Justice for Windrush? Redress, reform, repeat

University of Edinburgh
School of Law

Research Paper Series

No 2022/03

Justice for Windrush? Redress, Reform, Repeat

Timothy Jacob-Owens
GLOBALCIT Research Assistant
University of Edinburgh, School of Law
tjacobo@exseed.ed.ac.uk

Jo Shaw
Salvesen Chair of European Institutions,
Head of School
University of Edinburgh, School of Law
jo.shaw@ed.ac.uk

Forthcoming in the Journal of Immigration, Asylum and Nationality Law (2022)

Edinburgh School of Law Research Paper Series
University of Edinburgh

Abstract

This article explores the scope and limits of the law as a means of remedying the injustices of the Windrush scandal, focusing on pathways to British citizenship for Windrush victims. We begin by discussing the available avenues for redress for denial of British citizenship to members of the Windrush generation. We then consider potential legislative reform, which might expand the powers of the Home Secretary to further facilitate the acquisition of British citizenship by individuals in the affected groups. Finally, we examine ongoing developments in immigration and citizenship law, including the post-Brexit treatment of EU citizens resident in the UK, which indicate that, notwithstanding the Windrush scandal and the responses it generated, the UK government is simply repeating the failings of the past.

Key words:

Windrush, citizenship, naturalisation, immigration, United Kingdom

Justice for Windrush? Redress, Reform, Repeat

Timothy Jacob-Owens[*] and Jo Shaw[†]

1. Introduction

The 2018 'Windrush scandal' revealed the terrible human cost of the UK government's 'hostile environment' policies, which effectively 'shifted' the border inside the state through the imposition of excessive documentary requirements and the privatisation of immigration enforcement.[1] Despite having lawfully entered and remained in the country, often from a very young age, members of the 'Windrush generation' later found themselves unable to prove their right to be in Britain, having fallen into various gaps created by the rapid reshaping of UK immigration and citizenship law in the twilight of the Empire.[2] As a consequence, many lost their jobs and homes, were denied healthcare, and were even deported or denied re-entry to the UK.[3]

Government responses to the scandal have ranged from a formal apology to financial payments administered via the Windrush compensation scheme,[4] which – after a scandalously slow start – had paid out a total of £24.4 million by the end of May 2021.[5] Efforts have also been made to regularise the Windrush victims' legal status, including through acquisition of British citizenship. In order to acquire British citizenship, members of the Windrush generation have been required to naturalise, despite the

[*] European University Institute/University of Edinburgh.
[†] University of Edinburgh.

[1] Sheona York, 'The "Hostile Environment" – How Home Office Immigration Policies and Practices Create and Perpetuate Illegality' (2018) 32 JIANL 363. On the notion of the 'shifting border', see Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester University Press 2020).

[2] See Robin M. White, 'The Nationality and Immigration Status of the "Windrush Generation" and the Perils of Lawful Presence in a "Hostile Environment"' (2019) 33 JIANL 218; Mike Slaven, 'The Windrush Scandal and the Individualization of Postcolonial Immigration Control in Britain' (2021) 45 Ethnic and Racial Studies 49. More generally, see also Nira Yuval-Davis, Georgie Wemyss and Kathryn Cassidy, 'Everyday Bordering, Belonging and the Reorientation of British Immigration Legislation' (2018) 52(2) Sociology 228; Stefan Salomon, 'Citizenship and Unauthorised Migration: A Dialectical Relationship' (2020) 83(3) MLR 583.

[3] See Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (Guardian Faber 2019); Fiona Bawdon, 'Remember When "Windrush" Was Still Just the Name of a Ship?' in Devyani Prabhat (ed), *Citizenship in Times of Turmoil? Theory, Practice and Policy* (Edward Elgar 2019).

[4] Details for applicants: https://www.gov.uk/government/publications/windrush-scheme/windrush-scheme. Case work guidance: Home Office, *Guidance for Decision Makers Considering Cases under the Windrush Compensation Scheme* (2020). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945263/windrush-compensation-case-work-guidance-v6.0.pdf accessed 6 September.

[5] *Windrush Compensation Scheme factsheet - June 2021* (2021) https://homeofficemedia.blog.gov.uk/2021/05/14/windrush-compensation-scheme-factsheet-may-2021/ accessed 6 September.

government's acknowledgment that they are 'British in all but legal status'.[6] Steps were taken to facilitate this, including waiving the usual citizenship fees and the requirements to demonstrate sufficient knowledge of the English language and to pass the 'life in the UK' test.[7] Nonetheless, certain key barriers – notably the application of the residence test and of the 'good character' requirement – continue to hinder access to citizenship for members of the Windrush generation. For instance, between 2018 and 2021, 367 individuals applying for British citizenship or otherwise seeking to regularise their status under the Windrush Scheme were refused on good character grounds.[8]

In this article, we explore some of the ongoing legal responses to the Windrush scandal, focusing on the acquisition of British citizenship as a means of securing rights and status for Windrush victims. We begin by discussing the available avenues for *redress* for denial of British citizenship to members of the Windrush generation. We then consider potential legislative *reform*, which might further facilitate the acquisition of British citizenship by members of the affected group. Finally, we turn to the question of whether, notwithstanding the Windrush scandal and the responses it generated, the UK government might simply be *repeating* the failings of the past.

