ILPA MONTHLY

MAY 2020

Lessons Not Learned

An overview of the Windrush Lessons Learned Review

Background

On 19 March 2020, the much-anticipated report of the independent inquiry, led by Wendy Williams, into the Government's handling of the Windrush scandal was published. The timing of publication was, of course, deeply unfortunate, with the review's findings overshadowed in the media by the covid-19 crisis. We are taking this opportunity to provide an overview of the 275-page report and discuss its implications for UK immigration lawyers.

The Home Office established the Windrush Lessons Learned Review on 2 May 2018. The review examined nearly 69,000 official documents, analysed case files, and received submissions from Home Office officials, immigration lawyers, local authorities, charities, academics, and of course, members of the Windrush generation who were affected by the scandal. The objectives of the review were to establish the following:

- the key legislative, policy, and operational decisions that led to members of the Windrush generation becoming entangled in measures designed for illegal immigrants;
- what other factors played a part;
- why these issues were not identified sooner;
- what lessons the Home Office can learn to ensure it does things differently in future;
- whether corrective measures are now in place and, if so, an assessment of their initial impact;
- what (if any) further recommendations should be made for the future.

Those affected were from a group of British subjects who held what became CUKC (citizens of the UK and Colonies) citizenship, and their children, who came to the UK between 1948 and 1973, mostly from Caribbean countries. This group came to be known collectively as the Windrush generation, after the ship HMT Empire Windrush. It brought 1,027 official passengers, of which 802 stated their last country of residence was in the Caribbean, to the UK on 22 June 1948 on a journey that has come to symbolise post-war Caribbean migration to the UK at the end of the empire. The Review highlights that this is a group of people who can be defined, in the majority, as sharing the protected characteristic of race.

Most of the Windrush generation arrived as CUKC passport-holders, but successive immigration legislation in the 1960s, 70s and 80s, combined with citizenship laws of newly independent former colonies, increasingly restricted their rights to enter, live and work in the UK. Although the Immigration Act 1971 entitled people from the Commonwealth who arrived before 1973 to the "right of abode" or "deemed leave" to remain in the UK, it hadn't automatically given them documents to prove it. Nor had the Home Office consistently kept records confirming their status. So, without making a further application and paying a fee, they had no way to show the UK was their rightful home even though, in most cases, they'd known no other.

The report spends time tracing through the changes in immigration legislation, the political culture and public attitudes that led to the development of immigration control laws, and focuses on the increasing pressures to cut net migration that led to the "hostile environment". Immigration lawyers will, no doubt, be very familiar with this now-rebranded "compliant environment", measures designed to make everyday life more difficult for those without the correct immigration status, including restrictions on work, rent, opening bank accounts, accessing healthcare and benefits without the correct documentation.

As a cohort of people who had lawfully resided in the UK for most, if not all (for those born here), of their lives but whose status derived from the deemed leave provisions of the Immigration Act 1971, many were *"made to feel like criminals, made to question their identity, and in some cases, made destitute and separated from their family."* The plight and injustice of those affected were brought to light by a series of articles published in The Guardian, leading to a national outcry in Spring 2018 about the appalling treatment of the Windrush generation. Tracing the personal experiences of those affected throughout the report, Williams notes:

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"The Windrush generation has been poorly served by this country, a country to which they contributed so much and in which they had every right to make their lives. The many stories of injustice and hardships are heartbreaking, with jobs lost, lives uprooted and untold damage done to so many individuals and families".

In response to public pressure regarding the injustices, the Home Office established the "Windrush Scheme" to enable and assist those affected to apply for the correct documentation. This scheme has been drafted quite widely and practitioners should note that it covers a far larger cohort of people, both Commonwealth nationals and non-Commonwealth nationals, than those associated with "Windrush". While the report rightly focuses on the treatment of those who moved to the UK from the Caribbean, lawful migrants from across the Commonwealth and elsewhere have also suffered under the hostile environment. Belatedly, a compensation scheme has also been established for those who suffered losses as a result of their treatment.

Findings

The report makes a number of key findings and follows up with recommendations as to how the Home Office needs to address the underlying issues.

Foreseeable and avoidable

The report stresses that, while the Home Office was surprised by the scandal and surprised that the public reacted with outrage, this was entirely foreseeable and avoidable. This is a finding that will come as no

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surprise to those of us involved with the passage of Immigration Bills in recent years.

While the 1971 Act meant that Commonwealth citizens who arrived prior to 1973 had a right of abode, they hadn't been given the documents to prove it, and nor had the Home Office kept records confirming their status. At the same time, a mixture of the complexity of immigration and nationality law, the gradual erosion and narrowing of the rights of CUKCs, and rising application fees meant that it became harder for those affected to prove their status, while at the same time "hostile environment" legislation meant that proving one's status was more imperative than ever. The report notes that, for instance, the old NTL guidance made provision for the Windrush generation and recognised as far back as 2006 that:

"these applicants may have lived in the UK since World War 2 or longer. They may have difficulty in providing documentary evidence of their status on or before 1 January 1973 or continuous residence since then. Please be sensitive in dealing with this aspect."

In practice, applicants seeking to prove their settled status were being asked for documentary evidence they simply could not provide. The report quotes a member of Home Office staff saying:

"Several members of staff mentioned the standard of proof on people to be able to establish their immigration status. They commented that they would struggle themselves to provide that degree of evidence of their own residence in the UK."

The report also stresses that the history of the Windrush was forgotten, and accurate records were not kept - not just in relation to individual cases, but in relation to relevant policy and legislation as a whole. Immigration law has become more complicated, which the Home Office's own experts struggled to understand. The report notes the department had institutionally forgotten the implications of the Immigration Act 1971. It quotes a senior official as saying:

"One of the notable things… about when Windrush broke was [that] we all had to go and educate ourselves about historic legislation…No one knew off the top of their head what the 1971 Act said, what the rules [were] about British colonies that got independence and what happened to people from those colonies…all of that was 30, 40 years ago. Well, it's still live – it still matters but nobody had thought about that for a very long period of time."

The department also ignored warning signs that Hostile Environment policies could have a particularly harsh effect on the Windrush group - this was not considered in the policy analysis although politicians and civil society groups warned of the risks of consequences including discrimination, misidentification and removal. Even when, by late 2017, it became clear that a large group were affected, the Home Office continued to act with "indifference" and did not act quickly.

Home Office culture

The report spends time looking at the culture and the nature of the Home Office. It quotes a former minister as saying this was caused by a "*total lack of proper administrative competence*". The department is fragmented and split into different teams who operate "in silos", which means that policy design and development were conducted separately from implementation, with little oversight on the harm being caused and little capacity to spot emerging patterns.

The report quotes Home Office staff as saying:

"UKVI staff overwhelmingly believed that the pressure they felt as a result of 'throughput targets' – numbers of decisions they were expected to make each day – meant there was no time to exercise the right level of judgement. This, and the fact that they never met the people face to face, had led to them suspending 'common sense'."

The department is described as being defensive and sensitive to public criticism. The report notes:

"by citing process and procedure, the department distances itself from the human impact of its decisions. There is an absence of empathy for the individual. This is telling, as it goes to the heart of the department's response to the Windrush scandal: it was a tragedy, and it shouldn't have happened. But (paraphrasing) it was the fault of the people caught up in it that they didn't get evidence of their status and, when they tried to, they didn't provide the right documentation. And as soon as they provided this evidence, their status was documented".

While stopping short of making an overall finding of institutional racism at the Home Office, the report makes clear that race played a definite part in what happened, and that "thoughtlessness" and "ignorance" on race were factors that contributed to the scandal. It concludes that the failings were "*consistent with some elements of the definition of institutional racism*", noting that, at the Home Office, *"there seems to be a misconception that racism is confined to decisions made with racist motivations, akin to bad faith."* Adding, *"This is a misunderstanding both of the law, and of racism generally."*

Recommendations

In April 2018, the Windrush Taskforce was announced to run the Windrush Scheme. Caseworkers can directly access records from other departments, and the scheme is designed to be simple to use, with special provision for the most vulnerable. The report commends the fact that this was set up quickly, and notes that this is a *"testament to what the department can achieve when highly motivated and adequately resourced to demand."*

Overall, however, the report notes that while the Home Office has acted quickly to address some of the issues, the program of reforms are procedural, and do not address the roots of the issues. It recommends simplifying application routes, providing applicants the opportunity to be supported by officials, and allowing a more personalised approach to casework.

This report makes thirty recommendations, broadly revolving around these three key areas for the Home Office:

- Acknowledging the wrong which has been done.
- More transparency to external scrutiny.
- A culture shift to recognise that migration and wider Home Office policy is about people and, whatever its objective, should be rooted in humanity.

Lessons learned

History matters

The report notes that the scandal happened in part because of the lack of understanding by the Home Office (and general public) of British colonial history, and the history of migration. History matters. This remains true for immigration practitioners today more than ever, not only in the context of advising Windrush clients, but also far more broadly than this, covering many aspects of our nationality, immigration, asylum and EEA free movement law. Going forward, for example, knowledge of the history of EU accession and free movement law will be vital in advising EEA nationals and their descendants for decades to come.

Race matters

Law, policy and institutions are not colour blind. This is made clear from Williams's report into the treatment of the Windrush generation, yet it appears that the lessons have not been learned: only last month the Court of Appeal upheld the hostile environment's "right to rent' policy despite acknowledging its discriminatory effects; while we also know that the Home Office increasingly uses opaque algorithms, with criteria including nationality, to stream cases for decision-making.

Documents matter

It's self-evident that you can't run an immigration system that requires people to hold certain documentation, and then not provide that documentation to those who need it. As the report notes:

The 1971 Immigration Act entitled people who had arrived from Commonwealth countries before January 1973 to the "right of abode" or "deemed leave" to remain in the UK. But the government gave them no documents to demonstrate this status. Nor did it keep records. This, in essence, set the trap for the Windrush generation.

