

The Windrush Scandal

A Review of Citizenship, Belonging and Justice in the United Kingdom

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Abstract

This article points out that the UK Human Rights Act, 1998 does not have a clear provision guaranteeing a person's right to a nationality. Instead, this right is buried in the European Court of Human Rights decisions of Smirnova v Russia, 2003 and Alpeyeva and Dzhlagoniya v. Russia, 2018. In these cases, the Court stretched the scope of Article 8 of the European Convention on Human Rights, 1953 on non-interference with private life by public authorities to extend to nationality. The humanitarian crisis arising from the Windrush Scandal was caused by the UK Government's decision to destroy the Windrush Generation's landing cards in the full knowledge that for many these slips of paper were the only evidence of their legitimate arrival in Britain between 1948 and 1971.

The kindling for this debacle was the 'hostile environment policy', later the 'compliant environment policy' that operated to formally strip British citizens of their right to a nationality in flagrant violation of international and domestic law. This article argues that the Human Rights Act, 1998 must be amended to include a very clear provision that guarantees in the UK a person's right to a nationality as a portal to a person's inalienable right to life. This balances the wide discretion of the Secretary of State under Section 4 of the Nationality, Immigration and Asylum Act, 2002 to deprive a person of their right to a nationality if they are deemed to have done something seriously prejudicial to the interests of the UK.

This article also strongly recommends that the Preamble to the UK Human Rights Act, 1998 as a de facto bill of rights, be amended to put into statutory language Independent Advisor Wendy Williams' 'unqualified apology' recommendation in the Windrush Lessons Learned Report for the deaths, serious bodily and mental harm inflicted on the Windrush Generation. This type of statutory contrition is in line with those of countries that have carried out similar grievous institutional abuses and their pledge to prevent similar atrocities in the future. This article's contribution to the scholarship on the Human Rights Act, 1998 is that the Windrush Generation Scandal, like African slavery and British colonization, has long-term intergenerational effects. As such, it is fundamentally important that there is a sharp, comprehensive and enforceable legal mechanism for safeguarding the rights and interests of citizens as well as settled migrants of

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ethnically non-British ancestry who are clearly vulnerable to bureaucratic impulses.

Keywords: Windrush generation, statelessness, right to nationality, genocide, apologetic UK Human Rights Act Preamble.

If you brown then you can stick around, if you white well everything's alright, if your skin is dark, it is no use you try, you got to suffer until you die

Lord Kitchener, *London Is the Place for Me*, (1948) Passenger on the *HMT Empire Windrush*

A Introduction

The members of the Windrush Generation were invited to the United Kingdom between 1948 and 1971 to meet an acute skills shortage after World War II.¹ At an annual rate of 16,000 per year, this group of mostly black African ancestry came from the British Empire's colonies in the West Indies.² Under Section 4 of the British Nationality Act of 1948, these émigrés were citizens of the UK and the Colonies (CUKC) with equal rights to live in the UK to people born in the UK. They travelled on the vessel the *HMT Empire Windrush*, a German cruise liner turned British Navy trooper that toured the Caribbean in search of recruits to rebuild post-War Britain.³ Caribbean nationals had fought for England during World Wars I and II.⁴ Other incomers were the loved ones sent for by the service men who had remained in the UK after the guns fell silent.⁵ Fired with ambition and dreams of professional development, many West Indians and their compatriots decamped from the tropics whilst plucky voyagers amongst them were prepared to try their hand at anything for an improved standard of living and higher wages.⁶ For some it was an escape from poverty and children like Paulette Wilson and Barbara Allen made the voyage from the Caribbean to the UK as ten year olds on their own, greeted by parents or grandparents who had

1 'Windrush Generation: Who are They and Why are They Facing Problems?', *BBC*, 18 April 2018, available at: <https://bbc.in/2MfCBsN> (last accessed 10 April 2020).

2 'Commonwealth Citizens Arriving Before 1971', *Oxford Migration Observatory*, 4 May 2018, available at: <https://bit.ly/3hZUeM0> (last accessed 25 June 2020).

3 M. Phillips, 'Windrush – The Passengers', *BBC*, 10 March 2011, available at: <https://bbc.in/2AtrWZb> (last accessed 1 June 2020). 'Commonwealth Citizens Arriving Before 1971', *Oxford Migration Observatory*, 4 May 2018, available at: <https://bit.ly/3hZUeM0> (last accessed 25 June 2020).

4 C. Brennan, 'Soldiers of the Caribbean: Britain's Forgotten War Heroes', *BBC*, 13 May 2005, available at: <https://bbc.in/2Y02jbB> (last accessed 14 June 2020).

5 D. Olusoga, 'Defeating the Myth of Wartime Britain', *The New Statesman*, Vol. 147, No. 5434, p. 40, 31 August 2018.

6 *Ibid.*

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emigrated before.⁷ The Windrush Generation worked in sectors in desperate need of rebuilding such as healthcare as doctors and nurses.⁸ London Transport conducted a recruitment drive in 1956 whereby 3,787 Barbadians drove buses, trains and collected passenger fares.⁹ Individuals of this Generation also filled the vacuum in education, the postal service, manufacturing and the rough and ready work of building construction.¹⁰

Upon settling in the UK, this group of Caribbean nationals was not given official documents to reflect their settled status nor did the immigration authorities keep records of their arrival.¹¹ Children without their own passports travelled on those of their parents and at the port of entry whether by boat or later by plane, all new Windrush arrivals entering the UK between 1948 and 1971 filled out landing cards.¹² In spite of this, anecdotally older and more educated members of the Windrush Generation applied and gained British citizenship acquiring British passports for themselves and their children.¹³ A great many, though, did not renew their original Caribbean passports and some even lost them over the course of time.¹⁴ Countless men and women did not formalize their status by applying for UK citizenship nor did they do this for the children who accompanied them.¹⁵ This was also the case for children who arrived and were taken into the care system.¹⁶

It is important to recall that the West Indies was a part of the British Empire for geopolitical, strategic and economic reasons. Referred to as “The Cockpit of Europe”,¹⁷ the sugar and cotton plantations were “Britain’s most profitable

- 7 L. Poulton, ‘After Windrush – Paulette Wilson Visits Jamaica 50 Years On’, *The Guardian*, 10 October 2019, available at: <https://bit.ly/3eTjPnA> (last accessed 8 June 2020). Also see: Namitasha Goring, ‘Interview with Susan Zahab, sister of Barbara Allen a member of the Windrush Generation’ (London, 21 April 2020).
- 8 G. Younge, ‘The NHS, Windrush and the Debt We Owe to Immigration’, *The Guardian*, 22 June 2018, available at: <https://bit.ly/36PfVcx> (last accessed 10 April 2020).
- 9 ‘London on the Move: West Indian Transport Workers’, *Our Migration Story*, available at: <https://bit.ly/2Yzm5K3> (last accessed 14 June 2020). The article includes the original recruitment poster which advertised ‘Stationmen and Stationwomen Wanted’.
- 10 A prominent example is E.R. Braithwaite who was an ex Royal Air Force pilot who was unable to find work in post-war Britain. Braithwaite turned to secondary school teaching and wrote the literary classic *To Sir with Love* (The Bodley Head, 1959).
- 11 W. Williams’, *Windrush Lessons Learned Review*, (March, 2020) p. 9.
- 12 Home Office caseworkers used the landing cards to discover which people travelled on the passports of their parents. See A. Gentleman, ‘Whistleblowers Contradict No 10 over Destroyed Windrush Landing Cards’, *The Guardian*, 18 April 2018, available at: <https://bit.ly/2XOLO0J> (last accessed 1 June 2020).
- 13 S. Bowman, Interview with Evelyn James, Member of the Windrush Generation (London, 9 March 2019).
- 14 A. Gentleman, ‘Chased into ‘Self-Deportation’: Most Disturbing Windrush Case So Far’, *The Guardian*, 14 September 2019, available at: <https://bit.ly/2BADdas> (last accessed 1 June 2020).
- 15 *Ibid.*
- 16 See Williams’, *Windrush Lessons Learned Review*, pp. 25 & 27.
- 17 E. Williams, *From Columbus to Castro: The History of the Caribbean*, Carlton Publishing Group, 2003, p. 69.

investment”¹⁸ and the British Caribbean “was really a part of the British domestic economy”.¹⁹ This is because almost all of its trade was with British buyers and sellers.²⁰ This is in large part because it was the beneficiary of a steady supply of unpaid labour from some 1.5 million Africans brought to work in the Caribbean islands via the transatlantic slave trade.²¹ Before and after the leg irons were removed, these people were British subjects and for them, the UK was venerated as the Motherland.²² They were raised to believe that it was their home away from home. It is for this reason that thousands of the Caribbean diaspora, who came of their own accord to the UK, fell into the inertia of daily life and did not acquire documents to regularize their status in the UK. Moreover, the passage of £28 on the Empire Windrush was barely affordable for the ‘freely landed’²³ if you travelled in the uncomfortable open berths of the ‘troop deck’.²⁴ This was the recollection of Sam King, the first mayor of London Borough of Southwark, who said that “even this was a lot of money to the average Jamaican”.²⁵ King remembers it as five weeks’ wages, or about the cost of three cows.²⁶ On account of this, many of this Generation cited economic hardship for not being able to afford the immigration administrative fees.²⁷

As noted earlier, the members of the Windrush Generation were a mixture of skilled and unskilled workers and for the most part they were gainfully employed, paid tax, raised children and have grandchildren in the UK. Out of many a contemporary population of Caribbean people was characterized by pride and industry with several of its original members and their descendants making significant contributions to society.²⁸ As the demography of the UK changed to include Black and Asian people, there were recurrent bouts of anti-immigrant sentiment.²⁹ This reaction was largely amongst the lumpenproletariat such as the far-right British National Front in the 1960s and 1970s that were losing ground

18 H. McD Beckles, *Britain's Black Debt*, University of the West Indies Press, 2013, p. 91.

19 *Ibid.*

20 D. Eltis & S.L. Engerman, ‘The Importance of Slavery and the Slave Trade to Industrialising Britain’, *Journal of Economic History*, Vol. 60, No. 1, 2000, p. 123.

21 K. Morgan, *Slavery and the British Empire*, Oxford, Oxford University Press, 2008 also see M.J. Newton, ‘The Race Leapt at Sauteurs: Genocide, Narrative and Indigenous Exile from the Caribbean Archipelago’, *Caribbean Quarterly*, 2014, Vol. 60, No.2 , p. 5.

22 Williams, *Windrush Lessons Learned Review*, p. 30. Also see A. Gentleman, ‘I Can’t Eat or Sleep’: The Woman Threatened with Deportation after 50 Years in Britain’, *The Guardian*, 28 November 2017, available at: <https://bit.ly/3f4BwR8> (last accessed 9 June 2020).

23 ‘Windrush Generation’ (3 July 2020) Home Affairs Committee, available at: <https://bit.ly/3dAh6yh> (last accessed 25 June 2020).

24 A. Collinson, ‘How Did the Empire Windrush Change London’, *Museum of London*, 18 June 2018, available at: <https://bit.ly/2Aa7s7S> (last accessed 2 June 2020).

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 Bernie Grant, Dianne Abbott and Keith Vaz for example were the UK’s first Black Caribbean Members of Parliament. Available at: <https://bit.ly/3cWfCOO> (last accessed 12 June 2020).

29 C. Uche, ‘The British Government, Idi Amin and the Expulsion of British Asians from Uganda’, *International Journal of Post Colonial Studies*, Vol. 19, No. 6, 2017, p. 818.