2. Redress

The scope and limits of the law as a means of seeking redress for Windrush victims are well illustrated by the ongoing litigation in the English courts in *R* (*Howard) v the Secretary of State for the Home Department*.[9] The facts of the case are representative of the broader injustices suffered by members of the Windrush generation. Hubert Howard was born in Jamaica in 1956 and moved to the UK at the age of three, where he lived until his death in 2019. Having been born a citizen of the UK and Colonies, he became a citizen of Jamaica following Jamaican independence in 1962, which meant that he was then treated as a 'Commonwealth citizen' for the purposes of UK law and therefore subjected to immigration control. In 2012, having never sought formal recognition of his legal rights and status, his employer concluded that Howard was unable to prove his right to work as required under new legislation putting some of the onus of border control on private parties. Consequently, he lost his job. He then entered the labyrinth of the UK's immigration system. He applied for indefinite leave to remain and was initially rejected, having been unable to provide documents for every year since 1960 in order to prove his long-standing residence in the UK. After finally having his residence situation regularised, he later applied to naturalise as a British citizen but was refused, with the Home Office citing a series of minor past

[6] 'Home Secretary Statement on the Windrush Generation' (23 April 2018) https://www.gov.uk/government/speeches/home-secretary-statement-on-the-windrush-generation accessed 6 September 2021.
[7] British Nationality (General) (Amendment) Regulations 2020.
[8] *Windrush Task Force Data: Q2 2021* (26 August 2021) https://www.gov.uk/government/publications/windrush-task-force-data-q2-2021.
[9] [2021] EWHC 1023 (Admin).

criminal convictions as evidence of his failure to meet the 'good character' requirement. The Home Office eventually reviewed his case and decided to grant his application for naturalisation. Hubert Howard died a few weeks later.

In a legal challenge brought by Howard, and continued after his death by his daughter, it was argued that the Home Office's use of the good character requirement to refuse his naturalisation application was unlawful. As had been done with citizenship fees and the Knowledge of Language and Life in the UK test, the former Home Secretary Amber Rudd had been in favour of relaxing this statutory requirement,[10] which cannot be waived entirely, and had developed a proposal for how it might be applied more leniently to members of the Windrush generation. However, after she was forced to resign, Sajid Javid, her successor, reversed the proposal, opting instead to apply the requirement exactly as it would be applied to all other cases. This decision has subsequently had significant consequences for individuals like Hubert Howard, who have failed to satisfy the requirement because of a history of relatively minor criminal offences, often from decades earlier. In Howard's case, his most recent offence followed the loss of his job and multiple failed attempts to regularise his immigration status, pointing to a potential link with the multiple stresses engendered by the hostile environment. In this way, the fact that a person is deemed to fail the good character requirement may be connected to the burdens which the state has placed upon them and hence to the ways in which the state has failed vulnerable groups such as the Windrush generation.

The High Court found that, in light of Rudd's parliamentary statement promising to facilitate naturalisation for members of the Windrush generation and the measures she had subsequently taken to do so, the Home Secretary's decision to apply the good character requirement in an undifferentiated manner fell short of the *Wednesbury* reasonableness standard: no reasonable minister could have proceeded as Javid chose to, immediately after taking over from Rudd. The key part of the judgment is to be found in paragraph 35:

> Even allowing for the significant margin that the *Wednesbury* reasonableness standard permits any decision-maker, there is no sufficient reason to explain why, when it came to the good character requirement, no significance was attached at all to the long-residence and integration of a group all of whom had arrived in the United Kingdom prior to 1973, at least 45 years earlier.

[10] For the requirements for naturalisation under section 6(1) of the British Nationality Act 1981 (BNA), see paragraph 1 of Schedule 1.

'The logic of the Windrush statement', the court went on, 'required some form of departure' from the usual approach.[11] Both the Home Office's continued application of the existing good character guidance to the case of the Windrush generation and the application of that guidance as the basis for the refusal of Mr Howard's naturalisation application were thus held to be unlawful, and declarations issued to that effect.

The High Court decision vindicates the view that individuals like Hubert Howard should not have been unduly impeded in accessing British citizenship, particularly given the government's own position on the Windrush victims' status: the fact that they have been required to prove their 'good character', in line with the usual naturalisation conditions, is clearly at odds with the government's express acknowledgment that the members of the Windrush generation are 'British in all but legal status'. The decision thus illustrates how judicial review can be used to address some of the injustices of the Windrush scandal and offers a means for the Home Office to 'open itself up to greater external scrutiny', as recommended in the independent Windrush Lessons Learned Report.[12]

Nonetheless, the decision in *Howard* is a fragile victory. The outcome may yet be overturned if the Home Office is successful in bringing an appeal on the common law point about *Wednesbury* unreasonableness. It seems possible, for example, that the High Court's decision will be found to have been too intrusive vis-à-vis ministerial discretion, particularly given recent judicial deference in the context of politically sensitive citizenship cases, notably in *Begum* on citizenship deprivation[13] and most recently in the *O and PRCBC* case on citizenship fees for children registering as British.[14] More broadly, the government may also take steps to limit the legal scope for future challenges of this sort following the Independent Review of Administrative Law,[15] which forms part of a wider programme that seems to aim at reducing government accountability before the courts.[16] This latter avenue, which sees the Government undertaking a further consultation which appears to go beyond the relatively modest

