Privatisation, 'Mission Creep' and Lack of Home Office Legal Conscientiousness in the Immigration Application Process

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At a glance

In 2005, the Home Office privatised the visa application service. From May 2017, the visa applications customer enquiries service was contracted out, introducing a charge for emails and telephone calls. During 2018, instead of presenting supporting documents at a pre-booked appointment at a British embassy (or outsourced office), applicants had to post documents 'to Sheffield', to an address hidden on a broken website: subsequently, it remains unclear whether, for any given entry clearance post, documents should be presented, posted or uploaded. From November 2018 the Home Office began transferring in-country applications, both immigration and nationality, to online-only, requiring biometric enrolment and provision of supporting documents through a privatised charged-for service. The privatised entities offer additional charged-for services, while applicants not wanting those face a bewildering and often broken chain of 'click-through' web pages. Immigration lawyers' blogs and representative bodies' formal briefings are currently overflowing with strategic and specific criticisms.

However, this is not just another tale of unsuccessful government IT projects, or even risky reliance on outsourcing companies showing diminishing enthusiasm for providing a loss-making 'public' service. UK immigration and nationality law is laid down in statute, in the Immigration Rules and Home Office policies, and in legal cases. Hidden in the transfer of application processes to online platforms and in the transfer of responsibility to outsourced entities are actual, significant, changes in procedures, 'mandatory' information, requirements and documents, not presented to Parliament. Similarly, the new EU 'settled status' scheme relies in part on algorithms applied to HMRC records, not presented to Parliament. Refusals may be susceptible to challenge under *Alvi*,[1] but, beyond the sheer inefficiency inherent in this, the whole shift to a privatised, for-profit application process amounts to a lack of democratic accountability, lack of Home Office legal conscientiousness, and a formal and substantial 'legal distancing' of applicant migrants from a transparent, accessible application process.

1 *Alvi* [2012] UKSC 33, which held that if an applicant could be refused on the basis of not meeting a requirement, that requirement had to be placed in the Immigration Rules and laid before Parliament.

1. Introduction

Since the 1980's Thatcher government, UK immigration policy and practice has increasingly operated on an 'illegal unless proved legal' basis. First, by multiplying the circumstances in which people have to prove their immigration status, and requiring that this be done by producing specified documents rather than permitting holistic, common sense-based decisions, *the burden of proof on an applicant* (not just for their immigration status but for some other public or private good or service) *has in practice to be satisfied to the legal standard of 'beyond all reasonable doubt'.* This applies not just to unlawfully-present migrants (the ostensible target) but to those lawfully present. Secondly, the outsourcing of immigration enforcement to other public bodies, private entities and private individuals has *legally distanced* migrants from decisions made about them. For example, the Home Office may inform an employer or landlord about someone's status (maybe erroneously) without the migrant herself being a party to that process[2] and thus having no remedy if a mistake has been made.[3] Thirdly, the imposition of stricter requirements and significantly higher application fees, the lengthening waiting time for applications and appeals, the prevalence of Home Office caseworking and record-keeping errors, lack of caseworker discretion and common sense, and the lack of legal aid (as well as an unfortunate Supreme Court definition of 'precariousness'[4]) have combined with those other trends to prevent many unlawfully-present migrants from successfully making meritorious applications to remain (thus *perpetuating illegality*), and making it difficult for many lawful migrants to renew their leave, thus *creating illegality.*[5]

The scale of the problem, and the scale of the lack of legal conscientiousness on the part of the Home Office, can be seen by contrasting the application regime for non-EU migrants with that introduced for EU nationals in advance of Brexit. First, uniquely in the history of migrants' applications to the Home Office, the EU Settlement Scheme was subject to two separate trials for specific groups of EU nationals before being opened to all applicants, the results of which were formally considered and acted on. More importantly, for EU nationals, the *legal intention* is to grant status, (effectively adopting a shared burden and lower standard of proof) as well as explicitly renouncing some of the controversial requirements of the EEA Regulations;[6] and the *political intention,* backed up by significant resources, is to ensure that no one gets left behind, for fear of another 'Windrush' debacle.

The EU Settlement Scheme is intended to provide clear legal status to the around three million EU nationals and their family members currently living in the UK. In comparison, for the **over 3m visa applications and 130,000 citizenship applications made every year to UK Visas and Immigration**, the privatisation of visa application centres (from 2005)

2 From April 2018 the Home Office has provided access to this 'service' for migrants themselves, *but only if they already hold a biometric residence permit or EU settled status.* So my client, granted ILR in 2010 without receiving any papers, has since then had the right to work, in law, but has been treated as an unlawfully-present migrant since 2005.

3 We can, and do, threaten the HO with judicial review, but this cannot injunct the employer to employ the person or not dismiss them.

4 *Rhuppiah* [2018] UKSC 58; Richard Warren, 'Private life in the balance: constructing the precarious migrant' (2016) JIANL 124.

5 From my submissions to the Windrush Lessons Learned Review, drawing on my paper: The 'hostile environment' – how Home Office immigration policies and practices create and perpetuate illegality (2018) 32 JIANL.

