WINDRUSH COMPENSATION SCHEME

CONSULTATION RESPONSE

BHATT MURPHY SOLICITORS

Introduction

1. Bhatt Murphy is a niche firm established to concentrate expertise in matters pertaining to detention: our focus is upon the treatment of individuals in the criminal justice system and immigration detention.[1] During the firm's 20 years, we have represented hundreds of individuals detained and subject to other adverse measures in public and private law actions against the Home Office. In the course of this work we have litigated claims (primarily false imprisonment/human rights claims arising from unlawful immigration detention) for Commonwealth citizens who should not have been subject to enforcement action as they had lawful status in the UK, over a period of years. To that extent the 'Windrush scandal' is not new in our experience, but fits within a wider context of poor Home Office systems and decision making which goes back some decades. However the changes made by the 2014 and 2016 Immigration Acts requiring landlords, employers and other providers of private and public services to take 'proof' of lawful immigration status meant the hardships felt by those without the requisite 'proof' became much broader in scope and it would appear affected far greater numbers.

2. We are currently instructed on behalf of a number of Commonwealth citizens in relation to their treatment under this regime between 2010 - 2018. We welcome the opportunity to provide these comments with a view to assisting our clients to achieve restitution for the experiences they have suffered as a consequence of actions by the Home Office and/or a hostile regime without sufficient safeguards.

3. The consultation document (at 3.4) states that there are two principles underpinning the scheme - fairness and simplicity, which are laudable. We suggest that where a conflict between the two arises that fairness should take precedence. There is a danger that the impetus for the scheme to be efficient, clear and easy to access (simplicity) could compromise its *primary* purpose which we say should be that it is truly capable of being compensatory in its application, case by case (fairness). It must therefore be flexible enough to deal with individual circumstances and it must *not*, in our view, be subject to an arbitrary maximum cap or to 'rounding down' of amounts as suggested in the consultation document (further detail on this is provided below) and it should not oust those who fairness dictates should have access to it. If it does not achieve that, there is a risk of further damage being done to the trust that exists between the Home Office and the communities affected, which is likely to be, for understandable reasons, in

[1] Our website is at https://www.bhattmurphy.co.uk/ which includes further details of our work.

short supply. Secondly, it could defeat its purpose by presenting less attractive options, resulting in potential applicants deciding to pursue alternative legal remedies. That in turn, could give rise to delay to the restitution available as well as higher costs.

4. To assist the consultation we provide these additional documents:

   a. Annex 1: Table of basic damages relating to unlawful immigration detention; and
   b. Annex 2: Table of Article 8 damages for children separated from parents in care proceedings.

5. We have sought to address the consultation questions by following the format of the consultation on line, A – Eligibility – Who will be eligible for compensation; B – Eligibility - What losses will be eligible for compensation; C – Scheme Operation – How the compensation scheme will operate.

A. Scheme Eligibility – Who will be able to apply for compensation

1a: Do you think that eligibility for the compensation scheme should be aligned with those who are eligible for help through the Windrush Scheme? **No**
1b: If no, are there additional groups that you think should be eligible? **Yes**
1c: **No**

1a – Eligibility alignment with Windrush Scheme

The Windrush Scheme details particular policy provisions that may apply to individuals requiring regularisation of their immigration status at the present time. Some of those provisions should not be mirrored when looking at access to compensation for historic wrongs. In short, the 'immigration response' to an individual's circumstances via the Windrush Scheme may not necessarily reflect whether or not they were a victim of the hostile environment with lawful status at the time of the wrongs done. For example, the Windrush Scheme published policy states:

A Commonwealth citizen who was settled in the UK before 1 January 1973, whose settled status has lapsed because they left the UK for a period of more than 2 years, and who is now lawfully in the UK and who has strong ties to the UK
• If the applicant is currently lawfully in the UK ***and not liable to deportation on grounds of criminality or other non-conducive behaviour*** *and has strong ties with the UK they will be given indefinite leave to remain.*

A child of a Commonwealth citizen parent, where the child was born in the UK or arrived in the UK before the age of 18, and has been continuously resident in the UK since their birth or arrival, and the parent was settled before 1 January 1973 or has the Right of Abode (or met these criteria but is now a British Citizen).

- *If not, if they are lawfully in the UK and **are not liable to deportation on grounds of criminality or other non-conducive behaviour**, they will be given indefinite leave to remain.*

However, an individual may have had lawful status as a Commonwealth citizen before the offences triggering deportation action were committed and could have been subject to the hostile environment measures during that 'lawful' period. This bites in two ways. First, it gives the Home Office a wide margin of discretion as to whether or not the person is eligible for indefinite leave to remain under the Windrush Scheme at the time they apply. It does not pronounce on their past rights/status. Second, a Windrush Scheme 'ineligible' decision may also dictate whether or not the individual will be able to establish 'lawful immigration status' at the time of their application to the compensation scheme (which is also said in the consultation document to be a requirement). It would be preferable if the determination of eligibility could be tied to the date not of application to the Windrush Scheme or compensation scheme but to the time period of the losses/damage.