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in electoral politics. They turned towards the skinhead youth movement who were neo-fascists to give their cause the requisite ballast and gravitas.³⁰

This sentiment of invasion caused the citizenship laws of the UK to change from the bonhomie of the British Nationality Act, 1948 to the rumble and hiss of ‘nearly seven decades’ of successive Immigration Acts in order for the UK government to “demonstrate that they were being tough on immigration by tightening immigration control”.³¹

By thumbing back to the British Nationality Act of 1948, it is clear that it consolidated the British Nationality Status of Aliens Act of 1914 which established that any person born “within His Majesty’s dominions and allegiance” was deemed a natural-born British subject.³² This status was sharply reversed in the Commonwealth Immigrants Act of 1962, which was

an Act to make temporary provision for controlling the immigration into the United Kingdom of Commonwealth citizens, to authorise the deportation from the United Kingdom of certain Commonwealth citizens convicted of offences and recommended by the court for deportation.

The corrugated statute continues that it “amends the qualifications required of Commonwealth citizens applying for citizenship under the British Nationality Act, 1948”. Section 2 of the Commonwealth Immigrants Act, 1962 applies to any Commonwealth citizen who is not born in the UK, does not hold a UK passport or is not a citizen of the CUKC or does not hold a passport issued in the UK. Winnowing the automatic right of entry for Commonwealth citizens, Section 4 states that an immigration officer may refuse admission into the UK or “admit him into the UK subject to a condition restricting the period for which he may remain there with or without conditions for restricting his employment or occupation there”. Under Section 3 (a), the employment voucher scheme was inaugurated requiring that these pieces of paper be presented to the immigration officer to determine admission.

The amendments of 1968 under Section 1, (2A) a, b and c reframed and narrowed the eligibility criteria for Commonwealth citizens again to at least having:

one of his parents or grandparents’ being born in the UK, is or was naturalised in the UK or became a citizen of the UK and Colonies by virtue of being adopted in the UK or was registered in the UK as a citizen.

The armature of the immigration policies was strengthened in Section 2 of the Immigration Act of 1971 with a statement of abode in the UK, which read that a

30 J.-Y. Camus & N. Lebourg, *Far-right Politics in Europe*, Cambridge, MA, Harvard University Press, 2017, p. 91. See chapter entitled ‘White Power’.

31 Williams, *Windrush Lessons Learned Review*, p. 7.

32 Available at: www.legislation.gov.uk/ukpga/Geo5/4-5/17/enacted (last accessed 2 June 2020).

person has the right of abode in the UK if he is a British citizen or he is a Commonwealth citizen having the right of abode in the UK.

The British Nationality Act of 1981 was “an Act to make fresh provision about citizenship and nationality, and to amend the Immigration Act 1971 as regards the right of abode in the United Kingdom”. Part IV stated that “any person who is a British Overseas Territories citizen, a British National (Overseas), a British Overseas citizen, a British subject or a British protected person” shall be entitled:

on an application for his registration as a British citizen, to be registered as such a citizen if the following requirements are satisfied in the case that he was in the United Kingdom at the beginning of the period of five years ending with the date of the application and that the number of days on which he was absent from the United Kingdom in that period does not exceed 450;

This new compendium on British nationality continues that:

the number of days on which he was absent from the United Kingdom in the period of twelve months so ending does not exceed 90; and that he was not at any time in the period of twelve months so ending subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and that he was not at any time in the period of five years so ending in the United Kingdom in breach of the immigration laws.

This was a significant piece of legislation because it inaugurated a new scheme whereby if a person from the Commonwealth wished to remain in the UK they had to register to become a citizen as required by Part IV.

Turn by turn, these immigration law shifts took place under the dome of increasingly complex race relations, which ranged from the unprovoked attacks on immigrants to Conservative politician Enoch Powell’s polemical immigrant repatriation ‘Rivers of Blood Speech’ in 1968.³³ In addressing a Conservative Association meeting in Birmingham, Powell, in relation to the increasing numbers of Commonwealth migration quoting Virgil’s Aeneid said, “as I look ahead, I am filled with foreboding; like the Roman, I seem to see the River Tiber foaming with much blood”.³⁴

The Vagrancy Act, 1824 was “an Act for the punishment of idle and disorderly persons, rogues and vagabonds in England” colloquially known as “The Sus Laws” in the 1960s and 1970s.³⁵ This gave policemen the authority to randomly stop and search ‘suspected persons’, which meant that black and ethnic minorities felt

33 See D. Fowler, ‘From Jukebox Boys to Revolting Students: Richard Hoggart and the Study of British Youth Culture’, *International Journal of Cultural Studies*, Vol. 10, No. 1, 2007, p. 73.

34 E. Powell’s, ‘Rivers of Blood’ Speech’, *The Telegraph*, 6 November 2007, available at: <https://bit.ly/3hz2QYW> (last accessed 4 June 2020).

35 Available at: <https://bit.ly/3eqe6py> (last accessed 23 June 2020).

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that they were not allowed to wander the streets unfettered.³⁶ A collective resentment gave rise to tense police community relations and the Brixton Riots of 1981, 1985 as well as the Tottenham Broadwater Farm riots of 1985 inserted deep fault lines into the society.³⁷

The Police and Criminal Evidence Act, 1984 is “an Act to make further provision in relation to the powers and duties of the police, persons in police detention, criminal evidence, police discipline and complaints against the police”. These stop and search powers are generally perceived by the black and ethnic minorities as having the same spirit as the sus laws.³⁸ Archbishop of York John Sentamu in 2000 gave a personal account of being randomly stopped and searched. Showing his dog collar brought the search quickly to an end but the then Bishop said that he did not know why he had been stopped but added that he did not know of any white bishop who had been treated in such a way by the police.³⁹ Sentamu said:

when you ask and somebody doesn't give a reason and they seem to be hiding behind a uniform, in terms of human relationships you're not entering into a human dialogue. That creates a feeling that they are more powerful than you. I just felt as if I was being treated like a little boy. It shouldn't happen. This is not a police state. They operate with the consent of the public.

In 2010, the Home Office moved premises from the Whitgift Centre in Croydon, London and staff asked their managers what to do with an archive of old landing cards also referred to as Registration Slips belonging to the Windrush Generation.⁴⁰ An order was given to destroy the landing or registration cards and this was met with much case-worker consternation.⁴¹ There were serious misgivings that the destruction of this cache of landing and embarkation cards “kept in alphabetical order and by month” was in effect to delete “a very important database”.⁴² Former Home Office employees turned whistle-blowers said that these slips of paper “would show who else arrived with you; it would show the parents and the children that they brought with them”.⁴³ As an alternative to destruction, there was a suggestion that the landing cards be sent to the National Archives but the staff was told that they would not be of much

36 See V. Dodd, ‘Black Bishop ‘Demeaned’ by Police Search’, *The Guardian*, 24 January 2000, available at: www.theguardian.com/uk/2000/jan/24/race.world (last accessed 2 June 2020). Also see B. Bowling & C. Phillips, ‘Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search’, *Modern Law Review*, Vol. 70, No. 6, 2007, p. 936.

37 T. Jefferson, ‘Policing the Riots: From Bristol and Brixton to Tottenham via Toxteth, Handsworth Etc’, *Criminal Justice Matters*, Vol. 87, No. 1, 2012, p. 8.

38 B. Bowling & C. Phillips, *Racism, Crime and Justice*, Pearson Education Limited, 2002.

39 *Ibid.*, p. 38.

40 K. McCann, ‘Home Office Destroyed Windrush Immigrants Records in 2010’, Leaving Amber Rudd to Clean up May’s Mess, *The Telegraph*, 17 April 2018, available at: <https://bit.ly/2AUT0k6> (last accessed 10 June 2020).

41 *Ibid.*

42 Gentleman, 2018, *supra* note 14.

43 *Ibid.*

national interest and the UK Border Agency was instructed to destroy the landing cards in 2010.⁴⁴

The lives of undocumented Windrush Generation entered very dark territory in 2014 when Prime Minister Theresa May introduced the 'hostile immigration policy' to control immigration.⁴⁵ This policy was designed to "make life as difficult as possible for people with no legal status in the UK to encourage them to leave".⁴⁶ As a strenuous protagonist of this strategy, May as Home Secretary under the David Cameron Government told the UK Parliament in 2012 that "her aim was to create here in Britain a really hostile environment for illegal immigrants".⁴⁷

A review of the Hansard of 2013 shows Member of Parliament Diane Abbott voted against the passing of the Immigration Act 2014, highlighting that the legislation removed important protection for people of the Commonwealth who had lived in the UK as permanent residents.⁴⁸ In Parliament, Abbott and other MPs articulated their concerns to Theresa May, acting then in her capacity as Home Secretary, protesting that she was erasing significant legislation, which protected the Windrush Generation without a parliamentary debate.⁴⁹ These protests were disregarded by Theresa May in Parliament who said that the legislation embodied the will of the people.⁵⁰

In 2014, the Legal Action Group produced a report titled 'Chasing Status: If Not British Then What Am I', which explained the plight of people from the Commonwealth who were impacted by the Government's immigration legislation.⁵¹ Their conclusion about 'surprised Brits' was that people who for all intents and purposes were British Subjects were being ensnared by the Immigration Act 2014 and found themselves at risk of being unable to work or were being deported even though they were in the UK legally.⁵² Despite these objections, the Immigration Acts of 2014 and 2016 were passed. The Immigration Act, 2016 states that it will:

44 *Ibid.*

45 See L. Hiam, S. Steele & M. McKee, 'Creating a Hostile Environment for Migrants: The British Government's Use of Health Service Data to Restrict Immigration is a Very Bad Idea', *Health Economics, Policy and Law*, Vol. 13, No. 2, 2018, p. 107.

46 *Joint Council for the Welfare of Immigrants and Secretary of State for the Home Department and Residential Landlords Association, Equality and Human Rights Commission and Liberty (JCWI case) [2020] EWCA Civ 542.*

47 I.E. Tyler, 'Deportation Nation: Theresa May's Hostile Environment', *Journal for the Study of British Cultures*, Vol. 25, No. 1, 2018, p. 1. Tyler reviews the highly publicised appearances of the former Prime Minister David Cameron and his then Home Secretary Theresa May at the scene of an immigration raid in Slough in 2014.

48 Hansard HC (569) Cols 157.

49 *Ibid.*

50 *Ibid.* Also see D. Taylor, 'UK Removed Legal Protection for Windrush Immigrants in 2014', *The Guardian*, 16 April 2018, available at: <https://bit.ly/2zTspnz> (last accessed 1 May 2020).

51 F. Dawdon, 'Chasing Status: If Not British, Then What Am I', *Legal Action Group*, available at: <https://bit.ly/2VyDSAD> (last accessed 25 June 2020).

52 *Ibid.*

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introduce new sanctions on illegal working, prevent illegal migrants accessing services and introduce new measures to enforce immigration laws.