6 Immigration (European Economic Area) Regulations 2016, in particular regarding the need for comprehensive sickness insurance and the treatment of gaps in enjoyment of Treaty rights.

and the rapid move to online application forms for applications from within the UK (from mid-2018) have been carried out with no published 'statement of intent', no trialling and only imperfect post-hoc lines of communication from applicant groups to those in the Home Office designing the process.[7] This has intensified the two processes of 'legal distancing' and 'creating and perpetuating illegality'. This is important even for EU nationals obtaining settled and pre-settled status, because once EU nationals and any non-EU family members cease to be protected by their separate scheme, they too will be subject to the hostile legal form and content of UK immigration control. A recent ICIBI inspection into Home Office approach to illegal working noted a Home Office 2014 estimate that 500,000 people might be in the UK lawfully but do not have a biometric residence permit (obligatory for non-EU and non-UK citizens since 2008), of whom only 90,000 have since applied for one.[8] Those remaining are all subject to the 'hostile environment.'

Last year's Home Office Annual Report[9] says:

> 'Most customers in the UK and overseas applying for visas or extensions of stay can now apply online, with the roll out of online applications due to be complete by Summer 2018 …'

And after much praise for the success and popularity of HM Passport Service, the report says, damning with faint praise:

> 'UK Visas and Immigration received positive customer satisfaction scores in 2018 and its Customer Service Excellence accreditation was renewed for a further three years.'

Maybe those dealing with super-premium applications from business are satisfied with their particular online and privatised service.[10] But, for those EU nationals and their families intending to remain in the UK after Brexit, it is the experiences of the average work or family migrant, and those resident here for some time but facing difficulties meeting the immigration rules, which will be more relevant. Using a comparison with the EU Settlement Scheme to show 'what can be done if we try', this paper presents a brief evaluation how the practical and legal problems of the new online procedures for non-EU migrants further distance applicants from achieving the rights and entitlements[11] set out in the law and the Immigration Rules. I then give a brief update on the progress of the EU Settlement Scheme and conclude that without big changes all migrants will continue to suffer from the lack of legal conscientiousness of the Home Office.

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7 This lack of forward planning and lack of involvement of applicants' stakeholders is completely standard – see part 4 of the paper.

8 ICIBI *An inspection of the Home Office's approach to illegal working August-December 2018* May 2019, para 14.5.

9 Home Office *Annual Report and Accounts 2017–18* HC 1136 19 July 2018. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727179/6_4360_HO_Annual_report_WEB.PDF accessed 7 November 19.

10 Though applicant lawyers' blogs suggest that even super-premium applicants have faced significant problems with their service.

11 I am using the phrase 'rights and entitlements' precisely to refer to benefits and legal statuses available by applications through law-governed administrative schemes, such as social housing, social security benefits, as well as rights and statuses under immigration and nationality law.

2. Two telling cultural and political differences between the EU Settlement Scheme and the regime applying to non-EU nationals

The EU Settlement Scheme Statement of Intent, as quoted in the ICIBI report *An inspection of the EU Settlement Scheme Nov 2018–Jan 2019*,[12] stated that the Home Office wished to take the opportunity to develop a fresh culture in this new business area, one that reflected the aim of 'looking to grant, not for reasons to refuse'. Both that inspection report and the subsequent Home Affairs Committee (HAC) report[13] noted that part of the success of the two trials of the new scheme, and of the functioning of the full scheme so far, must be due in large part to there being relatively good levels of staff resources, with high morale. 'Everyone said that they were committed to providing a world class customer service' and were clear that the aim was to ensure that the decision the applicant received was 'right first time'.[14] The Home Office clearly recognise that to achieve such a culture requires significant additional resources as well as a change in attitude. For example, for those applicants for whom the standard HMRC and DWP checks did not show 5 years' residence, Home Office caseworkers were permitted (ie, afforded the time) to exercise discretion in favour of the applicant and would not refuse an application for lack of documentation before attempting to contact the applicant to assist them find additional information.[15] In relation to vulnerable applicants, again the Home Office recognised that these would need extra resources, and has agreed to provide funding 'of up to £9m' for voluntary organisations to assist such applicants.[16] However even the level of resources and planning so far provided has not resolved all issues, and the Home Office has been urged to make further funding available to assist with vulnerable groups, as well as paying for travel to document scanning locations, help with fees, etc.

But underlying all this trialling, concern and preparation is a clear political aim to ensure that all eligible EU nationals and their family members do make a successful application under the scheme, so as not to be left without status – explicitly attempting to avoid a new 'Windrush' scandal. In other words, the Home Office appears to be adopting a shared responsibility for the stability and security of status of EU nationals and their families, into the future (though it is troubling that the then Home Secretary, in his responses to the HAC,[17] did not seem truly to appreciate the difficulties caused by the 'hostile environment').

