SWEET & MAXWELL

IMMIGRATION LAW

J. M. Evans

SECOND EDITION

MODERN *Legal* STUDIES

MODERN LEGAL STUDIES

IMMIGRATION LAW

by

J. M. EVANS
B.A., B.C.L. (OXON),

Professor of Law, Osgoode Hall Law School of York University, Toronto

SECOND EDITION

LONDON
SWEET & MAXWELL
1983

First Edition 1976
Second Edition 1983

Published by
Sweet & Maxwell Limited of
11 New Fetter Lane, London.
Computerset by Promenade Graphics Limited, Cheltenham
and printed in Great Britain by
Page Bros. (Norwich) Ltd.

British Library Cataloguing in Publication Data

Evans, J.M.
Immigration Law—2nd ed.—(Modern Legal Studies)
1. Emigration and immigration law—Great Britain
I. Title II. Series
344.102'82 K4134

ISBN 0–421–29950–9
ISBN 0–421–29960–6 Pbk

MODERN LEGAL STUDIES

IMMIGRATION LAW

PREFACE

This second edition is substantially longer than its predecessor and has been almost entirely rewritten. The organisational framework remains essentially intact, as does the original objective of attempting to present an account of the principles of contemporary immigration law and policy in their historical, political, social and administrative contexts. The book is intended to provide a case study in English public law.

The book's growth is largely the result of a number of important developments in the law that have occurred since the first edition. The British Nationality Act 1981 came into effect on January 1, 1983 and created out of the former composite citizenship of the United Kingdom and Colonies three new categories, British citizens, British Dependent Territories citizens and British Overseas citizens. This complex and controversial measure required amendments to the definition in the Immigration Act 1971 of those exempt from immigration control. The discussion in Chapter 2 of nationality law emphasises its relationship to immigration law.

The Immigration Rules were comprehensively revised in 1980, and, for the first time, the provisions governing control on and after entry of all those subject to immigration control were published in a single document. In addition to a number of smaller, but often practically important, clarifications and modifications (generally of a restrictive character), their most significant feature was the restriction of the admission of foreign fiancés and husbands of women settled in the United Kingdom, including some who had a right of abode here. At the end of 1982, a new set of Immigration Rules was introduced to

come into force on January 1, 1983, with the British Nationality Act 1981. In some respects, these eased the foreign husbands rule, but they were disapproved by the House of Commons in December, as a result of the combined vote of the opposition parties, who considered that they were still unacceptably discriminatory on racial and sexual grounds, and of disaffected Conservative backbenchers, who objected to the fact that they would allow too many Asian men into the United Kingdom. There is a curious parallel between this defeat and that suffered 10 years earlier by another Conservative Government when the first statement of the Immigration Rules to come into effect with the Immigration Act 1971 was laid before Parliament. A second statement was laid before Parliament in February 1983 which removed some of the obstacles to a man's being allowed to settle by virtue of his marriage to a British citizen. These are the Immigration Rules currently in force.

The courts have also been unprecedentedly active in immigration law since 1975. Largely as a result of the decisions of the House of Lords in *Zamir* and *Khawaja*, the topic of "illegal entrants" now requires the more extensive coverage contained in Chapter 6. Other significant decisions of the courts, the immigration appellate authorities, and the European Commission and Court on Human Rights will be found throughout this edition. Important developments contained in the decisions of the European Court of Justice and their impact upon British immigration law are discussed in Chapter 4. A new concluding chapter has been added which attempts a broader assessment of the role of the courts in immigration law.

The end notes to each chapter are substantially longer than those normally found in books about law. In addition to the normal legal citations, the notes contain fairly full references to parliamentary papers and secondary sources that may be of interest to readers, as well as additional legal analysis and contextual information which would

have unduly encumbered the text, but which seemed of sufficient importance to an understanding of immigration law and policy to be worth including. Nonetheless, readers, and particularly student readers, should not find it necessary to oscillate constantly between text and notes. The notes are primarily intended as sources of reference, although they may also be read consecutively, almost as a supplementary text.

