



Home Office

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Dear Sir/Madam,

## WINDRUSH COMPENSATION CONSULTATION

### Introduction

1. In mid-July 2018 the Government (Home Office) announced the 'Windrush Compensation Consultation'. This Consultation is the second stage in the designing of a Government scheme to compensate Windrush migrants who despite being in the UK lawfully, have been affected by Government measures to police illegal immigration.
2. Notably for this second stage, the Home Office seems to have extended those it believes should benefit from the Scheme. The Scheme will now cover those of any nationality who arrived in the UK before 31 December 1988 and are settled in UK.
3. We represent six Windrush migrants. Our clients arrived in the UK between 1961 and 1972 from Jamaica, Nigeria, Antigua, St Lucia, Dominica; and Barbados. All have now had their lawful status confirmed including one whose British citizenship, attained in 1979, had been finally recognised. Of the six, three suffer from the following disabilities: hearing impairment, cancer diagnosis; and Alzheimer's disease resulting in dementia; and all six have been psychologically impacted by the decisions made by the Home Office and other public bodies including the Department for Work and Pensions, the HMRC and local authorities. In particular, it has been the denial of statutory benefits that has impacted on them most significantly. For most, they have worked, paid taxes and national insurance contributions, and have therefore benefited others other than themselves and the UK economy, only to be treated with disdain and hostility; and suffer indignity.

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Legality of status

4. The fact is Windrush migrants are in, and have been in the UK lawfully, by operation of the law over the years. Statutory developments from the British Nationality Act 1948, the Immigration Act 1971 and the British Nationality Act 1981, have bolstered their lawful status in the UK, one way or the other.
5. The British Nationality Act 1948 imparted the status of British subject on citizens of the UK and its Colonies in §1(1) & (2):

‘(1) Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject.’

‘(2) Any person having the status aforesaid may be known either as a British subject or as a Commonwealth citizen; and accordingly in this Act and in any other enactment or instrument whatever, whether passed, or made before or after the commencement of this Act, the expression " British subject " and the expression " Commonwealth citizen" shall have the same meaning.’

6. The 1948 Act conferred citizenship of the United Kingdom and Colonies in §1(4) as follows:

‘Subject to the provisions of this section, every person born within the United Kingdom and Colonies after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by birth:

[...].’

7. By virtue of being born in Jamaica, Nigeria, Antigua, St Lucia, Dominica; and Barbados, the six clients we represent were British subjects, and citizens of the UK and Colonies, upon birth.
8. The Immigration Act 1971 as originally enacted provided in §1(1) that those with a right of abode in the United Kingdom:

‘[...] shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance

with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.'

9. And those considered to have a right of abode would include, according to §2(1) of the 1971 Act:

' (a) ...a citizen of the United Kingdom and Colonies who has that citizenship by his birth, adoption, naturalisation or (except as mentioned below) registration in the United Kingdom or in any of the Islands; or

[...]

(c) he is a citizen of the United Kingdom and Colonies who has at any time been settled in the United Kingdom and Islands and had at that time (and while such a citizen) been ordinarily resident there for the last five years or more.'

10. As to conditions for those without a right of abode, the 1971 Act provided in §1(2) and 1(5) as follows:

'(2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).

[...]

(5) The rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode shall include provision for admitting (in such cases and subject to such restrictions as may be provided by the rules, and subject or not to conditions as to length of stay or otherwise) persons coming for the purpose of taking employment, or for purposes of study, or as visitors, or as dependants of persons lawfully in or entering the United Kingdom.'

11. The effect of the above was that all Windrush migrants were British subjects and United Kingdom and Colonies citizens as of 1948; and by the coming into force of the 1971 Act obtained the right of abode; and those without the right of abode, as a result of their countries having gained independence in the meantime, but were in

the UK as of 1 January 1973 when the 1971 Act came into force, would have had indefinite leave to remain in the UK.

12. The British Nationality Act 1981, came into force on 1 January 1983. It provided in §11, that an individual who:

‘(a) was a citizen of the United Kingdom and Colonies; and  
(b) had the right of abode in the United Kingdom under the Immigration Act 1971 as then in force, shall at commencement become a British citizen.’