This legislation is buffered by a Code of Conduct entitled ‘Right to Rent Immigration Checks: Landlord Code of Practice’ to avoid the implication of unlawful discrimination. It states that:

As a matter of good practice landlords and their agents should apply the right to rent checks in a fair, justifiable and consistent manner regardless as to whether they believe the prospective tenant to be British, settled or a person with limited permission to be here.⁵³

To facilitate the ‘hostile environment policy’ or ‘Compliant Environment Policy’, the Immigration Act 2016 operated to empower HM Revenue and Customs (HMRC) to heavily penalize companies that employed illegal workers.⁵⁴ This bifold tool of fear and bureaucracy was used on anyone appearing to be ‘foreign’ being asked to produce confirmation of their immigration status.⁵⁵ These identity checks also happened at hospitals under the Health and Social Care Act via NHS Digital, a statistical agency that shares patient details at the request of the Home Office in a bid to track down illegal immigrants.⁵⁶ The Memorandum of Understanding with the Department of Health justifies its use in the public’s interest.⁵⁷ Banks, schools and universities were also required to check the immigration status of individuals before offering their services or a place to study.⁵⁸ Under the hostile environment policy, in former Prime Minister May’s own words, there would be ‘zero tolerance to benefits’ and there would be no ‘beds in sheds’.⁵⁹

The praxis of the ‘hostile environment policy’ was that immigration controls became the shared responsibility of private citizens with the imposition of penalties meted out to those who failed to comply.⁶⁰ For example, under Section 22 of the Immigration Act 2014, landlords operating in the private rental market:

53 House of Commons Library, ‘Right to Rent: Private Landlords’ Duty to Carry out Immigration Status Checks’, available at: <https://bit.ly/2XAS3X6> (last accessed 1 May 2020).

54 ‘Penalties for Employing Illegal Workers’, available at: <https://bit.ly/2XPFPDg> (last accessed 10 June 2020).

55 J. Elgot, ‘Theresa May’s “Hostile Environment” at Heart of Windrush Scandal’, *The Guardian*, 17 April 2018, available at: <https://bit.ly/2U8yfZ5> (last accessed 20 April 2020).

56 G. Lacobucci, ‘Union Vows to Support NHS Staff Who Refuse Act as “Border Guards”’, *British Medical Journal*, Vol. 360, No. 1, 2018, p. 1, available at: <https://bit.ly/2Y6GlCy> (last accessed 20 April 2020).

57 See Hiam *et al.*, 2018.

58 The Immigration Act, 2016 contains several guidance documents for various sectors.

59 J. Kirkup & R. Winnett, ‘Theresa May Interview: We’re going to Give Illegal Migrants a Really Hostile Reception’, *The Telegraph*, 25 May 2012, available at: <https://bit.ly/3faYaHK> (last accessed 10 June 2020).

60 Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/823111/short_guide_on_right_to_rent_v001.pdf (last accessed 20 April 2020).

must not authorise an adult to occupy their premises under a residential tenancy agreement as their main home if they have been disqualified as part of their immigration status. Therefore, landlords need to view original documents in the presence of the applicant (or via videolink) and must keep those documents on record for a minimum of 12 months after the tenancy has expired. The timing of checks can occur at any time before the commencement of a tenancy agreement if the applicant's right to remain in the UK is limited. However, checks can be made no more than 28 days prior.

The consequence of this legislation and the nationwide practice of identity checks by ordinary civilians was that undocumented people of British Caribbean origin or descent and some of their children who were legitimately resident in the UK found themselves in the position where they could not access the National Health Service (NHS) and some were even denied life-saving cancer treatment.⁶¹ Access to other services was restricted because the struggle to establish their identity meant that they could not get or renew drivers' licences, obtain bus passes, get benefits or own a bank account.⁶² For the vast majority, their social housing was taken away, rendering them homeless.⁶³

I The JCWI Case

In 2019, the Joint Council for the Welfare of Immigrants (JCWI)⁶⁴ sought judicial review of the hostile environment policy by way of a declaration that under Section 4 of the Human Rights Act, 1998 Sections 20-37 of the Immigration Act 2014 were incompatible with Articles 14 and 18 of the European Convention on Human Rights (ECHR). The JCWI further sought an order quashing the alleged decision of the Secretary of State to extend the scheme to Scotland, Wales and Northern Ireland on the grounds that the scheme gives rise to an inherent and unacceptable risk of illegality and because the decision breaches Section 149 of the Equality Act 2010, alternatively a declaration that a decision by the Defendant to commence the scheme in Scotland, Wales or Northern Ireland without further evaluation of its discriminatory impact would be irrational and a breach of Section 149 of the Equality Act 2010.

Mr Justice Spencer found that imposing the duty on landlords to check immigration status caused racial discrimination against anyone who did not possess a British passport as well as ethnic minorities. Also, the Government had not sufficiently proven that the checks had any actual effect on encouraging undocumented migrants to leave the UK. Justice Martin continued that the

61 See A. Gentleman, 'Windrush Scandal: Albert Thompson Still in Dark about Cancer Treatment Despite May's Promise', *The Guardian*, 19 April 2018, available at: <https://bit.ly/2AFkHxe> (last accessed 28 April 2020).

62 Williams, *Windrush Lessons Learned*, p. 108.

63 See example of Albert Thompson who lost his housing and was housed by the UK charity St. Mungos. See Gentleman, 'Windrush Scandal: Albert Thompson Gets Cancer Treatment', *The Guardian*, 24 April 2018, available at: <https://bit.ly/2Bk6PZU> (last accessed 28 April 2020).

64 [2019] EWHC, 452.

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scheme introduced by the Government does not merely provide the occasion or opportunity for private landlords to discriminate but causes them to do so where otherwise they would not.⁶⁵

The Secretary of State for the Home Department's appeal was allowed and the JCWI's cross-appeal was dismissed.⁶⁶ The court said that fashioning a master key to solve the problem of immigrants was not discriminatory or illegal but was a proportional measure to control immigration.

In tandem with the hostile environment policy, 'Operation Vaken' was a Home Office campaign where a phalanx of vans in the summer of 2013 toured the UK bearing advertisements with the words 'go home or face arrest'. Similar ominously worded advertisements on what came to be known as the 'Go Home Vans' were published in "eight ethnic minority newspapers, postcards in shop windows, leaflets and posters advertising immigration surgeries in buildings used by faith and charity shops".⁶⁷

Operating under the explicit doctrine of the May administration of 'deport first, appeal later',⁶⁸ the hostile environment policy targets set meant that immigration enforcement personnel were dispatched and highly motivated to pursue people who could not prove their status in the UK.⁶⁹ The subset of the Windrush Generation that had not formalized their status in the UK and for whom there was now no record of their legal arrival were collected by Border Force Personnel in the gloaming and treated as illegal immigrants.⁷⁰ They were detained in one of the eleven Immigration Removal Centres in the UK; there were some 164 deportations to the Caribbean and campaigner Sarah O'Connor, Hubert Howard and Richard (Wes) Stuart died.⁷¹

On 10 March 2018, Amelia Gentleman, a journalist from *The Guardian* newspaper, wrote the story that brought this Scandal to the attention of the public. The article was entitled 'Londoner Denied NHS Cancer Care: It's Like I'm Being Left to Die'.⁷² It was a piece on Albert Thompson who emigrated to the UK as a teenager with his mother who was recruited to work as a nurse. Thompson

65 *Ibid.*, para. 105.

66 [2020] EWCA, Civ 542.

67 A. Travis, 'Go Home' Vans Resulted in 11 People Leaving Britain, Says Report', *The Guardian*, 31 October 2013, available at: <https://bit.ly/3cATOYF> (last accessed 11 April 2020).

68 *R (On the Application of Kiare) v. Secretary of State for the Home Office* and *R (On the Application of and Byndloss) v. Secretary of State for the Home Office* [2015] EWCA] Civ 1020.

69 *Ibid.*

70 Tyler, 2018. 'Anger as "Windrush Generation" Face Deportation', *BBC*, 11 April 2018, available at: [uk-politics-43726976](https://www.bbc.com/news/uk-politics-43726976) (last accessed 13 April 2020).

71 A. Travis, 'Immigration Inspector Criticizes Dawn Raids on Families Facing Deportation', *The Guardian*, 27 July 2010, available at: <https://bit.ly/3dn2hPn> (last accessed 23 June 2020). Also see Williams', *Windrush Lessons Learned Review*, p. 9. The exact number of deaths is not known due to the lack of data kept on the Windrush Generation.

72 A. Gentleman, 'Londoner Denied NHS Cancer Care: It's Like I'm Being Left to Die', available at: <https://bit.ly/3cPuNsH> (last accessed 11 April 2020).

lived and worked in the UK for 44 years and is currently suffering from prostate cancer. Seeking treatment, Thompson was told by the Royal Marsden Hospital that he would have to pay £54,000 for radiotherapy because he could not prove his immigration status in the UK. This extraordinary headline caused a major stir in the readership and unzipped the reports of other newspapers taking up the cause of Windrush Generation people similarly dispossessed.^{73, 74, 75} One of these headlines told the astonishing story of Paulette Wilson, the 63-year-old retired House of Commons cook from Wolverhampton, who was wrongly classified as an illegal immigrant, detained at Yarl's Wood Removal Centre and threatened with deportation to Jamaica after living in the UK continuously for 50 years.⁷⁶

In Parliament, the Labour MP for Tottenham David Lammy, on 16 April 2018, was apoplectic with rage when he criticized the May Government and said that it was a day of 'national shame'.⁷⁷ Home Secretary at the time Amber Rudd apologized and promised to rectify the situation with an immediate cross-departmental approach.⁷⁸ On the eve of the Commonwealth Heads of Government Summit (CHOGM) of 2018, the leaders of the Commonwealth Caribbean officially requested a meeting with Prime Minister Theresa May.⁷⁹ High Commissioner to the UK from Barbados at the time Guy Hewitt explained that several years of diplomatically raising the issue of deportation with the UK were unsuccessful.⁸⁰ As such, the Caribbean Community (CARICOM) Leaders collaborated to formally query the steady flow of deportees arriving with no documentation to enter the various Caribbean countries or resources to start a

73 A. Gentleman, *Windrush Betrayal*, (Guardian Faber, 2019)p. 88: "Our readers were outraged and this time finally, politicians began to ask questions' one reader who was a former NHS Director wrote:

74 "I read the story of denial of care and other problems for "Albert Thompson" with great sadness, as yet another example of the persecution of people who came to this country with their parents many years ago, but who do not apparently have the documentation to prove this ... I am appalled that the Royal Marsden Hospital has become so tainted by a combination of the Home Office's culture of hostility and "austerity" that it has refused to take this man's word or to treat him. I am old enough to have encountered and appreciated the contributions made by the likes of "Albert's" parents when they came to the UK in the 1950s and helped to keep our public services and industries going, and to have known children of my age who may now, after years of residence, be facing this Government inspired witch hunt."

75 For another example, see *The Economist*, "The "National Shame" of Britain's Treatment of Windrush Migrants", 18 April 2018, available at: <https://econ.st/2Y8fJRM> (last accessed 1 June 2020).

76 A. Gentleman, "I'm Glad We Spoke Out" Windrush Victim Who Shone a Light on the Scandal', *The Guardian*, 5 May 2018, available at: <https://bit.ly/3h1rT7E> (last accessed 5 May 2020).

77 Hansard HC, Volume 639 Column 28, 16 April 2018, available at: <https://bit.ly/2BH8NU8> (last accessed 1 June 2020).

78 *Ibid.*

79 A. Gentleman, 'No.10 Refuses Caribbean Request to Discuss Children of the Windrush', *The Guardian*, 15 April 2018, available at: <https://bit.ly/2MAIGBz> (last accessed 13 April 2020).

80 See Former Barbados High Commissioner to the UK Guy Hewitt's interview with the BBC. 'Windrush Kids Told Don't Approach the Home Office', 16 April 2018, *BBC*, available at: <https://bbc.in/2zb3lrL> (last accessed 20 April 2020).

