



Dame Diana Johnson MP
Chair, Home Affairs Select Committee
House of Commons
London
SW1A 0AA

24 January 2021

Dear Chair,

I am writing to inform you I have today made amendments to the Windrush Compensation Scheme and Windrush Scheme to correct an error in our published guidance which affects a small number of people. Where individuals have been affected by this error, this would have been to their benefit.

People who have indefinite leave to remain (ILR) in the UK are subject to a longstanding 'two-year rule', meaning they will normally lose the right to permanently live in the UK following an absence of two years. This basic rule applies to all people who are settled in the UK with ILR, irrespective of their nationality. People who emigrate from the UK for more than two years, but who retain strong ties to the UK and wish to return to live here, may apply for a returning resident visa in order to resume their settlement here and regain ILR.

Following an error made in the course of routine updates in 2006, some Home Office guidance documents incorrectly stated Commonwealth citizens settled in the UK prior to 1973 were exempt from the two-year rule until 1 August 1988. The affected guidance documents stated before this date Commonwealth citizens would, therefore, have retained a right to return to permanently live in the UK even after an extended period of time living overseas. The basis for this error is a misinterpretation of Section 1(5) of the Immigration Act 1971, which established some preferential Immigration Rules for Commonwealth citizens.

Following a comprehensive review, we have now established Section 1(5) of the 1971 Act did not exempt Commonwealth citizens from the two-year rule. In fact, Commonwealth citizens have been subject to the two-year rule ever since the Commonwealth Immigrants Act came into force in 1962.

This means, prior to 1988, Commonwealth citizens who emigrated abroad for two years or more would not have retained any automatic right to return to the UK. They would have had to satisfy the requirements of the Immigration Rules in place at the time in order to return to live in the UK.

I understand many individuals successfully applied under the Immigration Rules in order to resume their settlement in the UK (and regain ILR) as returning residents. However, some individuals who sought to return to live in the UK after an absence of more than two years were not permitted to do so (in line with the two-year rules and Immigration Rules in place at the time).

By including the incorrect interpretation of Section 1(5) within the Windrush Compensation Scheme rules, a small number of people who have made claims on the basis they were prevented from returning to the UK before August 1990 have been offered compensation. However, we now know these individuals were subject to correct immigration decisions at the time and should not, therefore, have been entitled to compensation.

I am conscious their compensation claims were made in good faith, and it is therefore right they retain the compensation they have been offered or have received. We also have a very small number of outstanding claims centred on this issue. To ensure no one who has made a claim in good faith (i.e. based on a published interpretation of Section 1(5) which we now know to be incorrect) is disadvantaged, outstanding claims will be assessed in line with the previous interpretation of Section 1(5) on a transitional basis.

It is, however, important our error is now corrected. Therefore, any new compensation claims will be assessed on the basis the two-year rule did indeed apply to Commonwealth citizens prior to 1988. The Compensation Scheme rules have therefore been amended to reflect this.

It is also possible some individuals who returned to the UK on a limited form of leave (for example, on a visit visa) may, as a result of the error introduced to guidance in 2006, have subsequently been issued with documentation stating they held ILR when in fact they do not. The issuing of documentation, while ensuring individuals could access work, housing and public services, would not have had the effect of substantively granting ILR in law.

I must stress the conditions necessary for such cases to arise are exceptional, and we are yet to identify anyone in this position. Nevertheless, it is important anyone in this position is provided with an opportunity to formally regularise their status in law.

Therefore, I have today made an amendment to the Windrush Scheme in order to ensure any individuals who are affected in this way may be substantively granted ILR free of charge under the Scheme.

We anticipate people in this position are most likely to be identified in the course of normal business where they make an application for British citizenship. In these cases, we will look to ensure individuals' status is regularised free of charge and applications for citizenship are not disrupted. While I must again stress this would only have happened in very rare circumstances, I would also encourage anyone who thinks they may be affected by this issue to get in touch with the Windrush Help Team.

While this error would have been to the benefit of a small number of affected people, I fully acknowledge it may have caused some distress to individuals who spent time living outside the UK prior to 1988.

I hope the changes we have now made to the Windrush Compensation Scheme and Windrush Scheme provide some reassurance the small numbers of people affected by this error will not be disadvantaged.

With my very best wishes.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'K Foster', followed by a period.

Kevin Foster MP
Minister for Safe and Legal Migration