Chapter 4

Migrants, refugees and asylum seekers: predictable arrivals

Several works exist that compare British governments' responses to refugees over time.[1] Each traces the arrival and reception of groups of refugees, demonstrating how each was treated differently, offering explanations for governments' varying levels of 'generosity'. Yet refugee movements are not appropriate for comparison when divorced from the context of Britain's colonial identity. The relevance of Britain's contemporaneous identity as an empire, and the connection between this global white supremacist project and the domestic response to refugee movements, is frequently overlooked in the refugee law literature. The rhetoric of 'compassionate cases' and the international refugee law structure underpinning it provides a convenient path for Britain to frame itself as a generous host state and shed the association between its colonial history and the migration of its former subjects. As asylum applications increased, British officials claimed that they were being made by 'economic migrants' abusing the system. After briefly addressing international refugee law and tracing early attempts at legislating asylum in Britain, I analyse a number of Supreme Court cases. I show how the pre-eminence of the principle of state sovereignty and courts' inability to question

governmental power to grant or refuse legal status further goes to show the limitation of recognition-based approaches to migrant solidarity and racial justice.

Asylum as a post-imperial category

> We do have to hold out the prospect of an end of immigration, except of course, for compassionate cases.[2]

The removal of entry rights for racialised colony and Commonwealth citizens over the course of the 1960s, 1970s and 1980s produced the asylum route as one of the few means for historically dispossessed people to access Britain. The vast majority of asylum seekers in Britain are from its former colonies.[3] As Marie-Bénédicte Dembour has noted, '[m]igration patterns to Europe in the decades following independence very much followed colonial connections with, for example, Nigerians seeking to go to the UK, Algerians to France, and Zairians/Congolese to Belgium'.[4] At the same time, officially, legally and in the public conscience 'there was no sense in Europe that something was owed to these new migrants because of the colonial past'.[5] Dembour describes European colonisers' abandonment of their former colonial subjects as 'postcolonial dereliction', originating in 'the leftovers of ideology which saw nothing wrong in colonising other people, described as primitives, and thinking that the economic and political benefits which were drawn from this were rewards for the "burdens of empire"'.[6] The invocation of asylum and refugee law and the acceptance of the distinction between categories such as 'refugee' and 'migrant' allows Britain to conceal its colonial history beneath a veneer of humanitarianism. In 1978 Margaret Thatcher, then leader of the Conservative

opposition, unwittingly illustrated the way in which refugee law is existentially and ideologically bound up and compatible with the racial and colonial violence of immigration control.

> [P]eople are really rather afraid that this country might be rather swamped by people with a different culture and you know the British character has done so much for democracy, for law and done so much throughout the world that if there is any fear that it might be swamped, people are going to react and be rather hostile to those coming in. So, if you want good race relations, you have got to allay peoples' fears on numbers … We do have to hold out the prospect of an end of immigration, except of course, for compassionate cases.[7]

Thatcher presents a confused justification for contemplating an end to 'people of the new Commonwealth or Pakistan' migrating to Britain.[8] She holds up a distorted picture of British colonialism as a humanitarian mission and unintelligibly offers this as a reason for anti-immigrant sentiment among white Britons. She rehearses former Home Secretary James Callaghan's justification for introducing immigration controls as being to enhance 'race relations' by allaying 'peoples' fears on numbers', code for the maintenance of Britain as a white supremacy. Finally, Thatcher holds out the exceptional category of 'compassionate cases' to whom access might be granted, demonstrating the way in which refugee law allows Britain to present itself as a generous host – rather than colonial state.

In the 1980s people travelled to Britain in search of asylum in increasing numbers. An asylum seeker is traditionally understood to be a person travelling in search of a place of safety from persecution, but who has not yet been legally declared a refugee according to an asylum

procedure. People seeking asylum need leave to enter, which can only be granted once a claim has been processed and so are usually given a temporary admission status.[9] Entry into Britain is invariably made difficult, and asylum seekers can be detained for indefinite periods. While the majority are fleeing persecution as legally defined in international refugee law,[10] the colonial context of migratory movements must be acknowledged. People who arrived in Britain seeking protection in the 1980s are often misleadingly referred to as 'spontaneous arrivals'.[11] The term suggests that there was an element of unpredictability and suddenness in their arrival. The descriptor 'spontaneous' feeds an ahistorical understanding of contemporary migratory movements, erasing the connection between migration and colonialism. Britain's colonial history and identity makes it entirely predictable that former colonial subjects would seek to travel to Britain. Teresa Hayter has thus argued that

> imperialism created links between the colonies and the metropolis … it can be argued that some [wars, conflicts and repression] arise from centuries of imperialist control, and in particular the imperialists' divide and rule tactics and the boundaries they drew on maps. Imperialism in its modern guise has created new forms of impoverishment, which may exacerbate existing nationalist and ethnic tensions.[12]

The 1951 Refugee Convention: legitimising the post-imperial lie[13]

After the Second World War, a high degree of management and coordination between states was considered necessary in view of the millions of displaced persons across Europe.[14] International efforts were not, however, directed

at addressing the situation of displaced persons in European colonies where fighting had taken place.[15] The Refugee Convention was agreed on 28 July 1951, and signed and ratified by Britain in 1954. While Britain participated in the negotiations on the Convention, pledging to protect European refugees and insisting on the exclusion of colonial subjects from the scope of the Convention,[16] colonial populations were fighting for independence from British rule. Transitions to independence resulted in large-scale forced displacement. It is estimated that the partitioning of India led to the forcible displacement of 15 million people.[17] Nevertheless, despite post-war and post-independence large-scale displacement in the colonies, the Convention's scope was geographically limited to refugee movements 'resulting from events occurring in Europe' prior to 1 January 1951.[18]

The Convention definition of a refugee was formulated on the basis of a contrived image of an individual deserving of protection. It was moulded to fit 'existing refugees' already on European states' territories.[19] Its rhetoric of 'profound concern for refugees'[20] is still celebrated today for its universalistic and inclusive approach to refugee protection, despite having been written with only white European refugees in mind.[21] Lucy Mayblin has observed that the exclusion from the scope of the Convention of non-European refugees 'occurred despite extensive and protracted resistance from the representatives of formerly colonised states'.[22] In time the Convention was to provide a convenient legitimising framework for Britain, enabling it to construct itself as a post-colonial host state rather than as a colonial space.

