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The 'hostile environment' - How Home Office immigration policies and practices create and perpetuate illegality.

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At a Glance

The UK's 'assume illegal unless prove otherwise' style of immigration control, highlighted in Theresa May's 2013 announcement to create a 'really hostile environment' for illegal migrants, started long before Theresa May, and has affected many more than those here illegally. Not just the well-publicised fate of 'Windrush' people, lawfully present for decades, but also lawful migrants facing Home Office mistakes or unable to afford Home Office application fees have found themselves treated as unlawful or even becoming unlawful.

In this article I examine the range of 'hostile' immigration measures starting during the 1980s Thatcher regime and continuing through the 1997-2010 Labour government. Access to rights and entitlements in civil society have become increasingly based on immigration status, in relation to which the burden of proof lies wholly on the applicant. This has led to a shift in the meaning and use of the term 'illegal' as in the phrase 'illegal migrant', etc. As proof of those rights and entitlements increasingly rests on showing increasing numbers of specific original documents in a multiplying set of circumstances to diverse bodies, the very definition of 'illegal' shifts from being an *objective definition of a person's status under the law* to a *contingent relation* between the person and whichever private or public entity she faces in order to obtain a right or entitlement. Then, as responsibility for immigration control and enforcement has increasingly been outsourced, migrants have become *legally distanced* from decisions made about them: deprived of agency and left without remedies. Thirdly, *the UK's 'hostile' immigration policies consist in far more than the recent 'hostile environment' measures*. A combination of decades of Home Office mismanagement, coupled with the more recent deep cuts in Home Office, tribunal and court staff, the increased number, cost and complexity of immigration applications, cuts in rights and grounds of appeal and withdrawal of legal aid leaves applicants both practically and legally precarious. I conclude that far from reducing numbers of 'unlawful migrants', as the 'hostile environment' policies were designed to do, effectively it is Home Office policies which themselves *create and perpetuate illegality*.

1. Introduction

Seemingly out of the blue, the plight of the so-called 'Windrush' generation of immigrants to the UK has led to the resignation of a Home Secretary and the rapid introduction of an unprecedentedly swift 'regularisation' process, with an offer of

compensation to be consulted on. The 'Windrush' scandal concerned the fate of Commonwealth citizens and 'citizens of the UK and colonies' who had arrived in the UK in the 50's and 60's, many as children, who gained a status equivalent to British citizenship by operation of law. There was no requirement for them to apply for documentation, and even the checks on entitlement to benefits, housing and employment introduced in the 80's did not affect many, as for the most part it was accepted that they belonged here. However the 'hostile environment' measures introduced in 2014 and 2016 significantly increased requirements for public and private bodies to check immigration documents before recruiting staff, letting property or providing services. People who had lived in the UK for decades found themselves jobless, homeless, denied health care: some were detained and removed or deported from the UK, and a few have died before their status could be reinstated.

As one 'Windrush' person after another gave accounts to the media, their stories began to engage a wide audience even including the normally anti-immigrant *Daily Mail*. Now, because of the 'Windrush' scandal, the general public is not just responding to individual injustices suffered by individual victims. The entire 'hostile' framework of immigration control is being exposed to a wide public gaze.

What I intend to show are 4 major features of modern UK immigration control. First, the increasing requirement to show proof of status in order to receive benefits, housing, health care, access to education and so on has led *the practical meaning of 'illegal' to shift from being an objective definition of a person's status under the law to a contingent relation* between the person and whichever private or public entity she faces in order to obtain a right or entitlement. Then, as responsibility for immigration control and enforcement has increasingly been outsourced, migrants have become *legally distanced* from decisions made about them. No longer legal parties in Home Office decisions to inform an employer, or a landlord, about their status, such migrants are deprived of agency, left without effective remedies for decisions made *about them* for which there is no duty to notify them. Thirdly, *the UK's 'hostile' immigration policies consist in far more than the recent 'hostile environment' measures*. Cuts in rights and entitlements, stricter requirements, lengthening 'routes to settlement', increased legal complexity and payday-loan-sized application fees have all contributed to making it harder for lawful as well as unlawful migrants. These trends have combined with decades of documented Home Office mismanagement, coupled with the more recent deep cuts and downgrading in Home Office staff, to lead to longer application processing times and increased risk of mistakes in decision-making. All of this, combined with cuts in tribunal and court staff, cuts in rights and grounds of appeal and withdrawal of legal aid, leaves applicants both practically and legally precarious.

Far from reducing numbers of ‘unlawful migrants’, as the ‘hostile environment’ policies were designed to do, effectively it is Home Office policies which themselves *create and perpetuate illegality*.

In this article I propose to examine these developments keeping in mind 6 features of immigration control recently identified by the House of Commons Home Affairs Committee (HAC) report on the ‘Windrush generation’.¹ These include the removal of Home Office caseworker discretion;² the use of targets (both the high-level ‘reduce net migrant to the tens of thousands’ and specific targets such as for removals;³ restrictions on independent checks and appeals;⁴ and the formal ‘hostile environment’ measures introduced in the 2014 and 2016 Immigration Acts. Two further features referred to by the HAC are also noted in reports from the Independent Chief Inspector of Borders and Immigration (ICIBI): Home Office administrative incompetence, and Home Office reluctance to monitor and evaluate the recent ‘hostile environment’ measures, whether for effectiveness or for unintended consequences.

Clearly, each of these issues impacts on the others. We have seen several times in the past that Home Office organisational and administrative incompetence has led to backlogs of unresolved cases, leading to changed casework priorities and measures to increase ‘workflow’. Under Labour we saw several amnesties for overstayers (1999) and family asylum applicants (2003), the 2006 declaration of ‘not fit for purpose’ and the Legacy programme.⁵ Under the Coalition we saw Theresa May’s 2013 declaration that UK Border Agency (UKBA) was ‘not good enough’, the various controversies about the ‘migration refusal pool’, the Capita contract and the ‘go home’ texts.⁶ These Home Office/UKBA failings have led in turn to poor decision-making, increasing the numbers of appeals and the proportion of appeals which are allowed.⁷ The government’s response has generally not been to seek to improve decision-making, but to cut down on rights of appeal and access to legal advice.⁸ Attempted introductions of IT-based application processing systems have also failed, wasting money and leaving Home Office record-keeping in a chaotic state.⁹ This in turn has made it more likely that

¹ House of Commons HAC *The Windrush Generation* Sixth Report of session 2017-19, HC 990, 3 July 2018

² Lucy Moreton, head of ISU immigration workers’ union, told the Home Affairs Committee that changes made in 2011 effectively prevented her staff from using their discretion about whether people had been in the UK for a long time – ibid para 25, 45 onwards

³ Ibid para 46, 54 onwards, also reported in Guardian 26/4/18 ‘Amber Rudd vows to scrap targets..’

⁴ Home Affairs Committee, Third Report of Session 2017–19, *Home Office delivery of Brexit: immigration*, HC 421, para 32

⁵ I have written elsewhere about all these ‘amnesties’ in *Revisiting removability in the hostile environment* Birkbeck Law Review 3 (2) December 2015.

⁶ House of Commons Home Affairs Committee 14th report *The work of the Border Agency* 19/3/2013

⁷ Now over 50% - see latest appeal figure in <https://www.gov.uk/government/statistics/tribunals-and-gender-recognition-certificate-statistics-quarterly-april-to-june-2018>, reported in Free Movement

⁸ Discussed below in Part 5.

⁹ House of Commons HAC report *Home Office delivery of Brexit* – Immigration para 85 HC421

migrants will be wrongly held to have no leave, no outstanding application, or no records at all, resulting in wrongful loss of jobs and accommodation, detention and removal, as for many Windrush people.

In **part 2** I give a very brief history of the main changes in immigration control since the 1980's Thatcher regime. In **Part 3** I highlight earlier 'hostile environment' measures introduced long before Theresa May used the term in 2013. These include charging migrants for health care, carriers' liability and controls on employers. In **Part 4** I look at the formal 'hostile environment' measures introduced in the Immigration Acts 2014 and 2016. In **Part 5** I examine other recent changes in immigration rules, policies and procedures which, though not always seen as 'hostile environment' measures, on examination clearly have that effect: increased application fees, lengthy 'routes' of settlement; restrictions on rights and grounds of appeal, exclusions of large categories of migrant from the statutory appeals system, and restrictions on the ambit of 'administrative review'. Here I refer to some of the HAC and ICIBI reports criticising the Home Office's recent operations directed against unlawful migrants.