This is completely different to the various regimes governing applications for entry visas and for leave to remain. The high-level position of the Home Office towards non-EU migrants is that while they might choose to come to the UK, their motives for coming are always suspect and so must accept that their presence in the UK is fundamentally temporary and must be strictly policed. This in turn rests on explicit but not wholly compatible policy positions:

a. **Reducing net migration to the tens of thousands** (without any measures to encourage emigration other than the 'hostile environment'). This, in a climate of significant cuts in

12 ICIBI *An inspection of the EU Settlement Scheme November 2018–January 2019* published May 2019.
13 House of Commons Home Affairs Committee EU Settlement Scheme Fifteenth Report of Session 2017–19 https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1945/1945.pdf page 17.
14 ICIBI ibid para 6.13.
15 ICIBI ibid para 6.39, 6.45–48.
16 ICIBI ibid para 6.51.
17 HAC EU Settlement Scheme fn13 page 17.

Home Office staff, has inevitably led to a tick-box consideration of applications,[18] which are refused once the first unmet requirement is reached;

b. **Admitting labour migrants from outside the EU**, aimed at attracting 'the brightest and best', but imposing a no-discretion regime with refusals for small evidential problems, **while diminishing rights to family reunion and settlement**. Now these migrants are subject to the Supreme Court declaration that all non-settled migrants are 'precarious';
c. **Admitting family migrants of British and settled people**, also labelled as 'precarious', facing steep financial requirements and long routes to settlement with repeated loan-shark levels of application fees;[19]
d. **'Welcoming genuine refugees'**, for whom the stated stance is 'integration' while every immigration measure militates against this, including lengthening the qualifying period for settlement, introducing 'active review' and providing very limited family reunion;[20]
e. **Subjecting unlawfully-present migrants to the 'hostile environment'**, a hopeless as well as cruel quest in relation to at least the first 4 following groups of people (many of whom are in 'mixed families'):[21]
    i. People who have had leave to remain, and who would be entitled to extend it, but who can't afford the fees
    ii. People who arguably fit into the immigration rules but who cannot access legal advice and therefore make a flawed application or none;
    iii. Failed asylum-seekers and others who cannot be documented and therefore cannot 'return home'
    iv. Failed asylum-seekers who feel with good reason that their country is still dangerous (regardless of what any country guidance cases have decided) and decide that even the 'hostile environment' in the UK is better than what they would face at home;
    v. [A residual of straightforwardly unlawfully-present people with no asylum or human rights claim – who cannot be identified accurately by any of the hostile environment measures].

For all migrants in all of these categories the burden of proof falls squarely on the applicant, which is the *legal* basis for the 'culture of disbelief', since it permits Home Office decision-makers to assert propositions on the basis of no evidence ('he has got family in Kabul who will meet him at the airport and take care of him') and forces applicants to prove negatives (such as 'I haven't left the UK since I made my asylum claim 19 years ago'; 'my marriage is not a sham marriage'; 'I don't intend to overstay my visit visa').

18 Past ICIBI inspections of processing of visa applications revealed that entry clearance officers have 15 minutes to spend on each application – which may include hundreds of pages of original documents as well as an application form.

19 See my article cited at note 2- the total fees for a spouse and 2 children on the 10-year route to settlement at today's fees amount to more than £31,000, requiring a family of 4 to save over £250 pcm for 10 years, with no recourse to public funds.

20 Recent Home Office publications on integration concentrate on education and community involvement, etc, while entirely ignoring the consequences of these immigration procedures: see for example *Home Office Indicators of Integration framework 2019* third edition. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835573/home-office-indicators-of-integration-framework-2019-horr109.pdf accessed 7 November 2019.

21 For example, one parent settled, the other unlawfully present, one baby born British, two teenagers unlawfully present, entitled to British citizenship but unable to afford to register.

3. For non-EU applicants, the precise rules applying to an applicant are effectively hidden from them

The paradigm of good public administration for public authorities dealing with millions of applications for rights and entitlements set out in law (such as social housing, state benefits, immigration status) is that a prospective applicant:

1. Can easily and accurately locate the law and rules which apply to their situation, and then:
2. Is directed to clear instructions on:
   a. how to make the application
   b. what further steps once the application is submitted
   c. what to do when it is granted
   d. what further remedies if refused;

The Home Office immigration operation has for decades failed in all these requirements. Many NGO reports and numerous judicial pronouncements[22] formally criticise the legally dense nature of immigration statutes and the immigration rules, and accept that the law facing migrants is not transparent or easy to navigate even for lawyers. A Home Affairs Committee report from 2005 notes the criticism of the Independent Monitor of Entry Clearance Applications with No Right of Appeal: because the Immigration Rules are not clear, and separate published requirements are different, and also not clear, refusals often amount to saying: 'What you are doing is not something someone of your sort of background would do normally, therefore you must be up to no good'.[23] Since then there have been 104 Statements of Changes in the immigration rules,[24] and this lack of clarity has intensified. The Home Office effectively separates its attempt at customer-facing communication from the law and rules which apply. If you click on Visas and Immigration you arrive here: https://www.gov.uk/browse/visas-immigration which purports to set out the requirements for different types of applications. However, once having reached a heading such as 'Family visa, apply, extend or switch' what is set out there is just a summary. There is no reference to the relevant immigration rules, or even to the fact that there are 'immigration rules'. An applicant has no warning about how crucial it is to follow every single requirement to the letter, in particular the financial requirements set out in Appendix FM-SE.

