



BRIEFING PAPER

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Windrush generation: Government action to 'right the wrongs'

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Status: This is the original version (as it was originally enacted).



Immigration Act 1971

1971 CHAPTER 77

An Act to amend and replace the present immigration laws, to make certain related changes in the citizenship law and enable help to be given to those wishing to return abroad, and for purposes connected therewith. [28th October 1971]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

REGULATION OF ENTRY INTO AND STAY IN UNITED KINGDOM

1 General principles

- (1) All those who are in this Act expressed to have the 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.
- (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).
- (3) Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving, except in so far as any of those places

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Summary

In late 2017 *The Guardian* newspaper began reporting stories of longstanding UK residents who were being wrongly classed as illegal immigrants and consequently, denied access to employment, healthcare and other services in the UK and targeted for removal.

The obstacles these individuals encountered trying to prove their status, and the dire implications for their lives in the UK, have come to be known as the 'Windrush scandal'.

The overall number of people affected isn't known. Attention initially focussed on people from Caribbean Commonwealth countries, particularly 'Windrush children' - people who came to the UK as children to join family members who had migrated post-WW2. But people from other countries have also been affected.

What caused the problems?

The *Immigration Act 1971* provided that foreign nationals who were 'ordinarily resident' in the UK on 1 January 1973 (when the Act came into force) were deemed to have 'settled' status (i.e. Indefinite Leave to Remain). In practice many people have been living in the UK for decades without documentary proof of their immigration/nationality status.

This has become increasingly problematic for individuals as laws to detect and discourage illegal immigration have proliferated, particularly following the introduction of 'hostile' (also known as 'compliant') environment policies since 2010. These policies were intended to tackle illegal immigration, by making it harder for people without legal status to access services and live undetected in the UK. But in practice they also affected some people who were lawfully resident in the UK but didn't have documentary proof of their rights. They found themselves denied healthcare, welfare benefits, pensions, housing and jobs.

In theory they could resolve their difficulties by applying to the Home Office for confirmation of their status. However, issues such as the significant application fee, and the amount of supporting evidence required by the Home Office, posed additional obstacles for some people.

The Home Office has acknowledged that it lost sight of this cohort of people when designing and implementing immigration policies. Successive Home Secretaries have apologised for the "appalling" treatment that individuals have experienced and have vowed to put right the injustices that people affected have suffered.

Actions taken by the Government in response

In April 2018 the Home Office announced some measures to address the Windrush generation's difficulties. These included:

- conducting reviews of historical Caribbean Commonwealth cases wrongly targeted by the Home Office for detention/removal or a compliant environment sanction;

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- establishing a 'Windrush Scheme' to issue confirmation of status documents (and in some cases, grants of British citizenship) free of charge to eligible applicants;
- establishing a 'Windrush Taskforce' to assist people who may be eligible under the Windrush Scheme;
- establishing a 'Windrush Compensation Scheme';
- initiating an independent 'Lessons Learned' review; and
- suspending aspects of the 'hostile/compliant environment' policy and amending some related guidance.

Most of these workstreams are still in progress.

The time-limited compensation scheme was launched in April 2019. The deadline for applying has been extended to April 2023.

Ongoing controversies

The Home Office's response to the Windrush scandal continues to attract criticisms.

Stakeholders have complained of delays in resolving cases referred to the Taskforce and in establishing the compensation scheme.

There are concerns that the compensation scheme is receiving considerably fewer applications than anticipated, and that claims already submitted are being subjected to lengthy delays. There have been some cases of people who have died before their cases and claims for compensation were resolved.

Published data on the operation of the compensation scheme, up to the end of March 2020, shows that

- 1275 compensation claims have been made so far;
- 60 claims have received payments;
- The total value of payments made so far is £362,996.92; this includes a single payment of over £100,000.

The Home Office has said that many of the reported payments were interim payments, so the affected individuals might subsequently receive further payments. Additional offers of payments totalling approximately £280,000 had also been made, but were still pending acceptance or review, so had not yet been included in the published data.

Although there was an extensive consultation on the design of the compensation scheme, the final arrangements have been heavily criticised. Objections have been raised against the restrictions on the types of losses that individuals can claim for, the limits on the amount of compensation that can be awarded for certain categories of loss, and the complexity of the application form and supporting evidence required.

The Government has made some adjustments to the compensation scheme in response to feedback. For example, it has broadened the "mitigations policy" so that decision-makers can consider a wider range of actions taken by individuals to resolve their situation. It intends to

appoint a permanent Independent Adviser for the scheme, and it is tendering to extend advice and support services to potential applicants.

Some further measures to promote the scheme and assist potential applicants were announced by the Home Secretary, Priti Patel, on 19 March. She also announced the establishment of a cross-Government working group to improve the lives of people who have been caught up in the Windrush scandal, such as through employment programmes, education and training schemes, or dedicated mental health support. The Group was launched on 22 June (Windrush Day 2020).

External scrutiny

The Home Office's role in the Windrush scandal and the adequacy of its response has been heavily criticised by the National Audit Office, and several parliamentary Committees.

The 'Windrush Lessons Learned Review', which was led by Wendy Williams, HM Inspector of Constabulary and Fire and Rescue Services, was laid before Parliament and published online on 19 March 2020.

The report found that "what happened to those affected by the Windrush scandal was foreseeable and avoidable", observing that "A range of warning signs from inside and outside the Home Office were simply not heeded by officials and ministers".

Considering the question of whether the Home Office is institutionally racist, Ms Williams' report concluded

While I am unable to make a definitive finding of institutional racism within the department, I have serious concerns that these failings demonstrate an institutional ignorance and thoughtlessness towards the issue of race and the history of the Windrush generation within the department, which are consistent with some elements of the definition of institutional racism.

The Home Secretary set out the Government's initial response in a statement to the House on 19 March. She apologised for the actions spanning decades which had led to the Windrush generation's suffering. She confirmed that, over the coming months, the department would work to reflect on the report's recommendations, including those relating to the compliant environment policies and cultural change. She said that the Home Office would issue a detailed formal response to the report within the next six months.

The Equality and Human Rights Commission has recently announced that it is conducting an assessment of the Home Office's compliance with the Public Sector Equality Duty in relation to understanding the impact of its policies on the Windrush generation. It intends to complete the assessment by September 2020.

Might other groups be at risk of similar difficulties?

Observers have identified other groups of people living in the UK who are facing similar difficulties in securing or documenting their status, or might do in the future, as a result of Home Office policy and practice. Specific concerns have been raised about people living in the UK with

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rights under EU law, undocumented children, and Chagos Islanders. The Home Office has rejected the comparisons.

1. Background

In late 2017 *The Guardian* newspaper began to report case studies of longstanding UK residents who were being driven to extreme hardship as a result of difficulties proving their lawful immigration status. Examples highlighted across the media over the following months included individuals who had been denied free life-saving NHS treatment, and people who had lost jobs and fallen into debt and homelessness after being classed as irregular migrants and denied access to welfare benefits, pensions and housing.¹ In some cases, people had been held in immigration detention and threatened with removal from the UK. Some people had been removed from the UK or left of their own accord due to the difficulties they were having. Others had been left stranded overseas after being denied re-entry to the UK after trips abroad.

The obstacles these individuals encountered trying to document their immigration/nationality status, and the dire consequences for their lives in the UK, have come to be referred to as the 'Windrush scandal'.

The number of people affected isn't known. Attention initially focussed on people from Caribbean Commonwealth countries, particularly 'Windrush children' - people who had come to the UK as children to join family members who had migrated post-WW2.² But people from other Commonwealth and non-Commonwealth countries have also been affected.³

Government response

Pressure on the then Government to act increased in the run-up to the UK hosting the Commonwealth Heads of Government conference in April 2018. On 16 April 2018 the then Home Secretary, Amber Rudd, acknowledged that some people lacked the documentation that proved their right to be in the UK.⁴ She said she was sorry for the confusion and anxiety they had felt. She apologised for the "appalling" treatment that some people had suffered and promised to check with high commissioners as to whether people had been deported in error.⁵ She announced the creation of a dedicated Home Office taskforce and helpline to help pre-1973 arrivals obtain evidence of their immigration status in the UK.

The next day the then Prime Minister, Theresa May, apologised to Caribbean leaders during a meeting in Downing Street. She told them: "I want to dispel any impression that my government is in some sense

¹ For a detailed account, see Amelia Gentleman, *The Windrush Betrayal*, 2019

² HMT Empire Windrush's arrival at Tilbury Docks in June 1948 marked the start of a phase of Commonwealth migration which continued until the *Immigration Act 1971* came into effect in 1973.

³ This briefing uses the term 'Windrush generation' to cover people of any nationality affected by the Windrush scandal or the Government's response.

⁴ [HC Deb 16 April 2018 c27](#)

⁵ [HC Deb 16 April 2018 c15](#)

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clamping down on Commonwealth citizens, particularly those from the Caribbean.”⁶

The following week, Amber Rudd set out a more comprehensive list of actions that the Home Office would take, in an oral [statement to the House](#).⁷ These included steps to assist the ‘Windrush generation’ to acquire British citizenship and the establishment of a compensation scheme.

