

asylum matters

Asylum Matters Submission to the Windrush Lessons Learned Review

19 October 2018

Summary:

[Asylum Matters](#) is an advocacy project that works in partnership locally and nationally to improve the lives of refugees and people seeking asylum through social and political change. While we have not worked directly with members of the Windrush generation, we support refugee and migrant communities through our advocacy work. We believe that the hostile environment measures currently in place are one of the biggest obstacles to accessing justice in the immigration and asylum system and this is explored in more detail in our response.

The key points outlined below include:

- The introduction of the 'Hostile Environment' (HE) measures was the fundamental cause of the problems experienced by the Windrush generation. The challenges they faced were exacerbated by a lack of access to legal representation, a complex and hostile bureaucracy, and a Home Office Department driven by Ministerial ambitions to cut migration and enforce returns.
- Hostile Environment policies disproportionately affect vulnerable groups, including asylum-seekers and refugees. Those who do not have easy access to paperwork and passports are most likely to be caught up in HE policies, whether they are lawfully resident in the UK or not.
- The Hostile Environment has a negative impact on public service-providers and the communities which they serve. Expecting front-line service providers to act as border guards will prevent them from serving those with the greatest needs, erode the trust they have built with hard-to-reach communities, and burden already over-stretched workers with immigration-related tasks that they are ill-equipped to carry out.
- The intended recipients of the Hostile Environment measures – the unlawfully resident population – are not part of a homogenous group that fit neatly into the illegal migrant category. Immigration status is often fluid and not all people without leave to remain in the UK will have had access to justice and the chance to regularise their status in the UK.
- Individuals who become caught up in Hostile Environment measures will find it increasingly difficult to regularise their status in the UK, leading to a growing underclass of undocumented and unsupported individuals living on the margins of society.
- Refused asylum seekers who, through no fault of their own, cannot be returned to their country of origin, are currently facing a similar predicament to the Windrush Generation. They are unable to stay and live safely and humanely in the UK but they are also unable to return home, leaving them in a state of limbo and vulnerable to exploitation.

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

We believe that the introduction of the 'Hostile Environment' (HE) which included a series of measures designed to make life difficult for individuals without permission to remain in the UK is the fundamental cause of the problems experienced by the Windrush generation. The stated aim of the

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policy was to deter people from entering the UK illegally, while also encouraging those already here illegally to leave voluntarily. It involved embedding a series of immigration controls into public services and communities, so that employers, landlords, NHS staff and other public servants were increasingly expected to help the Government enforce immigration rules.

The majority of these proposals became law via the Immigration Act 2014 and have since been tightened or expanded under the Immigration Act 2016. With regard to implementing checks in the NHS, the Government also introduced a set of rules known as the 'NHS Charging Regulations' which govern how people access healthcare in England and when they have to pay for it. These were expanded with the Amendment Regulations in 2017 which extended charging into community healthcare services and introduced obligatory up-front charging. In addition, a number of data-sharing arrangements were introduced for immigration enforcement purposes, for example between the Home Office and NHS Digital or the Department of Education.

The impact of these measures on the Windrush generation, the undocumented population, the unlawfully resident population, as well as their communities, is explored in more detail below.

2. What other factors played a part?

Since the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in 2012, legal aid cuts have meant that the legal aid available for immigration cases has been dramatically reduced. Members of the Windrush generation would have been entitled to legal aid before the cuts came into force in April 2013 but with the introduction of LASPO were no longer eligible.¹ While asylum applications are still covered by legal aid, it is important to note that a fall in overall providers has created 'legal aid deserts' meaning asylum applicants are also missing out on vital representation and reach the end of the asylum process without having their protection needs recognised.²

Legal advice is particularly crucial to navigate the complex and often hostile immigration and asylum system, that is often responsible for poor decision-making, another factor that likely contributed to the Windrush scandal. The percentage of immigration decisions being reversed by judges – mostly challenges to Home Office refusals to allow people to stay in the UK – is the highest it's ever been and 50% of all appeals now succeed.³ The Windrush scandal also revealed the impossible burden being placed on individuals to prove their entitlement to be in the UK. This unrealistic standard of proof is also embedded in the asylum system, where there are numerous documented cases of survivors of torture and sexual violence who are not believed despite forensic medical reports detailing evidence of their abuse.⁴

