ILPA Response to Windrush Lessons Learned Review

Background

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.

Introduction

Over the last thirty years, ILPA has frequently informed the Home Office and Parliament of its concerns in connection with proposed legislative or practical changes. We often raised the issue that measures ostensibly aimed at people without permission to remain in the UK would impact on others who had full rights to remain but could not prove them. We have expressed our particular concerns about untrained people who have no reason to know about immigration law, such as employers and landlords/ladies, being required to make decisions based on complex law, and the risks of injustice and unlawful discrimination when they get these decisions wrong. So have many other organisations which understand immigration law. Warnings were ignored or belittled. An important lesson to be learned is that the Home Office should recognise that organisations such as ILPA sshave expertise in this area and their views should receive serious consideration. We do not expect the Home Office to agree with all our views, but when we point out potential adverse consequences which do not appear to have been considered, they should be.

As ILPA has regularly written on both the intended and unintended consequences of the 'hostile/compliant environment', we do not propose to repeat everything that we have already communicated. We hope that the Home Office will look at all the objective evidence and research and will accept that the 'hostile/compliant environment' policy has not had the effects it was claimed it would have on unauthorised and undocumented migration. Rather, as the evidence shows, it has had severely harmful effects on individuals legally in the UK and on community cohesion. ILPA's position is that in light of Windrush the policy must now be abandoned. We hope also that the Home Office will act to ensure that similar situations, concerning those who cannot prove their status but who have been in the country and part of UK society for decades, will be avoided.

Responses on the objectives of the review

(i) What were the key legislative, policy and operational decisions which led to members of the Windrush generation becoming entangled in measures designed for illegal immigrants?

ILPA objects to the framing of this question. The term 'illegal immigrants' has no meaning in law and cannot be clearly defined. Despite the public use of this term, it is inaccurate and unhelpful. More accurately, policies were aimed at those liable to removal because they arrived in the UK without documentation, those who had overstayed their permission to remain and those liable to deportation because of crimes they committed in the UK. Such policies require people to provide documents, for example, to employers and landlords to show their status. From the outset it was clear that certain groups of people would have more difficulty than others in providing such documents, in particular those who had come to the UK long ago, when there was no need for such documents. The potential for wrong refusals and unlawful discrimination was always there, as an integral part of the policy. By forcing employers and landlords into the position of immigration officials, it was always likely that anyone who is BAME, or is not a British citizen, or even has a foreign name, would face more difficulties renting and finding employment than others. In other words, the 'hostile/compliant environment' systematically encourages discrimination based on race and nationality.

There have been legislative and policy decisions for over 40 years which have built up to the current hostile environment for migrants. In the Parliamentary debates on what became the 1981 British Nationality Act, the ending of the rights of Commonwealth-country citizens to register to become British was controversial. Concerns were raised about people who would not know that this right was ending, or who did not realise that they were no longer British after their country of origin had become independent and so did not know that this would affect them. Voluntary organisations and campaigns produced information, and travelled up and down the country speaking at meetings and spreading information about rights to registration which were to be ended. This certainly had some effect, as huge numbers of people applied for registration – but clearly not enough. The Home Office did very little to publicise the changes from January 1983. There was a five-year window when people settled before 1973 could still apply to register, and many did so.

Internal immigration controls were already a significant issue in the 1980s. The No Pass Laws Here! Campaign, active in 1981 – 1983, wrote of the effects of restrictions on access to the NHS, to welfare benefits, to housing and the increasing prevalence of passport checks on those who looked as though they might be foreign and increasing numbers of wrong refusals of benefits or access to housing and healthcare when documents could not be produced. There were reports of local education authorities asking teachers to check pupils' passports and of councils asking potential employees or applicants for housing for passports, and benefits being refused through misunderstanding of people's status. Section 8 of the 1996 Asylum and Immigration Act provided that employers could be prosecuted for employing a person who was not allowed to work. The 'habitual residence test' for entitlement to some benefits came into force in August 1994, leading to further checks on entitlements and unjustified refusals of benefit to people with entitlements. At the same time, the benefits regulations were changed, restricting more and more benefits to those who had indefinite leave to remain, thus increasing the need for people to prove their status, leading to a vicious circle of checks and refusals when people did not have the documents requested.