Thirdly, on that 'customer-facing' website there is no reference to the general requirements in the rules such as what is required for a valid application, what are the general grounds for refusal, etc. There is a more formal UK Visas and Immigration website: https://www.gov.uk/government/organisations/uk-visas-and-immigration, but even here the full Immigration Rules are now hidden in the 'operational guidance' section, along with the 'fees and forms'.

For years the paper application forms contained questions whose import cannot be known without reference to the relevant Immigration Rules. For example, the question 'have

22 For example, *Alvi* [2012] UKSC 33, para 11 (Lord Hope); Lord Taylor of Holbeach *Hansard* HL Vol 555, Col 1087 (12 December 2012).

23 Fiona Lindsley, Independent Monitor of Entry Clearance Refusals Without The Right of Appeal from December 2003 to November 2005, cited in House of Commons Home Affairs Committee HAC 5th report 2005–6 *Immigration Control* 23/7/2006 https://publications.parliament.uk/pa/cm200506/cmselect/cmhaff/775/77503.htm.

24 All the Statements of Changes since 1994 are accessible and listed here: https://www.gov.uk/government/collections/immigration-rules-statement-of-changes as at 7 November 2019.

you ever been required to leave the UK?' applies to anyone who has been refused leave, as the refusal letter says: 'you are now required to leave the UK' (unless there is a right of appeal, etc). But most people would think this refers just to enforced removal or deportation. The question 'have you left the UK voluntarily?' applies to people who have overstayed but left before enforced removal, possibly with fares paid by the Home Office. Answering these wrongly is classified as 'deception', which can lead under part 9 of the Rules to mandatory refusal and a re-entry ban.

4. Changes in rules and procedures are explicitly introduced with no or little warning

The Home Office has for some time deliberately introduced changes with no or little warning, to prevent a rush of applicants before new restrictions or mandatory procedures are brought in. Notable examples are: the 26 January 2015 requirement for fresh asylum claims to be presented in person in Liverpool (suspended pending a judicial review from Liverpool City Council);[25] the 2011 requirement for new asylum-seekers to telephone the ASU for an appointment;[26] the entire 9 July 2012 new family migration rules: and, most recently, the many different changes associated with the move to privatised online application processes. The 2018 move to online application procedures was so little heralded that the only way an applicant or their representative knew to use the online procedure was by finding that the paper form had disappeared from the Home Office website.

5. The content of the new online forms, and the application requirements, are effectively hidden from the applicant

When applications were made on paper, the UK Visas and Immigration site provided a list of forms from which each form could be printed out, and each form stated what type of application it was and was not to be used for.[27] For each form there was a separate Guidance document, advising how the Home Office would consider each part of the form. The printed form included the address to which to send the form, the fees, and what documents to send with it. Now, once an applicant chooses an online form from the list, there is no preamble explaining what the form is for, nor any checkbox confirming what 'route' the person is applying on. There is no separate guidance, and the injunction to 'check your eligibility' just takes an applicant back to the 'customer-facing' page – still no mention of the Immigration Rules, nor, in particular, of the various and complex ways in which the Rules purport to deal with art 8 ECHR. And an applicant cannot print out or otherwise gain access to the whole online form before starting to complete it. So it is not possible to see the exact questions being asked before embarking on a specific application; every question in a section must be completed before you can move on, and

25 Sheona York *Fresh Claims for asylum since Rahimi: legal consequences and procedural barriers* 2015 – Kent Academic Repository.

26 ILPA *Making an asylum claim* Information sheet 15 August 2011; letter from Home Office to ILPA 10 February 2012 replying to criticisms about the screening process.

27 I intend no praise for the paper form system. Individual forms would be withdrawn with no notice and no explanation of what to do in the meantime; around two years ago the 'family life as a partner – ten-year route' form changed three times in around two months.

the relevant fee must be paid before reaching the stage of knowing what to do after submitting the online application.[28]

6. Mission creep – the requirements set out in the application forms do not match, and often go beyond, the requirements of the relevant rules

In any system of administration of rights and entitlements there will inevitably be a conceptual gap between a specific legal requirement and the route taken by an application process to ascertain whether an applicant meets that requirement. If an applicant must be a child, it is simple to see if they comply – just ask their age. But it is not obvious that a requirement such as 'being in a genuine and subsisting relationship' would be demonstrated by providing a bundle of official letters addressed to a couple at their address. Even during the long reign of paper forms, the Home Office engaged in 'mission creep' by revising and reissuing new versions of the forms with little or no notice, in which there would be one or two unannounced and subtle changes in how a question or group of questions were asked, giving rise to fears that behind the changes in the form lay an unheralded change in Home Office policy. But, with the paper forms the questions could be checked in advance, so that an applicant would know what questions they had to answer, and it was possible, by studying the various Guidances, to see how a set of questions related to a particular set of requirements of the Rules.

