' (2011) 48 San Diego Law Review 773

Warren R and York S 'How children become "failed asylum-seekers": reflections on the experiences of young unaccompanied asylum seekers in Kent from 2006 to 2013, and how "corrective remedies" have failed them' (2014) 28 JIANL 123

Webber F, 'Borderline Justice' (2012) 54 Race & Class 39

Webber F, *Borderline Justice: The Fight for Refugee and Migrant Rights* (Pluto 2012)

Weber L Landman T 'Deciding to Detain: The Organisational Context for Decisions to Detain Asylum Seekers at UK Ports' (Criminal Justice, Borders and Citizenship Research Paper 2002) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520379 accessed 28 September 2016

Weber L Gelsthorpe L, *Deciding to Detain: How Decisions to Detain Asylum Seekers are Made at Ports of Entry* (University of Cambridge Institute of Criminology 2000) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520382 accessed 28 September 2016

Whiteley P, *Political participation in Britain: the decline and revival of civic culture* (Palgrave Macmillan 2012)

William Turvill 'National newspaper ABCs, June 2015: Most tabloids suffer double digit declines, Sun reclaims Sunday top-spot' (Press Gazette, London, July 10, 2015) <http://www.pressgazette.co.uk/national-newspaper-abcs-june-2015-most-tabloids-suffer-double-digit-declines-sun-reclaims-sunday-top> accessed 22 September 2016

Williams F and Roseneil S, 'Public Values of Parenting and Partnering: Voluntary Organisations and Welfare Politics in New Labour's Britain' (2004) 11 *Social Politics* 181

Wilsher D, *Immigration Detention: Law History Politics*, (CUP 2014)

Wilson B M, 'Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics' (2006) 39 *Comparative Political Studies* 325

Women for Refugee Women, Campaign, (Undated) <http://www.refugeewomen.co.uk/campaign/> accessed 22 September 2016

Women for Refugee Women, <http://www.refugeewomen.co.uk/> accessed 26th September 2016

Woodfield K et al (eds) 'Exploring the decision making of Immigration Officers: a research study examining non-EEA passenger stops and refusals at UK ports' (Home Office, January 2007) <http://www.statewatch.org/news/2007/jan/uk-ho-immig-decision-making-study.pdf> accessed 22 September 2016

Wray H, 'Greater than the sum of their parts: UK Supreme Court decisions on family migration' [2013] *PL* 838

Wren K, 'Supporting Asylum Seekers and Refugees in Glasgow: The Role of Multi-Agency Networks' (2007) 20 *Journal of Refugee Studies* 391

Yap P-J, 'Defending Dialogue' [2012] *PL* 527

York S, 'Immigration Control and The Place of Article 8 In The UK Courts - An Update' (2015) 29 *JIANL* 289

York S, 'The End of Legal Aid in Immigration - A Barrier To Access To Justice For Migrants And A Decline In The Rule Of Law' (2013) 27 *JIANL* 106, 124

Young A, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2008)

Young A. 'Is dialogue working under the Human Rights Act 1998?' [2011] PL 773

Zackin E, 'Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU turned to Courts' (2008) 42 L&SR 367

Zemans F, 'Legal Mobilization: The Neglected Role of the Law in the Political System' (1983) 77 American Political Science Review 690

Zetter R & Pearl M, 'The Minority Within the Minority: Refugee Community-Based Organisations in the UK and the Impact of Restrictionism on Asylum Seekers' (2000) 26 JEMS 675

Zimbabwe Association, 'Home' (Zimbabwe association) <http://zimbabweassociation.org.uk/> accessed 22 September 2016

Case List

A & Ors v. SSHD [2004] UKHL 56

Abdul (section 55 - Article 24(3) Charter : Nigeria) [2016] UKUT 106 (IAC)

Abdulaziz, Cabales And Balkandali v United Kingdom - 9214/80; 9473/81; 9474/81 [1985] ECHR 7

Akhalu (health claim: ECHR Article 8) Nigeria [2013] UKUT 400 (IAC)

AM (S.117B) [2015] UKUT 260 (IAC)

AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1

Belhaj & Anor v Straw & Ors [2014] EWCA Civ 1394

Birmingham City Council v Clue [2010] EWCA Civ 460

Chahal v United Kingdom, App No 22414/93 (ECtHR, 15 November 1996)

Chahal v. SSHD, [1995] 1 ALL ER 658

Chikwamba v SSHD [2008] UKHL 40

Cruz Varas and Others v Sweden, App No 15576/89 (ECtHR 20 March 1991)

Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors [2015] EWHC 1689

D. v. United Kingdom, App No 30240/96 (ECtHR, 02 May 1997)

EB (Kosovo) v SSHD [2008] UKHL 41

Edore v SSHD [2003] EWCA Civ 716

EH (blood feuds) Albania CG [2012] UKUT 348 (IAC)

FM (FGM) Sudan CG [2007] UKAIT 00060

GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319

Greenwood (No. 2) (para 398 considered) [2015] UKUT 00629 (IAC)

Gulshan (Article 8 – new Rules – correct approach) Pakistan [2013] UKUT 640 (IAC)

Haleemudeen v SSHD [2014] EWCA Civ 558

Hesham Ali v SSHD [2016] UKSC 60

HJ (Iran) v SSHD (Rev 1) [2010] UKSC 31

Home Office v VS [2015] EWCA Civ 1142

Hossain & Ors v SSHD (Rev 1) [2016] EWHC 1331 (Admin)

Huang & Ors v SSHD [2005] EWCA Civ 105

Islam v. SSHD Immigration Appeal Tribunal and Another, Ex Parte Shah, R v. [1999] UKHL 20

Izuazu (Article 8 – new rules) Nigeria [2013] UKUT 45 (IAC)

JM & Ors v SSHD & First-Tier Tribunal (Immigration And Asylum Chamber) Consent Orders CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015, July 2015
<http://www.gardencourtchambers.co.uk/wp-content/uploads/2015/07/Helen-Bamber-Foundation-Order-Final.pdf> accessed 1 September 2016

JM & Ors v SSHD & First-Tier Tribunal (Immigration And Asylum Chamber) Statement of Reasons for CO/499/2015, CO/377/2015, CO/624/2015, CO/625/2015 July 2015
<http://www.gardencourtchambers.co.uk/wp-content/uploads/2015/07/Helen-Bamber-Foundation-statement-of-reasons.pdf> accessed 1 September 2016

JT (Cameroon) v. Secretary of State for the Home Department, [2008] EWCA Civ 878

KA and Others (domestic violence risk on return) Pakistan CG [2010] UKUT 216 (IAC)

Liu v SSHD [2005] EWCA Civ 249

Lord Chancellor v Detention Action [2015] EWCA Civ 840

Lumba (WL) v SSHD [2011] UKSC 12

MA (Nigeria) v SSHD [2009] EWCA Civ 1229

Maaouia v France App no 39652/98 (ECtHR, 5 October 2000)

Makhlouf v SSHD [2016] UKSC 59

Maslov v Austria App no 1638/03 (ECtHR, 23 June 2008)

MD (same-sex oriented males: risk) India CG [2014] UKUT 65 (IAC)

MF (Nigeria) v SSHD [2013] EWCA Civ 1192

Miranda v SSHD & Ors [2014] EWHC 255 (Admin)

MM & GY & TY v SSHD [2015] EWHC 3513 (Admin)

MN and others (Ahmadis - country conditions - risk) Pakistan CG [2012] UKUT 389 (IAC)

MP (Sri Lanka) v SSHD [2016] UKSC 32

MSS v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011)

N v SSHD [2005] UKHL 31

N v The United Kingdom App no 26565/05 (ECtHR, 27 May 2008)

NS (Social Group, Women, Forced marriage) Afghanistan CG [2004] UKIAT 00328

Ntege [2014] unreported. Judges remarks reported in BBC News, 'Probe of three immigration officers in 'sham vicar case'' (BBC News, London, 4 December 2014)
<http://www.bbc.co.uk/news/uk-england-london-30329896> accessed 22 September 2016

Odelola v SSHD [2009] UKHL 25

Public Law Project v The Lord Chancellor [2015] EWCA Civ 1193

QH (Christians - risk) (China) CG [2014] UKUT 86 (IAC)

