Response to Windrush Compensation Consultation from the Immigration Law Practitioners' Association

Introduction

ILPA is a professional association founded in 1984, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law.

ILPA is responding to this consultation through email to windrushcompensation@homeoffice.gsi.gov.uk as the web consultation form does not appear to provide for more than yes/no answers to many questions and does not give enough space to explain our views or to make further suggestions. We had also responded to the initial Call for Evidence, please refer to that response as well.

We are disappointed that the Home Office has not yet responded to calls to set up a short-term interim hardship fund for those people who are still experiencing loss and difficulty. The House of Commons Home Affairs Committee called for this on 13 June 2018, and there have been earlier and subsequent calls. People are losing their homes, sleeping rough, and still being denied benefits. People may have had their status confirmed but have urgent debts to pay off or be unable to afford tickets for vital travel for family emergencies. They need help now and waiting for a compensation scheme at an unknown time in the future does not help. We urge that a hardship fund should be available urgently now; anything paid out from it could, if necessary, be deducted from whatever compensation the people might receive years down the line.

We also urge that the compensation scheme be set up soon and also that a timetable towards this should be published. Many of the people affected are already in their seventies and eighties and cannot wait for long. Setting up the scheme quickly would help to show that the government is serious in its apology and intention to put things right.

To respond to the consultation questions in order

1. Yes, but depending on the definition of 'eligible'. ILPA thinks that people who meet the main 'Windrush' criteria, of having entered the UK for settlement before 1973, or before 1 August 1988, and their children, minor or adult, who have faced problems in establishing their status which they were able to resolve in the years before the 'Windrush' scheme was set up should also be eligible under this scheme.

1b. As above. People who had been able to resolve their immigration status in the past have often

suffered huge stress and expense in doing so, and may not have received the status now being granted to current 'Windrush' beneficiaries. They should also be able to claim compensation for past employment loss, benefit loss, housing loss etc. as well as their psychological suffering at the time, and the extra expenses that they had to incur to establish what should have been clear. Their applications would have been dealt with differently from those under the 'Windrush' scheme, they were often met with an assumption of disbelief rather than a desire to help, and the default position was often to refuse, and to request very much more evidence, much of it unrealistic. Some people were granted leave on the 10-year route to settlement, rather than their indefinite leave being confirmed. The historical injustice they suffered should be compensated.

1c. We cannot think of any affected group who should not be compensated.

2. Yes to all three.

We also think that people should be compensated for legal fees they paid for both successful and unsuccessful applications. The way that the Home Office states it is operating the current 'Windrush' scheme, and the scheme itself, is very much more simple than its usual procedures. It is possible that the statements often made on behalf of the Home Office that people do not need lawyers for immigration applications might be accurate for some people applying under 'Windrush'. It would not have been for past applications, when understanding of past immigration and nationality law, and the ability to collate the information and documents requested was required.

Some people who were refused initially applied for judicial reviews of the refusal, and were successful at that stage, or the Home Office changed the decision and recognised the person's status rather than go to court. Others were granted limited leave, rather than having their settlement recognised, thus their application could be considered unsuccessful and they have had to pay for making further applications. All those expenses in making applications should be compensated. When people had to pay for evidence then demanded, which would not be demanded under the 'Windrush' scheme, such as detailed doctor's letters, these costs should also be compensated.

3. Yes to all three.

It will be comparatively easy for people who were dismissed from their employment because their employers did not understand their immigration status to show this happened. They should receive compensation equivalent to their salary for the period from when they lost their job to when their status was eventually confirmed. There are recent Employment Appeal Tribunal cases confirming that employers should not have dismissed workers for this reason, without full inquiry, *Afzal* and *Abellio*, but the reasons for the employers' actions stem from Home Office policy decisions in connection with the 'hostile/compliant environment' and the necessity to prove status.

When people were unable to secure further employment and also unable to access jobseeking benefits, they should be compensated at the level of benefit they were entitled to receive. We accept that showing loss of employment opportunities and career progression are more difficult to prove, but they are very real. People who believe they have suffered in this way should be encouraged to

explain what had happened to them, and their application should be assessed in a sympathetic way, the assessor starting from the point that the loss is likely to have occurred.

As there is no question asked after the document's discussion on loss of statutory benefits, we hope that it has already been decided, on an interdepartmental basis, that these will be covered and will be paid to potential claimants. We hope that this will be assessed on the basis of people's entitlements, not on whether they had made a formal application for the benefit. Many people were told that they did not qualify, and did not make a formal application, or did not apply at all because they knew that the Department for Work and Pensions ('DWP') would request documents which they could not produce.

The refusal of benefits such as income support or jobseeker's allowance also has knock-on effects, in that it may also mean that the person was not 'passported' into another statutory benefit to which they would have been entitled, such as housing benefit or council tax benefit. People may have been refused these benefits or may not have applied at all, assuming that they would be unsuccessful because they had not been able to get the other benefit. When it is clear that a person did qualify for a DWP benefit, it should also be assumed that they should have been considered for a benefit paid through local councils and this loss should also be assessed and compensated.