The Independent reported on 29 April 1998 on a British citizen being wrongly deported. Immigration raids on workplaces and colleges have happened for the past 35 years, gathering up people with permission to be in the UK as well as those without.

The build-up towards the 'hostile environment' had thus been created for decades and internal immigration controls had been in place and been gradually augmented for decades, under governments of both political parties. The phrase itself was first used by Liam Byrne MP as immigration minister in 2007. It was used much more frequently, and the explicitness of its hostility to migrants increased, by the then Home Secretary Theresa May MP and the publicity given to her statements. The current Home Secretary has not repudiated these ideas, but has only suggested that

some of the wrong people were caught by the policy and renamed it as 'compliant' to sound less aggressive. It is hard to escape the conclusion that it was only the newspaper publicity for what had happened to some long-settled people, and the surprising public support expressed for them, that led to a change towards a re-naming of a 'compliant environment' and the creation of the 'Windrush' taskforce to mitigate the suffering of a small proportion of people affected.

There is ample further support for the conclusion that the Home Office only started caring about 'Windrush' when it became a public controversy rather than because its actions were unjust. Firstly, the Home Office appear to fast-track individual cases that hit the newspapers and generate public sympathy. The instructions to staff on dealing with citizenship applications state that decisions should be escalated to a senior caseworker 'where a decision is likely to attract public attention or press reaction'.

The only difference between such cases and those which are not fast-tracked is the publicity, not the unfairness of the decisions themselves. This gives the impression that the Home Office has sought to brush their poor decision-making in such cases under the carpet when it reaches the news. Instead the Home Office should have reflected properly on whether they should be considering removing individuals who have been here for decades and may have leave even if they do not have documents to prove such leave.

The second reason for ILPA's conclusion is that long before 'Windrush', the Home Office has attempted to remove individuals without documents who have been in the UK for decades. See, for example, these reported instances between 2015 and 2018: 1; 2; 3; 4; 5; 6.

(ii) What other factors played a part?

The 'tens of thousands' net migration target. This in itself suggests that migrants are in some way undesirable and the fewer of them the better. Its frequent repetition poisons the debate about migration policy and the treatment of individual migrants. It suggests to immigration staff there should be targets for refusals and removals in order to get closer to that target, and thus a disincentive to staff to try to understand people's situation and to get it sorted out, rather than refusing.

Home Office culture. The Home Office attitude to those applying for immigration matters has regularly been called a 'culture of disbelief.' This is evident in their dealing with long-settled people who cannot prove, and cannot find the documents to prove, their status from many decades ago. It should not be necessary for the guidance to the Windrush taskforce to state that staff should 'take a rounded view where evidence is not provided that proves matters of fact and decide the case on the balance of probability, taking into account the picture of life in the UK, evidence in the round....'. This should be the norm.

The Home Office generally makes no attempt to get supporting information or evidence itself, even when it is much easier for it than for individuals to do so, for example, contacting other government departments such as HMRC or DWP to check individuals' records. Home Office application forms include a statement from the applicant permitting the Home Office to check on their information and documents; this could be done without any breach of data protection and privacy laws and could lead to more correct and much quicker decisions. The Home Office uses data from HMRC and DWP to refuse applications; it would not take much of a change for them to use such data to obtain supporting evidence, saving time and expense.

Lack of legal aid. Legal aid for immigration matters (as distinct from asylum), except bail applications, was withdrawn in 2013. Thus most people who were told that they did not have the right to remain, work, receive benefits or NHS treatment here did not have any way of getting legal advice and representation in contesting the wrong decisions, or in sorting out their status with the Home Office. Some law centres and charities have been able to continue to advise and help in contesting refusals, but more often people had to use money they did not have to pay lawyers, and get into debt, or just failed to contest the situation as they did not know how. When they lost hope or did not know how to get the non-existent documents which the Home Office demanded, many will have given up

Home Office immigration and nationality fees have rocketed up in recent years. Thus when people who knew that they had the right to remain here were told that they should instead apply for a new immigration status, they often did not have the money to do so and thus remained in the limbo of the undocumented. They were unable to take action to sort out their status. Some people did, but then were put on the 10-year route to settlement; having to continue to apply for extensions at a cost of over £1000 a time, and being restricted from claiming benefits to which they should have been entitled, when this should never have happened.