On 26/4/18 Theresa May said:¹⁰ *'it is right to clamp down on illegal immigration. Up and down the country people want to ensure [we] are taking action against those people who are here in this country illegally ... [but the Windrush people] were not documented with that right, and that is what we are now putting right'*. Appearing to criticise the new Home Secretary Sajid Javid's criticisms of the hostile environment, Theresa May repeated this on 10/6/18. What she does not (or will not) understand is that many other ordinary people with lives just as rooted in the UK *appear illegal and even become illegal* precisely because of her policies.

In response to these revelations public opinion has shown itself less hostile to migrants than has been assumed for so long. This has provided an opportunity for politicians and campaigners to reject the 'hostile environment' and make the case for a simplified and fair method of dealing with non-citizen residents. Whether the required political courage exists to follow through on current promises is not yet clear.¹¹

2. Salient changes in immigration control from the 1980's to today

2.1 Background – the Immigration Act 1971 and the Immigration Rules

¹⁰ Guardian – *MPs accuse Home Secretary of protecting the PM* – 26/4/18

¹¹ As I write, Labour shadow home secretary Diane Abbott has announced that Labour will repeal the Immigration Act 2014 including its hostile environment measures.

The 1971 Act ensured that, from commencement on 1 January 1973, the broad structure of immigration control, to be set out in Immigration Rules, applied to ‘aliens’ and Commonwealth citizens alike.¹² That act controlled ‘primary immigration’ (then seen as male heads of households entering the UK to work) and set separate rules for entry of spouses and children of those already settled here. However, as many Commonwealth citizens and ‘aliens’ from many countries could still enter the UK as visitors without applying in advance for a visa, could still transfer or ‘switch’ to a work, study or spouse visa without returning home, and faced no restrictions on entitlement to health care, housing or benefits, immigration especially from Commonwealth countries remained relatively fluid and ‘unmanaged’ for some time.

2.2 1979-2010

I have written elsewhere¹³ about the development of Conservative party policy during the 70’s which culminated in the series of measures during the 80’s and 90’s curtailing migrants’ access to social security benefits, housing as homeless and social housing from council waiting lists.¹⁴

During this period the steady rise in the numbers of asylum applications again raised the profile of ‘immigrants’. This prompted the government to introduce requirements for more countries’ nationals to obtain a visa before entry, and further restrictions on ‘switching’ between immigration categories once in the UK; imposing ‘carriers’ liability’ on airlines and ships transporting migrants without the required papers, and impositions of duties on employers to check right to work before employing people. These measures will be discussed in **Part 3**.

The Labour government 1997-2010 introduced a completely separate housing and social assistance scheme for asylum-seekers, at lower financial rates and lower standards than for citizens and those with leave to remain.¹⁵ Amendments to the National Assistance Act 1948 excluded all those not British, settled or EU nationals from adult social care unless their needs did not stem ‘solely from destitution’.¹⁶

¹² Apart from EU nationals: the UK had joined the Common Market, and the first Immigration Rules under the 1971 Act provided for free movement of EU nationals.

¹³ *The Law of Common Humanity’: revisiting Limbuella in the hostile environment* Sheona York, Journal of immigration, Asylum and Nationality Law vol 31 no 4, 2017

¹⁴ (It has been suggested that the ultimate target of those policies was not so much the migrant recipients, but the welfare system itself; and migrants were seen by the Thatcher regime as a soft target rather as the Poll Tax was first introduced in Scotland).

¹⁵ Immigration and Asylum Act 1999 part VI, which set up the National Asylum Support Service (NASS), now directly under Home Office control

¹⁶ Immigration and Asylum Act 1999 s116

Under Labour there were 4 broad changes of policy affecting non-EU migrants: the clampdown on asylum (including new criminal offences and 2 major changes to rights of appeal); the transfer of most work-related immigration to the points-based system (in which the lack of discretion led to great difficulties); the introduction of ‘automatic deportation’ for those who had been sentenced to more than 12 months in prison – with human rights exceptions which have faced intense litigation ever since; and increases in probationary periods of leave for family migrants and for refugees.

2.3 2010- present

This period has been dominated by the Conservative Party’s 2010 manifesto announcing the intention to reduce net migration to ‘tens of thousands’, and by subsequent announcements to drive out unlawful migrants. Damian Green, Coalition immigration minister, announced¹⁷ that each main category of non-visitor immigration (i.e., students, workers, family members, asylum-seekers) had been examined to see how many in that category eventually went on to settle, and how numbers entering and eventually settling could be reduced. As well as tightening the legal requirements for each category, the government determined to reduce access to permanent residence (indefinite leave to remain) hitherto available for certain categories of workers and students; to cut migrants’ access to public funds (welfare benefits, social housing); to limit the use of human rights claims by foreign national prisoners, overstayers, failed asylum-seekers and others with no leave to remain; and to restrict the impact of recent European Court judgments giving rights to non-EEA nationals. The majority of those changes were made through the Immigration Rules. In relation to family migrants, long residents and those facing deportation, those policies were given legal expression in the ‘new rules’ laid before parliament on 13 June 2012.

Other important immigration changes were made through primary legislation.¹⁸ These included Theresa May’s celebrated ‘reduction of appeal rights from 17 to four’, always presented as if every migrant had access to all 17 rights of appeal. The changes provided that, in future, a person could appeal only against a refusal of a protection claim (asylum), a refusal of a human rights claim, or a revocation of protection status.¹⁹ Significantly, the permissible *grounds* of appeal were also

¹⁷ <https://www.gov.uk/government/speeches/immigration-damian-greens-speech-to-the-royal-commonwealth-society> accessed 28/7/18 The writer was present as Principal Legal Officer of IAS

¹⁸ The Immigration Acts 2014 and 2016

¹⁹ Immigration Act 2014 s15, amending s82 Nationality, Immigration and Asylum Act 2002 – in fact there are only 3 distinct rights of appeal

reduced, excluding appeals on the grounds that the Secretary of State had not followed the law or the Immigration Rules. A further controversial reduction in appeal rights was contained in section 94B Immigration Act 2014, giving power to the Secretary of State to certify an appeal against deportation so that the person would have no right of appeal until he left the country unless he could show a breach of art 8. The Immigration Act 2016 extended that ‘deport first, appeal later’ model to all appeals seeking to rely on art 8 ECHR, so that even those with arguable human rights claims would have to leave the country before pursuing their appeals. This will be discussed in **Part 5.4** below.

The Home Office’s attempt via the 2012 ‘new rules’ to determine how art 8 must be applied²⁰ had faced a number of stern litigation challenges, and so the Immigration Act 2014 included a new Part 5A Nationality, Immigration and Asylum Act 2002. This set out ‘public interest considerations’ which must be taken into account by courts and tribunals hearing cases concerning art 8 ECHR. These include whether the appellant can speak English and whether the applicant is ‘financially independent’, and instructions that ‘little weight’ must be given in certain circumstances to art 8 rights where an appellant is unlawfully present, or ‘precarious’. All these are controversial as seeking to tip the balance in an article 8 proportionality exercise even more towards the state’s ‘legitimate aim in a democratic society’ of controlling immigration and ensuring the ‘economic well-being of the country’.

3. Earlier ‘hostile environment’ measures: *outsourcing immigration enforcement to other public authorities, NGOs, private companies and individuals*

The ‘hostile environment’ was Theresa May’s 2013 title for a series of measures intending to substitute for what has previously been referred to as ‘destitution by design’²¹ as a means of encouraging the departure of ‘unlawful migrants’ (illegal immigrants, overstayers or failed asylum-seekers).²² However the recruitment of other public bodies, private entities and individuals to investigate and control the

²⁰ Immigration Rules Appendix FM GEN 1.1

²¹ *Destitution by Design* London Mayoral office 2004: <http://icar.livingrefugeearchive.org/3679/research-directory/destitution-by-design.html> ; *Between Destitution And A Hard Place: Finding Strength To Survive Refusal From The Asylum System: A Case Study From The North East Of England* Fiona Cuthill & ors, University of Sunderland 2013

²² The most recent official estimates of the numbers of unlawful migrants in the UK from around 2009, range from around 400,000 to 900,000 people. Removals have been falling from around 15,000 a year to 12,000 in the last year for which figures are officially available. See *Revisiting removability in the Hostile Environment* Sheona York, [n7](#). Migration Watch critically examined the unlawful migrant figures in 2010 and gives an estimate nearer 1.1m.

entitlement of a migrant to receive a certain service (health, education), to take an active role in society (by working or volunteering) or take advantage of a private service by way of a contract (airlines, ferries, hauliers, employers) is not new. The most recent policy measures are stated to be aimed at ‘unlawful migrants’, but similar measures have been in place for some time. What has gathered speed are: the investigative burden placed on these other bodies and individuals; the extent of criminal penalties; and the legal and practical effects of such regimes on all migrants not just those here unlawfully.

