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The Relationship between Immigration Status and Rights in the UK: Exploring the Rationale

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Abstract

Successive UK governments have expressed a commitment to 'equality for all'. Home Secretary Theresa May, prior to the 2010 general election, referred to equality of opportunity for 'every single individual in this country' and the recently enacted Equality Act 2010 has been heralded by government as providing a legislative framework 'to protect the rights of individuals and advance equality of opportunity for all'. Drawing on insights from academic literature, this Working Paper assesses the extent to which these claims of inclusivity ring true for migrants living in the UK. To do so, the paper maps the existing pattern of rights and restrictions for eight categories of migrants, setting out, where available, the rationales provided by government as to why a particular category of migrant has or has not been granted a particular right. The analysis is framed around four substantive rights: to healthcare, education, social housing and family life.

A core theme that emerges is that the context for each decision on the allocation or denial of a right is a series of sometimes conflicting policy objectives. The authors argue that international and regional human rights law, and in particular provisions relating to non-discrimination, provide a structured framework to consider the extent to which any differential treatment between citizens and migrants, or between different categories of migrants, is justified; in essence, where the power of the state to limit migrants' rights as part of immigration control should end and the principle of equality between individuals begin. The authors' premise is not that every person who arrives in the UK from abroad should immediately have equal access to health care, education, social housing, or family life. Rather, the framework provided is intended to facilitate a debate on equality for whom, when and on what grounds.

The law set out in this paper is current as at 1 January 2011.

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Table of Contents

1. Introduction

The Equality Act 2010 is heralded by government as providing a legislative framework 'to protect the rights of individuals and advance equality of opportunity *for all*'.[1] Yet that inclusivity is not in fact extended to some of those living in the UK for whom less favourable treatment in access to the labour market, to public services and to vote in elections, for instance, is proscribed by law. Successive governments have endorsed the principle of non-discrimination not only on grounds of fairness to individuals but as necessary to achieve economic and social objectives. Yet, the rationale for according or denying those rights to some categories of migrants and the impacts that may have has received surprisingly little attention in policy debates.

There may be a number of reasons for this omission. The existing pattern of rights and restrictions that has developed historically is hugely complex. All migrants are entitled to some rights as soon as they arrive in the UK: the government is required, for instance, to 'secure to everyone within their jurisdiction' the rights contained in the European Convention on Human Rights (ECHR), domestically enforceable via the Human Rights Act 1998 (HRA). These rights are thus not dependent on nationality, immigration status or length of stay in the UK. In other respects, however, restrictions are commonplace but selective. Labour migrants, dependants and students have variable rights of access to the labour market from which asylum seekers are largely excluded. Some migrants have full access to the National Health Service, others only to emergency services and, for instance, to services relating to transferable diseases. All migrants can send their children to state schools, including asylum seekers, but the latter are excluded from free post-16 education. Most migrants are told that they must have 'no access to public funds', significantly excluding them from access to social housing if homeless and to welfare benefits but not from access to publicly funded facilities such as libraries.

Rarely set out in primary legislation, the detail on these restrictions is to be found in numerous statutory instruments which can differ not only according to category of entry but by country of origin and length of residence. Mapping the existing pattern is thus no easy task. Government's rationale for granting or restricting rights is, moreover, rarely explicit. In some cases, notably in relation to asylum seekers, the case for restricting access has been set out in White Papers, parliamentary debates and evidence to Select Committees. In other cases it can be hard to find any public statement of the reasoning behind restrictions, particularly when they are hidden away in subordinate statutory instruments.

The aim of this paper is to explore the pattern of rights and restrictions that has emerged and the range of reasons given for granting or denying access in each case, set in the context of the UK's obligations under international and European human rights instruments and commitments from successive governments to tackle discrimination and advance equality in the UK. Rather than a comprehensive analysis, our intention is to provide an illustrative platform to frame further inquiry, debate and questions for research. Our premise is not that every person who arrives in the UK from abroad should have an equal right to work, family reunion, access public services or to vote. Rather, set against the value attached to equality in a liberal democracy, articulated in international human rights standards, it is to facilitate a debate on equality for whom, when and on what grounds (Spencer 1995).

A core theme that emerges is that the context for each decision whether to grant or restrict rights is a series of sometimes conflicting policy objectives that may or may not be explicit. Drawing on international and European human rights standards, we seek to promote a framework that provides an

[1] Government Equalities Office webpage 'Equality Act 2010' http://www.equalities.gov.uk/equality_act_2010.aspx (emphasis added).

external measure to assess whether or not these objectives justify differential treatment. We rely in particular on the jurisprudence of the European Court of Human Rights (ECtHR), which has held that a difference in treatment will only be discriminatory if it has 'no objective and reasonable justification'. In order to establish that justification the government will need to show that the differential treatment pursues a 'legitimate aim' and that there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[2] This obligation, domestically enforceable by way of the Human Rights Act (HRA), provides a structured legal framework to examine any differential treatment, whether between citizens and non-citizens, or between different categories of non-citizens.

Our analysis takes a first step towards exploring whether successive governments have met that test, providing an overview of the rationales that have been cited and the strength of the evidence on which they were based. In this way we provide a platform for further research and debate. The next step would be to explore whether, if that test were applied, taking competing objectives and evidence into account, the balance of rights and restrictions might be redrawn. In taking this first step we hope to illustrate the need for government to spell out both the rationales for granting or restricting rights to migrants and the evidence on which they rely. Not only is this good practice, we submit that a 'culture of justification'[3] is required as a matter of international and European and domestic law. As the discussion in this paper will illustrate, this is one area in need of vast improvement.

The paper is *not* concerned with rights of entry to the UK. Nor does it explore the extent to which migrants within the UK enjoy the rights to which they *are*, as a matter of domestic law, entitled. We recognise that many migrants and indeed citizens do not, for reasons that include unlawful discrimination (Kofman et al., 2009). Our concern here is the instances where immigration status is itself the reason that access is denied. As Linda Bosniak has observed, while it is common in the literature to come across 'laundry lists of the vectors of subordination' such as race, gender, class, sexual orientation and disability, texts invariably fail to mention immigration status: they focus on inequality among those who are entitled to equality while ignoring the more problematic category of those who by law are denied the full enjoyment of social, political and civil rights (Bosniak, 2006:4). This paper addresses that gap.

Our research has drawn extensively on primary material: legislation, regulations, a systematic search of parliamentary debates for the relevant periods and of Select Committee reports and other official sources.

Structure of this paper

In section 2 we begin by clarifying what we mean by 'rights' and consider the extent to which certain rights may be limited under international, European and domestic law. We focus in particular on the manner in which the principles of equality and non-discrimination have found expression at these levels. We then explore some of the insights from the academic literature that help to frame the context for the questions we address and debates to which the paper contributes. This discussion will illustrate the value attributed to the principles of equality and non-discrimination in social and legal discourse and the correlative need for governments to justify deviations from a presumption in favour of equal treatment.

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[2] See *Belgian Linguistic Case (No 2)* 1 EHRR 252 at [10]: "On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

[3] Lord Steyn, 'The New Legal Landscape' [2000] *European Human Rights Law Review* 549, 552.

In section 3 we explore the extent to which eight categories of migrants are currently excluded, as a matter of domestic law, from certain civil and social rights enjoyed by British citizens and, in many instances, by other migrants. By 'migrant', for the purposes of this paper, we are referring to those who are foreign born *and* have not subsequently acquired British nationality or permanent residence (indefinite leave to remain). The categories of migrants on which we focus are EEA (European) nationals (including, where relevant, A2 and A8 nationals)[4] and non EEA labour migrants, students, asylum seekers and refugees, those who have come on the basis of family union or reunion and young people on a youth mobility scheme. Irregular migrants have the fewest rights and raise the most challenging issues on entitlement. While we have largely focused on those legally resident in the UK as most clearly exposing the tension between differential entitlement and equality goals, we have therefore also included one category of irregular migrant, refused asylum seekers. We have limited our consideration to current categories of status, notwithstanding the fact that many individuals in the UK came under entry categories that have since been replaced.

The discussion is framed within a consideration of four substantive rights: to healthcare, education, social housing, and family life. We have not sought to include a broader range of rights at this stage, not withstanding their importance. The right to vote, for instance, is one in which the anomalous pattern of entitlement is stark: citizens of Commonwealth countries allowed to vote in local and general elections but not in elections for the European Parliament, while citizens of EU countries are allowed to vote in local and European elections but not for a Member of Parliament. For each right that we cover we have noted the legislative source to allow for ease of cross-referencing given the pace at which the relevant legislation is amended. We then set out, where available, the rationale provided by government as to why a particular category of migrant *has* or *has not* been granted that right.

Having mapped the allocation of rights and the stated rationale, we move on in section 4 to explore the five common themes we have identified in the reasons given by government for the *provision* or *denial* of these rights. Finally, in the concluding analysis we argue that principles of equality and non-discrimination provide a structured framework to consider the extent to which any differential treatment between citizens and migrants, or between different categories of migrants, can be considered appropriate. The adoption of an 'equality framework' is consistent with international and European law and the social and economic value attributed to the advancement of equality. We do not seek to reach a conclusions on where a line might be drawn between 'invidious discrimination and appropriate differentiation' (Fredman, 2001) but rather to open a debate which, given a trend towards greater restrictions on the rights of migrants in recent years at a time when equality law and policy has been significantly strengthened, would seem long overdue.

2. Migrants, Citizens and the Limits of Equality

Before we explore the pattern of rights allocated to different categories of migrants we need to clarify what we mean by rights and how restrictions on the rights enjoyed by some categories of people living in the UK might engage non-discrimination and equality provisions under international, European and domestic law.

[4] There are specific arrangements in place for nationals of the eight member states that joined the European Union (EU) in 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) ("A8 nationals"), and for the two newest EU member states, Bulgaria and Romania ("A2 nationals"), which will be outlined separately where appropriate throughout the paper. We note that the transitional arrangements in place for A8 nationals will come to an end in the UK on 1 May 2011.

What do we mean by rights?

We are concerned here with a range of civil and social rights protected under international and European human rights instruments. Each of the four substantive rights we discuss – the rights to healthcare, education, social housing and to family life – have found expression in United Nations human rights treaties to which the UK is a party, including the International Covenant on Civil and Political Rights (1966) (ICCPR)[5], the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)[6] the Convention on the Rights of the Child (1991) (CRC),[7] and the Convention Relating to the Status of Refugees (1951) (Refugee Convention).[8] In the European context, a number of the rights in the ECHR, domestically enforceable via the HRA, are pertinent, for example Article 8 discussed below.

Although the four rights discussed in this paper are thus underpinned by international or European human rights instruments, their application is generally limited to the proscription of minimum standards below which states may not fall. The instruments do not detail how a state is to protect the rights domestically. Further, none of the four rights discussed are absolute, allowing for their curtailment in certain circumstances. For example, Article 8 of the ECHR which protects the right to respect for private and family life, significant for rights to family union and reunion, allows for interference 'such as…is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

In the context of this paper, therefore, where we identify a situation where a citizen or long-term resident enjoys a right that a migrant does not, we are not intending to suggest that this is a breach of the right in question (although, in some cases it may be). Rather, we are concerned with identifying a differentiation in the allocation of rights amongst different groups of individuals in the UK; the rationale provided for that differentiation; and whether that differentiation in treatment might engage a further set of rights protected under international and European human rights law – those relating to non-discrimination and equality.

Equality and non-discrimination in international and European law

'Equality as an ideal' Sandra Fredman writes, 'shines brightly in the galaxy of liberal aspirations. Nor is it just an ideal. Attempts to capture it in legal form are numerous and often grand: all human rights documents, both international and domestic, include an equality guarantee and this is bolstered in many jurisdictions with statutory provisions' (Fredman, 2002:1). We turn now to consider the manner in which these principles have found expression in international, European and UK domestic law.

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[5] For instance Article 17: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence….'; and Article 23: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

[6] For instance Article 11: 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions…'; Article 12: 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'; and Article 13: '…the right of everyone to education'.

[7] For instance Article 10: '…applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner'; and Article 24: 'the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'.

[8] For instance Article 21: '…housing…as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances'; and Article 22: '…the same treatment as is accorded to nationals with respect to elementary education.'

International level

The post war United Nations (UN) Charter and the Universal Declaration of Human Rights (UDHR), influenced by their historical context, were considered revolutionary not simply because they protected human rights but also because they sought to do so in a manner which 'embraced all human beings equally'(Boyle and Baldaccine, 2001:138). The centrality of the concept of non-discrimination, which imbued and inspired similar protection in every other major international human rights instrument (Novak, 2005:598) underscores the central significance of and value attributed to the principle and the fact that 'human inclusiveness is a characteristic of the international human rights approach' (Boyle and Baldaccine, 2001:138).

The principle of non-discrimination was firmly entrenched within the ICCPR and ICESCR, adopted in 1966 and intended to translate the ideals contained in the UDHR into enforceable form. Both the ICCPR and ICESCR contain a common provision that provides that with limited exceptions,[9] all of the rights in the Covenant apply without discrimination,[10] the forbidden grounds of discrimination mirroring those contained in Article 7 of the UDHR.[11] The ICCPR contains a free-standing non-discrimination provision, Article 26, which provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Although nationality is not expressly listed, the UN Human Rights Committee has repeatedly affirmed that distinctions based upon nationality or citizenship fall within the final ground enumerated in Article 26, 'other status'.[12] On this basis, it seems reasonable to assume that it also applies to differential treatment among categories of non citizens.[13]

The principle of non-discrimination is also firmly entrenched in the Refugee Convention and the CRC. The commitment to the principle of non-discrimination has also led to the adoption of international instruments dealing with specific forms of discrimination. These include the International Convention of All Forms of Racial Discrimination (CERD) (1969), the Convention on the Elimination of Discrimination against Women (CEDAW) (1981), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) (to which the UK is not a signatory) and most recently the International Convention on the Rights of Persons with Disabilities (2006).