Further, the Home Office is currently getting a very high number of immigration decisions wrong: over 50% of decisions are overturned at appeal.[2] If deportation is successfully appealed, there must be some mechanism within the compensation scheme to have the original ineligibility decision re-examined.

Further, the Windrush Scheme has attracted criticism as it has not provided individuals with an independent right of appeal. So if the Home Office decides that the applicant does not have lawful status or should be deported, or should not benefit from the Scheme for some other reason, the compensation scheme should have some mechanism whereby the individual can make their case for access to compensation nonetheless.

This point sits within the broader context of a number of statements made by the Home Secretary as to who within the cohort of the Windrush generation should be 'entitled' to corrective action/restitution. He has stated an unwillingness to take steps to locate in Jamaica, for example, those for whom the mistakes were so grave that they led to unlawful deportation, where there is evidence that the individual committed criminal offences. Those statements are in our view deeply regrettable. If they were deported unlawfully, those individuals are highly likely to have had or been entitled either to British citizenship or a right of abode. It is our view that where wrongs are committed by the state, the state has no right to pick and choose who is permitted to access justice. We note that this trend is not new: in the context of litigation in this area, the Home Office adopted a strategy for a period of close to 2 years, whereby they made offers to settle meritorious claims for false imprisonment but on the condition that the individual either left the UK or acquired lawful immigration status. We objected to those 'conditional' offers in robust terms on the basis that, inter alia, an individual's immigration status should not dictate whether

[2] The Law Society has expressed its grave concerns at the quality of decision making by the Home Office: for example: https://www.bbc.co.uk/news/uk-politics-43737542

they are able to vindicate their constitutional rights. Happily that strategy has now been abandoned. Unless there is some discretion within the compensation scheme to deal with this issue, it would effectively oust those who have not retained their lawful status here and now, from accessing justice for historic wrongs. Individuals should be able to make submissions on eligibility if they are deemed to fall outside the Windrush Scheme or do not have 'existing lawful status' by the Home Office.

1b - Additional groups

Others affected by the hostile environment

Many of those affected by the Windrush scandal found themselves at the centre of a perfect storm broadly consisting of (i) the longstanding systemic deficiencies in considering the documentation / determination of cases of those from the Commonwealth who arrived many years ago; (ii) the quality and nature of the decision making process from the Home Office generally, including the culture of refusal, the impersonal approach taken to applicants who plainly had important and sympathetic cases, and the heavy handed response to those refused recognition (in error), including the use of detention and deportation and/or threats of the same; (iii) the catalyst provided by the hostile environment, a set of provisions requiring members of civil society including public and private agents to deny access to basic essentials like housing and employment to those without the 'right' Home Office documents. That is, as noted below in more detail, of course a system designed to make the environment so hostile that people who are not here legally leave the territory because their lives are made impossible.

It is said at paragraph 3.6 of the consultation document that the Windrush compensation scheme is "*not intended to be a general compensation scheme for anyone who has suffered difficulties demonstrating their immigration status*". However, those individuals who are similarly affected by factors (ii) and (iii) but who are not 'Windrush' generation individuals may share all the damage and losses that flow from being unjustly and unfairly subjected to the same hostile regime. They share precisely the key characteristic of the Windrush group who "*through no fault of their own have been caught up in immigration measures designed for illegal migrants*." They too should have redress.

Examples from our existing casework include clients who made 'in time' applications for further leave to remain to the Home Office, whereupon the conditions of leave including permission to work continue as a matter of law by virtue of Section 3C of the Immigration Act 1971 until the application or any in time appeal is determined. Where that is not properly recorded by the Home Office or where inadequate 'proof' of this 'interim' form of leave is not made available to the applicant by the Home Office, the hostile environment measures can bite. In one case it prevented access to employment and further education opportunities for two young people (who are Commonwealth citizens but not Windrush) for a period of 2 years. Another example is that Home Office guidance to employers, on pain of civil and criminal penalties, directs that where a Biometric Residence Permit is unavailable, only valid passports (issued by country of origin) with current visas (issued by UKVI) are acceptable as

proof of the right to work. Where a passport expires but a visa does not, employers have refused to accept that as sufficient proof, leading to loss of wages and job opportunities.

We note from the analysis of the Call for Evidence that you received responses from a limited number of non-Commonwealth nationals. Whilst there may be different systemic or individual factors at play at (i) above in respect of the particular circumstances of a non-Windrush applicant, given that the Scheme is going to deal with precisely the same kinds of losses (iii), and precisely the same kinds of conduct by the Home Office (ii), it is submitted that serious consideration should be given to opening this Scheme up to other groups unfairly affected by the hostile environment. That could be done by way of a particular application as to eligibility, for example, to be determined by the Scheme's administrators (which appears to be canvassed in the consultation document at para 3.57).