R (AB) v SSHD [2015] EWHC 1490 (Admin)

R (Adam) v. SSHD [2005] UKHL 66

R (AN & FA (Children)) v SSHD [2012] EWCA Civ 1636

R (Apata) v The SSHD [2015] EWHC 888 (Admin)

R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs [2012] EWHC 2115 (Admin)

R (Britcits) v SSHD [2016] EWHC 956 (Admin)

R (Corner House Research) v Secretary of State for Trade & Industry [2005] EWCA Civ 192

R (Das) v SSHD & Ors [2014] EWCA Civ 45

R (Detention Action) v SSHD [2014] EWHC 2245 (Admin)

R (EM (Eritrea)), v SSHD [2014] UKSC 12

R (Ganesabalan), v SSHD [2014] EWHC 2712 (Admin)

R (Gudanaviciene & Ors), v The Director of Legal Aid Casework & Or [2014] EWCA Civ 1622

R (Hagos) v SSHD (Dublin returns – Malta) (IJR) [2015] UKUT 271 (IAC)

R (Husan) v SSHD [2005] EWHC 189 (Admin)

R (Kiarie) v The SSHD [2015] EWCA Civ 1020

R (MA (Pakistan) & Ors) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705

R (Medical Justice) v SSHD [2011] EWCA Civ 1710

R (MM & Ors) v SSHD (Rev 1) [2014] EWCA Civ 985

R (MM) v SSHD [2013] EWHC 1900 (Admin)

R (Mohammed) v SSHD [2016] EWHC 447 (Admin)

R (Nagre) v SSHD [2013] EWHC 720 (Admin)

R (Razgar) v. SSHD [2004] UKHL 27

R (Refugee Action) v The SSHD [2014] EWHC 1033 (Admin)

R (Refugee Legal Centre) v SSHD [2004] EWCA Civ 1481

R (Saadi & Ors) v SSHD [2002] UKHL 41

R (Sino) v SSHD [2011] EWHC 2249 (Admin)

R (Sivakumuran) v SSHD [1987] UKHL 1

R (TH (Bangladesh) & Ors) v SSHD [2016] EWCA Civ 815

R (The Public Law Project) v Lord Chancellor [2016] UKSC 39

R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57

R (Ullah) v Special Adjudicator [2004] UKHL 26

R (Y) v SSHD [2012] EWHC 1075 (Admin)

R (ZAT and Others) v SSHD (Article 8 ECHR - Dublin Regulation - interface - proportionality) (IJR) [2016] UKUT 61 (IAC)

RT (Zimbabwe) & Ors v SSHD [2012] UKSC 38

Ruppiah v Secretary of State for the Home Department [2016] EWCA Civ 803

Saadi v The United Kingdom App no 13229/03 (ECtHR, 29 January 2008)

Singh v The SSHD [2015] EWCA Civ 74

Slivenko v. Latvia App no 48321/99 (ECtHR, 9 October 2003)

SM & Anor v SSHD [2013] EWHC 1144 (Admin)

Soering v. The United Kingdom App no 14038/88 (ECtHR, 7 July 1989)

SSHD v AJ (Angola) [2014] EWCA Civ 1636

SSHD v CT (Vietnam) [2016] EWCA Civ 488

SSHD v Limbuela & Ors [2004] EWCA Civ 540

SSHD v MA (Somalia) [2015] EWCA Civ 48

SSHD v MN and KY (Scotland) [2014] UKSC 30

SSHD v MSM (Somalia) & Anor [2016] EWCA Civ 715

SSHD v SS (Congo) & Ors [2015] EWCA Civ 387

SSHD v. K [2006] UKHL 46

Tarakhel v Switzerland App no 29217/12 (ECtHR, 4 November 2014)

Uner v Netherlands App no 46410/99 (ECtHR, 18 October 2006)

Vilvarajah and Others v The United Kingdom App no 13163/87 13164/87 13165/87 13447/87 13448/87 (ECtHR, 30 October 1991)

VW (Uganda) v SSHD [2009] EWCA Civ 5

W v The United Kingdom App no 9749/82 (ECtHR, 8 July 1987)

ZH (Tanzania) v SSHD [2011] UKSC 4