European level

At the European level, Article 14 of the ECHR contains an express prohibition against discrimination, providing that:

[9] In the CCPR, for instance, Article 13 applies only to aliens, Article 24 only to children, Article 25 only to citizens, and Article 27 only to members of minorities.
[10] Article 2(1) of the CCPR and Article 2(2) of the CESCR.
[11] Race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
[12] UN HRC, 'General Comment 18: Non-discrimination' (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004.
[13] For instance see *Karakura v Austria* (Communication No 965/2000) concerning a restriction on entitlement to stand for election to work councils to Austrian and EEA nationals.

> …the enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14, like Article 2(1) of the ICCPR and Article 2(2) of the ICESCR, may only be invoked where the discrimination relates to one of the rights contained with the ECHR, or one of its additional Protocols.[14]

The ECtHR has long held that differences in treatment on grounds of nationality may breach Article 14. In *Gaygusuz v Austria*,[15] for instance, the Court found that a Turkish national denied unemployment benefits in Austria on the grounds that he did not have Austrian nationality, despite having paid contributions and qualifying in other respects, amounted to discrimination in the enjoyment of his right to property, guaranteed by the Convention.

Under European Union (EU) law, nationals of EU Member States are protected from discrimination on grounds of nationality (Articles 18, 45 and 49 Treaty on the Functioning of the European Union (TFEU)) except (to an extent) where transitional arrangements allow restrictions on the rights of nationals of new Member States. Hence, as we shall see, the UK could restrict the access of 'A8' nationals to social housing after the enlargement of the EU in 2004.

The position is not the same for 'third country nationals'. While the EU Directive's protection from discrimination based on race or ethnic origin (Council Directive 2000/43/CE) also covers 'third country nationals' (i.e. not nationals of an EU Member State) that Directive expressly carves out protection from discrimination on grounds of nationality (unless used as a proxy for race discrimination and resulting in indirect discrimination on those grounds). It thus allows differences in treatment between third-country nationals and citizens of EU Members States, and between different nationalities.

Although the Charter of Fundamental Rights of the European Union prohibits all forms of discrimination, including on the basis of nationality (Article 21(1)) the Charter is not intended to extend protection beyond the obligations set out under the TFEU). Later Directives, such as that on the status of third-country nationals who are long term residents (Council Directive 2003/109/EC), are intended to strengthen the rights of this particular group of third-country nationals but do not ensure full equality of treatment; and, in any event, the UK has opted out of some of these provisions.

Notwithstanding the absence of an express prohibition on discrimination on the basis of nationality, the international human rights instruments to which we have referred are nevertheless taken into account by the European Court of Justice when interpreting EU law. A report from the European Network of Legal Experts on Discrimination recently found:

> A comparison of these instruments leads us to the conclusion that differences in treatment on grounds of nationality are increasingly treated as suspect in international human rights law. The implication is that, in the future, the situation of third-country nationals who are legally residing in Member States may have to be more closely aligned with that of the nationals of other EU Member States (De Schutter, 2009:6).

[14] Although Protocol No. 12 to the Convention, adopted in 2000 and in force since 1 April 2005 contains a general prohibition of discrimination, similar in scope to Article 26 of the ICCPR. However, the United Kingdom is one of ten Member States to have not signed or ratified the Protocol.
[15] Appeal Number 17371/90 of 16 September 1996

A qualified right

International and European human rights standards nevertheless do allow, as we saw, the curtailment of rights in certain circumstances. The principles of equality and non-discrimination are no exception. The UN Human Rights Committee has, in interpreting Article 26 of the ICCPR, stated that:

> …not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[16]

The ECtHR has read a similar qualification into Article 14 of the ECHR, ruling that a difference in treatment will only be discriminatory if it has no objective and reasonable justification. In order to establish that justification the government will need to show that the differential treatment pursues a 'legitimate aim' and that there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[17] In the *Gaygusuz* case it said that States have a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment:

> However very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.

In a case involving a challenge by foreign nationals to their indefinite detention under the *Anti-Terrorism Crime and Security Act* 2001, the House of Lords in 2004 considered that threshold had not been met.[18] The Attorney General had accepted that 'or other status' would cover the appellants' immigration status, so nothing turned on that point; and had not argued that he was authorised in the circumstances of the case to discriminate on grounds of nationality under an exemption then found in S19(D) of the Race Relations Act 1976 (which as we shall see below prohibits discrimination on grounds of nationality). The risk from Al-Qaeda terrorism was thought to be presented mainly by non-UK nationals but also and to a significant extent by UK nationals, yet the effect of the measure was to permit the former to be deprived of their liberty but not the latter. The Court held (at [54]) that the men were treated differently because of their nationality or immigration status and, while that might be reasonable and justified in an immigration context, it could not in a security context since the threat presented by suspected international terrorists did not depend on their nationality or immigration status.

In the review of EU law to which we have just referred, De Schutter suggests that the implications of international and regional (the ECHR) human rights instruments to which EU Member States are party, and the common constitutional traditions within those States,[19] mean that when implementing EU law, EU Member States may not establish or maintain differences in treatment on the basis of nationality (including citizenship), "unless such differences can be justified as measures adopted in the pursuance of legitimate objectives and proportionate to such objectives'. The conditions under which justifications may be provided, De Schutter suggests, are increasingly restrictive, the only area in which imposing

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[16] United Nations Human Rights Committee 'General Comment 18: Non-discrimination' (1989), UN Doc. HRI/GEN/1/Rev.7, May 12, 2004. Also see for example *Broeks v The Netherlands* (Communication No 191/1985), *Sprenger v The Netherlands* (Communication No 395/1990), *Kavanah v Ireland* (Communication No 819/1998), *Karakurt v Austria* (Communication No 965/2000).

[17] See *Belgian Linguistic Case (No 2)* 1 EHRR 252 at [10]: cited in footnote 2.

[18] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56.

[19] 22 out of the 27 EU Member states protect third-party nationals from discrimination on the grounds of nationality by rules adopted at a constitutional level (De Schutter, 61).

disadvantages on non-nationals is still common and widely accepted within EU law being that of political rights, although even that is now challenged in relation to democracy at the local level (De Schutter, 2009:78-9).

Equality and non-discrimination in UK domestic law

Successive UK governments since the 1960s have endorsed the principle of legal protection from discrimination, the law repeatedly being extended in breadth from race discrimination to cover gender, disability and further discrimination grounds. It has also been extended in scope to cover employment, goods, facilities and services and to place a duty on public bodies to advance equality, most recently in the Equality Act 2010, a substantial part of which came into force on 1 October 2010.

The Equality Act 2010 prohibits direct and indirect discrimination on grounds of race, where race is defined to include colour, nationality, ethnic or national origins. Direct discrimination occurs where someone is treated less favourably on grounds of that characteristic (S13), and indirect discrimination where a policy applies generally but has an effect which particularly disadvantages people with a protected characteristic unless that policy can be shown 'to be a proportionate means of achieving a legitimate aim' (S19). The prohibition includes discrimination by people who are performing public functions, whether or not this constitutes a 'service' (S29).

The Equality Act 2010 also contains a number of proactive mechanisms to promote equality of opportunity. These include a duty on public authorities to 'have due regard' to eliminating discrimination, advancing equality of opportunity and fostering good relations in the community when exercising their functions (S149(1)), and provisions allowing for positive action measures to meet the special needs of particular minorities (S158).

Save for the exemptions discussed below, each of the categories of migrants discussed in this paper are covered by the legislative mechanisms provided under the Equality Act 2010. This is important in that it provides a means by which migrants can access a remedy if discriminated against on a relevant ground of discrimination.

Exemptions relating to migrants

Given the broad protection from discrimination, largely taken forward from the earlier Race Relations Act 1976 (RRA), the question arises how government can restrict the rights of migrants living in the UK without regular challenge in the courts? The answer lies in two broad exemptions in the 2010 Equality Act, carried over from the incumbent RRA.

The first exemption (contained in Schedule 3, Part 4, which also contains provisions relating to disability (S16) and religion and belief (S18)) specifically allows for discrimination in certain contexts. The exemption applies to section 29 of the Equality Act 2010 which prohibits a service provider from discriminating against a person in the provision of public services. Schedule 3, Part 4 allows discrimination by a Minister on grounds of 'nationality or ethnic or national origins' (S17) (but not colour or race) or by an official where that person is authorised by the Minister or exercising functions 'exercisable by virtue of a relevant enactment' – defined to include the Immigration Acts and any provision of Community law that relates to immigration or asylum, or instruments made under those provisions. The official explanatory notes to the Act suggest that the exemption was intended to allow for differing visa requirements for nationals of different countries 'which arise for a variety of historical and political reasons', for instance, 'granting asylum to members of a minority ethnic group being targeted by a majority ethnic group in that country' (GEO 2010a: 707-708). Nevertheless, the scope of the exemption, in covering instruments such as Immigration Rules, clearly extends beyond admission to provisions covering the treatment of migrants once in the UK. Although a review of the incumbent

provision under S19 of the RRA (on which this exemption was modeled) suggests that it was primarily used for decisions concerning admission, in 2001 we saw the provision used to provide an employment concession outside the Immigration Rules to BUNAC and Japan Youth Mobility Scheme participants (Coussey, 2006: 26).

There was limited debate on this exemption during the passage of the Equality Bill. The then Solicitor General simply restated the justifications provided when the earlier provision was introduced into the RRA in 2000.[20]

> Indeed, it replicates an existing exception introduced in 2000. Many immigration laws and policies require differential treatment on grounds of nationality. It goes to the heart of the UK immigration system. Different visa requirements need to apply to people from different countries, depending on a variety of historical, political and diplomatic reasons. Immigration officers may want to give extra scrutiny to entrants from particular nationalities if there has been evidence of immigration abuse by people of those nationalities. The first one, I think, makes the point. Different visa requirements would not be possible if there was no exemption—that is the key.[21]

The earlier provision was subjected to more sustained debate back in 2000. Lord Bassam had argued for the Government that the exemption was also necessary to allow for *positive* discrimination, for example the special exercise to evacuate and provide protection to Kosovo Albanians during the crisis in the Balkans. He did not speak to the 'sweepingly broad' implications of the exception which Liberal Democrat Lord Lester argued were incompatible with the principle of non-discrimination which the legislation was intended to secure. Even if it were appropriate to include an exception to allow positive discrimination:

> the exception to the fundamental right to equal treatment without discrimination would need to be prescribed in legislation in a way carefully tailored to what is necessary to give effect to the Government's legitimate aims, with adequate judicial safeguards against the abuse of this extraordinary power, to ensure that the doing of a discriminatory act is justified by its purpose, as with national security….
>
> As it stands, Section 19C authorises breaches by a future populist illiberal Home Secretary, or by a prejudiced administration, of the various international human rights conventions by which the UK is bound: notably, Articles 2, 5 and 6 of the Convention on the Elimination of Racial Discrimination and Articles 2 and 26 of the International Covenant on Civil and Political Rights.[22]

In an analysis of Ministerial statements made during the passage of the Bill, Dummett noted the discord between the objectives of the Bill and the immigration exemption:

> The emphasis everywhere, except in the sections concerned with what will here be called the immigration exemption, is on extending powers to deal with racial discrimination in all its forms, on promoting equal opportunities and on requiring new duties from public authorities so as to create an equal, multiracial, multicultural society. The tone of debates on all these proposals is

[20] By way of the Race Relations (Amendment) Act 2000. That provision, an exception to S19B(1) of the RRA prohibiting discrimination by public authorities, allowed a 'relevant person' to discriminate against another person on grounds of 'nationality or ethnic or national origins' (but not colour or race) where that person is carrying out 'immigration and nationality functions' (S19D).

[21] Committee Stage, HC, 18 June 2009, column 358-359

[22] Lord Lester of Herne Hill, HL, 14 December 1999, column 145.

> unusually amicable; there is broad support from all sides of the House by the time the Bill reaches its final stages (Dummett, 2001).

As regards the 'immigration exemption', however, 'any criticisms were stonewalled. The Government's position was starkly different from its position on all other parts of the Bill, and the concessions made to critics were nugatory' (Dummett, 2001).

As a consequence of the concerns about the potential breadth of the immigration exemption in the RRA a new provision was included to set up an Independent Race Monitor to monitor the use and operation of section 19D (S19E). From July 2008 the Independent Race Monitor's role was subsumed into the remit of the Independent Chief Inspector of the UK Border Agency. There is no equivalent to S19E in the Equality Act 2010, and therefore this safeguard has in effect been removed.

A second equally significant and far broader exemption has been carried forward into the Equality Act 2010. Schedule 23 allows direct discrimination on grounds of nationality in relation to provision of services and public functions, employment and education and indirect discrimination on the basis of residency requirements (place of 'ordinary residence' and length of residence) where that discrimination is required by law, Ministerial arrangements or Ministerial conditions. Examples cited in the official explanatory notes indicate that this covers the provisions in the Points Based System which determine whether non-EEA migrants should be given permission to work in the UK; the NHS provisions for charging some people not 'ordinarily resident' in the UK for hospital treatment; and the requirement on overseas students to pay higher tuition fees than local students (Explanatory Notes, [988]-[989]).