B. Scheme Eligibility – What losses will be eligible for compensation

Q2 Costs associated with confirming immigration status

The Scheme should compensate for all costs incurred arising from unnecessary applications, including 'successful' applications if the wrong leave was granted. For example, a Windrush individual with lawful immigration status, who paid fees and/or a solicitor to make an application for leave on the basis of family life / long residence and was "successfully" granted limited leave - whereas they should have been recognised as having indefinite leave (e.g. arrived in the UK as a child before 1973) and that information was known and available to the Home Office- should be compensated for the adverse costs and consequences of this (such as repeated application fees, attendant test fees and legal fees). The only "successful" leave with no loss would be if the Home Office recognised correctly that the person had ILR/NTL. The Scheme should compensate for legal costs relating to unnecessary applications.

Q3 Loss of income: Do you think compensation should be given when the following losses can be demonstrated as a result of being unable to demonstrate immigration status?

The Scheme should follow usual compensatory principles and compensate for all recoverable losses arising from the wrongful act. This would include direct loss of income through termination of employment, direct loss of income through inability to secure employment, and loss of opportunities such as career progression and future employment. There is no reason to put future losses e.g. loss of opportunity for career progression into an 'exceptional category'. If the applicant can evidence loss of opportunity then this should be compensated. It is routine in tort claims to include claims arising from loss of opportunity/future loss of earnings. For example we have a client who was in line for a promotion which would have seen a significant increase in his wages when he ran into difficulties proving his status. As a consequence of the hostile environment he was unable to take the position and in fact his employment was terminated. It took a year to resolve his immigration case and when he was re-

employed he was forced to start again at the bottom and there are no managerial positions vacant.

Q2 Detention and removal: Do you think compensation should be given for the following impacts resulting from an inability to demonstrate immigration status?

Applicants should be compensated for both enforced removal or deportation, voluntary removal or deportation and of course detention.

If voluntary departure was a result of unlawful action by the Home Office and/or threats of enforcement action or adverse consequences arising from the hostile environment, then these losses should be compensated. In addition there may be losses arising from family separations or interference with family life contrary to Article 8 ECHR. This could arise in a detention context, an unlawful removal or deportation context, or refusal of re-entry to the UK, or fear of leaving the UK owing to the immigration issues which could make re-entry difficult resulting in missing key family events such as funerals, weddings, and the birth of children – which should be compensated. There is also the interference with family life which results from the grave pressures placed on family relationships whilst an individual is undergoing a financial crisis, at the same time as their fate in this country hangs in the balance. Our clients instruct us that this placed an unconscionable burden on them and their families who were at times strained to breaking point.

There is no domestic or ECHR authority on the issue of quantum for breaches of Article 8 ECHR in the context of family separation through immigration detention or indeed the other scenarios above, albeit settlements out of court are not uncommon.

The European Court of Human Rights (ECtHR) approaches the question of whether just satisfaction necessitates an award of compensation by considering what is equitable having regard to personal circumstances. The ECtHR will consider previous cases and also domestic practice. When deciding whether to award damages, and if so how much, the UK courts are not strictly bound by the principles applied by the ECtHR in awarding compensation under article 41 of the Convention (see Lord Bingham in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673).

In *Bernard v LB of Enfield* [2002] EWHC 2282 (Admin), the High Court had to consider the approach to be taken to breaches of Article 8 ECHR where the adult care department failed to provide adequate services over a prolonged period of time causing indignity, distress and injuries to feeling to the Claimant in breach of her Article 8 ECHR rights. In that case, Sullivan J (as he then was) considered submissions as to the relevance of personal injury benchmarks for minor injuries and the relevance of Local Government Ombudsman decisions as benchmarks for quantification of Article 8 ECHR awards for just satisfaction. The rationale for this is because these types of awards are also, like non-pecuniary awards for Article 8 directed at damages for discomfort, inconvenience and injuries to feelings and

health. Having reviewed the reports on Ombudsman awards and personal injury guidelines, the Court considered the range of awards for non-pecuniary losses to range between £5,000 to 10,000 for sustained periods of failure to provide suitable accommodation. That was an award range estimated in 2002 and is subject to uplifts given the *Simmons v Castle* [2012] EWCA Civ 1039 26 July 2012 and *Simmons v Castle* [2012] EWCA Civ 1288, 10 October 2012) case and inflation. The range will now be £8,604 to 15,644, uplifted.

At **Annex 2** to this submission, we set out a table of cases where damages were awarded for breaches of Article 8 where children were unlawfully separated from their parents in the course of care proceedings, in case that is of assistance.

