



## **Supplementary Submission to the Home Affairs Committee**

### **Windrush Compensation Scheme December 2020**

Amnesty International UK is a national section of a global movement. Collectively, our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. Our mission is to undertake research and action focused on preventing and ending grave abuses of these rights. We are independent of any government, political ideology, economic interest or religion.

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**Introduction:**

1. Amnesty International UK (AIUK) makes this supplementary submission in the light of the oral evidence received by the Committee on 9 December 2020, specifically the evidence from Martin Forde QC, Independent Adviser to the Windrush Compensation Scheme.<sup>1</sup>

### **Evidence from Martin Forde QC:**

2. In his response to the Chair towards the start of the evidence session, Mr Forde gave a brief but powerful summary of his personal experience and that of his parents. This has important relevance to the matters raised in our first submission to this inquiry.<sup>2</sup> In short, Mr Forde explained that his parents moved to the UK in the 1950s from Barbados. Mr Forde describes his parents as ‘thinking’ they were ‘fully British’. He and his brother were later born in the UK. On 30 November 1966, Barbados became independent. Mr Forde describes his parents as becoming Bajan ‘again’ and that they then ‘naturalised’ in the UK in 1975. He referred to Home Office correspondence from the time, which had suggested that unless and until his parents’ ‘naturalisation’ the right of he and his brother to be in the UK was in doubt – this despite their having been born in the UK. He describes the impact of reading this correspondence decades later as ‘chilling’.<sup>3</sup>
3. During that introduction, Mr Forde also highlighted the impact of the UK Borders Act 2007 as a ‘cranking up’ of effective immigration control by employers and service providers.<sup>4</sup> Elsewhere in his evidence, he drew the Committee’s attention to the generally more favourable treatment by the Home Office of members of the ‘white Commonwealth’.<sup>5</sup>
4. A full understanding of the Windrush scandal requires an understanding of the matters to which Mr Forde refers. For reasons addressed in our first submission to this inquiry, that understanding is necessary if wrongs are to be righted and a compensation scheme is to be effective. We provide this supplementary submission because the importance of the matters raised by Mr Forde in his evidence is not fully or clearly elaborated in that evidence. There are three critical matters that are liable to be misunderstood or lead to misunderstanding. These are addressed below under discrete subheadings. An Appendix is also provided setting out the relevant legislative history in greater detail.

#### ***(1) Members of the Windrush generation were ‘fully’ British***

5. Mr Forde’s evidence may give rise to the impression that members of the Windrush generation when arriving in the UK were not ‘fully’ British. He refers to his parents ‘thinking’ they were ‘fully’ British as if this may not have been the case. However, they were fully British; and it is a critical aspect of the injustice that was done that this is so.
6. In short, at the time of their arrival in the UK, members of the Windrush generation were British subjects (also Commonwealth citizens) equally with the population of

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<sup>1</sup> Oral Evidence, HC 1013, 9 December 2020

<sup>2</sup> That submission remains to be published by the Committee.

<sup>3</sup> HC 1013, Q34, *op cit*

<sup>4</sup> HC 1013, Q34, *op cit*

<sup>5</sup> HC 1013, Q49, *op cit*

persons born and living in the UK. Differentiation in the treatment of British subjects began to be introduced in the 1960s and was made more profound by the Immigration Act 1971. This differentiation was not directly to nationality status.

7. However, differentiation was ultimately crystallised in British nationality law by the British Nationality Act 1981, which commenced on 1 January 1983 (a decade after the last arrival of people who have generally come to be referred to as the Windrush generation). That crystallisation effectively deprived many people of British nationality (specifically, British citizenship as introduced by the 1981 Act). Whereas from 1 January 1983, all British citizens had the right of abode and so were free from immigration controls, many members of the Windrush generation became and remained subject to those controls.<sup>6</sup>
8. It is important to recognise, as further explained in the Appendix, what was done, how it was done and the underlying motivations for it. These matters are all material to the injustice done to members of the Windrush generation, which injustice stems from the means and motivations by which British people settled in the UK ceased to be formally recognised as British and were made to be without British citizenship.