The hostile environment requires all UK residents, both migrants and the indigenous population, to have documentation to prove their right to reside in the UK. Yet despite this framework, the UK has no national ID system nor does it have a unified system of immigration documentation. As the Review makes clear, the

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ILPA ACTIVITIES

Each month, the ILPA Activities section highlights what the Secretariat and members have been up to recently. It features meetings we have attended and work undertaken to advance the interests of members.

Coronavirus Activities

Our legal team is continuing to spend the majority of its time concentrating on the Covid-19 policies of the Home Office, the courts/tribunals and the Legal Aid Agency.

Recommendations to the Home Office

Since 21 March 2020, we have been maintaining an up-to-date list of our recommendations to the Home Office on its policy in relation to coronavirus. This was updated on 12 May 2020 to reflect the current position and to set out where our recommendations have been implemented (or partially implemented). We continue to take part in calls with the Home Office and regularly raise issues we are hearing from members and to ask for updates on current policy.

Through this, the Home Office has now confirmed to us in writing that immigration and nationality applications can be submitted without the English language test or Life in the UK test. The individual will still need to pass the test before the application can be granted. However, we still await a formal policy announcement on this.

Home Affairs Committee

On 20 April 2020, we submitted lengthy evidence to the House of Commons Home Affairs Committee inquiry into Home Office preparedness for Covid-19. We highlighted that the overwhelming issue has been the inadequacy of Home Office public communication, in particular in ensuring guidance is clear and publicly accessible. We also raised issues relating to the legal basis of the current coronavirus concession and extension policies. We highlighted that there were significant gaps in the NHS worker extension policy, including that a recent change to a government webpage gave the appearance that it was restricted just to Tier 2 (General) migrants.

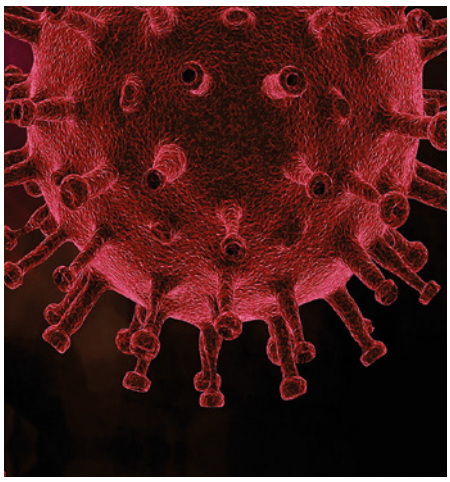
These issues were explored further in live evidence given by Adrian Berry, our chair of trustees, to the committee on 21 April 2020. That same day, in light of our evidence, the Home Affairs Committee wrote to the Home Secretary raising our concerns. On 29 April 2020, the Home Secretary announced in a letter to the Committee sent before she gave evidence that day that the NHS worker extension was being broadened to a wider scope of individuals. Further, the Home Office webpage setting out the extension policy was amended to clarify that it was not restricted just to Tier 2 (General) migrants. There are still issues with the NHS worker extension which we continue to raise. The Committee is continuing to raise the issue relating to the legal basis of the guidance.

Upper Tribunal

In addition to the various issues we raised with the UTIAC in early April (our letter is here and the response here - we also attended a UTIAC user group meeting on 12 May 2020 to discuss some of these issues further), we escalated the issue in relation to submission of non-urgent judicial review applications. The position had been that these must be submitted by post. We raised the obvious health risks and difficulties this posed, and the position was changed to allow submission via email.

Legal Aid

Before the coronavirus outbreak, we had already been raising concerns with the Ministry of Justice (HMCTS and LAA) in relation to the fact that there is no funding available in the First-tier Tribunal digital



reform pilot for the Appeal Skeleton Argument (ASA) in circumstances where, following the provision of the ASA, the Home Office then withdraws the decision such that a hearing does not take place. We have continued to raise these concerns during the outbreak and the matter has become more urgent because the FTTIAC directions for hearings in light of the Covid-19 pandemic effectively compel parties to follow the Digital Reform Pilot Directions without any necessary changes to legal aid being implemented.

Changes to the legal aid structure have now been announced. ILPA has been carrying out significant coordinating activity to ensure a united sector-wide approach is given in opposition to the new structure across the immigration bar and solicitors' firms. ILPA's statement is overleaf on page 4.

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problems faced by the Windrush generation in proving their status were entirely foreseeable. Yet the lessons seem not to have been learned as the UK continues to roll out the EU Settlement Scheme, conferring EU Settled Status and Pre Settled Status without physical documentation and, in the current pandemic, conferring blanket extensions of leave of dubious legal status and without adequate documentation to satisfy the employer / landlord / bank / hospital tasked with enforcing the hostile environment.

Institutional memory is short

The nation was outraged in early 2018 by the treatment of the Windrush generation. In response to the media attention, the Home Office acted swiftly, the Home Secretary was replaced and the Windrush Scheme established. The report commends the Home Office for its swift actions in this regard.

But institutional memory is short. Just two years later, the Windrush scheme continues but no longer offers the personalised 'humane' service of its early establishment. According to Amelia Gentleman, the *Guardian* journalist whose media campaign is credited for bringing the Windrush injustices to light, a backlog of Windrush cases is growing, with almost 4,000 outstanding applications, some of whom have been waiting for more than a year for a response, while the compensation scheme has, as of February 2020, only made payouts to 36 people.

Diana Baxter, Partner at Wesley Gryk Solicitors.

ILPA Statement Regarding the Legal Aid Structure

While an additional £400 (or £300) for the fixed fee may seem on the face of it to be a positive move, ILPA is concerned that in real terms, what is being proposed here is actually a reduction at a time when legal aid practitioners are least able to afford it. This should be seen in the context of a system that has faced very severe cuts over the last decade, the provision of legal aid is now severely limited and Law Centres face financial crises.

It is important to be clear, these changes that are being rolled out on an urgent basis, purportedly due to Covid-19, are not actually related to the pandemic at all. We understand that the urgency is being driven by HMCTS' desire to have everyone working within the new digital process, however we do not think that this should have been the top priority here, and the overriding desire to rush out that process is having a serious and negative impact on the sector. HMCTS did not appear to have considered the implications of the digital reform process (now known as the core case data ("CCD") platform) for legal aid at all until raised by ILPA and others last year. As recently as 17 April 2020, President Clements of the FtT(IAC) said "I am aware that there is continuing concern that current public funding or legal aid arrangements are not well suited to CCD or other examples of "front loading" work but I hope you will understand that that is not an issue with which the Tribunal can or should be directly concerned." We believe that there may have been some movement from that position subsequent to the letter, as the new Practice Statement was postponed pending an update on legal aid. The acknowledgement that the current legal aid fee structure is not suited to the CCD process is certainly welcomed.

While it is correct that the Tribunal has no control over legal aid fees, the Tribunal is now requiring evidence and the appellant's skeleton argument to be provided at an early stage of the proceedings under CCD. There is no pandemic related reason for this change, and the current legal aid system was simply not designed for this. We therefore consider that legal aid is an issue that the Tribunal should be directly concerned with, as rolling out the CCD changes without the appropriate legal aid changes being made will affect the efficacy of appeals under CCD, as well as having a negative financial impact on legal aid providers, many of whom are already struggling due to the pandemic. We do not see why CCD is being held out as the solution to the pandemic when other courts and tribunals have been able to merely adapt their existing processes.

ILPA's view is that we should have been able to complete the discussions that we had been having (that were only at a very early stage) with the Ministry of Justice previously in relation to what the new fee structure should look like, and representative bodies should have had the opportunity to provide proper input into the new fee structure. The failure to do this and the attempt to rush things through without proper consultation has resulted in a new fee structure which is not fit for purpose.

ILPA's position has been that hourly rates are the best option, and our position remains that this is the best way forward, however in the absence of that we had said that there should be a new bolt on fee for the appellant's skeleton argument, as there currently is for the appeal hearing. The reason this was our position was specifically to avoid the problems that have now arisen.

Cases that are resolved at an early stage under CCD

Our understanding of the CCD process is that it is specifically designed for cases to be reviewed at an early stage by the Home Office, with a view to their withdrawing unsustainable decisions. We are concerned about the impact of the new fee on these cases which do conclude without a hearing (currently 'stage 2a').There will not be a hearing fee, but there is likely to be a Case Management Review Hearing (CMRH), however ignoring any additional payments, and assuming that the legal help file has reached the escape claim fee threshold, the difference in the escape claim fee threshold between the current and new fees is both stark and concerning.

Currently, the fixed fee for stage 2a is £227 and the new asylum fixed fee is £627 (referred to as 'stage 2c'). This means that the amount of work that needs to be billed in order to reach the escape claim fee threshold and be paid at hourly rates has been increased from £681 (three times the fixed fee of £227) to £1,881 (three times the fixed fee of £627). Under the current scheme (excluding any additional payments for the purpose of simplicity) a stage 2a file which had accrued work valued at £682 to £1,880 would be paid at hourly rates. Such a file will now receive £627.

For a comparison of payments made under the existing and new fixed fee see the table below.

Although the new payment appears more generous when you look at the lower value cases, the reality is that under CCD the majority of files will exceed the new fixed fee and will therefore lose out financially as a result of this change.

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Existing and new fixed fee table

Value of work done	£300	£400	£500	£700	£1,000	£1,500	£1,800	£2,000
Payment under existing scheme (stage 2a)	£227	£227	£227	£700	£1,000	£1,500	£1,800	£2,000
Payment under new scheme (stage 2c)	£627	£627	£627	£627	£627	£627	£627	£2,000

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This will inevitably deter people from taking on the more complex cases, which require the most work, as that is a very high threshold to meet, and otherwise they risk falling into the gap between the fixed fee and the escape claim fee threshold in which all of that work will go unpaid.