Later that month Ms Rudd gave evidence to the Home Affairs Committee. She denied that the Home Office set targets for removals, only to return to the House the next day to acknowledge that the Home Office had been using local targets “for internal performance management.” Ms Rudd subsequently resigned as Home Secretary.⁸

1.1 What caused the problems?⁹

There had been warnings about the issue in the years before the scandal broke. For example, in 2014 the charity Legal Action Group [published a report](#) which highlighted the situation of long-term UK residents who were unable to prove their status or were deemed to be living in the UK unlawfully, and who were being targeted for detention and removal, despite having spent most of their lives here.

Changes to immigration and nationality law¹⁰

The succession of changes to the immigration and nationality rights of people associated with former British colonies over the past 50 years was a contributing factor to the scandal.

Under the *British Nationality Act 1948*, ‘Citizen of the UK and Colonies’ (CUKC status) was the common nationality status for individuals born in the UK or a colony. People born in a UK colony generally automatically lost their CUKC status when it gained independence, usually becoming nationals of the newly-independent Commonwealth country instead.¹¹ In addition, they had ‘Commonwealth national’ status.

Before 1 July 1962 Commonwealth nationals were not subject to UK immigration control. More immigration controls were progressively introduced throughout the 1960s. Some Commonwealth nationals could enter the UK without being subject to examination or conditions up to March 1968. They would have had an entry date stamp in their passport but would not have been issued with an immigration status document.

The *Immigration Act 1971* provided that foreign nationals ‘ordinarily resident’ in the UK on 1 January 1973 (when the Act came into force) were automatically deemed to have ‘settled status’ (i.e. Indefinite Leave

⁶ FT.com, ‘May says sorry to Caribbean leaders over Windrush scandal’, 17 April 2018

⁷ [HC Deb 23 April 2018 c619-622](#)

⁸ [HC Deb 26 April 2018 c1017-1018](#)

⁹ For a detailed overview, see [Windrush Lessons Learned Review](#), HC 93, March 2020, Part 2

¹⁰ For a more detailed overview, see for example Fragoman LLP, ‘[Understanding ‘Windrush’: Legal and practical issues](#)’, 11 May 2018

¹¹ Although the Act (as amended) did include some provisions enabling Commonwealth citizens living in the UK to apply to be registered as CUKCs.

to Remain).¹² However, beneficiaries of this provision were not automatically issued with documentation confirming their ILR status, or required to obtain any, and the Home Office didn't have a central register of people affected.

The 1971 Act also gave some protections from deportation, and section 1(5) gave Commonwealth citizens settled in the UK on 1 January 1973 (and their wives and children) protection from loss of status through absence from the UK. This section was repealed on 1 August 1988. Since then, Commonwealth citizens can lose their indefinite leave after more than two years' continuous absence from the UK.

Subsequent generations of people born in the UK to Windrush generation descendants have also been affected by legislative changes. The *British Nationality Act 1981* (in force from 1983) replaced the 1948 Act. People born in the UK before 1 January 1983 generally automatically acquired British citizenship status (as now is) at birth. Since 1 January 1983 children born in the UK only automatically acquire British citizenship at birth if their parent is 'settled' in the UK at the time of birth. Some people have had difficulties asserting their right to citizenship due to a lack of evidence of their parents' date of arrival or qualifying immigration status.¹³

Some pieces of legislation included time-limited transitional measures giving rights to apply for more secure types of status (such as British citizenship). But take-up would likely have been limited by factors such as individuals' lack of awareness, difficulties meeting the associated costs, or the perceived limited benefit of applying at the time.

'Hostile/compliant environment' policies

Measures to deter illegal immigration and restrict access to employment, healthcare and welfare benefits for people without a valid immigration status have been gradually introduced over many years, by different governments.¹⁴

Some of the Windrush generation began to experience difficulties well before 2010, but it appears that problems became more widespread in recent years. 52% of people who responded to a Home Office Call for Evidence reported that their losses began after 2010.¹⁵

Over the past decade, successive governments introduced a range of measures as part of a 'hostile environment' policy agenda against illegal immigration.¹⁶ The intention was to persuade irregular migrants to

¹² *Immigration Act 1971*, s1(2)

¹³ See, for example, The Guardian, '[Three generations of Windrush family struggling to prove they are British](#)', 18 December 2019

¹⁴ For example, NHS treatment charges for overseas visitors began in 1982, right to work checks were introduced in 1997, and measures to restrict access to benefits in 1999.

¹⁵ A further 28% said their difficulties began in 1999-2010 and the remaining 20% before 1999: Home Office, '[Windrush Compensation Consultation](#)', Cm 9654, July 2018, para 2.10

¹⁶ The 'Hostile Environment Working Group' was a Ministerial working group established in 2012 to consider whether existing rules preventing illegal migrants from accessing benefits, employment and public services could be administered more effectively, and whether rules on migrant access were overgenerous. The

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depart the UK voluntarily and reduce the so-called pull factor for anyone thinking to come to the UK to settle illegally. At the time, there was also a wider goal in the Home Office to reduce net migration levels significantly.

Central elements of the approach included greater data sharing between the Home Office and other departments for immigration purposes, and giving a wider range of state and non-state actors statutory responsibilities to check individuals' immigration status as a precursor for granting access to services. Some related measures were introduced by the *Immigration Act 2014* and *Immigration Act 2016*. These included provisions to prevent people without a valid immigration status from obtaining or retaining a driving licence, opening a bank or building society account or acquiring a tenancy in the private rented sector, more severe penalties for illegal working offences, and removing most immigration appeal rights. Commentators have associated a range of other measures with the policy.¹⁷

The vocabulary and policies associated with the hostile environment agenda have been controversial. From autumn 2017 onwards, successive Ministers began to refer instead to the 'compliant environment'.¹⁸ They also pointed to examples of Ministers in previous Labour governments having used the phrase 'hostile environment'.¹⁹

Stakeholders highlighted warning signs during the passage of related legislation about the potential for some measures to lead to discrimination against foreign nationals, people who don't have a passport, and British ethnic minorities.²⁰ Some policies have been challenged in the courts. In March 2019 the High Court found that the 'right to rent' scheme directly caused racial discrimination in the housing rental market, breaching human rights law.²¹ The Government's appeal against the judgment is due to be heard in mid-January and the policy remains in force in the meantime.

The Windrush scandal has led to some of the measures associated with the hostile/compliant environment being scaled back or put on pause.

The Government published [additional guidance](#) for landlords, employers and NHS staff on how to carry out their statutory responsibilities under immigration legislation in respect of Windrush cases.

It introduced a temporary pause on pro-active data-sharing between the Home Office and other departments and agencies (HMRC, DWP and

Committee was subsequently renamed the 'Inter-Ministerial Group on Migrants' Access to Benefits and Public Services': Independent Chief Inspector of Borders and Immigration, '[An inspection of the 'hostile environment' measures relating to driving licences and bank accounts: January to July 2016](#)', October 2016, para 4.1; *The Guardian*, '[Lib Dem MP attacks coalition's plans for immigration reform](#)', 13 July 2013

¹⁷ See, for example, Liberty website, '[Hostile environment](#)', [undated; accessed 19 December 2019]

¹⁸ E.g. [HC Deb 14 December 2017 c234-5WH](#); [HC Deb 23 April 2018 c630](#)

¹⁹ [HC Deb 25 April 2018 c871](#)

²⁰ Home Affairs Committee, *Windrush generation*, Sixth report of 2017-19, HC990, 3 July 2018, paras 86-90

²¹ [R \(Joint Council for the Welfare of Immigrants\) v SSHD \[2019\] EWHC 452 \(Admin\)](#)

DVLA) for controlling access to services purposes for people of all nationalities over 30 years old. Pro-active data sharing with banks and building societies was restricted to people subject to deportation action due to criminal activity.²² The information sharing agreement between the Home Office and NHS was also suspended.²³

Difficulties obtaining confirmation of status

The type of immigration status documentation issued by the Home Office, and what third parties can accept as proof of status, has changed over the years. In the past decade, less secure forms of status, such as endorsements in passports, were replaced for new applicants by Biometric Residence Permits, for example.

The Home Office has long been aware of the existence of a large number of UK residents without documentation to prove their status in the UK. The National Audit Office comments:

2.14 (...)The Department estimated in 2014 that 500,000 people might be in the UK lawfully who do not hold a biometric residence permit. (...). The Department expected this number to decline over time as people took up biometric residence permits, which it started to issue in 2008, gained citizenship, or died, but for it to remain in the hundreds of thousands well into 2019. The Department's data indicate it has issued around 90,000 no time limit biometric residence permits to settled migrants since June 2014. However, it has never formally or systematically issued them to this group, despite several briefings to ministers on this issue since at least 2013.²⁴

In the wake of the Windrush scandal, the Home Office acknowledged that it lost sight of this group of people when developing and implementing its policies.²⁵

People deemed to have leave under the 1971 Act have always been able to apply on their own initiative to the Home Office for confirmation of their status. The Windrush scandal highlighted the practical difficulties some people encountered when doing so, and the absence of safety nets for people whose applications were refused.

