

Current Protection Issues

Introduction:

1. This paper is to accompany a presentation and discussion at the Medical Foundation, West Midlands Network Programme on Tuesday, 3rd June.
2. The paper provides a review of current protection issues. It is not exhaustive. Not all issues are new. Asylum law and practice in the UK continues to throw up a variety of critical issues, many of which have remained critical for several years.
3. A short review of several key issues is provided under separate headings below.

Legacy cases:

4. In summer 2006, the then Home Secretary, John Reid MP, announced a backlog of asylum cases, which he estimated to be between 400,000 and 450,000. He called this backlog a “legacy” and that name has stuck, although the Home Office does not consistently use this name.
5. The UK Border Agency (UK BA) now has a specific directorate dealing with legacy cases. This is called the Case Resolution Directorate. The Case Resolution Directorate is responsible for all matters of policy and practice concerning these cases. The “legacy” is often referred to as “case resolution” and sometimes (including on the UK BA website) as “old cases”.
6. ILPA has produced a number of information sheets relating to legacy cases. These can be found on our website (www.ilpa.org.uk) in the “Info service” section. Further information sheets on legacy cases are likely to be available in the near future; and these will appear in the same place on the website.

7. Some general information on legacy that should be noted follows:
- a. The legacy backlog consists of cases of people who have made an asylum claim, which has not been dealt with in the New Asylum Model where the person remains in the UK and does not have settled status.
 - b. There is no amnesty. Some people whose cases are within the legacy backlog have received status in the UK, including indefinite leave to remain (ILR). Others have been removed from the UK.
 - c. The Home Office aim is to clear the legacy backlog by summer 2011.
 - d. In 2007, the High Court accepted that the Home Office must be left free to decide the order in which it deals with cases in the legacy backlog. However, there are some exceptions to this. The Home Office has said that it will prioritise cases where someone is said to be a danger to the UK or the community. After this, it will prioritise cases where it is likely someone can be quickly removed, cases of people who are receiving support and cases where it is clear that a grant of ILR can be made. The UK BA has also published a policy document which specifies reasons it will consider exceptional so as to justify taking a particular case out of turn: see http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apunotices/crd_prioritiesexceptional.pdf?view=Binary
 - e. The Case Resolution Directorate now has about 60 teams (Case Resolution Teams), each of which has around 5,000 cases to deal with. The teams were established in December 2007.
 - f. The UK BA intends to formalise arrangements so that it is possible to find out whether a case is being actively considered by one of these teams; and – whether or not the case is being actively considered –

which team is responsible for the case and how to write to that team. These arrangements have not been established yet.

- g. When a legacy case is considered, the UK BA applies existing criteria when deciding how the particular case should be resolved. These criteria include considering the following factors:
 - i. the person's age;
 - ii. how long the person has lived in the UK;
 - iii. the person's strength of connections to the UK;
 - iv. the person's personal address (including character, conduct and employment record);
 - v. the person's domestic circumstances;
 - vi. any criminal record and the nature of any offence(s);
 - vii. any compassionate circumstances; and
 - viii. any representations made on the person's behalf.
 - h. Legal aid is available for legacy cases. Whether legal aid is granted in any particular case will depend on the merits of the case (i.e. whether legal advice or representation will be of sufficient value) and the means of the person (i.e. whether the person's financial circumstances are insufficient to expect him or her to pay for legal advice or representation).
8. Anyone whose case is in the legacy backlog (or who thinks his or her case is in that backlog) may benefit from legal advice. For a lawyer to fully advise the person, the lawyer will usually need to see the person's complete file. Individuals may want to check whether any previous representatives still regard themselves as actively representing the individual's case. If not, the individual may want to obtain his or her complete file from the previous representatives in case he or she needs legal advice from another lawyer in the future.

New Asylum Model (NAM) cases:

9. The New Asylum Model was introduced in 2006. At that time only a sample of asylum claims were dealt with by NAM. From March 2007, all new asylum claims have been dealt with by NAM.
10. Fresh claims are not dealt with by NAM. A “new asylum claim” means the very first asylum claim a person makes following their arrival in the UK – whether this is made at the border or in the UK (e.g. at an Asylum Screening Unit; or following arrest).
11. ILPA has produced an information sheet on NAM cases, which is available on our website (www.ilpa.org.uk) in the “Info service” section. The Home Office no longer uses the term “New Asylum Model” as it is no longer considered to be new. When Ministers and the UK BA refer to asylum cases and the asylum system, they are now usually referring to NAM and NAM cases. However, it is important to remember that the legacy backlog remains much bigger than NAM.
12. Key aspects of NAM to note are:
 - a. All cases in NAM should have a named caseowner, who is responsible for all aspects of the case throughout the duration of the case following screening. The name and contact details of the NAM caseowner ought to be made available to the asylum-seeker and his or her legal representative – no later than the First Reporting Event (FRE), which usually follows within a few days of the screening interview.
 - b. NAM caseowners will often have much closer contact with asylum-seekers than has been the case previously. While it may be very useful that a caseowner has responsibility for a case throughout its duration and is readily contactable, there are dangers in this. It is important that closer contact does not interfere with the relationship between an asylum-seeker and his or her legal representative. Caseowners represent the Home Office, whereas legal representatives represent

their clients (in this case, asylum-seekers). This difference in roles is intended to protect clients. It should be noted that anything said by an asylum-seeker to his or her caseowner might influence the decision on an asylum claim. Anything that is said by an asylum-seeker to his or her caseowner may not necessarily be passed on to his or her legal representative.

- c. NAM cases work to a relatively tight timetable. It is expected that asylum interviews will usually be completed within about 3 weeks of the asylum claim being made. It is expected that decisions on asylum claims will usually be made within about 4 weeks.
 - d. The timetable for children's asylum claims is a little less tight. In these cases, the UK BA expects that asylum interviews will usually be completed within about 5 weeks of the asylum claim being made. Most children aged 12 years or over, will be interviewed by the UK BA about their asylum claim. It is expected that decisions on asylum claims will usually be made within about 7 weeks.
 - e. The key target in NAM is to complete cases within 6 months. What the Home Office means by completing a cases is that the case should be finally decided, including any appeal, and the individual should either have received a grant of status or have been removed from the UK within 6 months of the asylum claim being made. The Home Office aims that 90% of NAM cases will be completed within this 6 months target by end 2011.
13. The NAM caseowners work in regional teams. Matters of policy and practice relating to NAM cases may, therefore, be the responsibility of the Regional Director for the region in which the particular caseowner works. There is scope for different practice in different regions, albeit that asylum claims must be decided on the same criteria wherever the case is considered. Where there are significant differences in practice between regions, this may be a matter that needs to be considered by the UK BA

nationally since, even if decisions are made by applying the same criteria, the way in which an asylum claim is handled can have an important effect upon the ability of an asylum-seeker to fully put forward his or her case (e.g. flexibility in ensuring an asylum-seeker has legal representation before interview; allowing asylum-seekers to specify the gender of interviewers/interpreters).

Removals and injunctions:

14. In March 2007, the Home Office introduced a new policy regarding removals and injunctions. ILPA has produced an information sheet providing further information on this, which is available from our website (www.ilpa.org.uk) in the “Info service” section.
15. It is important to note that from March 2007, the amount of notice that the UK BA is required to give before removing someone from the UK was reduced. At the same time, the High Court in England and Wales amended its practice so that lawyers would ordinarily be expected to provide more information when seeking an injunction to stop a removal. Anyone who is at risk of removal would, therefore, be advised to ensure they or their legal representatives have access to a full copy of their case papers in case they are detained and face removal.
16. In two circumstances, the UK BA is not required to give any notice of removal. Children (and their legal representatives) who are to be removed to a safe third country (e.g. removed to another European country under what are known as Dublin II arrangements) may receive no notice of removal, although social services are supposed to be consulted about such removals. Individuals (and their legal representatives) who are considered to be at risk of self-harm (including suicide risks) may receive no notice of removal.

Re-entry bans

17. In April 2008, the Home Office introduced mandatory re-entry bans whereby people who had previously breached certain immigration laws

would face a mandatory ban upon returning to the UK for periods of 1, 5 or 10 years depending upon how they left the UK. Information about the re-entry bans is available from information sheets that are (and will shortly be) available on our website (www.ilpa.org.uk) in the “Info service” section.

18. These bans do not affect asylum applications, but may affect asylum-seekers.
19. For example, an asylum-seeker who is refused asylum and returns to his or her home country may face a mandatory ban on returning to the UK if he or she had entered the UK illegally or used deception in entering or seeking to stay in the UK. If the asylum-seeker was removed from the UK, this ban could last for 10 years. If he or she left voluntarily, the ban could last for 12 months (if the departure was completely at the asylum-seeker’s expense) or 5 years (if there was some expense to the UK).
20. The Home Office has made several, significant concessions since these mandatory re-entry bans were introduced. An important concession is that an application under the Immigration Rules to return to the UK to join family members who are settled in the UK will now not necessarily be refused, though any previous breaches of immigration laws may be taken into account when the application is considered.