Staff training and aims. In general, Home Office casework staff do not have historical experience and knowledge about past immigration law and policies. Neither do current policy staff or Ministers. The facts of Commonwealth-country citizens not being subject to immigration control before June 1962, and thus having by definition no evidence to show when they came to the UK is not known. The fact that before 1983 people from countries which were British colonies had passports stating their nationality as "British subject: citizen of the UK and Colonies", exactly the same as those of people from the UK itself, and the fact that immigration documents would not be needed for access to work or NHS or benefits, would seem strange to them. The fact that people living in the UK who had come from abroad often would not know that they had ceased to be citizens of the UK and Colonies when their colony gained its independence is not known. Let alone the rights to registration as British citizens these people had before the 1981 British Nationality Act and its five year window of retaining rights, but then requiring people to go through the more complex and costly process of applying for naturalisation to become British citizens.

This is not helped by **the Home Office lack of records**. The destruction of some landing cards completed by people who arrived here after 1973 has been publicised, but many other files are no longer available, due to fires, floods and failures to keep records properly at the Home Office in High Holborn, and then at Lunar House and its archive stores. Home Office file retention and disposal policies, and which files go to the National Archives, are not well known. Failure to take record-keeping as seriously as it should have been, or to have a clear and open archiving policy to ensure which papers would be available if needed, have contributed to the difficulties of people being able to prove their status.

(iii) Why were these issues not identified sooner?

The political culture of assuming that migration is a problem and that individuals should not be believed, led to Home Office staff disregarding the sufferings of these people. As Ministers have confirmed, it was not seen as a systemic issue but as a question of a few mistakes being made, or of people applying not providing documents as requested. There appeared to be no flexibility. The public revulsion after the extent of some people's suffering was revealed in the press surprised the Home Office (and many immigration advisers, having experience of indifference in the past) and

made the Home Office set up a unit which states it will be dealing with things in a different way.

Home Office caseworkers have no way to feed in to Home Office policy. It would appear that individual staff may have dealt with isolated cases but did not know how often the same issue was coming up with colleagues. Members of Parliament raised the issue on behalf of their constituents but may often have thought, because their constituents' cases seemed so unjust, that they must be unusual aberrations, rather than a comparatively common mess. The previous Home Secretary, Amber Rudd MP, said this was her view: she had MPs contacting her about constituents but did not see a pattern. It is not clear what use, if any, the Home Office makes of the statistics it keeps about MPs' casework. Of course it is varied, as each MP decides for him or herself which cases to take up, and their criteria for raising them, but some analysis could be helpful to the Home Office in showing what is happening, a kind of bellwether of issues.

It is impossible for ordinary people and advisers to communicate with the Home Office about cases, and to get any useful information, so MPs' casework records could provide some kind of indicator of specific issues.

Home Office caseworking staff are often inexperienced and staff retention is a problem. Junior, short-term and agency staff have no incentive to raise longer-term policy issues or ability to recognise them as such.

(iv) What lessons the organisation can learn to ensure it does things differently in the future

Policy decisions for improving things in future

Scrap the hostile or compliant environment policy. There has been no research into whether it has been effective in its ostensible aims of deterring people without permission to be here and persuading them to return to their countries of origin, or of not continuing to live or trying to work here. The numbers of people who have been removed has decreased and the net migration target has not been reached.[1] Attempting to enlist employers and landlords as immigration officials is wrong and inefficient and has had clear effects on people who are legally in the country.

Reduce immigration and nationality fees so that people are not stopped from being able to apply to exercise their rights or to establish their immigration status.

Operational decisions for improving things in the future

Home Office staff recruitment, retention and training needs to improve. Casework staff receive very little training on the law that they have to operate, they never meet the people whose lives they are affecting and may not realise the devastating effect a Home Office standard bureaucratic letter may have. Training must improve to ensure that the Home Office is treating people with respect, dealing with them in a humane way and writing standard letters that they can understand, properly tailored to the individuals' circumstances. The skills of caseworkers must be recognised. Restoring some power and discretion to caseworkers, and better training in using it, would help in allowing them to use their common sense in assessing whether people qualify.

Home Office record-keeping should improve, ensuring that files and records are kept and archived properly so that the facts can be established.