Appellant's skeleton argument

Further, under the new CCD system, the appellant's skeleton argument must be prepared and submitted at an early stage. At the stage where the appellant's skeleton argument is required, it is unlikely that the lawyers will know whether or not the case will reach the escape fee threshold (and therefore be paid at hourly rates). If the decision is withdrawn as a result, there is no fee specifically available for the appellant's skeleton argument, either under stage 2a or under the proposed new stage 2c. Therefore, at the point that the appellant's skeleton argument is required, there is no indication of what fee may be available to counsel. When ILPA raised this with the MoJ, we were told that the LAA does not dictate what element of payment is made by solicitors to barristers, and that payment to counsel is always a matter to be determined between them. This does not reflect the reality of how the current system works, where there are specific fixed fee additional payments which are to be allocated to counsel, including for CMRHs and for substantive hearings. In practice it has always been the case that the £302 hearing fee is paid to barristers on a fixed fee case, and the standard fixed fee is to cover the solicitor's work.

The new scheme simply provides an additional £400 to the standard fixed fee for an appeal without a hearing. Representatives should not be expected to devise a new fee splitting procedure internally and the new fee does not allow for any fair way to do so. Due to the way that the CCD process has been designed, the vast majority of the work is now done at the start of the appeal. Previously, the appeal would be likely to go to a full hearing, and the firm would have received £567 for this work (for asylum), and the barrister £302 for the hearing. Now, where the solicitor has prepared the case in full and the barrister has drafted the skeleton argument at an early stage as required under CCD, the total fee available is £627.

If that £627 was split to reflect the fact that the firm has done basically the same amount of work that would have been done for a full appeal hearing, that would leave an additional amount of just £60 for counsel to draft the appellant's skeleton argument. This is an extremely low fee particularly when it is considered that in this scenario the skeleton argument would have been successful in persuading the SSHD to concede the appeal. It is not financially viable for barristers to accept doing work which would in practice amount to an hourly rate that is under the minimum wage in most cases. Equally if that £627 was split so as to reflect the fact that counsel has done at an earlier stage all the preparatory work that would have been done for a full appeal hearing, this would mean that firms would receive less for appeal preparation than they currently do. Neither are financially viable options, and it follows that these changes will have a substantial negative effect on access to justice.

ILPA's recommendation

ILPA's position is that, if this is indeed a situation which requires urgent change and a temporary fee structure (which we do not accept is the case), then hourly rates must be implemented on a temporary basis rather than the proposed stage 2c fixed fee, until such time that the MoJ has been able to consult properly with all practitioners and to come up with a new and workable scheme. We believe that the proposed fixed fee will do irreparable harm to the sector, even if it is only in place temporarily. We urge the MoJ to take urgent steps to implement this rather than the stage 2c payment which is simply likely to cause further delay due to the problems that it will cause.

Securing a process to apply for a fee waiver for entry clearance applications

Earlier this year, we wrote to the Home Office outlining the need to institute a process to submit fee waiver requests in respect of entry clearance applications. We highlighted how the Home Office is required to waive the requirement to pay a fee for any immigration application where the imposition of the fee would breach human rights (as confirmed in *R (on the application of Omar) v Secretary of State for the Home Department* [2012] EWHC 3448 (Admin)) and that this position does not vary as between in-country and out-of-country applications. In practical terms, however, it was basically impossible to make a fee waiver request. Applicants were forced by the online forms to pay a fee in order to submit their application and there was no option for the applicant to request the fee be waived.

While there was a nod towards a discretion to waive fees for entry clearance in Guidance ECB06: entry clearance fees, this simply directed individuals to contact the general UKVI helpline. Members reported that this simply led individuals round in circles, and even filing a complaint to UKVI would not resolve the issue.

Following our representations, the Home Office has now updated Guidance ECB06, which describes the procedure to apply as follows:

"If an applicant requests that the fee should be waived for reasons other than those listed above they should be advised to email FeeWaiversEntryClearance@homeoffice.gov.uk with the following details:

- *first name(s) and family name*
- *date of birth*
- *nationality*
- *country where they will make an application*
- *passport number*
- *application type they wish to have the fee waived for*

Detailed reasons must be included on why the applicant is requesting a fee waiver including any information about why third party funding is not available and any exceptional circumstances, for example, civil war, natural disaster.

Destitution alone will not be considered as valid grounds for waiving fees. When considering waiver of the fee it is usual practice to consider not only the applicant's ability to pay but also to take into account the sponsor's, or other wider family's ability to pay the fee."

We understand that, within days of this procedure being commenced, one successful request has already been granted. We believe the policy as outlined is a good start but is inadequate and therefore want to monitor this. If practitioners face difficulties with applying for entry clearance fee waivers, please contact charles.bishop@ilpa.org.uk

ILPA ACTIVITIES

Immigration and Social Security Co-ordination (EU Withdrawal) Bill

The Bill, covered in last month's edition, had its second reading on the 18 May 2020. ILPA's briefing was sent to MPs before the second reading. The main recommendations in it are:

- Paragraph 6 of Schedule 1 should be amended so that the provisions the government intends to disapply are stated on the face of the Bill.
- Clause 2 of the Bill should be brought into line with the government's policy in relation to deportation of Irish citizens.
- Clause 2 of the Bill should make clear that Irish citizens born in Northern Ireland may not be deported or excluded from the UK.
- The government must justify the continued need for the powers in clause 4.
- The government should omit clause 5 on the co-ordination of social security and bring forward primary legislation to make any changes.

We are continuing to work with Parliamentarians and other organisations in advance of the committee stage of the Bill, when any proposed amendments are considered in more detail. We have also submitted a version of this briefing to the Joint Committee on Human Rights' inquiry into the Bill.

Strategic Legal Fund

STRATEGIC LEGAL FUND FOR VULNERABLE YOUNG MIGRANTS — Managed by ILPA

The Strategic Legal Fund supports grantees to achieve successful strategic litigation and interventions with the aim of improving the implementation and enforcement of policies for vulnerable young migrants in the UK.

As a result of the Covid-19 outbreak, the SLF is currently not running regular funding rounds. Please note that we still accept out-of-rounds funding proposals where the urgency can be demonstrated. We have recently awarded three grants via our out-of-rounds procedure for urgent proposals. If you have an urgent proposal please contact ILPA via our email info@ilpa.org.uk and we will contact you as soon as possible. The three grants we awarded were as follows:

Project 17 has been awarded funding to fund the costs of intervening in W&J v Secretary of State for the Home Department CO/3036/2019, a judicial review challenging the No Recourse to Public Funds (NRPF) scheme as it relates to the parents of British children granted leave to remain under the ten-year route to settlement.

JCWI has been awarded funding to work with the **Public Law Project** ('PLP'), to investigate a challenge to 'Presidential Guidance Note No. 1/2020: Arrangements during the COVID-19 Pandemic'.

Bindmans LLP has been awarded funding to gather evidence regarding reasons and rates of refusal of family visit applications from certain parts of the world which result in discriminatory disadvantage for migrant children or children of migrants. They anticipate this research will enable them to extend the issues they raise in the European Court of Human Rights.

We expect the SLF to be back up and running with regular funding rounds from September onwards when it will also be expanding its eligibility criteria. Please bear with us in the meantime.

www.strategiclegalfund.org.uk

Bindmans — TOGETHER FOR JUSTICE & EQUALITY JCWI — Public Law Project — PROJECT17

ILPA ACTIVITIES

ILPA in the Media

"MPs warned of gaps in plan to extend NHS workers' visas"

The Guardian, 21 April 2020 (also covered by the BBC, the Independent, the Financial Times, the Daily Mail and others).

Adrian Berry told the committee . . . "It may also be restricted to certain types of work in the NHS – for example, doctors and nurses – and not those, for example, like hospital porters and others who do essential jobs in the National Health Service."

"Coronavirus: Thousands could be forced to leave UK within weeks under current Home Office guidelines"

The Independent, 9 May 2020.

Sonia Lenegan, Legal Director at the Immigration Law Practitioners' Association (ILPA), said: "In just over three weeks the current extension of leave is due to end. The Home Office cannot realistically expect all of those people to get on a plane between now and then.

"It is not right to leave people in such a stressful and precarious position. Another, lengthy, extension must be confirmed as a matter of urgency. In March, ILPA recommended an extension until September, and that remains our position."

"Home Office accused of pressuring judiciary over immigration decisions"

The Guardian, 6 May 2020.

Adrian Berry, the chair of the Immigration Law Practitioners' Association, said: "It is not appropriate for government to use its position outside of the courtroom to seek to influence decisions. The separation of powers between the government and judiciary is a core constitutional principle."

ILR Applications Outside the Rules:

A route to regularisation for children and young people in the UK

There are a number of issues which face children without immigration status in the care of the local authority in the UK. Whilst the local authority applies 'corporate parenting' principles with regard to accommodation, education and welfare of a child in care, immigration status can often be ignored. Immigration status will not affect the child's rights to be cared for by the local authority and access healthcare and education, but lack of regularised status can affect the young person's access to student finance, mainstream benefits and right to work as they approach care leaver age and grants of shorter periods of leave can perpetuate instability in a child's life, negatively impacting their mental health and wellbeing from an early age.

It is important to state at the beginning that one should always consider the difference between nationality and immigration law and many children with no apparent immigration status may in fact be British through automatic acquisition or have entitlements to register as British. Given the advantages to holding British citizenship, this should always be the first consideration for any child (these advantages were explored recently in *R (PRCBC and Others) v SSHD* [2019] EWHC 3536 (Admin) at paragraphs 11-18). However, this is not an option available to many children facing immigration issues. While a normal grant of leave to remain based on Article 8 is two and a half years on a ten year route to settlement, there is provision within Home Office policy to make arguments for a longer period of leave or even indefinite leave to remain (ILR) for a child or young person. Out of all routes to regularisation, grants of ILR have fallen by the most over the last decade. In 2011 there were more grants of ILR to children than applications to register as a British citizen, with approximately 47,202 grants of indefinite leave. By 2016 this figure had fallen to just over 9,000.[1]

Charities have called for granting indefinite leave to separated children and those in care and highlights that granting this more durable form of leave does not mean the young person will never choose to go back to their country of origin, nor that the Home office will be unable to remove them.[2] Whilst ILR does not offer a young person the same permanence and protection as citizenship, it does give them the security of knowing they can remain in a country they were brought to as a child without the need to make regular immigration applications.