Q4 ctd Detention – damages for false imprisonment

We make particular submissions here about the importance of the Scheme providing proper compensation for detention. The right to liberty is a constitutional right, and one that the courts guard jealously. There is a substantial body of case law in the field of liability in immigration detention and a growing body of quantum decisions that are of relevance here. The issue for the potential applicants may be whether they are, overall, better off applying via the Scheme or bringing civil proceedings in false imprisonment/breaches of the HRA 1998. At **Annex 1** to this submission we provide a table of cases in respect of basic damages only, which records the date of the award and the increase for inflation (to 8 May 2018) and the 10% uplift (*Simmons v Castle*) as appropriate.

In *Thompson and Hsu v Commissioner of Police of Metropolis* [1998] QB 498 the Court of Appeal gave guidance for types of awards for false imprisonment claims. The Court reiterated that *the assessment of damages should be sensitive to the facts and the particular case and the degree of harm suffered by the particular claimant.* These are broadly: general damages (PSLA, personal injury) and pecuniary losses; aggravated damages; and exemplary damages.

A helpful distillation of the principles involved in assessing basic damages can be found in *MK (Algeria) v Secretary of State for the Home Department* [2010] EWCA Civ 980 at para 8, per Laws LJ:

"There are three general principles which should be born in mind: 1) the ***assessment of damages should be sensitive to the facts and the particularcase and the degree of harm suffered by the particular claimant****: see theleading case of Thompson v Commissioner of Police [1998] QB 498 at 515A and also the discussion at page 1060 in R v Governor of Brockhill Prison Ex Parte Evans [1999] QB 1043; 2)* ***Damages should not be assessed mechanistically as by fixing a rigid figure to be awarded for each day of incarceration****: see Thompson at 516A. A global approach should be taken: see Evans 1060 E; 3) While obviously* ***the gravity of a false imprisonment is worsened by its length the amount broadly attributable to the increasing passage of time should be tapered or placed on a reducing scale.*** *This is for*

two reasons: (i) to keep this class of damages in proportion with those payable in personal injury and perhaps other cases; and (ii) because the initial shock of being detained will generally attract a higher rate of compensation than the detention's continuance: Thompson 515 E-F."

The Court of Appeal laid down guidance for appropriate starting points for the assessment of basic damages in *Thompson* such that:

"In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale."

Adjusted for inflation and adding the 10% uplift, these figures amount to approximately £988 and £5925 respectively.

The Courts have repeatedly disavowed a 'mechanistic' daily rate type method. The Judicial College Guidelines on personal injury are sometimes prayed in aid in longer term detention cases as a useful 'check' on the proportionality of the award (*PB v Secretary of State for the Home Department* [2008] EWHC 3189 (Admin)).

Detention claims often attract aggravated damages. These are awarded at the court's discretion in addition to basic damages and are appropriate where (i) the Defendant has acted to aggravate the Claimant's basic loss by causing injury to his/her feelings (e.g. by insulting, humiliating, degrading, distressing and/or outraging the Claimant); and (ii) it could result in the Claimant not receiving sufficient compensation for the injuries suffered if the award was restricted to a basic award. In short, if the behaviour of the Home Office and/or experience of the Claimant is such that the injury suffered is over and above the pain and loss of amenity, e.g. if there is an element of fear, humiliation, degradation and loss of dignity, aggravated damages are worth considering.[3] The conditions of detention, the circumstances of arrest, the vulnerability of the detainee could all be factors pleaded in support of aggravated damages.

We suggest that the availability of aggravated or discretionary damages either related to the detention claim and/or in relation to other aspects of the individual's

[3] In *Thompson*: *"aggravating features about the case… Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest… which shows that they had behaved in a high handed, insulting, malicious or oppressive manner… in relation to the arrest or imprisonment… Aggravating features can also include the way the litigation and trial are conducted".*

experience, are appropriate within this Scheme. For example if the Home Office repeatedly refused to recognise overwhelming evidence of lawful immigration status or if the applicant was publicly embarrassed (in social services office, housing office etc.). Treatment by the Home Office should encompass not just whether or not they made correct and fair decisions, but also how they dealt with the applicant and their family members/persons who were trying to provide assistance. We are sorry to say that our clients report threatening letters, rude and unhelpful staff, and a dismissive attitude to matters of grave importance to the individual and so on. We understand from the two individuals who gave evidence to the JCHR that that kind of experience was far from unique. The hurt and distress caused by the decisions and practical consequences of the decisions themselves was in our view exacerbated when it was accompanied by a lack of compassion and threats of enforcement action (which in some cases led to actual enforcement action).

Examples of aggravated damages awards in the context of immigration detention include the following:

- *MK (Algeria):* £5,000 (adjusted for inflation £6246; with 10% uplift £6870) aggravated damages were awarded where the Home Office had *"acted in a blinkered and high-handed manner"* by detaining a man who had a right of residence under EU law deriving from his wife's status; administrative errors regarding C's address; opposition to bail; failure to respond to solicitor's attempts to clarify matters; resistance to claim on weak grounds; 'grudging' admission of liability.

