

Immigration Law Affecting Commonwealth Citizens who entered the United Kingdom before 1973

Summary

This article outlines the immigration law and practices of the United Kingdom applying to Commonwealth citizens who came to the UK before 1973, primarily those who had no ancestral links with the British Isles. It attempts to identify which Commonwealth citizens automatically acquired indefinite leave to enter or remain under the Immigration Act 1971, and what evidence may be available today.

This article was inspired by the problems faced by many Commonwealth citizens who arrived in the UK in the 1950s and 1960s, who have not acquired British citizenship and who are now experiencing difficulty demonstrating that they have a right to remain in the United Kingdom under the current law of the "Hostile Environment". In the ongoing media coverage, they are often described as the "Windrush Generation", loosely suggesting those who came from the West Indies in about 1949. However, their position is fairly similar to that of other immigrants of the same era from other British territories and newly independent Commonwealth countries, which this article also tries to cover.

Various conclusions arise. Home Office record keeping was always limited. The pre 1973 law and practice is more complex than generally realised. The status of pre-1973 migrants in the current law is sometimes ambiguous or unprovable. The transitional provisions of the Immigration Act 1971 did not intersect cleanly with the earlier law leaving uncertainty and gaps. An attempt had been made to identify categories of Commonwealth citizens who entered the UK before 1973 and acquired an automatic right to reside in the UK on 1 January 1973. Persons who entered before 1973 clandestinely or were not examined were often in a better position than persons who entered at a port of entry and were made subject to conditions. Persons born in the British Caribbean who migrated to the UK before 1973 and who were never granted British citizenship in the UK are likely today to have indefinite leave, British citizenship, right of abode via marriage or no status at all.

Example scenarios are provided. Persons residing in the UK and who lost nationality of the UK at independence were dropped into a limbo that has not had a proper legislative solution. The ambiguity suggests that new rules should be added to the Immigration Rules, and that a statutory provision should be made for those who lost or did not acquire right of abode due to UK independence legislation.

This article utilised research and analysis of pre 1973 UK immigration law done in 2016 and 2017 for a system modelling nationality law. Bruce Mennell is the director of [citizenship law consultancy Passportia](#) which he founded in 2013 and which specialises in complex claims to British, Irish and German citizenship.

The article does not cover human rights law, the political background or debate on the laws or policies¹, or the Special Voucher scheme.

In what follows, references to the “UK” are to the United Kingdom (not including the Channel Islands or the Isle of Man). References to laws are to those of the United Kingdom. An unqualified reference below to “section” is to a section in the CIA 1962. Almost all of the cases cited have a report on the UNHCR Refworld website (<http://www.refworld.org>). The countless “he” (apologies) include “she”, but not vice versa.

Before July 1962

Immediately before July 1962, Commonwealth citizens, British protected persons and Irish citizens were not subject to immigration control in the United Kingdom. ‘Commonwealth citizens’ comprised citizens of the United Kingdom and Colonies (“CUKC”), citizens of other Commonwealth countries and various transitional categories of British subject. At entry such persons were given a cursory examination and their passports were not stamped, and there were no restrictions on the time they could remain in the UK or on their employment.

In contrast, under common law and the Aliens Restriction Acts 1914 and 1919, almost all aliens (i.e. non-Commonwealth citizens) needed express permission to enter (“leave to land”) or remain in the UK and had to register with the police. An immigration officer had discretion on whether to admit an alien. Though he was expected to follow confidential guidance issued by the Home Office, his decisions could not normally be appealed.

Commonwealth Immigrants Act, 1962 (‘CIA 1962’)

The Home Secretary R.A.B. Butler sold the bill to the Commons on the basis that it was a temporary measure, and would give an immigration officer the power *on a selective basis* to place a ‘condition’ limiting the length of stay or activity of a Commonwealth citizen subject to control, but that that power would be optional and used reasonably in accordance with instructions approved by Parliament. The power to impose conditions could only be applied to a Commonwealth citizen on entering the UK, not if he was already in the UK. The expression ‘condition’ really means a ‘restriction’ on the time the person could spend in the UK or on employment in the UK.

¹ Many articles and books have commented on these aspects, for example *Immigration Law* by Evans, 1973, and the thesis *Immigration Policy in Britain Since 1962* by Natálie Abrahámová. Few however provide much in the way of detailed analysis of the law and practice.

In contrast, under the Aliens Restrictions Act 1914, aliens required express permission to enter or remain². The inverse approach used by the CIA 1962 was presumably chosen to demonstrate that Commonwealth citizens continued to enjoy preferential treatment relative to aliens, and it also allowed Irish citizens to quietly avoid restrictions.³ But the inverse scheme is harder to understand and made for loopholes.

The CIA 1962 applied to Commonwealth citizens, British protected persons and Irish citizens. All others were aliens and remained subject to control under the 1914 Act. Part I of the CIA 1962 imposed controls and came into force on 1 July 1962.⁴ CIA 1962 also provided for the refusal of entry or deportation of Commonwealth citizens in specific circumstances. This aspect is not covered in this article.

Between July 1962 and mid-1965 conditions were sparingly imposed on Commonwealth citizens from abroad and most were admitted without conditions.

Following the CIA 1962, Entry Clearance Officers were employed at UK High Commissioners in Commonwealth countries and by governments in colonial territories to provide “entry clearance”. An “entry certificate” was effectively a form of visa, but the expression “visa” was not used as it may have suggested that Commonwealth citizens were treated like aliens.

Commonwealth Immigrants Act 1968

Most of the Act took effect from 2 March 1968. The main change was to remove from the control of the Act CUKCs who had ancestral links with the British Isles, being large numbers of people in the Old Commonwealth, and to bring within the control of the Act holders of UK passports issued outside the British Isles or Ireland whose UK nationality arose from an existing or former colonial territory (item 4 replaced 3 in the Exempt List below). The persons in item 4 in the Exempt List below could not be readily proved to an Immigration Officer and from this time endorsements were stamped indicating if the holder was subject to immigration control, or not subject to immigration control, under the CIA 1962. But a UK passport issued in the UK, Islands or Ireland (lacking an endorsement as to which country it was issued on behalf of), retained its powers and practitioners should note that an endorsement indicating the person was subject to control did not overcome that⁵.

² For a comparison of the CIA 1962 and the Aliens Act, 1914 see *The Stranger at the Gate* by Cedric Thornbury.

³ In the Parliamentary debates strong objections were made to Irish citizens receiving preferential immigration treatment over citizens of Commonwealth countries.

⁴ The Commonwealth Immigrants Act 1962 (Commencement) Order 1962 (no. 863), 19 April 1962, which brought parts of the Act into operation on 31 May 1962 and 1 July 1962.

⁵ It remained within item 2 in the Exempt List below, which was unaffected by the CIA 1962.

In addition, from 9 March 1968, entry into the UK other than after an examination by an immigration officer was made an offence, though a new arrival could avoid prosecution by producing a passport that was stamped within 28 days of arrival (section 4A, added by section 3 of the CIA 1968). Persons arriving in the UK by ship or aircraft from the Republic of Ireland were exempt from 4A⁶, but it seems persons who crossed the land border into Northern Ireland were not, but such entry may have been lawful under non-legislative arrangements⁷. The Act was silent as to whether presence in the UK following an unlawful entry was unlawful presence and whether this carried across into the era of the IA 1971, with important implications for the transitions on 1 March 1973. The case law was not consistent – see discussion below.

List of Persons Not Restricted by the CIA 1962 and the CIA 1968 (“Exempt List”)

The CIA 1962 identified categories of Commonwealth citizens who were entitled to enter the UK without any restriction:

- persons not subject to control under the Act (section 1),
- persons who were exempt from control (section 17), or,
- persons who could not have conditions imposed at entry to the UK (section 2(1)).

For convenience a single list of all such persons is set out below and referred to as the “Exempt List”. Note the special meaning of “UK passport” which is discussed below the list.

Not subject to control:

1. a Commonwealth citizen born in the UK, the Channel Islands or the Isle of Man (section 1(2)(a)),
2. a Commonwealth citizen who held a UK passport issued in the British Isles or Republic of Ireland – see below (section 1(2)(b)),
3. Before 2 March 1968, a CUKC who held a UK passport issued anywhere (section 1(2)(b)),
4. From 2 March 1968, a CUKC who held a UK passport and who, or whose parent or grandparent, had been born or adopted in the UK, or at any time been granted nationality by the government of the United Kingdom, Jersey, Guernsey or the Isle of Man, including a High Commissioner representing the UK in a Commonwealth country (section 1(2)(b) as revised)), but not including certain registrations under

⁶ Commonwealth Immigrants (Exemption from Restrictions on Landing) Order 1968 (No 284) , articles 5 and 6.

