WINDRUSH "LESSONS LEARNED" CONSULTATION
RESPONSE
BHATT MURPHY SOLICITORS

Introduction

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. We have also responded to the consultation on how the Windrush compensation scheme should operate.

The unlawful treatment of the 'Windrush generation' has shone a light on discriminatory practices and policies which have adversely affected many people with an entitlement to remain in the UK. Our clients' experiences of being detained, told they have no legal right to be in the UK, being separated from children, losing jobs, being made street homeless, being humiliated and disbelieved whilst their lives were turned upside down are appalling. We have acted for many from the 'Windrush generation' and others with a legal right to remain many years. Our experience is that the Windrush scandal is nothing new, but should be seen within the context of poor and discriminatory decision-making by the Home Office that goes back decades. There are real risks in treating it as a time limited problem affecting a discrete group. The problems are wider than that and the Home Office should seize this opportunity to change.

Response

1. *What, in your view, were the main legislative, policy and operational decisions which led to members of the Windrush generation becoming entangled in measures designed for illegal immigrants?*

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

The wrong question

This question is based on unhelpful premises. It is not clear who are the "members of the Windrush generation" and still less who are "illegal immigrants".

The Windrush Scheme published on 13 April 2018[2] which relates to steps to be taken to regularise status for to various groups including Commonwealth Citzens exempt from deportation because of section 7 Immigration Act 1971 and also those of any nationality settled in the UK who arrived before 31 December 1988. The separate consultation as to the proposed compensation scheme is still running and it is unclear which groups this will cover.

"Illegal immigrant" is not a term with a statutory definition, and its use in the immediate aftermath of the Windrush scandal showed that it characterised the very kind of approach that caused that scandal in the first place.[3] It is a term that creates a false and misleading dichotomy between "legal" and "illegal" migrants, and encourages attitudes which treat people as potential criminals. As such it is at best unfortunate to see it used in a document seeking views on lessons learned.

The Windrush scandal was about the unlawful, unfair and discriminatory treatment of people with an entitlement to remain in the UK. This treatment has involved illegal detention and removal, and wrongful denial of access to education, healthcare, benefits and work. The victims include many children. To look at why this happened it is important not to limit the class of people affected as this obscures the real causes.

We note that even within the context of 'Windrush' the government is ambivalent about who is or is not 'deserving' of corrective action/restitution. The current Home Secretary 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

[2] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/735187/Windrush-Scheme-v2.0ext.pdf
[3] https://www.amnesty.org.uk/blogs/yes-minister-it-human-rights-issue/stop-saying-illegal-immigrants

British citizenship or a right of abode. Those rights cannot be stripped away simply because a government decides it is politically expedient. Those instincts were the reason the system produced this situation in the first place.

Examples from our existing casework of other individuals affected 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 is determined). Sometimes this is not properly recorded by the Home Office or inadequate 'proof' of this 'interim' form of leave is not made available. In our cases it prevented access to employment and further education opportunities for two young people for a period of 2 years. Another example is where Home Office guidance to employers, on pain of civil and criminal penalties, states 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.

The 'hostile environment'

Clearly government policy and legislative changes in the lead up to the Windrush scandal have contributed to the unlawful treatment of those with an entitlement to remain in the UK.

The elements of the 'hostile environment' policy are well known and we do not propose to rehearse them in detail, however:

- When Theresa May was home secretary in an interview she stated her aim was "to create here in Britain a really hostile environment for illegal migration"[4]
- There followed the legislative changes brought in by the Immigration Acts of 2014 and 2016 which amongst other things required a large range of bodies including landlords, banks and NHS bodies to carry out what amount to

[4] https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html

immigration checks. Other initiatives included the infamous "Go Home" vans driving round London.

The risks of such policies and legislative changes were obvious – as the Immigration Law Practitioners Association (ILPA) stated in its response to the proposals for the 2014 Act "British citizens, EEA nationals and third country nationals alike would be required to produce identity documents at many turns in schemes that would be intrusive, bullying, ineffective and expensive and likely racist and unlawful to boot".

The culture and practices of the Home Office

However the institutional attitudes and practices that led to the unlawful and discriminatory treatment of those with an entitlement to be in the UK long predated the 'hostile environment' – the environment was already hostile.

Those working in immigration law have long been used to a "culture of disbelief" infecting Home Office decision-making in relation to their client's cases. The Home Affairs Committee report on Asylum in 2014 noted that almost a quarter of those submitting written evidence made reference to such a culture.[5] In 2010 a Home Office whistle-blower gave evidence to Parliament that in one decision team a stuffed toy, "the grant monkey", was placed on the desk of anyone granting an applicant asylum as a suggestion that the person had not done their job properly.[6]

Further, any analysis of measures designed for the 'illegal' or the 'legal' migrant must take into account the serious deficiencies in the immigration decision making process. It is the Home Office who is the arbiter of who is 'illegal' to use its own terminology. The scale and nature of poor decision making by the Home Office has been widely reported over a number of years. The Home Office currently has over 50% of its decisions overturned on appeal.[7] That is in a context where legal aid is no longer available for any immigration case (see below) and not all individuals are able to exercise their right of appeal or represent themselves within the process. It is also in the context of repeated attempts by government to legislate to remove or restrict

[5] https://publications.parliament.uk/pa/cm201314/cmselect/cmhaff/71/71.pdf at para 12
[6] https://publications.parliament.uk/pa/cm200910/cmselect/cmhaff/uc406/uc40602.htm
[7] 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

migrants rights of appeal altogether. The Windrush generation didn't get 'entangled' in a system not designed for them, they were rendered 'illegal' alongside many others, by a system that was stacked against them by design. For many thousands of others, it still is.