[1] https://www.gov.uk/government/publications/immigration-statistics-year-ending-june-2018/how-many-people-are-detained-or-returned

(v) Whether corrective measures are now in place, and if so, an assessment of their initial impact

No, adequate corrective measures are not yet in place. **The 'Windrush' taskforce is not enough.** It is not only these groups of people who have been adversely affected. Many more recently-arrived and -settled people have been disadvantaged by having to provide documents which they do not have in order to establish their rights.

It is not clear what training the taskforce staff have on other aspects of immigration law to be able to help those who do not fit the 'Windrush' definition or to refer them to obtain any real help in establishing their status.

A hardship fund, to help those who are suffering now, has been suggested for months but this has not yet been implemented. It should be now. It is not clear how the 'vulnerable persons team' in the 'Windrush' taskforce has operated or how many individuals it has helped. People whose status has not yet been sorted out are unable to travel for several reasons:1) because they may not have passports; 2) theyworry about being allowed to return; and 3 because they do not have the money to travel, having been unable to work or receive benefits for long periods. There are still important family and compassionate reasons for travel. People are losing their homes as they have not been able to pay rent or mortgages. They need help now, not in the many months into the future when the compensation scheme might come into force.

Better information for employers and others is needed, to minimise further unlawful discrimination. The government information for employers is lengthy and complex and not easy to find on the government website. The information on the 'Windrush' page is vague and unhelpful, both for employers and property-owners wanting to use it. Information about documents which provide a statutory defence against the crime of employing a person illegally is not clearly differentiated from evidence that a person is allowed to work. Thus, for example, people who have indefinite leave to remain endorsed on an expired passport, or have a Home Office travel document, are permitted to work but such documents are not listed as a statutory defence, and they are wrongly refused employment, or dismissed.

(vi) What (if any) further recommendations should be made for the future?

Many of the points which ILPA has made throughout this response provide lessons for the future, and we hope that they will be heeded by government and Home Office policy-makers. We appreciate that a full review of immigration policy is beyond the remit of this review, but we hope that the points will be considered in the government's general plans for a post-Brexit immigration policy.

Change the culture of disbelief. If the Home Office can instruct staff to treat people differently under the 'Windrush' scheme, they can also make this a general instruction for dealing fairly with people whom they sometimes call 'customers.' If they can do it now, for this small group of people, they can do it in other areas of their work in future. The present Home Secretary, Sajid Javid MP, stated on his first day in the job, “We need to make sure that … the immigration system behaves more humanely and in a more fair sense, and that it takes more into account what I would call the obvious facts, rather than just asking for a piece of paper to prove everything.” (House of Commons Hansard, 30.4.18, Column 41ss Urgent Question) To do so is vital for the future.

Scrap the net migration target, which is unrealistic and harmful and poisons the atmosphere for considering migrants as people and treating them justly.

Ensure proper impact assessments of new policy and legislative proposals are carried out, to ensure that they should not entail unlawful discrimination and they should meet their published objectives.

Formally end the 'hostile/compliant environment' policy. Its effects have been shown to be devastating on people who have full rights to be in the UK. It is ILPA's view that it has not been effective on those who do not have such rights to remain in the UK. It is a failed policy which should no longer exist.

Front load the system – ensuring that the staff initially dealing with applications are knowledgeable and well trained and competent. This may mean recruiting more highly skilled and qualified staff and paying them accordingly, for doing a job which has huge impacts on individuals' and families' lives.

Reduce or waive immigration and nationality fees in some circumstances so that people who are clearly part of UK society are not deterred from trying to sort out their status or exercise their entitlements, and do not continue to live in fear. The criteria for fee waivers are extremely restrictive and militate against people who have a claim to remain being able to prove it.

Ensure against the creation of similar situations in the future of people having to prove their position by unrealistic means. An instance is the position of people born in the UK who are not born British citizens, but who have the right to register after spending their first 10 years in the UK. Many of these children and young people (they could be 35 by now) do not know that they were not born British or that they may have no formal immigration status and the older they become, the more difficult it is to prove their earliest years. This is a particular problem for children who grew up in insecure households, or whose parents are no longer in the UK, or who were looked-after by a local authority. They are as much a part of UK society as the 'Windrush' people and must get the help they need to establish this.

Restore the possibility of legal aid for immigration matters so that people who have been treated unjustly have a means to contest this, and thus make it less likely that the Home Office will continue to make the same errors of law and judgement in the future.

ILPA
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