Patricia Tuitt has argued that '[w]hat distinguishes the Geneva Convention definition from other legal definitions

of the refugee is its position of dominance – formal at least over other definitions – and its continued dominance in Europe in spite of the fact that few refugees seeking asylum in Europe fall within the Article 1(A)(2) definition'.[23] This is in part due to the definition's narrow construction. Traditionally, the essential quality of a refugee was seen to be their presence outside their own country as a result of political persecution.[24] The definition of a refugee eventually settled on in the 1951 Refugee Convention defined a refugee as a person who,

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.[25]

Recognition as a refugee therefore requires an individual to have crossed an international border and to have suffered some sort of discriminatory human rights breach. Proof of persecution alone is not sufficient to establish refugee status; the threat to the individual's life or liberty must have a discriminatory impact on the basis of 'race, religion, nationality, membership of a social group or political opinion'.[26] Though persecution is not itself defined, certain types of harm have traditionally been seen as falling within its scope of meaning, while others have not. For example, individuals fleeing poverty or climate-change-induced environmental degradation are not considered deserving of asylum. Traditionally, the dominant discourse has considered that '[t]he solution to their problem, if any, lies more within the province of international aid and development,

rather than in the institution of asylum'.[27] This is, of course, a convenient position to adopt for countries with colonial histories involving large-scale land and resource dispossession, exploitation and extraction. Poverty and environmental degradation can be conceived of as subtle but grindingly powerful forms of persecution if we consider that they are frequently the consequence of histories of resource extraction and ongoing 'economies of dispossession'.[28] Tuitt has noted that '[i]nevitably once a demand is made to prove that persecution was for a specified and recognised reason, then one introduces judgements which crudely are about when it is and is not justifiable or acceptable to persecute someone'.[29] The system becomes a 'lottery of state humanitarian protection'.[30] Placing the 1951 Convention definition in its historical context allows us to see that the persecution standard is reflective of the threat that Anglo-European countries perceived as emanating from eastern Europe – '[i]n short, it demonstrates the political goals of Western states who were largely instrumental in the drafting of the Geneva Convention'.[31]

The 1967 New York Protocol gave states the option of removing the geographical and temporal limitation attached to the 1951 Convention. Today, only four parties to the Convention retain the geographical limitation.[32] Britain signed the Protocol in 1968. After two years, the 1967 Protocol had been signed by 27 states, and by 1972, 52 states had ratified it.[33] However, as Mayblin points out, 1967 was not 'a moment of "peak rights" for asylum seekers'.[34] The main reason for the 1967 Protocol was to permit the United Nations High Commissioner for Refugees (UNHCR) to intervene in Africa, Asia and Latin America.[35] The lifting of the limitation was thus not designed to include colonial and former colonial populations within the scope of the

Convention, nor to invite them to seek asylum in European countries.

Traditionally the refugee debate has been depoliticised in being forced to sit on the narrow ethical basis of sanctuary from persecution for an undefined period of time. In this way, questions of historical injustice are ignored.[36] Tuitt has argued that refugee determination decisions are opportunities for the state to reassert its borders and the legitimacy of the nation-state system as a whole.[37] Human rights and refugee law processes can be seen as buttressing the idea that colonialism is in the past while also reinscribing those very colonial relations. As Sarah Keenan writes, refugee law 'conceptually confirms' a former colonial power's 'status as a space of modernity, cultural tolerance and political superiority, and that of the country of origin as a space of primitiveness … and inferiority'.[38] Such processes of status recognition have the effect of reinforcing 'hierarchies of race, gender and sexuality and colonial landscapes of "good" and "bad" states'.[39] Refugee law helps to erase the role of colonialism in causing instability in social and economic structures in former colonies, as well as providing 'ideological legitimation for [contemporary] imperialist projects'.[40] This points to the limitations of legal recognition processes, which while accommodating certain individual claims to status, embody an assimilationist logic and have the effect of delegitimising the claims to redistributive and reparative justice of the vast majority of people with geographical or ancestral histories of colonisation.

From refugee to economic migrant

The 1971 Immigration Act made no mention of refugee protection, which remained a 'traditional and jealously guarded

prerogative' of the government.[41] The accompanying 1973 immigration rules, issued by the Home Secretary, addressed the question of asylum, which meant that the system was administrative and highly discretionary.[42] Until 1992 they could be amended by the Home Office without informing Parliament. The immigration rules made a footnote reference to the Refugee Convention:

> A passenger who does not otherwise qualify for admission should not be refused leave to enter if the only country to which he can be removed is one to which he is unwilling to go owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.*
>
> *The criterion for the grant of asylum is in accordance with Article 1 of the Convention relating to the Status of Refugees[43]

The Convention's confinement to discretionary immigration rules meant that for two decades asylum remained an exclusive prerogative of the government, beyond the scrutiny of Parliament and the judiciary. It existed as a separate protection category from that of refugee status until 1979, and tended to be considered more suitable than refugee status for 'Commonwealth citizens', indicative of its post-colonial character.[44] After 1979, although secondary statuses remained in use, all those granted asylum were recognised as refugees.[45]

The increasing numbers of people seeking protection prompted the British government to reconsider the workability of its discretionary regime. Robert Thomas has observed that, although these 'club government' traditions were able to administer the 4,000 asylum claims made yearly during the 1980s, they have since proved deficient.[46] In 1984 2,905 asylum applications were lodged in Britain,

and in 1985, 4,500. Claims had remained under 4,500 until 1989 when they increased to 11,640, 'a reflection of the global increase'.[47] The majority of these applicants came from former British colonies or protectorates, such as Sri Lanka (1,790), Somalia (1,850) and Uganda (1,235).[48] The government resorted to legislation and discretionary rule-making powers, targeting those seeking protection with control measures.[49] Asylum seekers were constructed as being 'illegals' and 'scroungers' in order to justify their exclusion from access to territory as well as social provision.[50]

The government sought to preclude and deter applicants as well as to quickly remove those whose claims failed, arguing that people without a legal right of entry make asylum claims in order to be able to remain in Britain for economic reasons.[51] Visa requirements were placed on countries from which asylum seekers travelled. Countries are added to the visa list when the numbers of asylum claims are expected to increase.[52] Tuitt has argued that the imposition of visa requirements 'place[s] refugees in a position whereby, if they are to seek any form of territorial protection in Western European states, they are forced to comply with the image of the fraudulent refugee which Western states have constructed'.[53] In May 1985 such requirements were imposed on Sri Lanka, a former British colony, after an increase in the numbers of Tamils seeking protection in Britain. It had become commonplace to characterise asylum seekers as 'manifestly bogus', 'economic migrants' and 'liars, cheats and queue jumpers, as one MP described the Tamils'.[54] Visa requirements on other countries soon followed, many of which were former British colonies.[55] Following an increase in asylum claimants from Zimbabwe between July and September 2002, the Home Secretary placed Zimbabwe on the visa list.[56] On 11 February 2003 Britain suspended its

party status to the 1959 Council of Europe Agreement on the Abolition of Visas for Refugees, justifying the move on the basis that refugees were travelling to Britain and 'either remaining illegally or making asylum applications under false identities in order to access the benefits system'.[57] Anderson has argued that it is the 'erasure of imperial history' that allows for a discourse of choice around the reasons why people from Zimbabwe, Sri Lanka and Kashmir travel to Britain, reflecting a 'dehistoricized present rather than post-colonial legacies'.[58]

The restrictive effect of visas is intensified when coupled with the impact of carrier sanctions, a system of imposing penalties on companies that bring undocumented persons across a border. The Immigration (Carriers' Liability) Act 1987 established a system whereby any ship or aircraft would be fined £1,000 for each undocumented passenger. The Home Secretary, Douglas Hurd, emphasised that the reason for the legislation was the increasing number of asylum claims, stating that '[t]he immediate spur to this proposal has been the arrival of over 800 people claiming asylum in the three months up to the end of February'.[59] Control measures that are implemented within a framework of private liability reallocate the task of immigration control from the state to private actors, such as airline and ferry personnel, thereby outsourcing the policing of borders to third parties.[60] The increase and diversification in such practices since the 1980s has resulted in the proliferation of sites at which the fate of people seeking entry to Britain is determined.