[11] *Howard* [36].
[12] *Windrush Lessons Learned Report: Independent Review by Wendy Williams* HC 93 (2020) 7.
[13] *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7. For discussion, see Devyani Prabhat, 'A Paean to Judicial (Self) Restraint: The UK Supreme Court Shamima Begum Decision' (*Verfassungsblog*, 3 March 2021) https://verfassungsblog.de/a-paean-to-judicial-self-restraint/ accessed 20 January 2022.
[14] *R (O)* v *Secretary of State for the Home Department*; *R (The Project for the Registration of Children as British Citizens)* v *Secretary of State for the Home Department* [2022] UKSC 3. For discussion, see Colin Yeo, 'Supreme Court Upholds Government's Right to Set Child Citizenship Fees as It Chooses' (*Free Movement Blog*, 2 February 2022) https://www.freemovement.org.uk/supreme-court-upholds-governments-right-to-set-child-citizenship-fees-as-it-chooses/ accessed 4 February 2022.
[15] 'The Independent Review of Administrative Law' (Cm 407) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf accessed 8 September 2021.
[16] Ronan Cormacain, 'Unaccountability – The Disease within Government' (*UK Constitutional Law Association Blog*, 17 May 2021) https://ukconstitutionallaw.org/2021/05/17/ronan-cormacain-unaccountability-the-disease-within-government/ accessed 3 September 2021.

recommendations of the Independent Review,[17] may have wider consequences for individuals who are impacted by adverse immigration and citizenship decisions, for whom judicial review is often the only available avenue of redress.[18]

Alongside the common law challenge, the applicants also advanced the view that the Home Office's use of the good character requirement to refuse Howard's citizenship application constituted unlawful discrimination on the grounds of race and/or 'membership of the Windrush generation'. Instead, it was argued, the Home Secretary should have used the interpretive power under Section 3 of the Human Rights Act 1998 (HRA) to disapply the good character requirement for members of the Windrush generation, in order to avoid indirect (*Thlimmenos*) discrimination (i.e. failure to treat different cases differently) contrary to Article 14 of the European Convention on Human Rights (ECHR).[19]

The High Court was quick to dismiss the view that Hubert Howard had suffered discrimination on the ground of race. Formulating the claim in these terms, the court argued, does not fit 'the circumstances of this case': 'The good character requirement is applied to all non-United Kingdom nationals who apply to obtain British citizenship by naturalisation' and 'as applied to that class, the good character requirement is one that is justifiable and justified'.[20] No mention was made of the fact that Howard had been a racialised (former) colonial subject nor that the historical foundations of the UK's current citizenship regime lie in attempts to exclude such individuals from enjoying secure access to rights and status, as Nadine El-Enany has shown.[21] The Windrush Lessons Learned Report acknowledges that the Home Office's 'failings demonstrate an institutional ignorance and thoughtlessness towards the issue of race and the history of the Windrush generation within the department, which are consistent with some elements of the definition of institutional racism'.[22] At the very least, this wider context merited consideration; as it stands, the judgment in *Howard* is likewise blind to the systemic racism embedded in the UK's immigration and citizenship law and to the historical construction of those laws in a colonial image.

---

[17] Ministry of Justice, 'Judicial Review Reform Consultation' (March 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf accessed 6 September 2021.

[18] Joint Council for the Welfare of Immigrants, *Response to Independent Review of Administrative Law* (2020) 2 https://www.jcwi.org.uk/our-response-to-the-independent-review-of-administrative-law accessed 6 September 2021. On judicial review and immigration law more generally, see Christopher Rowe, 'Falling into Line? The Hostile Environment and the Legend of the "Judges' Revolt"' (2021) MLR, DOI: 10.1111/1468-2230.12673 (online first).

[19] *Thlimmenos v Greece* (2001) 31 EHRR 411.

[20] *Howard* [20].

[21] Nadine El-Enany, *(B)ordering Britain: Law, Race and Empire* (Manchester University Press 2020) 73-132. See also Devyani Prabhat, 'Unequal Citizenship and Subjecthood: A Rose by Any Other Name ...?' (2020) 71(2) NILQ 175-191.

[22] *Windrush Lessons Learned Report: Independent Review by Wendy Williams* HC 93 (2020) 7.

It is possible that greater attention might be paid to the race-based discrimination claim on appeal. Nonetheless, while other kinds of discrimination claims have had some success in nationality cases before the courts in both the UK and Strasbourg,[23] the auguries for pursuing a specifically race-based approach are not promising. A related issue was raised in the *East African Asians* case, which concerned the impact of post-war immigration restrictions imposed by the UK on British Asians from Kenya and Uganda.[24] In that case, the European Commission of Human Rights acknowledged that the restrictions had 'racial motives' and found that the discrimination vis-à-vis British Asians holding citizenship of the UK and Colonies amounted to 'degrading treatment' within the meaning of Article 3 of the Convention. By contrast, the Commission argued that no such discrimination was suffered by those categorised as 'British protected persons', i.e. (former) colonial subjects who were considered to be neither aliens nor citizens of the UK and Colonies, despite them being subjected to the same 'degrading' immigration restrictions. In the absence of full citizenship, human rights law was thus blind to Britain's discriminatory treatment of its former colonial subjects, failing to recognise that the post-war citizenship regime was structured on white supremacist premises.[25] The decision in *Howard* further underlines the limitations of human rights law as a means of challenging the systemic racism of the colonial state.