⁷ Perhaps under arrangements made under 4A(2)(b) of the CIA 1962.

section 6(2) (wives)⁸ or section 7 (children)⁹ of the British Nationality Act 1948 effected after 28 October 1971.

5. A person included in the passport of a person described above (section 1(2)(c))

Exempt from control:

6. A Commonwealth citizen connected with a diplomatic or consular mission, ship or airline, or in certain types of employment, such as international organisations (section 17),

Could not have conditions imposed on entry:

Returning residents:

7. A Commonwealth citizen who was, or at any time in the previous two years had been, ordinarily resident¹⁰ in the UK and not subject to a 'condition restricting the period for which he may remain' (excluding overstayers it seems, section 2(2)(a)),

Wives:

8. A wife whose husband who was resident in the UK *with or without conditions* (section 2(2)(b)).
9. A wife who entered the UK with a husband who was admitted *with or without conditions* (section 2(2)(b)),

Children:

10. Before 2 March 1968, a child aged under 16 years whose parent was resident in the UK *with or without conditions* (section 2(2)(b)),
11. Before 2 March 1968, a child aged under 16 years who entered the UK with a parent who was admitted *with or without conditions* (section 2(2)(b)),
12. From 2 March 1968, a child aged under 16 years who entered the UK with both parents who were admitted *with or without conditions* (section 2(2)(b)),

⁸ A registration through a marriage i) before 28 October 1971 or ii) to a CUKC excluded from control of the CIA 1962 by its section 1(2) continued to qualify.

⁹ A registration in the United Kingdom or Islands continued to qualify.

¹⁰ When ordinary residence ends after a long absence is discussed in *Tosir Khan v. Entry Certificate Officer, Dacca*, [1974] Imm AR 55.

13. From 2 March 1968, a child aged under 16 years both of whose parents were resident in the UK *with or without conditions* (section 2(2)(b)),
14. From 2 March 1968, a child aged under 16 years who entered the UK with one parent and the other parent was resident in the UK *with or without conditions* (section 2(2)(b)),

Entered without examination by an immigration officer:

15. A person who entered the UK before 9 March 1968 and was not examined at entry or within 24 hours, even a clandestine entrant (“the Bhagwan gap”),¹¹ so long as he was not subject to conditions imposed at an earlier entry.
16. A person who entered the UK on or after 9 March 1968 and was not examined within 28 days, even a clandestine entrant, so long as he was not subject to conditions imposed at an earlier entry.¹²
17. A child who entered the UK and was not examined at entry or within 24 hours, even a clandestine entrant,¹³ so long as he was not subject to conditions imposed at an earlier entry.

In addition, a Commonwealth citizen who was eligible for admission without conditions under the criteria in the Immigration Instructions in force on the date of his entry to the UK is likely to have been so admitted, and an argument based on the prevailing facts can be constructed.

Under the CIA 1962 a ‘child’ included a step-child and an adopted child and, in relation to the mother, an illegitimate child (section 2(6)). Note that in the Immigration Instructions a wife could in some cases include a cohabitee¹⁴ and a father a putative father.

Under the CIA 1962 ‘ordinary residence’ required that the person was not subject to a condition restricting the time he could remain (even if the time limit had passed as in the case of an overstayer¹⁵), and that his presence was lawful¹⁶ (section 2(6)). Note that ‘ordinary residence’ in the UK could be compatible with long absences¹⁷.

¹¹ Before 9 March 1968, no offence was committed. See *Director of Public Prosecutions v. Bhagwan*, [1972] AC 60, [1970] 3 All ER 97, [1970] 3 WLR 501, 54 Cr App Rep 460, 134 JP 622, United Kingdom: House of Lords (Judicial Committee), 23 July 1970; *R v. Brixton Prison Governor, Ex parte Ahson and Others*, [1969] 2 QB 222, [1969] 2 All ER 347, [1969] 2 WLR 618, 133 JP 407.

¹² See *R v. Governor of Pentonville Prison and Another, Ex parte Azam*, [1973] 1 WLR 528. No prosecution could take place after 6 months. Also *Azam and Others v. Secretary of State for the Home Department and Another*, [1974] AC 18, [1973] 2 All ER 765, [1973] 2 WLR 1058, 137 JP 626.

¹³ A generalised interpretation of *R v. Secretary of State for the Home Department, Ex parte Khan*, [1990] 2 All ER 531, [1990] 1 WLR 798, [1990] Imm AR 327. But see *Rahim Miah v. Secretary of State for the Home Department*, [1990] 2 All ER 523, [1990] 1 WLR 806, [1989] Imm AR 559. *R v. Secretary of the Home Department, and Ex parte Miah*, [1994] Imm AR 279.

¹⁴ *Hessing v. Secretary of State for the Home Department*, [1972] Imm AR 134.

¹⁵ Section 2(6) expressly excludes overstay.

¹⁶ *Re Abdul Manan* [1971] 1 WLR 859.

(Thus “ordinary residence” in the CIA 1962 had a meaning similar to “settled” in the IA 1971, except that settled would not include a person who was exempt – see discussion below).

In contrast ‘residence’ was not defined, and it would seemingly not matter if the person was subject to conditions, was in breach of those conditions (such as an overstayer), had entered unlawfully, or if the intention to stay was temporary.¹⁸

All other Commonwealth citizens *could be subjected to control* on entry. This could only happen if a person entering the UK was examined by an immigration officer and that officer imposed conditions that limited the time of stay or employment (section 2(1)).

Once imposed, conditions remained in force until the person was examined on re-entering the UK (section 2(6) of the First Schedule). If a person was not examined on entering the UK, such as by arrival from the Republic of Ireland or before 9 March 1968 clandestinely or at a small port with no officers on duty, then he entered free of conditions or remained subject to any conditions previously imposed.¹⁹ Thus Irish citizens and others who first entered the UK from Ireland were generally not subject to conditions as they were not examined at entry.

The Act gave a power to vary or revoke (lift) any existing conditions on a person inside the UK (section 2(5) of the First Schedule), but there was no power to impose conditions on a person who was free of conditions. This would include any person who had arrived in the UK before July 1962, or who came within control due to say expiry of a UK passport or loss of CUKC. Lifting of conditions would take the form of a letter from the Home Office or a stamp in a passport or both.²⁰

Notably a Commonwealth citizen who first entered the UK clandestinely and avoided examination was left in a better position than one who was admitted at a port of entry subject to conditions and overstayed (see the cases cited in items 15, 16 and 17 in Exempt List above, and *The 1974 Amnesty and Pre-1973 Illegal Entrants* section below).

United Kingdom Passports

¹⁷ *Entry Certificate Officer, Bombay v. Joshi* [1975] Imm. A.R. 1, 115.

¹⁸ See para 24 of the Immigration Instructions of 1962 (CMD 1716).

¹⁹ See item 15 in the Exempt List.

²⁰ For examples see TNA files FCO 50-273 and FCO 344/86.

British Passports issued by the Passport Office in the UK and by UK posts abroad (consulates in foreign countries and High Commissions in Commonwealth countries) were issued by and in the name of the United Kingdom government. Passports issued in a colonial territory were issued by and in the name of the government of that territory. The standard passport duration was an initial 5 years, with the possibility of a further 5 year renewal. Children under the age of 16 years could be included on the passport of their parent. A wife could be included in the passport of her husband.

In general, by 1962 a UK passport would be issued only to a CUKC, a British protected person, or a British subject who was not a citizen of a Commonwealth country. In urgent circumstances a short duration UK passport would be issued to a citizen of a Commonwealth country in a place where there was no nearby post maintained by that country²¹.

A 'United Kingdom passport' as defined in the CIA 1962 was in effect one issued by the government of the United Kingdom, Guernsey, Jersey or Isle of Man, not being a passport "issued on behalf of another part of the Commonwealth" (section 1(3)). Thus a British Passport was issued by the government of a colonial territory could not be a UK passport. This much was quite well known to people who have written about the CIA 1962.

The above quoted words were vague and undefined in the CIA 1962, and if they meant anything to Parliament, they were probably assumed to apply to a passport issued to a citizen of an independent Commonwealth country in exceptional circumstances²². In fact passports issued in the UK were often endorsed with the name of a colonial territory if that is where the holder came from or was the source of his UK nationality, and very rarely an independent Commonwealth country²³. Only the latter could be truly described as being "another part of the Commonwealth", because colonial territories fell within that part of the Commonwealth represented by the UK. These endorsements were not well known²⁴. They were not regulated by the Immigration Instructions.

After July 1962, a passport issued by the UK government in the UK to a person i) subject to conditions and ii) whose CUKC or British protected person status was based on links to a remaining overseas colonial territory, would normally have an endorsement identifying the territory concerned, e.g. "issued on behalf of Grenada". This endorsement was made by the Passport Office in the UK, which would if necessary consult the Home Office.