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new life there.⁸¹ This official request was refused and on 17 April 2018, some seven days later, Theresa May met the Caribbean Leaders and issued an apology to the Windrush Generation.⁸²

The following day, on 18 April 2018 in the throes of a now galloping crisis, there was a furious debate in the UK Parliament about whether it was the Labour or Coalition and Conservative Government's decision to destroy the landing cards.⁸³ Amidst the heavy breathing conjecture and internecine squabbling, there was recognition that the undocumented Windrush Generation were by-catch of the hostile environment policy.⁸⁴ In response to the Scandal, the Government announced a Windrush Compensation Scheme to make reparation for losses related to employment, immigration fees, housing health, education, driving licences, banking, impact on daily life, detention and removal.⁸⁵

The political earthquake caused by the Windrush Generation Scandal resulted in the resignation of Home Secretary Amber Rudd.⁸⁶ This is because the Chairwoman of the Commons Home Affairs Select Committee conducting the Inquiry into the Windrush Scandal asked the question "targets for removals, when were they set"?⁸⁷ Rudd haltingly responded that the Home Office did not have removal targets and this was found to be duplicitous when a letter was leaked to the press in which Rudd informed Prime Minister May that the 'Compliant Environment' will not work by itself, illegal and would-be illegal migrants and the public more widely, need to know that our immigration system has 'teeth' and if people do not comply on their own we will enforce their return, including through arresting and detaining them.

The letter continues:

That is why I will be refocusing Immigration and Enforcement's work to concentrate on enforced removals. In particular I will be reallocating £10m (including from low-level crime and intelligence) with the aim of increasing

81 G. Hewitt, 'The Windrush Scandal: An Insider's Reflection', *Caribbean Quarterly*, Vol. 66, 2020, p. 108. Also see A. Gentleman, 'Guy Hewitt: 'How I Forced the Government to Act on the Windrush Scandal'', *The Guardian*, 15 August 2018, available at: <https://bit.ly/2MDlm5a> (last accessed 7 June 2020).

82 J. Maidment, 'Theresa May Personally Apologizes to the Caribbean Leaders Over Government Handling of Windrush Scandal', *The Telegraph*, 17 April 2018, available at: <https://bit.ly/3eTdl80> (last accessed 7 June 2020).

83 Hansard HC Volume 645 Cols 16, 16 July 2018, available at: <https://bit.ly/2XJs2oN> (last accessed 7 June 2020).

84 *Ibid.*

85 *Ibid.*

86 H. Stewart, A. Gentleman & N. Hopkins, 'Amber Rudd Resigns Hours After Guardian Publishes Deportation Targets', *The Guardian*, 30 April 2018, available at: <https://bit.ly/376ERwe> (last accessed 21 April 2020).

87 'How Amber Rudd was Brought Down by a Simple Question', *Financial Times*, 18 April 2018, available at: <https://on.ft.com/3eVVAoL> (last accessed 20 April 2020). Also see N. Hopking, 'Amber Rudd Letter to PM Reveals "Ambitious but Deliverable" Removals Target', *The Guardian*, 29 April 2018, available at: <https://bit.ly/30hBMlc> (last accessed 21 April 2020).

the number of enforced removals by more than 10% or over the next few years: something I believe is ambitious, but is deliverable. Clearly, the resumption of Detained Fast Track would be of significant help in this regard.⁸⁸

The fallout from this resignation resulted in Sajid Javid, the first ethnic minority person appointed to hold the post of Home Secretary. Replacing Rudd, Javid, the son of an immigrant bus driver from Pakistan, said to the members of the Windrush Generation, “I thought ... that could be my mum. ... dad ... my uncle”.⁸⁹ Javid subsequently ordered a Lessons Learned Review of the Windrush Generation crisis to be carried out by Wendy Williams, Her Majesty’s Inspector of Constabulary. The Independent Report entitled *Windrush Generation Lessons Learned Report* was published on 19 March 2020 and some of the findings and recommendations of this Report are discussed later in this article.⁹⁰

The May Government called an early general election and Boris Johnson was elected the Prime Minister on 23 July 2019.⁹¹ MP Priti Patel was appointed the Home Secretary and like Javid, Patel is the descendant of Pakistani immigrant parents.⁹² Home Secretary Patel was the official recipient of the *Windrush Generation Lessons Learned Report* from Inspector Wendy Williams and she too lamented the treatment of the Windrush Generation in Parliament.⁹³ Thus far the administration of the resulting Windrush Compensation Scheme has proven to be pell-mell and complex.⁹⁴ This is because it is beset by unexplained delays and heedless confusion. Sixty people out of 11,000 eligible Windrush Generation have received a payout and whilst waiting for compensation there have been

88 R. Booth & N. Hopkins, ‘Amber Rudd Boasted of Harsher Immigration Strategy, Leak Reveals’, *The Guardian*, 20 April 2018, available at: <https://bit.ly/3gZZsH7> (last accessed 1 May 2020).

89 S. Swinford, ‘Sajid Javid Britain’s First Asian Home Secretary Believes There is Nothing Racist about Managed Migration’, *The Telegraph*, 30 April 2018, available at: <https://bit.ly/3dHFZc6> (last accessed 1 May 2020).

90 Available at: <https://bit.ly/3gGMcaj> (last accessed 1 May 2020).

91 A. Asthana & P. Walker, ‘Theresa May Calls for General Election to Secure Brexit Mandate’, *The Guardian*, 19 April 2020, available at: <https://bit.ly/2BuKQiT> (last accessed 23 June 2020).

92 N. Malik, ‘Immigrants Built Britain: Now Their Conservative Children are Disowning Them’, *The Guardian*, 24 February 2020, available at: <https://bit.ly/2YcNEc3> (last accessed 1 May 2020).

93 Parliament Business, ‘Home Secretary Makes Statement on Windrush Lessons Learned Review’, 19 March 2020, available at: <https://bit.ly/2XD27Pq> (last accessed 1 May 2020).

94 Available at: www.gov.uk/guidance/windrush-compensation-scheme (last accessed 10 April 2020). ‘Guidance Windrush Compensation Scheme’, available at: <https://bit.ly/2MEI18V> (last accessed 10 April 2020) also see A. Gentleman, ‘Windrush’ Victim Rejects “Insulting” Offer of £22,000’, *The Guardian*, 17 December 2020, available at: <https://bit.ly/30fZXH3> (last accessed 10 April 2020) and Editorial, ‘The Guardian View on Windrush Compensation: Why the Delay?’, *The Guardian*, 10 February 2020, available at: <https://bit.ly/2UmEkRQ> (last accessed 10 April 2020).

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victim deaths, but the vast majority live in legal limbo and are cruelly destitute in various parts of the UK and the Caribbean.⁹⁵

B Willams Report – Windrush Lessons Learned

As noted earlier, Inspector of the Constabulary Wendy Williams was appointed by the then Home Secretary, Sajid Javid on 21 June 2018 as an Independent Advisor with instructions to:

‘identify the key lessons for the Home Office, as a major department of state specifically the key legislative, policy and operational decisions that led to members of the Windrush Generation becoming entangled in measures designed for illegal immigrants’.⁹⁶ The remit of the Independent Adviser was to discover ‘what other factors played a part, why these issues were not identified sooner, what lessons the organisation can learn to ensure it does things differently in future’ and ‘whether corrective measures are now in place and if so, an assessment of their initial impact’.⁹⁷

In the executive summary, Williams writes that

the Members of the Windrush Generation and their children have been poorly served by this country. They had every right to be here and should never have been caught in the immigration net.⁹⁸

The many stories of injustice and hardship Williams said are “heartbreaking, with jobs lost, lives uprooted and untold damage done to so many individuals and families”.⁹⁹ The Independent Advisor’s conclusion was that “despite the scandal taking the Home Office by surprise ... what happened to those affected by the Windrush scandal was foreseeable and avoidable”.¹⁰⁰

Williams’ anamnesis and diagnosis continues that the “causes of the Windrush scandal can be traced back through successive rounds of policy and legislation about immigration and nationality from the 1960s onwards” explaining that the

95 See A. Gentleman, ‘Windrush Ministers Asked How Many Died before Payout?’, *The Guardian*, 10 February 2020, available at: <https://bit.ly/30g6HEU> (last accessed 10 April 2020). Member of Parliament David Lammy protests that the Government was swifter in compensating slave owning families than they have been in the Windrush scandal. Also see Williams’, *Windrush Lessons Learned Review*, p. 27 on the case of boxer Vernon Vanriel deported to Jamaica who lives in his sister’s chicken coop. Also see A. Gentleman, ‘My Life is in Ruins’: Wrongly Deported Windrush People Facing Fresh Indignity’, *The Guardian*, 10 September 2018, available at: <https://bit.ly/2AdFoQS> (last accessed 10 April 2020).

96 *Windrush Lessons Learned Review*, p. 8.

97 *Ibid.*

98 *Ibid.*, p. 7.

99 *Ibid.*

100 *Ibid.*

“aim of which was to restrict the eligibility of certain groups to live in the UK”.¹⁰¹ The Report points out that under the 1971 Immigration Act, the Windrush Generation had and have the right of abode in the UK “but they were not given any documents to demonstrate this status. Nor were records kept”,¹⁰² she observes. Williams explains that “they had no reason to doubt their status, or that they belonged to the UK”¹⁰³ and that “they could not have been expected to know the complexity of the law as it changed around them”.¹⁰⁴

In piecing the story of the Scandal together, Williams found that there was

a failure to see how past legislation combined with evolving policy and to assess what impacts this might have on vulnerable people and minorities, especially the Windrush Generation, alongside a focus of meeting targets made the crisis inevitable.¹⁰⁵

Williams’ opinion is that the ‘root cause’¹⁰⁶ of the Windrush Generation scandal is located in the window between 1960 and the 1980s and helpfully provides a roadmap of the legislative framework and social events of the legal changes, which when coupled with information on political will, illustrates Home Office culture as being by and large dismissive of the effects and impact.¹⁰⁷

Further, the roadmap charts the political pressures where it was necessary to be seen to be taking a firm stance on immigration. It begins during Notting Hill riots of 1958 and the British Election Study¹⁰⁸ and then the infamous Powell ‘Rivers of Blood’ speech to the Home Secretary of the time then to Reginald Mauling’s statement that “we are expected by our supporters to take visible action further to reduce the number of immigrants”.¹⁰⁹

Williams connects the dots and finds that the Home Office failed to take account of the Windrush Generation as it fortified its immigration laws as they were an

ethnic group, who came, or whose direct ascendants came, from Caribbean nations to the UK between 1948 and 1973, who were of Caribbean ethnic and national origin, and most of whom were black.

This damage was wrought, Williams said, “from how it developed, implemented and evaluated policy, to how it dealt with individual people”.¹¹⁰ Filling in the

101 *Ibid.*

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

105 *Ibid.*, p. 10.

106 *Ibid.*, p. 12.

107 *Ibid.*, p. 60.

108 *Ibid.*

109 *Ibid.*, p. 56.

110 *Ibid.*, p. 10.