The official narrative put forward to justify control measures against people seeking asylum was that Britain's resources were limited and asylum seekers were a threat. This discourse helped to give currency to the idea that

colonially secured wealth located in a post-colonial Britain belonged to people categorised as British citizens pursuant to the 1981 British Nationality Act. Dora Kostakopoulou and Robert Thomas have shown how 'the exclusionary power of national state, cultural and identity related aspects of territoriality have been combined with the material powers of territory', leading to people seeking asylum being seen not only as 'culturally other and a threat to the identity of the nation' but also as 'responsible for the depletion of the material resources needed for the sustenance of the nation'.[61] Asylum seekers' alien rather than subject status is historically contingent. Their alienation was effected through changes to immigration and nationality laws, a process that entailed the removal of their entry rights to Britain.

Legislating asylum: excluding former subjects

The Asylum and Immigration Appeals Act 1993, introduced by John Major's Conservative government, represented Britain's first attempt at detailed asylum legislation. In 1992, in spite of the very recent legislative history of the alienation of British subjects, including the deflection of Kenyan and Ugandan Asians in flight from persecution, the Conservative Home Secretary Kenneth Clarke introduced the Bill by emphasising the 'long and honourable tradition in the United Kingdom of offering political asylum to those who flee to this country'.[62] He spoke of the Bill as being about 'strengthen[ing] our system of controlling entry and excluding people not entitled to be here'.[63] He used the same rationale for 'strict immigration control' as his predecessor Home Secretaries, claiming that 'good race relations' depended on it, as though institutionalised state racism begets anti-racism.[64] Clarke spoke generally of deflecting

people from 'third-world' and 'troubled' countries,[65] some of which would have been former British colonies but were not acknowledged as such.

Roy Hattersley, the shadow Home Secretary, who had spoken against the racism of the 1981 British Nationality Act, reminded the House of Commons of the connection between Britain's colonial past and contemporary immigration and encouraged the government to take on the 'responsibility of empire'.

> Our immigration relationship is different from that of the rest of Europe as we have an imperial inheritance, the responsibility of empire and a duty to Commonwealth citizens who came to this country 30 or 40 years ago at the invitation of the Government, and who are denied the right for their families to visit them. That is a disgrace and I shall vote against the Bill with as much enthusiasm as I have voted against any Bill, because it is one of the most squalid measures ever to be put before the House.[66]

His position was not a popular one. People seeking asylum were described by Clarke and other parliamentarians as having arrived in Britain 'suddenly', 'unpredictably' and 'unexpectedly'.[67] Yet, as Hattersley had tried to point out, their arrival was entirely predictable both as a result of the impact of British imperial rule and the manner in which subjects had been alienated through successive immigration laws.

The Act set out the procedural rules governing people seeking protection and their dependants. It amended provisions on rights of appeal contained in the Immigration Act 1971 and extended the provisions of the Immigration (Carriers' Liability) Act 1987 to transit passengers. The 1993 Act effectively incorporated the 1951 Refugee Convention into domestic law. It was stated that '[n]othing in the

immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention'.[68] Prior to the 1993 Act, the decision to remove a person seeking protection was a matter of administrative discretion, requiring only observance of the principle of *non-refoulement*, that people must not be sent back to places where they risk persecution, as per the 1951 Refugee Convention.[69] Although the Act introduced an in-country right of appeal for asylum applicants, overall it was restrictive, curtailing the socio-economic rights of asylum applicants and removing their right to permanent accommodation provided by the local authority.[70]

The 1993 Act followed pressure from NGOs and courts to make the procedure for dealing with asylum claims more structured.[71] Although no mention of European norms was made in the Act, its content was heavily influenced by European intergovernmental cooperation. European interior ministers cooperated in secret on matters considered to affect internal security, including irregularised migration. This highly restrictive context was Britain's first experience of legislating specifically on asylum. The 1993 Act was to a large extent a product of the non-binding agreements reached in the course of intergovernmental cooperation, such as the London Resolutions, a set of concepts including the 'safe third country', the 'safe country of origin' and 'manifestly unfounded claims' – all designed to deflect people seeking protection and limit access to territory and procedures.[72] Amnesty International reported in 1995 that individuals returned under 'safe third country' rules were frequently subjected to chain-*refoulement* whereby the country to which they were returned refused responsibility for examining their claims. The Home Office's response was that it 'does not consider it either necessary or advisable

to seek guarantees from other States' and that it is not the government's 'policy to do so'.[73] This approach was adopted in the immigration rules, which stated that in cases where the Home Office has refused an asylum application on safe third country grounds, the Home Office 'is under no obligation to consult the authorities of the third country before the removal of [the] applicant'.[74]

In 1995, echoing the tired rationale of previous Home Secretaries, Michael Howard introduced the Asylum and Immigration Bill by declaring that 'good race relations' depended on 'firm but fair immigration controls'.[75] Once again, racism was presented as the result of the presence of racialised people in Britain and its amelioration held up as a quid pro quo for immigration control. The Race Relations (Amendment) Act 2000 extended anti-discrimination legislation into the public sector, but excluded from its scope decision making on immigration.[76] The Asylum and Immigration Act 1996 introduced new criminal offences including knowingly assisting asylum seekers to gain entry into Britain, and knowingly helping someone to obtain leave to remain through deception.[77] Penalties for immigration offences were extended,[78] as were police and immigration officials' powers to search and arrest.[79] It became a criminal offence for employers to hire a person subject to immigration control and who requires permission to enter or to remain, or who is prevented from undertaking employment due to a condition attached to their entry or admission.[80] The Act introduced a penalty of £5,000 where an employer could not prove an employee's right to work.[81] The Refugee Council reported in 1999 that these provisions affected employers' willingness to hire asylum applicants and refugees as a result of the burdensome documentation requirements and the risk of penalty in cases of error.[82]

The 1996 Act, like the 1993 Act, contained provisions modelled on developments that were taking place at the European level. Colin Harvey has commented on the contrast between the British government's general scepticism towards European integration and its enthusiasm for European asylum norms agreed intergovernmentally.[83] The Act included a power for the Home Secretary to designate countries in which there is 'in general no serious risk of persecution',[84] a concept taken directly from the 1992 London Resolutions.[85] It denied 'safe third country' applicants an in-country right of appeal, thereby reversing the general in-country right of appeal granted to asylum applicants in the 1993 Act.[86] Under the Act a 'state of upheaval' declaration could be made in relation to a specific country 'subject to such a fundamental change in circumstances that [the Home Secretary] would not normally order the return of a person to that country'. The Democratic Republic of Congo (formerly Zaire), a former Belgian colony, was the first country to be designated as being in a 'state of upheaval'. The second was Sierra Leone, a former British colony.[87]

Courts and colonial power

Courts operate within a framework of state sovereignty within which the legitimacy of borders and immigration control is assumed. Fundamentally, the capacity for the judiciary to effectively review immigration and asylum decisions is structurally limited due to the courts' inability to question the government's claim to sovereign power to grant or refuse legal status. This point is illustrated in what follows with reference to three Supreme Court cases: the 1987 case of *Bugdaycay* v. *Secretary of State for the Home Department*,[88] which was the first time the 1951 Refugee

Convention was considered by the Supreme Court; the 2018 case of *Rhuppiah* v. *Secretary of State for the Home Department*[89] on the meaning of a precarious immigration status where a claimant seeks to rely on Article 8 of the ECHR on the right to a private life in challenging a removal decision; and the case of *N* v. *Secretary of State for the Home Department*[90] on the scope for reliance on Article 3 of the ECHR by claimants challenging removal where their life depends on access to healthcare in Britain.

