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Immigration Policy and the “Crisis of British Values”

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ABSTRACT  It is widely believed that there is a lack of common values in contemporary Britain. One influential explanation is that immigration has created an ethnically “diverse” society with a multiplicity of values that have displaced the common culture. This article argues to the contrary that it is immigration policy that departs from an earlier consensus on British values. The article looks at the disagreement within the British elite over the measures adopted to deter asylum-seekers and argues that, in their effect on individual liberty and universal welfare provision, these measures indicate that a significant part of the political class has abandoned the post-war political consensus over what constituted British identity. Not only is the disagreement over the key values that make up British identity located at the heart of the establishment, rather than between native and immigrant, but it is the official deterrence of immigration which most clearly expresses the lack of consensus.

Citizenship and “Common Values”

We must... do more to articulate and secure the common values that underpin our democracy. We have allowed parts of our society to become effectively segregated. Mutual understanding and respect have weakened, particularly among the young. We have done too little in the past to articulate our common values and democratic commitments, or to promote positive induction into citizenship for those settling here.
(Blunkett, Home Secretary 2001)

The loss of common values is a pervasive theme of contemporary British politics. Over the past few years, British politicians have introduced measures that they claim will promote “common values”. For example, the Human Rights Act 1998 reformed the constitution by allowing the courts to rule on the compatibility of British law with the European Convention on Human Rights (ECHR). When the act came into force in 2000, the then Home Secretary Jack Straw argued that its purpose was the establishment of a sense of common values (Straw, 2000). Since 2002, citizenship education has become a statutory subject for children from 12 to 16 years old and an inspected subject for those aged 5 to 11 (Heater, 2004, p. 370). Since January 2004, individuals who have successfully naturalized as British have to undergo a citizenship ceremony where they give an oath or an affirmation of allegiance and a pledge of citizenship (IND, 2004).
Underlying all these measures is the assumption that people in Britain no longer have a clear sense of common values, and that there is no longer a shared “British identity”. When he was Home Secretary, Jack Straw claimed that: “Diverse societies cannot take shared values for granted. The core values need to be stated and affirmed so that everyone understands what they are, so that we can speak the same moral language.” (Straw, 2000)

This purported decline of a shared sense of Britishness, or common British values, is often attributed to the effects of immigration. David Goodhart, for example, took up Straw’s theme and claimed in his essay “Discomfort of Strangers” that “as Britain becomes more diverse that common culture is being eroded” (Goodhart, 2004). Goodhart and Straw, like many others, assume that immigrants hold different values to those of the natives. By contrast, in this article, I argue that it is the political class who have changed their values. The changed outlook of the political class is particularly striking in its debates concerning immigration policy, and this can be seen in detail here through looking at detention without trial and welfare provision.

I will be looking here at how certain claims about the right to liberty and universal welfare provision, values that are supposed to have defined Britain and which enjoyed great influence in post-war political discourse, have fared in recent immigration policy, and in the legal controversies that have surrounded that policy. These controversies reveal the depth of disagreement within the elite, and suggest that, in so far as there was a political consensus about certain aspects of national identity among the elite, that consensus has disintegrated. My concern here is with the dissent and sense of crisis within the political elite and its discourses. Whether or not the old political consensus was so widely shared as to actually constitute a national identity is not the issue here. Equally this article does not examine to what degree that sense of crisis, or any new values it has engendered, is shared or contested by other social groups.

Undoubtedly, if there is or was such a thing as a shared common identity in Britain, there is a multiplicity of factors which have contributed to it and its development. Post-war Britain has experienced important changes, most notably the loss of an empire. Some see British identity as still seeking a post-imperial definition (Kumar, 2000, p. 593). But just as I am not here concerned with the extent and solidity of any shared national identity that may once have existed or that now exists across British society, nor am I seeking to assert or deny the truth of any particular version of it. I am not suggesting here that the “values” of liberty and welfare, actually constituted a plausible British national identity, nor that they were the only values that such an identity might have invoked. My reason for examining the issues of liberty and welfare provision is that they were once authoritatively asserted throughout mainstream political discourse to be essential aspects of national identity.

It is poignant that it should be the debates over immigration policy that reveal the depth of disagreement within the elite over whether liberty and welfare constitute essential British values. Instead of immigrants bringing into question what were seen as traditional values, it is government policy aimed at deterring immigration that has undermined an earlier political consensus. Government policy was often criticized in the past for failing to uphold its promise of liberty and welfare for all, but in its recent development, examined in this article, policy has actively sought to limit these ideals. Of course, it may be that there is a new version of national identity implicit in these developments, but, if there is, it is the “values” underpinning immigration control rather than the beliefs of immigrants that are giving rise to it. It is this shift that I examine, and how the debate over
this shift between the government and the judiciary indicates the lack of consensus that prevails today.