In contrast, the online forms ask questions not previously on the paper forms, often bearing no apparent relation to the application in hand. For example, the form SET(P), for refugees applying for indefinite leave to remain after 5 years' refugee leave, asks questions about what friends, family and social or cultural connections they still have in the country they fled from. Now the requirements of the Immigration Rules for indefinite leave to remain for refugees, at para 339R, are very simple: five years' leave to remain as a refugee and (briskly) no criminal convictions. Two separate sets of Guidance[29,30] (which as we know does not form part of the Rules[31]) state that (since March 2017) an applicant will face a 'safe return review' on application for indefinite leave. But that does not require a restatement of their asylum application, and in any event such a review must by law be a high-level consideration, with UNHCR Guidelines in view, of the objective evidence about risk on return to that country. It cannot be relevant, let alone determinative, whether an applicant has kept up with her friends or other social, cultural and religious life in her country of origin. These types of questions are similar to those asked of applicants relying on their art 8 private life in the UK, or to support submissions that an applicant could not reintegrate back into their country of origin. Thus their presence on a form for refugees looks like Home Office preparation for refusal, in which they would state 'you say you still have good links with your church back home …'.

Spouses and partners now find themselves obliged to disclose details of all their children, whether in the UK or not, whether part of the household or not, whether applying for leave

28 Even an adviser making numbers of applications won't necessarily know all the questions on the form, since the progress of the form and the questions asked depends on previous answers.

29 https://www.gov.uk/government/publications/settlement-protection-asylum-policy-instruction.

30 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/597990/Refugee-Leave-v4.pdf.

31 *Alvi* [2012] UKSC 33.

or not; even where British. Faced with setting out details of my client's husband's several grown-up children from previous marriages, all British, all married and with children of their own, some older than the applicant, we ticked 'no children' and explained in an accompanying letter. But, anxiety remains about the purpose of these questions (bearing no relation to the requirements in the Rules – is the husband supposed to do without his spouse just because he has children?) – and if this had been a fee-paid application would we have had the courage to refuse to answer?

Unlawfully-present applicants, especially in families where no one has leave to remain and are sofa-surfing with tolerant but fearful friends and relatives, on answering 'I neither own nor rent my home', are faced with requirements to provide 'proof of the property owner of the property you live in …' 'copy of an ID document of the person whose property you live in'. There are two issues here. First, many unlawfully present applicants will not be able to provide this information, whether from the reluctance of their generous hosts or from simply not knowing the identity of the owner of the property they are staying in. On the working version of the form, which you can print out as you go, there are some caveats about these requirements, which disappear once that part of the form is saved, and cannot be retrieved. However, in completing the online form, the applicant must tick to say they will provide such information, and sign a declaration to this effect, before they can complete and submit the application. There is in general no way of saying 'I don't know' or 'I am sorry but I can't provide this' on the online form, and so applicants signing as to the correctness of applications find themselves having to promise to produce documents they don't possess, or make up dates which they cannot provide, etc with no place *in the form* to provide explanations.[32] In that particular example it is hard not to suspect that the purpose of obtaining information about the property owner is to be able to pursue them for allowing an unlawful migrant to live in their property.

In relation to all this it should be remembered that these applicants are applying *for a right or entitlement provided for in the Immigration Rules.*

7. Privatisation and 'legal distancing'

I have argued elsewhere[33] that outsourcing must inevitably provide a worse service, since profit is being extracted from a contract awarded to the lowest bidder, by a public authority attempting to save money from providing an in-house service. Just as bad, the interpolation of a private entity between an applicant and the Home Office effects a *legal distancing* of that applicant from any legal remedy. Caselaw is clear that, where a public body has a specific duty or function which is outsourced to a private entity, the public body continues itself to owe the duty to the applicant, so long as the applicant qualifies for the service.[34] But the ability of an applicant to achieve an appropriate remedy in any case where a public body has failed in a duty of care, or to administer an application process correctly, is dependent on there being properly-kept records of transactions and proper complaints procedures correctly followed. Reports on the private administration of Yarls Wood prison, and on the outsourcing of the provision of asylum support, (among other immigration-related services) show that one of the important effects

32 The stupidest example of this is that even on the statelessness leave application form an applicant must state their nationality – and there is no box for 'none' or 'disputed' or 'doubtful'.

33 S York, *The unravelling of 'administrative justice' in immigration and asylum*. In: Society of Legal Scholars Annual Conference, 1–4 September 2016, University of Oxford. (Unpublished) (access via Kent Academic Repository).

34 ibid, cases fully cited.

of outsourcing to a cheap contract from which profit is extracted is that the resulting cuts in staff time, lower morale, poor office procedures and inadequate office equipment all reduce an applicant's ability to collect the evidence to show the mistreatment or other breach in provision of the 'service'.