4. Yes to all.

Removal and detention are the most extreme immigration consequences of incorrect recognition of people's status and however few they were, the people affected must be compensated. There are numerous court cases on unlawful removal, and unlawful detention, in the past which have resulted in compensation and damages; those figures should be used in assessing the amount of compensation that people unlawfully removed and detained should receive. Where the person has since died, their family should receive the compensation.

The Home Office should continue its efforts to contact people who left voluntarily, and should publicise the possibility of return and of compensation both in the UK and in the countries to which most people would have gone, in particular Jamaica and other Caribbean countries and the parts of India, Pakistan and Bangladesh from which most migrants came at the relevant times. People who left the UK after being wrongly refused permission to stay, and people who left because the difficulties they were facing trying to establish their status became overwhelming must also be included.

5. Yes to both.

We recognise that it may be more difficult to establish the anticipation of denial of re-entry to the UK as a primary or only cause of people not returning. However, such cases should be considered for compensation, whether or not the people concerned have since been granted entry clearance either as returning residents or as visitors. Those who can show that they were living in the UK before August 1988 and either had problems in showing their status here, or left the UK and found later that they had to return within two years to keep their residence status should be considered for

compensation, as well as for entry clearance now.

6. Yes.

The government is responsible for the legislation which created the difficulties that people experience in establishing their status in order to prove their eligibility to access all these provisions. It is right that people who were wrongly refused access to services to which they were entitled should be compensated by the government, insofar as this is possible. Certainly if people had to pay for private medical treatment, those costs should be refunded, and people who could not get on council waiting lists should be reinstated as near as possible to the place on the list they would have reached. Compensation for the indignity of unjust refusal and the implications of illegality are more difficult to compute, but at the very least there should be an official apology from the authorities concerned.

7. Yes, this should be included.

7b. We recognise the difficulties in assessing such losses and effects and hope that the scheme would be operated in a sensible and sensitive way, recognising the importance attached to lawful status and the rights they had achieved by so many people. The allegation of illegality can be very distressing, especially to more elderly people who have spent the vast majority of their lives here, and this subjective view must be taken seriously. Many people will not have mentioned their worries to anyone other than close family and friends, due to the shame and distress they have felt at being treated like criminals, so it may be hard to provide evidence of the causes of ill-health and depression or not applying for jobs but such cases should be investigated and apologies be given.

8a. All these losses are of course important to the individuals concerned and whether they are few or many, they should be compensated. None should be excluded from the scheme.

Fees to Home Office	5
Incidental costs of applications	4
Employment	5
Benefits	5
Detention or removal	5
Voluntary departure	4
Denial of re-entry	5
Denial of travel	4
Denial of access to NHS	5
Denial of access to housing	5
Denial of access to education	4
Loss/denial of driving licence	4
Loss/denial of bank account	4
Impact on normal daily life	3

8b. Yes, in general, but they are not exhaustive.

8c. People should also be entitled to compensation or refunds of legal and incidental costs for Home Office applications that were successful, whether initially or after appeals, representations or judicial reviews. We have explained earlier how their applications were treated differently from those currently made under the 'Windrush' scheme and how much harder it was for them to establish their rights; this should be recognised by their inclusion in consideration for compensation.

8d. We cannot think of any.

9a. Yes

9b. It is clear that people have experienced difficulty in establishing their status for many years; even the Call for Evidence itself resulted in at least 66 people who had experienced losses from before 1999 and 90 between 1999 and 2010 responding. There are many more people affected than those responding to the consultation. It is right that their experiences from so long ago should belatedly be recognised. The 'hostile/compliant environment' and restrictions on access to work and the NHS, and internal immigration controls are all long-standing.

10a. Yes; particularly as many people affected are now elderly and are not confident or do not feel themselves competent in using computers and the internet. Many people are also not confident in writing and completing complex forms, and do not have UK English as their first language

10b. Yes, if they need it. Any forms should ask for details of any help that people have received in filling them in, and if and how much they have paid towards this assistance, to discourage sharks.

10c. Anyone who wants help should be able to access it.

10d. We would hope that legal aid might be made available for advice and assistance in this scheme, or that Citizens Advice Bureaux and equivalents should receive specific training and funding to be able to advise.

11. Yes, provided they are clear and transparent, and announced before the scheme starts, so that applicants will know what they might receive.

12a. Yes to all, provided the way that the amounts of compensation have been worked out is

clear and transparent. It should not be a one size fits all approach, but should recognise the actual losses incurred, and the potential future losses based on the actual past or present loss on a case-by-case basis.

13a. Yes, again provided the methodology of working out the tariff is clear and public. For example, detention and removal compensation should reflect that awarded by the courts for the length of time involved. Denial of NHS care should reflect the seriousness of the illness or condition that was not treated and the subsequent health problems.

14a. Yes as no specific scheme could possibly cover everything that might arise.