I will look first at the controversies surrounding welfare provision for asylum-seekers and then turn to the issue of the detention of asylum-seekers and immigrants.

Welfare

If there was a time when Britain had a set of common values, most writers suggest it could be found in the mid to late 1940s and the 1950s. By the end of the war, and largely in reaction to prewar class division, there was a cross-party consensus that a more inclusive society was important. The welfare state was seen as one of the ways in which a common civilization would be created.

Sociologist T. H. Marshall termed this shared civilization “social citizenship”; welfare rights would enable everybody to participate in society through progressive social policies (Marshall, 1992 [1950], p. 28). There were several instrumental pieces of legislation that formed the legal framework of the welfare state.1 In this article I focus on the National Assistance Act 1948 because this is what has been specifically amended in the Asylum and Immigration Act 1999.

National Assistance

The purpose of the National Assistance Act 1948 was to ensure that everyone was entitled to some sort of benefit. The National Insurance Act 1946 had created a universal, flat-rate pension and a sickness and unemployment benefit, and the National Assistance Act covered anyone else just in case (Thane, 1983, p. 254). The National Assistance Act therefore replaced the old Poor Law that had existed as a sort of “safety net” for those in need, because the old Poor Law had been deeply unpopular despite various nineteenth and twentieth century reforms.

The original Poor Law stigmatized the poor by forcing them to wear a “P”, removing their liberty and turning them into forced labourers in workhouses (Cranston, 1985, p. 35). Even after the major reform in 1834, workhouses continued, and as late as the 1930s poor relief was given only as a loan under a regime specified by the local relief board and debts could not be written off. The National Assistance Act, which started off life as the Poor Law (Abolition) Bill, planned how: “The sweeping gesture of repealing the Poor Law Acts and the transfer of financial assistance to a central authority should finally destroy the prejudices and free assistance from the old and unhappy associations.” (Ministry of Health, 1946, §8)

Poor Law stigma was as significant an issue as poverty itself, according to the Secretary of State for Scotland at the time, Arthur Woodburn. Speaking on the proposed legislation, he stated: “I think that the greatest injury done to the poor in the past was not the fact that they were deprived of food or nourishment, but that they were deprived of their self-respect.” (Cited in Brown, 1994, pp. 117–18)

The old poor relief system encouraged stigmatization and demeaning treatment of the poor. The local relief board’s discretionary power assumed a division between the deserving and undeserving poor, and that it was the board’s duty to determine who fell into which category. As a result, poverty was associated with being undeserving and morally degenerate. In a decided break from the prewar system, the post-war Labour government
upheld the idea of universal benefits to distance the system from the earlier stigma (Fraser, 1984, p. 207).

In fact the welfare system set up in 1948 was never entirely universal. Unlike health and education, welfare involved a means test, although the new National Assistance officials were apparently “sympathetic” in an effort to avoid the old stigmatization (Brown, 1994, p. 119). Nor was the avoidance of stigma the sole motivation behind the new legislation. Other forces, particularly the changes to common practice brought about by the exigencies of war and the desire for a peacetime society that would not relive the experience of the 1930s, contributed to the construction of the welfare state. But the originators of the legislation, despite their prejudices, were also determined that the change should be more than cosmetic and argued: “It will, however, be necessary to ensure that the new services will not themselves acquire a ‘Poor Law taint’ and be thought of merely as the old Poor Law under another name. To do this the services should be administered from the start with emphasis on a new spirit.” (Ministry of Health, 1946, §9)

The National Insurance scheme and the context of political support for welfarism, encouraged a view that relief from poverty was now an entitlement or even a right (Fraser, 1984, p. 216). This idea was basic to Marshall’s concept of “social citizenship” in which social rights guaranteed everyone membership of a single civilization which was a “common possession” (Marshall, 1992, p. 24).

Subjects of a Common Empire

It is worth noting at this point that the people who were considered part of this “new spirit” included not only those who lived in Britain, but all subjects of the British Empire. The idea that the State was an “active agency for promoting social welfare and improving the general standard of living” was not only a conception that “increasingly dominates our domestic policy”, but was “forcing its way from domestic into colonial policy” (Hailey, 1942, p. 5). Although in practice, the post-war increase in state intervention in the colonies represented a “second colonial occupation” (Berman and Lonsdale, 1992, p. 165), the idea that colonial people would receive a similar state-led assistance to people in Britain, was at the time “a revolution in the Colonial Office’s way of thinking about race relations” (Wolton, 2000, p. 153).