These problems have for some time affected applicants for visas from overseas. With the introduction of online applications these issues are now affecting UK-based applicants applying for further leave to remain. I look at these in turn.

a. Applicants from overseas

For some years overseas applicants for visas have in many countries ceased to be permitted to enter the relevant British Embassy, but must make their application through outsourced private companies, first making a formal application online then booking an appointment to present supporting documents both from the applicant abroad and couriered expensively from sponsors in the UK. Allegations of corruption and incompetence, complaints about missing and lost documents, have been made. From 2013, the Home Office has provided a charged-for telephone and email service where you can ask questions about your lost documents or half-completed application. Using this email service, once you have entered the applicant's details into an email and described the problem, you receive an email reply in tiny writing stating that your complaint will be 'escalated' and asking for the same information over again. This service suffers from the very widespread malaise affecting all call centre services, which is that the staff work to a script and either must not, or are not well-enough trained or of high enough quality, to divert from the script to ask natural follow-up questions and use common sense, because they do not see their function as *resolving the applicant's problem.*

Earlier in 2019, the Home Office, precipitately, it now seems, decided that an applicant's bundle of original documents had no longer to be presented to the outsourced entity in the foreign city, but to be sent direct to an address in Sheffield. In many cases this was not clear from the (privatised) online site, and people have brought their documents to their overseas visa office only to be told to post them, or posted them to the UK, only to be told they should have brought them. Some of the privatised sites' links to the Home Office address were broken. Then, the Home Office changed the procedures again, (and not at the same time with respect to every country) requiring that the documents had to be scanned and uploaded, and again the instructions were hard to find, and weblinks were often broken.

All of this is evidenced in the hundreds of emails shared over the last few months on the various applicant representatives' blogs: 'I have just made an application in Pakistan for a client: where do I send his documents? The website says Sheffield but gives no address'. 'I tried on [outsourced service X] to upload my client's documents and the system crashes repeatedly, and my client's visa has now expired …' At the same time, the overseas outsourced entities apparently offer such services as luxury cars and a 'health concierge' – to assist an applicant to keep calm in the face of administrative incompetence?

In September, the UKVI announced a 'document reduction pilot' for spouse and partner applications made under Appendix FM.[35] This has begun at 6 visa application centres in India. In response to the complaint that '*customers often tell us that it is difficult to be sure which documents*

35 Minutes of meeting between ILPA and Home Office 30/7/19 Reported by Ghersons Immigration https://www.gherson.com/blog/document-reduction-pilot-appendix-fm accessed 7 November 2019.

to provide in evidence of a settlement visa application', UKVI has given a list of what they do not want to see:

> 'greeting cards, phone cards, letters from friends, call logs, money transfers, wedding receipts or invitations, USB/DVD's and newspaper clippings. Limited evidence of WhatsApp and social media will be accepted and a limit of 10 photographs is being introduced.'

However, the real issue is not confusion over which documents to present, rather the very demanding burden of proof on the applicant to show that they meet the requirements of the Rules, especially that they are in a genuine relationship with the sponsor. Most legal representatives may have advised submitting any or all of the items listed above, depending on the facts of a particular case. Preventing applicants from providing a particular type of evidence will limit their ability to discharge the burden of proof, and would arguably amount to a change in family migration law. In a meeting with ILPA discussing a wide range of immigration application issues,[36] the Home Office were urged to rethink the rules about genuine and subsisting relationships, rather than curtailing the presentation of evidence. In response to ILPA's concerns, UKVI has agreed that applicants may submit additional documents – but there is no guarantee that these would reach the desk of the decision-maker.

b. Applicants inside the UK

The new online system was launched rapidly in November 2018 along with a £91m contract[37] let to a French company Sopra Steria to run a number of locations where applicants would, by appointment, attend to enrol their biometrics and bring their supporting documents to be scanned. The benefits were said to be that applicants would not have to send their documents away, in particular their ID and passports, and the Home Office would not have to be responsible for storing valuable original documents for millions of applicants. However, for the applicants this means longer journeys as biometrics can no longer be enrolled in main post offices in most towns, but only in these Sopra Steria offices, where they have to pay, or in the offices providing a free service (only 6 in the whole of the UK). Already the system has collapsed more than once, with 'no appointments being available in Manchester' for some time, with Sopra Steria not expecting people even where they have an online appointment; with Sopra Steria refusing to deal with people with no ID even where the very point of the application is to obtain formal documents (for example where a person has lost their biometric residence permit); charging money for the appointment for people who have been granted fee waivers because they cannot afford the application fee, etc. Complaints have been made that Sopra Steria (and the other outsourced visa centres abroad) are more concerned to offer charged-for ancillary services such as 'safely couriering your documents back to you' rather than carrying out the basic tasks properly. The blog *Free Movement* reported complaints that Sopra Steria had either itself outsourced biometric enrolment to yet another company, or that another private company had block-booked biometric appointments to sell on for a profit.[38] In July, Sopra Steria announced

36 ibid.

37 https://www.independent.co.uk/news/uk/home-news/home-office-immigration-croydon-queue-sopra-steria-a8867706.html accessed 8 June 2019.

38 Darren Stevenson: *The absolute state of the UK visa application system* Free Movement blog 2 May 2019.

that they 'were no longer subcontracting immigration [advice] services to BLS International: "this means that there should no longer be advertisements for BLS International or World *Migration Services* on the UKVI 'customer journey'".[39] UKVI are also discussing with Sopra Steria the issue of limiting applicants' documents for in-country applications.

Similar 'mission creep' has affected citizenship applications for children. On 22 March 2019, the paper forms were withdrawn from the Home Office website, and the Home Office announced that these applications had to be made online. There is no legal authority for this.