14b. By definition, these would have to be considered by the scheme assessors as they arose, after it had become clear that they did not fit into any existing category.

15a. No.

15b. It is hard to answer this question with no idea what amounts are currently being considered as minimum or maximum, or whether there is any planned total cap on the scheme. If the scheme sets out a tariff of different payments for different losses, none of them should be too small to pay out. If a person has suffered particularly extensive and serious losses, they should be fully compensated.

16a. No.

16b. A person who has experienced several different losses – for example, loss of job, loss of home, denial of NHS treatment and then detention or removal - has suffered multiple injustices and should not be restricted from claiming compensation. All their losses must be recognised. Setting a low bar for the total amount of compensation could lead to people trying instead to apply through the courts for compensation and damages, at a much greater cost to all concerned.

17a

Date of entry to the UK	4
Previous contact with Home Office	4
Quality of previous applications	1
Loss attributable to immigration status	5
Misapplication of immigration rules	5
Costs or expenses incurred	5

17b. The quality of any previous applications to the Home Office has little bearing on whether or not they were successful. Under 'Windrush' the Home Office has agreed to contact other government departments for evidence, which it can do much more easily than individuals can. Individuals should not be penalised because at the time they applied it was not Home Office policy to do so. The Home Office often did not explain clearly what evidence they wanted, and when they received alternative, but strong, evidence, did not consider it adequately.

When applications were refused unreasonably, and without the Home Office correctly applying the immigration rules, or using the standard of proof of the balance of probabilities, it is particularly important that individuals should be compensated for these unjust and illegal refusals.

18a. Yes.

18b

Counselling	no
Apology from Home Office	yes
Exploring reinstatement	yes

Other – could include apology from Department of Work and Pensions for refusing benefits, apology from local NHS health trust for refusing treatment, help in applying for benefits now.

18c. The government apology letters should be clearly personalised, and refer to the particular losses that the person has suffered. They should be signed, coming from an identifiable person. They should also refer to any government policy changes for the future which mean that similar injustice should not happen again.

Public statements from the Government should include the recognition that the 'hostile/compliant environment' policy is fatally flawed, that it was clear from the beginning that many people who had full rights to be in the country would be caught by it, and that it will be changed. There should also be clear information about whether it has in fact affected the people that it was ostensibly aimed against, and what evidence there is that it has led to people genuinely without immigration status leaving the UK, rather than remaining here in increasing hardship.

19a. Yes, provided the scheme is fully publicly known, and the amount that people can expect to receive is known before they apply, and that it is in line with any similar compensation schemes and awards made by the courts for similar losses.

19b. Yes, as above.

20a. Yes.

20b. Yes, all should be reviewable, depending on the reasons for the refusal of a claim or the amount of compensation offered, so that the reasoning of the assessors can be tested.

20c. It needs further clarification.

20d. It is not clear who the initial reviewer would be – a different member of the assessors' staff, and who such staff would be anyway – would they be from the Home Office, or from UK Visas and Immigration ('UKVI'), or from the Ministry of Justice, or some separate quango? The reviewer's qualifications and impartiality would have to be established. It is also not clear what is meant in the second stage by 'someone outside the compensation scheme' – again, a civil servant from the Home Office or UKVI or different department, ICIBI staff, a tribunal? ILPA would prefer a judicial body, such as the First-tier Tribunal of the Immigration and Asylum Chamber, to be the final reviewer, thus seen to be completely separate from the Home Office and from the scheme, and having judicial experience.

21. Who should be eligible:
We repeat our belief that people who experienced difficulties and were able to sort them out with the Home Office should also be compensated for the losses they suffered while applying to confirm their status, and the costs they incurred in doing so, when the applications were eventually successful.

What losses should be compensated:
All those listed in the consultation document, and leaving the discretion to consider any other losses which have not yet been raised.

How the scheme should run:
There is very little in the document about this, it is not clear who the assessors will be and what qualifications and training they will have received. It is not clear how people will make claims to the scheme – whether there will be compulsory application forms, whether people can write letters, whether they might be able to make claims over the phone, in the way pension claims or universal credit claims may be made. When the scheme has been set up, this should be made clear and public. Applications should be processed quickly.

22. Yes.
Many of the applicants to the scheme will be older people; by definition those who came to the UK as adults before 1973 must be over 63, those who came as adults before 1988, over 48, and many came in the 1950s and 1960s. Age must be a factor in confirming that applications can be made on paper as well as on-line, that the forms are simply worded and that advice and assistance will be available. They are also, by reason of age, more likely to have visual or motor or hearing impairments making form-filling more difficult.

Most of the people affected did not grow up and were not educated in the UK and have been

working for their whole adult life. They may have little experience of filling in forms and of using official English, thus needing extra help in making applications. Many people are also diffident, and embarrassed about asking for help and compensation, and the scheme should make it clear that they are applying because their rights were infringed and they were treated unjustly, not that they are applying for charity.

ILPA
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