In fact, prejudice about people in the colonies was not overcome, but the popular aim at the time was “equal treatment”. Certainly during the war, there had been much genuine dislike of the racial discrimination practised by the US Army stationed in the United Kingdom (Costello, 1985, p. 319). There was an assumption, by the end of the war, that the colour bar was outdated and that discrimination, other than on merit, was immoral.

It is also the case that, prior to the 1962 Commonwealth Immigrants Act, there was no distinction between those who held a British passport issued in the Empire and those who held one issued in the UK (Spencer, 1997, p. 129). It was only after this act that this distinction was introduced and the process by which “imperial subjects” were increasingly subject to immigration controls began. Although there was much popular resentment of benefits given to those working for Britain who originally came from the colonies (Rich, 1990 [1986], p. 185), it was still the case that in 1950s Britain, equal treatment was, in fact, held as an important ideal (even though in practice prejudice worked to prevent its day-to-day enactment).
Stigma and Equal Treatment

The stigma associated with welfare, never entirely disappeared. As Lydia Morris points out, “claimants have never been entirely free from moral condemnation and therefore social exclusion” (Morris, 1994, p. 159). Anti-working class sentiments continued and welfare-recipients still suffered derogatory stereotyping (Titmuss, 1956, p. 6).

In the late 1960s and then again in the late 1980s, poverty again became a political issue: in the first case, because the existence of the stigma was rediscovered (Lødemel, 1997, p. 224), and in the second, in an effort to reassert the stigma associated with welfare and prevent “scroungers”.3 Although further legislation was enacted in both periods, no attempt was made to reform the National Assistance Act precisely because no politician dared to repeal the founding acts of the welfare state.

My argument here is not to claim that the welfare state was not exclusive in its workings or did not sustain racist discrimination (as it continues to do (Revill, 2004, p. 3)), but instead to emphasize that the welfare state legislation was seen as upholding the principle of equal treatment and, in attempting to provide assistance as of right on the basis of need, rather than for good behaviour or on any other condition, made a claim towards universal provision. This universal welfare provision was a key aspect of how the elite saw itself as leading a democratic Britain in which all classes had united against adversity in World War II. So influential was this view that in 1990 the Commission for Citizenship regarded Marshall’s formulation of it as the “starting point” for discussion of citizenship in Britain (Commission on Citizenship, 1990). By the same token, however, by the 1990s, Marshall’s view was only a “starting point” and, as we shall see, the political class was prepared to abandon this principle in the attempt to deter asylum applications.

Removing Welfare for Asylum-Seekers

Home Office attempts to remove welfare support for asylum-seekers in Britain began in 1995 and continue today in 2005. However, resistance by the courts to these government policies has shown that, in contrast to politicians and the Home Office, judges hold different values and consider welfare as central to the values of a “civilized” country.

The Home Office argues that Britain’s welfare state is an attractive “pull factor” for asylum-seekers and illegal immigrants. Certainly asylum-seekers heavily depend on the welfare system since longstanding Home Office policy has been to deny asylum-seekers permission to work unless they were still waiting for an initial decision on their application after six months or more. From July 2003, no permission to work was granted for any asylum-seeker applying after that date. Since February 2005, however, following a European Union (EU) directive, asylum-seekers who are still waiting for an initial decision on their claim after 12 months may apply for permission to work (Hansard, 6 June 2005, col. 314W). Meanwhile official belief that welfare benefits are the reason that asylum-seekers are coming has led to measures, introduced both by Conservative and Labour governments, which have sought to reduce the welfare benefits available to asylum-seekers as a deterrent to asylum applications (Hansard, 8 January 2001, col. 702).

In late 1995, Charles Wardle, then minister for immigration, announced that, under existing social security legislation, benefits would be removed for all in-country asylum applicants (as opposed to port-of-entry applicants) from 5 February 1996 and from all applicants after a first refusal of asylum (so all appellants would lose benefits).
The parliamentary Select Committee on Social Services recommended to the government “not to proceed”. In June 1996, the Joint Council for the Welfare of Immigrants (JCWI) took the case of several asylum-seekers to the Court of Appeal. Lord Justice Simon Brown ruled against the government stating that parliamentary legislation cannot leave “some asylum-seekers so destitute that in my mind no civilised nation can tolerate it” (*R v SSHD, ex parte JCWI*). He ruled that existing statutory powers did not sanction such a shift in social policy.