Difficulties cited include the fees for obtaining modern status documents, and the associated evidential requirements. There have been examples of Home Office staff applying the law incorrectly, and the Home Office has acknowledged that it was applying a too high burden of proof, such as by requiring multiple pieces of proof for every year of claimed residence, or dismissing decades of National Insurance records as insufficient. Organisational changes, such as delegating initial decisions to staff at lower grades, and the removal of caseworkers' discretion, have also been identified as factors.²⁶

²² [Letter from Home Secretary to Home Affairs Committee](#), 10 July 2018

²³ *The Guardian*, '[NHS Will No Longer Have to Share Immigrants' Data With Home Office](#)', 9 May 2018.

²⁴ National Audit Office, [Handling of the Windrush situation](#), December 2018, para 2.14

²⁵ Public Accounts Committee, [Windrush generation and the Home Office](#), HC1518, 6 March 2019, para 17

²⁶ Home Affairs Committee, [Windrush generation](#), Sixth report of 2017-19, HC990, 3 July 2018, paras 24-25

2. Windrush Scheme and Taskforce

The Home Office established the Windrush Scheme so that people who settled in the UK before 1989 but do not have proof of their immigration status can apply for such documentation.

Applications to the Scheme are free of charge. The GOV.UK pages on ['Windrush scheme: prove your right to be in the UK'](#) give practical information for people considering applying to the Scheme.

The Home Office is committed to providing the Home Affairs Committee with regular updates on its work in relation to Windrush. These letters are published on the Committee's website. The figures referred to in this section draw on information provided in its [letter of 22 October 2019](#). This confirmed that, as at 30 September 2019, 8,124 individuals had been issued with some form of documentation under the Windrush Scheme.

2.1 Eligible cases under the Scheme

Although the term 'Windrush' is associated with Caribbean/Commonwealth migration, the Windrush Scheme is also open to people with other nationalities. The different eligible groups are as follows:

Commonwealth citizens who arrived before 1 January 1973

[Commonwealth citizens](#) who were settled in the UK before 1 January 1973 can apply for documentation confirming their right to live and work in the UK. This could be in the form of British citizenship, confirmation of a right of abode, Indefinite Leave to Remain, a returning resident visa, or a 10-year multi-visit visa.

Precisely which of these remedies are available depend on the individuals' circumstances – broadly speaking, whether they

- have been living continuously in the UK – they can either apply for British citizenship, confirmation of the right of abode, or confirmation of having Indefinite Leave to Remain status; or
- have been lawfully resident in the UK after more than two continuous years' absence; or
- are now living outside the UK

Children of Commonwealth citizens above

People who were either born in the UK or came to live in the UK before turning 18, and have lived continuously in the UK since, can apply for either British citizenship or confirmation of Indefinite Leave to Remain status if:

- their parents are Commonwealth citizens who were either
 - settled in the UK on 1 January 1973 or
 - had the right of abode

People of any nationality who arrived before 1989

People who came to live in the UK before 31 December 1988 and have Indefinite Leave to Remain can apply for documentary evidence of their right to live and work in the UK.

2.2 Decisions

Applications that are found to be ineligible do not have a right of appeal. It is possible to request a review of a decision or part of a decision (for example, if a person has been given confirmation of a less beneficial status than they applied for). It is also possible to submit a second application, but these can be rejected if they do not include new information. As at 30 September 2019, 264 review requests had been made. 223 decisions were upheld and 3 decisions were overturned. The remainder were still under consideration.

Citizenship can be refused on criminality/good character grounds. As at 30 September 2019, 235 people who applied to the Scheme from within the UK had been refused on those grounds (410 citizenship refusals were made on other grounds).

2.3 The role of the Taskforce

The Taskforce has been set up to advise and assist people who think they might be eligible under the Scheme.²⁷ It can help people to get evidence necessary to demonstrate their eligibility, including from other Government departments.

As at the end of September 2019, the Taskforce's cohort of outstanding cases included 261 which had been outstanding for over a year and 997 which were between six months and one year old.

Vulnerable people and those in the most urgent need of assistance are referred to the Taskforce's vulnerable person's team – for example, where the person is experiencing pressing difficulties related to benefits or housing. As at 30 September 2018, the team had provided support to just under 1,000 individuals and was continuing to receive approximately nine new referrals each week.

2.4 Reviews conducted by the Taskforce

Two Home Office reviews, focussing on cases involving Caribbean nationals resident in the UK since before 1973, were established to identify:

- people wrongly detained or removed from the UK since 2002
- people who had been wrongly sanctioned under compliant environment policies, as a direct result of Home Office activity.

²⁷ It is also possible to apply directly to the Scheme.

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The National Audit Office, amongst others, has criticised the Home Office for confining the scope of its reviews to people from Caribbean Commonwealth countries (discussed further in section 5).²⁸

Historical detention/removal cases

The Home Office's search of historical records identified 164 individuals of Caribbean Commonwealth nationality who might have been resident in the UK before January 1973 but were subsequently detained or removed from the UK.

Sadly, 24 of the 141 people the Taskforce has traced had already deceased. The others either already have status or are in contact with the Taskforce.

83 of the 164 individuals had been removed from the UK. The Taskforce has been unable to trace 14 of these individuals, and a further 14 people have unfortunately deceased. The other 55 people have obtained/applied for some confirmation of status or confirmed that they do not intend to apply.

Cases sanctioned under compliant environment policies

The Home Office also conducted a review of cases which had been subject to a 'compliant environment sanction' issued as a result of Home Office activity.²⁹

Out of a pool of just under 2,000 cases, the review identified 55 individuals who had action taken against them. 46 appeared to have been living continuously in the UK since before 1973 (and therefore had a right to remain).³⁰ Some of the cases overlapped with the historical detention/removal cohort of people.

The sanctions taken included revoking driving licences; revoking a welfare benefit or invoicing for a repayment; contacting employers to advise they conduct a right to work check; and contacting an NHS trust to advice that the individual be invoiced for treatment received.

The individuals, or families of those who had deceased, have received letters of apology from the Home Secretary. The Home Office has been unable to contact three individuals, who do not appear to have obtained confirmation of status or assistance from the Windrush Taskforce.³¹

²⁸ National Audit Office, [Handling of the Windrush situation](#), December 2018, para 2.10- 2.12

²⁹ The review did not identify individuals affected by compliant environment sanctions applied by third parties, such as employers or landlords. The Home Office does not monitor these.

³⁰ Home Office records suggested that the remaining 9 people may have subsequently lost their ILR status due to lengthy absence from the UK.

³¹ National Audit Office, [Handling of the Windrush situation](#), December 2018, para 2.8;

3. Windrush Compensation Scheme

3.1 Background to establishing the Scheme

The Government confirmed soon after the Windrush scandal broke that it would provide compensation to people affected.³² But a lengthy design and consultation process meant that the [Windrush Compensation Scheme](#) didn't launch until April 2019.

Martin Forde QC was appointed as independent adviser to Home Office on the design of the scheme.

An initial 4 week [Call for Evidence](#), issued on 10 May 2018, attracted 650 responses. These responses informed the design of a compensation scheme which was then opened to [formal public consultation](#). The public consultation ran from July – November 2018. It attracted over 1,400 responses, mostly from individuals rather than organisations. The Home Office also conducted 12 focus group sessions across the UK.

The [Government's response to the consultation](#) was published on 3 April 2019. The compensation scheme formally opened to receive claims on the same day. Anecdotal evidence suggests that the first compensation offers were sent out in late December 2019.

Interim hardship fund

In June 2018 the Home Affairs Committee called on the Home Office to establish urgently a hardship fund for people in acute financial difficulty, in advance of the launch of the compensation scheme.³³

The Government initially resisted the idea.³⁴ But in October 2018 (when the consultation on the compensation scheme was extended), it began to develop a policy for urgent and exceptional cases.³⁵

[The policy](#) was published in December 2018. Eligibility was limited to cases where:

- a. The person is part of the Windrush cohort (as defined in the Commonwealth Taskforce Scheme);
- b. There is a compelling reason why this cannot wait for the full compensation scheme; and
- c. The circumstances of the claim are exceptional – (should support the claimant's life, dignity or ability to return to the UK in an urgent circumstance).

The policy stated that payments or assistance provided under the policy could be taken into account in the event that the recipient subsequently applies to the Compensation Scheme.