13. This would have meant that all those of the Windrush Generation who had been born in UK Colonies who had not applied for British passports between 1 January 1973 and 1 January 1983, and whose countries of birth had gained independence from the UK and were no longer UK Colonies, would not have become British citizens on 1 January 1983 but would nonetheless have continued to retain their indefinite leave to remain.

14. Moreover, the 1981 Act sought to limit those with the right of abode to British citizens and some Commonwealth citizens. In §39, it amended the Immigration Act 1971 in respect of those with a right of abode as follows:

‘(1) The Immigration Act 1971 shall be amended in accordance with the following provisions of this section.

(2) For section 2 (statement of right of abode) there shall be substituted

2.-(1) A person is under this Act to have the right of abode in the United Kingdom if-

(a) he is a British citizen; or

(b) he is a Commonwealth citizen who- (i) immediately before the commencement of the British Nationality Act 1981 was a Commonwealth citizen having the right of abode in the United Kingdom by virtue of section 2(1)(d) or section 2(2) of this Act as then in force; and

(ii) has not ceased to be a Commonwealth citizen in the meanwhile.’

15. For those who could not show the above but had been in the UK as of 1 January 1973 when the Immigration Act 1971 came into force, they still had indefinite leave to remain; and were therefore entitled to be in the UK, by operation of the law.

16. This being the case, the above i.e. the fact that Windrush migrants at the time when the hostile environment was enforced were either British citizens, or were eligible for British citizenship or at the very least, had indefinite leave to remain in the UK and were therefore lawfully resident, should form the basis upon which the reasonableness of the Government's proposals for a compensation scheme is weighed.

#### The Government's Proposals

17. The main issues covered by the Consultation paper are as follows:

18. The Consultation Paper states that the Government is thinking about compensating individuals for the following:

- i. Fees for any unsuccessful applications made to the Home Office-
  - a. Windrush migrants should not have been required to, or an environment created where they were forced to, make any applications for leave to remain in the UK, as they were lawfully present in the UK at all material times. All fees for successful and unsuccessful applications to the Home Office should be refunded.
- ii. Fees for lawyers who represented in the unsuccessful applications:
  - a. Similarly, Windrush migrants should not have been placed in a position where they had to seek legal advice and pay for legal representation in order to prove that their presence and residence in the UK was lawful. Fees incurred for lawyers should be reimbursed regardless of whether applications were successful or not. Evidence shows that those who had applications refused in the past, and those who never made applications, are being treated the same way under the Windrush Taskforce process and are having their lawful status, either British citizenship or indefinite leave, confirmed. The point being that they should not have had to make applications in the first place. Therefore whether their applications were successful or not, application processes they were forced to undertake should not have been necessary and should not have incurred any costs.

- iii. Any fees incurred for obtaining documents as evidence for the applications submitted, whether these applications were successful or not:
  - a. This is agreeable; and reinforces the point that there should not be any distinction between past successful/unsuccessful applications, as those applications should not have been necessary.
  
- iv. Loss of income:
  - a. The Scheme should compensate those who lost their employment and those who were wrongfully prevented from obtaining employment. As individuals who were lawfully present in the UK, they should not have been prevented from working.
  
- v. Denial of statutory benefits:
  - a. The ability to secure social security i.e. assistance given to those with insufficient means to enable them to live a dignified life, formed part of the aspirations forming the Atlantic Charter of 1941.<sup>1</sup> In 1942, the 'Social Insurance and Allied Services' report i.e. Beveridge Report proposed the creation of a dignified social security system based on principles including prohibition of restrictions based on sectional interests; social progress and cooperation of the State and the individual with the State prevented from 'stifling incentive, opportunity, responsibility'.<sup>2</sup> In 1946, the National Insurance Act enforced a post-war system of social security which entitled individuals to unemployment benefit, sickness benefit, old age pensions and widows pensions. In 1948, the National Health Service was introduced to provide good healthcare for all regardless of wealth and was based on three principles: i) to meet the needs of everyone; ii) free at the point of delivery; and iii) based on clinical need, not the ability to pay.
  