Constraints of space have again necessitated the omission of some areas, including the criminal provisions, and investigative powers of the Immigration Act 1971. The treatment of international law as it bears upon immigration law has been expanded, but remains far from comprehensive. Extradition still seems best left to works on international criminal law and, despite some overlap with deportation, is not covered in this book.

The debts incurred in the course of preparing this edition have been numerous and substantial. I wish particularly to thank Charles Blake of Ealing College of Higher Education for his invaluable help in keeping me abreast of important developments in the latter part of 1982 and early in 1983. I am grateful also to Trevor Hartley of the London School of Economics who read and commented on Chapter 4, and sent me word of new decisions by the European Court of Justice. I have been fortunate in having research assistance from Richard Steinecke and David Howell, third year students at Osgoode Hall Law School, who intelligently and diligently helped to gather information from sources with which they were previously unfamiliar, and attended meticulously to the more mundane, but important tasks of proof reading and citation checking. The Librarian and staff of the Law School's library excelled even their own normally outstanding standards in satisfying my somewhat unusual research needs. Finally, it is a particular pleasure to thank Maureen Baranyai and Angela D'Ambrosi who typed and re-typed a difficult manuscript with great efficiency, cheerfulness and resilience.

I have attempted to take account of all significant developments in immigration law to the end of 1982, although I have also been able to include the more important legislative and judicial events which occurred early in 1983.

J.M.E.

Osgoode Hall Law School,
York University,
Toronto,
May 1983

AUSTRALIA AND NEW ZEALAND
The Law Book Company Ltd.
Sydney : Melbourne : Perth

CANADA AND U.S.A.
The Carswell Company Ltd.
Agincourt, Ontario

INDIA
N. M. Tripathi Private Ltd.
Bombay
and
Eastern Law House Private Ltd.
Calcutta and Delhi
M.P.P. House
Bangalore

ISRAEL
Steimatzky's Agency Ltd.
Jerusalem : Tel Aviv : Haifa

MALAYSIA : SINGAPORE : BRUNEI
Malayan Law Journal (Pte.) Ltd.
Singapore

PAKISTAN
Pakistan Law House
Karachi

CONTENTS

Chapter 1

INTRODUCTION

"*In an ideal world there would be no restrictions on immigration. In the actual world accidents of history, geography and climate create pressures to emigrate which are not matched by facilities for reception. Hence the imposition of immigration controls designed to produce a logical and just system for admitting those numbers and categories of long-term and short-term applicants for entry who can be absorbed without disastrous economic, administrative or social consequences*" (*R.* v. *Secretary of State for the Home Department, ex p. Khawaja* [1983] 2 W.L.R. 321, 357–358, *per* Lord Templeman).

It is an almost universal activity of the modern state to regulate the movement of people across its national boundaries. Definitions of those subject to this form of control, the purposes for which the power is exercised and the legal and administrative means by which policies are given effect exhibit wide variations. A nation's immigration policy and its implementation are inevitably and distinctively influenced by its history, prevailing political, social and economic climate, relations with other states and views about the proper relationship between individuals and the state.

This book is primarily about the law that embodies British immigration policy, and the legal and administrative framework within which it is administered. It is the aim of this chapter to provide a brief overview of the modern history of immigration control in this country, and of the often conflicting policies that this complex body of law has from time to time purported to serve. This background may both aid an informed understanding of the complexities of the current law and its turbulent

history, and suggest that British immigration law is an instructive microcosm of some important issues of law, government and politics in this country.