The High Court was somewhat more amenable to the argument that the Home Office had discriminated on the ground of membership of the Windrush generation, accepting that this constitutes an 'other status' for the purposes of Article 14 of the ECHR, but ultimately also dismissed that view. The court found that, as a general matter, the good character requirement 'plainly pursues a legitimate objective' and its current statutory formulation 'is capable of pursuing that purpose in a reasonable and proportionate way'.[26] Specifically in relation to individuals like Hubert Howard, the court considered that its disapplication would 'for all practical purposes revive section 7' of the British Nationality Act 1981 (BNA), which for a period of five years (ending on 1 January 1988) had allowed such individuals to acquire British citizenship by registration.[27] Reviving that provision, the court pointed out, would be contrary to the clear intentions of Parliament, which had expressly opted to place time limits on the registration route and had subsequently removed Section 7 altogether via legislative amendment.[28]

The High Court's decision appears not to contemplate a more moderate approach than either an outright challenge to the legality of the good character requirement or the claim that, in Howard's case, it should

[23] See, e.g., *Genovese v Malta* (2011) 58 EHRR 25; *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56.
[24] (1973) DR 78 A/B/5.
[25] For more detailed discussion of the case and wider context, see El-Enany (n 20) 114-116; Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 62-95.
[26] *Howard* [24].
[27] Ibid [23].
[28] See Nationality, Immigration and Asylum Act 2002, sch 2, para 1(a).

have been disapplied altogether. The court observed that '[w]hen deciding Mr Howard's application, the Home Secretary had no option but to … apply a good character requirement'.[29] While this may be so, it belies the fact that the Home Secretary still retains discretion as to *how* the requirement is applied. It might plausibly be argued that Section 3 of the HRA required a more lenient approach to the application of the requirement, along the lines envisaged by Amber Rudd prior to her resignation, in order not to discriminate (in the *Thlimmenos* sense) against members of the Windrush generation. Indeed, we may wonder why the High Court considered a differentiated approach of this sort to be required as a matter of reasonableness but not to avoid a potential breach of the ECHR.

This view is reinforced by two subsequent decisions dealing with the government's handling of the Windrush scandal. In the first, the High Court found that the Home Secretary's 'failure … to afford family members of a Windrush victim preferential treatment in the charging of fees' for leave to enter the UK was indirectly discriminatory (in the *Thlimmenos* sense) on the ground of their 'other status' and thus breached Article 14 of the ECHR.[30] In the second, the court held that the Home Secretary was required, under Section 3 of the HRA, to interpret the BNA as if it contained a discretion to disapply part of the usual residence requirement for naturalisation in the case of members of the Windrush generation who had been prevented from fulfilling that requirement as a consequence of the government's actions, in order to avoid an infringement of Article 14 (see further below).[31] In light of these more favourable decisions, it is to be expected that the applicants will push for reconsideration of the 'Windrush generation' discrimination claim on appeal.

3. Reform

Unless the Home Office successfully appeals the *Howard* decision, we can anticipate that the judgment will result in changed administrative practices and may potentially lead to changes in the legislative framework for nationality, if this is judged to be the more appropriate route.

The Home Secretary's guidance on the application of the good character requirement for members of the Windrush generation will certainly need to be reworked, with potential implications for others whose naturalisation applications have been refused on equivalent grounds.[32] In addition, it has been argued that this judgment could have implications for a highly restrictive and arguably vindictive good character requirement which continues to be applied within the Windrush Compensation Scheme, inappropriately denying compensation for state harm to those who have criminal convictions. The (now

[29] Ibid [22]
[30] *R (Mahabir) v Secretary of State for the Home Department* [2021] EWHC 1177 (Admin) [175].
[31] *R (Vanriel and Tumi) v Secretary of State for the Home Department* [2021] EWHC 3415 (Admin) [113].
[32] John Vasiliou, 'Good character requirement unlawfully applied in Windrush cases' (*Free Movement Blog*, 27 April 2021) https://www.freemovement.org.uk/good-character-requirement-unlawfully-applied-in-windrush-cases/ accessed 3 September 2021.

former) advisor to the Home Office in respect of that scheme, Martin Forde QC, has made clear his opposition, arguing that 'effectively tortious compensation in respect of damage caused by government policy […] could not rationally be reduced by reason of criminality'.[33]

As regards the possibility or necessity of legislative reform, it is useful to draw comparisons with the case of those members of the Windrush generation whose applications for naturalisation have failed because they cannot show that they satisfy the residence test, often as a consequence of the government's own errors. For example, in 2010, after attending his mother's funeral in Jamaica, Trevor Donald was denied permission to re-enter Britain, despite having lived in the UK for over 40 years, and was only allowed to return in 2019.[34] His subsequent application for British citizenship was then refused on the basis that he was not resident in the UK on the date five years before the application was made, when he was still excluded by the state. He was invited by the Home Office to reapply in 2024. Similarly, Ken Morgan failed to meet the residence requirement and was refused British citizenship after his passport was wrongly confiscated by UK officials, leaving him stranded in Jamaica for 25 years.[35]