3.1 NHS responsibility for imposing charges for health care

Powers to charge for access to health services for ‘overseas visitors’, defined as those not ‘ordinarily resident’, were introduced through the NHS (Amendment) Act 1949, but were not enacted until the Thatcher government, by means of the 1982 regulations.²³ These charges were, and remain, only applicable to hospital treatment. The operation of the scheme required hospital staff to assess each prospective patient’s liability to pay for each particular treatment. For the first time, those providing a service intended to be universal and free at the point of use were expected to question and examine patients about matters that were not to do with their health, but their immigration status and financial circumstances. The charging regime was and continues to be extremely complex, since ‘ordinary residence’ cannot be mapped to immigration status,²⁴ and there are currently 7 exempted types of medical services, 33 exempted categories relating to immigration status and a long list of exempted presenting medical problems. In 2012 the Department of Health reviewed the charging policy. That review noted that less than 20% of estimated chargeable costs were recovered, amounting to about £15-25m per year, against administrative costs of around £15m. It noted that *‘clinical staff have little interest in supporting [administrators] in the [charging] process and may individually be resistant to the whole principles and process’*, and concluded that *‘the NHS is not currently set up structurally, operationally or culturally to identifying a small subset of patients and charging for their NHS treatment’*.²⁵ The review stopped short of recommending the abolition of the scheme. In contrast, the 2015 Department of Health Guidance provides 130 pages of detailed instructions to NHS staff,

²³ National Health Service (Charges to Overseas Visitors) (No 2) Regulations 1982 SI 1982/863

²⁴ For example, returning expatriate British citizens are not ‘ordinarily resident’ on arrival

²⁵ 2012 Review of overseas visitors charging policy summary report Department of Health April 2012, pp 17 and 22

prefaced by the statement: ‘*All staff, including clinicians and managers, have a responsibility to ensure that the charging rules work effectively*’.²⁶

A migrant wrongly levied a charge for hospital treatment, or refused hospital treatment unless they pay, may bring a judicial review against the hospital. As with claims in respect of asylum support and accommodation, such a claim would fall under community care law and is still eligible for legal aid. But many factors, including the lack of practitioners, the difficulty of obtaining medical evidence of urgency, etc (more acute where the legal issue is precisely the denial of medical treatment without payment), finding a separate immigration lawyer (not legally aidable) and obtaining relevant documentation to identify the migrant’s status and argue that they are not liable, etc, often preclude action. Current NHS guidance²⁷ makes it clear that ‘ordinary residence’ is not a requirement for registration with a GP. However, this is resisted by many GPs, and many migrants and asylum-seekers find it hard to register.²⁸ In some areas refugee charities are able to direct migrants to sympathetic GPs or walk-in clinics.

From January 2017 the NHS has been obliged to inform the Home Office of NHS debts,²⁹ and from February 2017 hospitals were required to charge in advance those who are not eligible for free treatment.³⁰ From October 2011 the Immigration Rules allowed applications to be refused when a person owed over £1000 to the NHS, reduced in 2017 to £500.³¹ The HAC Windrush report³² referred to a Home Office refusal of an entry clearance application in which the Home Office had effectively requisitioned an NHS invoice (never sent to the applicant) so that the applicant could be refused for not paying it – despite the fact that the ‘invoice’ post-dated the refusal, and the applicant was not even liable to pay the charge. However, this could not be rectified without the applicant lodging an appeal and hoping that the Entry Clearance Manager would withdraw the decision.

²⁶ *Guidance on implementing the overseas visitor hospital charging regulations 2015* Department of Health

²⁷ Patient Registration Standard Operating Principles for Primary Medical Care (General Practice) 27/11/2015

²⁸ see for example this article in *Pulse* - <http://www.pulsetoday.co.uk/gps-forced-to-register-illegal-immigrants-after-threat-of-legal-action/13234713.article> and this information leaflet from the No Recourse to Public Funds group <http://www.nrpfnetwork.org.uk/Documents/NHS-healthcare.pdf> both accessed 17/9/18

²⁹ Memorandum Of Understanding Between Health And Social Care Information Centre And The Home Office 1/1/2017 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/585928/MOU_v3.pdf accessed 29/9/18 (this procedure was suspended in May 2018 as part of Home Office responses to the ‘Windrush’ debacle.

³⁰ The National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017 reg.4

³¹ For example in the ‘suitability’ requirements contained in Appendix FM of the Immigration Rules, and in Part 9 General Grounds of Refusal. For more details see *NHS Charging for Overseas Visitors* House of Commons Library briefing paper no Number CBP03051, 23 October 2017

³² HAC Windrush report [N1](#) above

Reports on the effects of health charging note:³³ administrators' pressure on clinicians to change their view on what constitutes 'emergency' or 'immediately necessary' treatment; individuals too scared or too poor to seek medical treatment; sick people afraid to approach a GP even though primary care services are not covered by the scheme; GPs refusing or failing to register overseas-born patients; patients presenting with emergencies (which are treated free of charge) who would have been more effectively treated earlier: and even the unnecessary spread of communicable diseases such as tuberculosis or virus infections such as HIV/AIDS.

Despite all this, despite the evidence that the scheme is not cost-effective, and despite the 2015 introduction of the Immigration Health Surcharge,³⁴ the scheme continues. This scheme effectively *treats as illegal* all those who have the right to be in the UK but who cannot prove it in the precise way required by the NHS charging regulations, and all those who are too afraid to register with a GP, or ask for the medical treatment they require, are driven to act as if illegal. Such people, even if lawfully present, are thus contingently *rendered as if illegal* in their relationship to the NHS, whose role is thus not that of a neutral public authority, but an arms-length enforcement branch of the Home Office which, because no discretion is permitted, requires migrants to prove their status 'beyond reasonable doubt'.

3.2 Privatisation of control on entry: carriers' liability

The Immigration (Carriers' Liability) Act 1987 introduced a charge to be imposed on the owners, agents or operators of a ship or aircraft responsible for carrying a person who requires leave to enter but who fails on arrival produce a valid immigration document showing not just his nationality and identity but also a valid visa. Section 40 Immigration and Asylum Act (IAA) 1999 extended the liability to haulage companies whose trucks are found, even unknowingly, to be carrying illegal immigrants.

Compared to the complexity of the health charging regime, it may be felt that expecting airlines, etc, to check immigration status documents is not such a big

³³ See for example *First do no harm: denying health care to people whose asylum claims have failed* Nancy Kelley and Juliette Stevenson, June 2016 Refugee Council/Oxfam; *Hostile health care: why charging migrants will harm the most vulnerable* Hannah Kilner, British Journal of General Practice 2014 Sept 64(626) published online; *Access to Health Care for Undocumented Migrants: A Comparative Policy Analysis of England and the Netherlands* Kor Grit, Institute of Health Policy and Management, Erasmus University Rotterdam; Joost J. den Otter, International Rehabilitation Council for Torture Victims; Anneke Spreij, Dutch Transplantation Foundation; Journal of Health Politics, policy and Law Vol 37 no 1 February 2012

³⁴ This requires every applicant (and dependant) to pay an up-front Health Surcharge fee of £200 per year of any proposed leave to remain.

step, since their business is precisely the carrying of passengers across international frontiers. But assessing the validity of entry documents often requires judgement and specialist knowledge: and the best interests of children may require that they be allowed to travel without the relevant documents. In the famous ‘DNA fingerprinting’ case,³⁵ my client, 14-year-old Andrew Gyimah, carrying an old British passport with his baby picture, was stopped at Heathrow in 1983, but granted temporary admission and allowed to join his mother for the 3 years it took for the Home Office to accept that he was the child of his mother and therefore a British citizen as claimed. If the Carriers Liability Act had been in force, he may well have been stranded in Ghana with no family. In a more recent case,³⁶ a 6-year old boy born in the UK was indeed prevented from returning home to his family because his British passport had been withdrawn (at no notice to the parents). Regardless of the reason for the withdrawal of the passport, it was clearly in his best interests to enable him to travel home to his mother and to allow time for the legal issues to be dealt with subsequently. Only following significant publicity did the Home Secretary intervene and allow him to travel home. These 2 cases, widely-spaced in time, as well as the Windrush people stuck abroad after returning for a family funeral, show how a carriers’ liability regime not formally linked to immigration officers authorised to exercise discretion in emergencies can result in acute hardship.