The fact that has perhaps most decisively shaped immigration law and policy in Britain over the last quarter of a century is that for more than a century the United Kingdom had been, but after the Second World War rapidly ceased to be, a major imperial power. Until 1962 immigration controls applied only to aliens:[1] citizens of independent countries of the Commonwealth enjoyed a common law right as British subjects freely to enter and remain in the United Kingdom,[2] and most inhabitants of British dependent territories were citizens of the composite entity of the United Kingdom and Colonies,[3] and also entered Britain as of right.[4] This freedom to enter the "mother country" was an important aspect of the Commonwealth. Its citizens were not 'foreigners' in Britain,[5] although when from the mid–1950s people from the Caribbean and, later, the Indian sub-continent, East Africa and Hong Kong, started to arrive in significant numbers, not as temporary workers but as permanent settlers seeking a better life than that often available to them in the poverty-stricken Third World, traditional sentiment in the United Kingdom towards the Commonwealth and its peoples, rapidly weakening as the colonies attained or demanded independence, gave way to hostility and resentment of the new settlers, most of whom were of non-European racial and ethnic origin. Immigration controls were extended hastily and piecemeal to many who had previously been free to enter at will, a process that was completed in 1973 when a comprehensive and permanent code came into effect that for the most part assimilated the immigration rights of all, irrespective of citizenship, who did not "belong" to the United Kingdom.[6] At the very time that the era of Commonwealth preference in immigration formally ended, the United Kingdom acceeded to the European Communities and consequently extended to nationals of the Member

States greater rights to enter and remain in the United Kingdom for purposes of employment and other economic activities than were enjoyed by most Commonwealth citizens who were subject to immigration control.[7]

Since 1962 the primary concern of British immigration policy has been to restrict immigration from the New Commonwealth, and to find the appropriate legal means for implementing this objective without resorting to laws that expressly discriminate on grounds of racial or ethnic origin. This latter task has been made more difficult by the secondary theme of policy, namely that the descendants of British emigrants who had settled the empty lands of Australia, Canada and New Zealand should be able to return to the United Kingdom. Ties of family kinship, history, and political and social cultures have made it difficult for many to accept that they should be treated for immigration purposes as "foreigners," a difficulty paradoxically often felt most keenly by many who eagerly clamoured for the imposition of immigration controls upon citizens of the New Commonwealth. The Old Commonwealth and ex-patriate lobbies have been remarkably successful in sheltering their constituents from the full rigours of the new laws,[8] but the price paid for these concessions by British governments has been to complicate and obscure immigration law and to expose it to the serious charge of racial bias, thus both attracting opprobrium abroad[9] and undermining efforts at home to create a harmonious and just multi-racial society.[10]

1. Historical Background

Immigration to the United Kingdom is by no means an exclusively modern phenomenon,[11] but the arrival from the early 1890s of substantial numbers of immigrants,[12] mostly Jewish refugees from poverty and pogroms in Russia and Eastern Europe, has been of particular historical significance, not least because of the comparisons that can be made between this wave of immigration

and the public and political responses to it, and the more recent migrations from the New Commonwealth.[13] These earlier immigrants settled mostly in parts of East London,[14] although some also went to other industrial cities, notably Leeds and Manchester. Their arrival caused concern amongst those already living in the areas of settlement who feared that this would increase the already stiff competition for jobs and decent housing. Populist politicians, some of whom represented constituencies in or near which the immigrants settled,[15] demanded, as a matter of urgency, the imposition of immigration controls. The debates of the day dwelt not only on the adverse effects that immigration had upon the availability of jobs and housing, but also upon the social and cultural changes attributable to the concentration in a few urban areas of foreigners who practised a different religion, spoke a foreign language, and whose customs and allegedly low standards of hygiene, morals, honesty and respect for the law threatened the indigenous inhabitants' existing way of life.[16] The burden of the message of many of the most vociferous populist politicians was that the problems of the poor were caused or certainly made much worse by immigration.

There was at that time no statutory machinery for regulating immigration, and the Conservative Government of the day clearly found the question of controls politically embarrassing, partly, no doubt, because of the apparently anti-Semitic undertones of some of its more strident backbenchers who led the demand in Parliament for action,[17] and partly because the issue was linked to the more general case for protectionism. The argument here was that British workers needed protection from undercutting by foreign workers in Britain, as much as they needed tariffs to protect them from competition from goods produced by foreign workers abroad.[18] The Government's response was to establish a Royal Commission under the chairmanship of Lord James of Hereford to inquire into "the character and extent of the evils which