These exemptions explain how government has and can continue to restrict the rights of migrants without regular challenge in the domestic courts. An exemption is required as there will be circumstances where it is necessary for the government to afford unequal treatment to particular categories of migrants. However, these exemptions fail to acknowledge that any such differentiation will *still* require the government to provide an objective and reasonable justification for the differential treatment. Government cannot hide behind these exemptions to justify *carte blanche* the unequal provision of rights to migrants. It is well established that a state cannot obviate its obligations under international or European law by reference to domestic legislation alone.[23]

The international and European standards pertaining to non-discrimination and equality therefore provide a legitimate framework to consider the extent to which any differential treatment between citizens and migrants, or between different categories of migrants, can be considered appropriate. In order to answer that question it is necessary to identify the justifications provided by government for the differential allocation of rights. Before we turn to consider those justifications in the context of four specific rights, it is first helpful to consider some of the ways in which this issue has been addressed in academic debates.

Universal rights?

Scholars have explored the significance of this tension between universal human rights and states' capacity to limit certain rights to some categories of residents only, often focusing on the significance of nationality status. In 1994, Yasmin Soysal optimistically argued that the rights of non nationals were, and would increasingly be, protected by the recognition of 'post national' rights, human rights replacing the logic of citizenship:

[23] Vienna Convention on the Law of Treaties, Article 27.

> A new and more universal concept of citizenship has unfolded in the post war era, one whose organising and legitimating principles are based on universal personhood rather than national belonging. To an increasing extent, rights and privileges once reserved for citizens of a nation are codified and expanded as personal rights, undermining the national order of citizenship (Soysal, 1994:1).

In many cases, however, international human rights norms have not prevented the imposition of limits on the rights of non citizens relating to entry and to rights after arrival - the restriction in question falling below the high threshold required to bring those norms into play: 'Thus a series of internal contradictions between universal human rights and territorial sovereignty are built into the logic of the most comprehensive international law documents in the world' (Benhabib, 2004:11). This tension has been brought to the fore by the extent to which people now live parts of their lives in countries in which they are not citizens. While globalisation has denuded state sovereignty in economic, military and other domains, it is still vigorously asserted in relation to the rights of non citizens within their territorial borders. Notwithstanding the legitimacy of so doing within international human rights norms, it has been argued that lack of citizenship ought not to denude one of fundamental rights and that permanent 'alienage' is incompatible with the principles which underpin the legitimacy of the liberal democratic state (Benhabib, 2004, Waltzer, 1983).

Political rights

In the tension between lack of citizenship rights and liberal democratic principles, one focus of analysis has been the implications for the ideal of universal suffrage and 'no taxation without representation'. When it became apparent that foreigners comprised a significant and permanent part of European populations, scholars began to argue that their exclusion from democratic participation – the right to vote and to be a candidate in elections - undermined the legitimacy of democratic government (Baubock, 1994, Hammar, 1990). Arguing that there had been some convergence between the socio-economic rights of citizens and non citizens, it was exclusion from voting rights which was of particular concern.

Whereas earlier scholars had focused on citizens and non citizens (eg Waltzer, 1983), Hammar argued there were in fact three gates: entry, long term residence and finally citizenship. It was long term residents ('Denizens') to whom he argued voting rights should be extended, noting that in some parts of Europe this was already beginning to happen, particularly in local elections (Hammar, 1990). Baubock considered the counter argument that migrants chose to enter as aliens knowing that they will not be treated as equals. Their discriminated status as aliens is the result of a social contract by which they gained admission; and people who subsequently chose not to naturalise are likewise voluntarily accepting their continued exclusion and discrimination (Baubock, 1994:203). Noting that the former argument is not applied to refugees, whose lack of choice in migration is recognised, he argues that this can equally be the case for some 'voluntary' migrants and, with Hammar, suggests that there are legitimate reasons why some cannot naturalise or are deterred by naturalisation requirements from doing so.

Although Baubock focuses on voting he extends his argument to the exclusion of migrants from a broader range of rights and argues as we shall that this challenges a further norm of liberal democracies, equality. Noting that emigrants continue to enjoy some rights despite lack of residence (e.g. drawing a pension, and voting), he argues that the case for equality for resident foreigners is stronger and that '[t]here ought to be a general presumption in favour of the equal treatment and rights of foreign residents and citizens unless expressly decided otherwise by legislation' (Baubock, 1994:222). We shall go further in this paper in arguing that any departure from the equality norm should not only be set out in legislation but should also be demonstrated to be reasonable and objective according to the standards prescribed under international and European human rights law.

Limiting rights as a matter of immigration control

While the case for extending voting rights has been considered most applicable to those who have passed through Hammar's second gate, permanent residents, the broader issue of socio-economic rights and the right to family reunion most concerns those who have entered the first gate and not yet acquired residence rights. Lydia Morris has documented the 'shifting contours of rights' among differing categories of migrants in Britain, exposing the hierarchy of rights to employment, family reunion and access to social welfare. She argues that the differing rights conceded by the state lead to 'discriminatory exclusion and partial inclusion set alongside assertions of equal treatment' (Morris, 2002:6). Rather than universal human rights taking precedence over the national, rights are restricted in order to defend the national resources of welfare systems and labour markets but also serve another function: that of monitoring and control of migrants through the procedures that they have to follow and information shared between agencies in the process of application to transfer from one status to the next (Morris, 2002:104). Granting and withholding of rights is thus part of the management of migration itself. Significantly, the courts had intervened to curtail government attempts to limit rights, most evident in relation to asylum seekers, finding successive measures to be in breach of the UK's obligations under the ECHR and of local authorities' duty of care under the National Assistance Act 1948.

While Morris focuses on the significance of the restrictions on rights, Hollifield argues that the acquisition of certain rights by migrants is nevertheless a major factor constraining States' capacity to limit future migration. In contrast to wealthy third world states that operate guest worker systems without family reunion, leaving migrants open to human rights abuses and expulsion when their labour is no longer needed, liberal democracies are obliged, sometimes by the courts, to accord migrants a level of settlement and family reunion rights. Consequently, migrants remain and are joined by their families even after demand for migrant labour has fallen, and despite public pressure to close the door. It is thus important to recognise, Hollfield argues, 'the pervasive and equally powerful rights-dynamic in the liberal democracies', referring to the jurisprudence and political culture in Western Europe, the US and Australia in particular (Hollifield, 2004:897).

Migrants' rights to employment and family reunion are likely to affect decisions and opportunities to migrate to particular destinations. Focusing on the rights of low skilled workers in particular, Ruhs suggests this interconnection means that migrants' rights need to be analysed as a core component of a states' immigration policies (Ruhs, 2010). When deciding how to select migrants and in what numbers, States also decide what rights to accord them and Ruhs suggests that there can, in that process, be a tradeoff between the numbers admitted and the rights they are accorded. Some rights have costs attached, for employers or the state. Where states are competing for the scarce resource of skilled workers we might expect rights to be more generous than in relation to those categories of workers in plentiful supply, and analysis of labour migration programmes suggests this is in fact the case. Drawing on Baubock (1994) he argues that we need to pay attention to the economic interests of states, their political traditions, social structures and cultural understandings but also to the social costs and to the States' international reputation if rights are denied, if we are to understand the basis of States' decisions. This is not, however, to suggest that the rights accorded will necessarily be a rational decision but rather the outcome of competing pressures, negotiation and compromise.

Appropriate limits of border control

When governments impose restrictions on the rights of migrants as part of the process of immigration control 'the border effectively follows them inside' (Bosniak, 2006:2-4). Linda Bosniak[24] has explored the extent to which it is legitimate for government to impose restrictions on non citizens as a condition of

[24] We are grateful to Bridget Anderson for drawing our attention to the relevance of this author to our analysis.

entry, as part of their right to exercise border controls, and when that capacity should be constrained by norms of equal treatment: 'when, in other words, is alienage a question of national borders, when is it a question of legal equality, and how are we to tell the difference?' (Bosniak, 2006:14).

She finds that US law has been ambivalent on whether alienage is a legitimate grounds on which to treat people less favourably, in some cases the courts concluding that, like race, it is not, in other cases that it is. This, she suggests, is because the state is given considerable leeway in regulating the entry of foreigners but not in relation to unequal treatment of people living in the territory and participating in national life. Alienage is a hybrid legal status that lies at the nexus of two legal and moral worlds: the world of sovereignty, control of borders and law regulating the admission of outsiders, on the one hand, and the world of social relationships among territorially present persons on the other, in which the law constrains the capacity of the state to impose inequality. The question whether a person's status as an alien, or non citizen, is relevant in determining the allocation of rights and benefits depends on whether it is a legitimate expression of the state's power to regulate the border, or whether that prerogative is superseded by the principle of equality (Bosniak, 2006:37-9).

Bosniak describes US law as 'capricious' in according full rights to non citizens in some key respects (freedom of speech for instance) while denying non citizens welfare benefits or the right to work in certain occupations, on the other. Under the auspices of immigration control, for instance, the law allows the state to deport people or to prohibit the employment of undocumented migrants, but the courts have questioned how far that power extends into regulating the status of aliens across economic, social and political domains. Bosniak cites an early instance (1886) where the courts rejected government insistence that a foreigner should not be accorded the full due process of the criminal law, deeming that what was at stake was criminal punishment not immigration control. When an alien is subject to state action it thus does not mean that it is necessarily on the basis of its immigration powers: 'power in one sphere does not necessarily entail power in the other'. Effectively the courts had decided that:

> although immigration power is extraordinarily broad, it must be exercised *within its own domain.* That domain governs matters of admission, exclusion and deportation; beyond it the alien inhabits the domain of territorially present persons, where different and more protective rules against government power apply (Bosniak, 2006:54).

Aliens have thus been accorded the same protection in law as citizens in many respects including in most federal antidiscrimination provisions, but in other respects government has been allowed to discriminate as long as it has sufficient justification for doing so:

> The question therefore becomes, what constitutes a sufficient justification for discrimination in this context? When does the fact of alienage legitimately matter? When may an alien properly be subject to less favourable treatment than a citizen simply on account of her lack of citizenship? (Bosniak, 2006:56).

In that calculation, the impact on the individual is not the only calculation. In a case relating to a right of access to education for undocumented children, Bosniak shows how the courts had considered a broad range of economic and social policy considerations as well as the implications for the children concerned: the potential fiscal burden on the state, whether denial would deter future undocumented migrants, the implications for the children concerned if access were denied, their lack of culpability for their undocumented status, and the social costs for society if individuals were as a consequence unable to read and write or absorb the values and skills on which society relies (Bosniak, 2006:65). Although the focus of much of the literature has been on the immigration control and economic grounds on

which states deny rights, we shall see that economic and social policy grounds can also be the grounds on which the allocation of rights (for instance access to health care) can be more extensive than might otherwise be expected to be the case.

Conclusion

In this section we have highlighted the extent to which the principles of non-discrimination and equality are protected under international and European law (including on the basis of nationality). Although firmly entrenched, we have seen that these rights are not unqualified and will not be infringed where a state is able to demonstrate that differentiation in treatment has a reasonable and objective justification. The government needs to show that the differential treatment pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The right not to be discriminated against is also protected by UK domestic law, most recently under the Equality Act 2010, but it contains two broad exemptions allowing discrimination on grounds of nationality and indirect discrimination on grounds of place of ordinary residence and length of stay, on which government relies when restricting the rights of migrants within the UK.

Scholars have explored the significance of the limits of international human rights standards in relation to such restrictions, arguing that they can conflict with principles that underlie the legitimacy of liberal democracies including universal suffrage and equality.

These standards and adherence to liberal democratic principles nevertheless constrain the extent to which states can restrict the rights of migrants and this in turn constrains their capacity to manage migration, for instance to limit family reunion. Decisions on whether to accord rights are thus, for the state, part and parcel of decisions on immigration control, as well as being influenced by broader objectives. The question – in law and in principle - is how far the border should follow migrants into the country and when the equality principle should prevail. In the next section we look at the pattern of allocations and restrictions in relation to four rights and the justifications given by government, before returning to that question in the final section.

3. The Allocation of Rights

In this section we explore the extent to which differing categories of people without British citizenship enjoy access to each of four substantive rights: to healthcare; education; social housing and family life, in each case exploring the rationale given by successive governments why a particular category of migrant has been granted, or excluded from, that particular right. The categories of migrants covered are:

- *European nationals:* Nationals of countries in the European Economic Area (EEA)[25] entitled to free movement in the UK, with exceptions relating to nationals of the 'A8' Member States that joined the EU in 2004[26] and of the 'A2' Member States, Bulgaria and Romania.

- *Non EEA Labour Migrants:* highly skilled, under Tier 1 of the Points Based System (PBS) and skilled, with a job offer, under Tier 2

- *Non EEA Students:* admitted under Tier 4 of the PBS

[25] EU Member States and Iceland, Liechtenstein and Norway. To gain a right of residence, they must be a job seeker, a worker, a self-employed person, a self-sufficient person or a student.
[26] 'A8' states, comprising Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia

- *Family members:* including the spouses, civil partners, unmarried partners, fiancé(e)s, dependent children, grandparents and very occasionally more distant relatives[27] of British citizens and permanent residents, family members of EEA nationals (European Commission, 2006:4); of refugees; and of labour migrants and students.

- *Young people on the Youth Mobility scheme:* under Tier 5 of the PBS, aged 18-30.

- *Refugees:* an individual granted refugee status pursuant to the Convention Relating to the Status of Refugees (1951) and the attendant Protocol relating to the Status of Refugees (1967).[28]

- *Asylum seekers:* an individual present in the UK who has applied for refugee status and is awaiting the outcome of that application.

- *Refused asylum seekers:* an individual who has remained in the UK after their application for refugee status has been rejected.