The legal and administrative developments of the 1970s, 1980s and 1990s resulted in a burgeoning and increasingly formalised immigration and asylum bureaucracy. One consequence of the formalisation of the asylum system was that the judiciary assumed a significant role in monitoring official decision making.[91] Legal representatives and judges were able to invoke formalised norms, providing some scope for scrutiny of executive decisions relating to individual rights. Despite the limited scope for judicial review of immigration and asylum decisions at the time, these cases made up 72 per cent of the caseload between 1987 and 1989.[92] Judges can only review the merits of an administrative decision when hearing appeals, but not in the course of judicial review. For these applications, only procedural aspects of administrative decision making can be revisited on grounds of illegality, irrationality, or procedural impropriety. As numbers of judicial review applications increased, the judiciary's response became increasingly conservative.[93] Despite the courts' habitual adoption of a highly deferential approach to immigration decisions, thereby allowing the executive to exercise 'a wide power to develop and administer asylum policy',[94] they nevertheless tend to be assumed to have an overall progressive effect on the field. While this might be true incrementally, it is difficult to draw overall conclusions about

courts' attitudes to migrant applicants. This is because of the rights-based nature of the immigration and asylum docket. Even if courts only find in favour of a small percentage of applicants, the overall effect can seem progressive because it is always the individual claimant who is appealing an initial refusal by the Home Office, which only appears in court to defend its position. Further, the response of governments to the practical effects of court decisions has been to limit as far as possible access to courts in order to pre-empt judicial intervention. Ad hoc legislative responses are used to nullify court decisions that go against it.

Bugdaycay v. *Secretary of State for the Home Department*: adjudicating the impossible

Bugdaycay concerned four conjoined appeals, all applicants from former British colonies challenging refugee status refusal decisions. In 1987 judicial review was the only means by which immigration and asylum decisions could be challenged. The court refused to review the decision to reject the asylum claims in the first three cases despite the appellants' claims that they would face political persecution if returned to Pakistan. The court made this decision on the basis that the appellants had obtained leave to enter by falsely stating that they were visitors when their intention was to claim asylum. It held that it would not question the fact finding of a discretionary decision by the Home Office regarding an application for asylum, except on grounds of irrationality. Lord Bridge emphasised that 'the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review'.[95]

In respect of the fourth applicant, Musisi, a Ugandan who had arrived in Britain having travelled through Kenya, the court reviewed the decision on the basis that the procedures to which the applicant's claim was subject were inadequate. Not only was the immigration officer who had interviewed the applicant not aware of the situation in Uganda, the Home Office had also failed to ascertain whether Musisi would be returned to Uganda if sent to Kenya. Lord Bridge made the since oft-quoted declaration that the courts are entitled, within limits, 'to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issues which the decision determines'. 'The most fundamental of all human rights', he continued, 'is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'[96]

Lord Templeton similarly considered that 'where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process'.[97] These statements have been said to represent an 'unequivocal recognition of the need for stricter scrutiny of administrative discretion where fundamental human rights are at stake, and of the need to protect those rights'.[98] Yet a close reading of the case demonstrates the limits of the review undertaken as well as the extent of judicial deference to immigration decisions and the legal frameworks within which they are made. According to Lord Bridge,

> all questions of fact on which the discretionary decision whether to grant or withhold leave to enter or remain depends must necessarily be determined by the immigration

> officer or the Secretary of State in the exercise of the discretion which is exclusively conferred upon them by section 4(1) of the [Immigration] Act [1971]. The question whether an applicant for leave to enter or remain is or is not a refugee is only one, even if a particularly important one required by paragraph 73 of HC 169 to be referred to the Home Office, of a multiplicity of questions which immigration officers and officials of the Home Office acting for the Secretary of State must daily determine in dealing with applications for leave to enter or remain.[99]

This paragraph marks a change in tone whereby the life and death question of whether someone is a refugee becomes 'only one', albeit important, matter for immigration officers and the Home Office to consider when determining whether a person is to be granted permission to enter and remain in Britain. Section 4(1) of the Immigration Act 1971 to which Lord Bridge refers stipulates that the power to grant or refuse leave to enter Britain lies with immigration officers, and that the power to grant leave to remain or vary its duration or conditions lies with the Home Secretary. Thus, despite calling for 'anxious scrutiny' of administrative decisions which have the potential to affect an individual's right to life, Lord Bridge is nevertheless deferential towards the 1971 Act and the ultimate discretion it grants the executive as regards entry decisions.

Although it is unsurprising that the overarching power of the British government to recognise or refuse legal status has been deemed to lie beyond the scope of judicial scrutiny, the assignation of non-justiciability in this context draws attention to the limited potential for court processes to lead to racial justice outcomes. It is difficult to imagine the Supreme Court ruling that Parliament could not have intended to deprive colony and Commonwealth citizens of the right to enter and remain in Britain through the

1971 Act. Yet Britain's jurisdiction was not exclusively a national one at the time of *Bugdaycay*. Britain remained a colonial power with subjects in colonies overseas. Indeed, the existence and work of the Judicial Committee of the Privy Council daily calls into question the boundaries of British jurisdiction. The Privy Council is staffed by Supreme Court judges along with other senior British judges and those of Commonwealth nations. It is the highest appeal court for a number of Commonwealth countries, the British Overseas Territories and the British Crown dependencies. Its rulings form precedents in England and Wales as well as other common law jurisdictions. While not the most visible court, the Privy Council is a fully operational relic of the British Empire. It now shares a building with the Supreme Court, unavoidably raising the question of where British legal jurisdiction begins and ends. In the absence of scrutinising Parliament's legislative intentions in *Bugdaycay*, the Supreme Court would have had to do the impossible and acknowledge the 1971 and 1981 Acts for what they were: acts of colonial theft. In order to do this, it would have had to recognise all claims of former colonial subjects as legitimate claims to entitlement to stolen colonial wealth and resources located within Britain's newly drawn national boundaries. The fact that no conventional legal basis exists that would permit such a reparative-oriented decision points to the limits of the legal system for achieving racial justice. The Supreme Court cannot grapple with the broader questions of justice at stake in the 1971 and 1981 Act's cordoning off of colonial spoils without calling into question Britain's existence as a sovereign nation-state, and by implication its own power of adjudication.