A durable status allows an easier transition into adulthood and also enables the voluntary return to a country of origin when the young person is safe and able to do so. A young person in care, or with significant involvement by the local authority, will likely have already experienced a large amount of disruption and potential trauma in their lives and a grant of ILR can create some much needed stability at a critical time of development. It's far too easy for young people's immigration applications to fall through the cracks by carers, guardians or social workers with heavy caseloads, especially for those who have already been in the UK for a long period of time. This can lead to numerous complications for young adults further down the line when they discover their immigration status was never regularised while they were a child.

These arguments are supported by case law. *SM and TM and JD and Others v SSHD* [2013] EWHC 1144 (Admin) supports the granting of ILR to a child in certain circumstances. This judgment is significant because it upholds the rights of children affected by immigration decisions and examines the way in which their best interests should be considered. The effect of this judgment, in summary, is that the welfare and best interests of children must be considered in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009 (section 55) before determining the length of leave to remain granted, and a blanket application of a fixed, limited period of leave in children's cases is unlawful. The High Court recognised in SM that successive grants of short periods of leave to remain can leave children in limbo which is likely to be contrary to their welfare. In deciding this case, the High court applied the Supreme Court's judgement in *ZH (Tanzania) v SSHD* [2011] UKSC 4 and *HH and Others* [2012] UKSC 24 and 25. These cases clarify that children's best interests must be a primary consideration in all decision-making about them or affecting them and the High Court in this case again confirmed that the test for assessing the best interests of children contains no 'exceptionality' requirement.

A child may therefore apply for ILR where they do not meet the immigration rules and when the Home Office receives an immigration application from a child, they must consider what type of leave should be given as part of their statutory obligation under section 55 - to safeguard and promote the wellbeing of children. The guidance on grants of limited or discretionary leave states that where there is compelling evidence to justify a longer period of leave or ILR in the best interests of the child, then this may be granted.

It is important that any ILR arguments are made at the point of application, rather than being raised at appeal and that the applicant formally request a grant of Indefinite Leave to Remain outside the rules at application stage in their representations. The Home Office policy Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes, at page 65 and 68, states: *"If the applicant specifically requests a longer period of leave than 30 months, or ILR, and provides reasons as to why they think a longer period of leave or ILR is appropriate in their case, the decision maker must consider this and set out in any decision letter why a grant of more than 30 months or ILR has not been made (…) Where granting a non-standard period of limited leave to the applicant, because it is accepted that there are exceptional reasons for doing so, this leave will have to be granted outside the Immigration Rules as there is no provision within Appendix FM for granting limited leave for a period of more than 30 months. This also applies to ILR, where this is granted outside of a valid ILR application or where the requirements of the Rules are not met. If there are exceptional reasons to grant ILR, this should be granted outside the Rules."*

continued...

[1] https://www.london.gov.uk/sites/default/files/final_londons_children_and_young_people_who_are_not_british_citizens.pdf

[2] https://www.parliament.uk/documents/joint-committees/human-rights/Written_evidence_final_(13.03.13).pdf p207.

continued from page 8...

This has also been confirmed in the case of R (on the application of VRB) v SSHD JR/3746/2017, unreported but available online. In this determination the Upper Tribunal held *"24. Thirdly, Mr Malik's submission is contrary to the Respondent's own guidance set out above, which expressly requires a decision maker to consider the grant of indefinite leave to remain where a clear request has been made for this, supported by reasons why it would be appropriate." ... 27. For all these reasons I reject the Respondent's submissions that a formal application, meaning valid application (in accordance with paragraph 34 of the Immigration Rules) for indefinite leave to remain is required before the Respondent is obliged whether to grant a longer period of leave or indefinite leave to remain. What is required, as set out by the Court of Appeal in Alladin and Wadhwa, and in the Respondent's own guidance set out above, is only that there should be a clear request to the Respondent for indefinite leave to remain, supported by reasons as to why that would be appropriate in the particular circumstances of the case. That is the extent of the requirements of a formal application."*

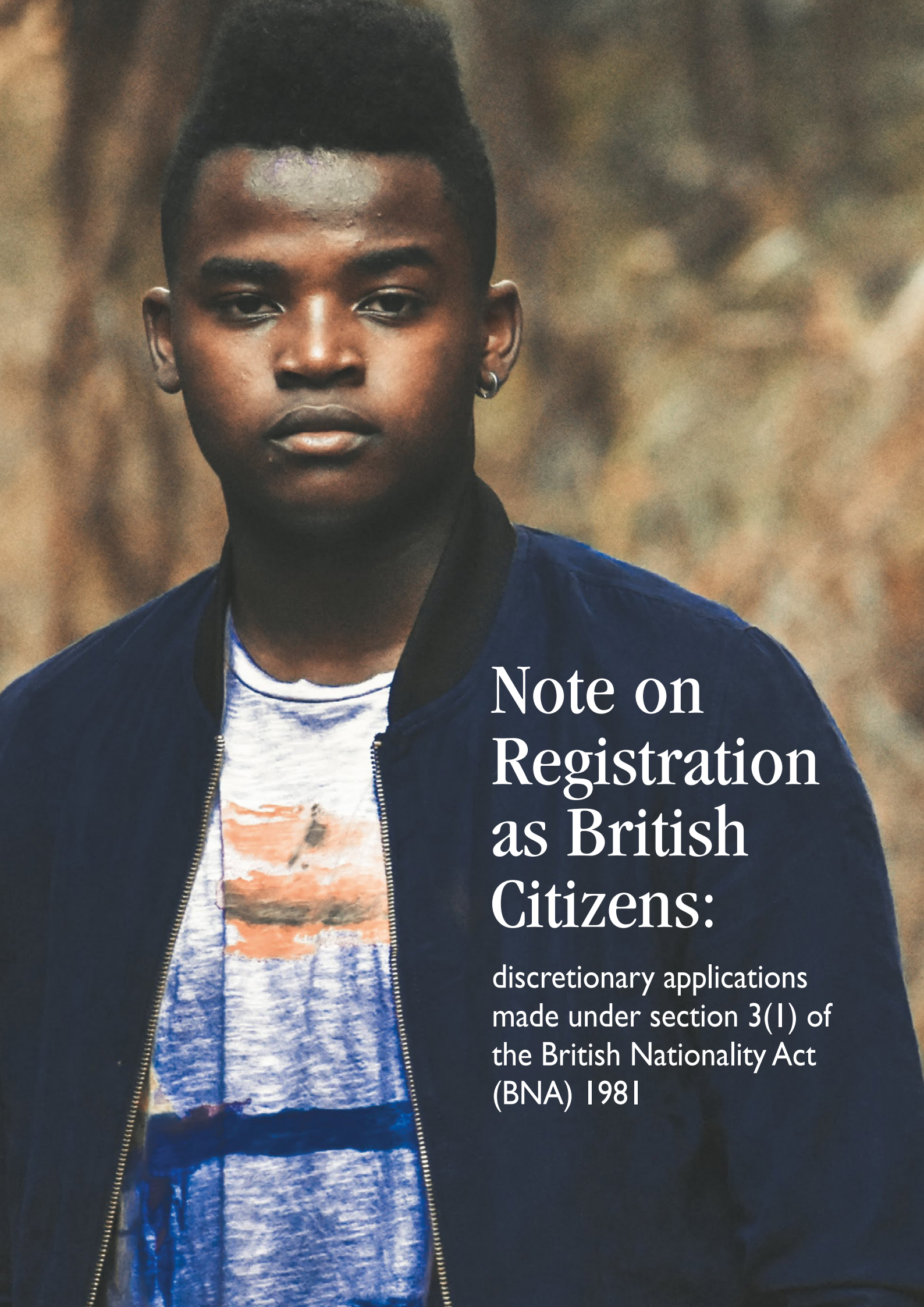
In addition to including a formal and clear request for ILR, representations also need to be made and evidenced regarding the compelling circumstances of the case and highlighting the particular circumstances which make a shorter period of leave undesirable and contrary to the child's best interests. As directed in Chapter 8, Section 5A, Annex M of Immigration Directorate Instructions, decisions about the future of children in the care of the local authority should be left primarily in the hands of their social services department as they will be best placed to act in the child's best interests. The views of the local authority should therefore be taken into consideration by the decision maker but are not determinative as to whether a child is granted leave and a decision-maker is required to make an individual assessment.

An application for ILR outside the rules should be made on form SET (O). This application comes with relevant fees and charges as ILR applications are not covered by the fee waiver policy. However, the application becomes feeless if it is specified in the 'Current Status' section of the online form that the applicant 'is living in Local Authority care in the UK.' Other applicants who may be accommodated by a relative or guardian but receive substantial involvement from the local authority in their daily and long term care, such that their guardian would be unable to accommodate or care for them without local authority support, should also use this feeless route and make arguments in their representations as to why the child should be considered in this category.

There are a number of arguments that a child in care may be able to make in support of an application for Indefinite Leave to Remain in the UK and an expert report from an independent social worker can assist in making these arguments by directly addressing issues of the child's best interests in being granted a more durable period of leave. The expert report is a useful addition to supporting evidence, particularly if available assessments from the Children's Services Department do not address the child's immigration status in detail or are not supportive to their application for a longer period of leave. Funding is available from the Legal Aid Agency for an expert report at the Legal Help stage. Other evidence of the local authority's involvement with the child, including Child in Need assessments and letters from Child and Young People's Services will often support arguments for ILR and, where possible, a witness statement from the child should be provided in addition to statements from carers, support workers and other relevant parties. The Home Office is under a duty to ensure that the best interests of a child are taken into account when making any immigration decision and it is the legal adviser's role to make comprehensive representations regarding those interests. It is above all important that the child receives legal advice about their options and that representations are made in support of Indefinite Leave to Remain from the initial application stage.

