ILPA briefing for the debate on the petition *"Amnesty for Anyone that was a Migrant and arrived in Britain between 1948 to 1971:"* Westminster Hall, 4.30pm, 30 April 2018

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

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The 'hostile environment' policies, given ever-stricter legislative effect through the Immigration Act 2014 and the Immigration Act 2016, as well as through the drive to reduce net migration (not least through the use of targets) have significantly contributed to problems of long-settled Commonwealth citizens, including the so-called "Windrush" generation, in establishing their right to live in the UK. The detrimental effect that these policies have had on individuals legally resident in the United Kingdom has had and continues to have serious consequences for them.

THIS BRIEFING COVERS THE SO-CALLED WINDRUSH GENERATION AND THOSE WHO ARRIVED FROM 1973 ONWARDS. IT SHOWS A CONTINUING PROBLEM, NOTWITHSTANDING RECENT COMMITMENTS MADE BY THE HOME SECRETARY. IT SHOWS ALSO THAT THE PROBLEM EXTENDS BEYOND THOSE FROM THE CARIBBEAN, AND AFFECTS PEOPLE FROM ALL COMMONWEALTH COUNTRIES.

BACKGROUND

The Immigration Act 1971 came into force on 1 January 1973; by section 1(2) it confirms the indefinite leave to remain (ILR) of people present in the UK on that date when those persons were settled here, that is, without restriction on the time for which they may remain.

It is unclear how many people fall within this category of Commonwealth citizens, and how many do not have the documents to prove their status. Many of those who travelled to the United Kingdom did so as children; a number of them travelling on their parents' passports. Since their arrival, many of these people have never travelled again nor applied for further (UK-issued) travel documents.

Of the Commonwealth citizens arriving before 1973, it is estimated that 57,000 of them are non-UK nationals, a number which can be broken down into 15,000 from Jamaica, 13,000 from India and 29,000 from other Commonwealth nations such as Kenya, South Africa and Pakistan[1].

In 2012 the Home Secretary outlined that "The aim is to create here in Britain a really hostile environment for illegal migration." The effect of the Immigration Act 2014 and the Immigration Act 2016 has been to ensure that those who cannot provide specified documents to confirm their right of residence in the United

[1] As reported by the University of Oxford's Migration Observatory (year ending June 2017): http://www.migrationobservatory.ox.ac.uk/commonwealth-migrants-arriving-1971-year-ending-june-2017/

Kingdom cannot open bank accounts, rent private accommodation or obtain driving licences. It adds to legislation that prevents people from working, accessing healthcare, and claiming social welfare benefits without specified documents.

Immigration enforcement has thus been outsourced to banks, landlords, employers and NHS staff. The efficacy of the "hostile environment" depends upon such people conducting rigorous identity checks to ensure compliance. The 2014 Act, for example, introduces a system of civil penalty charges for landlords and their agents who let property to migrants who cannot establish a (immigration status-derived) right to rent. The penalties imposed on landlords for non-compliance must not exceed £3,000 per migrant, but may be of any value that seems appropriate to the Secretary of State for the Home Department[2].

This leaves those long-settled Commonwealth citizens, legally resident, but who do not have documents to prove it, in a particularly precarious position. Their inability to provide the required documents to prove their lawful residence means that if they leave they can be refused entry back into the United Kingdom, National Health Service care, access to their funds, access to accommodation, and/or access to employment. This is despite the legality of their residence or the number of years they have spent living, working and paying taxes in the United Kingdom.

As early as 2014, the issue of undocumented Commonwealth citizens came to the fore[3], though this did not lead to any change in government policy regarding such persons. The difficulty of proving lawful residence falls on long-term resident Commonwealth citizens in particular ways. When these Commonwealth citizen migrants "first came to the UK four or five decades ago, their status was automatic, under the legislation of the time. They would have assumed it was permanent and irreversible. Newer migrant groups, who started coming to the UK after the introduction of tougher immigration laws, are far more alert to the importance – and difficulty – of securing their status… If they lose a document, they know they have got to get it back.[4]"

Long-settled people thus had no reason to find out about the existence of biometric residence permits, the generally-accepted documents to show a person's immigration status. Applying for one currently requires the person to fill in Home Office form NTL, pay a fee of £229, and provide evidence that the Home Office accepts of their indefinite leave/settled status, and that they have not been out of the UK for any period of over two years since gaining settlement. This can be very onerous when proof of some 40 or 50 years is required.