As Home Secretary, Priti Patel has argued that there is no legal 'exception for members of the Windrush generation who are unable to qualify for citizenship through no fault of their own'.[36] Reportedly 'frustrated' by this,[37] the Home Secretary has resolved to change the primary legislation. Amendments to the BNA have been proposed as part of the Borders and Nationality Bill introduced into Parliament in July 2021,[38] after a consultation process on a so-called New Plan for Immigration,[39] which by that

[33] Martin Forde, 'Home Office Windrush decision was irrational, holds High Court' (*UK Human Rights Blog,* 26 April 2021) https://ukhumanrightsblog.com/2021/04/26/home-office-windrush-decision-was-irrational-holds-high-court/.
[34] Amelia Gentleman, 'Windrush victim denied UK citizenship despite Home Office admitting error' (*The Guardian*, 5 March 2021) https://www.theguardian.com/uk-news/2021/mar/05/windrush-victim-denied-uk-citizenship-home-office-admitting-error-trevor-donald accessed 3 September 2021.
[35] Amelia Gentleman, 'Windrush victim refused British citizenship despite wrongful passport confiscation' (*The Guardian*, 22 November 2020) https://www.theguardian.com/uk-news/2020/nov/22/windrush-victim-refused-british-citizenship-despite-wrongful-passport-confiscation accessed 3 September 2021.
[36] Connie Sozi, 'Despite admitting failures Home Office refuse Windrush citizenship application' (*Deighton Pierce Glynn*, 8 March 2021) https://dpglaw.co.uk/despite-admitting-failures-home-office-refuse-windrush-citizenship-application/ accessed 3 September 2021.
[37] Amelia Gentleman, 'British nationality law reform aims to remove Windrush anomalies' (*The Guardian*, 18 March 2021) https://www.theguardian.com/uk-news/2021/mar/18/british-nationality-law-reform-aims-to-remove-windrush-anomalies accessed 3 September 2021.
[38] https://bills.parliament.uk/bills/3023. See also Explanatory Notes to the Bill: https://publications.parliament.uk/pa/bills/cbill/58-02/0141/en/210141en.pdf accessed 6 September 2021.
[39] The section of the New Plan concerned with immigration can be found here: https://www.gov.uk/government/consultations/new-plan-for-immigration/new-plan-for-immigration-policy-statement-accessible#chapter3 accessed 6 September 2021.

stage had not yet led to any published results.[40] Aside from a number of measures intended to correct some historical anomalies, especially as regards gender discrimination in relation to the transmission of various citizenship statuses including British Overseas Territory Citizenship across the generations, the measures proposed will allow the Home Secretary greater discretion in two important areas. First, the new provisions will create a discretionary adult citizenship registration route to grant citizenship in circumstances where 'unfairness and exceptional circumstances beyond their control' have made it impossible to gain UK citizenship. Second, the amendments will also allow the Secretary of State at her discretion to waive any part of the current requirement, pursuant to paragraph 1(2)(a) of Schedule 1 to the BNA, that applicants for naturalisation must both (1) be present in the UK on the day five years before their application is made and (2) not be absent for any more than 450 days during that period.

As regards the latter, it remains an open question whether the Secretary of State is actually prevented from waiving this requirement in cases of this sort: under the existing statutory framework, she already has discretion to treat an applicant 'as fulfilling the requirement specified in paragraph 1(2)(a) … although the number of days on which [they were] absent from the United Kingdom in the period there mentioned exceeds the number there mentioned'.[41]. A plausible reading would suggest that 'the requirement' referred to here includes both of the elements identified above, i.e. presence in the UK on the day five years before submitting a naturalisation application and absence of no more than 450 days.[42] On this view, the expanded discretion envisaged in the Borders and Nationality Bill is simply superfluous.

However, an alternative view, supported by the express reference to 'the number of days…' in the provision quoted above, suggests that the existing discretion only covers the latter aspect of the residence requirement, i.e. the cumulative absences. Authority for this position is found in *R (Vanriel and Tumi) v Secretary of States for the Home Department*, in which the High Court held that 'the natural and unambiguous meaning … is that there is no relevant discretion to disapply the 5 year rule'.[43] This would seem to support the Home Secretary's contention that, absent statutory amendment, the requirement remains 'unwaivable' for members of the Windrush generation. However, the High Court also found that in the specific case of Windrush applicants who had been prevented from returning to the UK, the Secretary of State was nonetheless required, under Section 3 of the HRA, to 'read and interpret schedule 1 to the BNA as if it contained a discretion to dis-apply the 5 year rule', in order to

[40] For details of the Consultation Process response, which was published after the Bill had been given a Second Reading by the House of Commons, see 'Consultation on the New Plan for Immigration' (Cm 493) https://www.gov.uk/government/consultations/new-plan-for-immigration accessed 8 September 2021.
[41] BNA, sch 1, para 2(1)(a).
[42] Laurie Fransman, *Fransman's British Nationality Law* (3rd edn, Bloomsbury 2011), 427, 437.
[43] *Vanriel and Tumi* [38].

avoid an infringement of Article 8 and/or Article 14 of the ECHR.[44] On this basis, the Borders and Nationality Bill might therefore be expected to clarify the ambiguities surrounding the scope of the discretion and facilitate the naturalisation of members of the Windrush generation. In any case, the fact that this issue was not (publicly) considered at the time the Windrush scheme was established betrays a further lack of foresight on the part of a government that had been so intent on hampering people's access to their residency rights.