3.3 Employers’ responsibility for checking the right to work

Civil penalties on employers for employing a person without permission to work were first imposed in 1996.³⁷ Subsequently the Immigration, Asylum and Nationality Act 2006, in effect from 29 February 2008, introduced a criminal offence for employers who knowingly employ illegal migrant workers, and a system of continuing responsibility to check a migrant employee’s entitlement to work in the UK. Failure to check can result in a civil penalty of up to £10,000 per illegal worker. The employer must be able to show that they followed due process in accordance with the regulations. In addition to this, employers are expected to check the UKBA website for policy and procedural changes. The UKBA set up an employer checking service, which in 2008 was accessed by telephone, but subsequently accessible only online.

³⁵ The first ever legal case to rely on DNA fingerprinting – dramatised in ITV’s *Code of a Killer*

³⁶ <https://www.independent.co.uk/news/uk/home-news/boy-passport-home-office-belgium-holiday-blocked-mother-a8522211.html>

³⁷ Asylum and Immigration Act 1996 s8

Once again, reports show that many migrants face legal and practical problems because of Home Office errors and poor administration. A 2014 ILPA letter³⁸ gives examples of employer checking service mistakes, including where migrants who have an outstanding application or appeal (and therefore continuing leave)³⁹ are wrongly stated not to have the right to work, and those for whom the Home Office has unlawfully not provided an EEA residence permit within the required 6 months.

If the decision is right the employer is protected against any claim for unfair dismissal. A person dismissed by or not employed by an employer on the basis of an erroneous report of their immigration status has a remedy in judicial review against the Home Office if the decision is wrong. It is difficult for applicants to find immigration lawyers, and hard to mount urgently because these types of cases often depend on formally obtaining a copy of the applicant's Home Office file to show that an application is outstanding, which is currently taking more than the statutory 40 days.⁴⁰ Neither can a judicial review achieve financial compensation for loss of earnings or loss of a chance to take up a job offer. Moreover, from 2014 employers could no longer rely on such as an indefinite leave stamp in an expired foreign passport, or a solicitor's letter confirming that an in-time application for further leave had been made. Only evidence of having seen documents from a specified list was sufficient. Thus failure to request such has led employers to face penalties for continuing to employ someone who is *in law entitled to work*, again *contingently treated as if illegal* while objectively not being so. The migrant with old-style evidence of indefinite leave must make an application for a biometric residence card, at a current cost of £229, taking several weeks: and during that time, just like a person applying for further leave to remain, must rely on the Home Office employer checking service accurately confirming her right to work *to the employer*.

Legal distancing'

This scheme displays a new feature. Once having been informed by the Home Office that an employee 'does not have the right to work', the employer is obliged

³⁸ Immigration Law Practitioners Association letter to the Chief Inspector of Borders and Immigration 14 November 2014. NB the report itself merely notes the concerns of ILPA and others and recommends that the Home Office produces accurate information, but does not consider the accuracy of HO data on individuals – see *An Inspection of How the Home Office Tackles Illegal Working* October 2014 – March 2015 p23

³⁹ Section 3C Immigration Act 1971

⁴⁰ That SAR scheme has been altered by the coming into force of the GDPR regime, but the HO has shamefully been granted exemption from this 'where to do so would undermine our immigration control' <https://www.theguardian.com/uk-news/2018/apr/23/home-office-data-exemption-sparks-fears-of-renewed-windrush-scandals> accessed 14/9/18

on pain of criminal penalties to bring to an end their contract of employment. But the migrant herself has no or only limited redress. She herself cannot access the Home Office employer checking service. If a wrong answer is given *to the employer* the migrant herself has no quick or effective means of correcting the mistake. The migrant is simply not a party to that process – she is *legally distanced* from any remedies. She remains an applicant in her immigration situation, but a Home Office determination *to her employer* that she has no right to work is not part of that application process. The migrant does not receive separate notification of such a decision. This is a clear breach of the public law duty to notify a person about a decision affecting them. The Home Office has been guilty of this *legal distancing* before. The House of Lords in *Anufrijeva*⁴¹ struck down the then Home Office practice of informing benefits officers that an asylum claim had been refused before eventually telling the applicant, such that an applicant would have their benefits stopped without knowing the reason. But judicial review, a migrant’s only recourse against the relevant public authority (the Home Office), is rarely granted where the substantive issue is delay in resolving a case.⁴² And since the transfer of immigration judicial reviews to the Upper Tribunal, and the lengthening timescales even for a paper grant of permission,⁴³ we have seen how judicial review is now a far less effective remedy in immigration for non-urgent claims, and so is little help to someone erroneously dismissed from their job because of poor Home Office record-keeping.

4. More ‘*legal distancing*’ in the formal ‘hostile environment’: controls on bank accounts, driving licenses and the ‘right to rent’

The two immigration acts of 2014 and 2016 broadened and intensified the outsourcing of immigration enforcement to outside bodies, with the declared aim of creating a ‘really hostile environment’ for unlawful migrants. These measures again remove agency from the migrant herself, as she is not a party to the checks

⁴¹ *Anufrijeva and Another v London Borough of Southwark* [2003] UKHL 36 - (relating to a time when asylum-seekers were entitled to mainstream benefits).

⁴² *FH & Ors v SSHD* [2007] EWHC 1571 (Admin) [21] (dealing with the Case Resolution Directorate or ‘legacy’ cases) held: ‘*The need to deal with so many incomplete claims has arisen as a result of the past incompetence and failures by the Home Office. ... It is not for the court to require greater resources to be put into the exercise ... unless persuaded that the delays are so excessive as to be unreasonable and so unlawful.*’ More recently, *TN & MA (Afghanistan) v SSHD* [2015] UKSC 40 decided that the so-called ‘*Rashid*’ principle, under which a person who suffered from a previous Home Office error could expect a ‘corrective remedy’, was not to be followed.

⁴³ The Home Office response to Robert Thomas’ 2018 FOI request FOI 180629004 shows a staggering increase from December 2016 from some 100 or so days’ wait to over 500 days’ wait – for a paper permission decision.

and controls operated in relation to her: she is *legally distanced* from the processes of immigration enforcement.

4.1 Driving licences and bank accounts

The 2014 Act determined that an unlawful migrant may not hold a bank account or a driving licence. Many found their driving licences summarily revoked. Those migrants had no direct legal avenue for representations. The 2016 Act created a new criminal offence of ‘driving when unlawfully in the UK’ and provided for a car driven by an unlawful migrant to be detained, and money held in unlawful migrants’ bank accounts to be frozen.⁴⁴ That Act imposed a duty on banks to check a holder’s immigration status and notify the Home Office of their findings without informing the holder, and a freezing order may be imposed without notice. In relation to none of these processes does the migrant have to be informed beforehand, or be given an opportunity to correct mistakes or make representations.⁴⁵

On finding that some Windrush people had been wrongly noted in Home Office records as unlawfully present, and had had their bank accounts closed as a result, Home Secretary Sajid Javid has suspended the checks on bank accounts.⁴⁶

4.2 The ‘right to rent’⁴⁷

Both Acts also imposed draconian controls on access to private accommodation. The 2016 Act now makes it a criminal offence to let property where not only the tenant but any of the occupants do not have leave to remain. The ‘right to rent scheme’ does appear to include a measure of discretion. Section 21 (3) says:

(3) But P is to be treated as having a right to rent in relation to premises ...
if the Secretary of State has granted P permission ...