Finally, the public and political discourse on migration undoubtedly impacted on the culture and ways of working within the Home Office. The Government's net migration target and the Home Office's targets for enforced removals will have weighed on the minds of the Home Office case-working teams. As noted by Free Movement, *"Officials are well aware of pressure on the department to meet the net migration target and the political cost to ministers of failing to do so. The net migration target, consistently negative comments on migrants and immigration and constant linkage, to the*

¹ <https://www.ft.com/content/02c95b0e-4d43-11e8-8a8e-22951a2d8493>

² <https://www.refugee-action.org.uk/legal-aid-cuts-july-2018/>

³ <https://www.freemovement.org.uk/half-of-all-immigration-appeals-now-succeed>

⁴ https://www.freedomfromtorture.org/news-blogs/11_07_2018/joint_open_letter_to_the_home_secretary_on_standards_of_proof_in_asylum

point it seems to be subconscious now, between immigration, crime and terrorism, have all contributed.”⁵

3. Why were these issues not identified sooner?

We now know that the cases of the Windrush generation were raised with MPs and covered by the media for months, and even years, before action was taken to address the issue. Home Office officials would be best placed to comment on why this wasn't identified as a systemic issue, rather than one of isolated cases gone wrong, sooner.

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

Hostile Environment policies disproportionately affect vulnerable groups, including asylum-seekers and refugees. Those who do not have easy access to paperwork and passports are most likely to be caught up in HE policies, whether they are lawfully resident in the UK or not. This includes many vulnerable groups such as victims of trafficking, refugees, asylum-seekers, homeless people, the elderly and those with mental health problems. For example, the challenges faced by new refugees as they struggle to move from Home Office support and housing to mainstream benefits have been exacerbated by HE measures. A report by the APPG for Refugees found that the 'right to rent' provisions of the Immigration Act 2014 have led to some refugees finding it harder to rent in the private rented sector as landlords are wary of accepting the documentation that refugees will have.⁶ Those who are still going through the asylum system will also struggle to provide correct documentation and prove entitlement to services, such as to healthcare. Asylum Matters and our partners have extensively documented the impact of healthcare charging and data-sharing in the NHS on the ability of refugees and asylum-seekers to access health services.⁷ We have found these measures have led to confusion around entitlements in the NHS with even those who are eligible for free care being wrongly denied or charged for it, or deterred from accessing healthcare altogether for fear of being charged. It is particularly concerning that the most adversely affected will be the vulnerable, who have little or no understanding of their rights or ability to advocate for themselves and navigate the NHS, particularly without a translator.

The Hostile Environment has a negative impact on public service-providers and the communities which they serve. Expecting front-line service providers to act as border guards will prevent them from serving those with the greatest needs, erode the trust they have built with hard-to-reach communities, and burden already over-stretched workers with immigration-related tasks that they are ill-equipped to carry out. For example, as part of the healthcare charging regime, clinical staff are now involved in making decisions about a patient's eligibility for healthcare as they are expected to make an assessment about the urgency and trajectory of a patient's condition. Not only is it unreasonable and unsafe to task already stretched NHS staff with making these assessments, it can also undermine the crucial relationship of trust between doctor and patient. This erosion of trust is particularly troubling as community-based services, which are often specifically commissioned to reach marginalised communities and individuals unlikely to seek out NHS care, are now also expected to charge for their services. This undermines the vital role they play in safeguarding children and vulnerable adults, and will result in increased health inequalities.

⁵ <https://www.freemovement.org.uk/a-draft-submission-to-the-windrush-lessons-learned-review/>

⁶ https://www.refugeecouncil.org.uk/assets/0004/0316/APPG_on_Refugees_-_Refugees_Welcome_report.pdf

⁷ [Asylum Matters' Response to Formal Review of Overseas Visitors Charging Amendment Regulations, Doctors of the World Briefing On Amendment Regulations.](#)

Hostile Environment policies are discriminatory. Preliminary reports have suggested that BAME and visibly foreign people are more likely to be asked to prove their entitlement to services than white British people. JCWI's report looking at the impact of the 'right to rent' scheme which requires landlords and letting agents to check the immigration status of all prospective tenants, conducted a mystery shopping exercise which found that an enquiry from a British Black Minority Ethnic (BME) tenant without a passport was ignored or turned down by 58% of landlords.⁸ In the public sector, the only way to ensure that eligibility checks do not contravene equality law is to check everyone, which would be time-consuming, costly to administer and frustrating for those saddled with this responsibility. Regular immigration checks would also place an additional administrative burden on the Home Office, to the detriment of their ability to manage the wider asylum and immigration system.