This firm has represented many people detained under immigration powers. In one of a number of cases where the Courts have found that the Home Office has subjected our clients to "inhuman and degrading treatment", the Court commented that our client, who suffered from a severe mental illness, was treated with a "callous indifference" by decision-makers maintaining his detention.[8]

This tendency to dehumanise those in relation to whom decisions are made can also be reflected in the language used by the Home Office. The Criminal Casework team refer to foreign nationals who have served a sentence of imprisonment and have been released into the community as "non-detained stock"[9], a word associated with management of animals rather than people.

This culture occasionally strays into more overt racism. Shockingly in one of our cases involving a vulnerable detainee, the barrister representing the Home Office, presumably in line with her instructions, suggested that it would be "ethnocentric" to suggest that drinking from a toilet was a sign of mental illness as "attitude to plumbing is actually very culturally based". The Court in that case also made a finding of degrading treatment of our client.[10]

Legal Aid

Legal aid for most immigration cases was removed in changes introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which came into force in April 2013. This meant that those who had been in the UK for a long time, and might have an entitlement to remain, could not access legal help in the sometimes complex process of obtaining information and documents that might establish their

[8] BA [2011] EWHC 2748 (Admin) at para 237

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656584/An_inspection_of_non-detained_FNOs.pdf

[10] HA [2012] EWHC 979 (Admin)

rights. Immigration law is notoriously complex, opaque and subject to frequent legislative and policy amendment. The removal of legal aid from most areas of immigration combined with the hostile environment policies created a perfect storm to deny people's legal rights without recourse.

2. *What other factors played a part?*

   See answers above

3. *Why were these issues not identified sooner?*

   It appears that the Windrush scandal became politically important at the time it did for a number of reasons. In fact all the evidence of how the Home Office were unfairly and unlawfully treating people who had rights to remain was already available.

   The issues had been identified: the real question is why did their impact on a particular group become politically important when it did. The answer seems to be that the Guardian article highlighting the issue coincided with the Commonwealth Heads of Government meeting in London in April 2018.

   The Windrush scandal was an extremely rare example of a media story critical of the Home Office's treatment of migrants achieving political traction. Those working in this area are much more accustomed to media coverage which is relentlessly supportive of hostile attitudes to migrants, which in turn reflects their treatment by the Home Office. The political will to defend the rights of migrants on fundamental issues such as the right to liberty, due process and access to justice has simply not been there. Rather, over successive governments, legislative and policy imperatives are focussed in the opposite direction at removing and restricting these fundamental rights (with the aim ultimately of reducing 'the numbers'). That agenda assumes there is a mandate of 'toughness' on immigration, come what may.

Despite a wealth of litigation and highly critical judgments by the senior Courts, both of the legality of some of these restrictions[11] and very poor decision making in numerous individual cases (including Windrush cases), the Home Office's response has been defensive and unapologetic. Ministers have on occasion been openly critical of the independent judiciary, or misrepresented judicial decisions for political gain[12]. We refer you to the enclosed letter sent by ILPA to the on 18.07.18 to the JCHR and HASC setting out the intractable approach taken by the Home Office in the face of any number of opportunities to 'learn lessons'.

The Home Office should recognise the culture of impunity that has marked its practice and conduct for many years. It should listen to our clients and others about the drastic and terrible effects of its conduct and practice on those who have had their legal rights denied.

4. *What lessons can the Home Office learn to make sure it does things differently in future?*

As noted above the real risk in seeking to learn lessons is in limiting the class of people affected. As such there needs to be recognition of the deep-seated and longstanding problems in Home Office culture and decision-making.

The Home Office should introduce changes to remove the hostile environment which as enacted operates in a discriminatory and unfair way.

The Home Office should reintroduce legal aid for out of scope immigration work to ensure that those who need access to legal advice to navigate an extremely complex immigration system are able to obtain it.

[11] See for example the Supreme Court in *R (Kiarie & Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42 where the Court held that a new power to remove in country appeal rights for certain migrants was operating unlawfully. Many of those removed or deported from the country on the basis of this power were Commonwealth citizens.
[12] See for example, Theresa May's speech (when she was Home Secretary) at the Conservative Party Conference in September 2011, with comment here by a human rights lawyer: https://www.theguardian.com/law/2011/oct/04/theresa-may-wrong-cat-deportation

If these changes are not implemented the Home Office is likely to face similar scandals in the future; for example following Brexit when EU nationals who are legally entitled to be in the UK may be caught with the hostile environment if they are unable to document legal right to remain in the UK.

5. *Are corrective measures now in place? If so, please give an assessment of their initial impact.*

   No – again the fact that the response to the Windrush scandal has been to limit the class of people deemed to be affected, and to perpetuate the division between "deserving" from the "undeserving", shows that nothing has been done to address the issues identified above. In particular there has been no reversal of the legislative and policy initiatives that underpinned the "hostile environment" nor even a commitment to look at the system again from first principles. Re-branding it as 'compliant' is an utterly meaningless public relations exercise.

6. *What (if any) further recommendations do you have for the future?*

   See above

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