Article by Beya Rivers.

Beya Rivers is a Trainee Solicitor/Immigration and Asylum Senior Caseworker at Hackney Community Law Centre.



Note on Registration as British Citizens:

discretionary applications made under section 3(1) of the British Nationality Act (BNA) 1981

What struck me about D's case was the impact that the instability of having limited leave to remain had had on his upbringing. Indeed, as a result of poor advice, his mum failed to renew their initial period of leave on time and the consequence of this was years of precarious accommodation and even street homelessness.

Praxis was recently successful in registering a young man (D) as a British citizen under section 3(1) of the British Nationality Act (BNA) 1981.

Applications made under s.3(1) are granted at the discretion of the SSHD, and as such, there are no set criteria or requirements to be met. The only statutory requirements are that the applicant is a child, of good character and that "the SSHD thinks it fit to register them". The issued guidance gives indications as to what will play significant factors in the SSHD's decision making, such as the nationality or status of the parents, the length of time spent in the UK and the applicants future intentions in this country.

I first met D four months before he turned 18 when he attended one of our weekly drop-in services with his mother. At the time D and his family had limited leave to remain in the UK and his mother was in the process of registering her two younger children as British under s1(4) of BNA 1981. D was born outside the UK, but entered when he was 1 year old and for this reason alone, he was prevented from registering under the same provisions as his siblings, despite the fact that he had lived in the UK for longer than both of them.

Like many young people in D's position, it was a shock for him to discover that not only did he not share the same citizenship as many of his classmates, but that he did not have the same legal rights to obtain it as his younger siblings. In contrast to his siblings, under nationality law, D would have to wait at least seven more years before he was eligible to naturalise because of his particular circumstances. D told me that being British was central to his identity and was something he had taken for granted before he learnt of the precarious nature of his immigration status, which sadly led to the family spending long periods of time homeless and in poverty.

What struck me about D's case was the impact that the instability of having limited leave to remain had had on his upbringing. Indeed, as a result of poor advice, his mum failed to renew their initial period of leave on time and the consequence of this was years of precarious accommodation and even street homelessness. These hardships continued to impact them, even when they were able to secure status again. Had the initial leave been renewed in time, the family would likely have had Indefinite Leave to Remain (ILR) before D turned 18, leaving him in a significantly securer position. As D was just a child at the time, it was argued that it would not be reasonable for him to be penalised for this, in line with caselaw asserting that children should not be blamed for matters they are not responsible for: *ZH (Tanzania) v SSHD* [2011] UKSC 4; *Zoumbas v SSHD* [2013] UKSC 74, amongst others.

The notable weakness in D's case was his mother's immigration status, as she was neither British, nor was she close to obtaining ILR and therefore the importance of the other supporting evidence was paramount. The application made the argument that as an older child who had spent the majority of his life in the UK, D's circumstances were exceptional – in line with the SSHD's own guidance which expressly identifies this situation to justify registering cases where neither parent are or can become citizens.

Whilst I knew it would be a complex application, there were many compelling aspects to the case: the length of time he had lived in the UK and his lack of ties to the country he was born in, his commitment to pursue higher education and ambitions to be a journalist, his reputation in school and extra-curricular activities. We also relied on the fact that he had a legitimate expectation that he would be British by now.

In support of the application we drafted detailed witness statements from D and his mother, as well as emotive statements from his teachers and school friends, all of which confirmed his connection to the UK and his future ambitions. These also highlighted the importance of citizenship to D, both in terms of his identity and mental health, but also for his future plans. We also included evidence of the work experience he had done and intended to do demonstrating his commitment to a future in this country. D was clear that he would not feel truly able to progress his life without the security of British citizenship. This feeling was heightened because of the hardships he had faced as a result of his precarious status.

Overall we asserted that it was undoubtedly in D's best interests to be registered as a British citizen at this crucial stage of his development and submissions were made on that basis: he had an overwhelming connection to this country, his future lay here and there were strong compassionate circumstances which meant that he, like so many other young people in his position, required the stability of citizenship as soon as possible.

Whilst I was confident that D had a strong case I ensured that I carefully managed his expectations and prepared him for the fact that if the application was unsuccessful it could result in a lengthy judicial review challenge. Thankfully, due to the strong evidence submitted, the application was granted three months after submission. I would encourage practitioners to submit applications of this type: they can be successful when carefully and thoroughly prepared.

D was represented by Laura Goodlife of Praxis Community Projects.

Human Rights and the Challenges of Automated Decision-Making on Migration

An examination of three central human rights challenges posed by the automation of administrative processes in the context of migration.

Put simply, automation refers to the operation of machines without human control. Artificial intelligence ('AI') is a subset of automation which 'refers to the broader science of designing computers to act intelligently without necessarily being explicitly programmed to reach particular outcomes.'[1] Within automated processes, therefore, there is an essential distinction between traditional rule-based systems, in which the system is programmed to implement a decision-making tree (namely a flow chart which maps out the different courses of action and their outcomes); and statistical machine learning in which a computer is trained (on data provided by the system designer) to draw inferences in respect of new data. An example of the difference between rules-based and statistical machine learning systems from a non-legal context is the training of dictation and predictive text software to infer the correct grammatical structure to be applied in a given context (eg, the correct contextual use of the homonyms 'there/their/they're') by reference to correlations in past data rather than by reference to the rules of grammar.

Automated decision-making ('ADM') employs rules-based and statistical algorithms in order to make decisions. ADM may be fully automated, in which case there is no human input (beyond the initial provision of training data) in a decision being taken; or it may support human decision-making. In the latter case, the AI system provides information such as a prediction or a recommendation that is (or should be) taken into account by a human decision-maker exercising discretion.

ADM is increasingly being used globally in government decision-making in the field of immigration and asylum. This may be ADM using rules-based systems, for example determining eligibility for an immigration permission by reference to residence in the host state for a given number of years. It may also rely on statistical systems, for example, assessing risk in entry clearance applications or in fraud detection.

Whilst there are potentially many efficiency gains in automation, there are also challenges as regards procedural legality, ensuring non-discrimination and protecting privacy. An example of a highly criticised programme using checks in government databases (through a search option) to identify irregularly present immigrants in the UK led at least in part to what has been termed the 'Windrush Fiasco'. In this programme, many people who had lived their whole lives in the UK found themselves targeted for deportation on the basis of checks in a wide range of government databases. The Home Office programme also included the sharing of personal data with other government departments which resulted in these individuals being prohibited from using the NHS and from working. The search criteria used by the Home Office involved machine searches on general criteria which provided results about individuals for the purposes of immigration decision making.[2] The use of automated processes in immigration decision making in the UK's EU Settled Status Scheme ('EUSS') deploys an algorithm which has access to a number of government databases and is able to determine rapidly eligibility of applicants for the new status for EU nationals in the UK. There are also AI-driven schemes being used in the EU, for example, in its 'Interoperability' project (which links databases on third country nationals to enable algorithmic searching). This article will examine the impact on three fundamental rights - the protection of privacy, non-discrimination and the right to an effective remedy - of the use of automated processes in decision making on immigration and asylum in the UK.

Privacy

Given that statistical AI systems are trained to make decisions on data provided to them, the quality of their decisions relies on the quality and quantity of the training data (that is data provided by the system designed to train a machine to draw inferences in respect of fresh data). As such, for AI and ADM to operate effectively they need access to data, including personal data. The greater the availability of good quality data, the better the outcomes of the use of AI and ADM (and the lesser the risks in terms of discrimination and other breaches of fundamental rights – see further below). Without personal data, AI and ADM are only able to work with impersonal data (that is, anonymised data) which does not give rise to the same immediate privacy issues but is much less interesting both to the private and public sectors. For the private sector, access to vast amounts of personal data is useful to target their potential customers; for the public sector, as explained above, the promise is of new (and cheaper) ways of determining claims on public services. The obstacle to accessing personal data, from a human rights perspective, is the right to privacy. Privacy is a gateway right. In particular, limitations on the collection and use of personal data on the basis of the right to privacy limit the amount of personal data available for AI and ADM processing techniques. As such, the right to privacy operating on AI and ADM processes is likely to have effects on the protection of other rights, which we discuss further below.

The right to privacy is an internationally recognised human right, included in the Universal Declaration of Human Rights, Article 17 International Covenant on Civil and Political Rights (as well as other conventions) and in the European sphere Article 8 European Convention on Human Rights and Articles 7 and 8 EU Charter of Fundamental Rights. The definition of privacy, as the UN Human Rights Committee has explained in General Comment 16[3] is relative as all persons live in society. However, state authorities must be limited as regards calling on persons to provide information relating to a person's private life to that which is essential in the interests of society as understood by the Covenant (para 7). Among the central duties on states to give effect to their obligation to deliver the right to privacy is to protect personal data both from the public and private sector.

The risks to privacy caused by digital technology are not born of the advent of AI. However, automation and AI add to the capabilities of those mining data by increasing significantly the speed and efficiency of data gathering and analysis. As human reliance on technology increases, so too does the amount of data produced. The vast quantities of data available and the wide access to them by AI systems poses challenges to the right to privacy. These include both the exploitation of personal data through lack of awareness by users of technology of how much data is individually produced and stored; and the impotence of anonymisation requirements in circumstances where, through access to multiple data sources, an AI system is able to de-anonymise data based on inferences from other data sets. Migration in the modern era is inextricably linked to technology and the provision of data. Not only do migration flows rely on data to enable human movement, of more concern in the present context are states' extraction and retention of personal data from those who seek (or who have, at some point, sought) immigration permissions from a host state.

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[1] PA. Zuckerman, 'Artificial Intelligence – Implications for the Legal Profession, Adversarial Process and the Rule of Law' U.K. Const. L. Blog (11th March 2020)

[2] See 'Windrush – Lessons Learned Review', Independent review by Wendy Williams, March 2020, which mentions issues with databases (see, eg, at pp89 & 226 onwards). The question of use of databases in the hostile environment was also widely reported in the press.