However, the Home Office has provided no application procedure, and it transpired⁴⁸ that there was no intention that *a migrant* should be able to apply for

⁴⁴ Immigration Act 2016 s40 as amended by Immigration Act 2016

⁴⁵ Once a bank account is frozen, a migrant may request access to funds for ‘reasonable living expenses’. *Immigration Act 2014 (current accounts) (Freezing Order: Code of Practice) Regulations 2017* SI 2017 no 930

⁴⁶ Guardian 17 May 2018 accessed 14/9/18

⁴⁷ See also *The right to rent* Sue Lukes, Chai Patel and Charlotte Peel, *Journal of Immigration, asylum and nationality law* Vol 31 no 1 2017

⁴⁸ Following 2 judicial review pre-action letters and a freedom of information request from the writer, and a debate in the House of Lords on 12 April 2016 (Hansard Online 12 April 2016 Volume 771), following which new guidance was issued in June 2016. (Neither my 2 clients nor I received any indication of whether they were recorded as having permission to rent).

permission to rent. An application for permission can only be made by a potential landlord, and consists merely of an online procedure in which the landlord provides his potential tenant's Home Office reference number and receives the answer Yes or No. There is no place *in that procedure* for the migrant, or anyone on her behalf, to present arguments in favour of being granted permission. Recent guidance⁴⁹ says this:

How can an individual enquire upon their permission to rent?

A migrant without leave who is looking to take up a new tenancy and considers that they meet the criteria set out above can enquire whether they have permission to rent through their established contacts points with the Home Office, such as at a reporting event, interview appointment or through the team dealing with their case. If somebody without leave is not in contact with the Home Office then they should rectify this by contacting the voluntary returns team; or by making an application to remain in the United Kingdom.

Note the interesting wording: the migrant 'can enquire whether they have permission to rent' – not 'may apply for permission to rent'. There is still no room for representations (by someone awaiting an appeal against refusal of a meritorious application, or having been wrongly classified *by the Home Office* as not having leave to remain, etc). Clearly this is not 'an application procedure' under public law – the migrant is not, or at least not straightforwardly, a party *to the decision to give them permission to rent* but is expected to *accept a decision made about them* or try to make urgent representations to the Home Office in circumstances where, commonly, 'the team dealing with their case' will not respond for several months or at all.

A current judicial review, granted permission on 6 June 2018, is challenging the scheme on the basis that it is proving to be discriminatory, and had no mechanism for monitoring its effectiveness.⁵⁰ However this does not deal with the removal of agency from the migrant - the 'legal distancing'. Neither does the discrimination argument highlight the effect on 'mixed families' in which one or more family members may be, or have just become, unlawfully present, leaving a British or settled tenant an ugly choice between kicking their partner or grown-up child out of the house or losing their home altogether. A cross-party group of MPs has urged a review of the policy, noting that there has been no proper assessment of its impact.⁵¹

5. Other 'hostile' changes in immigration law and policy:

⁴⁹ *A short guide to the right to rent* Home Office June 2018, page 9

⁵⁰ Brought by JCWI

⁵¹ *MPs urge Home Secretary to review 'right to rent' policy* Peter Walker, Guardian 6/6/18

5.1 rapidly-changing requirements, tighter application procedures and decision-making policies

Noticeable both during the Labour administration 1997-2010 and since has been the significant increase in the number of changes in the Immigration Rules. Lord Hope, in para 11 of *Alvi*,⁵² decided on 18 July 2012, said:

The 1994 Statement of Changes in Immigration Rules (HC 395) extended to 80 pages. There have been over 90 statements of change since then, and HC 395 has become increasingly complex. The current consolidated version which is available on line from the UKBA website extends to 488 pages.

A more recent Supreme Court case has described UK immigration law as ‘an impenetrable jungle of intertwined statutory provisions and judicial decisions’.⁵³ In a 2018 speech by Lord Justice Irwin discussing ‘complexity and obscurity in the law’ he described the Immigration Rules as ‘in truth, something of a disgrace’.⁵⁴

Since 2010 there have been more than 5700 changes in the rules.⁵⁵ The increased rate of rule changes has resulted in a more confusing structure. To identify the relevant requirements, reference is often required to other chapters of the rules, not signposted, to check on changed definitions, additional requirements and such as ‘general grounds of refusal’. Applicants need also to check separate guidance, which is not searchable or even listed in a comprehensible way, filed under headings such as ‘modernised guidance’.⁵⁶ New specified requirements are introduced without much publicity, such as the 2013 requirement for every applicant (including children born here to unlawful migrants) to hold and provide a valid passport. ‘Deception’ under Part 9 ‘general grounds of refusal’ has been stealthily extended to include things done without the knowledge of an applicant. Recently we have seen the draconian use of para 322(5) of that Part (asserting that the applicant ‘represents a threat to national security’) to refuse people who had been permitted by the HMRC to correct an error in their tax return.⁵⁷ Following the Supreme Court’s judgment in the case of *MM (Lebanon)* on the minimum income requirement, the family migration rules now contain an incomprehensible 2-layered definition of ‘exceptional’.⁵⁸

⁵² *Alvi v SSHD* [2012] UKSC 33 [11]

⁵³ *Patel and others (appellants) v Secretary of State for the Home Department* [2013] UKSC 72

⁵⁴ *Complexity and obscurity in the law, and how we might mitigate them* Lord Justice Irwin, Peter Taylor Memorial Lecture 17 April 2018

⁵⁵ *Revealed: Immigration rules in UK more than double in length* Guardian 27/8/18 <https://www.theguardian.com/uk-news/2018/aug/27/revealed-immigration-rules-have-more-than-doubled-in-length-since-2010>

⁵⁶ The Law Commission has been tasked with simplifying the Immigration Rules, though ILPA has described this as to be a fairly limited attempt. The project is at an early stage – see <https://www.lawcom.gov.uk/project/simplifying-the-immigration-rules/>

⁵⁷ See Guardian 8/5/18 *I feel like I’m drowning...*

⁵⁸ See Immigration Rules Appendix FM ‘exceptional circumstances; *MM (Lebanon) & Ors, R(on the applications of) v Secretary of State and another* [2017] UKSC 10

Applicants must apply on the correct prescribed form, of some 60 or 70 pages. New forms are introduced and existing forms reintroduced sometimes more than twice in a year, and often headed with contradictory instructions about which type of applicant should use them. Application fees also change at least each year. Increasingly, changes are made with little prior announcement.⁵⁹ Failure to use the correct form, pay the correct fee⁶⁰ or provide ‘specified evidence’ precisely as prescribed in the Rules results in the *rejection* of the application. Officials have no room for discretion, and are discouraged from asking for further information. Rejection of an application means an immediate loss of leave to remain. The applicant falls straight into the ‘hostile environment’, with a break in their continuous lawful residence even if a subsequent application is accepted.⁶¹

It is clear that the ‘complexity and obscurity’ of immigration law combined with this ‘take no prisoners’ approach to casework processing and the withdrawal of legal aid from immigration has tended to ‘*create illegality*’, as poorly-advised applicants make late, incomplete or badly-argued applications with no chance to rectify.

5.2 the hostile nature of the ‘routes to settlement’

The Immigration Rules introduced under the Immigration Act 1971 provided that people settled in the UK may be joined by family members from overseas, and that people working in the UK for 4 years would be allowed to bring their families, and that the whole family would be allowed to settle.

Over time the Rules have been successively tightened to limit rights to settlement and family migration. From 1977 foreign spouses had been required to make a two-stage application for settlement – an application to enter the UK, and an application a year later for settlement (indefinite leave to remain). This was explicitly presented as a period of ‘probation’. In a chapter bizarrely entitled *Marriage/family visits and war criminals* Labour’s 2002 White Paper⁶² proposed increasing this probationary period to two years, which was also subsequently imposed on couples who were already married and who had lived together abroad. From 2006 a worker had to work in the UK for five years instead of four before

⁵⁹ n53

⁶⁰ The case of *Basnet Basnet (validity of application - respondent) Nepal* [2012] UKUT 113 (IAC) held that where a person had been refused because of alleged non-payment of a fee, the Home Office had to provide evidence of their attempts to take the payment. In this case the Home Office had routinely destroyed the billing information.