  - b. It is difficult to comprehend that the above measures could form part of the State's thinking during the 2<sup>nd</sup> world war and made post-war law, and yet in an age different to that- a peaceful era- the Government resorted to denial of statutory benefits, and in some cases, healthcare to those who needed it, to individuals who are British

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<sup>1</sup> Charter signed by the British Prime Minister, Winston Churchill and the President of the United States, Franklin D. Roosevelt at the Atlantic Conference on 14 August 1941.

<sup>2</sup> Beveridge Report

or have indefinite leave to remain, and thus were entitled to such benefits.

- c. Denial of benefits/health care was caused not only by the failure to recognise and accept the legality of the Windrush migrants' status in the UK by the Home Office but also by Local Authorities and by the Department for Work and Pensions (DWP); the NHS and other public bodies.
- d. Although the Home Office, by virtue of a potential compensation scheme, may be viewed as accepting responsibility for denial of statutory benefits, the extent of the problems described by our six clients, suggests that there is probably a need for further investigations into the failures by the other public bodies, to recognise and accept the status of Windrush migrants. Such an investigation could take the form of a public inquiry to address three main questions:
  - i. What happened?
  - ii. Why did it happen and who is to blame?
  - iii. What can be done to prevent this happening again?
- vi. Impact on normal daily life- The Home Office is seeking to compensate for impact on normal daily life:
  - a. Although this is agreeable, there should be a recognition or even an assessment of the human rights; and Equality Act violations caused by the Home Office and other public bodies.
  - b. Under §9 of the Equality Act 2010, race as a protected characteristic is said to include 'colour, nationality, ethnic or national origin'. Harassment under §26 of the Equality Act 2010, is defined as an experience of violation of one's dignity; or conduct which has the effect of creating an intimidating, hostile, degrading, humiliating and offensive environment. All the six Windrush migrants we represent are black; and all describe violation of their dignity; and are all of the view that the conduct of the Home Office and other public bodies including the DWP and Local Authorities, created an intimidating, hostile, degrading, humiliating and offensive environment.
  - c. Under §29 of the Equality Act 2010:

‘A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.’

- d. Where public authorities like DWP and local authorities had evidence dating back 30-40 years, of taxes, national insurance contributions or benefits claimed, how was it possible that all of a sudden, they would consider that the six clients we represent, and others like them were not entitled to claim benefits? It is unlikely that they would have reached the same conclusion, in the case of their white counterparts. Essentially, it is unlikely that white British citizens would have been, after nearly half a century of being part of British society economically, socially and culturally, be asked to prove their lawful status in the UK and entitlements to benefits they had claimed over the years. Windrush migrants were discriminated against by service providers like the Home Office, the DWP and local authorities.
- e. Under §149 of the Equality Act states that public authorities i.e. the Home Office, DWP, HMRC, NHS and local authorities, must have due regard to the need to eliminate discrimination, harassment, victimisation; and also to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. The latter includes removing or minimising disadvantages suffered by persons who share a protected characteristic and those who do not; and to steps to meet their needs and where the person is disabled to take account of the person’s disabilities. In the case of our six clients, all the public authorities involved have not had due regard to their §149 duties.
- f. The Compensation Scheme should therefore compensate not only for the financial losses, psychological or physical impact of decisions but for Equality Act breaches, as above, in accordance with common law principles.



- vii. Detention, Removal from the United Kingdom – the Home Office is proposing to award compensation to those who were detained or removed from the UK:
  - a. This is only right. Such compensation, as noted below, should be commensurate with common law standards.
  - b. Compensation should also be paid to those who were not detained or removed but threatened with such enforcement action; and were placed on immigration bail upon the service of notices of removal and treated as liable to detained. These individuals would undoubtedly have suffered psychologically from the fear of being detained and removed from the UK particularly where they were required to report at immigration centres which would have increased any fear they had of detention and removal, as was the case with one of the six clients.
  