Amongst other issues, the plight of Commonwealth migrants without documents also shines a light on the continued importance of subject access requests (SARs). Legal representatives make SARs to the Home Office for the release of their clients' files because these files frequently provide crucial information about their clients' immigration histories. The Home Office cannot be relied upon to provide this information without a SAR, and the Home Office frequently does not act in accordance with its own records when making life-changing decisions. Many people will have had no dealings with the Home Office at all, as they came in for settlement and the only record would have been their landing card, if that had been kept; but others may have records in connection with other family members coming to join them later, vital to show their status at that time.

ILPA has supported the calls for the 'immigration control exception' under Schedule 2, Part 1, Paragraph 4 of the Data Protection Bill 2017 ('the Bill') to be removed. The inclusion of this exemption in the Data Protection Bill is of extreme concern to ILPA and its members.

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[2] Ss. 23 and 25 Immigration Act 2014.
[3] Bawdon F, *Chasing Status: The 'Surprised Brits' who find they are living with irregular immigration status* (2014) Legal Action Group: http://new.lag.org.uk/media/186917/small_chasing_status.pdf
[4] *Ibid.*

HOW COMMONWEALTH CITIZENS ARE AFFECTED

It is often difficult for long-settled Commonwealth citizens to prove that they have ILR under the 1971 Immigration Act.

An ILPA member highlights the case of a lady who “kept her family records very carefully to show their immigration history, but this evidence of old documents and old passports was destroyed by her vindictive ex-husband when she divorced him! ” In such instances, affidavit evidence and even DNA evidence may become of critical importance in proving family relationships and ensuring that immigration histories are properly recorded. The importance of preserving particular forms of evidence requires specialist legal advice, which is not available to the affected individuals where they lack the means to pay for it, as there is no legal aid available for immigration matters.

Another example from an ILPA member is that of a Jamaican national who arrived in the United Kingdom in 1968, aged nine, with his younger brother. His parents were already in the United Kingdom and he did not keep his entry passport. Since he had been present in the United Kingdom since 1968 and he has never left since arrival, he had no need to apply for any immigration status. He had attended primary and secondary school in the United Kingdom, worked here, and paid taxes and national insurance. He had not applied for naturalisation as a British citizen, though his younger brother was issued with a British citizen passport in the late 1980s. All his other siblings were born in the United Kingdom before 1983 and all British citizens. His children and grandchildren are also all British citizens. When he began to experience health problems, he sought NHS treatment, but was asked for his status documents. Subsequently, he had to stop working for health reasons but he was refused access to any social security benefits, including housing benefit, as he lacked status documents. In order to prove that he had arrived in the United Kingdom aged nine in 1968, school letters, HMRC statements, statements from siblings and children with UK passports attached, and a detailed statement from his younger brother who arrived with him, were submitted to the Home Office. After being granted his British Passport, he sought to claim the relevant benefits. However, he was “met with suspicion” even though he was carrying a letter of explanation from his solicitors. “He has still not been granted the benefits he has a right to claim and that he fully qualifies for. He has paid tax and national insurance for at least 35 years. ”

ILPA have also been made aware of the case of Ms B. She “travelled from India on her mother’s passport, she has been told that she was about six months old, which would make it 1970. There is a copy of her mother’s passport still, showing that entry clearance was granted to her ‘plus child’ to join their husband/father, but the immigration officer’s square entry stamp does not have ‘+1’ in manuscript beside it. She got her own passport some years later, and travelled and returned, but that passport was lost. She has lived here since babyhood, her three children were born here. The Home Office told her they had no records of her, and she could not satisfy them that she had been admitted for settlement. She eventually was given permission to remain on the 10 years’ route to settlement, with no recourse to public funds. ”

ILPA is also aware of Commonwealth citizens, presently undocumented, who arrived in the United Kingdom for settlement after 1 January 1973. Wives and children of Commonwealth citizens settled in the UK were also admitted for settlement until 1988, when a probationary period was first imposed. Their issues are not different because of the date they arrived, and the people in the following examples were all entitled to ILE/ILR on arrival. ILPA therefore urges that any cut-off date for migrants affected should not be rigid but should extend beyond 1 January 1973. The Home Secretary's statement refers to the '10 year route to settlement' in relation to people who came between 1973 and 1988, and that they will be 'supported to access the most suitable route to regularise their status.' Such people generally have nothing 'irregular' in their status and should have indefinite leave confirmed.

