Submission to Chief Inspector of Borders and Immigration re Inspection of the UK Border Agency's Handling of Legacy Asylum Cases

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 950 members (including individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, official and other consultative and advisory groups.

ILPA was represented on the National Asylum Stakeholder Forum Case Resolution Subgroup throughout the lifetime of that subgroup, which was the lead external stakeholder forum for the UK Border Agency (and its predecessor) concerning legacy asylum cases. ILPA is now represented on the Case Assurance and Audit Unit Partner Forum, which is to replace the subgroup and which is to have its first meeting on 12 June 2012. ILPA is also represented on the Chief Inspector's Refugee and Asylum Forum.

This submission first addresses the five issues, identified in the Chief Inspector's invitation to receive perspectives from stakeholders. It does so under distinct subheadings. Thereafter, some concluding observations are provided.

ILPA met with Ms Jo Liddy, Regional Director for the UK Border Agency in the North West on 2 May 2012. A copy of ILPA's note of that meeting and letter to Ms Liddy following that meeting is appended. Many of the matters raised in this submission were raised with Ms Liddy at that meeting, and the note and letter give further details of the concerns and experiences detailed here. Further background has been provided to the Chief Inspector's inspection team, and is included in ILPA's letter to Mr Eddy Montgomery, who works to Ms Liddy in the UK Border Agency North West Region, of 25 August 2011. This was copied to the Chief Inspector and has subsequently been separately provided to the inspection team.

The reasons that legacy asylum cases have not yet been concluded

Legacy asylum cases were to have been concluded by July 2011. That a case has not been concluded can only be for one of two possible reasons:

- the Agency has been unable to locate the individual to whom the case relates or
- the Agency has not delivered on its commitment to conclude the individual's case.

That commitment was given to Parliament[1], the public[2], the courts[3], individuals (and their legal representatives)[4] and representative bodies (including ILPA)[5].

It is evident that the Agency has treated many cases as relating to individuals whom the Agency has been unable to locate in circumstances where the Agency holds current contact details for the individual and/or his or her legal representative; and in some cases where the Agency has been in touch with the individual and/or his or her legal representative, including repeatedly and including in response to requests for information by the Agency.

ILPA cannot know the reasons for the Agency's wrongly treating large numbers of such cases as relating to individuals whom the Agency has been unable to locate. However, it was apparent from the meetings of the National Asylum Stakeholder Forum Case Resolution Subgroup, towards the end of the lifetime of that subgroup, that the Agency was under pressure to meet its commitment to resolve all legacy cases by July 2011.[6] In seeking to do so, the Agency had drafted in large numbers of administrative agency[7] staff to 'cleanse' electronic and paper files in preparation for caseworkers to make decisions on the cases, the aim being to free up caseworkers' time so that they could concentrate on making decisions and hence resolving cases.[8] At the National Asylum Stakeholder Forum Case Resolution Subgroup, ILPA raised concerns that inadequately supervised and/or trained administrative staff might be likely not to understand the relevance of whatever data/material they were required to 'cleanse'. While assurances were given, it remains a concern that the pressure to meet the July 2011 deadline, coupled with the use of external administrative staff,

---

[1] *Hansard* HC, 19 Jul 2006 : Columns 324 & 328; 25 Jul 2006 : Column 736; Home Office report *Fair, Effective, Transparent and Trusted: rebuilding confidence in our immigration system*, July 2006 (page 9)

[2] *Ibid.*

[3] In submissions and evidence presented, and upon which judgments were founded, in *R (FH & Ors) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin); and *R (HG & Ors) v Secretary of State for the Home Department* [2008] EWHC 2685 (Admin).

[4] Letters were issued to individuals indicating that their cases would be dealt with by July 2011, and inviting them to wait for the Agency to get in touch with them (save e.g. to provide any new address).

[5] E.g. via the National Asylum Stakeholder Forum Case Resolution Subgroup, at which ILPA and others were requested to disseminate information concerning the programme to resolve the legacy – including that individuals (or legal representatives) should wait for the Agency to get in touch with them (save e.g. to provide any new address).