The government responded by introducing an amendment to the immigration and asylum legislation already introduced to parliament at that time, and the resulting Asylum and Immigration Act that came into force on 24 July 1996 removed benefits. On 8 October 1996, a case was brought on behalf of four destitute asylum-seekers under the National Assistance Act. Again the government was defeated. The judge, Mr Justice Collins, “found it impossible to believe” that local authorities did not have a duty under this act to provide “at least shelter, warmth and food” to asylum-seekers with no other means of support (cited in Hornsby-Smith *et al.*, 1997, p. 10).

In February 1997 the Court of Appeal heard an appeal against this decision from the government and three local authorities (*R v Westminster City Council and Others*). The Appeal Court upheld Mr Justice Collins’s ruling and denied leave to appeal to the House of Lords. The government then agreed to repay local councils’ costs, although there was no agreed sum and support varied from borough to borough.

The New Labour administration continued the Conservative policy of removing benefits, and found a simple way around the obstacle posed by the courts. The new administration repealed the National Assistance Act in respect of persons “subject to immigration control” in the 1999 Immigration and Asylum Act (section 116). This legislation made support discretionary in three ways: the Secretary of State has the power to decide who is in need; the Secretary of State may decide to support those in need; and the Secretary of State may limit the support to “a portion” of income support that “he considers appropriate” (sections 97(1) and (5)). It has in fact been limited to 70 per cent of the income support of a UK citizen. The aim of denying welfare benefits to asylum-seekers was also made clear by the removal of welfare support for those who seek judicial review of the Home Office’s decision on their asylum case. The Home Office minister was quite clear that they would have to seek charity help. 4

**Section 55**

The determination of the Labour administration to cut welfare payments to asylum-seekers has been further shown by the introduction of the Nationality, Immigration and Asylum Act 2002. Section 55, in force since January 2003, only permits welfare support to asylum-seekers who are not only destitute but have also applied “as soon as is reasonably practical”. The National Asylum Support System (NASS), set up by the Immigration and Asylum Act 1999, decides who is entitled to support. Between January and September 2003, support was refused to 7,490 applicants, and by the end of 2003 the refusal rate was more than 30 per cent of new applicants (Shelter, 2004, p. 4).

In parliament, ministers had sought to reassure members that the aim of this measure was to seek to remove benefits from those who had been living illegally in Britain and had only claimed asylum when it became convenient, after losing their job or after being apprehended (Blunkett, 2002; Filkin, 2002). In practice, however, NASS refuses support if
an applicant cannot prove that they entered the country within the last 72 hours. In an attempt to gain welfare support for some, over 800 applications have been made to the courts, where about 95 per cent have been successful (Shelter, 2004, p. 6). Most asylum applicants, however, do not have the legal contacts to contest the refusal of welfare. Without the right to work, asylum-seekers have no means of support, and their access to the voluntary sector is also restricted as all but six night shelters across the country are reimbursed by housing benefits that are denied to asylum applicants (Shelter, 2004, p. 6).

Some of the cases have reached the higher courts. The Court of Appeal found the government’s plan to make people destitute “removed the law of humanity”, but the government chose to challenge this judgement. Mona Arshi, the Liberty lawyer leading the asylum-seekers’ case, responded: “We’re disappointed that the government even believes itself justified in appealing against this decision. Politicians can argue about statistics all they like; but the cruelty of condemning people to hunger and homelessness in this way should be inconceivable in a civilised country like the UK.” (Liberty, 2003)

The legal battles have continued, resulting in some new guidelines (Refugee Council, 2003). This legal contest has turned on the interpretation of the ECHR under the Human Rights Act. The key question has been whether being disallowed from working and thereby being forced to sleep rough and beg for food or money constitutes “inhuman and degrading treatment” and a violation of Article 3 of the ECHR. But what is significant here is that forcing asylum-seekers to beg for charity appears to be government policy. This is certainly a marked shift in values in a country that built its post-war identity on the abolition of the stigma and social division of the Poor Law, especially given that the Poor Law itself had been a measure, albeit a stigmatizing one, against destitution.

The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 removes support from asylum-seekers with children (section 9) once their claim has been refused. Up to now, considerations of the welfare of the child have prevented benefits from being withdrawn from families. Then Home Secretary David Blunkett threatened not only to have support withdrawn, but to place the children in care. This would permit the Home Office to say that the children have not been made destitute—by taking them away from their parents. The immigration minister tried to make this proposal acceptable by saying that “the number of children taken into care would be kept as low as possible” (Guardian, 16 December 2003, p. 7). If the Home Office were to use this power, they would be challenging the presumption in the Children Act 1989 that the best interests of the child are usually served by remaining in contact with the parents. Again, the law is being changed for non-citizens, but it shows how far politicians feel they can depart from the post-war commitment to the universal welfare state.

