The UK and Extraterritorial Immigration Control: Entry Clearance and Juxtaposed Control

Gina Clayton

Border control can no longer just be a fixed line on a map. Using new technology, particularly biometrics, and new approaches to managing risk and intelligence, we must create a new offshore line of defence, checking individuals as far from the UK as possible and through each stage of their journey. Our aim is to make legitimate travel easier, yet prevent those who might cause us harm from travelling here.


1. Introduction

If immigration is regarded as a problem, then there is an obvious advantage to a government in conducting immigration control outside its territory. The decision-making process is further from public view, and the result of a refusal is not a person of uncertain status pursuing appeals, but simply an absence. Someone who did not arrive is ‘out of sight, out of mind’.

This maintenance of decision-making away from public scrutiny is supported in the case of the UK by a belief in immigration control as a matter for the executive branch of government, and by practices which enact that belief. Despite the modern panoply of scrutiny bodies and committees, the resistance of the executive to subjecting immigration decisions to qualitative scrutiny is remarkably resilient. It seems to emerge in a new form after each encounter with parliamentary or judicial curbs, sometimes not tamed but invigorated.

This essay discusses the roles currently played in this process by two extraterritorial immigration control mechanisms: entry clearance and juxtaposed control. Entry clearance has a long history, and is the quintessential form of semi-formalised executive discretion. A short historical account shows how it has grown up uniquely apart from democratic control though in relationship to it. Juxtaposed controls are a recent offspring of international collaboration to deter asylum claims.

The legal foundation for immigration control in the UK is ‘leave to enter’, established by the Immigration Act 1971 as a requirement for all non-EEA
nationals. At the time of the passage of the Immigration Act 1971, leave to enter was granted or refused at ports of entry, by immigration officers. Statutory amendments made in 2000 paved the way for a radical relocation of this decision, enabling the grant or refusal of leave to enter to happen before the traveller even arrives in the UK.

These changes in legal process have been made in tandem with technological developments, with the aim of creating what the government calls ‘e-borders’ – electronic borders. Through a combination of machine readable passports, digital photography and fingerprinting, it is planned that all passengers will be subject to electronic checks of their identity. Any alert generated by such a check is likely to result in refusal of leave to enter. Finally, changes in the substantive law relating to work and study have been accompanied by a reduction in appeal rights, rendering those decisions virtually unchallengeable.

This essay charts the use and development of entry clearance, including its enhancement by technology. Secondly it describes the establishment of juxtaposed controls, by which leave to enter may be granted or refused abroad, and the particular problems these present in terms conflicts of laws, accountability, redress and protection for travellers. The availability of and limitations on appeals are discussed, together with questions about due process and human rights.

2. Entry clearance

Entry clearance is a form of prior authorisation to enter the UK, granted at diplomatic posts abroad. It has developed from an exercise of the discretion of Foreign Office officials and even today it lacks a statutory basis; thus its scope and terms remain within executive control. Despite this, it is now the effective immigration decision for most routes of entry.

The history of entry clearance

Even before the First World War, when passports were not generally required for travel, the requirement for particular entrants to have prior authorisation was used as an instrument of control. For instance, in the eighteenth century the ‘Secretary of State issued instructions that no Jews were to come to England on his Majesty’s packet boats except those who had paid their passage in full and

---

1 Immigration Act 1971 s.3(1): Except as otherwise provided under this Act, where a person is not a British citizen (a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of or made under this Act.

2 The word ‘passport’ itself had no settled meaning: see Ann Dummett and Andrew Nicol, Subjects, Citizens, Aliens and Others (London: Weidenfeld and Nicolson, 1990), fn p. 78.