Detention and removal:

21. The Home Office has recently announced its plans to significantly increase the UK’s immigration detention estate – see: [http://www.ind.homeoffice.gov.uk/sitecontent/newsarticles/largescaleexpansionofbritainsdet](http://www.ind.homeoffice.gov.uk/sitecontent/newsarticles/largescaleexpansionofbritainsdetentionofbritainsdet)
22. The intention is to increase the size of some current Immigration Removal Centres (IRCs) and build new IRCs. In total, the Home Office hopes that these plans will provide space to detain between 1,300 and 1,500 more people at any one time.

23. The Home Office also remains committed to the Detained Fast Track (DFT) in which asylum-seekers are detained throughout the duration of their asylum case. Cases in the DFT are dealt with in a very fast timetable, with asylum interviews conducted within about 2 days of the asylum claim being made, decisions made within a further day and appeals completed within 3-4 weeks.
24. Cases in the DFT have very poor success rates, and many asylum-seekers in the DFT are left without legal representation at appeal. There does not appear to be any objective reason why success rates are so low other than that the DFT is too fast for cases to be fully disclosed and established, which also appears to have an impact on decisions by legal representatives to withdraw legal aid for appeals on the basis of a merits assessment (i.e. an assessment of the chances that an appeal will be successful). The basis upon which the UK BA decides to take cases into the DFT is simply that it considers that a case can be decided quickly; and it has bed space in the relevant IRC. However, the UK BA position appears to be that almost any case can be decided quickly.
25. Certain individuals should not be taken into the DFT. This is broadly on the basis that they are generally considered not suitable to be detained. These individuals include children, age-disputed cases, torture victims, pregnant women (24 weeks and advanced) and those with serious physical or mental health needs. Chapter 55.4 of the Enforcement Instructions and Guidance lists those cases that are not suitable for the DFT. However, decisions to take someone into the DFT are taken at screening; and it is often the case that information is not available at this stage to identify that a person is not suitable for detention.

Asylum and immigration offences:

26. Last month, the House of Lords decided an important case for refugees who may face criminal prosecution in the UK for having breached

immigration laws when travelling to or through the UK in order to make an asylum claim here or elsewhere.

27. The Refugee Convention (Article 31) sets out certain circumstances in which refugees should not be prosecuted or penalised for entering a country illegally or being illegally present in a country. Essentially, a refugee who is fleeing his or her country of origin is not to be penalised for breaching immigration laws if it is necessary for him or her to breach these laws in order to reach a place of safety.
28. UK law provides a defence against prosecution for certain immigration offences in section 31, Immigration and Asylum Act 1999. Although this goes some way towards providing the protection in the Refugee Convention, it does not completely fulfil the UK's obligations. One important way in which it does not fulfil these obligations is that the section 31 defence is not available in respect of all offences with which a refugee may be charged for breaching immigration laws.
29. The House of Lords judgment in *R v Asfaw* [2008] UKHL 31 (decided by a 3-2 majority) means that a refugee ought not to be charged with or prosecuted for an offence for which the section 31 defence is not available, if there is an alternative offence with or for which he or she could be charged or prosecuted where the defence is available. The House of Lords also decided that a refugee who was attempting to pass through the UK to get to another country in order to claim asylum could rely on the section 31 defence.

Simplification project:

30. The Home Office is currently taking steps to simplify the UK's immigration laws. It intends to introduce a new piece of legislation before the end of the year – the Citizenship, Immigration and Borders Bill.
31. This Bill may contain changes to various matters including:

- a. Lengthening the time refugees must spend in the UK after being granted refugee status before they can apply for British citizenship; and if they cannot or do not want to apply for citizenship lengthening the time still further before they can apply for indefinite leave to remain.
 - b. The asylum support system. The Home Office has stated its intention to significantly reduce the total money it spends on providing support to asylum-seekers.
 - c. The appeals system. The Home Office is concerned to reduce the large number of judicial review and other applications made to the High Court.
32. It is expected that a draft Bill will be published before July 2008. This draft Bill, however, will not be complete; and important proposals for changes to the UK's asylum and immigration laws may not become clear until the full Bill is published. ILPA has published information sheets on simplification. These are available from our website (www.ilpa.org.uk) in the "Info service" section. ILPA will continue to provide information as the simplification project develops.

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