Access to health care

Health care in the UK is provided primarily through a tax-funded health system, the National Health Service (NHS), which provides free treatment based on clinical need. The National Health Services Act 1977 introduced powers to charge those who are not 'ordinarily resident' and regulations to enable charging for secondary care (hospital treatment) first came into force in 1982. 'Ordinary residence' means living lawfully in the UK 'as part of the regular order of their life for the time being, with an identifiable purpose for their residence here which has a sufficient degree of continuity to be properly described as 'settled"(DH, 2010:6). Ordinary residence is thus the underlying rationale for access to free care rather than nationality, for instance; and (unlike social housing) access to the NHS is not included with the 'no recourse to public funds' restriction to which many migrants are subject. As Figure 1 shows, access entitlements can differ in relation to hospital and related treatment, known as 'secondary care', and treatment provided by GPs and dentists, known as 'primary care'.

The NHS is under a statutory duty to charge and recover payment for primary and secondary services from 'overseas visitors'[29] who are not 'ordinarily resident', such as tourists and some British citizens living abroad. Regulations exempt categories of migrants from the definition of 'overseas visitor' namely those who are in the UK for the purpose of employment or self-employment or to study so long as they are working or studying at the time they receive treatment. This includes those in Tiers 1, 2, 4 and Tier 5 (in some circumstances) of the Points Based System (PBS) and their dependants. Free access is also available to refugees, asylum seekers and refused asylum seekers appealing against a decision (and their dependants).[30] Asylum seekers, in the absence of any general right to welfare, qualify for a number of additional health benefits under the Immigration and Asylum Act 1999 and Asylum and Immigration Act 1996 such as free prescriptions, eye tests and dental treatment and travel costs to hospital treatment. EEA nationals are eligible for access to free primary and secondary care (either as a permanent resident, or by showing their European Health Insurance Card). However there are now reporting requirements

[27] The definition of family member depending on the primary migrant category.
[28] The Refugee Convention is given domestic effect by the *Asylum and Immigration Appeals Act 1993* and the *Immigration Rules*, paragraphs 326A-335 HC 395. Section 77 of the *Nationality, Immigration and Asylum Act 2002* provides that those who have claimed asylum must not be removed from or required to leave the UK while their claims are outstanding.
[29] *National Health Services (Charges to Overseas Visitors Regulations 1989)*, regulation 2(1)) ('*NHSOV Regulations*').
[30] *NHSOV Regulations*, regulation 4.

on service providers to enable reimbursement from EEA Member States in some circumstances.[31] Free access to the NHS is also available to nationals of countries with which the UK has reciprocal arrangements for healthcare; in this instance it is nationality that forms the basis of the entitlement. This includes the European Health Insurance Card scheme for EEA nationals who are not resident in the UK.

Significantly for those lacking these entitlements, certain health care services are exempt from charges for everyone irrespective of immigration status: treatment that is immediately necessary; that is provided solely in an Accident and Emergency Department; treatment of certain specified communicable diseases and compulsory mental health treatment. For HIV/AIDS the initial diagnostic test and associated counselling is free but treatment is chargeable.[32]

Refused asylum seekers have been the subject of increased restrictions in recent years. A GP retains discretion to accept a refused asylum seeker or other irregular migrant as a registered NHS patient, their services not being governed by the regulations on overseas visitors. In 2004 there was a suggestion that this discretion would be removed,[33] however the Department of Health in 2009 indicated its intention to retain it (DH 2009). A refused asylum seeker has no general entitlement to access free secondary health care. A GP must however offer free treatment if in the doctor's medical opinion that treatment is 'immediately necessary'.[34]

Prior to 2004 any person in the UK, irrespective of immigration status, was entitled to free secondary health care if they had been in the UK for at least 12 months. In April 2004 the Regulations were amended so that entitlement only extended to individuals who had been lawfully in the UK for the relevant period. This, by definition, excluded refused asylum seekers (and indeed other irregular migrants not covered here), confirmed by the Court of Appeal[35] and payment is sought in advance unless treatment deemed to be immediately necessary or urgent.[36] Refused asylum seekers are liable

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[31] See Department of Health guidance available at <http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_107246>

[32] *NHSOV Regulations*, regulation 3.

[33] In the consultation paper, *Proposals to Exclude Overseas Visitors from Eligibility to Free NHS Primary Medical Services* (May 2004) the Minister stated: 'We want to make it clear to overseas visitors that whilst they will continue to be entitled to receive emergency or immediately necessary treatment, free of charge, under these proposals they would not be eligible for other free NHS primary medical services. We would like to be similarly clear that refused asylum seekers will not be eligible for free routine NHS primary medical services' [iii]. The proposals further stated that "[w]e [the Government] wish to see closer links established between free use of the NHS and UK citizenship or residency". And that "the NHS is a national institution and not an international one". Similar sentiments can be found in the consultation documents released as part of the current review of access to the NHS by foreign nationals: '[w]e cannot afford to become an 'international health service', providing free treatment for all. This would also risk encouraging people to enter, or remain, in the country solely to access treatment. Successive governments have therefore maintained a policy of charging non-residents for most hospital treatment' (Department of Health, *Review of access to the NHS by foreign nationals: Consultation on proposals* (February 2010) 1.

[34] The Department of Health defines "Immediately necessary" as that which is "essential…[and] cannot be reasonably delayed": Department of Health, *Overseas Visitors' eligibility to receive free primary care*, Health Service Circular HSC 1999/018.

[35] *R on the application of YA v Secretary of State for Health* [2009] EWCA Civ 225.

[36] See guidance notes issued to NHS Trusts: Department of Health, *Implementing the overseas visitors hospital charging regulations: Guidance for NHS Trust Hospitals in England. Revised 2007.* (2004). In the Forward John Hutton, Minister of State for Health, writes: "The National Health Service is first and foremost for the benefit of people who live in the United Kingdom…With the changes to the charging regulations, and their proper enforcement, we can ensure that, as far as possible, NHS resources are being used to meet the health care needs of people who live in the UK, not those who don't". Paragraph 3.1 of the Guidance provides that all NHS trusts have a legal obligation to: ensure that patients who are not ordinarily resident in the United Kingdom are identified; assess liability for

for charges unless the services fall within one of the exemptions (such as communicable diseases) to which we have referred. Any course of treatment already underway at the time when the asylum seeker's claim is rejected remains free of charge until completion.

Figure 1: Access to heath care[37]

	Primary health care	**Secondary health care**
Family member of a British citizen or Permanent resident	Access to primary health care without charge.	Access to secondary health care without charge if 'ordinarily resident',
EEA nationals / Family member of an EEA national	Access to primary health care without charge.	Access to secondary health care without charge (as a permanent resident or through the European Health Card Insurance Scheme).
Tier 1 **Highly skilled /** **Tier 2** **Skilled with job offer**	Access to primary health care without charge. Must be employed at the time of treatment. If on a work visa but currently unemployed will be charged for treatment.	Access to secondary health care without charge. Must be employed at the time of treatment. If on a work visa but currently unemployed will be charged for treatment.
Tier 4 **Students**	Access to primary health care without charge for anyone who comes to the UK to pursue a full-time course of study of not less than six months' duration, or a course of study that is of any duration but is substantially funded by the UK Government.	Access to secondary health care without charge for anyone who comes to the UK to pursue a full-time course of study of not less than six months' duration, or a course of study that is of any duration but is substantially funded by the UK Government.
Tier 5 **Youth mobility**	Access to primary health care without charge only after having spent a period of 12 months in the UK, or during periods of employment (including self-employment) during first 12 months.	Access to secondary health care without charge after only after having spent a period of 12 months in the UK, or during periods of employment (including self-employment) during first 12 months.
Family member of a Tier 1, Tier 2, Tier 4 (Adult) Student PBS migrant	Access to primary health care without charge, so long as they are living permanently with the primary applicant in the UK.	Access to secondary health care without charge, so long as they are living permanently with the primary applicant in the UK.
Refugee / Family member of a refugee	Access to primary health care without charge.	Access to secondary health care without charge.

charges in accordance with the charging Regulations; and charge those liable to pay in accordance with the Regulations. The Guidance goes on to provide definitions of "Immediately Necessary" or "Urgent".

[37] For the purposes of coherence this table has been simplified and does not necessarily reflect the raft of exemptions in place for particular categories of migrants.

	Primary health care	Secondary health care
Asylum seeker/ **Family member of an asylum seeker**	Access to primary health care without charge, so long as application (including appeals) is under consideration. Extends to a spouse, civil partner and children (under the age of 16, or 19 if in further education) so long as they are living permanently with the primary applicant in the UK. Note also entitlements under the *Immigration and Asylum Act 1999* and *Immigration Act 1996* (as no general access to welfare).	Access to secondary health care without charge, so long as application (including appeals) is under consideration. Extends to a spouse, civil partner and children (under the age of 16, or 19 if in further education) so long as they are living permanently with the primary applicant in the UK. Note also entitlements under the *Immigration and Asylum Act 1999* and *Immigration Act 1996* (as no general access to welfare).
Refused asylum seeker/ **Family member of a refused asylum seeker**	A GP has the *discretion* to accept a refused asylum seeker as a registered NHS patient. There is no entitlement to access primary health care without charge. Emergencies or treatment which is immediately necessary should be provided free of charge to anyone, where in the clinical opinion of a health care professional this is required.	Not eligible for free hospital treatment. Any course of hospital treatment already underway at the time when the asylum seeker's claim, including any appeals, is finally rejected, should remain free of charge until completion. Treatment that is "immediately necessary" to save life or prevent a condition from becoming life-threatening or "urgent" should *always* be given to refused asylum seekers without delay, irrespective of eligibility. Will still be chargeable.

Rationale

Where Ministers have provided a rationale for provisions relating to access to health care we find public health considerations, medical ethics, human rights standards, economic benefits of migration and practical considerations cited in support of free health care; and the cost of services, public opinion, and a need to deter 'health tourism' and encourage irregular migrants to leave the UK cited as grounds for restrictions.

The rationale for current policy was summarised in a recent Department of Health consultation on access to the NHS by foreign nationals:

> There are occasions when people visiting our country will need access to healthcare. The NHS has a duty to any person whose life or long-term health is at immediate risk, and medical treatment must not be denied to them. Wider public health must also be protected by ensuring that infectious diseases are identified, treated and contained wherever they occur in the population.
>
> However, we cannot afford to become an 'international health service', providing free treatment for all. This would also risk encouraging people to enter, or remain, in the country solely to access treatment. Successive governments have therefore maintained a policy of charging non-residents for most hospital treatment. Maintaining a policy that balances cost, public health, migration and humanitarian principles is challenging (DH, 2010:1).

The paper is explicit in linking policy on charging to immigration control:

> As part of the Government's immigration strategy, both to discourage illegal entrants and to dissuade those already present from overstaying, access to public services and benefits is restricted; people who are not residing lawfully are entitled to healthcare only on a chargeable basis (DH, 2010:3).

There are also, however, practical considerations and recognition that immigration control is not the primary responsibility of health professionals:

> Administrative processes to manage access and implement charging also have to be practical, proportionate and cost effective, and professional clinical staff, whilst having a responsibility to help ensure that the charging regime is upheld, should not be held accountable for administering immigration rules (DH, 2010:4).

The competing rationales that government has considered are particularly evident in debates concerning the provision of health care to refused asylum seekers and other irregular migrants. Introducing a proposal to limit a person's ability to enter and stay in the UK where they owe debts to the NHS, the then Immigration Minister said:

> In reaching final decisions the Government has embraced the need to strike the right balance between protecting public health, NHS resources and human rights on the one hand by ensuring vulnerable groups receive free treatment at an early stage to head off the risk of the spread of infection and prevent health conditions from exacerbating requiring more expensive downstream medical intervention, and on the other ensuring we have fair rules on free access (UKBA, February, 2010:5)

'Health tourism' and service costs

The Department of Health and the Home Office make frequent reference to the need to avoid 'health tourism', to protection of the limited resources allocated to the NHS and to public opinion. In 2004 the then Health Minister stated 'There is absolutely no doubt in my mind…that there is a significant amount of abuse going on'.[38] In a Consultation paper the previous year, prior to the introduction of secondary care charges for refused asylum seekers, the Department stated that its key aim was to save the NHS money (DH 2003). In Parliament, Baroness Boothroyd stated:

> …we cannot be expected to deal with those who come here for the deliberate purpose of using the health service at the expense of the British taxpayer… I rely on the health service and am proud of that service, and I seek to protect and cherish it. Equally, we in this country are proud of the way that we have demonstrated a welcome to the troubled and destitute. It would be a great pity for the goodwill of this nation were stretched to breaking point.[39]

Earl Howe, a Conservative front-bencher and the party's spokesperson for health, endorsed that concern:

> …while the founding ideals of the NHS may not have changed since 1948, we cannot ignore the fact that the world around it has changed a very great deal. We live in a global society; and if an essential and very expensive service, which is entirely funded by the British taxpayer, is being

[38] BBC News, *Are Health Tourists draining the NHS?* (14 May 2004).
[39] Baroness Boothroyd, HL Hansard, 5 March 2004

> offered and delivered to large numbers of people who do not live here, then we need to take a conscious decision: is this or is this not something we are prepared to live with?[40]

The proposed restrictions were however challenged on humanitarian and public health grounds, Liberal Democrat Baroness Thomas insisting for instance:

> …we must be careful not to carry regulation in this very delicate area too far. It would not be in accordance with our tradition over many years of generosity towards people coming into this country, nor is it the clinical tradition of UK health services to be excessively keen to reject people coming to the health service in perhaps acute need of care[41]

Public health, human rights and medical ethics

The rationale for access to some services regardless of immigration status was provided by the Parliamentary Under-Secretary of State, Department of Health, in the debate cited above:

> …we must not forget that we have an imperative duty to protect public health. That is why the treatment of certain communicable diseases, such as tuberculosis, is free of charge to all, irrespective of their status. It is far more important that we limit the spread of such disease by early diagnosis and comprehensive treatment that that we risk putting people off coming forward for treatment by requiring them to pay for it.[42]

In 2009 Baroness Thornton cited human rights standards as the Government's rationale for these carve-outs, stating 'we recognise and respect our duty to ensure that the provision of healthcare is fully compliant with human rights principles' and hence 'urgent treatment for any medical need, including HIV and AIDS, must never be denied or delayed, irrespective of a person's right or abode or ability to pay…'.[43] In response to a proposed legislative amendment introduced by Liberal Democrat Baroness Tongue that would have had the effect of allowing free treatment for refused asylum seekers, Thornton later noted that in deciding the *extent* of free health care the government must 'while paying due regard to human rights principles, also take account of other factors' such as the cost implications and whether it would encourage applications for asylum by those with chronic health conditions.[44]

In support of her amendment Baroness Tongue emphasised the conflict inherent in the current restrictions with medical ethics, arguing that her amendment was intended:

> …to clarify an unclear, confused and sometimes inhumane policy that has operated since 2004. Since then, there has been no free treatment for refused asylum seekers in hospitals except in emergencies. Ostensibly, this puts people's lives in danger and requires doctors to consider immigration treatment before treating a patient. This is difficult for a doctor who simply wants to help the patient.[45]

[40] Earl Howe, HL Hansard, 5 March 2004
[41] Baroness Thomas of Walliswood, HL Hansard, 5 March 2004
[42] Lord Warner, HL Hansard, 5 March 2004.
[43] Baroness Thornton, HL Hansard, 17 March 2009.
[44] Baroness Thornton, HL Hansard, 17 March 2009.
[45] Baroness Tongue, HL Hansard, 17 March 2009.

