Legacy Cases: Which way forward?

Workshop for IAS Conference 2007
Wednesday, 11th July

Introduction:

1. In July 2006, the Home Secretary (John Reid) announced that there was an asylum "legacy" of between 400,000 and 450,000 cases. He committed the Home Office to clear this legacy within 5 years.

2. Over the last 12 months, the Home Office has been making internal arrangements so as to be able to meet this commitment. Few cases have been processed, and little information has been provided by the Home Office. In April 2007, the person responsible for this legacy has changed; and with that change has come a change in the name given to this casework. Emily Miles is now the director of the Case Resolution Directorate at the Border and Immigration Agency (BIA).

3. Most recently, BIA has this month sent out 6,000 'legacy' questionnaires to families. Although this constitutes a drop in the ocean when compared to the total number of cases on record, it marks a significant escalation of the number of cases being processed.

4. The aim of the workshop, for which this paper is provided, is to consider the way ahead with this legacy. To begin with it will be necessary to understand what it means to be a legacy[1] case. Thereafter, there are broadly two key, general questions for consideration – (i) what can be done when a case is being actively dealt with by BIA? (ii) what can be done when a case is not active? These matters are dealt with in the following sections.

[1] The term 'legacy' is used in this paper despite the renaming of the BIA directorate because it has simply become common terminology.

What does it mean to be a legacy case?

5. BIA has given so little information on legacy that it is difficult to define what is a legacy case with both meaning and accuracy. The best answer that can be offered, at present, is that a legacy case is any outstanding case, where an asylum claim has at some point been made and the case is not being dealt with by the New Asylum Model (NAM). Here, outstanding means no more than the person has not been granted settled status and remains in the UK (or BIA records suggest this).

6. If an individual's case is a legacy case, then they face uncertainty as to how long it may take for their case to be dealt with. However, their case ought to be dealt with by July 2011.

7. There are some cases within legacy, which may be dealt with as a priority. Firstly, individuals, who pose a risk to the public, can expect BIA to deal with their cases quickly. After this, other priorities are: (i) cases where BIA consider the person may be removed quickly; (ii) cases where the individual is in receipt of support; and (iii) cases where a quick decision to grant status may be made.

8. More generally, in her evidence to the Administrative Court in *FH & Ors v SSHD* [2007] EWHC 1571 (Admin), the director of the Case Resolution Directorate

> "*states that there is a capacity to 'deal with truly exceptional or compassionate cases out of time where it is possible to do so. We will consider doing so where there has been a seriously mishandled case or where there are competing compassionate circumstances'*." (para. 17)

9. The current practice is that BIA will send an individual a questionnaire at the time the individual's case is brought forward to be dealt with. That questionnaire asks some general questions, and invites the individual to set out any further reasons why he or she should be allowed to remain in the UK. Receipt of the questionnaire means BIA are now actively dealing with the case. Even if further reflection reveals the case is not a priority,

BIA will continue to deal with the case through to conclusion – it will not be passed back to storage.

10. Significant observations from the judgment of Collins J in *FH & Ors* include (at para. 29):

> "*…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 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.*"

11. In *FH & Others*, Collins J dismissed the claims for judicial review challenging the delays in each of the ten legacy cases (with one exception). However, it is significant that Collins J distinguished between fresh claims/representations and initial claims. The one exception was closer to the latter category in that the claimant had been refused asylum, but prevented by the *Pardeepan* decision from raising human rights grounds in his appeal. It was his human rights claim that remained outstanding, which was one which had never been considered. In respect of what may be a minority of cases where the individual has an outstanding initial claim, it may be that the BIA justification for delay (that the case does not fall within a priority, and simply needs to be dealt with within the huge backlog for operational reasons) may be problematic – see *SSHD v S* [2007] EWCA Civ 546.

When a case is active:

12. Plainly, when a questionnaire is received, it will be important for the individual to consider with legal advice their current circumstances. At this point, the individual faces the prospect of removal. Any reasons why the individual should be granted leave to remain ought to be before BIA; and it may be reasonable on the questionnaire to highlight new matters as well as recall any previously outstanding matters that should be on the file. It should be noted that the LSC have informed the Refugee Council that they would expect legal aid to cover assisting a person to complete their questionnaire. In any event, advising someone on the consequences of receipt of a questionnaire would surely be within the specification.

13. Generally speaking, the issue will be whether existing criteria substantiate a claim to remain. This may be on asylum or human rights grounds, or by reference to Immigration Rules (e.g. long residence etc.) or policy (e.g. 7 year children's concession, family exercise, *Rashid* policy etc.).

14. Likely a critical issue in many cases will be the impact of delay as a relevant criteria to any substantive decision. Here, consideration may be given to three recent judgments of the Court of Appeal in *SSHD v S*, *ZK & YM v SSHD* [2007] EWCA Civ 615 and *A v SSHD* [2007] EWCA Civ 655. These judgments indicate (what has generally been said by the courts) that delay of itself is unlikely to substantiate a claim for leave to remain. Where it has resulted in real detriment by reason of maladministration or arbitrariness, by which the individual has lost an opportunity of ILR or to pursue an in-country application and/or appeal, this may be a cause for judicial intervention (see also *Shala v SSHD* [2003] EWCA Civ 233).

Conclusion:

15. There is no doubt that the issuing of legacy questionnaires has caused a considerable degree of confusion among those within the legacy backlog. Individuals see that their friend or relative or another has received a questionnaire, and wonder why they have not. The issuing of questionnaires has also triggered memories of the family exercise.

16. It must be recalled that 'legacy' is not a regularisation process or amnesty. The receipt of a questionnaire gives no indication of *the way* in which a case may be decided – it merely gives indication of *when* it may be decided. The questionnaire is not, therefore, an application form. It is not something that individuals can get hold of in order to make an application. It is merely a form BIA will send to the individual as and when BIA is ready to deal with the particular individual's case.

Steve Symonds
Legal Officer, ILPA

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