³² [HC Deb 23 April 2018 c621](#)

³³ Home Affairs Committee, [Windrush: the need for a hardship fund](#), HC1200, 13 June 2018

³⁴ [Government response to Committee's fifth report of session 2017-19](#), 14 September 2018

³⁵ [HCWS993, 11 October 2018](#)

The policy was due to be reviewed once the compensation scheme was operational.³⁶ As at 30 September 2019, 118 requests for support had been made under the policy, of which:

- 23 had been approved
- 73 had been declined
- 8 had been withdrawn
- 14 were under consideration

3.2 April 2019: the compensation scheme is launched

The Compensation Scheme was launched on 3 April 2019.³⁷ Using a planning assumption of 15,000 eligible claims, the Scheme's [Impact Assessment](#) estimated total compensation costs ranging between £120m - £310m. It estimated the Scheme's operational costs as between £4m and £6m per year, over three years.³⁸

The Home Office is running a series of [public events across the UK](#) to raise awareness of the Windrush Taskforce and Compensation Scheme. In addition, it is offering funding to registered charities and community groups who want to organise their own events.

The Home Office has established a Windrush Advisory Group, comprised of community and faith leaders. Its role is "to advise on how the [Home Office] can maximise the number of people applying to the Compensation Scheme".³⁹ It is intended that, through regular meetings with senior Home Office officials, they will influence the outreach and engagement activities related to the Scheme.

The [Scheme Rules](#) require the Government to appoint an independent person to have oversight of the Scheme and periodically report to the Home Secretary on its operation.⁴⁰ Martin Forde QC has been providing oversight of the Scheme on an interim basis pending a full appointment process.⁴¹

The *Windrush Compensation Scheme (Expenditure) Act 2020* gives parliamentary authority for expenditure under the Scheme. Before the Act was passed, payments were authorised by a Ministerial Direction.⁴²

Payments made so far

The Government must provide quarterly updates to Parliament about the operation of the scheme. In February 2020 it began publishing

³⁶ [Letter from Home Secretary to Home Affairs Committee](#), 22 October 2019

³⁷ [HC Deb 3 April 2019 c1044-5](#)

³⁸ Home Office, Impact Assessment, [Windrush Compensation Policy](#), IA No HO 0329, 9 January 2019

³⁹ GOV.UK, News story, '[Home Secretary launched Windrush Advisory Group](#)', 26 September 2019

⁴⁰ [The Windrush Compensation Scheme](#), (v4.0, published October 2019), para 1.9-1.10

⁴¹ Home Office in the Media Blog, '[Media factsheet: Windrush Compensation Scheme](#)', 6 February 2020

⁴² Home Office, [Letter from the Home Secretary to the Permanent Secretary](#), 4 July 2019

quarterly 'transparency data' on the number of claims and value of payments made under the Scheme.

According to the [data released on 28 May 2020](#), which goes up to the end of March 2020,

- 1275 claims have been made to the Scheme so far, mostly by 'primary claimants'.
- 60 claims have received payments since the Scheme became operational.
- The total value of payments made so far is £362,996.92.
- 20 claims have been assessed as having zero entitlement.
- 27 claims have sought a Tier 1 review, of which 9 have been determined. 3 have sought a Tier 2 review, of which 1 has been determined.

A Home Office press release issued on the same day gave some further details:

- The total payments include a single payment in excess of £100,000.
- Many of the reported payments were interim payments, so the affected individuals might subsequently receive further payments.
- At the time of the data release, the Home Office had also made offers of payments totalling approximately £280,000 but they had not yet been accepted by the applicants or were going through the review process, so were not included in the data.⁴³

There are concerns that the Scheme is receiving considerably fewer applications than forecast, and about the length of time being taken to process claims.⁴⁴ Some people have suggested that the reasons for this relate to problems with the nature of the Scheme, discussed further below.

Criticisms of the Scheme's design

The design of the Scheme has proved controversial in Parliament and amongst campaigners. The use of fixed payments for many of the eligible categories of compensation has attracted particular criticism.

Speaking for Labour on a related Urgent Question in April 2019, Diane Abbott, then Shadow Home Secretary, described the scheme as "shoddy, unfair and unjust".⁴⁵ She emphasised the Opposition's view that payments should be made for actual losses incurred. Joanna Cherry, SNP Spokesperson for Justice and Home Affairs, echoed the criticisms of the 'caps' on compensation awards and exclusion of many legal costs, and called on the Government to take another look at the Scheme.

⁴³ GOV.UK, *News*, '[Windrush Compensation Scheme pays out £360,000 in first year](#)', 28 May 2020

⁴⁴ The Guardian, '[Windrush lawyer Jacqueline McKenzie: "The Home Office is treating people with contempt"](#)', 22 June 2020

⁴⁵ [HC Deb 9 April 2019 c192-201](#)

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The Government's response to the consultation summarised what had informed its design:

The scheme design has been guided by the public consultation, advice from the independent adviser (Martin Forde QC), the guidance contained in the Parliamentary and Health Service Ombudsman's (PHSO) 'Principles for Remedy', National Audit Office briefing on establishing time-limited compensation schemes and good practice from the Home Office and other government departments' existing compensation and ex gratia schemes. In line with Treasury guidance on Managing Public money, we have also taken into account the need to ensure that public money is being spent in the best way. The way Government money is spent should, in other words, make good sense for affected individuals and it should make good sense for the taxpayer.⁴⁶

[A petition on the 38degrees.org.uk](https://www.38degrees.org.uk) website is calling on the Government to make changes to the Scheme, to ensure that it "reflects the principles of restorative justice and fairness to the victims ...". It was started by Patrick Vernon OBE, a prominent Windrush campaigner.

Specific proposals within the campaign's '10-point plan' include:

- That the Compensation Scheme is managed by another government department or independent body, along the principles of restorative justice and fairness. The petition contends that the current arrangements give rise to a conflict of interest, because the Home Office is still enforcing the 'hostile environment' agenda "which is clearly inherently racist in nature and breaches the Public Sector Equality Duty".
- The creation of easy read compensation application forms, and making compensation equally available to people with criminal records. The petition argues that "The current forms act as deterrent to the vulnerable and family members who are traumatised."
- Home Office funding to community groups, faith and small civil society organisations to support outreach and advice work intended to help people affected by the Windrush crisis.
- Automatic payments of £10,000 for anyone directly affected by the Windrush Scandal, without a requirement for any documentary evidence of hurt or financial loss.
- Abolishing all tariffs and caps on compensation awards.
- All compensation award letters to include a full apology recognising Home Office failure.
- A formal government apology to everyone given erroneous official advice on British citizenship eligibility since the 1971 Immigration Act came into force, and repayments (with interest) for related application and legal fees incurred.

The petition is also calling on the Government to provide at least £1 billion funding for a Windrush Endowment Fund to support the preservation and legacy of the Windrush generation; establish the

⁴⁶ Home Office, [Windrush Compensation: Response to Consultation](#), April 2019, para 4.3

Windrush Day Grants and Memorial Committee as an independent organisation; and establish a “nationally funded health and wellbeing programme” for the Windrush generation and their descendants.

3.3 Overview of the Scheme

[General practical information about the Scheme](#), including the eligibility criteria and how to apply, is available from GOV.UK.⁴⁷ Detailed information is available in the Home Office’s [Windrush Scheme Rules](#) and the [Windrush Compensation Scheme Casework Guidance](#).

Citizens Advice has received Home Office funding to help people who need assistance applying for compensation, and the Home Office is providing £500,000 funding to community groups to promote the Scheme.⁴⁸

The groups eligible for compensation reflect those who are eligible under the Windrush Scheme and Taskforce. Again, the Scheme does not only apply to people who originally came from Caribbean Commonwealth countries. It is also open to eligible claimants currently living overseas.

The Scheme refers to three eligible categories of claimant:

- **“primary claimants”** – broadly speaking, these are:
 - Commonwealth citizens who arrived in the UK before 1 January 1973 and, in certain circumstances, their children and grandchildren; and
 - People of any nationality who arrived in the UK before 31 December 1988 and are now lawfully in the UK or British citizens
- **“estates”** – the estates of deceased primary claimants
- **“close family members”** of primary claimants (including if the primary claimant is deceased or has not made a claim under the Scheme) – namely, their cohabiting spouse/civil partner/unmarried partner; child; parent; sibling.

Claimants must be able to provide evidence of their identity and information to confirm their lawful status. Those who cannot do so are expected to seek assistance from the Windrush Taskforce before applying for compensation.⁴⁹

The Scheme is time-limited. It was initially due to end in April 2021, but has since been extended by two years, partly to encourage take-up.⁵⁰

Claims received after 2 April 2023 will only be considered if the Home Office is satisfied that there are exceptional circumstances, and the claim is made on or before 2 October 2023.

⁴⁷ GOV.UK, Guidance, [Windrush Compensation Scheme](#) (accessed 22 June 2020)

⁴⁸ Citizens Advice, ‘[Citizens Advice to help those applying to the Government’s Windrush compensation scheme](#)’, 11 April 2019. The funding [is being extended](#) for the duration of the lifetime of the Scheme.