⁶¹ Practitioners suspect that more applications are being rejected, to cut down on Home Office caseworking time and reduce the number of appeals. See HC HAC *Delivery of Brexit* n4 para79, and also this Guardian article:

<https://www.theguardian.com/uk-news/2017/sep/01/home-office-makes-800-profit-on-some-visa-applications>

⁶² *Secure Borders, Safe Haven* CM 5387, February 2002

gaining a right to settle. From 2007 a migrant wishing to marry in the UK was required first to apply for a ‘certificate of approval’ (declared unlawful by the Court of Appeal in 2007 but not abolished until 2011, long after the House of Lords judgment in 2008).⁶³ In 2008 Labour raised the age for spouses seeking to enter the UK to 21 – finally declared unlawful by the Supreme Court in 2011.⁶⁴

The 2010 coalition government significantly tightened a number of family migration requirements. Some of these measures, namely the ‘minimum income requirement’ of £18,600, pre-entry English language tests, and the application of art 8 rights to family life, have been the subject of lengthy litigation reaching the Supreme Court.⁶⁵

In the 2012 ‘new rules’ the probationary period for spouses and partners was more than doubled, and the ‘long residence’ requirements for those unlawfully present lengthened from 14 to 20 years. Those changes do not appear to have been challenged. Those couples meeting all the requirements enter a probationary period of five years (the ‘5-year route’), requiring a foreign spouse or partner to make three applications before reaching settlement (entry clearance, limited leave and indefinite leave). At each stage, all the requirements of the rules must be met.

The 2012 ‘new rules’ also determined how the art 8 rights of migrants including those who are unlawfully present, who, though unable to meet the full requirements, might have a claim to remain under art 8 right to family life. Special ‘exceptional’ criteria applied. Where a case involves a British child, or a non-British child present in the UK for over seven years, an applicant may be allowed to stay if, having regard to the best interests of the child,⁶⁶ it is ‘not reasonable’ to expect the child to leave the UK. Where a case just involves a partner, a migrant may be able to remain in the UK with their partner if there are ‘insurmountable obstacles’ preventing their enjoying family life in the migrant’s country – amounting to ‘*very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.*’⁶⁷

Gaining the right to stay in the UK under these ‘exceptional’ provisions allows entry into the ‘10-year route’. This entails five applications, over 10 years, from first gaining leave in this category to indefinite leave to remain: and, as with the 5-year route, an applicant must continue to satisfy the compulsory criteria and their

⁶³ *Baiai & Ors, R (On The Application of) v Secretary of State For The Home Department* [2008] UKHL 53

⁶⁴ *Quila & Anor, R (on the application of) v Secretary of State for the Home Department* [2011] UKSC 45

⁶⁵ *MM (Lebanon) & Ors, R (on the applications of) v Secretary of State and another* [2017] UKSC 10 ; *R (Ali and Bibi) v SSHD* [2015] UKSC 68; *Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 11.

⁶⁶ As defined in relation to the obligations imposed by the UN Convention on the Rights of the Child and s55 Borders, Immigration and Citizenship Act 2009

⁶⁷ Immigration Rules Appendix FM family life, para EX.1

circumstances must remain broadly the same (for example, if on the ‘partner’ route, must remain with that partner, etc).

The increases in probationary periods appeared to arise from unparticularised concerns about forced and sham marriages, and marriages breaking down shortly after indefinite leave, but were opposed by women’s groups who feared the consequences for women left in insecure immigration status for long periods.⁶⁸ Obliging those who qualify on art 8 grounds to wait 10 years until settlement could be justified as an attempt not to encourage illegality, to show the public interest in meeting the income and language requirements, etc. However, many people being accepted onto the 10-year route will have already spent lengthy periods in the UK. Many have been lawfully present under other categories (workers or students) or have arrived as unaccompanied minor asylum-seekers and spent lengthy periods waiting for a decision. The 10-year route, for many, simply extends out into the distant future an already long period of twilight existence in the UK. Consider a family and children present in the UK lawfully on a points-based route for nearly 10 years until the death of the father led to refusal of a further visa, but finally accepted onto the 10-year route on art 8 grounds. Unless born in the UK⁶⁹ the children must spend a further 10 years on ‘limited leave to remain’, unable to access a student loan and thus unlikely to be able to afford any higher education. This was challenged but the Court of Appeal accepted the government’s argument that prioritising limited funds for individuals who are likely to remain in the UK in order to complete their education and benefit the UK economy was a ‘legitimate aim’.⁷⁰ That surely begged the question why such children would not be considered ‘likely to remain in the UK’ – or why any child should have to wait 10 years to gain settlement.

As if to answer such questions, section 19 Immigration Act 2014⁷¹ set out a statement of the ‘public interest considerations’ which a court or tribunal must take into account in deciding a claim based on art 8 ECHR. These include a determination that ‘a private life, or a relationship formed with a qualifying partner, that is established while an applicant is in the UK unlawfully should be given ‘little weight’;⁷² and that ‘little weight’ should be given to a private life established at a time when the person’s immigration status is ‘precarious’.⁷³ Alarming, the then

⁶⁸See the Home Office 2012 response to its consultation on proposed changes to the family migration rules (which provided no data). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/275300/cons-fam-mig.pdf

⁶⁹ A child born in the UK is entitled upon application to register as British after the age of 10 – British Nationality Act s1(4).

⁷⁰ *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 1216 (31 July 2014).

⁷¹ (Amending the Nationality, Immigration and Asylum Act 2002)

⁷² Nationality, Immigration and Asylum Act 2002 s117B(4)

⁷³ Nationality, Immigration and Asylum Act 2002 s117B(5)

President of the Upper Tribunal (Immigration and Asylum Chamber) decided that anyone who did not yet have indefinite leave to remain was ‘precarious’. He says:

28. In all such cases, in order to obtain the variation that they seek (whether to gain a further grant of leave which is limited in duration, or is indefinite) the individual will need to meet at some future date the requirements of the Immigration Rules that are then in force ... Indeed the ability of those who have not yet been granted indefinite leave to remain, to obtain a variation of their leave in the future, will probably always depend in part upon matters that are outside their control – whether that be the actions of others, or the future prosperity of themselves or others.

Effectively, he is saying, we can’t predict the future: and also that future changes in the Immigration Rules can apply retrospectively to people who have already embarked on a ‘route to settlement’. Even though the strict letter of that law applies only to those relying solely on ‘private life’, this ruling has given comfort to Home Office decisions to treat families on the ‘routes to settlement’ as only temporarily in the UK.⁷⁴

The structure of the ‘routes to settlement’ rules based on family life appears to require that, at each application, proof of family life is required *in exactly the same form as when they first applied*. Consider an applicant who has nearly completed the ‘5-year route’ on the basis of her relationship with her husband. They have a British child. However, should the couple separate, she would be precluded from applying for indefinite leave to remain, as not meeting the requirements *of that route*. She has instead to begin at the beginning of the 5-year route (or even the 10-year route) under another category – ‘parent of a [British] child’. But the applicant is still the same mother of the same child, with the same family life with that child. She still has parental responsibility, along with her husband. There would seem little benefit to that child, or wider society, to render her status in this country ‘precarious’ for a further 10 years.

It is clear that the long probationary periods, requiring repeated applications, are themselves *creating precariousness*, increasing the chances of missing an expiry date or making a mistake in an application, catapulting families into unlawful immigration status and thence into the ‘hostile environment’. The high cost of these applications is discussed next.

5.3 Loan-shark rates of fee increases

The ‘hostile environment’ has led to increases in immigration application fees of truly loan-shark proportions. In 2010, the fee for entry clearance for a spouse and two children was £644, an application for limited leave to remain for a spouse and two children was £575, and an application for indefinite leave for such a family

⁷⁴ See *Private life in the balance: constructing the precarious migrant* Richard Warren, *Journal of Immigration Asylum and Nationality Law* Vol 30 no 2, 2016

group would have been £1784 altogether from entry clearance, and £1615 altogether if inside the UK at the start of the process (requiring two applications in each case). From 2013, a dependant on an application had to pay the same fee as the main applicant; from 2015 the Immigration Health Surcharge was introduced, applying to every person applying; and the application fees themselves have gone up steeply since then, so that for a spouse and two children:

- the 5-year route to settlement, from entry clearance to ILR, (three applications starting in May 2018 and allowing for no further fee increases apart from the planned doubling of the Immigration Health Surcharge, will cost at least £19355, an increase of nearly 10 times on the 2010 fee;
- the 10- year route from entry clearance to indefinite leave (five applications starting in May 2018 and allowing for no further fee increases apart from the planned doubling of the Immigration Health Surcharge, will cost at least £31533, an increase of over 16 times on the 2010 fee;

In that time the Retail Price Index has increased from 220 (1987 base 100) to 278, an increase of 22% or not quite a quarter.