[6] The Agency had also been under pressure from the Home Affairs Select Committee to conclude the legacy programme early (i.e. before July 2011): see e.g. Government Response (recommendation 1) published by the Home Affairs Select Committee as its Second Report for Session 2009-10, HC 370, February 2010.

[7] The National Asylum Stakeholder Forum Case Resolution Subgroup was informed that Serco had been contracted to provide these staff.

[8] The minutes of the National Asylum Stakeholder Forum Case Resolution Subgroup meeting on 22 October 2009 include the following explanation of the 'cleansing' work of the administrative staff: "*4.10. ...Emily Miles explained that the first stage cleanse involves updating 28 fields on the Case Information Database (CID) and the Asylum Support System (ASYS) with details on the file. Some cases are identified as errors and concluded at this stage, for example those with British citizenship. The second stage cleanse involves updating a further 3 fields on CID, requesting documents and information from applicants and updating the file and CID when these are received. If the applicant responds the file will be passed on to a team for a decision to be made, if not it enters our process for considering cases for the Controlled Archive. By this stage in the programme the majority of cases who would not have been written to previously (harm and removal cases) have been identified so all cases will receive a letter notifying them when their case is being considered. (Post meeting note: the number of fields cleansed in each stage were clarified following the meeting and are reflected above)*".

may have contributed to the large numbers of cases being wrongly treated as relating to individuals whom the Agency was unable to locate.

The commitment to resolve the legacy within five years was given by the then Home Secretary, the Rt Hon Dr John Reid MP, in July 2006.[9] However, work on clearing the legacy did not begin for several months; and the programme for concluding the legacy was not fully operational for more than a year following Dr Reid's announcement.[10]

Decisions made on granting/refusing leave following further submissions

The commitment to conclude all legacy cases by July 2011 was a commitment that by that date all individuals with outstanding legacy cases would have been removed from (or otherwise have left) the UK or would have been granted indefinite leave to remain.[11] The importance of such an approach to a programme that was intended to clear a backlog of work of the Agency is readily apparent. Anyone granted limited leave to remain, or not granted leave to remain and not removed, would remain a person in respect of whom the Agency would have ongoing, potentially unchanged, responsibilities, whether to ensure the person's removal or to deal with any new application for leave to remain or any application to extend leave to remain on expiry of the person's current leave.

As July 2011 approached, it became apparent that the Agency was making grants of discretionary leave and treating this as a "conclusion" in legacy cases. This continues to be the position taken by the Agency in many legacy cases. To treat a grant of discretionary leave as a conclusion is to renege on the Agency's original commitment. Such a grant does not conclude cases, but ensures that these cases will continue to require casework by the Agency for years to come, as those granted discretionary leave to remain can be expected to apply to extend that leave on its coming to its end.

Current policy is that those granted discretionary leave must complete six years of discretionary leave before they may apply for and be granted settlement, and at every stage an application for further leave requires reconsideration by the Agency of the applicant's entitlement to discretionary leave. The prospect is that individuals, many of whose cases had been outstanding with the Agency for several years before the announcement of the legacy programme, will still have their cases outstanding with the Agency after the five years of that programme and for many years to come. The grant of discretionary leave is inconsistent with the approach to those whose cases were concluded by way of grant within the five years' period and within the

[9] See fn 1.

[10] In her statement to the Administrative Court of 3 May 2007 in *R (FH & Ors) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin), Emily Miles, Director of Case Resolution Directorate, UK Border Agency, confirmed that "*38. The case resolution programme started on selected cases on 1st November 2006. It is planned that the programme will be fully operational by Autumn 2007...*"; and that her appointment as Director of the Case Resolution Directorate took effect on 10 April 2007. So far as we are aware, neither the directorship nor the directorate existed before this date. It was confirmed at the National Asylum Stakeholder Forum Case Resolution Subgroup meeting of January 2008 that the Agency had met its target of allocating all legacy cases to its caseworkers in the Case Resolution Directorate by 18 December 2007.