- *Muuse*: £7,500 (adjusted for inflation £9368; with 10% uplift £10305) awarded to a Dutch national wrongly detained as a Somali national, who repeatedly protested that he was Dutch: the Home Office's approach and detention caused him to fear expulsion to Somalia.

- *R (PB)*: £6,000 (adjusted for inflation £7843; with 10% uplift £8627) aggravated damages were awarded to reflect D's maintenance of an unjustified defence and failure to follow policy on the detention of victims of torture.

- *E v Home Office* (CLCC, Claim No 9CL01651; 10 June 2010): £10,000 (adjusted for inflation £12,419; with 10% uplift £13,660) aggravated damages awarded to a torture victim who had been detained in undignified circumstances without a change of clothes, failure to offer counselling where that had been recommended by a doctor; the Home Office had failed to call evidence from the decision makers and where there had been multiple points during the detention when officials should have released E.

- *R (J) v SSHD* [2011] EWHC 3073 (Admin): £2500 (adjusted for inflation £2917; with 10% uplift £3209) was awarded for an Afghan minor who was

arrested and unlawfully detained for 4 days. TheCourt found that an award of aggravated damages should be significantly less than basic damages and awarded £2,500 in aggravated damages to reflect the high-handed and unnecessarily aggressive treatment of J upon his arrest, specifically the use of handcuffs, refusal of a phone call etc. (paragraphs 41-42, 46-48).

- *R (Lamari) v SSHD* [2013] EWHC 3130 (QB): £5,000 (adjusted for inflation £5524) aggravated damages were awarded. The Secretary of State was in contempt of court by failing to release the claimant in accordance with an undertaking; decision to re-authorise detention thereafter was 'outrageous flouting of undertaking and order' [29-30]; the claimant's detention has caused his mental health and the Secretary of State had release the claimant without making arrangements for his accommodation causing him to sleep on the street that night.

- *Hossain v Home Office* (A40CL182): the Claimant who had had section 3C Immigration Act 1971 leave throughout the detention (the Home Office having treated him erroneously as an overstayer). An award of £5000 (£5339 adjusted) in aggravated damages was given. The reason aggravated damages were appropriate was the Claimant's consistent and repeatedly claimed his application had been made on time but the Defendant refuted this repeatedly without properly checking their files.

Further in some cases exemplary damages may be appropriate to recognise and sound in damages particularly egregious conduct by Home Office officials. An award of exemplary damages is more exceptional than an award of aggravated damages, as the object of exemplary damages is generally to punish the Defendant rather than to compensate the Claimant. The following principles emerge from the authorities with regard to exemplary damages:

- Exemplary damages may be awarded where there has been "oppressive, arbitrary or unconstitutional action by servants of the government" (*Rookes v Barnard* [1964] AC 1129). Exemplary damages may be awarded if the Court considers that it is necessary in order to punish the Defendant for the conduct complained of and basic and aggravated damages are an inadequate punishment for the Defendant (*Thompson*,p516). The award should be sufficient to mark the disapproval of the oppressive, unconstitutional or arbitrary behaviour, but should be no more than is required for the purpose.

- An example of a situation where exemplary damages may be awarded is where the Home Office wilfully detained a Windrush individual despite overwhelming evidence of their lawful status and/or maintained detention despite recognition by officials of the unlawful conduct; where the Courts or Tribunals were misled or where there were other interferences with the individual's right to access the Court.

Some examples from the context of immigration detention include:

- *Muuse*: £27,500 (adjusted for inflation £34,350) was awarded at first instance and was upheld o n appeal. The Court of Appeal observed that those who had been tasked with authorising Mr Muuse's detention had not been competent to do thejob entrusted to them. There were a number of discrete and systemic failures. The award was upheld and if anything could have been a slightly higher figure [84].

- *E v Home Office* (unreported, CLCC, see above) £25,000 (adjusted for inflation £31,046) exemplary damages were awarded, primarily for systemic failings in dealing with similar cases, including non- compliance with policyand procedures on the detention of torture victims (of which the D had been on notice for some time). Reference was made to the HMIP report and recommendation regarding these failures in May 2005 following an inspection of Yarl's Wood IRC) [17-21].

Q5 Denial of re-entry to the UK: Do you think compensation should be given for the following impacts resulting from an inability to demonstrate immigration status?

Applicants should be compensated for their treatment (humiliation, anxiety, denial of autonomy, psychiatric harm, as well as pecuniary losses) arising from their being denied re-entry to the UK. The harm caused by being wrongfully told that you did not have lawful immigration status would include anticipation of denial of entry to the UK such that travel was prevented.

Q6 Denial of access to public, private and other services: Do you think compensation should be given to those who have been prevented from doing the following due to difficulties demonstrating their immigration status?