Habeas Corpus

A traditional British value of rather longer standing than that of welfarism is the rule of law. When, in 1885, the leading authority on the constitution, A.V. Dicey, wrote of the “distinguishing characteristic of English institutions”, he was talking of the “rule, predominance, or supremacy of law” (Dicey 1923 [1885], pp. 182–83). The “rule of law”, for Dicey consisted of three component parts, of which the third was that the law of the constitution is “not the source but the consequence of the rights of individuals” (1923, p. 198–99). The point here is that, for Dicey, the English constitution was, quintessentially, the civil rights of individuals and their right of access to the courts. In no other country,
were people as free from arbitrary power (1923, p. 185). Dicey’s view of the constitution was “vastly authoritative” for most of the twentieth century (Harden and Lewis, 1986, p. 3).

One of the key rights of the individual, upheld in the rule of law, was understood to be the right to personal freedom. The capacity to go to court and to challenge arrest and detention, to require proof of just cause, is central to the rule of law. Dicey dated the origin of the right to liberty to the 39th article of Magna Carta (1923, p. 203), although Babington argues that it only became meaningful in the seventeenth century. Up until 1671, judges could punish jurors for not following an instruction to convict. Edmund Bushell was the foreman of the jury who refused to convict Quakers of unlawful assembly, and his imprisonment, and that of his fellow jurors was successfully challenged using a writ of habeas corpus. Parliament then took up the cause giving the writ statutory force in the 1679 Habeas Corpus Acts (Babington, 1995, pp. 164, 208). The writ of habeas corpus, “to have his body”, is so called as it is a demand to bring the person to court to examine the reasons for his detention.

In 1765, William Blackstone, writing his Commentaries on the Laws of England considered freedom from arbitrary detention to be one of “the absolute rights of every Englishman”. And, moreover, English law extended these rights to all within its jurisdiction: “And this spirit of liberty is so implanted in our constitution, and rooted in our very soil, that a slave or a Negro, the moment he lands in England falls under the protection of the laws and becomes co instanti a freeman.” (Blackstone, 1979, p. 123)

In 1772, this was tested in court by the anti-slavery movement in the case: James Sommerset v Charles Stewart, heard by Lord Chief Justice Mansfield who found that to hold Sommerset, who had been Stewart’s Jamaican slave, without charge was unconstitutional.

Like the post-war “spirit of universalism”, the “rule of law” was often more cherished as an ideal than practical reality. As Ewing and Gearty argue, “nowhere was Dicey more inaccurate than in his claim that the common law was the protector of political freedom” (Ewing and Gearty, 2000, p. 393). But that does not alter the centrality of the claims made by Dicey to the British establishment’s perception of its own constitution.

Today Chancellor of the Exchequer Gordon Brown insists that “our belief in tolerance and liberty is essential for British values” (Brown, 2005). The National Curriculum instructs children to be made “aware of the issues surrounding rights such as freedom of speech and freedom from arbitrary arrest” (QCA, 6.13.2 DiEE, 1998, p. 49). But neither Brown nor the National Curriculum go into much detail about just how these rights have been limited by British governments in recent years.

**Immigration Detention**

The Immigration and Asylum Act 1999 made significant changes to the procedure for detaining immigrants, a procedure first introduced in 1971. The Immigration Act 1971 ended primary immigration and introduced the power of detention. Section 4(2)(d) of the 1971 act allows for “the detention of persons pending examination or pending removal from the United Kingdom”. The people over whom this power can be exercised are those who are “non-patrial” or those not “citizens” settled in the UK (section 1(5) and 2).

When the 1971 Immigration Act was introduced, the issue of immigration detention was posed as a mere administrative necessity for a government that had just established the power to deport migrants. A detention centre was set up at Harmondsworth, near
Heathrow airport, for the imprisonment of people before their forcible deportation. The wording of section 4(2)(d), however technical it may have first appeared, granted an important power to the immigration authorities.

Detention of arrivals increased markedly in the mid-1980s when asylum applications first started to rise. At first, the Home Office made temporary use of offshore prisons, such as MV Earl William. Since the late 1980s, detention capacity has steadily increased to its current level of about 1,500, which does not include the “fast-track reception centre” of Oakington, Cambridgeshire, which holds up to around 400 for usually around 10 days.