## ***(II) The important distinction between registration rights and naturalisation***

9. Mr Forde referred to his parents having ‘naturalised’. However, there was no power – prior to 1983 – to naturalise members of the Windrush generation. This is because that discretionary power, which has long resided with the Secretary of State, was not for people who were already British – i.e. British subjects.
10. As further explained in the Appendix, members of the Windrush generation had rights to register as citizens of the UK and Colonies and, with the passing of the British Nationality Act 1981, which introduced British citizenship, had rights to register as British citizens. These were (as registration remains) statutory rights generally exercisable by entitlement.
11. The exercise of the statutory right of registration became increasingly important for members of the Windrush generation over the period of legislation passed from the 1960s and culminating with the British Nationality Act 1981. However, the existence or importance of that statutory right remained unknown to some people right up to the point at which its availability to members of the Windrush generation was taken away. As Wendy Williams in her Windrush Lessons Learned Review acknowledges, among the reasons for this were that the Home Office intentionally and wrongly discouraged people from exercising their right by informing them that it would make no difference to them.<sup>7</sup> The department’s motivation appears to have been that (contrary to the intentions of Parliament as revealed by the Ministerial statements

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<sup>6</sup> Almost coincidental with the final loss of citizenship rights by the closing of the time-limit right of registration of British citizenship provided for members of the Windrush generation was the Immigration Act 1988, which by section 1 repealed the section 1(5) of the Immigration Act 1971 by which their rights prior to 1 January 1973 to come and go freely from the UK had been preserved.

<sup>7</sup> *Windrush Lessons Learned Review*, Wendy Williams, March 2020, HC 93, p59; see also *Hansard* HC, 26 November 1987 : Col 271 *per* Rt Hon Douglas Hurd. The leaflet to which Wendy Williams refers expressly stated that there would be no change in the person’s rights in the UK including their immigration position if they did not register. The Home Secretary made the same assertion in his Written Answer. Yet, the Immigration Act 1988 received royal assent barely 5 months later making the first significant change in people’s rights and their immigration position (see previous footnote).

during the passage of the 1981 Act) it did not wish to have to deal with the volume of applications from everyone entitled to register their British citizenship.

12. The result was that British people, disproportionately black and Asian British people, were made subject to immigration controls and immigration policy from which they ought to have been exempt. It is a remaining injustice that naturalisation – which has belatedly been offered to many members of the Windrush generation – is not merely discretionary but is subject to requirements that did not apply to the registration rights that became lost to members of the Windrush generation in the 1980's. These requirements (including relating to character) continuing to deprive people of the citizenship of which they were originally deprived by this scandal.
13. This injustice reflects a wider injustice at the Home Office, which is the department's general failure or refusal to understand the distinction between registration and naturalisation by which many people continue to be effectively deprived of their British citizenship rights.

### ***(III) The critical impact of this history***

14. Mr Forde identified the UK Borders Act 2007 as a particular point from which many injustices and harms to members of the Windrush generation may be traced. That Act is important for establishing the biometric residence (essentially identity card) scheme introduced for people subject to immigration controls.<sup>8</sup>
15. Nonetheless, starting at this point overlooks the way by which members of the Windrush generation became deprived of British citizenship. Had they not been deprived of that citizenship, members of the Windrush generation would and should – like other British citizens – have been exempt from both immigration controls and this scheme.<sup>9</sup> The injustice and racism – to which Mr Forde drew attention including by his reference to preferential treatment of the 'white Commonwealth' – at the heart of the Windrush scandal critically began decades before 2007; and it concerns the nationality matters on which Mr Forde's evidence to the Committee is lacking. Again, this is further addressed in the Appendix.

### **Summary and conclusion:**

16. In summary, therefore, the matters in the evidence of Mr Forde to which we draw attention are liable to lend further misunderstandings of the Windrush injustice; and thereby (as addressed in our first submission to the Committee) to undermine any action, including the Compensation Scheme, to provide restitution or remedy for that injustice. In particular, failure to understand the means by which members of the Windrush generation were ultimately deprived of their British citizenship, including the racist motivations that were integral to how and why that happened, constitutes a fatal flaw in the various efforts to apologise and put right the injustice. Moreover, the continued failure or refusal to recognise the distinction between the discretionary power to grant naturalisation and the statutory right of registration has a continuing impact upon both some members of the Windrush generation and many other people,

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<sup>8</sup> Sections 5-15

<sup>9</sup> Section 1(1) of the Immigration Act 1971

including their descendants, who have grown up from birth or an early age in the UK.<sup>10</sup>

17. There are several lessons that cannot be learned from the Windrush scandal if this history is overlooked or misunderstood. Some of these relate to other injustices which continue to affect people born in the UK or brought to this country as young children over the years since 1982, injustices which themselves have a disproportionate impact on black and Asian people.
18. As regards the various measures taken to put right the Windrush scandal, including the Compensation scheme, it is of particular relevance that the racism to which Mr Forde drew attention in his evidence is more directly causative than his evidence recognises of the injustices that the scheme is intended to compensate. The impact of that is more fully considered in our first submission.

## **APPENDIX**

### **A summary history of British nationality law over the relevant period**

A fuller summary of the most relevant legislative history is as follows. We take the circumstances as briefly described by Mr Forde in his evidence concerning his family as the foundation for illustrating some of the impact of this.