Rhuppiah v. *Secretary of State for the Home Department*: recognising precarity

The 2014 Immigration Act, which implemented the hostile environment, sought to constrain judicial scrutiny of status refusal and removal decisions. The Act inserted into Part 5A of the Nationality, Immigration and Asylum Act 2002 section 117B(5), entitled 'Article 8 of the ECHR: Public Interest Considerations'. This provision stipulates that little weight should be given to a private life that is established at a time when a person's immigration status is 'precarious'. In 2018 the Supreme Court delivered its judgment in the case of *Rhuppiah*, in which it ruled on what it means to occupy a precarious legal status in Britain. Ms Rhuppiah had travelled to Britain from Tanzania, a former British colony. After living and studying in Britain for several years she found herself facing removal following the denial of her application for indefinite leave to remain. Ms Rhuppiah had formed a long-standing friendship and relationship of primary care with Ms Charles, who suffered from a debilitating illness. Ms Rhuppiah sought to rely on Article 8 of the ECHR[100] in challenging her removal, arguing that it would amount to a disproportionate interference with her private life. Article 8 of the ECHR protects the right to private and family life:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and 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.

Article 8 thus allows for interference with the right by a public authority in the instances set out in Article 8(2). The European Court of Human Rights has held that the meaning of 'private life' is not confined to a narrow understanding of a person's personal life and includes 'to a certain degree the right to establish and develop relationships with other human beings'.[101]

Section 117B(5) instructs courts or tribunals tasked with determining whether a removal decision is an unlawful interference with Article 8 on the question of what is to be considered 'in the public interest'. It begins with the statement that 'the maintenance of effective immigration control is in the public interest'.[102] It is clear that the 'public' is conceptualised as encompassing people legally recognised as British citizens, since 'effective immigration controls' are not in the interests of those excluded from the post-1971 and 1981 conceptualisation of the British public. Also deemed to be 'in the public interest, and in particular in the interests of the economic well-being of the United Kingdom' is that 'persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English are less of a burden on taxpayers, and are better able to integrate into society'.[103] The same set of interests are also considered to be protected where people seeking to enter and remain in Britain are 'financially independent' because such persons will not be a 'burden on taxpayers' and are better able to integrate into society.[104] The invocation of the interests of the 'English-speaking taxpayer' feeds the mythology of a post-colonial Britain whose riches belong in the first instance to white Britons. Erased is the history of Britain's economic progress, which was made possible through processes of colonial dispossession.

The particular provision under consideration by the court in *Rhuppiah* was Section 117B(5), which states that '[l]ittle weight should be given to a private life established by a person at a time when the person's immigration status is precarious'. Thus, in the balancing act entailed in determining whether Article 8 rights have been unlawfully interfered with, courts and tribunals are to attach little weight to a private life established at a time when such a person's immigration status is *precarious*, and not only when a person is present unlawfully. The effect of Section 117B(5) is to make it much more difficult for claimants to rely on Article 8 when fighting removal decisions. Embodied in the amendments introduced in the 2014 Immigration Act is both the reification of secure status in the form of citizenship, and the precaritisation of racialised life whereby people who do not have a secure status, disproportionately racialised people, live under the threat of expulsion.

The Supreme Court, in determining the meaning of 'precarious', held that 'everyone who, not being a UK citizen, is present in the UK and who has leave to reside here other than to do so indefinitely has a precarious immigration status for the purposes of section 117B(5)'.[105] The decision in *Rhuppiah* means that people who had a temporary status in Britain could not argue that their status was not precarious because they assumed it would be renewed and eventually made permanent. The effect of Section 117B(5) is that a private life, which includes familial and close personal relationships such as those of Ms Rhuppiah and Ms Charles, cannot be safely created by those with a temporary status. People residing in Britain on a temporary status are at the constant mercy of the state. Hanging over them is the threat of losing their status and of a court attaching little weight to the private life they established while holding that temporary status.

Although the court's interpretation of the meaning of precarious immigration status relates to the application of Section 117B(5), for many racialised people their legal status, even where they are naturalised citizens, is precarious. The court left indefinite leave to remain outside the scope of 'precarious', yet this is also an insecure status since it can be lost when a person lives outside Britain for more than two years and can be withdrawn on grounds of public security, public health or public policy. Section 117B(5) reflects in law the idea that colonial spoils, broadly conceived so as to include the freedom to make everyday choices about how to live one's life, are predominantly a privilege attached to being white and British. The Home Office insists that citizenship 'is a privilege not a right'.[106] While the privileges attached to citizenship extend to racialised Britons, they are in a minority and are especially vulnerable to having their citizenship revoked under citizenship deprivation laws.[107] Under Section 40(2) of the British Nationality Act 1981 the Home Secretary 'may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good'. However, where a person would be made stateless pursuant to the revocation of their citizenship, the Home Secretary may not make such an order, unless there are 'reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory'.[108] Racialised Britons are therefore at disproportionate risk of having their citizenship revoked because they are more likely than white Britons to have dual nationality or the possibility of acquiring another nationality. Home Secretaries have shown increasing willingness to revoke citizenship in situations that risk making people stateless,

sometimes with fatal consequences, as we saw in relation to the case of Shamima Begum in 2019, whose newborn baby died after then Home Secretary, Sajid Javid, deprived her of her British citizenship.

The use of the term precarious in Section 117B(5), together with the wide scope of meaning attached to it by the Supreme Court, have the effect of reifying citizenship. Meanwhile, measures have increasingly been introduced which make it more difficult for racialised people to attain the threshold required to be granted citizenship and make it easier for the status to be withdrawn. Alongside citizenship deprivation laws, there has been an increase in the number of passport removals and denials of naturalisation, particularly through the operation of the 'good character' test, which has been the main reason for citizenship refusal decisions in recent years.[109] Nisha Kapoor and Kasia Narkowicz note that while the denial of citizenship through the refusal of naturalisation applications does not result in the withdrawal of residency rights, it does 'maintain a position of precariousness for those refused, restricting freedom of movement for those with no viable passport and preserving a sustained possibility for deportation at future dates'.[110] The scope of the 'good character' test has expanded beyond consideration of criminal behaviour so as to include scrutiny of 'non conducive, adverse character, conduct or associations' in the course of decision making on applications for leave to remain and citizenship.[111] Kapoor and Narkowicz argue that the effect of such measures is to 'starkly illuminate the extension of the border beyond the point of immigration so that marginal subjects who possess legal citizenship remain vulnerable and in positions of precarity through maintained raced and classed structures of exclusion'.[112] Home Office guidance states that the (non-exhaustive) factors

that suggest that a person will 'not normally' be considered to be of good character include criminality and suspected criminality, 'financial soundness', 'notoriety' – that is, their activities have 'cast serious doubt on their standing in the local community' – and 'immigration-related matters'.[113] The countries from which nationals are most likely to be refused citizenship on character grounds tend to be those from which a high proportion of asylum applicants originate, as well as those experiencing post-colonial instability in the form of civil war or imperialist invasion in which Britain has been directly on indirectly involved.[114]