Citing cases of individuals suffering as a result of the regulations she said:

> Of all these examples, the one that concerns me most is that of people with conditions deemed not an emergency being refused treatment until it becomes one. I cannot imagine a concept that goes against medical ethics more than that; it is quite extraordinary.[46]

The 2010 Department of Health consultation on access by foreign nationals to the NHS proposed that refused asylum seekers supported by the UK Border Agency (UKBA), because there are barriers to their leaving the UK, should retain entitlement to free health care. However, the consultation paper noted that allowing access to refused asylum seekers who make no commitment to leave would 'not be consistent with the denial of leave to remain and may act both as a deterrent to leaving the UK on a voluntary basis and an incentive to others to travel here illegally' (DH, 2010:11). The paper noted that the 'anomaly' which had denied free treatment to unaccompanied asylum seeking children was to be removed, consistent with the child's right to access healthcare facilities contained in Article 24 of the CRC (DH, 2010:12).

The consultation paper noted that one option to curb access to the NHS would be to review the exclusion of the NHS from the 'no recourse to public funds' visa stipulation. However, it suggests 'this would be complicated by the need to reflect exemptions relating to reciprocal agreements, infectious diseases and identified categories of visitor, and to safeguard the provision of urgent treatment' (DH, 2010:27). At the same time the government raised the possibility of requiring visitors, including students and labour migrants, to have health insurance as a condition of entry to the UK. The paper recognises, however, that this could have a negative economic impact if significant numbers of students and workers were deterred from coming, and that there would be costs associated with overseeing compliance. In a rare reference to equality implications, the paper acknowledged that 'particular attention will need to be paid to equality risks'.

The Joint Committee on Human Rights (JCHR) had earlier drawn attention to the equality implications of exclusions from health care, in its 2007 report on the treatment of asylum seekers in the UK:

> Under the ECHR, discrimination in the enjoyment of Convention rights on grounds of nationality requires particularly weighty justification. The restrictions on access to free healthcare for refused asylum seekers who are unable to leave the UK are examples of nationality discrimination which require justification. No evidence has been provided for us to justify the charging policy, whether on the grounds of costs saving or of encouraging refused asylum seekers to leave the UK. (JCHR, 2007: 56).

The JCHR was particularly critical of the failure of the government to conduct a race equality impact assessment before introducing the 2004 amendment to the *NHSOV Regulations* (JCHR, 2007: 54). In the Committee's view 'free primary and secondary healthcare be provided for all those who have made a claim for asylum or under the ECHR whilst they are in the UK, in order to comply with the laws of common humanity and the UK's international human rights obligations, and to protect the health of the nation' (JCHR, 2007: 56).

Evidence base challenged

In its 2007 report the JCHR noted 'the Government has not produced any evidence to demonstrate what it describes as "health tourism" in the UK', and that the then Heath Minister had confirmed that no research had been carried out on its existence or extent (JCHR, 2007: 44). The strength of the

[46] Baroness Tongue, HL Hansard, 17 March 2009.

evidential basis for restricting access was also questioned by the Health Select Committee which was 'astonished that by the Department's own admission, these charges [were] introduced without any attempt at a cost-benefit analysis' (Health Select Committee, 2005: 252). In 2005, when the then Health Minister was asked what health tourism cost the NHS he had stated that it was 'not possible to give a definitive assessment of the scale of health tourism'.[47] The Royal College of General Practitioners has argued that: 'There is no evidence that asylum seekers enter the country because they wish to benefit from free health care'.[48]

In the Department of Health consultation on access by foreign nationals to the NHS, taken forward by the Coalition government elected in May 2010 (DH, 2010), the Department acknowledged that the NHS does not collect data on the overseas visitors it treats or charges and that the precise scale of health tourism is therefore difficult to quantify:

> However, NHS frontline staff regularly report examples of people who have apparently travelled to the UK to seek treatment, sometimes even arriving with their medical notes to show to clinicians. UKBA also informs us of regular cases where visitors arrive at ports and airports with evidence of hospital appointments and medical records in their luggage.

In contrast to the weakness of the evidential basis to support the current restriction, there is some evidence that does support provision of free health care to refused asylum seekers and other irregular migrants on humanitarian, economic and public health grounds. This has been spelt out most clearly in relation to HIV/AIDS treatment. Organisations working with people with HIV and AIDS gave evidence to the JCHR inquiry in 2007 that the effect of charging was that people got more ill until they were treatable as an emergency and had a far higher viral load than if they had received earlier treatment. If they are denied anti-retroviral therapy, a cost effective medical intervention, they present in Accident & Emergency and then in intensive care, requiring intensive anti-retroviral treatment, a high cost to the NHS relative to the cost of earlier treatment. The Department of Health policy was also said to be at odds with that of the Department for International Development which has pressed for universal global access to anti- retroviral treatment, while in the UK some 'extremely vulnerable' people are being denied treatment. The National Aids Trust argued that it was 'both possible and likely' that third parties were being infected with infectious diseases as a result of the policy on restricting access to free treatment. The Department of Health argued that HIV was not included in the list of infectious diseases for which treatment is free because other infections were airborne whereas in relation to HIV the patient could take precautions. Evidence to the JCHR suggested, however, that the *NHSOV Regulations* have had a deterrent effect; people with HIV may not present for diagnosis, and so be unaware of their HIV status. The Committee recommended that:

> on the basis of common humanity, and in support of its wider international goal of halting the spread of HIV/AIDS, the Government should provide free HIV/AIDS treatment for refused asylum seekers for as long as they remain in the UK. Absence of treatment for serious infectious diseases raises wider public health risks…(JCHR, 2007: 51)

A study on the cost implications of providing free health care to migrants regardless of status (in the context of exploring the implications of regularisation of irregular migrants) found:

> The overall implication of the guidance issued by the government, supported by interviewees, is that many irregular migrants will already be using GPs and hospitals. However, as with other

[47] HC Hansard, 1 March 2005, column 1076W.
[48] Baroness Tongue, HL Hansard, 17 March 2009

> services, a proportion of irregulars are thought to hold back from presenting themselves to GPs or, wherever possible, other parts of the NHS. Regularisation might therefore generate a small extra cost to the NHS, though in the longer term this would be likely to be offset by lower hospital costs as a result of currently irregular migrants being able to visit GPs and thus be referred to hospitals at an early stage, before any illnesses become serious, and thus expensive.
>
> A rather different issue is whether regularisation with its associated greater propensity to present when in need of treatment would reduce public health costs associated with eg TB and HIV/Aids. To the extent that these benefits occur this would lower costs in the long term (Gordon et al., 2009:95).

The evidence does appear to have led the government to reconsider its position, recently spelling out the rationale both for and against the current restrictions:

> Unlike other sexually transmitted diseases (for which treatment is provided free of charge to all on public health grounds), individual treatment for HIV is life-long and does not offer a cure. The risk of infection to others remains and so the case to make HIV treatment exempt from charges on public health grounds is less strong. A charging exemption could attract visitors specifically seeking treatment, increasing NHS costs and demands on available capacity. The need for continuing treatment may also be a disincentive to return for those with no further permission to remain.
>
> However, treatment strategies, based on latest clinical and pharmaceutical advances, and containment strategies, based on clinical research into infectivity and transmission, are constantly developing. It must also be recognised that the long-term denial of treatment may lead to a deterioration in the health of an individual. (DH, 2010: 15).

On those grounds it suggested it would review the evidence and whether the rule should be changed (DH, 2010: 15).

Conclusion

Public health concerns, compliance with human rights standards and medical ethics are the core rationales cited by government for providing access to health care, and the cost of services and a correlative concern about 'health tourism' are the primary rationale for restricting access. Critics of restrictions equally rely on public health, human rights and medical ethics, affording those factors greater weight than government, while challenging the evidential basis (or lack thereof) on which the government has justified the current restrictions. While the human rights discussion has largely centered on the right to health care, we have more recently seen reference to equality standards, with the JCHR expressly noting the 'weighty justification' required to restrict access to health care on nationality grounds.

Access to school education

In contrast to health care, children of school age have the right to access a state school regardless of immigration or residence status. Local authorities have a duty to ensure that education is available to all those of compulsory school age (currently 5-16 years) within their area, appropriate to age, ability and aptitudes and any special educational needs.[49] In 2008 the leaving age was raised to 18 by the Education

[49] *Education Act* 1996, section 14. For the purposes of the Act, compulsory school age is defined at ages 5-16 (section 8). Confirmed by Alan Johnson, Secretary of State for Education, in Written Answer, 15 June 2004, Column 906W.

and Skills Act (2008), taking effect in 2013 for 17 year olds and 2015 for 18 year olds. Parents in turn are obliged to make sure that their children attend school. For school age children with irregular migration status, concerns that school attendance may result in detection and removal from the UK may undermine their right to education in practice (Sigona and Hughes, 2010). However, our concern in this paper is whether in law they have that right. A consequence of the lack of restrictions is that there has been little policy debate on this issue on which we can draw.

Only after compulsory school age do regulations restrict access to free further and higher education.[50] As Figure 2 shows, while migrants (with the exception of irregular migrants) may access further and higher education, many are charged 'overseas fees' substantially higher than the 'home fee' rate unless 'ordinarily resident' for three years prior to starting the course. [51]

Figure 2: Access to school education[52]

	Compulsory school age (5-16)	**Further education/Higher education**
Family member of a British citizen or Permanent resident	Access to free education.	Access to further/higher education, provided satisfy entry requirements and pay the course fees and support themselves financially while studying. May access further education/higher education at 'home fee' rate, but will generally require the family member to have been 'ordinarily resident' for a period of 3 years.
EEA nationals / Family member of an EEA national	Access to free education.	Access to further/higher education, provided satisfy entry requirements and pay the course fees and support themselves financially while studying. May access further education/higher education at 'home fee' rate if 'ordinarily resident' in EEA for previous three years.
Tier 1 Highly skilled/ **Tier 2 Skilled with job offer**	NA.	Access FE at home rates if 'ordinarily resident' in the UK for previous three years

[50] Higher education courses include undergraduate degrees and postgraduate degrees. Further education courses include GCSEs, AS and 'A' levels, NVQs, GNVQs, BTECs and English language courses. See discussion in Peter Aspinall and Charles Watters, *Refugees and asylum seekers: A review from an equality and human rights perspective* (2010) 44-46.

[51] For a current overview of eligibility for 'home fees' (and evidence of the complexity) see guidance issued by the UKCISA at http://www.ukcisa.org.uk/student/info_sheets/tuition_fees_ewni.php. See further guidance issues by the UKCISA at http://www.ukcisa.org.uk/student/info_sheets/tuition_fees_ewni.php.

[52] For the purposes of coherence this table has been simplified and does not necessarily reflect the exemptions in place for particular categories of migrants, particularly as regards eligibility for 'home fee' rate for further and higher education.

	Compulsory school age (5-16)	Further education/Higher education
Tier 4 Students	Child Students may only be educated at independent fee paying schools.	Adult Students will be entitled to undertake a course (at an acceptable level) with an approved education provider. Must be the equivalent of full time. Will generally be charged 'overseas fee' rate.
Tier 5 Youth mobility	NA	NA
Family member of a Tier 1, Tier 2, Tier 4 (Adult) Student PBS migrant	Access to free education for compulsory school age student.	Access to further/higher education at 'overseas fee' rate.
Refugee / Family member of a refugee	Access to free education.	Access to further/higher education, provided satisfy entry requirements and pay the course fees and support themselves financially while studying. Will be charged 'home fee' rate for further/higher education.
Asylum seeker / Family member of an asylum seeker	Access to free education.	Access to further/higher education, provided satisfy entry requirements and pay the course fees and support themselves financially while studying. In certain circumstances will be able to access further education at 'home fee' rate. Will generally be charged 'overseas fee' rate for higher education.
Refused asylum seeker / Family member of a refused asylum seeker	Access to free education.	In certain circumstances will be able to access further education at 'home fee' rate.