The 1971 act created a statutory power of detention limited to “examination or pending removal” and for those who have attempted illegal entry. These were generally envisaged as short periods of time. However, many detainees are asylum applicants who have been detained since their arrival even though they were applicants for asylum at the port-of-entry who have not attempted unlawful entry but merely asked for sanctuary.

An Amnesty International UK report on detention in 1996 found that 24.1% (of 751 in detention) were waiting for an initial decision on their asylum application, 53.3% were waiting for an appeal and only 22.6% were awaiting removal (Dunstan, 1996, p. 8). For 27 September 1998, these “snapshot” figures had shifted to 51.2% awaiting a first decision, 28.9% awaiting appeal and 19.9% awaiting removal (out of a total of 752 in detention) (Hansard, 30 March 1998, col. 388). The majority of detainees are therefore asylum-seekers who have not overstayed a visa, attempted unlawful entry nor had their asylum application fully processed, and the majority of them will spend more than two months in detention, and about 10% longer than six months.

Legal Scrutiny of Immigration Detention

There is, at present, some review of detention of those subject to immigration controls. Those who have entered the UK illegally, and are detained “pending removal”, may make an immediate application for Immigration Adjudicator’s bail. Those who applied for asylum when they arrived in the UK (known as “port applicants”) have to wait for seven days after their arrival to apply for Adjudicator’s bail. At present, all those detained under immigration law have the right to use habeas corpus and judicial review of the decision to detain. Although, as we have seen in relation to welfare provision, asylum-seekers generally lack access to the lawyers they need to negotiate the maze of immigration law.

The Immigration and Asylum Act 1999 made provision for “routine bail hearings” for immigration detainees. These hearings were planned to take place before the end of eight days in detention and then at monthly intervals thereafter (section 44). This was meant to introduce some element of “judicial oversight”, that is an examination by magistrates, of the decision to detain. The procedure was going to be introduced in 2002, but was then indefinitely delayed. Regular internal reviews of who is in detention and why are undertaken by the Immigration Service. These are not subject to public scrutiny. Sir David Ramsbotham, then Chief Inspector of Prisons, on his first visit to a detention centre in late 1997, was surprised to discover the lack of judicial oversight (Ramsbotham, 1998, §1-20, I-21 and 10.02).

A critical point is that even when immigration detainees manage to get a bail hearing, they do not enjoy the presumption of liberty. It is for the detainee to “prove” trustworthiness in order to be released. Section 45 of the act, which was introduced after much lobbying at the bill’s special standing committee stage, states that “the court...
must release the detained person on bail unless...”. This appears to return the presumption of liberty to immigration detainees. However the “unless” category lists an entire page of exceptions including, for example, anyone who may need to be questioned by the Immigration Service, a category which logically encompasses all asylum-seekers. Even Frances Masserick (1999), then director of the detention estate for the Immigration Service, admitted that no actual detainee would enjoy the presumption of liberty. By contrast, for anyone accused of a criminal offence, where the Bail Act 1976 applies, the burden is on the Crown Prosecution Service to justify the denial of liberty.

Not only has the presumption of liberty been undermined in the rules of immigration bail but the secretive character of the decision to detain has seriously limited the capacity to challenge it. The purpose of judicial oversight is that the court will examine the reasons for imprisonment and so determine whether there is “just cause” for the loss of liberty. Partly because of the complexity of British immigration law and partly because the Immigration Service does not give detailed reasons, most people in detention do not know why they are locked up. A recent survey of Immigration Service letters sent to detainees in Campfield Detention Centre showed that out of 57 letters, only one specified one of the criteria for detention used by the Immigration Service. These individuals are detained indefinitely without trial and no reasons are offered except that they have attempted to enter the UK.

It is extremely difficult for a lawyer to contest detention if the specific grounds of the decision to detain are unknown. The guidelines on detention for Immigration Officers were made public in 1996 by Amnesty International (Ghaleigh, 1999, p. 2). These show that one of the criteria for detention was the “likelihood of the person being removed” from the UK. This involves prejudging the applicant’s asylum case, without detailed knowledge of the circumstances, by an immigration officer (and not by the asylum directorate of the Immigration Service which will actually make a decision on the asylum application), and doing so before the applicant has had a chance to present their case (Medical Foundation for the Care of Victims of Torture, 1997, §2). The failure to introduce judicial oversight of immigration detention suggests that the Immigration Service is reluctant to have these subjective criteria discussed in open court.