As with the online immigration application process, the move to online applications effectively changes the law: the online form demands production of a passport or other photo ID – where children applying for British citizen by entitlement do not need these, only a birth certificate and evidence of residence. Some of the applicants are new-born babies holding no documents. Some children applying for citizenship by discretion faced being prevented from applying before their 18th birthday simply because they do not hold such documents and are not always able to obtain them.

A letter sent to immigration minister Caroline Nokes stated:

> 'The email updates containing this representation … suggest [that] a profound procedural change has been made overnight with no warning …'[40]

c. The online process has added to an applicant's *legal distance* from their access to such right or entitlement in the following ways:

(1) Until an applicant has completed the whole form and paid the fee, they cannot see a clear, step-by-step explanation of what they must do, where, and when, or a clear price list.[41] Thus the Home Office has not only outsourced the procedure, but distanced the applicant from the information they need *before* they can make a well-argued application.

(2) From the moment of submission via Sopra Steria until the HO refusal, there is no Home Office contact point or formal way of intervening. Thus an application may be refused, or rejected, or even not successfully made, on the basis of decisions made by the outsourced entity. Applicants do not have access to their algorithms or other caseworking procedures, and thus, even if a JR of the Home Office is theoretically available, they cannot obtain the necessary information.[42]

8. Home Office responses

The following message, circulated widely on 7 June 2019 by the Immigration Law Practitioners Association (ILPA), speaks for itself:

> 'ILPA and the Law Society are meeting with the Home Office lead on Entry Clearance (Tom Greig) on the 25th June 2019. We are also close to fixing a date to meet with the

39 C J McKinney: https://www.freemovement.org.uk/sopra-steria-terminates-controversial-immigration-advice-service/ accessed 7 November 2019.

40 Letter 22 March 2019 from Project for the registration of children as British citizens (PRCBC).

41 The Sopra Steria website says, 'prices from …' and all shoppers know what that means.

42 It is now possible to make a complaint to Sopra Steria about a technical glitch, such as their using the wrong email to contact our client, but the telephone calls and emails to their complaints procedure are chargeable.

new lead on Front End Services (George Shirley). We need evidence and examples from members to help us prepare for those meetings please.

The general categories we are looking for evidence for across all sections are as follows:

1. Non-functionality of upload services / technological issues (such as crashes, browser compatibility issues etc)
2. Non-functionality of application forms (such as out of date or poorly phrased questions)
3. Inability to secure appointments at visa application centres or biometric centres
4. Inappropriate upselling of additional services
5. Communication issues (e.g country inconsistencies, contradictions with the Rules, Home Office and the portals, insufficient, contradictory or wrong information about where to send documents)
6. Inappropriate provision of legal advice (from centre staff or VFS etc)
7. Incorrect specification of documents
8. No route of redress
9. Legal advice issues: WMS and VFS, accreditations, cold calling etc'

Further ILPA feedback records and responses from the Home Office during July have continued with the same complaints plus further issues:

10. Insufficient appointment; not enough centres *["62% of applicants are within 25 miles, 78% within 50 miles"* – the free appointments are very hard to get, and families end up paying significant money, taking children out of school etc]
11. Being asked substantive questions by Sopra Steria staff at biometric appointments
12. Not being allowed to submit a covering letter of legal representations, or a full file of relevant documents (essential where an application depends on art 8, etc) [This recognised by the HO to be incompetence on their contractor's part]
13. No clear published fee structure; charging to scan documents, so what is the basic fee for?
14. A particular form allowed for an application to be formally submitted before it had been completed [SET(P) for ILR for refugees]
15. Glitches between the fee waiver application and the main application.'

I have written elsewhere about the malign transformation of 'applicants' into 'customers' in the minds and public vocabulary of governments and managers of public bodies. However, regardless of whether any particular migrant has a 'choice' whether or not to come to or remain in the UK, in relation to the application process *they have no choice.* That is why Amber Rudd's comment[43] about making an application being as easy as setting up an LK Bennett account was so wide of the mark. If LK Bennett's online shopping portal was as bad as the Home Office or its Sopra Steria and other outsourcing partners, no one would shop there, whereas a person applying for a public right or entitlement must apply to the Home Office – and so is in no way a 'customer', but always and only an applicant.

43 Guardian 23 April 2018, referring to the EU Settlement Scheme.

9. Shift of the burden of public administration from the State to applicants and their lawyers

Apart from the sheer waste of time and money involved for applicants and their lawyers in navigating through this poorly-set up system, this is a further example of an un-trialled and poorly-designed system being foisted on the public. Then, in order to improve *our* service to *our* clients, applicant lawyers and our representative organisations and relevant NGOs are then obliged to put time and effort into collecting responses, writing briefing papers, holding meetings with the Home Office, publicising their responses – a further level of outsourcing in that we are expected to improve their administrative processes for them. It is clear from the Home Office's reports about the EU Settlement Scheme that this neglect of the non-EU immigration application process is a policy choice. It is notable that many of the comments come from university Highly Trusted Sponsor staff, who are dreading how the system will cope nearer to the beginning of term.