²¹ Typically of duration 3 to 12 months. with national status of "British subject" or "Commonwealth citizen".

²² Several colonies not independent of the UK had local citizenship, namely Southern Rhodesia and the State of Singapore. They were treated fairly similarly to independent Commonwealth countries. Citizens of Southern Rhodesia could generally obtain a passport issued by the UK after 11 November 1965 in any country. From 17 November 1965, a passport issued by the UK government to a Commonwealth citizen only by reason of his citizenship of Southern Rhodesia was excluded from the definition of UK passport, presumably to avoid having a "behalf of" endorsement that implied its government was recognised.

²³ All Commonwealth countries had posts in the UK.

²⁴ Reliance on these endorsements seems to have continued even from 1973, see para 5 of the *Immigration Rules for Control on Entry of Commonwealth Citizens* (H.C. 81, 1973).

Such an endorsement was an artful backdoor device that could turn a UK passport into a non-UK passport, to thus impose control on the holder under the CIA 1962. The practices regarding endorsements of (or a refusal to issue) a passport in the UK to a person subject to conditions was closely examined and approved in cases before the Immigration Appeal Tribunal²⁵ and considered a valid exercise of the prerogative of the Crown. It is unknown to what extent these endorsements were applied by UK posts abroad. Thus a “UK passport” had a very particular meaning for the CIA 1962.

Citizenship of the United Kingdom and Colonies ('CUKC')

Before 1962, almost all persons born in the UK, the British Caribbean territories (the West Indies) and other remaining colonies were CUKC. Between 1957 and the end of 1982, over 36 countries became independent of the UK, with 12 being in the Caribbean, namely:

Jamaica	6 August 1962
Trinidad and Tobago	31 August 1962
Guyana (formerly British Guiana)	26 May 1966
Barbados	30 November 1966
Bahamas	10 July 1973
Grenada	7 February 1974
Dominica	3 November 1978
Saint Lucia	22 February 1979
Saint Vincent and the Grenadines	27 October 1979
Belize (formerly British Honduras)	21 September 1981
Antigua and Barbuda	1 November 1981
Saint Kitts and Nevis	19 September 1983

Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat, St Christopher and Nevis, and Turks and Caicos remain as British Overseas territories in the Caribbean.

²⁵ The practice of the Passport Office is revealed in the case *Secretary of State for the Home Department v Lakdawalla* [1970] Imm AR 1-100, IAT. See also *Mamacos v Secretary of State for the Home Department* [1970] Imm AR 1-100, IAT, and *R v S of S for the Home Department*, ex p Bhurosah, ([1967] 3 All ER 831).

As each country became independent the vast majority of the persons born therein acquired citizenship of the new state²⁶ and lost CUKC under independence legislation²⁷. There were no exceptions for those resident in the UK in the independence legislation of countries in the Caribbean, but the independence legislation of Belize and Dominica excepted from loss CUKC with right of abode in the UK. Almost all such states were expected to promptly join the Commonwealth and were treated from independence as Commonwealth countries under UK laws, and as such their citizens continued to be Commonwealth citizens. However, freedom from control of the CIA 1962 depended in some cases (3 and 4 above) on possession of CUKC.

One potential advantage of losing CUKC for a UK resident however was the ability to re-obtain CUKC in the UK by registration²⁸. A CUKC by grant from the Home Office had right of abode from 1973 (section 2(1) of the IA 1971), or between March 1968 and December 1972, freedom from the control of the CIA 1962 (revised section 1(2)).

A person holding or included in a UK passport might or might not be subject to control through complex criteria, and there was an interplay between where the passport was issued (in the British Isles or not), whether it was endorsed as being issued on behalf of another part of the Commonwealth and whether the holder was a CUKC. In Appendix A below there are examples which illustrate the interplay of CUKC and immigration status.

On 1 January 1983 almost every CUKC with right of abode in the UK became a British citizen, and each CUKC connected with a remaining British territory became a British Dependent Territories citizen. On 21 May 2002, almost all British Dependent Territories citizens became British citizens, to thus acquire right of abode of the UK²⁹. In 1983 St Kitts and Nevis became independent of the UK and the independence legislation caused loss of British Dependent Territories citizenship by most persons who became citizens of that country.

Birth in the UK from 1983 only conferred British citizenship on those with a parent with British citizenship or no time limit. This means that the immigration status of a parent, who may have arrived in the UK decades before 1973, potentially affected his children born after 1982.

British Protected Person Status

²⁶ Local citizenship was usually conferred at independence under the constitution.

²⁷ Excepted from loss were generally those whose father or father's father was born in the UK or a remaining colonial territory. In practice few persons born in the British Caribbean benefitted, unless their father or father's father was born in another continuing British territory.

²⁸ A citizen of a Commonwealth country could generally acquire CUKC by registration after 5 years ordinary residence in the UK or a British territory, or 12 months residence before July 1962. The Home Office maintained a strict policy of not allowing an existing CUKC acquire CUKC by grant, which could have secured a right of residence in the UK from 1 March 1968.

²⁹ British Overseas Territories Act 2002.

Before 1962, almost all persons born in the remaining British protectorates, protected states and United Kingdom Trust Territories were “British Protected persons”. They were neither British subjects nor aliens, but were under the CIA 1962 treated equally with Commonwealth citizens.

A British protected person who lost that status when a territory became independent, or ceased being under United Kingdom protection and did not promptly join the Commonwealth, such as British Somaliland, South Yemen and protected states in the Persian Gulf, would before 1973 have become an alien and come under the control of the Aliens Restriction Act 1914, but was probably treated as being subject to the same conditions as before, if any.

Examination of Commonwealth Citizens on Arrival in the UK

From July 1962 all persons, including Commonwealth citizens entering the UK at a port of entry, were examined at entry and their passports were stamped. The power to impose or not impose conditions on entry was at the discretion of the immigration officer, but instructions reviewed by Parliament identified many situations where a person was entitled or eligible to be admitted without conditions. One example is a person who had served in the UK armed services (Home Forces) after WW2 or had served in the armed forces of any Commonwealth country during wartime. Another example is a person with an Employment Voucher from the Ministry of Labour or a Special Voucher from an Entry Clearance Officer.

The published Immigration Instructions were modified or re-issued several times during the life of the CIA 1962 as Parliamentary Command Papers, and it is beyond the scope of this article to discuss these. They were much less formal and prescriptive than the current Immigration Rules. The following statement from the instructions is worth considering:

"The Immigration Officer has the power to impose a condition limiting the visitor's length of stay in the United Kingdom. Where this power is exercised, he can in addition impose a condition limiting or prohibiting the visitor's employment or occupation. It will not be necessary to use these powers frequently. But the Immigration Officer should consider imposing a condition limiting the period of stay where the visitor's intentions are not clear, and he thinks it important that the visitor should appreciate that he is permitted to stay only for a limited period."³⁰

In addition, a stream of “unpublished instructions” were issued to immigration officers and Entry Clearance Officers setting out in more detail how the published Immigration Instructions should be implemented, as well as