[3] UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988, available at: https://www.refworld.org/docid/453883f922.

The dangers to privacy which automation constitutes was recognised by Council of Europe states in the 1970s. This culminated in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1981. The purpose of the Convention is to protect every individual irrespective of nationality or residence, with regard to the processing of their personal data. It is based on the right to human dignity and human rights in general. It has been ratified by all Council of Europe states (including the UK) as well as by nine non-Council of Europe states. In 2018, the Council of Europe opened for signature and ratification a protocol which updates the convention in light of the diversification, intensification and globalisation of data processing and personal data flows. The starting place of the Convention (and amending protocol) is personal autonomy based on a person's right to control her/his personal data and the processing of such data. The protocol clarifies the requirement that personal data can only be processed on the basis of the free, specific, informed and unambiguous consent of the data subject or of some other legitimate basis laid down in law. The amending protocol is a starting point in identifying the threats to privacy caused by AI and automation and recalls the need for a human-rights framework tailored to match the pace of developments in technology. Indeed, the absence of a rights-based regulatory framework for automated processes is brought into relief when the consequences of deficits in the quality of data are considered. We look below at two such effects, namely new challenges to the rights of equal treatment and access to an effective remedy created by automation in the migration context.

Non-discrimination

As noted earlier, the quality of decisions made by statistical AI systems relies on the quality and quantity of the training data. Put simply, biases within training data will risk the production of biased decisions. Unless the training data is free from bias, therefore, the automation of decision-making may simply apply existing societal inequalities and prejudices. Worse, ADM risks further compounding inequalities as the ostensible impartiality of machines provides an imprimatur of legitimacy to automated decisions. By its very nature, there are few areas other than immigration and asylum in which the risks of perpetuating inequality are as high.

Discrimination is raised in one of the first legal challenges to the use of algorithms in the UK, namely to the Home Office use of an algorithm to filter UK visa applications into those assessed as a low, medium or high risk. The results produced by the statistical system employed are then used by human decision makers. In effect, those applications categorised as higher risk are subject to higher scrutiny and, in practice are more likely to be unsuccessful. As reported in *The Guardian*, the two NGOs bringing the case, Foxglove, a new advocacy group promoting justice in the new technology sector, and the Joint Council for the Welfare of Immigrants (JCWI) have indicated their fears that the AI system employed could lead to structural discrimination, including on grounds of race.[4]

The risk of another type of bias in the entry clearance filtering system (though not one protected by equality law) was raised by the Independent Chief Inspector of Borders and Immigration who first reported on the automated 'streaming tool' in a July 2017 report on entry clearance processing.[5] In respect of the inputs used, the report notes that 'the streaming tool is regularly updated with data of known immigration abuses (for example, data relating to breaches of visa conditions after entry to the UK).' It concludes that whilst the streaming tool could usefully assist entry clearance decision-makers given the volume of applications, 'there is a risk that the streaming tool becomes a de facto decision-making tool.'[6] The report noted that in a working environment in which entry clearance officers were expected to reach high targets (70-75 visit visa decisions per day per Entry Clearance Officer), the AI system used did not take account of 'the danger of 'confirmation bias' (an unconscious disinclination on the part of the decision maker to look for or give appropriate weight to evidence that contradicts the streaming rating, and a tendency to select and rely on evidence that supports it).'[7]

The risk of discrimination in decision-making is also apparent if the data analysed is insufficiently broad. In a legal opinion commissioned by the Legal

continued...

[4] '…Both said they feared the AI "streaming tool" created three channels for applicants including a "fast lane" that would lead to "speedy boarding for white people"': 'AI system for granting UK visas is biased, rights groups claim', 29 October 2019 < https://www.theguardian.com/uk-news/2019/oct/29/ai-system-for-granting-uk-visas-is-biased-rights-groups-claim>.

[5] Independent Chief Inspector of Borders and Immigration, 'An inspection of entry clearance processing operations in Croydon and Istanbul', July 2017.

[6] §3.7

[7] Ibid.

Education Foundation, Robin Allen QC and Dee Masters[8] conclude that the EUSS established by the Home Office, in light of the UK's withdrawal from the EU, to regularise the immigration status of certain Europeans living in the UK, may also breach equality law. Eligibility for Settled Status is determined by reference to presence in the UK for a continuous five-year period over the relevant time frame. In order to determine length of residence in individual cases, the Home Office uses an automated system to analyse data from DWP and HMRC. Robin Allen QC and Dee Masters note that DWP's databases are only selectively trawled and significantly data relating to Child Benefits and/or Child Tax Credit is not analysed. This omission is relevant from an equality perspective as the vast majority of recipients are women. As a result, women are likely to be disadvantaged in showing five years' residence vis-à-vis men since relevant data most often relating to them is excluded. The opinion concludes that as a result, the EUSS could very well lead to indirect sex discrimination contrary to section 19 of the Equality Act 2010 as arguably the measure chosen to achieve the aim of speedy decision-making under the EUSS cannot be justified because it 'excludes relevant data, for no good reason, which places women at a disadvantage and which undermines the accuracy and effectiveness of the system.'[9]

Effective legal remedy

The quality of input and training data is further relevant to the availability of effective legal remedies. As part of the legal challenge to the entry clearance streaming tool discussed above, the claimants seek an explanation from the Home Office of the basis on which the algorithm allocates entry clearance applications to the three risk categories. This raises the central question of accountability in ADM. In short, the interaction of an absence of transparency and an abundance of complexity in AI systems may lead to a situation in which the subject of a decision is unable to determine the basis on which her/his application has been refused. If prevented from knowing the criteria against which an adverse decision was taken or the reasons for refusal, the possibilities of effectively challenging a decision are rendered nugatory. The result is 'Kafkaesque'.

In the light of the flaws in input and/or training data and at the current stage of development, the argument that automation obviates the need for any form of recourse from administrative decision-making (because the decision will always be right) cannot properly be sustained. As Andrew Le Sueur writes, '[i] it would be constitutionally dangerous to assume that 'the computer is always right'; even more worrying is the idea (no doubt attractive to government) that automation may require less provision to be made for citizens to challenge decisions.'[10]

Arguably, in the absence of clear assurances as to the quality of data and information input in ADM, the risks of unfairness associated with fully automated decisions (and, arguably for assisted decisions) may be high. Ensuring fairness in ADM will depend on effective regulation (including requirements of transparency and the protection of privacy) of training data.[11] What appears clear from the current use of AI in migration decision-making is that there is currently a regulatory gap in respect of the input and training data. Not only is there a lack of transparency but the variable quality of its non-automated decision-making,[12] as well as the ability of the Home Office lawfully to discriminate by way of ministerial authorisation in aspects of its functions, mean that there are flaws and biases potentially inherent in the training data sets available to ADM systems.[13]

Conclusions

By examining AI and ADM in the context of migration, our focus has been on the use by state authorities of AI and ADM tools.[14] Our primary concern regarding the current developments is that any AI or ADM tools which are used by the Home Office in this field must comply with existing data protection law and be effectively and reliably designed so as to prevent unlawful discrimination and/or procedural unfairness. The use of government (and private sector) databases containing personal data which have been created for specific purposes which are not migration-related (such as NHS and HMRC) must be protected against use by the Home Office without the specific consent of the data subject. Often the data subject will be willing to provide consent – for instance to establish her/his work record under the EUSS scheme. But in other cases this may not be true. The individual's right to consent or not when fully informed of the reason and risks of consent cannot be overridden by administrative convenience.

Secondly, there is a fine line between permitted discrimination on the basis of nationality and unlawful discrimination on the basis of race, religion or gender. While there are other grounds of prohibited discrimination, these three are at the cutting edge of immigration-related decision making. The introduction of AI and ADM tools to this area creates two discrimination related concerns: first: is the design of the tools sufficiently robust to ensure that unlawful discrimination is excluded; secondly: is there adequate transparency regarding the processes that an aggrieved individual can obtain a remedy? The examples discussed above creates significant uncertainty over the human rights compliance of aspects of the current use of AI and ADM by the Home Office. We must be astute to the new challenges and wary of obfuscation by technology. In an area such as immigration and asylum, where the stakes and consequences of decision-making are often very high, the need for proper regulation and oversight of automation is imperative.

Article by Elspeth Guild (below left) and Rowena Moffatt (below right).

Elspeth Guild is a partner in the Immigration team at Kingsley Napley and Rowena Moffatt is a public law practitioner at Doughty Street Chambers.

[8] 'Automated data processing in government decision-making'<https://www.cloisters.com/wp-content/uploads/2019/10/Open-opinion-pdf-version-1.pdf>

[9] Ibid.

[10] Robot Government: Automated Decision-making and its Implications for Parliament, Andrew Le Sueur, draft chapter, to be published in A Horne and A Le Sueur (ed), Parliament:Legislation and Accountability (Oxford, Hart Publishing, 2016).

[11] See, in this regard the efforts set out in the Canadian Directive on Automated Decision-Making https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592

[12] See, the high overturn rate on appeal: eg, 'Tribunal Statistics Quarterly, January to March 2019', published 13 June 2019: 'Just over half (51%) of the 11,000 cases determined at a hearing or in papers were allowed/granted, although this varied by case type (45% of Asylum/Protection and 55% of Human Rights appeals were allowed/granted).'

[13] Equality Act 2010, paragraph 17 of Schedule 3.

[14] We note that private sector relevance is only in so far as the Home Office has subcontracted aspects of the system to private sector actors.

ILPA LEGAL UPDATE

The Legal Update provides a regular snapshot of key legal developments over the past month.