(i) Over the post-War period from 1 January 1949 to 1 January 1983, British nationality was governed by the British Nationality Act 1948. Under that Act, the nationality of British subject was held by all citizens of the United Kingdom and Colonies and all citizens of the independent Commonwealth countries listed in section 1(3).<sup>11</sup> At the passing of the Act, that list constituted “*Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesian and Ceylon.*” All British subjects were also Commonwealth citizens.<sup>12</sup>

(ii) Importantly, therefore, Commonwealth citizens who came to the UK during the post-War decades – such as Mr Forde’s parents – were British subjects. Whereas their nationality status was ultimately affected by changes in law, there is no question that in law the people affected were fully British. They had the same nationality status in British nationality law as the population in the UK who had been born here. In the case of Mr Forde’s parents, on the brief facts he gives, they were also citizens of the United Kingdom and Colonies at the time of their arrival in the UK.

(iii) During this period, the arrival in the UK of black and Asian British subjects was a preoccupation of successive governments.<sup>13</sup> Numbers were formally monitored.<sup>14</sup> Emissaries were sent to certain of the Commonwealth countries and colonies seeking

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<sup>10</sup> This is more fully elaborated in *Reasserting Rights to British Citizenship Through Registration*, IANL, Vol 4, No, 2, 2020, pp139-157

<sup>11</sup> Section 1(1)

<sup>12</sup> Section 1(2)

<sup>13</sup> See e.g. Memorandum by the Secretary of State for the Home Department and Lord Privy Seal on Commonwealth Immigrants, C(58) 132, 25 June 1958 and Memorandum by the Lord President of the Council on Commonwealth Immigration, C.(65) 90, 6 July 1965

<sup>14</sup> *ibid*

assistance to deter the movement to the UK of black and Asian British subjects.<sup>15</sup> Cabinets discussed whether or how the arrival of black and Asian British subjects could be curtailed in ways that were not obviously discriminatory on grounds of colour.<sup>16</sup> Ultimately, this would lead to legislation for the purpose of curtailing the entry of British subjects motivated by the desire of successive governments to reduce the number of black and Asian people coming.

(iv) When former British colonies became independent, section 1(3) of the British Nationality Act 1948 was amended meaning that citizens of the newly independent country remained Commonwealth citizens and British subjects. Thus, when Barbados became independent on 30 November 1966, the Independence Constitution of Barbados made every person born in Barbados, who was a citizen of the United Kingdom and Colonies on 29 November 1966, a citizen of Barbados.<sup>17</sup> It made citizens of the United Kingdom and Colonies born outside Barbados to fathers, who were then becoming citizens of Barbados (or would if they were still living), citizens of Barbados too. At the same time, the Barbados Independence Act 1966 effectively added Barbados to the countries listed in section 1(3) of the British Nationality Act 1948.<sup>18</sup> Accordingly, the new citizens of Barbados remained British subjects and Commonwealth citizens.<sup>19</sup>

(v) On the brief facts described by Mr Forde, therefore, on 30 November 1966, his parents, he and his brother became citizens of Barbados. His parents ceased to be citizens of the United Kingdom and Colonies but remained British subjects and Commonwealth citizens. He and his brother, born in the UK, remained citizens of the United Kingdom and Colonies and also British subjects and Commonwealth citizens.

(vi) The British Nationality Act 1948 introduced registration of citizenship as one means by which a person could apply to become a citizen of the United Kingdom and Colonies. It also continued the power of naturalisation as a means by which a person could apply to become such a citizen. There were (as there remain)<sup>20</sup> important distinctions between these two provisions of British nationality law. Thus, registration was and is a statutory right and is generally by entitlement. In contrast, naturalisation was and remains a matter for the Secretary of State's discretion. Under the 1948 Act, the power of the Secretary of State to naturalise a person as a citizen of the United Kingdom and Colonies applied only to 'aliens' (and British protected persons).<sup>21</sup> It did not apply to British subjects. British subjects, ordinarily resident in the UK, were entitled to register as citizens of the United Kingdom and Colonies.<sup>22</sup>

(vii) On the brief facts described by Mr Forde, his parents could not have been lawfully naturalised. They were neither aliens nor British protected persons.<sup>23</sup> They were British subjects. They would have been entitled and it may be that they did register as citizens of the United Kingdom and Colonies. In doing so, they would not have been

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<sup>15</sup> *Ibid* and see *Hansard* HL, 6 April 1965 : Col 2; and *Hansard* HC, 13 July 1965 : Col 716

<sup>16</sup> *ibid*

<sup>17</sup> Chapter II, section 2(1) and (2)

<sup>18</sup> Section 2(1)

<sup>19</sup> The relevant law is set out in *Fransman's Nationality Law Handbook* (Third Edition) at B.20

<sup>20</sup> The effect of the distinction has, however, been significantly eroded by developments in law, policy and practice based on the failure to understand or respect the distinction: see *Reasserting Rights to British Citizenship Through Registration, op cit*

<sup>21</sup> Section 10

<sup>22</sup> Section 6

<sup>23</sup> Section 32(1) defined both who was an 'alien' and who was a 'British protected person'.

seeking the exercise of some discretionary power in their favour. Rather, they would have been exercising their right to citizenship of the United Kingdom and Colonies while remaining British subjects and Commonwealth citizens.