Rationale

Government statements in this area are sparse. Guidance to local authorities on admissions reiterates that their legal duty to provide education to children 'applies irrespective of a child's immigration status or rights of residence in a particular location, therefore this includes children from asylum-seeking and refugee backgrounds'[53] and that neither education nor health are included in the restriction referred to in some visas that the individual may have 'no recourse to public funds'.[54] UKBA guidance to individuals similarly simply reiterates their responsibility to ensure that their children attend school, regardless of immigration status.[55] In relation to school education we can thus only assume that the rationale for inclusion is that set out in 'Our Ambition for Every Child' in the last education White Paper of the

[53] http://www.education.gov.uk/schools/pupilsupport/inclusionandlearnersupport/mea/refugees/a0012497/asylum-seeking-and-refugee-children (accessed 1 November 2010. The page had a disclaimer that not revised since the change in government in May 2010)

[54] http://www.education.gov.uk/schools/adminandfinance/schooladmissions/a00196/school-admissions-guidance-and-reports (likewise with the same disclaimer as in the footnote above)

[55] http://www.ukba.homeoffice.gov.uk/while-in-uk/rightsandresponsibilities/education/

Labour government in 2009 – that education enables a child to enjoy their childhood, acquire the skills that they need for adult life and brings economic and social benefits to the country as a whole:

> We want every child to succeed and we will never give up on any child… Ensuring every child enjoys their childhood, does well at school and turns 18 with the knowledge, skills and qualifications that will give them the best chance of success in adult life is not only right for each individual child and family, it is also what we must do to secure the future success of our country and society.[56]

Migration Watch has implied that the absence of checks on the immigration status of children attending school is a mistake if government wants to curb irregular migration (Migration Watch, 2006) but successive government have chosen not to limit that right. The consequences of children being excluded from school and perhaps the opposition that might be anticipated from teachers (Arnot et al., 2009) may be judged to outweigh any benefits for immigration control.

Conclusion

In relation to school education we have seen that there is a duty on both local authorities and parents to ensure children have access to and attend school, regardless of immigration or residence status. Here it is evident that the child's right to education and the social desirability of children being in school and receiving an education is given priority by government over the requirements of immigration control that those without the right to be in the UK are detected and removed, or any public expenditure rationale for curbing pupil numbers. In relation to further and higher education the balance tips, to an extent, against the value of education – not by barring access but by requiring payment. We have not explored the rationale for that approach at this stage.

Access to social housing

Unlike school age education, social housing is a severely rationed resource and migrants' access to it has long been controversial. Downing Street papers reveal that Margaret Thatcher, when Prime Minister in 1979, was against providing Vietnamese 'boat people' with accommodation on the grounds that it would be 'quite wrong that immigrants should be given council housing whereas white citizens were not' (Travis, 2009).[57] Three decades later Margaret Hodge, a Minister at the Department for Trade and Industry, drew attention to that issue when she suggested that migrant families were getting priority access to social housing over families who had 'lived in the area for three generations and are stuck at home with the grandparents'. She argued that: '[M]ost new migrant families are economic migrants who choose to come to live and work here. If you choose to come to Britain, should you presume the right to access social housing?'[58] The shortage of social housing thus highlights differing attitudes towards entitlement – whether it should be on the basis of need or long-term residence or citizenship – less prominent in debates relating to the other rights we are considering.

Unlike health and education, there is no general entitlement to social housing in the UK, including for British citizens. Every individual, including those migrants who are not expressly excluded from entitlement to social housing, have to meet eligibility criteria set out in the Housing Act 1996 (as amended in 2002 and 2004). Priority for social housing goes to the homeless, priority need groups (such as families with children and the elderly), people living in unsanitary or overcrowded accommodation, who need to move on medical or welfare grounds or to prevent hardship. A local authority allocation

[56] P5 http://publications.education.gov.uk/eOrderingDownload/21st_Century_Schools.pdf
[57] http://www.guardian.co.uk/uk/2009/dec/30/thatcher-snub-vietnamese-boat-people
[58] Cited in House of Commons Library (2010), EU migrants: entitlement to housing assistance (England) http://www.parliament.uk/commons/lib/research/briefings/snsp-04737.pdf.

scheme must give 'reasonable preference' to applicants in those categories but may give more weight to some categories than others.

In contrast to education, it is evident from Figure 3 that immigration status has a significant effect on entitlement to social housing notwithstanding that a migrant may fall into one of the priority categories. The rules governing the limited circumstances in which non EEA migrants are eligible are governed by the Housing Act 1996 and The Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006. With limited exceptions, apart from EEA nationals (with a right to reside), only refugees and migrants who have secured indefinite leave to remain are eligible to access social housing, provided that they also satisfy the general priority criteria. All others who are 'subject to immigration control' (that is, who require leave to enter or remain') are excluded; although other forms of temporary accommodation are provided to asylum seekers and (for a finite period) refused asylum seekers. Those not subject to immigration control, including British citizens, are still subject to the 'habitual residence test', the government suggesting that continuous residence for the previous two years would in this instance confer eligibility. Particularly complex is the position of families in which some members do not have eligibility. They may be offered private rented accommodation but not a social housing tenancy (Wilson, 2010a;b).

Labour migrants under the PBS do not have a right to access social housing unless subsequently granted indefinite leave to remain in the UK. An irregular migrant has no entitlement to social housing although some local authorities provide emergency housing in limited circumstances (Kofman et al., 2009:13, Rutter and Latorre, 2009).

EEA nationals are only entitled to access social housing if they have a right to reside. Whether an EEA national (or a family member of an EEA national) has a right to reside will depend on their economic status (i.e. worker, self-sufficient, student), and on whether they are a national of an original EU Member state, or an A8 or A2 national. The restrictions placed on access to the labour market by A8 and in particular A2 nationals impact on the ability of these migrants to establish a 'right to reside' and entitlement to social housing. After 12 months of residency in the UK, however, an A8 national will not have to show EEA worker status to be entitled to join the social housing queue.

Access to social housing for asylum seekers was removed in 2000 after implementation of the Immigration and Asylum Act 1999 which set up a housing and subsistence scheme administered by the then National Asylum Support Service (NASS). Under that scheme an asylum seeker is entitled to 'adequate, no-choice accommodation' and basic subsistence while their claims were being processed (Section 95 support). Housing is provided in a number of dispersed regions of the UK (Kofman et al, 2009:13, Rutter and Latorre, 2009). To qualify for support an individual needs to show that they are 'destitute' (meaning that they do not have adequate accommodation or support for themselves and their dependants for the next 14 days), and have applied for asylum as soon as reasonably practicable after arriving in the UK. Section 95 support ceases 21 days after an asylum claim is finally refused (including appeals) at which point the individual is expected to leave the country. The Home Office recognises, however, that some refused asylum seekers are unable to leave the UK. Under the Immigration and Asylum Act 1999 they may qualify for accommodation if they meet one or more of the conditions set out in the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005, for instance if unable to leave the UK due to a physical impediment to travel or other medical reason (Section 4 support). In addition, families who have been denied asylum will continue to receive section 95 support (until dependent children in the household are 18), subject to section 9 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 which enables support to be withdrawn where a failed asylum seeking family fails to take reasonable steps to voluntarily remove

themselves from the UK.[59] There are a number of additional sources of support for children, and in particular unaccompanied children (see further (Aspinall and Watters, 2010).

Figure 3: Access to social housing

	Social housing
Family member of a British citizen or Permanent resident	Not eligible for social housing. Will become eligible if granted indefinite leave to remain or permanent residency in the UK (available after five years).
EEA nationals / Family member of an EEA national	Eligible for social housing if have a right to reside (hence not A8 nationals in their first year in the UK).
Tier 1 **Highly skilled/** **Tier 2** **Skilled with job offer**	Not eligible for social housing. Will become eligible if granted indefinite leave to remain or permanent residency in the UK (available after five years).
Tier 4 **Students**	Not eligible for social housing.
Tier 5 **Youth mobility**	Not eligible for social housing.
Family member of a Tier 1, Tier 2, Tier 4 (Adult) Student PBS migrant	Not eligible for social housing.
Refugee / Family member of a refugee	Eligible for social housing.
Asylum seeker / Family member of an asylum seeker	Not eligible for social housing. Temporary assistance provided by UK Border Authority during asylum process.
Refused asylum seeker / Family member of a refused asylum seeker	Not eligible for social housing. Temporary assistance provided by UK Border Agency up to 21 days after the end of the asylum process (unless child under the age of 18 involved). May subsequently be eligible for Section 4 support in limited circumstances.

Rationale

Social rented housing was described by the last government as 'an essential part of the welfare safety net that supports many of the most vulnerable in our society…And it can help to create prosperous, healthy local communities, as part of a balanced housing market' (CLG, 2009:8). Given the demand for housing, the way it is allocated is very important and should reflect a balance of national and local interests. Recent guidance, prompted by perceptions that housing was being allocated to those 'who have no legitimate right to it' affirmed that among those eligible for social housing those in greatest housing need

[59] For discussion on section 9, and in particular its implementation, see JCHR 2007. The Treatment of Asylum Seekers. 31-34.

must be given priority. However, it gave local authorities greater freedom to determine their own priorities in their allocation policy, including greater priority to 'people who have been on waiting lists for a long time or more priority for people with strong local or family connections', arguing that policies that are sensitive to local needs and priorities are more likely to be seen to be fair and achieve acceptance (CLG, 2009: 4 and 15). Local authorities were nevertheless reminded of their duty to promote equality and to carry out an equality impact assessment to ensure that their allocation policy does comply.

Migration Watch had recently questioned the fairness of 'need' if migrants are more likely to fulfil that criterion for instance by having larger families and hence more subject to overcrowding: 'So the question comes back to what definition of "need" you consider to be fair'. It also questioned whether migrants who had been in the country long enough to obtain indefinite leave to remain should be entitled to access social housing, given the shortage for other residents (Green, 2009). Margaret Hodge had argued that the government should move away from need as the main criterion and 'look at drawing up different rules based on, for instance, length of residence, citizenship or national insurance contributions'.[60] Government, in the 2009 guidance, chose not to heed that advice but to shift the balance a notch towards criteria other than need while emphasising better communication by local authorities to secure public support for their decisions.

In relation to social housing, government's insistence that access by migrants is highly restricted was supported by a report for the Equality and Human Rights Commission which found:

> The overwhelming majority of new migrants are housed in the private rental sector, partly because most new migrants have no entitlement to social housing. There is no evidence that newly-arrived migrant populations are queue jumping or being allocated social housing in preference to longer settled communities. (Rutter and Latorre 2009).

It argued that the shortage of housing lay at the root of tensions over allocation, not unfairness in allocation itself. A further report by the Chartered Institute of Housing found very limited but growing use of social housing by A8 migrants (CIH, 2008). LSE Centre for Economic Performance data analysis indicates that migrants, on average, 'are *less* likely to be in social housing than people born in the UK, even where the immigrant is from a developing country' (LSE, 2010: 1). One consequence of the exclusion of many A8 migrants is their prominence among people presenting as homeless in London (Homeless Link, 2009). A further implication for those not entitled to social housing is that in situations of domestic violence they can be tied to the marital home because refuges cannot accommodate them without reimbursement. Evidence on the hardship to which this has led has resulted in provision of accommodation for some of those concerned (Home Office, 2010, Sundari et al., 2008)

As part of the reforms introduced by the Borders, Citizens and Immigration Act 2009, (into force in July 2011, government strengthened regulations on access to social housing for non-EEA migrants. The Parliamentary Under Secretary of State at the Department for Communities and Local Government said, in response to a parliamentary question on migrants' access to social housing:

> Provisions in the Borders, Citizens and Immigration Act 2009…mean that (non-EEA) economic migrants and those on the family route will only receive full access to benefits by becoming a British Citizen or permanent resident. This policy upholds the principle that the rights and benefits of British Citizenship and permanent residence in the UK should be matched by

[60] *Observer,* 20 May 2007, 'A message to my fellow immigrants'.

responsibilities and contributions to the UK; and means that in practice most migrants will have to wait longer to access benefits and social housing.[61]

Conclusion

The rationale on migrants' access to social housing has been the need to ration a resource in short-supply and concern about community perceptions regarding the 'legitimacy' of migrants making use of this scarce resource. While the government has consistently reiterated that entitlement is based on *need*, for the few categories of migrants that are eligible to access social housing entitlement rests on the basis of need *and* proof of long-term residence (with recent legislative changes leaning further towards the latter as the basis for entitlement).

Access to family union and reunion

We look finally at the right of an individual living in the UK (whether permanently or on a temporary basis) to be *accompanied or joined* by family members (rather than simply that they come for a visit, to which other rules apply). The rules are, as for social housing and health, highly complex. Entitlement is heavily reliant on the immigration status of the individual but government freedom to restrict entry of family members is, to an extent less evident in relation to other rights, constrained by international and European legal obligations: the right to family life often referred to as an example of transnational obligations which override domestic control (Morris, 2002:84). The courts have in practice limited government options more at the margins than at the core of its family migration policies but government is also constrained by public expectation that individuals can choose whom they marry and that they should be allowed to live with other close family members; an expectation that led, for instance, to the extension of rights to family union and reunion to same sex partnerships in the past decade.