- viii. Evidence- The Home Office has said that evidence will be required to evidence whatever is claimed; and are proposing to make it easier for individuals where for instance they have been denied statutory benefits, to contact the relevant Local Authority on the individual's behalf rather than expect people to trouble themselves with finding evidence to prove their claims:
  - a. The Government should support people in obtaining evidence including making legal aid available for people to receive legal advice and assistance from non-decision makers on corroborative evidence that will help them substantiate their cases.
  - b. Where evidence is required from other state authorities, the Home Office should create and make available, where needed, a mechanism through which individuals can make it aware of delays in obtaining evidence from other public authorities such that the Home Office can seek expedition from the other bodies, on the individual's behalf.
  
- ix. Amount of compensation- In terms of how much they are willing to compensate individuals, the Home Office have proposed to set a capped minimum and maximum amount that individuals can claim. For instance the Home Office has said in paras 3.59 and 3.60 of its Consultation paper, that:
  - 3.59 It is important to ensure that no individual receives a disproportionately high payment from the public purse.

Equally, we need to balance the need to accept low value claims against the administrative process costs of doing so.

3.60 We propose to place a cap or maximum amount which can be paid under the scheme in order to ensure that the payments made under the scheme can be distributed fairly across eligible claimants. Whilst we do not yet know the administrative costs of processing claims (as the final scheme has not yet been agreed), we also propose in principle to establish a minimum size of claim so as to avoid significant administrative expenditure being incurred to process low value claims. We believe that both these measures would help to avoid any excessively high payments and protect the taxpayer from processing very low value claims.'

- a. There is no justification for this. The Scheme should compensate properly for all losses suffered and not seek to limit liability in this way. To adequately redress Windrush migrants, the proposal to compensate them must come from a genuine place.
- b. It does not sit well for the Government to limit liability and guilt-trip victims by referring to the impact on the public purse. The fact is, these individuals through their employment over the years have added to that public purse, but it is that same public purse that has been used by its stewards to create the hostile environment, with adverse impact on victims. *But for* such a hostile immigration environment, whose purpose was to target black and minority races, and cause them harassment, there would have been no need for compensation of this nature. In light of this, the Government must take appropriate steps to provide effective remedy including reparation, not only in line with common law principles but also in accordance with its international obligations. The Government's actions should be informed by, in the case of:
  - Detention: common law e.g. *Thompson and Hsu v Commissioner of Police for the Metropolis* [1998] QB 498 which remains the guideline case on compensation for false imprisonment. Notably, however, compensation should take into account the fact that detention would have been that of lawful residents and even British nationals.

- Removal: common law including domestic and EU-based case-law on removals of lawful residents and citizens.
  - Impact on daily life including physical, psychological and psychiatric injury: common law, the Vento guidelines and the JSB Guidelines etc.,
  - Overall: the Government should have regard to its international obligations as to what encompasses remedy and reparation: the UN's Basic Principles and Guidelines on the Right to a Remedy and Reparation
- x. Double recovery- The Home Office says that individuals will not receive compensation under the compensation scheme for compensation they have received elsewhere:
- a. The circumstances under which compensation was received in the past must be considered. It could be that compensation was received under duress or does not reflect the losses suffered. So for example, if it transpires that an individual was offered compensation which did not take into account the psychological impact they had suffered and was obtained without legal advice, such offers should be reviewed; and not categorised as double recovery.
  - b. It may also be the case that individuals have received compensation and have been compelled or felt compelled to agree to non-disclosure agreements. Such agreements where there was no legal advice, should be reviewed.
- xi. Claims against another department- The Home Office are also proposing that if an individual is likely to have a claim against another department, it can assist that individual in sorting out that claim within this compensation scheme:
- a. In light of the fact that the Home Office is seeking to create a maximum cap, this proposal can be construed as seeking to limit the compensation that individuals may otherwise be entitled to, where they pursue a claim against other departments. For instance, in cases where there has been a denial of treatment for a Windrush migrant

which then results in health complications which may result in a clinically-related claim, it would not be right for that claim to be subsumed by the Windrush compensation scheme particularly in view of the proposal to limit the compensation.

Conclusion

19. We ask that the Government do right by Windrush migrants who have suffered; and offer adequate compensation. This scheme should offer redress in its right form and not perpetuate their suffering.

Yours faithfully,

*DPG*

**DEIGHTON PIERCE GLYNN**