⁴⁹ Home Office, [Windrush Compensation Scheme Casework Guidance](#) v4.0, p.19

⁵⁰ GOV.UK, *News*, ‘[Windrush Compensation Scheme extended by 2 years](#)’, 6 February 2020

The Scheme Rules retain scope for extending the deadline for applying.⁵¹

Further details and controversial provisions

The Scheme Rules identify eight different categories of loss under which claims can be made:

- Immigration fees and legal costs
- Detention, deportation, removal and return
- Loss of access to employment
- Loss of access to Child Benefit, Child Tax Credit or Working Tax credit
- Denial of access to services (housing, health, education, banking)
- Homelessness
- Impact on life (non-financial impacts)
- Discretionary award for significant impacts, loss or detriment of a financial nature (not related to any of the above categories)

People applying as 'close family members' of a primary applicant can only apply for compensation for immigration fees and legal costs, impact on life and the discretionary award. The other two categories of eligible claimant can claim in all categories.

The Rules define the scope and extent of the costs which can be claimed for in each of these categories.

They also allow for payments to be refused or reduced in certain scenarios. Namely, to prevent double recovery or fraud, if the applicant has a history of serious criminality, or the Home Office considers that they failed to take reasonable steps to resolve their lawful status or mitigate losses.

Aspects of the Scheme and the Rules underpinning it have been criticised, as discussed below.

Scope to reduce or decline a compensation award

The Home Office can reduce or decline a compensation award if it considers that the person in question: failed to take reasonable steps to resolve their lawful status or mitigate losses or impacts; took unreasonable steps that resulted in increased losses; or failed to cooperate with attempts to resolve their status.⁵²

The caseworker guidance discusses how these Rules should be applied.⁵³ The starting principle is that:

All eligible claimants who have experienced difficulties on account of being unable to demonstrate their immigration status should ordinarily have been expected to have taken reasonable steps to regularise their status.

⁵¹ [Windrush Compensation Scheme Rules](#), v4.0, para 1.8

⁵² [Windrush Compensation Scheme Rules](#) v4.0, para 4.4

⁵³ Home Office, [Windrush Compensation Scheme Casework Guidance](#), p.29-33

It goes on to explain that decisions on what actions, or grounds for failing to act, are deemed to be reasonable must be informed by the individual facts of the case. For example, a failure to act might be accepted as reasonable if the person can show that they had a fear of contacting the Home Office based on direct knowledge of a family member's experience of contact leading to detention or removal from the UK.

Caseworkers must have sufficient evidence to conclude that it is "more likely than not" that the applicant took reasonable steps to resolve their status. Where this cannot be demonstrated by internal Home Office records, other evidence provided by the applicant (e.g. contact with an MPs office or legal representative) can be considered.

The 'mitigation of loss' provisions have been controversial. Following feedback from stakeholders, the Home Office amended the policy to enable it to "consider any evidence of the steps that someone took to resolve their situation, even if those steps were not taken immediately after suffering a loss."⁵⁴

Serious criminality (conviction of an offence with a sentence of 4 years' imprisonment or more) can also be grounds to reduce or decline an award.⁵⁵ The Home Office didn't consult on this provision. It has recognised that there are arguments for awarding compensation regardless of criminality. But it decided to retain discretion to withhold payments on criminality grounds due to considerations about the importance of managing public money effectively.⁵⁶

Certain costs are not eligible for compensation

Restrictions on what losses can be claimed for under each of the compensation category headings have been criticised.

For example, refunds for immigration application fees are only available for certain categories of application (e.g. indefinite leave, citizenship, no time limit stamp). These categories are only applicable to people who already have an immigration status. As the immigration lawyer Nick Nason has observed, this excludes other, potentially costly, application routes that Windrush victims might have pursued in the past after being (wrongly) told by the Home Office that they didn't have status. For example, private/family life-based applications.⁵⁷ He comments:

Victims were told, essentially, "you need a visa. Go get one".
Now they are being told "oh, you applied for the wrong visa?
Tough".

Furthermore, refunds are only available for applications which were refused solely on the grounds that the applicant couldn't provide enough evidence of having lawful status at the time.

⁵⁴ Home Office in the Media Blog, '[Media factsheet: Windrush Compensation Scheme](#)', 6 February 2020

⁵⁵ [Windrush Compensation Scheme Rules](#) v4.0, para 4.5

⁵⁶ [Windrush Consultation: Response to Consultation](#) CP81, April 2019, para 4.11-4.12

⁵⁷ Free Movement blog, '[Six reasons why the Windrush compensation scheme fails victims](#)', 10 April 2019

Some consultation respondents suggested that the Scheme should reimburse a broader range of immigration fees. The Home Office's view is that fees should not be reimbursed for successful applications in categories which now are free of charge for Windrush cases. It argues that "successful applicants nevertheless received what they paid for...The fact that the Government took the decision, subsequently, to waive the fee for certain groups of people, does not provide sufficient reason to refund".⁵⁸

The Government's response to the consultation did not directly address the idea that other types of application (e.g. for temporary/limited leave to remain) should be reimbursed.

Restrictions on claims for legal costs

Related to the above, the Scheme will only reimburse legal costs related to the eligible immigration application categories. And those payments are 'capped' at £500 per application.

This has been justified with reference to the Home Office's longstanding position that legal advice is not necessary for making an immigration application, and that people who use legal advice shouldn't be advantaged.⁵⁹

But for some observers, the Windrush scandal illustrates the significant difficulties that many individuals have navigating the immigration system without specialist advice.

The significant legal costs incurred in some cases has also been linked to the withdrawal of legal aid for general immigration casework in 2012. It has been suggested that the scale and extent of individuals' costs could have been avoided or mitigated if legal aid had been available for such cases, as it was until 2012.⁶⁰

The Discretionary award category

The caseworker guidance does not give examples of what types of financial loss might be covered by this category. It anticipates that awards are likely to be very rare:

Awards for losses should be adequately covered under the other categories and so awards under this category should be very rare. However, some individuals may, **exceptionally**, have evidence of other impacts, losses or detriments attributable to status difficulties which you may decide merits a discretionary award.⁶¹

The applicant must be able to provide "clear and compelling evidence" that the person in question suffered the losses as claimed; that these arose solely as a consequence of the inability to demonstrate lawful status; and that "at all material times [the person] used best endeavours to minimise and mitigate the losses or impacts suffered."⁶² Awards can be made in the absence of evidence of the losses in "wholly

⁵⁸ [Windrush Consultation: Response to Consultation](#) CP81, April 2019, para 4.16

⁵⁹ [Windrush Consultation: Response to Consultation](#) CP81, April 2019, para 4.15

⁶⁰ Free Movement blog, '[Six reasons why the Windrush compensation scheme fails victims](#)', 10 April 2019

⁶¹ Home Office, [Windrush Compensation Scheme Casework Guidance](#), p.77

⁶² [Windrush Compensation Scheme Rules](#) v4.0, para I2

compelling” circumstances, subject to the mitigating actions requirement.

There is no limit on the amount that can be awarded in the discretionary award category, but the Rules do not commit the Home Office to awarding the full amount claimed.

Some payments are based on fixed rates rather than actual costs

A person can apply for compensation in each of the award categories relevant to their case. Compensation awards are cumulative – there is no overall limit on the amount that someone might be awarded.

But fixed rates (variously described by the Government as ‘tariffs’ or ‘set awards’, described by some critics as ‘caps’) will be used to calculate compensation in most categories. Some compensation categories only allow for payments based on fixed rates, some are only actuals-based, and some allow for either, depending on the circumstances.

The Government considers that using ‘set awards’ “ensures that claims can be considered fairly, accurately and as quickly as possible”.⁶³ Its response to the consultation noted that 75% of respondents supported the principle of using a combination of methods for determining compensation payments. But its analysis of responses to other questions also acknowledged some support for known losses to be reflected in a broader range of compensation categories than the consultation envisaged.⁶⁴

Defending the design of the Scheme in the Commons, the then Minister for Immigration, Caroline Nokes, said that tariff-based payments were necessary to cater for individuals who were unable to provide enough evidence to claim for actual costs.⁶⁵ She also said that the Home Office “is determined to work with its own information and with data held by other Departments and indeed by individuals more widely, so that we help claimants to establish their actual level of loss, where that is the most appropriate route.”⁶⁶

Tariff-based compensation categories must be supported by evidence but will be assessed against a lower standard of proof than actuals-based applications (discussed further below).

The fixed payments for loss of access to benefits will only apply if the individual has been unable to secure financial redress from the relevant government department directly.