The discretionary adult 'registration' route for similar cases is an important innovation, although as with the other measures it raises the level of discretion in the hands of the Secretary of State. This new route could be seen as 'reasserting' Parliament's original intention regarding processes for (relatively) automatic acquisition and registration for those 'connected to the UK', an intention that has been substantially subverted over the years, in particular in the case of children.[45] Indeed, it is worth noting that prior to 1988, a person in Mr Howard's position (i.e. with a strong connection to the UK) could have 'registered' rather than naturalised, and thus avoided the good character requirement that has subsequently been imposed even in relation to children as young as 10. The new provisions would *allow*, but presumably not *require*, the Secretary of State to take into account the good character of the person seeking registration, again handing further discretion to the executive.[46] The Joint Committee on Human Rights, which has waged a long-standing campaign to reduce the incidence of good character clauses in UK nationality law and has decried their impact when applied in cases where the law is changed in order to correct a historical anomaly or incidence of discrimination, has called upon the Secretary of State to clarify her approach to this discretion.[47]

Expanding the Secretary of State's discretion in an area where the exercise of that discretion has already produced some troublesome outcomes does not necessarily seem a promising approach to providing redress *and* certainty for the victims of a scandal of the state's making. Some stakeholders have raised concerns about additional discretion for the Secretary of State in relation to the question of what might be 'exceptional' for the purposes of the access to the new adult registration route (which will apply both for British citizenship and British Overseas Territory Citizenship). For example, in its briefing on the first reading, the Law Society of Scotland argued that it was in favour of the new measures 'subject to clarification about what "exceptional" means … It is important that criteria for the exercise of the Secretary of State's discretion is set out in Guidance published by the Home Office'.[48]

[44] Ibid [113].
[45] Solange Valdez-Symonds and Steve Valdez-Symonds, 'Reasserting Rights to British Citizenship Through Registration' (2020) 34 JIANL 139.
[46] Clause 7, subsections 2 and 3 of the Nationality and Borders Bill.
[47] *Legislative Scrutiny: Nationality and Borders Bill (Part 1) – Nationality* HC 764, HL 90 (2021-22) para 40.
[48] Law Society of Scotland, 'Second Reading Briefing: Nationality and Borders Bill' (2021) 3.

Another regrettable aspect of the proposed reforms, notwithstanding the potential benefits for members of the Windrush generation, is that the provisions on nationality have been included in a Bill which contains multiple attempts to ratchet up the hostile environment by changing the UK's provisions relating to asylum seekers and the seeking of asylum in the UK, for example, penalising the use of 'illegal' routes to reach the UK (when it is clear that there are no safe and legal routes to be had). As Emma Harris has commented, in a largely positive evaluation of the new nationality provisions,

> It is incredibly disappointing that the reforms have been mashed up with the abhorrent and objectionable proposals contained in the rest of the Bill, when they could have been passed in a standalone piece of legislation that all sides of both Houses might have agreed on. Those who fight the Bill as a whole will no doubt be accused of seeking to delay justice for the Windrush generation and countless others.[49]

4. Repeat

The struggles in cases such as *Howard* and the evidence revealed in reports such as that of the National Audit Office on the Windrush compensation scheme[50] all highlight the insight that the wrongs committed by the state in the case of these members of British society continue to be compounded by further measures, whether these are accidental or intentional, which restrict access to full membership. In other words, many of the harms being suffered by those who are understood to fall within the scope of the Windrush scandal (and the boundaries themselves are rather contested) are continued and repeated harms, stemming from inadequate means of redress and an unwillingness to take on fundamental reform. That this continues to be the case is reinforced by the recent news that the Home Office has signed a legal agreement with the Equality and Human Rights Commission (EHRC) to improve practices following Windrush. This follows a finding by the EHRC that it had been failing to have proper regard to the public sector equality duty in its implementation of hostile environment policies, in particular the impact upon members of the Windrush generations who are Black.[51]

It is worth recalling that the impact of the so-called hostile environment upon vulnerable groups within society (of whom 'Windrush' is only one) was foreseeable and foreseen, even though the hostile

[49] Emma Harris, 'Briefing: The Nationality and Borders Bill, Part 1 (citizenship reforms)' (*Free Movement Blog*, 12 July 2021) https://www.freemovement.org.uk/nationality-and-borders-bill-analysis-part-1-nationality-citizenship-reforms/ accessed 3 September 2021. See also Helena Wray, 'Tying up historical loose ends: The Nationality and Borders Bill (UK)' (*Global Citizenship Observatory Blog*, 6 September 2021) https://www.globalcit.eu/tying-up-historical-loose-ends-the-nationality-and-borders-bill-uk accessed 6 September 2021.

[50] National Audit Office, *Investigation into the Windrush Compensation Scheme* HC 65 (2021–22).

