



Post Brexit Rights - another Windrush Scandal?

09 April 2021

On 11 March 2021 The High Court rejected a legal bid to extend the EU Settlement Scheme (EUSS). The Joint Council for the Welfare of Immigrants (JCWI) brought the case against the Home Office, seeking an assurance that those who miss the 30 June 2021 cut-off date will not be liable to detention and removal. The case was lodged on the back of concerns that EU residents in the UK who fail to apply to remain in the UK before the deadline could be deemed undocumented and face “devastating” consequences (The Express).

This situation has parallels with the injustice faced by members of the Windrush generation who lawfully entered the UK but fell prey to policies introduced by the UK Government in 2012. The stated aim of these policies was to create a “Hostile Environment” within the UK for illegal migrants, with the cumulative effect of making life so difficult for them that they would face choosing between voluntary expatriation and deportation (jcw.org).

As these policies are underpinned by a focus on “having the right paperwork”, any undocumented individual is denied access to fundamental services, including the NHS and the police, as well as work and private rented housing. For example, evidence has shown that victims and witnesses are less likely to report crimes for fear of being subject to questioning as part of the hostile environment (jcw.org). This is regardless of their legal entitlement to remain in the UK; no documentation, no access. Doctors, landlords, police officers and teachers are all tasked with checking immigration status.

In the case of the Windrush scandal, people who looked or sounded ‘foreign’ were often asked to show their papers. The Equality and Human Rights Commission’s 2020 report found that the Home Office had infringed its duties under the Equality Act 2020, by not considering how its Hostile Environment policies affected black members of the Windrush generation.

Following the outcome of the EUSS decision, JCWI’s representative, Paul Bowen QC, stated that the refusal to extend the EUSS cut-off date could lead to a second Windrush scandal.

What is the link?

The Home Office Guidance confirms that EU residents without EUSS have only been “tolerated” during the grace period between 31 December 2020 and 30 June 2021, stressing that *“until such time a person obtains pre-settled or settled status, they are unlawfully residing in the UK according to UK law. This does mean that you could face difficulties in exercising rights and entitlements such as accessing services including healthcare, obtaining or switching employment, and **only** obtaining pre-settled or settled status before 30 June 2021 would solve this problem.”* (London.gov.uk)

Accordingly, after the Settled Status deadline of 30 June 2021, any EU citizen or their non-EU family member who has not applied for pre-settled or settled status can be subject to removal. Further still, they will become victims of the government's hostile environment; by virtue of not having the right documentation, these individuals could be at risk of losing jobs, homes, healthcare and even face removal.

Members of the Windrush generation were legally residing in the UK, despite the lack of documentation. This meant that, once the scandal came to light, the government was liable to set up a compensation scheme for those affected by their policy. In contrast, the government has now made it express that citizens who miss the EUSS deadline will lose their legal status. Therefore, in addition to facing the 'Hostile Environment', they could face detention and removal from the UK.

The policies introduced in 2012 had a manifestly disproportionate impact on people of colour. The current post-Brexit immigration policy could also infringe the Equality Act 2020, by disproportionately affecting people with protected characteristics. Particularly during the lockdown period, when vulnerable people have had less face-to-face support, they argued that such individuals may have not managed to make an application yet and would be prejudiced by the longstop deadline. JCWI argued before the High Court that among those affected would be the elderly, children, those with physical or mental disabilities, women in abusive relationships or Roma people. They told the High Court the SSHD has failed to collect enough data to ensure that these vulnerable groups had been adequately encouraged to apply before the deadline. Furthermore, JCWI's investigations showed that the vast majority of people found the process difficult, and the aforementioned groups would likely find it even more difficult, increasing the risk of their applications failing. (Immigration News)

Expressing concern and disappointment at the High Court's decision, Satbir Singh, the chief executive of the JCWI said "[the government] promised all EU citizens would get an automatic right to stay in the UK. Not only have they broken that promise, they have created a scheme which discriminates against older people, disabled people, looked-after children and many others. The government must do the right thing and lift the June deadline." (The Express)

To put these concerns into perspective, on 16 January 2020 it was estimated that 900,000 EU citizens in the UK had yet to apply for settled status (The Guardian). As of 28 February 2021, there have been 5.18 million applications to the settled status scheme. However, the government's own statistics for the period 28 August 2018 to 31 December 2020 show that there was a sharp decrease in applications being made during the first lockdown period in spring 2020 (see figure 1).

The Judgment

Justice Nathalie Lieven found that it was the nature of all application schemes that there needed to be a deadline, noting the Home Office's reassurance that there would be a period of grace for those people who could show that they had reasonable grounds for making a late application. However, the government has provided no further details of how long that period will last, and what they will consider to be a "legitimate" exemption.

The Immigration Team at Payne Hicks Beach is able to assist regarding EU Settlement Scheme applications. We strongly recommend that you apply before the deadline, if you have not already and leave no room for chance. We also suggest that you check in with vulnerable family members to see if they have regularised their status.

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Head of Department by email or by telephone on 020 7465 4300, or alternatively your usual contact in the Citizenship & Immigration Department.