Fixed rate payments have also been strongly criticised on the grounds that the amounts on offer fail to reflect the harm and losses suffered by affected individuals. The Government’s response to the consultation gave an insight into how the rates had been calculated. For example, it said that payments for denial of access to services consider existing government precedents and Ombudsman recommended payments.⁶⁷

⁶³ [Windrush Consultation: Response to Consultation](#) CP81, April 2019, para 4.46

⁶⁴ [Windrush Consultation: Response to Consultation](#) CP81, April 2019, para 3.39, 3.44

⁶⁵ [HC Deb 9 April 2019 c193](#)

⁶⁶ [HC Deb 9 April 2019 c195](#)

⁶⁷ [Windrush Consultation: Response to Consultation](#) CP81, April 2019, para 4.25

Similarly, it said that the Home Office's longstanding ex gratia scheme and case law informed the rates for unlawful detention and removal. Nevertheless, some MPs have questioned the appropriateness of the amounts chosen. Speaking in the Commons soon after the Scheme launched, David Lammy said:

... a £500 payment for legal costs incurred; £500 for people who had been denied the chance to go to university; £1,000 for those wrongly obliged to leave the country under a so-called voluntary return scheme; and a mere £10,000 for people who were wrongly deported. Victims have correctly described these payments as "peanuts" and "insultingly low".

I say to the Minister: £10,000 is less than one Secretary of State's gross salary per month. (...) Is this the price that you put on my constituents being deported for no wrongdoing and nothing that they have themselves done? Is this how this Government value the lives of black Britons? I say to the Minister: you promised to do right by the Windrush generation, but quite rightly many of them think that they have been misled.⁶⁸

The evidential requirements and standard of proof

Another concern, which has been raised in Parliament and elsewhere, relates to the Scheme's perceived onerous evidential requirements.

Responding in April 2019 to criticisms about the complexity of the application form and guidance, the then Minister for Immigration said:

We designed the application form and scheme in consultation with members of the Windrush generation, and we sought to make the form as straightforward as possible.⁶⁹

The caseworker guidance on standard of proof emphasises:

As many of those affected have been in the UK for a long time and have suffered losses due to difficulties in demonstrating their lawful status it is important you treat these cases in a careful and sensitive manner. The claimant must be given every reasonable opportunity to provide evidence to support their claim.⁷⁰

Where there is a lack of supporting evidence, staff are instructed to take a "holistic view" and decide on the balance of probability (i.e. whether it is more likely than not).

Claims where compensation would reflect actual losses are subject to a higher standard of proof – the guidance states that clear evidence must be provided, and the decision-maker must be satisfied "beyond reasonable doubt".⁷¹

Procedures for deciding applications and challenging determinations

There have been criticisms that the Scheme has been slow to process applications received so far. In several cases people have died whilst waiting for a compensation offer.⁷²

⁶⁸ [HC Deb 9 April 2019 c193](#)

⁶⁹ [HC Deb 9 April 2019 c201](#)

⁷⁰ Home Office, [Windrush Compensation Scheme Casework Guidance](#), p.80

⁷¹ Home Office, [Windrush Compensation Scheme Casework Guidance](#), p.80

⁷² *The Guardian*, ['Windrush victim dies without compensation or apology'](#), 12 November 2019

The Rules do not specify a timescale for deciding claims. They allow the Home Office to request further information or evidence from the claimant or other departments, authorities or experts before making a decision. It is possible to make split decisions/payments, so that complex parts of claims would not delay resolution of more straightforward parts.⁷³

Applicants receive a written determination confirming the outcome of their application and the details of the award offered. Determinations also include a formal apology from the Home Office acknowledging the applicant's experiences and any role that the Home Office may have played in the impact or loss suffered. However, payment of an award is explicitly not intended to reflect acceptance by the Home Office of any legal liability for the losses.

Challenging compensation scheme decisions – the reviews process

Applicants must notify the Home Office within two months of whether they intend to accept the offer or want to request a review of the decision.⁷⁴

There is a two-tiered approach to reviews. In the first instance, the determination is reviewed by a 'senior reviewer' within the Home Office who was not involved with the original decision.

These 'Tier 1' reviews can challenge any part of the determination, including that the applicant is not eligible under the Scheme, that there are grounds to reduce or decline an award, or the amount awarded. The Compensation Scheme Rules do not specify a timescale for completing these reviews.

Depending on the nature of the complaint, the reviewer can remit the original decision to the Home Office, or make any decision available to the original decision-maker, including upholding or reinstating an original or revised decision, or making a new determination.⁷⁵

If the applicant does not want to accept the outcome of the Tier 1 review they must notify the Home Office within two months, in order to request a 'Tier 2 review'. These are conducted by an independent person. The Adjudicator's Office (who also deals with complaints about HM Revenue and Customs and Valuation Office Agency decisions) has been given this role.

The [scope of Tier 2 reviews](#) is different. The Adjudicator can consider complaints about the compensation decision (initial decision and Tier 1 review) and/or the handling of a compensation application, but they cannot review decisions about whether a person is eligible to claim compensation.

The Adjudicator may recommend that the Home Office reviews the amount of compensation being offered if it finds evidence that the

⁷³ [HC Deb 9 April 2019 c198](#)

⁷⁴ This period can be extended if the Home Office accepts there are reasonable grounds for delay.

⁷⁵ Rules, para 10.8-9

Home Office has not followed rules and guidance appropriately, or has applied the rules and guidance inappropriately and unreasonably.

The Adjudicator cannot substitute a decision made by the Home Office, and the Home Office can refuse to implement a decision by the Adjudicator. In such cases, it must provide written reasons.

More detailed information is available in the Compensation Scheme Rules (Part 10) and the [Service Level Agreement](#) between the Adjudicator’s Office and the Home Office.

Diane Abbott, then Shadow Home Secretary, contended that the Scheme “compares very unfavourably” with the [Criminal Injuries Compensation Scheme](#).⁷⁶ That gives a statutory right of appeal to the First-tier Tribunal (Criminal Injuries Compensation Chamber).⁷⁷

3.4 Compensation payment tables

Loss category	Basis of award	Amount
Immigration fees, legal costs		
Immigration application fees	Actual	Fee amount
Associated legal costs	Set or actual	£500 per eligible immigration application (or actual amount paid, if less)
Loss of access to employment		
	Actual or set/tariff (depending on evidence)	
	Actual	Period of loss x actual monthly earnings
	Set/tariff	Maximum £13,764 (max 12 months loss x max £1,147 monthly earnings)

⁷⁶ [HC Deb 9 April 2019 c194](#)

⁷⁷ [Criminal Injuries Compensation Scheme 2012](#) (as amended), pursuant to s5, [Criminal Injuries Compensation Act 1995](#) (as amended)

Loss of access to benefits		
Child Benefit	Set	£1,264
Child Tax Credit	Set	£2,500
Working Tax Credit	Set	£1,100
Loss of access to services		
Housing	Set	£1,000 (one-off payment)
Free NHS treatment	Set	£500 (one-off payment)
Reimbursement of private medical fees (overseas)	Actual	Full amount
Reimbursement of private medical fees (in UK)	Actual or set	Actual amount or equivalent NHS charge (whichever is less)
Access to higher education as a home student	Set	£500 (one-off payment)
Reimbursement of international student fees	Actual	Difference between international and home fees
Access to banking services	Set	£200 (one-off payment)
Losses arising from denial of access to banking services	Actual	Direct financial losses
Homelessness		
	Set/tariff	£250 per month; max award £25,000
Impact on life		
	Set	Depending on level of severity: £250 £1,000 £3,000 £5,000 £7,000 £10,000+
Discretionary award		
(not provided for elsewhere)		Actual amount claimed, or less

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Payments for deportation, removal or immigration detention are all based on fixed tariffs:

Deportation or removal	Amount of award
Deportation	£10,000
Administrative removal	
with reporting requirements	£7,500
with detention	£6,000
without detention or removal	£5,000
Any other removal or return	£1,000
Detention	
	£500 per hour
Over 30 minutes, for the next 3 hours	£300 per hour
For subsequent 6 hours	(part hours pro-rata'd)
Balance of the first 24 hours	£100 per hour (part hours pro-rata's)
Each full day of continuous detention following first 24 hours	£500 per 24 hours for the first 30 days
(part days pro-rata'd)	
	£300 per 24-hour period for the subsequent 60 days
	£100 per 24-hour period for any period of detention thereafter

4. Windrush Lessons Learned Review

An internal Home Office 'Lessons Learned' Review was established in the immediate aftermath of the Windrush scandal.

Wendy Williams, HM Inspector of Constabulary and Fire and Rescue Services, was subsequently appointed to lead the review as an independent adviser. She was also supported by an independent advisory group.

The terms of reference for the review were to focus on events from 2008 onwards and identify the underlying causes of the Windrush cohort's difficulties and key lessons for the Home Office.

The Home Office had originally intended that the review would be completed by summer recess (24 July 2018), but the scope of the review expanded, and the timetable slipped significantly.⁷⁸

4.1 Recommendations

The [Lessons Learned review](#) was laid before Parliament on 19 March 2020, the day after the Home Secretary received it.⁷⁹

The report found that "what happened to those affected by the Windrush scandal was foreseeable and avoidable", observing that "A range of warning signs from inside and outside the Home Office were simply not heeded by officials and ministers".