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blanks of what happened, Williams wrote that “this makes the Scandal more than a case of bureaucratic bad luck. It makes it a profound institutional failure”.¹¹¹

The worrying pathologies of this scandal, Williams said, were due to a “range of warning signs from inside and outside the Home Office”,¹¹² which in her view were “simply not heeded by officials and ministers”¹¹³ The Independent Advisor admonishes that

even when stories of members of the Windrush generation being affected by immigration control started to emerge in the media in 2017 onwards, the department was too slow to react.¹¹⁴

Intermixed with ignoring the semaphores in the build-up to the Scandal, Williams’ investigation found that “the organisational factors in the Home Office which created the operating environment in which these mistakes could be made” were layered upon a “culture of disbelief and carelessness when dealing with applications”.¹¹⁵ Drawing on the interviews and data collected from the Home Office, Williams re-enacts the scenes where “the Home Office demanded an unreasonable level of proof for them to be able to demonstrate their status”. This account includes the ponderous cruelty of

at times staff asked people for evidence for each year that they had lived in the UK (which for the Windrush generation was often over 40 years) and in some cases more than one document.¹¹⁶

Williams sounds astonished when she states that “this was clearly excessive particularly for people applying for the right to be in the UK, rather than applying afresh”.¹¹⁷

To determine the what, where and the how of the Windrush Scandal, Williams’ Review found that

over time those in power forgot about them and their circumstances which meant that when successive governments wanted to demonstrate that they were being tough on immigration by tightening immigration control and passing laws creating, and then expanding the hostile environment, this was done with a complete disregard for the Windrush generation.¹¹⁸

111 *Ibid.*

112 *Ibid.*, p. 7.

113 *Ibid.*

114 *Ibid.*

115 *Ibid.*

116 *Windrush Lessons Learned Review*, p. 10.

117 *Ibid.*

118 *Ibid.*, p. 7.

The lessons Williams published are “for both ministers and officials in the Home Office to learn” and she reminds and cautions that “ministers set the policy and the direction of travel”¹¹⁹ and upbraids them when she says that they “did not sufficiently question unintended consequences”.¹²⁰ Williams further admonishes that “officials could and should have done more to examine, consider and explain the impacts of the decisions”.¹²¹

The Review explores the “culture and workings of the Home Office (its ministers and officials working on their behalf) and its agencies”¹²² all set in the wider political context, during the critical time that created the conditions for the Scandal. Williams states that “in the process, it shows how both policy makers and operational staff lost sight of people the department had a duty to protect”.¹²³

Speaking truth to power, Williams writes that “the way the members of the Windrush generation were treated was wrong”.¹²⁴ Williams said that “they had the right to be in the UK” adding that “the difficulties they have had in demonstrating this cannot be laid at their door”.¹²⁵ In resolving the core question of what caused the Scandal, Williams says that she was not provided with

a positive justification for why they were treated in the way they were or why the department did not detect sooner that there would be a discrete group likely to be affected by the hostile environment measures.

Williams says that the Windrush generation “were not present unlawfully in the UK and should not have been, however unwittingly or unintentionally swept up in measures aimed at those that were”.¹²⁶

Documenting the infelicities at the Home Office, Williams said that she is “unable to make a definitive finding of institutional racism within the department”¹²⁷ and in backing away from this conclusion, she warned that she has “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” and in which her opinion are “consistent with some elements of the definition of institutional racism”.¹²⁸

Reporting on the sorting of in-groups and out-groups of migrants, Williams found a “lack of empathy for individuals and some instances of the use of

119 *Ibid.*

120 *Ibid.*, p. 10.

121 *Ibid.*, p. 7.

122 *Ibid.*, p. 9.

123 *Ibid.*

124 *Ibid.*

125 *Ibid.*

126 *Ibid.*, p. 10.

127 *Ibid.*, p. 7.

128 *Ibid.*

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dehumanising jargon and cliches”.¹²⁹ Before abandoning applicants to their fate, Williams found

little evidence of an understanding of the fact that the department serves the public as a whole and that those who are affected by individual decisions may be vulnerable and in need of assistance.¹³⁰

Williams shares her first-hand insights when she recounts that “the department itself had increasingly become fragmented and decision-making was separated between teams who operated in ‘silos’”.¹³¹ Wearing a proverbial hard hat, the Independent Inspector said that “this led to the risk of cases being processed without adequate quality control safeguards”.¹³² Williams also found that “within UK Visas and Immigration and Immigration and Enforcement there was a ‘target dominated’ work environment and low-quality decision making”.¹³³ Williams explains a practice that she came across whereby “some individual decision-makers operated an irrational and unreasonable approach to individuals requiring multiple documents for ‘proof’ of presence in the UK for each year of residence in the UK”.¹³⁴

Williams’ observation that “internal training had progressively become less thorough and joined up and there was an absence of a ‘learning culture’ in the organisation”.¹³⁵

To explain the spiral of uncertainty about the Windrush Scandal, the Williams Report states

what is clear to me is that operational and organisational failings of the department had a causative impact on the detrimental treatment received by the Windrush generation as a result of them being caught up in measures designed for people who have no right to be in the UK.¹³⁶

Williams continues that “accurate records were not kept, both in relation to individual cases and the development of relevant policy and legislation as a whole”.¹³⁷ This is correct and marks the beginning of the tortuous episode of the undocumented Windrush generation. The authors of this article are of the view that Williams’ finding on the accuracy of records is overly broad and does not capture in full the pouring of oil in the path of the Windrush generation by the destruction of an entire database that was a group of people’s only evidence that they had arrived in the UK legally and are in fact British citizens.

129 *Ibid.*, p. 13.

130 *Ibid.*

131 *Ibid.*

132 *Ibid.*

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

136 *Windrush Lessons Learned Review*, p. 12.

137 *Ibid.*

Williams provides the grist for how the Windrush Scandal fits together and makes thirty recommendations for change and improvement, which can be “boiled down to three elements and these are that the Home Office must acknowledge the wrong which has been done, it must open itself up to greater 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”.¹³⁸ The next part of this article discusses how these recommendations can be incorporated into the UK Human Rights Act, 1998.

C UK Human Rights Act, 1998

The primary objective of the Human Rights Act, 1998 (HRA) is “to give further effect to the rights and freedoms guaranteed under the European Convention for Human Rights”. It incorporates into the laws of the UK the right to life, the prohibition of torture, prohibition of slavery and forced labour, the right to a fair trial, no punishment without law. Section 6 (1) of HRA states that “it is unlawful for a public authority to act in a way which is incompatible with a Convention right” and Section 6 (3) (b) states that a “public authority” includes “any person certain of whose functions are functions of a public nature”. Section 6 (6) also provides that “an act includes a failure to act”.

Article 8 contains the rubric for non-interference by a public authority in private life. It states that:

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 2 (1) of the HRA, 1998 requires that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgement, decision, declaration or advisory opinion of the European Court of Human Rights.

Since 1975, there have been 547 European Court of Human Rights (ECHt) judgements against the UK with 315 where at least one violation of the ECHR was found.¹³⁹ There are several judgements against the UK under Article 8 and these cases according to Article 2 (1) are all part of the UK's laws. Examples of this are *Ndidi v. The UK*, [2018] *Bensaid v. The UK*, [2001] and *Hode and Abdi v. the UK*

¹³⁸ *Ibid.*, p. 14.

¹³⁹ J. Dawson, ‘House of Commons Library Briefing Paper. Number CBP8049’, 19 December 2019, UK cases at the European Court of Human Rights Since 1975, available at: <https://bit.ly/3fvozQs> (last accessed 16 June 2020).

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[2013]. However, it is the Russian cases of *Smirnova v. Russia* 2003 and *Alpeyeva and Dzhalagiya v. Russia*, 2018¹⁴⁰ that provide an interpretation of Article 8 that applies to questions of nationality directly. The next part explains the case of *Smirnova v. Russia* where the ECtH established that the lack of an internal passport made Smirnova's life difficult.¹⁴¹

I Smirnova v. Russia, 2003

Yelena Smirnova, a Russian national, was charged and arrested in 1995 for large-scale concerted fraud against a Moscow bank in partnership with her twin sister. When Smirnova was arrested, the investigating authorities withheld her national identity papers called the 'internal passport', which was kept in the file at the District Court. Smirnova made several unsuccessful attempts to recover her passport and filed complaints to courts and prosecutors. In December 1997 and April 1998, the Moscow Social Security Service and a law firm both refused to employ Smirnova because she did not have a passport.

In December 1997, a Moscow clinic informed Smirnova that free medical care could only be provided to her if she presented an insurance certificate and her passport. For the same reason, in April 1998, the Moscow Telephone Company refused to install a telephone line in Smirnova's home. On 2 June 1998, the Moscow City Notary Office notified Smirnova that she needed to verify her identity, for example, with a passport if she wished to obtain notarial acts. On 10 December 1998, Smirnova's application for the registration of her marriage was refused. On 19 March 1999, Smirnova was stopped by a police patrol for a routine identity check. As she was unable to produce the passport, she was taken to a police station and charged an administrative fine.

On 29 April 1998, the Office of the Moscow Prosecutor asked the Tversky District Court to return Smirnova's passport. On an unspecified date, the President of the District Court informed Smirnova that the passport could be made available to her only for certain purposes. The President's instructions were that the passport should at all other times remain in the case file because the authorities would not be able to tell Smirnova apart from her twin sister who was in hiding. On 29 June 1998, the President of the District Court confirmed that the passport should be kept in the case file. On 31 March 1999, a police patrol came to Smirnova's home to escort her to a court hearing and both Smirnova and her twin sister were at the premises. Perplexed by their almost identical appearance, the police demanded that the applicants identify themselves or produce identity papers. The sisters refused and acting on the knowledge that Smirnova's twin sister was also being looked for by the police, the patrol decided to arrest both women and take them to a police station. On 6 October 1999, the investigation officer in charge of Smirnova's case returned the passport to her.

140 [2018] ECHR, 214.

141 [2003] ECHR, 397.

The ECtHR said that the “lack of a passport made Smirnova’s life difficult” and it unanimously held that there was a violation of Article 8 of the ECHR. The Court said:

The Court notes that Smirnova’s passport was seized on 26 August, 1995 and returned on 6 October 1999 ... the interference with Smirnova’s private life is peculiar in that it allegedly flows not from an instantaneous act, but from a number of everyday inconveniences taken in their entirety which lasted till 6 October, 1999. ... The Court finds it established that in their daily life Russian citizens have to prove their identity unusually often, even when performing such mundane tasks as exchanging currency or buying train tickets. The internal passport is also required for more crucial needs, for example finding employment or receiving medical care. The deprivation of the passport therefore represented a continuing interference with the applicant’s private life. The case of *Alpeyeva and Dzhalagoniya v Russia* 2018 applies Smirnova and it is explained in the next part.

II Alpeyeva and Dzhalagoniya v. Russia 2018

In *Alpeyeva and Dzhalagoniya v. Russia 2018*, two Russian nationals who were former Soviet Union citizens from Kyrgyzstan and Georgia had their passports invalidated on the grounds of administrative irregularities. Lyubov Alpeyeva was born in 1951 in Kyrgyzstan in the former Soviet Union and left in 1994. The Russian Embassy in the capital city Bishek stamped her passport to confirm that she had been granted Russian citizenship and had moved to Russia. Alpeyeva has been living there ever since 1994 and was issued with an internal Russian passport in 2001. Datuna Dzhalagoniya was born in 1965 in Georgia, which was a state in the former Soviet Union. Dzhalagoniya lived in Russia and when the Soviet Union collapsed in 1991, his Soviet Union passport was issued with an insert certifying his Russian citizenship in 1998. Dzhalagoniya was granted a Russian passport in 2002.

Alpeyeva and Dzhalagoniya independently at a later date were told by officials that they had never properly acquired Russian citizenship because checks of the relevant databases had produced no records on them. The domestic authorities consequently found that their passports had been issued irregularly and were invalid. As a result, Alpeyeva’s passport was seized when she applied to the migration authorities for an international passport in 2006. Dzhalagoniya applied to exchange his passport in 2010 but was refused.