As Figure 4 illustrates, the immigration status of the person in the UK (or coming to the UK) determines not only their right to be joined by family members but the definition of who counts as a family member. The right is further dependent on details of their relationship to the person who wants to join them (such as length of previous co- residence). A British citizen, EEA national, those with indefinite leave to remain and refugees can apply to be joined by their family members. As regards PBS migrants, in the majority of cases family members are able to join the primary applicant, so long as the applicant is able to provide adequate maintenance ('no recourse to public funds').[62] The age requirement for partners of Tiered migrants under the PBS is 18, not 21.[63]

In recent years the definition of who counts as a family member has in many respects been narrowed down to the nuclear family, while in other respects broadened to include civil partners and unmarried partners. For EEA nationals, the definition is governed by European law, as codified domestically in the Immigration (European Economic Area) Regulations 2000. Under those regulations a family is defined as: spouse or civil partner over the age of 18; Children or grandchildren of EEA nationals, or spouse/civil partner of an EEA national, who are under 21 years and dependent on the migrant; and parents or grandparents, spouse/civil partner of EEA nationals (s 7). The UK has been able to assert more control

[61] Letter from Ian Austin MP to Caroline Spelman MP, dated 27 November 2007. Available at www.parliament.uk/deposits/depositedpapers/.../DEP2009-2960.pdf.

[62] Home Office, Skilled Workers under the Points Based System – Statement of Intent (May 2008) 4, available at http://www.law-now.com/cmck/pdfs/nonsecured/pbstier2may08.pdf (accessed 21 November 2009); Home Office, Highly Skilled Workers under the Points Based System – Statement of Intent (December 2007) 4, available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/pbsdocs/statementofintent/highlyskilledunderpbs.pdf?view=Binary (accessed 21 November 2009).

[63] Home Office Press release (August 2009).

over the definition of family members for British citizens and permanent residents. The sponsoring partner and partner for marriage or civil partnership for instance must be over the age of 21 (it was previously 18), and any children must be under the age of 18 (not the more generous 21 enjoyed by EEA nationals).

In applying the rules, immigration caseworkers are instructed to take into account the implications of the applicants' rights under Article 8 ECHR (and hence the potential for their decision to be challenged in the courts):

> Restriction or interference with that right is permissible in order to maintain effective immigration control. When an application for leave to enter or remain contains an express or implied family life claim, caseworkers should complete a five-stage process, considering the following questions: does the claimant have family life in the UK; is it reasonable to expect the family to leave with the claimant; if there is interference with family life, is it in accordance with the law and the immigration rules, published policy and procedures; is the interference in pursuit of one of the permissible aims set out under article 8(2); and is the interference proportionate to the permissible aim?

In considering proportionality, caseworkers are told to consider all relevant factors and that no one factor is decisive.

The prospective length and degree of family interruption involved is highly relevant, as is the person's immigration history. Any delay in considering the claim is relevant. Another factor is whether family members can or cannot reasonably be expected to join the person abroad when he or she makes his or her entry clearance application.[64]

Figure 4: Access to family union and reunion

	Criteria for entry
British citizen or Permanent resident	An individual who is settled in the UK, or is applying to settle in the UK, can apply to be joined by his or her partner (married, civil, unmarried or same-sex partner). The partner must be over the age of 21. An individual who is settled in the UK, or applying to settle in the UK, can also apply to be joined by his children, provided that the child is not leading an independent life, is not married or in a civil partnership, has not formed an independent family unit, and is aged under 18.
EEA nationals	EEA nationals are entitled to be joined by their family. The family is defined as: • Spouse or civil partner over the age of 18; • Children or grandchildren of EEA nationals, or spouse/civil partner of EEA national, who are under 21 years and dependant on migrant; and • Parents or grandparents of EEA national, or spouse/civil partner of EEA national. If the EEA national is a student, only the spouse or civil partner, and dependant children are entitled to a right of residence. If the family members are not EEA nationals, they will need to apply for an EEA family permit (a residence card) before come to the UK.

[64] Alan Campbell, PUS Home Office, Hansard 22 October 2009, Col 1149

	Criteria for entry
Family member of a Tier 1, Tier 2, Tier 4 (Adult) Student PBS migrant	Tier 1, Tier 2, Tier 4 (Adult) Student migrants are entitled to be joined by their family. The family is defined as: • Partner (married, civil, unmarried or same-sex partner) over the age of 18;[65] • Children under the age of 18, of if 18 or over, be shown to be a dependant of the PBS migrant. Immigration of partners and children is subject to proof of maintenance.
Tier 5 Youth mobility	Tier 5 (Youth Mobility) PBS migrants are not entitled to bring partners to the United Kingdom.[66]
Refugee	There are two avenues for family unification for refugees. Dependants of refugees may receive derivative status if they have arrived in the UK with the main applicant. Partners (married, civil, unmarried or same-sex partner) and children under the age of 18 may be treated as dependants of the refugee applicant, and if refugee status is granted, the spouse and/or children will receive derivative status. Relatives other than partners and children (for example, aged dependant parents), may also receive derivative status in 'exceptional compassionate circumstances'.[67] This is not viewed as 'family reunion', but is rather 'part and parcel of the asylum application (JCWI, 2007:759). Partners and children of a refugee may, of course, also apply for refugee status in their own capacity. Family reunion applications are different. These occur after the individual has been granted refugee status. If the spouse or child is abroad at the time that the main applicant receives refugee status, they will need to apply for entry clearance for family reunion with their refugee sponsor. Partners and children under the age of 18 may be treated as dependants for the purpose of refugee status, provided that the child is not leading an independent life, is not married or in a civil partnership, has not formed an independent family unit, and is aged under 18. Once again, other relatives may receive a concession in exceptional circumstances. The Home Office has taken a particularly restrictive approach in relation to applications for family reunion where the refugee sponsor is a child (JCWI, 2007:763).

Rationale

The rationale for this complex pattern of restrictions has again to be deduced from disparate sources. The rights of EEA nationals flow from EU law; and it is clear that obligations under the ECHR also impose some constraint on the extent to which access for any family member can be curtailed. The

[65] See Home Office, "Lower age limit for partners of points-based system applicants" (21 August 2009) which clarifies the age requirement for partners under the PBS (in light of the changes to age of partners for British citizens of Permanent residents. See further, paragraph [35] of Home Office, "Points Based System (Dependants) – Policy Guidance".

[66] See, further, Immigration Rules, Part 8.

[67] See *Asylum Policy Instructions*, Dependants, [currently not available, as under revision]. Previous version cited in Joint Council for the Welfare of Immigrants, *Immigration, Nationality & Refugee Law Handbook* (2007) 692.

courts have occasionally intervened where measures were considered a disproportionate interference with Article 8 or Article 12 of the ECHR.[68]

The history of family migration over the past thirty years shows a consistent pattern of rule changes to narrow the definition of family members in order to reduce the numbers who enter, particularly from New Commonwealth countries, constrained by a need to avoid perceptions of race discrimination if family members of white residents are allowed to come (Spencer, forthcoming, 2011). The definition has nevertheless been expanded to allow same sex partners to enter; and the families of those whom government wants to attract to the UK, skilled workers and international students. The rationale for not allowing temporary workers and those on Tier 5 (Youth mobility) schemes to bring family members is that their stay is temporary, that they are expected to return to a life elsewhere, and in the case of low skilled workers the concern that families could be a burden on the tax payer:

> If they are being admitted to undertake low paid work, there is inevitably a question about the balance between the economic contribution they would make and the burden that they and their families might in the long run place on the welfare system and public services.[69]

Measures taken to restrict entry for marriage have had an explicit objective of curbing marriages entered into solely for the purpose of evading immigration control (although such measures, applying generally, have also had an impact on genuine marriages, thereby limiting immigration numbers). In the context of changes increasing the age of marriage for sponsor and partner to 21, government expressed an intention to protect young people from forced marriages, a human rights objective, arguing 'statistics show that 30 percent of the cases dealt with by the Government's Forced Marriage Unit involved victims between 18 and 21'.[70] Announcing the reform the Minister said:

> The change reflects our firm conviction that no one should be pressurised into sponsoring a marriage visa and that those who wish to sponsor a marriage partner from overseas should be encouraged to establish an independent adult life here first and to see that as an important way of helping their partner to integrate.
>
> We believe it is important to protect young people from being forced into relationships they do not want at a time in their lives when they could be establishing a degree of independence as an adult through further education or through work.[71]

While the measure was welcomed by some in that context, others argued that the underlying reason was to be found in limiting numbers entering for marriage and an intention to 'police' minority communities' (Wilson, 2007; Home Affairs Select Committee, 2008: 119-122).

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[68] See for example *R (Baiai and Others) v Secretary of State for the Home Department* 2008 UKHL 53 (Admin) concerning a requirement for some migrants to get a Certificate of Approval from the Home Office before marrying in the UK. See also the recent criticism of the UK's policy raising the age of sponsorship for partners to 21 in *Quila & Ors v Secretary of State for the Home Department & Ors* [2010] EWCA Civ 1482, suggesting that it might constitute a violation of Article 8 and Article 12 of the ECHR.

[69] HL Committee on European Union Thirty Seventh Report Session 2006-07: 14th Report: Economic Migration to the EU, Government Response, para 103

[70] http://www.ind.homeoffice.gov.uk/sitecontent/newsarticles/2008/marriagevisaageraisedtoprevent

[71] PUS Lord West of Spithead, HL Hansard 4 November 2008 Col WS17. For a discussion on the Consultation process prior to that decision, see Ethnicities (Journal), special issue on 'The Rights of Women and the Crisis of Multiculturalism' September 2008, Vol 8, No 3. Also report of an LSE project for comparison of how such issues addressed in several European countries: 'Gender equality, cultural diversity: European comparisons and lessons' available at http://www.lse.ac.uk/collections/genderInstitute/NuffieldReport_final.pdf.

Recent measures to require a level of English language proficiency prior to entry to the UK were intended 'to ensure that migrants have an understanding of life in the UK and the requisite skills to allow them to play a full and active part in society' (Wright and Larsen, 2008:29) but the Home Office also expected the measure to reduce numbers coming from the Indian subcontinent by around ten percent (BBC, 2010).

Conclusion

Curbing immigration numbers has been a primary driver of rule changes to limit the right to be joined by family members as has addressing abuse of this entry channel, particularly through sham or forced marriages. Family members may not have recourse to public funds. The cost of their access to those services which that rule does not cover, including the NHS and schooling, may in practice be factors driving policy here. The counter pressures to allow access include the public's expectation that they be allowed to marry or have a civil partnership with whom they choose and to live with family members. For those coming to the UK temporarily to work or study, allowing family members to come enables the UK to compete effectively in the international market for people who bring economic benefits to the UK.

4. Exploring the Rationales

In this section we draw together and categorise the grounds that have been cited by successive governments and by their critics for providing or denying rights to different categories of migrants. The discussion in section 3 revealed competing policy objectives, sometimes articulated by different government departments or reflecting the differing priorities of central government and professional service providers. As Ruhs and Anderson have argued:

> The state is not a monolithic entity whose decisions are always rational in the sense that they result in policies that maximise a clear set of objectives in a transparent manner. In practice, the "state" comprises various state institutions including different government departments with varying responsibilities, interests and capacities in the making and implementation of public policies." (Ruhs and Anderson, 2007:6)

The rationales used to justify the provision or denial of rights can be categorised thus:

Arguments used to justify the provision of rights:

i. Economic objectives
ii. Social policy objectives
iii. Human rights
iv. Professional ethics
v. Practical considerations

Arguments used to justify the denial of rights:

vi. Immigration control
vii. Economic objectives
viii. Social policy objectives
ix. Human rights

The rationales relied on, and the respective weight afforded to them, vary according to right in question. The right to health provides the clearest example of the government drawing on competing rationales to justify the drawing of a fine line allowing provision of free secondary care for some categories of

migrants but not others. For the right to education the focus is very much on rationales justifying access to education for all school-age children (although that focus waivers for access to further and higher education); while for the right to social housing the government focuses heavily on the rationales to justify denial of social housing to (most) migrants. The right to family union and reunion is perhaps the most complex, with government constrained to an extent by international and European legal obligations.

Rationales for the provision of rights

We saw reference to an economic rationale in broad terms in relation to the health and education of the populace as a whole and in relation to family reunion where the rationale for allowing skilled workers and international students to be accompanied by their families is that they might not choose to come to the UK if this were not allowed. In health, provision of access to health care in order to prevent health conditions getting worse and thus requiring more expensive downstream medical intervention has been a further consideration, an argument also used by critics of the current restriction relating to treatment for HIV/AIDS. EEA rights to family reunion draw down from free movement rights which fundamentally have an economic rationale – the prosperity of EU Member States as a whole.

Social policy objectives appear prominently in relation to access to health, 'the imperative duty to protect public health' justifying high levels of access to free health care and access regardless of immigration status to treatment for most infectious diseases. Social policy grounds may also underpin the right of children regardless of immigration status to attend school and the duty on their parents to ensure that they do – education providing the knowledge, skills and qualifications that not only give the child the best start in life but as we saw 'secure the future success of our country and society'. Here the benefits of access are seen to outweigh any advantage to immigration control or public expenditure that could come from enforcing restrictions. Equally, social policy objectives (here the avoidance of hardship for those in need) justify access to social housing for the minority who have that entitlement but the rationale for exclusion from this severely rationed resource, to which access is highly contentious, overrides in most cases that concern.