Considering the question of whether the Home Office is institutionally racist, Ms Williams concluded

While I am unable to make a definitive finding of institutional racism within the department, I have serious concerns that these failings demonstrate an institutional ignorance and thoughtlessness towards the issue of race and the history of the Windrush generation within the department, which are consistent with some elements of the definition of institutional racism.⁸⁰

Summarising the Review's 30 recommendations, she highlighted a need for "systemic and cultural change":

The recommendations in this section can be boiled down to three elements: the Home Office must acknowledge the wrong which has been done; it must open itself up to greater external scrutiny; and it must change its culture to recognise that migration and wider Home Office policy is about people and, whatever its objective, should be rooted in humanity.

(...)

⁷⁸ [HCWS1714, 11 July 2019](#) and Letter from Wendy Williams to Sajid Javid MP regarding the review, [DEP2019-0744](#) of 2017-19. She was previously working to a deadline of 31 March 2019, but later informed the Home Secretary that more time was needed due to the complexity and scale of the work involved, and the Terms of Reference being extended in March 2019 to include the 'right to rent' policy.

⁷⁹ [HC Deb 19 March 2020 c1158](#)

⁸⁰ [Windrush Lessons Learned Review](#), HC 93, March 2020, p.7

While it may be possible to address some recommendations relatively quickly, the harder challenge will be for the department to accept, fundamentally, that a systemic and cultural change is necessary. That will call for some difficult discussions at senior levels and throughout the organisation, as well as personal reflection. It will call for commitment from the senior leadership to reinforce the behaviours they expect of each other, to model those behaviours and to hold each other and the leadership at all levels to account. It will require so much more than any defensive, technical or process solutions we have seen adopted in response to some other reviews and criticism.

One of the recommendations was for the Home Office to publish a comprehensive improvement plan within six months of the Review's publication, on the assumption that Ms Williams would conduct a follow-up review in approximately 18 months' time. Ms Williams commented on how the impact of the Review could be measured:

What will make this review different is if, in 12 to 24 months' time, we can see evidence of deep cultural reform, with changes in behaviour at all levels and functions throughout the organisation – up and down, and from side to side.⁸¹

The report made 30 recommendations which concerned four broad areas:

- The Home Office's interaction with the communities it serves and with external stakeholders
- The Home Office's interaction with its people
- The Home Office's role in wider government
- The Home Office's approach to race, diversity and inclusion

Government response

The Home Secretary set out [the Government's initial response](#) to the Lessons Learned report in a statement to the House on 19 March. She apologised, on behalf of the current and successive Governments, for the actions spanning decades which had led to the Windrush generation's suffering. She confirmed that, over the coming months, the department would work at all levels to reflect on the report's recommendations, including those relating to the compliant environment policies and cultural change. She committed to putting "people before process" and said that the Home Office would issue a detailed formal response to the report within the next six months.

Recent developments

On 12 June, the Equality and Human Rights Commission announced that it will use its powers under section 31 of the *Equality Act 2006* to assess the Home Office's compliance with the Public Sector Equality Duty in relation to understanding the impact of its policies on the Windrush generation (discussed further in section 5.3 of this briefing). It confirmed that the assessment will be informed by the findings of the Lessons Learned review.

⁸¹ [Windrush Lessons Learned Review](#), HC 93, March 2020, p.136

On 22 June 2020 (the second annual [Windrush Day](#)) the Home Office [announced the establishment](#) of the Windrush Cross-Government Working Group. The Group is to be co-chaired by the Home Secretary and Bishop Derek Webley. It will bring together stakeholders and community leaders with senior representatives from across government departments.

The Home Office press release describes the Group's purpose as to:

- Provide strategic input into the Home Office's response to the Wendy Williams Lessons Learned Review
- Support the design and delivery of practical solutions to address the wider challenges that disproportionately affect people from Black and wider BAME backgrounds. This will include programmes on education, work and health
- Advise on the design and delivery of the Windrush Schemes Community Fund⁸²

[An article](#) for the Evening Standard authored by the co-Chairs and re-published on the Home Office in the Media blog, affirmed their joint determination to ensure that "nothing like this scandal can ever happen again".

⁸² Home Office, *News*, '[New Cross-Government Working Group launched to address challenges faced by Windrush generation and their families](#)', 22 June 2020

5. External scrutiny

5.1 National Audit Office

The National Audit Office (NAO)'s December 2018 report on [Handling of the Windrush situation](#) considered whether problems with the Home Office's information management and management of immigration casework may have contributed to the difficulties encountered by the Windrush generation. Its recommendations, which aimed to reduce the risk of a similar situation arising in the future, included that the Home Office:

- Consider its responsibility to be more proactive in identifying people affected
- Improve its approach to assessing risks to particular individuals and groups before it implements its policies
- Develop a strategy to support potentially vulnerable customers
- Place a greater emphasis on outcomes in its checks on quality of decision-making, and consider additional checks on refusal decisions
- Use independent scrutiny to identify and counter potential negative consequences of policy and operational processes

The NAO criticised the department for restricting the scope of the reviews on removal/detention and compliant environment sanctions to people from Caribbean Commonwealth countries. Noting that the decision had been supported by an analysis of data from the Windrush Scheme's first month of operation, the report commented:

2.12 Data from the taskforce is not a sufficient basis on which to decide that reviewing other Commonwealth cases would be disproportionate. The Department's decision assumes that people coming forward to the taskforce are representative of the underlying population affected. However, it has not undertaken any analysis, for example, of a sample of those cases, to support this assumption. It also has not presented any analysis of the potential costs of the exercise relative to the potential benefits to individuals affected, to substantiate its assertion about the proportionality of the effort required. In relation to the review of sanctions in particular, the Department is reviewing fewer cases but its work to date indicates that there may be more cases of action having been taken against people who may have been in the country before 1973, despite many of the sanctions only having been introduced recently. This could reasonably be seen to indicate a bigger problem. Given this, we find the Department's decision not to investigate further surprising.

The NAO also questioned whether the scope of the reviews were consistent with established 'LEAP' principles on legal entitlements and administrative practices. It commented:

2.13 (...) The 1979 LEAP report sets out how government departments should act in situations where people's legal entitlements might not have been met. The report states explicitly: "The general principle is that a legal entitlement, once validly established and, where necessary, properly claimed, must be met,

whatever the administrative difficulties or costs involved in doing so". It also places the onus on departments to use data available to them to identify people affected and provide remedy, as well as publicising the situation to help individuals affected to come forward. The scope of the Department's proactive reviews is also inconsistent with the broader scope of its own Windrush scheme, and its proposed compensation scheme.

The NAO report confirmed that it had received legal advice indicating that the LEAP principles were applicable but noted the Home Office's view that they were not.⁸³

5.2 Parliamentary Committees

Public Accounts Committee, [Windrush generation and the Home Office](#), HC1518, 6 March 2019

Treasury Minutes, [Government response to the Committee](#), CP113, 10 June 2019

The Committee's report was based on the NAO's findings and evidence from the Home Office, immigration law advisers, and a member of the Windrush generation who had been affected by Home Office policies. It concluded:

The Windrush scandal demonstrates a combination of a lack of concern about the real-world impact of the Home Office's (the Department) immigration policies compounded by a systemic failure to keep accurate records, meaning many people who are British Citizens or have leave to remain in the UK do not have the paperwork to prove it. The Home Office was aware of this through case enquiries from citizens and their MPs. Yet, the department failed in its duty to protect the rights of people to live, work and access services and benefits in the UK when designing and implementing its immigration policies. This failure was compounded by the Department's lack of action when there were clear warnings that members of the Windrush generation, many of whom were elderly and vulnerable, were being denied their rights.⁸⁴

The Committee was highly critical of the extent of the Home Office's response to the scandal:

The Department has a duty of care to identify and support everyone affected by the Windrush scandal, but in practice its actions do not live up to its own promise to do everything it can to put things right. It has set up a task force, but while this belated flurry of activity may help some of those who have identified themselves, it does nothing to tackle the systemic issues that led to the problems in the first place. Rather than taking full responsibility to resolve the problems it has caused, it is being complacent, neglecting to identify those affected and denying people support to rebuild their lives. We do not believe that the Department is doing enough to address the appalling defects in

⁸³ National Audit Office, [Handling of the Windrush situation](#), December 2018, para 10

⁸⁴ Public Accounts Committee, [Windrush generation and the Home Office](#), HC1518, 6 March 2019, p.3

its systems, processes and data quality, which contributed to the scandal. (...) ⁸⁵

The Committee had recommended that the Government extend the historical review of cases to include non-Caribbean Commonwealth nationals. The Government disagreed. It questioned whether this would be efficient or effective, stating that the scope of the review had been restricted to the group believed to have been most affected, and that extending it would add around 300,000 more cases to its scope. ⁸⁶

Joint Committee on Human Rights, [Windrush detention](#), Sixth report of 2017-19, HC 1034/HL Paper 160, 29 June 2018

[Government Response to Committee's Report](#), HC1633 of 2017-19, 18 October 2018

The Committee conducted an in-depth examination of Home Office case files belonging to two victims of the Windrush scandal who had been wrongly detained. Again, in a highly critical report, it identified

18. ... a catalogue of errors—misapplication of the law relating to immigration status, the seemingly unlawful and inappropriate use of detention powers, and a culture that failed to treat people with basic respect and dignity. ⁸⁷

The Committee rejected the Home Office's explanation which attributed the poor handling of these cases to "a series of mistakes over a period of time". It did not consider that a credible or sufficient explanation, and raised concerns that the cases reflected systemic deficiencies.