Both applicants had unsuccessfully brought actions to challenge the migration authorities’ decisions in the Russian domestic courts. The ECtHR made specific reference to a claim brought by Alpeyeva in which she alleged failure by the migration authorities to issue her with a passport, which was dismissed by a final decision of August 2009. The ECtHR also referred to Dzhalagoniya’s appeal with regard to the refusal to exchange his passport which was dismissed by a final decision of December 2010. Alpeyeva and Dzhalagoniya were eventually granted

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Russian citizenship and issued with Russian passports in 2010 and 2013 respectively.

Having exhausted all available domestic remedies, Alpeyeva and Dzhalagoniya relied on Article 8 to protest the effect of not having a valid passport on their everyday lives, especially as it related to their inability to get employment or obtain medical assistance, pensions or social benefits. The panel of seven judges unanimously found that:

Due to the authorities' mishandling of procedures related to the granting of citizenship, the applicants had found themselves not only in a situation comparable to that in the Smirnova's case, but also faced consequences affecting their social identity far more fundamentally as they had been deprived of any legal status in Russia. They had become stateless persons and remained so until 2010 and 2013 respectively. It had taken the authorities from 2007, when the Ombudsman had drawn attention to the issue, until 2013 for the general problem to be solved. Since the authorities' oversight had resulted in consequences for the applicants so severely affecting their private life, it amounted to an arbitrary interference. The authorities had thus failed to act diligently.

There is no question that the UK Home Office is a public authority as "a major department of state"¹⁴² and since 1998 when the Human Rights Act was passed, Article 8 of the ECHR and the resulting ECHR case law in the form of *Smirnova* and *Alpeyeva and Dzhalagoniya* including the other cases have been a part of the laws of the UK.¹⁴³ The desperation and hopelessness suffered by a person who is unable to prove their nationality as seen in *Smirnova* and *Alpeyeva and Dzhalagoniya* is on a par with the countless stories of destitution and death experienced by the Windrush generation who did not have documents to establish their identity. Comparing like case with like case the UK Government was in violation of Articles 6, 8 and 14 of the UK HRA.

Some scholars have attacked the HRA as being structurally weak statutory protection against human rights abuses. This is because, for example, there are several interpretations of Article 8 on the limits of state interference with a person's private life.¹⁴⁴ Also there is the view that local courts show undue deference to the executive when called upon to review its bureaucratic

142 See *Windrush Lessons Learned Review*, p. 8 which refers to the Home Office as a major department of state that covers the Secretary of State, their special advisers and the Ministerial Team who head up the department, setting the political direction and priorities; the Permanent Secretary and the Senior Civil Service who lead and manage the department, advising ministers; civil servants at junior grades who perform the vast majority of policy and operational roles, developing and implementing policy proposals and carrying out operational roles engaging with the public.

143 Case *Ndidi v. The UK* [2018] ECHR, *Case of Bensaid v. The UK* [2001] and *Case of Hode and Abdi v. the UK* [2013].

144 S. Sedley, "The Rocks or the Open Seas: Where is the Human Rights Act Heading?", *Journal of Law and Society*, Vol. 32, No. 1, 2005, p. 3.

functioning.¹⁴⁵ This article adds to this scholarship by saying that the HRA and the case law confirm a person's right to a nationality, albeit through a purposive interpretation, but this right to a nationality is however overshadowed by Section 4 of the Nationality, Immigration and Asylum Act, 2002, which in very clear language provides that the Home Office can deprive a person of their nationality if they do something that is prejudicial to the interests of the UK.

The presence of these human rights laws affirming the right to a nationality complete with the EU law principle of Supremacy as established under *Van Gend en Loos Nederlandse Administratie der Belastingen*¹⁴⁶ did not however constrain the Home Office when taking the decision to destroy the landing cards knowing the prejudicial effect it would have. This also did not stop the passing without a parliamentary debate of the Immigration Acts of 2014 and 2016, which embed the hostile immigration policy. This decision and policy operated together like a pair of scissors to cut away the right to citizenship of countless legitimately British people of West Indian ancestry. The next paragraph is a review of Section 4 on the power of the Home Secretary to deprive a person of their citizenship. This is discussed with a view to demonstrating how powerful this provision is in comparison to the right to nationality which can only be established by reading the cases of *Smirnova*, *Alpeyeva* and *Dzhalagoniya* with Article 8 of the HRA in order to establish the right to a nationality.

D Nationality, Immigration and Asylum Act, 2002

The Nationality, Immigration and Asylum Act, 2002 is an Act to make provision about nationality, immigration and asylum to create offences in connection with international traffic in prostitution and to make provision about international projects connected with migration and for connected purposes. Section 4 is entitled 'Deprivation of Citizenship' and states that a reference to a person's 'citizenship status' is a reference to his status as a British citizen, a British overseas territories citizen, a British Overseas citizen, a British National (Overseas), a British protected person or a British subject. Under this provision, the Secretary of State has the discretion by order to deprive a person of their citizenship status if the Secretary of State is satisfied that the person has done anything "seriously prejudicial to the vital interest of the UK or a British overseas territory". The cases of Shamima Begum one of the 'Isis Brides', Alexandra Kotey and El Shafee Elsheikh 'The Isis Beatles' and Jack Letts 'Jihadi Jack' bring into sharp relief the effect of this power under Section 4 of the Nationality, Asylum

145 T.R.S. Allan, 'Human Rights and Judicial Review: A Critique of Due Deference', *Cambridge Law Journal*, Vol. 65, No. 3, 2006, p. 671.

146 (1963) Case 26-62.

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and Immigration Act, 2002.¹⁴⁷ These individuals' participation in international terrorism was deemed to be "seriously prejudicial to the vital interest of the UK" and they are no longer British citizens.¹⁴⁸

Section 4 continues that the Secretary of State may not make an order if he is satisfied that the order would make a person stateless and a person who is given notice of their nationality being deprived can appeal against the decision to an adjudicator appointed under Section 81 of the Nationality, Immigration and Asylum Act, 2002 entitled 'meaning of the Tribunal'. In the cases of Begum, Kotey, El Shafee and Letts, there is much uncertainty about whether the Secretary of State followed the correct procedure before rendering them stateless. For example, Begum is reported to be still in Syria whilst Bangladesh debates whether the 'blood line' laws entitle her to Bangladeshi citizenship through her mother who is a national.¹⁴⁹ Former Secretary of State Javid's decision received very harsh criticism because it was seen as a political ploy to appear tough on nationals who join terrorist groups.¹⁵⁰ Former DPP of England Ken Macdonald said that

this was an abject decision by a home secretary apparently so intent in furthering his leadership ambitions that he has lost sight of sovereignty, treating the UK as a banana republic incapable of regulating its own citizens.¹⁵¹

Macdonald continued

No dignified self-governing state should abandon responsibility for its own citizens in this way, trying to dump them on to poorer countries with failed security arrangements. Mr. Javid's behaviour is a recipe for refugee chaos and more cowardice of the worst sort.¹⁵²

147 See in relation to Begum, C. Nyamutata, 'Young Terrorists or Child Soldiers?, Isis Children', *Journal of Conflict and Security Law*, 2020, 1. Also see BBC, 'Islamic State "Beatles" Duo: UK Will Not Block Death Penalty', 23 July 2018, available at: <https://bbc.in/3fdFA1B> (last accessed 12 June 2020) and 'Canada Says It Will Not Help "Jihadi Jack" Come Home to the Country', *Reuters*, 20 August 2019, available at: <https://reut.rs/37oh779> (last accessed 12 June 2020).

148 For the situation of Shamima Begum see 'Sajid Javid's Decision to Strip Shamima Begum of her Citizenship Questioned by one of the UK's Most Senior Judges', *The Telegraph*, 9 June 2019, available at: <https://bit.ly/2YC8MbV> (last accessed 14 June 2020). See in relation to the 'Isis Beatles' D. Batty & P. Noor, 'Who Has Been Stripped of UK Citizenship before Shamima Begum', *The Guardian*, 20 February 2019, available at: <https://bit.ly/2B3SvED> (last accessed 14 June 2020). Also see 'Jihadi Jack: Canada Accuses UK of 'Off-loading Its Responsibilities' by Stripping ISIL Fighter', *The Telegraph*, 19 August 2019, available at: <https://bit.ly/37uHKY7> (last accessed 14 June 2020).

149 BBC, 'Shamima Begum Will Not be Allowed Here Bangladesh Says', 21 February 2019, available at: [uk-47312207](https://www.bbc.com/news/uk-47312207) (last accessed 21 June 2020).

150 J. Grierson, 'Shamima Begum's Mother asks Home Office to Show Mercy', *The Guardian*, 11 March 2019, available at: <https://bit.ly/37LXjuB> (last accessed 21 June 2020).

151 *Ibid.*

152 *Ibid.*

Letts has Canadian citizenship by descent from his father but Canada does not accept him as their national and he is in limbo in a Syrian prison.¹⁵³ Kotey and El Shafee were extradited to the United States of America to face trial and if found guilty would face the death penalty but the intervention of the Supreme Court in the decision of *Elgizouli v. The Secretary of State for the Home Department*¹⁵⁴ has blocked the UK Government from furnishing prosecutors with information about the defendants in violation of the Data Protection Act, 2018. The lack of clarity around how ‘satisfied’ the Secretary of State was in taking the decision to revoke these individuals’ British citizenship is flatly astonishing. Also the double standard of allowing a British citizen to face the death penalty goes against the UK Parliament’s abolition of the death penalty in 1969. Lord Dyson MR in *R (Sandiford) v. Secretary of State for Foreign and Commonwealth Affairs*¹⁵⁵ captures the national attitude towards capital punishment when he said “the death penalty is (in my view) rightly regarded by the Government as immoral and unacceptable”. This judicial reasoning informs the UK Judicial Committee of the Privy Council’s (Privy Council) decisions to commute death penalty cases from former colonies that still have the Privy Council, to life imprisonment as seen by the landmark case of *Pratt and Morgan v. The Attorney General of Jamaica*.¹⁵⁶ How can it be that in 2020 British citizens are facing justice in a country that metes out the death penalty?

The authors of the article argue that in the light of the Williams finding that there is at the Home Office a culture of “carelessness when dealing with applications”¹⁵⁷ as well as a “lack of empathy”,¹⁵⁸ it is not safe for the Secretary of State to have such vast discretion as to be “satisfied that the order would make a person stateless”. This is because several of the Windrush generation would have brought 40 years’ worth of proof that they had been living legitimately in the UK and some of those individuals were still deported to the Caribbean. Williams also said that she was unable to make a definitive finding of institutional racism within the Department in line with the definition established by Sir William McPherson during Inquiry into the killing of black teenager Stephen Lawrence where the definition of institutional racism is:

the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance,

153 ‘Jihadi Jack: Canada Accuses UK of Off-Loading its Responsibilities by Stripping ISIL Fighter of Citizenship’, *The Telegraph*, 19 August 2019, available at: <https://bit.ly/37uHKY7> (last accessed 21 June 2020).

154 [2020] UKSC 10.

155 [2013] EWCA Civ 581; [2013] 1 WLR 2938, para 61.

156 [1993] 4 All E.R. 769 Judicial Committee of the Privy Council.

157 Williams, *Windrush Lessons Learned Review*, p. 7.

158 *Ibid.*, p. 13.

