

# Making of an immigration mess

Edward Fennell

If, as the literary critic William Empson asserted, there are seven types of ambiguity then their close relations are surely the six types of British nationality listed on the Home Office website. The new home secretary, Sajid Javid, should master them pronto if he is not to follow Amber Rudd into the mire of immigration calamities summed up by the Windrush scandal.

Rudd's humiliation was partly of her own making, but also the almost inevitable consequence of a constantly changing landscape of immigration legislation dating from the late 1940s. "It's the legacy of empire and a very complicated story with the result that even lawyers sometimes struggle to understand it," says Ben Sheldrick, of Magrath Sheldrick.

The changing laws reflected the shifting priorities and fears of successive decades, but the fatal flaw was the failure to establish documentation systems so people could secure their rights. This did not matter too much so long as government took a laid-back view on immigration. But with the introduction under Theresa May of the hard-edged approach that demanded that people should provide evidence of their right to residence the consequence was predictable — a wholesale failure to satisfy tests that the system had not equipped migrants to pass.

The Windrush generation, the ones most affected by this, came to the UK between 1948 and the passing of the 1971 Immigration Act. During that time legislation permitted people from the empire and Commonwealth unhindered rights to enter Britain on the grounds that they were all British citizens. "Children would have come in on their parents' passports with very little documentation," Sheldrick says. The

law changed in 1972 so that generally people born overseas could settle in Britain only if they had a British passport, work permit or could prove that a parent or grandparent had been born in the UK. At that point, Claire Nilson, of Faegre Baker Daniels, explains: "Commonwealth citizens already living in the UK were given 'right of abode'.

The problem was that there was no move to issue the Windrush generation or their children with any formal statement of this status. Unless they applied for a UK passport they were, effectively, undocumented when they came under "hostile" scrutiny. To cover this gap the government has introduced a "no time limit" stamp, but to qualify for this individuals must prove that they have been in the UK continuously since before January 1, 1973. Easier said than done, as Lisa Mulholland, of Stephens Scown, points out. "The requirement,

until very recently, was enormously onerous — several pieces of documentation for every year since 1973 as evidence of presence in the country," she says. Who of us could provide that?

How far Javid will pursue reform remains to be seen. A good starting point, says Dr Tariq Mahmood, of 33 Bedford Row, would have been for the Home Office to observe its own rules. Anticipating that some of the people being investigated for the right to remain would have been in the country for many years, the official guidance to staff was that they should be treated in a careful and sensitive manner.

"Unfortunately in practice the Home Office officials did not even follow its own official advice," he says. Compounding this has been the stripping away of legal aid, and requiring people whose applications had been rejected to make their appeals from abroad.

Meanwhile, Robin Stewart, of Anthony Gold, highlights the way that immigration enforcement has been outsourced to landlords. "The 'right to rent' creates a particular problem for the new home secretary if he wants to change the culture of immigration enforcement," Stewart says. "He is not in direct control of the thousands of landlords who are required to carry out immigration checks on prospective tenants. Promoting a 'fair and humane' immigration policy is very difficult for the home secretary to achieve when the law requires landlords to do right to rent checks, and research shows that these checks are causing discrimination against prospective tenants who do not hold a British passport."

The only good thing to be said for the

mess is that it has alerted the government to the need to have an efficient, joined-up system to deal with the rights of resident EU citizens post-Brexit. "Out of this crisis could emerge a lot of opportunities for improvement," says Tetiana Bersheda, of LexSnap, an online platform offering advice for people with immigration concerns.

"You would not believe how many clients are coming to me already to ask about what their status will be," Mulholland adds. "More obstacles are being put in people's way. And while promises have been made about EU citizens nothing has been agreed about citizens from Switzerland, Norway, Iceland and Liechtenstein, which are part of the European Economic Area."

What with remedying past failures and preparing for Brexit, Javid has plenty on his plate — along with working out the difference between those six types of nationality: British citizenship, British overseas territories citizen, British overseas citizen, British subject, British national (overseas) and British protected person.





Amber Rudd resigned this week as home secretary during the Windrush scandal