In the case of *Williams*,⁷⁵ concerning increases in application fees for citizenship applications, the court referred at para 9 to the Home Office Impact Assessment for the Immigration and Nationality (Fees) Regulations 2014, which said:

The specific policy objective of this legislation is to generate sufficient income to ensure the Home Office has a balanced budget for the financial year 2014-15. This will enable the Home Office to run a sustainable immigration system – making timely, correct decisions on who may visit and stay and deterring, stopping or removing those who have no right to be here – in a way that achieves value for money for the taxpayer. Policy objectives on immigration and nationality fees are: (1) that those who benefit directly from our immigration system (migrants, employers and educational institutions) contribute towards meeting its costs, reducing the contribution from the taxpayer ...

What this means is that children *entitled on application* to British citizenship, and individuals and families on the ‘routes to settlement’, are paying enormously over the true administrative cost of their applications, in order to support, among other things, the maladministration of ‘hostile environment’ measures with no provision for evaluating their effectiveness;⁷⁶ enforcement operations which routinely fail to remove people because of bringing them late to the airport, failure to produce the

⁷⁵ *Williams, R (on the application of) v The Secretary of State for the Home Department* [2015] EWHC 1268

⁷⁶ See discussion at 5.7 below

right detainee, failure to produce the right air tickets, etc;⁷⁷ and regular ‘managed migration’ operations effectively no better than tossing a coin, as over 50% of refusals are overturned on appeal.⁷⁸ The case of *Williams* concerned fees for citizenship, which have (approximately) doubled since 2011, while immigration fees have increased to ten times as much over a similar period.

For families faced with making these repeated applications, the effect is stark. Some miss the application deadline because not able to raise the money, and become unlawfully present, and so fall directly into the ‘hostile environment’. For these people, a successful future application simply puts them back to the beginning of the ‘10-year route’. Some are forced into the payday loan/loan sharking world to obtain the fee. A fee waiver application may be made, but this requires that families would be ‘destitute’.⁷⁹ Moreover, a fee waiver is not available for indefinite leave to remain, the final hurdle of the ‘routes to settlement’, on the basis that this is a ‘benefit’ for the migrant who should therefore expect to pay for it. This is another piece of hostile thinking by the Home Office. The entire purpose, as set out in the Rules themselves, of the 5- and 10-year routes is that they are routes *to settlement*, for family and long -residence migrants who, *at the beginning of the route*, met the rules, policies and art 8 requirements for that route. The ‘benefit’ to be obtained on gaining indefinite leave to remain is merely the right, finally, to begin integrating properly into British life, to cease being regarded as precarious, to embark, belatedly, on higher education, and no longer be required to save significant money just to remain lawfully in the UK.⁸⁰

5.4 The effect of ‘reducing the rights of appeal from 17 to four’ ;⁸¹ other remedies

Because of the glacial slowness of the decision-making and appeals processes, it is only now emerging that a person refused a 5-year route application – even if the refusal arose from a Home Office legal error - can only appeal on human rights grounds. This is because the Immigration Act 2014 removed the right of appeal against a decision which was ‘not in accordance with the law’ or ‘not in accordance with the Immigration Rules’ and so a tribunal cannot allow an appeal on that basis, but only on human rights grounds. It would seem that if the appellant is found by the tribunal to have met the relevant rules, he should be granted the leave he

⁷⁷ *An Inspection of Home Office Outsourced Contracts for Escorted and Non-Escorted Removals and Cedars Pre-Departure Accommodation July – November 2015* ICIBI

⁷⁴ Ministry of Justice Tribunal and Gender Recognition Statistics Quarterly, October to December 2017, published 8/3/18

⁷⁹ As defined by the Home Office in *Appendix 1 Fee Waiver* August 2017

⁸⁰ The ICIBI has recently begun an inspection into the Home Office charging policy. Kent Law Clinic among others have provided written submissions and met the inspection team with ILPA on 16/7/18.

⁸¹ Immigration Act 2014 part 2

applied for. However, this is not always the case. Consider an applicant who applied under the ‘parent of a child’ route to remain in the UK with her British citizen niece. She was refused because she was not the biological or adoptive parent of the child, despite Home Office guidance expressly requiring consideration of the actual parental relationship, the requirements of which were entirely met by the applicant. An appeal fully 18 months later (after she had been reduced to apply for local authority accommodation and support)⁸² was allowed on the day – but she has been placed on the 10-year route to settlement, on the basis that she has ‘won a human rights appeal’.

‘deport first, appeal later

This was first introduced in s94B Immigration Act 2014, another measure headlined as targeting foreign criminals. Section 94B allowed the Secretary of State to certify that an appeal against deportation could only take place once the applicant had left the UK, unless there would be a breach of their human rights ‘including’ that he would face ‘a real risk of serious irreversible harm’ if removed before the appeal was heard. Guidance following that Act gave examples of ‘serious irreversible harm’ such as permanent damage to a child’s mental health. Unsurprisingly the Secretary of State applied the specific test of ‘real risk of serious irreversible harm’ to all applicants. This interpretation was struck down by the Court of Appeal in *Kiarie & Byndloss*,⁸³ which held that the test was simply whether forcing a person to leave the country in order to appeal would be a breach of his art 8 rights.

The Immigration Act 2016 then extended the ambit of s94B to cover all those wishing to appeal a refusal on human rights grounds. On its face this meant that no one appealing a refusal of leave to remain on human rights grounds, even those whose applications were based on their family and private life and whose refusals may have arisen from Home Office errors or small technical failings in their documentation, would be able to remain in the UK and participate in person in their appeal unless they would succeed in a judicial review application of the secretary of State’s decision to certify their appeal. Thus, far from seeking to ‘deport first’ foreign criminals before they could appeal, the 2016 Act sought to ‘remove first’ even those family migrants with strong human rights claims.

Interestingly, revised guidance gave a less tremendous example of ‘serious irreversible harm’:

⁸² Under s17 Children Act 1989

⁸³ *Kiarie & Byndloss v Secretary of State for the Home Department* [2015] EWCA Civ 1020. See ILPA information sheet on this: <file:///C:/Users/sfy/Downloads/16.11.01-IA2016-9-Appeals-UPDATED.pdf>

the person is the sole carer of a child who is at school and the child would have no choice but to accompany the parent to live abroad until any appeal is concluded, resulting in a significant interruption to the child's education.⁸⁴

Not long after the 2016 Act came into force, the Supreme Court significantly weakened the whole 'deport first, appeal later' policy in its judgment in *Kiarie and Byndloss*.⁸⁵ Home Office application forms now ask non-family life applicants to explain why an out-of-country appeal would not work for them, and the policy is simply not applied to families.

Rights of appeal have been removed altogether for important migration categories, such as visitors, students and workers. Applications for leave to remain as a stateless person does not attract a right of appeal. For these migrants, 'administrative review' is available. This procedure is covered by Appendix AR of the Immigration Rules, and limits matters to be considered to 'caseworking errors'. While these do cover whether the Home Office failed correctly to apply its own rules or policies, there is no scope for a reconsideration of the Home Office's assessment of the facts, the application of any Convention rights or the reasonableness of any decision: and certainly no opportunity to present evidence orally, arguably essential where credibility is in issue. The recent case of *Ahsan*, cited and discussed in the next section, finds that in certain circumstances only an in-country right of appeal will provide justice for refused applicants.

5.5 'Creating illegality' on a grand scale - the TOIEC cases

Arguably it is the net migration target, never achieved and probably unachievable, has provided the impetus for large-scale Home Office flawed decision-making. A National Union of Students (NUS) report⁸⁶ on the 'TOIEC scandal' said this:

The TOEIC (Test of English for International Communication) scandal is unprecedented in terms of numbers: in 2014 ETS [a language testing company] informed the Home Office that more than 56,000 people had cheated or may have cheated in the TOEIC English language test over the course of more than a three-year period. As at the end of 2016 the Home Office had taken action in a staggering 35,870 cases ... we are aware that further action has been taken by the Home Office since then. Clearly there were cheats, initially exposed in the 2014 Panorama footage... However, it is also now clear beyond any doubt that a significant number of innocent people have been caught

⁸⁴ Home Office immigration factsheet on s94B

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/537244/Immigration_Act_-_Part_4_-_Appeals.pdf

⁸⁵ *Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 42 (It is understood that to deal with the access to justice issued raised by the court, the Home Office are intending to construct videolink facilities in the British High Commission in Jamaica so that Jamaican 'foreign criminals' can give evidence from there. In the meantime, immigration application forms continue to require non-family applicants to give specific reasons why any right of appeal cannot be exercised from abroad.)