[51] 'Home Office signs legal agreement to improve practices following Windrush' (*Equality and Human Rights Commission*, 1 April 2021) https://www.equalityhumanrights.com/en/our-work/news/home-office-signs-legal-agreement-improve-practices-following-windrush accessed 6 September 2021.

environment policy was not one that was ever the subject of even a cosmetic consultation exercise and certainly not a White Paper.[52] As Wendy Williams, in her *Lessons Learned* report on the Windrush scandal put it, the Home Office had been 'overly optimistic' about 'the effectiveness of the proposed "mitigations"' for its hostile environment policy'.[53] In other words, the point was made to the Home Office, it contended that it had put in place mitigations, and these proved to be wholly inadequate. Unsurprisingly, many parts of the hostile environment have been legally as well as politically contested and there have been repeated judicial review successes against various measures imposed by the Secretary of State or by legislation.[54] Yet despite success on the litigation front, it was only when a combination of media coverage and greater inclination on the part of Members of Parliament to hold the Secretary of State and the Home Office accountable that recognition of the harms caused to the Windrush generation and their descendants was achieved. Furthermore, despite Windrush, despite the various judicial review successes, and despite the multitude of evidence presented by charities, advocacy organisations, and academics on its impacts and lack of efficacy in the stated objectives of border control and reduction of immigration, there has been no systemic change or recognition of the damage that the hostile environment can cause.[55] These points bear repeating, because new dimensions continue to be developed in relation to what is now generally termed the 'compliant environment', as the result of a superficial rebranding exercise. These new dimensions generate fresh problems for those who find themselves the subjects of immigration enforcement, even if they have a valid and legal reason to be present in the UK. One can highlight, for example, the discriminatory impacts of privatisation of immigration enforcement[56] and of the growing trend towards digitisation in relation to immigration status,[57] not to mention the new measures on asylum contained in the Nationality and Borders Bill, as mentioned previously.

Most significantly, there is a new scenario in place which matches some of the historical circumstances of the Windrush saga, where a repetition of many of the same harms could occur. This concerns the status of EU citizens resident in the UK before 31 December 2020 (i.e. before the UK formally withdrew as a Member State from the EU), who are supposed beneficiaries of the specially designed 'Settled Status' scheme (EUSS), and their capacity to access services to which they are entitled if they have

[52] Melanie Griffiths and Colin Yeo, 'The UK's hostile environment: Deputising immigration control' (2021) Critical Social Policy, DOI: 10.1177/0261018320980653 (online first).
[53] *Windrush Lessons Learned Report: Independent Review by Wendy Williams* HC 93 (2020) 86.
[54] See, for example, *Mirza v Secretary of State for the Home Department* [2016] CSOH 73; *R (MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10. More generally, see also John Campbell, 'The role of lawyers, judges, country experts and officials in British asylum and immigration law' (2020) 16(1) International Journal of Law in Context 1.
[55] See Griffiths and Yeo (n 36).
[56] Sheona York, 'Privatisation, "Mission Creep" and Lack of Home Office Legal Conscientiousness in the Immigration Application Process' (2020) 34 JIANL 52.
[57] Joe Tomlinson and Alice Welsh, 'Will Digital Immigration Status Work?' (2020) 34 JIANL 306. See also Joe Tomlinson, Jack Maxwell and Alice Welsh, 'Discrimination in Digital Immigration Status' (2021) Legal Studies, DOI: 10.1017/lst.2021.33 (online first).

leave to remain in the UK (or to take steps to acquire UK citizenship should they so choose). While the steps taken to move Commonwealth immigrants into *de iure* and *de facto* vulnerable situations occurred over many decades, and received relatively little attention, the potential for those who have not applied in a timely manner under the EUSS, and who are deemed not to have good cause for failing to do so, to fall foul of the shifted border has been widely observed and the analogy drawn to the case of Windrush.[58] Moreover, challenges may face even those who have applied successfully. The House of Commons Exiting the European Union Committee made the following remarks in a 2018 report:

> 47. We have heard evidence from the EU citizens in the UK that they would prefer a hard document to be able to show their legal status and to minimise the chance of them experiencing discrimination. The evidence of the Windrush generation—where many people who were perfectly entitled to be in the UK but found it difficult to persuade others of this without physical documentary evidence—has heightened this concern.
>
> 48. The Minister told us that the Home Office has started to roll out online checking of digital status for right-to-work checks. We recognise that, in future, other groups of non-UK passport holders will be using similar digital processes as a matter of course to demonstrate their immigration status. However, we are concerned that this is a task of unprecedented scale for the Home Office and it is being done within a very tight time frame. The experience of the Windrush generation shows that, where errors occur, it can lead to devastating consequences for individuals and their families. We are also concerned about the potential for fraud and the incentive for individuals to be exploited if they cannot persuade an employer or landlord of their status.[59]

Indeed, as this latter paragraph notes, the specific aggravating factor for the beneficiaries of the EUSS concerns the fact that it is a digital-only status. The House of Lords Select Committee returned to the same theme in a 2021 report, as the EUSS scheme closed for applications, stating that 'the absence of a physical document creates the risk that many EU citizens, including the elderly and those who are digitally challenged, will struggle to prove their rights'.[60] In discussion of the digital-only status, the

[58] See, for example, 'Fears of a Windrush Scandal in the NHS for EU Citizens' (*Doctors of the World*, 9 January 2020) https://www.doctorsoftheworld.org.uk/news/fears-of-a-windrush-scandal-in-the-nhs-for-eu-citizens/ accessed 3 September 2021; 'The EU Settlement Scheme application deadline has passed - what happens now?' (*The Joint Council for the Welfare of Immigrants*, 4 July 2021) https://www.jcwi.org.uk/blog/the-eu-settlement-scheme-application-deadline-has-passed-what-happens-now accessed 3 September 2021.