The Government's response "warmly welcomed" the Committee's report. It set out its response to the two cases considered by the Committee and the immediate actions it was taking in response to the Windrush scandal, as well as wider lessons for the immigration system.

Home Affairs Committee, [Windrush generation](#), Sixth report of 2017-19, HC990, 3 July 2018

[Government Response to Committee's Report](#), HC1454 of 2017-19, 4 September 2018

The Committee sought to identify the underlying causes of the scandal, the adequacy of the Government's response and broader lessons for the immigration directorates. Whilst welcoming the establishment of the Taskforce and fee waivers for Windrush cases, the Committee also concluded that:

The process of review, lesson learning and accountability remains unsatisfactory. There was a clear lack of oversight of the system as

⁸⁵ Public Accounts Committee, [Windrush generation and the Home Office](#), HC1518, 6 March 2019, p.3

⁸⁶ Treasury Minutes, [Government response to the Committee of Public Accounts](#), CP 113, June 2019, p.5

⁸⁷ Joint Committee on Human Rights, [Windrush detention](#), Sixth report of 2017-19, HC 1034/HL Paper 160, 29 June 2018, para 18

a whole, meaning that the Government did not recognise systemic problems as they arose. (...). It is vital that the “shape” of other problems with immigration policy is seen in future and that the promised change in culture in the Home Office is implemented.⁸⁸

A [separate interim report](#) published by the Committee, and related [Government response](#), considered the need to establish a hardship fund in advance of the launch of the compensation scheme.

5.3 Equality and Human Rights Commission

On 12 June 2020 the Equality and Human Rights Commission (EHRC) announced that it will use its powers under section 31 of the *Equality Act 2006* to assess “whether, and how, the Home Office complied with the Public Sector Equality Duty in relation to understanding the impact of its policies on the Windrush generation.”

The assessment will be informed by the findings of Wendy Williams’ Lessons Learned review. A [press release](#) gave further details of the intended scope of the assessment:

Among other obligations, public bodies must have due regard to advancing equality of opportunity between people who share protected characteristics and those who do not. We have provided the Home Office with proposed terms of reference for its assessment, to examine how the department engaged with affected individuals and communities to understand the relevant historical and contextual factors when developing immigration policy from 2012-18. We will particularly consider how the department understood, monitored and reviewed the impact of placing increasingly onerous documentation requirements on the Windrush generation.

The EHRC intends to publish more details in the near future, and intends that the assessment will be completed by September. It will include a set of recommendations which will be used to inform Home Office policies and procedures.

⁸⁸ Home Affairs Committee, [Windrush generation](#), Sixth report of 2017-19, HC990, 3 July 2018, para 140

6. Other groups at similar risk?

Commentators have identified various other groups potentially facing similar difficulties in securing or documenting their status as a result of Home Office policy and practice.

6.1 EEA nationals living in the UK before Brexit

People living in the UK under EU law (primarily, EU/EEA nationals and their family members) must apply to the EU Settlement Scheme (EUSS) in order to continue to have a legal status and associated rights and entitlements in the UK after Brexit.

Some critics have warned that the EUSS poses a risk akin to 'Windrush on steroids', or 'Windrush writ large'. This is because of concerns about the way in which the EUSS has been designed, and the number of people potentially affected.

The main elements of the EUSS causing concern are:

- The scheme is 'constitutive' rather than 'declaratory': People will automatically lose their legal status in the UK if they don't make a successful application.
- Successful applicants aren't given physical status documents, rather a digital code which can be used to verify their status.
- The EUSS is time-limited, and it is not clear how the Home Office will deal with late applications or people who fail to apply.

Research has identified several different groups of people particularly vulnerable to losing their status and entitlements under a constitutive system, whether due to a lack of awareness of the scheme or difficulties making an application or proving their eligibility under the scheme. These include the elderly, people with limited English, isolated individuals, people with mental health difficulties, children and young people in the care system, homeless people, people who arrive soon before the deadline and people in casual employment.⁸⁹

Critics contend that a 'declaratory' system, which automatically recognised their rights in law, would be a better way of ensuring that people had continuity of status post-Brexit. But the Government has consistently rejected these calls. It contends that one of the 'key lessons' of the Windrush scandal is that schemes which confer status by automatic operation of the law but don't issue confirmation of status documents don't work.⁹⁰ [Others have argued](#), however, that such problems could be avoided by making the EUSS a declaratory scheme with a requirement to register.

⁸⁹ See, for example, PoliticsHome, '[Older people facing 'Windrush 2' unless Home Office tweaks Brexit citizen scheme, ministers told](#)', 27 September 2019; Migration Observatory, *Report*, '[Unsettled status? Which EU citizens are at risk of failing to secure their rights after Brexit?](#)', 12 April 2018

⁹⁰ [HC Deb 9 April 2019 c1048](#)

Statistics on the number of applications to the EUSS and their outcomes are being published regularly by the Home Office, but there are some limitations with the data available so far, such as an inability to identify repeat applications. The total number of people who will need to apply to the scheme isn't known, because there are only estimates of the number of people living in the UK with rights under EU law.

6.2 Undocumented children

Undocumented children born in the UK or living here since an early age may face difficulties in regularising or securing confirmation of their status. As has been the case with some Windrush cases, it is not uncommon for children (and their families) to assume that they are already British, and not realise that there might be a problem until their status is questioned, for example, when they apply for their first passport or for higher education as a 'home' student.

The Home Affairs Committee has noted that 144,000 children were estimated to be in this position in 2016. The Committee noted that if they are unable to secure their status they will experience barriers to accessing services and other entitlements when they reach adulthood similar to the Windrush cases.

There are various provisions for children in British immigration and nationality law which offer routes to temporary or permanent status and/or British citizenship, such as on the basis of residence in the UK. As with Windrush cases, many children and their families are unaware of what they might be eligible for, or have difficulties accessing legal advice, or meeting the associated application fees.

The Committee has called on the Home Office to solve the problem. It advocated fee waivers and cost-level application fees, a shorter route to securing long-term status in the UK, and the reintroduction of legal aid for children's cases.⁹¹

The Government said that it shared the concerns around children who were "genuinely undocumented and who are in that position through no fault of their own". It said that it was considering how best to assist them in regularising their status.⁹²

It acknowledged that there are no fee waivers for children's citizenship applications, either for those who have an entitlement in law to be registered as British citizens, or those whose registration is at the Home Secretary's discretion. It said that the Home Office "is including this option in work on identifying and removing unnecessary barriers to a child's right to become a British citizen". There is an ongoing legal challenge on the issue of fees for children to register as British citizens.⁹³

⁹¹ Home Affairs Committee, [Windrush generation](#), Sixth report of 2017-19, HC990, 3 July 2018, para 128. Immigration legal aid for unaccompanied children was reinstated in October 2019.

⁹² Home Affairs Committee, [Government response to the Committee's Sixth report of session 2017-19](#), HC1545, 4 September 2018, p.19

⁹³ See Project for the Registration of Children as British Citizens, ['PRCBC High Court challenge on children's citizenship fee'](#) (undated; accessed 6 January 2020).

6.3 Chagos Islanders

A Home Affairs Committee report briefly summarised the position of exiled Chagossians in the UK:

(...). In the 1960s and 70s the inhabitants of the Chagos Islands, a UK Overseas Territory, were forcibly exiled by the UK Government while their homeland was leased to the United States for use as a military base. The British Overseas Territories Act 2002 had the effect of making people born on the Chagos Islands British Overseas Territory citizens and British citizens giving them the right of abode in the UK. As Fragomen LLP explain, the children of those born on the Chagos Islands will today have both BOTC and British citizenship. But the grandchildren of those born on the Chagos Islands normally would not, since British nationality generally only descends to the first generation born outside of British territory. In order to remain in the UK, grandchildren instead have to go through the expensive naturalisation process.

There are reports of many families struggling with the costs of acquiring citizenship and, as a result, many grandchildren of people born on the Chagos Islands but now living in the UK have been, or are due to, face removal to the Seychelles or Mauritius once they reach adulthood.⁹⁴

The Committee supported calls for descendants of forcibly exiled Chagos Islanders to be given eligibility to register as British citizens.

The Home Office committed to considering the issues but disputed the analogy with Windrush cases. It said, "one concerns people in the UK who do not have the documents to confirm their right to be here; the other generally concerns a group of people who do not have the right to be in the UK."⁹⁵

⁹⁴ Home Affairs Committee, [Windrush generation](#), Sixth report of 2017-19, HC990, 3 July 2018, para 130

⁹⁵ Home Affairs Committee, [Government response to the Committee's Sixth report of session 2017-19](#), HC1545, 4 September 2018, p.20

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