**Immigration Detention and the Human Rights Act**

Before the 1998 Human Rights Act came into force, there was some discussion that it might provide a bulwark against arbitrary arrest. Article 5 of the ECHR states that “everyone has the right to liberty and security of person”. There are, however, exceptions to the right to liberty. Important, in this case, is Article 5.1(f) that permits the “detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”. In April 1998, Nicholas Blake QC gave an opinion to Justice, a human rights pressure group, on the convention’s implications for immigration detention. He noted that “detention of those arriving in the UK is only permitted under Article 5.1(f) of the Convention in order to prevent unlawful entry to the territory of a Contracting State. A person who claims asylum at the port of entry is not acting unlawfully whatever incidental ruses have been adopted in order for the claim to be made.” (Blake, 1998, p. 9)
This proved to be an optimistic reading of Article 5.1(f) which in fact permits detention in order to prevent “unauthorised entry”; a term that probably includes those without proper travel documentation, something that few refugees have. In the light of this reading of the Human Rights Act, the courts were unlikely to overturn earlier decisions governing immigration detention, and indeed so it has proved. The legality of detaining asylum-seekers was first brought to the Court of Appeal in 1995. Lord Justice Leggatt found that “Parliament could not sensibly have intended that any illegal immigrant who was apprehended could, by claiming asylum, avoid detention unless and until his asylum claim had been investigated and dismissed. That he could then be detained would be irrelevant if he could no longer be found.” (*R v SSHD, ex parte Khan et al*, 1995)

However, as long as detention is not “unduly prolonged”, as it was in the case of *Chahal*, detained for six years (*Chahal v UK*, 1996), Lord Phillips, in the Court of Appeal, referring to the debate over “unauthorised” and “unlawful” entry, considers that “it is not easy to derive general principles from a passage that we have found far from clear”, and a “short period of detention can be justified” (*R v SSHD, ex parte Saadi et al*, 2001, §63, 66).

Moreover, the UK’s highest court, the House of Lords, interpreted the point even more broadly in the case of *Saadi*. Lord Slynn stated that “in my opinion until the State has ‘authorised’ entry the entry is unauthorised” (*R v SSHD, ex parte Saadi et al*, 2002, §35). It is striking that in the *Saadi* case, it was accepted that there was no danger of the asylum-seekers concerned absconding. As one authority concludes: “Close scrutiny of the Saadi judgement suggests no greater justification for detention than administrative need.” (Clayton, 2004, p. 438) Regardless of the intrinsic rights and wrongs of immigration detention, if the Human Rights Act is about establishing common British values, as Jack Straw claimed, they no longer seem to include the presumption of liberty, not at least for asylum-seekers.

### Detention of Foreign Nationals Under Terrorism Law

Since the Anti-Terrorism Crime and Security Act 2001, the issue of the detention of foreign nationals has prompted a strong debate on what constitutes “civilized values” in the UK. Between 2001 and early 2005, a number of foreign nationals were “locked up indefinitely without trial on the basis of the suspicion only of the Home Secretary that they have links with terrorism” (Peirce, 2004). The Home Secretary’s power to do this was granted by parliament in Section 23 of the 2001 Act. The challenge to their detention eventually reached the House of Lords. Unusually, nine (instead of five) Law Lords were appointed to hear the case and eight of them ruled against the Home Office. The question for the House of Lords was could the executive, on the ground of suspicion of being a terrorist, indefinitely detain (without charge or trial) persons who could not be deported because of a real (and undisputed) threat of torture in their home countries. The majority of the Lords ruled that the legislation was incompatible with the Convention because, in applying only to non-nationals, it discriminated against them on grounds of nationality in violation of Article 14 of the ECHR.

One of the Law Lords, while also deciding against the Home Office, put forward a different argument. Lord Hoffman questioned the idea that the “life of the nation” was under threat from terrorism, which was supposed to justify derogation from the Human Rights Act, and argued that detention without trial was a much more serious problem, whether or not it discriminated:
I said that the power of detention is at present confined to foreigners and I would not like to give the impression that all that was necessary was to extend the power to United Kingdom citizens as well. In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. (A and Others v Secretary of State for the Home Department [2004] UKHL 56 §97, p. 53)

In response to this judgment, parliament passed the Prevention of Terrorism Act 2005, Section 1 of which has replaced detention without trial with the power to impose “Control Orders” on foreign nationals and citizens alike. These have imposed effective house arrest on suspected individuals where the Home Secretary has reasonable grounds for suspecting that the individual is or has been involved in “terrorism-related activity”. Although a judge may review the “reasonableness” of the Home Secretary’s suspicions, personal liberty now depends on not provoking the Home Secretary’s suspicions.