Racialised people are disproportionately represented in the 'precarious' status category. The broad definition attached to 'precarious' in *Rhuppiah* narrows further the already limited scope for racial justice via processes of legal status recognition within the colonial state. As Kapoor and Narkowicz have argued with respect to the use of the 'good character' test to refuse naturalisation, it 'cements an impossible threshold' for racialised people seeking citizenship status.[115] Determining whether an applicant meets the criteria for a secure status thus feeds the colonial civilised/uncivilised dichotomy. In this way status recognition regimes operate according to a colonial logic. A failure to pass the 'good character' test becomes equivalent to a finding of barbarousness, which, in the era of the British Empire, legitimised outright dispossession of land and rights.[116] Such a finding in the context of refusal of naturalisation ultimately renders the applicant vulnerable to removal. The 'good character' test thus has racialising outcomes. Those found not to be of good character are constructed as racially inferior and as deserving of the position of vulnerability in which they subsequently find themselves. Meanwhile, white Britons are for the most part understood to be the authentic holders

of British citizenship, as per the parameters of the 1981 British Nationality Act. It is white Britons who are effectively invoked as the 'public' in need of protection via 'the maintenance of effective immigration control' in Section 117B(1). It is in their name that access to citizenship is so fervently policed through the application of the 'good character' test. It is therefore unsurprising that white Britons come to understand themselves as especially entitled to the privileges associated with secure status.

Although *Rhuppiah* entailed a ruling on private and not family life and on having a 'precarious' and not an unlawful immigration status, there are broader points to be gleaned from Section 117B. It is possible when regularly reading case law to become too familiar with terms such as 'private', 'family life' and 'interference', and for them to lose meaning other than that which is legally designated. If we pause to consider what 'family life' is and what 'interference' is, the violence of Section 117B more broadly becomes palpable. Section 117B(4) states that '[l]ittle weight should be given to (a) a private life, or (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully'. The law thus demands that people unlawfully present in Britain either place their lives on hold or heed the racist dictum, 'Go home', which in 2013 emblazoned vans commissioned by the Home Office to drive around areas of London in which racialised people live. The effect of Section 117B(4) is that a family life cannot be safely created by those unlawfully present in Britain. The law's effective instruction to those present in Britain unlawfully or with an insecure status is to be wary about living their lives, about forming loving relationships, about having children. They cannot assume the safety of the familial and personal relationships that people

with secure statuses take for granted. Thus, the descriptor 'interference' becomes apparent for the euphemism that it is. Legitimate interference with the right to a private and family life constantly sees families separated. It has been held, for instance, to include the removal of a British citizen's Jamaican husband who was in Britain unlawfully at the time they were married.[117] Legitimate interference becomes tantamount to racially targeted destruction of the loving relationships that make life meaningful, a colonial practice with a long history. Colonial authorities destroyed racialised families in multiple ways, stealing children from their parents[118] and selling enslaved members of the same family separately.[119] Colonial states continue to 'interfere' with racialised families' loving relationships by disproportionately scrutinising their marriages,[120] deporting their members,[121] separating them,[122] refusing family reunification[123] and incarcerating them.[124]

Asylum seekers and the welfare state: eliding the colonial

On introducing the 1996 Asylum and Immigration Act, Michael Howard had explicitly linked asylum with welfare, arguing that Britain 'is far too attractive a destination for bogus asylum seekers and other illegal immigrants. The reason is simple: it is far easier to obtain access to jobs and benefits here than almost anywhere else.'[125] Howard thus peddled the notion that people travel to Britain to access resources to which they are not entitled. This history-effacing narrative has long provided the justification for the introduction of measures which make it more difficult for people to access vital support services after arriving in Britain. In a precursor to the hostile environment policy introduced by Theresa May in 2014, in 1995 Howard called

for the NHS to 'find better ways of controlling access to free medical treatment … and to improve procedures to enable providers of benefits and services to identify ineligible persons from abroad'.[126] Limitations imposed on asylum seekers' access to support and welfare services operate 'on the assumption that the majority of asylum seekers are "bogus" and "undeserving", while the minority granted Convention status are the "deserving"'.[127] In 2002 Rosemary Sales could write that such legal developments 'have intensified differences among migrants, with a widening gap between the rights of the most precarious, including asylum seekers, compared to long term secure residents'.[128] Yet, as the 2018 Windrush scandal demonstrated, following the 2014 and 2016 Immigration Acts' implementation of the hostile environment policy, the security of long-term residents' rights and legal status has increasingly been called into question.

The 1996 Act limited access to welfare for persons seeking protection. There were media reports in the 1990s of hospitals refusing treatment to Kurdish people without documentation proving their protection status.[129] In 1996 the Home Office Immigration and Nationality Directorate (IND) issued guidelines targeted at welfare departments concerned with housing, student bursaries and council tax benefits, inviting 'local authorities to use facilities offered by the IND in identifying claimants who may be ineligible for a benefit or service by virtue of their immigration status; and to encourage local authorities to pass information to the IND about suspected immigration offenders'.[130] The Conservative government had previously enacted measures which removed access to welfare for asylum claimants who did not make their claim at the border, and from persons who had their claims refused at first instance.[131] The rules were the subject of a court challenge. Lord Justice Simon

Brown held that 'Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status, or to maintain them as best they can but in a state of utter destitution.'[132]

The government's response was to include a provision in the 1996 Act that had the effect of reversing the Court of Appeal's ruling.[133] The Act's removal of access to social housing and financial welfare led legal representatives to rely on local authority administered legislation to ensure support for asylum claimants. Section 21 of the National Assistance Act 1948 required local authorities to provide 'welfare arrangements' for the 'blind, deaf, dumb and crippled', and provided for 'residential accommodation for persons aged eighteen or above who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them'.[134] A court upheld the application of this provision to local authority responsibility for asylum applicants. The result was that adult asylum seekers were granted housing and subsistence in the form of vouchers.[135] Initially a cashless voucher scheme was in place whereby Sodexo, a French company, provided vouchers that were only exchangeable at designated supermarkets. Under the scheme, checkout operators were required to check the eligibility of people using the vouchers and ensure that purchases did not include prohibited items such as cigarettes and alcohol.[136] Alice Bloch and Lisa Schuster documented the way in which the voucher system 'resulted in the stigmatisation of asylum seekers by marking them out clearly as different and dependent'.[137] This legal measure, though abolished after a Home Office review in 2000,[138] in singling out racialised welfare users for the voucher scheme, served to make them hyper-visible and

construct them as underserving as compared with white British recipients of welfare.

In 1997 the newly elected Labour government quickly busied itself with attempting to curb growing numbers of persons seeking asylum in Britain. Asylum applications grew by around 4,000 a year in 1988 to over 32,000 in 1997.[139] Numbers continued to rise in the late 1990s, with 71,160 applications in 1999, primarily as a result of war in Yugoslavia and the Kosovo crisis.[140] Applications peaked at 84,000 in 2002.[141] The Immigration and Asylum Act 1999 followed the 1998 White Paper *Fairer, Faster, Firmer – A Modern Approach to Immigration and Asylum*. Jack Straw, the Home Secretary, introduced the White Paper by regretting the 'piecemeal and ill-considered changes' that had been made to the country's asylum regime 'over the last 20 years'. He described the system as being 'too slow' and suffering from 'huge backlogs'.[142] On 31 May 1998 the number of applications yet to be determined at the initial stage stood at 52,000; 10,000 of these had been lodged more than five years previously.[143] The White Paper was replete with fears about the rising cost of processing and supporting asylum applicants. The estimated cost of the administration of the asylum system was £500 million a year.[144] While £100 million was spent on processing individual applications, about £400 million was spent on the social, health and educational support provided to applicants, expected to double within five years 'unless action is taken to rationalise those arrangements and deal with asylum applications more quickly'.[145] The major concern in the White Paper was ostensibly to limit the costs of administering the system. In spite of this, a system of collectively determining claims was not considered in place of the individualised method of deciding applications.