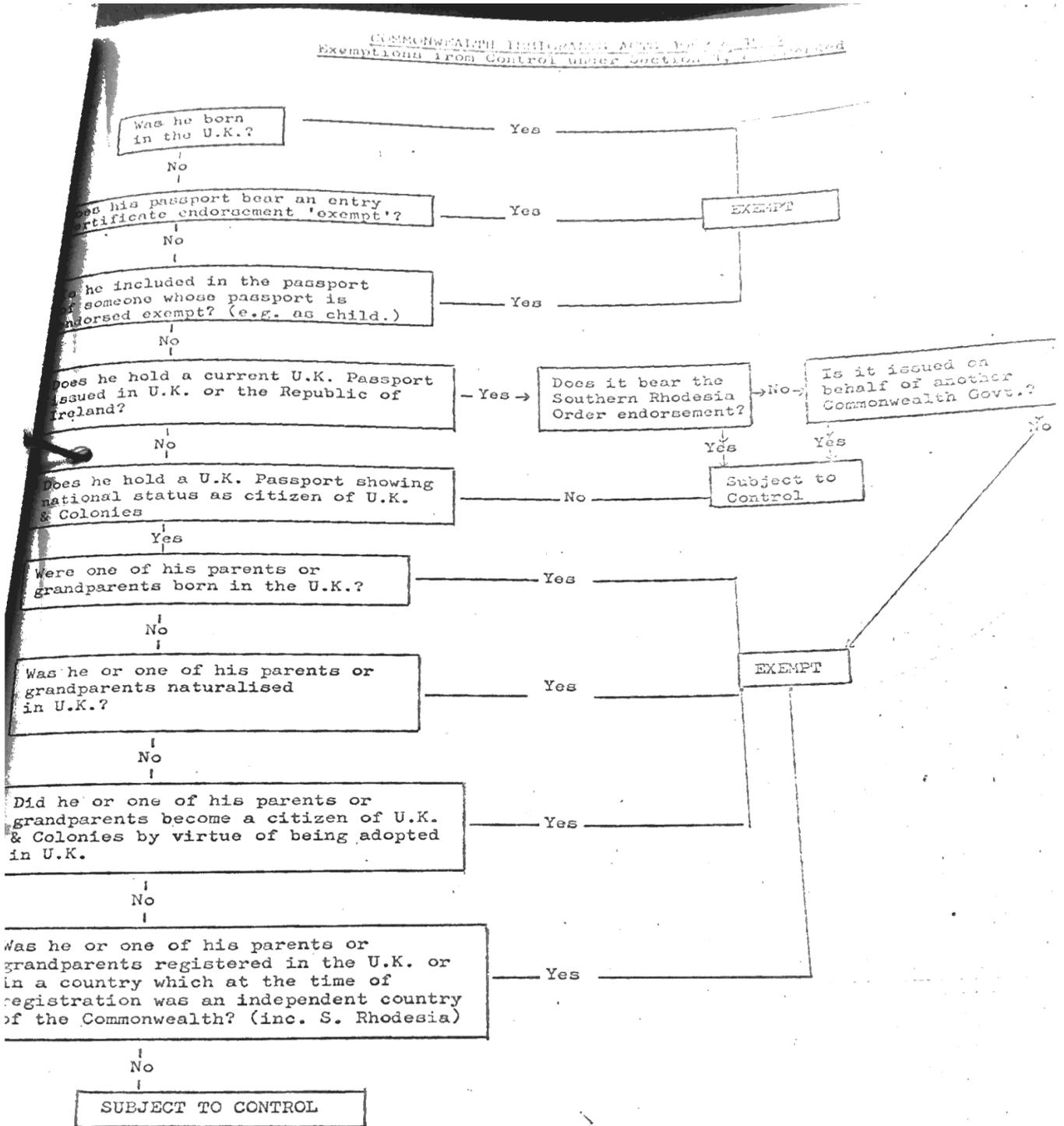
³⁰ The start of paragraph 7 of the Immigration Instructions of 1962 (CMD 1716).

information for reference.³¹ This included the endorsements used by the UK Passport Office, the various stamps used at entry or to vary or revoke conditions, and a flow chart for determining if a Commonwealth citizen was subject to control.³² These were frequently amended and parts of these are held at the National Archives at Kew, London.

If the person was not subject to control, exempt from control or admitted without conditions, his passport would receive a bare rectangular date stamp, sometimes known as an “open stamp”. If he was admitted with conditions the same date stamp had an endorsement annotated, using a rubber stamp or by hand. This is stated in unpublished instructions. There was evidently no record keeping system for such admissions. That has left a problem for those who need proof of such an admission. A departure from the UK was recorded by a triangular stamp. Thus, being the only record of admission without conditions, the remarkably understated bare date stamp was of great value to a person subject to control – yet it had the least information and its importance may not have been apparent. In fact open stamps were sometimes used after 1972 and in some cases constituted a valid grant of indefinite leave to enter.

³¹ The “Blue Book”, later a chapter in Volume 41 of the Diplomatic Service Procedures.

³² See TNA 344/86 and FCO 50-273.



1. Flow Chart for determining if a Commonwealth citizen was subject to control under the CIA 1962 and 1968, issued to Entry Certificate Officers by the Home Office in about 1970 (TNA HO 344-86)

The Position of Commonwealth Citizens at the end of 1972

Common examples of a Commonwealth citizen who was not subject to conditions immediately before 1973 are if:

- He had entered the UK before July 1962 and remained in the UK since that time.
- He had entered the UK between July 1962 and December 1972, with a bare date stamp at last entry.
- She had entered with a husband who was admitted, or her husband was already resident (see above).
- He had entered as a child aged under 16 years accompanying a parent who was admitted, or he had a parent already resident (see above, the test involves both parents for an entry from 2 March 1968).
- He had entered the UK at any time and his conditions had later been revoked.
- He had entered the UK without being examined by an immigration officer in the circumstances described at 14, 15 and 16 above.
- He held or was included on a British Passport current on 31 December 1972, of a type described at 2, 3 or 4 above.
- He had entered the UK at a time when he held or was included on a British Passport of a type described at 2, 3 or 4 above.

Immigration Act 1971 ('IA 1971') - General

This Act took effect from 1 January 1973 and replaced the CIA 1962 (whose structure it resembled) and the Aliens Restrictions Acts 1914 and 1918. A class of persons called 'patrials' with 'right of abode' was defined in section 2 and not subject to control under the Act. It was a recognisably similar class of persons to those who were defined in section 1(2)(b) of the CIA 1962 and had been free of the control since 2 March 1968. Leave to enter or remain was required by non-patrials, and this leave lapsed on departure (section 3(4)), unlike conditions under the CIA 1962 which persisted until a re-examination on re-entry. Leave was granted in accordance with rules reviewed by Parliament, which initially comprised four sets of rules made in January 1973, two for Commonwealth citizens (HC 79 and HC 80 of 1973) and two for aliens and EEC nationals (HC 81 and HC 82 of 1973). The bill which became the IA 1971 was described in Parliament as preserving the existing rights of

Commonwealth citizens settled in the UK before 1973, though as shown below these rights were not that well preserved³³. Holders of a UK passport issued in the UK, Islands or Ireland continued to enjoy benefits under the Immigration Rules³⁴ similar to those in item 2 in the Exempt List above.)

Immigration Act 1971 - Transitional Provisions

The IA 1971 conferred indefinite leave to enter or remain automatically onto two partially overlapping groups of non-patrials, through two transitional provisions.

Firstly, under section 1(2),

indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).

Meaning of the term “settled” arises from various provisions in the IA 1971:

2(3)(d) subject to section 8(5) below, references to a person being settled in the United Kingdom and Islands are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain.

8(5) Where a person having a limited leave to enter or remain in the United Kingdom becomes entitled to an exemption under this section, ...; and a person is not to be regarded for purposes of this Act as having been settled in the United Kingdom and Islands at any time when he was entitled to an exemption under subsection [8] (3) or (4)(b) or (c) above or, unless the order otherwise provides, under subsection (2) or to any corresponding exemption under the former immigration laws or under the immigration any of the laws of Islands.

32(2) It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or in any of the Islands at a time when he is there in breach of the immigration laws.

33(1) "immigration laws" means this Act and any law for purposes similar to this Act which is for the time being or has (before or after the passing of this Act) been in force in any part of the United Kingdom and Islands;

Thus to be “settled” a person has to be resident in the UK, any presence in the UK must not be in breach of the immigration laws, and he must be free of time limit, and not be entitled to exemption under section 8 (employment related). This appears to be tested at the start of 1 January 1973 (rather than the end of the day

³³ In particular the pre-existing rights of family re-union ended in 1988 when section 1(5) was repealed.

³⁴ Para 4 of the *Immigration Rules for Control on Entry of Commonwealth Citizens* (HC 79).

before). Thus a person resident and physically present³⁵ in the UK at the end of 31 December 1972 and who was not subject to a time limiting condition (and not reliant on exemption), and entry to the UK was lawful, clearly acquired on 1 January 1973 indefinite leave to enter or remain.³⁶ A person who on 1 January 1973 was absent from the UK on a short trip, or who was serving in the UK forces and so enjoyed exemption³⁷, did not benefit. It seems odd that absence is a disqualification given the words “leave to enter or remain” used to describe the status conferred, as leave to *enter* is intended for those located outside the UK.

Immediately before 1973, a Commonwealth citizen who overstayed his condition was present unlawfully, a Commonwealth citizen who entered clandestinely before 9 March 1968 (other than one refused entry or under a deportation order) entered lawfully and was not subject to conditions, and a Commonwealth citizen who entered clandestinely on or after 9 March 1968 generally entered unlawfully and was not subject to conditions.

Questions arise as to how these qualities in the prior law affected the meaning of “ordinary residence” on 1 January 1973. In the IA 1971 as originally enacted there is no definition of who is “there in breach of the immigration laws”. Is a person who was present in the UK at the end of 31 December 1972 in breach of the old immigration laws automatically in breach of the new laws that commenced a moment later? The transitional provisions of the IA 1971 (section 34) do not address these points. If a person had entered the UK unlawfully before 1973, was he was unlawfully present in the UK i) immediately before 1 January 1973 under the CIA 1962³⁸? and ii) at the start of January 1973 under the IA 1971? Various cases give conflicting outcomes.³⁹ The assumption of this article is that overstayers present immediately prior to 1973 were in breach of the immigration laws from 1 January 1973, and some illegal entrants were.