Hysaj (Deprivation of Citizenship: Delay) [2020] UKUT 128 (IAC)

The appellant is the same appellant in *R (Hysaj) v. Secretary of State for the Home Department* [2017] UKSC 82, in which the Secretary of State conceded that it could not declare that citizenship obtained through the use of a fraudulent identity was a nullity, but rather had to be removed using her powers to deprive someone of citizenship. In the appellant's case, she then issued a decision to deprive him of his British citizenship. The appellant appealed, but the Upper Tribunal dismissed the appeal, holding:

1. There was no legitimate expectation that the decision is subject to a historic policy in place prior to the Supreme Court judgment in *Hysaj*.
2. There is no historic injustice in these cases because it is not possible to establish that a decision to deprive should have been taken under a specific policy within a specific period of time.
3. Upon deprivation of British citizenship, there is no automatic revival of previously held indefinite leave to remain (confirming *Deliallisi (British Citizen: deprivation appeal; Scope)* [2013] UKUT 439 (IAC)).
4. In deciding the proportionality balance as to whether to grant a period of leave to an individual in these circumstances, there mere consequences of being deprived of British citizenship, without more, cannot tip the balance.

AM (Zimbabwe) v SSHD [2020] UKSC 17

The Supreme Court has clarified the legal position in cases where a seriously ill foreign national claims that removal will violate their right under Article 3 ECHR due to the consequences to their health. The applicant must show that there are substantial grounds for believing that although not at imminent risk of dying, he/she would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to:

(a) a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering; or

(b) a significant reduction in life expectancy.

The Supreme Court thus departed from the judgment of the House of Lords in *N v SSHD* [2005] UKHL 31. In that case, the test was that the applicant's illness has reached such a critical stage (ie he/she is dying) that it would be inhuman treatment to deprive him or her of the care which he or she is currently receiving and send him or her home to an early death unless there is care available there to enable him or her to meet that fate with dignity.

Since the judgment of the House of Lords, the Grand Chamber of the European Court of Human Rights delivered its judgment in *Paposhvili v Belgium* (2016). The Court of Appeal in *AM* interpreted *Paposhvili* as only modestly changing the test set out in *N*. The Supreme Court, however, ruled that the law had changed and *N* is no longer to be followed.

R (Fratila & Anor) v SSWP [2020] EWHC 998 (Admin)

The High Court has upheld the regulations which prohibit those with pre-settled status who do not satisfy the right to reside test (by not being habitually resident) from accessing universal credit. Those who are a qualified person under the Immigration (EEA) Regulations 2016 continue to be able to access universal credit. The challenge had been brought on the grounds they are discriminatory.

While Swift J found there was indirect discrimination, this was justified as it maintained "the status quo" by repeating the position as it exists under the UK's implementation of EU free movement law.

R (Bajracharya) v SSHD (para 34 – variation – validity) [2019] UKUT 417 (IAC)

This recently reported case finds that, where an individual submits a second application for leave while the first application is pending and is therefore treated as a variation application, if the second application does not comply with para 34 of the Immigration Rules, the variation will be invalid, but the original application will not be considered invalid and will remain eligible for determination.

ILPA LEGAL UPDATE

Ammari (EEA appeals – abandonment) [2020] UKUT 124 (IAC)

The Upper Tribunal has confirmed that a grant of leave to remain following an application under the EU settlement scheme does not result in an appeal against an EEA decision brought under the Immigration (EEA) Regulations 2016 being treated as abandoned.

MH (review; slip rule; church witnesses) Iran [2020] UKUT 125 (IAC)

The Upper Tribunal held that written and oral evidence given by church witnesses is potentially significant in cases of Christian conversion (see TF & MA v SSHD [2018] CSIH 58), but it is not expert evidence and is not "necessarily deserving of particular weight". The weight to be attached to such evidence is for the judicial fact-finder.

R (Mujahid) v First-tier Tribunal (IAC) and SSHD (refusal of human rights claim) [2020] UKUT 85 (IAC)

The Upper Tribunal held that a grant of limited leave to remain following an application for ILR (or where representations have been included that ILR should be granted) is not a human rights refusal and so does not attract a right of appeal.

R (JCWI) v SSHD [2020] EWCA Civ 542

The Court of Appeal has overturned the decision of the High Court to find the government's right to rent scheme unlawful. While the Court of Appeal found that the scheme does cause discrimination by landlords, this discrimination could be justified by the public interest in immigration control.

ILPA TRAINING

For full details and booking go to: www.ilpa.org.uk/events.php

Dear Member,

We're pleased to announce that we have officially launched our brand new webinar programme. As we're transitioning into home and lone working the delivery of live webinars to ensure practitioners stay informed of the latest developments in immigration, asylum and nationality law is ever more important. ILPA is dedicated to providing the highest quality training to our members and the wider legal community, and will continue to deliver this throughout this testing time.

Our tutors are known for their experience, for keeping up to date with the continuing developments in immigration legislation and case law, and for their involvement in landmark cases. You can meet our tutors **here**. With the support of our tutors we hope to make our webinars interactive, engaging and a vital tool for practitioners to remain connected with their peers.

We're adding new training all the time so please visit our **new website** for updates.

ILPA is a charity and all profits from ILPA training go towards supporting work to fulfil ILPA's objectives.

With many thanks,

ILPA Training

May 2020

WEB 1013 Deportation of EEA nationals and their dependants

Tuesday 26 May 2020, 15:00-18:15, 3 CPD Hours

Tutor: Alison Harvey, No.5 Barristers' Chambers

There is scope to challenge the deportation of EEA nationals and their family members, but you need to get your evidence right. Many of these cases will go to appeal and you may face attempts to deport your client before the appeal is heard. This course will give you the tools you need to represent your EEA national clients and their family members threatened with deportation.

WEB 1008 How to challenge certified asylum and human rights decisions successfully

Thursday 28 May 2020, 15:00-18:15, 3 CPD Hours

Tutor: Priya Solanki, One Pump Court Chambers

In this webinar, we will have a detailed look at the law on certified asylum and human rights claims. We will consider how practitioners can best use the current authorities and policy guidance to challenge decisions with success. This webinar is suitable for practitioners working in immigration and asylum law. It is suitable for individuals who are seeking more knowledge and experience in challenging certifications by judicial review and it will be a useful refresher and update course for those who are experienced in this field.

June 2020

WEB 1016 Nationality Law is Fun

Only 10 spaces available

Wednesday 03 June 2020, 15:00-19:15, 4 CPD Hours

Tutors: Adrian Berry, Garden Court Chambers and Diana Baxter, Wesley Gryk Solicitors LLP

The session is aimed at practitioners who want to develop their understanding of British nationality law and who are interested in more than making applications for citizenship. It complements the ILPA courses on naturalisation and registration of children. It covers automatic acquisition of British citizenship by birth or descent, tracing family status and old Commonwealth cases on and after independence, other forms of British nationality (e.g. British Overseas citizens), and dual nationality issues in practice. It also looks at the swing to correct historical injustices based on sex discrimination, illegitimacy and birth in the British overseas territories. It considers the nationality legislation of 1914 and 1948 before turning to the development of the British Nationality Act 1981 and its revisions down to the present day. Understand the implications of status tracing for your client and emerge a better-informed and wiser immigration, asylum and nationality lawyer.

WEB 1029 Employing migrant workers: Tier 2, sponsorship & alternatives

Just announced

Wednesday 10 June 2020, 14:00-17:15, 3 CPD Hours

Tutor: Shara Pledger, Latitude Law

A basic to intermediate level course aimed at those who do not yet feel confident with Tier 2 sponsorship. We will take a closer look at the requirements for employers and workers, and how the sponsorship system impacts them. The aim of the course is to expand and develop knowledge of business immigration law. We will demystify the Tier 2 sponsorship system and equip attendees to speak with confidence and precision on this tricky subject.

WEB 1009 Appeal Rights and Administrative Review

Thursday 11 June 2020, 15:00-18:15, 3 CPD Hours

Tutor: Priya Solanki, One Pump Court Chambers

The appeal regime is complicated. The right to appeal and grounds of appeal were severely restricted through the Immigration Act 2014. Practitioners need to be familiar with the current system and the complexities of issues such as new matters. This webinar is suitable for practitioners working in immigration and asylum law. It is suitable for individuals who are frequently involved in appeals to the Tribunals and challenges by administrative review.

WEB 1030 An introduction to asylum claims based on sexual orientation or gender identity - Refugee Week Series

Tuesday 16 June 2020, 15:00-18:15, 3 CPD Hours

Tutors: Gabriella Bettiga, MGBe Legal and Marios Kontos, UKLGIG

This course will focus on the aspects of an initial claim and appeal based on sexual orientation or gender identity. It requires some knowledge and experience of the asylum procedure. The course is aimed at practitioners who wish to improve their understanding of asylum claims based on sexual orientation or gender identity. After the course, participants will feel more confident to represent LGBTQI+ people seeking asylum up to and including appeal stage.

WEB 1033 The Hostile Environment - Prevention of Illegal Working

Wednesday 17 June 2020, 14:00-17:15, 3 CPD Hours

Tutors: Hazar El-Chamaa and Hester Jewitt, Penningtons Manches Cooper

Delegates who attend this session will learn about the operational and practical side of prevention of illegal working obligations on employers. At the end of the session they should be in a better position to advise clients on their duties under the Prevention of Illegal Working legislation and how to deal with the ramifications of a breach in those duties. Increased awareness of employment law considerations.

The course will also touch on implications of Brexit and recent changes introduced to the Right to Work checks.

Topics:

- Advising employers on prevention of illegal working checks – what, when and how?
- Advising employers on how to minimise the risk of discrimination claims when carrying out prevention of illegal working checks.
- Practical guidance for managing your clients' employment law risk when dealing with cases of suspected illegal working including: unfair dismissal, discrimination, breach of contract and deduction from wages claims.
- Common issues and practical tips
- Difficult cases: Employment restrictions applicable to various immigration categories
- Sanctions against employers and challenging these
- Special considerations for licenced sponsors
- Advising employers on civil penalty regime – sources, processes, points to check and ramifications.

WEB 1023 Running an Asylum and Human Rights Application: procedure and funding - Refugee Week Series

Thursday 18 June 2020, 15:00-18:15, 3 CPD Hours

Tutors: Gabriella Bettiga, MGBe Legal

This course focuses on how to run an asylum application and looks at the relevant legislation and practical steps to be taken. It will also cover the main Legal Aid regulations applicable to legal help files. At the end of the session you should have an understanding of the Geneva Convention grounds and be able to prepare an asylum and human rights application.