Human rights obligations are a significant factor in the provision of health care, government continuing to allow free access to some refused asylum seekers on those grounds and recently referring to the Convention on the Rights of the Child as the basis for extending access to free health care to some unaccompanied children whom the rules have previously excluded. Human rights legal obligations have secured some provision of accommodation for refused asylum seekers who would otherwise be destitute and, in a rare application of equality principles, can be seen in the extension of family union rights to same sex couples. In family reunion and union, human rights obligations loom large both in framing the rules and, as we saw, in instructions to caseworkers on how to weigh up the extent to which Article 8 of the ECHR applies in a particular case. Where government has not given due weight to its obligations under the ECHR, the courts have at times stepped in to require it to do so, those judgements reflected in current policy.

Human rights standards have also been used to criticise the current restrictions on access to health care. The JCHR, for example, argued that a number of aspects of the policy are incompatible with rights protected under the ECHR, in particular article 2 (the right to life), article 3 (the right to be free from cruel or degrading treatment) and article 8 (the right to respect for private life). The JCHR also makes a number of observations as regards the application of the non-discrimination obligation under Article 14 of the ECHR, reiterating that the principles of equality and non-discrimination are human rights in their own capacity (albeit often interacting with other substantive rights) (JCHR, 2007:56),

Professional ethics are a significant consideration in relation to health, the Department of Health recognising that health professionals should not be held accountable for enforcing immigration control; but seemingly insufficient to sway the argument further in favour of broader access (despite strong arguments to this effect).

Finally practical considerations arise in relation to the cost of enforcing restrictions, the Department of Health for example expressing caution that administrative processes have to be 'practical, proportionate and cost effective'. The suggestion that the NHS might be brought within 'recourse to public funds', for instance, would it was thought exacerbate that problem, already stretched staff having to identifying who is and is not eligible for treatment.

Rationale for inequality in the provision of rights

Immigration control features significantly here in relation to health and family reunion but not in relation to school education (where the need to detect irregular migrants is evidently outweighed by other considerations). In health, restrictions on access are overtly intended to address the concern that people from abroad might come to the UK as 'health tourists' to benefit from free provision and that irregular migrants might be deterred from leaving for that reason. A fine line is drawn between allowing access to health care for refused asylum seekers currently still supported in other ways by UKBA on the grounds that they face barriers in leaving the UK, and denying access to those who have made no commitment to leave. Restrictions on entry to the UK for marriage and to marriage to a migrant in the UK are justified by the need to address evasion of immigration control, and raising the age for such marriages to 21 by the need to prevent forced marriages; the latter a human rights rationale but in both cases critics believing that one underlying reason is also to limit immigration numbers. Pre-entry language tests are justified on social policy grounds but we saw it acknowledged by government that they are also expected to limit the numbers who enter by around 10 per cent.

Reliance on immigration control justifications has been particularly contentious because of the limited evidence presented that access to services does either draw migrants to the UK or deter them from leaving. Research commissioned by the Home Office on the decision-making processes of asylum seekers concluded, for instance, that their principal aim is to 'reach a place of safety' (Robinson and Segrott, 2002). There is also the broader question of whether immigration control can always be considered a 'legitimate aim' in this context: that is, whether the objective of deterring people from coming to the UK or encouraging them to leave can be adequate justification for denial of fundamental rights or their differential application to people already in the UK. If government were not able to restrict rights on the basis of immigration status, there could be consequences for decisions on allowing entry to the UK (Ruhs 2010).

Economic considerations are also significant here because of the cost of providing public services. Cost is a major consideration behind the exclusion of those with HIV/AIDS from access to free treatment; coupled with the immigration control rationale that access could encourage others needing treatment to come to the UK. Cost is the primary consideration for requiring many of those from abroad to pay for further and higher education (the obverse of which is that, when they do pay the higher 'overseas fees', that income helps to fund these education services). It is also a primary consideration in denying family reunion rights to those who come to the UK to undertake low skilled work.

Finally social policy considerations also arise, here in the form of public attitudes towards migrants accessing services to which they are not seen as 'entitled' and concerns that this fosters tensions that need to be addressed. Here it is social housing that is the primary (but not the sole) focus of concern, government under pressure from those who question the reliance on 'need' as a criterion for allocation relative to the entitlements of people who have been waiting for long periods, have strong local

connections or a record of contribution to the public purse. Once again evidence that migrants are taking social housing that would otherwise be available for other residents is not strong, government itself citing research evidence that this is not the case.

5. Conclusion

Non-discrimination is invariably articulated by UK governments as an inclusive principle but the law in practice provides a hugely complex pattern of restrictions on the rights of migrants depending on their immigration status, nationality, length of residence and other criteria. The rationale for those restrictions has been explicit in some cases, in others difficult to elucidate. Rather than being compelled to provide clear justification for restricting rights to migrants, government has relied on broadly drafted exemptions to the UK's equality legislation, exemptions that have been the subject of little policy or parliamentary debate.

Our aim has not been to suggest that migrants should have equal rights in all respects but to provide a framework in which to consider equality for whom, when and on what grounds. Drawing on Bosniak's analysis of the rights of non-citizens in the United States, we have asked where the power of the state to limit migrants' rights as part of immigration control should end and the principle of equality between individuals begin. In seeking to answer that question we have taken our yardstick from law and from ethics: the value placed on non-discrimination in liberal democracies as regularly articulated by successive UK governments to the present day, and the framework for the protection and restriction of rights provided by international and European human rights instruments.

Value attached to equality

Successive governments have justified the introduction and extension of equality law on grounds of benefits to the individual, the economy and society. The White Paper, *Racial Discrimination*, which preceded the 1976 Race Relations Act, for instance, observed that:

> Where unfair discrimination is involved, the necessity of a legal remedy is universally accepted. To fail to provide a remedy against an injustice strikes at the rule of law. To abandon a whole group of people in society without legal redress against unfair discrimination is to leave them with no option but to find their own redress. It is no longer necessary to recite the immense damage, material as well as moral, which ensues when a minority loses faith in the capacity of social institutions to be impartial and fair (Home Office 1975).

The Labour Government's Business Plan for the Government Equality Office (2010-2011) cited three reasons why its vision was 'for a fair and equal society for all':

- 'Fairness and equality are important for individuals. We should all have the right to achieve our potential, regardless of our background or personal characteristics such as gender, race or age, and it is unacceptable that factors such as where we are born should have a significant and lasting difference to our ability to realise our aspirations.
- Realising this ambition will be critical not just for each of us as individuals, but is also critical for our society and for our economy, and for a return to sustained growth… A key element of the Government's strategy to increase prosperity for the future therefore will be to ensure that we draw on, develop and retain all the available talents, and that goods and services are accessible by all.
- An equal society is more cohesive and at ease with itself' (GEO, 2010b).

The current Home Secretary and Minister for Women and Equality Theresa May has similarly articulated the three benefits of equality as moral, social and economic:

> Morally, everyone would agree that people have a right to be treated equally and to live their lives free from discrimination. Anyone who has ever been on the receiving end of discrimination knows how painful, hurtful and damaging it can be and why we should seek to eliminate it from our society. And anyone who has ever witnessed discrimination would want to stamp it out.
>
> So equality is not just important to us as individuals. It is also essential to our wellbeing as a society. Strong communities are ones where everyone feels like they have got a voice and can make a difference. And those people within communities who are allowed to fall too far behind are more likely to get caught up in social problems like crime, addiction and unemployment.
>
> That brings me on to the third reason why equality matters. Economically, equality of opportunity is vital to our prosperity. It is central to building a strong, modern economy that benefits from the talents of all of its members.
>
> So equality is not an add on or an optional extra that we should only care about when money is plentiful – it matters morally, it is important to our well-being as a society and it is crucial to our economy. [72]

Significantly, equality is invariably articulated as an inclusive principle. The Labour government, as we saw, spoke of 'equal society for all' and Theresa May, prior to the 2010 general election, referred to equality of opportunity for 'every single individual in this country'.[73] Prior to the election the Conservative Party published *A Contract for Equality* in which it said 'we are determined to fight prejudice and discrimination wherever it exists… No group, no minority, will be left behind on the road to a better future' (Conservative Party, 2010).

Migrants marginal to equality debates

Given successive governments' express commitment to 'equality of opportunity *for all*', it comes as a surprise that the principles of non-discrimination and equality have not received greater attention in relation to this section of society. This is despite the fact that government has a tool, in the form of an equality impact assessment, specifically designed to assess the equality implications of policy.[74] The JCHR criticised the failure to undertake an equality impact statement before the right to free secondary health care was removed from some migrants in 2004.

There may be a number of reasons why government has felt no need to justify less favourable treatment of this kind. First, there may be an assumption that the right not to be discriminated against simply does not apply to migrants; effectively, that a migrant loses this right once they leave the jurisdiction of their home State. Yet, we have shown that as a matter of international and regional law this is not the case. The point is cogently emphasised by the Committee for CERD which in its General Recommendation 30 on Discrimination against Non-citizens noted that 'human rights are, in principle, to be enjoyed by all

[72] Theresa May, 'Equality Strategy Speech', 17 November 2010, http://www.homeoffice.gov.uk/media-centre/speeches/equality-vision

[73] Second Reading, Equality Bill, 11 May 2009, Col 565.

[74] For a good overview of the role of equality impact assessments see Equality and Human Rights Commission, 'Equality Impact Assessment Guidance' (2009).

persons' and that State Parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law'.[75]

Second, this anomaly may also be the result of a view that migrant status will *automatically* provide an objective and reasonable justification for differential treatment; that that status provides sufficient justification for the hierarchical allocation of rights. The point was recently challenged by Ben Saul in a paper addressing the rights of migrants with disabilities:

> While human rights law allows a balance between non-discrimination and other social interests such as public health, in the migration area the balancing of interests is frequently tilted presumptively in favour of the local community and against the foreigner. Preserving scarce public welfare or health resources is not an ultimate value which must take pre-eminence in all situations. There is a countervailing public policy interest in ensuring that migrants and persons with disabilities are not treated adversely on account of personal characteristics – residency status, or permanent and debilitating impairments – which are beyond their immediate control (Saul 2010).

We have equally sought to show that this 'presumptive tilting' is unacceptable, citing a number of instances where courts have held that differential treatment for migrants is inconsistent with, for example, Article 14 of the ECHR. Indeed, international developments suggest that courts will now require 'particularly weighty justifications' for differential treatment on the basis of nationality (De Schutter, 2009:52).

Framework for assessing legitimacy of differential treatment

Under international and European human rights standards binding on the UK we saw that states may depart from the non-discrimination principle but only with objective and reasonable justification: to pursue a legitimate aim where the measure is a proportional means to achieve it.

The principles of equality and non-discrimination thus provide a structured framework to consider the extent to which any differential treatment between citizens and migrants, or between different categories of migrants, is justified. The adoption of this framework is consistent with international and European law and with the social and economic value attributed to the advancement of equality. It requires government to set out the rationale for restricting rights to migrants and the evidence that underpins that view in order to show that the differential treatment is based on reasonable and objective criteria, and has been instituted to serve a legitimate aim.

Our analysis has taken a first step to assess if successive governments have met that test in relation to four rights – health care, education, social housing and family union – providing an overview of the grounds which government has given for restricting or granting rights, where available. In many cases we have seen that the rationale has not been spelled out and that the evidence used to justify the restriction brought into question.

In the analysis we identified five common themes in the grounds that have been cited by government for granting rights: economic objectives (relating, for instance, to the UK's capacity to compete for sought after migrants and to the on-costs of not providing treatment at an early stage); social policy objectives (notably public health and education outcomes); human rights; professional ethics and practical considerations. In the breadth of access to health care and education that we found relative, for

[75] General Recommendation 30 adopted at the 64th session of the Committee on the Elimination of Racial Discrimination (CERD/C/64/Misc.11/rev.3) (1 October 2005) [5].

instance, to access to family reunion, we see competing departmental priorities: the strength of the social case for universal access and the influence of the professions evident in Department of Health interventions, for instance, in contrast to the apparent absence of any departmental voice articulating the importance of the right to family life. In contrast, any concerns there might be that migrants in need are excluded from social housing have been outweighed by the pressing shortage of that resource and public attitudes towards its allocation. Hence social housing is included within the injunction most migrants face that they must have 'no recourse to public funds' while access to the NHS and school-age education are not. The value in exploring the rationales cited for granting rights is in demonstrating the way in which competing objectives are explicitly or implicitly taken into account when these decisions are reached; and in demonstrating the considerable weight which clearly has in practice been attached to the rationales for provision of rights in some cases, overriding the competing objective of immigration control.

The four grounds cited for the restriction of rights were immigration control (to deter arrival and encourage irregular migrants to leave as well as, in restricting family union and reunion, to curb immigration numbers overall); economic objectives (protection of the labour market and of public expenditure); social policy objectives (addressing tensions arising from public attitudes towards migrants and their access in particular to scarce resources such as social housing); and in one case (forced marriages) to protect human rights. In some instances evidence was put forward to justify a restriction and in one case, the exclusion from HIV/AIDs treatment, we saw government willing to reconsider its position on the basis of new evidence presented. Nevertheless, in many instances the potential for counter arguments, such as the social policy benefits of family reunion, do not appear to have been explored.

In certain circumstances, one or more of the rationales may provide an 'objective and reasonable' justification for differential treatment between citizens and migrants, or between different categories of migrants. We have argued that the adoption of that test is consistent with obligations under international and European law and with the value attributed to the advancement of equality by the successive governments. In order to apply the test it is important that any justification is explicit and that it has a solid evidential foundation so that it is possible to assess whether any differential treatment is indeed based on reasonable and objective criteria and has been instituted to serve a legitimate aim. This requirement may prove an insurmountable hurdle in some instances.

Only a thorough analysis of the evidence on which the exclusion from rights is based and of the consequences of that exclusion will make it possible to assess whether government is indeed justified in 'taking the border inside' to restrict the rights of these individuals rather than allowing the equality principle to prevail.

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