Windrush individuals unlikely to be truly compensated by government scheme

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Immigration analysis: The Home Office has launched a compensation scheme for members of the Windrush generation who have experienced adverse effects on their life, but does it go far enough? Individuals who can prove they have suffered difficulty or negative effects on their life ranging across employment, access to health care, housing and paying immigration fees can apply. Rajiv Sharma, barrister at The 36 Group, discusses the design of the scheme and raises doubts that individuals will receive the level of compensation they deserve.

Original news

Government launches compensation scheme for Windrush generation, LNB News 03/04/2019 86

The Home Office has launched a compensation scheme for members of the Windrush generation who did not have the required documentation to prove their status in the UK and suffered adverse effects on their life as a result. The Windrush Compensation Scheme will provide payments to eligible individuals who have suffered adverse effects from their experiences, ranging from loss of housing or employment to deterioration in health.

What has led to the government launching this scheme and what are some notable developments around this?

The compensation scheme was launched following political pressure and widespread public outcry following the treatment of certain members of the 'Windrush generation' by the Home Office with reference to the 'hostile environment'.

The aim of the scheme is to compensate commonwealth migrants who arrived prior to 1 January 1973 and non-commonwealth migrants who have a right of abode or settled status and entered before 31 December 1988 and have been penalised by the operation of the hostile environment.

The scheme intends to provide compensation for losses arising out of the operation of the hostile environment. The heads of claim are as follows:

- employment
- immigration fees
- detention and removal
- housing

• health
• education
• driving licences
• banking
• impact on normal daily life

What should practitioners be mindful of when advising clients in this area?

The claim for compensation is made by way of a claim form supported by evidence. The form to be used differs depending on who is making the application—an applicant, their family member(s) or a representative of their estate, if they have passed away.

There are strict evidential requirements including a requirement to show mitigation—ie an attempt to minimise the damage and the scheme rules (45 pages) and guidance documents (a whopping 138 pages in total) should be consulted for the details.

All applications should be acknowledged so if an application is made but not acknowledged in good time, it may be an indication that something has gone wrong.

Applications are then answered by way of offers of compensation or a decision to offer no compensation. There are two levels of challenge—one internal to a senior decision-maker and one external. A final decision may be amenable to judicial review on usual public law grounds.

What are the benefits and drawbacks of the scheme? Do you foresee any problems and, if so, what can be done to resolve them?

One major problem is the narrow scope of the compensation offered:

• only applications that have been unsuccessful will be covered

• the limit for legal fees is £500, which is unlikely to cover the true cost incurred by an applicant in seeking the type of expert legal advice that is required

• applicants are required to show that they had previously made efforts to resolve their status—ignoring the fact that many did not know about the issue until it was too late and that for others such records may not have been retained

• the requirements to prove the losses incurred is more onerous than necessary—the guidance sets out the kind of detail that would be required and such detail echoes the requirement for the type of documentation that led to the scandal in the first place

• the limits of the compensation available may not be commensurate with the damage incurred by individuals

Are there other areas of immigration law where a scheme like this would work? Could we see more schemes like this?

The operation of the hostile environment has undoubtedly resulted in miscarriages of justice with regards to legitimate migrants in the UK. For obvious reasons, the Windrush scandal gained most media traction, due to the impact upon those lawfully entitled to settlement/citizenship in the UK. However, even temporary migrants have seen their rights infringed by the operation of the policy.

It is without doubt that the creation of an anti-immigrant environment—even if intended to be an anti-illegal-immigrant environment—has made the UK a less attractive place for legitimate migrants both currently within the UK as well as those on the outside. There should be no mistake about it, this was an intentional political decision. The motives behind the decision are perhaps for discussion in a different forum but the fact is that the effect of the decision can be seen in multiple scenarios. I will provide two that are relevant to my practice.

The ETS Test of English for International Communication (TOEIC) scandal

On 10 February 2014 the BBC aired a documentary showing widespread abuse within the ETS TOEIC examination structure (English Language exams used largely for immigration applications). The documentary showed the use of proxy test takers (ie candidates having somebody else—presumably more competent in the English language—take their speaking tests for them).

Following the airing of the documentary the Home Office set in motion a decision-making process to enforce the removal of those suspected of cheating. In 2016, it was reported by James Brokenhurst, the Minister for Immigration, and Mike Wells, the chief operating officer of UK Visas and Immigration that there were 56,419 ETS TOEIC tests taken and of those only 2,000 were released (ie there was no suspected cheating). This resulted in the cancellation of around 34,000 visas. It has taken the best part of five years for the courts to find that they should be given an opportunity to clear their names before being removed from the UK. Many lost their jobs as a result, many more have been put in a position of unlawfully overstaying (ie remaining in the UK with no visa) simply because the Home Office chose to issue removal notices—rather than any decision appealable from within the UK—without the opportunity to respond to the accusation beforehand.

The guardian has recently run a series of articles on this subject.

The National Audit Office (NAO) has also launched an investigation into the Home Office's removal of international students, following figures which have revealed that over 1,000 people were forcibly removed from the UK as a result of the English language testing scandal.

The 322(5) tax scandal

In a similar vein to the above, this scandal follows notification to the Home Office that applicants who had claimed a certain level of income in immigration applications had declared different levels of income—or

sometimes failed to declare anything at all—to HMRC for tax purposes and an approach that seemed to be more broadbrush than fact-sensitive. Indeed it has been argued that the rule used against such migrants is specifically for use against terrorists or individuals who represent a risk to national security, given that those phrases are specifically used in the rule and guidance.

Without doubt some individuals had gamed the system in order to either evade tax (which is unlawful) or gain a visa when not otherwise entitled (which is also unlawful)—I am yet to see an applicant who has been subject to prosecution or tax enforcement proceedings. The Home Office however took the approach that any applicant who had made subsequent amendments to their tax declarations fell into one of the two categories above, eliminating the possibility of an innocent mistake.

Again, many applicants charged with such accusations have not been entitled to have the accusation independently assessed by the judiciary. Unlike in the ETS TOEIC scandal, here the Home Office did not have the opportunity to choose the most oppressive form of decision-making—changes to the statutory scheme meant that the majority of decisions open to the Home Office now have the same oppressive feature—no independent right of appeal.

The Home Office has recently come in for criticism for their approach in these cases for being too fast to jump to a conclusion of dishonesty—*Balajigari v The Secretary of State for the Home Department* [2019] EWCA Civ 673

Both sets of applicants involved in the above scandals (and many others in smaller-scale or individual scandals) have lost their livelihoods, their legal status, their money and their reputation because of the actions of the Home Office and the legislature in relation to statutory changes. They have paid out thousands to the Home Office in application fees, to the tribunals and courts for appeal or claim fees and to lawyers for legal fees with little if any real compensation—often legal costs are disputed such that a party does not recover the actual costs incurred.

There is a little known scheme of ex gratia payments that is available to these individuals but the payment is entirely discretionary and, in my experience, does not come close to compensating individuals for the real losses incurred. A recent example I have seen is a well-documented claim to have lost out on close to £200,000 in which the offer made was less than £5,000.

Interviewed by Samantha Gilbert.

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