If a person was subject (or not) to a time limiting condition at the end of 31 December 1972 under the CIA 1962, was he free (or not free) of a time limit on his stay at the start of January 1973 under the IA 1971? The answer seems to be yes because of section 34(3) of the IA 1971, quoted below. A person last admitted without conditions, one whose conditions had been revoked (lifted), or a person last admitted with conditions and who

³⁵ This arose from case *R v Secretary of State for the Home Department, ex p Mughal* [1974] QB 313, [1973] QB 313, [1973] 3 All ER 796, [1973] 3 WLR 647, 137 JP 846. Ordinary residence is asserted in *Agyen-Frempong v. Immigration Appeal Tribunal*, [1988] Imm AR 262. See also *Taneja v. Entry Clearance Officer, Chicago*, [1977] Imm AR 9, and *R v. Secretary of State for the Home Department v Patel* [1979-1980] Imm AR 106.

³⁶ See Macdonald's Immigration Law and Practice, 8th Edition para 5.19.

³⁷ Under section 8(4)(a) of the IA 1971.

³⁸ In general that could only result from an unlawful entry from 9 March 1968, and whether that resulted in ongoing unlawful presence is not free from doubt.

³⁹ *R v. Secretary of State for the Home Department, Ex parte Khan*, [1990] 2 All ER 531, [1990] 1 WLR 798, [1990] Imm AR 327. There are different findings in *Azam and Others v. Secretary of State for the Home Department and Another*, [1974] AC 18, [1973] 2 All ER 765, [1973] 2 WLR 1058, 137 JP 626 and *Rahim Miah v. Secretary of State for the Home Department*, [1990] 2 All ER 523, [1990] 1 WLR 806, [1989] Imm AR 559. See also *R v. Secretary of State for the Home Department, Ex parte Razak* [1986], and *Bashir v. Immigration Officer, Dover*, [1976] Imm AR 96.

overstayed his time was not subject to a time limit⁴⁰. But in the case of the overstayer he appears on 1 January 1973 to be present in breach of the immigration laws⁴¹ and he does not have ordinary residence.

The indefinite leave acquired under section 1(2) of the IA 1971 appears to comprise a single acquisition on 1 January 1973, and to have been as durable (or tenuous) as indefinite leave to enter or remain granted administratively on or after that date, i.e. it lapsed on departing from the Common Travel Area⁴² (section 3(4) of the IA 1971), but it would normally be re-granted on entry if the absence was less than 2 years⁴³ (in the case of a departure after 1 Oct 2000 the indefinite leave lapsed only after an absence of 2 years⁴⁴).

The Home Office view is that a Commonwealth citizen settled in the UK on 1 January 1973, and later absent for more than two years, but before 30 July 1988, would not lose indefinite leave, or at least is now entitled to admission with indefinite leave to enter.⁴⁵

Secondly, under section 34(3), a person who had been admitted to the UK without conditions, between July 1962 and December 1972, and who was not subject to conditions on 31 December 1972, automatically acquired indefinite leave to enter on 1 January 1973.⁴⁶ It did not matter where the person was resident or located on that date.

Section 34(3) is even harder to understand:

(2) Without prejudice to the generality of subsection (1)(a) and (b) above, ... a person given leave to land by virtue of that Act [Aliens Restriction Act 1914] shall be treated as having been given leave to enter under this Act; and similarly with the Commonwealth Immigrants Acts 1962 and 1968.

(3) A person treated in accordance with subsection (2) above as having leave to enter the United Kingdom-

(a) shall be treated as having an indefinite leave, if he is not at the coming into force of this Act subject to a condition limiting his stay in the United Kingdom;

⁴⁰ It has been a long recognised principle that an overstayer is not subject to a time restricting his stay. The definition of "ordinary residence" in section 2(2) of the CIA 1962, akin to "settled", expressly excluded overstayers.

⁴¹ In the IA 1971 as originally enacted there is no definition of who is "there in breach of the immigration laws". See the cases referred to the cases in footnote 35.

⁴² The UK, Islands and Republic of Ireland.

⁴³ Under the Immigration Rules provision was made for "returning residents". See Macdonald's Immigration Law and Practice, 8th Edition paras 5.26 to 5.34 for a discussion of all types of returning residents.

⁴⁴ Immigration (Leave to Enter and Remain) Order 2000 (No. 1161).

⁴⁵ See Home Office guidance for an NTL application.

⁴⁶ See Macdonald's Immigration Law and Practice, 8th Edition para 5.20.

(b) shall be treated, if he is then subject to such a condition, as having a limited leave of such duration, and subject to such conditions (capable of being attached to leave under this Act), as correspond to the conditions to which he is then subject, but not to conditions not capable of being so attached.

The choice of words for the status granted - "leave to enter" - suggests this provision was aimed at persons located outside the UK on 1 January 1973.⁴⁷ The words for the first requirement in section 34(2) – "a person given leave to land" suggests the person must have received an *express grant* of leave on a past entry to the UK, and the reference to "Commonwealth Immigrants Acts 1962 and 1968" limits it to those Commonwealth citizens admitted to the UK during the life of the CIA 1962, following examination;⁴⁸ otherwise any Commonwealth citizen who last visited the UK before July 1962, such as a visitor, could have acquired indefinite leave to enter under section 34(3). But such a person may have benefited from section 1(2) as described above if he remained resident in the UK until 1973. It might not have benefited a Commonwealth citizen who arrived in the UK during the life of the CIA 1962 and was not subject to control under section 1 or exempt under section 17, but such a person would normally receive an open stamp like a person subject to control and admitted without conditions, and cannot be readily distinguished.

The second requirement in 34(4) is that the person was not "subject to a condition limiting his stay". That would be true of a person last admitted without a condition, whose last condition had been revoked (lifted), or (probably) had entered with a condition and had remained beyond its time limit.

The indefinite leave conferred by section 33(4) of the IA 1971 appears to comprise a single grant on 1 January 1973 and would survive until the person first visited the UK after that date, but it would be lost on subsequently departing the Common Travel Area (as described above)⁴⁹. It is quite possible that such a person attempting to return to the UK after 1 January 1973 was not recognised by the Immigration Officer as possessing indefinite leave to enter under section 33(4) and who was admitted with limited leave and thus did not attempt to stay longer or establish indefinite leave to remain. This second transitional provision is buried deep in the Act and few authors, practitioners or judges seem aware of it⁵⁰. Its scope is vague. In preparing this article, no cases were found which determined if a person did or did not benefit from it.

In summary, as regards persons who entered the UK before 1973:

⁴⁷ Though section 1(2) conferred to "leave to enter", it was found to apply only to a person present in the UK on 1 January 1973.

⁴⁸ It might even be limited to persons admitted at a time whilst subject to control following the line of reasoning in *R v Secretary of State for the Home Department, ex Himalyaishwar* (1984) Times.

⁴⁹ See *Taneja v. Entry Clearance Officer, Chicago*, [1977] Imm AR 9.

⁵⁰ Though in the Bill presented to Parliament the clause which became section 1(2) was nearly adjacent, making apparent the existence both avenues.

- section 1(2) conferred ILR on a person who at the end of 31 December 1972 was resident and present in the UK, without a time limiting condition and was not on 1 March 1973 present unlawfully or entitled to exemption (section 8, related to employment). It seems to not have benefitted overstayers, but may have benefitted some illegal entrants.
- section 33(4) conferred ILE on persons who entered the UK between July 1962 and December 1972 and were admitted by an Immigration Officer without conditions (other than through exemption under section 17) and at the end of 31 December 1972 were without a time limiting condition. It may have benefitted overstayers, but not illegal entrants (who would not have been examined).

The two transitional provisions do not appear to have captured situations that were surely intended to benefit, for example:

- A person who became resident in the UK before July 1962 (and did not depart and re-enter) and was temporarily absent on 1 January 1973,
- A person who was serving in the Home Forces on 1 January 1962.

The Immigration Rules for Control on Entry of Commonwealth citizens (HC 79 of 1973) stated in para 51:

A passenger who satisfies the Immigration Officer that he *was settled in the United Kingdom at the coming into force of the Act*, and that he has been settled here at any time during the 2 years preceding his return, is to be admitted for settlement. Any other passenger returning to the United Kingdom from overseas (except one who received assistance from public funds towards the cost of leaving this country) is to be admitted for settlement on satisfying the Immigration Officer that he was settled in the United Kingdom when he left and that he has not been away for longer than 2 years.

A person who was settled in the UK immediately before 1 Jan 1973 and who missed out on section 1(2) on account of say physical absence on that date, and who also somehow missed out on section 33(4), could return to the UK before 1975, or depart and then return with two years of that departure or the time his ordinary residence ended⁵¹, to take advantage of this rule. But it was in some ways less generous as the later returning residence rules which requires only ILR at the time of last departure two years before, this rule required the person to be settled then and on 1 January 1973.

⁵¹ It is possible that a person's ordinary residence continued for a significant period of time during a period of absence.