[11] This was confirmed by a secretarial note to the minutes of the National Asylum Stakeholder Forum Case Resolution Subgroup meeting of September 2008.

original terms on which the programme was to operate. In those cases, indefinite leave to remain was granted. Those who have been prejudiced by the Agency's failure to deal with their cases before July 2011 are being further prejudiced by different, and significantly less advantageous, treatment now that the five years has passed. Inevitably, this has led to litigation (see below).

The Agency's response to legal challenges such as pre-action protocol letters and judicial review claims

The Agency's response to pre-action protocol letters and judicial review claims has been inconsistent. There is often no response to a pre-action protocol letter. However, ILPA is aware of instances where a pre-action protocol letter or the lodging of a claim for judicial review has prompted the Agency to conclude a case.

It is not clear to ILPA who in the Agency has responsibility for instructing Treasury Solicitors in responding to these judicial review claims. However, acknowledgements of service in judicial review proceedings indicate that the Agency is providing inconsistent instructions. In some cases, the Agency has conceded the claim whereas in others the claim is defended on grounds, which include statements that are inaccurate and inconsistent with the concessions in other cases.

ILPA is aware of two general complaints at the heart of judicial review litigation in legacy cases. There are claims brought on the grounds of delay, and there are claims brought on the grounds that discretionary leave, rather than indefinite leave to remain, is an inappropriate grant of leave for conclusion of an outstanding legacy case.

Complaints, correspondence handling and the level of customer service provided to applicants and representatives

The Agency had, during the lifetime of the Case Resolution Directorate, adopted a position of 'Don't call us, we'll call you'.[12] This was intended to assist the Agency to get on with the work on concluding legacy cases with as little as possible distraction and time taken up in dealing with correspondence. However, even in cases where the Agency had contacted individuals or their legal representatives requesting completion and return of a legacy questionnaire[13] and this had been returned, cases have been placed in the controlled archive.[14]

Generally, the 'customer service' given to individuals whose cases were and remain in the legacy has been unacceptable. Individuals were told to wait to hear from the

[12] See fn 4. This was also the position advanced by the Case Resolution Directorate to stakeholders – e.g. Emily Miles, then Director of Case Resolution Directorate, wrote to ILPA on 7 September 2007 in which letter she said: "*We would therefore continue to advise individuals, as set out in our website FAQs http://www.ind.homeoffice.gov.uk/applying/asylum/caseresolutionprogamme that they can help progress their case by ensuring that they have provided the Border and Immigration Agency with their latest address. Otherwise they should wait until they are contacted by the Agency when they will have the opportunity to provide all current reasons for wishing to remain in the UK.*"

[13] This was a standard form used by the Case Resolution Directorate to collect and check basic information, and any new grounds the individual might have for remaining in the UK, prior to deciding how to conclude a legacy case.

[14] This is the formal name for the archive of cases treated as ones in which the Agency has been unable to get in touch with the individual.

Agency, and many did. They were told to respond when the Agency got in touch, and many did. They did so on the strength of the promise (confirmed before and acted on by the courts)[15] that all cases would be completed by July 2011. Not only has the Agency failed to fulfil that promise, it has since made public statements claiming that the promise has been met and/or that all cases have been thoroughly reviewed, e.g.:

> "*...in relation to the Controlled Archive, it is absolutely not the case that we have simply put these cases into a room and closed the door and forgotten about them. Each of those cases has been the subject of the most exhaustive checks and scrutiny...*"[16]
>
> "*...there is no trace of them. One conclusion from that might be that they have left the country, perhaps some of them died, but we have done the most exhaustive things we possibly can, that we reasonably and responsibly can...*"[17]
>
> "*...We have now completed the work of reviewing all the cases so we are disbanding the team that was responsible for that task of review, and we are establishing a new team of around 100 staff in Liverpool that will be responsible for overseeing this Controlled Archive...*"[18]
>
> "*It is not the case that cases that have been transferred to the Case Assurance and Audit Unit are no longer legacy cases. The CAAU is now responsible for the very small number of cases that have been reviewed and where the decision has been taken...*"[19]
>
> "*...we had a number of cases where late representations had come in, right at the end of the process. We reviewed those. A number of them were granted and a number of those cases have been refused.*"[20]
>
> "*They have been decided and we are trying to remove them but, as the Committee knows, there are barriers to removal...*"[21]
>
> "*We never pledged [to conclude the cases]... Our commitment was to decide the cases. We have decided all those cases...*"[22]
>
> "*...all the cases, every single case has had a decision... A small number of cases have had the decision and are awaiting removal, but there are legal challenges of them to us as we attempt to remove them...*"[23]

---

[15] See fn 10, *R (FH & Ors) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin).
[16] See evidence of Jonathan Sedgwick, then Acting Chief Executive, UKBA before the Home Affairs Select Committee on 5 April 2011, published with the Committee's Ninth Report for Session 2010-12 *The work of the UK Border Agency*, HC 929, June 2011 (answer to Q3).
[17] *Ibid* (answer to Q4).
[18] *Ibid* (answer to Q5).
[19] See evidence of Jonathan Sedgwick, then Acting Chief Executive, UKBA before the Home Affairs Select Committee on 13 September 2011, published with the Committee's Fifteenth Report for Session 2010-12 *The work of the UK Border Agency*, HC 929, June 2011 (answer to Q13).
[20] *Ibid* (answer to Q16).
[21] *Ibid* (answer to Q18).
[22] *Ibid* (answer to Q19).
[23] *Ibid* (answer to Q21).

> "*...they* [the relevant individuals] *have all been informed* [of the decision on their case]..."[24]

Such statements give the clearest impression that:

- the commitment was not to conclude the legacy by July 2011,
- all cases by that date had received a decision under the legacy programme,
- all individuals had been informed of that decision (assuming the Agency had the means to contact the individual or his or her legal representative), and
- what remained was limited to cases where there were said to be "*barriers to removal*" and cases where the relevant individual could not be located.

Such statements are incorrect, and have caused distress and anxiety to individuals – including those who have been given cause to question whether the legal advice they have received was appropriate and effective and whether the legal representatives they instructed acted upon the instructions given, e.g. to complete and serve legacy questionnaires upon the Agency and update the Agency with new addresses.

ILPA is aware that legal representatives have faced considerable difficulties in contacting the Case Assurance and Audit Unit over the time of its existence. At times, the Unit has failed to provide contact details save for a general address or general telephone number. Where effective contact with the Agency is not possible, it is very likely that there will be higher incidence of pre-action protocol letters and judicial review claims being issued.

Efforts made to trace individuals in archived cases where the Agency is unsure of the whereabouts of applicants

ILPA has no comment on the efforts made to trace individuals where the Agency has good reason to be unsure of the person's whereabouts or how to locate them. As indicated elsewhere in this submission, our concern is that the Agency has claimed to have been unable to get in touch with individuals with whom it is in touch, from whom it has received correspondence, from whom it has received responses to questionnaires and for whom it has on record details of legal representation. In one case, which was drawn to the attention of Ms Liddy during our meeting with her on 2 July 2011, the Agency contacted the legal representative to say that it had been unable to make contact with the relevant individual. With the legal representative on record, the Agency ought to have been communicating via that legal representative in any event. However, this case is even more egregious in that the individual was reporting and changes of address had been notified to the Agency.