[59] House of Commons, Exiting the European Union Committee, *The progress of the UK's negotiations on EU withdrawal: the rights of UK and EU citizens* HC 1439 (2017-19) [47]-[48].

[60] House of Lords, European Affairs Committee, *1st Report of Session 2021–22: Citizens' Rights* HL 46 (2021-22), summary.

Home Officer minister giving evidence decried the comparison to Windrush, arguing that in the case of that group it was the lack of a 'centralised record' not the lack of a physical document which caused the problem.[61]

Tomlinson *et al* have argued convincingly that these types of arrangements amount to indirect discrimination, in so far as the impact of having digital-only status will make it harder for certain groups such as those with disabilities, those who are older, and those in Roma, Gypsy and Traveller communities to effectively prove their right to reside in the UK in practice, even if they have previously applied successfully to the Scheme with the help of voluntary groups or organisations such as the Citizens Advice Bureaux.[62] Moreover, early research amongst affected groups has highlighted the extent to which fear of deportation is growing.[63]

There are, of course, limits to the comparison, as Windrush is less a product of 'migration' and more one of the complex and unresolved politics of decolonization in the UK.[64] It could be argued that the appropriation of the 'Windrush' language as a risk which is faced by those who fall through the gaps of the EUSS, either because they fail (successfully) to apply or because they face the shifting border because they cannot evidence their right to remain, amounts to yet another colonialization of the language developed to apply to one group by another group who are predominantly White Europeans. Yet the comparison has a number of validities, not least because the practices of intra-European Union free movement were characterised in terms of political symbolism, if not always in legal practice, as the interactions of a group of quasi-co-citizens, not those of migrants and sedentaries. Furthermore, there are important but less remarked upon 'postcolonial' dimensions to the post-Brexit narrative of the EUSS, as the interaction between Portuguese citizenship (and thus EU citizen status) and UK residence for the UK's East Timorese population makes clear.[65]

Finally, it is worth questioning how the narrative of the EUSS's negative impacts will play out, in the interplay between media attention, parliamentary accountability and legal action, and whether this will match the frustrations of the Windrush scandal, which have allowed the harms brought about by the violence of the state to be repeated and continuing, despite all the measures that have been taken.

---

[61] Ibid [155].
[62] Tomlinson, Maxwell and Welsh (n 41).
[63] See Sanna Elfving and Aleksandra Marcinkowska 'Imagining the Impossible? Fears of Deportation and the Barriers to Obtaining EU Settled Status in the UK' (2021) Central and Eastern European Migration Review, DOI: 10.17467/ceemr.2021.04 (online first).
[64] Jo Shaw, *The People in Question* (Bristol University Press 2020), 209.
[65] Eve Webster, 'UK's East Timorese population faces loss of rights after Brexit' (*The Guardian*, 27 June 2021) https://www.theguardian.com/world/2021/jun/27/uks-east-timorese-population-faces-loss-of-rights-after-brexit accessed 6 September 2021.

5. Conclusion

By more or less any conceivable standard, the mistreatment of the Windrush generation by the UK state constituted a grave injustice. The foregoing analysis illuminates the scope and limits of the law as a means of remedying that injustice. The High Court decision in *Howard* demonstrates how judicial review offers a possible avenue of redress for Windrush victims seeking to challenge their exclusion from British citizenship, albeit one that is subject to further contestation in the courts and perhaps wider, damaging reform by the government. On the other hand, the decision also illustrates the incapacity of the law even to recognise the racialised dimensions of the Windrush scandal and hence its complicity in the ongoing colonial violence of the state. Current legislative proposals may serve to further facilitate the acquisition of British citizenship by members of the Windrush generation, but in ways that reinforce the discretionary powers of the executive. They continue the scenario in which nationality law is seen as involving the interplay of legislative and executive action, with the courts playing a minor role in relation to executive discretion. This flows, as the Supreme Court acknowledged in *O and PRCBC*, from the statutory and non-constitutional status of citizenship within the UK legal order. Finally, ongoing developments in immigration and citizenship law, including the post-Brexit treatment of EU citizens resident in the UK, indicate that the Windrush scandal is by no means an isolated historical incident, but rather part of a broader and ongoing regime of precarity for those whose rights and status go unrecognised. By creating and maintaining the (internal) border between 'citizens' and '(im)migrants', the law plays a central role in sustaining that regime, thus ultimately serving the whims of the state.[66] As the Windrush scandal showed, this is no guarantee of justice for those left on the wrong side of that border.

[66] On the (legal) 'border' between citizens and migrants, see Bridget Anderson, 'More Equal Than Others: Managing the Boundaries of Citizenship' in Catherine S. Ramírez et al. (eds), *Precarity and Belonging: Labor, Migration, and Noncitizenship* (Rutgers University Press 2021).