The intended recipients of the Hostile Environment measures – the unlawfully resident population – are not part of a homogenous group that fit neatly into the illegal migrant category. Immigration status is often fluid and not all people without leave to remain in the UK will have had access to justice and the chance to regularise their status in the UK. For example, some refused asylum seekers can have their protection needs overlooked during the asylum process, as a result of limited access to legal advice, difficulty disclosing past traumas to officials, or a lack of documentary evidence to support their claims. Moreover, Home Office decision making can be unreliable and in the last year 38% of appeals received on asylum decisions were allowed.⁹ The percentage of immigration decisions being reversed by judges – mostly challenges to Home Office refusals to allow people to stay in the UK – is the highest it's ever been and 50% of all appeals now succeed.¹⁰

Individuals who become caught up in Hostile Environment measures will find it increasingly difficult to regularise their status in the UK, leading to a growing underclass of undocumented and unsupported individuals living on the margins of society. As seen with the Windrush generation, individuals who fell victim to Hostile Environment measures saw their lives and their livelihoods begin to unravel, as many lost their jobs, homes, savings and were prohibited from receiving benefits and cut off from basic services like healthcare. Many spoke about how the experience led to a deterioration of their physical and mental health which further limited their ability to navigate what some MPs and campaigners have referred to as the Kafkaesque bureaucracy within the Home Office. It is clear that forcing individuals into destitution and cutting them off from society increases their vulnerability and their exposure to potentially exploitative situations. It makes it increasingly difficult for them to regularise their status, which requires the mental, emotional and financial resource to engage with a complex, costly and often hostile process.

Refused asylum seekers who, through no fault of their own, cannot be returned to their country of origin, are currently facing a similar predicament to the Windrush Generation. They are unable to stay and live safely and humanely in the UK but they are also unable to return home, leaving them in a state of limbo and vulnerable to exploitation. A recent report by the British Red Cross looked extensively at the plight of refused asylum-seekers and found that many could not depart the UK for a number of reasons, as some were stateless, others could not obtain a travel document in order to return, and others still had no direct flight routes into their country.¹¹ Given that the option of going

⁸ <http://www.jcwi.org.uk/news-and-policy/passport-please>

⁹ In the last year, 12,571 asylum appeals were received and 11,461 appeals were determined, of which 38% were allowed (4,307). [Asylum Data Tables](#) to Q2 2018, Home Office.

¹⁰ <https://www.freemovement.org.uk/half-of-all-immigration-appeals-now-succeed>

¹¹ <http://www.refworld.org/docid/591965984.html>

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back to their country of origin is not available to this group, and many are not able to prove their eligibility for Home Office support, they are stuck in the UK, in situations of destitution and desperation. In these circumstances, they are also more likely to drop off the radar, which makes it even less likely that they can be returned. It is therefore both ineffective and inhumane to keep these people living in destitution for years with no chance of securing leave to remain.

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

While we welcomed many of the corrective measures put in place, we are not able to offer an assessment of their initial impact as we do not work directly with members of the Windrush generation. However, we are disappointed that there has been no public acknowledgement by the Home Office that there are likely to be other groups experiencing similar challenges as a result of Home Office policies.

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

Asylum Matters believes there should be a number of reforms to the asylum and immigration system and calls on the Government to:

- Commit to a full-scale and independent review of Hostile Environment measures, including of their effectiveness in achieving intended aims, as well as their impact on vulnerable groups;
- Withdraw the NHS (Charges to Overseas Visitors) (Amendment) Regulations 2017 and commit to a full-scale independent review of the 2015 NHS Charging regulations;
- Re-instate legal aid for immigration cases and guarantee that there is legal aid provision in areas into which asylum-seekers are dispersed;
- Offer discretionary leave to remain with a right to work and access higher education in the UK to refused asylum-seekers who are appeal rights exhausted, but cannot, after a period of 12 months, be re-documented, or there is a barrier to return that is beyond their control, and they are complying with the system.
- Properly resource the case-worker system so that it is capable of managing claims efficiently and effectively, without the repeated need for remedial measures to reduce backlogs;
- Ensure that all case-worker staff receive adequate training and support and put in place a performance management regime which rewards accurate decision-making rather than the quantity of decisions made.