Yes. The position in the consultation document is that applicants should be able to submit claims for losses experienced from being denied access to these types of services as a result of being unable to evidence lawful immigration status. We agree that applicants should be able to recover for losses experienced from being denied access to these services, being pecuniary and non-pecuniary losses. When considering applications, the fact of denial of access should encompass the loss of accrued rights. For example, one of our clients had waited, prior to his immigration problems, for 6 years for social housing. He was a secure tenant in a local authority property when his problems occurred, which led to his losing his job and almost losing his home for rent arrears. Fortunately he did not lose his tenancy in the event, but given this example which is unlikely to be unique, those kinds of losses need to be considered within this Scheme. As such we note that losses experienced by the prevention of access are not always pecuniary. It may be difficult to quantify the loss of opportunity, confidence and/or future employment that arises from being unable to access further education for example, but it is surely significant.

Q7 Impact on normal daily life:

a) Do you think the compensation scheme should include the impact on normal daily life as a loss?

Yes. We work on the assumption that this is directed towards emotional impact, distress, anxiety or types of 'Pain Suffering and Loss of Amenity' ('PSLA'), which could also be expressed as a breach of Article 8 ECHR in respect of the interference with the applicant's moral and physical integrity. Again we say that the Scheme should follow usual compensatory principles and awards for PSLA should be made. We note that the Call for Evidence analysis shows that emotional distress was reported by 68% of participants. Of that percentage, 25% complained of adverse impact on their family life. Given the nature of the Windrush scandal we consider it is vital that these aspects of the victims' experience are properly provided for. Our clients report significant levels of anxiety and distress about what would happen to them (whether they would be detained or deported, including fear at every knock on the door), about how they were going to survive without wages and/or benefits, about losing their homes, about the pressure placed on their families, about what they would do if they were deported, about what would happen when they attended the Home Office. In some cases that led to or contributed to a period of depression and/or anxiety related condition. In some cases the bars on access to public services including health services may have caused or contributed to physical illnesses.

The evidence required for a PSLA type claim should not be overly onerous. The starting point should be that discovering that the country you consider your home does not consider you have any right to be here is, without more, a very hurtful and distressing event even setting aside the stress and anxiety of the hostile measures that attend that decision. If applicants provide evidence from themselves as to how it affected them, and their loved ones who observed the distress (in the form of letters and/or statements) that should be treated as good evidence of the impact upon them. Severity will obviously vary from case to case but the scheme must be capable of compensating individuals for this type of damage whether or not the impact falls short of a psychiatric injury.

b) How should the compensation scheme take account of the different experiences of individuals in terms of the type and severity of any impact?

For general damages for PSLA/injury to feelings, we would suggest that the Scheme should reflect the guidance for discrimination claims as set out in *Vento v Chief Constable of West Yorkshire Police* (No. 2) [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318. The *Vento* guidance provides the compensation levels for injury to feelings arising from discrimination. The current guidance (further adjusted for uplifting on 11 September 2017 in *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879 and for inflation) provides that "*lower band of £900 to £8,600 (less serious cases); a middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and an upper band*

of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900."

However, the Scheme should not preclude someone from presenting with evidence of psychiatric harm (e.g. GP records, hospital records, expert report), which would have a specific and separate award for psychiatric injury. Those should be calculated by reference to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury. Where severe impact on mental or physical health is claimed it is said that a 'proportionate level of evidence to support the claim' should be produced. That is not of itself an unreasonable proposition as long as access to that evidence is meaningful. Unless there is a supported, legally aided system it may be difficult for the Scheme to enable people to evidence such claims. A GP letter might just be affordable, but expert's fees to address the diagnosis, prognosis and causation suggested by the 'proportionate' standard above are costly and require some legal input in preparation.

Q8 Relative severity of losses

a. The table below summarises the different types of losses that the compensation scheme may compensate individuals for. Please give each a rating from 1 (not important) to 5 (very important) based on how important you think it is that the scheme covers this loss:

We consider that all the losses are recoverable.

b. Do you think the proposals contained in this section have captured the correct type of losses?

Yes in terms of special damages but the scheme should not exclude other losses if they can be evidenced. There should be discretion to make awards for losses that are not envisaged at this point.

c. Are there any additional losses that you think should be included? Please state.

Yes the scheme should include PSLA elements such as anxiety, distress and humiliation. and aggravated and exemplary damages. See answer to question 7 above.

d. Are there any losses that you think should not be included? Please state.

The Scheme should not exclude losses subject to causation and evidence.

Q9 Backdated claims

a. Do you think losses experienced at any time point in the past should be covered by the compensation scheme?

Yes.

a. In our experience the 'Windrush' situation is but one injustice of many, endemic to the current immigration system, and which have been going on for a long time. The hostile environment provisions acted a catalyst and ultimately the sheer numbers of those affected alongside good investigative journalism appears to have led to public exposure and outcry. Given the Ministerial statements made it would not meet the stated aims of those announcements if the Scheme was to be capped by a cut-off date, albeit we would expect that the majority of applicants are likely to have claims arising over the past 5 years.