Para 5 went some way to preserve the rights held by UK passport holders before 1973⁵² (items items 2 and 4 in the Exempt List above). Rules which represented in a simple way all the rights held by a Commonwealth citizen settled in the UK on 1 January 1973 would have been complicated⁵³.

Thus para 59 constituted a kind of third alternative transitional provision, though not an automatic one.

No equivalent seems to exist in the Immigration Rules for Control after Entry of Commonwealth citizens (HC 80). Presumably persons who fell through the cracks were granted leave on a discretionary basis outside the rules if they applied for it or the 1974 amnesty, described below.

In addition, section 1(5) of the IA 1971, in force until 30 July 1988, provided that

(5) The rules shall be so framed that Commonwealth citizens settled in the United Kingdom at the coming into force of this Act and their wives and children are not, by virtue of anything in the rules, any less free to come into and go from the United Kingdom than if this Act had not been passed.

Until 30 July 1988, a person who had been settled in the UK on 1 January 1973, his child (even if born after that date) or a wife (even through a marriage after that date) could enjoy a right to enter or remain in the UK⁵⁴, if he or she would have enjoyed a right to live, enter or remain in the UK under the pre-1973 law, and thus the categories in the Exempt List above are relevant. In practice, a child or wife needed to be a Commonwealth citizen aged under 16 years.⁵⁵ The first set of *Immigration Rules for Control on Entry of Commonwealth Citizens* made provision for this (HC 79, para 39). However, the Home Office was reluctant to admit on this basis a woman who married after 1972 a Commonwealth citizen settled in the UK on 1 January 1973. The repeal of section 1(5) was probably motivated by a desire to terminate its use to for this purpose, but the entire provision was repealed to cause a loss of rights for any child or wife, whenever born. The Home Office view today is that the past existence of this provision means that a Commonwealth citizen settled in the UK on 1 January 1973 may have his absence from the Common Travel Area for any length of time between 1 January 1973 and 30 July 1988 disregarded, and has a right to be admitted with indefinite leave to enter.⁵⁶

⁵² An endorsement concerning the government on behalf of whom the passport remained relevant here for a passport issued in the CTA.

⁵³ Thus the policy mentioned below of ignoring long absence from the UK before 30 July 1988 seems a reasonable and practical solution.

⁵⁴ Confirmed in *Secretary of State for the Home Department v. Zalihe Huseyin*, [1988] Imm AR 129; *R v Immigration Appeal Tribunal ex parte Ruhul* (CA transcript 31 July 1987, now reported, [1987] Imm AR 587); *Afuah Foriwa Poku v. Secretary of State for the Home Department*, [1986] Imm AR 119;

R v. Secretary of State for the Home Department, Ex parte Rajinder Kaur, Kulvinder Kaur, ... and Ranjit Kaur, [1987] Imm AR 278.

⁵⁵ *O'Shea v. Secretary of State for the Home Department*, [1988] Imm AR 484.

⁵⁶ This view has also been expressed by John Vassiliou.

Current Immigration Rules

There are three further provisions in the current law which can in some cases aid Commonwealth citizens born before 1973.

Under section 7 of the IA 1971, a Commonwealth citizen who had been lawfully resident in the UK on 1 January 1973 and who has been lawfully resident in the UK for the previous 5 years, is generally exempt from deportation.

Under para 16 of the current Immigration Rules, a UK national subject to control has a right to be granted indefinite leave on entering the UK if he can produce a UK passport issued in the UK and Islands before 1973, issued to him or on which he was included, and which was not endorsed to show he was subject to immigration control⁵⁷.

Under para 17 of the current Immigration Rules, a British Overseas citizen subject to control has a right to be granted indefinite leave on entering the UK if since 2 March 1968 he was admitted to the UK without conditions or had his conditions lifted, or he was (after 1972) granted indefinite leave to enter or remain.⁵⁸ This paragraph seems redundant as regards a person who acquired indefinite leave to enter under section 34(3) (see above) unless he visited the UK after 1972 and was then absent for 2 years. The Immigration Directorate's Instructions extend this treatment to British subjects and British protected persons under the British Nationality Act 1981.

The Immigration Rules made after January 1973 and before the present Rules have not been examined for this article.

The 1974 and 1977 Amnesties and Pre-1973 Illegal Entrants

The Home Secretary made an announcement in reply to a written question in the House of Commons on 11 April 1974 as follows:

"I have now reached a decision regarding the exercise of the administrative power under the Immigration Act 1971 to remove illegal entrants who are Commonwealth citizens or citizens of Pakistan. This power, which came into effect on 1 January 1973, applies to those who entered this country illegally before that date, and who were irremovable by administrative means until the law was changed with retrospective effect."

"... I have decided not to exercise the power of removal in respect of those who were adversely affected by its retrospective operation. This means that I shall not direct the removal of any Commonwealth citizen or citizen of

⁵⁷ An endorsement concerning the government on behalf of whom the passport is not relevant here. For commentary see Macdonald's Immigration Law and Practice, 8th Edition 8th Edition para 5.27. This is the residue of para 5 in HC 79 of the 1973 Immigration Rules.

⁵⁸ For commentary see Macdonald's Immigration Law and Practice, 8th Edition 8th Edition para 5.28.

Pakistan who entered illegally before 1 January 1973. Those in this category will, on application to the Home Office and verification of the facts, be given indefinite leave to remain. Their dependants will, in accordance with the immigration rules, be admitted when they have obtained entry certificates."

"... My decision does not extend to those who were not adversely affected by the retrospective provisions in the Act of 1971 and so does not apply to foreign nationals other than citizens of Pakistan, to deserting seamen, to stowaways, to people who entered in defiance of a deportation order or to people who entered lawfully but then overstayed."

If the statement above accurately describes the implementation of the amnesty, then it only benefited unlawful entrants. Note that persons who entered clandestinely were in many cases not subject to a time limiting condition (see 14, 15 and 16 above). Those who entered legally after June 1962 and overstayed a time limiting condition were expressly excluded. It was thus not that generous, and only 1990 persons evidently had applied after two years⁵⁹.

Another amnesty was announced on 29 November 1977⁶⁰ that Commonwealth citizens or citizens of Pakistan whose last entry had been secured by deception before 1 January 1973 could apply to have their stay regularised.

The final deadline for both amnesties was evidently the end of 1978. Thus the first Immigration Rules and the amnesty did not help those who slipped through the lacunas in the transitional provisions. This point is considered below.

Right of Abode or Patriality

Between 1973 and 1982, a CUKC who had at any time been lawfully resident in the UK for 5 years, even before 1973, and had no time limit on his stay (other than as a result of an employment related exemption⁶¹) acquired right of abode and became patrial.⁶² Such status could not be lost by absence from the UK, but loss of CUKC would end such right of abode and not cause any leave previously held to revive, thus leaving the person with no rights to remain in the UK, apart from possibly section 34(3).

⁵⁹ *What's new about new immigrants in twenty-first century Britain?*, Runnymede Trust, 2005.

⁶⁰ Hansard 29 November 1977, Written Answers cols 125-128.

⁶¹ Under section 8 of the IA 1971 or section 17 of the CIA 1962, such as diplomatic staff, visiting forces, seamen, airline staff, employees of international organisations, but 8(5) precludes such person from the definition of "settled".

⁶² IA 1971, section 2(1)(c), 2(3)(d) and 8(5).

Many persons lost CUKC when the country through which it was held became independent of the United Kingdom. Many residents of the UK who lost CUKC between 1973 and 1978 simultaneously lost right of abode. Many who lost CUKC between 1957 and 1972 lost the opportunity to acquire right of abode on 1 January 1973 even though they had acquired the qualifications for right of abode. Surprisingly there was no provision in independence or immigration legislation for CUKC with right of abode before 1979, and such persons generally lost CUKC and right of abode to be cast into a legal limbo.⁶³ However from 1979 the position improved: the independence legislation for Dominica and Belize (British Honduras) did not terminate the CUKC of those with right of abode. CUKC with right of abode immediately before 1 January 1983 automatically became British citizenship and such citizenship has not been affected by independence legislation.

A female Commonwealth citizen (not a British protected person) who married before 1983 a man who had right of abode or met its requirements before 1973 generally acquired right of abode, and this would not be lost when CUKC was lost under independence legislation so long as she remained a citizen of a Commonwealth country.

A remedy for those who had and then lost right of abode is proposed below.

The Process for Proving Indefinite Leave to Enter or Remain

A Commonwealth citizen who lived in the UK before 1973, who does not have British citizenship or right of abode, and who wishes to remain in the UK, needs certification of immigration status. In almost all cases the normal certification is a "Biometric Residence Permit", which is suitable for a person with indefinite leave to remain.