A large measure of the Immigration and Asylum Act

1999 was reliant on secondary legislation to be introduced at a later date and not subject to parliamentary debate.[146] The 1999 Act made use of the criminal law in the regulation of asylum, making it an offence 'if, by means which include deception by him', a person 'obtains or seeks to obtain leave to enter or remain in the United Kingdom' or 'secures or seeks to secure the avoidance, postponement or revocation of enforcement action against him'.[147] The 1999 Act conferred on the Home Secretary new powers and created new possibilities for the search, arrest and detention of asylum applicants.[148] The legislation contributed, as Sales has argued, to the creation of 'a new social category of asylum seeker', separating the asylum seeker both in policy and popular discourse from recognised refugees.[149] A voucher scheme was imposed on all claimants,[150] and a system of forced dispersal put in place.[151] The aim of dispersal was to reduce the number of asylum applicants in London and Kent.[152] The policy is effectively one of racial segregation designed to reduce the appearance of the scale of asylum by distributing racialised people across Britain. Through dispersal, asylum applicants are made invisible by being removed and excluded from certain places, yet are also made hyper-visible through their forcible insertion into white-dominated spaces in which they represent diminutive minorities. The cumulative effect of dispersal policies has been that asylum seekers are exiled to the poorest parts of Britain.[153] Access to support is based on coercion, requiring asylum seekers to agree to dispersal in order to avoid destitution. In this way the movement of racialised people is continually subject to coercion, from their initial flight and mode of travel, to their forced displacement within Britain. Just as the label of 'Commonwealth citizen' had symbolised a threat to white supremacy and was invoked

to justify racially exclusive measures in Britain in the 1960s and 1970s, its new iteration, that of 'asylum seeker', had assumed this role by the 1990s.

Fiona Williams has shown how 'racism has operated in specific ways over the historical development of the welfare state', arguing that the relationship between race and welfare articulated through restrictions on access for asylum seekers represents 'a nationalism and racism intrinsic in the provision of welfare'.[154] The omission in mainstream discourse of the colonial context for the presence of asylum seekers and other people without a legal status in Britain enables them to be presented as a drain on resources understood as belonging to Britons. Bhambra and Holmwood have criticised the habitual construction of immigration as having 'undermined the solidarity necessary to recognise the claims of fellow citizens to social rights' and called for acknowledgement of the connections between modern welfare states and histories of colonial dispossession.[155] They argue that colonialism was intrinsic to the historical trajectories of European welfare states, and show how the welfare state in Britain was 'dependent on a political economy of Imperial and (subsequently) Commonwealth preferences which was designed to enrich the British state while restricting the rights extended to subjects throughout its territories'.[156] Understanding the British welfare state as a product of colonialism and being cognisant of the continuum between colonialism and contemporary migratory movements to Britain enables us to see how measures that restrict access to welfare for asylum seekers feed the assertion, given legal force through the 1981 British Nationality Act, that white Britons are exclusively entitled to the wealth and resources accumulated via colonial dispossession.

N v. *Secretary of State for the Home Department*: deathbed access only

> The general principle is that a person cannot avoid return on the basis that they should continue to benefit from medical, social or other form of assistance provided in the UK.[157]

The cases that perhaps best demonstrate the way in which access to colonial spoils is withheld from people with geographical or ancestral histories of colonialism are those that involve people whose lives depend on being granted permission to remain in Britain so that they can continue accessing vital healthcare. Such cases are based on Article 3 of the ECHR which provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Despite the absolute terms of this provision, it has been held to apply to medical treatment cases only in 'very exceptional circumstances'.[158] The result is that the courts regularly preside over the sending of people back to certain death. In the case of *N* v. *Secretary of State for the Home Department*, which remains the authority,[159] the Supreme Court set out the test as being

> whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity.[160]

N, from Uganda, a former British colony, was receiving treatment for HIV/AIDS when she faced removal from Britain. She was not dying in the sense that the medical treatment she was receiving in Britain was effective. However, as she argued, if she were to be returned to Uganda her rights under Article 3 would be breached because she would not have access to the medication she required in order to stay

alive and she would die a very painful death. The Supreme Court judges who considered her case were well aware of this fact. Lord Nicholls stated that N's

> doctors say that if she continues to have access to the drugs and medical facilities available in the United Kingdom she should remain well for 'decades'. But without these drugs and facilities her prognosis is 'appalling': she will suffer ill-health, discomfort, pain and death within a year or two.[161]

According to Lord Hope, N's prospects for surviving for more than a year or two if she were returned to Uganda were

> bleak. It is highly likely that the advanced medical care which has stabilised her condition by suppressing the HIV virus and would sustain her in good health were she to remain in this country for decades will no longer be available to her. If it is not, her condition is likely to reactivate and to deteriorate rapidly. There is no doubt that if that happens she will face an early death after a period of acute physical and mental suffering.[162]

Nevertheless, the Supreme Court deemed the Article 3 threshold not to have been reached in N's case. While the judges considered the pain, suffering and death that N would experience should she be removed as being of the utmost humanitarian concern, they nevertheless found that the Convention does not *oblige* states to grant the right to remain to people in order to avoid such outcomes. Precisely because N was receiving effective treatment and was not on her deathbed, her case fell outside the scope of Article 3. Lord Nicholls described N's removal as tantamount 'to having a life-support machine switched off',[163] an entirely inappropriate comparison since life-support machines are switched off in cases where there is no hope of recovery, whereas N could have lived a long and healthy life had she been permitted to stay in Britain and access the medication

she needed. Lord Hope stated that '[t]he question must always be whether the enlargement [in interpretation of the ECHR] is one which the contracting parties would have accepted and agreed to be bound by'.[164] By confining the question before them to one of 'the extent of the obligations' under Article 3, the court could omit consideration of what a humanitarian approach required, as well as what justice demanded. A just approach, for example, might see states' obligations towards the populations of their former colonies as being reparative.