C Scheme Operation – How the compensation scheme will operate

Q10 Applications

a. Do you think the scheme should accept both postal and online compensation claims?

Yes to ensure that it is appropriately accessible.

b. Do you think claimants should be offered assistance in completing their application?

Yes

c. Who do you think should be offered assistance?

All applicants should receive free legal assistance.

d. What assistance should be provided?

Paragraph 2.11 of the consultation document notes that a theme of the Call For Evidence was that that legal assistance should be offered to all applicants to enable them to make the correct compensation schemes. The scheme will cover a wide scope of losses and the nature of the loss and evidence of the same will be critical to the applicant being able to achieve compensation for the losses they suffered. There may also be some difficult pieces of evidence to collate and potentially some difficult decisions for applicants to make. It is no accident in our view that the mistakes being made on Windrush cases and the dire consequences this generation were subjected to coincided with the time when immigration cases had been completely cut from the scope of legal aid (by the Legal Aid Sentencing of Offenders Act 2012). Had victims had access to good quality free legal advice, perhaps their losses and the damage done would have been more limited. It is not in our view

sensible to repeat that sense of confusion and disenfranchisement with the compensation scheme.

That assistance needs in our view needs to be legal in nature to that it is (i) independent, (ii) expert and (iii) confidential. Many victims feel betrayed and rejected by what has happened to them. Restoring trust and ensuring that the Scheme is a genuine effort to "right the wrongs" is key. Without legal assistance to advise on issues like eligibility, losses and value, applicants could be unable to recover what they should, could be and feel 'short-changed' by the process, and an opportunity to take a step towards the restoration of trust could be lost.

This could be done via the existing legal aid system (either through Legal Help or Certificates) if the Legal Aid Agency is instructed to add to existing CAPA[4] contracts for this specified scheme; however, if so the legal aid means test must be disapplied given that many applicants will be ineligible for it (as with many inquest based applications). The legal aid case could be subject to a 'fixed fee' or 'costs limit' as with other forms of legal aid. However, disbursements need to be available under such a scheme so the evidential requirements of any particular case can be met. Finally, we note that the Ministry of Justice which funds the Legal Aid Agency has been subject to swingeing cuts since 2010, many of which have been made in legal aid. If legal assistance is to be provided through the Legal Aid Agency it must not be subsumed within the existing budget pots but must be funded as a separate bespoke Scheme on top.

Q11 Calculating Payments: Do you think it is right that the compensation scheme uses a combination of different calculation methods for determining compensation payments?

The Scheme should apply normal compensatory principles. We have suggested above that losses without a specific value could follow the guidance in *Vento* in regard to the impact assessment, and the *Thompson* approach to aggravating features and exemplary damages.

Q12 Compensation for known value

a. Do you think compensation for a known value of loss should be considered where the claimant has (lost their job, been denied access to benefits, incurred costs and fees that are eligible to be compensated).

Yes. The evidential hurdle should not be very high given the nature of the claims and the need to avoid unnecessary complexity.

[4] This is the contract under which civil claims against public authorities can be brought. Legal aid suppliers who hold such a contract will therefore have demonstrated that they have the relevant expertise and knowledge in these areas of law which are of most relevance to the Scheme including tort, HRA 1998 and of civil claims/CPR and preparation of evidence of this nature.

b. Not applicable

Q13 Tariff style approach

a. Do you think compensation should be calculated on a tariff style approach where the claimant has forgone rights and responsibilities, detained or removed, denied NHS care, denied access to other services, experienced an impact on normal daily life.

There is nothing objectionable about a tariff style approach as long as it is flexible and does not impose an unreasonable evidential burden.

Q14 Discretionary awards

a. Should the scheme have a discretionary element to make payments for circumstances not covered by the scheme rules?

Yes; if it does not it is likely to be vulnerable to legal challenge.

b. If yes, what circumstance should a discretionary element apply to?

See above at 1c – who is eligible for the Scheme should have a discretionary element. Aggravated and/or exemplary damages could be discretionary.

Q15 Minimum Amount

a. Do you think the compensation scheme should have a minimum claim amount?

The justification for having a minimum amount is administrative convenience. This runs counter to the principle that the Scheme should operate fairly to address wrongs.

b. See above

Q16 Maximum Amount

a. Do you think the compensation scheme should have a maximum claim amount?

No. The purpose of the compensation to provide redress for wrongs and put the person back in the position as in the loss has not happened, so there is no rational justification for an arbitrary cap. The scheme must be capable of providing proper restitution, whatever the harms done. Those payments may need to be, on occasion, significant in order to be truly compensatory. We are not convinced by the language in the consultation document around being wary of

applications for sums which are ‘excessively high’. If the loss/damage occurred and can be evidenced, it should be paid.