(viii) In the 1960s, British governments introduced legislation intended to secure what they had previously sought to secure through their influence of various Commonwealth governments and authorities – that is the curtailment, by reason of their colour, of black and Asian British subjects moving to the UK. These Acts introduced powers for immigration officers, with certain restrictions, to refuse entry to Commonwealth citizens (i.e. British subjects) who both were born outside the UK and did not hold British passports issued “*by the Government of the United Kingdom*”.<sup>24</sup> The Immigration Act 1971 went further by its restriction as to whom had the right of abode in the UK (patriality) – that is the right to enter and/or stay free from any immigration control.<sup>25</sup> These Acts did not, however, change people’s nationality. Moreover, they retained the general right of all Commonwealth citizens ordinarily resident in the UK prior to their introduction to remain and freely come and go from the UK.

(ix) The Immigration Act 1971, which commenced on 1 January 1973, also amended the right of registration under the British Nationality Act 1948.<sup>26</sup> This would on the facts described by Mr Forde have applied to his parents, whom he said ‘naturalised’ (which they could not have done) in 1975. The amendment lengthened the period for which a person was required to have been ordinarily resident in the UK from 12 months to 5 years.<sup>27</sup> Nonetheless, on the facts described, Mr Forde’s parents would have remained entitled to register as citizens of the United Kingdom and Colonies. It appears that this is what they did. Accordingly, from 1975, Mr Forde’s parents once again became, like he and his brother had remained throughout, citizens of the United Kingdom and Colonies. There remained no change to their all being British subjects and Commonwealth citizens.

(x) The British Nationality Act 1981 commenced on 1 January 1983. At that point, British nationality law was radically changed. There were no longer any citizens of the United Kingdom and Colonies. Instead, the Act introduced British citizenship; and at its commencement it made an important distinction among the former citizens of the United Kingdom and Colonies. Among the citizens of the United Kingdom and Colonies who were automatically made British citizens at the Act’s commencements were those who were born in the UK (including Mr Forde and his brother) and those who had registered in the UK (including Mr Forde’s parents).

(xi) Moreover, the 1981 Act no longer recognised the entirety of people, who prior to its commencement were British subjects and Commonwealth citizens, as sharing British nationality. Many members of the Windrush generation who were now settled in the UK were not automatically made British citizens by the Act. Nonetheless, the Act recognised the importance of their equal connection to the UK by providing a statutory right for them to register as British citizens.<sup>28</sup> Had Mr Forde’s parents not registered in 1975 (or at another time), it appears on the facts he describes that at the commencement of the 1981 Act his parents would not have automatically been made British citizens. He and his

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<sup>24</sup> Section 1 of the Commonwealth Citizens Act 1962 defined to whom the powers applied; and section 2 of that Act set out the powers. These powers were then amended by section 1 of the Commonwealth Citizens Act 1968.

<sup>25</sup> Section 1(1) of the Immigration Act 1971

<sup>26</sup> Schedule 1

<sup>27</sup> Paragraph 2 of Schedule 1 to the Immigration Act 1971

<sup>28</sup> Section 7

brother would still have automatically been made British citizens whereas his parents would have needed to register, which they would have had a now time-limited statutory right to do.<sup>29</sup>

(xii) During the passage of the British Nationality Act 1981, questions were raised as to why it was necessary or appropriate to time-limit the right of registration as British citizens provided for members of the Windrush generation. Ministers answered this by emphasising the importance of registration – both for the individuals affected and for race relations and social cohesion more generally – and stating that a time-limit would encourage the exercise of the right.<sup>30</sup> It is all the more disgraceful, therefore, that when the time came, the Home Office not only failed to effectively promote this right but intentionally and successfully set out to deter its exercise.<sup>31</sup> Ultimately, many members of the Windrush generation were thereby deprived of British citizenship. They remained subject to immigration controls and with various developments of immigration policy over the years, the Home Office assurance that registration as a British citizen would make no difference was cruelly and emphatically exposed to be false.

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<sup>29</sup> *ibid*

<sup>30</sup> *Hansard* HL, 21 July 1981 : Col 173-4 *per* Lord Belstead

<sup>31</sup> See footnote 7 (above)