Concluding Observations

Had the Agency's Case Resolution Directorate met its objectives, the Case Assurance and Audit Unit would either not need to exist or would be solely concerned with managing cases where the Agency has been unable, despite good efforts, to locate and get in touch with individuals whose cases were in the legacy. The Unit is, however, dealing with many cases of individuals who had remained in contact with the Agency (e.g. by reporting, returning legacy questionnaires, updating contact details, making of further submissions, confirmation of legal representation

[24] *Ibid* (answer to Q22).

on record). Any evaluation of the efficiency and effectiveness of this Unit must start from an understanding of the failure of the Case Resolution Directorate to complete its task, and the obligations now owed by the Agency towards individuals which arise from that failure. The misinformation that has been given by the Agency in public statements exacerbate that failure, by adding to the distress and anxiety of those whose cases have not been concluded within the five years' timeframe further distress and anxiety that for them it now appears 'the rules have changed' and information they received from legal representatives, NGOs and indeed from ILPA's public information, on which they had relied, was incorrect.

It is not and will not be an effective or efficient response to that situation for the Agency to seek to repeat what it did in the case of the legacy at the time of establishing the Directorate. Then it effectively started afresh with the backlog of cases on the basis that it would take each case in turn, with the promise of a fixed conclusion date for the cohort of cases. That conclusion date has been and gone, and the Unit's response to those whose cases have not been dealt with must be to recognise and address the ongoing failure on the Agency's part to those who properly had expectations of a conclusion within the legacy programme. The Agency's starting point in respect of each individual case, where there has been no good reason for the Agency to treat the case as one where it has been unable to locate the individual, must be that those whose cases remain in the legacy have suffered additional prejudice to the "*excessive*" delay and detriment suffered by many even before the establishment of the legacy programme.[25] So far as the Agency is now able, it must treat these individuals no worse than those whose cases were dealt with within the five years. Moreover, given conclusion (removal or grant of indefinite leave to remain) was to have been reached within those five years (i.e. by July 2011), the appropriate response is, as quickly as possible, to make and give effect to grants of indefinite leave to remain to those individuals, whom the Agency has had no good reason to treat as unable to be located. The clearest indication was given that if they waited, remained in contact and responded to e.g. any legacy questionnaire served upon them, and they were not removed within the five years, they would be granted indefinite leave to remain since that was the only other way in which their case could be concluded. Had the Agency intended to fulfil its original commitment, that must have been the means to concluding such outstanding cases as at end July 2011.

We have referred in this submission to the lead judgment of the Administrative Court concerning legacy cases in 2007.[26] While essentially giving approval to the legacy programme as a means to deal with the cases in that backlog, Mr Justice Collins stressed:[27]

> "*...Since a substantial delay is, at least for the next 5 years or so, likely to occur in dealing with cases such as these, steps should be taken to try to ensure that so far as possible claimants do not suffer because of that delay. They should be informed when receipt of an application is acknowledged, as it must be, that there will likely to be a wait which could be for x months (or years). Thus they should be asked not*

[25] See comments of Collins J in *R (FH & Ors) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin), in particular paragraphs 6, 21 & 22.
[26] See fns 10, 15 & 25.
[27] *Ibid* paragraph 29.

to pursue the Home Office unless circumstances have arisen which make a communication necessary, for example, a new development or a need which has arisen for some sort of discretionary action. One serious and matter of complaint has been the continual failure of the Home Office to respond to or even acknowledge receipt of correspondence. Measures should be taken to minimise any prejudice to applicants occasioned by the delay. Thus those who were being given support should continue to receive it, those who were able to work should continue to be permitted to do so and there should be favourable consideration of desires to travel outside the United Kingdom for short periods (as, for example, in a case such as FH) without affecting the validity of the application. Applicants should not suffer any more than is inevitable because of delays which are not in accordance with good administration even if not unlawful."

It is apparent that, for many of those whose cases have wrongly not been concluded within the five years' timeframe, the 'customer service' which they have received from the Agency's Case Resolution Directorate falls very far short of that which Mr Justice Collins had clearly set out. Moreover, now almost a full year beyond the end of those five years, the 'customer service' from the Agency's Case Assurance and Audit Unit continues to do so.

We should be happy to provide further information to the Inspectorate if this would be of assistance.

ILPA
18 May 2012