

# Understanding 'Windrush'

## Legal Background and Practical Issues

UK residents who arrived in the UK before 1973 and who have a legitimate right to live in the UK have been caught up in the 'hostile environment' created by the 2014 and 2016 Immigration Acts, as they do not have documentation to prove their eligibility to access basic services. We look at the background history of these immigrants, their immigration status today and comment on some proposed solutions.

### The History – before 1973

- Before 1 July 1962 Commonwealth nationals were not subject to UK immigration control. In the post-war period and until the 1960s, successive UK governments encouraged immigration from the Commonwealth to fill labour shortages in the UK, now referred to in ongoing media coverage as the 'Windrush' generation.
- Many of that generation would by birth in a UK Colony have held UK citizenship ('citizenship of the United Kingdom and Colonies' (CUKC)) when they arrived in the UK. A person holding CUKC by their connection to a Colony would in general lose it when the Colony became independent. This would happen automatically by operation of law.
- Between 1962 and 1973 there were progressively more immigration controls introduced, however the system was still relatively porous, for example:
  - Until 1965 more than 50% of arrivals from the Commonwealth were admitted without being subject to conditions.
  - Those seeking entry to the UK using an employment voucher issued by the Ministry of Labour would in general be admitted without being subject to conditions.
  - Restrictions were not placed on the entry of CUKCs until March 1968.
  - Where a Commonwealth national man was admitted, his wife and children entering at the same time would not be subject to conditions.
  - There was no legal requirement until March 1968 for a Commonwealth national to be examined on entry. Those who entered the UK without being examined (e.g. not at a port, or at a port without an immigration officer) were not subject to conditions.
- Commonwealth nationals who arrived in the UK during this period were not centrally registered. Commonwealth nationals admitted without being subject to time restrictions were not issued with an immigration status document, there was simply a rectangular date entry stamp on their passport.

## From 1 January 1973

- On this date the Immigration Act 1971 came into force and the UK joined the European Community. Anyone physically present and settled in the UK on this date was deemed to acquire 'indefinite leave to remain' (ILR), automatically by operation of law.
- For times prior to October 2000, ILR lapsed when the holder left the UK, but if they had been absent from the UK for less than 2 years they would be readmitted to ILR on their return. Commonwealth nationals who acquired ILR by residing in the UK on 1 January 1973 would not lose their ILR status on leaving the UK as their status was protected by section 1(5) Immigration Act 1971. This protection was repealed in August 1988.
- There was no general system for recording this ILR. A person who gained ILR on 1 January 1973 and took a trip abroad, might have an ILR stamp placed in their passport. This would be the only record, and loss of the passport would potentially entail loss of proof of their status.
- A person born in the UK before 1983 will be a British citizen today unless their father was a foreign diplomat at the time of their birth. A person born in the UK from 1983 onwards will be a British citizen today if at least one of their parents was settled (e.g. living in the UK with ILR) at the time of their birth.

## The 'Hostile Environment'

- The system of third-party checks, criminal sanctions and data-sharing for immigration enforcement purposes has been gradually extended by successive governments, and especially by the Immigration Acts of 2014 and 2016. A person unable to prove their immigration status will now have difficulty if for example they try to:
  - Take employment
  - Access healthcare in a NHS hospital
  - Open a bank account
  - Lease property
- A person who arrived in the UK before 1973 as described is likely to have had difficulty proving that they were here lawfully and may be unable to satisfy third-party checks. They may then face removal action by the UK authorities if there is no documentation to show what their status is.
  - Since April 2013 it is no longer possible to access legal aid for this type of case.
  - Since October 2015 there is no longer any statutory right of appeal against removal.

- The Data Protection Bill 2017-19 currently before Parliament will enable the Home Office to refuse any request for a migrant to access their personal data held by the Home Office, an important tool in resolving complex cases.
- A pre-1973 arrival may make an application for a Biometric Resident Permit, known as a 'No Time Limit' (NTL) application, which requires payment of a fee of £229. They will usually need to demonstrate to the Home Office that they were present in the UK immediately before 1 January 1973 and that they have not been absent for a continuous two year period since that time. The NTL guidance states that 'Evidence must include official correspondence' and it will usually be necessary to produce evidence of residence as far back as 1973.
- Traditionally, the Home Office would not proactively obtain information about the individual from other government agencies such as HMRC, would not offer the applicant an interview to establish their case, would not contact or interview witnesses. They would expect the applicant to conduct all necessary investigative work unassisted. Defects (for example gaps) in the documents provided by the applicant might result in a negative decision which would not generate any right of appeal, or right of administrative review.

## **The Government Proposal**

- The government have stated that:
  - There will be a dedicated task force to assist impacted people.
  - The Home Office will waive the citizenship fee for anyone in the Windrush generation or their children 'who are in the UK' who wishes to apply for naturalisation, and will waive the requirement to carry out a Knowledge of Language and Life in the UK test.
  - They will ensure that those who made their lives here but have now retired to their country of origin, are able to come back to the UK – the cost of any fees associated with this process will be waived.
  - They will set up a new scheme to compensate people who have suffered loss.
  - They will establish a new customer contact centre to help people get appropriate advice.

## **Some of the Remaining Issues**

- A pledge to provide compensation (or access to British citizenship) has no meaning unless it is tied to a specific statement of how the individual may prove that they are entitled to claim it. The issue is not whether the 'Windrush Generation' are given British citizenship, but how they can prove the existence of the ILR status that they already hold.
- The Home Office has stated that they are reviewing thousands of files to determine if anyone was deported in breach of protections that were inserted into the Immigration Act 1971. This

statement is easily misunderstood; the reference is to a protection against deportation, however if a person had been unable to prove their lawful status in the UK they would more likely have been subject to voluntary departure or administrative removal than deportation. Moreover if a person had been a pre-1973 arrival but unable to prove this to the Home Office, it would not be possible to determine this from re-examining the Home Office file.

- The government continues to propose to remove the right of migrants to access their personal data held by the Home Office.
- Some of the proposals for the Windrush generation accessing British citizenship in the Home Secretary's speech on 23 April would require amendments to primary legislation. For example it is not legally possible to grant British citizenship to a standard naturalisation applicant who has not been present in the UK on the date 5 years before the date of the application, regardless of the reason for the absence.