Ideally there should also be, in parallel or later:

- A search for any past grant of British citizenship or CUKC in the UK, such as by registration as a minor;
- Evaluation of an automatic claim to British citizenship;
- For a woman who married a Commonwealth citizen before 1983, right of abode;

Note that a "Biometric Residence Permit" would be evidence that the person has indefinite leave to remain. It does not cause a grant of such leave.

At the time of writing it appears that it is generally sufficient to demonstrate to the Home Office that the applicant:

- Was a Commonwealth citizen and 'ordinarily resident' in the UK on 1 January 1973

⁶³ The late Ann Dummert had raised this as a concern.

- Has not been absent from the UK since 1 August 1988 for more than two years
- Is ordinarily resident in the UK at the date of the application and has been for the previous 5 years.

This is a lighter version of the test in section 1(2) of the IA 1971 which requires that the person present in the UK or Islands was “settled” on 1 January 1973, i.e. ordinarily resident and not subject to time restrictions. Ordinary residence on 1 January 1973 would require that the person’s presence in the UK was also lawful. (for discussion see above).

An important question to ask is “Could the person have been made subject to conditions on an entry to the UK before 1973?”. Consider the Exempt List above and the common scenarios under the heading 'The Position of Commonwealth Citizens at the end of 1972' above.

Note that a person not resident or present in the UK on 1 January 1973 may have acquired indefinite leave under section 34(3) of the IA 1971, which does not require that the person was present or resident in the UK or Islands on 1 January 1973 (see above).

Evidence and Burden of Proof

The CIA 1962 made provision for landing and embarkation cards (section 5 of the First Schedule). Any landing cards completed by Commonwealth citizens, even those admitted for the first time without conditions, appear not to have been retained.⁶⁴ It is not known if the conditions of admission were systematically recorded on such cards, but useful information such as if a child was travelling with a parent, or a wife with a husband, would have been recorded.

In fact, the instructions to Entry Clearance Officers in 1970 stated “The Home Office keep no record of Commonwealth citizens admitted unconditionally, and cannot trace all of those admitted subject to conditions.”⁶⁵

It seems therefore that the only hard evidence of admission without conditions would be:

- The stamp in the passport used, or,
- The stamp on an entry clearance certificate, or an employment or Special Voucher.

⁶⁴ No Orders in Council for landing cards were made under the CIA 1962.

⁶⁵ TNA HO 344/86.

In contrast, non-Commonwealth citizens (aliens) were recorded fairly systematically. Aliens were required to register periodically with the police, while the Home Office normally maintained a file on each. These records were generally kept at least until an alien naturalised as a CUKC.

What is stated above regarding admission to the UK before 1973 is also true of many persons admitted to the UK from 1973, who were granted “indefinite leave to enter” at entry or whose passport was stamped “no time limit” at entry. These stamps were often copied placed in a new passport in reliance on a stamp in an expired passport, in some kind of precarious relay system, which failed if a passport was lost, stolen or not returned. Records other than the passport stamps are often hard or impossible to obtain.

In contrast, in many countries, such as the US, Canada and Australia, the first entry of a person with ‘permanent residence’, even if granted on arrival by an immigration officer, would be carefully recorded and this record would end up in a central register and can still be accessed today, usually with the landing form completed by the entrant. In fact, the record of grant or first entry with permanent residence is treated with similar importance to a record of grant of citizenship.

As regards the revocation before 1973 of conditions limiting the stay of a Commonwealth citizen in the UK, it is not clear what records still exist of the letters sent by the Home Office.

The standard of proof in establishing entitlement to a nationality and immigration status is the normal civil standard of the balance of probabilities (*Kessori Khatun* (4272)), i.e. it is enough to demonstrate better than 50% probability based on facts relating to the case, prevailing law, policies and practices. In particular, the Immigration Instructions operative when a person entered the UK may indicate if he or she would have been eligible for admission without conditions.

Where evidence is lacking, other factors can be taken into account to build a case based on probability. As mentioned above, the Home Office have not kept records of an exceptionally important nature, namely admission without conditions before 1973. Therefore, expectations of evidence from claimants cannot be so high.

As mentioned, before July 1965, most Commonwealth citizens who entered the UK (having lived abroad) were admitted without conditions.

Sources of Evidence of Entry or Residence

For persons who arrived in the UK by ship, as was common before 1960, there are passenger lists.

If a person entered as a minor his entry can be inferred by birth outside the UK and health and schooling records.

If a woman entered with a husband this can be inferred from electoral registers later showing joint residence and full birth certificates of any children born in the UK subsequently.

Records of residence prior to 1973 exist in electoral register records, records of tax and national insurance, records of benefits, council rates, community charge, council tax, records of driving licenses and vehicles at the DVLA, records of schooling, examinations or vocational qualifications, records of radio or television licenses, records of a marriage, divorce or birth of a child in the UK. Other records would be rental agreements, utility bills, employment contracts, payslips, bank statements, records held by dentists, medical practitioners and pharmacies. Data from each ten year census (which included children in a household) could also be very useful, though there is no public access to census data after the 1911 census. The records for the 1971 census and the 1981 census appear most relevant. Registration for "National Registration Identity Cards" was mandatory until February 1952, and registration for National Service until sometime in 1960⁶⁶. For children, far fewer records are available.

There may in some cases be a record of a UK passport issued in the UK between July 1962 and December 1972, which may prove or strongly suggest that the holder or a person included was not subject to control, under 2, 3 or 4 above. Note however the change on 2 March 1968. There may also be a record of a passport issued by the High Commission or consulate in the UK of the person's country of citizenship, demonstrating presence in the UK.

Recommendations

It is not known what proportion of Commonwealth citizens who suffered in the hostile climate applied for a BRP or what proportion were refused, or the main reasons for refusal. It is surmised that two main factors amongst others have contributed: i) a lack of understanding by Home Office staff of the old immigration laws and policies applying to Commonwealth citizens who arrived in the UK before 1973, and ii) difficulties of finding evidence of residence in the UK, both before 1973 and since, including evidence of lack of absences since 1973. It is also likely that in many cases these persons did at some point after 1972 receive a stamp in a passport, or letter, confirming indefinite leave to remain or enter, or no time limit, but that such passports and letters are no longer held by the applicant and the Home Office cannot locate any record of these.

⁶⁶ It was phased down from 1957 and only men born after 1 October 1939 had to register.

Given the challenges to find evidence of residence, the complexities as regards the law, such as section 34(3) of the IA 1962, section 1(5) of the IA 1971, and uncertainty regarding those lawfully present on or immediately before 1 January 1973, an express grant of indefinite leave to enter or remain following an application seems the most practical solution, as the grant of itself confers the leave and the underlying evidence would not be needed again. It would avoid doubt being cast in the future on biometric cards being issued during a period of political pressure. An *en masse* automatic grant would still mean that each person seeking a biometric card would have to provide evidence for the claim⁶⁷.

For that purpose new rules are proposed that should be fairly easy to administer. These are discussed below.

- 1) **Legal Aid:** For Commonwealth citizens who arrived in the UK before 1973 there should be Legal Aid for immigration and nationality advice.
- 2) **Facilitated access to records.** The Home Office should fund services which have access to all major online record services to find data from public sources and if possible arrange permission for access to the census data for the years 1951 to 2001. Access could be limited to data relating to the person needing help or a parent.
- 3) **Provision in the new Immigration Bill.** A provision for British citizenship by registration by a person who ceased being a CUKC due to independence legislation on a date i) when he had right of abode, or ii) before 1973 on a date by which he met the requirements for right of abode (set out in section 2 of the IA 1971 as originally enacted). This change would in effect treat such former CUKC on an similar footing to CUKC from Belize, Antigua and Barbuda, Saint Kitts and Nevis.
- 4) **Additions to the Immigration Rules.** It is also suggested that the Home Secretary should add a new rule to the Immigration Rules for a grant of indefinite leave to Commonwealth citizens who arrived in the UK before 1973, which is i) easy to administer, ii) helps persons lacking evidence or left behind by the drafting gaps of the transitional provisions, sections 1(2) and 33(4), of the IA 1971. The new rules could be on the lines of:

A Commonwealth citizen or British protected person who either:

⁶⁷ En mass grants of leave were made to Polish nationals resident in the UK in the 1950s.

- i. Immediately before 1 Jan 1973 was resident in the UK and not subject to a condition, and was not on that date reliant on exemption under section 8 of the IA 1971 other than as a member of the Home Forces,
- ii. Between 1 Jul 1962 and 31 Dec 1972, was admitted to the UK without conditions following an examination by an Immigration Officer and was not reliant on exemption under section 17 of the CIA 1962 other than as a member of the Home Forces, or,
- iii. Was resident in UK for a period of 5 years that started before 1 Jan 1973.