For example, ILPA has been made aware of Ms J, who arrived in the United Kingdom in the early 1970s. She arrived from east Africa, when the Kenyan government was pursuing its 'Africanisation' policy, a policy that led to many people of Asian ethnicity to leave their jobs and homes. "Her parents had British passports, so the family came to the UK; she was seven years old. She has never been out of the UK since. She became estranged from her parents as they did not approve of her relationship with a British man; she had two children with him but the relationship ended. She has lived and worked and brought up her children here. She could not prove her status for employment and had no evidence of her status. Her parents refused to help, and told her that they had destroyed her documents. It took her years to establish that she had any nationality and was finally granted indefinite leave again in 2010." She obtained her ILR pursuant to the immigration rules of the time that allowed people ILR if they had lived in the United Kingdom for over 14 years. However, "when she applied for naturalisation in 2016, it was refused, on the ground that she could not show that she had been legally in the UK before 2010."

Similarly, Mr N travelled from Pakistan with his mother and elder sister in 1974 to join their husband/father, when he was one year old. They have lived here ever since and he went to school in Lancashire before travelling south for work. He got married, had five children, all born in the United Kingdom. However, he did not have a passport. When Mr N was made redundant two years ago and began to seek a new job, this became a significant problem. "His mother's passport was long lost, though his grandmother, who travelled with them, has hers showing her own indefinite leave to enter stamp, they both wrote to confirm that the three of them travelled together. He collected letters from the schools that still existed, his NI contributions, his marriage certificate and his children's birth certificates and applied for a biometric residence permit to confirm his settlement." Nevertheless, Mr N's application was refused by the Home Office for lack of evidence. "He has had to rely on his adult children to support him, as he has been unable to work or to claim benefits.[5]" He later went to solicitors to apply for a judicial review of the refusal; the Home Office only withdrew their case shortly before the case was due in court.

What is clear from these examples is that the Home Office has long been aware that the "hostile environment" would and did cause problems for all those without documents, and that this included migrants who were legally resident but who did not have documents. These groups had never needed documents, although they had rights to be in the United Kingdom. The impact of the "hostile environment" has been known since at least 2014, as we noted at the outset of this briefing. The Home Office dealings regarding these people cannot be characterised as understanding, caring, efficient or just.

KEY RECOMMENDATIONS

ILPA submits the following recommendations moving forward from this position:

- An independent review of the "hostile environment" policy, and of its consequences both on those whose immigration status was and was not illegal.

- Guidance and training for Home Office caseworkers and staff specifically pertaining to the residence rights of Commonwealth citizens before and after commencement of the Immigration Act 1971. Such guidance must also address the issue of the proper evaluation of the evidence available. If a Commonwealth citizen can show they were here prior to 1973 (or 1988 – when wives were first given time limits), then, absent contrary indications, it should be presumed that they had no time limit on their stay and thus that, if they have continued to live in the United Kingdom, they have ILR. The Home Secretary's statement includes: 'we do not need to see definitive documentary proof of the date of entry or continuous residence … instead the caseworker will make a judgement based on all the circumstances of the case and on the balance of probabilities.' We look forward to evidence that this instruction is followed.

[5] *Ibid.*

- The Home Office should quickly publish the guidance to its new team set up to deal with this situation, so that people will be aware of the kind of evidence that will be expected when they deal with the team, and how the team has been instructed to deal with applicants. It should also quickly make clear how the waiving of requirements for becoming British citizens will be brought into force, and how people may apply.

- Given the difficulty that many such migrants face in providing documents, the Home Office must take a flexible approach, on the balance of probabilities and, for example, accept copies of documents rather than insisting on originals.

- Guidance should be published from the Home Office advising employers, landlords, etc. to make clear that those with an Indefinite Leave to Enter (ILE) or an ILR stamp in a previous passport, or other document, and who have continued to live here, have no time limit on their UK residence. Such documents should be prescribed as a defence against civil penalties imposed on employers, landlords etc.

- The Home Office must make it clear that those refused employment, accommodation etc. due to the lack of documents, but nevertheless in the country legally, have been discriminated against and should receive compensation. It should quickly be explained what this compensation could entail – for example, years of lost earnings or benefit entitlements, fees paid for limited leave to remain given when the person should have had indefinite leave confirmed.

- ILPA calls upon the government to restore legal aid for immigration matters in light of the travails faced by undocumented Commonwealth citizens. This will allow those with complex status issues access to the expert legal advice that they will need.

- ILPA urges the Home Office to improve communications across other government departments, particularly with HMRC and with the Department for Work and Pensions in order to check National Insurance and tax records where the person so requests, since the Home Office is in a better position than individual people to do so. In particular, this will help those people who have been wrongly denied any benefits and who may struggle to continue to engage with government departments.

- ILPA urges the government to delete the immigration exemption from the Data Protection Bill, as the ability to make subject access requests and receive copies of full immigration documentation can help to ensure that scenarios such as the above do not happen again.