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thoughtlessness and racist stereotyping which disadvantage minority ethnic people.¹⁵⁹

Whilst Williams' finding that the Home Office was not institutionally racist, she did express that she has "serious concerns that these failings demonstrate an institutional ignorance and thoughtlessness towards the issue of race" and the history of the Windrush generation ... "which are consistent with some elements of the definition of institutional racism"¹⁶⁰ In this way it is calamitous that the Secretary of State is supported by a coterie of professionals who have been found to be 'unimpressively unreflective' about race and who show "little awareness of the possibility of indirect discrimination or the way in which race, immigration and nationality intersect" – this is also the case given that "while the department itself has a large BAME workforce at junior levels it does not at senior levels".¹⁶¹ Amelia Gentleman describes the case of Jocelyn John who was "Chased into 'self-deportation' as the 'The Most Disturbing Windrush Case So Far'".¹⁶² Jocelyn John, who is 58, describes that "she had £60 to start a new life ... she was given no money to set her up and found getting work very difficult in the Caribbean island of Grenada. This hardship in her own words are that:

You're very vulnerable if you're a foreigner. There's no support structure and no one wants to employ you. Once they hear an English accent – forget it. They're suspicious. They think you must be a criminal if you have been deported.¹⁶³

As illustrated by the 164 Windrush era deportees whose lives have been upended, how can the life or death decision about whether a person should be made stateless be taken by officials with no comprehension and in some cases no interest in the vertigo that a black or ethnic minority person experiences starting anew in a country with limited resources or family ties?

Section 4 continues that this right of appeal is removed if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public, in the interests of national security, in the interests of the relationship between the United Kingdom and another country or otherwise in the public interest. The sinews of this provision are overly muscular in the light of the lack of clarity concerning Begum, Kotey, El Shafee and Letts as well as the Williams *Lessons Learned Review* finding that "policy makers and operational staff" have "lost sight of people the department had a duty to protect".¹⁶⁴ As a matter of urgency, the authors of this article recommend that

159 Sir William McPherson, *The Stephen Lawrence Inquiry*, 1999, Para. 6.34.

160 *Ibid.*, p. 7.

161 *Ibid.*, p. 13.

162 (14 September 2018) *The Guardian*, available at: <https://bit.ly/2BADdas> (last accessed 1 June 2020).

163 *Ibid.*

164 Williams, *Windrush Lessons Learned Review*, p. 9.

the proposed Migrants Commissioner must be at the coalface of every decision to render someone stateless.¹⁶⁵ To keep this provision as it is would be to perpetuate the Home Office's

failure to see how past legislation combined with evolving policy and to assess what impact this might have on vulnerable people and minorities, especially the Windrush generation, alongside a focus on meeting targets.¹⁶⁶

Williams, in her report, says that the Windrush Generation has been poorly served¹⁶⁷ and the authors of this article agree and are of the view that instead of treating the Windrush Generation's landing cards as midden, their digitization ought to have been prioritized and outsourced to a contractor given their evidentiary import. It is disturbing that the Home Office was not transparent about the destruction of the landing cards and their value as proof of arrival to the Windrush generation.¹⁶⁸ The policy to turf out undocumented migrants without taking measures to mitigate against harming the Windrush generation coupled with the then Home Secretary's action of misleading a Home Office Select Committee about deportation targets is an egregious breach of trust by a public authority. Her demitting office only came about when a leaked letter provided incontrovertible evidence that there were in fact deportation targets.¹⁶⁹ The appointment of two Asian Home Office Secretaries for the first time in the UK since 1792 in rapid succession during the Windrush Scandal is shot through with gossamer.

As the senior most member of the Government, Theresa May at the time only offered an apology after the 'guerrilla diplomacy' of the Commonwealth Leaders and conceded when the torridity of the situation was inescapable.¹⁷⁰ It is the authors' opinion that this lack of transparency and the recalcitrant approach are sufficient grounds to recommend that this power to remove the right of appeal of a person who has been made stateless is too vast and any such decisions ought to be reviewed by an independent body such as the Williams-recommended Migration Commissioner.¹⁷¹

Section 4 (3) continues that

a party to an appeal to an adjudicator may with the permission of the Immigration Appeal Tribunal appeal to the Tribunal against the adjudicator's determination on a point of law.

165 *Ibid.*, p. 10.

166 *Ibid.*

167 Williams, *Windrush Lessons Learned Review*, p. 7.

168 A. Gentleman, 'Home Office Destroyed Windrush Landing Cards', *Says Ex-Staffer, The Guardian*, 17 April 2018, available at: <https://bit.ly/3eRCos9> (last accessed 14 June 2020).

169 See Hopking, 2018.

170 Hewitt, 2020. Also see Gentleman, 2018, *supra* note 81.

171 See Recommendation 9, p. 142.

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This convoluted provision also states that

a party to an appeal to the Immigration Appeal Tribunal may bring a further appeal on a point of law and where the decision of the adjudicator was made in Scotland, the Court of Sessions or in any other case to the Court of Appeal.

This provision squats behind Section 4 (2) in a way that is forbidding and devilishly bureaucratic.

As seen from the cases of *Smirnova*, *Alpeyeva and Dhazalgoniya* and the countless stories of the Windrush Generation who have endured unimaginable suffering, the complex and bureaucratic nature of this provision should be revisited to make it easier for an individual to ford if they find themselves on this type of bureaucratic sandbank. Otherwise, left as it is, Section 4 is incredibly difficult for a person to navigate without expensive specialized legal expertise. As seen from the cases of Windrush victims living *in extremis*, it is unrealistic to expect them to pay for specialized legal counsel. The same can be said of the next provision which reads that “an appeal may be brought only with the permission of the Tribunal or if the Tribunal refuses permission, the Court referred to Subsection 4 (a) or (b)”. The provision continues that:

an order under Section 40 may not be made in respect of a person while an appeal under this section or Section 2B of the Special Immigration Appeals Commission Act 1997 has been instituted and has not yet been finally determined, withdrawn or abandoned or could be brought ignoring any possibility of an appeal out of time with permission.

This provision is vertiginous and should be amended. As with the provision previously discussed, this part of Section 4 is equally bewildering in that it states that:

rules under Section 106 of the Nationality, Immigration and Asylum Act 2002 (immigration appeal: rules) may make provision about an appeal under this section. Then it directs the appellant to directions under Section 107 of that Act (practice directions) may make provision about an appeal under this section.

It is submitted that Section 4 of the Nationality, Immigration and Asylum Act, 2002 is pneumatically powered in comparison to the thready pulse of Article 8 of the ECHR in the HRA, 1998 because the right to a nationality is not expressly referenced but is buried in opaque statutory language accompanied by interpretations in *Smirnova* and *Alpeyeva and Dzhalagoniya*, which would not be easy for a person who is not legally trained to understand.

The question is why should a person have to rummage through Article 8 and then pair the cases of *Smirnova*, *Alpeyeva and Dzhalagoniya* to discover their right to a nationality? Given the closeness of the right to a nationality to the basic right

to life, there should be greater clarity on a person's right to nationality and far less discretion in respect of depriving a person of that right. This is especially the case where there is an institutional willingness to quarry for deportation targets from low-level criminals.¹⁷²

E International Law

Article 15 (1) of the Universal Declaration for Human Rights, 1948 states that: "everyone has the right to a nationality, no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". Article 1 of the 1930 Hague Convention on Certain Questions Relating to Conflict of Nationality Laws states that

it is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

This right was upheld in the recent case of *Anudo v. The United Republic of Tanzania* (2018) before the African Court on Human and Peoples' Rights. The question before the Court was whether the withdrawal of Anudo's nationality was arbitrary or whether it conformed with international human rights standards.¹⁷³

The Court observed that the African Charter for Human Rights does not contain an article that deals specifically with the right to nationality.¹⁷⁴ It relied on Article 15 of the Universal Declaration of Human Rights (UDHR), which it said is recognized as forming part of customary international law. The Court said that in international law, it is recognized that the granting of nationality falls within the ambit of the sovereignty of States and that each state determines the conditions for attribution of nationality. It said "however, the power to deprive a person of his or her nationality has to be exercised in accordance with international standards, to avoid the risk of statelessness".¹⁷⁵

The Court continued that:

International Law does not allow, save under very exceptional situations, the loss of nationality. The said conditions are they must be founded on a clear basis, must serve a legitimate purpose that conforms with international law, must be proportionate to the interest protected and must install procedural guarantees which must be respected allowing the concerned to defend himself before an independent body... in the case of Anudo he maintains that

172 Stewart *et al.*, 2018.

173 Application Number 012/2015.

174 The Court also said nor does the ICCPR which Tanzania is a signatory to. See Art. 24(3), which states that a child has the right to a nationality.

175 *Anudo v. The United Republic of Tanzania* (2018) Application Number 012/2015.

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he is of Tanzanian nationality which is being contested by the Respondent State. In the circumstance, it is necessary to establish on whom lies the burden of proof. It is the opinion of the Court that, since the Respondent State is contesting the Applicant's nationality held since his birth on the basis of legal documents established by the Respondent State itself the burden is on the Respondent State to prove the contrary.¹⁷⁶

The Court found that the evidence provided by the State concerning the justification for the withdrawal of the Applicant's nationality was "not convincing and therefore held in conclusion that the deprivation of the Applicant's nationality was arbitrary, contrary to Article 15 (2) of the Universal Declaration of Human Rights".

It is important to recall that Article 24 (3) of the International Covenant on Civil and Political Rights, 1976 (ICCPR) states that "every child has the right to acquire a nationality" and Article 26 of the Vienna Convention states that "every treaty in force is binding upon the parties to it and must be performed in good faith". The UDHR, 1948 profoundly influenced the ECHR. However, under the ECHR, there is no specific provision on the right to a nationality. As though the provision on nationality was supernumerary, instead there is Article 8, which through a purposive interpretation by the ECHR now guarantees the right to a nationality.

The UK maintains a dualist approach to international law whereby an act of Parliament must be passed in order for the International Treaty to be translated into UK Law. In this way, the UK Human Rights Act, 1998 makes the ECHR operational in the UK. Given what has transpired with the Windrush generation, it is recommended here that the Human Rights Act, 1998 is amended to include a provision that reflects the spirit of Article 15 (1) of the UDHR, 1948 and the other international laws on nationality. This is because it is clear from the grinding poverty and the loss of a social identity that the right to a nationality is the portal through which people in modern times can enjoy their basic right to life.

The Williams Review recommends that the Home Office make an unqualified apology to the Windrush Generation. The next part filters the Windrush crisis through Articles 1 and 2 of the Genocide Convention with the intention of creating a platform upon which to make the argument that there ought to be an apology that is enshrined in the Preamble to the Human Rights Act, 1998.