10. Assessment of progress under the EU Settlement Scheme

By 16 July 2019, the total number of applications received under the scheme was over 950,000, with over 850,000 granted status.[44] Both official reaction (as shown in the Home Affairs Committee report in May[45] and reports from lawyers, NGOs and academics[46] shows a mixed reaction to the basis of the scheme and to the application process. The overarching decision to implement a constitutive scheme (in which those eligible must make an application, rather than simply being declared to have the relevant legal rights) has been criticised, and anxieties raised about those who do not apply before the deadline, especially if there is a 'no deal' Brexit. However one might say that those issues are no different from those faced by non-EU migrants, on whom lies the same individual burden to make the relevant immigration application, in time and in the proper way). The progress of the scheme has revealed that despite the *political intention* to include everyone, and the *legal intention* to grant status, difficulties have emerged which are similar to those facing non-EU migrants – of 'mission creep', of 'legal distancing' and the potential of 'creating illegality'. For the many applicants who do not have simple national insurance and tax records, 'things quickly spiral into being immensely complex'. It is feared that many people are being granted pre-settled status wrongly, on the basis of the way the HMRC algorithms work.[47] Records on child tax credit, working tax credit and child benefit are held by HMRC and directly accessible to the algorithm, while records on housing benefit, ESA, DLA, PIP and Universal Credit are held by DWP and are not part of the algorithm. When these records are interrogated, an applicant receives fewer 'residence credits' (my term) from those latter benefits. One month's pay on PAYE leads to being counted as resident for that year, while

44 House of Commons Home Affairs Committee (HAC) *EU Settlement Scheme* Fifteenth Report of Session 2017–19 https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1945/1945.pdf accessed 7 November 2019.

45 House of Commons Home Affairs Committee (HAC) *EU Settlement Scheme* Fifteenth Report of Session 2017–19 https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1945/1945.pdf accessed 7 November 2019.

46 City Law School University of London conference *Brexit's effects on Citizens, Human Rights and Immigration* 11 June 2019, at which I gave an earlier version of this article).

47 ILPA published a research paper in January 2019 on the Home Office legal duties in relation to algorithms used in decision-making file:///C:/Users/sfy/Downloads/EU-Settled-Status-Automated-Data-Checks-ILPA-Research-Piece.pdf accessed 7 November 2019.

11 months on Universal Credit gives only *one month's* residence for that year. This suggests that certain types of applicant are being privileged.[48] Applicants who were not the main applicant on a benefits claim, and applicants who can prove a period of five years' residence, which are not the most recent five years, but find that the earlier years are excluded from the algorithm, were also in danger of being wrongly granted pre-settled status.

Secondly, there is evidence that significant groups of EU nationals and family members will not be drawn into the scheme: travellers and others with no or limited documents, third country nationals separated and/or estranged from their EU family member, vulnerable people such as those lacking capacity, children in care, trafficked people, those in prison or detention, street homeless, those in closed religions, those in patriarchal family groups. Others, such as those with dual EU and other nationality such as Somali/Dutch, Sudanese/French citizens, and long resident EU nationals, may simply not engage, as don't work, don't travel, don't drive, etc and just may not see the point.[49] It is still not yet known what is happening in relation to those with criminal convictions, and it is suspected that those are being shunted off into the Criminal Casework Directorate for decisions to be delayed until after Brexit, so that applicants will no longer have the protections against deportation provided by EU law.

In response to the HAC criticisms of the scheme, the Home Secretary has asserted that 'The "correct" immigration status is the status for which the applicant demonstrates they qualify'.[50] This formulation is effectively what led to the Windrush debacle, in which the 'correct' immigration status *demonstrated* by the Windrush people, citizens and settled, was that they were unlawful, since they had none of the relevant documents.

Conclusion: effect on attitudes to lawyers and respect for public sector decision-making

During the period of the Legacy,[51] hundreds of thousands of asylum-seekers waited years for decisions, and, in despair, shopped around from one lawyer to another in the hope of finding someone who could resolve their case. Precisely because of the capricious nature of the process, the difference between good and bad advisers began to blur. There is a danger that the essentially capricious nature of application procedures for non-EU migrants both from outside the UK and inside will have a similar effect. The opaque process is leaving solicitors and advisers ignorant of the procedures and any new 'requirements', so clients cannot be advised confidently, leading applicants to shop around, pay stupid money, make unmeritorious application, and fall into or remain in the hostile environment. If these problems are not solved *for all immigration applications,* eventually EU nationals and family members may face the same issues in future.[52]

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48 From address by Paul Erdunast, ILPA at the City Law School conference (n 41).
49 From address by Chris Desira, Seraphus Solicitors at the City Law School conference (n 41).
50 (HAC) *EU Settlement Scheme* [120].
51 Following the 2006 discovery of 450,000 unresolved asylum applications, the Case Resolution Directorate was set up to deal with all of them by July 2011. Cases were drawn out of the archive at random and 'worked on to a conclusion', with no way of prioritising urgent cases, or, eg dealing with all those from a specific country after a new country guidance case. Solicitors spent years telling clients 'there was nothing we can do' to resolve their cases.
52 See also Jonathan Thomas, *Back to the future – what history tells us about the challenges of post-Brexit UK immigration policy* Social Market Foundation May 2019.