It is clear that the Supreme Court's decision was driven by specific policy goals rather than the wording of Article 3 of the ECHR. There is no doubt that the conditions N faced on removal fell within the ordinary meaning of the terms 'inhuman and degrading'. For the court, the policy question at issue was one of access to resources understood as belonging to those legally entitled to be in Britain and at risk of depletion on account of immigration. Article 3 could not be allowed to function as a route to an immigration status. Lord Hope thus considered that a finding in N's favour would 'risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country'.[165] The court understood the dilemma it faced as being a choice between

> allowing the patient to remain in the host state to enjoy decades of healthy life at the expense of that state – an expense both in terms of the cost of continuing treatment (the medication itself being said by the Intervener to cost some £7,000 per annum) and any associated welfare benefits, and also in terms of immigration control and the likely impact of such a ruling upon other foreign AIDS sufferers aspiring to

> these benefits – and deporting the patient to a life of rapidly declining health leading to a comparatively early death.[166]

By contrast, the dissenting judges made short shrift of the floodgates argument, stating that 'when one compares the total number of requests received (and those refused and accepted) as against the number of HIV cases, the so-called "floodgate" argument is totally misconceived'.[167] Further, unaddressed in the *N* decision is the question of how Britain came to be so rich in resources and to have one of the most advanced healthcare systems in the world. There is no mention of the resource and labour extraction entailed in colonisation and the fact that Britain's economy and infrastructure are products of this history.[168] Colonisation and ongoing forms of racial capitalist exploitation systematically destroyed vital means and methods of sustenance in Uganda and more widely in East Africa, severely affecting the health of local populations.[169] Lord Hope characterises African countries as 'still suffering so much from the relentless scourge of HIV/AIDS'.[170] It is easy to put African countries' problems down to AIDS, which as Cindy Patton points out is 'not a problem of Africa', but a 'problem of Western ethnocentrism'.[171] What Lord Hope does not say is that African countries are still suffering from the relentless scourge of colonialism. Another way of looking at N's case would have been to acknowledge that the resources in Britain that were keeping N alive in fact rightfully belong to her. Although the absence of such a critical discourse in the courtroom is unsurprising, a decision like that in *N* must be understood as ongoing colonial violence. The judges acknowledged that N's presence in Britain was what was keeping her alive, but through the application of human rights law they legitimised her removal, sending her

to her death. N died within three months of her expulsion to Uganda.[172]

The judges construct wealth disparity and illnesses as unfortunate or natural occurrences rather than products of a colonially structured world. Lord Brown thus characterises the suffering to be faced by N on removal as flowing from 'a *naturally* occurring illness'.[173] Lady Hale acknowledges that in Britain, 'HIV is a long term but treatable illness whereas in sub-Saharan Africa for all but the tiny minority who can secure treatment it is a death sentence'.[174] This is a jarring description since the European Court of Human Rights decision in the case of *Soering* prohibits the return of individuals to countries where they face the death penalty.[175] In the court's ruling in *N* it was deemed that 'the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country'.[176] Yet the political cannot be bounded off in this way. The effect of constructing HIV and its lack of treatment in former colonies as a natural occurrence is to depoliticise the context of deep disparities in wealth and healthcare. The mass murder of colonised populations occurred not only through direct killings, but also as a result of resource deprivation, famine and the spread of disease.[177] Recurring famines in India, such as the Orissa famine in 1886, killed one in three people in the region.[178] The response of the British government was to do nothing. Colonial authorities prevented individuals from providing relief and exported 200 million pounds of rice to Britain. The colonial authorities argued that excessive deaths were nature's way of responding to overpopulation.[179] Yet deaths as a result of famine were not a natural occurrence. They followed the East India Company's destruction of the

Indian textile industry and the forcing of people into agriculture, an industry dependent on the weather. Ultimately, the effect of the ruling in *N* is to reproduce the 'let die' logic of colonialism which saw colonial administrations construct the murderous spread of disease and famine as nature's way of dealing with so-called surplus populations.

The European Convention on Human Rights: exclusive humanitarianism

It is clear from the above discussion that the framework of the European Convention on Human Rights has failed to protect the human rights of people categorised as migrants.[180] At the time the Convention was agreed, five states parties, including Britain, were colonial powers.[181] This colonial context was the foundation upon which the European human rights regime was constructed.[182] None of these colonial states would have ratified the Convention had it not provided them with the possibility of excluding their colonial subjects from its scope of application. The long-term British resistance to the application of the Convention was in part driven by colonial exigencies. In 1950 the Colonial Secretary, James Griffiths, expressed his opposition to the Convention in a manner that both revealed the racist paternalism of colonial rule and made clear the prevalence of ongoing colonial ambitions within the British government. He considered that the introduction of a system of individual petitions would 'cause considerable misunderstanding and political unsettlement' in colonial territories because '[t]he bulk of the people in most Colonies are still politically immature and the essence of good government among such people is respect for one single undivided authority'.[183] Following pressure exerted

by British delegates, the 'colonial clause' was framed so as to protect the interests of colonial powers concerned not to extend human rights protections to colonial subjects.[184] The clause left it to their discretion whether to extend the Convention's application to colonial territories.[185] For states that submitted to the possibility of individual petitions to the European Court of Human Rights, the clause made it possible for colonial powers to exclude subjects in overseas colonies from being able to make such petitions.[186] It was not until 1998 that Protocol No. 11 abolished the optional clauses.[187] Britain ratified the Convention in 1951 and grudgingly extended its application to 42 of its colonial territories in 1953. This was done with the purpose of keeping at bay domestic and international criticism of British colonial rule.[188] However, the effect of this extension was limited, since Britain did not submit to its supervisory aspect until 1966. By this time the then Labour government was keen on joining the European Union and was thus 'intent on showing its European credentials'.[189] Moreover, by 1966 the British Empire had drastically reduced in size.[190]

In its decisions, the European Court of Human Rights consistently gives priority to the principle of state sovereignty, the 'well-established principle of international law' according to which states can control the entry and residence of 'aliens'.[191] Because the court's authority to adjudicate rests on the principle of state sovereignty, it cannot question the legitimacy of immigration law as an expression of state sovereignty. It is precisely the habitual exclusion from courts' consideration of the legitimacy or otherwise of the state's power to grant or refuse legal status that means that recognition-based arguments for migrant justice, including those based on human rights, are ultimately limited. The European Court of Human Rights has refused to comment

on the human rights implications of citizen revocation decisions,[192] or to prevent the regular deportation of people categorised as 'foreign criminals'.[193] As Marie-Bénédicte Dembour writes, the court

> tends to regard migrant applicants as solely responsible for the problematic situation they are in. For example, they should not have had children when their status was insecure; they should have accessed nationality status when the opportunity was there; they should not have assumed that they would be able to settle and work outside their country of origin.[194]

In this way the European Court of Human Rights legitimises, reproduces and reinforces states' 'interference' with, or disproportionate violence against, racialised people.

The period covered in this chapter demonstrates how immigration and asylum laws worked in combination with a discourse around spontaneity and abuse of the asylum system peddled by officials to erase the colonial context in which contemporary migratory movements take place. The cases discussed show how the human rights framework fails, often with fatal consequences, to protect people who have been found to have no legal right of entry or stay. Courts cannot ultimately challenge state sovereignty without questioning their own power of adjudication. Their starting point will always be to accept the legitimacy of Britain's post-colonial articulation of its borders and their dispossessory effect. In the following chapter, we will see how many of the exclusionary elements in Britain's first asylum legislation were devised in the course of informal cooperation between European interior ministers, in which British governments played an agenda-setting role. Rather than pose a challenge to Britain's post-colonial articulation of its borders, European integration has served to accommodate and reinforce its border control regime.