F Genocide

Article 1 of the Genocide Convention, 1954 states that Contracting Parties confirm that "genocide, whether committed in time of peace or in time of war, is

¹⁷⁶ *Ibid.*, para. 78.

a crime under international law which they undertake to prevent and punish". Article 2 (b) states that

genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such causing serious bodily or mental harm to members of this group deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

The Williams *Windrush Lessons Learned Review* states that the UK Government, "through what it did and did not do, threw people into turmoil because it did not recognise their legal right to be in the UK".¹⁷⁷ The Report continues that:

through policies designed to combat illegal migration, it denied people access to work, housing and services, even though they were here lawfully and therefore lawfully entitled to access them. Some lost their jobs, their homes and in many cases their sense of identity and well-being. Inevitably, their families also paid the price'. This experience has left the people of this Generation "scared and scarred."¹⁷⁸

Williams cites several harrowing cases and says that it was unreasonable to require Windrush Generation members to provide 40 years of documentation to prove that they have lived in the UK.¹⁷⁹ The effect of this is that people entering their twilight years and having performed yeoman service to the UK lost years of their lives putting together impossible bundles to help narrate their lives in the UK. Their sense of citizenship and belonging was lost as they were treated like foreign scroungers living off the largesse of the state. This dispossession and the resulting deaths from being stateless has had a profound psychological impact on the Windrush generation and their descendants.^{180, 181} The database that was the landing cards together with the hostile environment policy upended the Windrush generation's livelihoods, forcing them into a life of extremis.¹⁸² The effect of this was to inflict on them very harsh conditions of life.

Consider again the example of Jocelyn John who was spooked by Operation Vaken with the 'racially insensitive' 'go home' advertising and volunteered to

177 *Windrush Lessons Learned Review*, p. 8.

178 *Ibid.*

179 *Ibid.*, p. 10.

180 A. Gentleman, 'Lambs to the Slaughter: 50 Lives Ruined by the Windrush Scandal', *The Guardian*, 19 March 2020, available at: <https://bit.ly/2Y85HkV> (last accessed 16 June 2020).

181 See page 20 for the case of Gloria whose daughter had to forego her university studies in order to work and support her mother who was the breadwinner but lost her work when she was unable to prove her identity. Also see page 120 for the case of Nathaniel whose daughter stopped her career as a social worker to care for her father in Jamaica suffering from prostate cancer after he was not allowed back into the UK after a holiday.

182 Gentleman, 2020, *supra* note 180.

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leave the UK for Grenada even though the UK was the only home she had.¹⁸³ John was eventually returned to the UK but was so traumatized by the experience that her state of fugue meant that she could not even recognize her own children.¹⁸⁴ Her private life was forever disrupted as she returned to a partner who was engaged to someone else in her absence.¹⁸⁵ There are many who have been deported to the Caribbean and are marooned indefinitely without adequate resources to survive like former boxer Vernon Vanriel who lives in his sister's chicken coop in Jamaica.¹⁸⁶

The part of the provision that says “calculated to bring about its physical destruction in whole or in part” is unclear and evokes images of state-led ethnic cleansing like that of the Jewish people in Nazi Germany, the Kurds of Iraq or the Rohingya of Myanmar. As the Williams Report observes, “officials could and should have done more to examine, consider and explain the impacts of decisions”.¹⁸⁷ It is argued here that the blasé officialdom that resulted in the landing cards being destroyed despite being warned of their evidentiary importance including the batting away of the suggestion to preserve them at the National Archives is sufficient to meet the requirements of Article 2 (b).

This accepted risk that the Windrush generation may or may not be in grave peril from this action together with the plotting on paper to increase deportations as seen in the leaked Rudd letter was a clear calculation to banish foreigners from the UK and there was no concern at the decision-making level for people of the Windrush Generation being possibly trapped in the increasingly aggressive programmes to bring immigration numbers under control.

Policies that create one national mind and body to banish foreigners in every possible way do go beyond winking out illegal immigrants to a deliberate sealing of the burrow, which is designed to make life so unbearable that the ‘destruction in whole or in part’ that follows in the form of joblessness, homelessness and deportation to foreign countries where their ties are cultural only must logically be a form of destruction in whole or in part because the right to life is not just the privilege of breathing, it is also an entitlement to a good quality of life in which there is access to services.

G Apologies

The *Williams Lessons Learned Review* recommends that the Home Office make an unqualified apology for the Windrush Generation Scandal “as well as tell the

183 *Windrush Lessons Learned Review*, p. 29.

184 *Ibid.*

185 *Ibid.*, p. 46.

186 *Ibid.*, p. 13.

187 *Ibid.*, p. 7.

stories of the Empire”.¹⁸⁸ In an encouragement to “right the wrongs”,¹⁸⁹ Recommendation one reads that:

Ministers on behalf of the Department should admit that serious harm was inflicted on people who are British and provide an unqualified apology to those affected and to the wider black African-Caribbean Community as soon as possible. The sincerity of this apology will be determined by how far the Home Office demonstrates a commitment to learn from its mistakes by making fundamental changes to its culture and way of working that are both systemic and sustainable.¹⁹⁰

Member of Parliament David Lammy’s speech thundered in Parliament when he gave the Windrush generation’s history as the descendants of African slaves in context and acidly described the Home Secretary’s slow handling of the matter as well as the lack of reliable data on the number of deportations.¹⁹¹ Calling it a day of national shame, Lammy said that the crisis was as a result of the hostile environment policy.¹⁹² He enjoined the Secretary of State to apologize properly and act quickly to ensure that the thousands of British men and women who have been denied their rights are satisfied. Rudd gave an apology and promised to keep the individual at the forefront of all its decisions.¹⁹³ The following day, former Prime Minister May also said that she was sorry for the outcome of the hostile environment policy before the CHOGM. Former Home Secretary Javid and Patel lamented the plight of the Windrush generation and issued a commitment to implement all of the lessons learned. Immigration Minister Caroline Nokes was deeply contrite for the events that occurred and said that she was devoted to the vast amount of work to be done.

Independent Advisor Williams recommended a series of reconciliation events to be held

in consultation with those affected ... to enable people who have been affected to articulate the impact of the scandal on their lives in the presence of trained facilitators and/or specialist services and senior Home Office staff and ministers so that they can listen and reflect on their stories.¹⁹⁴

It would give all of the parties involved a safe space in which the doughty Windrush members can show “their dignity and calm despite all that happened”.¹⁹⁵ By dint of their harrowing experience, some made comments such

188 *Ibid.*, p. 14.

189 *Ibid.*, p. 15.

190 *Ibid.*

191 Hansard HC, Volume 639 Column 28 (16 April 2018).

192 *Ibid.*

193 *Ibid.*

194 *Windrush Lessons Learned*, p. 15.

195 *Ibid.*, p. 8.

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as “Any way you take it, I’m British. Although I was born in Jamaica, ... I was born under the British flag” and “I don’t feel British, I am British. I’ve been raised here, all I know is Britain.”¹⁹⁶ The fiduciaries involved can share in this “humbling experience”¹⁹⁷ and this might go some way towards curing the ignorance and lack of understanding of the root causes and a lack of acceptance of the full extent of the injustice done’.¹⁹⁸

Examples of countries that have committed similar acts against their own citizens are Nazi Germany, South Africa and Rwanda. These countries have carried out similar acts of persecution against their own people and they have publicly apologized. They too have had truth and conciliation processes and they have amended their constitutions to reflect this.

Interestingly, despite the volubility of former Prime Minister Rudd’s apology to the Stolen Generation of Australia, it is yet to pass the referendum to amend its Constitution to include the Indigenous Aboriginals as the first peoples of Australia.¹⁹⁹ The authors of this article state that the unwritten nature of the UK Constitution allows for amendments to be made without a referendum. Parliament in its sovereignty has the power to make these changes. It is our view that the apologies from the former Prime Minister, past and present Home Office Secretaries must be combined together to form a single apology, which is inscribed in the Preamble to the Human Rights Act, 1998 where it must now say that they recognize the injustices done to the Windrush, honour and respect the sons and daughters of the Windrush Generation as British citizens who stood in the frontline in battle and rebuilding. This type of apology in the Preamble to the Human Rights Act, 1998 and a provision that declares a person’s right to a nationality will ensure that the Windrush generation are never ‘institutionally forgotten’ again.

H Conclusion

The Williams *Windrush Lessons Learned Review* is very strong medicine for the Home Office that has tipped a large group of its own citizens from their homeland and rendered them stateless. This coruscating *Review* is also a reminder from Williams to blinkered bureaucrats that their métier is about people and regardless of its objective, it should be rooted in humanity. For all of its taut observations about bigotry, prejudice and professional thoughtlessness, the *Review* in the hierarchy of sources of law is a secondary source which is instructive only because it is not a set of binding rules made by the UK Parliament. In order

196 *Ibid.*

197 *Ibid.*

198 *Ibid.*, p. 12.

199 The full transcript of the Rudd speech is available at: The Australian Government, <https://bit.ly/2VeRyAy> (last accessed 23 June 2020). Also see A. Yeatman, ‘Receiving the Final Report of the Referendum Council: A Challenge in Public Law’, 2018 *Australian Journal of Public Administration*, 2018, p. 63.

to translate the Williams Recommendations into a binding statute and give it the status of the Sir William McPherson Inquiry Report, this article strongly recommends that the Human Rights Act, 1998 is amended to include a right to a nationality in line with Article 15 (1) of the UDHR, 1948, which guarantees this right and very clearly proscribes anyone being arbitrarily deprived of it. This type of provision would have the girth to resist the power wielded by the Secretary of State under the convoluted Section 4 of the Nationality Immigration and Asylum Act, 2002 to deprive a person of their nationality without the oversight of the Williams-proposed Migration Officer.

Given the 164 known deportations of Windrush era citizens who have come to grief after being deported to the English-speaking Caribbean and the lack of clarity around the process of rendering a British citizen stateless for having done something prejudicial to the interests of the UK, the authors recommend that an act of Parliament be passed every time that the Secretary of State is confronted with a case of a British national who is deemed to have done something prejudicial to the UK's interests. Mirroring what takes place in Germany is recommended because the lack of transparency about how this deprivation of nationality power operates means that it is no longer safe for one official operating with institutionally ignorant and thoughtless officials who inhabit a different world from the public they are required to serve to have such vast powers. This is especially the case where there are set targets for how to seal the burrow and banish illegal migrants by applying the hostile environment policy that will cure any leaks by quarrying for deportation numbers in low-level crime and intelligence.

The debate in Parliament about the individual that is about to fall into the crevasse of statelessness ensures that there are independent checks on whether the Department received and heeded prescient warnings concerning the vulnerable citizen. This is much like the alarms raised during the destruction of the Windrush generation's landing cards as well as the passing of the Immigration Acts of 2014 and 2016 without proper safeguards for this group of citizens.

Independent Advisor Wendy Williams captures an important truth when she observes in her *Windrush Lessons Learned Review* that the Windrush generation was poorly served by the UK Government. This is because they have provided yeoman service to the UK to face in their twilight the burden of proving their right to British citizenship by providing some 40 years of evidence, which very often was found to be insufficient proof. For imposing these vertiginous standards, the authors of this paper recommend that the various apologies for inflicting such harsh conditions of life given by the senior most members of the Government at the time, the Immigration Minister and the involved Home Secretaries past and present must be knitted together to amend the Preamble to the Human Rights Act, 1998 in which there is a respect, admiration and gratitude for the people who came to the UK and contributed to make it what it is today.

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In healing the injured spirits of the Windrush generation with something real and solid should be a genuine recognition for the irreversible pain, suffering and misery of statelessness inflicted on the Windrush generation. To do this would mark a new frontier for the Windrush generation who are descendants of African slaves and it will serve as a reminder to an institution that is responsible for people's lives from the cradle to the grave that they are not themselves ungovernable and must be focused on their commitment to be governed by the rule of law. Making these proposed changes to the Human Rights Act, 1998 and educating the public about them are pressing because the right to a nationality carries with it the inalienable right to life. The authors believe that an amendment to include a provision on the right to a nationality in the Human Rights Act, 1998 as well as an apology in the Preamble to the Act to make it a more comprehensive legal mechanism are ambitious but deliverable.