⁸⁶ *The TOIEC Scandal – an ongoing injustice* NUSUK May 2018

up in the scandal and an extremely serious injustice has been done to them. In very many cases, the injustice has still not been recognised or rectified. As we set out below, the impact on those falsely accused cannot be understated. It is worth noting that there has been absolutely no willingness by the Home Office to consider representations or evidence put forward by students to explain their innocence.

It appears that over 40,000 students may have been removed from the UK as a result of the ETS notification. In *Mohibullah*⁸⁷ the Upper Tribunal described the effect on that appellant:

this decision effectively branded the Applicant a fraudster, a person who had abused immigration laws and control; required him to leave the United Kingdom, where he had been established for several years; blighted his academic and career prospects; rendered null the substantial financial investment which he had made in his studies in the United Kingdom; and blacklisted him with regard to future immigration decisions.”

In *Ahsan*⁸⁸ the Court of Appeal decided that an out-of-country appeal ‘would not provide a fair and effective challenge’ to the decision that a TOEIC applicant had cheated, as oral evidence may be required. The TOEIC affair, still not resolved as hundreds of cases await legal settlement, highlights the dangers of an immigration control system allowing no post-application communication with Home Office caseworkers, no or no effective right of appeal, and no access even to administrative review.

5.6 Formal criticism of the hostile environment

In February 2018 the Home Affairs Committee’s report on the delivery of Brexit⁸⁹ set out major criticisms of Home Office immigration operations, including the hostile environment policies. As background, the report notes (para 9) that UKVI deals with 3 million visa applications a year, and is now proposing to register 3 million EU citizens resident in the UK – a huge undertaking. The HAC is not confident: *‘The UKVI has a poor accuracy record’... in asylum one-third of cases are wrongly marked as non-straightforward in order to meet targets (para 27); ‘the sheer complexity of the immigration rules and pressure on staff resources were leading to concerns about decision-making processes... both in terms of accuracy... and procedures’ (para 54); ‘over a third of refusal notices included factual inaccuracy, inappropriate grounds of refusal and unclear refusal reasons’ (para 59).* The section on litigation notes the reduction in rights and grounds of appeal and loss of legal aid, the numbers of appeals being upheld as indication of poor accuracy, and the lack of feedback from allowed appeals (para 67). The HAC concludes that *‘this is not a way to run an immigration system’*. [69]. Significantly, the report recommends simplifying rules and guidance; reducing bureaucracy including

⁸⁷ *R(Mohibullah) v SSHD* [2016] UKUT 00561 (IAC)

⁸⁸ *Ahsan and others v Secretary of State for the Home Department* [2017] EWCA Civ 2009

⁸⁹ HAC delivery of Brexit n4

eliminating repeated applications for settlement [75], and an end to rejecting applications for small technical faults [79].

This is followed by an equally critical section on immigration enforcement. This notes the cuts in enforcement staff, and the government's decision to '*outsource much of its enforcement function*' which is '*changing behaviour towards people who are lawfully resident*'. This report again criticises the government for not monitoring the effectiveness of the hostile environment policies; and quotes David Bolt (Independent Chief Inspector of Borders and Immigration (ICIBI)):

*Of the 40 reports I have produced...the one that has caused me the most irritation was the report into the hostile environment and the response I got from the Department, where I believe they need to do more to understand the effectiveness of [these provisions] ... and to be able to give an account of the effectiveness of those measures, or not'*⁹⁰

The ICIBI reported a '10% error rate' in the information provided to banks, but that the Home Office had rejected his recommendation that the data be checked. The HAC report concludes this section demanding a dedicated helpline for people wrongly declared to be unlawfully present. Against these criticisms, the Home Office response merely referred to applicants' rights to bring an administrative review, statutory appeal or judicial review.⁹¹

Mark Serwotka, General Secretary of the Public and Commercial Services Union (PCSU), which organises many Home Office staff, stated⁹² that his union

'had opposed the Immigration Act 2014, and many of our members were appalled at the 'hostile environment' created by then home secretary Theresa May as she sought to make political capital out of the sensitive issue of immigration.'...

'my union stands in solidarity with all those caught up in a crisis which was not of their own making...we push, as a union, for a humane immigration policy that respects people who decide to come to this country.'

During this period the Home Affairs Committee⁹³ has demanded a review of the 'right to rent' policy, reporting the ICIBI evidence that '*the Home Office does not have in place measurements to evaluate the effectiveness*' of the hostile environment measures.' This was echoed in a House of Lords briefing paper on the hostile environment⁹⁴ issued on 14 June this year, which reviewed the 3 ICIBI inspection reports covering 'sham marriage' investigations, the driving licence and bank account provisions, and the

⁹⁰ Ibid para 119

⁹¹ *Home Office delivery of Brexit: Immigration: government's response to the Committee Recommendation* 38 published 25/5/18

⁹² *How dare ministers try to blame the Windrush fiasco on Home Office staff* Guardian 24/4/18

⁹³ House of Commons Home Affairs Committee *Immigration policy: Basis for building consensus* HC 500 session 2017-19

⁹⁴ *Impact of the hostile Environment policy Debate on 14 June 2018* House of Lords Library Briefing footnote 68 page 16

‘right to rent’ measures.⁹⁵ As well as there being no monitoring or evaluation of the measures, the inspection reports noted that Home Office errors in record-keeping and caseworking are a significant issue. The briefing reports evidence from a number of other organisations critical of the policies, including the United Nations Special Rapporteur. He strongly recommended that the government should repeal those measures giving responsibility for immigration enforcement to private citizens and civil servants responsible for public and social services.

Since the original ‘Windrush’ story broke, the Home Office under Sajid Javid quickly announced the following specific measures:

1. A procedure for Windrush people to obtain citizenship rapidly at no cost, a compensation scheme and dedicated customer contact centre
2. A trawl through hundreds of deportations and removals to identify if any ‘Windrush’ people or their children have been wrongly deported;
3. A withdrawal of notices to close bank accounts of alleged illegal migrants
4. A withdrawal and reconsideration of the refusals made under para 322(5) of the Immigration Rules
5. A withdrawal of the requirement for NHS staff to provide data on patients to the Home Office.
6. Lifting the immigration cap under Tier 2 for doctors and nurses.

Those decisions may betray some recognition by the government that the general public’s view on immigration is not as hostile as they have assumed.

6 Conclusion

In this article I aimed to show 3 things. Firstly, how under the modern ‘hostile’ immigration control the very definition of ‘illegal’ has shifted from being an objective definition of a person’s status under the law to a contingent relation between the person and whichever private or public entity she faces in order to obtain a right or entitlement. This, along with the pressure from the target to reduce net migration, is driving an interpretation of the burden and standard of proof for both immigration applications and for applications for other rights and entitlements which, since no discretion is permitted, borders on ‘beyond all reasonable doubt’. That, together with the limitations on rights and grounds of appeal and the withdrawal of legal aid, leaves many migrants wrongly held to be ‘illegal’ without access to adequate legal remedies. In summary, ‘illegal until proved

⁹⁵ The inspections can be accessed on the ICIBI website

legal'. As the Home Affairs Committee has stated, this is *'changing behaviour towards people who are lawfully resident'*.

Secondly, a combination of outsourcing immigration control measures (to hospitals, universities, employers, landlords etc) and the outsourcing of enforcement measures (to Capita, G4S etc) leaves individual migrants *legally distanced* from many decisions made about them, again reducing and even excluding their ability to challenge mistakes or make human rights-based representations.

Thirdly, the sheer pace of change in immigration laws, rules, fees and policies as well as their 'hostile' nature creates an environment for non-settled migrants which is complex, obscure and ruinously expensive.

I aimed to show that these three trends are combining with historic Home Office bureaucratic incompetence to create a perfect storm of laws, policies and practices which *create and perpetuate illegality*.

At the time of writing it appears that the 'Windrush' scandal has opened a crack in the Government's determination to enforce strict immigration control measures by focusing on those who are 'illegal'. It is clear, at the time of writing, that there is considerable sympathy around the country for ordinary people caught up in the stranglehold of one or other 'hostile environment' measure. It is also clear that there is widespread official and political concern about current immigration policy.

However only time will tell whether this leads to any real, long-lasting changes.

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