AND the person has been resident in the UK over a period of 5 years before application, or,
the person has not been absent from the UK for more than two years since 30 July 1988, or,
the person attempted to enter (or obtain Entry Clearance) the UK after 1973 (and after ceasing residence in the UK) and was not granted nor recognised as having indefinite leave to enter or remain.

Rule (i) above is a more practical version of section 1(2) of the IA 1971 and has no lacunas.

Rule (ii) above is a more practical version of section 33(4) of the IA 1971.

Rule (iii) above caters for overstayers or those subject to a time limit on 1 Jan 1973 who missed out on section 1(2) or possibly 33(4) of the IA 1971 and the amnesty of 1974. Appearance in the electoral registers or census of two years separated by an interval of 5 to 15 years should be regarded as sufficient evidence.

Appendix A: Case Studies

These illustrate a variety of situations, in which a person might be start or cease to be:

- subject to control under the CIA 1962
- subject to conditions under the CIA 1962
- patrial (having right of abode) under the IA 1971
- a CUKC.

Today the person might be a British citizen, have indefinite leave to remain or have no UK immigration status at all.

Example 1: A CUKC from Jamaica

In 1956 a CUKC born in Jamaica was issued with a passport by the government of Jamaica.

In 1960 he came to the UK to work.

From July 1962 he was subject to control under the CIA 1962. He was not subject to conditions. He had accumulated two years of unrestricted residence and was thus entitled to re-enter the UK without being subject to conditions.

On 6 August 1962 he became a citizen of Jamaica and ceased being a CUKC. He remained free of conditions.

On 1 January 1973 he was present in the UK and acquired indefinite leave to remain under section 1(2) of the IA 1971.

On 1 January 1983 he did not acquire British citizenship.

Example 2: A CUKC from Grenada

In 1956 a CUKC born in Grenada was issued with a passport by the government of Grenada.

In 1960 he came to the UK to work with his wife, also born in Grenada and a CUKC.

From July 1962 he was subject to control under the CIA 1962. He was not subject to conditions and having accumulated two years of unrestricted residence he was entitled to re-enter the UK without being subject to conditions.

In 1966 he applied for a UK passport in London (to replace his Grenada passport). He was issued with a passport not endorsed as being issued on behalf of the government of Grenada, because he was free of conditions. He was no longer subject to control under the CIA 1962.

On 1 January 1973 he and his wife acquired right of abode under section 2(1)(d) of the IA 1971 as he had been resident in the UK for 5 years and was not subject to a time limit. His wife also acquired right of abode under section 2(2) of the IA 1971 through marriage to him.

On 7 Feb 1974 he and his wife became citizens of Grenada and ceased being CUKC. He lost right of abode. He had no clear immigration status in the UK. His wife retained right of abode through section 2(2) of the IA 1971 which applies to any Commonwealth citizen, not just CUKC.

On 1 January 1983 he did not become a British citizen.

Example 3: A CUKC from British Honduras (later Belize)

In 1956 a CUKC born in British Honduras was issued with a passport by the government of British Honduras.

In 1960 he came to the UK to work.

From July 1962 he was subject to control under the CIA 1962. He was not subject to conditions. He had accumulated two years of unrestricted residence and was thus entitled to re-enter the UK without being subject to conditions.

In 1966 he applied for a UK passport in London (to replace his British Honduras passport). He was issued with a passport not endorsed as being issued on behalf of the government of British Honduras, because he was free of conditions. He was no longer subject to control to control under the CIA 1962.

On 1 January 1973 he acquired right of abode under section 2(1)(d) of the IA 1971 as he had been resident in the UK for 5 years and was not subject to a time limit.

On 21 September 1981 he became a citizen of Belize, but he remained a CUKC because he had right of abode in the UK.

On 1 January 1983 he acquired British citizenship.

Example 4: A CUKC from the Colony of Aden

In 1956 a CUKC born in the Colony of Aden was issued with a passport by the government of Aden. From July 1962 he was subject to control under the CIA 1962.

In 1965 he came to the UK to study and conditions were imposed at entry which limited his stay to 2 years.

In 1966 he applied for a UK passport in London (to replace his Aden passport). He was issued with a passport endorsed as being issued on behalf of the government of Aden as he was still subject to conditions. He remained subject to control under the CIA 1962.

On 30 Nov 1967 Aden ceased being a colony, but because he was ordinarily resident in the UK he retained CUKC.

Soon after, he applied for a UK passport. He was issued with a passport not endorsed as being issued on behalf of another country, because his CUKC was no longer dependent on Aden colony. He ceased to be subject to control (see 2 or 3 above). The same would also have been true if his passport had been issued by a UK post overseas because he is a CUKC (see 3 above).

On 2 March 1968, when the CIA 1968 commenced, he remained free of control because his UK passport was issued in the UK. But if it had instead been issued by a UK post overseas (other than Ireland) he would resume being subject to control (as 3 above ceased), though at entry to the UK he could not have been subject to conditions because of his recent ordinary residence (see 7 above).

On 1 January 1973 he acquired right of abode under section 2(1)(d) of the IA 1971 as he had been resident in the UK for 5 years and was not subject to a time limit.

On 1 January 1983 he acquired British citizenship.

Example 5: A British Protected Person from Gambia Protectorate

In 1954 a British Protected person born in Gambia Protectorate was issued with a passport by the government of The Gambia. He was subject to control under the CIA 1962 from July 1962.

In 1963 he came to the UK to study and conditions were imposed at entry which limited his stay to 2 years.

In 1964 he applied for a UK passport in London (to replace his Gambia passport). He was issued with a passport endorsed as being issued on behalf of Gambia as he was still subject to conditions. He remained subject to control under the CIA 1962.

On 18 Feb 1965 the Gambia became independent, but he did *not* become a citizen of The Gambia and he retained British Protected person status.

Soon after, he applied for a UK passport. He was issued with a passport not endorsed as being issued on behalf of a Commonwealth country, because his British Protected person status was not dependent on another part of the Commonwealth. He ceased to be subject to control (see 2 above). This would *not* have been true if his passport had been issued by a UK post overseas because he was not a CUKC (see 3 above).

On 2 March 1968, when the CIA 1968 commenced, he remained free of control because his UK passport was issued in the UK.

On 1 January 1973 he was present in the UK and acquired indefinite leave to remain under section 1(2) of the IA 1971.

On 1 January 1983 he did not acquire British citizenship, as he was not a CUKC.

Example 6: A CUKC from Kenya

In 1955 a CUKC born in Kenya Colony was issued with a passport by the government of Kenya.

From July 1962 he was subject to control under the CIA 1962.

On 12 December 1963 Kenya became independent, but he failed to become a citizen of Kenya and he retained CUKC.

In 1965 he was issued with a UK passport by the government of the UK via the British High Commissioner in Kenya; it was not endorsed as being issued on behalf of a Commonwealth country. He ceased being subject to control under the CIA 1962.

In 1965 he came to the UK to work.

In 1971 he returned to Kenya.

On 1 January 1973 he acquired right of abode under section 2(1)(d) of the IA 1971 as he had been resident in the UK for 5 years and was not subject to a time limit.

On 1 January 1983 he acquired British citizenship.

Example 7: A citizen of Trinidad and Tobago

In 1955 a CUKC born in Trinidad and Tobago was issued with a passport by its government.

From July 1962 he was subject to control under the CIA 1962.

On 31 Aug 1962 Trinidad and Tobago became independent, he became a citizen of Trinidad and Tobago and he lost CUKC.

In 1966 he came to the UK to work using a Trinidad and Tobago passport and was admitted with conditions limiting his stay to 2 years. His wife and child accompanying him were admitted without conditions (none could be imposed – see 9 and 11 in the Exempt List above).

In 1968 he returned to Trinidad with his family.

On 1 January 1973 he and his family were resident in Trinidad.

On 1 January 1973 his child and wife acquired indefinite leave to enter under section 34(3) of the IA 1971.

On 1 January 1983 none acquired British citizenship, for none was a CUKC.

Example 8: A Canadian citizen from Canada

In 1955 a Canadian citizen born in Canada was issued with a passport by its government.

From July 1962 he was subject to control under the CIA 1962.

In 1968 he came to the UK to work using a Canadian passport and was admitted with conditions limiting his stay to 6 months.

Two months later his wife and child, who were Canadian citizens, came to join him in the UK and were admitted without conditions (none could be imposed – see 8 and 10/11 under Exempt List above).

In 1970 he returned to Canada with his family.

On 1 January 1973 he and his family were resident in Canada.

On 1 January 1973 his child and wife acquired indefinite leave to enter under section 34(3) of the IA 1971.

His wife visited the UK in 1985 and then departed. Her indefinite leave to enter lapsed on departure.

His son visited the UK in 2001 and then departed. His indefinite leave to enter lapsed after two years.

On 1 January 1983 none acquire British citizenship, for none was a CUKC.