WEB 1019 Windrush Scheme: a guide to applications

Tuesday 23 June 2020, 10:00-13:15, 3 CPD Hours

Tutors: Anjana Daniel, Fragomen LLP and Diana Baxter, Wesley Gryk Solicitors LLP

This webinar aims to teach practitioners how to make successful immigration and nationality applications under the Windrush Scheme. The aim of the course is to teach practitioners how to identify potential Windrush Scheme applicants, what factors to consider in deciding which application to make, how to make the applications and what evidence is needed.

WEB 1015 EU Settlement Scheme Update

Thursday 25 June 2020, 15:00-18:15, 3 CPD Hours

Tutor: Eva Doerr, Lamb Building and Leonie Hirst, Hirst Chambers

The course will cover key legal provisions for EEA/Swiss nationals in the UK by the specified date (the end of EEA free movement in the UK), their family members and employers, including problematic areas of the EU Settlement Scheme and common pitfalls. The aim is to provide practitioners with the tools to advise clients on their immigration status and options in light of Brexit and the practicalities of applying for immigration permission under the EU Settlement Scheme. The focus will lie on highlighting problematic and uncertain areas and common pitfalls.

WEB 1006 It's all about the money: financial requirements of the rules for applications by partners

Monday 29 June 2020, 15:00-18:15, 3 CPD Hours

Tutors: Nath Gbikpi, Wesley Gryk Solicitors and Adam Cotterill, Penningtons Manches Cooper

At the end of the course participants should fully understand the financial requirements in Appendix FM and the related evidential requirements in Appendix FM-SE, and be equipped to handle a range of applications involving different financial circumstances.

July 2020

WEB 1022 How to Draft Asylum and Immigration Statements

Thursday 02 July 2020, 15:00-18:15, 3 CPD Hours

Tutor: Gabriella Bettiga, MGBe Legal

The course is aimed at caseworkers who wish to draft strong, hard-to-challenge statements, and is packed with practical tips. Attendees will explore style and drafting techniques, essential content, format and presentation, and common traps. The tutor will also look at professional conduct issues likely to arise in asylum matters, and how to deal with vulnerable clients.

Topics:

- What you should cover when taking a statement
- How to tackle credibility issues
- Statements and vulnerable clients
- Beware of vicarious trauma
- Statements in immigration applications: when and why are they needed
- How to respond effectively to refusal letters
- Lots of practical tips

Be prepared to share your experience in this interactive webinar. You can send general question to the tutor when you register for this course.

WEB 1017 Naturalisation as a British Citizen

Tuesday 07 July 2020, 14:00-19:15, 5 CPD Hours

Tutor: Adrian Berry, Garden Court Chambers

This course will enable practitioners to advise and assist foreign nationals on all aspects of securing naturalisation as a British citizen for adults, as well as registration for their families/children.

Topics to be covered:

- Criteria for naturalisation as a British citizen
- Applying for naturalisation as a British citizen
- Naturalisation issues: residence, absences, good character, and future intentions, etc.
- Evidence issues
- Form Filling
- Administrative and Legal remedies in the event of a refusal

WEB 1027 Domestic Workers

Thursday 09 July 2020, 15:00-19:15, 3 CPD Hours

Tutor: Alison Harvey, No.5 Barristers' Chambers and Alex Millbrook, Kalayaan

An examination of the requirements of the visas for domestic workers in private and in diplomatic households, with a particular focus on how to navigate the ethical problems thrown up by the power relationship between employer and worker. A look at what can be done for migrant domestic workers when things go wrong: what options are open to them, including when are they recognised as trafficked persons? The course will also consider the circumstances in which you might be called upon to assist domestic workers in private households who held the "old" visa that led to settlement.

Topics:

- Visas for domestic workers in private households
- Visas for domestic servants in diplomatic households
- Ethical considerations
- When will a domestic worker be recognised as trafficked (and when not)?
- What options are open to domestic workers recognised as trafficked?
- Domestic workers who came in on visas leading to settlement and the problems with which they present.

ILPA MEMBERSHIP

Each edition, the ILPA Monthly focuses on one aspect of ILPA membership to make sure you're getting the most out of your ILPA membership!

Message for Fuloughed Staff

We want to ensure any of our members who have been furloughed are able to remain connected with the ILPA community should they wish.

We want to ensure that you have access to working groups, webinars, online resources and continue to keep up to date.

If you're being furloughed and want to remain in touch with a different email address please email info@ilpa.org.uk with your preferred email address.

If members of your team have already been furloughed, please do feel free to get in touch on their behalf, or forward this newsletter on to them. Please don't hesitate to get in touch if you have any questions.

ILPA WHO'S WHO

ILPA's Board of the Directors is its Committee of Trustees which is elected annually by the membership. All members of the Committee of Trustees are members of ILPA. All aspects of ILPA's work are supported by its Secretariat of paid staff. ILPA's work is organised into working groups.

The Committee of Trustees of ILPA

To get in touch with members of the Committee of Trustees, please get in touch with the ILPA Secretariat.

Chair: Adrian Berry, Barrister, Garden Court Chambers

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Hazar El Chamaa - Solicitor and Partner, Penningtons Manches Cooper LLP

Natasha Gya Williams - Solicitor, Gya Williams Immigration

Helen Johnson - Head of Children's Services, British Refugee Council

Grace McGill - Solicitor, McGill and Co. Solicitors

Julie Moktadir - Solicitor, Stone King

Daniel Rourke - Solicitor, Migrants Law Project

ILPA Working Groups

ILPA organises its work into working groups which are shown below. To subscribe to a working group email list or to check your subscriptions/unsubscribe visit the working group page on the members' area of our website. Each working group has a page and subscription details are at the top.

All convenors are members of ILPA. To contact a working group convenor please get in touch with the ILPA Secretariat. ILPA also convenes ad hoc working groups around particular topics and staff can help you identify who would be the best person to speak to on a particular topic.

Children: Operates as an email group only

Courts and Tribunals: Allan Briddock - One Pump Court, Nicola Burgess - JCWI, Rowena Moffatt - Doughty Street Chambers

Economic Migration: Tom Brett-Young - Veale Wasbrough Vizards LLP, James Perrott - Macfarlanes LLP, Anushka Sinha - Kemp Little

European: Elspeth Guild - Kingley Napley LLP, Alison Hunter - Wesley Gryk Solicitors LLP, Jonathan Kingham - LexisNexis

Family and Personal: Katie Dilger - Bates Wells LLP, Nath Gbikpi - Wesley Gryk Solicitors LLP, Sue Shutter - volunteer with the Project for the Registration of Children as British Citizens and Slough Immigration Aid Unit

Legal Aid: Polly Brandon - Freedom from Torture, Laura Smith - JCWI, Ayesha Mohsin - Kalayaan

Legislation Adrian Berry - Garden Court Chambers

Refugee: Ali Bandegani - Garden Court Chambers, Nicola Braganza - Garden Court Chambers, Annie Campbell - North Kensington Law Centre

Removals, Detention and Offences: Convener: Bahar Ata - Duncan Lewis. Sairah Javed - JCWI, Pierre Makhlouf - Bail for Immigration Detainees

Well-Being: Aisha Choudhry - Bates Wells LLP, Kat Hacker - Helen Bamber Foundation, Emily Heinrich - Fragomen

Immigration Professional Support Lawyers Network: Shyam Dhir - LexisNexis, Tim Richards - Kingsley Napley LLP, Josh Hopkins - Laura Devine Immigration

Regional Working Groups

North West: Lucy Mair - Garden Court North Chambers, Denise McDowell - Greater Manchester Immigration Aid Unit, Emma Morgan - DAC Beachcroft LLP, Shara Pledger - Latitude Law

Northern Ireland: Ashleigh Garcia - Law Centre NI, Sinead Marmion - Phoenix Law/Step, Maria McCloskey - Napier Solicitors, Carolyn Rhodes - Law Centre NI

New York: Tanya Goldfarb - Clintons, Jenny Stevens - Laura Devine Solicitors

Scotland: Fraser Latta - Latta and Co Solicitors, Kirsty Thomson - JustRight Scotland, Darren Stephenson - McGill and Co. Solicitors

Southern: Tamara Rundle - Redstart Law

South West: Sophie Humes - Avon and Bristol Law Centre, Glyn Lloyd - Newfields Law, Luke Piper - South West Law, Marie Christine Allaire Rousse - South West Law, Dr Connie Sozi - Deighton Pierce Glynn

Yorkshire and North East: Ish Ahmed - Bankfield Heath Solicitors, Emma Brooksbank - Freeths LLP, Nichola Carter - Carter Thomas Solicitors, Christopher Cole - Parker Rhodes and Hickmott Solicitors, Bryony Rest - David Gray Solicitors

ILPA THE SECRETARIAT

All aspects of ILPA's work are supported by its Secretariat of paid staff who are here listed. ILPA's work is organised into working groups and all ILPA's work is carried out by its members, supported by the Secretariat.

Nicole Francis
Chief Executive

Lana Norris
Finance and Office Manager

Helen Williams
Membership Manager and Website Project Manager

Sonia Lenegan
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Emmanuel Benedetti
Finance Assistant, Strategic Legal Fund

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Esme Kemp
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Amira Rady
Training Officer

How to Contact ILPA

Remember we have a general email address which is always checked and your email will be forwarded from there to the relevant person in ILPA, so if you don't know who to contact about your question please send it to **info@ilpa.org.uk**

ILPA MEMBER
IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

This is the monthly publication of the Immigration Law Practitioners' Association Ltd. It is FREE for members. **Membership starts from just £90 per year.**

If you are interested in joining ILPA or finding out more about our work see **www.ilpa.org.uk** or contact **helen.williams@ilpa.org.uk**

ILPA

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