In making this point we are mindful that the stated aim of the hostile environment policy is to make life so difficult or unbearable for those that do not have regular immigration status, across multiple aspects of their daily lives, that they give up and leave the country. This is important context to keep in mind when seeking to put that right. This scheme must compensate for treatment arising from a *range of measures deliberately* designed to be adverse, intrusive and pervasive into all aspect of life with the stated aim, whether singly or in combination, of making a life here unbearable. If some individuals had more to contend with than others, or had to endure the hardships for longer, that should be reflected in their payments, even if that renders them higher than others. The Home Secretary states that he intends to “put things right” for those who had lawful status but who could not prove it but who were nonetheless caught up in the hostile measures. In order to achieve this the Scheme must not be fettered by arbitrary caps and must be sufficiently flexible to provide meaningful redress.

If a budget limit has already been set this should be published and transparent. Given the Home Office is still investigating the extent of the wrongs done to this group and is gathering information about the scandal, including via the Learning Lessons review, it would seem premature to be concerned about avoiding excessively high payments.

Q17 Factors when calculating loss

a. Different factors which may be taken into account when awarding compensation

Date of entry into the UK:
This is relevant to eligibility under the Scheme, not the assessment of compensation. We are not clear why the consultation document differentiates between ‘deemed leave’ (pre 1973) and 1973-1988 cohort.

Claimant had previous contact with the Home Office:
This is relevant but must also include any efforts the applicant made via social services or other government agencies. For example if a Windrush person sought to obtain benefits and was told by the benefits office that they did not have status, and the person then pursued via the social services information to support their status then the fact that they have not had direct contact with the Home Office should not be held against them. This is all the more so relevant where often immigration staff are based in social services offices and it may be unclear who is speaking on behalf of which government agency.

Quality of previous applications:

The immigration system provided no adequate safeguards for the Windrush generation. It represents a systemic failure to take their particular needs and situation into account. For example, a number of our clients contacted the Home Office and were told that there were no records held about them whatsoever, without making enquiries of other government departments or providing any other assistance. The burden should not be placed solely on the applicant as to whether or not they made the right application or provided the right evidence. As we say above, however, where in the face of ample evidence of rights the Home Office maintained a refusal to recognise the applicant's true immigration status, that should go to aggravated damages.

Loss attributable to immigration status:
This is relevant.

Misapplication of Immigration Rules:
We are aware of claimants who made applications under the incorrect Immigration Rules. We do not believe the Windrush generation should be penalised for the Home Office's failure to apply its own Immigration Rules properly, or for the failure to have proper guidance and systems in place to deal with the long standing situation of a group who were particularly vulnerable to the hostile environment regime. If there was evidence of the person's correct status, then the Home Office should have indicated that the application had been made under the wrong rule and given advice on what they should do and how.

Costs or Expenses otherwise incurred:
Yes following the usual principles for special damages.

b. Please provide any comments you have on the factors that may be taken into account when calculating the amount of compensation awarded.

The consultation document suggests that the scheme will take account of the full range of circumstances of the individual rather than simply adding together losses. It is proposed that then an appropriate overall amount will be reached. This seems arbitrary and could lead to unfairness. Save for where the multiple claims may in fact amount to a double recovery (for example the loss of earning and loss of unemployment based benefits in claimants for the same period would not both be recoverable), the losses claimed were suffered and in line with both the simplicity and fairness principles individuals should be compensated for that.

Q18 Non-financial remedies

a. Do you think claimants should be offered non-financial recompense in addition to a financial award?

Yes.

b. **If yes, which of the following non-financial recompense should be offered**

All of them.

c. **Do you have any comments on non-financial recompense?**

Non-financial remedies can be a very meaningful recognition of the harm suffered and in our experience assist to achieve a dignified settlement by both parties. Several of our clients have expressed a wish to receive an apology.

Q19 Acceptance of awards

a. **Do you think conditions of acceptance should be applied to the final compensation payment?**

"Full and final" settlement is standard for civil claims against the Home Office. However these claims are subject to important safeguard for Claimants, most importantly that the Claimant has received independent legal advice on the terms of the settlement. The Scheme must therefore, as set out above, make reasonable provision for Legal Help or Certificates via the existing legal aid contract for advice to those considering settlement under the Scheme. In addition, in order to be "full and final" the Scheme must be sufficiently broad to encompass all the losses experienced by our clients at the right level otherwise they will be disadvantaged by using the Scheme.

b. **Do you think the following conditions of acceptance should be applied?**

None of these terms are objectionable as long as the claimant receives independent legal advice.

Q20 Review of Compensation Decisions

a. **Do you think the claimant should be able to request a review of the compensation scheme decision if they do not agree with the outcome?**

Yes.

b. **If yes, which parts of the compensation scheme decision should a claimant be able to request a review of?**

c.

The claimant should be able to see a review of Eligibility, Assessment of Evidence, Final Award.

d. Do you agree with the compensation scheme decision review process set out in the consultation?

Yes.

Any other comments
Access to the Scheme across the board will no doubt be improved if free legal advice and assistance is given.

Bhatt Murphy Solicitors

10 October 2018