The litigation concerning executive detention brought under the Human Rights Act 1998 underscores the official difficulty with establishing a secure set of British values. Jack Straw claimed that the Human Rights Act is a set of “basic values we can all share” (Straw, 2000). For one of its key proponents, Francesca Klug, “the modern idea of human rights has to be understood as a quest for common values in an era of failed ideologies and multiple (including non-existent) faiths” (Klug, 2000, p. 17). But far from creating a new consensus, the experience of the act appears to be that it provides another arena in which the “values” of individual liberty and freedom from arbitrary detention compete, in an unsettled and unsettling political controversy, with the “values” of safety from terrorism or administrative convenience.

Lord Chief Justice Woolf (2002, p. 2) underlines the decline of the old British official self-perception of the supremacy of legality when he observes that “the primary concern of the Human Rights Act is not so much rights in the ordinary common law sense but values.” And the key point for this article is that if there is a diversity of opinion concerning those values, it is not between immigrant and indigenous but rather between people at the very heart of the British establishment.

Conclusion

The treatment of asylum-seekers in terms of their freedom from arbitrary detention and their access to welfare marks a sharp departure from the rule of law and universal welfare provision that were key features of the post-war British constitution. Although the narrowing of the civil and social rights involved has been brought about through measures focused on non-nationals, the language in which these developments have been contested has invoked notions of what it means to be civilized and what constitutes “British values”. Moreover, in respect of prevention of terrorism, the initial power of executive detention of foreign nationals has, with the introduction of Control Orders, subsequently been broadened to include citizens. In both welfare and detention, legislative policy has brought out the sharp disagreement about basic values that exists within the judicial branch of the state and between it and the executive.

According to the new citizenship pledge affirmed by those naturalizing, being a good citizen means: “I will give my loyalty to the United Kingdom and respect its rights and
freedoms.” (IND, 2004) But those “rights and freedoms” that the citizenship pledge talks of are now uncertain. By their own actions, British governments have withdrawn the universal application of the most basic of “social rights”, and the “values” they promote now openly encompass executive detention without trial and destitution. To attribute uncertainty and lack of consensus regarding British values to the arrival of immigrants, and to the diversity of values they purportedly bring, is profoundly ironic, when it is official efforts to control immigration and asylum-seekers that have made an unrivalled contribution to the undermining of the elite’s earlier consensus on British values.

Notes

1 The Education Act 1944, the Family Allowances Act 1945, the National Health Service Act 1946, the National Insurance Act 1946, the Industrial Injuries Act 1946 and the National Assistance Act 1948.
2 The Interdepartmental Committee on the Poor Law still insisted that forced labour would continue to be an essential element in preventing poverty: “There will be some cases in which firmness will be necessary as we have already indicated in dealing for instance with the ne’er-do-well and the ‘work-shy’. The Board would need power, among others, to set up Work Centres for the ‘work-shy’, and power to require them to enter a Centre as a condition of receiving an allowance.” (Ministry of Health, 1946, §9)
3 The Social Security Act 1989 reintroduced the “seeking work” test but despite claims by John Moore, then Secretary of State for Social Security, that it would reduce the unemployed by 50,000, the number of claims disallowed actually fell from 0.14% to 0.05% of claims (Jacobs, 1994, pp. 126–45).
4 When questioned on how such people would be left destitute, Mike O’Brien replied, “Individual cases will have to be dealt with via other means, primarily the voluntary sector making direct payments” (Hansard, 4 May 1999, col.1263).
5 The MV Earl William broke its moorings in the storm of 1987 because the prison officers who were not experienced seamen would not listen to the advice of the immigrants to loosen the mooring ropes.
6 This was also confirmed from Mr Kirkhope’s written answer in Hansard (31 January 1997, col. 381) where the figures were 20.2% awaiting initial decision; 50.2% awaiting an appeal; 29.6% awaiting removal (total number in detention 754).
7 The Home Office has not published more recent figures. Another Home Office “snapshot”, for 27 February 1998, showed that 32.2% were in detention for less than one month; 17.7% up to two months; 38% from two to six months; 9.3% from six to 12 months; and 2.8% had been in detention for longer than one year (Hansard, 15 July 1998, col.191).
8 Survey of Immigration Service letters to detainees in Campsfield Detention Centre by Bail for Immigration Detainees on 9 May 2001. Only eight of the 57 detainees were awaiting travel documents and deportation. The remaining had appeals or first decisions outstanding. Of the latter group, one had been in detention for eight months and another for almost 14 months. Those remaining had been detained for between one and six months.

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